Constitutional Developments in Autumn 2009

*Albert H.Y. Chen**

On 24 September 2009, the Court of First Instance of Hong Kong's High Court delivered its judgment in the case of Cheng Kar-shun and Leung Chi-kin v the Honourable Li Fung-ying and Others.[1] *On 18 November 2009, the Government of the Hong Kong Special Administrative Region (HKSAR) published its Consultation Document on Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012.*[2] *Both may be regarded as landmark events that can shape the future development of constitutional law and the political system of the HKSAR. This comment describes the two events and reflects on their significance.*

The Cheng v Li case

Cheng v Li involved, inter alia, a constitutional challenge to the power of a select committee of the Legislative Council (LegCo) of the HKSAR to summon witnesses to testify before it and to produce documents. The court also had to consider whether the inquiry which the select committee proposed to embark on was *ultra vires* the resolution of LegCo that established the committee. In the words of Justice Andrew Cheung who decided this case, the case thus "brings into focus directly the interface of the exercise of the judicial power of the HKSAR which is vested in the judiciary, and the performance of the powers and functions which the Legislative Council has been endowed with under the Basic Law as the legislature of the Region."[3]

The litigation arose from the LegCo inquiry into what may be called the "Leung Chin-man incident" which has been in the public domain in Hong Kong for several years. Mr Leung is a retired senior civil servant of the HKSAR Government. Before his retirement, he had held the positions of Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing. He was a key official involved in the negotiations with a company of the New World Group of Companies on the lease modification relating to a housing development project on Hunghom Peninsula, in relation to which there had been a dispute

* Chan Professor in Constitutional Law, Faculty of Law, University of Hong Kong. The author is grateful for the anonymous reviewer's comments which have led to improvements to the draft of this comment.

1 HCAL 79/2009; Cheung J, 24 Sept 2009; [2009] HKEC 1587.

2 The document is available in both hard copy and electronically. For the electronic version, *see* www.cmab-cd2012.gov.hk.

3 Para 7 of the judgment.

between the government and the developer. There had been public concerns regarding whether the premium charged by the government in 2004 for the modification was too low.[4] Leung retired from the Civil Service in January 2007. In August 2008, it was announced that Leung would take up employment with New World China Land Ltd as an executive director and deputy managing director.[5] Although at this time he was still within the period during which he, as a retired senior civil servant, needed to obtain approval from the government before he could undertake post-retirement work, the Secretary for Civil Service had given him such approval. The announcement about Leung's new job caused an uproar in the community. New World soon announced the cancellation of Leung's appointment. Despite this, LegCo members felt that it was necessary to investigate into the matter, including whether there existed loopholes in the existing system for processing former directorate civil servants' applications for approval to take up post-retirement work,[6] and whether New World's offer of a job to Leung might have been a kind of "deferred reward" for Leung's allegedly "generous" treatment of New World when he was in government.[7]

In December 2008, LegCo passed a resolution to establish a select committee ("the Select Committee") for this purpose. The terms of reference of the Select Committee were set out in the resolution.[8] In the resolution, LegCo also authorised the Select Committee, in pursuance of s 9(2) of the Legislative Council (Powers and Privileges) Ordinance ("the Ordinance"),[9] to exercise the power to order any person to attend before the committee and to give evidence or to produce documents.

The applicants in *Cheng v Li* were Mr Cheng Kar-shun, Chairman and Managing Director of New World China Land Ltd, and Mr Leung Chi-kin, Executive Director of the same company. After receiving summons from the Select Committee in July 2009,[10] they applied for judicial review of the Select Committee's Order requiring them to appear as witnesses. The respondents were the members of the Select Committee

[4] *See* eg para 13 of the judgment.
[5] *See* para 15 of the judgment.
[6] The Chief Executive of the HKSAR, appointed on 30 September 2008, an independent Committee on Review of Post-Service Outside Work for Directorate Civil Servants, to review the relevant policies and arrangements. The Committee has now completed its work and published its *Report on Review of Post-Service Outside Work for Directorate Civil Servants* (Hong Kong Government, July 2009).
[7] *See* eg paras 256–257 of the judgment.
[8] The text of the resolution has been reproduced in para 18 of the judgment.
[9] Cap 382, LHK.
[10] This was not the first time for which the applicants were summoned to appear as witnesses before the Select Committee, which had scheduled two rounds of hearings focusing on different sets of issues. The first round of hearings was conducted in Mar–May 2009, and in Apr 2009 the applicants testified before the Select Committee for the first time. In July 2009 they were summoned again to testify in the second round of hearings. *See* paras 21–26 of the judgment.

and the President of LegCo. The Secretary for Justice participated in the litigation as an interested party. Counsel for the Secretary for Justice supported the arguments of counsel for the respondents. The judge dismissed the application for judicial review. Two major issues were decided on by the judge: (1) whether s 9(2) of the Ordinance was unconstitutional; (2) whether the proposed investigation by the Select Committee regarding the applicants was *ultra vires* the LegCo resolution that established the Select Committee.

On the first issue, the applicants mainly relied on a literal reading of Article 73(10) of the Basic Law. Article 73 reads: "The Legislative Council of the [HKSAR] shall exercise the following powers and functions: ... (10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence." It was argued that the power which LegCo enjoys under Article 73(10) to summon witnesses may only be exercised by LegCo sitting as a full Council and may not be exercised by a committee of LegCo. It was thus argued that s 9(2) of the Ordinance is unconstitutional, as it provides that the power to summon witnesses may be exercised by a LegCo committee which is "specially authorised by a resolution of the Council to exercise such powers in respect of any matter or question specified in the resolution."

The judge rejected the applicants' argument in this regard. The part of the judgment dealing with this issue is lengthy (paragraphs 89–201) and contains many strands of reasoning. In this author's opinion, they may be summarised as follows. First, the court pointed out that the Basic Law as a constitutional instrument "does not condescend on particularity".[11] Its wording is "large and general".[12] "[T]he language of the Basic Law can be expected to be expressed in terms of general statements of principle, or in board brush terms."[13] The court thus adopted a "flexible"[14] interpretation of Article 73:[15] although Article 73(10) does not expressly refer to LegCo committees, it does not mean that only the LegCo (but not its committees) may exercise the powers concerned. The term "Legislative Council" in the article could be construed to mean "the Legislative Council functioning as a full body or the Council functioning through committees, as the individual context may require".[16]

[11] Para 161 of the judgment.
[12] *Ibid.*
[13] Para 162.
[14] Para 96.
[15] The cases relied on to support this approach to the interpretation of the Basic Law include *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211; and *M'Culloch v Maryland* 17 US 316 (1819).
[16] Para 143 of the judgment. *See* also para 96.

Secondly, reference was made to Article 48(11) of the Basic Law, which provides that the Chief Executive may "decide, in the light of security and vital public interests, whether government officials ... should testify or give evidence before the Legislative Council *or its Committees*".[17] Thus the Basic Law itself contemplates the possibility of persons giving evidence before a LegCo committee.

Thirdly, the court took into account the practice relating to and the proper interpretation of paragraphs (1) to (9) of Article 73 of the Basic Law in deciding how Article 73(10) should be interpreted. These paragraphs provide for various powers and functions of LegCo, such as law-making, examining and approving the government's budgets, approving taxation and public expenditure, raising questions on the government's work, debating issues concerning public interests, receiving and handling complaints from residents, etc. The judge pointed out that "as a matter of actual practice, many powers and functions of the Legislative Council were and are exercised not only by the Council as a full body, but also at committee level."[18] If the applicants' interpretation of Article 73(10) were to be adopted, then similarly all the powers and functions of LegCo as prescribed by the other paragraphs of Article 73 could only be exercised by LegCo in its plenary meeting and not by its committees. The judge felt that this could not be right.

Fourthly, the court pointed out that since Article 73(10) authorises LegCo to summon witnesses "as required when exercising the above-mentioned powers and functions" (ie the powers and functions set out in paragraphs (1) to (9) of Article 73), the power that it confers is "ancillary to and parasitic on"[19] the latter powers and functions. Now some of these powers and functions have in practice been exercised by – and in the Judge's view lawfully exercised by – committees, and in the course of their work such committees may find it necessary to summon witnesses. "To the extent that these powers and functions may be exercised by a select committee, it is legitimate to think that the power to summon witnesses may also be exercised by the committee in appropriate circumstances."[20]

Fifthly, the court pointed out that the practice of LegCo performing some of its work in committees has existed for a long time. The Legislative Council (Powers and Privileges) Ordinance has existed since 1985, and since 1994 the power under the Ordinance to compel the attendance of

[17] Emphasis supplied.
[18] Para 116. For example, the power and function of receiving and handling complaints under Art 73(8) "have for a long time been handled by Legislative Council members working in groups under a roster system (known as 'the Legislative Council Redress System')" (para 127).
[19] Para 146.
[20] Para 153.

witnesses has been exercised on a number of occasions by LegCo committees and panels (but never by LegCo sitting as a full Council).[21] These facts should be taken into account in interpreting Article 73 of the Basic Law, because "the Basic Law does not create a new legislature out of nowhere"[22] and does not "intend a complete break from the past".[23]

Sixthly, the court pointed out that the Basic Law is a "living instrument" and should "be treated as 'always speaking'" and "be given an 'updating construction' to the extent that its language can bear".[24] It "must be interpreted flexibly to meet the challenge of the time"[25] and "must be given a purposive interpretation".[26] The power of a LegCo committee to summon witnesses is needed by LegCo in order to do its "job".[27] As pointed out by the Clerk to LegCo, without it "the effective working of LegCo would be very seriously hampered".[28] The court was therefore reluctant "to impose a straitjacket on the Legislative Council as to how it may go about its business".[29]

Finally, the court also considered the arguments put forward by both sides on the basis of the drafting history of the Basic Law.[30] However, none of the arguments proved to be conclusive.

The court concluded that "on its proper interpretation, Article 73(10) provides for the exercise by the Legislative Council, whether sitting as a full body, or, functioning through a select committee in accordance with its Rules of Procedure, the power to summon" witnesses "in accordance with the provisions of the Ordinance".[31] Having decided on this point, the court considered it unnecessary to decide on the issue of "delegation" – if on its true construction Article 73(10) only empowers LegCo as a full body to summon witnesses and does not authorise any LegCo committee to do so, whether LegCo may nevertheless delegate this power to its committees.[32] However, the court did make some obiter comments on this point.[33]

We now turn to the second major issue raised by the case. Here the applicants argued that the proposed course of inquiry by the Select Committee was *ultra vires* its terms of reference as set out in the LegCo

[21] Paras 79–88.
[22] Para 111.
[23] *Ibid.* See also para 123.
[24] Para 188.
[25] Para 197.
[26] Para 198.
[27] Para 193.
[28] Para 191.
[29] Para 199.
[30] Paras 168–186.
[31] Para 200.
[32] Para 202.
[33] Paras 203–213.

resolution that established it.[34] Before dealing with the substance of this argument, the court had to consider the preliminary issue of whether the court had jurisdiction to inquire into the "internal working"[35] of LegCo. In deciding this issue, the court took into consideration "the general principle of separation of powers, that the legislature should have control over the conduct of its own affairs, and primarily, alleged irregularities in the conduct of parliamentary business are a matter for the legislature, rather than the courts, subject to any over-riding provisions in the written constitution."[36] Applying the relevant case law,[37] the court concluded that (1) "the Courts of the HKSAR do not, as a rule, interfere with the internal working of the legislature";[38] (2) the Courts do have the jurisdiction to intervene, a jurisdiction which they should exercise "with great restraint",[39] but also a jurisdiction which they will exercise in a "clear-cut case".[40]

On the particular facts of this case, the court decided not to intervene. There was no clear-cut case that what the Select Committee was going to inquire into was *ultra vires* the wording of the LegCo resolution. Moreover, the court pointed out that the Ordinance already provides a statutory scheme with built-in mechanisms to deal with witnesses' objections to answering particular questions.[41] The "wholesale attack"[42] or "global challenge"[43] launched by the applicants to the orders of the Select Committee requiring the applicants to appear as witnesses should not therefore be entertained. The court also commented that if there was ambiguity or doubt regarding the scope of inquiry authorised by the LegCo resolution, clarification could be sought from LegCo itself.[44] "Save in a clear-cut case of *ultra vires*, the courts are simply not intended to be embroiled in the dispute."[45]

[34] Section 9(2) of the Ordinance provides that the power to summon witnesses may be exercised by a LegCo committee "which is specially authorised by a resolution of the Council to exercise such powers *in respect of any matter or question specified in the resolution*" (emphasis supplied). As the judge pointed out, this means that the power of a committee to summon witnesses "is restricted to the subject matter of inquiry set out in the resolution of the Legislative Council" (para 4).

[35] Para 6.

[36] Para 232.

[37] *Rediffusion (Hong Kong) Limited v Attorney General* [1970] HKLR 231; *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387; *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* (2002–03) 5 ITELR 311, [2000] 5 LRC 196; *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, 2005 SCC 30.

[38] Para 220. *See* also para 227.

[39] Para 220.

[40] Paras 236, 251.

[41] Paras 228–231.

[42] Para 236.

[43] Section heading of s 5.3 of the judgment (paras 233–236).

[44] Paras 251, 253.

[45] Para 254.

At the time of writing,[46] the Court of First Instance's decision in this case is on its way to the Court of Appeal. In this author's opinion, it is unlikely that the appeal will succeed. On the first issue mentioned above, the appellants would only succeed if their literal interpretation of Article 73(10) of the Basic Law were to prevail. However, Hong Kong's Court of Final Appeal has already held that in constitutional interpretation, "the courts must avoid a literal, technical, narrow or rigid approach",[47] and a "purposive approach" should be applied.[48] In the present case, it is difficult to find fault with the approach to constitutional interpretation adopted by the Judge of the Court of First Instance. Interpreting Article 73 in the manner advocated by the appellants would hamper the effective operation of LegCo and upset many of its long-standing practices which have proved to be effective. Even if Article 73(10) by itself (in the absence of the Ordinance) is not clear enough to authorise a LegCo committee to summon witnesses, it is certainly legitimate to interpret Article 73(10) broadly (and taking into account LegCo's power to make law under Article 73(1) and to enact its own Rules of Procedure under Article 75) so as to avoid striking down as unconstitutional s 9(2) of the Ordinance. Furthermore, even if the appellate court were to disagree with the judge on the interpretation of Article 73(10), the constitutionality of s 9(2) can still be saved by the reasoning expressed in the judge's *obiter dicta* on the "delegation" point: The Basic Law can be construed to allow LegCo to delegate to its committees the power to summon witnesses where such power is "reasonably required"[49] at the committee level, particularly where, as in the present case, the committee to which the power has been delegated is a "natural extension of the legislature",[50] and the delegation only relates to the work of investigation with LegCo itself retaining the power to receive and consider the report (including recommendations) of the committee and to make decisions thereon.[51]

On the second issue, it is equally unlikely that the appeal will succeed. The judge's view that the court will only in exceptional circumstances interfere with the internal working of the legislature was based on case law on the court's disinclination to intervene in the legislative process.[52] It may be argued that this principle should not be applied to the present case, which does not concern the legislative

[46] November 2009.
[47] *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 at 340.
[48] *Ibid.*, at 339–340.
[49] Para 208.
[50] Para 211.
[51] Para 212.
[52] Eg *Rediffusion*; *Leung Kwok Hung*; and *Bahamas District of the Methodist Church*, all cited in note 37 above.

process but concerns a LegCo committee's power to summon witnesses. However, even if the judge has formulated the general principle too widely, his decision on the facts of the present case can still stand on firm ground. This is because the ordinance does allow witnesses to raise objections to particular questions[53] (so that they do not have good reasons to mount a "wholesale attack" on the summons), and in any event it is by no means clear that the Select Committee was embarking upon a course of inquiry that was *ultra vires*. And even if the appellants were to argue that the power under Article 73(10) of the Basic Law is not unlimited but limited to circumstances where the summons of witnesses is required for the purpose of exercising the powers and functions provided for in paragraphs (1) to (9) of Article 73,[54] it will be very difficult for them to persuade the court that the proposed investigation in the present case is totally unrelated to such powers and functions, given the broad terms in which they have been framed in Article 73.

Since the Basic Law came into operation in 1997, most of the Basic Law cases decided by the courts concern the rights guaranteed by the Basic Law and the judicial review of legislative and executive actions on the basis of such rights. The present case is one of the very few cases which concern that other domain of constitutional law which deals with the powers and operation of the legislature and judicial scrutiny of the internal working of the legislature. Here lies the significance of the present case. It may be usefully compared with another major case in this same domain of constitutional law – *Leung Kwok Hung v President of the Legislative Council*.[55] In that case, Leung, a LegCo member, applied for judicial review after the President of LegCo ruled that certain committee stage amendments proposed by LegCo members to the Interception of Communications and Surveillance Bill had a "charging effect" within the meaning of rule 57(6) of the Rules of Procedure of LegCo and could not therefore be introduced.[56] Leung argued that rule 57(6) was unconstitutional because Article 74 of the Basic Law only prohibits the introduction of private members' bills which relate to public expenditure but does not prohibit the introduction by members of amendments (to bills) which relate to public expenditure. Hartmann J (as he then was) in the Court of Instance dismissed the application for judicial review on the ground that the making of rule 57(6) is within the power of LegCo under Article 75 of the Basic Law to make its own Rules

[53] *See* s 13–15 of the ordinance.
[54] Art 73(10) empowers LegCo "to summon, *as required when exercising the above-mentioned powers and functions*, persons concerned to testify or give evidence" (emphasis supplied).
[55] [2007] 1 HKLRD 387.
[56] *See* paras 1–2, 14–23 of the judgment.

of Procedure, and Article 74 only regulates the introduction of bills and does not govern the subsequent enactment process.

The following similarities between *Cheng v Li* and *Leung v President of the Legislative Council* may be discerned. First, in both cases, the validity of the existing norms governing the operation of LegCo was upheld, and the constitutional challenges mounted on the basis of particular interpretations of Basic Law provisions failed. Secondly, in both cases the impugned norms (which the court upheld) reflected not only the practice of the LegCo of the HKSAR but also that of the pre-1997 colonial LegCo,[57] and the court respected the continued validity of these norms. Thus Hartmann J. referred to "the principle of continuity"[58] adopted by the Basic Law, and Cheung J. pointed out that "the Basic Law does not create a new legislature out of a vacuum".[59] Thirdly, in both cases, the lawyers acting for LegCo and those acting for the Secretary for Justice were united in the defence of the impugned norms governing the existing operation of LegCo, and the court basically agreed with their submissions. In the words of Cheung J., "In matters of this sort, if nothing else, the third arm of the government, namely, the judiciary, should give due respect, if not defer, to the joint views of the legislature and the executive."[60] Finally, in both cases the court took into account the principle of separation of powers, and the jurisprudence of the Privy Council in *Bahamas District of the Methodist Church*[61] on the court's self-restraint regarding interventions in the legislative process or the internal working of the legislature. Collectively the two cases may be regarded as having paved a jurisprudential foundation for judicial deference to the views of the legislature in matters of constitutional interpretation affecting the internal operation of LegCo and the effective performance of its constitutional functions, particularly where such views are shared by the executive branch of government of the HKSAR.

The Consultation Document on Political Reform

Since the demonstration on 1 July 2003 of half a million people against the bill to implement Article 23 of the Basic Law and the subsequent withdrawal of the bill,[62] a strong democracy movement to fight for

[57] In the *Leung* case, it was pointed out that the rule against the introduction of amendments having a charging effect had also existed in the Royal Instructions and the Standing Orders of the Legislative Council in the colonial era (*see* paras 85–86 of the judgment).
[58] Para 75 of his judgment.
[59] Para 123 of his judgment.
[60] Para 208 of his judgment in *Cheng v Li*.
[61] *See* n 37 above.
[62] *See* generally Fu Hualing et al (eds), *National Security and Fundamental Freedoms: Hong Kong's Art 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005).

"double universal suffrage" (in the election of the Chief Executive and of all LegCo members)[63] has emerged in the HKSAR. The Consultation Document ("the Document") on *Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012*[64] published by the HKSAR Government on 18 November 2009 began yet another episode in the struggle for political and electoral reform in Hong Kong. The Document should be understood in the context of the Decision of the National People's Congress Standing Committee (NPCSC) in December 2007 on political development in Hong Kong ("the 2007 Decision"),[65] and the HKSAR Government's earlier proposal for political and electoral reform which failed to secure the necessary two-thirds majority in LegCo in December 2005.[66]

The 2007 Decision[67] was made by the NPCSC in response to the report submitted to it by the Chief Executive of the HKSAR on political development in the territory.[68] It set the year 2017 as the target date for the introduction of universal suffrage in the election of the Chief Executive, and also indicated that the whole of LegCo may also be elected by universal suffrage thereafter. It permitted electoral reforms with regard to the election of the Chief Executive and LegCo in 2012, subject to the parameter that the proportions of LegCo members elected by universal suffrage in the geographical constituencies and those elected by the functional constituencies should remain unchanged. The Document published recently is designed to consult members of the public on the Government's proposal on such electoral reforms for the 2012 elections.

It might be useful to compare this proposal ("the 2009 Proposal") with that put forward in 2005 in the Fifth Report of the Constitutional Development Task Force ("the 2005 Proposal").[69] The 2005 Proposal was developed on the basis of the NPCSC Decision in April 2004 on Hong Kong's political development,[70] which, like the 2007 Decision,

[63] *See* generally Albert H.Y. Chen, "The Basic Law and the Development of the Political System in Hong Kong" (2007) 15 *Asia Pacific Law Review* 19.

[64] *See* n 2 above.

[65] *See* generally Albert H.Y. Chen, "A New Era in Hong Kong's Constitutional History" (2008) 38 HKLJ 1.

[66] *See* generally Albert H.Y. Chen, "The Fate of the Constitutional Reform Proposal of October 2005" (2005) 35 HKLJ 537.

[67] Gazette of the HKSAR Government, Special Supplement No 5 to Gazette Extraordinary No 48/2007 (31 Dec 2007), p E49. The text of the 2007 Decision has also been reproduced in the Document, Annex I.

[68] For the report and other relevant documents, *see* the website of the Constitutional and Mainland Affairs Bureau of the HKSAR Government, www.cmab.gov.hk ("topical issues" – "constitutional development").

[69] *Ibid.*, *see* also Chen (n 66 above).

[70] *See* generally Albert H.Y. Chen, "The Constitutional Controversy of Spring 2004" (2004) 34 HKLJ 215.

permitted electoral reforms (in 2007 and 2008, the dates of the next elections for the Chief Executive (CE) and LegCo respectively) subject to the conditions that the CE would not be elected by universal suffrage and the ratio of LegCo members elected by universal suffrage to those elected by functional constituencies would remain unchanged. Thus the space for political reform made available by the NPCSC to the draftsmen of the 2005 Proposal and those of the 2009 Proposal was basically the same.

The 2005 Proposal had been called the "District Councils Scheme" as it gave a prominent role to the District Councils in both the Election Committee for the CE and LegCo. According to the Proposal, the existing 800-member Election Committee for the CE would be expanded to become a committee of 1600 members, with all members of the District Councils (there being over 500 of them) joining it (ie its expanded "political sector"[71]), and with each of the three other existing sectors (ie business, the professions, and labour, etc)[72] which elected members of the Election Committee electing an additional 100 members. As for LegCo, it was proposed that 10 additional seats be added to the existing LegCo of 60 members, with five of the new seats being elected by universal suffrage in geographical constituencies and the other five elected by the District Councillors (who will be regarded as forming a functional constituency).

The 2009 Proposal is similar to the 2005 Proposal in at least three ways: (1) the proposed expansion of the size of the Election Committee for the CE; (2) the proposed increase of the total number of seats in LegCo from 60 to 70; and (3) the prominent role proposed for District Councillors in the election of LegCo and in the Election Committee. There are however two main differences between the two proposals. First, the expanded Election Committee under the 2009 Proposal will have 1200 members instead of 1600 members. Secondly, under this proposal the District Councillors who will participate in the election of the five additional seats in LegCo and of relevant additional seats in the Election Committee will only include elected members of District Councils and exclude the appointed members (who comprise approximately 20 per cent of the membership of the District Councils).

More precisely, the expanded Election Committee in the 2009 Proposal will be elected by the four sectors of society (ie business, the

[71] Annex I of the Basic Law provides for a 800-member Election Committee elected from or formed by four "sectors" of society. The fourth sector consists of LegCo members, representatives from District Councils, Hong Kong deputies to the NPC, and representatives of the Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference. This sector is commonly known as the "political sector".

[72] The third sector is defined in Annex I of the Basic Law as "labour, social services, religious and other sectors". For details, *see* the Chief Executive Election Ordinance, Cap 569, LHK.

professions, labour, etc, and the "political sector") each of which elects 200 members of the Election Committee under the existing system. Each of these sectors will elect 300 members under the 2009 Proposal. As regards the additional 100 seats allocated to the fourth sector (the "political sector"), the 2009 Proposal suggests that "most of them"[73] may be elected by the elected members of the District Councils. On the issue of the "nomination threshold" for candidates for Chief Executive, it is proposed that it will remain at one-eighth of the total number of members of the Election Committee (ie 150 among the 1200-member committee, as compared to the existing rule of 100 among the 800-member committee).[74]

In designing the revised model for the Election Committee, the draftsmen of the 2009 Proposal took into consideration the relevant views of the NPCSC as expressed in the 2007 Decision.[75] It was stated in the Decision that the nominating committee for candidates for election of the CE by universal suffrage in future "may be formed with reference to the current provisions regarding the Election Committee in Annex I to the Hong Kong Basic Law".[76] This can probably be construed as a reference to the Election Committee that was in existence at the time of the 2007 Decision. Thus if the reformed Election Committee in 2012 has a structure and composition similar to the previous Election Committee and does not represent a radical departure from it, the reformed Election Committee may be used as a model for the nominating committee for the election of the CE in 2017.

As regards whether the existing functional constituencies for the election of LegCo members and Election Committee members should be reformed,[77] the Document does discuss the proposal on the part of some members of the community that the "corporate votes" in some of the functional constituencies should be replaced with "director's / executive's / association's / individual votes",[78] which would have the effect of increasing the total number of individual voters in the functional constituencies.[79] The 2009 Proposal does not however include any such reform – or any other reform – of the existing functional constituencies. It is argued that the process for such reform "would be too

[73] Para 4.13 of the Document.
[74] Para 4.21 of the Document.
[75] Para 4.08 of the Document.
[76] *See* the 2nd last paragraph of the Decision, and Art 45 of the Basic Law.
[77] *See* generally Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006).
[78] Paras 2.16, 3.21, 4.16, and 5.11 of the Document.
[79] Annex V to the Document shows that according to the register in 2009, there were a total of 210,531 individual voters (persons) and 16,060 corporate voters in the functional constituencies for LegCo elections.

complicated" and would "involve the interests of many different sectors and individuals", so that "it would not be easy for the community to reach consensus on this matter".[80]

The lack of proposed reform to the functional constituencies is a disappointment for those who have hoped that the 2009 Proposal would mark a significant step forward towards the eventual abolition of the functional constituencies in the electoral system for LegCo. However, the Government's reluctance to propose significant reforms of the functional constituencies at this time is understandable. Given that the 2009 Proposal would need to secure the support of a two-thirds majority in LegCo in order to be adopted,[81] and given that half of the seats in the existing LegCo have been elected by functional constituencies,[82] electoral reforms relating to the functional constituencies do run the risk of encountering resistance from some incumbent LegCo members elected by functional constituencies. In any event, in regard to existing functional constituencies in the business sector which represent the interests of capital rather than the employees, substituting directors' votes for corporations' votes will not change their nature and will thus not be too significant in terms of democratisation. On the other hand, simply by not creating new "traditional"[83] or occupation-based (or trade-based) functional constituencies and using the "District Councils Scheme" instead, the 2009 Proposal has at least the merit of not creating new obstacles to future reforms of the functional constituency system: "traditional" occupation-based functional constituencies, once created, are likely to generate vested interests opposed to their abolition or radical re-structuring, which are however necessary or inevitable as LegCo moves in future towards a system of the election of all its members by universal suffrage.[84]

One of the reasons why the pan-democrats vetoed the 2005 Proposal was that they objected to the appointed members of the District Councils having the same voting and political rights as elected members.[85] Insofar as the 2009 Proposal excludes the appointed members

[80] Paras 4.17 and 5.12 of the Document.
[81] *See* the Basic Law, Annex I, Art 7 and Annex II, Art III.
[82] *See* the Basic Law, Annex II, Art I.
[83] Para 5.13(ii) of the Document.
[84] When Chief Secretary Henry Tang Ying-yen presented the Consultation Document to LegCo on 18 Nov 2009, he admitted in his speech that the existing system of LegCo elections by functional constituencies is not consistent with the requirements of universal and equal suffrage and thus needs to be reformed when the whole of LegCo is elected by universal suffrage in 2020. *See* the discussion in "Reform Proposals Leave Much Work Still to Do", editorial, South China Morning Post, 19 Nov 2009, p. A12; Li Xianzhi, "Not Making Progress Makes Two Groups Happy, Functional Elections are the Main Battlefield" (原地踏步「兩無」樂透，功能選舉才是主戰場), Ming Pao, 27 Nov 2009, p A4 (in Chinese).
[85] *See* Chen (n 66 above).

from voting rights in the additional LegCo seats and additional Election Committee seats, it should be recognised as a significant improvement of the 2005 Proposal from the perspective of democracy. The voting rights in LegCo election and in the election of the Election Committee on the part of elected District Council members who are themselves elected by universal suffrage in geographical constituencies all over Hong Kong enable the will of the people of Hong Kong to enter LegCo and the Election Committee via a system of "indirect election". As the next District Council election will take place before the next election of LegCo and of the Election Committee in 2012, Hong Kong voters can use their right to vote in District Council elections (in addition to their right to vote in LegCo elections) to ensure that the candidates of their preferred political party will be elected, and thus to maximise the influence of their preferred political party in LegCo and in the Election Committee. This, then, is the democratic core of the 2009 Proposal.

Some pan-democrats are not satisfied with the exclusion of appointed District Councillors' right to vote in the proposed system, and have demanded the abolition of all appointed seats in the District Councils.[86] With respect, it is not fair or reasonable to insist on this demand as a condition for supporting the 2009 Proposal. Unlike LegCo, District Councils are only consultative bodies,[87] and whether it is desirable to have appointed members in the District Councils should be considered in a separate exercise in which the role and contribution of appointed District Councillors are objectively and thoroughly reviewed.

Most pan-democrats have so far condemned the 2009 Proposal and refused to recognise that it may have any positive significance for democratisation in the HKSAR. They plan to use their power of veto (as they currently occupy more than one-third of LegCo seats)[88] to press the Hong Kong Government or Beijing to give certain undertakings

[86] In December 2005, in a last-minute attempt to lobby for support for passage of the 2005 Proposal through LegCo, the Government offered to reduce the number of appointed District Councillors by one-third in 2008, and thereafter either to abolish appointed District Council seats completely in 2012 or to further reduce their number in 2012 and then to abolish them completely in 2016: *see* Chen (n 66 above) at 541. As the 2009 Proposal does not involve any reduction or phasing out of appointed District Councillors, it has been criticised for "back-tracking" on this issue.

[87] *See* the Basic Law, Art 97.

[88] And some also plan to use the strategy of "mass resignation" from LegCo, using the resulting by-election as a "de facto referendum" on Hong Kong's democratisation. At the time of writing, the pan-democrats are divided on this issue, with the Civic Party and the League of Social Democrats in favour of the mass resignation strategy (of one pan-democrat legislator resigning in each of the five geographical constituencies for LegCo election in Hong Kong) and the Democratic Party opposed to it. *See* eg "Mass Resignation would be an Act of Surrender, says Albert Ho", *South China Morning Post*, 23 Nov 2009; Ambrose Leung and Albert Wong, "Concessions Made on Move for 'Referendum' on Reform", *South China Morning Post*, 24 Nov 2009.

regarding the future election of the Chief Executive (CE) and of all LegCo members by universal suffrage, particularly as regards a low "nomination threshold" for candidates in the CE election, and the abolition of all functional constituencies in LegCo elections. These are questions of the "models" and "roadmap" for universal suffrage in Hong Kong.[89] However, as the Document has made it clear,[90] the HKSAR Government has not been authorised to deal with these issues at the present point in time. Furthermore, these issues have been discussed in the Hong Kong community and in the Strategic Development Commission for many years.[91] Many different views and proposals have been put forward by different persons and groups in Hong Kong. In the Chief Executive's report to the NPCSC in December 2007, it was pointed out that there was no consensus or mainstream opinion on these issues.[92] Nor has any progress been made on these issues since then. It is therefore unrealistic to demand or expect that these issues be settled once and for all before the 2009 Proposal is brought before LegCo for a vote in preparation for the 2012 elections.

Unlike the 2005 Proposal which was put forward after consultative activities on the basis of the Third and Fourth Reports of the Constitutional Development Task Force,[93] the 2009 Proposal is a tentative proposal contained in a Consultative Document. There is a three-month consultation period ending on 19 February 2010. In the Document, the Government has stated that it "adopts an open attitude with regard to the electoral methods for the CE and the LegCo in 2012",[94] and that the views of members of the public will be considered before the Government finalises its proposal.[95] On the other hand, the specific questions set out for consultation in the Document all focus on the basic ingredients of the 2009 Proposal as outlined above.[96] The public discourse generated by the Document so far suggests that the Hong Kong community is polarised among those in support of the 2009 Proposal and those – the pan-democrats – fundamentally opposed to it. The opponents of the Proposal are apparently not interested in discussing the details of the proposal which have been left open in the Document, such as what should be the voting method (eg proportional representation, block-voting, etc) for the proposed election of LegCo seats by elected District Councillors, the

[89] *See* generally the *Green Paper on Constitutional Development* (HKSAR Government, July 2007).
[90] Paras 1.28–1.29 of the Document.
[91] Paras 1.09–1.10, 1.16 of the Document.
[92] *See* Chen (n 65 above) at 4–5.
[93] *See* n 68 above; Chen (n 66 above) at 537; Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005).
[94] Para 1.24 of the Document.
[95] *Ibid.*
[96] *See* Ch 6 of the Document.

electoral mechanism (eg using district constituencies or the whole of Hong Kong as one single constituency) for the proposed election of five additional LegCo seats by universal suffrage, the precise number of Election Committee seats to be elected by elected District Councillors, or the precise mode of election of the 300 additional Election Committee seats allocated to the first three sectors of the Election Committee. Actually these are all important issues on which the 2009 Proposal can be "fine-tuned" in the direction of democracy.

If the pan-democrats veto the 2009 Proposal – which is at present a likely scenario – as they did in respect of the 2005 Proposal, Hong Kong would lose the last opportunity to practise the "art of the possible" before the final preparation for the introduction of universal suffrage for election of the Chief Executive in 2017. The mutual distrust and suspicion between Beijing and the pan-democrats – probably the most fatal obstacle to the successful democratisation of Hong Kong so far[97] – would loom larger than ever before. And for those people of Hong Kong who have hoped to see a more rational and reasonable way forward in the democratisation of the territory, there will be nothing but disappointment, frustration and regret at a lost opportunity. And history may be such that when a golden opportunity arises and is missed, it will never come again.

[97] *See* eg Chen (n 63 above) at 33–40.