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## THE BASIC LAW AND DEMOCRATIZATION IN HONG KONG

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### I. Introduction

Hong Kong's status as a Special Administrative Region of China has placed it on the foreign policy radar of most countries having relations with China and interests in Asia. This interest in Hong Kong has encouraged considerable interest in Hong Kong's founding documents and their interpretation. Hong Kong's constitution, the Hong Kong Basic Law ("Basic Law"), has sparked a number of debates over democratization and its pace. It is generally understood that greater democratization will mean greater autonomy and vice versa, less democracy means more control by Beijing. For this reason there is considerable interest in the politics of interpreting Hong Kong's Basic Law across the political spectrum in Hong Kong, in Beijing and in many foreign capitals. This interest is encouraged by appreciation of the fundamental role democratization plays in constitutionalism in any society. The dynamic interactions of local politics and Beijing and foreign interests produce the politics of constitutionalism in Hong Kong. Understanding the Hong Kong political reform debate is therefore important to understanding the emerging status of both Hong Kong and China. This paper considers the politics of constitutional interpretation in Hong Kong and its relationship to developing democracy and sustaining Hong Kong's highly regarded rule of law.

The high level of popular support for democratic reform in Hong Kong is a central feature of the challenge Hong Kong poses for China. Popular Hong Kong values on democracy and human rights have challenged the often undemocratic stance of the Beijing government and its supporters. The Basic Law has become the centerpiece of this debate.<sup>1</sup> The Basic Law aims to implement China's "one country, two systems" formula, first outlined in the Sino-British Joint Declaration,<sup>2</sup> whereby Hong Kong is to be allowed a high degree of autonomy in a separate system from the rest of China. In this formula Hong Kong is promised a separate system of democracy, human rights and the rule of law within officially Marxist China. The political reform agenda has been set both by the liberal constitutional content of the Basic Law and support for liberal democracy in the Hong Kong community. In the past couple years pro-Beijing attacks on democracy and China's interpretation of the Basic Law have sought to displace this

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<sup>1</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 Apr. 1990, 29 ILM 1511 (1990) [hereinafter Basic Law].

<sup>2</sup> 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, 26 Sept. 1984, 23 ILM 1371 [hereinafter Joint Declaration].

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liberal constitutional agenda, putting the Basic Law and Hong Kong's high degree of autonomy at risk.<sup>3</sup>

In various official interpretations, the Beijing and the Hong Kong governments have halted any serious efforts at democratic political reform. At the same time, via these interventionist tactics, they have put the rule of law in Hong Kong under serious stress. It has become increasingly apparent, as generally appreciated by constitutionalists around the world, that the process of interpretation and the rule of law form a mutually constitutive relationship with the democratic component of constitutionalism. As democratic institutional commitments are expressly provided in both the Joint Declaration and the Basic Law, it is apparent that attacks on political reform challenge the very foundation of the "one country, two systems" model. Will the democracy promised under the "one country, two systems" formula in Hong Kong be achieved? Does Beijing's constant interference to head off democratization also pose a grave risk to the rule of law and related stability in Hong Kong?

In the 2004-2005 debate over political reform, Hong Kong arrived at a critical juncture in its now decades-long constitutional development. The Basic Law specifies that full democracy can be embraced, after 2007, with elections of both the Chief Executive and the Legislative Council ("Legco").<sup>4</sup> Beijing's April 2004 interpretation of the relevant provisions of the Basic Law first accepted that the Basic Law language "subsequent to the year 2007" and "after 2007" encompassed the election of the Chief Executive in 2007, and of the Legco in 2008.<sup>5</sup> But the text of this same interpretation seized for Beijing the power to decide unilaterally the pace of democratization. By specifying that the Chief Executive would be required to issue a report to the Central Government as to the need for changes, this interpretation put the power to initiate any reform in the hands of Beijing and its appointed Hong Kong government. The unseemly haste of a series of subsequent reports left little doubt as to the outcome. After the April 2004 interpretation, the specified report from the Chief Executive was quickly issued.<sup>6</sup> Although the report acknowledged that there was a need for change in the election methods of the Chief Executive and the Legco, the report focused upon political maturity and offered little hope for substantial democratization.

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<sup>3</sup> See HONG KONG'S CONSTITUTIONAL DEBATES (Johannes Chan & Lison Harris eds., 2005).

<sup>4</sup> Basic Law, *supra* note 1, arts. 45, 68, & Annexes I, II.

<sup>5</sup> The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on Apr. 6, 2004), L.N. 54 of 2004 of the Hong Kong Gazette, L.S. No. 2 to Gazette Ext. No. 5/2004 *reprinted in* Chan & Harris, *supra* note 3) [hereinafter April 6th NPC Standing Committee Interpretation].

<sup>6</sup> Report on Whether There is a Need to Amend the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in 2008, a report of the Chief Executive, Hong Kong Special Administrative Region, Hong Kong, Apr. 15, 2004 *reprinted in* Chan & Harris, *supra* note 3) [hereinafter Chief Executive's Report].

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Beijing quickly responded to the report with a decision on April 26, 2004 expressly prohibiting expansion of direct elections in 2007 and 2008.<sup>7</sup> In this decision, the Standing Committee of the National People's Congress ("Standing Committee") specified that the Chief Executive must continue to be selected by the Election Committee in 2007—although the size of the Election Committee could be expanded—and that the ratio of directly elected to functional legislators must be maintained at the same 50-50 ratio for the 2008 Legco election.<sup>8</sup> This decision allowed some room for tinkering but effectively halted any serious democratic reform. The October 2006 report from the Hong Kong government called for the specified reform: doubling the size of the Election Committee to 1600, with the bulk of such additions coming from members of the District Councils; and adding five directly elected and five functional seats to Legco, with the functional seats all to be chosen by the District Council members.<sup>9</sup> The democratic camp's outcry with respect to such token reforms was expected.<sup>10</sup> With a two-thirds vote in Legco needed to pass the "reform," (meaning the democrats had enough votes to block it) the expected Legco rejection came in December 2005.<sup>11</sup>

Beijing's continuing concerns over democratic reform in Hong Kong reflect its long-standing suspicions of liberal-minded democrats in Hong Kong. It has long resisted the participation of members of the democratic camp in key roles of governance in Hong Kong. The key difference in the recent episode is that the calendar had run out on Beijing's Basic Law strategy to defer democracy during the first ten years after the handover. The Basic Law expressly provides for such deferral in the first ten years but for this to be reconsidered at the end of that period. At the same time, the July 1, 2003 mass demonstrations by one-half million people over the proposed national security legislation under Article 23 of

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<sup>7</sup> Decision of the Standing Committee of the National People's Congress on Relevant Issues Concerning Methods for Selecting the HKSAR Chief Executive in 2007 and for Forming the Legislative Council in 2008, Apr. 26, 2004 *reprinted in* Chan & Harris, *supra* note 3 [hereinafter April 26th NPC Standing Committee Decision].

<sup>8</sup> Note that the Chief Executive is currently selected by an 800-member Election Committee and so-called functional constituencies are currently used to fill half the seats in the 60-member Legco. The 800-member Election Committee is itself chosen mostly by similar functional categories of electors. The pro-government and pro-Beijing orientation of these categories is evident in the fact that only one candidate was nominated in the last two selection processes for the current Chief Executive and for his predecessor. Regarding functional legislators, there is again a pro-government orientation, in that the government can nearly always count on their support. So for Hong Kong, electoral reform ultimately aims at direct election of the Chief Executive and abolition of functional constituencies, what Beijing has barred for the 2007 to 2008 period.

<sup>9</sup> The Fifth Report of the Constitutional Development Task Force, Package of Proposals for the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008, Oct. 2005, available at <http://www.info.gov.hk/cab/cab-review/eng/report5/htm> [hereinafter Fifth Task Force Report]. For the Election Committee to choose the Chief Executive, the Government recommended that 800 seats be added with approximately 500 including all members of the District Councils and the additional 300 seats coming from existing functional categories—with the details to be supplied later in a legislative amendment bill. For Legco, all five new functional seats were to be elected by the District Councils, with the method of this likewise to be determined in subsequent legislation.

<sup>10</sup> K.C. Ng & Philip Pan, *Hong Kong Democrats Blast Reform Plan*, WASHINGTON POST, Oct. 13, 2005.

<sup>11</sup> *Where the Battle Was Won and Lost Democrats' Silence Catches the Opposition Off Guard*, SOUTH CHINA MORNING POST, Dec. 22, 2005, at 3.

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the Basic Law surely put the government under pressure to abandon its resistance to democracy.<sup>12</sup> But in the face of both its own calendar and public pressure, Beijing and its Hong Kong supporters still remained determined to resist calls for democratic reform. Though the political environment has over the years gone through several cycles of public agitation, the Beijing and Hong Kong governments' hostility toward democracy and distrust of the democratic camp has not changed.<sup>13</sup>

How will Hong Kong fare in the face of this clash of political expectations and cultures? And how will the public, both local and international, come to view the Hong Kong project? On a substantive level, questions about how well political institutions are working and the cost engendered by any political deficiencies need to be explored. This essay will consider the posture of this intense debate over interpreting Hong Kong's path to democratic development. In this regard, the next two sections consider the content of the roadmap for democratization and the most recent debate over this roadmap, addressing both the Basic Law and its interpretations and the related political debate. It is important to appreciate why democratization has always been considered a fundamental ingredient of Hong Kong's political development process. I will then step back and consider how these factors and other developments may effect the overall constitutional development of Hong Kong—exposing a much deeper debate over the character of Hong Kong's political system and the quality of Hong Kong's institutions. This analysis will consider the health of basic constitutional elements that interact with democratic institutions in order to gauge the urgency of democratic reform.

## II. The Roadmap for Hong Kong's Constitutional Development

To appreciate the centrality of democratic development in the Hong Kong political debate, it is important to consider the foundational democratic requirements spelled out in the Sino-British Joint Declaration and the Basic Law—as well as various interpretations now offered of these documents. The 1984 Sino-British Joint Declaration put in play China's design of “one country, two systems.” It signaled the democratic road ahead by providing that the Legislature shall be chosen by elections and the Chief Executive by elections or consultations held locally. “One country, two systems” obviously aimed to encourage confidence in Hong Kong's “high degree of autonomy.” The people of Hong Kong were asked to put their hearts at ease, as China anticipated the flight of Hong Kong people fearing the dawn of Chinese rule. For local people the most effective vote remains the one they can make with their feet.

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<sup>12</sup> See FU HUALING, CAROLE J. PETERSEN, & SIMON N.M. YOUNG, NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY (2005).

<sup>13</sup> There have been occasional outreach efforts to democrats, including a recent first time visit by all Legco members to Southern China, but these efforts have so far had little substance. Todd Crowell, *Throwing Hong Kong Democrats a Bone*, ASIA TIMES ONLINE, Oct. 22, 2005, <http://www.atimes.com/atimes/China/GJ22Ad02.html>.

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It is important that the Joint Declaration is an international treaty properly ratified by both governments and registered with the United Nations as such. China exerted great effort to garner international support by speaking with foreign governments, and encouraging their reliance on the “one country, two systems” framework. Foreign governments were asked to establish separate economic, social and cultural relations with Hong Kong and to recognize Hong Kong as a distinct customs and immigration territory. Without question, this treaty internationalized the Hong Kong issue and encouraged subsequent international concern. Any government establishing separate trade and cultural relations with Hong Kong would be justified in questioning the bona fides of Hong Kong’s autonomy. The connection between democracy and autonomy is apparent, making Hong Kong’s political development a subject of great international concern. Thus, the stage was set early on for many of the current controversies over democratization in Hong Kong.

As stipulated in the Joint Declaration, the Basic Law takes up Hong Kong’s democratic promise in Articles 45 and 68, supplemented by Annexes I and II respectively. Basic Law Article 45 puts the democracy debate on the public agenda, indicating as follows:

The method for selecting the Chief Executive shall be specified in light of the *actual situation* . . . 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.<sup>14</sup>

Triggering the recent reform debate, Basic Law, Annex I specifies election of the Chief Executive by a “broadly representative” election committee in the first two terms but provides in Annex I, Article 7 for changing the method of election, as follows:

If *there is a need* to amend the method for selecting the Chief Executives for the terms *subsequent to the year 2007*, such amendments must be made with the endorsement of a *two-thirds majority* of all the members of the Legislative Council and the *consent* of the Chief Executive, and they shall be *reported* to the Standing Committee of the National People’s Congress *for approval*.<sup>15</sup>

Taking such action would move the system toward the specified “ultimate aim” of choosing the Chief Executive “by universal suffrage on nomination by a broadly representative nominating committee in accordance with democratic procedures.”<sup>16</sup>

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<sup>14</sup> Basic Law, *supra* note 1, art. 45 (emphasis added).

<sup>15</sup> Basic Law, *supra* note 1, Annex I, art. 7 (emphasis added).

<sup>16</sup> Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (adopted by the Standing Comm. Nat’l People’s Cong. Apr. 26, 2004) (P.R.C.), [http://www.info.gov.hk/basic\\_law/fulltext/0426npesc\\_e.pdf](http://www.info.gov.hk/basic_law/fulltext/0426npesc_e.pdf).

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Article 68 provides essentially the same thing as to forming the Legislative Council, except that there is no need for a nominating committee and the provision on changing the method in Annex II, part III specifies that the change only be reported to the Standing Committee “for the record.”<sup>17</sup> Under Basic Law Annex II, after several expansions of the number of directly elected seats in steps during the first ten years, by 2007 there will be thirty sitting Legco members who were directly elected (in 2004), and thirty members representing various functional constituencies—from business, social and professional groups.<sup>18</sup>

As noted above, on April 6, 2004, the Standing Committee reacted to calls for democracy in Hong Kong, offering its own interpretation of the above noted Annex I, Article 7 and Annex II, part III. This interpretation added new requirements to change the method of selection, essentially giving the Central Government complete control over initiating change. In its interpretation, the Standing Committee specified in relevant part as follows:

The Chief Executive of the Hong Kong Special Administrative Region shall make a report to the Standing Committee of the National People’s Congress as regards whether there is *a need to make an amendment*; and the Standing Committee of the National People’s Congress shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law, . . . make a determination in the light of the *actual situation* in the Hong Kong Special Administrative Region and in accordance with the principles of *gradual and orderly progress*. The bills on the amendments to the method for selecting the Chief Executive and the method of forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government . . . into the Legislative Council. (emphasis added).<sup>19</sup>

The Standing Committee interpretation wisely concluded that “subsequent to 2007” included changes for the method of selection in 2007 and 2008.

The Standing Committee was widely criticized both for intervening in this way, by making an interpretation respecting a local election, and for effectively revising the order of decision specified in the Basic Law. The interpretation, which is binding on Hong Kong, effectively amounts to an amendment of the Basic Law by specifying a route to reform that undercuts the seeming primary role of Legco.<sup>20</sup> It gives the central government, through the Chief Executive and to the exclusion of the Legislative Council, complete control of any initiation of democratic reform. This has generated concern because the Basic Law in

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<sup>17</sup> Annex II, pt. III provides,

With regard to the method for forming the Legislative Council . . . and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for the record. (emphasis added).

<sup>18</sup> Basic Law, *supra* note 1, Annex II.

<sup>19</sup> April 6th NPC Standing Committee Interpretation, *supra* note 5, ¶ 3.

<sup>20</sup> Basic Law, *supra* note 1, Annex II, pt. III.

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Article 159 specifies its own method of amendment, requiring approval by the full NPC and specifying that amendments not contravene the basic policies of the PRC specified in the Joint Declaration.<sup>21</sup> The exercise of such power to override the Basic Law not only impedes democratic development but also puts strain on the rule of law. Under the formula articulated in the interpretation, the Legislative Council can at best serve as a source of political pressure, perhaps by resolution, and it can approve or disapprove any final change to the methods of selection when presented. In late 2005, after the Government released its reform plan, the Legislative Council did precisely that, withholding its approval of the Government's electoral reform proposal.

The PRC government had not always taken the view that it could intervene so readily in this democratic reform decision. In a comment in the People's Daily on March 18, 1993, the then Director of the Hong Kong and Macau Affairs Office, Mr. Lu Ping, stated, "As for how the legislature will be constituted after its third term, all that is needed is for two-thirds of legislators to approve, the chief executive to give his consent, and then report to the Standing Committee for the record. There is no need for Central Government approval. How Hong Kong develops democracy in the future is entirely within the autonomy of Hong Kong."<sup>22</sup> Even this Basic Law version is, of course, subject to the obvious restraint that the current Chief Executive is bound to follow his mainland employer's instructions.

The April 6, 2004 PRC interpretation was quickly followed in just ten days time by a Government Task Force report on constitutional reform and the indicated report by the Hong Kong Chief Executive specifying that there was a need to change the method for selecting the Chief Executive and forming the Legislative Council.<sup>23</sup> While specifying a need for change, the Chief Executive and his Task Force left little doubt that any changes forthcoming were unlikely to satisfy the public demands for democratic reform. Nine conditions specified in the Chief Executive's report, and elaborated in the Task Force report, signaled to most members of the public that the change in methods of selection was going to be minimal. By specifying how the "actual situation" would be evaluated, the Chief Executive's report appeared to add again to the Basic Law by specifying conditions and factors to consider that were in no way apparent in the Basic Law text.<sup>24</sup> Both reports emphasized the lack of political maturity in politicians and political groups, the need for different sectors of society to be represented, and that "the pace should not be too fast."<sup>25</sup> They also emphasized that any changes must not have any adverse economic effect.<sup>26</sup>

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<sup>21</sup> *Id.*, art. 159.

<sup>22</sup> See Frank Ching, *Be Consistent*, SOUTH CHINA MORNING POST, Mar. 30, 2004.

<sup>23</sup> The Second Report of the Constitutional Development Task Force, *Issues of Principle in the Basic Law Relating to Constitutional Development*, Apr. 16, 2004 reprinted in Chan & Harris, *supra* note 3 [hereinafter Second Task Force Report]; Chief Executive's Report, *supra* note 6.

<sup>24</sup> *Id.*; see Basic Law, *supra* note 1, Annex II, pt. III.

<sup>25</sup> See Chief Executive's Report, *supra* note 6.

<sup>26</sup> *Id.*

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The April 26, 2004 response of the Standing Committee to the Chief Executive's report sealed the doom for democratic reform, essentially barring any meaningful reform for the 2007-2008 elections by requiring continued use of the Election Committee for selecting the Chief Executive—though its membership could be increased—and specifying that the current ratio of directly elected to functional legislators be maintained.<sup>27</sup> The only reform options left open for the 2007-2008 elections were to increase the size of the Election Committee and the Legco. In October 2005, this was precisely what the Government proposed: to double the Election Committee membership to 1600, and add five functional seats representing the District Councils balanced against five directly elected seats.<sup>28</sup> While this proposal would have somewhat increased participation and the number of directly elected legislators, it would have further entrenched non-democratic forces. Anyone doing the math could see that democrats would have wound up with about the same relative proportions in Legco and an inability to win the post of Chief Executive—effectively maintaining the status quo. While the current Chief Executive seems more popular than the former one, this model clearly did not satisfy democrats and they used the requirement of two-thirds approval to block it in Legco when it came up for vote in December 2005. The differences in political values between the Hong Kong government and the democratic camp could not be more stark.

### III. The 2004-2005 Constitutional Debate

These interpretations and reports took place in an environment that conveyed extreme Beijing hostility toward democratization in Hong Kong—a hostility that met with considerable local and international objection. Prior to April 2004, Hong Kong democracy supporters had been subject to a two-month barrage of severe criticism. Beijing officials and “legal experts,” as well as their local Hong Kong leftist supporters, subjected the calls for democracy to a variety of attacks that sought to set the stage for importing other requirements for reform that were not mentioned in the Basic Law.<sup>29</sup> In thinking about the relationship between democracy and constitutionalism in Hong Kong it is important to consider the gap in interpretation of the Basic Law formula between the two sides and the strength of conviction that divides them. In 2004-2005 this was on display more clearly than it had been at any time since the 1997 change-over. The interpretations of the Basic law offered during this period were intensely political. Beijing launched what was essentially a five-stage attack on the democratic camp.

First, Beijing launched the so-called “patriot debate,” taking a swipe at foreign interference. Hong Kong was told that under any democratic reform “patriots

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<sup>27</sup> See April 26th NPC Standing Committee Decision, *supra* note 7.

<sup>28</sup> See Fifth Task Force Report, *supra* note 9, ¶¶ 5.04, 5.17.

<sup>29</sup> This barrage began with the visit of several elderly mainland legal experts in mid-January 2004. Gary Cheung, *Universal Suffrage in 2007 Flouts Basic Law*, SOUTH CHINA MORNING POST, Jan. 17, 2004, at A1. A finger-wagging Mr. Xiao Weiyun even attacked constitutional judicial review by the courts and votes of confidence by Legco. Jimmy Cheung, *Courts and Legco “Can’t Interpret Basic Law,”* SOUTH CHINA MORNING POST, Jan. 17, 2004, at A3.

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must be the main body of those who govern Hong Kong.”<sup>30</sup> While Deng Xiaoping was cited for this requirement, Deng was frequently on record as indicating that one need not be pro-communist to be a patriot, and that Hong Kong people who criticize the communist party could also be considered patriots.<sup>31</sup> Categories of democracy activists who were labeled unpatriotic in this campaign included, as paraphrased in various media reports, those who are subversive of mainland authorities, those who support Taiwan independence, those who raise the flag of democracy but are in fact running dogs for Western forces, and those who opposed Article 23 national security legislation.<sup>32</sup> The patriot debate reached its zenith when the former Democratic Party Chair Martin Lee was criticized for testifying before a U.S. Senate hearing on Hong Kong.<sup>33</sup>

The second stage of the attack on democracy was to offer a steady diet of Deng Xiaoping statements arguing the meaning of “gradual and orderly progress.” These were cherry-picked to suit the moment and again with no Basic Law support.<sup>34</sup> As it became apparent that Deng’s statements could be used on either side, this barrage slowed down. Ultimately, one suspects the best source of Deng’s thought is the Basic Law, which is better subject to current interpretation. The rule of law would be better served by reliance on the Basic Law text than on vague and contradictory interpretations of Deng’s thoughts.

The third stage of this attack on democratic reform became even more aggressive when Beijing officials and media started publishing threats to take emergency action. At this stage NPC vice-chairman Sheng Huaren delivered a long lecture on Beijing’s power to declare a state of emergency in Hong Kong.<sup>35</sup> The *China Daily* hinted at the possibility that the Central Government would dismiss the Legislative Council if democrats take more than thirty seats in the September elections.<sup>36</sup> The *China Daily* warned, “[i]f those who try to use democracy to

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<sup>30</sup> Ambrose Leung & Gary Cheung, *Patriots Should Govern Hong Kong*, SOUTH CHINA MORNING POST, Feb. 11, 2004, at A1.

<sup>31</sup> “*Selective*” *Quotes Skew Deng’s Words*, SOUTH CHINA MORNING POST, Mar. 3, 2004, at A2.

<sup>32</sup> Gary Cheung & Ambrose Leung, *Xinhua Releases Criteria for Being True Patriot*, SOUTH CHINA MORNING POST, Feb. 25, 2004, at A1.

<sup>33</sup> Mr. An Min, a P.R.C. Vice Minister of Commerce and leading mainland official attacked even Martin Lee’s father, General Li Yin-Wo, a highly regarded KMT military officer who had fought in the resistance against Japan. Cheung Chi-fai, Gary Cheung & Ambrose Leung, *Beijing Hits at US Over Democrats’ Washington Trip, Senate Hearing on Democracy in Hong Kong Draws Fire*, SOUTH CHINA MORNING POST, Mar. 3, 2004, at A1; Ambrose Leung, *An Min’s Wrath Turns to Martin Lee’s Father*, SOUTH CHINA MORNING POST, Mar. 8, 2004, at A1.

<sup>34</sup> The April 6th NPC Standing Committee Basic Law interpretation and the Task Force and Chief Executive reports offer little hint of what “gradual and orderly progress” means, other than to say it must not go too fast and that this depends on the actual situation. “*Selective*” *supra* note 31, at A2. The actual situation is said to mean more than just having popular support, including a variety of innocuous legal factors, as well as “maturity of political talent and political groups.” See Second Task Force Report, *supra* note 23; see also Chief Executive’s Report, *supra* note 6.

<sup>35</sup> Gary Cheung, *Beijing Will Step in if Security is Threatened*, SOUTH CHINA MORNING POST, March 13, 2004, at A1.

<sup>36</sup> It is true that the Basic Law has provisions allowing for dissolution of the Legco, but these only provide that the Chief Executive may dissolve the Legco, after consultations, if it refuses to pass bills proposed by the Chief Executive. Basic Law, *supra* note 1, art. 50. Such provisions require a new election to form a new Legco and specify that if the Legco again refuses to pass such bill then the Chief

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exclude the Communist Party of China and ‘respect Taiwan self-determination’ take the majority of seats in Legco, Hong Kong’s executive-led government will collapse and the central authority and national security will be severely challenged.”<sup>37</sup> The local pro-Beijing paper the *Wen Wei Po* quoted an unnamed Beijing official as saying, “[I] have a knife. Usually it is not used but now you force me to use it.”<sup>38</sup> These statements were understood locally to threaten dissolution of the Legislative Council if pro-Beijing parties lost control in the next election.

The fourth stage in the crisis was for mainland experts to lecture Hong Kong on the spirit of the Basic Law and the demerits of fake democracy. Hong Kong was told by mainland “legal expert” Xiao Weiyun that the spirit, not words, is the key to interpreting the Basic Law.<sup>39</sup> The spirit in question appeared to be a very mainland-regarding spirit and offered little regard to the long ago assurances that Hong Kong people should put their hearts at ease and that the rest of the world might rely on Hong Kong’s autonomy. The pro-Beijing business elite also weighed in on this spirit, worrying about a welfare state.<sup>40</sup>

The fifth and final stage in this effort to contain calls for democratic reform was embodied in the Standing Committee’s interpretations and the ultimate reform the Government put forward. Having used two months of vociferous attacks to push the goal post back, mainland officials then began to sound more conciliatory by mid-2004, even sending a mainland official team to Hong Kong to explain the first interpretation.<sup>41</sup> Few were convinced. In respect of said interpretation, mainland officials emphasized that ultimate authority rest with Beijing.<sup>42</sup> This suggested that Hong Kong was constrained by whatever line Beijing specified. There has been little indication as to the limits of this power and how it maintains China’s commitments under the Joint Declaration. The interpretation, by effectively amending the Basic Law, posed a severe threat to Hong Kong’s autonomy and rule of law, and largely took the democratic reform debate out of Hong Kong hands.

Even at some future stage, when some forms of full direct elections emerge, the opportunities for mischief loom large. Even in late 2003, various pro-Beijing Hong Kong political sectors had already begun to hint at their substantive positions on the ultimate question of the shape of Hong Kong democracy. While the democratic camp has insisted that the nominating committee for popular election

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Executive must resign. *Id.*, arts. 52, 70. It is seriously in doubt whether a non-elected Chief Executive under the current system would willingly subject himself to what amounts to a referendum.

<sup>37</sup> Cannix Yau, *Democratic Legco “Will See Executive Collapse,”* THE STANDARD, Mar. 2, 2004, at A1.

<sup>38</sup> Edward Cody, *Hong Kong Reminded that China is in Charge, Beijing Issues Warning Against Direct Elections,* WASHINGTON POST FOREIGN SERVICE, Feb. 19, 2004, at A14.

<sup>39</sup> Ambrose Leung & Louisa Yan, “*Spirit, not Words, is the Key to Basic Law,*” SOUTH CHINA MORNING POST, Mar. 16, 2004, at A1; Louisa Yan & Ambrose Leung, *Democrats are Accused of Betrayal,* SOUTH CHINA MORNING POST, Mar. 16, 2004, at A2.

<sup>40</sup> Wilson Wong, *Why Less Democracy Means More Free Lunches,* SOUTH CHINA MORNING POST, Feb. 16, 2004, at 13 (responding to these various arguments by business elite).

<sup>41</sup> Meeting attended by author. See also Gary Cheung, *Beijing Lays Down the Law for Dialogue,* SOUTH CHINA MORNING POST, May 17, 2005, at 2.

<sup>42</sup> *Id.*

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of the Chief Executive not be used as a device to screen out democratic candidates, their stance faces severe resistance from Beijing supporters.<sup>43</sup> Pro-government parties will encourage Beijing to do just that—use the nominating committee as a screening device. The pro-government Liberal Party has generally refused to endorse democratization or has favored it always at some future date.<sup>44</sup> The leftist pro-Beijing Democratic Alliance for the Betterment of Hong Kong (“DAB”), while saying that it supports democracy, has staked out only a quasi-democratic position, frequently arguing for a “restrictive nomination committee.”<sup>45</sup> Prior to Beijing’s interference, the government was non-committal on the nominating committee, though the government’s Secretary for Constitutional Affairs, Stephen Lam, had indicated that the government would not block democrats from running for Chief Executive.<sup>46</sup> Of course, running and actually having a chance at nomination are two different things. More recently Secretary Stephen Lam has made the case that even functional constituencies do not contradict the requirement of “universal suffrage.”<sup>47</sup>

In the early discussions, before all reform was scotched, the democratic camp, in a spirit of compromise, had offered at least two possibilities on how to form the nominating committee. One possibility that was suggested by both the Democratic Party and the Article 45 Concern Group (now the Civic Party) would be to use the Legislative Council as the nominating committee.<sup>48</sup> With thirty functional members representing narrow constituencies, the Legislative Council was not viewed by the democratic camp as broadly representative, as required by the Basic Law. But this method was considered acceptable by many democrats for 2007, as long as only a small number (five had been suggested) of nominators were required, so as not to block democratic candidates. A second alternative offered by the Article 45 Concern Group was to use the existing Election Committee structure as the nominating committee for the 2007 election—with a direct election then to follow. Democrats would likely have accepted this highly unrepresentative body if only nomination by about 5% of its members were required for a candidate to be nominated for direct public election. With the government having halted real democratic reform for 2007-2008, these debates over what shape direct elections may ultimately take are awaited.

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<sup>43</sup> See Jimmy Cheung, *Article 45 Group to Push for Democratic Reforms*, SOUTH CHINA MORNING POST, Nov. 13, 2003, at 2 (citing a new pamphlet, *Article 45 Concern Group, Opinion 1*, November 2003); Gary Cheung & Raymond Ma, *Democrats Unveil Their Blueprint for “Balanced Election,”* SOUTH CHINA MORNING POST, Apr. 18, 2004, at 3.

<sup>44</sup> See Cheung & Ma, *supra* note 43 at 3.

<sup>45</sup> Early in the debate the then DAB Chair, Mr. Tsang Yok-Sing, appeared to suggest that such restrictive process, that presumably might exclude democrats, would still represent progress over the present small circle election by an 800 member Election Committee. Klaudia Lee, *Former DAB Chief Backs Direct Election with “Filter,”* SOUTH CHINA MORNING POST, Nov. 7, 2003, at 1.

<sup>46</sup> Mr. Lam gave no clear indication of how the nominating committee might function. See Klaudia Lee, *Chief Executive Election “Open to Democracy,”* SOUTH CHINA MORNING POST, Nov. 16, 2003, at 2.

<sup>47</sup> Eddie Luk, *Functional Constituency Elections do not Contradict Universal Suffrage*, CHINA DAILY, Jan. 27, 2005.

<sup>48</sup> See Cheung, *supra* note 43, at A2; Cheung & Ma, *supra* note 43, at 3.

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#### IV. Hong Kong's Historical Constitutional Path

It would be wrong to consider the current issues of democratic reform in Hong Kong divorced from the broader issues of constitutional development and good governance. In many respects Hong Kong has not suffered from a lack of vision. What sometimes has been lacking is a full appreciation of how imaginative the Sino-British agreement was and the sufficient political will to carry it out. The many crises Hong Kong has faced in the twenty years since the Sino-British Joint Declaration was signed have often been a consequence of incoherence in execution of this design. China's leaders and their Hong Kong supporters have often been unwilling to relinquish the degree of democratic control necessary to carry out the original constitutional design. In 2004 it was the failures of the current system of governance that inspired more assertive public action, largely as a negative response to official arrogance and failure. The present constitutional juncture offers some very clear images and experience for assessing Hong Kong's constitutional health and the optimal road ahead. Coming to understand the best path forward would clearly reduce difficulties for China on the diplomatic front and advance Hong Kong's long-term interests.

To assess Hong Kong's constitutional development one must consider how constitutional institutions work and their relationship to democracy. I have long felt that constitutionalists over-emphasize the constraints of constitutional government without sufficiently appreciating its positive empowering role.<sup>49</sup> Constitutional government provides a venue for empowerment and legitimacy.<sup>50</sup> If anything, in the first six years of the Hong Kong Special Administrative Region ("HKSAR"), Hong Kong officials have not lacked constraint as much as a source of legitimacy and venues to mobilize support behind the many difficult choices they have had to make. The institutions of constitutionalism therefore aim to empower the public and constrain officials in the interest of political legitimacy and stable policy formation and execution. In Hong Kong, local officials have often had to commit more energy to guarding their seemingly unwarranted powers and privileges than to addressing imaginative solutions to pressing public problems. The taint of government by the privileged has extended to the Legco, as a variety of legislators hold their seats from small-circle functional constituencies, and seek to develop and maintain their privileged status.

The 1984 Sino-British Joint Declaration put Hong Kong on a visionary path to constitutional democracy.<sup>51</sup> In many respects it aimed to resolve the above noted tensions shaped by deep divides in political culture. It offered a formula that stipulated the drafting of the Hong Kong Basic Law and its liberal democratic content. This formula gave expression to Chinese sovereignty over Hong Kong by assigning content to the concept "one country, two systems" articulated in

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<sup>49</sup> Stephen Holmes, *Precommitment and the Paradox of Democracy*, reprinted in *CONSTITUTIONALISM AND DEMOCRACY* 195-240 (Jon Elster & Rune Slagstad, eds., 1988).

<sup>50</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS*, 29-33 (2d ed. 1986).

<sup>51</sup> Michael Davis, *Constitutionalism Under Chinese Rule: Hong Kong After The Handover*, 27 *DENV. J. INT'L L. & POL'Y*, 275, 275 (1999).

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Article 31 of the Constitution of the People's Republic of China ("PRC"). At the same time, it put into motion a process of liberal democratization that continues to this day. Chinese officials have generally acknowledged that the concept "one country, two systems" aimed to cope with local and international mistrust of the mainland system. Paradoxically, many of the political battles over Hong Kong's constitutional and democratic development have been in areas where mainland mistrust of Hong Kong and foreign intentions have been evident. The mainland has been resistant to democratization and suspicious that hostile foreign forces have influenced the actions of local democrats.

While Chinese leaders originally offered imaginative solutions to the problem of Hong Kong's return, they may not have fully appreciated the constitutional implications of their vision. It was generally understood that anything less than substantial constitutional democracy would fail to secure adequate confidence in Hong Kong's future.<sup>52</sup> The elements of constitutional democracy typically include democratic elections, the protection of human rights and liberty, and the rule of law, especially constitutional judicial review.<sup>53</sup> The Joint Declaration addresses all three such elements of constitutional democracy. The Joint Declaration paragraph 3 and Annex I, Article I promise that the Chief Executive is to be chosen by "elections or consultations" held locally, and that the legislature is to be chosen by "elections." Article XIII lists the full panoply of liberal rights, of which more than half relate to freedom of expression, and require application of the international human rights covenants.<sup>54</sup> The rule of law is expressly secured by the continued application of the common law, the independence and finality of the local courts, the supremacy of the Basic Law, and the right to challenge executive actions in the courts.<sup>55</sup> The latter right presumably includes constitutional judicial review, as is now widely accepted. These commitments were all stipulated for inclusion in the Hong Kong Basic Law.

The Basic Law faithfully incorporates most of the requirements of the Joint Declaration. But in the key three areas noted, the Basic Law sometimes comes up short, either in its text or in its interpretation. Malleability of existing institutions has put a high premium on democratic development to afford the highest level of oversight. This has placed a premium value on the coherence and liberality of Basic Law interpretations to provide a workable constitutional framework. Disputes over Basic Law interpretation have been evident in a variety of crises Hong Kong has faced in recent years. Full direct election of the Legco was promised but not provided. Liberal human rights guarantees are adequately provided, but are put at risk by national security and public order provisions elsewhere in the Basic Law. Constitutional judicial review was long in doubt from the lack of explicit reference in the text. While that doubt has been resolved favorably by judicial decision, Beijing and pro-Beijing politicians at critical moments have sought to challenge such resolution. Lastly, actions of the govern-

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<sup>52</sup> *Id.* at 277.

<sup>53</sup> *Id.*

<sup>54</sup> See Joint Declaration, *supra* note 2.

<sup>55</sup> Joint Declaration, *supra* note 2, ¶¶ 3(3), (5), (12), & Annex I, §§ I-III, XIII.

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ment to overturn Hong Kong's courts and various Standing Committee interpretations have especially put the health of that institution at risk. These developments are elaborated under three main headings in the discussion that follows.

### A. Democracy

From Beijing's perspective democratic development has seemed to pose the biggest threat to Beijing's control over events in Hong Kong. The Basic Law text, while ultimately favoring full democracy, in many respects reads like a roadmap on how to obstruct democratic development in Hong Kong. The level of distrust between competing supporters of authoritarian and liberal ideals is at its highest in the debate over democracy. As noted above, such obstacles on the road to full democratization are enhanced by the lack of political commitment to democracy both in the government and among its supporters. There has been no evidence that the local government in any way challenges Beijing's efforts at controlling the process of democratization, a situation that demonstrates a rather weak sense of local autonomy.

As noted above, the Hong Kong government, with Beijing's blessing had recently suggested the addition of ten seats to Legco (five directly elected and five functional) and a doubling of the Election Committee to 1600 members. But given the rejection of these meager proposals by Legco, Hong Kong will continue to have in place a sixty-member Legislative Council where only half of the seats are directly elected—a ratio that also had to be maintained under the government's suggested model. Legislators who represent narrow functional constituencies that mostly favor pro-business and pro-government candidates fill the remaining thirty seats. The Chief Executive has been chosen, in an uncontested election, by an 800-member Election Committee, itself chosen largely by functional sectors.<sup>56</sup> To make matters worse, the existing electoral laws give an appearance of unfairness because the electoral model results in groups of candidates who win large majorities of the popular vote getting a much smaller percentage of the actual seats in the Legco.<sup>57</sup>

Given the many obvious failures of this system it can be wondered how long the government and its supporters will insist on maintaining this system in the face of continuing calls for reform. As the Standing Committee in its recent interpretations has essentially allocated to itself complete control over the democratization process, and while the Hong Kong government shares Beijing's view, there are few prospects for meaningful political reform in the foreseeable future. Official Hong Kong simply lacks an autonomous voice.

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<sup>56</sup> Basic Law, *supra* note 1, Annexes I & II. See Davis, *supra* note 51, at 312.

<sup>57</sup> In the first post-handover Legislative Council election on May 24, 1998, various democrats received just under 60% of the vote. Davis, *supra* note 51 at 284 (citing to *Record Turnout Poised to Give Democrats Sweeping Victory*, SOUTH CHINA MORNING POST, May 25, 1998 at 1; See also *Lessons of the Poll*, SOUTH CHINA MORNING POST, May 26, 1998, at 18). A similar voter outcome and seat distribution was evident in the last Legco election in September 2004.

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In addition to electoral shortcomings a democratic deficit is built into the very fabric of the Basic Law. Basic Law Article 74 requires members of Legco to get the Chief Executive's approval before they can introduce bills involving public expenditure or government policy.<sup>58</sup> Additionally, amendments to government bills and motions or bills introduced by individual Legco members require majority approval by each of two different groups of legislators: the thirty from functional constituencies and the thirty directly elected members. The Government has argued, so far unsuccessfully, in challenging the Legislative Rules of Procedure, that even amendments to government bills proposed by legislators require the Chief Executive's approval. This government position was reinforced in the recent Standing Committee interpretation requiring that even amendments to the electoral laws under Annexes I and II be introduced by the government. Though Basic Law Annex II, part III would have allowed a change in "the procedures for voting on bills and motions," the final Standing Committee response to the government's report disallowed this change as well.

Avenues to amend the Basic Law are equally blocked. The general power to amend the Basic Law is vested in the NPC.<sup>59</sup> Even local legislative proposals for amendment require a two-thirds vote in the Legco, the consent of two-thirds of the local NPC deputies (invariably "pro-China"), and the approval of the Chief Executive.<sup>60</sup> This is not just a matter of interpretation but also a matter of political will. Closing the democratic deficit requires convincing a large number of currently favored politicians that the model is fundamentally flawed and needs correcting.

It is not difficult for ordinary observers to appreciate the cost of such a democratic deficit. This system, at moments of crisis, tends to produce a legitimacy gap between those legislators who are directly elected, and officials and legislators who are not. With directly elected legislators in permanent minority under the current model, democrats are essentially left to the politics of shame to pressure officials in power or in the legislative majority to support popular initiatives. This tends to produce political crises when public outrage is at its highest—producing government by expediency and often government by crisis management.<sup>61</sup> Such authoritarian government, in Jon Elster's terms, is unable to make itself unable to interfere when it is expedient to do so.<sup>62</sup> In the July 2003 demonstrations over the government's proposed Article 23 legislation, the legitimacy gap was most striking in the arrogance of government officials, supporters, and the public outrage that followed. This system is highly confrontational and encourages popular suspicion of political leaders.

The local government has attempted some short-cut measures to solve this credibility problem. In 2002, the Hong Kong government put in place a so-called

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<sup>58</sup> Basic Law, *supra* note 1, art. 79.

<sup>59</sup> Basic Law, *supra* note 1, art. 159.

<sup>60</sup> *Id.*

<sup>61</sup> Michael C. Davis, *A Vote for Democracy*, SOUTH CHINA MORNING POST, Nov. 26, 2003, at 17.

<sup>62</sup> Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUBLIC ADMINISTRATION 169, 173 (1993).

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“ministerial system,” seeking to offer up the “accountability” of non-elected “ministers.”<sup>63</sup> The government presumably aimed to offer this as an alternative to full democratization. The track record of ministerial accountability has been less than satisfactory. Ministers still lack the capacity to mobilize public support for their policies and their occasional ineptitude may simply serve to multiply the number of crises, in the sense that there are just more targets for media attention and still no genuine public accountability. With much of the foundation for democracy in place, one can only question the wisdom of maintaining this flawed and unstable system.

### B. Human Rights

The Hong Kong Basic Law has a satisfactory chapter on human rights, which includes the various liberal rights specified in the Joint Declaration and requires that any restrictions on rights meet the standards of the international human rights covenants. As with democratic development, the chief obstacle to realization of the liberal human rights guarantees promised in the Joint Declaration appears to be interpretation. Beijing’s interpretive role has generally been to restrict human rights—to which the local government offers no resistance. Two articles in Basic Law Chapter II on local-central relations especially elevate concerns over mainland interference: Article 18 allows for application of national law in cases of emergency or where the central government determines there is “turmoil” in the region; and Article 23 requires the enactment of local laws on subversion, secession, sedition and state secrets.

As noted above,<sup>64</sup> the government-proposed national security law advanced in late 2002 and early 2003 in respect of the Article 23 requirements was a matter of great public controversy and international solicitude.<sup>65</sup> These Article 23 legislative proposals were widely criticized for being too vague and overly broad.<sup>66</sup> The arrogant and insensitive approach to promoting the legislation by government officials and pro-government supporters appeared to further outrage the public. While the government withdrew the legislative proposal in the face of such intense public opposition,<sup>67</sup> the government’s stance fomented a serious political crisis whose effects linger in the ongoing debate over democratization.

In Hong Kong, as anywhere, human rights protection ultimately depends on public support and official solicitude. Such official solicitude is called into play in official interpretations in the exercise of executive, legislative and judicial power. In the absence of democracy the judicial role has been especially important. Without adequate enforcement human rights will not flourish. Enforcement

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<sup>63</sup> See Davis, *supra* note 51.

<sup>64</sup> *Id.*

<sup>65</sup> This concern was most directly expressed when one-half million demonstrators took to the streets on July 1, 2003. Ambrose Leung, Klaudia Lee & Ernest Kong, *Hopes for Freedom Float Upon a Sea of Political Discontent*, SOUTH CHINA MORNING POST, July 2, 2003, at 3.

<sup>66</sup> *Id.*

<sup>67</sup> Klaudia Lee, *Security Chief Says Consultations on Article 23 will Continue*, SOUTH CHINA MORNING POST, Sept. 7, 2003, at 1.

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may depend on official avenues such as human rights or equal opportunities commissions and on the judiciary. Ultimately, there is concern that the local courts, exercising constitutional judicial review, retain the power to draw the boundary between basic rights and competing government and private concerns. In the face of China's dramatically contrasting rights tradition, the strength of the local institutional commitment is especially important. Chinese officials or their local supporters seeking to override the local security of human rights would profoundly undermine the "one country, two systems" formula.

The level of public support for human rights in Hong Kong has been surprisingly strong. The central position of human rights in the local political culture was initially stimulated by the human rights guarantees in the 1984 Joint Declaration. The tragic events at Tiananmen in 1989 further brought vitality to Hong Kong's human rights discourse.<sup>68</sup> This vitality has tended to support the legal and legislative processes. Energetic human rights support continued to infuse the public debate during the handover period and beyond. The massive demonstrations against the proposed Article 23 legislation on July 1, 2003 and similar pro-democracy demonstrations on July 1, 2004 showed that public support for human rights and democracy remains undiminished.

The most striking quality of the Hong Kong human rights regime is its international character, a feature that sharply contrasts with China's approach to human rights. The foundation for this international character was laid in the Joint Declaration, which included substantial human rights guarantees and maintenance of the international human rights covenants. The 1991 Bill of Rights Ordinance, which remains in force copies almost verbatim the International Covenant on Civil and Political Rights ("ICCPR").<sup>69</sup> The ICCPR has therefore shaped interpretations of Hong Kong's rights commitments. The government and the Legco, "in the last years of colonial rule, reformed many non-conforming colonial laws to better protect human rights."<sup>70</sup> Basic Law Article 39, likewise incorporates the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), imposing the requirements of such covenants as a limit on any rights restrictions.<sup>71</sup> These international rights guarantees have therefore been enforced by constitutional judicial review both before and after the handover. Subsequent to the handover, the Chinese government has likewise

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<sup>68</sup> Davis, *supra* note 51, at 286.

<sup>69</sup> Hong Kong Bill of Rights Ordinance, No. 59 (1991) reprinted in 30 I.L.M. 1310 (1991); International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967); Davis, *supra* note 51, at 286 (citing Johannes Chan, *The Hong Kong Bill of Rights 1991-1995: A Statistical Overview*, reprinted in HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (George Edwards & Johannes Chan eds., 1995)). When the Bill of Rights Ordinance was enacted, the colonial constitution, the Letters Patent, was also amended to include the ICCPR, a change which effectively implemented constitutional judicial review to enforce rights.

<sup>70</sup> Davis, *supra* note 51, at 287. Amended laws included: 1) Societies Ordinance (1992); 2) Television Ordinance (1993); 3) Broadcast Ordinance (1993); 4) Public Order Ordinance (1995); and 5) Emergency Regulations Ordinance (1995). The international character of the rights regime was enhanced by frequent judicial reference to overseas common law and European Union precedent. See *R. v. Sin Yau Ming* [1992] 1 H.K.C.L.R. 127, at 141-42 (CA).

<sup>71</sup> Basic Law, *supra* note 1, art. 39.

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continued to file reports on behalf of Hong Kong under the international human rights covenants. The application of international standards and international solicitude is certainly encouraged by these practices.

Causes for pessimism about human rights also remain substantial. Chinese officials and local pro-Beijing politicians have often appeared to be the chief attackers of human rights in Hong Kong. This was especially evident in the developments immediately surrounding the handover.<sup>72</sup> While Hong Kong's rights guarantees remain in tact, this hostile attitude does give reason for concern. The lack of appreciation of human rights fundamentals was on display in the government's Article 23 national security proposals.<sup>73</sup> Whether, after massive demonstrations successively on July 1, 2003 and 2004, Beijing and its supporters in Hong Kong have sufficiently come to appreciate the importance of human rights to Hong Kong's success and local wellbeing remains to be seen—though the recent Beijing interpretations concerning democratic reform bode ill in this regard.

### C. Rule of Law

As noted above, the interpretations of the judiciary in exercising the power of constitutional judicial review will have a great bearing on whether the current system comes up short regarding human rights. Both the Joint Declaration and the Basic Law implicitly require the exercise of constitutional judicial review.<sup>74</sup> The Hong Kong Court of Final Appeal (“CFA”) in the “right of abode” case acknowledged the power of constitutional judicial review in the local Hong Kong courts.<sup>75</sup> The future vigor of this institution was put in doubt by the subsequent government attack on this judgment.<sup>76</sup>

Article 158 of the Basic Law offers the main guidance regarding interpretation of the Basic Law. While it vests the power of interpretation in the NPC Standing Committee, it specifies that the Standing Committee authorizes local courts, when adjudicating cases, to interpret those provisions, which are “within the limits of the autonomy of the Region” and “other provisions.” If the CFA is con-

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<sup>72</sup> After the handover, the Provisional Legislature enacted new laws regarding public order and societies, restricting the right of abode of mainland children (later challenged in the well-known right of abode case), reducing labor rights protections and rejecting actions for private violation under the Bill of Rights. Davis, *supra* note 51, at 289 (citing Margaret Ng, *Threat to Our Civil Rights*, SOUTH CHINA MORNING POST, Apr. 11, 1997).

<sup>73</sup> Basic Law, *supra* note 1, art. 22.

<sup>74</sup> See Joint Declaration, *supra* note 2, Annex I, arts. 2, 3 & 13; see Basic Law, *supra* note 1, arts. 2, 8, 17, 80-96 & 158. Such judicial role may be supplemented by other institutions that provide affordable avenues of complaint about public and private rights violations.

<sup>75</sup> Ng Ka Ling v. Director of Immigration, [1999] 1 H.K.L.R.D. 315, 318-319 (C.F.A.) [hereinafter Ng Ka Ling I]. Article 24 of the Basic Law provides that Hong Kong residents include “persons of Chinese nationality born outside of Hong Kong.” The suit was brought by several children of Hong Kong residents claiming a denial of their basic right of residence under a newly enacted immigration ordinance that required them to apply on the mainland for an exit permit, a process that could take several years.

<sup>76</sup> See Mark O'Neill, *Beijing Says Abode Ruling was Wrong and Should be Changed*, SOUTH CHINA MORNING POST, Feb. 9, 1999, at 1; Cliff Buddle et al., *Judges Asked to Clarify Right of Abode Decision*, SOUTH CHINA MORNING POST, Feb. 25, 1999, at 1.

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fronted with the interpretation of provisions that are the responsibility of the Central People's government or concern local-central relations, then it must refer the matter to the Standing Committee. Upon such referral, the Standing Committee decides the matter with the advice of the Committee for the Basic Law.<sup>77</sup> The scope of these provisions is still to be worked out in local jurisprudence and related politics.

In the "right of abode" case the CFA took a purposeful and generous approach to interpreting the constitutional rights guaranteed in the Basic Law. The Court also explicitly accepted for itself the right to determine when to refer provisions respecting local-central relations or matters of central authority to the Standing Committee for interpretation. The Court concluded that referral was not required in the pending "right of abode" case. This decision was widely applauded in Hong Kong for its firm defense of human rights and the rule of law. But the judgment attracted a very harsh official response in two respects. Immediately after the judgment, the government, in a motion for clarification, attacked the obiter dicta (non-binding aspect) in the judgment, where the Court declared it had the right to "examine" acts of the NPC for conformity to the Basic Law—not necessarily a strategically wise claim by a court still feeling out its power. Pro-Beijing critics had claimed the Court was putting itself above the NPC. In its clarification judgment, the Court explicitly stated that it did not hold itself above the NPC or its Standing Committee, though the Court essentially restated its original position.<sup>78</sup> A second, more serious attack on the judgment and the rule of law occurred in May 1999. After the government issued a report claiming the judgment would produce a flood of 1.67 million migrants claiming the "right of abode" into Hong Kong, the Government requested and was granted a reinterpretation of the relevant provisions by the Standing Committee, effectively overturning the CFA interpretation.<sup>79</sup>

It seems that final judgments in Hong Kong, where constitutional rights are concerned, are not final, at least beyond the narrow application to named parties. The local government can simply file a motion with the Standing Committee to reinterpret the Basic Law and effectively overturn them as to the law of the case. Given the general level of consensus between the Beijing government and its

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<sup>77</sup> Decision of the National People's Congress to Approve the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region Under the Standing Committee of the National People's Congress, Adopted at the Third Session of the Seventh National People's Congress on Apr. 4, 1990 (published with the Basic Law). The role of the courts and the Standing Committee are addressed in Basic Law Articles 17, 19, and 158.

<sup>78</sup> *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.C.F.A.R. 577, 578 (C.F.A) [hereinafter *Ng Ka Ling II*]. The Court concluded, "nor did the court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."

<sup>79</sup> See Chris Yeung, *Court Gives 1.67m Right of Abode*, SOUTH CHINA MORNING POST, Apr. 29, 1999, at 1. The government asked the Standing Committee to re-interpret Articles 22 and 24(3) to effectively overturn the CFA Final Judgment. Chris Yeung, *NPC Will be Asked to Revoke Abode Rights for 1.5m Migrants*, SOUTH CHINA MORNING POST, May 19, 1999, at 1. The government sidestepped the problem of a lack of expressed power in the government to make such referral by seeking an endorsement from the Legislative Council and asking the State Council to make the referral on its behalf.

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locally anointed officials, this may effectively amount to the local government having the right to overturn the judgment of the CFA, at least as to any other effected parties. The prospect of the government freely interfering with judicial finality has brought suspicion on the government in nearly every controversial legislative outing, where an assumption must be made that the courts may not be able to correct any legislative deficiency. This suspicion was especially apparent in debates concerning the government's proposed Article 23 national security legislation. Will the government someday avail itself of such referral in respect of interpreting the boundaries between national security and freedom in Hong Kong?

Unconstrained government power was again on display in the above noted Standing Committee interpretation regarding democratic reform. While that interpretation did not result from a court case, it raised the troubling possibility that the Standing Committee may freely take back the power to interpret matters within local autonomy, though such interpretation power was expressly authorized to local courts in Article 158 of the Basic Law. Furthermore, the Standing Committee's wide interpretations of its allegedly broad authority have challenged the rule and role of law. Observers will be left to wonder if there are any limits on the Standing Committee's authority. Are these interpretive interferences to be back-door methods to effectively amend the Basic Law and reach outcomes that officials favor?

### V. Conclusion

Government missteps and crises have spawned a great deal of public skepticism about the existing constitutional model in Hong Kong, both locally and internationally. This skepticism demonstrates a variety of genuine reasons for democratic reform. Yet, in the recent Article 23 and political reform debates, government officials in both Beijing and Hong Kong have shown little appreciation of these difficulties. The arrogant attitude that has been a pervasive feature of Hong Kong's anointed leaders and their supporters has certainly been an important stimulant for public outrage. This reached its apex during the Article 23 debate. The government's somewhat chastened attitude since July 1, 2003 may hopefully signal a change in approach. The new Chief Executive has shown greater appreciation of the message of public indignation communicated on that day.

What the above analysis tells us is that this is not just about what democratic reform the Basic Law may allow in Articles 45 and 68 and Annexes I and II. What is at stake here involves larger issues of Hong Kong's constitutional development. Government by expediency and crisis and public action by shaming are an inherent feature of a constitutional system that cherishes liberty and the rule of law but fails to afford democracy. Such an authoritarian system may frequently put important constitutional institutions at risk. Such actions may engender public indignation and criticism. This may in turn encourage governance by expediency, an inherently unstable political course.

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Liberal constitutionalism assumes democracy. Pro-Beijing and pro-government leaders in Hong Kong frequently worry that democracy poses a risk to stability. The opposite may be true in Hong Kong. The lack of democracy in Hong Kong's liberal constitutional system may pose the greatest risk to stability, as the government veers from crisis to crisis. A system that undermines orderly constitutional channels for public action may simply encourage greater confrontation and disorder, as well as government by expediency and often by crisis management. The good news is that, except for direct elections and universal suffrage, most of the features for fully developing constitutional democracy are now in place.

Beijing's fear of Hong Kong democrats seems at odds with reality. It is apparent that there are no radical advocates of independence in Hong Kong, nor any sign of outside political control over local political actors. The democrats thus pose no real threat to Chinese sovereignty. Change in this attitude has essentially been confronted by a minority of very unpopular pro-Beijing politicians and business elite who seek to preserve their privileges and the political and economic advantages they afford. These elites have especially sought to poison the minds of Beijing officials concerning democrats in Hong Kong. But democracy clearly does not pose the threat about which these elites worry. Even most of their privileges will likely survive under democratic governance, as business typically does very well in a democracy. This essentially means that the chief risk of instability comes from the very Beijing officials and supporters that most often warn of instability from democracy. A revision of this view would help a great deal.

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