

THE CONSTITUTIONAL CONTROVERSY  
OF SPRING 2004

The exercise by China's National People's Congress Standing Committee (NPCSC) of its power to interpret the Basic Law in June 1999 upon the request of the Hong Kong Special Administrative Region (HKSAR) Government was, until April 2004, the single most controversial event in the legal history of the HKSAR since its establishment in July 1997. On 6 April 2004, the NPCSC exercised this power for the second time,<sup>1</sup> bringing the constitutional debate on "one country, two systems" in Hong Kong to a new climax. The interpretation was followed by a decision of the NPCSC on 26 April 2004 on the issues arising from the interpretation. These interventions on the part of the NPCSC have far-reaching implications for Hong Kong's autonomy, the development of its political system and the constitutional relationship between the HKSAR and the Central Government in Beijing. It is the purpose of this comment to explain the background to these interventions and to undertake a preliminary exploration of the issues involved.

Since the demonstration on 1 July 2003 by an estimated half a million people against the proposed legislation to implement Article 23 of the Hong Kong Basic Law, the political climate of Hong Kong has changed dramatically. There was a rising tide of demands for further democratisation of Hong Kong's political system,<sup>2</sup> as reflected in the pro-democracy demonstrations on 9 July 2003, 13 July 2003 and on 1 January 2004 – each attended by tens of thousands of people – and in the landslide victory of pro-democracy candidates (as opposed to pro-China candidates) in the District Councils election on 23 November 2003. Pro-democracy forces called for the introduction of universal suffrage in the election of the Chief Executive in 2007 and in the election of all the members of the Legislative Council in 2008.<sup>3</sup> They also urged the HKSAR Government to initiate a comprehensive review of Hong Kong's political system (together with a full-scale public consultation exercise on the matter) as soon as possible so as to ensure that new electoral laws could be put in place in time for the elections in 2007 and 2008.<sup>4</sup>

<sup>1</sup> For the text of this Interpretation and the subsequent decision of 26 Apr 2004, see the Gazette of the HKSAR Government, Legal Supplement No 2, 8 Apr 2004, p B431 (LN 54 of 2004); Gazette Extraordinary, 28 Apr 2004, Special Supplement No 5, p E5.

<sup>2</sup> See generally Johannes Chan, "Some Thoughts on Constitutional Reform in Hong Kong" (2004) 34 HKLJ 1, which discusses relevant developments up to Feb 2004.

<sup>3</sup> The Basic Law only provides expressly for the modes of election of the Chief Executive and the Legislative Council before 2007, and contemplates the possibility of change in the modes of election after 2007. See Annexes I and II to the Basic Law.

<sup>4</sup> On the issues relating to such a review, see Albert H. Y. Chen (Chen Hongyi), "Consulting First on the Need for Reform", *Ming Pao*, 20 Jan 2004, Forum Page (in Chinese).

In early 2004, it was widely anticipated that Mr Tung Chee-hwa, Chief Executive of the HKSAR, would announce the arrangements for the review of the political system when he gave his annual policy address to the Legislative Council on 7 January 2004. Many people in Hong Kong were disappointed when Mr Tung actually delivered the policy address. Instead of announcing the arrangements for constitutional review and consultation or committing the Government to such a review, he announced the establishment of a Constitutional Development Task Force headed by Mr Donald Tsang, the Chief Secretary, to study the relevant issues relating to the Basic Law and to consult relevant departments of the Central Government. At a press conference following the policy address Mr Tsang explained the position in the following terms:

“[I]n accordance with the Basic Law, the Central Authorities have constitutional responsibility and authority in relation to the development of the political structure within the HKSAR. Earlier on, the Central Government expressed to the Chief Executive the wish that the HKSAR Government should thoroughly discuss the issues on principles and legislative process relating to the development within Hong Kong’s political structure as enshrined in the Basic Law with the relevant departments of the Central Government *before* determining the relevant working arrangements.”<sup>5</sup> (emphasis supplied)

At the same time, the Hong Kong and Macau Affairs Office of the State Council of China took the unprecedented step of issuing a press statement on the same day as the Chief Executive’s policy address. The statement pointed out that the development of Hong Kong’s political system relates to the implementation of the “one country, two systems” policy and the Basic Law, and touches upon the relationship between the Central Government and the HKSAR. It also revealed that the Central Government had requested the HKSAR Government to discuss the matter with the Central Government before deciding the relevant working arrangements.

On 14 January 2004, the Constitutional Affairs Bureau of the HKSAR Government published a document on principles relating to constitutional development and issues of legislative process on which the Government would consult members of the public in Hong Kong and relevant departments of the Central Government.<sup>6</sup> The issues of legislative process were rather technical in nature, while the principles relating to constitutional development were stated in broad and abstract terms. The document was therefore

<sup>5</sup> Press release of the HKSAR Government dated 7 Jan 2004 (at <http://www.info.gov.hk>).

<sup>6</sup> For the text of the document and other documents relevant to the constitutional debate on spring 2004, see <http://www.info.gov.hk/cab/cab-review>. For a discussion of some of these issues, see Chan (n 2 above).

perceived as dealing with preliminary issues relating to constitutional reform rather than as a consultative document on substantive models for the reform of the political or electoral system.

In the weeks that followed, the issue of constitutional reform dominated the mass media in Hong Kong, with public lectures in Hong Kong by mainland professors of constitutional law who had served as members of the Basic Law Drafting Committee,<sup>7</sup> a visit to Beijing by members of the Constitutional Development Task Force,<sup>8</sup> a media campaign initiated by the Central Government stressing that the original conception of “one country, two systems” as developed by Deng Xiaoping involved the idea that the HKSAR should be ruled by “patriots”,<sup>9</sup> and a high-profile seminar on the Hong Kong Basic Law at the Great Hall of the People in Beijing on 12 March 2004 when the current session of the NPC was drawing to a close.<sup>10</sup> Such active and visible involvement in Hong Kong affairs on the part of Beijing was unprecedented in the history of the HKSAR. Both pro-democracy and pro-China forces in Hong Kong were at a loss as regards how exactly to position themselves and as to where the Central Government was heading. Generally speaking, pro-democracy forces continued to insist that their demands for universal suffrage in 2007 and 2008 were perfectly consistent with the Basic Law, while pro-China forces supported the theory of patriots ruling Hong Kong. Some members of the pro-China camp also expressed reservations regarding the speedy introduction of universal suffrage for the Chief Executive and all Legislative Councillors.

Then came the crucial month of April 2004, in which the fate of Hong Kong’s political development was sealed. On 26 March 2004, it was announced that the next meeting of the NPCSC, which would begin on 2 April 2004, would consider, *inter alia*, issuing an interpretation of provisions of the Hong Kong Basic Law relating to political development. The Hong Kong community was taken by surprise,<sup>11</sup> and pro-democracy politicians were outraged.

<sup>7</sup> They included Professors Xiao Weiyun and Xu Chongde and Mr Shao Tianren. Other scholars who also visited and lectured in Hong Kong at the same time included Professor Xia Yong, Director of the Institute of Law at the Chinese Academy of Social Sciences, and Professor Wang Zhenmin, Associate Dean of the School of Law, Tsinghua University.

<sup>8</sup> The visit took place on 9–10 Feb 2004.

<sup>9</sup> See generally the collection of relevant articles in Chinese in Ming Pao Editorial Department (eds), *Aiguo Lunzheng (The Debate on Patriotism)* (Hong Kong: Ming Pao Press, 2004).

<sup>10</sup> For the speeches made at the seminar, see *Wen Wei Po*, 13 Mar 2004 (in Chinese) (*Wen Wei Po* is a Chinese newspaper published in Hong Kong. For the electronic version, see <http://www.wenweipo.com>.)

<sup>11</sup> The NPC Standing Committee’s interpretation of the Basic Law in June 1999 stemmed from a request for interpretation from the HKSAR Government itself, while the interpretation in the present case was proposed on the initiative of the Council of Chairpersons of the NPC Standing Committee. It should be noted that in *Lau Kong-yung* [1999] 3 HKLRD 778, the Hong Kong Court of Final Appeal has acknowledged that the Standing Committee’s power under Art 158 to interpret the Basic Law is a “free-standing” power that may be exercised at any time on its own initiative, although Art 158(3) specifies when it is mandatory for the Court of Final Appeal to refer a Basic Law provision to the Standing Committee for interpretation.

The Basic Law Committee, which must be convened to advise the NPCSC before the latter issues any interpretation of the Basic Law,<sup>12</sup> met on 27–28 March 2004. On 30 March 2004 the Constitutional Development Task Force met with representatives of the NPCSC in Shenzhen and presented its First Report, on *Issues of Legislative Process in the Basic Law Relating to Constitutional Development*. The NPCSC representatives also met the Hong Kong deputies to the NPC and the Hong Kong members of the Standing Committee of the National Committee of the Chinese People's Political Consultative Conference (CPPCC) to discuss the forthcoming interpretation. Finally, on 6 April 2004, the NPCSC issued its Interpretation on Article 7 of Annex I and Article 3 of Annex II to the Hong Kong Basic Law ("the Interpretation"). An unusual step was taken in that a press conference was held in Beijing immediately after the Interpretation was issued. On 8 April 2004, a delegation headed by Mr Qiao Xiaoyang, Deputy Secretary-General of the NPCSC, visited Hong Kong to explain the Interpretation.

The Interpretation does not rule out the possibility of universal suffrage for the election of the Chief Executive ("CE") and of all members of the Legislative Council in 2007 and 2008 respectively.<sup>13</sup> Rather, it introduces a procedure whereby changes to Hong Kong's political system may be initiated, and formulates the "rules of the game" for changing this political system. It requires the CE of the HKSAR to submit a report to the NPCSC on whether there is a need to change Hong Kong's existing political system, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the Basic Law.<sup>14</sup> Thus the power to initiate the process of changing the political system of the HKSAR lies with the NPCSC, which will make its decision only after hearing from the CE of the HKSAR. The Interpretation also provides that if the NPCSC gives the "green light" for electoral reforms in Hong Kong, it will be up to the HKSAR Government to introduce the bills on such reform to the Legislative Council, as well as any proposed amendment to such bills.

<sup>12</sup> Article 158 of the Basic Law provides that the NPCSC should consult the Basic Law Committee before making any interpretation of the Basic Law.

<sup>13</sup> On the contrary, the Interpretation suggests that in the provision on "[i]f there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007" in Annex I to the Basic Law, the reference to "the terms subsequent to the year 2007" includes a reference to the term commencing in the year 2007 itself. This means that it would be possible to amend the method for the election of the CE in 2007 (when the term of office of the incumbent CE expires) if it is considered that there is a need to do so. Prior to the interpretation, some people in Hong Kong had argued that the cited provision in Annex I implies that the electoral method for the CE may only change with regard to a CE elected *after* 2007 (and not *in* 2007): see Chen Yang, "Direct Election of the Chief Executive in 2007 is Against the Basic Law", *Wen Wei Po*, 17 Jan 2004, p C3 (in Chinese).

<sup>14</sup> The articles provide that while the "ultimate aim" for the HKSAR's political development is election of the CE and all Legislative Councillors by universal suffrage, the actual electoral arrangements "shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress."

Critics<sup>15</sup> of the Interpretation argue that it is in effect an amendment of the relevant Basic Law provisions and a change in the rules of the game introduced unilaterally by the Beijing side, because there is nothing in the Basic Law on the CE reporting to the NPCSC on political reform and the NPCSC deciding on the matter. The Basic Law only provides for the NPCSC's role in approving the package of electoral reforms for the selection of the CE after it has passed the Legislative Council with the required two-thirds majority and has received the assent of the CE. In the case of the electoral reform for the Legislative Council, the Basic Law only requires that it be reported to the NPCSC for the record after it has passed the Legislative Council and the CE.<sup>16</sup>

On the other hand, defenders of the Interpretation point out<sup>17</sup> that it is consistent with the customary practice of legislative interpretations in the Chinese legal system which is also applicable to Hong Kong under Article 158 of the Basic Law.<sup>18</sup> This practice allows for the introduction of new and supplementary legislative provisions (taking the form of an interpretation) to clarify an ambiguity in a law. It is argued that according to the Basic Law, the procedure provided for in the Basic Law for the amendment of the electoral methods for the CE and the Legislative Council may only be invoked "if there is a need to amend" the existing electoral method.<sup>19</sup> It is not clear from the Basic Law who has the authority to determine, on the basis of the "actual situation in the HKSAR" and "the principle of gradual and orderly progress" referred to in Articles 45 and 68 of the Basic Law, whether there is a need to change the existing electoral method. It is therefore open to the NPCSC to claim this authority for itself, particularly if the power to change the political

<sup>15</sup> See Ronny Tong (Tang Jiahua), "Against the Basic Law", *Ming Pao*, 7 Apr 2004, p A11 (Forum Page) (in Chinese).

<sup>16</sup> This does not necessarily mean that the NPCSC has no power to "veto" the electoral reform for the Legislative Council. Under Art 17 of the Basic Law, the NPCSC has the power to invalidate laws made by the HKSAR legislature on the grounds that they are "not in conformity with the provisions of this Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region". Even if the electoral reform introduced by the HKSAR involves the amendment of Annex II to the Basic Law and is not a "law" covered by Art 17, it is easily arguable that the NPCSC may still invalidate the amendment of Annex II submitted to it for the record on the grounds that it is inconsistent with the Basic Law (as interpreted by the NPCSC). The principle applicable to this situation is clearly analogous to that covered by Art 17.

<sup>17</sup> See Albert H. Y. Chen (Chen Hongyi), "Affirming that the SAR Government Has the Initiative", *Ming Pao*, 7 Apr 2004, p A11 (Forum Page) (in Chinese).

<sup>18</sup> The practice was partially codified in the Law of Legislation 2000, Arts 42–47. Six interpretations of the Criminal Code have been issued after the Law of Legislation was enacted. For the Chinese system of legislative interpretation, see generally Albert H. Y. Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 *HKLJ* 380.

<sup>19</sup> The relevant provision in Annex I to the Basic Law reads: "If there is a need to amend the method for selecting the CEs for the terms subsequent to the year 2007, such amendments must be made with the endorsement of ..." Annex II also provides: "if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of ...".

system of the HKSAR is not to be considered as a matter entirely within Hong Kong's autonomy. It is also argued that since Hong Kong does not enjoy "residuary powers" as in the case of states (provinces) of some federal countries, a power that has not been expressly conferred on the HKSAR by the Basic Law should vest in the Central Government.<sup>20</sup>

After the Interpretation was issued, some pro-democracy politicians demanded that the Hong Kong Government should conduct a full consultation exercise before submitting the required report to the NPCSC. However, the CE's view was that there was already consensus in the Hong Kong community that some change to the existing electoral system is desirable for 2007 and 2008, and that it was in Hong Kong's interest to submit the report quickly. On 15 April 2004, the *Report by the CE of the HKSAR to the NPCSC on whether there is a need to amend the methods for selecting the CE of the HKSAR in 2007 and for forming the Legislative Council of the HKSAR in 2008* was published and submitted to the NPCSC together with the Second Report of the Constitutional Development Task Force on *Issues of Principle in the Basic Law Relating to Constitutional Development*. The Reports suggested that there is a need to amend the relevant electoral methods in 2007 and 2008, and at the same time opined that "development towards the ultimate aim of universal suffrage must progress in a gradual and orderly manner step by step. The pace should not be too fast."<sup>21</sup> However, the Second Report of the Task Force included the following statement:

"Recent opinion polls have indicated that more than 50% of those polled are in favour of selecting the Chief Executive by universal suffrage in 2007, while around 60% of those polled support election of all members of the Legislative Council by universal suffrage in 2008. At the same time, considerable reservations exist in the community."

Although the pro-democracy forces agreed with the view in the CE's Report that there is a need to change the existing electoral system in 2007 and 2008, they protested against the other recommendations in the Report which were cautiously formulated and may be interpreted against the introduction of universal suffrage for the CE and all Legislative Councillors in 2007 and

<sup>20</sup> For the discussion on the issue of residuary powers in the course of the drafting of the Hong Kong Basic Law, see Albert H. Y. Chen, "The Relationship Between the Central Government and the SAR", in Peter Wesley-Smith and Albert Chen (eds), *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988), p 107 at pp 120–121; Wang Shuwen (ed), *An Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: CCP Central Party School Press, revised ed, 1997), pp 140–142 (in Chinese), the English translation of which is *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Beijing: Law Press, 2000), pp 237–239.

<sup>21</sup> The CE's Report, p 10, para (v); the Second Report of the Constitutional Development Task Force, p 39, para (v).

2008 respectively. In the meantime, the NPCSC took the unprecedented step of convening its plenary session for a second time in a single month,<sup>22</sup> with the agenda for the session devoted entirely to the examination of the CE's Report. Prior to the meeting, representatives of the NPCSC led by Mr Qiao Xiaoyang visited Shenzhen again on 21–22 April 2004 to meet with the Constitutional Development Task Force, Hong Kong deputies to the NPC, Hong Kong members of the Basic Law Committee, Hong Kong members of the CPPCC National Committee, and selected members of various sectors of Hong Kong society. The NPCSC met on 25–26 April 2004, and on 26 April 2004 promulgated its Decision on Issues relating to the Method for the Selection of the Chief Executive of the HKSAR in 2007 and the Method for the Formation of the Legislative Council in 2008 (“the Decision”). A delegation led by Mr Qiao Xiaoyang visited Hong Kong again on the afternoon of 26 April 2004 to explain the Decision.

The Decision states that conditions are not yet ripe for the introduction of universal suffrage for the CE and all Legislative Councillors in 2007 and 2008 respectively. It also points out that there is not yet consensus in Hong Kong on the matter, and that the effect of the proportion of directly elected members in the Legislative Council reaching 50 per cent (in September 2004)<sup>23</sup> on the “executive-led” political system<sup>24</sup> in Hong Kong has yet to be observed. The Decision goes on to provide that the CE shall not be elected by universal suffrage in 2007, and the proportion of directly elected members in the Legislative Council in 2008 will be kept at 50 per cent (the other 50 per cent being elected by functional constituencies). Subject to these

<sup>22</sup> For many years the NPCSC has followed a consistent practice of convening a plenary session (lasting for several days) every two months (usually an even number month): see Jiang Jinsong, *The National People's Congress of China* (Beijing: Foreign Languages Press, 2003), p 475.

<sup>23</sup> The Basic Law itself has provided for the progressive democratisation of the legislature of the HKSAR in that the number of Legislative Councillors elected by universal suffrage in district-based geographical constituencies increases from 20 (in the first legislature elected in 1998) to 24 (in the second legislature elected in 2000) and then to 30 (in the third legislature to be elected in Sept 2004), while the total number of seats in the Legislative Council remains steady at 60. In the second legislature, 30 seats were elected by functional constituencies consisting primarily of business and professional groups, and 6 seats by the electoral college of 800 persons (themselves elected by functional constituencies) that also elected the CE. In the third legislature, functional constituencies will continue to elect 30 seats, whereas the electoral college will no longer return any members to the Legislative Council.

<sup>24</sup> On the concept of “executive-led” government in the HKSAR, see the three-part article, Albert H. Y. Chen (Chen Hongyi), “The Origin of the Concept of Executive-led Government”, “The Design of the Basic Law Does Not Guarantee a Strong Government”, and “Hong Kong Should Move Towards Consensual Democracy”, in *Ming Pao*, 23 Apr 2004, p A40; 24 Apr 2004, p B16; and 26 Apr 2004, p A29 (Forum Pages) (in Chinese); and the two-part article, Joseph Chan (Chen Zuwei), “Executive-led Government Was Not the Original Intent of the Basic Law” and “Hong Kong's Political System is that of Separation of Powers”, in *Ming Pao*, 28 and 29 Jun 2004 (Forum Pages) (in Chinese). Professor Xiao Weiyun's response to Dr Chan's article is “Executive-led Government was an Important Original Intention of the Basic Law” and “Executive-led Government is in more than 20 Provisions of the Basic Law”, *Ming Pao*, 11 and 12 Aug 2004 (Forum Pages) (in Chinese).

limits, the electoral methods for the CE and the Legislative Council may change in 2007 and 2008 respectively in accordance with the principle of gradual and orderly progress.<sup>25</sup>

Critics of the Decision argue<sup>26</sup> that it is completely unreasonable since universal suffrage in 2007 and 2008 has been ruled out before full consultation on and review of the political system has taken place in Hong Kong, and the views of the people of Hong Kong have been disregarded. The Decision is considered to be a naked exercise of sovereign power and a gross violation of Hong Kong's autonomy. On the technical side, the Decision is also criticised as *ultra vires*, as the Interpretation of 6 April 2004 only refers to the NPCSC's determination of *whether* there is a need to change the electoral methods and not its determination of *how* the electoral methods may be changed. The pro-democracy forces' criticism of the Decision seems to enjoy considerable public support. On 1 July 2004, the anniversary of the march against Article 23 of the Basic Law, an estimated 200,000 people participated in a pro-democracy march in Hong Kong.<sup>27</sup>

Defenders of the Decision believe<sup>28</sup> that the views of the people of Hong Kong, which have been discussed in the CE's Report and the Second Report of the Constitutional Development Task Force, have already been considered by the NPCSC. However, as explained by Mr Qiao in his speech in Hong Kong on 26 April 2004,<sup>29</sup> there were other factors which the NPCSC also took into account, such as considerations of whether the people of Hong Kong are ready for universal suffrage and the effect of mass politics on political stability and on the economy. As to whether the NPCSC's Decision goes beyond what was contemplated in the Interpretation, it was pointed out that<sup>30</sup> since the Interpretation states that the NPCSC should make its determination on the basis of the actual situation in Hong Kong and the principle of gradual and orderly progress in political development, it is legitimate for the NPCSC to express its view in the Decision that the actual situation in Hong Kong is such that Hong Kong is not yet ready for universal suffrage in 2007

<sup>25</sup> In pursuance of the Decision, the Third Report of the Constitutional Development Task Force was published in May 2004. This report consults members of the public regarding what electoral changes should be introduced for 2007 and 2008.

<sup>26</sup> See Audrey Eu (Yu Ruowei), "Ruling Out Universal Suffrage is Unconstitutional and Unreasonable", *Ming Pao*, 27 Apr 2004, p B14; Ronny Tong (Tang Jiahua), "The Day When Sheer Political Power was Demonstrated", *Ming Pao*, 29 Apr 2004, p A32 (Forum Pages) (in Chinese).

<sup>27</sup> The organisers estimated that 530,000 people had participated in the demonstration, but the figures given by the police, the Hong Kong Human Rights Monitor, and independent scholars ranged between 120,000 and 260,000.

<sup>28</sup> See Albert H. Y. Chen (Chen Hongyi), "The Legal Basis of the NPC Standing Committee's Decision", *Ming Pao*, 28 Apr 2004, p A32 (Forum Page) (in Chinese).

<sup>29</sup> The full text of the speech has been made available at the Hong Kong government's website on constitutional reform, <http://www.info.gov.hk/cab/cab-review>.

<sup>30</sup> See Qiao's speech (n 29 above).



and 2008, and that such speedy introduction of universal suffrage is not consistent with the principle of gradual and orderly progress. In other words, it is possible for the NPCSC to agree *conditionally* rather than *unconditionally* that there may be a need to change the political system in 2007 and 2008, or to agree that there is need for change but only within certain parameters. The Decision may also be regarded as an advance indication of what changes to the electoral system the NPCSC would find to be inconsistent with the Basic Law when the changes are ultimately submitted to the NPCSC for approval (in the case of the election of the CE) or for the record (in the case of the election of the Legislative Council).<sup>31</sup> As to whether Hong Kong's autonomy has been violated, it is argued that the HKSAR's autonomy may only be exercised through the routine operation of the existing political system of the HKSAR as prescribed by the Basic Law, and the scope of Hong Kong's autonomy does not include the power to change unilaterally the political system of the HKSAR.

The interventions of the NPCSC in April 2004 were clearly designed to halt the strong popular movement for further democratisation in the HKSAR by 2007 and 2008. The timing of the interventions was significant. In theory the Central Government could have waited until a fuller public consultation on political reform had been conducted in Hong Kong by the HKSAR Government. However, given that the Hong Kong Government has been perceived as a weak or even "lame-duck" administration since the 1 July 2003 demonstration, and given that the public sentiment in favour of universal suffrage in 2007 and 2008 was strong, the Central Government probably weighed the costs and benefits of an early intervention against a later decision against the democrats' demands when public consultation shows a preponderance of opinion in favour of universal suffrage and expectations for its speedy introduction run high.

<sup>31</sup> See n 16 above. According to one provision in the Interpretation, reporting the matter for the record of the NPCSC is an integral part of the legal procedure for changing the electoral method for the legislature, and the change will only become effective when it has been recorded (or filed – the Chinese term is *bei'an* 備案) at the NPCSC in accordance with law. This seems to contemplate that it is possible for the NPCSC not to accept (for the record or for filing) the proposed amendment to relevant provisions in Annex II to the Basic Law, for example on the ground that it is inconsistent with the Basic Law. It should also be noted that there seems to be a difference, as far as the time of effectiveness of the provision "reported for the record" is concerned, between the present case (under Annex II to the Basic Law) and the case under Art 17 of the Basic Law. Article 17 expressly provides that "The reporting for record shall not affect the entry into force of such laws" (although if the law "reported for the record" is "returned" by the NPCSC to the HKSAR, it will thereupon be invalidated). In view of the Interpretation, this principle is apparently not applicable to the "reporting for the record" of amendments to Annex II to the Basic Law. It is arguable that the difference is justified because Annex II to the Basic Law stands at a higher level in the hierarchy of legal norms than ordinary laws enacted by the HKSAR legislature, and thus it is legitimate for the NPCSC to exercise a higher degree of scrutiny and control.

The main reason why the Central Government is not willing to accede to the democrats' demand is apparent from the earlier discussion of "patriots ruling Hong Kong". Since the 1990's, the pro-democracy political forces have consistently won the majority of the votes in direct elections by universal suffrage. They also gained significantly in the District Councils election in late 2003 following the Article 23 controversy. It can therefore be expected that if universal suffrage is introduced for the CE and all Legislative Council seats, the democrats (rather than the pro-China camp) will capture the majority of seats in the Legislative Council and probably also the office of the CE.<sup>32</sup>

However, the democrats have always been considered to be anti-China, or against the Central Government, by Beijing. They have been involved in organising the annual assembly in memory of the victims of the 4 June 1989 massacre – more recently they have opposed the implementation of Article 23 of the Basic Law. Some of them are considered to have close connections with foreign countries and have testified in the US Congress or lobbied foreign governments in order to promote democratisation in Hong Kong. They are also considered to be constant opponents of the Beijing-supported Tung administration and have sought to bring about its downfall.

Beijing's concept of autonomy for the HKSAR is not the same as that of the autonomy of states (provinces) in a federal country (for example the US, Canada, Australia, Germany), in which the people of the state (province) freely elect the governor and legislature of the state. It seems that the high degree of autonomy of the HKSAR under "one country, two systems" is predicated on the assumption that the CE of the HKSAR is someone whom the Central Government considers to be trustworthy and loyal to the Central Government. That is why Beijing repeatedly stresses that the political system of the HKSAR is an executive-led one,<sup>33</sup> and that Beijing's power to appoint the CE (after he or she is elected locally by the electoral college) is a substantive power and not merely a ceremonial procedure or formality. For it is the executive rather than the legislature which Beijing can trust, and therefore Beijing would like to ensure that the executive is the predominant branch of the government in Hong Kong.

I believe that the NPCSC's interventions should be seen in the light of the configuration of political forces in Hong Kong and the poor or antagonistic relationship between the pro-democracy camp and the Central

<sup>32</sup> Under Art 45 of the Basic Law, even if universal suffrage is introduced for the election of the CE, "a broadly representative nominating committee" will be responsible for making nominations of candidates "in accordance with democratic procedures". It is possible that the nominating committee will be so constituted that in practice only "pro-China" figures will receive sufficient support to be nominated as candidates. However, the "democrats" are likely to put up a strong resistance to constituting the nominating committee in this manner.

<sup>33</sup> See n 24 above.

Government.<sup>34</sup> The interventions are lawful from the point of view of Chinese law and of the Basic Law as interpreted by the NPCSC itself. The issues dealt with by the NPCSC are highly political ones. If Hong Kong were part of a federal state in which the federal supreme court or constitutional court decides on constitutional disputes between the federal government and the local government, the issue of the extent to which the central (federal) government has a say in matters of political reform of the local government would be decided by the federal supreme court or constitutional court. The NPCSC has in this case performed functions of constitutional adjudication which would have been performed by the federal supreme court or constitutional court in a federal jurisdiction. Precisely because the NPCSC is not a court that commands high respect and that is perceived to be the guardian of the Rule of Law, its interpretations or decisions suffered from a deficit of legitimacy in Hong Kong. This is an innate or inherent deficiency in the “one country, two systems” model that is enshrined in the Hong Kong Basic Law – but it is one that we have to live with, and we hope, overcome in the course of time.

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<sup>34</sup> In June 2004 the political atmosphere improved slightly with both sides engaged in the rhetoric that confrontation is not constructive and dialogue and cooperation should be sought. Whether any concrete gains in the relationship between the two sides can or will be made remains to be seen.

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