

How to Work the Unworkable?
The Long-term and Short-term Solutions to
Hong Kong's Constitutional Anomalies

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The present impasse

The political impasse created by Hong Kong's post-1997 constitutional arrangements has long been recognized by local political scientists and politicians alike. The debate has recently gathered new momentum with open comments by Tsang Yok-sing, Chairman of the Democratic Alliance for the Betterment of Hong Kong, to the effect that the system is in danger of losing its political and administrative talent, so much so that Hong Kong may eventually be governed by mediocre people. His argument was based on the observations that without any votes in the Legislative Council (Legco), top government officials have to spend too much precious time simply on 'begging votes' from legislators in order to pass legislations and finance bills, while on the other hand legislators lament about having only votes and yet no active part to play in policymaking¹. Both sides have thus become highly frustrated. In the long-run, talent will not stay in the top echelons of the civil service; nor can political parties attract talent to run for legislative office.

Despite the commonly alleged tensions between the Government and Legco, however, there is no imminent danger of government bills being not passed by the latter. On the contrary, the present Legco is still dominated by functional constituency representatives and pro-Beijing legislators who ultimately deem it their political obligation to support Tung Chee-hwa's administration. Tsang's frustration has probably arisen from his perceived lack of political reward for his party's legislative support to the Chief Executive (CE); hence his proposal for party groups in Legco to form into a majority alliance which should nominate the future CE and provide him with a majority vote in Legco, in exchange for which the CE should appoint their members to some

¹ Under Article 74 of the Basic Law, Legco members are not allowed to move bills relating to public expenditure, the political structure or the operation of government; bills relating to public policy can only be moved by legislators with the consent of the Chief Executive.

principal official posts - in effect advocating some form of 'ministerial' system, as the local political parlance puts it.

Why the colonial constitutional doctrine no longer works?

The Hong Kong SAR's constitutional impasse has largely resulted from a Basic Law which has essentially extended a system originating from British colonial days with the following features:

- An executive-led system, with powers highly biased towards the Administration, so much so that Legco plays only the role of disposing the executive's proposals;
- An Administration dominated by the civil service, with most if not all top posts filled by civil servants who in effect act as 'ministers';
- An amateurish Executive Council (Exco) that constitutionally only advises and assists the Governor (and now CE) in policymaking, but is politically regarded as the latter's inner cabinet.

The colonial system worked in the past because all Exco and Legco members were appointed by the Governor on the advice of senior civil servants. They therefore all shared a high degree of political consensus and usually followed the government line. With the introduction of elected seats since the mid-1980s (and some directly elected members since 1991), Legco is no longer at the service of the Administration. By now Legco has regarded its role as mainly a watchdog over the government, causing some Exco members and senior government officials to question if it had in effect become an 'opposition' body. Because Legco cannot constructively share the power of policymaking and law-initiation, but can only exercise its political muscle through the extreme measures of vetoing government bills, funding requests or even the budget, it has been forced to take on an increasingly confrontational stance vis-a-vis the Administration.

Although Exco is still appointed, it now comprises people recruited by Tung Chee-hwa for various political considerations. Some Exco members harbour greater political ambition and have their own policy agenda which they would like to implement under the blessing of the CE. There is already some subtle rivalry between Exco and top civil servants over 'who to executive-lead' the Administration. The senior civil service, for obvious bureaucratic reasons, would resist any such encroachment on their policymaking powers, in much the same way as they have resisted challenges from Legco and political parties. Meanwhile, senior civil servants have also found it increasingly difficult to satisfy the public's demand for them to be politically accountable. Indeed, as career bureaucrats, their mindset cannot accept taking responsibility for matters of political judgement and consequence, not to mention resignation when policies fail.

There is a need for a more comprehensive review of Hong Kong's constitutional arrangements. As Singapore's elder statesman Lee Kuan-yew said in his public lecture in Hong Kong on 25 October 1999, any constitutional document cannot

remain unchanged forever, otherwise it would become a straitjacket that hinders progress and development. Here some thoughts for long-term constitutional changes are offered. Pending such changes some of which may require amending the Basic Law, certain interim measures to reduce anomalies are suggested.

Long-term constitutional solutions

Executive-legislative relationship

The Basic Law has already placed the SAR's political system firmly on the basis of the separation of executive and legislative powers. Unfortunately, such separation is still practised within the context of the previous colonial doctrine of executive-dominated government, so that Legco's powers to introduce bills and amendments to government bills are very much curbed².

To address such constitutional anomalies, the most straight-forward solution lies in the SAR moving into a proper democratic system built on the separation of powers and check-and-balance, whereby both CE and Legco are to be elected by universal franchise so that either can claim to derive political mandate and legitimacy from the population and there can be a genuine balance of power and authority. The constitutional restrictions on private member's bills should be removed so that Legco can play a more active and thus constructive role in policymaking, instead of being simply a 'questioning' and 'criticising' chamber.

There should not be any undue worry about keeping an executive-led system within a democratic form of government because if we look at the world around us, both the British Westminster model and the US-style presidential system feature a strong executive government.

Executive Council

The role of Exco needs to be re-visited. Exco is a colonial legacy taken on board by Basic Law Drafters for no other good reasons than to retain continuity in the system and to opt for a government by career bureaucrats (hence keeping Exco amateurish and advisory). It is entirely necessary and legitimate for the CE to have his own top policy advisers and these can be organized as a council (like the US Presidential Councils on Security and on Economic Affairs). But ultimately, we have to decide if political appointment should be introduced into the top 'ministerial' posts (i.e Chief Secretary, Financial Secretary and other Secretary portfolios). If so, these appointees will already be people politically in alliance with CE and operating full-time to assist him in leading and directing the government. An Exco which is neither a full-time cabinet nor actually helping to run the government will then become redundant.

² As Footnote 1.

Legislative Council

The reason why the Administration finds Legco so threatening and disturbing is that the former is led by a CE who is not democratically elected. If the CE is elected by universal franchise, he will possess even greater political legitimacy than a fully directly-elected Legco (witness the position of the politically popular President Bill Clinton vis-a-vis the US Congress). Once both the executive and the legislature are democratically elected, Legco can then properly settle into the role of a legislative organ with broad representation, to check and balance the executive. Legco Panels can hold hearings on government policies and can call public officials into account. Legco members can also introduce bills if necessary in competition with the executive though priority can still be accorded to government business and bills. A popularly-elected CE will have nothing to fear politically from Legco because he can equally resort to the popular mandate.

There can be several ways of moving into a democratically elected Legco in which all the seats are directly elected by the population:

- (a) all the 60 seats can be directly elected on a geographical constituency basis;
- (b) 30 of the 60 seats can be directly elected on a geographical constituency basis and the other 30 on a territory-wide single-list system so as to achieve mixed representation of local and territory-wide interests; or
- (c) 30 of the 60 seats can be directly elected on a geographical constituency basis and the other 30 on a functional constituency basis, *but with social/economic functional constituencies established on the basis of universal franchise* so that in effect every citizen of voting age should be eligible to vote in both one geographical and one functional constituency. This option however suffers the problems of defining functional constituencies and voter eligibility. Besides, some functional constituencies will be much larger than others so that the value of voting right may inherently become quite unequal.

Furthermore, if the concern is that business and professional elites may suffer a disadvantage in the early years of introducing full direct election, the number of Legco seats can be increased to say 100 or 120 (Hong Kong's 8-10 million population in 10 years' time will fully justify such increase), so that there will be greater chance for those elites to get elected into Legco even on a popular basis under the 'proportional representation' voting system.

The civil service

For the sake of safeguarding the institutional neutrality and integrity of the civil service, we must not allow its upper echelons to become too 'politicized'. To that extent the present practice of requiring top civil servants to operate as 'ministers' defending

political decisions and engaging in lobbying politics carries a lot of risk to the civil service institution. All ministerial posts (i.e. Chief Secretary, Financial Secretary, Secretary for Justice and other Secretaries, but not the Commissioner of Police and similar functional principal official posts stipulated in the Basic Law) should preferably be turned into political appointments, whose term should coincide with that of the CE. If existing civil servants are to be recruited to those posts, they should first quit the civil service on voluntary retirement and take up political contracts. Secretaries may also recruit non-civil servants to form 'ministerial cabinets' together with civil servants, to provide policy and political advice to them.

Political parties

Parties are not highly relevant to the existing political order which is built on an executive-led system suppressing the growth of representative government. However, should Hong Kong eventually move into a full democracy, parties will certainly feature more prominently in such a system, either giving rise to a majority party or a majority coalition of parties within Legco which can enter into political bargaining with the CE, or even enabling a CE with party-political background to be popularly elected. But in such eventualities, parties will probably be of a very different breed from those today.

Short-term measures to reduce anomalies

Executive-legislative relationship

Between now and the arrival of fundamental constitutional change in the democratic direction, solutions should be found in engaging Legco and political parties more in the policymaking process. To start with, the CE should interpret the Basic Law restrictions on private member's bills more flexibly so that legislators are allowed to contribute to policy innovation through legislative proposals. Major government policy advisory committees should be opened up to legislators and professionals/community leaders with political party affiliation. To recognize the role of political parties in the system, the Chief Secretary as the official in charge of the government's legislative programme should hold regular meetings with leaders of major Legco parties to iron out issues and to receive ideas towards the legislative agenda.

There does not appear to be much practical merit in having overlapping membership between Exco and Legco as that in place before Governor Chris Patten did away with the fused model in 1992. The reason is simple. Once legislators are appointed to Exco, their preferred and politically perceived role is that of an Exco rather than Legco member. So the expectation that those 'dual role' members can win over their legislative colleagues to the side of the Administration will not necessarily work.

It also does not work in appointing party leaders to Exco. No parties would like to give up their political independence by joining Exco and be bound by the rules of collective responsibility and confidence, *unless* the CE is prepared to join hands with

major parties to form some kind of coalition government in which case Exco will naturally become the coalition's cabinet.

Executive Council

As for Exco, introducing full-time paid Exco members as some have suggested in the past is considered unrealistic unless the appointees are willing to become full-time politicians. Most if not all existing Exco members are not. However, Exco members should be more visible politically. Instead of staying behind the cloak of back-seat advisers, they should have the obligation to come out to more actively defend government policies.

While there is no objection to appointing Exco members to head major government policy advisory committees and statutory bodies, the role distinction between them and Policy Secretaries should still be clearly made. The latter are the true 'ministers'. We should not turn the system the other way round by putting Exco members in charge of policy portfolios with the Secretaries playing a subservient role. Such an attempt will only create further constitutional confusion and power conflicts. If CE would like one of his Exco members to play a key role in any policy area, he can simply appoint that member to be a full-time Policy Secretary.

Ministerial system and the civil service

By the time of the second CE term, there will be an opportunity to introduce political contracts for the appointment of principal officials holding 'ministerial' portfolios. Appointees can come from both existing civil servants and 'outsiders'. On that basis, if there are non-civil servants who are willing to assist the CE full-time, they should be recruited as 'ministers' rather than as Exco members. Some form of 'ministerial cabinets' can also be introduced.