

Civic Nomination and Nomination by Political Parties

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Almost two months have lapsed since the commencement of public consultation on constitutional development. Civic nomination and nomination by political parties are two of the more controversial topics. Put shortly, the former proposal would allow direct nomination of a Chief Executive candidate by a specified number of registered voters, while the latter would allow direct nomination by political parties that have obtained a specified number of votes in the preceding Legislative Council election. The question of whether these proposals are consistent with the Basic Law has attracted divergent views. This article seeks to provide to the community certain thoughts for reference. Due to limited space, this article cannot discuss every issue in detail. When necessary, further discussion will be made in future.

Whether any proposed nomination method is consistent with the law turns on the proper interpretation of the Basic Law. Article 45(2) of the Basic Law stipulates as follows: “The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region 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”. As the language of this provision is abundantly clear, the Government has all along stressed that any proposal bypassing the nomination procedures of the nominating committee (NC) or undermining its substantive nomination power might be inconsistent with the Basic Law.

Some take the view that when interpreting the Basic Law, one must avoid a literal, technical, narrow or rigid approach. Instead, one should adopt a purposive approach so as to ascertain the legislative intent. Others stress that the Basic Law, being a constitutional document, is a “living instrument” and its interpretation should meet the changing needs and circumstances of our society. Whilst these views are consistent with the basic principles applicable to the interpretation of the Basic Law, they do not pay sufficient heed to the clear language of Article 45(2) of the Basic Law. As expounded by the Chief Justice in his speech entitled “*The Interpretation of Hong Kong’s Constitution: A Personal View*”, “the common law method of interpretation, whether of a contract, a statute or the Basic Law, is to assume that the intention behind a provision is to be found primarily in the words actually used. If the words themselves are clear and unambiguous, there may be little room or need to go further; quite simply, the words mean what they say.”¹

The suggestion that the Basic Law is a “living instrument” is itself not sufficient to render civic nomination or nomination by political parties to be consistent with the Basic Law. Whilst the Basic Law may be

¹ See: The Hon. Chief Justice Geoffrey Ma, “The Interpretation of Hong Kong’s Constitution: A Personal View”, collected in *The Common Law Lecture Series 2011-2013* (HKU) (2013) 85 (at p. 97).

interpreted to meet changing needs and circumstances, the court cannot ignore the clear language used or else the court would have assumed the role of the legislature. Besides, the relevant Interpretation and Decisions of the Standing Committee of the National People's Congress were only made in April 2004 and December 2007, and not the distant past. It is difficult to see any changes of circumstances that can justify the inclusion of civic nomination or nomination by political parties under Article 45.

Article 45 aside, some opine that Article 25 (all Hong Kong residents shall be equal before the law) and Article 26 (Hong Kong permanent residents shall have the right to vote and the right to stand for election in accordance with the law) are also relevant. I do not dispute this view. However, the general provisions of Article 25 or 26 cannot override the clear language and specific provisions of Article 45, let alone undermine the NC's substantive nomination power.

Others suggest that civic nomination and nomination by political parties are not expressly disallowed by, and thus cannot be inconsistent with, the Basic Law. Putting aside the legislative history of the Basic Law for the time being, such a view ignores a basic common law interpretation maxim (the *expressio unius* principle): to express one thing is to exclude another. Since Article 45 of the Basic Law only specifies the NC as the body which has the power to nominate candidates, it follows that other individuals or bodies are not intended to have any nomination power. The logic is crystal clear. Consider this example. Article 59 of the Basic Law stipulates that the

Government shall be the executive authorities of Hong Kong, and Article 62 sets out its powers and functions. The Basic Law does not expressly say that the Legislative Council cannot exercise executive powers and functions. Can it then be argued that the Legislative Council can exercise executive powers and functions in place or on top of the Government? In view of the clear provisions in Article 59, the answer is plainly “No”.

In the document “Finding the Right Path to Universal Suffrage – What the Government is NOT telling you” prepared by the Civic Party and Hong Kong 2020 (para. 2.08), it is contended that “civil nomination” and “nomination by political organisations” are consistent with the Basic Law stipulation that the NC must carry out its work “in accordance with democratic procedures”. The document does not contain any elaboration or analysis, but such a contention has apparently confused the different concepts of nomination power and nomination procedure, and also the distinct concepts of nomination and recommendation. Take civic nomination as an example. If the NC cannot decline to nominate an individual once he or she has obtained the support of certain specified number of registered voters, the NC’s nomination power would become meaningless. It is difficult to see how it can be suggested that such a proposal does not impact upon the nomination power but only the procedure.

Civic nomination and nomination by political parties are not the only means to achieve universal suffrage. The community should consider

approaching the issue of nomination in a pragmatic manner and in a way consistent with the Basic Law.

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