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## THE POLITICAL ECONOMY OF THE CONSTITUTIONAL CONFLICT IN HONG KONG

### INTRODUCTION

**P**re-1997 Hong Kong had a generally robust legal system by virtue of its status as a British colony and the political liberalization gradually pursued by the local government with London's blessing. The constitutional component of that system, however, was not necessarily its most sturdy part. A less enlightened policy establishment might have taken undue advantage of the considerable scope for manoeuvre afforded by a distinctly elastic framework without contravening the law in the strict sense of the term. Besides its rather loose nature, the framework did not lack authoritarian elements.<sup>1</sup>

Post-1997 Hong Kong appears to be resting on more solid constitutional foundations, at least in theory. Its Basic Law qualifies as a constitution, both in its form and substance. The document is rather elaborate and relatively precise (by constitutional standards). Further, it has its roots in the Sino-British Joint Declaration on the Question of Hong Kong, a binding international legal agreement carrying significant symbolic importance.<sup>2</sup> A democratic colonial power may have thus departed, and one that may have not yet completely

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<sup>1</sup> S.K. LAU, *BASIC LAW AND THE NEW POLITICAL ORDER OF HONG KONG*. (Hong Kong: Center for Hong Kong Studies, Chinese University of Hong Kong, 1988); M.C. DAVIS, *CONSTITUTIONAL CONFRONTATION IN HONG KONG*. (London: Macmillan, 1989); M.K. CHAN AND D.J. CLARK, *HONG KONG BASIC LAW*. (Hong Kong: Hong Kong University Press, 1991); R. WACKS, *HONG KONG, CHINA, AND 1997*. (Hong Kong: Hong Kong University Press, 1993); P. WESLEY-SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG*. (Hong Kong: Longman, 1994); N.J. MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG*. (5<sup>th</sup> ed., Hong Kong: Oxford University Press, 1995); Y. GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER*. (2<sup>nd</sup> ed., Hong Kong: Hong Kong University Press, 1999); J.M.M. CHAN, H.L. FU, AND Y. GHAI, *HONG KONG'S CONSTITUTIONAL DEBATE* (Hong Kong: Hong Kong University Press, 2000).

<sup>2</sup> R. MUSHKAT, *ONE COUNTRY TWO LEGAL PERSONALITIES – THE CASE OF HONG KONG*. (Hong Kong: Hong Kong University Press, 1997).

jettisoned its legacy of socialist-style arbitrary rule may have assumed sovereignty over the territory, but on the face of it Hong Kong seems paradoxically to have enhanced its constitutional position as a result of this momentous change in the political status quo.<sup>3</sup>

This is the formal side of the picture. In practice, although China has thus far not unambiguously deviated from the spirit and letter of the Joint Declaration, and while has not glaringly breached the Basic Law, it may have erred on the side of (authoritarian) caution in guiding (explicitly or implicitly) constitutional development in Hong Kong and responding (directly or indirectly) to problems arising from the implementation of the Basic Law. This pattern has not manifested itself across the board. There have been virtually no attempts to stifle private enterprise, or revamp the institutions underpinning it, but the stance vis-à-vis political freedoms (broadly defined) has been less accommodating.

The national security legislation proposed by the local government, apparently at the behest of the central authorities in Beijing, is perhaps the most telling case in point. This new initiative constitutes the most radical departure from the generally benign practices prevailing before the transfer of sovereignty and during the initial phase of the transition to Chinese "rule." The legislation, to be passed under Article 23 of the Basic Law, introduces in an unpalatable form the crimes of subversion and secession, and grants the government extensive powers to ban non-mainstream groups (Table 1). It has the potential, in the present climate, to pave the way for actions inconsistent with fundamental principles of human rights, and hence arguably the Basic Law as originally conceived.<sup>4</sup>

### Table 1

#### Repression in Hong Kong

Taking advantage of preoccupation in Hong Kong with the SARS epidemic, the territory's pro-Beijing government has been pushing along a noxious national security bill that would leave the territory vulnerable to the sort of political repression common on the Communist mainland. It may be too late to block the law, which looks likely to pass on July 9. But it should be made clear to Beijing that nobody buys its justifications for this repressive measure.

The measure, known as Article 23, deals with treason, sedition, subversion and the theft of state secrets, and includes provisions that would enable the Hong Kong government to crack down on organizations deemed to be linked to any that are

<sup>3</sup> GHAI, *op. cit.*

<sup>4</sup> A.H.Y. Chen, *How Hong Kong Law Will Change When Article 23 of the Basic Law Is Implemented*, 33 HONG KONG LAW JOURNAL, 1-7 (2003).

banned in China, such as Falun Gong. That would seriously erode the autonomy that the former British colony was promised when it came under China's rule six years ago under the formula of "one country, two systems."

Some governments, including the United States and Canada, have already protested, as have many human-rights organizations, prompting predictable squawks from Beijing against meddling in its internal affairs. That can hardly be said of opponents in Hong Kong, who turned out in the tens of thousands on the 14<sup>th</sup> anniversary of the Tiananmen Square uprising, and now plan an even larger protest against Article 23 for July 1, the anniversary of the turnover of Hong Kong. The resistance draws on an expanding coalition of human-rights groups, independent politicians, trade unions, journalists, academics, and students. They have correctly identified the bill as a challenge to their autonomy and fundamental freedoms, and as an attempt to impose China's arbitrary legal system on Hong Kong through the back door.

China argues that Article 23 is not much different from the laws of some democratic states. That may be so, but democratic societies have checks and balances that China and other Communist states do not; in the latter, national security laws have long been a primary tool for silencing critics and subverting freedoms. The fate of Falun Gong is but one example. Another is SARS: Under the new law, the dogged newspapers of Hong Kong might have been forced into the same disgraceful and dangerous silence as the mainland press.

China's rulers have also portrayed Article 23 as a critical test of national sovereignty. It is really an assault on the freedoms they promised to respect in Hong Kong for 50 years. Even if the bill cannot be stopped, it should be widely exposed and condemned for the repressive measure it really is.

Source: *International Herald Tribune*, June 28-29, 2003, p. 4.

This development is serious enough to revive concerns that have largely receded in recent years. The "one country, two systems" concept, enshrined in the Joint Declaration and designed to insure an effective separation of Hong Kong's capitalist institutions from their mainland socialist counterparts, may be at risk of material erosion. Given the scale and pace of economic reform in China, the relevance of the distinction between capitalism and socialism can be legitimately questioned in this particular context. However, it is appropriate to differentiate between the (not yet fully erected) liberal democratic façade (including the rule of law) in Hong Kong and the authoritarian political structure enduring on the mainland. It is the former, its international legal and constitutional roots notwithstanding, whose future viability cannot be taken for granted.<sup>5</sup>

Chinese policy makers evidently subscribe to the view that commitment to economic liberalism need not be coupled with one to that of the political variety. This stance requires no fine-tuning even in a setting where capitalist

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<sup>5</sup> M. C. Davis, *Constitutionalism and Hong Kong's Future*, 8 THE JOURNAL OF CONTEMPORARY CHINA, 263-273 (July, 1999).

institutions are firmly anchored in the common law and an affluent population has grown accustomed to expressing its voice in a meaningful fashion through a number of channels. While there are no concrete signs that the aversion toward political freedoms is propelling China to curtail Hong Kong's autonomy, or deny it the right to exercise fully the international powers guaranteed in the Joint Declaration, such a scenario cannot be ruled out.<sup>6</sup>

Gradual tightening of the constitutional framework may not have far-reaching implications for Hong Kong and hardly any repercussions for China. On the other hand, a discernible shift in an authoritarian direction could prove costly for both the former and the latter, albeit undoubtedly not to the same extent. Indeed, even the international community might be adversely affected. The purpose of this paper thus is to restate the importance of a progressive constitutional order for Hong Kong. However, because that scarcely qualifies as a controversial proposition, the principal focus is on exploring, from a politico-economic/game-theoretic perspective, key dimensions of the complex relationship between the territory and China, as well as drawing the necessary policy conclusions.

## 1 COSTS OF CONSTITUTIONAL "MISMANAGEMENT"

Since its absorption into the British Empire to the present, Hong Kong has displayed remarkable flexibility and dynamism. It has not sought to reshape its external environment, but has adapted rapidly and effectively to impulses originating from other parts of the region/world. Such adaptation has often entailed a radical transformation of the socio-economic structure. The past half of a century has witnessed the most dramatic shifts on this front. The Korean War served as a catalyst for brisk industrialization and the opening up of China following the Cultural Revolution provided the impetus for the emergence of a vibrant service sector.<sup>7</sup>

Interestingly, socio-economic metamorphosis has taken place against the backdrop of notable stability in Hong Kong's *modus operandi*. The territory may have shed its form often, and unreservedly so, but throughout its history it has consistently functioned as an "intermediary of capital", that is, a pivot of decision-making about the exchange of capital within Asia and between the region and the rest of the world. Metropolises which perform this role normally serve as crucial points of intersection between local and foreign social networks

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<sup>6</sup> *Ibid.*

<sup>7</sup> D.R. MEYER, HONG KONG AS A GLOBAL METROPOLIS. (Cambridge: Cambridge University Press, 2000).

of capital (the term “social networks” is employed here to highlight the fact that intermediary decision-making about the exchange of capital rests on bonds that extend beyond pure market calculations of profit and loss to include deeper, wider social relations).<sup>8</sup>

After the curtain fell on Mao Zedong’s ultra radical experiments – notably, the Great Leap Forward and the Cultural Revolution – and his more pragmatic successors adopted an “open-door” policy, Hong Kong has rapidly shifted the low end of its manufacturing sector (indeed, it has effectively “de-industrialized”) across the border and has reshaped itself as an intermediary of capital on a scale not witnessed previously, in the qualitative as well as the quantitative sense of the term. The post-1978 transformation has largely been geared toward maximizing opportunities arising from China’s market reforms in general and its increasingly liberal trade regime in particular.<sup>9</sup>

As an intermediary of capital with a pronounced mainland orientation, Hong Kong has reached new heights as China’s financier, trading partner, middleman, and facilitator. It has thus played a prominent role in this context as a source of direct and indirect investment funds, as well as a provider of syndicated loans (financier). It has also acted as a major exporter and importer of goods/commodities and services, both directly (trading partner) and indirectly (middleman). Finally, it has functioned as a vital contact point, conduit of information and technology, and training ground (facilitator; Table 2).<sup>10</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> Y.W. SUNG, *THE CHINA-HONG KONG CONNECTION*. (Cambridge: Cambridge University Press, 1991).

<sup>10</sup> *Ibid.*

Table 2

## A Summary of the Role of Hong Kong in China's Open Door Policy

Financier	Direct investment Indirect investment Loan syndication	
Trading Partner	Commodity trade Services trade	
Middleman	Commodity trade	entrepôt trade trans-shipment brokerage in direct trade
	Services trade	tourism loan syndication business consultancy
Facilitator	Contact point Conduit of information and technology Training ground	marketing production

Source: Sung, *The China-Hong Kong Connection*, *op. cit.*, p. 17.

Prior to the post-1978 policy turnabout, China preferred direct trade because it could be employed as a potent political instrument. Having opted for a more outward-looking foreign policy, and having reaped the inevitable international rewards from embracing accommodation (i.e., having gained worldwide political recognition), China has no longer found it necessary to pursue simultaneously its trade and political agendas and has encouraged, rather than merely tolerated, the channelling of trade activities indirectly via Hong Kong, which has consequently thrived as a centre of intermediation. This economically-inspired strategy has been pursued vigorously for the past quarter of a century, benefiting enormously the two sides.<sup>11</sup>

The division of labour is underpinned by sound business logic. China lacks skills in intermediary services – including communications, finance, insurance, marketing, and legal services. Such skills, on the other hand, are abundant in Hong Kong. Further, intermediation requires fast response to shifts in global demand and quick identification of profitable opportunities. The Hong Kong economy enjoys minimal government intervention and is remarkably flexible (Table 3). One should not be surprised, therefore, that its more rigidly controlled Chinese counterpart has grown to depend heavily on Hong Kong-sourced intermediary services.<sup>12</sup>

<sup>11</sup> *Ibid.*; Y.W. SUNG, *THE EMERGENCE OF GREATER CHINA*. (Basingstoke: Palgrave, 2002).

<sup>12</sup> SUNG, *THE CHINA-HONG KONG CONNECTION*, *op. cit.*

Table 3

**Index of Economic Freedom**  
(2004 Rankings)

	<b>Free</b>	44	Armenia		Swaziland	134	Sierra Leone
1	Hong Kong		France	91	Georgia		Togo
2	Singapore	46	Belize	92	Djibouti	136	Indonesia
3	New Zealand		Korea, South	93	Guinea	137	Haiti
4	Luxembourg	48	Kuwait	94	Kenya	138	Syria
5	Ireland		Uganda	95	Burkina Faso	139	Congo, Rep.
6	Estonia	50	Costa Rica		Egypt		Guinea Bissau
7	United Kingdom	51	Jordan		Mozambique	141	Vietnam
8	Denmark	52	Slovenia	98	Tanzania	142	Nigeria
9	Switzerland	53	South Africa	99	Bosnia	143	Suriname
10	United States	54	Greece	100	Algeria		<b>Repressed</b>
11	Australia		Oman	101	Ethiopia	144	Cuba
12	Sweden	56	Jamaica	102	Mali	145	Belarus
13	Chile		Poland	103	Kyrgyzstan	146	Tajikistan
14	Cyprus	58	Panama		Rwanda	147	Venezuela
	Finland		Peru	105	Central African Republic	148	Iran
16	Canada	60	Cape Verde		Republic	149	Uzbekistan
	<b>Mostly Free</b>		Qatar	106	Azerbaijan	150	Turkmenistan
17	Iceland		Thailand		Paraguay	151	Burma
18	Germany	63	Cambodia		Turkey		Laos
19	Netherlands		Mexico	109	Ghana	153	Zimbabwe
20	Austria		Mongolia		Pakistan	154	Libya
	Bahrain	66	Morocco	111	Gabon	155	Korea, North
22	Belgium	67	Mauritania		Niger		<b>Unrated</b>
	Lithuania		Nicaragua	113	Benin		Angola
24	El Salvador		Tunisia	114	Malawi		Burundi
25	Bahamas	70	Namibia		Russia		Democratic Republic of Congo
26	Italy	71	Mauritius	116	Argentina		
27	Spain		<b>Mostly Unfree</b>	117	Ukraine		Iraq
28	Norway	72	Senegal	118	Lesotho		Sudan
29	Israel	73	Macedonia		Zambia		Serbia and Montenegro
	Latvia	74	Philippines	120	Dominican Republic		
31	Portugal		Saudi Arabia		Republic		
32	Czech Republic	76	Fiji	121	Honduras		

33	Barbados		Sri Lanka		India		
34	Taiwan	78	Bulgaria		Nepal		
35	Slovak Republic	79	Moldova	124	Chad		
36	Trinidad and Tobago	80	Albania		Gambia		
			Brazil	126	Ecuador		
37	Malta	82	Croatia	127	Cameroon		
38	Japan	83	Colombia	128	China		
39	Botswana		Guyana	129	Romania		
	Uruguay		Lebanon	130	Equatorial		
41	Bolivia	86	Madagascar		Guinea		
42	Hungary	87	Guatemala	131	Bangladesh		
	United Arab Emirates		Malaysia		Kazakhstan		
		89	Ivory Coast		Yemen		

Source: *Asian Wall Street Journal*, January 9, 2004, p. A7.

It should be noted that, as a result of the implementation of the open-door policy, the number of Chinese export-import firms has increased significantly and that many now compete fiercely with the established Hong Kong players. However, most of the mainland operators are state-owned enterprises hampered by administrative controls. In the very long run, when economic reform reaches a more mature stage, efficient/profit-maximizing Chinese trading firms may emerge. Nevertheless, given economies of scale and economies of agglomeration in the provision of intermediary services, Hong Kong's status as the pre-eminent supplier of such services in the Greater China context should not be at risk, absent serious exogenous shocks.<sup>13</sup>

Even in the very long run, Shanghai is the only Chinese city capable of challenging Hong Kong's position as a centre of intermediation. Still, its communication and transport infrastructure is not of a comparable standard and its service industries are rudimentary. China's commodity trade is shifting toward less bulky and heterogeneous goods and thus boosting the demand for Hong Kong-style intermediation. This trend is reinforced by the development of services trade and acceleration of investment flows, areas characterized by relatively high product heterogeneity. By the same token, the secular decline in transportation costs implies that the locational advantage of Shanghai is becoming less important, while proficiency in trading skills is assuming greater significance.<sup>14</sup>

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



The Chinese themselves are continuing to establish trading companies in Hong Kong, signalling that they recognize the territory's strengths as a centre of intermediation. Some local players regard the build-up ambivalently because this inevitably leads to further intensification of competitive pressures. However, from a broad macro perspective, the situation should not be viewed as a "zero-sum game" due to positive spillovers resulting from economies of agglomeration: provided they act according to the "rules", the new entrants in fact enhance Hong Kong's status as a regional leader in the supply of intermediary services.<sup>15</sup>

Hong Kong has been aptly described as a "global metropolis for Asia".<sup>16</sup> The portrayal rightly suggests that the scope of intermediation is not confined to Greater China. Rather, the territory serves as a meeting place for *Asian* and foreign social networks of capital. Further, the trade linkages embedded in its domestic exports, imports, and re-exports are global in nature. Its role as an emporium of finance, circulator of financial capital, risk control hub, and corporate management centre also has wide international ramifications, placing it functionally on a par with global metropolises/providers of intermediary services such as London and New York.<sup>17</sup>

A tightening of the constitutional framework along conservative lines could arguably undermine this position at a considerable cost to Hong Kong, China, other parts of Asia, and the entire international community. The reason lies in the fact that high-level regional/worldwide intermediation cannot proceed smoothly in an environment where economic agents face hurdles which tangibly constrain their freedom of action. To control the exchange of commodity and financial capital, for example, intermediaries must acquire public and specialized information about demand and supply conditions in the markets in which they operate. Any delays in receipt and transmission of key messages are potentially very disruptive because intermediary profitability often hinges on being the first to make exchanges.<sup>18</sup>

By the same token, intermediation cannot flourish unless rooted in trust. Otherwise, it may be prohibitively costly to monitor risks stemming from opportunistic and malfeasant behaviour of parties involved in the process. Since such risks are common and serious, demand for the norm of trustworthiness among intermediaries is exceptionally strong. Indeed, this explains their

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

<sup>16</sup> MEYER, *op. cit.*

<sup>17</sup> *Ibid.*; Y.C. YAO, HONG KONG AS AN INTERNATIONAL FINANCIAL CENTER. (Hong Kong: City University Press, 1997); Y.C. JAO, THE ASIAN FINANCIAL CRISIS AND THE ORDEAL OF HONG KONG. (Westport: Quorum, 2001).

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

preference for relying on networks that revolve around families, ethnic groups, and religious communities, whose members share beliefs and values and participate in relations that extend beyond the business domain and reach across nations. The high level of trust permeating these networks can be considered as a form of social capital that confers significant advantages on insiders.<sup>19</sup>

A shift in an authoritarian direction on the constitutional front might thus have distinctly adverse implications for Hong Kong. A city driven by fear (of subversion and secession) cannot function as a dynamic centre of intermediation because of the element of uncertainty injected into information management (compounded by concerns about possible violations of “state secrecy” laws)<sup>20</sup> and the undoubtedly corrosive effect on exchanges governed by the norm of trustworthiness, as well as the carefully nurtured social relationships underlying them. To paraphrase Fukuyama, a global metropolis propelled by intermediaries of capital needs to be sustained by a “culture of trust”, rather than one of paranoia.<sup>21</sup>

Conservative constitutional adjustment may also aggravate the “crisis of legitimacy” and exacerbate the problem of “political decay” in Hong Kong. The origins of the former can be traced to rising democratic aspirations in a complex urban environment, where the emerging social structure is skewed toward the middle class, against the backdrop of infringements on local autonomy by the new sovereign (and selectively its predecessor, in the twilight period of colonial rule). The lack of sensitivity displayed vis-à-vis these aspirations is a source of widespread cynicism that manifests itself directly and indirectly regarding government institutions and the policy establishment presiding over them.<sup>22</sup>

Political decay is another symptom of “reverse democratisation”. It takes the form of a material deterioration in government performance as evidenced,

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<sup>19</sup> *Ibid.*

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

<sup>21</sup> F. FUKUYAMA, TRUST. (London: Penguin, 1995); F. FUKUYAMA, THE GREAT DISRUPTION. (New York: Free Press, 1999).

<sup>22</sup> I. SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG. (Hong Kong: Oxford University Press, 1989); J.T.M. Lam, *The Political Culture of Voters*, in B. Leung and I. Wong (eds.), 25 YEARS OF SOCIAL AND ECONOMIC DEVELOPMENT IN HONG KONG. (Hong Kong University Press, Hong Kong, 1994), pp. 236-251; I. Scott, *Political Transformation in Hong Kong*, in A.Y. So and R.Y.W. Kwok (eds.), HONG KONG-GUANGDONG LINK. (Hong Kong University Press, Hong Kong, 1995), pp. 189-223; C.Y. Cheung, *Legitimacy, Legitimacy Crisis, and Transitional Politics in Hong Kong*, in B. Leung and J. Cheng (eds.), HONG KONG SAR. (Chinese University Press, Hong Kong, 1997), pp. 3-24; I. SCOTT, INSTITUTIONAL CHANGE AND THE POLITICAL TRANSITION IN HONG KONG (London: Macmillan, 1998); I. Scott, *The Disarticulation of Hong Kong's Post-Handover Political System*, 43 CHINA JOURNAL, 29-53 (January, 2000).

*inter alia*, by the adoption of a Third World-style personal rule at top echelons of the executive branch, reliance on patron-client networks, politicisation of the judiciary, cavalier attitude toward freedoms in general and civil liberties in particular, indifference to public opinion, poor response to demands emanating from the grass roots, erratic policy formulation and implementation, symbolic manipulation, and a propensity to play one segment of the community against another.<sup>23</sup> Needless to say, a crisis of legitimacy and political decay are hardly conducive to social stability. And a potentially unstable social system, in turn, cannot serve on a long-term basis as a viable platform for the development of sophisticated intermediary services. As the editors of the *South China Morning Post*, not known for their liberal views, have opined: “Our freedoms are precious, they underpin the very fabric of our lives... Hong Kong’s future as a unique place in Asia is at stake.”<sup>24</sup>

## 2 A GAME OF (MIS)TRUST

The Joint Declaration offered a reassuring vision of a liberal constitutional government for Hong Kong, commensurate with its status as a thriving global metropolis and consistent with the aspirations of its increasingly self-assured, yet anxious, populace. The “one country, two systems” concept underlying it provided a seemingly viable institutional framework within which the capitalist enclave could effectively, albeit not necessarily in an unfettered fashion, pursue this vision to its logical conclusion while being politically absorbed into a socialist state slow to jettison deeply-entrenched authoritarian practices. The journey was expected to culminate in the creation of a robust liberal constitutional order resting on three pillars: a fully-fledged democracy, unwavering commitment to human rights, and scrupulous adherence to the rule of law.<sup>25</sup>

The progressive vision embodied in the Joint Declaration has subsequently been diluted, although neither drastically nor harshly. The Basic Law, the constitutional cornerstone of the post-1997 system, for example, cannot be portrayed as the incarnation of the democratic spirit in its liberal form. The document paves the way for a more representative and accountable government, but the evolution toward this goal is distinctly slow and possibly uncertain. Indeed, it is legitimate to argue that the Basic Law reflects greater concern about

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<sup>23</sup> S.H. LO, *GOVERNING HONG KONG*. (New York: Nova, 2002).

<sup>24</sup> June 9, 2003, p. A10.

<sup>25</sup> R. MUSHKAT, *op. cit.*

the “costs” of democratisation, particularly abrupt in nature, than those stemming from overly cautious adaptation.<sup>26</sup> Electoral laws introduced following the transfer of sovereignty obscure the picture further.<sup>27</sup>

Post-1997 constitutional mechanisms for the protection of human rights may also fall short of the Joint Declaration ideals. Basic Law stipulations regarding the need for legislative action to address the “threats” of subversion and sedition (Article 23), which have now come to haunt Hong Kong, and allowing mainland interference during periods of “turmoil” (Article 18) are notable examples. By the same token, key liberal laws promulgated before the transfer of sovereignty, following the 1991 enactment of the Bill of Rights, were set aside unceremoniously. The legislative measures offered as an alternative incorporate the notion of national security into the public order and societies laws, weaken labour law safeguards, and reverse a host of legal reforms spurred by the Bill of Rights.<sup>28</sup>

Insofar as the rule of law is concerned, the gap between pre-1997 expectations and subsequent reality has not widened to the same extent, but the picture is not entirely reassuring. On the positive side, the constitutional judicial review of local legislation for conformity to the Basic Law appears to have taken root. In a landmark decision, the Hong Kong Court of Final Appeal declared that it had the power to examine both local and National People’s Congress (NPC) legislative acts in terms of this yardstick.<sup>29</sup> On the negative side, mainland officials and pro-China local elements inveighed against the judgment, claiming that the Court was trying to put itself above the NPC. Indeed, they insistently called for the ruling to be “rectified”.<sup>30</sup>

Unsurprisingly, the Hong Kong Government responded to the challenge by filing a motion to “clarify” the decision regarding this matter. The Court then issued a clarifying judgment that merely restated its original ruling, but affirmed

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<sup>26</sup> Davis, *Constitutionalism and Hong Kong’s Future*, *op. cit.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal Nos. 14, 15, and 16 of 1998, January 29, 1999. The case, combining three test cases on appeal, involved the right of abode of mainland born children of Hong Kong residents. Article 24(3) of the Basic Law placed such children unequivocally in categories of persons entitled to permanent residence in the territory. The lower courts had upheld legislation restricting the entry of such children subject to a lengthy certificate of entitlement and exit permit process on the mainland. These provisions and others relating to children born out of wedlock and imposing retroactivity of the laws were found unconstitutional. The Court upheld the constitutionality of the NPC created Provisional Legislature, a legislative body that operated during the first year following the transfer of sovereignty and had enacted the legislation in question. *Ibid.*

<sup>30</sup> *Ibid.*

that it was not above the NPC and could not question “the authority of the NPC and its Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein”.<sup>31</sup> The Court’s stance throughout this disturbing episode bodes well for the rule of law in Hong Kong. Nevertheless, the intense pressure emanating from mainland and sympathetic local sources (including the Government), which has since periodically resurfaced in one form or another, suggests that the “war”, as distinct from the “battle”, may have not necessarily been won.<sup>32</sup>

Democratisation, particularly pace thereof, is not an entirely uncontroversial issue in Hong Kong. Some serious observers of the local political scene argue that the territory needs to strike a balance between “electoral representation” and “authoritarian decisiveness” rather than pursue the former goal with a single-minded determination. This unfashionable view, yet one that cannot be dismissed altogether, reflects concerns about the potential impact on policy effectiveness in a quintessentially capitalist setting of providing universal franchise in a premature fashion from a socio-economic perspective. Optimal timing is deemed to be crucial to the success of the enterprise (which is akin to embracing “gradualism”) because of the perception that Hong Kong, its veneer of political conservatism notwithstanding, remains a metropolis where affluence is not widely shared and populist sentiment may manifest itself in both a powerful and disruptive form.<sup>33</sup>

While the gulf between the advocates of rapid political reform and proponents of executive-led government (i.e., status quo) remains wide, there is less disagreement regarding the need to safeguard human rights and the rule of law.<sup>34</sup> The steps taken by the authorities in the opposite direction, culminating in the unveiling of the new national security legislation, are thus considered to be fundamentally inconsistent with the public interest, as well as highly divisive. The government has since partially retreated in the face of an unprecedented grass-roots protest. It has initially offered to amend the bill (Table 4) and has subsequently decided to shelve it temporarily on largely opportunistic grounds (in order to minimize short-term electoral damage to pro-China organized political forces). However, it is reasonable to assume that the gap between its blueprint and the aspirations of parties committed to liberal constitutional principles (Table 5) is unlikely to narrow dramatically.

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<sup>31</sup> Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal Nos 14, 15, and 16 of 1998, February 26, 1999. *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> W.H. Overholt, *Hong Kong*, 12 JOURNAL OF DEMOCRACY, 3-18 (October, 2001).

<sup>34</sup> *Ibid.*

Table 4

**A Bill Too Far**

It is now all but certain that within the next few days Hong Kong will have a new internal-security law which, were it a democracy, could never be passed. Fortunately for the government in Beijing and its hand-picked chief executive in Hong Kong, the bumbling and deeply unpopular Tung Chee-hwa, it is not a democracy. Only 24 of the 60 seats in Hong Kong's Legislative Council are directly elected.

The bill is not wholly bad, and it is to the government's credit that it has paid some attention since its original outline proposals were published for comment last year. In some respects it even marks an improvement on the existing colonial laws: the crimes of treason and sedition, for instance, are now properly defined, in terms of the commission of violence. On the other hand, whole new crimes, principally those of "sub-ersion" and secession", the former already used with gay abandon against dissidents in China, have been introduced.

There are plenty of other complaints. One section of the bill provides a mechanism to ban any organization in Hong Kong that is deemed to be subordinate to one banned in China on security grounds – which could easily be used against the religious group Falun Gong, or perhaps against the Hong Kong Alliance, which organized protests in China after the Tiananmen Square massacre. Also included is a clause that would make it an offence for newspapers to publish material gleaned from secret state documents, without any countervailing public-interest defence. Though abuse of any of these innovations seems unlikely in the current climate, they would be most useful to a compliant leader in Hong Kong in the event of a future political upheaval in China.

All these defects, coupled no doubt with a general sense of dissatisfaction, drew close to 500,000 people on to the streets of Hong Kong to protest on July 1<sup>st</sup> (see page 25). It was by far the largest demonstration seen there since 1989, when the Tiananmen massacre brought out a million, forever shattering the myth that Hong Kong cares only about business. Hong Kong's Democrats have tabled amendments to correct these abuses. They will be debated next week. But given Legco's composition, they have virtually no chance of success.

The bill, however, is not just bad in some of its particulars: it is bad in principle, too. Even if the amendments the Democrats would like to see were miraculously passed, its timing is hopeless. Hong Kong's economy has suffered a treble blow in recent years, from the Asian financial crisis, the post-September 11<sup>th</sup> slowdown and, more lately, SARS. It is a fragile creature that could do without self-inflicted wounds of this kind.

The great mystery in all this is just why China ever embarked on such a course. Apart from anything else, it is having a powerful effect on Taiwan's interest in any form of reunification with the mainland. Hong Kong and the mainland have lived together on the whole pretty happily over the past six years: for the most part, Hong Kong's Democrats have kept their politics local. It is true that the security bill is a requirement laid on the Hong Kong government by Article 23 of the Basic Law, Hong Kong's constitution. But until last year, the whole matter had been quietly neglected.

If the bill does go through unaltered, one casualty is sure to be Hu Jintao's

reputation in the West. On June 19<sup>th</sup>, President Bush's spokesman explicitly called for the bill to be modified, and implicitly threatened that, if it is not, there may be economic consequences. Mr Hu, who has been China's president for the past four months, though leader of its Communist Party for eight, has sometimes been viewed as a potential if cautious reformer. Encouragingly, he has been more open than would have been possible in the past about a recent submarine accident, and he dismissed a minister and a mayor over China's flat-footed and secretive response to SARS. But by allowing the tame government in Hong Kong to press ahead with the security bill, and by failing in his eagerly awaited speech of July 1<sup>st</sup> to support even the most limited of political reforms, he has now disappointed the world twice.

Source: *The Economist*, July 5, 2003, pp. 11-12.

Table 5

**Spot The Difference**

What the government proposes	Amendments proposed by pro-democracy lawmakers
<b>Treason</b>	
Joining foreign armed forces at war with China, intending to overthrow, intimidate or compel the central government to change its policies or measures	"Intimidate" and "compel the central government to change its policies or measures" should be deleted because they are too vague and broad
Instigating foreign armed forces to invade China	Speech, words, gestures or expression should be excluded
Assisting public enemies at war with China by doing anything to prejudice China's position in the war	Anti-war protests, medical and humanitarian assistance and actions to promote peace should be excluded
<b>Subversion</b>	
Disestablishing the basic system of China as established by the constitution, overthrowing or intimidating the central government by using force, serious criminal means that seriously endanger the stability of China or engaging in war	"Disestablish" and "intimidate" should be deleted as too vague. Intent to overthrow the government should be proven "Serious criminal means" should be "intentional acts of violence" and should exclude advocacy, protest and existing criminal offences that carry a maximum seven-year prison term
<b>Secession</b>	
Withdrawing any part of China from its	"Intent" should be added and the

sovereignty by using force, serious criminal means that endanger the territorial integrity or engaging in war	offence clarified. Anything done in respect of a state of separation existing at the time the law is enacted should not be an offence
<b>Sedition</b>	
Intentionally inciting others to commit treason, subversion or secession or to engage in HK or elsewhere in violent public disorder that would seriously endanger China's stability. Incitement should make it likely for a person to be induced to commit the crime	The incitement should make it likely for a person to "immediately" commit the crime. The penalty should be reduced from life imprisonment to seven years for inciting treason, subversion and secession and to five years for inciting violent public disorder
Handling seditious publications likely to induce a person to commit the above offences with intent to incite them, including publishing, selling, distributing, displaying, importing or exporting them	Handling seditious publications should not be an offence at all
It is not an offence to show the central or HK government has been misled or is mistaken, to point out errors, to persuade the public to try to lawfully alter or remove any matter in China or HK or to draw attention to a matter	Engaging in reporting China or Hong Kong news should not be covered under the sedition law
<b>Theft of State Secrets</b>	
Unlawful and damaging disclosure by a former or current public servant or illegal access to information relating to HK affairs that fall within the mainland's responsibility if the disclosure endangers or would be likely to endanger national security	Should not be used to protect a government from embarrassment or conceal wrongdoing and should not be an offence if the information has already been published or is available in the public domain
Public interest is a defence if the disclosure reveals unlawful activity, abuse of power, serious neglect of duty or other serious misconduct by public officials or a serious threat to public order, security, health or safety and does not exceed the extent necessary for revealing the matter	Public interest should be a defence with no strings attached
<b>Proscription of groups</b>	
The secretary for security may ban groups if she reasonably believes it necessary for national security. If their objective is to engage in or are trying to commit the above offences. Membership, aiding or attending meetings of	The proscription offence should be deleted



banned groups is an offence. Members may appeal the decision in court. The secretary may make regulations for the appeal and this appeal may be held in the absence of the appellant and lawyer if necessary	
<b>Others</b>	
Chinese nationals who are HK permanent residents who commit these acts outside HK will be covered	They should not be covered. Time limits and penalties are too high and several minor technical amendments needed

Source: *South China Morning Post*, July 7, 2003, p. 3.

The ultimate form of the national security legislation is highly relevant from a short-term policy perspective. The medium-term outlook, on the other hand, is essentially a foregone conclusion, irrespective of the outcome of the current manoeuvring. The reason lies in the fact that the shape of China's strategy with respect to constitutional evolution in Hong Kong appears to have basically crystallized. The ill-fated bill is merely a manifestation, albeit a distinctly unpalatable one, of this strategy which seems directed toward shifting the balance, even if not decisively for the foreseeable future, from the liberal to the authoritarian end of the constitutional spectrum.<sup>35</sup> It is useful to explore the thrust and implications of the strategic posture adopted by the Chinese leadership in that regard, and implemented through a variety of channels, within a politico-economic/game-theoretic framework.

Hong Kong's constitutional predicament, resulting from a clash between authoritarian forces (represented by China and its local "proxies") and their liberal counterparts (spearheaded by middle class professionals but not confined to this narrow stratum), falls into a category of "games" (situations, in common parlance) known as "social dilemmas". The latter refer to circumstances where "players" (individuals, groups, organizations, etc.) make choices involving a high degree of interdependence. The distinguishing characteristic of such games is that if each player in a one-shot or finitely repeated process of interaction selects strategies on the presently accepted, "rational-choice" model of decision making, all players will realize a payoff at an equilibrium outcome of less value than one or more of the available alternatives (i.e., a "sub-optimal" configuration will ensue).<sup>36</sup>

<sup>35</sup> Davis, *Constitutionalism and Hong Kong's Future*, *op. cit.*

<sup>36</sup> E. OSTROM AND J. WALKER, *TRUST AND RECIPROCITY*. (New York: Russell Sage Foundation, 2003).

The existence of at least one outcome that can yield superior returns for all participants is the source of the “dilemma”. This outcome is attainable, but to secure it the players need to trust one another. Where that is not the case, rational participants making interdependent choices are not expected to gravitate toward this “Pareto-optimal” configuration (“Pareto efficiency” is achieved when no party can be made better off without another party being made worse off). A conflict is thereby posed between acting in an individually rational fashion and gaining sufficient trust to obtain the optimal outcome for the group. The problem of “collective action” raised by social dilemmas is to discover a way to avoid “Pareto-inferior” configurations and move closer to the optimum.<sup>37</sup>

Social dilemmas abound in human affairs. They have been examined by biologists, economists, evolutionary psychologists, game theorists, historians, legal scholars, mathematicians, philosophers, political scientists, sociologists and social psychologists. The problem of providing, in the absence of voluntary social cooperation (or incentives to engage in socially-minded behaviour), essential “public goods” – including clean air, national defence, and safe streets – is one example. Another can be found in the difficulties stemming from socially damaging action by appropriators “selfishly” using (or, to be exact, “overusing”) an “open-access common-pool resource”, such as the ocean fisheries, rather than jointly harvesting it at a rate that would maximize benefits to the group as a whole (or the sustainability of the resource).<sup>38</sup>

The best-known form of social dilemma in the “prisoner’s dilemma”. It is an imaginary construct in which two partners in crime, separated from each other in prison, are individually motivated to defect (that is, to inform the prosecutor about the other prisoner’s involvement in the crime). The partner who defects will improve his or her outcome, earning release or a diminished sentence, provided the other does not. If the two partners defect, both will face the maximum punishment for the crime. On the other hand, if the two partners remain silent, the penalty for both will be relatively mild (the optimal configuration from their perspective in this context).<sup>39</sup>

Social dilemmas feature increasingly in legal analysis<sup>40</sup> but seldom at the constitutional level. The United States qualifies as the exception to the norm, albeit on a limited scale. A notable example is the potentially harmful inter-state competition for a share of the national pie. The framers of the American constitution did not assume that altruism would govern commercial relations.

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> D.G. BAIRD, R.H. GERTNER AND R.C. PIKER, *GAME THEORY AND THE LAW*. (Cambridge: Harvard University Press, 1994).

When it comes to business, asserted Hamilton, “men are ambitious, vindictive, and rapacious”.<sup>41</sup> Legislators representing parochial (i.e., state) interests might be expected to act accordingly, undermining “the principle of the unitary national market”.<sup>42</sup> As Hamilton opined, “[e]ach state, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent”.<sup>43</sup>

To forestall such a divisive outcome, the Supreme Court has interpreted the Commerce Clause to include an implied Dormant Commerce Clause. Under the latter, states may not, in their dealings with each other, engage in protectionism – that is, take initiatives “whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within”.<sup>44</sup> It would not be unreasonable for the federal government to act in such a manner against a foreign country, yet there is no foreign entity among the several states. They are supposed to pass laws for their own benefit but not detrimental to the national interest. Their propensity to deviate from this pattern is indicative of the fact that federal-state relations, and the Dormant Commerce Clause, reflect tensions similar to those that manifest themselves in the context of the prisoner’s dilemma.<sup>45</sup>

Social dilemmas loom larger in the study of international relations than constitutional affairs. Trust, mistrust, or a combination of the two, is normally a key factor in the analytical equation. Typically, structural realists veer toward mistrust, arguing that there is “little room for trust among states” because intentions are difficult to discern and hence fear “can never be reduced to a trivial level”.<sup>46</sup> Defence realists are less unequivocal in this respect, yet they too acknowledge the persistence of security dilemmas, which are hypothesized to compel states to arm against each other even though the protagonists would prefer mutual cooperation. At the heart of a security dilemma is mistrust, a fear that the other side is malevolently inclined and bound to exploit one’s cooperation rather than reciprocate it.<sup>47</sup>

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<sup>41</sup> M.I. MEYERSON, *POLITICAL NUMERACY*. (New York: Norton, 2002), p. 115.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, p. 116.

<sup>45</sup> *Ibid.*

<sup>46</sup> A. Kydd, *Trust, Reassurance, and Cooperation*, 54 *INTERNATIONAL ORGANIZATION*, 325 (Spring, 2000).

<sup>47</sup> *Ibid.*

The US-Soviet arms race, a major element in the twentieth-century international political dynamics, has been dissected within this framework, and so has a number of other, less prominent, international conflicts. Specifically, it has been suggested that such escalations may be viewed as “perceptual dilemmas” with three characteristics: each side most prefers mutual disarmament, each side least prefers unilateral disarmament, and each side thinks the other actually prefers superiority to mutual agreement (incorrectly, as the first assumption makes clear). Empirical data have been adduced from various settings to lend support to this thesis and the conflict management strategies derived from it.<sup>48</sup>

Social dilemmas that revolve around trust have at least three standard components and two, often implicit ones. First, the relationship involves a truster, a trusted, and some matter that is at stake in the trust, so that it is a trilateral structure. Second, the trusted has some incentive to be trustworthy with respect to the matter at issue in the truster’s trust. Third, this incentive might be trumped by other considerations, so that there is some risk of default by the trusted. The two, often implicit components are the claims that trust is cognitive and that it is not a primitive term. To say that trust is cognitive is to say that our trust in another is essentially a matter of relevant knowledge about the other – in particular, knowledge of reasons the other has to be trustworthy. To say that “trust” is not a primitive term means that it must be reducible to other terms, including the terms included in these standard components.<sup>49</sup>

Perhaps the best-known and widely influential analysis of trust in the social dilemma context has been provided by Coleman, who has constructed a game theoretic framework with two actors, a truster and a trusted. He has opted for an illustration featuring one farmer faced with the decision whether to help another farmer bale hay. The first farmer has not received a favour from the second and has no positive reassurance that the second will return the favour currently being contemplated. Later on, the first farmer will seek a favour from the second farmer, who will then decide whether to reciprocate the first farmer’s earlier cooperation or to exploit it by not cooperating. The crucial dilemma for the first farmer lies in the fact that he does not know if the second farmer is trustworthy or not – that is, whether the second farmer is inclined to return favours when needed.<sup>50</sup>

This scenario can be formalized in a simple incomplete information game (Figure 1). Nature first decides whether to make player 2 trustworthy or

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<sup>48</sup> *Ibid.*

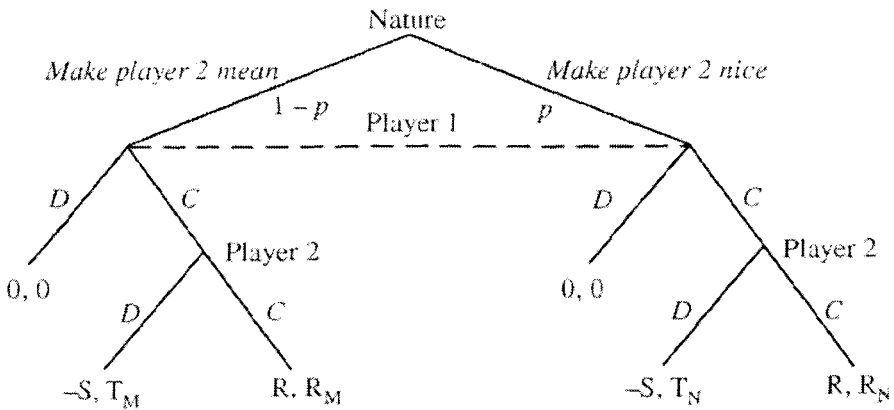
<sup>49</sup> OSTROM AND WALKER, *op. cit.*

<sup>50</sup> J. S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY*. (Cambridge: The Belknap Press of Harvard University Press, 1990).

untrustworthy. It is convenient to refer to the trustworthy player who returns favours as “nice” and the untrustworthy player who does not as “mean.” The main difference between the types is that the nice one prefers to reciprocate cooperation, whereas the mean one does not. In technical parlance, this implies that the nice type’s payoff for cooperation,  $R_N$  (symbolizing “reward” for cooperation), is higher than his payoff for exploiting the other side’s cooperation,  $T_N$  (symbolizing temptation to defect). For the mean type, the temptation to defect,  $T_M$ , exceeds the reward for cooperation,  $R_M$ .<sup>51</sup>

Figure 1

**The Trust game**



Adapted from: Coleman, *Foundations of Social Theory*.

Nature makes player 2 nice with probability  $p$ , choosing the right branch of the game tree, and mean with probability  $1 - p$ , on the left branch of the tree. As indicated by the information set linking player 1’s decision nodes, player 1 is not informed of what type of player is being faced. However, the probability that player 2 is nice,  $p$ , is known to player 1 and can be thought of as player 1’s level of trust. The greater  $p$  is, the more certain player 1 is that player 2 is trustworthy, and so the greater is player’s 1’s level of trust for player 2.<sup>52</sup>

This prior level of trust may be a product of several factors. In international settings, for example, a state which has had previous interactions with another state featuring a high degree of hostility use adopt a low level of  $p$  in considering its strategic options. France’s distrust of Germany in the

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

immediate post-World War II era, which prompted it to oppose strongly German rearmament, was thus a natural result of the French experience of being invaded by Germany three times in the past seventy years.<sup>53</sup>

The prior level of trust could also be a reflection of generalized experience with many other states. If a state found in the course of its interactions that most states in its neighbourhood honour their trade commitments, for instance, it may then have a generally trusting prior belief, or high  $p$ , when it commences a trade relationship with a new, more distant trading partner. By the same token, the prior could be influenced by theories or hypotheses about state behaviour as they apply to specific cases. A democracy that regards political systems like its own as generally more peaceful, at least toward other democracies, may therefore approach a relationship with a new democracy with a greater level of trust than vis-à-vis an authoritarian state. Accordingly, while most new revolutionary regimes are viewed with fear and suspicion, which may in some circumstances lead to war, the new regimes in Eastern Europe that emerged circa 1989 were welcomed by the Western democracies because their revolutionary transformations propelled them in the direction of Western norms.<sup>54</sup>

Following Nature's choice, player 1 has the first move and may cooperate or defect. If player 1 decides to cooperate, player 2 has the option to reciprocate that cooperation or exploit it by defecting. If player 1 does not decide to cooperate, the game ends and the payoffs are zero for both players. If player 1 cooperates but player 2 does not, player 1 gets the sucker's payoff,  $-S$ , and player 2 gets the temptation to defect,  $T_N$  if nice or  $T_M$  if mean. The game then ends.<sup>55</sup>

What are the equilibria of the trust game? Backward induction shows that on the right branch where player 2 is nice, player 2 will cooperate, and on the left branch where player 2 is mean, player 2 will defect. Given that player 1 values the reward for mutual cooperation over mutual non-cooperation,  $R > 0$ , player 1 has an incentive to cooperate if player 1 thinks player 2 is likely enough to be nice. The payoff for cooperation for player 1 is  $pR + (1 - p)(-S)$ , and this will be greater than zero, the payoff for defecting, if  $p$  (the level of trust player 1 has for player 2) exceeds a critical threshold  $p^*$  defined in the following equation:<sup>56</sup>

<sup>53</sup> Kydd, *op. cit.*

<sup>54</sup> *Op. cit.*

<sup>55</sup> COLEMAN, *op. cit.*

<sup>56</sup> *Ibid.*

$$p^* = \frac{S}{R + S}$$

If  $p > p^*$ , player 1 is trusting enough of player 2 to cooperate. If  $p < p^*$ , then player 1 is too mistrustful to cooperate and will defect. Thus  $p^*$  is a critical value for player 1 and defines player 1's attitude toward the risk of being exploited in a trust relationship. The greater  $p^*$  is, the more trusting player 1 has to be, to be willing to cooperate in a trust game. The lower  $p^*$  is, the greater the risk of being exploited player 1 is willing to run in order to secure mutual cooperation.<sup>57</sup>

The values of the payoffs affect this critical value of trust in a straightforward way. The worse the sucker's payoff, the higher the critical value will be. That is, as the payoff for being exploited for player 1 decreases, the more trusting player 1 must be in order to be willing to cooperate. Increasing the reward for mutual cooperation,  $R$ , has the opposite effect: it lowers the threshold for cooperation. The greater the rewards for mutual cooperation, the greater the risk player 1 will be willing to run in an effort to secure them.<sup>58</sup>

In international settings, states that place a higher value on the rewards of mutual cooperation, or are less adversely affected if their overtures go unrequited, will thus have a lower  $p^*$  and will be willing to cooperate at lower levels of trust. A lower value on mutual cooperation or a greater sensitivity to the pain of being exploited will make for a higher  $p^*$ , producing cooperation only for higher levels of trust, and defection otherwise.<sup>59</sup>

The trust game is a convenient way to formulate the problem of mistrust rigorously, and it confirms some intuitive conceptions about how the interaction between the level of trust and the payoff affect the possibility of cooperation. Conflict arises because mistrust becomes too high, and there is a critical threshold of trust,  $p^*$ , above which the rational course of action is to cooperate, and below which the rational course of action is to defect. The model seems to validate the traditional structural realist gloom about mistrust and cooperation in international relations.<sup>60</sup>

The two-party relationship, as portrayed thus far, is limited in nature because the players "react" to each other in a static fashion, but they do not "interact" in a dynamic manner. To qualify as a game of *mutual* trust in the true sense of the term, the model should feature interaction involving a long sequence

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*; R. JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS. (Princeton: Princeton University Press, 1976); R.M. AXELROD, THE EVOLUTION OF COOPERATION. (New York: Basic Books, 1984).

of “exchanges” between the parties. This takes the form of an iterated prisoner’s dilemma with, perhaps, some variation in the stakes at each exchange.<sup>61</sup>

In real life, it is not likely to be a game of simultaneous moves. Normally, it is one of sequential moves, in which a player takes the risk of doing something for another today in the expectation that the latter will reciprocate in some way tomorrow. The key incentive that one faces in an exchange in which one is trusted by another party is the potential benefit from continuing the series of interactions. The sanction that can be invoked in such circumstances is to withdraw from further interaction. In some contexts, this is a substantial sanction because there might be no suitable party for future interactions.<sup>62</sup>

This politico-economic/game-theoretic model provides an effective framework for explaining how China and its local proxies (player 1) have sown the seeds of a constitutional crisis in Hong Kong. Chinese foreign policy has traditionally been characterized by a low level of trust vis-à-vis other parties in the international arena. More often than not, the strategic choice, to all intents and purposes, has been to “defect” rather than “cooperate”.<sup>63</sup> Hong Kong has not been the exception to the norm, in the political (as distinct from economic) sense of the term. Liberal forces (player 2) – advocating (in an orderly fashion) democratic reform, protection of human rights, and commitment to the rule of law – have been assumed to be “mean”.<sup>64</sup>

These forces have consequently been isolated at the policy level, unable to participate meaningfully in the strategy formulation process and influence the content of major decisions. The meanness has thus become a “self-fulfilling prophecy”. Withdrawal from the game, or non-cooperation, has been the inevitable response. The tactics have included not just grass-roots mobilization, with anti-establishment (and hence China) overtones, but also appeals for support in the West. The latter have reinforced the perception (“mistrust”) in Beijing that the “battle” is being waged by “subversive” elements (initially pro-British, and now anti-communist) whose ultimate goal is to undermine the present regime on the mainland.<sup>65</sup>

This game of mistrust has culminated in the massive protest against the proposed national security legislation. The unprecedented demonstration of discontent by the public has been a reaction to the policy style adopted by the government throughout this episode, and in broadly similar circumstances in the

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<sup>61</sup> OSTROM AND WALKER, *op. cit.*

<sup>62</sup> *Ibid.*

<sup>63</sup> D. ROY, CHINA’S FOREIGN POLICY. (Lanham: Rowman and Littlefield, 1998)

<sup>64</sup> LO, *op. cit.*

<sup>65</sup> *Ibid.*



past, as well as the thrust of the new initiative. The strategy of exclusion, of keeping liberal elements (or, for that matter, any party not fully trusted by entrenched pro-China elites) at an arm's length, has produced a backlash whose powerful reverberations seriously threaten Hong Kong's constitutional – indeed, possibly overall – stability.<sup>66</sup>

The challenge lies in transforming the game of mistrust into one of trust, or at least shifting tangibly from one end of the spectrum to the other. The literature on conflict management is not short of insights that might prove useful in this respect. Most of them revolve around the notion of “reassurance”, which in practice takes the form of trust-building gestures initiated by one or both of the players in an effort to encourage cooperation over time. The underlying assumption is that reassurance of the right kind, and at the appropriate juncture, can elicit a favourable response from “nice” types.<sup>67</sup>

There is certainly scope for employing this tactic as part of a well-coordinated strategy designed to defuse the constitutional crisis in Hong Kong. The government in particular could adopt a more enlightened approach in dealing with its “adversaries”. Rather than driving the process in a heavy-handed top-down fashion, with the blessing of its “controllers” in Beijing and on the ground, it ought to engage them in a proper dialogue and display genuine willingness to pursue the exchanges in a constructive manner.<sup>68</sup>

That being said, the crisis has arguably reached a point whereby incremental changes in style and substance may prove insufficient to contain it. In the parlance of game theory, the government probably has no choice but to resort to a very strong form of reassurance featuring “costly signalling”.<sup>69</sup> In other words, the gestures offered should involve substantial sacrifices on its part. Specifically, the recycled national security bill ought to pose no palpable threat to human rights, the rule of law, and Hong Kong's open-society architecture.

## CONCLUSION

Pre-1997 anxieties regarding the political implications of the transfer of sovereignty from Britain to China have not really been validated by subsequent developments. Post-1997 Hong Kong may have lost some of its previous economic luster, but on the face of it the institutional fabric has remained largely

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<sup>66</sup> Chen, *op. cit.*

<sup>67</sup> JERVIS, *op. cit.*; AXELROD, *op. cit.*; Kydd, *op. cit.*; OSTROM AND WALKER, *op. cit.*

<sup>68</sup> Chen, *op. cit.*

<sup>69</sup> Kydd, *op. cit.*; M.A. Spence, *Job Market Signaling*, 87 QUARTERLY JOURNAL OF ECONOMICS, 355-374 (August 1973).

intact. Nevertheless, a subtle shift in a more authoritarian direction has undoubtedly taken place. Recently, there has been a worrisome acceleration in the trend, as evidenced by the unveiling of the proposed national security legislation.

It has become apparent that the policy establishment has decided to reshape the institutional order in a way that is inconsistent with the letter and spirit of the Joint Declaration. The resultant muscle flexing by an increasingly disaffected grass-roots community has plunged Hong Kong into a deep constitutional crisis. From an analytical perspective, this sequence of events can be described as highly predictable. It is also difficult to avoid the conclusion that, to break the vicious circle, the government may have to change radically its *modus operandi* and seriously rethink its stance with respect to constitutional reform in general and this controversial issue in particular.