

**The Constitutional, Political and Legal Order of  
the Hong Kong Special Administrative Region**

**By**

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Administrative Region

Since the handover, Chinese leaders have demonstrated to the local and international communities that they intend to follow a strict hands-off policy towards Hong Kong. To show its respect for the Hong Kong Special Administrative Region (HKSAR)'s autonomy, the Chinese Ministry of Foreign Affairs has been politely turning down requests by foreign dignitaries to arrange their Hong Kong visits and asking them to approach the HKSAR government directly. At the beginning of 1999, the European Commission, in its first annual report on the HKSAR, acknowledged that "basic rights, freedoms and autonomy have been broadly upheld". The report welcomed steps towards broader suffrage in the legislative elections in May 1998, and appealed that the HKSAR government should announce soon a clear commitment to full democracy and fix a "reasonably early" date for its full implementation. It too noted that there had been regular demonstrations, unbridled press criticism, and no detentions or harassment of political opponents or human rights activists.<sup>1</sup> Such assessments are obviously shared by the local community.

Hong Kong people's confidence at this stage is mainly based on two assumptions: the first is that the trends of economic reform and opening up to the outside world are irreversible in China, and the second is that the Chinese leadership is determined to maintain the stability and prosperity of the territory. The Hong Kong community understands that the maintenance of the "one country, two systems" arrangement also depends on the following considerations: (a) Hong Kong's contribution to China's modernization efforts; (b) the territory's demonstration effect on Taiwan; (c) if the existing conditions deteriorate in Hong Kong, the confidence of the international business community in China will be adversely affected; and (d) change of China's policy towards Hong Kong will affect the confidence and morale of the reform-orientated cadres in China too.

The Chinese leadership can afford to adopt an apparently hands-off policy towards Hong Kong because the Basic Law was designed to ensure that nothing would go

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<sup>1</sup> Sunday Morning Post (a Hong Kong English newspaper), January 10, 1999.

wrong from the point of view of Beijing. The purpose of this article is to analyze the constitutional, legal and political order established by the Chinese authorities and their local supporters, as well as its functioning since the establishment of the HKSAR. Attempts will be made to examine the challenges to this order largely initiated by the pro-democracy groups in the territory, and how these challenges have been handled by the HKSAR government and Beijing. Their implications for the HKSAR's constitutional, legal and political order will also be considered.

## I. The Constitutional Order<sup>2</sup>

The Chinese authorities' demand to have the final say was reflected in the powers of interpreting and amending the Basic Law. Article 158 of the Basic Law provides that "the power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress".<sup>3</sup> Article 159 also provides that the "power of amendment of this Law shall be vested in the National People's Congress", while the "power to propose bills for amendments to this Law shall be vested in the Standing Committee of the National People's Congress, the State Council and the Hong Kong Special Administrative Region".

Regarding the political system, both the Sino-British Joint Declaration (Annex I, Article 1)<sup>4</sup> and the Basic Law (Articles 45 and 48.5) provide the Central People's Government with the power to appoint the Chief Executive and the principal officials of the HKSAR government. It had been anticipated that such appointment would be a mere formality to demonstrate China's sovereignty over Hong Kong. Chinese officials responsible for Hong Kong affairs, however, indicated that the power of

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2 The following seven paragraphs are largely a summary of sections of the author's article, "The Basic Law: Messages for Hong Kong People", in Richard Y.C. Wong and Joseph Y.S. Cheng (eds.), The Other Hong Kong Report 1990, Hong Kong: The Chinese University Press, 1990, pp. 29-63.

3 See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Hong Kong: The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region, April 1990.

4 A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, Hong Kong: Government Printer, September 26, 1984, p.12.

appointments would be a "substantial" one, implying a veto power in the hands of the Central People's Government.

The Basic Law also stipulates that the Chief Executive "shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law" (Article 43). It is significant that the Chief Executive's power of appointing and dismissing the principal officials of the HKSAR government is quite limited. He may nominate them and report such nominations to the Central People's Government for appointment and may propose to the Central People's Government the removal of the principal officials (Article 48.5).

According to the Constitution of the People's Republic of China (PRC), local people's congresses, at their respective levels, "elect, and have the power to recall, governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns" (Article 101). The Constitution further provides that "the standing committee of a local people's congress at and above the county level ... decides on the appointment and removal of functionaries of state organs within the limits of its authority as prescribed by law" (Article 104). In actual practice, the Communist Party of China controls the appointment of local government personnel at all levels, without much regard for the constitutional powers granted to the local people's congresses. When control of the Party is not expected, as in the case of the HKSAR, the Central People's Government will have to assume that ultimate control.

The HKSAR political system, as outlined in the Basic Law, enables the Chief Executive to be a very strong leader within the local government. The Chief Executive has powers and functions similar to the president of the United States, though the former probably has even larger powers *vis-a-vis* the legislature. For example, the Chief Executive may dissolve the Legislative Council when the latter refuses to pass the budget or other important bills and consensus cannot be reached after consultation (Article 50).

The strength of the Chief Executive and the weakness of the Legislative Council are further demonstrated by the Chief Executive's power "to approve the introduction of motions regarding revenues or expenditure of the Legislative Council" (Article 48.10) and "to decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees" (Article 48.11). If the Chief Executive can, without having to give reasons, reject any motion presented to the Legislative Council regarding revenues and expenditure, then basically the Legislative Council can only respond to the Chief Executive's proposals regarding revenues and expenditure. The Chief Executive's power to exempt government officials or other personnel in charge of government affairs from testifying or giving evidence before the Legislative Council or its committees will severely hamper the latter's function as a watchdog of the Chief Executive and the executive authorities.

Further, regarding bills relating to government policies, members of the Legislative Council may only introduce them with the prior written consent of the Chief Executive (Article 74). There obviously will be a danger that "government policies" may be defined so broadly as to render members of the Legislative Council almost powerless to introduce bills. The Legislative Council also has no powers over the appointments of the principal officials and members of the Executive Council of the HKSAR.

In sum, the political system outlined in Chapter IV of the Basic Law presents an "executive dominant" system in which the Chief Executive will have powers similar to those of the former British Governor. The Legislative Council will only have limited powers.

Even then, the Chinese authorities want to ensure that the Chief Executive will have a safe majority support in the legislature. Let us examine the preferred scenario of the Chinese authorities before Chris Patten's political reform proposals.<sup>5</sup> In the sixty-seat legislature in 1995, there were thirty seats for functional constituencies, an expansion of nine compared with the twenty-one seats in the 1991 elections. The Chinese authorities had hoped that candidates acceptable to Beijing would have picked up 70%, or twenty-one of the thirty seats. Functional constituencies favoured the Establishment, which preferred not to confront the Chinese authorities and disturb the stability and prosperity of Hong Kong. The Chinese authorities had expected that they would have had a say in the identification of the nine new functional constituencies for the 1995 elections, and thus would have been assured that about two-thirds of the legislators returned by functional constituencies would pose no challenge to Beijing. They had also hoped that pro-Beijing political groups would win at least three or four seats in the direct elections. The Election Committee, which returned ten seats to the legislature would thus have been crucial. The Election Committee, according to the Basic Law, would have been composed of members in the following proportion: one-quarter from the industrial, commercial, and financial sectors; one-quarter from the professions; one-quarter from the labour, grassroots, religious, and other sectors; and the remaining quarter from former political figures, Hong Kong deputies to the National People's Congress (NPC), and representatives of Hong Kong delegates to the National Committee of the Chinese People's Political Consultative Conference. The Chinese authorities certainly had planned to capture a majority in the Election Committee through their united-front work, and thus would have returned at least eight or nine legislators acceptable to Beijing.

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5 See "Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region", adopted at the third session of the Seventh National People's Congress on April 4, 1990, in *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, op. cit., pp. 65-67. It was stipulated in the Decision that if the composition of the last Hong Kong Legislative Council before the establishment of the HKSAR had been in conformity with the relevant provisions of the Decision, then its members would have become members of the first Legislative Council of the HKSAR, provided certain other conditions had been fulfilled. Hence, it had been expected that the 1995 Legislative Council elections would have been held in accordance with the relevant provisions of the Decision so as to achieve a "through train" arrangement.

Chris Patten's political reform proposals allowed the pro-democracy groups a chance to secure a majority of seats in the legislature, and were therefore unacceptable to the Chinese authorities. Despite the implementation of the reforms for the 1995 Legislative Council elections, the Chinese authorities decided to dissolve the duly elected Legislative Council and replace it with a provisional legislature in July 1997. For the Legislative Council elections in 1998, the old model as envisaged in the Basic Law in 1990 was adopted. Further, regarding the twenty seats for direct elections, the previous single-seat constituency, simple majority system was replaced by a proportional representation system combined with a medium-sized, multi-seat constituency, single-vote arrangement. The change, as demonstrated by the election results in 1998, limited the chance of a sweeping victory in the direct elections for the pro-democracy groups. The electoral system forced the pro-democracy groups to compete against each other; and enabled the pro-Beijing political groups to capture at least one seat in each constituency with about 25% of the votes.

The HKSAR government had defended the changes in the electoral system for direct elections by arguing that a proportional representation system was fairer, and that a single-seat constituency, simple majority system which allowed a political party to capture all the seats with perhaps 51% of the vote was not a reasonable system. If all the seats in the legislature are to be directly elected, a proportional representation system obviously distributes seats more fairly and protects the interests of smaller parties. However, as the functional constituencies and the Election Committee are already heavily biased against the pro-democracy groups and favour the Establishment, a proportional representation system only serves to restrict the number of seats captured by the pro-democracy groups in direct elections.

The HKSAR government then contradicted itself in the Election Committee elections. In the Patten era, the Election Committee consisted of directly elected District Board (local advisory council) members, and each member of the Election Committee could only vote for one Legislative Council candidate. Basically, it meant that if a political party or a coalition of parties secured one-tenth of the seats of the District Boards, it could capture a seat in the legislature. The composition of the Election Committee in the 1998 legislative elections followed the original design of the Chinese authorities

and heavily favoured the Establishment. The HKSAR government further revised the electoral rules and allowed each member of the Election Committee to choose ten Legislative Council candidates. This meant that if a political party or a coalition of political parties won the support of half plus one of the Election Committee members, it could capture all ten seats in the legislature returned by the Election Committee. But the HKSAR government exactly argued against this kind of arrangement in the direct elections and introduced a proportional representation system. The pro-democracy groups obviously could not hope to win any seat in the legislature in the Election Committee elections.

In both the election of the first Chief Executive and that of the provisional legislature in late 1996, the Chinese authorities wanted to make certain that nothing could go wrong.<sup>6</sup> According to a decision of the NPC at the time of the promulgation of the Basic Law on April 4, 1990, the NPC would establish a Preparatory Committee for the HKSAR in 1996 to prepare for the establishment of the Selection Committee for the first HKSAR government. The entire process clearly demonstrated the method of "election with Chinese characteristics". In the first place, the Preparatory Committee rejected the proposal that various important interest groups in the territory should be allowed to nominate a number of representatives to the Selection Committee. Instead, people who wanted to join the Selection Committee had to take part on an individual basis. They did not, therefore, have to be accountable to the organizations to which they belonged. In drawing up the final list of candidates, the Preparatory Committee's presidium had ample discretionary power and could remove undesirable elements from the list. Finally, in the voting process, one could assume that the fifty-six Mainland China members in the 150-member Preparatory Committee voted alike, and, hence, that they wielded a decisive influence on the outcome of the elections.

The Chinese authorities, therefore, expected no surprises from the Selection Committee; and it was not just a matter of cultivating a trusted candidate for the post of the first Chief Executive. Similarly, in the election of the provisional legislature,

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6 See the author's "Restraining the Development of Democracy in Hong Kong: Reducing Political Expectations with the Offer of Stability and Prosperity", in *The American Asian Review*, Vol. XV, No.4, Winter 1997, pp.13-42.

when Qian Qichen, Chinese Vice-Premier and chairman of the Preparatory Committee, appealed for support for those candidates with experience in legislative affairs,<sup>7</sup> the Selection Committee got the message and returned thirty-three incumbent Legislative Councillors plus eight former Legislative Councillors.<sup>8</sup> Undeniably, this was a major united-front victory for Beijing. The British administration, as well as Hong Kong and international public opinion, considered the Legislative Council elected in 1995 to be truly representative of Hong Kong people and the provisional legislature undemocratic and unnecessary. Yet, over one-half of the incumbent Legislative Councillors joined the provisional legislature and they tended to dominate the Legislative Council in the first half of 1997.<sup>9</sup> Lau Siu-kai, a Preparatory Committee member heavily involved in the design of the political system of the HKSAR, observed that the Chinese authorities were satisfied with the outcome of the provisional legislature election. He noted that since no political party could dominate the provisional legislature, the executive would not be restrained by the provisional legislature.<sup>10</sup>

## II. The Constitutional Controversies in the Relationship Between the Central Government and the HKSAR Authorities

Despite the fact that the Chinese leadership avoids interfering in the HKSAR, the relationship between the central government and the HKSAR authorities is not without problems.<sup>11</sup> In December 1997, the Selection Committee, which had earlier selected the first Chief Executive and members of the provisional legislature, selected thirty-six deputies to represent the HKSAR in the NPC. Thirty-five deputies were members of the Selection Committee and the only non-member returned was Jiang Enzhu, head of the Hong Kong branch of the New China News Agency (NCNA).

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7 Ming Pao (a Hong Kong Chinese newspaper), December 13, 1996.

8 For analyses of the election to the provisional legislature, see all major newspapers in Hong Kong on December 22, 1996.

9 Wong Wai-kwok, "The Provisional Legislature Directs the Legislative Council?", Yazhou Zhoukan (a Hong Kong Chinese weekly magazine), Vol. 11, No. 1, December 30, 1996-January 5, 1997, P. 30.

10 Ibid.

11 See the author's "Political Changes Since the Establishment of the Hong Kong Special Administrative Region", The American Asian Review, Vol. XVII, No. 4, Winter 1999, pp. 77-113.

Following the normal practice in Mainland China, Jiang, the most senior Chinese official in Hong Kong, was a natural choice to represent the territory in the NPC. However, many Hong Kong people believed that Jiang would certainly toe the central government line rather than articulate local interests. Hence their view was that Jiang should be returned to the NPC as senior cadre in the State Council. The local pro-Beijing circles and media strongly defended Jiang's candidacy, and Jiang eventually received the highest number of votes in the selection process.<sup>12</sup>

Then came the debate on the Crown/State issue. The HKSAR government introduced the Adaptation of Laws (Interpretative Provisions) Bill to the provisional legislature, which passed it in April 1998. The law changes colonial definitions in all the laws of the HKSAR, replacing phrases such as "the Crown" with "the State", and is retroactive to July 1, 1997. The purpose of the ordinance was to adapt Hong Kong's existing laws to its post-colonial status. Section 24 of the Adaptation of Laws (Interpretative Provisions) Ordinance substitutes the word "State" for the word "Crown" in section 66 of the Interpretation and General Clauses Ordinance, which then reads as follows: "No Ordinance shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby."<sup>13</sup> According to the Adaptation of Laws (Interpretative Provisions) Ordinance, "the State" includes the HKSAR government, the central government of the PRC and the subordinate organs of the central government exercising executive functions on its behalf. The HKSAR government subsequently admitted that such subordinate organs include the Office of Commissioner of the PRC Foreign Ministry in Hong Kong, the People's Liberation Army stationed in Hong Kong and the Hong Kong branch of the NCNA.

Article 22 of the Basic Law, however, states: "All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region." The pro-democracy groups therefore argue that the Adaptation of Laws (Interpretative

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12 See all major newspapers in Hong Kong on December 9, 1997.

13 Ordinance No. 26 of 1998, passed by the Provisional Legislative Council on April 15, 1998.

Provisions) Ordinance is a breach of the Basic Law and that it gives up considerable jurisdiction unjustifiably by exempting the NCNA and other Mainland bodies from some laws.<sup>14</sup> Moreover, the HKSAR government has refused to provide a definition of "the State", or a list of Mainland organs in Hong Kong which come under the definition of "the State".<sup>15</sup> The pro-democracy groups had asked the government to postpone the introduction of the bill until after the first legislature had been elected.

This debate on the Crown/State issue was probably more politicized by the Department of Justice's decision not to prosecute the Hong Kong branch of the NCNA for a possible violation of the Personal Data (Privacy) Ordinance. Emily Lau, an elected Legislative Councillor in the 1995 and 1998 elections, requested to see the personal data on her held by the Hong Kong branch of the NCNA in late 1996, following the passage of the Personal Data (Privacy) Ordinance. According to the law, a response should be given within forty days. But after ten months and a complaint to the Privacy Commission, Lau only received a reply from the local NCNA branch that it did not have a file on her. The Privacy Commission passed the case to the Secretary for Justice, Elsie Leung Oi-sie, who decided not to prosecute. The Department of Justice explained that the decision was based on "established criteria" of whether there was sufficient evidence and whether a prosecution was in the public interest.<sup>16</sup> To be fair to the Department of Justice, it did not prosecute any of the eight cases passed on to it by the Privacy Commission; but a subsequent comment by the Chief Executive probably made the matter more controversial. When asked why the local NCNA branch was not prosecuted, Tung Chee-hwa replied that it was only a "technical breach [of the Personal Data (Privacy) Ordinance], not a substantial breach".<sup>17</sup>

To ensure that the Chinese authorities would have the final say on the laws of the HKSAR and to protect themselves from any possible conspiracies of the British administration, Article 160 of the Basic Law stipulates that: "Upon the establishment

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14 Sunday Morning Post, March 29, 1998.

15 Ming Pao, April 8, 1998.

16 South China Morning Post, February 28, 1998.

17 See Christine Loh, "Human Rights in the First Year - Genuine Restraint, or Buying Time?", in Larry Chuen-ho Chow and Yiu-kwan Fan (eds.), The Other Hong Kong Report 1998, Hong Kong: The Chinese University Press, 1999, p. 66.

of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law.

In accordance with this provision, on January 19, 1997, the legal sub-group of the Preparatory Committee for the HKSAR made its final recommendations to repeal sixteen of Hong Kong's laws and modify nine others, including parts of the Bill of Rights Ordinance. The sub-group considered that these statutes were inconsistent with the Basic Law.<sup>18</sup> This was in line with the Chinese authorities' position since the mid-1980s: the British administration could not introduce any major changes in the transitional period without their consent; and it should maintain the *status quo* in Hong Kong as it stood in 1984 when the Sino-British Joint Declaration was concluded. The Chinese authorities also wanted to retain all the draconian powers enjoyed by the colonial government for the HKSAR government without dilution. Like the traditional colonial government, they wanted the HKSAR government to be well prepared for all contingencies. They therefore looked upon attempts by the British administration and the elected Legislative Council to revise existing statutes to improve human rights protection as British conspiracies. The recommendations were largely adopted by the Preparatory Committee and then endorsed by the NPC Standing Committee in February 1997. The Chief Executive's Office then amended the Societies Ordinance and the Public Order Ordinance in the following April. With the approval of the provisional legislature, the revised ordinances have become effective since July 1, 1997.

The pro-democracy groups expected that these legal changes would further exacerbate the self-censorship already prevalent in the territory. But the actual amendments to the ordinances were limited. Although the NPC Standing Committee nullified the major amendments made to the Societies Ordinance and the Public Order Ordinance in July 1992 and July 1995 respectively, it did not actually mandate the restoration of these laws to their original versions. The HKSAR government was in fact given a free hand. Apparently the Chinese authorities were only eager to show that the Patten

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18 South China Morning Post, January 20, 1997.

administration could not get away with its conspiracies; and as the Chinese leaders had already warned, they would certainly turn the clock back. The Chinese authorities wanted to demonstrate the high degree of autonomy enjoyed by the HKSAR government too, and they probably did not have the intention to impose specific restrictions on human rights and freedoms in Hong Kong.

The Office of the HKSAR Chief Executive-designate appreciated the significance of amending the Societies Ordinance and the Public Order Ordinance in Sino-British relations, and it released a consultative document on April 9, 1997 to solicit the community's views on the new versions of the ordinances. Bills were then drafted and enacted by the Provisional Legislative Council on June 14, 1997 in the form of the Societies (Amendment) Ordinance 1997 and the Public Order (Amendment) Ordinance 1997. According to Albert H.Y. Chen, the amended versions largely retained the improvements and liberalizations made in the 1992 and 1995 amendments. The Public Order (Amendment) Ordinance re-introduced licensing for demonstrations; but in practice, so far, it works like a notification procedure. Further, according to the two amended ordinances, the HKSAR government has the power to prohibit a public meeting or procession or the operation of a society on the additional ground of "national security", in addition to the pre-existing grounds of "public safety" and "public order". The term "national security" is loosely defined as "safeguarding of the territorial integrity and independence of the People's Republic of China". The Societies (Amendment) Ordinance also prohibits political bodies in Hong Kong from having any connection with foreign or Taiwanese political bodies.<sup>19</sup>

The above exercise was not popular with Hong Kong people, and could easily damage Hong Kong's reputation at a critical moment when international media focussed their attention on the territory. The Office of the HKSAR Chief Executive-designate managed the amendment process with considerable caution and was engaged in intensive lobbying of local opinion leaders.

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19 See Albert H.Y. Chen, "Continuity and Change in the Legal System", in Larry Chuen-ho Chow and Yiu-kwan Fan (eds.), *op. cit.*, p. 33.

### III. Jurisdiction of the Court of Final Appeal and Foreign Affairs Issues

The greatest challenge to the relationship between the central authorities and the HKSAR did not arrive until February 1999 when the Court of Final Appeal (CFA) delivered its landmark ruling on the cases of illegal migrant children. The CFA claimed that the courts of the HKSAR have the jurisdiction to examine whether legislative acts of the NPC or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. This decision was regarded by four legal experts in Mainland China as a violation of the Basic Law. They argued that the NPC is the organ of supreme state power in China, and that no organization can challenge the laws promulgated by it or its decisions. They also asserted that the authority to interpret the Basic Law rests with the Standing Committee of the NPC; and the CFA's ruling willfully expanded its right to partially interpret the Basic Law.<sup>20</sup>

These legal experts further indicated that the Preparatory Committee for the HKSAR attempted to prevent a rapid population increase in Hong Kong which would exert pressure on all sectors, hence it held certain views on the implementation of the second clause of Article 24 of the Basic Law.<sup>21</sup> These legal experts implicitly criticized the CFA's ruling for facilitating a huge influx of people into Hong Kong, thus creating a negative impact on Hong Kong society. The harsh criticisms of the CFA were then endorsed by the head of the State Council's Information Office, Zhao Qizheng. The HKSAR government subsequently sent its Secretary for Justice, Elsie Leung, to Beijing to seek the central authorities' understanding. The Chinese authorities' reaction to the CFA's ruling also caused a diplomatic row between Beijing and London. In response to the British media's criticisms, the Chinese Foreign Ministry released a statement suggesting that Britain had no right to comment on the CFA's ruling. A spokesman for the British Prime Minister, Tony Blair,

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20 China Daily (a Beijing English newspaper), February 8, 1999. These four legal experts were closely involved in the drafting of the Basic Law. Because their opinions were reported prominently in the official media, they were considered to reflect the official view.

21 The second clause of Article 24 of the Basic Law defines the qualifications for permanent residents of the HKSAR. See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, op. cit., p.14.

responded by insisting that Britain had a right to comment on developments in Hong Kong because of its role in the Sino-British Joint Declaration.<sup>22</sup>

Differences in the interpretation of the Basic Law between the HKSAR and the central authorities in Beijing are natural and almost inevitable. In the first fifty years of American history, the U.S. Supreme Court attempted to expand its jurisdiction and some of its rulings were controversial. The CFA naturally wanted to define its judicial independence and the HKSAR's high degree of autonomy to their fullest extent possible, and in doing so might well be challenged by the central authorities. Procedure wise, before its final judgement (which is not appealable), the CFA should seek an interpretation from the Standing Committee of the NPC concerning provisions of the Basic Law covering affairs which are the responsibility of the central government or the relationship between the central authorities and the HKSAR. There is no guarantee that the CFA will refer to the Standing Committee of the NPC for an interpretation in every case which the latter considers necessary.<sup>23</sup>

The Chinese authorities obviously do not want to damage the good image regarding Hong Kong's high degree of autonomy and their non-interference in the territory. However, they believed that the challenges to the NPC and its Standing Committee posed by the CFA's ruling had to be rectified.<sup>24</sup> Under such circumstances, considerable adverse reaction was inevitable. In an opinion poll conducted in February 1999, 70% of the respondents indicated that a constitutional crisis would emerge if the CFA's ruling was overturned; 72% of the respondents believed that the HKSAR government should explain the ruling to the central government in Beijing and seek to uphold the CFA's independence; only 11% of the respondents believed that Hong Kong should follow Beijing's instructions.<sup>25</sup>

It is widely believed that the Chief Executive, Tung Chee-hwa, had engaged in intensive lobbying of the Chinese authorities to minimize the damage. At the request

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22 South China Morning Post, February 13, 1999.

23 Article 158 of the Basic Law. See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *op. cit.*, p.54.

24 Ming Pao, February 9, 1999.

25 Sunday Morning Post, February 14, 1999.

of the government, the CFA took the unprecedented step of clarifying its ruling on the cases of the illegal migrant children. The five judges released a brief, unanimous statement which stated that its earlier ruling "did not question the authority of the Standing Committee (of the National People's Congress) to make an interpretation under Article 158 (of the Basic Law) which would have to be followed by the courts of the region". The CFA indicated that "it cannot question that authority", and that it "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>26</sup>

The local Bar Association and many in the territory's legal community believed that the CFA's response would undermine the rule of law by giving the impression that it had bowed to political pressures.<sup>27</sup> The local Law Society, however, endorsed the CFA's action. Within days, the Chinese authorities indicated that the CFA had taken the "necessary step" to clarify its controversial ruling, and the constitutional crisis seemed to be over.<sup>28</sup> This was a considerable relief for Hong Kong people who wanted to avoid further troubles in times of economic hardship. The controversy well demonstrated the discrepancies in the legal doctrines of the two legal systems, and that the maintenance of judicial independence and a high degree of autonomy in the HKSAR within the "one country, two systems" framework is a constant challenge. It is also obvious that the Chinese authorities would not give up its powers of final control over Hong Kong, though they would, for the sake of the stability and prosperity of the territory, handle challenges to that final control with restraint and caution.

While the CFA's challenge to the authority of the NPC and its Standing Committee had been resolved, the HKSAR government subsequently believed that it could not accept the CFA's ruling in January 1999 which awarded the right of abode to illegitimate children of Hong Kong residents and children born before one of their parents had become a permanent resident. On April 28, 1999, the government

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26 South China Morning Post, February 27, 1999.

27 Ibid.

28 Sunday Morning Post, February 28, 1999.

released the results of a survey which showed that 692,000 Mainlanders had the immediate right to live in Hong Kong under the CFA's ruling; and 983,000 would be eligible after seven years. The Secretary for Security, Regina Ip Lau Suk-ye, warned that the 1.675 million figure could be an under-estimation because Mainland children of former Hong Kong residents who had migrated or died were not included; at the same time, wives of Hong Kong residents across the border might continue to have children, so the number of people eligible for the right of abode would increase.<sup>29</sup>

The government's position was clear: the huge influx could not be accepted because it would worsen unemployment and impose a heavy burden on the territory's social services. The government would not opt for amending the Basic Law because it was too time-consuming. Only the NPC has the authority to amend the Basic Law, and the next session would not convene until March 2000. The only viable option therefore was to seek an interpretation from the Standing Committee of the NPC.

According to sources close to the Basic Law Drafting Committee of the HKSAR, a loophole exists in Article 24 of the Basic Law defining the categories of permanent residents of the HKSAR which gave rise to the ruling of the CFA. The loophole in fact was recognized by the officials of the State Council's Hong Kong and Macau Affairs Office, and the corresponding article of the Basic Law of Macau clearly stipulates that at least one parent has to have acquired the right of abode in Macau first before his or her children born outside of Macau can secure the right of abode in the Macau SAR.<sup>30</sup> The loophole was allowed to exist because the Basic Law drafters and the Chinese officials concerned wanted to facilitate the return to Hong Kong of those who had earlier emigrated to Western countries, and they thought they could rely on administrative procedures on the part of the Chinese authorities to stop any unintended influx of Mainland immigrants into Hong Kong. The CFA's ruling meant that such administrative procedures would be inadequate.

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29 See all major newspapers in Hong Kong on April 29, 1999.

30 Article 24(2) of the Macau SAR Basic Law, see Zhonghua Renmin Gongheguo Aomen Tebiexingzhengqu Jibenfa (Basic Law of the Macau Special Administrative Region of the People's Republic of China), Beijing: Renmin Chubanshe, 1997, p.12.

The government's survey results caused a lot of debates as some supported the government's view that they were probably under-estimations, while human-rights and pro-democracy groups attacked them as gross over-estimations exploited by the government to scare the community into accepting its plan of seeking an interpretation from the Standing Committee of the NPC. Opinion polls clearly indicated that a majority of Hong Kong people were reluctant to countenance a major influx of immigrants from Mainland China, and they therefore would support any prompt measure of the government to remove this threat.<sup>31</sup> This was understandable and predictable because Hong Kong was in an economic recession and people were most worried about the economy and unemployment.

The HKSAR government had obviously been unprepared for the ruling of the CFA. Its initial response was to accept the ruling as an indication of its respect for judicial independence. Its subsequent decision to stop the influx was widely supported by the community, and its critics concentrated on the survey and the rejection of the option of amending the Basic Law. Apparently the Chinese authorities did not want to interfere in the issue. It was ready to help the HKSAR government, but it much preferred the Tung Chee-hwa administration to handle the issue on its own. The latter believed that the Chinese leadership would not like amending the Basic Law, because it was reluctant to set a precedent and to admit that a mistake had been made in its drafting process. The important question was: if the Chief Executive had considered it the best option, would he have seriously lobbied the Chinese leadership?

With the benefit of hindsight, the HKSAR government should have sought an interpretation from the Standing Committee of the NPC before the CFA giving its verdict. It might have chosen to direct the CFA to seek such an interpretation, and thereby established a precedent so that the CFA may voluntarily seek an interpretation from the Standing Committee of the NPC or be directed by the executive branch of the government (the Chief Executive) to do so. At least the Tung Chee-hwa

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31 A survey by the University of Hong Kong's Social Science Research Centre held on April 29-May 1, 1999 showed that 61% of the respondents objected to the expected influx of Mainland migrants; 44% of them indicated that their main concern was unemployment, 12% citing fears for public order and 11% were concerned about housing and education. See South China Morning Post, May 9, 1999.

administration should have followed the example of the U.S. President, declaring the administration's position before the ruling of the Supreme Court, indicating that it would seek to change the law if the Supreme Court's ruling went against its position.

Changing its position from accepting the CFA's verdict to attempting to block the influx of 1.675 million people into Hong Kong was embarrassing, but the survey results certainly helped to generate the community's support for the government's position. However, to seek an interpretation from the Standing Committee of the NPC to overturn the CFA's ruling certainly compromises the CFA's dignity and integrity. The CFA's verdict is no longer perceived as final. Hence, from the point of view of maintaining the rule of law and the independence of the judiciary, the amendment of the Basic Law would have been a better option. Amending the Basic Law would have been time-consuming, but the Chinese authorities were obviously willing to co-operate in trying to stem the tide of immigrants from the Mainland. After all, from the CFA's ruling in January 1999 to the release of the interpretation by the Standing Committee of the NPC in the following June, Hong Kong had been relying on the support and co-operation of the Chinese authorities to prevent an influx of Mainland immigrants. Unfortunately, it appeared that the Tung Chee-hwa administration's consideration of the preferences of the Chinese leadership assumed greater weight than its concern for the independence of the judiciary.

On June 26, 1999, the Standing Committee of the NPC unanimously endorsed the HKSAR government's request to reinterpret sections of Article 22 and 24 of the Basic Law. The Standing Committee of the NPC ruled that the CFA had been wrong in not seeking its interpretation before the CFA's final ruling. It also found the CFA's verdict did not reflect the "true legislative intent". According to the NPC Standing Committee, the relevant section of Article 24 means that Mainlanders born before one of their parents had become a permanent resident of Hong Kong do not have the right of abode in the HKSAR. A reinterpretation of Article 22 means that Mainlanders, including Hong Kong permanent residents' children born with Chinese nationality, must seek a valid pass before entering the HKSAR. The Chief Executive, Tung Chee-hwa, stated publicly that the NPC Standing Committee's reinterpretation had "made a giant step towards solving a very difficult problem", as more than 1.4 million

Mainland residents' right of abode in the HKSAR had been revoked. Tung defended his administration's decision as "entirely legal and constitutional", and was taken in the overall interests of Hong Kong.<sup>32</sup>

In another important right of abode judgement in the following December, the CFA accepted that the NPC Standing Committee's interpretation of the relevant sections of the Basic Law in June 1999 was "a valid and binding interpretation ... which the courts in the HKSAR are under a duty to follow". Claims by the Mainland migrants' lawyers that the NPC Standing Committee can only interpret the Basic Law when asked to do so by the CFA were rejected. The Chief Justice Andrew Li Kwok-nang stated: "This argument cannot be accepted. It is clear that the Standing Committee has the power to make the interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself." The CFA's verdict restored a government scheme requiring migrants claiming the right of abode to apply for certificates of entitlement in China and be subjected to a quota system for entry into Hong Kong.<sup>33</sup>

Within a fortnight, the CFA again ruled in favour of the HKSAR government over the legality of a law banning the desecration of the national and regional flags. The Tung administration was much relieved with the avoidance of a possible constitutional crisis. As Albert Chen Hung-yee observed, the Chinese flag plays a more sensitive role in the territory than national flags in other countries because "it is one of the few manifestations of Chinese sovereignty in Hong Kong".<sup>34</sup> Thus a ruling against the constitutionality of the flag law could have been seen as an affront to Beijing's sovereignty.

The pro-democracy groups, human rights activists and a segment of the legal profession in Hong Kong are unhappy with the above verdicts of the CFA. Democratic Party chairman Martin Lee Chu-ming stated: "I am afraid people will see this [the CFA's ruling on the flag law] as a trend. It won't be long before Hong Kong

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32 Sunday Morning Post, June 27, 1999.

33 South China Morning Post, December 4, 1999.

34 Ibid., December 16, 1999; see also Chris Yeung, "Flag ruling casts shadow over liberty", ibid., December 18, 1999.

goes down the same route as Singapore or Mainland China, where the courts never rule against the government on sensitive cases."<sup>35</sup> Martin Lee may well be right, but Hong Kong has accepted the Basic Law which gives the power of interpreting and amending it to the Chinese authorities. The latter obviously insist on a veto power over issues which they consider related to China's sovereignty. It appears that the CFA has indicated its respect for the Chinese authorities' position.

According to Article 13 of the Basic Law, the "Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region". Under such circumstances, Hong Kong sometimes has a price to pay. In mid-May 1999, it was announced that Beijing and Pyongyang had reached an agreement for North Korea to open a consulate in Hong Kong. It was reported that before the announcement, a number of Western and Asian governments, including those of the United States and South Korea, had made quiet representations against the establishment of a North Korea consulate to HKSAR government officials, and Chinese Foreign Affairs Ministry officials based in Hong Kong and in Beijing. Such opposition was related to Pyongyang's record of laundering counterfeit US dollars and engaging in terrorism through its overseas diplomatic missions. In Macau, cadres working for Pyongyang's official Zhokwang trading company have been associated with the laundering of high-quality forged US\$100 notes.<sup>36</sup>

Similarly when the Chinese government two months later allowed Iran to open a consulate in Hong Kong, there were concerns in the local consular community that Tehran could use it as a base for arms smuggling. The United States and other Western countries have also accused China of selling cruise missiles and chemical weapons to Iran.<sup>37</sup>

In retaliation against NATO's bombing of the Chinese embassy in Belgrade on May 7, 1999, the Chinese government banned United States Navy vessels and military aircraft from visiting the HKSAR. According to one estimate, about sixty to seventy United

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35 Ibid.

36 Glenn Schloss, "Beijing's interference hurts SAR's image", ibid., June 10, 1999.

37 Ibid., July 13, 1999.

States military ships visit Hong Kong every year, spending up to HK\$387 million in addition to having about 50,000 sailors on shore leave. The Clinton administration also exerted pressure on the territory by stressing its position that the docking of its military vessels would be viewed as an indicator of the HKSAR's openness under Chinese rule.<sup>38</sup> It seems that the Hong Kong community is ready to accept the price, as being part of China involves responsibilities and obligations.

### III. Political Reforms

Since the handover, the performance of the Hong Kong civil service has attracted considerable criticism from the community.<sup>39</sup> From the bird flu to the opening of the new airport, and to the over-estimation of the territory's demand for electricity, Hong Kong's top civil servants have committed one blunder after another. While many criticisms of the civil service undoubtedly are justified, one must take note that the development of representative government and the recent economic difficulties since the handover have made Hong Kong people much more critical of their senior civil servants, and the latter have been conveniently blamed for the territory's current troubles.

Nevertheless, there are long-term structural questions that have to be examined. Hong Kong's civil service system is, of course, modelled after that of the United Kingdom. But in contrast to their counterparts in Whitehall, top civil servants in Hong Kong make policies and attempt to secure acceptance of their policies by the public. In this regard, they are politicians and far from neutral. Yet, they do not have to be accountable to the people in the sense that they must resign should their policies fail. This difference tends to be ignored when the government's performance proves to be satisfactory; in times of economic difficulties and civil service blunders, however, people are dissatisfied that no senior civil servants have been sanctioned for serious policy or administrative mistakes.

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38 Glenn Schloss, *op. cit.*

39 See the author's "Political Changes Since the Establishment of the Hong Kong Special Administrative Region", *op.cit.*

While the British and Japanese civil service systems are very similar, they differ in one important aspect: the Japanese administrative officers are highly specialized. They join one ministry after appointment upon graduation, and normally stay there until retirement. This means that they have much time to develop their policy expertise. In Hong Kong, following the British practice, administrative officers move frequently from one department/policy branch to another, they are supposed to be generalists. Whether generalists can manage to lead in policy areas which increasingly demand expertise and which are highly complicated is becoming doubtful. When speculators attacked the Hong Kong dollar, some of the senior civil servants were clearly perceived to be inadequate because they lacked experience in the money and currency markets. They therefore could not inspire confidence and respect in the financial community.

Most of the top local civil servants studied literature and history as university students, and in the last decade, had frequent transfers and promotions because of the departure of expatriates and the shrinking pool of talents in the administrative officer grade. This, in turn, was related to the inadequate localization before the Sino-British Joint Declaration, when about half of the administrative officers and police inspectors were recruited overseas. During the transition period, a few senior civil servants emigrated and some left for the private sector. At the same time, the civil service expanded considerably because of economic development and improvements in social services provided by a more prosperous government. This resulted in rapid promotions for administrative officers, so much so that a considerable proportion of the HKSAR's senior civil servants do not have sufficient experience behind them and do not have enough time to cultivate the expertise necessary for their present positions. Obviously, this situation is not a simple question of what has happened since the departure of the British.

More questions should be raised concerning the system itself. Is it wise and fair to recruit administrative officers on the basis of one examination normally taken shortly before university graduation? Are there sufficient tests and reviews to weed out those administrative officers who are not qualified for senior positions? Administrative

officer examinations emphasize English language skills which tend to favour liberal arts graduates. Is there a need to recruit from more diverse backgrounds, including those with degrees in engineering and information technology? Grooming of administrative officers for senior positions has generated resentment from civil servants of professional grades who believe that their talents and experiences have been overlooked. They find it difficult to accept leadership from administrative officers who lack the necessary professional qualifications and policy expertise.

At the middle and junior levels, the quality of Hong Kong civil servants suffer as standards of local university graduates decline. This decline is not only limited to proficiency in English, Chinese, and creativity; more important still, the sense of responsibility and commitment have also deteriorated. This might help to explain why water supplies stopped and telephones did not work when the new airport opened.

Hong Kong's civil service system has been slow to come up with an effective incentive system. Civil servants can only be promoted and transferred. They enjoy an "iron rice-bowl" and yet opportunities for promotion (except for administrative officers) have become more limited because the civil service as a whole is becoming younger while it is expanding more slowly. Starting salaries are considerably higher than those in the private sector, and seniority remains the most important factor determining promotions. Such a system cannot reward outstanding performers and cannot weed out those who cannot deliver. The HKSAR government appreciates these problems, and civil service reforms are now high on its agenda.<sup>40</sup>

Dissatisfaction with the civil service has attracted some discussion on the introduction of a ministerial system. Theoretically, if a political party or coalition of political parties can control a majority in the legislature, it can dictate policies to the executive branch of government and can demand to control the appointments of at least some senior civil service positions. This concept of government, however, is against the principle of "executive-led government" advocated by the Chinese leadership.

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40 See Consultation Document on Civil Service Reform, Civil Service Bureau, Government Secretariat, March, 1999.

Hence, the pro-China and pro-HKSAR government political parties, i.e., the Liberal Party, the Democratic Alliance for the Betterment of Hong Kong (DAB) and the Hong Kong Progressive Alliance, as well as the independents of similar political orientations, who together constitute a safe majority in the legislature in support of the Chief Executive, have no intention of demanding a ministerial system because it is not favoured by Tung Chee-hwa or the top civil servants. The pro-democracy political groups do not pay too much attention to the issue at this stage because they understand that, without substantial electoral reforms, they will not be in a position to secure a majority of seats in the legislature.

If by a ministerial system, one simply refers to the recruitment of talents from outside the civil service to fill positions at the secretary level, then Tung Chee-hwa already has appointed Elsie Leung as Secretary for Justice, Edgar Cheng as head of the Central Policy Unit, and Dr. Yeoh Eng-kiong as Secretary for Health and Welfare. There were precedents for such appointments in the British administration too. The crucial issue is a matter of scale. Appointing a small number of senior civil servants from the private sector is an established practice. At the same time, rumours circulate that the Chief Executive does not trust his senior civil servants and that the community wants the resignation of a few civil servants at the secretary level. Indeed, a vote of no confidence against the Secretary of Justice was defeated only narrowly in March 1999 after intense lobbying by the Chief Executive. Replacing a number of top officials with outsiders might be controversial and damaging to the morale of the civil service. Nonetheless, there has been considerable support for such a move because it would enhance the accountability of the senior civil servants, weed out a small number of them who are incompetent or unpopular in the eyes of the public, improve the image of Tung Chee-hwa as a decisive and strong leader, and ensure that he has his own team in the government instead of inheriting some administrators who were groomed by Chris Patten.

Soon after his election as Chief Executive and his appointment of his future Executive Council, Tung Chee-hwa informed the public that three of the Executive Councillors, Antony Leung, Leung Chun-ying and Tam Yiu-chung, would be given special policy

responsibilities on education, housing and services for the elderly, three policy areas which Tung later identified as his priorities in his first policy speech. There was considerable speculation on the relationship between the three Executive Councillors and the respective policy secretaries, and whether all Executive Councillors would eventually be given policy portfolios covering all the policy branches in the government. Within a year or so after the handover, it had become clear that Executive Councillors had not become super-secretaries; in fact, no more Executive Councillors have been given specific policy portfolios. The very heavy responsibilities of the three Executive Councillors outside the Council mean that they are in a highly handicapped position to compete with the policy secretaries for control of policy-making processes. Policy secretaries enjoy the full backing of the civil service which controls access to information and other resources essential to policy-making. The three Executive Councillors apparently have to count on their own resources. Indeed, since the handover, Executive Councillors have often been criticized for adopting too low a profile, and for rarely being available to defend government policies. In sum, they are not perceived to be very influential or to have contributed much to the HKSAR government's handling of its many challenges. However, constitutionally, the Chief Executive can strengthen the role of his Executive Council and transform it into his cabinet, like that of the United States President.

Another option for managing the civil service, which can be introduced at this stage without encountering substantial opposition, would be to offer contracts to top civil servants following the Australian model. Top civil servants believe that they are underpaid compared with their counterparts in the private sector. The contract system can offer them substantially higher salaries, while breaking the "iron rice-bowl", i.e., contracts may not be renewed. Top civil servants would be given the option to hold on to their tenure or to opt for contracts, therefore they would not have grounds for complaint. Those who are fifty-five years of age or above would not lose much by opting for initial contracts of three to five years. Such arrangements, hopefully, would change the culture, at least at the top echelons of the civil service, and further justify the gradual implementation of the contract system throughout the civil service.

Top

civil servants would be more accountable, and the Chief Executive would have a better chance of forming his own team.

In the first days of the millennium, DAB chairman Tsang Yok-sing warned Hong Kong people that the government would gradually fall into the hands of mediocre people in the absence of political reforms. Tsang appealed to the Chief Executive to reform the relationship between the executive and legislative branches of the government; and he proposed that the major parties in the legislature should form a coalition to nominate the candidate for the Chief Executive. At the same time, he advocated a ministerial system involving political parties, i.e., the Chief Executive would recruit his principal officials from the political parties supporting him. Tsang, however, admitted that his proposals were unlikely to be implemented in the foreseeable future.<sup>41</sup>

The general speculation was that Tsang's proposal was an attempt to articulate the DAB's frustration generated by its difficult position. The HKSAR government expects the party to support its policy programmes, but the party does not feel that it has been fully consulted and has adequate inputs in the policy-making process. Sometimes support for the government's policies can be quite unpopular and costly in terms of voters' support. The DAB is acutely aware that its criticisms of the government accompanied by consistent delivery of its votes in support of the Tung administration in the legislature has been eroding its credibility in the eyes of the electorate. The local political culture expects political parties to assume the role of the opposition constituting part of the checks and balances mechanisms. Political parties therefore dare not identify too closely with the government. The limited role of the pro-democracy groups and the pro-government parties in the political process means that all political parties have serious difficulties in political recruitment.

At the same time, senior government officials increasingly find their position untenable, and have been tempted to leave for more lucrative positions in public sector corporations or in the private sector. Since there is no government party, they have to lobby hard for legislators' support; and they are exposed to severe criticisms

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41 Ming Pao, January 3, 2000.

in the legislature from opposition as well as pro-government legislators who are eager to secure media attention. They often feel humiliated not only because there is no support in the legislature, but because they have to be polite to most legislators, despite their sometimes unreasonable criticisms, so as to retain their goodwill to facilitate future lobbying efforts. That is why Tsang Yok-sing lamented that talented people in Hong Kong would not find senior positions in the civil service nor seats in the legislature attractive.

It is not likely, however, that the Chinese leadership would allow the political parties to usurp the power of appointing principal officials from the Chief Executive, as this is perceived to be a violation of the principle of an "executive-led" system of government. While there is considerable frustration on the part of senior government officials and the pro-government political parties, the HKSAR government still enjoys a safe majority support in the legislature and there is no danger of a constitutional or political crisis. So those who hold the power have no incentive to reform.

Theoretically, the Tung Chee-hwa administration can allow the pro-government political parties to introduce important bills in the legislature, so that they can win credit for supporting the government and can claim to have delivered to the electorate. This is less a challenge to the "executive-led" system of government because the Chief Executive has full power to control the introduction of bills by members of the legislature. Introducing a contract system for principal government officials may serve to enhance their accountability to the legislature and the public, because the Chief Executive can refuse to renew their contracts or even terminate their contracts early if their performance is unsatisfactory. It will also strengthen the Chief Executive's hand over the senior civil servants. But admittedly these measures will not solve the basic problems in the existing system. Meanwhile, Tung Chee-hwa has clearly stated that he would not consider the adoption of a "ministerial system" at this stage.<sup>42</sup>

A potentially significant political breakthrough took place in the first days of the millennium when the DAB, the Liberal Party and the Democratic Party agreed that all

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42 *Ibid.*, January 9, 2000.

Legislative Council seats should be elected by universal suffrage in 2008, subsequent to the review of the legislature's electoral system promised to be held in 2007.<sup>43</sup> Such an agreement among the three major political parties will put considerable pressure on the Tung Chee-hwa administration domestically and internationally. It will have to engage in discussions on constitutional reforms long before 2007. So far the Tung administration has given the community the impression that it is not interested in the subject which was avoided in all his first three policy speeches. In his policy speech delivered in October 1999, Tung only indicated that he hoped that by 2007, "a mature review" would emerge on the development of the political structure. He has ruled out amending the Basic Law to accelerate the progress of democracy.

The community certainly anticipates that the review in 2007 will lead to a considerably higher proportion of directly-elected seats in the legislature, if not a wholly directly-elected legislature. But there is a catch: changing the electoral system will require the approval of a two-thirds majority of all legislature members and the endorsement of the Chief Executive.<sup>44</sup>

It is difficult to imagine why members returned by functional constituencies would support an increase in directly-elected seats at the expense of functional-constituency seats. If the legislature maintains its present size, then which functional constituencies will be abolished, and according to what criteria? The Liberal Party and the Progressive Hong Kong Alliance failed to win any seats in the direct elections in 1998. They probably will not win more than one or two seats each in the coming elections in 2000 and 2004. These two parties do not have strong discipline to because their legislators do not depend much on their respective parties to secure their seats in the legislature. A less controversial way to increase the proportion of directly-elected seats in the review in 2007 will be to expand the size of the legislature to ninety seats, and increase the number of directly-elected seats to sixty. Political parties will find it easier to agree on this, and a two-thirds majority in the legislature to support the change may become possible. The pro-democracy groups will have to wait for the next review to achieve their objective of having the entire legislature

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43 [South China Morning Post](#), January 3, 2000.

44 See Annex II to the Basic Law.

elected by direct elections. In view of the conservatism of the business community in the territory, the above scenario is probably still too idealistic.

Immediately after the legislative elections in May 1998, the Democratic Party and The Frontier, taking advantage of the unexpectedly high voter turnout rate and the pro-democracy camp's electoral success, demanded direct elections of the entire legislature and the Chief Executive in the near future.<sup>45</sup> But the demand failed to attract support and attention, and it quietly faded away in a matter of two to three days. This reluctance on the part of Hong Kong people to demand democratic reforms and to struggle hard to realize such a goal remains the most formidable obstacle to further democratization.

#### IV. Conclusion

The "China factor" will remain significant in the deliberations on constitutional reforms in the HKSAR in the coming years. As reflected by the local pro-Beijing mass media, the Chinese leadership appears reluctant to give up its veto powers on the political situation in Hong Kong and is inclined to opt for the preservation of the *status quo*. It is generally expected that the Chief Executive will toe the Beijing line on such an important political issue.

It has to be admitted that further democratization will likely generate more difficulties for the executive branch of the government, and the administration's efficiency will be adversely affected since more compromises have to be made to facilitate successful lobbying of the legislature.

One may be reminded of the territory's consensus on the political system in the mid-1980s during the initial drafting of the Basic Law. In the first place, almost everyone agreed that the political system of the HKSAR should be designed to achieve a high degree of stability. A presidential system, for example, gives the Chief Executive security of tenure and is therefore a relatively stable political system. An electoral

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<sup>45</sup> See all major newspapers in Hong Kong on May 25 and 26, 1998.

system based on proportional representation, on the other hand, encourages a multiparty system; if this was combined with a parliamentary system, Hong Kong might well encounter the situation in Italy and some Western European countries where shifting coalitions of political parties result in frequent falls of government and general elections. Hong Kong can ill afford such a scenario, and it might well lead to an early termination of whatever autonomy the territory might have been enjoying.

Secondly, the future HKSAR government was intended to be an efficient one. Over-emphasis on separation of powers as well as checks and balances might lead to deadlock and confrontation between different branches of the government, resulting in political crisis and paralyzing the government. These considerations remain important in the eyes of the Chinese leadership and the business community of Hong Kong.

In view of the above resistance and the Hong Kong community's lukewarm attitude towards political reforms, it is entirely feasible for the Tung Chee-hwa administration to avoid the issue until 2007, and even then, limit the reforms to a moderate increase in the number of directly-elected seats in the legislature. After all, the initial stage of further democratization will probably offer more problems than solutions to the HKSAR government. The Tung administration may well survive a muddling through approach, even assuming that Tung will secure a second term. The deterioration in the political situation may then have a major impact on Tung's successor.

Where comes the incentive for political reforms? If Tung Chee-hwa is really interested in making Hong Kong a world-class city, then active political participation among Hong Kong people must be encouraged. A community mainly interested in the pursuit of stability and prosperity and which lacks a strong sense of civic-mindedness will never make Hong Kong a London or New York of Asia. The danger for Hong Kong to become just another Chinese city will be correspondingly significant. At the same time, as the economy matures and keen competition emerges from among Hong Kong's neighbours, it will be more and more difficult for Hong Kong people to secure rapid rises in salaries and fast promotions. Economy of scale considerations will reduce opportunities to become entrepreneurs as small and medium-sized enterprises increasingly find it difficult to survive. The younger

generation of Hong Kong people, hopefully, will accord lower priority to economic and physical security, and higher priority to self-expression and quality of life.<sup>46</sup> In this connection, political participation will be treasured for its intrinsic value as part of a meaningful life.

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46 Ronald Inglehart, "Values, Ideology and Cognitive Mobilization in New Social Movements", in Russel J. Dalton and Manfred Kuechler (eds.), Challenging the Political Order, Cambridge: Polity Press, 1990, p.47.