

**Re: Green Paper on Constitutional Development**  
**SUBMISSION OF THE HONG KONG BAR ASSOCIATION**

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1. In July 2007, the HKSAR Government published the Green Paper on Constitutional Development ("Green Paper"). The constitutional development discussed in the Green Paper no doubt involves political, legal and various other issues. However, as a professional and apolitical body, the HKBA will and do confine its following submission to the legal issues arising from the Green Paper.

2. Paragraphs 2.18 to 2.20 of the Green Paper read as follows:–

'2.18 Article 39 of the Basic Law provides that the provisions of the International Covenant on Civil and Political Rights ("the Covenant") as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

2.19 Article 25 of the Covenant stipulates 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,”.

2.20 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 (sic) 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.’

3. The HKBA recognizes that the HKSAR’s constitutional development towards universal suffrage is to be achieved within the framework prescribed in the Basic Law. However, the way in which paragraph 2.20 of the Green Paper deals with the reservation made under paragraph (b) of Article 25 of the International Covenant on Civil and Political Rights (referred to below either as “the Covenant” or “ICCPR”) causes concern.

#### **Reservation to Article 25(b): The Legal Analysis**

4. The reservation mentioned in paragraph 2.20 of the Green Paper is in the following terms:

“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.”

5. Upon the resumption of sovereignty, the Central People's Government sought to apply to the HKSAR the same reservation the United Kingdom Government applied to Hong Kong. Paragraph II of the Central People's Government's notification of 20 June 1997 reads as follows:

“The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997”

(accessed from the *Hong Kong Treaty Project*, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, at <http://www.hku.hk/ccpl>, confirming that paragraph 2.20 of the Green Paper is incorrect in its reference to the date of the Central People's Government's notification).

6. The same reservation was reproduced as section 13 of the Hong Kong Bill of Rights Ordinance (Cap 383), which provides that Article 21 of the Hong Kong Bill of Rights Ordinance does not require the establishment of an elected Executive or Legislative Council in Hong Kong. The meaning of section 13 was considered by Keith J. in *Lee Miu Ling v Attorney General (No 2)* (1995) 5 HKPLR 181. Although section 13 did not require the establishment of an elected legislature, Keith J. pointed out (at pp. 197-198) that 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”.

7. The United Nations Human Rights Committee, the treaty body overseeing the implementation of the ICCPR by its State parties, observed in November 1995 as follows:

“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.”

8. The Human Rights Committee reiterated the same view in 1999 and in March 2006.
9. Professor Yash Ghai has considered the reservation, along with other reservations, entered by the United Kingdom in respect of the ICCPR. Professor Ghai noted that although British policy did change in some respects (and the development of representative government beginning in 1984 was referred to), no formal changes in the reservations were made. More importantly, a formal change was not strictly necessary for reversion to full implementation of the ICCPR provisions (the reservations being permissive rather than obligatory). 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.

10. Although the reservation to paragraph (b) of Article 25 of the ICCPR and section 13 of the Hong Kong Bill of Rights Ordinance both refer to the Executive Council, neither of them has any application to the electoral arrangement concerning the Chief Executive of the HKSAR. Looking at provisions such as Articles 54 to 56 of the Basic Law, it is clear that the Executive Council is an institution distinct from the Chief Executive. In particular, although the Chief Executive presides over the Executive Council, he is not a member thereof. In other words, neither the reservation to paragraph (b) of Article 25 nor section 13 of the Hong Kong Bill of Rights Ordinance provides any justification for not applying paragraph (b) of Article 25 to the electoral arrangements for the selection of the Chief Executive.

### **Conclusion**

11. The HKBA urges the HKSAR Government to devise and implement, within the constitutional framework laid down in the Basic Law, a method for the selection of the Chief Executive by election and a method for forming the Legislative Council that are fully in line with Article 25 of ICCPR. In both cases, the method to be devised should not contain any discriminatory

distinctions or unreasonable restrictions and must ensure to every 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.

Hong Kong Bar Association  
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