

The phrase “in accordance with democratic procedures” in Article 45 of the Basic Law

- 1 This paper elaborates my views (which I briefly expressed at the meeting of the Committee on Governance and Political Development of the Commission on Strategic Development on 21 June 2007) on the meaning of the phrase “in accordance with democratic procedures” in Article 45 of the Basic Law (“BL 45”).
- 2 The nomination procedure specified in BL 45 may be compared with (a) the nomination procedure for the candidates for the Chief Executive (“CE”) to be elected by the Election Committee provided for in Annex I to the Basic Law, and (b) the nomination procedure for the candidates for the first CE of the HKSAR provided for in the Measures for the Selection of the First Chief Executive of the HKSAR adopted by the Preparatory Committee for the HKSAR on 5 October 1996 (“the Measures”).
- 3 As regards (a), paragraph 4 of Annex I provides that candidates may be nominated jointly by not less than 100 members of the Election Committee, and that each member may nominate only one candidate. Further details are provided for in the Chief Executive Election Ordinance.
- 4 As regards (b), the Measures provide for persons interested in becoming candidates submitting relevant information, the preparation of a list of such persons (called 参选人 in the Measures), consultation and then the nomination of candidates by signatures by members of the Election Committee – each member of the Election Committee may nominate one candidate, and if a person is supported by 50 or more signatures of nomination, he or she will become a candidate (候选人) in the election.
- 5 It may be noted that the phrase “in accordance with democratic procedures” which appears in BL 45 does not appear in either Annex I or the Measures. However, whereas Annex I and the Measures both provide in detail on how a candidate may be nominated, such detail is not provided by BL 45.
- 6 BL 45 refers to “nomination by a broadly representative nominating committee in accordance with democratic procedures”. This suggests that there is a need for at least two sets of rules. The first set of rules provide for the formation of “a broadly representative nominating committee” (by, for example, elections in different occupational sectors or functional constituencies as is the case in the existing Election Committee). The second set of rules provide for how the nominating committee operates in order to produce nominations of candidates for the election of the CE by universal suffrage. This second set of rules

should be consistent with the concept of “democratic procedures”.

- 7 *BL 45 thus requires that the nomination of the candidates for election as CE by universal suffrage be made by the nominating committee in accordance with rules (“the Nomination Rules”) that provide for a democratic procedure in the making of nominations.* However, BL 45 (unlike Annex I to the Basic Law and the Measures) does not itself prescribe the content of the Nomination Rules. It is possible to conceive of different types of Nomination Rules that are equally permissible under BL 45 from the *legal perspective*, and the choice between them is a matter for *political decision*. BL 45 provides however for a minimum standard that any set of Nomination Rules must satisfy, i.e. they should be consistent with the concept of “democratic procedures”.

- 8 The concept of “democratic procedures” includes the ideas that the procedures be fair, transparent and reasonable. Persons who are interested in becoming candidates (hereafter called “Interested Persons”

or, to use the wording in the Measures, 参选人) for the CE should have the opportunity of submitting relevant information to the nominating committee (note: see for example the procedure in this regard prescribed by the Measures mentioned above) and of being considered by members of the nominating committee. Member of the nominating committee should have an equal right to participate in deciding who should be the candidates (候选人) for the CE.

- 9 In my view, the following types of Nomination Rules (given here as examples and not as an exhaustive list or classification) would all be permissible under BL 45:

- a. The Nomination Rules provide that each member of the Nomination Committee may nominate only one Interested Person as a candidate, and any Interested Person who receives a prescribed number of nominations by members (e.g. 100 members out of a 800-member nominating committee) shall become a candidate. (This procedure is similar to that prescribed for in Annex I to the Basic Law and in the Measures.)
- b. The Nomination Rules provide that each member of the Nomination Committee may vote for (say) 3 Interested Persons as candidates (assuming that there are 3 or more Interested Persons), and the 3 Interested Persons who receive the highest number of votes shall become candidates.
- c. The Nomination Rules provide for voting by members of the Nomination Committee, and provide that an Interested Person shall only become a candidate if he/she receives a prescribed minimum number of votes. If in the first round of voting, no candidate receives the prescribed number of votes, then one or

more candidates who receive the lowest number of votes shall be “eliminated” from the list, and there will be a second round or even further rounds of voting for the purpose of producing candidates (or a candidate) who receives the prescribed number of votes.

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