

THINKING ABOUT 2007

COMMENTS OF FOCUS GROUP 1 ON SESSION III: ELECTORAL SYSTEMS AND PARTIES

Note: These comments do not necessarily represent the consensus of the group.

Importance of the topic

The current system is very unfair and undemocratic. Also, people do not understand it.

The Workshop papers discuss electoral systems and parties in relation to an ideal system of universal suffrage. However, Hong Kong does not have universal suffrage, and has a number of institutional and constitutional problems. Potential improvements to the system for electing representatives within Hong Kong's existing geographical constituencies may not be a high priority within a total constitutional reform agenda.

Voting systems

In Hong Kong, the legislature is at best an opposition. Proportional representation, while perhaps desirable under a fully democratic system, in Hong Kong would tend to fragment an already-fragmented opposition further. This is what the Hong Kong Government wants. Prior to introducing full democracy in Hong Kong it might be better to use an electoral system that encourages concentration in fewer political parties.

Compulsory voting is very rare: used only in Australia.

The electoral system itself is not stipulated in the Basic Law and so can be reviewed at any time. But the voting system within Legco – the two-tier votes for FC and geographical constituencies – is a major problem and is stipulated in the BL.

The benefit of the open list system is that it gives all candidates within a party an equal chance. The drawback is that this encourages factionalism. In Hong Kong, the open list system would fragment parties even more.

Hong Kong people do not like being forced to vote for just one party (ie as in the current Legco geographical constituencies). They would like to vote for their favourite candidates, say five of them, no matter what party they belong to. On this basis, STV might be a suitable option, since it enabled voters to rank as many candidates as they liked. STV is rarely used around the world because it can appear complicated to voters. It is used mainly in Ireland, Malta: small places. It could be suitable for Hong Kong because of Hong Kong's small size. The voters know all the candidates. But would voters like to have five solid votes better than a single transferable vote?

Electoral systems could be designed to promote accountability (non-PR systems) or to promote representation (PR); there is a trade off between these two goals. Of the two, representation is probably the more important because accountability can be achieved by other means. However, in Hong Kong's case it might be better tactically to go for

a less representative system because PR would risk even greater fragmentation of parties.

Technology could be used to encourage people to vote, eg electronic voting in supermarkets.

Functional constituencies

The business sector fears that democratisation will lead to socialism, and supports the functional constituencies (FCs) for this reason. However, this reasoning is naïve: democracies around the world are not all socialistic. Hong Kong's FC system is unique within the world. The FCs should be phased out: they are irredeemable. But if they cannot be got rid of, perhaps you have to look at reforming them nonetheless. You could at least require voting by individuals rather than companies. And one individual to have only one FC vote. And you could widen their franchise: six or seven of them had less than 200 voters. These were the three reforms introduced by Chris Patten.

However, it is difficult to see how the existing FC-dominated Legislature would introduce reforms of the FC system. How would FC representatives justify supporting reform to their constituents?

One possibility would be to increase the number of geographical seats while leaving the FC seats unchanged. This would dilute the importance of the FCs while remaining in accordance with the principles of "gradual and orderly progress", ie it would be less dramatic than abolishing the FCs.

Legco-Executive relationship

In the Legco-Executive relationship, it is considered that Legco has little power. There is perhaps a parallel with the European Parliament. In the early days this had no power, but since it is the only democratically legitimised body at the European level, it gradually acquired more and more powers.

A better analysis might be that Legco has substantial powers, but the make up of Legco ensures that it rarely uses them. No one controls it. On the few occasions when Legco was united - eg over the 1998 economic relief package, over air quality, over the Housing Authority scandals – it got what it wanted very quickly.

The executive broadly represents the haves; the legislature the have-nots. So in Hong Kong the natural tension between executive and legislature has an added dimension: it manifests a class struggle as well as a separation of powers. There is no point in reviewing the electoral arrangements for Legco unless you can persuade more haves to participate. Otherwise you will just get more sectors of the grassroots represented in Legco. To get the haves to participate in Legco you have to redistribute power between the Executive and Legco. The Basic Law does not envisage such redistribution. But you could try for it.

Campaign finance

Constituencies in Hong Kong are very large; this is a major drawback of PR. It is too expensive for small parties to contest them. One solution would be for parties to be

remunerated on the basis of votes that they obtain, say HK\$20 per vote obtained. Taiwan has a system like this.

Political parties

There should be registration of political parties. At present political parties have to register as companies limited by guarantee, which leads to misperceptions of their role and the way in which they would use their money. Most European countries register political parties because they have a list system. Britain has just introduced it. Since Hong Kong has just introduced a list system, it should register parties. This would tend to discourage fragmentation. Also, party registration would involve definition of what a political party was, and distinction between political and other activities such as interest groups (although such distinction was admittedly tending to break down). This might have an impact on Hong Kong's existing FCs, which were generally interest groups.

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Notes from English-language discussion group on constitutional issues

1 Origins

Do constitutional origins matter? In some cases they do – they can help explain how and why a constitution is legitimated. The case of Indonesia (1945) was cited. Do the circumstances in which a constitution is drafted matter? Again, they can do – post-war constitutions sometimes have special features. To what extent are external influences important? Clearly Hong Kong is a special case in having two external powers draft a Basic Law for it. But it is not entirely unique – Japan and Zimbabwe may share some features with it.

2 Legitimacy

In the 1980s, Hong Kong people were strongly in favour of continuity. Moreover, a series of delegations went to Beijing to discuss key constitutional issues, and even some democrats were involved. There was therefore some practical legitimacy to the Basic Law in the drafting stage, even if the procedural legitimacy was limited. However, just because there was practical legitimacy in the 1980s does not mean it still exists today. Underlying circumstances have changed, notably since the handover, and practical constitutional legitimacy has ebbed away.

3 Sovereignty

Constitutions tend to be seen as conferring sovereignty, whereas in the Hong Kong case the constitution was designed to limit sovereignty. However, the contrast is not entirely straightforward. One point is that all constitutions limit sovereignty as the present generation constrains all future generations. Another is that the Basic Law constrains the sovereignty not only of the Hong Kong people but also, at least in practical terms, of the PRC. In this context, the issue of what the Basic Law actually is can be raised. In many ways it has more in common with a charter granted by the sovereign to the people, rather than a constitution claimed and developed by them.

4 Values

Ultimately, political systems depend on shared values, and can experience problems if values become significantly unsynchronized. A pessimistic view is that the Basic Law is an inherently impossible document, because it is attempting to bridge two incompatible systems. This could be why the Basic Law has no preamble expressing some of the values and aspirations of its framers. Article 23 might be one issue that exposes the incompatibilities only too clearly. A more optimistic view is that no political system is ever static, and that whilst there are obvious differences between Hong Kong and mainland China, both are changing. Over time, some sort of convergence at the level of values is possible.

5 Amendments

Procedures for amending the Basic Law are variable. In particular, new mechanisms for electing the Chief Executive require NPC approval, whereas changes to elections to LegCo only need to be reported.

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Report on points raised in the Chinese Discussion Group (Morning session)

1. while the procedures (whether there has been widespread public participation or a referendum in the process) of the formulation and adoption of a society's constitution may not be absolutely fundamental, Hong Kong's Basic Law was basically imposed on its people as they were only presented with the choice to either take it or leave it as a *fait accompli*; this has resulted in some sustained sense of resentment at least in some quarters of the population
2. also because of the exclusion of Hong Kong people's participation from the beginning, it is difficult to say if they embrace the Basic Law or not; at best, their attitude towards the mini-constitution is ambivalent
3. as far as a constitution is concerned, the most important is for it to embody and reflect the major values of the society in question; in this connection, when the Basic Law for HK was drafted, "stability and prosperity" were given prominent place in the document, the problems in this regard are several fold: (a) it is questionable if "stability and prosperity" should have been given such prominence at the expense of other values; because of this focus, when changing secular circumstances call for the reformulation of social consensus on substantive policies, the Basic Law has proved to be ineffective in facilitating the formulation of such consensus; (b) even if "stability and prosperity" might have been on the top of HK people's priorities, the problem is that in both the drafting process and in the subsequent implementation of the constitution, what "stability and prosperity" mean and how best these values can be attained seem to have been monopolized by the view of a very selected group of elites; and (c) while "stability and prosperity" might have been at the top of priorities back in the early and mid-1980s, Hong Kong people's priorities may have changed over the years so that other important values have emerged but not sufficiently embodied in the Basic Law
4. based on the experience of post-Handover years, it is becoming increasingly clear that the blueprint as provided for in the Basic Law is not working: the increasing tension between the executive and the legislative branches, the growing numbers of groups and people publicly showing their dissatisfaction with government performance, etc.; all these are leading people to investigate the sources of the problems bedeviling their daily lives and inevitably, to questions about the institutions of government and the contents of the constitution
5. because of all the reasons above, there was a majority though not unanimous view in the Group that it was necessary to open the window for amending the Basic Law; to the extent that this might not be possible in the immediate future, efforts should be made on improvements to existing practices and on the gradual adoption of enlightened conventions within the letters of the existing constitutional document