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 Urgent
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To: stephen_sl_lam
cc:
Subject: some ideas on FCs and universal suffrage

Dear Mr Lam,

I attach a short paper I have recently prepared on how FCs might be reformed in order to co-exist with universal suffrage. I'm happy to engage with you further to discuss these and any related ideas.

All the best.

Regards,

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Can Functional Constituencies Co-exist with Universal Suffrage?

by

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The Director of the Centre is Dr. Fu Hualing and the Deputy Director is Associate Professor Simon Young. The Assistant Research Officer is Lison Harris; and the Executive Secretary is Flora Leung.

This Occasional Paper was written by Mr. Simon Young. It presents a proposal for a viable co-existence of functional constituencies (FC) with universal suffrage, which could feasibly be implemented in Hong Kong by 2008. It is first proposed that all Legislative Council (Legco) members be elected by universal suffrage. A further election is held from amongst the elected LegCo members to elect, on the basis of FCs, functional members who will have a special role in the executive branch of government. The new FCs will be delineated in accordance with the policy areas of the existing Principal Officers or the Panels in LegCo. The proposal achieves three aims: it guarantees universal suffrage at its core, it corrects the many deficiencies and anomalies with the present FC system, and it realigns the FC system to provide for a more effective system of governance.

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Introduction

The answer to the question posed in the title of this paper may well break the impasse that divides those who desire universal suffrage in 2008 and those who stand firmly behind the National People's Congress Standing Committee (NPCSC)'s Decision of April 2004.¹ For if a true consensus can be reached on a reformed political system that guarantees universal suffrage along with a system of functional representation, there is little reason why such a system should not be implemented as soon as possible.

In this paper, I present a proposal for a viable co-existence. I argue that it is viable for essentially four reasons. First, it provides for universal suffrage of legislators in its uncompromised form, with direct elections based on geographical constituencies (GCs). Secondly, it provides for a system of functional representation whereby different sectors of society will directly vote for a representative who will carry out a functional role that has both legislative and executive qualities. Thirdly, this system of functional representation will be free from the anomalies and inequalities that plague the existing system of functional constituencies (FCs). Lastly, by giving the elected FC legislators a new executive role, it will help alleviate the structural flaws of the existing executive-led system of governance. Before laying out this proposal I briefly consider and reject two alternative proposals for co-existence.

Rejected proposals for co-existence

Some have argued that the co-existence of universal suffrage and FCs can be achieved within our existing political structure by simply ensuring that the general electorate has a second vote in the FC system.² In my opinion, this would achieve very little as it would retain the inherent problems and anomalies of our existing arrangement of FCs.³ The gross disparities in constituency size would continue, if not worsen. New sectors would continue

* Associate Professor, Faculty of Law, University of Hong Kong. I would like to thank Lison Harris for her comments on an earlier draft. This paper will form part of a volume of papers on constitutional development and reform in Hong Kong to be published by CCPL in 2005. The titles of some of the papers referred to here may change on publication.

¹ The NPCSC decided that neither the election of the Chief Executive nor the members of the Legislative Council (LegCo) in 2007 and 2008, respectively, would be by universal suffrage. The proportion of functional constituency (FC) and geographical constituency (GC) members elected in 2008 would have to be same. See "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 in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008", adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004, *Hong Kong Gazette Extraordinary*, Special Supplement No 5, No 8/2004, pp E5-E11.

² The Secretary for Justice recognised this option in her speech in LegCo on a motion debate on "The Fourth Report of the Constitutional Development Task Force" moved by the Hon Albert Jinghan Cheng, see "Speech by Secretary for Justice on motion debate 'The Fourth Report of the Constitutional Development Task Force'", Hong Kong, 5 January 2005.

³ Many of these anomalies and criticisms are discussed in SNM Young & A Law, "A Critical Introduction to Hong Kong's Functional Constituencies", a report published by Civic Exchange, Hong Kong, July 2004, which can be found at www.civic-exchange.org.

to jockey for recognition, requiring the government to make difficult and divisive political decisions on which sectors to favour and which to exclude.

Perhaps the most significant objection to this proposal is that it does little to address the fundamental governance problems that have afflicted the Administration since the 1997 handover.⁴ I believe that many of the governance difficulties we have seen have a structural origin. In other words, there are basic flaws in the internal structure of the executive and legislative branches of government and also in their inter-structural relationship. Even if a completely different group of individuals had been in power, it is likely the same types of governance issues would have arisen.

Another proposal for co-existence that some have discussed is the transformation of the FCs into an upper house or chamber in the legislature.⁵ I doubt if this would be appropriate for Hong Kong. All the flaws and inequalities of the existing FC system would be carried into this upper house. Very soon there would be calls for an upper house elected by universal suffrage, a debate that still rages in some western democracies.⁶ More problematic is that this reform would not change one of the basic structural flaws with our system: legislators have no real executive powers, particularly when it comes to formulating, evaluating and changing public policies.⁷ I believe this flaw is responsible for the many misconceived policies and initiatives that the government has tried (and often failed) to put through in the last few years.⁸ This flaw is joined with a second one: none of the principal executive officials are democratically accountable to the people.⁹ In the eyes

⁴ See generally ABL Cheung, "The Changing Political System: Executive-led Government or 'Disabled' Governance?" and SK Lau, "Tung Chee-hwa's Governing Strategy: The Shortfall in Politics" both in SK Lau, ed., *The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (Hong Kong: Chinese University Press, 2002) 41-68, 1-39.

⁵ See, for example, NK Lau, "Two are better than one", *South China Morning Post*, 3 December 2004, 16; P Wesley-Smith, "Bicameralism and its Relevance for the Hong Kong Legislature" in this volume.

⁶ For example the debate still continues in Canada and the United Kingdom, see generally, D Roblin, "The Case for an Elected Senate" and P Bosa, "A Reformed but not Elected Senate" both in (1982) 5 *Canadian Parliamentary Review*; P Wells, "Triple-E entrapment", *Macleans*, 6 December 2004; Department for Constitutional Affairs, *The House of Lords Completing the Reform: A Government White Paper Presented to Parliament by the Prime Minister By Command of Her Majesty*, United Kingdom, 7 Nov 2001.

⁷ Perspectives on Hong Kong's 'executive-led' political system are found in P Wesley-Smith, "The Hong Kong Constitutional System: The Separation of Powers, Executive-Led Government, and Political Accountability" and A Chen, "'Executive-led Government', the Strong and Weak Governments and 'Consensus Democracy'", both in this volume.

⁸ Some recent examples include the Government's handling of the Link REIT listing, the West Kowloon cultural district project, the Hunghom Peninsula demolition controversy, the SARS outbreak, appointments to the Equal Opportunities Commission, the implementation of Article 23, and the enactment of anti-terrorism legislation.

⁹ Under The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law), the legislature's role is to scrutinise and approve the initiatives of the executive; it is given little if any powers or functions to formulate or implement executive policies (see Article 73). All principal officials and members of the Executive Council are appointed by the Chief Executive (Articles 48(5), 55 & 62). The powers of LegCo members to introduce legislation are limited (Article 74). In practice, there have been few private members' bills since the handover, see discussion in C Chaney, "The Hong Kong Executive Authorities' Monopoly on Legislative Power: Analysis of the Legislative Council's Second Term Voting Records", *Centre for Comparative and Public Law, Faculty*

of the public, these officials lack democratic legitimacy since neither they nor their chief executive are subject to appointment or direct removal by the people. Unless and until legislators are given a role in the executive branch of government, it seems wasteful and inefficient to have two houses in the legislature, especially for such a small jurisdiction like Hong Kong.

A viable proposal

I believe there is a viable option for achieving co-existence. This option seeks to address the many flaws with the existing FC system and to establish a new inter-structural relationship with the executive that can improve the quality of governance. Under the current FC system, FC legislators assume two distinct roles. He or she is both a legislator and a de facto critic of the government in respect of his or her functional sector. In other words, the FC legislator, unlike the GC legislator, assumes both a legislative and functional role. The fundamental flaw with the existing system is that the FC legislator lacks a democratic mandate to assume the legislative role. This is because only a small proportion of the general electorate has the right to vote in FC elections.¹⁰ There is a second flaw. While the FC legislator has a sector-based mandate to assume the functional role, this role carries with it no real executive authority and is no more than that of a critic or lobbyist vis-à-vis the executive powers. It is only rational that an individual, having the mandate of the people engaged in a particular sector, should have some involvement in formulating policies and overseeing the implementation of such policies for that sector. Any viable proposal for co-existence must be able to address these two fundamental flaws.

First and foremost, it is necessary to invest the FC legislator with a democratic mandate. In this respect, I propose that all legislators be elected as legislators *per se* by way of direct elections on the basis of GCs.¹¹ In other words, universal suffrage sits at the base of this reformed political system. Secondly, to build an inter-structural relationship with the executive, I propose that from amongst the elected legislators, a sub-group will be further elected, on the basis of FCs, to interface with the government's administrative system. This sub-group of legislators, whom one might continue to label as FC legislators, would be given certain executive privileges and responsibilities. Thus, the new FC legislators, by virtue of the process by which they are determined, would be accountable to both the general electorate and to the specific sector that he or she has been elected to represent. With a new inter-

of Law, University of Hong Kong, Occasional Paper No 13, June 2004, which can be found at www.hku.hk/ccpl.

¹⁰ In the 2000 FC Election, only 5.25% of the registered GC electorate was entitled to vote in the FC elections. In the 2004 FC Election, the proportion increased marginally to 5.76%. See Electoral Affairs Commission, *Report on the 2000 Legislative Council Elections held on 10 September 2000* (Hong Kong: Electoral Affairs Commission, 2000) Apps. VI & VII; Electoral Affairs Commission, *Report on the 2004 Legislative Council Elections held on 12 September 2004* (Hong Kong: Electoral Affairs Commission, 2004) Apps. III & IV. See discussion generally in Young & Law, above n 2, 4-8.

¹¹ The question of the method of direct elections is not considered here, although there may be some merit in retaining a reformed system of proportional representation to ensure a diversity of political viewpoints amongst legislators. For a comparative perspective see, M Sing, "Design for the Future Democratic System of Hong Kong: Some Lessons from Comparative Studies" in this volume.

structural relationship in place, the FC legislator would also be given a clear mandate to engage in the policy making apparatus of government.

Transformation of the functional constituencies

If there is to be a close interface with the government's administrative system, this will mean that the delineation of the FCs will need to be completely reformed if not transformed. The new FCs will be based on policy areas rather than on arbitrarily chosen discrete professional and economic sectors. The new FCs will generally track the existing administrative areas for which the 19 Principal Officials have been appointed under the government's "Accountability System".¹² Some examples of new FCs might include a Justice FC, a Housing, Planning and Lands FC, an Education and Manpower FC, and so on. Persons and groups who have a genuine and demonstrated stake or interest in the policy areas of the new FC should be entitled to vote in that FC. I envisage the recognition of many public interest groups as participants in this new system. I do not rule out the possibility of having corporate participants but only if there are sufficient safeguards against the unfair practice of exercising multiple votes by using subsidiaries or other controlled/related entities.¹³ Ultimately, the entire system of recognizing electors would need to have sufficient controls and safeguards to prevent abuse and to ensure that only those with a legitimate and direct interest in the FC will be included.

Those familiar with the existing operations of the Legislative Council (LegCo) will recognise immediately the similarities of the new proposed FCs with the existing "Panels" used in LegCo. There are currently 18 different LegCo Panels covering the different policy areas addressed by the Principal Officials, although not exactly configured in the same manner. Currently, when a new term of LegCo commences, elections are held amongst the legislators to determine who will become Chairman of each Panel.¹⁴ I believe the existing Panel system provides a useful framework on which to build the new FC system. In the interests of preserving a degree of continuity, the new FCs could share the same delineation as the LegCo Panels. The elected FC legislator could also serve as the chairperson of the Panel. Going beyond the existing Panel system, however, this new chairperson as a FC legislator would also have a role to play in the executive apparatus of government.

The new executive role of FC legislators

What executive involvement would the new FC legislators have? At minimum, the new FC legislators must be given a seat in the Executive Council (ExCo),

¹² The "Principal Officials Accountability System" was proposed and elaborated upon in the Chief Executive's 2000 and 2001 Policy Addresses. It was implemented in April 2002, see "CE on Principal Officials Accountability System", Hong Kong Government Press Release, 17 April 2002. In the Chief Executive's 2004 Policy Address, the system was described as "meeting the requirements of Hong Kong's political development", see "The 2004 Policy Address: Seizing Opportunities for Development Promoting People-based Governance", Hong Kong, 7 January 2004, paras 58-9.

¹³ See the criticisms of the existing corporate voting arrangements in Young & Law, above n 2, 39-49.

¹⁴ See Legislative Council, "Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region", Hong Kong, current to January 2005, para 77 (rule enacted 2 Jul 1998).

even if it is only a non-voting one. For too long have ill-informed decisions and policies flowed from this secretive body. Having FC legislators in ExCo who are genuinely accountable to both the public and their specific functional sector will help ensure that policies are more in touch with the lives of ordinary people and the actual circumstances in society.

I also envisage a close working relationship between the new FC legislator and his or her counterpart Principal Official, which would include continuous consultation on new and existing policy initiatives. Indeed, there could be a rule that before any proposed legislation is introduced into LegCo, the relevant FC legislator must be satisfied that he or she has been adequately consulted.

Each of the new FCs will need to have specific funds allotted to it in order to facilitate the discharge of the FC legislator's functional role. These funds will primarily be spent on carrying out proper consultations with the public, and on public policy research, particularly on the empirical needs of the community and on international standards and best practices.

Safeguards

Critics of the proposal may argue that there are still inequalities perpetuated in this system and that the true ideal of universal suffrage is not achieved. They would point out that it is unfair to exclude the general electorate from electing the FC legislators who enjoy a special status because of their executive privileges, that all persons have an interest in the various policy areas, and that whatever line is drawn to define the electorate for each FC, it would be an arbitrary one.

I concede there is merit to some of these criticisms. I recognise that some of the policy areas under the Panel system are of such general interest that it would be difficult and artificial to carve out a class of specially interested persons or groups. Some examples within this category would include Constitutional Affairs, Home Affairs, Financial Affairs and perhaps also Manpower. For these FCs, I would propose that the electorate consist simply of all the members of LegCo.

As for the other Panel areas, I believe it is possible to establish statutory criteria by which to define the limited class of persons and groups who should form the electorate for the FC. The theoretical justification for restricting the electorate in this way is that those who are most directly interested or engaged in a specific policy area are in the best position, given their knowledge of the issues and relevant personalities, to select a functional representative to serve their sector and to hold him or her accountable when necessary.

Since the FC legislator is first and foremost a legislator elected by direct elections, he or she will always have to be accountable to the public. But this accountability can only be made to bite if and when the legislator decides to stand as a candidate in the next election. I believe there needs to be a mechanism whereby the serving FC legislator can be made accountable to the public during his or her term of office. As a safeguard, it would be wise to

have a mechanism whereby serving FC legislators can be removed from their functional office on a vote of no confidence favoured by two-thirds of all LegCo members. This impeachment mechanism will help to ensure that FC legislators act not solely in their sector interest (and definitely not in their personal interest) but also in the interest of the public.

Implementation and implications

According to the proposal, with each new term of LegCo, there will need to be two elections, the general one and the functional one. The election of FC legislators will probably take place about one month after the general election so as to give newly elected legislators time to run and campaign for the functional posts. With a smaller electorate, which will tend to be more sophisticated, it may be possible to apply modern technologies (eg Internet voting) to make the functional vote more efficient and less costly.

I would recommend increasing the number of legislators from 60 to 80 as this would generate a larger pool of LegCo members from which to choose the FC legislators. Judging from the results of the 2000 and 2004 LegCo elections, I am certain that the LegCo elections will be able to attract talented and experienced individuals who would be able to take on with competence the executive functional roles.¹⁵ Indeed, I believe this proposed new system presents many new incentives to attract, as possible candidates, those who were candidates in past FC elections.

I also believe this proposal will help to strengthen political parties in Hong Kong.¹⁶ The possibility of having an executive role, albeit limited, will give new life to existing political parties, leading possibly to mergers and further consolidation. The budget given to FC legislators will also provide additional financial support to help build the infrastructure of political parties.¹⁷

As to when this new reformed system might be implemented and applied, if there is a general consensus on its acceptability, I do not see why it cannot begin to apply in 2008. The NPCSC's Decision, although it is to be respected and obeyed until amended, should not be seen as an absolute obstacle to this reform. Once the Hong Kong government has endorsed the proposal, whether privately or publicly, I believe the central authorities will be persuaded in due course, particularly if the major political parties and the public generally have accepted it. Laws made in the past should not impede good public policies for the future; laws are made to serve the public interest, and old laws, unless the rationales for them remain compelling, should give way when their time has passed.

¹⁵ See discussion of 2004 election results in N Ma, "Pluralization amidst Polarization: the 2004 Legco election" in this volume.

¹⁶ On the development of political parties in Hong Kong, see generally P.K. Chau, "Information Note: Views on Political Party Law in Hong Kong", Hong Kong, Legislative Council Secretariat, IN17/04-05, 10 January 2005; R Cullen, "Political Party Development: Improving the Regulatory Infrastructure" a paper published by Civic Exchange, Hong Kong, August 2004; R Cullen, "Renovating the Political Party Regulatory Infrastructure in Hong Kong" in this volume.

¹⁷ On the importance of funding for the development of political parties, see LL Thornton, "Legislating Political Finance: International Lessons Learned" in this volume.

Conclusion

From the Task Force on Constitutional Development's Fourth Report, I see very little prospect of arriving at a genuine consensus on a single model of reform.¹⁸ Indeed the entire approach of the Task Force can be criticised for looking at the question of reform in too narrow a fashion. The questions on which the Task Force has solicited public input have been framed in such specific terms that the entire exercise has failed to attract thinking and commentary that analyses the entire political system as a whole, particularly the legislative-executive relationship. Many of the suggestions reflected in the Fourth Report only tinker with the existing system and do not address the fundamental flaws of the existing structure which have contributed to the many governance difficulties since 1997.

It is time for the current constitutional development debate to 'cut to the chase' by focusing on visions of how universal suffrage can be implemented, as required by the Basic Law, in the Hong Kong Special Administrative Region. The government (including the central authorities) should articulate what precise interests they would like to preserve in a political system that provides for universal suffrage. If it is the business and professional class interests, which have traditionally marked the FC system, that the government would like to preserve, then the proposal in this paper (and in other universal suffrage proposals) can cater for this. Ultimately, it is a shift in the political discourse from mere reform to visions of co-existence that will move our society towards genuine consensus.

¹⁸ *The Fourth Report of the Constitutional Development Task Force: Views and Proposals of Members of the Community on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008* (Hong Kong: Constitutional Affairs Bureau, Dec 2004). See critical commentary by Y Ghai, "The real agenda of the Constitutional Development Task Force", for *Apple Daily News*, 23 December 2004.

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