

# Essay

## Hong Kong Democracy

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Throughout the second half of the 20th century, we have witnessed the end of the empire, not just of the British, but of all the major powers. The process of decolonization has been diverse and varied, as any world-historic process should be. Yet the outcome of that process has had a remarkable singularity: the colonies have emerged as independent sovereign nations. History took a different turn with Hong Kong. On July 1, 1997, at the end of a ninety-nine year “lease”, Britain returned Hong Kong to China.

Today Hong Kong is governed as an administrative unit of China. To be technically correct, Hong Kong is a “Special Administrative Region.” The preamble to the Basic Law of 1990 announces the principle “one country, two systems.”<sup>1</sup> The Joint Declaration of 1984 between Britain and China, which set the terms of the handover, says that Hong Kong will “enjoy a high degree of autonomy.”<sup>2</sup> There can, however, be no mistake that China’s sovereignty over Hong Kong is now full and complete.

As is true of many nation states, especially those so vast, China exercises its sovereign power through a federal system that divides authority between the central government and local or provincial governments. Sometimes the subdivisions are allowed to pursue varied policies, say on economic matters, but the political character of each government is usually identical. Hong Kong stands as a bold exception

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1. See Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, 29 I.L.M. 1511 (1990) [hereinafter Basic Law].

2. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, Dec. 19, 1984, P.R.C.-U.K., 23 I.L.M. 1371 [hereinafter Joint Declaration].

to this rule because, in contrast to the national government and other provincial governments, it has been allowed to enjoy a measure of democracy.

The government of Hong Kong is divided into the three usual branches. Naturally, the judges are appointed, not elected. A more significant departure from the democratic ideal occurs with the Chief Executive. While the Basic Law specifies that the “ultimate aim is the selection of the Chief Executive by universal suffrage,”<sup>3</sup> it is not until after 2007, a full decade following the handover, that the Chief Executive may be elected; until then he or she will be appointed. The power of appointment is vested in a committee whose members are named by Beijing, although the governing law specifies that the committee shall be “broadly representative.”<sup>4</sup>

The legislative power of Hong Kong is vested in the Legislative Council, which “shall be constituted by elections.”<sup>5</sup> It is here, therefore, that democracy finds its beachhead. The Basic Law calls for three elections over the first decade of post-colonial rule, with gradually increasing democratization. The first election will be held in May 1998. For this election and the next, a number of members will continue to be appointed by an election committee (ten in the first and six in the second). These seats will be phased out for the third Legislative Council of 2003–2007. Yet even then half of the Council’s sixty members will be elected by functional constituencies, which in total represent only 180,000 citizens out of an electorate of three million.<sup>6</sup> These deviations from the democratic ideal must be acknowledged, yet at the same time recognition must be given to the fact that a substantial number of delegates—twenty in the first term, twenty-four in the second, and thirty in the third—will be chosen by geographic constituencies where the vote is allocated on a one person, one vote basis.<sup>7</sup> Using Chinese practices as a benchmark, this seems a remarkable achievement.

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3. Basic Law, *supra* note 1, art. 45.

4. *Id.* annex I (Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region). It should be noted that even after 2007 the election of the Chief Executive is not mandated by the Basic Law, and will require an amendment to the method set forth in annex I.

5. *Id.* art. 68.

6. *See, e.g.*, Peter Stein, *Tung to Tell U.S. of Success With Handover*, ASIAN WALL. ST. J., Aug. 28, 1997, at 1.

7. For the evolution of the electoral system summarized in this paragraph, see Basic Law, *supra* note 1, annex II (Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures).

So too is the presence of the background institutions and practices needed for a democratic electoral system to function. For one thing, there remains a strong and varied press in Hong Kong. There are sixteen major daily newspapers. Dozens of foreign news bureaus operate out of Hong Kong. True, some of the television and radio stations are government-owned, but according to a recent report by a watchdog agency, those stations operate independently and, in any event, are supplemented by a number of commercial stations.<sup>8</sup> The danger is ever present that journalists and publishers, in both the state and private media, will practice self-censorship in order to win favor with the authorities or those who control their finances, but that danger is present in all democracies. By most accounts, Hong Kong journalism has been, and remains to this day, lively, aggressive, and competitive.

Hong Kong citizens are allowed to speak their mind; indeed, they are even permitted to engage in street demonstrations. According to one report, there have been some twenty street demonstrations every week since the transfer of power in July 1997.<sup>9</sup> The present law requires that the police be informed of the demonstrations beforehand, and allows interference on grounds of "national security."<sup>10</sup> Also worrisome is the guideline that permits the police to take into account whether the *purpose* is to advocate the independence of Tibet or Taiwan.<sup>11</sup> Yet even with these restrictions, more freedom of speech is allowed in Hong Kong than in China—much, much more, and perhaps as much as Hong Kong enjoyed under British rule.

Democracy not only requires a free press and freedom of speech, but also a multitude of political parties. These organizations serve democracy by framing the issues, sponsoring and supporting the candidates, and getting out the vote. In China there is in reality one, and only one, party. In Hong Kong there are four or five major parties, including some that openly oppose Beijing and its policies.

The current electoral system favors multiple parties. Representatives from the geographic constituencies will be elected in May 1998 on

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8. See A. Lin Neumann, *Press Freedom Under the Dragon: Can Hong Kong's Media Still Breathe Fire?*, DANGEROUS ASSIGNMENTS (Committee to Protect Journalists, New York, N.Y.), Fall 1997, at 8.

9. See John Ridding, *Hong Kong's Solid Start*, FIN. TIMES, Sept. 8, 1997, at 22 (quoting Hong Kong Financial Secretary, Donald Tsang).

10. See, e.g., Hong Kong Public Order Ordinance, ch. 245 § 8 (notification of public meetings), available at <<http://www.justice.gov.hk/Home.htm>> (visited February 3, 1998).

11. See, e.g., Stella Lee & Angela Li, *Security Ban on Freedom Rallies*, S. CHINA MORNING POST, July 19, 1997, at 1.

a proportional basis: there are five multi-seat constituencies, each with three to five seats that will be allocated among the contending parties on the basis of their overall showing within the constituency.<sup>12</sup> Leaders of the dominant party in Hong Kong, the Democratic Party, criticize this arrangement as a way of limiting their power, since under a “first-past-the-post” system within single-seat constituencies they might win all the geographic seats.<sup>13</sup> But viewed from another perspective, this feature of the electoral law will preserve and strengthen the pluralism of the political system and will therefore serve democracy. The contrast with Beijing deepens, and we are thus left to wonder how this island of democracy can exist in a sea of totalitarianism.

The role that law plays in protecting the democratic future of the Hong Kong political system is also startling, since in all other matters China manifests no commitment to the rule of law. China has a constitution, enacts statutes and regulations, and has a judicial system. The government may also take action that accords with these laws, but there is no evidence that it regards obedience to the law as an independent value in the complex calculus that determines its course of action. Everything is party policy.

In the case of Hong Kong, however, law does seem to matter. The reforms of Chris Patten, the last British governor, were opposed by Beijing on the ground that they departed from the 1990 Basic Law,<sup>14</sup> and the present electoral law is defended on the ground that it is in accord with that law. Admittedly, the government’s willingness to abide by that law may be due to a complex set of factors—economic, foreign relations, etc.—that make those in charge anxious to appear to the world that they are committed to the rule of law. Yet that may be enough. It is awfully difficult to create an appearance of following the law without actually following the law. A commitment to the rule of law, moreover, does not require that obedience to the law be valued for its own sake. It only requires that obeying the law be a positive factor in the policy calculus and that it not be wholly reducible to these other, motivating factors.

The government’s commitment to the rule of law is further

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12. See Hong Kong Legislative Council Ordinance, ch. 542 §§ 18, 19, 49, available at <<http://www.justice.gov.hk/Home.htm>> (visited February 11, 1998).

13. See, e.g., John Ridding, *Hong Kong Election Proposals Draw Democrats’ Fire*, FIN. TIMES, July 9, 1997, at 3 (quoting Martin Lee, leader of the Democratic Party, “[t]his is the beginning of the Singapore-isation of Hong Kong”).

14. See, e.g., JONATHAN DIMBLEBY, *THE LAST GOVERNOR: CHRIS PATTEN AND THE HANDOVER OF HONG KONG* 118 (1997).

heightened by its willingness to treat the 1990 Basic Law as a constitution, though to be sure, it is a very odd constitution. It reads like a constitution. It announces its purpose in a preamble. It establishes the executive, legislative, and judicial branches of government; it separates and allocates power between those branches; and it outlines the processes of selection of their officeholders. It defines who is eligible for permanent resident status (having no autonomous citizenship to bestow), and it guarantees the fundamental rights of all residents—civil rights, political rights, property rights, and even limited welfare rights.<sup>15</sup> Yet in at least one crucial respect it is unlike other constitutions: it is not self-authored by an independent, sovereign people.

In the typical post-colonial scenario, soon after independence, a committee of citizens frames a constitution establishing the political structure and social ideals to govern their common life. Soon thereafter the constitution is adopted by citizens constituting the political unit it is meant to govern. Elites, including some who served the colonial regime, often play a crucial role in that process—no constitution is truly bottom-up in its genesis. Even so, most constitutions can be considered self-authored because, at some point in the process, they are approved by a plebiscite or through ratification by a constituent assembly specially elected for that purpose. The Basic Law never met that test.

A number of prominent Hong Kong figures participated in the drafting of the Basic Law, but they hardly dominated that process; in any event they were chosen by Beijing, not by the people of Hong Kong. Even more significantly, the Basic Law was never voted upon or approved by the people of Hong Kong or their representatives. It was simply adopted by the national legislature in Beijing. The Basic Law is sometimes referred to as a mini-constitution, emphasizing that it remains subordinate to the Constitution of the People's Republic of China and is a product of a political institution—the National People's Congress—established by that law. It is formally a delegation of autonomy to a special administrative region, not a sovereign act of self-definition.

The source of the Basic Law not only challenges the notion of the constitution as a self-authored legal instrument, but also raises some doubt as to whether it is entrenched—another conventional feature of constitutions. Because the 1990 Law is a statute it would seem to follow that it can be repealed or modified by the simple decision of the legislature that enacted it. Article 159 says, "No amendment to this

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15. See, e.g., Basic Law, *supra* note 1, art. 36.

Republic of China regarding Hong Kong,” but as a purely formal matter that provision itself is subject to repeal or amendment by simple legislation.

As a matter of practical reality the situation is quite different. The Basic Law—much like certain foundational statutes in our own system such as the Civil Rights Act of 1964 or the Sherman Antitrust Act of 1890—seems to have a specially revered place in the culture and thus may have acquired a near-permanent status. While in the ordinary post-colonial scenario the constitution acquires its entrenched quality through the unique process that brought it into being, in the case of Hong Kong, the special status of the Basic Law derives from how people actually view or think of the law. The entrenched quality of the Basic Law is rooted in social practice and thus acquired this status through a process that is self-referential—the Basic Law is entrenched because *they* say it is.

The Basic Law seeks to implement the policies set forth in the Joint Declaration of 1984. The provisions in the Basic Law for the election of the Legislative Council can be seen as an elaboration or particularization of the requirement in the Joint Declaration that the Legislative Council “shall be constituted by elections.” Still, it is hard to understand how the presence of the Joint Declaration endows the Basic Law with the qualities often associated with constitutions, such as self-authorship. The Joint Declaration was signed by Margaret Thatcher, and although she may have had the welfare of Hong Kong in mind, she was neither chosen to speak for the people of Hong Kong nor in any real sense was she their representative.

Nor can the Joint Declaration entrench the Basic Law. On the assumption that the Joint Declaration is a treaty and somehow binding on China, and on the further and more questionable assumption that the treaty could somehow be enforced against China, I would acknowledge that the way China administers Hong Kong and every law passed for that purpose will have to be measured against the Joint Declaration. That would not, however, entrench the Basic Law of 1990 in any formal sense or prevent it from being repealed or modified through simple legislation. Social practice would still be crucial.

The Joint Declaration might be entrenched, but, due to its very form and language, it seems ill suited to serve as a constitution or even a law. It is an international treaty, outlining future policy; its ambiguities are the stuff of diplomatic double speak, not law. At one point, the Joint Declaration declares that Hong Kong will “enjoy a high degree of

autonomy,” and at another it declares, “[t]he current social and economic systems in Hong Kong will remain unchanged, and so will the lifestyle.”

From this perspective, it is hard to tell what the future will bring. In marveling at the existence of any democracy in Hong Kong and the use of law to protect that fledgling democratic system, all so contrary to the present policies of the nation that now governs it, I do not mean to paint a bleak picture of the future. The sea may, of course, sweep away the island, but it is also possible that the sea may recede and this little island may grow, or new ones appear. The future may be impossible to foresee, but there is no doubt that the meaning of a “high degree of autonomy” lies in that future experience; it is not immanent in the texts of past negotiations. An acknowledgment of the anomalous, unique character of Hong Kong democracy is not to predict its future but only to acknowledge the tensions and thus the uncertainties implicit in the “one country, two systems” formula. Only future practice will, indeed can, give concrete meaning to this slogan.

In the face of these uncertainties, every effort must be made to consolidate and legitimate the gains of the past. For the friends of democracy, this means two very specific things. First, I would strengthen and deepen the social practice that entrenches the Basic Law as constitution. Some may criticize that law as falling short of the philosophic ideal of democracy or even of the understanding of democracy they are able to extract from the Joint Declaration. Prior to the transition, there may have been something especially appealing to this critique; now it seems a little beside the point. It strikes me as a luxury that should be foregone in an effort to strengthen the commitment to the rule of law, knowing full well that though the Basic Law does not yet guarantee democracy pure, it does provide for more democracy than China allows anywhere else in its territory.

Second, it seems urgent that the democratic movement fully engage the challenge presented by the May 1998 election. The game known as democratic politics must be played and played to win. This cannot, I believe, be done by constantly harping on the imperfections or shortcomings of Hong Kong democracy. Maybe some votes could be won on that basis, but my own hunch is otherwise. Given the context—Hong Kong is now a part of China—those criticisms are unlikely to come to anything and thus do not constitute a fully adequate reason for voting someone into office. Far more significant in the voters’ minds are the substantive policies that are presented by the candidate—substantive policies, mind you, that can be developed within the framework of the present political structure. Affordable Housing. Social Security and Pensions. Education. Continued Prosperity. The

immediate challenge for the democratic movement, then, is to develop a program on these issues that stands apart from that offered by the Chief Executive and that will get voters to participate fully in the May election and to give those committed to democratic values all the power the law allows.