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**THE POLITICAL ECONOMY OF CONSTITUTIONAL REFORM IN AN EXTERNALLY-CONSTRAINED ENVIRONMENT: CHINA'S SHADOW OVER HONG KONG AND STRATEGIES TO MINIMIZE IT**

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**Abstract**

Hong Kong is a highly developed metropolis - affluent, dynamic, flexible, open, blessed with excellent infrastructure, enjoying British-style rule of law, benefiting from a free flow of information, and being "guided" by a generally efficient and clean government. Its economic foundations are robust and their social counterparts display few signs of fragility. Hong Kong's political institutions, on the other hand, still bear the marks of the benevolent authoritarianism which characterized the colonial era. As such, they are arguably out of sync with the socio-economic environment in which they are embedded. A distinct majority of the local population is clamoring for representative democracy. Those spearheading the effort have exhibited remarkable courage, dedication, selflessness, and consistency. However, they may have pursued an overly narrow agenda. This agenda could be broadened and, in the process, possibly rendered more palatable from a Chinese perspective, as well as intellectually credible.

**Introduction**

Hong Kong qualifies as a special case in the annals of international and constitutional law. Over a long period featuring radical shifts in the economic, political, and social domain, it functioned comfortably as a British colony. Its political institutions did not match the sophistication of its economic - or even social - counterparts, but the local government acted in a generally benevolent fashion and avoided authoritarian excesses. Indeed, the policy making apparatus operated in a mostly

transparent and accountable manner (in the broad sense of the term), and the rule of law was on the whole observed in both theory and practice.<sup>1</sup>

This can hardly be depicted as an institutional anomaly given the nature of the relationship between this predominantly Chinese city, with a traditional-style socio-economic fabric (a characterisation valid up to the outbreak of the Korean War and possibly beyond), and Britain. The center of the empire was embedded in a democratic milieu and this was bound to exert a strong influence on the administrative climate (liberal/rule-oriented versus authoritarian/arbitrary) in the colony, particularly in light of the fact that local political institutions were for a long time completely dominated by expatriate officers.<sup>2</sup>

The anomalous element in the picture is the product of the transfer of the reins of power on the 1<sup>st</sup> of July, 1997, from a quintessentially democratic sovereign deeply committed to the idea of a market economy to one still wedded, albeit no longer firmly, to the notion of a socialist dictatorship. Subsequent to this potentially disruptive event, a thriving metropolis enjoying a very high standard of living by any established yardsticks has effectively been integrated into the body politic of a country in the early stages of modernization (broadly defined). Perhaps more importantly, Hong Kong's *laissez-faire* economic ethos, rule-of-law legacy, human-rights practices, bureaucratic-neutrality conventions, and increasingly open policy machinery have become subject to possible infringement by economically and politically "backward" (or, to put it mildly, "unprogressive") China.<sup>3</sup>

Both international and constitutional law were resorted to in an effort to ensure that such infringement does not take place. Hong Kong and Chinese institutions may be poles apart in their form and substance, but the architects of the post-1997 regime proceeded, whether boldly or naively, on the assumption that their distinct attributes could be preserved within a unified national structure. The much-vaunted

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<sup>1</sup> NJ Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 1995).

<sup>2</sup> *Ibid.*

<sup>3</sup> M Mushkat, *The Economic Future of Hong Kong* (Boulder: Rienner, 1990); R. Mushkat, *One Country, Two Legal Personalities - The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997); Y Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 1999).

“one country, two systems” formula was floated for this purpose. The Sino-British Joint Declaration on the Question of Hong Kong, a binding international agreement, and the Basic Law, the constitutional document that embodies its spirit, were drafted in order to give that formula a meaningful legal expression and provide an effective framework for sustaining Hong Kong’s progress as a Special Administrative Region (SAR) of the People’s Republic of China (PRC).<sup>4</sup>

The legal edifice that was constructed is expected, assuming a measure of good will and restraint on all sides, to play a pivotal role in allowing Hong Kong to exercise a high degree of autonomy, in the external as well as the domestic arena, and evolve in an orderly fashion within the limits of the pre-1997 institutional order. In some respects, the transition from British to Chinese rule should reinforce the foundations of that order. Specifically, the quasi-authoritarian remnants of the colonial era, which was for the most part not marked by genuine grass-roots participation in the political process, ought to be removed and supplanted by democratic structures. While the final destination is not entirely clear, the journey should culminate in a representative government in the conventional sense of the term.<sup>5</sup>

Policy intentions, reflecting time-sensitive strategic/tactical considerations and power constellations, should not be equated with policy realities however, even when supported by legal instruments of great practical and symbolic value. The formal side of the picture notwithstanding, China controls, both directly and indirectly (through its local proxies), the key decision points in Hong Kong. This includes the channels through which executive, bureaucratic, and legislative authority flows. The business elite is also a tactical ally and so are selectively the media. Several large social organizations toe the line too, whether actively or passively (in which case, they can be easily mobilized). The judiciary, some of the professions, and various liberal-type groupings (really, often loosely-connected individuals) are the exception to the norm but their ability to influence events is, in the final analysis, modest.<sup>6</sup>

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<sup>4</sup> R Mushkat, *op.cit.*; Ghai, *op.cit.*

<sup>5</sup> R Mushkat, *op.cit.*; Ghai, *op.cit.*

<sup>6</sup> SH Lo, *Governing Hong Kong* (New York: Nova, 2002).

External constraints are conspicuous in their absence. The Sino-British Joint Declaration is indeed a binding international agreement. No party has expressed, whether explicitly or implicitly, views to the contrary or has acted, whether overtly or covertly, in a manner suggesting otherwise. Be that as it may, international agreements often undergo a substantive erosion, even unravel, due to problems stemming from "moral hazard." This term, which features prominently in the literature on institutional economics<sup>7</sup> (incorporating law and economics),<sup>8</sup> refers to post-contractual opportunism characterized by a divergence of interests among the players involved, coupled with difficulties encountered in determining whether the terms of the agreement have actually been followed and in enforcing the contract provisions.

Hong Kong's and China's interests are believed to be converging, but this is a slow and uneven process.<sup>9</sup> As matters stand, the former British colony is focused on keeping its highly flexible capitalist system intact and preventing its generally benevolent government from turning into a malevolent entity. The mainland, on the other hand, is pursuing economic reform, yet not unequivocally so. It travels in a jagged terrain and its path is marked by many twists and turns. The commitment to economic reform appears to be quite strong, but it is clearly less than total because of concerns at elite level about its socio-political costs. The overarching goal remains the preservation of Communist Party rule and any potential threats to its supremacy must be nipped in the bud.<sup>10</sup> In this context, Hong Kong's interests, while not irrelevant, are undoubtedly of secondary importance.<sup>11</sup>

The problem of moral hazard has attracted considerable attention on the part of students of international law/relations. In recent years,

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<sup>7</sup> W Kasper and ME Streit, *Institutional Economics* (Cheltenham: Elgar, 1998).

<sup>8</sup> R Cooter and T Ulen, *Law and Economics* (Reading: Addison Wesley Longman, 2000).

<sup>9</sup> YW Sung, *The China-Hong Kong Connection* (Cambridge: Cambridge University Press, 1991); DR Meyer, *Hong Kong as a Global Metropolis* (Cambridge: Cambridge University Press, 2000); YW Sung, *The Emergence of Greater China* (Basingstoke: Palgrave, 2002).

<sup>10</sup> M Mushkat, *Economic Reform, Discontinuous Change and China's Future: Perspectives on Global Development and Technology* (forthcoming).

<sup>11</sup> M Mushkat, *The Economic Future of Hong Kong*.

research has been conducted on monitoring arrangements and enforcement mechanisms for international agreements. Some of the work undertaken is merely theoretically illuminating, but several projects have arguably yielded useful practical insights.<sup>12</sup> The difficulty lies in the fact that it is simply too late to convert such insights into effective control measures in the Hong Kong-China case. The Sino-British Joint Declaration is a *fait accompli* and, as an international agreement, has to be accepted in its present form, whatever the limitations. It is also a moot point whether China, given the sensitive nature of the issues involved, would have been willing at any juncture to contemplate a more robust monitoring/enforcement structure for post-1997 Hong Kong.<sup>13</sup>

The corollary is that the external side of the picture features no significant players other than China. The latter is, to all intents and purposes, free to interpret the Joint Declaration as it sees fit and cannot be propelled by any country or group of countries (including the United Kingdom and its "allies") in a direction considered "more consistent" with the letter and spirit of that document. China may opt to broadly adhere to the terms of the Joint Declaration because an expression of goodwill and restraint in such contexts often has general ramifications that states, except those on the periphery of the international system, cannot overlook. Specifically, compliance with treaty provisions can be said to have an intrinsic value of its own for actors in the global arena who consistently rely on contractual relationships to further their goals and gain overall from the stability of the existing international "regime" (this presumably encourages them to refrain from taking steps that might undermine its fabric). By the same token, non-compliance may prove costly due to its potentially adverse effect on their "reputation."<sup>14</sup>

The significance of such symbolic factors cannot be dismissed lightly. There is reason to believe that they do play a part in shaping

<sup>12</sup> X Dai, 'Information Systems in Treaty Regimes', *World Politics*, 54 (July, 2002), pp 405-436

<sup>13</sup> R Mushkat, *op.cit.*

<sup>14</sup> M Mushkat and R Mushkat, 'The Political Economy of International Legal Compliance', *University of California Davis Journal of International Law and Policy* (forthcoming).

China's policy vis-à-vis Hong Kong.<sup>15</sup> This observation is equally valid with respect to the former's desire not to harm the interests of the latter, and avoid the consequences of being perceived as responsible for the deterioration in performance of a metropolis that displayed remarkable dynamism under British rule.<sup>16</sup> As indicated, however, the ultimate goal of China's leaders is to maintain the supremacy of the Communist Party. All else simply pales in comparison.<sup>17</sup> This inevitably limits the room for maneuver Hong Kong enjoys to pursue its interests, even within the framework of the Joint Declaration and the Basic Law.

Constitutional reform in general and democratic broadening/deepening is no exception to the norm. Indeed, that is the area where the apparent conflict between the center (Beijing) and the periphery (Hong Kong) manifests itself in its most acute form.<sup>18</sup> Progress on the constitutional/democratic front is arguably essential for a city that aspires to preserve its status as a leading international financial/service hub.<sup>19</sup> Absent such progress, Hong Kong would also probably be thrown into a state of "social disequilibrium" in that its rapidly expanding middle class needs effective channels to express its increasingly multifaceted aspirations.<sup>20</sup> Yet, constitutional /democratic reform is viewed as potentially destabilizing from a Beijing perspective because it might act as a catalyst for socio-political change on the mainland. The Communist Party rule would thus possibly be threatened.<sup>21</sup>

This poses a dilemma which is difficult to manage, let alone resolve, at the practical level. On the one hand, pursuing constitutional/democratic reform vigorously is an undertaking consistent with the interests and aspirations of the Hong Kong people. On the other hand, displaying such determination in the face of opposition, whether outright or latent, from Beijing is a strategy that carries considerable

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<sup>15</sup> *Ibid.*

<sup>16</sup> M Mushkat, *The Economic Future of Hong Kong*.

<sup>17</sup> *Ibid.*

<sup>18</sup> Lo, *op.cit.*

<sup>19</sup> M Mushkat, *The Economic Future of Hong Kong*.

<sup>20</sup> Lo, *op.cit.*

<sup>21</sup> *Ibid.*

political risks. Unless executed judiciously, it could antagonize the leadership of the Communist Party and provoke an authoritarian response. The purpose of this paper is to explore ways to render such an outcome less likely. The focus is exclusively on measures to broaden the constitutional/democratic reform agenda. The related issue of how to conduct the dialogue with China, both directly and indirectly, which merits equal attention, will be addressed at a later juncture.

### **Broadening the Reform Agenda**

The democratic movement in Hong Kong is relatively young and, despite its strong grass-roots support, it has remained on the periphery of the political system. The elements representing it in the policy arena (a well organized party and a cluster of like-minded activists/professionals) are not part of the executive establishment and they exert little influence over government decisions. Democrats are capable of embarrassing, frustrating, and slowing down the well-ensconced power holders - and this qualifies as a notable achievement, given the asymmetric nature of the relationship and the enormous shadow cast by China over Hong Kong. Nevertheless, the tremendous efforts directed toward molding official strategies seldom yield meaningful results.<sup>22</sup>

A sense of political inefficacy, coupled with a firm commitment to the principle of universal suffrage, and an unshakeable belief that widespread community support should translate into policy leverage through representative institutional channels, has prompted democrats to concentrate on process-related reforms. Specifically, they have devoted a great deal of thought to means that could be employed to dramatically improve access to the executive-legislative-bureaucratic arena and have taken many steps, at times bold in nature, to ensure that idea formulation culminates in idea implementation. In many respects, their platform has borne close similarities to those of other democratic movements at the embryonic stages of development.<sup>23</sup>

While resources have been mobilized primarily for this purpose, that has not been the case in the exclusive sense of the term. Out-

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

come-related goals have also been pursued in earnest, albeit selectively so. Human rights and the rule of law have loomed particularly large on the democratic agenda. By the same token, considerable attention has been accorded to human services (education, health and welfare). More recently, environmental concerns have been given prominence, and so have various "merit goods" (e.g., the arts), although less persistently so. Here the similarities are with the liberal platforms of (socio-) democratic movements in more mature stages of development.<sup>24</sup>

A glaring omission is economic strategy. Hong Kong derives its vitality largely from the flexible and open structure of its economy. The latter, in turn, is the product of policies designed to allow private markets and private agents to function subject to minimum constraints. These policies are part of a package whose components, both macro and micro, form a coherent whole. The package has undergone some adjustments over the years because of changes in the external/internal environment and shifts in personnel at the upper echelons of government (mostly reflecting de-colonization and localization against the backdrop of the transfer of sovereignty from the United Kingdom to China).<sup>25</sup>

Neither the adjustments, nor the core of the package, are thoroughly examined by the democrats. Fiscal issues (level of government spending, revenue enhancement strategies in general and those focused on broadening the tax base in the particular, public borrowing, cyclically-balanced budgets, etc) and their monetary counterparts (independence of the Hong Kong Monetary Authority, the linked exchange rate system/dollar peg, accumulation of foreign exchange reserves, etc) are not treated as meticulously as one would expect under the circumstances (after all, Hong Kong has been plagued by deflation-

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*; Meyer, *op.cit.*; Sung, *The Emergence of Greater China*; DWW Chang and RY Chuang, *The Politics of Hong Kong's Reversion to China* (New York: St. Martin's, 1998); I Scott, *Institutional Change and the Political Transition in Hong Kong* (Houndmills: Macmillan, 1998); JYS Cheng, 'Political Changes Since the Establishment of the Hong Kong Special Administrative Region', *American Asian Review*, XVII (Winter, 1999), 77-113; R Ash *et al.*, *Hong Kong in Transition* (Houndmills: Macmillan, 2000); I Scott, 'The Disarticulation of Hong Kong's Post-Handover Political System', *China Journal*, 43 (January, 2000), pp 29-53.



ary pressures for several years and during this period the traditionally sound fiscal and monetary systems have started exhibiting signs of strain).<sup>26</sup>

The limited consideration given to micro questions is perhaps even more noteworthy. This is an area where the distinction between economic freedoms and those falling into the categories toward which (social) democrats gravitate is often blurred. Hong Kong's economy is indeed flexible and open, relatively speaking. However, pockets of rigidity or, worse still, market power not just endure but are actually reinforced, at least selectively so, by a government dominated by special interests ("pure" monopolies/monopsonies are uncommon, yet oligopolies, including of the "tight" variety, are by no means non-existent). The democrats have nevertheless not accorded a high priority to measures to boost competition, particularly the promulgation of the type of elaborate laws (and institutional infrastructure) introduced for this purpose by most liberal democracies.<sup>27</sup>

"Rolling back the frontiers of the state" is also largely overlooked as a theme of considerable relevance in the Hong Kong context. The local government has expanded in function and size well beyond the vision which had guided those who had played a leading role in shaping its structure and *modus operandi*. The balance between the private sector and its public counterpart has swung in favor of the latter. This has had adverse implications in terms of efficiency and freedom (in addition to the macro/fiscal problems which have ensued). Shrinking government via privatization (broadly defined to encompass, *inter alia*, the purchaser-provider split/contracting out/voucher-type financing without direct production of services, etc) could help reverse the trend.

<sup>26</sup> YC Jao, *Hong Kong as an International Financial Center* (Hong Kong: City University of Hong Kong Press, 1997); YC Jao, *The Asian Financial Crisis and the Ordeal of Hong Kong* (Westport: Quorum, 2001); M Mushkat, 'The Hong Kong Currency Board Defense Against Financial Market Pressures', *Developing Economies*, XL (June, 2002), pp 152-165; *Economist Intelligence Unit, Hong Kong* (London: Economist Intelligence Unit, 2003).

<sup>27</sup> Jao, *Hong Kong as an International Financial Center*; Jao, *The Asian Financial Crisis and the Ordeal of Hong Kong*; Economist Intelligence Unit, *op.cit.*; MJ Enright, D Dodwell and E Scott, *The Hong Kong Advantage* (Oxford: Oxford University Press, 1997); WG Shepherd, *The Economics of Industrial Organization* (Upper Saddle River: Prentice Hall, 1997).

Again, the upshot would arguably be a social configuration encouraging individuals to exercise responsibility and act in an accountable fashion (i.e., conducive to the promotion of freedom), rather than one merely contributing to economic ("Y") and managerial ("X") efficiency.<sup>28</sup>

There is reason to believe that broadening of their agenda (roughly) along these lines would render the democrats a more credible political force both at home and across the border. Some of the ideas highlighted here have "libertarian" (as distinct from conservative macro/micro) underpinnings and, on the face of it, may seem as an anathema to the power holders in Beijing. There is evidence to suggest, however, that they need not provoke a negative reaction from that side of the political fence. China itself is apparently following a generally similar path in the economic sphere and may view any initiatives aimed at revitalizing private markets and stabilizing the economy quite favorably.<sup>29</sup>

Such initiatives, in any case, should not be regarded as radical from a domestic Hong Kong perspective. They are from time to time promoted by elements representing the mainstream business community (the "liberals"), who on the whole enjoy a productive relationship with Beijing, and their implementation would constitute a modest adjustment rather than a dramatic leap forward. The challenge here lies in shifting in this direction without materially alienating constituencies oriented toward the redistribution of income and wealth, as distinct from efficiency/freedom/growth/stability.<sup>30</sup>

Another key factor not addressed effectively by the democrats is "government failure." This is a complex phenomenon, highlighted by

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<sup>28</sup> Enright, Dodwell and Scott, *op.cit.*; Jao, *Hong Kong as an International Financial Center*; Jao, *The Asian Financial Crisis and the Ordeal of Hong Kong*, Economist Intelligence Unit, *op.cit.*; SJ Bailey, *Public Sector Economics* (Houndmills: Macmillan, 1995); S. J Bailey, *Local Government Economics* (Houndmills: Macmillan, 1999); R Baldwin and M Lave, *Understanding Regulation* (Oxford: Oxford University Press, 1999); JE Lane, *New Public Management* (London: Routledge, 2000); JE Lane, *The Public Sector* (London: Sage, 2000); BE Dollery and JL Wallis, *The Political Economy of Local Government* (Cheltenham: Elgar, 2001).

<sup>29</sup> Bailey, *Public Sector Economics*; Bailey, *Local Government Economics*.

<sup>30</sup> Lo, *op.cit.*

political economists associated with the “public choice school.”<sup>31</sup> Government failure is commonly viewed as a problem stemming from bureaucratic malfunctioning. Unlike in the private sector, the lack of a profit motive is assumed to detract from cost-effectiveness (depriving civil servants of the incentive to minimize costs and maximize “saleable” output). By the same token, again unlike in the private sector, the threat of bankruptcy does not exist, preventing decision makers from pursuing strategies designed to enhance organizational viability and satisfy genuine demand/need. Such influences, which are not confined to the two outlined here, are thought to render the government a highly inefficient provider of services.

Government failure should not be equated exclusively with bureaucratic malfunctioning, however. It may be regarded as a multi-dimensional phenomenon encompassing a host of behavioral problems at both the demand/voter and supply/politician ends of the political spectrum. Paradoxically, these problems manifest themselves in a particularly acute form in a democratic environment which, as Churchill has argued, is not short of imperfections despite being “superior” to any alternative regime in terms of virtually all relevant yardsticks (efficiency, justice, freedom and accountability).<sup>32</sup> Examples abound,<sup>33</sup> but just a handful will suffice to illustrate that voters exercise their responsibilities in a cavalier fashion and politicians act opportunistically.

For instance, on the voter side, there is little incentive to gain a thorough appreciation of the issues involved and express one’s preferences through the ballot box. The reason apparently lies in the fact that the benefits of voting for the individual are rather modest - the probability of one person affecting the outcome is distinctly low. By the same token, the competing platforms (assuming they are the product

<sup>31</sup> JM Buchanan and G Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962); G Tullock, *The Politics of Bureaucracy* (Washington: Public Affairs Press, 1965); WA Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine-Atherton, 1971); JM Buchanan and RE Wagner, *Democracy in Deficit* (New York: Academic Press, 1977); G Brennan and J Buchanan, *The Power to Tax* (Cambridge: Cambridge University Press, 1980); M Olson, *The Rise and Decline of Nations* (New Haven: Yale University Press, 1982); RG Noll, *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985); WC Mitchell and RT Simmons, *Beyond Politics* (Boulder: Westview, 1994); DP Rachter and RE Wagner, *Limiting Leviathan* (Cheltenham: Elgar, 1999).

<sup>32</sup> D Heald, *Public Expenditure* (Oxford: Robertson, 1983).

<sup>33</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

of anything other than short-term electoral expediency) may display few meaningful differences, implying that the outcome is inconsequential. Thus, although the costs of voting cannot be said to be particularly high, they may be regarded as such in relation to the benefits.<sup>34</sup>

Indeed, in a fully rational calculation no one would vote since the probability that an individual's vote would make a difference to the outcome - given that in most cases the individual cares only about whether the candidate wins or loses, not the magnitude of the win or loss - is essentially zero. Individuals do vote, of course, albeit in a restrained manner (i.e., participation rates remain at disappointing levels across electoral systems). The assumption is that they obtain some utility out of voting, or more generally, out of participation in the political process (after all, considerable time, effort, and money are devoted to inculcating into children the notions of civic responsibility).<sup>35</sup>

To explore the ramifications of the analytical claims made by members of the public choice school further, it is convenient to hypothesize that the standard civic education textbook "model citizen" actually researches the election issues and candidates. The question one must inevitably pose is: What then? First, the voter presumably discovers that the "research" has proved costly in terms of time, effort, and money expended, meaning the opportunity costs have been high. At the same time, the voter learns that in order for his/her preferences to count or be enacted, two related developments need to take place: (1) he/she has to be a member of the majority, and (2) he/she must pay dearly in way of transaction costs to assemble a winning majority.<sup>36</sup>

By contrast, majorities are not required in markets (where "economic democracy" is practised). In fact, one virtue of markets is that there are always entrepreneurs eager to provide specialties or so-called "niche" products. Not so in the political process where uniformity prevails. Voters who express support for something, but are on the losing side, do not obtain what they value or do not obtain it in the preferred amounts, whereas voters who express disapproval of something, but are on the losing side, obtain what they do not want or obtain it in less preferred quantities. Accordingly, the essence of collective

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<sup>34</sup> JE Stiglitz, *Economics of the Public Sector* (New York: Norton, 2000).

<sup>35</sup> *Ibid.*

<sup>36</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

choice is coercion. In a real sense, each voter is a presumptive dictator telling all other voters what they should or should not have.<sup>37</sup>

To make matters worse, elections are scheduled at fixed times, often after several years, with the cycle having little relationship to world events. The comparison with consumers is telling. The latter can enter retail markets whenever it suits their own convenience rather than that of the storekeepers. Further, unlike the consumer, who faces shelf-loads of easily identifiable private goods, the voter is presented with a ballot offering choices among competing candidates for public office who have campaigned and made loud, but mostly vague, promises. These choices are over "durable goods" that cannot be exchanged or adjusted "at the margin," a little more or a little less to please each voter-buyer. Take it or leave it. Much the same applies to referenda issues, including fiscal proposals.<sup>38</sup>

To compound the problem, when elections are held, those contemplating participation are provided with no "reality" check. Because the political system generates many of its dilemmas without a price system, and without price tags, assessing benefits and costs becomes impossible. Even in fiscal referenda elections, the voter is confronted with decisions that are normally posed in either/or terms with the intended benefits, but not the costs, particularly the distribution of those costs among taxpayers. Or the costs, at least the direct ones, are provided while the expected collective, as well as individual benefits, are overlooked. In short, the voter faces enormous uncertainty. This divorce of costs and benefits accounts for much of the irresponsibility displayed by voters, which manifests itself in inconsistency across issues and voters wanting "to have their cake and eat it too."<sup>39</sup>

Members of the public choice school contend that rational voters learn sooner or later that their most valued interests can be better served not by marching to the polls on election days, but by organizing special-purpose interest groups. This leads to an extraordinary proliferation of such groups and a channeling of massive resources to the pursuit of private privileges at public expense. It is an "arms race" in

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<sup>37</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>38</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>39</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

which the sum total of costs outweighs the benefits, for the players as well as the community-at-large, yet once started, it is irrational for any group to opt not to participate.<sup>40</sup>

The same logic applies to legislators who authorize "pork-barrel" expenditures. They must engage in "bringing home the bacon," which explains why they necessarily become involved in "logrolling." To refrain from taking this course is tantamount to neglecting the interests of their constituents, who continue to pay for the "pork" of others, but obtain none of it themselves. Needless to say, a legislator inclined to defy the trend is unlikely to be returned to office (a well-known case in point is the defeat suffered in 1972 by Oregon's fiercely independent Senator Wayne Morse, who was ousted by Bob Packwood for failing to produce more "pork").<sup>41</sup>

From a public choice perspective, voters thus confront a host of challenges, rendering the exercise of their rights a not entirely rewarding experience. The problem largely lies in the fact that they have limited influence, without enjoying the opportunity to make real choices. The upshot is a high degree of absenteeism, cynicism, and ignorance - a pattern that diverges from that observed in the marketplace, where consumers display a significant measure of situational control, have a very powerful incentive to become informed about the goods/services offered, and derive substantial pleasure from purchases.<sup>42</sup> Members of the public choice school argue that such demand-side behavioral problems, serious as they may be, are perhaps not as daunting as those encountered on the supply-side.

The basic proposition here is that elected political suppliers differ in four fundamental ways from market suppliers. They possess no property rights in their office, do not generate profits from successful activities, must trade with each other without a currency, and are elected for relatively short terms, under plurality rules. Such attenuated political markets tend to produce a strong bias toward politically-rational, but publicly-irrational decisions/policies. This apparently reinforces the distortions originating from the demand side, creating a

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<sup>40</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>41</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>42</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

political environment which in many respects falls short of the ideal picture of democracy painted by standard civic education textbooks.<sup>43</sup>

Members of the public choice school claim that politicians gain office through a competitive struggle for votes from utility-maximizing, but generally uninformed, part-time voters. This quest for electoral gains inevitably encourages the participants in the contest to adopt short-term perspectives and engage in full-time money gathering to finance continuous campaigns. In essence, politicians "buy" support by offering policies/services for "sale." They opt for programs that are highly visible to specific groups, particularly those with an economic orientation, and expect to be rewarded with campaign resources - money, labor contributions, and votes.<sup>44</sup>

The groups likely to benefit most from rallying to the cause are not necessarily those displaying the greatest loyalty, but those whose support is most contingent. Public expenditures by politicians must be allocated in the "optimal" political manner, that is, in the "right" amounts in the "right" places at the "right" times! Wealthy constituents prefer their benefits through indirect mechanisms, such as regulation and tax privileges, rather than through outright transfers. The poor favor benefits of the direct variety, while the middle class is specially fond of educational grants, low-interest loans, urban renewal, clean industry privileges, social security, highways and streets, parks, research, and so on - programs benefiting primarily the middle income groups and neatly rationalized not as rent privileges, but as "public goods." Politicians respond accordingly, granting each class what it demands, while minimizing vote losses incurred in giving more to some groups than to others.<sup>45</sup>

The enactment of such plans depends on logrolling, as for example, whenever farm groups vote for subsidized-food programs benefiting inner-city poor, while the representatives of the latter vote for agricultural subsidies. And both groups support granting "in-kind" goods (food, housing, medical services, etc) to low-income elements over the more efficient cash transfers. This distributional pattern not only ap-

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<sup>43</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>44</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>45</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

peals to those who are concerned about the spending habits of the poor. It seems, somehow, to have more of a "gift-giving" quality than simply mailing checks.<sup>46</sup>

When the time comes to consider how to pay for all this, politicians tend to respond in perfectly rational, self-interested ways, the obverse of spending choices. Diffusing hidden taxes is the much preferred strategy. Taxing later rather than now has strong political attraction, as does increasing old taxes over introducing new ones. Rendering the mode of payment less onerous or visible ranks high with both taxpayers and politicians. In confronting such choices, neither the former nor the latter pay close attention to the long-term impact on the economy, according to members of the public choice school.<sup>47</sup>

Politicians labor in a very peculiar institutional setting, one that simultaneously makes them fierce competitors for vote, and yet yields tremendous potential for monopoly privileges. In the first place, there is but one government, one set of officials at a time, each of whom may face highly restrictive legal constraints, but wield more influence and power than any single citizen or even interest group. Another way of expressing this idea is to note that elections are held to grant government monopolies for a fixed term of office. Further, electoral laws and practices effectively prevent the entry into the political arena of elements not affiliated with the Establishment.<sup>48</sup>

While politicians enact the laws of the nation, the laws are administered by bureaucrats working in what members of the public choice school depict as "non-working" bureaucracies. The ordinary citizen may have some awareness of the actions of politicians but actually deals only with bureaucrats, be they courthouse employees, fire fighters, police officers, teachers, or welfare caseworkers. As indicated earlier, these "faceless" bureaucrats, like the politicians, act out their roles in a peculiar institutional framework, one not conducive to efficient outcomes.<sup>49</sup>

To reiterate, their enterprises are funded by taxes, for the most part, and their "bottom line" is not profit (worse still, contend members

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<sup>46</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>47</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>48</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>49</sup> Niskanen, *op.cit.*



of the public choice school, it is “maximal budgets”). Their product is often hard to measure, and it is seldom sold in the market. Last but not least, the threat of bankruptcy, since it is not part of the equation, does not exert a moderating influence.<sup>50</sup> In a democracy, bureaucrats are beholden to elected officials, particularly legislators who finance and monitor their operations.

While legislators do in fact monitor performance, it is evident that their attention is spasmodic. Bureaucrats, on the other hand, operate on a full-time basis, and consequently enjoy considerable advantage during budget formulation and execution. By the same token, the various segments of the bureaucratic machine offer services, generally free of charge, for which there is strong demand among special citizen-client groups and which are aggressively promoted by the representatives of these groups. Indeed, such representatives are even found in the legislature, where they sit on spending committees that provide the funds and conduct the oversight. Members of the public choice school refer to this phenomenon as an “Iron Triangle.” They argue that it sows the seeds of the abuse of power, corruption, favoritism, monopoly privileges, and runaway spending growth.<sup>51</sup>

If such diagnostic insights, regarding the fragile structural foundations upon which the modern political edifice rests, and the unfortunate behavioral consequences of this configuration that manifest themselves on both the demand/voter and supply/politician sides of the picture, are grounded in reality, whether unambiguously or selectively, policy analysts concerned with institutional design should undoubtedly be engaged in a quest for measures to rectify the situation. To their credit, members of the public choice school have not been content merely to highlight flaws in the system, as well as pinpoint their roots, but have also endeavored to identify institutional mechanisms that might serve to minimize the “damage.”<sup>52</sup>

The mechanisms are designed to provide protections to citizens from one another (which is not as far-fetched as it may sound; e.g.,

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<sup>50</sup> *Ibid.*

<sup>51</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>52</sup> Buchanan and Tullock, *op.cit.*; Tullock, *op.cit.*; Niskanen, *op.cit.*; Buchanan and Wagner, *op.cit.*; Brennan and Buchanan, *op.cit.*; Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

shielding minorities from majority transgressions) and from “rulers” (politicians/bureaucrats). At the economic end of the constitutional (or, alternatively, but less satisfactorily, statutory) spectrum, they include balanced-budget requirements, tax and expenditure limitations, a line-item veto (allowing the chief executive to exercise veto power in the budgetary context on an item-by-item basis), an item-reduction veto (granting similar authority to reduce the level of funds without eliminating the entire item from the budget), tax earmarking (most commonly when taxes are applied to fund a particular category of expenditure by imposing a levy on those who benefit from it; e.g., gasoline taxes that are earmarked for highway expenditures), regulatory limits, voter approval (for fiscal proposals) and supermajority requirements for legislatures (e.g., a two-thirds majority for tax initiatives).<sup>53</sup>

Members of the public choice school also advocate adjustments to the Bill of Rights or, better still, from their perspective, the promulgation of an Economic Bill of Rights. They regard this legal instrument, whether in its original (American-style) or extended form, in an appropriate institutional setting, as a powerful tool for the protection of individual rights from encroachments by other parties, notably fellow-citizens and rulers. The appeal of such a constitutional vehicle, for them, lies in the fact that it serves to reduce significantly the uncertainty facing an individual, in that he/she cannot predict when he/she might be a member of a minority in need of a shield from majority action (e.g., a person accused of crime deserves protection, for who knows when one might be so accused; Amendments IV-VIII).<sup>54</sup>

The concerns expressed by members of the public choice school in this regard stem from the perception that the relevant constitutional safeguards have not fared well in legislatures and, perhaps more importantly, the judicial system. Their attention is directed primarily at the economic side, but the political dimension is not overlooked (e.g., the question is posed whether a greater emphasis should be placed on victims' rights, because in an environment characterized by escalating

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<sup>53</sup> Buchanan and Tullock, *op.cit.*; Tullock, *op.cit.*; Niskanen, *op.cit.*; Buchanan and Wagner, *op.cit.*; Brennan and Buchanan, *op.cit.*; Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>54</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

crimes rates, one must contemplate seriously the possibility of becoming a victim). The spotlight normally falls on rights pertaining to property - that is, who may acquire it, how it will be administered, and how it will be disposed of. Such rights are deemed to be the most fundamental, and hence controversial, among those designed to protect minorities from majority infringements. The focus is not on property rights *per se*, but the rights of individuals, as well as organizations, to control property uses.<sup>55</sup>

The key argument advanced in this context is that the rights of property-holders have been seriously eroded over the past century in democratic settings. The balance of power between them and non-holders has shifted decisively in favor of the latter, thereby enhancing the power of government and curtailing that of would-be property holders. The conclusion drawn is that personal liberty, particularly as secured against government, has been materially undermined. This observation is considered to be valid even with respect to areas where property rights are well-defined, trespass being one of the most conspicuous examples. In such areas, the transaction costs endured by private-property holders have increased so dramatically that it has become prohibitively expensive for them to pursue their interests through the appropriate legal channels.<sup>56</sup> This partly accounts for the efforts to place the (Economic) Bill of Rights on the public policy agenda.

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

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<sup>55</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

<sup>56</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wagner, *op.cit.*

the public sector from a multi-purpose provider to a mere purchaser of services).<sup>57</sup>

Many of these proposals have their roots in “participationist” political theory, which stands in sharp contrast to the “representationist” variant. Scholars who subscribe to the former portray the institutions of representative government as inefficient “middlemen” who interfere with the expression by citizens of their true preferences. Direct democracy eliminates, or at least minimizes, this problem by allowing the direct, undiluted expression of such preferences. Representationists, on the other hand, maintain that the relatively high participatory burden (which economists would term “high transaction costs”) associated with the institutions of direct democracy render direct popular participation in public decision-making wasteful and impractical in the modern polity. To state it differently, public policy decisions are better undertaken by specialist politicians, albeit ones who gain power as a result of winning a competitive election.<sup>58</sup>

A careful reading of the literature, however, suggests that these two theoretical perspectives may legitimately be viewed as complimentary in nature. The notion that the participationists - and, by implication, members of the public choice school - favor radical versions of direct democracy with virtually all political decisions being made in the mythical “town square,” clearly rests on a shaky foundation (so does, of course, the proposition that the opposite school of thought is rigidly wedded to the concept of purely indirect representation). The differences are of the “quantitative” rather than “qualitative” variety, and should perhaps be addressed in “relativist” terms. On balance, public choice theorists seem to be presenting, compellingly or otherwise, a case for an effective use of direct modes of political participation as supplements to the institutions of representative democracy.<sup>59</sup>

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<sup>57</sup>Bailey, *Public Sector Economics*; Bailey, *Local Government Economics*; Dollery and Wallis, *op.cit.*

<sup>58</sup>W Kendall and A Ranney, *Democracy and the American Party System* (New York: Harcourt, Brace, and Jovanovich, 1956); RG Holcombe, *From Liberty to Democracy* (Ann Arbor: University of Michigan, Press, 2002).

<sup>59</sup>Holcombe, *op.cit.*; H Hahn and S Kaminjeski, *Referendum Voting* (Westport: Greenwood, 1987).

A constructive blending of the participationist and representationist standpoints is evidently necessary for generating an intellectually credible institutional reform agenda, and one that is politically viable in an environment where group interests do not easily converge. A thoughtful examination and selective adoption of ideas originating from the public choice school would arguably serve to solidify the Hong Kong democratic platform and render it more acceptable on the home front. Paradoxically, the Chinese response might also be more positive than one would initially be inclined to assume. After all, China and its local proxies are in some crucial respects on the periphery of the Hong Kong political system. The introduction of new mechanisms to protect minority rights, as well as the strengthening of established channels designed for this purpose, might thus be regarded as a reassuring gesture from their perspective.<sup>60</sup>

Nor should the participationist element in the analytical structure erected by public choice theorists be viewed in isolation. In conjunction with the other (reasonable) elements, it apparently constitutes a coherent whole which qualifies as well-balanced, and which seems to have the potential to enhance the stability of the socio-economic system. Indeed, again paradoxically, on the face of it, countries which have embraced participationist principles in one form or another (e.g., Switzerland at the national level and the United States at the local level) have enjoyed a high degree of socio-economic stability and their socio-economic policy mix has seldom reflected centrifugal ideological influences.<sup>61</sup> The corollary presumably is that the entire package, if properly designed and delivered, would be more palatable from a Chinese standpoint than the almost exclusively representationist product currently offered.

### Conclusion

Hong Kong is moving inexorably, albeit gingerly, from an institutional configuration akin to that of a benevolent dictatorship toward an ac-

<sup>60</sup> WH Overholt, 'Hong Kong', *Journal of Democracy*, (12 October, 2001), pp 13-18.

<sup>61</sup> Mitchell and Simmons, *op.cit.*; Rachter and Wegner, *op.cit.*; Holcombe, *op.cit.*

countable government operating within a framework featuring democratic checks and balances. The movement is driven by socio-economic forces (growing affluence, emergence of the middle class, shift to services, rise of consumerism, globalization, spread of individualistic ethos, and decolonization) and underpinned by ethical considerations (the firm belief that democracy is a morally superior form of political organization). Instrumentalist factors also play a role in the process in that representative government is regarded as a bulwark against authoritarian influences from across the border.

On the possibly negative side, the movement appears to be spearheaded by individuals and organizations concerned with virtually no other goals than the promotion of democratic representation in the conventional sense of the term. Their ideas and *modus operandi* provoke mixed reactions in Beijing because of the threat they are supposed to pose to the political *status quo* on the mainland and business continuity in Hong Kong. A broader agenda, incorporating economic (macro, micro, neo-classical, monetarist, supply-side, and libertarian) and participationist elements could help alleviate the anxieties in China. It might also serve a similar purpose *vis-à-vis* the local business sector, which tends to equate full-fledged democracy with widespread inefficiencies, and even disruptive populism.

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## UNITED STATES SUPREME COURT POLITICS: FOCUS ON STEVEN'S AND OTHER MODERATE JUSTICES' LONGEVITY

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In the United States Supreme Court politics the month of June is normally 'crunch time'. Many rulings are delivered by the Supreme Court during and before the end of the month of June. In the beginning of July of each year the nine Justices of the Supreme Court go for a three month (fully-paid of course) summer vacation. After the three months vacation the Court resumes hearing new cases on the 'first Monday in October'.

During the Supreme Court terms of 2000-2001, 2001-2002 and 2002-2003 the month of June was also 'speculation' time. During the 2002-2003 Supreme Court term there was also speculation as to whether any of the Supreme Court Justices would retire. (Normally though, but not invariably, Justices make announcements of their retirement at the end of June when the Court recesses for the summer vacation). As the most recent (US) Supreme Court term ends at the end of June 2003 there were no announcements of resignations or retirements from the nine-member Bench. At the start of the Supreme Court term in October 2003 also there has been no announcement of impending resignations or retirements.

In a ruling delivered on the night of 12 December 2000, in the (in)famous *Bush v Gore*<sup>1</sup> case the Supreme Court by a five to four majority peremptorily stopped the Florida recounts and by this action virtually declared George W. Bush to be the winner of the 2000 United States Presidential election. Since then speculation has been rife as to

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<sup>1</sup> 121 S.Ct 636 (2000).