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HEARINGS ON PROSPECTS FOR DEMOCRACY IN HONG KONG

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Mr. Chairman and Members of the Subcommittee:

Thank you for holding these hearings and for providing an opportunity for me to present my views and to share information gathered on recent visits to the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC) and in ongoing work in the field of the rule of law in China. Given Hong Kong's population, strategic position, and economic importance, it remains necessary to focus upon a number of other significant considerations in formulating United States policy towards the HKSAR. Of course, the United States has enacted in domestic law the Hong Kong Policy Act of 1992,¹ to indicate our continuing interest in economic and political relations with the territory and in the well-being and prosperity of its citizens. In addition to United States actions and responses to moves taken by the PRC, recurrent questions surrounding the PRC's intervention in the HKSAR's governance despite promises that Hong Kong would enjoy at least fifty years of autonomy following its return to PRC sovereignty remain difficult to answer.

In recent weeks, thousands of Hong Kong residents have once again taken to the streets to call for greater democracy in the territory. Six years after the handover, the populace is calling for the semi-autonomous Hong Kong government to speed up reforms that would grant them more say in the choice of leaders and legislators. The first series of protests last summer was triggered by the Hong Kong government's attempts to pass a security law designed to prevent subversion against the central government in Beijing -- seen by many as signal of an

¹ United States - Hong Kong Policy Act of 1992, Public Law 102-383, 102nd Congress [S. 680]. (*codified at* 22 U.S.C. 5701 *et seq.*) Sec. 2, para. 6, "Findings and Declarations," states:

The human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves. Human rights also serve as a basis for Hong Kong's continued economic prosperity.

erosion of the freedoms the territory was promised under Hong Kong's mini-constitution, the Basic Law. After an estimated half-a-million people protested on July 1, Hong Kong's Chief Executive Tung Chee-hwa backed down and delayed a vote on the controversial security bill, originally scheduled for early July, 2003.

Introduction. An increasing cause for concern in the international community is the Chinese government's antagonism towards the desire of the Hong Kong people for the establishment of a modicum of the democratic political process as expected under the terms of the Sino-British Joint Declaration and Hong Kong's Basic Law by 2007. Hong Kong's future has become even more problematic in the wake of the failed attempt to enact draconian national security legislation pursuant to Article 23 of the Basic Law by means of a truncated legislative process and the sympathetic reaction of many Hong Kong residents to the goals of pro-democracy forces. Harsh rhetoric from Beijing has been addressed to those in Hong Kong who publicly voiced their support for dissident elements, boding ill for the enjoyment of promised civil liberties.

This drama has been played out in Hong Kong before, so the residents of Hong Kong are understandably worried. A protracted series of negotiations led to the adoption of the Basic Law, a "mini-constitution" for post-1997 Hong Kong. Three successive drafts were circulated, and public comment was invited. Strong public reaction to the undemocratic nature of the government proposed for Hong Kong after 1997 in these drafts led to strident statements from both PRC and Hong Kong representatives. Officials from China threatened to impose a framework on Hong Kong unilaterally if its representatives persisted in their "intransigence."

To allay fears in Hong Kong over the prospect that the United Nations International Covenant on Civil and Political Rights, in force in Hong Kong as a result of British colonial rule, would no longer apply after the Chinese takeover, China agreed to its incorporation in the territory. Although British attention to human rights in Hong Kong had been rather limited, the threat of the removal of this basic underpinning for civil liberties was nonetheless troubling. Adherence to international human rights standards and the conventions enunciating them since the handover of Hong Kong has been generally good, with a few glaring exceptions which will be noted below.

The Legal Framework. On July 1, 1997, the United Kingdom relinquished sovereignty over Hong Kong to the People's Republic of China according to an agreement between those two nations reached in 1984.² As an international agreement between the two nations which have had the most direct control over Hong Kong's fate, this document is the starting point for any analysis of Hong Kong's post-1997 legal system. Yet, the Joint Declaration itself merely anticipated the construction of a new framework to implement the broadly-worded, precatory

² 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, Dec. 19, 1984, Gr. Brit. T.S. No. 20, *reprinted in* 23 Int'l.Leg. Mats. 1366 (1984)[hereafter "Joint Declaration"].

document that established the process for the transfer of sovereignty.

On April 4, 1990, the Chinese National People's Congress in Beijing passed a Basic Law for the Hong Kong Special Administrative Region,³ which came into effect in 1997; the President of the PRC subsequently promulgated this law. Among other provisions, this Basic Law contains guarantees of individual rights, leaving to future determination the precise means for enforcement of these rights.

Current Rights Situation in Hong Kong. Despite its status as one of the United Kingdom's last remaining colonies (or "Dependent Territories," in quaint British usage), Hong Kong had come to enjoy considerable economic prosperity and rather extensive civil and political liberties during the two decades immediately preceding its return to Chinese sovereignty. The formal instruments of government were controlled by the appointed Governor; the nominal legislature, Hong Kong's Legislative Council, was hardly a democratic body. Its 56 members were either personally selected by the governor (20 non-official members) or elected by professional bodies and district boards (26 non-official members). An additional ten members were public servants, who served by virtue of their official positions (10 official members). Yet, despite the undemocratic nature of their selection, in the decade preceding 1997, the membership of the Legislative Council had come to include (by appointment and election) a reasonably large group of younger, outspoken members who voiced the concerns of the Hong Kong citizenry. Moreover, the obvious concern of the Hong Kong government for the well-being of its people – manifest in its commitment to public housing projects, mass transit and other infrastructural improvements and public health and social welfare – convinced the populace of the benign intentions of their unelected overseers.

As a British colonial dependency, Hong Kong also enjoyed many of the protections of the unwritten English constitution and common law as well as the rule-of-law tradition. These were – to a great extent – transplanted to Hong Kong and have taken root. The Hong Kong judiciary, particularly at its higher levels, was scrupulously honest and independent of (and resistant to) any executive or legislative interference with its adjudication. Significant indigenization of the judiciary and the legal profession has occurred over the past twenty-five years; local Chinese professionals are well trained and already largely in control of these institutions. Until 1992, final appeals from the Hong Kong Court of Appeal were taken to the Privy Council in London; since that time, in preparation for Hong Kong's return to Chinese sovereignty in 1997, a new Final Court of Appeal was established. The Chinese government, among other guarantees, promised that Hong Kong could retain this legal system for at least 50 years after China recovers sovereignty over Hong Kong.

Some Issues Arising from Hong Kong's Return to Chinese Sovereignty. As already noted, the United Kingdom and the People's Republic of China concluded a Joint Declaration with three

³. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, adopted on 4 April 1990 by the Seventh National People's Congress of the People's Republic of China at its Third Session. [hereafter "Basic Law"].

annexes in 1984 under which Britain has agreed to restore Hong Kong to China on July 1, 1997. Hong Kong then became, pursuant to Article 31 of the Chinese constitution, a Special Administrative Region(SAR) of China and, in the words of the Joint Declaration, was expected to “enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibility of the Central People's Government.” Following the ratification of the Joint Declaration in 1985, the National People's Congress of China, through an appointed Basic Law Drafting Committee (BLDC), undertook the writing of a Basic Law - in effect, a constitution for post-1997 Hong Kong - which was (among other things) to insure Hong Kong's autonomy: “[T]he socialist system and socialist policies shall not be practiced in Hong Kong, and ... Hong Kong's previous capitalist system and lifestyle shall remain unchanged for 50 years.”

In connection with the transfer of sovereignty, the British government in Hong Kong attempted to establish a toehold for representative government in Hong Kong before 1997 by aiming for the direct election of at least ten members to the Legislative Council by 1991, with further increases before 1997. Members of the pre-1997 Legislative Council had proposed that at least 50 per cent of the seats there should be directly elected by 1997, with a mechanism put in place to provide for 100 per cent direct election by 2003. The last British Governor of Hong Kong, Chris Patten, proposed speeding up this timetable to provide more representative rule by 1995. China threatened to “react” to any precipitous rush toward participatory democracy in Hong Kong before 1997 as a hostile act. In crude, almost scatological, language that echoed the denunciatory harangues of the worst days of the Cultural Revolution, Patten, the British and any Hong Kong Chinese who sided with them were vilified repeatedly and at great length. The parallels with recent rhetoric emanating from Beijing is ominous.

Moreover, before 1997, in response the outpouring of popular support in Hong Kong for the mainland pro-democracy demonstrators in 1989 and thereafter, thinly veiled threats against Hong Kong individuals and groups issued from both the Chinese government and its representatives in Hong Kong. China stated that it would not allow Hong Kong to become a "base for subversion" against the People's Republic, although it has never made clear what activities it would count as subversive. Three successive drafts of the Basic Law were publicized, with little attempt to answer substantive criticisms of earlier drafts by responsible Hong Kong parties (and Hong Kong members of the BLDC). Two members of the BLDC who were also current members of the Legislative Council at that time, teachers' union leader Szeto Wah and lawyer Martin Lee, were expelled from the BLDC and accused of "counter-revolutionary activities" for their involvement in protests against the 1989 massacre in and around Tiananmen Square. A Bill of Rights for Hong Kong, which was supposed to be published in January 1990 by the Hong Kong Government, was delayed because of mainland pressure. When it was eventually adopted in June, 1991, the Chinese authorities announced that it would not bind them after 1997 and that they felt free to reject any or all of it after the resumption of Chinese sovereignty. So much for guarantees that Hong Kong's pre-1997 legal system would continue in force!

A Brief History of PRC Interference in Hong Kong Governance. Almost immediately after the establishment of the People's Republic of China on the mainland in 1949, the Chinese government began a program of infiltration and sought to wield influence over the affairs of the

British colony which remained in Hong Kong. Once it became clear that the British were not leaving Hong Kong, China reached a *modus vivendi* with the British colonial government which permitted China, isolated from much of the world after the Korean War, to use Hong Kong as a kind of entrepot for contact with the non-socialist world. Much of China's foreign exchange was earned through Chinese-controlled enterprises based in Hong Kong and from direct sales to Hong Kong of basic commodities. Surplus population and individual malcontents were allowed to flee across China's border with Hong Kong; eventually, almost two million refugees entered Hong Kong from 1949 until the late 1960s. Whatever hopes China might have had that such an influx would destabilize Hong Kong and encourage the British to leave were dashed by Hong Kong's resilience; resources were mobilized to house and maintain at a subsistence level the colony's swelling population.

At the end of the 1960s, China's "Great Proletarian Cultural Revolution" washed over into Hong Kong briefly, as political radicals sought to achieve - in line with then-current political thinking on the mainland - the immediate revolutionary transformation of Hong Kong and the expulsion of the colonial power. Militant trade unionists and other pro-mainland activists tried their best to turn the populace against the British, but to no avail. After a brief period of disorder, the government firmly re-established its control. Successive temporary waves of immigrants from the mainland recurred, but they were easily absorbed by Hong Kong's growing economy.

By the early 1980s, attention began to focus on the 1997 deadline for return of the leased New Territories (which account for over 90 per cent of Hong Kong's total land area) to China under the terms of an 1898 treaty. China made it clear that it would not countenance any continuation of British control and that it intended to resume sovereignty. As a practical matter, the rest of Hong Kong would have to revert along with the New Territories. Initial resistance to China's stance, contemplated by then-British Prime Minister Thatcher (flush from her victory in the Falklands), was later prudently abandoned in the face of Chinese resolve. A handful of senior Hong Kong Chinese officials were promised full British passports and residency in Britain, but only a pitiful number availed themselves of the offer. On the other hand, the basic human rights of the rest of Hong Kong's people were left to the determination of the same Chinese leaders who ordered the People's Liberation Army to fire on students in Tiananmen Square. From an international human rights perspective, this was clearly unacceptable; however, the international community, which at that same time was scarcely bestir itself to worry about Bosnia and Somalia in the throes of all-out war, proved unable to focus upon a possible crisis in Hong Kong years before its return to the mainland.

Reasons for the Current Concern Over Democracy in Hong Kong. Hong Kong's Basic Law, often described as a "mini-constitution," which was agreed by both sides before the handover, allows the possibility of direct elections for the Chief Executive and all of its Legislative Council from 2007. But it also says Beijing must approve any electoral changes, which means China has the final say. China's Communist Party clearly fears growing demands for full democracy could threaten its control over the territory and possibly spread to mainland China. Some mainland officials have said they doubt Hong Kong's patriotism after a massive protest against the local Beijing-backed government last year. The march drew half a million

people into the streets to denounce attempts by Hong Kong leader Tung Chee-hwa to push through an unpopular anti-subversion bill. As the Chairman well knows, having co-sponsored a Joint Resolution in the Senate last summer expressing support for democracy in Hong Kong, both the legislative and executive branches of the United States government have expressed serious concerns about compliance with, and implementation of, the Joint Declaration and the Basic Law in the light of these experiences.⁴

Notwithstanding these wide-ranging differences, there remains a great deal of common interest between the United States and the PRC in the resolution of other numerous issues which may make the PRC heed expressions of concern over the smooth transition in Hong Kong in the runup to 2007. On the regional level, continuing peace and prosperity in East and Southeast Asia and even free access to the high seas to the east and south of the PRC will require China to maintain stability, balance and positive engagement with the international community.

Below, I attempt to examine just a few problem areas with regard to pace of democratization in Hong Kong, and the legal underpinnings of the claims made by both pro-democracy forces and representatives of the PRC insofar as the gradual introduction of self-governance was promised to Hong Kong, to evaluate their current status and to weigh various options for possible progress.

The Legal and Policy Bases for Democratization in Hong Kong after 1997

Under the Sino-British Joint Declaration of 1984, Hong Kong returned to Chinese rule in 1997 with the understanding it would maintain limited self-government and be allowed to enjoy its capitalist way of life at least until 2047. The current Chief Executive, C.H. Tung, was installed for five years, and again in 2002 for a second term, after being selected by a pro-Beijing electoral committee. Hong Kong's local laws are passed by a 60-member Legislative Council, but only 24 of its members are directly elected by Hong Kong voters. The rest are selected by an electoral committee or by groups called "functional constituencies," representing a small segment of the total population of seven million. Ironically, the same Basic Law that required the government to enact the security legislation which proved so broadly unpopular last summer also calls for it to pursue greater democracy by 2007. Yet Tung's attempts to push ahead with the security laws, while not moving on the democratization, has left many in the territory frustrated and suspicious.

Rev. Louis Ha, a Roman Catholic priest, has said that the aim of the protests has been to promote the drive for universal suffrage, as well as to educate people about democracy, and encourage democratic values such as tolerance and respect in peoples' everyday lives. The Catholic bishop of Hong Kong, head of Hong Kong's 230,000 Catholics, has also appealed to the

⁴ S. J. RES. 14, "Expressing support for freedom in Hong Kong," IN THE SENATE OF THE UNITED STATES, 108th CONGRESS, 1st Session, June 27, 2003.

government to listen to the voices of the people. “Hong Kong people have the quality and ability to rule ourselves,” he has been quoted as saying. “Give us a chance to show the whole world that we will do well on our own.”⁵

Recent Developments Affecting Prospects for Hong Kong’s Democratization

Communist China welcomed back Hong Kong in 1997 under its “one country, two systems” policy, whereby Hong Kong people could still enjoy a bustling free press, freedom of speech and religion, and rule of law. It promised a fair degree of autonomy, and with Britain drafted Hong Kong's the basic law. But when it comes to the “one country, two systems” policy under which Britain handed Hong Kong over in 1997, there's a wide gulf between the aspirations of the majority in Hong Kong and China's authoritarian rulers. What's happening now in China is about the next steps toward democratization in Hong Kong in 2007. Democracy is being debated. What's being talked about is the right of Hong Kong citizens in 2007 to elect a Chief Executive, like an American state governor, of their own choice.

Hong Kong is not a full democracy. Under a complex system carried over from British colonial days, only some politicians are freely elected, while trade groups and China also have their say. People do not directly elect the Chief Executive. But over the past year, hundreds of thousands of Hong Kong citizens have expressed their desire for greater democracy. As many as 100,000 people took to the streets on New Year's day, and 500,000 did so on July 1st last year. Under pressure, Chief Executive Tung Chee-hwa, last year promised to draw up plans for a consultation process on the possible introduction of direct elections in 2007. Pursuant to the Basic Law, 2007 is the earliest chance for constitutional reform and movement towards the ultimate goal of direct elections. The Basic Law provides that after 2007 major changes to the constitutional framework in Hong Kong may take place, the ultimate aim of these changes being the election of the Chief Executive and the Legislative Council by direct election.

Last month, a Hong Kong task force finished three rounds of talks with leaders in Beijing on the future of democracy in the territory. Hong Kong's Chief Secretary for Administration Donald Tsang and his team completed the talks after their meeting with the Chinese parliament, the National People's Congress, to seek their advice on holding full elections in Hong Kong by 2007. The Chief Secretary said of his mission, “The most important thing of the trip is to give us an opportunity to express the public opinion. I think we have reached that target,” he told reporters, calling the result of the meeting “satisfactory.” Tsang said Beijing wants thorough discussions on principles before Hong Kong proceeds with its constitutional development and a web page would be established to seek further public opinion on the issues. Chinese leaders

⁵ Fr.Ha is editor of the Catholic periodical, *Kung Kao Po*, as well as a member of the Democratic Development Network (DDN) that formed last summer in Hong Kong. See <<http://www.cnsnews.com/ViewForeignBureaus.asp?Page=\ForeignBureaus\archive\200307\FOR20030714c.html>>.

have appeared non-committal on the issue, questioning only whether Hong Kong actually wanted universal suffrage.

The task force was created by Hong Kong Chief Executive Tung Chee-hwa early this year, following the street protests last summer calling for a speedier transition to universal suffrage in the territory.

Reportedly, China will not allow Hong Kong to choose its next leader through full elections, according to a local press report that quoted unnamed sources close to the Beijing leadership. Also a consultation exercise to seek the public's view on increased democracy in the city was just a "show" intended to placate the pro-democracy camp, the *South China Morning Post* (SCMP) has reported. The source told the SCMP that Beijing would draw up its own plan to guide what form the next selection process for the city's chief executive would take in 2007.

A three-day trip to Beijing last month by a task force charged with seeking the Chinese leadership's opinion on the issue ended in near farce when China's top leaders snubbed the delegation. Beijing later poured cold water on democracy hopes, saying it would have the final say in how Hong Kong chooses its next leader and that "patriots" would rule the territory. That sparked hot debate on what defined a patriot and whether China would consider anti-government campaigners patriotic enough to allow them to stand in any election. Beijing is also expected to take a tougher position on Hong Kong if pro-democracy forces become the dominant power in the territory's top law-making body in elections in September and then work against China-backed leaders, according to unidentified sources. In 1997, Beijing established a provisional legislature and effectively dismantled electoral changes made by Britain in the waning years of colonial rule.

Post-2007 Political Reform and Democratization in Hong Kong. Hong Kong's constitutional journey has been unique. Most former colonies were released from their imperial power decades ago; Hong Kong was almost the last major territory to achieve such status. Furthermore, these former colonies became independent and replaced their former colonial administration with the institutions of democratic government. Hong Kong was absorbed by another sovereign power, and preserved its former administration almost unchanged. In Hong Kong's case, in fact, a virtue was made of continuity with the colonial era. Many civil servants simply carried over.

Then, why does Hong Kong need reform? Hong Kong has an established system of rights and operates by the rule of law. It enjoys a high standard of living and – aside from the recent recession – consistently high levels of economic growth. Although many people express discontent with the Government, there are no signs of mass unrest. And the PRC, as sovereign, would have to be persuaded of the benefits of any reform. Is it worth expending energy on the constitutional reform project? Some have suggested that the current system might continue for several more decades, with full suffrage and direct elections coming at the end of the fifty-year period, say in 2037, rather than "as early as" 2007.

Hong Kong's governance today is essentially that of a colonial administration, a form

more appropriate to the nineteenth than to the twenty-first century. The relatively favorable outcome of this governance to date – at least in terms of living standards and rights – should be regarded as exceptional. Particularly in the light of the few spectacular glaring failures of the Tung administration, it is definitely not something that can be relied upon for the long term. Also, under British rule there were certain checks and balances on Hong Kong's colonial governance system, such as accountability to the democratically-elected British Parliament. In that position today is China's National People's Congress, a far different institution. It is not clear that in Hong Kong's present situation the continued enjoyment of human rights, the rule of law, and ultimately of living standards, can be assured.

By its own terms the constitution mandated by the Basic Law should begin to change – with a gradual expansion of directly elected seats in the legislature and a progression, albeit without a definite timetable, towards full democracy. As Hong Kong approaches the ten-year anniversary of its handover, it is only common sense to plan for these changes. Secondly, Hong Kong's governance structure increasingly seems inherently unstable: a legislature enjoying an gradually growing mandate from the people but little power, facing an executive selected by a narrowly-based committee which wields very considerable power. It is highly unlikely that such a situation can accommodate the changes that lie ahead. Finally, recent experience with the HKSAR's response to SARS and the Article 23 legislation reveals how far Hong Kong needs to reform over the long term.

The Chief Executive. Hong Kong's executive model is that of a colonial administration, similar to the former administrations of Britain's other ex-colonies. The civil service wields both substantial power of policy-making and power to administer policies. The Chief Executive is selected by an Election Committee which is in turn selected by the Mainland Chinese authorities or under their auspices – the latter process being conducted in secrecy. With the departure of British administrators, many Hong Kong residents believe that the executive tends to represent the interests of local business elite. At the same time, the democratically-elected portion of the legislature appear to represent the “have-nots,” pressing for social-welfare policies such as a minimum wage, more public housing, lower government charges and fees. This tends to polarize policy debates in the HKSAR.

As provided in the Basic Law, the Chief Executive is expected to be chosen by direct election eventually, even though the initial selection process provides for the narrower and less democratic committee-selection process. Article 45 spells out the details:

Article 45

The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region 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.

The specific method for selecting the Chief Executive is prescribed in Annex I: "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".⁶

Moreover, the Basic Law envisages an executive accountable to the legislature (Article 64).

The legislature. The Basic Law sets out a program for increasing the proportion of legislators elected by direct election. This was meant to increase the popular mandate and legitimacy of the legislature. Increasing power for the Hong Kong Legislative Council, or Legco, might follow the trajectory of the European Parliament, which when established had little power, but gradually took more power. Also, being directly elected, the European Parliament enjoyed greater legitimacy than the other European governmental institutions, parallel to the experience in Hong Kong.

The majority of Legco's members are not directly elected and tend to side with the government. Legco's voting procedures also handicap its effective performance. The Hong Kong Legco also has almost as many committees as a large developed country parliament like the UK, but only one-tenth as many legislators. In the 2000 Legco, 30 seats are from Functional Constituencies (professional groups, business and other sectors) and 10 are selected by an Election Committee. In countries with bicameral legislatures, frequently members of one chamber are selected other than by geographical direct election. For example, the House of Lords in Britain includes not only hereditary and appointed Lords but also bishops. The United States Constitution provides every State with two Senators, while member of the House of Representatives are elected proportionally to population. Yet, in most countries, these second chambers are with another chamber which is fully directly-elected. Hong Kong's Functional Constituency and Election Committee elections to the legislature are almost unique.

The Election Committee will not be used again. But by 2007, unless there is some change, the 30 Functional Constituency seats will continue to exist. This functional constituency system is highly anomalous. In 1998 – among other shortcomings – 10 out of 28 functional constituencies were unopposed, while many others were returned by a “small circle” of individual voters or by companies under common control. Three ways have been suggested to address the issue of Hong Kong's functional constituencies: abolition (arguing that they are anachronistic and should simply be abolished); reform (to make them more democratic and representative of the people); or dilution (to reduce their influence by creating more directly elected seats). Any of these solutions would be preferable to maintenance of the status quo.

Here again, the Basic Law contemplates eventual movement towards fully representative government. Article 68 makes clear its “ultimate aim”:

⁶ The text of Annex I is appended at the end of this testimony, pp. I-ii.

Article 68

The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: “Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures.”⁷

The Judiciary . As the post-1997 experience has made painfully clear, the independence of the judiciary cannot be relied upon when the power of the Executive is as pervasive as it is in Hong Kong. It is ultimately unreasonable, in the absence of other strong institutions of government, to expect individual judges to resist the executive. The independence of the judiciary needs to be buttressed by strengthening other institutions such as the legislature.

Most notoriously, the judiciary’s independence was circumscribed after 1997 by the outcome of the Ng Ka Ling case, which arose out of a challenge to a local Hong Kong immigration statute severely inhibiting right of abode in Hong Kong (guaranteed in the Basic Law) for children born to parents resident in Hong Kong.⁸ Exercising its power of constitutional judicial review to overturn several provisions which derogated that right, the Court declared it would take a purposeful and generous approach to interpreting constitutional rights guaranteed in the Basic Law. In its judgment, the Court also explicitly declared that in deciding such disputes the Court of Final Appeal (CFA) would have to determine when to refer provisions respecting local-central relations or matters of central authority to the Standing Committee of the NPC.⁹ The court concluded it was not required in this case.

⁷ The full text of Annex II is appended at the end of this testimony, pp. ii-iv.

⁸ Article 24 of the Basic Law (the first Article in the chapter entitled “Chapter III: Fundamental Rights and Duties of the Residents) provides that Hong Kong residents include “persons of Chinese nationality born outside of Hong Kong” of Hong Kong residents. Under the Article, such residents are entitled, as are other Hong Kong residents, to the right of abode and a permanent identity card. Suit was initiated by several children who claimed that their basic right of residence was effectively denied under a newly enacted immigration ordinance which required them to apply on the mainland for an exit permit.

⁹ Basic Law, art. 158.

The HKSAR government, at Chief Executive Tung's direction, filed a motion for the CFA to "clarify" its judgment declaring its power to examine acts of the NPC. In a second brief judgment, the Court explicitly stated that it did not hold itself above the NPC, essentially restating its original position.¹⁰

A more serious attack on the judgment and the rule of law occurred in May 1999 when the government, after issuing a report claiming the judgment would produce a flood of 1.67 million migrants into Hong Kong, made a request to the Standing Committee of the NPC to interpret the relevant provisions of the Basic Law, effectively seeking to overturn the CFA judgment.¹¹ As a result of this end-run around the CFA, the finality of judgments of the CFA in Hong Kong has clearly been called into question and the rule of law has been put in doubt. Full confidence in the rule of law requires both respect for the authority of the CFA and confidence in its genuine ability to render final judgments.

A Note on Human Rights. These are enshrined in the Basic Law and in statute, and protected by the courts. However, Article 23 of the Basic Law on subversion – which occasioned such controversy last summer when attempts were made to push through legislation implementing it – and other provisions such as those enabling the Chinese Central Government to intervene in Hong Kong's affairs (Article 18) and to interpret the Basic Law (Article 158), the superior privileges of "Chinese citizens", set limits on the enjoyment of human rights. In practice, the non-democratic nature of government and the power of the executive pose further dangers. Also, with regard to the media, there are important issues of newspapers' self-censorship and censorship by newspaper owners which affect the actual enjoyment of freedoms guaranteed by the Basic Law and international human rights agreements.

Conclusion. The Basic Law of Hong Kong provides for the possibility of instituting full direct popular democracy in 2007. Hong Kong is, therefore, at a stage where it makes eminent good sense to look forward, to ask what type of political arrangements should be made for the next steps in its democratic development, and to begin planning. For Hong Kong, the issue is not *whether* to have or not have democracy or constitutionalism; these institutional commitments are provided in an international agreement, the Sino-British Joint Declaration. Furthermore, Hong Kong's own popular commitment to democracy, human rights and the rule of law favors liberal

¹⁰ Ng Ka Ling v. Director of Immigration, Court of Final Appeal, Final Appeal No. 14 of 1998 (Feb. 26, 1999).

¹¹ The government's decision to undermine a Final Court Judgment has produced strong condemnation from the Democratic camp, the Bar and leading constitutional scholars. Michael C. Davis, "Home to Roost," *South China Morning Post*, May 16, 1999, at 10.

constitutional democracy.¹² Fundamental to Hong Kong's economic future is the widely acknowledged fact that human rights and the rule of law give economic actors more confidence in the system. Moreover, democratic countries are better able to respond to crises such as the late-1990s' East Asian economic crisis and the more recent SARS.

The 1984 Sino-British Joint Declaration provides for democratic rights, as well as incorporating in Hong Kong international human rights covenants.¹³ In practice, since the hand-over, there have been some problematic developments and failures to make progress. The current electoral system works to the advantage of a tiny elite. A two-thirds majority of the Legco would have to vote to institute full universal suffrage after 2007. Even amendments to government bills, proposed by legislators, require the Chief Executive's approval to be considered. Even more problematic is the fact that amendment of the Basic Law is vested in the National People's Congress (NPC).¹⁴

Attacks on the judicial independence is probably the greatest causes for concern about continued protection of human rights. On the other hand, continued exercise of freedom of speech and association is the greatest cause for optimism. The 1991 Bill of Rights Ordinance remains in force after the handover, minus certain key provisions; it copies almost verbatim the International Covenant on Civil and Political Rights (ICCPR).¹⁵ At least, the PRC government continues to file reports on behalf of Hong Kong under the international human rights covenants. Yet, as is clear from the concerns expressed above about the willingness of both the PRC and Hong Kong governments to follow through on settled expectations about the pace of democratization in the HKSAR, much more remains to be done. Judiciously applied, foreign pressure to maintain the pace established by the HKSAR's foundational documents can encourage progress for the millions of Hong Kong residents whose democratic aspirations should not be dashed.

12 Michael C. Davis, "Constitutional Theory and Hong Kong Practice," paper delivered at Hong Kong Democratic Foundation seminar titled "Thinking about 2007," October 21, 2000. *See* <<http://www.hkdf.org/seminars/001021/01oct21.htm>>.

¹³ Joint Declaration, para. 3(5) & Annex I, art. XIII.

¹⁴ Basic Law, art. 159.

¹⁵ Hong Kong Bill of Rights Ordinance, No. 59 (1991) reprinted in 30 Int'l Leg. Mats. 1310 (1991); International Covenant on Civil and Political Rights, 6 Int'l Leg. Mats. 368 (1967).

