

HONG KONG BAR ASSOCIATION
VIEWS ON ARTICLES 45, 68 AND ANNEXES I, II OF THE BASIC LAW:
CONSTITUTIONAL DEVELOPMENT

1. The Chief Executive has established a Task Force on Constitutional Development. The work of the Task Force has been outlined in a paper dated 14 January 2004 provided to the Legislative Council and made generally available entitled ‘Task Force on Constitutional Development’.
2. According to paragraph 3 of the paper, the Task Force has three tasks. Its first task is to examine the Basic Law to examine ‘the relevant principles and legislative processes in the Basic Law relating to constitutional development. Its second task is to consult the ‘relevant departments of the Central Authorities’. Its third task is to ‘listen to the views of the public on the relevant issues’.
3. The issues that are the subject of the Task Force’s attention are identified in an appendix to the paper. They are divided into two categories: legislative processes and related legal issues.
4. The issues that arise under the heading of ‘legislative processes’ are:
 - a. What legislative process should be used for amending the methods for selecting the CE and for forming the Legislative Council as set out in Annex I and Annex II of the Basic Law.

- b. Whether there is no need to invoke Article 159 of the Basic Law if the amendment procedures as prescribed in Annex I and Annex II are used.
 - c. Initiation of amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council.
5. The issues that arise under the heading of ‘related legal issues’ are:
- a. Whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council.
 - b. How the phrase ‘subsequent to the year 2007’ should be understood.
6. The Task Force has since then presented the issues of principle and of the legislative process for which the views of the public are sought in the form of questions. The questions are presented in the Task Force’s website (<http://www.info.gov.hk/cab/cab-review/>) and in newspaper advertisements.

Consultation/Listening

7. The Bar Association notes that the Task Force paper identifies two of its tasks as being ‘consultation’ with the relevant departments of the Central Authorities and ‘listening’ to the views of the public.

8. Consultation means genuinely seeking advice and genuinely considering the advice that is given in response. It means that the party consulting provides sufficient information to the consulted party and allowing sufficient time for the consulted party to respond with helpful advice. Advice can only be helpful if the consulted party is provided with sufficiently informed and considered information or advice that is directed to the proposals of the consulting party.
9. 'Listening' implies something less. It is a passive activity. There is no commitment to inform or to genuinely consider the views communicated. Without relevant information representations may be unfocussed and therefore of little assistance. Without a commitment to genuinely consider views there is no real incentive for persons to participate in a 'listening' process.
10. The Bar Association considers that the Task Force needs to say whether there is any difference of approach to these two tasks: 'consulting' the Mainland and 'listening' to local views.
11. If there is a difference, it should be explained. For its part, the Bar Association can see no justification for treating the views of the people of Hong Kong as being any less valuable or important as the views of departments in the Central Government as they all have a stake in the constitutional development of the HKSAR.

12. The Bar Association sees obvious merit in approaching the ‘consultation/listening’ exercise with clear criteria fixed at the outset. It understands that the HKSAR Government has its own internal guidelines on Public Consultation.
13. These guidelines were explained to Legislative Council at the end of 2003 in a paper submitted to the Legislative Council Panel on Constitutional Affairs (LC Paper No. CB(2)337/03-04(02)). The Task Force should make it clear whether the guidelines apply to the exercise. If they do not, the Task Force should say why and explain what guidelines apply in the present exercise.
14. If the guidelines do apply, it appears to the Bar Association that they should be amended for the purpose of the present exercise. It is noted that the guidelines as explained to the Legislative Council last year do not contain a requirement that a minimum period of consultation be fixed. It is highly desirable that a time limit be set so as to encourage timely and focussed submissions.
15. It is also noted that the public are not being invited to address specific proposals that represent the thinking of the Task Force on the issues involved.
16. Whilst the Bar Association appreciates that the consultation/listening exercise involves legal issues in respect of which there will be, ultimately, no options because the relevant constitutional obligations require a particular result as a matter of law it hopes that when the Task Force eventually forms preliminary views on the issues

involved it will advise the public of these views so that informed comment, particularly legal comment, can be made on those proposals. The document containing those views should be clear, concise and widely accessible.

Basic Principles: Interpretation of the Basic Law

17. The Basic Law is a constitutional document having legal force. As such it requires interpretation as a legal document.
18. Although BL 158 reserves the power of interpretation to the Standing Committee of the National People's Congress ("NPCSC") with an authorization to the courts of the HKSAR to interpret the Basic Law in certain circumstances that is a reference to the power to make a binding interpretation such as to affect rights and obligations.
19. The Basic Law confers no monopoly on interpretation in other context where interpretation of the Basic Law is required. Legislators, public servants, law enforcement agencies and members of the public are all equally bound by the Basic Law and must interpret it when their actions or the actions of third parties require it. Professional skilled advice about interpretation may be provided by government

lawyers, legal academics, barristers and solicitors but such advice binds no one, least of all the courts.

The Issues

Article 45 and Annex I of the Basic Law (“BL 45 and BL Annex I”)

The Threshold Question of whether the phrase “the Chief Executive for the terms subsequent to the year 2007” in BL Annex I para 7 should be understood to include 2007

20. Assuming that the second (and current) Chief Executive (“CE”) completes his 5-year term on 30 June 2007, the Bar Association takes the view that BL Annex I para 7 permits amendment to the method of selection of the third term CE even though the term of the third term CE commences on 1 July 2007.
21. The Bar Association recognizes the existence of an ambiguity in the Chinese version and in the English version of BL Annex I para 7 in that the Chinese version begins with and might thereby emphasize ‘2007’ whereas the English version begins with and might thereby emphasize ‘*terms*’ subsequent to 2007.

22. The Chinese version itself is ambiguous in that it is possible to construe it to include a term beginning in 2007 or to include only terms that begin after 2007.

23. The Bar Association believes an interpretative principle can be found in BL 45 that will help solve the problem. The 'ultimate aim' is the selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The method for selection is said to be one specified in accordance with 'gradual and orderly progress'. If there is an ambiguity in BL Annex I para 7 so that there are two possible interpretations but one interpretation of the provision will assist in achieving progress towards the ultimate goal and the other will not then the interpretation that does not put unnecessary obstacles in the way of achieving the aim should be the one that is preferred.

24. The Bar Association notes that its interpretation is one that is consistent with Mr Ji Pengfei's explanations on behalf of the Basic Law Drafting Committee to the National People's Congress on 28 March 1990.

Consultation with the Central Authorities

25. The Bar Association takes the view that while it is arguable that BL Annex I para 7 does not require consultation with the Central Authorities on amendment of the method of selection of the CE, such an argument is not to be preferred.

26. It is not to be preferred for the simple reason that the power of the NPCSC to approve an amendment of the method of selection of CE is a *substantive* one and it could be a waste of time and effort of the community to come to a consensus on the need to amend the method of selection and to report the endorsed amendment to that method to the NPCSC only to find out that the amendment is one that NPCSC would not approve. However the Bar takes the view that the impetus and design for the amended method of selection must come from the HKSAR.

Questions of Implementation

27. The Bar Association takes the view that an amendment to the method of selection of the CE pursuant to BL Annex I para 7 is not an amendment to the provisions of the BL under BL 159. An amendment to the method of selection of the CE pursuant to BL Annex I para 7 is at the most an amendment to BL Annex I itself. What is amended is the method of selection of the CE under BL Annex I para 7 in development of the political system of the HKSAR under the process obligated under BL 45 (which provides that the specific method for selecting the CE is prescribed in BL Annex I) and BL Annex I para 7 (which is the special provision within BL Annex I prescribing for the amendment of the method of selection prescribed therein).
28. Further, the Bar Association takes the view that after the need to amend is established, the amendment can be effected by the series of steps set out under BL Annex I para 7. The initial step begins with the Legislative Council endorsing a resolution to amend

the method of selection of the CE. The method of endorsement is by a two-thirds majority of all the members of the Legislative Council pursuant to BL Annex I para 7 and in this connection BL Annex II div II does not apply to impose different methods of voting depending on whether the motion is introduced by the Government or by a member of the Legislative Council. The next step is for the CE to give his consent to the resolution that has been endorsed by the Legislative Council and to report on behalf of the HKSAR the said two decisions to the NPCSC for approval. It is then for the NPCSC to apply its own procedure to consider whether to approve the new method for the selection of the CE. If the NPCSC decided to approve the new method, then the new method is legally effective. Although the Basic Law does not make any express provision on the method of the implementation of the amended method for the selection of the CE, the Bar considers that the change should be implemented through consequential amendments to the relevant HKSAR electoral laws, including the Chief Executive Election Ordinance (Cap 569). This would be a matter of formality as by then the decision to adopt the new method would be binding on the HKSAR including the Legco and the CE.

Questions of Deadlock and Development

29. The Bar Association takes the view that in the case of deadlock over amendment to the method of selection of the CE for the third term CE, the method of selection prescribed in BL Annex I paras 2-5 would remain constitutionally valid.

30. The Bar Association takes the view that BL Annex I para 7 is the enduring operative provision governing amendment to the method of selection of the CE. In other words, this provision is not an one-off provision and can be invoked more than once to develop the method of selection of the CE of the HKSAR in accordance with BL 45 (which provides for the *ultimate* extent of development to be selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures).

Article 68 and Annex II of the Basic Law (“BL 68 and BL Annex II”)

Consultation with the Central Authorities

31. The Bar Association takes the view that a distinction ought to be drawn between BL Annex I para 7 (which prescribes that an amendment to the method of selection of the CE endorsed and consented in the HKSAR must be reported to the NPCSC for *approval*) and BL Annex II div III (which prescribes that an amendment to the provisions of BL Annex II be reported to the NPCSC for *record*).
32. In the former provision, the amendment is not legally valid unless and until the NPCSC approves it. In the latter, the amendment is legally valid *upon* endorsement by the prescribed special majority in the Legislative Council and consent by the CE.

33. Further, the Bar Association notes that the procedure of reporting for record of an amendment to the provisions of BL Annex II does not include a mechanism for return (together with immediate invalidation) whereas such a mechanism is specifically provided for laws enacted by the legislature of the HKSAR in BL 17.

34. While an amendment to the provisions of BL Annex II may have to be implemented by the HKSAR legislature enacting an amendment Ordinance to, for example, the Legislative Council Ordinance (Cap 542) (which is subject to the BL 17 mechanism of reporting for record, return and invalidation), that itself is not a supplementary procedure to BL Annex II div III since the NPCSC may only act under BL 17 on the specific and limited grounds of a law being ‘not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’.

35. BL 68 provides that the Legislative Council of the HKSAR is constituted by elections. On the basis of the above analysis, the Bar Association takes the view that there is a stronger argument for amendments to the provisions of BL Annex II to be made exclusively in the HKSAR without the need or obligation to consult with the Central Authorities.

Questions of Implementation

36. The Bar Association takes the view that an amendment to the provisions of BL Annex II to provide for the method of formation of the fourth term Legislative Council is not an amendment to the provisions of the Basic Law under BL 159.
37. What is amended is the method of formation of the Legislative Council under BL Annex II div I in the development of the political system of the HKSAR under the process required under BL 68 (which provides that the specific method for forming the Legislative Council is prescribed in BL Annex II) and BL Annex II div III (which is the special provision within BL Annex II prescribing for the amendment of the method of formation prescribed therein).
38. Further, the Bar Association takes the view that after the need to amend is established, the amendment can be effected by the series of steps set out under BL Annex II div III. The initial step begins with the Legislative Council endorsing a resolution to amend the method of formation of the 4th term Legislative Council. The method of endorsement is by a two-thirds majority of all the members of the Legislative Council pursuant to BL Annex II div III and in this connection BL Annex II div II does not apply to impose different methods of voting depending on whether the motion is introduced by the Government or by a member of the Legislative Council.
39. The next step is for the CE to give his consent to the resolution that has been endorsed by the Legislative Council and to report on behalf of the HKSAR the said two decisions to the NPCSC for the record. After this stage, the combined decisions

achieve legal effect. The Legislative Council must endorse and the CE must consent to the same amendment. An amendment to the provisions of BL Annex II to provide for the method of formation of the fourth Legislative Council that has legal effect is to be implemented through consequential amendments to the relevant HKSAR electoral laws, including the Legislative Council Ordinance (Cap 542).

Questions of Deadlock and Development

40. The Bar Association recognizes that there is a credible argument that if political deadlock occurs over endorsing and consenting to an amendment to the provisions of BL Annex II over the method for the formation of the Legislative Council for the fourth term Legislative Council, there would be no method in place for the formation of the fourth term Legislative Council and hence a legal vacuum.

41. This is because BL Annex II div I only prescribes for the method for the formation of the first, second and third terms of the Legislative Council. Assuming that the terms of the Legislative Councils have been completed, the need to amend the provisions of BL Annex II to provide for the method of formation of the fourth term Legislative Council is obvious and vital. (However, if the third term Legislative Council elected in September 2004 fails to complete its prescribed term of four years and is dissolved *before* 2007, a *legal* gridlock or, to be more precise, *impasse*, will occur since the next

Legislative Council is to be the fourth term Legislative Council (the method of formation of which has not yet been prescribed in BL Annex II) but, pursuant to BL Annex II div III, the *first* occasion where provisions of Annex II may be amended to provide for the method of formation of the fourth term Legislative Council is *after* 2007.)

42. In either case, it seems that the legal doctrine of necessity may have to be invoked to enable the method of formation for the third term Legislative Council to continue in place and to be the method of formation for the fourth term Legislative Council until an amendment consistent with BL Annex II div III can be endorsed and consented to in the HKSAR.
43. It is also arguable that in such circumstances, the doctrine of necessity operates differently to invalidate any expiration of the term of office or dissolution of the third term Legislative Council and to require the third term Legislative Council to continue to exist and operate not only to make laws for the HKSAR but also to urgently to provide for the method of formation of its successor.
44. On the other hand, there could be three other possible ways to bridge the legal impasse described above, all of which require intervention of the Central Authorities. The first and most desirable way is to amend BL Annex II under the procedure prescribed under BL 159 since the impasse is the consequence of the special provisions of BL Annex II div III not anticipating the event in question. The second

and less legitimate way is for the Central Authorities to confer upon the HKSAR additional powers to deal with the problem pursuant to BL 20, which might appear to be amendment by the backdoor. The third and the least legitimate way is to engineer an interpretation under BL 158, which is very likely to arise under a non-judicial context.

Qualities of Candidates and Holders of Office under the Basic Law

45. The Bar Association notes that the eligibility qualifications of the CE are prescribed under BL 44. The CE is appointed by the Central People's Government pursuant to BL 45. Further requirements of the CE during his term of office are prescribed in BL 47 and BL 52. Upon assuming office, the CE must swear an oath in terms of BL 104. The CE must resign under specified circumstances provided in BL 52. The Legislative Council may impeach a CE for serious breach of law or dereliction of duty and report the impeachment to the Central People's Government for decision pursuant to BL 73(9).

46. The Bar Association also notes that the eligibility qualifications of members of the Legislative Council are prescribed under BL 67. The Legislative Council is constituted by election pursuant to BL 68. Upon assuming office, members of the Legislative Council must swear an oath in terms of BL 104. The circumstances in which a member of the Legislative Council is to be declared no longer qualified for office are set out in BL 79 and one of the circumstances is censure for misbehaviour

or breach of oath by a vote of two-thirds of the members of the Legislative Council present.

47. The Bar Association considers that candidates for the offices of CE and members of the Legislative Council are eligible to stand if they satisfy the eligibility qualifications. Whether any one candidate is suitable for the relevant office is an altogether different matter to be decided by the responsible body of voters after considering a variety of criteria and factors, some political, some personal. The Basic Law has left the decision to the complete discretion of the body of voters.

48. The electoral laws place only those limits on the candidature to ensure that the relevant electoral process is fair and free from corruption. The Bar Association knows of no other constitutional mechanism to assess the suitability, as opposed to eligibility, of candidates for the offices of the CE and Members of the Legislative Council other than the ballot box and does not consider that any such other mechanism is necessary or justified.

Hong Kong Bar Association

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