Political System Transformation in Hong Kong

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China's National People's Congress (NPC) and Standing Committee of the NPC (NPCSC) decided in March 2021 to transform Hong Kong's political system. Within a couple of months, the Hong Kong government will amend local laws to enable elections for a reconfigured Election Committee (EC) and Legislative Council (LegCo) to be held, respectively, in September and December 2021, ahead of the Chief Executive (CE) election in March 2022.[1]

Reforming Hong Kong's electoral system

The CE is Hong Kong's political leader, accountable to both the central government and the Hong Kong Special Administrative Region (HKSAR). The CE is nominated by EC members, elected by the EC, and appointed by Beijing. The EC was first established in 1998 with 800 members divided equally across four sectors.[2] In 2012, it was expanded to 1,200 members. EC members are elected by almost 250,000 voters, most of them individuals, some corporate. To run for CE a nomination by one-eighth of the EC members is needed, and the successful candidate needs more than 50 per cent support. The CE is not allowed to be a member of a political party. The new reforms will increase the size of the EC by another 300 members, add a new sector for Hong Kong members of national bodies, abolish individual voting, and give EC members the power to nominate LegCo members.[3]

LegCo members were mostly appointed up until 1985, when elections by functional constituencies (FCs) and an electoral college were introduced. The FCs are special interest constituencies based on economic sector, profession or other interest; both individual and corporate voting is used to return FC members.[4] Direct elections for some members were only introduced in 1991. After the resumption of Chinese sovereignty in July 1997, the EC, FCs and geographical constituencies (GCs) were used to return LegCo members up until 2004, when an equal number of legislators were elected by FCs and GCs only. LegCo had 60 members in 1997 but was expanded to 70 members in 2012. The new reforms will expand the size further to 90 members, remove some individual voting from the FCs, bring back the EC elected members in a significant way, shrink the number of GC members from 35 to 20, and redraw the GCs incorporating a new method of first-past-the-post voting.[5]

Hong Kong also has 18 District Councils (DCs) with elected members. The DCs have been used to return members to both the EC and LegCo. However, when pro-democracy candidates won the vast majority of DC seats in the 2019 elections, giving them control over all but one of the 18 DCs, this troubled the Hong Kong and central governments. The new reforms will remove the DCs from the mechanisms used to return EC and LegCo members, on the ground that Article 97 of the Basic Law requires them not to be "organs of political power". The so-called five FC super-seats, with candidates drawn from elected DC members, are also abolished. The super-seats were introduced in 2012 to give everyone else a FC vote who did not already have one in the traditional FCs. With the new reforms, there will be some voters with three votes, more with two votes, and the vast majority with only one vote in LegCo elections.

[1] See Improving Electoral System (Consolidated Amendments) Bill 2021, gazetted on 13 April 2021.
[2] Simon NM Young and Richard Cullen, *Electing Hong Kong's Chief Executive* (HKU Press, 2010) ch 2.
[3] See Annex I Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, as amended at the 26th meeting of the Standing Committee of the 13th NPC on 30 March 2021.
[4] See Christine Loh and Civic Exchange (eds), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (HKU Press, 2006).

Are the new reforms justified? In examining this question, I consider the aims of the reforms, their implications, and whether they are necessary and reasonable. Overall, I have doubts whether all the reforms are necessary and proportionate to achieving their intended aims.

Reform aims

The reforms serve three main political ends: (1) ensuring only patriots serve as the CE and as LegCo and EC members; (2) promoting rational and constructive debate in LegCo; and (3) laying the foundation for a speedier realisation of universal suffrage of both the CE and LegCo members. In my view, all of these ends are legitimate and of pressing concern. Deng Xiaoping wrote that a patriot need not agree with China's socialist system but must "love the motherland and Hong Kong".[6] There is an analogy to the convention of loyal opposition in parliamentary democracies, i.e. the opposition can be critical of the government as adversaries, rather than enemies, while sharing the same respect for country and constitution.[7]

As for the second end, it is well known LegCo has not been operating smoothly or effectively in recent years. For example, in its first four years of operation after 1997, it passed 251 bills; in the most recent four years from 2016, only 81 bills were passed.[8] As Webber notes, when "government and opposition are carried on by disagreement, neither will be facilitated in fulfilling its responsibilities: the government will not get its Bills or anywhere near all of them, and the opposition will not make known its criticism or present itself to the public as a responsible alternative".[9]

As for the aim of universal suffrage, we are reaching the midpoint of the 50-year journey promised in the Sino-British Joint Declaration, yet nowhere near reaching the universal suffrage aims promised in the Basic Law. The 2015 veto of a CE universal suffrage proposal meant there needed to be a shift in the LegCo composition if there was to be another chance at reform.

Process of reform

Though the ends are good, what about the means? First, one must consider the means by which reform has come about. In 2004, the NPCSC decided that any political reform must follow a five-step procedure which involved a tripartite consensus of the CE, NPCSC and two-thirds of all LegCo members and, in practice, wide consultation of Hong Kong people.[10] Out of expedience, this procedure has now been jettisoned by the NPC and NPCSC and only a partial consultation was conducted. There was no consultation document, no proposals for comment, no website, no public forums, and only 20 days between the NPC and NPCSC decisions. Compare this to the seven months of public consultation conducted in 2014 and 2015 on CE and LegCo elections reform.[11]

In my view, the "consultation" fell short of the requirements of Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) guaranteeing the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. ICCPR standards remain a matter of state interest as China continues to report periodically to the United Nations (UN) Human Rights Committee on the continued application of the ICCPR in Hong Kong. With the safeguard of the tripartite consensus gone, any election laws now made can be changed again with little notice or consultation. Such precarity would seem to be inconsistent with the origi-

[5] See Annex II Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, amended at the 26th meeting of the Standing Committee of the 13th NPC on 30 March 2021.
[6] Deng Xiaoping, "One Country, Two Systems", 22-23 June 1984, reprinted in China Daily, 19 February 2004.
[7] Michael Ignatieff, *Fire and Ashes: Success and Failure in Politics* (Harvard UP, 2013) 101-2.
[8] LegCo Secretariat, "Legislative Council in figures (as at 2002.08.27)", "Legislative Council in figures (as at 2021.03.05)".
[9] Grégoire Webber, "Loyal Opposition and the Political Constitution" (2017) 37 OJLS 357, 372.
[10] Interpretation by the Standing Committee of the National People's Congress Regarding Annex I (7) and Annex II (III) to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the 8th Meeting of the Standing Committee of the 10th NPC on 6 April 2004.
[11] Simon NM Young, "Rethinking the Process of Political Reform in Hong Kong" (2015) 45 HKLJ 381, 384.

nal intention of those who drafted annexes one and two of the Basic Law.

New vetting committee

The main vehicle for vetting patriotism is a new Candidate Eligibility Review Committee whose membership will consist of several minister-level principal officials and possible others. This vetting committee will assess candidacy qualifications, including whether the person will uphold the Basic Law and swear allegiance to the HKSAR of the People's Republic of China, taking into account the findings and opinion of the new national security committee, who will receive input from the new national security police. Surprisingly, a person who is refused candidacy on national security grounds will not be told the reasons or be able to challenge the refusal in court.

In my view, this is likely a violation of the ICCPR's right to be elected without unreasonable restrictions. In *Leonid Sinitsin v Belarus*, the individual's nomination for the presidential election was ruled invalid by the election commission because he failed to submit enough signatures in support.[12] The courts refused to hear his challenge on jurisdictional grounds. The UN Human Rights Committee found no effective remedies were available to the individual to challenge the ruling before an independent and impartial body, resulting in a violation of his rights under article 25(b) of the ICCPR, read in conjunction with article 2 (right to an effective remedy).[13] To comply with these requirements, local legislation should include an independent and impartial mechanism to review decisions of the vetting committee, with sufficient safeguards to protect sensitive information.

EC and LegCo reconfigured

The reforms change significantly the election methods of the EC and LegCo. These reforms are intended to further the aims of having patriots administer Hong Kong and having more balanced participation. The EC membership is increased from 1,200 to 1,500, and many of the new members, all of whom must be Hong Kong permanent residents, will come from national bodies and organisations. As we reach the mid-point of the 50 years transition period, there is merit in having more EC members who are knowledgeable and interested in matters of national interest. It reflects what I have described as adopting an external perspective of the Basic Law, one that sees Hong Kong's model and people playing a distinct role on the national level.[14]

Though the national focus is understandable, what is less clear is the need to disenfranchise so many individual EC voters. In the 2016 EC elections, there were 230,073 individual voters in 23 subsectors. Most of those will now lose their vote.[15] EC elections already have the lowest turnout rates of all elections; cutting off individual voters will further alienate the EC from the general electorate.

Similarly, with functional constituencies (FCs) used to elect LegCo members, there were 232,252 individual voters registered in 2020 (ignoring the super-seats), but the reforms will likely eliminate the vote for around 24,715 individuals. Corporate voting is to replace the lost EC and FC individual votes. But a long-standing problem with corporate voting is the ease by which a single individual can enjoy multiple votes by virtue of his or her control of multiple corporations. The three-year operation rule only addresses possible abuse from creating new entities to gain more votes; pre-existing corporations and bodies can still be used to pack subsectors and constituencies. If the government is to have "measures against acts of manipulating or undermining election", it needs to take steps to prevent the potential abuses and unfairness of corporate voting.[16]

The EC will now elect 40 of the 90 LegCo members. This is a significant change as the existing LegCo has only 70 members, half returned by

[12] *Leonid Sinitsin v Belarus* (1047/2002), UN Doc CCPR/C/88/D/1047/2002 (16 January 2007).
[13] ibid [7].
[14] Simon Young, "How Hong Kong's Basic Law can serve the interests of all China", *South China Morning Post*, 27 June 2017.
[15] See Changhao Wei & Taige Hu, "Legislation Analysis: NPC Standing Committee Approves Overhaul of Hong Kong's Electoral System", NPC Observer, 31 March 2021.
[16] Annex I (n 2) [9]; Annex II (n 3) [6].

geographical constituencies (GCs) and half by FCs. After the reform, FCs will return 30 members and the GCs only 20 members, representing only 22 per cent of all seats. This is the smallest proportion of directly elected legislators in LegCo since such members were introduced in 1991, when their proportion was 30 per cent.[17] Hence, the reforms are criticised for being retrogressive or, euphemistically, a reboot. I do not doubt that the 40 new EC seats, the reforms to FCs including the partial elimination of individual votes, and the shrinking of the GC membership will bring more patriots and calm to LegCo. But, if this is so, why not leave the tripartite consensus intact for future reforms? Hopefully, the new direct amendment procedure will facilitate more progressive changes in the future, when the NPCSC is ready to relax its grip.

New nomination hurdle and power

More troubling is a new requirement that all LegCo candidates obtain at least two to four nominations from members of each of the five EC sectors. With the new fifth sector consisting of Hong Kong delegates to the NPC, Hong Kong members of the National Committee of the Chinese People's Political Conference, and Hong Kong members of relevant national organisations, it may be difficult for persons with critical views, whether from the pro-democracy camp or otherwise, to satisfy this requirement. If the vetting committee will be closely monitoring oath compliance and national security concerns, this additional nomination requirement seems to be overkill. Once the Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Bill 20201 is passed, there will also be a new mechanism to disqualify legislators who have gone astray on their oath.

In my view, this new nomination requirement could foreseeably amount to an unreasonable restriction on the right to stand for election in some cases. Good potential candidates may also be discouraged from entering politics given the additional hurdles involved. I also fear more corruption will creep into the system once EC members, who are unremunerated, have this additional power of nomination.

Stairway to universal suffrage?

Finally, are we any closer to universal suffrage? I can see how the remaking of the EC can lend confidence to going ahead with another CE universal suffrage proposal, albeit similar to the 2015 one, that evolves the EC into a nominating committee for CE candidates. With all the new prophylactic safeguards in place, maybe a lower threshold for nomination, something less than 50 per cent, will be acceptable next time around.

As for LegCo universal suffrage, it is not apparent how a practical system of direct elections will evolve or develop. Beijing may want to retain the EC and FCs as nominating bodies, but that would still entail a rather long and complicated ballot paper for the 4.5 million electors to cope with in the voting booth.

A previous version of this article contained an incorrect information about the number of individual votes eliminated by the reform. The error has been corrected.

[17] Simon Young, "The Meaning of the Right to Vote in Hong Kong" (1997) 42 McGill LJ 649, 667 (Table 4).

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