THINKING ABOUT 2007 – GREEN PAPER DRAFT FOR DISCUSSION

INTRODUCTION

This green paper sets out an approach to considering constitutional reform for Hong Kong within the framework established by the Basic Law.

The Basic Law provides that after 2007 major changes to the constitutional framework in Hong Kong may take place, the ultimate aim of these changes being the election of the Chief Executive and the Legislative Council by direct election. During the time between now and 2007, it is necessary for the community to explore and understand the options for reform and, ultimately, develop a consensus on the changes to be adopted.

As a contribution to this process, on 21 October 2000, a workshop jointly organised by the Hong Kong Democratic Foundation and the Hong Kong Policy Research Institute was held on constitutionally-related issues facing Hong Kong. Eighty participants attended, heard five papers presented by local and overseas academics, and debated these papers and related issues in focus groups and in plenary sessions. The papers and the notes of the focus group discussions are attached as appendices to this green paper.

This green paper draws out the main points emerging from the Workshop, and develops these into a framework for thinking about constitutional reform for Hong Kong. The paper also sets out possible next steps in the development of a community consensus.

The paper is divided into two parts. The first part deals with the formal institutions of government, namely the constitution, the executive, the legislature, the judiciary, and the electoral system. These formal elements are dealt with together because they often interrelate: for example, the form of electoral system chosen will impact the composition and hence the functioning of the legislature, its relationship with the executive, and so on. The second part deals with the development of a civil society in Hong Kong. Without the civic spirit and the institutions make up the fabric of civil society, the formal machinery of government will not function well. Most of the sessions of the Workshop dealt with the first part of this structure - the formal institutions of government. Consequently, the second part of this Green Paper has less material. Indeed, the Next Steps section of the paper recommends that further research be done on the civil society in Hong Kong.

Hong Kong's constitutional journey is in specifics unique. Most former colonies were released from their imperial power decades ago; Hong Kong was almost the last major territory to achieve such release. Further, these former colonies mostly achieved independence and replaced their former colonial administration with the institutions

of democratic government. Hong Kong was absorbed by another sovereign power, and preserved its former administration almost unchanged. Indeed, in Hong Kong's case a virtue was made of continuity with the colonial era.

However, in broader terms Hong Kong is making its journey at a time when a large number of polities around the world are revisiting their constitutions. Some of these polities, for example the states of Eastern Europe, are in transition from Communist rule; others, like Zimbabwe, are seeking to diversify political representation. However, even many of the mature democracies are reviewing long-standing constitutional arrangements. New Zealand has just introduced a form of proportional representation; Britain is devolving power to a new Scottish Parliament; Australia has examined whether it wishes to become a republic. And at the supranational level, the continuing development of the European Union is exploring new space in inter-state relations. In selecting its path, Hong Kong can draw upon the experience of other polities. We are not making the journey alone.

The need for reform

But first, it may validly be asked, does Hong Kong need to make a journey at all? Although adopting only a very limited form of democracy, Hong Kong has an established system of rights and operates by the rule of law. It enjoys a high standard of living and – the recent recession apart – a high level of economic growth. Although many people express discontent with the Government, there are no signs of mass unrest. And Mainland China, the sovereign, would have to be persuaded of the benefits of any reform. Is it worth expending the energy of the people on the constitutional reform project?

The answer of the Workshop to this question was an unqualified, yes. Hong Kong's governance is essentially that of a colonial administration, a form more appropriate to the nineteenth than to the twenty-first century. The relatively favourable outcome of this governance to date in terms of living standards and rights should be regarded as exceptional – more a matter for congratulation than something that can be relied upon for the long term. It should perhaps also be remembered that under British rule there were certain checks and balances on Hong Kong's colonial governance system, such as accountability to the democratically-elected British Parliament. It is not clear that in Hong Kong's present situation the continued enjoyment of human rights, the rule of law, and ultimately of living standards, can be assured.

The premise of this Green Paper, then, is that consideration of constitutional reform is necessary. Necessary because even on its own terms the constitution mandated by the Basic Law is in the process of change - with a gradual expansion of directly elected seats in the legislature and a progression, albeit without a definite timetable, towards full democracy. It would seem imprudent not to plan for these changes. Secondly, Hong Kong's governance structure would appear inherently unstable: a legislature enjoying an increasing mandate from the people but little power, facing an executive selected by a narrowly-based committee which wields very considerable power. New ideas and mechanisms are surely needed to make even the current structure operate successfully, let alone to accommodate the changes that lie ahead. Thirdly, the review

of contemporary constitutional experience provided by the Workshop reveals just how far Hong Kong is from being an optimal polity. Reform can bring substantially greater fulfilment to the people, and assure greater stability and prosperity for community in the long term.

Questions

(1) Is the premise of the Green Paper that consideration of constitutional reform is necessary for Hong Kong correct?

(2) Is it appropriate to start the process of considering constitutional reform now, or should the community wait for a more opportune time? If so, what time frame would be appropriate for considering constitutional reform, or what conditions should be met before reform be considered?

1. INSTITUTIONS OF GOVERNMENT

1.1 Constitution

Comparison of Hong Kong's constitution, the Basic Law, with those of other polities reveals shortcomings. However, it should first be asked, what kind of a document is the Basic Law? Most constitutions are written by and on behalf of the peoples of states that are independent, or that are to become independent. Hong Kong, however, is an entity within a state, and its constitution was written for it by representatives of the current sovereign power, China, within parameters agreed with the former sovereign, Britain. The Basic Law, as a document, thus has characteristics of a charter conferred on the people by the sovereign, perhaps analogous to the charters granted to certain cities in Medieval Europe. At any rate, development or replacement of the Basic Law cannot be considered in isolation, but involves the consent and perhaps the participation of the sovereign power. Ultimately, there must be the question of convergence between the constitution of the satellite and that of the sovereign.

Comparison of the Basic Law with the constitutions of other polities reveals the following issues:

- The Basic Law does not express the aspirations or fundamental will of the people. Hence it does not show how power flows from the people. It does not show what in deepest terms Hong Kong is about. Most constitutions set out such aspirations in their preamble to provide a framework for the specific provisions that follow.
- The Basic Law devotes much space to the promulgation of policies, and less to the "normal" business of a constitution: the delineation of institutions of government and the relations between them and between them and the people. The emphasis on policies in the Basic Law is no doubt because of the

perceived need to buttress Hong Kong's capitalist system against the socialist system of Mainland China. However, policies should change to respond to changing circumstances. Policies that may have been appropriate to Hong Kong's situation in the late 1980s become less relevant as the world changes and, in particular, as Mainland China itself becomes more open. There is a danger that the Basic Law will "freeze" Hong Kong in a policy framework increasingly inappropriate to the modern world. Secondly, greater clarity is needed in the provisions concerning the institutions of government.

- The Basic Law was never expressly mandated by the people; thus it may be felt to lack legitimacy.

Regarding the final point, legitimacy, the Workshop considered the question of constitutional origins. It was noted that even in cases where a constitution had been developed by a colonial or occupying administration or a dictatorship (examples being Indonesia, Japan and Korea respectively), over time and where necessary with amendment, these constitutions had become accepted by the people. It was therefore considered that while ideally Hong Kong would have a constitution developed by people's representatives and validated by the people, this was not essential to constitutional success. There would also be obvious practical difficulties in any attempt to replace the Basic Law with a new constitution.

A second pragmatic point made in the Workshop was that, notwithstanding the defects of the Basic Law, there is a great deal of scope to work for a more democratic polity within its confines. For example, the Basic Law does not rule out either a presidential or a parliamentary system, or a system such as the French one where power is shared between the president and the parliament (so-called "cohabitation"). A decision to take any of these routes could perhaps be made by Hong Kong on its own without changes to the Basic Law.

A third pragmatic point is that even where the Basic Law has provisions which are conflicting or distasteful, these could be dealt with, not by amendment of the provision but by establishing a practice of non-adoption, i.e. a convention of interpretation. However, the feasibility of such approach depends on the willingness of the executive to adopt it.

Validation

While a constitution may become validated by observance over a lengthy period of time, it would still appear preferable to facilitate community acceptance of the constitution if possible. A mechanism should be established to validate the changes or decisions taken in respect of the constitutional arrangements post-2007.

Such validation mechanism could be a referendum or a constitutional convention. However, as important as the mechanism itself is the overall process leading to the decision. The Workshop felt that the experience of South Africa in developing its current constitution was an example of reasonably successful community participation. Based on this experience, Hong Kong's constitutional reform process,

- Should be transparent;
- Should be inclusive, involving as many people and as many facets of society as possible;
- Should include informal as well as formal procedures;
- Should involve extensive public education.

Questions

(3) Should Hong Kong work within the framework of the Basic Law, if necessary seeking amendment to it, or should Hong Kong strive to establish a constitution of its own?

(4) Assuming Hong Kong decides to work with the existing Basic Law, to what extent should the involvement of the Mainland Chinese authorities be sought in the constitutional reform project? For example, should their involvement be sought proactively, as partners in the project, or should the Hong Kong community try to articulate its wishes itself, and, where necessary, refer these to Beijing for approval subsequently?

(5) If the Basic Law lacks a statement of the fundamental aspirations of the Hong Kong people, what are these aspirations? What are the values of the community? What is the vision of an ideal future? Do these aspirations come to an end in 2047?

(6) If certain elements of the Basic Law are felt to be inappropriate to Hong Kong's needs, is the "non-adoption" approach to these inappropriate elements of the Basic Law viable, given the nature of Hong Kong's executive authorities? Or is revision of those undesirable elements is the only solution?

1.2 Executive

As already stated, Hong Kong's executive largely follows the form of a colonial administration, similar to the former administrations of Britain's other ex-colonies. The civil service wields both substantial power of policy-making and power to administer policies. The Chief Executive is selected by an Election Committee which is in turn selected by the Mainland Chinese authorities or under their auspices – the latter process being conducted in secrecy. The Chief Executive is advised privately by a team of Executive Councillors. The present Chief Executive is currently in the process of drawing the policy secretaries of the Civil Service more closely into his power by the introduction of a contract system under which the secretaries become more accountable for their performance - but accountable to the Chief Executive rather than to the legislature.

From the foregoing, there would appear to be a degree of fragmentation in the executive.

- Firstly, there is a duality between the policy secretaries and the Chief Executive. The Chief Executive is elected by the mechanism described above, whereas the Policy Secretaries are mostly tenured civil servants. Notwithstanding their tenured status, the policy secretaries enjoy considerable autonomy in developing and promoting policy initiatives. The Policy Secretaries, collectively, represent a power base with its focus in the Chief Secretary – the whole enjoying a degree of independence of the Chief Executive. The above-mentioned contract system reforms appear to be aimed at reducing this degree of independence and consolidating power in the Chief Executive.
- A second dimension of duality arises between the Chief Executive and the Executive Councillors. The Executive Councillors are appointed by the Chief Executive, and so are under his control, but nonetheless, they can and do make policy pronouncements that may be at odds with the expressed views of both the Chief Executive and the Policy Secretaries. Yet the Executive Councillors wield no official policy-making powers and are not accountable to anyone except the Chief Executive in private.

One solution to the above fragmentation would be to pursue further the current direction of consolidating power in the Chief Executive by developing a presidential system. Under a presidential system, the Chief Executive would appoint those responsible for policy portfolios, whether from within or without the Civil Service - such persons in turn becoming his cabinet and inner circle of advisers. The introduction of such as system would in effect consolidate the current roles of the Policy Secretaries and the Executive Councillors.

The Workshop noted that it is common for polities in transition from communist or other dictatorial forms of rule to choose a presidential system with the aim of achieving "strong" leadership. However, because these polities usually lack strong institutions and a developed civil society that could act as a check and balance on such leadership, the president himself develops into a quasi-dictator, examples being Russia and certain Latin American democracies.

One danger of the presidential system is thus its degeneration into quasi-dictatorship. Another is that even where there are other institutions sufficiently strong to counter the president, the system naturally generates conflict. Hence, to operate effectively, the presidential system requires of its institutions not only strength but also the maturity to deal with such conflict.

On this basis, it is suggested that the presidential or "strong leader" model may not be suitable for Hong Kong, at least not until the legislature, and the civil society outside government, have become more stronger and more mature. On this basis, it would appear preferable for the current direction of concentrating power within the Chief Executive to be reversed, and more power devolved to the other institutions of government, in particular the legislature.

Further, in contrast even with Russia or Latin America, Hong Kong's Chief Executive is not elected by universal suffrage. For an unelected "president" to gather further powers to himself would indeed seem dangerous. The Workshop noted that it is the experience of other polities, such as Germany, that have an unelected president for such president, either voluntarily or by the evolution of practice, to give up powers to those institutions of government that have a greater popular mandate, normally the legislature. In this model the unelected head of state assumes a more symbolic role.

Essentially, with the departure of British administrators, it would appear that the executive tends to represent the interests of local business elite, the "haves". The thrust of the executive's policy formulation – for example, in areas such as land use, the absence of a competition law, neglect of anti-pollution regulations, etc – tends to align with the wishes of the business elite. And the democratically-elected portion of the legislature would appear to represent the "have-nots". These legislators tend to press for welfare-type policies such as a minimum wage, more public housing, lower government charges. This already anomalous situation could be exacerbated by any further concentration of power within the executive. Such further concentration might be more devisive to Hong Kong society, and result in more polarised debate over policy.

The direction of devolving power to the legislature might accord better with the Basic Law than the present direction of reinforcing the Chief Executive. The often-quoted dictum, "executive-led government" is not in fact in the Basic Law. Rather, the Basic Law envisages an executive accountable to the legislature (Article 64).

The role of the legislature is discussed further in the following section. However, in the interim, one way to devolve power away from the Chief Executive would be to reinforce the position of the Chief Secretary, and to continue to appoint Policy Secretaries from the Civil Service.

Civil Service

Tensions arise in the current system from the fact that the Civil Service both implements policies and, in its upper ranks and in the person of the Policy Secretary, also makes policy. This leads to a lack of accountability for policy failure, since the proponent of the policy, the Policy Secretary, is a tenured Civil Servant and in normal circumstances cannot be fired. It also leads to conflict of interest, in that there is often no independent scrutiny from the Executive of performance in implementation of the policy.

To deal with these problems, it would appear desirable to separate the policy-making level (the ministerial or "Cabinet" level) from the policy implementation level (the "bureaucracy" or Civil Service proper). However, as discussed above, it may be dangerous to progress with such separation before the legislature is properly strengthened and before the Chief Executive is directly elected.

Questions

(7) Could the Basic Law, without any changes to it, accommodate a range of political systems, for example, a presidential system, a parliamentary system, or a system in which power is shared between an executive and a legislature (cohabitation)?

(8) Are Hong Kong's executive authorities currently moving in the direction of a presidential system?

(9) Is the above analysis of the dangers of a presidential system given the current state of maturity of Hong Kong's society and governmental institutions valid?

(10) Should more power be devolved to the legislature? If so, how?

(11) Does the Civil Service currently wields powers of both policy-making and policy implementation? If so, should these powers be separated when the time is right?

1.3 Legislature

Power of legislature

The Basic Law sets the direction of increasing the proportion of legislators elected by direct election. As discussed above, this means increasing the popular mandate and legitimacy of the legislature. If stability and proportionality in the governmental system - and in society as a whole - is to be maintained, it would appear that the increasing mandate of the legislature should be matched by its increasing power. Speakers at the Workshop drew attention to the European Parliament which on establishment had little power, but gradually took more power to itself because, being directly elected, it had higher legitimacy than the other European governmental institutions.

One way to increase the role of the legislature in the business of government would be for the Chief Executive to increase the number of Executive Councillors appointed from the legislature (at present there is only one).

Another important way to increase the power of the legislature would be to enable it to introduce more private members bills.

The Workshop noted that, notwithstanding the foregoing, the legislature still has significant powers. These include, the power to examine and approve budgets, the power to call officials to account and to launch enquiries, the power to conduct audits of governmental institutions, and the power to debate any issue concerning the public interest. However, it was suggested that the legislature is often unable to use its powers or does not use them effectively, for reasons such as the following.

- The composition of Legco. The majority of its members are not directly elected and tend to side with the government.
- Legco's voting procedures - the requirement for the geographical seatholders and the others to approve separately each motion - are also a handicap to effective performance. This was demonstrated by the failure in October 2000 to come to a

view on whether or not to approve the vote of thanks for the Chief Executive's Policy Address.

- Committee procedure. It was pointed out that in the UK, Parliamentary committees do most of the work in debating and if necessary modifying a bill, so that when it comes to the House for a reading, it rare for further amendments to be made or for significant further debate to be necessary. However, in Hong Kong, amendments are rarely made as a result of committee input. As a result that the reading of the bill in the full session of Legco to some extent duplicates, or renders redundant, the work of the respective committee.
- Ratio of committees to legislators. The Hong Kong legislature has almost as many committees as a large developed country parliament like the UK, yet one-tenth as many legislators. This means heavy demands on the time of individual legislators, and presumably correspondingly lower quality of input into debate. One option would be to increase the number of Legislative Council seats. However, in order to maintain public confidence in value for money, any such increase in the number of legislators should probably not come before an increase in the powers and functions of the legislature.

If the power of the legislature is to grow, and that of the Chief Executive correspondingly to diminish, there will be a transition period during which the respective powers of the two institutions become more equal and conflict between them could intensify. Such situation would resemble the French institutional framework where executive power is to some extent divided between the head of the legislature – in France, the Prime Minister – and the head of state – the President. Conflict is not inevitable, or if it arises, not inevitably dysfunctional. It would be possible for Hong Kong's Chief Executive and legislature to develop their own equivalent of the French "cohabitation" – both institutions could learn to work together better. One way to achieve this might be for the Chief Executive to appoint more members of his Executive Council from the legislature.

Functional constituencies

In the 2000 Legco, 30 seats are from Functional Constituencies and 10 are selected by an Election Committee. The Workshop was hard-pressed to find parallels to this system in modern polities. It was noted that in polities with second chambers, the second chamber frequently does have members selected other than by geographical direct election. For example, the House of Lords in Britain includes not only hereditary and appointed Lords but also bishops. However, such narrowly-based second chambers are supplementary to the primary chamber which is fully directly-elected. Hong Kong's Functional Constituency and Election Committee elections to the legislature are almost unique.

The Election Committee will not be used again. But by 2007 there will still be 30 Functional Constituency seats. The Workshop felt the functional constituency system to be highly anomalous. Among the shortcomings noted was the fact that in 1998, 10 out of 28 FCs were unopposed, while many others were returned by a "small circle" of individual voters or by companies under common control. The Workshop suggested three ways to address the issue of Hong Kong's functional constituencies.

- **Abolition**. After 2007, any changes to the electoral arrangements can be considered, subject to approval by the relevant bodies. One suggestion is that the Functional Constituencies are anachronistic and should simply be abolished.
- **Reform**. Another suggestion was to reform the existing Functional Constituencies so as to make them more democratic and representative of the people. Three methods were proposed, which are similar to the reforms actually introduced in the early 1990s and subsequently reversed by the post-1997 Administration: individual rather than corporate voting; broadened franchise; and one person one vote. (Under the present system, some individuals have as many as three votes – via geographical seats, Functional Constituency and Election Committee – and those controlling corporate entities in the business Functional Constituency seats can enjoy many more).
- **Dilution**. Rather than abolish the Functional Constituencies, one suggestion was to reduce their influence by creating more directly elected seats. For example, if 30 more geographical seats were created, the geographically-elected members would form 2/3rds of the Legislature.

Questions

(12) Should the powers of the Legislature be increased?

(13) Should more Legislative Councillors be appointed to Exco?

(14) Should the Legislature have more power to introduce private members' bills?

(15) Should the present "bicameral" voting system in Legco, i.e. the requirement for Functional Constituency members and geographical constituency members to vote separately for a motion, be abolished?

(16) After 2007 should the Functional Constituency system be,
(a) preserved?
(b) abolished?
(c) phased out, e.g. by progressive reduction in the number of Functional Constituency seats;
(d) reformed, e.g. by broadening the franchise, abolishing corporate voting, introducing one-man-one-vote?

(17) Should the number of legislators be increased?

1.4 Judiciary

The Workshop did not discuss the judiciary in detail. However, two points were made.

- Firstly, Hong Kong needs a **constitutional court**.

- Secondly, the **independence of the judiciary** cannot be relied upon when the power of the Executive is as pervasive as it is in Hong Kong. It is ultimately unreasonable, in the absence of other strong institutions of government, to expect individual judges to resist the executive. The independence of the judiciary needs to be buttressed by strengthening other institutions such as the legislature.

Questions

(18) Does Hong Kong need a dedicated court for constitutional affairs? Or is it preferable for the existing court system to continue to develop expertise in interpreting the constitution?

(19) Is the community concerned about the independence of the judiciary, i.e. the ability of the judiciary to resist pressure from the executive when forming judgement on a case? If so, what measures should be proposed to bolster the independence of the judiciary?

1.5 Electoral system

Questions of the composition of the legislature – by Electoral College and Functional Constituency – are discussed in 1.3 above. This section focuses on the electoral processes in a more mechanical or operational sense.

Priority
The Workshop emphasised that modifications to the system for electing geographical seats for the Legislative Council had received a great deal of attention by the Government and the public. However, while improvements to the electoral system for geographical seats appear possible – as discussed below – it is suggested that their importance in any overall agenda for democratic reform in Hong Kong is somewhat secondary. It is suggested that other issues, such as the Functional Constituency system, or the relationship between the executive and the legislature, are of higher importance to the overall democratic agenda.

Representativeness vs accountability
The Workshop noted and discussed the theory that in general, electoral systems can be designed to promote accountability or to promote representation, but not both. Systems designed for accountability, such as "first-past-the-post" voting method, tend to force politicians to group into a small number of parties which can then campaign on distinct platforms and form governments either alone or as powerful partners in a coalition. Representative systems, such as the various forms of proportional representation, tend to result in elected bodies that more closely mirror the composition of the population as a whole. However, such representativeness, the theory holds, comes at the expense of coherence and of the ability to form strong and lasting governments.

However, this theory is contested. While there are polities with proportional representation such as Italy that tend to experience short-lived coalition governments, there are many others, such as Germany that have had long-lasting and effective governments despite employing forms of proportional representation. And conversely, in non-proportional systems, anomalous results can arise – for example the election of a Government with less than a majority of the votes – that undermine public confidence in the system and are destabilising. The Workshop thus tended not to accept the accountable/representative dichotomy, but felt that it was possible to achieve the best of both worlds, i.e. an electoral system that was both accountable and representative. This could possibly be done through the adoption of some form of mixed system. For example, the majority of the seats in the legislature could be returned by geographical constituencies, a minority being reserved for party lists, allocated in accordance with the parties' respective share of the geographical votes.

However, the Workshop was of the view that such vision should wait until Hong Kong's legislature was fully directly elected. During the interim period while the Functional Constituencies are still in force, the Workshop felt that different considerations should apply to the geographically-elected portion of the Legislature. The current problem was over-fragmentation of this democratic portion into small parties or individual "independent" politicians. Given that the remainder of the legislature is already divided into Functional Constituencies of different natures, which to some extent already represent at least certain minorities, it was felt that the need was to reduce fragmentation, not increase it. Proportional representation systems should be avoided; the geographical electoral system should be designed to encourage politicians to group into larger parties. On this basis, the current very large geographical constituencies should be broken up into smaller ones. The electoral system could be a "first-past-the-post" method, perhaps similar to that used in 1995.

It was suggested that if Hong Kong desired to try a form of PR, the single transferable vote system (STV) could be suitable. STV, despite strong academic support, is used by very few countries because voters find it complex. However, the Workshop felt that in Hong Kong where the constituencies are small in geographical extent and voters can easily get to know the candidates, the practical difficulties with STV would be less severe.

Campaign finance

The multiseat constituencies used in the 2000 Legco elections comprise electoral populations that are very large by international standards. Although Government pays for the candidates to make two mailings to voters, the costs that must be born by the candidates to mount a reasonable campaign are very considerable, to the extent that constituency size bars all but well-financed individuals from standing.

If Hong Kong continues to have such large electoral constituencies, it should consider some form of campaign financing. One model to consider is that used in Taiwan where the parties are paid a certain sum by the Government per vote cast in their favour.

Existing system
It was noted that Hong Kong's system for electing geographical constituency seats has been confusing and should be improved.

- There have been four such elections, and each election has had a different system. This has tended to prevent the public becoming familiar with the system and identifying with their constituency and with the system as a whole.
- The current system, of voting for an individual ranked according to a party list, is inconsistent in that the name of the party is not disclosed on the ballot paper.
- While it was felt that in Hong Kong the geographical elections were probably well-managed in an operational sense, it was nonetheless a matter of concern that the Hong Kong electoral authorities did not permit international observers to view the electoral arrangements.
- The Workshop did not feel so confident about the absence of anomalies in Functional Constituency voting. Given that both corporations and individuals can vote, and that each of the 30 constituencies differs from the others, there would be considerable scope for manipulation, vote-buying, padding of electoral rolls and other abuses. Further, in view of the very small size of many of the Functional Constituencies, even small irregularities or a small number of miscounted votes could swing contested seats.

Questions

(20) As long as there are Functional Constituency seats in the Legislature, should the voting system for the geographical seats be such as to encourage candidates to group into political parties and discourage fragmentation, e.g. a first-past-the-post system rather than a proportional representation system?

(21) Ultimately, when the Legislature is fully directly elected, what electoral voting system should be adopted?

(22) Should more funding for electoral campaigns be provided by the taxpayer?

(23) Is there a need for the presence of international observers at Hong Kong's elections?

(24) Are special measures are needed to minimise the risk of abuse in Functional Constituency elections?

1.6 Local government

In 1999, with the termination of the Urban and Regional Councils and the assumption of the bulk of their work by Hong Kong's Central Government, the pre-existing tier of local government in Hong Kong was largely abolished. The District Boards remain, but their role is advisory. Given the prominence of the Legislative Councillors, even the advisory role of the District Board members is perhaps smaller than it was in the past.

In most polities, significant functions are devolved to local levels of government. Such devolution makes for better identification of the citizen with those governing him, closer accountability and better tailoring of services to the needs of particular districts. In some systems, such as the federal systems of the US and Germany, the devolved powers include the right of the localities (the US states or the German Laender) to legislate within certain limits and to tax. In more centralised systems such as Britain, the devolved powers are limited to setting the level of rates and executing policies decided by the central government. The disadvantages of local government are that duplication of resources can arise, economies of scale may fail to be achieved, and differences in local rules and procedures may hamper economic activity.

It can be argued that because of its geographical compactness, Hong Kong does not need a tier of local government. However, the establishment of such a tier would be helpful in fostering local civic activity and civic identity. Policy formulation at the territory-wide level would be improved with more input on local needs and differences. And many government services, such as education and health, are provided through large-scale monolithic institutions that are neither close to the customer nor subject to competition. Devolution could bring improvement in service quality and, by introducing inter-regional competition, greater efficiency in the use of resources.

If local government were restored in Hong Kong, it is suggested that it should not be on the pre-existing model. The Urban and Regional Councils had only very limited responsibilities, mainly for recreation and hygiene. One of the complaints about them was that they did little relative to the very extensive revenues they enjoyed. A proper system of local government should include devolution of more substantial powers to implement policy, for example local government could take over responsibility for provision of government health care and housing. This would probably involve breaking up the existing territory-wide Housing Authority and Hospital Authority into regional units.

Questions

(25) Should Hong Kong have a tier of local government?

(26) If so, should its scope of activity be limited, e.g. similar to that of the former Urban and Regional Councils? Or should its scope be wider and include responsibility for implementing substantial areas of policy? If the latter, what policy areas should be assumed by local government?

2. CIVIL SOCIETY

However well-designed, the formal machinery of government will not function well in the absence of a vigorous and engaged civil society. The activities of civil institutions and of civic-minded individual citizens are the flesh on the bones of the constitutional

mechanism. The Workshop felt that while the formal institutions of government in Hong Kong were capable of much improvement, the need for improvement on the civic side was if anything greater.

In the first decades after the Second World War, Hong Kong faced severe practical difficulties in accommodating waves of immigration from Mainland China. The territory was ruled by a colonial administration, hence it was not easy for residents to identify with it as a polity. Newer immigrants were struggling for survival, and in many cases regarded Hong Kong only as a temporary staging post prior to migrating elsewhere. To a certain extent the prevailing mentality was every man for himself and his family, leaving only the administrators to consider the ordering of Hong Kong society as a whole.

In recent decades this picture has of course changed. Many migrants have put down roots in Hong Kong; around half of the present Hong Kong population was born in the territory. Although during the 1980s and early 1990s many middle class people emigrated or considered emigration, this trend has, for the time being at least, abated, and many overseas migrants have returned to Hong Kong. General elections to the Legislative Council have been held for a decade. Clubs, societies, charities, political parties and other civic institutions have developed. The media actively discusses government policy and social issues; citizens vent their feelings through demonstrations. Opinion polls suggest that the high turnout in the 1998 Legco elections was motivated by a sense of civic responsibility.

Notwithstanding these developments, Hong Kong's civic society remains less developed than that of many other countries, not only countries in the West but also the developing countries of neighbouring Asia. Although there are frequent demonstrations in Hong Kong, attendance is thin; membership of political parties remains miniscule; though interest groups are active they rarely mobilise sufficient support to effect change; political parties criticise but rarely have developed alternatives to offer, and mostly lack the resources to do so. There are limited intellectual resources, such as policy institutes, to support debate on public policy, with the result that such debate is often shallow, or on some issues, entirely lacking. Civic movements that achieve major social change, such as Korea's Citizens' Coalition for Economic Justice, have not been seen in Hong Kong. Overall, many citizens feel disillusioned with the political process and do not identify with any civic grouping. Many still think in terms of "every man for himself", leaving higher social questions to the administrators.

The foregoing issues arise partly from the nature of the formal political system. The system is not designed to foster popular participation, and the way it has been operated, for example the constant changes in electoral method, at times appears calculated to alienate. If the system were changed, for example, by broadening the franchise of the legislative council and increasing the Council's powers, popular participation in both formal and informal politics would surely improve. However, much needs to be done outside the formal system of government too, as discussed in the sections which follow.

Question

(27) Is the above analysis of Hong Kong's civil society as rather lacking correct? What institutions within it, or aspects of it, are stronger? Which are weaker and in most need of regeneration?

2.1 Government facilitation

The growth of Hong Kong's civil society should be driven mainly by the citizens themselves. However, it is important for Government to at least remove barriers to the formation of civic institutions, and if possible positively to encourage their formation. Some steps that the Hong Kong Government can take to facilitate the development of civil society are as follows.

- To protect freedom of expression and assembly;
- To recognise non-governmental institutions (NGOs) as legal entities, permit them to raise money and recruit members, allow them to operate independently and disseminate information;
- To invite NGOs to make submissions to the Government and attend Government hearings.
- To wind down and abolish most if not all of the currently more than 300 advisory committees and boards. These Government-appointed bodies straddle the channels of access to the Government policy-making function, displacing the civic organisations that would play such a role in a democratic society.
- To sponsor forums to discuss issues of public concern, and support such forums by sending official representation.
- To provide free broadcast time to political parties and other NGOs.
- To provide public education on civic institutions as well as the formal institutions of government. The current school curriculum does include a factual account of governmental and social institutions, but lacks activity-based learning which would foster the pupil's engagement.
- To privatise or contract out many services currently provided by government institutions. Examples, include airport, rail, water supply, mail, housing, schools, hospital services, vocational training, convention services. Fostering a greater diversity of private institutions would facilitate greater participation in such institutions by the public. Based on the experience of other countries that have conducted such privatisation programmes, it should also improve service quality and economic efficiency.
- To enact a Freedom of Information Ordinance to enable citizens to obtain information about their government easily and as of right.

Questions

(28) Should the Government adopt policies to actively promote the development of civil society in Hong Kong? Or should this be left to private initiative?

(29) If it is correct that the Government should adopt policies and initiatives that actively encourage the development of civil society, what policies and initiatives would contribute most to this goal?

2.2 Political parties

The Workshop noted some issues with Hong Kong's political parties. These parties do not have a distinct status, and at the fringes become indistinguishable from interest groups, personal support groups and business associations. There are too many parties, and most of them are too small for effective action. They do not project a real vision of Hong Kong, and their policy positions are often shallow, indistinct or contradictory. Perhaps for this reason the parties are not mutually exclusive – some individuals belong to more than one.

As already noted, the business elite currently finds political voice through the Functional Constituency system and through direct access to the executive. Business-oriented parties have fared poorly in direct election. The business sector has accordingly tended to resist further democratisation – seeing it as conducive to socialism. However, the Workshop noted that a democratic system does not necessarily bring socialistic parties to power; on the contrary, in most countries, conservative or business-friendly parties enjoy at least as much success at the polls as socialists do. There is a need for the "haves" in Hong Kong, the business elite, to participate in the political process through political parties.

At present, political parties generally have to constitute themselves as companies limited by guarantee. This is inconvenient, and can give rise to difficulties in distinguishing political from commercial activities, for example in fund-raising. Political parties should be given a distinct status and be able to register as such. This would enable political parties to distinguish themselves from interest groups. It should also enable interest groups to distinguish themselves from political parties - an issue highlighted by controversy over the activities of Falun Gong in Hong Kong.

A clear status for political parties should also bring clarity to the Functional Constituencies. At present, because many professional and business associations have been granted a seat in the Legislature, they find their legitimate professional and business interests politicised – the converse of the problem faced by Hong Kong's political parties. The introduction of a political party registration system would enable both the parties and those other interest groups represented in the legislature to distinguish their political activities from their other interests.

Other shortcomings of Hong Kong's present political parties should be addressed by reforms to the formal machinery of government, as described in section 1 above. A first-past the post voting system would give politicians more incentive to group into parties, reducing the current trend to fragmentation. Moves to give greater power to the legislature, and make its procedures more effective, would also help. Increasing

the number of seats in the legislature would increase the number of persons available to form and lead parties.

Questions

(30) Is the above proposition that the business sector does not participate sufficiently in politics valid? If so, what measures would encourage them to participate more effectively?

(31) Is the current state of development of Hong Kong's political parties satisfactory, or is improvement is needed? If the latter, what are the major issues?

(32) Should political parties have a distinct legal identity and be registered as such?

2.3 Other dimensions of Civil Society

The Workshop did not discuss the following issues but emphasised that they are important to the functioning of civil society. These topics could be the subject of further research or of a further workshop.

- Non-governmental organisations (NGOs). Compared with mature democracies, NGOs in Hong Kong are less developed and play a smaller role.

- Human rights. These are enshrined in the Basic Law and in statute, and protected by the courts. However, Article 23 of the Basic Law on subversion, and other provisions such as those enabling the Chinese Central Government to intervene in Hong Kong's affairs (Article 18) and to interpret the Basic Law (Article 158), the superior privileges of "Chinese citizens", set limits on the enjoyment of human rights. In practice, the non-democratic nature of government and the power of the executive pose further dangers.

- Media. Important issues include the proliferation of newspapers, self-censorship, censorship by newspaper owners, the role of the press council, training and quality of journalists, shortfall of investigative journalism, and the social standing of journalists.

3. NEXT STEPS

The aim of the Workshop, and of this Green Paper which attempts to summarise and take forward the views expressed within it, is to contribute to a community-wide process of debate on constitutional reform for Hong Kong.

One element of such community-wide process would be to conduct further research into overseas constitutional experience. Some areas of focus for such further research, such as how to develop a healthy civil society, are outlined in the preceding sections.

If the community is to be ready for constitutional change by 2007, it is important for there to be a timetable for the process of considering reform. The broad outlines of a possible timetable are given below.

- 2001 – 2003 Community-wide discussion of constitutional reform, development of consensus on areas needed attention

- 2003-5 Development of specific reform proposals, in legal form, eg revisions to laws or to Basic Law

- 2005-7 Preparation for constitutional convention to finalise reform document

- 2007 Approval and enactment of post-2007 constitution by relevant bodies.

Constitutional Developments and Historical Experiences

Paper presented at the Workshop Thinking about 2007

by Professor Rudiger Wolfrum

I. Introduction

By the adoption and promulgation of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April 1990 (Basic Law) a constitutional development has been set in motion for Hong Kong since several of the provisions of that Basic Law require further actions to be taken. Past experiences in other States and, in particular, constitutional developments following the dissolution of the eastern European bloc may give some insight concerning possible approaches to be considered in the process of progressively developing the Basic Law.

It will be impossible for this paper to analyse all the new constitutions and to give an assessment as to whether they can be considered as being successful. Apart from that this would be rather counterproductive. Constitutions have to be tailored taking into consideration the historical, political, cultural and social needs of a given society. Since these parameters differ for each society, it is difficult and often has resulted in a failure to transfer a constitution from one country to another. A well-known example in this regard is the Constitution of the Weimar Republic which was modelled along the lines of the Constitution of the United States and the Constitution of France. This does not mean, though, that no positive insight could be gained for the constitutional development in one State by analysing the constitutions of others. In the contrary, in particular the recent constitutional developments clearly prove the merits which lie in comparative constitutional assessments and in the inspiration which can be

gained from institutional set ups and procedures of other States. The drafting of the constitutions of all eastern European States was inspired to a certain degree by the constitutions of the United States, Germany and France. The same is true in respect of the drafting of the constitution of South Africa and of Portugal. It is just a matter of consequence that the respective constitutional courts when interpreting constitutional provisions also consider judgements of other constitutional courts. Only the language barrier forestalls a more frequent and efficient use of such an approach.

The paper will concentrate on several constitutional key issues which may be of particular interest for this Workshop, namely:

- predominance of the constitution in national law;
- the content of a constitution;
- its leading principles such as democracy and rule of law and their implementation; and
- the protection of the rights of individuals.

There are many other issues worth discussing, but if the need to do so arises this can be done in the exchange of views following my presentation. However, as will be seen most of these issues to be discussed will fall under one or the other category mentioned above.

II. Predominance of the Constitution in National law

In modern constitutionalism the predominance of the constitution is accepted as axiomatic. This is also true, at least to some extent, for the Basic Law since its article 8 provides that the law previously in force in Hong Kong shall be maintained unless it is in contravention with the Basic Law. The predominance of the Basic Law is also reflected in its article 17 albeit to a more limited extent.

The question remains why a constitution should be supreme. A pragmatic and by no means exhaustive answer is that modern constitutions are supreme

because they elate themselves to a position of predominance. On the basis of historical experience one may identify at least two reasons why it is considered to be important that a constitution enjoys predominance namely: the constitution is considered the fundamental contract of the society forming the basis for the establishment of a given State or - a more rare case - the constitution is in fact part and parcel of an international agreement (Constitution of Cyprus, the Dayton Accord containing the Constitution for Bosnia Herzegovina).

The social contract theory was developed by Jean Jacques Rousseau although Thomas Hobbes and John Locke, his predecessors, also relied upon it. The essence of that theory was defined by Rousseau as follows:

> "Each one of us puts into common stock his person and all his power, under the supreme direction of the general will; and will receive as a body each member of an indivisible part of the whole."

The notion of a social contract continues to be a well-supported point of departure and often employed fictional introductory statement in modern constitutions. The 1949 German Basic Law (Grundgesetz), as amended, states in its preamble that the German nation, in terms of its constitution-making power, has given itself its Basic Law and that it applies to the whole of the German nation on the grounds of all Germans in the various Lader having consummated the unity and freedom of Germany in free self-determination. The Japanese constitution of 1946 is introduced with similar terms. The preamble of the 1996 South African Constitution begins with the words "We the people of South Africa ...through our freely elected representatives, adopt this constitution as the supreme law of the Republic...".; the Constitution of the Russian Federation says: "We, the multinational people of the Russian Federation...". Despite the continued widespread acceptance of the terminology of the social contract theory, it is to be doubted whether it indicates much more than an ingrained historical usage induced mostly by the famous introductory words of the United States Constitution.

For that reason it is necessary to search for another justification why constitutions are considered predominant. In fact, this predominance reflects the profound implications and express or implied presuppositions regarding the nature and origins of authority, the State and law as well as of the conditions under which individuals live in the said community. Therefore predominance of the constitution mirrors its content. Apart from that democratic constitutions provide for a balance of power and limitations for State organs in exercising their functions. The respective organs should not have the possibility to free themselves from the respective restrictions by amending the constitution.

Either justification of the predominance of the constitution entails procedural consequences. Very often constitutions are drafted by an assembly of representatives (constitutive assembly) only elected for that purpose and the draft constitution was accepted by referendum. This was the case, for example, for the constitutions of the Russian Federation, Bulgaria, Hungary, Poland and South Africa. Thus, the authoritative constitutional author - the population - endowed the constitution with superior normative effect. However, this general rule is not without exception. The German Grundgesetz has never been put to a referendum, neither when it was originally adopted - it was voted upon in the parliaments of the Lader - nor after German unification. This procedure, although probably justifiable for political reasons, had at least some psychological setbacks. The negative attitude of some parts of the population of the former German Democratic Republic towards unification is, amongst others, fuelled by the belief that they had no sufficient influence upon the content of the German constitution.

The predominance of a constitution is maintained as long as the procedures for its amendment or abolition are not put into motion and have resulted in drafting and accepting a new or modified constitution. Note should be taken, however, of the fact that there is also another aspect to be considered. A constitution only plays a viable role, in spite of its formal predominance, as long as the citizenry

and the State's organs of authority continue to lend legitimacy to the institutions of that State through the true employment of the mechanisms, procedures and values provided for by the said constitution.

It may be summarized that the respect for the constitution and upholding of its predominance is an obligation faced by all public authority. However, forces outside the constitution also contribute thereto. Where the constitution reasonably and realistically reflects the principles consented by the society and is open to its needs and changements of perspectives, its primacy as well as its legitimacy are not endangered.

III. Content of Constitutions

Constitutions for democratic States are meant to organize the life of and in a given human society. They can do so by different means, either by providing for the establishment of certain institutions (presidency, government, parliament), the interaction amongst such institutions and, in particular, the mechanisms with which their legitimacy is to be renewed periodically. Older constitutions concentrated on this aspect. They were based upon the belief that a democratic procedure and the respect for the separation of powers would produce adequate results for the formulation of public decisions. History has shown that this is not always the case. The old saying that parliament can do no wrong is at least contested. Additionally, constitutions may establish a certain value system which will guide the decisions and actions of public authorities or rather restrict them. May I use a very old and a very recent example to illustrate my point.

According to the Constitution of Virginia of 1776:

> "... all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a State or society, they cannot, by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

This provision in the most succinct form describes the philosophical background and the value system which was the foundation of that constitution. It still aptly describes the underlying philosophy of U.S. American constitutionalism.

The Preamble of the Constitution of the Russian Federation describes the underlying philosophy as follows:

> We, the multinational people of the Russian Federation, united by common destiny on our land, asserting human rights and liberties, civil peace and accord, preserving the historic unity of the State, proceeding from the commonly recognised principles of equality and self-determination of peoples honouring the memory of our ancestors, who have passed on to us love of and respect for our homeland and faith in good and justice, asserting its immutable democratic foundations, striving to secure the wellbeing and prosperity of Russia and proceeding from a sense of responsibility for our homeland before the present and future generations,...". Art. 2 of the Constitution further adds: "Man, his rights and freedoms shall be the supreme value".

Speaking in general terms, all constitutions, in particular those that came into operation since 1990 contain similar elements. Nevertheless, it is difficult to describe those which are mandatory. This was the situation which was faced by the 'Western Contact Group' consisting of the United States, Canada, France, United Kingdom and Germany in respect of the drafting of the Constitution of Namibia. In 1982 the Contact Group produced, in consultation with all interested parties, a set of Constitutional Principles to guide the eventual writing of a constitution by a constituent assembly. The elements prescribed by the Constitutional Principles included the supremacy of a rigid and justiciable constitution, the separation of powers, regular multi-party democratic elections, inclusion in the constitution of a justiciable declaration of fundamental rights, a prohibition on retrorespectivity of laws, balanced public and security services, fair personnel policies and elected councils for regional and/or local administrations. The latest example of predetermined constitutional principles is to be found in the constitutional renewal of South Africa. However, these principles were not externally imposed but rather autochthonously negotiated

and agreed. This approach is to be preferred, since it is more likely to meet the needs and aspirations of the given society.

A comparative study of the constitutions of Poland, the Czech Republic, Slovakia, Hungary, the Russian Federation, Romania, Bulgaria, Albania, Slovenia, Croatia and Macedonia reveils that these constitutions, all adopted or fundamentally adapted in the period of 1989 - 1991, contain similar elements. They tend to define the State as a 'Rechtsstaat'; they provide for an electoral system based upon universal and equal suffrage; they distribute power in terms of the trias politica with a balance between the heads of State, the executive and the legislature; they all enshrine fundamental constitutional rights, including in many instances second and third generation rights; centralised constitutional courts have been established (except for Albania which followed, in this respect, the French excample); the independence of courts is protected constitutionally and special bodies for the appointment of judges have been instituted. It appears as if a universal understanding has emerged regarding the requirements for a constitution acceptable in the democratic world. In fact, some of the elements referred to have been enshrined in international agreements, in particular, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This, however, does not mean that modern constitutions have become homogeneous.

IV. Leading Principles such as Democracy and the Rule of Law and their Implementation

1. Democracy

Most constitutions give only a very general definition of their understanding of the notion of democracy. According to article 20 of the German Basic Law:

"(1) The Federal Republic of Germany shall be a democratic and social federal State.

(2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies."

Although being rudimentary this provision indicates some of the salient features of democracy.

The first feature is expressed in the sentence saying that all public authority emanates from the people. Hence the vote of the population is the decisive basis for the legitimacy of public authority. There must be a chain of legitimacy between the vote - in general the election - and any act of public authority. Acts of public authority lacking such legitimacy are illegitimate.

As can be seen from paragraph 2 of article 20, the German concept of democracy is based upon the representative democracy, which means that the participatory action of the population is, generally, restricted to the election of its representatives. This is true for all modern democratic States although the mechanisms under which the population may directly influence public decision-making vary considerably. The German model on the federal level suppresses direct participation of the population except for one case. The situation is somewhat different on the level of the Lader. The Swiss Constitution, for example, follows a different approach which provides for direct participation of the population, on the level of the cantons Swiss constitutional law even goes somewhat further.

In reality no democratic State exists which is not based upon some kind of representation mechanism. This is also true for one party-systems where the political party, in fact, constitutes a representative organ although it would not be considered as being representative from the point of view of western democracies.

Under a representative democracy there are, in principle, two different means how to ensure legitimacy of public authorities or their actions - either, already mentioned, by general, equal, periodic elections or by an action taken by the organ elected.

Since the third part of the Workshop is particularly devoted to elections I will refrain from dealing therewith. At this point, however, it is also appropriate to deal with the interrelationship between government and parliament, the second feature of democracy. Under the European system, a system which has been followed by all new constitutions, a distinction is to be made between the head of State and the government. Whereas the government may be legitimized by parliament only (as in Germany) or by parliament and the head of State, the head of States may receive their democratic legitimization either indirectly (as in Germany) or through direct election. Under the latter system the head of State enjoys the same amount of democratic legitimacy as the parliament. It is unavoidable that under such a system the head of State will be endowed with significant political power (as in France, USA, Russian Federation, Poland) and, accordingly, there will be a tension between the head of State and parliament which may result in a checks and balances situation as in the United States or a predominance of the President such as in the Russian Federation, Ukraine and in other States which before were members of the Eastern European bloc system and in some Latin American States. To avoid just that situation the German Basic Law provides for a President which does not enjoy the legitimacy through a direct vote of the population and who, accordingly, exercises no significant political power. The German Government only depends on parliament and receives its democratic legitimacy through the latter. The German Parliament elects the Prime Minister and may under certain restrictions withdraw its confidence from him. Apart from that the German Parliament controls - as other parliaments - the activities of the Government politically. The historically most important tool for parliamentary control in that respect used to be and still is the parliamentary right to finally approve the budget of the State.

As already indicated, democratic legitimacy can be established and transferred through action of the directly democratically legitimized body, generally the parliament. The relevance of this mechanism - the third important feature of democracy - increases to the extent that certain acts of public authority may only be taken through act of parliament or on the basis of an act of parliament. These two mechanisms, referred to in the German constitutional system as reservation of law (Vorbehalt des Gesetzes) and reservation of act of parliament (Vorbehalt des formellen Gesetzes) play a dominant role under German constitutional law. For example, fundamental rights may be restricted only by or pursuant an act of parliament and the budget may only be approved by act of parliament. The Federal Constitutional Court has further elaborated upon these mechanisms emphasizing that all public decisions on issues of importance to the State or the society shall be taken by act of parliament or on the basis of an act of parliament.

Finally, the German Basic law additionally curtails the possibility of the executive to exercise legislative powers in competition with the legislature. The respective provision (article 80) stipulates that the Federal Government, a Federal Minister or a government of a Land my be empowered by law to issue statutory orders. This means the government does not have general legislative powers to issue statutory orders but is restricted to those based on a specific mandate. However, the parliament is restricted in authorizing the Government since according to the same provision the authorizing act of parliament itself has to specify the content, purpose and scope of a possible statutory order.

These provisions which restrict the exercise of legislative functions of the German government are meant to safeguard the powers and functions of the parliament as the institution directly legitimized by the population vis-à-vis the parliament itself. They also reflect the principle of the division of power, a central principle of democratic constitutions. The idea of restricting the exercise of legislative powers of the Government is based upon the experience under the Constitution of Weimar. This regime gave the President

the power to rule independently from parliament with statutory orders. This possibility and, in particular the way it was used, is considered to be one reason for the collapse of the political system under that constitution. Other States have adopted a less rigid approach. Some constitutions provide for the possibility of independent statutory orders of the government and/or the head of State (Russia, Hungary) whereas most of the others follow the more restrictive approach of the German Basic Law according to which such statutory orders may only limit details within an act of parliament (for example, Poland, Czech Republic, Lithuania).

To summarize, the principle of democracy is not yet fully implemented - although this is one of the elementary features of democracy - when a given constitution provides for general, direct and equal elections of a parliament. It is further necessary that this legitimacy is carried forward so that all public authority and every act of the latter can be considered to emanate from the people. This can be achieved only through a parliament which dominates the enactment of laws and which controls directly and/or indirectly the activities of government. Apart from that the legitimizing effect of elections rests upon a true participation of the population, which means the population must be able to take an informed decision and, in elections, has the right to chose amongst alternatives. Elementary features of democracy are accordingly the freedom of opinion and expression, the freedom of information, the freedom of the press and a multi-party system. Human rights will be dealt with separately. They are only mentioned in this context to highlight that they are not only meant to protect the private sphere of individuals against acts of public authority but that they are to be looked at, too, as indispensable features of a democratic society.

2. Rule of Law (Rechtsstaat)

The principle of the Rechtsstaat - the term 'rule of law' does not cover the concept fully and therefore sometimes the term government of law or rule-of-law State is used - has been explicitly invoked in most of the most recent

constitutions (Portugal, Spain and all constitutions of eastern European States except those of Poland and Hungary). Except for the Constitution of Bulgaria where it is stated that Bulgaria is a State based on law all other constitution use the term together with democracy or other constitutional principles (the Constitution of the Russian Federation speaks of "a democratic federal rule-of-law State). Like in the German Basic Law, the reference to the government being based on law is a reaction to past experiences.

Neither these constitutions nor the German Basic Law under which the principle has received its most progressive refinement elucidate the full meaning of that principle. The constitutions referred to even differ as to the consequences to be drawn from that concept. Nevertheless, an acquis constitutionnel does exist.

According to German constitutionalism the notion government of law has two aspects, a procedural and a substantive one. This was confirmed by the German Federal Constitutional Court as well as the constitutional courts of eastern European States which have already invoked that principle. The procedural aspect dates back to the early constitutional development in the United Kingdom. It entailed the protection of individuals against arbitrary arrest and later developed into the general principle that the exercise of public authority was limited through law. As such the principle was at the roots of the constitutionalism of the late 18th and 19th century. Another aspect of the government of law-principle is that acts of public authority should be taken in the form of an act of parliament (reservation of act of parliament) or should be based thereon (reservation of law). This is seen as an essential means to achieve predictability of law and the transparency of obligations of individuals. Here again the leading idea is to forestall arbitrary acts of public authority. Reference has already been made thereto from the point of view to guarantee a central role in law making for the directly legitimized democratic body, the parliament. Further, it has been argued that the separation of power is part of that notion, several of the new constitutions invoke that principle explicitly (for example Croatia, Slovenia, Russian Federation, Ukraine). Unless explicitly

enshrined in the constitution, this principle has been developed from the government of law-principle (Constitutional Court of Hungary). The separation of power is a mechanism designed to weaken the potential power of a State organ for the benefit of individuals and to avoid any misuse of power. Finally, the government of law-principle emphasizes the role of courts. It requires that everyone has the right to an effective remedy by the competent tribunals for acts of public authority violating rights granted by law or the constitution (justiciability of acts of public authority). This requires a truly independent judiciary. All new constitutions emphasize this point which is understandable on the basis of past experiences, and the respective constitutional courts have strengthened the independence of courts and individual judges in particular against the government. There is one area which has been dealt with controversially, namely whether acts of parliaments are judiciable or not. According to the German constitutional system this possibility exists under certain restrictions. The Federal Constitutional Court has the monopoly to declare a federal act of parliament to be in violation with the constitution and thus to be void. This approach has been adopted by nearly all new constitutions of eastern European States. Most of them state explicitly that acts of parliament must not be in contradiction to the constitution (for example, Bulgaria, Estonia, Croatia, Lithuania, Russian Federation, Slovenia) and that the Constitutional Court judges thereon. Only through this constitutional predominance is guaranteed; without the possibility of judicial review constitutional predominance becomes entirely theoretical.

The elements briefly referred to so far result in the following concrete principles inherent in all modern democratic constitutions: State authority acts within the framework of law, there are no law-free (political) acts of public authority; any action infringing upon or likely to infringe upon the rights of individuals must have its foundation or justification in law or even in an act of parliament; judges are bound by law only, they are independent; the court procedure has to meet the standards of fair trial.

The substantive side of the government of law-principle has also been accepted in most of the recent constitutions. It means that government and legislature are not only bound by the respective procedures referred to but that the constitution also sets substantive limits for acts of public authority. These limitations result from the human rights as guaranteed by all modern constitutions. The Constitution of the Russian Federation puts it into the following words: "Man, his rights and freedoms, shall be the supreme value".

As already indicated most of the constitutions of the eastern European States follow the German example that human rights also restrict the legislature.

V. Human Rights

It has already been emphasized that modern constitutions contain human rights catalogues, these catalogues have been expanded in recent years and now very often cover, additionally to the traditional civil and political human rights, also economic, social and cultural rights or even rights to peace or to a safe environment. Even States traditionally opposed to limit the parliamentary powers have, by now, adopted or are preparing such catalogues. In other countries courts have developed human rights from general constitutional principles (Australia).

Human rights are not only to be understood as a means of safeguarding the individuality of persons and their right to develop their way of living, although this is an important aspect. Human rights taken as a whole also describe the value system on which the respective society is based. Therefore, they also influence public life as such and oblige States to intervene if the conditions for the enjoyment of human rights need to be improved.

VI. Conclusion

Modern democratic constitutions have changed in comparison to old ones. They are more explicit in the establishment of institutions and procedures and as far as the interaction between State organs is concerned. Through these procedures they try to achieve that public authority truly emanates from the people. The establishment of a chain of legitimacy from general equal and periodic elections via parliament to the election of the government through parliament is an essential element in these constitutions. Other cornerstones are the strengthened legislative powers of parliament and corresponding restrictions for legislative powers exercised by the government and the acknowledgement of the principle of the rule of law. Finally, all recent constitutions are based upon a value system centering around the protection of human rights. These elements start to form the internationally established constitutional standard.

Constitutional Theory and Hong Kong Practice

By Michael C. Davis

The Basic Law of Hong Kong provides for the possibility of instituting full direct popular democracy in 2007. Some members of the community have also begun to consider other types of constitutional reform. Hong Kong is, therefore, at a stage where it is prudent to look forward and ask what type of constitutional community it wants and needs on the road ahead. Reflections on constitutional theory offer occasions to ask how well things are working and what reform would be helpful. This paper will focus on the issues of constitutionalism and the rule of law and their relationship to the democratic process emerging in Hong Kong. In global discussions of constitutionalism and development basic questions are ask about the importance of constitutional democracy in the development process. For Hong Kong, whether to have or not have democracy or constitutionalism is really not an issue. These institutional commitments are provided in an international agreement, the Sino-British Joint Declaration.[1] Furthermore, Hong Kong's own processes of constitution-making have shown a popular commitment to democracy, human rights and the rule of law (the most commonly understood ingredients of constitutionalism) as ends in themselves. This vision seems to clearly favor a liberal form of constitutional democracy. Various forms of authoritarianism, socialist democracy or even illiberal democracy" are neither envisioned nor publicly acceptable and will not be considered as serious options here.

The central question, therefore, is not to ask Should we?" but, rather, to consider just how well Hong Kong is realizing its constitutional objectives and what are the implications for change. In this regard, questions about how constitutional institutions work and the cost engendered by any deficiencies are important. There are patterns of constitutional interaction between the key institutions of government that need to be explored. After briefly outlining what I believe to be the most coherent vision of what liberal constitutionalism does, this paper will discuss basic constitutional components and their health in the Hong Kong context. In this regard, the paper will adopt the commonly recognized liberal constitutional elements of democracy, human rights and the rule of law as a framework for analysis.[2] Local application of these components will be addressed in turn in succeeding sections of the paper. These elements must, of course, be appreciated in their local social and political setting.[3] Ultimately, the paper will make the case for full universal suffrage as a way to improve Hong Kong's constitutional performance.

I. Basic Constitutional Theory and the Processes of Political Development

Prior to jumping into the details of Hong Kong's constitutional journey, a concise theoretical account of what I believe to be the institutional dynamics of liberal constitutions may be helpful. This may assist our efforts to understand the role of constitutionalism both as a source of constraint and of empowerment. It may also help us to construct a yardstick to measure achievements and objectives. These institutional processes are, of course, effected by differences in legal systems, party systems, legislative structures and powers and patterns of democratic participation. But the present account will focus on the dynamics of a liberal constitutional model,

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[1] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984, 23 ILM 1371 (hereinafter "Joint Declaration").

[2] *See* Robert A. Dahl, Democracy & Its Critics 223 (1989).

[3] Michael C. Davis, "Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values," Harvard Human Rights Journal, vol. 11, at 109 (1998)

with a written and supreme constitution, in a common law jurisdiction. There are many comparative accounts of constitutional structures in civil law countries and of systems of parliamentary supremacy in other common and civil law context that need not much concern us, given the pre-existing constitutional commitments in Hong Kong.

In broad terms, one might envision constitutional government as a venue for discussion of political outcomes and values. Laws, including judicial decisions, usually have two effects: the immediate intended effect expressly addressed by the law itself and long-term effects on political values that are of more enduring interest.[4] Constitutionalism is especially concerned with our basic value commitments. Constitutional theory generally focuses on the functioning of institutions of constitutional government and their interactions with the democratic process.[5] Scholars too often emphasize the constraints of constitutional government without sufficient appreciation of the positive discourse-engendering role.[6] The outcomes of decision in a constitutional system are the product of the interaction of politics and institutions. The flow of information between the people and these institutions and the interaction of the institutions themselves is generally a measure of the health of the constitutional system and the values it represents. This health may also serve to engender confidence, or the lack thereof, in the system. As many constitutional enterprises have revealed in recent years, this confidence may be the measure of success or failure in a given country and will certainly shape a countries economic developmental path.

Alexander Bickel, discusses liberal constitutionalism in its American common law variant.[7] He describes a system where the outcomes of democratic processes, reflected in legislation, are measured against fundamental democratic commitments reflected in the constitution. Courts, exercising the power of constitutional judicial review, may be called upon to take the constitutional measure of legislation on familiar topics such as, for example, the death penalty, the protection of national symbols or equal protection of the laws. The other side of the scale is generally weighted with various human rights, liberty and democracy concerns addressed in the bill of rights. He envisions a role where the outcome of this judicial process, applying a bill of rights or other constitutional requirements, is informed by both expediency and principle in a dialogue with the elected branches and the people. The court may uphold a law, overturn it or simply avoid the issue.[8] The people may respond with new laws and the Court respond again, when those laws are brought up for review. This chain of action and reaction engenders an ongoing inter-institutional conversation that engages the public at large through the electoral process. This constitutional conversation is constructive of fundamental commitments and the mechanisms of the constitutional order. Outcomes both constrain options and

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[4] *See* Alexander M. Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics (2nd Edition, 1986)

[5] Constitutional theory offers competing conceptualizations of the role of courts but I have found the account offered by Alexander Bickel to be most useful in explaining the interactions of democracy and institutions. *Id. See also* John H. Ely, Democracy and Distrust, A Theory of Judicial Review (1980); Raoul Burger, Government by Judiciary, The Transformation of the Fourteenth Amendment (1977).

[6] Stephen Holmes, "Precommitment and the Paradox of Democracy," in Constitutionalism and Democracy (Jon Elster & Rune Slagstad, eds., 1988) at 195.

[7] Bickel, supra, note 4. The American contribution to theories about written constitutions with constitutional bills of rights is well known. Though sensitive to system differences and similarities, scholarship from this tradition has contributed a great deal to recent comparative discussions of constitutionalism in East Europe, Latin America and beyond. The usefulness of such scholarship in Hong Kong's common law context is even more pronounced

[8] Here he refers to various doctrines of avoidance and principles of standing or case development he calls "passive virtues."

engender further responses. This process is productive of what is generally thought of as a giving constitution."

While constitutional theory scholarship generally assumes democracy is in place and worries about the role of constitutional judicial review in a democracy, the pivotal role of a healthy and genuine democracy is apparent. Democracy is the essence of the entire liberal constitutional project, whether addressed at length in the constitutional text or not.[9] While theory often focuses on the role of constitutional judicial review, this constitutional project occasionally engages the people directly. At times, characterized by Bruce Ackerman as constitutional moments," the people move beyond ordinary politics and institutional mechanisms to mobilize to speak directly to their fundamental concerns.[10] These moments may be moments of formal or informal constitutional change. Such moments will likewise face difficulty and distortion without a robust and reliable democracy. In all of these processes, the coordinate role of democracy, human rights (including liberty) and the rule of law is apparent. Each effects the other and distortion may follow from unwarranted interference or depreciation of democratic and institutional roles.

When we appreciate that constitutional processes are not just concerned with constraint but also with the empowerment of the people, in a discursive sense, then it is easier to see that the legitimacy embraced in democratic institutions is central to the functioning of this constitutional framework. Leaders who override constitutional constraint to get the job done" are not just overriding some disagreeable laws but are, rather, undermining the will of the people. When it is in doubt whether the will of the people is, in fact, reflected by quasi-democratic institutions, such as now exist in Hong Kong, then confidence in the democratic legitimacy of the system is at even greater peril. As is discussed in succeeding sections of this essay, there is evidence that Hong Kong has been plagued by efforts to economize on these constitutional commitments.

Undercutting democracy undermines our efforts to achieve orderly and principled government and tends to polarize the society and distort political outcomes. Undercutting democracy also undercuts the legitimizing component of the system and disturbs public confidence in the value of participation, cutting off the fuel that drives the constitutional process. Undercutting human rights undermines the assurances of equal representation, trust in procedural and substantive justice and the adequacy of the public debate. Undermining the judicial component in some sense undercuts the engine that drives the constitutional system and engenders a system without reliable constraint. Jon Elster notes that the strength of the authoritarian leader is also his weakness: He is unable to make himself unable to interfere with the legal system whenever it seems expedient."[11] It is difficult to sustain the rule of law without democracy and difficult to sustain democracy without the rule of law.

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[9] This idea of a constitutional essence or unity that underlies a constitution and takes priority in its interpretation has substantial legal basis. This has been most strikingly evident in constitutional decisions in Germany and India that have overturned even constitutional amendments that were deemed to violate the "overarching principles and fundamental decisions to which individual provisions are subordinate." *See* Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy," in Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds, 1993). Of course, constitutional courts more generally employ notions of democracy in interpreting rights requirements (as reflected in the European Convention on Human Rights expression "necessary in a democratic society").

[10] Bruce Ackerman, We the People (1991). In comparative application, Stephen Krasner discusses a similar dynamic he refers to as "punctuated equilibrium." Stephen Krasner, "Approaches to the State, Alternative Conceptions and Historical Dynamics," Comparative Politics (January, 1984) at 240.

[11] Jon Elster, "Constitution-making in Eastern Europe: Rebuilding the Boat in Open Sea," Public Administration, Vol. 71, at 169, 199 (1993).

It is generally felt that this constitutional engine drives economic development, as well. This certainly seems to be the case on the high end.[12] As economies reach a higher level of development authoritarian developmentalism, as experienced in much of East Asia, becomes its own grave digger. Economic development under the free market model tends to engender greater diversification of social and economic interest and increased demands for representation of such interest. As our analysis of law suggests, these interests produce immediate demands, while, at the same time, engendering more principled interest or values. This process has been evident throughout East Asia in the tiger economies, where the authoritarian developmental miracle" was followed by a wave of democratization. In the terms of Dietrich Rueschemeyer and others, the causal mechanism of this involved the emergence of Subordinate classes" that were able to mobilize to seek better representation through greater democracy.[13] It is believed that constitutional democracy may better mediate the complex forces at play in a highly developed society.[14] Human rights and the rule of law may cause economic actors to have more confidence in the system. In this global age, countries that do not demonstrate sufficient commitment to these institutions do so at their peril. This may effect their ability to attract investment and to regulate it effectively, when it arrives. Poorer countries without reliable institutions may attract investment, especially on the low end of the production process, but usually at a greater cost. Other factors contribute to greater confidence in democracies with relevant rule of law and other constitutional elements. Democratic countries are thought to be able to respond better to crises of the type evident in the recent East Asian economic crisis because democracy provides a venue for addressing the conflicts that emerge.[15] Finally, open democratic societies are thought to foster greater know-how, inventiveness and initiative, more efficient functioning of economic incentives and greater openness and competitiveness in the industrial, banking and financial sectors. Highly developed countries cannot afford to loose their competitive edge in these areas.

Because of these complex dynamics the effort to construct legitimacy and reliability under constitutional government often requires demonstrations of extraordinary commitment to the constitutional fundamentals we have discussed.[16] So one measure of the health of the constitutional system in Hong Kong is the degree of commitment to constitutional fundamentals. I believe that for a society of Hong Kong's sophistication and high-end development it will not do to too readily fall short on the level of extraordinary commitment democratic constitutional institutions

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[12] Michael C. Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development," Human Rights Quarterly, Vol. 20 (1998) at 303.

[13] The democracy they refer to is a liberal one with human rights and rule-of-law-related institutions. Dietrich Rueschemeyer Et Al, Capitalist Development and Democracy (1992) Such mobilization of "subordinated classes" may be indicative of Bickel's constitutional moment.

[14] Some scholars have tried to back this claim up by data. After surveying 115 countries for economic performance data from 1960 to 1980, Gerald Scully argues that human rights and the rule of law improved the growth rate of countries. Gerald Scully, Constitutional Environments and Economic Growth (1992). Other scholars have found economic development contributes to the survival of democracy. Adam Przeworski et al, "What Makes Democracies Endure?" Journal of Democracy, Vol. 7, at 39 (1996).

[15] Dani Rodrik, "Democracy and Economic Performance," paper prepared for the Conference on Democratization and Economic Reform in South Africa, January 16-19, 1998. See, Donald Emmerson, "Americanizing Asia," Foreign Affairs, May-June, 1998 (addressing specifically the question of rebound from the East Asian economic crisis).

[16] Lee Bollinger notes how an "extraordinary commitment" to tolerance in American free speech doctrine aims to exercise a capacity for tolerance in other aspect of American society, placing emphasis on the need for exceptional commitment to such constitutional fundamentals. Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986).

require. Doing so to date has engendered a certain dysfunctional quality to Hong Kong's constitutional processes. Decisions that either undermine the democratic process and its legitimacy or shave on constitutional requirements fundamentally alter value commitments and undermine confidence. The reform process on the horizon offers an opportunity to discuss where we could do better and shape the path ahead.

II. Hong Kong's Constitutional Path

The 1984 Sino-British Joint Declaration, in addition to providing for the return of Hong Kong to China in 1997, put Hong Kong on the rather visionary path to constitutional democracy, though Chinese leaders may not have worked out the full implications of this vision. It was understood that anything less would fail to secure adequate confidence in Hong Kong's future. The Joint Declaration addresses all the fundamental elements of constitutionalism. Respecting democracy, it promises that the Chief executive is to be chosen by elections or consultations" held locally and that the legislature is to be chosen by elections."[17] Regarding human rights, the Joint Declaration lists the full panoply of liberal rights, of which more than half relate to freedom of expression, as well as requiring application of the international human rights covenants.[18] The rule of law is expressly secured by the continued application of the common law, the independence and finality of the local courts, the supremacy of the Basic Law (which is stipulated to include the content of the Joint Declaration) and the right to challenge executive actions in the courts.[19] This later element presumably includes the right to challenge the actions legal basis under the Basic Law. By implication, this promised nothing less than a full system of constitutional judicial review of legislation, as is now widely accepted. Though the Basic Law appropriately incorporates most of the requirements of the Joint Declaration, in the three key areas noted above, there have been some shaving of these commitments.[20] Full democracy is promised but not provided (the most substantial issue now before us) and the character of constitutional judicial review was left in doubt (a doubt now largely resolved favorably but seriously interfered with). Subsequent practice, since the hand-over, has brought further peril.

A. Democracy

It is important to consider the full force of legal obstacles in the way of democracy in Hong Kong. Such obstacles not only stand on the path to democracy but are indicative of both the democratic deficit built into the system and the value commitments of those in power. Essentially, if no previous amendments occur, when the 2007 target year for this decision dawns Hong Kong, under the Basic Law, will have in place a 60 member legislature where only half of the seats are directly elected. The remaining seats will largely be filled by narrow-based functional constituencies.[21] The Chief Executive will have been chosen by an 800 member Election Committee, itself chosen by largely narrow-based functional constituencies. These functional constituencies, by their nature, tend to favor pro-Business candidates. In this regard, it should be noted that Hong Kong's functional constituency system is quite distinguishable from certain legislative power-sharing arrangements used in some countries to ensure representation of ethnic or religious minorities. In Hong Kong this

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[17] Joint Declaration, para. 3(4) & Annex I, art. I.
[18] Joint Declaration, para. 3(5) & Annex I, art. XIII.
[19] Joint Declaration, para. 3(3), (5), (12), & Annex I, arts. I-III, XIII.
[20] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, April 4, 1990, 29 ILM 1511 (1990) (hereinafter "Basic Law").
[21] *See* Basic Law, Annexes I and II.

electoral system seeks merely to empower an elite business minority. Democratic theory would tell us the interests of economic elites are already well represented in typical democratic systems (money speaks in electoral politics). Accordingly, this privileging of an elite minority and undermining of majority control would appear to violate the very essence of democratic constitutionalism, as well as equal rights. Though the Basic Law ultimately calls for universal suffrage, it will take a two-thirds vote in the Legislative Council and the Chief Executive's approval for any amendment to succeed. Given the poor track record of conservative candidates in direct elections, it will be an uphill battle to convince them of the merits of this course of action. And yet, the pathology of Hong Kong's political system to date makes further democratization a matter of great urgency.

Any hope that the current crop of directly elected legislators can use their foothold to expand democracy incrementally through expansion of the franchise under electoral legislation (of the type enacted in 1995) is not hopeful. Not only is there the two-thirds vote requirement to institute full universal suffrage after 2007, but there are a plethora of other constraints on democratic action. These constraints mostly relate to legislative powers.[22] Members of the Legislative Council are required to get the Chief Executive's approval before they can introduce bills involving expenditure or government policy. Additionally, amendments to government bills and motions or bills introduced by individual members of the Legislative Council require majority approval by each of two different groups of legislators: thirty from functional constituencies and thirty eventually made up of members directly elected.[23] The government argued, in challenging the Legislative Rules of Procedure, that even amendments to government bills, proposed by legislators, require the Chief Executive's approval.[24] The chance of avoiding these constraints through early amendment of the Basic Law is also blocked. The general power to amend the Basic Law is vested in the National People's Congress (NPC).[25] Even the submission of local proposals for amendments requires a two-thirds vote in the Legislative Council, the consent of two-thirds of the local NPC deputies, and the approval of the Chief Executive. To make matters worse, the elections that have been held give an appearance of unfairness because this model results in groups of candidates who win large majorities of the popular vote getting a much smaller percentage of the actual seats in the Legislative Council.[26] What is very clear is that any movement toward closing this democratic deficit will require persuading a very large number of currently favored politicians that the current model is fundamentally flawed and that correcting its flaws is a matter of urgency.

There may be some sign that even the most ardent supporters of slow incremental change are beginning to realize the cost of such democratic deficit. The democratic deficit appears to produce a legitimacy gap between the directly elected legislators and those who are not. Because those with popular electoral support are in a permanent minority position under this model, they are essentially left to the politics of shame to pressure officials in power or in the legislative majority to support popular initiatives.

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[22] Basic Law, art. 74 and Annex II.

[23] Basic Law, Annex II.

[24] Angela Li, "Justice Chief to Challenge Bill in Court; 'To Apply a Judicial Review Shows Disrespect for the Legislature's Unanimous Decision'," S. China Morning Post, July 8, 1998, at 6; Margaret Ng, "Restrictions Will Clip Legco's Wings," S. China Morning Post, July 17, 1998, at 17.

[25] Basic Law, art. 159.

[26] With a relatively high voter turnout of fifty-three percent, the various democrats, including members of three parties and some independents, were given roughly sixty percent of the vote at the May 24, 1998 Legislative Council elections. Despite this resounding victory, democrats were able to secure only one-third (twenty) of the sixty seats in the Legislative Council. "Record Turnout Poised to Give Democrats Sweeping Victory," S. China Morning Post, May 25, 1998, at 1; "Lessons of the Poll," S. China Morning Post, May 26, 1998, at 18.

Hong Kong is left with a government prone to high levels of expediency constrained only by the pressure of public shame. We have a government, in Jon Elster's terms, which is unable to make itself unable to interfere when it is expedient. This system tends to be confrontational with substantial value discord and encourages popular suspicion of political leaders on both sides. Poor electoral turnout in the 2000 election may be indicative of a loss of confidence.

While poor voter participation may favor those who are supportive of those currently in power, who are also more supportive of China's policies, such politicians should not celebrate too loudly. In a system where no popularly elected politicians accept responsibility for government missteps, the national government in Beijing will frequently find itself credited with the most questionable policies of its anointed politicians, undermining its legitimacy and the loyalty of Hong Kong people. This situation could become intolerable for the Basic Law architects, over the long term. This seems to be an unnecessary cost to bear. Hong Kong appears to have a lot of the democratic architecture in place. There is a well-developed party system, the administration of elections seems to go well, a vibrant press attuned to political coverage is in place and the public is familiar with the process. There are few want-to-be democracies with such a fully developed foundation.

In a constitutional system where democratic participation is the fuel that drives all the other components of orderly and principled government, the democratic deficit may cause the system to run out of gas. Will people continue to have confidence in a system they cannot control? Will they participate in democratic processes when their vote does not determine the outcome? How many government missteps will be tolerated before confidence in basic institutions starts to wan? When will investors be infected with this lack of confidence, now evident in voter apathy? While in some societies one may relate voter apathy with general voter satisfaction, it will be hard to interpret this in such a manner in a society where voters lack the capacity to choose their government. Does the lack of democracy effect the functioning of the constitutional system and the people's ability to protect their legal institutions from interference? When will widely valued rights be put at risk? Will corruption or other forms of malaise creep into the system and undermine its famous competitive qualities? There is already concern that Hong Kong businessmen have learned to do business the mainland way. The democratic deficit, when viewed in the context of the whole constitutional system, does not seem to be something that can be widely sustained beyond the transition period. Query what will be the cost in public confidence of waiting until 2007 to correct this problem? Clearly, delaying universal suffrage for both the Legislative Council and the Chief Executive beyond 2007 will come at great cost in this regard.

Should the Chief Executive cling to the Electoral College method of extremely limited franchise, while allowing universal franchise in the election of the Legislative Council? I think not. The liberal constitutional system, of the type that Hong Kong has embraced, is one that values human rights and the rule of law, but especially prioritizes democracy. The legislative design at the moment, as noted above, tends to deny substantial power in respect of government policy to the Legislative Council. But a fully elected Legislative Council, facing a 忱on-elected" Chief Executive could be expected to escalate the use of public pressure and the politics of shame. It would appear that the only way such Chief Executive could avoid such pressure is to be directly elected territory wide or shift to a figurehead role, allowing the government to be formed in the Legislative Council.

For the Chief Executive to remain not directly elected but to cling to real power in some form of hybrid parliamentary system, where members of a majority coalition are appointed to the Executive Council and to head government departments, would be to invite unstable government. Such system risk a walk-out at any juncture where there is dissatisfaction with the government's direction. Such parliamentary-like officials

would have responsibility without power, a very unstable situation and one not likely to be agreed to, at least by the present democratic camp. In the debate over presidentialism versus parliamentarism, the constitutional imperatives, to encourage an orderly flow in the constitutional dialogue and reduce inter-branch tension, seems to point to an all or nothing approach. Whether such Chief Executive should be directly elected under the current structure or move to figurehead status, embracing a parliamentary structure, is an issue with no clear indication. Both the Basic Law and the tradition of a strong governor or chief executive in Hong Kong would tend to point to the former. While some scholarship has indicated the likely stabilizing quality of parliamentarism in such places as Latin America,[27] I am doubtful that such reasoning (emphasizing the need to escape the grip of former military rule or even corporatism) has application in Hong Kong.

B. The Human Rights Structure

The importance of human rights, especially free speech related and minority rights, to the kind of constitutional discourse noted in the theory discussion above is apparent. In this regard, the Basic Law appears facially adequate because it includes the various rights specified in the Joint Declaration and specifies that any restrictions on rights are subject to the requirements of the international human rights covenants.[28] Rights were placed at some risk in the Basic Law in provisions beyond the rights chapter, allowing for application of national law in cases of emergency or where the central government determines there is turmoil" in the region and in provisions requiring the enactment of local laws against Sedition" and Subversion."[29] With an adequate rights chapter and such ambiguous terms in other sections, rights protection ultimately depends on interpretation in the exercise of executive power, in processes of enacting and enforcing laws, and especially in the exercise of constitutional judicial review.[30]

The evolving human rights regime in Hong Kong has revealed a surprising vitality, though there are serious threats. A rich public discourse fuels this vitality. This discourse is evident in both cases and in the legislative process.[31] The 1984 Joint Declaration, and later, the tragic events at Tiananmen, stimulated a great deal of public discussion of human rights in Hong Kong. Hong Kong people have generally exercised their rights and seem to value them. The strong guarantees in the Basic Law itself and this public sentiment gives cause for hope regarding human rights. During the last years of colonial rule the largest immediate local threat to rights development

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[27] Carlos Santiago Nino, "Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America," in Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley, eds, 1993).

[28] Basic Law, arts. 24-42.

[29] Basic Law, arts 18, 23.

[30] In this regard we must bear in mind that the Hong Kong rights traditions is very different from that on the Mainland. The Mainland rights system has been described as having the following characteristics: 1) rights are juxtaposed with duties; 2) rights are not considered inherent in humanhood but are treated as the creation of the state; 3) welfare rights are emphasized over political rights; and 4) instead of rights being a limit on the state, the state's interest are a limit on rights. *See* R Randle Edwards, et al, Human Rights in Contemporary China (1986)**.** The contradiction in the respective systems is acknowledged to be the basis for the "one country, two systems" model for Hong Kong.

[31] Under the Hong Kong Bill of Rights Ordinance enacted in 1991, the level of human rights litigation has been substantial. Hong Kong Bill of Rights Ordinance, No. 59 (June 8, 1991) *reprinted in* 30 I.L.M. 1310 (1991). *See generally* Johannes Chan, "*The Hong* Kong Bill of Rights 1991-1995: A Statistical Overview in Hong Kong's Bill of Rights: Two Years Before 1997 (George Edwards & Johannes Chan, eds. 1995)(discussing various aspects of the Hong Kong Bill of Rights and the Basic Law).

was the rather conservative character of the evolving human rights jurisprudence. In spite of this, there was a surprising vitality both in political discussion and in the courts. The democratic deficit and attacks on the judiciary are the greatest causes for concern about continued protection of human rights. The continued exercise of freedom of speech and association is the greatest cause for optimism. At the same time, it is important to bear in mind that there have been threats to these foundation rights. In this regard, the stark contrast between popular discourse regarding free speech broadly understood and the discourse on this topic from some sectors of the favored elite is striking. This tends to demonstrate a values gap between a majority of the people and those anointed with power that is important in reflecting on the democratic quality of the constitutional system.

The international character of the emerging rights regime is its' most striking quality. Hong Kong is legally at a crossroads of international human rights forces. China stimulated much of this energy by including substantial human rights guarantees, the international human rights covenants, and maintenance of the common law in the Joint Declaration. Because of this, the 1991 Bill of Rights Ordinance (which remains in force after the handover, minus certain key provisions) copies almost verbatim the International Covenant on Civil and Political Rights (ICCPR).[32] When the Bill of Rights Ordinance was enacted, the colonial constitution, the Letters Patent, was amended to include the ICCPR.[33] So under this rights regime the courts were called upon to exercise constitutional judicial review power before the handover, and have done so, under similar Basic Law provisions, since the handover. Here again, the international character of the rights regime was enhanced by frequent judicial reference to overseas common law and European Union precedent.[34] Subsequent to the handover, the Chinese government, to its credit, announced it would continue to file reports on behalf of Hong Kong under the international human rights covenants. After the enactment of the Bill of Rights Ordinance the government, and the increasingly democratic Legislative Council, in the last years of colonial rule, reformed many non-conforming colonial laws to better protect human rights.[35] Many of these reforms especially aimed to better secure equal protection, freedom of speech and labor rights.

There is, however, reason for some pessimism about human rights, evident in developments following the handover. Basic Law Article 160 provides that the Standing Committee of the National People's Congress (NPC), at the time of handover, could determine existing laws to be in contravention of the Basic Law, and therefore invalid. Assisted by its transition Preliminary Working Committee, and later the Preparatory Committee, China proceeded to review all of Hong Kong's laws. Unfortunately, in the strained politics of the time, this became a vehicle to reverse the most important reforms of draconian colonial laws that had occurred in the years leading up to the handover, especially respecting reform legislation which Chinese officials had earlier opposed. The use of Article 160 review to take away rights, rather than protect them, became a source of Hong Kong anxiety about future rights security. The post-handover period saw a list of other questionable steps in this regard by the

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[32] Hong Kong Bill of Rights Ordinance, No. 59 (1991) reprinted in 30 I.L.M. 1310 (1991); International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967).

[33] Hong Kong Letters Patent, No. 2 1991, reprinted in Public Law and Human Rights: A Hong Kong Source Book, (Andrew Byrnes and Johannes Chan eds., 1993).

[34] *See* R v. Sin Yau Ming [1992] 1 H.K.C.L.R. 127, at 141-42 (CA) (specifying at length the various foreign sources to be considered, including other common law jurisdictions and the European Union cases under the European Convention on Human Rights).

[35] The amended laws included: 1) Societies Ordinance (1992); 2) Television Ordinance (1993); 3) Broadcast Ordinance (1993); 4) Public Order Ordinance (1995); and 5) Emergency Regulations Ordinance (1995).

Provisional Legislature on the rights front.[36] Through it all, the general attitude of hostility to human rights protection is troubling. So far there has been no dramatic action to radically deny such basic rights as free speech, freedom of press and freedom of association, so vital to Hong Kong's constitutional processes, but the hostile attitude does give cause for concern.[37] The protection of human rights ultimately depends on enforcement.

C. Rule of Law

Whether the current system comes up short regarding human rights depends a great deal on interpretation and the institution of constitutional judicial review.[38] As noted above, the Joint Declaration and the Basic Law implicitly require the exercise of constitutional judicial review under the Basic Law.[39] The power of constitutional judicial review has, in fact, been acknowledged by the Hong Kong Court of Final Appeal, though the future vigor of such review has been put in doubt by the likely chilling effect on the Court flowing from the events surrounding the right of abode case.[40] Article 158 of the Basic Law specifically vests the power of interpretation of the Basic Law in the Standing Committee of the NPC. However, the Article further specifies that the Standing Committee shall authorize local courts, when adjudicating cases, to interpret those provisions, which are within the limits of the autonomy of the Region" and other provisions."[41] Under further provisions in Article 158, if courts are confronted with the interpretation of provisions, which are the responsibility of the Central People's Government or concern local/central relations, then they must refer the matter to the Standing Committee of the NPC. The Standing Committee, upon such referral, then decides the matter with the advice of the Committee for the Basic Law.[42] Other provisions not to be addressed at length here shape the scope of the

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[36] The Provisional Legislature enacted new laws regarding public order and societies with ominous provisions on national security. Margaret Ng, "Threat to Our Civil Rights," S. China Morning Post, Apr. 11, 1997. There were further laws restricting the right of abode on mainland children (later challenged in a well-known court case), reducing labor rights protections, rejecting actions for private violation under the Bill of Rights.

[37] There have been occasions when rights are threatened by government control of public demonstrations and other actions. Menacing statements by government supporters concerning the public broadcaster are also of concern. Rights in other areas such as those implicated in the right of abode case have also been put in jeopardy.

[38] A strong case can be made that constitutional judicial review can better serve the cause of human rights, especially where litigation cost and time are factors, when supplemented by other institutions that provide affordable avenues of complaint about public and private rights violations. This is especially true in areas such as labor rights, gender discrimination and civil rights more generally. The present discussion focuses on the more basic commitments engendered in the notion of constitutional judicial review.

[39] The Joint Declaration guarantees the maintenance of the common law system, the independence and finality of the local courts and the right to challenge the executive in the courts. Joint Declaration, Annex I, arts. 2, 3 and 13. The Basic Law includes the same requirements in addition to various detailed requirements common to common law systems respecting the judiciary. Basic Law, arts. 2, 8, 17, 80-96 and 158.

[40] Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal 14 of 1998 (January 29, 1999) [hereinafter Ng Ka Ling I].

[41] Basic Law, art. 158. The reference to "other provisions" in the third paragraph of Article 158 is not limited by the scope of autonomy.

[42] The Committee for the Basic Law is provided for in NPC legislation enacted along with the Basic Law. It is made up of six local and six mainland members. Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People's Congress, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (published

Courts power of review not to include matters of local central relations and matters of central authority.[43] The scope of these provisions and others are still to be worked out in local jurisprudence and related politics.

The above noted Ng Ka Ling judgment arose out of a challenge to a local Hong Kong immigration statute which severely inhibited the Basic Law guaranteed right of abode in Hong Kong for children born to Hong Kong resident parents.[44] In exercising the power of constitutional judicial review to overturn several provisions, which heavily burdened that right, the Court declared it would take a purposeful and generous approach to interpreting constitutional rights guaranteed in the Basic Law.[45] In the judgment, the Court also explicitly declared that the CFA would have to determine when, in deciding disputed cases, to refer provisions respecting local-central relations or matters of central authority to the Standing Committee of the NPC.[46] The court took a narrow view of when such referral was required and concluded it was not required in this case.

While this decision was widely applauded in Hong Kong for its firm and unambiguous defense of human rights and the rule of law, there was a very severe response on two occasions. Immediately after the judgment was issued, leading mainland officials and legal scholars", as well as their local pro-China" supporters attacked the part of the judgment where the court articulated in orbiter dicta its right to examine" acts of the NPC, claiming the Court was putting itself above the NPC.[47] They claimed the judgment had to be rectified".[48] The HKSAR government filed an unprecedented motion for the CFA to clarify" the orbiter dicta in its judgment declaring its power to examine acts of the NPC.[49] This clarification was granted in a second brief judgment in which the Court explicitly stated that it did not hold itself above the NPC, a judgment in which the Court essentially restated its original position.[50] A second, more serious attack on the judgment and the rule of law

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with the Basic Law). The Basic Law Committee was already appointed and in place upon the handover. Linda Choy & May Sin-Mi Hon, "Airport Boss Gets Senior Basic Law Job," S. China Morning Post, June 28, 1997, at 6.

[43] Basic Law, arts. 17, 19, 158.

[44] Article 24 of the Basic Law (the first Article in the chapter entitled "Chapter III: Fundamental Rights and Duties of the Residents) provides that Hong Kong residents include "persons of Chinese nationality born outside of Hong Kong" of Hong Kong residents. Under the Article, such residents are entitled, as are other Hong Kong residents, to the right of abode and a permanent identity card. The suit was brought by several such children claiming a denial of their basic right of residence under a newly enacted immigration ordinance which required them to apply on the mainland for an exit permit. The practical effect of such application process was likely to cause a lengthy delay, even years, of their entry into Hong Kong. *See* Basic Law, art. 24.

[45] While the courts assertive approach to protect the human rights and the rule of law was widely applauded in Hong Kong, there was considerable public concern over the dangers of a flood of mainland born people with this right, which would result from the decision. Lau Siu-Kai, "Verdict Tips the Political Balance," S. China Morning Post, Mar. 2, 1999, at 17.

[46] The standing committee would then be advised by the Basic Law committee when rendering such interpretation. Basic Law, art. 158.

[47] Mark O'Neill, "Beijing Says Abode Ruling was Wrong and Should be Changed," S. China Morning Post, Feb. 9, 1999, at 1.

[48] *See* Margaret Ng, "The Legal Perils of 'Rectification,'" S. China Morning Post, Feb. 26, 1999, at 19.

[49] Cliff Buddle, et al., "Judges Asked to Clarify Right of Abode Decision," S. China Morning Post, Feb. 25, 1999, at 1.

[50] Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal No. 14 of 1998 (Feb. 26, 1999) [hereinafter Ng Ka Ling II]. In the original judgment the Court had really not held itself above the NPC, but had merely indicated that it would implement the Basic Law as required by the NPC; it had not denigrated the NPC Standing Committee's power to interpret the Basic Law. In the second clarifying judgment, the CFA simply made this more explicit while continuing to uphold the pre-eminence of the Basic Law. The Court concluded, "nor did the court's judgment question, and the

occurred in May 1999 when the government, after issuing a report claiming the judgment would produce a flood of 1.67 million migrants into Hong Kong, made a request to the Standing Committee of the NPC to interpret the relevant provisions of the Basic Law, to effectively overturn the CFA Judgment.[51] As a result of the latter action, the finality of judgments of the CFA in Hong Kong has clearly been called into question and the rule of law has been put in doubt.

When it comes to the rule of law in Hong Kong, there are several troubling aspects of the circumstances surrounding this case. The most blatant damage is reflected in the simple reality that final judgments in cases in Hong Kong, at least where constitutional rights are concerned, are simply not final. They are subject to being overturned by a combination of local government and Mainland interference. This will certainly have a chilling effect on courts. There is reason for concern that the Hong Kong courts will be faced with further official political attacks in the future. This may lead to intimidation and timidity in the courts. There is specific concern that several of the political attacks on the court's judgment were initially publicly joined in by members of the Basic Law Committee, the very committee which would be called upon to advise the Standing Committee of the NPC when issues of Basic Law interpretation are referred.[52] Some members of this committee showed little concern to maintain a judicial demeanor, leading to some suspicion that any future advice forthcoming from this committee will be of a political, rather than legal, nature. The government's motion for clarification raises further concern about the court's independence and finality. The only positive aspect of this procedure and the resultant extraordinary judgment is that the Court appeared to stick to its substantive position in articulating its clarification, though the Court, in a latter case, fully endorsed the NPC ruling.

Given the harshness of the government's attack on the Court of Final Appeals Judgment can that court be counted upon in future to take the kind of firm stand on

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Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein." *Id.* It appears that a Court created under the Basic Law was merely upholding the priority of the Basic Law as required on its face. The overturning of local legislation implicates the standard separation of powers concerns of constitutional judicial review. In addressing its relationship to the NPC, the Court appeared to be merely giving priority, as a source of law, to the sovereign instructions of the NPC reflected in the Basic Law. In the Second clarifying judgment, the Court explicitly sought only to respond to confusion over "interpretations (which) have been put on part of the court's judgment", and not to amend the judgment.

[51] In late April the government eventually estimated the likely migration figure to be 1.67 million. Chris Yeung, "Court Gives 1.67 m Right of Abode," S. China Morning Post, Apr. 29, 1999, at 1. The government asked the Standing Committee to re-interpret Articles 22 (which relates to Mainland control of people from other parts of China) and 24(3) (which specifies the residence rights of children born to Hong Kong residents) to effectively overturn the CFA final judgment. Chris Yeung, "NPC Will be Asked to Revoke Abode Rights for 1.5m Migrants," S. China Morning Post, May 19, 1999, at 1. In doing this, the government targeted for exclusion the children of Hong Kong residents who were born before their parents became residents. The CFA previously upheld the right of such children under Article 24. The government explicitly rejected the more legally acceptable alternative of amending the Basic Law. The government's decision to undermine a Final Court Judgment has produced strong condemnation from the Democratic camp, the Bar and leading constitutional scholars. Michael C. Davis, "Home to Roost," S. China Morning Post, May 16, 1999, at 10.

[52] Basic Law, art. 158; Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 (Apr. 4, 1990) [hereinafter Basic Law Committee Decision].

the protection of human rights it took in the NG Ka Ling case? Would an elected government, have confronted the courts judgment in this manner? Would such a government have pursued a more cautious response, through legislative or even constitutional amendment, as is usual under constitutional democracy? Would the level of demagoguery that occurred have occurred if officials faced electoral approval? Would this legislation, in a form that attracted such severe court surgery even have passed in an elected Legislative Council? Would the legislative process itself have spawned the kind of constitutional debate that could have avoided this confrontation? Clearly democratic governments can pass questionable laws, but would the system have suffered such a severe crisis in such case? What is the long-term cost of this attack on the Court? Will the constitutional flow of discourse in the paradigm of a living constitution be stifled? Or will judges avoid sensitive issues, too readily invite standing committee review or simply give in to political pressure? Can we expect the government to effectively overturn (by inviting this kind of NPC review) the Court again? Can investors and insiders count on the circumspection of a government that is unable to make itself unable to interfere when it seems expedient? Since institutions of constitutional judicial review are essentially in place, including jurisprudential and professional support, the main concern here is to encourage democratic development to reduce the incentive to interfere. The constitutional judicial review engine runs best when fueled with full popular democracy. Full democracy also seems the best way to engender the degree of circumspection that constitutional government requires. At a minimum one would like to see clear constitutional guidelines constraining this kind of interference.

III. Conclusion

Hong Kong's constitutional system has been put under severe stress in the transition period. Government missteps (only a few of which are mentioned here) and crises have been frequent. The politics of shame has proven to be the only effective channel for public action. Nearly all public officials have a legitimacy problem. Those in power and favored by the system lack legitimacy because of their lack of direct electoral validation. Even those minority legislators who are directly elected increasingly lack legitimacy because they lack power and are unable to represent the voters who have elected them. This produces voter apathy of the severest kind. At the same time the various complicated elector models (clearly aimed to water down the opposition) confuse the voters and create a Hobsian world of all against all. Without severe discipline, even members of the same party wind up fighting each other and internal party conflicts are legend. At the same time, the dynamics between the branches of government are put in jeopardy by intractable constitutional conflict. The most legitimate members of the legislature are nearly certain to oppose the executive and the only conceivably independent institution, the court, had to be tamed. Full electoral democracy is needed to get this system running again before the political break-downs result in higher cost for the economy and the wellbeing of the people. The degree of damage done to date is difficult to assess but persistence of the existing electoral system leaves little doubt that further damage will occur..

Constitutional and Electoral Design
As A Participatory Political Process

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Workshop on Constitutional Design: Thinking about 2007
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Introduction

I am very pleased to be here today on behalf of the National Democratic Institute. We welcome this opportunity to lend our support to your efforts to initiate a discussion on Hong Kong's constitutional and political development.

The current situation poses serious challenges for democratic activists, but it presents opportunities as well. The Basic Law states, as ultimate goals, that the legislature and chief executive be elected by universal suffrage after 2007. The nature of Hong Kong's political institutions, however, is not further defined. Nor is there an established process for redesigning Hong Kong's institutional framework.

Several important issues that are central to Hong Kong's democratic development will have to be resolved. These include:

- What type of electoral system is used to elect legislators and the chief executive?
- What is the institutional relationship between the legislative and executive branches of government?
- What is the relationship of both branches of government to the civil service?
- How will political and civil rights be protected; in particular, how will Article 23 of the Basic Law (dealing with subversion, treason and foreign political organizations) be implemented?

These issues are politically and legally complex. They are also issues that will in large measure shape Hong Kong's democratic future. In several countries, in Asia and elsewhere, civil society has played a very important role in resolving these and other issues of constitutional development. I will outline some of these efforts in my following remarks. But first I would like to tell you a little about the work of the National Democratic Institute.

The National Democratic Institute

The National Democratic Institute for International Affairs (NDI) was established in 1983 to promote democracy worldwide. NDI's early programs focused on providing assistance to democratic movements in Latin America and then to the transitions occurring in eastern and central Europe. NDI is now working in each region of the globe. It has worked in approximately 100 countries and now has programs throughout Africa, Asia, Eurasia, Central and Eastern Europe, Latin America, and the Middle East.

NDI's programs include work in strengthening newly established parliaments, developing rules on transparency and accountability, increasing the capacity of newly emerging political parties and civil society organizations, working in the area of civil-military relations, and primarily helping to establish more effective controls for civilian oversight of the military.

NDI is probably best known, however, for its work in elections. Since the mid 1980's, NDI has participated in over 100 elections around the globe. Its work in elections has included:

- Developing legal frameworks for elections;
- Working with political parties and election commissions to establish conflict prevention mechanisms;
- Providing assistance to political parties to help them effectively participate in the political process;
- Working with civil-society groups to participate in the design of new electoral rules and in mounting election monitoring and voter and civic education programs, and
- Organizing international observer delegations.

NDI's work in Asia

NDI is currently working to support parliamentary development in Bangladesh and Nepal; in Cambodia we are helping civil society groups prepare for upcoming local elections; in China, NDI is working with the Center for Comparative Legislation at Beijing University on strengthening democratic legislative processes; and in Malaysia and Sri Lanka, NDI recently worked with civil society groups to assist them in their efforts to monitor national parliamentary elections. In Indonesia, NDI is implementing a multi-faceted program that focuses on civil-military relations, constitutional development, legislative strengthening and political party and civil society capacity building.

NDI's work in Hong Kong

Since 1997, NDI has been observing the on-going transition in Hong Kong and regularly reporting on political developments. NDI's reports have been widely distributed within Hong Kong and to the international community. In conjunction with preparing these reports, NDI organized a series of international delegations that visited Hong Kong in 1997 and 1998. These delegations included participants from Bangladesh, New Zealand, the United Kingdom and the United States. Since then, NDI's staff have made several trips to Hong Kong, meeting with civil society activists, senior governmental officials and political party leaders to discuss how the democratic process in Hong Kong could best be developed and supported by the international community.

Citizen Participation in the Political Process

A consistent theme of NDI's work is encouraging citizen participation in the political process. Citizen involvement is an essential feature of democratic governance. The right of citizens to participate in the political process is recognized in the major global human rights instruments, such as the Universal Declaration of Human Rights (Article 21) and the International Covenant on Civil and Political Rights (Article 25). Both of these instruments recognize the right of citizens to participate in the electoral process on the basis of *equal and universal suffrage*. Public involvement is also crucial because it provides a check on governmental power and helps to protect democratic rights. Citizen participation also enhances the legitimacy, and therefore the effectiveness, of governmental policies and programs.

NDI's programs have helped to strengthen citizen involvement in a variety of ways. Assistance in the area of domestic election monitoring, for instance, directly engages citizens in the electoral process to ensure that elections are fair and conducted according to international standards and the rule of law. Civic and voter education programs are designed to help inform citizens about the institutions of governance, the democratic process and the electoral system. Civil society advocacy training helps democracy activists learn how to intervene in the political process to promote reforms. Legislative strengthening programs include efforts to enhance the transparency and openness of the legislative process so that citizens can effectively engage their legislative representatives.

Modes of Citizen Participation

Citizens participate in the political process in several ways; some are quite informal, and others are more structured. In the electoral arena, citizens participate by joining or supporting political parties. They vote on Election Day, volunteer to help administer or monitor elections and sometimes become political candidates.

Between elections, citizens express their views as individuals by writing to, or otherwise communicating with, their legislative representatives. They attend public meetings and engage their neighbours in political arguments and debates. They might also express their opinions in "letters to the editor" in newspapers or participate in "talk radio" programs.

The Role of Civil Society

Outside of elections most people participate in the political process through civil society organizations. In addition to political parties, these include labour unions, student organizations, and professional associations. They also include smaller issue-oriented advocacy groups, such as environmental and human rights groups. If citizens' political participation is to be meaningful, then, these civil society groups must be strong.

Government policies can help to strengthen civil society and promote public participation. These policies help to establish an "enabling environment" in which civic organizations can participate in the political process.

What are some of these policies? They include laws that:

- Protect freedom of expression and assembly;
- Recognize nongovernmental organizations as a legal entity that can enter into contracts and have a full range of legal rights and responsibilities;
- Permit civil society organizations to raise money and recruit supporters;
- Allow organizations to operate independently, free from interference from the government.

In addition, there are several concrete steps that public officials can take to promote public involvement. These include:

- Widely disseminating information about meetings and encouraging the public to attend;
- Inviting civil society organizations to appear at public hearings and submit written comments on pending proposals;
- Sponsoring forums in which public officials appear in communities and answer citizens' questions;
- Providing free broadcast time to civil society organizations so that they can inform the public of their events and activities;
- Launching public education campaigns—or financing civil society groups to do so—informing citizens of important policies under consideration.

The Role of Civil Society in Democratic Transitions

During the "third wave" of democratic transformation that has swept across the world over the past two decades, civil society has played important roles in creating democratic openings and in framing the new institutions of governance. In South Korea and Taiwan, for example, political liberalization began in the mid-1980s; led by segments of civil society, including opposition political party activists, lawyers, religious leaders, university professors and other professionals, as well as students.

Civil Society and the Democratic Transitions in South Korea and Taiwan[1]

In South Korea, students, journalists, religious leaders and other civil society activists pressured the government of Chun Doo Hwan to provide for direct presidential elections. The government initially rejected these reform demands. The government's intransigence, however, led to an intensified opposition movement and the student's call for "democracy, people, nation" (*minju, minjung, minjok*) begin to resonate with the general public. As a result, white collar unions of teachers, bankers, pharmacists and lawyers contributed to the reform effort by issuing statements,

[1] See Hsin-Huang Michael Hsio and Hagen Koo, The Middle Class and Democratization, in Consolidating the Third Wave Democracies: Themes and Prospects (1997).

organizing rallies and engaging in other political activities. Faced with escalating political protest activity, the regime agreed to the opposition's demands in late June 1987.

The reform movement split its vote in the presidential election of December 1987 and Roh Tae Woo, a military leader from the former administration became president. In the National Assembly elections held in April 1988, however, the opposition captured a majority of seats in the legislature. In December 1992, the election of Kim Young Sam ended over 30 years of military-dominated government. During the early 1990s, civil society organizations such as the Citizens' Coalition for Economic Justice (CCEJ) emerged advocating for income redistribution and tax reform. Initially composed largely of professionals such as doctors, lawyers and professors, CCEJ grew from 500 members in 1989 to over 7,000 by 1993. Its reform demands fuelled opposition to the military regime and after the 1992 election bolstered the reform agenda of the newly elected civilian government.

In Taiwan, civil society opposition to the Kuomintang (KMT) government intensified in the 1980s as grass roots social movements of consumers, environmentalists, women and church groups emerged to challenge anti-democratic policies. In response to growing demands for reform, martial law was lifted in July 1987 and other repressive political measures were abolished. This liberalization, however, spurred even greater demands for reform. By the early 1990s several parliamentary reforms had been adopted and in December 1994, the first opposition victories occurred in the elections of mayors in Taipei and Kaohsiung and for governor of Taiwan Province.

During this period, civil society's prodemocracy movement was instrumental in achieving substantive constitutional and other legal reforms, including repeal of the anti-democratic Temporary Provisions of the Constitution and ending the Period of National Mobilization for Suppression of the Communist Rebellion. In May 1992, political pressure by civil society led to the abolishment of Article 100 of the Criminal Law, which substantially limited free expression.

The Role of Civil Society in Constitutional Development

In the transition period, civil society groups have played an important role in developing the nation's new democratic legal and institutional frameworks. Sometimes this has involved drafting a new constitution. There are several important questions that must be answered before a constitutional review process can be initiated.

- Who will be involved in the constitutional review process? Will a new constitution be written by the members of the existing legislature or by a Constituent Assembly?
- If there is a Constituent Assembly, how will it be selected? Will it be elected under the electoral rules of the former regime?

- If a special commission is appointed to draft a new constitution, how will its members be chosen? Will civil society members be included? If so, who will appoint them?

The mode of adopting a new constitution has proven to be one of the most contentious issues of transition periods. If a constitution is adopted by the parliament of the old regime, which was elected under undemocratic rules, the process and the resulting constitution may lack legitimacy. This might occur, for instance, if members of parliament were elected under one-party rule; or where the electoral rules were simply considered unfair.

It seems that the process that is most likely to result in broad public support for a new constitution is one in which the constitution is adopted by: a legislature whose members have been elected under a new democratic dispensation; (2) a commission that has been appointed and is broadly representative of the public; or (3) where the new constitution is approved by the electorate in a referendum.

Witness what recently happened in Zimbabwe. In an February 2000, Zimbabwean voters rejected the government's draft constitution, and in violence-marred elections this past July the opposition increased its representation despite overwhelming obstacles in the surrounding political environment. The civil society-led National Constitutional Assembly (NCA) opposed the draft constitution of the government appointed Constitutional Commission. The NCA opposed the draft, which was submitted to the voters in a referendum, even though it would amend the constitution to establish a proportional electoral system that would almost certainly increase opposition representation in Parliament. The NCA's major objections related to the process: President Mugabe selected members of the government commission and the commission included few civil society leaders (the 385 member commission included all members of parliament and the civil society leaders were all hand-picked by the president). The NCA developed its own constitutional review process – parallel to the government's – claiming that a government controlled process could not be trusted

On the other hand, several countries have developed effective means by which civil society could participate in the constitution making process. In South Africa, for instance, a four-year negotiating process that painstakingly elicited the involvement of all segments of society created a constitution that addressed the public's key concerns and established an electoral system that enjoyed the public's confidence. The lengthy participatory process helped to avoid the civil violence that many expected when the negotiations began.

Australia's 1998 constitutional convention was transparent and participatory. The 152 delegates, half of whom were elected and half appointed, were drawn from diverse segments of the population. Prior to the convention, several local governments sponsored informal meetings to encourage citizens to express their views on constitutional issues. A

women's convention was held to collect views on issues of particular importance to women. Those views were later communicated to the national convention. Prior to the convention, the government conducted an extensive public education campaign informing people of the constitutional options under consideration. The convention itself was open and transparent. The public could attend sessions of the convention and it was televised as well. The key issues were later submitted to the voters in a 1999 referendum.

In some countries, civil society groups have taken imaginative steps to ensure that their voices are heard. In Brazil, for instance, The National Network of the Women's Movement for Constitutional Revision (CFEMEA) has established a mechanism for monitoring and influencing debate on proposed constitutional articles affecting women. The Network sends to parliament legislative proposals issued by womens' organizations. Its bulletins on constitutional issues reach 800 organizations, which in turn pass on information to over 100,000 women. CFEMEA also meets with legislative leaders to discuss issues of special concern to women.

Constitutional Development as a Political Process

The best way to ensure that the choices that are made in designing institutions promote reconciliation, rather than exacerbate social tensions, is to develop a constitutional process that is:

- Transparent (covered by the news media and proceedings are open to the public and well publicized);
- Inclusive (provides all major interests an opportunity to participate and have their views heard);
- Informed by the best expert advice available regarding the implications of selecting one constitutional design over another; and
- Accompanied by an extensive public education effort that informs citizens of options under consideration and of the major arguments in supporting and opposing them.

The *process* that leads to political transformation may receive little attention, but it may be as important as the choices that are ultimately made about constitutional design. Public participation and transparency do not guarantee that the best or optimal choices will be made, but they increase the likelihood that a wide range of choices will be considered and that the resulting institutions will be viewed as legitimate.

Appendix

NDI's Constitutional Development Programs

NDI has supported constitutional reform in many countries by providing technical expertise and comparative information on reform processes. In addition, NDI has provided information for substantive debates about constitutions, assisted lawmakers in reviewing draft constitutions, educated citizens about proposed changes to their constitutions, and assisted in puclic education efforts with a focus on helping legislatures in defining their role in a democratic system.

Albania. In 1998, NDI brought together Albanian political party leaders with Canadian, French, and Polish leaders who are actively involved in constitutional negotiations in their countries. In cooperation with the Ministry for Legislative Reform, NDI devised a public outreach program to inform the public about key components of the proposed constitution. The program included the development of radio phone in shows, print education pieces, educational videos and the organization of public hearings.

Angola. In support of the process to revise the constitution, NDI has organized seminars and study missions in response to the Constitutional Commission, the Attorney General and the Minister of Justice for information on human rights, judicial and prosecutorial reforms and ethics. Justice Albie Sachs (South Africa), Judge Jesus Fernandez Entralgo (Spain), Professor of Law Walter Kamba (Namibia) and Advocate George Bizos (South Africa) have travelled to Luanda for public seminars and consultations with the Commission, parliamentarians, political parties and government officials. Their presentations have been published in an Occasional Paper series in Portuguese and English. NDI has sponsored several study missions to South Africa to expose Angolans to the peaceful process of constitutional negotiations and the transformation of the justice system.

Georgia. To assist Georgian legislators in defining a post-Soviet system of governance and to provide structure to the constitutional debate, NDI organized conferences in 1994 and 1995 that brought parliamentary experts from France, Hungary, Poland, and Canada to discuss critical substantive and procedural issues, such as division of power between the executive and legislative branches and achieving consensus on the constitution.

Guyana. NDI has supported political reconciliation and the constitutional reform process in Guyana since 1996 by arranging international consultations, workshops and study missions designed to facilitate an exchange of ideas regarding constitutional reform. NDI ahs helped to increase the effective participation of citizens in the process by making

available in over 150 locations comparative constitutional materials from around the world and copies of the Guyana constitution.

Indonesia. NDI has been working with the national legislative body (the People's Consultative Assembly, or MPR) on developing amendments to the countries 1945 constitution. NDI has been working with lawmakers to democratise the nation's executive and legislative institutions to reflect the basic demands that led to the overthrow of Soeharto in May 1998. NDI has helped by providing expert advice and comparative information on the separation of powers, civil military relations, decentralization and establishing a bill of rights. NDI has also worked with civil society groups to develop a greater capacity to advocate on behalf of constitutional reforms.

Malawi. NDI provided forums for leaders of political parties, civil society organizations, women's groups and traditional authorities to develop agendas, form united fronts and devise strategies on how to lobby in preparation for Malawi's National Constitutional Conference. In support of the conference, NDI provided delegates with an annotated review of the constitution. NDI organized a session entitled "The Role of Parliament in Malawi's Constitutional Democracy," at the 1994 Constitutional Conference. International presenters provided members of parliament, cabinet ministers, high court justices and civic organization representatives with comparative information about key features of the different branches of government, specifically the powers and authorities of the president compared to the legislative branch.

Poland. In 1994, NDI organized a three-day conference on comparative constitutional models for the polish parliament's constitutional committee and other interested parliamentarians. During the conference, participants considered issues such as the presidential and parliamentary systems, and the role of economic rights in constitution.

South Africa. NDI contributed to several stages of the negotiations on the constitution. In the first stage of all-party negotiations, NDI provided comparative information on elections and intergovernmental relations. Following the election of the Constitutional Assembly in 1994, NDI was asked to provide expert advice on proposals for an independent election authority, funding of political parties, intergovernmental relations and bi-cameral legislative bodies. Following the enactment of the constitution, NDI assisted with initiatives on constitutional education and in developing enabling legislation for local government.

West Bank/Gaza. In 1996, as the Palestinian Legislative Council was debating a draft of their basic law, NDI provided a forum for members to speak with expert legislators from Canada, France and Hungary about constitutional issues, particularly issues related to executive-legislative relations. The experts presented approaches to constitution writing and discussed ways to create a balance between the legislative and executive branches and to ensure implementation of constitutional provisions.

Electoral Systems, Parties and Voters:
A Comparative Overview*

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Electoral Systems, Parties and Voters: A Comparative Overview

The recent wave of democratization across many of the world's regions has placed electoral systems firmly in the political limelight. The political elite are faced with important choices over the design of appropriate electoral institutions for their burgeoning democracies, in some cases (such as in the Czech Republic) adapting and fine-tuning the system in the light of the experiences of first democratic elections, in other cases (such as Estonia) tearing up the plan and starting from scratch with a brand new system. Moreover, such decisions are being taken just at a time when a number of the more established democracies are also entertaining the idea of overhauling existing electoral systems, in some instances (e.g. Italy, Japan, New Zealand) actually implementing major reform.

The long-established truism that electoral reform is very uncommon, occurring only in 'extraordinary historical circumstances' (Nohlen 1984: 218), seems no longer appropriate in an age of global constitutional and institutional experimentation. Electoral system design (and reform) has been high on the political agenda of a large number of countries over the past decade or so. In this context, then, it is highly appropriate for Hong Kong to be examining its existing electoral system, with a view to possibly making some changes – certainly the Special Administrative Region (SAR) is not alone in giving the subject such serious consideration.

This paper aims at providing a comparative overview of the types of issues an electoral engineer might want to consider when the time comes to think about electoral reform in Hong Kong. In three sections this paper considers the following themes:

1. It reviews the range of existing electoral systems which Hong Kong's electoral engineers may wish to choose from;
2. It assesses the proportional consequences of different electoral systems for political parties, and for the political system;
3. It assesses the strategic consequences of different electoral systems for voters and parties.

1. The Five Main Families

In any given political arena, parties, politicians, voters and the media (and all other relevant actors) operate according to sets of rules and conventions which, together, make up what are known as the electoral laws. These can include regulations regarding how much candidates may spend, who can vote, how the broadcasters should cover the campaign, and so on. Among this panoply of electoral laws there is one set of rules which deal with the election itself – i.e. the electoral system. The function of the electoral system is to determine the means by which votes are translated into seats in the process of electing politicians into office.

In basic terms electoral systems are generally seen to fall into two main groups: proportional (PR) systems – where the aim is that a party's share of seats should reflect as closely as possible its share of the vote – and non-proportional systems – where greater importance is attached to ensuring that one party has a clear majority of seats over its competitors, thereby (hopefully) increasing the prospect of 'strong' and stable government. While this PR/non-PR distinction provides a useful summary classification, we need to take account of the fact that life, as ever, is a bit more complex; there are significant nuances of variation between the different types of electoral systems in use across the Planet. This is not just in terms of how one particular system may have a greater tendency to produce greater (lesser) *proportionality* than another. Just as significant is how electoral systems can also vary in a *strategic* sense. For instance, some systems provide greater scope for 'voter choice' than others, and this has implications both for parties, in how they campaign, and for voters, in how they vote.

Table 1. The Five Main Families of Electoral Systems

Family	Countries (N=59)	Proportion of countries (%)	Proportion of population (%)	Average disprop. (GI)	Average no. of parties (ENPP)	Average proportion of women MPs (%)	Average voter turnout (%)
Plurality systems	Bangladesh, Canada, India, Jamaica, Malawi, Mongolia, Nepal, Papua New Guinea, Thailand, UK, USA	18.6	52.8	12.3	3.4	10.9	69.1
Majority systems	Australia, France, Mali	5.1	2.9	15.8	2.8	16.7	59.9
PR-List systems	Argentina, Austria, Belgium, Benin, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Finland, Greece, Israel, Latvia, Madagascar, Mozambique, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Uruguay	47.5	18.3	3.9	4.5	19.7	70.3
Single transferable vote	Ireland	1.7	0.1	5.4	3.2	12.0	66.7
Mixed systems	MMP: Bolivia, Germany, New Zealand, Venezuela MMM: Ecuador, Hungary, Italy, Japan, Lithuania, Mexico, Panama, Philippines, Russia, South Korea, Taiwan, Ukraine	27.1 (6.8/20.3)	25.8 (3.9/21.9)	3.8/9.9	4.3/4.7	20.9/10.9	77.7/55.8

Notes: Only including countries with a population greater than two million (1998 estimates), and with a Freedom House score of 4.0 or less (1998-99 rankings). The averages in the final four columns are based on elections in the 1990s. Due to data gaps, the averages refer to a smaller range of countries (N=51-52); the number of countries is even less for the voter turnout figures which exclude cases of compulsory voting. Two sets of averages are provided for mixed systems: MMP/MMM. GI = Gallagher (Least Squares) index of disproportionality; ENPP = Laakso/Taagepera index of effective number of parliamentary parties.

Sources: Derived from tables in Farrell 2001. Original sources incude: Gallagher et al (2000); LeDuc et al (1996); Massicotte and Blais (1999); Reynolds and Reilly (1997); Shugart and Wattenberg (2000); International Foundation for Electoral Systems (www.ifes.org); Wilfried Derksen's Electoral Web Sites (www.agora.stm.it/elections/election.htm); CIA World Factbook 1998 (www.odci.gov/cia/publications/factbook/index.html); Freedom House, Annual Survey of Freedom Country Scores 1999 (www.freedomhouse.org); Inter-Parliamentary Union (www.ipu.org); International IDEA (www.idea.int/turnout/voter_turnout.html).

Before exploring these two themes of proportionality and strategy, it is useful to start with a brief overview of the main types of electoral systems currently in operation. It is not to gross a simplification to state that electoral systems can be grouped (albeit quite unevenly) into five main families, as shown in Table 1. The first two families are non-PR systems. Plurality systems (in virtually all cases the single member plurality [SMP] system; also referred to as first past the post), in which a candidate requires a plurality of the vote to win a seat, remain the most common electoral systems on a per capita basis (though India's vast population accounts for the bulk of that). Majority systems (such as the Australian Alternative Vote [AV], or France's two-round system), as the title suggest, are designed to ensure that candidates are elected with an overall majority of the vote in their constituency. As Table 1 shows, these systems are not used widely.

Traditionally, the most common PR systems are the list systems (used by almost half the world's democracies). These can vary widely (Farrell 2001), but the basic point they share in common is that they are party-based rather than candidate-based systems: voters choose between party lists and the proportion of votes a party wins in the election determines the proportion of seats it is allocated to fill from its candidate lists. Another long-established PR system is the Single Transferable Vote (STV), used in just two countries for national level elections (Ireland and Malta), but nevertheless a system which has been much written about and studied by electoral systems specialists over the past century or so. In its operation STV is very like the AV system: voters complete the ballot paper by voting in order of preference for as many candidates from as many parties as they like. The proportionality of the result is produced by the fact that (unlike AV) the voters are electing several legislators in each constituency or district (i.e. the district magnitude [DM] is greater than one, a crucial feature of all PR systems).

Finally, there are the mixed systems, which come in many different forms. What makes these systems unique – and the basic point which they all share in common – is their hybrid nature in offering both non-PR (generally SMP) and PR (generally List) elections in the one system. For long (West) Germany stood virtually alone as one of the few places using such a system (often referred to there as personalized PR or the

additional member system). As Table 1 reveals, in the recent wave of democratization and also in the recent cases of electoral reform in established democracies, mixed systems have come into their own – mixed systems are currently much in vogue (over-taking plurality on a per country basis and List on a per capita basis).

Among all the possible types of mixed systems (Massicotte and Blais 1999; Shugart and Wattenberg 2000), there are two main groupings. First there are those systems where the PR and non-PR side of the election are treated as separate parallel elections, in which the proportion of seats a party wins in the non-PR part of the election have no bearing whatsoever on the proportion of seats it is allocated in the PR part of the election. In consequence, larger parties are able to win a disproportionate share of the seats. These are non-proportional, mixed member majoritarian (MMM) systems, and they make-up the bulk of the mixed systems currently in operation.[53]

The second grouping (and the one most loyal to the German model) are the mixed member proportional (MMP) systems, in which the allocation of seats to a party in the PR tier is affected by the proportion of seats the party won in the non-PR tier, in particular compensating those parties whose seat allocation in the non-PR tier was lower than should have been expected under a PR system. Given the importance attached to the PR tier, the MMP systems tend to produce electoral outcomes – in terms of overall proportionality – very similar to those produced by List systems.

2. Proportionality and Stability

[53] On one interpretation, Hong Kong might be said to operate an unusually complex MMM system, in which the membership of the Legislative Council (LCMs) are elected according to three different sets of electoral rules. The LCMs from geographical constituencies (GCs) are elected by a closed-list largest remainder-Hare system; LCMs from the six 'special' functional constituencies (FCs) are elected by AV (referred to in the legislation as a 'preferential elimination system'); LCMs from the remaining FCs and from the election committee (EC) are elected by SMP (except in the case of the three-member Labour EC sub-sector where the block vote version of plurality is deployed). Given that there is no compensation across the different tiers (e.g. the proportion of seats a party wins, say, in ECs are not taken into account when determining the proportion of seats it is allocated in the GCs), the Hong Kong system can be categorized as MMM. However, strictly speaking, because not all (indeed, very few) voters can vote for all three tiers of LCMs, and in particular since the general public only have a vote for the GCs, it might be more appropriate to refer to this as a 'coexistence' form of mixed system (Massicotte and Blais 1999: 347). Furthermore, given the weakness of the LegCo vis-à-vis the ExCo and the Chief Executive (both elected by the EC), it is stretching credulity somewhat to attempt to include the current Hong Kong system in existing comparative models.

There has been a fair bit of discussion in the literature over how to rank the various electoral systems in terms of overall proportionality. Table 1 provides summary measures of the Gallagher Index of disproportionality for each of our five electoral systems.[54] Consistent with other evidence, this reveals the lowest levels of disproportionality in List and MMP systems; STV represents an intermediate category; and the highest levels of disproportionality (double-digit figures) are in the plurality, majority and MMM systems. Of course, it is possible to be even more precise about the PR ranking of different electoral system, in particular where we can take account of the different electoral formulas which are used in translating the vote proportion to a seat proportion. This allows us to separate the various PR systems.[55] In one of the most sophisticated efforts to produce a ranking of PR systems based on electoral formulas, Arend Lijphart (1994) suggested the following ranking:

1)	Most proportional:	largest remainder (LR)-Hare; Sainte-Lagüe
2)	Intermediate:	LR-Droop; STV; modified Sainte-Lagüe
3)	Least proportional:	d'Hondt; LR-Imperiali

Proportionality is a very important variable in the study of electoral systems. Among the factors it affects are: (1) gender and ethnic balance in the composition of the legislature; (2) the number of political parties winning seats in the legislature; and, by implication, (3) the number of parties involved in forming a government. Proportionality is also said to have an important influence on (4) the overall stability of the political system. Let us take each of these points in turn.

First, PR systems are more likely to produce parliaments which, in terms of their membership, represent a microcosm of society: i.e. there is greater gender balance, and also (where relevant) greater representation of ethnic minorities. Demonstrating this point

[54] The Gallagher (Least Squares) index of disproportionality is derived as follows: square the vote-seat differences for each party (ignoring 'others'); sum the results; divide the total by 2; take the square root. The higher the figure the greater the disproportionality.

[55] Strictly speaking the district magnitude (DM, i.e. the size of the constituency) is even more important in determining the overall proportionality of an electoral systems. The basic rule (for PR systems) is that the

empirically is not easy because other factors have to be taken into account (such as the level of economic development of the country, or the role of the party selectorates). This explains why the relevant figure for women's representation under STV (N=1), reported in Table 1, is out of step with our expectations. But, overall, the relationship is as anticipated: the greater the proportionality the greater the representation of women (a correlation of 0.32). Furthermore, this has been confirmed by more sophisticated multivariate analysis (e.g. Norris 1996).

Second, proportionality also influences the number of parties winning seats in the legislature. Named after a famous French political scientist, Duverger's 'Laws' (1954) stipulate that PR systems tend to produce multi-party systems, while non-PR systems tend to produce two-party systems. In other words, the more proportional the electoral system the greater the number of political parties we should expect to see. The relationship is determined both by the *mechanics* of an electoral system (i.e. in terms of whether it makes it easier or more difficult for, say, a small party to win seats) and also by the *psychological* expectations the electoral system produces in politicians and voters (i.e. in terms of whether it is a waste of time for a small party to bother fielding candidates in a non-PR system, and for a supporter to bother voting for it) (Blais and Carty 1991). This relationship has been demonstrated in many studies (Lijphart 1994; Taagepera and Shugart 1989), and we can also see a good 'fit' in Table 1, which reports the trends for the effective number of parliamentary parties (ENPP), a summary measure designed to take account of the number of parties in the system and their relative sizes.[56] The List (4.5), STV (3.2) and MMP (4.3) systems have greater numbers of parties than the majority systems (2.8). The fact that the plurality (3.4) and MMM systems (4.7) are out of step may have something to do with the fact that these include many cases of new democracies.

Third, given that PR electoral systems allow more parties to win seats in the legislature, in the case of parliamentary political systems this has implications for the

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larger the DM the greater the proportionality. The extreme examples of high proportionality are Netherlands and Israel where there are no constituencies; the legislators are elected on nation-wide lists.

[56] Laakso and Taagepera's index of the effective number of parliamentary parties (ENPP) is derived as follows: 1 divided by the sum of the squared percentage seats for each party represented in the legislature.

formation of government. There is plenty of comparative evidence to prove a clear, and unambiguous relationship between proportionality and types of governments. Non-PR systems are characterized principally by single-party government, PR systems by multi-party, coalition government (Gallagher et al. 2000; Lijphart 1999).

Fourth, and to a degree following on from the last two points, the argument is often made that PR systems promote political instability. The issue is usually presented in terms of a trade-off: either we have a representative parliament which elects a similarly representative government, or we can have 'strong' and stable government – the suggestion is that we cannot have both at the same time (e.g. Hain 1986; Pinto-Duschinsky 1999; Norton 1997). The fact is, however, that there is actually very little evidence in support of this supposed trade-off, as can be illustrated by the following summary bullet-points:

- Comparative studies find very little evidence of government longevity being significantly shorter in PR systems than in non-PR systems (Lijphart 1999).
- In general, governments in PR systems are more representative of public opinion given that they comprise coalitions of several (or many) parties.
- Extremist parties can win seats more easily under PR, but there are cases of extremists winning in non-PR systems (France; Italy) and, in any event, to-date there have been very few cases of dramatic electoral gains by extremists.
- Electoral turnout tends is higher in PR systems. The average trends for the 1990s are reported in the final column of Table 1, showing higher turnouts under List and MMP systems than under the non-PR systems. Once again the STV figure is an outlier, due to the fact that we are dealing here with just one case. On the whole, turnout in PR systems averages 70.8 percent; in non-PR systems it averages 68.2 percent. The overall correlation between proportionality and turnout is 0.26.

In the most thorough review to-date of the relationship between electoral systems and system stability, which assessed a large range of aggregate indicators, Arend Lijphart concludes that 'the conventional wisdom is wrong in positing a trade-off between the advantages of plurality and PR systems' (1994a: 8; Lijphart 1999). There has also been

some use of individual-level data to assess the relationship between electoral systems (or surrogates thereof) and levels of satisfaction with democracy, though here the findings have tended to be quite mixed. For instance, Anderson and Guillory (1997) employed Eurbarometer data to show how, in general, levels of satisfaction were higher in consensus democracies (characterised principally by PR electoral systems) than in majoritarian democracies (which use non-PR electoral systems). There findings, however, were contradicted by Pippa Norris (1999) who repeated their analysis, using other data sources, over a larger range of countries.

In general, though, the fourth point is not confirmed. There is little evidence of a trade-off between proportionality and system stability; if anything, it might be suggested that the bulk of the evidence points in the opposite direction.

3. The Strategic Consequences of Electoral Systems

Arguably just as important as the proportional effects of electoral systems are their strategic effects. Here attention is drawn, in particular, to the type of ballot paper and the degree of choice it gives to the voters in selecting their preferred parties and candidates. For instance, in SMP systems such as used in Britain or the closed list system used in Spain, voters have a categoric (either/or) choice to vote for one candidate (in Britain) or one party (in Spain). By contrast, under STV as used in Ireland, voters can rank all candidates in order of preference; they can vote ordinally. These distinctions, based as they are on degrees of 'voter choice', suggest an entirely different ranking of electoral systems to that discussed in the previous section. The following is illustrative (Farrell and Gallagher 1998):

1) STV (e.g. Ireland): can rank all candidates from all parties
2) Panachage (e.g. Switzerland): can vote for candidates from more than one party
3) Open list (e.g. Finland): 'personal' votes determine ranking of candidates
4) Mixed member (e.g. New Zealand): two votes – one for candidate, one for party

5) AV (e.g. Australia): can rank all candidates, but only one is elected
6) Closed list (e.g. South Africa): can only vote categorically for one party
7) SMP (e.g. UK): can only vote categorically for one candidate of one party

Given the differences between electoral systems based on the type of choice given to voters (e.g. candidate-centred vs. party-centred systems), as well as the extent of choice (categorical vs. ordinal systems), it can be expected that this will have important influences on both the politicians and the voters. We begin with the politicians: electoral systems can be seen to have strategic effects on politicians in, at least, three areas: (1) election campaigning, (2) style of party organization, and (3) forms of parliamentary representation.

First, election campaigns are influenced by the electoral system (Katz 1980). Where the electoral system allows high levels of intra-party choice (e.g. STV), there is a tendency for parties to campaign in a decentralized fashion; there is more emphasis on the campaigns of individual candidates; and, on occasions, this can result in faction-fighting between candidates of the same party. By contrast, if the system is categoric, there is no scope for faction-fighting. Furthermore, if the system is party-based (e.g. closed list), there is far less emphasis on the candidates: the campaign is run from, and about, the centre.

Second, it may also be surmised that there are effects on the nature of party organization, though to date the academic evidence is more anecdotal than systematic. In candidate-based systems there appears to be more emphasis on grassroots links, on the need for constituency parties and on internal party democracy. The centre is not so well resourced and is less in control of the party as a whole (on Ireland, see Farrell 1994). In party-based systems, by contrast, the organization is traditionally much more top-down, with tighter controls imposed on branches and members (on Spain, see Holliday 2001). Since the 1980s, with the process of campaign and organizational professionalization, these distinctions have been breaking down (Farrell and Webb 2000), though it is still

possible to identify remnants of strong organization at the local level in candidate-based systems.

Third, there are also effects on the nature of parliamentary representation. In his famous address to the voters of Bristol in 1774, Edmund Burke set out two competing concepts of the role of the elected representative: as a *delegate* of the voters, listening to their views (and even, perhaps, being mandated to vote in a certain way), or as a *trustee*, taking decisions based on a view of what is believed to be best for the voters. In party-based electoral systems, where the voter is choosing between parties and not candidates, there is little scope for mandating individual politicians and therefore we can expect a greater tendency for politicians to act as trustees. Indeed, in such systems, the principal 'voting constituency' of the individual politician is not the voters, but rather the party selectorates who determine whether the politician will appear on the list, and in which rank position (Bowler et al. 1996). By contrast, in candidate-based electoral systems, where the politicians are clamouring for precious personal votes (in some cases, such as under STV, in direct competition with fellow party candidates), we can expect a greater tendency for politicians to act as delegates.

Evidence in support of this is provided by a survey of the activities of the Members of the European Parliament (MEPs), who are elected by a range of different electoral systems. This study found that MEPs elected under candidate-based systems – and particularly systems which were constituency-based (Ireland and, at the time, Britain) – were more inclined to have regular contact with individual voters. By contrast, MEPs elected under party-based systems were prone to have closer links with organized interests. The study concluded that 'individual voters are better – or at least more frequently – served by representatives elected under district based systems and where voters can choose candidates' (Bowler and Farrell 1993: 64; for an alternative perspective, see Katz 1997).

Electoral systems can also have an effect on the strategic calculations of voters (Cox 1997). In a categoric system, where a voter can make only an either/or choice, the voting exercise is relatively straightforward. The voter selects the appropriate candidate or party and votes accordingly. There is, however, some limited scope for 'tactical' voting.

Take the scenario of a voter who likes a particular candidate but knows full well that this candidate does not stand a chance of being elected (e.g. is expected to come in a bad third in the constituency race). The voter has one of three options: (a) to 'waste' her vote and vote for the preferred candidate anyway; (b) not to bother voting; (c) or to vote for the candidate expected to come second, on the grounds that *anyone* would be better than the incumbent. Option (c) is a good example of tactical voting under SMP.

The scope for strategic voting increases once we start to consider more open electoral systems.[57] For instance, where there are different levels of election occurring at the same time, the voter can take advantage of the situation and vary her support for the different parties. This phenomenon of 'ticket-splitting' is particularly acute in the USA, where voters increasingly split their votes between the two main parties (Wattenberg 1998). It is also a feature of mixed systems, as has been shown over the years in Germany (Roberts 1988). Preferential electoral systems (STV, AV, certain types of open list) provide ever greater scope for voters to express more complex and nuanced preferences. Voters can switch and change between one candidate and another at will (and, in STV, between one party and another). There is plenty of scope to retain loyalty for party X, while at the same time giving a preference to a candidate from party Y whose policies, personality or ethnic profile make her attractive (Bowler and Farrell 1991a, b).

4. Choosing an Electoral System

From one perspective, the discussion in the previous two sections should produce some pretty clear conclusions. For instance, the fact that the link between PR and instability remains 'not proven', should point pretty clearly to the conclusion that PR electoral systems, in general, are to be preferred over non-PR systems. Similarly, the fact that ordinal/candidate-based electoral systems allow greater scope for strategic voting by

[57] Here I part company with social choice perspectives on strategic voting, which tend to examine it in terms of 'insincere' voting (e.g. Dummett 1997) or 'coordination failure' (Cox 1997). In the SMP example cited above, when the voter selects option (c) she is seen to be voting 'insincerely' because she is not expressing a vote for the candidate she really prefers. An alternative perspective relates to the possibility for voters to use certain electoral systems to express a complex strategic vote, such as in the case of voting for a set of parties that might form a coalition. The vote can be both sincere (in the sense that voters are supporting their most preferred candidate) *and* strategic. Of course, there is always a question-mark over the sophistication of the

voters and encourage politicians to pay closer attention to their support-groups, should point clearly to the conclusion that such electoral systems are to be preferred. On such a set of propositions, one could then quite easily rule out from consideration certain electoral systems such as, perhaps, SMP or closed list PR. High on the list of preferred systems would be STV, mixed systems (especially MMP), or perhaps open list (with small DM).

But electoral engineers face a range of different considerations when assessing the merits and demerits of different electoral systems. As one experienced observer of the process of electoral engineering has observed: 'The crafting of electoral systems is both an art and a science' (Rose 2000: 58, entry by Andrew Reynolds). From the 'science' of electoral systems research it is possible to work out the merits and demerits of certain electoral systems; but then it is necessary to fold into the process the wider institutional, political , historical and cultural context. By way of illustration, consider the following (very incomplete) set of questions:

- Should 'my' party be given a priority over and above, say, the need to consider the rights of minority forces?
- How much control of the political process should be retained at the centre?
- How socially representative should the parliament be?
- What form of 'representation' should be nurtured and encouraged?
- What kind of politicians are we looking for?

Given the often conflicting demands, for instance, between wanting small parties to have a role, wanting strong government, wanting to influence the types of politicians to be elected, wanting to encourage constituency-based representation, it is little wonder that in the current wave of democratization electoral engineers have tended to opt for some form of mixed system. Indeed, some go so far as to say that mixed systems offer the 'best of both worlds' (Shugart and Wattenberg 2000). Whether this will be confirmed by long-term trends is a moot point. But, given the current popularity of such systems and the fact

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average voter and the degree to which information limits may limit the ability of a voter to make full use of the strategic options presented to her (Cox 1997).

that Hong Kong already operates a version of mixed system (albeit in a non polyarchical fashion; see footnote 1), then it is probably a safe bet that electoral engineers will place this family of electoral system high on their list of preferred options for 2007.

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A Case Study in the Consequences of Electoral System Change

by

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David Farrell's paper, Electoral Systems, Parties and Voters: A Comparative Overview", is an excellent introduction to the range and types of electoral systems that electoral engineers" (Lijphart, 1994: 138) may wish either to adopt or to adapt to their own particular circumstances and needs. The purpose of this paper is to provide details of what happened when New Zealand changed its voting system in the 1990s.

Although New Zealand is a small country on the periphery of both the world and the attention of the world (so much so that it is often left off maps of the world), the country's decision to change its electoral system resulted in a great deal of interest. The reason for this was simple: New Zealand had long been accorded special status among the world's democracies as the purest example of the Westminster model of government" (Lijphart, 1987: 97), with a voting system which was in some ways more British than Britain" (Taagepera and Shugart, 1989: 38). When New Zealand, of all countries, not only adopted a proportional representation system but even went to far as to allocate seats in Parliament to parties using the post proportional … Sainte Laguë" formula(Farrell, 2000: 5), the

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country seemed to be acting out of character — hence the interest in its unexpected (or even odd) behaviour. It is necessary, therefore, briefly to examine the reasons why, as well as how, New Zealand discarded its plurality voting system in favour of a proportional representation electoral system.

Why and how New Zealand changed its voting system

Public disquiet about the effects of New Zealand's first-past-the-post plurality system surfaced after the 1978 and the 1981 parliamentary elections. On both occasions, the opposition Labour Party won more votes throughout the country as whole than the incumbent National Party government, but in both elections the National Party won a majority of the seats in Parliament and thus stayed in power. Furthermore, in both 1978 and 1981, the then third party in New Zealand politics, Social Credit, won a fairly large share of the popular vote — 16 per cent in 1978, and more than 20 per cent in 1981 — but, not unusual for plurality systems, it won very few seats in the New Zealand Parliament (namely, one seat and two respectively in a House of Representatives of more than 90 members).

When it gained office in 1984, the Labour Party established a Royal Commission on the Electoral System to consider whether all or a specified number or proportion of Members of Parliament should be elected under an alternative system ... such as proportional representation or preferential voting" (Royal

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Commission on the Electoral System, 1986: xiii). The Royal Commission on the Electoral System sat for most of 1985 and 1986 before releasing a long and detailed report in which it defined ten criteria for testing both first-past-the-post and other voting systems — namely, fairness between political parties; effective representation of minority and special interest groups; effective Maori representation (Maori are, of course, New Zealand's indigenous ethnic minority); political integration; effective representation of constituents; effective voter participation; effective government; effective Parliament; effective parties; and legitimacy. At the same time, however, the Royal Commission also stressed that ‟No voting system can fully meet the ideal standards set by the criteria" and pointed out that the criteria were not all of equal weight (Royal Commission on the Electoral System, 1986: 11).

In light of the fact that New Zealand had used single member districts for more than a hundred years, the Royal Commission on the Electoral System rejected both list systems of proportional representation and the Single Transferable Vote system of proportional representation (sometimes seen as an English-speaking version of proportional representation) in favour of German-style proportional representation. The Royal Commission came to this conclusion not only because MMP retains single-member constituencies", but also because the results of an MMP election were likely to be more closely proportional" than STV (Royal

Commission on the Electoral System, 1986: 50-57). The Royal Commission was also first to call such systems Mixed Member Proportional — i.e., MMP.

Electors have two votes: one for a political party and one for a local Member of Parliament elected by plurality in single member districts. As in Germany — but contrary to the situation in Italy, Japan, and Russia — the party vote is paramount in the New Zealand system. The party vote determines the overall number of seats parties are entitled to in Parliament. For example, if a political party wins 25 per cent of the party votes in an election, it will qualify for 30 of the 120 seats — a quarter of the seats — in Parliament. If the party has already won 23 local district (or constituency) seats, then its complement of seats in the House of Representatives is topped up by giving it seven additional seats, and those seven seats will be allocated to the first seven eligible people on the party's rank-ordered list of nominated candidates. Likewise, a party with 25 per cent of the party votes but only two constituency MPs will be awarded an additional 28 seats from its party-list to bring its total number of seats in Parliament up to 30 as well.

The New Zealand Royal Commission also recommended that referendum ... should be held ... on the adoption of the Mixed Member Proportional system" (Royal Commission on the Electoral System, 1986: 295), and despite the fact that a select committee of the New Zealand Parliament disagreed with the Royal Commission's recommendations, political pressure eventually led the

government to hold two referendums on electoral reform. The first referendum, held in September 1992, was not binding. It was an indicative plebiscite. However, voters so overwhelmingly favoured changing the electoral system and MMP that a second — and binding — poll was held 14 months later. The second referendum was a straight fight between the first-past-the-post and the MMP electoral systems. MMP won 53.9 per cent of the votes in the referendum, compared with 46.1 per cent for the old plurality system.

It also worth noting that in order to ensure that the official publicity campaigns for the electoral reform referendums were conducted with political impartiality, ... balance and neutrality" (Electoral Referendum Panel, 1992: 18), the Minister of Justice went so far as to appoint an independent Electoral Referendum Panel — at arms length from politicians and public servants — in both 1992 and 1993. On each occasion, the panel was headed by the country's Chief Ombudsman and had a substantial budget for the task of informing voters about the mechanics — and, in effect, the advantages and the disadvantages — of the different options under consideration in each of the referendums.

What happened when New Zealand switched to proportional representation?

Political scientists, politicians and the public all had reasonably clear expectations as to what would occur when New Zealand discarded plurality in favour of proportional representation. This paper will now examine some of the

consequences of the changes. The criteria for judging voting systems" that were adopted by the Royal Commission on the Electoral System (1986: 11-12) will be used as a framework for doing so.

Fairness between parties

Political scientists have long known and shown that there is a close and demonstrable relationship between types of voting systems and the number of political parties that flourish under them. For example, political scientist Arend Lijphart has noted that plurality and majority systems have the highest disproportionality. After that, the indices of disproportionality of the donut and LR-Imperiali systems are higher than those of … other PR [proportional representation] systems" and that there are more parties in … PR systems than in … plurality and majority systems" (Lijphart, 1994: 103-4). Likewise (but in somewhat less technical language), the 1993 New Zealand Electoral Referendum Panel's voter education pamphlets noted that MMP is a form of proportional representation. Each party represented in Parliament wins seats that reflect its share of the nationwide party vote" (Electoral Referendum Panel, 1993: 9). The Panel also pointed out that under MMP it's easier for minor parties to get into Parliament because seats in Parliament are won by parties in proportion to their share of the nationwide party vote" (Electoral Referendum Panel, 1993: 8).

As Table 1 shows, this is exactly what happened in New Zealand. The number of parties that won seats in the House of Representatives rose from four in 1993 to six in 1996 and seven in 1999. What is more, of course, the parties represented in Parliament all gained a share of the seats that reasonably accurately reflected the proportion of the votes they had won. As a result, the disproportionality indices for New Zealand dropped dramatically. (In 1994, statistics used by Arend Lijphart showed that New Zealand's plurality electoral system was, indeed, more British than Britain's — New Zealand had a higher ranking on his disproportionality scales than the UK. Since switching to proportional representation, however, New Zealand disproportionality scores now resemble Norway's, a country sometimes referred to as the New Zealand of the North Atlantic"!)

Effective representation of minority and special interest groups

Through its criteria, the Royal Commission on the Electoral System expressed a desire for significant change both in the way that politics was conducted and the kinds of actors who conducted it. The latter goal was certainly achieved. As Table 2 makes clear, the goals of increased minority, women's and special interest group representation were attained in both 1996 and 1999. In the space of six years, the proportion of women in the New Zealand House of Representatives has risen from a little over 20 per cent to just above 30 per cent. This is wholly in accord with the findings of many political scientists, who have long shown that in

terms of numbers, women fare better under proportional representation systems than they do under majority or plurality electoral systems (see, for example, Norris, 1985; Rule, 1987; and Rule and Zimmerman, 1994).

Three Pacific Islanders were elected to Parliament in both 1996 and 1999, and other advances in the representativeness of the New Zealand legislature were (at least in part) also a consequence of electoral system reform: Pansy Wong, the country's first-ever Asian MP was elected in 1996 and re-elected three years later; two openly gay MPs and an MP who had undergone a sex change were elected in 1999; as was a dread-locked Rastafarian.

Effective Maori representation

Although this criterion is obviously unique to New Zealand, all other countries have their own unique features, and this basis for assessing an electoral system is thus worth considering as well. The Royal Commission on the Electoral System argued that, in view of their particular historical, Treaty and socio-economic status, Maori and the Maori point of view should be fairly and effectively represented in Parliament. As Table 2 also shows, fair representation was achieved in both 1996 and 1999; effective representation has probably been partly realised. The proportion of Maori in the New Zealand House of Representatives has more than doubled under proportional representation, and the number of

Maori in Parliament comes close to reflecting the proportion of Maori in the population as a whole.

It is significant, too, that there are as many Maori list MPs as there are constituency MPs despite the fact that Maori have their own set of seats in Parliament, and that five of the seven parties in Parliament (i.e., all the parties other than the Greens and United) have Maori members in their parliamentary caucuses.

Political integration

Measuring the extent to which any electoral system encourages all groups to respect other points of view and to take into account the good of the community as a whole" is probably an impossible task. However, five of the parties currently in Parliament include women MPs (the exceptions are New Zealand First and United), and — as was noted above — five of the parties include Maori MPs. It could well be argued that these two factors indicate that MMP has indeed meant, as the Royal Commission on the Electoral System hoped it would, that parties are provided with real incentives to appeal to and include significant groups within their party tickets and structures" (Royal Commission on the Electoral System, 1986: 52). At the same time, though, it is worth recalling the fact that the Royal Commission on the Electoral System also thought that the plurality system encouraged parties and individual candidates to seek broad support from the

community and to eschew extreme or selfish positions" (Royal Commission on the Electoral System, 1986: 20; for a negative perspective — albeit from a different political system — on the integrative capacities of plurality electoral systems, see Reilly, 1997a and 1997b). It is not yet clear whether the introduction of MMP has affected the kinds of interests (for example, local versus national, sectional versus public) that MPs seek to represent, or whether list MPs, by virtue of not being tied to a geographical district, are displaying a greater propensity to address broader issues than district MPs. While assessing such matters is likely to prove extremely difficult, criticism of the conduct of list MPs suggests that as a group they may have thus far failed to adopt a significantly broader perspective, or established for themselves a distinctive parliamentary role from that taken by constituency MPs. More broadly, while MMP has succeeded in bringing about greater representation for women and minorities, there are few signs yet of an understanding or acceptance of the value of political integration" (which requires cooperation and commitment to the common good) — but it is also an open question as to whether this may be too much to expect of any modern political system.

Effective representation of constituents

With the caveats mentioned above, the voting system has encouraged those links and accountability between individual MPs and their constituents". As has been noted, MMP — a mixed electoral system — was recommended because it

retained single member districts, and would thus continue the long-standing tradition of links between voters and the parliamentarians who represent them. A recently published study of voting behaviour during the 1999 New Zealand general election found that just over 3 per cent of respondents considered the government's performance to have been very good.' By contrast, five times as many respondents thought the government's performance had been very poor' — including a third of Alliance and New Zealand First voters, and about a quarter of Labour and Green voters" (Levine and Roberts, 2000: 163). This negativity was not indiscriminate, however. when asked to assess the performance of their own electorate MPs, 15 per cent of respondents rated them as very good' — a much more positive assessment than that accorded the government. The level of approval was even more striking among respondents who knew the name of their local MP: one in five had a very high opinion of their MP's performance, while a further 44 per cent thought it reasonable' (as against 13 per cent who rated it unsatisfactory' and 10 per cent who said poor'). These proportions — a favourable ratio of almost three to one— are strongly at variance with the view of an out-of-touch government and Parliament"(Levine and Roberts, 2000: 164).

Effective voter participation

From the Royal Commission on the Electoral System's description of this criterion, there appear to be at least three distinct aspects to effective voter participation": voter turnout; the degree to which electors cast an informed vote; and the extent to which all votes have

equal value. The is considerable evidence that these goals were achieved. There is especially little doubt that the introduction of MMP served to equalise the weight of all the party votes. Leaving aside disproportionalities stemming from the five percent threshold (sometimes referred to as the five per cent urdle"), all party votes contribute equally to the allocation of seats to each party in Parliament. By world standards, voter turnout at general elections is healthy, possibly even high (although by New Zealand standards it has definitely declined during the past two decades). And the proportion of New Zealand voters who split their tickets" is also high. In 1996 and in 1999, 37 per cent and 35 per cent of electors respectively cast their constituency vote for a candidate representing a party other than the one to which they had given their party vote. This is roughly double the proportion of split ticket voters in the home of MMP — i.e., Germany.

Effective government

As with many of the Royal Commission on the Electoral System's criteria, the criterion of effective government is open to varying interpretations and contains a number of distinct elements. These include the capacity of a government to act decisively when required, governmental durability, governmental cohesion, and the stable transfer of power. The capacity of a government to act decisively depends on whether it enjoys a stable parliamentary majority and the degree to which it is free from internal dissent. Other things being equal, single-party majority governments are best able to fulfil these criteria. Under PR, however, it was expected that governments would be less likely to have such strength

(Boston, Levine, McLeay and Roberts, 1996: 30-31). Minority governments (whether single-party or coalition) would have to secure the support of another party or parties in order to pursue their legislative agenda, while majority coalition governments would face a prospect of greater internal division, thus reducing their capacity for decisive policy action. Utterly unsurprisingly, in light of the research by Lijphart and others, both the 1996 and the 1999 MMP elections produced neither a parliamentary nor a manufactured majority (as is shown in Table 1). The governments in the MMP era have been very different from most of their plurality predecessors, but the New Zealand public had been forewarned that this was likely. During the voter education campaign prior to the binding 1993 electoral referendum, it was pointed out that coalition governments are more likely under MMP. … Having several parties in Parliament makes it more likely that there will be no one party with a majority of seats" (Electoral Referendum Panel, 1993: 10).

Further features of effective government" are durability and cohesion. International evidence shows that coalitions are less durable than single-party majority governments (Boston, 1998) and the dissolution of the National/New Zealand First coalition in August 1998 followed this pattern. At the same time, however, it is important to stress that a National-led government survived the entire 1996-99 parliamentary term. (It is noteworthy that, in country with a constitutional stipulation that governments have a three-year term of office, when

Prime Minister Jenny Shipley finally called an election, it was held thirty-seven and a half months after the October 1996 MMP election.) What is more, MMP did not prevent the voters from throwing the rascals out" in 1999; nor did it prevent the rapid formation of a minority Labour/Alliance government after the 27 November 1999 general election.

Effective Parliament

This criterion has an obvious relationship with the preceding one, which emphasises the need for the government to be able to act decisively where necessary. Indeed, it could be argued that the two goals are partially incompatible, for an electoral system that enables the government to act in an assured and decisive manner may require a weakening of Parliament's ability to act independently of the executive. The legislative process is, however, more complex and subtle than these apparently opposing ideals might suggest. While a majority government clearly enjoys a powerful position and a greater ability to force legislation through Parliament, neither the persuasive role of independent-minded select committees nor the indirect pressures placed on Ministers should be ignored.

Although it was hoped that the introduction of a large number of new members into the House of Representatives would cause some of its more questionable conventions to be altered and the quality of debate to be raised, there is little

evidence that these hopes have been fulfilled. The importance of Parliament's select committee system was also widely expected to increase under MMP, especially where governments did not have a majority in Parliament or where coalition partners have divergent views on particular policy areas. Certainly the range of views represented in select committees has increased, consistent with the greater diversity of representation in the House. Furthermore, because MMP governments do not have majorities on any of Parliament's sector committees and because (under revised Standing Orders) committee chairpersons no longer have a casting vote, it is now far less likely that the executive will dictate committee decisions (as used to occur regularly under the former first-past-the-post system). However, during the National/New Zealand First coalition it was not unusual for Ministers to use the government's majority in the House to override committee recommendations on matters considered vital by them or by the Cabinet. For instance, despite unanimous agreement in the Justice and Law Reform Committee on changes to the proposed Witness Anonymity Bill, the Minister of Justice had the committee's recommendations overturned, thus compelling government MPs on the committee to vote against their own recommendations in the House (Barker and Levine, 1998).

In addition, the distribution of select committee chairpersonships has not reflected the strength of the political parties in Parliament. For example, the National/New Zealand First majority coalition government permitted only two

of these positions to go to MPs from non-coalition parties (Foreign Affairs, Defence and Trade to ACT; and Regulations Review to Labour), likewise, the Labour/Alliance minority government also allotted just two of the 19 committee chairs to MPs from other parties (Local Government and Environment to the Greens; and Regulations Review to National).

Effective parties

The Royal Commission on the Electoral System argued that the voting system should recognise and facilitate the essential role political parties play in modern representative democracies in, for example, formulating and articulating policies and providing representatives for the people". These functions have been fulfilled, although critics might say that parties have too much power under MMP because of their party list selection rules. It is also clear that parties have not been revitalised as the Royal Commission on the Electoral System had hoped: party membership remains low.

Legitimacy

The Royal Commission on the Electoral System wrote that, members of the community should be able to endorse the voting system and its procedures as fair and reasonable and to accept its decisions, even when they themselves prefer other alternatives" (Royal Commission on the Electoral System, 1986: 12). The new voting system has undoubtedly been unpopular. However, dissatisfaction

with the electoral system undoubtedly sprang from an even deeper dissatisfaction among electors with the December 1996 decision of New Zealand First to form a coalition with the then incumbent National Party, as well as the subsequent antics of several members of that government and the eventual collapse of the coalition. In addition, popularity should not be confused with legitimacy, although clearly a persistently unappealing system almost by definition cannot be expected to retain the allegiance of the people for whose benefit it has ultimately been devised. On the other hand, despite periodic protests of various kinds over the years, New Zealanders have generally eschewed political violence as a means of bringing about fundamental change. Under plurality, New Zealand electors were able to endorse the voting system and its procedures as fair and reasonable and to accept its decisions, even when they themselves prefer[red] other alternatives." Complaints about MMP exist side by side with a willingness to abide peacefully by the country's legal and political processes. Even levels of dissatisfaction (bordering at times on contempt) with the behaviour of some MPs and aspects of coalition governance have failed to dislodge the bulk of electors from their patience with the political process. Voters seem to regard any defects of MMP with a degree of resignation. Moreover, there is little sign that anti-system parties questioning the actual legitimacy of New Zealand's system of democracy will emerge to gain significant levels of popular support.

Conclusion

New Zealand's political culture under MMP has displayed opposing tendencies. This is not really surprising given, first, the country's cultural traditions and, second, the fact that, with the exception of PR, New Zealand retains many of the characteristics of a majoritarian political system. Despite the fact that New Zealand was clearly a pore or less majoritarian" democracy (Lijphart, 1998: 106), the country chose to adopt the kind of proportional representation electoral system mostly found in the more consensual democracies of Western Europe. Having done so, New Zealand now finds that is has its political feet, in effect, in two different camps — in two opposing (and at least partially antagonistic) cultural traditions. Although it remains to be seen which of these traditions will ultimately prevail and what impact this will have on the long-term viability of MMP, Professor Farrell ended his paper with a prediction and I will do so too.

It is probably a safe bet" that MMP in New Zealand (let alone New Zealand itself) will survive.

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