

Consultation Document on Methods for Selecting the Chief Executive in  
2017 and for Forming the Legislative Council in 2016

**Submission of the Hong Kong Bar Association**

1. The HKSAR Government published in December 2013 a Consultation Document on Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016 (“the Consultation Document”).
2. The Hong Kong Bar Association (“the HKBA”) presents this Submission in response to the Consultation Document. As the HKBA had indicated in relation to earlier consultation exercises by the HKSAR Government on constitutional development (such as the Green Paper on Constitutional Development (July 2007)), the HKBA, as a professional and apolitical body, will and does confine its discussion in the Submission to the legal issues arising from or relating to the Consultation Document. Accordingly, the HKBA does not intend to address each and every question listed out in Chapter 5 of the Consultation Document in respect of which the views of the public are sought, or to address those questions in the order they have been presented in the Consultation Document. The HKBA also does not intend to and will not propose any method for selecting the Chief Executive in 2017 or for forming the Legislative Council in 2016.

The Constitutional Basis of Constitutional Development

3. (a) Chapter 2 of the Consultation Document is headed “*Constitutional Basis of the Constitutional Development and the Design Principles of the Political Structure of the Hong Kong Special Administrative Region*”. This Chapter underlines the constitutional status of the HKSAR and the constitutional powers and responsibilities of the Central Authorities to determine the systems to be

implemented in the HKSAR, including the model of political structure of the HKSAR, so that “*the HKSAR cannot decide its political structure on its own*”.

(b) This Chapter further emphasizes that the design of the political structure of the HKSAR relates to the exercise of sovereignty by the People’s Republic of China over Hong Kong as well as the full implementation of “One Country, Two Systems” and the basic policies of the Central Authorities towards Hong Kong, so that “*[the] HKSAR does not have the power to unilaterally alter the system prescribed by the Central Authorities*”. While the discussion in this Chapter acknowledges that the political structure of the HKSAR encompasses the universal suffrage electoral method, it advises that any proposals on universal suffrage must comply with design and principles of the political structure as prescribed in the Basic Law, and in this connection, the relevant provisions of the Basic Law are said to be Article 11(1) (which stipulates that the systems and policies practised in the HKSAR shall be based on the provisions of the Basic Law), Article 45 (in respect of the method for selecting the Chief Executive) and Article 68 (in respect of the method for forming the Legislative Council).

(c) This Chapter goes on to indicate that the model to be devised for implementing universal suffrage must ensure the implementation of not only the basic policies of the State regarding Hong Kong, but also four major principles of constitutional development taken from the speech of Ji Pengfei, the Chairman of the Basic Law Drafting Committee, to the Session of the National People’s Congress on 28 March 1990 in his presentation of the Basic Law (Draft) and related documents.

(d) This Chapter, in concluding the discussion, urges that:

*In dealing with the methods for selecting the CE in 2017 and for forming the LegCo in 2016, due regard has to be paid to the following three aspects:*

*(i) the proposal should be strictly in accordance with the Basic Law and the Interpretation of the NPCSC in 2004 and relevant Decisions of the NPCSC;*

*(ii) the proposal should stand a reasonable chance of gaining majority support of the Hong Kong community, securing passage by a two-thirds majority in the LegCo, and receiving the approval or record by the NPCSC; and*

*(iii) in terms of operation, the electoral procedures under the proposal should be practical and practicable, simple and easy to understand, convenient to voters in exercising their voting rights, and conducive to maintaining an open, fair and honest electoral system.*

4. The HKBA notes that Chapter 2 of the Consultation Document stresses what the HKSAR, by reason of its status under the Basic Law, may not do. However, it does not indicate adequately at the same time the commitments of the Central Authorities under the provisions of the Basic Law to implement the basic policies towards Hong Kong, which, as stated in the Sino-British Joint Declaration 1984, include the following namely:

(a) The HKSAR enjoys a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government;

(b) The HKSAR is vested with executive, legislative and independent judicial power, including the power of final adjudication;

(c) The Government of the HKSAR shall be composed of local inhabitants. The Chief Executive will be appointed by the Central People's Government on the basis of the results of elections to be held locally (香港特別行政區政府由當地人組成。行政長官在當地通過選舉…產生，由中央人民政府任命。);

(d) The HKSAR Government shall protect the rights and freedoms of inhabitants and other persons in the HKSAR according to law;

(e) The provisions of the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong shall remain in force.

5. While Chapter 2 of the Consultation Document makes reference to Article 11(1) of the Basic Law as a relevant provision in constitutional development, it does not indicate that Article 11(1) draws its force from Article 31 of the Constitution of the People's Republic of China so that the systems instituted in the HKSAR are committed by the National People's Congress to be prescribed by the provisions of the Basic Law, which was enacted in the light of Hong Kong's specific conditions. Thus the National People's Congress, on behalf of the Central Authorities, have committed in Article 11(1) that "the social and economic systems, the system for safeguarding the fundamental rights and freedoms of [HKSAR] residents, the executive, legislative and judicial systems, and the relevant policies, shall be based upon the provision of this Law". The Central Authorities in the "ruled by law state" of the People's Republic of China undoubtedly adhere to Article 31 of the Constitution and Article 11 of the Basic Law enacted as a basic national law (國家基本法律) pursuant to Article 31 of the Constitution.
6. One of the General Principles in Chapter I of the Basic Law, which underlies the Basic Law and the systems it establish, develop and maintain, is Article 4:

*The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.*

香港特別行政區依法保障香港特別行政區居民和其他人的權利和自由。

7. In the light of Article 159(4) of the Basic Law, which stipulates that no amendment to the Basic Law shall contravene the established basic policies of the People's Republic of China towards Hong Kong, the HKBA would underline as part of the constitutional basis of constitutional development that any amendment, and any interpretation, by the Standing Committee of the National People's Congress ("NPCSC") of any provision of the Basic Law for the purpose of constitutional development must not contravene the established basic policies of

the People's Republic of China towards Hong Kong, which include the matters stated above.

8. The HKBA also notes that, unlike the Green Paper on Constitutional Development (July 2007), the Consultation Document does not discuss the relevance to constitutional development of Article 39 of the Basic Law and, through it and the Hong Kong Bill of Rights Ordinance (Cap 383), of Article 25(b) of the ICCPR; as well as the relevance of Article 26 of the Basic Law, which guarantees the right to vote and the right to stand for election of HKSAR permanent residents in accordance with law.

#### Article 25 of the International Covenant on Civil and Political Rights

9. (a) The HKBA had studied the legal position regarding Article 25(b) of the ICCPR in its Submission in respect of the Green Paper on Constitutional Development (July 2007). The HKBA had re-visited the same matter in the preparation of this Submission.

(b) The HKBA notes the repeated expression of view by the United Nations Human Rights Committee, the treaty body overseeing the implementation of the ICCPR by State parties, in 1995, 1999, 2006 and now 2013, that once an elected Legislative Council is established, its election must conform to Article 25 of the ICCPR.

(c) The HKBA also notes the view of Professor Yash Ghai that a formal change in the reservation entered was not necessary for the United Kingdom to revert to full implementation of the provisions of the ICCPR, given that the reservations were permissive rather than obligatory; see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd Ed) (Hong Kong University Press, 1999) pp.408-409.

(d) The HKBA has already adopted the position in 2007 that neither the reservation entered by the United Kingdom in relation to Article 25(b) of the ICCPR in 1976 (“the 1976 reservation”) nor section 13 of the Hong Kong Bill of Rights Ordinance<sup>1</sup> has any application to the electoral arrangement concerning the Chief Executive, bearing in mind the fact that Articles 54 to 56 of the Basic Law establish the Executive Council as an institution distinct from the Chief Executive. Indeed although the Chief Executive presides over the Executive Council, he is not a member of the Executive Council. In other words, neither the reservation nor section 13 provides any justification for not applying Article 25(b) to the electoral arrangements for the selection of the Chief Executive.

10. Following further studies, the HKBA affirms its earlier views. The HKBA now summarizes in the following paragraphs its further analysis of the legal issues concerning the applicability of Article 25 of the ICCPR to the electoral arrangements for the selection of the Chief Executive.<sup>2</sup>

11. The People’s Republic of China has made statements in the international plane, including its notification of 20 June 1997 to the United Nations, that it has assumed the responsibility to continue the application of provisions of the ICCPR as applied to Hong Kong. The expression “provisions of the ICCPR as applied to Hong Kong” refers to the ICCPR as applied to Hong Kong under international law. Further it refers to the provisions of the ICCPR in so far as they are applied to Hong Kong or to the extent that they are applied to Hong Kong. This means that the mere fact that the adoption of the 1976 reservation in respect of Article 25(b) of the ICCPR by the People’s Republic of China continues to apply to the HKSAR does not support the suggestion that Article 25(b) is not or has ceased to be a provision of the ICCPR as applied to Hong Kong. The wording of the 1976 reservation must be examined to find out what has been expressly reserved.

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<sup>1</sup> Section 13 of the Hong Kong Bill of Rights Ordinance states: “Article 21 does not require the establishment of an elected Executive or Legislative Council in Hong Kong.”

<sup>2</sup> The HKBA’s further legal analysis is published in full as an Appendix to this Submission.

12. The 1976 reservation is in these terms:

*The Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.*

The 1976 reservation, interpreted in its context and purpose, means, in the opinion of the HKBA, that it does not require the establishment of an elected Executive Council and Legislative Council. Given that a state reserves no more than what is contained in the text of the reservation itself, the 1976 reservation cannot possibly cover the electoral method of the Chief Executive, which is an office separate from the Executive Council.

13. When the People's Republic of China notified the United Nations of the continued application of the ICCPR in the HKSAR in April 1997, it must be taken to be well aware of its basic policy stated in the Sino-British Joint Declaration 1984 that the Chief Executive of the HKSAR will be appointed on the basis of the results of elections held in Hong Kong, as well as the terms of the Basic Law enacted in 1990 that those elections held in Hong Kong will ultimately be by universal suffrage. Accordingly, it must be taken that insofar as Chief Executive elections in the HKSAR are concerned, the notification by the People's Republic of China of the continued effect of the 1976 reservation was not a reservation of the right not to apply Article 25(b) of the ICCPR to Chief Executive elections in the HKSAR. If the People's Republic of China were so minded to enter a reservation of right not to apply Article 25(b) of the ICCPR to Chief Executive elections in the HKSAR, it should first ratify the ICCPR.

14. The HKBA therefore is of the view that the provisions of the ICCPR as applied to Hong Kong include Article 25(b) in full insofar as the electoral method for the Chief Executive is concerned. Article 25(b) provides:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*

In other words, the method to be devised for the selection of the Chief Executive should not contain any discriminatory distinctions or unreasonable restrictions and must ensure to every HKSAR permanent resident the right and opportunity to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage, guaranteeing the free expression of the will of electors.

15. The HKBA considers that Article 25(a) of the ICCPR is also relevant. Article 25(a) provides:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.*

The implementation of the right under Article 25(a) must ensure that representatives are “freely chosen” in a process that is without discrimination and ensures a plurality of participation. “[There] can be no democracy without pluralism”: *Socialist Party & Ors v Turkey* (1998) 27 EHRR 51, para 41.

16. Legislative Council elections are one of the modes for HKSAR permanent residents to exercise their right guaranteed under Article 25(a) of the ICCPR. And in the light of the Legislative Council of the HKSAR having been fully elected, there is no reason for the Central Authorities and the HKSAR Government to insist on the continued relevance of the 1976 reservation. In the opinion of the HKBA, Article 25(b) also applies to the proper formulation of the method of forming the Legislative Council in 2016. Accordingly, the method to be devised should not contain any discriminatory distinctions or unreasonable restrictions and must ensure to every HKSAR permanent resident the right and opportunity to



vote and be elected at genuine periodic elections which shall be by universal and equal suffrage, guaranteeing the free expression of the will of electors.

17. The HKBA adds that Article 25 of the ICCPR enshrines the political rights in paragraphs (a) and (b) to be enjoyed without any of the distinctions mentioned in Article 2 and without unreasonable restrictions. The distinctions mentioned in Article 2 are: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The requirement of enjoyment without the said distinctions brings into play the “equality before the law” and anti-discrimination stipulations in Article 26. And the assessment of “unreasonable restrictions” in the context of Article 25 involves analysis of the rationality and the proportionality of the restriction.

18. The HKBA further considers that Article 25 of the ICCPR guarantees the citizen’s right and opportunity to take part in the conduct of public affairs and to vote and be elected without discriminatory distinctions and without unreasonable restrictions. The United Nations Human Rights Committee’s General Comment No 25 (57) (CCPR/C.21/Rev.1/Add.7) makes it clear in paras 15 to 18 that conditions to nomination or registration to stand in an election are concerned with implementation of the right and the opportunity of citizens to stand for elective office. Such conditions must not be discriminatory or unreasonable restrictions.

#### Article 26 of the Basic Law

19. Article 26 of the Basic Law guarantees that HKSAR permanent residents shall have:

*the right to vote and the right to stand for election in accordance with law.*  
依法享有選舉權和被選舉權。

20. The HKSAR courts have considered applications for judicial review relying on Article 26 of the Basic Law, both in relation to the right to vote and the right to

stand for election; see *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 (prisoners voting); *Chan Yu Nam & Anor v Secretary for Justice* [2012] 3 HKC 38 (corporate voting in functional constituencies in Legislative Council elections); *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 70 (disqualification of persons convicted of criminal offence but not having served prison sentence from standing in Legislative Council elections); and *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (unreported, 5 March 2014, HCAL 72/2012) (disqualification of member of Legislative Council from standing in by-election held within six months from date of his resignation taking effect). However, with the exception of *Chan Yu Nam*, there has not been judicial exposition of the substance of the rights guaranteed in Article 26, since the adjudications in the above cases concerned the reasonableness of a restriction viewed in the lens of proportionality analysis, and that analysis have been conducted in line with the approach taken in the application of Article 21 of the Hong Kong Bill of Rights, which implements in Hong Kong Article 25 of the ICCPR; see *Wong Hin Wai v Secretary for Justice* (above) at para 33 and *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (above) at paras 26 to 28, 48. Also, the courts have held that “in accordance with law” within the meaning of Article 26 connotes a requirement for “certain and accessible” electoral laws; see *Chan Kin Sum v Secretary for Justice* (above) at paras 51 to 54.

21. Article 26 of the Basic Law is not confined or constrained by Article 25 of the ICCPR, since Article 5 of the ICCPR makes it clear that the ICCPR prescribes and guarantees minimum standards and:

*There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.*

22. The Court of Final Appeal recognized this issue in *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 and indicated firstly that a generous approach should be adopted to the interpretation of the rights and freedoms guaranteed in Chapter III of the Basic Law; secondly that the intention of the Basic Law was to entrench constitutionally the rights and freedoms in Chapter III, rights and freedoms which are essential to Hong Kong's separate system, and the courts have the duty of safeguarding and protecting them by adopting a generous approach to their interpretation; and thirdly that the ICCPR as applied to Hong Kong as incorporated by the Hong Kong Bill of Rights only provides for minimum standards for rights which are internationally recognized.<sup>3</sup> The Basic Law can provide for rights additional to such minimum standards.

23. The ascertainment of the rights guaranteed under Article 26 of the Basic Law will require reading Article 26 in conjunction with the provisions of Chapter IV and Annex I and Annex II of the Basic Law, which establish the elected political institutions of the HKSAR and prescribe the process for their progressive development. At the same time reference may be made to comparative and international instruments and jurisprudence, particularly in relation to values and principles commonly associated with electoral democracies.

24. In this connection, it may be useful to refer to the cases of the Supreme Court of Canada, which has in its election law jurisprudence recognized, with reference to the Canadian Charter of Rights and Freedoms 1982, a bundle of democratic rights, including the right to effective representation, the right to meaningful

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<sup>3</sup> A similar point of caution is to be made in relation to reliance or reference to judgments of the European Court of Human Rights, which likewise ensures a standard among the Contracting States of the European Convention on Human Rights, which have different historical, social and cultural circumstances and are in different stages of political evolution. Hence the European Court of Human Rights considered that its role *in this area* to be a subsidiary one: "the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight" (*Greens v United Kingdom* (2010) 53 EHRR 710 at §113). Further, the right to free election guaranteed under Article 3 of the Protocol No 1 to the European Convention on Human Rights relates only to the choice of the legislature.

participation, the right to equal participation and the right to a free and informed vote.<sup>4</sup>

25. Of the four democratic rights recognized by the Supreme Court of Canada, it is useful to highlight the first two in the context of the present discussion. The right of effective representation is the underlying purpose of the right to vote and stems from the idea that an individual's voting power is affected by the configuration of the political system as a whole.<sup>5</sup> Relative parity of voting power is an important element of effective representation: "A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation": *Reference re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158 at 183-184.<sup>6</sup>

26. The right to meaningful participation is based on the idea that an individual's ability to participate is affected by the broader institutional framework within which his or her participation is taking place.<sup>7</sup> The Supreme Court of Canada explained in *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 in para 26 that the democratic rights guaranteed in the Canadian Charter "are participatory in nature". The fundamental purpose of the constitutional guarantee "is to promote and protect the right of each citizen to play a meaningful role in the political life

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<sup>4</sup> According to Assistant Professor Yasmin Dawood of the Faculty of Law, University of Toronto, these rights are "structural rights", which "take into account the broader institutional framework within which these rights are defined, held and exercised. Rights do not exist in vacuum, but are instead exercised within an institutional framework that is constituted by relations of power"; see Yasmin Dawood, *Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter* (2013) 51 *Osgoode Hall Law Journal* 251-295 at 255.

<sup>5</sup> See Dawood (above) at 274.

<sup>6</sup> Other factors including geography, community history, community interests and minority representation may also need to be taken into account to ensure that legislative assemblies effectively represent the diversity of the social mosaic: *Reference re Provincial Electoral Boundaries (Saskatchewan)* (above) at 184.

<sup>7</sup> See Dawood, at 264.

of the country. Absent such a right, ours would not be a true democracy” (para 30). Thus –

*participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. (para 29).*

27. The Canadian approach towards democratic rights is unsurprising. One of the tenable views the Court of Appeal had identified in *Chan Yu Nam* involved taking account of the institutional framework in the Basic Law for the establishment and development of the method for forming the Legislative Council.

28. As it has been discussed above in relation to Article 25 of the ICCPR, the right to vote and the right to stand in elections of HKSAR permanent residents in Article 26 of the Basic Law must be read together with the guaranteed fundamental right of equality before the law under Article 25 of the Basic Law, which has been interpreted by the Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung Zigo & Anor* (2007) 10 HKCFAR 335 to mean “in essence the right not to be discriminated against. It guarantees protection from discrimination” (para 1). Further, the Court of Final Appeal underlined in *Fok Chun Wa & Anor v Hospital Authority* (2011) 15 HKCFAR 409 at para 77 that if the reason for unequal treatment –

*strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values.*

In this connection, it is also important to note that a restriction can be ruled as discriminatory not only where the ground or reason for the measure is one or more of the said personal or human characteristics (ie direct discrimination) but also where the effect of the measure unjustifiably disadvantages a significant proportion of persons who has one of the said personal or human characteristics (ie indirect discrimination).

#### Article 45 of the Basic Law: Chief Executive Electoral Method

29. Article 45 of the Basic Law provides:

*The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.*

*The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.*

*The specific method for selecting the Chief Executive is prescribed in Annex I "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".*

香港特別行政區行政長官在當地通過選舉或協商產生，由中央人民政府任命。

行政長官的產生辦法根據香港特別行政區的實際情況和循序漸進的原則而規定，最終達至由一個有廣泛代表性的提名委員會按民主程序提名後普選產生的目標。

行政長官產生的具體辦法由附件一《香港特別行政區行政長官的產生辦法》規定。

#### *The Framework of Relevant Provisions*

30. Article 45 of the Basic Law, together with Annex I of the Basic Law, the Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted

by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004) ("the NPCSC Interpretation of 6 April 2004"), the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (Adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004) ("the NPCSC Decision of 26 April 2004"), the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (Adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007) ("the NPCSC Decision of 29 December 2007") and the Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region (as approved by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010), form the framework for the development of the method for the selection of the Chief Executive under the Basic Law.

31. The Basic Law is interpreted in the light of its purpose and context. The purpose of the Basic Law is to establish the HKSAR being an inalienable part of the People's Republic of China under the principle of "One Country, Two Systems" with a high degree of autonomy in accordance with the People's Republic of China's basic policies regarding Hong Kong as set out and elaborated in the Sino-British Joint Declaration.<sup>8</sup> The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Sino-British Joint Declaration: *Ng Ka Ling &*

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<sup>8</sup> See, in the context of this Submission, para 4 above.

*Ors v Director of Immigration* (1999) 2 HKCFAR 4, CFA at 28F-H. The context of a particular provision includes, where relevant, other provisions of the Basic Law and the principles of the ICCPR: *Ng Ka Ling & Ors v Director of Immigration* (above) at 41B, H-I.

32. The HKBA finds that Article 45(2), which provides for the ultimate aim in the development of the method for the selection of the Chief Executive, is in broad and general language in respect of the composition of the nominating committee, which is to be “broadly representative”, and in respect of the “democratic procedures” for nominations. There are numerous approaches, models, options or proposals that will comply with Article 45(2). At the same time, it must be recognized that the method, scheme or arrangement to be established pursuant to the aim stated in Article 45(2) impinges on the enjoyment and exercise by HKSAR permanent residents of their right to vote and right to stand for election, and more generally, their right and opportunities to take part or participate in the conduct of public affairs, so that the standards as discussed above for the enjoyment and exercise of these rights and opportunities in accordance with Articles 2, 25 and 26 of the ICCPR and Articles 25 and 26 of the Basic Law must be fully respected and implemented in the rules of composition and formation of the nominating committee, the rules of operation of the nominating committee, the rules of nomination in the Chief Executive election, the rules of campaigning in the Chief Executive election, and the rules of voting in the Chief Executive election that are to be formulated. This is in order to ensure the achievement of the ultimate aim under Article 45(2) is in line with the overall purpose of the Basic Law as well as the purpose and context of Article 45(2) itself.
33. The HKBA finds that the NPCSC Interpretation of 6 April 2004 is concerned with the procedure for amending Annex I and Annex II of the Basic Law, including stipulating for the role of the NPCSC to determine, in the light of a report of the Chief Executive, whether there is a need to make an amendment to Annex I or Annex II, and does not contain an interpretation of Article 45 of the Basic Law.



34. The HKBA finds that the NPCSC Decision of 26 April 2004 is a decision of the NPCSC in accordance with the NPCSC Interpretation of 6 April 2004 on whether there was a need to make an amendment to Annex I and Annex II of Basic Law to amend the method for selecting the Chief Executive in 2007 and the method for forming the Legislative Council in 2008. The NPCSC decided that appropriate amendments may be made to the two methods subject to a number of parameters, including that the election for the third Chief Executive in 2007 shall not be by means of universal suffrage and that the election of the Legislative Council in the fourth term in 2008 shall not be by means of universal suffrage.
35. The HKBA finds that the NPCSC Decision of 29 December 2007 is a decision of the NPCSC in accordance with the NPCSC Interpretation of 6 April 2004 on whether there was a need to make an amendment to Annex I and Annex II of the Basic Law to amend the method for selecting the Chief Executive and the method for forming the Legislative Council in 2012. The NPCSC decided that appropriate amendments may be made to the two methods subject to a number of parameters, including that the election for the fourth Chief Executive in 2012 shall not be by means of universal suffrage and that the election of the Legislative Council in the fifth term in 2012 shall not be by means of universal suffrage. On the basis that *“the election of the fifth Chief Executive of the Hong Kong Special Administrative Region in the year 2017 may be implemented by the method of universal suffrage/ 2017年香港特別行政區第五任行政長官的選舉可以實行由普選產生的辦法”*, the NPCSC also decided that:

*2. At an appropriate time prior to the selection of the Chief Executive of the Hong Kong Special Administrative Region by universal suffrage, the Chief Executive shall make a report to the Standing Committee of the National People’s Congress as regards the issue of amending the method for selecting the Chief Executive in accordance with the relevant provisions of the Hong Kong Basic Law and “The Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China”; a*

*determination thereon shall be made by the Standing Committee of the National People's Congress. The bills on the amendments to the method for selecting the Chief Executive and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region to the Legislative Council; such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and they shall be reported to the Standing Committee of the National People's Congress for approval.*

二、在香港特別行政區行政長官實行普選前的適當時候，行政長官須按照香港基本法的有關規定和《全國人民代表大會常務委員會關於〈中華人民共和國香港特別行政區基本法〉附件一第七條和附件二第三條的解釋》，就行政長官產生辦法的修改問題向全國人民代表大會常務委員會提出報告，由全國人民代表大會常務委員會確定。修改行政長官產生辦法的法案及其修正案，應由香港特別行政區政府向立法會提出，經立法會全體議員三分之二多數通過，行政長官同意，報全國人民代表大會常務委員會批准。

This paragraph stipulates the procedure to be followed “at an appropriate time prior to the selection of the Chief Executive of the [HKSAR] by universal suffrage” to require the Chief Executive at the time make a report to the NPCSC for determination regarding the issue of amending the method for selecting the Chief Executive, and to specify the steps for completing the amendment of the method following the relevant determination of the NPCSC. This paragraph, as it is plain in its terms, does not touch upon the contents of the amendments to the method, which is a matter for the “appropriate time” in the future.

36. The NPCSC Decision of 29 December 2007 also contains after its numbered paragraphs two further unnumbered paragraphs, which are in the following terms:

*The Session is of the view that in accordance with the provisions of Article 45 of the Hong Kong Basic Law, in selecting the Chief Executive of the Hong Kong Special Administrative Region by the method of universal suffrage, a broadly representative nominating committee shall be formed. The nominating committee may be formed with reference to the current provisions regarding the Election Committee in Annex I to the Hong Kong Basic Law. The nominating committee shall in accordance with democratic procedures nominate a certain number of candidates for the*

*office of the Chief Executive, who is to be elected through universal suffrage by all registered electors of the Hong Kong Special Administrative Region, and to be appointed by the Central People's Government.*

*The Session is of the view that with the joint efforts of the Government of the Hong Kong Special Administrative Region and the people of Hong Kong, the democratic system of the Hong Kong Special Administrative Region will definitely make progress continuously, and that the aim of the selection of the Chief Executive and the election of all the members of the Legislative Council by universal suffrage will be realized in accordance with the Hong Kong Basic Law and this Decision.*

會議認為，根據香港基本法第四十五條的規定，在香港特別行政區行政長官實行普選產生的辦法時，須組成一個有廣泛代表性的提名委員會。提名委員會可參照香港基本法附件一有關選舉委員會的現行規定組成。提名委員會須按照民主程序提名產生若干名行政長官候選人，由香港特別行政區全體合資格選民普選產生行政長官人選，報中央人民政府任命。

會議認為，經過香港特別行政區政府和香港市民的共同努力，香港特別行政區的民主制度一定能夠不斷向前發展，並按照香港基本法和本決定的規定，實現行政長官和立法會全部議員由普選產生的目標。

These two paragraphs are plainly hortatory (in the sense of being aspirational), as opposed to being decisional (in the sense of being mandatory, or by way of definition). Since the NPCSC Decision of 29 December 2007 was a decision made pursuant to the framework set out in the NPCSC Interpretation of 6 April 2004 for the determination of whether there was a need to amend Annex I and Annex II of the Basic Law in respect of the method of selection of the Chief Executive and the method of forming the Legislative Council respectively, it is not, and does not purport to be, an interpretation of any provision of the Basic Law.

37. (a) In so far as the first of these two unnumbered paragraphs of the NPCSC Decision of 29 December 2007 is concerned, the expression “*may be formed with reference/可參照...組成*” should be interpreted in a manner consistent with the

broad and general language of “a broadly representative nominating committee” in Article 45(2) of the Basic Law.

(b) The HKBA is of the view that the phrase “*may ... with reference ...*” should be given its ordinary and natural meaning, i.e. as being permissive only but not obligatory.<sup>9</sup> The Court of Final Appeal has consistently emphasized that in constitutional interpretation, one must have regard to the context and purpose of the instrument and the relevant provision of the instrument to be construed; see *Vallejos & Anor v Commissioner of Registration* [2013] 2 HKLRD 533 and *GA & Ors v Director of Immigration* (unreported, 18 February 2014, FACV 7, 8, 9, 10/2013). While sometimes the phrase “may” appearing in a written instrument can, depending on its context, be interpreted as “must”, the HKBA disagrees with the suggestion that “may/可” means “must” *in this context*.

(c) This is so especially because the draftsmen of the Decision obviously knew the difference between “must” and “may” and had used the phrase “must/須” in the previous sentence when describing the need to form a nominating committee. Therefore one can readily infer that if the draftsmen had wanted to say “must” they could have said so. This militates against any argument that *in this context* the phrase “may” means “must”.

(d) An example of this straightforward approach in statutory construction is found in the *Lee Yiu Kee* case (above), where the Court of Appeal accepted in paras 122 and 123 as valid the submission that where two different Chinese characters were deliberately used by the legislator in respect of the same English word “shall” in the same part of the instrument (in that case the preamble of an Ordinance) with one of them being plainly mandatory (namely the character 須), the meaning of

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<sup>9</sup> The word “may” is commonly used in the statutes of the HKSAR and in contradistinction with the word “shall”. It is “directory”, not “mandatory” in nature; see *Lee Yiu Kee v The Chinese University of Hong Kong* (unreported, 23 July 2010, CACV 93/2009), CA at para 124.

the other (namely the character 為) must at the very least be regarded as ambiguous.

38. The HKBA is of the view that interpreting this paragraph of the NPCSC Decision of 29 December 2007 as non-decisional (or non-mandatory) would not deprive this paragraph of meaning. The specific mention of the current provisions regarding the election committee with permissive language serves to provide *political assurance* that a nominating committee formed with reference to the current election committee would be favourably considered by the NPCSC when it is submitted for approval, but does not mean that it is the only legally permissible way of forming the nominating committee. As to *constitutional requirements*, the guiding phrase is “broadly representative” in the text of Article 45(2) of the Basic Law. As a matter of law, it is possible to constitute a “broadly representative” nominating committee in a way otherwise than by reference to the sectorial makeup of the current election committee.<sup>10</sup>

39. Even if, as it has been suggested in the Consultation Document,<sup>11</sup> the expression “參照” carries with it a sense of “following”, this does not mean “copy”. This is because the election committee and the nominating committee are not comparable bodies in terms of purpose and function. How one should “follow” the current provisions regarding the election committee in formulating the composition of the nominating committee (for example, the precise delineation of various sectors, and the weighting given to each sector) remains an open question. Any adaptation of the current provisions regarding the election committee in formulating the composition of the nominating committee must be guided by, and give real effect to, the language and context of Article 45(2) of the Basic Law, in particular the language that it must be “broadly representative”.

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<sup>10</sup> For instance, a nominating committee formed by random selection of individuals from the electorate can be regarded as “broadly representative”. Another example is a nominating committee formed by individuals elected from the electorate.

<sup>11</sup> See Consultation Document, para 3.13 and note 3.

40. The HKBA finds that the Amendment to Annex I of the Basic Law approved by the NPCSC in August 2010 was the product of an exercise of the procedure stipulated under the framework of the NPCSC Interpretation of 6 April 2004 and the NPCSC Decision of 29 December 2007 derived under it.

*Can one improve on a method declared to have achieved the “ultimate aim”?*

41. The HKBA understands that the NPCSC Decision of 29 December 2007 provides simply that the 2017 Chief Executive election “may be” implemented by the method of universal suffrage, and that depending on the outcome of the present effort in constitutional development, the HKSAR Government can propose amendments to Annex I to the Basic Law and to the Chief Executive Election Ordinance (Cap 569) for the 2017 Chief Executive election that falls short of the “ultimate aim” stated in Article 45(2) of the Basic Law. The HKBA also understands that such an outcome is not only possible but also constitutionally uncontroversial.

42. The HKBA also understands that the NPCSC Interpretation of 6 April 2004 provides in paragraph 2 an interpretation of Article 7 of Annex I to the Basic Law in relation to the method for selecting the Chief Executives *for the terms subsequent to the year 2007*, which appears to indicate that the NPCSC has accepted that Article 7 of Annex I shall continue to apply for the subsequent terms notwithstanding any amendment to the other Articles of Annex I.

43. Notwithstanding the above, however, the HKBA is concerned that, in the event that the HKSAR Government proposes an amendment to Annex I to the Basic Law that it says provides for the method of selection of the Chief Executive in 2017 by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures and that following the necessary endorsements by the Legislative Council and the Chief Executive, the amendment to Annex I is approved by the NPCSC, is it still possible to *further* amend Annex I subsequently to *improve upon* the method of

selection of the Chief Executive? The HKBA expresses this concern because there could be an argument that by reason of the amendment to Annex I made or the expression of the view of the NPCSC Session making that amendment, the “ultimate aim” in Article 45(2) has been achieved, so that any further amendment to Annex I to change the method of selection of the Chief Executive is thereby precluded.

44. The HKBA considers that such a constitutional consequence will arise in an acute form if any amendment to Annex I to the Basic Law approved by the NPCSC explicitly purports to repeal the current Article 7 of Annex I, which is the provision on amending the method for selecting the Chief Executives for the terms subsequent to the year 2007 and the textual basis for that portion of the NPCSC Interpretation of 6 April 2004 that deals with the procedure for initiating and completing the process of amending the method of selection of the Chief Executive. The HKBA therefore suggests that the Central Authorities and the HKSAR Government should clarify this important constitutional issue as to the continued possibility to amend Annex I to improve upon an already “broadly representative” nominating committee and its “democratic procedures” in nominating candidates in a Chief Executive election.

#### *General Observations*

45. (a) The HKBA turns now to the process of nomination envisaged in Article 45(2) of the Basic Law to be part of the ultimate aim. As the HKBA has indicated above, the rules of composition and formation of the nominating committee, the rules of operation of the nominating committee, the rules of nomination in the Chief Executive election, the rules of campaigning in the Chief Executive election, and the rules of voting in the Chief Executive election that are to be formulated must conform in substance with Articles 2, 25 and 26 of the ICCPR and Articles 25 and 26 of the Basic Law. They should not contain any discriminatory distinctions or unreasonable restrictions and must ensure to every HKSAR permanent resident the right and opportunity to vote and be elected at

genuine periodic elections, which shall be by universal and equal suffrage, guaranteeing the free expression of the will of electors.

(b) Further, the process of nomination, as part of the electoral process, must ensure the full enjoyment by the electorate of their democratic rights, including the right to effective representation and the right to meaningful participation. Thus the rules of composition and formation of the nominating committee, the rules of operation of the nominating committee and the rules of nomination in the Chief Executive election must in practice and substance ensure that the persons entitled to vote shall have “a free choice of candidates”.

(c) Since political or other opinion is one of the distinction noted in Article 2, and one of the discriminatory ground listed in Article 26, of the ICCPR, it is clear that neither the rules in respect of the nominating committee and of its work, nor the nominating committee itself, may sanction the use of or apply political or other opinion as a ground for depriving any person of the right to stand for election.

46. The HKBA adds two more self-evident points:

(a) The nominating committee’s function is limited to nomination; it is neither its function nor its purpose to determine the result of the Chief Executive election.

(b) The eligibility criteria to the office of the Chief Executive have been exhaustively set out in Article 44 of the Basic Law. Neither the rules in respect of the nominating committee and of its work, nor the nominating committee itself, may sanction the imposition of or apply any other eligibility criterion.

47. Obviously, it goes without saying that the constitutional jurisdiction of the HKSAR courts is available to ensure consistency of the enacted electoral rules



with the Basic Law and the provisions of the ICCPR applicable to and implemented in Hong Kong.

48. The HKBA now puts forward specific comments on the electoral rules to be enacted.

*Rules of composition and formation of the Nominating Committee*

49. The HKBA is of the view that the explicit language of Article 45(2) of the Basic Law does not envisage nomination otherwise than by the nominating committee. The nominating committee cannot be *required by electoral law* to nominate a person who has fulfilled certain characteristics (whether, say, by reason of his political affiliation or by reason of his being able to demonstrate the support of a certain number of electors or a certain portion of the electorate), for that would be to render the nominating committee otiose. If the nominating committee is so required by law to nominate such a person as a candidate in the Chief Executive election, it cannot be reasonably said that such an act on the part of the nominating committee is in substance its own act. Rather such a nomination is one completed by operation of law merely in the name of the nominating committee. Nor can such an arrangement be rationalized or justified on the basis that it was “in accordance with democratic procedures”; it is clear that this phrase refers to the procedure of decision-making by the nominating committee. Where the nominating committee is simply required by operation of law to adopt a particular course or nominate a particular applicant it undergoes no procedure at all and there is nothing democratic in respect of the nominating committee’s procedure in such an arrangement.

50. Likewise the explicit language of Article 45(2) of the Basic Law rules out a nominating committee consisting of the whole of the electorate or each and every registered voter, for that would be to render otiose the requirement that the nominating committee should be “broadly representative”. That said, the requirement in Article 45(2) that the nominating committee shall be “broadly

representative” operates as an assurance for effective representation and meaningful participation of the electorate in this important part of the electoral process. For the avoidance of doubt and misunderstanding, the fact that a nominating committee *cannot* consist of the whole of the electorate and that it cannot be *required by electoral law* to nominate a candidate who has demonstrated certain electorate support does *not* mean that it is not “broadly representative”.

51. The HKBA have reached the above views having taken into account not only the explicit language of Article 45(2) of the Basic Law and the necessary implication of its expression of “the selection of the Chief Executive by universal suffrage *upon nomination by a broadly representative nominating committee* in accordance with democratic procedures”,<sup>12</sup> but also the advice of Lord Millett NPJ in *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342 at para 36 regarding the purposive interpretation of a legislative text:

“... There can be no quarrel with the principle that statutory provisions should be given a purposive interpretation, but there has been a distressing development by the courts which allows them to distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they consider desirable. It cannot be said too often that this is not permissible. Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing ...”

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<sup>12</sup> See *Bennion on Statutory Interpretation* (6<sup>th</sup> Ed) pp.1123-1126, which discuss the principle of statutory interpretation known as *expressum facit cessare tacitum* (i.e. to state a thing expressly ends the possibility that something inconsistent with it is implied); and *Craines on Legislation* (10<sup>th</sup> Ed, 2012), which makes the point at 20.1.28 that this rule of interpretation is no more than a particular application of common sense. The Supreme Court of India had applied this rule of interpretation when it considered whether it was constitutional for the legislature to delegate its legislative power to an extraneous body where the Constitution had made provision for conferring on the President legislative authority in emergencies: *Re The Delhi Laws Act 1912* [1951] AIR 332.

The HKBA considers that Lord Millett's words are applicable to the interpretation of the Basic Law too. As the Court of Final Appeal has indicated in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 223F-224D, the common law approach applies in the interpretation of the provisions of the Basic Law by the HKSAR courts, whose role is

“to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. ... The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at 28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear” (emphasis in the original).

The notion that the purposive interpretation of a provision of a constitutional instrument must be consistent with the language used in the provision is elementary and well accepted by common law courts.<sup>13</sup>

52. (a) The HKBA disagrees with the suggestion that forms of nomination other than that prescribed under Article 45(2) of the Basic Law are permissible on the basis that the Basic Law does not expressly prohibit other forms of nomination. The Basic Law is a constitutional instrument that establishes institutions and distributes and delimits powers; see *Ng Ka Ling* (above) at 26D. The Basic Law accordingly is a positivistic construction. In relation to the function and power of nominating candidates for Chief Executive election by universal suffrage, the Basic Law establishes the nominating committee and distributes this function and power to it.

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<sup>13</sup> See *Robinson v Secretary of State for Northern Ireland* [2002] NI 39, HL at paragraph 11 (per Lord Bingham) and *Sommerville v Scottish Ministers* 2007 SC 140, CSIH at paragraphs 48, 49.

(b) Further, this claim appears to be based upon a misunderstanding and misapplication of the common law principle that “everything is permitted except what is expressly forbidden”. This principle was famously stated by Sir Robert Megarry VC in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 357C in these terms: “England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden”.<sup>14</sup> In the recent case of *Moore v British Waterways Board* [2013] Ch 488, Mummery LJ of the English Court of Appeal took the caution of describing this principle in paragraph 39 as a “basic, if not totally accurate, maxim of English law” and identified it as a notion that underlines “the need in law enforcement to prove distinctive breaches of established law” as well as “the accessibility of law and the need for it to be, so far as possible, intelligible, clear and predictable, so that the citizen knows when his actions would be unlawful”. Thus the rationale behind the common law principle is to protect the private individual so that he or she is free to do whatever he or she likes unless there is a law (be it civil or criminal) that provides otherwise; and that he or she will not be liable to civil liability or criminal prosecution for what he or she does in such event.

(c) The authors of *De Smith’s Judicial Review* (7<sup>th</sup> Ed, 2013) point out in 5-025 that this principle, which pertains to private individuals, cannot be applied to elucidate the powers of ministers ‘where the opposite is true. Any action they take must be justified by a law which “defines its purpose and justifies its existence”.’<sup>15</sup>

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<sup>14</sup> The Hong Kong Court of Appeal applied this common law principle later in *Hall v Commissioner of the ICAC* [1987] HKLR 210 at 213F and *Ho Shau Hong v Commissioner of Police* [1987] HKLR 945 at 951A.

<sup>15</sup> The authors of *De Smith’s Judicial Review* (7<sup>th</sup> Ed) cite *R v Somerset County Council ex p Fewings* [1995] 1 All ER 513 at 524E-F where Laws J made the distinction between the principles that govern the relationships that public bodies and private persons have with the law. The relevant principles are “wholly different”. For public bodies, “any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed it exists for no other purpose ...”.

(d) Hence the common law principle that “everything is permitted except what is expressly forbidden” is mainly concerned with the particular act of a private individual. It simply means that he or she has the “freedom, liberty or privilege” to do whatever he or she likes unless the law provides otherwise.

(e) However, in the present context of Chief Executive election under Article 45(2) of the Basic Law, one is not concerned with such an issue. HKSAR permanent residents or a political party in Hong Kong, are “free” to purport to nominate a person to be a candidate in a Chief Executive election in the sense that they would not thereby commit any civil wrong or criminal offence. But that is not the real issue, which is whether they do have the legal authority or power so to do, in the sense that their decision will have the intended legal consequence and be effective in law. To whom such authority or power has been conferred by the Basic Law is a question of the proper interpretation of the relevant provisions of the Basic Law.

53. The HKBA has referred to judicial considerations in different common law jurisdictions of the expression “broadly representative” in various contexts, such as the constitutional right in the United States to be indicted by a grand jury drawn from a pool of persons broadly representative of the community,<sup>16</sup> and the constitutional right in various jurisdictions of trial by jury.<sup>17</sup> What can be drawn from the cases is the recognition of the impossibility to achieve complete representation of all sectors of the community in a panel. But where a system of selection of a panel excludes, by intent or operation, any class or group of citizens who, if included, might be expected to carry out their duties according to beliefs, standards or attitudes not represented by those included, such a system is liable to be held exclusionary to be point of unconstitutionality.

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<sup>16</sup> See *United States v Marcello* 423 F 2d 993 (1970), USCA(5<sup>th</sup> Cir).

<sup>17</sup> See *Taylor v Louisiana* 419 US 522 (1975), USSC; *Rojas v Berllaque* [2004] 1 WLR 201, PC; *Ellis v R* [2011] NZCA 90 (23 March 2011); *O Maicin v Ireland* [2014] IESC 12 (27 February 2014).

54. A sectorial composition of the nominating committee is not a constitutional difficulty in itself. Rather the divisions, distribution and weighing of membership among the different sectors may raise constitutionally contentious issues.
55. For example, if disproportionate or undue weight is proposed to be given on the basis of property holding or functions or any other established ground of discrimination to certain parts of the Hong Kong community in the sectorial composition, constitutionally contentious issues could be raised from the perspective of equality or parity,<sup>18</sup> and also on the grounds of whether it is “broadly representative” in accordance with Article 45(2) of the Basic Law and whether there can be effective representation and meaningful participation.
56. A nominating committee that is questionable in terms of fair distribution or reflection of the electorate among its members also presents the difficulty in ensuring the availability of a “free choice of candidates” to the electorate following nomination.
57. The HKBA adds that in relation to the formation of the nominating committee, the majority of its members should be elected or selected in accordance with rules that ensure the maximum extent of participation of the electorate and parity in such participation by individual members of the electorate. To this end, corporate voting in elections to form the nominating committee, which violates the fundamental requirement of equality, should be abolished.

#### *Rules of operation of Nominating Committee*

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<sup>18</sup> Cf the concluding observations of the United Nations Human Rights Committee in respect of Legislative Council functional constituencies, see *Concluding Observations on the Fourth Periodic Report of Hong Kong* (CCPR/C/79/Add.57) (9 November 1995), para 19; *Concluding Observations on the Initial Periodic Report of Hong Kong, China* (CCPR/C/79/Add.117) (15 November 1999), para 12; *Concluding Observations on the Second Periodic Report of Hong Kong, China* (CCPR/C/CHN-HKG/CO/2) (21 April 2006), para 18.

58. The rules of operation of the nominating committee include the term of office (if any) of the nominating committee, the rules of meeting (if any) of the nominating committee, and the rules of ethics for members of the nominating committee.

59. There has been a suggestion that the nominating committee shall act “organizationally” or “collectively”, which seems to envisage that the nominating committee would meet, debate and decide as a body which persons it would nominate as candidates.<sup>19</sup> This suggestion, in and of itself, does not raise a constitutionally contentious question. The HKBA considers that the constitutionally critical issue should be how the nominating committee exercises, pursuant to the rules of nomination, its function of nominating candidates for the office of the Chief Executive to be voted by the electorate.

*Rules of nomination in Chief Executive election*

60. The rules of nomination in the Chief Executive election include the rules for an individual permanent resident of the HKSAR to have his or her proposed candidature for the office of the Chief Executive to be considered by the nominating committee, and the rules for the nominating committee to deliberate and nominate the candidates in the Chief Executive election. Article 45(2) of the Basic Law indicates that the nominations shall be made in accordance with “democratic procedures”.

61. Individual permanent residents of the HKSAR must have access to the process of nomination by the nominating committee before their proposed candidatures can be considered by the nominating committee for the purpose of the making of nominations. The conditions of access to the nomination process must be transparent, opinion-neutral, non-discriminatory, and conducive to meaningful participation; they must not become eligibility criteria additional to those already spelt out exhaustively in Article 44 of the Basic Law. The criteria of disqualification in the Chief Executive Election Ordinance can be retained so long

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<sup>19</sup> Consultation Document, para 3.20 and note 10.

as they are not unreasonable restrictions to the right of HKSAR permanent residents to stand for election.

62. The HKBA now turns to the issue of “love our country, love Hong Kong/愛國愛港”. Every Chief Executive election candidate in the 2012 Chief Executive election had to make the following solemn declaration:“(a) I stand for the election in an individual capacity; and will uphold the [Basic Law] and pledge allegiance to the Hong Kong Special Administrative Region. 本人是以個人身分參選；及會擁護《中華人民共和國香港特別行政區基本法》和保證效忠香港特別行政區。(b) I am a Chinese citizen with no right of abode in any foreign country. 本人是中國公民，並且沒有外國居留權”。<sup>20</sup> The HKBA assumes that similar declarations will be required of the candidates in the 2017 Chief Executive election. The oath of office of the Chief Executive already prescribed in Article 104 of the Basic Law requires him to “swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China 宣誓擁護中華人民共和國香港特別行政區基本法，效忠中華人民共和國香港特別行政區” in accordance with law.<sup>21</sup> Further, “love our country, love Hong Kong/愛國愛港” is not an eligibility requirement stipulated in Article 44 of the Basic Law. There is also great difficulty in defining with legal precision the political concept of “love our country, love Hong Kong/愛國愛港”.

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<sup>20</sup> The form of the solemn declaration is available at: [http://www.eac.gov.hk/pdf/2012CE-E/2012ce\\_reod1.pdf](http://www.eac.gov.hk/pdf/2012CE-E/2012ce_reod1.pdf).

<sup>21</sup> The oath of the Chief Executive on assuming office is the following terms in Schedule 2 to the Oaths and Declarations Ordinance (Cap 11): “I swear that, in the office of Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, and be held accountable to the Central People's Government of the People's Republic of China and the Hong Kong Special Administrative Region. 本人，謹此宣誓：本人就任中華人民共和國香港特別行政區行政長官，定當擁護《中華人民共和國香港特別行政區基本法》，效忠中華人民共和國香港特別行政區，盡忠職守，遵守法律，廉潔奉公，為香港特別行政區服務，對中華人民共和國中央人民政府和香港特別行政區負責。”



In view of all the above, the HKBA is of the view that any proposal to introduce into electoral law an additional requirement that a person proposing his candidature to the nominating committee must “love our country, love Hong Kong/愛國愛港” is highly questionable as a matter of law. A legal restrictive requirement that is uncertain in meaning cannot possibly be a reasonable restriction to the exercise of the fundamental right to stand in an election guaranteed in Article 26 of the Basic Law and Article 25 of the ICCPR.<sup>22</sup> Further, the HKBA notes that in prescribing in law such a requirement, it would have become necessary for official evaluation in the course of verification of the person’s application of the said qualities of that person. Such official evaluation runs a serious risk of being a discriminatory practice on the ground of “political or other opinion” prohibited under Article 25 of the Basic Law and Articles 25 and 26 of the ICCPR. This would make the matter even more highly questionable in law.

63. The rules for the nominating committee to deliberate and nominate candidates should not be designed in terms or be operated in effect to act, or act unreasonably, as a barrier to candidacy. In this connection, the HKBA finds it useful to refer to international jurisprudence that highlights this very important point.

64. These cases were concerned with the rules of nomination that restrict candidacies to persons who are members of political parties or sponsored by political parties. In *Castaneda Gutman v Mexico* (Series C, No 184),<sup>23</sup> the Inter-American Court of Human Rights decided on 6 August 2008 a complaint that Mexican presidential electoral law requiring candidates to be nominated by registered political parties barred independent candidates who are not sponsored by a registered political party violated the provision in the Inter-American Convention of Human Rights

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<sup>22</sup> See *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, CFA and *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229, CFA, which underline the principle of legal certainty.

<sup>23</sup> The judgment of the Inter-American Court of Human Rights is accessible at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_184\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf).

that was similar to Article 25 of the ICCPR. The Inter-American Court rejected the complaint after conducting a proportionality analysis of the arguments of the Presumed Victim and the State Party. In *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* (App Nos 009, 011/2011), the African Court on Human and Peoples' Rights, in its first substantive judgment of 14 June 2013, found, following the conduct of a proportionality analysis, that certain amendments to the Constitution of Tanzania, by prohibiting independent candidates to contest presidential, parliamentary and local government elections constituted a violation of the right to participate freely in the government of one's country, as well as the right to freedom of association, right to participate in public/governmental affairs and the right against discrimination guaranteed under the African Charter on Human and Peoples' Rights.<sup>24</sup> Although the Tanzanian State relied heavily on *Castaneda Gutman v Mexico*, the African Court considered that in Tanzania the options available to Tanzanians who wish to seek public elective offices other than through being members of and being sponsored by political parties were not as many as those available to Mexicans.

65. The contrasting judgments of the two international courts can be explained by the ease with which a person who seeks elective office can become a candidate for that office through compliance with the relevant legal requirements. In Mexico, it appears that such a person need not become a member of a registered political party and can become a presidential election candidate through sponsorship or endorsement by a registered political party or setting up a registered political party. In Tanzania, the options are comparatively limited.<sup>25</sup> In Hong Kong, there is only one way by which an eligible HKSAR permanent resident can become a candidate in a Chief Executive election, namely through being nominated by the

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<sup>24</sup> The case is reported in (2013) 33 Human Rights Law Journal 18-34.

<sup>25</sup> For a recent analysis of the judgments of the Inter-American Court of Human Rights and the African Court on Human and People's Rights, as well as other judicial interpretations of democratic or political rights in human rights treaties, see Jure Vidmar, *Judicial Interpretations of Democracy in Human Rights Treaties* (2014) 3(2) *Cambridge Journal of International and Comparative Law* (forthcoming).

nominating committee. Hence the consideration of the principles highlighted in these judgments assumes importance.

66. The HKBA has also reviewed the jurisprudence of other common law jurisdictions to ascertain whether there has been any judicial consideration of the expression “democratic procedures”. The HKBA is able to find that in *Payne v Adams* [2009] 3 NZLR 834, a full bench of the New Zealand High Court (which was presided by the Chief High Court Judge) examined the obligation in section 71 of the Electoral Act [NZ] on registered political parties to follow certain “democratic procedures” in the selection of candidates. The full bench endorsed the conclusions of the single judge in an earlier hearing of the same proceedings that the section ‘was a requirement that the selection of candidates by political parties would be participatory; that members of the party may participate in the selection process ... The term “democratic procedures” means what it says. The promise of the heading is that candidate selection will be participatory ...’.<sup>26</sup>

67. In the context of the nominating committee, the principle of “participatory” procedures coming from the New Zealand jurisprudence must mean that each and every member of the nominating committee must have the equal right to participate in the decision-making process as to who to nominate.

68. (a) The rules for the nominating committee to deliberate and nominate candidates must not be designed to or applied with the effect of denying HKSAR permanent residents of direct or meaningful participation in Chief Executive elections by standing as a candidate. The HKBA is of the opinion that the suggestion that the “democratic procedures” referred to in Article 45(2) of the Basic Law simply or necessarily connotes decision-making by a simple majority or some form of majority vote in a meeting of the nominating committee acting collectively or as an organization to select as nominated candidates a certain number of persons

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<sup>26</sup> See also *Takerei v Winiata & Ors* [2011] NZHC 173 (2 March 2011).

(such as between two to four),<sup>27</sup> runs a serious risk of limiting the free choice of voters among the variety of alternatives and undermines the requirement that Chief Executive elections shall be genuine periodic elections that guarantee the free expression of the will of the electors without unreasonable restrictions.

(b) As the European Court of Human Rights has indicated in *Republic Party of Russia v Russia* [2011] ECHR 644 that: “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position ... The voters’ choice must not be unduly restricted and different political parties must be ensured a reasonable opportunity to present their candidates at elections”.

(c) In the context of the Australian Constitution, the principle of free elections ensures that the electoral methods selected by Parliament are valid ‘only if they allow a “free choice” among the candidates for election and an “informed choice”. ... The choice “must be a true choice ... a choice made with access to the available alternatives.”’: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, HC Aust at para 75 (per McHugh J).

(d) The HKBA finds it impossible to see how political minorities will have a real and reasonable chance to stand for election so as to ensure that the electorate has a free or true choice of candidates if a person will only be nominated by the nominating committee upon he or she being favoured by the simple majority decision of the nominating committee. This still remains a difficulty even where the nominating committee is “broadly” representative of the whole electorate.

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<sup>27</sup> See Consultation Document, paras 3.20 to 3.22.

(e) Additionally, such a suggested mode of decision-making might also appear to be regressive when compared to the method for selecting the fourth Chief Executive in 2012.

(f) Indeed the suggestion that puts a self-standing numerical limit to the number of candidates that the nominating committee can nominate arguably infringes the authority and liberty of the nominating committee.

69. (a) The HKBA considers that instead, the nominating committee's democratic procedures should ensure the production of a spectrum or plurality of candidates for the voters. The expression "plurality" refers not simply numerical plurality but more importantly political plurality. The HKBA considers that this principle, in the present context, carries two implications.

(b) The first implication is that the suggestion that only "certain number of candidates" (say two to four) be nominated does not have much credence. The HKBA is aware of overseas jurisprudence that recognized as a legitimate state interest the prevention of overcrowded ballots. However, the usual means taken in democracies to promote that legitimate state interest have been to require each candidate to show either sponsorship by a registered political party or a substantial support in the community by securing a specified number of signatures of registered voters, or to pay a substantial filing fee or deposit at the time of registration of candidature.<sup>28</sup> However, in the opinion of the HKBA, the practical concerns of overcrowded ballots that probably exist in other jurisdiction are not present in Hong Kong since it is the nominating committee that decides which persons are nominated as candidates in a Chief Executive election by universal suffrage. Further, if the rules of nomination by nominating committee contain both a prescription of a percentage threshold in the making of nominations and a restriction in the number of applicants that each member of the nominating

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<sup>28</sup> See *Jennes v Forston* 403 US 431 (1971), USSC; *Bullock v Carter* 405 US 134 (1972), USSC; *Storer v Brown* 415 US 724 (1974), USSC; and *Mulholland v Australian Electoral Commission* (above)

committee may support, they could well have operated to produce the consequence of controlling number of nominated candidates, without there being an explicit numerical limitation on number of candidates in electoral law.

(c) The second implication is that a simple majority way of “organizational” or “collective” determination would have difficulty in passing muster. While a more evaluative mode of decision-making may need to be considered as a much better choice, there is nothing inherently objectionable in having “organizational” or “collective” decision-making by a lower threshold (though what the percentage threshold should be, and rules governing the number of votes each member is entitled to cast, is a matter of careful consideration and debate).

70. The HKBA also considers that to achieve this legitimate aim of “plurality”, it may be constitutionally permissible within the framework of Article 45(2) of the Basic Law to prescribe a lower threshold of nomination by the nominating committee in respect of applicants who can put forward verified recommendations from a substantial number of registered voters. This arrangement, which at first glance may seem to be inconsistent with the principle of equal treatment of all applicants for candidacy, may in substance serve as a means to counterbalance the constitutional difficulty that may arise out of a “broadly representative” nominating committee which contains certain sectorial interests (because within the rubric of “broadly representative” there could be numerous legally permissible setups) and the associated risk that certain applicants commanding popular support might not be able to obtain the support of such sectorial interest, a concern which is also related to the principle of equality applied in the context of broad or effective representation and meaningful participation. This arrangement does not amount to a fetter on the nominating committee’s function and power to decide whether to nominate an applicant (as long as the threshold is not so low as to amount to *de facto* automatic nomination). On the other hand, an arrangement that requires a specified majority of the nominating committee to veto such applicants from becoming candidates runs the risk of constituting an

impermissible fetter on the nominating committee's function and power since it could be regarded as *de facto* automatic nomination.

71. (a) In other words, the HKBA disagrees with the suggestion that the nominating committee should endorse as a matter of law or course applicants who can put forward verified recommendations from a substantial number of registered voters or demonstrate the support of a well recognized or represented political party in Hong Kong.

(b) If, upon a proper construction of Article 45(2) of the Basic Law, the nominating committee is the only established institution empowered to nominate candidates for Chief Executive election by universal suffrage, it will not be permissible for the nominating committee to simply endorse or “rubberstamp” applicants who have been “nominated” by other means. The HKBA has already touched upon the issue of fettering the nominating committee's function and power to decide whether to nominate an applicant above.

(c) The HKBA considers that another principle of public law is also engaged, which is that essential to the lawful exercise of power is the notion that it should be exercised by the authority upon whom it is conferred, and by no one else. The valid exercise of a discretion always requires a genuine application of the mind and a conscious choice by the correct authority: Wade and Forsyth, *Administrative Law* (10<sup>th</sup> Ed, 2009) pp.259-262.<sup>29</sup>

(d) The HKBA further considers that if the nominating committee is required by electoral law to “rubberstamp” a choice made by other persons, it cannot be said

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<sup>29</sup> The authors of Wade and Forsyth cited in p.262 the Sri Lankan case of *Cader v Commissioner for Mosques and Muslim Charitable Trust* (1963) 66 NLR 16 where the court underlined the statutory board's power to appoint trustees of a mosque must be exercised by the members of the board personally and not in favour of anyone else however competent, honourable or efficient that person may be as regards the matter. If the selection and appointment were the result of the judgment exercised by someone else other than the board then such selection and appointment is no appointment in law. The members of the board had no business to surrender their judgment to anybody else.

that the procedures so established by electoral law are “participatory”, the essential quality of “democratic procedures” discussed above, since they will not be any participation by the members of the nominating committee in the nomination of that applicant in any real sense.

(e) The HKBA furthermore considers that it cannot possibly be implied into Article 45(2) of the Basic Law a power, or more accurately a *duty*, on the part of the nominating committee to endorse or “rubberstamp” applicants who have been purportedly “nominated” by other entities or groups; the test of necessity for such implication is plainly not satisfied.

72. The HKBA further considers that given the nominating committee’s function of nominating candidates, its deliberation and decision-making should be public and open in order to promote and ensure transparency and accountability. Each member of the nominating committee’s participation in the nominating committee’s deliberations and decision-making must be open and accurately recorded since he or she will act as if he or she is subscribing to the candidature of a particular proposed candidate,<sup>30</sup> and he or she will act as a representative of both a portion of the electorate and on behalf of the overall electorate. Each member participates in the nominating committee in the capacity of a “representative” only and he or she owes a duty to account to those whom he or she represents. In other words, there should not be any secret balloting in the nominating committee’s decision-making.

#### *Rules of voting in Chief Executive election*

73. The HKBA is of the clear view that there must be voting in a Chief Executive election by universal suffrage, even where the nominating committee nominates only one candidate. If it were otherwise, the nominating committee would have effectively determined the election. In such a vote, the single candidate must

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<sup>30</sup> Contrast with the London Mayoral Election, in which each candidate is required to have 330 subscribers, namely 10 registered voters from each of the London boroughs and 10 registered voters from the City of London.



obtain more than 50 per cent of the valid votes of all voters who voted, provided that the number of voters who voted passes a minimum threshold in terms of the proportion of the electorate, say 40 per cent.

74. In a contested Chief Executive election with two or more candidates, the method of voting, in the opinion of the HKBA, should ensure that the preferences of each voter be expressed and properly taken into account. The method of voting should also ensure that the winning candidate would have a majority mandate to legitimately exercise the powers of the Chief Executive for and on behalf of the HKSAR.

75. Voting in a Chief Executive election must be by secret ballot.

#### Article 68 of the Basic Law: Legislative Council Electoral Method

76. Article 68 of the Basic Law states:

*The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.*

*The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.*

*The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures".*

香港特別行政區立法會由選舉產生。

立法會的產生辦法根據香港特別行政區的實際情況和循序漸進的原則而規定，最終達至全部議員由普選產生的目標。

立法會產生的具體辦法和法案、議案的表決程序由附件二《香港特別行政區立法會的產生辦法和表決程序》規定。

*The Framework of Provisions*

77. Article 68 of the Basic Law, together with Annex II of the Basic Law, the the NPCSC Interpretation of 6 April 2004, the NPCSC Decision of 26 April 2004, the NPCSC Decision of 29 December 2007 and the Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures (as recorded by the Standing Committee of the Eleventh National People's Congress at its Sixteenth Session on 28 August 2010), form the framework for the development of the method for the forming of the Legislative Council under the Basic Law.

78. The HKBA finds that the NPCSC also decided in the NPCSC Decision of 29 December 2007 that:

*3. At an appropriate time prior to the election of all the members of the Legislative Council of the Hong Kong Special Administrative Region by universal suffrage, the Chief Executive shall make a report to the Standing Committee of the National People's Congress as regards the issue of amending the method for forming the Legislative Council and the issue of whether any corresponding amendment should be made to the procedures for voting on bills and motions in the Legislative Council in accordance with the relevant provisions of the Hong Kong Basic Law and "The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China"; a determination thereon shall be made by the Standing Committee of the National People's Congress. The bills on the amendments to the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region to the Legislative Council; such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and they shall be reported to the Standing Committee of the National People's Congress for the record.*

三、在香港特別行政區立法會全部議員實行普選前的適當時候，行政長官須按照香港基本法的有關規定和《全國人民代表大會常務委員會

關於〈中華人民共和國香港特別行政區基本法〉附件一第七條和附件二第三條的解釋》，就立法會產生辦法的修改問題以及立法會表決程序是否相應作出修改的問題向全國人民代表大會常務委員會提出報告，由全國人民代表大會常務委員會確定。修改立法會產生辦法和立法會法案、議案表決程序的法案及其修正案，應由香港特別行政區政府向立法會提出，經立法會全體議員三分之二多數通過，行政長官同意，報全國人民代表大會常務委員會備案。

This paragraph stipulates the procedure to be followed “at an appropriate time prior to the election of all members of the Legislative Council of the [HKSAR] by universal suffrage” to require the Chief Executive at the time make a report to the NPCSC for determination regarding the issue of amending the method for forming the Legislative Council, and to specify the steps for completing the amendment of the method following the relevant determination of the NPCSC. This paragraph, as it is plain in its terms, does not touch upon the contents of the amendments to the method, which is a matter for the “appropriate time” in the future.

79. However, the NPCSC Decision of 29 December 2007 records in the Preamble the view of the NPCSC Session that “after the Chief Executive is selected by universal suffrage, the election of the Legislative Council of the [HKSAR] may be implemented by the method of electing all the members by universal suffrage”. This has been understood by the HKSAR Government to indicate that the method of forming the Legislative Council in 2016 cannot be by way of electing all the members by universal suffrage.<sup>31</sup>

80. The HKBA submits that functional constituency elections to return members of the Legislative Council in the present format do not comply with Article 25(a) and Article 25(b) of the ICCPR, particularly the principle of equality of voting power. The United Nations Human Rights Committee has maintained this view since 1996.

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<sup>31</sup> See Consultation Document, para 4.09.

81. The HKBA finds that the point made in the preceding paragraph is most readily illustrated when one considers the electoral method of the current District Council (Second) Functional Constituency, where persons who are registered as electors for geographical constituencies but are not registered as electors for any other functional constituencies elect five members of the Legislative Council from candidate lists of elected members of a District Council each subscribed by not less than 15 other members of a District Council. The electoral method of the District Council (Second) Functional Constituency makes better provision for the effective representation and the meaningful participation of HKSAR permanent residents in the conduct of public affairs, through their freely chosen representatives, than other traditional, trade-based, functional constituencies.
82. The HKBA also submits that corporate voting should be abolished in all functional constituencies.
83. The HKBA further submits that it finds no valid reason to maintain the present procedures for voting on Bills and Motions in the Legislative Council in Annex II of the Basic Law.

Dated: 28th April 2014.

HONG KONG BAR ASSOCIATION