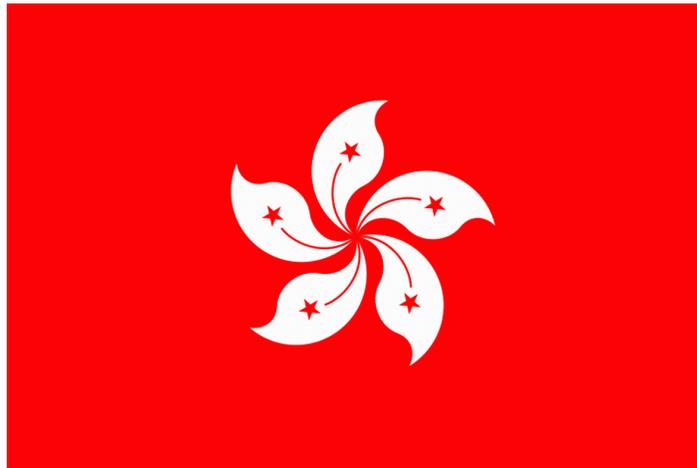




**A DIVISIVE CAMPAIGN SEASON:  
HONG KONG'S 2011 DISTRICT COUNCIL ELECTIONS,  
2012 CHIEF EXECUTIVE ELECTION  
AND THE CHALLENGES AHEAD**



*The Fifteenth NDI Report in the Promise of Democratization Series*

July 1, 2012

## The National Democratic Institute

The National Democratic Institute for International Affairs (NDI) is a nonprofit organization working to strengthen and expand democracy worldwide. Since 1997, NDI has periodically published assessment reports, evaluating the status of democracy in Hong Kong. These reports have reviewed the Hong Kong Special Administrative Region's electoral framework, autonomy, the rule of law and civil liberties under the "one country, two systems" framework. This report is the fifteenth in that series. It focuses on the November 2011 district council elections and March 2012 chief executive election. Through this series of reports, entitled "The Promise of Democratization," NDI has sought to raise awareness of the challenges and the progress toward "universal suffrage," which is set forth as the "ultimate aim" in Hong Kong's Basic Law.

In the weeks prior to the November 6, 2011 district council elections, representatives from NDI and the Commissioner to the Americas from the Victorian Government of Australia, Victor Perton, met with members of the political parties, the judiciary, academia and the press to discuss the overall political environment in Hong Kong. On the day of the district council elections, representatives from NDI together with the Hong Kong Human Rights Monitor observed campaign activities and polling throughout the region and spoke with candidates. Following the March 25, 2012 chief executive election, NDI representatives met with many of the same individuals. On April 21, 2012, NDI together with Hong Kong University's Center for Comparative and Public Law and the Consulate General of Canada in Hong Kong co-sponsored a public forum where several well-known commentators and political party leaders discussed their views on Hong Kong politics in light of the recent chief executive election.

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

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Taking Stock: Passage of the Political Reform Package, NDI Hong Kong Report No. 14, November 2010.

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## FREQUENTLY USED ACRONYMS

CE	Chief Executive
CFA	Court of Final Appeal
CFI	Court of First Instance
CTU	Hong Kong Confederation of Trade Unions
DAB	Democratic Alliance for the Betterment and Progress of Hong Kong
EC	Chief Executive Election Committee
FC	Functional Constituency
FDH	Foreign Domestic Helper
FTU	Hong Kong Federation of Trade Unions
GC	Geographical Constituency
HKSAR	Hong Kong Special Administrative Region
ICAC	Independent Commission against Corruption
LegCo	Legislative Council
LSD	League of Social Democrats
SCNPC	Standing Committee of the National People's Congress

## Executive Summary

In Hong Kong, public expectations and the legal framework of the Special Administrative Region set out direct elections of the chief executive and the legislative council as the “ultimate aim.” This report assesses Hong Kong’s current progress and challenges in the pursuit of democracy. It provides an overview of the political events in Hong Kong from mid-2011 through mid-2012. Covering the November 2011 district council elections and the March 2012 chief executive election, this report focuses on strategic positioning and competition among Hong Kong’s political parties. The assessment concludes with an examination of specific challenges facing Hong Kong’s democratic development.

***The November 2011 District Council Elections.*** The pro-establishment Democratic Alliance for the Betterment and Progress of Hong Kong and the similarly aligned Hong Kong Federation of Trade Unions registered a major gain of 24 seats in the November 2011 district council elections, while the pan-democratic parties lost 16 seats. Although district council elections have generally focused on local livelihood issues, these elections had broader significance. The political reform package passed in 2010 introduced five new seats in Hong Kong’s legislature, reserved for selected district council members. These five seats will be contested in Hong Kong-wide elections in September 2012. No other political office in Hong Kong will derive its power from such a broad base of popular support. The winners of these “super seats” will be well positioned to influence the legislative agenda and to run for chief executive in 2017. With the losses by pan-democratic parties in November 2011, the possibility that an opposition leader will gain control of one or more of the super seats is increasingly less likely. Furthermore, the district council elections have revealed that the divisions within the pan-democratic camp, which surfaced soon after the 2010 political reform package was first proposed, have deepened. “Radical” and “moderate” groups within the camp have not cooperated. At the same time, pro-establishment parties have solidified a strong presence in local communities. Record voter turnout reflects superior organization and resources as well as the voter mobilization capabilities of the pro-establishment parties.

***The March 2012 Chief Executive Election.*** Although the 2010 political reform package expanded the chief executive election committee, the chief executive selection process still falls short of international democratic standards. Using functional constituencies as the building blocks of the election committee imports the same imbalance of representation as exists in the legislative council. However, over time each chief executive election has become relatively more democratic. This election was no exception. While a pro-Beijing candidate was a preordained certainty, in 2012 central government authorities did not endorse a single candidate and, at one point, urged the chief executive election committee to choose a candidate acceptable to the Hong Kong public. The race involved three candidates, with one from a pan-democratic party. A plurality of pro-establishment candidates presented Beijing with the option to wait and see before making its final pick. This allowed the central government to hedge against commitment to an unpopular candidate. As a result of the lack of clear signaling from Beijing, and genuine political differences among the pro-establishment candidates, the pro-establishment camp split. It remains to be seen whether the chief executive-elect will be able to bridge this divide. The new divisions within the pro-establishment camp could present a political

opportunity for the pan-democrats to cooperate with dissenting pro-establishment party members on discrete issues.

Beijing's nod to public opinion and the enhanced level of competition among three candidates created additional space for civil society to influence the political process. Rather than conduct a public opinion poll, collating the views of a sample of a few hundred citizens over the phone, Hong Kong University Professor Robert Chung sought to solicit public input. His mock election exercise, organized in the face of harsh criticism from the pro-government media, was held two days before the actual chief executive election committee vote. Citizens registered for the referendum using their Hong Kong identification cards and could vote at an online website or through a mobile phone application. Participants could cast their ballots for any one of the three candidates, or they could vote to abstain—effectively an affirmative vote for none of the candidates. Nearly 223,000 citizens, or approximately 5 percent of Hong Kong's registered voting population, turned out to vote in the referendum, and about 55 percent of them voted to abstain. Chung's referendum laid bare the shortcomings of the chief executive selection process. The turnout revealed a significant number of Hong Kong people frustrated by the limited options presented by their political system. While this population may not strongly identify with any of the political parties, it cares deeply about certain public policies.

Although these developments suggest progress, Hong Kong's development of mature democratic institutions is not assured. Judicial independence, civil liberties and universal suffrage are three areas where interpretations of the Basic Law differ. Without sustained public scrutiny and constructive dialogue on these issues in the months and years ahead, Hong Kong could witness political stagnation or degeneration.

***Judicial Independence.*** The Basic Law provides for the separation of the legal systems of Hong Kong and the mainland, but Article 158 establishes a scheme for interpretation of the Basic Law, which gives Beijing the last word. Under Article 158, the power of final interpretation of the Basic Law is vested in the Standing Committee of the National People's Congress in Beijing. As the Hong Kong government and pro-establishment parties raise the possibility of Standing Committee review with increasing regularity, they cast doubt on the finality of decisions by Hong Kong's highest court. Unless the chief executive and central government authorities exercise discretion and refrain from invoking the interpretive power of the Standing Committee, Article 158 could become a means for evading the Hong Kong courts and eviscerate the independence of the judiciary.

***Civil Liberties.*** Article 23 of the Basic Law provides that the Hong Kong government enact laws to protect national security. The implementation of Article 23 in a way that is acceptable to Beijing while respecting the rights and freedoms of the Hong Kong people remains a difficult challenge. Concerns about vague clauses in the original bill hinge, in part, upon the autonomy of the Hong Kong government and the independence of its judiciary. A new framework for electing the chief executive by universal suffrage in 2017 and election of the legislative council by universal suffrage soon thereafter will clarify lingering questions about democratization and the relationship between Hong Kong and the mainland. It will also be relevant to consider the extent that authorities invoke Article 158 during the next chief executive's term.

***Universal Suffrage.*** China has accepted a self-imposed obligation to allow the Hong Kong people to directly elect their legislature and chief executive. Hong Kong lawmakers will have to contend with the public's expectations. The Hong Kong people have grown to expect an

opposition candidate as a voice in the chief executive race. Efforts to raise the nomination threshold or introduce a screening mechanism may provoke a negative public reaction. Moreover, the legacy of a public acceptability criterion in 2012 may contribute to expectations of genuine competition among the candidates. A number of possible reforms to realize direct elections have been put forward. The fate of functional constituencies is the most difficult aspect of the universal suffrage issue. The debate may consider replacing the chief executive election committee with a party-oriented nominating system. Prominent scholars have argued that party affiliation for the chief executive would lead to better and more responsive governance. Replacing the chief executive election committee will require an amendment of the Basic Law. To achieve consensus and satisfy the amendment formula, appropriate political incentives together with a vision of common interest must exist. This is perhaps the most formidable task facing the next chief executive.

## I. Introduction

In 2012, both the Hong Kong Special Administrative Region (HKSAR) and the People's Republic of China (PRC) will undergo leadership transitions. The new administrations in both governments will face difficult choices on the direction of political reform. While the direction of political reform throughout the rest of the PRC remains unclear, in Hong Kong public expectations and a legal framework clearly set out direct elections of the HKSAR Chief Executive (CE) and Legislative Council (LegCo) as the "ultimate aim." The Standing Committee of the National People's Congress (SCNPC) in Beijing has decided that election of the CE by universal suffrage may take place in 2017 and the election of the LegCo by universal suffrage may follow in 2020. The HKSAR constitution, known as the Basic Law, prescribes judicial independence and a significant degree of political autonomy through 2047.

The Hong Kong people view the 2012 CE election as the last chief executive selection process before direct elections in 2017. A compromise between the pro-democracy Democratic Party and PRC central government authorities (Central Government or Central Authorities) in 2010 put in place a series of reforms, starting with the district council elections of 2011 and chief executive election of 2012, in order to gradually reach the goal of universal suffrage. An amendment passed in 2010 expanded the Chief Executive Election Committee (EC) from 800 to 1,200 members and increased the LegCo from 60 to 70 members. Half of the new seats in the LegCo will go to representatives from geographical constituencies (GCs), and the other half will go to representatives from a new district council functional constituency (FC).<sup>1</sup> Only district council members are eligible to run for district council FC seats. Most importantly, the five district council FC seats will be contested in HKSAR-wide elections. No other political office in Hong Kong derives its power from such a broad base of popular support. The winners of each of the five district council FC seats will thus enjoy a unique democratic mandate. Commentators have taken to calling the district council FC seats "super-seats."

This report provides an overview of the November 2011 district council elections and the March 2012 CE election. The analysis focuses on strategic positioning and competition among Hong Kong's political parties. Previous analysis of the parties has tended to categorize them as part of a "pan-democratic" camp, favoring a quicker path toward universal suffrage, or part of a "pro-establishment" camp, generally deferring to Beijing on critical issues like suffrage. While this report will continue to use the terms "pan-democratic" and "pro-establishment" the findings below will show that this terminology is increasingly less useful because of inter-party divisions. The summary below offers a snapshot of the state of Hong Kong's political parties and democratic development during the period roughly from mid-2011 through mid-2012. The intention is to identify Hong Kong's progress and challenges in the pursuit of democracy as promised by the Basic Law. At this juncture in the political evolution of the HKSAR, this report also highlights specific vulnerabilities. The final section examines three elements essential to

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<sup>1</sup> Half of the seats in LegCo are currently apportioned among 28 functional constituencies. Functional constituencies are interest groups, such as Agriculture and Fisheries, Financial Services and Education. Eligible voters for functional constituency seats may include natural persons as well as other legal entities, including corporations. Representatives from Hong Kong's five geographical constituencies occupy the remaining seats in LegCo. All eligible natural persons within these geographically demarcated zones may elect their respective geographical representatives. Pro-democracy groups have criticized functional constituencies for giving minority groups disproportionate political influence. For more information, see CHRISTINE LOH, FUNCTIONAL CONSTITUENCIES: A UNIQUE FEATURE OF THE HONG KONG LEGISLATIVE COUNCIL (2006).

Hong Kong's democratization that the Hong Kong and international communities should monitor going forward: judicial independence, civil liberties, and universal suffrage.

## II. Background

In order to understand the forces driving Hong Kong's political transition, one must first appreciate the global significance of Hong Kong itself. Hong Kong's democratic development has broad implications for the Chinese people, the PRC Central Government and the international community.

### A. Strategic Importance of Hong Kong

From the perspective of many Chinese citizens, Hong Kong is a source of inspiration and a model for what they can hope to achieve in the mainland. Hong Kong continues to enjoy a degree of press freedom and freedom of association not available in the mainland. Hong Kong remains the only place within the PRC where Chinese citizens may openly commemorate the June 4 Tiananmen Square massacre. Mainlanders in Hong Kong participate in this and other public demonstrations. Furthermore, the rise of the internet has allowed expanded access to and discussion of reporting by Hong Kong's media in the Mainland.

From the perspective of China's leaders, Hong Kong serves as a laboratory for broader political reforms. Since Deng Xiaoping's Reform and Opening Policy, Chinese leaders have pursued reform initiatives: first, as pilot projects in discrete counties or special economic zones; and later, broadened those initiatives nationally. Beijing has become increasingly attuned to Hong Kong public opinion and adept at managing Hong Kong's quasi-democratic institutions. In the event that Beijing decides to expand political reform in the mainland, the architects of that reform will likely draw upon their experience in Hong Kong.

Lastly, from the perspective of the international community, Hong Kong represents a litmus test for China's adherence to its obligations under international law and China's respect for international norms and values, such as human rights. Negotiations with Britain over the resumption of China's sovereignty over Hong Kong proceeded from the assumption of a high degree of autonomy for the territory.<sup>2</sup> The second General Principle of the Basic Law promises the Special Administrative Region of Hong Kong a "high degree of autonomy" exercised through its own executive, legislature and judiciary, including the power of final adjudication.<sup>3</sup> China made declarations regarding the grant of autonomy to Hong Kong to multi-lateral institutions and foreign states in order to enable the continuation of Hong Kong's wide and varied treaty rights and obligations and its membership in international organizations.

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<sup>2</sup> The language of the Sino-British Joint, later reiterated in the Basic Law, set out the initial terms of the transfer of sovereignty. *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-P.R.C., Dec. 19, 1984, 23 I.L.M. 1371 ("The Hong Kong Special Administrative Region shall be directly under the authority of the Central People's Government of the People's Republic of China and shall enjoy a high degree of autonomy. Except for foreign and defense affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication.")

<sup>3</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), *reprinted in* 29 I.L.M. 1519 [hereinafter "Basic Law"], art. 2.

## B. Institutional Foundations

The following discussion puts the district councils and the CE into historical context and explains the mechanisms of selection.

### 1. Electing the District Councils

Hong Kong's district councils represent the lowest tier of governance in the HKSAR.<sup>4</sup> The district councils derive from the district boards, which were instituted by the colonial government in the early 1980s to help facilitate government responsiveness to local needs and improve coordination of services at the district level. A District Administration Scheme divided Hong Kong into 18 districts, with each board serving as a district affairs management committee. By the mid-1990s, the people of Hong Kong elected almost all members of their District Boards by a first-past-the-post system. The colonial governor refrained from appointing any members although the chairmen of the Rural Council (Heung Yee Kuk) held unelected *ex officio* seats on New Territories district boards.

#### SELECTION OF HONG KONG'S DISTRICT COUNCIL MEMBERS

	November 1999	November 2011
Directly Elected	405	412
<b><i>Percent Directly Elected</i></b>	<b><i>76%</i></b>	<b><i>81%</i></b>
Rural Council Ex Officio Members	27	27
Appointed by the Chief Executive	102	68
<b><i>Percent Not Directly Elected</i></b>	<b><i>24%</i></b>	<b><i>19%</i></b>
TOTAL	534	507

These institutions were essentially maintained as Provisional District Boards after the return to Chinese sovereignty. In early 1999, a LegCo bill established district councils, reserving 24 percent of the total number of seats for the Rural Council and appointment by the CE. Constitutional reform legislation in 2010 increased the number of directly elected district council members and decreased the number appointed by the chief executive. The number of seats reserved for the Rural Council did not change.

<sup>4</sup> For an brief overview of the district council, see Information Services Department, Hong Kong Special Administration Region Government, Hong Kong: The Facts, District Administration (April 2012) available at [http://www.gov.hk/en/about/abouthk/factsheets/docs/district\\_admin.pdf](http://www.gov.hk/en/about/abouthk/factsheets/docs/district_admin.pdf)

## 2. Electing the Chief Executive

The Basic Law defines the composition of the EC as consisting of members from four sectors.<sup>5</sup> Local laws and regulations detail the operation of the EC, such as demarcation of different sectors and specific qualifications for membership.<sup>6</sup> Local law also restricts CE candidates from having political party affiliation.<sup>7</sup>

Under the Basic Law, each of the following sectors makes up one-fourth of EC membership:

- (i) Industrial, Commercial and Financial Sector;
- (ii) Professional Sector;
- (iii) Labor, Social Services and Religious Sector; and
- (iv) Political Sector.<sup>8</sup>

Following the debate and compromise on political reform in 2010, a resolution to increase the size of the election committee won endorsement. Under this resolution, the election committee expanded its membership from 800 to 1,200 seats, taking effect for the 2012 CE election. The 1,200 members must publically declare their nomination decision within a two week nominating period. Nomination requires at least 150 signatures. A runoff election must be held if no candidate receives an absolute majority of 601 votes.

Notwithstanding the 2010 reform package, the EC system belies the principles of being broadly representative, democratic and open.<sup>9</sup> The Basic Law requires the EC, but not FCs, to be broadly representative. Using FCs as the building blocks of the four sectors necessarily imports the same imbalance of representation to the EC. The essential difference between the FCs and the EC subsectors is the addition of the Political Sector. With the Political Sector having ninety-one members from the PRC National People's Congress and Chinese People's Political Consultative Conference, views are closely aligned with those of the Central Government in Beijing. All members of the LegCo also vote for the CE as part of the Political Sector. The EC system fails to include certain groups and persons in Hong Kong society. For example, women, young adults, retired senior citizens, ethnic and religious minorities, and persons from disadvantaged groups have fewer opportunities to participate. At the same time, the system over-represents certain interest groups. The sixty seats apportioned to the Agriculture and Fisheries subsector is one example of over-representation. The proportion of uncontested seats and low voter turnout in the elections of EC members raises additional concerns about whether

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<sup>5</sup> Basic Law, Annex I.

<sup>6</sup> The Legislative Council Ordinance (Cap. 542) and the Chief Executive Election Ordinance (Cap. 569) [hereinafter "CEEO"] delineate the corresponding subsectors and establish eligibility criteria for candidates and voters.

<sup>7</sup> CEEO Section 31.

<sup>8</sup> Basic Law, Annex I.

<sup>9</sup> Annex I of the Basic Law states that the CE shall be elected by a "broadly representative Election Committee" and shall be appointed by the Central People's Government. It goes on to state: "The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region in accordance with the principles of democracy and openness." [Emphasis added.] Basic Law, Annex I(3).

the members actually represent the will of their constituents.<sup>10</sup> Membership requirements and voter registration in various subsectors are not always open or subject to public scrutiny.<sup>11</sup>

### III. The November 2011 District Council Elections

Although the district councils are local offices with elections generally dominated by local issues, the introduction of the five district council FC super seats gave the November 2011 contest broader significance. A winner in this district council election would be eligible to contend for one of the super seats in the September 9, 2012 LegCo election. The eventual holders of the super seats will be positioned to challenge the incumbent in the 2017 CE election. The fact that pan-democratic candidates fared poorly in this district council election means that they are less likely to win any of the super seats in September.

#### A. The District Councils in Context

Pro-establishment interests have historically dominated the district councils. As consultative bodies to the HKSAR government on district administration, the district councils have an institutional link to the civil service. They accept the supervision of the Home Affairs Bureau and work closely with the government bureaucracy. Thus, favorable relations with the government will help a district council member to provide benefits to local constituents. District council seats that are not directly elected have gone to pro-establishment candidates. The CE has tended to favor independents or pro-government parties, such as the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) and the Liberal Party.

Pro-establishment candidates have also done well in contests for the directly elected seats. The DAB has pursued a strategy to establish a strong presence in the district councils.<sup>12</sup> According to academic observers, the pro-establishment party's leadership realized decades ago that focused efforts at the grassroots can have a significant impact in district-level elections since candidates do not require a large number of votes to win.<sup>13</sup> They have cultivated an extensive network of neighborhood cultural and patriotic associations that provide perks—pre-paid travel excursions, health checks, and haircuts—and inculcate a loyal following among residents. Politically affiliated associations will mobilize voters on polling day, sometimes providing transportation to the polls. Political party members and candidates also provide services in the community, such as walk-in legal advice. The older political parties, including the Democratic Party, have offices in some districts that serve as hubs for these activities. This culture of engagement favors pro-establishment parties, who can rely on financial support from businesses closely aligned with Beijing as well as logistical and strategic support from the Central

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<sup>10</sup> SIMON N.M. YOUNG & RICHARD CULLEN, *ELECTING HONG KONG'S CHIEF EXECUTIVE* 71-75 (2010).

<sup>11</sup> *Id.* at 76.

<sup>12</sup> Lo, Shiu-hing, *Political Parties in Hong Kong: The Role of "Pro-China" Democratic Alliance for the Betterment of Hong Kong*, 4 *ASIAN J. POL. SCI.* 98, 129 (1996).

Ma Ngok and Ivan Choy have observed that organizations based on patriotism, home town or profession are particularly important for voter mobilization in district council elections because candidates for these local elections require relatively few votes (compared to LegCo GC elections) to win. 馬嶽, 蔡子強 《選舉制度的政治效果: 港式比例代表制的經驗》 133 (2003).

Government’s Liaison Office.<sup>14</sup> Furthermore, this financial advantage allows pro-establishment parties to staff young people full-time in the districts and collect a talent pool from which to draw future candidates.

## B. The Results of the November 2011 Elections

The pro-establishment DAB/FTU alliance registered major gains in the November 2011 district council elections, adding 24 directly elected seats. This tally does not include *ex officio* members and those appointed by the CE. The majority of the other parties and independent candidates that won seats, such as the Civil Force, the Liberal Party and Regina Ip’s New People’s Party, are pro-establishment. On the other hand, pan-democrats lost a total of 16 seats.

### NOVEMBER 2011 DISTRICT COUNCIL ELECTION RESULTS SUMMARY

Political Parties		Candidates	Seats	Net Change	% of Seats
Pan-Democrats	Democratic Party	132	47	-3	11.41
	Civic Party	41	7	-5	1.70
	Hong Kong Association for Democracy and People’s Livelihood	26	15	-1	3.64
	Neo Democrats	10	8	0	1.94
	Neighborhood and Workers Service Center	6	5	+2	1.21
	Hong Kong Confederation of Trade Unions	3	0	0	0
	Individuals and others	8	2	-9	0.49
<b>Total for Pan-Democrats</b>		<b>226</b>	<b>84</b>	<b>-16</b>	<b>20.39</b>
“Radical” Democrats	People Power	62	1	-2	0.24
	League of Social Democrats	27	0	-6	0
<b>Total for “Radical” Democrats</b>		<b>89</b>	<b>1</b>	<b>-8</b>	<b>0.24</b>
DAB/FTU	Democratic Alliance for the Betterment and Progress of Hong Kong	182	136	+17	33.01

<sup>14</sup> CHRISTINE LOH, UNDERGROUND FRONT: THE CHINESE COMMUNIST PARTY IN HONG KONG 209 (2010) (“The Liaison Office, which evolved from Xinhua Hong Kong in 2000, continued to coordinate patriotic forces at elections.”)

	Hong Kong Federation of Trade Unions	20	11	+7	2.67
<b>Total for DAB/FTU</b>		<b>202</b>	<b>147</b>	<b>+24</b>	<b>35.68</b>
Others	Civil Force	20	15	-3	3.64
	Liberal Party	24	9	+2	2.18
	New People's Party	12	4	+2	0.97
<b>Others and Independents (incl. unlisted parties)</b>		<b>322</b>	<b>180</b>	<b>-</b>	<b>33.69</b>
<b>GRAND TOTAL</b>		<b>839</b>	<b>412</b>	<b>+7</b>	<b>100</b>

Taking aim at the new district council FC seats, the Democratic Party fielded 132 candidates in the election but won only 47 seats, three less than in 2007. The party had never fielded such a large number of candidates. High profile members of the party, such as Lee Wing-tat and Wong Sing-chi, failed to obtain seats. The Civic Party also nominated a large number of candidates, but out of 41 only seven were successful. The more radical People Power Party and League of Social Democrats (LSD) fared worse. None of the LSD, including Lee Kwok-hung (“Long Hair”), secured a district council seat. After losing the seat he had held for 20 years, Andrew To resigned from his position as LSD chairman. The newly formed People Power Party fielded a total of 62 candidates yet only one was elected. In a number of these races, high-profile members of the pan-democratic camp “parachuted” into districts. These candidates may have calculated that the introduction of the district council FC would elevate the discussion in this election and allow Hong Kong “core values,” such as universal suffrage and human rights, to influence voter preferences. Some candidates may have expected their name recognition to carry them to victory. With record turnout of 41.49 percent, in the end, pro-establishment parties bested the pan-democrats in getting supporters to the polls.

### C. A Divided Pan-Democratic Camp

Infighting among the pan-democratic parties may have influenced election results. Disagreements among pan-democrats surfaced following the 2009 reform package. Many believed that the government’s proposal did not move Hong Kong in the direction of genuine democracy. In protest, five pan-democratic legislators resigned from LegCo as part of a plan to trigger by-elections. They hoped that their reelection would function as a de facto referendum rejecting the reform package. The by-elections controversy provoked strong condemnation from Beijing and the HKSAR government. Ultimately, the five legislators were reelected, but pro-establishment candidates did not challenge them, and voter turnout was low. At the same time, the Democratic Party met with the Central Government Liaison Office and brokered a compromise with Beijing, delaying universal suffrage until 2017 in exchange for incremental democratic change. Critics argued that the Democratic Party and their allies settled for a resolution that fell short of the party’s ideals and legitimized functional constituencies by agreeing to the introduction of the district council FC. Moreover, in communicating directly with the Liaison Office, the Democratic Party marginalized the more radical pro-democracy factions within the pan-democratic camp. In January 2011, the radical faction itself fell into

division. Incumbent LSD legislators, Raymond Wong and Albert Chan, split with their party and formed the People Power Party.<sup>15</sup> Personal rivalries among the radicals played a role in the split, and at the time of this report's drafting, members of People Power admitted to NDI that they do not foresee any chance of cooperation with LSD—or any of the other pan-democratic parties—in the future.

In the November 2011 elections, both People Power and the LSD campaign literature emphasized political issues such as close relationships between government and business, the Central Government's influence on Hong Kong's media, and the need for Mainland China to reform politically. However, People Power more aggressively targeted the Democratic Party. People Power sought to cast the district council elections as a referendum on the 2010 constitutional reform compromise. Their losses at the polls may indicate that the mainstream Hong Kong public is generally comfortable with—or at least had not yet formed an opinion on—the reform package. Voters may have disapproved of the radicals' confrontational tactics and the overall sense of disharmony within the pan-democratic camp. Nonetheless, it is not clear whether competition from People Power materially damaged the pan-democrats. Even after adding the votes that went to People Power candidates, a number of the Democratic Party's high-profile candidates still came up short against their pro-establishment opponents. People Power may have actually helped the Democratic Party mobilize supporters; in some heavily contested districts with both Democratic and People Power candidates, Democratic Party candidates received more votes than they had four years earlier.<sup>16</sup>

Democratic Party candidates generally refrained from discussing the 2009 constitutional reform package during their campaigns. The party might have engaged the radicals and defended their compromise on constitutional reform. Albert Ho was one of the few candidates that mentioned the district council FC and his intention to run for one of the super seats in September, and Albert Ho won a district council seat. He also went on to run as the sole pan-democratic candidate in the March 2012 CE election and is seen as the most likely pan-democrat to win a super seat. Other high-profile pan-democratic candidates who were not as vocal about their true intentions may have missed an opportunity to emphasize the broader significance of the district council elections. It is unclear, however, whether this strategy would have worked. Voters' rejection of the LSD and People Power, and the general failure of out of district (“parachuting”) candidates, highlight the local nature of district council elections, and the importance of establishing credibility at the district-level. The Neo Democrats, for example, a party that split from the Democrats in late 2010, fared well in the November elections. They chose to focus on district-work while remaining ideologically and rhetorically restrained on political issues.

#### **D. The Right to Abode Controversy**

A number of pan-democratic parties, and the Civic Party in particular, may have suffered at the polls as a result of their advocacy on behalf of Foreign Domestic Helpers (FDHs) seeking

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<sup>15</sup> The People Power Party maintained opposition to the “four democracies,” meaning members of the Alliance for Universal Suffrage (the Democratic Party, the Association for Democracy and People's Livelihood and Power for Democracy). People Power also opposes the pro-establishment parties led by the DAB. < 人民力量無所懼，表明阻擊四民 > 《星島日報》2011-01-31, A12.

<sup>16</sup> 孔誥烽 < 票債票償運動失敗之後 > 《明報》2011-11-12.

the right of abode in Hong Kong. Article 24(2)(4) of the Basic Law provides that the following persons are entitled to the right to abode in Hong Kong:

Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region....

Immediately after the transfer of sovereignty in 1997, amendments to the Hong Kong Immigration Ordinance came into effect that excluded certain classes of persons from the definition of “ordinary resident.” FDHs were one of the proscribed classes.<sup>17</sup> Several Philippine nationals who had lived in Hong Kong since the early 1980s filed for judicial review. Barrister and Civic Party founding member Gladys Li agreed to represent applicant Evangeline Banao Vallejos. The Hong Kong media first reported on the case in December 2010.<sup>18</sup> About one month before the district council elections, the Court of First Instance (CFI) held that the legislation restricting FDH’s from qualifying for permanent residence violated the Basic Law.<sup>19</sup> The appeals process is ongoing, but the *Vallejos* case has generated considerable controversy.

The pro-establishment parties generally rejected the CFI’s ruling on the right of abode for FDHs. Opponents framed the issue in terms of the purported social consequences: an onerous tax burden from the influx of new permanent residents entitled to Hong Kong’s social services.<sup>20</sup> During the hearing, the government did not provide statistics on the impact of striking down the FDH exclusion.<sup>21</sup> Outside of the courtroom, however, the DAB predicted that granting FDHs a right of abode would lead to an increase of 500,000 residents, since the existing population of domestic workers would bring their spouses and children to Hong Kong, and eligibility for social services would lead to tens of billions of dollars in additional public expenditures.<sup>22</sup> Both political parties and the media employed negative and polarizing rhetoric. The Liberal Party directly attacked the Civic Party in quarter page advertisements in the Chinese language press. The advertisements read: “The Civic Party has never talked about its stance on the residency fight. Is it on the side of the Hong Kong people or on the side of foreign maids?”<sup>23</sup> An editorial in *Wen Wei Po* accused the Civic Party of being an “enemy of the people” for their alleged role in the *Vallejos* case.<sup>24</sup> A number of high-profile members of the government and the pro-

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<sup>17</sup> Immigration Ordinance (Cap. 115) Article 2(4)(a)(vi).

<sup>18</sup> <留港 23 年無居權 外傭斥歧視申覆核> 《明報》 2010-12-05.

<sup>19</sup> *Vallejos Evangeline Banao also known as Vallejos Evangeline B. v. Commissioner of Registration, Registration of Persons Tribunal*, [2011] HKCAL 124 /2010 (C.F.I.), *rev’d*, [2012] CACV 204/2011 (C.A.). available at <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>

<sup>20</sup> See e.g., Gary Cheung & Peter So, ‘Scare Tactics’ over Maids’ Rights, SOUTH CHINA MORNING POST, Jul. 27, 2011 available at <http://topics.scmp.com/news/hk-news-watch/article/Scare-tactics-over-maids-rights>

<sup>21</sup> Tanna Chong & Austin Chiu, *Evidence Against Helpers Dropped*, THE SOUTH CHINA MORNING POST, Aug. 16, 2011 available at <http://topics.scmp.com/news/hk-news-watch/article/Evidence-against-helpers-dropped>

<sup>22</sup> Mary Ann Benitez & Winnie Tse, *House of Cards*, THE STANDARD, July 29, 2011 available at [http://www.thestandard.com.hk/news\\_detail.asp?we\\_cat=12&art\\_id=113579&sid=33196451&con\\_type=3&d\\_str=20110729&fc=8](http://www.thestandard.com.hk/news_detail.asp?we_cat=12&art_id=113579&sid=33196451&con_type=3&d_str=20110729&fc=8)

<sup>23</sup> Tanna Chong, *Whose Side is the Civic Party on, Liberals Ask*, SOUTH CHINA MORNING POST, Aug. 11, 2011, available at <http://topics.scmp.com/news/hk-news-watch/article/Whose-side-is-Civic-Party-on-Liberals-ask>

<sup>24</sup> 馬彥 <公民黨為外傭爭居權是與民為敵> 《香港文匯報》 2011-10-02 available at <http://paper.wenweipo.com/2011/10/03/PL1110030003.htm>

establishment camp have called for an interpretation of Basic Law Article 24 by the SCNPC to clarify the issue.<sup>25</sup>

The pan-democrats' response to the litigation was mixed. The Democratic Party was generally silent on the right to abode issue. As pressure mounted, some Democratic Party candidates did voice their opposition to granting permanent residency to FDHs.<sup>26</sup> On the other hand, the LSD and Hong Kong Confederation of Trade Unions (CTU) defended the FDHs. They attempted to emphasize the importance of an impartial rule of law and characterized the Immigration Ordinance as discriminatory. CTU leader Lee Cheuk-yan, a defender of the CFI ruling on right of abode, lost his bid for a district council seat (although he retains a seat in the LegCo). Civic Party leader Alan Leong questioned the popular assumptions about a mass influx of immigrants. He pointed out that many FDHs would not qualify for permanent residence under *Vallejos* because the Immigration Department would continue to require an applicant to declare that she has sufficient means to support her family.<sup>27</sup>

The pro-establishment camp waged a similar attack on the Civic Party earlier in 2011. Attorneys affiliated with the Civic Party challenged an HKSAR government assessment on the environmental impact of a bridge linking Hong Kong, Zhuhai and Macau. The CFI put the multi-billion dollar project on hold after ruling that the government's impact study contained omissions. As with *Vallejos*, pro-establishment parties and the government coordinated an effective messaging campaign. They emphasized job losses and the additional financial costs arising from the cessation of the bridge project.<sup>28</sup> The campaign portrayed the Civic Party as out of touch with the practical economic realities of governing Hong Kong. The FDH and the Hong Kong-Zhuhai-Macau bridge issues energized establishment-leaning voters. In the lead up to the election, these cases served as a rallying cry for pro-government demonstrators, including one incident of more than 2,000 protesters gathered outside the Civic Party's North Point headquarters.<sup>29</sup>

## E. Vote Planting and Fraud

The allegations of voter fraud leveled after November reflect the high stakes perceived by both ideological camps and the increasingly polarized atmosphere. In the month following the election, Hong Kong's Electoral Registration Officer received about 50 complaints from 1,800

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<sup>25</sup> For example, former Secretary of Justice and deputy director of the Hong Kong Basic Law Committee Elsie Leung indicated that she believed the government should seek SCNPC interpretation on the abode issue. Joseph Lee, *Elsie Leung Urges Government to Seek NPCSC Interpretation*, CHINA DAILY, Oct. 4, 2011, available at [http://www.chinadaily.com.cn/hkedition/2011-10/04/content\\_13835705.htm](http://www.chinadaily.com.cn/hkedition/2011-10/04/content_13835705.htm), see also, Albert Cheng, *Populist Stance on Abode Hypocritical*, SOUTH CHINA MORNING POST, Aug. 17, 2011.

<sup>26</sup> Mary Ann Benitez, *Don't Fuel Bias Against Helpers, Authorities Told*, THE STANDARD, Oct. 17, 2011 available at [http://www.thestandard.com.hk/news\\_detail.asp?sid=34096310&art\\_id=116107&con\\_type=1&pp\\_cat=11](http://www.thestandard.com.hk/news_detail.asp?sid=34096310&art_id=116107&con_type=1&pp_cat=11)

<sup>27</sup> < 外傭居權倘敗訴釋法機會大 > 《明報》 2011-08-12 available at <http://news.sina.com.hk/news/2/3/1/2405374/1.html>

<sup>28</sup> < 港珠澳大橋官司蓋棺定論 > 《新報》 2011-11-05 available at <http://www.hkdailynews.com.hk/news.php?id=183920>

<sup>29</sup> Diana Lee, *Marchers Slap at 'Black Hand'*, THE STANDARD, Oct. 10, 2011; Li Likui, *10,000 Take to Streets to Protest Civic Party's Unwanted Actions*, CHINA DAILY, Oct. 10, 2011.

voters.<sup>30</sup> The irregularities follow a pattern of voter registrations not meeting Hong Kong's residency requirements. Almost 100 voters in the Central District used registered offices and hotels as their home addresses.<sup>31</sup> In another reported case, approximately 120 voters had registered non-existing residential addresses.<sup>32</sup> As of December 2012, the police had received 38 complaints and arrested eight people in connection with alleged voter fraud.<sup>33</sup> The HKSAR government Independent Commission Against Corruption (ICAC) had launched an investigation and arrested 23 people.<sup>34</sup> If vote-rigging did occur, it may have only affected outcomes in a handful of districts where the contests were close. Overall, the reported voting irregularities have not shaken the public's confidence in the outcome of the November election.

#### **IV. The March 2012 Chief Executive Selection Process**

Two key developments will likely stand out in the minds of Hong Kong people when they recall the March 25, 2012 CE election.<sup>35</sup> One is Beijing's unexplained announcement in July 2011 of a new "public acceptability" criterion to guide the selection of Hong Kong's next chief executive. The second is Hong Kong University pollster, Robert Chung's mock on-line election, allowing Hong Kong people to have a voice (if not a vote) in the process.

##### **A. The Chief Executive in Context**

The HKSAR has undergone five CE selection processes in its 15 year history. Until the most recent CE "election" on March 25, 2012, the outcome in each of these was a preordained certainty. In 1996, a 400-member Selection Committee, a similar but smaller institutional precursor to the EC, selected C.H. Tung from among three nominees. Tung's victory was never in question. The subsequent 2002 CE election did not require a vote. The law in 2002 stipulated that if there was only one valid candidate, he would be declared the winner.<sup>36</sup> At the end of the nominating period in 2002, C.H. Tung garnered 712 nominations for the EC and thus was the only validly nominated candidate. Despite public discontent with his performance, Tung won a second term uncontested.

The events of 2003 led to Tung's ouster. Severe Acute Respiratory Syndrome (SARS) spread to Hong Kong from Mainland China. This health emergency caused around 300 deaths in Hong Kong, widespread illness and panic. Central Government Authorities initially regarded SARS as a state secret impeding public awareness and containment of the virus. At about the

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<sup>30</sup> Legislative Council Secretariat, *Electoral Affairs Commission Report on the 2011 District Council Election*, Panel on Constitutional Affairs Background Brief, LC Paper No. CB(2)1394/11-12(04) Ref.: CB2/PL/CA, [hereinafter "LegCo Secretariat Brief"] p 3465 (testimony of the Secretary for Constitutional and Mainland Affairs).

<sup>31</sup> Coleen Lee, Tanna Chong & Stuart Lau, *Voter Listed Four Seasons Hotel as Home*, SOUTH CHINA MORNING POST, Nov. 29, 2011 available at <http://topics.scmp.com/news/hk-news-watch/article/Voter-listed-Four-Seasons-hotel-as-a-home>

<sup>32</sup> *Id.*

<sup>33</sup> LegCo Secretariat Brief at 3466.

<sup>34</sup> *Id.* ("As of 5 December 2011, the Independent Commission Against Corruption (ICAC) has received 27 complaints on breach of relevant legislation and arrested 23 persons."); see also Staff Reporters, *ICAC Arrests 22 in Council Poll Vote-Rig Probe*, SOUTH CHINA MORNING POST, Dec. 5, 2011 available at <http://topics.scmp.com/news/hk-news-watch/article/ICAC-arrests-22-in-council-poll-vote-rig-probe>

<sup>35</sup> NDI is grateful to Suzanne Pepper for her insights into these two key developments. See *A Precedent Setting Election or Prelude to Nightmare?* <http://chinaelectionsblog.net/hkfocus/?p=355>

<sup>36</sup> CEEO Section 23.

same time, the HKSAR government attempted to introduce controversial national security legislation under Article 23 of the Basic Law. These events led to popular upsurge of approximately half a million protesters calling for Tung to step down. The event provided Beijing with a warning on the hazards of endorsing a CE out of sync with public opinion. Tung eventually did resign as CE, citing health reasons in March 2005. Under these circumstances, Article 53 of the Basic Law called for an election to fill the CE office vacancy. Donald Tsang, Tung's Chief Secretary, won 674 EC nominations and was the only valid candidate at the end of the nomination period. Tsang's initial term ran for two years until the expiry date of Tung's second term in June 2007.<sup>37</sup>

Hong Kong's fourth CE election in 2007 was a turning point. Although there was never any doubt about the outcome of the election, a contested campaign with widely watched televised debates unfolded. Previously, the pan-democratic parties had declined to participate in these "small circle" elections for fear of legitimizing the undemocratic EC mechanism. In 2007, however, a number of pan-democrats decided to work within the system. The pan-democratic camp secured more than 100 EC seats, making it possible to nominate an opposition candidate. The challenger, Alan Leong, a prominent lawyer and former chairman of the Hong Kong Bar Association, challenged incumbent CE Donald Tsang to a televised debate. Tsang agreed and two widely watched debates took place. Tsang may have won the public opinion battle. According to the Hong Kong Public Opinion Programme, following the TV debates, 81% of respondents favored Donald Tsang. Just over 14% favored Alan Leong. The EC reelected Tsang with 649 votes to Alan Leong's 123 votes. The high level of public attention to the 2007 CE election likely pressured the Central Government and Tsang to speak to the question of a timetable for universal suffrage. Nevertheless, throughout the process it remained clear that the composition of the EC made victory for a pan-democratic candidate impossible.

## **B. "Public Acceptability"**

Public opinion played an unprecedented role in the 2012 CE election. In the months immediately preceding the election, academia and media outlets released weekly public opinion polls rating the candidates. The race involved three candidates: two pro-establishment and one pan-democrat; they each confronted each other in televised debates. While the EC mechanism remained in place, candidates appealed directly to political parties and interest groups for support, pitched their policy platforms to the broader Hong Kong public, attacked each other's positions, and faced a high level of scrutiny from the media. Ultimately, the winner, C.Y. Leung, upset the historically favored candidate, Henry Tang, at least in part because Leung enjoyed a broader base of popular support. It was a competitive election, where public opinion was a critical factor, and the outcome was uncertain until days before the EC vote.

The level of commentary and public participation surrounding the March 2012 CE election has raised popular expectations for direct elections of the CE in 2017 to new heights. The SCNPC rejected direct elections on two prior occasions: first, in 2004 with a decision ruling out direct elections in 2007 and 2008; and second, in 2007 with a decision ruling out direct elections in 2012. The 2007 decision states that the CE in 2017 "may" be elected by "universal

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<sup>37</sup> The determination that Donald Tsang serve out the balance of Tung's term required an interpretation under Article 158 of the Basic Law by the NPCSC. The decision that a replacement CE serves out just the unexpired term of the original CE is now reflected in Section 3(1A) of the CEE0.

suffrage.” Beijing complicated the picture in 2012 by breaking with convention and not openly endorsing one candidate. Two possible explanations for the lack of clear signaling from Beijing emerge: political gridlock leading to indecision, or a purposeful strategy to let the Hong Kong people decide for themselves.

The infighting among intra-Communist Party factions in Beijing provides one explanation. The so-called Princelings<sup>38</sup> and leaders with strong ties to former Chinese President Jiang Zemin reportedly supported Henry Tang. Tang’s father had interacted with Jiang in a business context and later served on various consultative committees to the Chinese government.<sup>39</sup> On the other hand, the Youth League Faction favored C.Y. Leung.<sup>40</sup> Jiang Zemin’s poor health<sup>41</sup> and the negotiations over the make-up of the new Politburo Standing Committee in fall 2012 likely impacted the decision process over the next CE. Xi Jinping, a Princeling and the heir apparent to China’s presidency, may have felt it imprudent to back either Henry Tang or C.Y. Leung given the complexities of his own leadership transition. Members of the EC Political Sector concurrently serve as members of the National People’s Congress and the People’s Political Consultative Conference. When these members attended their institutions’ meetings in Beijing in early March 2012, they received no clear instructions on a preferred CE candidate for whom to cast their votes.

Other signs point to a strategy on the part of Beijing to invite the EC to consider each candidate’s acceptability to the Hong Kong people. As early as July 11, 2011, Wang Guangya, the director of the State Council’s Hong Kong and Macau Affairs Office, took the opportunity to spell out Beijing’s criteria for the next CE during a visit with the FTU. Wang set forth three criteria: (i) love of country and of Hong Kong; (ii) a very high capacity for governance; and (iii) broad acceptability by the people of Hong Kong. The next day *Wen Wei Po* ran an editorial elaborating on Wang’s remarks. The Chinese government-run English language newspaper, the *China Daily*, reproduced part of the editorial. These reiterations could indicate a deliberate effort to explain to the Hong Kong people, to the electors of the EC and to CE candidates what the Central Authorities would like to see.<sup>42</sup> Two of the three themes were not new. In 2007, Jia Qinglin, chairman of the National Committee of the People’s Political Consultative Conference, had articulated a similar formula: love of country and of Hong Kong, support for the Basic Law and the capacity to govern.

The new addition of “broad acceptability to the people of Hong Kong” acknowledges that public opinion should affect CE electability. The public acceptability criterion was particularly

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<sup>38</sup> For background on Chinese Communist Party factions, including “Princelings” and the “Youth League Faction” see John Dotson, *The China Rising Leaders Project, Part 1: The Chinese Communist Party and Its Emerging Next-Generation Leaders*, The U.S.-China Economic and Security Review Commission Staff Research Report, Mar. 23, 2012, available at

[http://www.uscc.gov/RFP/2012/USCC\\_Staff\\_Report\\_Rising\\_Leadersinthe\\_CCP\\_\(March%202012\).pdf](http://www.uscc.gov/RFP/2012/USCC_Staff_Report_Rising_Leadersinthe_CCP_(March%202012).pdf)

<sup>39</sup> Editorial, *Beijing’s Split and Hong Kong’s Autonomy*, WALL ST. J., Jan. 3, 2012 available at

<http://online.wsj.com/article/SB10001424052970204720204577128200948494924.html>

<sup>40</sup> Te-ping Chen, *Beijing Tips Hand in Hong Kong Poll*, WALL ST. J Mar. 22, 2012, A11, available at

<http://online.wsj.com/article/SB10001424052702303812904577295342191821080.html> (“Beijing’s decision to back Mr. Leung reflects another victory for current President Hu Jintao and his power base, the Communist Youth League.”)

<sup>41</sup> *Supra* note 40.

<sup>42</sup> Regina Ip, *Throwing Down the Gauntlet*, SOUTH CHINA MORNING POST, Jul. 25, 2011 available at

<https://crm.npp.org.hk/en/node/6516>

noteworthy since at the time of Wang Guangya's remarks, Beijing's traditional favorite, Henry Tang, had low public approval ratings. If the Central Government wished to give weight to public acceptability, then EC members should vote for C.Y. Leung. Leung had bested Tang in every poll dating back to October 2011. Regina Ip, who unsuccessfully sought nomination as a CE candidate, speculated in a *South China Morning Post* editorial that Beijing's "hidden agenda" behind the new criterion might be to screen out some of the reputed frontrunners and invite newcomers to join the race.<sup>43</sup>

A plurality of pro-establishment candidates presented Beijing with the option to wait and see before making its pick. This allowed the Central Government to hedge against commitment to an unpopular candidate, who might provoke a popular backlash. Indeed, around December 2011 some politically connected residents of Hong Kong began reporting the message that the Central Government was comfortable with both pro-establishment candidates and Hong Kong itself must choose between them. Thereafter, the Hong Kong press gave equal coverage to both Henry Tang and C.Y. Leung. Most media outlets provided coverage skewed in favor of one of these two candidates, although they generally failed to openly assert their endorsement. Members of the pro-establishment political parties were granted leave to attend the rallies of either candidate.

### C. A Divided Pro-Establishment Camp

If the strategy was to let the EC choose on its own, Beijing ultimately reneged on that strategy. Discord within the pro-establishment camp led to the distinct possibility that no candidate would secure a majority (601 votes) in the EC. Liberal Party leaders announced that their members in the EC would cast blank ballots rather than vote for C.Y. Leung.<sup>44</sup> Henry Tang had been a member of the Liberal Party, and that party's constituents in the business community remained strongly opposed to C.Y. Leung's policies on labor and housing. EC members from radical democrat contingents, such as LSD and People Power, also would cast blank ballots rather than vote for either C.Y. Leung or Albert Ho. Under the relevant election ordinance, no clear majority in the EC would have led to a restart of the nomination process and a second CE poll weeks later. Voices close to Beijing indicated that the Central Government was very concerned about the possibility that the March 25 vote would be declared invalid. Former Deputy to the National People's Congress Ng Hon-mun opined that the Central Government would exert influence at the right moment to ensure that the election would proceed smoothly.

The results of the EC nominations and votes show the impact of Beijing's lobbying efforts on behalf of C.Y. Leung in the final days of the campaign. Although Henry Tang obtained close to 400 nominations, many members of the EC warned that nominations were not guarantees of votes. Lau Wong-fat, chairman of the Rural Council (Heung Yee-Kuk), which has 28 votes in the EC, said that nomination and voting were two separate matters.<sup>45</sup> By not committing their votes to Tang, EC members left room for negotiations with Beijing over their final votes. Prior to the final vote, C.Y. Leung's popularity was on the decline, according to a

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<sup>43</sup> *Id.*

<sup>44</sup> < 未有共識是否投白票自由黨出現分歧 > 《蘋果日報》 2012-04-05 available at <http://www.applehk.info/apple/20120305/4104/16126382/>; *Liberal Party Won't Vote for Leung*, RTHK, Apr. 22, 2012, available at <http://gbcode.rthk.org.hk/b5i/m.rthk.hk/news/20120322/827676.htm>

<sup>45</sup> Hong Kong Election Media Watch, Feb. 22, 2012, <http://hkgelection.com/2012/02/22/media-watch-22-feb-2012/>

number of polls,<sup>46</sup> but after the final televised debate on March 19 with C.Y. Leung remaining the public opinion winner overall, Beijing threw its full support behind him. The Liaison Office heavily lobbied members of the EC to vote for Leung,<sup>47</sup> and just days before the March 25 election, the FTU and DAB announced that their CE votes would go to C.Y. Leung. Despite the urging of Central Authorities a number of pro-establishment members of the EC voted for Henry Tang or cast blank votes.

#### **ELECTION COMMITTEE NOMINATIONS AND VOTES FOR CHIEF EXECUTIVE**

	Nominations (February 29, 2012)	Votes (March 25, 2012)
C.Y. Leung	305	689
Albert Ho	188	76
Henry Tang	390	285
Abstain/No Show		61
Mis-marked/Invalid		82
<b>TOTAL</b>		<b>1,193</b>

Beijing’s decision to abandon Henry Tang, and the subsequent rift within the pro-establishment camp that festered in the months and weeks leading up to the election, may have created wounds that will take time to heal. C.Y. Leung’s immediate challenge may be convincing the business sector to return to the pro-government camp. After the election, C.Y. Leung hosted a “reconciliation dinner” on April 12 seeking to bring his pro-establishment supporters and opponents together. Liberal Party chairman Miriam Lau declined the invitation. Lau then advertised the snub by allowing herself to be photographed eating out alone at a fast food restaurant. She has stated that her party will monitor Leung’s performance and decide whether he is upholding Hong Kong’s “core values”—a statement which sounds oddly pan-democratic. Although C.Y. Leung enjoyed consistently higher public approval ratings than Henry Tang, the focus now is on Leung’s low ratings relative to his predecessors C.H. Tung and Donald Tsang immediately following their selection. These new developments may create opportunities for the Liberal Party and pro-business constituencies to cooperate with the pan-democrats.

#### **D. The 3.23 Civil Referendum**

Beijing’s nod to public opinion and the enhanced level of competition among three candidates created additional space for civil society to influence the political process. For many Hong Kong people, the most exciting aspect of the March 25 CE selection process was not the

<sup>46</sup> < 梁民望挫 10 百分點，仍拋離唐 > 《蘋果日報》 2012-03-16 available at <http://hk.apple.nextmedia.com/news/art/20120316/16160960>

<sup>47</sup> < 香港特首選舉前夕出現中央干預傳聞 > 《BBC 中文網》 2012-03-20 available at [http://www.bbc.co.uk/zhongwen/simp/chinese\\_news/2012/03/120320\\_hk\\_elections.shtml](http://www.bbc.co.uk/zhongwen/simp/chinese_news/2012/03/120320_hk_elections.shtml)

victory of underdog candidate C.Y. Leung but rather the fact that they personally had the opportunity to cast a vote. The votes cast by hundreds of thousands of Hong Kong people were in a mock election exercise, which existed outside all formal political institutions. Hong Kong University professor and pollster Robert Chung announced late in 2011 that he would try to arrange a mock referendum based on the CE election.

Rather than conduct a public opinion polling exercise and solicit the views of a sample of a few hundred citizens over the phone, Chung sought to extend the voting experience more broadly. The mock election exercise, dubbed the “3.23 Civil Referendum,” was held two days before the actual EC vote on April 25. Participants registered using their Hong Kong identification card and voted online or through a mobile phone application. Participants could cast their ballots for any of the three candidates, or they could vote to abstain—effectively an affirmative vote for none of the candidates. Chung had hoped for 50,000 participants and planned to announce his results the same evening. Pro-Beijing media outlets sharply criticized Robert Chung and the referendum project, but the exercise seemed to proceed as planned until the day of the referendum, when two hackers blocked access to the online site. In response, Robert Chung’s team printed thousands of extra paper ballots and set up seventeen polling stations around the HKSAR. Instead of one day, the mock poll continued for two. Hong Kong people responded to the provocation of the hackers by queuing up in lines that snaked around street corners near makeshift polling stations for most of that Saturday.

**RESULTS OF THE “3.23 CIVIL REFERENDUM”**

Total number of voters:	222,990
Onsite voters:	85,154
Online voters:	66,005
Mobile application voters:	71,831

	C.Y. Leung	Albert Ho	Henry Tang	Abstention
Mobile	19.7%	9.2%	13.4%	57.7%
Online	18.4%	11.0%	13.9%	56.8%
Onsite	15.7%	13.6%	20.4%	50.3%
Total	17.8%	11.4%	16.3%	54.6%

Source: Hong Kong Public Opinion Programme

In total, approximately 223,000 Hong Kong people—or about 5 percent of the population of registered voters—participated in the referendum. While the exercise cannot claim that its participants’ preferences mirror the preferences of the electorate as a whole, the participants represent a significant number of politically motivated Hong Kong people. In 2003, during an economic recession, a housing crisis and the SARS epidemic, 500 million peaceful demonstrators thwarted the passage of Article 23 national security legislation. In 2012, during a

period of relatively good economic growth and a relatively greater political democracy, 230,000 people turned out to vote in an election without any direct impact on the election's outcome. Pro-Beijing voices have suggested that the economic downturn and SARS caused the mass demonstration in 2003 and that pan-democrats overstate the Hong Kong people's commitment to democracy and human rights. The 3.23 Civil Referendum exercise, on the other hand, may suggest a degree of continuity among a motivated activist population in Hong Kong. It would appear that the poor performance of the pan-democrats in the November 2011 district council elections should not be interpreted to mean that Hong Kong people have become indifferent on the issue of universal suffrage.

The people who participated in the 3.23 Civil Referendum are frustrated by the limited options presented by Hong Kong's political system. The 54.6 percent abstention vote indicates that these participants do not support any of the three candidates. It is not clear how (or if) this population would vote in an upcoming election, such as the September 2012 LegCo election. They likely do not identify with any political party<sup>48</sup>—not with the HKSAR government and also not with the moderate wing of the Democratic Party, embodied by Albert Ho. At the same time, this population may care deeply about certain issues, such as autonomy from the mainland and Hong Kong's unique cultural identity.

Even as Beijing and pro-establishment parties have become increasingly savvy in electoral processes and co-opting large segments of society, a handful of grassroots and university-based leaders continue to effectively organize and agitate for democratic reform. In the past, Beijing and the HKSAR government had discredited bottom-up efforts to initiate public referendums, as with the 2010 by-elections controversy. Undeterred (or perhaps inspired) by the memory of the 2010, Robert Chung's referendum highlighted the undemocratic nature of the EC process. This sort of grassroots mobilization evades Beijing's mechanisms for managing public opinion. From December 2011 through the date of the referendum exercise, more than 90 critical articles and commentaries were published making inflammatory claims against Robert Chung. Chung was accused of "liaising with British intelligence" and performing on cue for his "American masters."<sup>49</sup> Apparently, these criticisms did not have traction with a sizable segment of the Hong Kong population. Once more, the hacking incident fueled the perception that Beijing was unduly interfering in Hong Kong's domestic affairs. Rather than obstruct the civil referendum, the hackers likely energized more people to participate.

## **E. Hong Kong Mired in Scandal**

In the months preceding the election, each candidate exposed improprieties about the other. Most media aligned itself with one of the two candidates and packaged the stories for the public's consumption. The scandals suggest an emerging narrative that Hong Kong's once clean government and bureaucracy have fallen into disarray. The corruption narrative feeds into

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<sup>48</sup> A survey by the Hong Kong Transition Project released prior to the 2011 district council elections found that a majority of Hong Kong people does not see any political party as representing its interests. *Local Elections, Long Term Effects*, Nov. 2011 available at <http://www.ndi.org/node/18269>

<sup>49</sup> An article in *Wen Wei Po* criticized Robert Chung for the fact that he has accepted funding from NDI. See 黎子珍 < 指点江山：钟庭耀是一个政治捐客 > 《香港文匯報》 2012-02-09 available at <http://paper.wenweipo.com/2012/02/09/HK1202090017.htm>. While Professor Chung has collaborated with NDI on public opinion polling projects in the past, NDI did not provide funding or technical support in connection with the 3.23 Civil Referendum project.

anxieties about how Hong Kong will develop under the leadership of C.Y. Leung, whose ideological convictions (beyond his longstanding allegiance to Beijing) remain unknown.

In the weeks leading up to and following the CE election, the two main candidates, the serving CE, the former Chief Secretary and some of the HKSAR's most wealthy business people came under scrutiny for misconduct ranging from ethical breaches to crimes.

- Henry Tang faced media accusations of extramarital affairs and fathering an illegitimate child. More damaging in the eyes of the Hong Kong public, Tang admitted to failing to disclose an illegal 2,200 square foot basement in his home. The admission followed several denials and then the gaffe that the basement was his wife's idea. The incident had a serious impact on Tang's public image and credibility.
- According to media reports, C.Y. Leung took part in several business dealings involving conflicts of interest, and LegCo passed a motion to investigate these allegations. Separately, the ICAC launched an investigation into a dinner meeting in the New Territories attended by C.Y. Leung's election staff, members of the Rural Council (Heung Yee Kuk), and an individual with known links to triads (i.e., organized crime). According to a City University of Hong Kong tracking poll, C.Y. Leung's popularity dropped from 57% to 45% during the second week in March after the reports of his alleged involvement with the triads. Most sensationally, during the final televised debate between the CE contenders, Henry Tang divulged that during a confidential Executive Council meeting in 2003 C.Y. Leung urged the use of riot police against the half a million Hong Kong residents demonstrating against the Article 23 national security legislation. Leung called Tang's statements a "fabrication." Throughout the campaign, C.Y. Leung has also denied persistent accusations that he has been a member of Hong Kong's underground Communist Party.
- The ICAC is currently investigating Donald Tsang for alleged violations of anti-bribery laws. Tsang may have improperly accepted invitations by tycoons to travel on private jets and yachts. Misconduct may have also arisen during Executive Council discussions over a pending broadcasting license, when Tsang did not disclose the fact that he received a discounted rental rate from the applicant (a mainland media mogul) for a second home rented by Tsang in Shenzhen.<sup>50</sup> As a result, some lawmakers have supported a motion to impeach Tsang.<sup>51</sup>
- On March 29, 2012 the ICAC arrested Rafael Hui, Thomas Kwok and Raymond Kwok on suspicion of bribery. Rafael Hui served as Chief Secretary for Administration, effectively Donald Tsang's right hand advisor, between 2002 and 2007. The Kwok brothers are the third wealthiest people in China. They serve as joint chairman of Sun Hung Kai Properties, the largest real estate company in Hong Kong.

These allegations of corruption may feature prominently in voters' minds in the six months leading up to the September 2012 LegCo elections.

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<sup>50</sup> Eddie Luk, *Tsang Denies License Link to Penthouse Deal*, THE STANDARD, Feb. 27, 2012 available at [http://www.thestandard.com.hk/news\\_detail.asp?pp\\_cat=30&art\\_id=120109&sid=35550457&con\\_type=1](http://www.thestandard.com.hk/news_detail.asp?pp_cat=30&art_id=120109&sid=35550457&con_type=1)

<sup>51</sup> Eddie Luk *Impeachment Pressure Grows*, THE STANDARD, Feb. 29, 2012 available at [http://www.thestandard.com.hk/news\\_detail.asp?sid=35572939&art\\_id=120195&con\\_type=3&pp\\_cat=30](http://www.thestandard.com.hk/news_detail.asp?sid=35572939&art_id=120195&con_type=3&pp_cat=30)

## V. Challenges to Hong Kong's Democratic Development

Hong Kong's development of mature democratic institutions is not assured. Judicial independence, civil liberties and universal suffrage are three critical areas, where interpretations of the Basic Law differ. Without sustained public scrutiny and constructive dialogue on these issues in the months and years ahead, the HKSAR may witness political stagnation or degeneration.

### A. Judicial Independence

The right to abode litigation reflects the tendency in Hong Kong for contentious political and social issues to manifest as legal issues. Hong Kong's common law courts provide a venue where minority rights may find some protection and redress. However, *Vallejos* and its precedents dealing with Article 24 also illustrate the vulnerability of the courts to the political clout of the mainland system. The frequency with which the HKSAR government and political parties have invoked the possibility of SCNPC interpretation of the Basic Law to overrule final judgments of Hong Kong courts threatens Hong Kong's judicial independence.

The Basic Law provides for the separation of the legal systems of Hong Kong and the mainland, but Article 158 establishes a scheme for interpretation of the Basic Law, which gives Beijing the last word. Under Article 158, the power of final interpretation of the Basic Law is vested in the SCNPC. The general rule is that the Hong Kong courts may interpret the provisions of the Basic Law which are within the autonomy of the Region. According to Article 158, the Hong Kong courts may also interpret other provisions of the Basic Law as well, but if those provisions concern affairs:

- (i) which are the responsibility of the Central People's Government, or
  - (ii) concerning the relationship between the Central Authorities of the Region, and
  - (iii) if such interpretation will affect the judgments of the cases
- then the courts shall... seek an interpretation of the relevant provision from the [SCNPC] through the Court of Final Appeals.<sup>52</sup>

Moreover, SCNPC has construed a plenary power of interpretation over any provision of the Basic Law.

As early as 1999, a dispute over the right to abode triggered an interpretation of the Basic Law by the SCNPC. At that time, Hong Kong's Court of Final Appeal (CFA) held, *inter alia*, that a child of Chinese nationality with a parent who has the right to abode in Hong Kong also has the right to abode, regardless of whether the parent was a permanent resident at the time of the child's birth.<sup>53</sup> Amidst widespread public concerns over a surge of new permanent residents from the mainland, the Hong Kong Government invited an SCNPC interpretation of Articles 24(4) and 24(2)(3) to effectively overturn the CFA decision. The request to the Standing Committee raised a number of legal questions. Article 158 expressly provides that the courts shall seek SCNPC interpretation *through the CFA* and does not provide a mechanism for the executive or legislature to take the initiative to seek an interpretation. The government might have brought another case to give the court an opportunity to reconsider its previous judgment.

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<sup>52</sup> Basic Law Art. 24

<sup>53</sup> *Ng Ka Ling and Others v. Director of Immigration* [1991] 1 HKLRD 315.

Alternatively, the government might have petitioned for an amendment to the Basic Law consistent with Article 159. Instead, the government assumed authority not evident from the plain language of the Basic Law. In the end, the SCNPC conveniently determined that the CFA decision was not consistent with legislative intent and reinterpreted the relevant provisions in accordance with the stipulations of the HKSAR government.

In August 2011, over a month before the CFI's ruling in *Vallejos*, veteran politicians urged the government to seek SCNPC interpretation of Article 24(4), the provision at issue in that case.<sup>54</sup> During the CFI hearing, the presiding judge asked government counsel whether the executive intended to seek an SCNPC interpretation. Counsel responded that the government would not seek such an interpretation until after his court's judgment.<sup>55</sup> Prior to the CFI judgment, the DAB had made the "foreign maids' residence issue" a central part of its platform and conducted a massive petition campaign, collecting 91,250 signatures, against granting the right to abode to FDHs.<sup>56</sup> After the government's loss in the CFI (but before adjudication on appeal), Regina Ip and her new People's Party endorsed the move to seek SCNPC interpretation and launched their own signature campaign.<sup>57</sup>

On March 28, 2012—three days after the election of C.Y. Leung—the Court of Appeal overturned the CFI decision. *Vallejos*' lawyer has indicated that they will likely appeal that decision to the CFA. The push to resolve the issue through the Article 158 interpretation mechanism will only intensify in the months ahead. A number of editorials and reports in the *China Daily* have argued that the government should have applied for interpretation prior to the CFI ruling and should do so before the case goes to the CFA.<sup>58</sup> Soliciting SCNPC review to conclude this chapter of the right to abode saga presents C.Y. Leung with a win-win: he can sure-up his popularity deficit with the Hong Kong people while appeasing political constituencies in Beijing, which seek to bring Hong Kong's judiciary more squarely under their control. C.Y. Leung's remarks that he will impose restrictions on mainland mothers seeking to give birth in Hong Kong show that he has honed in on the public's sensitivities on the right of abode issue.

To date, the HKSAR government has sought SCNPC interpretation of the Basic Law twice: in 1999, in connection with the right to abode issue; and in 2005, on the question of the term of the new CE after the resignation of the original CE. Once, in 2008, the CFA referred

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<sup>54</sup> Colleen Lee and Diana Lee *Beijing or Not, Just Get Maids' Lawsuit Sorted, Urges Rita Fan*, THE STANDARD Aug. 15 2011 available at

[http://www.thestandard.com.hk/news\\_detail.asp?sid=33394714&art\\_id=114149&con\\_type=1&pp\\_cat=30](http://www.thestandard.com.hk/news_detail.asp?sid=33394714&art_id=114149&con_type=1&pp_cat=30)

<sup>55</sup> < 政府大律師保留釋法權 > 《星島日報》 2011-08-23 available at <http://news.singtao.ca/toronto/2011-08-23/hongkong1314089134d3378538.html>

<sup>56</sup> Diana Lee, *DAB Turns Up Heat on Abode Bid by Helpers*, THE STANDARD, Sept. 26, 2011 available at [http://www.thestandard.com.hk/news\\_detail.asp?pp\\_cat=11&art\\_id=115508&sid=33853714&con\\_type=1](http://www.thestandard.com.hk/news_detail.asp?pp_cat=11&art_id=115508&sid=33853714&con_type=1)

<sup>57</sup> < 外傭居港權案 新民黨促政府研釋法 > 《信報》 2011-10-02 available at [http://www.hkej.com/template/onlinenews/jsp/detail.jsp?title\\_id=76688](http://www.hkej.com/template/onlinenews/jsp/detail.jsp?title_id=76688)

<sup>58</sup> Lau Nai-Keung, *Government Should Stop Passing Buck on Basic Law Interpretation*, CHINA DAILY, Oct. 4, 2011 available at [http://www.chinadaily.com.cn/hkedition/2011-10/04/content\\_13835746.htm](http://www.chinadaily.com.cn/hkedition/2011-10/04/content_13835746.htm); Joseph Li, *Elsie Leung Urges Government to Seek NPCSC Interpretation*, CHINA DAILY, Oct. 4, 2011 available at [http://www.chinadaily.com.cn/hkedition/2011-10/04/content\\_13835705.htm](http://www.chinadaily.com.cn/hkedition/2011-10/04/content_13835705.htm)

questions of interpretation to the SCNPC.<sup>59</sup> In 2004, the SCNPC interpreted the Basic Law on its own initiative, ruling out universal suffrage in 2007 for the CE and 2008 for the LegCo. Some see the unilateral decision by the SCNPC to interpret key provision of the Basic Law as a worrisome sign that it might become more interventionist in other issues, such as Article 23. As the HKSAR government and pro-establishment parties raise the possibility of SCNPC review with increasing regularity, doubt has been cast on the finality of decisions by Hong Kong's highest court. Unless the CE and Beijing exercise discretion, Article 158 could become a vehicle for evading the Hong Kong courts and eviscerate the independence of the judiciary.

## **B. Civil Liberties**

Article 23 of the Basic Law is one of the most controversial provisions in Hong Kong's constitution. It provides:

The [HKSAR] shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

The implementation of Article 23 in a way that is acceptable to Beijing while respecting the rights and freedoms of the Hong Kong people has been one of the most difficult challenges faced by the Hong Kong government. The push to pass Article 23 legislation in 2003 led to a demonstration of more than half a million Hong Kong people. The government was compelled to withdraw the bill from the legislature. The legacy of "people power" is now part of Hong Kong politics.

The Chinese state-run media and sources close to the Chinese government have reiterated that Article 23 legislation is a priority and a task that Beijing expects C.Y. Leung to accomplish.<sup>60</sup> The question is not if the HKSAR government will enact Article 23 national security legislation; the question is when. One perspective, articulated above, has suggested that the 2003 display of people power was an anomaly, and the electorate concerns itself with economic and livelihood issues rather than abstract human rights. The success of pro-Beijing parties, such as the DAB and FTU at the polls, could imply that the majority of Hong Kong people do not feel threatened by the mainland system. Thus, if pro-establishment parties do well in the September 2012 elections (as expected) that could create an opportunity for C.Y. Leung to introduce Article 23 legislation within his first term. On the other hand, a leader of one pro-establishment party who may serve in C.Y. Leung's government argued that Article 23 is too polarizing for C.Y. Leung to bring up in his first term. C.Y. Leung has all but announced his intention to run as the incumbent in the 2017 CE election. Since 2017 will likely be an election by universal suffrage, Leung must now solidify a base of popular support. The timing of the legislation will likely depend upon a complex array of factors, including the interpersonal

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<sup>59</sup> Before ruling in *Democratic Republic of the Congo and Ors v. FG Hemisphere Associates LLC*, the CFA referred questions on Articles 13 and 19 of the Basic Law, which related to foreign affairs and the relationship between the Central Authorities and the HKSAR, to the SCNPC. HCMP928/2008 (12 December 2008).

<sup>60</sup> See e.g., Zou Pinxue, *Negative Campaigns Temporary Hurdle for HK Electoral Process*, GLOBAL TIMES, Mar. 27, 2012 14, at 14 ("By the end of his first term, [C.Y. Leung] needs to... pass the legislation for Article 23 of the Basic Law").

dynamics between C.Y. Leung and his principles in Beijing, Leung's public approval ratings, and the state of the Hong Kong economy. The issue is quite delicate. Beijing would like to avoid another incident like 2003, which could further strengthen and legitimize people power as an institution of bargaining in Hong Kong politics.

Some pro-Beijing legal scholars have argued that public opinion would help prevent abuse of the laws, that prosecutions under Article 23 would be rare, and that the independent judiciary would interpret any vague clauses in a manner consistent with international standards of human rights.<sup>61</sup> Unfortunately, these assumptions do not square with experience. National security laws can be particularly oppressive in societies without democratically elected governments.

The International Covenant on Civil and Political Rights (ICCPR) has been incorporated into the HKSAR's domestic law through the Hong Kong Bill of Rights Ordinance and Article 39 of the Basic Law. As a result, courts must declare invalid any ordinary laws or executive actions that violate the ICCPR. However, this is a heavy burden to put solely on the courts. This is partly because of the overriding power of the SCNPC under Article 158 to issue an interpretation of any Article in the Basic Law which would, thereafter, bind the Hong Kong courts. Furthermore, courts throughout the world are reluctant to interfere in executive actions taken in the name of national security.

As Article 23 crimes are essentially political in nature, journalists and civil society organizations understandably fear that the HKSAR government will defer to Beijing in applying the law. When asked during a consultation in 2003 whether HKSAR government would consult Beijing on a decision to bring a state secrets prosecution, the then Secretary of Security replied: "Of course, we will take into account the views of the Central Government. It will carry certain weight." The executive branch will always determine whether and how prosecutions are brought. So long as the CE is selected by and accountable to Beijing, Beijing's view will influence the decision to prosecute. Similarly, a government consultation document in 2003 admits that the HKSAR government may not be in a position to determine whether an organization poses a threat, and so "should defer to the Central Authorities based on the comprehensive information it possesses." Prosecutions in these contentious areas can have chilling effects: both for civil society and for journalists.

The Hong Kong government will have to wrestle with the difficulties of drafting Article 23 legislation in the near future. Public opinion, both local and international, should inform the debate. Concerns about certain vague clauses in the original bill hinge, in part, upon the autonomy of the HKSAR government and the independence of the judiciary. The new framework for electing the CE by universal suffrage in 2017 and election of the LegCo by universal suffrage soon thereafter will clarify lingering questions about democratization and the relationship between Hong Kong and the mainland. It will also be relevant to consider the extent that Central Authorities invoke Article 158 during C.Y. Leung's term in office. On all sides of the Article 23 issue, prudence would suggest delaying a new bill until after 2017.

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<sup>61</sup> See e.g., Albert H.Y. Chen, *The Consultation Document and the Bill: an Overview*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY, 93-118 (Fu Hualing, Carole J. Petersen & Simon N.M. Young eds., 2005).

### C. Universal Suffrage

China has accepted a self-imposed obligation to allow the Hong Kong people to directly elect their legislature and CE. Under the Basic Law, election of the CE and the LegCo by “universal suffrage” is the “ultimate aim.” However, the timing of implementation is conditioned upon the “actual situation” and “gradual and orderly progress.” Article 68 of the Basic Law provides:

The method of forming the Legislative Council shall be specified in light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all members of the Legislative Council by universal suffrage.

Similarly, under Article 45:

The method of selecting the Chief Executive shall be specified in the light of the actual situation in the [HKSAR] and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

A critical procedural distinction is the nomination of the CE by a “broadly representative” nominating committee. The 2007 SCNPC decision on universal suffrage contemplates that the nominating committee be based on the current EC, where representatives from functional constituencies and mainland political organizations have representation. “Gradual and orderly progress” has been interpreted to mean incremental change. In other words, Hong Kong will likely retain certain institutional vestiges, such as FCs, past 2017. In this regard, the introduction of the district council FC seats in 2012 is an attempt to expand upon and legitimize functional constituencies.

Amid these constraints, lawmakers will have to contend with the public’s expectations. Hong Kong people have grown to expect an opposition candidate as a voice in the CE race. In 2007 and 2012, pan-democratic candidates secured enough nominations to compete. Currently nominees must receive endorsement from 150 members of the EC to enter the race. C.Y. Leung has stated that he believes any reforms should not lower the threshold, and having more than two candidates is cause for concern.<sup>62</sup> Efforts to raise the nomination threshold or introduce a screening mechanism, however, would provoke a negative public reaction. Moreover, the legacy of 2012 may contribute to expectations of genuine competition among the candidates. To some extent, Hong Kong people now expect Beijing to sit back and let two pro-establishment candidates vie for public support. Public opinion polls—and perhaps popular referenda—have become standard features of the process.

The debate over universal suffrage may consider replacing the EC with a party-oriented nominating system. Statute (but not the Basic Law) currently forbids the CE from belonging to a political party. Prominent scholars have argued that party affiliation for the CE would lead to

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<sup>62</sup> < 2017 特首選舉門檻 須確保真正的競爭 > 《明報》 2012-04-02 *available at* <http://life.mingpao.com/cfm/basicref3b.cfm?File=20120402/braa02c/mra.txt>

better and more responsive governance.<sup>63</sup> If a party-oriented system could meet the “broadly representative” requirement, the spirit of the Basic Law could be honored. In 2012, the pan-democrats pioneered a nominating system combining a random survey of the public and electronic voting at nearly all of Hong Kong’s subway stations. They hoped to demonstrate that the traditional FC-dominated nominating system is neither necessary nor desirable.

The fate of FCs is the most difficult aspect of the universal suffrage issue. One basic approach proposes reducing the total number of FC seats while expanding the total number of GC seats. This introduces the problem of which constituencies will give up influence first. An alternative would be to dilute their relative power by increasing FC membership at the grassroots level, ultimately including most voters in an FC.

Such changes necessitate an amendment of the Basic Law, which involves satisfying a three-step formula. To amend the election method for the CE: a two-thirds majority of all LegCo members, the consent of the CE, and SCNPC approval.<sup>64</sup> To amend the election method for the LegCo: a two-thirds majority of all LegCo members, the consent of the CE, and reporting to SCNPC for the record.<sup>65</sup> In practice, the last two steps are achieved first as it is the CE’s administration that makes the proposal for LegCo endorsement. The CE is expected to present the LegCo with a proposal to reform election of both the CE and the LegCo in late 2013 or early 2014.

C.Y. Leung is expected to propose a system for direct elections. To achieve consensus and satisfy the amendment formula, appropriate political incentives and a vision of common interest must exist. Such incentives and vision were lacking in 2005, when pan-democrats refused to join with other legislators to provide the two-thirds majority support needed to pass the HKSAR government’s reform proposal for the 2007/2008 CE and LegCo elections. In 2013/2014, the divisions in the pro-establishment camp could pose a challenge for C.Y. Leung. However, a greater challenge will be the public’s expectations for genuine democracy.

## **VI. Conclusion**

Strong ideological differences within the pan-democratic and pro-establishment camps clearly surfaced during the 2011 district council elections and 2012 CE election. These differences will continue to influence Hong Kong politics. Following the election of C.Y. Leung, members of the pro-business Liberal Party may be willing to work with the pan-democrats on discrete issues. Pro-democracy lawmakers will need to hold approximately 20 seats in LegCo in order to exercise veto power. Another theme to watch in Hong Kong politics is the heightened role of public opinion. While Hong Kong’s institutions are not yet fully democratic, candidates and political parties understand the rhetorical power and legitimacy that comes with support from the people. All sides tend to frame issues and political decision making in terms of public acceptability. For their part, Hong Kong people appear discontented with their political options. There is also a perception that Mainland China’s growing interference may be having some negative effects, such as the slow erosion of the rule of law. The influx of migrants

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<sup>63</sup> MA NGOK, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY AND CIVIL SOCIETY 230 (2007); BUILDING DEMOCRACY: CREATING GOOD GOVERNMENT FOR HONG KONG 66-68 (Christine Loh & Civic Exchange eds., 2003).

<sup>64</sup> Basic Law, Annex I, para. 7.

<sup>65</sup> *Id.*

from the mainland has raised concerns about the need to preserve Hong Kong identity and values as well as competition over social services and entitlements. Many of these sentiments find an outlet in anxieties about CE-elect C.Y. Leung. A final theme is the increasingly open involvement of Central Authorities in Hong Kong's domestic elections. While support from the PRC Central Government Liaison Office in Hong Kong is an accepted advantage enjoyed by pro-establishment parties, the perception of more direct interference from Beijing risks alienating the Hong Kong public.



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