



2030 M Street, NW, Fifth Floor
Washington, DC 20036
(202) 728-5500
fax: (202) 728-5520
mail: contactndi@ndi.org
www.ndi.org

**The Promise of Democratization in Hong Kong:
The 2002 Chief Executive Election
and the Transition Five Years after Reversion**

NDI Hong Kong Report #6

March 11, 2002

For further information, please contact:

Peter M. Manikas
Director of Asia Programs

or

Christine Chung
Senior Program Officer

National Democratic Institute for International Affairs

2030 M Street, NW

Washington, DC 20036

Telephone: (202) 728-5500

Fax: (202) 728-5564

Email: cchung@ndi.org

Previous reports in NDI's series, *The Promise of Democratization in Hong Kong*, include:

Report of the NDI Survey Mission, NDI Hong Kong Report No. 1, July 13, 1997.

The New Election Framework, NDI Hong Kong Report No. 2, October 23, 1997.

Autonomy and the Rule of Law, NDI Hong Kong Report No. 3, May 1, 1998.

The May 24, 1998 Elections - A Pre-Election Report, NDI Hong Kong Report No. 4, May 15, 1998

The May 24, 1998 Elections, NDI Hong Kong Report No. 5, July 30, 1998.

These reports are available on the World Wide Web at <http://www.ndi.org>.

The National Endowment for Democracy provided funding for the publication of this report and for NDI's program in Hong Kong.

Copyright © National Democratic Institute for International Affairs (NDI), 2002. This work may be reproduced and/or translated for noncommercial purposes provided that NDI is acknowledged as the source of the material and is sent copies of any translation.

NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS

The National Democratic Institute for International Affairs (NDI) is a nonprofit organization working to strengthen and expand democracy worldwide. Calling on a global network of volunteer experts, NDI provides practical assistance to civic and political leaders advancing democratic values, practices and institutions. NDI works with democrats in every region of the world to build political and civic organizations, safeguard elections, and to promote citizen participation and openness and accountability in government.

Democracy depends on legislatures that represent citizens and oversee the executive, independent judiciaries that safeguard the rule of law, political parties that are open and accountable, and elections in which voters freely choose their representatives. Acting as a catalyst for democratic development, NDI bolsters the institutions and processes that allow democracy to flourish.

Build Political and Civic Organizations: NDI helps build the stable, broad-based and well-organized institutions that form the foundation of a strong civic culture. Democracy depends on these mediating institutions, which link citizens to their government and to one another by providing avenues for participation in the public policy process.

Safeguard Elections: NDI promotes open and democratic elections. Political parties and governments have asked NDI to study electoral codes and to recommend improvements. The Institute also provides technical assistance for political parties and civic groups to conduct voter education campaigns and to organize election-monitoring programs. NDI is a world leader in election monitoring, having organized international delegations in more than 50 countries, and helping to ensure that polling results reflect the will of the people.

Promote Openness and Accountability: NDI responds to requests from leaders of government, political parties and civic groups seeking advice on matters from legislative procedures to constituent service to the balance of civil-military relations in a democracy. NDI works to build legislatures and local governments that are professional, accountable, open and responsive to their citizens.

Headquartered in Washington D.C., with field offices in more than 40 countries in every region of the world, NDI complements the skills of its staff by enlisting volunteer practitioners from around the world, many of whom are veterans of democratic struggles in their own countries with valuable perspectives on democratic development.

The Promise of Democratization in Hong Kong:

The 2002 Chief Executive Election and the Transition Five Years after Reversion

This report is the sixth in a series prepared by the National Democratic Institute for International Affairs (NDI) about the promise of democratization in Hong Kong. Since early 1997, NDI has monitored the status of autonomy and the prospects for democratization in the Hong Kong Special Administrative Region (HKSAR) in light of international standards and benchmarks outlined in Hong Kong's Basic Law. NDI has also organized study missions and issued periodic reports on political developments in the region. These reports have assessed the development of the Hong Kong's post-reversion election framework; the political environment on the eve of reversion to Chinese sovereignty; the status of autonomy, rule of law and civil liberties under Chinese sovereignty; the first elections in the HKSAR under Chinese sovereignty; and the prospects for democratization beyond the 10-year transition period set forth in the Basic Law. The Institute hopes that its monitoring efforts will contribute to better understanding of the ongoing transition process and provide support to those interested in promoting democratisation in Hong Kong.

Eric Bjornlund, NDI Senior Advisor and former NDI Senior Associate and Regional Director for Asia, and Christine Chung, NDI Senior Program Officer, wrote this report. Bjornlund and Chung most recently visited Hong Kong in February 2002. They met with government officials, including Chief Secretary Donald Tsang, Secretary of Justice Elsie Leung and Constitutional Affairs Secretary Michael Suen; political party leaders and legislators, including Martin Lee of the Democratic Party and Tsang Yok Sing of the Democratic Alliance for the Betterment of Hong Kong; nongovernmental organization representatives; academics; journalists; diplomats; and others.

Kenneth D. Wollack
President
National Democratic Institute for International Affairs

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
Re-Election of the Chief Executive	1
The Status of Democracy in Hong Kong Today	2
Autonomy, Rule of Law and Judicial Independence.....	3
I. INTRODUCTION	4
The Importance of Hong Kong.....	4
Democracy and the Basic Law	5
Hong Kong’s Experience with Elections	6
II. THE SELECTION OF THE CHIEF EXECUTIVE	7
Re-Election of Tung Chee Hwa	8
III. THE STATUS OF DEMOCRACY IN HONG KONG TODAY	11
Relationship between Executive and Legislative Branches	13
The State of Political Parties	15
The Cross Party or Eight-Party Coalition.....	16
IV. AUTONOMY, RULE OF LAW AND JUDICIAL INDEPENDENCE	17
Provisions under the Basic Law	17
Right of Abode Cases and the Issue of Reinterpretation.....	18
Status of Human Rights.....	20
Freedom of the Press	21
Implementation of Article 23	21
V. CONCLUSION	22

EXECUTIVE SUMMARY

It has been nearly five years since Hong Kong reverted to Chinese sovereignty on July 1, 1997, and began its fundamentally important experiment with the idea of “one country, two systems.” This means Hong Kong is about half way through a 10-year transition period toward fully democratic elections established by its Basic Law, the constitution of the Special Administrative Region enacted by the National People’s Congress in Beijing. It also means that the first chief executive of the Hong Kong Special Administrative Region (HKSAR), Tung Chee Hwa, has approached the end of his five-year term.

Re-Election of the Chief Executive

On February 28, the nomination period for candidates for chief executive closed with Tung Chee Hwa as the sole candidate. Although an 800-member Election Committee had been scheduled to meet on March 24 to choose the next chief executive, by the close of nominations Tung had received the support of 714 members and was officially declared “re-elected.”

This process fell short of international democratic standards. First, according to the Basic Law, until the “ultimate aim” of direct election is achieved, an 800-member Election Committee selects the chief executive. The Basic Law requires the Election Committee to be “broadly representative,” but most of the members were in fact chosen by the same special interests that are able to choose “functional constituency” representatives to the Legislative Council (LegCo). Moreover, the Chief Executive Election Ordinance adopted in 2001 retained the same Election Committee that had been formed to choose members of the LegCo in 2000 to also select the new Chief Executive. Thus, the very composition of the Election Committee was known at the time that the decision was made to give that body the power to choose the new Chief Executive.

Second, the Basic Law provides that the Election Committee chooses the chief executive by secret ballot from nominations made jointly by at least 100 members. In 1996, candidates could nominate themselves for chief executive, and the then-400-member Selection Committee chose nominees through a secret ballot from among eight candidates. Even though it was widely accepted that Beijing had anointed Tung, three candidates received at least the required 50 votes to be officially “nominated” and Tung was chosen a month later by secret ballot. The new Chief Executive Election Ordinance, in contrast, established that the nominations from the Election Committee must be public. In practice, the open nomination process replaced the election itself, and the Basic Law’s call for selection of the chief executive by secret ballot was not realized.

In his second term, Tung Chee Hwa will face the increasingly difficult challenge of governing without a democratic mandate and within a system that seems increasingly anachronistic and incapable of addressing Hong Kong’s current problems. While the government argues that Hong Kong must defer consideration of political reform until

economic and social problems are addressed, structural flaws in the HKSAR's political institutions are hampering efforts to address such problems.

The Status of Democracy in Hong Kong Today

The promise of democratization in Hong Kong remains largely unrealized, and its prospects appear to be diminishing. Hong Kong officials continue to refuse to commit to universal suffrage at the end of the constitutionally prescribed transition period. An emerging view holds that universal suffrage is merely possible but not necessarily desirable or even practical after the 10-year transition period.

Much of the debate around the time of reversion was about whether the timetable for achieving the ultimate aim of universal suffrage should be accelerated or whether the delicate compromises reflected in the Basic Law should be left alone. But public discussion of post-2007 political institutions increasingly includes options that fall short of universal suffrage. Few expect direct elections for the chief executive in 2007, and there is also increasing discussion of maintaining at least some functional constituency seats in the LegCo in 2008 and thereafter, which is fundamentally inconsistent with the stated goal of universal suffrage.

Hong Kong's Legislative Council has relatively narrow powers and has no role in forming a government. The "executive-led" government has not built a strong relationship with any of the political parties in the legislature. The lack of any governing role for parties leaves a vacuum around the executive and relegates a class of potential leaders to an emasculated, permanent opposition role.

To break the impasse between the executive and legislative branches, and to control a sometimes recalcitrant civil service, the Chief Executive has proposed an "Accountability System" that would create a cabinet of appointed ministers or "principal officials." Some observers believe that the new quasi-ministerial system could be the first step in a process of political reform that could eventually even lead to an opening for political parties to participate in forming and running the government. Others point out the basic flaw: unlike ministerial systems in parliamentary democracies, the executive in Hong Kong is not accountable, through elections, to the public.

Meanwhile, political parties in Hong Kong are beleaguered as they face declining membership, increasing factionalization and ever-lower levels of public support and esteem. Many Hong Kong residents consider political parties to be both divisive and ineffective. Since September 2001, however, representatives from all eight political parties represented in the LegCo have met on at least 10 occasions to discuss the government's management of the economy and similar issues. While the parties do not all agree on issues of political development, this is the first significant cross-party cooperation in several years.

Autonomy, Rule of Law and Judicial Independence

Although Hong Kong's government has enjoyed considerable autonomy since its reversion to Chinese sovereignty, the handling of disputes over who has the rights to live in Hong Kong has called into question the ability of the judiciary – and the commitment of the government – to protect rights promised by the Basic Law. The Basic Law provides that Hong Kong will enjoy “independent judicial power, including that of final adjudication,” but issues dealing with the relationship between Hong Kong and the mainland must be referred to the Standing Committee of the National People's Congress for interpretation.

Much of the debate in Hong Kong about judicial independence, rule of law and the relationship with the mainland over the last five years has centered whether Hong Kong courts have the power to interpret the “right of abode” established in the Basic Law. A series of cases since reversion began as a debate over the extent of rights granted by the Basic Law but evolved into a fundamental debate over the appropriate relationship among the Hong Kong courts, the Hong Kong executive and the Central People's Government. When Hong Kong's highest court determined in 1999 that it had the power to interpret rights relating to Hong Kong residents and ruled against the government's more restrictive immigration policy, the Hong Kong government warned of floods of new immigrants and the Chief Executive asked the Standing Committee for a “reinterpretation.” The Standing Committee agreed that mainland exit regulations overrode rights ostensibly provided in the Basic Law. The government's decision to seek a reinterpretation from Beijing set an unfortunate precedent for the independence of the Hong Kong courts from the executive and for the autonomy of Hong Kong from the mainland.

A potential issue on the horizon involves Article 23 of the Basic Law, which requires Hong Kong to enact laws “to prohibit treason, secession, sedition, [and] subversion against the Central People's Government” The international war on terrorism gives new impetus to the mandate of this article. Some legislators and pro-democracy activists in Hong Kong have expressed concern that this legislation may bestow dangerous new powers on the executive without sufficient checks.

I. INTRODUCTION

It is an appropriate time to reassess the promise of democratization in Hong Kong. It has been nearly five years since Hong Kong reverted to Chinese sovereignty on July 1, 1997, and began its fundamentally important experiment with the idea of “one country, two systems.” This means Hong Kong is about half way through a 10-year transition period toward fully democratic elections established by its Basic Law, the constitution of the Special Administrative Region enacted by the National People’s Congress in Beijing. It also means that the first chief executive of the Hong Kong Special Administrative Region (HKSAR), Tung Chee Hwa, has approached the end of his first five-year term.

On February 28, the nomination period for candidates for chief executive closed with Tung as the sole candidate. An 800-member election committee had been scheduled to meet on March 24 to choose the next chief executive, but Tung, because he was unopposed, was officially declared “re-elected.”

In his second term, Tung Chee Hwa will face the increasingly difficult challenge of governing without a democratic mandate and within a system that seems increasingly anachronistic and incapable of addressing Hong Kong’s current problems. While the government argues that Hong Kong must defer consideration of political reform until after it addresses economic and social problems, structural flaws in the HKSAR’s political institutions are hampering efforts to address such problems.

This report considers the present status of the promise of democratization in Hong Kong. After first briefly reviewing the relationship between democracy and the Basic Law and Hong Kong’s past experience with elections, the report describes the process of selecting the chief executive under the Basic Law and assesses the recent “re-election” of Tung Chee Hwa. Next, the report considers the status of democracy in Hong Kong, including the current debate about the pace of democratization, the Chief Executive’s proposed “Accountability System,” the relationship between the executive and legislative branches, and the state of political parties. Finally, the report considers the status of autonomy, rule of law and judicial independence, including issues raised by the series of legal cases over the “right of abode” in Hong Kong and other human rights concerns.

The Importance of Hong Kong

Although it has only seven million people, Hong Kong is disproportionately important in international affairs. First, Hong Kong is of interest because its decolonization is both recent and unique and because it reunified with China, the largest country in the world and one that retains a Communist Party-dominated government. Also, the 1992 US Hong Kong Policy Act requires American attention to Hong Kong’s prosperity and freedoms. At the same time, Hong Kong’s historical commitment to the rule of law has made it the financial capital of Asia and the gateway to economic investment in mainland China.

While the mainland is a single-party state, Hong Kong has a multi-party system and an active civil society. Hong Kong serves as an example that these institutions are not inherently disruptive to civil order. Moreover, political reform in China often progresses by example, with active experimentation leading to changes and their theoretical underpinnings only following. Successful institutions in Hong Kong have the potential, at least, to serve as a model in the future. Similarly, Hong Kong's success under the "one country, two systems" paradigm could have an impact on the eventual resolution of the stalemate over Taiwan.

For these and other reasons, Hong Kong remains of great interest in the United States and elsewhere around the world.

Democracy and the Basic Law

In April 1990, the government of the People's Republic of China promulgated the Basic Law of the Hong Kong Special Administrative Region, which became the constitution of Hong Kong upon reversion to Chinese sovereignty on July 1, 1997. Drawing on the institutions and experiences of Hong Kong under British colonial rule, the Basic Law does not provide initially for fully democratic elections in the HKSAR. During a transition period of 10 years, the Basic Law provides for incremental increases in the number of directly elected seats in the Legislative Council (LegCo), "in accordance with the principle of gradual and orderly progress," until a decision is made about fully democratic elections. The Basic Law declares "the ultimate aim is the election of all members of the Legislative Council by universal suffrage." Likewise, during the transition, an 800-member Election Committee selects the Chief Executive. While the Basic Law does not specify how the chief executive will be selected in 2007 and thereafter, it clearly states, "the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."¹ This raises the possibility that the Chief Executive could be popularly elected beginning in 2007 and the legislature could be fully elected by 2008.

Until the "ultimate aim" of universal suffrage is achieved, elections in the HKSAR, like elections held under British sovereignty, will not meet international standards. Hong Kong was not a democracy under British rule and has yet to become one as part of China. The framework established by the Basic Law, reinforced by post-reversion election laws that further restrict democratic rights, maintains a system that effectively maximizes political power for economic and political elites and minimizes the participation of the citizens at large. Nevertheless, the Basic Law framework also protects the rule of law and holds out the promise of fully democratic elections in the future, if Hong Kong's government and elites allow that promise to be realized.

¹ Basic Law, Articles 45 and 68, Annexes I and II.

Hong Kong's Experience with Elections

Hong Kong's experience with elections has been relatively short. Only in 1991 were 18 of the Legislative Council's 60 seats directly elected for the first time. Elections in 1995, however, were significantly different as a result of the last British governor's efforts to expand the franchise and decentralize political power. While only 20 representatives could be directly elected in 1995 in accordance with the Basic Law framework agreed to by Britain and China, Christopher Patten's reform package included dramatic expansions in the electorates for functional constituencies, the designation of locally elected officials as the Election Committee, the establishment of District Boards, and the adoption of single-member geographical constituencies.

The Chinese leadership objected that many of these changes violated the Basic Law. This disagreement between the British and the Chinese effectively derailed the "through train," which would have allowed members of the LegCo elected in 1995 to serve through reversion until the end of their four-year terms in 1999. Instead, China never recognized the validity or results of the 1995 elections and dissolved the LegCo upon reversion.

In December 1995, China established a 150-person Preparatory Committee, chaired by the Chinese foreign minister, to oversee Hong Kong's transition to Chinese sovereignty. The Preparatory Committee in turn established a 400-member Selection Committee. In December 1996, the Selection Committee chose Tung Chee-hwa as Chief Executive from among eight candidates and selected the 60 members of a provisional legislature. Tung and the members of the Provisional Legislative Council took office upon reversion.

The new HKSAR held legislative elections in 1998 (to complete the term of the legislature elected under British sovereignty in 1995) and again in 2000. The next LegCo elections will be held in 2004. In each of these elections, 30 of the 60 seats have been reserved for representatives of "functional constituencies" composed of various business and professional groups. The Basic Law provides, however, for incremental increases in the number of directly elected seats in each successive election. In the first elections, in 1998, 20 seats were directly elected and committee chose 10. In 2000, 24 were directly elected and six by committee. In 2004, the Basic Law provides for the number of directly elected seats to increase to 30 of the 60 total, and the seats chosen by the Election Committee will be eliminated.

II. THE SELECTION OF THE CHIEF EXECUTIVE

The Chief Executive is the head of the HKSAR and is accountable to both the Central People's Government of the People's Republic of China and the HKSAR. The Chief Executive serves a five-year term of office with no more than two consecutive terms allowed.

Until the "ultimate aim" of direct election is achieved, according to the Basic Law, an 800-member Election Committee selects the Chief Executive by secret ballot. Nominations may be made jointly by at least 100 members of the Election Committee, and each member is allowed to nominate only one candidate.²

The Chief Executive Election Ordinance, enacted by the Hong Kong Legislative Council in July 2001, further specifies the rules governing the selection process. The new law authorizes the Electoral Affairs Commission (EAC) to supervise the selection of the Chief Executive, provides further details about the nomination process and appoints the Election Committee (EC).

The ordinance retained the Election Committee that had been formed to choose the six members of the LegCo in 2000 to also serve as the Election Committee for the new Chief Executive.³ Thus, the composition of the Election Committee was known at the time that the decision was made to give that body the power to choose the new Chief Executive

The Basic Law requires the Election Committee to be "broadly representative," but most of the members are chosen by the same special interests that select functional constituency representatives to the LegCo. Of the 800 members of the EC, under the Chief Executive Election Ordinance, 664 were chosen by eligible members from 35 "subsectors" representing various special interest groups, including trades, professions, labor and social welfare groups, and district organizations. Forty were nominated by designated religious organizations. The 60 members of the LegCo and 36 Hong Kong deputies to the National People's Congress are *ex officio* members, making up the remainder. The current Election Committee actually has only 796 members, as three individuals are both LegCo members and National People's Congress (NPC) deputies; and one Hong Kong NPC deputy is ineligible because he is not a Hong Kong resident.

Subsector by-elections were held on January 6, 2002 to fill three vacancies on the EC. These by-elections generated very little interest, either among the general public or even among the eligible subsector electors. Less than 19 percent of eligible special interest voters bothered to cast ballots: 30 of 123 eligible individuals (24 percent) in the

² Basic Law, Annex I.

³ Chief Executive Election Ordinance, Art. 8.

Finance subsector, 121 of 138 eligible voters (88 percent) in the Heung Yee Kuk subsector, and 649 of 4,033 eligible voters (16 percent) in the Legal subsector.⁴

The nomination period for the Chief Executive position began on February 15 and closed on February 28. If there had been more than one candidate, the meeting of the Election Committee to select the new chief executive would have taken place on March 24. The winner would have to receive a majority of the votes, which could take more than one round of balloting. With the incumbent as the only candidate, the EAC declared the results upon the close of nominations on February 28.

Re-Election of Tung Chee Hwa

On February 19, only four days after the nomination period opened, the *Asian Wall Street Journal* first reported Tung's de facto victory, as more than 695 EC members had nominated him for a second term.⁵ This made it mathematically impossible for anyone else to be nominated. By the close of nominations on February 28, 714 of the 796 members had publicly supported him.

Leaders of the central government had made clear for sometime their support for Tung. Speaking in Myanmar in December 2001, President Jiang Zemin stated, "I wish that Mr. Tung will get re-elected. I am convinced he will get re-elected."⁶ Given that support and the certainty of Tung's re-election, many observers argued that not only would it have been futile to oppose Tung or to support another candidate, but also that many Election Committee members would likely judge support for another candidate potentially harmful to their business interests in Hong Kong and mainland China. While two individuals did seek nominations to challenge Tung—Jenny Kan Wai Fun, a self-employed insurance agent, and Li Hung, an online newspaper editor, who died of a stroke in late January—they were never regarded as serious contenders.

In October 1996, candidates could nominate themselves for chief executive. On November 15, 1996, the 400-member Selection Committee (constituted in September of that year by the 150-member Preparatory Committee) chose nominees through a secret ballot from among eight candidates who met the technical qualifications. Even though it was widely accepted that Beijing had indicated its preference for Tung, three candidates received at least the required 50 votes to be officially "nominated" and thus eligible for further consideration.⁷ On December 11, after a month-long campaign, the Selection Committee chose Tung, again by secret ballot, from among the three candidates.

⁴ Electoral Affairs Commission, website.

⁵ Matt Pottinger, "Tung Chee Hwa Moves Closer to a Second Term—Hong Kong Leader Seems to Block Challengers," *Asian Wall Street Journal*, February 19, 2002.

⁶ Chris Yeung, "Tung Seeks Five More Years," *South China Morning Post*, December 14, 2001.

⁷ The three were Tung, who received 206 of 385 ballots, businessman Peter Woo and Chief Justice Sir Ti Liang Yang.

The Chief Executive Election Ordinance adopted in 2001, in contrast, establishes that the nominations from the Election Committee must be public.⁸ In other words, prospective nominees had first to find 100 EC members willing to publicly challenge the sitting Chief Executive. Because the election ordinance stipulated that the election process could end at the end of the nomination stage if only one candidate is able to garner the necessary minimum of 100 nominations, the open nomination process could replace the election itself. Because the nomination process was held as a public exercise, the Basic Law's call for selection of the Chief Executive by secret ballot was not realized. The election ordinance did not even allow the Election Committee to vote by secret ballot on the sole nominee.

Given indications of Beijing's steady approval of Tung, democracy advocates argued that the electoral process was deliberately designed to obstruct any challenge to Tung. Although critics argued that supporters of the pro-democracy camp in the Election Committee number around 100, which might have made it possible to nominate an alternative candidate, they chose not to field a candidate. Realistically, the pro-democracy camp might not have been able to agree on an alternate candidate. LegCo Member and Frontier Chairperson Emily Lau argued against supporting an alternate candidate: "As it is not a fair, open and democratic election, we should not participate in it and give it any legitimacy."⁹

Despite characterizations of the process as a rubber stamp for Beijing's choice, protest against the election system or Tung was fairly muted. Emily Lau formed the Coalition Against Second Term (CAST) to draw attention to the flawed process of choosing the Chief Executive, the lack of competition for the post, and the need for real democracy in Hong Kong. Despite an impressive list of members,¹⁰ active support for CAST was tepid, and turnout at CAST demonstrations was small. Whether because they were unwilling to risk confrontation, were more concerned about economic and livelihood issues, or were resigned to their inability to affect the process of choosing the leader of their government, Hong Kong people did not rally to the cause of denying Tung a second term.

⁸ Chief Executive Election Ordinance, Art. 18.

⁹ Klaudia Lee, "Tung Re-election a Farce, say Pro-democracy 17," *South China Morning Post (SCMP)*, January 22, 2002.

¹⁰ Members of the Coalition Against Second Term were: The Frontier, Social Democratic Forum, Hong Kong Professional Teachers' Union, Hong Kong Catholic Commission for Labour Affairs, Hong Kong Confederation of Trade Unions, Democratic Party, Lam Sum Shing Social Service Centre, Rainbow Action, Parents' Association for the Implementation of Right of Abode of Mainland Children, Right of Abode Alliance, Neighbours and Workers Service Centre, Ma On Shan Association, Skek Kip Mei Residents Group, Office of Tsang Kin Shing, Constitutional Affairs Society, Hong Kong Christian Industrial Committee, Steve Chan, Joe Wan, Deric Lam, Vincent Vong, Ivy Chan Social Service Centre, Legislative Councillors Emily Lau and Mak Kwok Fung, Office of District Councillors Cheng Tsuk Man, Chow Ka Kong, Mok Wai Hung, Au Wai Kwan, Luk Ka Ming, Leung Wing Kuen, Andrew To Kwan Hang, Wong Chung Ki, Chui Pak Tai, Gary Fan Kwok Wai. Press release, November 2001.

Allowed to spend up to HK\$9.5 million for his election campaign, Tung held forums with Election Committee members and issued a campaign platform. Although his principal constituency was the 796 members of the Election Committee, Tung sought to speak directly to the residents of Hong Kong. Even though, according to most accounts, Hong Kong residents paid little attention to the campaign, Tung's more frequent appearances apparently boosted his popularity somewhat.¹¹ However, one Hong Kong academic called this simply an "acceptance of authority." Some pundits have long suggested that Tung would be more popular and acceptable if he behaved more like a political leader than a government administrator or businessman.

The Electoral Affairs Commission is a competent, well-funded, professional body, but its preparations for the chief executive selection process appeared to put form over substance. The EAC engaged in elaborate rulemaking about campaign finance and electoral procedures and even reserved the Hong Kong Convention Center for the Election Committee for two days in March, in case the Election Committee needed to hold more than three ballots.

¹¹ Polls by the University of Hong Kong, for example, showed an increase in Tung's approval rating from 48 percent in December 2001 to 55 percent in February 2002. Anne Hyland, "Tung's Second Term Assured," *Australian Financial Review*, February 20, 2002.

III. THE STATUS OF DEMOCRACY IN HONG KONG TODAY

The promise of democratization in Hong Kong remains largely unrealized, and its prospects appear to be diminishing. While the central Chinese government has largely refrained from interfering in Hong Kong affairs, Hong Kong authorities and elites have themselves manipulated democratic institutions, stalled in undertaking a constitutional review process and undermined the independence of the judiciary. Since reversion, for example, the Hong Kong government has changed the system of electing representatives to the Legislative Council, added appointed members to District Councils, dissolved elected Municipal Councils, and invited central government reversal of the Hong Kong courts.¹²

Hong Kong officials continue to refuse to commit to election of the Chief Executive and all members of the Legislative Council by universal suffrage at the end of the constitutionally prescribed transition period. Instead, they seek to defer the reckoning with the complex questions about the political and institutional changes that would have to take place to prepare for fully democratic elections in 2007. An emerging view holds that fully democratic elections are merely possible but not necessarily desirable or even practical after the 10-year transition period.

Public discussion of post- 2007 political institutions increasingly includes options that fall short of fully democratic elections. Few expect direct elections for the chief executive in 2007. There is also increasing discussion of maintaining at least some functional constituency seats in the LegCo in 2008 and thereafter. Some people have suggested increasing the size of the legislature, perhaps as part of a compromise that would allow existing functional constituency representatives to keep their seats.

Any change in the method for forming the LegCo or electing the chief executive after 2007, 10 years after reversion, requires a two-thirds majority of LegCo members and the consent of the chief executive and must be “reported to” the Standing Committee of the National People’s Congress (NPC). Thus, by definition, the Chief Executive and at least some of those representing functional constituencies must agree to change the method of elections in order to implement the ultimate aim of universal suffrage. In other words, even if all 30 democratically elected (i.e., geographical constituency) representatives in the LegCo after 2004 support fully democratic elections, in order to reach the necessary 40 votes, at least 10 functional constituency representatives would have to agree, in effect, to put themselves out of office. If the method for electing the chief executive is not changed until after selection of the next chief executive in 2007, the incumbent chief executive would also have to agree to face the voters to serve a second term.

¹² Changes in the system of electing representatives to the LegCo included, for example, the creation of multi-member districts elected by proportional representation and reintroduction of corporate voting for functional constituency seats. For a detailed analysis of the 1998 election framework, see *The Promise of Democratization in Hong Kong: The New Election Framework*, NDI Hong Kong Report No. 2, October 23, 1997.

Functional constituencies, although first introduced in 1985 when many in Hong Kong wanted to protect and strengthen the territory's economic power and thereby assert its autonomy from China, are an essentially undemocratic phenomenon. First, they exist to directly represent special interests. Second, they also allow members of such special interest groups to have more than one vote—one for representatives from geographical constituencies and a second one for representatives from functional constituencies. Third, because of the peculiar rules governing LegCo, which allow functional constituency representatives acting separately of the directly elected legislators to obstruct private member bills, functional constituencies have considerable power as a block.

In contrast, much of the debate before and soon after reversion was about whether the timetable for achieving the ultimate aim of universal suffrage for the chief executive and all members of LegCo should be accelerated or whether the delicate compromises reflected in the Basic Law should be left alone. The LegCo adopted motions calling upon the government to immediately begin a formal process of constitutional review. Yet the Hong Kong government demurs on initiating the public debate about how to implement the Basic Law's goal of elected institutions under universal suffrage after the transition period, at least until after the 2004 LegCo elections. Officials also argue that, because at present Hong Kong residents remain preoccupied by more immediate issues, such a debate will have to await an improvement in the HKSAR's economic situation.

Meanwhile, Hong Kong business elites have become increasingly bold in their anti-democratic rhetoric. In what some observers have dubbed the "tycoon mentality," these elites now argue publicly that democracy does not work and unapologetically argue that universal suffrage would lead to chaos and would allow the public to insist on redistribution of wealth, higher taxes, broader welfare programs and other policies that threaten to destroy the Hong Kong economy. Well-known businessman Peter Woo, for example, wrote in the *South China Morning Post* in February 2000 that "the argument for universal franchise in Hong Kong is populist and emotive." Expressly worrying that universal suffrage "might redistribute power, and perhaps wealth eventually," Woo argued for maintaining special representation through functional constituencies for those who make up Hong Kong's narrow tax base:

Hong Kong has also fashioned a form of 'taxation with representation' – the functional constituencies – to ensure the tax exempt majority does not swamp the taxed minority. The functional constituencies are, thus, not quaint or anachronistic but rather an approximate reflection of the tax base. Far from taking more than their share, the business sector and professionals pay their way to the political table. . . . If the functional constituencies were to be abolished or effectively diluted, the consequence would not be universal franchise or utopia but the deprivation of the existing right to representation for the taxed. No wonder those paying

most of the taxes resent the idea of others paying less than five per cent of the taxes making important decisions . . .¹³

Others members of the political elite express similar views. At a public meeting in December 2001, for example, NPC Deputy and Election Committee Member Maria Tam criticized supporters of universal suffrage as “blind followers of Western thinking.” Another NPC Deputy Raymond Wu said, “Mass politics is shallow and immature in Hong Kong. . . . Hong Kong has no future if the Democrats gain power.”¹⁴

The Chief Executive himself discounts the value of democracy. In lieu of representative institutions, he would rely on polls to assess public opinion. In Tung’s campaign statement, he pledged to “put in place an effective opinion survey system to ensure the highest level of Government awareness of community attitude, sensitivity, and reaction to policy initiatives.”¹⁵ Gauging public opinion is common practice for political leaders almost everywhere, and Hong Kong already produces many polls. But while public polls serve many functions, they cannot replace democratic institutions and processes, including regular, meaningful elections.

In fact, given the extensive polling in Hong Kong, public support for democracy in principle is not in doubt. According to a recent survey by the Hong Kong Transition Project, two-thirds of even Tung’s supporters, and 74 percent of those opposed to a second term for Tung, favored direct elections for chief executive.¹⁶ By all accounts, however, democracy rates relatively low on people’s list of concerns. Government officials often justify their failure to initiate public debate on political reform by pointing to lackluster public support for democracy. However, public sentiment appears to be a rational reaction to the political reality in Hong Kong rather than its cause.

Relationship between Executive and Legislative Branches

The Hong Kong Special Administrative Region is an executive-led system. Hong Kong’s Legislative Council has relatively narrow powers and has no role in forming a government. Rather, the legislature is essentially a monitoring body that can block or amend government legislation and call on the administration to defend government policy. Legislators have the power to introduce private members bills, but not ones that involve public expenditure, political structure or operation of the government. Bills introduced by the government need to be endorsed by a simple majority to become law.

¹³ Peter Woo, “Taxing Times for the Rich,” *South China Morning Post*, February 24, 2000.

¹⁴ Angela Li and Chris Yeung, “Tung Supporters in Election Drive,” *South China Morning Post*, December 12, 2001

¹⁵ Tung Chee Hwa, My Pledge to the People of Hong Kong, January 2002, website <http://www.chtung.org>.

¹⁶ Ambrose Leung, “Only 16pc Want Tung to Run; Public Satisfaction with Chief Executive at Lowest Level in Four Years as He Prepares to Stand Again,” *South China Morning Post*, December 13, 2001.

However, the LegCo acts like a bicameral legislature for private member bills, legislative motions and amendments to government bills. These require majority support of both halves of the body: both the 30 functional constituency representatives and the 30 members elected through direct elections and by the Election Committee.¹⁷

The government has not built a strong relationship with any of the parties in the legislature in order to pass legislation. Thus, there are no governing or opposition parties in any traditional sense, although some parties find themselves in constant opposition to the administration. The lack of any governing role leaves a vacuum around the executive and relegates a class of potential leaders to an emasculated, permanent opposition role. Moreover, this arrangement makes a constructive relationship between the executive and legislature more difficult to maintain.

In his campaign statement and various speeches, the Chief Executive has announced a new “Accountability System” that would create a cabinet of appointed ministers or “principal officials.” (These changes would not require any amendment of the Basic Law.) Although the proposal has yet to be fleshed out, this quasi-ministerial system would end the role of civil service officials as principal defenders of government policy and leaders of government departments. Because the Chief Executive could remove them, principal officials would be more accountable to him and potentially enable him to better implement and defend his policies. It is unlikely that the legislature would have any role in approving ministerial appointments.

It is not clear whether the cabinet would replace the Executive Council or how the top civil service posts would be rearranged to accommodate this change. There has been speculation that a number of current department secretaries would be tapped for what may be six to 10 ministerial positions. No party members have been mentioned as possible candidates.

The proposal for an Accountability System appears to be an attempt to break the impasse between the executive and legislative branches and to control a sometimes-recalcitrant civil service. The proposal seeks to solve the problems caused by the design of a chief executive position as a lone figure without the resources of a party to draw on. The government argues that the new system will provide a firmer basis for cooperation between the executive and legislative branches and solve the problem of government accountability to the people of Hong Kong.

Opinions differ on whether the proposed Accountability System is a positive development. Some observers believe that the new system could be the first step in a process of political reform which could eventually even lead to an opening for political parties to participate in forming and running the government. Others point out the basic flaw: that unlike ministerial systems in parliamentary democracies, the executive in Hong Kong is not itself accountable, through elections, to the public. One democracy activist suggested the Accountability System represents a centralization of power and

¹⁷ Basic Law, Article 74 and Annex II.

thus represents a “road to autocracy.” Until further details emerge, it is difficult to make a full assessment of this plan.

The State of Political Parties

Political parties in Hong Kong are beleaguered as they face declining membership (from an already tiny base), increasing factionalization and ever-lower levels of public support and esteem. Public opinion polls show the popularity of parties and legislators falling even more precipitously than the famously unpopular Chief Executive. Hong Kong residents, including many in the business community, consider political parties to be both divisive and ineffective. The British colonial government long disparaged (and banned) political parties, and many Hong Kong residents still associate parties and partisan politics with the civil unrest that hit Hong Kong during the Cultural Revolution. Indeed, the Chief Executive Election Ordinance requires any party member elected as Chief Executive to step down from his or her political party upon assuming office.

There are no legally recognized political parties in Hong Kong since there is no party registration law. Moreover, trade unions and other groups that appear to be non-party civil society organizations regularly field candidates for elections. A large number of independents have run for and won legislative seats, as well.

The leading pro-democracy party of Hong Kong, the Democratic Party (DP), faces long-simmering internal conflicts and has lost some public support, as some criticize the party as increasingly powerless. The DP saw a loss of about 172,000 votes in the 2000 elections, as part of the dramatic drop off in voter turnout as compared to the 1998 election although it once again garnered the largest number of seats. In 1998, more than 60 percent of the vote in the direct elections went to pro-democracy candidates, winning them 14 of the 20 available seats. The Democratic Party won 43 percent of the direct vote, the most of all parties. In 2000, the DP share of the vote slipped to 35 percent.

The DP numbers around 600 members, but about 30 to 40 members of the so-called Young Turks faction have left or are threatening to leave the party to join the Frontier. There may also be a struggle for the party leadership when Martin Lee, the party’s eminent chairperson and the icon of Hong Kong’s democracy movement, steps down later this year because of term limits in the party’s constitution.

The pro-Beijing Democratic Alliance for the Betterment of Hong Kong (DAB) continues to have the largest party organization in Hong Kong, with some 2000 members, 16 branch offices and 85 full-time employees. Yet even the DAB has been experiencing declining support and appears concerned about its public image.

The pro-business Liberal Party currently holds no geographical constituency seats. Former party leader Allen Lee failed to win a geographical constituency seat in 2000 and subsequently departed party politics.

Frontier Chairperson Emily Lau continues to insist that Frontier is a “pressure group” rather than a political party. Her rationale is that the group is too small, narrowly focused, and lacking in structures and resources to present itself as a full-fledged political party. The Frontier’s official membership has declined to about 40 members, although its ranks may soon be boosted by defections from the Democratic Party.

Even as they struggle for support and membership, the parties have less and less to offer to their own activists. Without the usual rewards and promise of career development paths to offer, parties face difficulty attracting talented younger members who could prepare for future political leadership roles. One immediate consequence of the abolition of Municipal Councils, for example, has been the loss of a livelihood in politics for many political party activists. While they can serve on the District Councils, which deal with very local issues and pay relatively modest salaries, rising young politicians typically find it extremely difficult to find room on party election lists for the Legislative Council.

The Cross Party or Eight-Party Coalition

Since September 2001, representatives from all eight political parties represented in the LegCo have met on at least 10 occasions to discuss the government’s management of the economy and similar issues. In October, the coalition developed a seven-point package on proposed economic relief measures for the Chief Executive’s policy address. The coalition has also agreed to oppose any new taxes in 2002-03 and has passed a non-binding motion calling for reductions on utility fees. Initiated by Emily Lau and led by James Tien, Chairman of the Liberal Party, this joint effort of the parties to address economic issues has come to be called the Cross Party or Eight-Party Coalition. About 50 of the 60 members of LegCo have been involved.

The cooperation has been issue-specific. The parties do not all agree on issues of political development and the pace of democratization. Nevertheless, this is the first significant cross-party cooperation since the parties came together on economic issues in 1998. The willingness of the parties to sit down and come up with a common agenda is noteworthy, and the emergence of the coalition, however transitory, may have begun to counter perceptions of the parties as uncooperative and ineffectual.

At the same time, the formation of the Eight-Party Coalition demonstrates the inherent role, in the current system, of parties as opposition to the government. Reaction from the administration has been surprisingly vitriolic, with condemnations of the coalition as fundamentally obstructing the executive-led system. Some party leaders have reportedly been criticized for public cooperation with pro-democracy parties.

IV. AUTONOMY, RULE OF LAW AND JUDICIAL INDEPENDENCE

A strong respect for rule of law has long been a hallmark of Hong Kong. Many considered Hong Kong's strong commitment to legal norms and processes to be a significant factor in the territory's economic successes under colonial rule. Accordingly, one of the main concerns before reversion within Hong Kong and among members of the international community was whether the return to Chinese sovereignty would compromise the rule of law.

Before reversion, Hong Kong received a broad promise of autonomy, a commitment that the central government would not interfere with local control – a key aspect of the territory's democracy. The Basic Law authorizes the Hong Kong Special Administrative Region to “exercise a high degree of autonomy” in all areas except foreign affairs and defense. This autonomy was to include a judiciary independent not only of executive or legislative interference but also of interference from the central government. In the nearly five years since reversion, according to most observers, political actors and institutions in Hong Kong have been largely free of overt interference or direction from the Chinese government. But the constitutional arrangements cannot provide democracy if the Hong Kong government itself invites such interference.

With the People's Republic of China's accession to the World Trade Organization and Hong Kong's own economic performance stalled after several years of malaise, the HKSAR finds itself in the awkward situation of appealing to Beijing for favorable treatment. The dynamics of this relationship have thus changed from earlier expectations. The movement towards greater reliance on the relationship with the central government creates concerns about the HKSAR leadership's greater willingness to trade independence for trade concessions or other assistance from the mainland. While there are few indications at this point that such fears are justified, the stakes do appear to be climbing as perceptions about the HKSAR's nervousness about displeasing Beijing grows.

Provisions under the Basic Law

The Basic Law provides that Hong Kong will enjoy “independent judicial power, including that of final adjudication.” It established a new Court of Final Appeal (CFA), which has power of final adjudication except on issues within the sole purview of the central government. The Basic Law provides that HKSAR courts shall have no jurisdiction at all over defense and foreign affairs. Under the Basic Law and the constitution of the People's Republic of China, the Standing Committee of the National People's Congress has the power to interpret the Basic Law. At the same time, Hong Kong courts, in adjudicating cases, must necessarily interpret on their own provisions of the Basic Law. If the courts confront issues “concerning affairs which are the responsibilities of the Central People's Government, or concerning the relationship between the Central Authorities and the Region,” they must seek an interpretation of the

relevant provisions from the Standing Committee of the NPC through the Court of Final Appeal.¹⁸

When the Court of Final Appeal refers a case to the NPC, the Standing Committee must consult an advisory body called the Committee for the Basic Law. This Committee is composed of six mainland and six Hong Kong representatives, not all of whom need to be lawyers. According to the Basic Law, the Committee for the Basic Law will advise on interpretation of cases referred to the Standing Committee, that is, cases within the jurisdiction of the central government or that concern Hong Kong's relationship with the central government.¹⁹ The Standing Committee then decides the cases.

Although Hong Kong's government has enjoyed considerable autonomy since its reversion to Chinese sovereignty, the handling of disputes over who has the right to live in Hong Kong has called into question the willingness or ability of the judiciary, and the commitment of the government, to protect rights promised by the Basic Law.

Right of Abode Cases and the Issue of Reinterpretation

Much of the debate in Hong Kong about judicial independence, rule of law and the relationship with the mainland over the last five years has centered on litigation over the "right of abode." This began soon after reversion as a debate over the extent of rights granted by the Basic Law but evolved into a fundamental debate over the appropriate relationship among the Hong Kong courts, the Hong Kong executive and the Central People's Government.

The series of cases on the right of abode began as a dispute over whether a fundamental right guaranteed by the Basic Law could be qualified by another provision of the Basic Law about the relationship between the HKSAR and the mainland. Article 24 of the Basic Law grants the right of abode – the right to permanent residency – to, among others, all persons of Chinese nationality born to Hong Kong residents regardless of whether they are born in Hong Kong. At the same time, Article 22 requires persons entering Hong Kong from China to obtain exit approval from mainland authorities.

One case brought in 1997 challenged an immigration law, enacted by the Provisional Legislative Council, authorizing Hong Kong authorities to expel children born in China of Hong Kong parents who had not followed the prescribed mainland government exit procedure, notwithstanding the Basic Law's guarantee of the right of abode to such individuals.²⁰ While the Court of Final Appeal is not permitted to interpret Article 22, because it pertains to the relationship between Hong Kong and the central

¹⁸ Basic Law, Articles 12, 19 and 158.

¹⁹ Basic Law, Article 158.

²⁰ *Ng Ka Ling v. Director of Immigration*, 2 HKCFAR 4 (1999)

government (Article 158), the CFA declined to refer the issues in the case to the NPC Standing Committee for interpretation. The Hong Kong court viewed the case to depend on interpretation of Article 24, on the right of abode, an article that can be interpreted by the Hong Kong courts. The Court held that the law was invalid because it violated the plaintiffs' rights under the Basic Law.²¹ On the same grounds, a concurrent case invalidated another provision of the immigration ordinance that restricted the right of abode to children born of persons who themselves had Hong Kong residence at the time of birth.²²

These decisions led to widespread apprehension that Hong Kong would be flooded with new immigrants from the mainland, who would unduly tax Hong Kong's education, housing and social welfare systems. The government estimated that, under the Court's interpretation, some 1.67 million children in mainland China would have the right of abode in Hong Kong. Many criticized that figure as considerably inflated, based on suspect statistical methods and calculated to fan the flames of public fears.²³

On February 26, 1999, the HKSAR government asked the Court to clarify its judgment. The CFA replied that nothing in its earlier judgment was meant to question the authority of the NPC or the Standing Committee and acknowledged that an interpretation by the Standing Committee would be binding on the Hong Kong courts. Nevertheless, on May 21, 1999, the Hong Kong Chief Executive, via a formal report to the State Council of the Central People's Government, asked the Standing Committee to overrule the Hong Kong Court of Final Appeal's interpretation of the law and hold that those with the right of abode in Hong Kong still had to follow the mainland exit requirements. (The reinterpretation would not apply to the specific cases covered by the judgment.) The Standing Committee did so on June 26, 1999.

After consulting the Basic Law Committee, but without a hearing, the Standing Committee concluded that the exit requirements of Article 22 superseded the rights guaranteed in the Basic Law. Drawing on legislative intent of the Preparatory Committee for the SAR established by the NPC (which came into existence in 1995, long after the Basic Law was enacted in 1990), the reinterpretation also stated that children born of Hong Kong parents only obtained the right of abode if their parents had such rights at the

²¹ In the same ruling, the court rejected the plaintiffs' claim that the Provisional Legislative Council was illegitimate and therefore that the law requiring the certificate of entitlement was invalid. The court also rejected the claim that in enacting the law the provisional legislature acted outside its jurisdiction. The Provisional Legislative Council was authorized to enact only those laws necessary to ensure the proper functioning of the HKSAR, and the plaintiffs contended, unsuccessfully, that the law in question did not fall in this category.

²² *Chan Kam Nga v. Director of Immigration*, 2 HKCFAR 82 (1999); See generally, The Hon Sir Anthony Mason, *Human Rights in China and Hong Kong*, Lecture at Australian National University, August 21, 2001, p. 7.

²³ According to the Hong Kong Human Rights Monitor, a more accurate estimate number of children from mainland eligible for the right of abode would be about 400,000.

time of their birth. And the Standing Committee chided the CFA for failing to seek an interpretation of Article 22 in the first place.²⁴

The government's decision to seek a reinterpretation from Beijing outraged many in the Hong Kong Bar and others. These critics argued that the government jeopardized the independence and autonomy of the Hong Kong judiciary in order to vindicate its policy against immigration from the mainland. While the Basic Law directs the Hong Kong courts to seek interpretation of specified provisions involving the relationship with the mainland, it does not expressly give the government the right to do so. By establishing this precedent, the government has made judicial interpretations in Hong Kong subject to executive concurrence and demonstrated that rights in the HKSAR can always be taken away through "reinterpretation" by a legislative body in Beijing. The Hong Kong government itself jeopardized the delicate balance inherent in the "one country, two systems" formula.

During the recent Chief Executive campaign, pro-democracy legislators publicly challenged Tung Chee Hwa, among other things, to promise to never again seek reinterpretation of the Basic Law from the NPC.²⁵ While the government has refused to make such a promise, it has clearly been chastened by the firestorm of criticism. When asked what criteria would govern whether the government would ask the NPC to overrule Hong Kong's highest court in the future, a senior government official said there were no such criteria but went on to suggest some. Specifically, the government would only consider doing so if (1) there was widespread public support for a request for reinterpretation, (2) there was a vote of the LegCo in favor of such a request, and (3) the issue could not be resolved in Hong Kong because it was beyond the powers of the LegCo.

Status of Human Rights

In 1976, while under British sovereignty, Hong Kong became a party to the International Covenant on Civil and Political Rights (ICCPR). Like all international agreements in effect in Hong Kong before reversion, the ICCPR remains in force, and the Hong Kong Bill of Rights Ordinance of 1991 incorporates the ICCPR into Hong Kong law. Among other things, the Covenant provides that "Every citizen shall have the right and the opportunity . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot . . ."²⁶ Hong Kong's elections clearly do not meet the Covenant's standards for elections, including the requirement of universal and equal suffrage. Because the colonial government claimed an exception for Hong Kong's electoral arrangements, which also remains in place, Hong Kong maintains that it is not technically in violation of the Covenant because it does not hold democratic elections.

²⁴ Anthony Mason, *Human Rights in China and Hong Kong*.

²⁵ Klaudia Lee, *SCMP*.

²⁶ International Covenant on Civil and Political Rights, Article 25.

Since reversion, Hong Kong residents have not experienced any dramatic impairment of their civil liberties, such as the rights to free speech or free assembly. The Court of Final Appeal, however, upheld the validity of a law banning desecration of the Hong Kong and mainland flags in the face of a challenge based on the Basic Law, the Hong Kong Bill of Rights ordinance and the ICCPR.²⁷ But the activities of pro-democracy organizations, including groups that focus on democratic development in the mainland, in general have not been restricted. Likewise, Falun Gong members, despite being persecuted in the mainland and being labelled an “evil cult” by Tung, are largely left to practice their breathing exercises and to organize in peace.

Freedom of the Press

Some observers have suggested that Hong Kong media outlets are careful to avoid offending mainland authorities, in part because of the increasingly concentrated corporate ownership of those outlets. Hong Kong has experienced the same consolidation of media ownership that has raised fears elsewhere about potential conflicts of interests and reduced opportunities for reporting and opinion. The extensive mainland holdings of Hong Kong’s so called “tycoons” who own major media outlets exacerbate the situation. Of the 30 or so mainstream press outlets, only the owners of the Apple Daily and Hong Kong Economic Journal remain free of direct investments in China. Nevertheless, Hong Kong continues to host many international media companies, and freedom of press does not appear to be seriously threatened at present.

Implementation of Article 23

Article 23 of the Basic Law requires the SAR to enact laws “to prohibit treason, secession, sedition, subversion against the Central People’s Government” The article also requires laws “to prohibit foreign political organizations or bodies from conducting political activities” in the HKSAR and “to prohibit political organizations or bodies” from Hong Kong from “establishing ties” with foreign political groups. During Tung’s first administration, the HKSAR government postponed the introduction of legislation implementing Article 23, but it is expected to present such a proposal in April. With new pressures on the HKSAR to enact anti-terrorism measures, legislators and pro-democracy activists have expressed concern that this legislation may bestow dangerous new powers on the executive without sufficient checks. The process of implementing Article 23 may reveal the extent of the administration’s commitment to protecting civil liberties.

²⁷ *HKSAR v. Ng Kung Siu*, 1 HKC 117 (2000).

V. CONCLUSION

There is cause for concern about the promise of democratization in Hong Kong five years on. This report has outlined some of the deliberate designs, both originally inscribed in the Basic Law and subsequently enacted during the transition period, that have managed to entrench the power of the elite in the governance and political life of the HKSAR. At the same time, public complacency and the daunting nature of the work ahead in negotiating the constitutional changes necessary to realize universal suffrage pose considerable challenges.

It is critical for the judiciary to emerge as a strong and independent institution capable of checking, when necessary, the authority of the government and the legislature and protecting rights in Hong Kong from being eroded by mainland regulations or actions by mainland authorities. The HKSAR administration should not seek reinterpretation from mainland authorities whenever it disagrees with legal interpretations of Hong Kong's highest court. The government's decision to appeal interpretations of the Hong Kong courts in the right of abode case has weakened confidence that the courts can effectively protect the rule of law or the rights guaranteed in the Basic Law.

Finally, Hong Kong citizens have the right to democracy regardless of where they might rank it in their list of priorities in various public opinion polls. The right to democratic elections is unambiguous in the ICCPR and according to international standards. Where Hong Kong has led with the example of its success under one of the finest rule of law regimes in Asia, it could similarly serve to assure the mainland of the value of a fully democratic system.