



**BY EMAIL**

23 April 2014

**Centre for Chinese and Comparative Law**  
School of Law  
City University of Hong Kong

Attn: Prof Lin Feng

Dear Prof Lin,

**Roundtable on Issues Relating to the 2017 Chief Executive Election**

We refer to the above Symposium and express our gratitude for inviting us to present on Panel 2 : Formation of the Nominating Committee and Its Nomination Procedure.

Our views are as follow:-

(1) Formation of the Nominating Committee ("NC")

(a) Democracy/ Universal suffrage according to law

Democracy is a political or social-political concept and it has to be implemented and concretized by substantive rules, legally valid rules. Democracy, and in Hong Kong's situation, universal suffrage, has to be found in the constitutional document, which is the Basic Law.

Many would have erroneously thought that the court is here to do justice, and is at liberty to dispense justice at will. The court has to do justice according to law: *Yap v Granich* [1998] HCATrans 396 (22 Oct 1998).

No matter how well an election system is so designed and embraced with absolute democratic virtues, it has to be legally valid and constitutional when tested against the Basic Law.

(b) What is the Law?

Basic Law is the governing constitutional document. Art 45 states unequivocally that the Chief Executive ("CE") has to be selected by

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universal suffrage upon nomination by a broadly represented nominating committee in accordance with democratic procedure.

There are a number of alternate proposals of nomination and all of their legal validity has to be tested. I list them out as follow:-

(i) Individual nomination: each eligible registered voter or citizen is entitled to nominate a CE candidate. There are over 3m registered voters or 7m citizens so technically the candidate can run into millions. This is absolutely impracticable. It is also unconstitutional. Firstly, Art 45's nominating committee is one and only one. The word "a" means "one" and individual nomination is very many; secondly, individual citizen is not a 'committee' as a committee comprises of a group of people and an individual is never a committee; thirdly, individuals cannot be 'broadly representative' of all sectors of the society other than him/herself. The word "broadly represented" literally<sup>1</sup> means the committee has to be constituted by people with wide range of views or interest and from all walks of life.

(ii) Civil nomination<sup>2</sup>: 1% of eligible registered voters endorsement. It is unconstitutional because the NC is legally a constitutional authority established under the Basic Law. Civil nomination seeks to replace the function of and to usurp or 'hijack' the role of the constitutional NC. There is a rule of statutory interpretation of Express inclusions and implied exclusions<sup>3</sup> - to express the one is to exclude all inconsistent others. Thus, if there is an Art 45 constitutional nominating committee, there can be no other committee performing and discharging the same function. Also, applying the plain meaning or literal rule of statutory interpretation, the word "a" NC together with the absence of an "s" after NC, the constitution clearly refers to a single NC. Should the legislative intention is to provide for multiple NCs, it could have expressly stated so.

The same principles apply to political party nomination, which requires the result of the party nomination be mandatorily endorsed by the NC.

(iii) Civil recommendation: a group of citizens all signed to recommend a candidate to the NC and the NC should adopt. There is no legal

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<sup>1</sup> "Broadly represented" is not a technical legal phrase but general English words of common usage.

<sup>2</sup> Connotes public or communal nomination. As proposed by Prof Joseph Cheng and the Alliance for True Democracy.

<sup>3</sup> *Expressio unius exclusio alterius est* (Lat.)- to express the one is to exclude all others. *Whiteman v Sadler* [1910] AC 514 at 527 per Lord Dunedin (e.g. "every factory, shop, office and workroom" excludes "hotel"); *Smith v City of Melbourne* (1971) 27 LGRA 125 AT 129.

prohibition of any kind of recommendation or persuasion made to the constitutional NC and in fact citizens are encouraged to express their views. The constitutional freedom of expression indeed protects such right.<sup>4</sup> But one should not confuse private right with a public power. Private right in the form of individual freedom to express who should be the CE candidate has no legal bearing upon how the NC should legally discharge its constitutional function. Members of the NC, when exercising its discretion to select the CE candidate(s), may pay heed to views and opinions but in no way such views and opinions dictates the will of the members. Thus, civil recommendation is not invalid so long as it is not to usurp the NC's role. Compulsory endorsement by the NC that takes away its cardinal power and discretion to nominate is unconstitutional.

(iv) Status of political criteria.<sup>5</sup> They are not legal requirements under the Basic Law and can hardly be written into the CE election method as a legal measurement of eligibility. Simply, it is a political requirement and it cannot be legally tested in a court of law. However, it is relevant not to nomination but to the final step of appointment after election. Under Art 45(1) the Central People's Government has the unfettered constitutional power of appointment to whoever elected. Hong Kong courts has no power to question "the authority of the NPC or the NPCSC to do any act which is in accordance with the provisions of the Basic Law and the procedure therein"<sup>6</sup> so will also have no power to quash any NPC decision refusing appointment on political grounds.

## (2) The Nomination Procedure

### (c) Any applicable International Standard ?

#### (i) What is the Law? (ICCPR Art 25)

No unreasonable restriction to, *inter alia*, a person's right to be elected,

Express reservation. When the treaty first came into force in 1976, the United Kingdom reserved "the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong". The question now is whether the reservation should also extend to the 2017 CE election. One argument that since there was no reference to the Governor as he was always appointed, it goes without saying that if the Governor was then elected, he would have been included in the reservation. The other argument is that the reservation simply does not apply as it did not include the Governor (or

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<sup>4</sup> Art 27 Basic Law.

<sup>5</sup> Political criteria that the CE candidate has to 'love China, love Hong Kong' and should not engage in 'confrontations with the Central People's Government' have been stated openly by the Chairman of the National People's Congress Standing Committee during the Parliamentary Session in March 2014.

<sup>6</sup> *Ng Ka Ling v Director of Immigration (No 2)* [1999] 1 HKLRD 577 (CFA).

the CE). It is doubtful whether the express reservation applies now to exclude the operation of Art 25.

(ii) Is the Right to stand for election now unreasonably restricted?

Decision of the NPCSC (Instrument 21: 2007) said the "NC may be formed with reference" to the current provisions regarding the Election Committee in Basic Law Annex I. "May" is *prima facie* directory and not mandatory so the NC can be otherwise constituted, provided that it is broadly represented.

Is the 1/8 (150) NC members out of the existing 1200 NC members threshold unreasonable? Technically there can be 8 candidates which is undesirably too many and for this reason a higher threshold is justified to limit real contestants to two or three.

That may involve the adducing of expert evidence of other presidential or prime ministerial nomination committee of other jurisdictions for comparison. If there is one such committee adopts a higher threshold than that of 1/8 then *prima facie* the NC threshold is not unreasonable.

Referring to other jurisdictions may result in inconclusiveness: the Australian position is that the decision of who may be a candidate is decided by the political party in any manner they choose. It can range from a postal vote to the whole party membership through to a decision made by a small select committee. The selection process can be a system of voting by the selectors (examples include United States primaries and most major Australian political party pre-selections), or there may be a system of appointment, such as through decision by a selection committee. All are internal party rules and processes.

With Compliments,



Lawrence Ma  
Executive Council Chairman