

Constitutional Reform and the Rule of Law in Hong Kong

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Isabel Hilton

Welcome to Chatham House. I know that events in Hong Kong, as they have unfolded over recent months, have been of great concern (particularly here in London, I think). We are delighted to be able to welcome today our speaker, Mr Rimsky Yuen, who is pretty much in the hot seat of the constitutional argument in Hong Kong. I notice you're listed as secretary, as one of Hong Kong's three top officials. The *South China Morning Post* published a helpful popularity rating the other day in which, you may know, you score 47 per cent, which is below Carrie Lam, who's on 56.3, but it is nearly 7 points above C.Y. Leung. So maybe he should be taking tips from you, I'm sure.

Our speaker will talk to us about constitutional reform and then we will have a Q&A session. So without further ado – by the way, sorry, my name is Isabel Hilton. I'm the CEO and founder of Chinadialogue and it is my pleasure to be chairing this event. Without further ado, Mr Secretary, please, the lectern is yours.

Rimsky Yuen

Thank you. Ms Hilton, distinguished guests, ladies and gentlemen: thank you for attending this event and thank you for giving me this chance to address this distinguished audience. Today I intend to deal with two areas: namely, the rule of law and constitutional reform in Hong Kong. Each of these two areas involves numerous issues which merit separate discussions. In the limited time available, I will seek to highlight certain key aspects so as to give you a snapshot of the fundamental issues involved.

Let me begin with the rule of law. As the secretary for justice, the single most important duty is to maintain the rule of law in Hong Kong. Recently I noticed in media reports and other materials that there are concerns or queries raised as to the state of the rule of law in Hong Kong. One recent example is the news release issued by the Fraser Institute on 7 October. While Hong Kong maintains her position as the number one jurisdiction in terms of economic freedom, the news release suggested that Hong Kong's status is 'threatened by encroaching mainland Chinese influence in Hong Kong's legal system and attempts to impose government control on judges and their decisions, potentially turning the rule of law into a political instrument'.

With respect, I do not think this observation made by the Fraser Institute or similar queries recently made in other contexts are justified. As the secretary for justice, I believe it is my duty to defend Hong Kong and now I am so glad I have this chance to speak to you. Put shortly, the observations and queries that I mentioned earlier are no more than mistaken perceptions, or bare assertions devoid of supporting evidence. If one looks at the objective evidence, one will arrive at a very different conclusion. Among others, I would invite you to consider three pieces of objective evidence.

First, the composition of our court of final appeal is definitely worth noting. I briefly discussed this aspect on another occasion yesterday, but at the risk of being repetitive do allow me to reiterate the key message. Articles 2 and 19 of our Basic Law, which as you know is our quasi-constitution, provide that Hong Kong enjoys independent judicial power, including that of final adjudication. By reason of Article 82 of our Basic Law, such power of final adjudication is vested in the court of final appeal, which has taken the role of the Judicial Committee of the Privy Council and has since acted as the final appellate court of Hong Kong.

One important aspect to note is that Article 82 permits the invitation of judges from other common law jurisdictions to sit on the court of final appeal. Since the establishment of the court of final appeal in 1997, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit in our court of final appeal. Final appeals of all types of cases, including those raising important constitutional issues or concerning important government policies, were and still are being heard by a panel of five judges, which invariably includes one overseas judge. At the moment we are privileged to have a total of 12 such overseas judges who sit at our court of final appeal from time to time. They include Sir Anthony Mason, Lord Neuberger, Lord Hoffmann, Lord Millett, Lord Walker, Lord Collins, Lord Phillips and Lord Clarke.

One asks these questions: would these eminent judges be willing to sit in our court of final appeal if they do not enjoy judicial independence? Would these eminent judges remain silent if they felt any form of interference in the discharge of their judicial duties? The answer is more than obvious. The fact that Hong Kong can continue to enjoy and attract such eminent overseas judges to sit in our court of final appeal is a strong testimony to the state of judicial independence and the rule of law in Hong Kong.

Second, observations made by judges and those whose independence can hardly be questioned can also illustrate the judicial independence in Hong Kong. I believe many of you would be aware of the speech delivered by Lord Neuberger in Hong Kong on 26 August, and I do not think I need to repeat its contents. Let me perhaps quote from a speech made by Mr Justice Patrick Chan, a former permanent judge of the court of final appeal who has served under four chief justices (including the current one), which was delivered at his farewell sitting in October last year. Mr Justice Chan said as follows: ‘There is one thing I wanted to say for a long time to those who still perceive any doubt about the independence of our judiciary. Since 1995, I have been involved in the selection of judges, either as a member of the Judicial Service Commission or the Judicial Officers Recommendation Commission or the Judiciary’s Internal Selection Committee. I can bear witness to the fact that there has never been any interference from any quarter or any person in the appointment of judges. All my colleagues were appointed on their own merits’.

One other relevant speech is the one delivered by the current chairman of the Hong Kong Bar Association on 17 May this year. This speech merits quoting at some length, and the relevant parts read as follows:

‘We often hear that the rule of law and an independent judiciary is what marks Hong Kong out in the region uniquely. To many people, it simply means that Hong Kong people generally obey the law and do not [indiscernible] and they do not beat people up lightly when they do not get what they want. But some people do not actually know that it means something more. In particular, some people from within and outside Hong Kong actually think that when it comes to important cases, judges and courts are or can be subject to unspoken inferences or pressure of business interests or the powers that be. Bernard Chan, a member of the Executive Council, wrote in the *South China Morning Post* last December about examples where American businessmen or lawyers did not want to use Hong Kong as a venue for dispute resolution for fear of outside influence. I have friends, locally born and bred and educated overseas, who think in the same way and who have asked me whether things are done that way. The truth, as we know, is that this view is completely and utterly groundless. The Hong Kong judiciary has a longstanding history and tradition of independence. Not one iota of evidence or proof from actual cases has or could be produced, even anecdotally, in support of this view. Justice is administered openly and publicly and judgments are openly available for public scrutiny. It is hard to see how such misconceived notions could even begin to be spread. It could possibly be spread by overseas rivals for the legal services or dispute resolution services market, or it may be because it would suit the political agenda of scaremongers to portray the Hong Kong judiciary as gradually turning red or looking up north’.

Third, the situation concerning judicial review applications and legal aid in Hong Kong is also relevant. It is an important principle of the rule of law that government should not be above the law and all government action must be within the parameters of the law. In common law jurisdictions, including Hong Kong, judicial review is one of the robust means to ensure that this principle is upheld. On the other hand, legal aid is important to facilitate access to justice, which is another important aspect in the rule of law. In Hong Kong, we have a healthy legal aid system, in that in appropriate circumstances, applicants for judicial review would be granted legal aid so that they would be in a position to challenge administrative action or government policy with funding provided by the government. As far as I know, not too many jurisdictions have such or similar arrangements.

A few figures may perhaps help to illustrate the position. In 2012, there were a total of 161 applications for leave to apply for judicial review, and leave was granted in 63 such applications. In the same year, the applicants in 92 judicial review applications were provided with legal aid. In 2013, there were a total of 182 applications for leave to apply for judicial review, and leave was granted in 38 such leave applications. Besides, the applicants in 119 judicial review applications were granted legal aid.

The advance of technology helps to disseminate information but it also facilitates the building up of perceptions which may not always be justified. I hope the three pieces of objective evidence that I have just highlighted would be helpful in clearing up any mistaken perceptions that the rule of law or judicial independence in Hong Kong is subject to erosion.

The Hong Kong SAR government fully appreciates the fundamental importance of the rule of law and judicial independence. It is the cornerstone of Hong Kong's success. We will continue to make every effort to protect and uphold the rule of law and to ensure judicial independence, as it is not in anyone's interest to do otherwise.

Let me move on to the constitutional development in Hong Kong, with a focus on the selection of the chief executive (which I shall call in short form 'CE') of the Hong Kong SAR by the method of universal suffrage. Admittedly, the matter has given rise to hugely divergent views among different sectors of the Hong Kong community. One of the core issues is the nomination of candidates for the office of CE. This is, no doubt, an important issue, since it relates directly to the question of whether the people of Hong Kong will have genuine choice of candidates for the CE office – a question which has generated much debate in Hong Kong.

Genuine choice is, of course, important. However, like any other constitutional issues, the question of genuine choice should be considered in the proper legal and constitutional context of the Hong Kong SAR. This is of paramount importance in the context of Hong Kong, since her status as a special administrative region of the People's Republic China, which is a result of the 'one country, two systems' policy, is unique and unprecedented in the history of constitutionalism as well as in the history of democratic elections. In one sense, the implementation of universal suffrage for the selection of CE in Hong Kong is uncharted territory, since no other design of democracy in other sovereign states can be said to be directly applicable, as they do not operate under the 'one country, two systems' policy. [indiscernible] thus, it is essential that we have a proper understanding of the CE office as well as the role of the Central People's Government (CPG) of China.

In this regard, the provisions in the Basic Law, and the relevant interpretations and decisions made by the National People's Congress Standing Committee (NPCSC), are highly pertinent. Article 15 of the Basic Law provides that the CPG shall appoint the CE and the principal officials of the executive authorities of the Hong Kong SAR, in accordance with the provisions of Chapter 4 of the Basic Law.

Chapter 4 is the chapter in the Basic Law which deals with the political structure of the Hong Kong SAR. The most relevant provisions for the present purposes are Articles 43, 45 and 48. Article 43 stipulates that the CE, as the head of the Hong Kong SAR, is accountable to both the CPG and the Hong Kong SAR. Article 45, which is the most pertinent provision concerning the selection of the CE, provides as follows: 'The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally, and be appointed by the Central People's Government. The method for selecting the chief executive shall be specified in the light of the actual situation in Hong Kong 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. The specific method for selecting the chief executive is prescribed in Annex 1: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'.

Annex 1, as it now stands, provides that the CE shall be elected by a broadly representative election committee comprising a total of 1,200 members from four sectors (that is to say, 300 members from each sector). Paragraph 7 of Annex 1, which is also highly pertinent, provides as follows: 'If there is a need to amend the method for selecting the chief executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the chief executive. They shall be reported to the Standing Committee of the National People's Congress for approval'. If I may stress, it is 'for approval', not 'for the record'.

Article 48, on the other hand, deals with the powers and functions of the CE. One can see from the various provisions in Article 48 that the powers and functions of the CE are very wide and extensive. Based on the provisions of the Basic Law, the NPCSC has previously dealt with the issue of universal suffrage by, firstly, an interpretation made on 6 April 2004; a decision made on 26 April of the same year; and a further decision made on 29 December 2007.

Put shortly, the effect is that amendments to the method concerning the selection of the CE have to go through a five-step process. First, the CE has to make a report to the NPCSC, so as to invite the NPCSC to decide whether it is necessary to amend the method of selection of the CE. The NPCSC to make a determination on whether such amendment should be made, and then thirdly, if the NPCSC determines that the amendment may be made, the Hong Kong SAR government is to introduce to the Legislative Council (LegCo) a resolution on the proposed amendments, to be passed by a two-thirds majority of all members. Fourth, the CE to consent to the resolution as passed by LegCo. Fifth and finally, the CE to lodge the relevant bills to the NPCSC for approval. So again, it's for approval and not just for the record.

From this brief survey of the relevant constitutional regime, it is clear that the CPG has a substantive, as opposed to nominal, role to play in the constitutional development of the Hong Kong SAR. Not only does the NPCSC have the power to decide whether to approve the bill for amending Annex 1 to the Basic Law, which sets out the method for selecting the CE, the CE-elect has to be appointed by the CPG. This power of appointment is a substantive one. This is because Hong Kong is not a sovereign or independent state. Instead, it is a special administrative region of the PRC. Besides, as we have seen, the CE has to be accountable to both the CPG and the Hong Kong SAR.

It is equally clear that the future system of universal suffrage concerning the selection of the CE does not only include the element of election by eligible voters. There is also the equally important element of appointment by the CPG. As noted above, Article 45 of the Basic Law provides that any CE-elect shall be

appointed by the CPG and that this power of appointment is a substantive one. In other words, the CPG may either appoint the CE-elect or, in appropriate circumstances, decline to make such an appointment.

Taking into account all these matters, the future system for selecting the CE by way of universal suffrage has to satisfy two objectives. On the one hand, the system shall be designed in such a way as to allow the people of Hong Kong a genuine choice of suitable CE candidates. At the same time, the selection system shall also be designed in such a way as to effectively avoid the scenario where the CPG might decline to appoint the CE-elect for good reasons. From the constitutional and political perspective, the need to satisfy these two objectives in an appropriate and effective manner is most important. Any failure to properly acknowledge and address this fundamental issue might, as I said yesterday on another occasion, turn the future system for selecting CE by way of universal suffrage into a recipe for constitutional crisis.

One can broadly group the stakeholders involved in Hong Kong's constitutional development into four groups. First, the people of Hong Kong, whose support and participation are necessary before any constitutional development can be meaningful. Second, the Hong Kong SAR government. Third, the LegCo members, as they have the right to vote for or against any proposed amendment to Annex 1 of the Basic Law. Fourth, the CPG, which has both the constitutional right and responsibilities to be involved in the constitutional development.

One thing is clear: it is the common aspiration of all these four groups of stakeholders to attain universal suffrage for the selection of the CE in 2017. The difficult question we now face is how to address the divergent views within the community and foster the requisite consensus so that we can devise a selection system which can strike the right balance and properly address the two objectives that I mentioned earlier, and so they move forward in the best interests in Hong Kong.

On 31 August, NPCSC made a decision which states that starting from 2017, the selection of the CE may be implemented by universal suffrage. In addition, it contains stipulations concerning the design of our future election system. Among others, it states that a broadly representative nominating committee shall be formed, and that stipulations for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the election committee for the fourth CE. Besides, it also provides that the nominating committee shall nominate two to three – and if I may stress: not two, not three, but two to three, nor can it be one, because it has to be two to three – candidates for the office of CE, in accordance with democratic procedures, and that each candidate must have the endorsement of more than half of all the members of the nominating committee.

The road ahead is for the Hong Kong SAR government to conduct another round of consultation on the basis of the recent NPCSC decision, so as to enable the Hong Kong SAR government to consider and hammer out the further details of the selection system. Contrary to some suggestions expressed in the community, there remains plenty of room for consultation and discussions. By way of example, the expression 'democratic procedures', which are the procedures to be adopted by the nominating committee, will be one of the important issues that the people of Hong Kong will need to discuss and deliberate.

After the details are discussed, there remains the need to translate the details into local legislation. The timetable is tight but the Hong Kong SAR government will make its best endeavours to take forward the constitutional development. When universal suffrage is put in place, it is estimated that around 5 million voters will be entitled to take part in the selection of the CE. Viewed from any angle, the election of the CE by 'one person, one vote' will necessarily be a step forward and will certainly be a system more democratic

than the current system of the election of the CE by the election committee. Besides, the election of the CE in 2017 by universal suffrage is just the first step. Paragraph 7 of Annex 1 to the Basic Law and the five-step process mentioned earlier provide the legal avenue for future refinement of the system when sufficient support from the community exists.

Ladies and gentlemen, we believe we owe it to the people of Hong Kong, including her future generations, to move forward in the constitutional development of Hong Kong. Hong Kong has in the past survived difficult challenges. It is true that constitutional development presents Hong Kong people with daunting challenges but we believe Hong Kong people will have the wisdom and courage to tackle them and take the correct stride forward. Thank you very much.

Isabel Hilton

Thank you very much, Mr Secretary. I have to say, I think we would all agree that Hong Kong is facing some delicate moments.