

## The Crisis in Hong Kong: Can Comparative Law Help?

JURIST Guest Columnist Shubhankar Dam, of the Singapore Management University, proposes a solution to the underlying issues which caused the ongoing protests in Hong Kong ...

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Nearly three weeks after they began, Hong Kong's student-led protests show little signs of abating. Parts of the central business district remain paralyzed. Skirmishes between the police and the protestors are on the rise. Peace has been breached more than once, initially with tear gas and pepper spray. Scuffles and arrests followed. Now a video of police officers allegedly beating a handcuffed activist has gone viral. As police action turns violent, the threat of "unimaginable consequences" in the People's Daily, the official mouthpiece of China's Communist Party, hangs heavy. A resolution is urgently needed, before patience wears off and sanity breaks down.



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The controversy has to do with the appropriate method of electing the chief executive. Article 45 of the Basic Law, Hong Kong's mini constitution, says that the Chief Executive "shall be selected by election or through consultations held locally and be appointed by the Central People's Government." Selection by universal suffrage, the provision adds, "is the ultimate aim." Thus far, executives have been indirectly elected. On August 31, the Standing Committee of the National People's Congress in Beijing reversed this. Henceforth, chief executives shall be directly elected, the Committee decided. However, only "pre-approved" candidates may stand for elections. Protestors want Beijing to reverse this latter decision. Party bosses though are in no mood for new concessions and have said so publicly. Activists seem unwilling to stand down. What, then, is the way out?

Enter the Indian Supreme Court and its recent decision on the right to vote. In *People's Union for Civil Liberties v. Union of India* [PDF], the court concluded that under Indian law, the right to vote includes the right not to vote. This latter right is not merely about staying home on polling day. Rather, voters have a right to formally record their rejection of all candidates on the ballot paper itself. The right to vote, in other words, includes a right to vote for nobody.

"A voter may refrain from voting," the court said, "for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote." Indeed, "negative" votes are an important facet of free speech and liberty. As such, the right to reject all candidates must be "recognized and given effect to" in the same way as the right to vote for a particular candidate.

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The court ordered the Election Commission to modify its voting machines to include a "None of the Above Option" (NOTA) in the electronic ballot.

NOTA has many advantages, the court explained. It encourages voter participation, and thereby strengthens democracy. It fends off political frustration: Those dissatisfied with the existing crop of candidates can formally register their rejection. It also performs a signalling function. Resorting to NOTA on a large-scale is an implied warning to political parties to groom better candidates. Finally, NOTA helps maintain privacy; voters needn't publicly identify their disapproval by opting out of polling booths.

Many countries recognize NOTA. Bangladesh, Belgium, Brazil, Chile, France and Greece provide for it. Hong Kong should join this club. It may offer a meaningful way out of the current impasse. Introducing NOTA within the existing arrangement would imply that party mandarins in Beijing have the authority to pre-approve candidates. But Hong Kong voters retain the right to reject all or any their choices. The arrangement neatly acknowledges Hong Kong's simultaneous connection to and distinctiveness from China. Potentially, both sides gain.

Is there a legal basis for recognizing NOTA in Hong Kong? Article 26 of the Basic Law, Hong Kong's Constitution, already acknowledges the right of permanent residents "to vote and ... to stand for election in accordance with law." Similarly, Article 27 guarantees residents freedom of speech while privacy of communication is protected under Article 30. Properly marshalled, these rights and freedoms can easily lead to the conclusion that NOTA is a constitutional requirement; the option must be provided for on ballot papers.

What if a majority opt for it? Soon after the NOTA verdict in India, a petition sought clarification on this point. This time the court was less daring; it quickly recoiled from the powerful implications of its decision. NOTA is merely a protest, the court said; it has no constitutional or electoral significance. In other words, the person with the second highest votes, effectively a loser, shall be declared the winner. The clarification was unfortunate: it renders the negative vote democratically impotent.

Perhaps the rule should be different in Hong Kong. If NOTA polls the most number of votes in 2017, it should be taken to mean that permanent residents have rejected Beijing's choices. A re-election must be held with new nominations. This, however, is a matter of institutional design; there are no right answers. A simple majority for NOTA may compel new elections. Or the rule may be that NOTA must secure an absolute majority of all votes cast to trigger new elections.

This of course raises the spectre of a protracted election cycle. Beijing and Hong Kong may be locked in a permanent state of nominations and rejections. But the fear of this likelihood may also breed thoughtful conduct. Party bosses may nominate conscientiously; permanent residents should vote carefully. If both sides can incubate this version of NOTA, communist China may teach democratic India a lesson in the art of negative voting.

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Reports indicate that the chief executive, CY Leung, has reached out to the protestors. He wants to restart talks, without compromising on the already agreed upon nomination process. Protestors should take him up on his offer; NOTA might give them a way out. This is in everybody's interest, especially those who are invested in the wellbeing of the students and their Umbrella Revolution. We mustn't forget: Umbrellas do not fend off bullets.

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