

# Conversationalism, Constitutional Economics, and Bicameralism

## Strategies for Political Reform in Hong Kong

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Hong Kong has at long last regained the economic momentum lost in the wake of the Asian financial crisis and the collapse of the local property market. However, political friction and uncertainty have escalated rather than subsided, because of deep-rooted divisions over the pace of democratic reform. There are no simple remedies for the constitutional deadlock that has emerged. Nevertheless, it might be possible to improve the overall political climate and both the form and substance of the dialog regarding fundamental institutional reform by borrowing some ideas from constitutional economics.

### Introduction

Unsurprisingly, nearly a decade following the transfer of sovereignty from Britain to China, and despite the latter's steady progress towards a market economy, Hong Kong remains mired in constitutional controversies. The desire for a representative and accountable government, as well as an institutional infrastructure conducive to the maintenance of the rule of law and the protection of human rights, has grown stronger over the years in a city which enjoys high living standards—and whose political aspirations reflect its affluence and “global metropolis” status—yet which continues to view itself as vulnerable to a range of exogenous shocks. In critical areas and at critical junctures, this desire has often not been accommodated by the powers that be in Beijing and their local “proxies.”

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China may be firmly committed to economic liberalization. It may also be experimenting with less authoritarian forms of governance, particularly at the local level. However, the experiments are very tentative and limited in nature. The overarching goal still is the preservation of Communist Party rule (which is conveniently equated with “social stability”). As the Taiwan experience suggests, democratic change, or a decisive shift towards competitive politics, may be inevitable, but this should be regarded as a long-term prospect. To meet Hong Kong aspirations for a representative and accountable government, driven by a liberal set of values and open to foreign influences, might prove a costly proposition from this perspective in that it could have premature reverberations across the border.

Moreover, it cannot be said that the support for unfettered democratization manifests itself across the domestic arena. It is solid overall—indeed, decidedly so—but some segments of the community are harboring doubts and even expressing reservations. One may be inclined to dismiss this as merely a product of communist manipulation/pressures or self interest, yet there is evidence that this is not always necessarily the case. The resistance from certain quarters rests on analytical/intellectual foundations. Specifically, it is being argued that a rapid elimination of the vestiges of the top-down command-and-control system, in an environment characterized by a fairly high degree of socio-economic polarization, could destabilize the private sector and paralyze its public counterpart.<sup>1</sup>

Constitutional friction is not unique to Hong Kong. It is a common phenomenon whose intensity varies according to the degree of political cohesion. In multicultural societies—Canada being an obvious example, and one with which students of the Asian political scene are reasonably well familiar—the level of constitutional conflict may surpass that witnessed in post-1997 Hong Kong. The issues dividing the public and its

representatives often run deeper and are more wide ranging. They also tend to loom large on the political agenda for distinctly long periods of time.

The problem is compounded by the “populist” features of modern constitutional thought. These features may be viewed as a “virtue” from an ethical perspective, but they pose practical difficulties in circumstances where the gap separating the parties engaged in debate over fundamental political questions is rather wide. A constitution is now increasingly viewed, at least in democratic settings, as a document that is implicitly prefaced by “We the people ....” The corollary is that, in the absence of such a preface (i.e., without an explicit endorsement by the “people”), a constitution lacks the most crucial basis of legitimacy.<sup>2</sup>

This generally enlightened position is often associated with contractualism. It should be noted, however, that the latter extends beyond the notion that constitutions are rendered legitimate by the consent of the governed. Not all forms of consent and agreement amount to contracts in the strict sense of the term. To qualify as such in this context, they need to crystallize at a privileged moment in history where constitutional essentials are unambiguously settled and made binding well into the future.<sup>3</sup>

Constitutional contracts can be of the “hypothetical” or “real” variety. The work of Locke and Rawls is often invoked to illustrate the essence of the former.<sup>4</sup> In this case, philosophers undertake a thought-experiment envisaging a contractual agreement between rational parties (such mental simulation need not be confined to philosophers or even “intellectuals”; the participants may be constituent assembly members and/or ordinary citizens, and the activity may be pursued individually or through collective channels). Whatever shape the experiment takes, the outcome is normally assumed to contain the key ingredients of a constitutional blueprint.

Real contracts, also referred to as “original contracts,” are the product of interaction

between real actors, who may or may not resort to thought-experiments for inspiration. The most obvious example of a real/original contract is the American constitution. In contemporary settings, societies grappling with constitutional challenges have inevitably found it necessary to deviate from this model, however. In 1787, a small group “representing” a cross-section of American elites could comfortably begin a constitutional document with “We the people” and apparently believe that its members spoke for the people despite the fact that most citizens—not to mention women, Native Americans and slaves—were never consulted nor asked to endorse the document.

The pressures of egalitarian democracy, coupled with the demand for the inclusion of a wider range of voices, have rendered this type of constitution-making increasingly problematic, although post-colonial Hong Kong has chosen to follow a similar path. The growing desire on the part of people from all walks of life to participate in the constitutional debate and to be given the opportunity to vote on proposals may be viewed as an attempt to democratize the real/original contract tradition. Otherwise, the democratic ideal does not diverge markedly from its hypothetical and real/original counterpart. In all three cases, the fundamental characteristics of the contract are the same. First, it embodies the notion of popular sovereignty (the modern variant) and second, it lays down the ground rules to be followed by future generations and thus represents a unique and privileged moment standing above day-to-day politics.

As indicated, the contractual model, in all its forms, but specially the one reflecting full-blown democratic aspirations, may not provide an ideal framework for divided polities such as Hong Kong. The concept of popular sovereignty derived from the writings of Locke is rooted in the assumption that the people perceive themselves as a society of equal individuals in a state of nature existing prior to a constitution. The shared premise of their deliberation (and the grounds for agreement) is that they wish to secure the protection for

their individual rights to life, liberty and property. Although subsequent contractual formulations are broader in scope, most presuppose that parties to a political association regard themselves as individuals and display a fairly high degree of consensus regarding the “goods” to be gained by entering into a contract.

### **The Appeal of Conversationalism**

The problem posed by this model when considered from a contemporary perspective in general, and applied to divided polities in particular, extends beyond the fact that individuals can no longer, even hypothetically, be thought of as operating in a state of nature. Rather, the principal difficulty encountered in employing this framework is that people disagree, at times deeply, with respect to the “goods” to be obtained through political association. For example, the identities of the participants in the Hong Kong debate do not all conform to the individual-as-rights possessor model that can be extracted from the work of Locke. The corollary is that constitutional proposals that are justified by appeal to Lockean- or Rawlsian-type mental experiments are not likely to sway participants who define themselves in different terms.<sup>5</sup>

Substituting the democratized real/original contract for the hypothetical variant does not lessen the challenge stemming from pluralism. While embracing the notion that constitutions must ultimately be endorsed by “the people,” participants in the political process in societies enjoying universal franchise, yet experiencing segmentation, do not deliberate as one people but as many peoples. In such circumstances, a stage must be added to the process of constitution-making not envisaged by Locke, the Founding Fathers or Rawls. Divided polities need to create a “people” before they can realistically hope to speak in terms of “We the people....”<sup>6</sup>

At the same time, this goal is expected to be pursued in contemporary settings without

erasing legitimate differences. Specifically, demands for assimilation, homogenization and standardization are no longer viewed as either morally or practically acceptable means of achieving “agreement” in pluralistic environments. It has become increasingly untenable to argue that only those people who define themselves and express their claims in liberal individualist terms “may come to the negotiating table.” The assumption that people must speak as one, in order to fulfill the voluntarist aspiration of modern constitutionalism, needs to be somehow reconciled with the fact that the emphasis on convergence may in some respects be inconsistent with this democratic ideal.<sup>7</sup>

Given this moral predicament, the focus in constitutional analysis seems to be shifting, at least selectively, from contractualism to “conversationalism.” The latter is rooted in the theory of “discursive legitimacy” first articulated by Habermas<sup>8</sup> and subsequently converted by political scientists into a conceptual structure centered on the notion of “deliberative democracy.”<sup>9</sup> Advocates of conversation-oriented strategies champion rules whose purpose is to ensure discursive equality, fair play and freedom in the course of the dialogue/interaction taking place in the process of constitution-making. Specifically, no one with the competence to speak and act may be excluded from discourse; everyone is allowed to express their attitudes, desires and needs; no one may be prevented coercively from exercising these rights.

In a pluralistic environment, agreement under these constraint-free conditions is possible only if participants display respect and impartiality towards each other. Equality, as reflected in the rules, means that each individual has a right to speak. Respect is a more substantive requirement and means that each individual enjoys the right to be heard. For discourse to evolve productively, individuals must listen to each other, respond to each other and justify their claims to each other. Simply not preventing others from voicing their concerns provides an inadequate basis for devising an authentic agreement.<sup>10</sup>

Besides requiring that participants treat each other with equal respect, an ideal discourse should also feature a determined effort on their part to adopt an impartial perspective. This does not necessarily amount to transcending one's situatedness in an attempt to obtain a "view from nowhere" or an Archimedean point. Instead, impartiality is understood in contrast to partiality or, to state it differently, in contrast to a perspective exclusively focused on the individual's own concerns. To elaborate, it is achieved by broadening one's perspective to include the perspective of others. Without such a cognitive adjustment, participants may not be able to undertake a genuine assessment of the merits of arguments from other sources.

When the rules are effectively integrated, anchored by positive attitudes and implemented in a pluralistic spirit, discourse may follow productively a two-stage pattern. First, participants endeavor to gain insight into their motivations by listening and responding to each other, as well as seeking to examine the world from each other's standpoint. At this stage, the objective is to clarify issues, grasp and articulate differences, allow people to speak in their own voice and, ultimately, build trust. The assumption is that these conversations are likely to initiate a learning process in which positions are softened, horizons are extended and participants display greater flexibility. Attaining a satisfactory level of mutual understanding is a prerequisite for the second stage: finding solutions to constitutional controversies acceptable to all.<sup>11</sup>

This two-stage model (first, the conversational stage during which constitutional morality is promoted; second, the outcome stage during which agreement is forged) of constitutional negotiation has a number of advantages over its contractual counterpart. Perhaps most importantly, discursive outcomes are likely to be more stable than contractual ones. As Hobbes has argued, covenants without the sword are but words, a feature which highlights their inherent fragility. The corollary is that, for agreements to hold without the

sword, they must spring from and be supported by conversations that reinforce trust between citizens.

In addition, the conversational model offers a framework for people with fundamentally different visions to seek concrete ways to come to a generally acceptable agreement. The contractual model provides no procedural method for overcoming deep diversity. The core of discourse theory addresses the issue of how deliberation under conditions of equality, fairness and freedom may transform preferences and foster cooperative dispositions. Rather than the possible bargains that could be struck between prevailing divergent interests, the deliberation school focuses on the conditions under which interests are formed in the first place. This is a more sensible approach to democratic legitimacy in an environment characterized by a high degree of diversity, because positions may need to shift if an agreement is ever to be reached.

Finally, engaging in discourse requires a different and, in some sense, more realistic set of shared values among citizens than concluding a contract. In the Rawlsian contract, for example, parties all value liberal autonomy. The contract is designed to solve problems and disputes that emerge when liberals who value-autonomy disagree. Rather than a desire to safeguard individual autonomy, the preliminary requirement or background condition necessary for conversation is a commitment to noncoercion, persuasion and consent. Like the Rawlsian contract, the essential background conditions for conversation are primarily cultural. Unlike in that case, however, they are the existence of democratic rather than simply liberal values. In deeply divided polities, this requirement is more likely to be met than the corresponding contractual condition.

Hong Kong is not a multicultural society or one suffering from a high degree of communal fragmentation. Nevertheless, at this particular juncture, it displays the characteristics of a deeply divided polity, at least in the constitutional meaning of the term.



As matters stand, the pattern is likely to persist for the foreseeable future. In such circumstances, promoting discourse between parties that are fundamentally at odds with each other might prove to be a constructive strategy for facilitating progress towards a broadly acceptable and generally viable macro-level political blueprint. The aim of this article is to make a modest contribution in that direction.

The underlying assumption is that the gap separating the pro-democracy forces and their pro-status quo counterparts may be considerably narrowed through a productive dialogue in which the participants exhibit a modicum of mutual respect and impartiality. The initiative has inevitably to come from the democratic side, with which the authors identify, because that is where the passions are more intense and the positions are more entrenched. The work of constitutional economists may be invoked for this purpose because, although not uncontroversial, it has sufficiently solid analytical underpinnings to enable the pro-democracy elements to gain a better appreciation of some of the concerns often vaguely expressed by those clinging to the status quo. This, in turn, may set the scene for a genuine engagement across a wider spectrum.

### **Theoretical Foundations: The Demand Side**

Constitutional economics is a relatively new field of academic inquiry whose roots lie in the well-established discipline of public finance. The latter has traditionally centered on the symptoms of “market failure,” or conditions preventing “efficient” functioning of private sector institutions, and policy responses thereto. The prevalence of such symptoms has been the focal point for students of public finance for decades and it accounts for the rise of a voluminous literature on government programs geared to the allocation of resources (i.e., provision of goods and services), redistribution of income and wealth, and stabilization of the economy.<sup>12</sup>

In recent years, the preoccupation with market imperfections and their policy implications has given way to growing misgivings about the limitations of the responses originating in the public sphere and their adverse consequences. The term “failure” still looms large on the research agenda but, paradoxically, it now more often than not is employed with reference to government action and inaction. The scholars largely responsible for this radical shift belong to a branch of public finance known as the “public choice school” (which is not to suggest that its members focus exclusively on government deficiencies).<sup>13</sup>

Constitutional economics features prominently in the writings of public choice theorists, who continue to exert a very strong influence on the evolution of the subject. The relevance of their analytical insights in the current Hong Kong political context lies in the fact that, while acknowledging the virtues (indeed, the undoubted superiority) of democratic institutions, they are willing to address systematically the negative side of the picture and suggest, at times boldly, ways to render them more effective (in terms of criteria such as efficiency, equity, freedom and accountability). For this reason, part of the theoretical edifice built by constitutional economists/members of the public choice school may provide a basis for efforts to narrow the ideological chasm between elements deeply divided over the direction of political reform in Hong Kong.

Constitutional economists identify a host of problems on the demand and supply sides of the democratic political arena. The voter is the source of demand and politicians/bureaucrats are the suppliers. At both ends, behavior inconsistent with democratic ideals is by no means the exception to the norm. The “costs” of voting are not necessarily high, even if the time/effort/money invested in research is taken into consideration, but the “benefits” are rather meager, which explains the disappointingly low levels of political awareness/interest/participation throughout the world, including

developed countries.

An individual voter, after all, cannot affect the electoral outcome in any concrete form. The scope for communicating the intensity of one's preferences, as distinct from merely embracing or rejecting a candidate/platform, is also extremely limited. By the same token, the competing policy packages are presented as "bundles," leaving voters with no room for maneuver "at the margin." To make matters worse, the packages tend to converge, often offering no meaningful choice to those inclined to employ them as a key input in the electoral decision-making process. Unlike consumption, voting is of course a one-off act, seldom yielding significant long-term benefits for individuals who express their views through the ballot box.

The contrast with the marketplace is telling. Voter preferences simply do not count unless he/she is a member of a majority (which, incidentally, can be assembled in most circumstances only at a substantial cost). Participants in elections who register their support for a candidate/platform, but are on the losing side, do not obtain what they value or do not obtain it in the desired amounts, whereas those who signal their disapproval, but are on the losing side, obtain what they do not want or obtain it on a smaller than desired scale. This detracts from the attractiveness of the exercise and reinforces the propensity to adopt a passive posture.

Even if that were not the case, aggregating voter preferences into a pattern consistent with the "will of the people" would pose insurmountable difficulties on technical grounds. The underlying logic is complex and cannot be fully developed in the present context. Suffice it to say that, whenever two or more persons must select a candidate/platform from among three or more alternatives, the outcome is not likely to be fair because of the stringent criteria that need to be satisfied in the process ("transitivity," "axiom of Pareto choice," "axiom of independence" and "axiom of nondictatorship"). This amounts to a

serious challenge in a typical democratic setting.

Nor is it just a matter of aggregating effectively individual preferences. The technical problems to which this (known as the “paradox of voting”) gives rise extend beyond a distortion of the will of the people. Specifically, there is considerable scope in such circumstances to manipulate the political agenda through “opportunistic”/“sophisticated voting” by proceeding in a manner reflecting the realization that a more favorable final result may be achieved by voting against one’s true preferences in the preliminary rounds (this requires a degree of “sophistication” and involves “opportunistic” moves).

The measure of cyclicity introduced into democratic decision-making as a consequence of this phenomenon may be exploited by voters who would otherwise face an undesirable social choice. For example, Riker argues convincingly that the introduction of slavery as an important national issue in the United States after 1819 may be interpreted as the ultimately successful strategy in a series of attempts by northern Whigs (later Republicans) to split the nationally strong Democrat Party. He uses the experience to offer a fundamentally important generalization: persistent losers have an incentive to raise new issues in an effort to create voting cycles that provide an opportunity to defeat the dominant coalitions during the ensuing periods of disequilibrium. Again, this leads to a distortion of the will of the people, particularly at times when the stakes are high.<sup>14</sup>

Such shrewd maneuvering is scarcely a common phenomenon at grass roots level. As indicated, sophistication is not a salient feature of the voting process. In addition to the constraints highlighted earlier, it should be noted that those contemplating participation in elections are provided with no effective “reality check.” Because the political system generates a multitude of issues with no price tags attached, assessing benefits and cost is an elusive task. Even in fiscal referenda, which are reasonably focused, the voter is confronted with decisions that are normally posed in either/or terms, with the intended benefits, but not

costs, particularly the distribution of those costs among taxpayers. Or the costs, at least the direct ones, are given, while the expected collective, as well as individual benefits, are overlooked. Put another way, would-be participants, face enormous uncertainty. This divorce of costs and benefits apparently accounts for much of the irresponsibility displayed by voters, which manifests itself in inconsistency across issues and electors wanting “to have their cake and eat it too.”

It is hardly surprising that voters learn sooner or later that their most valued goals can be better served not by marching to the polls, when the rare opportunity presents itself, but by organizing special-purpose interest groups. This leads to an extraordinary proliferation of such groups and a channeling of massive resources to the pursuit of private privileges at public expense. It is often portrayed by professional observers as an “arms race” in which the sum total of costs outweighs the benefits, for the players as well as the community at large, yet once started, it is irrational for any strongly motivated group to opt not to participate.

The expression “strongly motivated” implies that, in such a setting, the politically active few have an opportunity to wield influence disproportionate to their number. Some of those who fall into this category may be driven by a genuine desire to promote the social good and may thus seek to shape the policy agenda irrespective of whether they stand to gain or lose personally. For the most part, however, political participation is inspired by private self interest. Assuming that most people are economically rational, it is reasonable to infer that the greater the anticipated net benefits one expects to reap from a specific

political activity, the more likely is one to undertake that activity.

Policies that spread large aggregate benefits widely and uniformly among the electorate have a limited appeal because, for any individual, the costs of political activity exceed the expected benefits (which are the individual's private gains if the policy is adopted weighted by the probability that the resources expended will result in implementation). By the same token, no individual may find it in her self-interest to resist policies that spread costs widely. On the other hand, many people will undoubtedly resort to political action, on grounds of self interest, in situations where policies involve heavily concentrated costs or benefits.

Given that players on the supply side of the political arena respond at least to some extent to stimuli from the demand side, the consequences of individual rationality manifest themselves in collective choices biased towards policies with concentrated benefits and away from policies with concentrated costs. This bias may lead to the adoption of policies for which the total social costs exceed the total social benefits. Interestingly, concentrated economic benefits (and diffuse economic costs) often arise when governments intervene in markets. The interventions tend to produce economic benefits in the form of rent or payments to owners of resources above those which the resources could command in any alternative use. Lobbying for such interventions is referred to as "rent-seeking."

From a demand-side perspective, it is thus posited that voters confront a host of

challenges, rendering the exercise of their rights a not entirely rewarding experience. The problem largely lies in the fact that they have limited influence and are unable to make meaningful choices. The upshot is a high degree of absenteeism, cynicism, ignorance and susceptibility to pressure by special interests—a pattern that diverges from that observed in the marketplace, where consumers display a significant measure of situational control, have a very strong incentive to become informed about the goods/services offered, derive substantial pleasure from purchases and are capable of influencing the outcomes. Constitutional economists argue that such demand-side problems, serious as they may be, are perhaps not as daunting as those encountered elsewhere in the political arena.

### **Theoretical Foundations: The Supply Side**

The dilemma confronted by elected officials, a vital component of representative government, in endeavoring to reconcile their conceptions of the good society and the preferences of their constituents (“universalism” versus “parochialism”) is a case in point, for the latter normally dominate. For example, a legislator may believe that the construction of a safe nuclear waste facility is socially desirable and that the optimal location from a broad societal perspective would be in her district. This notwithstanding, she would almost certainly refrain from acting in a manner consistent with that view in the face of evidence that her constituents are overwhelmingly against the idea.

The problem extends well beyond the tendency of representatives, in general and in a district-based (such as partially in Hong Kong) legislature in particular, to accord priority to the social benefits that accrue to their own constituencies in deciding how to position themselves vis-à-vis policy issues. To illustrate, a cost-benefit analysis of a weapons system from a general societal standpoint would consider expenditures on components as costs. A representative might nevertheless regard the portion spent in her district as benefits because of the contribution made to the vitality of the local economy.

Constituency-focused valuation of expenditures often results in the adoption of policies with net social costs as legislators bargain with each other to obtain their share from the “pork barrel.” This process, commonly referred to as “logrolling,” consists of efforts to assemble a collection of projects that provide sufficient locally perceived benefits to ensure support for the entire package. When coupled with the unwillingness of elected officials to bear the political costs of increasing taxes, logrolling for district “pork” may lead to deficit spending.

Narrow-based, constituency-driven, strategies are not necessarily the most problematic part of the picture for representatives pursue their own private interests rather than merely those of their districts. Notably, motivated perhaps by the status and perquisites of office, they are propelled, above all, by a strong desire to secure electoral success. There is solid empirical evidence to suggest that candidates are heavily focused on the percentage of



votes they might receive and that this remains the principal concern throughout their political careers. That posture, which maximizes the probability of gaining a majority, requires them to pay more attention to the demands of a relatively small number of responsive (in the “rational” sense of the term) citizens than to those who are either unlikely to vote or are likely to be influenced by party, ethnic, or other general considerations.

Self interest also inevitably needs to be addressed in the context of the relationship between the voting behavior of legislators and financial (or in-kind) campaign contributions by well-organized groups. Promotion through costly, yet widely accessible and hence effective, media renders it necessary for those seeking public office to raise substantial funds. If financial contributions alter representatives’ voting patterns, democratic ideals are clearly undermined (although some observers argue that as long as the “purchased” votes are “bought” by constituents it simply represents the expression of intense preferences). Certainly, where such practices are endemic, government/society cannot function efficiently.

Party discipline may constrain the self-interested behavior of elected officials. The political *modus operandi* in this respect differs from one jurisdiction to another, however. For example, the United States is generally thought to have a rather weak party discipline, both at the national and sub-national level. Parliamentary democracies exhibit greater

tightness on that front due to more centralized control of nomination procedures/campaign funds and the inherently centralizing nature of cabinet government in such settings. On the whole, Hong Kong is probably closer to the American end of the organizational spectrum and the self-interest issue is thus of considerable relevance in this context.

Monitoring by individual citizens is another potential control mechanism, but not a very reliable one because of the heavy burden this places on those who follow that route. Given financial and time constraints, people normally do not find it worthwhile to articulate policy preferences and scrutinize the actions of their representatives. The broader the scope of government, the more costly is systematic articulation and scrutiny. Those who do make the commitment typically have strong policy preferences based on either ideology or financial interests. Consequently, legislative output tends to be most carefully evaluated by groups that display attitudes that are very different from those of the community at large. The corollary again is that such groups enjoy an undue influence over the policy agenda.

In addition to falling short of democratic ideals in discharging their responsibilities as “delegates” (who are expected to reflect the desires of a majority of their constituencies), self-interested representatives tend to favor policies which maximize short-term benefits and minimize short-term costs. This is the unavoidable consequence of the incentives built into the electoral process. Given the fact that the cycle seldom stretches over more than a number of years, and rightly so in terms of most relevant criteria (e.g., accountability),

legislators usually gravitate towards policies which offer immediate gratification to those upon whom they depend, even if future costs outweigh the benefits. Such myopic behavior is particularly common in cases where the odds of re-election are low. This is difficult to reconcile with their roles as “trustees” (who are expected to act in a manner consistent with the interests of those whom they represent).

In seeking the support of the electorate, legislators rely heavily on the media, perhaps the most cost-effective channel for influencing public opinion. The tactics they adopt in this context are mostly reactive in nature. The media zero in on some undesirable and visible social condition and legislators respond by floating ideas designed to alleviate it, which allows them to share the limelight. These attempts to convert undesirable and visible social conditions to policy problems seemingly amenable to practical solutions are a key factor in shaping the policy agenda. As newly “discovered” conditions push older ones from the media, the agenda evolves. The media are thus the “cause” and the agenda the “effect,” a rather unhealthy configuration in that a media-inspired program of action is not the optimal basis for pursuing the public interest.

The problems which affect adversely the performance of legislators as trustees and delegates also prevent them from holding the executive branch of government accountable for its actions in a way that accords with democratic principles. This partly stems from the asymmetry of information between the two sides. The executive (“agent”) is generally in a

much better position to know the minimum cost of producing a given level of output than either the public or their representatives (“principals”), who approve the overall public budget and its key components. They thus mostly follow, often mechanically, rather than lead, a pattern that diverges from that featuring in the theory of representative government.

The implications of the asymmetry of information that unbalances this crucial relationship can be highlighted by introducing the concept of the “discretionary budget”: the difference between the budget that a public bureau receives from its “sponsor” and the minimum cost of producing the output level that would satisfy the latter. Executives enjoy the greatest freedom of action when the size of the discretionary budget is both large and unknown to the sponsor. It would be economically efficient for them to produce output at minimum cost so that they could return the discretionary budget to the sponsor. However, this might provide insight into program operations and be used, in a restrictive fashion, in deciding on the level of next year’s expenditure. The observation that bureaus rarely fail to spend their budgets, sometimes exhorting employees to accelerate the pace as the end of the fiscal year approaches, suggests that executives seldom view revelation of their discretionary budgets as an attractive management strategy.

If the bureau were a private firm with sales revenue as the source of its budget, the owner-executive would simply retain the discretionary budget as profit. However, in most countries, civil service laws and their enforcement prevent public executives from

converting discretionary budgets to personal income. Executives reluctant to return their discretionary budgets have an incentive to find personally beneficial methods to employ the extra resources within their bureaus. A large budget serves the interests of those who preside over it (by enhancing organizational power, professional status, tangible and intangible rewards, etc.) and rendering it easier for them to confront challenges as senior managers (with ample human resources at their disposal, they can tolerate some shirking by employees that would be time-consuming and perhaps unpleasant to eliminate; the availability of resources on a large scale might facilitate effective responses to unexpected demands in the future; increased spending on items such as supplies and travel could boost morale; and so on).

This is a costly pattern, from a public interest perspective. Admittedly, similar problems are encountered in the private sector, but in a less severe form. The government operates in a fundamentally different environment because of the difficulties inherent in valuing public output (and, by implication, performance), the lack of competition among bureaus and the inflexibility of civil service systems. Regarding the first of these challenges, it is apparent that imputing values to goods such as health and safety, law and order, and national security is a daunting task. Even when elected officials are genuinely interested in estimating the true social benefits that accrue from their provision, analysts often cannot devise reliable and valid instruments for achieving this objective. Determining the “optimal”

size of a public bureau is thus, to all intents and purposes, an impossible undertaking.

Competition forces private firms to produce output at minimum cost. Firms which do not stretch themselves to the full sooner or later fall by the wayside. Public bureaus, on the other hand, can survive—worse still, thrive—despite failing to meet acceptable efficiency standards because of their monopoly status. The inflexibility of civil service systems compounds the problem. This is a by-product of the necessary extension into the bureaucratic arena of democratic checks and balances designed to provide insulation against attempts to use the service network for partisan purposes and ensure organizational continuity/stability in the face of changes in the political power structure resulting from shifting electoral fortunes of competing entities.

Nonpartisanship and continuity/stability must be purchased at the expense of a certain flexibility in staffing, however. The same rules that render it difficult to dismiss employees for political reasons make it difficult to weed out the incompetent. Fixed pay schedules, which reflect a legitimate concern about possible exercise of political leverage over public sector employees, tend to under-reward the most productive members of the workforce and over-reward the least productive ones. As the former depart for more lucrative positions in the private sector, bureaus are left with a higher proportion of the latter.

A civil service system that imposes tight restrictions with respect to the dismissal of employees must also subject candidates to careful scrutiny during the selection process, if

quality is to be maintained. But a slow and complicated hiring system reduces the ability of managers to implement public programs quickly. The problem is particularly severe for those who fear losing allocated slots which are not filled within the budget period. Rather than waiting for the appropriate authorities to grant approval for selecting the most suitable candidate, the safer course of action may simply be to opt for someone who already is on the civil service payroll. The more often such decisions are made for expediency, the less likely are public bureaus to operate efficiently in the long run.

Inadequate government response to community demands/needs may partly be attributed to similar factors. Because bureaus normally enjoy monopoly status, consumers cannot “vote with their feet” by choosing another supplier. Elected officials obviously have an incentive to be responsive to their constituents/consumers. Shielding the civil service from undue political interference reduces the role politicians can play in informing bureaus about public wants, however. Threatening budget cuts and exerting pressure on senior executives may not be very effective ways of influencing behavior by employees at the lowest level of the bureau who, in most cases, actually deal with the public. Again, the necessity for a clear separation between politics and administration limits the capability of public bureaus to meet their obligations in an efficient manner.

Ideally, the concepts introduced in this and the preceding section of the article should be examined in the Hong Kong context. The study of political behavior in the territory has

unfortunately not progressed to a point whereby this would be an entirely meaningful exercise. It may be noted in passing that surveys of public opinion conducted by researchers at the University of Hong Kong<sup>15</sup> and the Baptist University of Hong Kong<sup>16</sup> lend support to the notion that opportunistic maneuvers by legislators are not uncommon. There are also indications that they struggle in their roles as delegates and trustees,<sup>17</sup> and that their agendas are shaped to some extent by the “hyperactive” local media.<sup>18</sup>

Perhaps more significantly, the Hong Kong bureaucracy, by far the most powerful institution in the territory, can scarcely be portrayed as being driven exclusively, or even strongly, by a classical-style vision of the public good. There is ample evidence to suggest that its own interests are a key element in the equation. This manifests itself in many forms, most notably in areas such as pay (broadly defined) and other terms of service (again, broadly defined). The reluctance to countenance painful adjustments during the “lean years” following the Asian financial crisis of the late 1990s (a period which has also featured intense deflationary pressures induced by the bursting of the property bubble which coincided with political regime change) has been quite remarkable.<sup>19</sup>

There is little awareness of the problems surveyed in this and the preceding section of the article in Hong Kong and elsewhere. An acknowledgement of their existence and prevalence on both sides of the constitutional debate would be an important step towards enhancing the quality of the argument and placing the entire process on a firmer footing. As



indicated, the pro-democracy forces should ideally take the initiative because, given the circumstances, it is logical to move from that end of the ideological spectrum to the other. Problem recognition is an essential part of the exercise, but it is incomplete without a constructive examination of the unconventional remedies. We discuss a number of possible corrective measures briefly<sup>20</sup> and accord considerable attention to one potentially stabilizing institutional mechanism that might be suitable for Hong Kong during the transition to a fully-fledged democracy.

### **The Lure of Participationist Mechanisms and Bicameralism**

Constitutional economists have not confined themselves to diagnosis in dissecting government failure in democratic settings. They have explored a wide range of policy designs whose purpose is to provide protection to citizens from one another (which is not as far-fetched as it may sound, e.g., shielding minorities from majority transgressions) and from “rulers” (politicians/bureaucrats). Some of the ideas floated have withstood critical scrutiny by insiders and outsiders (not invariably sympathetic to the effort and the outcome) and have become an integral part of the democratic reform agenda, albeit perhaps not its core, and certainly not in Hong Kong (or, for that matter, most Asian countries).

Those of the economic variety, which tend to be more readily accepted than their political counterparts, include balanced-budget requirements, tax, and expenditure

limitations, a line-item veto (allowing the chief executive to exercise veto power in the budgetary context on an item-by-item basis), an item-reduction veto (granting similar authority to reduce the level of funds without eliminating the entire item from the budget), tax earmarking (most commonly when taxes are applied to fund a particular category of expenditure by imposing a levy on those who benefit from it; e.g., petrol taxes that are earmarked for highway expenditures), regulatory limits, voter approval for fiscal proposals and supermajority requirements for legislatures (e.g., a two-thirds majority for tax initiatives).

Constitutional economists have also been advocating, albeit with limited success, adjustments to the Bill of Rights or, better still, from their perspective, the promulgation of an Economic Bill of Rights. They regard this legal instrument, whether in its original (American-style) or extended form, in an appropriate institutional setting, as a powerful tool for the protection of individual rights from encroachments by other parties, notably fellow-citizens and rulers. The appeal of such a constitutional vehicle, for them, lies in the fact that it serves to reduce significantly the uncertainty facing an individual, in that he/she cannot predict when he/she might be a member of a minority in need of a shield from majority action (e.g., a person accused of crime deserves protection, for who knows when one might be so accused; Amendments IV–VIII).

The concerns expressed by constitutional economists in this regard stem from the

perception that the relevant constitutional safeguards have not fared well in legislatures and, perhaps most importantly, the judicial system. Their attention is directed primarily at the economic side, but the political dimension is not overlooked (e.g., the question is posed whether a greater emphasis should be placed on victims' rights, because in an environment characterized by escalating crime rates one must contemplate seriously the possibility of becoming a victim). The spotlight normally falls on rights pertaining to property—that is, who may acquire it, how it will be administered and how it will be disposed of. Such rights are deemed to be the most fundamental, and hence controversial, among those designed to protect minorities from majority infringements. The focus is not on property rights per se, but the rights of individuals, as well as organizations, to control property uses.

The key argument advanced in this context is that the rights of property holders have been seriously eroded over the past century in democratic settings. The balance of power between them and non-holders has shifted decisively in favor of the latter, thereby enhancing the power of government and curtailing that of would-be property holders. The conclusion drawn is that personal liberty, particularly as secured against government, has been materially undermined. This observation is considered to be valid even with respect to areas where property rights are well-defined, trespass being one of the most conspicuous examples. In such areas, the transaction costs endured by private property holders have increased so dramatically that it has become prohibitively expensive for them to pursue

their interests through the appropriate legal channels. This partly accounts for the efforts to place the (Economic) Bill of Rights on the public agenda.

Constitutional economists do not restrict their quest for institutional remedies to symptoms of government failure to the economic domain. Their policy designs, while not always finely balanced from a multidisciplinary perspective, are normally two-dimensional in nature. At the political end of the constitutional/statutory spectrum, the proposals originating from this source include citizen-initiated legislation, easily enacted referenda, term limitations for politicians, recall of officials (as witnessed recently at the gubernatorial level in California), a high degree of public disclosure (in the executive, legislative and bureaucratic realms) and flat/decentralized government structures (featuring a shift in the role of the public sector from a multi-purpose provider to a mere purchaser of services).

Many of these proposals have their roots in “participationist” political theory, which stands in sharp contrast to the “representationist” variant. Scholars who subscribe to the former portray the institutions of representative government as inefficient “middlemen” who interfere with the expression by citizens of their true preferences. Direct democracy eliminates, or at least minimizes, this problem by allowing the direct, undiluted expression of such preferences. Representationists, on the other hand, maintain that the relatively high participatory burden (which economists would term “high transaction costs”) associated with the institutions of direct democracy render direct popular participation in public

decision-making wasteful and impractical to the modern polity. To state it differently, public policy decisions are better undertaken by specialist politicians, albeit ones who gain power as a result of winning a competitive election.

However, a careful reading of the literature suggests that these two theoretical perspectives may legitimately be viewed as complementary in nature. The notion that the participationists—and, by implication, constitutional economists—favor radical versions of direct democracy with virtually all political decision-making being made in the mythical “town square,” clearly rests on a shaky foundation (so does, of course, the proposition that the opposite school of thought is rigidly wedded to the concept of purely indirect representation). The differences are of the “quantitative” rather than “qualitative” variety, and should perhaps be addressed in relativist terms. On balance, constitutional economists seem to be presenting, compellingly or otherwise, a case for an effective use of direct modes of political participation as supplements to the institutions of representative democracy.

Their ideas should arguably be incorporated into the democratic reform agenda in Hong Kong, at least selectively, in order to render it less skewed towards the representationist vision of political organization and provide a catalyst for shifting the constitutional debate between deeply-opposed ideological camps to a more productive level. Nevertheless, this is not the angle from which the subject is approached here. The

intellectual appeal and practical relevance of participationist style institutional reforms are highlighted elsewhere.<sup>21</sup> Constitutional economists have also advanced proposals for enhancing the stability of representative democratic structures. One of them focuses on a bicameral legislature and is explored below.

### **A Corporatist Variant for Hong Kong**

Bicameralism is by no means a new concept. It certainly cannot be portrayed as radical given that France, Germany, the United Kingdom and the United States have two legislative assemblies (with differing powers) and so does Italy (with identical responsibilities). The drafters of the US Constitution opted for this complex institutional configuration because of their concern that the House of Representatives might succumb to the “irregular passions” of the moment due to the fact that its members were directly elected for short terms by the citizens. To minimize the potential risks, an upper house was created in which the electorate was represented disproportionately by state through individuals indirectly selected for longer terms.<sup>22</sup>

The non-proportional nature of the representation of citizens in the US Senate was not central to the argument, and was of course included primarily to secure the support of the smaller states, but the indirect selection of senators by state legislatures for overlapping six-year terms was. If the senators voted against a proposal that had excited the momentary

passions of the electorate, all members of the House of Representatives would have to confront the wrath of the voters in less than two years. Only a third of the Senate would face re-election in such a short time interval. Further, the wrath of the electorate would be filtered through the elected state legislatures charged at the time with electing US senators.

If this logic proved compelling in justifying the original procedures for selecting the US Senate, then the British House of Lords might be considered as an even more effective check on the passions of the populace, for most of its members are not chosen by the citizens at all, and all are Lords for life. The risk inherent in granting veto authority to a body with such independence stems from the possibility of it not only blocking the “temporary errors” of an impassioned citizenry but thwarting with equal impunity well-conceived proposals that could advance the general welfare. Over time, the latter prospect has come to be viewed as the greater risk. The US Senate has for the past century or so been directly elected by the citizenry and the House of Lords has lost virtually all of its authority to block acts of the British Parliament.

Nevertheless, bicameralism as such, without the least palatable undemocratic extensions, continues to be regarded by constitutional economists and others as an appropriate institutional vehicle for limiting the scope for actions that favor narrow interests, mitigating the impact of electoral cycles and enhancing the representation of different interests. The analytical claim with respect to the challenge posed by narrow interests has

technical underpinnings. These can be illustrated by constructing a rectangle with population distributed uniformly across it. The Horizontal House is established by electing one member from each of  $n$  geographic districts, which are formed by  $n - 1$  equidistant horizontal lines. The Vertical House is established by electing one member from each of  $m$  geographic districts, which are formed by  $m - 1$  equidistant vertical lines (Figure 1).

*(Insert Figure 1 about here)*

If both houses employ the simple majority rule, and the approval of the each is required for a bill to pass, then coalitions of a least  $(n/2 + 0.5)$  Horizontal Representatives and  $(m/2 + 0.5)$  Vertical Representatives are required to pass a bill. If it is assumed that the representatives of the first  $(n/2 + 0.5)$  district from the top and from the first  $(m/2 + 0.5)$  district from the left form coalitions (i.e., the squares with diagonals), then the representatives of slightly more than 75 percent of the population have to agree on a bill for it to pass. While with a unicameral legislature either the North could impose costs on the South, or the West on the East, both the North and the West must concur with a bicameral legislature when the lines are drawn orthogonally to one another. As long as this pattern holds, bicameralism thus raises the effective majority required to pass legislation over that needed under the same voting rule with a unicameral legislature.

Bicameralism may also reduce or even eliminate the likelihood of electoral cycles.<sup>23</sup> Again, the argument rests on technical foundations. Assume, for example, a



two-dimensional issue space, as in Figure 2. Voter indifference curves are concentric circles around their ideal points. Line  $pp'$  divides the set of ideal points with  $m$  to the left of  $pp'$  and  $n$  to the right. For every point like  $z$  to the right of  $pp'$  there is a point  $a$  at the intersection of  $pp'$  and the perpendicular from  $z$ , which all  $m$  voters on the left prefer to  $z$ . Similarly, points like  $w$  to the left of  $pp'$  are dominated in the eyes of the  $m$  voters on the right by points like  $w'$ . If separate legislatures are established with voters to the left of  $pp'$  represented in one, and those to right in the other,  $pp'$  becomes a Pareto set for the two disjoint groups (i.e., it is impossible to find an alternative pattern that would make one party "better off" without making the other "worse off"), and some point along it can be agreed by the two houses. This configuration is likely to produce stable outcomes over time.

*(Insert Figure 2 about here)*

The claim regarding the representation of different interests is perhaps the most compelling from a Hong Kong perspective, given the territory's high degree of political fragmentation.<sup>24</sup> The legislature is normally viewed as an institution for representing the preferences of citizens with respect to those public good and prisoners' dilemma-type (where the parties have an incentive to act "selfishly") issues in which all individuals can be better off. In this context, it is information about the interests that individuals have in common that is sought, and a unicameral legislature is all that is required for that purpose. But one can think of the people as having quite different sets of interests, as is currently the

case in Hong Kong, and bicameralism as an institutional mechanism for satisfying them.

A two-tier legislative structure has traditionally served as a vehicle for maintaining the political supremacy and preserving the interests of the upper class. Only patricians could be members of the Roman Senate. When the House of Lords played an effective role in the British parliamentary system it was primarily to protect the British aristocracy from the “common folk” represented increasingly over time in the appropriately named House of Commons. With the House of Lords as a model, Gouverneur Morris, and to some extent James Madison, sought to have the aristocracy directly represented in the US Senate.

No sophisticated theory supporting institutional configurations conducive to the promotion of deliberation and temperance accounted for these efforts. The upper house was to safeguard the property rights of the rich against encroachments by the masses. As the republican form of government replaced the unchallenged rule of the aristocracy, bicameralism emerged as a compromise featuring power sharing between the upper class and the commoners. As such, it constituted a half-way house between a government in which sovereignty lies with the aristocracy, and one in which it lies with the people.

Today, the notion that a particular class should be represented in one body and everyone else in another is considered to be fundamentally at variance with the inherently egalitarian foundations of democracy. For this reason, the tendency has been for economically-based forms of bicameralism to be replaced over time by unicameralism (e.g.,

Denmark, Sweden), and for the upper house of the traditional variety to fade into oblivion (e.g., Canada, the United Kingdom). The concept of a bicameral legislature is currently linked almost exclusively with strategies aimed at advancing geographic and corporatist interests.<sup>25</sup>

Germany is an example of a country committed to bicameralism on geographic grounds. Representatives are chosen for the Bundestag from both a national electoral district and separate geographic districts in a way that essentially produces a multiparty legislature in which voters across the nation are represented roughly in proportion to the parties for which they voted. In the Bundesrat each of the regional governments (Lander) is represented, with each Land obtaining three to five votes depending on the size of its population. The Bundesrat does not address all the legislative initiatives examined the Bundestag. Rather, it votes on legislation related to programs that must be administered by the Lander, or which otherwise has important geographic ramifications. The corollary is that the Bundesrat plays a pivotal role in preserving the decentralized nature of Germany's federal system in the face of centripetal forces propelling it in the opposite direction.<sup>26</sup>

Corporatist representation focuses on functional interests (capital, labor, the professions, etc.). The source of income, broadly defined, is the key factor in the equation here, but without the strong class connotations found in pre-modern contexts. It should also be noted that membership in the "representational monopolies" that are the centerpiece of

the system is involuntary. Although functional groups, notably capital and labor, often have conflicting interests, their positions tend to converge when matters concerning the growth of national income and its distribution (at least the variability of the individual shares) are confronted. Indeed, it is these positive-sum-game themes that, perhaps surprisingly, have largely dominated the corporatist agenda.<sup>27</sup>

Several studies have endeavored to quantify the impact of corporatism on economic and political performance. Schmitter's assessment of the relationship between corporatism and political stability<sup>28</sup> and Schmidt's examination of the link between corporatism and economic performance<sup>29</sup> are deemed to be particularly illuminating. Schmitter has explored two dimensions of political instability: (1) unruliness, which consists of antigovernmental demonstrations, armed attacks on governmental institutions, attempted and actual assassinations, political strikes, etc., and (2) unstableness, which combines changes in the prime minister and major cabinet positions, changes in the degree of fractionalization in the parliament, the narrowness of the government's margin of seats in the parliament and other measures of parliamentary instability. Schmidt has conceptualized economic performance in terms of standard indicators such as the fiscal balance, inflation, output growth and unemployment.

Both studies lend ample support to the notion that corporatism is associated with better performance across the politico-economic spectrum (parliamentary stability being a

possible exception to the norm) than alternative modes of democratic representation. It is legitimate to infer on this basis that corporatist structures allow the *common* interests of functional groups to be channeled and addressed more effectively, leading consequently to superior macroeconomic outcomes. Further, because the interests of key functional groups are adequately expressed and satisfied in corporatist settings, levels of public discontent are lower, and so too are political protest and violence (unruliness, but not necessarily unstableness). The size of government's parliamentary majority and its ability to maintain it over time (i.e., unstableness) do not impinge materially on economic performance since the key decisions affecting economic progress, over the business cycle and in the long run, are made outside the confines of the parliamentary system.

The performance-enhancing features of corporatism, which apparently come into play in certain circumstances, should not obscure the fact that it is not a universal panacea (the existence of cases which do not conform to the pattern implies that it may not be the right constitutional mechanism for every country grappling with the challenge of promoting prosperity and stability in a fluid and polarized politico-economic environment). More importantly, from a Hong Kong standpoint, this institutional framework has a number of problematic characteristics which need to be addressed in order to render it normatively acceptable. Thus, because corporatist structures are the product of historical evolution, rather than democratically-inspired deliberate policy design, they tend to be

unrepresentative (according better access to the political arena to some organized groups than others).<sup>30</sup>

It follows that, if one were to embrace corporatism in its modern form, one would go to great lengths to ensure proper representation for all citizens. In Austria, the archetypal corporatist state, every qualified individual *must* be a member of at least one functional group (chamber) and can be a member of more than one.<sup>31</sup> Another troublesome feature of traditional-style corporatism has been the involuntary nature of group membership and the undemocratic character of group representational procedures. Some degree of involuntariness is inevitable in this context. For example, medical doctors cannot be free to join either the association of physicians or the association of dairy farmers, unless they also happen to breed cows.

There is no reason why such associations could not adopt democratic procedures for selecting leaders and taking positions on strategic issues, however. Here the state, and ideally the constitution, could play a constructive role guaranteeing organizational openness and transparency. Once these principles are endorsed, it should not prove overly difficult to design a set of institutions capable of accomplishing in a more formal and more legitimate way what corporatism at its best seems to achieve. Provision would have to be made to ensure that all citizens are represented, that the representation process is democratic and that the corporatist agenda is strictly limited to those issues whose resolution could possibly

benefit all members of the community. The Hong Kong political system is already to some extent structured along functional lines, albeit in a rather haphazard fashion, and the transition to bicameralism of the corporatist variety should be relatively smooth, as well as broadly consistent with established societal goals.<sup>32</sup>

It is important to emphasize that constitutional economists favor, where appropriate, a second chamber that focuses exclusively on a set of distinct and well-defined issues, rather than one that materially constrains its first counterpart. Their ideas in this respect broadly correspond to Musgrave's tripartite division of the work of government into an Allocation Branch, a Distribution Branch and a Stabilisation Branch.<sup>33</sup> The purpose of the Corporatist chamber is to contribute mostly to economic growth and stability (stabilization in the broad sense of the term). Allocation, or the provision of goods and services via public channels, is the responsibility of the first chamber and distribution could ideally be addressed through innovative, special-type constitutional mechanisms.<sup>34</sup> By establishing such clear demarcation lines, it should be possible to enhance the appeal of corporatism to key segments of Hong Kong society.

This point is of considerable significance and it must be properly highlighted, rather than relegated to the analytical periphery, for conversationalism to gain any momentum in the local political context. As indicated, because of the historical backdrop, bicameralism inevitably conjures up images of class domination. One component of the structure is

normally designated as the “upper house” and the other as the “lower house,” and even where that is not formally the case, differentiation along such hierarchical lines is difficult to avoid in practice. It is thus essential to stress, repeatedly if need be, that a Corporatist chamber may function only parallel to the Democratically-elected one in a modern social setting, and very selectively so. Certainly, the notion of traditional-style veto power would not be entertained under any circumstances. On the contrary, it is now common for a Corporatist chamber to operate within a distinctly narrow legislative space.

### **Conclusion**

A high standard of living is enjoyed mostly by countries that have embraced democratic principles without any qualifications. Asia offers some exceptions to the rule, the city-state of Singapore and the Hong Kong Special Administrative Region (HKSAR) being notable examples. The latter is progressing towards universal franchise, in one form or another, but the pace is viewed as decidedly slow by some and far too fast by others. This has spawned sharp disagreements regarding the direction of constitutional change and an overwhelming sense of policy paralysis. No viable proposals have surfaced as to how to break the impasse and ensure orderly evolution towards representative, transparent and accountable government.

Given the nature of the politico-economic environment, the solution may well lie in a



modern-style bicameral legislature, embodying the concept of corporatism as selectively advanced by contemporary constitutional economists. At the practical level, this requires an acknowledgement on the part of the advocates of rapid constitutional change that there are different routes to democracy. The academic literature lends considerable support to this suggestion. Solid empirical evidence to that effect can be found in the seminal work of Dahl,<sup>35</sup> Lijphart,<sup>36</sup> Putnam,<sup>37</sup> and Linz.<sup>38</sup> Even if Hong Kong ultimately chooses not to follow the path recommended in this article, confronting the constitutional challenge in the manner proposed here might enable the opposing camps to move more gently, systematically and equitably towards the goal of an open, vibrant and stable political system.

One should not underestimate the degree of ideological polarization in the territory and the emotional intensity displayed on both sides of the political divide. This reflects the build-up of tension in recent years, due largely to policy rigidity and the sense of alienation that it begets, which is reinforced by the long separation from the mainland, and the cultural differences and identity clashes to which it gives rise.<sup>39</sup> The positions that the opposing camps hold may thus be "non-negotiable" and the institutional adjustments proposed here may be viewed by them as unattractive, both in terms of their normative underpinnings and practical implications.

Pro-democracy activists may also believe that time is on their side and they should not

settle for structural configurations that they deem "sub-optimal." This may well prove to be a valid assumption from a long-term perspective, but the post-1997 experience suggests that unqualified resistance may turn out to be a costly strategy from a medium-term standpoint. Endless confrontation has assumed the form of a "prisoner's dilemma" with no relief in sight.<sup>40</sup> Moreover, while Hong Kong has embraced corporatism with apparently no tangible political benefits, it has arguably not approached the task thoroughly and fairly, and it would be inappropriate to portray the experiment as a "failure" at such an early stage of constitutional development.

Indeed, the misgivings expressed about any dilution of representative government as traditionally conceived may have deeper intellectual than empirical roots. The advocates of universal franchise in Hong Kong are strongly wedded to the contractual model of constitutional design and the notions of political equality espoused compellingly by Locke and Rawls.<sup>41</sup> Paradoxically, their adversaries also qualify as contractualists, albeit of an unmistakably different variety. For the mainland protagonists in this political tug-of-war and their local allies, contracts are normally imposed in a top-down fashion, rather than negotiated freely, particularly if the subject is one of a strategic nature. They are also geared to promoting harmony between state and individual interests.<sup>42</sup>

On the face of it, given the diametrically opposed intellectual traditions driving the two sides in this unproductive "game of chicken,"<sup>43</sup> bridging the gap would appear to be an

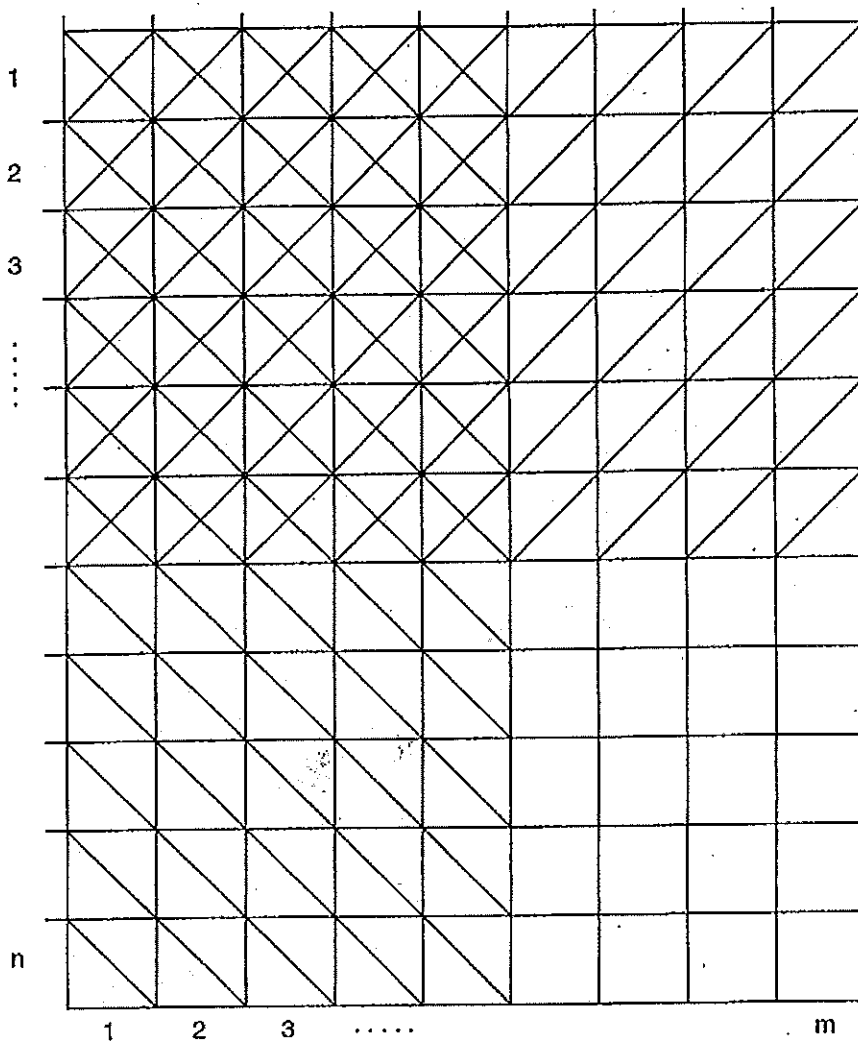
elusive goal, whatever the merits of a compromise and the empirical foundations upon which it rests. The fragility of the Basic Law—a less than perfect “contract,” hardly the product of a democratic bargain and tinkered with opportunistically (via frequent interpretations/reinterpretations by the Standing Committee of the National People’s Congress in Beijing)—lends some support to the argument.<sup>44</sup> One can readily understand the passion and frustration of those who advance it consistently and persistently.

Be that as it may, this is not a clear-cut case. There is evidence of pragmatism and even “learning-by-doing” on the part of China, both in the mainland and in Hong Kong.<sup>45</sup> It may tolerate a faster progress towards representative government, provided it takes place within an institutional framework conducive to “prosperity and stability,” at home as well as in the capitalist enclave previously controlled by a foreign power. By placing bicameralism effectively on the constitutional agenda, the pro-democracy camp may be able to sow the seeds of conversationalism and fulfill, albeit not completely, its aspirations in the process. There is reason to believe that the movement is selectively open to the idea of dialogue on broadly similar terms.<sup>46</sup>

We stop short of offering concrete ideas regarding implementation. This is not the purpose of the present article and the challenge of dealing with the fine details of the institutional architecture should be left to a task force representing a wide range of political interests, although academic contributions would doubtless be helpful and well-received.<sup>47</sup>

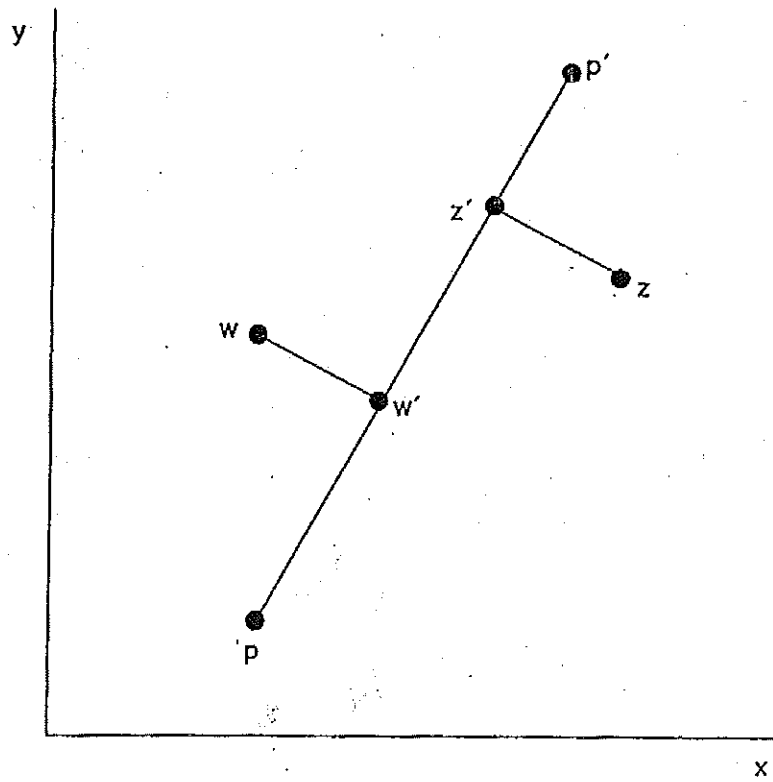
The blueprint that emerges should preferably be the result of ongoing exchanges between multiple parties bound to each other through a commitment to proceed in a manner reflecting the principles of conversationalism. Our objective is merely to provide an analytical basis for such an endeavor and hopefully furnish the catalyst that might galvanize them into action.

**FIGURE 1** Implications of bicameralism



SOURCE: Adapted from Mueller, *Constitutional Democracy*, p. 194.

**FIGURE 2** Possible equilibrium induced by bicameralism



Source: Adapted from: Mueller, *Constitutional Democracy*, p. 196.

## Notes

1. For more details see W. Overholt, "Hong Kong," *Journal of Democracy*, vol. 12, no. 4 (October, 2001), 3–18; M. Mushkat and R. Mushkat, "The Political Economy of Constitutional Reform in an Externally Constrained Environment," *Journal of Malaysian and Comparative Law*, vol. 30, nos. 1 and 2 (2003), 15–36.
2. See D. Castiglione, "Contracts and Constitutions," in *Democracy and Constitutional Culture in the Union of Europe*, ed. R. Bellamy, V. Bufacchi, and D. Castiglione, (London: London Foundation Press, 1995), 59–79.
3. See S. Chambers, *Reasonable Democracy* (Ithaca: Cornell University Press, 1996), chapters 1, 5–7, 11–14; S. Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis," *Politics and Society*, vol. 26, no. 1 (March, 1998), 143–172.
4. See J. Locke, *Two Treatises of Government* (New York: New American Library, 1965) and J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).
5. For a more detailed analysis, see Mushkat and Mushkat, "The Political Economy of Constitutional Reform in an Externally-Constrained Environment," 15–36; Y. Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 1999); J. M. M. Chan, H. L. Fu, and Y. Ghai, *Hong Kong's Constitutional Debate* (Hong Kong: Hong Kong University Press, 2000); M. Mushkat and R. Mushkat, "The Political Economy of Constitutional Conflict in Hong Kong," *Tilburg Foreign Law Review*, vol. 11, no. 4 (2004), 756–781.
6. See Chambers, *Reasonable Democracy*, chapters 1, 5–7, 11–14; and Chambers, "Contract or Conversation?" 143–172.
7. Ibid.
8. See J. Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 1990); S. K. White, *The Recent Work of J. Habermas* (Cambridge: Cambridge University Press, 1991); and J. Habermas, *Justification and Application* (Cambridge: Cambridge University Press, 1993).
9. See for example Chambers, *Reasonable Democracy*; and Chambers, "Contract or Conversation?" 143–172.

10. See I. Kant, *Groundwork for the Metaphysics of Morals* (New York: Harper Terchbooks, 1964).
11. See J. Bohman and W. Rehg, *Deliberative Democracy* (Cambridge: MIT Press, 1997); and D. Estlund, *Democracy* (Oxford: Blackwell, 2002).
12. For an overview see R. A. Musgrave, *The Theory of Public Finance* (New York: McGraw-Hill, 1959); and R. A. Musgrave and P. B. Musgrave, *Public Finance in Theory and Practice* (New York: McGraw-Hill, 1989).
13. This and the following section of the paper draw on the following four works: Mushkat and Mushkat, "The Political Economy of Constitutional Reform in an Externally-Constrained Environment," 15–36; W. C. Mitchell and R. T. Simmons, *Beyond Politics* (Boulder: Westview, 1994); D. P. Rachter and R. E. Wagner, *Limiting Leviathan* (Cheltenham: Elgar, 1999); and D. L. Weimer and A. R. Vining, *Policy Analysis* (Upper Saddle River: Pearson, 2004).
14. See W. H. Riker, *Liberalism Against Populism* (San Francisco: Freeman, 1982), chapter 9.
15. For more information, see the website of its Social Sciences Research Centre ([www.ssrc.hku.hk](http://www.ssrc.hku.hk)).
16. For more information, see the website of its Hong Kong Transition Project ([www.hkbu.edu.hk](http://www.hkbu.edu.hk)).
17. See K. Cheek-Milby, *A Legislature Comes of Age* (Hong Kong: Oxford University Press, 1995), chapter 7.
18. For more information, see the Legislative Council website ([www.legco.gov.hk](http://www.legco.gov.hk)).
19. See I. Scott and J. P. Burns, eds., *The Hong Kong Civil Service* (Hong Kong: Oxford University Press, 1988); and J. P. Burns, *Government Capacity and the Hong Kong Civil Service* (Hong Kong: Oxford University Press, 2004).
20. For a more detailed review see Mushkat and Mushkat, "The Political Economy of Constitutional Reform in an Externally-Constrained Environment," 15–36.
21. Ibid.



22. See C. Mueller, *Constitutional Democracy* (New York: Oxford University Press, 1996), chapter 13.
23. Ibid.
24. See Overholt, "Democracy," 3–18.
25. See Mueller, *Constitutional Democracy*, chapter 13.
26. This institutional configuration is discussed from a comparative perspective in R. C. Macridis, *Modern Political Systems* (Englewood Cliffs: Prentice-Hall, 1990), Introduction and Part IV.
27. See Mueller, *Constitutional Democracy*, chapter 13.
28. See P. C. Schmitter, "Interest Intermediation and Regime Governability in Contemporary Western Europe," in *Organizing Interests in Western Europe*, ed. S. Berger, (Cambridge: Cambridge University Press, 1981), 287–327.
29. See M. G. Schmidt, "Does Corporatism Matter?" in *Patterns of Corporatist Policy Making*, ed. G. Lehmbruch and P. C. Schmitter, (London: Sage, 1982), 237–258.
30. See Meller, *Constitutional Democracy*, chapter 13.
31. See W. Grant, *The Political Economy of Corporatism* (New York: St. Martin's Press, 1985), Introduction and chapter 4.
32. See Overholt, "Democracy," 3–18; and N. J. Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 1995).
33. See Musgrave, *The Theory of Public Finance*, chapter 1.
34. See Mueller, *Constitutional Economics*, chapter 16.
35. See R. A. Dahl, *Polyarchy* (New Haven: Yale University Press, 1971).
36. See A. Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977).
37. See R. Putnam, *Making Democracy Work* (Princeton: Princeton University Press,

1993).

38. See J. Linz, "Presidential or Parliamentary Democracy," in *The Failure of Presidential Democracy*, ed. J. Linz and A. Valenzuela, (Baltimore: Johns Hopkins University Press, 1994), 3–87.
39. See S. H. Lo, *Governing Hong Kong* (New York: Nova Science, 2002), Introduction and chapters 2, 6–7.
40. See Mushkat and Mushkat, "The Political Economy of Constitutional Conflict in Hong Kong," 756–781.
41. See Ghai, *Hong Kong's New Constitutional Order*; Chan, Fu, and Ghai, *Hong Kong's Constitutional Debate*; and M. Davis, *Constitutional Confrontation in Hong Kong* (London: Macmillan, 1989).
42. See A. J. Nathan, *Chinese Democracy* (New York: Knopf, 1985); A. J. Nathan, R. R. Edwards, and L. Henkin, *Human Rights in Contemporary China* (New York: Columbia University Press, 1986); and M. Davis, *Human Rights in Contemporary China* (Oxford: Oxford University Press, 1995).
43. See Mushkat and Mushkat, "The Political Economy of Constitutional Conflict in Hong Kong," 756–781.
44. See Ghai, *Hong Kong's New Constitutional Order*; Chan, Fu, and Ghai, *Hong Kong's Constitutional Debate*; Lo, *Governing Hong Kong*; Mushkat and Mushkat, "The Political Economy of Constitutional Conflict in Hong Kong," 756–781; I. Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Oxford: Oxford University Press, 1989), chapter 7.
45. See L. W. Pye, "An Overview of 50 Years of the People's Republic of China," *China Quarterly* 159 (September, 1999), 569–579; M. Mushkat and R. Mushkat, "The Political Economy of International Legal Compliance," *University of California Davis Journal of International Law and Policy* 10 (Spring, 2004), 229–246.
46. The Hong Kong Democratic Foundation website ([www.hkdf.org](http://www.hkdf.org)) features a number of speeches by Professor H. C. Kuan of the Department of Government and Public Administration at the Chinese University of Hong Kong, which address in the same vein themes similar to those explored in this article.

47. For example see S. H. Lo and J. Y. S. Cheng, *Green Paper* (Hong Kong: Power for Democracy and the Hong Kong Democratic Foundation, 2003).