

**SEMINAR COMPARATIVE CONSTITUTIONAL LAW
SWITZERLAND – CHINA – HONG KONG**

**DEMOCRATIC RIGHTS IN SWITZERLAND, CHINA
AND HONG KONG**

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Laws

Switzerland:

- Federal constitution (“Bundesverfassung”, BV)
- Federal law of political rights (“Bundesgesetz über die politischen Rechte”, BPR)

China:

- Constitution of the PRC
- Organic Law of the Villagers Committees (VC) of the PRC
- Organic Law of the Local People’s Congress (LPC) and Local People’s Governemnts (LPG) of the PRC
- Organic Law of the National People’s Congress (NPC) and Local People’s Congress (LPC) of the PRC
- Electoral Law of the National People’s Congress (NPC) and Local People’s Congress (LPC) of the PRC

Hong Kong:

- Hong Kong Basic Law

LIST OF ABBREVIATIONS

Art.	Article
etc.	et cetera, and other things
BPR	Bundesgesetz über die politischen Rechte
BV	Bundesverfassung
ch.	chapter
CCP	China Communist Party
cit.	cited
e.g.	for example
FC	Functional constituencies
GC	Geographical constituencies
HKSAR	Hong Kong Special Administrative Region
Ibid.	Ibidem, the same place
LPG	Local People's Government
SAR	Special Administrative Region
para.	paragraph
PRC	People's Republic of China
i.e.	id est, that is
NPC	National People's Congress
p.	page
NPCSC	Standing Committee of the National People's Congress
VC	Village Committee
VEC	Village Electoral Committee

A. Introduction

This work examines and analyzes the democratic rights in three different political systems: in Switzerland, China and Hong Kong. The goal is to describe these democratic political institutions of each country and to confront and compare them at the end. Primarily, chapter B will focus on the democratic political institutions in Switzerland regarding the conditions of the voting right, description of the representative and direct-democratic elements and suffrage principles. Chapter C explores the institutionalization of elections in China and describes the electoral process from the village to the federal levels, whereas the role of the Chinese Communist Party plays a major role as we will see. The election of the Legislative Council, District Council and Village Representatives in Hong Kong is the focus of chapter D, where at the end the political reform with the aim of universal suffrage will be discussed. Finally in chapter E, a comparison of the democratic political institutions of these three countries will be drawn by regarding certain aspects of similarities and differences.

B. Democratic political institutions in Switzerland

Switzerland's political system is a composition of representative and direct democracy. Swiss eligible voters do not solely elect their representatives (element of representative democracy), they additionally decide on their own about factual issues (element of direct democracy)¹. Therefore the political system of Switzerland is also called a "semi-direct democracy".

I. Voting right: conditions

Political rights allow the active participation in the decision-making process of the state². Voting rights enable the access to political rights³, which are explicitly declared as a fundamental right in Art. 34 para. 1 BV. The eligible voters can cast their vote by letter or by ballot boxes or even in some cases electronically (Art. 5 para. 3 BPR).

1. At federation level

Swiss citizens are entitled to vote, if they have reached the age of 18 and are not incapacitated due to mental illness (Art. 136 para. 1 BV). The active suffrage contains also

¹ HANGARTNER / KLEY, 134.

² RHINOW, 332.

³ HANGARTNER / KLEY, 24.

the passive suffrage, therefore the eligible voters are as well able to be elected as member of the National Council (Art. 136 para. 2 BV).

2. At cantonal and communal level

According Art. 51 para. 1 BV, every canton has to establish a democratic constitution. Therefore the voting rights exist also at the cantonal and communal level, which are similar to those at federal level. In all levels, the principle of abode is applicable, what means that the citizens exercise their political rights concerning federal, cantonal and communal issues at the place of abode (Art. 39 para. 2 BV).

II. Representative elements of political institutions (suffrage)

1. At federal level: direct elections of the legislative

The legislative authority in Switzerland is vested in the bicameral parliament (Federal Assembly)⁴, which is composed of the National Council as the representation of the population and the Council of States as the representation of the cantons. A dual representation in the federal state can be ensured in this way⁵. Both chambers are equated to each other (Art. 148 para. 2 BV). The Federal Assembly is responsible for the election of the Federal Council (the executive), the Head of the Federal Chancellery and the judges of the Federal Supreme Court as well as the General (Art. 168 BV).

a) Direct Election of the National Council

The only direct elections at federal level, are those of the National Council (art. 149 para. 2 BV), whereas the Council of States acts at federal level, but the election procedure is determined by the cantons (see below). The National Council is composed of 200 members that represent the total population and are elected directly all 4 years (Art. 149 BV). As presented above, eligible voters are entitled to be elected as a member of the National Council as well (Art. 136 para. 2, Art. 143 BV). The only possibility to dissolve the National Council – besides no re-election – is the case of a total revision of the constitution, whereat both chambers must be elected new (Art. 193 para. 2 BV)⁶.

b) Direct Election of the Council of States

The Council of States represents the 26 cantons – 20 cantons are represented by two members while the six half-cantons each send one representative to the 46-membered

⁴ <http://www.state.gov/g/drl/rls/hrrpt/2007/100588.htm>.

⁵ RHINOW, 371.

⁶ HÄFELIN / HALLER, 435.

chamber. The Council of States is elected according to provisions differing from canton to canton⁷, whereas all elections are held directly at present⁸.

2. At cantonal level: direct elections of the legislative and executive

Contrary to the executive at federal level, at cantonal level not only the legislative, also the executive is elected directly as well⁹.

III. Direct-democratic elements of political institutions

According Art 148 para. 1 BV, the Federal Assembly exercises the supreme authority under reserve of the population and cantons. This regulation signifies the sovereignty of the people, that the people hold supreme state authority. Therefore the Federal Assembly, which is directly elected by the people, depends on the approval of the people with the final decision in major political issues. These rights of self-determination enable the eligible voters to participate in the decision-making of the state¹⁰.

1. Referendum

The concept of the referendum is the confirmation or rejection of a parliamentary decision¹¹. There are two different types of referendum: obligatory or facultative.

a) Obligatory

If a decision is ex officio subject to a plebiscite¹², it falls to the category of obligatory referendum. Cases of an obligatory referendum are according to Art. 140 BV: amendments of the constitution (which is the main case), popular initiatives to partial revision or total revision of the constitution, accession to organizations for collective safety or to supranational community (e.g. the EU), urgent declared federal laws without constitution foundation whose period of validity exceeds 1 year. In initiative cases, only a simple majority of the participating population is required to accept a draft, while in all the other cases a double majority of participating population and cantons each has to be reached (Art. 142 para. 2 BV).

b) Facultative

If it must be especially required to hold a plebiscite about the parliamentary decision, then it is a matter of a facultative referendum. In this case the process is two-staged; first it

⁷ <http://www.admin.ch/org/polit/00054/index.html?lang=en>.

⁸ RHINOW, 372.

⁹ HÄFELIN / HALLER, 398.

¹⁰ HANGARTNER / KLEY, 127.

¹¹ HANGARTNER / KLEY, 146.

¹² HANGARTNER / KLEY, 147.

contains the right to use the referendum against a parliamentary decision and second the right to vote in the plebiscite is involved¹³. The facultative referendum can be demanded by 50'000 eligible voters or 8 cantons (Art. 141 BV) in the following cases: federal laws, urgent declared federal laws whose period of validity exceeds 1 year, federal decisions as far as constitution or law requires and certain treaties of public international law (as unlimited and noncallable treaties or the accession to international organizations for example). Only a simple majority of the population is required to accept a draft in all facultative referendum cases. After the unused referendum period of 100 days or with the acceptance in the plebiscite, the federal law or federal decision becomes valid.

c) Miscellaneous and functions

Only edicts of the National Council are subject to (facultative) referendum, not edicts of the Federal Council¹⁴. While the initiative symbolizes the accelerator, the referendum causes a braking effect. Furthermore, the referendum forces to approach the status quo in order to prevent a negative plebiscite¹⁵.

Although the referendum cannot alter or amend the parliamentary decision and therefore is rather an element of the representative democracy¹⁶, I assign this institution all the same to the direct-democratic elements here. The reason is that pure representative democracies do not apply referendums and have only elections of representatives, and therefore the referendum has a direct element, namely to confirm or reject a decision of the state.

2. Initiative

By means of the initiative a certain quote, namely 100'000 of eligible voters, can propose a decision, which will be decided by plebiscite. The initiative is consisted of the right to proposal and can be submitted as a general proposal or as an elaborated first draft. While the general proposal provides only a certain direction, the elaborated first draft leaves no space for concretion by the parliament¹⁷. The intention of the popular initiatives can either be a partly revision or a total revision of the constitution, whereas the elaborated first draft is only allowed for the partly revision, not for the total revision of the constitution. If 100'000 eligible voters request a total revision, then a so-called pre-voting about this request takes place at first and only if a total revision has been accepted, the parliament

¹³ HANGARTNER / KLEY, 147.

¹⁴ HANGARTNER / KLEY, 246.

¹⁵ LINDER, 259.

¹⁶ HANGARTNER / KLEY, 152.

¹⁷ HANGARTNER / KLEY, 153 ff.

elaborates a new constitution, which then requires the approval of population and cantons¹⁸. In case of a popular initiative for partly revision, the federal assembly has to recommend acceptance or refusal about it and is additionally empowered to put a counterdraft (Art. 139 para. 3 BV)¹⁹. The eligible voters have then the right to accept both submittals, while they can state in the tie-break question which one they prefer if both will be accepted (Art. 139b para. 2 BV).

3. Petition

Petitions comprise a please or a suggestion, an incitation or a critique, a request of reconsideration or a complaint to an authority²⁰, without having any disadvantages thereby (Art. 33 BV). Not only the eligible voters have the right for petition, but all people, also foreigners, natural and juristic persons²¹. The petitioner does not have a claim for handling his petition, not even a reply²². However the authority is obliged to take cognizance of the content (Art. 33 para. 2 BV). Unlike political rights, the right of petition is not a right of participation in decision-making process of the state²³.

IV. Suffrage principles

The below mentioned suffrage principles are a part of all democracies²⁴.

1. Universal suffrage

The universal suffrage means that any judicious adult who has the citizenship of the respective state, has the right to vote, regardless of gender, race, religion, political opinion, property and income or education²⁵. Notwithstanding, requirements as a certain age, citizenship, abode and no mental illness are permitted²⁶.

2. Free suffrage

The free suffrage requires the possibility of a voting decision without state coercion or pressure. The preparation of the vote is included in this principle²⁷. Art. 34 para. 2 BV declares the claim for free decision-making and undistorted voting, meaning that no voting result may be approved if the will of the voters is not freely and undistortedly expressed²⁸.

¹⁸ RHINOW, 347.

¹⁹ RHINOW, 351.

²⁰ RHINOW, 339.

²¹ HANGARTNER / KLEY, 130.

²² HÄFELIN / HALLER, 255.

²³ HÄFELIN / HALLER 256.

²⁴ RHINOW, 337.

²⁵ HALLER / KÖLZ, 73.

²⁶ HANGARTNER / KLEY, 15.

²⁷ IBID.

²⁸ RHINOW, 333.

The information about the topic of the voting has to be objective to ensure a free opinion-forming²⁹.

3. Secret suffrage

The principle of secret suffrage serves the protection of freedom of choice and voting. The electoral procedure should be organized in a way that an examination about a particular vote is impossible during the election and also afterwards³⁰. The secret voting is stated in Art. 8 para. 1 BPR.

4. Equal suffrage

The principle of equal suffrage requires that each vote has to be equivalent, meaning the so-called equality of the counting value “one person, one vote”³¹. However, it is not necessary that each vote has the same impact on the election result (equality of success value)³².

5. Implementation in Switzerland

The most suffrage principles are established by law and are generally adhered to. The critical point is the „assembly democracy“ and the open ballot as an original democracy, which is widespread in Switzerland³³. This is doubtful, because thereby the principle of free and secret election is violated.

V. Critical consideration of direct democratic institutions

Although direct democratic institutions have their advantages such as the legitimization of the state power by control of the people, there are still some points which need to be critically considered nevertheless. The reason is that self-government of the people concerning all possible issues is impossible in practice³⁴. Additionally, many people lack the required expertise and are excessive demanded of too complex submittals. Moreover, unlimited sovereignty of the people results in the expense of the individual freedom. As a result, rule of the people can jeopardizes rule of law, which could lead to the consequence of arbitrariness of the state action³⁵. This conflict between democracy and rule of law plays a major role in the common popular vote in assemblies about the applications for citizenship. In one case, the naturalization of all applicants from the former Yugoslavia was

²⁹ RHINOW, 335.

³⁰ HANGARTNER / KLEY, 17.

³¹ HALLER / KÖLZ, 73.

³² HANGARTNER / KLEY, 16.

³³ HANGARTNER / KLEY, 79.

³⁴ MÖCKLI, Stärken und Schwächen, 18.

³⁵ BORNER, 18.

denied, which lead to the decision of the Supreme Court. It judged that this popular vote was not accompanied by any justification and thus naturalization by popular vote was unconstitutional due to the constitutional requirements of the right to be heard and such act must follow the rule of law³⁶. Therefore it can be concluded that the optimum would be a balance of rule of law and rule of the people³⁷.

VI. Conclusion

Devices of direct democracy are an important structural element in Switzerland's political system³⁸ and are realized at all federal levels. The referendum leads to plebiscite about acceptance or rejection of parliamentary decisions and the initiative to plebiscite about approval or refusal of proposals of initiators³⁹. The initiative has tendentially a innovative and dynamic effect and the referendum rather a conservative and braking impact. Direct democracy in Switzerland can be regarded as corrective to the state authorities and political parties⁴⁰. Moreover, the state power is decentralized, so that the political rights exist in federation and cantons: the cantons can participate in the decision-making of the federation by the Council of States as the second chamber of the Federal Assembly (see also Art. 150 BV and the requirement of the majority vote of cantons in major decisions)⁴¹. Although political rights seem to weaken the parliament, its position also is reinforced, because its decisions are made with implicit or explicit acceptance of the people and therefore have a greater acceptance and legitimacy in effect⁴².

C. Democratic political institutions in China

I. Institutionalizing elections

1. Villagers' Committees

a) Development of direct village elections

By the early 1980s, peasants in many of China's villages had forced the government to terminate the collective system of communes and brigades as the basic levels of rural administration. Once the communal structure was abandoned in the villages, the government had to institute a new form of local government to maintain order and promote development. Economic reforms gave the peasants a greater voice in production and

³⁶ UHLMANN, 717.

³⁷ BORNER, 21.

³⁸ MÖCKLI, Direct Democracy, 19.

³⁹ HANGARTNER / KLEY, 158.

⁴⁰ MÖCKLI, Stärken und Schwächen, 12 ff.

⁴¹ HANGARTNER / KLEY, 237.

⁴² RHINOW, 330.

marketing decisions, but generated also considerable financial and social instability. The administrative and financial order collapsed and to address this social instability as well as to prevent government officials from taking away their newly won economic rights, peasants in a number of villages spontaneously initiated village elections⁴³. The government's major motivation to decide to institutionalize village elections was not democratization, but the conclusion that this would improve political order and greater village autonomy would further the party-state's interests better than continuing a system of centrally directed government⁴⁴. Therefore, the government promulgated the Organic Law of Villagers' Committees in 1987, which was revised in 1998.

b) Functions of the VC and principles of election

The Villagers' Committee is assigned to functions of managing the public affairs and public welfare undertakings, mediate disputes among the villagers, help maintain public order, and convey the villagers' opinions and demands and make suggestions to the people's government⁴⁵. Although the Organic Law of VC states majority vote, direct nomination by individuals (Art. 14 para. 1), more candidates than the number of seats (Art. 14 para. 1), secret ballots and public vote-counting (Art. 14 para. 3), these principles are not always followed⁴⁶. Therefore the degree to which elections are fair, open and competitive varies⁴⁷. Moreover, even where election is free and fair, there is not yet a village democracy, because the VC's are still limited to self-government (Art. 2) and therefore do not have final say over village political life⁴⁸. Besides, Art. 3 of the Organic Law of VC's stipulates that the party branch plays a role as a leading nucleus.

2. Urban elections: neighborhood residents' committees

Elections were initiated in cities as well, but from the top down. Urban neighbourhood residents' committees appeared already in the early 1950s and were improved in the 1980s until in 1990 the Organic Law of Urban Residents' Committees was promulgated⁴⁹. The residents' committees are administrative organs in charge of daily affairs within a defined urban neighbourhood. Urban democracy has benefited from the same basic changes in electoral procedures as in the rural areas: more than one candidate per seat, a secret ballot, and election by majority vote. Nevertheless, China's cities have not witnessed as dramatic a

⁴³ OGDEN, 183ff.

⁴⁴ OGDEN, 185.

⁴⁵ Art. 2 Organic Law of the Villagers Committees of the PRC.

⁴⁶ ROWEN, *Journal of Democracy* 2007, VOL. 18, 45.

⁴⁷ *IBID.*

⁴⁸ DIAMOND, 124.

⁴⁹ OGDEN, 221.

change in local government as have China's villages. This is because cities, unlike rural villages and towns, did not lose their administrative structure with the coming of economic decentralization. In cities, the overall administrative structure remained in place⁵⁰. The difficulties were more that, the committee's position at the bottom of the urban administrative hierarchy, with the work unit and street offices, the district government, and the city government above it, combined with the fact that the committee's duties overlap with those of higher units means that any of these higher units can overrule its decisions⁵¹.

II. Elements and stages of the electoral process

1. Election management

Prior to each election, a village election committee (VEC) is appointed (by villagers assembly or by villagers groups) to conduct the registration and election for the VC. These appointments are not followed as stated in Art. 13 Organic Law of VC's, in fact the Party secretaries are acting as VEC in almost all the cases⁵².

2. Registration

Any villager who has reached the age of 18 and has not deprived of political rights has the right to elect, regardless of his education, property status, race, gender, or religious belief⁵³. The list of the registered eligible voters should be published 20 days prior to the date of election⁵⁴.

3. Nomination and selection of candidates

In the early rounds of village elections, the party branch controlled the nomination process⁵⁵. Although direct nomination by villagers is required today (Art. 14 Organic Law of the VC's), in some villages the party branch still nominates candidates directly.

The use of blank ballot and nomination of anybody is widespread, so that in many cases a second stage is required for the final selection of candidates who received the highest number of votes⁵⁶.

4. Campaigning

Campaigning in the Chinese villages hardly exists. The little time after posting of the final list of formal candidates 5 days before election is not the reason, rather the view that

⁵⁰ OGDEN, 221f.

⁵¹ OGDEN, 223.

⁵² DIAMOND / MYERS, 130.

⁵³ Art. 12 Organic Law of the Villagers Committees of the PRC.

⁵⁴ IBID.

⁵⁵ DIAMOND / MYERS, 131.

⁵⁶ IBID.

promoting oneself is culturally inappropriate⁵⁷. Hence, the campaigning is usually limited to a short statement before the election.

5. Voting styles and procedures

There are different voting styles of casting ballots. The first one is called the mass voting where all the voters go to a central voting place, vote, and remain there until the end of the count. The advantage of this type is the opportunity for the entire village to be educated in the correct voting procedures at the same time⁵⁸. Individual voting, the second style, takes place throughout the course of the day of election. The critical issue is not whether the voters should go to the square together or individually but whether the right to a secret and individual ballot is guaranteed⁵⁹ as stated in Art. 14 of the Organic Law of VC's. However, that is not the case in proxy, absentee voting or "roving ballot boxes". Proxy ballots permit an individual to cast the votes for up to three other people⁶⁰, while the "roving ballot box" is carried around the village to permit voting by people who cannot go to the polling station. The former does not guarantee an individual vote due to the transfer and in the latter method the secrecy can be easily violated⁶¹.

6. Vote count

Art. 14 para. 3 of the Organic Law of VC's explicitly requires an open vote-counting. If the validity of a ballot is doubtful, the chairman of the VEC renders a judgment⁶².

7. Supplemental comment

The illiteracy rate in China is high, it ranges between 12 and 15 percent. To enable these people all the same to nominate and vote, some villages hired people to fill in the ballots for illiterate voters. This can be regarded as exemplary and should be introduced to all villages. Although this necessarily violates the principle of secret ballots, it ensures the right to vote to what may be a significant percentage of a village⁶³. Furthermore, the use of proxy ballot and roving ballot boxes should be prohibited and voting by letter (for people who are impeded due to illness, absence and so on) introduced instead to guarantee an individual and secret ballot.

⁵⁷ DIAMOND / MYERS, 132.

⁵⁸ DIAMOND / MYERS, 133.

⁵⁹ IBID.

⁶⁰ DIAMOND / MYERS, 134.

⁶¹ IBID.

⁶² DIAMOND / MYERS, 135.

⁶³ OGDEN, 199.

III. Elections at higher levels and at the federal level

1. Local People's Congress (LPC) and its lawmaking power

Local People's Congresses exist at various levels in China, from township to province, which are elected to 5 year-terms according to Art. 6 of the Organic Law of the LPC and LPG. Before 2004, when the Electoral Law of the NPC and LPC was revised, citizens were only allowed to elect members of village and neighbourhood residents' committees directly, which are not considered to be government bodies (so-called subgovernment organizations⁶⁴). Since then, direct elections of deputies to the people's congresses of cities not divided into districts, municipal districts, counties, autonomous counties, townships and towns are established⁶⁵, while deputies to the People's Congresses of provinces, autonomous regions, municipalities, cities divided into districts and autonomous prefectures are elected by the people's congresses at the next lower level⁶⁶ (so-called indirect elections).

The nominations of the candidates are induced by political parties, organizations or a joint group of at least 10 voters or deputies⁶⁷. However, in most cases the nomination of candidates is strictly controlled by the party⁶⁸. The LPC may formulate and promulgate its own local regulations, but does not possess the same lawmaking power in all levels: While the LPC's of provinces, autonomous regions and municipalities only have to report their regulations to the NPCSC and the State Council for the record, the LPC of the other levels (as county and township) have to report their regulations to the Standing Committee of the People's Congresses of the respective provinces for approval first before implementation and can only thereafter submit the regulations to the NPCSC and the State Council for the record⁶⁹. This leads to the conclusion that the LPC's which have real lawmaking power – provinces, autonomous regions and municipalities – are all not elected directly, while the directly elected LPC's do not possess real making power. Therefore, it can be said that although direct elections for some levels of LPC's take part, they are not really democratic due to the lacking power of lawmaking.

2. National People's Congress (NPC)

The NPC is elected indirectly by the people's congresses at the next lower level, i.e. the people's congresses of provinces. It is composed of maximal 3000 members that are

⁶⁴ <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm>.

⁶⁵ See Art. 2 para. 2 Electoral Law of the NPC and LPC.

⁶⁶ See Art. 2 para. 1 Electoral Law of the NPC and LPC.

⁶⁷ See Art. 29 para. 2 Electoral Law of the NPC and LPC.

⁶⁸ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

⁶⁹ See Art. 7 para. 2 and 3 Organic Law of the LPC and LPG.

elected for five year terms⁷⁰ and is formally the highest organ of state power. According Art. 58 of the Constitution of the PRC, the NPC and its Standing Committee (NPCSC) exercise the legislative power of the state, whereas the NPCSC is the permanent body of the NPC. Besides legislative enactments, the NPC is also empowered to elect the President and the Vice-President of the PRC.

IV. The core role of the Chinese Communist Party (CCP)

Though the NPC is formally the highest organ of state power, in fact it is the Chinese Communist Party with its over 73 million members⁷¹ which dominates the political system in China. A high percentage (around 80 per cent or higher) of village chairs are party members⁷² and local CCP secretaries generally serve concurrently as the head of the LPC, thus strengthening party control over legislatures⁷³. So there are CCP Committees at all levels of the hierarchy, while the ultimate authority rests with the 25-member political bureau (Politburo) of the CCP and its ninemember Standing Committee, which are the central deciding bodies of the party dicatorship⁷⁴.

The CCP adhere to the Marxism-Leninism whereby the party - as the ‘wellspring of ideology from which all political decisions emanate – is supreme and infallible’’. Therefore Chinese people’s possibilities to participate in the political decision-making process are very limited, if not even excluded from the political process, because the Communist Party as the wellspring of ideology makes all the important decisions⁷⁵. This one-party-system de facto excludes the possibility for citizens to select rulers⁷⁶. However, a significant progress could be made: People’s Congresses at all levels, from the NPC down to the township People’s Congresses, have also gained power vis-à-vis the Party through their enhanced role in nominating and approving the selection of key government officials⁷⁷.

V. Conclusion

With the authoritarian and socialistic one-party-system in China, it seems hardly feasible to establish a real democracy. In the recent decades, nonetheless, increasing democratic advancements could be perceived: beginning with institutionalizing direct elections in villages that slowly but finally moved to higher levels in townships and counties. Direct

⁷⁰ See Art. 15 para. 2 Electoral Law of the NPC and LPC.

⁷¹ <http://www.chinatoday.com/org/cpc/>.

⁷² DIAMOND / MYERS, 146.

⁷³ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

⁷⁴ IBID.

⁷⁵ Cit. in MASON, 170.

⁷⁶ HU, 114.

⁷⁷ OGDEN, 254.

election is still not realized at the federal level, but this is rather a matter of time. However, direct elections solely do not guarantee a democratic election, they should be additionally meaningful: elections should also have a political impact. As presented above, this is not the case, because the directly elected political entities have only little legislative power. Moreover, the critical area is particularly the central role and the immense impact of the Communist Party and therefore the small importance of the NPC because the major issues have already been decided by the Party Committee. Likewise, the party does not allow any opposition, although official statements assert “a multiparty cooperation and political consultation under the leadership of the CCP”⁷⁸. Thereby, with a pluralistic political system, multiple, different interests could be expressed and would further democratization by deciding through majority vote.

D. Democratic political institutions in Hong Kong (HKSAR)

I. Background of Hong Kong’s political situation

With the expiry of a ninety-nine-year lease of Britain on the bulk of the territory, Hong Kong had to be reunited with the Chinese mainland. Hence on July 1, 1997, Hong Kong was restored to the People’s Republic of China⁷⁹.

The basic policies regarding Hong Kong as stated in the Sino-British Joint Declaration 1984 were implemented in the Basic Law which was adopted by the NPC in 1990 and took effect on July 1, 1997⁸⁰. According Art. 2 and Art. 12 of the Basic Law, HKSAR is a local administrative region of the PRC which enjoys executive, legislative and independent judicial power such as a high degree of autonomy (except in matters of defense and foreign affairs) and comes directly under the Central People’s Government.

II. Voting procedures for the Legislative Council and its ability to influence policy

1. Composition of the Legislative Council

a) Candidacy requirements

The Legislative Council is basically composed of Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country. However, permanent residents of the Region without Chinese nationality or with the right of abode in foreign countries (i.e. with a foreign passport) are allowed to be elected members up to 20 per cent

⁷⁸ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

⁷⁹ THOMAS, 1.

⁸⁰ HUALING/CULLEN, Hong Kong Journal 2006, 2.

of all members in the LegCo (Art. 67 Basic Law). This seems problematic regarding the internationality of Hong Kong with a considerable proportion of emigrants and repatriates which probably most support the democratization of the political system⁸¹.

b) From a three-legged to a two-legged electoral system

Annex II Art. 1 (1) of the Basic Law scheduled the changing composition of the LegCo. Therefore, three primary groups of legislators – election committee, functional constituency and geographical constituency - were reduced to two groups: the number of members returned by geographical constituencies was raised to 24 (2000) and then to 30 (2004), the number of members returned by functional constituencies remained 30 and the election committee as legislator was abolished in 2004. The prospective methods for the formation of the LegCo will be explained below (see chapter D. IV.).

2. Voting procedures: electorate of the LegCo

a) Geographical constituencies

As already mentioned above, there are two groups of legislators. The geographical constituency is consisted of eligible voters divided in their electorate districts who directly elect members of the LegCo (at present 30 of total 60 members). Eligible voters are permanent residents of Hong Kong who have reached the age of 18 years and are not disqualified from being registered as an elector⁸². In 2007 3,2 Million eligible voters were registered⁸³.

b) Functional constituencies

The other half of the LegCo is indirectly elected by functional constituencies representing various industries and professions⁸⁴. The eligibility in 2007 was limited to 212'825⁸⁵ voters in 28 functional constituencies (e.g. insurance, education, health services, labour, finance, etc.).

3. Dismissal of legislators

The dismissal of the LegCo deputy is worth to be noticed in view of the regulation in Art. 79 para. 1 Basic Law which states that the President of the LegCo decides on its own about the dismissal of a member of the Council, even if the member was directly elected by the

⁸¹ HORLEMANN, 128.

⁸² http://www.eac.gov.hk/pdf/legco/2008lc/en/chapter_2.pdf (2.4).

⁸³ <http://www.voterregistration.gov.hk/eng/statistic20071.html#1>.

⁸⁴ LANGER, International Journal of Constitutional Law Vol. 5 (2007), 420.

⁸⁵ <http://www.voterregistration.gov.hk/eng/statistic20071.html#1>.

people⁸⁶. This would mean that the President of the LegCo could overrule the former decision of the citizens without involving them again in the dismissal.

4. Ability to influence policy: legislative initiative from the LegCo

In order to examine the effects and consequences of the LegCo elections a consideration of the influence on policy is inevitable.

Members of the LegCo may individually or jointly introduce bills which do *not* relate to public expenditure or political structure or the operation of the government though (Art. 74 Basic Law), but there are hardly bills that do not fall in the category of government policy or expenses in the end. Apart from that, it is the Standing Committee of the NPC that holds the power of interpretation. This means that, virtually all bills require the written consent of the CE to be introduced, because most bills cause expenses or relate to government policies⁸⁷.

Finally, if a bill is passed by the LegCo, it can not take effect without the signing and promulgation of the CE (see Art. 76 Basic Law and below).

Moreover, there are additional procedures that hinder legislative initiatives from the LegCo, namely the „bicameral-voting procedure“ (Annex II para. 2 of Basic Law): If an individual member of the LegCo introduces motions, bills or amendments to government bills, there is a simple majority vote of members returned by functional constituencies as well as a simple majority vote of members returned by geographical constituencies required. This means that, a double majority in both groups has to be reached before soliciting the CE for a written consent in order to introduce this bill. The consequence of this procedure is, that only a quarter of the members of the LegCo. e.g. 15 members of functional constituencies, is able to block the legislative initiative of a single deputy⁸⁸. However, bills introduced by the government require only a simple majority vote of the members of the LegCo present, whereas the government enjoys already great legislative power.

5. Relationship of the LegCo to the Chief Executive (CE)

The Chief Executive of the HKSAR is not directly elected by the population. The election committee composed of 800 individuals (who are directly, indirectly, and appointed⁸⁹) selects the Chief Executive who will later be approved by the Central People's Government

⁸⁶ HORLEMANN, 127.

⁸⁷ HORLEMANN, 124.

⁸⁸ HORLEMANN, 125.

⁸⁹ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

(see Annex I para. 1 Basic Law). Although the CE is not democratic legitimated, he holds extensive competences (see Art. 48 Basic Law).

As the executive branch he dominates the political system including the legislation and has the political power of decision⁹⁰: According Art. 62 para. 5 Basic Law the CE is responsible for draft and introduce bills, motions and subordinate legislation. Furthermore, as already mentioned above, a bill passed by the Legislative Council of the HKSAR may take effect only after it is signed and promulgated by the Chief Executive (Art. 48 para. 3 and Art. 76 Basic Law). The CE may even dissolve the LegCo under the circumstances mentioned in Art. 50 Basic Law: when the CE refuses to sign a bill passed the second time by the LegCo, or the LegCo refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations. The LegCo, on the other hand, can only instigate impeachment procedures and report it to the Central People's Government for decision which means that the LegCo has no control over their outcome⁹¹. It can be said, that the actionability of the Legislative Council is very limited. His functions are restricted to debating and raising questions about acts of the government (Art. 73 para.3 – 9 Basic Law), apart from approving budgets, taxation, and public expenditures (Art. 73 para. 2 and 3 Basic Law)⁹². The basic role of the LegCo is a passive one and limited to react. His major power is the veto, particularly against budget and public expenditure⁹³. The position of the legislative is very weak regarding the little power to initiate or enact legislation (restricted ability to introduce bills which can not be enforced without consent of the CE in most cases). The drafting period of the Basic Law already showed that the pro-chinese forces do not aim a powerful legislative as a counterbalance to the executive⁹⁴.

6. Relationship between the LegCo and its Central Authority

According Art. 17 para. 2 Basic Law, enacted laws have to be reported to the Standing Committee of the NPC for the record which does not affect the entry into force of such laws. Nonetheless, the NPCSC may return the law in question, if it considers that it is not in conformity regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region. The law may not be amended but is immediately invalidated without retroactive effect.

⁹⁰ HORLEMANN, 117.

⁹¹ LANGER, *International Journal of Constitutional Law* Vol. 5 (2007), 419.

⁹² LANGER, *International Journal of Constitutional Law* Vol. 5 (2007), 436.

⁹³ HORLEMANN, 124.

⁹⁴ HONG KONG 1997, 56.

Another critical area is the power of interpretation of the Basic Law that is not held by the courts of Hong Kong but by the NPCSC on their own (see Art. 158 para. 2 Basic Law).

An effective, agreed institutional dispute-resolving mechanism⁹⁵ would be therefore needful, to enable the HKSAR to participate in the interpretation of their own Law.

III. Elections of the District Council and of Village Representatives

1. Elections of the District Council

District councils exist since January 2000, which are responsible for advising the government on matters affecting the well-being of district residents, the provision and use of public facilities and services, and the use of public funds allocated to the district for local public works and community activities⁹⁶. In 2007 there were 534 District Council members, whereof 405 were elected besides appointed end ex-officio members. At the time, Hong Kong is divided into 405 District Council constituencies (with each around 17'000 people) under 18 districts⁹⁷.

2. Elections of Village Representatives

A system of village representation has developed in the New Territories over the decades. All Village Representatives are elected with the major function to reflect views on the affairs of a village on behalf of that village resident⁹⁸.

IV. Political reform: aim of universal suffrage

Art. 45 and 68 Basic Law provide for eventual universal suffrage in both CE and LegCo elections as the “ultimate aim” within 50 years since 1997 with the principle of gradual and orderly process. Notwithstanding, in April 2004 the NPCSC rejected universal suffrage in Hong Kong for the CE elections in 2007 and LegCo elections in 2008 and determined that the current 50-50 ratio for GC and FC in the LegCo must remain in 2008⁹⁹. In October 2004, a pro-democratic member of the LegCo put a referendum motion with the proposal that the method of CE and LegCo elections should be decided by a referendum by Hong Kong’s citizens¹⁰⁰. The Beijing leadership and Hong Kong legal experts were divided in their interpretation over the situation, that the Basic Law does not mention anything about referendums. While Beijing leadership “insisted the drafters of the Basic Law had no intention to introduce such thing as a plebiscite, Hong Kong legal experts claimed that what

⁹⁵ HUALING/CULLEN, Hong Kong Journal 2006, 3.

⁹⁶ <http://www.elections.gov.hk/elections/dcelect99/eg01.htm>.

⁹⁷ <http://www.elections.gov.hk/elections/dcelect99/eg01.htm>.

⁹⁸ <http://www.had.gov.hk/vre/eng/types/index.html>.

⁹⁹ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

¹⁰⁰ <http://www.atimes.com/atimes/China/FK17Ad03.html>.

is not overtly prohibited in law should be allowed, at least according to the common-law tradition”¹⁰¹. The LegCo member declared that the referendum would not be legally binding and only serve as an indicator of public opinion for the leaders in Hong Kong and Beijing. However, his proposal did not go far because of the majority opposition from pro-government legislators¹⁰².

In December 2007, Donald Tsang, the Chief Executive, put a proposal on constitutional reform to the NPCSC to amend the methods for selecting the CE and forming the LegCo of the HKSAR in 2012¹⁰³. The session concluded that appropriate amendments may be made to the methods for CE and LegCo elections in 2012, and did not fix a date for universal suffrage in prospective CE and LegCo elections, but decided that the election of the CE may be implemented by universal suffrage in 2017 and thereafter in 2020 also the LegCo may be directly elected¹⁰⁴. That the NPSCC officially provided a possible timeline for Hong Kong’s transition to election by universal suffrage of the LegCo and the CE can be considered as a great democratic progress, however, the definitive decision of universal suffrage is incumbent upon the NPSCC.

V. Conclusion

As the previous statements already have exposed, citizens of the HKSAR are limited in their ability to change their government¹⁰⁵. Rights of direct election exist only in the half of the LegCo through geographical constituencies, in District Councils and Village Representative, whereof the latter two institutions do not have power to affect policy besides advising government or represent villages. Likewise the LegCo has no significant law-making powers due to the hindered ability to initiate legislative, due to the CE as well as the central authority, whose agreements are required to enact or amend a law (particularly the methods for the CE and LegCo elections) successfully. Therefore, in order to achieve universal suffrage, cooperation is required between LegCo, CE and their central authority. However it can be said, that it is only a matter of time until universal suffrage will be established. Thereafter the question remains whether the policy of the HKSAR holds effective autonomy (without too much state tutelage), which would make the elections in Hong Kong real democratic. Otherwise, it would be necessary that Hong

¹⁰¹ <http://www.atimes.com/atimes/China/FK17Ad03.html>.

¹⁰² <http://www.atimes.com/atimes/China/FK17Ad03.html>.

¹⁰³ ZHENMIN, Hong Kong Journal 2008, 1.

¹⁰⁴ ZWEIG, Hong Kong Journal 2008, 1.

¹⁰⁵ <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

Kong's citizens are also involved in the policy of China, because that affects the political system in Hong Kong directly.

E. Comparison of the democratic rights in Switzerland, China and Hong Kong

I. Composition

The democratic institutions of these three countries have hardly any parallels to each other, what makes it difficult to compare them. For this reason, instead of describing similarities and differences, certain aspects with the consideration of the three different political systems of Switzerland, China and Hong Kong will be presented.

1. Requirements for voting

All countries require the age of 18 and the citizenship of the accordant state respectively the residence in Hong Kong to vote. Additionally, no one may be disqualified from being registered as an elector, which all countries apply. In Switzerland the only way to be deprived is the reason of mental illness, while in Hong Kong and China it seems to be outstanding when a person is disqualified of his political right.

2. Requirements to stand for election

In China and Switzerland all citizens who are eligible to vote can as well stand for election of the legislative¹⁰⁶. However, the nomination and selection of the candidates is still dominated by the party branch in China, with the consequence that hardly anyone can stand for election without being a member of the Chinese Communist Party. In Hong Kong, permanent residents without Chinese nationality or with the right of abode in foreign countries may be elected to the LegCo, but only up to 20 per cent of all LegCo members.

3. Suffrage: direct election

The Federal Assembly (composed of the National Council and the Council of States) in Switzerland is elected directly by the people, while the direct elections in Hong Kong are limited to 30 of 60 LegCo members. In China, direct election at the federal level is still not realized, but from village to county levels.

4. Recall and dissolution

A single member of the LegCo can be dismissed by the President of the LegCo and the Chief Executive may even dissolve the whole LegCo under certain circumstances¹⁰⁷. In China, 30 or more voters may submit a demand for the recall of a deputy to the People's

¹⁰⁶ See Art. 3 Electoral Law of the NPC and LPC and Art. 136 para. 2 BV.

¹⁰⁷ See Art. 50 Basic Law.

Congress at the county or township level¹⁰⁸; the Standing Committee decides thereafter whether to put this demand to vote. A recall of a deputy to the NPC can only be required by one-tenth of the deputies¹⁰⁹ and is adopted by a majority vote of all the deputies of the NPC¹¹⁰. The dissolution of the parliament in Switzerland is only possible by a total review of the Constitution, whereas both chambers must be elected new.

5. Pluralistic and monistic political system

A pluralistic political system prevails in Switzerland and Hong Kong. Various political parties exist in both countries. Although China's official statements assert a multiparty cooperation and political consultation under the leadership of the CCP, the CCP does in fact not allow any opposition.

6. Supreme state authority and sovereignty

In Switzerland, it is the people who hold supreme state authority and have the final decision about the central issues. Although the Chinese Constitution states that the highest organ of state power is the NPC, this remains rather formal. In effect, it is the CCP which dominates the political system. Even if the Chief Executive in Hong Kong holds extensive legislative competences, the state authority rests with China.

7. Suffrage principles

The universal suffrage at all levels in the country is only realized in Switzerland. Although a secret suffrage is established by law in Switzerland and China, it is not always implemented. The common "assembly democracy" and open ballot violate the principle of free and secret election. Also in China, where often only the opportunity to mark the ballot in a secret voting booth is given, can affect these two principles. Therefore, citizens must be required to use a secret voting booth, then, people can be afraid that their leaders will interpret their decision to vote in secret as a vote against them¹¹¹. The principle of equal suffrage is not really implemented in Hong Kong in view of the geographical and functional constituencies. The access to the functional constituencies is very limited (only about 200'000 voters), however they have the equal counting value as a vote of geographical constituencies.

¹⁰⁸ See Art. 44 Electoral Law of the NPC and LPC.

¹⁰⁹ See Art. 45 Electoral Law of the NPC and LPC.

¹¹⁰ See Art. 47 para. 2 Electoral Law of the NPC and LPC.

¹¹¹ DIAMOND, 134.

8. Direct democracy and representative democracy

Devices of direct democracy exist only in Switzerland, while China and Hong Kong confine the participation to elections, which not even have a great influence on policy. Decisions taken by means of direct democracy are more legitimate than those taken under representative democracy because they involve the electorate more closely¹¹².

However, the devices of direct democracy could not just be imported to Hong Kong and China because the same institutions in political systems with different structures and traditions would have different effects¹¹³.

¹¹² MÖCKLI, Direct Democracy, 17.

¹¹³ MÖCKLI, Direct Democracy, 2.

Eigenständigkeitserklärung

Hiermit erkläre ich, dass ich die vorliegende Arbeit selbständig und nur unter Zuhilfenahme der in den Verzeichnissen oder in den Anmerkungen genannten Quellen angefertigt habe. Ich versichere zudem, diese Arbeit nicht bereits anderweitig als Leistungsnachweis verwendet zu haben. Eine Überprüfung der Arbeit auf Plagiate unter Einsatz entsprechender Software darf vorgenommen werden.

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