

Functional Constituencies and Universal Suffrage

A response to SNM Young's Occasional Paper No 14

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FUNCTIONAL CONSTITUENCIES AND UNIVERSAL SUFFRAGE

Comments Stimulated by a Proposal from
The Centre for Comparative and Public Law at the University of Hong Kong

The Centre for Comparative and Public Law at the University of Hong Kong has published its Occasional Paper No. 14 as a contribution to the debate on the evolution of Hong Kong's political system.¹ Its aim is to 'break the impasse' between those who argue for universal suffrage in 2008 and those who support the Standing Committee of the National People's Congress' ("NPCSC") decision that the 2007/2008 elections for the Chief Executive ("CE") of the Hong Kong Special Administrative Region ("HKSAR") and the Legislative Council ("Legco") of the HKSAR respectively shall see no material change in the method of their (s)election.

The Paper concedes that the Functional Constituency ("FC") system has major structural flaws, but asserts that the search for a 'viable coexistence' between universal suffrage and the FC system is vital to allow Hong Kong's political system to make progress based on 'true consensus'.

The model proposed ("Proposal") would incorporate the following features:

- (i) Geographical Constituencies ("GCs") with legislators elected by 'one man one vote' of all electors, who are defined by age and citizenship-type limits only
- (ii) FCs, broadly categorised in line with policy areas rather than industry groupings, but whose legislators will be *drawn only from those elected in GC elections*, and will in turn be elected by electors whose vote will be based on their having a 'genuine and special' interest in the sector
- (iii) Elimination of the 'anomalies and inequalities that plague the current system' and the introduction of an impeachment mechanism (2/3 of Legco) for FC legislators
- (iv) Alleviation of the structural flaws of the 'executive-led' system, by making FC legislators *ex-officio* members of ExCo and granting them additional 'executive' roles, a mandate to engage in policy-making and a right to be consulted *and satisfied* before a particular bill is introduced.

Rejected *ab initio* were: those approaches to reform that would give the geographical electorate a second vote in the FCs, because such a change would not address structurally-derived executive/legislative frictions, nor the disparity in constituency size and jockeying for political favour that we see today; those approaches that would transform the FCs into an Upper House, because, again, they would not resolve the legislative/executive imbalance, nor provide legitimacy to Government in the policy-making field, and furthermore experience of reform overseas suggests it is difficult to achieve consensus on Upper House/Lower House relations.

Constitutional development in Hong Kong presents many problematic issues, and it is certainly easier to criticise than to synthesise. Nonetheless for all its theoretical potential, the Proposal to elect the FC legislators from within the GC-elected pool and then endow them with 'executive' functions and a privileged position in relation to policy and legislation seems to this writer to repeat many of the weaknesses of the

¹ Simon N.M. Young: *Can Functional Constituencies Co-exist with Universal Suffrage?* Occasional Paper No. 14, Centre for Comparative and Public Law, Hong Kong: The University of Hong Kong, January 2005 available at www.hku.hk/ccpl

present system from which the Proposal aims to escape, while adding a few more practical complexities and problems of political principle and practice of its own.

OBSERVATIONS TENDING TO COUNT AGAINST THIS NEW PROPOSAL

It is easy to observe that, under the Proposal the GC electors whose chosen legislators disappear into the FC system may be forgiven for feeling that their votes have been hijacked; that the FC electors may feel that the GC legislators are not the best pool from which to draw their representatives; that the chosen FC legislators will be relatively poorly equipped either to deal with the problems of their electors or to balance general against special interests; that jockeying for power is a political phenomenon that will not be made to disappear by interposing one extra electoral step in the process of getting to power; that introducing into an already layered system extra layers of complexity tends to go against the benefits that transparency is generally thought to bring to a political system; that many political systems that appear formless or arcane can nonetheless work well in practice when the efficiency with which power is allocated and balanced is high in practice; that the requirement for FC legislators to be satisfied before legislation can be passed would paralyse 'executive-led' government under the current interpretation of the words; and finally that the proposal would actually involve a major restructuring of the FCs, on which the NPCSC seems not to be keen.²

All of these observations would tend to count against this new Proposal.

Despite this, such detailed objections can doubtless be adapted to and mitigated by judicious adjustment of voting ratios, careful selection of FC areas of responsibility and new rules for ExCo's collective responsibility (if all the FC representatives or even committee chairmen were in ExCo, it would be very large). But more important are the serious problems that would result from the structural intermingling of legislative and executive functions, which will exacerbate not reduce core problems in the operation of Hong Kong's legislative system and may create a longer-lasting negative impact on Hong Kong's political culture by further delaying its maturing process.

CHECKS AND BALANCES CORE TO SYSTEM

Political systems range from the adversarial (the United Kingdom) to the consensual (Switzerland's elaborate confederal system); political cultures, likewise, may be adversarial (the UK and Australia have a long history of such an approach) or consensual (Belgium, the Netherlands and the European Parliament); and social cultures may be competitive or cooperative (the United States of America is competitive, while consensus marks the Alpine traditions of Switzerland and

² As Chaney puts it in relation to the Decision of the NPCSC of April 26, 2004 on the selection of the Chief Executive in 2007 and forming Legco in 2008: "the Basic Law does not prescribe the type of vote applied to executive-moved Committee Stage Amendments. Basic Law Article 75, however, states that "[t]he rules of procedure of [Legco] shall be made by the [Legco] on its own, provided that they do not contravene this Law." The Standing Committee ruling, therefore, acts as an exception to Article 75, and raises the question of how much control Legco has over its rules of procedure.

The ruling also diminishes any hopes of granting the geographical constituency members more legislative power. Subject to a unicameral vote, the executive authorities can continue to rely on the support of the majority of functional constituency members and ignore the positions of the majority of geographical constituency members." *The Hong Kong Executive Authorities' Monopoly on Legislative Power: Analysis of the Legislative Council's Second Term Voting Records*, Occasional Paper No. 13, Centre for Comparative and Public Law, Hong Kong: The University of Hong Kong, June 2004

Austria³). Almost all countries strive to implement the theory of checks and balances, even though it may be the culture, not the system that delivers the result.⁴ In Asian political practice, culture (Confucianism, for example) and history (colonialism, followed in many countries by a politically dominant military) have resulted in an experience of ‘top-down’ political leadership, even where consensus is the social norm and harmony the ideal towards which people aim⁵.

Hong Kong’s present system, while ‘executive-led’, also accepts the idea of checks and balances. The Government is accountable to the Legislature⁶ and the Chief Executive (“CE”) of the Hong Kong Special Administrative Region must resign if Legco repeatedly refuses to pass important bills⁷. Checks and balances are meant to work precisely by virtue of the separation of roles so that there is no doubt about the duties and answerability of the different elements of the political system to the various constituencies represented. The executive tends to be implementation and action-oriented and needs to be checked, while the legislative process is deliberative, deliberate and generally needs to be stimulated. Government (the executive) needs to achieve things in order to deliver its political promises (even inaction, if true conservatism is the aim), while its political opposition generally tries to frustrate it. The legislative process allows compromises to be made so that society may function as well as possible between elections and so that, as the political wheel turns, the rules governing communities retain a reasonable degree of continuity and consistency - sufficient at least to retain the consent of the governed, whether reluctant or warm-hearted, to the exercise by the powers that be of their powers.

At present, while members of Legco may not have much direct influence on Government, at least it is clear they do not represent Government – they represent the avenue through which their respective constituents may bring influence to bear on policy-makers and on the drafting of laws to reflect policy. If a select group of legislators is given prior access in the creation of policy and to the drafting stages of law making, that will only reinforce the destabilising constitutional divide between those who are ‘only’ legislators and the executive (at least the GC members presently share their broad exclusion from Government with FC members). Worse, it will do so by enshrining special interests as the basis for penetrating more deeply into the policy-making and executive processes of the constitutional framework of Hong Kong.

³ To the point that its ‘Proporz’ system involved the appointment to state-owned enterprises of board members in broad proportion to the political balance of power.

⁴ Per Lord Hailsham in the BBC’s Richard Dimbleby Lecture: “... the powers of our own [UK] Parliament are absolute and unlimited. And in this, we are almost alone. All other free nations impose limitations on their representative assemblies. Parliament can take away a man’s liberty or his life without a trial, and in past centuries, it has actually done so. So, of the two pillars of our constitution, the rule of law and the sovereignty of parliament, it is the sovereignty of Parliament which is paramount in every case. ... The limitations on it, are only political and moral. They are found in the consciences of members [of Parliament], in the necessity for periodical elections, and in the so called checks and balances inherent in the composition, structure and practice of Parliament itself.” (in the BBC’s magazine “*The Listener*”, London: BBC, 21/10/76)

Note also that the physical layout of the English system places Government and Opposition in the House of Commons in seats directly opposed to each other; but the opposition is a “Loyal Opposition” – loyal to Crown and therefore country; and offsetting the adversarial layout is the small size of the debating chamber that allows the ‘conversational’ interaction of MPs (per Churchill, according to Lord Moran in *Churchill at War: 1940-1945*, London: Robinson, 2000, p.148.

⁵ Gabrenya & Kwang suggest: “Harmony within hierarchy is probably the phrase most widely used to characterize a wide range of social behaviour in Chinese societies.”, in Bond (ed.) *The Handbook of Chinese Psychology* Hong Kong: Oxford University Press, 1996, at p.313

⁶ Basic Law of the Hong Kong Special Administrative Region (hereafter: “HKSAR”), Art. 64

⁷ Basic Law of the HKSAR, Art. 52

It is true that substantial overlap exists between executive and legislative elements in many systems of government. In the UK system, the 100+ ministers are drawn from the Members of Parliament of the dominant party, and patronage is used to keep party members in check, a problem commented upon by constitutional theorists for many years, made worse in theory by the absolute powers of the UK Parliament at Westminster and leading to the expression 'elective dictatorship'.⁸ Still, among the four main roles of Members of Parliament is included holding to account the executive branch of government.⁹ Further, no MP is elected to represent special interests.

The main difference between the Westminster model and Hong Kong's legislature is that the former evolved as a check on the sovereign's authority with a real authority (= power) of its own; while in HK we have seen a concerted effort to strip Legco of any authority (= power); this power-reduction being achieved by diluting the direct mandate of members (list system, multi-member constituencies); through the existence of FCs; by the rule on the introduction of charging bills, needing the Chief Executive of the HKSAR's agreement for bills on government policy¹⁰ and the need for votes to pass with both GC and FC majorities;¹¹ as well as by a determinedly demeaning approach to the formal status of Legco (illustrated by limited attendance by Tung Chee-hwa while he was CE, reluctance to answer legislators' questions fully, Government dealings with the press before Legco, and the lack of any but the most perfunctory consultation).

In Hong Kong's system there is not even a token balance, and certainly no real interaction of constitutionally equal parts of the system such as exists in the UK, the USA, or Switzerland. Even in the UK, many constitutional observers have found the trend towards "Presidential" government a negative not a positive development; nor does this seem mere nostalgia. But the operation of the system in Hong Kong is so foreign to the principle of Parliamentary supremacy that it seems a false move to seek to redress an imbalance of power by pushing it more in the same direction.

In the formal separation of powers and checks and balances, Hong Kong is perhaps nearer the American model, succinctly described by politician-statesman Winston Churchill as having 'a single Executive: a President appointed indirectly by electors chosen as the State legislatures might decide ... with the right of veto over the acts of Congress, but subject to impeachment ..., responsible only to the people, completely independent of the legislative power'.¹² If one substitutes 'The Central People's Government and the people of Hong Kong'¹³ for 'the people', and replaces impeachment by the Basic Law's Article 52 obligation to resign in the case of legislative impasse, one has a description of the CE as leader of government in Hong Kong today.

⁸ per Lord Hailsham "... since the sovereignty of [the UK] Parliament was established ...there has been a continuous enlargement of the scale and range of government ..., the checks and balances, which in practice used to prevent abuse, have now disappeared. ... both sets of changes have increase[d] the extent to which elective dictatorship is a fact, and not just a lawyer's theory.", *The Listener*; supra, note 4)

⁹ see The Jenkins Commission: *The Report of the Independent Commission on the Voting System*: "The role of Members of Parliament can now be broadly regarded as four-fold: to represent their constituencies; to provide a pool from which most of the holders of ministerial office are chosen; to shape and enact legislation; and to enable the party in power to sustain the central planks of its legislative programme whilst yet being held to account for its executive action." Presented to Parliament by the Secretary of State for the Home Department, October 1998, at para 10.

¹⁰ Basic Law of the HKSAR, Art. 74

¹¹ Basic Law of the HKSAR, Annex II, II

¹² Winston S. Churchill: *A History of the English-Speaking Peoples, Book IX*, London: Cassell, 1956 (reprinted 2002), p.207

¹³ Basic Law of the HKSAR, Art. 44

In an ideal world, and especially in the ideal world of cooperative community relationships and duty-bound leaders that characterises the Chinese political tradition, it would be neither naïve nor utopian to strive for a Hong Kong constitutional framework built around the concept of a dutiful collective leadership able to gain respect from the people because of its integrity and effectiveness. In other words, if the outcome of a framework in which FC legislators also became part of the executive was, or was trusted to be, that the privileged FC legislators became disinterested public servants able to influence the government to a benign reassessment of its policies – then all would be well.

BENIGN OUTCOME NEVER THE RESULT OF PRIVILEGE

The problem is that such an outcome has never been the result of privilege, whether in the ancient Greek world, or in the history of parliamentary democracy in England, or even in the heat of that most powerful experiment in popular fusion of executive and legislative roles, the French Revolution and its aftermath. Stretching our consideration to the US experience, substantial interaction between executive and legislative roles has only really gained acceptance in wartime.¹⁴ The same could be observed of Britain's World War II coalition National Government under Churchill: it was accepted - despite strains amongst coalition members - because it was seen to pay functional dividends and was needed to ensure the survival of the nation.

By contrast, strongly executive-led systems, under which the executive directs the legislature to follow its conclusions and accepts little or no democratic feedback, have had no aversion to privilege, but have a long-standing association with economic failure: the economic stagnation of Spain under Franco, the experiences of China under The Great Leap Forward and the Cultural Revolution, the post-World War II and post-Cold War evolution of Eastern Europe all make clear that the excessive fusion of the legislature with the executive roles carries enormous practical and economic costs – not to mention the political costs. There are exceptions. Napoleon Bonaparte as First Consul brought to France a drive and a practical, results-driven intellect which replaced the chaos of the Revolution with one of the strongest executive-led constitutional frameworks in Western Europe.¹⁵ Even today, presidential powers are considerable in France,¹⁶ nonetheless there is no special position vested in a class of legislators driven by economic function, and a period of 'cohabitation' may exist during which the President has to accommodate his powers to a National Assembly (lower house of the Legislature) controlled by a different political party from his own. Hitler's Germany was a short term economic success, and developed a close alignment between the state and special interests, consistent with the Führerprinzip¹⁷ which subsequently enabled Hitler effectively to short-

¹⁴ E.g. the establishment of the War Manpower Commission, and the First and the Second War Powers Acts, of March and June 1942

¹⁵ See, for a concise description, Cronin, *Napoleon*, London: HarperCollins, 1994 at p. 176 ff.

¹⁶ According to Guy Carcassonne: "The President of the [French] Republic ... has important powers, ... to appoint the Prime Minister, ... the other members of the government. He can call a referendum, dissolve the National Assembly, negotiate ... treaties, ... propos[e] a revision of the Constitution. His most important power, however, stems from ... elect[ion] by direct universal suffrage. The fact that over half the voters have voted for him personally gives the head of State an incomparable political power." on <http://www.info-france-usa.org/atoz/constitution.asp> for the Embassy of France in the United States; published on May 23, 2001; last accessed on 20 April 2005.

¹⁷ As Prof. Colleen A. Dunlavy reminds us: "Indeed, a German expert on competition policy commented on this difference in 1912. "In England and—what is most peculiar—especially in America, the joint-stock corporation is much less democratically organized." This difference in the governance of American and German corporations subsided for political reasons in the Nazi era. To bring the German corporation in line with the Nazis' Führerprinzip, a massive revision of incorporation law in 1937 strengthened the power of the board of directors (Vorstand) and diminished that of the shareholders. The result was also to bring German governance closer to

circuit the existing parliamentary framework.¹⁸ Even amongst newly industrialised but economically successful nations the most rapid and transformative period of economic growth came after they had emerged from colonial status and had thrown off the military-dominated regimes, as in Korea and Taiwan,¹⁹ that could certainly be called 'executive-led'. As the economies rose from poor to 'Tiger' economic status, both surrendered the privileges of power only slowly to a system of checks and balances. This remains a continuing process. Singapore also has been strongly executive-led but it has nonetheless been careful to value expertise,²⁰ rather than to institutionalise politically the access of special interest groups to Government.

Political leaders in advanced democracies have often succumbed to the temptation of believing that the formulation of policy will be improved, if only special interest groups are allowed access to the inner workings of government to help.

However practical experience in the West has not been so positive. In the UK, for example, the special access of the Trades Unions to the Labour Government in UK in the 1960s was widely seen as discrediting the 'objectivity' of government and leading to unbalanced economic policies.²¹ The same was true of Mrs Thatcher's Conservative Government's attachment to business – though the penalties there were more political than economic, as economic benefits did flow from the detachment of Government from a symbiotic relationship with union power and a closer alignment with business and business principles; but Thatcher's gradual detachment from the judgements of even her own party contributed to her downfall in due course. Today, in the USA, one of the major critiques of the second Bush Administration in terms of public policy is the perception that special interest groups have become too close to financially sensitive decision-making in the executive arm of government (for example, in the case of the 'Energy Task Force' headed by United States Vice President Cheney, the subject of judicial actions for disclosure), and also too influential in the legislative arm of the system.

The Australian experience with the caucus system (decisions made by party bodies before debate in Parliament) illustrates the frustration which unduly close executive/legislative relations can engender:

'[Parliament is] not responsible to the people at all. It is responsible to an assemblage of members known as the labour caucus ... away from ... Parliamentary scrutiny and discussion ... You are giving up the grandeur of your parliamentary system, which looks upon Ministers, not as the minions of a caucus, but as the trustees of a nation.'²²

American practice." - in *Government Structure and Policy Making in Germany and the U.S.* at an IAESBE Symposium at Johns Hopkins University, October 1, 2004

¹⁸ Adolf Hitler declared: "In the new German legal system which will be in force from now onwards the nation is placed above persons and property.... Th[is] principle ... has led to the greatest reform ever introduced in our German legal structure. The first decisive action taken ... was the setting up not only of one legislator but also of one executive." *Speech* delivered to the Reichstag, January 30th 1937; Berlin: translation pub. by H. Müller & Sohn,. (The 'one executive' was of course Hitler himself.)

¹⁹ On Taiwan's post-1972 economic growth, see Samuel C.Y. Ku: *The Political Economy of Regime Transformation: Taiwan and Southeast Asia*, in (2002) *World Affairs*, Fall issue

²⁰ According to Chew: "policy-making was entrusted to the technocrats, who were empowered to interpret the interests of the state and achieve economic goals"; in *Human Rights in Singapore. Perceptions and Problems* in *Asian Survey*, 34 (11), 1994, pp. 933-48, at p. 939

²¹ The failed '*Social Contract*' of 1975, a pact between the UK Government and the Trades Unions being a good example of such problems

²² G. S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives*, Melbourne: Melbourne University Press, 1989, p. 306. Refer also: Australasian Federal Convention Debates, Sydney, 17 September 1897, p. 782.

That said, taking advantage of the Panel/FC linkage in Hong Kong may well have potential as an evolutionary model to 'break an impasse'. Evolution remains possible and in Australia it has been said that:

'... as unlikely as it may seem at a time when Parliament's demise is being lamented by most observers, Parliament's backbenchers are busy using the committee system to revitalise their institution and thereby challenge the dominance of the executive. Put simply, they are trying to put the word 'responsible' back into Australian government.'²³

On the other hand, a 'solution' for Hong Kong which attempts to resolve our core governance problems by embedding selected elements of the Legislature more deeply into the Executive in fact merely embeds the core problem deeper into the system, and spreads the points of friction further without removing the cause. This will merely redouble, not resolve, the problem.

In contrast to the seemingly inexorable self-reinforcement of political power in adversarial systems, consensual models do exist in the political structures of economically advanced nations. Some of them even include an element of corporatism. This suggests that, while too much overlap between specialist inputs and Government responsibility may be undesirable, some interpenetration of business within the legislative and executive arms of government may work:

'The consensus model of democracy may be described in terms of ten elements that stand in sharp contrast to each of the ten majoritarian characteristics of the Westminster model. Instead of concentrating power in the hands of the majority, the consensus model tries to share, disperse, and restrain power in a variety of ways.'²⁴

Both Belgium and Switzerland apply the consensus model, and the operation of these successful examples suggests that consensus – a Chinese cultural preference referred to by many commentators – works best in a framework which demands cooperation in order to work, rather than one which enables the executive to decide and execute policy without true consensus. The list of factors²⁵ that help such consensual models to work includes 'executive power-sharing in broad coalition cabinets' and 'an executive-legislative balance of power' – both visibly resisted by Hong Kong's Government. According to the report of the Electoral Affairs Commission, the pan-Democratic grouping received some 62% of the votes cast in Hong Kong's 2004 Legco elections; however it has not hitherto been part of the Government's consensus-building exercises.

More positively, 'interest group corporatism', also included in the list, is seen as a supportive element of Switzerland's constitutional framework.²⁶ However, as there

²³ Martin Indyk, 'Making Government Responsible: The Role of Parliamentary Committees' in Patrick Weller and Dean Jaensch, eds, *Responsible Government in Australia*, Melbourne: Drummond, 1980, quoted by Jim Chalmers and Dr Glyn Davis in *Power: Relations Between the Parliament and the Executive* an Australian Parliament Research Paper 14 2000-01, 7 November 2000

²⁴ Arendt Lijphart *Patterns of Democracy*, New Haven, Connecticut: Yale University Press, 1999.

²⁵ The full list of ten 'consensual model' elements is: Executive power-sharing in broad coalition cabinets; Executive-legislative balance of power; Multiparty system; Proportional representation; Interest group corporatism; Federal and decentralized government; Strong bicameralism; Constitutional rigidity; Judicial review; Central bank independence; see Lijphart, *ibid*.

²⁶ According to Lehbruch, "*Konkordanzdemokratie* is [how] the Swiss designate their peculiar system of government based on the participation in the executive of all major political parties, and the accompanying preference for decision-making by broadly based compromises. The central institutional pattern ... is the settlement of major social conflicts not by majority decisions but through bargaining processes between

are many other elements in the Swiss framework that have little chance of adoption in Hong Kong, and which are specific to the historical development of the Swiss state (see footnote 25 for the list), the major lesson to learn from Switzerland is that corporatism can work, provided that checks and balances operate well and that there is a living consensus – one in which the attitude of participants as well as the framework supports the consensual resolution of problems.

In the post-War German system, consensus even penetrates the corporate world, through co-determination.²⁷ This too is unlikely to be adopted in Hong Kong, where 'the previous capitalist system and way of life shall remain unchanged for 50 years',²⁸ and where the idea of worker representatives on corporate boards is unlikely to appeal.

Nonetheless, the fact that multi-interest trade-offs are achieved in the Swiss political system and that the German post-World War II economy flourished with workers in the boardroom suggests that a greater toleration of 'horsetrading' – actually the central stuff of politics – is needed in Hong Kong. After all, the substance of political compromise is often achieved outside of a system (which simply validates the result) provided it is obtained in a way that all parties accept is 'by the rules'. If one party breaks the rules, as House Majority Leader Tom DeLay did in Texas and Washington,²⁹ constitutional friction follows – but this is a consequence of how the participants operate the system rather than a necessity entailed by the system itself.

In Hong Kong, however, there is not even an informal framework reflecting the kinds of rules, processes and opportunities for participation in the system that have made the consensual model effective in countries such as Switzerland. To further deepen an institutional imbalance of power by giving an executive role to an (indirectly) elected person representing a special interest group in a system with no other balances does not solve the problem; and if the structural problem is reinforced by an attitudinal problem, that makes matters worse.

UNDERSTANDING 'BALANCE OF POWER' A PREREQUISITE FOR A FUNCTIONAL 'EXECUTIVE-LED' SYSTEM

To assess the relative claims of a failure in the 'structure' or of a failure of 'philosophy of government' to be considered the core source of our problems, consider an alternative hypothesis: that current structural issues worsen, but do not cause the underlying conflict; that the conflict in fact reflects a dissonance between different philosophies of government.

organized groups. ... this meant ... the inclusion of the major political parties in bargained conflict settlement, often institutionalized by [their] participation in the executive. Later, typically, these large coalitions were reinforced by "corporatist" bargaining systems including the dominant associations of organized producer interests." *Consociational Democracy and Corporatism in Switzerland*; PUBLIUS vol 23 no 2 Konstanz: Universität Konstanz, 1993, p. 43-60

²⁷ The system of co-determination (Mitbestimmung) provides for fifty percent of worker representatives on Supervisory Boards. (§ 1 para. 1 No. 2, § 7 para. 1 No. 1 *Gesetz über die Mitbestimmung der Arbeitnehmer*, published in: BGBl (Official German Bulletin) I (1976), 1153), 4 May 1976

²⁸ Basic Law of the Hong Kong SAR, Art. 5

²⁹ As a *New York Times* editorial put it: "House majority leader Mr. DeLay is not content with having a Republican president and majorities in both houses of Congress. He wants to control every aspect of government fully, and to deny the Democrats any role at all. The method is simple: when the game does not go his way, he changes the rules. If Republicans cannot win huge majorities in House races, he shifts the boundaries of their districts; if ethics rules ... catch up with his ... behavior, he rewrites them. ..., when rulings by judges - the one branch of government still beyond his grasp - did not precisely suit him, Mr. DeLay resolved to impose his ideology on the judiciary." (18 April 2005)

In Hong Kong's system, in contradistinction to that operating in the rest of China, the concept of balance of power is part of the system. The key to successfully resolving governance issues in Hong Kong is to identify the best way to reconcile the expression 'Executive-led' with the expression 'Balance of Power'. Reducing the dissonance requires attitudinal not structural changes as the precondition to resolving the conflicts, which originate in the placing of an over-aggressive interpretation on the words 'Executive-led', and in the failure of Hong Kong's political leadership to understand how those words should be interpreted in order to function in the dynamics of mature political life, more specifically in the dynamics of the relationship between Hong Kong's executive and legislature.

It is a truism that a political system is able to operate in ways that belie its formal framework. Even an adequate system can be badly run and a seemingly outmoded system can operate well. The most obvious positive example is the British parliamentary system, once described as an 'elective dictatorship' because Parliament theoretically had the power to pass any law it wished, including sacrifice of the firstborn.³⁰ Such was the consequence of Parliament transferring to itself the mantle of the sovereign king,³¹ whose powers derived but from God. This power, owing to the existence of constitutional conventions, never did result in outrageous laws, but in reality permitted gradual social and political progress. The political class understood the need to adapt – the example of the French Revolution gave an additional impetus to the start of the process – and that understanding allowed the political system, dominated though it was by a 'ruling class,' to abolish slavery,³² limit the powers of the House of Lords³³ and emancipate women.³⁴

In contrast, the constitution of the Weimar Republic, with its liberal framework, did little to restrain Hitler's rise, which was marked by a gradual intrusion into the legislative process of elements loyal to the party first and the legislature second, before the *Führerprinzip*, "the setting up not only of one legislator but also of one executive" took over completely, and 'Working Towards The Emperor', to name a more local equivalent principle, became the official norm. We need not spend too much time reflecting on the guarantees of citizen's rights in the constitution of the former Soviet Union to conclude that form does not define function in politics.

From the start of the popular democratic impulse (let us say, from the French Revolution), successful political systems and politicians have operated on the basis that the purpose of politics is twofold: to allow signals to be transferred from people to rulers; and to ensure that compromises are made between different ways of seeing the world, translated into laws, that allow legitimacy to those laws and consequently

³⁰Despite the entry into force of *The European Communities Act, 1972* and implementation by the UK of a number of treaties dealing with Human Rights, which would conflict with a law as inhumane as to allow murder of children, Parliament could arguably reverse the adherence to European law initiated by *The European Communities Act 1972* s.2; but in the absence of such a reversal, national laws breaching rights granted at European level, can now give rise to rights against national governments *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (Case C-213/89)* [1990] E.C.R. I-2433; and Parliament accepts there is direct application of many European laws in the UK: *Select Committee on Modernisation of the House of Commons Second Report*, para 16 (Ordered by the House of Commons to be printed, 16 March 2005) last accessed at www.publications.parliament.uk/, 20 April 2005.

³¹ In the '*Bill of Rights*' - An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689 (1688, by old calendar): "... the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, ... do in the first place ... for the vindicating and asserting their ancient rights and liberties declare: - That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal...."

³² Slavery Abolition Act, 1833

³³ Parliament Act, 1911

³⁴ Representation of the People Act, 1918

enable the subjects of the state to accept them however reluctantly as fair and applicable to all. In other words, political progress is about openness and legitimacy. Openness permits changes to be adaptive not revolutionary and legitimacy allows political society to operate efficiently.

From this perspective, it can be seen that no amount of adjustment to the mechanism or the framework will produce satisfactory results, absent acceptance on the part of all major participants that it requires a reasonable degree of openness and compromise to operate efficiently a political system; and even then such a system requires independent or, at the least, mutually respecting executive and legislative components. To make our legislative system work, we need to accept the fundamental insight that drove Madison to declare in his Federalist Paper No. 1 that:

“Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold ...

... Candor will oblige us to admit that even such men may be actuated by upright intentions; So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we... see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance... would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy. And we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives ... are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

... A torrent of angry and malignant passions will be let loose. ... An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of the public good. ... it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government.”

And if we do accept this view, we gain and in consequence can apply the practical, real-world insight that leads politicians in advanced democracies to try to understand, not to exclude, and to satisfy, not to deny, the interests of their people.

Interestingly, Madison’s words illuminate the fears and hopes on both the conservative and the progressive sides of the debate as Hong Kong considers political reform. They also demand, however, that we confront reality: to embed

vested interests still deeper in our system is to reinforce the disease, not bring about the cure.

Thus the core problem of the Proposal is not that it fails to offer a framework within which political debate can happen and perhaps be extended (the executive would after all have discussions in private with the new FCs), it is that the consequence of the Proposal is to bury conflict rather than allow it free rein and open resolution. In order for a consensual political system to work efficiently, it must allow open conflict, tempered by appropriate rules.

INSTITUTIONALISING CONFLICT RESOLUTION BY REDEFINING 'EXECUTIVE-LED'

An alternative system for developing policy without full debate amongst legislators, attractive to the Executive, is to allow the political battles to take place within the framework of a controlling party, and then to present the results to the official organs of state power including the legislature, which are then expected to pass the necessary legislation. That is the Chinese system, and it currently operates, in its own way, to deliver progress quite efficiently. It is also perhaps more compatible with the Chinese cultural preference for external harmony and respect³⁵ than is the 'Western-style' preference for public debate as a means to resolve disagreements. The equivalent in Australia – the caucus system – does not eliminate often raucous debate; but then in Australia a new party may gain access to power through a general election and needs to express itself in Parliament to get there.

Hong Kong's governance problem arises because, by insisting that conflict is impermissible, by demanding that all be resolved within the Government, by denying the concept of 'Loyal Opposition', by denying access and turning a deaf ear to those who differ, and by refusing to put the outcome of the policy-making process to the test of being acceptable to representatives elected by Universal Suffrage, the Executive denies the fundamental objectives of an effective political system, and consequently denies itself the benefits of such a system.

For this reason, if changes to our system are to be effective, they must be preceded by the question: "What do we mean by 'Executive-led'?" The answer to this question is at the core of Hong Kong's governance problem.

If Executive-led means that the executive arm alone has the duty to identify and resolve society's major problems for the benefit of all, and that having done its best, it becomes entitled to demand the support of the people and especially of the legislative arm of the state, then it is natural that little time will be given by the Executive to the views of GC legislators or those outside government circles.

In the context of such an understanding, it is possible that the Proposal to privilege certain FC legislators may improve matters in the sense of extending the scope and social awareness of the 'Executive' in its policy-formulating role. But it is also clear that nothing will fundamentally have changed: the legislature, and especially the GC legislators, will remain outside the scope of those considered to have a role to play in an Executive-led political framework.

To escape this trap, we need to stop thinking of Executive-led as analogous to business leadership (an analogy encouraged by the naming of Hong Kong's lead political figure the 'Chief Executive'), a leadership style rightly or wrongly identified with 'tough love' – telling people what they want and giving it to them. Instead we should require a leadership of ideas such as one finds in an academic or scientific

³⁵ Gabrenya & Kwang, in *The Handbook of Chinese Psychology* (Bond, ed.), point out: " Chinese often avoid conflict and minimize loss of face...by the use of mediators ... eschewing the direct approaches favoured in the West." Hong Kong: Oxford University Press, 1996, at p.318

community: the leaders raise the best ideas they can find for consideration by others than themselves. Leadership in this sense is not synonymous with imposition but with exploration; is not a matter of directing results, but of facilitating and pressing others for decision; is not about bending facts to fit pre-decided truths, but allowing truths as others see them to influence outcomes.

The inconvenience of this model is that it is impossible always to predict the outcomes, and it is impossible to be sure one will personally agree with the majority. We all know Winston Churchill's view of the unpredictability of the democratic system: he considered it the worst form of Government, except for all the others. And as we know, the wartime hero of Britain was voted out by the electors in 1945. Mature leaders accept that they may become out of touch enough to lose power, and if that happens, they go with good grace. But if the currency of a leadership becomes devalued without the possibility of gradual adjustment, the eventual break is dramatic and therefore destabilising. There needs to be mechanism to signal misalignment between the leadership and the led, and an incentive to pay attention to the signal. Periodic elections threatening loss of office supply both a mechanism and an incentive.

AN INTEGRATIVE APPROACH: MATCHING FCS' FUNCTION TO THEIR MAKE-UP

Despite this potential 'inconvenience' of elections, and despite the requirements of the Basic Law as clarified by the NPCSC, there is no reason (even though there are plenty of emotional factors, differing opinions³⁶ and special interests) why the government could not decide to see its role differently. It could light the paths ahead, not pull a reluctant Legco horse by the reins; listen to the GCs more before drafting legislation; and appear less driven by vested interests when taking policy decisions. If the Government had listened more to its political opponents and not looked upon compromise with disdain, it would have suffered less and achieved more in the political tumult of recent years.

If it were to accept that Legco, and especially its GC component, is only fulfilling its constitutional role in questioning and challenging Government, that would go a long way to reducing political conflict and problems of governance, including fears of Government-business 'collusion' mentioned by the previous CE in his last annual Policy Address.³⁷

But absent a willingness to engage with Legco as a whole, to take and answer its questions, to treat seriously even those for whom one may have little individual respect (even perhaps to add to their resources so that research and policy formulation in the public sphere outside government may be better informed and public policy debate less fractious as a result), absent reforms which make the balance between executive and legislature work as it must - by respecting the core roles that each plays, no attempt to improve governance will succeed that tries to do so by blurring the differences between the legislature and the executive. Instead, people will agree with Madison that they only see in the FCs the operation of 'the most formidable of obstacles ... the obvious interest of a certain class of men ... to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold'.

Under the alternative 'attitudinal deficit' hypothesis, the dysfunction that has plagued government in Hong Kong is the same as that which would appear in the UK

³⁶ *The Standard* (Hong Kong) on April 16, 2005 reported that former Basic Law drafter Xu Chongde said in Beijing on April 15, 2005 that the new Chief Executive should exercise his power to build up a strong executive-led government. He also called on all civil servants, legislators and judicial staff to support such a system. He represents that strand of thought which believes the executive has been too weak in pushing its policies through.

³⁷ Chief Executive, Mr Tung Chee Hwa, annual Policy Address, January 12, 2005

if the government disregarded all conventions, and which really did occur in the USA when Congress, under the 'leadership' of Newt Gingrich, shut down the US Federal government's funding and might occur again over judicial nominations and the filibuster. Such problems can be cured by adopting a different attitude of mind – a political, not a revolutionary's or a businessman's, a theoretician's or a theologian's attitude of mind.

If that were to happen – which was unlikely under the corporate-style vision of the last CE – then even the relatively slow elimination of the FCs could become acceptable to the political majority (as measured by the popular vote), while leaving the fearful numerical minority (the business community) sufficient time to adjust, and for their fear of a popular free-for-all to be mitigated. Politics could then focus on results, not theory, certainly the preferred approach of the average Hong Kong citizen.

It could be said Mr Tung's final days as Hong Kong's first ever Chief Executive began with the above-mentioned declaration against 'collusion between business and Government', which raised issues spoken of in private but never in public at the official level. This was politically inept, and perhaps reminded people of the systemic risk that led to Lord Acton's aphorism: "Power tends to corrupt; absolute power corrupts absolutely". But in adverting to the issue, he impliedly recognised one important point: our economic, social and political conflicts do not arise from an insufficient focus of power, but rather the opposite.

As a counterweight to this, the Proposal envisages adding the power of impeachment to balance the greater power of special (expert) interests at the heart of Executive Government. However, impeachment is something of a 'nuclear option', while the structural deficiencies in the FC-based insertion of new blood into Government would generate continuing, not remote or infrequent, instances of conflict, and the radical solution of impeachment would only enervate and then exhaust the body politic. This would not make for a stable political system. The European Union's consensual system of government also provided the nuclear option of a form of impeachment (in fact a vote of no confidence). This resulted in the *de facto* dismissal by the European Parliament which procured the resignation of the entire body of 20 European Commissioners under the leadership of Jacques Santer.³⁸ More effective would have been a system in which a different balance of power, and a different attitude to criticism, allowed relatively minor corruption problems to be better restrained and which led the executive (the Commission) to acknowledge and deal with such problems rather than to play for the highest stakes: the continuity of executive Government.

It may reassure the politically conservative, and help them to a change of heart on giving up the power of FCs, to observe that, while political pressure in Hong Kong tends towards and the aim of the Basic Law is elections by Universal Suffrage,³⁹ the global tendency in major democracies has been away from untrammelled and direct intervention by the masses in the political process of lawmaking. There has been a gradual shift of the legal framework of society – its creation, its definition, its interpretation and its application – towards political elites. The remoteness and growth of the powers of the European Commission, the huge expansion of secondary legislation, the expansion of the powers of statutory bodies in the USA and the European Union, the growth in power of transnational bodies such as the WTO and the direct impact of their rules on the ordinary citizen, all act as a counterbalance to the powers of popular assemblies, leaving the smaller confederal democracies such as Belgium or Switzerland as perhaps the best examples of how a central sovereign, a local direct democracy, conservatism and economic success can co-exist.

³⁸ 15 March 1999. This might have been necessary, but was not a plus for the smooth operation of the system.

³⁹ Basic Law of the HKSAR, Article 45

The wave of populism that began with the American and French revolutions and swept away old power elites may well now be peaking. New ways of controlling the balance of power between elites and peoples may be emerging as societies become richer and more complex. There is a new battle joined. The French people rejected the proposed new European Constitution in their referendum on May 29th, in part as a reflection of the feeling that the rules are made too far away from the people, by unresponsive elites. In this context, when we in the HKSAR consider how to reform our legislative and in particular our electoral system, we may be exploring a better way to strike these balances on behalf of more than just ourselves.

The HKU Occasional Paper in noting the parallel between its Proposal and the existing system of Legco Panels may have inadvertently hit on a more attractive way to retain the positive features of FCs. Certainly, the UK Parliamentary system's historical weakness has been the lack of expert legislative scrutiny of executive-proposed specialist laws or regulations, especially those emanating from the Europe Commission.⁴⁰

If the FCs were to evolve into something closer to the powerful Congressional Committees in the American system, they could retain expertise, influence, bipartisanship, value for the government itself, and acceptability to the wider political community, without doing violence to the fundamental principle of the separation of powers, so valuable to the openness and legitimacy of political systems.

Such an evolution would represent a constructive search for a solution to a legislative problem highlighted by Lord Jenkins:⁴¹

'... it is difficult to be at all sanguine about the performance of the House of Commons as a legislature. There is a mass of complex legislation each session. The tasks imposed on the relevant civil servants and parliamentary draftsmen are demanding. ... in the past much legislation has been hastily conceived, and ... imprecise ministerial instruction or sheer pressure of time have resulted in inadequate thought being given to the precise form [of] legislation We hope that the increasing trend towards pre-legislative scrutiny will contribute to an improvement in the draft legislation presented to Parliament.'

Many have said the same of the legislative process in Hong Kong. Perhaps, if the FCs were to mutate into FC-*cum*-Panels such as suggested above, they might for a time continue to be elected and to retain a role in the political system, not as part of the executive, but as part of the system of legislative oversight of the executive's

⁴⁰ Troels B. Hansen and Bruno Scholl in *Europeanization and Domestic Parliamentary Adaptation – A Comparative Analysis of the Bundestag and the House of Commons*: “The non-existent permanent committee system meant a lack of expertise and independent technical advice. This starved the House [of Commons] of information and hampered its ability to call the executive to account. ... this tradition made it ill prepared to handle the increasing inflow of technical legislative acts [with] accession to the EC, and thus aggravated the asymmetric relationship with the executive ... a high degree of misfit.”; European Integration Online Papers (EIoP) Vol. 6 N° 15, 2002; Published: 30.9.2002 <http://eiop.or.at/eiop/texte/2002-015a.htm>, last accessed at 20 April 2005

⁴¹ in the Jenkins Commission Report, at para. 13, v.s.. His Lordship further maintained at para. 15: “Inevitably perhaps, the competing responsibilities of MPs do not assist them in the task of coping with the large and complex burden of legislative business. We believe nonetheless that there is considerable scope for some members to concentrate more fully and more critically on the legislative process and for there to be amongst the mix of members some who have appropriate expertise and temperament to undertake the grinding and often unnoticed slog of improving the quality of our laws. For on those laws depend the legal foundation and economic and social balance of our society.”

legislative proposals. This might even be held up as an example of a constitutional innovation in Hong Kong to be emulated elsewhere – perhaps even in China.

Such a contribution from Hong Kong should not seem so far-fetched: it was with the introduction of reforms including the Special Economic Zones (“SEZs”) that Deng Xiaoping was able to introduce into the body politic of a Communist state, the operation of a partly capitalist framework, while retaining the core political role of the Party, despite the radical nature of the change.⁴²

How much less radical would it be to reform the role of the FCs so as to retain their best and eliminate their worst features, than it was to set up the SEZs, or indeed to conceive of ‘One Country Two Systems’.

As the time for the ‘ultimate aim’ foreseen of the evolution of the Hong Kong system approaches,⁴³ the FCs may be expected ultimately to lose their voting rights in Legco, or to become subordinate to the GCs in the final approval of legislation - but such value as they provide would be preserved and enhanced, if their role matched their make-up, rather than contradicting it.

⁴² Goodman and Segal in *China Without Deng* “Before 1978 and during the Mao-dominated era of China's politics, everything was regarded as politics, or rather nothing was regarded as being apart from politics: in the slogan of the Cultural Revolution ‘Politics was in command’. The result was a fundamental social and political paralysis. The CCP as the central locus of political power was regarded as responsible for everything ... such over-concentration of power rapidly became dysfunctional since the CCP ... became overloaded and could carry out neither its own functions nor those of other institutions.... Deng's basic reform - the replacement of economics for politics in command - has changed power relations not only within the state but also within society.” China News Digest Special Issue, 1997 Part 2 of 6, at www.cnd.org/CND-Global/CND-Global.97.1st/CND-Global.97-02-24.html last accessed at 20 April 2005.

⁴³ Article 68 of the Basic Law of the HKSAR states: “The method for forming the Legislative Council shall be specified in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.”

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