

Submission

To: Constitutional and Mainland Affairs Bureau, HKSAR Government

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Re: Reform of the Legislative Council (LegCo) for 2012 and 2016

Looking to the Election Committee for Inspiration

1. The composition of the Election Committee (EC) is the key to the reform of the functional constituencies (FCs) in the transitional period leading up to 2020. This simple but important reform idea found within the Basic Law itself was not considered in the HKSAR Government's 2009 Consultation Document.

2. Annex I of the Basic Law prescribes the main structure and function of the EC. It is an entity that uses LegCo FCs (together with a few additional constituencies) to form a body used to nominate Chief Executive (CE) candidates and to select the CE. It manifests the Chinese principles of broad representation and balanced participation. It appears destined to have a continued existence post-universal suffrage as the permanent nominating committee for CE candidates.

Two Guiding Principles in Annex I

3. There are two relevant guiding principles implicit in Annex I. Firstly, FCs realise broad representation and balanced participation when organised according to the four sectors appearing in the annex. Secondly, to further balanced participation, the number of FC representatives within each of the four sectors should be roughly the same. The relevant portion of Annex I is excerpted below:

2. The Election Committee shall be composed of 800 members from the following sectors:

Industrial, commercial and financial sectors	200
The professions	200
Labour, social services, religious and other sectors	200
Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong	200

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4. For historical reasons, the development of the FCs in the LegCo has never adhered to these two principles. HKSAR electoral laws for the legislature have never attempted to organise the FCs according to the four sectors. FCs have always been conceived of as a single collection of constituencies.

5. When one arranges the FCs and their members according to the EC sectors, one readily notices a gross deviation from the second principle. Table 1 below shows the current 2008 FCs arranged according to the four EC sectors. One should immediately notice the inequality in the distribution of members across the four sectors: 14, 8, 6 and 2, respectively. This historical anomaly does not sit well with the current EC position and future direction of the EC. The Government regards equality of representation across the four EC sectors as meeting the principle of balanced participation. See Consultation Document, paras 4.10 and 4.13.

6. The current distribution of FC members across the four sectors also does not accord with the size of each sector, as measured by the number of registered electors. For example, while the second sector has about seven times more electors than the first sector, it has only 57% of the number of elected members in the first sector. Thus the voting power of the electors in the second sector is substantially less than that of the voters in the first sector. See Table 1 for the number of registered FC voters in each sector.

Objectives of Reform

7. Recognition of this anomaly has important implications for reform. Until the time when the legislature can be formed by universal suffrage in 2020, we should correct the anomaly and reform in accordance with the two Annex I guiding principles. We have seen that there is a constitutional basis for seeking to ensure a greater parity of FC representatives across the four sectors in a manner that reflects the balanced participation inherent in the EC. There are also other legal and moral reasons for moving in this direction. In an equalitarian society governed by international human rights norms, broad special interest groups should have no more than a fair and equal opportunity to participate in the political process. Thus another objective of reform is to achieve substantive equality in political participation. See Basic Law, Articles 25, 26 & 39; Hong Kong Bill of Rights Ordinance (Cap. 383), Articles 1, 21 & 22.

8. As seen in Table 1 below, we propose (“CCPL proposal”) a roadmap of reform to the LegCo FCs that sees a diminishing number of representatives in the first sector (industrial, commercial and financial FCs) and an increasing number of representatives in the fourth sector (political FCs). Thus we agree with the Government’s proposal to add five additional elected District Council members to the District Council FC for the 2012 election. However, our justification for doing so runs deeper than that of the Government’s and has its roots in the Basic Law itself.

9. Another important objective of reform is the actual realisation of universal suffrage in 2017 for the CE and 2020 for LegCo. Realising universal suffrage requires an amendment of

the Basic Law which in turn requires a two-thirds majority support of all members of LegCo, the consent of the CE and the approval of the Standing Committee of the National People's Congress (NPCSC). Thus LegCo reforms for 2012 and 2016 need to increase the influence of those elements who are likely to support universal suffrage and reduce the influence of those likely to be opposed, such as those FC members and electors who would want to have their existing privileges preserved.

Reform without Disenfranchisement

10. The most difficult challenge is to arrive at a strategy to diminish the number of representatives in the commercial and industrial FCs. While there are clear constitutional, legal and moral reasons for doing so, the current political reality requires a strategy that reduces the number of representatives without taking away the vote of any existing FC voter. As shown in Table 1, the most feasible way of doing this is to remove the borders between FCs in the first sector and to allow a more general election that sees each FC voter in that sector electing up to 11 representatives in 2012 and 8 representatives in 2016. When pooled together the size of this electorate is about 26,562 (13,683 individuals and 12,879 bodies) based on the 2009 Final Register, see Consultation Document, Annex V. This makes it highly likely for there to be a (hotly!) contested election for the 11 seats in 2012. Thus this reform will also address one of the imperfections of the existing commercial FCs, i.e. too many seats being returned without any contest. In the 2008 LegCo election, eight of the 14 FCs in the first sector were uncontested. See Table 2 below.

11. It is more feasible to remove FC borders in the first sector than those in the other sectors. The FC electors in the first sector are more likely to have many shared interests. This is the sector that houses the vast majority of the corporate electors. Their shared interests would include a belief in the capitalist system and free economy, minimal government regulation and taxes, and closer economic ties with the Chinese mainland. These FCs generally return representatives uncontested who are typically senior business executives who do not necessarily offer any special scientific or professional expertise. Table 2 below shows the 2008 FC members in this sector. There is little diversity in the occupation of these members, many of whom have held a FC seat for many years. Under the CCPL proposal it is predictable that many of these legislators would be returned to office even in a more general election, and if not returned then another company chairman or director would likely fill the place.

12. The FCs in the second sector (the professions), on the other hand, bring special scientific, technical, and professional expertise to the legislature; thus, it is valuable to continue to maintain these FCs as discrete constituencies returning their own representatives.

Ensuring Substantive Equality

13. The CCPL proposal also recommends adding another member to the Education FC since this is by far the largest FC in electorate size. This helps to ensure greater equality of voting power as between individual voters. We also recommend adding representatives to the Labour and Social Welfare FCs as these constituencies serve a wider and significantly larger indirect constituency, i.e. workers and the underprivileged/socially disadvantaged. Moreover, current societal concerns with poverty and equality would justify an additional Social Welfare member to give voice to these issues.

Practical Considerations

14. The CCPL proposal requires very little by way of legislative change. As the proposal neither creates new nor abolishes existing FCs, the reforms can be implemented with the passage of a short amendment bill.

15. The only amendment required of the Basic Law is that the reference to 60 legislators in paragraph 1 of Annex II be amended to refer to “70 members”. The proposal is also compatible with reform proposals put forward by other individuals and groups. For example the proposal would be compatible with the ideas of Michael DeGolyer and the Hong Kong Transition Project who have advocated for a substantial enlargement of the electorate base of FCs.

16. What is the chance of the CCPL proposal obtaining the necessary two-thirds support from legislators? First it is important to note that the proposal is entirely consistent with the Government’s preferred reform option of increasing the size of the LegCo to 70 and adding five new members to the District Council FC. The only difference is that the CCPL proposal builds upon the Government’s inchoate plans by proposing reform to the other FCs. It is this very difference, however, that will likely attract support from the pan-democratic LegCo members, most of whom appear to be discontented with the Consultation Document’s failure to address FC reform more comprehensively.

17. How likely then are FC members to support the CCPL proposal? As the proposal maintains the status quo for the FCs in the second, third and fourth sectors, there is no reason to believe that these FC members will not support the proposal. This leaves the 14 members in the commercial and industrial FCs (and those members aligned with them) who are most likely to oppose the proposal. This group however will not likely have enough votes to negative the motion.

Possible Criticisms of the Proposal

18. One possible criticism of the proposal is that the Chinese principle of balanced participation when applied to the LegCo was intended to apply to the whole of the LegCo by taking into account both geographical and functional constituency members. If the 30 directly elected representatives are also taken into consideration then there will be less justification to diminish the representation of the commercial and industrial FC representatives. In other words, the argument would run that the balance (when measured across all 60 LegCo members) is already appropriately struck.

19. The problem with this criticism, however, is that it ignores the effect of the separate voting procedures required by Annex II which effectively creates two separate chambers of LegCo, each having the power to veto the other when important split voting decisions have to be taken (i.e. motions, bills or amendments to government bills).

20. The NPCSC’s decision to maintain the voting procedure in Annex II (at least in the transitional period) means that functionally we must continue to regard the LegCo as consisting of two chambers. The reality of having two chambers, each with the power to veto the will of the other, requires that each chamber’s power be respectively subjected to the principle of balanced participation. When the FC chamber is subjected to the principle of

balanced participation through the Basic Law vehicle of the EC, the product is the CCPL proposal.

21. Pan-democrats may also criticise the proposal for fear that it might potentially entrench FCs even after 2020. This would be an erroneous assumption. The proposal even for the 2016 election (see Table 1) would not satisfy the ICCPR requirements of equal and universal suffrage. As the CCPL proposal does not concern itself with the electorate base it does not purport to be a proposal for universal suffrage. Rather what the CCPL proposal attempts to do is to lay down legal and political conditions that facilitate the achievement of true universal suffrage for LegCo in 2020. See Table 3 below which shows the stronger potential of the CCPL proposal to ensure a favourable vote for universal suffrage in comparison to other scenarios including the Government's 2012 proposal and if repeated again in 2016.

Table 1: Roadmap of Proposed Reform of FCs from 2012 to 2020

Sector	Subsector	FC 2008	FC 2012	FC 2016	FC 2020
<i>First Sector</i> 2009 Electorate Size: 26,562	Catering	1	11	8	0
	Commercial (First)	1			
	Commercial (Second)	1			
	Employers' Federation of Hong Kong	0			
	Finance	1			
	Financial Services	1			
	Hong Kong Chinese Enterprises Association	0			
	Hotel	1			
	Tourism				
	Import and Export	1			
	Industrial (First)	1			
	Industrial (Second)	1			
	Insurance	1			
	Real Estate and Construction	1			
	Textile and Garment	1			
	Transport	1			
	Wholesale and Retail	1			
Total No. of Members		14	11	8	0

<i>Second Sector</i> 2009 Electorate Size: 184,184	Accountancy	1	1	1	0
	Architecture, Surveying, Planning	1	1	1	0
	Chinese Medicine	0	0	0	0
	Education	1	2	2	0
	Higher Education				
	Engineering	1	1	1	0
	Health Services	1	1	1	0
	Information Technology	1	1	1	0
	Legal	1	1	1	0
	Medical	1	1	1	0
	Total No. of Members		8	9	9

Table 1 cont'd

2009 Electorate Size: 15,265	<i>Third Sector</i> Agriculture and Fisheries	1	1	1	0
	Labour	3	4	5	0
	Social Welfare [excl. corp electors]	1	2	2	0
	Sports, Performing Arts, Culture and Publication	1	1	1	0
	Religious	0	0	0	0
Total No. of Members		6	8	9	0

2009 Electorate Size: 580	<i>Fourth Sector</i> Heung Yee Kuk	1	1	1	0
	Hong Kong and Kowloon District Councils	1	6	8	0
	New Territories District Councils				
	Chinese People's Political Consultative Conference	0	0	0	0
	National People's Congress	0	0	0	0
	Legislative Council	0	0	0	0
Total No. of Members		2	7	9	0

GRAND TOTAL		30	35	35	0
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Table 2: Sector One FC Members and their Occupations in 2008

FC	2008 Member	Occupation
1. Catering (uncontested)	Tommy Cheung	Chairman of companies
2. Commercial 1st	Jeffrey Lam	Managing Director x 2
3. Commercial 2nd (uncontested)	Philip Wong	Chairman and CEO
4. Finance (uncontested)	David Li	Chairman and CEO
5. Financial Services (uncontested)	Chim Pui-chung	Director of companies
6. Tourism	Paul Tse	Solicitor
7. Import and Export (uncontested)	Wong Ting-kwong	Merchant
8. Industrial 1st (uncontested)	Andrew Leung	Merchant
9. Industrial 2nd (uncontested)	Lam Tai-fai	Ex-Managing Director
10. Insurance	Chan Kin-por	Ex-CEO
11. Real Estate & Construction (uncontested)	Abraham Shek	Company Director
12. Textile and Garment	Sophie Leung	Non-Executive Director
13. Transport	Miriam Lau	Solicitor
14. Wholesale & Retail	Vincent Fang	CEO & Managing Director

Table 3: Four Scenarios of LegCo Universal Suffrage Amendment Vote

Scenario 1 (Status Quo)						
60 LegCo members (30 GC & 30 FC members) 2/3 majority requires 40 votes .						
	GC	Sector 1 FCs	Sector 2 FCs	Sector 3 FCs	Sector 4 FCs	Total Votes
Maximum Support	30	14	8	6	2	60
Estimated Support	27	0	4	4	1	36
Predicted Result: Insufficient support for universal suffrage.						
Scenario 2 (Government's 2012 Proposal)						
70 LegCo members (35 GC & 35 FC members) 2/3 majority requires 47 votes .						
	GC	Sector 1 FCs	Sector 2 FCs	Sector 3 FCs	Sector 4 FCs	Total Votes
Maximum Support	35	14	8	6	7	70
Estimated Support	32	0	4	4	5	45
Predicted Result: Insufficient support for universal suffrage.						
Scenario 3 (Government's 2012 Proposal Repeated in 2016)						
80 LegCo members (40 GC & 40 FC members) 2/3 majority requires 54 votes .						
	GC	Sector 1 FCs	Sector 2 FCs	Sector 3 FCs	Sector 4 FCs	Total Votes
Maximum Support	40	14	8	6	12	80
Estimated Support	36	0	4	4	10	54
Predicted Result: Minimum support for universal suffrage.						
Scenario 4 (CCPL Proposal)						
70 LegCo members (35 GC & 35 FC members) 2/3 majority requires 47 votes .						
	GC	Sector 1 FCs	Sector 2 FCs	Sector 3 FCs	Sector 4 FCs	Total Votes
Maximum Support	35	8	9	9	9	70
Estimated Support	32	0	5	7	7	51
Predicted Result: Support for universal suffrage.						

Assumptions

1. 90% of Geographical Constituency (GC) and District Council FC members will support universal suffrage.
2. Sector 1 FCs together with Agriculture and Fisheries FC, Sports, Performing Arts, Culture and Publication FC, and Heung Yee Kuk FC will not support universal suffrage.
3. Only half of the Sector 2 (professions) FCs will support universal suffrage.