

**Subcommittee on Proposals on
the Method for Selecting the Chief Executive in 2017
Follow-up item to the meeting on 2 June 2015**

At the Subcommittee meeting on 2 June 2015, there was a request from a Member for clarifications on whether the method for selecting the Chief Executive (“CE”) in 2012 would continue to apply if the proposals to amend the method for selecting the CE put forth by the HKSAR Government failed to obtain the endorsement by a two-thirds majority of all Members of the Legislative Council (“LegCo”) and, if so, the legal basis for such a position. The HKSAR Government’s reply is as follows.

2. Paragraph 5.4 in Chapter Five “Next Steps” of the Consultation Report and Proposals on the Method for Selecting the Chief Executive by Universal Suffrage published by the HKSAR Government on 22 April 2015 points out that –

“According to the N[ational] P[eople’s] C[ongress] S[tanding] C[ommittee]’s Decision:

‘IV. If the specific method of universal suffrage for selecting the Chief Executive is not adopted in accordance with legal procedures, the method used for selecting the Chief Executive for the preceding term shall continue to apply.’

In other words, if the motion to amend Annex I to the Basic Law regarding the method for selecting the CE is not endorsed by the LegCo, the CE in 2017 would continue to be elected by the 1 200-member E[lection] C[ommittee]... The constitutional development of Hong Kong will inevitably come to a standstill.”

3. Article 45 of the Basic Law provides that the method for selecting the CE shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the CE is prescribed in Annex I.

4. In the 2004 Interpretation by the Standing Committee of the National People’s Congress (“NPCSC”) of Article 7 of Annex I and Article III of Annex II to the Basic Law (“Interpretation”), apart from stipulating the legal process required for amending Annex I and Annex II to the Basic Law

subsequent to the year 2007 (i.e., the “Five-step Process”), Article 4 of the Interpretation also stipulates that if no amendment is made to the method for selecting the CE in Annex I, the provisions relating to the method for selecting the CE in Annex I will remain applicable.

5. At the NPCSC session on 2 April 2004, Li Fei, the then Vice-Chairperson of the Legislative Affairs Commission of the NPCSC, made the following remarks in the Explanations on the Interpretation –

“4. On whether the existing provisions would continue to apply if no amendment is made

If no amendment is made to the method for selecting the Chief Executive subsequent to the year 2007... the method for selecting the Chief Executive then has to be further clarified. According to the legislative intent of ‘whether there is a need’ to amend, in the circumstances where no amendment is made, the provisions relating to the method for selecting the Chief Executive in Annex I should remain applicable to the method for selecting the Chief Executive... in this regard, Article 4 of the Draft Interpretation provides an interpretation on the above matters.”

6. In October 2005, the HKSAR Government put forth a package of proposals to amend the methods for selecting the CE in 2007 and for forming the LegCo in 2008. As the package of proposals could not obtain the endorsement by a two-thirds majority of all Members of the LegCo, the method for selecting the CE as in Annex I to the Basic Law without any amendment was adopted for the selection of the third term CE in 2007; and the method for forming the LegCo as in Annex II to the Basic Law without any amendment was adopted for the formation of the LegCo in 2008.

7. In December 2007, the then CE submitted to the NPCSC his report on whether there was a need to amend the methods for selecting the CE and for forming the LegCo in 2012. The NPCSC stipulated in Paragraph 4 of the relevant Decision that –

“If no amendment is made to the method for selecting the Chief Executive... in accordance with the legal procedures, the method for selecting the Chief Executive used for the preceding term shall continue to apply...”

8. At the NPCSC session on 26 December 2007, Qiao Xiaoyang, the then Deputy Secretary General of the NPCSC, pointed out in the Explanations on the relevant Draft Decision that –

“It is a general principle of law that the original legal provisions will continue to apply where new provisions have not been passed.”

9. On 28 August 2010, the NPCSC approved the Amendment to Annex I on the method for selecting the CE. The Amendment stipulated that the Election Committee (“EC”) selecting the fourth term CE in 2012 would be of 1 200 members (the number of members was 800 before the Amendment), and that not less than 150 EC members could jointly recommend a CE candidate (not less than 100 EC members before the Amendment). At the same time, the Amendment to amend the method for the formation of the LegCo and its voting procedures also passed through the “Five-step” constitutional process. The fifth term LegCo in 2012 was formed by 70 Members, with 35 seats returned by functional constituencies and 35 seats by geographical constituencies.

10. Paragraph 4 of the Decision of the NPCSC made on 31 August 2014 also stipulates that –

“If the specific method of universal suffrage for selecting the Chief Executive is not adopted in accordance with legal procedures, the method used for selecting the Chief Executive for the preceding term shall continue to apply.”

11. On 27 August 2014, Li Fei, the Deputy Secretary General of the NPCSC, again reaffirmed in the Explanations on the Draft Decision that –

“Pursuant to the *Interpretation* made by the NPC Standing Committee in 2004, if no amendment is made to the method, existing provisions relating to the method for selecting the Chief Executive, the method for forming the Legislative Council and the procedures for voting on bills and motions will remain applicable. In 2007, the NPC Standing Committee reaffirmed the above position in its *Decision on Issues Relating to the Methods for Selecting the Chief Executive and Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage*. In the premises, Article IV of the *Draft Decision* stipulates that ‘If the specific method of universal suffrage for selecting the Chief Executive is not adopted in accordance with legal procedures, the method used for selecting the Chief Executive for the preceding term shall continue to apply.’”

12. In view of the above analysis and precedents, it can be seen that if the current proposals for the selection of the CE by universal suffrage were

not endorsed by a two-thirds majority of all Members of the LegCo, legally speaking, the method for selecting the fourth term CE in 2012 will continue to apply to the CE election in 2017, i.e., the CE would continue to be nominated and elected by the 1200-member EC. The constitutional development of Hong Kong would come to a standstill.