

The Concept of "Universal Suffrage" under the Basic Law

- 1 This paper discusses the concept of "universal suffrage" (普選) as provided for in articles 45 and 68 of the Basic Law (BL45, BL68).

The relevant provisions of the Basic Law

- 2 We first consider BL68. This provides that "the method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage."
- 3 BL68 should be considered in the light of Annex II to the Basic Law. This provides for a progressive increase in the number of "members returned by geographical constituencies through direct elections" from 20 in the first LegCo to 24 in the second LegCo, and to 30 in the third LegCo. It is clear that LegCo members directly elected by voters in the geographical constituencies are members elected by universal suffrage, and this is one of the reasons why Annex II provides for a progressive increase in the number of such members in accordance with "the principle of gradual and orderly progress (循序漸進的原則) as stipulated in BL68. On the other hand, members elected by functional constituencies are not elected by universal suffrage, since not all permanent residents of the HKSAR have the right to vote in a functional constituency. (Note: BL26 provides that all HKSAR permanent residents shall have the right to vote and the right to stand for election in accordance with law.)
- 4 The view expressed in paragraph 3 above is consistent with that in the book on Introduction to the Basic Law of the HKSAR (香港特別行政區基本法導論 [1997年修訂本] edited by Professor Wang Shuwen (王叔文). There it was pointed out that it is not possible immediately upon the establishment of the HKSAR to have universal suffrage, i.e. direct election by "one person, one vote", for the Legislative Council ("要求立法會立即採用全民普選方式產生，即一人一票直接選舉產生立法會議員也是不行的": page 266) Instead, universal suffrage should only be introduced in accordance with the principle of gradual and orderly progress. The passage implies that "universal suffrage" (普選) means "one person, one vote" (一人一票) (i.e. equal voting rights for all citizens or permanent residents); although this cannot be achieved immediately upon the establishment of the HKSAR, this is the ultimate destination of the development of the political system of the HKSAR in accordance with the principle of gradual and orderly progress and the actual situation in the HKSAR.
- 5 We now turn to BL45. This article provides that "the method for selecting the Chief Executive shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."

- 6 Annex I provides for the expansion of the size of the Electoral Committee for the election of the Chief Executive from 400 members to 800 members for the election of the second Chief Executive. It is clear that the ultimate aim of electing the Chief Executive by universal suffrage means that ultimately the Chief Executive will be no longer be elected by an Election Committee, but will be directly elected by all permanent residents of the HKSAR, although before such election the candidates in the election must first be nominated by a nominating committee which (like the existing Election Committee for the election of the Chief Executive) should be broadly representative (note however that BL45 does not require the nominating committee to be elected by universal suffrage; so it might be possible that the nominating committee is elected in a manner similar to that in which the existing Election Committee is elected).
- 7 In considering the concept of "universal suffrage" in the Basic Law, the following matters are also relevant.
- 8 First, as mentioned above, BL26 confers the right to vote (and to stand for election) on permanent residents of the HKSAR. BL25 provides for equality before the law of all Hong Kong residents. The ultimate aim of "universal suffrage" in BL45 and BL68, when achieved, would mean that all permanent residents have equal voting rights. At present, all permanent residents already enjoy the right to vote in accordance with BL26, but there is not yet equality of voting power, because many permanent residents do not have the right to vote in the functional constituencies, and because even among those entitled to vote in the functional constituencies, there exists significant difference between their voting power because of great variations in the size of the functional constituencies. Thus although all permanent residents already have the right to vote in the present system, the present system is not a system of "universal suffrage" which is the ultimate destination of the development of the political system of the HKSAR as stipulated in BL45 and BL68. The concept of "universal suffrage" in the Basic Law implies equality of voting rights. The process of gradual and orderly democratization stipulated in BL45 and BL68 is a process in which a political system with initially unequal voting rights evolves to become a political system with equal voting rights.
- 9 Secondly, the implications of BL39 should also be taken into account. BL39 provides (among other things) that "the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

The International Covenant on Civil and Political Rights

- 10 Article 25 of the ICCPR provides (among other things) that "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [i.e. "race, colour, sex, language, religion, political or

other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors". Article 26 provides (among other things) that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

- 11 When the United Kingdom applied the ICCPR to Hong Kong in 1976, one of the reservations made by it was that "The Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of Article 25 in so far it may require the establishment of an elected Executive or Legislative Council in Hong Kong". Since BL39 refers to the continued implementation in Hong Kong of ICCPR provisions "as applied to Hong Kong" previously, this reservation may be relevant in considering the application to the HKSAR of article 25 of the ICCPR.
- 12 In the Hong Kong case of *Lee Miu Ling v Attorney General (No 2)*,¹ Mr Justice Keith of the High Court considered the effect of section 13 of the Hong Kong Bill of Rights Ordinance which was based on the reservation mentioned in the preceding paragraph. Section 13 provides that "article 21 [of the Hong Kong Bill of Rights which basically reproduces article 25 of the ICCPR] does not require the establishment of an elected Executive or Legislative Council in Hong Kong". Mr Justice Keith expressed the view that although section 13 made it lawful not to have an elected legislature, once an elected Legislative Council was established in Hong Kong, section 13 became a "dead letter" and "cannot now be used to justify a departure from the rights guaranteed by article 21 of the Bill of Rights."²
- 13 A similar approach to the reservation mentioned in paragraph 11 above has been adopted by the Human Rights Committee (HRC), the international body established by the ICCPR for the purpose of monitoring compliance with the ICCPR on the part of signatory states. After considering the 4th periodic report submitted by the United Kingdom on behalf of Hong Kong, the HRC in its Concluding Observations dated 9 November 1995 stated as follows (among other things): "The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant [the ICCPR]. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60

¹ (1995) 5 HKPLR 181. The case was appealed to the Court of Appeal which dismissed the appeal: *Lee Miu Ling v Attorney General* [1996] 1 HKC 124. The Court of Appeal did not however express any view on the point discussed here.

² (1995) 5 HKPLR 181 at 197-198.

seats [this refers to the situation in 1999] in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25(b) and 26.”³ In its Concluding Observations dated 12 November 1999 on Hong Kong’s 5th periodic report, the HRC “reiterates its concern, expressed in paragraph 19 of its concluding observations, adopted at the end of the consideration of the fourth periodic report, that the electoral system for the Legislative Council does not comply with articles 2, paragraph 1, 25 and 26 of the Covenant.”⁴

14 The reservation referred to in paragraph 11 above was made at a time when all the members of the Legislative Council in Hong Kong were appointed by the Governor. It is arguable that since it is desirable that democratization should proceed in accordance with “the principle of gradual and orderly progress”, it is unrealistic to expect that article 25 of the ICCPR can be fully implemented immediately once elected members were introduced into the Legislative Council in Hong Kong. However, it is perfectly reasonable to expect that article 25 of the ICCPR (which the People’s Republic of China itself signed in 1998 although it has not yet ratified the Covenant) will be complied with when the ultimate goal of “universal suffrage” prescribed by BL45 and BL68 is achieved in future. Thus the concept of “universal suffrage” in the Basic Law may be regarded as being the same as the concepts of political right and of “universal and equal suffrage” in article 25 of the ICCPR (which are also linked to the equality and non-discrimination principles in articles 2 and 26 of the ICCPR).

15 The meaning of article 25 of the ICCPR has been authoritatively elaborated by the Human Rights Committee in its General Comment No. 25 dated 12 July 1996.⁵ The Committee pointed out (among other things) that “Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. *The principle of one person, one vote, must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another.* The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”⁶ (emphasis supplied)

³ Paragraph 19 of the Concluding Observations, CCPR/C/79/Add.57, available at www.unhcr.ch/tbs/doc.nsf.

⁴ Paragraph 12 of the Concluding Observations, CCPR/C/79/Add.117.

⁵ CCPR/C/21/Rev.1/Add.7, available at the same website mentioned in note 3 above.

⁶ Paragraph 21 of the General Comment.

Foreign jurisprudence

- 16 Thirdly, foreign jurisprudence may also be useful in elucidating further the concept of "universal suffrage" in the Basic Law. As discussed above, universal suffrage implies equal voting rights for all citizens or permanent residents. However, the general principle of equality of voting power does not necessarily require precise arithmetic equality in voting power. The principle does not, for example, require that the size of each constituency electing a certain number of seats must be exactly the same as that of every other constituency electing the same number of seats. Variations in the population size of electoral districts are permissible within reasonable limits. This principle finds support in Canadian and European case law.
- 17 For example, in the case of *Reference re Electoral Boundaries Commission Act*,⁷ the Canadian Supreme Court, while interpreting the provision on the right to vote in the Canadian Constitution (i.e. section 3 of the Canadian Charter of Rights and Freedoms),⁸ held as follows:

"What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. ...

Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

It emerges therefore that deviations from absolute voter parity may be

⁷ (1991) 81 DLR (4th) 16, [1991] 2 SCR 158.

⁸ Section 3 provides that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in Dixon, at p. 414, that 'only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed.'"⁹

- 18 The issue of the equality of voting power as an ingredient of universal suffrage has also been considered by the European Court of Human Rights. In *Mathieu-Mohin and Clerfayt v Belgium*,¹⁰ the European Court considered the application of article 3 of the First Protocol to the European Convention on Human Rights.¹¹ The majority judgment held as follows:

"As to the nature of the rights thus enshrined in Article 3, the view taken by the Commission [European Commission of Human Rights] has evolved. From the idea of an 'institutional' right to the holding of free elections the Commission has moved to the concept of 'universal suffrage' and then, as a consequence, to the concept of subjective rights of participation -- the 'right to vote' and the 'right to stand for election to the legislature'. The Court approves this latter concept.

The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'.

Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other; on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase 'conditions which will ensure the

⁹ This quotation is from paragraphs 27-32 of the majority judgment of the court delivered by Madam Justice McLachlin (now Chief Justice of Canada).

¹⁰ (1988) 10 EHRR 1.

¹¹ Article 3 of the First Protocol provides that the signatory states "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

free expression of the opinion of the people in the choice of the legislature' implies essentially -- apart from freedom of expression (already protected under Article 10 of the Convention) -- *the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.*

It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes'.

For the purposes of Article 3 of Protocol No. 1, any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.¹² (emphasis supplied)

Conclusions

- 19 The conclusions of this paper may be summarized as follows:
- 20 Hong Kong Legislative Council members directly elected by voters in the geographical constituencies are members elected by universal suffrage. Members elected by functional constituencies are not elected by universal suffrage, since not all permanent residents of the HKSAR have the right to vote in a functional constituency.
- 21 "Universal suffrage" (普選) means "one person, one vote" (一人一票) (i.e. equal voting rights for all citizens or permanent residents).
- 22 The ultimate aim of electing the Chief Executive by universal suffrage means that ultimately the Chief Executive will be no longer be elected by an Election Committee, but will be directly elected by all permanent residents of the HKSAR, although before such election the candidates in the election must first be nominated by a nominating committee which itself is not necessarily elected by universal suffrage.
- 23 Although all permanent residents of the HKSAR already have the right to vote in the present system, the present system is not a system of "universal suffrage" which is the ultimate destination of the development of the political system of the HKSAR as stipulated in BL45 and BL68.
- 24 The concept of "universal suffrage" in the Basic Law implies equality of voting rights. The process of gradual and orderly democratization stipulated in BL45 and BL68 is a process in which a political system with initially unequal voting rights evolves to become a political system with equal voting rights.
- 25 The concept of "universal suffrage" in the Basic Law may be regarded as being the same as the concepts of political right and of "universal and equal suffrage" in article 25 of the ICCPR.
- 26 The general principle of equality of voting power does not necessarily require

¹² This quotation is from paragraphs 51-54 of the majority judgment of the court.

precise arithmetic equality in voting power. The principle does not, for example, require that the size of each constituency electing a certain number of seats must be exactly the same as that of every other constituency electing the same number of seats. Variations in the population size of electoral districts are permissible within reasonable limits.

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