Chapter 4

A Rawlsian Model of Land Justice for Hong Kong: The Controversy on the Development of the North New Territories

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Abstract I adopt a Rawlsian model in analysing the challenge recently faced by the Hong Kong government regarding its governance of the land development. The challenge is illustrated with the stakeholders' debates on three case studies: the brownfield sites, Fanling Golf Course and the private agricultural land reserve. The Rawlsian model adopted here aims to unfold the dialectics of the land controversy and identify the Rawlsian solution. For this purpose, expounded are certain important Rawlsian concepts, including the distinction between rationality and reasonableness. In conclusion, I argue that, while an immediate political reconciliation seems unlikely, the possibility of such a reconciliation is open in the long run if one grasps the crux of the stakeholders' dialectics and recognizes the intricate interconnection of the overlapping consensus in the constitutional and institutional levels on the political conception of justice.

Introduction

Overview

In this chapter, a Rawlsian model is adopted in analysing the dynamics between politics, governance and justice in the land controversy of Hong Kong. First, I outline the background of the land controversy. Then, I introduce the concepts of reasonable pluralism, reconciliation and overlapping consensus, and explain how the Rawlsian model is applicable to the general situation of Hong Kong. Followed is an examination of three selected case studies of the land controversy in the North New Territories, whereby the nature of the stakeholders' argumentative dialectics is illustrated. In addition, I further probe into the Rawlsian distinctions between rationality and reasonableness and between the overlapping consensus in the constitutional and institutional levels on the conception of justice vis-a-vis his two principles of justice.

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The purpose is to unfold the crux of the land controversy and identify the Rawlsian solution.

Context: Public Engagement in 2018 on the Land Development in Hong Kong

To begin with, a public engagement on the land development in Hong Kong was officially embarked on 26 April and ended on 26 September 2018. It was conducted by the Task Force on Land Supply (henceforth Task Force), formed in September 2017 by the commission of the Hong Kong government. In the Engagement Paper (*Land for Hong Kong, Our Home, Our Say!*), the Task Force discussed 18 possible choices for the land development. Their aim was to provide the public with the information and consultation on how to meet the urgent need for extra 1200 ha in land supply. In their final Report (*Striving for Multi-pronged Land Supply: Report of the Task Force on Land Supply* [henceforth Report]), the Task Force claimed that the public engagement has “heighten[ed] society’s awareness of issues of land resources; it also has stimulated heated discussions on the planning, allocation and rights over land. Its impact on Hong Kong is therefore profound”.¹ The Task Force’s observation was by no means an exaggeration. One of the reasons for the citizens’ active engagement is the fact that Hong Kong, with a total area of 1106 km², has topped the world’s housing market in price and become, for 9 consecutive years up to 2018, the least affordable city to buy a modest home (Demographia 2019). This was the background of the community’s fervent participation in the public engagement and a source of the land controversy in Hong Kong.

This public engagement, like others, faced a pressing question after the collection of the stakeholders’ different opinions: that is, *what follows?* One has to appreciate the fact that the participants had diverse and often opposing motivations and expectations. Gustafson and Hertting (2017) rightly note that the success of a public engagement depends on the identification of the participants’ different motives. In this connection, I will identify the source of the land controversy in Hong Kong in the *dialectics* of the stakeholders’ disputes. Now, among the 18 options considered by the Task Force, each unavoidably touched on certain deep-seated interests represented by different sectors of the community. No matter what choices the government may finally make after the public engagement, it is clear that those negatively affected stakeholders would suspect that they have been treated *unjustly and unfairly* by the government.

Is there any way to settle the disputes among the stakeholders? Can justice be ever served if a certain degree of *arbitrariness* in the *space of reasons*,² as will be illustrated below, seems to play a role in the stakeholders’ dialectics and the government’s final decision? In short, is there land justice as such? And if there is, how should one make sense of it?

¹Report, p. 1.

²The term is borrowed from Sellars (1956).

Concepts and Theories

The Rawlsian Model

Confronting these questions, I will first introduce three conceptual tools found in Rawls' theory of justice (1972, 1996, 2001) and then show how the Rawlsian model is applicable to the general situation in Hong Kong.

The first conceptual tool is Rawls' idea of *reasonable pluralism*. This idea suggests that the divergence and discrepancy of people's moral, philosophical and religious beliefs are, as a matter of fact, bound to exist in a pluralistic society. It is a fact one should recognize and respect if a pluralistic society is to be sustained. At the convergence of Chinese and the western values, Hong Kong has a history of pluralism in the cultural, social and religious dimensions. Overall, different values and traditions are well respected by the citizens. This seems to fit in with the Rawlsian notion of reasonable pluralism.

In addition, for Rawls, it is illegitimate for any government to use any coercive force in rigidly unifying people's diverse, comprehensive doctrines of beliefs into a single system. This sort of coercion would completely undermine the essence of reasonable pluralism. A corollary of this recognition is Rawls' emphasis that the political conception of justice he advocates is not a comprehensive doctrine in competition with any other comprehensive doctrines. Instead, it is a free-standing political conception that could belong to any reasonable comprehensive doctrine.

What is the function of this free-standing political conception of justice? It concerns Rawls' general view of political philosophy, which, in his later years, is assigned the mission of achieving a *reconciliation* among people who embrace opposing philosophical and moral doctrines in a pluralistic society. Rawls (2001, 3) claims,

[P]olitical philosophy may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form. This fits one of Hegel's well-known sayings: "When we look at the world rationally, the world looks rationally back".

Reconciliation facilitates people to go along with each other, despite the discrepancy of their comprehensive doctrines of values. Rawls' quotation of Hegel's (1977) famous statement above is remarkable. The whole Rawlsian project of reconciliation hinges on the *way* we see (or conceptualize) how justice be formed and served in society. To a large extent, it is a matter of what *perspective* (or, in Hegel's terms, *idea*) one adopts in the dialectics on justice. Now, there is a hope for reconciliation when and only when the conceptual confusion and misunderstanding regarding what counts as justice are cleared up, so that a *rational* order of the society can come to sight to all stakeholders. This sort of *perspectival* reconciliation is important for a pluralistic society, as is demonstrated in the case of Hong Kong below.

To accomplish the reconciliation in a pluralistic society, according to Rawls, stakeholders need to achieve an *overlapping consensus* on the political conception

of justice. Only after such an overlapping consensus on justice had been attempted and constructed could people ever attain their long-term reconciliation (in distinction from a temporary and fragile compromise or, in Rawls' terms, *modus vivendi*). This idea of overlapping consensus is an important conceptual tool in the context of reasonable pluralism. One might legitimately ask: How can a whole-hearted consensus on any political issue ever exist among *all* the stakeholders who basically have their interests in conflict (as represented by their incompatible comprehensive doctrines of philosophies and moral values)? Long-term reconciliation and persistent reasonable pluralism sound almost like an oxymoron. For this reason, the search for the *conceptual space* where one can find the consensus of different stakeholders *overlapping* across different comprehensive doctrines becomes the most daunting task for any model that aims at a political reconciliation. I will explain how the Rawlsian model helps construct this important conceptual space applicable to the land controversy at issue.

At this point, replies to two possible objections are in order. First, one might question whether it is appropriate to apply the Rawlsian model to a case like Hong Kong. The Rawlsian model is seen to apply to a specific type of society Rawls (2001, 145–8) calls *constitutional democracy*. The objection questions the current status of Hong Kong as a constitutional democracy and casts doubt on the applicability of the Rawlsian model.

This objection is worth considering because an answer to it here paves the way towards the discussion of a possible solution to the land controversy by the end of the chapter. Now, so far as the issue of *constitutionality* is concerned, one should note that, after the return of Hong Kong to China from the United Kingdom in 1997, the Basic Law has officially taken effect as the supreme law of Hong Kong, with which all the local, specific laws are required to square. According to the Basic Law, except for the military and foreign policies, Hong Kong government has the freedom to exercise its capitalist governance in line with the principle of “One Country Two Systems” for 50 years with no change to the lifestyles of people. And the Basic Law is mentioned in Article 31 of the Constitution of the People's Republic of China.³ In a derivative sense, Hong Kong is ruled under the Basic Law as its minuscule constitution within the rubrics of the grand Chinese Constitution. In this way, constitutionality is implemented in the legal system of Hong Kong in an indirect but real sense.

Concerning the idea of democracy, obviously, Hong Kong is not a politically democratic society so far as, for instance, the election of the Chief Executive is concerned. The right to the nomination and election of the Chief Executive is currently limited to the Election Committee, composed of 1200 members, who are either *ex officio* members or individuals in different professions elected by 38 designated functional constituencies (or sub-sectors).⁴ Currently, apart from the 1200 members of the Election Committee, the general public do not have the right to nominate or elect the Chief Executive.

³The Basic Law (<https://www.basiclaw.gov.hk/en/basiclawtext/index.html>).

⁴2016 Election Committee Sub-sectors Election (<https://www.elections.gov.hk/ecss2016/eng/>).

But it is fair to say that, according to Article 43 of the Basic Law, Hong Kong is entitled to evolve into a certain model of *political* democracy so far as the election of the Chief Executive is concerned. The Article reads,

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 accord with democratic procedures.⁵

It is difficult to foresee the exact trajectory or destination of the development of Hong Kong democracy. Suffice it to note that the very *possibility* of developing Hong Kong into (something close to) a democracy and the *fact* that it is now in a process of morphing towards it as a political goal warrants the feasibility of the adoption of the Rawlsian model. Indeed, such a *possibility* and such a *fact*, when compounded, make the case of applicability even stronger, as the need for the guidance of a theoretical model in facilitating the process of democratization is normatively justifiable. The Rawlsian model is one of such theoretical models.

On the other hand, the adoption of Rawls' theory might pose a different question. His thought experiment of the veil of ignorance in the original position, which lays down the foundation of his theory of justice, is controversial for its generality and abstractness. Dworkin (1989, 16–7) succinctly summarizes Rawls' idea of original position in this way:

It imagines a group of men and women who come together to form a social contract.... They are men and women with ordinary tastes, talents, ambitions, and convictions, but each is temporarily ignorant of these features of his own personality, and must agree upon a contract before his self-awareness returns.... Rawls tries to show that if these men and women are rational, and act only in their own self-interest, they will choose his two principles of justice.

In the original position, people are supposed to be rational and yet ignorant of their personal background and subjective inclinations. Behind this so-called veil of ignorance, they collectively deliberate and attempt to reach a consensus on the principles of justice. One might challenge that Rawls' theory as such could at most outline a hypothetical conception of justice. And, the objection goes, it could not address the actual problems of the real political world. Exactly in this spirit, Nagel (1989) raises an objection regarding the abstractness of the presuppositions of Rawls' theory, in particular with regard to the original position. Nagel argues, "There is a real question whether hypothetical choice under conditions of ignorance, as a representation of consent, can by itself provide a moral justification for outcomes that could not be unanimously agreed to if they were known in advance". That is, even if the rational agents in the original position chose the Rawlsian principles of justice, it would not follow that, once they knew their personal backgrounds and abilities by stepping outside the veil of ignorance, *as we do in reality*, they might still stick to the same principles of justice that they agreed upon in the original position. On this score, the specific details of the land controversy in Hong Kong, entangled with the

⁵Article 43, the Basic Law.

competing stakeholders' informed preferences and self-understanding, might be too mundane and contextualized to be suitable for the examination by such a general and abstract theory. What is the justification for the application of Rawls' general theory of justice to the specific reality of Hong Kong? This is the question raised by the second objection.

This objection might appear to be more legitimate to Rawls' early than later works. After his switch to the practical consideration of reasonable pluralism, his theory is intended to address the actual conditions of the political reality. In his words (2001, 4),

We view political philosophy as realistically utopian: that is, as probing the limits of practicable political possibility. Our hope for the future of our society rests on the belief that the social world allows at least a decent political order, so that a reasonably just, though not perfect, democratic regime is possible. So we ask: What would a just democratic society be like under reasonably favourable but still possible historical conditions, conditions allowed by the laws and tendencies of the social world? What ideals and principles would such a society try to realize given the circumstances of justice in a democratic culture as we know them?

The idea of political philosophy viewed as *realistically* utopian is important. It highlights the applicability intended by Rawls to the concrete contexts of the political reality. The theory is no longer limited to the contemplation of merely idealistic, "perfect" cases of democracy. Instead, a more down-to-earth approach to the "reasonably just, though not perfect, democratic regime" is adopted so that "reasonably favourable but still possible historical conditions" are addressed within the framework. Rawls' appreciation of the "historical conditions" of society allows for the contextualization of his theory of justice by "probing the limits of practicable political possibility". The historical condition of Hong Kong, as delineated above, favours, where applicable, such a quest for the *realistic* application of a theoretical conception of justice.

Now, with the two possible objections briefly replied, I now move on to the deliberation of the further specifics of the land controversy, especially with regard to the development of the North New Territories. I will further unravel the "space of reason" in the stakeholders' dialectics under the Rawlsian analysis.

Deliberation

Land Development Recommended by the Task Force for the North New Territories

The Task Force's Engagement Paper and Report outlined the implementation schedules of the 18 options in three categories: the short (within 10 years), middle (10–20 years) and long term (20–30 years). Now, given the urgent need for the land supply in Hong Kong, options that could help, to a certain extent, meet the demand

within a short-term period have become highly important. Three such options were identified by the Task Force from their final 8 recommendations in their Report. All of the three options belong to the North New Territories. I will elaborate on the three options one by one.

The Task Force's first and most recommended option is the development of the brownfield sites, where there are villages or business operations of commercial activities, such as open storage sites and container lorry parks. This option has received the widest support from the general community. The Task Force recommended the government to develop the brownfield sites that might feasibly provide new land supply up to 330 ha (of which 110 ha is for the short-term development, out of the total area of the scattered brownfield sites in 760 ha).

At the same time, the Task Force also realized the challenge for the government to step into this area because the force of resistance by the stakeholders there was strong. In as early as 2014, the government had had confrontations with the villagers of the brownfield sites in Wang Chau by forcing them out from their village (5.6 ha in size). In addition, the government at that time failed to negotiate with the local kingpins for reclaiming their brownfield sites (33 ha) with business operations.⁶ Two problems with the large brownfield sites posed a serious challenge to the government: that is, first, how to move the business operations out from there to somewhere else in a cost-effective way, and, second, how to make a fair compensation to the property owners. The Rawlsian model, discussed in the next section, is to examine the nature of this sort of question in terms of land justice: Is it *justice* to force people and business operations out from there for the purpose of land development *when there are other options available* for meeting the target of seeking extra land supply? *Mutatis mutandis*, this type of question is recurrent for all other options for the land development as well.⁷

In the Report, the second top recommendation is to tap into the private agricultural land reserve owned by developers, again mostly found in the North New Territories. In Hong Kong, a number of developers have kept the agricultural land in their reserve, the total area of which is estimated to be as much as 1000 ha.⁸ Keeping such agricultural land in reserve, the private developers look for the opportunities to change the land use into private residential sites. In the past, developers on their own initiatives have applied for such an alternation of the land use. However, the success rate was low. In the past several years, only 7 out of 40 applications were successful.⁹ The real problem was that all those approved applications were only small and scattered pieces of land, totalling to 18 ha only, which were not helpful enough to meet the demand for land supply. And such applications obviously lacked

⁶This series of incidents has been documented in detail as the "Wang Chau housing saga" by the South China Morning Post (SCMP) (<https://www.scmp.com/topics/wang-chau-housing-saga>).

⁷Indeed, this sort of question is applicable not only to the land controversy of this chapter but also to other cases, such as the controversy of NIMBY.

⁸Report, p. 50.

⁹Report, p. 53.

the proactive support from the government, as the developers only aimed at making profits for themselves.

For this reason, the Report recommended that the government take the lead and identify the suitable agricultural land currently owned by the developers. The Task Force called this second top option as the public–private partnership (PPP).

However, objections to this option arise from two opposite directions. First, questions have been raised as to whether there are conflicts of interests in PPP, as the developers may receive favourable compensation from the government for returning their sizeable land and get further benefits when they are (naturally) chosen to be the developers of those areas into residential areas, including the private residential areas. The community’s suspicion of the “collusion between the government and businesses” over the transfer of these sorts of benefits through PPP has already been noted by the Task Force in their Report.¹⁰ On the other hand, since the target of the government is to build more public than private housing,¹¹ another possible scenario is that the benefits gained by the developers may not be as high as they expect after their land is reclaimed. Resistance from certain developers may happen and should not be neglected. The Report suggested that the government could in this case apply the Land Resumption Ordinance for “public purposes”. According to the Ordinance (Land Department 2013), “[t]he Government may acquire private land by resumption for the implementation of public projects such as a road scheme, a public housing development, an urban renewal project, an open space, a drainage improvement project, a new market, a school or any item in the Public Works Programme”. If there is any dispute between the government and the stakeholders over the amount of compensation, it can be brought to the Lands Tribunal for the judicial review. Obviously, this idea of PPP, if implemented, will engender a lot of controversies from the perspectives of different stakeholders.

Finally, the third option among the top priorities recommended by the Report was the use of the sites under the private recreational leases. In Hong Kong, there are many private recreational leases by the government to the private clubs and organizations for a nominal annual rent. Among the 66 private recreational lease sites, the Fanling Golf Course (FGC) has become the hottest topic. It is partly due to the large size of the site, which amounts to 172 ha. Another important factor concerns the timing. The expiry date of the government’s lease of FGC is 2020. It means that the government could promptly start the development of this area. This is possibly the fastest track one could ever find among all the options and recommendations by the Task Force. The Report recommended that the government might first of all develop 32 ha of FGC in order to ease up the pressing housing needs within a short period of time (i.e. less than 10 years). The remaining 140 ha could still be used for the international golf tournaments in the short term, allowing time for the consultant to examine how to develop the remaining area into the residential area. This proposed plan was divided into two phases because it would take time to deal with the conservation of heritage

¹⁰Report, p. 52.

¹¹See *Chief Executive’s 2018 Policy Address* (<https://www.policyaddress.gov.hk/2018/eng/highlights.html>).

buildings and the preservation of endangered species of trees in the remaining 140 ha of the site.

Debates by different stakeholders on this recommendation on FGC have been publicly staged. The antagonistic dialectics was fierce. For instance, the Hong Kong Golf Association sternly expressed their opposition to the development of FGC in an open statement published on the local newspapers. Their rationale was that such development would be detrimental to the high ecological values of FGC. In response, the Legislative Council member Andrew Wan fired back, “Our city is so small and our hunger for land supply is so severe – not only for housing, but also for public facilities such as hospitals and elderly care centres.... I find it rather clownish to hear that [the golf course should not be redeveloped because] it will affect the businesses of tycoons”.¹² However, the Hong Kong Golf Association continued their dialectics by arguing that “[r]eclaiming any part of Fanling Golf Course would be a devastating and irreversible loss for Hong Kong”.¹³

Other arguments have been advanced by the stakeholders. The protection of the historical buildings and the conservation of precious trees there would inevitably reduce the size of the developable land of FGC. And the value of the development of the site would be significantly dwindled. Furthermore, the large-scale construction of the transport and infrastructure would delay the completion of the project, in spite of its appearance to be the fastest possible option for the land development. On the other hand, for the public who have not visited FGC or had no interest in golf, the site was considered merely as a theme park solely for the rich that should be reclaimed for the public interests. Yet, still, hundreds of the staff members of FGC opposed to the claw-back of the land because of a very simple and direct concern: they would lose their jobs.

A further twist to the land controversy should be mentioned here. It was the government’s announcement of their own preference, which was made even before the release of the Task Force’s Report. It was to build an artificial island close to the Lantau Island. This option was dubbed “Lantau Tomorrow Vision” (HKSAR Government 2018). Immediately, the environmentalists and the general public attacked the government for a fake consultation. Even afterwards the government claimed to accept all the 8 recommendations by the Task Force, the public basically suspected that this was only the government’s lip service, as it seemed to have its own agenda for the land development.

In the face of the land controversy, the question of justice seems to be unavoidable. It is remarkable that, in their Report (2018, 32), the Task Force considered the political topic of land justice as “outside their purview”. They deliberately did not touch on this question. But, as I argued above, the concept of land justice is crucial for understanding the nature of the controversy and the possibility of a viable solution. The Rawlsian model examined here is exactly to address the critical issue of land justice omitted by the Task Force in their Report.

¹²SCMP, 2 January 2019 (<https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2180350/hong-kong-golf-alliance-says-using-fanling-course>).

¹³SCMP, A1, 21 February 2019.

Rational Resentment and Reasonable Judgement

To adopt the Rawlsian model in examining the land justice, I will start with the two principles of justice as fairness. However, as will be clear below, my main concern is not the consideration of their theoretical justification but the examination of their practical implication for the “special psychologies” found in the stakeholders’ dialectics.

Rawls’ two principles of justice in the latest version (2001, 42) read:

- (1) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (2) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

I will discuss the second principle first and then return to the first principle. Now, for the second principle, one may note that social and economic inequalities do take place in Hong Kong. For Rawls, such inequalities are allowable in a just-and-fair society so long as the fair equality of opportunity is open to all in respect of the associated offices and positions. In the case of Hong Kong, one may find that offices and positions, when attached to certain forms of inequalities (such as the significant discrepancies in income between different types of jobs), are in general open to all citizens according to their abilities and qualifications. Given this sort of openness in Hong Kong that, more or less, meets the first part of the second principle, I will narrow down the scope of my discussion to the second half of the principle, namely the difference principle, according to which social and economic inequalities are allowed only in the cases where they are to the greatest benefit of the least-advantaged members of society.

For my purpose, it is important to differentiate theoretical from practical questions on the difference principle. Sandel (2009, 160), for instance, notes that the difference principle as adumbrated in the original position is counter-intuitive. He argues that, if one follows through Rawls’ position, the theoretical consequence is that people would strangely not be considered to deserve their dues (such as high salaries) on account of their personal talents and efforts expended. For Rawls, personal talents and subjective propensities to make efforts in work are only natural endowments that randomly obtain in nature. They lie, in a sense, beyond one’s control. Rawls’ position is that the justification for such dues should be linked up with nothing but the question whether they contribute to the greatest benefits of the least advantaged in society. This position, Sandel contends, is problematic because it seems to disregard the fact that agents do deserve the moral recognition and dues for their talents cultivated and efforts made.

On the other hand, Sen (2010, 61) contends that the difference principle is problematic because it seems to infect Rawls’ position with an inconsistency. The alleged inconsistency is Rawls’ allowance for the particular idea of incentive (high salary, for instance, to a CEO) in the rational agents’ deliberation in the original position.

The idea of incentive would constitute a problem because it looked like a *bribe* to motivate people to work hard to the benefit of the least-advantaged people. Rawls seemingly depends on this idea but he does not provide any justification why only this sort of bribe-based inequality be allowed while other inequalities are ruled out in the agents' abstract considerations in the original position.

Furthermore, Cohen (2000) criticizes the difference principle because of its inability to safeguard against the theoretical possibility of substantial inequalities that might happen in society. That is, apparently, there would be no limit to the possible scale of inequality by dint of the difference principle. But all these general criticisms, important as they are, are worth mentioning only to clarify the very fact that, for my present purpose, they should be considered as side issues off the focal point I want to make regarding the difference principle.

The point I want to make is not so much about the theoretical justifications as practical implications. Sandel, Sen and Cohen are concerned with the justification for the difference principle in the original position. However, my current concern is about, vis-à-vis the application of the difference principle, how to interpret and channel away the stakeholders' *misconception* in their dialectics, specifically with regard to their perception of the government's possibly *unequal* treatment of them as a type of injustice *in reality* (i.e. outside the veil of ignorance).

To analyse such a dialectical misconception, one may start by highlighting a typical mentality of the stakeholders from the aforementioned case studies. For instance, the employees of FGC opposed to the reclamation of the site because they would lose their jobs if such an option was implemented. Underlying their opposition was their frustration as to why it would be they who should be *unfairly* chosen to make the sacrifice (of their jobs), while some other stakeholders apparently did not need to. The same mentality could be found in the villagers of Wang Chau who confronted the government and the kingpins who completely rejected the idea of clawing back their brownfield sites by the government in 2014. When the stakeholders preferred to maintain their status quo, they would see the government to be *unreasonable* to select them as the target and force them to make the concession. In a similar vein, the public suspected the collusion between the government and the developers in the proposed PPP. From their perspective, the government should not *unjustly* allow a selected group of stakeholders (i.e. the developers) to *unfairly* take advantages of the situation when Hong Kong people collectively facing such a serious land problem.

To come to grips with the stakeholders' mentality and the embedded confusion, it is necessary to further analyse the general tendency of their dialectics. People tend to identify *inequality or unequal treatment* by the government's policies with *unfairness* towards them. That is, when interpreted from within their perspectives, the stakeholders' resistance to (or, depending on the context, insistence on) certain choice of land to be selected and reclaimed by the government seems rational enough. In particular, when there is more than one possible choice to be selected for solving the problem with land supply, one tends, not without good rationales, to shift the onus to other parties so that one's own stakes need not be adversely affected. In other words, no matter how the government's land policy might be formulated in the aftermath of the public engagement, it would be (mistakenly) challenged as *unfair* in

the eyes of many stakeholders because of the unavoidably *unequal* treatment of the different options, such as in the scenarios where some are chosen and some are not for the land development. Indeed, *unless a perfectly equal distribution of resources and responsibilities were possible in reality, there would always be perceivable arbitrariness to some degree in the government's policy in selecting the choices of land supply.*

To find an answer to this dialectical challenge, one has to go into the crucial distinction Rawls (2001, 7) makes *between rational*¹⁴ *and reasonable people.*¹⁵ This is closely related to the question about the application of the difference principle to the land controversy at issue. Now, people are *rational* if, crudely put, they act for their self-interests and, whenever possible, take advantage of their situations. On the other hand, people are considered as *reasonable* if they respect the *fair* terms of cooperation and the principles thus derived, even at the expense of their own interests. *At some point, rational people, when taking advantages of their situations, could be acting unreasonably,* that is, unfairly taking advantages of other stakeholders.

Another way of putting this distinction is to see the difference *between private and public reason.* In the individual level (private reason), one may adopt many legitimate rationales in chasing one's self-interests. Yet, for the public reason, people reason not from their own private interests. Instead, they reason from a collective viewpoint, which need not guarantee that the self-interests of any individuals, including their own, are protected against any interference when such an interference is deemed as necessary and legitimate, such as its being to the greatest benefits of the least-advantaged members of society, as advocated by the difference principle.

But how can one postulate reasonableness (public reason) from one's rational self-interests (private reason)? In reply to this question, Rawls (1996) stresses the importance of the possession of a *minimal* moral sense by the rational agents in the original position in order for them to figure out the two principles of justice. In other words, the two principles of justice are already inclusive of both the rational and reasonable perspectives. Being rational, the agent should be in some sense moral at the same time in the original position. This point is important because only by underscoring this minimal moral sense can Rawls fully answer the challenge, such as the one raised by Habermas (1995), that merely from the self-interested rationality (private reason) one can *never* yield reasonableness (public reason) in one's judgment, which is required for the impartial agents in the original position to formulate the two principles of justice, especially the difference principle.

However, Rawls' answer only underpins his clarification of the situation in the original position. It does not explain how one may interpret the implication of the rationality/reasonableness distinction for the stakeholders in reality, which is my

¹⁴The term "rational" applied in the distinction here has a specific meaning for Rawls, which is different from the term used, for instance, in Hegel's remark noted in section "[Deliberation](#)"

¹⁵Lange (2014) also touches on this distinction but he seems to omit the broader context and the complexity of the practical issues, such as the stakeholders' "special psychologies", that would demand a more systematic application of Rawls' theory of justice, which I attempt to address here.

focal point here. Now, applying the crucial distinction to their dialectics, the fundamental point is this: on pain of inconsistency, the stakeholders need to but typically fail to *grasp* the fact that, even if they have justifiable rationales in arguing why their vested interests *need not* (and from their perspectives, *a fortiori*, *should not*) be negatively affected, it does not follow that their position as such is a *reasonable* one. In other words, although stakeholders may have their *rational* justifications for disagreeing to the government's choices of the land supply, their position may well be only *rational without being reasonable*. As a result, *the stakeholders might rationally resent the government (if they wanted to). But they could not reasonably disagree to it* if the government's decision follows the public reason, aimed, for instance, at a fair distribution of resources in society to the greatest benefits of the least advantaged.

In this light, the distinction at issue helps the stakeholders distinguish their rational resentment from reasonable judgement in their dialectics, which, I argue, are constantly confused by them. Their rational resentment being fully justified (in the case where they have been adversely and unequally treated by the government), the stakeholders should also understand that it is *fair* for the government to ask them to follow the reasonable judgement (public reason) for the sake of others and at the expense of their self-interests. This recognition of the distinction between rationality and reasonableness is important on two counts. First, this is the demarcation between equality and fairness. For Rawls, only fairness, not equality, counts as justice. That is why he allows inequalities in his principles of justice. However, many a stakeholder confuses the two (equality and fairness) as one concept, mixing up the justification for their rational resentment (at inequalities) with that for their reasonable judgement (in favour of fairness). In other words, when they found that they were inflicted with an unequal treatment, they typically inferred that this should be unfairness to them. The Rawlsian model demonstrates that this inference is incorrect. Second, the distinction is helpful for equipping the stakeholders to conceptually revamp their perspectives on what truly counts as justice. Once the rationality/reasonableness distinction is incorporated into their perspectives (no matter what comprehensive doctrines they variously subscribe to), it can address their "special psychologies" regarding the extent to which they *should* put the collective interests prior to their self-interests when they pursue justice as fairness.

An objection arises. Why should the stakeholders' judgements be demanded to be *reasonable* in the first place if they are already *rational*? This is a legitimate question if the stakeholders' question is not to be begged. To answer the question, a regressive argument is in place here. In the first place, the stakeholders' rational resentment is legitimate enough and should be appreciated when their self-interests are *unequally* undermined by the government. But in order for them to criticize the government as being *unfair* or *unjust* to them, they need a consistent framework of justice, from which they can meaningfully mount their criticism. Such a framework cannot be based merely on the stakeholders' private reasons or self-interests, as they are constantly in conflict with each other, clearly demonstrated by the land controversy. The framework, therefore, has to be established on the basis of collective interests, postulated by the public reason. And what the public reason yields is the reasonable judgement, which sees the public interests as logically prior to the private

interests. In other words, reasonableness is indispensable because, as Rawls holds, only when society *collectively* functions as a fair system of cooperation may one find *justice* (and derivatively *injustice*) therein. Interpreted in this sense, reasonableness is indispensable for any stakeholders, including those who attempt to criticize the government as being *unfair* or *unjust* to them. This is the reason why reasonableness (public reason) would be regressively assumed in the dialectics of the stakeholders against the government, no matter what position they adopt in reality.

To apply this regressive argument to the land controversy in Hong Kong, it means that the stakeholders, for instance, those of the North New Territories, *should* agree to the espousal of the public reason along with the private reason side by side. And the public reason always takes precedence over the private reason in order to make possible the conceptual framework of justice. Now, if the government exercises the public reason in their policies, the stakeholders should understand, normatively speaking, the need to square with the government's policy, despite the fact (which is the focal point I want to make in this chapter) that (a) this might go against their private reason or rational interests, and (b) *a certain amount of inequality and arbitrariness of the choice of land supply inevitably remain in the government's final decision, as the perfect distribution of resources and responsibilities is impossible*. My point, then, is boiled down to this, that, even when (a) and (b) occur, as they are bound to in reality, the final decision of the government can still be *a just-and-fair re-distribution of the stakeholders' interests in the land controversy, provided the public reason is well exercised by the government*. This is what the stakeholders cannot consistently reject.

Overlapping Consensus Versus Modus Vivendi

Now, suppose the stakeholders *recognized* this distinction between rationality and reasonableness. Wouldn't this already put them in the position where they could have an overlapping consensus on how the land justice be served? Would the problem not, then, be solved? However, the Rawlsian answer is much more sophisticated and, as one may say, realistic than this short-cut approach.

For one thing, even recognizing such a distinction between rationality and reasonableness, the stakeholders need not be *motivated* to reach any overlapping consensus on the conception of justice. Their rational *resentment* easily in reality supersedes their reasonable *judgement*, unless the stakeholders have a deep *sense of justice* cultivated and are *willing* to stick to it.

Such a cultivation, however, would depend on the existence of a well-ordered society, in which one finds oneself situated in the just-and-fair social and political institutions. In the actual world is a reciprocal relationship between the citizens' possession of the sense of justice and the existence of the just-and-fair social and political institutions. Both would mutually depend on and reinforce each other through the reflective equilibrium. If one asks how this reciprocal relationship is initiated and sustained at all, the answer has to do with the motivation on the part of the

stakeholders from a higher or more general level, which serves as a foundation that facilitates this reciprocal dependence and reinforcement in the particular institutional (policy) level, including that of the governmental policies on the land development. This higher level is found in the overlapping consensus, according to Rawls, in the constitutional level. At this point, one has to return to the first principle of justice to complete the inquiry of this chapter.

In Hong Kong, the Basic Law, the mandate of which comes from the Chinese Constitution, as noted above, serves as the minuscule constitution, given the special concept of One Country Two Systems. Now, in the discussion above, we have also noted an obvious omission in Hong Kong from the scheme of equal liberties that fall into the first principle of justice, that is the absence of Hong Kong people's liberty (and right) to vote for the election of the Chief Executive of Hong Kong. This particular lacuna of the scheme of liberties in the present poses serious problems with the formation of the overlapping consensus in the foundational or constitutional level. One typical question, engendered by this problem, is whether the government led by the Chief Executive and other politically appointed high-rank officials can be seen to have the mandate from Hong Kong people or serve as the embodiment of the people's collective interests in general so that it can genuinely represent people's public reason with the political accountability to them.

The answer, at this stage, is clearly negative. Without a clear mandate from the people or legitimate embodiment of the public reason as such, the overlapping consensus on the political conception of justice (here specifically referring to the first principle of justice) at the constitutional level (the Basic Law) cannot be completed. Without the completion of this general foundation, people at most might maintain a *modus vivendi* in associating themselves with others who have in possession contrasting philosophical and moral preferences. A type of what Rawls (1996, 147) calls "equilibrium point" would take place. That is, people may be, to a certain extent, willing to go along with others over the government's policies only for the sake of expedience, without their genuine support or commitment to them. This fragile compromise among the people could easily be disrupted should any critical events occur that are considered to undermine the integrity of their comprehensive doctrines. Recent incidents, such as Occupy Central or the umbrella movement in 2014,¹⁶ the large-scale confrontational incidents in society between the Hong Kong people and the government (and the police) over the proposed extradition bill in the second half of 2019 and the community's criticism of the government's policies in fighting against the epidemic spread of novel coronavirus in early 2020, were but some of the never-ending manifestations of, among other things, the instability of the "equilibrium points" at work in Hong Kong.

If one moves from the constitutional to the policy level, such as the level of the government's land policy, the same type of situation applies. In modelling the land controversy, one sees that a similar "equilibrium point" is at work. That is to say, even if the Rawlsian distinction between rationality and reasonableness could

¹⁶SCMP has a succinct description of the nature of this large-scale civil disobedience in Hong Kong (<https://www.scmp.com/topics/occupy-central>).

be made known to all, people would, whenever possible, continue to pursue their rational stakes (vis-à-vis their private reason) at the expense of their reasonableness (and public reason). For, in their mind, the government, without the mandate or accountability to them, could not represent the public reason. If any stakeholders perceived their rational stakes jeopardized by any of the government's policies, it is likely that strong resistance would result. Stakeholders would find it difficult to reach any reconciliation with any other stakeholders (including the government). Crudely put, all this can be explained by the fact that the difference principle, as part of the second principle, can hardly be fully subscribed by the people because the first principle of justice (regarding people's equal liberties, such as their right to elect the Chief Executive of the government) is not yet fully established in the case of Hong Kong. People would continue to challenge the government (including their policies) on the ground that they could hardly represent their collective interests or be given their genuine mandate to implement justice as fairness. Their challenge would be posed not only at the constitutional level but also, as a corollary, at the policy level. For this reason, Rawls puts the rightful liberties of people, expressed in the first principle of justice, prior to the second principle as a theoretical construct more important and more fundamental.

This delineation of the idea of overlapping consensus in the constitutional and institutional levels provides a crucial context in which one sees, first, how the clarification of the rationality/reasonableness distinction is necessary for the stakeholders to understand the possibility of their reconciliation with one another and, second, the fact that the stakeholders would likely achieve merely a compromise (*modus vivendi*) without the rationality/reasonableness distinction endorsed unless, and until, their overlapping consensus can be achieved at the constitutional level with their political liberties fully recognized. Then, and only then, could their public reason be well formulated and represented in reality through the Hong Kong government.

Conclusion

In conclusion, it is illuminating to cite a passage from Rawls (1996, 165),

[P]olitical groups must enter the public forum of political discussion and appeal to other groups who do not share their comprehensive doctrine. This fact makes it rational for them to move out of the narrower circle of their own views and to develop political conceptions in terms of which they can explain and justify their preferred *policies* to a wider public so as to put together a majority. As they do this, they are led to formulate political conceptions of justice.... These conceptions provide the common currency of discussion and a deeper basis for explaining the meaning and implications of the principles and *policies* each group endorses [emphasis added].

The passage explains how the process of reflective equilibrium takes place when people are engaged in the institutional (policy) level with their collective deliberation on social and political issues. It is true that the cited passage is followed by a qualifying statement by Rawls (1996, 165) that this sort of public forum may help only

“once a constitutional consensus is in place”. Nevertheless, the mechanism of the reflective equilibrium in shaping a conception of justice, such as that of land justice in the institutional level, reveals a moral. Namely, if the obstacle to the overlapping consensus in the institutional level (e.g. land justice) is to be removed, it has to have the corresponding one removed (first or simultaneously) at the constitutional level so that, for instance, Hong Kong people would have the genuine liberty to participate in the election of the Chief Executive, rendering the public reason to be legitimately represented by the government, which is then conceptualized to be accountable to the citizens. *This* emphasis on the connection of the overlapping consensus (and reconciliation) in the constitutional and the institutional levels, together with the cultivation of the requisite sense of justice among the stakeholders, is the political conception of justice that serves as the Rawlsian long-term solution to the land controversy.

To round out the discussion of this chapter, it is worth considering how the application of the Rawlsian model to the land controversy addresses the main theme of the book, namely the interrelationship between politics, governance and justice. To begin with, Rawls’ notion of reasonable pluralism defines the *dialectics of politics* in a liberal society. In more than one way, politics concerns how stakeholders, including the government, dialectically navigate to a collective agreement through the pluralistic values of the society. At some points, the government’s policies might result in the reallocation of social resources to different parties, engendering disputes among the latter. Now, the government’s attempt to seek the citizens’ wide-ranging support for their *governance*, however, is bound to fail unless the citizens’ sense of reasonableness has been cultivated so that, as stakeholders, they are equipped with a perspective where they can, conceptually speaking, exit from their parochialism and enter into the realm of public reason.

Nonetheless, the Rawlsian model further asserts that this perspectival process of “in-and-out” in the citizens’ deliberation would not happen if it were merely a political goal demanded by the government and imposed on the citizens for the sake of expedience. Instead, this political goal has to be formulated with the citizens’ support from bottom up as well. This requires, among other things, the mandate of the government and the legitimacy of their governance to be endorsed by the citizens. Only in this way can the government function as the embodiment of the people’s public reason even when its governance in some cases comes into a conflict of interests with these or those stakeholders. Furthermore, this embodiment would not be completed unless the stakeholders had reached their overlapping consensus on a political conception of *justice*, whereby the governance of the government can be collectively understood as “just” and “fair” to them, again even in the cases where some parties’ interests have been adversely affected. These triangular factors—politics, governance and justice—are in this way *dialectically* interconnected with one another.

Really, to follow through the Rawlsian model, justice is not something hammered out once and for all but dynamically constructed through a long, ongoing process of political negotiation, reconciliation and collective commitment to a political conception of justice in two levels. This moral ultimately allows one to see clearer the essence of the long-term (though not perfect) solution to the land controversy, while

the original intents of the government and other stakeholders to look for a solution to the housing and land problem that has already exacerbated in Hong Kong, ironically, are something no one has ever doubted from first and last.

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