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POLITICAL DOMINATION AND THE RULE OF LAW IN HONG KONG

James A. Rice¹

For many observers, the rule of law has been highly significant in terms of Hong Kong's economic development during its colonial past and in the more recent era of Chinese rule. Yet at the same time, the political arrangement that has emerged since 1997 is widely perceived as being characterized by government domination over the individual. Following the government's concerted efforts to enact anti-subversion legislation and the overwhelming popular reaction against it, a state of domination has become increasingly apparent. This paper will consider the notions of political liberty and domination that have emerged within the context of the Basic Law and the prospects for the future in terms of political reform.

I. INTRODUCTION

In this paper, I will argue that any reality surrounding the notion of the rule of law in Hong Kong is under threat. By the term, rule of law, I refer to those general principles that have been advanced by A.V. Dicey who argued the principle that the law serves to bind those who make and enforce it – that is in its most concise terms, a governance of law as opposed to governance by men. Furthermore, the rule of law, as I understand it, includes the principle of separation of powers, meaning that that the judiciary shall be separate and independent from the government. The rule of law also includes *inter alia*, inherent principles such as the presumption of innocence, no *ex post facto* laws, legal equality before the law and the right to *habeas corpus*.

I will further argue that the reality of the rule of law in Hong Kong is under threat, in large part because of the three successive “interpretations” of the Basic Law that have been done by the Chinese Central Government since the return to Chinese sover-

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eighty in 1997. These cases (of interpreting various provisions of the Basic Law) have either overturned existing judicial decisions or replaced them with a decision made by the Standing Committee of the National People's Congress.² Instead of the reality of the rule of law, there is a growing body of evidence of official reliance upon government generated "spin" (or what I will call slogan) to shore up China's own notion of the rule of law. This notion of the rule of law presumes law to be a tool of government.

II. THE RULE OF LAW IN THE ABSENCE OF REPRESENTATIVE DEMOCRACY

During the nine years since the transition to Chinese rule, the Hong Kong Government has invested heavily in "talking up" the "Special Administrative Region" as a center for business, as a tourist destination and as a desirable place to live.³ A centerpiece of the public relations effort has been to advance Hong Kong's unique position in the region as one that enjoys the rule of law in a series of television spots.

Since the transition from British colonial administration to Chinese rule, the concept of the rule of law has been touted by the Hong Kong administration as being highly significant for two main reasons. First, in the absence of democracy, the judiciary of Hong Kong has been perceived as being an institution that is ostensibly independent from a government that lacks both a popular mandate and the legitimacy that is conferred by being accountable to the voters. In fact, the reliance that has been placed on the courts during both the colonial and post-colonial eras in dealing with what are otherwise understood as political issues has been referred to by at least one scholar, as the "judicialization of politics".⁴

The second reason that the rule of law is seen as significant is that for China - the sovereign power with regard to Hong Kong - there is no institutional reality regarding independence of the

2. See, James Rice, *Reinterpreting the Rule of Law in Hong Kong*, ASIA-PAC. J. HUM. RTS. & L., no. 1, 2002, at 40-76.

3. Since 1997, the official name for Hong Kong is, "The Hong Kong Special Administrative Region of the People's Republic of China" (HKSAR). This arrangement came about following negotiations in 1984 between Great Britain and China, whereby Hong Kong would revert to Chinese sovereignty but would retain its capitalist economic system for 50 years. In addition, Hong Kong would also retain a "high degree of autonomy" and would be governed under the framework of the Basic Law.

4. Carol A.G. Jones, *Politics Postponed: Law as a Substitute for Politics in Hong Kong and China*, in *LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS* 45, 64 (Kanishka Jayasuriya ed., 1999).

judiciary outside of the commercial realm.⁵ Moreover, no meaningful degree of tolerance ever been demonstrated on the part of the Central People's Government for manifestations of either political pluralism or religious freedom. National security is often invoked as a pretext in order to curb political dissent as well as religious or trade union activities.⁶

The rule of law, by providing or promising viable legal remedies to the harm that may be caused by arbitrary government decisions, has played a role in reassuring the people of Hong Kong in the face of the endemic corruption that is perceived to exist on the Mainland.⁷ The rule of law in the context of Hong Kong's experience has been widely understood as serving as *de facto* guarantor of Hong Kong's way of life (as distinct from that of Mainland China). A key implication of this reversion of political issues to the judiciary is that, in addition to being part of an ideological state apparatus, the rule of law also serves as a means for individuals and organizations to engage in meaningful debates about human rights.⁸ Yet it is becoming increasingly apparent that in the years following the transition, this policy has been an assertion of slogan at the expense of institutional reality. Despite the government's rhetoric, the past eight years have witnessed a steady erosion of an adherence to the rule of law. For example, any existing popular belief in the efficacy of the rule of law was undermined by the perception that well-connected individuals were able to avoid criminal prosecution.⁹

5. See Mark Findlay, "Independence" and the Judiciary in the PRC, in *LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS* (Routledge 1999), at 281, 294.

6. See Siu-sin Chan, *Dissidents and Christians are Detained in Run-Up to Communist Party Conference*, S. CHINA MORNING POST, Oct. 4, 2003, at 5; see also HUMAN RIGHTS WATCH, *CHINA - NIPPED IN THE BUD: THE SUPPRESSION OF THE CHINA DEMOCRACY PARTY* (2000), available at <http://www.hrw.org/reports/2000/china/>.

7. See comments made by former Chief Government Secretary, Anson Chan Fang On-sang, such as: "Shanghai may have good physical infrastructure but Hong Kong has the rule of law, an independent judiciary and a clean civil service. Provided we stay ahead of the game, I see a continued role for Hong Kong." *Answers According to Anson*, S. CHINA MORNING POST, May 20, 2004, at 16.

8. Jones, *supra* note 4, at 63.

9. See the decision not to prosecute a case of fraud in *Re Aw Sian Sally*, [1999] 2 H.K.C. 270 (H.C. Bankr.). See also the decision by the administration's in July 2003 to dismiss the head of the Equal Opportunities Commission, Anna Wu. Finally, see the decision in December 2003 by the Justice Department not to prosecute the former Budget Secretary, Anthony Leung in the matter regarding an allegation of tax evasion regarding the purchase of a luxury car.

III. THE BASIC LAW: OVERVIEW

In order to properly understand this situation, it is first necessary to briefly introduce Hong Kong's post-transition legal order. The Basic Law of Hong Kong was promulgated in 1990 by the Chinese government to serve as Hong Kong's "mini constitution" following the return to Chinese rule. The Basic Law stipulates that after 2007 the Special Administrative Region (SAR) can move toward universal suffrage if any governmental proposals for change have the endorsement of 40 members of Hong Kong's Legislative Council (known locally as Legco) and the consent of the Chief Executive.¹⁰

The Basic Law also stipulates that Hong Kong's legislative body, the Legislative Council, shall have 60 members. In 1998, the first post transition elections for the Legislative Council were held. During those elections only 20 members were chosen by universal suffrage from five geographical constituencies. By 2004, 30 seats were chosen by popular vote while the rest were selected from what are referred to as "Functional Constituencies" which represent mainly special commercial or financial interests including the influential property development sector.

The Basic Law also calls for what it refers to as "executive led" governance, whereby the Chief Executive of Hong Kong possesses powers to sign into law any legislation passed by the Legislative Council, and also holds the exclusive power to introduce that same legislation. Moreover, the Chief Executive has the powers to appoint members of the judiciary and to appoint a cabinet (known as the Executive Council) which is accountable to him.

According to the Basic Law, any further democratic reforms to the Legislative Council have to be endorsed by two-thirds of the Legislative Council, approved by the Chief Executive, and reported to the Standing Committee of the National People's Congress.¹¹ The prospect of any further democratic progress was diminished in 2005, by the refusal of the government to set a timetable for a government elected by universal suffrage.

10. XIANGGANG JI BEN FA [Constitution] (1990) (H.K.) [hereinafter BASIC LAW], art. 45; *id.* annex I § 7 ("If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval.")

11. *Id.* annex 1 § 7.

IV. GOVERNMENTAL MANIPULATION OF THE BASIC LAW: USING THE RULE OF LAW TO COMPROMISE FREEDOM

To reiterate, in the absence of democratic institutions, the idea of the law's supremacy has long been perceived as especially important to the continuity of the basic freedoms and way of life for the people of Hong Kong. This concept was understood as being even more relevant following the bloody suppression of protestors in Tienanmen Square in June 1989.¹² It was during that time that significant numbers of Hong Kong residents first took to the streets *en masse* protest against the crackdown. Hong Kong was subsequently "punished" for this perceived act of defiance when the Basic Law Drafting Committee submitted a more comprehensive version of an "anti-subversion" provision which was embodied in Article 23 of the Basic Law.¹³ The final draft of Article 23 places an obligation on the Hong Kong Special Administrative Region to "enact laws on its own" to prohibit acts of "treason, secession, sedition, subversion against the Central People's Government" as well as "theft of state secrets." This latent conflict regarding the subversion law issue finally came to a head in 2003, after the Hong Kong government's introduction proposals for legislation that would define the implications of Article 23.

On July 1st, 2003 (the day that marks the transition from British to Chinese rule), over 550,000 people came out into the streets in a massive protest against government proposals to enact new security laws. This demonstrated clearly the depth of popular feeling against the government's proposed Article 23 legislation and caused the government to temporarily shelve plans to enact the legislative package.

Exactly one year later, approximately 350,000 protesters called for full democracy to be implemented in Hong Kong. Following these massive demonstrations, it was widely expected that the Hong Kong government would respond to the people's over-

12. Nihal Jayawickrama, *The Bill of Rights, in HUMAN RIGHTS IN HONG KONG* 37, 69 (Raymond Wacks ed., 1992).

13. The text of Basic Law Article 23 reads: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." BASIC LAW art. 23.

whelming desire to accelerate the pace toward the attainment of democracy in the territory.¹⁴

However, the response from the Central People's Government to these popular calls for universal suffrage was to bluntly assert its own power. Its initial argument was that despite calls for democratic reform, only those deemed "patriots" would ever be allowed to govern Hong Kong.¹⁵ This remarkable claim set off a debate in the territory as to what properly comprises patriotism. Indeed, a former drafter of the Basic Law, Xu Chongde, named specific pro-democracy figures in Hong Kong's legislature as people that China regarded as being "unpatriotic."¹⁶ This accusation, surrounding a lack of patriotism on the part of critics of the government, invites wider reflection and discussion about such fundamental issues such as the relationship between the individual and the state, and society members' loyalties to their city, state and rulers. Just what are the proper loyalties for the people who live in a place such as Hong Kong?

V. PETTIT'S NOTION OF FREEDOM AS NON-DOMINATION AND HONG KONG'S POLITICAL REALITY

The transition from colonial rule to Chinese sovereignty has served to expose an underlying rights reality, that of "domination without interference."¹⁷ Upon closer examination, one is able to find that the Basic Law itself and the manner that the constitutional powers of interpretation held by the Hong Kong judiciary has been interfered with represents a distinct form of political domination.

Contemporary political philosopher, Phillip Pettit has written about what he terms the "grievance" and the "ideal" that he

14. Regarding Hong Kong's legislative body, the Legislative Council, Annex II of the Basic Law stipulates that it should have 60 members, of which 24 are directly elected from five geographical constituencies. Thirty are returned by what are referred to as "Functional Constituencies" which represent mainly the wealthy as well as special interests such as the property development sector – the same people who have a vote in choosing the Election Committee. The remaining six Legco members are chosen by a government appointed body known as the Election Committee. Furthermore, in the Legislative Council election in September 2004, the number of directly elected seats are to be increased from 24 to 30, while the six seats returned by the Election Committee will be abolished. The number of members returned by functional constituencies will remain unchanged. Members elected in September will serve a four-year term until 2008.

15. Gary Cheung & Ambrose Leung, *Xinhua Releases Criteria for Being True Patriot*, S. CHINA MORNING POST, Feb. 25, 2004, at 1.

16. Jimmy Cheung, *Xinhua Takes off the Gloves and Names HK Alliance as Unpatriotic*, S. CHINA MORNING POST, Mar. 1, 2004, at 1.

17. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 23 (Clarendon Press 1997).

believes has been largely overlooked in contemporary rights debates. By the notion of grievance, Pettit refers to the condition of being dominated by others who hold sway over them, and by the notion of ideal he refers the prospect of being free. Pettit goes on to argue that liberty has been traditionally understood by liberal philosophers (such as Isaiah Berlin) as the absence of interference. However such a condition may, at the same time, leave one subject to “the grievance of having to live at the mercy of another.”¹⁸ He argues that this condition entails having to endure at the dependence of others and a state of vulnerability.

As an alternative to a liberal notion of liberty, Pettit writes about what he refers to as the “ideal,” or a “republican” tradition of liberty, that of “freedom as non-domination.” As Pettit understands it, such republican freedom can be traced to the writings of Cicero, Enlightenment philosophers including James Herrington and John Locke, as well as to the present day scholars such as Quentin Skinner, John Braithwaite and Pettit himself. Pettit’s republicanism casts the notion of the “people as trustor and the state as trustee” and consists substantively in governance under a fair system of law.¹⁹ Seen in this way domination is understood as the relationship of “master to slave” or of “master to servant” and implies that the dominating party may “interfere on the basis of interest or an opinion that need not be shared by the person affected.”²⁰

By contrast, Pettit’s own understanding of republican liberty is a state that is free from such domination. He understands this to be “a condition unlike the slave or servant, and is not subject to the arbitrary power of another.”²¹ This condition is what Cicero referred to as an empire-of-law, a system of law that satisfies established constraints, such as being general in nature, prospective, well-drafted, precise and published.²² Further, there is a requirement that there be institutional checks on power such as the presumption of the common law as well as constitutional constraints.²³ Pettit also envisions that this form of republican governance must be grounded in a “contestatory democracy,” one

18. *Id.* at 4-5.

19. *Id.* at 9.

20. *Id.* at 22.

21. *Id.* at 31.

22. *Id.* at 276-77.

23. In this regard, see the comments made by Montesquieu in the 1740’s on the English Constitution: “the one nation in the world whose constitution has political liberty for its direct purpose.” *Id.* at 41 (citing CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156 (Anne M. Cohler, Basia C. Miller, & Harold Stone trans. & eds., 1989)).

which is able to allow people from all sectors to challenge decisions made by government.²⁴

It is argued that with respect to Hong Kong, however, a condition of political domination is evidenced in various provisions of the Basic Law itself. The document does confer "negative" liberties, those kinds of liberties that may be construed as freedom from interference, such as freedom of speech, freedom of the press, and freedom of assembly.²⁵ However because of a lack of democratic representation and the potential threat from an authoritarian China, the Basic Law does not confer a meaningful measure of robust freedom from external domination or arbitrary rule, nor does the Basic Law set out a timetable for the implementation of governance by popular consent. This state of affairs is evidenced by the absence of a mechanism for the democratic election of either the Chief Executive or his ministers.

Most significantly, the Hong Kong government has already interfered with the judiciary by overturning a landmark decision by the Court of Final Appeal (CFA) in the matter of the right of abode.²⁶ Following the Court's decision to grant permanent residence to the children of Hong Kong and permanent residents born in the Mainland, the government effectively overruled the Court by requesting that the National People's Congress Standing Committee "interpret" the relevant provision of the Basic Law.²⁷ The impact of this interference on the part of the NPC went beyond the issue of whether to allow Mainland children to join their parents who were living in Hong Kong. The interpretation was handed down in response to the CFA's assertion that "*it had the power to interpret the Basic Law,*" and further served to diminish the powers of the judiciary and weaken the rule of law.²⁸

The relationship of subjection that exists between the Central Government and Hong Kong has been made all the more clear by the National People's Congress decision in 2004, to once

24. *Id.*

25. BASIC LAW art. 27.

26. For the relevant "right of abode" cases see *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.C. 291 (C.F.A.); *Chan Kam Nga v. Director of Immigration*, [1999] 1 H.K.C. 347 (C.F.A.).

27. See *The Chief Executive's Report to the State Council Concerning the Right of Abode*, in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 474 (Johannes M.M. Chan, H.L. Fu & Yash Ghai eds., 2000).

28. See *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (adopted by the Standing Comm. Nat'l People's Cong., June 26, 1999), in HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION *supra* note 18, at 478 (P.R.C.) ("Moreover, the interpretation of the Court of Final Appeal is not consistent with the legislative intent.").

again interpret key provisions of the Basic Law with regard to the principle of universal suffrage.²⁹ The interpretation (which effectively ended any popular aspirations for democratic reform) surrounded Hong Kong's constitutional development and the issue of democratic reforms that are included in the Basic Law. Article 45 of the Basic Law indicates a principle of "gradual and orderly progress" to be made toward the "ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating Committee in accordance with democratic principles."³⁰ The Standing Committee interpreted relevant provisions of annexes 1 and 2 to the Basic Law that deal with Hong Kong's constitutional development after 2007, in a way that rules out popular elections in the foreseeable future.³¹ The effect of the interpretation by the Standing Committee was to reserve for itself the power to approve any future changes in Hong Kong's electoral arrangements.

This interpretation on the part of the Standing Committee was all the more remarkable following the subsequent publication of the government's taskforce on constitutional reform which set down nine "rules" to be met before any reforms could take place.³² These rules included the following conditions: That the meaning of the phrase, "the actual situation in Hong Kong" (found in Article 45) should include factors such as, "public opinions (sic), economic development, social conditions, an understanding on the part of the public of 'one country, two systems' and the Basic Law, the maturity of political talent, and the relationship between the executive and the legislature."³³ Since the introduction of these additional criteria, any possibility of democratic reform instigated at the behest of the executive, would seem at first glance to be yet another non-judicial interpretation

29. *Beijing to Interpret Basic Law on Reforms Chief Executive Says Move Will End Wrangling and Allow Political Debate to Progress*, S. CHINA MORNING POST, Mar. 27, 2004, at 1.

30. BASIC LAW art. 45.

31. For highlights of the official announcement by Wang Zhenmin, deputy dean of Tsinghua University Law School, see *Law Interpretation Key to Hong Kong Stability*, CHINA DAILY, Mar. 27, 2004. This announcement includes an enlightening passage about China's view regarding the separation of powers: "In some countries and regions, the legislature is only responsible for stipulating laws, while the duty to make interpretations on laws belongs to the court. China has a different constitutional system. The NPC Standing Committee's interpretations of the Constitution and laws is a way for the supreme legislative body to implement the Constitution to exercise the country's sovereignty."

32. Jimmy Cheung, *Yes, Changes Are Needed. . . But They Must Comply With These 9 Rules*, S. CHINA MORNING POST, Apr. 16, 2004, at 1

33. *Id.*

of the Basic Law, not by the Standing Committee, but by the Chief Executive himself.

VI. SELLING THE BASIC LAW

It is significant that during the post-transition period, the Basic Law has been marketed in a way that attempts to remove any and all meaningful elements of “robust” participatory or “republican” liberties from the minds of the public. The attempts at promoting the government’s proposals relating to Article 23 follow in a similar manner. Indeed, the legislation that was proposed for implementing Article 23 only served to enhance the sense of powerlessness and domination on the part of the residents of Hong Kong.

Over the course of 2001 through early 2004, the Government Information Service released a series of 14 “Announcements of Public Interest” (API). The 30-second television spots were designed to sell the Basic Law and its provisions to the public by conveying bits of information combined with an element of entertainment. These ads conveyed a message of “weak,” non-resilient rights of the kind referred to by Pettit as liberty based on non-interference (as opposed to liberty from political domination). Moreover, the messages tended to trivialize the issue of rights. Instead, rights are viewed as not essential to the individual or society.

In one of the first API spots, a young girl is shown typing on a computer.³⁴ When her father enters the room and amiably asks whether she is sending an e-mail message, she defensively covers the screen and says, “Article 30 of the Basic Law protects freedom and privacy of communication.” The tagline is funny, but it does little to advance any meaningful notion of rights. Indeed, one might wonder, “Shouldn’t concerned parents be looking after the safety of their children even if it means checking up on their e-mail?”

In another of the API’s, a scene from a traditional wedding party is featured.³⁵ While serving ceremonial tea to the bride and groom, one of the guests offers the toast, “May you have at least three children in the next two years.” At this remark, the bride becomes somewhat uncomfortable. At this point the most elderly woman in the room responds with the remark, “According to Article 37 of the Basic Law the right to marry and raise a family freely is guaranteed by law.” The viewer however, learns

34. *Basic Law-Civil Rights I: E-Mail & Secretary* (PMP Advertising Int’l television broadcast Nov. 13, 2001).

35. *Basic Law-Civil Rights II: Marriage* (PMP Advertising Int’l television broadcast Nov. 27, 2001).

little more than the fact that the Basic Law protects against an outdated adage that carries little influence in today's world.

Another of these spots is set in a stylish apartment, where a couple is watching TV.³⁶ The woman says, "Honey, I want to go on a holiday." The husband responds by saying, "Fine, let's go to America." Then the scene changes to scenes of the husband imagining himself playing a round of golf. Clearly unhappy with that prospect, the woman petulantly responds, "No, not America. I want to go to France." The scene then shows the wife imagining herself power shopping at *Arch de Triumph*. At this point, anticipating her husband's objection, she counters with, "Article 21 of the Basic Law says that Hong Kong residents shall have freedom to travel and to enter and leave the Region."

In the final scene at the airport, the stylishly dressed wife is shown proffering her papers to an immigration officer who responds by saying, "Ma'am, you have given me a copy of the Basic Law." As she goes into shock, her husband then places both of their passports on the counter. The tone of the rich, spoiled woman is unmistakable. She demands that her husband take her on extravagant shopping trips in Paris. In the same context, she stamps her foot and demands the right to freedom of travel. Again, the subtext can easily be interpreted to imply that any such "right" (and the idea of a right in general) is on par with a demand to be taken on a shopping spree.

The Government Information Service deals with issues of arbitrary arrest or unlawful detention somewhat more incongruously than with "rights" surrounding travel. In a scene in which we see a young family playing Monopoly, a three year old girl lands on the "Go to Jail" space.³⁷ The rest of the family shouts, "You have to go to jail!" The little girl responds by shouting, "Oh no I don't." The family asks in unison, "Why not?" She places her hands on her hips and says, "Hong Kong residents have the freedom that a person shall not be detained except by law." Meanwhile her mother, looking through the Monopoly rule-book, says that she can't find that rule. The little girl replies, "It's in Article 28 of the Basic Law." Again, something is wrong here. The subtext of the API appears to lead the viewer to conclude that the little girl is actually cheating at Monopoly by asserting a legal claim to due process.

Through the portrayal of individual rights and the rule of law as inappropriate in the scenes depicted in the API's, the message conveyed to the viewer is that individual rights are somehow out of place in the real world. Yet it is Article 23 of the Basic

36. *Vacation* (PMP Advertising Int'l television broadcast June 30, 2002).

37. *Monopoly* (PMP Advertising Int'l television broadcast June 30, 2002).

Law and the administration's proposals regarding its legislation that truly indicate the state of political domination by the Central Government over the people of Hong Kong. There was a concerted effort by the administration to reassure a public that was becoming increasingly uncertain about whether to oppose the government's proposal document.

In one of the API's dealing with Article 23, the scene shows a group of young trainees seated in a classroom-like setting, presumably attending some kind of a business seminar.³⁸ The speaker, who has just written on the blackboard, the words "Insurance = Security," informs the class, "Our clients would like to buy insurance to protect themselves and their families. So for medical needs they would require. . . what?" At this point a student raises his hand and correctly answers, "Medical insurance."

The speaker continues his lesson; "For employment?" Another trainee shouts out, "Employment insurance." "For the household?" The answer comes back, "Household insurance." "And then, what about the nation?"

At this point a young girl dressed in a business jacket that is perhaps a size too big, raises her hand and volunteers, "National insurance." There is a pause as the answer is not obvious. The speaker asks, "So how do we insure the nation then?" The girl, who suddenly seems to gain confidence in herself answers, "According to Article 23 of the Basic Law, we can implement the law in order to insure security and protect the nation!" There is general approval as the speaker strokes his chin and nods. Later, as the class is leaving the room, the speaker remarks to his assistant, "Smart girl." Here the viewer appears to learn to view the government's proposals regarding Article 23 as "something we can do" as well as an "insurance policy." Here, as in other API's not described here, it is the young (those who represent the future) who are best equipped to show the way forward.

VII. AUTONOMY: A PROMISE UNFULFILLED

The establishment of Hong Kong as a Special Administrative Region was done under the authority of Article 31 of the 1982 Chinese Constitution. The terms of the transition from British colonial administration to Chinese rule were broadly set out in the Sino-British Joint Declaration of 1984. Hong Kong's Basic Law was passed by the third session of the National People's Congress in April 1990, as a part of a process of reversion to Chinese rule, although the Joint Declaration promised that Hong Kong would enjoy "a high degree of autonomy." This provision is

38. *Insurance* (PMP Advertising Int'l television broadcast Feb. 12, 2003).

very much circumscribed (apart from the semantic question as to whether the phrase means anything at all) by the ultimate vesting of legal sovereignty with the People's Republic of China.³⁹ This notion of autonomy is found in Article 3(2) of the Joint Declaration and also in the provisions of the Basic Law itself. However, it is clear that the Basic Law, by its nature, is not a constitutional, but rather a subordinate document.

Chapter 3 of the Basic Law provides guarantees to fundamental rights and duties of the residents of Hong Kong. However, as has been argued, such rights are purely "negative" in nature.⁴⁰ In this regard, Pettit has (I believe) argued effectively that a purely negative-positive dichotomy is not an adequately effective conception of liberty. While he allows that liberty is negative to the extent that it requires an absence of domination, it also requires more than this. Liberty as non-domination requires, according to this conception, "security against interference, in particular, against interference on an arbitrary basis."⁴¹

That the Basic Law was conceived by the Chinese government, drafted by a government-selected committee, "promulgated" by Yang Shangkun (then president of the PRC), and then "adopted" by the National People's Congress, is fair indication of its ability to adequately represent the interests of its intended constituents.⁴² In this regard, something is clearly missing from the Basic Law concerning the provision of any genuine security against arbitrary interference. The Basic Law conveys a message of only limited powers granted by the ruler to a subject territory. The message that it does *not* convey, however, is of the people of Hong Kong granting limited powers to a government of their choosing. Indeed, in the text of the Basic Law, Hong Kong people are addressed as "permanent residents" as opposed to "citizens," individuals who are constitutionally empowered and as such, are able participants in public life.⁴³

Article 26 of the Basic Law guarantees residents the "right to vote and to stand for election," however the Basic Law also insures that only one-third of the seats in the Legislative Council

39. 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, U.K.-P.R.C., art. 2, Dec. 19, 1984, 1399 U.N.T.S. 23391; BASIC LAW art. 2.

40. BASIC LAW arts. 24-42.

41. PETTIT, *supra* note 17, at 51.

42. See THE HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY? xiii (Ming K. Chan & David J. Clark eds., 1991).

43. BASIC LAW arts. 24-42.

are filled by popular election.⁴⁴ The other two-thirds of the council are either chosen by an appointed "electoral committee" or elected by "functional constituencies," which represent specific business interests.⁴⁵ In any case, no substantive political power is actually held by a legislature, which cannot either introduce legislation or control the budget.

That Hong Kong's "executive-led" government is run by a chief executive currently chosen by an 800-member committee that has been hand picked by the National People's Congress, is a prime indicator of this democracy deficit. The lack of restraint on the exercise of power held by the executive branch is seen in the events that followed immediately following the transition. More specifically, upon the transfer of sovereignty, the post-colonial administration acted promptly to amend the Public Order and Societies Ordinances in order to impose greater restriction upon the formation of political societies,⁴⁶ the freedom of assembly⁴⁷ and trade union activities.⁴⁸

This type of social and legal order bears some similarity to other Asian authoritarian regimes that have sought refuge in Confucian values such as deference for authority as a means of discrediting a universal notion of human rights.⁴⁹ However these political orders are not conducive - nor for that matter are they intended - to facilitate the emergence of citizens able to actively participate in the determination of their own affairs or as Pettit would have it, to enjoy "liberty as non-domination." This is the liberty that goes beyond that of mere non-interference and provides an exemption from any arbitrary interference over the actions of the citizen.⁵⁰ Pettit further explains the distinction in this way:

The constraint from which exemption is given is not interference of any sort, just arbitrary interference. And the exemption given involves not just the absence of the interference but the incapacity of others to practice it: if you like, the resilient absence of the interference.⁵¹

44. Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (adopted by the Nat'l People's Cong., Apr. 4, 1990) (P.R.C.), reprinted in BASIC LAW annex III.

45. BASIC LAW annex II.

46. See Societies Ordinance, (1997) Cap. 151, § 5 (H.K.).

47. See Public Order Ordinance, (1997) Cap. 245, §§ 8-9 (H.K.).

48. See Societies Ordinance, *supra* note 46, at § 5; see also HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1998: HONG KONG, available at http://www.hrw.org/worldreport/Asia-05.htm#P494_134004.

49. Carol A.G. Jones, *Law, Patriarchies, and State Formation in England and Post-Colonial Hong Kong*, 28 J.L. & SOC'Y 265, 287 (2001).

50. PETTIT, *supra* note 17, at 25-26

51. *Id.* at 26.

Indeed, it is just such a resilient affirmation of an absence of interference that is most lacking in the “rights and duties” provisions of the Basic Law. As a further indication of this deficiency, the Hong Kong SAR Government released a proposal document that was issued in 2002 in order to enact legislation relating to Article 23 of the Basic Law. While this set of proposals had been packaged as a consultation document, it was in fact a carefully orchestrated campaign designed to sell the government’s proposals to the public. The document’s conclusion revealed that the “consultative process” was merely an illusion:

Therefore, while nationals of a state enjoy the privilege of protection provided by it on the one hand, the individual citizens have a reciprocal obligation to protect the state by not committing criminal acts which threaten the existence of the state and to *support legislation which prohibits such acts* on the other hand (emphasis added).⁵²

Such an idea of a citizen’s duty not only to obey the law, but also to support proposals put forward by a particular government is not one that is found within the context of civil society. This notion of a positive duty or “reciprocal obligation” to support government legislation or protect the state and its policies is one that is found in regimes where democracy or the rule of law is nonexistent.

In the absence of meaningful democratic mechanisms, the government’s consultation process over the Article 23 legislation as a means for members of the public to express their views regarding the proposal was unconvincing as a means of establishing legitimacy for what certainly was to be controversial law.⁵³ The Secretary for Security indicated that the public supported the government proposals despite a survey indicating that only 26 percent surveyed found the proposals to be necessary, and over 57 percent felt that this was not the appropriate time to enact such laws.⁵⁴

In response to repeated calls from legislators, non-governmental organizations, and members of the public to publish a final draft of the proposed legislation and then engage in a second round of public consultation, the Secretary for Security chose to disparage members of the public. In a meeting in which she was

52. Proposal to Implement Article 23 of the Basic Law: Consultation Document (proposed by the Security Bureau, Sept. 2002) (H.K.) (hereinafter Consultation Document) § 1.4, available at <http://www.basiclaw23.gov.hk/english/download/report.pdf>.

53. See Benny Tai Yiu-Ting, *The Development of Constitutionalism in Hong Kong*, in *THE NEW LEGAL ORDER IN HONG KONG* 39, 63-64 (Raymond Wacks ed., 1999).

54. Symposium, Survey on the Proposals to Implement Article 23 of the Basic Law, Research and Survey Programme, Lingnan University (Dec. 2-3, 2002).

answering questions relating to the government's proposals, the Secretary for Security stated that there was "no need" for the government to issue a draft of the legislation as these laws did not concern "housewives, waiters and taxi drivers."⁵⁵

During the consultation period, the Solicitor General (whose official capacity lies in acting as the deputy to the Justice Minister) repeatedly stressed that it would be up to the legislature to pass the government's bill. However, since Hong Kong lacks a democratic system reflecting the views of its people based upon the principle of universal suffrage, such a claim on the part of the executive branch, was particularly specious.

At the same time, as responsibility for the security legislation was deferred to a largely appointed Legislative Council, the Secretary for Security cast doubt on the legitimacy of democracy as an institution by asserting (misleadingly) that "Hitler had been elected in a democratic process and he killed 7 million Jews."⁵⁶ In the wake of the controversy that followed that assertion, the administration did not take any steps to distance the government from this statement.

In a further effort at selling its proposals surrounding Article 23 legislation to the public, the government enlisted the help of a well-known senior barrister, David Pannick QC, who in a five-page opinion concluded that, "none of the proposals in the Consultation Document offends against fundamental rights."⁵⁷ From a reading of the opinion, one may conclude that Mr. Pannick's client was actually the government and not the people of Hong Kong. This is because Pannick's brief was to consider the likely effect of the government's proposals on basic rights guaranteed under Articles 27 and 39 of the Basic Law. Article 27 grants Hong Kong residents freedoms of speech, the press, publication, freedom of association, assembly, procession, as well as the right to form and join trade unions and to strike. Article 39 links the rights afforded under the Basic Law to international human rights instruments:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and International labour conventions as applied to Hong Kong shall remain in force and shall be im-

55. Cliff Buddle, *Defiant Regina Ip Stands by Her Handling of Article 23*, S. CHINA MORNING POST, Mar. 12, 2003, at 1.

56. Christine Loh, *Hitler Comments Undermine Democracy*, S. CHINA MORNING POST, Nov. 1, 2002, at 18.

57. DAVID PANNICK, QC, OPINION: IN THE MATTER OF PROP[OS]ALS TO IMPLEMENT ARTICLE 23 OF THE BASIC LAW, available at <http://www.basiclaw23.gov.hk/english/resources/pannick/pannick3.htm> (last modified Jan. 28, 2003).

plemented through the laws of the Hong Kong Special Administrative Region.⁵⁸

Pannick reasoned that any rights conferred under Articles 27 or 39 are not absolute, but require a “balance between the interests of the individual and other interests.”⁵⁹ In an effort to illustrate his point, Pannick cited dicta found in recent decisions of the European Court of Human Rights. Here he found a need to:

“strike a fair balance. . . between the demands of the general interest of the community and the requirements of the protection of the individual’s human rights.”⁶⁰

Pannick also cited as further authority for this “balanced” view of individual rights and societal interests, the opinion of Lord Steyn in a Privy Council decision.⁶¹

“The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights.”⁶²

Interestingly, the cases Pannick cited were all decided in jurisdictions that enjoy institutions of democracy. Hong Kong, on the other hand, has no institutional safeguards such as accountability to the electorate through universal suffrage. Pannick’s assumptions about how a future judiciary would be able to interpret and apply the proposed laws surrounding Article 23 in a manner consistent with Articles 29 and 39 are even more remarkable. In support of his assumptions, Pannick cites the consultation document and its assurances that it will provide adequate protection of fundamental rights.⁶³ However, what evidence is there of the institutional safeguards that would be make these assurances credible?

VIII. THE UNCERTAIN EFFICACY OF HONG KONG’S “CONSTITUTIONAL SAFEGUARDS”

There is similarly good reason for skepticism as to claims made by the Solicitor General and others that the Hong Kong judiciary would be able to serve as a check on any abuses of power on the part of the government. First, this position places a very heavy burden on the judiciary. Serious questions have been asked as to whether it is good policy for the administration to

58. BASIC LAW art. 39.

59. PANNICK, *supra* note 57.

60. *Sporrong v. Sweden* (1982) 5 Eur. H.R. Rep. 35, 52 (1982).

61. The Judicial Committee of the Privy Council is the court of final appeal for those remaining UK overseas territories and Crown dependencies. The Privy Council is still employed as the court of final appeal for some British Commonwealth territories that have already gained independence.

62. *Brown v. Stott (Procurator Fiscal, Dunfermline)* [2001] 2 W.L.R. 817, (P.C. 2000) (appeal taken from Scot.) (U.K.).

63. Pannick, *supra* note 57.

place the judiciary in the position of being asked to challenge decisions made regarding security issues that have also been raised by Mainland China.⁶⁴ Second, the claim that controversial government decisions would be judicially reviewable, and that this remedy would be a viable safeguard of civil liberties, flies in the face of experience.

A series of decisions by the colonial judiciary during the 1990's surrounding the issue of the long-term internment of Vietnamese asylum seekers indicate the limited scope and force of judicial review as a means of countering arbitrary government policy.⁶⁵ During the colonial government's administration, there existed at least the prospect of appeal to the Privy Council.⁶⁶ As Mr. Pannick was most certainly aware, that avenue of final appeal is now closed. The fact of the matter is that the government has demonstrated that it is quite willing to go to the Standing Committee of the National People's Congress when decisions of the Court of Final Appeal (CFA) are not to its liking. The government is also aware that the NPC will intervene when it wishes. It is also very clear that the NPC will also intervene in order to interpret the Basic Law as it sees fit. What has replaced judicial interpretation by the courts is an assertion of "true legislative intent" - as understood by the NPC.⁶⁷ Following the CFA's ruling in the right of abode matter, the NPC effectively overturned the decision of the Hong Kong judiciary. The NPC's interpretation of the Basic Law as a means of ending the prospects for democratic reform serves to further erode the reality of the rule of law.

The Hong Kong Government's proposals to enact legislation surrounding Article 23 demonstrate an inexorable move towards

64. Carole J. Peterson, *National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's "Consultation" on Article 23 of the Basic Law*, 32 H.K. L.J. 457, 463 (2002).

65. See *Re Pham Van Ngo*, [1991] 1 H.K.L.R. 499 (H.C.). See also *Superintendent of Tai A Chau Detention Centre v. Tan Te Lam*, [1995] 3 H.K.C. 339 (C.A.). In upholding the colonial regime's policy of open-ended executive detention of Vietnamese refugees, Litton J. wrote: "All that can be said, as a matter of common sense, is this: there must come a point in time when the purpose of the detention, that is to say, removal from Hong Kong, cannot upon any realistic view of the facts, be achieved. When that point is reached, the purpose for which the detention is justified under the statute is spent. Further detention then becomes unlawful: but, as to whether such purpose can, as a matter of hard fact, be achieved, the judgment of the Director of Immigration must carry great weight with the court. *He is, after all, charged by the legislature with the responsibility of carrying out the policy set out in the Ordinance; so long as he is acting in good faith and within the scope and purpose of the Ordinance it is difficult to think of circumstances where a court could legitimately interfere.*" *Id.* at 346-47 (emphasis added).

66. *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*, [1997] A.C. 97 (P.C. 1996) (appeal taken from H.K.). Here, the Privy Council reversed the decision by the Hong Kong Court of Appeal.

67. Rice, *supra* note 2, at 40.

a more arbitrary exercise of power, and will prove to be an alarming development for those residents of Hong Kong committed to upholding the development of civil society and preserving individual liberty. The Article 23 legislation represented a move calculated to import the standards of the Chinese legal system into Hong Kong. The rule of law as understood by its liberal advocates is barely regarded within the Chinese legal system.

In light of this, Pannick argued that the proposed legislation surrounding Article 23 would conform to the standards set out under the ICCPR. However, this claim is called into doubt by language used throughout the Article 23 proposal to curb civil liberties under a pretext of *ordre public*. The claim is further called into doubt by the way in which the concept of *ordre public* has been interpreted by the judiciary in a case in which a tiny plastic Hong Kong flag (defaced with a penned-in “x”) was displayed in a public protest.⁶⁸

IX. EXAMINING THE IMPLICATIONS OF ARTICLE 23 OF THE BASIC LAW

1. *Treason*

Treason, an offence that first emerged within the English common law and was later codified in the Treason Act of 1351,⁶⁹ is generally understood as applying only to nationals who aid and support the enemy during times of war.⁷⁰ The National Security Bill (that was proposed) limits the offence of treason to acts by Chinese nationals that would amount to “overthrowing the Central People’s Government, intimidating the Central People’s Government or compelling it to change its policies or measures.”⁷¹ It was not at all reassuring that following the central government’s assertion that only “patriots” may govern Hong Kong, allegations of treason were leveled against Legco member Martin Lee (and his father) in response to his testimony before the U.S. Senate East Asian and Pacific Affairs Subcommittee on the future of democratic reform in Hong Kong.⁷²

68. *HKSAR v Ng Kung Siu*, [2000] 1 H.K.C. 117 (C.F.A.). Here, peaceful protesters were convicted for having defaced the Hong Kong and Chinese flags. By invoking *ordre public* (public order), the CFA held that Article 16 of the Bill of Rights Ordinance and Article 19 of the ICCPR did not apply in cases of “flag desecration.” *Id.* at 137-41.

69. Treason Act, 1351, 25 Edw. 3, stat 5, c.2 (Eng.).

70. See U.S. CONST, art. III, § 3.

71. National Security (Legislative Provisions) Bill, 2003, Leg. Council (H.K.), § 2, available at <http://www.legco.gov.hk/yr02-03/english/bills/c007-e.pdf>.

72. Gary Cheung & Ambrose Leung, *Heat Turned Up on Democrats’ Trip*, S. CHINA MORNING POST, Mar. 4, 2004, at 1; Ambrose Leung, *An Min’s Wrath Turns to Martin Lee’s Father*, S. CHINA MORNING POST, Mar. 8, 2004, at 1.

2. *Secession*

China's concern with the issue of secession relates to the problems of Tibet and Taiwan, which China has long regarded as being "inalienable parts of China".⁷³ The offence of secession is addressed in China's Criminal Code, where it prohibits the "organizing, scheming and carrying out activities that sabotage national unity."⁷⁴ With reference to secession, the consultation document states that such an offence may amount to:

"Resisting the Central People's Government (CPG) in its exercise of sovereignty over a part of China."⁷⁵

In the HKSAR, because of our proximity to the Mainland, individuals or groups of individuals could become involved in organizing and supporting secessionist activities on the Mainland. Such activities, which involve making use of Hong Kong's free and open environment as a base against national security and territorial integrity, should be prohibited.⁷⁶

The relevant section of the National Security Bill is more narrowly drawn, with the offence of secession being limited to "withdraw[ing] any part of the People's Republic of China from its sovereignty by using force or serious criminal means."⁷⁷ This offence would assert extra-territorial jurisdiction, however, in that secession may be carried out by a Hong Kong permanent resident in any place outside of Hong Kong and within the SAR.⁷⁸

3. *Sedition*

Sedition is an offence that has long been employed in the context of colonial rule as a tool of political repression. Essentially, the government proposed to outlaw legitimate political dissent that it may find unacceptable. Any reassurances made by the Solicitor General, as a representative of the government, that this legislation would not threaten basic liberties did not extend

73. With regard to China's assertion of Tibet and Taiwan as being an inalienable part of its whole, this at least in relation to Taiwan, is a relatively recent development. During the 1870's a large crew of Luchuan (Ryukyuan) fishermen ran aground on Taiwanese Shores and were killed by local warriors. Japan, which was itself in the process of asserting its own claim over the Ryukyu Islands as its ancient, inalienable territory, demanded compensation from the Chinese authorities. The Chinese government replied in no uncertain terms that the killings had taken place beyond the borders of their empire.

74. Criminal Law (revised by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 103, *translated in* THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION 71 (Wei Luo trans. 1998) (P.R.C.).

75. Consultation Document, *supra* note 52, § 3.6(b).

76. *Id.* at § 3.8.

77. National Security (Legislative Provisions) Bill, *supra* note 71, § 2B(1)(a).

78. *Id.* at § 2 B(3).

beyond a mere promise that the government would not do so. On the other hand, it has been more convincingly argued that similar laws have long been used as a tool for repression of legitimate voices of dissent in both Malaysia and Singapore.⁷⁹ The proposed National Security bill would also make it an offence to handle (publish, sell, display or distribute) any material that the government deems to be seditious.⁸⁰

4. *Subversion*

Subversion is an offence that is employed by the Mainland authorities for suppressing political opposition.⁸¹ It is not an offence that is found in the common law tradition. As laid out in section 2A of the proposed National Security (Legislative Provisions) Bill, the scope of subversion goes far beyond the kind of acts that constitute legitimate security threats. It includes acts that would “disestablish the basic system of the People’s Republic of China as established by the Constitution,” “overthrow the Central People’s Government,” “intimidate” the government by “criminal means,” or “endanger the stability” of the government.⁸²

The proposed legislation would have the effect of outlawing political activities that the government may find to be contrary to the authority of the Chinese Communist Party as defined under the Chinese criminal law.⁸³ According to the proposal, any democratic opposition found to be unacceptable by the government would potentially come under its scrutiny.

This legislation could be interpreted to include political agitation that involves public demonstrations. Examples of this kind of abuse of power already exist in Hong Kong. Under cur-

79. Mark Daly, *Let’s Not Follow the Example of Malaysia*, S. CHINA MORNING POST, Nov. 6, 2002, at 16.

80. National Security (Legislative Provisions) Bill, *supra* note 71, § 9C.

81. *Trial of Chinese Labour Activists Accused of Subversion Ends*, BBC MONITORING INT’L REP., Jan. 16, 2003.

82. National Security (Legislative Provisions) Bill, *supra* note 71, at § 2A(1)(a)-(c).

83. See HUMAN RIGHTS IN CHINA & HUMAN RIGHTS WATCH ASIA, WHOSE SECURITY? “STATE SECURITY”: IN CHINA’S NEW CRIMINAL CODE (1997) available at http://www.hrichina.org/fs/view/downloadables/pdf/downloadable-resources/state_sec_04.97.pdf. Criminal Law (P.R.C.), *supra* note 64, art. 105 (criminalizing “organiz[ing], plott[ing] or act[ing] to subvert the political power of the State or to overthrow the socialist system” and “us[ing] rumor, slander or other means to encourage subversion of the political power of the State or to overthrow the socialist system.”). See also XIAN FA, art. 1 (“The People’s Republic of China is a socialist state under the people’s democratic dictatorship and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.”).

rent law, the Public Order Ordinance requires that police permission be granted before any public demonstrations can be held.⁸⁴ The government has been willing to prosecute participants of small and peaceful demonstrations held without their approval.⁸⁵ Furthermore, the judiciary has not been able to establish itself as a consistent check in cases involving abuses of governmental power.⁸⁶

5. *Theft of State Secrets*

The legislation proposed in this area broadly reflects Article 111 of the Chinese criminal code, which prohibits “stealing, prying into, purchasing or illegally providing state secrets or intelligence for institutions, organizations and individuals outside the country.”⁸⁷ The provisions surrounding official secrets or theft of state secrets and the widening of Hong Kong’s Official Secrets Ordinance would have a chilling effect on legitimate news reporting, and on academic research and publication.

Academics, journalists, members of non-governmental organizations and political activists in Hong Kong fear that China appears to define the concept of “state secrets” in a very broad way. Chinese officials have classified even general economic information as state secrets.⁸⁸ This includes “major policy decisions on state affairs” and “secret matters in national economic and social development.”⁸⁹ In addition, the Chinese law includes “those secret matters of political parties . . . [that] concern the security and interests of the state.”⁹⁰ But in addition, the proposed legislation includes a catch-all clause capturing “other state secret

84. See Public Order Ordinance, *supra* note 47, at §§ 8-9.

85. See Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 H.K. L.J. 271 (2002).

86. Press Release, HKSAR Legislative Council, LCQ 2: Prosecution Under Public Order Ordinance (Feb. 19, 2003), <http://www.info.gov.hk/gia/general/200302/19/0219209.htm> (“The Department of Justice earlier invoked the Public Order Ordinance for the first time to prosecute three persons for organizing or assisting in organizing an unauthorized public procession on February 10, 2002. It was reported that, in giving the verdict, the Chief Magistrate responsible for hearing the case had queried whether the case, which was of a ‘political nature,’ should have been handled by the court.”).

87. Criminal Law (P.R.C.), *supra* note 74, art. 111.

88. Gary Cheung, *Researchers Fear Study Threatened by New Law*, S. CHINA MORNING POST, Oct. 14, 2002, at 5.

89. Law on Guarding State Secrets (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 5, 1988, effective May 1, 1989) (P.R.C.), art. 8, *translated at Selected Legal Provisions of the People’s Republic of China Affecting Criminal Justice*, <http://www.cecc.gov/pages/newLaws/protectSecretsENG.php>.

90. *Id.* arts. 2, 8.

matters that the state secrecy preservation departments determine should be preserved."⁹¹

The outbreak in southern China of Severe Acute Respiratory Syndrome (SARS) in November 2002 revealed a profound reluctance among Chinese officials to divulge information regarding the disease's infection and mortality rates. While SARS spread throughout Guangdong and Hong Kong to the rest of the world, officials in China initially sought to cover up the problem. As the outbreak continued to spread, the government remained in a state of denial about the true extent of the problem.⁹² Chinese officials did not admit that SARS was a significant problem until the disease impacted the overall economy, making it difficult to continue to cover up the problem.⁹³ Academics and journalists fear that the proposed legislation under the National Security Bill would have a similar effect on the dissemination of information in Hong Kong.⁹⁴ For example, the changes that were proposed may fail to take into account the public interest in the disclosure and reporting of information pertaining to future public health issues. Consider the following passage, taken from the government's consultation document regarding Article 23 legislation:

Where unlawful disclosure is involved, the following categories of information should be protected:

(iv) information relating to relations between the Central Authorities of the PRC and the HKSAR. . . .⁹⁵

The reason this change to existing law is so dangerous is that the proposal has a potential to cover a wide range of information depending on the government's intent. Mainland authorities have used similar legislation to prosecute persons reporting information as innocuous as interest rate figures.⁹⁶

6. *Proscription of Foreign Political Organizations*

In 1997, following the transition to Chinese rule, the existing Societies Ordinance (Chapter 151) was amended to give the gov-

91. *Id.* art. 8; see also HUMAN RIGHTS IN CHINA & HUMAN RIGHTS WATCH ASIA, *supra* note 83, at 21.

92. Susan V. Lawrence, *Leadership: How to Fail the People*, FAR E. ECON. REV., Apr. 24, 2003, at 26-27.

93. Erik Eckholm, *Beijing Discloses Hidden SARS Cases*, INT'L HERALD TRIB., Apr. 21, 2003, at 1.

94. See the written submission by the Foreign Correspondents' Club of Hong Kong, Foreign Correspondents' Club Hong Kong, <http://www.fcchk.org/media/bl23.htm>.

95. Consultation Document, *supra* note 52, at § 6.19(b)(iv).

96. HUMAN RIGHTS IN CHINA & HUMAN RIGHTS WATCH ASIA, *supra* note 83, at 22 n.73.

ernment the power to ban organizations that are political in nature and are connected to foreign political organizations, including those based in Taiwan.⁹⁷ However, the government concluded that these restrictions were not by themselves sufficient.

The proposed Article 23 legislation confers power to outlaw local organizations that the Secretary for Security believes to be contrary to the interests of national security.⁹⁸ The sections of the bill dealing with "organizations affiliated with a Mainland organization which has been proscribed in the Mainland by the Central People's Government" are of greater concern.⁹⁹ The reason for the concern is the provision's close correspondence to Article 102(1) of the Chinese criminal code, which prohibits colluding "with foreign institutions, organizations and individuals" to "harm the sovereignty, territorial integrity and security of the People's Republic of China."¹⁰⁰ Despite the fact that the government attempted to justify its actions as required under Article 23, this provision extended well beyond any of the Basic Law's requirements. There is no reference in the proposed legislation to any link between Mainland and Hong Kong organizations.¹⁰¹

With regard to foreign political organizations and the "proscription mechanism," the Solicitor General repeatedly offered assurances that the decision regarding whether to proscribe them would be made within Hong Kong. However, the government's claim on this issue is simply not credible because the government's consultation document makes clear its position on the applicability of Mainland law:

"Regarding (c) above, the HKSAR may not be in a position to determine whether an organization poses a threat to national security, especially for those entities based on the Mainland with cells in the HKSAR affiliated with them. Therefore, to a large extent, on the question of whether such a Mainland organization endangers national security, *we should defer to the decision of the Central Authorities* based on the comprehensive information that it possesses (emphasis added)."¹⁰²

The proposed Security Bill specifically allows proscription of an organization if the Central People's Government issues a certificate stating that a particular type of organization in Hong Kong ought to be banned.¹⁰³ One of the more pressing aspects

97. Societies Ordinance, *supra* note 46, at § 8.

98. National Security (Legislative Provisions) Bill, *supra* note 77, at § 8A.

99. Consultation Document, *supra* note 52, at § 7.15.

100. Criminal Law (P.R.C.), *supra* note 74, art. 102.

101. *See* BASIC LAW art. 23.

102. Consultation Document, *supra* note 52, at § 7.16 (emphasis added).

103. National Security (Legislative Provisions) Bill, *supra* note 77, at §§ 8A(2)(c).

of the proposed legislation is the question of how this passage can be interpreted in a way that would allow Hong Kong to preserve any of its existing autonomy regarding the freedom of association. Some lawyers and legislators in Hong Kong have voiced concern that “deferring” to Mainland authorities to ban Hong Kong organizations could establish a “connecting door” between Hong Kong and Mainland concepts of national security.¹⁰⁴

In light of the criticism leveled at the proposals regarding the proscription of organizations, the government stressed that any organization impacted by the proposed legislation would have a right to appeal to the courts. However, it would be difficult for an organization to successfully challenge proscription through judicial review, since it would involve trying to show that the decision by the Secretary for Security was “unreasonable.” It would be difficult for the applicant to establish unreasonableness in light of any Mainland “notification” that the organization in question posed a security threat. A provision claiming a judicial remedy is not only questionable, it would place an unreasonable burden on the judiciary should an application ever be submitted.

The issue of the proscription of political organizations is particularly worrisome given that Mainland authorities have banned the Falungong organization. This concern is heightened by the statements issued by the Hong Kong Chief Executive and the Security Secretary characterizing the group as an “evil cult.”¹⁰⁵

X. CONCLUSION

The process set in motion by the government with the publication of the Article 23 consultation document in September 2002 was intended as a public relations exercise designed to package the government’s proposals. The government’s failure to issue a subsequent and detailed set of proposed legislative changes for further legislative debate that would allow a second round of consultation despite public demand, revealed that the consultation process was nothing more than a marketing campaign. It was a move designed to sell the public a legislative package that had been predetermined by government authorities. The government’s decision to halt the legislative process in order to curb public protest following the July 1, 2003 public demonstrations further weakened a deeply discredited administration. Nonetheless, according to the Basic Law, the obligation to legislate under Article 23 remains the same.

104. Peterson, *supra* note 64, at 461-62.

105. Press Release, Hong Kong Human Rights Monitor, Tung’s Arbitrary Criteria After “Detailed Consideration” (June 15, 2001), available at <http://fungchiwood.com/HKHRM-Tung-cult.htm>.

Despite its position of dominance, problems clearly remain for the government. First, because Hong Kong's government is not popularly elected, it lacks the legitimacy that a genuine mandate found among democratic institutions can provide. Thus, the government cannot provide a convincing response to increasing public protest. Second, as has been argued elsewhere, the prolonged economic downturn - as well as the crises that culminated with the SARS outbreak - has deprived the administration of its "performance-based" claim to legitimacy based on a popular perception of either administrative competence or growing prosperity.¹⁰⁶

Given the lack of democratic legitimacy or the perception of an ability to deliver economic prosperity, the administration's claim to popular support is becoming increasingly limited. The grave economic difficulties faced by the SAR and the administration's poor performance have created strong impetus for change. Many in Hong Kong have been affected by the economic downturn and the widening gap between the rich and poor. They are disillusioned with an unelected, unresponsive and incompetent government, aspiring to have greater influence concerning their own destiny and to have the power to choose a government that is representative and accountable. The decision to indefinitely defer universal suffrage may have been made by central authorities in order to prevent Hong Kong from becoming a hotbed of dissent. But this latest interpretation of the Basic Law by the National People's Congress has also had the effect of undermining the rule of law.

The attempt by the government to promote the rule of law merely as slogan together with a series of non-judicial interpretations of the Basic Law, has undermined the very underpinnings of governance by law itself. But such attempts to manipulate the meaning of rights, together with acts that circumvent the judiciary, also strike at the very nature of one of the most fundamental of "social bonds," that of language itself.

In *Essay Concerning Human Understanding*, Locke refers to the human facility and need to communicate in a social context as the "great instrument and common tie of society."¹⁰⁷ Jeremy Waldron has observed this particular aspect of language. In this light, he invokes Locke's references to language and its significance in a "civil conversation," whereby individuals in society are able to involve themselves in a collective moral reasoning.¹⁰⁸

106. Jones, *supra* note 49, at 288.

107. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 3 (Alexander Fraser ed., Dover Publications 1959) (1690).

108. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 81 (1999).

While Locke perceives the importance of maintaining the integrity of what he calls “the instruments and means of discourse, conversation, instruction and society,” he also disparages those who would advance their own position by “perplexing and confounding” the signification of words.¹⁰⁹

Jean Bethke Elshtain has also referred to this phenomenon of “draining words of meaning” and notes that this is what Vaclav Havel has called, “pseudoideological thinking” “where words have been separated from the realities that they purport to describe.”¹¹⁰ As such, there has been “a separation of thought from its immediate reality “crippling its capacity to intervene in that reality effectively.”¹¹¹

Recent developments in Hong Kong regarding the Basic Law and the government’s own ambivalence toward the rule of law itself, demonstrate that through the conscious manipulation of a language that permits public discourse, the “civil conversation” that Locke speaks of, is lost. It would seem, that if the government is to solve problems ranging from a lack of legitimacy to economic difficulties, it will be forced to reach a solution that is based on genuine democratic reform. However, whether this is a likely course of action will unfortunately depend not on the demands of the people of Hong Kong, but on the will and foresight of their political masters in Beijing.

109. LOCKE, *supra* note 107, at 129.

110. Jean Bethke Elshtain, *What’s Morality Got To Do With It? Making the Right Distinctions*, in *MORALITY & POLITICS* 1, 7-8 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul eds., 2004).

111. *Id.* at 8.