

The Hong Kong electoral law reforms: the end of democracy?*

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Introduction

On Thursday, 11 March, 2021 the Chinese National People's Congress (NPC) passed, with 2895 votes in favor, one abstention and no votes against, the draft proposal for a complete overhaul of the Hong Kong electoral system, eventually approved on 30 March. The changes mainly affect the composition and election of the city's Legislative Council and the Chief Executive selection process. As required by the Basic Law of Hong Kong, the authorities of the city have implemented the changes into local law in April¹. This development represents, by far, the greatest change on the Hong Kong political scene since its handover by the British Government and could well mean the end of democracy in the city, but it is also revealing of the peculiar concept of Far-Eastern constitutionalism, especially in its Chinese variant. In order to understand the depth of the roots, as well as of the implications, of the momentous events of the last two years, this essay will also briefly

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¹ See *Improving Electoral System (Consolidated Amendments) Bill 2021*, passed by the Executive Council on 13 April 2021, <https://www.gld.gov.hk/egazette/pdf/20212598e/es32021259817.pdf>.

recap the main background features of the People's Republic of China-Hong Kong relationship, the concept of Chinese constitutionalism and the previous political system in the former British colony; it will then focus on the amendments to the city's election law and its consequences for the effectiveness of democratic control in the Hong Kong Special Autonomous Region (hereinafter, HKSAR).

1. *Overview of the PRC-Hong Kong relations*

Hong Kong first became subject of international interest when the United Kingdom forced² the Qing Empire to surrender the control of the island of Hong Kong³, the Kowloon peninsula and Stonecutter Island⁴, and, in 1898, to lease the northern New Territories to the British government for 99 years⁵. Under British rule, the colony recorded a very strong economic development, especially after the Second World War, the establishment of the People's Republic of China (PRC) and, more recently, the creation of the Shenzhen Special Economic Zone in 1980.

The looming expiry of the lease led to five years of negotiations between the PRC and the UK on the status, privileges and rights of the city and its citizens after the handover to China, which would have included the entirety of the colony. Eventually, the two sides agreed on the principle of "One Country, Two Systems", whereby, after the departure of the British governor on 1 July 1997, the city would have maintained its capitalist, liberal-democratic system, based on the rule of law, while the PRC central government would have taken control of foreign policy and defense. The terms of the agreement were enshrined

² Despite the formal appearance of international conventions, the so-called "unequal treaties" between European powers and China were as colonial in nature as African or American-style direct invasions.

³ Treaty of Nanking, 1842, at the end of the First Opium War.

⁴ First Convention of Peking, 1860, at the end of the Second Opium War.

⁵ In 1898, Her Majesty's Government negotiated the lease to almost double the size of the colony. See J. Carrol, *A Concise History of Hong Kong*, 2007, and I. Scott, *Political Change and the Crisis of Legitimacy in Hong Kong*, University of Hawaii, 1989, chapter IV.

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into the 1984 Sino-British Declaration⁶, a treaty between the soon-to-be former colonial power and the future new sovereign of Hong Kong, which listed the main policies that the People's Republic of China committed to maintain unchanged for 50 years after the handover⁷. These policies, ranging from freedom of movement for goods and capital to airline regulation, included a local autonomous government⁸, with legislative, executive and judicial branches set up by a Basic Law⁹, but under the direct control of the central government in Beijing¹⁰. In particular, the PCR State Council¹¹ would have appointed the Chief Executive of Hong Kong, while the National People Congress (China's national Parliament) could amend or interpret the Basic Law, reject locally approved laws and impose legislation on certain matters¹²; the military garrison of the People's Liberation Army (PLA) to be stationed in the city could not "interfere in the internal affairs of the [HKSAR]"¹³. Finally – and crucially for this paper's purposes – Section XIII of Annex I kept in force the provisions of the International Covenant on Civil and Political Rights, as ratified by the UK and consequently applied in the city.

⁶ Joint Declaration on the question of Hong Kong (with annexes). Signed at Beijing on 19 December 1984, UNTS 23391, vol. 1339.

⁷ *Id.*, Section I, Annex I.

⁸ Technically, a "Special Administrative Region" (SAR), which is permitted under art. 31 of the PRC Constitution.

⁹ Basic Law of the Hong Kong Special Administrative Region, adopted at the Third Session of the Seventh National People's Congress of the People's Republic of China on 4 April 1990 and issued by Decree of the President of the People's Republic of China no. 26 of 4 April 1990.

¹⁰ Technically, therefore, the entire HKSAR has been established to manage the direct sovereignty of China over Hong Kong, under the terms of the Declaration, but without any meaningful way to ensure that the PRC government respects the provision in it, except general public international law methods.

¹¹ Which, under the Chinese constitution, «is the executive body of the highest organ of state power; it is the highest organ of state administration», basically corresponding to the Cabinet in Anglo-Saxon systems. See PRC Constitution, Chapter III, Section 3, arts. 85-92.

¹² Listed in the infamous Annex III to the Basic Law. The list, which dealt only with national emblems, anthems, flags, citizenship and typical international issues (sea shelf, consular and diplomatic immunities...), was extended to national security in 2020.

¹³ Joint Declaration on Hong Kong, cit., Annex I, sec. XII

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The first contentious issues between the PRC and the newly constituted HKSAR arose almost immediately: in 1999 the city's Court of Final Appeal struck down¹⁴ a local ordinance restricting the right of abode in the region, but the Chief Executive appealed to the Standing Committee of National People's Congress (NPCSC) in Beijing to issue the first "interpretation" of the Basic Law¹⁵, that the Court agreed to follow¹⁶. This move, however, caused part of the citizenry to feel disenfranchised and led to marches in protest, despite the fact that the

¹⁴ *Ng Ka Ling and Another v. Director of Immigration* [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4; [1999] 1 HKC 291; FACV 14/1998 (29 January 1999). This case had the potential to create a *Marbury*-like precedent, because the Court unanimously held that «Like other constitutions, [the Basic Law] distributes and delimits powers, as well as providing for fundamental rights and freedoms. As with other constitutions, laws which are inconsistent with the Basic Law are of no effect and are invalid. Under it, the courts of the Region have independent judicial power within the high degree of autonomy conferred on the Region. It is for the courts of the Region to determine questions of inconsistency and invalidity when they arise. It is therefore for the courts of the Region to determine whether an act of the National People's Congress or its Standing Committee is inconsistent with the Basic Law, subject of course to the provisions of the Basic Law itself». It has to be noted that the relevant provision of the Basic Law was a direct reference to Section XIV, Annex I, of the Joint Declaration.

¹⁵ Interestingly, the Legislative Council was briefed by the Executive in a remarkably honest paper (*Right of Abode: The Solution*, <https://www.legco.gov.hk/yr98-99/english/hc/papers/roa-e.pdf>), in which it suggested to have the Standing Committee of the National People's Congress (NPCSC) in Beijing interpret the Basic Law in order to overrule the Court of Final Appeal (CFA) judgment. However, it also noted that «NPCSC's interpretation of the Basic Law may be regarded by common law jurisdictions and some people in Hong Kong as undermining the rule of law and CFA's power of final adjudication, as well as interference with the judicial independence and jeopardizing Hong Kong's autonomy. These perceptions may attract negative criticisms on NPCSC's interpretation and the HKSAR Government».

¹⁶ See *Lau Kong Yung & Others v Director of Immigration* (1992) 2 HKCFAR 300 and, later, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 234. In both cases, the CFA stated that the NPCSC power to interpret the Basic Law was «in general and unqualified terms» and that HKSAR courts were bound to follow it, regardless whether the interpretation had been solicited by the Chief Executive or by Hong Kong courts, or the NPCSC had acted independently under art. 158 of the Basic Law.

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struck-down law was generally popular among Hongkongers, who began to distrust the national government as well as their own¹⁷.

Four years later, the HKSAR government tried to give effect to art. 23 of the Basic Law, which requires the city to pass a “national security law” to protect the interests of the PRC in Hong Kong. Massive protests ensued and the proposal was withdrawn¹⁸.

In 2012, the government announced a plan to implement “national, moral and civic education” in every non-international school, in order to foster “national identity awareness and nurture patriotism towards China”, due to a perceived lack of Chinese identity in the HKSAR scholastic curricula¹⁹. Again, the population took to the streets and forced Chief Executive Leung to make the program facultative for schools, but his successor Carrie Lam has repeatedly stressed the importance of this issue²⁰.

Political intimidation and the use of authoritarian practices were made public in the 2015 “Causeway Bay booksellers” case: five Hongkongers working at Causeway Bay Books, an independent publisher, were abducted by PRC security forces and detained in mainland China, in blatant violation of the Basic Law. The idea that Hong Kong citizens were not protected against being deported to the mainland was met with anger and preoccupation in the city and internationally²¹.

¹⁷ The story of this important case is summarized in C. Buddle, *We're living in a Hong Kong shaped by a landmark 1999 ruling*, in *The South China Morning Post*, 29 January 2019.

¹⁸ See A. Gunia, *A Brief History of Protest in Post-Handover Hong Kong*, in *The Time*, 20 June 2019.

¹⁹ The plan is available in its amended form, *Moral and National Education Curriculum Guide (Primary 1 to Secondary 6)*, available at [https://www.edb.gov.hk/attachment/en/curriculum-development/moral-national-edu/MNE%20Guide%20\(ENG\)%20Final_remark_09102012.pdf](https://www.edb.gov.hk/attachment/en/curriculum-development/moral-national-edu/MNE%20Guide%20(ENG)%20Final_remark_09102012.pdf).

²⁰ *A Brief History of Protest in Post-Handover Hong Kong*, cit.

²¹ See A.W. Palmer, *The Case of Hong Kong's Missing Booksellers*, in *The New York Times Magazine*, 3 April 2018.

2. *The events leading to the reform*

In order to understand the reasons behind the HKSAR electoral reform, it is necessary to recap briefly the political events that led to the democratic crisis of the last decade.

When the central government in Beijing reneged on its commitment to grant universal suffrage by 2012²², democratic activist began to push for reform through different means: for example, in 2010, five democratic members of the Legislative Council (LegCo) resigned simultaneously, thereby triggering five by-elections to be held at the same time in the entire HKSAR, in what became known as the “Five Constituencies Referendum”²³. Later that year, the LegCo approved a reform package that raised the members of the Electoral Committee from 800 to 1200 and the members of the LegCo from 60 to 70, adding five legislators from the geographic constituencies and five to the District Council (Second) Functional Constituency²⁴.

In 2014, however, the NPCSC issued a Decision²⁵ concerning the election of the Chief Executive (CE), which stated that «the principle

²² On December 29, 2007, the National People Congress Standing Committee decided that the Chief Executive was to be elected directly in 2017, while other reforms could be proposed by the LegCo with a two-thirds majority. See “Decision of The Standing Committee of The National People’s Congress on Issues Relating to The Methods for Selecting the Chief Executive of The Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (Adopted by the Standing Committee of the Tenth National People’s Congress at its Thirty-First Session on 29 December 2007)”, available at <https://web.archive.org/web/20081223214014/http://www.hklii.org/hk/legis/en/orid/2211/longtitle.html>.

²³ The vote was boycotted by almost all non-pan democratic candidates and voters, resulting in less than 20% turnout and the reelection of all the five incumbent members of the LegCo.

²⁴ See Amendment to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, Recorded at the Sixteenth Session of the Standing Committee of the Eleventh National People’s Congress on 28 August 2010.

²⁵ “Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year

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that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld», paving the way to an even more penetrating screening of future CE candidates by the central government. The decision caused an uproar in the city, especially among the students, who organized in a series of mass protests, collectively known as the “Umbrella Movement”.

The calls for reform led the central government to back a proposal that would have introduced universal suffrage in the election of the Chief Executive, in exchange for a limitation to two or three candidates, with the approval of more than half of the Election Committee; the vote overwhelmingly failed in the LegCo²⁶. Consequently, the 2016 LegCo elections and the 2017 CE elections went forward with the same rules as the previous time, but with a much stricter candidate screening by the Electoral Affairs Commission, which prevented several pro-democracy politicians from running, on the basis of their supposed “unconstitutional” views²⁷.

The political restrictions did not stop after the elections, though. On 17 July 2018, the Hong Kong National Party was officially disbanded on national security ground for advocating in favor of Hong Kong independence. The move was particularly unexpected also because, despite a pending regular legal challenge to the police action, the Security Secretary John Lee proceeded to the ban anyway²⁸.

The new – and current – Chief Executive, Carrie Lam, was then involved into the latest stages of the democratic crisis in the HKSAR, which were ignited again in February 2019 by a government-backed proposal to amend the extradition laws, in order to allow HKSAR

2016”, available at <http://www.2017.gov.hk/filemanager/template/en/doc/20140831b.pdf>.

²⁶ The democratic opposition had the votes to stop the measure anyway (a two-thirds majority was required), but, because of a poorly-timed walkout of the pro-Beijing LegCo members, the motion failed 8-28.

²⁷ See A. Ramzy - A. Wong, *Hong Kong Restricts Election Candidates, Renewing Fears of Lost Rights*, in *The New York Times*, 3 August 2016. The main problem with the excluded candidates appeared to be their reluctance to acknowledge that, as art. 1 of the Basic Law stipulates, the HKSAR is an «inalienable part» of China.

²⁸ See T. Cheung – J. Lam, *Ban on Hong Kong National Party over ‘armed revolution’ call met with both cheers and fear*, in *The South China Morning Post*, 24 September 2018.

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residents to be exceptionally extradited to other jurisdictions, such as mainland China, without a specific extradition agreement²⁹. After massive internal and external³⁰ protests in March and April, the proposal was greatly reduced in scope and eventually withdrawn, but physical confrontation between protesters, lawmakers (some of whom – all from the democratic camp – were briefly detained by the police) and security forces led to very dramatic moments and widespread chaos during the summer, when some activists, mainly from the Beijing camp, resorted to violence without particular police reaction³¹.

The increasing politicization of society, especially the youth³², led to the landslide victory for the democratic camp in the November 2019 District Council elections, but also to more protests and consequent violent reaction by the police, who began systematically arresting pro-democracy activists and lawmakers. The confusion and instability took their toll on the economy of the city, which registered the first recession since 2009, in a period of overall global economic expansion³³.

The central government in Beijing concluded that the situation in the city was out of control and, having lost the faith in Ms. Lam ability to restore the peace, moved to overtake HKSAR authorities by proposing a new National Security Law³⁴, while the city was in a

²⁹ The government exploited the case of an 18-years old Taiwanese man who murdered his pregnant girlfriend and escaped to the HKSAR: Taiwanese authorities could not have him extradited because of the lack of an extradition treaty between the two countries.

³⁰ Politicians from around the globe, especially from the United States, Canada and the European Union, formally asked the government to reconsider its position.

³¹ See, for example, J. Pomfret - D. Kwok, *Hong Kong police criticized over failure to stop attacks on protesters*, in *Reuters*, available at <https://www.reuters.com/article/us-hongkong-extradition-idUSKCN1UH02O>.

³² Often left behind in society by the combination effect of housing and job policies. See, for example, T. Peter, *Inside Hong Kong's youth housing crisis*, in *The Independent*, 24 July 2019, available at <https://www.independent.co.uk/arts-entertainment/photography/hong-kong-youth-housing-crisis-protests-china-living-costs-a8994976.html>.

³³ See "GDP Growth, annual – Hong Kong HKSAR, China", World Bank, available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2019&location=HK&start=1962&view=chart>.

³⁴ See "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region" available at

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lockdown due to the Covid-19 pandemic. The bill criminalized many forms of expression and political activity until then protected by the Basic Law³⁵, on the pretense to fight «secession, subversion, terrorism and foreign interference». The National People's Congress swiftly approved the law in May 2020, a few days after a debate in the LegCo on a proposal to make it a crime to disrespect the national anthem became a brawl in which several lawmakers were injured and removed from the building³⁶. The new National Security Law was quickly used to silence many prominent opposition figures, including politicians, journalists, professors and businesspeople.

Predictably, the tension rose, but the simultaneous effects of Covid-related restrictions to public gatherings and beefed-up police reaction led to a period of precarious peace in the streets. LegCo elections, originally scheduled in early September 2020, were delayed by a year³⁷, while the authorities targeted potential and nominated democratic candidates³⁸, even disqualifying four incumbent members of the LegCo on July 30th. These same four lawmakers were then removed from the LegCo when the NPCSC passed a decision to ban any member who supported, even in the past, Hong Kong independence

[https://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_\(a406\)_en.pdf](https://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf). It must be noted that such a law is actually required by art. 23 of the Basic Law, that orders the HKSAR to «enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies», but an attempt to pass it in the LegCo failed in 2003 due to public protests; it must also be noted that nothing in the Basic Law allows the NPC to surrogate the LegCo in the enactment of such laws.

³⁵ Such as «freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike», Basic Law of the HKSAR, art. 27, or the *habeas corpus* provision in art. 28.

³⁶ See *Hong Kong: Lawmakers carried out during parliament mayhem*, in *BBC*, 18 May 2020, available at <https://www.bbc.com/news/world-asia-china-52702076>.

³⁷ The current scheduled date is 19 December 2021.

³⁸ In particular, after the pro-democracy bloc held primaries in July 2020, the first in the HKSAR history. However, many of the winning candidates were disqualified by the election authorities.

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from the PRC³⁹. This decision caused the mass resignation of all 15 remaining⁴⁰ opposition lawmakers on December 1st: as of today, there is virtually no organized political opposition to the pro-Beijing forces in the LegCo.

3. Previous political system

Since its handover to China by the British government in 1997, the Hong Kong Special Administrative Region has enjoyed a peculiar form of limited democracy, under the famous “One Country, Two Systems” model. The system envisioned by the Basic Law granted an island of rule of law, democracy, basic human rights and capitalist economic system near the biggest one-party autocratic regime of the world. The oddity of this situation has led, with time, to a progressively bigger chasm between the mainland and the city, in a conflict that turned violent in recent years. It is therefore understandable that the political authorities of Beijing tried to bridle the most prominent institutional mechanism that granted Hongkongers the exercise of the very rights China does not recognize for its citizens.

However, in order to understand the deep changes proposed by the NPC, it is fundamental to briefly recap the previous system of government of the HKSAR, beginning with the institutional role and

³⁹ «A member of the LegCo of the HKSAR does not fulfill the legal requirements and conditions on upholding the Basic Law of the HKSAR of the People's Republic of China and pledging allegiance to the HKSAR of the People's Republic of China if the member advocates or supports “Hong Kong independence”, refuses to recognise the People's Republic of China's sovereignty over Hong Kong and the exercise of the sovereignty, solicits intervention by foreign or external forces in the HKSAR's affairs, or carries out other activities endangering national security. When the member is so decided in accordance with law, he or she is immediately disqualified from being a LegCo member». NPCSC Decision on the qualification of members of the Legislative Council (LegCo) of the Hong Kong Special Administrative Region, 11 November 2020.

⁴⁰ Six democratic members had already been disqualified in 2016 and 2017 due to the infamous “oath-taking controversy”, especially after the NPCSC issued an “interpretation” of art. 104 of the Basic Law, which required lawmakers to swear allegiance to the HKSAR with due solemnity and sincerity.

electoral norms of its three main government institutions: the Legislative Council, the Chief Executive and the District Councils.

3.1. *Legislative Council*

«The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: “Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures”⁴¹.

Under the former system, the 70-member unicameral legislature of the HKSAR was elected for a 4-years term in, at least, three different ways, a convoluted procedure that reflects (or, at least, should reflect) the progressive path towards «the election of all the members of the Legislative Council by universal suffrage».

Firstly, 35 members were elected directly by the people, with proportional representation based on the Hare quota (largest remainder method) and medium-to-small-sized, multimember, geographical constituencies⁴² (GCs). The implicit electoral threshold, especially in Kowloon East, was high⁴³ and allowed only parties with a relatively strong support overall or a small but localized voter base to obtain seats. These elections used to be actually contested and participated by numerous parties, both pro-democracy and pro-Beijing.

⁴¹ Basic Law of the Hong Kong Special Administrative Region, art. 68.

⁴² In the 2016 elections, the New Territories (East and West) elected 9 representatives each, Hong Kong Island 6, Kowloon East 5 and Kowloon West 6. The allocation is based on the resident population of each zone.

⁴³ Under Hare quota, with only five seats to distribute, the implicit threshold is above 10%. Case in point, in the 2016 Kowloon East elections, the successful candidate with the fewest votes got 13,80% of the total.

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Secondly, 30 members were (and are) elected by 28 Functional Constituencies (FCs), which do not have a geographical, but rather a professional identity; moreover, the franchise is not necessarily attributed to people, but it is often granted to organizations, such as corporations or unions (for example, about 70,000 teachers voted in the Education FC, but just 121 banks had the right to vote in the Finance FC). 27 FCs elect a single representative, in most of the cases through a simple FPTP method. The Labour constituency, which represents trade unions, elects three representatives with a plurality-at-large method⁴⁴.

It is apparent that, since each FC has a different number of members (ranging from a couple of hundreds to tenths of thousands of voters) and much of the voting power is channeled through the administrators of corporations, there is an enormous disproportion in voting power benefitting the business community, which overwhelmingly supports the central government in Beijing.

Finally, despite technically being the last Functional Constituency, the District Council (Second) FC, created in 2010, presented a unique system: the candidates could only be current district councilors, while the voters were all Hong Kong citizens who were not already voting in another FC. This rule allowed almost 3.5 million Hongkongers to vote for 5 more legislators without geographical limitations and proportional representation.

The last election, held on 4 September 2016, recorded the following results:

⁴⁴ The three candidates with the most votes win. Every voter has three votes.

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	Pro-democracy	Localist ⁴⁵	Pro-Beijing	Independents	Total seats
Hong Kong Island	2	1	3	0	6
Kowloon East	2	0	3	0	5
Kowloon West	2	2	2	0	6
New Territories East	5	1	3	0	9
New Territories West	2	2	5	0	9
Geographical Constituencies	13	6	16	0	35
Functional Constituencies	7	0	22	1	30
District Council (Second)	3	0	2	0	5
Total by camp	23	6	40	1	70

2016 LegCo Elections - Total by camp



This quick overview of the LegCo electoral system shows that the norms were already blatantly skewed in favor of the pro-Beijing camp,

⁴⁵ Localist forces have greatly risen in popularity in the last decade, thanks to a more direct appeal to local issues, quite relevant in the GCs. They align for the most part with the pro-democracy camp. See Y.H. Kwong, *The Growth of "Localism" in Hong Kong: A New Path for the Democracy Movement?*, in *China Perspectives*, 3, 2016, p. 63 ss.

which could safely count on almost half of the seats thanks to the FCs and was well represented in the GCs by the current relative majority party, the Democratic Alliance for the Betterment and Development of Hong Kong (DAB).

3.2. *Chief Executive*

«The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures».⁴⁶

If the election of the Legislative Council allowed, at least, a quota of direct democracy, not a single step of the election of the Chief Executive of the HKSAR, heir to the British Governor of Hong Kong, can be described as democratic in nature.

The Chief Executive was – and still is – the head of the government of the city and was appointed by the State Council in Beijing upon the results of an election/nomination process performed by the Elections Committee, a 1200-member-strong electoral college, whose member were elected by 38 groups, known as “Subsector”, grouped in 4 Sectors⁴⁷, each one electing 300 people. The 38 Subsectors

⁴⁶ Basic Law of the HKSAR, art. 45.

⁴⁷ «(I) Industrial, commercial and financial sectors; (II) The professions; (III) Labour, social services, religious and other sectors; (IV) Members of the Legislative Council, representatives of members of the District Councils, representatives of the Heung Yee Kuk, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference». See Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region (Approved at the Sixteenth Session of the Standing Committee of the Eleventh National People's Congress on 28 August 2010).

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broadly corresponded, in membership and scope, to the FCs, therefore some of them had few hundreds of eligible voters, others tens of thousands, while others gave the franchise only to corporations. The Elections Committee has always had a strong presence of business-related member, but it also comprises representatives from religious, sports and social institutions.

Once the Elections Committee convened, it voted on candidates who had received the endorsement of, at least, 150 members of the same Committee. A majority (601 votes) was necessary to win; if no candidate reached the threshold, a runoff was held.

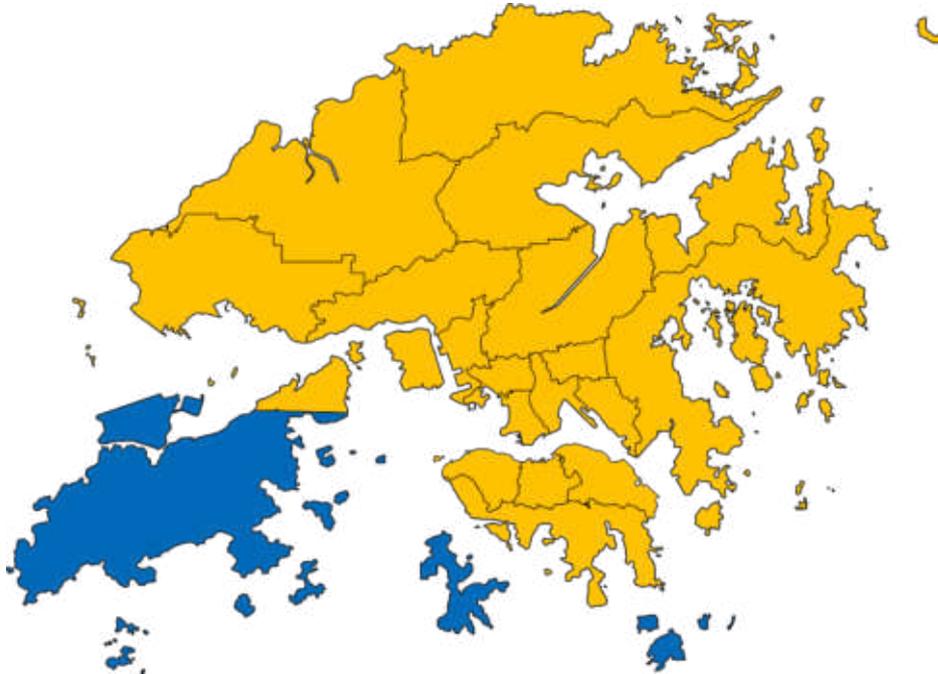
3.3 District Councils

The territory of the HKSAR is divided into 18 districts, whose inhabitants directly elect a District Council every four years. The size of each District Council depends on the population of the district, ranging from 42 members in Sha Tin District to just 13 councilors in Wan Chai. With the exception of the 27 members appointed by the Chief Executive as rural committee chairmen, the remaining 452 councilors are elected via FPTP in single-seats constituencies.

Unsurprisingly, given the relative fairness of the electoral game (but despite the potentially disproportionate effects of the FPTP system), the District Council elections were not arranged so that they inevitably return a pro-Beijing majority and, in 2019, registered an outright landslide in favor of the pro-democracy camp (yellow), which gained 265 seats and the control of 17 out of 18 Councils⁴⁸.

⁴⁸ Thanks to Momocalbee - Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=84514870> for the map.

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4. Notes on Far-Eastern constitutionalism

Before moving on to the analysis of the electoral reform imposed on Hong Kong, it could be expedient to give appropriate, though condensed, mention to the ever-developing concept of constitutionalism in Far East Asia, because it may be misleading and detrimental to the scientific purpose of this paper to assume that the idea of constitutionalism which is deeply entrenched in Western legal culture has absolute and unquestionable application throughout the world. As a fundamental initial disclaimer, this paper will refer to “Western” constitutionalism as the one dating back to 17-18th century Western Europe and generally considered to be hypostatized by the text of art. 16 of the *Déclaration des droits de l'homme et du citoyen* (1789): «Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution»⁴⁹. The two

⁴⁹ «Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution, *Declaration of the rights*

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main prongs of Western constitutionalism, i.e. the guarantee of individual rights and the separation of powers, are widely considered – among Western scholars – to be inescapable features of any governmental organization that aspires to be “constitutional”, together with their logical consequences in both the economic (free market capitalism) and political (democracy) fields. Moreover, after the fall of the Berlin Wall, the Western paradigm of liberal-democratic constitutionalism has been virtually unchallenged on the world stage, in the infamous “end of history” mindset that has proven as correct as long-lived⁵⁰. Constitutionalism, however, has taken different paths in Eastern Asia, whose legal culture and history has consistently diverged from that of the West; its idea of what constitutionalism means is particularly relevant for a number of reasons⁵¹.

First of all, as far as the descriptive meaning of “constitutionalism” is concerned, the Far East, especially China, boasts probably the most ancient, complex and somewhat uninterrupted constitutional system in human history. The basic tenets about the functioning of the State and the authority of the Emperor have been in place for more than two thousand years⁵².

Secondly, whereas Western constitutionalism is deeply connected to the idea of natural (later, human) individual rights that the government ought not to interfere with, Eastern constitutionalism,

of the man and of the citizen», text available at <https://www.elysee.fr/la-presidence/la-declaration-des-droits-de-l-homme-et-du-citoyen>.

⁵⁰ See, of course, F. Fukuyama, *The End of History and the Last Man*, New York, 1992, and, critically, L. Harris, *China's Constitutionalism*, in H. Fu - L. Harris – S. N. M. Young (eds.), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence*, New York, 2007, p. 243-244.

⁵¹ For another perspective on the issue of the differences between Western and Chinese constitutionalism, see *Political but incontestable: A review of 'political constitutionalism' in China*, in *Global Constitutionalism*, 10(1), March 2021, p. 10 ss.

⁵² If we assume the Aristotelian meaning of *politeia*, there is no conceivable State-like organization without some form of constitution. See T. Ginsburg, *Constitutionalism: East Asian Antecedents*, in *Chicago-Kent Law Review*, 11, 2012. See also Z. Han, *Modern Constitutionalism in China and the Fundamental Structure*, in *The Constitutional Identity of Contemporary China*, 2019, p. 27. Just to give an example, the Qin dynasty, which ruled China in the 3rd century BC, already had a complex bureaucratic system known as “Three Lords and Nine Ministers”.

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under different philosophical influences (e.g., Confucianism)⁵³, has championed the value of societal benefit over individual satisfaction, the importance of rule by the elderly/sages, but also the ruler's duty to pursue the welfare of the ruled⁵⁴. However, since absolute divine monarchies have been the norm in East Asia until the XIX century, the idea of a restriction of the sovereign power of the Emperor was never taken into serious consideration⁵⁵.

Thirdly, constitutionalism in Far East Asia has in itself taken very different routes: the countries which recorded a strong economic and political development after WWII (Japan, South Korea, Taiwan) under US influence adopted Western-style constitutions and embraced Western constitutionalism, though with some peculiarities⁵⁶. Conversely, China lives under the pervasive influence of Marxist ideology, which has momentous effects on the Chinese constitutional debate. In particular, the interaction of Marxism (*rectius*, Maoism or Sino-Marxism) with concepts like the rule of law entails two main consequences⁵⁷: on one hand, the law is seen as part of the "superstructure" (much like culture, religion, family values, etc.), which depends on the dynamics of the economic "structure"; therefore, the law has no particular value as the "general will"⁵⁸ of the people, but

⁵³ On this topic, see B. Ngoc Son, *Confucian Constitutionalism in East Asia*, New York-London, 2016 and T. Ginsburg, *op. cit.*

⁵⁴ A significant example of this approach can be detected in arts. 33-51 of the Chinese Constitution: after a long list of rights and privileges granted to Chinese citizens, among which freedom of expression, freedom of religion, right to social assistance, protection from unlawful search and seizures, even the right to "lawful" private property, art. 51 puts the entire enumeration into question, by subordinating the exercise of these rights to the «interests of the state, society or collective».

⁵⁵ There are, however, some examples of self-imposed limits to central government authority (such as a ban on forced labor during farming season in China) or political compromises limiting such power (such as the shogunate in Japan). See T. Ginsburg, *op. cit.*

⁵⁶ On the specific features of constitutionalism in these countries, see J-R. Yeh - C. Wen-Chen, *The Emergence of East Asian Constitutionalism: Features in Comparison*, in *The American Journal of Comparative Law*, 59(3), 2011, p. 805 ss.

⁵⁷ For an in-depth analysis, please refer to the numerous materials cited in P. Renniger, *Chinese (Anti-) Constitutionalism: Sino-Marxism, Xi Jinping Thought, and Hong Kong*, in *Verfassungsblog*, 28 November 2019, available at <https://verfassungsblog.de/chinese-anti-constitutionalism>.

⁵⁸ Again, from the *Déclaration*, art. 6.

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only as a reflection of the current stage of the economic relationship (and struggle) between different parts of Chinese society, in a series of contradictions that the law is called to solve according to the needs and perspectives of the time⁵⁹. On the other hand, given the supreme status accorded by Sino-Marxism to the political aims of the Communist movement, law is inevitably dependent on, and interpreted according to, the political priorities as enunciated by the leadership of the Chinese Communist Party (CCP). The law – constitution included – is not binding by itself or by authoritative fiat, but only because and insofar as it suits the objectives of the CCP, as if all legal theory amounted only to “factualistic positivism”⁶⁰ and the law was deprived of any meaningful normativity beyond what the Party wants⁶¹.

Having presented some caveats about trying to apply the schemes of (Western) constitutionalism on a fundamentally different political system, since this paper covers the Hong Kong-China relationship, it is probably more useful to focus only on the specifics of the Chinese debate on constitutionalism.

4.1. Issues in Chinese constitutionalism: the role of the CCP and the meaning of “democracy”

The modern approach of the People’s Republic of China to constitutionalism is a story of opposing tendencies: since the opening of its economy to market-based dynamics and capitalism, the government has consistently tried to balance the demands of the business and middle class, on which its newfound prosperity is based, and the orthodoxy of the one-party Sino-Marxist rule. In the public debate on Chinese constitutionalism, there are two main issues: the relationship with Western constitutionalism as a whole and the Chinese interpretation of the concept of “democracy”.

⁵⁹ As set by the Party, naturally.

⁶⁰ P. Renniger, *op. cit.*

⁶¹ For an in-depth analysis on the philosophical implication of idealism and realism in Chinese constitutionalism, please refer to F. Lin, *Idealism and Realism in Chinese Constitutional Theory and Practice*, in M. Adams – A. Meuwese – E.H. Ballin (eds.), *Constitutionalism and the Rule of Law, Bridging Idealism and Realism*, Cambridge, 2017, p. 294 ss.

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4.1.1. *The role of the CCP in Chinese constitutionalism*

Firstly, from a simple reading of the Chinese Constitution, it is clear from its initial article (stating that «The People's Republic of China is a socialist state governed by a people's democratic dictatorship»⁶²) that it has little to share with Western habits in terms of hierarchy and rule of law. However, the most relevant provision about constitutionalism, art. 5, deserves a deeper look: at a first glance, it seems slightly contradictory, because it features some lines that could easily be found in any Western constitution (such as «No law, administrative regulation or local regulation shall be in conflict with the Constitution»⁶³), together with Marx-inspired clauses («The state shall safeguard the unity and sanctity of the socialist legal system»), but the illusory conundrum can be solved by interpreting it with due regard for the role of the Party.

⁶² Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress on December 4, 1982; amended in accordance with the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Seventh National People's Congress on April 12, 1988, the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Eighth National People's Congress on March 29, 1993, the Amendment to the Constitution of the People's Republic of China adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, the Amendment to the Constitution of the People's Republic of China adopted at the Second Session of the Tenth National People's Congress on March 14, 2004, and the Amendment to the Constitution of the People's Republic of China adopted at the First Session of the Thirteenth National People's Congress on March 11, 2018, art. 1.

⁶³ Or «All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the Constitution and the law. Accountability must be enforced for all acts that violate the Constitution or laws» and «No organization or individual shall have any privilege beyond the Constitution or the law». PRC Constitution, art. 5.3-5. This could easily be paired with US Constitution, art. VI, sec. 2 («This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding»).

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According to art. 1.2 of the Constitution, as amended under Secretary Xi in 2018⁶⁴, «The socialist system is the fundamental system of the People's Republic of China» and «Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics». If, therefore, the entire constitutional system of the state is based on the idea that the CCP has the sole right and duty to lead the country, the various power struggles that Western constitutionalism is so focused on managing and avoiding⁶⁵ cannot be an issue for Chinese constitutionalism. There is simply no circumstance when a law, administrative or local regulation can be in conflict with the Constitution, because either the Party endorses the new rule (and the Constitution can be “interpreted” to fit in the rule by no other than the NPCSC⁶⁶), or the Party does not endorse the new rule and those who approved it acted against the fundamental principle of the entire legal order, namely that the Party leads and administers public power. Since the Party is the forum where all conflicts of power are dealt with, there is no need for institutional mechanisms to solve them.

It is clear therefore that, when the Chinese ruling class utters “constitutionalism”, it refers to this peculiar concept, even when Party officials seem to publicly call for something different.

The term itself rose in popularity with the leadership of current Chairman Xi Jinping (since 2012), who sponsored a series of sweeping anti-corruption investigations against famous business people and powerful CCP members⁶⁷. The state-owned media presented the

⁶⁴ The reform introduced Xi Jinping's Thoughts in the Constitution, abolished term limits for the President and added an explicit reference to the supremacy of CCP rule over the Constitution in art. 1, which used to read «The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited» and now reads: «The socialist system is the fundamental system of the People's Republic of China. *Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics*. It is prohibited for any organization or individual to damage the socialist system». Constitution of the PRC, art. 1, emphasis added.

⁶⁵ Thanks to, first and foremost, vertical and horizontal separation of powers.

⁶⁶ «The National People's Congress Standing Committee shall exercise the following functions and powers: (1) interpreting the Constitution and overseeing its enforcement»; Constitution of the PRC, art. 67.

⁶⁷ This undertaking was motivated both by the urging need to quell the rampant corruption inside the Party and by the political opportunity to put political

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prosecutions as operation of law enforcement aimed at restoring the “rule of law” over the despotism of Party officials, especially those in local government; at the same time, the most reform-minded personalities and journals began publicly debating and arguing for a Western-like implementation of the rule of law and constitutionalism⁶⁸. At the Fourth Plenum of the 18th Party Congress, in October 2014, President Xi announced that «fully implementing the Constitution is the primary task and basic work in building a socialist nation ruled by law, and that the Constitution is the country’s basic law and the general rule in managing state affairs»⁶⁹, while the Central Committee, under Xi Jinping’s presidency, stated that the «rule of law should be fully implemented as a basic strategy, a law-based government should be basically functional, judicial credibility should be steadily enhanced, and human rights should be fully respected and protected»⁷⁰.

Despite the general approval of local scholars⁷¹, Western commentators were quick to warn that this apparent commitment to the basic tenets of constitutionalism had to be interpreted according to both Sino-Marxist legal theory and the pragmatic political needs of the new leader⁷². Moreover, some Chinese officials rapidly clarified that the

rivals inside the CCP out of public life. See C. Kautz, *Power Struggle or Strengthening the Party: Perspectives on Xi Jinping’s Anticorruption Campaign*, in *Journal of Chinese Political Science*, 25, 2020, p. 501 ss.

⁶⁸ Which is possible, in China, provided that the tone remains strictly within Party censorship criteria, as the cases of *Southern Weekend* and *China Through the Ages*, two reformist journals censored in 2013 for speaking up about constitutionalism, show. See R. Creemers, *China’s Constitutionalism Debate: Content, Context and Implications*, in *The China Journal*, 74, 2015, p. 91 ss.

⁶⁹ S. Tiezzi, *Could China’s ‘Rule of Law’ Lead to Constitutionalism?*, in *The Diplomat*, 23 October 2014.

⁷⁰ Xinhua agency, quoted by S. Tiezzi, cit.

⁷¹ See, *ex plurimis*, J. Shigong, *Chinese-Style Constitutionalism: On Backer’s Chinese Party-State Constitutionalism*, in *Modern China*, 40(2), 2014, p. 133 ss.

⁷² With the words of S. Tiezzi, «In the end, what Xi means when he speaks of the rule of law is not the same as the Western concept. A more accurate term would be the rule of the CCP through the law. The CCP still controls the legal system, but uses it as one of many available tools to enforce edicts from the center. That means the Party will have more options for disciplining unruly members, whether local officials or high-ranking members who overstepped their bounds. It also means that the CCP can and will continue to use the legal system to imprison political activists and dissidents seen as dangerous to its continued rule. No individual Party member

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country was not going to mimic any feature of the Western political doctrine⁷³. Xi Jinping was more cautious⁷⁴, until his grip on power was solid enough to change the Constitution in 2018 and to announce that «[China] must never copy the models or practices of other countries. [...] must never follow the path of Western ‘constitutionalism,’ ‘separation of powers,’ or ‘judicial independence’»⁷⁵. According to Xi Jinping, the only thing that maintains cohesion and consistency throughout the Chinese legal system is the unified and centralized Party rule, which uses the law only as an instrument to quell disputes in the provinces and subjugate unruly local officials, in order to cement the authority of the Central Committee of the CCP and show the people that nobody is above the law (or the will of General Secretary Xi).

Consequently, it is safe to say that, under President Xi rule, China has not improved its human rights or rule of law records (if the improvement is measured against Western constitutional standards), nor has it any intention to do so in the near future, but it clearly has implemented a stricter control over rogue Party officials and pursued an increasing economic prosperity. Interestingly, though, Xi Jinping’s ideas about the role of the law in society closely resembles the bimillennial Chinese tradition of a set of rules «not used to constrain the sovereign, but [as an] effective instrument of controlling lower level agents, [to] facilitate ... the operation of government»⁷⁶ and there is little doubt that, under his leadership, the central government has

is exempt from the law, but the Party as a whole is above it», S. Tiezzi, *Zhou Yongkang and the Rule of Law with Chinese Characteristics*, in *The Diplomat*, 30 July 2014. See also L.C. Backer, *Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong’s Constitutionalism*, in *Modern China*, 40(2), 2014, p. 168 ss.

⁷³ The 2013 debate on constitutionalism in China is brilliantly summarized in S. Yuen, *Debating Constitutionalism in China: Dreaming of a liberal turn?*, in *China Perspectives*, 4, 2013, p. 67 ss.

⁷⁴ For example, at the 19th Congress of the CCP, he still referenced the Constitution multiple times and explicitly said that one of the main objectives of the Party was «ensuring every dimension of governance is law-based». *Report of the 19th CCP Congress*, p. 22. See L.C. Backer, *Chinese Constitutionalism in the New Era: The Emerging Idea and Practice of Constitution in the 19th CPC Congress Report*, 2017.

⁷⁵ See C. Gao, *Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence*, in *The Diplomat*, 19 February 2019.

⁷⁶ T. Ginsburg, *op. cit.*, p. 31.

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improved its legal (and political) control over local authorities and officials, managing to disseminate CCP orders throughout the country⁷⁷.

The scope of the CCP agenda, however, has steadily broadened in the recent years, both geographically and theoretically: in the former sense, thanks to the Belt and Road Initiative, China is creating economic and political partnerships with countries in Eurasia and Africa and asserting its might over its neighbors, such as Japan, India and the South-East Asia countries. In the latter sense, these renewed relationships have been especially successful with leaders with similar ideological features⁷⁸; the objective is to strengthen not only its current and future economic power in the regions, but also the ideas of political supremacy over the legal system and, more broadly, authoritarianism, which in turn weakens Western constitutionalism⁷⁹ and makes it easier for the PRC to justify its own system.

4.1.2. *The meaning of “democracy”*

Secondly, despite the clear attempt by the CCP leadership to set Chinese constitutionalism apart from the rest of the world, a surprisingly amount of effort has recently been put in promoting the idea that the country is, indeed, “democratic”: on 4 December 2021, the State Council Information Office released a white paper by the title

⁷⁷ This idea can also be found at the end of the first part of *China: Democracy That Works*, a report by the State Council Information Office of the People’s Republic of China, which will be introduced in the next paragraph: «The CPC upholds law-based governance of the country. It exercises leadership over legislation, guarantees law enforcement, supports judicial justice, and plays an exemplary role in abiding by the law. Through advancing the rule of law, the Party ensures that its policies are effectively implemented and that the people run the country as its masters».

⁷⁸ In Europe, for example, the main recipient of China’s influence (in terms of money and infrastructural projects) are the Balkan States and Hungary, which may sound paradoxical given the strong anti-Communism sentiment of the governments involved, but makes perfect sense from an anti-Western-constitutionalism point of view.

⁷⁹ Which is already facing unprecedented internal challenges from the rise of populist and authoritarian parties and, especially with the aftermath of the 2020 US elections, gave China a powerful tool to attack liberal democracy.

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*China: Democracy That Works*⁸⁰. In it, the Chinese government celebrates the history of the country, the Revolution and the concept of “whole-process people’s democracy”, a creation of the CCP⁸¹ that seeks to «pool [people’s] wisdom and strength», allowing the best-suited individuals to access the Party inner circle and the government while «ensuring that the leadership of the Party and the state rests in the hands of those loyal to Marxism, the Party, and the people». In less idealistic terms, the report envisions a system where the people have all the power and control every public authority (“democracy”), but the state «takes resolute action against any attempt to subvert the country’s political power or endanger public or state security» (“dictatorship”); according to the State Council, therefore, «democracy and dictatorship appear to be a contradiction in terms, but together they ensure the people’s status as masters of the country. A tiny minority is sanctioned in the interests of the great majority, and “dictatorship” serves democracy».⁸²

The system, based on people’s congresses of increasing size and geographical scope⁸³, recognize (eight) other parties, but none of them is part of the opposition: all parties work with the CCP to administer the state⁸⁴, but the CCP «is the governing party, and the other parties accept its leadership». This form of democracy is allegedly better equipped to deal with problems because «when making decisions and exercising governance, [Western] political parties act in their own interests or the

⁸⁰ See the full text, published by press agency Xinhua, at http://www.news.cn/english/2021-12/04/c_1310351231.htm. The publication is an ostensible answer to the impending Summit for Democracy, sponsored by the US Department of State, to which the PRC was not invited, but it also celebrates the 100th anniversary of the foundation of the Chinese Communist Party.

⁸¹ *China, Democracy That Works*, part. I.

⁸² *Ivi*, part II.1.

⁸³ Township, county, city, province and nation respectively, but also grassroot groups in communities, residential units and enterprises. It is a clear application of Lenin’s democratic centralism.

⁸⁴ «In China, there are no opposition parties. But China’s political party system is not a system of one-party rule. Nor is it one in which multiple parties vie for power and govern in turn. It is a multiparty cooperation system in which the CPC exercises state power. In addition to the CPC, there are eight other political parties. The other parties participate fully in the administration of state affairs under the leadership of the CPC». *China, Democracy That Works*, part. II.3.

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interests of the classes, regions and groups they represent, provoking division in society». According to the report, in the PRC, whenever there a public issue arises, democratic consultation of the concerned group is activated at the correspondent level, and the ideas of the people are duly considered before, during and after any deliberation process⁸⁵. Finally, separation of powers is judged unnecessary thanks to the all-encompassing network of democratic supervision by the people's congresses over all public authority⁸⁶.

After describing its own model of democratic participation, the State Council addresses directly the recent developments of democracy abroad, carefully showing other nations the path towards a «different form of democracy», stating that «the model that suits best is always the most appropriate»⁸⁷ and not-so-subtly swiping at US attempts to “export democracy” and impose its Western form as the only golden standard. But it is precisely there that the incompatibility between the two approaches surfaces: China appears to favor a democracy *à la carte*, with each country (i.e. each country's political establishment) choosing the best way to accomplish – or not – the fundamental human aspiration of self-government; the Western constitutional tradition, instead, generally holds that, beyond the technicalities of each electoral system, some guarantees and rights are *universally* necessary to implement a democratic form of government⁸⁸. According to the PRC government, its model has granted China a prosperous and harmonious society, while the Western one has proven unfit to deal with the great challenges of the century, from the pandemic to growing inequality.

⁸⁵ Ivi, part. III.4.

⁸⁶ Ivi, part. III.5. The report then continues its celebratory remarks with parts on the rights of Chinese citizens («In China, personal liberty has developed to an extent never before seen in several thousand years of history. Creativity and potential for innovation have been fully unleashed, and people enjoy freedom of speech and mobility») and economic successes («In just a few decades, China has gone through a process of industrialization that took the developed countries centuries to complete. Despite undergoing this dramatic transformation, it has avoided the social unrest which has afflicted many late-industrializing economies in the process of modernization. Instead, it has maintained rapid economic growth and lasting social stability»).

⁸⁷ Ivi, part V.2.

⁸⁸ Such as, for example, the right to establish a party and campaign freely, or the peaceful transition of power to different political forces.

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The place where the two models were inevitably due to collide was, indeed, the HKSAR.

4.2. The clash between Western and Chinese constitutionalism in Hong Kong

From the clear differences between Western constitutional requirements and the PRC practice and legal system, it is easy to understand why the situation of Hong Kong represents such an important and, for China, existential question: situated at China's door to the world, with a peculiar mix of Western and Chinese identity, the city could have become a paradigm of success for fundamentally Western institutions managed by and for the benefit of the Chinese people; instead, the threat posed by the incompatible views of constitutionalism in the HKSAR were deemed real, and ultimately too dangerous to be left alive.

Despite its grossly undemocratic government system, that, as shown in Section 3, left much of the power in the hands of Beijing-friendly groups and individuals, the HKSAR guaranteed its citizens the privilege to be able to count on the actual and unrestricted exercise of their Basic Law-granted civil and political rights: in the real, paper and virtual squares of the city there were true political debates, which led to real power struggles between public institutions. The LegCo (or, at least, opposition lawmakers) tried to challenge the authority of the Chief Executive⁸⁹ and the courts ensured that the rights recognized by the Basic Law were respected (even during “public emergencies” – as *Kwok Wing Hang v Chief Executive in Council* stated⁹⁰). From a Chinese constitutional perspective, however, this was not a well-

⁸⁹ For example, though the “double-majority” provision in the Basic Law, see Section 5.1.3.

⁹⁰ *Kwok Wing Hang v Chief Executive in Council* [2020] HKCA 192, [1]. See also F. Hualing - Z. Xiaobo, *Two Paradigms of Emergency Power: Hong Kong's Liberal Order Meeting the Authoritarian State*, in *Hong Kong Law Journal*, 50, part. 2, 2020, where the Authors advocate for an internalization of emergency measures within the HKSAR, in order to let the courts apply ICCPR standards to internal regulation, thereby avoiding dangerous political thug-of-war with mainland authorities.

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functioning, institutionalized legal system where power is always checked and balanced by other powers, but a chaotic, unpredictable and inefficient contraction of the decadent capitalist past⁹¹.

However, being – at least on paper – bound to keep this mechanism in place for almost three more decades, the CCP probably realized that in order to rein in the unruly Hong Kong opposition without getting completely rid of the procedures and guarantees of the Basic Law, it had to intervene in a sort of apparently technical, but actually political, way: if there was a method to thwart the increasing protests and demands for democracy⁹² while formally keeping in place the legal system that had been instrumental to allow the city to remain an important financial access to the mainland, that method resided in a complete overhaul of the electoral process, designed to prevent any form of legitimate political opposition.

Despite not needing popular support for the implementation of the changes, the CCP and its allies in the HKSAR deemed it useful to justify the reforms with the pursuit of the welfare of the people, or, with the words of CE Lam: «If democracy harms people's lives, it is putting

⁹¹ On any given day, there is an actual barrage of articles on Chinese media deprecating the state of US and, in general, Western democracy and exalting the reforms imposed on the HKSAR: for example, on 6 December 2021 no less than five different pieces on the Global Times main page referred to the Hong Kong situation and the superiority of the Chinese system of government (*ex plurimis*, see X. Hu, *Whole-process democracy in China is a great practice of universal significance*, in *Global Times*, 5 December 2021). For example, again in response to the Summit for Democracy, the Chongyang Institute for Financial Studies at Renmin University of China released a 74-pages study report, *Ten Questions for American Democracy*, with a series of typical accusations: US democracy is inefficient and corrupt («The founders of the United States designed the “separation of powers and checks and balances system” to prevent power corruption and abuse. But if the principle of “separation of powers and checks and balances” is used to avoid power from playing a beneficial role or used as a shield for corruption and abuse of power, it loses its original meaning», *ivi*, p. 14), chaotic and disharmonious («Democracy should promote national unity and social harmony. If it leads to more and more division in the state and society, then this kind of “democracy” is a harmful system for the state», *ivi*, p. 38), racist and imperialist («The hegemony, arrogance and bullying of the United States do not appeal to the people at home and cause resentment from other countries», *ivi*, p. 68).

⁹² And self-determination, which is known to be one of the main bugbears for CCP officials, as Tibet and Taiwan continue to show.

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the cart before the horse»⁹³; similarly, Xia Baolong, Director of the Hong Kong and Macao Affairs Office of China's State Council (the liaison office that supervises the two SARs) stated that «for quite a long time, Hong Kong has blindly followed Western-style democracy, which creates a divided Hong Kong society, and infighting, which leads to social disorder, an imbalance in the economy and uncontrolled crises»⁹⁴. It appears that, in the speeches and policies of CCP officials, there is now no difference between chaos and (Western) democracy.

5. The amendments to the electoral law

Following Standing Committee procedure, the decision to amend Hong Kong electoral laws was initially announced as a Draft Decision of the NPC, later explained in detail by the Standing Committee and eventually approved by the NPC plenary⁹⁵. According to NPCSC Vice

⁹³ Chief Executive Carrie Lam, quoted in *Democracy harming people's lives is like putting the cart before the horse: Carrie Lam*, in *Global Times*, 7 December 2021. It is interesting to note that, in this case, "democracy" is synonymous to Western-style constitutionalism and apparently does not include the "democracy" that China purports to grant to its citizens.

⁹⁴ Xia Baolong, quoted in *Official applauds HK's new electoral system for balancing social interests, promoting democracy*, in *Global Times*, 6 December 2021.

⁹⁵ This process is laid out in the same decision, where Mr. Chen specifies that «In the first step, the NPC, in accordance with the relevant provisions of the Constitution, the Basic Law, and the Law on Safeguarding National Security in the Hong Kong HKSAR, makes the decision on improving the electoral system of the Hong Kong HKSAR, which lays out the basic principles for revising and improving the electoral system of the Hong Kong HKSAR as well as the core elements of such revision and improvement. Meanwhile, the NPC authorizes its Standing Committee to amend Annex I and Annex II to the Basic Law in accordance with the decision. In the second step, in accordance with the Constitution, the Basic Law, the Law on Safeguarding National Security in the Hong Kong HKSAR, and the NPC decision, the NPC Standing Committee amends Annex I: Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region and Annex II: Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures of the Basic Law of the Hong Kong HKSAR». Explanations on the Draft Decision of the National People's Congress on Improving the Electoral System of The Hong Kong Special Administrative Region, Presented by Wang Chen, Vice Chairman of the Standing Committee of The National People's

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Chairman Wang Chen⁹⁶, the electoral system of the region should «ensure ‘patriots administering Hong Kong’»; since the democratic camp «masterminded and perpetrated the so-called ‘primary election’, in an attempt to obtain a majority in the Legislative Council so that they could step further to grab the power to administer Hong Kong» and because «the existing electoral system in the HKSAR has clear loopholes and deficiencies, which the anti-China, destabilizing elements jumped on to take into their hands the power to administer the HKSAR», it was necessary to «improve the electoral system and remove existing institutional deficiencies». Therefore, «the electoral system of the HKSAR, including the methods for the selection of the Chief Executive and for the formation of the Legislative Council, must strictly follow and fully reflect the political principle and criterion of the administration of Hong Kong by Hong Kong people with patriots as the main body and provide institutional safeguards for this purpose».

The center of the reform was announced as the «reformation and greater empowerment» of the Election Committee, which was being enlarged and given the power to elect «a relatively large share of Legislative Council members and directly participating in the nomination of all candidates for the Legislative Council».

On March 11, just six days after the Draft Decision was published, the National People’s Congress voted 2895-to-0 to back the proposal, which authorizes the NPCSC to amend Annexes I and II to the Basic Law⁹⁷. The final version of the amendments was approved by the NPCSC on March 30 by unanimous consent and immediately promulgated by President Xi Jinping.

First of all, the new Election Committee will be expanded to 1500 members, from five sectors selecting 300 members each. The sectors⁹⁸

Congress, At the Fourth Session of the 13th National People’s Congress on 5 March 2021.

⁹⁶ *Ibid.*, here and in the following quotations.

⁹⁷ See J. Sudworth, *China’s parliament remakes Hong Kong in its own image*, in *BBC online*, 11 March 2021, available at <https://www.bbc.com/news/world-asia-china-56364912>.

⁹⁸ First: Industrial and Commercial; Second: Profession; Third: Agriculture, Labor, Religions and Grassroots associations; Fourth: local politicians, including all 90 LegCo members, but no District Council member; Fifth: HKSAR members of mainland China political institutions and organizations. See Annex I to the Basic Law of the HKSAR as amended by the NPC on 30 March 2021, art. 2.

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are further divided in subsectors, roughly corresponding to the Functional Constituencies of the LegCo, but with a substantial increase of appointed and ex-officio members over elected ones⁹⁹. Moreover, according to the new art. 8 of Annex I of the Basic Law, all candidates for the Election Committee, as well as the Chief Executive and the Legislative Council, must now be vetted and approved by the Candidate Eligibility Review Committee (CERC), after consultation with the Committee for Safeguarding National Security¹⁰⁰, which receives reports from the National Security Department of the HK Police Force. The decision of the CERC is not challengeable in court if it complies with the recommendation of the Committee for Safeguarding National Security.

The Election Committee will elect the Chief Executive, by majority vote: the candidates shall however be nominated by no less than 188 EC members, with no less than 15 from each of the five sectors: this is apparently a concession to the democratic camp, which has lobbied, in the past, to lower the nominations requirement to stand as a candidate; however, combined with the sharp vetting and crackdown on democratic candidates, it is all but certain that only pro-Beijing candidates will ever be elected under this system.

By far, the most impactful reform will affect the Legislative Council¹⁰¹. Its members will be increased from 70 to 90, but, consistently with the same trend in the Election Committee, the number of elected members will decrease dramatically: from 35 (plus five in the District Council (Second) FC), the new LegCo will only have 20 directly elected lawmakers; 30 will continue to be selected by FCs, rearranged to eliminate both District Council FC seats¹⁰²; the 40 remaining seats will be filled by members appointed by the Election Committee. The

⁹⁹ The last Election Committee had 1034 elected members, 60 appointed and 106 ex-officio, while the next Election Committee will have 982 elected, 156 appointed and 362 ex-officio members. It is interesting not underline that, even if the overall size of the EC is expanding, the number of elected members decreases.

¹⁰⁰ Incidentally, presided over by the incumbent Chief Executive.

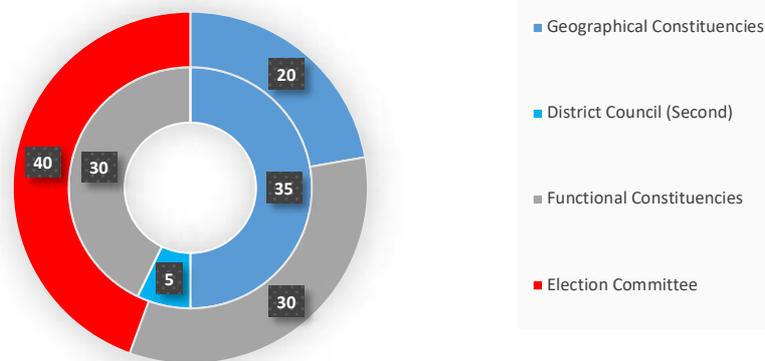
¹⁰¹ See Annex II to the Basic Law of the HKSAR, as amended by the NPC on 30 March 2021.

¹⁰² Which will impact the democratic camp in two ways, since three out of five lawmakers from the DC (Second) FC were democratic, but also the new DC (First) FC member would have been pro-democracy, due to the result of the 2019 DC elections.

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following graph shows the size of the change, with the inner ring representing the pre-reform situation and the outer ring the future one. The blue and light-blue sections indicate lawmakers elected by universal suffrage.

LegCo seats by election, pre- and post-reform
(pre: inner ring; post: outer ring)



Each candidate returned by the Election Committee must be nominated by at least 10, but no more than 20, members of the EC, with at least 2, but no more than 4, members for each of the five sectors, and each EC member can nominate only one candidate. The actual election uses multiple non-transferable voting¹⁰³, with seats assigned to the 40 candidates obtaining the highest number of votes.

The 30 LegCo members returned by the FCs are elected in 28 FCs¹⁰⁴ (the Labour constituency keeps its three seats): most of the voters

¹⁰³ Each EC members fills a 40-names ballot, meaning that each EC members has 40 votes.

¹⁰⁴ «There shall be 28 functional constituencies for election of members of the Legislative Council: Agriculture and fisheries, Heung Yee Kuk, Industrial (first), Industrial (second), Textiles and garment, Commercial (first), Commercial (second), Commercial (third), Finance, Financial services, Insurance, Real estate and construction, Transport, Import and export, Tourism, Catering, Wholesale and retail, Technology and innovation, Engineering, Architectural, surveying, planning and landscape, Accountancy, Legal, Education, Sports, performing arts, culture and publication, Medical and health services, Social welfare, Labour, HKSAR deputies to

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of the FCs are companies and organizations, while only in 9 FCs the franchise is actually given to individuals¹⁰⁵. Moreover, FC candidates must be nominated by at least 10, but no more than 20 voters of the FC and at least 2, but no more than 4 members from each sector of the EC.

Finally, the 20 lawmakers directly elected in geographical constituencies are now distributed in 10 GCs, each one returning two LegCo members. Candidates must be nominated by at least 100, but no more than 200 voters of the GC and at least 2, but no more than 4 members from each sector of the EC. The election then uses single, non-transferable vote and the two candidates with the highest results obtain the seats.

The amendment to Annex II also affects the voting procedure of the LegCo: while the common requirement of a majority of the members present is maintained in most cases, any «motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority of votes of each of the two groups of members present»: before the reform, the two groups corresponded to lawmakers elected in GCs and FCs, respectively; however, now GCs and FCs members are grouped together, the other group being EC-elected lawmakers.

5.1. *Analysis*

The new electoral system of the HKSAR can be interpreted in different ways: on one hand, it is a clear political answer to a perceived chaotic situation in the city, a situation that could have spread instability to the Communist regime in mainland China and projected weakness abroad; on the other hand, it is an incredibly clever – and, by all metrics, successful – attempt at elaborating a new type of government, based on the different kind of constitutionalism discussed

the National People's Congress (NPC), HKSAR members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC), and representatives of relevant national organisations». Annex II, art. 3.

¹⁰⁵ These FCs are Heung Yee Kuk (rural villages councils), Engineering, Architecture, Accountancy, Legal, Education, Health, Social welfare, HKSAR members of RPC political institutions. See Annex II, art. 3.

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in Section 4, which would never be described as democratic in the West¹⁰⁶.

It is interesting, therefore, to analyze some of the most egregious aspects of the amendments, in order to highlight the foresight that the NPCSC put into creating a system under the terms of which the will of the people will never play a role again in Hong Kong political life. There are three areas where the system affects the mainstream democratic process the most: the candidate vetting process, the electoral formula and the system of checks and balances.

5.1.1. *Candidate Vetting*

First of all, and most importantly, the reforms create a byzantine and bureaucratic¹⁰⁷ method of candidate selection that guarantees the absolute control by the local and national governments on anyone who wants to stand in the election. Not only the Election Committee will keep its role as electoral college of the Chief Executive and directly select 40 out of 90 lawmakers; as it was shown, the nomination requirement (at least 2, but no more than 4 EC members for each of the five sectors) has been extended to all candidacies. This requirement directly imperils the ability of any given aspirant lawmaker to enter the political arena, especially because the new EC's fifth sector (which includes HKSAR members of mainland China political institutions and organizations) is extremely unlikely to host people willing to throw their support behind "unpleasant" candidates.

Moreover, the imminent institution of the Candidate Eligibility Review Committee, an administrative office reporting to the Chief Executive and whose determinations are not susceptible to judicial

¹⁰⁶ Interestingly, this is exactly how Regina Ip, a prominent pro-Beijing lawmaker, puts it: «Hong Kong's electoral reform is not to suppress democracy, but to cure the ills of the existing system, and to explore a path toward epistocracy», in *Twitter.com*, personal post by DAB lawmaker Regina Ip Lau Suk Yee, 13 March 2021, available at <https://twitter.com/ReginaIpLau/status/1370554195930095618>.

¹⁰⁷ The entire vetting process is described in detail with a government-published 11-steps flowchart, available at <https://www.cmab.gov.hk/improvement/filemanager/content/pdf/en/qualification-review/chart.pdf>.

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appeal, adds further doubts to any residual resemblance of democracy the system may have. By the decision of another administrative office, namely the Committee for Safeguarding National Security, based on an assessment elaborated by the HKSAR police National Security Department, the CERC will have the power to disqualify any member of society who does not comply with «the Basic Law, the Law on Safeguarding National Security in the HKSAR, the NPC Standing Committee's interpretation of Article 104 of the Basic Law, the NPC Standing Committee's decision on the qualification of HKSAR LegCo Members, and provisions of relevant local laws of the HKSAR»¹⁰⁸. It is apparent that compliance with such a wide and unclear body of law and political statements can be very difficult to state objectively: even government officials candidly state that the process will involve vetting past statements and behaviors and that the assessment will be, at least in part, rendered in secret, to avoid problems with national security issues¹⁰⁹.

To put this procedure into perspective, if a similar reform had occurred before the 2020 US elections, the thousands of House candidates, the dozens Senate candidates and, of course, the presidential candidates¹¹⁰ would all have had to be nominated by some members of the 2016 Electoral College¹¹¹ and then politically vetted by a government committee appointed by President Trump, operating under the advice of the National Security Council (chaired by President Trump), using a (partially secret) assessment provided by the NSA, the CIA and the FBI (whose managing staff was appointed by President Trump), with a non-challengeable procedure.

¹⁰⁸ See the new government website created to explain the main features of the electoral reform. *Hong Kong Special Administrative Region, Improve Electoral System, Candidate Eligibility Review Mechanism*, available at <https://www.cmab.gov.hk/improvement/en/home/index.html>.

¹⁰⁹ See L. Cheng, *Past actions, words by candidates will be considered by vetting committee set up under Hong Kong's electoral overhaul: city's justice chief*, in *South China Morning Post*, 3 April 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3128210/past-actions-words-candidates-will-be-considered-vetting>.

¹¹⁰ Ten overall, including the four main candidates (Democratic, Republican, Libertarian and Green) and the six minor ones.

¹¹¹ Which did not include any third-party member, only Republicans and Democrats.

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The analogy, however, still fails to accurately represent the fact that, in Hong Kong, many of the local institutions have deep connections – to put it mildly – with the Chinese Communist Party.

It is clear that a system where the government decides who can even be on the ballot box in the first place is detached from the generally acknowledged canons of democracy recognized in international instruments such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights¹¹², which applies, by virtue of the Sino-British Joint Declaration of 1984¹¹³, to Hong Kong. However, this procedure fits perfectly with the idea that only the “best” candidates, capable to ensure the welfare of the citizens and loyal to the political institutions of the State, are even considered to be elected.

5.1.2. *Electoral formula*

Besides the fundamental issue of candidate selection, the NPCSC-backed reforms also impact the voting procedures and electoral formula used in the election of the LegCo, and it does so in a way that makes it particularly difficult for pro-democracy candidates to win seats. It is interesting to underline that, unlike candidate vetting procedures, which are *prima facie* suspicious in a democracy, electoral norms are generally perceived as more “neutral”, due to their purely mathematical nature. However, as any electoral law expert could tell, this idea is very far from reality¹¹⁴.

¹¹² Whose art. 25 states that «Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors».

¹¹³ See Annex I, section XIII (Basic Rights and Freedoms): «The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force».

¹¹⁴ *Ex plurimis*, see C. Flanders, *Election Law Behind a Veil of Ignorance*, in *Florida Law Review*, 64, 2012, p. 1371: «Election law does not, and cannot, exist in a partisan vacuum».

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For example, under the new rules, 40 lawmakers will be selected by the Election Committee: each candidate, as usual, shall obtain the nomination of a certain number of EC members, then the entire EC votes. Despite the obvious pro-Beijing majority in the EC, the system does not appear to be skewed for that camp on paper, because there are some parts of the EC which, most likely, will continue to be pro-democracy strongholds¹¹⁵ and they could, in theory, concentrate their votes to elect some democratic candidates to the LegCo. However, this occurrence is made all but impossible by the voting system chosen by the NPCSC: because each EC member has to fill a 40-names list in order to vote and their ballot is invalid if there are less than 40 votes¹¹⁶, it will suffice that the pro-Beijing camp puts forward just 40 candidates for it to obtain all the open seats. Block voting is indeed an ultra-majoritarian voting system, often compared to the FPTP, but with multi-member constituencies¹¹⁷.

Moreover, while the FC electoral system remains basically the same (but with the significant removal of both District Council FCs), the Geographical Constituencies are also going to be a battleground where the new electoral rules will play an important role. The reform creates 10 GCs from the existing 5, each of them returning two LegCo members. Since the requirement to win is simply being one of the two (preapproved) candidates who received the most votes in a GC, it is clear that elections will become a game of coordination: each side will try to focus all their votes on just two candidates, so that both get elected, but also to avoid wasting votes on an already winning (or definitely losing) candidate. Considering the result of the past election cycle, together with the historic divisions within the democratic camp,

¹¹⁵ Such as the Education and Law subsectors.

¹¹⁶ «The Election Committee shall elect members of the Legislative Council from the list of nominations by secret ballot. A ballot paper is valid only if the number of candidates voted for is equal to the number of members of the Legislative Council to be returned. The 40 candidates who obtain the highest numbers of votes shall be elected». Annex II to the Basic Law of the HKSAR, art. 2. It is interesting to note that, according to CE Lam, «the new system only required candidates to be patriotic but it accommodated different political opinions», see *Democracy harming people's lives is like putting the cart before the horse: Carrie Lam*, cit.

¹¹⁷ «The Block Vote is simply the use of First Past the Post (FPTP) voting in multi-member districts», see ACE Electoral Knowledge Network Encyclopedia, *Block Vote*, available at <https://aceproject.org/main/english/es/esd02.htm>.

it is easy to foresee that, realistically, no more than half of the winners will belong to the anti-establishment forces, provided that they manage to get the necessary nominations.

5.1.3 *Institutional checks and balances*

Finally, the Beijing-sponsored plan will also have a long-lasting impact on the shreds of remaining democracy in the HKSAR. Despite the uninterrupted control of the pro-establishment forces over the region's government since the handover, democratic forces had always enjoyed some *negative* legislative power in two forms.

Firstly, by the terms of the Basic Law, bills can be introduced by both the government or private members. The former bills are passed by simple majority, while the latter used to require the approval of the majority of both groups of lawmakers, the two groups being the members elected in GCs and FCs, respectively. Because of this norm, if a particular private member bill was considered unacceptable by the democratic camp lawmakers, who generally represented the majority of GCs members, they could block it even without an overall control of the chamber. The new system keeps the double-majority requirement, but it changes the groups into one made of EC-elected members and the other of GCs and FCs members¹¹⁸, where members democratically elected in the GCs are the minority (20 out of 50).

Secondly, and more importantly, the democratic opposition had the power to stop constitutional amendment to Annexes I and II, which

¹¹⁸ «Unless otherwise provided for in this Law, the Legislative Council shall adopt the following procedures for voting on bills and motions: The passage of bills introduced by the government shall require a simple majority of votes of the members of the Legislative Council present. The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority of votes of each of the two groups of members present, i.e. members returned by the Election Committee, and those returned by functional constituencies and by geographical constituencies through direct elections». Annex II, art. 7. The precedent text read: «The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee».

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cover the election and voting procedure for the CE and LegCo, respectively, thanks to the need for a two-thirds majority of the members approving the changes. This had happened, for example, in 2005, when the pro-democracy camp blocked a reform proposal¹¹⁹ and failed in 2010, because of the divisions among democratic forces¹²⁰. After the recent reform, this power has been completely erased¹²¹ and only the NPC Standing Committee can amend the two Annexes.

This last modification is probably the most devastating for the hopes of pro-democracy activist; it is true that never, since the restitution to China, has Hong Kong been capable of true sovereign power over itself, but now that the NPC can change the very core of the city's political system at its whim, it would be very difficult to argue that the HKSAR still maintains any resemblance of a democracy. If the next years see any kind of political reform, it will come from the NPC Standing Committee, not from Hong Kong; this alone should be enough to be worried for the preservation of not only the political rights of HKSAR residents, but also for all the other rights they currently enjoy. On the other hand, the central government can now claim that the "rule of law" – here represented by the supremacy of PRC authorities over the HKSAR – is restored and the political chaos that has engulfed the city finally comes to an end¹²².

¹¹⁹ 25 pro-democracy lawmakers voted against or abstained, thereby denying the government the required *quorum*.

¹²⁰ The 2010 reform package received 46 votes, with about half of the democratic caucus joining the pro-Beijing members.

¹²¹ The previous version of what is now the almost identical text of art. 10 of Annex I and art. 8 of Annex II read «if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record»; they both now state that «The NPC Standing Committee exercises in accordance with the law the power to amend this Method [and the procedures for voting on bills and motions]. Prior to making any amendment, the NPC Standing Committee shall solicit views of various sectors of Hong Kong by appropriate means».

¹²² *Ex plurimis*, see the editorial on the Global Times: *Loving both the country and Hong Kong, essence of Hong Kong's democracy: Global Times editorial*, in *Global Times*, 7 December 2021, which reads «Firmly establish the faith and hold high the banner of patriotism and the love of Hong Kong. This is the essence of Hong Kong's democracy» and «Hong Kong will always be China's Hong Kong», quote by Xia Baolong, director of the Hong Kong and Macao Affairs Office of China's State

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6. Conclusions

It is undeniable that the reforms imposed by the NPCSC on Hong Kong election laws have deeply undermined the freedom and autonomy of the region's political institutions and residents. The carefully drafted revisions ensure beyond any realistic doubt that the December 2021 elections will return a strong and cohesive pro-Beijing supermajority in the LegCo, besides a similarly-minded Chief Executive. If there has been a battle for the democratic soul of Hong Kong, China has won, and there will not be a rematch. Even if the current political crisis was resolved and the relations between the city and the mainland returned to more amicable terms, Beijing would probably not have any incentive to restore the previous, somewhat democratic regime, for various reasons.

First of all, despite all US pushback¹²³, the world has protested fiercely, but acted scarcely, to protect the city and its form of government. The Chinese government was confident enough of its right to intervene in the HKSAR that it publicly mocked British protests¹²⁴ and denounced HM Government's attempt to extend BNO passports to all Hong Kong residents¹²⁵. In general, it is sufficiently clear that there is little interest in the cause of Hong Kong in the outside world, especially when compared to more pressing general issues, such as the Covid pandemic or climate change, and, as far as China is concerned, the dispute over the South China Sea and the treatment of the Uyghur people.

Secondly, the CCP leadership is definitely looking forward to 2047, when the terms of the "One Country, Two Systems" policy will

Council and vice chairman of the National Committee of the Chinese People's Political Consultative Conference.

¹²³ In summer 2020 Congress approved the Hong Kong Autonomy Act, a piece of legislation imposing sanctions against individuals and entities in China and the HKSAR and, together with Executive Order 13936, revoking special trade status for the city. These acts followed the 2019 Hong Kong Human Rights and Democracy Act, which imposed the first sanctions against Beijing interference in the democratic life of the HKSAR.

¹²⁴ See J. Pang - J. Zhou, *Hong Kong, China governments reject UK 'interference' and 'biased' criticism*, in *Reuters*, 12 June 2020.

¹²⁵ See G. Torode - A. M. Roantree, *Exclusive: Hong Kong tells foreign governments to stop accepting special British passport*, in *Reuters*, 25 March 2021.

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expire. Since the Joint Declaration explicitly stated that «the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years»¹²⁶, with time it becomes more and more unlikely that democracy returns, just to be again revoked in less than a generation time.

Finally, with the crackdown on democracy in Hong Kong, China makes a powerful political statement on the global stage: it offers its significant backing to potential or actual authoritarian leaders around the world, reaffirms the country as a beacon for alternatively-democratic regimes (with democracies suiting the needs of each country's ruling class) and presents the world with a different narrative, whereby harmonious, stable, efficient and prosperous societies can be created even without Western-style democratic accountability of the rulers and guarantees for the ruled.

ABSTRACT: In March 2021, the National People's Congress introduced a sweeping reform of the electoral system in Hong Kong. The changes deeply affect the composition and method of election of the city's Legislative Council and the Chief Executive selection process. This paper aims at contextualizing the reform within Hong Kong history and, especially, the last decade of tense standoff between pro-Beijing and pro-democracy forces in the Special Autonomous Region, while also briefly recapping the debate on the issue of "constitutionalism" and "democracy" in China. The details of the new electoral law will then be analyzed, in order to show that the overhaul not only is a direct answer to the perceived political chaos in the city, but also a – probably successful – attempt at experimenting a different form of government, in which the will of the people is just one of the factors considered.

¹²⁶ Sino-British Joint Declaration of 1984, cit., Annex I, para. I.

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