NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 7 • NUMBER 2 • DECEMBER 2009

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2009

The mode of citation of this journal is: (2009) 7 NZJPIL (page)

The previous issue of this journal is volume 7 number 1, June 2009

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

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THE ECONOMIC DIMENSION OF HONG KONG'S BASIC LAW: AN ANALYTICAL OVERVIEW

Miron Mushkat* and Roda Mushkat**

Constitutional development in the dynamic and resilient, but potentially vulnerable and prone to occasional bouts of uncertainty, capitalist enclave on China's southern tip continues to attract strong scholarly attention. Yet, paradoxically given the crucial contribution of industry and commerce to the prosperity and stability of Hong Kong, the subject is explored almost exclusively from a traditional legal perspective. Constitutional economics, a locally overlooked conceptual instrument, may enhance selectively the understanding of the complex Basic Law process, assist in diagnosing challenging problems to which it gives rise and offer concrete ideas for pursuing productively constitutional reforms.

I INTRODUCTION

Its adverse cultural connotations notwithstanding, colonial dependence was not without tangible benefits for Hong Kong. Economic institutions were structured along distinctly libertarian lines, according primacy to essentially autonomous market forces and symbolically consigning the government to a refereeing/facilitating role, albeit one performed with greater vigour than that envisaged by Adam Smith and his intellectual disciples. Wherever possible, policy makers consistently followed simple and transparent rules, eschewing situational opportunism and extensive reliance on strategic discretion. Regime changes were infrequent, allowing private agents to operate in a stable macro and micro environment, characterised by low uncertainty (other than that emanating from market sources), and thus incur modest risks and transaction costs. The economy

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had displayed remarkable dynamism and resilience as a consequence, in the face of formidable challenges on the domestic and external fronts.

Colonial control is clearly incompatible with genuine democratic participation. British administration had nevertheless been benevolent on the whole, particularly by People's Republic of China (PRC) standards. Perhaps more importantly, in this context, and again unlike across the border, the political centre in Hong Kong functioned in an inhibited (as distinct from uninhibited) fashion throughout the colonial era, selectively reflecting institutional constraints prevailing in the United Kingdom and the modus operandi of the local (but, to all intents and purposes, British) bureaucracy. Liberal-style political reforms were introduced hesitantly and in a piecemeal manner, for obvious reasons. Hong Kong had evolved into an economic powerhouse, yet it had failed to progress beyond metaphorical infancy in other respects. Be that as it may, the erstwhile colonial power had bequeathed the territory a robust form of the rule of law (as distinct from the rule of man), coupled with a relatively open society.

The not universally expected, but ultimately inevitable, resumption of Chinese sovereignty in 1997 was thought to have the potential to disrupt severely this highly effective, albeit not altogether palatable, politico-economic configuration. The burden of maladjustment would fall most heavily on the Hong Kong people who might suffer a marked erosion of living standards and a significant loss of individual liberties. Other parties would not necessarily escape unscathed, however. The United Kingdom might emerge as embarrassingly impotent and callously reckless. China would be denied a wide range of material advantages accruing through the pursuit of its open-door policy via Hong Kong. Its failure to sustain prosperity and stability in the former British colony could also reinforce Taiwanese determination not to seek rapprochement with the mainland. Given Hong Kong's position as a vital regional and global commercial centre, negative economic repercussions might manifest themselves elsewhere in Asia–Pacific and beyond.

There had been no concerted international efforts to prevent this scenario from materialising. Parties not directly involved in the unfolding drama had opted, sensibly perhaps from a tactical perspective, to remain on the sidelines. The two principal protagonists, the United Kingdom and China, had nevertheless gone to considerable lengths to shore up local confidence and preserve the institutional status quo in Hong Kong. The principal instruments employed to this end were legal in nature. The Sino-British Joint Declaration (Joint Declaration), a combined initiative, provided a credible international framework, although neither multilateral nor watertight. The Basic Law, a product of a Chinese-Hong Kong cooperative endeavour, converted its essence into a palpable constitutional mechanism, if not an unbreakable one. Their limitations notwithstanding, these two legal tools serve as a viable foundation of the post 1997 politico-economic order, which does not diverge substantially from its predecessor.

Both documents have attracted much scholarly attention during the various phases of their life cycle, including drafting. The interest in the Joint Declaration, which has always tended to be more academic than practical, has diminished over time, without waning completely. The intensity of

research devoted to the Basic Law has naturally ebbed and flowed, but it has continued to be fundamentally strong. Constitutional law inevitably impinges to a far greater extent on societal dynamics than its international counterpart, at least in normal circumstances, and this presumably accounts for the different patterns observed – albeit additional factors are apparently at work (for example, Hong Kong's status as a Special Administrative Region of the PRC rather than a fully-fledged sovereign entity). Indeed, the study of the Basic Law is currently experiencing a veritable revival, partly due to a deliberate attempt to take stock of constitutional developments a decade following the transition from British to Chinese rule.

The scholarly explorations undertaken have proceeded along multiple paths. Several issues have been addressed, in depth, and from a wide array of conceptual and normative angles. That said, the mode of inquiry relied upon has been almost exclusively of the traditional legal variety. There has been virtually no incorporation of social science insights, either by legal researchers or by scholars operating in other academic fields. A notable exception to this pattern is a recent dissection of the constitutional game in Hong Kong.[1] The author has blended the legal and political paradigms in order to place constitutional development in the territory in a broader and more fluid theoretical context. This type of approach, however, remains a methodological outlier. The Basic Law literature continues to expand quantitatively and qualitatively, without paying close heed to analytical and policy concerns that loom large on the social science agenda and without turning decisively in an interdisciplinary direction.

The absence of a meaningful economic component in the constitutional picture painted by legal researchers (and, worse still, not painted at all by economists) is especially noteworthy. The Basic Law is a product of a grand bargain, or an exchange in economic parlance. It is also an institutional vehicle whose principal aim is to solidify the pre 1997 economic status quo in Hong Kong, as acknowledged by legal scholars following an essentially traditional route, even if in a sophisticated fashion.[2] Constitutional evolution may be viewed in similar terms to its formation (that is, as a process of economic exchange). Moreover, constitutions have tangible economic consequences, both intended and unintended. Their economic facets thus merit proper examination in general and in the politically unique Hong Kong context in particular. The purpose of this article is to narrow a gap in the Basic Law literature by systematically highlighting those facets. The discussion is grounded in relevant theoretical work in the field of constitutional economics, which is surveyed first.

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1 See Benny YT Tai "Basic Law, Basic Politics: The Constitutional Game of Hong Kong" (2007) HKLJ 503.

2 See Yash Ghai *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (2 ed, Hong Kong University Press, Hong Kong, 1999) 231-244.

II CONCEPTUAL UNDERPINNINGS

Constitutional economics is not a rigidly delineated academic sub-discipline. It cannot always be neatly separated from public choice, which extends the logic of microeconomics into the political arena, albeit not in a mechanical manner. It also cannot in all circumstances be unambiguously set apart from the new institutional economics, whose primary focus is on the development of institutions as constraints on human behaviour. Adhering carefully to a narrowly defined, constitutional economics script is not beyond the realm of possibility, but it may pose difficulties in practice. Giving oneself some leeway to cross boundaries, when necessary and appropriate, may be a realistic and productive course of action, provided key demarcation lines do not become overly blurred as a result.

One analytical boundary that may have to be respected, pending full (as distinct from partial) synthesis, is that between constitutional economics (including, if need be, public choice and mainstream new institutional economics) and discourse theory. The latter may also be regarded as a variant of new institutional economics, albeit one lying outside the conceptual mainstream, and is referred to as deliberative institutional economics by researchers who view it as such.[3] Unlike constitutional economics, which is concerned with *homo economicus*, or an economising agent, it focuses on *homo communicans*, or a communicating agent. The two paradigms may be integrated by invoking the notion of *homo rationalis communicans*, or an agent which both economises/rationalises and communicates, but this remains a challenging proposition in theory as well as in practice.[4]

Homo communicans engages in social discourse, or pursues multi-party agreements through deliberation, not necessarily uneconomically or irrationally. What ensues is a social learning process in the course of which preferences and meta-preferences (that is, preferences regarding preferences) undergo a transformation. Dynamic interaction is predicated on socially acceptable, but not static, rules of discourse. Participants attach importance to the entire process and to these rules (hence the rather unconventional idea, by traditional economic standards, of procedural utility; economists typically assume that utility is derived exclusively from outcomes). If social deliberation follows this pattern, the consensus that emerges (effectively the outcome) is accorded legitimacy and is likely to enjoy solid support and elicit strong compliance.[5]

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3 Anne van Aaken "Deliberative Institutional Economics, or Does Homo Economicus Argue? A Proposal for Combining New Institutional Economics with Discourse Theory" in Anne van Aaken, Christian List and Christoph Leutege (eds) *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy* (Ashgate, Aldershot, 2004) 3-32.

4 Ibid.

5 Ibid.

Deliberative institutional economics may not occupy a mainstream position in the analytical domain to which it belongs. It nevertheless encompasses a wide range of social phenomena. Court proceedings, for example, reflect closely the workings of this paradigm in that they revolve around a discourse-oriented process which does not merely provide the parties with the right to argue their case but also calls for deliberation and impartiality on the part of the judge and requires the court to substantiate its findings (principle of fair trial). This procedural structure enhances the legitimacy of judicial rulings and makes their acceptance a high-probability event.[6] Traditional legal writings on Hong Kong's Basic Law implicitly incorporate key dimensions of that doubtlessly relevant conceptual framework, without having recourse to the underlying economic logic.

It should be emphasised that there has been no paradigm shift. Deliberative institutional economics complements its constitutional counterpart rather than supersedes it. The latter is well-entrenched – indeed, it is still gaining ground – and possesses a number of innovative characteristics. *Homo economicus*, a crucial import from neo-classical microeconomics, dominates its own version of social discourse. This metaphorical creature is a product of methodological individualism whose proponents posit that a person endowed with rationality and equipped with constant preferences will seek to maximise (individual) utility in conditions of scarcity. Constitutional economists, however, display greater flexibility than their neo-classical predecessors in handling pivotal components of that proposition. When appropriate, they are willing to entertain the possibility of bounded rationality and relax the constant preferences assumption. Perhaps more importantly, in this context, they do not confine themselves to the dissection of choices within a given set of rules (that is, assert that rules need not be regarded as exogenously given) and proceed liberally to address the choice of (constitutional) rules.

Like the larger theoretical corpus in which it is embedded, constitutional economics has both positive (explanatory) and normative (evaluative) facets. One of the principal aims of the positive side is to provide a rigorous account of constitutional formation and evolution. The initial impetus for conceptual explorations directed towards that end was furnished by scholars seeking to explain systematically those processes from a strictly contractarian perspective (that is, within an analytical framework rooted in social contract theories of the State – developed by economists, lawyers, philosophers, political scientist and sociologists). The contractarian orientation generally persists but in a less homogenous and dominant form than was originally the case.

Researchers who embrace this approach typically portray the constitution as a social contract. To the extent that government is an integral part of the picture (in some models it is not or does not feature prominently),[7] the constitution is the culmination of an agreement between the government

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6 Ibid, 4. See also James G March and James P Olsen *Democratic Governance* (Free Press, New York, 1995).

7 For example see James M Buchanan and Gordon Tullock *The Calculus of Consent* (University of Michigan Presss, Ann Arbor, 1962); John Rawls *A Theory of Justice* (Belknap, Cambridge, 1971); James M Buchanan *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago University Press, Chicago, 1975)

and its citizens involving the exchange of protection for tribute. By offering protection, the government creates an institutional environment conducive to productive endeavour and in parallel lowers substantially the risk to citizens of having the fruits of that endeavour denied them. Citizens pay tribute to the government in exchange. This payment acts as incentive for the government to protect its citizens, given that they serve as a source of its income. The exchange makes both sides better off. What transpires is similar to an exchange between private individuals (that is, a private contract) but, since the government is a party to the bargain, it is referred to as a social contract.[8]

At a more elementary level, bypassing government, exchange takes place between private individuals who seek a viable institutional alternative to anarchy, or a Hobbesian state of nature in which "every man is Enemy to every man"[9] and whose harsh characteristics render human life "solitary, poor, nasty, brutish and short."[10] A well-defined structure of rights is the upshot (a right is "a claim by a specific individual, which is honoured by other individuals, that some specific treatment is due to him[/her]").[11] It is underpinned by social rules that are crystallised in the course of a bargaining process, propelling the participants to a superior state (social contract, with or without government) to the one from which they choose to emerge (anarchy or conceptual equivalent). The dynamics may lead to a Nozick-style minimal state which observes and enforces the structure of rights[12] or a more powerful institutional configuration.

The principle of unanimity looms large in early-day contractarian versions of constitutional economics. Social or constitutional rules are deemed to be legitimate if rational individuals seeking to maximise utility (can) unanimously embrace them. This strict requirement is anchored in the view that the aggregation of individual utilities, a central tenet of welfare economics (and utilitarianism), is an elusive undertaking because preferences and their intensities cannot be meaningfully observed

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[Buchanan *The Limits of Liberty*]; Geoffrey Brennan and James M Buchanan *The Reason of Rules: Constitutional Political Economy* (Cambridge University Press, Cambridge, 1985); James M Buchanan *Explorations into Constitutional Economics* (Texas A&M University Press, College Station, 1989) [Buchanan *Explorations into Constitutional Economics*]; and Geoffrey Brennan, Hartmut Kliemt and Robert D Tollison (eds) *Methods and Morals in Constituional Economics: Essays in Honor of James M Buchanan* (Springer, Berlin, 2002).

8 For an overview see Christopher Morris (ed) *The Social Contract Theorists: Critical Essays on the Classics* (Rowman & Littlefield, Lanham (MD), 1999). For additional insights see Randall G Holcombe *The Economic Foundations of Government* (Macmillan, Basingstoke, 1994) 41-49.

9 Thomas Hobbes *Leviathan* (EP Dutton, New York, 1950) 104.

10 Ibid.

11 Holcombe, above n 8, 11.

12 See Robert Nozick *Anarchy, State and Utopia* (Basic Books, New York, 1974).

and are thus not comparable on an interpersonal basis.[13] It is also normally stipulated that the social contract/constitution must be the product of voluntary agreement, or that coercion not be relied upon to induce cooperation or adherence.[14] Complex issues arise in this context, due to the inherent challenges of coming to grips with the notion of voluntary choice. Ingenious analytical devices (such as the cost avoidance criterion, which states that the cost of choosing to reject the consensus must not be prohibitively high and man-made) are proposed,[15] but the intellectual uncertainty merely diminishes rather than vanishes.

The quest for social/constitutional unanimity has lost momentum due to the holdout problem, which stems from the fact that an individual could opportunistically refrain from agreeing to a proposal that would benefit everyone, hoping that this tactical posture would compel the group to offer more attractive terms to him or her.[16] One may settle for approximate unanimity or insist that bargaining be done behind a veil of ignorance, as Wicksell[17] and Rawls[18] have respectively suggested, but these are theoretical rather than practical solutions. The difficulties the holdout problem poses are compounded by those engendered by the widespread prevalence of sharp (and legitimate) differences of opinion, which again may not be amenable to practical fine tuning, if the unanimity principle is not realistically whittled down. The issue is distributional in nature, since it might be possible to compensate an individual for costs imposed by the social contract/constitution, yet the matter of fair compensation may not be easily addressed.[19]

The pure theory of economic rights (PTER) has emerged as a practically credible (without necessarily resorting to conceptual dilution) alternative to strict contractarian versions of constitutional economics. It may be viewed as a direct extension of the exchange model of government, whereby protection is offered in exchange for tribute within a constitutional framework. Individuals thus claim rights when they perceive it in their self-interest to do so, and individuals honour the rights of others to make such claims when they perceive it in their self-interest to pursue this course of action. The resulting structure of rights (constitution) is the product of an exchange between self-interested individuals engaged in the process of forging mutually

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13 Buchanan and Tullock, above n 7; Rawls, above n 7; Nozick, above n 7; Buchanan *The Limits of Liberty*, above n 7; Brennan and Buchanan, above n 7; Buchanan *Explorations into Constitutional Economics*, above n 7; Brennan, Kliemt and Tollison, above n 7.

14 For an overview see ibid.

15 For an overview see Viktor J Vanberg *Rules and Choice in Economics* (Routledge, London, 1994).

16 Holcombe, above n 8, 46-48.

17 Knut Wicksell "A New Principle of Just Taxation" in Richard A Musgrave and Alan T Peacock (eds) *Classics in the Theory of Public Finance* (St Martin's Press, New York, 1967) 72-118.

18 Rawls, above n 7.

19 Holcombe, above n 8, 46-48.

beneficial agreements. Not every individual is expected to benefit from every social/constitutional agreement, however. The upshot may be an institutional configuration that lowers the welfare of some individuals who fall outside the consensus.[20]

Paradoxically, individuals may be more inclined to join the social/constitutional mainstream if unanimity is not required. If it is, everybody enjoys veto power, so no one has an incentive to agree. If it is not, then the dissenting individual has the option of either cooperating or staying in the minority. Since cooperating is often less costly than staying in the minority, it is easier to secure unanimous agreement with less-than-unanimous decision rule than if unanimity is required. Those who persist in disagreeing with social/constitutional rules embraced by others in such circumstances, and who are reluctant to choose exit (for example through emigration), need to comply with the mainstream decision.[21] As Hobbes has argued, "because the major part hath by consenting voices declared a Sovareigne; he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else be destroyed by the rest."[22] To elaborate further:[23]

> Governments in the real world and governments in [the PTER] model do not have unanimous approval in anything but the most abstract sense. Yet in most cases there is a general agreement that constitutes a social[/constitutional] contract. Citizens have an ideological commitment … to their countries, and try to work within the system to effect change. The peaceful change in Eastern Europe in 1989 is an example of how governments can be replaced when they lose ideological commitment and the appearance of legitimacy; governments that rule without the general aura of legitimacy – Uganda under Idi Amin might be an example – are rare and usually short-lived.

Given its greater realism and broader scope, the PTER construct may be portrayed as a superior analytical vehicle to the early-day contractarian versions of constitutional economics, but it may inevitably be at a disadvantage in respect of them from a normative perspective. Within this rather elastic framework, there is no presumption of equality in the bargaining process. Individuals have whatever rights they are capable of bargaining for and, in the absence of an effective unanimity rule or a strict requirement that preferences be expressed behind a Rawlsian veil of ignorance, some individuals would be expected in most circumstances to stake claims from a more powerful position than others ("casual observation seems to confirm that higher-income individuals are extended more rights, and those rights are more extensively protected, than lower-income people").[24] It should be

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20 Ibid, 11-31.

21 Ibid, 46-48.

22 Hobbes, above n 9, 147.

23 Holcombe, above n 8, 48.

24 Ibid, 16.

noted however that this is a positive statement and that PTER proponents are by no means averse to making value judgments. Indeed, even in fundamentally empirical contexts, they demonstrate that blatant social exploitation may contain the seeds of its own destruction. For example (in a two person setting):[25]

> One possibility would be for a strong person to enslave the weak one and force the weak person to work for her. The strong person is the residual claimant in this case, but once again the weak person has little incentive to be productive. Slavery will be most productive when slaves can be assigned clearly defined tasks and when shirking is easy to monitor. Slavery obviously will be unproductive in cases where shirking is hard to monitor, but also will be relatively unproductive when productivity requires individuals to make independent decisions about how to allocate resources.

Like inequality, coercion (as distinct from contractarian-style voluntary accord) is an enduring explanatory feature of PTER, without necessarily being condoned or being depicted as a viable long-term management instrument. It is posited that individuals may be coerced into taking a course of action and yet still "agree" with the policy that compels them to take this step ("coercion occurs when a party indicates the willingness to harm another if the other does not do what the coercing party wants").[26] Redistribution via taxation is invoked for illustration purposes. Affluent individuals may wish those less well off to be materially more comfortable but have the incentive to get a "free ride" on the charitable initiatives of others. The corollary is that everyone gains if an accord is struck to allow the government to coerce such individuals into contributing towards its redistributive efforts.[27]

Government is an integral part of the PTER analytical structure, precisely because inequality and coercion are explicitly incorporated into it (early-day contractarian versions of constitutional economics often address the institution rigorously, but separately). In a typical microeconomic environment, individuals are assumed to purchase protection on a competitive basis, yet in this instance the exchange of protection for tribute takes place in a setting characterised by a high degree of market concentration, in that the government is a natural monopoly and, as such, charges monopoly prices for its protective services. It also tends to employ coercion to establish monopolies in other domains of socio-economic activity (for example, redistribution via taxation, mass communication, postal delivery and utilities).[28]

Market domination in the provision of protective and other services allows the government to generate monopoly profits. This, in turn, makes that institutional configuration an attractive

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25 Ibid, 33.

26 Ibid, 161.

27 Ibid, 161-162.

28 Ibid, 37-38, 92-109.

proposition, enticing new entrants. The threat of competition is thus potentially serious, assuming a variety of forms, some more palatable than others (for example, elections versus revolutions or wars). The competitive pressures below or above the surface may prove beneficial for consumers/citizens because they may enable them to exercise choice in a meaningful fashion and may enhance service quality/government accountability. In hypothetical circumstances, intense competition for the right to operate a government monopoly may produce an outcome analogous to that of a free market.[29]

A number of countervailing factors combine to erode possible competitive influences. Incumbency is a powerful force blunting the impact of the widespread desire to enter the political arena with a view to gaining monopoly profits via government channels. In a dictatorship, the means of physical coercion may be employed on a large scale to contain the threat posed by outside competition. Even in a democracy, incumbency confers tangible advantages on those in power and barriers to entry are by no means negligible (indeed, the incumbents are prone to erect new ones).[30] The monopolistic, or quasi-monopolistic, constellation encountered in the public domain is a feature of the institutional environment that constitutional economists highlight for explanatory purposes, but certainly not in a detached manner, for they definitely take it into account when engaging in a quest for offsetting mechanisms within a normative framework.

In such an institutional setting, goal displacement is a common phenomenon. Public service providers (politicians/bureaucrats) often pursue their own interests to the detriment of consumer welfare/collective wellbeing.[31] For their part, grassroots political community members/voters are less motivated to go to considerable lengths to counter this trend than consumers in the marketplace – a single vote is not likely to impinge on electoral outcome so voters have no strong incentive to invest resources in an effort to shape it.[32] For especial interests, on the other hand, much is at stake in the political/bureaucratic arena, as policy decisions may have a crucial effect on their distinct activities. Moreover, special interests are normally well-equipped, that is, possess the resources to influence such decisions. The upshot is that it is not unusual for strategies delivered through public channels to bear the imprint of clearly-defined private interests.[33]

There is considerable empirical evidence to substantiate these theoretical assertions. Most of it has been generated in developed country contexts, but factual support may also be obtained from

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29 Ibid.

30 Ibid.

31 David L Weimer and Aidan R Vining *Policy Analysis: Concepts and Practice* (4 ed, Pearson Education, Upper Saddle River (NJ), 2004) 156-208.

32 Ibid.

33 Ibid.

developing country sources.[34] It is legitimate to argue that, across the entire politico-economic development spectrum, public service providers display pronounced self-orientation, rather than unadulterated public-spiritedness, and that special interests resort in a determined fashion to rent-seeking (using scarce resources to effect group-specific wealth transfers)[35] in order to shift policies in a favourable direction for them.[36] The public strategies adopted consequently deviate from the standard economic model rooted in the notion that the typical policy maker is a social welfare maximiser, bent on and capable of choosing and implementing the optimal programmes for the community as a whole.[37]

Political competition mitigates the adverse repercussions of government monopolistic status, particularly in an environment characterised by low barriers (financial as well as structural) to entry, but it is no panacea. Several institutional features render it inherently difficult to hold public service providers accountable even in a highly competitive political setting. To single out only two problems constituting the tip of a large iceberg, the monitoring of agent (politician/bureaucrat) behaviour by principals (citizens/voters) is a far more challenging undertaking in the public sector than in the private domain; by the same token, government output is much less amenable to quantification than that of private organisations, further complicating the oversight process.[38]

Moreover, intense competitive pressures may undermine policy coherence and reinforce agent opportunism. The loss of focus is the result of a high degree of *ex ante* and *ex post* heterogeneity (the former being the product of diverse preferences regarding what strategies to pursue and the latter reflecting differences with respect to the distribution of the costs and benefits of the actions taken) which is likely to materialise in such circumstances.[39] This may lead to deterioration on a number of policy fronts (notably, collective welfare and political stability). Similarly, keen competition in the public arena may induce agents (bureaucrats as well as politicians, but particularly the latter) to follow strategies mirroring short-term (often their own, for example a desire to maximise re-election prospects) rather than long-term objectives.[40] When engaging in

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34 For an overview see Mwangi S Kimenyi and John Mukum Mbaku (eds) *Institutions and Collective Choice in Developing Countries: Applications of the Theory of Public Choice* (Ashgate, Aldershot, 1999).

35 Anne O Krueger "The Political Economy of the Rent-Seeking Society" (1974) 64 AER 291; and Gordon Tullock *Rent Seeking* (Elgar, Aldershot, 1993).

36 For an overview see Kimenyi and Mbaku, above n 34.

37 Allan Drazen *Political Economy in Macroeconomics* (Princeton University Press, Princeton , 2000) 3-5.

38 Weimer and Vining, above n 31, 156-208.

39 Drazen, above n 37, 9-12.

40 Weimer and Vining, above n 31, 156-208; Georgios E Chortareas "Political Business Cycles: Theory, Evidence and Extensions" in Kimenyi and Mbaku, above n 34, 113-144; Byung Hee Soh "National Elections and Policy Induced Business Cycles: A Historical Perspective on the Literature" in Jac C Heckelman (ed) *Public Choice Economics* (University of Michigan Press, Ann Arbor, 2004) 165-185.

normative institutional design or redesign, constitutional economists thus endeavour to strike a balance between placing effective constraints on government monopoly power and the need to maintain policy decisiveness over an extended time horizon.

It should be noted that, although the constitution as commonly conceived is the principal target of such value-driven pursuits, they are not confined strictly to the process-oriented mechanisms and restrictions included in a country's constitution. Rather, the term refers broadly to "the fundamental and durable procedures and constraints through which laws and public policies are adopted."[41] These may encompass "election laws (which are often not part of the nation's written constitution), the general architecture of government, statements of citizen rights and obligations, the legal system, and formal procedures for reforming these procedures and constraints."[42] The absence of a written constitution and a formal process of amendment thus do not prevent the United Kingdom from enjoying constitutional governance, according to this conception.[43]

Perhaps the most publicly visible normative advocacy, albeit one encountering limited success, by constitutional economists in that wide-ranging institutional space has focused on adjustments to the Bill of Rights or, more ambitiously, the promulgation of an Economic Bill of Rights. Such initiatives are inspired by the perception that, even in vibrant democratic societies, the relevant constitutional safeguards have not fared well in legislatures and, possibly more significantly, the judicial system. An effective Economic Bill of Rights might serve as a powerful legal instrument for the protection of individual rights from encroachments by other parties (monopolistic/quasi-monopolistic rulers as well as fellow citizens). The attention normally centres on rights pertaining to property (who may acquire it, how it will be administered and how it will be disposed of), although the issue is not property rights per se, but the rights of individuals (and organisations) to control property uses.[44]

Other conspicuous proposals from that source have also attracted considerable interest and have been implemented selectively in some jurisdictions. Particularly noteworthy in this respect have been suggestions for citizen-initiated legislation, easily enacted referenda, term limitations for politicians, recall of officials (as witnessed a few years ago in California), a high degree of political disclosure (in the executive, legislative and bureaucratic domains) and flat/decentralised government structures (often featuring a shift in the role of the public sector from a multi-purpose provider to a

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41 Roger D Congleton and Birgitta Swedenborg "Introduction: Rational Choice Politics and Political Constitutions" in Roger D Congleton and Birgitta Swedenborg (eds) *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (MIT Press, Cambridge, 2006) 2.

42 Ibid.

43 Ibid.

44 Miron Mushkat and Roda Mushkat "Conversationalism, Constitutional Economics and Bicameralism: Strategies for Political Reform in Hong Kong" (2005) 13 Asian Journal of Political Science 23, 37-39.

mere purchaser of services). Again, the goal has been to multiply institutional channels for the expression of political voice, to enhance institutional heterogeneity and to circumscribe room for manoeuvre of political monopolists/quasi-monopolists.[45]

Some of these ideas are grounded in participationist political theory, which is poignantly contrasted with the representationist variant. Constitutional economists tend to portray the institutions of representative government as inefficient middlemen that interfere with the expression of citizens' true preferences. Direct democracy – in the form of referenda, citizen initiatives and the like – circumvents this problem, or at least minimises it, by allowing the direct, undistorted expression of such preferences.[46] Moreover, this type of grassroots participation intensifies monitoring of agents by principals, reducing substantially opportunities for members of the politicians' cartel to deviate from their fundamental mission (for example by ignoring voters' preferences, obtaining excessive privileges for themselves or the groups/parties to which they belong and engaging in corrupt activities). Last but not least, direct involvement in political decision making transforms the participants into more motivated voters, taxpayers and (generally) fellow citizens.[47]

Direct participation rights such as referenda and citizen rights (which are employed widely in Lichtenstein and Switzerland) are merely one weapon in the constitutional economists' arsenal to wage a campaign to establish an institutional platform to increase grassroots involvement in the political process. Also on the agenda are specific constitutional provisions designed to curtail conduct by members of the politicians' cartel that is contrary to the public interest, broadly defined. This includes rules prohibiting the excessive appropriation of rents by them, the most glaring example being corruption, coupled with an effective enforcement machinery; the setting up of special courts geared towards preventing citizens' exploitation; and a host of measures designed to stimulate competition between parties (for example by facilitating entry into the political arena).[48]

The normative position regarding electoral rules is less clear cut. On the one hand, reliance on the plurality rule, featuring district-level elections on a majority basis, which converts swings in voter opinion into relatively large shifts in the composition of the legislature, encourages political agents to be responsive to grassroots preferences and militates against rampant rent-seeking and corruption. On the other hand, proportional representation, under which legislative outcomes roughly reflect the share of national vote received, renders political agents less sensitive to parochial demands originating within individual constituencies and more inclined to favour initiatives which

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45 Ibid.

46 Ibid.

47 Bruno S Frey and Alois Stutzer "Direct Democracy: Designing a Living Constitution" in Congleton and Swendenborg, above n 41, 39-78.

48 Ibid.

benefit the community as a whole. The impression gained is that, on balance, constitutional economists prefer the plurality rule – in a modified form, if appropriate – because it is likely to lead to better economic performance, all else being equal.[49]

A degree of ambiguity is also apparent with respect to the structure of government. In a parliamentary environment, the threat that the executive might be ejected from office at any juncture through a non-confidence vote by the legislature is a stabilising factor, which generates consistent majority support for Cabinet policy proposals. In the absence of a similar institutional mechanism, a presidential system is characterised by fluid coalitions and low party discipline. The corollary is that fund allocation is skewed towards minorities in constituencies of powerful political agents, and programmes wide in scope are overlooked. At the same time, parliamentary regimes are associated with high taxes and spending. This is attributable to the fact that the stable majority of incumbent legislators, as well as the majority of voters backing them up, function as residual claimants on additional revenue, keeping the gains from spending to themselves, and shifting a significant part of the costs to the excluded minority. Given their aversion to fiscal excesses, constitutional economists seem to favour, at the margin and subject to certain qualifications, the presidential alternative.[50]

The organisation of the legislature, with special reference to bicameralism (or multicameralism), is another subject attracting normative attention. The practice of dividing the authority to create new laws between two (or more) legislative chambers is a time-honoured one. Constitutional economists commend it on a number of grounds. The underlying assumption is that bicameralism often produces more broad-based, coherent, forward-looking and stable policies which are less susceptible to ad hoc influences, electoral cycles, partisan politics and random variations. This pattern is attributable to the incorporation of a wider range of interests and the inevitably greater care taken in scrutinising legislative proposals. The effects are most pronounced if the interests represented by the two chambers are substantially different, but they manifest themselves even when this is not the case.[51]

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49 Torsten Persson and Guido Tabellini "Constitutions and Economic Policy" in Congelton and Swendenborg, above n 41, 81-110. For additional insights see Roger Congleton *Improving Democracy through Constitutional Reform: Some Swedish Lessons* (Kluwer Academic Publishers, Dordrecht, 2003) [*Improving Democracy through Constitutional Reform*]; and Torsten Persson and Guido Tabellini *The Economic Effects of Constitutions* (MIT Press, Cambridge, 2003).

50 Persson and Tabellini "Constitutions and Economic Policy", in Persson and Tabellini, ibid.

51 Roger D Congleton "On the Merits of Bicameral Legislatures: Intragovernmental Bargaining and Policy Stability" in Congleton and Swendenborg, above n 41, 163-188; and John C Bradbury and W Mark Cain "Bicameralism and Political Compromise in Representative Democracy" in Congleton and Swendenborg, above n 41, 189-201. For additional insights see Buchanan and Tullock, above n 7; Congleton *Improving Democracy through Constitutional Reform*, above n 49; Persson and Tabellini, above n 49; Dennis C Mueller *Constitutional Democracy* (Oxford University Press, New York, 1966); George Tsebelis and Jeannette Money *Bicameralism* (Cambridge University Press, Cambridge, 1997); and Robert D Cooter *The Strategic Constitution* (Princeton University Press, Princeton, 2000).

A variety of additional strategically relevant political topics are addressed by constitutional economists from a normative perspective. Some are of limited interest in the Hong Kong context (such as federalism). Those which should not be overlooked altogether include judicial independence and the constitutional amendment process (ideally, well-designed). Both loom large in traditional legal writings, but constitutional economists approach them from a different theoretical angle. Notably, they explore the links between these two variables and politico-economic performance. It transpires that there is an empirical relationship, the strength of which hinges on situational (predominantly institutional) circumstances. All else being equal, judicial independence may bolster economic growth and a well-designed constitutional amendment process may enhance political stability.[52]

The economic side of the constitutional picture is dissected from a broadly similar normative viewpoint. The supply and demand forces operating in the political arena (a high concentration of power, agent opportunism, special interest pressures, voter short-sightedness, low transparency and the like) combine to produce fiscal, monetary and regulatory distortions which are inimical to the public interest, loosely defined. There is a built-in propensity for public expenditure to exceed public revenue by a wide margin, culminating in uncomfortable levels of government indebtedness. This (in which additional influences of roughly the same nature are at work) induces the fiscal/ monetary authorities to pursue an inflationary course. Regulators fail to adhere to their designated path because of rent-seeking engendered both within and without the agencies they oversee.[53]

A procedural antidote to the fiscal ills recommended by constitutional economists is an executive line-item veto. Since omnibus, multi-issue legislation with numerous riders is deemed to be a key factor aggravating budget deficit, it is thought to be desirable to grant the head of the executive branch of government the authority to veto a single item in a multi-issue bill, without vetoing the entire bill. Such power is enjoyed by many governors of American states and was briefly exercised by President Clinton (before being declared unconstitutional by the District and Supreme Courts) in an attempt to curtail pork-barrel spending which favoured particular regions rather than the nation as a whole. Substantive suggestions to avert fiscal slippage put forth by constitutional economists focus squarely on the symptoms themselves and stipulate that there should be a formal

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52 Lars P Feld and Stefan Vogt "Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary" in Congleton and Swendenborg, above n 41, 251-288; and Bjorn Erik Rasch and Roger D Congleton "Amendment Procedures and Constitutional Stability" in Congleton and Swendenborg, above n 41, 319-342. For additional insights see Cooter, above n 51; Congleton, *Improving Democracy through Constitutional Reform*, above n 49; Persson and Tabellini, above n 49; and Stefan Vogt *Explaining Constitutional Change: A Positive Economics Approach* (Elgar, Cheltenham, 1999).

53 For an overview see James M Buchanan and Richard E Wagner *Democracy in Deficit: The Political Legacy of Lord Keynes* (Academic Press, Orlando, 1977); Geoffrey Brennan and James M Buchanan *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge University Press, Cambridge, 1980); and Richard B McKenzie (ed) *Constitutional Economics* (DC Heath, Lexington, 1984).

requirement that the budget be balanced (over the economic cycle, if not annually) or a requirement imposing concrete limits on government expenditure (for example, by tying its growth to that of the private economy).[54]

The normative route to monetary stability followed by constitutional economists has broadly similar procedural and substantive characteristics. It is proposed that the central bank be granted a high degree of operational independence and the necessary means to fulfil its mission. It is also recommended that goals be set for it to ensure that price volatility is avoided. The early search for a rigid convertibility rule has been largely abandoned, but inflation targeting is definitely in vogue. To the extent that the target is democratically determined (imposed externally via established political channels), institutional accountability is enhanced. The corollary however is that the central bank enjoys procedural but not substantive autonomy, a feature which may undermine operational effectiveness (a tactical sacrifice viewed as strategically appropriate).[55]

The regulatory function has proved particularly susceptible to internally-induced goal displacement and capture by special interests. According to Bernstein, regulation typically progressed through the following (life cycle) stages: gestation (concerns with market failure lead to the creation of a regulatory agency), youth (the inexperienced organisation is outmanoeuvred by the regulatees but is sustained by a crusading zeal), maturity (political support for agency objectives diminishes and devitalisation sets in; needs of industry take precedence over those of the community) and old age (symptoms of atrophy proliferate and private interests become paramount).[56] A host of procedural mechanisms (such as sunset laws) and substantive mechanisms

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54 For an overview see Buchanan and Wagner, above n 53; Brennan and Buchanan, above n 53; McKenzie, above n 53; Cooter, above n 51; Randall G Holcombe, Robert A Lawson and James D Gwartney "Constitutions and Prosperity: The Impact of Legal and Economic Institutions on the Wealth of Nations" in Congleton and Swendenborg, above n 41, 289-316 ["Constitutions and Prosperity"]; Aaron B Wildavsky *How to Limit Government Spending* (University of California Press, Berkeley, 1980); Michael J Boskin and Aaron B Wildavsky (eds) *The Federal Budget: Economics and Politics* (Institute of Contemporary Studies, San Francisco, 1982); and Aaron B Wildavsky and Naomi Caiden *The New Politics of the Budgetary Process* (Longman, New York, 2003).

55 For an overview see McKenzie, above n 53; Holcombe, Lawson and Gwartney "Constitutions and Prosperity", above n 54; Alex Cukierman *Central Bank Strategy, Credibility and Independence: Theory and Evidence* (MIT Press, Cambridge, 1993); Geoffrey E Woods *Central Bank Independence* (Institute of Economic Affairs, London, 1993); Ben Bernake et al *Inflation Targeting: Lessons from International Experience* (Princeton University Press, Princeton, 2001); Delia M Boylan *Defusing Democracy: Central Bank Independence and the Transition from Authoritarian Rule* (University of Michigan Press, Ann Arbor, 2001); Edwin M Truman *Inflation Targeting in the World Economy* (Peterson Institute for International Economics, Washington, 2003); William Roberts Clark *Capitalism, Not Globalism: Capital Mobility, Central Bank Independence and the Political Control of the Economy* (University of Michigan Press, Ann Arbor, 2005); and Ben Bernake and Michael Woodford (eds) *The Inflation-Targeting Debate* (University of Chicago Press, Chicago, 2006).

56 Marver H Bernstein *Regulating Business by Independent Commission* (Princeton University Press, Princeton, 1955). For additional insights see Barry M Mitnick *The Political Economy of Regulation:*

(such as a regulatory budget) have been suggested in order to arrest this trend. More radical ideas have also been floated for enhancing the independence of agencies[57] and constitutionalising regulation through the reinvigoration of the delegation doctrine.[58] Both the positive and normative dimensions of the theoretical framework outlined in this section are worth examining selectively in the Hong Kong constitutional context, a task which is addressed in the next part.

III BASIC LAW MEETS CONSTITUTIONAL ECONOMICS

Hong Kong's post-colonial international legal and constitutional experience is not inconsistent with the exchange model grounded in neo-classical microeconomics, certainly not the relatively elastic PTER version. Even the Sino-British Joint Declaration may be legitimately portrayed as a product of a bargain. Hong Kong was excluded as a bona fide party from the negotiations, which were conducted between the colonial power and a resurgent one determined to reclaim its sovereignty. China obviously proceeded from a position of strength and did not hesitate to flex its political muscles, although a distinction should be drawn between form (posturing) and substance (real stance). The United Kingdom nevertheless maintained its composure and offered meaningful resistance. The end result bears the hallmarks of a compromise, albeit not of the symmetrical variety.[59]

Moreover, while it is difficult to assess the significance of this pattern, Hong Kong was formally represented inside the British team. Strong pressures, both subtle and unsubtle, were also exerted on the two negotiating parties through informal channels by resourceful local groups for whom it was a high-stakes game. It is conceivable that a better bargain could have been struck which would qualify as a Pareto improvement (in the sense of not making any of the principal protagonists worse off). That said, the Joint Declaration has several commendable features (for example, registration by both

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Creating, Designing and Removing Regulatory Forms (Columbia University Press, New York, 1980); Roger G Noll "Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis" in Roger G Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press, Berkeley, 1985) 18-24; Robert Baldwin, Colin Scott and Christopher Hood (eds) *A Reader on Regulation* (Oxford University Press, Oxford, 1998); Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, Oxford, 2004); and Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, Cambridge, 2007).

57 See Giandomenico Majone "Non-Majoritarian Institutions and the Limits of Governance" (2001) 157 Journal of Institutional and Theoretical Economics 57. For additional insights see Holcombe, Lawson and Gwartney "Constitutions and Prosperity", above n 54.

58 See Peter H Aranson "Constitutionalizing the Regulatory Process" in McKenzie, above n 53, 187-206. For additional insights see Holcombe, Lawson and Gwartney "Constitutions and Prosperity", above n 54.

59 For a discussion of the intricacies involved, as well as a dissection of the negotiation process and its outcome, see Michael B Yahuda "Hong Kong's Future: Sino-British Negotiations, Perceptions, Organization and Political Culture" (1993) 69 International Affairs 245; Michael B Yahuda *Hong Kong: China's Challenge* (Routledge, London, 1996) 61-82; Roda Mushkat *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong University Press, Hong Kong, 1997) 137-161.

governments at the United Nations in accordance with Article 102 of the United Nations Charter) and its signing had a salutary effect on public confidence in Hong Kong.[60] Opinion surveys did not venture systematically and consistently into this territory, but it would not be unreasonable to conclude that this international legal document was well-received throughout the community, reservations about its effectiveness notwithstanding.

The process of drafting the Basic Law displayed perhaps even closer correspondence to the exchange model, an observation that also applies to the post-promulgation dynamics, in that it was a large-scale affair, entailing complex manoeuvring and characterised by a modicum of transparency (at least in the sense of not being undertaken behind an impenetrable diplomatic veil). Elaborate bargaining took place through two key institutional channels, the Basic Law Drafting Committee (BLDC) and the Basic Law Consultative Committee (BLCC), over an extended period of time. Consistent with the prevailing policy development procedure in Hong Kong (but not in China), feedback was sought from the community, albeit rather perfunctorily (while this may have been the case, public opinion was nevertheless mobilised, intentionally or otherwise).[61]

The entire drafting exercise was inevitably China-led. Mainland direction was evident across the board, with respect to institution formation, process management and substantive architecture. The Hong Kong and Macao Office of the People's Republic of China State Council played a pivotal role in moving the organisational machinery forward, although overall strategy was formulated at a higher level in Beijing. The BLDC comprised a majority of mainland members (36) and a Hong Kong minority (23). The BLCC consisted exclusively of local members (180 altogether) from different walks of life. None of the participants was elected directly or indirectly, and the Hong Kong contingent was predominantly drawn from the business and professional sectors of the community.[62] Such a lopsided configuration does not accord with the principle of unanimity espoused by early-day contractarians, but in itself it is not at variance with the PTER analytical framework.

The flow of information (or negotiations, in terms of the exchange model) followed the well-publicised "two ups and two downs" principle (up to Beijing for revision and down to Hong Kong for public discussion). The pressures emanating from the top of the pyramid obviously dominated the ones originating from its bottom. The latter however reached a high level of intensity at a number of junctures and were not completely overlooked. Indeed, the controllers of the constitutional agenda were forced to backtrack on a number of occasions, and rather awkwardly so,

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60 For relevant empirical evidence see Robert Ting-Yiu Chung "Hong Kong People's Receptiveness of 'One Country, Two Systems' as Reflected in Opinion Polls" <www.hkupop.hku.hk> (last accessed 1 May 2010).

61 Ming K Chan "Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90" in Ming K Chan and David J Clark (eds) *The Hong Kong Basic Law: Blueprint for 'Stability' and 'Prosperity' under Chinese Sovereignty* (Sharpe, Armonk (NY), 1991) 3, 3-4, 7-9.

62 Ibid.

when their ill-advised actions provoked a severe backlash (for example, in the face of a widespread uproar engendered by a decision to deviate from the charter of the BLCC and allow the New China News Agency in the territory, a crucial mainland organisational vehicle, to appoint nine members of the BLCC Executive Committee, who were supposed to be elected by the 180-person body).[63] This may be construed as a form of (tacit) bargaining, albeit again asymmetrical in nature.

The Basic Law drafting venture was scarcely a popular one. While difficult to gauge precisely, sentiment appears to have fluctuated within a range whose low points outweighed those that vaguely qualified as symbolising constitutional progress. There was considerable dissatisfaction with the institutional facade underpinning the design effort, the lack of adequate representation and consultation, the cavalier attitude towards agreed-upon rules of the game and the shape of the evolving and final product. The drafting exercise also partly coincided with the Tiananmen Square incident of May–June 1989 which, although short-lived, generated psychological effects that lingered for several months. This exacerbated tensions in Hong Kong between patriotic elements and the pro-democracy movement ill-disposed towards the procedures employed and the politico–legal blueprint emerging, and led to a further erosion of confidence in the Basic Law drafting infrastructure.[64]

The chasm between those spearheading the process and those positioned on the political periphery was deep and reflected competing visions of autonomy, democracy and the rule of law. The liberal camp was unconvinced, and continues to exhibit scepticism on that score at this late juncture, that the constitutional mechanisms in the making would provide an effective foundation for genuinely autonomous local government, steady democratic development and entrenchment of the pre 1997 legal system.[65] Be that as it may, the existence and persistence of political conflict is not incongruent with the assumptions underlying the exchange model of the constitutional order. Again, survey-generated empirical evidence is in short supply, but there are no solid grounds for arguing that the Basic Law's claims to legitimacy are tenuous. Whatever the normative deficiencies

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63 Ibid, 9-20.

64 Ibid, 9-20.

65 Ibid, 29-32. For an exposition of this group's evolving stance, activities and impact see Ming Sing *Hong Kong's Tortuous Democratization: A Comparative Analysis* (Routledge Curzon, London, 2004) 19-30, 94-122 [Sing *Hong Kong's Tortuous Democracy*]; Joseph M Chan and Francis LF Lee "Who Can Mobilize Hong Kong People to Protest? A Survey-Based Study of Three Large-Scale Rallies" in Ming Sing (ed) *Politics and Government in Hong Kong: Crisis under Chinese Sovereignty* (Routledge, Abington, 2009) 14-37 [Sing (ed) *Crisis under Chinese Sovereignty*]; Agnes SM Ku "Civil Society's Dual Impetus – Mobilizations, Representations and Contestations over the July 1 March in 2003" in Sing (ed) *Crisis under Chinese Sovereignty* 38-57; Ming Sing "Hong Kong at the Crossroads: Public Pressure for Democratic Reform" in Sing (ed) *Crisis under Chinese Sovereignty* 112-135; and Ming Sing "Hong Kong's Democrats Hold Their Own" (2009) 20 Journal of Democracy 98.

(which may overshadow the more palatable facets),[66] Hong Kong was furnished with a constitutional platform that, while less than ideal (there is definitely scope for Pareto-style improvements), remains viable and evolves in a generally orderly manner, from a positive conceptual/PTER perspective.

The evolution of this platform may be accommodated comfortably within the confines of a bargaining-focused exchange model, provided the analytically problematic notion of a wholly unanimous/entirely voluntary agreement is dispensed with (an unnecessary condition in the case of the PTER version). Indeed, in a paper referred to earlier, Tai can be said to have taken tentative steps in that direction by breaking out of the traditional mould and exploring the Basic Law adaptation process, which is still ongoing, as an interactive constitutional game featuring not negligible (albeit by no means fundamentally equitable and finely balanced) give-and-take.[67] It is played by a moderately large number of participants with divergent goals. They have different capabilities, but none is without any influence. The institutional boundaries are not completely impermeable and the outcome is not fully predetermined.[68]

Tai identifies three distinct, socio-legal (although he portrays them as political) approaches to constitutional dynamics: attitudinal, institutional and strategic. He distinguishes them from the traditional/doctrinal legal method, which equates constitutional interpretation with the ascription of meaning geared towards "understanding the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates."[69] According to him, the doctrinal scheme, while an essential component of a multi-dimensional conceptual system, applies effectively to just a limited range of intricate and varied constitutional phenomena.[70]

The corollary is that complementary perspectives should be brought to bear on constitutional realities in general and in Hong Kong in particular. The attitudinal approach seeks to determine the impact of ideological values and derived attitudes on perceptions of the constitution and

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66 For an observation-based but balanced assessment of the contextual strengths and weaknesses of the Basic Law see Ghai, above n 2; Peter Wesley-Smith *Constitutional and Administrative Law in Hong Kong* (2 ed, Longman Asia, Hong Kong, 1994) 66-71; Priscilla Leung Mei-Fun *The Hong Kong Basic Law: Hybrid of Common Law and Chinese Law* (LexisNexis, Hong Kong, 2006); Zhenmin Wang "A Decade of Hong Kong Basic Law Actualization" in Ming K Chan (ed) *China's Hong Kong Transformed: Retrospect and Prospects* (City University of Hong Kong Press, Hong Kong, 2008)155-172.

67 This theoretical argument is developed in a comprehensive fashion in Tai, above n 1.

68 Ibid.

69 Douglas W Vick "Interdisciplinarity and the Discipline of Law" (2004) 31 Journal of Law and Society 163, 178.

70 Tai, above n 1, 504-506 (and references therein).

corresponding actions (incorporating a neo-classical microeconomic version of an optimising/ rational agent, if necessary).[71] The institutional approach extends this logic further and posits that the value–attitude constellation is not an entirely autonomous force, but one shaped by the institutional environment, both formal and informal.[72] The strategic approach shares with its attitudinal counterpart the assumption that actors in the political arena are goal driven, yet it views them as rather sophisticated operators not exclusively propelled by ideological stimuli. It acknowledges the effect of the institutional setting and emphasises the role of other players (actor interdependence).[73]

Tai constructs an elaborate analytical framework comprising a host of factors that impinge on the ongoing Basic Law process or that are its products or byproducts: constitutional players, rules of the constitutional game, players' goals, players' resources, players' actions, playing fields, players' interaction, players' strategies and game's end.[74] This is an illuminating conceptual structure that allows socio-legal scholars to chart in a detailed fashion the origination, launching, implementation (including non-implementation) and realisation (if implemented) of Basic Law initiatives. It is however too extensive, or not parsimonious enough, to be employed in conjunction with the stylised exchange model. It may serve as a valuable reference point, but just a handful of the factors, and sub-factors, highlighted may be productively utilised in endeavouring to gain relevant constitutional insights through this compact lens instrument.

According to Tai, prominent players in the Basic Law arena include the mainland government (exercising influence through institutional channels such as the National People's Congress (NPC) and the National People's Congress Standing Committee (NPCSC), the PLA and the Foreign Office of the Central People's Government (CPG)), the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) and his team, the Hong Kong civil service, the principal socio-political groupings represented in the legislature (pro-Beijing, pro-business and pro-democracy), the judiciary (particularly the Court of Final Appeal (CFA)) and Hong Kong civil society (which overlaps partially rather than wholly with the pro-democracy movement).[75] For analytical purposes as expressed here, it is convenient to distinguish merely between the conservative, or pro-status quo, camp (conservative camp) and its liberal, or pro-reform, counterpart (liberal camp), even though some players (notably the CFA) do not fit neatly into either category.

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71 Ibid, 508-510 (and references therein).

72 Ibid, 510-513 (and references therein).

73 Ibid, 513-515 (and references therein).

74 For a detailed and illuminating depiction and application of this framework in the Hong Kong context see ibid, 524-577.

75 These players are identified and their role is assessed in ibid, 538-577.

The liberal camp advocates genuine autonomy for the HKSAR, fast-paced and meaningful democratisation, and strict adherence to the rule of law (which implies an unwavering respect for human rights). It also favours somewhat greater economic activism in the form of a stronger determination to redress market failure (pollution being a serious concern), engage in counter-cycling fiscal fine-tuning (when appropriate), invest in human capital (as distinct from just physical infrastructure), and redistribute income and wealth (or at least take concrete steps to alleviate poverty). The conservative camp is less inclined to signal its intentions unambiguously, but it is apparent that it prefers controlled/guided autonomy, distinctly gradual and rather limited democratisation, and flexible commitment to the rule of law (with no relentless pursuit of human rights). Its posture regarding the economy places it somewhere between the protective state[76] and productive state[77] visions.

In terms of resources, this is scarcely a contest between equals. The conservative camp constitutes the political centre (with mainland strategic institutions at its heart) and the liberal camp forms the political periphery. The power equation is tilted unequivocally in the direction of the former: "Political power is a measure of how influential a particular group [or individual] is in the political arena when there is a conflict over which policy should be implemented".[78] The liberal camp, however, is not without influence. A distinction should be drawn in this context between de jure and de facto political power. In a non-democracy, such as Hong Kong (which may in fact qualify as a partial democracy), the political centre monopolises:[79]

> de jure political power but not necessarily de facto political power. The citizens are excluded from the political system … but they are nonetheless the majority and they can sometimes challenge the system, create significant social unrest and turbulence, or even pose a serious revolutionary threat.

The liberal camp wields modest de jure power by virtue of its selective access to the formal institutions of the State, the most significant by far being the legislature. Its de facto power is arguably greater and is employed with more effectiveness when interacting with the conservative

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76 "The protective state is the minimal state of classical theory. The assumption is that of a stable constitutional democracy that limits the functions of the state to the provision of national defence and law and order. The state defines and protects property rights. Beyond these narrow functions the state is essentially neutral and policyless." Barry W Paulson *Economic Development: Private and Public Choice* (West, Minneapolis, 1994) 98.

77 "The productive state is the welfare-maximizing state of neoclassical theory. Implicit is the assumption of a stable constitutional democracy defining property rights. Agents of the state act as a monolithic decision maker, maximizing social welfare. However, the state intervenes only to correct market failures, and those policy interventions consistently lead to welfare maximization." Ibid.

78 Daron Acemoglu and James A Robinson *Economic Origins of Dictatorship and Democracy* (Cambridge University Press, Cambridge, 2006) 173.

79 Ibid, 25.

camp in the course of the constitutional game. The players, it should be emphasised again, do not command equal resources. Further, they do not deploy the resources at their disposal with consistently the same concentration of effort and adroitness (terms such as doggedness, ruthlessness and tactical manipulation may provide a valid depiction of some of the actions, methods and strategies resorted to).[80] Be that as it may, this is not a completely one-sided affair. Interaction (and thus bargaining/exchange), both direct and indirect, does take place and its intensity may escalate to uncomfortable highs on occasion. A constitutional game is being played, with one party dominating yet not being able to impose its will in all respects at every key juncture.

There is no lack of empirical evidence to substantiate this assertion. The liberal camp has been able to torpedo periodically salient potential and actual conservative camp initiatives.[81] Perhaps the most conspicuous example is the fate of the national security legislation (intended to be passed under Article 23 of the Basic Law), which was proposed by the local government, apparently at the behest of the CPG. It sought to introduce, in a form unpalatable to the liberal-democratic viewpoint, the crimes of subversion and secession, and to grant the government extensive powers to ban non-mainstream groups. As such, it was viewed at the political periphery as an act constituting a radical departure from the generally benign policy practices prevailing during the colonial era and the early phases of the post 1997 transition. The blueprint triggered a decidedly adverse, and large-scale, liberal camp reaction and was withdrawn unceremoniously.[82]

In addition to the pronounced imbalance of power between the parties, the ongoing two-way Basic Law interaction is characterised by an extraordinarily low degree of trust. This has consequences which may elude economic students of the constitution because they often (but not

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80 The liberal camp's capabilities and competencies are explored in Sonny SH Lo *Governing Hong Kong: Legitimacy, Communication and Political Decay* (Nova Science, New York, 2002) 193-198 [Lo *Governing Hong Kong*]; Sonny SH Lo "The Mainlandization and Recolonization of Hong Kong: A Triumph of Convergence over Divergence with Mainland China" in Joseph YS Cheng (ed) *The Hong Kong Special Administrative Region in its First Decade* (City University of Hong Kong Press, Hong Kong, 2007) 179-231; and Sonny SH Lo *The Dynamics of Beijing-Hong Kong Relations: A Model for Taiwan?* (Hong Kong University Press, Hong Kong, 2008) 55-68 [Lo *The Dynamics of Beijing-Hong Kong Relations*].

81 For a discussion of the liberal camp's tactics and their effectiveness see Tai, above n 1, 540-541; Sing *Hong Kong's Tortuous Democratization,* above n 65, 19-30, 94-122; Chan and Lee "Who Can Mobilize Hong Kong People to Protest? A Survey-Based Study of Three Large-Scale Rallies", above n 65; Ku "Civil Society's Dual Impetus – Mobilizations, Representations and Contestations over the July 1 March in 2003", above n 65; Sing "Hong Kong at the Crossroads: Public Press for Democratic Reform", above n 65; and Sing "Hong Kong's Democrats Hold Their Own", above n 65.

82 For a descriptive and analytical account of the Article 23-induced political crisis see Miron Mushkat and Roda Mushkat "The Political Economy of the Constitutional Conflict in Hong Kong" (2004) 11 Tilburg Foreign LR 756 ["The Political Economy"]; and Carole J Petersen "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003" in Fu Hualing, Carole J Petersen and Simon NM Young (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong University Press, Hong Kong, 2005) 13-62.

invariably, as attested to by the conceptual path followed by game theorists and institutionally-oriented researchers) draw close analogies between the marketplace and the political arena. In a perfect model of the market, transactions are instantaneous (as well as costless, as long as transaction costs are not incorporated into the analytical framework). In the political arena, time plays an even more crucial role than in a carefully fine-tuned microeconomic model. Actors build relationships of trust (or mistrust) over time and this enhances the effectiveness of their interaction (or impedes it, if a high level of mistrust prevails).[83] The absence of trust in the conservative camp–liberal camp Basic Law game, and the paucity of intermediaries capable of bridging the gap, detracts from the quality of the bargaining and, inevitably, the end product.

Games of trust (or mistrust) are a variant of interactive dynamics known as social dilemmas. This broad category refers to situations where players make decisions featuring a high degree of interdependence. A salient characteristic of such games is that, if each participant in a one-shot or finitely repeated process of interaction selects strategies consistent with the rational choice model, all players would realise a payoff of an equilibrium outcome of less value than one or more of the available alternatives (a sub-optimal pattern would ensue). The existence of at least one outcome that may generate superior returns for all players is the source of the dilemma. This outcome is not unattainable, but to secure it the participants need somehow to learn to trust each other and bring themselves to act accordingly.[84]

Social dilemmas that are shaped by trust (or mistrust) have at least three standard components. First, the relationship involves a truster, a trusted and some issue that is at stake between the parties, so it is a trilateral structure. Second, the trusted has an incentive to be trustworthy regarding the matter in question in the truster's trust. Third, this incentive may be overshadowed by other considerations, and there is thus some risk of default by the trusted. Subjective factors may also exert influence on the evolution of the game in that trust is a phenomenon with a cognitive dimension. For example, some (trustworthy, "nice") players tend to return favours but other (untrustworthy, "mean") players do not. It is formally demonstrated that these economic and psychological elements may combine to propel the participants towards divergent social states such as defection (which may manifest itself in intense conflict, total breakdown and similar forms of social disequilibrium) or cooperation.[85]

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83 See James S Coleman *Foundations of Social Theory* (Belknap Press, Cambridge, 1990) 91-116.

84 For an overview see ibid; Douglas G Baird, Robert H Gertner and Randal C Piker *Game Theory and the Law* (Cambridge University Press, Cambridge, 1994); and Elinor Ostrom and James Walker (eds) *Trust and Reciprocity: Interdisciplinary Lessons from Experimental Research* (Russell Sage Foundation, New York, 2003).

85 For an overview see Coleman, above n 83; Baird, Gertner and Piker, ibid; and Andrew Kydd "Trust, Reassurance and Cooperation" (2000) 54 International Organization 325.

The application of such a conceptual scheme to the Basic Law dyadic interaction brings poignantly into focus the dampening effects of mutual mistrust and illustrates vividly that the dominant player is by no means immune to the fallout. The conservative camp has placed little trust in the liberal camp, assuming it to all intents and purposes to be mean, and often leaving it with no choice but to defect. The latter has been isolated at the policy level, unable to participate meaningfully in the constitutional decision-making process. The meanness has proved to be a self-fulfilling prophecy. Withdrawal from the game, or non-cooperation, has been a frequently-observed response. The tactics have included not merely grassroots mobilisation, with anti-government (on both sides of the border) overtones, but also appeals for support abroad. The latter have reinforced the conservative camp perception that the battle is being waged by subversive forces whose ultimate goal is to engineer a fundamental regime change.[86]

In the case of the national security legislation, a vicious cycle of potentially draconian measures, conveyed in an authoritarian manner, and profoundly adverse reactions culminated in an unprecedented manifestation of public discontent, producing powerful reverberations that derailed the Basic Law machine for a period of time and threatened to destabilise the entire political system.[87] This turned out to be a distinctly uncomfortable experience for the supposedly invulnerable conservative camp, which needed to engage in costly signalling[88] or offer gestures entailing substantial sacrifices on its part (such as freezing the proposed legislation).[89] The challenge here lies in transforming a game of mistrust into one of trust, or at least shifting palpably in that direction. Students of social dilemmas recommend strategies based on reassurance, featuring trust-building steps initiated by one or both of the parties in an effort to encourage long-term cooperation.[90] To its credit, the conservative camp has fine-tuned its strategies in light of the at

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86 Mushkat and Mushkat "The Political Economy", above n 82; and Petersen "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003", above n 82. For additional insights see Sing *Hong Kong's Tortuous Democratization*, above 65; Sing (ed) *Politics and Government in Hong Kong: Crisis Under Chinese Sovereignty,* above n 65; and Miron Mushkat and Roda Mushkat "The Political Economy of Governance and Public Trust: The Promise of Autonomy and Post-1997 Hong Kong Inertia" (2006) 37 Internationales Asienforum/ International Quarterly for Asian Studies 87 ["Political Economy of Governance"].

87 Mushkat and Mushkat "The Political Economy of the Constitutional Conflict in Hong Kong", ibid; and Petersen, ibid.

88 Michael A Spence "Job Market Signaling" (1973) 87 Quarterly Journal of Economics 355.

89 Mushkat and Mushkat "The Political Economy of the Constitutional Conflict in Hong Kong" above n 86; and Petersen, above n 86. For additional insights see Sing *Hong Kong's Tortuous Democratization: A Comparative* Analysis, above n 65; Sing (ed) *Crisis Under Chinese Sovereignty*, above n 65; and Mushkat and Mushkat "Political Economy of Governance", above n 86.

90 For an overview see Coleman, above n 83; Baird, Gertner and Piker, above n 84; Ostrom and Walker, above n 84; Robert Axelrod *The Evolution of Cooperation* (Basic Books, New York, 1984); and Robert Axelrod *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (Princeton University Press, Princeton, 1997).

times intense bottom-up pressures it has encountered (some learning-by-doing is apparently taking place), and the liberal camp has softened its tactics (there has also been a certain loss of cohesion on both sides of the political divide).[91] But the current Hong Kong constitutional scene can scarcely be portrayed as a sea of tranquillity, and understandably so.[92]

The stylised exchange model remains largely intact. The heavily skewed power structure and widespread mistrust do not invalidate it. Meaningful bargaining is seen in the Basic Law arena and persistent conflict over specific issues has not resulted in a corrosive erosion of legitimacy, let alone severe deterioration in effectiveness/governance.[93] It is nevertheless obvious that, unlike in the frictionless market, not all forms of exchange are equal. Hong Kong is a homogeneous community but, from an institutional perspective, it bears some similarities to multi-cultural societies, such as Canada, where constitutional management is inherently a less straightforward affair than in political environments not characterised by such a high degree of fragmentation.[94] This is not just a domestic matter as the problem is rooted in deep cross-border divergences, including those of the essentially legal variety.[95] Consequently, the Hong Kong constitutional game may not qualify as a symbol of procedural efficiency, a facet of the situation not devoid of substantive ramifications.

Despite a modest decline in the political temperature, the prospects for a material procedural enhancement are not deemed to be favourable, not merely because of the residue of mistrust but also due to the patrimonial style of societal conflict resolution that seems to be emerging. The post 1997 institutional setting is thought to be underpinned by patron–client networks which foster polarisation, by pitting competing groups against each other. The ruler (chief executive) in such a milieu however also needs to establish a modicum of inter-group balance, in order to sustain forward movement and maintain stability (deliver adequate performance).[96] The corollary is that the

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91 Ma Ngok "Democratic Development in Hong Kong: A Decade of Lost Opportunities" in Cheng (ed), above n 80, 49-74; and Ma Ngok *The Political Development of Hong Kong: State, Political Society and Civil Society* (Hong Kong University Press, Hong Kong, 2007) 1-14, 57-91, 160-219 [Ma *The Political Development of Hong Kong*].

92 See Tai, above n 1, 538-577.

93 For an overview see Cheng (ed), above n 80; Ma *The Political Development of Hong Kong*, above n 91; Ian Scott *Public Administration in Hong Kong: Regime Change and its Impact on the Public Sector* (Marshall Cavendish, Songapore, 2005) 265-297 [Scott *Regime Change*]; Lam Wai-man et al (eds) *Contemporary Hong Kong Politics: Governance in the Post-1997 Era* (Hong Kong University Press, Hong Kong 2007); and Ian Scott "Legitimacy, Governance and Public Policy in Post-Handover Hong Kong" (2007) 29 Asia Pacific Journal of Public Administration 29.

94 Mushkat and Mushkat "Conversationalism, Constitutional Economics and Bicameralism: Strategies for Political Reform in Hong Kong", above n 44.

95 Leung, above n 66; Yash Ghai "The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?" (2007) 37 HKLJ 363.

96 The politics of post 1997 patronage is examined in Lo *Governing Hong Kong*, above n 80, 12-13; Lo "The Mainlandization and Recolonization of Hong Kong: A Triumph of Convergence over Divergence with

problems highlighted above are likely to persist, yet that constitutional paralysis is apparently a low-probability outcome. From a positive analytical viewpoint, the community may brace itself for more inefficient bargaining between the two opposing camps, without confronting a total stalemate scenario.

The normative side of the picture is subjected to microscopic examination in the traditional legal literature, albeit the assessment is seldom extended consciously into economic territory. At the outset, it should be noted that referring to the end game may not be altogether appropriate in this context, unless it is understood that any episode under scrutiny is merely a link in a chain rather than the terminal point of the whole process. The Basic Law regime is a moderately dynamic one and its static properties should not be overemphasized. Both the strategies pursued and tactics relied upon by the principal constitutional players, even the hard core of the seemingly immovable CC, are not cast in stone. Any normative evaluation of the record must be regarded as part of a multi-step exercise, even if it is convenient not to draw a rigid distinction between intermediate and final product for this purpose.

The notion of autonomy looms large in traditional normative discourse. It is argued emphatically that Basic Law realities are not consistent with the ideal of genuinely autonomous Hong Kong and the territory's needs in that respect. This is partly attributable to the fact that the constitutional foundations of autonomy are fragile because they are at the mercy of external parties which may potentially undermine them. A politico-administrative entity cannot really function as a truly autonomous unit when its consent is not required for fundamental adjustments in the institutional architecture. This remains the prerogative of strategic arms of the Chinese State, although the Basic Law confers extraordinary substantive powers on the HKSAR (akin to semi-sovereignty outside the domain of defence and foreign affairs). The constitutional guarantees relating to autonomy are scarcely foolproof, are fraught with ambiguities and may be readily circumvented.[97]

Mainland China" above n 80, 187, 191-193; Lo *The Dynamics of Beijing-Hong Kong Relations*, above n 80, 7-37; and Sonny SH Lo "The Political Culture of Hong Kong and China: Democratization, Patrimonialism and Pluralism in the 2007 Chief Executive Election" (2007) 29 Asia Pacific Journal of Public Administration 101.

97 The potential fragility of Hong Kong's autonomous status is explored in Lo *The Dynamics of Beijing-Hong Kong Relations*, above n 80, 109-149; Ghai, above n 2, 137-187; Ma Ngok and Ray Yep "A High Degree of Autonomy? Hong Kong Special Administrative Region, 1997-2002" (2002) 73 Political Quarterly 455; Ian Holliday, Ma Ngok and Ray Yep "After 1997: The Dialectics of Hong Kong Dependence" (2004) 34 Journal of Contemporary Asia 254-270; Phil CW Chan "Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage" [2006] Singapore Journal of Legal Studies 285-311; Yash Ghai "The Legal Foundations of Hong Kong's Autonomy: Building on Sand" (2007) 26 Asia Pacific Journal of Public Administration 3-28 ["Building on Sand"].

Since this is an aspect which receives considerable attention in economic writings, it should be pointed out that the Basic Law amendment process may not be a source of reassurance for critical observers. The authority to institute changes in the local constitutional facade lies in the hands of the NPC. No relevant number is specified, so a simple majority would presumably suffice. Proposals for amendment may originate with the NPCSC, State Council or the HKSAR (in which case, they need to enjoy the support of two-thirds of Hong Kong deputies to the NPC, an equal proportion of local legislature members and the Chief Executive). Additional institutional mechanisms ensure that the Hong Kong input into the process is distinctly modest. Nor are the necessary details of such an undertaking spelled out unambiguously in the Basic Law or elsewhere.[98]

Judicial independence is a key component of the post 1997 autonomous configuration. The courts' far-reaching jurisdiction over matters pertaining to the Basic Law is the most palpable expression of their unfettered status.[99] The traditional normative concern is that their ability to shield autonomy from external infringements is severely compromised by the power accorded to the NPCSC to exercise final authority with respect to constitutional interpretation in the territory.[100] The leading expert on the Basic Law has no doubt that "the NPCSC has ultimate control over the validity of Hong Kong laws"[101] and that "'China can determine what the law in the HKSAR will be."[102] Indeed, if it "were to make the full use of these possibilities, then the autonomous

98 See Ghai, above n 2, 177-182.

99 Article 19(1) of the Basic Law provides for the independent judicial power of the HKSAR, including that of final adjudication. Article 19(2) stipulates that the local courts shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. As recently reiterated by the Court of First Instance, such jurisdiction encompasses the "power … of the courts of the Hong Kong Special Administrative Region to interpret on their own the provisions of the Basic Law (which are within the limits of the autonomy of the Region), such power having been delegated by the Standing Committee of the National People's Congress to the courts pursuant to article 158(2) of the Basic Law": *Cheng Kar-shun and Leung Chi-kin v the Honourable Li Fung-ying and Others* (24 September 2009) HCAL 79/2009, para 7 Cheung J, 24 <www.hklii.hk> (last accessed 1 May 2010). The Court seems to have adopted a risk-avoidance stance by refraining from classifying the delegation of powers as a "full" one, although it has not reprised the Court of Final Appeals' (excessively) deferential statements in its early decisions, explicitly acknowledging that the power of interpretation granted to the NPCSC under Article 158 of the Basic Law was in essence unlimited. See for example *Lau Kong Yong and Others v Director of Immigration* [1999] 3 HKLRD 778, 798-799; and *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, 548.

100 Article 158 of the Basic Law states that "[t]he power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress."

101 Ghai "Building on Sand", above n 97, 11.

102 Ibid.

application of the common law in Hong Kong would be impossible, and the common law as we know it would cease to exist."[103]

Local autonomy does not hinge exclusively on constitutional safeguards and judicial independence. It needs to be grounded effectively in representative institutions that rest on solid domestic foundations. Another prerequisite for successful implementation is a clear delineation of

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103 Ibid. For additional insights, not invariably consistent with this position, see Ghai, above n 2, 137-187, 303-357; Chan "Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90", above n 61; Ghai "Building on Sand", above n 97; Lo *The Dynamics of Beijing-Hong Kong Relations*, above n 80, 81-108; Benny YT Tai "The Judiciary" in Lam Wai-man et al (eds), above n 93, 59-74; Johannes MM Chan, HL Fu and Yash Ghai (eds) *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, Hong Kong, 2000); Mark R Conrad "Interpreting Hong Kong's Basic Law: A Case for Cases" (2005) 23 UCLA Pacific Basin Law Journal 1-50; James A Rice "Political Domination and the Rule of Law in Hong Kong" (2005) 23 UCLA Pacific Basin Law Journal 51-77; Albert HY Chen "Constitutional Adjudication in Post-1997 Hong Kong" (2006) 15 Pacific Rim Law and Policy Journal 627-682; Simon Marsden "Constitutional Interpretation in Hong Kong: Do Common Law Approaches Apply when the National People's Congress Standing Committee Interprets the Basic Law?" [2006] Law Asia Journal 99-124; Johannes MM Chan "Basic Law and Constitutional Review: The First Decade" (2007) 37 HKLJ 407-447; Albert HY Chen "The Basic Law and the Development of the Political System in Hong Kong" (2007) 15 Asia Pacific LR 19-40; Ricky YH Fong "Universal Suffrage in Hong Kong: Promise or Illusion? A Critical Analysis of National People's Congress Standing Committee's Interpretation of Hong Kong Basic Law Annexes" (2007) 24 UCLA Pacific Basin Law Journal 225-248; Hualing Fu, Lison Harris and Simon Young (eds) *Interpreting the Basic Law: The Struggle for Coherence* (Palgrave Macmillan, Basingstoke, 2007); Carina Lai and Christine Lo *From Nowhere to Nowhere: Constitutional Development, Hong Kong 1997-2007* (Civic Exchange, Hong Kong, 2007); Po Jen Yap "Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong" (2007) 37 HKLJ 449-474; and Po Jen Yap "Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions" (2007) 6 Chinese Journal of International Law 543-564. Recent judicial decisions in Hong Kong lend support to a relatively benign assessment of the putative threat posed by the National People's Congress Standing Committee to the common law edifice in the territory. Specifically, the local courts have consistently employed a distinct (purposive) approach to the Basic Law, embracing international human rights practices and at times venturing even further. Notable examples include *Chan Kin Sum v Secretary for Justice and Electoral Affairs Commission* (8 December 2008) HKCL79/2008 Court of First Instance, para 1.64 <www.hklii.hk> (last accessed 1 May 2010), which held as unconstitutional the "general, automatic and indiscriminate restrictions" imposed by the Legislative Council Ordinance on prisoners' right to vote in the Legislative Council elections. It is noteworthy that a total ban on voting by prisoners is practised in many states of the United States of America, Japan, Singapore and Malaysia (see paragraph 45 of the judgment); *Koon Wing Yee v Insider Dealing Tribunal and The Financial Secretary* FACV19/2007; *Chan King Shing Sonny v Insider Dealing Tribunal and The Financial Secretary* (18 March 2008) FACV20/2007 Court of Final Appeal <www.hklii.hk> (last accessed 1 May 2010), which relied on the case law of the European Court of Human Rights and the General Comments of the United Nations Human Rights Committee to hold the Insider Tribunal to high standards of procedural due process; and *Lam Siu Po v Commissioner of Police* (26 March 2009) FACV9/2008 Court of Final Appeal <www.hklii.hk> (last accessed 1 May 2010), which adopted latest progressive European case law, in preference to the less progressive Human Rights Committee Comments, to determine the applicability of Article 14(1) of the International Covenant on Civil and Political Rights, giving the right to fair and public hearing by a competent, independent and impartial tribunal, to disciplinary proceedings and legal relations between civil servants and the State as their employer.

the division of power between the political centre and the autonomous regional entity. The standard reading of the situation (not confined to traditional legal circles) is that democratic development in Hong Kong has been stifled and that the necessary transparency has not been achieved.[104] Ambiguous signals emanating from the political centre and periodic shifts in direction by those who control it exacerbate the problem by intensifying the sense of legal opaqueness and thus injecting an element of instability into the fluid structure of (agent) expectations.[105]

This is a potentially problematic constitutional constellation. As traditionally portrayed, the Basic Law framework does not appear to be sufficiently comprehensive, progressive, robust and unambiguous to sustain strong economic momentum in the long run. As a global metropolis providing intermediary services throughout the Asia–Pacific region and beyond,[106] Hong Kong may well need a less certainty-dampening and a more confidence-inspiring legal edifice. A degree of caution however may have to be exercised in addressing this issue. A dichotomy was suggested earlier between de jure and de facto power. A similar distinction may be drawn here. To the extent that the policies pursued by the political centre in respect of Hong Kong are shaped predominantly by informal rather than formal considerations (strategic realities, not constitutional commitments), the adverse economic consequences of the flawed Basic Law architecture highlighted in the traditional legal literature may be relatively modest. Moreover, there may be a trade off between a high degree of local autonomy and cross-border integration, in that the former may breed politico-economic insularity, and agents active in the Greater China arena may have to accept the inevitability of a balancing act, rather than lean heavily in one direction or another.

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104 This is the view expressed by Ghai, above n 2, 245-302; Holliday, Ma and Yep "After 1997: The Dialectics of Hong Kong Dependence", above n 97; Chan "Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage", above n 97; Ghai "Building on Sand", above n 97, 109-149; and Ma "Democratic Development in Hong Kong: A Decade of Lost Opportunities", above n 91.

105 Holliday, Ma and Yep "After 1997: The Dialectics of Hong Kong Dependence", above n 97. Recent developments on this front, while not unequivocally reassuring, offer some scope for cautious optimism. Assuming that several conditions are satisfied and the key protagonists do not waver, Hong Kong could conceivably progress in a semi-orderly fashion towards a configuration closer to "dual universal suffrage" (in electing the Chief Executive and members of the Legislature). See Government of the HKSAR *Consultation Document: Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012* (November 2009) ["Consultation Document 2009"] <www.cmab-cd2012.gov.hk> (last accessed 1 May 2010). The document is based on the *Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage*, adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007 ["NPCSC Decision 2007"]. The Decision provides that universal suffrage for electing the Chief Executive may be implemented first in 2017 and that the election of all the members of the Legislative Council by universal suffrage may follow thereafter.

106 David R Mayer *Hong Kong as a Global Metropolis* (Cambridge University Press, Cambridge, 2000).

By the same token, time inconsistency, which is normally viewed as a disruptive influence in the marketplace and in modern political settings, may not have typically adverse side effects in this somewhat unusual case. The point is that an upward sloping trend line (symbolising steady progress on key policy fronts, for example, from a rule of man to, initially, a rule by law and, eventually, a rule of law, in China) may underlie the zigzag movement. One legal commentator, for instance, charts the rise, retreat and resurgence of judicial power in Hong Kong.[107] Forward-looking economic agents may proceed on that basis and not attach an excessively high risk premium to their Hong Kong exposure. This is by no means a foregone conclusion but a possible feature of the institutional dynamics that cannot be completely overlooked. Given such complexities, it may be desirable to refrain from overly general judgments and focus the normative lens on specific economic issues arising in the evolving Basic Law context.

As matters stand, a number of economically sensitive constitutional themes (broadly defined) merit attention, some closer than others: structure of government, direct political participation, electoral rules, organization of the legislature, economic rights, fiscal management, monetary control and regulatory oversight. The government structure has a pronounced tilt in favour of the executive arm of the trilateral system. The Basic Law provides the Chief Executive (CE) of the HKSAR with an exceptionally sturdy constitutional platform.[108] A detailed cross-country comparison suggests that the presidential analogy is not merely valid, but that the local variant is in fact equipped with far greater powers than the standard model.[109] Notably, the CE is catapulted into a position of enormous influence by an Election Committee comprised of just 800 members, who themselves owe their rise to political prominence to the metaphorical invisible hand and resemble a

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107 Yap "Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong", above n 103.

108 Ghai, above n 2, 257-259, 262-264, 270-274; and Ma *The Political Development of Hong Kong*, above n 91, 58-59. Note, however, articles 88 to 90 of the Basic Law. Article 88 provides for judges of the HKSAR to be appointed by the Chief Executive "on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors"; Article 89 provides for the removal of a judge to be only for inability to discharge his or her duties or for misbehaviour, and to be by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice consisting of not fewer than three local judges, with more stringent processes provided for the investigation and removal of the Chief Justice; and Article 90 requires, in relation to the appointment or removal of other judges of the Court of Final Appeal and the Chief Judge of the High Court, for the Chief Executive in addition to following the procedures prescribed in Articles 88 and 89 to obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress "for the record".

109 Ma Ngok "Executive-Legislative Relations: Assessing Legislative Influence in an Executive Dominance System" in Lau Siu-kai (ed) *The First Tung Chee-hwa Administration* (Chinese University Press, Hong Kong, 2002) 349-374.

corporate board of directors (not necessarily an independent one).[110] At the current juncture, no popular or legislative mandate is required, and the status quo is likely to remain intact for the next several years[111] (at least until 2017).[112]

The CE and his/her policy team dominate the strategic government agenda. Most pivotal programmes do not need the approval of the legislature, unless they entail changes of the law or extra financial appropriations.[113] The CE also effectively shapes the legislative agenda. Government-initiated Bills enjoy priority over those originating in the legislature and all Bills passed by the latter must have his/her signature to become valid laws. If the CE deems a Bill passed by the legislative body "'not compatible with the interests of Hong Kong", he/she may ask for reconsideration.[114] The CE could dissolve the legislature, should he/she not wish to sign a Bill passed by the legislature following recourse to such a measure or if the legislative body refuses to pass the Budget or any significant Bill.[115] In this institutional environment, a fiscal control mechanism like the executive line-item veto would probably be redundant.

The authority wielded by the CE to make crucial appointments is vast. It extends to key government officials, judges, members and chairs of policy commissions, boards of public corporations, government advisory committees, appointed district council members and so forth.[116]

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110 A modest improvement may assume the form of an increase in size, and hence diversity, of the Election Committee. Consultation Document 2009, above n 105 (proposing an expansion of the size of the Election Committee to 1200 members).

111 Ghai, above n 2, 257-259, 262-264, 270-274; and Ma *The Political Development of Hong Kong*, above n 91, 58-59.

112 See NPCSC Decision 2007, above n 105.

113 See Ghai, above n 2, 257-259, 262-264, 270-274; and Ma *The Political Development of Hong Kong,* above n 91, 58-59.

114 Article 48 of the Basic Law.

115 Article 50 of the Basic Law. The powers of the Chief Executive under Articles 48 and 50 have been recently confirmed in *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of Hong Kong Special Administrative Region* (9 February 2006) HCAL 107/2005 Court of First Instance <www.hklii.hk> (last accessed 1 May 2010), which held that the Chief Executive, in failing to appoint a date for the implementation of the Interception of Communications Ordinance, Cap 532, acted lawfully and that the Law Enforcement (Covert Surveillance Procedure) Order made by the Chief Executive was lawfully made, pursuant to powers vested in him under Article 48 of the Basic Law.

116 Ma *The Political Development of Hong Kong*, above n 91, 58-59. With respect to judicial appointments and removals, it should be noted however that Articles 88-90 of the Basic Law restrict the leeway enjoyed by the Chief Executive, albeit not in an ideal fashion. See criticisms of the process of appointment of judges in Hong Kong (including lack of transparency, insufficient information provided by the Administration to the Legislative Council and appointment of political figures as members of the nominating body) in Eva Liu and Wai L Cheung "The Process of Appointment of Judges in Hong Kong and Some Foreign Countries: Overall Comparison" (Research and Library Services Division, Legislative Council Secretariat, Hong Kong, 12 May 2001). Moreover, in practice, the Chinese authorities have refrained from stepping into this domain,

This authority is a valuable source of patronage and thus substantial power. The CE is "the lynchpin of the political system."[117] He/she serves for five years, and the post may not be held for more than two consecutive terms (although definitional issues are involved).[118] An early termination of office through (inter alia) impeachment is possible, but the relevant procedure is weighted heavily in favour of the CE and the final decision lies with the CPG rather than with a local institution.[119] The corollary is that the strategic capabilities overshadow the constraints.

From an economic perspective, this constitutional configuration does not strike a proper balance between the imperatives of policy decisiveness and competitive efficiency. The CE is in a position to dominate a complex political setting without receiving adequate feedback from independent parties. The channels through which such parties may exert constructive influence are few and far between, and they are often blocked. Without the incorporation of autonomous insights generated in an orderly fashion by countervailing forces, the likelihood of serious administrative error is high and, because of the paucity of error-correction mechanisms, the probability of an expeditious response is low. This pattern was observed during the tenure of the first CE of the HKSAR and led to his premature departure. The successor has pledged to display greater openness but has not taken any concrete steps to bring about the necessary institutional realignment.[120]

Paradoxically, the lopsided power structure, while not containing the seeds of its own destruction, has not had an invariably salutary effect on policy decisiveness. Again, a dichotomy between de jure and de facto realities may be appropriate. The CE may well be constitutionally insulated from the kind of intense centrifugal pressures witnessed in many presidential systems (or, for that matter, parliamentary ones). At the same time, the lack of a direct popular and/or legislative mandate undermines his/her authority. A tactically astute CE may mobilize support from a variety of sources via the elaborate patronage network at his/her disposal. However, in the final analysis, there is merely one pillar, the CPG, that he/she may confidently rely upon when confronting an increasingly vibrant political/civil society from his/her tightly-fenced metaphorical fortress. Indeed,

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although have expressed occasional misgivings about an overly rigid separation of powers in Hong Kong. See "Hong Kong Democrats Worry Judicial Independence Won't Last" (29 June 2007) *The New York Times* <www.nytimes.com> (last accessed 1 May 2010), which reported on the anxiety among democrats over remarks made by the Chairman of the NPC, Wu Banggu, at a conference in Beijing on Hong Kong's Basic Law, asserting inter alia that the Hong Kong Chief Executive should play a "dominant role" in government and that it would not be appropriate for the territory to copy the Western democratic notion of separation of powers among the executive, legislature and judiciary.

117 Ghai, above n 2, 270.

118 See ibid, 270-274; Ghai "Building on Sand", above n 97.

119 Ibid.

120 Hung Ching-tin "From Tung Che-hwa to Donald Tsang: China's Grudging Self Correction and Policy Re-orientation towards Hong Kong in the Lost Decade" in Cheng (ed), above n 80, 233-260.

notwithstanding CC-style Basic Law/ institutional manoeuvres, fissures may have surfaced in the executive arm of government and a tangible deterioration may have been seen in state capacity to deliver strategically effective performance.[121]

Innovative politico-administrative reform has been largely geared towards placing the executive function on a firmer footing. Not content to depend on the support of the sprawling – but neutral, or even apparently recalcitrant – civil service bureaucracy, the first CE thus created a top layer of ministerial-type appointees (the principal officials accountability system) expected to pursue the policy agenda in a more far-sighted and responsive fashion.[122] The restructuring of representative institutions has been a pedestrian affair in comparison and the executive-legislative nexus has been mostly overlooked.[123] The need to materially improve communication with the grassroots community has been recognised during the tenure of the second CE, a former professional civil servant, but the impression is that the emphasis is on top-down rather than bottom-up information flows (that is, guiding instead of learning).[124]

The colonial government built the nucleus of a multi-channel institutional network which, while not even remotely analogous to direct democracy, could facilitate the direct transmission of signals from the political periphery to the political centre although the ultimate intention was often to serve the purposes of the latter. Its principal constituent parts included the now defunct Urban and Regional Councils, the extensive district administration infrastructure, numerous government advisory committees (the number not being indicative of impact), the code of access to information, the Privacy Commission, the Consumer Council, the Equal Opportunities Commission, the Legislative Council redress system, the Independent commission Against Corruption, the Ombudsman, the Complaints Against Police Office, the departmental complaint-handling units, administrative tribunals and the Administrative Appeals Board.[125] The methodical broadening and

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121 Ma *Political Development in Hong Kong: State, Political Society and Civil Society*, above n 91, 58-82; Lau (ed), above n 109; John P Burns *Government Capacity and the Hong Kong Civil Service* (Oxford University Press, Hong Kong, 2004); Anthony Cheung "Political Capacity in Post-1997 Hong Kong: Constrained Institutions Facing a Crowding and Differentiated Polity" (2007) 29 Asia Pacific Journal of Public Administration 51-75; and Anthony BL Cheung "The Story of Two Administrative States: State Capacity in Hong Kong and Singapore" (2008) 21 The Pacific Review 121-145 .

122 See Ma *The Political Development of Hong Kong*, above n 91, 65-70; and Li Pan-kwong "The Executive" in Lam et al (eds), above n 93, 23-37.

123 See Ma *The Political Development of Hong Kong*, above n 91, 97-133; and Percy Luen-tim Lui "The Legislature" in Lam et al (eds), above n 93, 39-57.

124 Hung "From Tung Che-hwa to Donald Tsang: China's Grudging Self Correction and Policy Re-orientation towards Hong Kong in the Lost Decade", above n 120.

125 Scott *Regime Change*, above n 93, 328-371; and Norman J Miners *The Government and Politics of Hong Kong* (5 ed, Oxford University Press, Hong Kong, 1998) 106-111, 155-181.

deepening of this network might have arguably yielded gains in competitive efficiency without impinging adversely on policy decisiveness, but momentum has slackened considerably after 1997.

The issue of electoral rules does not have significant economic ramifications in this context. It should be noted however that, following the transition from British to Chinese rule, the single-member constituency first past the post formula was abandoned in favour of proportional representation for directly elected legislative seats. The unabashed objective was to bolster the strength of the CC and curtail the progress of the LC. The strategy has proved to be remarkably successful. It has not merely produced, literally at a stroke, a pro-government majority in the legislature but has also put a damper on development of (unappealing to players at the political centre) party politics (by lowering barriers to entry for independent actors without strong institutional affiliation). On the negative side of the ledger, legislative fragmentation has escalated substantially. Moreover, a highly concentrated de facto presidential system has been transformed into one with a comfortable parliamentary majority.[126] In the absence of offsetting initiatives, designed to restore checks and balances to previous equilibrium, this may be viewed as detrimental to competitive efficiency.

The organisation of the legislature is highly relevant from an economic perspective. Hong Kong is widely perceived as a minimalist State and, as such, has been lavished with praise by libertarian icons. Milton Friedman, for instance, poses the question "whether there exist any contemporary examples of societies that rely primarily on voluntary exchange through the market to organize their economic activity and in which the government is limited."[127] According to him, "the best example is Hong Kong."[128] After all, the territory "has no tariffs or other restraints on international trade."[129] Further, it "has no government direction of economic activity, no minimum wage laws, no fixing of prices."[130] Last but not least, "government plays an important but limited role. It enforces law and order, provides a means for formulating the rules of conduct, adjudicates disputes, facilitates transportation and communication, and supervises the issuance of currency."[131]

While this is at least a mild overstatement of a fundamentally compelling argument, post-colonial constitutional design in Hong Kong has been heavily geared towards preserving not just the lofty image but also the underlying economic realities. The dangers presented by agent (politician

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126 Ma *The Political Development of Hong Kong*, above n 91, 119-122, 145-147; and Ma Ngok "Political Parties and Elections" in Lam et al (eds), above n 93, 121-127.

127 Milton Friedman and Rose D Friedman *Free to Choose: A Personal Statement* (Pelican, London, 1981) 33-34.

128 Ibid, 34.

129 Ibid.

130 Ibid.

131 Ibid.

and bureaucrat, particularly the former) opportunism and voter short-sightedness, as highlighted by economists, have been acknowledged, implicitly but emphatically. Institutional architects have gone to considerable lengths to ensure that populist excesses are kept firmly at bay. One of the principal mechanisms chosen for this purpose has been a form of corporatist political representation via functional constituencies. The idea was originally floated by a maturing colonial regime – seeking organisationally credible ways to formalise a traditionally close, yet rather informal, government-business alliance – which embraced the notion that "full weight should be given to representation of the economic and professional sectors of Hong Kong society which are essential to future confidence and prosperity."[132]

The political entrenchment of corporatist elements is a historically common phenomenon. It is conceptualized in the social science literature as a mode of interest representation entailing the orderly mobilisation of coherently-structured social groups by creating a viable participatory platform incorporating a manageable number of singular, compulsory, hierarchically-ordered, non-competitive and functionally-differentiated special purpose units.[133] This notion is one of the keystones of the post 1997 constitutional order, regarded by those who shape it as a necessary condition for achieving institutional stability and maintaining economic dynamism. The functional constituency (FC) component now matches quantitatively the geographical constituency (GC) one within the legislature (the latter consists of directly elected councillors) and is less fragmented (but, on the other hand, more inertia-driven).[134]

The FC venture was ill conceived and may scarcely be portrayed as a success. There are vexing issues of equity and accountability which need not concern us here. In an economic context, the problem lies in the fact that the current organisational framework is not conducive to performance consistent with expectations. In theory, the FC are supposed to serve a specific role, acting as a stabilising force both in the short term and over a long horizon (by suppressing the urge to accommodate parochial pressures and applying a low discount rate to future outcomes; that is, they have a balancing agenda). In practice, their mission, if any, is poorly defined and cannot be pursued effectively in the present institutional environment. Indeed, they tend to operate as generalists and

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132 Hong Kong Government *White Paper on the Future Development of Representative Government in Hong Kong* (Government Printer, Hong Kong, 1984) 4.

133 Philippe Schmitter "Still the Century of Corporatism?" (1974) 36 Review of Politics 85-131.

134 Ma *The Political Development of Hong Kong*, above n 91, 36-45, 100-102; Sing Ming "To What Extent Have Members of the Functional Constituencies Performed the 'Balancing Role' in Hong Kong?" in Cheng (ed), above n 80, 109-177; Rowena YF Kwok and Elaine YM Chan "Functional Representation in Hong Kong: Problems and Possibilities" (2001) 24 International Journal of Public Administration 869-885; Christine Loh and Civic Exchange (eds) *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong University Press, Hong Kong, 2006); and Rowena YF Kwok "Functional Representation in Hong Kong's Legislature: Voting Patterns and Political Implications"(2006) 46 Asian Survey 401-416.

otherwise be preoccupied with corporatist interests. Most of their members are content to faithfully toe the government line in crucial circumstances, detracting from competitive efficiency. Paradoxically, they have been less inclined to support initiatives aimed at enhancing Hong Kong's economic competitiveness than directly elected GC representatives.[135]

If a delicate balancing act is called for, there is a superior organisational alternative to the uneasy and unproductive FC-GC cohabitation. A bicameral solution would increase transparency, lead to a more satisfactory division of labour, provide focus and reduce ambiguities. Musgrave's tripartite classification of government activities into an Allocation Branch, a Distribution Branch and a Stabilisation Branch might furnish a model for implementation.[136] The responsibility of a corporatist chamber would be to contribute primarily to economic growth and stability (stabilisation in the broad sense of the term). Allocation, or the delivery of goods and services through public channels, should be undertaken largely via the first chamber route and distribution might be ideally addressed through innovative, special-type constitutional mechanisms.[137]

There is no reason to assume that FC could not adopt democratic procedures for selecting legislative leaders and adopting common positions on strategic issues. In this respect, the State and the constitution might play a constructive role in guaranteeing organisational openness and accountability. Once the basic principles are widely endorsed, it should not prove overly challenging to design a set of institutions capable of accomplishing in a more effective and legitimate way what corporatism at its formal best seems to achieve. The necessary steps would of course have to be taken to ensure that all citizens are properly represented, that the selection process is generally consistent with established democratic criteria and that the corporatist agenda is strictly limited to those issues whose resolution might possibly benefit all members of the community.[138]

The question of economic rights need not concern economic students of the constitution in this particular context. The principal purpose of the Basic Law is to insulate, at the institutional level, the ultra-capitalist Hong Kong economy from the mainland hybrid (it was predominantly socialist at the time of drafting). Political autonomy is an instrumental goal accorded secondary importance and, constitutional commitments notwithstanding, subject to situational influences. The Basic Law contains elaborate provisions, on an unprecedented scale by historical and contemporary standards, aimed at ensuring, albeit not with clinical precision, that the territory does not deviate from the libertarian path on the whole faithfully adhered to during the colonial era.[139] Thus far, it has not

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135 Ibid.

136 For an overview see Richard A Musgrave *The Theory of Public Finance* (McGraw Hill, New York, 1959).

137 Mueller, above n 51, 192-208.

138 Mushkat and Mushkat "Conversationalism, Constitutional Economics and Bicameralism: Strategies for Political Reform in Hong Kong", above n 44.

139 Ghai, above n 2, 231-244.

been seriously tested in complex practical settings (political and judicial), so that a comprehensive assessment cannot be offered. Hong Kong is blessed with a Bill of Rights (although it was not painlessly born),[140] but the experience of the past decade does not suggest that an economic version would be equally desirable.

Rather uncharacteristically, from a comparative perspective, fiscal constraint is built into the Basic Law, and emphatically so. The HKSAR is saddled with a requirement of "keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product."[141] Better still, in terms of the logic underpinning constitutional economics, rapid expansion of gross domestic product should not translate automatically into a corresponding rise in public revenue. Restraint must be exercised even in such propitious circumstances. When faced with a buoyant economy, the government still ought to take "the low tax policy previously pursued in Hong Kong as reference" in determining the types and rates of taxes.[142] This pattern is arguably tilted further towards the neoclassical ideal than blueprints generated by prominent constitutional economists.

Policy practice may diverge from Basic Law theory, however. The relevant provisions are rather general and, in themselves, are not likely to amount to a binding constraint in specific politico-economic contexts. A crucial variable such as time, for instance, is not part of the equation. It is not entirely clear whether the Budget should be balanced annually, over the economic cycle or perhaps within some other appropriate time frame. By the same token, the term is open to conflicting interpretations. Similar observations apply to the tax side. During the "lean" years immediately following the transition from British to Chinese rule, fiscal deficits were a common occurrence and greater than usual tinkering with tax rates was witnessed. When the economy has regained momentum, reversion to fiscal norms has taken place. It is interesting to note that, throughout the whole pre-recovery phase, no party opted to sound the metaphorical constitutional alarm.

It is apparent that the government targets consciously the level of fiscal reserves, even if it is not a scientific exercise. It is equally evident that the tax regime is a constant element in the picture, although periodic signals that a consumption/sales tax may inevitably become sooner or later the mainstay of the system may rattle economic agents. Yet, this fundamentally stable configuration is the product of self-imposed restraint – and thus, in the final analysis, policy discretion – rather than Basic Law fortitude.[143] To complicate matters, the rules supposedly followed by the fiscal

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140 Johannes MM Chan and Yash Ghai (eds) *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworth Asia, Hong Kong, 1993).

141 Article 107 of the Basic Law.

142 Article 108 of the Basic Law.

143 Tony Latter *Hands On or Hands Off? The Nature and Process of Economic Policy in Hong Kong* (Hong Kong University Press, Hong Kong, 2007) 47-71.

authorities have not been made fully transparent and, in order to incorporate them into one's expectations, a combination of historical extrapolation and future discounting is needed. Better visibility, coupled with broad pre-commitment,[144] would be a concrete step towards narrowing the gap between constitutional intent and administrative practice.

The conduct of monetary policy is not subject to far-reaching prescriptions. The Basic Law stipulates that the HKSAR should have its own currency and should exercise its monetary responsibilities with the requisite prudence. The local currency thus "must be backed by a 100 per cent reserve fund" and its issue, which may be delegated to commercial banks, ought to be "soundly based" and geared towards "maintaining [its] stability."[145] The implication possibly is that the present linked exchange rate system/currency board should remain intact, but this is not a foregone conclusion. The activities of the Exchange Fund must be focused principally on "regulating the value of the Hong Kong Dollar."[146] Except for providing for the continuing existence of a separate currency, those are elastic statements which may not furnish a solid foundation for policy implementation, monitoring and calibration. Monetary stability is aspired to, but less ambitiously sought than its fiscal counterpart, at least via constitutional channels.

The absence of a set of tighter rules is largely attributable to the institutional prominence of the deeply-entrenched and time-tested peg to the US dollar. The linked exchange rate system/currency board acts as an antidote to the potential politicisation of monetary policy which, by virtue of this formidable constraint, is literally orchestrated by the maestros at the United States Federal Reserve. As long as this pattern persists, no extraordinary vigilance is apparently required. At least two qualifications may nevertheless be called for. First, monetary policy should be broadly rather than narrowly conceived, to encompass activities other than those focused directly on combating inflation (controlling the money supply, managing the exchange rate, setting interest rates and the like). Secondly, the assumption that the peg to the United States dollar would remain a permanent feature of the economic regime must inevitably be treated with a degree of caution.

It thus cannot be overlooked that the Hong Kong Monetary Authority (HKMA) has experienced very rapid quantitative and qualitative expansion. It now operates on a far larger scale and along a much wider spectrum than during the drafting of the Basic Law. The organisational transformation that seems to have taken place may have been the result of an essential adaptation to shifts in the domestic and external economic environment. It may have however also partly reflected internally-induced goal displacement, or the influence of bureaucratic empire-building (utility-maximisation in

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144 This concept is explored in Martin DD Evans "Optimal Pre-Commitment in Macro-Economic Policy: A Game Theoretic Approach of Fiscal Policy" (1990) 42 Oxford Economic Papers 695-714; and David Currie and Paul Levine *Rules, Reputation and Policy Coordination* (Cambridge University Press, Cambridge, 1993).

145 Article 111 of the Basic Law.

146 Article 113 of the Basic Law.

the parlance of constitutional economics). A stance sympathetic to special interests (in the financial community) has manifested itself periodically as well. The HKMA is not an island unto itself. It is governed by statute and falls under the purview of the financial secretary (the local equivalent of a Minister of finance). This notwithstanding, it qualifies in many respects as the equivalent of an independent central bank, without being as democratically/ institutionally accountable. It may not be appropriate to lower constitutional/ political vigilance in such circumstances.[147]

The oft-predicted demise of the peg to the United States dollar has not materialised and the mechanism has withstood many financial market challenges. Its imminent dismantling or unravelling is an unlikely prospect. On the other hand, the long-term outlook may be shrouded in uncertainty. The Chinese currency has already decoupled from the United States dollar. The latter's persistent slide is a source of moderately serious economic distortions (notably, susceptibility to imported deflation/ inflation), which for the time being are worth tolerating. The structure of the regional and global economy is changing in a manner that is not necessarily conducive to peg stability. Its removal and replacement with a link to the renminbi, if technically feasible (when mainland capital account transactions are no longer subject to tangible restrictions), would not be without politico-economic disadvantages and the Hong Kong government is probably not strong enough to operate effectively a currency regime structured along Singaporean lines (a flexible peg to multiple currencies on a trade-weighted basis). It may be premature to prepare viable contingency plans, but it should be noted that the present constitutional framework may be deemed backward-looking, given this not altogether unrealistic scenario.[148]

In the fiscal and monetary domains, the Basic Law and time-honoured rules of thumb can be said to be a source of economic discipline, albeit one varying in strength. Key institutional innovations, such as the peg to the United States dollar, whether sustainable or not in the long run, may play an even more significant role in this respect. In the regulatory sphere, the picture is considerably less satisfactory. Indeed, it would not be an overstatement to portray it as uncharted constitutional territory and an area where policy evolution has not progressed conceptually beyond the rudimentary stage. The Basic Law, while not short of microeconomic prescriptions, displays rather limited awareness of the extensive nature of regulation and its substantial ramifications. The government has taken few pivotal steps to ensure that the structural and functional gaps narrow materially over time.

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147 These issues are explored in Latter, above n 143, 73-89; YC Jao *Asian Financial Crisis and the Ordeal of Hong Kong* (Quorum Books, Westport, 2001); Leo F Goodstadt *Uneasy Partners: The Conflict between Public Interest and Private Profit in Hong Kong* (Hong Kong University Press, Hong Kong, 2005) 117-138; Tony Latter *Hong Kong's Money: The History, Logic and Operation of the Currency Board* (Hong Kong University Press, Hong Kong, 2007); and John Greenwood *Hong Kong's Link to the US Dollar: Origins and Evolution* (Hong Kong University Press, Hong Kong, 2008).

148 For additional insights see ibid.

Too many crucial pieces of the constitutional–statutory–policy puzzle are conspicuously missing. Examples abound. A cost-benefit analysis of actions designed to rectify market failure is seldom undertaken. The notion of a comprehensive regulatory budget (which may or may not be in positive territory) is not entertained systematically (the negative side of the ledger should reflect compliance and third-order costs rather than merely direct ones). Sunset laws are not firmly on the legislative agenda and regulation is consequently an open-ended affair. Such errors or omissions should not be dismissed lightly just because, at the present juncture, government coffers are overflowing. This is not only a matter of policy effectiveness and accountability. One could argue that the rather cavalier approach to the strictly economic dimension of regulatory oversight is not entirely consistent with the spirit of the Basic Law, even if it might be challenging to establish that it is contrary to the letter.

Regulation in Hong Kong is scarcely a wholly neutral exercise in the political sense of the term. Goal displacement – particularly one induced, deliberately or otherwise, by special interests – is not uncommon. The government has long refrained from contemplating the introduction of a viable competition law, partly for fear of circumscribing the room for manoeuvre enjoyed by big business (cartel theory-style explanation).[149] Elsewhere, there may have been reluctance to lower barriers to market entry due to, inter alia, resistance from well-entrenched monopolists/oligopolists (capture theory-style explanation).[150] Moreover, there is evidence to suggest that politicisation of regulatory decisions is by no means the exception to the norm in a (global) metropolis boasting an image of clinical efficiency.[151] This is hardly surprising, given the powers of patronage at the disposal of the government (especially the chief executive) and the difficulties it confronts in seeking legitimacy.

Implementation might prove to be a lengthy affair, but addressing the essentially technical issues need not pose an insurmountable problem. Strategic reorientation, entailing marked shifts in the modus operandi of the public sector, would be a less straightforward undertaking. Hong Kong has probably not reached a stage in its institutional development whereby it would be even remotely comfortable to consider experimenting with the delegation doctrine, which is being selectively

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149 Goodstadt, above n 147, 4-5; Latter, above n 143, 91-100; John H Ho "From Free Port to Competition: Is Asia's World City Playing Catch-up?" in Cheng (ed), above n 80, 421-442; Leonard K Cheng and Changqui Wu *Competition Policy and the Regulation of Business* (City University of Hong Kong Press, Hong Kong, 1998); Edward KY Chen and Ping Lin "Competition Policy under Laissez-Faireism: Market Power and its Treatment in Hong Kong" (2002) 21 Review of Industrial Organization 145-166; and Suk-ching Ho and Chi-fai Chan "In Search of a Competition Policy in a Competitive Economy" (2003) 37 Journal of Consumer Affairs 68-85.

150 For an overview see Miron Mushkat and Roda Mushkat "The Transfer of Property Rights from the Public to the Private Sector in Hong Kong: A Critical Assessment" (2006) 35 Global Economic Review 445-462; and Miron Mushkat and Roda Mushkat "The Political Economy of Loose Regulation: Modernity Meets Tradition in Hong Kong" (2007) 7 International Journal of Regulation and Governance 101-145.

151 For an overview see ibid.

revived by constitutional economists concerned with the negative facets of regulation in other jurisdictions. [152] On the other hand, theoretically well-grounded and practically feasible recommendations put forth by scholars working in this field, with a view to meaningfully enhancing the independence of regulators and insulating them tangibly from pressures likely to culminate in goal displacement, [153] may be productively pursued by local policy makers, provided they are willing to grasp the nettle. This observation applies to several of the normative ideas touched upon earlier.[154]

IV CONCLUSION

The HKSAR and its Basic Law are more than a decade old. The former has weathered several storms and is readily fulfilling expectations in terms of prosperity and stability, the two principal yardsticks commonly employed to assess its performance. Its remarkably flexible and open economy, in particular, keeps on demonstrating its inherent dynamism and resilience. Success often breeds complacency and, to their credit, students of the Hong Kong constitutional scene have not switched into a passive mode. Indeed, the Basic Law research industry is mirroring the territory's vibrancy. Pivotal constitutional issues are being constantly subjected to analytical scrutiny and there have been some ambitious attempts to explain process (of formation/evolution) rather than merely evaluate it (as well as outcome). The economic side of the picture however has attracted little attention.

This is rather surprising as the avowed purpose of the Basic Law is to preserve the quintessentially capitalist pre 1997 order. Both lawyers and social scientists should gravitate towards questions that arise in this context, but they have opted to focus on more traditional topics. It has been argued here that constitutional economics may shed new light on the development of the Basic Law, although in a complementary fashion, without crowding out other, empirically and theoretically sound approaches. It is a powerful explanatory instrument, parsimoniously but effectively applied to complex social phenomena. In addition, it may be used as a wide-ranging normative tool, generating insights capable of inspiring meaningful institutional reforms. In the unique Hong Kong political environment, constitutional economics may contribute to both objectives by enhancing the understanding of the Basic Law process and suggesting mechanisms for improving the quality of macro- and micro-level management.

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152 Aranson "Constitutionalizing the Regulatory Process", above n 58.

153 Majone "Non-Majoritarian Institutions and the Limits of Governance", above n 57.

154 The relationship between the legal framework and economic performance in post 1997 Hong Kong is explored further in Douglas W Arner and Berry FC Hsu "The Rule of Law and Economic Development in the Hong Kong SAR" in Chan (ed) *China's Hong Kong Transformed: Retrospect and Prospects*, above n 66, 173-187.

APPENDIX: ECONOMIC CONCEPTION OF THE CONSTITUTION[155]

(a) Constitutions grant citizens a well-defined set of rights. The government will not modify this set of rights except by using a well-defined procedure. This is necessary for the government to be viewed as legitimate by its citizens.

(b) Constitutions require citizens to fulfil a well-defined set of obligations. The government will not modify this set of obligations except by using a well-defined procedure. These first two characteristics of constitutions provide a general outline for the exchange model of government.

(c) The result of the exchange between government and its citizens is a long-term contract that cannot be modified except by the consent of both parties. The long-term nature of the contract and its relatively fixed rules differentiate government from the market provision of similar services. For example, this differentiates government police from private security guards.

(d) Every constitution must provide for the protection of its citizens. Governments exchange protection for tribute. This must include protection from physical harm as well as economic protection. Physical protection means that the government will try to protect the individual from harm as long as the individual obeys the government's rules. Economic protection means ensuring a way to earn an income in exchange for productive activity.

(e) Every constitution must provide for a clearly defined mechanism whereby the government collects its tribute. Constitutional limits on its taxing power provide citizens with a guarantee that they can retain some of what they produce. This incentive to be productive benefits both the citizens and the government that receives its income from the productivity of its citizens.

(f) From the standpoint of those in government, government is a way to reap monopoly profits. Constitutional rules define the extent to which the government can produce monopoly profits. Just as in other industries, the extent to which the government can generate monopoly profits is a function of the alternatives available to the consumers of government services.

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155 Adapted from Holcombe, above n 8, 50-51.