

**AUTONOMY AND THE RULE OF LAW:
THE PROMISE OF DEMOCRATIZATION IN HONG KONG
NDI PRE-ELECTION REPORT #3**

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TABLE OF CONTENTS

- I. PREFACE**
- II. ABBREVIATIONS**
- III. INTRODUCTION**
- IV. INTERACTION BETWEEN HONG KONG AND BEIJING**
 - A. Economic and Health Crises
 - B. Reporting to the United Nations
 - C. Selection Process for the National People's Congress
 - D. Criticism of Hong Kong's Public Broadcasting Company
- V. THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY**
 - A. The Role of the Judiciary
 - B. Court of Final Appeal
 - C. Committee for the Basic Law
 - D. Early Tests of the Judiciary
 - E. Respect for the Rule of Law
- VI. CONCLUSIONS**
- VII. ENDNOTES**

PREFACE

This report is the third in a series prepared by the National Democratic Institute for International Affairs about democratization in Hong Kong. NDI expects to continue to monitor the status of autonomy and the prospects for democratization in the new Special Administrative Region in light of international standards and benchmarks outlined in the Basic Law. The Institute hopes that this and its other reports will contribute to better understanding of the ongoing transition process and assist those interested in promoting democratization in Hong Kong.

This report was written by Eric Bjornlund, NDI Senior Associate and Regional Director for Asia; Sophie Richardson, NDI Program Officer; and Andrew Fuys, NDI Program Assistant. The report is based in part on the findings of NDI teams that visited Hong Kong from December 2 to 5, 1997 and from March 15 to 18, 1998. Bjornlund, Richardson and Fuys participated in both missions. The December mission was led by Eugene Eidenberg, NDI board member and former senior White House official during the Carter administration, and included Sue Wood, former head of the National Party of New Zealand, who had also participated in an NDI study mission to Hong Kong earlier in 1997. Former US Attorney General and Pennsylvania Governor Dick Thornburgh led the March mission, which also included Kamal Hossain, former Foreign Minister of Bangladesh, and Somchai Homlaor, Secretary General of the Asian Forum for Human Rights

and Development. The teams met with a broad range of political and governmental actors, including Chief Executive Tung Che-hwa, other senior government and election officials, former Legislative Council members, Provisional Legislative Council members, political party leaders, representatives of domestic and international NGOs, members of the domestic and international media, academics and representatives of the diplomatic, business and legal communities. NDI previously sent missions to Hong Kong in March and August 1997.

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Kenneth D. Wollack
NDI President

ABBREVIATIONS

CFA Court of Final Appeal

CPPCC Chinese People's Political Consultative Committee

HKSAR or **SAR** Hong Kong Special Administrative Region

ICAC Independent Commission Against Corruption

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

NPC National People's Congress

PLC Provisional Legislative Council

RTHK Radio Television Hong Kong

UNHRC United Nations Human Rights Commission

INTRODUCTION

Hong Kong's new constitution, the Basic Law, makes a broad promise of autonomy from mainland China. The Basic Law authorizes the Hong Kong Special Administrative Region (HKSAR) to "exercise a high degree of autonomy" and "enjoy executive, legislative and independent judicial power, including that of final adjudication."⁽¹⁾ This means that political actors and institutions in Hong Kong will be free from interference or direction from the Chinese government in all areas except, as provided in the Basic Law, foreign affairs and defense.

Hong Kong's government has enjoyed considerable autonomy since its reversion to Chinese sovereignty in July 1997. Nevertheless, a few early indications of the emerging relationship between Hong Kong and authorities in the mainland suggest some causes for concern, and some recent court cases have called into question the willingness or ability of the judiciary to protect rights promised by the Basic Law.

Against the backdrop of preparations for the May 1998 Legislative Council elections, this report examines these two important subjects.

The report is the third in a series prepared by the National Democratic Institute for International Affairs (NDI) about democratization in Hong Kong. In December 1997 and March 1998, building on missions earlier in 1997, NDI sent teams to Hong Kong to explore the state of autonomy and democracy in the HKSAR. NDI has previously issued reports on the political environment on the eve of reversion to Chinese sovereignty⁽²⁾ and on the new framework for the May 1998 legislative elections.⁽³⁾

The Chinese government has taken a relatively "hands-off" approach to relations with Hong Kong. With respect to the HKSAR's relationship with the mainland, there have been some encouraging signs, such as the Chinese government's commitment to honoring Hong Kong's autonomy in treaties such as the International Covenant on Civil and Political Rights. Likewise, the SAR administration has apparently made its own decisions in managing its recent economic troubles. The selection of a mainland official to lead Hong Kong's delegation to the National People's Congress, however, was a troubling development. The public outcry after a Hong Kong representative to a mainland political meeting in Beijing criticized Hong Kong's public broadcasting station showed that concerns about autonomy still exist.

The Hong Kong judiciary must maintain its independence and act as a check on the power of the SAR government. The Hong Kong legal community has criticized two court rulings--on the legitimacy of the Provisional Legislative Council (PLC) and on the "right of abode" for mainland children born to Hong Kong parents--for not adequately protecting rights established in the Basic Law. Some evidence suggests a lack of sensitivity on the part of the SAR administration to concerns about the rule of law. With an independent judiciary adapting to a new role in a complex political environment, threats to the rule of law merit continuing attention.

INTERACTION BETWEEN HONG KONG AND BEIJING

In the 10 months since reversion to Chinese sovereignty, Hong Kong's autonomy has faced a number of challenges. The transition did not result in a sweeping crackdown on rights or freedoms, but many in Hong Kong still have concerns about the future of the SAR's autonomy. Several indications of the emerging relationship between Hong Kong and Beijing have been encouraging, including the handling of recent public policy crises without interference from Beijing and the mainland government's decision to file human rights reports with the United Nations. But there have also been reasons for concern, such as the process of selecting SAR delegates to the National People's Congress.

Economic and Health Crises

The SAR's post-handover period of relative calm came to an end in early December with twin economic and public health crises. These challenges provided an opportunity to assess whether the HKSAR government would exercise its autonomy and whether the Chinese government would intervene.

Since late 1997, economic difficulties have rocked Asia. As the stock markets and currencies in Thailand, Indonesia and South Korea

plummeted, Hong Kong struggled to protect its own financial strength. Throughout the crisis, however, there was no indication that Chinese authorities interfered with the Hong Kong government's economic policymaking, including politically sensitive issues such as the maintenance of the currency peg linking the value of the Hong Kong dollar to that of the US dollar. Financial Secretary Donald Tsang reportedly has acted independently throughout the economic crisis and has not had to take cues from Beijing before making policy decisions. Likewise, the Hong Kong Monetary Authority made its own decision to contribute to the Thai bailout package. Hong Kong clearly continues to make its own decisions on other pivotal economic issues such as interest rates and participation in the World Trade Organization.

Similarly, it appears that Beijing kept its distance as the SAR government addressed the December outbreak of the "bird flu." This public health scare erupted when several people became ill after eating contaminated chicken. Over the course of eight weeks, six people died of the flu as the government moved to identify and destroy the source of the virus. While the SAR authorities were criticized for not addressing this health hazard sooner and more effectively, it again appeared that Beijing was not dictating the SAR's responses to the crisis.

Reporting to the United Nations

Attitudes toward preexisting international human rights covenants to which Hong Kong is a signatory also shed light on the new relationship between the SAR and Beijing.

In 1976, while under British sovereignty, Hong Kong became a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Basic Law provides that all international agreements to which Hong Kong was a signatory before reversion remain in effect after reversion, including those to which China is not a party.

The ICCPR and ICESCR, therefore, remain in force in Hong Kong. The two covenants require the annual submission of reports to the UN Human Rights Commission (UNHRC). The Chinese government had suggested in the past that it would not submit reports to the UNHRC on behalf of Hong Kong because the Chinese government had not signed either. The Basic Law, however, requires the Chinese government to assist Hong Kong to comply with even those international agreements that do not bind China itself.

The issue of reporting to the UNHRC reflected the uncertainty of the Chinese government's commitment to upholding the covenants and to allowing international scrutiny of human rights in the SAR. It also raised questions about the commitment of the Hong Kong government to its international human rights obligations. After one political party called for a body independent of the SAR government to be established to write the report, Chief Executive Tung responded that the reporting mechanism outlined in the covenants was the "Western way" and "not necessarily the best" means of evaluating the human rights situation in Hong Kong.⁽⁴⁾

Nevertheless, on November 22, 1997, the Chinese Ambassador to the UN, Qin Huasun, submitted a letter to UN Secretary General Kofi Annan stating that the Chinese government had reversed itself and would submit the required reports on Hong Kong under both the

political and economic covenants. The Chief Executive's Office will submit reports to the Hong Kong branch of the Chinese Ministry of Foreign Affairs, which will then transmit the reports to the UN.

The new Chinese government position suggests a willingness to honor Hong Kong's established autonomy in international arrangements. It also reflects a changed position within the Chinese leadership toward the two agreements themselves. During his visit to the United States in October 1997, Chinese President Jiang Zemin signed the economic covenant on behalf of China at the UN. In March of this year, the Chinese government pledged that it will also accede to the political covenant.

Selection Process for the National People's Congress

Hong Kong's delegates to the Chinese legislature, the National People's Congress (NPC), will play a key part in developing the relationship between the HKSAR and the government in Beijing. Any amendments to the Basic Law require the approval of two-thirds of Hong Kong's NPC delegates, making them influential figures in the course of Hong Kong's constitutional development.

Before reversion, Xinhua (the New China News Agency), China's de facto consulate in Hong Kong, chose 28 deputies to represent the territory in the NPC. In the mainland, delegates to the NPC are chosen by provincial people's congresses. Because Hong Kong's Legislative Council is not equivalent to a provincial people's congress, however, Hong Kong could not adopt the method used in the mainland. Accordingly, the NPC determined a new method by which an augmented group of 36 Hong Kong delegates would be chosen after the establishment of the SAR.

The new five-year term of the NPC began in March 1998. In early October 1997, the NPC opted to reconvene the same 424-member Selection Committee that had chosen Chief Executive Tung to select Hong Kong's NPC delegates. In the process of choosing deputies, the Selection Committee would narrow a list of candidates, identified by self-nomination, to not more than 48. In a second vote, the Selection Committee would then choose a delegation of 36. These 36 would also be *ex officio* members of the HKSAR's Election Committee, which will select 10 legislators in the May 1998 legislative elections.

The NPC Standing Committee announced an 11-member presidium from the 424 members to oversee the deputy selection process. The Standing Committee emphasized that any delegates elected to the body had to "love China and Hong Kong."⁽⁵⁾ In early October, members of the NPC Standing Committee declared publicly that members of the Democratic Party were "against everything Chinese."⁽⁶⁾ In response, candidates from within Hong Kong's democratic camp emphasized that their objection to the one-party system in China should not be equated with a lack of patriotism. The democrats repeated that they would advocate institutional reform in the mainland and encourage a reevaluation of the Tiananmen massacre.

The Selection Committee convened in early November, endorsed the presidium and chose Chief Executive Tung Chee-hwa as its chairman. At this time, the Selection Committee opted not to establish any rules governing the conduct of the deputy selection process. After three days of discussion, the Selection Committee, by a vote of 362 to five, defeated proposals to require candidates to declare Hong Kong residency and lack of criminal records and to adopt a binding code of

conduct. Thus, no penalties were established for improper actions by candidates. The presidium also decided that it alone would address any "special circumstances arising from the process of the selection," that the list of those submitting applications would not be publicly announced and that the lists of candidates' supporters would be available only to the members of the Selection Committee.

From November 13 to 28, candidates collected application forms and began their efforts to garner the required 10 signatures of Selection Committee members. Ultimately, 72 candidates submitted complete applications. The Selection Committee then reconvened in early December to narrow the list of candidates to 54. It is unclear why the list included 54 candidates instead of 48 as previously specified. This was followed by another equally intense round of lobbying of the Selection Committee by the 54 candidates.

On December 9, the 36 delegates were announced. The top vote-getter was Jiang Enzhu, the director of the Xinhua office and a mainland official. Fourteen of the 36 were incumbent NPC deputies, two were members of the Chinese People's Political Consultative Conference, 10 were members of the PLC (including President Rita Fan), and all but two were also members of the Selection Committee. Three were deputies to the Guangdong People's Congress. Of the political parties, the Hong Kong Progressive Alliance had five members chosen, the Democratic Alliance for the Betterment of Hong Kong, four, and the pro-China Federation of Trade Unions, three.

The selection process raises concerns about the relationship between Beijing and the HKSAR. The expectation was that the NPC delegation would be composed of Hong Kong residents. It appears inconsistent with this expectation that Jiang Enzhu, a mainland official who is not a permanent resident of Hong Kong, should be allowed to represent the SAR. Residency-based requirements are imposed for other offices. For example, because Jiang is not a permanent resident of Hong Kong, he is ineligible to be part of the Election Committee that will select 10 legislators in the May elections.

The process also highlighted certain differences between political traditions in Hong Kong and in China. During the November 12 meeting of the Selection Committee, for example, Chief Executive Tung asked members of the Committee to approve two sets of rules by clapping. In the mainland, applauding is a common method of approving laws. After this vote, one Committee member immediately criticized the Chief Executive for employing a voting method alien to Hong Kong, and the subsequent vote was determined by a show of hands. One member of the Selection Committee stated that she did not feel that clapping had allowed her adequate opportunity to make a decision and abstained from the vote as a result.⁽⁷⁾

The Selection Committee's failure to establish rules or penalties governing the selection resulted in a process that was neither transparent nor credible. Even Tsang Yok-sing, Chairman of the pro-China Democratic Alliance for the Betterment of Hong Kong, publicly complained that there would be no recourse if anyone felt the process had been corrupted because the elections were for a national institution and thus were not governed by SAR laws.⁽⁸⁾ During the nomination stage, in an apparent breach of the presidium's guidelines that nominators not disclose their choices, the identities of many candidates' nominators were openly discussed and appeared in numerous newspapers. Several political analysts in Hong Kong and some candidates criticized the lack of accountability in the selection

process. This illustrated public anxiety that allegedly corrupt influences from mainland politics might permeate Hong Kong.

Democratic candidates failed to garner any significant support in the NPC selection process. In late November, the three DP candidates (Anthony Cheung Bing-leung, Albert Ho Chun-yan and James To Kun-sun) quit the race, charging that Selection Committee members would not support them because they criticized Beijing and therefore did not "love China." To, a longtime democratic activist, explained the Democrats' withdrawal. "You can't say we are now giving up the election," he said. "The point, on the contrary, is that we have no way to join the race."⁽⁹⁾

Criticism of Hong Kong's Public Broadcasting Company

In early March, a Hong Kong delegate to a mainland political body touched off a storm of controversy with a statement regarding Radio Television Hong Kong (RTHK). Xu Simin, a Hong Kong member of the Chinese People's Political Consultative Committee (CPPCC), criticized the government-funded station for not being sufficiently supportive of the new SAR administration and its policies. XU leveled this accusation against RTHK at the annual CPPCC meeting in Beijing, prompting concerns that Chinese authorities had endorsed this attack on the editorial freedom of RTHK.

Several leading political figures immediately criticized XU for making this statement at an official meeting in Beijing. Anson Chan, Chief Secretary for Administration and the second highest official in the government, publicly stated that the comments were equivalent to "inviting interference from the central government."⁽¹⁰⁾ Only after receiving much public criticism for not defending RTHK's independence did Chief Executive Tung state that independence of the public broadcasting authority was a matter to be considered in Hong Kong, not in Beijing, although he refrained from addressing whether the initial comment was appropriate.

Later that week in Beijing, Li Ruihuan, a prominent mainland leader and head of the CPPCC, strongly emphasized that RTHK was not a matter of concern for the central government. Li instructed deputies attending the meeting not to comment on Hong Kong affairs, lest they undermine the policy of "one-country, two-systems." President Jiang Zemin made similar statements at the March meeting of the National People's Congress. Thus, at least on this one issue, mainland leaders seemed to take a stronger position about the importance of maintaining Hong Kong's autonomy than did Chief Executive Tung himself.

The RTHK episode highlighted the extreme sensitivity in both Hong Kong and Beijing to any appearances of undue mainland influence in the SAR. Although some public figures suggested that the incident had been blown out of proportion, public opinion showed strong disapproval for Xu's statement. Chief Secretary Chan's quick response to XU showed that the administration remains concerned over public perceptions of Hong Kong's autonomy.

THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY

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. Some thought that the Chinese government might attempt to interfere with Hong Kong's legal structure by manipulating the makeup of the judiciary, or that government officials would act without respect to legal constraints or civil liberties.

According to the Basic Law, laws in force before reversion remain in force after reversion with the exception of any that contravene the Basic Law.⁽¹¹⁾ Since reversion, the Chinese government has taken no overt actions that threaten the rule of law in Hong Kong. There have, however, been several court rulings addressing fine points of constitutional law that highlight the critical role of the judiciary. In particular, the Hong Kong legal community has criticized two court rulings--on the legitimacy of the Provisional Legislature and on the "right of abode" for mainland children born to Hong Kong parents--for not adequately protecting rights established in the Basic Law.

The Role of the Judiciary

Hong Kong's judiciary is highly regarded and has earned a reputation for independence. It now finds itself with the responsibility to interpret the Basic Law, Hong Kong's new constitution. The rights of Hong Kong's citizens are defined in the Law, and it is critical that the judiciary rises to the challenge of defending these rights. As one prominent Hong Kong legal scholar stated, "the fate of Hong Kong's autonomy is in the courts' hands."

The judiciary faces a number of issues as the protector of rights. Several Hong Kong lawyers suggest that because Britain lacks a written constitution, judges trained in the British legal tradition are not accustomed to the responsibility of constitutional interpretation. To ensure that the rights established by the Basic Law are fully protected, judges will have to assert their autonomy from the administration and the legislature. The Hong Kong judiciary must not allow the policy choices of the government and legislature to take precedence over rights provided for in the Basic Law.

Court of Final Appeal

The outgoing British government had a strong interest in preserving the rule of law in Hong Kong after its return to Chinese sovereignty. The 1984 Sino-British Joint Declaration called for the laws to remain in force after reversion and for the establishment of a final appeals court.

Under British colonial rule, the Privy Council in London served as Hong Kong's final appeals court. The Basic Law established in its place the Court of Final Appeal (CFA) in Hong Kong. The Basic Law also provided that the CFA could "invite judges from other common law jurisdictions to sit on the Court of Final Appeal."⁽¹²⁾

In the negotiations between the Chinese and the British concerning Hong Kong's future, the CFA became a point of controversy. The Chinese felt it inappropriate to have more than one foreign judge on a court that could interpret the Basic Law. Hong Kong's legal community and British advisors, however, argued that local Hong Kong judges could be intimidated by Beijing and therefore that the presence of foreign judges was essential to maintaining independence.⁽¹³⁾

The British and much of the Hong Kong legal community also wanted the CFA to be established before reversion, citing the need for the court to adjust to its new role and establish expertise before the transition. The Chinese government objected to the idea of a high court with the ability to interpret the Basic Law functioning under British rule and threatened that it would dissolve a pre-reversion CFA and establish a new one on July 1, 1997.⁽¹⁴⁾

The jurisdiction of the CFA was also an issue before reversion. The Basic Law states that HKSAR courts "shall have no jurisdiction over acts of state such as defense and foreign affairs."⁽¹⁵⁾ Before reversion, Hong Kong's courts could not challenge the constitutionality of acts of their sovereign, the British parliament. Nor can they do so under Chinese sovereignty. However, the use of the words "such as" caused concern in some quarters about what actions could be considered acts of state. As one commentator pointed out after the issue was resolved in 1995, the wording "raises the possibility that other government actions, such as the quelling of protests or the arrest of dissidents, could be defined as acts of state and outside the jurisdiction of the court."⁽¹⁶⁾ It will therefore be important to see which post-reversion actions and issues are considered "acts of state."

The Basic Law gives the power of interpreting the Basic Law to the Standing Committee of the National People's Congress.⁽¹⁷⁾ At the same time, Hong Kong courts, in adjudicating cases, must necessarily interpret on their own provisions of the Basic Law. If they 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 CFA.⁽¹⁸⁾ In this respect, the CFA can mitigate potential interference, as the Standing Committee cannot give any legal interpretation until the CFA refers to it the case in question.

The CFA has four permanent members: a Chief Justice and three other justices. The Basic Law stipulates that all Hong Kong judges are to be appointed by the Chief Executive after being recommended by an independent commission of local judges, prominent citizens and members of the legal community.⁽¹⁹⁾ By law, the Chief Justice must be Chinese, while the others must simply be residents of Hong Kong, which allows for expatriate participation. In any given case, the Chief Justice has the option of adding a fifth judge. This justice would come from a list of 15 judges, which includes members of the local judiciary and overseas judges from common law countries. Judges are assigned at the Chief Justice's discretion on case-by-case basis.⁽²⁰⁾

The current Chief Justice is the highly regarded former barrister Andrew Li Kwok-nang. The three other CFA Justices are Henry Litton, Kemal Bokhary and Charles Ching, who all held judicial positions under the colonial government. For the court's opening case, Chief Justice Li chose as the fifth justice Lord Cooke of Thorndon, a former Court of New Zealand president who continues to sit on the Privy Council in London.⁽²¹⁾

The CFA began its first session on December 18, 1997, and its initial case dealt with squatters' rights. In February, the court heard its first case in which a government action was challenged, one that involved the right against self-incrimination. The court may hear cases considered to be litmus tests of its independence--and Hong Kong's autonomy--in the coming months.

Committee for the Basic Law

When the Court of Final Appeal refers a case to the NPC, the NPC's 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.⁽²²⁾ The Standing Committee then decides the cases. The Basic Law Committee has the potential to play a positive role advising the Standing Committee on interpreting the Basic Law.

The Committee was approved by the NPC on June 27 and formed on July 1. It has met twice since then. Committee members were drawn from prominent political, economic and academic circles. The chairman is Xiang Chunyi, a former deputy director of the Commission of Legislative Affairs of the NPC Standing Committee. The vice chair is Wong Po-yan, a Hong Kong businessman. Other Hong Kong members include Albert Chen, Anthony Neil, Maria Tam, Ng Hong-man and Raymond Wu Wai-yung. Wong, Tam, Ng and Wu are all members of Hong Kong's delegation to the National People's Congress. Chen is the Dean of the Law Faculty of Hong Kong University. Neoh is the Commissioner of the Securities and Futures Commission.

Early Tests of the Judiciary

It remains to be seen how the judiciary will adapt to the new legal environment in which it finds itself. It will be important to watch future court cases involving interpretation of the Basic Law to learn whether the judiciary is maintaining its independence from the government and legislature and from Beijing. Two cases provide insights into how the judiciary may react to governmental actions that appear to violate the Basic Law: one that challenged the legitimacy of the Provisional Legislative Council and the other about the "right of abode" of children born in China of Hong Kong parents.

Challenge to the Legitimacy of the Provisional Legislature

In late July, a court ruling upheld the legitimacy of the Provisional Legislative Council, even though the Basic Law clearly does not provide for any provisional or appointed legislature.⁽²³⁾ This was an early, troubling indication that courts would not question the legality of an act of the sovereign even when that act violated the Basic Law.

The issue arose when three defendants in a criminal trial challenged whether certain criminal offenses under the common law had survived and become part of the laws of the HKSAR. They argued that it was necessary for the National People's Congress through its Standing Committee and/or the HKSAR legislature to act affirmatively to adopt the pre-existing common law, rules of equity, ordinances, subordinate legislation and customary law. They further challenged the legality and competence of the Provisional Legislative Council.

The Basic Law expressly establishes that the Legislative Council must be elected.⁽²⁴⁾ Nevertheless, a three-judge panel of the Court of Appeal, an intermediate appellate court, concluded that because the NPC granted authority to the Preparatory Committee to take necessary steps to establish the new Special Administrative Region, the Preparatory Committee was thus empowered to establish the Provisional Legislature. The Court upheld the argument that because

Hong Kong is now part of China, as a special administrative region directly under the central government, actions of the NPC with respect to the SAR could not be challenged in Hong Kong. The Court of Appeal found that Hong Kong courts have no jurisdiction to question the legality of an act of the sovereign, such as a decision of the NPC, just as they could not have challenged the constitutionality of acts of the British parliament before July 1.

The court took the view that the PLC was not the first Legislative Council, which according to the Basic Law must be elected. Rather, the court considered the PLC something for which the Basic Law did not provide. Therefore, as legal expert and former LegCo member Margaret Ng has pointed out, the NPC resolution may have amounted to an amendment of the Basic Law without following the procedure specified in Article 159.⁽²⁵⁾

Under the decision, then, the NPC can apparently legislate for Hong Kong in any way it sees fit, regardless of the provisions of the Basic Law. Thus, it becomes entirely up to the NPC whether the promises of the Basic Law will be kept. Not only is this a troubling legal conclusion, it also means that the promises of autonomy and eventual democracy in Hong Kong will depend on the willingness of authorities in Beijing and Hong Kong to uphold those promises.

The Right of Abode Case

Another recent case that raises questions about the extent to which Hong Kong courts will protect rights guaranteed by the Basic Law involves the "right of abode" in Hong Kong.⁽²⁶⁾ The Basic Law grants this 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.⁽²⁷⁾ The case challenged the PLC's enactment of a law requiring that persons claiming the right to reside in Hong Kong must prove it with a certificate of entitlement. Under the new law, Hong Kong authorities moved to expel children born in China of Hong Kong parents who had not followed the prescribed procedure, notwithstanding the Basic Law's guarantee that such individuals have the right to live in Hong Kong.

In early October, a Hong Kong court rejected arguments that a seven-year-old girl should be allowed to stay in Hong Kong even though she did not have the required certificate of entitlement. The Court of First Instance rejected the claim that because Article 24 of the Basic Law granted the girl the right of abode she, like any other permanent resident, was not subject to government immigration control once inside Hong Kong. Instead, the court supported the government's claim that Article 22 of the Basic Law provides grounds to expel individuals who have not followed proper mainland exit procedures.

Article 22 states that "people from other parts of China" entering Hong Kong must first apply for approval from mainland authorities. Chinese immigration laws establish quotas that regulate the flow of people from the mainland to Hong Kong. According to the court, mainland children with the right of abode must leave China for Hong Kong through this general quota system, the same as other Chinese emigrants to Hong Kong. Many Hong Kong residents with children in the mainland choose for them to enter illegally rather than wait out the lengthy and allegedly arbitrary quota system. This risky venture sidesteps mainland regulations and allows children to "jump the queue." The children involved in the case had not exited the mainland

through proper channels and therefore, according to the court, the Hong Kong government could expel them. In this ruling, the court made no distinction between these children who, according to the provisions of Article 24, have the right of abode and immigrants from the mainland who do not.

In the same ruling, the court rejected the plaintiffs' claim that the PLC 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 PLC was authorized to enact only those laws necessary to ensure the proper functioning of the SAR, and the plaintiffs contended, unsuccessfully, that the law in question did not fall in this category.

The issue of migration from the mainland is a particularly sensitive one in Hong Kong. The government and many residents are concerned that a large influx of new residents would unduly tax Hong Kong's education, housing and social welfare systems. Thus, the government implemented the certificate system to regulate the entry of the estimated 66,000 mainland children who have the right of abode in Hong Kong.

The system for regulating the exodus of "people from other parts of China," however, should not hinder the return "home" of legal Hong Kong residents. The Basic Law specifies who are legal Hong Kong residents and expressly includes these children.

The court in effect allowed the government's judgment about the public interest to supersede a right guaranteed in the Basic Law. That is, the ruling suggests that the government's policy to control the flow of mainland children into Hong Kong is more important than allowing those children to exercise their constitutionally guaranteed rights. This decision has understandably caused concern about the ability or willingness of Hong Kong courts to ensure respect for the rights established by the new Basic Law.

The ruling also suggests that mainland laws automatically limit rights guaranteed by the Basic Law. But Annex III of the Basic Law, which lists mainland laws that are applicable in Hong Kong, does not include mainland immigration laws. The October ruling nonetheless shows deference to these immigration laws. Since these laws are not applicable in Hong Kong, the court should not have considered whether the children had violated them when making its ruling. It seems a troubling notion that their exercise of their constitutionally guaranteed residency rights can be somehow made subject to the laws of another jurisdiction.

In March 1998, an appeal of the October ruling came before an appellate court. In early April, the court upheld the October decision and allowed the law requiring certificates of entitlement to stand. As of the date of this report, the case has not been appealed to the Court of Final Appeal.

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 of mainland authorities. When rights are spelled out in the Basic Law, the courts must not defer in the adjudication of cases to the SAR administration or to mainland authorities. The October and April decisions in the right

of abode case do not provide confidence that the courts can effectively protect rights guaranteed in the Basic Law.

Respect for the Rule of Law

Many in Hong Kong have questioned the new government's attitudes toward the rule of law. They point to laws seemingly inconsistent with the Basic Law, such as the limitations on entry for those with residency rights discussed above and a recently enacted law exempting mainland authorities from more than a dozen local laws. Other incidents suggest that the administration does not seem to feel the need to take seriously criticisms that certain government actions have jeopardized the rule of law. Examples include the actions of authorities to prevent residents from flying nationalist (Taiwanese) flags on Taiwan's National Day and recent government decisions to not pursue legal action against groups or individuals with ties to the mainland and the administration.

Removal of Flags on Taiwan's National Day

On October 10, Taiwan's National Day known as "Double Tenth," Hong Kong police ordered citizens to remove Taiwanese flags. This holiday commemorates the founding of the Republic of China, and under colonial rule it was regularly observed by a small but visible portion of the population. Many observers consider that displaying a Taiwanese flag, which is more accurately the flag of the Republican government on Taiwan, symbolizes allegiance with that government and rejection of the People's Republic government in the mainland. As the first celebration of Double Tenth under mainland sovereignty approached, attention focused on how the government would handle public observance of the holiday.

One report estimated that 22 flags and four banners were ordered down. Hong Kong has no laws barring the display of these specific flags, and at the time the police cited no legal basis for their orders. Several prominent members of Hong Kong's legal community argued that the order had no legal basis and inquired of the government whether the request had come directly from the administration.

Chief Executive Tung defended the flags' removal as a key means of ensuring order and upholding the "one country" principle.⁽²⁸⁾ Furthermore, when questioned about the actions of the police he explained that he personally had given instructions to the police to remove the Taiwanese flags.

Only later, in the face of public criticism, did government officials cite two laws which they claimed provided legal grounds for the action: the Crown Land Ordinance and the Public Order Ordinance. Several legal experts questioned whether these ordinances could be read to justify such actions. They pointed out that political and commercial advertisements are commonly displayed on public grounds without government approval. This gave the impression that, in this case, the government acted first and only later sought to find a plausible legal basis for its actions.

Incidents of Selective "Non-Prosecution"

In February 1998, the Justice Department chose not to take legal action against the Hong Kong branch of Xinhua, the official news agency of China, when it failed to comply with local privacy laws. The case involved a prominent democracy activist, Emily Lau, who sought in 1996 to see any files that Xinhua held on her. Ten months later--and only after Lau complained to the Privacy Commissioner--Xinhua responded that it had found no such files. A

local privacy law states that such requests must be answered within 40 days. Hong Kong's Privacy Commission investigated the case and submitted its findings to the Justice Department, which subsequently decided not to take legal action against Xinhua for its violation of the law.⁽²⁹⁾

When asked about Xinhua's apparent failure to comply with this time limit, Chief Executive Tung stated that it was "a technical breach, not a substantive breach"⁽³⁰⁾ and did not clarify further the basis for this statement. As many in Hong Kong quickly pointed out, there was no legal basis for this distinction.

In March, the government chose not to pursue criminal charges against publishing magnate Sally Aw for an alleged scheme to defraud advertisers in the *Hong Kong Standard*. After an investigation by the Independent Commission Against Corruption (ICAC), Hong Kong's highly regarded anti-corruption agency, the government announced it would prosecute three of Aw's colleagues for conspiring to defraud advertisers. Although she was named in the ICAC investigation report as a co-conspirator, the Department of Justice did not seek to prosecute Aw herself.

Many observers suggested that Aw's ties to the mainland and the administration influenced the government's decision. Aw is a delegate to the Chinese People's Political Consultative Committee, an important mainland political body, and is reportedly close to figures in the administration. Following on the heels Xinhua case, the decision not to prosecute Aw reinforced concern that the government would not necessarily hold figures or groups with ties to the mainland to the laws of the SAR. Even the normally tame Provisional Legislature called the Secretary for Justice, Elsie Leung, to appear before it and address the government's decision in the Aw case.

The details of the Aw case are unclear, and thus any consideration of Aw's guilt or innocence remains conjecture. The government has not helped itself, however, by failing to give a public account of its reasons to not prosecute. Secretary Leung has thus far only stated that there are several similar examples in the past where the government did not prosecute individuals named as co-conspirators and that the government will make its justification public in due course. Given the high sensitivity within Hong Kong to threats to rule of law and autonomy, this explanation has not reduced public concerns about the decision.

Exemption of Mainland Institutions from Local Laws

At the end of March, the SAR government proposed a bill that would require all laws to specify whether they apply to Chinese state organs. The Adaptations of Law (Interpretive Provisions) Bill was passed on the last day of the Provisional Legislature's existence. The new law will exempt administrative bodies of the mainland government, as well as the SAR government itself, from 17 local laws, including the privacy law involved in the Xinhua case described above and several anti-discrimination ordinances. In addition to mainland government agencies, subordinate organs of the central government such as Xinhua are also exempted from these laws, as long as they are carrying out the administrative functions of the central government.

The Basic Law stipulates that all offices of the central government and their personnel "shall abide by the laws of the Region [Hong Kong]."⁽³¹⁾ The new law seemingly violates this constitutional provision by requiring local laws to specifically include mainland

government bodies within their scope if those bodies are to be subject to those laws. Furthermore, since the SAR has administrative authority in all areas except foreign affairs and defense, the government could have chosen to simply replace "the Crown" with "the Hong Kong Special Administrative Region" rather than "the State."

The government defended the new law, contending that it merely adapts the language used in colonial laws, to which government bodies were not bound unless specified, by replacing "the Crown" with "the State." A government spokesperson added that the new law "does not change the current law, but merely clarifies it."⁽³²⁾

The law has drawn fierce criticism from many legal experts, who fear that it will create a two-tier system in which not only Chinese government bodies but also agencies such as Xinhua that have ties to the state would be out of reach of local laws. The Hong Kong Human Rights Monitor opposed the new law on the grounds that it breaches "the fundamental principle of the rule of law that the law applies equally to residents and governments."⁽³³⁾ The group suggested that instead of rushing to revise the wording of local laws to reflect the change in sovereignty, the government ought to consider whether maintaining such legal immunity is desirable.

In contrast to its rush to enact this legislation, the government wisely chose to delay the submission of another controversial bill until after the establishment of a more legitimate legislature. That bill will be needed to implement provisions in the Basic Law that call for laws prohibiting treason, secession, sedition and subversion.⁽³⁴⁾ Likewise, the government, at the very least, ought to have waited until after the establishment of a more legitimate legislature to introduce such a sensitive bill as one to exempt mainland agencies from local laws.

CONCLUSIONS

The Chinese government has taken a relatively "hands-off" approach to relations with Hong Kong since reversion. The decisions not to interfere with Hong Kong's management of the economic and health crises and its commitment to have the SAR submit human rights reports are positive developments. With the exception of the March incident involving RTHK, there has been no direct criticism of Hong Kong political institutions from the mainland--and, in that incident, it was a Hong Kong deputy who made the critical comments.

Other evidence, however, indicates a troubling lack of commitment on the part of the SAR administration to concerns about the rule of law. Incidents such as the removal of Taiwanese flags last October 10 and the decision to not take legal action against persons or groups with ties to the SAR administration or the mainland government send unfortunate signals. Similarly, the unregulated and elitist process of selecting NPC deputies suggested a lack of commitment toward transparent, competitive political processes in the SAR.

A strong and independent judiciary is critical to any democratic political system. In its two early cases involving constitutional interpretation, lower courts in Hong Kong did not adequately uphold the laws of the SAR or protect the rights of residents. When government actions or policies jeopardize the rights of Hong Kong residents as spelled out in the Basic Law, the courts must not defer to

the administration or the National People's Congress. A strong and independent judiciary will also be critical for protecting rights from being eroded by actions of mainland authorities, although to date the mainland government has not taken any such actions. Upcoming court cases will provide an important indication of whether the judiciary is able to perform this function that is essential to Hong Kong's democratic development.

It is premature to cite these incidents as evidence that rule of law is on a pronounced decline in Hong Kong. The administration, however, has not given the public adequate explanations for actions that have seemingly violated local law. It could have taken these incidents as opportunities to demonstrate its commitment to the rule of law by providing the public with explanations for its actions. With this in mind, it remains important to continue to monitor political developments to determine whether occurrences such as the government's failure to effectively enforce the privacy law in the Xinhua case or its decision to order down nationalist flags on Double Tenth are anomalies or harbingers of things to come.

The autonomy of Hong Kong is critical but should not be the only criterion with which to measure the success or failure of the SAR government. The absence of direct interference from Beijing should not shield the SAR government from criticism when its own actions fail to uphold a commitment to the rule of law. While the SAR government has demonstrated its independence in the months since reversion, the Chinese government, in the words of one political observer, has already succeeded in placing "influential people in influential positions" and has no need to directly manipulate the political process. Democratic development in Hong Kong must necessarily include a commitment of the government and the ruling elites to the rule of law, civil liberties and full political participation.

ENDNOTES

1. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law), Article 2.
2. *The Promise of Democratization in Hong Kong: Report of the NDI Survey Mission*, NDI Hong Kong Report No. 1, July 13, 1997 (NDI Report No. 1).
3. *The Promise of Democratization in Hong Kong: The New Election Framework*, NDI Hong Kong Report No. 2, October 23, 1997 (NDI Report No. 2).
4. "ADPL's Wish List Calls for Human Rights Report," *Hong Kong Standard*, September 27, 1997.
5. "Democrat Hopefuls 'Right for NPC Role'," *South China Morning Post*, November 5, 1997.
6. Rodger Lee, "Burning Basic Law 'Rules Out Eligibility'," *South China Morning Post*, October 3, 1997.
7. "Anger at Mainland Tradition of Applause to Carry Votes," *South China Morning Post*, November 13, 1997.

8. Tsang Yok-sing, "Electoral Rules of Doubtful Authority," *South China Morning Post*, November 18, 1997.
9. Carmen Cheung, "Democrats to Pull Out of NPC Election," *South China Morning Post*, November 26, 1997.
10. Carmen Cheung and Cynthia Wan, "Tsui Invites Mainland Interference with RTHK Criticism says Chan," *Hong Kong Standard*, March 6, 1998.
11. Basic Law, Article 8.
12. Basic Law, Article 82.
13. Mark Roberti, *The Fall of Hong Kong* (John Wiley & Sons: New York), 1996, p. 300.
14. Willem van Kemenade, *China, Hong Kong, Taiwan, Inc.: The Dynamics of a New Empire* (Alfred A. Knopf: New York), 1997, pgs. 80-81.
15. Basic Law, Article 19.
16. Frank Ching, "Patten Accord: A Mixed Blessing," *Far Eastern Economic Review*, June 29, 1995, p. 36.
17. Basic Law, Article 158.
18. *Ibid.*
19. Basic Law, Article 88.
20. Hong Kong Court of Final Appeal Bill.
21. Cliff Buddle, "Highest Court Finally Rolls into Action," *South China Morning Post*, December 19, 1997.
22. Basic Law, Article 158.
23. *HKSAR v. Ma Wai Kwan*, High Court of Hong Kong, Court of Appeal, July 29, 1997.
24. Basic Law, Article 68.
25. Margaret Ng, "Decision that Resonates," *South China Morning Post*, August 8, 1997.
26. *Cheung Lai Wah, et al. v. The Director of Immigration*, High Court of Hong Kong, Court of First Instance, October 9, 1997.
27. Basic Law, Article 24.
28. Baby Sung and Carmen Cheung, "Flag Removal Necessary: Tung," *South China Morning Post*, October 14, 1997.
29. Gren Manuel, "Xinhua Escapes Prosecution," *South China*

Morning Post, February 28, 1998.

30. Angela Li, "Xinhua Privacy Rules Breach a Technicality: Tung," *South China Morning Post*, March 11, 1998, p. 1.

31. Basic Law, Article 22.

32. Hong Kong Special Administrative Region, Daily Information Bulletin, March 30, 1998.

33. "Adaptations of Laws (Interpretive Provisions) Bill: The Application of Ordinances to the 'State'," Hong Kong Human Rights Monitor, April 6, 1998.

34. Basic Law, Article 23.

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