

Submission

To: Constitutional and Mainland Affairs Bureau, HKSAR Government

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Re: Reform of the Methods for Selecting the Chief Executive in 2012

Forthcoming Book

1. We have written a book on the system used to nominate and elect the Chief Executive. It will be published by Hong Kong University Press in the summer of 2010.¹ The book traces the history and development of the Election Committee (EC) and discusses the EC's significance in Hong Kong and China. It also offers a critical analysis of the two systems used respectively to elect EC members and to select the Chief Executive (CE). Without repeating the findings and arguments made in the book, this submission contains some of the main recommendations arising from the study. For convenience, references to the Consultation Paper's identified issues are highlighted in bold.

Main Considerations

2. Reform of the EC for 2012 must be done with a view to realising an ideal Nominating Committee (NC) for 2017 when the CE will be elected by universal suffrage. The idea of transforming the current EC into the NC is only acceptable if the end product is a body that meets constitutional standards. In particular, (1) the EC/NC must be broadly representative; (2) the EC/NC's formation and functions must be in accordance with democratic procedures; (3) the EC/NC cannot impose unreasonable restrictions on the right to take part in the conduct of public affairs; (4) the EC/NC cannot impose unreasonable restrictions on the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage; and (5) the EC/NC cannot impose unreasonable restrictions on the right to an election that guarantees the free expression of the will of the electors.

3. The 2007 CE election is proof that the current EC system is compatible with the holding of a competitive CE election with candidates having different backgrounds. The 2007 election also confirmed that the current system is conducive to producing the political campaigning, debates and expression typically seen in free and democratic societies. However, given the imbalances of the current system and the lack of adequate institutional safeguards there is a great risk that the same competition, diversity in candidates and political atmosphere will not repeat itself in future CE elections (especially if China becomes more interventionist in these elections).

¹ Simon N.M. Young & Richard Cullen, *Electing Hong Kong's Chief Executive* (Hong Kong: Hong Kong University Press, 2010) [forthcoming]. The project was commissioned by Civic Exchange.

4. Reform undertaken for 2012 and beyond should strive towards reducing barriers to candidacy to ensure a genuine contested CE election with credible candidates who have diverse political backgrounds and platforms. It should also produce candidates who are strongly committed to establishing universal suffrage for the Legislative Council in the year 2020.

Recommendations

5. The nomination threshold coupled with the skewed interests represented in the EC are the two main factors limiting the ability of the EC to produce a wider range of CE candidates. Positive reform is needed to avoid the contradiction of having universal suffrage without a real choice between several candidates. We would recommend reducing the nomination threshold, increasing the size of the EC and widening its electorate base. These reforms aim to lower the barriers to nomination and increase the representativeness of the EC/NC. Thus, we agree with the proposal to increase the size of the EC to 1200 (or even to 1600). **[Issue 1]**

6. Serious consideration should be given to not only maintaining the nomination threshold at one-eighth but lowering it to no more than one-tenth (10%). This lower nomination threshold could be tried on an experimental basis for 2012 to test whether it would give rise to an unwieldy number of candidates. Experience has shown that the current one-eighth threshold is unlikely to give rise to more than two CE candidates under the current EC system. Given these current limitations, imposing an upper limit on the number of candidates is neither necessary nor consistent with constitutional principles. **[Issue 4]**

7. We recommend two further ideas to help increase the number of CE candidates. The first is to have secret nominations. The second is to have an earlier stage of application and verification of eligibility before the nomination deadline is reached. Both these measures were used in the 1996 selection of the CE using the then Selection Committee. We believe these procedures assisted to produce more candidates and a lively election process.

8. Maintaining the same proportion of members across the four EC sectors helps to ensure balanced participation and an equality of interests. However, increasing the proportion of members in the fourth sector with directly elected District Council (DC) members could be justified on the grounds of making the EC more broadly representative. Consideration should be given to adding more than 100 directly elected DC members to the EC, even if this requires a derogation from an exact equality of interests. Increases to the size of the first three sectors should be the same. **[Issues 2 & 3(b)]**

9. No attention has been paid in the Consultation Paper to the inequality of representation as across all subsectors. If the EC is premised on the principle of balanced participation and the equality of interests then there is little justification for why (for example) the Agriculture and Fisheries subsector has 40 EC seats while the Catering subsector has only 11. The problem lies not with the Basic Law but with decisions taken in local legislation to design and allocate seats within subsectors to the four sectors. We recommend reforms to ensure a greater equality of representation across all subsectors (at least those in the first three sectors). One approach is to delineate an equal number of subsectors for each sector (at least the first three sectors) and an equal allocation of seats to each subsector.

10. There is no doubt that much more can and should be done to increase the electorate base of the EC. The EC is currently very much an exclusive and closed system with few opportunities to apply to come within the system either via the executive branch or the courts. The device of corporate voting gives rise to unfairness and can be subject to abuse, even if it is primarily confined to the first sector. Replacing corporate votes with individual votes (a la the Patten reforms for 1995) will not necessarily reduce the influence of corporate entities in our political system. There will also need to be safeguards in place to counter balance the ability of individuals to enjoy more than one vote via controlled corporate entities. **[Issue 3(a)]**

11. In addition to the Consultation Paper's two narrow issues concerning the electorate base, we would also recommend a comprehensive review and public consultation on the range of interests that should be recognised in the EC. There should be an invitation to the public for recognition of new interests, and deletion or reorganisation of existing ones.

12. There also needs to be a change in how existing legislation accords votes to electors within subsectors. The use of umbrella organisations without any certain process for adding or deleting recognised organisations freezes the system in time thereby inhibiting evolution and development. An organic approach that allows for natural and rational growth is a better alternative. Published statutory criteria on what is required as a matter of substance for there to be a substantial connection with a recognised interest would facilitate organic growth.

13. The statutory rule that prohibits the CE from being a member of a political party is unjustifiable and should be abolished. It is premised on an erroneous assumption that being a member of a political party would preclude the CE from serving the overall interest of Hong Kong. With the advancement that political parties in Hong Kong have made in the past two decades it is only a natural and logical extension that the CE should be allowed be a member of a political party. **[Issue 5]**