

Hong Kong Bar Association's Submission
on the Consultation Document as regards
Methods for Selecting the Chief Executive and
for Forming the Legislative Council in 2012

Executive Summary of the Submissions

Introduction

1. The Hong Kong Bar Association (“HKBA”) makes this submission on certain legal issues relating to the HKSAR Government’s Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012 (“the Consultation Document”).
2. The HKBA notes that the Chief Secretary has acknowledged that the HKSAR Government consider that the existing functional constituency elections have yet to comply with the principles of universality and equality; and that the model for implementing universal suffrage in 2020 should so comply.
3. The HKBA has repeatedly stressed that the reservation entered into by the United Kingdom for Hong Kong in 1976, which stated that

“[the] Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong”,

provides no justification for excluding Article 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”) from being a provision of the ICCPR as applied to Hong Kong within the meaning of Article 39 of the Basic Law.

The Chief Executive of the HKSAR (“CE”)

4. While the development of the electoral method for selecting the CE for appointment by the Central People’s Government towards universal suffrage is to be achieved within the framework prescribed in the Basic Law, the method to be devised and implemented within that framework must be fully in line with Article 25(b) of the ICCPR and Article 21 of the Hong Kong Bill of Rights. This means:

- (1) All electors in the HKSAR must have the right and opportunity to vote and be elected in a CE election.
- (2) The electoral method to return a candidate for appointment as CE (including the nomination process and the voting process) must ensure that every elector in the HKSAR has an equal opportunity to participate in the electoral process.
- (3) The elections to return a candidate for appointment as CE must be genuine. This requires that voters may freely choose between candidates pursuing different programmes.
- (4) In so far as the nomination process is to be performed by a committee of limited composition, imposing an upper limit on the number of subscribers (as the trigger for a valid nomination) better accords with the principles of equal opportunity in participation and free and genuine elections.
- (5) The elections to return a candidate for appointment as CE must be periodic, which favours affirmative voting in the case where at the end of the process of nomination, only one candidate is nominated.
- (6) The principle of free elections militates against the requirement that the CE should not have any political affiliation.

The Legislative Council of the HKSAR (“LegCo”)

5. While the development of the electoral method for the formation of LegCo towards universal suffrage is to be achieved within the framework prescribed in the Basic Law, the method to be devised and implemented within that framework must be fully in line with Article 25(b) and Article 21. This means:
 - (1) All electors in the HKSAR must have the right and opportunity to vote and be elected in a LegCo election.
 - (2) The electoral method to return members of LegCo (including the nomination process and the voting process) must ensure that every elector in the HKSAR has an equal opportunity to participate in the electoral process.
 - (3) The elections to return members of LegCo must be periodic, which favours affirmative voting in the case where only one candidate is nominated.
 - (4) The prohibition of unreasonable restrictions to the right to vote and to be elected entails an exacting proportionality test. In so far as the 20% proportion of members of LegCo who are permanent residents of the HKSAR but permitted not to be Chinese national etc (as provided for under Article 67 of the Basic Law) is concerned, if the composition of LegCo is to be expanded to more than 60 members, there should be a proportionate increase in the number of such seats.

Functional Constituencies

6. Functional constituencies, whether “trade-based” or not, do not fully comply with Article 25(b) and Art 21 and the principles of universality and equality. The same observation applies to granting the franchise to corporate entities. The HKBA urges the Government of the HKSAR to put forward proposals that would eventually lead to the total abolition of functional constituencies.

District Council Functional Constituency

7. In addition, expanding the number of seats allocated to the District Council functional constituency not only exacerbates the issue of inequality of voting power but also begins to transform District Councils from being consultative and service-providing “district organizations which are not organs of political power”, the specifications under Article 97 of the Basic Law that underlie the constitutional position of the District Councils.

Submission in Detail

Introduction

8. The HKBA adopts the approach taken in its Submission to the HKSAR Government’s Green Paper on Constitutional Development (July 2007) and confines this Submission to legal issues.
9. In sum, the HKBA presents its views on the following matters that arise from the Consultation Document:
 - (1) the principle of universal and equal suffrage and Article 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”);
 - (2) the method for selecting the Chief Executive and the relevant constitutional requirements;
 - (3) the method for forming the Legislative Council and the relevant constitutional requirements;

- (4) the compatibility of functional constituencies with the principle of universal and equal suffrage; and
- (5) the elected members of the District Councils as a functional constituency and the proposed expansion in the allocation of seats in the Legislative Council.

The Principle of Universal and Equal Suffrage and the ICCPR

10. A feature of the Consultation Document is the curious and deliberate omission of any mention of the ICCPR and the guarantee in Article 25(b) thereof that every resident of the HKSAR shall have the right and opportunity, without any discriminatory distinctions and without unreasonable restrictions, 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 electors.
11. The Chief Secretary, in his statement to the Legislative Council on 18 November 2009, outlined five principles that the HKSAR Government had considered in preparing the Consultation Document:
 - (1) that it must comply with the relevant provisions of the NPCSC Decision of 29 December 2007;
 - (2) that it must be consistent with the principles under the Basic Law of the HKSAR, including meeting the interests of different sectors of society, facilitating the development of the capitalist economy, gradual and orderly progress, and being appropriate to the actual situation in the HKSAR;
 - (3) that it can respond to the aspiration of the community on constitutional development and enhance the democratic elements of the elections;

- (4) that it can enhance the representativeness and democratic elements of the elections, realize democratic enhancement and development, and pave the way for implementing universal suffrage for the Chief Executive in 2017 and for the Legislative Council in 2020; and
 - (5) that it can have the possibility of being accepted by the majority of the public, the Legislative Council, the Chief Executive and the Central Authorities.
12. The Chief Secretary has indicated that, as the starting point, the directions which the Consultation Document presents for consideration should comply with the above principles and that they are legal, reasonable and practicable. More particularly, the Chief Secretary acknowledged that the HKSAR Government consider that the existing functional constituency elections have yet to comply with the principles of universality and equality; and that the model for implementing universal suffrage in 2020 should comply with these two principles.
13. It is therefore paradoxical to find the Secretary for Constitutional and Mainland Affairs stating in the Legislative Council on 2 December 2009 that because of a reservation entered into by the United Kingdom for Hong Kong in 1976, “the ultimate aim of universal suffrage in Hong Kong’s constitutional development originates from the Basic Law, and not the [ICCPR]”.
14. The HKBA has repeatedly stressed that the reservation entered into by the United Kingdom for Hong Kong in 1976, which stated that

“[the] Government of the United Kingdom reserves the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong”,

provides no justification for excluding Article 25(b) of the ICCPR from being a provision of the ICCPR as applied to Hong Kong within the meaning of Article

39 of the Basic Law. See *Submission of the Hong Kong Bar Association on the Green Paper on Constitutional Development* (24 August 2007); and *Press Statement of the Hong Kong Bar Association on Constitutional Development* (6 January 2009).

15. The HKBA submits in this connection as follows.
16. The reservation was entered into by the United Kingdom in respect of the situation of the governmental institutions of Hong Kong in 1976, when both the Executive Council and the Legislative Council consisted of members appointed by the Governor.
17. Professor Yash Ghai has been right to observe that given that the reservation was permissive rather than obligatory, no formal change (such as a withdrawal) was strictly necessary for reversion to full implementation of the ICCPR provisions; see Ghai, Yash, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2nd Ed) (Hong Kong University Press, 1999) pp 408-409.
18. This being the case, it is not difficult to understand both the representation of Mr Steel of the United Kingdom before the 55th session of the UN Human Rights Committee on 19 October 1995 that “[the United Kingdom] Government had carefully assessed, in consultation with the Government of Hong Kong, the reservations to the Covenant in force with respect to that territory and had determined that all of them were relevant and necessary. They would not therefore be withdrawn” (CCPR/C/SR.1452, 24 October 1995, para 47); and the approach taken by the United Kingdom and Hong Kong Governments in the subsequent Supplementary Report, in response to the view of the Human Rights Committee in its Concluding Observations adopted at the end of its consideration of the fourth periodic report on 3 November 1995 that functional constituencies were not in conformity with Arts 2(1), 25(b) and 26 of the ICCPR, that “[the]

present network of functional constituencies must be seen as a transitional stage in the evolution of Hong Kong's political system. The ultimate aim, as declared in article 68 of the Basic Law, is the election of all the members of the Legislative Council by universal suffrage" and that the two Governments "respectfully maintain their view that the electoral system which now obtains in Hong Kong in respect of elections to the Legislative Council is appropriate and justifiable in present circumstances and gives rise to no incompatibility with any of the provisions of the Covenant".

19. The transitional existence of functional constituencies in Hong Kong's political development was emphasized as the "background" against which the two Governments dissented from and declined to share with respectively the Human Rights Committee's assessment in relation to both compatibility of functional constituencies with the ICCPR and the scope and effect of the reservation (CCPR/C/117, 3 June 1996, paras 33-35).
20. The UN Human Rights Committee, as the treaty body for the ICCPR, was and is competent to interpret on the effect of the reservation. See Kamminga, Menno T and Scheinin, Martin (eds), *The Impact of Human Rights Law on General International Law* (OUP, 2009) pp 12, 66-67, 84-92, 95-96. The Human Rights Committee has consistently observed that "once an elected Legislative Council is established, its election must conform to article 25 of the Covenant" (CCPR/C/79/Add.57, 3 November 1995, para 19; CCPR/C/79/Add.117, 4 November 1999, para 12; CCPR/C/HKG/CO/2, 30 March 2006, para 18). The Human Rights Committee has urged that "[it] should be ensured that all interpretations of the Basic Law, including on electoral and public affairs, are in compliance with the Covenant".
21. Accordingly, it must be recognized that the Human Rights Committee has consistently considered that Article 25(b) of the ICCPR as a provision of the ICCPR *that* applied to Hong Kong.

22. Given the terms of the reservation, which does not provide for a specific restriction, prohibition or state of affairs excluded from implementation of the relevant provision of the ICCPR but a reservation of a *right* on the part of the State Party entering it to exercise and maintain (ie withholding the application of Article 25(b)), the fact that the People's Republic of China is not a State Party to the ICCPR and the specific exclusion of the ICCPR from Annex II of the Central People's Government's notification to the United Nations Secretary-General of 20 June 1997 (see conveniently the account in Aust, Anthony, *Modern Treaty Law and Practice* (2nd Ed, Cambridge UP) pp 386-391; notification of the United Nations Secretary-General on 4 December 1997; and Initial Report of the Hong Kong Special Administrative Region of the People's Republic of China (CCPR/C/HKSAR/99/1, 11 January 1999) para 2) carry the implication that the reservation may not be exercised and is inoperable by the People's Republic of China following resumption of sovereignty over Hong Kong and accordingly, the reservation cannot be the basis for the People's Republic of China to withhold implementation of Article 25(b).
23. The Hong Kong Bill of Rights Ordinance (Cap 383) implements the provisions in the ICCPR as applied to Hong Kong pursuant to Article 39 of the Basic Law. Article 21 of the Bill of Rights follows from Article 25 of the ICCPR to guarantee to every permanent resident the right and the opportunity, without any discriminatory distinctions and without unreasonable restrictions 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 electors.
24. While section 13 of the Ordinance provides that Article 21 of the Bill of Rights "does not require the establishment of an elected Executive or Legislative Council in Hong Kong", Keith J was correct to observe in Lee Miu Ling v Attorney General (No 2) (1995) 5 HKPLR 181 (HC) at 197-198 that once an elected

legislature was established in Hong Kong the section 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”. Andrew Cheung J did not question this observation in Chan Yu Nam & Anor v Secretary for Justice (unreported, 10 December 2009, HCAL 32, 55/2009), CFI.

25. Article 39(2) of the Basic Law provides that restrictions of the rights and freedoms enjoyed by Hong Kong residents shall not contravene the provisions of Article 39(1), which provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

The Chief Executive of the HKSAR

26. Electoral arrangements for the selection of the Chief Executive must comply with Article 25(b) of the ICCPR and Article 21 of the Bill of Rights. This is so even where the candidate returned in the election is subject to appointment by the Central People’s Government.
27. The Chief Executive undoubtedly has vested in him constitutional, legal and de facto power, including the power to introduce legislative proposals and to consent to private member’s bills. In any event, since the office of the Chief Executive is subject to elections, the principles guaranteeing the right to vote and to be elected in Article 25(b) and Article 21 apply; see Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd Rev Ed, 2005) p 574.
28. While the development of the electoral method for selecting the Chief Executive for appointment by the Central People’s Government towards universal suffrage is to be achieved within the framework prescribed in the Basic Law, the method to be devised and implemented within that framework must be fully in line with Article 25(b) and Article 21 and should not contain any discriminatory distinction

or unreasonable restriction and must ensure to every permanent resident of the HKSAR the right and opportunity to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage, guaranteeing the free expression of the will of electors.

29. The implications of Article 25(b) of the ICCPR and Article 21 of the Bill of Rights to the electoral method for selecting the Chief Executive for appointment by the Central People's Government are:

- (1) All electors in the HKSAR must have the right and opportunity to vote and be elected in a Chief Executive election.
- (2) The electoral method to return a candidate for appointment as Chief Executive (including the nomination process and the voting process) must ensure that every elector in the HKSAR has an equal opportunity to participate in the electoral process.
- (3) The elections to return a candidate for appointment as Chief Executive must be genuine. Read in conjunction with the principle of free elections, genuine elections require that voters may freely choose among various alternatives. There must be a choice between candidates pursuing different programmes. See Nowak, *CCPR Commentary* p 575.
- (4) In so far as the nomination process is to be performed under the Basic Law by a committee of limited composition, imposing an upper limit on the number of subscribers (as the trigger for a valid nomination) better accords with the principles of equal opportunity in participation and free and genuine elections.
- (5) The elections to return a candidate for appointment as Chief Executive must be periodic, which requirement favours the holding of a process of

affirmative voting in the case where, at the end of the process of nomination, only one candidate is nominated.

- (6) The principle of free elections militates against the requirement that the Chief Executive should not have any political affiliation. See Nowak, *CCPR Commentary* p 584.

The Legislative Council of the HKSAR

30. Electoral arrangements for the formation of the Legislative Council must comply with Article 25(b) of the ICCPR and Article 21 of the Bill of Rights.
31. While the development of the electoral method for the formation of the Legislative Council towards universal suffrage is to be achieved within the framework prescribed in the Basic Law, the method to be devised and implemented within that framework must be fully in line with Article 25(b) and Article 21 and should not contain any discriminatory distinction or unreasonable restriction and must ensure to every permanent resident of the HKSAR the right and opportunity to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage, guaranteeing the free expression of the will of electors.
32. Apart from the observations already stated in this Submission, it is instructive to note in addition what the Human Rights Committee indicated in its General Comment No 25/57 (12 July 1996):

“The principle of one man, 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 the 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.”

33. The implications of Article 25(b) of the ICCPR and Article 21 of the Bill of Rights to the electoral method for selecting the Chief Executive for appointment by the Central People's Government are:
- (1) All electors in the HKSAR must have the right and opportunity to vote and be elected in a Legislative Council election.
 - (2) The electoral method to return members of the Legislative Council (including the nomination process and the voting process) must ensure that every elector in the HKSAR has an equal opportunity to participate in the electoral process.
 - (3) The elections to return members of the Legislative Council must be periodic, which favours the holding of a process of affirmative voting in the case where at the end of the process of nomination, only one candidate is nominated.
 - (4) The prohibition of unreasonable restrictions to the right to vote and to be elected entails a proportionality test. Such a test is exacting so that in so far as the 20% proportion of members of the Legislative Council who are permanent residents of the HKSAR but permitted not to be of Chinese nationality or to have right of abode in foreign countries (as provided for under Article 67 of the Basic Law) is concerned, development of the political system in the HKSAR should take care in ensuring that the said permission is provided for at the full extent in any change in the composition of the Legislative Council. Thus if the composition of the Legislative Council is to be expanded to more than 60 members, the arrangement allowing HKSAR permanent residents who are not Chinese nationality or who have the right of abode in foreign countries to stand in Legislative Council elections for 12 seats should be changed proportionately.

Functional Constituencies

34. Functional constituencies as existed since 1985 “traditionally” are “trade-based”. They have an electorate defined by reference to qualifications, membership of a trade-related association or chamber. Some functional constituencies grant the franchise to corporate entities, which vote by authorized representatives.
35. The District Council functional constituency and the Heung Yee Kuk functional constituency, on the other hand, are not “trade-based”.
36. Neither form of functional constituencies fully complies with Article 25(b) of the ICCPR and Art 21 of the Bill of Rights and the principles of universality and equality. (The HKBA notes that this is properly accepted on behalf of the HKSAR Government.)
37. The same observation applies to granting the franchise to corporate entities; the failure to comply is not mitigated by replacing corporate voting by an authorized representative with voting by directors / executives / member associations / individual members.
38. The HKBA urges the Government of the HKSAR to include, when putting forward proposals for development of the political system of the HKSAR, proposals that would eventually lead to the total abolition of functional constituencies in both forms and demonstrate its commitment towards development an electoral system that is in compliance with Art 25(b) of the ICCPR and Article 21 of the Bill of Rights.

District Council Functional Constituency

39. In addition to the question of compatibility with Article 25(b) of the ICCPR and Article 21 of the Bill of Rights that is inherent in the functional constituency consisting only of elected members of District Councils, expanding the number of seats allocated to this functional constituency not only exacerbates the issue of inequality of voting power but also begins to transform District Councils from being “district organizations which are not organs of political power ... to be consulted by the government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation”, the specifications under Article 97 of the Basic Law that underline the constitutional position of the District Councils.

Dated 5th February 2010

Hong Kong Bar Association