Interim Report on the Rule of Law, Democracy and the Protection of Fundamental Rights in Hong Kong, June 1999 to July 2002

*The Committee on International Human Rights**

CONTENTS

* This report was co-authored by the The Joseph R. Crowley Program in International Human Rights, Fordham Law School.

Interim Report on the Rule of Law, Democracy and the Protection of Fundamental Rights in Hong Kong, June 1999 to July 2002

The Committee on International Human Rights

I. OVERVIEW

This is the third in a series of reports by the Association of the Bar of the City of New York (the "Association") in recent years examining questions of the rule of law, democracy and fundamental rights in Hong Kong.

The Association's continued interest reflects in part an affinity for the people of Hong Kong as fellow residents of one of the handful of the world's great, global financial capitals, both governed by a shared, adopted heritage of the common law legal tradition. In part, the Association's interest reflects the business interests of its members and their clients. Hong Kong is America's 15th largest trading partner, home to more than 50,000 Americans and 1,100 American companies, destination for more than 75,000 American travelers each month, including many business travelers, and the recipient of more than $21 billion in direct investment from America and much, much more in managed funds and portfolios.[1] These citizens, businesses and investments are linked to New York directly

1. "A Tale of Two Cities: The Image and Reality of Hong Kong Today," Remarks of U.S. Consul General Michael Klosson to the Asia Society, Houston, Texas (Feb. 15, 2001).

and indirectly through its markets, businesses and service professionals, including many members of the Association. And in part, the Association's interest reflects the hope that enduring respect for the rule of law and fundamental freedoms in Hong Kong after the reversion of sovereignty in 1997 will help to speed the on-going evolution of legal norms on the mainland, bringing the benefits of the rule of law and established legal practices to more than one fifth of the population of the world.

This interim report follows a mission to Hong Kong in May/June 1999 by representatives of the Association in conjunction with faculty and students in the Joseph R. Crowley Program in International Human Rights at Fordham Law School (the "Crowley Program"). The report of that mission was published in *The Record* under the title "One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Post-Handover Hong Kong."[2] A parallel report was printed in the *Fordham International Law Journal*.[3] A central purpose of the 1999 mission was to follow up on the work of the Association's first Hong Kong mission, which took place in October 1995. That mission went to Hong Kong to monitor and report on issues that were anticipated to affect the rule of law in Hong Kong as a result of the transfer of governmental authority from the United Kingdom to the People's Republic of China ("PRC"). The report of that mission was published in *The Record* under the title "Preserving the Rule of Law in Hong Kong after July 1, 1997: A Report of a Mission of Inquiry," by the Committee on International Human Rights.[4] The report was reprinted in the *University of Pennsylvania Journal of International Economic Law*.[5]

Both earlier reports stressed the importance of continuing to monitor events in Hong Kong:

> It is also imperative that this monitoring continue well beyond July 1, 1997. Many have expressed to us the view that the risks to Hong Kong's preservation of the rule of law and of its economy

2. One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Post-Handover Hong Kong, 55 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 32-388 (2000).

3. One Country, Two Legal Systems?, 23 FORDHAM INT'L L.J. 1 (Nov. 1999).

4. Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights, 51 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 357-90 (1996).

5. Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights, 18 U. PA. J. INT'L ECON. L. 367 (1997).

> will not be as great in the early years of the transition as they will be in later years, when world attention on Hong Kong will have abated and the temptations for exploitation may have increased.... It is imperative that questions relating to the preservation of the rule of law in Hong Kong not be overlooked or compromised because attention is focused elsewhere. We believe the Association may play a role in assuring that this does not occur.[6]

It is in that spirit that the Association, again in conjunction with the Crowley Program, undertook the present examination of recent developments in Hong Kong.[7] Unlike the 1996 and 2000 reports, however, this interim report does not follow a visit to Hong Kong by a delegation of Association members. It reflects conclusions drawn from written submissions solicited from persons and entities in Hong Kong with whom the Association and the Crowley Program met during earlier visits—including members of the Hong Kong government, judges, legislators, leaders of the Hong Kong bar (both barristers and solicitors), law professors, journalists, human rights advocates, consular officials and business leaders—as well as independent research and communications with persons outside Hong Kong who share an interest in the issues addressed. The use of these submissions is not intended to substitute for future visits to Hong Kong, but rather as an approach to reporting significant developments that occur between missions. Accordingly, this interim report focuses largely on factual developments that have occurred since June 2000. Readers are referred to the earlier mission reports for detailed historical and legal analysis.

In the 1996 mission report we focused largely on potential threats to Hong Kong's system of rule of law and fundamental liberties originating from outside of the territory, and in particular from Beijing. In fact, as our 2000 report indicated, the more serious threats came not from the mainland, but from the actions of HKSAR government officials themselves, particularly the actions of the HKSAR administration in seeking a "reinterpretation" of the Court of Final Appeal's ("CFA") decision in the right of abode cases.

---

6. Preserving the Rule of Law, supra note 4 at 388.

7. The Hon. Leonard B. Sand, District Judge, U.S. District Court for the Southern District of New York, Professor Martin Flaherty, Co-Director of the Crowley Program at Fordham Law School, and Robert Quinn, Director of Scholars at Risk at the University of Chicago, each of whom participated in the 1994 mission, also contributed.

Events since 2000 tend to confirm our impression that the most serious threats to Hong Kong come from within. A series of statements, actions, omissions and policies of the HKSAR administration and persons connected with it give on the whole an impression of an administration insufficiently attuned to its essential role in preserving Hong Kong's side of the "one country, two systems" relationship. These include acts harmful to respect for the rule of law, the most visible of which we addressed in our prior report, the Administration's original willingness to undermine the Court of Final Appeal by seeking the "interpretation" of the NPCSC in the right of abode cases. Also included are the Administration's urging the CFA to invite NPCSC intervention in subsequent cases and the Administration's threatening to seek NPCSC intervention on its own in future cases without the procedural safeguards or other limits which are hallmarks of the common law tradition. The Administration's general lack of transparency, particularly in its evaluative and deliberative processes, may have magnified the harmful effects of these positions, and raises concerns in a number of other areas, including arrangements relating to Basic Law Article 23, rendition, or other cross-border agreements.[8] Certain of the Administration's actions may also be undermining fundamental rights, including the Administration's resistance to electoral reforms, rolling back democratic development by eliminating the Municipal Councils and reinstating appointed members to the District Councils, selective uses of the Public Order Ordinance and immigration offices to restrict expression and assembly, and disparaging statements by administration officials seemingly aimed at chilling the expressive activities of the public, including members of the media, academics, spiritual groups (including Catholics and Falun Gong practitioners) and social advocates.

Of course we recognize always that we are outsiders to many of the events and processes of Hong Kong. As such we may be limited, or perhaps even wrong, in our impressions. We cannot know, for example, whether

8. As this report was going to press, a major controversy had erupted in Hong Kong over the imminent introduction of proposed security laws. On September 24, 2002, the Hong Kong administration began the process by circulating a consultation paper entitled, "Proposals to Implement Article 23 of the Basic Law." Article 23 among other things provides that the Hong Kong government "shall enact laws on its own to prohibit any act of treason, secession, sedition [or] subversion against the Central People's government." The proposals have generated significant concerns with respect to a number of fundamental rights, including, among others, freedom of association, freedom of expression, and privacy. Conversely, the government has defended these proposals as reasonable security measures. The Association notes the human rights concerns that have been raised and will continue to monitor these developments closely. For background on Article 23, see infra at 409-410.

the Administration's efforts on behalf of Hong Kong's autonomy, the rule of law, and the rights of its residents are not significantly more robust in private than in the public fora to which we have access. They may well be. It is not our intention to deny our limits, rather, it is out of respect for them we solicited input from a wide section of individuals and groups in Hong Kong. We are grateful for all that they have shared and hope they will forgive any errors we may make, which are entirely our own. In accepting our status as outsiders we offer that which we hope will be of value, that which is of value to any society undergoing the transformation currently apace in Hong Kong—an outsider's perspective. We do so in an on-going spirit of friendship and cooperation, hoping to increase dialogue and understanding within and between our two great cities.

II. PRESERVING THE RULE OF LAW

A. Introduction

The Association's most enduring concern, reflected in our 1995 mission and 1999 follow-up with the Crowley Program, has been with the preservation of the rule of law as Hong Kong had known it prior to the handover. During our last visit, nothing so dominated the rule of law question as the "right of abode" controversy. In the landmark cases of *Ng Ka Ling* and *Chan Kam Nga*, the Court of Final Appeal had interpreted Articles 22 and 24 of the Basic Law to invalidate SAR Ordinances that restricted the right to claim Hong Kong residence to 1) holders of mainland issued certificates of entitlement; 2) children born after the right of abode had vested in at least one parent; and 3) legitimate children of at least one parent possessing the right. Citing fears of 1.67 million mainlanders claiming the right of abode under the CFA's judgments—a figure that was vigorously contested—the Chief Executive issued a report seeking an "interpretation" of Articles 22 and 24 by the Standing Committee of the National People's Congress (NPCSC) under a procedure ostensibly set out in Article 158. The NPCSC responded with a reinterpretation that reinstated the restrictions that the CFA had struck down. The NPCSC based its conclusion on mainland legal principles relying on the "true legislative intent" of the Basic Law and also indicated that the CFA should have referred interpretation of the relevant articles to it during the litigation. While the reinterpretation let stand the CFA's judgment as to the actual parties in the cases, it mandated that the SAR's courts "adhere to this Interpretation" in all future proceedings.

It was amid these events that the Association and the Crowley Program conducted its joint mission. As our report noted, a central purpose of the mission was to fulfill the Association's earlier commitment to continue monitoring developments in Hong Kong beyond July 1, 1997 so that "questions relating to the preservation of the rule of law not be overlooked or compromised because attention is focused elsewhere." Our report concluded that "the right of abode controversy represents an assault on [Hong Kong's common law] legal system that merits the attention and concern of lawyers around the world." The Report further noted that, "Other cases working their way through the Hong Kong judiciary may soon give the HKSAR leadership an opportunity to demonstrate whether reinterpretation will be an extraordinary measure." It concluded that should the controversy turn out to have been an isolated event, as the Administration maintained, the damage done would "prove neither fundamental nor lasting." If, however, "further requests lead to further reinterpretations, then Hong Kong's common law traditions will continue to give way to mainland legal conceptions, further undermining China's "One Country-Two Systems" pledge.

Nearly three years later the right of abode Interpretation remains an isolated event, yet its effects linger. Almost all of the responses to our request for information pointed out that, as a general matter, the rule of law in Hong Kong remains strong and the common law system continues intact. Moreover, the HKSAR administration has yet to seek a interpretation from the NPCSC from a final judgment of the CFA. Yet cause for concern remains on several grounds. First, no subsequent reinterpretation has taken place in part because the CFA has ruled in favor of the HKSAR administration's position on most significant issues involving the Basic Law since the original right of abode decisions. In addition, in certain instances in which an adverse ruling was perceived as likely, there have been both formal and informal indications that the Administration would seek the intervention of the NPCSC, either through a interpretation after a judgment or an Article 158 interpretation during the course of litigation. We note that before many of these developments the UN Rapporteur on the Independence of Lawyers and Judges indicated that the original reinterpretation should not be viewed as an encroachment on the CFA's independence. Even earlier, however, the UN Human Rights Committee expressed serious concern about both the reinterpretation and the possibility of future [re]interpretations. As the Chair of the Hong Kong Bar Association put it, the possibility of interpretation "was and is a Damocles sword to our CFA."

B. Subsequent Court of Final Appeal Judgments

1. Right of Abode Cases

Lau Kong Yung v. The Director of Immigration. The first follow-up case to reach the CFA, Lau Kong Yung directly raised the issue of the Interpretation's legality. In light of the original right of abode decisions, seventeen mainlanders who had illegally overstayed the terms of their admission to Hong Kong sought to invalidate removal orders that had been issued against them on the grounds that they now qualified for the right of abode as interpreted by the CFA. While the case was on appeal to the CFA, the NPCSC issued its Interpretation, apparently invalidating the underlying basis for the claimants' right of abode. In response, the claimants directly questioned the NPCSC's authority to act. In December 1999 the CFA held for the government, ruling that the NPCSC had plenary authority to interpret the Basic Law, and that the Interpretation be deemed effective July 1, 1997, the date of Hong Kong's handover to the PRC. Conversely, the Court did not rule as to whether the HKSAR's request for an Interpretation comported with the Basic Law, nor did it address its own decision not to refer the interpretation of the Basic Law in the original right of abode cases. Reactions to Lau Kong Yung largely echoed earlier reactions to the Interpretation itself. The HKSAR administration heralded the decision as a vindication of its decision to go to the NPCSC, though it continued to contend that such requests would not be made lightly. Conversely, many commentators argued that the CFA had been presented with an invidious choice of either upholding the Interpretation's effective diminution of the Court's interpretive authority or instigating a constitutional crisis with Beijing.

The Director of Immigration v. Chong Fung-Yuen. On July 20, 2000 the CFA handed down three judgments resolving right of abode issues previously left open. Of these *Chong Fung-Yuen* stands out first, because it remains the only follow-up decision in which the HKSAR administration sustained a clear defeat and second, because the CFA rejected the Administration's formal requests for an Article 158 interpretation from the NPCSC, which provides for judicial referral while a case is still proceeding. *Chong Fung-Yuen*, popularly called "the toddler case," involved the assertion of the right of abode on behalf of a three-year old born in Hong Kong to parents of mainland nationality who were visiting the SAR on a lawful two-way permit. Expressly invoking common law reliance on text, context, and purpose, the CFA held for the claimant under Article 24(2)(1), which provides that "Chinese citizens born in Hong Kong" shall have the right of permanent residence. Perhaps more important, the Court rejected the Administration's request for a judicial reference of Article 24(2)(1) to the

NPCSC pursuant to Article 158. Further, the Court rejected the government's position that the CFA in effect broaden its criteria for making a judicial reference beyond the standards it set forth in the original right of abode judgments. Previously, the CFA had held that referral should take place only when 1) a disputed Basic Law provision or provisions predominantly concerned affairs that are the responsibility of the mainland government or concerned the relationship between the central government and the SAR, and 2) interpretation of such a provision or provisions was necessary to resolve the case. By contrast, the government in *Chong Fung-Yuen* argued that the CFA refer any Basic Law provision whose implementation would have a substantive (real) effect on HK/PRC affairs. Commentators expressed concern that the government's broader test would lead to more frequent Article 158 referral, including references concerning other Basic Law provisions protecting fundamental rights. The CFA's decision assuaged these fears by retaining the older test and in doing so on the basis of common law interpretation. The Administration's readiness to advance a broader test for referral nonetheless generated continuing concern.

Tam Nga Yin & Chan Wai Wha v. The Director of Immigration; Xie Xiaoyi v. The Director of Immigration. In these consolidated cases, the CFA upheld the government's more restrictive interpretation of the right of abode with regard to adopted children, yet again stressed its commitment to common law principles and rejected the Administration's request for an Article 158 judicial referral to the NPCSC. These cases concerned three children of Chinese nationality born outside of Hong Kong of non-HKSAR permanent residents but adopted by HKSAR permanent residents. These claimants argued that they qualified for the right of abode under Article 24(2)(3), which expressly granted the right to children "born" of HKSAR permanent residents. Apart from its request for a referral, the government countered that the NPCSC's previous Interpretation already resolved the matter against the adoptees and that in any case Article 24(2)(3) did not extend the right beyond "natural" children. The CFA rejected all but the final argument. The Court first held that the Interpretation did not address the question of adopted children. Referring to its analysis released the same day in *Chong Fung-Yuen*, the CFA further declared that the issue did not require referral. On the merits the Court nonetheless did hold that the right of abode did not extend to adoptees. It stressed that it reached this conclusion, however, solely on the basis of common law principles. While the decision showed a willingness to rely on the International Covenant on Civil and Political Rights (ICCPR) to hold for the adoptees, it ultimately reasoned that the Article 24(2)(3) express use of

the word "born" precluded this possibility. Justice Bokhary filed a lone dissent stating that the language of the provision did not prevent the application of more general principles valuing family unity regardless of whether children are biological or adopted.

Fateh Muhammad v. The Commissioner of Registration. In this judgment, the last of the three delivered on July 20, 2000, the CFA again employed common law interpretative principles to uphold the HKSAR's more restrictive reading of the Basic Law. The appellant, Fateh Muhammad, was a Pakistani who had lived in Hong Kong since 1962. On this basis Muhammad claimed the right of permanent residence under Article 24(2)(4), which accords the right of abode to "[p]ersons not of Chinese nationality" who have lawfully entered and been resident in Hong Kong "for a continuous period of not less than seven years . . . before of after the establishment of the Hong Kong Special Administrative Region." The Administration denied Muhammad a permanent identity card, arguing that he did not qualify for the right of abode since he had been in prison from 1994 to 1997 serving a sentence for forgery. The CFA agreed with the Administration's position that under Article 24(2)(4), lawful imprisonment does not count toward the required seven year residences requirement and that the seven years must come either immediately before or after the July 1, 1997 handover date.

Ng Siu Tung & others v. The Director of Immigration; Li Shuk Fan v. The Director of Immigration; Sin Hoi Chu & others v. The Director of Immigration. The CFA resolved the last significant—and perhaps most keenly awaited—right of abode cases earlier this year, again ruling generally in favor of the HKSAR administration but again basing its ruling on common law interpretive principles.

These cases involved the claims of 5,073 individuals who argued that the NPCSC Interpretation should not affect their rightful status as permanent residents under the original right of abode cases, *Ng Ka Ling* and *Chan Kam Nga*. The claimants in part based their position on undisputed public statements made by senior government official and through specific communications by the Legal Aid Department. These statements and communications assured those who were considering joining the original litigation that the HKSAR authorities would abide by whatever judgment the CFA handed down. When instead the HKSAR administration sought and obtained the NPCSC Interpretation letting stand the CFA judgments as to the parties to the right of abode cases, but otherwise voiding the Court's initial interpretation, the some 5,000 brought suit to remain in Hong Kong. In particular, they asserted that 1) that under Article 158(3)

they were covered by the original right of abode decisions; 2) that the official statements gave them a legitimate expectation that they would be treated in the same way as the actual parties to the right of abode cases; 3) that it would be an abuse of process for the immigration authorities to execute removal orders; 4) certain claimants were not properly subject to the Interpretation based upon when they arrived in Hong Kong; and that 5) certain claimants had a legitimate expectation that they would be treated as if they were parties to the original cases under a policy "concession" announced by the Chief Executive shortly after the Interpretation.

Continuing to stress its commitment to common law principles, the CFA's lengthy opinion rejected most though not all of the appellants claims. First, the Court held that a proper construction of Article 158(3)'s provision that NPCSC interpretations "shall not affect judgments previously rendered" refers only to the decision affecting the parties to the original litigation rather than to the rationale of the decision. Second, the CFA ruled that the assurances given by senior HKSAR officials did not create a legitimate expectation sufficient to compel the authorities to treat the appellants as if they were parties to the original cases. By contrast, the holding stated that specific assurances to individuals from the Legal Aid Department had created expectations that the immigration authorities had to consider. Third, the ruling rejected the claimants' abuse of process argument. Fourth, the Court ruled that those appellants who were resident in Hong Kong before the handover and who were born after one of their parents had become a permanent resident under Article 24(2)(3) were entitled to the right of abode, but no others. Finally, the CFA held that the Administration's post-Interpretation policy "concession" that it would permit those who advanced a right of abode claim with the HKSAR authorities during the original litigation had been fairly implemented in general, but in certain instances had been too narrowly applied.[9]

Justice Bokhary filed a lengthy dissent stating that he would grant relief to all of the appellants. The dissent's initial ground was that Article 158(3) language that an interpretation shall not affect "judgments previously rendered" should properly be read to preserve the original right of abode

9. In implementing the decision, the Immigration Department has submitted each case to the courts for final determination under the standards set down by the CFA. It had also relied on "voluntary" compliance (averaging about 50 per day) until June, when it arrested several persons in their homes early in the morning. After these arrests, the average numbers of "volunteers" for deportation rose to approximately 200 a day. At the same time, the Immigration Department has entered into an informal agreement with the PRC to give preference in issuing exit permits to those deported children under the age of eighteen, the younger receiving the greater preference.

to those who could have become parties at the time. In Justice Bokhary's view, this position constituted a "middle ground" between interpreting the language of the previous judgments as applying only to the original parties on one hand or to a judgment's rationale as it might apply to any subsequent litigants seeking to invoke it as precedent on the other hand. In addition, the dissent further asserted that all removal orders should be quashed, and that the immigration authorities should permit all appellants to remain in Hong Kong, based upon the legitimate expectations create by the official assurances they generally received during the original litigation.

2. Other Issues: Freedom of Expression

HKSAR v. Ng Kung Siu, an earlier CFA ruling, handed down at the end of 1999, effectively avoided a constitutional confrontation in a case involving not the right of abode, but freedom of speech. *Ng Kung Siu* arose when two individuals peacefully protesting the 1989 killings in Tiananmen Square were convicted of defacing the PRC and HKSAR flags in violation of Hong Kong ordinances, one of which incorporated the PRC's Flag Law. The defendants challenged these laws on the ground that they violated the right of free speech under Basic Law Article 39, which itself incorporates the free speech provisions of ICCPR Article 19. The Court of Appeal accepted these challenges and reversed the convictions. The resulting appeal to the CFA prompted a number of observers to speculate that Beijing would be far more concerned about the treatment of the national flag than with the migration of mainlanders to Hong Kong. Speculation further ran that such concern would either lead to another HKSAR request for an interpretation or even NPCSC intervention on its own initiative. These fears went unrealized when the CFA in December 1999 ruled for the government. Unanimously holding that the Basic Law incorporated the ICCPR, the Court nonetheless held that the flag desecration provisions fell into the category of permissible restrictions of free speech that were "necessary" to further "public order." Reaction to *Ng Kung Siu* was generally muted in comparison to the original right of abode cases. Certain press reports, however, did cite "Government sources" before the hearing in the case as making the troubling suggestion of a "contingency plan" of seeking an Interpretation in the event the CFA invalidated the ordinances.

C. Other Rule of Law Concerns

A number of other concerns relating the rule of law, respect for legal process and legal obligations, particularly treaty obligations, have been mentioned in our earlier reports and warrant brief mention here. The

first is continuing concern about possible legislation to implement Article 23 of the Basic Law. Article 23 requires Hong Kong to enact its own laws on treason, sedition, secession, subversion, theft of state secrets, a prohibition against foreign political organizations or bodies conducting political activities in Hong Kong, and a prohibition against Hong Kong political organizations or bodies from having ties with foreign counterparts. Many of the submissions received expressed concern that the HKSAR government was preparing to propose legislation to implement Article 23 of the Basic Law.[10] These concerns were recently heightened with passage in July of this year of the United Nations (Anti-Terrorism Measures) Bill. The government stated that it introduced this legislation to implement U.N. recommendations for the passage of laws to combat terrorism. Critics, including the Hong Kong Bar Association, nonetheless criticized the measure for being rushed through LegCo, for potentially chilling the press by criminalizing false reports of terrorism, and for impinging on attorney/client privilege by forcing lawyers to reveal confidential information.

A second concern is that of rendition and other custody arrangements between the HKSAR and the mainland. Hong Kong and mainland authorities have entered a preliminary agreement requiring notification when residents of either territory are held in the other, and mainland security officials are supposed to inform Hong Kong police if they wish to enter Hong Kong to investigate crimes and are to be accompanied by Hong Kong police while in Hong Kong. Nevertheless, there have been media reports that mainland public security officials had taken HKSAR residents in their custody from the mainland, into Hong Kong, without alerting HKSAR authorities. The security officials allegedly coerced the HKSAR residents to give them access to their homes and bank accounts, claiming that these actions were for the purpose of advancing criminal investigations. There have also been reports of secret talks between the HKSAR administration and the Central People's Government (CPG) concerning a formal rendition agreement. The Administration has thus far refused to discuss such talks publicly, promising only "consultation" after negotiations conclude and before implementation of any relevant legislation. Because such agreement may include promises by the HKSAR to render to mainland authorities persons in Hong Kong accused of crimes in the mainland, including political crimes and crimes subject to capital punishment, such agreement raises serious concerns for Hong Kong's observance of its

10. See Hong Kong Human Rights Monitor, " A ticking time bomb? Article 23, Security Law and Human Rights in Hong Kong."

obligations under international treaties, as well as the respect of fundamental rights of people in Hong Kong generally.

A third concern is the denial of visas and other restrictions on travel. This concern includes actions taken by the HKSAR administration in restricting travel into the SAR, apparently for the purpose of restricting free expression of opinion or faith within the territory. The Immigration Department banned 103 followers of Falun Gong, an organization outlawed on the mainland, from entering Hong Kong in advance of the Fortune Global Forum. The followers had intended to demonstrate and protest the treatment of fellow practitioners on the mainland. Former Chinese student leaders, active in the 1989 student movement and now living in exile have been repeatedly been denied permission to attend an annual June 4th commemoration. These actions suggest acquiescence to direct pressures from the CPG or at a minimum prophylactic measures intended to satisfy perceived interests of the CPG.

This concern includes also the HKSAR administration's failure to protest actions by the CPG against HKSAR residents. We received reports for example that Ms. Margaret Ng, Legislative Councilor, barrister and Vice-Chair of the Hong Kong branch of the International Commission of Jurists was on a "blacklist" of HKSAR residents maintained by the Central People's Government. This resulted in her being barred from the mainland despite possessing a valid PRC visa and travel documents. We can only surmise that Ms. Ng's opposition to the Interpretation in the right of abode controversy and vigorous, public criticism of the HKSAR administration's position on a number of rule of law questions contributed to the Administration's failure to protest to the CPG. In another highly publicized case Professor Li Shaomin, a US citizen residing in Hong Kong and teaching at the City University of Hong Kong since 1996, was arrested and detained on the mainland on vague charges widely believed to stem from his academic work. Although Li was released to the US in July and allowed to return to Hong Kong in August 2001, it remains uncertain if the HKSAR administration took to any action to protest his arrest and secure Mr. Li's release. These and similar cases create the impression that the Hong Kong administration is unwilling or unable to assert the rights of Hong Kong people *vis a vis* mainland authorities.

III. STATE OF DEMOCRACY

In our prior report, we expressed a view that the Administration's actions in the right of abode controversy "represent[ed] a missed oppor-

tunity to strengthen democratic values in Hong Kong by encouraging public participation in the debate," and specifically noted that the "deliberate foreclosure of representatives of pro-democracy groups" from participation in the process "does not bode well for the development of democratic institutions in Hong Kong." We concluded by quoting provisions in Article 68 of the Basic Law and Article 21 of the BORO calling for "universal and equal suffrage," and urged the Administration and members of the Legislative Council ("LegCo") "to support measures that would transform the institutions of government in the HKSAR into ones more representative of the democratically expressed will of the people of Hong Kong."

Today there is evidence of only small progress in Hong Kong's democratic development, specifically the development of greater accountability within the executive by the adoption of a ministerial system. As of this writing, the system is in its infancy. It does seem to offer some promise of increasing the Chief Executive's authority over administrative officers. It would seem to offer less by way of increasing the accountability, transparency and responsiveness of the Administration to the LegCo or the public.

At the same time, there are reasons for concern. The Legislative Council, most recently elected in late 2000 and not due for reelection until 2004, continues to be dominated by the functional constituency framework. The Administration, having previously disbanded the Municipal Councils in 1999, reintroduced appointed seats to the District Councils in 2000. Most significantly, for only the second time Hong Kong selected a Chief Executive. An Election Committee of approximately 800 persons out of Hong Kong's potential electorate of approximately 3 million selected the current Chief Executive, Mr. Tung, in an "election" in which he ran unopposed. This fact alone demonstrates that democracy in Hong Kong remains lacking in significant ways.

A. Selection and Accountability of the Chief Executive

1. Chief Executive Selection

On March 24, 2002, Mr. Tung Chee Hwa was selected to a second term as the Chief Executive of the HKSAR. In the prior November, several thousand persons marched in a "no-Tung" campaign. Opinion polls in advance of the selection indicated that 61% of Hong Kong residents did not want Mr. Tung to run again. However, universal and equal suffrage is not part of the current system. Mr. Tung was selected by an Election Committee consisting of approximately 800 persons. Although this number was up from the 400 members who selected Mr. Tung for his first term, it

obviously excludes the vast majority of Hong Kong's approximately 3 million residents of voting age.[11] Mr. Tung ran unopposed, despite public expressions of dissatisfaction, because no other candidate received the 100 votes from the Election Committee needed for nomination. Moreover, even if the Election Committee had nominated and then selected an alternative candidate, that selection would have been subject to the approval of the Central People's Government. This in effect gives the CPG the ability to veto any candidate selected by Hong Kong, even when the selection is made by the under-representative Election Committee.

The selection took place under the Chief Executive Election Ordinance, introduced by the Administration in May and passed in July 2001. Several provisions of the ordinance triggered significant controversy and remain areas of concern. Under the ordinance, for example, the Chief Executive cannot belong to a political party. In the first CE selection in 1997, all potential candidates had to be nominated in their individual capacity, meaning anyone with a party affiliation had to resign from the party first. The new bill allows party members to run, but if selected, the winning candidate must resign and must declare that he or she is not a member of a political party and will not become a member of such party. This restriction may weaken the ability of parties to organize support, and almost certainly contributed to the absence of any candidate other than Mr. Tung.

The fourth clause of the Election Ordinance is a particular concern. It deals with vacancy in the office of the Chief Executive. As originally proposed by the Administration, the language of the ordinance appeared to permit the CPG to remove the Chief Executive. The language indicated that the office of the Chief Executive would become vacant "if the Central People's Government removes him from office ... under any other circumstances." Opponents charged that this language would empower the CPG to remove the CE for reasons that were not in the Basic Law, which contains explicit provisions for resignation and impeachment. The HKSAR administration responded to criticism by arguing in favor of a plenary power of removal for the CPG rooted in the CE's accountability to the CPG under Article 43 of the Basic Law and arising by "necessary implication from a number of articles." Commentators including the Hong

11. Clause 8 of the Election Ordinance also merits brief mention. It provided for the Election Committee selecting the Chief Executive to be the same Election Committee that was constituted under the Legislative Council Ordinance on July 14, 2000, which selected six members of the Legislative Council. Critics note that this provision further concentrates power that should belong to the general electorate of Hong Kong in the hands of a small group of 800 persons shaping both the executive and legislative branches of the HKSAR government.

Kong Bar Association and legislative councilors considered the Administration's stance yet another surrender of the autonomy of the HKSAR.

Although the provision was subsequently amended in a compromise to "if the Central People's Government removes the Chief Executive from office in accordance with the Basic Law," we find the Administration's position troubling. It appears as one more indication of the HKSAR administration's willingness to cede significant elements of Hong Kong's autonomy to the CPG. Whether the Administration's position was a response to direct influence of CPG officials, acting officially or otherwise, is impossible to assess. Certainly there have been reports of acts by PRC officials seeking to influence the behavior of the HKSAR administration and the people of Hong Kong. In April 2000, for example, a Hong Kong-based PRC official stated that Hong Kong media should not report views that advocate Taiwan's independence as "normal" news. In the next month, an official suggested that Hong Kong should not do business with pro-independence Taiwan companies. In September and October of that year, mainland officials publicly cautioned Hong Kong's 250,000 Catholics to keep "low key" any religious observances celebrating the Pope's canonization of 120 Chinese martyrs.[12]

But there are reports also of members of the Hong Kong Administration pressuring Hong Kong residents in ways that appear intended to satisfy the Administration's own interests in restricting the development of democratic practices. A particularly troubling example involved allegations by a Hong Kong University academic and opinion pollster, Dr. Robert Chung, that he was pressured by the Vice-Chancellor and the Pro-Vice Chancellor of the University to discontinue polling regarding the popularity of the Chief Executive. (As noted earlier, polling had revealed significant dissatisfaction with Mr. Tung and the Administration.) After the allegations erupted in the media, the university launched an inquiry which concluded that the university officials had discussed with Dr. Chung his polling activities, particularly the polls about the popularity of the Chief Executive, after they themselves had been visited by the Chief Executive's senior special assistant, Mr. Andrew Lo. In their 74 page report to the public, the inquiry panel found Dr. Chung to be "an honest witness who was telling the truth in relation to the matters he is complaining about," whereas it found Mr. Lo to be a "poor and untruthful witness," and con-

12. In August 1999, mainland authorities prevented Hong Kong from allowing a papal visit to the territory because the Vatican maintains diplomatic relations with Taiwan. The fact that a papal visit had occurred in 1970 while Hong Kong was under British sovereignty was cited by some as further evidence of erosion of Hong Kong's autonomy.

cluded that neither Lo nor the Vice Chancellor "disclosed the full and truthful extent" of their actions. The panel concluded that the Vice Chancellor had, at the intervention of Mr. Lo, attempted to push Dr. Chung into discontinuing his polling work, and that the messages relayed to Dr. Chung were "calculated to inhibit his academic freedom." The inquiry further revealed that Mr. Lo had made similar visits to other universities in Hong Kong. The Vice-Chancellor resigned on September 6, 2000. Despite public calls for his resignation, Mr. Lo remained an aide to Mr. Tung. Mr. Tung had refused to testify before the investigation panel, saying that he had "the responsibility to protect the dignity of the post and ensure [that] the government can operate efficiently and normally." Critics noted that the controversy itself has raised questions about the dignity and integrity of the office of the chief executive, and that Mr. Tung could have restored respect for the office by volunteering to testify before the panel, especially since Tung claimed that he had nothing to hide.

We should note that this assault on academic freedom in Hong Kong unfolded at a time when scholars in the mainland faced ever more serious threats. During this time, a number of ethnic-Chinese scholars with residence in the HKSAR or outside of China were arrested and detained by PRC authorities. Several, including Professor Li mentioned earlier and Dr. Xu Zerong, an Oxford-educated historian and permanent resident of the HKSAR, were charged with crimes related to espionage or the mishandling of "state secrets," a term widely used on the mainland to include vaguely defined bodies of information which would not be considered secret in Hong Kong or any other open society. Dr. Xu, for example, was detained in June 2000 reportedly for publishing an article discussing a 1950s era radio station hidden in China's Hunan province that broadcast communist propaganda into Malaysia. Independent observations of these arrests strongly suggest efforts to chill academic inquiry into areas considered sensitive to mainland authorities, such as Taiwan, Tibet, and social, economic or political reform of the mainland system. These cases bear heavily on Hong Kong, impeding not only its political development but social, cultural and economic activities as well. Many Hong Kong residents have family and business interests in the mainland maintained by regular and frequent visits. These people's rights are no doubt curtailed if they reasonably fear being arrested on visits to the mainland because of teaching, writing or other expressive activity in Hong Kong. They are left with two equally unacceptable options. They may continue to exercise their expressive rights, as guaranteed by the Basic Law and international instruments applicable to Hong Kong, but accept restrictions on travel to the main-

land (and derivative restrictions on family, business or other interests). Or they may restrict their expressive activity in Hong Kong in an attempt to avoid unwanted attention of mainland authorities and the imposition of restrictions on access and travel into and out of the mainland. The uncertainty of the situation is no doubt heightened by the HKSAR administration's apparent unwillingness to intervene on behalf of Hong Kong residents on the mainland, like Professor Li and Dr. Xu.[13]

2. Accountability System

The Chief Executive has recognized the need to improve accountability of the executive. In his October 2000 policy address, Mr. Tung proposed an internal study and in 2001 he unveiled a skeletal proposal for a ministerial-type system. On April 17, 2002, he formally announced a new "Principal Officials Accountability System," seeking to have it in place by the beginning of his second term on July 1, 2002. A marked lack of transparency in the process of developing the system and the short period for review prior to its debate in the Legislative Council in May 2002 makes it difficult to discuss the POAS or to evaluate its likely effect, frustrating not only our examination but many legislators and others in Hong Kong. We do note, however, that in a political system such as Hong Kong with three coordinate branches—executive, legislative and judicial—we understand "accountability" of the executive to require examination on three levels. First is accountability within the executive itself. That is, accountability of executive officers—including department heads and their senior deputies—to a chief executive or senior executive body. Second is accountability of the executive branch to the legislative branch, the legislative branch being most representative of the electorate when constituted by a system of equal and universal suffrage. Third is accountability of the executive directly to an informed electorate, again enjoying equal and universal suffrage.

The proposed ministerial system appears to be a step in the direction of accountability on the first level—within the executive branch itself. Under the system, the Chief Executive would assign ministerial portfolios to persons then charged with overseeing government departments and offices previously headed by senior civil servants. Ministers would likely also become members of the Executive Council, although not all members of the Council would hold portfolios. Although critics charge that

13. In August 2001, Li Shaomin was allowed to return to Hong Kong after being convicted on the mainland of a national-security related offense and expelled to the United States. Xu Zerong was convicted in January 2002 and sentenced to 13 years. He remains imprisoned in China.

the system will increase the power of the Chief Executive by allowing him to install his own people in the government and to remove them at will, we do not find these aspects unusual. Enhancing the Chief Executive's authority in these areas will no doubt improve his ability to design and implement government policy. At least to this extent the proposal garnered significant public support. What is lacking, however, is any improvement in the accountability of the Chief Executive on the second or third level, that is to the Legislative Council or to the electorate. Moreover, there is concern that the system will empower the Chief Executive to manipulate appointments to erode further the already weak position of the LegCo, for example by appointing select Legislative Council members as ministers "without portfolio," without responsibilities but beholden to the Chief Executive and therefore more likely to support government legislative initiatives.

Critics rightly argue that true accountability—that is, accountability on all three levels—will require reforming the methods by which the Chief Executive and the Legislative Council are elected by bringing them in line with the principles of universal and equal suffrage, principles recognized in the Basic Law and the BORO. Such a system would give the HKSAR government greater legitimacy, and would no doubt strengthen the positions of the government vis a vis domestic constituencies in Hong Kong as well as in advocating the rights and interests of Hong Kong residents before mainland authorities. In his first term, however, Mr. Tung's administration showed no signs of supporting electoral reform. There is little reason to expect the Administration's support for such reform during his second term. In response to our request for submissions Secretary for Constitutional Affairs Patrick Chan, while recognizing the ultimate goals of universal and equal suffrage, indicated that the Administration would await the outcome of the 2004 Legislative Council elections before addressing any changes in the methods of election. Meanwhile, no proposal has been considered or introduced to secure the election of the Chief Executive by a broadly based electorate or to implement the stated goal of universal suffrage for LegCo after 2007, when the third term of Legco expires with no current provision regarding members' reelection. Until these are implemented, a truly democratic society and accountable government will remain an unrealized hope.

In the absence of electoral reform, some have urged the Chief Executive to develop a practice of consulting with the Legislative Council on appointments and removals of senior executive officers. Others have urged a practice of removing top officials when the public has lost confidence in them. Had they been in place, such practices may have prevented or miti-

gated certain controversies which erupted during the reporting period, including the LegCo's vote of no-confidence taken against Administration housing officials in 2000 and speculation surrounding the departure from the Administration in 2001 of Chief Secretary Anson Chan, widely seen as a key proponent of Hong Kong's autonomy and international character.

B. Legislative & District Council Elections

1. Legislative Council Elections

Hong Kong last held legislative elections in September 2000. Of the sixty members returned, thirty were returned by functional constituencies whose electors were leaders or members of different sectors of the community totaling about 300,000 persons. Twenty-four members were elected by geographical constituencies whose electors were registered permanent residents of the HKSAR, totaling about 3 million. As mentioned earlier, six members were returned by the Election Committee of about 800 persons. The next elections for the Legislative Council will be held in 2004. Absent any changes before then, functional constituencies representing largely business interests will remain a feature and will elect thirty of sixty members. The six seats returned by the Election Committee in the 2000 elections will be eliminated, and the remaining 30 seats will be returned by geographic constituencies.

Thus it is likely that at least through 2008 the people of Hong Kong will be limited to returning not more than half of their legislators through direct, universal suffrage. We share concerns expressed repeatedly within Hong Kong and in the international community that the electoral system for the Legislative Council does not comply with Hong Kong's obligations under the ICCPR. For example, the UN Human Rights Committee, the interpretive body for the Convention, noted in both 1995 and 1999 that "the electoral system for the Legislative Council does not comply with articles 2, paragraphs 1, 25 and 26 of the Covenant." The Committee urged the HKSAR to "take all necessary measures to maintain and strengthen democratic representation of HKSAR residents in public affairs."[14]

14. The Concluding Observations of the Human Rights Committee, dated November 4, 1999; see also, The Concluding Observations of the Human Rights Committee, dated November 9, 1995 ("[O]nce an elected Legislative Council is established, its election must conform to article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25(b) and 26.").

2. District Council Elections

There are 18 District Councils (formerly District Boards) in the HKSAR charged to advise the government on matters affecting the well-being of the people working and living in the districts, generally in the area of minor environmental improvement works, provision of cultural and entertainment activities, and local and community issues. In November 1999 the first post-handover elections for District Councils were held. The members' term of office of four years started January 2000. Three hundred and ninety members were returned by direct election. Changing recent practice, the government reintroduced appointed members, adding 102 members selected by the executive.[15] The reintroduction of appointed members, coupled with the Administration's earlier elimination of the Municipal Councils a year earlier, raised questions about the Administration's commitment to democratic principles and marked for some a step backward.[16]

IV. FUNDAMENTAL RIGHTS ISSUES

In our prior report, we noted that the right of abode controversy and reinterpretation process suggested a significant change in the relationship between the mainland system and the HKSAR, which came at the expense of a fundamental right explicitly included in the language of the Basic Law. This raised for us concern that other rights contained in the Basic Law could be at risk, in light of which we examined several areas of concern including discrimination on the basis of gender, race, or national origin. We return to this topic briefly below, as well as examining several issues in the area of free expression.

A. Discrimination

In our prior report, we noted that "[a]nti-discrimination protection is another area in which Hong Kong's internal obligations have been less than fully honored." We noted that administration's limited implementation of existing legislation banning discrimination on the basis of gender and disability, and "its resistance to the enactment of legislation prohibiting racial discrimination, cast doubt on its commitment to eliminating discrimination."

15. A total of 519 District Council members includes the 390 elected, 102 appointed, and 27 ex officio members.

16. The UN Human Rights Committee had urged the government to reconsider the abolition of the Municipal Councils, expressing concern that the step would "further diminish the opportunity of HKSAR residents to take part in the conduct of public affairs, that is guaranteed under article 25."

Two years later, the government continues to oppose legislation prohibiting private actors from discriminating on the basis of age, race, or sexual orientation. The Administration claims that public opinion is against such legislation, and that government educational measures, consisting largely of voluntary codes of practice, are sufficient to address these issues. With regard to discrimination based on race or ethnicity, the UN Human Rights Committee has repeatedly expressed concern about the absence of legislative remedies to individuals as against private violators. Both the UN Committees on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have likewise examined the government's existing measures, found them insufficient, and called on the HKSAR to implement legislation to prohibit racial discrimination in the private sector. In May 2001, the UN Economic and Social Committee found the failure of the HKSAR to prohibit race discrimination in the private sector constituted a breach of its obligations under Article 2 of the ICESCR. The Committee called upon the HKSAR government to extend its prohibition of race discrimination into the private sector and requested information on the progress in implementing this recommendation to be submitted by June 30, 2003. (The government was also urged to prohibit discrimination on the basis of sexual orientation and age.) In August 2001, the UN Committee for the Elimination of Racial Discrimination reiterated its concern about the absence of legal provisions protecting persons from racial discrimination by private actors, and again recommended that appropriate legislation be adopted to provide legal remedies and to prohibit discrimination based on race, color, descent, ethnicity or national origin.

With regard to discrimination on the basis of gender, a positive development is the establishment of a Women's Commission in January 2001. The commission is "tasked to promote the well-being and interests of women in Hong Kong," and includes in its understanding of this charge such activities as advising the Administration on the development of a policies related to the development and advancement of women; reviewing government and private services and identifying priority areas, monitoring and developing new or improved services; preparing surveys and research studies on women's issues; organizing educational and promotional activities; and building communication with local and international women's groups and service agencies.

While it is still too early to evaluate this new institution, we welcome its creation. It significantly addresses one recommendation in our prior report, where we joined the calls of a number of Hong Kong-based hu-

man rights organizations for the creation of a "women's bureau within the HKSAR administration, charged with analyzing the effect of all government policies on women as well as drafting policy proposals to promote gender equality." We invite the members of this new commission to consider also our report's other recommendations for improving gender equality in Hong Kong, specifically legislative initiatives to address problems of violence against women and of foreign domestic workers who are predominately women from the Philippines, Thailand and Indonesia. As to the latter, we have previously expressed concerns about existing regulations, particularly those governing the extensions of stay by domestic helpers after the completion of contracts. The so-called "two week rule" has been the subject of repeated international attention and criticism, including that of the UN Committee for the Elimination of Racial Discrimination which in August 2001 reiterated its earlier concerns regarding possible discriminatory effects of the rule.

We would also welcome efforts by the Women's Commission to press the Administration and the Equal Opportunities Commission, as we had urged in our prior report, to implement readily achievable policy changes "designed to educate women about their rights and available remedies and to encourage the EOC to use its existing powers, especially that of independent investigation."

B. Freedom of Expression and Association

1. Public Order Ordinance

A number of arrests of protesters during the year 2000 led to a public reexamination of the Public Order Ordinance. On June 26, 2000, for example, a demonstration commemorating the first anniversary of the NPCSC's "reinterpretation" of the CFA's decision in the right of abode cases ended in scuffles between demonstrators and police. During the scuffle, police used pepper spray against right of abode claimants and student activists. Five student activists were later charged with unlawful assembly under the ordinance, triggering an outpouring of public support for the students and condemnation of the ordinance. Although the charges were subsequently dropped, the Legislative Council held hearings on the ordinance.

Opponents of the ordinance objected to a number of its provisions as applied by the government. First, they argued that the notice provision in practice permits police to disperse any gathering, no matter how peaceful or orderly, merely for failure to provide technically valid "notice" under the ordinance. Second, they argued that the notice periods provided in the ordinance (a minimum of 7 days notice) are too long and

lack flexibility necessary to allow organizers of public events to mobilize resources and address current issues in a timely fashion. Third, they objected to the provision that requires organizers of public events to include in the notice the purpose and subject matter of the gathering. Organizers expressed concern that this provision allows permits to be delayed or denied on the basis of political content of the message. They expressed concern also that the provision could lead to permits being granted with conditions narrowly restricting the content of remarks delivered during events to the topics expressly included on the notice statement, providing a basis for police to prevent or disburse a gathering if any participant or even any member of the public gathered at the event raised a topic not explicitly stated in the notice. Fourth, they objected to the provision that allows the police to prevent a meeting or procession on the grounds that it is "in the interest of national security or public safety, public order or the protection of the rights and freedoms of others," and the similar provision that grants the Chief Executive the power to prohibit "all public gatherings" or a period of up to three months. Opponents argued that both provisions are overbroad and inadequately defined in the ordinance, posing a risk of abuse.

Many community organizations not previously concerned with the constitutionality of the ordinance appeared at the hearings to support it, leading commentators to suggest an active, behind-the-scenes effort to create an appearance of "popular" support for the government's positions. Although it is not possible to determine if this did happen, if true it clearly would have undermined informed public debate on the objections to the ordinance. It also brings to mind similar allegations in the right of abode controversy of organized efforts to misinform public opinion. Both incidents, whether true or not, highlight the importance of expeditious progress toward a system of true accountability, based on universal and equal suffrage, as a means of defending against efforts to manufacture legitimacy by manipulating public opinion.

In the end, the Secretary for Security rejected calls to amend the ordinance. The Secretary instead introduced a motion before the Legislative Council asking it to "affirm" the Public Order Ordinance as striking the "proper balance" between individual freedom and social order and as being "compatible" with international human right standards. The motion carried in December 2000. One might question the value of the motion on several grounds. First, as noted above, the current Legislative Council includes only twenty-four geographically elected members, the rest being elected by under-representative functional constituencies or selected by

the Election Committee. Second, the question of the ordinance's compatibility with international human rights standards is a legal question not properly brought before an elected legislature. On this question, we would suggest that a more compelling determination can be found in reports from the international bodies charged with interpreting the ICCPR and the ICESCR. Both the Human Rights Committee and the Committee on Economic Social and Cultural Rights have expressed concern about the Hong Kong government's use of the Public Order Ordinance, with specific concerns about restrictions on freedom of assembly and trade union activities. We share these concerns.

The December 2000 motion was by no means the end. In May 2001, the Administration's use of the ordinance again triggered controversy, this time arising out of demonstrations at the Fortune Global Forum. On that occasion, police restricted demonstrators to designated "demonstration zones" which demonstrators claimed were so far from the location that Forum participants could neither see nor hear the demonstrators, effectively frustrating the purpose of the demonstration. Other police activities raising concerns include the confiscation of a mock coffin made of plywood which the demonstrators had intended to use in their protests; the arrest, prosecution and assault by police officers of three demonstrators resisting confiscation of a vehicle used by demonstrators; and the arrest and prosecution of seven demonstrators who had chained themselves to a flagpole outside the site prior to the start of the Forum, at a time before the flagpole was put off limits. These actions by the Administration raised anew the concerns that the Public Order Ordinance is being applied to impede, restrict or punish freedoms of expression, association and assembly.

Most recently, in May 2002 the HKSAR administration charged three political activists with "organizing an unauthorized rally" in violation of the provision of the Public Order Ordinance which requires demonstrators to obtain police permission seven days in advance of a protest, in the form of a "letter of no objection." The defendants were charged with failing to obtain such a letter prior to organizing a rally on February 10, 2002 protesting the jailing of a social worker for incidents during an August 2001 protest. The case is being described as the first of its kind, and likely to end up in the Court of Appeal or the Court of Final Appeal if the government pursues the charges. There have been dozens of protests in Hong Kong since reversion to China's sovereignty for which police received no prior notice, but only once before has the Administration charged demonstrators under the permit provision. Those charges were later dropped.

Critics point to the current case as an example of the Administration's selective use of the Public Order Ordinance as a vehicle for curtailing nonviolent expression and assembly in Hong Kong, in violation of the BORO, the Basic Law, and the rights guaranteed Hong Kong residents under international law. Although it is early in the current proceedings, we assume that if the charges are pursued the case will warrant our future attention.

2. Press Freedom

Hong Kong continues to enjoy vibrant, independent media. Nevertheless, self-censorship remains a serious concern, and a number of incidents during the reporting period remind us of the need for vigilance. For example, Hong Kong subscribers of a text-based pager messaging service lost service in October 1999 when mainland officials interrupted service across southern China in an effort to block messages related to Falun Gong (see below). In April 2000, after a Hong Kong-based PRC official stated that Hong Kong media should not report views that advocate Taiwan's independence as "normal" news, Internet chat rooms were reported scrambling pages discussing "Taiwan independence" and "Tibet independence." In the fall of 2000, the *South China Morning Post* removed reporter Willy Wo Lap Lam from an editorial position, triggering concerns that the demotion was brought about by persons outside the editorial department who were upset that Lam's column on Beijing politics had become "too critical" of the mainland's leadership. Lam later resigned in protest, raising additional concerns about a weakening of English-language media undermining Hong Kong's status as an international information center. Perhaps the most telling example of continuing tension between Hong Kong's free press and censorship pressures occurred on December 10, 2000, Human Rights Day. On that day four newspapers printed an advertisement protesting the treatment of Falun Gong practitioners on the mainland. At the same time, three Hong Kong papers refused the ad on the grounds that it was "defamatory to the Central Government."

The most significant development during the reporting period was the creation of a Press Council. In August 1999, the HKSAR government released a consultation paper recommending the establishment of a press council to adjudicate and punish privacy intrusions by the media. Media and other sectors resisted, seeing the proposal as a step toward government interference with the press. To head off the proposal, a private press council comprised of industry and public members was established in 2000 with limited powers to investigate complaints by members of the public

of media invasion of their privacy. Some supporters of the council, however, are now trying to turn it into a statutory body with limited immunity, arguing that this will strengthen the Council's ability to advance complaints without fear of being sued. Opponents argue that the council must remain fully independent of the government and that as a statutory body the Press Council would be susceptible to government interference and later restrictions. Any changes to the Press Council must be considered carefully, especially any which would compromise its independence or create even an appearance of government influence.

3. Falun Gong

Falun Gong is a practice of spiritual, meditative and physical exercises which practitioners believe will bring them greater health, happiness and prosperity. The practice of Falun Gong has been banned on the mainland since July 1999, when the movement was branded by the CPG as an "evil cult." Falun Gong practitioners in Hong Kong have formed a society registered under the Societies Ordinance and are largely permitted to practice without interference. Nevertheless, there are signs suggesting a willingness on the part of HKSAR officials to curtail the rights of Hong Kong's Falun Gong practitioners to accommodate the CPG.

In January 2001, for example, after a conference at Hong Kong's City Hall attended by more than 1,000 Falun Gong practitioners from around the world, a representative of the PRC's Government Liaison Office in Hong Kong was quoted as saying "the Central Government will not allow any organization or anyone attempting to turn Hong Kong into a center for Falun Gong activities and using Hong Kong as an anti-China base, damaging 'one country, two systems' and Hong Kong's stability and prosperity." The statement was taken by many as a clear signal from Beijing to the Hong Kong administration to take action against the Falun Gong. Over the next few months, public comments by the Chief Executive and other senior HKSAR administration officials suggested their singling out Falun Gong for surveillance, with the Chief Executive stated that Falun Gong was "more or less bearing some characteristics of an evil cult." Mr. Tung admitted discussing Falun Gong members activities in Hong Kong with PRC President Jiang Zemin, and raised the possibility of Hong Kong enacting anti-cult legislation. The Director of Hong Kong's Leisure and Cultural Services Department ("LCSD") suggested that activities at government venues should not be "critical in nature." Because LCSD venues include the City Hall where the earlier conference was held, the comment was interpreted as laying the groundwork to deny future permits to Falun

Gong members. As noted earlier, in May 2001 the Immigration Department banned 103 followers of Falun Gong from entering Hong Kong in advance of the Fortune Global Forum. In June, the Chief Executive stated his office had determined that Falun Gong was undoubtedly an evil cult, requiring the government to continue monitoring practioners. In August, police ordered a group of approximately 20 Falun Gong followers demonstrating near the Government Liaison Office to leave, despite their demonstrating in an area that had previously been demonstrated a "Designated Demonstration Area" by police. Later that month, 10 Falun Gong followers were arrested outside the same office. They were later released without charge as police admitted that the arrests were triggered by complaints from the Liaison Office.

Most troubling in the many reports of HKSAR administration surveillance and harassment of Falun Gong practitioners are those which suggest that the Administration was preparing to adopt legislation to combat "sects" or "cults." Reports indicated that the Security Bureau had completed a study of similar foreign legislation, including legislation adopted in France to outlawing cults and prohibiting brainwashing. Commentators, including the Hong Kong Bar Association, expressed concern about anti-cult legislation, noting specifically the lack of an accepted, objective definition of a "cult" could permit arbitrary or abusive application. The Association further noted that existing laws in Hong Kong were sufficient to deal with any threats to personal safety, public order and morals, and that any new legislation could have a grave impact on the freedoms of thought, conscience, belief, religion, expression, assembly and association, all of which are guaranteed under the Basic Law.

V. CONCLUSION

After the our last mission to Hong Kong, we concluded: "If the PRC's pledge of 'One Country, Two Systems' has meaning, it must include a commitment to preserve the rule of law in Hong Kong, and in particular, judicial independence, the finality of decisions, and the respect for precedent, as those qualities have been known in practice in Hong Kong for decades." We further noted that, "[t]his common law tradition has been a central component of what makes Hong Kong among the most stable, open, and productive societies both in Asia and the world." Among other things, our 1999 report expressed concern that the HKSAR administration had undermined Hong Kong's common law traditions by requesting an NPCSC interpretation, which in turn created the possibility that Hong

Kong's legal system would evolve into a "hybrid" of the common law tradition and the significantly different mainland legal tradition. As one of Hong Kong's leading academics recently put it, "To some extent the problem is inherent in the system. 'One Country, Two Systems" is a journey without destination. It is unclear whether the ultimate goal is to retain two equal, thriving, but different systems, or whether it is to assimilate Hong Kong into the mainland politically, legally, culturally, and ideologically. As long as there is no clear destination, there will be tensions to maintain a separate liberal tradition on the one hand and to assimilate Hong Kong into the mainland on the other. Protection for human rights in such circumstances will always be precarious."[17] Our report nonetheless expressed the hope that Hong Kong's legal traditions in particular would endure.

Developments in the immediate wake of the right of abode controversy give cause for reassurance, but also reasons for ongoing concern. Nearly all of the communications that we received make clear that as a general matter Hong Kong's legal system continues to flourish. Moreover, the cases that the CFA has considered since our last visit, suggest many reasons for optimism. First and most obviously, there has been no subsequent NPCSC interpretation in response to a final judgment rendered by the CFA. Nor, second, has the HKSAR government made a subsequent request for such an interpretation. Third, the government has in fact lost cases, or parts of cases, before the CFA, including *Chong Fung-Yuen* (the "toddler case") and *Ng Siu Tung* (the "5000" case). Fourth, the Court has thus far rejected every request that the government has made for an interlocutory NPCSC interpretation under Article 158. Finally, and perhaps most importantly, the CFA has repeatedly stressed that it shall continue to interpret the Basic Law in accordance with common law principles.

At the same time, the same case law suggests several ways in which the rule of law as Hong Kong has known it might again face serious assault or erosion. First, the HKSAR administration has on two occasions—the "toddler case" and the "adoptees case"—made requests for NPCSC interpretations under Article 158. While such requests comport with the Basic Law's interlocutory mechanism, too frequent resort to this device would have the effect of eroding the CFA's position and the common law methodology it has been at pains to safeguard. Second, the Administration's requests in these cases indicate that its standards for seeking Article 158

17. Johannes M. M. Chan, Human Rights in the Hong Kong Special Administrative Region: The First Four Year, 35 KOBE UNIVERSITY LAW REVIEW 75, 101 (2001).

interlocutory interpretations are more broad than for interpretations after a judgment, which the Administration stated would be rare and isolated. Third, several communications we received directed our attention to press reports that the Administration, and in at least one instance, a mainland official, has raised the specter of a request for a post-judgment NPCSC interpretation in an ostensible effort to pressure the CFA in its deliberations. We are in no position to verify or refute such reports. We can say, however, that if they are true they raise grave concerns and that in any event the governments of both the SAR and mainland should refrain from giving any appearance of subjecting the CFA to this type of pressure. Finally, it remains that the CFA has yet to render another judgment against the government in a case that has either extensive social and economic consequences or major symbolic importance comparable to the original right of abode cases. To a large extent, the true test of the "One Country, Two Systems" idea will come when the CFA renders such a judgment and the authorities in both the SAR and the PRC not only let it stand, but the Hong Kong government enforces it.

We observe similarly that the true test for Hong Kong's democratic development and for continued respect for fundamental rights within the territory is whether the HKSAR administration will fulfill its essential role in preserving Hong Kong's side of the "one country, two systems" relationship. Signs for reassurance include the evolution of greater accountability within the executive leadership of Hong Kong and the creation of the Women's Commission. Reasons for ongoing concern include a generally low level of transparency in the Administration, lack of progress toward universal and equal suffrage, continuing failure to redress problems of discrimination, and a variety of incidents tending to chill freedoms of expression, association and belief, including restrictions on visas and travel, use of the Public Order Ordinance to curtail expressive activity, and public statements of both HKSAR and CPG officials against legislators, counsel, academics, the media, and public advocates, at best disparaging their actions and at worst challenging the propriety of the exercise of expressive rights as somehow dangerous to the well being of Hong Kong.

As Hong Kong is facing these challenges, it is worth noting that the SAR has been suffering its first recession in many years. Its unemployment rate is nearly 7%. Property values, moreover, have dropped nearly 50% in the past several years. Further, the accession of the PRC to the WTO will reduce the need to use Hong Kong as a commercial entry into China just as Shanghai is aggressively seeking to replace the SAR as Asia's

leading financial center. Hong Kong nonetheless boasts several important advantages. Its commercial and investment banks are strong, well-capitalized, and sophisticated. Yet not least among Hong Kong's attractions has also been the rule of law in general and a highly respected legal system in particular. Preserving the rule of law as Hong Kong has known it will contribute substantially to the SAR maintaining its commercial and financial preeminence.

We agree with the US Consul General, who in a speech last year noted that "Hong Kong's autonomy does not depend upon Chinese forbearance alone. It also depends upon the strength of the local community's commitment to and willingness to stand up for, its freedoms and the rule of law guaranteed in Hong Kong's mini-constitution, the Basic Law."[18] On both of our visits to Hong Kong, and through the many submissions received for this interim report, we have encountered many who are indeed committed and willing to stand up for Hong Kong's autonomy and for the betterment and long-term happiness of its people. But Hong Kong's well-being depends upon more than just these committed and willing individuals. It depends upon the HKSAR government, in the role of intermediate authority between the people and the ultimate sovereign, acting as mediator and advocate of the SAR's residents, their system, rights, and autonomy.

To date the HSKAR government appears divided in this role. The Court of Final Appeal continues to maintain its authority as guardian of legal process and the rule of law. The Legislative Council—not an equal partner in design or function—nevertheless endeavors and not infrequently succeeds in speaking for the people. The Administration, enjoying under present conditions the largest part of the governmental authority, must bear an equally large share of responsibility for Hong Kong's autonomy, the freedoms of its people, and the rule of law. At the present, it is unclear whether the Administration will to meet the challenge.

Above all we conclude, as we emphasized in our earlier reports, that ongoing monitoring of the situation in Hong Kong is warranted and welcome by those dedicated to the territory's welfare and that of its people. It is in that spirit that we first visited in 1995. It is why we have returned—in body and via regular correspondence. And it is why we will continue to do so.

September 2002

18. "A Tale of Two Cities: The Image and Reality of Hong Kong Today", Remarks by U.S. Consul General Michael Klosson to the Asia Society, Houston, Texas (Feb. 15, 2001)