

# COMMENT

## THE FATE OF THE CONSTITUTIONAL REFORM PROPOSAL OF OCTOBER 2005

On the evening of 30 November 2005, Mr Donald Tsang Yam-kuen, Chief Executive of the Hong Kong Special Administrative Region (HKSAR), delivered the first-ever televised address directly to the people of Hong Kong by a Chief Executive of the HKSAR on a specific policy.<sup>1</sup> He pointed out that Hong Kong stood at a crossroads in its constitutional development as the Legislative Council (LegCo) prepared to debate and vote on the Government's proposal for constitutional reform contained in the Fifth Report ("5th Report") of the Constitutional Development Task Force published on 19 October 2005.<sup>2</sup> As the proposal involved the amendment of Annexes I and II to the Basic Law of the HKSAR, a two-thirds majority of all LegCo members was required for the proposal to be passed.<sup>3</sup> The proposal was put to the vote on 21 December 2005, and was defeated by 24 LegCo members – all members of the group commonly known as "the democrats"<sup>4</sup> – voting against it.

The 5th Report represented the culmination of a series of momentous events in the constitutional history of the HKSAR. These events included the march on 1 July 2003 of half a million people against the national security bill (to implement Article 23 of the Basic Law) proposed by the Tung Chee-hwa administration, the following popular movement for democratisation and, in particular, for direct election of the Chief Executive in 2007 and of all members of LegCo in 2008,<sup>5</sup> Beijing's legislative moves in April 2004 to stem the rising tide of demands for direct elections,<sup>6</sup> and the Hong Kong Government's subsequent consultation exercise with regard to the electoral arrangements for 2007 and 2008.<sup>7</sup> The parameters of the

<sup>1</sup> The full text of the 5-minute speech was published in various Hong Kong newspapers on 1 Dec 2005. See, eg, *Hong Kong Economic Times*, 1 December 2005, p A37 (in Chinese).

<sup>2</sup> *The Fifth Report of the Constitutional Development Task Force: Package of Proposals for the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008* (Hong Kong Government, October 2005).

<sup>3</sup> See para 7 of Annex I and section III of Annex II. There is a total of 60 members in LegCo, including the President who normally does not vote.

<sup>4</sup> These Legislative Councillors had all in their campaign for the LegCo election of September 2004 included in their platform the demand for universal suffrage in the election of the Chief Executive in 2007 and in the election of all members of LegCo in 2008.

<sup>5</sup> See Johannes Chan, "Some Thoughts on Constitutional Reform in Hong Kong" (2004) 34 HKLJ 1.

<sup>6</sup> See Albert H.Y. Chen, "The Constitutional Controversy of Spring 2004" (2004) 34 HKLJ 215.

<sup>7</sup> See generally Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005); *The Third Report of the Constitutional Development Task Force: Areas Which May be Considered for Amendment in Respect of the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008* (Hong Kong Government, May 2004); *The Fourth Report of the Constitutional Development Task Force: Views and Proposals of Members of the Community on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008* (Hong Kong Government, December 2004).

electoral reforms that are possible for 2007 and 2008 have been set by the Decision of the National People's Congress Standing Committee (NPCSC) on 26 April 2004:<sup>8</sup> there shall not be direct election of the Chief Executive by universal suffrage in 2007; the proportions of LegCo members directly elected by universal suffrage in the geographical constituencies and those elected by functional constituencies (currently both being 50 per cent of the total LegCo membership of 60) shall remain unchanged in 2008.<sup>9</sup>

The main elements of the reform package of the 5th Report may be summarised as follows:

- (a) The size of the Election Committee for the Chief Executive would be increased from 800 to 1600. Under the existing system, 200 members are elected by functional constituencies in each of four social sectors.<sup>10</sup> According to the reform proposal, three of the four existing social sectors would each elect 300 members to the Election Committee. The fourth sector (commonly known as the "political sector") would produce 700 members of the Election Committee. Among these 700 members will be all the members of the District Councils.<sup>11</sup> There is currently a total of 529 members of the 18 District Councils in Hong Kong,<sup>12</sup> comprising 400 members (ie 75.6 per cent) elected by universal suffrage, 102 members (19.3 per cent) appointed by the Chief Executive, and 27 ex officio members (5.1 per cent) who are the chairmen of Rural Committees which are largely elected by villagers in the New Territories.
- (b) The size of LegCo would be increased from 60 to 70 members. Five of the 10 additional members would be elected by universal suffrage, ie elected in the same manner as the existing 30 out of the 60 members. The other five will be elected by District Councillors. Since there is in the existing LegCo already one member elected by District Councillors, according to the proposed reform District Councillors will return a total of six LegCo members. The 5th Report does not

<sup>8</sup> See Chen (n 6 above); Chan and Harris (n 7 above) at 179.

<sup>9</sup> In accordance with Annex II to the Basic Law and a related decision of the National People's Congress in 1990, the number of LegCo members elected by universal suffrage was 20 for the 1st LegCo (1998-2000), 24 for the 2nd (2000-2004), and 30 for the 3rd (2004-2008), while the total number of LegCo members has remained constant at 60.

<sup>10</sup> See Annex I to the Basic Law.

<sup>11</sup> Under the existing system (as prescribed by Annex I to the Basic Law and the Chief Executive Election Ordinance, Cap 569, LHK), District Councillors form one functional constituency for the purpose of electing 42 members to the Election Committee. They also form one functional constituency for the purpose of electing one member to LegCo (see the Legislative Council Ordinance, Cap 542, LHK).

<sup>12</sup> See generally the District Councils Ordinance, Cap 547, LHK. Section 8 of this Ordinance empowers the Chief Executive in Council to determine the number of Districts in Hong Kong and to specify the numbers of elected and appointed members of the District Councils.

prescribe what electoral method (eg block vote system or proportional representation) will be used in this context, but suggests that this will be dealt with later by local legislation.<sup>13</sup>

The reform proposal is commonly known as the “District Councils Scheme” since one of its key features is the enhancement of the role of District Councillors in both the expanded Election Committee for the Chief Executive and the expanded LegCo. The Government argued that the implementation of the proposal would have the effect of further democratising the existing political system of Hong Kong, and amount to a significant step forward in bringing Hong Kong closer to the ultimate goals stipulated in the Basic Law<sup>14</sup> of electing both the Chief Executive and all LegCo members by universal suffrage. The 5th Report elaborates as follows:

“The rationale behind the proposal [as regards including all District Councillors in the Election Committee] is that District Council members have a public mandate, and that they are in a better position to understand and reflect the views of the general public on day-to-day livelihood issues. ... The composition of District Councils can be said to be a microcosm of the community at large.<sup>15</sup> ... Furthermore, more than 80% of District Council members are returned by elections.<sup>16</sup> ... Accordingly [according to the proposal regarding District Councillors electing five additional LegCo members], close to 60% of the Legislative Council seats ... would be returned by ... over three million voters. The representativeness of the Legislative Council would thereby be further enhanced.”<sup>17</sup>

Mr Donald Tsang described the proposal as one “not easy to have been made available”.<sup>18</sup> It is believed that pro-China political forces in Hong Kong, including the Democratic Alliance for Betterment of Hong Kong (“DAB”) and the Liberal Party, privately harboured reservations against the proposal, and that it had not been an easy task for Mr Tsang to lobby Beijing’s support for the proposal which he eventually obtained before it was released. In the event, the opposition to the proposal came not from the DAB or the Liberal Party (both of which publicly supported the proposal immediately after it was

<sup>13</sup> See para 5.17 of the 5th Report.

<sup>14</sup> See Arts 45 and 68 of the Basic Law. The articles also provide that the methods for selecting the Chief Executive and forming LegCo “shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress”

<sup>15</sup> Para 5.08.

<sup>16</sup> Para 5.09.

<sup>17</sup> Para 5.22.

<sup>18</sup> The Chinese original is *delai buyi* (得來不易). See the speech referred to in n 1 above.

announced in October 2005) but from the democrats. Twenty-five democrats in LegCo joined together to oppose the proposal immediately after it was announced. Together with the Civil Human Rights Front, they organised a massive demonstration against the proposal, demanding a “timetable” for the introduction of universal suffrage. The march took place on Sunday 4 December 2005, attracting many more participants than originally expected and evidencing the strength of the pro-democracy social movement in Hong Kong that has evolved since 2003. Independent researchers estimated the number of demonstrators to be between 60,000 and 100,000.<sup>19</sup>

The democrats attacked the proposal mainly on two fronts. First, they criticised the inclusion of appointed District Councillors among District Council members who under the proposal would become eligible to sit on the Election Committee for the Chief Executive and to elect six LegCo members. They thus labelled the proposed reform as a retrograde step rather than a step forward on the road to full democracy.<sup>20</sup> Secondly, they criticised the

<sup>19</sup> The organisers of the march (the Civil Human Rights Front) claimed that there were 250,000 participants. However, the estimates by (a) the police, (b) Paul Yip Siu-fai, senior lecturer of statistics and actuarial science at the University of Hong Kong (HKU), (c) the HKU Public Opinion Programme, (d) the HKU Social Sciences Research Centre, and (e) a satellite study commissioned by the Chinese newspaper *Ming Pao* were respectively (a) 63,000, (b) 72,000, (c) 81,000–98,000, (d) 57,000–61,000 and (e) 92,000. See “Six Estimates of Crowd Strength”, *South China Morning Post*, 5 Dec 2005, p A3; “92,000 People According to Satellite Picture Analysis”, *Ming Pao*, 5 Dec 2005, p A13 (in Chinese); “HKU Social Sciences Research Centre: About 60,000 People Marched”, *Hong Kong Economic Times*, 9 Dec 2005, p A6 (in Chinese). According to an opinion poll conducted (on 5–7 Dec) shortly after the march by the Institute of Asia-Pacific Studies of the Chinese University of Hong Kong, 49.9% of those surveyed considered the Government’s political reform proposal acceptable, while 28.9% considered it unacceptable. 66% believed that the reform plan should include a timetable for the introduction of universal suffrage, while 23.6% believed that such a timetable should not be included. 56.3% did not agree that the democrats should veto the reform proposal (as it currently stood) in LegCo on the ground that no timetable was included, while 35% agreed with such a veto. See “More than Half of the People Against the Democrats’ Vetoing the Political Reform”, *Hong Kong Economic Times*, 10 Dec 2005, p A6 (in Chinese), or other Hong Kong newspapers of the same date. The Grand Coalition Concerning Political Reform led by the pro-China Federation of Trade Unions launched a signature campaign on 11 December in support of the Government’s political reform proposal. By 20 December nearly 780,000 signatures had been collected: “Nearly 780,000 People Want Reform Package to be Passed”, *China Daily* (Hong Kong edition), 21 Dec 2005, p 2.

<sup>20</sup> There were also some debates as regards whether the reform proposal, and in particular the “District Councils Scheme”, is consistent with the Basic Law. For example, the Article 45 Concern Group criticized it as being inconsistent with Article 25 (on voting by universal and equal suffrage) of the International Covenant on Civil and Political Rights which has been incorporated into the Basic Law by Article 39 of the Basic Law, while Mr Wong Yan-lung, the Secretary for Justice, defended the proposal against this criticism by relying on the reservations made by the UK with regard to the application of the Covenant to Hong Kong (it seems that the reservations are still currently relevant as Article 39 provides that the provisions of the ICCPR “as applied to Hong Kong shall remain in force” (emphasis supplied)). See, eg, “Concern Group Rebutts Wong Yan-lung”, *Ming Pao*, 17 Dec 2005, p A9 (in Chinese). On a separate front, the reform proposal was criticised by some lawyers on the ground that it was similar to the constitutional reform package proposed in 1992 by Mr Christopher Patten, the last Governor of Hong Kong, that was condemned by Beijing as being a violation of the Basic Law. Article 97 (on district organisations) of the Basic Law also figured in this debate. See, eg, Elsie Leung, “The Political Reform Package Does Not Involve ‘the Three Violations’”, *Hong Kong Economic Times*, 17 Nov 2005, p A38 (in Chinese); Fan Chan-yu, “District Councillors Electing the Chief Executive Violates the Basic Law”, *Hong Kong Economic Times*, 29 Nov 2005, p A40 (in Chinese).

proposal for failing to indicate when Hong Kong would have universal suffrage for the Chief Executive and for all LegCo members. This is known as the “timetable” issue: the democrats demanded a timetable for the introduction of universal suffrage in Hong Kong.

On the issue of appointed members, the Government argued that all District Councillors should have the same rights and duties, and appointed Councillors should not be discriminated against. However, since the democrats had declared well in advance that they were going to vote the reform proposal down on 21 December, the Government announced a concession on 19 December in order to gather more support at the last minute.<sup>21</sup> The concession was that as from the beginning of the next term of office of the District Councils in January 2008, the number of appointed District Councillors would be reduced by one-third (from 102 to 68). Furthermore, the Government would decide before the end of 2011 whether (a) to abolish appointed District Council seats completely in 2012 or (b) to further reduce their number to 34 in 2012 and then to zero in 2016. The proposal however was expressed to be an integral part of the political reform package and would therefore be conditional on the package being adopted by LegCo.

On the issue of the timetable, the Government’s line was that this should be dealt with later and separately from the political reform package for 2007 and 2008. The issue was not new; it was discussed in both the Fourth and Fifth Reports of the Constitutional Development Task Force.<sup>22</sup> The Reports acknowledged that there were different views on the issues of whether there should be such a timetable, and, if so, when would be the suitable date for the introduction of universal suffrage, and suggested that it would be difficult to achieve a consensus in the immediate future. On the issue of the timetable, Ms Elsie Leung, who had resigned from the post of Secretary for Justice in October 2005 but continued to serve on the Constitutional Development Task Force until December 2005, also pointed out that since the Decision of the NPCSC on 26 April 2004 relates specifically to political reforms for 2007 and 2008, it would not be lawful to stipulate in the 5th Report and the proposed amendments to Annexes I and II to the Basic Law a timetable for the introduction of universal suffrage.<sup>23</sup>

<sup>21</sup> This was announced by Mr Rafael Hui, Chief Secretary for Administration. See various Hong Kong newspapers of 20 Dec 2005.

<sup>22</sup> See the 4th Report, paras 3.20, 4.22, 5.03; 5th Report, paras 3.22–3.23, 4.17–4.18, 5.25–5.26.

<sup>23</sup> Elsie Leung, “Why a Timetable for Universal Suffrage Cannot be Written into the 2007/08 Electoral Proposals”, *Oriental Daily*, 10 Nov 2005, p A31 (in Chinese). The argument is that the proposed amendments to Annexes I and II must stay within the scope of the Decision of the NPCSC on 26 April 2004, and it would be *ultra vires* for the HKSAR Government to include in the proposed amendments a timetable for the introduction of universal suffrage.

A similar legal point was made by Mr Qiao Xiaoyang, Vice Secretary General of the NPCSC on 2 December 2005 when he met in Shenzhen with representatives from various sectors of Hong Kong society. In his speech,<sup>24</sup> he broke new ground by acknowledging the existence of a large body of public opinion in Hong Kong that there should be a timetable for the introduction of universal suffrage, as well as a large body of public opinion in support of the Government's proposed reform for 2007 and 2008. However, he explained that the NPCSC Decision of 26 April 2004 only authorises the amendment of Annexes I and II to the Basic Law with regard to electoral arrangements in 2007 and 2008, and there is "no legal basis" for "tying together" the question of the amendment of Annexes I and II (which is what the 5th Report is about) and the question of the timetable. He pointed out that the question of the timetable can only be resolved by further discussion in Hong Kong society so as to achieve a consensus, including a consensus on the "mode of election by universal suffrage that is consistent with the Basic Law and appropriate for the circumstances of Hong Kong".

Although neither Beijing nor the Hong Kong Government was willing to accede to the democrats' demand for a timetable immediately, Mr Tsang did attempt to demonstrate his sincerity to work towards a plan for the eventual introduction of universal suffrage in Hong Kong by making some undertakings about the "timetable" of the work of the newly established Committee on Governance and Political Development of the Commission on Strategic Development.<sup>25</sup> Speaking to the press immediately after the first meeting of the Committee on 29 November 2005,<sup>26</sup> he indicated that the work of the Committee before the end of his current term of office as Chief Executive in June 2007 would be divided into two stages. The first stage would focus on the discussion of the concept and principles of universal suffrage in the Hong Kong context and would conclude by summer 2006. The second stage would focus on issues of institutional design for the election of the Chief Executive and LegCo by universal suffrage, and this stage would conclude by early 2007. He explained that after such institutional design has been completed, the main elements of the road map for the introduction of universal suffrage would become apparent, and the timetable issue can then be addressed.

In the event, neither the concession on the issue of appointed District Councillors nor the promise made about the timetable of the work of the

<sup>24</sup> The full text of the speech was published in *Wen Wei Pao*, 3 Dec 2005, p A24. For reports on the 2 Dec meeting between Mr Qiao and other Chinese officials with persons from the Hong Kong community, see various Hong Kong newspapers of 3 Dec 2005.

<sup>25</sup> On the establishment of the 153-member Commission, its 4 Committees and their membership, see various Hong Kong newspapers of 16 Nov 2005.

<sup>26</sup> See various Hong Kong newspapers of 30 Nov 2005.

Commission on Strategic Development was able to satisfy the democrats, who eventually vetoed the political reform package on 21 December 2005. But this would not be the end of the controversy regarding constitutional reform in Hong Kong, as the democrats were demanding other substantial reforms to the electoral system (that do not involve amendments to Annexes I and II to the Basic Law) as an alternative to the package they vetoed. The political community in Hong Kong has become more polarised than ever before, and the “honeymoon period” begun by Mr Tsang’s succeeding Mr Tung has definitely come to an end. In the honeymoon period, Mr Tsang enjoyed popular support in Hong Kong, and Beijing adopted a conciliatory stance towards the democrats. In his maiden Policy Address at LegCo on 12 October 2005, Mr Tsang outlined his ambitious plan for strong and effective governance of Hong Kong and expressed the hope to build social harmony in Hong Kong.<sup>27</sup> Two months after this Policy Address, the prospects for the plan and hope materialising have become dimmer. The Tsang administration, Beijing and the pro-China political forces in Hong Kong have tried their best to promote a political reform package which they believed would introduce more democratic elements into Hong Kong’s political system without trespassing on Beijing’s “baseline” on democratisation in Hong Kong. The democrats have now rejected it. Would some kind of compromise by the democrats in this regard have been more constructive to further democratisation in Hong Kong? Or would the uncompromising stance they actually took be more effective? Would the building of trust between the democrats and Beijing not be essential for Beijing allowing further democratisation in Hong Kong in future? If so, would acts of cooperation and compromise be necessary for the purpose of building such trust? Is not politics ultimately the art of the possible? Is not Max Weber’s distinction between the “ethics of intention” and the “ethics of responsibility”<sup>28</sup> instructive for pro-democracy politicians in Hong Kong? These are questions for us to ponder.

Albert H.Y. Chen\*

<sup>27</sup> See various Hong Kong newspapers of 13 Oct 2005.

<sup>28</sup> See Max Weber, *From Max Weber: Essays in Sociology*, translated and edited by H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958), chap 4 (Politics as a Vocation). The ethics of intention (alternatively translated as “the ethics of conviction”) judge a person according to the moral righteousness or purity of the intention, motive, convictions or ideal upon which he or she acts, while the ethics of responsibility judge a person according to the practical consequences of his or her actions on people, events, society and history. Weber suggests that the ethics of responsibility are particularly relevant for politicians.

\* Professor, Faculty of Law, University of Hong Kong.