

Structural Impediments to Environmental Justice

By James D. Seymour

Why has the government of the Hong Kong Special Administrative Region done so little to protect the environment? There are many ways to go about answering that question. Here we take a political science approach; more specifically, one that examines the structure of the polity.

Functional Constituencies

Hong Kong's laws are ratified by the [Legislative Council](#). Because its powers to legislate are severely circumscribed (with the [Basic Law](#) placing the initiative largely in the hands of the executive), the body rarely *makes* law.¹ Still, it does have roles to play, including prodding the government into action.

The Legislative Councillors are chosen in a quasi-democratic method. Half of the Legco is elected directly from geographic constituencies, the other half according to a complex method that we shall examine below. The system is unicameral in form, but bicameral in the manner in which it functions. Even if the democratically elected legislators vote as a solid bloc and even if they have considerable support from a few other legislators, they cannot prevail.

The decline in representativeness. A major problem lies in the functional constituency (FC) system, according to which the second half of the legislature is chosen. The system's roots can be traced back to 1985, when London and Beijing decided that the legislature should be dominated by certain groups whose interests were aligned with those of the current British and future Chinese authorities. In their final years the British had second thoughts about this arrangement, and made the functional constituency part of Legco more democratic. However, immediately after the handover this manoeuvre was undone. Beijing was convinced that only by means of a rotten borough system could it control the legislature from behind the scenes. Indeed, it was a highly restricted version of the earlier system, with corporate representation introduced, and only 11% as many individual voters involved as had just been the case (see Table 1).

Furthermore, the functional constituency system was designed for maximum opacity. Originally, even the names of those voting for FC candidates were secret. That changed in 2005 but only slightly, when the regulations were amended to allow certain persons² to visit the Registration and Electoral Office to see the lists. However, those persons are not supposed to *reveal* the information. Anyone who "reproduces or permits another person to reproduce in any form" such information (knowledge of which one would think is every citizen's right) can receive a prison sentence of up to six months.³ Thus, beyond its broad outlines, the nature of the functional constituencies remains semi-secret. People who have attempted to research the subject have tended to give up in despair. (The main exception has been the think tank Civic Exchange, which in 2004 undertook the task of examining the system. Their findings were published in an excellent 2006 report.⁴)

Table 1: Eligible to vote for functional constituency legislators⁵			
	1995	1998 ('98/'95)	2004 ('04/'95)
Individuals	1,150,000	127,075 (11%)	184,756 (16%)
Corporations	0	11,909	14,783
Total	1,150,000	138,984	199,539

For the part of the Legislative Council that is filled on the basis of one-person-one-vote geographical constituencies, there were 3.2 million voters registered to participate in the latest (2004) election. By comparison, there were less than 200,000 people who could vote in the FC elections. (They can also vote in the geographic constituency elections.) A vote for a functional constituency candidate always has more weight than a vote for a geographic constituency candidate.⁶

On average, the FC vote has more than 10 times the weight of a geographical constituency vote. In one case (the Finance constituency), a vote counts 715 times as much as a normal geographical constituency vote. If a person controls many corporations, his or her vote can have thousands of times the weight of that of an ordinary citizen.

The functional constituency problem is exacerbated by the virtual bi-cameral nature of the Legislature. Tucked away in an “annex” of the Basic Law is a requirement that “the passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections.”⁷ This means that a majority of FC legislators representing a tiny minority of the population must vote for any motion or bill introduced by a legislator, or else it fails. If only half of the FC legislators vote for it, it does not pass even if three-quarters of all legislators voted for it. Half of the FC legislators represent individuals who often stand to benefit financially by environmental degradation or non-sustainable exploitation. By my worst-case-scenario calculation, FC legislators representing a mere one-third of the corporate bodies (4,894, mostly corporate members of the Hong Kong General Chamber of Commerce) plus those representing 959 individual FC voters could block any member’s bill in the legislature.⁸

Impact. The functional constituency system has a disproportional and detrimental impact on the environment. One recent example is the effort to deal with the “wall effect” caused by rows of tightly spaced high buildings that block airflow and prevent the dispersion of pollutants. In May 2007, directly elected legislators voted 13 to 10 in favour of regulating such construction (which would have meant fewer units per hectare). It was defeated because a bare majority, 16, of the FC legislators opposed it.⁹

Another example is public transportation. Mass transit, especially rail, is far more environment friendly than are small vehicles. Rail lines result in less cementing over of the landscape and waterscape, produce less air pollution, and use less in the way of the earth’s resources. But mass-transit riders are not recognised as a constituency. The bus and rail companies are so recognised, but in the transportation constituency they are only allotted one vote each. Minibus operators and taxi companies together have 55 votes. Altogether, according to one count,¹⁰

there are 88 votes for road passenger transportation, only two for rail. Could there be a connection between that and the fact that, whereas government pays for highways and allows their use at no charge, until now there have been no direct subsidies for the construction of rail transport, which is expected to be paid for by riders?¹¹ The long-proposed rail line to the south side of Hong Kong Island has thus always been successfully resisted by the pro-highway constituencies. Also, it appears to be government policy (or at any rate, it is the practice) to discourage cross-border passengers from travelling by rail by charging a high tariff, an indirect subsidy to road carriers.¹²

Another example of the pernicious effect of the FC system involves fisheries. Represented in the Legco, the fisheries industry has for a decade resisted efforts to licence fishing vessels. Hong Kong's fisheries management scheme remains, in the words of one expert, "one of Asia's most primitive."¹³ Thus Hong Kong (a significant consumer of seafood) contributes to the serious stress that the oceans labour under.

Even legislators from constituencies where one might expect some interest in environmental protection have disappointed. For example, in six years sports-and-culture representative Timothy Fok Tsun-ting has not moved any motions or amendments and has been absent from about two-thirds of Legco votes,¹⁴ even though sporting events sometimes have to be cancelled because of air pollution.

Some more equal than others. The functional constituencies include representatives of certain sectors of society, to the exclusion (or under-representation) of others. Those in power seem able to pick and choose which chambers of commerce, which unions and which groups of fishermen will be represented. They are also able to entirely exclude constituencies. With a few exceptions, one would expect the groups on the left side of Table 2 to downplay the environmental effects of their enterprises, or simply be uninterested; one would expect the contrary from those on the right side. This goes a long way in explaining why the environment is given such short shrift in the Hong Kong Special Administrative Region.

Recognised constituencies	Some unrecognised stakeholders
Accountants	Bicyclists
Agriculture and fisheries	Conservation NGOs
Architectural, surveying, and planning	Consumers
Caterers	Environmental NGOs
Commercial (4)	Future generations
Educators	Homemakers
Engineers	Human rights and media NGOs
Financial, financial services (2)	Mass transit riders
Health, medical (2)	Parkland users
Industry (2)	Pedestrians
Information technology	Religions (However, a
“Labour” (3) (519 voters)	disproportionate one-third of
Legal	over-all FC legislators are
Real estate/construction	Christian. ¹⁶⁾
Social welfare	Retirees
Sports, culture, etc.	Students
Tourism and Transport (2)	Unemployed
	Workers

In order to resolve Hong Kong’s environmental problems, either the functional constituency system would have to be eliminated, or at least there must be created new FCs, comprised of representatives of such stakeholders as most of those listed on the right side of the table. Under the Basic Law, the former cannot be accomplished until after 2012, but the latter could be done now (subject to Beijing’s approval) provided that the ratio of geographical to functional constituency seats was maintained at 50:50.

Other Structural Problems

Legco’s structure is the main political obstacle to improving Hong Kong’s environment, but there are others.

Cross-border issues. In a *New York Times* op-ed, Thomas Friedman has argued that China is unlikely to be able to clean up its environment (achieve a green revolution) without first undergoing an “orange revolution” in the manner of the Ukraine.¹⁷ This is not good news for Hong Kong, given the unlikelihood that China will democratise any time soon.

The Pearl River Delta is geo-politically “structured” in a manner that has unfortunate consequences for the environment. In the middle of what is a single air shed there is a hard political boundary (at the Shenzhen River). That makes determining the sources of Hong Kong’s pollution difficult. Much depends on the direction of current winds, and also on just where in Hong Kong and to which pollutants one is referring. In Kowloon and the northern part of Hong Kong Island where much of the population lives or works, the pollution is largely local in origin. In northern and

out-lying New Territories (especially those islands that have few or no motor vehicles), the pollution is almost all from Guangdong, especially if the winds are from the north or west. If there are sustained winds from the east or south, the SAR's pollution eventually clears out somewhat (that is, it is blown to the mainland). Overall, one study concludes that "regional sources" are the primary influence on Hong Kong's air approximately 36% of the time (132 days a year) while local sources are the crucial factor nearly 53% of the time (192 days).¹⁸

If more than one-third of the air pollution comes from Guangdong, the HKSAR government would do well to spend some political capital on pressing the province to reduce pollution. This means spending it in two ways. Hong Kong has asked the mainland for very little; now, when it comes to the environment, some quid pro quo in return for past fealty should be requested. But political capital also needs to be spent closer to home. When Hong Kong de-industrialised the factories moved to Guangdong to take advantage of low costs; part of the "low cost" was the result of the province's lax environmental controls. The province now has 90,000 factories that are Hongkong-owned or financed.¹⁹ The Hong Kong government could lean on the financiers to require the factories to stop polluting. This could include Hong Kong's monitoring of these factories, and pressing local authorities to enforce environmental standards. After all, we may have one-country-two-systems, but when it comes to climatology and to a considerable extent to finance, Hong Kong and Guangdong are one inter-related system.²⁰

But the fate of greater China's environment is ultimately in the hands of China's leaders in Beijing. Here the outlook is bleak. The man tapped to be China's next leader, Xi Jinping, built a record of repressing the environmental movement in Zhejiang when he was first party secretary there. In particular, the head of Green Watch, Tan Kai, was imprisoned in 2005 for "illegally obtaining state secrets."²¹

Budgetary process. Another problem that we can call "structural" has to do with the way Hong Kong budgets are derived. There are separate current account and capital expense budgets. The latter is funded from the sale of public land. This makes huge sums of money not just available but begging to be spent on infrastructure and similar capital projects, not all of which are environmentally friendly. Although the bifurcated fiscal system has its own historic origins, it would be difficult to eliminate because of the construction industry's clout as a functional constituency. We have already noted how difficult it is to spend public funds on railway construction. The funds tend to go to huge, wasteful projects like Cyberport and Disneyland, not for protection of the environment. This problem can probably be solved only by reverting to the old unitary budget system.

Inter-agency coordination. Also "structural" in cause is the lack of coordination among government agencies. Decisions affecting the environment are made by many government agencies that often communicate little with one another. Numerous agencies make decisions affecting, for example, air quality, even though the Environmental Protection Department is supposed to have responsibility in this area.

Problems of leadership. Even in democracies, improving the environment requires that the long-term good be given priority over short-term gain. The democratic model breaks down

somewhat, since people naturally think in the more-certain shorter term; the next generation does not vote. Thus, at least in theory, a strong executive can be more effective in solving environmental problems than can pluralistic democracy (though it seldom works out that way in practice). For people to believe in deferred gratification there has to be some prospect that the gratification will eventually happen, and without good governance it probably will not. For example, if there is a rational, workable recycling program, people will endure a little inconvenience to participate. But if recycling is confusing and obviously ineffective, people will ignore it. (The first recycling program in New York City was unworkable and completely abandoned until a new, more workable program was set up, which now seems to be functioning reasonably well.) Still, some credible persuasion can play an important role.

Good leadership is thus important. That is what has been lacking in Hong Kong. The SAR's chief executives are chosen not because they have the potential to be great leaders, but because they are good followers—of Beijing and of the region's economic elites. Thus, even though they may give lip service to environmental goals and principles of sustainable development (as did both Donald Tsang Yam-kuen and his predecessor, Tung Chee Hwa), they are normally reluctant to risk their limited supply of political capital by pushing for measures that are anathema to their tiny constituencies.

Tsang's position on the environment has been erratic. As financial secretary, he came out strongly and specifically on the urgency of cleaning up Hong Kong's air.²² But his first years as chief executive have been disappointing. In 2006 he reacted to complaints about Hong Kong's air quality by downplaying the problem. The issue, he said, must be "kept in perspective." His October [2007 Annual Policy Address](#) was a mixed bag. The section on environmental protection began with a pitch for his ten infrastructure projects, only some of which (the rail projects) are environmentally friendly. On global warming, in contrast to what others have said,²³ he spoke of striking "a balance between economic development and the reduction of greenhouse gas emissions," and seemed content to rest on past successes)which, in reality, had been unintended consequences of the decline of local industry.

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He did promise that by the year 2030 "energy intensity" would be reduced by at least 25%, but the specifics he mentioned seemed inadequate to achieve this. In the discussion on electric power, the emphasis seemed to be on "lowering of electricity tariffs,"²⁴ whereas only shifting taxes from other sources to a tax on power consumption would create incentives for conservation. There was talk of conversion from industrial diesel to ultra low sulphur diesel, but not of eliminating diesel fuel altogether. The government would only "study the feasibility" of requiring the notoriously polluting ferries and other vessels to use high-quality fuel. Tsang has always given priority to low fares over the clean air that would result from the use of costlier fuels. This is so even though the external costs of cheap fuel are far less than the cost of pollution, including extra health care costs and higher mortality, in addition to the negative values of ecological and aesthetic damage. Anyway the government could easily avoid fare increases by providing subsidies to cover the added cost of cleaner fuels. Still, if government action lives up to the promise of the speech, the result would be at least a modest improvement in the environment.

Judiciary. The Hong Kong courts have generally taken the view that positive rights such as environmentalism are non-justiciable. The judiciary at best can be reactive, and even then the courts do not want to be in the position of setting public policy, much less ordering the government to take actions not clearly mandated by legislation or the Basic Law. Thus the courts have played little part in environmental protection. However, there may be one interesting exception.

In 1998 (days before the Legco was revamped in a way that would thereafter make such pro-environment actions virtually impossible), a [Protection of the Harbour Ordinance](#) was passed. That law states that “the harbour is to be protected and preserved as a special public asset and a nature heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.” Officials are required to heed that principle “in the exercise of any powers vested in them.”

Because the government pushed ahead anyway without regard to this law, the NGO [Society for Protection of the Harbour](#) went to court and succeeded in obtaining a ruling in their favour. The Court of Final Appeal issued a judgment that a Town Planning Board had erred in allowing a particular landfill project to go forward. However, encroachments on the harbour continued, and to date the SPH has been unable to persuade the court to issue an injunction blocking further development. Thus the role of the judiciary in preserving the environment still appears problematic.

The way ahead. To truly solve Hong Kong’s environmental problems and make a contribution to the international effort to curb global warming, the government would have to take even bolder steps than have been contemplated.

If one walks down any of Hong Kong's commercial streets, outside about half of the entryways one is greeted by a blast of cold air from open doorways (encouraged by low electricity rate charges for commercial users). This astonishes people from abroad, who are accustomed to doors, often revolving, that help buildings retain cooled air in summer and heat in winter, thus greatly reducing fuel combustion at power plants. This practice should be outlawed. Also, minimum temperatures should be legislated. Many buildings, vehicles, and vessels are frigid. Mandatory minimum temperatures in the range of 25.5 to 28 degrees Celsius have been suggested; if thermostats were set to such levels power plants would burn much less fuel and everyone would still be reasonably comfortable (and breathe much more easily).

Then there is the anomaly of Hong Kong's clocks being so far removed from solar time. Because the city is near the eastern end of the world's widest time zone, the sun rises early and sets early. It should not rise until about 7 am; it should normally set well after people return from work. Introducing daylight saving time would reduce the number of hours the lights are burning. Few Hongkongers would have a problem with this; the political forces who would oppose more solar-convergent time zone are probably not only the power companies, but also people who do business with the Mainland, and officials who fear Beijing’s reaction if the “two systems” diverge too conspicuously.

Urban centres could be much more pedestrian friendly. On main streets, far more square metres are allocated to each passenger than to each pedestrian. Probably nothing would do more to clean

Hong Kong's air than to widen the walkways and add more pedestrian street crossings. That would tend to draw people out of their cars. If one thinks of a street as a public resource, then there is now quite a subsidy for a small group of motorists. Alas, the rich and powerful (made so in part by the functional constituency system) who move about by private automobile have more political clout than the average pedestrian.

There should simply be a moratorium on highway building. Traffic can be expected to rise to the availability of highways, which suck ever more vehicles into places like Central.

These five suggestions are examples of how the executive needs to go far beyond the usual platitudes and think outside the box, then boldly drag the functional constituencies along with him/her. The structural defects in Hong Kong's constitutional system require no less.

This article is not intended as a comprehensive view of Hong Kong's environmental woes. A full understanding of the problem would require that this systemic approach be supplemented by economic and cultural analyses. How can the economic incentives be rearranged so that the present psychology of an underlying "right to pollute" is replaced by an "obligation not to pollute"? Why do people believe that they have a right to pollute, and must be bribed not to? Why do international environmental human rights laws, even those that have been incorporated into domestic law, hold so little sway?²⁵ Why is there so much apathy on the part of the public? The answers await an analysis that takes approaches other than those pursued in this paper.

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Endnotes

¹ Article 74 of the Basic Law inhibits legislators from introducing any bill that would involve the expenditure of public funds. “Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government polices are introduced.” That seems to mean that any member’s bill to improve the environment would have to place the entire financial burden on the polluters, with the government assuming no role; this virtually guarantees that any member’s serious environmental cleanup efforts would be stopped dead in its tracks.

² One can only see the register if one’s purpose is related to an election and not, say, if one simply wants to understand the system. Simon N. M. Young and Anthony Law, “Privileged to Vote: Inequalities and Anomalies in the FC system,” in *FC*, p. 109.

³ Electoral Affairs Commission Ordinance, Chap. 541A, section 22, http://translate.justice.gov.hk/gb/www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/8c63896ca2dc9e3348256ce00007d2ba?OpenDocument.

⁴ Christine Loh and Civic Exchange, eds., *Functional Constituencies: A Unique Feature of the Hong Kong Legislative Council* (Hong Kong: Hong Kong University Press, 2006). Hereafter *FC*.

⁵ Data from *FC*, Appendix 5 (on CD-Rom; hereafter *FC/CD*).

⁶ Michael E. DeGolye, “Comparative Profiles and Attitudes of FC Voters Versus GC Voters in the 2004 Legco Election Campaign,” *FC*, p. 191.

⁷ Basic Law, Annex 2, http://www.info.gov.hk/basic_law/fulltext/index.htm.

⁸ This is based on the four smallest individual-voter constituencies (total: 959), and the eleven smallest corporate constituencies (total: 4,894). Four plus eleven equals fifteen, which is a quarter of Legco and half of the FCs, the number needed to block a member’s bill. Data drawn from Appendix 7 of *FC/CD*.

⁹ Olga Wong, Call for Law Against Wall Effect Fails, *South China Morning Post*, 10 May 2007.

¹⁰ Jake van der Kamp and Carine Lai, “Non-positive Interventionism: How Functional Constituencies Distort the Free Market,” *FC*, p. 307.

¹¹ There is a tax on petrol, but users often benefit from reductions or exemption.

There have been indirect subsidies for rail, such as building rights over stations, and the government sometimes waives dividends to which it would otherwise be entitled. See Kate Trumbull, *Still Holding Our Breath: A Review of Air Quality Policy in Hong Kong, 1997-2007* (Hong Kong: Civic Exchange, 2007), pp. 56-67.

There are signs that the lack of direct subsidies for rail construction may change, as the government has indicated willingness to subsidize a mass transit railway project on Hong Kong Island, though this would be a one-time, non-precedent-setting arrangement. See Anita Lam and Joshua But, “Kennedy Town Rail Link Approved: HK\$6b from Taxpayers Helps MTR Go West,” *South China Morning Post*, 24 October 2007, p. 1.

¹² Van der Kamp and Lai, pp. 307-8. The fare on the government-owned rail line (KCR) from Hong Hum railway station to the border is \$33; if one gets off one stop before the border it is only \$9. The latter may decrease after the pending fair reductions take effect, but the former will not.

¹³ Shelley Clarke, “Sink or Swim: Hong Kong Can Take A Lead in Asia by Supporting A Certification Scheme to Save World Fish Stocks,” *South China Morning Post*, 25 October 2007, A19, <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0/?vnextoid=1532942d5f1d5110VgnVCM100000360a0a0aRCRD&ss=Insight&s=Opinion>.

¹⁴ Ambrose Leung, “Monitors Praise Civic Party, Slam Others Over Legco Absences,” *South China Morning Post*, 7 November 2007, p. A2.

¹⁵ The right side is admittedly an arbitrary selection. However, in a sense so is the left side when there were no clear selection criteria. The left side omits two atypical constituencies (those that do not represent narrow interest groups) which are Legco FCs: the rural Heung Yee Kuk, and the more numerous representatives of the district councils. In theory, these ought to make the FC part of Legco more democratic. However, these legislators are often inactive. Lau Wong-fat of the Liberal Party (District Councils representative) is the only Legco never to have moved any motions. Ambrose Leung, Monitors Praise Civic Party, Slam Others Over Legco Absences, *South China Morning Post*, 7

November 2007, p. A2.

¹⁶ DeGolye, p. 169.

¹⁷ Thomas Friedman, "China in Three Colors," *New York Times*, September 23, 2007, <http://www.nytimes.com/2007/09/23/opinion/23friedman.html>.

¹⁸ Alexis Lau, Andrew Lo, Joe Gray, and Zibing Yuan, *Relative Significance of Local vs. Regional Sources of Hong Kong's Air Pollution*, Hong Kong: Civic Exchange, n.d. (2007?), p. 7.

¹⁹ Trumbull, p. 98.

²⁰ The government may be thinking along these lines. In his 2007 policy speech, Donald Tsang said: "To further encourage Hong Kong enterprises in Guangdong to play their part to improve the regional environment, I will ask the Legislative Council to approve funding of \$93 million for the Hong Kong Productivity Council to launch a five-year programme. This programme will assist and encourage Hong Kong-owned factories within the PRD region to adopt clean production technologies and processes." <http://www.policyaddress.gov.hk/07-08/eng/p42.html>.

²¹ Chinese Human Rights Defenders report, http://crd-net.org/Article/Class9/Class15/200705/20070502061321_4152.html.

²² Budget Speech of 2001, quoted at length in Trumbull, p. 61.

²³ See Paul G. Harris, "Hong Kong and Climate Change: A Question of Justice," April 2007, *Hong Kong Journal*, http://www.hkjjournal.org/archive/2007_summer/harris.htm.

²⁴ This attitude has also been reflected in government consultation papers. For example, the Stage Two Consultation Paper on Future Development of the Electricity Market in Hong Kong recommends that consumers not be burdened with the cost of pollution avoidance. To avoid having the cost of emissions-reduction facilities being passed on to consumers as far as possible, we propose to subject this type of assets to the lowest rate of return. This appears to mean that power companies will have minimal incentive to minimize pollution. For more on this subject, see Jake van der Kamp, "Short-sighted Bureaucrats Choose Any Colour but Green," *South China Morning Post*, 11 December 2007, <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0/?vgnnextoid=61a7883da5eb6110VgnVCM100000360a0a0aRCRD&ss=Markets&s=Business>.

²⁵ The International Covenant on Economic, Social and Cultural Rights (which has been incorporated into Hong Kong law by virtue of Article 39 of the Basic Law) states: the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: The improvement of all aspects of environmental hygiene (Article 12).