

FUNCTIONAL CONSTITUENCIES

A Unique Feature of the Hong Kong Legislative Council

Edited by Christine Loh and Civic Exchange

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INTRODUCTION

Christine Loh

For a city as sophisticated as Hong Kong, to be discussing the merits of indirect elections and functional constituencies (FCs) as an alternative to universal suffrage seems absurd. No other community as prosperous and pluralistic as Hong Kong in today's world is burdened with such a relic of 19th century imperialism as a substitute for a directly elected legislature. For Hong Kong's post-colonial government to engage at Beijing's behest in public consultations on reforming rather than abolishing FCs has all the intellectual attractions of a discussion of the merits of the abacus over the computer in modern banking.

Hong Kong people, unfortunately, cannot afford the luxury of simply dismissing the invitation from national and Hong Kong officials to review the workings of FCs. China's leaders have postponed the introduction of full direct elections for either the legislature or the post of chief executive. Hong Kong's former Secretary for Justice, Elsie Leung, and the Secretary for Constitutional Affairs, Stephen Lam, both declared in 2005 that they saw no conflict between retaining FCs — indefinitely apparently — and the commitment to introduce universal suffrage.¹ Given these constraints, the real challenge is to examine how FCs can be reformed in order to serve the public wellbeing rather than the interests of dominant business groups.

The debate over political reform demands, therefore, a serious analysis of FCs concentrating on two questions: How can they be improved so as to minimise their more adverse and undemocratic features? How can the opponents of modern democratic institutions be brought to realise the flawed nature of FCs, both in terms of their colonial origins and the way they handicap effective governance of this advanced post-industrial community? The contributors to this book offer a compelling and authoritative analysis of both issues.

SCNPC Decision 2004

With the Standing Committee of the National People's Congress (SCNPC) decision of April 2004 on political development for the Legislative Council (LegCo) election in 2008, FCs are destined to continue as a major feature of the Hong Kong Special Administration Region's (HKSAR) political system. They will continue to exist at least up until the LegCo election in 2012. The SCNPC decision stipulated that the 50:50 ratio of geographical constituency (GC) and FC seats must be retained through 2008, although Hong Kong may consider changing the number of legislators and expanding the FCs' franchise. Any proposed change will be subject to the SCNPC's approval.

The HKSAR government's Constitutional Development Task Force's *Fourth Report*, published in December 2004, spelt out the limited options for a public consultation, which ended in May 2005.² Proposals received ranged from ones that called for no change to those that called for splitting up some existing FCs to form new FCs, to ones that are much more radical in nature although staying within the parameters drawn by the SCNPC. The task force published its *Fifth Report* on 19 October 2005, in which it put forward the government's preferred option, which also represented what Beijing was prepared to allow. The proposal increased the total number of legislators from 60 to 70 with the additional 10 seats given equally to GCs and FCs. However, all the FC seats would go to the District Council Functional Constituency, which meant this FC would return six seats in the 2008 election.³ This proposal did not receive the two-thirds majority it needed in LegCo and was voted down on 21 December 2005. A key reason for it not being acceptable to the legislators in the democratic camp was the government's unwillingness to do away with corporate voting for the FCs.

Given that heated debate about political reform is unlikely to abate in Hong Kong, how the FCs will evolve can be expected to remain on the political agenda for the coming years. There is now a 20-year history of experience to reflect upon, making this a good time to study FCs seriously and thoroughly.

Research challenge

Prior to 2004, there had been relatively little scholarly work done to study the FCs even though there is a much larger body of work available on the geographical constituencies and the GC election system. The reasons for neglect of the FCs have become clearer to me after spending two years putting Civic Exchange's Functional Constituency Research Project together. The prime hindrance to research is that the information about the electorates and the election process have been made deliberately non-transparent.

The primary information provided by the government about FC electors is a list of recognised umbrella organisations whose members are eligible to vote in an FC election, published in the Legislative Council Ordinance (Cap 542). As many eligible voters are corporate bodies and not individuals, this adds another layer of difficulty, as researchers (and even the candidates) have little, if any, way of knowing how these bodies decide whom to vote for, or even whether their designated voters vote as their organisations wish them to. Any attempt at polling FC voters would be an arduous task indeed.⁴ While members of the public are, since 2001, allowed to inspect the register of electors for the FCs at the government's Registration and Electoral Office, they are prohibited from reproducing or disseminating the information. A person who 'reproduces or permits another person to reproduce in any form' an electoral register in full or in part for any purpose other than a purpose relating to an election commits an offence under the Electoral Affairs Commission Ordinance sections 22(3) and 42(3) (L.N. 2001), and can be punished by up to six months in prison. These

laws make it much more difficult for members of the public to find out the names of the people who may vote in FCs. The rationale for such laws is unclear. The need to prevent electoral bribery is redundant in the cases of elections already past, and on its face seems to be negated by language in the legislation which permits people to obtain a copy of the register for a purpose ‘related to an election’. To research FCs, researchers must therefore employ more indirect means or throw their hands up in frustration and abandon the job altogether.

Another reason for research neglect of the FCs may well be because FCs have never been a popular part of the political system, whereas the GCs accord much more with popular preference. But whatever may be one’s emotional reaction to FCs, their importance cannot be disputed. It is for this reason that Civic Exchange embarked upon researching the FCs in a comprehensive and systematic way in 2004–2005. Hong Kong must understand the FCs more fully, how they function and how they have impacted the city’s economic, social and political developments in order to consider how the current political system could develop.

FCs versus GCs

The functional constituency election system is extraordinarily cumbersome and complicated, making the complex geographical constituency election system seem simple by comparison. Currently, 30 legislators are elected by universal franchise, proportionally from GCs using a list system, and 30 legislators are elected from 28 FCs using a mix of qualified individual voting and corporate voting. GCs were first introduced in 1991 for a small number of seats, rising to make up half the legislators in 2004. FCs have been a feature of Hong Kong politics since 1985 after the British and Chinese governments struck an agreement over the transfer of sovereignty. Up until then, the government appointed all the legislators. Nevertheless, the functional approach to making appointments has a very long history. The colonial administration had long favoured appointing members of the business and professional elites to LegCo, the Executive Council (ExCo), as well as the government’s extensive network of consultative and advisory bodies. The appointment system was created to generate a semblance of democracy when there was none. The functional constituency election system was created to enable the elites to be elected to LegCo through giving the franchise to narrowly defined interest groups. When new FCs were fashioned to make up the 30 seats that had been provided for in the Basic Law, which interest groups were given a seat in LegCo also reflected the British and Chinese governments’ preferences and their eventual negotiated compromise. After all, the FCs are there to provide a counterweight to the GCs.

Why was a counterweight seen to be necessary? Beijing thought direct election was too dangerous, as the people might elect legislators whom Beijing considered ‘anti-China’. Beijing’s pre-1997 framework for understanding Hong Kong reflected its longstanding distrust of ‘foreign forces’ interfering in China’s

internal affairs. Beijing worried that Hong Kong would be used as a base of subversion. It suspected that 'foreign forces' promoted democracy at the eleventh hour of British rule to make it harder for Beijing to deal with Hong Kong after the handover. While allowing elections was a necessary part of the bargain with Britain, so as to give Hong Kong people and the international community confidence in the post-1997 arrangements, the electoral systems were designed in such a way that the majority of legislators elected would be 'patriotic' and politically conservative.

'Balanced' or skewed participation?

Beijing's pre-1997 strategy was to win over as many sectors of opinion in Hong Kong as possible through applying 'united front' tactics.⁵ Many of the business and professional elites, who had supported the colonial administration for decades, were won over to support Beijing's positions versus Whitehall's. On the issue of democratic reform and elections, the elites' natural inclination was against opening up the entire legislature for direct election because they feared it would lead to expensive welfare policies and higher taxes. In their view, Hong Kong would become 'business unfriendly'. The elites saw themselves as playing an important role in maintaining stability and prosperity, acting as a foil to popularly elected politicians. Thus, Beijing's and the elites' interests were perfectly aligned. When the draft Basic Law was introduced at the National People's Congress (NPC) meeting in 1990, it was noted that in providing for the post-1997 political structure, 'consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy'. The FCs were seen to be crucial to ensuring that Hong Kong remained capitalist because presumably Beijing believed them to represent capitalists who understood how the system worked.

Beijing's view about the FCs did not change post-1997. In 2002, it was noted by a senior official that 'Hong Kong is a commercial city' and that 'functional constituency elections is an effective way to ensure that people from all walks of life can have balanced participation in political life'.⁶ However, after the massive demonstration on 1 July 2003 against the HKSAR government's proposed Article 23 national security legislation, Beijing had to reassess its Hong Kong policy. While it felt it needed to pre-emptively rule out universal suffrage for the 2007 chief executive election and the 2008 LegCo election by means of the April 2004 SCNPC decision, Beijing did leave a window open for modest change.

It had been hoped the opening, albeit small, would provide an opportunity for Hong Kong and Beijing to review whether the FCs have indeed helped to maintain the capitalist system and to what extent they have contributed to the city's 'stability and prosperity' in time to make changes for the 2008 election. Unfortunately, the opportunity appears to have closed with the task force's *Fifth Report* merely saying: 'The Task Force considers that the future of functional constituencies is an important issue that deserves future discussion by the

community'.⁷ The discussion on how to reform LegCo's electoral system for 2012 will hopefully have a qualitative difference than previous debates when Beijing looked at Hong Kong through the 'anti-China' filter. Today, it is clear that Hong Kong people are proud Chinese citizens and have no interest in seceding from the nation. However, Hong Kong people want good governance, which they felt they did not have during almost eight years with Tung Chee Hwa as chief executive (1997–2002 and 2002–2005). While the people will not be able to elect their head of government, they do look to Beijing to ensure the right person is given the job since Beijing is in full control of who becomes chief executive. Beijing's new pragmatism can be seen with the endorsement of the chief secretary, Donald Tsang, to take over for the remaining two years after Tung resigned on 10 March 2005. Tsang was a former colonial administrator and knighted for services rendered to the British Crown. The more pragmatic attitude may also be due to Beijing's growing confidence that it is in control over the affairs of the HKSAR and has little to fear from former civil servants. Tsang certainly made sure he gave the right assurances to Beijing. In his selection campaign materials for the Election Committee, he emphasised he would maintain and cultivate good relations with Beijing by respecting 'the Central Government's constitutional power, uphold national security, and safeguard China's sovereignty and territorial integrity'.⁸ The task force's *Fifth Report* also was careful to stay within the parameters of the 2004 SCNPC decision, though giving the five new FC seats to the largely elected District Council represents a compromise between universal suffrage and giving the seats to more narrowly-defined functional groups.

Dispassionate assessment

It is now urgent for both Hong Kong and Beijing to examine the FCs dispassionately. What is the rationale for preserving FCs? The constant criticisms of FCs for their inherent unfairness and non-democratic nature should no longer be brushed aside. For the 2004 LegCo election, there were some 3.207 million registered voters in the GCs and 199,539 registered FC voters for the 28 FCs.⁹ Beijing's declared belief that the FCs provide 'balanced participation' leading to 'stability and prosperity' needs to be critically examined. When the task force's *Fifth Report* was published, the head of the task force, Chief Secretary Rafael Hui said:

The existing District Council members come from different strata and sectors of the community. Around one-fourth are from the industrial and commercial sectors, around one-fifth are from the professional and managerial ranks, whilst the others include personalities from the education, social work, sports and cultural sectors, representatives of trade unions, housewives, and representatives of rural communities. The background of District Council members can be said to be a microcosm of the community at large. It epitomises the spirit of 'balanced participation' and gives full effect to the principle of 'looking after the interests of different sectors of the community'.¹⁰

Does functional representation truly produce better balance than universal and equal suffrage? Why should small functional groups have additional representation over and above the individual representation in the GCs? Would not be better for social stability if there was universal and equal suffrage?

The Americans answered this question in the 18th century when their founding fathers debated what type of representative system they should have. They rejected the English system of the day because parliament was then elected by a handful of voters concentrated in small localities. The term ‘rotten boroughs’ was used to describe what was seen as narrow and partial elections. On top of small constituencies, the constitutional jurist and historian, Thomas Erskine May (1815–1886), described how commercial interests were allowed to corrupt the parliamentary system of his time:

One other form of parliamentary corruption yet remains to be noticed. Lucrative contracts for the public service, necessarily increased by the American war, were found a convenient mode of enriching political supporters. A contract to supply rum or beef for the navy was as great a prize for a member, as a share in a loan or lottery. This species of reward was particularly acceptable to the commercial members of the House. Nor were its attractions confined to the members who enjoyed the contracts. Constituents being allowed to participate in their profits were zealous in supporting government candidates. Here was another source of influence, for which again the people paid too dearly. Heavy as their burdens were becoming, they were increased by the costly and improvident contracts, which this system of parliamentary jobbing encouraged. The cost of bribery in this form was even greater and more indefinite than that of loans and lotteries. In the latter case, there were some limits to the premium on scrip, which was public and patent to all the world: but who could estimate the profits of a contract loosely and ignorantly — not to say corruptly — entered into, and executed without adequate securities for its proper fulfilment? These evils were notorious; and efforts were not wanting to correct them.

In 1779, Sir Philip Jennings Clerke obtained leave to bring in a bill to disqualify contractors from sitting in Parliament, except where they obtained contracts at a public bidding: but on the 11th of March, the commitment of the bill was negatived. Again, in February 1780, Sir Philip renewed his motion, and succeeded in passing his bill through the Commons, without opposition: but it was rejected by the Lords on the second reading. In 1781 it was brought forward a third time, but was then lost in the House of Commons.¹¹

The Americans opted to give the vote to as many people as possible. The equality of representation was seen as forming the foundation of legitimacy to the political system as a whole.

While 21st century Hong Kong is not 18th century England, there is the problem of whether functional legislators play too much the role of lobbyists.

For example, Raymond Ho, the functional member for the engineering constituency, sent this out to his voters for the 2004 election:

I am pleased to report that as a result of my last couple of years' efforts, the government has committed \$29 billion on infrastructure works every year, about 10% more than previous years. However, the unemployment of the construction industry stands at 20% because of greatly reduced workload from the private sector and the Housing Department. We must take stronger actions to press the government to speed up the implementation of infrastructure projects and building works to resolve this serious situation. It was decided that, as I am the convenor of the Public Works Concern Group which I established three years ago to include 12 professional bodies, contractors' associations and trade unions, I arranged a meeting with the Financial Secretary for 16 December to discuss the issue. If the government does not take any immediate actions to address the issue, a large-scale demonstration could be staged. The construction industry, with over 300,000 people including professionals, technicians and labour workers, must have united efforts to tackle the issue. I request all fellow Engineers to watch out for the development of this plan and ensure their active participation for the well-being of the profession.¹²

Transparency and corporate voting

Beyond the principle of equality and fairness of the functional constituency election system, it should also be asked whether and to what extent it has contributed to good governance. Important aspects of a good governance system are transparency and accountability. The functional constituency election system has neither. It has been noted earlier that researching the FCs is difficult because of the lack of transparency.

In this regard, there are two particular features about Hong Kong's FCs that need emphasising. Firstly, nine out of the 28 FCs are returned wholly by corporate voting and another nine have mixed corporate and individual voters. Only 10 FCs are wholly returned by individual voters and these, except for the Heung Yee Kuk, are the ones with the larger voter numbers. In the cases where corporate bodies can vote, it effectively means the vote is given to non-human voters. The corporation has to designate a human to cast the vote. Some corporate voters have large numbers of members, such as the member companies of the Hong Kong General Chamber of Commerce, while others may have only the owner of a shelf company as the only real voter. The government has been happy to sub-contract a part of the electoral process to private bodies. Indeed, it has been no easy task figuring out who truly controlled the corporate votes. This is a principal cause for the non-transparency in the functional constituency election system. After all, these corporate entities do not have to be publicly accountable and indeed, there has been relatively little public pressure on them to account. The task force's *Fifth Report* simply avoids the problems related to corporate

voting by saying: ‘the Task Force notes that there are not many concrete proposals on how to [replace corporate voting by individual voting] . . . The Task Force considers that we should continue to study the pros and cons of the issue’.¹³ But the proposal to give five new seats to the District Council Functional Constituency, where most of the members are directly elected, would not solve the problems of the functional system as a whole. Moreover, of the 529 district councillors, only 400 are directly elected, while 102 are appointed by the chief executive and 27 are, *ex officio*, representing rural interests that are not dissimilar to the Heung Yee Kuk Functional Constituency. The refusal to exclude the appointees was another key reason why the government’s proposal was voted down on 21 December 2005.

Secondly, Appendix 26 (see accompanying CDROM) shows the high incidence of uncontested seats for corporate voting FCs. For example, there were 11 uncontested FC seats at the 2004 LegCo elections. For the winners of the contested seats, they received a total of only 9,707 votes, which when contrasted with the number of GC votes a candidate needed to get elected, makes the FC electoral system a substantially more privileged one than the GC one. In other words, there is gross inequality between the relative voting power of the two.¹⁴

Accountable to whom?

Furthermore, despite having sworn to serve the HKSAR as a whole upon taking office,¹⁵ examinations of the functional representatives’ LegCo records showed that on the whole they protected their sectors’ interests first and foremost. Indeed, some of the FC members hardly participated in LegCo’s general affairs. Thus, it may be said that the functional representatives feel accountable to their respective sectors but not necessarily to the public at large. It is therefore not surprising that FCs are seen as a form of government by special interests. Being embedded directly in the political structure, these interests feel it quite legitimate to press their cases to the government and resist what they perceive to be bad for them. The vested interests do not have to rely on paid lobbyists to speak for them. They are sitting in the legislature and can do it directly.

The research done for this book shows that creating an electoral system that overwhelmingly favours the business and professional elites has had a systemic impact on Hong Kong politics, as well as on policy. The elites’ preferences in many areas appear not to reflect those of the general citizenry. Indeed, it may be said that the FCs by and large represent the interests of the wealthy and the GCs represent the rest of society. A system designed to give significant influence to these interests over others is bound to cause friction among the various sectors of society.

Preserving capitalism

As to the belief that the FCs can best preserve Hong Kong’s capitalism, this notion is pure fiction. The business and professional elites on the whole act to

preserve the status quo that favours them. They also consistently seek to expand their influence. The FC legislators have a habit of protecting the interests of some capitalists, who already have large vested interests in the Hong Kong economy. Capitalists are not necessarily in favour of free and open market systems. FC legislators have opposed putting in place a competition regime and regulatory mechanism, leaving the city as the sole developed economy that does not have competition laws that apply across the board. The government's policy of adopting what it calls a 'sector by sector' approach to competition regulation is intellectually feeble.¹⁶ Despite attempts by legislators to press for a competition law, the efforts came to naught as there is no real hope in putting forward a private bill to the floor of the house.

It is worthy of note that Donald Tsang signalled in his first policy address on 12 October 2005 that he was willing to review the government's sector-by-sector approach to competition and stated explicitly that his administration has not closed its mind to introducing a comprehensive and cross-sector law on fair competition. Tsang emphasised he wanted to 'actively protect market order and fair competition by preventing manipulative practices such as price fixing, bid rigging and market sharing'. By putting this part of his address in the section on achieving social harmony rather than in the economic section, Tsang presumably wanted to show his sensitivity to the discontent that grew under his predecessor's watch that the government was seen to be in collusion with business interests. It will be interesting to observe how the FCs respond to the result of the review due out in mid-2006.

Design to thwart legislative initiative

Annex II of the Basic Law requires the passage of motions, bills or amendments to government bills introduced by legislators to pass by majority vote of those present for both the FC and the GC representatives voting as two blocs. However, motions, amendments to motions, bills and amendments to bills raised by the HKSAR government only need a simple majority vote of the members present to pass. The exception is for motions to amend the Basic Law, which requires a two-thirds majority of all members. On ordinary motions there have been many occasions where there had been majority support from those present but the vote failed because the split-voting mechanism in effect requires a 'super majority' vote to pass.¹⁷ Indeed, assuming all 60 members were present, even with 30 votes from all the GC members and 14 of the FC members, the vote will still fail.

The split-voting mechanism therefore has several special effects:

- It serves to bolt the door twice to minimise the amount of legislation introduced by legislators. Article 74 of the Basic Law shows how determined the drafters of the constitutional were to thwart legislative initiative. The provision makes it very hard for legislators to raise a private members bill in the first place. Legislators may not introduce bills that relate to public expenditure,

political structure or the operation of government. The written consent of the chief executive is required before bills relating to government policies are introduced. Even if a private bill gets to the floor of the house, the split-voting mechanism requires the bill to have majority support from both the FC and GC members.

- There is still a strong padlock to make it challenging for legislators to raise amendments to government bills with the split-voting mechanism.
- This mechanism in effect means that 16 GC or FC members can veto any measure that requires a vote. The system pitches the FCs as one voting bloc against the GCs as another voting bloc. Since the FCs are special interests constituencies and the GCs represent the citizenry at large, the system is designed to cause social strife between them. The question that needs to be answered is whether the FCs promote social stability or ferment instability. A Marxist may well think the functional constituency election system perpetuates 'class struggle'. It is doubtful that the architects of the Basic Law intended LegCo to be a class battleground but this is what it has become.

Election Committee and its subsectors

Not only is LegCo dominated by special interests, the election of the chief executive is similarly so. Tung Chee Hwa was selected in 1996 by a 400-member, Beijing appointed, Selection Committee.¹⁸ A large number of the members came from among Hong Kong's tycoons and leading members of the business and professional elites. Beijing in effect adopted a functional approach to making the appointments by providing that 25% of the members came from the industrial, commercial and financial sectors, 25% from among professionals, 25% from labour, grassroots and religious sectors, which included people with long-time 'leftist' links, and the rest from among political figures, including Hong Kong deputies to the National People's Congress and Chinese People's Political Consultative Conference (CPPCC).

The Selection Committee effectively transformed into the Election Committee for the 1998 election for a two-year term (1998–2000), with an expanded membership of 800, selecting 10 legislators. The term was only for two instead of four years in order to get back as closely as possible to the original schedule that the first post-1997 LegCo election would take place in 1999. This was necessary because the 'through train' agreement between the British and Chinese governments for the 1995 elected LegCo to serve till 1999 was derailed because Beijing disagreed with the great expansion of FC electorates to include most working adults under Governor Chris Patten's plan to increase representation. At the change of sovereignty in 1997, an appointed Provisional Legislature was put in place instead for a year. New electoral laws were passed for the 1998 election, where the FCs' franchise was greatly trimmed back down.¹⁹

A new and expanded Election Committee was chosen on 9 July 2000 for a five-year term in accordance with Annex I of the Basic Law to elect six legislators on 10 September that year and the chief executive in 2002. Since Tung Chee Hwa stood unopposed in 2002, the Election Committee did not have to be called to make a selection. The composition of the Election Committee was made up of various subsectors of 96 ex officio members including the 60 LegCo members and the 36 Hong Kong deputies of the National People's Congress; 40 members nominated by six designated bodies in the religious sector;²⁰ and 664 members from 35 other sub-sectors.²¹ Those entitled to vote in these other sub-sectors are almost the same as those for FCs. This body did not have to elect legislators for the 2004 LegCo election because, by then, the six Election Committee seats were given over to create new GCs. In 2005, after Tung's resignation, Donald Tsang stood unopposed for the chief executive by-election so there was no need for the Election Committee to be called even though, in preparation for a selection, the Electoral Affairs Commission arranged elections on 1 May to fill a number of vacancies that had arisen since 2002.²² The term for the Election Committee chosen in 2000 ended on 13 July 2005 and a new body will be chosen for the 2007 chief executive election.

Researching the members and behaviour of the Election Committee and its subsectors is just as difficult as for the FCs. While members of the public can inspect the register of electors for the Election Committee and its subsectors at the Registration and Electoral Office, the law prohibits anyone from reproducing or disseminating the information, just as for the FCs as discussed above. Protecting the privacy of Election Committee members in particular is questionable when they have decided to run for, and hold, public office. Moreover, incomplete lists of Election Committee members' names are available on government websites and the HKSAR Government Gazette publicising the results of the Election Committee subsector elections.²³ This excludes variously (depending on year) the names of electors in uncontested subsectors, the religious and Chinese People's Political Consultative Conference subsectors, and ex officio Hong Kong deputies to the National People's Congress. The HKSAR government does not appear to think the lack of transparency and consistency to be problems.

In putting Appendix 28 (see accompanying CDROM) together, listing the members of the election committees that elected the 1998 and 2000 LegCo, as well as for the 2002 and 2005 chief executive selection, our researchers did not do so by inspecting the Election Committee electoral register to avoid offending the law. Instead, they relied on published government sources, such as government websites and press releases that announced the results of the various subsector elections. These sources provided approximately 80% of the names of the subsector election winners. Depending on the year, these sources variously excluded the results of uncontested subsectors, the nominated religious subsector, and the names of the members of the National People's Congress and Chinese People's Political Consultative Conference. Some of the missing

information was deduced from the candidate nomination lists, which were also available on government websites. Using an Internet search engine, our researchers verified the identities of most of the people from a variety of sources, including the websites and annual reports of companies and organisations, curricula vitae on personal websites, and press reports.²⁴

The task force's *Fifth Report* proposed to increase the membership of the Election Committee from 800 to 1,600. The new structure also includes all legislators, all NPC deputies, a number of CPPCC deputies, Heung Yee Kuk members and all district councillors:

- Industrial, commercial and financial sectors: increase from 200 to 300.
- Professionals: increase from 200 to 300.
- Labour, social services, religious and others: increase from 200 to 300.
- Political sectors: increase from 200 to 700.

The HKSAR government's proposal to expand the Election Committee for the 2007 chief executive election did not receive the two-thirds majority vote it required and was voted down by LegCo on 21 December 2005. Therefore, the functional approach to identifying Election Committee members remains for the next election. However, with the 2012 elections in sight, and with the inevitable debate over the FCs, it may well have a spill over effect on to the method of election for the chief executive since their underlying philosophy is essentially the same.

Chapter organisation

This book presents the fruits of Civic Exchange's FC research project over the last two years. Some of the chapters had been previously published but they have been fully updated for this edition, taking into account the results of the 2004 LegCo Election and relevant recent events. The large amount of data tables from the various previously published papers have been consolidated into the extensive appendices on the CDROM for convenient access.

It is tempting to say that this book tells you everything you need to know about Hong Kong's functional constituencies and the FC election system; but there is still much more research needed to shine light on this peculiar aspect of Hong Kong politics. We hope scholars will be inspired to do further studies, as the constitutional structure and electoral systems evolve as they must for Hong Kong to achieve the 'ultimate aim' of universal suffrage envisioned in the Basic Law.

Chapters 1 and 2 provide the historical background to FCs stretching back to the early days of colonial rule. I recommend that they be read together as sister chapters.

Chapter 1, *Business and government alliance: Hong Kong's functional constituencies*, which I wrote, argues that the 'capitalism' that operates in Hong Kong that is understood by Beijing to be 'the original capitalist system' that Beijing wants to maintain is the colonial model that evolved from the 19th century that reflected the interests and objectives of the colonialists at that time. That model involved the colonial administration forming an alliance with the business and professional elites to promote their respective interests. It was a self-serving alliance within a colonial context. It developed under a particular set of circumstances that produced a particular political economy, style of politics and set of policies that still very much influences the Hong Kong of today. Just how much can be seen from statements made by a number of Hong Kong tycoons and members of the business and professional elites in recent years over the issues of taxation and democracy. However, there are doubts that such a system is fit for the 21st century.

Chapter 2 by Leo F. Goodstadt, *Business friendly and politically convenient – the historical role of functional constituencies*, provides a useful chronology of how various colonial governors looked at the issue of representation and how they created justifications to deny the people of Hong Kong a true representative system of government. Goodstadt sees FCs at best as a token gesture of respect for the principle of representative government. He argues that since the system of indirect elections for FCs define their voters in terms of class or occupation, business and professional interests and other similar criteria the system ends up diluting the legislators' right to speak on behalf of the whole community and encourages them to promote vested interests. His argument is supported by Chapters 7, 8 and 9 where the authors looked at FC legislators policy preferences in social and economic policies. His concern is that the FCs may continue indefinitely because they ensure that a significant number of seats in the legislature are in 'safe', pro-government hands.

Chapters 3 and 4 are also sister chapters. These two chapters are the 'bible' for understanding the intricacies of the FCs in their current form. The authors have sorted through a large amount of data and put them in a coherent form for analysis so that readers can have a clear picture of what are the major issues.

In Chapter 3, *Privileged to vote: Inequalities and anomalies of the FC system*, Simon N.M. Young and Anthony Law provide a thorough background to the development of the FCs since 1985. They take a critical look at which functions and sectors the government recognises, and question the manner of how the functions are put together into constituencies. The authors point out the unique feature of giving the vote to corporate entities rather than individuals in some of the FCs and the significant disparity in constituency sizes, which has significant impact on relative voting power. The authors observe that many of the features

of the functional constituency election system are arbitrary and sometimes illogically designed to limit the size of the electorate. Indeed, many of the processes for determining and qualifying electors are not stipulated in law. They are either the results of ad hoc bureaucratic decisions or of private bodies' non-transparent decisions because the government has delegated a part of the electoral process to such bodies.

In Chapter 4, *Elected by the elite: Functional constituency legislators and elections*, Simon N.M. Young produces a *tour de force* in the examination of the FCs' legislators and the privileged few who have been given an FC vote. The author examines the FC representatives' backgrounds since 1985 and looks at how they functioned in LegCo. Readers can optimise the benefits from this chapter by also reading the relevant appendices and Chapters 7, 8 and 9. Young also notes the high incidence of uncontested seats at elections, and critically examines the elector registration system, as well as the voter turnout rates.

In Chapter 5, *The legal status of functional constituencies*, Gladys Li, S.C. and Nigel Kat note that the FCs as presently constituted are inconsistent with the provisions of the Basic Law which incorporate the provisions of the International Covenant on Civil and Political Rights into the post-1997 constitution. They argue both the HKSAR government and Beijing are duty bound to rectify the situation by legislating to provide for electoral rights on terms of broad equality to Hong Kong people. The authors are clear that the legislation must provide universal and equal suffrage, including substantially equal numerical voting weight and substantially equal effect in the composition of the legislature so elected. Without these reforms, the authors do not see how this aspect of Hong Kong's political system could ever be regarded to have real legitimacy.

In Chapter 6, *Comparative profiles and attitudes of FC voters versus GC voters in the 2004 LegCo election campaign*, Michael DeGolyer bases his analysis on years of surveying public opinion through the work of the Hong Kong Transition Project, as well as the results of new surveys commissioned by Civic Exchange in 2004 during the time of the LegCo election and post-election.²⁵ The surveys were specifically designed to tease out functional voters to poll their views and preferences and then to compare them with those of geographical voters. As far as we know, this is the first time that anyone has attempted to identify FCs' voters to survey them and to compare the findings with those of geographical voters. Readers may well find some aspects of the surveys' results surprising. Among the many interesting insights, the most glaring issue is that on average FC voters have a 16 times greater voting power than GC voters. Some FC voters have much greater voting power still because of the very small sizes of their constituencies.

In Chapter 7, *The dynamics of social policy making in Hong Kong: The role of functional representatives (1998–2004)*, Rowena Y.F. Kwok and Chow Chiu Tak examine the role of FC legislators in social policy making. This chapter is valuable for three other reasons: firstly, it explains how LegCo functions and how legislators can create an impact within the legislative structure; secondly, it

provides a rich source of empirical data on how FC legislators functioned; and thirdly, it uses the government's school-based management framework, the Education (Amendment) Bill, and the Occupational Safety and Health (Display Screen Equipment) Regulation as observation tools to gain a deeper understanding of the FCs. The authors have painstakingly scrutinised the kinds of questions FC representatives asked at LegCo meetings, the nature of motions and amendments to motions they moved, their participation and behaviour in bills committees, as well as their voting patterns. Kwok and Chow identified the phenomenon of 'role fixing' among the FC legislators in that they were most conscientious when their functional sectors' interests are involved. When their sectors' interests were not involved, those with party affiliations would vote along party lines. Moreover, they showed an inclination to support the government when they voted in social policy issues when these did not conflict with their sectoral concerns or when they suffered from what the authors called 'role confusion'.

In Chapter 8, *The contribution of the functional constituencies to economic policy in Hong Kong, 2000–2004*, Tony Latter examines the influence of the FCs members on key elements of economic policy during the 2000–2004 LegCo session, as evidenced by their stances taken in debates. On the whole, like Kwok and Chow, he found that they have pressed, first and foremost, their constituency interests, and secondarily, in the case of those who were members of political parties, their party's line, and that only a third of FCs legislators expressed, to any significant degree, independent positions. He noted that the business and professional sectors have a dominant representation and the system tended to deliver, in its opinions and recommendations, a bias towards more government intervention in the economy than has been traditional in Hong Kong. To the extent that the Tung administration may be judged to have become somewhat more interventionist, Latter thinks the FC system may have contributed in that direction.

In Chapter 9, *Non-positive intervention: How functional constituencies distort the free market*, Jake van der Kamp and Carine Lai debunk the myth that FCs are good for capitalism. They show how FCs' members support and indeed push for 'corporate welfare' unashamedly for themselves while at the same time argue against spending on public services. The authors illustrate their arguments with many examples that will resonate with Hong Kong readers, having provoked public questioning of the governance capability of the Tung Chee Hwa administration. Before his resignation, his last crisis was dealing with renewed criticism of his administration's collusion with big business interests. The evidence in this chapter points to how the FCs helped to foster social disharmony in Hong Kong.

Chapter 10, *'One person, one vote': The US electoral system and the functional constituencies*, is adapted from a paper written in 2004 by the Association of the Bar of the City of New York's Committee on International Human Rights and Committee on Asian Affairs. The Association was stirred into action by comments made by the former colonial administrator, Sir David Akers-Jones; the Director of the Institute of Hong Kong and Macau Affairs, Zhu Yucheng; and

Executive Director of the One Country, Two Systems Research Institute, Siu Sin-por. They all used the American electoral experience to justify Hong Kong's electoral system for the chief executive and the FCs. The Association felt it needed to set the record straight. Blow-by-blow, they deconstructed the assertions that the US experience lent credence to the systems in Hong Kong. This chapter provides an invigorating read and is particularly important to anyone interested in comparative studies of the issues.

I had the privilege to write the concluding chapter, *Functional constituencies: The way forward*. In this chapter, I examine some of the proposals put forward to the HKSAR government's task force for the chief executive and FC election systems, including ones proposed by Civic Exchange. I also discuss the recent proposal for a bicameral system from the Business and Professionals Federation of Hong Kong, where Sir David Akers-Jones, who is attributed with initiating the FCs system in 1985, chairs its research on this matter. One assumes both Akers-Jones and the Federation think FCs are not working as well as they should. Perhaps they may even agree with some of the analysis in this book. In proposing a bicameral system as a possible 'way out', one hopes the proponents will not merely be transforming FCs into a formal second chamber in the legislature, when the current split-voting system effectively already provides for two chambers. The challenge will be to address all the problems with the FCs and the functional constituency election system, which will necessarily require a complete overhaul of Hong Kong's political system.

As noted earlier, with Beijing feeling comfortable with Hong Kong's loyalty to China, the challenge is to redesign the political process so that the HKSAR government can enjoy a popular mandate thereby completing the constitutional mission in the Basic Law of achieving the 'ultimate aim' of universal suffrage. It needs to be emphasised that Hong Kong is not alone in its attempt to design a political system that can cope with the diversity of views in society. Many other jurisdictions have had to struggle with how to ensure that their electoral systems can provide for popular support and at the same time expertise and cool heads when it comes to deliberating controversial issues. Arguably, the FCs in their current form cannot help Hong Kong to move forward economically, socially or politically. If anything, they have been a hindrance on many areas of progress due to vested interest lobbying.

What impact might the failed proposal to increase the role of the district councillors have on the FCs, chief executive election and politics in Hong Kong as a whole? The district councils were first established in 1982. They are the oldest bodies in Hong Kong that are elected by universal suffrage, and are thus the locus of the first experiences of Hong Kong people with voting, elections, electioneering, and of councillors with elected public office and constituency service. If the district councils would have a total of six seats in a 70-member LegCo, it would increase both the number and proportion of district representatives in the legislature who may well have an important impact campaigning for LegCo election, as well as legislative deliberation. Beyond these six seats, there

are in fact other legislators who are also concurrently district councillors. Furthermore, if district councillors were to become the largest single group within the Election Committee for the selection of the chief executive (529 out of 1,600), there would be bound to be an interesting impact on the district councillors' attitudes towards the government and their voters, public perception towards and expectations of the district councils and the councillors, as well as relations of the district councils with LegCo and the chief executive. It would be hard to say exactly how these changes might alter politics in Hong Kong, but they would not alter the problems of the functional approach to the electoral system. In conclusion, it also needs to be pointed out that another key reason for the defeat of the government's electoral proposals was its inability to give a time table when universal and equal suffrage could be achieved in Hong Kong.

CONCLUSION

Functional constituencies: The way forward

Christine Loh

Quality of government

Governments are indispensable for all societies. They form an important framework within which we all live and work. The quality of government affects the quality of our lives and well-being. Governments have power to make laws, collect taxes, issue money, defend the territory, conduct foreign relations, keep public order, punish crime, arbitrate, allocate resources, provide public services, and regulate all kinds of social and economic activities. It is often said that a government has the monopoly on coercive power. However, no government could operate effectively if coercion was needed to conduct daily public affairs. Stable governments require a solid foundation resting on public trust in the system that produces the government of the day, as well as trust in power holders to act rationally, predictably, and observe the rule of law. To a great extent, the legitimacy of a government depends on the means by which power holders are brought into positions of authority. Changing political leadership in a regular and orderly manner is one of the greatest challenges of contemporary politics. Legitimation by election based on universal and equal suffrage at fixed intervals is the modern answer for most governments as well as regional and local authorities around the world.

Democratic characteristics

Despite the many debates about the meaning of democracy, political scientists generally agree that for a political system to qualify as 'democratic', the system must be politically accountable to voters through periodic, free and fair elections; there must be free political competition with the winners allowed to take office; and all citizens must enjoy civil liberties and have the equal right to participate in the political process. Some scholars summarise these elements using such terms as sovereignty of the people, universal and equal suffrage, free society and majority rule, while others define the characteristics as accountability, competition, freedom and equality. Although these terms and words are commonly used, how to interpret and implement them are highly contentious. Political structures

around the world differ significantly in terms of size, complexity, centralisation, openness and responsiveness.

Economic inequalities, political tension and ‘good government’

Economic inequalities cannot be ignored. Those who are rich are generally much more politically influential than those who are poor. They have more resources to apply to influence public policy and they can usually get closer to the power holders. This greater influence creates tension in society and is frequently the source of division as political actors compete to have their policies and preferences, often influenced by their supporters’ interests, adopted and implemented. The issues of greatest contention are usually those related to government spending and distribution of taxes. Naturally, whenever debates arise as to how to reform the political system, passions are greatly stirred as restructuring is likely to lead to redistribution of power. These are all recurring themes for Hong Kong.

While endorsement through the ballot box legitimises a government, it does not necessarily follow that democratic government results in good government. Whatever may be said of the electoral process, the success of a government in maintaining authority and remaining in power is greatly affected by its real as well as perceived ability to create employment and a strong economy. However, a society cannot be managed like a commercial business. Managing a society is much more complex than operating even very large companies. No minority group can be considered unimportant. Fairness may be more important than efficiency. The opposition cannot be ignored. Dissent cannot be dismissed. Citizens cannot be ‘fired’. Businessmen are not necessarily knowledgeable about economics, fiscal matters, public policy or politics. In today’s world, there is no social group distinguished by ethnicity, family background or economic status whose members are consequently inherently more fit to govern. The art and science of politics must be learnt and practised for breadth and depth to develop.

Hong Kong and political legitimacy

It may be said that Hong Kong is on a path from a colonial political system prior to 1997 to something that should be increasingly democratic as a Special Administrative Region. Hong Kong has enjoyed remarkable prosperity and stability over the course of transition that started in 1984 with the signing of the Sino-British Joint Declaration. One of the great issues of today for the city is the pace and direction of further political reform, the role of elections in legitimising the HKSAR government, the maintenance of freedom and how to ensure good government within a nation that operates under a very different set of political values but has agreed that Hong Kong can enjoy ‘a high degree of autonomy’ within ‘one country’.

The Hong Kong public is visibly mature, pragmatic and well-informed. It is hard to think of a community that is more ready for the democratic transition than Hong Kong. The statistics to back this up can be found in the regular surveys of Hong Kong people's attitudes carried out by the Hong Kong Transition Project that now span over 12 years.¹ There is however a greater willingness today to acknowledge that the real issue is not that Hong Kong people are politically immature or unready but that Hong Kong cannot move ahead faster than Beijing leaders feel is appropriate.² Donald Tsang, the new chief executive, has chosen to speak in terms of a 'Hong Kong-style of democracy' and 'involving more people in decision-making'.³ In introducing the Constitutional Development Task Force's *Fifth Report*, Tsang nevertheless acknowledged 'universal suffrage was the common wish of the Hong Kong people'.⁴

The HKSAR government has raised doubts about the availability of local 'political talent' and the 'maturity of political groups' to take the reins of power.⁵ This is a Catch-22 issue. Without providing the opportunity for aspiring politicians to be involved in policy making at the highest level, to exercise power and be publicly accountable for their decisions, it is hard to attract talent and for political groups to mature. Currently, the chief executive must have no political affiliation, which shows Hong Kong's systemic bias against politics and political parties.⁶ The task force in its *Fifth Report* has, however, decided to maintain this position for the 2007 selection, even though there have been suggestions that the current arrangement is biased against party politics.⁷

The legitimisation of the head of government in the HKSAR is effectively through endorsement by the central authorities through Chinese leaders making known via various stage-managed events who they favour to lead Hong Kong.⁸ Nevertheless, an elaborate indirect election process using functionally-based subsector elections to create the Election Committee is provided for in the Basic Law. The subsectors and the structure of the Election Committee reflect the composition of Hong Kong's political and economic establishment in the 1980s and early 1990s when the electoral arrangements were finalised.⁹

Executive-led government

While in many other parts of the world, whether on a national or local basis, the primary organ of government is the elected legislature, in the case of Hong Kong, the office of chief executive is much more powerful and constitutionally important than LegCo. It is referred to as an 'executive-led' system. As the Article 45 Concern Group points out, 'in a sense, all governments are executive led'.¹⁰ What is more telling about the Hong Kong version is how Chinese leaders understand the term. They contrast it with 'legislative-led' systems and have made it clear that a 'legislative-led' system is unsuitable for not only the HKSAR about also for China as a whole. The notion of separation of powers is also not accepted by China, which operates a one-party system led by the Chinese Communist Party.¹¹ Essentially, the central authorities do not favour a system

where there is a legislature with strong powers that can check the powers of the executive. Using Mainland logic, LegCo's role should be to support the executive authorities. Whilst it has the power to question policies and legislative proposals, and approve public expenditure, LegCo has little role in formulating policies, hardly any opportunity to propose bills, and no ability to amend government spending. The Basic Law reflects this logic.

Political structures and legislatures

History is important for explaining why political systems are structured as they are. It is beyond the ambit of this chapter to go into detail except by providing the most basic contrast. In the case of the United Kingdom, which operates the oldest parliamentary system, the executive and the legislature are fused, with the government having substantial control over the legislative agenda. Parliament has two houses, the House of Lords, which is descended from a hereditary assembly where noblemen and clergy met separately from the House of Commons, the other house made up of commoners. Since the common people were asked to finance the sovereign's wars, and with the House of Commons controlling the purse strings, it eventually acquired greater powers than the House of Lords. In a parliamentary system the key function of a parliament is to express the results of elections and place the winning party in office. The leader of the parliamentary majority becomes the prime minister and forms a government.

In the case of the United States, which operates the oldest presidential system, where the legislature and the chief of administration are elected separately, neither is answerable to the other in the way that the entire executive is answerable to the legislature under a parliamentary system. Each has substantial independent powers and neither controls the agenda of the other. The legislature is made up of the House of Representative and the smaller Senate. The bicameral solution was adopted, as shown in Chapter 10, as a compromise to ensure that small states would not be disadvantaged within a federal system. France has a semi-presidential system combining elements of presidential and parliamentary systems, where the executive and legislature are not wholly separate, and the executive dominates parliament. The French legislature is composed of the National Assembly and Senate with the former elected by single-member constituencies and is more powerful while senators are chosen by mayors and town councillors from each administrative district. The German legislature is made up of the Bundestag, and the upper Bundesrat. Bundestag members are directly elected, where voters choose both individual district representatives and the political parties that represent their interests. The Bundesrat is made up of representatives from the regional authorities, and its role is to make the federal system work by distributing power between the state and regional governments.

Bicameralism is a common feature with over 70 countries having two houses in their legislatures. Generally speaking, the forms of bicameralism found in the world today are usually there either to enable a less-powerful upper house act as

a check on possible hasty actions by the lower chamber, or to balance power between the centre and the regions. Bicameralism is seen as a means to improve governance and not as a way to lessen the popular legitimacy of the lower house.

What is noteworthy about Hong Kong's case is that while it has a unicameral LegCo, when it votes on motions, bills, and amendments to motions and bills raised by legislators, the voting is bicameral and split on a functional versus geographical basis. The original design was premised on the basis that directly-elected politicians were on the whole in favour of a faster pace of democratic reform, and they are at the same time viewed by the business and professional elites, as well as by senior civil servants, as 'populist free-lunchers' who, if given the opportunity, would turn Hong Kong into a business-unfriendly welfare state. The bicameral voting system was put there as a safety valve for Beijing to ensure Hong Kong's democratic aspirations do not run ahead of its readiness for reform and to maintain 'capitalism'.

Good for capitalism and social stability?

In 2002, the former vice-premier, Qian Qichen, said: 'The past practices have shown that the model based on functional constituency elections is an effective way to ensure that people from various walks of life can have balanced participation in political life. As a result, this should be kept intact.'¹² The HKSAR government's Constitutional Development Task Force specifically raised the issue of how the further development of political structure could 'facilitate the development of the capitalist economy', paraphrasing statements made by Mainland officials in the past.¹³ Influential political figures have used similar language to argue that reform must be aimed at producing a system that can 'maintain investors' confidence' and 'Hong Kong's competitive edge in business'.¹⁴

However, various chapters in this book have raised doubts as to whether the functional constituency election system is the best way to maintain a competitive, open, market-based capitalist system in Hong Kong, or merely gives undue influence to the vested interests of some dominant capitalists in order to retain their monopolies, oligopolies and cartels. Those who are willing to keep functional constituencies and insist that they are the best way for the Hong Kong economy to be competitive are probably focussing on the interests and biases of established business and professional elites rather than taking into account how to make Hong Kong as a whole more attractive to local and foreign investors. It may be that the dominant capitalists who enjoy oligopolies would prefer to invest only if their special positions can be kept rather than if the market is opened up. But it is hard to argue rent-seeking habits are good for Hong Kong as a whole. Indeed, the Hong Kong public of today is unlikely to agree that if the rich get richer, everyone else will benefit somewhere along the line through a trickle-down effect. The fact that many scholars and influential bodies, including the Hong Kong Consumer Council, have highlighted the uncompetitive nature of Hong Kong's domestic markets¹⁵ does not appear to have been taken note of

by those who think functional constituencies are necessary to maintain Hong Kong's competitiveness. In fact nothing could be further from reality.

Furthermore, functional constituencies and the behaviour of their representatives in LegCo may well be a contributing cause of the persistent political tension in society as the public feels the system favours 'big business'. Chapter 6 provides data to support this argument. By analysing the demographic characteristics of functional voters, evidence shows that voting within the functional constituency structure magnifies systemic volatilities rather than reducing them. It is no wonder that when the LegCo and chief executive elections systems are taken together, both functionally based, to produce Hong Kong's key power holders, that the failed Tung Chee Hwa administration never managed to rid itself of constant public accusation of 'black-box politics' and collusion with big business interests.¹⁶

Functional elections and the middle class

The proponents of functional constituencies are not wholly unaware of the sensitivities of what are popularly referred to as 'small-circle elections'. To counter this, some of them have put forward the argument that the middle class should be given more say in the governing of Hong Kong in order to ease social tension.¹⁷ As to how this could be achieved, one suggestion is to keep functional constituencies and give 'preference ... to the middle class when considering which new functional constituencies should be added to the Election Committee' for selecting the chief executive.¹⁸ But who are members of the 'middle class' in their minds?

Chapter 6 shows that current functional voters are among the highest income earners in Hong Kong (over \$60,000 per month). If by 'middle class' the proponents are in fact referring to those who earn above the median income (approximately HK\$10,000 in 2004), or those who have at least completed secondary education, who earn at least the median income in Hong Kong and who see themselves as having the potential to improve their earning capacity, the middle class would be quite sizable. On this basis, we can make two observations. Firstly, this categorisation will include many of the younger generation in early careers who are likely to support economic liberalisation. As such, they are unlikely to look favourably on the current functional system. Secondly, if this categorisation is accepted, then the proponents of functional elections might as well accept direct election as a better way to expand inclusiveness, otherwise they are really only thinking of expanding the vote to more higher-income earners thereby perpetuating a deep socio-economic division in Hong Kong's political system. In other words, they are back to square one.

The chapters in this book have showed that one of the key justifications for functional constituencies — to maintain capitalism — cannot stand up to scrutiny. The HKSAR government has not been willing to openly discuss the

criticisms to date. It has only been willing to acknowledge that ‘some views expressed by the public have brought out some deeper issues of principle’.¹⁹

A devil’s bargain?

The real reason for keeping functional constituencies has to do with the central authorities’ need to have enough politically conservative forces in place to act as a bulwark against demands for a quicker pace of democratic reform. This may never be admitted explicitly of course. It is therefore couched in indirect language. It is said that ‘any proposed amendments must enable different sectors of society to be represented in the political structure, and to participate in politics through various channels . . . should ensure that consideration would continue to be given to the interests of different sectors of society; and . . . must not bring about any adverse effect to the systems of economy, monetary affairs, public finance’.²⁰ To maintain the force of conservatism within the political system, the implicit bargain is that the interests of these sectors have to be satisfied in return. Beyond functional representation, this bargain includes providing political access to leaders in Hong Kong and the Mainland, appointments to various consultative bodies and invitations to important events.

Trade-offs and design goals

Given this backdrop, it is unsurprising that none of the HKSAR government’s Constitutional Development Task Force reports provided detailed discussions on the philosophy, principles and goals of how to design a new political system that will create better governance. Other critical issues of how the chief executive’s office and the Executive Council function, and their relations and links with LegCo have not been openly and extensively discussed.

The *First Report* published in March 2003 dealt with issues of ‘legislative process in the Basic Law relating to Hong Kong’s political structure’,²¹ while the *Second Report* published in April 2004 dealt with issues of ‘principle in the Basic Law’.²² The *Third Report* published in May 2004 explained the areas where reforms might be possible, within the SCNPC decision declared the month before ruling out universal suffrage in 2007 and 2008, and called for public views within the allowable parameters.²³ Taken together, the aim of these reports was to emphasise the power the central authorities have in determining the timing and direction of the HKSAR’s political reform. The *Fourth Report* published in December 2004 summarised the views received, noted that ‘the community holds divergent views’ and that Hong Kong needed to strive to ‘reach the broadest possible consensus’.²⁴ By asking for further proposals ‘that are considered acceptable to all parties concerned’, the HKSAR government gave the game away that it has limited appetite for change.²⁵ It would not consider any proposals that were ‘inconsistent’ with the SCNPC decision.²⁶

The task force's *Fourth Report* noted that in arriving at a package that would cover 'all the areas of amendments and which could command the support of various parties. . . . Much trade-off may be required'.²⁷ What it did not say was how this trade-off would be determined. The HKSAR government announced what it considers to be an acceptable package with the task force's *Fifth Report*, which presumably represents the necessary trade-offs. Unfortunately, the public does not have the benefit of a full discussion by the government on what it takes to create a modern political system for good governance for Hong Kong as the *Fifth Report* is devoid of a comprehensive discussion, as were the previous reports.

Without a substantive analysis of the problems related to the current system from the HKSAR government, the risk is that the decisions will be made based on opinion rather than knowledge. The design of political structure is a rich area of study but to date, neither the central authorities nor the HKSAR government have been willing to engage the public to deliberate the issues openly.

'Not acceptable' to Beijing

The booklet *2012: A Bicameral System for Hong Kong* put forward by the influential Business and Professionals Federation of Hong Kong in July 2005 indicates how some elites who can command the attention of Beijing think reform might proceed.²⁸ The paper acknowledged that there were strong public calls for universal suffrage, but insisted that to have a fully directly elected LegCo in 2012 and to abolish functional constituencies 'would be to leap into an unpredictable future'. While it did not explain what that ominous statement meant, the federation thought a fully directly-elected LegCo by 2012 'would not meet the gradual and orderly criteria and would not be acceptable to the Central Authorities'. The federation emphasised that there was a need to 'provide a necessary check to extremism' although it did not clarify what kind of extremism it had in mind. It then raised the idea of a bicameral legislature and how it might be structured to lead to greater efficiency and expedition in the conduct of government business. The first chamber could be fully directly-elected by universal suffrage while the second chamber might have vocational or functional members as well as possibly appointed members of distinguished persons, and it might be given a special veto in some constitutional matters which impinge on the powers of Beijing.

The challenge for the federation is to consider whether the second chamber of functional members would behave any differently than they currently do in LegCo, which already has a bicameral voting system. The evidence and conclusions in this book suggest that this may be difficult. It needs to also take into account that, by making the functional representatives occupy the second chamber to check the 'extremism' of the elected first chamber, the federation's idea of bicameralism may be turning the usually understood structure upside down. The modern idea of having an upper house is to introduce a broader vision to restrain the lower house in case it takes important decisions that are too

narrowly or parochially focussed. The evidence in Hong Kong is that functional legislators vote much more parochially to press their sectors' interests than directly elected ones.²⁹

It is also clear from their own choice of words that the business and professional elites are prepared to continue to play a role to slow constitutional reform whenever necessary, although it is also significant that they noted a genuine desire among Hong Kong people for the system to be made more democratic.

Civic Exchange's proposal

Appendix 27 provides a summary of selected reform proposals put forward in recent months on the chief executive and LegCo elections from both influential bodies and individuals, and from those who have put forward innovative ideas. We hope this book will help readers to judge the various proposals that have been put to the task force, as well as how the task force has framed its third, fourth and fifth reports.

Civic Exchange has tried to consider options for reform within the SCNPC decision that minimise the current system's more adverse and undemocratic features, even though we would have much preferred to apply our minds to designing a system based on universal and equal suffrage. In thinking how we could move forward in light of the constraints, we focussed on ways to eliminate and minimise the existing anomalies and deficiencies that have been highlighted in great detail in Chapters 3 and 4. Thus, corporate voting should be abolished. Our aim has also been to reduce the likelihood of functional elections being abused for the benefit of narrow vested interests. We believe our proposals reduce the likelihood of uncontested seats (a regular phenomenon to date), make the elections harder to manipulate, offer functional voters broader choice in the kind of candidate who would not be too narrowly focussed, and better facilitate political party participation in functional elections.³⁰

The architects of the Basic Law saw the current functionally-based systems as a way to include participation from many sectors of society in indirectly selecting the chief executive and half of LegCo. Those entitled to vote in the Election Committee subsectors are almost the same as those for functional constituencies. The current base of the various subsectors amounts to approximately 163,500 potential individual/corporate voters.³¹ The 2004 voter base for the functional constituencies was 199,539 voters (individual and corporate), with an estimated potential base of 295,534 (individual and corporate) according to the HKSAR government. Our proposal aligns the two elections since they are so similarly based and there is already significant overlap between the two groups of voters.

Our proposal has three essential features:³²

Large generic constituencies

There needs to be a number of very large, generic constituencies. We suggest that the subsector base for the Election Committee and the voter base for the functional constituencies be increased to 400,000–500,000 voters for the next round of elections.³³ This proposal is not so radical since it is in fact only doubling the size of the current base. On the basis that there are currently approximately 150,000 potential individual voters for the Election Committee subsectors,³⁴ and that the HKSAR government believes the potential number of individual functional constituency voters for the LegCo election to be 280,751 for the 2004 election, it seems quite politically possible to boost total numbers to 400,000–500,000 for the next round of elections. Should the HKSAR government wish to put a cap on the total number of potential voters at, say, 500,000, then it can encourage people to register within a certain time and priority will be given to the qualified individual voters who registered first. It can also put a cap on numbers by requiring a number of years of engagement in a sector or constituency but this should be kept relatively low, such as five years' relevant experience.

By way of illustration, the Election Committee subsectors could include:

- I. **Production:** This sector includes individuals engaged in manufacturing, power generation, farming, fisheries, mining, etc.
- II. **Services (1):** This sector includes individuals engaged in banking and financial services institutions, and including insurers and stockbrokers.
- III. **Services (2):** This sector includes individuals engaged in trading and commercial services organisations (e.g., agency, import/export, whole/retail).
- IV. **Services (3):** This sector includes individuals engaged in the publications sector (publishers, writers, distributors, media, etc.), communication (marketing, public relations, etc.) and arts and cultural organisations (artists, arts administrators, designers, etc.).
- V. **Services (4):** This sector includes individuals engaged in all types of transport, food and beverage, catering, tourism, hospitality and personal services organisations.
- VI. **Services (5):** This sector includes individuals engaged in or are members of social welfare organisations and community groups (registered charities).

- VII. **Technology:** This sector includes individual engaged in all the technology fields, including information technology.
- VIII. **Education & Training:** This sector includes all those related to the teaching profession including those employed by primary, secondary, tertiary and other types of registered educational and training institutions, as well as those who sit on their boards and councils.
- IX. **Professionals (1):** This sector includes individuals engaged in all types of medical and healthcare professionals, including doctors, TCM practitioners, nurses, hospital/clinic employees, naturopaths, chiropractors, and other types of wellbeing practitioners.
- X. **Professionals (2):** This sector includes individuals engaged in all types of built environment professions, including planners, architects, surveyors, engineers, landscape architects, electricians, plumbers, contractors, builders, consultants, etc.
- XI. **Professional (3):** All practitioners in the legal, accountancy and audit professionals, including clerks and employees working in these fields.
- XII. **Labour & Employers:** This includes those who are individual members of trade unions, and individual employers who employ at least five employees.

According to the example above, where there are 12 subsectors, another needs to be added to reflect the Ex Officio and Nominated Sector (XIII), which includes all the individuals who are the current office holders of the Hong Kong Legislative Council, District Councils, Hong Kong Deputies to the National People's Congress, Chinese People's Political Consultative Conference, and the nominated members from the religious subsector.

The LegCo functional constituencies could be similarly re-organised to include 14 constituencies with even wider participation. The difference here is that we propose adding one more constituency to include Home Economics;³⁵ and splitting up Services (5) into two separate constituencies by adding Services (6).³⁶ Every constituency will return two legislators except Labour, which will return three seats as is currently the case,³⁷ and we propose giving Education and Training also three seats, thereby making up in total 30 seats.

The SCNPC decisions require the ratio of directly and functionally elected seats to be the same. There were functional bodies lobbying for either splitting up current functional constituencies into even smaller ones (e.g., Real Estate and Construction, and Sports, Performing Arts, Culture and Publications) or be

given one of their own (Employers' Federation, Traditional Chinese Medicine, SMEs, etc.). This was not surprising as with the current system, it made sense for vested interests to increase their influence. However, it has always been extremely doubtful that any such reform would 'enhance the representativeness and legitimacy' of the system.³⁸ In our view, this would instead further entrench certain interests in the electoral system. By allocating the five new seats to the District Councils, this particular problem has been avoided.

We had proposed leaving the number at 60 seats for the 2008 election in order not to allow functional constituencies to grow since we strongly believe that they should be replaced by 2012. Thus, our proposal for the 2008 election would do away with some of the worst aspects of the system and to introduce some measures that points towards universal and equal suffrage. We believe our proposal to create large generic constituencies would eliminate the problem of every narrow interest group fighting for their sectoral interests in LegCo and that those elected to represent a large sector would need to have wide experience to win and thus this would improve legislative capacity.

Thus, the functional constituencies for the 2008 election could be:

- I. **Production:** This sector includes individuals engaged in manufacturing, power generation, farming, fisheries, mining, etc.
- II. **Services (1):** This sector includes individuals engaged in banking and financial services institutions, and including insurers and stockbrokers.
- III. **Services (2):** This sector includes individuals engaged in trading and commercial services organisations (e.g., agency, import/export, whole/retail).
- IV. **Services (3):** This sector includes individuals engaged in the publications sector (publishers, writers, distributors, media, etc.), communication (marketing, public relations, etc.) and arts and cultural organisations (artists, arts administrators, designers, etc.).
- V. **Services (4):** This sector includes individuals engaged in all types of transport, food and beverage, catering, tourism, hospitality and personal services organisations.
- VI. **Services (5):** This sector includes individuals engaged in or who are members of social welfare organisations.
- VII. **Services (6):** This sector includes individuals engaged in or who are members of community groups (registered charities).

- VIII. **Technology:** This sector includes individuals engaged in all the technology fields, including information technology.
- IX. **Education & Training:** This sector includes all those related to the teaching profession, including those employed by primary, secondary, tertiary and other types of registered educational and training institutions, as well as those who sit on their boards and councils.
- X. **Professionals (1):** This sector includes individuals engaged in all types of medical and healthcare professionals, including doctors, TCM practitioners, nurses, hospital/clinic employees, naturopaths, chiropractors, and other types of wellbeing practitioners.
- XI. **Professionals (2):** This sector includes individuals engaged in all types of built-environment professions, including planners, architects, surveyors, engineers, landscape architects, electricians, plumbers, contractors, builders, consultants, etc.
- XII. **Professional (3):** All practitioners in the legal, accountancy and audit professions, including clerks and employees working in these fields.
- XIII. **Labour:** This includes those who are individual members of trade unions.
- XIV. **Home Economics:** This includes individuals who work at home to care for family well-being.

Large number of potential ‘qualified individual voters’

To qualify as a voter, the individual has to be a member, owner, partner, director, council member, officer, or employee as the case may be, of one of the above subsectors or constituencies plus be a registered voter in a geographical constituency in order to register. If an individual qualifies for more than one subsector and constituency, s/he must choose only one to register in both cases.

No delegation of any part of electoral process

The HKSAR government must be involved in setting rules for the direct registration of voters just as it does for the registration of geographical constituencies voters. Organisations can assist as they already do by encouraging qualified individuals to register but not to be delegated any part of the electoral process. The

task force's *Fifth Report* made no mention of this matters, which presumably means the existing system remains for the 2008 election.

Election process

While LegCo's functional elections can then remain substantially the same as they are organised today, the process for electing the Election Committee is more difficult.

Size of Election Committee

Many submissions in response to the task force's *Fourth Report* supported expanding the size of the Election Committee indicating there is general acceptance that the current system is too narrowly defined. In suggesting that the numbers could be increased from 800 to 1,200 or 1,600, it would appear that the suggestions were based on the present construct of 200 per sector in four sectors.³⁹ While this may appear to be the easiest way forward it is still narrow, can be easily manipulated, and therefore will not reduce cynicism about Hong Kong being allowed to achieve universal and equal suffrage in the next election, if ever. The task force's *Fifth Report* opted for increasing the size to 1,600 with each of the sectors being given 300 seats, except for the political sector, which would go from 200 to 700 seats, most of whom would be District Councillors.

Instead, we proposed to increase the size of the Election Committee to 4,000–5,000 members. Thus, the Election Committee would effectively be 1% in size of the electorate of 400,000–500,000 voters. It needs to also be noted that by this expansion the ratio between electors and the general population would be the same as the current ratio in the Macau Special Administrative Region. Using such a ratio, we believe the actual numbers are sufficiently large to satisfy the public's desire that the process be a useful step towards achieving universal and equal suffrage.

Electing the Election Committee

For the 12 subsectors illustrated above, the HKSAR government could consider having the same number of members for each of the subsectors. Equal numbers for the 12 sectors can be justified as no one sector can dominate. Assuming that the total number of Election Committee members is 4,000, and taking out say 500 members for sector XIII, by dividing 3,500 by 12, each sector would elect say 290 members to the Election Committee.

This is a very large number for a subsector to elect and may appear quite complicated for candidates to campaign and voters to choose so many members. However, the problem can be ameliorated through political parties and interest groups self-organising to create lists to make it easier for both candidates and voters. These lists, which may have sizable batches of candidates, are most likely

to be based on political or interest lines. Admittedly, having to elect a large number of people to subsectors is problematical. It should be noted that the design of the current system itself poses many inherent problems that are also hard to resolve without major surgery or total abandonment.

The above problem can be solved by simply using the 400,000–500,000 functional voter base to elect the chief executive. This retains the idea of functional election and at the same time widens public participation. This also does away with the Election Committee. However, if an election committee has to be kept at around 1,600 people in size, then this body could be made a nominating committee and whatever is the size of the voter base (which is already at 150,000 individual voters today and can easily be increased to the potential size for functional constituencies), all the functional voters can elect the chief executive.

Conclusion

China is the only world power that is a one-party communist state still claiming allegiance to Marxist-Leninist ideology. It has reabsorbed Hong Kong as a special administrative region operating under a capitalist system, where multi-party elections to the legislature has been practised since 1991 with the proportion of directly elected seats on the basis of universal and equal suffrage having grown to produce half of Hong Kong's legislators. Beijing has had to dampen Hong Kong people's aspiration to directly elect their chief executive in 2007 and legislators in 2008 by explicitly ruling it out using the SCNPC to give an interpretation of the Basic Law. Nevertheless, it has had to leave a window open for modest reforms in the next two years. Public attention is increasingly focussing on functional elections, which is the basis for the selection of the chief executive and 30 of the 60 legislators. The oddities, anomalies and unfairness of functional elections are slowly being exposed. It is also becoming increasingly clear that the unfairness may well be the cause of constant political tension in Hong Kong. Even the conservative business and professional elites are now engaging in the public debate on possible reforms for the next round of elections beyond 2008. Even if Hong Kong does not achieve universal and equal suffrage by 2012, some of the worst aspects of the current functional election elements need to be replaced. The idea of bicameralism has been put forward by the business and professional elites as a possible way out of the functional mess. We hope this book will help all sectors to engage more meaningfully in that debate.