

ABOLISHING BY-ELECTIONS TO FILL VACANCIES IN THE LEGISLATIVE COUNCIL



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Introduction

Like in many places, by-elections are used to fill causal vacancies¹ in Hong Kong's Legislative Council (LegCo).² In June 2011, the Hong Kong government proposed, without any formal public consultation in advance, to abolish such by-elections and to adopt an automatic rule that would fill the vacancy with the candidate who lost in the original election but was next in line to obtain a seat under the proportional representation system (the Original Proposal). After a fair amount of public criticism of the Original Proposal and the lack of consultation, reminiscent of the 2003 controversy with the failed national security bill,³ the government retreated and decided to conduct a proper public consultation with options (the option favoured by the government in the consultation paper was different from the Original Proposal). The government issued a consultation paper, entitled "Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council", on 22 July 2011.⁴ The consultation period ended on 24 September 2011. After a cabinet reshuffling due to Henry Tang's resignation as Chief Secretary on 28 September 2011 to consider running for the Chief Executive, a new Secretary for Constitutional and Mainland Affairs, Raymond Tam, was given responsibility to oversee the by-election reform

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¹ Vacancies that do not arise from expiry of the term, such as due to illness, death or other reasons.

² Legislative Council Ordinance (Cap 542), s 36.

³ See Fu Hualing, Carole Petersen & Simon Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005) ch 1.

⁴ The Constitutional and Mainland Affairs Bureau, "Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council", (2011). (Hereinafter referred to as the "Consultation Paper".) The government's proposal applies not only to the existing Geographical Constituencies but also to the future District Councils Functional Constituency.

issue which under the previous Secretary, Stephen Lam, was intended to be completed in the 2011–2012 legislative year.⁵

This article will, first, provide some background on the government's proposal; second, offer some critical comments on the Consultation Paper; and third, offer some concluding thoughts.

Background on the Consultation Paper

By-elections have always been used to fill causal vacancies in constituencies elected by proportional representation in LegCo. Two such by-elections were held in 2000 and 2007 respectively and the government did not see a need for change in those years.⁶ So why did the government suddenly propose a change in 2011?

This had to do with the so-called “referendum” in 2010, a scheme devised by pan-democratic parties to demonstrate that the Hong Kong public is in favour of specific democratic reforms. Five legislators from the Civic Party and the League of Social Democrats, one in each of the LegCo geographical constituencies, resigned on 21 January 2010 to trigger five by-elections concurrently held on 16 May 2010. As was their plan, the five resigned legislators stood for election in the by-elections. If they were all re-elected, then it would demonstrate the Hong Kong public was in favour of the reforms for which the resigned legislators were advocating.⁷

The Hong Kong government reacted strongly to that scheme, claiming that intentional triggering of by-elections amounted to an abuse of process. In fact, in an unprecedented manner, the politically appointed officials of the HKSAR publicly announced that they would not vote in the by-elections. The Chinese government was also unhappy with the so-called referendum. The Hong Kong and Macau Affairs Office of the Chinese government made a statement on 15 January 2010 claiming that such referendum was “inconsistent with the legal position of the HKSAR”.⁸ As was expected, the five pan-democratic legislators were all elected back into office on 16 May 2010.

⁵ Consultation Paper, para 5.05.

⁶ The two by-elections were held to fill the seats originally held by Gary Cheng and Lik Ma respectively.

⁷ Albert Chen, “An Unexpected Breakthrough in Hong Kong’s Constitutional Reform”, (2010) 40 *HKLJ* 259.

⁸ The full text of the statement is available at http://www.hmo.gov.cn/Contents/Channel_115/2010/0115/13133/content_13133.htm (visited 5 Nov 2011; in Chinese).

The Hong Kong government obviously did not want similar events to happen again. With perceived public support on its side, the government introduced a bill into LegCo on 3 June 2011, without any formal public consultation in advance.⁹ We now know that the government misread the public's likely response to the specific proposal, even though there may have been significant public support for measures to prevent a repeat of the *de facto* referendum and its attendant costs. The Original Proposal as set out in the Legislative Council (Amendment) Bill 2011 was to replace the use of by-elections with a rule that a vacancy would be filled by the person who ranks highest on the precedence list of that constituency in the original election. The candidates on the precedence list are the candidates who are (a) unelected; and (b) highest in their respective candidate lists. Their ranking on the precedence list is determined by the remaining amount of votes in their lists in the original election. The remaining amount of votes a list had in the original election refers to the number of votes the list had in the original election minus the number of votes the list spent in returning Legco members.

This may sound quite complicated to those unfamiliar with the proportional representation system, but a simple example will illustrate the idea.¹⁰ Suppose that 100 votes were cast in the original election for a constituency with five seats, and two parties competed for those seats. Party A received 59 votes and party B received 41 votes. Given that 100 votes were cast for five seats, the initial quota for returning a LegCo member is 20 votes ($1/5$ of 100). That is to say, any list can spend 20 votes to obtain a seat. The result of this initial exercise is that two members on list A and two members on list B were elected. The remaining seat is filled as follows. After filling in the first four seats, list A had 19 votes remaining (59 minus $(20 \text{ times } 2)$) and list B had 1 vote remaining (41 minus $(20 \text{ times } 2)$). Since no list can obtain the remaining one seat under the original price (20 votes), the remaining seat can be obtained for less than 20 votes by the list with the largest number of remaining votes using its remaining votes. In this case, 19 votes from list A will be sufficient to obtain that seat, resulting in list A sending three members to LegCo and list B sending two members.¹¹ After all this, list A would have zero votes left, and list B would have one vote left. So the first member of list B will rank first on the precedence list after the original election.

⁹ Legislative Council (Amendment) Bill 2011.

¹⁰ While Annex 3 of the Consultation Paper is not about the Original Proposal, readers may find that helpful as some of the important concepts about the Original Proposal are illustrated there.

¹¹ Legislative Council Ordinance, s 49.

The above illustration can also show the serious defect with the Original Proposal. If an elected member of list A leaves office, then according to the proposal, a person from list B will replace him \her. This will result, in the scenario above, list B obtaining a majority number of seats over the constituency without having a majority of votes. This problem was widely noticed and the Original Proposal was heavily criticised.¹² Faced with strong negative public opinion, the government, on 29 June 2011, replaced the Original Proposal by the following proposal (the Revised Proposal): instead of using the precedence list to fill the vacancy, the vacancy will be filled, in the first instance, by members on the same list as the member who leaves office. Only if the vacancy cannot be filled this way will the precedence list system be used to fill the vacancy.¹³ Thinking that the revision would be sufficient to ease public dissent, the government still wanted to force the legislative change without any formal consultation before July.¹⁴ Yet, there was widespread misgiving about the lack of consultation over this issue even after the government revised its proposal. On 1 July 2011, over 10,000 Hong Kong people participated in the annual demonstration against the government, and the dissatisfaction with the Bill and its consultation process featured as one of the major motivations of the demonstrators.¹⁵ In view of that, the government finally announced on 5 July 2011 that there would be a public consultation process for two months before resuming the second reading of the Bill, and a formal consultation paper was issued on 22 July 2011. The contents of the Consultation Paper will be the subject of the next section.

Contents of the Consultation Paper

There are good democratic reasons for maintaining the *status quo*. By-elections reflect, in a rather direct way, the will of the public. After all, Hong Kong permanent residents enjoy the constitutional right without unreasonable restrictions to take part in the conduct of public

¹² For example, this problem is highlighted in the statement issued by Hong Kong Bar Association on 25 June 2011, available at <http://www.hkba.org/whatsnew/press-release/20110625.pdf> (visited 15 Oct 2011).

¹³ The Constitutional and Mainland Affairs Bureau, "Replacement Mechanism", (2011), available at <http://legco.gov.hk/yr10-11/english/bc/bc56/papers/bc56cb2-2226-1-e.pdf> (visited 15 Oct 2011).

¹⁴ The Constitutional and Mainland Affairs Bureau, "SJ and SCMA Speak to the Media", (2011), available at http://www.cmab.gov.hk/en/press/press_2755.htm (visited 15 Oct 2011).

¹⁵ "Record Number of Demonstration Participants in Tsang's Era", *Hong Kong Economic Times*, 2 July 2011, P01 (in Chinese).

affairs, directly or through “freely chosen” representatives, and the rights to vote and to be elected at genuine elections “held by secret ballot, guaranteeing the free expression of the will of the electors”.¹⁶

The government stated in the Consultation Paper several reasons for changing the *status quo*. First, cost is involved in holding by-elections.¹⁷ Second, LegCo will be deprived of the service of one member before the by-election.¹⁸ Third, the respect for the electoral process will be lowered if the *status quo* is maintained.¹⁹ Fourth, intentional triggering of by-elections, which is allowed by the *status quo*, amounts to an abuse of process.²⁰ Fifth, the effect of by-elections is to introduce a first-past-the-post element into what is otherwise a proportional representation system.²¹ Sixth, there was strong public dissatisfaction with the so-called *de facto* referendum.²²

The government suggested four options to alter the *status quo*. The first option was to restrict resigning members from participating in any by-election in the same term. The second option was to adopt a replacement mechanism using the same candidate list, followed by a precedence list system. The third option was to use the replacement mechanism as stated in the second option, but adding that the replacement mechanism should only be triggered if the vacancy resulted from voluntary circumstances. The fourth option was to adopt a replacement mechanism using the same candidate list, followed by leaving the seat vacant if the list was exhausted. The second option in the Consultation Paper was the same as the Revised Proposal and was the option favoured by the government.²³

The reasons put forward to support the Revised Proposal were not strong. Insofar as cost was a concern, one might wonder whether, in a society that aspires for democracy, cost should be the primary concern in designing an electoral system, especially in a society as well off as Hong Kong. That is not to say that cost, however great, is irrelevant; the argument is, rather, cost should not be decisive given that there is no suggestion that the cost involved would be astronomical. Perhaps it would be argued that the cost would be overwhelming if parties frequently trigger by-elections by voluntary resignations. However, experience

¹⁶ Hong Kong Bill of Rights Ordinance (Cap 383), s 8, Art 21(a) & (b).

¹⁷ Consultation Paper, para 3.06.

¹⁸ *Ibid.*, paras 1.05, 3.06.

¹⁹ *Ibid.*, para 1.05.

²⁰ *Ibid.*, para 1.04.

²¹ *Ibid.*, paras 1.09, 1.10, 3.06.

²² *Ibid.*, para 1.02.

²³ *Ibid.*, paras 4.09–4.15.

now shows that frequent (even infrequent) resignations will not be popular, and thus there are strong political incentives for the parties not to do so unless there exist strong public support or moral justification.

As to the concern about deprivation of a member's service, three replies could be given. First, the primary purpose of a legislature is to represent. As such, an electoral system should be assessed primarily on whether it reflects the views of the public, a function which is not necessarily made better with the number of legislators in office. Second, a proportionate response to this alleged problem only calls for an improvement of the efficiency of by-elections rather than the elimination of them. Third, there is no evidence to suggest that the workings of the legislature has ever been impaired or compromised as a result of a vacancy (or concurrent vacancies) in the relatively short period needed to hold a by-election.

Regarding the concern about the loss in respect for electoral process it is, first of all, entirely a matter of speculation that the public respect for the electoral system will be reduced if the *status quo* is maintained. It is not obvious that the Hong Kong public has less respect in elections after the *de facto* referendum. Moreover, the Revised Proposal, while better than the Original Proposal, can also lead to very undemocratic outcomes, as many have observed.²⁴ Building on the example above to illustrate, suppose that list A only contains three members. If the Revised Proposal is adopted, then the vacancy would be filled by list B, and again, list B will obtain a majority of seats while being a minority party. Since the Revised Proposal can lead to these undemocratic outcomes while the *status quo* would not, it is arguable that adopting the Revised Proposal would lead to greater loss of respect for the electoral system.

As to the argument that intentional triggering of by-elections amounts to an abuse of process, it could be argued to the contrary, that a legislator resigning and triggering a by-election is advancing the highest ideals of democratic government. It could be argued that a legislator facing a highly controversial public issue might elect through resignation and participating in a by-election to consult the voters directly. Thus, rather than being an abuse of process this would be the occasion where a by-election is seen as serving the ideals of elected representative and responsible government.²⁵ And even if we assume, for the sake of argument, that such intentional triggering of by-elections amounts to an

²⁴ Hong Kong Bar Association, "Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council: Response of the Hong Kong Bar Association", (2011), available at <http://www.hkba.org/whatsnew/press-release/20110831e.pdf> (visited 24 Oct 2011), paras 20–21.

²⁵ We thank Michael Davis for this idea.

abuse of process, we might wonder whether the adoption of the Revised Proposal, which may lead to undemocratic outcomes, is a proportionate response, especially given that, as we have argued above, there are already political incentives for parties not to trigger by-elections too frequently.

The objection that the effect of by-elections is to introduce a first-past-the-post element into what is otherwise a proportional representation system can be illustrated as follows. Imagine after the original election, a party B representative leaves his/her office. In such a case, under the *status quo*, party A would probably take the seat as it would probably win the by-election. One may think it is unfair to party B, and thus the *status quo* is unsatisfactory. To this objection two replies can be given. First, we might wonder whether proportional representation is really a good expression of the democratic ideal. Second, the Revised Proposal may not be a solution at all to the problem of ensuring proportional representation. Imagine the following situation in the original election: list A obtained 60 votes, list B obtained 39 votes, list C obtained 1 vote, so three candidates on list A and two candidates on list B were elected. However, suppose that list A only has three candidates and list B only has two candidates and one elected candidate has to resign. In this case, the seat will go to list C instead of list B or list A. It is unclear that this outcome coheres with the ideal of proportional representation, especially in the case where the resigned candidate is from party A.

Is the government right in saying that the public opinion is in favour of adopting the Revised Proposal? The government cited the low turnout rate in the by-election in 2010 and the fact that a large number of people were against the so-called referendum in 2010 as indirect evidence.²⁶ In reply, it is true that the turnout rate of the by-election in 2010 was low and that the so-called referendum in 2010 was not very popular. But that does not *per se* show that people dislike by-elections in general,²⁷ and even if that is true, that would not *per se* show that they take by-elections to be a worse evil than the Revised Proposal. The government, furthermore, said recently that some polls supported its claim that the public is in favour of a change.²⁸ But insofar as polls are concerned, there are actually some polls showing contrary results.²⁹

²⁶ Consultation Paper, para 1.01.

²⁷ It must not be forgotten that the turn-out rates in the 2000 and 2007 by-elections were quite high. We thank Johannes Chan for this point.

²⁸ "Stephen Lam Stated that Poll Results Support Plunging the By-election Loophole", *Hong Kong Daily News*, 27 August 2011, A04 (in Chinese).

²⁹ Some of the poll results are surveyed in "The Battle over Poll Results between the Pro-Democratic Camp and its Opponent", *Sing Tao Daily*, 23 July 2011, A04 (in Chinese).

Moreover, a study done by the Hong Kong Deliberative Polling Project (a joint project between the Radio Television Hong Kong and the Public Opinion Programme of the University of Hong Kong) may be relevant here.³⁰ The study included a deliberative session on the Revised Proposal, and asked the participants to indicate their preference concerning whether the *status quo* should be maintained before and after the session. It was found that after the session, the proportion of participants in support of maintaining the *status quo* increased from 48 per cent to 55 per cent. The sample size in this study was small, so the result should be taken with a grain of salt.³¹ Yet, if what we are looking for is *reasoned* public opinion, we might wonder whether the poll results adduced by the government should be taken at their face value.

Concluding Thoughts

As mentioned above, the reaction to the Revised Proposal was mixed insofar as the public opinion polls were concerned. Many academics and legal practitioners were, however, against the proposal. The Bar Association and the Law Society submitted responses to the Consultation Paper, stating that the government had not demonstrated a strong case for change.³² Over 100 academics in Hong Kong signed a petition stating that the *status quo* should be maintained.³³ Even persons usually regarded as being more pro-government stated that the four options suggested by the government were not ideal.³⁴ Whether the government will ultimately accommodate these views is unclear.

With the new Secretary for Constitutional and Mainland Affairs, Raymond Tam, previously Director of the Chief Executive's Office, it is interesting to wonder what will happen next. At the time of writing, more than a month has passed since the end date of the consultation period. More likely than not, the Administration was intent to keep the issue under wraps until after the region-wide District Council elections

³⁰ The details of the study are available at <http://hkupop.hku.hk/chinese/features/rthkdf2011sep/index.html> (visited 15 Oct 2011).

³¹ 85 people participated in the study.

³² The responses of the two professional associations are available at <http://www.hkba.org/whatsnew/press-release/20110831e.pdf> (visited 15 Oct 2011) and http://www.hklawsoc.org.hk/pub_e/news/submissions/20110921.pdf (visited 15 Oct 2011).

³³ The petition is available at https://www.mindvan.com/ourdb/files/ourdb@ourtv.hk/110922_joint_dec.pdf (visited 15 Oct 2011) (in Chinese).

³⁴ "The Basic Law Institute Suggested a Fifth Option", *Ming Pao Daily*, 15 September 2011, A16 (in Chinese).

to be held on 6 November 2011, so as not to have any unnecessary anti-government sentiments affect the election results.

It is not inconceivable that the consultation results show no consensus with any particular proposal, in which case the government could not legitimately proceed to reform without further engagement with the community. In this situation it would be highly unlikely if anything further would be done in the remaining months of the Donald Tsang Administration. Even the new 2012 Administration may drop the matter altogether, or at least until there are signs of further “abuse” of by-elections. The situation would not be comparable to the ongoing problem of legislating national security legislation because there is certainly no constitutional duty to abolish by-elections.

If the consultation results showed a consensus in favour of maintaining the *status quo* (which is consistent with having no consensus in public opinion polls), then acting honestly and consistent with past practices the Administration would need to drop the matter. This would be consistent with its approach to the question of reforming the restrictions on prisoner’s rights to vote. The results of that public consultation had shown that the public largely supported the removal of all restrictions on prisoner voting and the government gave effect to that desire.³⁵

On reflection the entire episode has served to remind us once again that the views of Hong Kong people cannot be taken for granted when it comes to law reform that impinges on fundamental rights and freedoms.

³⁵ See The Constitutional and Mainland Affairs Bureau, “Report on Public Consultation on Prisoners’ Voting Right”, (2009), para. 4.03, accessible at www.cmab.gov.hk/doc/ConsultationReport_e_final.pdf (visited 15 October 2011).

