



THE GREEN PAPER FROM A CONSTITUTIONAL PERSPECTIVE

Due to a treaty reservation to Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR),¹ the Hong Kong Special Administrative Region (HKSAR) Government says that the right to universal suffrage is not a treaty right applicable to Hong Kong.² So we have to ask whether there is a legal right to universal suffrage, and if so where that right comes from. The 2007 Green Paper on Constitutional Development suggests some possible answers.³ This document has an important constitutional dimension in its bearing on democratic rights in Hong Kong, quite apart from its object of constitutional reform. Its tone, language and content are riddled with implicit constitutional assumptions and theories. This short commentary argues, against a reading of the Green Paper, that (1) universal, equal suffrage is a constitutional entitlement with a “minimal content”, (2) that the Green Paper acknowledges this, and that aside from its acknowledgement in the Green Paper, (3) that constitutional right regulates both the content of the Green Paper and its consultation process.

1. The “Not a Treaty Right” Argument

The Human Rights Committee (HRC) says that universal, equal suffrage is a legal right applying to Hong Kong, and that Hong Kong is in violation of this right.⁴ The Government claims the existence of a valid treaty reservation. The HRC has responded by repeating its earlier view, first expressed in relation to Britain’s report on behalf of pre-handover Hong Kong, that the treaty carve-out only works in so far as Hong Kong did not have, and was not required to have, an elected legislature at the time.⁵ Since Hong Kong now has an elected legislature, Article 25 of the ICCPR should be observed.⁶ The Government says this is just the HRC’s opinion.⁷ In any event, the whole debate is moot since Hong Kong is not after all in breach:⁸

¹ GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 Mar 1976.

² “Hong Kong SAR Government Welcomes Constructive Dialogue with the UN Human Rights Committee”, Hong Kong Economic & Trade Office News Release, United States, 3 April 2006 (statement of Carrie Lam).

³ Green Paper on Constitutional Development, July 2007.

⁴ UN Doc CCPR/C/HKG/CO/2, 21 April 2006, para 18, reiterating its view in UN Doc CCPR/C/79/Add.57, 9 Nov 1995, para 19.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See n 2 above.

⁸ *Ibid.*

“Hong Kong’s electoral system shall be determined in accordance with the Basic Law and the Decision of the NPCSC of April 2004. Our electoral system is appropriate to Hong Kong’s circumstances and gives rise to no incompatibility with any of the provisions of the Covenant [the ICCPR] as applied to the HKSAR.”

The upshot is that the HRC’s views do not matter much at the end of the day. An ungenerous way of putting it might be to say that if the reports get the right result then they hold value, but where they lead to unwelcome answers then they do not matter. This would be a strange view for the Government to hold to the extent that the HKSAR Government has consistently felt compelled to address the other views of the Committee as well as those of the Committee on Economic, Social and Cultural Rights.⁹ Of course, the Government’s position might simply be that the HRC has got it wrong. That is what the Government means when it says that Hong Kong is not, after all, in breach of its treaty obligations. What is missing here is why the Government thinks that its view should prevail as a matter of legal principle.

One answer could be that Hong Kong’s Basic Law trumps Hong Kong’s international obligations, at least as a matter of Hong Kong’s domestic law. That would not be an unusual view to take as a matter of constitutional principle when we look at other jurisdictions which accept such a dualist view of the relationship between the domestic and international legal order. Secondly, Hong Kong might simply adopt the view that the HRC cannot pronounce on the scope and validity of reservations to the ICCPR, or sever invalid reservations.¹⁰ This is a controversial area of international law, but the United States and the British Foreign and Commonwealth Office have taken the same view.¹¹

In sum, the statements quoted above mean that the Basic Law is what we really should be looking at, and that for these purposes Hong Kong’s participation in the ICCPR and ICESCR is legally irrelevant at least to

⁹ For the latest report to the Committee on Economic, Social and Cultural Rights, see Second Report of the HKSAR to the International Committee on Economic, Social, and Cultural Rights (submitted in June 2003 as part of People’s Republic of China’s Initial Report, available at <http://www.hab.gov.hk>).

¹⁰ Human Rights Committee General Comment No 24 on Issues Relating to Reservations Made to the ICCPR, UN Doc CCPR/C/21/Rev.1/Add.6 (1994); 34 ILM 839 (1995). I am not saying that an issue of severance is necessarily involved, that being a legal question.

¹¹ Observations of the United States of America and of the United Kingdom on General Comment No 24, GAOR, UN Doc A/50/40, Annex VI (1995); (1995) 16 *Human Rights Law Journal* 422,424. However, the International Law Commission has said that treaty monitoring bodies such as the HRC do have the power to comment and to make recommendations in this regard; Report of the ILC on the work of its 49th Session (1997), GAOR, 52nd Session, Supp No 10 (A/52/10), paras 5, 6 and 8.

the question of democratic rights. Facially, both responses would have the colour of law. The discourse at the international level which the HKSAR Government has said it welcomes over the question of universal, equal suffrage would at least be conducted on a legal plane. Elsewhere, this seems not to be the view taken by the HKSAR Government, which appears to claim some sort of Hong Kong “exceptionalism” by appealing to Hong Kong’s “uniqueness”,¹² but it might be suggested that this is really a reference to the uniqueness of the Basic Law, and the system of “one country, two systems”, not to the fact that there is a legal black hole on the question of democratic rights in Hong Kong.

The Government appears to contemplate, in varying degrees, both arguments above. The Green Paper makes this plainest where it says:¹³

“Upon ratification of the Covenant in 1976, a reservation was made reserving the right not to apply sub-paragraph (b) of Article 25. After the establishment of the HKSAR, in accordance with the CPG’s notification to the United Nations (“UN”) Secretary-General in June 1996 and Article 39 of the Basic Law, this reservation continues to apply to the HKSAR. Hence, the ultimate aim of universal suffrage for Hong Kong’s constitutional development originates from the Basic Law, and not the Covenant.”

Thus, the Government claimed that, contrary to the HRC’s views, Hong Kong has a valid reservation, and that this cuts out Article 25 of the ICCPR leaving the Basic Law as the only source of these democratic rights. The reasoning above is not entirely explicit, and it can be teased out further to a point. What the Government seems to be saying is that Article 25 of the ICCPR is incorporated via Article 39’s indirect reference to the Bill of Rights Ordinance 1991 (BRO);¹⁴ namely, through Article 21 of the Bill of Rights. Crucially, the reservation to the ICCPR is also incorporated into Hong Kong law *only* via section 13 of the BRO. How else could it make its way into Hong Kong law? After all, treaty laws are not automatically a part of Hong Kong law, and the Government has said (above) that the whole issue of democratic rights is governed by Hong Kong law; namely, the Basic Law. It is only in this (limited) sense that the Basic Law, or the Government’s reading of it and of the BRO, trumps whatever the HRC says about what Article 25 of the ICCPR means.

¹² Green Paper, n 3 above, para 6.03, for example.

¹³ *Ibid.*, para 2.20.

¹⁴ (Cap 383). For recent *dicta*, see (eg) *Leung Kwok Hung and Others v Hong Kong SAR* (8/7/2005, FACC 1 and 2/2005), paras 19 and 20 (Li CJ, Chan and Ribeiro PJJ, Mason NPJ). But cf Simon Young, “Restricting Basic Rights in Hong Kong”, (2004) 34 *HKLJ* 134.

All this still leaves the following question open: what does the Basic Law *itself* say about democratic rights? All we know is that the Chief Executive is reported to have said (and presumably he states the Government's position on this) that while the Hong Kong meaning of "universal suffrage" would meet international standards, Article 25 of the ICCPR would not apply in Hong Kong.¹⁵ Presumably, this *need not* mean that the "incorporation of the reservation" in section 13 of the BRO limits or qualifies "universal suffrage" within the meaning given to it by the Basic Law. As one commentator has pointed out, such a view would entail the extinguishment of the entire category of "parallel rights" (ie those found in both Chapter III of the Basic Law *and* in Part II of the BRO). Just amend the BRO and you will eat away the Basic Law.¹⁶

2. The Basic Law and the "Deferred Entitlement" Theory

So what does the Basic Law itself say about democratic rights? It is well-known that both Basic Law Articles 45 and 68 state that "universal suffrage" is "the ultimate aim", and that the right to vote, and to stand for elections may be found also in Article 26. One understanding of this was that, after 2007, it would be for the Hong Kong people to choose.

The constitutional issue of the day is based partly on the fact that the "ultimate aim" clause is to be read, subject to, other clauses which require the "actual situation" in the HKSAR to be taken into consideration. More specifically, they require that any change to the method of selection of both the Chief Executive and the members of the Legislative Council (LegCo) should be both "gradual and orderly".¹⁷ On this view "ultimate" means "one day, but not too soon". It is one interpretation and there does not appear to be a better legal and constitutional explanation of what we *actually* see happening today. Putting political explanations aside, the need for further public consultation is squared with a legal entitlement to universal suffrage, and with the idea that the Hong Kong people are to choose after 2007, if the legal entitlement is interpreted as a non-immediate, and certainly non-automatic, entitlement to universal, equal suffrage. It is a deferred entitlement. As the Green Paper puts it:¹⁸

"It is generally understood that "gradual and orderly progress" means

¹⁵ "UN Panel is Asked to Join in Debate on Democracy", *South China Morning Post*, 23 August 2007.

¹⁶ Young, n 14 above, 122.

¹⁷ See Basic Law, Arts 45 and 68.

¹⁸ Green Paper, n 3 above, para 2.16.

proceeding step by step in an orderly fashion to move forward. It involves a step by step transition, and different stages of evolution over time. With regard to arriving at the ultimate aim of selecting the CE and electing all members of LegCo by universal suffrage, the evolutionary process could not be taken forward too rapidly, and should proceed in a gradual and orderly manner and in the light of the actual situation in the SAR, in order to preserve its prosperity and stability.”

It goes against the usual understanding of a right *qua* human right. Professor Charles Fried once pointed out that what characterises a right is that it is to be enjoyed “here and now”.¹⁹ Seen in the present context, the phrase “ultimate aim” would suggest not the deferment, but the importance of the right instead. And that, likewise, the “gradual and orderly” as well as the “actual situation” clauses are not words of limitation but are instead subject to the “ultimate aim” clause. This is what makes universal, and we might add “equal”,²⁰ suffrage a right in Hong Kong.

Yet it is important to notice that the “deferred entitlement” theory does not mean that no legal, or indeed constitutional, right exists, or that even if it does, that right is somehow devoid of content.

3. Distinguishing “Compatibility” from “Zero Obligation”

It cannot mean that the Basic Law either (1) says nothing, that being the reason then that consultation is required on democratic or other grounds, or (2) that it only requires that the people of Hong Kong should be consulted, and only consulted (ie that they have no legal entitlement beyond that). While there has been ample controversy over the latest consultation exercise, there seems to have been no disagreement that there should be a consultation exercise. Part of the explanation here is that the consultation exercise acknowledges and implements a deferred constitutional entitlement to universal suffrage. Put simply, the whole consultation exercise means that what we have is a constitutional right.

Yet the idea of consultation, once accepted, can wear away or wither a legal entitlement to suffrage. Consultation can be a double-edged sword where, for example, it is taken mistakenly to suggest that consultation is

¹⁹ Charles Fried, *Right and Wrong* (Cambridge, MA: Harvard University Press, 1978), 113.

²⁰ See the Basic Law's equality provision, Art 25. It is virtually inconceivable that this provision is also, somehow, qualified by the reservation to ICCPR, Art 25, and Art 21 of the Bill of Rights Ordinance 1991 (Cap 383). The qualifying provision, namely BRO s 13, merely states that “Article 21 [of the Bill of Rights] does not require the establishment of an elected Executive or Legislative Council in Hong Kong”.

needed precisely *because* there is a *lacuna* in the Basic Law, or if it is taken to mean that the Hong Kong people are entitled only to consultation as opposed to choice. Neither of these meanings would be acceptable if consultation is not to stand accused of eroding the legal entitlement to suffrage.

Two clear issues stand out. First, once consultation is accepted as a legitimate device, such acceptance amounts to an understanding that it is being used to fulfil (and *only* to fulfil) the demands of the Basic Law. Secondly, the Basic Law demands universal suffrage, at some point after 2007.²¹ These issues, viewed clearly, throw light on what the Green Paper means in constitutional terms. It means that the process which the Green Paper stands for is regulated by the terms of the Basic Law; even if, accepting the Government's view, it is not governed by, or is at least not contrary to, international law.

4. A "Substantive" Constitutional Rule

So far as public attention is concerned, much of it seems to be focused on the range and bewildering variety of the options in the Green Paper.²² But we cannot neglect a more important question. Universal suffrage has become a slogan today. What it could, and perhaps should, mean is "universal, equal suffrage", or even "complete, universal, equal suffrage"; by which we mean that (1) the Chief Executive should be returned by direct popular election on the basis of one person, one vote, and that (2) all LegCo seats should be returned on the same basis.

Let us get back to what we know about the Government's views. First, that the international obligations which apply to Hong Kong do not wholly agree with what the Human Rights Committee has said; that in any case, Hong Kong is in compliance; and that the Basic Law, as interpreted by the Standing Committee of the National People's Congress (the NPCSC) in its decision of 26 April 2004,²³ governs the issue. Does this mean that there is no Basic Law obligation as such excepting the NPCSC's decision?²⁴ This would be the idea of a Basic Law right without content.

²¹ Basic Law, Annex I, Art 7; Annex II, Art III.

²² See (eg) Albert Wong, "Anson Chan Slams Green Paper in Open Letter", *South China Morning Post*, 4 August 2007; Anson Chan Fang On-sang, "An Open Letter to Donald Tsang", *South China Morning Post*, 4 August 2007.

²³ The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted 6 April 2004.

²⁴ See further, Johannes Chan and Lison Harris, "The Constitutional Journey: The Way Forward" in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong: HKLJ, 2005), 143.

The preferable view, the more accurate view, would be that the *text* of the Basic Law actually “says something”. If the Basic Law text does not say anything substantive, beyond what the NPCSC says, it would mean very little to say that the *terms* of the Basic Law govern the issue.

5. But a “Thin” Rule

Yet saying that the Basic Law has something to say – eg that it says at least that there is a deferred legal entitlement to democratic governance – need not amount to very much beyond that. The constitutional rule at play is elastic – suffrage could come in 2012, 2017 or indeed on some other later date.²⁵ What we do know, *even* according to this “thin view” of the Constitution, where “ultimate” means “eventual” as opposed to “foremost”, is that suffrage *must* come and that, beyond a certain leeway of constitutional judgment, the constitutional chord will snap. At that point, short of amendment to the Basic Law, we will have a constitutional violation.

The Green Paper raises all these questions. It does so not only because it seeks to consult the people of Hong Kong on a very wide range of possibilities, but because it reiterates some of the Government’s earlier views about the principles of reform. Once we accept that the Hong Kong people have a constitutional albeit deferred entitlement to democratic governance, then at most they can delay but not waive their entitlement. In this sense, it would be inaccurate to say that the Basic Law “promises” universal suffrage. You can waive a promise. But you cannot waive away a constitutional right. So when does too much delay or deferment start to wither away that constitutional right?

Is it where the Green Paper includes proposals that suffrage should arrive only in 2020? How about 2024?²⁶ What if the “Basic Law Institute’s” proposal is accepted and no deadline at all needs to be considered at this stage?²⁷ The “deadline” issue arose in 2005 when a timetable was demanded by pro-democrats though in vain.²⁸ This time, however, a timetable seems to be one of the clearer objectives of the Green Paper’s consultation process.

²⁵ See (eg) “Agree to 2017, Allen Lee Urges Pan-Democrat Camp”, *South China Morning Post*, 24 August 2007; “Strongest Hint Yet by Beijing on Suffrage”, *South China Morning Post*, 23 August 2007.

²⁶ Green Paper, n 3 above, 47 (citing the Honourable Rita Fan and the Liberal Party, respectively, for these two dates).

²⁷ *Ibid.*

²⁸ See Albert H.Y. Chen, “The Fate of the Constitutional Reform Proposal of October 2005”, (2005) 35 *HKLJ* 537.

Three important qualifications need to be made to all this, which otherwise seems reasonably promising. First, the Green Paper actually contemplates a date “after 2017” in the case of elections for Chief Executive,²⁹ coupled with an only marginally more palatable notion of reform “in phases after 2016” in the case of LegCo electoral reform.³⁰ This last is only more palatable because the phrase “in phases” suggests that actual, progressive steps will be required, and that simple delay will not suffice. But still, we may not know anything about the actual pace and eventual deadline. This first problem has to do with the content of the Green Paper. It has to do with the questions which the Green Paper asks, some of which may fall outside acceptable constitutional bounds. The constitutional requirements are flexible, but not infinitely so. Deferment is constitutionally finite.

Secondly, some of the Government’s long-standing assumptions about the legal principles governing the suffrage debate are reiterated in the Green Paper. Does the process of consultation mean that public participation in the consultation process is tantamount to public acceptance of these purported legal principles? Examples include the notion of an “executive-led” government,³¹ a controversial idea.³² But perhaps it should not be. As with “balanced participation” which also appears about five times in the Green Paper,³³ the notion of an “executive-led” system has at least the authority of the NPCSC’s April 2004 decision. But there are other ideas, such as the idea that the road to suffrage is to be built on the back of societal “consensus”, a euphemism which occurs 19 times in the Green Paper but which finds scant support in the Basic Law. In short, the principles which purportedly govern constitutional reform in Hong Kong seem, at least from the Government’s standpoint, to be multiplying at a rapid rate.³⁴ The Green Paper is a part of that phenomenon.

Thirdly, “Green Papers” by definition do not bind Government, and we turn to this last issue.

²⁹ *Ibid.*, para 5.15 – option “(iii)”.

³⁰ *Ibid.*, para 5.19 – option “(iii)”.

³¹ Green Paper, n 3 above, *see* (eg) para 2.12.

³² Compare Peter Wesley-Smith, “The Hong Kong Constitutional System: The Separation of Powers, Executive-Led Government, and Political Accountability”; Albert Chen, “Executive-Led Government’, Strong and Weak Governments and ‘Consensus Democracy’”, in Chan and Harris (eds), n 24 above, 3, 9, respectively.

³³ Green Paper, n 3 above, *see* (eg) para 2.12.

³⁴ Benny Tai, “One Principle...Two Principles...3, 4, 5, 6, 7, 8, 9 Factors for Constitutional Reform”, in Chan and Harris (eds), n 24 above, 15.

6. Conclusion

There is no need to belabour the point. Readers of this journal know that there are constitutional parameters here, even if it is difficult to say exactly where some of those parameters lie. Could the Green Paper have observed these parameters more closely? The fact is that we know too little about the weight which will finally be accorded to this latest exercise. What the Green Paper says is that “following the end of the consultation period in October this year, the HKSAR Government will submit a report to the Central Authorities to reflect faithfully any mainstream views formed during the public consultation period and other views expressed”.³⁵ “Mainstream”? And so there have been criticisms here.³⁶ It suffices to add only that such criticism is not without some constitutional basis or import.

That is where things stand, for now.

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³⁵ *Ibid.*, para 1.19.

³⁶ See “An Open Letter to Donald Tsang”; n 22 above, seeking an “explanation of the methodology for assessing public opinion”.

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