



Title	Putting the Cat Among the Pigeons: The Politics of the Referendum
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PUTTING THE CAT AMONG THE PIGEONS: THE POLITICS OF THE REFERENDUM

The Parable

The epic story started innocently enough, despite dark allegations of intrigue and conspiracy. On 22 October 2004, when the Panel on Constitutional Affairs (“the Panel”) of the new Legislative Council (LegCo) convened after the general elections, 58 out of the 60 members of the LegCo showed up, breaking all records. Although the Interpretation and subsequent Decision of the Standing Committee of the National People’s Congress (NPCSC) earlier in the year had dampened the movement for constitutional reform and severely restricted the scope of changes for the 2007 executive and 2008 parliamentary elections, the pro-Beijing members were taking no chances. There would undoubtedly be skirmishes on issues of reform, and they did not want to be caught off guard, despite what was seen as a shift towards pro-Beijing parties. The immediate prize was the chair of the Panel under whose authority democrats would be kept on a leash.

Newly-elected legislator Albert Cheng King-hon takes up the story:

“However, after they had elected an ‘acceptable’ chairman in Lui Ming-wah, a member of The Alliance who represents the industrial sector, many of the conservative legislators reverted to their normal mode of operation, and soon left after the meeting started. Some preferred to talk on the phone rather than to listen to the democrats’ arguments, while others attended to their own business. The lack of enthusiasm made it possible for the democrats to propose a motion calling for a referendum to be held on universal franchise.”¹

Conservatives later claimed that the motion was a calculated plot on the part of the democrats to ambush the country. Having been worsted by the NPCSC and rebuffed by the electorate, they were opening a new front. Having no respect for the rule of law, they were defying the sovereign. The sovereign itself accused the democrats of plotting to split the country asunder. No less a person than Lau Nai-keung, a member of the Chinese People’s Consultative Conference, was later to accuse the democrats of a “singular obsession” (but did not share the apocalyptic visions of his friends, telling them that

¹ Albert Cheng King-hon, “Too Pampered To Care?” *South China Morning Post* (hereinafter “SCMP”), 23 Oct 2004.

these democrats had “empty minds” and history would bypass them).² These words conveyed little comfort to the Beijing camp that brought in the legal guardians of the constitution (with a younger colleague in tow) – and local and Mainland political heavies – to do battle with enemies obsessed with a singular obsession.

Albert Cheng, an eyewitness, disagrees with this conspiracy theory. He said: “the father of all evil” was the Secretary for Constitutional Affairs, Stephen Lam Sui-lung. Having elected their chap, “the conservatives” abandoned Lam, no doubt secure in the knowledge that between him and the new chair, democrats would be taken care of. Lam was in the chamber because there was some unfinished business from before the elections on which the Panel wanted a government response – weighty matters like legislation on political parties, extension of anti-graft legislation to the chief executive, review of district councils and the scope of the Electoral Affairs Commission. Albert Cheng continues: “Lam brushed aside all these issues, saying merely that ‘they would be tackled in due course’”. Calling him a “typical arrogant bureaucrat”, Cheng is of the view that Lam’s attitude amounted to dereliction of duty (which he claims that even some government supporters noted).

But worse was yet to come. When questioned on the procedure and timetable of the Task Force on the Constitution, Lam (being one of the three members) was “ambiguous” about how the authorities would actually collect public views. He described what the Task Force had done in the past, which members felt provided an insufficient basis for consultation. Democrats were already feeling that the earlier reports of the Task Force had not adequately taken into account pro-democracy voices, and on the basis of its misleading report, the NPCSC had closed off options for reform. Frustrated by Lam’s stonewalling and worried about a similar misrepresentation this time round, Fernando Cheung Chiu-hung, elected by the social welfare constituency, tabled the “impromptu” motion that a referendum be held on how to revise electoral arrangements for the chief executive and LegCo elections in 2007 and 2008 respectively. Cheng said: “the move was not meant as a challenge to Beijing. Unlike in Taiwan, a referendum in Hong Kong would have nothing to do with prompting independence or quasi-independence”.

The account of the reluctant hero (or the villain) of this story corroborates Cheng’s analysis. Cheung said that the motion was also prompted by Lam’s emphasis (as that of Beijing and the chief executive) that reform

² His *ipsissima verba* have been recorded. See SCMP, 19 Nov 2004.

proposals should be built on “consensus” and consensus-building processes. He said that, judging from the discussion held earlier by the Panel, both the Task Force and members of the Panel agreed that any proposal on electoral change should have the consensus and the support of the community at large. If consensus was the aim, it seemed logical that people should be asked for their views. That, he claims, was the motive behind his motion which reads as follows:

“That, as constitutional reform in the HKSAR should have the consensus and support of the community at large, this Panel requests that the Government should conduct as soon as possible a referendum on the constitutional reform proposals for 2007 and 2008, and such proposals should include direct election by universal suffrage.”³

He later said that he realised that the referendum would not be legally binding as there was no law on the matter. His was to be a consultative referendum as “the best means to gauge the views of the public”⁴ and to assist in developing a consensus and moving the reform process forward. In face of criticism by Beijing and its Hong Kong supporters, Cheung said he would consider replacing the word referendum with “public opinion poll” as his interest was in seeking public views to help consensus. He appears to have failed in his effort to convince Beijing and Tung Chee-hwa of his bona fides and only intensified their attacks on him and the democrats. Li Gang, deputy director of the Central Government’s Liaison Office, said that supporters of the referendum were “playing with fire” and “will get burned”.⁵ Tung called it irrelevant, inappropriate and unconstitutional.

However, on that fateful day when the motion was introduced, the newly-recruited chair of the Panel found himself beleaguered, attracting accusations of both incompetence and dishonesty. He was criticised for delaying tactics until the deserting conservatives had been shepherded back into the chamber, by which time it was too late to hold a vote. There was no vote even during the following meeting of the Panel (due to prolixity of the debate) and it was not until 29 November 2004 that a vote was taken. By this time, China had made abundantly clear its opposition to any form of referendum and the anti-democracy forces had been marshalled, defeating the motion by 31 votes to

³ Allegations that the decision to move the motion was premeditated are scarcely borne out by the fact that Cheung had no written version of the motion and formulated it during his speech, in the Chinese language. There ensued a discussion whether an oral motion could be debated and voted on, while the staff of the Panel hastily prepared a written text (see the record of the proceedings of the Panel, 20 Oct 2004).

⁴ See SCMP, 16 Nov 2004.

⁵ *Ibid.*, 18 Nov 2004.

20 votes. Cheung declared his intention to organise an unofficial referendum but he was cautioned by several democrats to be careful.

Interpreting the Parable

This “debate” is typical of previous constitutional “debates” in Hong Kong. The issues and the legal concepts are seldom defined clearly, much less explored seriously. There are assertions rather than arguments, providing little engagement on the issues. Beijing intervenes at an early stage; this is a signal to its supporters in Hong Kong who, like sycophants, join the fray. Positions are very quickly polarised and polemicised – henceforth there is no scope for or interest in examining the grey areas. The wishes of the Central Authorities are read into vague formulations of the Basic Law or NPCSC interpretations. At some stage Mainland academics close to the Central Authorities, known as “guardians” of the Basic Law, are wheeled out to say that this or that is inconsistent with the Basic Law. They seldom provide substantive arguments. Nor does the NPCSC, but its interpretations and decisions serve as *deus ex machina*. Sovereignty raises its head – the Hong Kong government treats this as the trump card. The government’s arguments are a hotchpotch, some law, some policy, threats, pronouncements of the oracle, moralising, invocations of sovereignty – meaningless in the end (*vide* Tung’s criticism of the proposal as “inappropriate, inconsistent with established legal procedures, impractical and misleading the public”, “creating divisions within the community and harming relations with the Mainland” – a sort of rolled up plea). Even before this happens, we have travelled far from the Basic Law. The focus shifts rapidly from the morals or rights and wrongs of arguments to the dangers of offending the sovereign. We are told that we can avoid dire punishments only by placating the sovereign. Like children, Hong Kong people are told that, by asking for too much, they stand to lose what little Beijing might be disposed to throw their way. They are urged to be reasonable, at least realistic. The end is predictable. It is infinitely depressing.

Terminological Confusion

There was considerable confusion as to the kind of referendum that was proposed and its consequences. To be fair, this was no fault of Cheung who repeatedly explained the scope and consequences of his proposal. Many preferred – for their own reasons – to see in it more than he claimed, or more than was possible given the lack of a legal framework for referendums. In this way they expected to destroy the credibility of the proposal. Qiao Xiaoyang, deputy secretary of the NPCSC, said the concept of referendum has a “special meaning” (implying law-making, for he wanted to present

the proposal as a challenge to Beijing). Professor Xiao Weiyun, a “legal guardian” dismissed the whole idea of a non-binding referendum.⁶ Lau Nai-king said the referendum was against the rule of law since the NPC had made a binding decision against universal franchise.⁷ Senior Counsel Ronny Tong said he would have supported the referendum if it did not carry legal weight.⁸ A curious leader on 3 November 2004 attacked the referendum but supported a plebiscite when in fact there is no difference in law between the two – both can be binding or advisory. It seems to assume that a plebiscite is approval or rejection of a decision, for it said that “a process that accurately assesses public support for the government’s final proposal is indeed needed” – which is exactly what a referendum can also do.

Frank Ching (an intelligent and usually well-informed commentator) defined a referendum as “the submission of a law, proposed or already in effect, to a direct vote of the people”, and for that reason opposed the proposal as it could not be that. Professor Xiao’s views that nowhere could a referendum be held otherwise than by a government, or be advisory, were wrong as a matter of comparative law – not an infrequent failing of the “guardians”. Dr Kwok Ka-ki, representing the medical constituency, said that a referendum had a special meaning in constitutional law – which the law in Hong Kong did not provide for and which was different from a referendum conducted at community-level.⁹ Not for the first time, Cheung acknowledged the absence of a law and explained his was to be consultative referendum (which presumably did not require a law).

In fact the referendum can take many forms and can perform a number of functions. It can seek public opinion in order to assist the government or parliament to make a decision. Or it can be part of decision-making – and its results dispositive of an issue. It can come before or after a decision or legislation on which the public is to be consulted. In the UK, whose constitutional order is based on parliamentary sovereignty, a referendum can only be used in this way. It has been used extensively in recent years to determine policies both on internal devolution and increasing degrees of integration within the EU. Almost all European states have also used the referendum, either as binding or advisory, to negotiate their relationship to the EU.

Sometimes the referendum is compulsory and sometimes optional. Some changes in law, and more frequently in constitutions, can only be made after

⁶ He said: “If you look around the world, holding referendums are acts of the governments. There is no such thing as a non-governmental referendum or a referendum with no legal binding force.” See SCMP, 18 Nov 2004.

⁷ See SCMP, 5 Oct 2004.

⁸ *Ibid.*, 26 Oct 2004.

⁹ *Ibid.*, 15 Nov 2004.

a referendum. Usually the decision to have a referendum is made by the government or parliament, but it can also be made by the people – if, for example, a sufficient number of them file a petition that a measure adopted by the government be referred to voters. Ordinary people can also sometimes ask that proposals for new laws or amendments be put to a referendum, and if a sufficient number sign the petition, it has to be held – this is a form of direct law-making. There are examples of referendums being organised by the people directly without approval or participation of the government – as a means of putting pressure on state or international authorities. Referendums played a critical role in the implosion of the former Yugoslavia and the emergence of the new political order in the Balkans – as indeed they did in the new Russian Federation. Quebecois have defied Ottawa in holding referendums in determining their future relationship with Canada (and have received the imprimatur of the Supreme Court). Considering all these possibilities, Cheung's aims were quite modest.

Debating Pros and Cons of the Proposal: The Supporters

But implicit in his proposal was a theory of direct representation. Almost all contemporary democracies are representative democracies – executive and legislative decisions are made by persons chosen by the people to represent them. There are those who, disillusioned by the compromises and betrayals by chosen representatives, advocate forms of direct democracy – and want to use all the above types of referendum. The Hong Kong debate not only showed the general ignorance among the public, politicians and commentators, of the range and specificity of referendums, but also was singularly lacking in any debate on the relative merits of indirect (representative) and direct democracy. There is a fairly large literature on this subject, central to the development of political and constitutional theory, which canvasses the strengths, weaknesses and tendencies of both types. In general, governments and politicians do not like the referendum except when it lets them off the hook of making difficult, unpopular decisions – referendums qualify their own powers, and may trigger off a sequence of claims and events which may not suit them. Referendums are empowering of the people and turn them from passive to active subjects of politics, but they are also problematic, not so good for consensus building, and give considerable scope to prejudices. A referendum, whatever its legal nature, can have consequences for attitudes, empowerment, and for shaping aspirations. None of these elements entered the Hong Kong debate.

No one, least of all the government of the People's Republic of China, wanted to be seen to be denigrating the wisdom of the people. For both Beijing and Tung's administration, exploring the implications of referendum would have been both uncomfortable and inconvenient. The Chinese Constitution

does not even have representative democracy, and the Basic Law only partially so (the current method for nomination of candidates for the chief executive, even if elections were direct, would fatally weaken the claim of representation). Better to stay away from the murky, indeed dangerous, waters of democratic political theory (more on this later). Why more was not made of this by the democrats, despite the constraints of the Basic Law and the NPCSC interpretations, remains intriguing.

The case for the democrats was based on the inadequacy of public consultations by the Task Force. Its reports had failed to indicate accurately the depth of public support for universal franchise; instead it had given the impression that the public was deeply divided on this issue (its style was to state: "some people said this, some said that" without any quantitative analysis). Some felt that it was on the basis of its misleading reports, that the Standing Committee had made its restrictive ruling. A referendum would correct this error and provide the basis for a re-consideration. Lam had indeed asserted that the Standing Committee had taken public views into account, but Martin Lee wondered, if this was the case, why did the Committee not state this in its Decision.¹⁰ The relevance of public opinion was not otherwise sufficiently canvassed. The criteria for deciding on constitutional reform that the chief executive submitted to the NPC and which it accepted, attach no special importance to public opinion. Yet who is then to decide on the impact of other, seemingly more objective, criteria? Tung's statement is, to say the least, ambiguous on this – on which more later.

The strongest support came from the Human Rights Front and the Catholic Church. The convenor of the Front, Chung Chung-fai said:

"The community has no way to express its demands after exhausting all means, including demonstrations, signature campaigns and petitions. The government has not responded to the public demand, and a referendum is the only way".

Bishop Zen of the Catholic Church said that Beijing should not be afraid of the people. "Everything should start with the people. There is no way the people are not involved in the process." The call for a referendum was a reaction to lack of democracy and frustration at the disregard of popular opinion.

Not all democrats supported the referendum proposal – although none of them opposed universal suffrage or the importance of public opinion. They were no doubt influenced by the fact that public opinion had already expressed itself in the recent general elections where 62 per cent of the voters supported parties that were committed to universal franchise. Some thought

¹⁰ *Ibid.*, 30 Nov 2004.

that no referendum could change the decision of the NPCSC and so it was better to focus on long-term strategies. Others may have considered the moment unpropitious when Beijing seemed ready for talks with the democrats. The very, although possibly just apparent, opening offered by Beijing produced a concern with “being realistic and practical”. Others were daunted by consideration of the practical difficulties and expenses of holding a non-official referendum (although Bishop Zen offered the facilities of Catholic schools for polling purposes and other assistance). The Human Rights Front has expressed its support for a non-official referendum, and Leung Kwok-hung (also known as “Long Hair”), has promised to introduce legislative proposals on a referendum. Albert Ho said: “There is a demand for a referendum because many Hong Kong people’s views have been trampled upon”.¹¹

The former Chief Secretary, Anson Chan, a democrat with reservations on the referendum, spoke against it on 25 October 2004, urging people to be realistic and practical, saying that it was more productive to concentrate on when and how universal franchise would be fully introduced. She cautioned that more trust and accommodation was needed on “both sides” to deal with “a clash in culture and values”. Her concern, that the politics of the referendum would detract from the critical questions of timing and substance, were echoed by others. In an op-ed newspaper article,¹² Professor Anthony Cheng Bing-leung, expressing his reservations, emphasised the need to think strategically and prepare responses to the expected proposals of the government:

“makes better sense than engaging in a prolonged but fruitless referendum debate ... The worst scenario would be an informal referendum done in a messy manner that discredits the pro-democracy camp and yet fails to bring us any closer to substantive progress in constitutional reform”.

Frank Ching took a similar position. If a private referendum was held, the only option since Tung had rejected an official one, the cost and the effort would be massive (the postage alone would cost HK\$8.9 million) and the results could be manipulated. He said:

“An elaborate attempt to prove that the electorate still supports universal suffrage in 2007 and 2008 will be interpreted by Beijing as a challenge to its authority. The thing to do now is aim for 2012. And a massive effort to determine if the majority of Hong Kong voters supports such a move is a worthwhile project.”¹³

¹¹ *Ibid.*, 8 Nov 2004.

¹² *Ibid.*, 3 Nov 2004.

¹³ *Ibid.*, 13 Nov 2004.

Three democratic legislators representing functional constituencies withdrew support for the referendum on 14 November 2004 because they considered that Hong Kong people did not understand it (and had not called for it). An SCMP leader on 3 November 2004 called the referendum a “waste of time and money” that would “harden Beijing’s attitude to democracy”. But it faulted the Task Force for underrating democratic aspirations and expressed the need for better ways of gauging public opinion.

Debating Pros and Cons of the Proposal: The Opponents

The Central Authorities and the Tung administration are the principal opponents of the proposal, supported by that loose coalition of parties, groups and individuals who are frequently referred to as “pro-Beijing”. The business community are often a part of this group although of late there are divisions among them, and some have come out in favour of universal franchise. Stephen Lam immediately repudiated the idea of a referendum when it was first proposed by Cheung. Beijing itself was quick to attack it. On 24 October 2004, Beijing formally rejected the proposal. On 2 November 2004, Tung made an uncompromising statement, ruling out even a non-official referendum.¹⁴ Predictably, a chorus of protests followed, intense lobbying of legislators took place and a sufficient number were mobilised to defeat the motion on 29 November 2004.

The principal argument against the referendum is that it is unconstitutional, being against the Basic Law and against the PRC Constitution. No very precise arguments have been advanced. It is said that the referendum would go against the procedure for the amendment of the Basic Law or the electoral provisions set out in the Basic Law. It is also pointed out that the Basic Law does not provide for a referendum of any kind. It has also been argued that as the proposal during the drafting of the Basic Law for a referendum on further constitutional reform was rejected, the Basic Law prohibits it. Gao Siren, director of the Central Government Liaison Office, said: “any attempt at a referendum – no matter how it was carried out or packaged – breached the Basic Law”.

Another constitutional argument is that the referendum would violate the interpretation and decision of the NPCSC, which had outlawed full suffrage for 2007 and 2008 and which the HKSAR had no power to disregard. Tung said that the NPCSC had made its decision “strictly in accordance with legal procedures after consulting various sectors in Hong Kong ... The NPCSC

¹⁴ He said: “The SAR government will neither hold a referendum on universal suffrage nor approve any local (political and social) organization’s plan to encourage citizens to participate in and seek the referendum.” See *China Daily*, 2 Nov 2004.

is the highest organ of state power [actually it is the NPC]. The HKSAR must abide by and implement this decision". He said: "using a referendum to reverse the decision of the NPCSC is against the Basic Law". Professor Xu Chongde said: "it is inappropriate for the lawmakers, who have sworn allegiance to the Basic Law, to push for a referendum after a decision was made by the NPCSC".¹⁵ Others too have referred to the oath of office as imposing an obligation for those who have sworn it not to go against the Basic Law (but presumably this obligation rests on everyone), Professor Wang adding that it was a disrespect to the Basic Law.¹⁶

A frequent criticism is that the proposal to hold the referendum is a "challenge to the Central Authorities". On 15 November 2004, Gao said that the referendum proposal was a "challenge to the country's political and constitutional system. We express grave concern over it". Qiao Xiaoyang said the proposal was a "challenge" to the Central Authorities. Professor Xu said that the essence of the pro-democracy camp's call for a referendum, no matter how it was defended, was to mount a challenge to the central government. It is not entirely clear what is meant by "challenge" to the national system or central authorities. It could mean merely the expression of a different point of view from that of the Central Authorities, or questioning a decision of the Central Authorities, or an act of disobedience and a breach of the law. Perhaps all these are implied – and they are perhaps also connected to the frequent statement that the PRC is sovereign over the HKSAR. Perhaps this last is implied in Tung's statement that the NPCSC is the highest organ of state power, and is implicit in Gao's remark that "the so-called referendum motion" was inconsistent with the legal status of the HKSAR stipulated by the Basic Law (views echoed by Tung).¹⁷ Professor Xu has also referred to the application of the "national system" (which presumably means that it is superior to that of the HKSAR).¹⁸ Professor Wang Zemin, a new "guardian", said that there was no point to the referendum as Beijing has the final say on constitutional development, and in any case it was "irresponsible".¹⁹

¹⁵ See SCMP, 18 Nov 2004.

¹⁶ *Ibid.*, 20 Oct 2004.

¹⁷ He said: "Constitutional changes in Hong Kong have a strong bearing on national sovereignty and are not an issue that Hong Kong can determine by itself through a referendum." See *China Daily*, 3 Nov 2004. Donald Tsang was even more explicit: "International law prohibits the infringement of a country's territorial integrity and sovereignty through referendums under any circumstances. Since all the powers Hong Kong enjoys derive from the central government, a referendum that challenges the central government and national sovereignty is out of the question." See *China Daily*, 21 Oct 2004. In fact many systems allow the autonomous region to make its own constitution, and this is in no sense seen as a breach of state sovereignty. Perhaps Tsang was misquoted because there is no such international law. Quite the contrary, as referendums and autonomy are becoming very important ways to accommodate diversity.

¹⁸ See SCMP, 18 Nov 2004.

¹⁹ *Ibid.*, 20 Oct 2004.

Other arguments are more oriented towards pragmatic considerations. Tung said that the referendum would damage the cordial relations between the Central Authorities and the HKSAR. It would divide the community in Hong Kong. It would harm the interests of Hong Kong people and obstruct “the gradual and orderly” progress of constitutional development.²⁰ He also said: “it will not help promote the healthy development of democracy in Hong Kong” although it is not reported why he thought so. He criticised the proposal as “inappropriate, inconsistent with established legal procedures, impractical and misleading the public”.²¹ Donald Tsang said that it would affect efforts towards consensus, was a waste of time and energy – “a needless distraction for the community”; and anyway, the government would not heed democrats’ demands.²² Yip Kuk characterised pushing the referendum as “playing with fire”. Why all this over-reaction, to puny Hong Kong when the whole world seems to be cowering before China’s economic prowess? I did think of an alternative title for this comment, “The Mouse That Roared”!

Evaluating the Debate

The case for the referendum was weakened by the fact that general elections had recently been held where, while the issue of electoral reforms for 2007 and 2008 was pretty well ruled out, it was clear that a substantial majority of voters supported universal franchise. There seemed little point in demonstrating this again, even though the government insisted that opinion was divided and would not recognise the majority. Again, the supporters of the referendum were not able to show how the referendum would affect the decisions or the decision-making process on reform (especially if the referendum was to be non-official), and most people assumed that Beijing would not go back on the NPCSC interpretation. Tung’s criteria for constitutional progress did not rate people’s views highly. But the supporters could argue that the opinions of the people were critical to the assessment of other criteria (as people were not to be offered simply a choice for or against universal franchise). Moreover the experience of the referendum, engaging the people, parties and social groups, in an intensive way, would itself help to supply a desideratum alleged in Tung’s report to be absent – the political maturity of Hong Kong people and political parties. The absence of details on the administration of the referendum may also have affected people’s understanding of it.

The debate was confined to politicians and seems not to have been explained or taken to the public. People needed to understand the implications of the referendum (and some of its machinery) before they could engage

²⁰ *Ibid.*, 8 Nov 2004.

²¹ *Ibid.*, 15 Nov 2004.

²² *Ibid.*, 19 Oct 2004.

with the controversy. People do not really understand the intricacies of referendums, neither the previous nor the current “sovereign” having, for legal or political reasons, much time for referendums. Even in the dying days of its rule, when, only, colonial powers can be agreeable to referendums, Britain denied it to Hong Kong people, ending instead with a shameful, manipulative process to validate the Sino-British Declaration.

Nor was the post-election context in which all groups sought openings to Beijing (astutely exploited by the Central Government) receptive to what was portrayed as “singular obsession” or show of aggression. The focus on the proposals for a referendum in Taiwan stirred and muddied the waters and enabled the pro-Beijing group to present the proposal as pregnant with secession – although it was evident to most that the two proposals were quite different. But, as I show later, the proponents did not feel able to argue their real motives and case – just as the pro-Beijing camp was not able. But the supporters, divided to some extent among themselves on strategy, allowed the Beijing camp to establish the framework of the debate. Eric Cheung Tat-ming²³ repeatedly made the point that the Basic Law did not prohibit referendum, and thus allows it, as did Margaret Ng.²⁴ But few systematic arguments were based on the rights and freedoms guaranteed in the Basic Law – the freedoms of expression, association, assembly, procession and demonstration and right to demand accountability from public authorities.

The case of the opponents is more revealing. They built their case by constantly misrepresenting the nature of the proposed referendum, including on the eve of the second vote in the Panel (15 November 2004). Cheung accused Gao of misleading the public by saying that the democrats were trying to conduct a “legally binding referendum” to overturn Beijing’s April Decision. In fact, the referendum was to be no part of a formal decision-making process. In that sense it did not detract from the Basic Law. But it would provide arguments and evidence that could assist in decision-making, and indeed, in any sensible process, should be used. It was not to usurp the functions of any state institutions – indeed the Basic Law assumes that there would be consultations and the seeking and finding of public views (and the absence of a reference to such consultations is no bar to them, any more than it should be to a referendum). It would also demonstrate how politically mature or otherwise were the voters of Hong Kong.

The assertions about “challenge to the central authorities” were more like threats than legal arguments – and in fact no legal arguments seem to have

²³ *Ibid.*, 18 Nov 2004.

²⁴ In a Letter to Hong Kong, she said: “while the Basic Law does not contain provisions for a referendum, it does not mean Hong Kong cannot hold a non-binding vote to gauge public opinion ... The referendum proposed violates no article in the Basic Law. What it does is to allow each and every person in Hong Kong to speak for himself, directly and unequivocally, without the results being distorted by loaded questions or through an arbitrary interpretation.” See *The Standard*, 22 Nov 2004.

been placed in the public domain. Evident again was the tendency of the Beijing camp to term all differences of view from it on the Basic Law attacks on China. What was being demanded was obsequiousness and submission. What else was the point of constant references to the “dangers of upsetting the central authorities”, not damaging “cordial relations”, “playing with fire” and “losing what is realistic in the search for more”? What is the significance of the unending mantra of “consensus” (at a time when the NPCSC closes doors to a consensus and Beijing is refusing to meet democrats it does not like) other than to submit to Beijing’s will? This submission is secured not only by veiled (but not so subtle) threats but also through appeals to legality – thus the constant references to the Basic Law or the “national system”, the finality of the interpretations of the NPCSC and the supremacy of the NPC (and the wheeling out of “legal guardians” and resort to threadbare arguments about even oaths of office). Much of the controversy was used to reinforce the status of the NPCSC and the legal powers of the Central Authorities, and to strengthen the force of the NPCSC interpretation and decision on constitutional reform – the paucity of precise legal points notwithstanding (maybe it was not a coincidence that a newspaper²⁵ recommended that interpretations of the NPCSC should be annexed to the Basic Law so that their authority becomes obvious to all). The acquiescence of the Tung administration and the pro-China lobby in these tactics and interpretations bodes ill for the remaining vestiges of Hong Kong’s autonomy. Experience shows that each time there is a controversy about Hong Kong’s relations with the Central Authorities, Hong Kong is diminished.

Explaining the Debate

To understand these happenings, it is necessary to start with the scheme of the Basic Law. It is usual to think of the Basic Law as an instrument of autonomy, and indeed the Basic Law claims one of its principles a high degree of autonomy. But it is also possible to see the Basic Law essentially as the entrenchment of an economic, social and political system. A close examination of the scheme of the Basic Law and the operation of “one country two systems” suggests that autonomy is not its defining characteristic. As far as the substantive aspect of the “system” is concerned – the powers and functions to be exercised in Hong Kong – autonomy is circumscribed by a number of general principles and specific rules prescribed in the Basic Law. As far as the institutional aspect is concerned – the distribution of powers and the

²⁵ See *China Daily*, 22 Nov 2004.

rules for decision-making – the degree of democracy and the power of the Central Authorities to intervene in Hong Kong means that the ultimate control is vested in the Central Authorities. The result is that while Hong Kong institutions are vested with powers greater than any federal or autonomy system, leaving precious little for the Central Authorities, its institutional autonomy is severely limited. Indeed it was possible for China to formally vest these extensive “powers and functions” in Hong Kong precisely because it retained control over institutions and the decision-making process. China therefore regarded the institutional question as more critical than the devolution of powers. This is contrary to the experience of other autonomy systems where there are long and difficult negotiations about the division of powers but relatively little about institutions – indeed the autonomous region is generally left to draft, adopt and amend its own constitution.

The Central Authorities have sought control or influence over institutions principally through restrictions on generally accepted constitutional principles, especially principles of autonomy. The central piece of the scheme is the office of the chief executive in whom are vested all the powers of the executive of the HKSAR – it is fashionable to describe the Hong Kong governmental system as “executive led”. The relationship between the chief executive and the legislature is tilted in favour of the former – the chief executive can veto legislation, dissolve the legislature once in a term in case of conflict with the legislature, and can prevent the submission of legislative bills relating to government policies by members of the legislature. Members cannot introduce bill or other motions dealing with public expenditure, political structure or the operation of the government. The composition and procedure of the legislature are designed to assist the chief executive, principally through a large majority of functional constituency members whose election by small electorates easy to influence or control by the Central Authorities, and chosen from sectors who can be expected to support the government. The dominant influence of these members is facilitated through a complex system of voting in which they act as a second chamber, voting separately from the directly elected members, and thus have a veto over all initiatives of legislators. Research on the voting pattern shows the heavy dependence of the government on functional constituency members.

Having created such a powerful office, it was necessary to ensure the control of this office by the Central Government – which it has done by rules of appointment and removal leaving the final word with itself, particularly nomination and election through a small committee, easily controlled. The result, along with the provision that the chief executive is accountable to the Central Government, is that he or she is accurately regarded as its creature. The maintenance of these, or broadly similar, electoral rules for the executive and the legislature (and the latter’s procedure) is critical to the scheme of the Central Government.

However, two kinds of development could threaten it. The first is a time bomb placed in Articles 45 and 68 (dealing with the election of the chief executive and the legislature, respectively). These adopt elections by universal franchise as the ultimate aim and in Annexes I and II set out a programme and procedure for progress towards it. It was the conflict between those requiring or resisting that decisive steps be taken towards this goal in 2007 and 2008 (as was the expectation to happen) that led to the intervention of the Central Authorities through a NPCSC interpretation ruling out any real move to full democracy.

The second development could have been, and has become, popular discontent with the government and the rules which sustain its dominance over the legislature and subordination to the Central Authorities. Such discontent was not difficult to predict as it was obvious that the Central Authorities intended to work with the tycoons of Hong Kong who had interest in neither constitutional reform nor progressive social policies, and the people had no choice in the appointment of the chief executive. The most popular political parties were doomed to remain perpetually out of power or even influence. Frustration with “constitutional politics”, the disregard of their interests, and the ineptitude of the Hong Kong administration led the people to lobby outside the framework of formal institutions (a dialectical reaction that Marxists should have been alert to). This was most powerfully demonstrated on 1 July 2003 when over half a million people marched to protest against government policies and to demand constitutional politics. Popular politics had mushroomed and the Central Authorities were neither prepared for it nor did they know how to deal with it. They were handicapped by the total lack of experience of popular or democratic politics on the Mainland – but they could not use Mainland tactics to suppress these populist impulses because of the constitutional protection of rights and the watchful eyes of the outside world.

The Central Government opted for policies of economic assistance through promotion of Mainland tourists to Hong Kong, economic integration, and greater direct engagement in Hong Kong affairs – and a modicum of charm. Having, through massive intervention, ensured a victory of sorts for its side in the general elections in September 2004, it heaved a sigh of relief – only to be hit on the convening of the new legislature through the proposal of a referendum. Here was the hydra-headed people raising its heads again. The Central Government opposed the referendum because in it and through it, the Central Government saw the popularisation of politics and a crisis of formal structures of state. The NPCSC interpretation introducing further restrictions on reform and clamping down on democratic forces produced great resentment. The constitution review process, which looked increasingly manipulated and driven from the Mainland, added to the frustration and anger. Already there were other manifestations of popular initiatives which bypassed the executive and the legislature – campaigns for the protection of the harbour,

reform of property development policies, preservation of flats in Hunghom, the abandonment of plans to sell off public properties, and to develop a cultural centre in West Kowloon. These campaigns built up such a head of steam that the government had sometimes to relent – which showed the weakness of administration and the lack of firm policies or the ability to see them through. The Central Authorities might have found it easier to manage the transition to more democratic institutions; for the establishment parliamentary politics are easier to cope with than street politics. It will be much harder now to contain populist politics, which have a new lease of life in reaction to the government's obduracy.

Beijing's disquiet about the referendum is thus connected with the defiance of its authority and the rise of popular politics operating outside the formal framework of the Basic Law. It probably realises that even a consultative referendum will have major consequences – further politicisation of the people and of civil society, upsetting the balances between different interest groups within Hong Kong built into the Basic Law and thus making it harder to neutralise or manage popular politics. This point is not lost on some supporters of the referendum. Indeed its principal proponent, Cheung, is quoted as saying that “my recent proposal is a form of social movement which is also fuelled by my refusal to back down. I believe that we should think outside the box, instead of only listening to the top command and doing nothing”.²⁶ Undoubtedly, many others think in the same way – although they may prefer not to articulate it in quite this way.

The experience of the use of popular referendums in Quebec and Eastern Europe, which led to the development of new ideas of self-government and gave a standing to communities is probably not lost on Beijing. In a reference to the Supreme Court by the Canadian government on whether Quebec had a right to self-government, the Court answered it, sort of, in the affirmative, if some conditions were met. First, that a clear majority of the Quebec people showed in a referendum support for a clear question on self-determination. This itself left many questions open. Second, if this happened, the government would have to negotiate with Quebec to settle differences between Quebec and the rest of Canada. The settlement could take the form of greater autonomy for Quebec – but it could also result in a negotiated separation.

The moral and political message of the judgment is that understandings and negotiations are more effective ways to deal with identity and discontent than strong-arm tactics. In fact, Quebec politics have already taken a turn towards greater acceptance of its role in Canada. It would be a great shame if

²⁶ See SCMP, 8 Nov 2004.

Beijing misread that judgment or the people of Hong Kong. It is understandable that a Leninist regime in power for over half a century should find it difficult to come to terms with democratic politics. But Beijing has no other alternative. The Basic Law has many virtues but it is also a deeply flawed instrument. It shows an amazing distrust of the people. It is also incredibly rigid – for example, the chief executive can, and has said he would, veto even the introduction in the LegCo of Leung Kwok-hung's bill on the referendum. Beijing has seldom given Hong Kong people a real opportunity to debate its future in a free, frank and rational manner. All debates have been hijacked, circumscribed and the people divided on spurious grounds. Hong Kong people are mature, responsible, anxious for compromise, and for the most part strongly committed to their destiny as part of China; they deserve to be treated with greater respect.

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