

LEGCO PANEL ON CONSTITUTIONAL AFFAIRS

An Open Process for Community Discussion

Background Paper on Constitutional Conventions

Citizens Party wrote to the Chief Executive on 7 September 1998 suggesting a process by which complex community issues could be discussed in Hong Kong. The examples shown are related to constitutional discussions in a number of countries. LegCo's Panel on Constitutional Affairs may find the information useful in its own deliberation on what can be done to stimulate discussion about political reform in Hong Kong.

Part I: General Introduction - An Open Inclusive Process

We propose a process by which important issues could be discussed by the widest number of people in an open and organized manner. The advantages of the process are that it would:

- Enhance involvement;
- Build community consensus;
- All stakeholders can participate;
- Expert opinion can be incorporated;
- Harness collective intelligence and experience;
- Identify priorities; and
- Help to set policy direction.

This process could be used to discuss important issues such as constitutional reform, sustainable development, hospital charging reform, the economy etc where there could be many views and much controversy.

The process involves the SAR Government (SARG) inviting concerned groups and parties, including experts in the relevant fields, to a series of preparation meetings over the course of say 4-6 months before holding an open and organized meeting for those groups as well as the public. The final meeting could last two or three days where necessary. The aim is to get to a consensus of what the community's bottom line is for specific issues.

Part II: An Example - On Political Reform

Take the example of political reform. This is a controversial issue with many views and many complex aspects to resolve. An open and organized process is the only way to enable the community as a whole to become familiarized with the complexity of the issues involved, and for views to be aired. Such a process can only enhance understanding and generate the possibility for change that has the support of the community.

1.The Chief Executive's duty

The SARG has a pivotal role in helping Hong Kong become a true democracy. The Basic Law calls for universal suffrage to be adopted through “gradual and orderly progress”. This ultimate goal is clear and unequivocal. Whoever is CE has the constitutional duty to move the discussion and preparation for that eventuality along expeditiously.

2.Best Option - A Constitutional Convention

One way to initiate this process is to establish a constitutional convention. This usually involves the head of government asking the legislature to prepare an open and organized forum in which the public and the legislature can discuss and debate the issues. The legislature usually plays a central role because it consists of the people's representatives.

The purpose of this convention should be to reach a consensus on the issue of universal suffrage and on other pertinent constitutional questions like the balance of power between the executive and legislative branches, and the accountability of the government.

Indeed, Hong Kong had a constitutional convention of sorts in the mid-1980s with the drafting of the Basic Law itself. The Standing Committee of the National People's Congress was in charge of initiating the process, and appointed the Basic Law Drafting Committee.

However, the proceedings were far from perfect because the drafters were not the people's representatives. Moreover, the drafting process was not open to public scrutiny. These inadequacies can be corrected this time if the Chief Executive asks the Legislative Council to set-up an open process to discuss and debate the issues.

3.Other Options

If the Chief Executive is unwilling to consummate his duty, the Legislative Council itself can set the process in motion. The Legislative Council's House Committee can set-up a special committee in which councillors and political parties can debate their ideas and gather the public's views. The legislature has previously established special committees,

similar to this, to discuss particular subjects, such as equal opportunity, and labour problems. Failing that, the Constitutional Affairs Panel can take on the task and organize hearings to gather public views.

While the legislature can organize a constitutional convention, it is, however, beyond the scope of their powers to amend the Basic Law to provide for universal suffrage. Nevertheless, setting-up a process to explore the issue of constitutional change is an essential first step towards amending the constitution.

Part III: Constitutional Conventions in Australia, Taiwan, and South Africa

In order for Hong Kong to better understand how constitutional conventions work, we can examine the recent efforts of other countries. Many countries have held successful constitutional conventions in recent years, including Australia, Taiwan and South Africa.

Australia

In Australia, one hundred and fifty-two delegates gathered in February of this year to discuss whether Australia should become a republic and if so, the form of republican government they should adopt and the timeframe of any such change. The Prime Minister was responsible for setting up the convention and establishing the agenda. While the delegates did ultimately vote on the questions at stake, their votes were merely to inform the general public. For it was ultimately left up to the people to decide in a referendum. Indeed, the proceedings were carried out in an orderly and democratic fashion.

The Delegates

Half of the delegates to the Convention were elected, while the other half were appointed. The number of delegates elected by each state and territory was to be broadly based on their representation in the national Parliament. Of the seventy-six appointed delegates, 40 were selected from Federal, State, and Territory Parliaments. The other thirty-six were selected from Aboriginal and Torres Strait Islanders, local government, young people, and women, to ensure that these groups were appropriately represented.

Garnering the people's views

Prior to the convention, many local governments conducted their own mini-conventions to collect the people's views and pique the interest of citizens. In Moreland, Victoria, the local council sent out more than seven hundred invitations to people they thought would be interested, and in addition, they advertised heavily in the media. While this local convention focused on broader and more diverse issues than the national convention, it still served to bring ordinary citizens into the process and heighten awareness throughout the populace.

A women's convention was held to gather the views of women and ensure that their voices were taken into account. Delegates to the national convention then took those opinions with them to the national convention.

One appointed delegate to the convention, Christine Milne, leader of the Tasmanian Greens Party, called on the people to help write the preamble to the constitution. She asked the public to submit their ideas for the preamble so that she could then take those ideas to the convention.

To ensure that the people were duly knowledgeable when they voted for electors, the government conducted an extensive public information campaign. The campaign sought to inform people about the nuances of the present system, to outline the options for change, and to detail the arguments for and against the proposed reforms. The government then invited the public to offer suggestions on the proposals.

The convention was conducted in an open manner, allowing the people to access the proceedings on a daily basis. Indeed, a number of avenues were available for the public to gain access to the convention. For one, the convention was broadcasted live into the Senate chamber of Old Parliament House, for interested parties to watch. The public could also sit in the public gallery to watch the majority of the proceedings, and transcripts of the proceedings were written up on the convention's home page every day. With the conclusion of the convention, the proceedings were also published in CD-ROM format.

The Proceedings

On the first of the convention's ten days, selected delegates gave speeches on issues related to whether Australia should become a republic. Other delegates were afforded this privilege on different occasions throughout the convention. The planners set three days aside for debates on groups of issues related to whether Australia should become a republic. Before certain contentious issues arose, delegates broke into working groups to allow similarly minded delegates to collaborate and form their arguments. Representatives from each working group would then report to the full convention on their discussion.

One day was used to discuss the timing and circumstances for change. When each of these debates ended, the delegates would vote on the provisional resolutions. A Resolutions Group would then collect all the proposed resolutions and resubmit them in the closing debate.

The convention's organizers distributed a book of rules for the convention before the proceedings began, to ensure that the convention ran in an organized and efficient manner. They also issued the order of proceedings for each day and the agenda so the delegates fully understood the schedule and exact issues before they arrived at the convention.

Taiwan

Constitutional reform in Taiwan began in June of 1990 with the National Affairs Conference (NAC). Called together by President Lee Teng-hui, the Conference sought to bring advocates from the political, economic, and academic spheres together to discuss constitutional issues.

President Lee instructed the general secretary of the KMT and the chairman and general secretary of the Democratic Progressive Party (DPP) to meet. They ultimately decided to proceed with a national conference. While the President set the process in motion, the ruling Kuomintang (KMT) and DPP were responsible, for the most part, for determining the conference's agenda.

NAC Resolutions

The conference drew one hundred and fifty political, business, and academic leaders, for five days of intense discussion on a variety of constitutional issues. While they could not agree on a system to directly elect the president, they did arrive at a number of conclusions. These included an agreement that members-for-life of parliament, who had been elected to represent the mainland years before, should retire; new elections for the Legislative Yuan; and direct election of the Taiwan province governor, and Taipei and Kaohsiung mayors. They also concurred that the "Temporary" Provisions that had been used to curtail the voices of political opponents should be repealed. Indeed, the NAC enabled previously hostile individuals to work through a number of contentious issues.

While the NAC did not have any statutory power, its resolutions were carried out. Moreover, the NAC created a much more congenial political atmosphere, as it forced political elites from different spectrums to communicate in an organized, respectful manner, reaching agreement on previously divisive issues.

The National Development Conference

While the National Affairs Conference did resolve a number of issues, it also left many unsettled. Another conference, the National Development Conference (NDC), was convened. The NDC met from December 23-28, 1996. The organizers for the conference asked public officials and members of political parties to nominate participants. The conference's one hundred and seventy participants included representatives from academia, political parties, government, and the community. Their job was to draw up a blueprint for Taiwan's development into the 21st Century. The three main topics for discussion were constitutional government and multi-party politics, economic development, and relations with the mainland. The conference gave a clear direction to Taiwan's future, reaching one hundred and ninety-two proposals. Eventually, the NDC's resolutions were incorporated into the constitution.

In all, they conceived of twenty-two dictums on constitutional government and multiparty politics. These included decisions to adjust the government's organization, so that power and responsibility coincided, and to overhaul the provincial governments.

Throughout the conference, even if only one party disagreed to a prospective proposal that was noted and highlighted. Only proposals that had the unanimous support of the attendees were set forth as resolutions. Indeed, the proceedings throughout the conference were conducted in a democratic manner.

For those issues which they could not reach a consensus on, the government established a task force to plan constitutional reform. A number of different scholars and experts were invited to participate in that next stage of reforms.

South Africa

The process of constitutional reform in South Africa was a long and extensive one, in which the ideas of millions of ordinary citizens were incorporated to ensure that the entire populace supported the document.

While initial, confidential, discussions took place beforehand, formal deliberation began in February 1990, after the ban was lifted on the African National Congress (ANC) and other liberation movements, and after the release from prison of Nelson Mandela and other persons. At this time, the government of the Republic of South Africa openly agreed to negotiate with the liberation movements. These people, along with a variety of other groups and parties began to discuss a transition to democracy. The negotiations were made official, with the CODESA I and CODESA II talks in 1991 and 1992, and then more so, with the Multi-Party negotiations in March of 1993.

The Interim Constitution

A variety of problems and deadlocks arose throughout the negotiations. However, the participating groups eventually agreed upon an Interim Constitution (IC), in December of 1993, and set a date for a democratic election. The Interim Constitution came into effect on 27 April 1994, at which point South Africa's first comprehensive democratic election occurred. On 10 May 1994, Nelson Mandela became the President of the Republic of South Africa.

One of the main deadlocks revolved around the new Constitution. Because many of those involved in the negotiations were not freely and authentically elected, some thought they were not qualified to write the people's Constitution. They decided that a mandate from the people was necessary for a legitimate and respected Constitution to evolve.

For this reason, they decided upon a two-staged process, in which an interim government would function while the Constitution was being drafted. Thus, the old system would not transform into the new immediately, but would go through an intermediate stage. In this way, the drafters for the final constitution would be indirectly and directly elected through universal adult suffrage, thus, giving credence to the final product. On 1

November 1995 and in April and June 1996, local elections were held to ensure that the drafters of the new Constitution had a mandate from the people. However, the Interim Constitution was in effect while the new one was being designed.

The drafters of the IC had not been able to solicit public opinion so they mandated that that step be included in the final drafting. The National Assembly and the Senate constituted the Constitutional Assembly. They comprised the national legislature while also writing the new constitution.

While the original negotiators were not necessarily involved in the drafting of the final Constitution, they agreed to the constitutional process because they mandated that the new Constitution abide by whatever they laid down in the IC. Ultimately, the IC contained 34 canons with which the final constitution had to conform. The original drafters also provided for an independent body to determine whether the final constitution was in accordance with the IC; this body took the form of a Constitutional Court.

The Constitutional Court

Along with establishing a Bill of Rights, the IC also provided for a Constitutional Court. Ultimately, the Court played a pivotal role in the adoption of the final Constitution. This Court was created as an impartial, independent body, to judge whether or not the new Constitution was in keeping with the IC, and also to be the highest court with respect to all future constitutional cases. In all instances, the Court is to consider international human rights law and the laws of other democracies. It consists of eleven judges, appointed by the President, who may sit for a non-renewable term of 7 years and must retire at the age of 70. The Constitution dictates that at least 8 judges must be present for a case to be heard. Generally, all 11 are in attendance. Decisions are based on the majority vote of those judges sitting in the case. The final verdict, which includes the opinions of all the judges, is issued as a written statement.

The Constitutional Assembly

The Constitutional Assembly (CA), consisting of the 400 members of the National Assembly and 90 members of the Senate, was to draft the new Constitution within two years of the National Assembly's first sitting. The Assembly met under the chairmanship of Cyril Ramaphosa, of the ANC, and deputy-chairman, Leon Wessels, of the NP. The CA needed at least a two-thirds majority of all its members to adopt the constitution.

Soliciting the Community

A Transitional Executive Council (TEC) was established to give groups and individuals outside the drafting process a chance to voice their opinions on the transition to democracy. The government made a concerted effort to ensure that the people's voices were heard and incorporated into the new constitution. To this end, those involved went to great lengths to reach the community and elicit their views. The Assembly embarked on an extensive countrywide information campaign to heighten people's awareness and gain greater feedback. Groups of politicians and administrators of the Constitutional

Assembly visited urban and distant rural areas to conduct workshops and inform citizens of the meaning of constitutional reforms. On a number of different occasions, the deliberations were opened up to the public and experts were asked to confer on a regular basis.

The Constitutional Assembly had its own newspaper in which major constitutional debates were played out. Comic strips even appeared in regular newspapers to help pique the interests of citizens. The cartoons were used, among other things, to suggest that everyone, including Nelson Mandela himself, could call into the convention's hotline and offer suggestions. The public faithfully sent in oral and written opinions, in response to the frequent drafts of the constitution that the CA sent out. The CA also kept the political parties informed and gave them ample time to respond to the different blueprints. Millions of people participated, ensuring that a legitimate constitution evolved. On 8 May 1996, the Constitutional Assembly overwhelmingly supported the new constitution, with a vote of about 86% of members in favor.

The Court's Review

However, under the conditions of the IC, the Constitution still had to pass through the auspices of the Constitutional Court. Two days after the CA passed the Constitution they submitted it to the Court. The Court solicited public opinion at this point as well. It called on the people, the parties, and other interested groups, to send written objections showing why they thought the Constitution contradicted the IC. The Court then reviewed each submission and asked those parties with relevant, original, complaints to submit a more comprehensive written statement.

Because the Court realized the significance of the matter, it carried out the proceedings as expeditiously as possible, following a strict timetable and procedure. The political parties, the Constitutional Assembly, and 27 other groups were granted an audience. Ultimately, around 2,500 pages of objections were submitted (excluding attached publications). The Court allowed for 8 days to hear objections, from July 1, 1996 to July 11, 1996. While the Court was willing to hear objections from political entities, it remained non-political and was clear in its mission to carry out a legal review, without succumbing to influence from those with vested interests. Its aim was only to decide whether or not the Constitution complied with the tenets of the IC, a purely legal exercise.

Rejecting the Constitution

On 6 September 1996 the Constitutional Court rejected the Constitution and sent it back to the Constitutional Assembly for revisions. The Court pointed to a number of different instances where the Constitution conflicted with the IC.

The Court's main contention with the Constitution was that it allowed power to weigh too heavily in the hands of the central government, without enough authority given to the provincial governments. Specifically, the Constitution reduced the power of the provincial governments over the police and the local governments. Many, including political parties and the business and labor sectors, supported the Court's decision.

Agreement

After the Constitutional Assembly revised the Constitution, the Constitutional Court reviewed it again and on 4 December 1996 proclaimed it to be fully compliant with the Interim Constitution. President Mandela signed the Constitution into law on 10 December 1996 and on 4 February 1997 South Africa's new Constitution came into effect.

While South Africa's was a long drawn-out process, their job was more laborious than most. The country's previous Constitution, adopted in 1983, firmly established the elements of apartheid, providing for separate Houses of Parliament for African, Indian, and White people. Indeed, many people were completely left out of the formal constitutional milieu. As a result, once South Africa decided to proceed with a transformation to democracy, the system had to be completely overhauled. Moreover, because many people were left out of the political process for so long, extensive efforts and considerable time were needed to draw those marginalized groups into the system.

Part IV: Conclusion

The experiences of Australia, Taiwan, and South Africa demonstrate that constitutional reform can be orderly, democratic, and effective. Citizens Party urges the Chief Executive to fulfill the people's mandate and accept his constitutional duty by directing the Legislative Council to organize a constitutional convention for the open and thorough discussion of reform. Working together to promote the common good will no doubt forge better relations among all our political actors and will also build consensus on previously contentious issues.

p.s. since preparing this paper, Citizens Party has also received detail information on the Scottish experience and would be happy to share the papers with the Panel if interested.

7 September 1998
Citizens Party