

Constitution-related articles

Hong Kong
A step taken in development of political system

In June 2010, political institutions in Hong Kong managed to take a step together to develop the political system of the Hong Kong Special Administrative Region towards the ultimate goal of universal suffrage for both the Chief Executive (the head of the HKSAR and of its executive authorities) and the Legislative Council (the legislature of the HKSAR), following an almost last minute indication on the part of the Central Authorities in Beijing of willingness to accept a modification of the proposal of the HKSAR Government to expand the electorate of the five new members of the Legislative Council to be returned in elections in 2012.

Hong Kong's constitution, the Basic Law, provides for a gradual process of achieving universal suffrage for both the Chief Executive and the Legislative Council. At present, the electoral method for the Chief Executive provides for an election committee of 800 persons returned from four sectors of the community, whereas the electoral method for the Legislative Council provides for 30 members returned from direct elections in geographical constituencies and for 30 members returned from elections in functional constituencies (which are constituencies of specified sectors of the community, such as industrialists, bankers, real estate developers, doctors, lawyers, teachers and trade unionists).

In 2007, the Standing Committee of the National People's Congress (NPCSC) decided that the 2012 elections for the Chief Executive and for the Legislative Council would not be by universal suffrage and that the half-and-half ratio between members returned by geographical constituencies through direct elections and members returned by functional constituencies in the Legislative Council would remain unchanged. Subject to these constraints, appropriate amendments may be made to the electoral methods for the Chief Executive and for the Legislative Council.

The HKSAR Government sought to introduce electoral reform by presenting a package of proposals in April 2010. A number of political parties and public activists and intellectuals in Hong Kong objected to the proposals, particularly those relating to amending the electoral method for the Legislative Council in 2012 by adding 5 seats returned by geographical constituencies through direct elections and 5 seats returned by the functional constituency of all elected District Council members. A group of Hong Kong politicians, activists and intellectuals calling themselves the Alliance for Universal Suffrage (AUS) counter-proposed that the voters who are currently not entitled to vote in functional constituencies should be allowed to elect the 5 new legislators from the District Councils in 2012.

The AUS counter-proposal was then subject to criticism that it arguably was not in conformity with the Basic Law and the 2007 NPCSC Decision. Qiao Xiaoyang, Deputy Secretary General of the NPCSC, made a speech on 7 June 2010 highlighting the division in opinions in Hong Kong society on the matter but expressed his own opinion that the core content of "universal suffrage" is protecting that everyone has the equal right to vote. Historically, the concept of "universal suffrage" emphasized that there should not be inequality in the right to vote through differences in property, sex and race. Therefore, what has been said conventionally as "universal suffrage" is a reference to the universality and equality of the right to vote. However, it is internationally recognised that reasonable restrictions could be imposed on the right to vote, and different countries have indeed adopted different electoral arrangements in accordance with their respective circumstances to give effect to the universal and equal right to vote. Qiao also expressed the view that functional constituencies should be considered objectively since they have always existed since Hong Kong had adopted an electoral system.

The Hong Kong Bar Association has reiterated time and again the continued relevance of Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR) to the question of universal suffrage for the Chief Executive and the Legislative Council of the HKSAR. The proposal to expand the number of seats allocated to the District Council functional constituency exacerbates the existing inequality of voting power. Such an arrangement may lead to a transformation of the role of District Councils, which according to Article 97 of the Basic Law should constitute consultative and service-providing “district organizations which are not organs of political power”.

The Hong Kong Bar Association is also of the opinion that Qiao’s own view that universal suffrage incorporates principles of universality and equality might tend to mislead. This is because Qiao’s focus was on the right to vote and he had not said anything about the right to be voted/ elected. Therefore, it is submitted that Qiao’s own view provides no assurance that the principles of equal opportunity in participation and free and genuine elections, which are part and parcel of the right guaranteed in Article 25(b) of the ICCPR and reiterated in the HKBA’s submissions, will be respected.

Qiao also made a reference in his speech to “global practice for different countries to adopt different electoral systems in accordance with their respective circumstances to give effect to the principles of universality and equality”. The Hong Kong Bar Association is of the view that while the practical circumstances of a particular place would of course play a role in shaping its electoral arrangements, such general assertion does not in itself justify the retention of functional constituencies on the sole basis that they have historically been adopted in Hong Kong. More importantly, the Hong Kong Bar Association finds it undesirable that many may have been directed by Qiao’s own views from seeking to abolish functional constituencies to seeking to modify functional constituencies to come within “reasonable restrictions” to the right to vote. The Hong Kong Bar Association has reiterated time and again its view that functional constituencies must be abolished in order for the Legislative Council to returned by universal suffrage in compliance with Article 25(b) of the ICCPR.

Negotiations and contacts were maintained after Qiao’s speech among the Central Authorities, the HKSAR Government and the AUS and the related political parties (most notably the Democratic Party) in an effort to secure the necessary two-third majority in the Legislative Council for the HKSAR Government’s electoral reform to be passed.

In the afternoon of 17 June 2010, Elsie Leung, the former Secretary for Justice and currently a vice-chairman of the Basic Law Committee (which advises the NPCSC on Basic Law related matters), made it known that she considered the AUS/Democratic Party proposal for the new five functional constituency seats to be returned by more than 3 million voters registered under the geographical constituencies (minus the 200,000 odd voters who are registered under another functional constituency) to be acceptable and not in contravention with the Basic Law of the HKSAR and the 2007 NPCSC Decision of 2007 (which requires the maintenance of the 50/50 split between geographical constituency seats and functional constituency seats in 2012). Others warmed up to the idea.

On 21 June 2010, the Chief Executive and his team held a press conference in the afternoon announcing that the HKSAR Government had accepted the Democratic Party’s proposal. The Secretary for Justice made a separate speech indicating that in his view, the Democratic Party’s proposal was not in contravention of the Basic Law of the HKSAR and the 2007 NPCSC Decision.

Following a three-day debate, the Legislative Council voted on 24 June 2010 and on 25 June 2010 to pass the motion concerning the Amendment to the Method for the Selection of the Chief Executive and the motion concerning the Amendment to the Method for the Formation of the Legislative Council and its Voting Procedures respectively with the requisite two-third majority. The two motions are set out below:

Motion concerning the Amendment to the Method for the Selection of the Chief Executive
Pursuant to Article 7 of Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China of 6 April 2004, and the Decision of the Standing Committee of the National People's Congress on Issues relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2012 and on Issues relating to Universal Suffrage of 29 December 2007, the "(Draft) Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region" appended to this Motion is hereby endorsed by this Council by a two-thirds majority of all Members.

Annex (Draft) Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region

The Election Committee to elect the fourth term Chief Executive in 2012 shall be composed of 1200 members from the following sectors:

Industrial, commercial and financial sectors 300
The professions 300
Labour, social services, religious and other sectors 300
Members of the Legislative Council, representatives of members of the District Councils, representatives of the Heung Yee Kuk, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference 300

The term of office of the Election Committee shall be five years.

Candidates for the office of Chief Executive may be nominated jointly by not less than 150 members of the Election Committee. Each member may nominate only one candidate.

Motion concerning the Amendment to the Method for the Formation of the Legislative Council and its Voting Procedures
Pursuant to Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China of 6 April 2004, and the Decision of the Standing Committee of the National People's Congress on Issues relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2012 and on Issues relating to Universal Suffrage of 29 December 2007, the "(Draft) Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative

Region and its Voting Procedures" appended to this Motion is hereby endorsed by this Council by two-thirds majority of all Members.

Annex (Draft) Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures

The fifth term Legislative Council in the year 2012 shall be composed of 70 members, and the composition shall be as follows:

Members returned by functional constituencies 35

Members returned by geographical constituencies through direct elections 35

Following the passage of the two motions, the Chief Executive gave his consent to the two amendments and reported them to the NPCSC for approval in the case of the amendment concerning the method for the selection of the Chief Executive and for the record in the case of the amendment concerning the method for formation of the Legislative Council. The amendments would take effect upon the approval or recording given or made by the NPCSC.

The final step to complete electoral reform would be to amend the Chief Executive Election Ordinance (Cap 569) and the Legislative Council Ordinance (Cap 542) to give effect to the two amendments and to other matters of detail that the Central Authorities and the HKSAR Government had supposedly accepted or reached agreement with the AUS/Democratic Party.

The Hong Kong Bar Association had examined the AUS/Democratic Party proposal and the justifications offered in the Secretary for Justice's speech for accepting that proposal. The Hong Kong Bar Association considered that a number of pertinent matters were not properly addressed in the Secretary for Justice's speech: -

(a) The Hong Kong Bar Association had criticized that the proposal to expand the number of seats allocated to the District Council functional constituency exacerbates the existing inequality of voting power. This criticism remains in spite of the AUS/Democratic Party's proposal that the new five District Council constituency seats would be returned by voting by all those geographical constituency electors who have not registered as an elector in another functional constituency. The voting power of the electors (totaling 3 million) of the new five District Council constituency seats is not comparable to the electors in other functional constituencies (in the tens, hundreds and at most thousands).

(b) The Hong Kong Bar Association also expressed earlier that such arrangement may lead to a transformation of the role of District Councils, which according to Article 97 of the Basic Law should constitute consultative and service-providing "district organizations which are not organs of political power". The Secretary for Justice did not address this issue in his speech. On the other hand, it might be arguable that a distinction can be drawn between District Councils, whose functions are set out in the District Council Ordinance (Cap 547) and will remain, and the body of persons of elected District Council members, who will form exclusively the body of nominators and potential candidates for the new five District Council constituency seats, as well as the body of nominators, potential candidates and voters to return a number of the additional members of the Chief Executive Election Committee. The District Councils will not be organs of political power so long as their statutory functions remain. But the body of elected District Council members will wield significant political power.

(c) The Secretary for Justice's argument that the AUS/Democratic Party's proposal was consistent with the Basic Law and the 2007 NPCSC Decision consisted of three points: (i) the proposal would entail an election that was not geographical constituency direct elections; (b) the District Council(s) had been and would still be a functional constituency; and (c) the five new

Legislative Council members returned through the proposal would still represent the District Council(s) in the Legislative Council.

(d) This argument had not addressed the historical position of District Councils/ Boards in relation to Legislative Council elections. The Legislative Council (Electoral Provisions) Ordinance (Cap 381, repealed) governed the composition of the Legislative Council in British administered Hong Kong before 1 July 1997. It provided that in the 1988 Legislative Council Elections, members of District Boards (other than those who are members of the Urban Council or Regional Council) are grouped together in District Board constituencies called electoral college constituencies under Schedule 1 of the Ordinance (which are distinguished from functional constituencies set out under Schedule 2 of the Ordinance); that in the 1991 Legislative Council Elections, the electoral college constituencies were abolished and three new functional constituencies created, namely Urban Council functional constituency, Regional Council functional constituency and Rural functional constituency (but not a District Board functional constituency); and that in the 1995 Legislative Council Elections, an Election Committee constituency was created in Schedule 1 of the Ordinance with its electors being members of the District Boards, returning 10 elected members of Legislative Council. The above historical facts suggest that the pre-1997 practice of the British colonial administration was not to treat District Board members as a functional constituency, but *separately* as a constituency engaging in indirect elections to return some of them as members of Legislative Council.

(e) The historical context, up to the time when the Basic Law was enacted, is a significant indicia of the *intention* of the National People's Congress (and the Basic Law Drafting Committee) when enacting the Basic Law; see the following cases of the Court of First Instance of the HKSAR: *Cheng Kar Shun & Anor v Honourable Li Fung Ying & Ors* [2009] 4 HKC 204 (per Andrew Cheung J); and *Chan Yu Nam & Anor v Secretary for Justice* [2010] 1 HKC 493 (per Andrew Cheung J).

(f) There was no District Council functional constituency in Sch 1 of the Legislative Council Ordinance (134 of 1997) enacted by the Provisional Legislative Council (which then set out the functional constituencies). Members of the Provisional District Boards at the time may elect among themselves 42 persons to go into the Fourth Sector of the Election Committee of 800 members, which was to return 10 members of the Legislative Council.

(g) A District Council functional constituency was only created in 1999, with the addition of s 20ZB of the Legislative Council Ordinance.

(h) In this connection, paragraph 2 of Annex II of the Basic Law provides that the delimitation of functional sectors and corporate bodies, their seat allocation and election methods shall be specified by an electoral law introduced by the HKSAR Government and passed by Legislative Council. This arguably does not absolve the requirement that what is delimited must be "functional constituencies" within the meaning of paragraph 1 of Annex II.

(i) The second matter the Secretary for Justice's argument had not addressed is a feature of functional constituency elections since it was first introduced in 1988, which one may term as the identity of the candidature base, the nomination base and the electorate base. The same group of people are the nominators, potential candidates and electors. It may be suggested that this has been a purposive or core characteristic of functional constituency elections.

(j) It might be said that the Secretary for Justice's argument, without addressing the above matters, could be reduced to the proposition that an election that is not direct election through a geographical constituency is a functional constituency election. An alternative way of describing his argument is that a "progressive or updating interpretation" was made of the Basic Law on this occasion. A third way is to regard it as "purposive" interpretation for transiting to universal suffrage.

(k) The amendments to the Legislative Council Ordinance must have to be consistent with the Basic Law. The making of a record of the amendment to the Method for the Formation of the Legislative Council of the HKSAR and its Voting Procedures by the NPCSC cannot be taken as an interpretation of the Basic Law in the strict sense the Court of Final Appeal has required since *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. Since the amendment specifies only the bare bones of the 2012 LegCo, its recording by the NPCSC cannot be regarded substantively as blessing the not-yet-proposed amendments to the Legislative Council Ordinance.

The Hong Kong Bar Association believes that the above matters should be properly addressed when the proposed amendments are deliberated in Legislative Council after the summer.

Hong Kong Bar Association
July 2010