



## A NEW ERA IN HONG KONG'S CONSTITUTIONAL HISTORY

The Hong Kong Special Administrative Region (HKSAR) reached another critical juncture in its constitutional history in December 2007. On 12 December 2007, the Government published its Report on Public Consultation on the Green Paper on Constitutional Development (“the Consultation Report”).<sup>1</sup> At the same time, Donald Tsang, the Chief Executive of the HKSAR, submitted his report to the National People’s Congress Standing Committee (NPCSC) on “the Public Consultation on Constitutional Development and on whether there is a need to amend the methods for selecting the Chief Executive of the [HKSAR] and for forming the Legislative Council of the [HKSAR] in 2012” (“the Report to the NPCSC”).<sup>2</sup> On 29 December 2007, the last day of its week-long meeting of 23 to 29 December, the NPCSC enacted its Decision on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage (“the NPCSC Decision”).<sup>3</sup> Tsang, the Chief Executive, described this as “a most important step for Hong Kong’s constitutional development”.<sup>4</sup>

Before commenting on the texts of the Report to the NPCSC and the NPCSC Decision, their legal origins and historical background should first be introduced. The Basic Law provides that the “ultimate aim” of the political evolution of the HKSAR is the election of both the Chief Executive (CE) and all the members of the Legislative Council (LegCo) by universal suffrage.<sup>5</sup> The concrete electoral arrangements for the CE and LegCo are not prescribed in the text of the Basic Law itself but in Annexes I and II to the Basic Law governing the election of the CE and LegCo respectively.<sup>6</sup> The Annexes provide specifically for the electoral arrangements applicable

<sup>1</sup> Hong Kong: Government Logistics Department, 2007. The electronic version is available on the website of the Constitutional and Mainland Affairs Bureau of the HKSAR Government: <http://www.cmab.gov.hk> (“topical issues” – “constitutional development”), last visited 17 Feb 2008. The *Green Paper on Constitutional Development* was published on 11 July 2007, and the consultation period for the Green Paper ended on 10 October 2007. For a commentary on the Green Paper and related issues, see Lim Chin Leng, “The Green Paper from a Constitutional Perspective” (2007) 37 *HKLJ* 741.

<sup>2</sup> Hong Kong: Government Logistics Department, 2007. The electronic version is available on the website mentioned in n 1 above.

<sup>3</sup> See the website mentioned in n 1 above; Gazette of the HKSAR Government, Special Supplement No 5 to Gazette Extraordinary No 48/2007 (31 Dec 2007), pp E48 (Chinese version), E49 (English version).

<sup>4</sup> “Donald Tsang’s statement on the NPC decision”, *South China Morning Post*, 30 Dec 2007, p 3.

<sup>5</sup> Basic Law, Arts 45 and 68.

<sup>6</sup> Annexes I and II prescribe the basic framework and principles, while further details are provided by local legislation in the HKSAR, eg the Chief Executive Election Ordinance and the Legislative Council Ordinance.

in 1997 to 2007. The procedures for introducing new electoral arrangements for the post-2007 period are provided for in Article 7 of Annex I and Article III of Annex II. According to these provisions (“the Relevant Provisions”), “if there is a need to amend” the electoral arrangements specified in Annexes I and II, “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 then approved by the NPCSC (in the case of electoral arrangements for the CE) or reported to the NPCSC for the record (in the case of electoral arrangements for LegCo).

In response to a new wave of the democracy movement in Hong Kong that arose in the aftermath of the 1 July 2003 protest against the national security bill for the implementation of Article 23 of the Basic Law,<sup>7</sup> the NPCSC intervened in April 2004 by issuing its second ever interpretation of the Basic Law.<sup>8</sup> The Interpretation of 6 April 2004 elaborates upon the Relevant Provisions by stipulating an additional procedure for initiating changes to the electoral arrangements for the CE and LegCo: the CE should first submit a report to the NPCSC on whether there is a need to change the relevant electoral arrangement, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the Basic Law.

As regards possible changes to the electoral arrangements for the CE in 2007 and LegCo in 2008, Tung Chee-hwa, the CE at the time, submitted his report to the NPCSC on 15 April 2004. The NPCSC convened almost immediately to consider the report, and on 26 April promulgated its Decision on the matter.<sup>9</sup> The Decision ruled out universal suffrage for the election of the CE and all legislators in 2007 and 2008 respectively, but permitted electoral reforms in 2007 and 2008 within certain specified parameters. In December 2005, the electoral reform proposals put to LegCo by Donald Tsang, CE at the time, were defeated in LegCo.<sup>10</sup> The “pan-democrats” (hereafter called “democrats”) in LegCo voted against the proposals which therefore failed to secure the required two-thirds majority.<sup>11</sup> The democrats objected to the proposals because they considered them not democratic enough, and also because the Government failed to accede to

<sup>7</sup> See generally Fu Hualing et al (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005).

<sup>8</sup> See generally Albert H.Y. Chen, “The Constitutional Controversy of Spring 2004” (2004) 34 HKLJ 215; Carine Lai and Christine Loh, *From Nowhere to Nowhere: A Review of Constitutional Development, Hong Kong 1997-2007* (Hong Kong: Civic Exchange, 2007).

<sup>9</sup> *Ibid.* For the bilingual texts of the Interpretation and the Decision, see *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Related Documents* (Hong Kong: Joint Publishing, 2007).

<sup>10</sup> See generally Albert H.Y. Chen, “The Fate of the Constitutional Reform Proposal of October 2005” (2005) 35 HKLJ 537.

<sup>11</sup> The requirement for the two-thirds majority is stipulated in the Basic Law, Annex I, Art 7 and Annex II, Art III.

their demands for a timetable for when universal suffrage for the election of the CE and all legislators would finally materialise.

In response to the democrats' demand for a timetable for the introduction of universal suffrage, Tsang's approach at the time was to argue that before the precise "modes" or "models" of election by universal suffrage and the "roadmap" for the introduction of universal suffrage were worked out, it was not feasible to produce a timetable for the introduction of universal suffrage. He then arranged for these matters to be discussed in the Committee on Governance and Political Development of the Commission on Strategic Development. It was on the basis of the deliberations in this Committee – which took place between late 2005 and mid-2007 – that the Green Paper on Constitutional Development<sup>12</sup> was published on 11 July 2007, initiating a three-month consultation on the subject. The Green Paper presented various options as regards (a) the modes or models of electoral arrangements for election of the CE and all legislators by universal suffrage, (b) the roadmap for the introduction of universal suffrage, and (c) the timetable for the introduction of universal suffrage.

As expected, divergent views corresponding to different points of Hong Kong's political spectrum were voiced during the consultation period. The democrats reiterated their demands for direct election of the CE and all legislators in 2012, including a low "nomination threshold" in the operation of the "nominating committee"<sup>13</sup> for candidates for the CE, and the abolition of all functional constituencies for LegCo election in 2012. The conservatives preferred a higher nomination threshold or a more rigorous screening process for candidates in any election of the CE by universal suffrage, and the retention of functional constituencies either temporarily or permanently. The Democratic Alliance for the Betterment and Progress of Hong Kong, the largest pro-China political party in Hong Kong, was in favour of election of the CE by universal suffrage in 2017 rather than 2012.

The consultation period ended on 10 October 2007, and on 12 December 2007 the Government published the Consultation Report. The outcome of the consultation was summarised in a 13-point statement,<sup>14</sup> followed by a statement on "conclusion and recommendations".<sup>15</sup> These statements were also included in the CE's Report to the NPCSC submitted on the same day as the publication of the Consultation Report.<sup>16</sup> The most significant points in the statements may be highlighted as follows:

<sup>12</sup> Hong Kong: Government Logistics Department, 2007.

<sup>13</sup> Article 45 of the Basic Law provides for nomination by a "nominating committee" of candidates in an election of the CE by universal suffrage.

<sup>14</sup> Consultation Report, para 6.01.

<sup>15</sup> *Ibid.*, paras 6.02–6.06.

<sup>16</sup> Report to the NPCSC, paras 13–18.

- (a) “[T]he community generally hopes that the universal suffrage timetable can be determined early, so as to set the course for Hong Kong’s constitutional development.”<sup>17</sup>
- (b) “[C]onsensus has begun to emerge on taking forward universal suffrage towards the direction of implementing universal suffrage for the CE first, to be followed by that for LegCo.”<sup>18</sup>
- (c) “Opinion polls have indicated that more than half of the respondents support implementation of universal suffrage for the CE and LegCo in 2012.”<sup>19</sup>
- (d) “Currently, in LegCo, less than half of the Members support the implementation of universal suffrage for the CE and LegCo in 2012.”<sup>20</sup>
- (e) “Implementing universal suffrage for the CE first in 2012 is the expectation of more than half of the public, as reflected in the opinion polls; this expectation should be taken seriously and given consideration. At the same time, implementing universal suffrage for the CE first by no later than 2017 will stand a better chance of being accepted by the majority in our community.”<sup>21</sup>
- (f) “As for the models, roadmap and timetable for implementing universal suffrage for LegCo, LegCo, various sectors of the community and the public hold diverse views, and no mainstream view can be formed at this stage.”<sup>22</sup>
- (g) There are “diverse views on the models for implementing universal suffrage for the CE”, “the models for forming LegCo by universal suffrage and how the functional constituencies should be dealt with”; “[h]owever, setting the timetable for implementing universal suffrage for the CE and LegCo can help promote the ultimate resolution of the issues involved.”<sup>23</sup>

What is most significant and innovative in the Consultation Report and the Report to the NPCSC is the emphasis on the desirability of a timetable for the election of the CE and LegCo by universal suffrage, even in the absence of any consensus, recommendation or decision on the issues of the precise electoral “models” (eg how high or low the nomination threshold

<sup>17</sup> *Ibid.*, para 15.

<sup>18</sup> *Ibid.*, para 16.

<sup>19</sup> *Ibid.*, para 13(10).

<sup>20</sup> *Ibid.*, para 13(8).

<sup>21</sup> *Ibid.*, para 15.

<sup>22</sup> *Ibid.*, para 13(6).

<sup>23</sup> *Ibid.*, para 16. As regards the models for election of the CE by universal suffrage, it is also pointed out that “there are relatively more views that the formation of the nominating committee ... may make reference to the existing Election Committee for electing the CE”: *ibid.*, para 13(2).

should be for candidates in the election of the CE by universal suffrage, or whether functional constituencies for LegCo are to be abolished entirely) and the “roadmap” for the implementation of universal suffrage (eg what the electoral models are for the CE and LegCo in the period of transition (if any) from the existing system to the system of elections of both the CE and LegCo by universal suffrage). This is no less than an about-turn performed by Donald Tsang, as he himself admitted in his speech on the NPCSC Decision on 29 December 2007:

“In handling the issue of constitutional development, I once thought that it would be easier to forge a consensus on a road map and the models for universal suffrage first, and then set a timetable for implementation. After working on this matter for two years, I have encountered enormous difficulties in reaching the desired consensus, and views within the community remain diverse. Holding fast to the idea of agreeing on a road map for universal suffrage before setting a timetable might effectively hold back the pace of constitutional development. Instead, we have to be pragmatic, flexible and accommodating; ... Consequently, I have stated in the report on constitutional development that I now believe setting a timetable as soon as possible first can help forge a consensus on the road map leading to universal suffrage.”

Another significant feature of the Report to the NPCSC is the absence of any discussion regarding whether or when the socio-political conditions in Hong Kong will be such that the time is ripe for the introduction of universal suffrage, or what such socio-political conditions are. This contrasts with Tung Chee-hwa's report to the NPCSC in April 2004 on electoral reform in Hong Kong<sup>24</sup> and the Second Report of the Constitutional Development Task Force annexed to it.<sup>25</sup> The Second Report discusses at length the “actual situation” in Hong Kong, including the challenges of governance, the shortage of political talent, the need for more mature and highly developed political parties, the insufficiency of public policy research, and the lack of “established support” in LegCo for the Chief Executive.<sup>26</sup> None of these

<sup>24</sup> *Report by the Chief Executive of the Hong Kong Special Administrative Region to the Standing Committee of the National People's Congress on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2008* (Hong Kong: Government Logistics Department, 2004).

<sup>25</sup> *The Second Report of the Constitutional Development Task Force: Issues of Principle in the Basic Law Relating to Constitutional Development* (Hong Kong: Government Logistics Department, 2004). See generally Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: Hong Kong Law Journal Limited, 2005).

<sup>26</sup> The Second Report, paras 3.16–3.27.

factors are discussed in the Consultation Report and Report to the NPCSC in December 2007, which focus on the subjective opinions of the people of Hong Kong and their aspirations for the speedy realisation of the ultimate goal of universal suffrage as stipulated in the Basic Law, rather than the objective socio-political conditions in Hong Kong at present and their likely evolution in the foreseeable future.

However, in terms of the specific request addressed to the NPCSC by the CE, the 2004 Report and the 2007 Report are alike: they both seek the NPCSC's permission to introduce amendments to Annexes I and II to the Basic Law (without specifying the content of the amendments). That the CE's report to the NPCSC on electoral reform should take this form is actually dictated by the text of the NPCSC interpretation of 6 April 2004, which requires the report to be on "whether there is a need to make an amendment" to the Annexes, whereupon the NPCSC shall "make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress". In response to Tung's report to the NPCSC in April 2004, the NPCSC Decision of 26 April 2004 gave the "green light" to amendments of Annexes I and II in 2007 and 2008 respectively, but at the same time set certain parameters for such amendments (such as no election of the CE and all legislators by universal suffrage, and no change in the proportions of legislators directly elected by universal suffrage and those elected by functional constituencies).<sup>27</sup> After Tsang's Report to the NPCSC was submitted in December 2007 and before the NPCSC rendered its decision on the matter, there was legal uncertainty as to whether technically the NPCSC could do no more than follow the 2004 precedent by giving the "green light" to electoral changes for the 2012 CE and LegCo elections while setting the parameters for such changes, and whether it was possible or practicable for the NPCSC to address the longer-term issue of the timetable for the introduction of universal suffrage if it decides that the SAR is not ready for the election of the CE and all legislators by universal suffrage in 2012.

We now turn to the text of the NPCSC Decision of 29 December 2007. A careful analysis of the text is necessary for the purpose of ascertaining exactly what legal norms are generated by it. The text consists of an introductory paragraph, a four-point decision, and two concluding paragraphs. The most significant provisions may be set out as follows:

- (a) In 2012, neither the CE nor all legislators may be elected by universal suffrage. In 2012, the ratio (50%:50%) of legislators elected

<sup>27</sup> For the legality of the setting of such parameters, see Chen (n 8 above) at 222–223.

by universal suffrage to those elected by functional constituencies will remain unchanged. Subject to these parameters, the electoral arrangements for the CE and LegCo in 2012 may be amended in accordance with the “principle of gradual and orderly progress” as provided for in the Basic Law.<sup>28</sup>

- (b) At its meeting the NPCSC was “of the view that” “the election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage”.<sup>29</sup>
- (c) “At an appropriate time prior to” the election of the CE or of all legislators by universal suffrage, the five-step procedure prescribed in the NPCSC Interpretation of 6 April 2004 ((1) the CE making a report to the NPCSC, (2) the NPCSC rendering a decision thereon) and Annexes I and II to the Basic Law ((3) a government bill for electoral reform being passed by a two-thirds majority in LegCo, (4) the CE consenting to the bill, and (5) the bill being reported to the NPCSC for approval or for the record) should be followed.
- (d) At its meeting the NPCSC was “of the view that” the nominating committee (referred to in the Basic Law) for candidates for election of the CE by universal suffrage “may be formed with reference to the current provisions regarding the Election Committee in Annex I to the Hong Kong Basic Law”.<sup>30</sup> The nominating committee shall in accordance with democratic procedures<sup>31</sup> “nominate a certain number of candidates for the office of the CE, who is to be elected through universal suffrage by all registered electors of the HKSAR, and to be appointed by the Central People’s Government.”<sup>32</sup>

<sup>28</sup> Point 1 of the 4-point decision.

<sup>29</sup> This passage is in the introductory paragraph and not in the 4-point decision.

<sup>30</sup> Quotation from the first of the 2 concluding paragraphs of the Decision.

<sup>31</sup> The reference to “democratic procedures” is not new but exists in Art 45 of the Basic Law (which provides for “the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures”). The meaning of this phrase is uncertain and has become controversial in recent years in the context of the debate on universal suffrage for the election of the CE in Hong Kong. For example, it has been suggested that the phrase means that all members of the nominating committee should vote for the purpose of selecting a number of candidates who may then participate in the election of the CE by universal suffrage. At present, under Annex I, Art 4 of the Basic Law and the Chief Executive Election Ordinance, nomination by not less than 100 members of the 800-member Election Committee is sufficient to enable a person to become a candidate in the election of the CE.

<sup>32</sup> Quotation from the first of the 2 concluding paragraphs of the Decision.

It may be observed that there is a close correspondence between Tsang's Report to the NPCSC and the NPCSC Decision. The latter not only gives permission, as requested by the Report, for the electoral arrangements in Annexes I and II to the Basic Law to be amended for the 2012 elections (subject to parameters similar to those set by the NPCSC Decision of April 2004), but also deals with the issue of the timetable for the full introduction of universal suffrage which was highlighted in the Report. From the legal perspective, what deserves closer analysis is the manner in which this timetable issue has been dealt with in the NPCSC Decision.

The first issue arises from the fact that the reference to 2017 as the date for election of the CE by universal suffrage is in the introductory paragraph of the Decision rather than in the four-point decision, and the language used is "the NPCSC is of the view that ..." rather than "decides that ...". On this point, Li Fei, Deputy Director of the Legislative Affairs Commission of the NPCSC, explained that the language "of the view that" is commonly used in the text of decisions or resolutions of the NPCSC, and the whole text of the Decision has legal force and is binding.<sup>33</sup> Qiao Xiaoyang, Deputy Secretary-General of the NPCSC, also pointed out that "there is no doubt about the authority and legal force" of the timetable for universal suffrage determined by the NPCSC.<sup>34</sup> On the question of why the word "may" rather than "shall" is used with regard to the election of the CE by universal suffrage in 2017, Li Fei said that the timetabling provision embodies a solemn decision by the highest organ of state power of the PRC, and provides the constitutional and legal basis for election of the CE by universal suffrage in 2017.<sup>35</sup>

However, Qiao pointed out at the same time<sup>36</sup> that the timetabling provision is no substitute for the five-step procedure as reaffirmed in points two and three of the four-point decision. Thus at some point in time before 2017, the CE would still need to submit a report to the NPCSC regarding amendment of the existing electoral arrangements for the CE for the purpose of the 2017 election, and the NPCSC will need to render a decision on the report.

In the light of the above and taking into account the respective roles of the NPCSC, the CE and LegCo in the process of electoral reforms in Hong Kong, the nature and effect of the timetabling provision in the NPCSC Decision may best be understood as follows. The NPCSC Decision may best

<sup>33</sup> "Qiao Xiaoyang and Li Fei explain the legal terms in the Decision", *Wen Wei Pao* (文匯報), 30 Dec 2007, p A4 (in Chinese).

<sup>34</sup> See the transcript of Qiao's speech in Hong Kong on 29 Dec 2007, *Wen Wei Pao*, 30 Dec 2007, p A19 (in Chinese).

<sup>35</sup> "Universal suffrage timetable will be implemented", *Wen Wei Po*, 30 Dec 2007, p A4 (in Chinese).

<sup>36</sup> See n 34 above.

be conceived of as an expression of good will on the part of the Beijing government regarding the wish of Hong Kong people that universal suffrage be introduced as soon as possible; it signals that Beijing will have no objection to the introduction of universal suffrage for the election of the CE in 2017. It may also be interpreted as a commitment on the part of Beijing to support and facilitate future efforts in the HKSAR for the purpose of realising the goal of election of the CE by universal suffrage in 2017. It is an advance indication that at some point in time before 2017, the CE is welcome to submit a report to the NPCSC regarding electoral reforms for the CE election in 2017, and that the NPCSC will in all likelihood give the “green light” to such reforms without setting any parameters (like those it set in its 2004 and 2007 decisions) ruling out universal suffrage for the election of the CE. However, whether such an election will eventually materialise cannot be unilaterally determined by the NPCSC or the Beijing side, but depends ultimately on the interaction between Beijing, the CE and LegCo in Hong Kong. If, for example, the CE at the time does not submit a report to the NPCSC regarding electoral reforms for 2017, then such reforms will not be initiated at all. Or if, after the NPCSC gives the “green light” to such reforms upon receiving the CE’s report, the bill for such reforms fails to secure a two-thirds majority in LegCo, then again the reforms will not materialise. This, then, can explain why the language of “may” rather than “shall” is used in the Decision with regard to universal suffrage for the CE election in 2017, and why the NPCSC cannot unilaterally “decide” that there “shall” be election of the CE by universal suffrage in 2017.

The next issue concerns the timetable for election of the entire LegCo by universal suffrage. On this issue, the introductory paragraph of the NPCSC Decision provides that such an election “may be implemented” “after” the introduction of universal suffrage for the election of the CE. No specific year is mentioned in the Decision itself with regard to the election of all legislators by universal suffrage. However, Donald Tsang in his speech on the NPCSC Decision on 30 December 2007 interpreted the Decision to mean that “[i]n other words, all Legislative Council members may also be elected by universal suffrage in 2020”. Qiao Xiaoyang in his speech in Hong Kong on the same day said that the “earliest possible date” for the election of the entire LegCo by universal suffrage is 2020,<sup>37</sup> although he did not make this point in his official speech at the NPCSC on 26 December 2007 introducing and explaining the bill for the Decision.<sup>38</sup> The better

<sup>37</sup> See n 34 above.

<sup>38</sup> For edited versions of the speech, see *Wen Wei Po*, 30 Dec 2007, p A18 (in Chinese); “Qiao Xiaoyang’s explanation of the NPC’s decision”, *South China Morning Post*, p 3. The full text of the speech has been published in the Gazette of the NPCSC (in Chinese).

view is that the government and the people of Hong Kong may set as their target the election of the entire LegCo by universal suffrage in 2020, and Beijing has no objection to such a target being set by the Hong Kong side. Thus as Tsang said in his speech: “We should all try to apply fresh thinking to secure implementation of universal suffrage for the CE first, in 2017, to be followed by that for the LegCo in 2020. We must treasure this hard-earned opportunity.”<sup>39</sup> As in the case of the election of the CE by universal suffrage, the five-step procedure also needs to be followed at a point in time before the election of LegCo by universal suffrage in 2020. It may also be implied from the NPCSC Decision that for the LegCo elections in 2012 and 2016, the electoral arrangements may be further democratised relative to the arrangements for the 2008 election in accordance with the principle of gradual and orderly progress as provided for in the Basic Law and in preparation for full universal suffrage in 2020.

Another question that has arisen is whether, in the event of the failure to amend the electoral arrangements for the CE in 2012 for the purpose of democratising them in preparation for the election of the CE by universal suffrage in 2017 in accordance with the principle of gradual and orderly progress (eg, a repetition of the scenario in December 2005 when the government bill for electoral reform failed to secure a two-thirds majority in LegCo), Beijing’s commitment to universal suffrage for the election of the CE in 2017 will still stand. Qiao was asked this question but did not answer it directly. He only expressed the hope that the electoral arrangements could move forward in 2012 and thus provide a stable transition towards the arrangements for 2017.<sup>40</sup> In this author’s opinion, there is nothing in the text of the Decision that suggests that electoral reforms in 2012 (which are permitted but not mandated by the Decision) constitute a condition precedent for Beijing’s consent to universal suffrage for the election of the CE in 2017. For example, the Decision provides that the existing system of the Election Committee for the election of the CE may be used as the basis or model for the formation of the nominating committee for nominating candidates in the election of the CE by universal suffrage. Thus if the constitution of the Election Committee does not change in the 2012 election,

<sup>39</sup> “Donald Tsang’s statement on the NPC decision”, *South China Morning Post*, 30 Dec 2007, p 3.

<sup>40</sup> “2017 suffrage goal hinges on progress by 2012”, *South China Morning Post*, 30 Dec 2007, p 2.

apparently that constitution may still be used as the basis or model for the nominating committee in 2017.<sup>41</sup>

Given that the democrats have in recent years been pressing for a timetable for the implementation of universal suffrage and they vetoed Tsang's political reform proposal in December 2005 partly on the ground that no such timetable had been provided, the NPCSC Decision may be regarded as a compromise and a concession on the Beijing side. In 2005, both the HKSAR and Beijing governments had resisted the demand for such a timetable. Conservatives probably did not want to introduce any timetable, believing that whether or not the socio-political conditions (or the "actual situation" referred to in Articles 45 and 68 of the Basic Law) in Hong Kong are ripe for universal suffrage depends on changing circumstances and cannot be predetermined years in advance.<sup>42</sup> Indeed, there is nothing in Tsang's Report to the NPCSC, the NPCSC Decision, Qiao's speech at the NPCSC explaining the bill for the Decision or Qiao's speech in Hong Kong on the day of the Decision that deals with the question of why or how socio-political conditions are expected to evolve in Hong Kong in such a way that by 2017, the time would be ripe for the election of the CE by universal suffrage. Instead, Qiao's speech at the NPCSC suggested that the main reason or motive behind the Decision was to alleviate controversies in Hong Kong relating to its political development, so that Hong Kong may focus its energy on economic development.<sup>43</sup> There is also nothing in the speech to suggest that the Beijing authorities believe that the introduction of universal suffrage will contribute to the improvement of the governance of Hong Kong.

It is however unlikely that the Decision will have the effect of reducing significantly controversies regarding Hong Kong's political development.

<sup>41</sup> On the other hand, if the constitution of the Election Committee is modified and further democratised for the purpose of the 2012 election, it is arguable that the modified constitution (instead of the constitution of the Election Committee for the 2008 election) should be the basis or model for forming the nominating committee for the 2017 election. This is because the NPCSC Decision itself allows the electoral arrangements for the election of the CE in 2012 to be modified and further democratised, and Mr Qiao himself suggested that the electoral arrangements in 2012 should provide a stable transition to the 2017 arrangements (see n 40 above).

<sup>42</sup> Speaking in Hong Kong on 26 April 2004 to explain the NPCSC Decision in 2004 ruling out universal suffrage for the election of the CE and all legislators in 2007 and 2008, Qiao actually discussed the socio-political conditions in Hong Kong and argued that the conditions were such that the implementation of universal suffrage in 2007 and 2008 would be inappropriate. For a summary of some main points in Qiao's speech, see Albert H.Y. Chen, "The Basic Law and the Development of the Political System in Hong Kong" (2007) 15 *Asia Pacific Law Review* 19.

<sup>43</sup> The need for the HKSAR to focus its energy on "economic development and improvement of the people's livelihood" was stressed by Hu Jintao, PRC President and General Secretary of the Chinese Communist Party in his speech in Hong Kong on 1 July 2007 commemorating the 10th anniversary of the establishment of the HKSAR: Hu Jintao, *Speech at the Meeting for the Celebration of the Tenth Anniversary of Hong Kong's Return to the Motherland and the Inauguration Ceremony of the Third-Term Government of the HKSAR* (Beijing: People's Press, 2007) (in Chinese).

The democrats condemned the Decision as yet another tactic to postpone the full democratisation that the HKSAR could legitimately expect in 2007–2008, as the Basic Law itself opens the possibilities of election of the CE by universal suffrage in 2007 and election of all legislators by universal suffrage in 2008. It was the NPCSC's intervention in April 2004 which ruled out these possibilities. Furthermore, the rule that no plan for electoral reform in Hong Kong may be proposed by the HKSAR Government for consideration by LegCo without the CE first submitting to the NPCSC a report on the need for electoral reform and the NPCSC giving the "green light" is not in the Basic Law itself, but was artificially created by the NPCSC in its Interpretation of 6 April 2004. It was in accordance with this Interpretation that the CE's Report to the NPCSC was made and the NPCSC Decision was rendered in December 2007. The democrats also have legitimate concerns about whether the universal suffrage promised with regard to the election of the CE in 2017 and with regard to the election of LegCo thereafter is genuine or "fake" universal suffrage,<sup>44</sup> as the issues of the nomination threshold and the "screening mechanism" for candidates for the CE in the context of the operation of the nominating committee for candidates for direct election have not been resolved, nor has the issue of whether universal suffrage for the election of all legislators necessarily means the abolition of functional constituencies.<sup>45</sup>

From the perspective of Beijing, the HKSAR Government and the pro-China political parties in Hong Kong, the main political consequence of the NPCSC Decision of 29 December 2007 is to shift the responsibility for political reform and progress towards universal suffrage in Hong Kong from Beijing to the Hong Kong polity itself. Now that Beijing has given the "green light" to electoral reform in 2012 and election of the CE by universal suffrage in 2017, whether Hong Kong would actually move forward in its political and electoral system depends on whether a sufficient consensus will emerge in Hong Kong itself – hopefully in a political process of bargaining and give-and-take – so as to enable the relevant government bills for amendment of Annexes I and II of the Basic Law to secure the support of a two-thirds majority in LegCo. Given the sorry precedent of December 2005 in which the democrats vetoed the reform proposal on the ground that it was not democratic enough,<sup>46</sup> one cannot be too optimistic about the

<sup>44</sup> See "Tsang's 2020 vision", *South China Morning Post*, 30 Dec 2007, p 1.

<sup>45</sup> Zhang Xiaoming, Deputy Director of the Hong Kong and Macau Affairs Office of the State Council, suggested in his speech in Hong Kong on 29 Dec 2007 that the existence of functional constituencies for the purpose of LegCo elections is not necessarily inconsistent with the concept of universal suffrage: see "2017 suffrage goal hinges on progress by 2012", *South China Morning Post*, 30 Dec 2007, p 2; "NPC: Functional constituencies consistent with principle of universal suffrage", *Ming Pao* (明報), 30 Dec 2007, p A2 (in Chinese).

<sup>46</sup> See n 10 above.

prospects for Hong Kong's democratisation. The future depends on whether it proves possible for the people of Hong Kong to "forge a consensus together in a rational, pragmatic and inclusive manner".<sup>47</sup> If we succeed, then we will be able to prove that "the people of Hong Kong have not only been able to enact an economic miracle that has been the envy of the world, and in the domain of economic development to write a Hong Kong story that has been highly acclaimed, but also have the wisdom and ability to do well in practising universal suffrage, and in the domain of political development write yet another highly acclaimed Hong Kong story."<sup>48</sup>

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<sup>47</sup> See Tsang's speech (n 39 above).

<sup>48</sup> See Qiao's speech (n 34 above).

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