

ELECTORAL REFORM IN HONG KONG: FROM SCHEDULE TO SUBSTANCE

By Lorenz Langer

The Basic Law—the Chinese legislation that serves as Hong Kong’s de facto constitution—promises, as an ultimate aim, the selection of the Legislative Council (Legco) and (upon nomination) of the Chief Executive through universal suffrage.¹ So far, it is the temporal aspect of this promise that has received most attention: first, selection of the executive and the legislature by universal suffrage was hoped for in 2007/2008 – a hope quashed by the National People’s Congress Standing Committee (NPCSC) in its interpretation of and decision on Annex I(7) and Annex II(3) of the Basic Law in spring 2004. In its 2007 decision, the NPCSC also ruled out universal suffrage for the 2012 elections of Legco and Chief Executive. The same decision, however, envisaged that in 2017, the election of the Chief Executive “may be implemented by the method of universal suffrage”, and that thereafter, the election of Legco “may be implemented by the method of electing all the members by universal suffrage” as well.²

After these authoritative statements by the NPCSC, it is safe to assume that the question when universal suffrage will be introduced at the earliest has now been settled. (By the same token, it has also become moot to discuss to what extent the various NPCSC decisions and interpretations comply with the procedural guidelines set out in the Basic Law). Some political activists may still demand “universal suffrage for 2012” at this year’s democracy march on July 1 but, particularly after the adoption of the Hong Kong Special Administrative Region’s constitutional reform proposals by Legco in June 2010, an acceleration of the schedule for universal suffrage is highly unlikely.

Much to the chagrin and ire of other pro-democracy forces, even the Democratic Party (DP) has now accepted that Legco- and CE-elections in 2012 will at best see small increments in universal participation. And even the exact scope of these increments is still uncertain; it bears reminding that the details of the 2010 compromise between the DP have yet to be hashed out, particularly with regard to the election of the five “super district councillors”.

With the schedule thus set, it would seem high time to consider the potential substance of universal suffrage in Hong Kong. The concept of universal suffrage has been treated as the holy grail of democratisation in the HKSAR – and just as with that chalice, there seem few concrete ideas on what it contains or what effects that content will have. What does universal suffrage mean in and for Hong Kong – and

does it mean something different here when compared to universal suffrage in other jurisdictions?

Legal Issues Become Political

To a constitutional lawyer, answering these questions is a matter of constitutional and hence legal interpretation of the pertinent provisions in the Basic Law. Yet lawyers are rarely merely disinterested observers. In addition, these matters are of such eminent importance to a commonwealth that they require political as well as legal consideration. Nevertheless, the process by which decisions over public participation are taken is prescribed by the Basic Law, which thus provide the framework within which politics should play. I would even argue that, up to 2004, Hong Kong was notable for putting particular emphasis on this legal nature of constitutional questions. The courts were in the forefront of constitutional development and, as Professor Yash P. Ghai has pointed out, there was a “tendency to convert political and social issues into legal issues” – in marked contrast to the mainland, where legal problems are converted into political issues.³

Now, by contrast, Hong Kong has begun to emulate the mainland in its purely political approach to constitutional issues. In this development, the 2004 NPCSC decision and interpretation marked a watershed in the move from interpretation as a judicial process to a determination of political preferences. Subsequently, the 2004 report by the HKSAR Government and the 2007 NPCSC decision confirmed that the provisions on constitutional development in the Basic Law provided guidelines at best. The introduction of political changes seems no longer prescribed by or based on provisions of the Basic Law.

The most blatant example of this change is the way in which the constitutional crisis was temporarily solved in 2010. Without addressing the substantial merits of the compromise (which might be considerable), the way it was achieved was, to say the least, peculiar. Early on, Beijing had indicated that the proposals of the HKSAR Government were the best offer available; it was argued (probably correctly) that the direct election of District Councillors to Legco was not compatible with the 2007 decision of the NPCSC. Yet these objections were jettisoned when political considerations suggested that it would be inopportune if reform were once more vetoed in Legco. The way in which this change of heart was communicated is also telling: through semi-official intermediaries, with the HKSAR Government largely sidelined.

These developments should caution us when addressing the issue of universal suffrage. We have to keep in mind that constitutional developments in Hong Kong are now largely detached from legal provisions, taking place almost entirely in the political realm. This complicates an already difficult task: even when leaving politi-

cal vagaries aside, universal suffrage is not a clear-cut, one-dimensional constitutional concept.

Few Rights for *Citoyennes*

Historically, the origins of modern notions of suffrage can be traced back to the French Revolution. The 1789 *Déclaration des droits de l'homme et du citoyen* proclaimed that all citizens were equal before the law and therefore equally entitled to participate in its formation. However, the holders of public functions should be selected “according to their capacity” and “based on their talents and virtues” – and of course political rights were granted to *citoyens* only, not to *citoyennes*. For many decades, suffrage would remain restricted to men and still be considered “universal”. Switzerland, to give but one example, vaunts its century-old democratic tradition, but only admitted women to vote on the federal level in 1970 (one laggard canton had women’s voting rights imposed by the Federal Court in 1990). Voting rights were also made contingent on, or tiered according to, property and wealth: in the 19th century, such restrictions applied in the United Kingdom and Prussia (where voters were divided into three classes according to their tax contribution). Religion was also a ground for electoral discrimination (during the 19th and early 20th century (and of course in the Third Reich), Jews were not eligible and could not vote). Race was an important factor as well – most notably in the United States: even after the Civil War, the so-called Jim Crow laws effectively prevented blacks from voting and standing for election.

“Universal suffrage” therefore meant different things in different contexts and places. Today, universal suffrage may be understood to rule out the kind of discrimination just referred to – exclusion based on gender, religion, race or on similar grounds. Still, the contours of the concept remain blurred. Does it include a right to equal suffrage as well? Equality, i.e. the equal weight of each vote, is neither guaranteed in a majority vote systems, nor in most elections to federal chambers (in the United States, a Californian vote weighs less than a Wyomingite one in elections for the presidency, the House and (most egregiously) the Senate). Nor is the purpose of suffrage uncontested. Under a purely procedural approach, universal suffrage simply prescribes how elections are held and specific office-holders selected. Such an approach merely requires that everyone can vote and does not specify, for instance, among how many candidates or parties voters should be able to choose.

Conversely, from a substantive perspective, universal suffrage is seen as a precondition for democratic governance; it is a means to substantive ends such as the realisation of civil liberties as well as the control of political power. This latter, substantive perspective arguably underlines and informs international provisions on elections such as Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The-

se provisions still allow for “reasonable restrictions” and generally grant a wide margin of appreciation. Yet they nevertheless set out a minimum scope for universal suffrage that includes the right to elect and stand for election as well as the right to “genuine elections” – that is elections that at the very least offer a choice between political alternatives that are substantially different, i.e. that offer different programmes and policies.

What Model Should Be Applied?

It is to such international standards that Hong Kong should turn when introducing universal suffrage – at least in the view of western governments. In the 2010 Annual Commission report on Hong Kong, Catherine Ashton, the European Union High Representative for Foreign Affairs, spoke of the “goal of genuine universal suffrage”.⁴ The US Government hoped for “a broad consensus on implementing elections by full universal suffrage”.⁵ And William Hague, the British Secretary of State, called for “a system of full universal suffrage in line with ... international standards.”⁶

But is such an insistence on international standards appropriate? The ICCPR applies to Hong Kong, but the reservation to Article 25 made by the United Kingdom is still in force. The Joint Declaration as the only international instrument addressing the constitutional development of Hong Kong does not promise universal suffrage, but only “elections”. Universal suffrage may be envisaged by the Basic Law but this is, at least in Chinese understanding, an exclusively Chinese law, the construction of which is not contingent on international provisions or precedents. In addition, the Central People’s Government (CPG) would argue that at any rate, a general agreement on what constitutes universal suffrage is absent on the international plane.

In June 2010, Qiao Xiaoyang, deputy secretary-general of the NPCSC, held that “within the international community, it [was] a fact that different countries [had] adopted different electoral systems to realise the universal and equal right of election in the light of their own situations”. When introducing universal suffrage, it was therefore not international treaties that mattered, and certainly not the views of other governments. Instead, the focus would be on “the legal status of the HKSAR”, accommodation with the executive-led political system of the HKSAR, the interests of different sectors of society and facilitating the development of the capitalist economy”.⁷

This represents a much more parochial approach to the definition of universal suffrage. Indeed, a textual analysis of the Basic Law points to a primarily procedural understanding of suffrage: it is a way to select certain office-holders, not a means to ensure a democratic system. The Basic Law mentions “democratic procedures” only in the context of the selection of the Chief Executive by the Election Commit-

tee (Article 45), which is to be constituted “in accordance with the principles of democracy and openness” – yet it is exactly the institution of the Election Committee and its selection of the CE that seems most remote from democracy as generally understood. In addition, the reference to “universal suffrage” in the context of both CE and Legco points to a variable and wide meaning of the term: the selection process for these two institutions are, and will remain, fundamentally different. As confirmed by Qiao, there will therefore be at least “two future universal suffrage methods”.

For China, a Concept to be Determined

The Chinese government does not perceive universal suffrage as a pre-existing concept merely to be implemented in Hong Kong, but as a concept yet to be determined. This raises the prospect of a non-democratic regime defining and establishing the parameters of a participatory system to be based on universal suffrage. In this process, there is a considerable risk that the content of universal suffrage may become subject to semantic re-definition. It would not be the first time that the usage of democracy-related terms in the PRC differed substantially from other jurisdictions. The very term “democracy” is a prime example: “democratic dictatorship” or “democratic centralism” may stand for many things, but hardly describes majoritarian decision-making processes. Similarly, “elections” in the PRC – to the NPC, the NPCSC or party bodies such as the Central Committee – are not competitive (at least not by the stage the actual voting takes place), but amount to little more than the ceremonial anointing of pre-selected candidates. In a similar vein, the “multi-party system” in the PRC with its participation of “democratic parties” is a far cry from the competition of parties in a genuinely democratic system.

These examples indicate that when the central government refers to universal suffrage, it does not consider itself bound by what most comparative or international lawyers today would call universal suffrage, but might envisage a definition of universal suffrage for Hong Kong with Chinese characteristics. How might this prospect play out with regard to the selection of the CE and the election of the Legco?

It has to be kept in mind that even in countries considered paragons of democracy, elections of the executive rarely take place through direct and universal voting. In representative systems such as the United Kingdom and Germany, voters can express their preference only through legislative elections. They will have a fair idea of how their vote might affect the make-up of the government, as the potential candidates for, say, the office of the Prime Minister have already been selected (albeit through party machinations rather than public participation). Arguably even less democratic is the selection process in Switzerland, where the executive posi-

tions are divided between the major parties based on unwritten quotas (truly a small-circle election!).

Still, these examples differ from the situation in Hong Kong in several ways: the members of Parliament selecting the executive have been elected directly by the entire electorate, contrary to the member of the CE Election Committee. The skewed power-balance between executive and legislature in Hong Kong further exacerbates the democratic deficit and, in the above-mentioned cases, candidates for the executive usually offer genuine alternatives to voters. If the run-up to the 2012 CE-election provides any indication, the system of “universal suffrage” that will eventually be implemented for the CE-elections – nomination of candidates through a committee, and then selection by the electorate at large – is likely to result in candidates that all stand for the same policies. With such a lack of alternatives, the criterion of “genuine elections” would hardly be fulfilled. Any procedural changes – further enlargement of the Election Committee, inclusion of additional sectors of society – would be of little importance if a practice evolves according to which candidates acceptable to Beijing are designated far in advance, coupled with a general understanding that any other candidates will stand no chance.

Different, but equally significant obstacles stand in the way of genuine universal suffrage for Legco elections in 2020. The major issue in this context are, of course, the functional constituencies (FCs), by which members of certain interest groups—and not the general public—elect legislators. So far, contradictory signals have been given as to their fate. The central government has refused to commit in any way to abolishing the FCs by 2020, as demanded by the Democratic Party during their mutual semi-covert negotiations in 2010. In his statement, Qiao referred to the need for “an objective assessment” of the future role of FCs, “as they [had] been in existence since the electoral system was introduced in Hong Kong”, and “very diverse views” over FCs persisted “within the community”.

The Hong Kong Government Dithers

In absence of a clear indication from the mainland, the HKSAR Government has also been dithering over the fate of the FCs. The fourth report of Constitutional Task Force indicated that universal suffrage did not necessarily mean elections only through geographic constituencies, but that there might be a role for FCs too.⁸ Conversely, Chief Executive Donald Tsang at one point conceded that functional constituency seats were “not totally compatible” with the principles of equal and universal suffrage and that, therefore, FCs could survive in their present form.⁹

In their emphasis on occupational and professional criteria, functional constituencies seem to hark back to the corporative system of medieval guilds. They reflect an understanding of the commonwealth as a body economic, not a body politic. They also pose several problems in the context of universal suffrage. A purely tex-

tual analysis of the Basic Law would suggest that FCs are indeed not “totally compatible”, or rather incompatible, with universal suffrage. For the third Legco term, the Basic Law provides for both functional and geographic constitutions. If there is to be an additional step beyond that set-up, an ultimate goal of universal suffrage, this dichotomy would therefore have to be overcome.

Why is the attachment to FCs so strong both in Beijing and (by extension) within the HKSAR Government? The major rub seems to be the threat that universal suffrage allegedly poses to the stability and prosperity of Hong Kong. So far, however, no one has explained in what exactly this threat consists. Sceptics of universal suffrage – both on the mainland and in Hong Kong – insist on the unique situation of Hong Kong as an international financial centre. It is not quite clear why universal suffrage should undermine that position. Other international financial centres display a wide range of political systems, ranging from paternalism in Singapore to direct democracy in Switzerland – and albeit in the latter case, voters could easily introduce far-reaching political changes and economic redistribution through ballot initiatives, an anti-capitalist revolution has yet occurred in the Alps. Nor is democratic participation by necessity anti-business or hostile to elites. On the contrary, the strong democratic penchant of the political system in the United States has by no means resulted in hostility towards, and even less in a waning influence of financial, political or other elites.

In the end, views on universal suffrage reflect views on the political maturity of Hong Kongers. Both Beijing and the HKSAR Government keep invoking the common sense and responsibility of Hong Kong citizens; they also claim that government policies are determined to a large extent by regular consultations of the public. If that trust is genuine, if the Hong Kong Government truly wants its policies to reflect popular preference (and is convinced that they do), why not let the people speak for themselves through equal and universal elections to the maximum extent possible under the Basic Law? Currently, it is easy to argue that Legco does not represent the community at large, and thus to justify taking to the street. A legislature elected equally by the whole citizenry would command more legitimacy and actually defuse the risk of social unrest.

I would argue that the only danger to the moderate make-up of the political landscape in Hong Kong, the one approach that would radicalise voters, is the continuous foot-dragging over universal suffrage. The Central Government recognised this in 2010, leading to a first compromise over constitutional reform. Hopefully, it will recognise it again in time for 2017 and 2020.

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¹ *Basic Law Arts. 45(2), 68(2).*

² *Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage, Gazette of the HKSAR Government, Special Supplement No 5 to Gazette Extraordinary No 48/2007 (31 Dec 2007), p. E49, Annex I. (Dec. 29, 2007).*

³ *YASH P. GHAI, Litigating the Basic Law: Jurisdiction, Interpretation and Procedure, in Hong Kong's Constitutional Debate: Conflict over Interpretation 8 (Johannes M.M. Chan et al. eds., 2000).*

⁴ *EUROPEAN COMMISSION, Report from the Commission to the Council and the European Parliament: Annual Report Hong Kong 2008, COM(2010)242 final, 2 (June 1, 2010).*

⁵ *United States Government Statement on Hong Kong Democracy (June 30, 2010).*

⁶ *SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, Six-Monthly Report on Hong Kong: 1 January – 30 June 2010, Cm 7939, 1 (2010).*

⁷ *AMBROSE LEUNG & ALBERT WONG, Beijing Offers Definition of HK Suffrage, SOUTH CHINA MORNING POST, June 9, 2010, .*

⁸ *HKSAR CONSTITUTIONAL DEVELOPMENT TASK FORCE, Fourth Report, Para. 5.04 (December, 2005).*

⁹ *Quoted in EUROPEAN COMMISSION, supra note 4, at 4.*