Chief Executive Election by Universal Suffrage: The Relevance of the Basic Structure Doctrine to the Nomination Quandary

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Backdrop

The Consultation Paper issued by the HKSAR government is entitled 'Let's Talk and Achieve Universal Suffrage'. Talks (or rather dialogues) are critical to achieve the goal of universal suffrage. More critical, however, is that the talks are not designed to achieve or endorse certain pre-determined outcomes. The crucial enquiry then becomes on *whose terms* the talks are conducted. In my view, the talks should only be conditioned by the relevant laws, decisions, international instruments and legal principles. Law and politics have a multifaceted relationship. The Basic Law should dictate the politics in Hong Kong, rather than politics determining its interpretation by the Standing Committee of the National People's Congress (NPCSC).

The Paper states that the 'HKSAR Government is yet to have any position' regarding the methods for selecting the Chief Executive (CE) in 2017 and that it will operate 'strictly in accordance with the Basic Law and the Interpretation of the NPCSC in 2004 and the Decision of the NPCSC in 2007'.[1] These seemingly comforting words are, however, undermined by some statements made by the Chief Secretary for Administration (Mrs Carrie Lam) and the Secretary for Justice (Mr Rimsky Yuen).

More problematic perhaps are contours of the talks set by the Paper in a way that would limit pro-democracy proposals. Let me offer a few examples to illustrate this point. First of all, the Paper states that 'the Central Authorities have the constitutional powers and responsibilities to determine the systems to be implemented in the HKSAR, including the model of political structure of the HKSAR'.[2] While the Central Authorities certainly have this power, their power is not absolute by any means. Nor could they exercise this power alone.

Secondly, the Paper claims that the Central Government under Article 45 of the Basic Law has a substantive power to appoint or not to appoint the Chief Executive (CE).[3] While the Basic Law does not explicitly confer the negative power upon the Central Government, the HKSAR government itself has unnecessarily conceded the existence of such a power. I think that the Central Government's power to appoint the CE does not (and should not) include the power not to appoint.[4] A distinction should be made between an *affirmative* power and a *discretionary* power.[5] The Central Government's power under Article 45 to appoint the CE is merely an affirmative power to indicate the

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[1] Paras 1.21 and 1.15.

[2] Para 2.05.

[3] Paras 2.05(ii) and 3.28.

[4] An analogy with past instances in which the Central Government did not appoint secretaries recommended by the CE is not appropriate in view of significant differences between the appointment processes of the CE and secretaries.

[5] Article 157 offers an example of the Central Government's discretionary power under the Basic Law. It provides: 'The establishment of foreign consular and other official or semi-official missions in the Hong Kong Special Administrative Region shall require the approval of the Central People's Government.'

HKSAR's integration with the mainland. This power cannot be used to veto the election of a CE who has been elected by the Hong Kong people as per the procedure stipulated in the Basic Law. In fact, if the Central Government is given the power not to appoint a CE elected by the Hong Kong people, this will not only make universal suffrage meaningless but also destroy the 'two systems' prong of the 'one country, two systems' principle.

Thirdly, the Paper outlines four 'major principles' of constitutional development under the Basic Law that should guide Hong Kong's journey towards universal suffrage.[6] This list, however, does not include the most fundamental principle of 'one country, two systems', a principle which, as I argue below, should be regarded as the 'basic structure' of the Basic Law.

Fourthly, the Paper equates 'democratic procedures' to be adopted by the nominating committee under Article 45 to the 'organisational' or 'collective' nomination.[7] This narrow conceptualisation is probably designed to prod views that align with the goal of designing a procedure which shuts out pro-democracy candidates.

The Relevance of the 'Basic Structure' Doctrine

The basic structure doctrine means that certain aspects/provisions/features of a constitution are so fundamental that they cannot be amended or taken away even by a constitutional amendment. The doctrine – which is recognised in many countries by express constitutional provisions[8] or through judicial interpretation[9] – is aimed at controlling the power of government organs (primarily the legislature) from subverting core constitutional values. It seems that the HKSAR's Basic Law also embodies the basic structure doctrine in Article 159 by providing that '[n]o amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.'

I will argue that 'one country, two systems' – the fundamental principle that underpins most of basic policies of the Central Government regarding the HKSAR – is part of the basic structure of the HKSAR's Basic Law. If so, no government organ of the HKSAR government or the Central Government can take any decision that undermines the 'one country, two systems'.

Similar to the historical challenges experienced by other states that have embraced the basic structure doctrine, the HKSAR also faces a challenge in preserving its core constitutional value: various facets of the high degree of autonomy guaranteed by the

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[6] Para 2.07.

[7] Para 3.20.

[8] See, for example, Art 79(3) of the Basic Law of the Federal Republic of Germany; Art 139 of the Constitution of the Italian Republic; Art 177 of the Constitution of the Islamic Republic of Iran; Art 60(4) of Subsection II of the Constitution of the Federative Republic of Brazil; Art 152 of the Constitution of Romania; Art 153 of the Constitution of Cambodia; Arts 159 and 161E of the Federal Constitution of Malaysia; Art 4 of the Constitution of the Republic of Turkey; Art 112 of the Constitution of Norway; Art 220 of the Constitution of the Democratic Republic of the Congo; Art 37 of the Constitution of Indonesia; and Art 110 of the Constitution of Greece.

[9] The most prominent example of this model is India: *Kesavananda Bharti v State of Kerala* (1973) 4 SCC 225; *Minerva Mills v Union of India* (1980) 3 SCC 625; *L Chandra Kumar v Union of India* (1997) 3 SCC 261.

Basic Law. Considering the fact that the NPCSC has used its interpretation-cum-decision making power to *de facto* amend the Basic Law,[10] the basic structure doctrine should also bind the NPCSC. Otherwise, the NPCSC can do indirectly what it cannot do directly. Seen in this context, the doctrine could serve a vital role in that it will not permit the Central Government authorities to exercise their diverse powers under the Basic Law to undermine the very essence of the Basic Law, that is, the 'one country, two systems' principle. Thus, if any decision or interpretation of the NPCSC infringes the basic structure of the Basic Law, it should be regarded as unconstitutional.

The significance of 'one country, two systems' as a basic structure lies in operating as an additional overarching requirement to test constitutionality of all decisions that potentially impinges upon the HKSAR's autonomy. One should, for instance, ask whether the proposed method of the nominating committee's formation and the procedure that the committee adopts to nominate candidates for the CE election will promote or undermine the 'two systems' prong?

Formation of the Nominating Committee

Article 45 of the Basic Law requires the nominating committee to be 'broadly representative', while the 2007 decision of the NPCSC states that the nominating committee may be formed 'with reference to' the current Election Committee. But what should it be representative of? Also, can the current Election Committee be regarded as truly representative of Hong Kong people?

The nominating committee should be representative of Hong Kong people. For historical reasons, the current Election Committee does not represent the people; rather it represents various business sectors, professions, occupations and religious groups. This results in a situation where significant chunks of the population – such as the senior citizens, women, the LGBT community, people working in informal sectors, poor people not falling into any of the listed professions or occupations, self-employed people, students, homemakers, and people belonging to religious/linguistic/racial minorities – are not represented or are under-represented in the Election Committee. If the nominating committee is modelled on the Election Committee, it will inherit these deficits. Such an elitist model of representation is problematic from a universal suffrage point of view.

Nevertheless, since I conceive the role of the nominating committee to be limited to weeding out non-serious – rather than inconvenient – candidates, we can live with an imperfect nominating committee for the 2017 CE election. In addition to the current 1,200 members of the Election Committee, 400 additional members should be elected by the excluded groups of people identified above. The nominating committee for the 2017 CE election can thus have 1,600 members.

[10] For example, the limitations that the process of amending Annex I or II of the Basic Law first requires a 'green light' from the NPCSC, that the nominating committee under Article 45 may in essence be the Election Committee for selecting the Chief Executive and that only a certain number of candidates can be nominated for election are not contemplated by the Basic Law. Rather these have been introduced by the NPCSC through its 2004 Interpretation and the 2007 Decision.

Procedure for Nomination

Nomination by the nominating committee is a prerequisite for election as the CE. This means that no other body of people or institution can exercise this power of nomination under the Basic Law as it stands now. This, however, does not mean that certain percentage of electorates or political parties cannot recommend potential candidates for nomination by the nomination committee. In fact, to cure the democracy deficit of the nominating committee, this should be encouraged.

The Nominating Committee must exercise its power in accordance with the Basic Law and to further the ultimate aim of achieving universal suffrage. It should also be bound by the 'one country, two systems' principle as the basic structure of the Basic Law. Any attempt to get rid of inconvenient candidates on grounds not expressly permitted by the Basic Law (e.g., 'love the country') will be unconstitutional.[11] The nomination process in democracies is mostly used only to filter out non-serious candidates. The nominating committee should keep this principle in mind, otherwise the legitimacy and democratic character of the election process will be undermined. Universal suffrage implies that people have choices. If everyone has one vote, but the vote could only be exercised to elect one of the two candidates handpicked by the Central Government, this would hardly be election by universal suffrage.

Having said this, for the sake of economic efficiency and in order to enable voters to exercise their judgment in an informed manner, only a limited number of serious candidates may be allowed to contest in the election.[12] Therefore, for the 2017 election, candidates with negligible public support may not be nominated so as to avoid any unnecessary financial burden of election and to help voters get used to engaging politically with multiple candidates. However, no attempt should be made to come up with a 'magic number', i.e., the maximum number of candidates that could be nominated by the nominating committee.

As per the mandate of Article 45, the nominating committee should adopt 'democratic procedures' to nominate candidates. Again, there is an ambiguity as to the meaning of this term. But any suggestion that the term refers to organisational, institutional or collective nomination is problematic. For one, it will be difficult for a large body to deliberate and act in an institutionalised manner. Moreover, since the nominating committee is unlikely to be elected directly by the entire electorate, any attempt to base nomination decisions on the majority vote of the nominating committee would be undesirable, for it might result in the exclusion of pro-democracy candidates. Rather, a low threshold (say, 10 per cent of the total strength of the nominating committee) should be used for nomination purposes. This will be an improvement over the 2012 CE election, where a minimum 12.5 per cent support of the Election Committee was required for successful nomination.

Cat Watching the Milk?

In electing the CE by universal suffrage, the nominating committee conceived under Article 45 of the Basic Law should have a very limited role to play. In fact, the Basic Law does not permit the power and procedure of nomination to be used to exclude

[11] Arts 44 and 104 of the Basic Law should provide guidance here.

[12] This can arguably support voters' right to vote under the Basic Law as well as under the ICCPR.

candidates that might be considered unacceptable to the Central Government. I have argued that any attempt by the Central Government authorities (including the NPCSC) to manipulate the election process will run afoul of the basic structure doctrine embodied by the 'one country, two systems' principle.

Despite having a sound legal grounding, the HKSAR's high degree of autonomy, as the process to achieve universal suffrage demonstrates, faces constant threats in political terms. Evidence so far suggests that the executive branch of the HKSAR government cannot be trusted too much to safeguard this autonomy. We should, therefore, also consider utilising the other two branches of the government (the Legislative Council and the Judiciary) and, more critically, non-state organs such as the general public, students, media and civil society to ensure that the 'one country, two systems' experiment does not fail.