

Constitutional Reform and the Problem of Consent

By Ian Scott

The pace of constitutional reform has been the central issue facing Hong Kong for the past 20 years. It is likely to remain its most contentious and pervasive problem during the course of the Chief Executive's next term. At stake is the critical question of how a government that is essentially appointed obtains public consent for its actions and thereby legitimates its use of power.

The post-1997 government has implicitly sought to justify its rule on the basis of its performance, a strategy that was used with some success by its colonial predecessor. But a series of deficit budgets (until recently) and increasingly militant civil society groups have made it difficult to introduce the kinds of policies which would generate broader support. New policy proposals have often been successfully challenged by coalitions of pressure groups, resulting in expensive delays or in the abandonment of the original programs. These frequent policy defeats have been as detrimental to the government's credibility as they have been important in increasing the confidence, status and strength of groups that are effectively excluded from the decision-making process. The standoff between government and civil society has intensified the need to find a constitutional consensus that could satisfy both the many opponents of the present system and those who seek to maintain the status quo.

The problem of consent stretches back to the 1984 agreement between Britain and China on the transfer of power. Neither that agreement nor the Basic Law, which serves as Hong Kong's constitution, was approved by a ballot or a referendum; they were simply imposed after minimal consultation. Because the two governments could not agree on the post-1997 political system, the composition of the Legislative Council and the pace of constitutional change were deliberately left vague. The 1984 agreement simply states that the Chief Executive may be "selected by election" and the legislature shall be "constituted by elections" but gives no details about how this might be done.

The Basic Law is a little more helpful. Articles 45 and 68 provide that the ultimate aim is to introduce universal suffrage for the election of both the Chief Executive and the Legislative Council. The Chief Executive is

presently elected by 800 carefully-chosen delegates although there is qualified room for expanding their number. The Basic Law also provided a timetable for the development of the Legislative Council until 2004, providing for slow progress towards a more directly-elected legislature and the prospect of more rapid development for the 2007 Chief Executive election and the 2008 Legislative Council elections.

The composition of Hong Kong's Legislative Council (Legco) is a curious mixture of 30 seats directly elected under a list proportional representation system and 30 functional constituency seats, which often have very small electorates and which in theory should disappear if universal suffrage is ever introduced. The system is designed to minimize the influence of the democrats who have consistently received over 60% of the vote in the directly-elected seats but have never had a majority in the full Legco. The number of more politically-conservative delegates elected by the proportional system combined with conservative and pro-Beijing members elected in the functional constituencies surpasses the number of seats that pro-democrats can win.

In 1995, the last British Governor, Chris Patten, who regarded the functional constituencies as "rotten boroughs", attempted to expand the franchise in those seats. Although his changes were within the terms of the Basic Law, the Chinese government proclaimed the election under the expanded franchise to be invalid and announced that it would introduce a Provisional Legislative Council in 1997. The democrats boycotted the Provisional Council, which they regarded as illegitimate, but they would probably in any event have been excluded from it by Beijing. Hong Kong entered its new incarnation as Special Administrative Region of China with a grossly unrepresentative Legislative Council, passing laws within a constitutional framework that had never been approved by its people.

In the 1998 election, when the pre-Patten rules were re-introduced, voters went to the polls in unprecedented numbers and gave the democrats nearly 66% of the vote in the directly elected constituencies, coupled with a decline of about 5% for the pro-Beijing parties. Although the principal pro-Beijing party, the Democratic Alliance for the Betterment of Hong Kong (DAB), was able to claw back some of its support at the next election, voters were becoming increasingly disenchanted with the performance of their government. The mishandling of the Asian flu epidemic, the chaotic opening of the new airport, public housing corruption scandals and the SARS

outbreak of 2003 were all taken as evidence of government incompetence. The Asian financial crisis and a subsequent economic downturn resulted in budget deficits, high unemployment figures and negative equity for many home owners. Government policies were increasingly unable to provide solutions for mounting problems. The housing targets proposed by the Chief Executive, Tung Chee-hwa, in his first policy address were abandoned. Education policies caused friction with parents and unions. Air quality gradually deteriorated despite government measures designed to improve it. Problems, such as the need to improve labour laws, to strengthen domestic violence laws, to introduce competition laws and to find a solution for the growing cost of health care, remained unresolved. And surrounding all of this was the continuing difficulty of governing a polity in which over 60% of the voting population selected candidates who had fundamental objections to the way in which power was structured and exercised.

The defining event in the increasingly fractious relationship between the government and civil society occurred on July 1, 2003 when an estimated 500,000 citizens took to the streets to protest against the government's attempt to legislate new security legislation under Article 23 of the Basic Law. The proposals were widely perceived to violate civil liberties, but the demonstration was probably also a reflection of the government's inability to address the mounting array of policy problems. Performance as the means of legitimating government action depends on the implicit consent of society to allow the introduction of new policies in the first instance. After July, 2003, the government could never again be certain that its citizens would not take to the streets in similar numbers. Policies that had the potential to cause unrest were shelved; the government clearly felt that it could not afford to alienate even more of its citizens.

There has been little subsequent progress in resolving the problem of consent. Under the Basic Law, the arrangements for the Chief Executive election of 2007 and the Legislative Council elections of 2008 were to be reviewed to see if there was any prospect of a faster pace towards universal suffrage. But any chance this might happen was quickly dampened by the Chinese and Hong Kong governments. A Basic Law drafter was reported to have said that he did not expect to see universal suffrage introduced until 2030 or 2040, while another leading former official labelled the democrats as "dangerous elements" who were puppets of the British government. When the official announcement rejecting any changes to the status quo was finally made, the prospect of introducing universal suffrage was so hedged by

qualifications and conditions that 2030 began to look like a comparatively liberal target.

According to the Constitutional Task Force set up to examine the issue, universal suffrage could not be achieved unless a range of economic, social, and political factors were taken into account. These included the views of the Chinese government and its powers of appointment; recognition of the need to maintain the disproportionate representation of business and professional groups; the need for more “maturity of political talent and political groups”; the strengthening of “executive-led” government through constitutional reform; and the condition that reform measures should not adversely affect the economy, monetary affairs or public finances. Predictably, in protest, there was a large demonstration in favour of universal suffrage in July, 2004.

The Legco elections of September, 2004 were marred by smear campaigns and a number of well-documented instances of attempted intimidation. The vote reflected increasing polarisation on the issue of constitutional reform; nearly 98% of the votes were cast for candidates whose position on universal suffrage could be easily identified, compared with 93% and 95% in the 2000 and 1998 elections respectively. There was also further evidence that some of the functional constituencies had turned into little more than personal fiefdoms. Eleven candidates in functional constituencies with electorates of less than 2000 were returned unopposed. If the 2004 election did nothing to resolve the constitutional issue, neither did the resignation of the lame duck Chief Executive, Tung Chee Hwa, in the following March. His successor, Donald Tsang Kam-yuen, did suggest marginal changes to the Legislative Council and to the Chief Executive’s electoral committee in December 2006. But the proposals were rejected by the democrats on the Council who had sufficient seats to block constitutional amendments.

Following Tsang’s re-election in 2007, the position of both the Hong Kong and Chinese governments on universal suffrage seemed to soften slightly. Tsang announced that he intended “to resolve completely the question of universal suffrage for the Chief Executive and the legislature”, an issue on which, he said, he had the support of the Chinese government. The level of invective was reduced, and the democrats were urged to compromise for the sake of a consensus. The government line now appeared to be that everyone was some kind of democrat; universal suffrage would be introduced

although, like Saint Augustine praying for chastity, not just yet, perhaps never.

Not all of those who opposed the introduction of universal suffrage took the same line. Ma Lik, the leader of the DAB, argued that Hong Kong should not have universal suffrage until its population was sufficiently “patriotic”, a view which echoed that of some Chinese government officials and which seemed to imply unswerving loyalty to the Chinese government’s position on all issues. He suggested that 2022 might be a suitable date to introduce universal suffrage. Businessmen likewise expressed alarm at the possible early introduction of universal suffrage, raising the perennial spectre of a devastated economy and high taxation should the democrats ever accede to power.

For their part, the democrats, who by now comprise a number of political parties and groups with considerable support from civic organizations, want to see the Chief Executive and the Legislative Council elected by universal suffrage in 2012. Tsang has promised a consultation document that will list three options; the democrats are urging that their proposal should be one of them. If it is not included, it is difficult to see how the problem of consent will be resolved. Even it is included, and is subsequently rejected by the government, the only way forward then would be to have a timetable for the introduction of universal suffrage to which the major parties would subscribe, possibly in 2016, as the former Chief Secretary for Administration, Anson Chan On-sang, has suggested. However, the government has been reluctant to commit to a timetable. Unless it is willing to change its stance on this, it is unlikely the democrats will accept vague promises that universal suffrage will be introduced when the “conditions are ripe”.

Even if the democrats were to obtain their objectives, it is not certain that the problem of consent would be resolved. Hong Kong’s government is not accountable to its legislature or to its people. Even if the legislature were directly elected, its powers would remain relatively weak and the government would remain appointed and not responsible to it. An appointed executive and properly elected legislature might equally result in deadlock. Yet the system as it currently operates is not an effective way of making public policy. While the civil service can be relied upon to carry out routine administration in a generally efficient and economic way, the backlog of unresolved policy problems could soon increase opposition to the regime

from within civil society, making it even more difficult for government to achieve its goals.

Tsang has rightly identified constitutional reform as the major task for his new administration. He has a window of opportunity for trying to achieve the kind of consensus that eluded his predecessors. If he resolves the problem of consent, he will deserve the plaudits of Hong Kong people. But he faces formidable odds from many of his own supporters, who do not want to see universal suffrage introduced under any circumstances, and from the democrats who want nothing less than “one person, one vote”. The window will not remain open for long and, if it shuts, Hong Kong may be faced once more with the kind of policy gridlock that might be just as detrimental to economic development as pro-Beijing loyalists and businessmen believe universal suffrage would be.

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