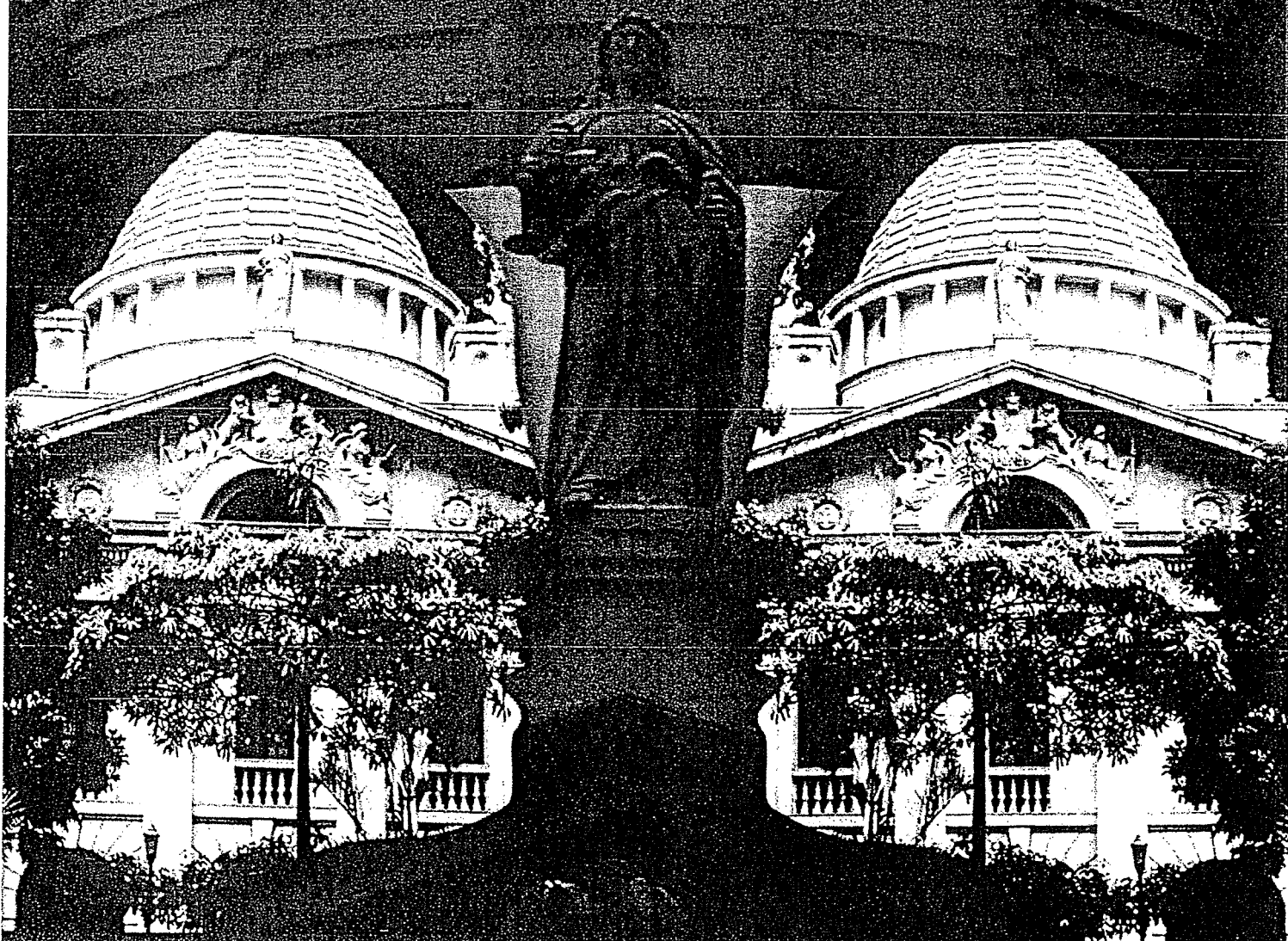


香港推行政治改革的新機遇： 一個立法會，兩個議院？

陸恭蕙

 思匯
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陸恭蕙

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思匯政策研究所

香港中環雲咸街六十九號賀善尼大廈七零一室

電話：(852) 2893 0213

傳真：(852) 3105 9713

思匯政策研究所是一非牟利組織，主要透過研究和分析以協助改善政策和決策。本報告之內容乃屬作者之意見，並不代表思匯政策研究所的立場。

前言

在思匯政策研究所進行的功能界別研究系列中，本文件為最新的文獻。

這幾年來，我們反覆檢視功能界別選舉制度的每個方面，以及功能界別在立法會內的實際運作情況，結論是這種制度問題頗大。假如香港不能以基於公平普選的全面民主制度來取而代之，這種制度便要加以改善。

儘管港人渴望推行民主改革，但明顯不過的是，北京中央政府對於在中國一隅實行普選仍未放心。港府於 2005 年提議的改革方案包括保留功能界別的原貌，不作任何改變。我們關注的是，保留功能界別原有的模式可能會令公眾更添疑慮，擔心現有政治制度有欠公平，偏袒個別群體，尤其是商界的利益。

有論者已提出兩院制，認為這可能是向前邁進的其中一個解決方案。我們相信這個想法仍未獲充分探討，因為港府仍未完全公開向公眾交代為何港府官員及中央政府覺得這是向前邁進的一步。只有先行接納這一點，香港才可以探討如何革新功能界別及其選舉安排。

我們期望本文可以在一定程度上釐清相關課題，以便香港可以專注於推進憲制發展的討論。

在有關功能界別的研究中，許多學者及具有真知灼見的人士均參與其中，並與我們分享其心得，我們對此深表謝意。我們感謝負責統籌此系列研究的葉澌澌，翻譯本文件的潘寶蓮，以及設計本文件封面的李參元。而最要多謝的，當然是資助本研究的 Peter 及 Nancy Thompson。

陸恭蕙

行政總監

2006 年 11 月 20 日

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兩院制的概念會否在不知不覺、無人追惜下，從香港的政治議程中消失？大多數政論家均視此為另一項推遲普選的工具，而港府官員從未解釋他們為何要花費氣力正視這個課題。然而，兩院制仍有可能為憲制改革停滯不前的僵局提供重要的解決方案。

遙遠的目標

香港特別行政區政府（港府）面對的政治窘境是如何向社會大眾解釋，北京對全面普選仍未完全放心，所以這仍是一個遙遠的目標。在未來一段時間內，香港的政治安排仍會繼續保留若干明顯不民主的重要模式。因此，港府有需要設法說服港人接受在這種局限之下，香港仍有可能朝民主邁出有意義的步伐。在顧及北京的關注下，港府有需要抱持開放態度，面對政治安排需要改進的事實，讓具備個人資歷且成功不靠忠於某一政黨的個別人士，可以透過相關安排晉身立法機關。倘若港府有足夠的技巧，應可說明即使是西方的民主政體，亦不相信大多數意見理應在不受限制的情況下主宰一切。

故此，港府面對的挑戰是尋求一個可以接受的模式，使普選與繼續代表少數意見甚至是特殊利益的制度結合起來。許多國家均能透過兩層立法機關的形式解決這類問題。在這種制度下，第二層議會的成員可以透過直選或間選產生，或甚至透過委任產生，而其任務的「政治色彩」，則低於所有代表均透過普選產生的另一層議會。

本文將會展示，不論是港府抑或是中央人民政府（中央），均覺得兩院制這個選擇有助香港邁向《基本法》承諾的普選。但在最近幾個星期，這項可能性看來遭遇若干挫折，因為港府官員發覺，兩院制並未引起多大興趣，而且即使是經過精心挑選而獲邀參與討論的人士，亦對這個課題缺乏興趣。然而，港府並未擯棄兩院制這個可能性。顯而易見的是，這個選擇太有價值，港府並不願意就此放棄。¹

本文會審視為何中央及港府均如此看重這個選擇、檢視中央及港府對政制改革及兩院制可能作出的貢獻抱持的態度，以及討論香港對這個概念的保留態度。而且，本文亦會點出兩院制對解決目前政制改革的僵局可能作出的貢獻，並會討論這種制度到底是有助抑或有礙香港的有效管治。

功能問題

要尋求日後政制改革可以接受的方案，最大的問題是功能界別的未來去向。一個經普選產生的立法機關，如何能保留經間接選舉產生的功能界別呢？要在不久的將來推行重大的政治改革，這項課題成了主要的障礙。建議香港設立兩院制的立法機關，與解決這個困局的方案有直接關連。²

在《基本法》下，中央有責任實現普選。但在 2004 年 4 月，中央頒令香港須保留英治時代設立的功能界別，因為中央相信，任何邁向西方式民主的急劇演變，均會危及資本主義經濟及削弱政治上的和諧。

在中央是次介入以前，港人相信香港和現代世界其他先進社會一樣，理應透過普選挑選其行政長官及立法機關成員。剔除功能界別被視為這個過程中無可避免的安排。

¹ 可留意政制事務局局長林瑞麟言詞小心：「至於是否暫時擱置兩院制的討論呢？…」（加強語氣），政府新聞處，2006 年 11 月 6 日。

² 政務司司長許仕仁聲稱：「一旦推行普選，現有的功能界別——設立目的是為了平衡社會各方面利益——必須改變。但認為功能界別背後的利益團體會從政治舞台上消失，將是不切實際的想法。同樣情況亦見於設有兩院制的國家及地區，但其設計有所不同」，《中國日報》，2005 年 11 月 23 日。

中央及港府均提出引入兩院制可以解決中央政策與港人期望之間的矛盾。假如立法機關分為兩層議會，功能界別的代表便可以保留在「上議院」，安排一如其他司法管轄區，而另一層議會的議席則專門保留予由全民直選產生的議員。

官方政策

在全國人大常委會於 2004 年否定於 2007 及 2008 年的選舉引入普選後不久，兩院制或可用以解決香港政制爭拗這種說法便迅即冒出來。內地一位高官指出，功能界別對維繫香港的資本主義相當重要。

如果在既沒有兩院制又沒有能夠代表他們界別的政黨來保證均衡參與的情況下，就貿然取消功能團體選舉制度，勢必使均衡參與原則得不到體現，使賴以支撐資本主義（強調語氣）的這部分人[*即商家*]的利益、意見和要求得不到應有反映。³

這項具權威的聲明反映，倘若香港可以在立法機關內加入第二層議會，使商界及專業人士的利益得到反映，功能界別才可以取消。

然而，中央並未作出進一步聲明，鼓勵這種發展。傳媒偶爾的報導表示中國領導人繼續視設立第二層議會為重要的選擇⁴，但公開表態則變得非常小心翼翼。因此，2005 年 12 月於深圳一個有關憲制發展的重要座談會上，同一位官員容許他人以非常不帶承諾的方式，引述他就探討引入兩院制發表的談話。他表示其談話只限於評論可能需要修訂《基本法》以備有關安排。⁵

其後便由港府主動提出建議，使這項選擇保持在考慮之列。2005 年 10 月，港府決定由策略發展委員會專門負責討論未來的憲制發展。政制事務局提出一系列方案，設法點出必須處理的主要議題。值得注意的是，相關文件有三分之二以上是集中檢討兩院制及這種制度在外國如何運作。⁶然而，該委員會轄下的管治及政治發展委員會在 2006 年 11 月一個檢視兩院制的工作坊上，小組成員對相關概念並不熱切。⁷

這個結果並未令人感到意外。港府在推廣這個解決方案時注定要面對重大障礙。

- 在起草《基本法》時亦出現類似建議，但遭否決，結果由現有安排取而代之。
- 香港內部實質上無人支持有關建議。在尋求公眾關注兩院制一事上，鍾逸傑爵士及工商專業聯會的聲音相當孤單，而且大部分無人理睬。
- 採納相關建議可能需要修改《基本法》，港府本身不能保證中央會贊成有關修改。

³ 全國人大常委會副秘書長喬曉陽，「探求香港政制發展正確之路」，《南華早報》，2004 年 4 月 29 日。

⁴ 近期的例子包括，有報導指國家主席胡錦濤可能在香港慶回歸 10 周年的慶典上，提到兩院制的問題。《南華早報》，2006 年 10 月 17 日。

⁵ 《中國日報》，2005 年 12 月 3 日。

⁶ 策略發展委員會管治及政治發展委員會的《行政長官產生辦法及立法會產生辦法最終普選模式初探及相關議題》，政制事務局，立法會 CB (2) 519/05-06 (02) 號文件，2005 年 11 月。

⁷ 策略發展委員會管治及政治發展委員會於 2006 年 11 月 6 日舉辦了一個工作坊，研究立法會選舉。在工作坊後的一個新聞發布會上，政制事務局局長林瑞麟表示，有幾位參加工作坊的委員對香港採納兩院制的構想表示保留。見 Tonny Chan 的 "Controversial bicameral plan faces ax"，《虎報》，2006 年 11 月 7 日。

但對推廣兩院制概念造成最大障礙的，卻可能是港府採取的策略。港府一方面設法把兩院制持續納入討論議程，但礙於議題涉及明顯的政治風險，所以另一方面又顯得小心翼翼，設法避免就這個概念作出正式的承諾。然而，即使外間對 11 月的工作坊反應令人失望，港府官員仍設法拖延最終否決這個方案的決定。⁸

歷史遺留的問題

政制事務局的文件看來是意圖鼓勵大家認真研究兩院制。而且，該文件可能還有進一步的目標：在決定政治改革措施方面，界定香港獲准享有的自治程度有何局限。

該文件全面論及《基本法》第 45 及 68 條就邁向普選所作的承諾。在中央於 2004 年介入前，這些條文在香港已差不多被普遍詮釋為「賦權條文」，容許香港以普選取代間選。⁹

政制事務局的文件亦巨細無遺地引述了港澳辦主任及前國務院副總理與外交部長姬鵬飛於 1990 年向全國人大作出的「解釋」。

姬氏的聲明包含了兩項主張，其後中央便將這兩項觀點解釋為香港憲制發展的「限權條文」。這些條文為：

- 「…必須兼顧社會各階層的利益，有利於資本主義經濟的發展…」，以及
- 「…保持原政治體制中行之有效的部分」。

香港並未認知這些「限權條文」的重要性。

- 大眾假設相關事宜會以《基本法》的清晰語句而非港澳辦的正式聲明為準（儘管有關聲明是由姬氏這樣的高官發表）。¹⁰
- 即使是知名的內地法理學家，亦未視該項「解釋」最終有權決定 2007 年後的政治改革範疇。¹¹
- 中央本身在 1997 年以前已宣稱：「有關 2007 年以後香港特區立法會全部議員由普選產生…是由香港特區決定的問題，無需中國政府保證。」¹²

第二份政制事務局文件則詳細說明了該項「解釋」如何在姬氏發表 15 年以後適用於香港。¹³ 該份文件的主要論點是香港仍然深受歷史影響。

⁸ 政制事務局局長林瑞麟，*政府新聞處*，2006 年 11 月 6 日。

⁹ 相關節錄來自政制事務局的文件，該文件探討了《基本法》及姬鵬飛的「解釋」，詳見本文件的附錄。

¹⁰ 內地法理學家堅持只有全國人大常委會而非任何個別官員有權解釋《基本法》，*新華社*，1999 年 2 月 6 日。

¹¹ 尤其可以參照蕭蔚雲的《香港基本法與一國兩制的偉大實踐》，（北京：北京大學出版社，2001 年），第 276-7、280-1、316-7、324-5 頁。

¹² 外交部，《Facts about a Few Important Aspects of Sino-British Talks on the 1994/95 Electoral Arrangements in Hong Kong》（香港：三聯書店（香港）有限公司，1994 年），第 34 頁。

¹³ 策略發展委員會管治及政治發展委員會的《特區政治體制綜覽》，政制事務局，立法會 CB（2）519/05-06（01）號文件，2005 年 11 月。

「香港的經濟發展歷史說明，經濟繁榮主要倚靠工商界、中產階層、專業人士、勞工階層和社會其他各階層的努力。故此，這項原則涉及如何妥善地處理好兼顧各階層的利益，以達到保障穩定繁榮的目標。」¹⁴

基於這個原因，該文件認為功能界別必須保留。然而，政制事務局的分析確認保留功能界別與實現普選存有內在矛盾。¹⁵該文件暗示「在最終達至立法會全部議員由普選產生的目標時」，採納兩院制可以找到解決方案。¹⁶

行政長官的觀點

雖然坊間有許多學術論文供公眾討論抽象的政制改革，但這些政制事務局的文件比那些學術論文帶來更多訊息。行政長官曾蔭權個人亦同意有需要嚴肅對待兩院制這個議題。

在一份重要的公告內，他概述政府在尋求落實《基本法》那些明確條文時面對的實際困難，以及姬氏於1990年就政制改革提出的保留，而這些保留仍繼續影響中央對香港的態度。

我們也沿用了循地方選區選出代表的制度。而從功能界別選出的議員，代表了社會上一些重要界別，例如工會、商會、衛生服務、社會福利、工業、製造業、金融服務業，以至鄉事界別。這些功能界別代表社會上各類強大的利益團體，並扎根於我們的政治制度。我們不能輕率地把他們刪除或取消。

至於行政長官選舉，普選的意義相當明確，就是每名選民都有機會選出香港特別行政區的領導人。但立法會如何達至普選，《基本法》並無着墨。舉例來說，究竟我們應該維持單議院制，還是追隨大部分在民主制度上有長足發展的地方，採用兩議院制？我們應否保留功能界別？如不保留功能界別，如何能夠逐步淘汰，而不致引發長期政治混亂和不明朗的局面？一旦出現這種局面，將會嚴重打擊香港經濟。¹⁷

至於勞工階層、衛生服務及社會福利界別應否列為他所說的「社會上強大的利益團體」，則有待商榷，因為罷工相當罕見，而衛生及福利界儘管有其功能界別代表，但近年這兩個界別卻未能阻擋嚴峻的財政緊縮措施。而且，勞工、衛生及福利界別的立法會議員亦傾向支持以直選取代功能界別制度。但商界代表及「鄉事」利益（鄉議局）的聲音確是強而有力，而他們的意見正是反對取消功能界別制度。

假設取消功能界別制度會引發行政長官憂慮的局面，即「長期政治混亂和不明朗的局面，一旦出現這種局面，將會嚴重打擊香港經濟」，實在欠缺理據。中央過去曾埋怨英政府「試圖在1995年以直選方式選舉全部立法局議員…並且將功能界別合資格選民的數目增至114萬，試圖改變功能界別選舉的性質」。¹⁸雖然北京指責這些舉措帶來不穩，但香港的政治生態未受破壞，經濟並未衰退。

¹⁴ 同上，第4頁。

¹⁵ 這種矛盾隱含於文件提交討論的問題中：「在最終達至立法會全部議員由普選產生的目標之前，立法會現有的功能界別應當如何演變？」。同上，第11頁。

¹⁶ 假如不擬嚴肅考慮以兩院制作為實際的解決方案，政制事務局為何在提及達至全面普選的目標時，提到這個問題？同上，第11頁。

¹⁷ 政府新聞處，2005年11月4日。

¹⁸ 外交部，《Facts about a Few Important Aspects of Sino-British Talks on the 1994/95 Electoral Arrangements in Hong Kong》（香港：三聯書店（香港）有限公司，1994年），第31頁。

內地的分析

在中央發表的聲明中及港府把情況套用到香港時，均隱含明顯的憂慮，擔心由全體市民自行挑選其領導人時，社會的穩定能否受到保障。中央相當明確地假設(官員的宣述已反映)香港受互相矛盾的階級利益支配，而且這些矛盾永遠有可能變成互相敵對。¹⁹

有兩個原因令中國共產黨很自然地從這個觀點出發。其一涉及意識形態的問題。中國共產黨已大力強調要更為高度確認商界人物及私人機構在國家政治舞台上扮演的角色(特別是透過前國家主席江澤民提倡並由其繼任人胡錦濤繼續推動的「三個代表」論²⁰)。本地商界領袖大力游說，指香港的資本主義很易受民主主義者壓迫，上述趨勢正好使中國領導人對這種說法保持敏銳。由於內地容許更多成功的資本家晉身政治舞台，我們很難期望中國共產黨對推行措施削弱這些人在香港的政治影響力表示同情。

影響中國領導人如何取態的另一個因素，則是內地現有的政治架構。過去中國共產黨一直尋求容許具有影響力的團體(例如共產黨以外的政黨、宗教組織及其他團體)，在國家及地區政治架構內佔有代表席位。因此，中國已有一個兩層模式的政治代議制。

- 立法機關是全國人大。
- 而中國人民政治協商會議(政協)則旨在代表多類團體及利益，發揮監察功能。²¹

根據官方的界定，政協的主要任務是「政治協商、民主監督、參政議政」²²。儘管政協缺乏立法的權力，但國家主席胡錦濤已指示各級政府及中國共產黨「要積極發揮人民政協對國家憲法、法律和法規的實施，重大方針政策的貫徹執行、國家機關及其工作人員工作的監督作用」。²³

因此，作出政治安排讓各種特殊利益團體參與討論是內地政治架構令人熟知的一個特點，其中大眾尤其熟悉的是，這種運作方式可以動員外界支持政府，減少政治及社會矛盾。

就香港而言，中央似乎覺得大商家好像內地的少數派那樣，可能會覺得自己的權利實質上被剝奪，所以需要特別照顧。

固守特權

要促進功能界別的發展或者設立第二層議會以保障大商家，其中一個難題是香港並無這種特別安排。相關民意調查顯示的壓倒性趨勢，是香港的資本家從來不是受到危害的一群。同時，相關資料亦證明，港人對「階級鬥爭」相當缺乏興趣。

¹⁹ 有關馬克思主義的重要性，全國人大常委會副秘書長喬曉陽已清楚說明：「《基本法》規定：“香港特別行政區不實行社會主義制度和政策，保持原有的資本主義制度和生活方式，五十年不變。”按照馬克思主義理論，資本主義社會的一個重要特徵是生產資料的私人佔有制，包括低稅、高效、法治、多元。」，政府新聞處，2004年4月26日。

²⁰ 例子見此理論連同三卷《江澤明文選》於2006年出版的報導，新華社，2006年8月9日，以及《人民日報》，2006年8月10日。

²¹ 1982的憲法在序言中界定中國人民政治協商會議「是有廣泛代表性的統一戰線組織，過去發揮了重要的歷史作用，今後在國家政治生活、社會生活和對外友好活動中，在進行社會主義現代化建設、維護國家的統一和團結的鬥爭中，將進一步發揮它的重要作用。」

²² 《人民日報》，2001年3月2日。

²³ 《人民日報》，2004年9月22日。

港人和大部分先進社會的人一樣，覺得自己主要屬於「中產階級」。說他們尋求勞工階級的利益，或他們視政治活動為重新分配收入使自己受惠的良方或為採納「平民主義」經濟及社會政策的良方，實際上並無根據。

如果要說港人有甚麼觀感，那就是商界已享有太多特權，而且任人唯親及欠缺透明度已因此可以蓬勃發展。事實上，港府顯示傾向從事偏幫商界的建設項目時，惹來的廣泛猛烈抨擊不單源自社會大眾，而且亦源自多類商業機構。

從數碼港的爭論以及港府未能透過公開招標推進這項發展計劃，尤其可以清楚看到這種傾向。西九龍的建議發展計劃，以及紅灣半島以至較近期的西灣河發展項目惹起的爭議，均涉及類似問題。

公眾的關注並非只限於地產界。商界人士亦放心不下，認為有需要更加投入建設機會均等的營商環境，所以 2005 年內不少商界人士亦支持立法加強市場競爭，結果是迫使港府就競爭法及規管專利事業運作方式展開公眾諮詢。²⁴

政治上的便利

因此，港府亦感到公眾的壓力。各級官員，包括行政長官，則埋怨立法會缺乏尊重與合作，更聲稱《基本法》要求立法會議員對港府表示尊重和合作。²⁵港府官員尤其容易被立法會的直選議員激怒。

但大家必須注意，殖民時代過後政局一個惹人注目的現象，那就是面對一些可能被形容為「反福利」的政府政策，直選的立法會議員往往未能大力游說其他人反對。

- 他們只是溫和地阻止教育及醫院收費大幅增加、減建公屋以及減少給予長者和殘障人士的服務。
- 在失業率上升及通縮加劇之際，他們並未反對削減公營部門的規模及薪酬水平。

在港府提出有需要緊縮財政預算時，直選的立法會議員與其功能界別的同僚一樣，同是那麼容易被港府的訴求說服。簡而言之，他們對「傾向社會主義」的措施並未顯得感興趣。

但對於港府而言，功能界別在政治上較為便利，因為整體而言他們的要求仍是少於各政黨。

- 商界代表並不向普羅大眾承擔責任。
- 他們的議事範圍相對狹窄，而且大部分均是有關維持「對商界友善」的政府。

由於滿足個別範疇商界利益團體的要求，總易於滿足社會普羅市民的期望，所以保留功能界別令港府獲益良多。

然而，曾蔭權已作出相當讓步，設法拉攏民主建港協進聯盟（民建聯）。港府與這個政黨聯盟的重要好處，是使港府除可依賴大部分功能界別的自由黨議員外，還可獲得該黨補充若干票數。

²⁴ 經濟發展及勞工局，《促進自由競爭—保持經濟動力》，2006 年 11 月。

²⁵ 可參閱對政務司司長許仕仁的攻擊。《明報》，2005 年 9 月 13 日；財政司司長唐英年的埋怨，政府新聞處，2006 年 3 月 29 日；以及政制事務局局長林瑞麟與梁耀忠及李柱銘的對話，政府新聞處，2006 年 2 月 15 日及 2006 年 3 月 1 日。

然而，港府尋求民建聯支持亦要付出相當的政治代價，因為民建聯的主要目標是爭取直選。

- 大規模的政黨希望爭取修訂政府建議的權利，以顯示其影響力。
- 他們希望其黨員獲委任參與高姿態及地位崇高的公營團體，以增加其知名度。
- 社會對大型政黨評價不高。²⁶無可避免的是，公眾既不相信政府與商界建立的密切關係，亦同樣相當懷疑行政長官與個別政黨建立的聯盟。²⁷

總括的結論必定是，港府會發覺倘若提早取消所有功能界別，處理立法會便會更為複雜。正可能是基於這個事實，港府官員才會嚴肅看待過渡至兩院制的可能性。

缺乏熱情

簡而言之，由於擔心推行更大規模的民主時資本主義能否維繫，所以中央希望保留功能界別。而港府希望繼續保留功能界別，則是因為此舉可使各級官員更容易與立法會議員打交道。從上文的論述可知，對於設立第二層議會以便功能界別有可能保留於第二層議會內這項選擇，港府已壯着膽子盡量保持開放。

但總括而言，政界、商界及社區領袖對兩院制明顯欠缺熱情。這種態度在一定程度上反映政治爭議的重點是普選，而非在政治體制內保留商界的支配角色。

過去商界領袖亦曾偶爾表明支持兩院制，其中最突出的是吳光正。²⁸他的論點是這種安排除符合海外的憲制慣例外，亦對保留功能界別特別重要。但總而言之，商界對此仍是冷淡為主。

舉例而言，自由黨的田北俊已宣稱商界對這個建議興趣不大。他表示這個建議在起草《基本法》時雖經廣泛討論，但未能贏取支持。他個人認為解決這個問題的方法是以直選議席取代功能界別，並可由「選民基礎較大或有較大機會轉為直選[的功能界別開始，例如教育界]」。這種策略可給予商界利益團體一個空間。²⁹

檢討失敗

雖然公眾對這個議題漠不關心，但香港工商專業聯會的反應是例外的。2005年7月，該會對兩院制進行了詳細的檢討，包括大規模分析海外的經驗。³⁰其最顯眼的特點是意圖指出，設立第二層議會將如何配合中央對推行普選的保留。

相關報告旨在致力展示，在減低商界疑慮及配合中央要求方面，設立第二層議會具有潛在的價值。同時，該報告不大贊同要求普選，而且對西方式民主的內在優點表示一定的保留。

有關檢討雖曾吸引若干傳媒注意，但卻無法吸引商界或中央政制改革政策的支持者廣泛認同。

²⁶ 有關公眾對政黨的尊重程度處於低水平而且日見低落，詳見香港過渡期研究計劃的《香港政黨、政策及政治改革》，2006年5月，第76-85頁。

²⁷ 有關批評曾蔭權與民建聯的關係愈來愈密切，例子見《蘋果日報》，2006年4月6日及2006年4月13日。

²⁸ 《中國日報》，2004年4月28日。至於其他富豪的評論，見陸恭蕙的「Government and business alliance: Hong Kong's functional constituencies」，陸恭蕙與思匯政策研究所（編）的《Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council》第1章。香港：香港大學出版社，2006年，第36-38頁。

²⁹ 《中國日報》，2005年11月29日。

³⁰ 《兩院制的立法機關》，香港：香港工商專業聯會，2005年。

這個結果有兩種重要的意義：

- 社會普羅階層對討論如何保留功能界別興趣不大或毫無興趣。推行普選被視為是關鍵的課題。³¹
- 商界對利用複雜的憲制創新方案來保障功能界別無甚興趣。這個假設看來是基於中央會確定保留其利益。

清楚不過的是，除非有一個擁護資本主義的大型政黨在政治體制中緊緊守護商界的利益，使中央感到放心，或者設立第二層議會，否則中央仍會繼續阻擋邁向重大政治改革的步伐。

自由黨顯然未能在政壇上達致理想的成績，以符合中央的首項條件。至於民建聯，雖然亦致力拉攏大企業家及中產市民，但在本地商界利益團體眼中，亦難以發揮上述作用。³²

難道只有兩院制才是另一個出路？如果答案是肯定的話，我們便別無選擇，而只有嚴肅看待這個課題。不過，要在一個如此長時間實行單院制的體制中加插第二層議會，無可避免要面對很多難題。

前路何往

在此背景下，若港府對兩院制的選擇給予更強力的支持，將會獲益良多。但截至目前為止，港府仍是猶豫未決。港府官員強調的是，這只是 2005 年就政制改革進行諮詢期間提出的選擇之一，港府並無特定的承擔。³³若港府維持這個立場，引起社會大眾對這個選擇產生廣泛興趣的機會仍然渺茫。

香港官員一直靠含蓄暗示，若要在不久將來真正邁步走向普選，兩院制可以認真滿足中央的先決條件。同時，中央亦採取相似的看法，但更為簡接。

若要向前邁步透過兩院制尋求解決方案，港府必須主動與各政黨以至社會大眾坦率對話。行政長官必須比其他官員更清楚地詳細說明，中央在可見的未來仍不會容許進行任何憲制改革，致使商界利益團體無法在立法機關內保留強大的聲音。

中央堅決保護資本家和這些資本家目前掌握的支配地位具有下列多重意義。即使這些意義可能令人感覺討厭，香港在憲制發展的過程中實不可忽視。

- 即使在推行普選以後，經直選產生的立法會議員仍不得實行商界普遍反對的措施。因此，要通過立法會的議案，仍須繼續得到大部分直選及功能界別的議員的支持。
- 與商界有關的功能界別將要保留，但或可進行一定的革新。
- 港府難有希望勸服中央改變其根本立場。

³¹ 民意調查顯示，社會絕大部分人均致力追求行政長官及立法會的選舉推行普選。香港過渡期研究計劃，《香港政黨、政策及政治改革》，2006 年 5 月，第 69-70 頁。

³² 尤其重要的是，工聯會雖明顯與政府合作，答應阻延最低工資的立法工作，但卻未能在工人表示憤慨下，堅持這個立場。《星島日報》，2006 年 10 月 27 日。

³³ 政制事務局局長林瑞麟表示：「政府並未傾向任何特定制度，倘若社會大眾在討論終結時贊成推行兩院制，政府會探討修訂《基本法》的可能性。」。《中國日報》，2006 年 1 月 18 日。

同時，港府必須說服市民大眾，中央及港府仍然致力實現《基本法》所涵蓋的普選。應該認知的是，要在達致這個目標的同時保留功能界別，將是進一步推展政治改革的主要障礙。

結果是，港府應該改變目前的策略。

- 港府不應再堅持普選是一個含糊不清的概念，要在香港的環境中作出特殊的解說。³⁴此類爭拗會令人覺得港府欠缺誠意推動普選。
- 港府不應再聲稱民主威脅經濟繁榮及中產階級的生存空間。³⁵此類爭拗會令公眾更加譏諷港府的誠意，因為並無政黨支持重新分配財富或建立一個福利社會。
- 港府不應再提出，設立包含間選或甚至是委任議員的第二層議會，是代替普選的上好方法，而且外國亦有許多先例可援。³⁶此類爭拗會被解釋為港府的花招，旨在把公眾的注意力從真正的普選議題分散他處。

港府亦必須更為積極地界定第二層議會如何運作：該議會在阻擋立法及阻截財政措施方面有何權力。制訂憲法往往是相當複雜的工作，但外國有許多例子讓香港仿效，使港府可以相當確定立法機關的模式及其他相關後果。

從某個角度來看，界定第二層議會的模式及其任務這項工作，對香港而言並不如其他地方那麼艱巨。

- 香港和一般的先進社會並不相同，香港的立法機關並無獨立權利可供制訂或改變政府政策、引入法例，或者提出新訂的財政方案。根據《基本法》，港府有權阻止個別立法會議員行使該等權力。
- 因此，立法會實質上只有三種不受限制的權力：審議及條訂法例；削減或否決政府的稅務或開支建議；以及調查和匯報政府的表現。
- 這些「負面」的權力，即可以否決政府建議的權力，已由立法會的功能界別代表行使。
- 在一般情況下，這些權力正是外國交由第二層議會發揮的功能。但有別於海外一般慣例的是，香港第二層議會掌握的權力，不會大幅低於經普選產生的議會。

值得努力？

在此種種限制條件下，香港值得努力建設第二層議會嗎？

港府應能基於改善施政質素的前景為兩院制辯解。目前檢討新法例的過程對一個規模相對細小且屬兼職運作的立法機關，構成相當重大的壓力。法例草案差不多是常常包含若干瑕疵和缺陷，只有經過逐字逐句的公開討論，這些瑕疵和缺陷才會浮現。

³⁴ 顯著例子有政制事務局的文件《對“普選”概念的一般理解》。同時，亦可參閱《中國日報》，2006年1月18日。

³⁵ 政務司司長許仕仁，政府新聞處，2005年10月26日及12月9日；政制事務局局長林瑞麟，政府新聞處，2005年11月30日；《中國日報》，2005年12月1日。

³⁶ 顯著例子有政制事務局的文件《行政長官產生辦法及立法會產生辦法最終普選模式初探及相關議題》，〈附件〉。

外國的經驗顯示，第二層議會可以減輕這種負擔，而且可以提高檢討及修訂法例的質素。但應該注意的是，功能界別議員或可在審議新法例這方面作出較大的貢獻。³⁷因此，第二層議會可能需要加入更多由港府委任的議員（類似世界其他許多地方的慣例）。

同樣，由於香港及其經濟活動變得愈來愈複雜，審議港府的開支計劃亦需要愈來愈多時間。基於同一原理，第二層議會亦可減輕這種負擔。

由於第二層議會的議員無需承擔等同直選議員的問責度，所以第二層議會將會成為較少「政治色彩」的議事場所，讓各級官員可以鋪陳其方案及解釋其建議。這使政府可以更有效地處理公共事務，將其議程分為兩部分，一部分為較受公眾關注或更具爭議性的議題，必須交由更民主的議會審議，而另一部分的議題則交由第二層議會審議。

第二層議會可以給予香港的是：

- 在目前的憲制安排下，功能界別可以因應商界的游說阻截若干措施，但又無需直接負責，因為結果會以立法會整體決議案的形式紀錄。
- 但如果功能界別移至第二層議會，他們代表其選民的利益作出干預便會更為顯而易見。
- 結果是改善重要事項（尤其是有關經濟及財務政策的事項）的議事及決議質素，因為社會廣泛群眾的福祉（整體而言亦包括商界的福祉）與個別行業的狹隘利益有何區別，將可更為明顯。

再者，假如港府願意向港人坦承必須保留功能界別，而且顯示出真正開放地檢討可以如何改善功能界別制度，有關憲制發展的討論將可望向前推進。³⁸

³⁷ 在陸恭蕙與思匯政策研究所（編）的《Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council》內，已詳細分析有關課題。香港：香港大學出版社，2006年，第7、8及9章。

³⁸ 本文並未探討如何改革功能界別選舉制度或如何改善功能界別在立法會內的運作，因為陸恭蕙與思匯政策研究所（編）的《Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council》，已大幅探討這些課題。香港：香港大學出版社，2006年。

附錄

節錄自策略發展委員會管治及政治發展委員會的《行政長官產生辦法及立法會產生辦法最終普選模式初探及相關議題》。³⁹

《基本法》第四章及有關附件具體規定了特區的政治體制。《基本法》第四十五條規定“香港特別行政區行政長官在當地通過選舉或協商產生，由中央人民政府任命。行政長官的產生辦法根據香港特別行政區的實際情況和循序漸進的原則而規定，最終達至由一個有廣泛代表性的提名委員會按民主程序提名後普選產生的目標。”《基本法》第六十八條規定“香港特別行政區立法會由選舉產生。立法會的產生辦法根據香港特別行政區的實際情況和循序漸進的原則而規定，最終達至全部議員由普選產生的目標。”

姬鵬飛主任在一九九零年三月二十八日第七屆全國人民代表大會第三次會議上發表關於《基本法（草案）》及其有關文件的說明中指出，香港特別行政區的政治體制，要符合“一國兩制”的原則，要從香港的法律地位和實際情況出發，以保障香港的穩定繁榮為目的。為此，必須兼顧社會各階層的利益，有利於資本主義經濟的發展；既保持原政治體制中行之有效的部分，又要循序漸進地逐步發展適合香港情況的民主制度。

³⁹ 上述資料是港府多份政制改革討論文件的標準內容，例如是策略發展委員會管治及政治發展委員會的《《基本法》中有關“普選”條文的憲制基礎》，政制事務局，CSD/GC/2/2006，2006年1月，以及《對“普選”概念的一般理解》，政制事務局，CSD/GC/3/2006，2006年1月。

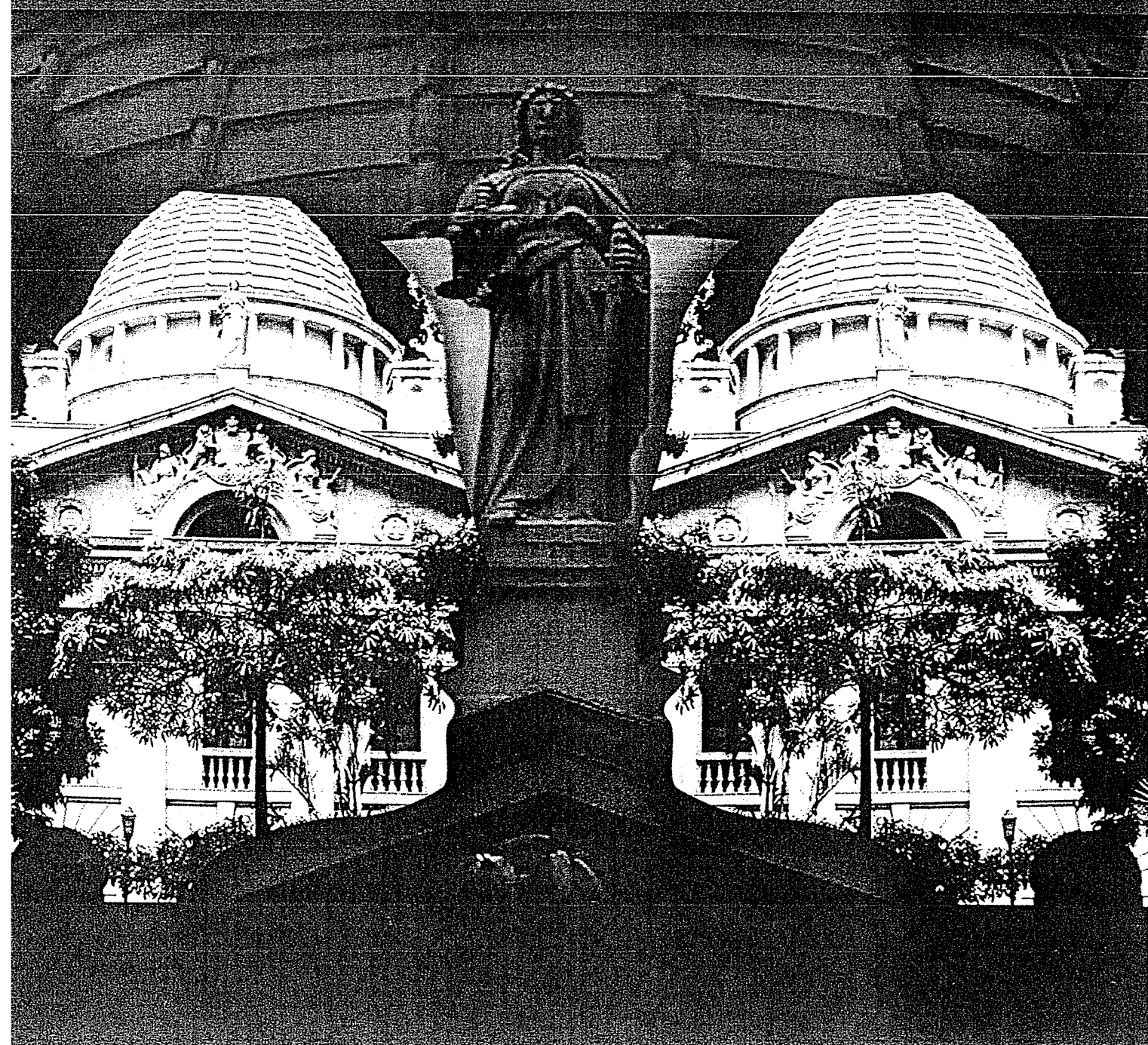
A New Chance for Political Reform in Hong Kong:

One Legislature, Two Chambers?

Christine Loh



November 2006



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www.civic-exchange.org

Civic Exchange
Room 701, Hoseinee House,
69 Wyndham Street, Central, Hong Kong.
Tel: (852) 2893 0213 Fax: (852) 3105 9713

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Preface

This represents the latest paper in Civic Exchange's research series on Functional Constituencies.

Having spent several years examining every aspect of the Functional Constituency Election System, as well as how the Functional Constituencies work in practice in the Legislative Council, we have come to the view that the system has significant problems. If the system cannot be replaced by a fully democratic system based on universal and equal suffrage, it will need to be overhauled nevertheless.

Despite Hong Kong people's desire for democratic reform, it is also clear that the Central Authorities in Beijing are not yet comfortable with a corner of China practising universal suffrage. The Hong Kong administration's proposed reform package put forward in 2005 included the retention of Functional Constituencies in its current form without reform. Our concern is that to retain Functional Constituencies as they are will likely reinforce public suspicions that the current political system unfairly favours certain groups, particularly business interests.

Bicameralism has been proposed as a possible solution. We believe this concept has not been fully explored because the Hong Kong administration has not been totally open with the public about why it is seen by both Hong Kong officials and the Central Authorities as a way forward. Only if this admission is made can Hong Kong then look at how to revamp the Functional Constituencies and their elections.

We hope this paper will bring a degree of clarity to the subject so that Hong Kong can focus attention on moving the constitutional development debate forward.

We are grateful to the many scholars and insightful individuals who have worked on Functional Constituencies research and have shared their ideas with us. We are grateful to Yan-yan Yip for coordinating this series of research, Pauline Poon for translating this paper, and Ken Li for designing the cover. Most of all, we need to thank Peter and Nancy Thompson for funding this important research.

Christine Loh
Chief Executive Officer
20 November 2006

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Will the concept of bicameralism disappear from Hong Kong's political agenda, unnoticed and unmourned? Most political commentators have looked on the concept as yet another device for postponing universal suffrage. Officials have never explained why they bothered to give it serious attention. Nevertheless, bicameralism may still make an important contribution to solving the deadlock over constitutional reform.

A distant goal

The political dilemma for the Hong Kong Special Administrative Region Government (HKSARG) is how to explain to the community that total universal suffrage remains a distant goal because Beijing is not yet sufficiently comfortable with it. Therefore, Hong Kong's political arrangements will continue to retain for some time to come key elements which are plainly undemocratic. The HKSARG then needs to persuade the people of Hong Kong that this constraint does not rule out progress towards a more meaningful level of democracy. It needs to be open with the fact that, to meet Beijing's concerns, progress would need to allow for arrangements that bring into the legislative process individuals with personal qualifications and whose careers do not depend on loyalty to a political party. If the HKSARG were sufficiently skillful, it should be able to illustrate that even Western democracies do not believe that majorities should rule unchecked.

As such, the HKSARG's challenge is to find an acceptable formula which will combine universal suffrage with continued representation of minority and even special interests. This problem has been overcome in many countries through a two-tier legislature, with a second chamber in which members may be directly or indirectly elected, or even appointed, and whose role is less 'political' than in the chamber whose representatives are all elected through universal suffrage.

As this paper will show, both the HKSARG and the Central People's Government (CPG) have looked on bicameralism as a useful option in moving forward towards the universal suffrage pledged by the Basic Law. This possibility seems to have suffered a considerable setback in recent weeks when officials realised how little interest they could arouse in bicameralism even among a carefully selected group of discussants. The HKSARG has not abandoned bicameralism, nevertheless. This option, apparently, is too valuable for the HKSARG to willingly discard.¹

This paper will examine why both the CPG and the HKSARG regard this option with such favour. It will review the attitudes of the CPG and HKSARG towards political reform and the potential contribution of bicameralism. It will discuss Hong Kong's reservations about the concept. The paper will identify its possible contribution to solving the current impasse over political reform. It will discuss whether it would help or hinder the effective administration of Hong Kong.

Functional problems

In the search for an acceptable formula for future political reform, the biggest problem is the future of the Functional Constituencies. How can there be a legislature elected through universal suffrage while retaining indirectly-elected Functional Constituencies? This issue has become the principal obstacle to significant political reform in the immediate future.

¹ Note the careful wording of Stephen Lam, Secretary for Constitutional Affairs: 'As to whether we should *suspend for the time being* further discussions about a potential bicameral system for returning the LegCo ...' (emphasis added), *Government Information Services*, 6 November 2006.

Proposals for Hong Kong to establish a bicameral legislature are linked directly to a solution for this dilemma.²

The CPG is committed under the Basic Law to the principle of universal suffrage. In April 2004, however, the CPG decreed that Hong Kong should preserve the Functional Constituencies established under British rule, in the belief that any rapid progress towards Western-style democracy would imperil the capitalist economy and undermine political harmony.

Up until this intervention by the CPG, Hong Kong people had believed that Hong Kong would choose its Chief Executive and its legislators by universal suffrage, just as other advanced societies in the modern world do. The elimination of Functional Constituencies was seen as an inevitable part of this process.

Both the CPG and the HKSARG have suggested that the introduction of bicameralism could resolve the conflict between CPG policy and Hong Kong expectations. If the legislature were divided into two chambers, the representatives of the Functional Constituencies could be retained in an 'upper house', as other jurisdictions have done, with membership of the other chamber reserved exclusively for directly-elected members of the community as a whole.

Official policies

The possible role of a bicameral system in resolving Hong Kong's constitutional contradictions emerged very shortly after the Standing Committee of National People's Congress in 2004 prohibited the introduction of universal suffrage for elections in 2007 and 2008. A senior Mainland official stated that Functional Constituencies were essential to the survival of capitalism in Hong Kong.

Rashly abolishing the functional constituency electoral system *in the absence of a bicameral system* or political parties that can adequately represent them will surely fail to realise the principle of balanced participation or reflect the interests, opinions and demands of this group of people [*i.e.*, businessmen] on which capitalism depends (emphasis added).³

The implication of this authoritative declaration was that they could be abolished if Hong Kong added a second chamber to the legislature in which business and professional interests could be represented.

However, the CPG has made no further public statements to encourage such a development. Occasional media reports claim that China's leaders continue to regard a second chamber as an important option.⁴ But public pronouncements have become very cautious. Thus, at a major seminar on constitutional development convened in Shenzhen in December 2005, this

² Rafael Hui, Chief Secretary, declared: 'Once universal suffrage was in place, existing functional constituencies – set up to balance the interests in the community – must change. It would be unrealistic to think though that the interests behind them would disappear from the political landscape. The same has happened in countries and regions that have a bicameral system, though their designs are different', *China Daily*, 23 November 2005.

³ Qiao Xiaoyang, Deputy Secretary-General of the Standing Committee of the National People's Congress Standing Committee, 'Striving in a pragmatic spirit to find the right path to political development', *South China Morning Post*, 29 April 2004.

⁴ A recent example claimed that President Hu Jintao was likely to refer to bicameralism during the celebrations to mark the tenth anniversary of China's resumption of sovereignty, *South China Morning Post*, 17 October 2006.

same official allowed himself to be quoted on the prospects of introducing bicameralism in very non-committal terms. He confined himself to commenting that the Basic Law would need to be amended to accommodate such an arrangement.⁵

Initiatives to keep this option alive were left to the HKSARG. In October 2005, it decided to use its Commission for Strategic Development as a specialised forum for the discussion of future constitutional development. The Constitutional Affairs Bureau (CAB) presented a package that sought to identify the principal issues that would have to be tackled. Significantly, over two-thirds of the documentation was devoted to a review of bicameralism and how it operates overseas.⁶ Yet, when the Commission's Committee on Governance and Political Development organised a workshop in November 2006 which reviewed bicameralism, participants showed little enthusiasm for the concept.⁷

This outcome was no surprise. The HKSARG was bound to face serious obstacles in promoting this solution.

- A similar proposal was floated during the drafting of the Basic Law but rejected in favour of the present arrangements.
- There is virtually no support within Hong Kong for the proposal. Sir David Akers-Jones and the Business and Professionals Federation have been lone – and largely unheeded – voices in drawing public attention to the case for bicameralism.
- The proposal would require an amendment to the Basic Law, and the HKSARG, by itself, is unable to guarantee that the CPG would be in favour of such an amendment.

But possibly the biggest drawback to the bicameral concept was the strategy adopted by the HKSARG. It tried to keep bicameralism on the agenda for discussion while being careful to avoid making a formal commitment to the concept because of the obvious political risks involved. Yet, even after the disappointing response to the November workshop, officials still tried to postpone a final rejection of this solution.⁸

Legacy of the past

The CAB paper appeared to have been intended to encourage serious study of a bicameral system. It probably had a further objective: to define the limits within which Hong Kong would be permitted to exercise a degree of autonomy in deciding on political reform measures.

The paper made full reference to Articles 45 and 68 of the Basic Law pledging progress towards universal suffrage. Before the CPG's intervention in 2004, these provisions had

⁵ *China Daily*, 3 December 2005.

⁶ Commission on Strategic Development Committee on Governance and Political Development, *A Preliminary Study on the Models to be Adopted for Selecting the Chief Executive and for Forming the Legislative Council when Universal Suffrage is Attained and Related Issues*, Constitutional Affairs Bureau, LC Paper No. CB(2)519/05-06(02), November 2005.

⁷ The Committee on Governance and Political Development organised a workshop on legislative election on 6 November 2006. In a post-workshop press briefing, Stephen Lam, Secretary for Constitutional Affairs, said that several members attending the workshop expressed reservations about the idea of adopting bicameralism in Hong Kong. See Tonny Chan, 'Controversial bicameral plan faces ax', *The Standard*, 7 November 2006.

⁸ Stephen Lam, Secretary for Constitutional Affairs, *Government Information Services*, 6 November 2006.

been interpreted almost universally within Hong Kong as 'enabling clauses' which would allow the replacement of indirect elections by universal suffrage.⁹

The CAB paper also cited very fully the 1990 'Explanation' to the National People's Congress delivered by Ji Pengfei, Director of the Hong Kong Macao Affairs Office and former Deputy Premier and Minister of Foreign Affairs.

Ji's statement contained two assertions that have been interpreted subsequently by the CPG as 'limiting clauses' on Hong Kong's constitutional development. These clauses are:

- '... consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy ...'; and
- '... the part of the existing political structure proven to be effective would be maintained'.

The importance of these 'limiting clauses' was not appreciated in Hong Kong.

- It was assumed that the clear wording of the Basic Law would prevail, rather than an official statement from the Hong Kong Macao Affairs Office even when made by a dignitary of Ji's rank.¹⁰
- Even distinguished Mainland jurists had not treated the 'Explanation' as the decisive authority in deciding the scope of post-2007 political reforms.¹¹
- The CPG itself had declared before 1997: 'With regard to election of all members of the Legislative Council of the Hong Kong SAR by universal suffrage after 2007...it is a question to be decided by the Hong Kong SAR and it needs no guarantee by the Chinese Government'.¹²

A second CAB paper spelled out how the 'Explanation' applied to Hong Kong 15 years after Ji had delivered it.¹³ The paper's main argument was that Hong Kong was still heavily influenced by its history.

As can be seen from the history of Hong Kong's economic development, economic prosperity is largely dependent on the joint efforts of the industrial and business sectors, the middle class, professionals, the working class, and other sectors of society. Therefore, this principle concerns how to meet the interests of different sectors in a proper way, with the aim of preserving prosperity and stability'.¹⁴

⁹ See Appendix for the relevant extracts from the CAB paper dealing with both the Basic Law and Ji Pengfei's 'Explanation'.

¹⁰ Mainland jurists insisted that the right to interpret the Basic Law belonged exclusively to the National People's Congress Standing Committee rather than to any individual official, *New China News Agency*, 6 February 1999.

¹¹ See, in particular, Xiao Weiyun, *One Country, Two Systems. An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001), pp. 276-7, 280-1, 316-7, 324-5.

¹² Ministry of Foreign Affairs, *Facts about a Few Important Aspects of Sino-British Talks on 1994/95 Electoral Arrangements in Hong Kong* (Hong Kong: Joint Publishing (H.K.) Co., Ltd., 1994), p. 34.

¹³ Commission on Strategic Development, Committee on Governance and Political Development, *An Overview of the Political Structure of the Hong Kong Special Administrative Region*, Constitutional Affairs Branch, LC Paper No. CB(2)519/05-06(01), November 2005.

¹⁴ *ibid.*, p. 4.

For this reason, it was argued, Functional Constituencies must be retained. Yet, the CAB analysis recognised that there was an inherent conflict between retention of the Functional Constituencies and the achievement of universal suffrage.¹⁵ The paper implied that the solution was to be found through the adoption of a bicameral system 'upon attaining the ultimate aim of the election of all members of LegCo by universal suffrage'.¹⁶

Executive views

These CAB documents represent much more than academic discussion papers designed to provoke a debate of political reform in the abstract. The Chief Executive, Donald Tsang, has personally endorsed the need to take bicameralism seriously.

In a major public presentation, he summarised the practical difficulties his administration faces in seeking to implement the clear provisions of the Basic Law and the reservations about political reform enunciated by Ji in 1990 and which continue to influence CPG attitudes towards Hong Kong.

We have also inherited a structure that incorporates people elected in geographical constituencies, and those elected in functional constituencies representing important sectors such as the labour unions, chambers of commerce, health services, social welfare, industry, manufacturing, financial services and even rural communities. These functional constituencies represent powerful interests in the community, and are entrenched in our political system. They cannot easily be expunged or cancelled at will.

For the Chief Executive election, it is fairly clear what we mean by universal suffrage – that is, every voter having a chance to elect the leader of the Hong Kong SAR. But for the legislature, the Basic Law is silent on how we are to achieve universal suffrage. For example, do we stick with our uni-cameral system, or do we move towards a bi-cameral system prevalent in most advanced democracies? Do we retain the functional constituencies? If we don't, how can we phase them out without arousing a long, drawn out political upheaval and uncertainty, that may even entail serious economic consequences?¹⁷

It is open to argument whether the labour force, health services and social welfare should be included in his category of 'powerful interests in the community' since strikes are rare, while the health and welfare services have been unable to resist severe financial constraints in recent years despite their functional constituency representatives. Furthermore, labour, health and welfare legislators tend to support the replacement of Functional Constituencies by direct elections. However, it is true that business representatives and 'rural' interests (the Heung Yee Kuk) are powerful voices, who oppose the abolition of their Functional Constituencies.

There is no reason to suppose that the abolition of Functional Constituencies would cause 'long, drawn out political upheaval and uncertainty, that may even entail serious economic consequences' as the Chief Executive fears. As the CPG complained in the past, the British

¹⁵ This conflict is implicit in the question for discussion posed by the paper: 'How should the current LegCo functional constituencies evolve before the ultimate aim of the election of all members of LegCo by universal suffrage is attained?'. *ibid.*, p. 11.

¹⁶ If serious consideration of bicameralism were not intended as a practical solution, why should CAB have raised it in the context of achieving full universal suffrage? *ibid.*, p. 11.

¹⁷ *Government Information Services*, 4 November 2005.

had 'attempted to apply direct elections to all the members of the Legislative Council in 1995 ... [and] to change the nature of the election by functional constituencies' by increasing their electorates to 1.14 million eligible voters.¹⁸ Yet, despite these moves denounced by Beijing as destabilising, political life was not disrupted, and the economy did not go into decline.

Mainland analysis

Behind the declarations of the CPG and their application to Hong Kong by the HKSARG lies an obvious anxiety about the stability of a society in which the community as a whole selects its rulers. The CPG assumes quite explicitly, as the quotations from official pronouncements have already indicated, that Hong Kong is dominated by conflicting class interests and that there is a constant danger that these conflicts may become antagonistic.¹⁹

There were two reasons which made it very natural for the Chinese Communist Party to take this starting point. The first involved ideology. The Chinese Communist Party has laid great stress on giving greater recognition to the role of business personalities and the private sector in the nation's political life (notably through the 'Three Represents' campaign launched by the previous President, Jiang Zemin, but continued by his successor, President Hu Jintao²⁰). This drive has helped to make China's leaders sensitive to vigorous lobbying by the leading local business families that capitalism in Hong Kong is very vulnerable to populist pressures. As the Mainland expands the political access of successful capitalists, the Chinese Communist Party can hardly be expected to be sympathetic to moves which would reduce their political role in Hong Kong.

The second factor influencing the attitude of China's leaders was the Mainland's own political structure. The Chinese Communist Party has traditionally sought to allow representation in national and local political institutions for influential groups such as political parties, religious organisations and other bodies which are excluded from Party affiliation. Thus, China already has a two-tier approach to political representation.

- There is the National People's Congress, which is the legislature.
- There is also the Chinese People's Political Consultative Conference (CPPCC), which exercises supervisory functions and is intended to be representative of a plurality of groups and interests.²¹

The CPPCC's main responsibilities are defined officially as 'to conduct political consultation, exercise democratic supervision and participate in the discussion and handling of state

¹⁸ Ministry of Foreign Affairs, *Facts about a Few Important Aspects of Sino-British Talks on the 1994/95 Electoral Arrangements in Hong Kong* (Hong Kong: Joint Publishing (H.K.) Co., Ltd., 1994), p. 31.

¹⁹ The importance of Marxist ideology in this context has been made clear by Qiao Xiaoyang, Deputy Secretary-General of the National People's Congress Standing Committee: 'Under the Basic Law, Hong Kong should not exercise socialism or socialist policies. The original capitalist lifestyle should be kept unchanged for 50 years. According to Marxism, an important characteristic is that means of production should be owned by private individuals. There should be low taxation, highly efficient administration, pluralism and rule of law', *Government Information Services*, 26 April 2004.

²⁰ See, for example, the coverage given to this theory in connection with the publication of the three volumes of President Jiang's *Selected Works* in 2006, *New China News Agency*, 9 August 2006 and *People's Daily*, 10 August 2006.

²¹ The preamble to the 1982 Constitution defines the CPPCC as 'a broadly representative organization of the united front, which has played a significant historical role and will continue to do so in the political and social life of the country, in promoting friendship with the people of other countries and in the struggle for socialist modernization and for the reunification and unity of the country'.

affairs'.²² Despite its lack of legislative powers, President Hu Jintao has directed all levels of both the Government and the Chinese Communist Party to give 'full scope to the CPPCC's supervision over the implementation of laws, regulations and major policies and the performances of the governments and officials'.²³

Thus, political arrangements offering a forum for special interests are a familiar feature of the Mainland political system. In particular, they are seen as a way of mobilising support for the government by reducing political and social conflicts.

In the case of Hong Kong, the CPG seems to regard big business as needing special protection rather like minority groups on the Mainland which are likely to find themselves effectively disenfranchised.

Entrenching privileges

One of the difficulties of promoting either Functional Constituencies or a second chamber to protect big business is that the case for such special treatment does not exist in Hong Kong. The polling evidence shows overwhelmingly that capitalists have never been an endangered species in Hong Kong. The same evidence shows a considerable lack of interest in 'class warfare'.

In common with most advanced societies, Hong Kong people regard themselves in the main as 'middle class'. The notion that they pursue working class interests or that they see political activity as the high road to the redistribution of income in their favour or the adoption of 'populist' economic and social policies has no foundation in reality.

If anything, the perception is that business is already too privileged and that cronyism and lack of transparency have consequently been able to flourish. Indeed, when the HKSARG has shown a tendency to engage in pro-business projects, they have provoked widespread hostile comment not just from the general public but from a wide spectrum of business voices.

This tendency was especially obvious in the controversy over Cyberport and the failure to proceed with this development by open tender. The same issues arose in connection with proposals for the development of West Kowloon and controversies over development projects at the Hung Hom Peninsula and, more recently, Sai Wan Ho.

Concerns are not confined to the property sector. The anxiety within the business community over the need for increased commitment to a level playing field helps to explain why legislation to enhance market competition won considerable business support during 2005. The result has been to force the HKSARG to start public consultations on a competition law and the regulation of monopoly practices.²⁴

Politically convenient

The HKSARG, therefore, feels under pressure from the public. Officials, including the Chief Executive, complain about a lack of the respect and cooperation from the Legislative Council

²² *People's Daily*, 2 March 2001.

²³ *People's Daily*, 22 September 2004.

²⁴ Economic Development and Labour Bureau, *Promoting Competition – Maintaining our Economic Drive*, November 2006.

which they claim the Basic Law requires legislators to show for the HKSARG.²⁵ Officials are especially irritated by the directly-elected legislators.

Nevertheless, it must be noted, a striking feature of post-colonial politics is the failure of directly-elected legislators to campaign vigorously against government policies which might be described as 'anti-welfare'.

- They offered only mild resistance to significant increases in fees for education and hospital services, a reduction in public housing and a lower provision of services for the elderly and the disabled.
- They did not challenge cuts in both the size and the emoluments of the public sector in a period of mounting unemployment and rising deflation.

Directly-elected legislators were as easily persuaded as their Functional Constituency colleagues by the HKSARG's appeals to the need for budgetary stringency. In short, they exhibited no interest in 'socialist' measures.

Nevertheless, for the HKSARG, Functional Constituencies are politically convenient because, on the whole, they are less demanding than political parties.

- Representatives from business are not accountable to the public at large.
- Their agendas are relatively narrow and mostly concerned with maintaining 'business friendly' government.

Thus, the HKSARG has much to gain from retaining Functional Constituencies because, in effect, it is easier to satisfy the demands of sectional business interests than to meet the expectations of the wider community.

Yet, Donald Tsang has gone to considerable lengths to woo the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB). An important benefit for the HKSARG from an alliance with this party is that it would supplement the votes that the HKSARG can rely on from the largely functional constituency Liberal Party members.

However, the political costs to the HKSARG of seeking the backing of the DAB whose main target is direct elections are considerable.

- Mass political parties want to have official proposals modified in order to demonstrate their influence.
- They want their members to be appointed to high-profile and prestigious public bodies to increase their profile.
- The community has a low opinion of the major political parties.²⁶ Inevitably, in the same way that the public mistrusts close relations between the government and business,

²⁵ See the attack on Rafael Hui, Chief Secretary, *Ming Pao*, 13 September 2005; the complaints by Henry Tang, Financial Secretary, *Government Information Services*, 29 March 2006; and the exchanges between Stephen Lam, Secretary for Constitutional Affairs and Leung Yiu-chung and Martin Lee, *Government Information Services*, 15 February 2006 and 1 March 2006.

²⁶ For detailed data on the low and declining public respect for political parties, see Hong Kong Transition Project, *Parties, Policies and Political Reform in Hong Kong*, May 2006, pp. 76-85.

there is considerable suspicion of an alliance between the Chief Executive and an individual political party.²⁷

The overall conclusion must be that the HKSARG would find management of the Legislative Council more complicated if all Functional Constituencies were abolished at an early date. It is probably this fact that makes officials take seriously the prospect of moving to a bicameral system.

A lack of enthusiasm

In short, the CPG wants Functional Constituencies to be retained because of its fears about whether capitalism would survive if more extensive democracy is introduced. The HKSARG wants them to continue because they make life easier for officials dealing with legislators. As the discussion above indicates, the HKSARG has opened the door as widely as it dare to the option of setting up a second chamber to make possible their retention in a second chamber.

On the whole, however, there has been a marked lack of enthusiasm among political, business and community leaders for bicameralism. To some degree, this attitude reflects the sense that the political debate is about universal suffrage and not the preservation of a dominant role for business in the political system.

Leading businessmen have spoken up occasionally in support of bicameralism in the past. The most prominent is Peter Woo.²⁸ He argued that such an arrangement was of special importance for the preservation of Functional Constituencies, besides being in line with the constitutional practice overseas. On the whole, however, the business community has been largely unenthusiastic.

For example, the Liberal Party's James Tien has declared that the business community has little interest in this proposal. It failed to win support when the Basic Law was being drafted, despite extensive discussion, he noted. His own formula for resolving this issue was to replace Functional Constituencies with directly-elected seats, starting with Functional Constituencies 'that have a large electorate or greater potential for direct election, such as education'. This strategy would give business interests a breathing space.²⁹

A review that failed

One important exception to the general apathy on this issue is the Business and Professionals Federation of Hong Kong. In July 2005, it produced a detailed review of bicameralism, including an extensive analysis of overseas experience.³⁰ Its most striking feature was an attempt to show how a second chamber would meet the CPG's reservations about the introduction of universal suffrage.

This document was an effort to demonstrate the potential value of a second chamber in allaying misgivings of the business community and in meeting the CPG's requirements. It

²⁷ For criticism of Tsang's growing ties with the DAB, see, for example, *Apple Daily*, 6 April 2006 and 13 April 2006.

²⁸ *China Daily*, 28 April 2004. For comments by other tycoons, see Christine Loh, "Government and business alliance: Hong Kong's functional constituencies, Chapter 1 in Christine Loh and Civic Exchange (eds.), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council*, Hong Kong University Press, Hong Kong, 2006, pp. 36-38.

²⁹ *China Daily*, 29 November 2005.

³⁰ *A Bicameral System for Hong Kong*, Hong Kong: Business and Professionals Federation of Hong Kong, 2005.

exhibited little sympathy for demands for universal suffrage and expressed considerable reservations about the intrinsic merits of Western-style democracy.

This exercise attracted some media attention, but failed to attract extensive endorsement either from the business community or from supporters of the CPG's policies on political reform.

This outcome has two important implications.

- The wider community has little or no interest in discussing how to preserve the Functional Constituencies. The introduction of universal suffrage is seen as the crucial issue.³¹
- The business community has no interest in complex constitutional innovations to protect Functional Constituencies. The assumption appears to be that the CPG will ensure their preservation.

It is plain that the CPG will continue to check progress towards significant political reform until business interests are firmly entrenched in the political system through a sizeable political party committed to capitalism that Beijing is comfortable with; or a second chamber.

The Liberal Party, apparently, has not succeeded in achieving the political stature which would satisfy the CPG's first criterion. The DAB is unlikely to do so in the eyes of local business interests despite its efforts to woo entrepreneurs and the middle class.³²

Is bicameralism the only other way forward? If it is, then there may be no choice but to take it seriously, despite the inevitable difficulties of fitting a second chamber into a system which has been unicameral for so long.

The way ahead

Against this background, the HKSARG has much to gain by giving more vigorous support to the bicameral option. So far, it has hesitated to do so. Officials have insisted that this is only one of the options that emerged in 2005 from its consultations on political reform, to which the HKSARG has no particular commitment.³³ As long as the HKSARG sticks to this stance, the chances of arousing widespread public interest in this option will remain small.

Hong Kong officials have relied on inference and innuendo to indicate that bicameralism offers a serious hope of satisfying the CPG's preconditions for substantive progress towards universal suffrage in the near future. The CPG has taken a similar line, but even more obliquely.

For progress to be made on the basis of a bicameral solution, the HKSARG will have to start a frank dialogue with the political parties and the wider community. The Chief Executive will have to spell out far more clearly than officials have done hitherto that the CPG will not

³¹ The community's commitment to universal suffrage in elections for both the Chief Executive and the Legislative Council is overwhelming according to the polling evidence. Hong Kong Transition Project, *Parties, Policies and Political Reform in Hong Kong*, May 2006), pp. 69-70.

³² Particularly important in this context was the Federation of Trade Unions' inability to stand firm against workforce indignation over its apparent cooperation with the government in delaying minimum wage legislation, *Sing Tao Daily*, 27 October 2006.

³³ 'The government is not inclined towards any particular system, and it would look into the possibility of amending the Basic Law if the community was seen to be in favour of a bicameral system at the end of the debate', Stephen Lam, Secretary for Constitutional Affairs, *China Daily*, 18 January 2006.

permit constitutional changes in the foreseeable future which do not retain a powerful voice in the legislature for business interests.

The CPG's determination to protect capitalists and their current dominant position has the following implication, which the process of constitutional development cannot ignore, unpalatable as it may be:

- Directly-elected legislators will not be allowed to impose measures to which there is widespread business opposition even after the introduction of universal suffrage. Thus, a majority of both directly-elected and Functional Constituencies will continue to be required to pass Legislative Council measures.
- The business-related Functional Constituencies will need to be retained although some re-vamping may be possible.
- There is no hope of the HKSARG persuading the CPG to change its basic stance.

At the same time, the HKSARG will have to convince the community that both the CPG and the HKSARG remain committed to the principle of universal suffrage as enshrined in the Basic Law. The challenge of achieving this goal while retaining Functional Constituencies should be acknowledged as the principal obstacle to further political reform.

In consequence, the HKSARG should change its current tactics.

- It should cease to insist that universal suffrage is an ambiguous concept which needs special definition in the context of Hong Kong.³⁴ Arguments of this sort are taken as a lack of sincerity about the commitment to universal suffrage.
- It should cease to claim that democracy threatens economic prosperity and the existence of the middle class.³⁵ Arguments of this sort increase public cynicism about the HKSARG's sincerity because no political party supports redistribution of wealth or the creation of a welfare state.
- It should cease to suggest that the creation of a second chamber comprised of indirectly-elected or even appointed members is a respectable substitute for universal suffrage for which ample foreign precedents can be found.³⁶ Arguments of this sort are interpreted as an HKSARG ploy to distract public attention from the real issue of universal suffrage.

The HKSARG will also have to be far more proactive in defining how the second chamber would operate, i.e. what powers to hold up legislation or to block financial measures it would have. Although constitution-making is always complex, there are ample examples from overseas for Hong Kong to imitate with considerable certainty as to what the legislative and other consequences will be for the HKSARG.

In one respect, the task of defining a second chamber and its role would be less arduous for Hong Kong than elsewhere.

³⁴ A notable example is the Constitutional Affairs Bureau document *General understanding on the concept of 'Universal Suffrage'*. See also, *China Daily*, 18 January 2006.

³⁵ Rafael Hui, Chief Secretary, *Government Information Services*, 26 October and 9 December 2005; Stephen Lam, Secretary for Constitutional Affairs, *Government Information Services*, 30 November 2005; *China Daily*, 1 December 2005.

³⁶ A notable example is the Constitutional Affairs Bureau document *A Preliminary Study on the Models to be Adopted for Selecting the Chief Executive and for Forming the Legislative Council when Universal Suffrage is Attained and Related Issues*, 'Annex'.

- Unlike advanced societies generally, Hong Kong's legislature has no independent right to create or change official policy, to introduce legislation, or to propose financial initiatives. Under the Basic Law, the HKSARG has the power to prevent individual legislators from exercising such powers.
- Thus, the Legislative Council in practice has only three unrestricted powers: to scrutinise and amend legislation, to reduce or reject the government's taxation or expenditure proposals, and to investigate and report on the government's performance.
- These 'negative' powers, which offer a veto over government proposals, are already exercised by representatives of Functional Constituencies in the Legislative Council.
- They are exactly the sort of functions which are normally entrusted to second chambers overseas. Yet, unlike general practice overseas, a Hong Kong second chamber would not have powers significantly inferior to the chamber elected through universal suffrage.

Worth the effort?

Would it be worth the effort of establishing a second chamber under such restrictive conditions?

The HKSARG should be able to justify bicameralism based on the prospect of improving the quality of administration. At present, the process of reviewing new legislation imposes serious strains on a relatively small, part-time legislature. Draft legislation almost always contains a number of flaws and deficiencies that only become apparent when subject to line-by-line public discussion.

Experience from overseas suggests that the second chamber could ease this burden and raise the standards of reviewing and amending legislation. It should be noted, however, that Functional Constituency members could make a greater contribution to scrutinising new legislation.³⁷ For this reason, a second chamber might need to have additional members who are appointed by the HKSARG (which would be in line with the practice in many parts of the world).

Similarly, as Hong Kong and its economy become increasingly complex, scrutiny of the HKSARG's spending plans requires more and more time. Once again, this is a burden which a second chamber could ease.

A second chamber whose members do not have the same level of accountability as directly-elected members offers a less 'political' forum for officials to make their case and explain their proposals. This allows governments to manage public business more effectively, dividing their agendas into matters of greater public interest or more controversial issues which must be referred to the more democratic chamber, and other business which can be directed to the second chamber.

A second chamber could offer Hong Kong the following:

- Under current constitutional arrangements, Functional Constituencies can block measures in response to business lobbying without taking direct responsibility. The outcome will be recorded as a decision of the Legislative Council as a whole.

³⁷ This issue is analysed in detail in Christine Loh and Civic Exchange (eds.), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council*, Hong Kong University Press, Hong Kong, 2006, Chapters 7, 8 and 9.

- However, if the Functional Constituencies were removed to a second chamber, their intervention on behalf of the vested interests which elected them would become more transparent.
- The result would be to improve the quality of discussion and decision on important issues, especially those relating to economic and financial policies, because the distinction between the well-being of the wider community, including business as a whole, and narrow, sectoral interests would be more evident.

Moreover, if the HKSARG is willing to be frank with the people of Hong Kong on the necessity to retain Functional Constituencies and to show a genuine openness in examining how the Functional Constituency Election System can be overhauled, it may well lead to the possibility of moving the constitutional development debate forward.³⁸

³⁸ This paper does not deal with how to reform the Functional Constituency Election System or how the Functional Constituencies can operate better in the Legislative Council as these issues have been substantially dealt with in Christine Loh and Civic Exchange (eds.), *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council*, Hong Kong University Press, Hong Kong, 2006.

Appendix

Extracts from Commission on Strategic Development Committee on Governance and Political Development, *A Preliminary Study on the Models to be Adopted for Selecting the Chief Executive and for Forming the Legislative Council when Universal Suffrage is Attained and Related Issues*.³⁹

Chapter 4 and the relevant annexes of the Basic Law have specifically stipulated the political system of the HKSAR. Article 45 of the Basic Law provides that 'The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.' Article 68 of the Basic Law also provides that 'The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election. The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the Members of the Legislative Council by universal suffrage'.

In his Explanation on the Basic Law (Draft) and related documents delivered at the Third Session of the Seventh NPC on 28 March 1990, Director Ji Pengfei said that the political structure of the Hong Kong Special Administrative Region should accord with the principle of 'One Country, Two Systems' and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective would be maintained, a democratic system that would suit Hong Kong's reality should gradually be introduced.

³⁹ This material is a standard feature of the HKSARG discussion documents on political reform. Commission on Strategic Development, Committee on Governance and Political Development, *Constitutional Basis of Basic Law Provisions Regarding 'Universal Suffrage'*, Constitutional Affairs Bureau, CSD/GC/2/2006, January 2006, and *General understanding on the concept of 'Universal Suffrage'*, Constitutional Affairs Bureau, CSD/GC/3/2006, January 2006.