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Hong Kong: Preserving Human Rights and the Rule of Law

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The most direct impact of the reversion of Hong Kong to Chinese rule on July 1, 1997 will be on the people of Hong Kong. While the arrangement between the British and the Chinese governments concerning the reversion sought to preserve the unique nature of Hong Kong society, the people of Hong Kong are likely to experience a change in the nature of their system of governance after July 1, 1997.

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The laissez faire and newly democratizing colonial regime that presently governs Hong Kong will have been replaced by a regime acceptable to the Chinese Communist Party.

This change raises important questions about the sustainability of the recent democratic changes in Hong Kong and about the likely impact of the new regime on the human rights and economic futures of the citizens of Hong Kong. The answers to these questions will depend on many factors, including the actions and decisions of the people of Hong Kong, those who presently represent them in the Legislative Committee, the new leaders who will take office at the time of the reversion, and the actions and decisions of both the Chinese government and the international community. In addition, it will be influenced by the differing legal traditions that exist in Hong Kong. The way in which the new rulers of Hong Kong integrate the common law traditions of the "old" colonial Hong Kong with the Chinese legal tradition that predominates in the People's Republic of China will influence how the human rights of Hong Kong's citizens evolve, how much protection workers and other economic actors receive, the predictability and enforceability of commercial transactions, and how free speech and the press are respected in the post-reversion society. This attempt to combine two different legal orders is also an experiment of interest to all who are concerned with how to integrate all the legal traditions of the world into a sustainable and just international legal order.

The reversion will also create challenges and opportunities for China. The world is watching to see how it absorbs the free-wheeling and legally distinct Hong Kong enclave into its own more regimented social order. China's ability to successfully absorb Hong Kong, while respecting the rights and different traditions of Hong Kong citizens, will raise confidence in the ultimate success of the social and economic transformation presently underway in China. A successful reversion of Hong Kong to China will also raise hopes for the establishment of a more human rights sensitive social and legal order in China.

The forthcoming changes in Hong Kong are also of importance to the international community. First, China is an increasingly important actor in the evolving global economic order and in geo-political affairs. Consequently, how it meets its obligations under the "one country, two systems" arrangement that it proposed as the model for the reversion of Hong Kong to China, will influence other international actors' faith in China's credibility as a negotiating partner. Second, the ability of China to successfully re-integrate Hong Kong, will influence investors and others' perceptions of the sustainability of China's own social and economic transformation. This in turn will affect their confidence in the long-term prospects for Asian development. Based on these factors, the success of the reversion of Hong Kong to Chinese rule is likely to affect China's influence over the evolving international order and thus over all of our futures.

Given the international political, economic, and legal significance of the upcoming events in Hong Kong, the International Legal Studies Program at the Washington College of Law is proud to have co-sponsored together with Human Rights Watch/Asia and the Lawyers Committee for Human Rights, the conference
on “Hong Kong: Preserving Human Rights and the Rule of Law,” which took place on March 18-19 at the Washington College of Law. The mission of the International Legal Studies Program of Washington College of Law includes the promotion of an international legal order that respects the rights of all human beings and the legal traditions of all societies and that is based on mutual respect and justice. As part of this mission, it sponsors conferences, like the conference on Hong Kong, that are designed to educate law students, lawyers, and the broader community about important developments in international law. We hope that the publication of the transcript of this conference will assist the people of Hong Kong to protect their human rights and their evolving democratic order and will help keep international attention focused on ensuring that the reversion of Hong Kong to Chinese rule becomes an important event in our long march to the establishment of the rule of law in all countries and of a just international legal order.

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WELCOMING REMARKS

PROFESSOR BRADLOW: Good morning, everyone. My name is Daniel Bradlow, and I am the director of the International Legal Studies Program at the law school, and I would like to welcome you to the law school.

It is my great pleasure to call on the Dean of the law school, Claudio Grossman, to officially open this conference. Dean Grossman.

DEAN GROSSMAN: Thank you Professor Bradlow, and I’m very pleased to be here with you this morning for this inaugural event on the Hong Kong Conference. I am especially gratified to welcome again into our institution Human Rights Watch Asia and the Lawyers’ Committee, and I would like to express to
them our appreciation for involving us in this important conference.

As someone who has worked in the human rights field, I cannot say enough about the work of this ongoing American organization. In my own experience, with particularly the American Commission of Human Rights, the presence of independent and powerful observers and activists guarantees the promotion and protection of human rights. Without their voice, many lives would be sacrificed and the hope of expanding the freedom and the protection of their witness would not be possible. So as an academic institution, as I stated before, we are proud to be associated with this important ongoing American organization.

I'm not much of a flag-waver I want to tell you, but this is a good flag, the flag I want to mention today in the morning meeting, is the flag of an institution like ours which is committed to research, teaching, and service, to numerous human rights activities. And I want to share some of those activities with you.

The law school is now the Legal Research Office for the Prosecutor's Office of the War Crimes Tribunal in The Hague. We have a team of faculty members and students that put their time and effort assisting in that activity whose main aim is to avoid one of the most important problems of humankind, and that is impunity. Our work on impunity—or against impunity—is shown through the type of curriculum we offer and other research projects in which we are currently involved. The law school is also a place where the Inter-American Human Rights Digest Project is taking place. The purpose of this project is to systematize the jurisprudence under the Inter-American system for the purposes of placing that jurisprudence at the process of human rights activists, petitioners, and victims. The law school is also starting for a second year an Inter-American work core competition attracting over forty samplings from all over the hemisphere who come here to acquire the skills, the knowledge, the researchability, and the networks, the possibilities that are offered by the capital of the United States.

As you probably know, we were the first school in the country and in the world created by women, and we think that it is very important to offer the possibility of specializing in gender issues and becoming advocates, law professors, and activists in that important aid.

For this initiative I want to thank the director of the program, Danny Bradlow, who has placed a tremendous energy and enthusiasm in these endeavors. I would like to say, however, that what defines this law school is not the number of things we're doing here or attempt to do; what defines us is that we feel the need to continue to interact with scholars, practitioners, and students for the purposes of promoting values of human dignity. And when I mention the types of things we are doing in this law school, I mention them for the purpose of seeing whether we can continue to do things together, whether we can entice you to see us as partners to continue to develop exciting projects.

It's from that perspective, also, that I'm proud and I'm pleased to be here participating in the opening of this conference which is so essential in the moment in which I'm currently living and I'm going to continue to live. The program, I think, is excellent and attaches on the issues that have relevance for Hong Kong's
future. We as an academic institution have an issue that is specific to us that I would like to see discussed in the debate. It is the issue of academic freedom in Hong Kong. We know now that before the transfer of power in Hong Kong, Hong Kong rarely had full academic freedom. I know of an incident in academic Hong Kong where students painted some slogans concerning the massacre at Tiananmen Square and the president of the university ordered these removed, but the students protested, the faculty protested, the press protested, and these slogans were painted again. That shows the existence of a vibrant intellectual community which was prepared to participate in the dialogue of their debates and the analysis of the future of their city and of their country.

We intend to remain vigilant with them in preserving all the human rights and, specifically, the values of academic freedom. We would seek guidance also in this conference as to how we can contribute in that endeavor.

I welcome you again to this exciting conference, and I hope that this will be the continuation of the partnership with ongoing developments that we consider so important for the expansion of human rights. Thank you very much.

PROFESSOR BRADLOW: Thank you, Dean Grossman. With that, let me hand things over to Professor Peter Jaszi, who moderates the first panel.
guished career as a lawyer and business person in Hong Kong and has been a long-time advocate of governmental transparency and democratic values in Hong Kong. Since 1992, she has been a member of the Legislative Council representing the Hong Kong Island Central constituency—with which I will ask Professor Strossen to begin.

PROFESSOR STROSSEN: Thank you very much, Professor Jaszi. I am delighted to participate in this important conference. Before I became ACLU President, I was honored to be Vice Chair of Human Rights Watch/Asia, and in that capacity I had the opportunity to visit Hong Kong on a number of occasions and to meet with leaders of its legal and human rights communities.

Unfortunately, I've had to reduce my active involvement in international issues since becoming head of the ACLU, but I have continued to follow developments in Hong Kong with great interest and, increasingly, with great concern. Very recently, former U.S. Attorney General Richard Thornburgh asked me to join with him as one of the founding members of an organization called the U.S. Committee for Hong Kong, and I was honored to do so. This is a bipartisan organization that supports the guarantees to the people of Hong Kong that were originally laid out in the 1984 Sino-British Joint Declaration: most importantly, for autonomy, a democratically elected legislature, the rule of law, an independent judiciary, and a free-market capitalist economy.

As indicated by its bipartisan nature, the U.S. Committee for Hong Kong calls for holding China to its guarantees of autonomy, democracy, and human rights, and calls for the United States government to use its influence to that end, have been coming from across the political spectrum in the United States. In this effort, I think it is interesting and noteworthy that many liberal organizations, including human rights groups, have been joined by many conservative organizations, including some from the so-called “Religious Right.” We are also seeing strange bedfellows on this issue in Congress, from liberal Democrats to conservative Republicans. I think that this broad ideological consensus underscores the fundamental nature of the rights that are at stake—core human rights tenets that are broadly supported by the international community. In addition to democratic elections, the rule of law, and an independent judiciary, these fundamental human rights include an independent civil service and basic civil and political liberties—notably, freedom of speech, press, assembly, and association.

These basic rights are essential not only for the sake of individual freedom, but also for the sake of social, political, and economic stability. It’s no wonder, then, that these rights are supported not only by advocates of individual human rights, but also by business interests. And these rights should be of urgent concern not only to those who are specifically interested in Hong Kong, important as that is, but also to those with a more domestic outlook. That is because the future of Hong Kong will have an enormous impact on the United States for better or for worse. As Dick Thornburgh stated in recent Congressional testimony: “U.S. interests in Hong Kong and Asia from trade to law enforcement will be directly affected by whether the Joint Declaration’s broad guarantee of autonomy is respected by China. The concept of autonomy cannot be separated from the guarantees of an
elected legislature, an independent judiciary, and a capitalist economy. Any broken promise by China will make Hong Kong’s autonomy more fragile.”

Unfortunately, of course, China has already broken many essential promises and already cast doubt on Hong Kong’s autonomy after July 1. Therefore, since July 1 is rapidly approaching, it is now critical to bring this problem to the attention of significant affected communities in this country, which could exercise meaningful support for China’s guarantees toward Hong Kong: most importantly, policymakers, business interests, the legal profession, the press, and the academic world.

Martin Lee, head of Hong Kong’s Democratic Party and a prominent human rights lawyer, has been traveling around the world and speaking with literally thousands of journalists in a nonstop effort to plead the causes of autonomy, democracy, and human rights in Hong Kong. When a U.S. journalist recently asked him why he was working so hard to try to galvanize international concern, Martin Lee replied, “I believe the battle for Hong Kong cannot be fought and won if the world is not behind us. Otherwise we become another Tibet.”

As I have already indicated, in the 1984 Joint Declaration, in return for the transfer of sovereignty over Hong Kong, China bound itself to a number of important guarantees. Most importantly, it agreed that the Hong Kong Special Administrative Region (SAR) “will enjoy a high degree of autonomy, except in foreign and defense affairs;” that it will be “vested with executive, legislative and independent judicial power, including that of final adjudication;” that “the laws currently in force in Hong Kong will remain basically unchanged;” and finally, that the following rights and freedoms “will be ensured by law”: speech, press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research, and religious beliefs.

Annex I to the Joint Declaration elaborated on its guarantees of “rights and freedoms.” It also contains the following additional guarantees, among others: that the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights shall remain in force in Hong Kong; that the legislature “shall be constituted by elections”; and that a court of final appeal shall be constituted to exercise “the power of final judgment.”

As written, these promises were certainly cause for optimism. On the other hand, in light of China’s historic record, they also provided some cause for skepticism. China had previously made a commitment to “the right of exercising national regional autonomy” when it assumed sovereignty over another region and that other region, unfortunately, was Tibet in 1951.

Sadly, China has already shown that its pledges for Hong Kong may well be worth no more than its pledges for Tibet. That conclusion was supported in last week’s issue of The New Republic in an article by Stan Sesser, a Senior Fellow of the Human Rights Center at Berkeley. In his words: “Emboldened by the United States’ open embrace of trade concerns over democracy and human rights, and seeing no particular reason to wait until July, Beijing has already gone a long way
toward destroying what democracy there was in Hong Kong, and it shows every intention of finishing the job.”

A similar conclusion was reached in Human Rights Watch’s last annual report written at the end of 1996. It stated: “The chances that Hong Kong’s autonomy would be maintained after . . . July 1, 1997 . . . seems slim. [T]he Chinese government seem[s] intent on repealing provisions in Hong Kong’s Bill of Rights, dissolving the elected Legislative Council, undercutting the independence of the judicial system and the executive, and curbing freedoms of expression and assembly.”

In my remaining time, I will briefly outline some of the highlights of this antidemocratic trend—or I should say the lowlights. Throughout the remainder of the conference, other speakers will amplify on particular developments in more detail. Ironically, China’s departure from the Joint Declaration began in 1990 when its National People’s Congress enacted the Basic Law, which was designed to serve as the Hong Kong SAR’s constitution. That was ironic because the stated purpose of the Basic Law was to implement the Joint Declaration.

To be fair, to some extent the Basic Law did reiterate and reinforce some of the essential guarantees of the Joint Declaration. For example, it granted the SAR “a high degree of autonomy ... and executive, legislative and independent judicial power, including that of final adjudication.” It also reiterates the basic human rights that are set out in the Joint Declaration, adds several others, and repeats that the two international human rights covenants shall remain in force.

To an alarming extent, though, the Basic Law departed from and undermined the Joint Declaration’s guarantees. That was the conclusion of a 1992 report by the International Commission of Jurist (ICJ). Accordingly, the ICJ called on China to amend the Basic Law to bring it into compliance with the Joint Declaration—something that has never happened.

The Basic Law’s serious deviations from the Joint Declaration included sharp limits on the power and independence of Hong Kong’s courts. Also, contrary to the Joint Declaration’s clear guarantee of an elected legislature, the Basic Law provides for the democratic election of only one-third of the legislative seats. Another very troubling provision in the Basic Law is its Article 23, which requires the SAR’s legislature to enact laws prohibiting various crimes, including “subversion” and “theft of state secrets.” These are precisely the types of laws that Beijing has used to suppress dissent in China, thus raising fears that they will be used in the same way in Hong Kong.

Such fears have recently been fanned by criminal cases in the PRC. First, Wang Dan, the Tiananmen student leader, received an 11-year prison sentence for subversion, and his allegedly subversive act included publishing articles in foreign publications, attempting to maintain contact with other dissidents, and taking a correspondence course from the University of California at Berkeley.

The second recent case in China shows that Beijing’s concept of the theft of state secrets is as expansive and as inconsistent with civil liberties as its concept of subversion. Specifically, a Beijing-based reporter for a Hong Kong paper was
convicted of theft of state secrets and received a 12-year sentence after he acquired information about interest rate changes and other financial data that was about to be made public anyway.

The next agreement between China and Britain concerning Hong Kong continued this pattern of eroding the Joint Declaration’s guarantees. Under the Joint Declaration, a new high court for Hong Kong was to be composed of judges selected by an independent commission, and judges were to be appointed from overseas common law jurisdictions. But the 1995 Court of Final Appeals Agreement (CFA Agreement) gives the Chinese-appointed Chief Executive a role in judicial selection and also limits the overseas common law judges to just one. Moreover, the CFA Agreement sharply limits the courts’ jurisdiction and, worse yet, gives to the National People’s Congress final power over jurisdictional issues. Consequently, Beijing had the last word on the Hong Kong courts’ treatment of civil liberties and challenges to government power. Obviously, that cripples the courts’ ability to enforce human rights guarantees or to remedy human rights violations.

Not surprisingly, therefore, this agreement was strongly opposed by the Hong Kong Bar Association and Martin Lee. In Lee’s words, this agreement meant that “the rule of law is finished in Hong Kong.”

To say the least, then, the Basic Law and the CFA Agreement were terrible setbacks for Hong Kong’s autonomy. Sadly though, they were followed by even more distressing setbacks. In the 1995 elections for the Legislative Council, Martin Lee’s Democratic Party won a landslide victory, gaining 12 of the 20 directly elected seats and seven of the indirectly elected seats. That was a wonderful historic show of support for democracy and human rights by the people of Hong Kong. But the PRC showed no more enthusiasm for this pro-democracy outpouring in Hong Kong than it had shown for a similar outpouring in Tiananmen Square in 1989. Indeed, up to one million Hong Kong residents had demonstrated against the Tiananmen massacre. Thus, as Stan Sesser wrote in his New Republic piece last week, perhaps that itself “led Chinese leaders to rethink the guarantees they had offered in the Joint Declaration.”

At least the PRC’s backlash and crackdown in Hong Kong has not been as overtly violent and brutal as its crackdown in Tiananmen, but it may well have the same stifling impact on democracy and human rights. Specifically, in March 1996, the Beijing-appointed Preparatory Committee, chaired by the PRC’s Foreign Minister, voted to replace Hong Kong’s elected Legislative Council (LEGCO) with an appointed Council. Moreover, last December, China further violated its promise of an elected legislature by engineering the appointment of a “Provisional Legislature.” This body was chosen by the 400-member Selection Committee, which had in turn been chosen by Beijing’s Preparatory Committee. In the words of Governor Chris Patten, this Provisional Legislature has “no legitimacy, no credibility, and no authority.” Yet it is purporting to act.

The PRC delivered its most recent blow to Hong Kong’s autonomy last month, when the Preparatory Committee recommended that 24 Hong Kong laws not be adopted as laws of the Hong Kong SAR. That recommendation, of course, violates
the Joint Declaration’s guarantee that Hong Kong’s laws should remain essentially unchanged. And the targeted laws, not surprisingly, all promote civil and political liberties. They include: central provisions in Hong Kong’s Bill of Rights Ordinance; laws protecting freedom of the press, assembly, and association; and democratic electoral reforms. Instead, the PRC is seeking to revive draconian colonial security laws that severely restrict private associations, demonstrations, broadcasts, and publications.

Ironically, Britain had adopted these repressive laws in the 1960s to curb expression supportive of China; now Beijing wants to use these laws to curb expression critical of China. Even before reviving these repressive laws, China has already enormously stifled political dissent, artistic expression, and other important speech in Hong Kong. In a report issued last October, Human Rights Watch/Asia concluded that free speech in Hong Kong is “at great risk.” It cited specific evidence ranging from direct government censorship to intimidation, harassment, and detention of journalists, and, finally, last but not least, enormous pressures toward self-censorship.

I’d like to close my overview by quoting from Dick Thornburgh’s forceful Congressional testimony last month on behalf of the U.S. Committee for Hong Kong, of which we are both founding members. So far I have been mostly negative, giving you the gloom and doom picture from Hong Kong. As an activist, I naturally have a more constructive, positive outlook and agree with Dick on his ending note that we should look constructively to what we here can do to forestall the trend away from the promises of autonomy, democracy, and human rights, and I think we can and should and must do a lot. As Dick stressed, Congress has based U.S. policy toward Hong Kong on support for the Joint Declaration’s guarantees, but he also criticized the Clinton Administration for not vigorously supporting these guarantees, and he urged Congress to more forcefully exercise its oversight role. I’ll end with his powerful call for renewed vigor, by all American policymakers, and leaders in monitoring developments in Hong Kong:

It would be a tragedy if, at a time when democracy and the rule of law are gaining ground around the world, Hong Kong’s people, a great many of whom are refugees or descendants of refugees from repression, were to be denied the future they were promised. The United States simply must stand up for the people of Hong Kong. As the strongest and most free nation in the world, our leadership is crucial. It is more than a matter of national interest. It is a matter of national honor.

HONORABLE MS. NG: That was a very rousing speech. As someone from Hong Kong, I’d like to start by expressing my appreciation for the interest that the American people have shown Hong Kong. It is very easy for one to be totally submerged in one’s own interests and one’s own concerns, but to take so much time to understand in such full detail, as Professor Strossen has done, about another people’s problems is something that is to be praised, something that I’m very grateful to see.

Professor Strossen has outlined to you the predicament that Hong Kong people
are in. This morning I shall try not to speak with the excitement that we feel at home, the passion that we feel at home, about defending our autonomy and the rule of law and our rights. This morning I'll try to use a dispassionate voice, not to say what problems we are facing, so much as what we can adhere to in order to protect those rights. And because this morning's conference is going to concentrate on preserving human rights and the rule of law, and as I am a lawyer, a member in Hong Kong's Legislative Council representing lawyers, I shall stick to the rule of law.

I consider sticking to the legal regime in Hong Kong after the 1st of July a very, very important matter because, as lawyers, you would appreciate the dictum: There is no right without remedy. So it is useless for us to talk about rights in very general principles if we do not have the mechanism with which to protect these rights, with which to give remedy when these rights are infringed.

In passing, as the Basic Law is imperfect and Professor Strossen has very powerfully highlighted to you some of these imperfections, as I politely put it, we have to go by what protection there is already in the Basic Law; what is already put in the Basic Law we intend to keep. We intend to keep China to those promises. So I'd like to just say one more thing, and that is there is a lot of attention on the protection of human rights on the ICCPR, on the international mechanism for looking at these rights, and of pointing them out. But to us in Hong Kong, much, much more important is the mechanism in place in Hong Kong that would safeguard the individual's rights from day to day. We are talking about the laws which are going to be enacted in Hong Kong, which have already been enacted in Hong Kong, and the courts which are going to enforce these laws. Without that system and without the democracy which underpins those laws and makes sure that the court has those powers, I think to have human rights organizations or organizations intervene is hardly sufficient because these organizations will only be able to intervene when things have become truly terrible. And we don't want things to develop to that extent.

So first of all, I'd like to pick up on the point that our starting point is the Joint Declaration and the Basic Law which provides that Hong Kong's legal system and laws in force in Hong Kong before 1st of July, 1997, shall remain unchanged. And just to refresh your memory, I would like to read Article 8 which sets out the most fundamental point. Article 8 of the Basic Law says: "The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Now, what is important to note here is that it is all encompassing. Let nobody tell you that the laws in force previously in Hong Kong means the ordinances which were in force in 1984; it said nothing of the sort. It means the common law which is developing; the rule of equity, itself also a life-developing thing; the ordinance says "subordinate legislation and customary law," and it said, "except for any that contravene this law." That is to say, any law which is in force in Hong Kong unless it contravenes the Basic Law shall be in force. So any law, unless you
can show that it contravenes any article of the Basic Law, is in force in Hong Kong.

And, moreover, it says that "except to any amendment by the legislature of Hong Kong"—in other words, the only people who can amend the laws of Hong Kong is the legislature of Hong Kong, and that's very important. The NPC itself cannot amend any law in Hong Kong; even according to the Basic Law it can just say that it is not to be adopted or that it contravenes the Basic Law and send it back to the Hong Kong legislature. It has no authority to amend that law itself.

Equally important is Article 18, and I will also read that one to refresh your memory. Article 18 the first paragraph says: "The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law and the laws enacted by the legislature of the Region." In other words, the legislature of the region shall be the only authority which can enact any law for Hong Kong. It goes on to say: "National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III," and even Annex III, which can be changed from time to time, is limited here, and it says it has to be, "The laws listed therein shall be applied locally by way of promulgation legislation by the Region." And then it further says that, "The Standing Committee of the National People's Congress may add to or delete," but these laws "shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region, as specified by this law."

In other words, even though the list may be changed from time to time and added to, the scope of Annex III of these laws is limited. In other words, it's limited to those relating to defense, foreign affairs, and things which are outside the autonomy of the region. So that makes it very, very clear that the laws of Hong Kong, the legal system, shall remain unchanged.

Now, what does "remaining unchanged" mean to us? It means not only the ordinances but the system of law, and I emphasize particularly one point, and that is the continuity of the common law system with its well-established legal principles. Now, we are accustomed to talking about the ICCPR in recent years, and yet the common law in itself, as its fundamental spirit, protects the liberty of the individual even before the coming into being of the International Conventions. There is within the Basic Law this, from the mental spirit, which is that the freedom, the liberty of the individual has to be protected. There is to be no arbitrary detention, no arbitrary arrest. And that has lasted as long as the common law has existed.

Moreover, equally important, it is inherent in the common law that there are certain things about the law which the executive must not do. You can change a law, you can repeal it, you can enact a new law, but everything has to be done according to due process. Now, this will be emphasized again and again as I go to some of the examples.

When you look at the Basic Law, when you look at Chapter III, there is a list of rights which are protected there, and in Article 39, I think, then it sweeps out by saying that all the rights you have in the ICCPR are protected. But I think you
should notice as you read through the articles in Chapter III on your own that almost every article begins with those rights are to be protected according to the law; that they must not be limited except as stipulated by the law, and "the law" means laws to be enacted by the legislature.

That goes to two points: Firstly, it is important what laws the legislature of Hong Kong is going to enact, and that takes you to what sort of a legislature the Hong Kong SAR is going to have. And, secondly, those laws are to be enforced by the court. So that brings you to the question of what sort of legal system, what sort of court system you will have after the 1st of July, 1997. It is vital to the rule of law in Hong Kong after the 1st of July to ensure that the above is scrupulously maintained; that is to say, what I have read out about the laws and the system of law remain unchanged. And in the months to come we in Hong Kong shall watch very carefully what is going to happen.

Now, people have asked me, "Are people in Hong Kong very scared about the future?" I would say we are equal to anything. Hong Kong is our home. Pessimism or optimism have got nothing to do with what we think about the future. We look at the Basic Law and we ask what we have been asking throughout the time when the Basic Law was being drafted: Are there any loopholes there? Professor Strossen had pointed out to you some of the loopholes, and no doubt, if we have time, we could point out others. But that was the first thing we looked at, and we say even if every article of the Basic Law is obeyed, technically, would our freedom and our rights be compromised? My topic this morning: "Will our system remain unchanged and will our laws remain unchanged?" The answer I fear is that many of us think not.

But more than that our question is: Will China keep to the promises which are in the Basic Law? And that is not a matter of China saying the Basic Law shall not apply as from tomorrow. It is something we have to watch from day to day.

The prospect of Hong Kong's legal regime remaining unchanged is threatened by a number of things China has been doing. Professor Strossen again has very helpfully given you some of the examples in the past, and I will give you some of the recent examples. One example is the unjustified position not to adopt 24 of Hong Kong's ordinances. Now, why are we particularly concerned? Now, it's not just that—and I have to tell you that many of these 24, I believe, are juxtaposed to the numbers because many of them would have become defunct anyway; they're about the British naval force, what would happen to their belongings, things of that kind—but among them are the very substantive ones about the Societies Ordinance, about public order and so on. But the legal profession in Hong Kong is particularly concerned because it could be done without due process.

In other words, firstly, it has not been shown in law how any of this legislation contravenes any of the articles of the Basic Law. That, up to this point, has not been explained to us, and, in fact, some of the explanations are downright wrong. For example, insofar as they have explained anything, the only thing they have explained, for example, is what would happen to the Bill of Rights Ordinance in Hong Kong. The Bill of Rights Ordinance in Hong Kong basically just incorpo-
rates the ICCPR as applicable to Hong Kong. It has one or two preliminary, overall provisions. The one that they say will not be adopted says that ordinances which passed in Hong Kong before the enactment of the Bill of Rights Ordinance shall be read in light of this Ordinance. That is to say, insofar as it can be read consistently with that Ordinance, it will be read that way; insofar as it cannot be read consistently with that Ordinance, it will be impliedly repealed.

And then, secondly, it says that all future legislation shall be construed in light of the ICCPR, not in light of the Ordinance, but in light of the ICCPR, which was incorporated into the Letters Patent which has, as of now, more or less the same status as the Basic Law after the 1st of July.

Now, the reason we are told that has to be scrapped is because that law, that provision, has an overriding status over the other legislation in Hong Kong. Firstly, even if it does, that does not contravene the Basic Law. But, secondly, as lawyers, you know that what I have just told you does nothing of the kind; it merely states a common law principle that later legislation shall be read as impliedly repealed if it is inconsistent with the most recent legislation.

Now, this sort of thing gives the legal profession a lot of worry. Secondly, the earlier suggestion was not just that these laws will be not adopted. It goes on further to say that the old forms will be revived. For example, the Societies Ordinance was amended in 1992. What was not to be adopted was the 1992 amendment, with the result that the unamended version will be revived. There is no provision in Hong Kong law to revive an amended legislation save and except the power of disallowance of the Queen.

So, in other words, we see due process being trampled. Without any explanation, they are recommended not to be adopted. Without telling us how they can revive the previous version of laws, they say, “Well, it’s going to be done anyway.” Then the second example is the more recent one. You must have heard that the Premier has recently made a working report to the NPC. Now, this is about the “provisional legislature.” In Hong Kong, especially the legal professions, keeping away from political controversy, had said that they find no legal basis for the “provisional legislature.”

Now, it is said that the “provisional legislature” will have legitimacy because the NPC has endorsed a report on the work progress of the Preparatory Committee which includes the establishment of the “provisional legislature”. Now, I do not know how that is supposed to give it legitimacy. All we are going to say is if that does give it legitimacy, then we are really in trouble, because if something is previously—what is the polite way of putting it?—if something which has been clearly shown not to have a legal basis, which is wrong, in other words, for all sorts of reasons, can be made right just by the NPC endorsing it, where would we be?

Now, law can only have a forward effect. In other words, you enact that law today and it has effect as of today. What is legal today is legal; what is illegal today is illegal until you change it. If you could change it just like that, and that is to say three months down the road you say something which was illegal three weeks or
three months ago now suddenly becomes legal, do we know any longer what the law is?

Further, here is something, it seems to us that it is all a matter of whim. It depends on whether the NPC is going to say yes or no. Then next time a client comes to you and says, "Well, is this lawful or not," you would have to say, "Well, it depends on what the NPC is going to say tomorrow." And that is utterly unacceptable to people in Hong Kong.

Secondly, if we read the NPC’s endorsement of that working report as simply saying that although the Basic Law is there, the Basic Law could be suspended if a need arises without going into the circumstances of when it is supposed to be necessary, and, secondly, what is going to happen when the Basic Law is suspended. Then, we say, "Well, why are we spending our time trying to study this instrument? Why are we, in spite of the fact that we would prefer Hong Kong to be much more liberal and more autonomous than provided by the Basic Law, why are we trying nonetheless to accept it and to abide by this Law if this Law can simply be set aside when it is inconvenient, when in some undefined circumstances it has become necessary to suspend it?"

So that is why the recent development in the NPC gives us further worries. Further threats are now being posed in the decision of the Preparatory Committee that the "provisional legislature" which has been established in December and is now working, is going to enact laws for the SAR, to come into effect after the 1st of July. This is very worrying to us because at any one time we consider that there is only one legislature for Hong Kong, and we cannot have two legislatures purporting to be functioning.

Now, a very fundamental thing about whether something comes into effect, is that when you pass a law, the law has an effective date. Before that date comes, you can do preparatory work for that law, but you cannot assume power under that law. It is now explained in such a way that even before the Basic Law comes into effect a purported legislature has the power, has the legislative power, to enact laws. Then, it seems to be contradicting one of the very fundamental principles of the legal system we are familiar with in Hong Kong. It is not a matter of when a law comes into effect but when you purport to enact it. So that is an additional problem which we are living with.

Now, before I stop, I shall just briefly point to two things: many people in the United States, much as they are doubtful about what the Chinese government does, are very impressed with our Chief Executive-elect, Mr. C.H. Tung, and they tentatively have a good view of him that he will do the right thing for Hong Kong. Now, I sincerely hope that this trust is well placed because whether or not the "provisional legislature" is going to be enacting laws before it has power to do so depends more on Mr. Tung than on the provisional legislature because the legislature itself does not generate a bill; it is the executive which generates that bill. If Mr. Tung puts a bill in front of that "provisional legislature", that legislature will be invited to enact it. If he doesn’t, then that "provisional legislature" will have no authority to do so because the process could not have begun. So let's watch Mr.
C.H. Tung and see whether he is going to do that.

Further on, Ms. Christine Loh will talk about, I think, Article 158 of the Basic Law, which does things to Hong Kong's jurisdiction in spite of the fact that I think Article 19 of the Basic Law sets that the courts will have the same jurisdiction as they had before. Now, whether the jurisdiction of the court will be severely cut down, will depend on two things. Firstly, it will depend on China's self-restraint; secondly, it will depend on a strong and independent judiciary in Hong Kong. And, later on today, the question of the independence of a judiciary in Hong Kong will be further discussed. Hong Kong is, at this moment, at the brink of appointing the Chief Justice of the Court of Final Appeal and the judges of Courts of Final Appeal. And we are watching this process to see how it is done, to see whether the way it is going to be done will tend to preserve the independence of the judiciary or whether it will be the other way around. And I'm afraid that the rule of law again is bound up with Hong Kong autonomy which is again founded on the elected legislature, because here you see that the legal basis of the "provisional legislature," particularly the legal basis of its enacting or purporting to enact laws before the 1st of July, is likely to be challenged in the Hong Kong courts after the 1st of July.

Now, who is going to be Chief Justice will somehow be linked with that problem, I think, in our minds. So in a way the politicization of the judiciary seems inevitable. I leave that problem with you. That is almost an imponderable problem, but I think I shall stop here. Thank you very much.

HONORABLE MS. LOH: Very often in the Hong Kong Legislative Council I follow the distinguished Ms. Margaret Ng in making speeches, and I always feel extremely inadequate following Margaret. And today I'm not only following Margaret, I'm also following Nadine. So what I shall try to do is not talk about politics, the development of the political process and the "provisional legislature" so much now, because in the afternoon I'll be participating in another session where we will really talk about the future of politics.

What I will say now is if we look at the Joint Declaration, well, it's really a political document. It's a political document between Britain and China to settle the transfer of sovereignty, and for such a political document, well, it sounded quite good and, I guess at the time, back in 1994, myself and many people in Hong Kong, we certainly expressed cautious optimism about this document. And I guess in time it was good that China committed itself to the Joint Declaration, and I guess the question we're asking now is whether it is too good to be true. If we then look at the Basic Law, the Basic Law has much to commend itself for, but it also has all the problems that Nadine and Margaret have spoken about. I guess we needed the Joint Declaration and we need the Basic Law precisely because we are merging two systems within one country where the two systems are fundamentally different in values and in the way things operate.

Since the two systems are so different, I guess we shouldn't be surprised that there are going to be very different and difficult problems to resolve. We should not be surprised that there are conflicts, and we're seeing many conflicts today.
These two very different systems are coming into clashes. We are already seeing them now, and it makes us wonder how these clashes will be resolved, whether they can be resolved after 1997. Let us just take one or two examples to see what these clashes are.

First of all, the Chinese legal tradition that is currently in place in China is a Marxist-Leninist-socialist tradition. In that tradition, the law is regarded as an instrument of the state, so in many ways it makes perfect sense in that system that the state, the executive, would use the law to serve its political purpose. The common law tradition, as Margaret has explained and as you well know, has a fundamental respect for individual liberties, and it places great emphasis on due process.

Now, if we look at the National People's Congress role in Hong Kong's future, we immediately see something that makes perfect sense in a Marxist-Leninist tradition but makes no sense in a common law tradition. What the Basic Law requires is for the Standing Committee of the National People's Congress to really be the final adjudicator, the final interpreter of much of the Basic Law. So it is mandating that a political organ interprets the law. This makes perfect sense in the Marxist-Leninist tradition because they see that the power of the proletariat has been vested in the National People's Congress. However, in the common law tradition, as you well know, this makes no sense because how can a political organ be independent in adjudicating the law?

This is a fundamental clash that Hong Kong and China, in becoming one country, will have to work through. If we look at the issue of the "provisional legislature" I think that offers another interesting example. By Hong Kong's way of looking at things, the "provisional legislature" has no legal basis. In China's way of looking at things, the executive has said it should exist. The law, if used as an instrument of state can do no wrong. What has happened, as Margaret explained, is that it wasn't quite acceptable to Hong Kong. Our leading legal minds and even people who are trusted by China have been bleating all the while to say it isn't quite right. So what we have now is, I guess, a very interesting example of how Hong Kong has already caused its first very public act of indigestion on the Chinese system. Because of all this continuous bleating, both in Hong Kong and overseas, what the National People's Congress has had to do is to openly endorse what the Vice Premier Qian Qichen had in his report. Now, it doesn't get rid of the "provisional legislature," but what it has had to do is to make China, at its highest political organ, make some additional statement and comments.

So I bring this as an example because we are actually seeing the two systems coming into conflict and settling to some solution. Now, this solution is not the solution that Hong Kong would like to see, however, if one looked at how China traditionally dealt with this problem. Traditionally they would have just said, "Well, you know, we don't need to deal with these problems at all." But the fact that they've had to deal with Hong Kong because Hong Kong says, even amongst people very well trusted by them, that it wasn't good enough is the first jolt that Hong Kong is causing in the Chinese system.
How many more of these jolts might there be as these two systems work and merge into one country? If we look at China today, she is passing more laws than ever because she wants to modernize. Because she’s reforming her economic system, she wants to deal with financial services, so she’s had to look at new laws, new ways of doing things. That is certainly an area where Hong Kong has had quite a lot of input in how China is drafting some of her new commercial and trade-related laws.

It is very well that China has these laws, and I think we certainly want to encourage that legislative process to continue. But we know that one day she will also need to look at her judicial process and her enforcement process. Those are going to be very big challenges for the Chinese system. When she will do it, we don’t know, although I think she will have to deal with those problems even within the Chinese polity itself. Whether Hong Kong and whether China’s continuing engagement with the international community through the WTO and other organizations, whether those connections and engagements will push China to look at systemic changes to her system sooner rather than later, I don’t know, but I suspect that these engagements will help to expedite the process somewhat.

Now, for Hong Kong, how do we deal with this problem of a common law system and a Marxist tradition? The Basic Law has one mechanism that proposes to deal with this situation: The Basic Law proposes that there should be a Committee for the Basic Law set up. It should be there by the 1st of July, I guess. It says that there should be a total of twelve members appointed to this committee, six from the mainland and six from Hong Kong. In the areas relating to the interpretation and the amendment of the Basic Law, the Standing Committee of the National People’s Congress should consult the Basic Law committee before coming to a final view. I wonder whether the drafters of the Basic Law were sort of thinking of a compromise because it was precisely because they recognize the very fundamental differences in the values that underpin the two legal systems that made them think that there should be a committee that would advise the National People’s Congress on how to interpret and think about the Basic Law in general.

Now, of course, this committee could be an interesting committee in the sense that Hong Kong will be able to have six members on it. I would certainly like to propose that these six members should be lawyers because, after all, they are making legal suggestions to the NPC, and I guess if the NPC wants to take political positions, they can do it there. So the six members from Hong Kong, I mean, obviously, if the six appointees are going to be distinguished lawyers from Hong Kong, well, that would be good: Distinguished lawyers with good international reputations who stand in high regard within the Hong Kong legal community. I think that would be good. And in times to come when we dare to propose amendments to the Basic Law, I wonder whether we should not argue that, instead of having sort of a 50/50 balance between mainland appointees and Hong Kong appointees, whether we shouldn’t have two-thirds of the members from Hong Kong. These are ideas that we have to work at in the future. But I guess what I’m saying is we can make perfect sense by arguing what this committee should be doing.

The Basic Law doesn’t really tell you exactly how this committee is going to
work, but I think this committee is potentially important. There’s not much talk about this committee either in Hong Kong or internationally at this moment in time, but I’m pretty sure that appointments to this body are probably already being considered by the Chief Executive Designate, and perhaps also by China. There’s only 100 days or so left before this committee will be appointed, and I certainly hope very much that the legal community in Hong Kong will start whipping into action and perhaps putting ideas, terms of references and so on, that are missing in the Basic Law, to the Chief Executive for consideration.

Another point I wish to make is, if we were to imagine that today in America you had the beginning of lawmaking, procedures, and conventions that will determine the relationship between the federal government and states’ governments, let’s say, today is Day One. You have a Constitution that broadly spells out that relationship, but what you don’t have yet are really those details that define that relationship. Well, if you can imagine that, then I’m sure you can already imagine what we need to do to define the relationship between the Hong Kong Special Administrative Region and the Central People’s Government. What is set in the Basic Law, is only a broad framework; we still have to work out perhaps more laws, certainly procedure and convention that will define that relationship. I guess we’re going to have to make it up as we go along. In making up that relationship, much will be determined by how clear-headed and determined Hong Kong will be in constructing a system that will help to preserve the integrity of the Special Administrative Region, which will have a high degree of autonomy.

If we are going to look at establishing these relationships and creating the Special Administrative Region, we are really talking about an act of creation. It is an animal the world has never seen, and I’m pretty sure that the rest of the world would probably, over time, continue to take an interest in Hong Kong precisely because Hong Kong and China will have to labor through this extraordinary relationship that straddles two very fundamentally different legal systems.

I think I will just end by saying that this is an exciting process. It is one that the international community will take an interest in, and it is one where we in Hong Kong will also have to ensure that we, ourselves, know what we are doing in entrenching the rule of law more deeply in Hong Kong and in also instilling broadly in the community the spirit of the rule of law in the common law tradition. How can we do that?

What I would like to propose, for example, is that our leading legal bodies in Hong Kong, the Bar Association, the Law Society, and our three law schools in Hong Kong, that they have a particular role to play in engaging in a range of activities every year over the course of many years to help, for example, young lawyers, young law graduates in Hong Kong to be able to hook into the leading legal minds and the legal thinking around the world so that they can feel inspired about what the law should be. We want to invite legal minds, law graduates, and law professors from the People’s Republic of China to participate in this process.

Constructing seminars and exchanges is very easy. This is what universities and various bodies do all the time. But what I am proposing is that we should
think in Hong Kong about constructing these projects and these programs with very specific objectives in mind. This isn't just another academic conference. This isn't just another exchange program among lawyers. We are doing it because the aim is to engage Hong Kong, is to engage all of the people, including the judiciary, law teachers, law graduates, law students, the profession—engaging everybody in a process, year after year, in instilling in them the spirit of the rule of law.

PROFESSOR JASZI: Thank you all very much. I can hardly imagine a set of presentations better calculated to set up the rest of the day's discussions. Technically, our allotted time is done, but Danny has been nice enough to say that we could encroach a bit on the rest of the day's program for question time. So if you would step to the microphone, identify yourself, and if your question is directed to a particular panelist, so specify.

MR. DOWNS: I'm Chuck Downs, Associate Director of Asian Studies of the American Enterprise Institute. And since I'm first up at the microphone, I'd like to express my personal gratitude to the panelists for casting light on a number of very murky issues today.

But I'd like to take off on a point that Ms. Loh made first about the fundamentally different systems between Hong Kong and the PRC and express a concern that I have that in a lot of the discussions of the Hong Kong situation we very seldom hear the words "private property." And the term "property" is used only twice in the Basic Law, and both times it is used in a way that says that property does not entitle you to any special considerations under the law.

How can the international community gain some feeling of assurance that private property in Hong Kong will be protected after July 1st? I'd like to know how the three panelists view this and whether you think there is reason for assurance. Perhaps it's based on the fact that C.H. Tung must be a man who has a respect for private property; perhaps it's based on Chinese self-restraint and modernization, and new approaches to reform; perhaps it's based on the notion of continuity of laws. But please share with me at least why you think there is reason for assurance on this point.

HONORABLE MS. NG: Can I answer very briefly? Firstly, on the broadest basis, I think that concern was very much present in the minds of people in Hong Kong in 1982-84 when the whole Joint Declaration was being negotiated, and that point was well taken by China. It really tries to assure people in Hong Kong that private property will not be dealt with in a way that it was dealt with in the heydays of communism. So by saying that the socialist system will not be applied to Hong Kong, that is particularly what is targeted; that is, your private property is not going to be confiscated by the state. It will not become state owned.

But I think much more of the guarantee is in the preservation of the present system of law and the present law. I have emphasized the protection for personal liberties in the common law, but you must know, of course, the other strong leg of the common law is private property. Property and liberty are the two feet of the common law. Now, provided that spirit continues, not only in the courts in adjudication, but also in the process of making law, private property is not to be taken
away without compensation. And I think that you know that this is one of the most fundamental presumptions of the law.

I can give you a minute example of what is going on now in the Legislative Council. We are, at the moment, scrutinizing a bill called the Government Rent Bill. You would find that it is a dry kind of thing. I was on the committee because I wanted to make sure that nobody was going to have additional taxation, or rent, on his property without a clear case that the government is entitled to charge that sort of rent.

So that spirit persists, and it is in the small particulars, not only in the general principles. We have the broad general principles, but their protection is in the particulars, in the routine, in every legislation being scrutinized in every case which is to be adjudicated before the law. I do not think we are going to look for a new creature here, as Christine was saying. This is not where we're looking for this new creature. This is where we are looking for the old creature to be given its full power, to have its full power and its full spirit assured.

HONORABLE MS. LOH: Yes. I guess all the people that China are united-fronting at the moment are the biggest property owners, so I guess they're alerted to this need to respect private property.

I was trying to reflect on the Basic Law—this is a new copy, so I can't find anything in it—but the leases run out in Hong Kong, the government will be charging, and it is mandated in the Basic Law, an additional three percent in annual rental to be paid just as a point of information. That means that the Hong Kong government, from this levying of extra taxation, is going to earn another three to four billion Hong Kong dollars a year—you know, a large sum of money, so I guess they want to respect private property.

The last point I want to make is in Hong Kong what we are seeing Chinese enterprises do is, in fact, buying up, or beginning to buy up, key strategic businesses in Hong Kong. For example, they have chosen to buy a large share into Cathay-Pacific. We are likely to see China buying into other major utilities, perhaps power utilities and other companies in the future. So I think the Chinese way of doing this seems to be not just to nationalize it but, perhaps, to consider having to pay for it, which is, of course, much less objectionable.

MR. FELDMAN: My name is Harvey Feldman. I'm Senior Fellow for Asia at the Heritage Foundation. Before that, I was foreign service officer and had the good fortune to live in Hong Kong for eight years.

I don't know if this is really a question; this is perhaps a meditation. This is a conference on rule of law and what we're hearing is that if they violate the Basic Law in their undertakings, we shall take them to court, and then we will dispose of it that way. That sounds nice in theory, but what we have is a situation where what the Basic Law guarantees can easily be amended by whim, as it seems. For example, when Jiang Zi Chen says, "Well, freedom of press, obviously, does not include the freedom to criticize the leadership of the People's Republic of China, or to advocate independence for Tibet, or to discuss the question of Taiwan in terms other than as a province of the People's Republic of China," what we have
is, in effect, amendment of the Basic Law by whim. And I’m not quite sure how you deal with that.

PROFESSOR JASZI: Meditation or question, would anyone like to respond?

HONORABLE MS. LOH: Well, again, I think the Qian statement is a very good example of fundamental conflict. Now, how do you deal with that? Well, in Hong Kong right now, of course, our laws allow us to criticize anyone we like. As Margaret reminded us, if we’re going to have different laws in the future, it would require the Chief Executive representing the administration to put new laws forward to the legislature.

Now, in Hong Kong I wonder whether we are going to see amendments soon to the law where it would say something like this: That the people of Hong Kong will be prohibited from—from criticizing Chinese leaders of a certain rank up. I really don’t know. That would be absolutely ludicrous. So if what we’re going to end up with is no laws of that sort altogether, that the laws that we have in the future would be pretty much the laws that we have today, and, after all, we also have to interpret Article 39 of the Basic Law which allows the ICCPR to continue as they are, and if they are, well, we can say what we like. Or are we just going to continue to have this kind of discussion with China where China expresses outrage and upset with certain statements and criticisms from people in Hong Kong from time to time?

Now, if that is the case where it’s just talk, and we continue to express the differences of the two systems but continue to express some general statement that we recognize the differences, we need to work it out, but actually the laws don’t change, well, that might be one way to go in the future. But I don’t see why that today we already need to make assumptions that our laws will be changed so fundamentally in Hong Kong that these statements would actually be put in laws that we cannot criticize the Chinese leadership. I find that quite difficult to actually digest in my own mind—but perhaps I’m being too optimistic.

MR. FELDMAN: My point is this: You’re arguing that the law will be changed and that unless the law is changed nothing happens. I suggest to you that that’s not the way it’s going to work at all. I suggest to you the way it shall work is that someone shall be arrested and brought forward on a charge of subversion and convicted on a charge of subversion.

HONORABLE MS. LOH: Yes. Well, I can respond to that, too. What it says in the law here is that the SAR shall pass laws to prohibit subversion. That means Hong Kong has to write laws and define for itself what subversion means in Hong Kong. That again requires the Chief Executive to draft laws in some detail to bring them to the legislature for passage.

Margaret and I right now sit on one bills committee where we’re looking at laws of subversion as the British believe that they are acceptable. It requires, basically, some physical act, some physical unlawful act. That’s why I’m saying in Hong Kong, if we are going to have to pass some laws prohibiting certain acts, we still need to define what they are. And what we are suggesting is that Hong Kong would have the same kind of subversion laws or state security laws as they have in
China; that in Hong Kong what we would do is simply duplicate the laws that are in existence in China for us today. Well, I also find that quite extraordinary. I'm not saying it wouldn't happen, but Mr. Tung will have to have tremendous courage to come forward with Chinese legislation for Hong Kong.

HONORABLE MS. NG: I think I'd like to thank this gentleman for his question. That is very much in our minds, you know. I think the short answer to this is not to accept that merely by Jiang Zemin or anybody else saying that this is not allowed, that the Basic Law is changed. I think that that is why the job is not simply one of holding to general principle, but standing up each time where that general principle is in fear of being violated. So we in Hong Kong, the moment Jiang Zemin says such a thing, we say: "Under the Basic Law this is not a crime. We are not restricted from criticizing leaders." When the NPC endorses his working report, we stand up and say, "This does not appear to us to be right. You cannot change the law except by due process, and the process is written in the Basic Law. Unless you are prepared to tear up the Basic Law, and please do so before the whole world, we are going to hold you to it."

That is why when Lu Peng, in one of his pronouncements, said that if someone in America were to advocate the independence of Hawaii that would not be allowed by American law. In fact, he would be arrested. That is against the law. We in Hong Kong stood up and said, "This is not so. Under the common law there is no crime of advocating anything, because there is no such thing as a law of advocating the wrong things."

So we want not only to point out that due process is provided in the Basic Law, we also want to say that it is important to emphasize the continuity of the common law because in the common law we do not just interpret words as the meaning is suggested to us, we interpret them with reference to cases decided. We say that you can't just say because you want to interpret it this way, the words are as you want them to mean. We have a whole case law behind us, and it is very important. And for us in Hong Kong, it goes back to the nitty-gritty of the law which is to say what is the language of the law going to be. If you are going to have Chinese as the language of the law, how do you interpret it once that law is expressed in Chinese?

I mean, let me just say that this is the point I tried to emphasize this morning, and that is that we have to go like the common law; case by case. We have to speak up each and every time it happens, and I hope that when we do this, when we interpret the law in the spirit of the common law, that common law jurisdictions will stand up and say that we are right.

PROFESSOR STROSEN: And I'd like to add from the American perspective, because I was very struck by Christine's, I think, completely apt analogy of the workings out we had to do. We had a wonderful Constitution, I guess analogous to imperfect, as your Basic Law is imperfect, but a lot to start working with that was only worth the paper that it was written on for much of our history.

Specifically, relating to Mr. Feldman's question, as most of the Americans in the audience know, very shortly after our Constitution even had a specific free
speech guarantee added to it through the First Amendment, Congress passed a law that made it a crime to criticize the government. It was called the Alien and Sedition Act and people were convicted under it. In fact, it wasn’t until, sadly, recently in our history that we took a robust view of freedom to criticize government officials. It wasn’t until this century. So it may be, I hope for Hong Kong it’s not, as long a working out.

But I couldn’t agree with you more, and this was a point that Margaret made that what really makes a difference is not only the words they are to work with, but who is enforcing them, what positions are the lawyers taking, is there a strong bar with a commitment to and understanding of human rights, and is there an independent judiciary.

PROFESSOR JASZI: I can hardly imagine a better transition to the next panel, and so we will give way. Thank you so much to our speakers.

ISSUES FACING THE JUDICIARY: MAINTAINING INDEPENDENCE AND THE ROLE OF THE COURTS

DEAN DINNERSTEIN: I think we can all agree, this has been an excellent introduction and kick-off to the conference. This particular panel is entitled “Issues Facing the Judiciary: Maintaining Independence and the Role of the Courts.”

My name is Robert Dinnerstein. I’m one of the Associate Deans for Academic Affairs here at The Washington College of Law, and I want to add my welcome to you as well as that of Peter Jaszi and Danny Bradlow and the deans. How fortunate we are to have you here for this conference.

We have a distinguished panel to address the issues regarding the independence of the judiciary and, of course, the independence of the judiciary in any system is a critical aspect of whether the system will abide by the rule of law and recognize human rights.

Our first speaker will be Professor Nihal Jayawickrama. He is a Professor at the School of Law of Hong Kong University and a noted human rights advocate. Among other things, he is Chairman of the Hong Kong section of the International Commission of Jurists.

Our second speaker will be someone you’ve already met, Margaret Ng, from the Hong Kong Legislative Council. I might point out, in addition to what you’ve already heard about her, that Ms. Ng and Ms. Loh, who you also heard from, have not joined the “provisional legislature” that is in effect, as have 33 of their colleagues of the Legislative Council of 60. So they have not done that.

Our third speaker will be Scott Greathead, an attorney with the law firm of Olwen & Davis, New York City, a founding member of the Lawyers Committee for Human Rights in New York, and probably most relevant for our purposes, a member of a mission that the Association of the New York Bar undertook to Hong

I will now turn it over to the panelists, and at the end we will again try to provide some opportunity for questions. Without further adieu, Professor Jayawardena.

PROFESSOR JAYAWICKRAMA: In the normal course of events, the transfer of sovereignty over Hong Kong would have required the Hong Kong judiciary to adapt itself not only to a life outside the common law world in which it was created and from which it constantly sought nourishment, but also to an environment dominated by concepts and values which were both alien and sometimes even antagonistic to those upon which it was founded. Reference this morning was made by Nadine—or I think it was Margaret—to the fact that the Hong Kong courts will have to seek guidance—not only guidance but even an authoritative pronouncement—from the legislature of China on the interpretation of basic law. It would have been unthinkable in a common law jurisdiction, certainly in Hong Kong, for such an event to occur.

That challenge has been made even more formidable by recent decisions of the Chinese authorities to establish what has already been referred to as, the so-called “provisional legislature” which has as yet no valid legal existence, and also to remove from the Bill of Rights, its operative provisions which do no more than restate principles of the common law. How will the Hong Kong judiciary meet these challenges, considering that in the best of times most Hong Kong judges have not only been very executive-minded but have also demonstrated an intellectual inability to look beyond the common law world, within which they have imprisoned themselves, out into the emerging body of international law that now regulates the treatment of the individual by his government? I am frankly quite skeptical.

Let me identify briefly three issues that are likely to arise: The first is the question of institutional independence. One of the consequences of the transfer of sovereignty is that the Judicial Committee of the Privy Council will cease to be Hong Kong’s Court of Final Appeal. Accordingly, it was agreed in the Joint Declaration that the power of final adjudication will remain in the territory and be vested in a new court to be established in the Hong Kong Special Administrative Region. The Basic Law therefore provided that—and I think I need to refer to that article in the Basic Law, Article 82: “The power of final adjudication of the Hong Kong SAR shall be vested in the Court of Final Appeal of the Region,” mark these words “which means, as required, invites judges from other common law jurisdictions to sit on the Court of Final Appeal.”

In a territory where the legal profession is strong both in quality and in numbers, the unusual provision which enables the Court of Final Appeal to invite on an ad hoc basis judges from other common law jurisdictions to sit on it was advisedly made. Firstly, since the common law is expected to continue operating in Hong Kong despite its integration with China, it was believed that the active participation in the judicial process of sitting judges from other common law juris-
dictions will help to maintain its vibrancy and dynamic nature.

Secondly, it was thought that the confidence of the business sector in Hong Kong's judicial system could be maintained if the courts of the Hong Kong SAR continue to have an international flavor in the form of judges who are not likely to be subject to the pervasive influence of Beijing. What was probably envisaged was that a judge of a court of comparable status would be invited by the Court of Final Appeal to sit and participate in the hearing of an appeal of particular importance or complexity. However, following a secret agreement between the Chinese and British governments in the wake of the Tiananmen massacre—hardly anyone calls it the Tiananmen massacre now, it's the Tiananmen "event," the Tiananmen "incident," but I still like to call it the Tiananmen massacre because that is what it was—it was decided to withdraw the power of invitation from the court and to substitute a power of appointment vested in the chief executive.

That was a fundamental difference because it moved the selection process from the court to the office of the Chief Executive. Accordingly, the Court of Final Appeal Ordinance now provides for a panel of so-called non-permanent judges from common law jurisdictions to be appointed by the Chief Executive on the recommendation of the Judicial Officers' Recommendation Commission. Once appointed, they will rank below the permanent judges of the court, five of them, and another category of non-permanent Hong Kong judges—a category of retired Hong Kong judges, based perhaps on the principle of "jobs for the boys," not provided for in the Joint Declaration or in the Basic Law. They will hold office, these non-permanent judges from abroad, for a term of three years with a possibility of repeated extensions at the discretion of the chief executive. A nonpermanent judge from abroad will be subject to disciplinary control in Hong Kong and may be suspended or dismissed from office by the Chief Executive on the recommendations of a judicial tribunal. Therefore, what is now provided for is the office of a non-permanent judge. Whether on application or by some other process of recruitment, it is expected that judges from other common law jurisdictions, sitting in the highest courts of their country, will be appointed to these offices.

Apart from the fact that serving judges in the courts of final appeal in most common law countries are not permitted by their national constitutions to hold any other office, it is inconceivable that they would either apply to the Hong Kong government for appointment as non-permanent judges or would subject themselves to a process of selection by an administrative body in the Hong Kong SAR. Nor is it conceivable that they would agree to submit themselves to disciplinary control, possibly involving dismissal, by Hong Kong's Chief Executive, thereby placing in jeopardy the security of tenure guaranteed to them by their own national constitutions.

What will probably happen is that judges of lesser courts in common law jurisdictions, state or provincial judges from Canada and Australia, or retired judges who have ceased playing any active role in the development of the common law and who do not themselves enjoy any constitutional guarantee of independence, will begin to vie with each other in seeking employment, even of a non-permanent nature, under the patronage of the future Hong Kong SAR government.
The second issue is one of personal independence and impartiality. Let me refer to just two, perhaps three incidents. In October 1995, in a dramatic departure from the accepted canons of judicial conduct, the then Chief Justice decided to become a secret advisor to the Preliminary Working Committee established by the Chinese authorities, an unofficial advisory body comprising persons from both China and Hong Kong. I say “secret” advisor because his role was not known for several weeks until it was broken in a newspaper story. He reportedly urged one of the members of that committee to repeal the operative provisions of the Bill of Rights. He was then asked to express his views in writing. He reportedly discussed the matter with six of his judicial colleagues, who are as yet unidentified, and drafted a statement that reflected their collective view. That document was circulated to members of the legal sub-group of the Preliminary Working Committee who then decided that the Bill of Rights should be emasculated and that amendments made to six other laws to bring them into conformity with the Bill of Rights should be ignored.

I don’t wish to refer to the Chief Justice’s subsequent conduct, such as his denial that he held any views at all on the Bill of Rights; his denial that he had discussed the subject with anyone at all; or his subsequent admission that he had, but that he later had forgotten about it; his meeting with the Chief Secretary, the head of the executive branch of government in her own office, to explain his conduct; done on his own his press statements setting out reasons why, in his opinion, the Bill of Rights would create chaos in the administration of justice. It is sufficient to point out that his conduct raised very serious questions, not only in the matter of his judgment but also in respect of his independence, his impartiality, and, above all, his integrity.

At about the same time, and again a few days ago here in the United States, another Justice of Appeal who is now being mentioned as being likely to be appointed to the office vacated by the Chief Justice, which is the Office of Chief Justice of the Court of Final Appeal, has echoed the Chinese government’s concerns on the Bill of Rights. According to him, the Bill of Rights had a great adverse impact on criminal law and civil litigation. It weakened the effectiveness of law enforcement agencies in the maintenance of public order. It increased legal fees by creating unprecedented obstacles in legal proceedings. He publicly supported the decision to strip the Bill of Rights of its operative sections.

Yet another Justice of Appeal, who was once mentioned as a likely contender for the Office of Chief Justice, publicly stated immediately before he joined the bench that the Bill of Rights—these are interesting comments he made in articles that he published under his own name—that the Bill of Rights was an “odd document,” with “some bizarre provisions that,” according to him, “burns up much of the fabric of Hong Kong society and tears up much of the fabric of Hong Kong law.” It was, as he called it, “legislation bought off the peg from other countries,” containing “odd concepts and strange prohibitions, sometimes expressed in bad French which left one,” and I quote again, “wholly disoriented.”

Finally, he concluded—he is referring to the Bill of Rights which seeks to incorporate the provisions of the International Covenant on Civil and Political
Rights—that, in his view, "It was similar to the ravings of Adolf Hitler in his bunker during the last days of the Third Reich, and if the general public really sinks its teeth into the text of the Bill and analyzes its impact, there would be a public outcry." He predicted that it would become a port of first asylum for every lawyer whenever a client has a grievance to ventilate. These are three judges before whom matters relating to human rights have come up and at least two of whom will become members of a court which will be the final arbiter of individual liberty in the Hong Kong SAR.

The third issue I wish to refer to relates to the appointment process of judges; in particular the appointment process of the Hong Kong SAR’s Court of Final Appeal. I think reference has already been made to the fact that under the Basic Law the Chief Executive is bound to accept the recommendations of an independent commission before he makes appointments to the highest court. But the present Judicial Service Commission which performs that task now is not on what is commonly described as the “through train.” It will cease to exist on the 30th of June this year. But since the Court of Final Appeal Ordinance becomes operative on the next day, the 1st of July, it is expected that the Chief Justice and the other judges of that highest court will be selected before that date—that is, before the 1st of July.

For that to be done, the members of the future Judicial Service Recommendation Board will also need to be selected before that date. What may, therefore, happen is an intermingling of the two exercises, with the Chief Executive choosing not only the members of the advisory body, but the judges themselves. In fact, the newspapers have already reported discussions which the Chief Executive designate has had with one prospective chief justice.

The second stage of the appointment process is an innovation as far as Hong Kong is concerned, but is perhaps commonplace to today’s audience. The Basic Law requires the appointments of the Chief Justice and the other judges of the Court of Final Appeal to be endorsed by the legislature, by the Legislative Council. In the absence of a duly constituted Legislative Council, that task may well be usurped by the so-called “provisional legislature”. The endorsement procedure, as I said, is something very new to Hong Kong where judicial appointments have always been the exclusive concern of the Executive branch of government. Whatever merit there might be in involving the legislature in the appointment process, a serious problem could arise if the judges of the highest court are to derive their legitimacy from being endorsed by a body whose own legitimacy will almost certainly be the first serious legal and constitutional issue to be raised before them.

These are, as I said, three issues that relate to judicial independence and the role of the courts that are likely to arise in the immediate months following the 1st of July.

HONORABLE MS. NG: Thank you very much. I agreed that my role would be generally to sweep up the elective issues raised by Nihal, and there seems to be very little to sweep up. He certainly has put before you very serious problems.

As a continuation of what I said earlier this morning—which is the importance
of preserving the common law system, the legal system, and the laws in Hong Kong—in the days to come as in the years just past, we are looking very carefully at how the common law system may be damaged. We are looking to risks and dangers and to do something to forestall the destructive effect they may have on Hong Kong's legal system.

Nihal stated some of the challenges, and you can see that the whole idea of having the Court of Final Appeal in Hong Kong is to preserve the legal autonomy of the SAR. And the main point of having the provision whereby the Court of Final Appeal can invite judges of other jurisdictions as required, is for the purpose of keeping Hong Kong's common law jurisdiction alive because Hong Kong is a very small place. Although we have all sorts of cases, we cannot expect to develop the kind of expertise in as many directions as, say, you can find in the privy council. So that provision is so that the Hong Kong common law jurisdiction can be plugged into the common law jurisdiction of the world and, secondly, that the legal system, the court system in Hong Kong, may be transparent, so that it may remain open and transparent from the inside, because it is when people from another jurisdiction come to work in Hong Kong and participate in that work that they can see exactly how independent we are and exactly those principles, those values, that have been traditionally upheld by the common law, that continue to be upheld in Hong Kong.

So when you limit, restrict the channels through which Hong Kong's common law can remain plugged into the common law of the world, then you run some risk of that system, that court system in Hong Kong, becoming diminished in its importance and its liveliness. But once you have that dried up, once you isolate the legal system in Hong Kong, then you can expect that system to become withered. If at the same time you have the strongest influence from across the border, then you stand in some danger of the autonomy of that system being somehow eroded.

Now, Nihal has pointed out to you the danger facing the Court of Final Appeal, and what he pointed out is a very strong, a very blunt way, if I may say so, of interfering, namely, by a breach of the Joint Declaration. But there are actually other ways without reaching the Joint Declaration whereby the system in Hong Kong can also be eroded. Firstly, there is the presence of Article 158 in the Basic Law, and just for those of you who are not familiar with the Basic Law, Article 158 is the one which states the power of interpretation.

As you know, the courts in Hong Kong on every level have the jurisdiction to interpret any part of the law. There is no limitation—it is not that the lower courts can only interpret small, unimportant pieces of legislation whereas only the higher court can interpret important things. And certainly, we don't have such a thing as a constitutional court. Every court can interpret every part of the law. But in Article 158 it's stated: "The power of interpretation of this law shall be vested in the Standing Committee of the National People's Congress." So as far as the Chinese are concerned, because it is the NPC which promulgates this Law, the power of interpretation stays with the NPC, and it is only by delegation from that body that the Hong Kong courts will be allowed to interpret. But their power of
interpretation is limited in this way, in that although the courts of the Hong Kong SAR may also interpret other provisions of this Law in adjudicating cases, under certain circumstances an opinion has to be sought from the NPC. As explained by Christine Loh earlier, when you come to a provision which has to do with matters which are the responsibility of the Central People's Government, or you come to a point which has to do with the relationship between the SAR and the Central Government, then before you come to a final unappealable adjudication, you have to seek an interpretation.

Now, as I tried to hint earlier, exactly how to interfere Article 158 depends upon two things: One is how China is able to refrain from intervening with the judicial process in Hong Kong. Secondly, it depends on how robust the Hong Kong courts are going to be, how robust the judges are going to be, because one of the parties has to make this application to the court at which time it is for the court to decide whether Article 158 is to be invoked. If the court is prepared to intervene every time, then you will see 158 being invoked all the time, and the jurisdiction of the Hong Kong court will diminish to a point that almost all parts of the Basic Law will be interpreted in that way because, as you can see, this is the first time Hong Kong has had a document of this kind.

The Basic Law covers, if you like, every aspect of Hong Kong law. And every aspect can be interpreted loosely in a way having to do with the Central People's Government, or having to do with the relationship between the SAR and the Hong Kong government. Now, if I were before a court like this, I would argue, that it does not really have to be a point under Article 158. But if you have a very weak judiciary, then there are ways of arguing whereby everything will have to do with 158. And that is why the independence, not only the independence, but the robustness of that judiciary, is extremely important.

Now, the other part is that you can see that the Hong Kong court has been a very professional court in that it tries to disassociate itself from politics in the sense of policies of the government. But with the coming into effect of a constitutional document like the Basic Law, you will find that the courts inevitably will be interpreting law in light of policies much more frequently than they would have done before.

Now again, that depends on how self-restrained the judiciary is and how much they are prepared to separate the government from the judiciary. We are already faced with two issues which Nihal has touched on. First, the adjudication, the very likely adjudication, before the court on the legitimacy of the "provisional legislature" itself. The second part, of course, has to do with the rest of the Basic Law.

Now, when you have something like this, how can you have trust in the independence of the judiciary when everyone knows that if this comes up for challenge in the courts, China will not want to hear an answer which says that the "provisional legislature" is illegitimate or without basis in law? Now, before arguments are heard, we can't prejudge the issue. But how can we ensure that at the end of the day when that court makes adjudication, whether it has to do with jurisdiction or whether it has to do with the law, that it is not going to immediately destroy
our faith in the judiciary? I imagine that the only way of doing it is to ensure that the appointment of the judiciary itself is not politicized. And the only way of doing this is to ensure that the members of the committee or the commission which makes these recommendations are completely above question; that their integrity, their professionalism, their independence are totally beyond questioning. And we will await Mr. C.H. Tung to make the appointments to assure us that whatever comes out of that commission will have our trust.

Finally, I want to touch on a point which I assure you is very, very difficult because it goes into even greater detail on some of the things I touched on this morning. So I would just introduce a problem without really going into it. As I was saying this morning, much of the protection we are looking to from the court system and from the legal system is in our reliance on cases or past authorities decided in the common law system. If that goes, then much of the protection of the law which we now have will go. So in what way will that be preserved? It can be preserved only if we stick very closely to the principles already established. But it can be questioned in a very innocuous sort of way by Article 9.

Article 9 is extremely reasonable. It really talks about a language of the government and of the court. It says, "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature, and judiciary of the Hong Kong SAR." Now, you would think that if Hong Kong reverts to China, it is almost natural and perfectly legitimate that Chinese rather than English would be the official language. So what is English doing there? English is there because it is recognized, even by China, that the common law is expressed in English. And the reason why the common law is preserved is in order to preserve the confidence of the international community in the legal system in Hong Kong. So it has to remain in a system which is familiar to the rest of the world. So that is why English is there.

Now, if after the 1st of July, the tendency of the court is to use Chinese in exclusion of English, then firstly, we would further lose the link with the rest of the common law world; and, secondly, we would be left to interpret the law by what the letter of the law suggests rather than by plugging it into all of the case law history. Given Article 9, however the only politically correct thing to do is to replace English with Chinese in court. We are seeing the beginning of some of that being pushed, not as required by the Basic Law, but by the change of political climate in Hong Kong.

Now as I said, I would mention that problem to you because that problem is just developing. So what I'm trying to say is, if you find the legal profession in Hong Kong advocating caution in the greater use of Chinese, especially in the higher courts in Hong Kong, please understand that we are dealing with a very tricky problem. It will be a great thing if we can develop an expression of the common law in the Chinese language, but we have to proceed very slowly. If we go too fast, it will become breathless; then that becomes an instrument for destroying that system. For example, one very immediate effect it will have is to say that you will not allow judges who are not bilingual to sit in a Hong Kong court. When you do that, you will be doing away with quite a large proportion of the le-
MR. GREATHEAD: I come at the situation in Hong Kong from a somewhat
different perspective than my colleagues on this panel. I’m a practicing lawyer in
New York. I’m a litigator with a law firm. My entire professional career has been
spent litigating in the state and federal courts in New York and other jurisdictions
in the United States. As a member of a delegation of the Association of the Bar of
the City of New York, I visited Hong Kong in October of 1995 to examine the is-
sues that relate to the transition to Chinese rule in July of this year. We went be-
cause the New York City Bar Association has a very large presence in Hong
Kong. A large number of New York law firms and a large number of U.S. law
firms maintain offices in Hong Kong, and like New York, Hong Kong is a finan-
cial center and a place of great significance in the world financial community.

We also went because our bar association, like the American Bar Association
and other bar associations in this country, has adopted resolutions committing it-
self to work toward the maintenance of the rule of law in all parts of the world.
Hong Kong’s transition to Chinese rule, of course, presents special problems and
special challenges that we wanted to get a basic understanding of.

I made this trip after spending some time reading press reports in the United
States about the situation in Hong Kong. I have to say that from that perspective,
things looked pretty bad in Hong Kong. For the past few years, the issue of what’s
going to pass after Chinese sovereignty is restored has been the subject of very
bleak reports in the U.S. press.

One that came out just before our trip in 1995 was a cover story in *Fortune*
magazine that announced “The Death of Hong Kong.” A few months later in a
Federal District Court in Massachusetts, in a relatively routine wrongful death
case involving the death of a tourist in the swimming pool of a Hong Kong hotel,
the Hong Kong owners of the hotel, the defendants, moved to dismiss for lack of
jurisdiction and improper venue. The district judge in an opinion denying the
motion to dismiss made the following observation:

> The uncertain future of the Hong Kong legal system, given the island’s reversion
to Chinese sovereignty in less than two years, counsels heavily in favor of juris-
diction [in Massachusetts] to ensure that the Nowaks [the plaintiffs] have the op-
portunity to obtain redress if any be appropriate for the grievous loss they have
suffered.

Before our trip, I also read the basic instruments that are going to govern the
transfer. You’ve heard a lot about them this morning. The first one, of course, is
the Joint Declaration, the agreement between Britain and China that was reached
in 1984, that sets out the basic terms of the transfer. The second principal docu-
ment is the Basic Law that was adopted by the National People’s Congress in
1991. After reading these documents, my attitude changed somewhat. The Joint
Declaration is a very encouraging document to those who are concerned about the
future of the rule of law in Hong Kong. It expressly provides that the basic rights
and freedoms, including those of the person, of speech, of the press, assembly, of
association, of travel, of movement, of correspondence, of strike, of choice of occupation, academic research, and religious belief will be ensured by law after July 1, 1997.

It also provides that the provisions of the two international human rights covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, as applied in Hong Kong, will remain in force. This was impressive to me as a lawyer because I knew that China wasn’t a signatory of either of those documents, and it seemed to me to be a significant concession by the Chinese. My spirits were raised further when I read the Basic Law.

The Basic Law reiterates the basic rights of the Special Administrative Region’s inhabitants that are set out in the Joint Declaration, and it adds more rights to it. It adds freedom from arbitrary arrest, detention or imprisonment and the prohibition of torture, and arbitrary or unlawful deprivation of life. It also reiterates that the two international covenants shall remain in force and shall be implemented by the laws of the Special Administrative Region. This was impressive to me, but as always, the devil is in the details.

You’ve heard a lot about some of the more detailed provisions of the Basic Law that threaten to undercut these basic rights and protections. I’ll only briefly mention two of them: Article 19, which limits the jurisdiction of Hong Kong’s courts to the extent that they deal with acts of state, such as defense and foreign affairs; and Article 158, which vests the ultimate power of interpretation of the Basic Law in the Standing Committee of the National People’s Congress rather than the courts. This, obviously, is a major departure from the notions of an independent court system that we’re used to in the United States, and that British common law jurisdictions are used to.

Article 158 is somewhat mitigated by a clause that requires the National People’s Congress to authorize Hong Kong’s courts to interpret the Basic Law on their own in cases that are within the limits of the Special Administrative Region’s autonomy. But the courts are required to abide by the interpretation of the People’s Congress Standing Committee in cases that concern affairs which are the responsibility of the Central People’s Government or concerning the relationship between the central authorities and the region. This means that Article 19, when read with Article 158 basically gives the Standing Committee the non-reviewable authority to determine what cases fall within the definition of “acts of state,” and thus fall outside the jurisdiction of the SAR’s courts.

While we were in Hong Kong, we met with members of the Legislative Council, with judges, and with leaders of the bar. Hong Kong has a vigorous and energetic bar, about 5,000 lawyers. Four thousand of them are solicitors who belong to the Law Society. The Bar Association, which is comprised of roughly 400 or so barristers, is one of the outstanding bar associations in the world. It is vigorous and energetic and, I think, in the end will be the institution that is likely to be the ultimate safeguard of the rule of law in Hong Kong. This provides us with a degree of cautious optimism about Hong Kong’s future.
I think we all have to agree that the People’s Republic of China has probably one of the worst public relations records of any country in the world. Maybe Za-ire’s is a little worse, but it’s hard to find a country that has done more to raise apprehensions about its intentions than China has done in the last year and a half with respect to Hong Kong.

The first conflict was over the Court of Final Appeals and its composition. I think that is a conflict that is largely laid to rest. There’s not much that can be done about it. While we were there, a lot of lawyers, leaders of the Bar Association and Legislative Council members expressed the concern that the quality of justice in Hong Kong is going to be diminished significantly if only one member of the Court of Final Appeal can come from a foreign common law jurisdiction.

We were sufficiently impressed with the quality of judges and lawyers we met in Hong Kong to feel that probably wasn’t as major an issue as some of the other issues that we heard about. Hong Kong has a number of extremely capable judges. They are not judges whose philosophy we would all agree with, but the Supreme Court of the United States has a few judges whose philosophies are not universally accepted by lawyers in the United States, and we survive it. Ultimately, as others have mentioned, the quality of the justice system in Hong Kong is going to be determined by the independence and willingness of individual judges to carry out their responsibilities fairly and professionally. There are enough qualified judges in Hong Kong to do that to make the need for more than one foreign judge from another common law country to be relatively less urgent.

A bigger problem, of course, is the issue of the Bill of Rights Ordinance. In October 1995, when we were in Hong Kong, the Chinese government announced its intention to repeal several provisions of the Bill of Rights Ordinance that affected national security issues: the ability of the government to regulate the press and freedom of assembly, particularly during times of emergency. They couldn’t have done it in a way that was more calculated to arouse the concerns of those who doubted the intentions of China to carry out its responsibilities under the Basic Law and the Joint Declaration. They consulted no one before they did it. Even their own supporters in Hong Kong were taken back by the announcement of these intentions. We met with Tsang Yok-sing, who is the leader of the principal pro-Beijing party in Hong Kong, and he told our delegation that he thought it was a mistake for the Chinese to be announcing this.

In the end, the future of Hong Kong is going to depend on the willingness of the Chinese government to tolerate what is a very different kind of system. Our delegation’s view that the future of Hong Kong is a case for mild optimism is based on the vigor of its bar, the kind of lawyers that you’ve heard here today, the kind of Legislative Council members who are sitting in the present Legco, people like Christine Loh and Margaret Ng, who may not be sitting in the “provisional legislature” when it is seated on July 1, but I have no doubt will be seated on the first elected legislature of the new Special Administrative Region of Hong Kong. Thank you.

DEAN DINNERSTEIN: We have some time for questions. I would encourage
you to come up to one of the microphones and again, please speak into the micro-
phone and then identify who you are and where you’re from.

PROFESSOR JAYAWICKRAMA: May I just make a comment on the ques-
tion of the Court of Final Appeal and what Mr. Scott Greathead said about it not
being of such great significance that there may not be more than one foreign judge
on the bench. I think it’s not a question of numbers; it’s not a numbers game at
all; it’s very much a question of the courts’ autonomy.

Of course, it’s true that Hong Kong does not need foreign judges. The judicial
expertise is there in Hong Kong’s legal profession. There are more than enough
people who could, with great dignity and acceptability, serve on the highest court.
That’s not the question. It was decided that there will be foreign participation in
the Hong Kong Court of Final Appeal for a completely different reason, and I
mentioned two of them in my presentation.

What is significant is the decision taken to reverse that. It was decided that the
matter of foreign participation shall not be left to the discretion of the court. It
would be decided by the Chief Executive who will appoint these foreign judges.
The whole concept of appointing foreign judges, as I pointed out, meant that
judges of all the highest courts in common law jurisdiction were immediately ex-
cluded because they are not in a position to be appointed to another court. And
that meant, as I said, retired judges being appointed. In fact, one or two retired
judges of other common law jurisdictions have already publicly expressed a will-
ingness to serve on this committee when they were interviewed by the press.

I don’t think it was ever expected or anticipated that that kind of judge
would serve. So it’s not a numbers issue at all. Rather, it is the concept of having some-
body from outside sitting on that court because the court chose to invite that per-
son. That was important. But that was changed, and the Joint Declaration was
perfunctorily violated in that respect.

MR. GREATHEAD: Well, just to respond, it’s highly unusual. I’m not aware
of any other judicial system in the world that provides for, or even permits, for-
earn judges to sit on their highest court. Part of the Hong Kong experience is
based on the fact that appeals always went to the Privy Council, the law Lords in
London. People who practice law in British common law jurisdictions tend to re-
gard the law Lords as somewhere next to God in terms of their judicial com-
petence, and it is undoubtedly, one of, if not the most outstanding judicial body in
the world. Those of us from less exalted legal systems, like the United States, who
have to deal with more mundane judicial bodies like the Supreme Court of the
United States, which is occasionally a very political body, are more modest in our
expectations. I have to say as a foreign lawyer, a U.S. lawyer looking at Hong
Kong, and having met a number of judges in Hong Kong, I came away convinced
that there is a great opportunity for judicial independence just relying on Hong
Kong judges. Certainly with the opportunity to occasionally invite a foreign judge,
there will be even more protection.

What will really determine the independence of Hong Kong’s judicial system is
the selection of the first Court of Final Appeal and the ability and willingness of
the members of that court to stand by their guns when the first issue involving their jurisdiction versus the jurisdiction of Standing Committee of the National People's Congress arises. If they're willing to be expansive and honor the commitments in the Basic Law, then I think Hong Kong's future will be comfortable. But that's going to be very dependent on the political process by which these people are chosen.

HONORABLE MS. NG: Mr. Chairman, I'm sure the audience will forgive me if, as a Hong Kong person, we are passionate about one thing, and that is we always think only the best will do for Hong Kong. And we don't often say, "Oh, that is good enough," because other people are making do with less, less exotic stuff.

But I think, more realistically, we are now talking about how to preserve the present system in Hong Kong. It is all very well that we didn't have to do much before 1997 because the older system is backed up by all the basic systems in England; whether it is the democratic parliament or whether it is the tradition of the Privy Council. Once you become entirely on your own, and you are plugged into the much larger and more powerful systems in China, remaining the same becomes a unique problem. And that is why you need all the equipment that you can get, and why you need to become very open.

You want to invite as many outside judges as you possibly can to preserve that autonomy. That becomes necessary. It's no longer a luxury. All the things which are luxuries to Americans, because you have a very large country and a very large jurisdiction, become dire necessities to people in Hong Kong. You see the kind of process which is beginning to take place in Hong Kong, which was behind why the panel was trimmed to one foreign judge at most. And that is because the argument was: Why do we need foreigners? Aren't Chinese people just as good? I mean, once you have that sort of point in, everything becomes measured on whether it is Chinese, whether the Chinese are good enough. That political consideration would erode quite a lot of things which we have to keep in place if Hong Kong is to stay separate from the main systems in China, and that is why we require that.

But before I stop, I think that one message which I want to put across is that Hong Kong has been able to stay the way it is because of the communications we keep having with different parts of the world—with people like you, with people all over the place.

I hope very much that that communication will remain, because I have been told that people are thinking that after the 1st of July, they will be less happy; people in American firms will be much less happy to litigate in Hong Kong; they would prefer to litigate in the United States. For example, the case that you have just cited, the Holiday Inn case. If I remember that case correctly, what the judge was saying—it was one of these cases deciding on forum—and one of the considerations of Judge Hart was that after the 1st of July, the political situation in Hong Kong, not the judiciary, but the political situation in Hong Kong, will become so uncertain that you won't actually know whether the parties and their witnesses...
But I would say please, please litigate in Hong Kong because it isn’t only by working in Hong Kong, by coming to Hong Kong, by keeping up the communication that you will keep the Hong Kong system alive. Thank you very much.

MR. FELDMAN: Harvey Feldman once again. This is just an answer to Mr. Greathead. Yes, there is at least one other constitution which provides for foreign judges from common law countries, and that is Papua, New Guinea, which commonly has judges from Australia and/or New Zealand and/or Canada sitting on its Supreme Court. Thank you.

MS. ZELDEN: I’m Wendy Zelden from the Library of Congress. First I’d like to thank the panel for their insights. You’ve probably touched on this issue already, but I wondered if you’d elaborate on how the various provisions of the Basic Law, especially Articles 19, 158, and maybe 23, will impact on the jurisdiction of the Court of Final Appeal.

MR. GREATHEAD: I’d like to add a caveat to that. My view of these provisions is that the Hong Kong courts will be relatively independent and free to act up to the point that something arguably involves an act of state. My concern in reading these provisions was what happens when an issue of speech arises. Freedom of speech is guaranteed in the Basic Law. But what if an issue of speech arises that the Standing Committee of the National People’s Congress rules involves facets of national security or some act of state issue. Will that be a case in which the courts’ ability to interpret the Basic Law is restricted and that the Standing Committee’s interpretation will have to prevail?

HONORABLE MS. NG: Yes. In Hong Kong there are different views about the effect of Article 19. The view I prefer is that it makes no change to the jurisdiction of the courts. If you look at Article 19, the middle paragraph says that “The courts of Hong Kong SAR shall have jurisdiction over all cases in the Region except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

Then, it follows on the “act of state.” “Act of state” is a very exalted doctrine in the common law, but there is such a doctrine in the common law. As to exactly what doctrine, it’s rather more difficult to determine, because after all, there are not that many cases. But the way we look at it is that one principle is very clear. There is no act of state as between the sovereign and its subject. This is the rule in the common law, and we in the legal profession, some of us, prefer to think that this is the correct view, that this is the correct way to look at Article 19.

I referred to an earlier version of this Article which makes an act of state itself a means for certification for the Central People’s Government or for the government of the SAR. As you look at it now, it’s different. There are only the facts which are relevant in claiming an act of state that are satisfiable. Whether something is an act of state or not is still the business of the court to decide, and that is why we go back to the same thing, which is the robustness of your judiciary and your ability to preserve the common law, and all the established principles in the common law. So that is what we’re relying on.
PROFESSOR JAYAWICKRAMA: I'm inclined to agree that Article 19 merely restates the legal position as it is today, which is that the courts may determine whether something is an act of state. I don’t think it seeks to change the current legal position. Of course that, as Margaret said, is entirely in the hands of the judges and depends on how vigorously they are prepared to uphold the present legal system or whether they are prepared to yield to pressure from outside.

HONORABLE MS. NG: So if you want to infringe on the freedom of the people in Hong Kong, they are already opening and you are vulnerable because it is arguable. The question is which way are you going to argue? That’s why we need much more than just the letter of the law where the Basic Law is concerned. The Basic Law itself is very encouraging. The question is, how do you interpret it and whether they are going to be adhered to.

DEAN DINNERSTEIN: I want to thank the panelists for a provocative discussion. Thank you very much.

LUNCHEON SPEAKER

PROFESSOR BRADLOW: We’re very fortunate to have as our lunchtime speaker, Congressman John Porter. Congressman Porter is from Illinois. He’s now in his tenth term as a congressman.

During his time in the House of Representatives, he founded and co-chaired the Congressional Human Rights Caucus and is the co-chair of the Congressional Caucus on Hong Kong. He has been actively involved in Hong Kong issues since the early 1980s, and he’s one of the key sponsors of the Hong Kong Reversion Act, which was recently passed by the House of Representatives. Congressman Porter.

CONGRESSMAN PORTER: Dan, thank you very much, and thank you for the opportunity to talk to you while you’re having lunch. And I want to begin by thanking the law school, Human Rights Watch, the Lawyers Committee, and the International Legal Studies Program for sponsoring this conference on Hong Kong.

I had hoped to be able to see Christine Loh who is here, and we are, of course, delighted that she’s here, and what I plan to do is simply to attempt to give my remarks. I have a very bad allergy problem, and my voice may give out. If it does, I’m going to ask Kelley Currie, of my staff at the Congressional Human Rights Caucus to continue. And then we’ll have, as I understand it, a couple minutes for questions if you would like to dialogue a little bit.

I. INTRODUCTION

The return of Hong Kong to the People’s Republic of China and the events leading up to it present incredible challenges to the way of life that the people of
Hong Kong currently enjoy, as well as the institutions that support this way of life. As international attention zooms in to focus on this historic transition, these challenges will play out against a backdrop of international scrutiny and local political intrigue. Since the signing of the Joint Declaration, those who harbor a positive vision of Hong Kong’s future have placed their faith in the institutions and people who have made Hong Kong what it is today. They have done so with good reason: these institutions are strong, stable, and principled; the people are well-educated, innovative, worldly, and highly motivated; and both these institutions and people owe their success to a deeply-rooted rule of law that pervades Hong Kong. For these same reasons I am at once optimistic and concerned about Hong Kong’s future. As long as these people and institutions are functioning properly, there is no doubt that Hong Kong will continue to thrive. Without them the future is much darker.

II. REASONS FOR OPTIMISM

Members of the business community—both here and in Hong Kong—have, by and large, remained optimistic that they will be able to continue to operate in Hong Kong as they have in the past. This optimism stems from the fact that the island’s legal structure fosters economic growth and opportunity, along with their anticipation that these structures will remain in place and remain viable in Hong Kong after the transition. The basis for this belief is that it is in China’s best interest not to “kill the goose that lays the golden egg”—a phrase you hear repeatedly in discussions of the future of Hong Kong. Given the dramatic opening of the mainland Chinese economy in recent years and the benefits that have followed particularly to the ruling elites, I believe that there is reason to believe that the Chinese value the economic freedom of Hong Kong and will try to preserve it. Unfortunately, I am afraid that the Chinese government does not fully appreciate that preserving Hong Kong’s market economy requires that they also preserve liberty and the rule of law.

III. THE IMPORTANCE OF RULE OF LAW AND INSTITUTIONS

We cannot overlook the importance of the rule of law and the institutions that support it in underpinning and protecting the economic success of Hong Kong. The rule of law insures that contracts will be honored, that business secrets can be kept and that the definition of permitted activity does not change at the whim of a government official. Without the rule of law, bribery and corruption will flourish, and those without the necessary “connections” will be left out in the cold. Frequently, the law can be a businessman’s only protection when wronged by unfair dealing in the marketplace. Intellectual property protection is a good example of this, and China’s performance in this arena points out the perils of doing business without the rule of law to fall back on.
A. The Legislative Council

As important as the laws themselves are, who makes and enforces the laws, and how those people are chosen, is equally significant. Laws that are created in an environment of legitimate participation and accountability, and impartially enforced by independent institutions are the foundation for economic prosperity in Hong Kong. This is why the appointment of a non-elected Legislative Council is so problematic. China's decision to appoint an unrepresentative body—outside the scope of the Joint Declaration and ostensibly in response to greater democratization in Hong Kong—sends the wrong signal to the people of Hong Kong and the rest of the world.

1. The Provisional Legislature

After June 30th, the legislature of Hong Kong will consist of a group of individuals who are loyal to, accountable to, and guided by a despotic regime in Beijing, rather than the people of Hong Kong. The importance of this distinction, and the negative impacts it will have on the rule of law system in Hong Kong, cannot be underestimated. This legislature's first impulse will be to figure out, by asking directly if necessary, what China's interests and preferences are when passing laws dealing with matters where Hong Kong is legally mandated to govern itself. My friend, Martin Lee, has termed this phenomenon "bending before the north wind has begun to blow." Unless the goal is to create a Hong Kong that more closely resembles mainland society, this cannot possibly be desirable. China will be given the opportunity, through the backdoor, to influence and control those areas where it is not supposed to have a say. On the other side, the democratic and free impulses of the people of Hong Kong are thwarted. Their wants, needs, desires and inputs are ignored. China could not easily or gracefully accomplish this by force, but by employing patronage, they may have already seriously eroded Hong Kong's autonomy.

The Chinese and their supporters argue that these legislators will listen to the people of Hong Kong because they will have to stand for election, eventually. There are a couple of problems with this argument. The first, is that this body is responsible for creating the laws that will govern these elections. As a politician myself I know how important it is to have your allies involved in areas such as determining electoral districts and eligibility requirements. If you are able to set the rules of the game, your opponent starts out at a disadvantage. Martin Lee has assured me that, in a free and fair election, his Democratic Party and other democrats will win—no problem. But what about an election which is structured to give certain candidates an inherent advantage? That is quite another story.

2. The Future of Democracy in Hong Kong

The other element that concerns me is the "eventual" return of democracy, on China's terms. Admittedly, Britain's decision to extend some measure of democracy to Hong Kong in the aftermath of Tiananmen Square was a mistake—they
were 100 years too late. But by the same token, the people of Hong Kong have been living under the British system of laws and good government for 150 years, and it is this tradition that we have the historical and moral authority to fight for. If the Chinese stick to their part of the Joint Declaration, democracy will return to Hong Kong. But what if they decide there is nothing to gain and no one to stop them if they don’t stick to this part of the deal? The attitude and actions of the United States government, up to this point, do not inspire great confidence in me that we will stand up for democracy in Hong Kong any better than we have in Burma, Indonesia, Nigeria—the list goes on.

B. OTHER INSTITUTIONS

It is also vital that the institutions of Hong Kong—a clean and efficient civil service, independent courts, and a vibrant civil society—be maintained, in order for this promised democracy to be meaningful.

With regard to the civil service, I have great confidence in Anson Chan, as do most people who know her. She will continue to enforce the highest standards in the civil service of Hong Kong, and maintain the integrity of this key institution. C.H. Tung’s decision to retain virtually all of the current civil service leadership, including Anson Chan, also sends a positive message of continuity and credibility for himself and the future of the Hong Kong government. But there is also bad news. There are reports that experienced men and women are leaving the civil service and the police because they are not eager to serve the “future sovereign.” This is something for us to watch.

I am also concerned about the influx of a large number of PRC officials, without clearly defined or identified roles, into the mix of Hong Kong’s government. The Xinhua, or New China News Agency, has served for many years as the major Chinese government presence in Hong Kong. After June 30th, the number of employees at NCNA is expected to increase, and they will be joined by approximately 200 new officers from the Ministry of Foreign Affairs. While about 50 of those have been identified as visa and/or consular officers, the other 150 have no known role. Without letting the imagination run too wild, it is easy to envision these individuals attempting to insert themselves into the governance of Hong Kong—particularly the economic sector as it relates to the mainland. It would be a great loss if mainland style corruption were to seep into Hong Kong’s governmental and economic spheres.

1. Independent Judiciary

The hard-fought concession of having the Court of Final Appeals remain in Hong Kong is of obvious significance to the future of the rule of law. The Chinese do not have much experience with the rule of law and the Chinese courts are far from independent. The mainland judiciary sees itself as an instrument of the Communist party and acts accordingly. Allowing the final decision on legal matters to be made in China would be disastrous for Hong Kong. The implications of preserving the independent judicial review process range from decisions on con-
tract matters to Emily Lau's demonstration permits, to Martin Lee's ability to stand for election, to Han Dong Fang's ability to continue publishing. Beijing has already warned that Hong Kong will no longer be a safe harbor for those fleeing punishment by China for political activities. We must be especially vigilant in monitoring how Hong Kong's courts deal with such cases.

2. Society

In Hong Kong today, there is a wide and flourishing public space for political, cultural, religious, professional and other activities and associations. The people of Hong Kong are generally free to meet with whomever they please and conduct a wide range of activities, without government interference. The reach of many groups in Hong Kong extends far beyond its borders. In addition to being an economic center, Hong Kong is also a leading exporter of ideas and its people are intimately connected to the global village on a personal level. Such activities and exchanges are a critical element of the vibrant community that exists in Hong Kong. In contrast to the present level of openness, senior Chinese officials have called for a return to the draconian colonial laws that require all private societies to have government approval. They have also stated their intention to proscribe organizations from receiving funds from foreign entities. Such changes could affect not only democracy activists, religious organizations and human rights groups, but also the American Chamber of Commerce in Hong Kong and similar organizations.

IV. THE CHIEF EXECUTIVE

Any discussion of Hong Kong's future eventually finds its way to C.H. Tung. There has been a great deal of speculation about the media-shy shipping magnate, and his plans for leading Hong Kong on this journey. When I met with C.H. Tung in January, I told him that I believed he has the toughest job in the world. He must oversee the return of a prosperous, free and healthy prodigal child to the nest of a parent which tends to be unpredictable, irrational, and stifling. This clash of cultures and lifestyles is certain to bring conflict; no one in Hong Kong, even the most optimistic person, believes that there won't be problems. At some point, C.H. will have to decide if he is going to be Beijing's man in Hong Kong or Hong Kong's man in Beijing. I believe that there will be a defining moment in this regard sometime this year or the next, after the transition occurs. How C.H. handles this defining moment will determine much about the future of Hong Kong. There is a saying that some people seek out greatness, and some people have greatness thrust upon them. Greatness is bearing down on C.H., and he can either run from it or embrace it. I hope for his sake, and for Hong Kong's, that he will chose to embrace it.

V. CONCLUSION

I remain "cautiously optimistic" about the future of Hong Kong. Depending on
what China does or says on a given day, I am either more cautious or more optimis-tic. The institutions in Hong Kong have strong roots, and they have good people lead-ing them. C.H. is a decent, thoughtful man who cares about the people and the future of Hong Kong.

Anyone who says they know what is going to happen in Hong Kong in the next couple of years is either lying or crazy. But I am sure of one thing, the people of Hong Kong will find a way to survive and thrive. Like America, it is a place of immigrants, made prosperous by people who came there with nothing but their sharp minds, strong backs and indomitable spirits. I believe that we must stand with the people of Hong Kong and fight with them to protect their way of life—not just because we have strong economic or geo-strategic interests, but because it is the right thing to do. And in the end, I also believe that Hong Kong will change China far more than China changes Hong Kong. Thank You.

MR. FELDMAN: Mr. Porter, I'm Harvey Feldman. I'm a retired ambassador and currently Senior Fellow for Asia at the Heritage Foundation. Sir, you said that we should stand with the people of Hong Kong, and indeed I do believe we should. How do we do that? What should we be doing?

CONGRESSMAN PORTER: It's fascinating that no one in the United States for a long, long time now has paid a great deal of attention to what has been happening in Hong Kong, or indeed has been focused on the date July 1, 1997. Suddenly, the American media has discovered—even though we've been trying to tell them for years—but they have suddenly discovered that Hong Kong is about to transition; that this free, open society, a place ruled by law, is about to come under the domination of a society that is very, very different. And you're seeing today a great deal of interest arising in the American press that will lead to a crescendo, and they will all be there on the evening of June 30th and the morning of July 1st to cover what's going on.

That is also being reflected in the priorities in our administration and in what members of Congress are reflecting, and so what we're seeing now in both the administration and the Congress is a much greater interest in Hong Kong. Presumably, it's been latent all these years and all this time, but now it is beginning to come forward, and I think the fact of a free society coming under the domination of an unfree society by agreement, is probably unprecedented in history, I think it's beginning to capture the imagination of the American people and their government. What can we do?

We can focus public attention on what happens in Hong Kong. That, more than anything, may tend to shape the Chinese response in any given situation. The more the people of the world look on and watch and monitor what is done, the more likely we are going to have rational decisions rather than irrational ones—decent decisions rather than bad ones—the more likely C.H. is going to have a good say-so rather than being dictated as to what should happen from Beijing.

Right now I've introduced legislation, which I had introduced before without much interest, to attempt to protect the right of free speech in Hong Kong and to
say to journalists: "If you're in trouble, you'll have a visa to come to the United States. If you're in trouble because you've written the truth, if you're in trouble because you've written an article about Tibet or Taiwan or something else that the Chinese don't like, don't worry. We'll be able to bring you here if you absolutely have to get out."

Now, this legislation is symbolic. It is simply a message-sending device to say: We're watching what happens to free speech, which is, after all, the most basic freedom that must be preserved, in my judgment, in Hong Kong if they're going to have a viable society and a viable economy continuing in that part of the world. And so it is something that has been introduced for the purpose of getting members of Congress to come together in their concern for Hong Kong. It probably isn't going to pass into law by June 30th, but it is there on the table; it says something both to China and to the people of Hong Kong; it says something to the journalists of Hong Kong, but perhaps more than anything, it says to our people, the people in Congress, and to the administration, there is concern about the future of Hong Kong. We want to focus on what's happening in Hong Kong. We want to keep the light of public opinion in this country and—hopefully in every country in the world, on what happens to the people there.

When I say the people there, I'm not talking about the wealthy people who can go out any time they want—I'm talking about the six million people who fled, many of them or their parents, from mainland China to find freedom and made a huge success of their economy and made a stable society ruled by law. Those are the people I'm concerned with, the ones who can't get out if problems really arise.

HONORABLE MS. NG: Thank you very much, Congressman Porter, for those rousing words. Do you agree with me that the most important thing is not the 1st of July, 1997, but possibly the 1st of July, 1998, 1999, and thereafter, if the difficulty lies in keeping up the interest and seeing what China and Mr. C.H. Tung intends to do about Hong Kong? He has retained the officers right now on the 1st of July, but whether he manages to keep them and keep the civil service functioning in the same mode, in a mode which abides by the rule of law thereafter. Would you agree with me that that is a much more difficult job, which is to maintain interest?

CONGRESSMAN PORTER: I very much agree with you. First of all, in the last three years, I have been urging Time magazine, U.S. News, Newsweek, and others to put Hong Kong on the cover, not on July 1st or just before July 1st, but on the cover now so the people will understand what is about to happen and will be focused on it. Of course, they're not interested. It's got to be topical. And the difficulty is, when July 1st passes, it's topical; it's over. And the media fades away.

I have to say that there haven't been many conferences like this one either, and yet here we are, we're suddenly focused on this thing, and the difficulty is: Will there be a conference like this on July 1, 1998? Will there be a conference like this on July 1, 1999? We would hope that we wouldn't need a conference like this, that everything will have gone smoothly and no problems, and everything is fine.
You’re exactly right, though, the focus has to be, not on July 1, 1997—and this big crescendo of press interest—it’s got to be on every day after that. And what happens on that day and what happens on the next day, and what happens to investor confidence, and what happens to the people, and what happens when you apply for a permit to demonstrate, and what happens if you write an editorial in the local paper that the people in Beijing don’t like, and all the rest. And so, it seems to me, that you’re exactly focused correctly: How do we keep the interest that’s going to build to July 1st there after July 1st and watch every move that goes on in Hong Kong to ensure that the parties live up to the agreement—that China lives up to the agreement.

MR. DOWNS: I’m Chuck Downs from the American Enterprise Institute. A few weeks ago I had an opportunity to talk to an advisor of Governor Patten and ask him: “What could the U.S. Congress do, and what will you be asking the U.S. Congress to do while you’re in town to help facilitate the transition in Hong Kong?”

And, to my surprise, he said, “I think that it’s important that the U.S. maintain FBI links, Interpol membership, and these kinds of law enforcement connections to Hong Kong.” And I think that you, Congressman, in the past, have been supportive of this. I think in the Hong Kong Policy Act of 1992, if I’m right, there are provisions that sort of facilitate the continuation of these law enforcement programs with Hong Kong. But, is this at all challenged by the current atmosphere of concern on Capitol Hill about Chinese alleged influence-buying and espionage? And do you see that as threatening the continuation of ties with Hong Kong, on these law enforcement agencies, after July 1st?

CONGRESSMAN PORTER: Well, you’re exactly right. The piece of significant legislation that was passed was the Hong Kong Policy Act of 1992, which simply follows the British-Sino Accord, and what it leaves to the people of Hong Kong in terms of their autonomy and says that the United States will deal with Hong Kong on a whole range of issues that relate to areas carved out by the Accord for Hong Kong.

The Act that we passed just last week, the Hong Kong Reversion Act, follows up on that, and focuses exactly on the kinds of issues you’re raising now, our continued maintenance of ties to civil institutions in Hong Kong where we have specific concerns. And this, to me, is also part of it. If all of our European friends and the United States—all of the Asian friends together with the United States—if we all follow a pattern that strictly observes the autonomies left to Hong Kong in the Accord and keep those ties together, then obviously we have a much greater chance of forcing China to observe them as well.

I don’t know the answer to your factual question about whether there has been increased activities there that we should be concerned about, but obviously, if we have the institutions and the ties between them, built to deal with these things, and we observe them, then I think it’s going to help a great deal.

Well, you’re very kind to listen to me. I had hoped, originally, to be here this afternoon and been on one of the panels with Christine. Unfortunately, we have
votes in the House of Representatives in that time frame, and I cannot miss them, and so you've been kind to accommodate me and grant me this opportunity to talk with all of you.

You’re focusing on one of the most important human rights issues maybe in the history of human-beings, which will play out before our eyes in the next few months, and on after. And it is terribly important that all people, who are concerned about human rights, remain engaged in this and keep the pressure on to make sure that, in the end, the people of Hong Kong continue to live as free people in a free society. Thanks for listening to me.

ISSUES FACING THE LEGAL PROFESSION, INDEPENDENT MONITORING: THE BASIC LAW AND SUBVERSION, THE BILL OF RIGHTS ORDINANCE, PROSPECTS FOR NGOs

PROFESSOR SHALLECK: I’m Ann Shalleck, from the Washington College of Law where I direct our Women in the Law Program. And we’re starting this next academic year, for the first time, a specialization within that program, gender in the law, in women’s rights. And so, we’re very excited about many of the developments in our international program.

We have a very interesting panel and a very important panel, which I think follows up very nicely on the Congressman’s remarks at lunch. Where the Congressman spoke about the importance, not just of the situation at the moment of transition in Hong Kong, but the importance of the on-going situation year after year. And one of the important pieces of that is, a monitoring piece. And an important part of the monitoring piece is the role of NGOs and the legal profession, as people who can keep track of what’s happening in terms of human rights and then have the various tools at their disposal for addressing issues as they develop.

And our panelists, today, will be able to give us both some background on the role of NGOs and of the legal profession in Hong Kong and the prospects for the future within the legal structure that will exist at the point of transition and the role that those sectors of civil society can play in the protection of human rights.

Our speakers today will be: first, George Edwards, an associate professor at Indiana University School of Law. Before teaching there, he taught for four years in Hong Kong. He taught both at the University of Hong Kong, where he was the associate director of the Center for Comparative and Public Law. He also taught at the City University of Hong Kong and for the Law Society of Hong Kong.

In addition to his extensive work in Hong Kong, he has worked with the U.N. High Commissioner for Refugees in their legal protective divisions. When he was in Hong Kong, he was active in many activities there. Throughout, he’s been doing an enormous amount of writing and speaking about the situation in Hong
Following Professor Edwards, Dinah PoKempner will speak. She’s the Acting General Counsel of Human Rights Watch, where she reviews all of the legal positions and is involved in policy formulation for that very important NGO. In addition to her role in developing legal and policy provisions, she supervises the advocacy of that organization on all international law issues, including work on legal tribunals, international standard setting, legislation drafting, and law reform initiatives.

Obviously, many of those activities are important as we think about the transition in Hong Kong. Much of her focus, while at Human Rights Watch, has been on Asia. And she’s done field research there and has been involved in writing numerous reports and articles.

Following Ms. PoKempner, George Black will be our next speaker. He’s the research and editorial director of the Lawyer’s Committee for Human Rights. He has published several major books on very important human rights issues: on genocide in Iraq, on the Democracy movement in China, and on the U.S. role in Central America and the Caribbean.

In addition to these major works that he has written, he is a frequent contributor to many magazines and newspapers. In addition to his own writing, he edits other people’s writings, which is perhaps more difficult than writing yourself, sometimes.

He was the foreign editor of The Nation. And he was an editor at NACLA. His specialty is in U.S. foreign policy and human rights, and particularly, human rights in China and Hong Kong.

And finally, we will have Nihal Jayawickrama, who’s from the School of Law at Hong Kong University. I won’t introduce him again, since all of you got to hear him speak this morning. Let’s begin with Professor Edwards.

PROFESSOR EDWARDS: Thank you very much Professor. I was asked to address the following question today: Will Hong Kong’s human rights non-governmental organizations (NGOs), that play an instrumental role in the quest for justice and peace in Hong Kong, survive, unencumbered by excessive restrictions, after the People’s Republic of China (PRC) reclaims sovereignty over Hong Kong on 1 July 1997?

To answer that question, I will briefly survey the evolution of human rights NGOs in Hong Kong. I will examine the development of the law, including: the Societies Ordinance, which since 1949 has governed the establishment and operation of Hong Kong NGOs; the Hong Kong Basic Law (also referred to as the “mini-constitution”), which will come into force on 1 July 1997, and which in Article 23 calls for the enactment of certain regulatory legislation post-1997; and other legislation that may affect NGOs after 1997.

To facilitate discussion about the burdens faced by Hong Kong human rights NGOs in the light of the transition, I will construct a typology of the NGOs, based on their membership and focus. To illustrate the challenges, I will highlight a
particular NGO—the Hong Kong Human Rights Monitor—whose work is representative of NGOs that engage in both community service work and domestic and international advocacy. I emphasize freedom of expression and freedom of association, which are both threatened. I will not focus on freedom of assembly, which is also threatened, but which is beyond the scope of today’s presentation.

I. OVERVIEW OF HONG KONG NGO HISTORY: PROBLEMS THAT HUMAN RIGHTS NGOs WILL LIKELY FACE POST 1 JULY 1997

Hong Kong human rights NGOs have shifted from being scarce, narrow, provincial, and unfocused in the early days, to being vibrant, abundant, and internationally astute today. Despite this metamorphosis, a presumption exists within the Hong Kong NGO community today that human rights NGOs will suffer post-July 1997. One need not have a crystal ball to be reasonably assured of this. A clear sign of adversity is that NGOs have already begun to feel the heat, even though more than 100 days remain before the sovereignty change.

The long-standing protection of Hong Kong human rights NGOs—under domestic Ordinances, under international human rights treaties, and under the common law—is deteriorating. Protection under the Societies Ordinance is jeopardized because of PRC attempts to repeal that legislation, particularly the 1992 Amendments to the Societies Ordinance which had been enacted to bring the original 1949 Societies Ordinance into compliance with international human rights norms. Protection under international treaties and the United Nations bodies that monitor them may fail because that protection flows from the United Kingdom’s ratification and extension of the treaties to Hong Kong, and China has failed to demonstrate her commitments to keeping the treaties in force. Finally, NGOs stand to lose protection under the common law, which though pledged to continue in force after 1997, is threatened by the possible erosion of the rule of law in Hong Kong after Hong Kong becomes a Special Administrative Region (HKSAR) of the PRC on 1 July.

Hong Kong NGOs will lose their “guaranteed” freedoms of expression and association. For example, the incoming Administration—which is led by the Chief Executive Designate, Mr. Tung Chee Hwa, who was appointed by Beijing to become the first HKSAR leader—suggests that some human rights NGOs will be deemed “political organizations,” and must, therefore, sever ties with overseas NGOs. Hong Kong NGOs would be denied overseas funding, which has been vital to NGO operations.

The Hong Kong press has been warned that their news reports will be controlled on “sensitive” topics such as Tibet and Taiwan and that they will not be permitted to publish “personal attacks on the Chinese leaders” or put forward “rumors or lies.” The press has begun to refrain from contacting Hong Kong human rights NGOs for comment on controversial human rights, governance, or “political” topics. This self-censorship, which is subtle, would tend to erode the freedom of expression of human rights NGOs. Their voices are being gradually ignored.
The incoming Administration has threatened to require NGOs to seek approval before they engage in public demonstrations or marches. The Government would have authority to vet the content of NGO speech and prohibit protests that do not suit the Government. NGOs will be stripped of their rights to expression and association (and assembly).

NGOs will likely be required to register, after receiving Government approval, before being permitted to operate in Hong Kong. NGOs could be de-listed, at the unbridled discretion of the Government for reasons such as “national security,” which is an undefined amorphous concept. The restrictions could be used to stifle the establishment and operation of NGOs. Hong Kong NGOs will not be able to function effectively because the regulatory environment would be unduly burdensome, with its vetting and pre-approval processes, which could be easily abused and are repressive.

The problems and challenges faced by Hong Kong human rights NGOs are very real, but I posit that the NGOs do not have to continue to be faced with high hurdles now and do not have to languish post-1997. Political will, internal Hong Kong pressure and international persuasion may help prevent some of the crippling restrictions upon Hong Kong human rights NGOs.

Human rights NGOs in Hong Kong are vital to the protection of the human rights of the Hong Kong people, now in the endmost days of British Administration and post-1997. It is only with the efforts of Hong Kong human rights NGOs—as independent mechanisms that can help enhance and maintain the accountability of governmental authorities for their actions—that human rights protection will strengthen in Hong Kong, and not be truncated by the incoming Administration.

II. HISTORY OF HONG KONG HUMAN RIGHTS NGOs AND NGO REGULATION

A. 1949 - Mid-1970s

Before the mid-1970s, human rights in Hong Kong were protected primarily by the common law and by ad hoc provisions in Hong Kong Government Ordinances. Hong Kong Ordinances are enacted by the Governor of Hong Kong with the advice and consent of the Hong Kong Legislative Council, which until recently was fully appointed by the Queen or King of England.

During the 1970s, there was no distinct body of law in Hong Kong known as “human rights law,” and there was a paucity of active human rights NGOs in Hong Kong to promote within the Colony internationally recognized human rights. Hong Kong NGOs were mostly community service oriented, rather than advocacy oriented. The advocacy groups, which at that time confined their efforts primarily to domestic fora, are a principal focus of today’s presentation because those groups have shifted emphasis to the international arena and stand to be greater targets of restrictive post-1997 legislation.
In 1949, the United Kingdom, through the appointed Hong Kong Legislative Council, enacted in Hong Kong the Societies Ordinance, which was implemented to control the creation and operation of Hong Kong societies, including NGOs. Through the Societies Ordinance, the United Kingdom had sought to prevent communist and nationalist forces from operating in Hong Kong in a manner that would adversely affect the Colony. There was fear that Hong Kong would become a base of subversion for pro-Chinese, communist forces, as well as for nationalist forces.

The Societies Ordinance, which was contained in Ordinance No. 28 of 1949, is found at Chapter 151 (1950) of the Laws of Hong Kong. Since 1949, the Societies Ordinance has been amended numerous times, with the more significant modifications occurring in 1957, 1961, and 1992: Societies (Amendment) Ordinances No. 31 of 1957, No. 28 of 1961, and No. 75 of 1992. Before the Societies Ordinance was enacted, Hong Kong people were free to associate with whomever they chose, without restriction, as the case was (and still is) in the United Kingdom.

I refer to the Societies Ordinance and its multiple iterations between 1949 and 1991 as the "pre-1992 legislation" because it represents the widening and tightening of social control imposed on Hong Kong NGOs during the period commencing in 1949 and ending in 1992 with the adoption of liberalized Amendments to the Societies Ordinance.

The pre-1992 legislation required any organization that wished to operate as a society in Hong Kong to apply to the Registrar of Societies (who was the Commissioner of Police) for registration (or for exemption from registration) upon establishment or upon being deemed to be established (Section 5(1)). Pursuant to Section 5(2), the Registrar had the discretion to register the society if he was satisfied that it was established solely for religious, charitable, social, or recreational purposes, or as a rural committee or as a federation or other association of a rural committee (as amended by Ordinance No. 28 of 1961).

The Registrar could refuse to register or to exempt from registration any society on any of the following grounds:

(1) The society was a branch of or was affiliated to or was connected with any organization or group of a political nature established outside of Hong Kong (as amended by Ordinance No. 33 of 1952);

(2) The society was likely to be used for any purpose prejudicial to or incompatible with peace, welfare, or good order in Hong Kong (as amended by Ordinance No. 33 of 1952); or

(3) The constitution or rules of the society did not contain matters as prescribed by the Ordinance or required by the Registrar (as amended by Ordinance No. 28 of 1961).

Furthermore, the Registrar had discretion to cancel the registration or exemption of a society on specified grounds (similar to those in respect of the approval of registration or exemption) and upon failure to otherwise comply with the Ordinance, but the Registrar was required to afford the society an opportunity to be
heard before cancellation (Section 10). Finally, any person aggrieved by a decision of the Registrar could have appealed to the Governor in Council, who had the power to revoke or confirm the decision. The Governor in Council could, at his discretion, order that any exempted or registered society be dissolved where he was satisfied that such society was being used for purposes “prejudicial to or incompatible with peace, welfare or good order in the Colony” (Ordinance No. 28 of 1949, § 16). Appeal was once allowed to the Supreme Court of Hong Kong, but such appeals were later disallowed.

Under the pre-1992 legislation, the Registrar could: enter, with or without force, premises believed to be used as a meeting place for a society; enter any meeting of any society at any time; search the premises and persons present therein or leaving therefrom; demand information about the number and places of all meetings of any society in the six months preceding the request for such information; demand that the society provide the Registrar with a membership list of the society; and demand “such other information as may be prescribed” (Ordinance No. 28 of 1949, § 7(1)(d)). There was no requirement that any action of the Registrar be reasonable.

NGOs fought for many years for the amendment or repeal of this Draconian, colonial legislation, that they deemed burdensome, unnecessary, and contrary to domestic and international human rights law. It was not until many years later—1992—that the pre-1992 oppressive provisions of the legislation were superseded by Ordinance No. 75 of 1992.

**B. LATE 1970s - EARLY 1980s**

The pre-1992 Societies Ordinance was still in place during this period.

On the whole, the 1970s in Hong Kong were times of general political quiescence on human rights promotion and protection issues. However, discourse on human rights issues grew in Hong Kong during the late 1970s, following the United Kingdom’s 1976 ratification of the two human rights Covenants—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—and the concurrent extension of both Covenants to Hong Kong.

The limited domestic human rights protections in Hong Kong were converted, through application of the Covenants, to internationally recognized protections. Human rights in Hong Kong became subject to scrutiny and monitoring by the international community, notably by the United Nations Treaty Bodies. As individuals in Hong Kong became more aware of these new international protections, human rights NGOs in Hong Kong began to blossom, particularly in the international advocacy arena.

In 1978, the United Kingdom submitted to the Human Rights Committee its First Periodic Report on implementation of the ICCPR in Hong Kong. Neither the 1978 report nor the hearings held by the Committee in 1979 on the report attracted much attention from the Hong Kong NGO community. Though the reporting process went virtually unnoticed among NGOs, it marked the beginning
of the robust, ongoing practice of Hong Kong NGO involvement in the United Nations Treaty Body reporting and monitoring process. For example, NGOs became involved with other Treaty Body reports during this period, such as the First Report on Hong Kong under the ICESCR, which was submitted to the UN Economic and Social Council (the predecessor to the Economic Committee) on 13 April 1981. Commentaries by academics involved in the early reporting process include Nihal Jayawickrama, Hong Kong and the International Protection of Human Rights, in *Human Rights in Hong Kong* 120, 134-135 (Raymond Wacks ed., Oxford University Press 1992) and *Andrew Byrnes & Johannes Chan, Public Law and the Human Rights: A Hong Kong Sourcebook* 419 (Butterworths Asia 1993).

By the early 1980s, the United Kingdom and the People’s Republic of China had begun to negotiate the blueprint for the change of sovereignty—the Joint Declaration on the Question of Hong Kong. Hong Kong people became increasingly aware that “1997” was not just an Orwellian fiction that would never arrive, but was real and was rapidly approaching. Consciousness within the community of human rights waxed.

**C. Late 1980s**

A milestone for NGOs in Hong Kong, particularly for international advocacy NGOs, was the submission to the Human Rights Committee of the Second Periodic Report on Hong Kong in May 1988 and the November 1988 hearings on that report. The report and hearings attracted more attention than the ones ten years earlier. Several Hong Kong NGOs submitted comprehensive briefing papers and/or delivered oral briefings to the Human Rights Committee and attended the hearings. Among those groups was the Hong Kong Journalists Association, JUSTICE, and the Professional Lobby Group.

The next milestone, which was unfortunate and tragic, resulted in a surge of human rights activism in Hong Kong, and the epiphany of the vibrant international and domestic advocacy human rights movement in Hong Kong today. On 4 June 1989, in what has become known as the “Tiananmen Square Massacre,” the People’s Republic of China ordered armed troops in Beijing to quell peaceful demonstrations by students who favored democracy in China. The troops opened fire on the masses of students and killed untold thousands of innocent, unarmed civilians. In direct and immediate response to the Tiananmen Square Massacre, Hong Kong human rights NGOs exploded in energy and vibrancy that was unprecedented in Hong Kong.

Hong Kong human rights NGOs began to become more heavily immersed in international advocacy, campaigning furiously before United Nations bodies. Perhaps the first major triumph was before one of the United Nations Charter-based bodies in which many human rights abuse complaints against nations are first officially lodged within the UN system. In the summer of 1989, months after the Tiananmen Square Massacre, advocacy and international political will resulted in the People’s Republic of China becoming the target of a denunciatory resolution.
regarding her human rights practices. Though the resolution was not directly related to Hong Kong, Hong Kong people participated instrumentally in the NGO team that lobbied for the resolution.

D. EARLY 1990s

Hong Kong human rights NGOs had become familiar to the international advocacy process and actively prepared critiques of Government reports and regularly attended UN hearings. In 1990, the Third Periodic Report on Hong Kong to the Human Rights Committee was submitted, followed by hearings in New York in April 1991. Among the human rights NGOs that either submitted comprehensive briefing papers to the Human Rights Committee, attended the hearings, or both, were: JUSTICE, the United Democrats of Hong Kong, the Hong Kong Human Rights Commission (which is in fact an NGO and not a governmental body), the Hong Kong Bar Association, the Hong Kong Journalists Association, the Hong Kong Council of Women, Amnesty International, and the International League for Human Rights.

Other reports that were submitted to UN Treaty Bodies, and for which hearings were held in the early 1990s and in which NGOs became involved, included the United Kingdom’s Tenth Periodic Report to the Race Committee, which was heard at the Race Committee’s March 1991 Session.

In the period between the June 1989 Tiananmen Square Massacre and June 1991—two years later—not only were NGOs inspired by the Human Rights Committee’s consideration of the Third Periodic Report under the ICCPR, but also Hong Kong NGOs were motivated by public debates and discussions about a British-backed Bill of Rights Bill that, as a direct result of the Massacre, had been tabled in the Hong Kong Legislative Council. NGOs were absorbed in the debates and discussions for what became the Bill of Rights Ordinance, which was enacted on 6 June 1991 (and came into effect on 8 June 1991) to “provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.” Among the NGOs involved in Bill of Rights discussions and debates were the Bar Association of Hong Kong, JUSTICE, the Law Society of Hong Kong, the Civic Association of Hong Kong, and the Human Rights Commission.

E. 1992 AMENDMENTS TO THE SOCIETIES ORDINANCE

In 1992, the Draconian, colonial provisions of the pre-1992 Societies Ordinance were superseded in an attempt to bring that Ordinance in line with the Hong Kong Bill of Rights Ordinance and with the ICCPR. The 1992 Amendments are in place today but will not survive the 1 July 1997 handover because the Standing Committee of the National People’s Congress (NPC) of the PRC voted not to adopt the 1992 Amendments as part of the law of the Hong Kong SAR.

Under the 1992 Amendments, the NGO registration requirement was abandoned and replaced by an NGO notification requirement. Organizations are re-
quired to inform the Societies Officer—who, under the pre-1992 legislation, was known as a Registrar, but in both instances is the Commissioner of Police—in writing, of specified particulars, within one month of the date of establishment of an organization or the date that the organization is deemed to be established (Section 5). The notification calls for the name of the organization, its objects, the names of its office bearers, and the address of its principal place of business and every place or premises owned by the society. After notification, the organization is listed on a “list of all societies.” The only restrictions attached to the notification process are that an organization cannot be listed under a particular name if another organization is already listed under that or a similar, confusing or misleading name (Section 9), and notification has to be given within one month of changes in a society’s name, objects, office-bearers, or principal place of business. (Section 10(1)). No requirement exists that a detailed set of objectives be spelled out in the notification. Less opportunity exists for abuse in vetting than there was under the pre-1992 legislation.

Under the 1992 Amendments, the Societies Officer has limited powers to make inquiries of a society, or to take action against an organization. For example, the Societies Officer can ask a society for information about itself or its operations only if the request is reasonably related to the carrying out of the functions of the Societies Officer (Section 15(1)). Though the Societies Officer can still enter a meeting, he may do so only if his entry is reasonably necessary (Sections 31 & 33). If the Societies Officer reasonably believes that the operation or continued operation of a society would be prejudicial to the security of Hong Kong or to public safety or public order, the Societies Officer must notify the Secretary for Security, and may recommend that a prohibition order be published in the Gazette (Section 8). After the prohibition order is gazetted, the society will have an opportunity to be heard before any action is taken against it. It is only after these procedural safeguards have been effected that a society can be de-listed.

Under the 1992 Amendments, any person aggrieved by a decision of the Secretary for Security may appeal to the Governor in Council who may revoke, vary, or confirm the decision (Section 8(7)). Under the 1992 Amendments, the Governor no longer has the power to dissolve societies.

F. POST-1992 AMENDMENTS—INCREASED INTERNATIONAL ADVOCACY

During the period following the 1992 Amendments, the depth and breadth of NGO activity was reinforced. International scrutiny of human rights in Hong Kong heightened, as evidenced, for example by United Nations Treaty Bodies calls for extraordinary hearings on human rights in Hong Kong in light of human rights concerns generated by the impending transfer of sovereignty. These extraordinary reports and hearings primarily focused on issues related to how the Treaty Bodies would be able to monitor treaty implementation in Hong Kong post-1997, after China (a non-party to the UN treaties) resumes sovereignty over Hong Kong.

Between 1992 and March 1997, nearly one dozen reports—including regular
periodic reports and extraordinary reports—have been submitted on behalf of Hong Kong to five United Nations Treaty Bodies, and corresponding hearings have been held on the reports. Among the respective Committees, reports and corresponding hearings are: the Economic, Social and Cultural Committee (two periodic reports, hearings November 1994 and 1996); the Human Rights Committee (one periodic report and one supplementary report, hearings October 1995 and 1996); the Committee Against Torture (one report, hearing November 1995); the Race Committee (one report, hearing March 1996); and the Committee on the Rights of the Child (one report, hearing September 1996).

Hong Kong NGOs were indispensable to the efficacy of the monitoring process, by attending meetings, lobbying, and briefing the Committees with insightful information, for these reports. For example, Hong Kong NGOs worked with the Economic Committee in 1994 when hearings were held on a Periodic Report under the ICESCR. As Professor Andrew Byrnes has pointed out, NGOs began preparing for the hearings months in advance, by establishing an information and action network within the NGO community for the gathering and dissemination of information. NGOs sought to brief the Committee on human rights issues that were of priority to the NGOs and to provide the Committee with information to supplement or complete the information provided in the Government Report. (Will the Government Put its Money Where its Mouth Is? The Verdict of the UN Committee on Economic, Social and Cultural Rights on Hong Kong's Human Rights Record, 25 HONGKONG L. J. 156, 158-160 (1995)).

Hong Kong NGOs traveled to Geneva and made oral presentations and/or written submissions to the Economic Committee on implementation of the Covenant in Hong Kong. NGO participants in Geneva included: the Society for Community Organisation, the Hong Kong Human Rights Commission, JUSTICE, the Hong Kong Committee on Children's Rights, the Constitutional Development Panel of the Hong Kong Legislative Council, and the International League for Human Rights. Written submissions were made by Hong Kong NGOs who did not travel to Geneva, including: the Hong Kong Women’s Coalition, Hong Kong Committee on Children’s Rights, Refugee Concern, the Hong Kong Christian Institute, the Hong Kong Youth Concern Group, Amnesty International, a group of 31 NGOs that submitted a joint statement on one issue, and migrant organizations which wrote about foreign domestic helpers.

Furthermore, regarding various other Hong Kong appearances before UN Treaty Bodies, the Centre for Comparative and Public Law (of the Faculty of Law, University of Hong Kong) has traditionally invited Hong Kong members of various Treaty Bodies following publication of particular Hong Kong periodic reports and before hearings on them. The Centre sponsors public seminars on issues related to human rights and respective treaties. NGOs actively participate as seminar panelists, engage Committee members in discussions, and accompany Committee members into the field—to prisons, refugee detention centers, cage homes, the courts, etc.—to talk to victims of human rights abuses, to listen to concerned members of the public, and to talk to government officials.

Professor Peter Burns, who is a member of the United Nations Committee
Against Torture and who in October 1995 visited Hong Kong at the invitation of the Centre, stressed, in his presentation, the importance of such visits by Committee members and further explained that the Torture Committee "finds the materials supplied to it by NGOs to be of the most vital significance. "... Specifically directed NGO material related to the particular country that we are dealing with has provided us with the most useful check against the information contained in the government report. Without that, I suspect we just could not function effectively at all."

In October 1995, the Human Rights Committee held hearings in Geneva on the United Kingdom’s Fourth Periodic Report on Hong Kong. The following NGOs attended the hearings: the United Ants, the Hong Kong Human Rights Commission, the Hong Kong Human Rights Monitor, the Hong Kong Bar Association, the Hong Kong Journalist Association, JUSTICE, and the Democratic Party of Hong Kong. Representatives of the Centre for Comparative and Public Law of the University of Hong Kong Faculty of Law attended the hearings, and presented to the Committee submissions made by several Hong Kong human rights NGOs who were unable to travel to Geneva for the hearings. In October 1996, the Human Rights Committee held hearings on a United Kingdom Supplemental (Extraordinary) Report to the Fourth Periodic Report on Hong Kong. The same NGOs attended those hearings, and the Centre played a role similar to its role in the previous Human Rights Committee monitoring proceedings.

Domestic NGO service work and domestic advocacy had increased dramatically by this time, along with international advocacy. NGOs grew. Receipts of contributions from overseas sources grew. NGO lobbying and briefing of foreign governments grew, as did lobbying and briefing of inter-governmental organizations, such as the United Nations.

Domestic advocacy constituted an important element of the efforts of NGOs. Many NGOs became more heavily involved in lobbying the Executive and Legislative Branches of the Hong Kong Government (meetings with Government Departments and Branches, meetings with the Governor, testifying before Legislative Council panels, etc.). Some groups became more involved with the Judiciary (by, for example, working on judicial proceedings involving human rights issues, such as immigration claims). Service work also increased.

Generally, among NGOs there was an immensely heightened political awareness, which coincided with increased enfranchisement within the Hong Kong community. Enfranchisement had been slow in coming to Hong Kong. Until 1991, all Hong Kong Legislative Council members were appointed by the Governor of Hong Kong, who in turn was appointed by the British monarch. Democratic elections were held for a portion of the 60 seats in the Hong Kong Legislative Council then and by 1995, all 60 members were elected.

There was a boost in organized training in international human rights law within the NGO community. For example, in April 1994, a three day human rights advocacy training workshop was conducted at the Faculty of Law, University of Hong Kong. Trainers were academics and NGO workers from the United
Kingdom, Hong Kong, India, and Australia. Participants in the session hailed primarily from Macau and Hong Kong. A similar large-scale workshop is scheduled for June 1997 in Hong Kong. This training helps inform Hong Kong people of their rights, and inform them of the role they can play in ensuring the continued protection of those rights, particularly through international advocacy.

Finally, motivation was spurred by a lack of trust in China. What would prevent the Tiananmen Square Massacre from being re-enacted at Statue Square in downtown Hong Kong, after 1 July 1997?

There was a shift in culture and tradition among Hong Kong people. Quiescence turned to activism in magnitudes theretofore unheard of in Hong Kong. The threat of retrenched civil and political liberties in Hong Kong was sufficient to start ablaze a new human rights NGO campaign.

III. THE VIBRANCY OF NGOs IN HONG KONG TODAY

Today, a wealth of Hong Kong-based NGOs focuses its efforts on the promotion and protection of human rights in Hong Kong. I categorize the NGOs into several discrete yet overlapping groups, based loosely on the composition of the NGOs, their mandates, their activities, and their general nature. It is difficult to formulate a coherent structure that will sustain rigorous scrutiny, in which to pigeonhole the NGOs. I intend for the typology merely to serve as a general map that can be referred to for convenience by persons who wish to gain general familiarity with Hong Kong human rights NGOs. The grouping may offer insights into, and facilitate discussion about, the sorts of difficulties that NGOs have experienced in the lead up to 1997, and the encumbrances that they will likely face post-1997. All NGOs are at risk post-1997, whether they are groups that engage primarily in community service, groups that engage primarily in domestic or international advocacy, or, as in the case of most NGOs, groups that engage in both service and advocacy.

My list is not exhaustive. It reflects only some of the NGOs and NGO types that operate in Hong Kong. My failure to mention any NGO or NGO type is either an oversight, for which I assume full responsibility, or is purposeful because of my view that the absent organization or type of organization is subsumed, and therefore represented within one of the listed categories. Likewise, my inclusion of a group or groups in this categorizing does not suggest that those groups would categorize themselves in the same manner, or that they would even consider themselves to be “Hong Kong human rights NGOs.”

I draw the following categories of groups:

(A) Grassroots NGOs;
(B) Multi-ethnic Advocacy Groups;
(C) Non-Local (Expatriate) Special Interest Groups;
(D) Regional Human Rights Groups that Focus on Asian Issues;
(E) Labor Groups;
(F) Other Law-Oriented Groups;
(G) Globally Focused Overseas NGOs with a Physical Presence in Hong Kong;
Globally Focused Overseas NGOs without a Physical Presence in Hong Kong that Focus on Hong Kong Issues;
(I) Other Hong Kong Special Interest Groups;
(J) Other Local Groups;
(K) Gay and Lesbian Groups;
(L) Refugee Groups;
(M) Cultural and Social Rights Groups;
(N) Religious groups;
(O) Alliances of NGOs on Specific Issues; and
(P) Women’s Groups.

These groups, some of which are registered under the Societies Ordinances and others of which are registered under other Ordinances, such as the Companies Ordinance, tend to overlap in the areas of their work, their mode of operations, their mandates/remits, their scope, their membership, and even their facilities.

A. GRASSROOTS NGOs

There exists a host of “grassroots” organizations based in Hong Kong that primarily provide services to the Hong Kong community. Some of these groups perform social work services for the homeless and the aged and in the area of health. Though some of their work may be advocacy-oriented (both domestically and internationally focused), most of it is service.

The Society for Community Organisation was established in 1976 to help the poor and disadvantaged, particularly in the area of housing. SOCO combines community organizing with human rights monitoring and education, and publishes occasional reports.

The July 1st Link is an umbrella group that was created in 1995 by eight Christian NGOs to monitor issues related to the transfer of sovereignty on 1 July 1997. July 1st Link publishes a bi-monthly newsletter and organizes workshops and conferences.

The Hong Kong Welfare Society is a charitable organization that provides a wide range of services for families, including family counseling, clinical psychological services, family life education, home help service, family aide service, foster care service, school social work, services for single parent families, and services for people suffering mild mental health problems.

A distinguishing characteristic of these groups is that they are comprised almost exclusively of Hong Kong Chinese, who do not hold overseas passports and who do not have the right of abode in any country or territory outside of Hong Kong. Persons who fall into this category are destined to remain in Hong Kong after the change of sovereignty, for they have no place else to go.
This is significant because, though they may not be at risk because of their advocacy, they may be at risk because they, as groups, are subject to the regulatory whim of the incoming Administration. The members of the groups, as individuals with no right to leave Hong Kong, are themselves subject to the whim of the incoming Administration, more so than individuals who have the right to leave Hong Kong if the political climate becomes unbearable.

On the one hand, grassroots groups have more obstacles to advocacy, particularly of a controversial nature, and may need to pay a higher price, because of possible personal or group repercussions. Such self-censorship is often a goal of repressive regimes. On the other hand, the grassroots organizations may be more formidable because, for example, of a commitment born out of attachment to their culture or their way of life.

B. MULTI-ETHNIC ADVOCACY GROUPS

These groups, which I label "Multi-Ethnic, Advocacy Groups," are comprised partially of local ethnic Chinese, but mostly of a mix of foreign nationals, including American, Filipino, Australian, Canadian, Indian, European, etc. These groups, which include the Hong Kong Human Rights Monitor (which I discuss in more detail later), are few, and tend to focus on a wide range of Hong Kong human rights issues that they raise in the advocacy context in domestic and international arenas. On a lesser front, they also engage in community service work.

Domestically, they raise issues within the Legislative Branch, the Executive Branch, and the Judicial Branch. Internationally, these groups engage in extensive overseas lobbying and briefing. For example, they lobby/brief and receive financial assistance from intergovernmental institutions such as the United Nations (both the Treaty and the Charter-based bodies) and the European Union. Furthermore, they lobby/brief individual foreign governments, such as the United States of America, Australia, Canada, and New Zealand, and, of course, they have launched intensive advocacy efforts in the United Kingdom.

Members of the multi-ethnic groups tend to have acquired more years of formal higher education than members of other groups, with more members in the professions such as solicitors and barristers (lawyers) and law-makers (Legislative Council members). Again, membership in multi-ethnic groups overlaps with the grassroots groups. Often, for example, local Chinese members of the multi-ethnic groups will also be members of one or more grassroots groups.

C. NON-LOCAL (EXPATRIATE) SPECIAL INTEREST GROUPS

These groups tend to be comprised of expatriates, who campaign for specific rights, applicable to them in Hong Kong, that are common to the group. These groups include supporters of rights for foreign domestic helpers in Hong Kong, such as: the Mission for Migrant Workers; Friends of Thai in Hong Kong; Helpers for Domestic Helpers; Kaibigan (Friends of Filipino Migrant Workers); and the multitudinous other Foreign Domestic Helper NGOs comprised mostly of Fili-
Among these groups is the United Filipinos in Hong Kong, which is an umbrella group for more than 20 Filipino groups with different missions related to social welfare and social services, fellowship, socialization, charity, and religion. These groups stand threatened because they are primarily comprised of expatriates who have no right of abode rendering their immigration/visa status precarious, and because their issues sometimes include sensitive points of Hong Kong law and policy.

D. REGIONAL HUMAN RIGHTS GROUPS THAT FOCUS ON ASIAN ISSUES

There are many NGOs based in Hong Kong that are comprised of mainly multi-ethnic persons but that focus primarily on Regional/Asian issues, rather than on Hong Kong issues. These NGOs include the Asian Monitor Resources Centre (AMRC), the Asian Migrant Workers Centre (AMWC), the Asian Domestic Workers Union (ADWU), the Asian Center for the Progress of Peoples, the Asian Regional Exchange for New Alternatives (ARENA), the Asian Pacific Mission for Migrant Filipinos (APMMF), and Documentation for Action Groups in Asia (DAGA).

Also within this group is the Asian Human Rights Commission (AHRC), which is an independent NGO that promotes awareness and realization of human rights within Asia and mobilizes Asian and international public opinion to obtain relief and redress for victims of human rights violations. The AHRC focuses on civil, political, economic, social, and cultural rights, and the right to development. Its Regional scope covers Cambodia, India, Burma, South Korea, Indonesia, Malaysia, Australia, Bangladesh, Bhutan, Hong Kong, and Thailand.

These groups are jeopardized, but perhaps not as much as some of the other groups. There is a concern because most of their members are expatriates whose immigration status could be compromised. However, this concern is tempered because the issues these groups tend to concentrate on are not Hong Kong human rights issues, making them less threatening to the incoming Administration.

E. LABOR GROUPS

Approximately 20% of the Hong Kong workforce belongs to a trade union or organization. There are three principal factions of such groups: (1) the pro-Beijing affiliated unions in the Federation of Trade Unions, (2) the pro-Taiwan Hong Kong and Kowloon Trade Union Council, and (3) the Hong Kong Confederation of Trade Unions, which is not aligned with China or Taiwan. Thirty-six percent of labor organizations are unaffiliated to any of the three.

Labor groups have been heavily involved in advocacy, and they are at risk post-1997. They will be adversely affected by the Societies Ordinance and Article 23 of the Basic Law even though a separate legislative regime is in place to govern trade unions. The Trade Union Ordinance imposes upon unions a compulsory registration process. The Registrar of Trade Unions has the power to monitor union activities through supervision of union rulebooks, accounts, and related pa-
pers. The Registrar even has the authority to monitor the administration of trade unions. Furthermore, the right of workers to organize is restricted by the Trade Union Ordinance, which is deemed by some labor groups to be so burdensome that they opt to register under the Societies Ordinance or other Ordinances rather than the Trade Union Ordinance.

F. OTHER LAW-ORIENTED GROUPS

These groups, some of which are multi-ethnic in mix, others of which are predominantly ethnic Chinese, are comprised primarily of members of the legal profession. Their advocacy tends to be both local and international in focus. Among these groups are JUSTICE, which is the local branch of the International Commission of Jurists (which is an international organization based in Geneva with local affiliate chapters around the globe), the Hong Kong Bar Association (comprised of Hong Kong barristers), and the Law Society of Hong Kong (comprised of Hong Kong solicitors). All of these groups have been actively involved in community human rights service, as well as in lobbying/briefing the three Branches of the Hong Kong Government and, to a degree, in lobbying/briefing United Nations Treaty Bodies and other international bodies.

G. GLOBALLY FOCUSED NGOs WITH A PHYSICAL PRESENCE IN HONG KONG

Several globally focused NGOs have a physical presence in Hong Kong—much like a branch office—that focus on China and/or Hong Kong human rights concerns. These organizations include Amnesty International (Hong Kong Branch) and Human Rights Watch/Asia. Each has a physical office with staff in Hong Kong.

Amnesty International (United Kingdom), which is the parent organization of Amnesty International (Hong Kong Branch), works on behalf of prisoners of conscience, irrespective of belief, and for the human rights of political prisoners, including their right to a fair trial. Furthermore, it advocates the right to be free from torture and ill treatment and for abolition of the death penalty for all prisoners. Amnesty International (Hong Kong Branch) does not focus on individual human rights cases in Hong Kong but focuses to a larger extent on institutional framework Hong Kong human rights issues and on human rights in China and elsewhere.

Human Rights Watch/New York, which is the parent of Human Rights Watch/Asia, was established in 1978 to monitor and to promote internationally recognized human rights globally. In Hong Kong, Human Rights Watch/Asia tends to concentrate on human rights in Hong Kong and in China.

Thus, both Amnesty International and Human Rights Watch strive to focus international attention on the human rights scene in Hong Kong and China. They provide information on existing human rights situations, and they center their work on abuses, legislation, and practices. Both organizations issue press releases, and they advocate before domestic and international tribunals in Hong Kong and
China. These organizations are in jeopardy because they will more likely be deemed "political" organizations and because they will likely be considered thorns in the side of the incoming Administration.

H. GLOBALLY FOCUSED NGOs WITHOUT A PHYSICAL PRESENCE IN HONG KONG THAT FOCUS ON HONG KONG ISSUES

These groups, such as the New York-based Lawyers Committee for Human Rights, have headquarters overseas but engage in significant advocacy and other human rights work related to Hong Kong and China. The Lawyers Committee, which since 1978 has focused its programs on building the legal institutions and structures that guarantee rights long-term, sends missions to Hong Kong and China to collect human rights data and to participate in the advocacy process. Groups such as these are at risk because of the nature of their work, but their exposure is less because they do not have a permanent physical presence in Hong Kong.

I. OTHER HONG KONG SPECIAL INTEREST NGOs

Many other special interest NGOs operate in Hong Kong. Among those are international advocacy groups such as Article 19, which is a United Kingdom-based NGO that focuses on freedom of expression. This NGO takes its name and mandate from Article 19 of the Universal Declaration on Human Rights, which proclaims the fundamental right to freedom of expression. Also included is the Hong Kong Journalist Association (HKJA), that focuses on freedom of expression. The HKJA, which was established in 1968, monitors freedom of the press and works on cases of individual journalists in trouble because of their work. It publishes two quarterly newsletters—Journalist and On the Record—and publishes annual reports on freedom of expression issues. The HKJA is registered as a trade union for journalists in Hong Kong and has been active in human rights advocacy in the international arena for many years. It works closely with the NGO Article 19, with whom it publishes joint Annual Reports.

Also included in these groups is the Asian Resources Group, comprised mostly of Indians and other South Asians who were longtime residents of Hong Kong who would have become stateless after 1997 because they did not qualify for Hong Kong Special Administrative Region or British passports. Early in 1997, following heavy NGO campaigning, the United Kingdom government confirmed that Asians who would otherwise have become stateless would be granted full United Kingdom citizenship.

Also included among these groups is the People's Council on Public Housing Policy.

J. OTHER LOCAL GROUPS

A multitude of other local Hong Kong NGOs exist. Most of these groups are comprised primarily of ethnic Chinese. Among these groups are the Hong Kong
Human Rights Commission, the United Ants, MAD (Movement Against Discrimination), Against Child Abuse, the Friends of the Earth, the Council on Smoking and Health, the Hong Kong Development and Strategic Research Centre, the Joint Council for the Physically and Mentally Handicapped, the Humanist Association of Hong Kong, the Hong Kong Temporary Housing Area Joint District Residents Committee, the University of Democracy, and the Professional Teachers Union.

The Hong Kong Human Rights Commission was founded in 1988 as a consortium of 10 NGOs that represent interests of labor, women, religion, the poor, communities, and students. The Commission focuses on rights monitoring and human rights education, and it publishes occasional reports and educational materials. The Commission has been heavily involved in the monitoring and reporting processes of the United Nations Treaty Bodies that oversee implementation in Hong Kong of UN human rights treaties.

The United Ants advocates for the abolishment of functional constituencies in the electoral process in Hong Kong. MAD struggles against discrimination. Against Child Abuse campaigns for children’s rights. Friends of the Earth is concerned with the environment. The Council on Smoking and Health focuses on tobacco-related issues. The Hong Kong Development and Strategic Research Centre aims to enhance public participation in public policy deliberations. The Joint Council for the Physically and Mentally Handicapped is concerned with rights of the disabled. The Humanist Society, which was founded in 1984, seeks to humanize the social and political situation of Hong Kong. The Hong Kong Temporary Housing Area Joint District Residents Committee, which is set up by residents of Temporary Housing Areas in Hong Kong, is concerned with government policies affecting THAs, and the right to adequate housing. The University of Democracy is an educational organization established after the Tiananmen Square Massacre to explore, in a public manner, China’s way of democratization. Its goals include dissemination of democratic ideas via various means to promote democratic education and practices.

One local group, the Professional Teachers Union (PTU), is particularly influential and effective. It is the wealthiest of the pro-democracy NGOs in Hong Kong, and through revenues from the operation of two supermarkets, provides support to many smaller NGOs. The PTU provides venues for press conferences and loans chairs, tables, and loudhailers to other groups. The PTU makes its staff available to facilitate NGO alliance activities.

K. GAY AND LESBIAN GROUPS

There is an increasing number of Gay and Lesbian Groups in Hong Kong that have been struggling in recent years for, inter alia, legislation prohibiting discrimination based on sexual orientation. Some of the groups are comprised of predominantly local Chinese, others are predominantly expatriate, and others are of mixed local and overseas membership. However, their missions converge—equality for all, and non-discrimination based on sexuality. Among these organiza-
tions are the Hong Kong 10% Club, Freemen, Isvara, the Long Yang Club, the Satsanga, Horizons, and the Hong Kong Gay Coalition.

L. REFUGEE GROUPS

These groups include those that campaign for internationally recognized human rights of refugees, primarily the Vietnamese asylum seekers who reside in Hong Kong. These groups often provide legal representation to the asylum seekers in domestic and other tribunals and provide other assistance. These groups include Refugee Concern and Legal Assistance for Vietnamese Asylum Seekers.

M. CULTURAL AND SOCIAL RIGHTS GROUPS

These groups include Zuni Icosahedron, which struggles for rights in the area of culture, and other groups that campaign for language rights and other similar rights.

N. RELIGIOUS GROUPS

Religious groups include the Justice & Peace Commission of the Hong Kong Catholic Diocese, the Christian Conference on Asia/Urban Rural Mission (CCC-URM), the Diocesan Pastoral Centre for Filipinos, and the Hong Kong Christian Institute.

Furthermore, there is the Hong Kong's Women Christian Council, which was founded in 1988. It seeks equality for women within the established church and in society. It publishes a newsletter and other publications. Of course, this group might be categorized under "Women's Groups," which I mention later.

O. ALLIANCES OF NGOs ON SPECIFIC ISSUES

Alliances of NGOs on specific issues typically form in response to controversial issues, as they arise. The alliances tend to wane when they achieve their goals regarding the specific issues of concern, when the alliances are no longer able to command sustained media attention, or when it is deemed that there are other mechanisms available to achieve their goals. Alliances have included the Joint Alliance of People's Organizations Striving for Democracy (JAPOD), Full Democracy in '95, Joint Action for the Release of Xi Yang (a Hong Kong journalist who was convicted in a PRC for publishing PRC government "state secrets"), and the Hong Kong Alliance for Human Rights. One of the alliances—the Hong Kong Alliance in Support of Patriotic and Democratic Movement in China—is one of the most targeted groups and is at great risk.

P. WOMEN'S GROUPS

Women's groups include the Hong Kong Women's Christian Council, Hong Kong Women's Coalition for Equal Opportunities, and the Hong Kong Association of Business and Professional Women. These and other women's groups ac-
III. Activists campaign for equal opportunities legislation, freedom from discrimination, and other human rights concerns in a wide range of areas.

IV. HOW THESE NGOs MAY BE AFFECTED BY THE CHANGE OF SOVEREIGNTY: THE HONG KONG HUMAN RIGHTS MONITOR

To illustrate the need for human rights NGOs to continue to operate in Hong Kong, and to demonstrate the manner in which human rights NGOs in Hong Kong might become stifled, I highlight the Hong Kong Human Rights Monitor, which is but one of the many NGOs active on human rights issues in Hong Kong.

The Hong Kong Human Rights Monitor (the “Monitor”) is a local NGO that promotes better human rights protection in Hong Kong, both in terms of law and of practical daily life, and encourages greater human rights awareness. The Monitor is particularly concerned that human rights should be protected in the light of the transfer of administration from the United Kingdom to the People’s Republic of China. The Monitor focuses on human rights law, as contained in international human rights instruments that apply to Hong Kong, and on domestic Hong Kong law that incorporates international human rights norms.

The Monitor engages in community service. It assists in resolving community and individual problems and promotes education and awareness of human rights issues in Hong Kong. The Monitor also engages in domestic and international advocacy—before governmental and inter-governmental bodies—on Hong Kong human rights concerns.

The Monitor was founded in 1995 by individuals drawn from the legal profession (law academics, solicitors and barristers, and the Legislative Council), community human rights leaders and advocates, and others. The Founding Chairperson of the Monitor is Paul Harris, an English Barrister who was the first Chairman of the English Bar Human Rights Committee. The Founding Members of the Monitor are: Professors Andrew Byrnes and Johannes Chan, (Faculty of Law, University of Hong Kong and noted human rights academics); Philip Dykes, QC (the chief architect of the Hong Kong Bill of Rights); Ho Hei Wah (known for his grassroots human rights work with groups such as the Society for Community Organisation and the Hong Kong Human Rights Commission); Stephen Ng and Charles Mok (former Chairman and Vice-Chairman, respectively, of the Association of Hong Kong Chinese in the United States); John Kamm (who has long experience in working for human rights in China); P. Y. Lo (member of the Hong Kong Bar Council and an expert in international human rights treaties); Christine Loh (Legislative Councillor); and Phillip Ross (a noted Barrister and human rights worker). Staff of the Monitor include Mr. Law Yuk Kai (Director), Ms. Patricia Ignarski (secretary), and Mr. Lai Wing Yiu. The Monitor has had the assistance of Ms Maryanne Joyce, an intern from Columbia Law School, New York. The Monitor will have two interns from Yale University beginning June 1997.

The non-founder members of the Monitor who are also members of the Hong Kong Legislative Council (raising the total of Legislative Council Monitor Mem-
bers to 11) include Elizabeth Wong, Lau Chin Shek, Andrew Cheng, Bruce Liu, Leung Yiu-Chung, Zachary Wong, Albert Ho, Emily Lau, Lee Cheuk Yan, and James To.

The remaining approximately 120 members of the Monitor come from all walks of life including, in addition to the founding members, students, blue and white collar workers, and members of other NGOs. Many members have long experience in human rights work. There are no formal requirements for Monitor membership, which is open to anyone with a commitment to the rule of law and to human rights.

There are no geographic restrictions for membership in the Monitor. Approximately 90% of Monitor members live in Hong Kong. The remaining 10% live in a variety of countries including the United Kingdom, Malaysia, the United States of America, Australia, the Philippines, and Canada. The Monitor has representatives living in or handling Hong Kong human rights matters from bases in Washington, DC, New York, and Canada. Some of the overseas members act as liaisons between the Monitor and overseas governments and NGOs and other concerned entities. There are no ethnicity restrictions for membership in the Monitor. Approximately 70% of Monitor members are Hong Kong Chinese. The remaining 30% are of numerous ethnic backgrounds.

The Monitor is funded primarily by overseas contributions, from concerns such as the National Endowment for Democracy (United States), the John Merck Foundation (United States), and the European Union. An example of funding is in March 1996, the Monitor received U.S. $50,000 from the European Union to produce a series of booklets explaining human rights in simple language. So far, six of these have been published: “The Rule of Law and You,” “The ABCs of Processions and Demonstrations,” “The ABCs of Press Freedom,” “Hong Kong Bill of Rights: Clarification of Misconceptions and Misunderstandings,” “Human Rights Made Simple,” and “Taking Your Rights Seriously”.

In addition to membership fees ($12.50 U.S. joining fee, with no annual dues), the Monitor has received funding from the Hong Kong Committee on the Promotion of Civic Education (funding for a human rights educational video). Finally, the Monitor occasionally receives modest local donations from non-members.

The principal activities of the Monitor since its inception have consisted of: monitoring the actions of the Hong Kong government on human rights matters and speaking out on those issues, conducting human rights research, investigating allegations of human rights abuses, publishing and distributing human rights information in English and Chinese, and participating in the United Nations system for the protection of human rights by lobbying, briefing, and appearing before UN Committees.

Since its creation in 1995, the Monitor has accomplished the following:

(1) Drafted and submitted Briefing Reports to United Nations committees responsible for monitoring human rights in Hong Kong pursuant to UN treaties. The Monitor has sent representatives to Geneva and New York to UN hearings at which these reports were considered, including hearings before the following UN
Committees: Committee on the Rights of the Child; the Human Rights Committee; the Economic, Social and Cultural Rights Committee; the Race Committee; and the Committee Against Torture;

(2) Sent missions to the United States, to brief the U.S. Government regarding human rights in Hong Kong. The missions included meetings with officials from the U.S. Department of State, the White House, and Congress, and with NGOs, academics, and the press;

(3) Sent briefing missions to the European Parliament, the Australian Parliament, and the United Kingdom Parliament, and organized a visit to Hong Kong of a party of European Parliament Members who met with Mr. Tung Chee Hwa (the Hong Kong Chief Executive Designate) and Mrs. Rita Fan (the Speaker of the Provisional Legislature);

(4) Met with the Hong Kong Governor Christopher Pattern on topics relating to police interrogation practices and complaint procedures, the prison system, and Vietnamese Boat People;

(5) Testified at Legislative Council hearings on various human rights issues, including equal opportunities legislation;

(6) Published a report on Hong Kong’s immigration law and practice from a human rights standpoint and handled immigration cases referred by other NGOs;

(7) Campaigned for an improved police complaint system, and for an independent inquiry into the case of Mr. Lee Shing Tat, who had been arrested after an argument over production of his Hong Kong identity card, and who died shortly after he made a complaint that he had been beaten up by police officers;

(8) Helped the People’s Council on Public Housing Policy and social workers’ groups to promote housing rights;

(9) Reviewed Hong Kong’s legal aid system and practice;

(10) Spoke out, in the English and Chinese press, on important issues such as the dangers to the rule of law from the “new” arrangements for the Hong Kong Court of Final Appeal and the emasculation of the Bill of Rights;

(11) Submitted suggestions to amend the draft code of practice under the Sex Discrimination Ordinance;

(12) Researched the continuity of Hong Kong’s habeas corpus and lobbied for legislation for its preservation;

(13) Investigated individual cases with possible human rights implications;

(14) Delivered public speeches and organized evening classes on human rights; and

(15) Published and distributed English and Chinese booklets and newsletters, produced by the Monitor, informing members of various groups (including migrant workers) of their rights.

Thus, the Monitor’s work is a combination of community service and domestic and international advocacy.
V. CHALLENGES THAT THE MONITOR AND OTHER SIMILAR
HUMAN RIGHTS NGOS WILL LIKELY FACE POST-1997

Hong Kong NGOs, particularly those such as the Monitor that strongly focus
on domestic and international advocacy, face many risks post-1997. Paramount
among those risks is erosion of their association and expression rights guaranteed
by the ICCPR, the Bill of Rights Ordinance, and the Basic Law. Again, even
though freedom of assembly is implicated, I will not discuss that freedom today.

Before I explore the specific harms that may befall these NGOs, it is
necessary to canvass: (a) the law currently in place that protects human rights NGOs; and
(b) the law that will likely govern NGOs after the change of sovereignty on 1 July
1997.

A. THE EXTANT LAW THAT GOVERNS NGO CREATION
AND OPERATION IN HONG KONG

As discussed above, the 1992 Amendments to the Societies Ordinance are in
effect in Hong Kong today and are scheduled to remain in effect until 1 July 1997.
Those Amendments liberalized the repressive pre-1992 Societies Ordinance and
were enacted to render the pre-1992 legislation in compliance with the Hong
Kong Bill of Rights Ordinance and with the ICCPR. Specifically, the 1992
Amendments protect NGOs' freedom of expression pursuant to Article
19 of the
ICCPR and Article 16 of the Bill of Rights. Furthermore, the 1992 Amendments
protect NGOs' freedom of association, in conformance with Article 22 of the
ICCPR and Article 18 of the Bill of Rights.

Though the 1992 Amendments provide for more freedoms than the pre-1992
legislation, it is arguable that even the 1992 Amendments are burdensome, and
should be abolished, whether or not they fully comply with the ICCPR and the
Bill of Rights. Proponents of this theory would argue that there is no need what-
soever to control Hong Kong societies through registration, notification, or other-
wise.

B. POST-1997 LAW TO GOVERN THE CREATION
AND OPERATION OF NGOs IN HONG KONG

It is unclear precisely what the scope of the post-1997 law will be that will
govern the creation and operation of Hong Kong human rights NGOs, but there
are some general guidelines that the new Administration is obliged to follow in
determining the reach of the new HKSAR law. The Basic Law, which will be the
PRC promulgated "mini-constitution" of the newly created Hong Kong Special
Administrative Region after 1 July 1997, provides, in Article 160, that the laws
previously in force in Hong Kong shall be adopted, except for those which the
Standing Committee of the National People's Congress (NPC) of the People's Re-
public of China declare to be in contravention of the Basic Law. There are no cri-
teria set out in the Basic Law for determining what constitutes a pre-1997 Hong
Kong law that contravenes the Basic Law post-1997.

On 23 February 1997, the NPC resolved that the 1992 Amendments to the Societies Ordinance would not be adopted as the laws of the HKSAR because the Amendments contravene the Basic Law. The NPC did not indicate in the resolution how it was that the Amendments were deficient. After 1 July 1997, in light of the non-adoption of the 1992 Amendments, the HKSAR will have two choices regarding legislation governing the creation and operations of NGOs in Hong Kong: (1) the HKSAR can refrain from enacting legislation governing NGOs; or (2) it can enact new legislation governing NGOs. If the HKSAR enacts new legislation, it could be more restrictive, or less restrictive, than the 1992 Amendments. Non-adoption of the 1992 Amendments will not automatically result in reinstatement of the pre-1992 Legislation, but will result in a vacuum, in that there will be no legislation applicable in Hong Kong that expressly addresses the creation and operation of Hong Kong human rights NGOs.

If the HKSAR chooses to enact legislation, which it will likely do, that new legislation must comply with international human rights protections embodied in Article 27 and Article 39 of the Basic Law.

Article 27 of the Basic Law provides: "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions and to strike."

Thus, under Article 27, no HKSAR legislation may infringe the rights of freedom of expression or freedom of association in Hong Kong. Article 39 sets the standard for defining the scope of freedom of expression and freedom of association protection.

Article 39 provides:

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 implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Thus, Article 39 sets a floor, a minimal standard, beneath which the laws of the HKSAR cannot fall in providing protections in Hong Kong for fundamental freedoms, such as freedom of expression and freedom of association. First, freedom of expression and freedom of association in the HKSAR must be protected at least at the level they are protected under the ICCPR as applied to Hong Kong, and no HKSAR Law may contravene the ICCPR. Second, if the rights and freedoms enjoyed by Hong Kong people are to be restricted—and there is nothing in
the Basic Law that suggests that there is any need to restrict expression or associ-
ation or that such restrictions are mandatory—such restriction must be as pre-
scribed by law. Again, this is not a general call for restrictions, but only a guide-
line to be used to outline the manner and the means by which any restriction, should it be warranted, would be imposed.

The proper approach in interpreting Article 23 would be a restrictive approach. All HKSAR laws must incorporate principles of international human rights law, as contained in the ICCPR, and as interpreted in the common law. The Privy Council recently reiterated such international human rights law principles, as embodied in the ICCPR. These principles, because of the continuation of the common law in the HKSAR, should guide the HKSAR Legislative Council as it enacts new laws that might restrict freedoms and that should guide HKSAR courts as they interpret such laws. In *Ming Pao Newspapers Ltd. v. Attorney General* 6 HKPLR 103 at 110 (1996), Lord Jauncey recapitulated those principles:

1. A generous and purposive interpretation must be given to any constitution that entrenches fundamental rights and freedoms to which all persons in a state are to be entitled;

2. Three of the essential foundations of a democratic society are freedom of expression, freedom of association, and freedom of assembly. When a restriction is imposed on those guaranteed rights, those restrictions must be narrowly inter-
preted; and

3. Any restriction on freedom of association, expression or assembly must be proportionate to the legitimate governmental aims sought to be achieved by the restriction.

Similarly, the European Court of Human Rights—to which Hong Kong courts have looked for guidance to the jurisprudence of the European Human Rights Commission, see *R v. Sin Yau-ming* 1 HKPLR 88, 107-108 (1991)—has reiterated that not only must any restriction of a fundamental right be narrowly defined and construed, but also the restriction must be necessary to the achievement of the legitimate objectives that are pursued. *Handyside v. United Kingdom*, 1 EHRR 737 (1976). There must be a rational connection between the restriction and the goal. Furthermore, the restriction must be proportional to important governmental objec-
tives. Thus, if a right is to be restricted, that restriction must impair the enjoyment of the right to a minimal extent and then, only as much as is necessary to achieve the important goal.

Many common law courts, in other jurisdictions that have constitutionally en-
trenched bills of rights and to which Hong Kong courts look for guidance in in-
terpreting constitutional documents that protect rights (1 HKPLR at 88 (1991)), have adopted similar tests for outlining the scope of permissible restrictions of fundamental rights. For example, the Canadian Supreme Court, in interpreting the Canadian Charter of Rights and Freedoms 1982 (Canadian Bill of Rights, Section 1), requires that if a law restricts a fundamental right, that restriction must be “demonstrably justifiable in a free and democratic society.” Furthermore, as the Canadian Supreme Court ruled in *R v. Oakes* 1 SCR 103, 26 DLR (4th)
the restriction must satisfy the tests of rationality, proportionality and minimal impairment. In the United States, expression may be restricted only if there is a "clear and present danger" to justify a "compelling state interest." Cox v. Louisiana, 379 U.S. 536, 13 L. Ed. 2d 471 (1965); Boos v Barry, 485 U.S. 312, 99 L. Ed 2d. 333 (1988). Thus, the HKSAR should be guided by the principles that if restrictions are to be imposed on the fundamental freedom of expression or association, the burden upon the government will be extremely high to show that the interest in expression or association is somehow outweighed by whatever interests are sought to be protected by the restriction.

C. FURTHER PROSPECTIVE LEGISLATION: ARTICLE 23 OF THE BASIC LAW

As a means of restraining any dissent within Hong Kong and as a means to quell any subversive activity in the HKSAR, in particular threats from outside forces that might tend "to destabilize" the HKSAR and "threaten" China, Article 23 of the Basic Law requires the new HKSAR to enact legislation that will prohibit treason, secession, sedition, and subversion against the Beijing Central government. Furthermore, it requires the HKSAR to enact legislation that will prohibit theft of state secrets and that will prohibit ties between "local" "political organizations" and overseas "political organizations." Article 23 has far-reaching implications for and creates pressing problems for Hong Kong human rights NGOs.

Article 23 of the Basic Law provides:

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.

It is important to note that Article 23 of the Basic Law mandates that the HKSAR shall pass these restrictive laws; Article 23 does not prohibit, or restrict. It provides merely that the HKSAR must prohibit certain things.

The HKSAR itself must decide which laws to pass. Generally, Hong Kong human rights NGOs will have no major problem with the application and interpretation of Article 23 so long as the rule of law is in place in Hong Kong. The new government is bound by Article 39 of the Basic Law not to impose new legislation in Hong Kong that is more restrictive of rights than laws currently in place, but if the rule of law goes sour, Hong Kong NGOs stand to face grave problems, including imposition of prospective broad definitions, interpretations, and applications of the terms of Article 23.
D. BROAD DEFINITIONS, INTERPRETATION AND APPLICATION OF ARTICLE 23 TERMS


It is unclear how the terms "treason," "secession," "sedition," "subversion," and "theft of state secrets" will be defined. The broader the definitions, the greater the chances for abuse. There is the great likelihood of unfettered abuse because ultimate interpretation over the definitions lies with the NPC, which is not part of or even within the HKSAR. We can look to interpretation and application of these terms in China in recent years in instances in which individual freedoms were at stake.

For example, on 30 October 1996, the Beijing No 1 Intermediate People's Court found human rights activist Mr. Wang Dan guilty of "conspiring to subvert the government" and sentenced him to 11 years in prison and two year's deprivation of political rights. The 7 October 1996 indictment of Mr. Wang alleged that his criminal acts of subversion included accepting funds from organizations "hostile" to China and "publishing anti-government articles abroad." He was further charged with "colluding" with other dissidents (including Mr. Wei Jingsheng) to form discussion groups and to appeal for the rule of law, criticizing the government in articles published abroad, accepting a scholarship at the University of California for self-study in Beijing, and forming a mutual aid group with other dissidents.

In 1994, Mr. Xi Yang, a Hong Kong journalist who wrote for the Hong Kong Chinese-language newspaper Ming Pao, was in the PRC working on a story. He was charged with "stealing state financial secrets." His crime was that he acquired and published information related to the PRC gold reserve. He received a sentence of 12 years in prison. (Mr. Xi was released from prison in early 1997, and permitted to return to Hong Kong.) Those interpretations and applications of the amorphous terms do not engender confidence in the new HKSAR legal system.

2. "Local" versus "Foreign" Organizations

Article 23 calls for a distinction to be drawn between local and foreign organizations. It is unclear which human rights NGOs operating in Hong Kong will be deemed "local" or "of the Region" and which will be deemed "foreign." Unfortunately, there are no definitions of these terms in Article 23, but the Societies Ordinance might offer some guidance on those definitions, even though it is unclear that the incoming Administration will look to the Societies Ordinance for such definitional assistance.

Section 2 of the Societies Ordinance (both the pre-1992 and the 1992 amendment versions), provides the following definitions:

"Society" means any club, company, partnership or association of persons,
whatever the nature or objects, to which the provisions of this Ordinance apply.

"Local society" means any society organized and established in Hong Kong or having its headquarters or chief place of business in Hong Kong, and it includes any society deemed to be established in Hong Kong by virtue of section 4.

Section 4 of the Societies Ordinance provides:

A society shall be deemed to be established in Hong Kong, although it is organized and has its headquarters or chief place of business outside Hong Kong, if any of its office bearers [president, vice-president, secretary, treasurer of the society or branch, or member of the governing body/branch], or members resides in Hong Kong or is present therein, or if any persons in Hong Kong manages or assists in the management of such society or solicits or collects money or subscriptions in its behalf.

Furthermore, Section 4 provides that a society is not a "local society" if and so long as:

(A) It is organized and is operating wholly outside Hong Kong;

(B) No office, place of business, or place of meeting is maintained or used in Hong Kong by such society or by any person in its behalf; and

(C) No register of members is kept in Hong Kong; and

(D) No subscriptions are collected or solicited in Hong Kong by the society or by any person in its behalf.

Under the Societies Ordinance, most of the human rights NGOs contained in my typology are "local." They all have the requisite contacts. For example, most of them, excluding the Lawyers Committee which does not maintain a physical presence in Hong Kong, are organized and established in Hong Kong or have Hong Kong as their headquarters or chief place of business.

Again, it is not clear whether these definitions will be used when the HKSAR government legislates under Article 23, but these definitions provide a sense of the regime that has been in place in Hong Kong since 1949.

3. "Political" Versus "Non-political" Organizations

There is no definition of "political" in Article 23, and there is no other Hong Kong ordinance that defines the term. To help determine which NGOs will likely be deemed local and which will be deemed foreign, it is instructive to look at case law as precedent. Furthermore, it is helpful to examine comments by the Chief Executive Designate, as evidence of the intentions of the incoming Administration.

The clearest guidance is that of the English Court of Appeal in a case decided 17 December 1996. In R v. Radio Authority, ex parte Bull and Another, 2 All ER
561 (C.A. 1997), Lord Woolf MR ruled that Amnesty International is a "political organization" that engages in political activities. Specifically, Amnesty International is political because it urges countries to change their laws or policies to conform to the United Nations Charter's human rights standards. Lord Woolf ruled that: "To campaign to change those laws and policies so that they do comply with the Charter is political even though it is also commendable."

The definition of "political" contained in this English case is relevant because pursuant to Article 8 of the Basic Law, the common law as exists in Hong Kong, which includes the common law of England, will continue to apply in Hong Kong. Thus, under the common law system of precedents, Radio Authority will apply, and the definition of "political" in the context of organizations and as regards Amnesty International will apply.

a. Local "Political Organizations"

Now that I have defined "local," and I have defined "political organisation," I can determine that the following organizations will likely be deemed "local political organisations" for purposes of Article 23.

(1) The Hong Kong Human Rights Monitor

Following the case of Radio Authority, the Monitor will be deemed a political organization. Aside from the definition provided in Radio Authority, the Chief Executive Designate, Mr. Tung, has stated that the Monitor would be considered "political." Mr. Tung stated this during a visit to Hong Kong of a delegation of European Parliament members in March 1997. Though Mr. Tung's word in March 1997 is not the law, it is an indication of the thinking of the incoming Administration.

(2) Amnesty International (Hong Kong Branch)

It follows that if Amnesty International (United Kingdom) is a political organization, then Amnesty International (Hong Kong Branch) is also a political organization.

(3) The United Ants

"This Hong Kong NGO that is listed pursuant to the 1992 amendments to the Societies Ordinance advocates" for abolishment of the functional constituency electoral system in Hong Kong. Following the Radio Authority definition of political, the United Ants is political.

(4) The Democratic Party of Hong Kong

By any reasonable definition of "political organisation," the Democratic Party will be deemed political.

(5) Human Rights Watch/Asia

Human Rights Watch/Asia, which is based in Hong Kong, monitors and promotes the observance of internationally recognized human rights and advocates for governmental conformance to the human rights norms contained in the United
Nations Charter and other international human rights instruments. Thus, Human Rights Watch/Asia would fall within the definition of "political" as outlined in Radio Authority.

(6) Bar Association of Hong Kong

The Bar Association, which is comprised of Hong Kong Barristers, engages in domestic and international advocacy to foster change in Hong Kong laws. Thus, the Bar Association would fall within the definition of "political" organization.

(7) Law Society of Hong Kong

The Law Society of Hong Kong is comprised of Hong Kong solicitors. Like the Bar Association of Hong Kong, the Law Society engages in advocacy for the change in laws. Thus, it too would be deemed a "political organization."

(8) Tibet/Taiwan Groups

Without question, these groups will be deemed political. And, they stand to be banned irrespective of the Societies Ordinance definitions.

b. Foreign Political Groups

(1) Amnesty International (United Kingdom)

As I mention above, Lord Woolf in Radio Authority has ruled that Amnesty International is a political organization.

(2) The Bar Association of the City of New York

This group can be considered a political organization because it fosters the change of law.

(3) Human Rights Watch (New York)

Since, as I conclude above, Human Rights Watch/Asia in Hong Kong is a political organization, it follows that Human Rights Watch (New York) is also a political organization, because they are both engaged in the same types of activities.

(4) The United Nations

The United Nations and all of its instrumentalities that have competence over human rights matters are political bodies because the function of these bodies includes advocating the change of law and practice by governments to conform with internationally recognized human rights norms.

(5) The European Union.

The European Union is a political body by almost any definition and, certainly, because its primary functions include modifying law.

(6) The United States Congress, the Australian Parliament, the Canadian Parliament, and the Legislative Branch of any other Foreign Government

All of these organizations, by function and otherwise, are political by any definition.

(7) The United States Democratic Party and the United States Republican
These organizations are political because they strive for change in laws and because they are directly involved in the electoral processes for government officials.

(8) Overseas Trade Unions

Most of these organizations, by even the most conservative and narrow definitions, are political because of their involvement in advocacy and their involvement in elections around the world.

(9) National Endowment for Democracy

This organization, which is a bipartisan creation of the United States Government, is political because among its purposes is the encouragement of governments to democratize.

4. "Ties"

There is no definition of "ties" in Article 23, which bans certain "ties" between certain types of organizations. The plain meaning definition of "ties"—"Lian (2) Xi (4)" as taken from the Chinese version of the Basic Law—is "contacts," which is general and broad. If I take a conservative definition of "ties," and construe it narrowly, it can still have a wide range of meanings from direct or indirect communication, receipt or solicitation of financial assistance, influence, formalized contractual relationships, or memberships.

The incoming Administration, when and if it enacts legislation that restricts "ties" between Hong Kong human rights NGOs and overseas entities, has an opportunity to enact legislation narrowly, to conform with Article 27 and Article 39 of the Basic Law and to comply with internationally recognized human rights standards. Such legislation would be narrowly tailored to achieve a legitimate government objective, it would be proportional to the aim sought, and it would impair freedom of association and freedom of expression minimally.

5. "Ties Between Local Political Organizations and Foreign Organizations"

Article 23 calls for legislation banning ties between local political organizations and foreign political organizations. I have identified above some organizations as local political organizations, and I have identified some organizations as overseas political organizations. It is, however, unclear which "ties" between these two types of organizations will be banned. Even if I presume that "ties" will be narrowly construed, so as to maximize the expression and association freedoms of Hong Kong NGOs, the proscribed ties will likely have a crippling impact upon Hong Kong NGOs. This adverse impact will contravene NGOs freedom of expression and freedom of association.

It is fruitful to explore the range of prospective proscriptions, in the context of "ties" of the Hong Kong Human Rights Monitor, by examining some of the con-
strictions the Monitor may face after 1997, depending on how "ties" is defined.


Under Article 23, the Monitor (along with most of the NGOs I described) will likely be deemed a "political organization," and it will be deemed a "local organization" (as will most of the NGOs I have described). Thus, the Monitor (and the other Hong Kong NGOs) will be required to sever "ties" with overseas political organizations. The following are the types of "ties" that the Monitor may be compelled to sever with overseas political organizations, if the definition of "ties" is broad.

A. TIES WITH INTERGOVERNMENTAL ORGANIZATIONS, SUCH AS THE UNITED NATIONS, THE EUROPEAN UNION, AND THE BRITISH COMMONWEALTH

The inter-governmental organizations that will likely be deemed "foreign political organizations" include the United Nations, the European Union, and the British Commonwealth. Any Monitor "ties" (which could include lobbying, briefing, solicitation of funds, etc.) with these groups would be illegal.

B. TIES WITH THE LEGISLATIVE AND EXECUTIVE BRANCHES OF ALL OVERSEAS GOVERNMENTS, INCLUDING THE UNITED STATES CONGRESS, AND THE PARLIAMENTS OF AUSTRALIA, CANADA, NEW ZEALAND, AND THE UNITED KINGDOM

All overseas governmental legislative branch and executive branch bodies are by their very nature "political organizations." Thus, "ties" between the Monitor and any of those bodies would be prohibited. Since ties could include lobbying, briefing, solicitation of support, and other contacts, the Monitor and other Hong Kong "political organizations" would be banned from establishing or maintaining such relationships. The Monitor has engaged in briefing missions to the United States Congress and the Parliaments of Australia, Canada, New Zealand and the United Kingdom. Furthermore, the Monitor has engaged in briefing missions to the United States Department of State and the White House. Those are activities that could possibly fall within the proscriptions of Article 23.

C. TIES WITH MONITOR MEMBERS (WHETHER OR NOT THEY ARE HONG KONG RESIDENTS) WHO LIVE OVERSEAS

Though Article 23 bans ties between local political organizations and overseas political organizations, it could be read to include overseas individuals who are "political," in particular because the purpose of the overseas ties proscriptions of Article 23 are to protect China from outside destabilizing forces, irrespective of whether the subversive or other untoward threat issues from an overseas individ-
ual or a group. Thus, Article 23 could be extended to ban "ties" between the Monitor and its members who reside overseas, particularly if those overseas members are "political" and can be seen to pose a threat to the stability of China or of Hong Kong.

D. TIES WITH ITS OVERSEAS FUNDERS

The Monitor has received substantial grants from overseas funders. These include the National Endowment of Democracy, the John Merck Foundation, and the European Union. Without this funding, it will be extremely difficult, if not impossible, for the Monitor to continue its domestic service and domestic and overseas advocacy work. The National Endowment for Democracy and the European Union would be considered overseas political organizations. Thus, the Monitor would not be permitted to solicit those groups for funding or receive funding from them. Though it is less clear whether the John Merck Foundation would be deemed an overseas political organization, funding from Merck to the Monitor stands to be cut off because of the incoming Administration's underlying fears of undue overseas influence in Hong Kong.

E. TIES WITH OVERSEAS NGOs, INCLUDING GROUPS THAT FOCUS ON HONG KONG ISSUES, SUCH AS FRIENDS OF HONG KONG AND MACAU (WASHINGTON DC-BASED), AND FRIENDS OF HONG KONG (WASHINGTON, DC-BASED)

Numerous overseas groups focus on Hong Kong issues. For example, in the United States, these groups include: the Friends of Hong Kong and Macau, Friends of Hong Kong, and the Association of Hong Kong Chinese in the United States. Though there may not be formal, institutionalized "ties" between these organizations and the Monitor (or other Hong Kong NGOs), no such "ties," of any sort, will be permitted if these overseas groups are deemed to be political organizations.

F. TIES WITH THE UNITED NATIONS TREATY BODIES, AND WITH THE UNITED NATIONS CHARTER-BASED BODIES, SUCH AS THE HUMAN RIGHTS COMMISSION

The United Nations Charter-based bodies, such as the UN Human Rights Commission, are political bodies, within the meaning of Article 23. The member States of the Commission of Human Rights carry to the Commission their own national agendas, which either favor the furtherance of change in the human rights law and practices of other member States or defend the maintenance of the human rights status quo in their own or other States.

The Monitor would not be permitted to create or maintain any ties with the Commission or with any other United Nations body, such as the Economic and Social Council, that was deemed a political organization. This prohibition could extend to United Nations Treaty Bodies, even though their members work on those committees in their personal capacities, rather than as mouthpieces for their States.
G. THE MONITOR WILL BE COMPELLED TO SEVER ITS INTERNET LINKS WITH OVERSEAS ORGANIZATIONS

The Hong Kong Human Rights Monitor maintains a Web Page on the Internet <www.freeway.org.hk or members.hknet.com/~hkhrm>. The Web Page is "linked" to the Web Pages of several organizations, and can potentially be "linked" to Internet sites of overseas organizations. Given any reading of Article 23, any "links" or electronic "ties" between the Monitor Home Page and any overseas political organization's site would be forbidden. Furthermore, Article 23 would likely draw within its scope any links between the Monitor's Internet connection and any local organization that has "links" or "ties" (Internet or otherwise) with an overseas political organization.

VII. OTHER RESULTS OF INTERPRETATION AND APPLICATION OF ARTICLE 23

Examples of some other absurd results from imposition of legislation enacted under Article 23, even if that legislation is narrowly tailored, follow:

(1) Amnesty International (Hong Kong Branch) would not be allowed to receive funding from Amnesty International (United Kingdom), because both organizations would be deemed political, and the former organization is local and the latter is foreign. In this case, the tie is an institutional tie and could be banned under any reading of Article 23. The same restrictions on ties would apply in the case of Human Rights Watch. Human Rights Watch/Asia would be prohibited from maintaining "ties" with its parent organization, Human Rights Watch/New York. The former group is local, and the latter is overseas. They both would be deemed political.

(2) The Bar Association and Law Society of Hong Kong would be prohibited from maintaining ties with the Bar Association of the City of New York (New York Bar). From 24-31 October 1995, the Committee on International Human Rights of the New York Bar sent a mission of lawyers to Hong Kong to inquire into the future of the justice system and the rule of law post 1 July 1997. The mission was led by Senior United States District Judge Leonard B. Sand of the Southern District of New York and included three members of the Committee: R. Scott Greathead, Monica McCabe, and Maurice Nessen. The team issued a report, Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry, 51 The Rec. of the Bar of the City of N.Y. 357 (1996), which contained the Committee's conclusions. The Report, after acknowledging that "the rule of law in Hong Kong will require careful world-wide monitoring", proposed an "on-going relationship" that would take the form of a "special committee" that would, among other things, "hold joint-conferences, perhaps bi-annually alternately in Hong Kong and New York" to discuss matters such as those raised in the Report. Though the "leaders of both the Hong Kong Bar Association and the Law Society of Hong Kong expressed great enthusiasm when this proposal was tentatively advanced," that enthusiasm may be misplaced should Article 23 be
broadly defined to proscribe this relationship.

(3) Democrats Abroad and Republicans Abroad, both of which are active in Hong Kong—particularly during U.S. Presidential campaign years—would be forced to sever ties with their parent groups, the United States Democratic Party and the United States Republican Party, respectively, because all of the groups are political and the parents are foreign. The Hong Kong-based U.S. political groups would be forced to cease operation in Hong Kong in any event, because Article 23 of the Basic Laws calls upon the HKSAR to enact legislation “to prohibit foreign political organization or bodies from conducting political activities in the Region.”

VIII. OTHER POTENTIALLY RELEVANT PROVISIONS OF THE BASIC LAW

The Basic Law contains several articles that address the issue of “ties” between local NGOs and foreign NGOs post-1997. Unfortunately, these articles do not explicitly include Hong Kong human rights NGOs. Thus, it is unclear whether the human rights groups will be included within the limited protections contained therein. However, it is likely that Hong Kong human rights NGOs will be excluded from protection, because they will be deemed political, and thus restricted, under Article 23.

The following Basic Law Articles explicitly mention NGOs:

Article 144:

The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system.

Article 145:

On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.

Article 148:

The relationship between non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region and their counterparts on the mainland shall be based on the principles of non-subordination, non-interference and mutual respect.
Article 149:

Non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Region may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations. They may, as required, use the name 'Hong Kong, China' in the relevant activities.

Again, it is unlikely that these articles will apply to Hong Kong human rights NGOs.

IX. CONCLUSION

Hong Kong human rights NGOs will likely not be permitted to operate freely and unencumbered after the People’s Republic of China resumes sovereignty over Hong Kong on 1 July 1997. The freedom of association and freedom of expression that Hong Kong NGOs have enjoyed is waning now and will likely continue to constrict after 1 July. Human rights NGOs, such as the Hong Kong Human Rights Monitor and others that are actively involved in domestic and international advocacy, are particularly at risk because of the prospective enactment of restrictive control legislation and because of the potential for discretionary abuse of those laws.

This deterioration does not have to continue. Hong Kong NGOs can persevere in their struggle for their expression and association rights. The international community can pressure China to ensure that she fulfills her commitment to the continued enjoyment of rights in Hong Kong. Now is not the time for the world to turn a blind eye to Hong Kong. Now is the time to speak out against restrictive legislation, before it is imposed on 1 July 1997. The enactment of Draconian, oppressive legislation would not only be a retrogression, but also, it would violate the internationally recognized human rights of the people of Hong Kong, who have enjoyed human rights and fundamental freedoms and should not be swept into the dungeon of repression.

XI. ADDENDUM—CONSULTATION PAPER ISSUED ON SOCIETIES ORDINANCE

On 9 April 1997, the Office of the Chief Executive Designate (Mr. Tung Chee Hwa) issued a “Consultation Document” on “Civil Liberties and Social Order” that purports to serve as a basis upon which the people of Hong Kong will be consulted on Hong Kong legislation that would control the creation and operation of human rights and other NGOs. This Document outlines proposed legislative substitutes for the Societies Ordinance Amendments of 1992. The proposed legislation would swing the pendulum further retrograde than even the earlier oppressive
pre-1992 Legislation. The changes put forth in the Document have been severely criticized and condemned in written submissions by human rights NGOs including the Lawyers Committee for Human Rights, Human Rights Watch/Asia, the Hong Kong Human Rights Monitor, the Law Society, the Society for Community Organisation, and the Bar Association Council of Hong Kong.

The proposed changes toll the death knell for organizations such as the Hong Kong Human Rights Monitor, and other human rights NGOs in Hong Kong that engage in international advocacy and that rely upon support from overseas entities.

The Document, which proposes that the Chief Executive will be the ultimate civil liberties arbiter, proposes that all NGOs register with the police, who are given panoramic powers. The police would have the authority to deny an application in the interests of national security, public safety, or public order. Furthermore, the police would be able to deny registration if the NGO engages in "political activities" and has "ties" to foreign organizations, such as accepting financial contributions from foreign organizations or allowing foreign groups to influence its activities. Thus, all "political organizations" will be prohibited from soliciting or accepting financial assistance from overseas.

The Document defines "political organization," sweepingly, as: "those societies which directly participate in political activities relating to government institutions and comment on public affairs as their main objectives." Domestically, this encompassing pronouncement captures the Monitor within its wings, as well as groups such as Amnesty International, Human Rights Watch, the United Ants, as expected. Internationally, the broad proposed legislation captures many organizations and institutions, also as expected, such as Amnesty International (United Kingdom), Human Rights Watch (New York), the United Nations, the European Union, and foreign governmental bodies.

Thus, all of the "ties" between local and overseas "political organizations" that I feared would have to be severed would be required to be severed pursuant to the Document proposals.

The incoming Administration attempts to justify the repressive proposals by asserting that the new legislation would serve to strike the "balance between civil liberties and social stability" that the new laws are needed for "national security," and, that "We must take steps to prevent Hong Kong from being used for political activities against China." These claims are not supported by facts or arguments sufficient to overcome the high hurdle of necessity, rationality and proportionality that must be shown in order to justify, under international human rights law, legislation that would restrict fundamental freedoms, such as expression and association.

The Document also proposed legislation that would replace the 1995 Amendments to the Public Order Ordinance and that would further restrict freedom of assembly for Hong Kong human rights NGOs. The 1995 Amendments, which are in force today and will remain in force until 1 July 1997, require that the police be notified if more than thirty people are to gather, not less than 24 hours in ad-
vance. The police can deny permission for the gathering in the interests of public order or public safety. Under the proposed law as outlined in the Document, the police must issue a "Notice of Objection" before a peaceful protest or demonstration can take place. The police can refuse to issue a Notice of Objection on the grounds of national security, public safety, public order, protection of health or morals, or the protection of the rights and freedoms of others.

If these proposals of the Chief Executive Designate are enacted and become the law of Hong Kong after 1 July 1997, Hong Kong human rights NGOs will become imperiled. Hong Kong human rights NGOs will be shifted further away from full realization of expression, association and assembly rights, rather than closer towards full suppression of those rights.

MS. POKEMPNER:

A FRAGILE MACHINERY: OVERSIGHT MECHANISMS AND GOVERNMENTAL ACCOUNTABILITY IN HONG KONG

The greatest danger to human rights in Hong Kong is low expectations. Should the transition date pass without the arrest of a democrat, the dispersal of a protest, or the expulsion of a human rights activist, there is a risk that observers worldwide will heave a sigh of relief and conclude that the territory has managed to stay above the level of the rest of China with regard to civil rights. This, however, would be exactly the wrong benchmark to use. The risk is not so much that Hong Kong will undergo some swift and dramatic human rights disaster as that civic engagement in governmental accountability will atrophy and Hong Kong will return to an undemocratic style of governance that typified colonial rule. Such a return, indeed, might set the stage for later human rights disasters, of both the dramatic type—suppression—and of the quieter type—inhibition.

Popular interest in governmental accountability represents a sea change in the civic culture of Hong Kong that has gone largely unnoticed abroad. Concern with human rights and the growth of democratic participation and politics in the territory, both of which bloomed in the wake of the Tiananmen Massacre in 1989, have driven the development or refinement of oversight mechanisms in numerous areas of government. By oversight mechanisms, I refer to institutional means by which individuals can compel review of governmental action in a wide range of situations. This paper will briefly sketch some of these mechanisms and the situations to which they apply, including access to the courts, complaints against law enforcement agencies, prison monitoring, government record-keeping, and anti-discrimination enforcement. The last British government of Hong Kong, I will argue, did much to install oversight measures but preferred weak ones to strong ones and, in several instances, overrode legislative support for stronger accountability. The administrative measures in place at the point of transition constitute a fragile machinery dependant on executive goodwill for their effectiveness and popular engagement for their fuel.
Left to its own trajectory, there is little doubt that popular demand in Hong Kong would be for continued refinement of this machinery, and greater governmental transparency. But China has already let it be known that it intends to rein in some of the most powerful checks on the executive branch of government: an elected legislature, a Bill of Rights, a free press, and popular politics and protests. These institutions are the substratum in which oversight mechanisms have their roots. This paper concludes by examining what implications China’s intentions hold for government accountability and the tradition of administrative oversight. The survival of these mechanisms will be a critical indicator for the condition of Hong Kong’s democracy, and the vindication of basic human rights.

The enactment of the Bill of Rights Ordinance made it possible for the first time in Hong Kong law for litigants to use the provisions of the International Covenant on Civil and Political Rights (ICCPR) to state a cause of action, or to challenge the validity of a domestic law for inconsistency with that treaty. The scope of the law was swiftly curtailed by the courts at the government’s motion to preclude challenges to human rights violations committed by private hands, even where the act was possible only in the context of government tolerance or facilitation. Thus, the first and most frequent application of the ordinance was in criminal law to challenge statutory presumptions. Even so, the ordinance was wielded with enthusiasm by the Hong Kong bar in just under 200 cases in the first four years after its introduction in June 1991.

For the most part the poorest in Hong Kong were unable to exploit the Bill of Rights in a civil context. It soon became apparent that the Legal Aid Department was approving exceedingly few cases based on the new statute. For example, in 1991 it came to light that the Legal Aid Department and opposing government authorities had reached an informal agreement that Vietnamese asylum seekers who sought Legal Aid to appeal denial of refugee status would be put through an administrative procedure, rather than allowed to demand judicial review of their cases. Another case was the application of Lee Miu-ling, a member of a democratic pressure group known as the United Ants which supported direct elections, who requested Legal Aid to challenge the legitimacy of Hong Kong’s electoral laws. She was denied assistance on the rationale that the relief sought—a declaration that functional constituencies are inconsistent with the principle of one person, one vote under the ICCPR—would bring only “trivial advantage.” In this case, a rumor circulated that a member of the Attorney General’s chamber had sought to discourage Legal Aid from taking the case, a practice suspected in other politically sensitive cases before. Lee Miu-ling’s case also brought to light the plight that unsuccessful applicants face: it is possible to appeal an adverse decision on Legal Aid, but one cannot get legal aid funding for the appeal.

The Legal Aid Department is not an entity independent of the government in Hong Kong, although it is supposed to operate free of influence from other government departments. It places an annual bid to the government for its budget, which is allocated from general treasury funds. The Legislative Council passes on
the budget as a whole, rather than approving any specific allocation for Legal Aid. Until 1996, such meager oversight as existed was provided by a Standing Committee on Legal Aid, chaired by the Registrar, and answerable to the judiciary. The director of Legal Aid is a government appointee, and its lawyers are civil servants.

The agency's vulnerability to executive pressure and lack of any meaningful independent oversight were widely criticized. In July 1993, Hong Kong's Legislative Council (LegCo) urged the establishment of an independent legal aid authority, a move supported by both branches of the legal profession and numerous human rights groups. The government countered by proposing the creation of a Legal Aid Services Council to replace the Standing Committee, a move that was adopted. Both oversight bodies have very limited mandates: both may formulate policy directives, but neither has oversight of day to day operations, the power to intervene in cases, review individual applications, or hire or fire. The new council consists of the Director of Legal Aid and nine unofficial members appointed by the Governor and is serviced by six staff and a HK$4 million budget. Its principle distinction is that it has been specifically charged with considering the feasibility of establishing an independent legal aid authority and reporting back to the government. So far, it has not made recommendations.

In 1995, an amendment to the law allowed the Director of Legal Aid to waive the means test for all civil suits where an applicant has a meritorious Bill of Rights claim. The Department's practice is to refer such cases to independent experts outside the government for their recommendation. Both measures are helpful, though hardly foolproof, for avoiding undue government influence. After July 1, 1997, however, the utility of the Bill of Rights in challenging the validity of new legislation may be nil. The Standing Committee of the National Peoples Congress has announced that it will strike down the provision in the Bill of Rights giving it precedence over subsequent inconsistent law in the territory. In theory, the provisions of the ICCPR will still be the law of Hong Kong and, as international treaty obligations, superior to subsequent inconsistent domestic laws. It remains to be seen, however, whether Hong Kong courts will entertain claims based on the treaty once its application depends on its incorporation through reference in the bilateral treaty between the United Kingdom and China and Hong Kong's Basic Law, both of which specify that the provisions of the ICCPR as applied to Hong Kong shall remain in force. Cases brought under the Basic Law, which also has fairly detailed rights provisions, should be subject to waiver of the means test as well.

**Police Oversight**

Hong Kong enjoys one of the most professional and disciplined police forces in Asia, yet concern over police abuse has been rising steadily. Over the last five years, the number of complaints against the police for abuses such as assault or fabrication of evidence has run between 4,000 and 5,000, but only two to three and a half percent of these complaints has been verified. The high ratio of complaints to cases where allegations have been substantiated through investigation
... has called into question the effectiveness of police oversight, particularly in view of evidence that police abuse is a real problem. Janice Brabyn, who conducted empirical research over two months on lower court treatment of evidence where coercion was alleged, has documented that in approximately twenty percent of cases, magistrates excluded from evidence confessions that defendants claimed were forgeries or the product of physical abuse. Comparable figures in England ran at about two percent. Some of the particular allegations documented by NGOs and the press are shocking accounts of brutality amounting to torture, and there have been several cases of deaths that allegedly resulted from abuse in custody. Loh's bill also had proposed that individuals be given access to personal information that the government held on them and be provided means to challenge its accuracy. This aspect was not incorporated into the government's code, but the government introduced an ordinance on personal data and privacy with similar effect that became law.

Should individuals be dissatisfied with the government's compliance under the Code on Access to Information, the mechanism for investigating police abuse is the Complaints Against Police Office (CAPO), a branch of the police, which reports to the Independent Police Complaints Council (IPCC), an administrative committee that until recently lacked any investigatory powers. CAPO has come under fire for bias and egregious delays during investigation that seriously compromise the ability of witnesses and complainants to present credible evidence. In 1993, the IPCC itself recommended that some non-police should be appointed to CAPO to participate in the investigation of serious complaints and that a civilian should be appointed the head of CAPO. The government rejected these recommendations, but the IPCC reiterated them again in 1995. Once again, the administration rejected the recommendations on the rationale that police were the only ones with requisite expertise to investigate complaints of police abuse. The police, for their part, strenuously argued it would injure police morale to have outsiders investigate the force. Hong Kong has a unitary police force, so it is not feasible to have one branch investigate another, as is done in some countries.

In response to this pressure from NGOs and the IPCC itself, the mandate of the IPCC was expanded to give it powers to interview, but not compel, witnesses and observe, but not participate in, CAPO investigations. There is still considerable doubt whether these measures are sufficient to enable the IPCC to perform a genuine supervisory function to CAPO inquiries and correct bias. The government tabled a bill in July 1996 that is still pending to change the IPCC from an administrative to a statutory body. The bill will not, however, widen the IPCC's powers. Moreover, the IPCC, like most oversight bodies, continues to have at its head a Governor appointee. It has been suggested by human rights organizations that the IPCC be allowed to recruit its own head to better enhance its independence and allow at least a portion of its regular meetings to be open to the public.

THE INDEPENDENT COMMISSION AGAINST CORRUPTION

Corruption has bedeviled Hong Kong's past, and in the last three years there has been a resurgence that may in part be a cyclical phenomenon and in part a
reflection of the growing influence of China in the territory’s economy and business practices. The Independent Commission Against Corruption (ICAC) is a police body in Hong Kong vested with extraordinary powers of search, seizure, and arrest in cases involving corrupt practices. It has been notably effective in suppressing corruption, but its powers and secrecy have generated considerable unease, particularly in the light of China’s impending political control.

The ICAC came under public scrutiny in 1993 when Alex Tsui Ka-kit, the Deputy Chief of Operations (the number three post in the organization) and the ethnic Chinese most likely to have assumed leadership after the transition, was abruptly fired without explanation. He claimed it was a racist decision; subsequent information that came out in a LegCo hearing linked Tsui to triads (Hong Kong criminal societies). In the course of the scandal, Tsui protested the wiretapping of his telephone by the agency, and alleged that it had similarly monitored a political target list of prominent local figures. The ICAC maintained it was privileged to withhold explanation for the dismissal. In the end, a Review Commission was appointed by the governor to examine the agency’s powers and accountability.

Given six months to complete its inquiry, the Review Commission issued its report in December 1994 after deliberations behind closed doors. It declined to look into Tsui’s allegations of wiretapping. Some recommendations involved long-overdue checks on the ICAC’s powers, such as requiring court authorization to conduct searches of premises. But few of the seventy-five listed recommendations challenged the broad powers of the agency, and some, such as urging a greater role for the Governor in high-level appointments, seem of dubious utility in promoting the agency’s future political neutrality and independence. The recent statement of the Chief Executive-designate, C.H. Tung, that the term “independent” would be dropped from the agency’s name after the transition has reawoken concerns for its future integrity.

One result of the Review Commission’s recommendations was broadening the scope of review of the most important of several oversight bodies for the ICAC, its Operations Committee. The Operations Committee advises and monitors all specific investigations completed by the ICAC and is empowered to demand explanations in cases where investigations have been pending for too long without prosecution. It gained the mandate to monitor investigations in progress, cases where suspects faced prolonged bail periods and search requests. All these powers, however, are exercised in strict confidentiality, giving little scope for public accountability or pressure. Beyond calling the head of the ICAC to account in situations of concern, the Operations Committee may also bring its concerns directly to the Governor. But as a member of the committee explained, the committee members are Governor-appointees, and if they are dissatisfied with the response from the executive branch, their only recourse would be to resign in public protest.
Independent prison monitoring is not routinely permitted in Hong Kong, despite the recent growth in human rights NGOs and the presence of an inquisitive press corps. A joint visit in 1997 by Human Rights Watch and the Hong Kong Human Rights Monitor is the first non-governmental exercise with regard to the prison system as a whole. Family members and lawyers may visit under conditions prescribed by the Correctional Services Department. Official oversight is provided through Justices of the Peace, who by statute must visit prisons once a fortnight and record their impressions in a book. The Commissioner of the Correctional Services Department must allow access at all reasonable times to the Justices of the Peace. In practice, these visits consist of little more than guided tours by prison authorities, with little initiative shown by these Governor appointees for interviewing prisoners privately or independent exploration of the facilities and their operation.

The lack of oversight is particularly apparent in the management of detention centers for Vietnamese asylum-seekers. The government has in the past barred the press and certain non-governmental groups from these camps, which are squalid and rife with abuse, in contrast to the more orderly conditions in prisons for criminal offenders. Although Justices of the Peace have been charged with inspecting these facilities as well, they have proven ineffectual in bringing abusive conditions to light. In 1995, the government employed massive amounts of tear gas against protesting Vietnamese in the Whitehead Detention Centre, causing large numbers of injuries. A public outcry and legislative hearings ensued, and the government initiated a joint monitoring scheme involving Justices of the Peace and representatives of non-governmental organizations. The monitors were to be summoned whenever there was a camp transfer or repatriation exercise, and their presence was to reassure asylum seekers and act as a deterrent to police excess. To some extent, they succeeded, and the inclusion of non-governmental monitors resulted in more thoughtful and critical reports of these operations. Monitoring, however, was highly variable, depending on the degree of government cooperation in summoning the observers to the scene. An area of immigration detention that continued to lack effective oversight was the practice of separating individuals from their families and incarcerating them in separate units for being “troublemakers” in the eyes of correctional service personnel, without recourse to judicial review or legal services.

Access to Government-Held Information

In 1994, LegCo member Christine Loh Kung-wai proposed a bill to mandate public access to government-held information, along with the establishment of an administrative office to enforce public requests. In its response to the U.N. Committee’s Concluding Observations, it justified this conclusion by reference to existing Hong Kong institutions, such as the “Bill of Rights Ordinance to provide remedies against infringement of human rights, a truly independent judiciary, a sound and comprehensive legal aid system, an effective ombudsman, a fairly
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The Code on Access to Information sets out an expansive range of grounds on which the government may refuse to disclose information, such as information concerning defense and security, or deliberations of any government advisory body, to information that might damage the environment, harm economic policy, prejudice commercial transactions, or even prejudice efficient departmental operations. The government has broadened the number of government departments to which the Code applies from the initial nine departments named at its implementation in early 1995.

Should individuals be dissatisfied with the government’s compliance under the code, they may appeal to the Commissioner for Administrative Complaints, Hong Kong’s general administrative ombudsman. The Commissioner has powers to investigate and report on complaints of governmental maladministration, but does not have the power to enforce a judgment or compel government action to remedy a complaint. In the first appeal under the Code on Access to Information, the Commissioner upheld the government’s refusal to disclose to the South China Morning Post records on Carrian Investments Limited and Carrian Holdings Ltd, two companies at the center of recent financial scandals. In the most recent appeal, the ombudsman also upheld the government’s refusal to release two consultancy studies on electricity supply and demand, on the grounds that it concerned pending commercial negotiations with two major utility companies.

Despite the limitations on the ombudsman’s powers and the numerous loopholes of the administrative code on access to information, in other areas the Commissioner has focused public attention and pressure through his reports, more effectively in some instances than other oversight bodies. For example, in 1995 he put a spotlight on the Legal Aid Department’s laggard performance in taking twelve years to decide whether to give assistance to an applicant in a land dispute case that involved both Qing dynasty and modern property law. Since the public was allowed to submit complaints directly to the office of the Commissioner for Administrative Complaints, the number of complaints has grown dramatically, and the ombudsman has sought to increase his mandate’s scope, another suggestion that this mechanism is taking on increasing importance in Hong Kong.

THE EQUAL OPPORTUNITIES COMMISSION

In July 1994, legislator Anna Wu Hung-yuk proposed an equal opportunities bill to LegCo, which would have outlawed both private and public discrimination on the grounds of sex, marital status, pregnancy, family responsibility, sexual orientation, race, political or religious conviction, trade union membership or activities, or prior conviction. This law was to be accompanied by another bill proposing a Human Rights and Equal Opportunities Commission which would be charged with implementing the law, receiving human rights complaints, and conducting research, promulgating standards, and promoting human rights education.

The Governor refused to allow the bill’s introduction on the basis that it would
have financial implications—if not the proposed commission, then in increased applications for Legal Aid assistance under the law. Instead, the administration introduced two far narrower bills on discrimination on the basis of sex and disability, with significant exemptions, lack of reinstatement as a remedy, and a limit on the damages available to victims of discrimination so low it is unlikely to have strong deterrent effect. The government also created an Equal Opportunities Commission with a more limited scope than the commission proposed by Wu; the government’s commission is, however, empowered to suggest amendments to the law should it not be working effectively. Other grounds of discrimination that Hong Kong is obligated to address under international law, including age discrimination, family status, race, and sexual orientation, were put off on the dubious excuse of a need for “further study,” such as surveys polling the community to discern whether discriminatory attitudes actually exist.

The Commission, established in May of 1996, is another Governor-appointed body but with more powers than most oversight mechanisms. It may investigate complaints of discrimination, encourage conciliation between disputing parties, and where conciliation is inadequate to resolve a dispute, it may provide legal assistance in bringing a case to court under the anti-discrimination laws. As of January 1997, the Commission had received nine complaints, roughly split between disability and sex discrimination, and was in the process of investigating them. The Commission has also drawn up codes of practice on employment that were approved by LegCo and went into force at the end of the year and has taken a proactive stance on discriminatory newspaper advertisements, warning publishers, with the result that such advertisements are on the decline. It remains to be seen, however, to what degree it will be willing to use the courts to enforce the law, rather than rely on compromise and conciliation.

OVERSIGHT IN THE CONTEXT OF CIVIL SOCIETY

While the willingness of the government to establish oversight committees is commendable, its preference for weak, executive-dependent committees over independent authorities is not. The mechanisms described above share several features that make them vulnerable to manipulation. One is that most are bodies whose members are appointed by the head of the executive branch. Given that Hong Kong’s top executive position is not chosen by direct election, this feature is unhelpful in insulating them from political pressure. Although some bodies have included a fairly wide scope of appointees, including known critics of the government, others have been staffed with members who are deferential to the bureaucracies they monitor, making oversight more decorative than functional. Another is that not all oversight mechanisms are transparent. Few hold their meetings publicly, and many do not report the specifics of their findings (the ICAC oversight committees and CAPO are notable examples).

Another problem has been the government’s reluctance to vest oversight bodies with the power to intervene in individual cases. The Equal Opportunities Commission and the ombudsman are the notable exceptions, with the Legal Aid Services Committee at the opposite end of the spectrum, and the Independent Police
Complaints Commission mid-way, empowered to observe but not to participate in fact-finding. Under pressure, the government has supported grounding administrative oversight mechanisms in statute, ensuring their continued existence from administration to administration.

The government has also preferred administrative solutions to legislation that would allow individuals recourse to the courts. The administration refused to entertain legislation on access to information and strenuously resisted equal opportunity legislation, in the end substituting a much weaker version of the law and scrapping the plan for an expansive human rights commission. Conversely, where human rights law was already in place, the government resisted supplementing enforcement through administrative recourse. Hong Kong shares the British rule that unsuccessful civil litigants must bear their opponents' legal costs; where a challenge to the government is involved, the prospect of confronting an opponent with very deep pockets is inhibiting. The United Nations Human Rights Committee, in its concluding observations to the United Kingdom's fourth report under the ICCPR on Hong Kong, criticized the government's decision not to establish a Human Rights Commission to facilitate enforcement of the Bill of Rights and afford individuals a means of redress or conciliation in situations where litigation was unnecessary or prohibitive. The government rebuffed the U.N. recommendation as "not the best way forward in the particular circumstances of Hong Kong." It justified this conclusion by reference to Hong Kong's "Bill of Rights Ordinance to provide remedies against infringement of human rights, a truly independent judiciary, a sound and comprehensive legal aid system, an effective ombudsman, a fairly elected legislature and an active advisory committee on civic education including human rights."

Many of these elements are in question today: the continued applicability of the Bill of Rights; the existence of an elected legislature; the availability of Legal Aid to challenge government laws and even the independence of the judiciary. The compromise between the United Kingdom and China that limited to one the number of foreign judges on Hong Kong's highest court has caused some anxiety over the continued independence of the judiciary, particularly after Hong Kong's chief justice was discovered to have taken a position against the legality of the Bill of Rights in private to Mainland officials. The provisional legislature has announced it intends to review candidates for the highest court, a political move that has raised doubts about the viability of the rule of law. Normally a nine-member board, the Judicial Officers Recommendation Commission, is responsible for recommending candidates for judicial office in Hong Kong. In April 1997, Chief Executive-designate, C.H. Tung, reappointed seven of the current nine members, but replaced two known for their support of democratic politics with two pro-China businessmen who are also members of China's appointed Preparatory Committee and Selection Committee. Along with the Secretary of Justice that Tung will appoint, these constitute the three votes necessary to block judicial nominations under the procedures for deliberations, effectively giving the Chief Executive control over all judicial appointments.

It is not accidental that many of the bodies and practices described above re-
resulted from legislative pressure, a novel phenomenon in Hong Kong that is a direct result of the electoral reforms that broadened the franchise in the territory. The abolition of an elected legislature may have severely detrimental consequences for mobilizing popular pressure for reform. Even should the provisional legislature or future elected legislatures continue the tradition of questioning the government on the transparency of administration, the ability of members to press for reform by proposing laws will be even more constrained than under the colonial regime. Currently, private members cannot introduce bills with “charging effect”—i.e. financial implications—without the consent of the Governor. Article 74 of the Basic Law stipulates that for the future Legislative Councils, private members may only introduce bills “which do not relate to public expenditure or political structure or the operation of the government” and that bills “relating to government policies” must have the written consent of the Chief Executive before their introduction. As virtually all matters of oversight involve government policies or the operation of government, it is likely that the incentive to draft such legislative proposals will be dampened.

Still other developments throw into question the viability of oversight bodies in the new Special Administrative Region of China. The press is coming under increased pressure for self-censorship, and China has not hesitated to blacklist certain publications it considers overly critical, either by denying correspondents access to the Mainland or attempting to otherwise influence the financial viability of critical media. Public protests and non-governmental organizations are likely to come under tighter regulation in the territory as well. In the wake of the decision of the Standing Committee of the Chinese legislature to scrap laws that had been amended to conform to the Bill of Rights, the Chief Executive-in-waiting has proposed revisions to the Public Order Ordinance and the Societies Ordinance. The revisions, which have drawn heavy protest, in essence would give enormous discretion to police authorities to suppress public demonstrations or declare political parties and other noncommercial organizations illegal by invoking “national security” concerns. The press, non-governmental activists, and political parties each act as a channel for the expression of popular opinion and all are critical to channeling demand for government oversight. If their demands for oversight trigger retaliatory acts of government regulation, they are less likely to express such popular demands. This, in turn, may provoke a synergy where public expectations for government responsiveness and accountability diminish as popular demands vanish from view. Once public expectations are lowered and voiced opprobrium muzzled, there will be less inhibition of government abuse and less pressure for oversight bodies to perform their functions with integrity.

The colonial wisdom on Hong Kong was that it was a place to which people had fled to make money, not to make politics or tangle with government. This view of an apathetic polity is patently untrue in the 1990s, as the growth of public oversight bodies shows. The question is whether the perception of a disengaged public revives after the transition to a less democratic system. Will the demands for independent oversight mechanisms and transparent government persist? Or will the momentum be lost, with compromised oversight committees serving as
window-dressing on unchecked executive powers? A subtle change in attitudes towards governmental accountability is much to be feared, because it threatens Hong Kong’s character as an open society in a far more invidious way than blundering acts of repression ever could.

GEORGE BLACK: Let me speak very briefly, in part because George Edwards has made such a magisterial presentation that it leaves one very little to say, especially in describing the details of the statutory framework within which Hong Kong NGOs operate. I’ll allude to that briefly, but I won’t repeat what George has done so excellently. I also very much appreciated Dinah PoKempner’s emphasis on the need to be attuned to the subtleties of developments in Hong Kong and not to have apocalyptic fears or to be delighted when those fears fail to materialize.

I think that is in many ways the key to understanding the human rights situation in Hong Kong, both today and in the future, and I approach these questions with a somewhat different perspective than both the previous speakers on this panel and those on the panel this morning. I’m delighted that the Lawyers Committee for Human Rights, together with Human Rights Watch/Asia, has been able to cosponsor this event, and the perspective that I want to bring is not that of the expert immersed in the details of the situation in Hong Kong. Instead, what I’d like to try to contribute to this discussion is to pick up on the last thing that George said, which was the invitation to meditate on what it is that can be done by outsiders.

What are the levers that one should use in seeking to influence events in Hong Kong? What are the antennae that one needs to develop to understand what is going on there? These questions are very consonant, I think, with Dinah’s earlier comments about oversight mechanisms.

I think this is a situation which calls for very particular antennae to be developed in the human rights community and, perhaps, antennae which are not the same as those we have not historically used.

This is quite an unusual situation. In a way, it’s almost the reverse of the characteristic situation that confronts an international human rights NGO when it seeks to be useful and helpful to the interests of its counterparts in a particular country.

The classic model of human rights advocacy by internationally based groups is of course to document abuses as they occur and then to hold governments accountable and to hold them up to public stigmatization for the abuses of which they are guilty.

The second thing that we have increasingly tried to do—and I think all of the principal international human rights NGOs have adopted this focus in different ways—is either to compensate for, or preferably to help develop, a local human rights community by placing the skills they have acquired at the disposal of local NGOs.

Within that context, there is a third thing that we have been able to do with the understanding that we now operate in an international human rights community
which has changed quite radically in character over the last ten or fifteen years as the result of the tremendous proliferation throughout the world of the kind of groups that George has so ably characterized in Hong Kong. We have tried to provide access to local NGOs, primarily access to international institutions as well as to foreign governments who were capable of influencing the situations in the particular country in question.

Hong Kong, as I say, confronts us almost with the reverse of the standard picture. Here, we have a situation where, at least currently, there are very few obvious classic abuses. There are many problems of the sort that Dinah has pointed out, but this is not, or at least not yet, a situation which is characterized by large scale or gross violations of human rights.

As reversion approaches, I think we increasingly feel that this may continue to be the case, at least for some considerable time. The threat to human rights remains a latent one. It remains a matter of what is expressed in the intentions—or the feared intentions or the half suggested intentions—of the Chinese government and the future SAR authorities.

Perhaps it is because we are dealing with a nebulous, looming set of threats that much of the discussion of the prospects for human rights in Hong Kong is so alarmist and, frankly, apocalyptic in tone. I think the challenge that we now face is knowing how to define the threats clearly and how to strike an appropriate tone in our response.

The indigenous, locally based human rights community in Hong Kong is almost unique in my experience. In addition to its work at the grassroots level, in constituency building and representation, it is extraordinarily well versed in those areas in which the international human rights NGOs have traditionally tried to supply access and guidance. It is certainly the equal of any other national NGO community that I have encountered. My co-panelists have made presentations to the Human Rights Committee and to other UN treaty bodies, to which, frankly, we have nothing greatly to contribute or to add. If the job is being exceedingly well done locally, why duplicate it?

The local advocacy skills that allow NGOs to confront their own government and to achieve modifications in the behavior of that government—modifications in the legislative framework and influence on particular pieces of legislation—all those skills exist, too, and we have heard them described.

The existence of this vital human rights advocacy community is, I think, one of the prime indicators or barometers of the survival of the rule of law in Hong Kong. Now, I don’t want to romanticize this concept of the rule of law in Hong Kong. What we’ve heard, particularly in Dinah’s presentation, is a very necessary reminder that for all the general virtues there is a great deal wrong with the Hong Kong polity, and a great deal of what is positive about that polity was added very late in the day by the colonial authorities.

For reasons that we all know, the more positive aspects of the rule of law and rights protection manifestly arose as a response to events in China in 1989. They have, therefore, become embroiled in the most difficult and contentious areas of
China's conception of its sovereignty. So, it is not a clear-cut or uncomplicated rule of law situation in Hong Kong, and it is certainly not something we should idealize.

Just as the NGO community is one of the best indicators that the rule of law is thriving in Hong Kong, so logically is the continued ability of that community to exercise its freedom of association and the closely related right of assembly. For that reason, the continued enjoyment of these rights is one of the threshold issues, one of the tripwires if you like, to measure whether our more apocalyptic fears are coming to pass. The fact is, I think, that our fears may be borne out in quite subtle ways, which we may need a little practice and some new skills to identify and to respond to.

I offer these remarks in the context of a growing awareness among governments, and certainly in the NGO world, that the issue of freedom of association, the right which is basically expressed in Article 22 of the International Covenant on Civil and Political rights and in many of the regional instruments, is the most neglected of rights. In some respects, it is the most important of rights, in that it serves as a guarantor of other rights. It is the monitoring and lobbying and the capacity of independent monitors that allows other rights to be observed and enjoyed. We are belatedly waking up to the importance of freedom of association as a key international right.

China's role in this emerging discussion about freedom of association bears thinking about for a moment. In the UN, there has been underway for some ten years or more now, a draft declaration that would codify the rights of human rights defenders. China has not only been one of the primary obstacles to developing that declaration in terms that are genuinely permissive of NGO activity. I think it is fair to say that China has also learned a great deal from the experience of watching other governments develop regulatory and legislative frameworks to contain the threat that NGOs can present to their laws and to their practices.

While governments have grown increasingly sophisticated in developing mechanisms of control of NGOs, I think the human rights movement has been late in devising, as it were, countermeasures to the kinds of things that governments characteristically do. I'll try to describe some of these in a moment, and they may suggest some of the areas that we will need to keep an eye on as Hong Kong moves through reversion.

I think we have begun to develop a focus—and by we, I mean not only human rights groups, but the UN, the US State Department, and other national governments. We have learned to look at the predicament of human rights defenders, but the tendency is still very much to approach the problem in a very traditional way. This is very evident, for example, in the human rights country reports of the Department of State. Let me explain. The country reports now have established categories for monitoring the climate in which human rights advocacy takes place. Section 2B of the Country Reports deals with freedom of peaceful assembly and association. Section 4 calls itself "governmental attitude regarding international and non-governmental investigation of alleged violations of human rights."
sections on Hong Kong this year I thought weren’t bad, and were an improvement in that they began to look, albeit rather glancingly, at the question of the legislative and regulatory framework governing NGOs. This year’s report looks, in somewhat general terms, at the Societies Ordinance in particular, but the general tendency is still to start by asking the classic, traditional human rights questions. Did any human rights activists have their heads cracked in a demonstration? How many people received death threats? Clearly, of course, dramatic events such as these should be noted and described, but they are, if you will, just the tip of the iceberg and we only get very progressively and slowly to the larger question of how the activity of these groups is impeded in the first place.

As I suggested before, Hong Kong may be an interesting laboratory, a place where the threat begins at the other end of the spectrum where it starts with the regulatory and legislative end of the spectrum, and may or may not over time progress to the head-bloodying end of the spectrum.

I tend to agree with Dinah that is not likely to happen in the foreseeable future, even though it’s a scenario that we all sometimes lie awake at night thinking about, but I don’t think Christine Loh, or Martin Lee, or Margaret Ng, God willing, is going to end up in jail Wei Jingsheng style, that is in a way the scenario that many people in this country are predisposed to see and respond to. Let me be clear: when I say that won’t happen or is unlikely to happen, I am not for a moment saying that I feel optimistic, but my pessimism is rather of a different variety.

My fear is not that there will be blood in the streets. It’s more that we will not know how to devise the means of responding effectively to the kind of subtle encroachment on rights which I think will happen, and indeed is already happening. This will require a conceptual framework, a set of antennae, that we haven’t really had to devise, or learn how to devise, until now. It will require a very precise set of legal and monitoring skills to come up with appropriate policy responses to what is likely to happen in Hong Kong.

We are likely to get some hints tonight at our video tele-conference panel. It will be instructive to look at the field of press freedom and freedom of expression, which was alluded to earlier today. One thinks immediately of course of the celebrated cases such as Xi Yang, a Hong Kong journalist operating in China, who got 12 years for “revealing state secrets.” Notwithstanding cases of this sort, the laboratory of press freedom has created a niche for a very innovative partnership between a local NGO and an international NGO and a new style of human rights work tailored to the reality it is confronting. I am talking about the collaboration between the Hong Kong Journalists Association and Article 19. What they have been able to do jointly is to illustrate, very effectively and persuasively, the creeping encroachment on the right of freedom of expression.

One journalist described the Hong Kong press as the canary in the coal mine. It’s the first thing to drop, and it has certainly been the first thing to be affected in Hong Kong. It’s worth running through briefly the spectrum of threats, short of the Xi Yang scenario where an individual journalist is thrown in jail, to under-
stand the very palpable change in the climate of freedom of expression in Hong Kong.

One which has been mentioned is the chilling statement, the veiled threat, the implication that the law is something other than what is actually written on paper. It is a matter of the interpretation that Chinese officials or SAR officials will give to a particular event. Lu Ping, the PRC spokesman on Hong Kong, has spoken of the boundary between objective reporting and advocacy, but there is absolutely no statutory basis for defining what that distinction is.

We've seen a very prevalent, and very widely publicized climate of self censorship, which I don't need to dwell on at length, especially in the Chinese-language press. We've seen particular pieces of legislation that were reviewed in the early 1990s by the Hong Kong Government for their conformity with the Bill of Rights Ordinance, which we've heard a great deal about this morning. These include the Television Ordinance, the Telecommunications Ordinance, the Broadcasting Authority Ordinance, and the provisions for censorship in the Emergency Regulations Ordinance. There are some early signposts here, I think, to the way in which the statutes themselves, and retrogressive interpretations of what the law says, will become the battleground in other areas beyond that of press freedom.

Then we've seen the way in which the economic climate, the advertising climate, the ownership issues associated with the press, have all been used in a way that came up this morning in response to a question about private property rights. The most recent case in point involved a very aggressive entrepreneur called Jimmy Lai, who also runs a very contentious newspaper called the Apple Daily. He floated a public stock offering for his media company, only to find that the underwriter of the offering mysteriously pulled out at the eleventh hour, and when this fellow was asked why this had happened, he made a dark allusion to—well, everyone knows why these things are happening.

That climate, of what you might characterize as "indirect burdens," is something that is likely to apply in the NGO world, too, and I'll come to that in a minute. It's something that we must be exceedingly watchful of.

In thinking about some of the danger signs that one should watch for, I wanted to be less Hong Kong-specific for a moment and reflect a little on the behavior of other governments—the kind of thing that China has probably been observing with interest during its very obstructive involvement, together with Mexico and Cuba and a handful of other governments, in the UN Working Group on the Draft Declaration on the Rights of Human Rights Defenders.

I think China, at a minimum, has been very carefully studying the experiences of other Asian governments in the regulatory arena as it effects freedom of association. I think it's also very plausible that it may have been studying the laws and practices that have been applied by other governments trying to clamp down on NGOs.

The danger in Hong Kong may not be that it will replicate, or import wholesale, legislation from the PRC. It may well be that it will pick and choose from other attractive models. It frequently cites Singapore. All sorts of Chinese officials
cite Singapore and in all sorts of contexts, as their model.

A number of Asian governments—Singapore, Malaysia, Indonesia and others—have devised various forms of threats against the ability of NGOs and other human rights monitors to operate freely. The Lawyers Committee has begun to study these laws and practices at a global, comparative level, and we will soon publish a report on this. In the process, we have come to recognize what you might call a typology of abuses. The range of restrictions that NGOs characteristically encounter in the legal and regulatory spheres. These abuses are not necessarily headline-grabbing. They are not sexy, they are not classic human rights abuses as we have learned to recognize them, but they really are the areas in which Hong Kong has to be watched very, very carefully.

There are questions of registration, for example. Is the registration of an NGO mandatory? Are the conditions for registration, where they exist, reasonable ones? How is a “reasonable” condition defined? If registration exists and an NGO is denied, what access to redress and review exists?

The funding of NGOs is, I think, likely to be an extremely contentious area, and it’s also been alluded to by other speakers. There are very few NGOs who do not depend, directly or indirectly, on some kind of support from abroad, often in the form of financial support from foreign foundations, governmental organizations, intergovernmental organizations, or private donors. Will NGOs in Hong Kong be obliged to disclose the sources of their funding or to give details of their own disbursements?

In thinking about foreign funding, governmental or non-governmental, the example of Indonesia has been something that everyone monitoring these matters has taken very deeply to heart since the Dili massacre in East Timor in 1991. In response to the criticism that was leveled by both the Dutch Government, the former colonial power, and by local NGOs who were receiving Dutch government support, the Indonesian government barred all financial support from the Netherlands.

Next, the tax regime. This doesn’t sound like a human rights issue, but it really is in a context such as Hong Kong, and increasingly in a number of other countries. Part of Mexico’s restrictions on NGOs, for example, has been the denial of not-for-profit status to NGOs. Will NGOs in Hong Kong enjoy non-profit status? If they have to disclose financial information, to whom should that information be made available? Some governments will argue that it should be made available to all interested government departments. In this country, it’s made available to the IRS. So, if there is a disclosure requirement, will China, will the SAR require disclosure only to the relevant taxation authority, or more broadly?

There are a whole slew of questions concerned with interference in the internal governance of NGOs, in which governments around the world are becoming very practiced. Does the government have the power to dissolve an NGO? Can the government replace the board of an NGO and substitute its own designated members? Can a government force an NGO to disclose the details and biographies of its members?
I mentioned indirect burdens earlier. One form of indirect burden that NGOs in many countries have experienced, and I would suspect we are quite likely to see in Hong Kong, is the use of both the legal process and the media to intimidate, sometimes perhaps even directly prosecute, but at least intimidate NGOs or discredit them in the eyes of public opinion.

Will the government stimulate or acquiesce in assaults on NGOs by third parties? There are many examples. Kenya, for one, springs to mind. For example, there is one case in which the government of Arap Moi has not directly been involved, but a pro-Moi deputy has brought a private lawsuit against the Bar Association of Kenya for involving itself in exactly the kind of charge that George was talking about earlier in relation to Hong Kong—becoming involved in political activities and therefore, acting against its charter.

Now I don’t think for a moment that the Chinese lie awake at night studying Kenyan jurisprudence, but I wouldn’t be surprised if they’re aware, and have their own ideas, of how NGOs can be intimidated in this fashion.

Finally, we talked a little about the question of international ties and obviously the areas covered by Article 23 of the Basic Law, which probably gave rise to the gravest immediate concern for interference with NGOs. I would be quite worried if I were the New York City Bar Association or the Hong Kong Bar Association. I was just looking a moment ago at the text of the final appendix to the New York Bar report, which is in your briefing book at page 104, the proposal for an on-going relationship between the New York City Bar Association and the Hong Kong Bar Association.

I remember when the delegation came back to New York, there was great excitement and enthusiasm on both sides, but how that kind of relationship will now be interpreted, I’m a little apprehensive to think. There are governments elsewhere who have already acted quite aggressively, and have laid down some markers, if you like. The Turkish Government, for example, has actually prosecuted people, citing in their criminal indictment the fact of their transmitting information about human rights conditions to Amnesty International. Turkey has gone even further, in fact, and has actually brought prosecutions citing a lawyer’s use of the right of individual petition to the European Commission on Human Rights under Article 25 of the European Convention.

Again, Turkey is a long way from China, but I think it is clear that the Chinese Government, whether through the Working Group on Human Rights Defenders or through other mechanisms, is aware of these trends and has become much more sophisticated about its own practices. The examples are out there, and they, or something like them, are quite likely to be applied in Hong Kong. As I said before, they will not demand the traditional responses that we are used to giving as human rights advocates.

PROFESSOR JAYAWICKRAMA: Thank you. The last speaker said that after hearing George and Dinah he had little to say. You will be quite relieved to know that after George, Dinah, and George, I have even less, if anything at all to add. Perhaps that’s not a bad thing because we ought to begin a discussion after this
There is no doubt that the international monitoring of human rights is vital as far as Hong Kong is concerned. It is a fact that international monitoring has brought about considerable changes in Hong Kong life. Notably, the attention that has been paid by the U.N. Human Rights Committee has led to significant legal changes in Hong Kong.

In fact, the Hong Kong that was the subject of the Joint Declaration in 1984 was transformed into what Hong Kong is today largely due to the scrutiny that the Human Rights Committee subjected Hong Kong to since 1988. In that respect, the non-governmental organizations in Hong Kong, perhaps more than any other, were responsible for activating the U.N. Human Rights Committee.

Dinah referred to the tremendous blossoming of NGOs and human rights activity in Hong Kong. That's perfectly correct. But all that happened post Joint Declaration, post-1984. I'm happy to see Dimon Liu here. She will remember the formation of the Ad Hoc Study Group on Human Rights in China which sprang up in the wake of the Tiananmen Massacre and which was able to provide perhaps the most comprehensive and accurate report of the events in China in the months of April, May, and June of 1989, and which led to the first ever resolution in any U.N. human rights monitoring body against China; the first time that the searchlight was focused on a Security Counsel member. That was due to NGO activity which commenced in Hong Kong. The first report on Hong Kong that was submitted by the British Government to the Human Rights Committee under the ICCPR in 1979, is now being cited by the Chinese Government.

That document and the statements made on behalf of the Hong Kong Government were cited by Chinese jurists and Chinese officials in making out a case for the abolition of the Bill of Rights.

They say, here is a British Government representative who goes to the U.N. and tells the UN that every law in Hong Kong is fully consistent with the international obligations under the ICCPR. And how would you know about it? Because it is the policy of the British Government not to ratify a human rights treaty unless and until it has ensured that every single law is in conformity with the obligations it is about to undertake.

That was absolute nonsense. But it was possible for none other than a chief justice of the Hong Kong Supreme Court who was chosen to be the spokesman for the Hong Kong Government on that occasion, to say that and get away with it.

But when the second report was submitted in 1988, ten years later, the interest that was generated by a number of NGOs in Hong Kong led to the British Government hurriedly submitting a supplementary report claiming there were matters that had been overlooked. That was just a week before the Human Rights Committee sat.

I have been associated with one NGO, Justice, the Hong Kong Section of the
International Commission of Jurists which, together with the Bar Association, the Law Society, and the Hong Kong Journalists Association, has regularly attended meetings of the U.N. Human Rights Committee and briefed its members as best as it could.

That has, no doubt, resulted in the attention the Committee has paid to Hong Kong and the changes that have resulted in consequence of that attention. So, it is important, it is vital, that NGOs should remain active.

The response to that of the Chinese Government is that Hong Kong is the internal affair of China; that it is no business of anyone else to criticize what is being done. In fact, before the last session of the Human Rights Committee, the Chinese Government issued a statement and warned the world that criticism of Hong Kong after 1997 will not be welcome.

Mr. Tung Chee-hwa, the Chief Executive-designate said only a few weeks ago that people in Hong Kong should not go abroad and say unkind things about the territory. He called it “badmouthing” Hong Kong. One can therefore see the sort of creeping paralysis that is being induced on the NGO.

What are the threats that exist to NGOs? The old Societies Ordinance, to which reference has been made, is obviously the principal threat to the functioning of NGOs. It is ironic that the Society’s Ordinance was originally introduced in 1949, to prevent the Communist Party of China establishing branches in Hong Kong.

I have seen the letter which was sent by the British Governor to the Colonial Secretary in London in April, 1949 where he said:

The Chinese Communist Party is about to take control of China, which means that within the next few months the Communist Party of China will be trying to establish branches in Hong Kong; we have to stop that; we’ve got to take immediate action to stop that; we’ve had enough problems with the KMT forming branches. We do not want Hong Kong to become the battle ground between the Chinese Communist Party and the KMT.

The Society’s Ordinance resulted from that. It prohibited outside political organizations from forming branches in Hong Kong and Hong Kong’s political organizations from establishing links with political organizations abroad.

That law was repealed to give effect to the Bill of Rights. The Chinese authorities now want to bring it back and it will probably be brought back because the NPC has taken a decision to repeal the amending ordinance.

In that connection, perhaps nothing could be more chilling than the judgment of the English Court of Appeal—to which George referred to a moment ago—concerning Amnesty International, where it was held that to campaign for the observance of fundamental human rights, by seeking to influence or agitate for a change of law or policy, is “political activity” and that any organization that is engaged in that kind of a work is a political organization. In terms of that judgment, Amnesty International was barred from advertising on British radio under
With judicial authority of that kind, it is not going to need much effort to prohibit at least the three organizations in Hong Kong with foreign links, the Human Rights Watch, Amnesty International, and the Hong Kong section of the International Commission on Jurists, from conducting the kind of activity they have been engaged in.

That is a major obstacle. Then, of course, the other proposal to revive the old Public Order Ordinance, will result in prohibiting any kind of demonstration or public meeting except with the leave and license of the Commissioner of Police.

The Official Secrets Act is a law that one can live with, because it is a somewhat modernized version of an old English law that is rarely fully implemented. But when the law is modernized, as the government intends to do very shortly, I think Margaret is the chairman of the committee that’s looking into it.

MR. JAYAWICKRAMA: Not the chairman, I see. Well, a member of the committee that’s looking into it. The intention is to localize that old law, without making any substantive change, merely substituting PRC for the United Kingdom, which means that any information which is considered to be “prejudicial to the interests” of the People’s Republic of China will be an official secret, and people will be prohibited from dealing with that kind of information.

To have in one’s possession, a document which might be prejudicial to the interests of the PRC, would be an offense. If that kind of substitution takes place without drafting a new law to meet the new requirements, it would be a major threat to the functioning of the NGOs.

Reference has already been made to Article 23 of the Basic law. I don’t want to go into that again. But the Government has now presented to the Legislative Council a bill to preempt the future Legislative Council and to create the new offenses of treason, subversion, sedition, and secession. They are seeking to do that by repackaging existing offenses under new names. I personally think that’s a very dangerous exercise.

For instance, sedition is virtually dead under the common law. The most recent prosecution I believe was in Canada, about 40 or 50 years ago. And there, too, the judges interpreted the law of sedition to require some violent activity.

But if the Hong Kong Legislative Council were to reenact these old offenses—some which are dying and some which are dead—they would, then, become new offenses. And accused persons who are brought before the courts will probably be denied the benefit of judicial interpretation which has narrowed the scope of the offenses considerably during the past two centuries.

These are some of the problems which NGOs in Hong Kong will have to face. But, the real problem is that which the Chinese government will be called upon to face. And one has to understand the Chinese position as well.

It’s well and good for us to be talking about the fears that Hong Kong has. But if one looks at it from China’s point of view—which I think one must also do from time to time—it’s really a problem of people who have been trained and
brought up and schooled in what Justice Douglas of the U.S. Supreme Court called the "suffocating orthodoxy" and "standardized thought" to having to come to terms with a free, open, liberal, relatively democratic society."

How do you accept such a society, take it into your bosom, and deal with it? The Hong Kong of today is not the Hong Kong of 1984.

But if and if Hong Kong changed, it was not because the British government changed it, but because one single event in China, the Beijing spring of 1989, completely transformed Hong Kong. The reality is that Hong Kong has changed dramatically.

But, then, is it conceivable that the Chinese government would permit a small region in the South China Sea to enjoy individual and collective rights that are denied to the rest of the country, including other neighboring southern provinces?

What explanation can the Chinese leadership offer—if each of you happened to be a state leader of China, what explanation can you give to other regions in the country, including the relatively prosperous Shanghai or the rapidly developing Guangzhou, for not allowing them the rights and freedoms enjoyed in the newly regained Hong Kong? How long will it be before the Hong Kong phenomenon becomes infectious?

It may be possible to have two economic systems in one country. But I must confess I am no longer a starry-eyed idealist to believe—naive enough to believe—that it is possible to preserve and nourish an oasis of freedom circumscribed by an enormous authoritarian desert.

Ostensibly, Hong Kong may enjoy autonomy. But that autonomy will be exercised under controlled conditions by officials, legislators, and judges, who are themselves chosen and ordained under controlled conditions. That is why we are seeing today, a "Provisional Legislature," and an attempt to handpick judges to man the highest courts.

We have a Secretary for Justice who has been chosen, who, in her first statement to the press, said that "[i]t is unlawful today to say 'Down with the Queen,' therefore it shall be unlawful after the 1st of July to say 'Down with Li Peng.'"

Of course, she didn’t explain how the attributes of a monarchy can be transferred into a republic and how Li Peng could possibly be equated to the British monarch, who is really the symbol of the state, or symbolizes the state.

These, then, are problems that they have to grapple with. The reality is that the Chinese authorities do have a problem themselves in dealing with Hong Kong. That’s what, I suppose, should bother us most. Thank you.

PROFESSOR SHALLECK: Thank you all for those thought-provoking presentations. Do we have any questions?

MS. MOORE: Margaret Moore, Legislative Council, Hong Kong.

Madam Chairman, I can hardly wait to respond. As a lawyer, I am warned to win on my good points—at least to try to win on my good point and not to win on my bad point, because I will lose on the appeal. And for the first time, it looks as
if, this afternoon, this panel, we may win on our good point instead of winning on our bad point.

I want to heartily thank this panel for drawing the conference's attention to a very real thing, which is that we are not going to be so much afraid of having blood on the head of Margaret—and which is very, very unlikely—and having a reversion of the trend that we have been enjoying in the last decade and more.

I have to say that Hong Kong enjoys very high standards, and we always aspire to international standards. And the development in the last 10 or 15 years is very much made possible because of the activity of NGOs and also because of the beginning of a more democratic legislature.

I thank Diane for describing in such concrete detail how these things actually happen. For example, if you have a bill on legal aid—I happen to be on the Vote Committee—you will see the Vote Committee of this elected legislature asking for representations from anybody who is interested. And, then, an NGO can come to the Legislative Council, speak to the Vote Committee, and put forward views, which will then be considered.

Nihal has just cited an example on the laws of subversion and secession. The very first things that the Vote Committee did was to ask for representation. Nihal came as a representative of Justice. We heard from a human rights monitor. We heard from a number of human rights groups. We heard from the Bar Association, the Law Society. And their views were very, very clear, that they didn't think it would be a good thing.

The Legislative Council, with the assistance of NGOs, is able to put forward amendments, or it is able to come to a position in which the laws which will be passed will conform to the high standard of human rights, instead of allowing governments to slip through legislation which would do that damage.

For example, the Independent Council on Police Complaint—again, that happens to be a Vote Committee that I am sitting on—again, you see here a cooperation between the NGOs and the more democratic element of the elected Legislative Council.

Now, I have to say that George Black is perfectly right, that we are dealing with a latent threat. And that is much, much more difficult to deal with. Because if you already have a few bloodied heads in the streets in Hong Kong, your case will be a lot easier to run. But if you are talking about latent fears, then it is much more difficult.

I think it is George Black who put forward the example of the press. George said the most chilling thing is that is what is said by people like the Chinese officials about the law would not really be the only control. But I do not think that that is the most chilling thing. The even more chilling thing is how little response there was to threats of this kind in the Hong Kong press.

And you will find, more and more, that although in the beginning the response to replacing a democratically elected Legislature with a handpicked one—although in the beginning it was very strong—now the press has come to a stage
when they become more accepting of these things. It takes you years and years of very hard work to achieve a high standard—to expect high standards. But it is very easy for you to give up those standards. All you have to do is to lose heart, and you will very quickly go back to the old days and nobody would be able to raise a single sigh of complaint. And I think that these are the very real dangers we’re facing.

Now, much more than that, I think the danger we face is much, much more real. Article 23 is a very strong weapon because it will have a lot of popular support. It is easy to say, why should we allow a bunch of foreigners to come and tell us what to do? We should be allowed to make our own positions. So, these NGOs, with their connections abroad, should not be allowed to influence Hong Kong.

And Nihal has pointed out to you the kind of real problems that the Chinese government is facing. But I think that this is exactly where Hong Kong needs most input from abroad, because even economically we have not become what we are by staying provincial, by staying completely closed to outside influence. We have become what we are in Hong Kong because we have kept on listening to the voice outside, imbibing standards which are accepted not by the country which is the least concerned about human rights, but from the countries which are most concerned about human rights. We would only take the highest standards, and I think this is what we have to keep in the future.

I think this is a very good start, because we have to find those mechanisms to fight something which, at the first blush, will be very acceptable both abroad and at home in Hong Kong as shutting out foreign influence because Hong Kong people should decide on their own.

I hope very much that you would succeed. I think you’ve highlighted the problems. I think we’re in the right direction. But it is a lot of hard work. And with the elected Legislature being disbanded very soon, in a few months’ time, being replaced by an undemocratically elected one, I think the work is even harder.

I started looking at the Legislative Council very closely in the middle 1970s. And I tell you, it is nothing like what it is today. Because when you have an appointed Council, it is very easy to arrange for an agreement between the Council and the executive. It is only when you have open elections, when you have elected members, that you find that this cooperation between the more open-minded element of the Council and the NGOs in the world—that you find it working.

So, you’re in the right direction. I hope you will succeed, because your success would mean very much to me personally. Thank you very much.

MR. HUGHES: Edward Hughes, from the National Democratic Institute.

I’d first like to thank the panel for your thoughts on this topic of NGOs. My question is whether you have any sense that NGOs in Hong Kong are committed to the test. I guess, what are the boundaries of what political activities would be—as Professor Edwards spoke to—and whether they’re committed to really force the government’s hands to act before allowing the government to dictate their activities?
MR. EDWARDS: I'm not sure I understood the question. But did you ask how far will the Hong Kong NGOs go in trying to test the hand of the—— Well, it's easy for me to sit here in Washington, D.C.—or in Indianapolis, Indiana where I live—and say that I would be willing, personally, to push very hard, because my livelihood is not at stake. Even when I lived in Hong Kong, which I did do for almost six years, my livelihood—my freedom was not really at stake.

And if I were to go back, I would not have the same problems that some of my colleagues at the Monitor—or my colleagues and comrades at some of the other organizations have. And some of their constraints are that they don't have a way out if things get really hot and heavy. And I can't really speak for those people. Those are the ones who I think would be in a far better position to answer that question. We don't have the same—we don't have the same risks.

So, I don't know—I can't speak for all of the NGOs. I can only speak for myself, personally. I do know that—and I do believe that some of the people working at the Monitor who don't have overseas passports would be willing to even have blood on their head if that's what it takes for fundamental freedoms to be the rule in Hong Kong in the future.

GOVERNANCE: THE PROVISIONAL LEGISLATURE, CHIEF EXECUTIVE, ROLE OF POLITICAL PARTIES, CORRUPTION, AND ACCOUNTABILITY

PROFESSOR WILSON: My name is Rick Wilson. I am on the faculty here at the law school, and I direct the International Human Rights Law Clinic and teach in comparative law areas, particularly human rights and criminal procedure.

It's a great pleasure for me this afternoon to moderate this panel. And we'll run about an hour and a half. I hope we'll have a chance to have some questions at the end.

And if I may just introduce the panelists. To my immediate right is Howard Lange, from the State Department. To his right is Edwin Fung, from the Alliance of Hong Kong Chinese in the U.S. And you have seen Christine Loh this morning, a member of the Hong Kong Legislative Council. Mr. Lange has done a great favor by standing in for Jeff Bader, who was scheduled to be a panelist this afternoon and who was taken ill at the last minute. So, Howard has bravely agreed to step in on his behalf.

He is a veteran at the State Department. He has been there for 27 years. He is currently Director of the Department of Chinese and Mongolian Affairs. And for some time before that, he was the Coordinator of Taiwanese Affairs.

He spent a good deal of time in China in the '80s, both in China and, then, on the China desk here at the State Department. And he's going to give us an overview with regard to U.S. policy regarding Hong Kong.
MR. LANGE: Thank you, Rick. I am a last-minute addition. I am certainly much less qualified than Jeff to speak to Hong Kong. I have not served in Hong Kong during my career. I have lived in Taiwan and in mainland China. I dare say I’m less qualified than many in the room, also, to speak to the situation in Hong Kong currently or the history that led us to where we are today.

But I thought I would speak about what I do have some familiarity with, and that is the U.S. administration’s approach to Hong Kong as we near reversion at mid-year.

Of course, by way of background, the commitments that the Chinese made in the Joint Declaration are a fairly impressive list of commitments.

Just to tick off the main items in the Joint Declaration: they committed themselves to independent courts for Hong Kong; that Hong Kong residents would be in all the important positions in the government in Hong Kong; that Hong Kong laws would apply to Hong Kong residents; that Hong Kong’s finances would be independent, there would be no taxes remitted to Beijing. It would have its own currency; that Hong Kong police would maintain public order; that, to the extent possible, international agreements would be made with the Hong Kong Special Administration Region; and that there would be an elected legislature.

As I say, it’s a pretty impressive list. And with some of those items, there is considerable room for optimism, at least in terms of what has happened so far.

Obviously, with a couple of the items, there are some serious concerns, the establishment of the Provisional Legislature being one concern. Our view is that this was an unnecessary step, but we have generally refrained from addressing the legal interpretation of this step. What we really want to support are open, accountable, and democratic institutions as Hong Kong moves into the era after July 1st.

We have expressed the view that the Provisional Legislature should be limited in duration and in the scope of its action, and that we will be watching for the emergence of an electoral law for the elected Legislature which is to follow the Provisional Legislature.

There are some other sources of concern as well: the Preparatory Committee named by Beijing excluded members of the Democratic Party; there is some doubt about whether Beijing is going to follow through on reporting on the human rights covenants as they apply to Hong Kong; there, of course, is the repeal of certain portions of the 1991 Bill of Rights Ordinance; and there are certain statements from responsible people in Beijing which, as I say, are a source of concern, statements such as: “There will be respect for freedom of expression in the media, with the possible exception of such things as rumors and lies.” Well, in the U.S., if that were excluded from publication, there would be a lot less in the newspapers.

The objectives of the United States in Hong Kong—given that we have very extensive, immediate interests there in terms of U.S. residents, business investment, and trade, our objectives are to help preserve the prosperity and the way of life of Hong Kong.
In our dialogue with all of the directly interested parties—that is, Beijing, London, and Hong Kong—we emphasize that we hope to see: maximum autonomy for Hong Kong; the continued operation of free market; a legal system which continues operating independently; protection of freedoms, including press freedoms; and continued development of democratic institutions.

Bilaterally, directly with Hong Kong, we have tried to set firmly in place a framework of agreements that will support Hong Kong’s autonomy: we have negotiated an Extradition Agreement, which we believe will soon be taken up by the Senate for ratification, and a wide range of other agreements, such as Air Services Agreement, Judicial Assistance, and so forth; we will do what we can to support Hong Kong’s continued autonomy in economic institutions such as WTO and APEC; we have independent agreements with Hong Kong with respect to textile quotas and export controls; we are pursuing privileges and immunities legislation for Hong Kong’s offices in the United States; we pursue education and cultural exchange. We have had a series of high-level visitors to Hong Kong. And that continues, and we intend that it will continue. All of this is supported, of course, by the Hong Kong Policy Act passed by our Congress.

Well, for the future, one encounters differing views on whether the glass is half full or half empty. One could say, in the perspective of the past seven years or so, beginning with the period directly after Tiananmen, when the outlook seemed quite gloomy, that today things look better than expected.

On the other hand, Beijing has taken some steps that may undercut autonomy and freedoms in Hong Kong. From that perspective, the glass can seem to be half empty.

The Hong Kong economy seems quite strong. Investors at least sound confident. The stock market also seems strong. Property values are up. People are not leaving. And, in fact, there are some Hong Kong residents who have second passports who have been returning to Hong Kong.

Beijing has strong reasons to live up to the Joint Declaration, the agreements it made there. It has every interest in seeing a prosperous and vibrant Hong Kong. Of course, we all know that Beijing is going to face some difficult periods. Hong Kong is much different than any other part of China, and it will take an extraordinary degree of flexibility on the part of the leadership in Beijing to learn how to deal with this different animal.

The U.S. will continue its policy of supporting Hong Kong’s autonomy through reversion and into the future. And we will do what we can to support that. I think we have a reasonable amount of influence. During Secretary of State Albright’s recent visit to Beijing, she was prepared to discuss our concerns about Hong Kong. She did not have to raise the subject; it was raised to her. So, I think it’s a promising sign that the leadership in Beijing has come to realize that the world is watching to see how they carry out Hong Kong reversion. Thank you very much.

PROFESSOR WILSON: Our next speaker is Edwin Fung. Edwin was born in Hong Kong in 1955 and emigrated with his family to the United States in 1969. He is currently an employee of the Goddard Space Center, works with NASA as a
thermal systems engineer—something I find fairly daunting as a career.

He has been active—since the time that he left Hong Kong—with issues regarding Hong Kong. He has been active with the Alliance of Hong Kong Chinese in the United States, the Federation of Overseas of Hong Kong Chinese in Washington, and other organizations. He tells me that although he has been away from Hong Kong more than twice the time he has lived there, he still considers himself very much from Hong Kong.

He is going to speak this afternoon about the Provisional Legislature and what we might anticipate from the Chief Executive who has taken power there.

MR. FUNG:* First, I would like to thank the Washington College of Law for putting together this conference on Hong Kong and for inviting me to be a speaker.

I would like to correct a little bit of what Rick said about me. I was a thermal systems engineer for my first three years at NASA, but now I’m a computer analyst.

Okay. In my presentation, what I’ll try to do is to focus on how Hong Kong will be governed, how the Provisional Legislature and the Chief Executive would run Hong Kong come July 1st.

In the first part of my talk I will try to give a little background of how the Provisional Legislature comes about, how they are being formed. And, then, I am going to spend a majority of the time on the kinds of laws that the Provisional Legislature will change. And, then, at the very end, I will have a preview of what we expect from the Chief Executive, Executive designate, Mr. Tung Chee-Hwa.

I. BACKGROUND

Why is the Provisional Legislature such a controversial issue? Though he never intended it, the Provisional Legislature is, in a way, a legacy of the political reforms introduced by Governor Chris Patten in 1992. Governor Patten’s reforms in changing the election laws for the 1994 and 1995 elections of the District Boards, the Municipal Councils and the Legislative Council took advantage of the gray areas in the Basic Law. The Basic Law stipulates that a certain number of seats of the Legislative Council are to be directly elected while others are to be indirectly elected. The indirectly-elected seats are produced by either “functional constituencies” or by an “Election Committee.” The Basic Law, however, does not specify how those seats are to be elected. Governor Patten took advantage of this by enlarging the functional constituency electorate by a huge margin. For example, while in the past only the owners and CEO’s of major companies have had a vote in their respective profession or functional constituency, Governor Patten made it

* Mr. Fung learned after the conference that he incorrectly asserted Mr. Allen Lee’s position on the Bill of Rights. Mr. Fung apologized to Mr. Allen Lee for misrepresenting Mr. Lee’s position on this issue, and he also apologizes to the organizers of the Hong Kong conference.
such that anyone in that profession can have a vote, in effect making these seats "quasi-directly elected." In the ten seats returned via the Election Committee, Patten's reforms made it so that the Election Committee itself is composed of members of the District Boards, who are themselves directly elected. To sum up Patten's political reform in one sentence: He made it such that the Legislative Council elected in 1995 is the most representative and most democratic in Hong Kong's history.

It is, therefore, not surprising that China reacted furiously to Governor Patten's reforms, calling him anywhere from a "prostitute" to "a criminal for all ages." The British Government at first tried to find common ground with China and attempted to negotiate with China on a formula acceptable to both sides. After 17 rounds of negotiation from April 1993 to December 1993, when the only concession that China would agree to is the lowering of the minimum voting age from 21 to 18, Governor Patten decided to implement his political reforms unilaterally, if for no other reason than that time was running out. China reacted to this by vowing to scrap all three tiers of the legislature—the Legco, the Municipal Councils as well as the District Boards—when it took over Hong Kong on July 1, 1997, and to install in its place the "Provisional Legislature."

A lot has already been said about how the Provisional Legislature violates both the 1984 Sino-British Joint Declaration and the Basic Law of the Hong Kong Special Administrative Region. I will not rehash the arguments on whether the Provisional Legislature is legal or not, but instead concentrate on how the Provisional Legislature was formed, what laws the Provisional Legislature will change and how they will affect Hong Kong.

II. FORMATION OF THE PROVISIONAL LEGISLATURE

The Provisional Legislature was "elected" by a 400-member Select Committee (SC) on December 21, 1996. Supposedly any legal permanent resident of Hong Kong can apply to join the Selection Committee. In a letter to the New York Times on November 26, 1996, Nellie K.M. Fong, a Selection Committee member herself, claimed that membership of the SC is from "all walks of life" and "open to the public," and that more than 5,700 H.K. permanent residents applied. Four hundred of those who got the most votes were selected. What Ms. Fong neglected to mention was who voted for the SC members. It is the hand-picked Preparatory Committee (PC), a 150-member body of Hong Kong advisors and Chinese officials appointed by Beijing to handle transitional details.

If there is any doubt that this voting process for the Selection Committee is rigged, consider the case of Eric Wong Chung-ki and Grace Au Yuk-har, two members of the Association for Democracy and People's Livelihood (ADPL), a "middle-of-the-road" political party. Both submitted applications to join the Selection Committee but both got kicked out by the PC Secretariat simply because they wrote on their application forms that they opposed the Provisional Legislature (under the Basic Law, the Selection Committee is supposed to select the Chief Executive only). So membership in the SC, in effect, is limited to only those
who were willing to toe Beijing’s line.

It is also worthy to note that all 86 members of the PC who stood for “election” to the SC were “elected.” Beijing obviously does not think that there is any conflict of interest when PC members “elected” themselves. In fact, some of those PC members who elected themselves into the Selection Committee promptly reprised this trick by electing themselves into the Provisional Legislature. In fact, if we follow the history of how Beijing selected those they wanted to install in positions of power in Hong Kong, we can see the pattern that it is almost always the same set of people who get appointed. First, they were known as “advisors on Hong Kong affairs.” Then most of these H.K. advisors graduated to the Preliminary Working Committee (PWC), which is then reincarnated in the Preparatory Committee (PC). The PC then elected themselves into the SC which in turn elected themselves into the Provisional Legislature. It is almost the same set of people over and over again. Therefore, if we study what the PWC and the PC advocated in the past, we can get an idea of how the Provisional Legislature will act when they take over Hong Kong on July 1.

III. ELECTION LAWS

The first order of business the Provisional Legislature (PL) will take on is to undo all the political reforms instituted by Governor Patten. The PL will install new election laws which will then govern the next election for the three-tiered legislature, now promised by China to occur some time in 1998. On the two lower tiers, the District Boards and the Municipal Councils, PC members have indicated that they will return to appointed seats after the Patten reforms made all District Board seats to be elected directly by the people.

On the Legislative Council elections, while the number of directly-elected seats will stay the same—twenty, as this number is agreed to by China in the early 90s—the Provisional Legislature will very likely institute a “single vote, double seats” scheme or even a “single vote, multiple seats” scheme. In the first-ever direct Legco election in 1991, the system in use was “double votes, double seats” where two Legco members will be elected in the same geographical constituency with each voter in the geographical area they were in casting two votes. This was changed to the “single vote, single seat” scheme in 1995 where there will only be one single Legco representative for each geographical area with each voter having one vote. The “single vote, double seats” arrangement will again limit each voter to one vote but there will be 2 winners—the two candidates with the highest votes will be elected. Imagine, for those of you who live in Maryland, that you can vote for either Barbara Mikulski or Paul Sarbanes, but not both, and for Virginia voters, you can vote only either Chuck Robb or John Warner, and you can imagine how fair this “single vote, double seats” or even worse, “single vote, multiple seats” arrangement will be. This will clearly favor the pro-Beijing factions to the disadvantage of the Democratic Party of Hong Kong. In 1991, both seats on the Hong Kong Island districts were won by the United Democrats of Hong Kong, the predecessor of the Democratic Party, on the “double votes, double seats” system.
Martin Lee won more than 70 percent of the vote, helping the much lesser known Sai-Cheung Man to win the second Legco seat in that geographical district. If it were the “single-vote, double seats” scheme then very likely Martin Lee would be the only democrat elected.

At the heart of the Patten reforms was to transform the previously small electorates of the old “functional constituencies” into much larger ones. It will be natural that the Provisional Legislature will turn back the clock on these “functional constituencies.” Under the Patten reforms, nine new functional constituencies were created, in addition to the original twenty-one. The Provisional Legislature will likely abolish all nine new functional constituencies and install completely new ones following the old scheme of giving votes to only a selected few. The smaller the electorate, the better chance that Beijing can control the elections. Sir David Akers-Jones, a former chief Secretary of Hong Kong, but in recent years an “advisor” to Beijing, once said with remarkable insight, that “the Chinese do not mind having elections. But they do like to know the result before they are held.” Patten’s “sin” is simply that it goes against this principle.

IV. THE BILL OF RIGHTS AND CIVIL LIBERTIES

In January of this year the Preparatory Committee created a furor by proposing to amend certain sections of the Bill of Rights and the Societies and Public Order Ordinances. Despite the protests of the Hong Kong people as well as the international community, the National People’s Congress nevertheless endorsed the proposals. Chief Executive-designate Tung Chee-Hwa also expressed support for the proposals, thereby almost guaranteeing that parts of the Bill of Rights will be repealed after July 1, 1997.

The proposed changes involved changing several articles in Part I of the Bill of Rights: Article 2(ii), which deals with the interpretation of the Bill of Rights with regard to the International Covenant on Civil and Political Rights (ICCPR); Article 3 which deals with pre-existing laws before the Bill of Rights was enacted; and Article 4, dealing with the interpretation of subsequent legislation. All of these articles relate to the idea that the ICCPR should be the standard in judging existing and future laws. The PC claims that these articles of the Bill of Rights contravene the Basic Law’s Article 8, which states that pre-existing laws should be maintained, and Article 11 of the Basic Law, which maintains the supremacy of the Basic Law over any other law in the Hong Kong Special Administrative Region (SAR).

Actually, the reverse can be argued. The Hong Kong Bill of Rights was codified and incorporated to satisfy provisions of the International covenant on Civil and Political Rights as applied to Hong Kong—Great Britain being a signatory of the ICCPR. If the Bill of Rights contradicts the Basic Law, then it would mean that the ICCPR itself contradicts the Basic Law. And yet Article 39 of the Basic Law states: “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and International labor conventions as applied to Hong Kong shall remain in force
and be implemented through the laws of the Hong Kong Special Administrative Region."

It is also interesting to note that some of those Preparatory Committee/Provisional Legislature members such as Allen Lee and Maria Tam who are now proposing to repeal or amend parts of the Bill of Rights supported the enactment of the Bill of Rights themselves back in 1991.

The Public Order and the Societies Ordinances have been changed in recent years to take into account that Hong Kong has evolved into a civil society and that these original antiquated draconian measures are no longer suitable for Hong Kong. For example, using a loud-hailer in public without applying for a permit from the police used to be a criminal offense but is no longer so since 1995. Also, to conform with the Bill of Rights, it is no longer required to get a police permit to demonstrate—a simple notification is sufficient. In a similar way, forming a society or association now no longer requires registration with the government—simply notifying the government suffices. The Provisional Legislature will reverse these relaxations of the draconian public securities measures and return to the order of the early and more turbulent colonial days of Hong Kong.

In late 1996, Legco passed a bill on subversion which essentially states that any acts of non-violence will not be considered subversive. The heavy sentencing of Wei Jingsheng to his second 15-year prison term in late 1995 and an almost just as heavy sentence of 11 years meted out to Wang Dan in October 1996 provided the impetus for this new subversion law. If China were to adopt a similar subversion law then clearly the jailing of Wei and Wang would not be lawful. Of course China objected to this so this law definitely will not survive the Provisional Legislature, which will enact its own subversion law to satisfy Article 23 of the Basic Law, which deals with treason, secession, subversion, and sedition.

V. LAWS RELATED TO CULTURAL AFFAIRS

In general, proposals by the PWC or the PC in laws relating to cultural affairs such as the changing of the flags, emblems, stamps, holidays, etc. are less controversial, with the exception of the attempt to revise existing textbooks for Hong Kong’s schools. The PC takes the position that anything which remotely smacks of Hong Kong’s colonial past needs to be eradicated. They would also like to put the studying of the Basic Law into the curriculum. The PC has been saying this for some time, but the matter has sort of been brought to the forefront of the news last week, when Chinese Foreign Minister Qian Qichen threw his support behind the idea that Hong Kong’s textbooks need to be revised if they “do not conform to China’s principles.” One can only guess what he means by “China’s principles.” Would events such as the Great Leap Forward, the Cultural Revolution, and the 1989 Tiananmen Massacre be against “China’s principles?” To use an American term, Hong Kong’s history textbooks after 1997 will need to be “politically correct.”

Incidentally, as he has done every time since he became Chief Executive-designate, Mr. Tung Chee-Hwa once again stated his support for this Beijing-
inspired proposal.

VI. CHIEF EXECUTIVE-DESIGNATE TUNG CHEE-HWA

This brings us to the question of how the first Chief Executive of the Hong Kong Special Administrative Region will govern after July 1, 1997. There is less material on Tung’s views in the public domain than the Provisional Legislature’s, but nevertheless since he was selected as the Chief Executive by the Selection Committee on December 11, 1996, Tung Chee-Hwa has spoken on numerous occasions on Hong Kong issues in various speeches and interviews with the press to give us some idea of how he will govern.

One of the recurring themes that Tung touches on is his emphasis on livelihood issues over the issues of democracy and civil liberties. In a recent interview with Mike Chinoy of CNN, Tung claimed that the Hong Kong people are not really concerned with democracy and civil liberties, but rather that they care for housing, education, and social benefits. Immediately after his selection, Tung said that he wanted Hong Kong to return to the non-confrontational era. He has complained that Hong Kong has become “too politicized.” After the transfer of sovereignty, our society will not be as politicized. We can all work together to create a caring society that has a strong social fabric.

Essentially Tung considers western-style democracy as not suitable for Hong Kong. No wonder he won praise from Lee Kuan Yew, Senior Minister of Singapore, who espouses the so-called “Asian values”—hard work, emphasis on education, obedience to the authorities, belief in order and stability, a preference for consultation instead of open confrontation and more emphasis on obligations to society than the rights of the individual. On the PC’s proposal to repeal and amend the civil liberty laws, Tung justified his support of those proposals by stating that Hong Kong needs to strike a balance between the need for an orderly and stable society and the rights and freedom of the individual.

Tung also toes Beijing’s line on freedom of speech and freedom of the press. He has said that “slanderous or derogatory remarks and personal attacks against Chinese leaders” will not be tolerated in Hong Kong. When asked by Mike Chinoy whether he will permit commemoration of June 4 after the handover, while stating that “any form of peaceful and lawful demonstration will be permitted,” Tung refused to say outright that he will allow commemorations of June 4. He simply ducked the issue by stating that he will uphold whatever laws that will be enacted by the Provisional Legislature.

In the end, a thing of note is that Tung has not deviated in any single instance from the official line espoused by Beijing. Whether it is the formation of the Provisional Legislature, the repealing and amending of the Bill of Rights or the issue of revising history textbooks for Hong Kong’s schools, Tung so far in all cases has come to support Beijing’s position. It really makes people wonder whether he is capable of any independent thinking at all.

When asked about the criteria of serving in the three tiered legislature, Tung
replied that "one should love Hong Kong and love China," and "one should uphold the Basic Law," a position that Beijing has stated time and again. However, I don’t know if Tung is aware of the fact that in Article 68 of the Basic Law it is stated that: "The Legislative council of the Hong Kong Special Administrative Region shall be constituted by election."

So by his support for the Provisional Legislature, a legislature NOT constituted by election by any stretch of the imagination, he has flouted the Basic Law himself. Thank you very much.

PROFESSOR WILSON: Thank you very much, Edwin. Our last speaker is Christine Loh. You met her this morning. For those of you who weren’t here this morning, a brief introduction. She is an independent member of the Hong Kong Legislative Council, and she represents Hong Kong Island’s Central Constituency. She had a long career as a commodities trader in Hong Kong before taking up her political activities. Since that time, she has been a strong advocate of democracy, human rights, the arts, and environment in Hong Kong. She’s going to be speaking this afternoon about the future of political parties in Hong Kong.

MS. LOH: Thank you. Well, maybe I should start off by addressing whether there is a future for the business that I’m in, which is, of course, politics. After listening to Edwin’s very fine exposition of the current situation and, indeed, members of my family, my friends, my overseas friends, I get streams of messages all the time saying, “do you still want to be doing what you’re doing?” Because in the last year or so I have also decided that I want to spend the next 10 years in full-time politics. Now, of course, I am about to be unemployed, so being in full-time politics may very well also mean unpaid work. But nevertheless, I do believe there is a future in politics.

Just now Edwin reminded us of Mr. Tung’s remarks. It’s the sort of remarks we hear quite often from a wide circle of people in Hong Kong, that politics is bad, we don’t want too much politicization.

I believe that kind of thinking stems from a time of the past. Many of the people who hold this view, fail to distinguish that politics is really a public decision-making process. They fail to see that any community has to take collective actions and therefore take collective decisions. They are used to a system where only a few people make all the decisions.

In a place like Singapore, the Government doesn’t want to consult the people too often because they believe they already have all the best ideas, so why ask people whether they should go ahead with those ideas?

Now, traditionally, in Hong Kong, the colonial way of governing is precisely like that. A few senior government officials draft policy and they implement policy. They don’t really have to ask anybody. Our laws don’t mandate that the government has public inquiries in many, many important cases.

So, is that the kind of public decision-making process that is so relevant for the 21st century? I think not, because even in China, what you’re seeing is—well, the top Chinese leaders, increasingly need to build up a bureaucracy. They need to tap
into the thinking of technocrats in order to advise them of issues like telecommu-
nications, trade liberalization, and so on. Before, you had the Politburo, who basi-
cally took all of the decisions on almost everything. Now even in China, they are
not able to do that.

Now in Hong Kong—I mean, increasingly, the Hong Kong British Govern-
ment has had to tap into, again, a wider pool of information and expertise in order
to make decisions.

So in the future, is Mr. Tung seriously suggesting that his hand picked execu-
tive council and senior civil servants are all that are necessary to arrive at a whole
range of public decisions that could only get more complex? Now he might think
so because he comes from that tradition. But Hong Kong has also arrived at a time
where, well, the society is increasingly better educated. It is fundamentally a dif-
ferent society than was the case in the '50s and '60s.

Hong Kong has had universal education since 1978. So you do have a younger
crowd who are educated, who have experience, who have ideas, and who want to
share them. Part of, I think, the quality of life is also to be able to participate in
community.

Now in the past, the culture is well, if you want to participate in community,
get into charity work. I think that is not going to be enough any more. And if you
look at the Non-Governmental Organizations (NGOs) that we have in Hong Kong
today, well, we have labor groups. We have women’s groups. We have groups
representing the rights of the disabled. We have many green groups. I mean, we
have a whole variety of groups in Hong Kong who are quite vocal. We have the
Bar Council. We have the Law Society. We have distinguished members of pro-
fessional bodies who are now speaking out on a whole variety of issues that go to
the heart of policymaking. And the government has not been able to say we don’t
want to listen to these people.

So the culture of the colonial government is changing. So, therefore, I suggest
that the business of politics has a bright future. But what the Hong Kong people
must do is stick at it.

Now I have to say, that so far being a politician under British rule has been
pretty cushy. It hasn’t been so difficult. We can direct all kinds of unpleasant
statements, and nothing happens to us. For example, Governor Chris Patten. He
rather likes it. He is rather combative. He likes to defend his position.

It seems like this sort of culture perhaps is a little less comfortable to Chinese
leaders. But nevertheless, when Hong Kong becomes a part of China, we are not
going to change overnight either. So therefore, there will be this tug where Hong
Kong people should just keep on being themselves.

Now also, I feel very strongly that our generation of politicians—we are the
first generation of politicians in Hong Kong who want to be politicians—we are
prepared to go to the ballot box and seek legitimacy from the people. We prefer
that, in a way, to the old system, which is an appointment system. The appoint-
ment system essentially requires that you get on well with the hand that feeds you.
If you get on well with the power source, you get appointed to influential commissions and the legislature and the executive council. But if you have derived your legitimacy from the people, well, you don’t have to do any of those things.

Whatever we say about what the future electoral laws are going to be, it seems like elections are going to stay. There will be elections where the general mass in Hong Kong will be involved. This introduces a significantly new arrangement in the political scene in Hong Kong. And there are actually people, not just me—there are quite a lot of people in Hong Kong who want to dedicate ourselves to that process. So I think this is a good beginning for really a kind of political life in the Chinese community in Hong Kong, which is a significant departure from the past.

Again, using myself as an example, I am new in politics. In Hong Kong, we all have to think through what kind of values and principles we stand for. What are the kind of ideologies that really invigorate us? And frankly, why are we in politics in any case?

We’re in politics because we want to stimulate social progress. So you have to have a pretty clear idea of what kind of society you want to move towards, and therefore build a political message and a political campaign based on a broad picture of the kind of community you want.

And when you look at it that way—well, like any community anywhere, what are the areas of progress? What are the areas we need to fundamentally reform? Education, the environment, competitiveness of our economic system—many, many issues. And these are fundamentally the issues that I think the men and women anywhere in any country are concerned about.

So when we are looking at social change, and when you look at the political process, you look at politicians, people like myself who want to be politicians. We don’t just want to be NGOs. We want to get into the process, to stimulate change from within.

What I found is—why do I want to spend the next ten years of my life doing this? Because in the last five years, just being an independent member, being one voice—if you are prepared to work hard, if you are prepared to work with other people, actually you can make quite a significant impact. You are able to change the law. When you change the law, when you influence policy, that affects 6.3 million people in Hong Kong. It is an effective route to social change.

So I have learned an awful lot in the last five years. I no longer want to be just a member of an NGO. I chaired Friends of the Earth in Hong Kong for two successive sessions. I am passionate about the environment in Hong Kong. But I know if I remain just as an NGO, there will be a role, but it will not be as effective a role as a member of the legislature. That is why I am going to contest the elections in 1998, and I hope I will win.

But as I said, it is more than just the environment. It is about thinking through social progress, and what are the values and the principles you want to be guided by. These are very challenging thoughts. I don’t think I have come to the end of the road in that process at all. In fact, I think I am only at the beginning.
If we are looking again at the future of developing representative government in Hong Kong, if you read the Basic Law, it says the ultimate aim is universal suffrage. Well, it doesn’t tell you any more about how you get there. What I am going to argue in Hong Kong is that the Basic Law throws down a tremendous challenge. The challenge is one day you will have universal suffrage.

Universal suffrage just refers to elections. It doesn’t say, when you have people elected, how they are going to hold power or how they are going to exercise power. And I think that is essentially the challenge for the future, whether we can delineate and define a new political structure that will make universal suffrage, that will make elections, meaningful. Are we going to adapt ourselves to a U.S. Congressional style of government? Are we going to go for a British parliamentary style, a Swiss style of direct democracy, or some other style?

Hong Kong people have grown used to elections. We like elections. But we know we are not electing a government. We now have to make a quantum leap sometime in the future to make elections meaningful by making sure that the political process empowers elected representatives in some way that will make their task effective.

It will require re-balancing the powers of the executive and the powers of the legislature. I don’t know what that final structure is going to be. And it isn’t just the legislature. We have three tiers of government in Hong Kong. We have Municipal Councils, and we have District Bodies. And we are seriously looking at the future of an authentic system of representative government. We have to look at all three tiers of government.

At this moment in Hong Kong, the focus on this area is not yet there. Perhaps we are totally upset and preoccupied with the immediate problems of the transition. But when we get over the transition in 110 days time, if we are committed to revising the Basic Law as a living document, something that has to accommodate to the community as we change, then we have to, as a community, start looking at these serious issues.

So there is plenty of work to be done—plenty of opportunity for lawyers, political scientists, with our friends overseas in think tanks who have done work on political systems around the world, to actually cooperate—for Hong Kong to think through a political system for the future that would be appropriate for Hong Kong. That’s a big deal. That’s going to take time.

I’m sure some of my democratic friends in Hong Kong will be criticizing me for even talking about a process that will take time. But having thought about it now for a couple of years, I think we do need to think of a new political structure. It isn’t just about elections to the legislature.

So this period of time, how are we going to spend it? How are we going to work with each other? How are we going to stimulate and motivate the people of Hong Kong? Because the people themselves have not focused on this issue.

This is one of the tasks I have set for myself. And I think lastly, I just wish to say that I don’t regard politicians as an endangered species. I think we can grow
and multiply. What I am going to do on the fourth of May, 1997, with others, is form yet a new political party.

Now why is that? People say there are already so many political parties. But as I said, we’re at the beginning of thinking through what values we stand for, what programs we want to promote. So I think the most important thing is for people to dedicate themselves in that process. There is plenty of time in the future to coalesce and join hands if we feel over time that actually our values and our program for action are very similar. I think it is more important at this time that people are willing to dedicate themselves to the political process. So I certainly look forward to ten years in full time politics, whether I am in the Legislative Council or outside the council. Thank you.

PROF. WILSON: I think your remarks bring a question of my own to mind. And given the concern that I have in the United States with the declining levels of public participation in the electoral process, I’m curious as to the sense any of you may have about the extent to which there is a culture of participation, a culture in the Hong Kong people, at the grassroots level, that is likely to take hold during the transition and assert itself in aspects that have to do not only with the exercise of the vote, but in other public participatory activities.

MS. LOH: If I can take that question first, I think there is a big market out there for all kinds of issues. The reason for this is that people in Hong Kong are interested in many issues. They are concerned about the future of education for their children. They are worried about the increasing amount of air pollution in the air. They are concerned about jobs in the future, whether economic restructuring is going in a direction where many of them will not have jobs. They are interested in what kind of retraining programs there might be.

So you can get a lot of people interested in these issues. What is missing in Hong Kong is that many people, even very well educated people, because they have been brought up in a colony, don’t feel empowered.

You must not forget that since 1991 they have only had a legislative councilor, the equivalent of a senator or a congressman to whom they can write and put their problems to.

People in Hong Kong don’t really as yet connect their vote with voting in a government. However, people are interested in public issues. So I think our mission really is how can you capture that interest and that energy, and make them feel empowered, that there are things that they can do.

For myself, I think the more that I can stimulate members of the public who are interested in any of these issues, that in taking an interest in that issue, actually you are building the building blocks, the nuts and bolts, for the democratic system.

Now whether you are talking about air pollution—essentially, there are certain ingredients in the approach that you look for to solve the problem. You are inevitably today calling for more information from the government. You are inevitably questioning government about polices that they have. You are inevitably using
words like “calling them to account.” You are perhaps asking for more public consultation on government policy.

These are all the nuts and bolts of a democratic system. So even if you are talking about air pollution, you can very consciously build in a way of dealing with that issue where, I think, at the end of the day, the people who are concerned about that issue, will be heard; it is collective action.

MR. FUNG: Let me also try to tackle that question. If politics is a dirty word in America, it is an even dirtier word in the Chinese culture. In fact, we have a saying in Chinese that you will be very lucky if you never enter politics in life. It is almost like it is better than not going to hell.

So it is—you’re right in that there is a culture problem. The Chinese people are not used to being activists, being masters of their own destiny. But I think what happened in Hong Kong within the last 20 years or so—I think some people are beginning to see that they can make a difference, that people are more civic minded than the Hong Kong that I knew when I was born and raised there.

Every time I go there, I have to remark on the efficiency of the civil service in Hong Kong. And I think in some ways the colonial British government has, over the last 20 years, been electing more and more Hong Kong people to participate. And that is hopefully helping to change the culture for the Chinese people to get involved in politics.

There is also another thing that will probably help the people to be more concerned with politics in the future. In the U.S., we have witnessed a declining percentage of Americans going to the voting polls. I think that if you compare the situation with Hong Kong, it might be that people may not be very active in politics. But if they see that their own livelihood, their own environment is being controlled by people that are not really putting the peoples’ interests before their own, then I think that would help them more; it would motivate them. When there are injustices in the system, it will motivate the Hong Kong people to be more involved.

In the U.S., the average voter may not think that he or she matters too much. You don’t see a whole lot of great injustices in American society, but with Hong Kong maybe. With Hong Kong—especially if we have an unelected legislature—that would be an impetus for people to get more involved.

I believe the Provisional Legislature will definitely change all of the election laws governing the next legislative council elections. But will there be any participation from the people of Hong Kong?

The way China wants to handle it—one hand—they want to have control. But on the other hand, they want it to appear as a democratic process. It is the Chinese way of, you know, having faith in saying that we can. In fact, when Tung Shih Wa was elected Chief Executive, Tung Shih turned to the foreign minister of China to say there is a new day for democracy for Hong Kong.

So in view of this desire to appear that it is a fair process, they will probably hold these consultation sessions with the general public. But the problem is that
for people that they vehemently oppose, like the Democratic Party of Hong Kong, they will not allow them to have any say. But for people that are less confrontational in their view, they may actually listen to some of the grassroots opinions about how those election laws can be changed.

So I think from the Hong Kong peoples' point of view, they need to become engaged in this process, even though it might be just a facade for giving the appearance of having consulted the Hong Kong people. My view is that they ought to engage the political legislature every chance they have.

They do care about public opinion. In fact, I think China miscalculated to some degree how unpopular the idea of the Provisional Legislature was. They did not expect that there would be such a furor. And when the dust settled, Chan Chi Chen again said that "the rice is cooked," meaning there is no turning back.

In Chinese, the phrase "the rice is cooked" is almost always not referring to something that is good. But it is referring to something that is really bad when they say "the rice is cooked." So in a subconscious way, I think, Prime Minister Chen has admitted that maybe the Provisional Legislative is not a good idea after all.

So the problem is if the Hong Kong people do not even engage the Provisional Legislature or their representatives, then they can do whatever they want to do.

MS. LOH: Can I just add to that? We don’t quite know exactly what kind of election laws we are going to have in 1998. But unless they pass laws to exclude specific individuals from standing, whatever system they come up with, it is not going to be full proof that people they don’t like will not get elected.

Now I guess they can dream up whatever laws they like which are intended to disadvantage certain people. Well, it doesn’t stop the people they want to disadvantage from also considering what strategy they want to use to maximize those rules for their own benefit. There is not much point at the moment, for example, for all of the democrats to band together in one big party, I mean, if the electoral laws are such that precisely what they want to do is disadvantage big parties. So I think we can wait and see.

The other thing that I would recommend to you is to look at Annex II of the Basic Law. What you will see is a sort of timetable for a series of elections up to the year 2007. The general idea is that every time there is another election beyond 1998, they would reduce the number of seats in, for example, the electoral college, and increase the number of seats in direct elections. So basically, what this is saying to us is every time we have an election in the next ten years, we will have to revise the laws somewhat to accommodate the changing environment. I certainly like to argue that each time that the law needs to be adjusted, we should be arguing in Hong Kong for some sort of reform that would lead us towards the more desired political system that we want to reach, which is why I am saying it is very important at this stage, for Hong Kong to start thinking about an ultimate political model that we want to adopt.

As I said earlier, this is a big job. There are many models that have been
looked at by think tanks around the world. So Hong Kong does not need to re-
search into different political models de novo. We can absorb the experience and
the knowledge that has been accumulated around the world. What we need to do
in Hong Kong is somehow have some kind of a project, maybe conducted by the
universities, where they can bring together this sort of international knowledge.
What we need to do in Hong Kong is to take that knowledge and then to think
through what system we want for ourselves. For politicians like myself, I also am
interested in plugging into that knowledge so that we can think through what
would be a good model. Without a doubt, there will be several models in the end
that different people would want to support.

So at that stage what kind of political debate can we generate in Hong Kong?
Can we have a genuine debate and in the end seek to amend to the Basic Law, be-
cause that is what is necessary.

There is a process in here for amending the Basic Law. Some people would say
it is pretty hard to hit the jackpot because you have got to get the National Peo-
ple’s Congress to agree and so on. But nevertheless, if you took a ten year view,
you might be able to get somewhere. If you want to take a one year view as to
what the elections are going to be like in 1998, things may be a bit rough.

In terms of the public sector, the Hong Kong civil service is required to release
quite a lot of information to the government about their private holdings and in-
terest. In fact, Margaret and I sit on a rather interesting inquiry at the moment
into the case of a former director of immigration. And through that one of the
things we are also looking at is the extent that a civil servant, a senior civil ser-
vant, has to declare his interest.

There might be some room for improvement of that declaration process. But, of
course, right now we don’t have much to worry about. So I guess the question
really is about the future, whether the ethics that has been instilled into the cur-
rent civil service, whether that is going to fall away very soon, and whether you
are going to have, of course, a Secretary of Justice, this Chief Executive, you
know, people in the senior ranks of the government who are determined as a
matter of policy to hold the line on running a clean government. I think that will
be very important.

Secondly, about the private sector. I am a bit surprised to hear that the ICAC is
having problems promoting clean business to the private sector because I certainly
have been led to believe by the department and the ICAC, whose task is to go out
and talk to private business, to explain to them about the corruption laws in Hong
Kong, and to help them, in fact, define internal processes for monitoring business
within their own organizations. I thought it was quite popular. I thought they had
quite a long agenda of companies to visit and so on. I am not aware that that is a
problem.

We’re talking about representative government, and I think there are many
ways to skin this cat. I believe the chair of this meeting has already said even
America, the sexiest of modern democracies, has many problems. Americans that
I have talked to say that they don’t like the political process because it is a lot of
talk. It is highly politicized in the sense that the Republicans and the Democrats like to have regular punch-outs, and then, there are no solutions to real problems.

I'm not thinking of transplanting any existing structure for Hong Kong. I think we need to develop a process of government whereby we have genuine elected representatives, and those representatives will have sufficient power to affect change. Frankly, if people lose trust in them, then they don't get reelected.

Of course, we also need to get away from the notion, I think both in the East and the West—I mean, I agree with Edwin entirely. But in the Eastern tradition, people don’t want to see their friends and children go into politics because politics is a really bad business for bad people. It is the kind of business where people go in for their own self interest. I think to a great extent in the West, people are sick of politics because that is precisely what they see. So, the common men and the common women of the country get left behind.

What kind of new political system do we need to build for the 21st century, not just in Asia, but even reform in the West so that they are more solution based. Perhaps big parties—two big parties is not such a good idea. Perhaps a model where you have more parties is a better idea. You would be going from, in America, reforming a system that is already here. In a way, in Hong Kong, we are starting from a process where we have to fit in the building blocks. Maybe we will have more space to maneuver in the next five or ten years. What is my ultimate system? I don’t know. I suspect that over the course of the next few years my own thinking will continue to evolve and to see what is an appropriate structure for Hong Kong.

PROF. WILSON: I appreciate the ongoing interest in discussion. It is 5:30, and Christine has indicated that she has to leave now. So I think it is appropriate for us to finish at this point. On behalf of the law school and the other organizers of this conference, I want to extend my personal thanks to all three of our speakers and thank them one more time officially.

BUSINESS AND LAW AFTER JULY 1: LEGAL AND REGULATORY IMPACT OF THE TRANSITION ON MARKETS, INVESTMENT, AND LABOR ISSUES

PROFESSOR BRADLOW: Welcome back to the second half of the conference on Hong Kong. The title for this topic, for the session this morning, is Business and Law after July 1: Legal and Regulatory Impact of the Transition on Markets and Investments and Labor Issues. We are delighted to have Johanas Chan, who joined us at the last minute. And we are very grateful for that.

I will introduce all of the speakers on the panel, both from Hong Kong and here. The order of speakers will be—we'll begin with Johanas, and then come back to Washington, where Natalie Lichtenstein will speak next. Then we will go
back to Hong Kong for Apo Leung to speak, and we will come back to Washington for Claude Fontheim to speak.

Let me introduce the speakers in the order in which they will be speaking. The first speaker is Johanas Chan, who is a barrister in Hong Kong, and also an associate professor of law at Hong Kong University. He has had a distinguished career as a barrister in Hong Kong, was educated both in Hong Kong and in the United Kingdom. He practices both—a practice in public law, and includes human rights issues and administrative law issues.

He has been the counsel in many leading cases involving the Bill of Rights in Hong Kong. He has published numerous books on the Bill of Rights and human rights issues in Hong Kong. In 1995, he was selected as one of the ten young outstanding persons in Hong Kong.

MR. CHAN: Thanks again for the very warm welcome. It is always an embarrassing moment for a speaker to be introduced in way that is almost beyond his own recognition, and I think it is a good morning in your time, and good evening in our time. Modern technology is wonderful, that I can be so far away and yet so near.

As you rightly point out, I was chosen only last night, and indeed, I received my brief only a few hours this morning. Shortly after, I also have a free speech case in court.

I am asked to address on business and law, which are not usually some of the topics that I address. Nonetheless, I think comments might be interesting in two questions. The first question is what will be the regulatory regime, including the law, the labor system in Hong Kong in 1997. The second question is, if there is a dispute and if someone needs to go to court, what will be the court system in Hong Kong after 1997? Will the court system in Hong Kong be able to protect our interests, our properties, and our rights? I will deal with these two questions in turn.

On the first question, what will be the regime, the regulatory regime, that will exist in Hong Kong after 1997? I'm sure most of you have heard about Basic Law in the last day or so. Nonetheless, may I just take you through some of the provisions in the Basic Law?

The starting point, of course, is Article 18 of the Basic Law, which provides that the laws in force in Hong Kong after 1997 shall be the Basic Law, the laws previously enforcing Hong Kong, and the laws enacted by the legislature of the region. It goes on to provide also certain national laws which shall apply to Hong Kong by the date—in the areas of foreign affairs and defense.

A fair understanding of a reading of Article 18 would suggest that these provisions are exhaustive. Although in the last week or so there were some suggestions that these provisions are not exhaustive. So, apart from the Basic Law, the law previously proposed in Hong Kong, and the laws enacted by the future legislature, it has been suggested, for example, some position of the National Peoples Congress may have binding effect in Hong Kong.

I believe that, aside from those views, for the large part the law will be the laws
previous enforced in Hong Kong. The law previously enforced in Hong Kong is defined in the Basic Law to include the common law, the rules, ordinances, supporting legislation, and customary law of Hong Kong. These will be preserved.

Indeed, it is interesting to look at Article 8 to see not what is there, but what is not there. So what has been taken out? Obviously, the last, the current constitutions of Hong Kong. It has also been left out of the U.K. legislation, U.K. acts, which applied to Hong Kong for the last 150 years. The U.K. acts are interesting in the sense that, at present, there are about 300 U.K. acts which apply to Hong Kong—among them, about 20 are pre-1843 acts. These are fairly old acts. Although they are old, there are still some very important pieces of legislation, for example, the habeas corpus act. A large part of those 1843 English acts could largely be divided into the following areas: shipping, aviation, intellectual properties—all very important English acts. These are not to be preserved under Article 8 of the Basic Law. Since 1985, the Hong Kong government indeed has engaged in a process called the localization process, and it means to localize this English act into Hong Kong legislation. So far, the progress is only moderately successful. Part of the reason is that the project is far more complicated than just to re-enact an English law by legislature. For example, a lot of laws dealing with aviation involve treaties, and unless there are new bilateral treaties between Hong Kong as they are in foreign parts, the current treaties, which include those between U.K. and the foreign countries, will lapse after 1997.

The discussion of these treaties, recognitions of bilateral treaties and multilateral treaties in areas of aviation in particular, shipping register, and intellectual properties have proved to be far more difficult, far more complicated than expected.

Nonetheless, we have concluded new treaties, and new laws have been enacted. The large majority of them are in the shipping areas. We have less progress in civil aviation. And if no further progress is made within the next few months, some of the important aviation treaties will just expire. The exciting areas in intellectual property, I think, probably could be localized.

A large part of laws in Hong Kong are the laws previously enforced in Hong Kong. All of these parts of laws will be preserved after 1997, except for any that contravene the Basic Law. That is an important qualification. A few weeks ago, the National People’s Congress adopted decisions which set out the laws which they regard as having contravened the Basic Law and will not be preserved, apart from the intellectual laws, and also two very controversial pieces of legislation, namely the society’s ordinance and the public order ordinance. The rest of the list is not that controversial.

In short, most of the regulatory law, particularly the business field, in finance, in trade will be preserved after 1997. Indeed, the Basic Law goes further than that. In chapter five of the Basic Law, there are detailed provisions setting out the policy of Hong Kong SAR on matters like public finance, monetary affairs, trade, treaties, and commerce.

It starts with Article 105, which may well prove to be one of the most problem-
atic and litigious provisions. Article 105 protects the rights of acquisition, use, disposal, and inheritance of property. It also protects the right to compensation for the lawful deprivation of property, and such compensation shall correspond to the rate value of the company concerned.

The protection of private properties is important in any capitalist society. The difficulty, of course, is in many countries where their constitutions introduce a clause on property rights, that is virtually a fertile field—a fertile legal battlefield. They are all arranged upon implications, including, for example, implications of land planning, town planning, compensation, resumption, and so on. This chapter goes on to deal with things like Hong Kong SAR will be guaranteed with independent finance and an independent taxation system. Hong Kong does not have to pay tax to the central government, and it runs its own tax system. It’s really important for the investor.

Article 109 further sets down the policy that the government of the Hong Kong SAR shall provide an appropriate economy and legal environment for the maintenance of the status of Hong Kong as an international financial center. Later on, Article 118 further provides that the government shall provide an economic and legal environment for encouraging nationalist technological progress and the development of new industries. So the policy is quite clear, although it is not so clear how these policy oriented provisions could be enforced in court. Nonetheless, they provide solid declaration of the policy of the SAR government to provide an appropriate, economic, and legal environment for trade and investment.

Article 110 provides for an independent monetary and financial system in Hong Kong. Hong Kong SAR is given the right to formulate its own monetary and financial policy. The government can safeguard the financial business and financial markets and regulate and supervise them in accordance with the laws of Hong Kong SAR.

Article 111 provides that Hong Kong dollars shall continue to circulate, and 112 provides that there will be no foreign exchange control policy. Article 114 further provides that Hong Kong shall remain as a free port. No tariff shall be imposed unless otherwise prescribed by law, and Article 115 goes on to provide, to elaborate, this policy of free trade by requiring the safeguard for free movement of goods and tangible assets and capital.

Article 116 is important. It is that Hong Kong shall remain a separate customs territory. All international trade agreements shall continue, while Hong Kong may continue anticipating the relevant international organizations. The most important one is, of course, the GATT, the General Agreement on Trade and Tariffs. And Hong Kong has already resolved its status in GATT after 1997. This article further provides that export quotas and other similar arrangements, which are extremely important for investment, if they are obtained or made by Hong Kong SAR, they shall remain valid and shall be enjoyed exclusively for Hong Kong. So, export quotas from Hong Kong could not be shared by the mainland or by the provinces of China. They can only be enjoyed exclusively by Hong Kong SAR. The Hong Kong SAR can also issue its own certificates of origin of products in
accordance with prevailing rules of origin. Then it goes on to deal with the visas, and there is also one section on shipping and one section on civil aviation.

On the whole, you will find that the provisions in these chapters are fairly elaborate as possible. In short, what it basically says is there will be an encouraging financial, economic, and legal environment. The position before 1997 will remain basically unchanged in this respect.

There are a few moments, areas. The first problematic area is some contracts which straggle over 1997, particularly long term franchise contracts and licensing agreements. In 1992/1993, China at one stage pointed out that since these contracts for license would straddle 1997, they would not be recognized unless they had the approval of China.

I'll say that this kind is clearly contradictory to Article 160 of the Basic Law. Article 160 clearly provides that documents, certificates, contracts, and license obligations valid under the laws previously enforced in Hong Kong shall continue to be valid and shall continue to be recognized and protected by Hong Kong SAR.

The second problematic area, which probably is not something which could be guaranteed as such by constitutional provisions, is the problem of corruption. The only thing one can see in Basic Law is that Article 57 provides that a commission against corruption shall be established, and it shall function independently and be accountable to the Chief Executive. No doubt, this article refers to the current independent commission against corruption, no less ICHD Hong Kong, and ICHD has been doing a great job. Indeed, in the last few days, they had a major operation. Certainly, ICHD would have a continued important role to play, and it would not be an easy job. Indeed, to some critics, ICHD has too much power. Nonetheless, there are a few court cases in the past trying to challenge the powers of ICHD without success, and the court seems to be very supportive, on the basis that corruption is an insidious evil, a cancerous disease, and ICHD must be given an even Draconian power to cope with this serious evil.

A third area is the government's policy as outlined in the provision in chapter five of the major framework of the economic, financial policy that has already been set down in the Basic Law. It is unlikely that there will be major departure from current policies. However, it is true that there is no anti-competitionist law in Hong Kong, for example, and the Consumer Council has recently put out a report recommending that Hong Kong should introduce anti-competitionist laws to guarantee fair and level playing fields in Hong Kong.

It is too early to tell whether these recommendations will be eventually implemented into law. But no doubt there are strong pressures from the international community, particularly from the World Trade Organization and from Europe, that Hong Kong has to enact some kind of anti-competitionist law.

Nonetheless, even in the absence of law, there are certain areas where the government has already subscribed to the policy of free competition, particularly in telecommunications. Not long ago, six more new licenses were granted, and the government has already declared that the role of the government is encouraging competition and to providing a level playing field.
There is no reason to expect any change on these matters, though in other areas, other than telecommunications, they may not be as concrete and as clear, but the general trend, I suspect, is that the government will have to move to some kind of anti-competitionist, though no doubt there will be opposition from some quarters, particularly from some service industries.

The second question which I will refer you to is: If there is a dispute, and if one needs to go to court, what will the court system like in Hong Kong be like after 1997? Will there be independence of the judiciary? Will we have confidence in the judicial system after 1997?

I won't go into detail, as I know that you had a session on the qualifying appeal yesterday. I will just briefly point out one or two points. First, the Basic Law provides that judges and other members of the judiciary serving in Hong Kong before 1997 shall remain in employment and can retain their seniority. So, most of the judges who are sitting in the courts today can continue to sit as judges in the court in 100 days. They will be the judges of the Hong Kong court, and of course, they will still be handling the day to day civil and criminal trials.

There are two or three problems which I would like to point out. Although the court, or the Basic Law points out that the current serving judges will continue their service, in the last few years, we have faced the problem of retirement of some senior judges. And indeed, at various level of judges, there are some experienced judges who have reached their retirement age and unfortunately will have to leave us. They, in the last few months, all have been coming up. So, there may be a personnel problem, although I am glad to say that we have had some also very good new appointments.

The second point I would make is that the powers of the court after 1997 will be greatly increased. This is mainly because of the Basic Law—as it touches on a whole range of matters. No doubt, some of these matters will come to court eventually. Apart from human rights issues, there are difficult issues dealing with the relationship between the executive and the judiciary and the executive and the legislature.

Some legislative council members will try to do the job, and under Article 74, the Basic Law, the bills would be confined to those bills which are not related to public expenditure or political structure or the operation of the government. So, what is the meaning of political structure and operation of the government, so that a member could not make a private member bill?

The final point I want to make are the problems of enforcement of judgments. Again, this relates to what an earlier speaker referred to as mutual enforcement of judgments as tying to the question of treaties. Some of these treaties will lapse after 1997, and very few countries have entered these kind of treaties with China.

I think on the whole, as far as economic affairs are concerned, there is no reason to doubt the sincerity of China. The whole tenor of the Basic Law is to try to provide as much freedom to Hong Kong as possible to guarantee this enforcement of an environment for investment and trade. There are a few problematic areas. On the whole, as far as business is concerned, I think the prospect is reasonably
optimistic, and no doubt, I think they probably disagree with me, so they cut away my last few words. That brings me to the end.

PROFESSOR BRADLOW: Thank you very much. The next speaker is Natalie Lichtenstein, who is the chief counsel at the World Bank, the World Bank legal department for East Asia and the Pacific. Prior to that position, she worked for many years as a lawyer on the China desk at the World Bank. She is an expert on Chinese law, and has taught Chinese law at Georgetown University. She was educated at Harvard University, and has a law degree from Harvard.

MS. LICHTENSTEIN: What I'd like to do is offer a slightly different perspective on the question of business and law in Hong Kong after July 1. There are two reasons for this. One is because it is obvious that—both physically and in terms of experience—there are people who are far closer to the actual situation and far more familiar with Hong Kong and Hong Kong law and the situation on the ground. The other is because I think it is quite useful in dealing with anything related to China to take a historical perspective, and the perspective I would like to bring is, stepping back, how likely is this to work?

I read for the first time in about ten years the Sino-British declaration. I think that looking back at the arrangements that were agreed to in 1984, as I think back to what people thought at the time, it was quite amazing that China had agreed to preserve Hong Kong for 50 years, roughly, as it was in 1984. And I have seen a line in the press today that, of course, Hong Kong in 1997 is very different from Hong Kong in 1984, and what effect does that have on China's willingness to preserve it?

But I think it is an equally important, and maybe a more important aspect that China today, in 1997, is vastly different from China in 1984, and that will have several ramifications, I think, for the success of business and law in Hong Kong after July 1. It is my perception that in 1984 many people were afraid that the Chinese decision makers would simply not appreciate what it meant to preserve Hong Kong as the market economy it was and still is today. That they would not appreciate that the role of the government in a market economy is completely different from what it was in a socialist market economy, a communist economy, a planned economy, and certainly the way China was in 1984.

If you look back at where China was when that arrangement was agreed, you will recall that China was partly on the road to reform. Agricultural reforms had been started. The legal and market reforms were at a very early stage. Contract law had been passed, but not yet civil code company law, bankruptcy law, et cetera. Foreign and direct investment in China at that point was extremely limited in scope. At one point in the early '80s, I remember reading a fascinating article in China Business Review that revealed something like 80 percent of the foreign investment could be toured in a day. Things have changed considerably.

I think at that time there was also limited or almost no experience at any level in China with the sensitivity of financial markets. Shanghai and Shenzhen had not begun market activity. Even as late as 1990, I recall visiting Shanghai when there were 11 joint stock companies, as they were called. Of course, no legislation
provided for the joint stock companies at the time. But there were 11 joint stock companies, of which eight were trading.

When the Shanghai exchange opened, there were those eight firms and one from another province. I think that at the time 95 percent of the volume in the market was in fact government securities.

All of that I raise by way of explaining how different China was then, from how it is today. At that point, one could consider a fairly real concern that the gap could have become too big. A concern about a lack of understanding the importance of government acting as a regulator and being sensitive to the need, for example, in the financial sector, to having openness in the system, to having public accounts, and to having a market that can really rely on knowledge and not back door transactions.

None of that would have been familiar in any way to most decision makers in China. The notion that rather than controlling business decisions, we should provide a regulation or a legal system to challenge them is very hard.

China today is still far from the mature system in Hong Kong, which is recognized around the world as a bastion of market economy. But the gap has closed not just in the parts of Guangdong that are close to Hong Kong, but even among the decision making life in Beijing.

While there are certainly people who do not have an appreciation of what makes Hong Kong work, there are far more people who have seen how it works, and who have seen how the rest of the world operates, than there were in 1984. That has important ramifications for how seriously and how vigorously the preservation of completely different systems can work. And of course, it points out that China is no longer as different from Hong Kong as it was.

The other interesting aspect of this is that China is still changing, and market forms throughout China are deepening. There is an increasing likelihood that the preservation will work. This is where it becomes very interesting, in an interactive fashion, because one of the great benefits of integration for China will be Hong Kong’s influence on its future course. Hong Kong is not only an example—although it is a sterling example—for China’s reforms, but also a source of experience, a source of experimentation, and a linguistically compatible source. So, as China’s reforms deepen and take further root, they will not have experience and examples just from outside of China. They will have examples from inside of China.

This will mean that China’s economy, economic behavior, and governmental systems will be more likely to reflect the kinds of things that are going on in Hong Kong and signify an interactive, symbiotic relationship.

There is at least one area I would like to highlight in terms of how China has changed. For example, as was mentioned, the Basic Law is rather explicit about preserving the legal profession and right of counsel. I cannot imagine that anyone could really appreciate that in 1984 in China. If you looked at the legal profession in China, they were still at the stage where lawyers were state functionaries in
many instances and offices were government-owned or run. Lawyers played a minimal role, and in terms of what the legal system required of them and what there was on the economic side, there wasn’t that much in terms of law.

That has changed dramatically in the number of legal issues facing lawyers in China today. There is a multiplicity of non-state law firm partnerships. The last figure I saw numbered them around 7,200. There are all kinds of legal organizations that are active in transactions. Even if there is a high proportion of foreign investment, there still needs to be company law, bankruptcy law, and securities practice.

With the changing lawyers’ role in China, you’ll have a much greater likelihood that they will come to appreciate that the role of the legal profession should be preserved in Hong Kong, and wherever China might go in the future. Also, if you look at legislative drafting law, there are specific examples. I recall comments by a senior Hong Kong official describing quiet interactions between Hong Kong drafters and Chinese drafters, looking at ready sources of actual experience. As he summed it up, there were Hong Kong fingerprints on a number of key pieces of legislation.

If you look, for example, at the course of reforms in China, the closeness of examples of other ways of doing things is very small. I am reminded of being confronted in one of our transactions quite some time ago with essentially a domestic venture among state enterprises. They had some well drafted legal documents, which was unusual at the time. When I asked what law had been applied, they said, well, we didn’t have a law that applied, but we had a foreign investment joint venture model, so we took it. And actually, it worked pretty well.

What I would like to say in conclusion is that I can’t really address what law and business will be like in Hong Kong after July 1. You have already heard some interesting views and a lot of detail about it. As you look at the details, it is also important to think about the context. And I think that the context is certainly a more supportive one than I could have imagined when the declaration was signed, and I hope will continue along that way.

PROFESSOR BRADLOW: Thank you very much, Ms. Lichtenstein. Our next speaker back in Hong Kong is Apo Leung, who has had a distinguished career as a trade unionist and a journalist in Hong Kong. He presently works with the Asia Monitor Resource Center and the Hong Kong Confederation of Trade Unions. He also is a journalist for a number of newspapers where he comments on labor affairs and social and political issues, and he is active in numerous NGOs.

MR. LEUNG: We have heard a lot about business and law in Hong Kong. Well, everything is quite rosy for the business people. But I’m afraid it won’t be that positive for the general public, especially for NGOs, labor organizations, and the working class people. They are very worried.

I will share with you my thoughts about two major areas of concern. Firstly, we talk about the present situation, unemployment, and an aging population. In terms of where the factories were located in the last 15 years we have the working class people in the blue collar sector, reduced from nearly 1 million to 300,000 today.
Furthermore, we see a lot of the old people and single parents left destitute in this society. We need to do something drastically before and after 1997.

On the labor union front, as you may be aware, Hong Kong labor movement is divided into four major centers: the Federation of Trade Unions (FTU)—the pro Beijing camp, the Confederation of Trade Unions (CTU), and the pro-Taiwan camp (TUC). Under this Basic Law, a lot has been said, though, about providing basic rights to the workers in chapter three and other articles, upon which I am not going to elaborate.

However, we are very worried about Article 23, and a lot of discussion has focused on the links between local and international organizations. We are afraid that they have scattered a lot of land mines. It could be more than in Cambodia or Vietnam after the Vietnam war. In the future, we may be easily labeled and persecuted by the new laws and subversive acts, internal security acts, or in violation of Article 23.

Furthermore, the other coercive laws, the Public Order Ordinance and the Societies Ordinance, are also affecting the ongoing organizing efforts of the Hong Kong NGO people and the labor front. Some unions are registered under the Trade Union Ordinance, and some are registered as companies or under the Societies Ordinance. How will the future government deal with these NGOs? This remains to be seen. Some of us prefer to wait and see, depending on what we can do. If possible, some will try to emigrate. For the progressive ones, we'll stay here and try to get organized, and continue to do what we have been doing for the last twenty years.

Secondly, I would like to share with you some thoughts on the future relationship of Hong Kong with the international instruments. We are very concerned about the future implementation and ratification of the international laws applicable to Hong Kong. So we would like to see most of it fully implemented to protect the Hong Kong workers by complying with the international standards. Of course, we would like to see China also adopt broad, international instruments to provide better protection to the Chinese workers. As the lady just now mentioned about the progress that has been made in the business and legal aspects of China, I'm afraid to tell you that with China's working class, they are suffering. They are suffering a lot, especially the migrant workers inside China who are working for multi-nationals.

For the CTU and many active trade unionists, we are determined to stay on top and continue our organizing work. We need the solidarity. And we will continue to do whatever we can with the international camps and with the international working class.

PROFESSOR BRADLOW: Thank you very much, Mr. Leung. Our fourth speaker is Claude Fontheim, back here in Washington. Mr. Fontheim is the senior principal of Fontheim & Hammonds, a Washington, D.C. law firm. And he is the chief executive officer of a consulting firm of international and strategic advisors, which has offices both here in D.C. and in Hong Kong.

He is a trade law expert, having served as the executive director of the Ameri-
can Bar Association's study of international trade laws. He lectures widely, has written articles on foreign investment issues and trade-related issues.

He was educated at the University of Michigan, from which he also has a law degree.

MR. FONTHEIM: It would probably be most useful if I focus on the perspective of American companies doing business in Hong Kong, and how the change in legal system will likely affect markets and labor conditions and the overall business environment in Hong Kong after July 1.

The overall picture for the U.S. business community in Hong Kong is positive. A set of expectations has been created which is very high. And I think, on the whole, that the effects of that are positive.

However, the business community has a set of expectations that may be unrealistic. And if, for example, some of the worst case scenarios described by the previous speaker were to come about, which is very overt and Draconian political oppression in Hong Kong, there could be an even more negative reaction here because of the fact that the business community has certain expectations about what is going to happen. But this is not likely to occur, certainly not in the short term.

Let me talk a bit about the more immediate concerns of some American companies and how they might play out after July 1. First of all, there are concerns that the rule of law may erode in Hong Kong, that the judiciary, to the extent that it loses its independence or that its independence is eroded, will not be a good means of recourse for the business community for enforcement of contracts, etc. And while there is not extreme concern on this point, there is concern.

Second is the issue of corruption and integrity of the government. There is concern that the integrity of the Hong Kong government institutions may be eroded over time.

Third, on labor issues, I haven't heard any new concerns, but there are ongoing concerns. Including the fact that—I have heard concerns that there isn't enough of a blue collar work force in Hong Kong. For some industries, in some instances, that is an issue, although that is not likely to get worse or better after July 1. It is just the circumstance of companies that are already in Hong Kong.

And related to this is the fact that costs in Hong Kong are already extremely high. There are concerns about costs continuing to increase after July 1 with the influx of new Chinese companies and institutions plus ongoing increasing demand for real estate and facilities in Hong Kong.

In addition to the issues that are part of the common wisdom and that I think we are all fairly familiar with, there are other issues that are worth thinking about: in order for markets to operate effectively, you want to make sure that not only the judiciary and the executive are independent; you also need a certain amount of independence on the part of certain critical business institutions in order for markets to operate effectively.

If you think about it, this hasn't gotten a lot of attention yet. You need securi-
ties analysts to be fairly independent in how they do their analysis. You need the news reporting services that report on business issues to be fairly independent. If they are overly influenced by how they are perceived by local authorities or the Chinese government, they are not going to operate objectively, and that is going to skew the markets and create a problem.

We have seen isolated reports that are a cause for concern. One such case involves the Next media group. The company had intended to go public in Hong Kong. It was widely reported that the owner of the company had fallen out of favor with the Chinese government because of his public comments. Investment banks then immediately pulled back and refused to take the company public. Whether or not the cause and effect are as reported, if it becomes widely perceived that government authorities are directly intervening in the capital markets for such political reasons, and on a large scale, this could eventually undermine the Hong Kong markets. Some are also predicting disruption of trade through Hong Kong after July 1 due to civil unrest, but I don’t see this as a particularly big risk.

There is an increasing interest among certain American companies in further developing their own internal policies and practices as they relate to local laws and treatment of workers, given local labor conditions around the world. This is still a minority of U.S. companies. But it is a growing minority of U.S. companies that understands that their reputation in the marketplace here, and the value of their brands, is affected if it turns out that their operations abroad are not in compliance with local laws, if companies that they purchase from locally are not in compliance with local laws, or if their local operations or companies they purchase from otherwise mistreat their workers.

For instance, Nike is under intense criticism for treatment of workers in certain foreign operations. The Gap came under intense criticism for treatment of workers in factories in Central America. And so certain companies are instituting internal policies and practices in order to avoid this. Until now, there hasn’t been a great deal of concern about compliance issues in Hong Kong.

There has been great scrutiny of labor and environmental conditions in China, but not Hong Kong. To the extent that conditions change, the level of scrutiny may increase even more. And that will be an issue for a growing number of American companies that are committed to such policies and practices.

Finally, and this will overlap a bit with the following panel, you can’t divorce the local markets, investment environment, labor environment, et cetera from the larger political environment and the way that it affects business. There is no question that if there are serious problems after the transition that look bad in the context of U.S. public policy and politics, that is going to have a profound effect on the business environment, the investment environment, and the trade environment because U.S. companies will come under intense pressure and criticism in the United States.

The reaction to any problems could be severe in terms of business confidence, but I don’t think that such a severe deterioration of conditions in Hong Kong is likely—at least in the short term, which is as far as we can predict.
PROFESSOR BRADLOW: Thank you very much, Mr. Fontheim. Would anyone else on the panel like to comment on the presentations of anybody else? We have had a very rich and diverse presentation of views. Let me open it up if anyone would like to comment.

MR. CHAN: Let me just say a few words. I think most of the people in Hong Kong also share that kind of concern.

On the other hand, to put it in a more positive way, these are the challenges that we have to face. And one worrying feature is you change this sort of concern into a self-fulfilling prophecy fueling matters. That is a worry which we have seen in the past already. In the last few years when we engage in the wider political debate with China, we have seen how this self-fulfilling prophecy works.

Some sectors, both locally and internationally, believe that China will. And they work in a way which will feed into what China expects. And the result is probably a disaster. And to just sum up either way is—in some quarters, there are people who are more pious than the pope.

No doubt corruption and inequity—that could be a major concern. The difficulty is what could be done. On the one hand, one can stack up, and the other thing is the culture, how to enforce and reinforce the current culture. And fortunately, in the last 20 years or so, generally businessmen here have some sense that corruption and inequity eventually will hurt themselves. But of course, with more influx of PRC institutions, they have a completely different way of working.

So whether we would be able to pass on the information—and related to this, I am not that optimistic—I am not that pessimistic, thinking that—of work stoppage in Hong Kong. But rather, more difficult issues would probably be how to regulate PRC related operations in Hong Kong, on the one hand, a subject for Hong Kong law. On the other hand, there are a number of PRC companies which is also a company or institution in China and subject to Chinese law at the same time. And that will be a difficult legal issue, when there are two sets of law in conflict relating to exactly the same company running in two different regimes.

And I think that will pose problems.

MR. LEUNG: You have heard from the various speakers on the cultural content or some practices initiated by the American multi-nationalists. We have been monitoring this very closely in China and other parts of southeast Asia, especially the shoe industry, the garment industry, and the toy industries. So we are strongly demanding that there should be an independent monitoring mechanism. Though these are not legally binding practices, the NGOs or the labor groups are able to play a crucial role to make sure the labor rights are upheld in the whole process because a lot of the Hong Kong business are acting as intermediaries of vendors for US companies.

MR. FONTHEIM: First, in passing on some of the issues and concerns that I have heard, I don't want to imply that I think that this is a list of horribles that will come to pass. In fact, they are unlikely, but I think it is worth keeping in mind what the concerns are, particularly given our positive expectations. The ex-
pectations of in the business community, particularly in the next few years, for Hong Kong, are very bullish, and I think on the whole justifiably so.

On this last point, I didn't mean to paint too rosy a picture on the issue of internal policies and practices. This is an area that is still developing in the U.S. business community. Lots of companies that don't have such policies and practices are just starting the process of thinking about it.

The good thing is that you now leave tangible actions by some, and a lively debate occurring in a number of other companies. Some executives say, look, it just isn't our responsibility. We contract with some supplier in Hong Kong who then farms out the manufacturing to a plant in China or Indonesia. What happens there is not our concern, that's their concern.

Then other executives in the same company will say, well, yes, perhaps technically it is not our concern, but practically it is. We own the problem. If there is a problem in the plant, it is going to be in the major news outlets in the United States. So, whether or not it is legally our problem, as a practical matter it is our problem.

This new direction within the American business community is very positive and should be encouraged. Premature criticism and insisting on "independent" monitors, particularly as a cure all, is not helpful.

So, I see the practices of most American companies as positive, but we're at the very beginning of a very long road, I think, in seeing this play out.

PROFESSOR BRADLOW: Thank you. I want to thank all of our panelists, both here in D.C. and in Hong Kong, very much for coming in at unusual times to make this panel as interesting and diverse as it has been. I hope the next 100 days until July 1 go much more smoothly than the technology did today.

UNITED STATES POLICY IMPLICATIONS OF HONG KONG'S REVERSION

PROFESSOR ORENTLICHER: Virtually every panel at this conference has raised issues that are of deep interest to U.S. policy, and the subject of this panel is in fact U.S. Policy Concerns Relating to the Transition in Hong Kong. Needless to say, United States interests in the transition are enormous. Hong Kong is the 13th largest trading partner of the United States. The United States has 36,000 American citizens living in China—I'm sorry, Hong Kong—full time. About all of the transition and reversion process will be centrally important to the larger transition process underway in China, in which the United States has an enormous interest.

In this setting, the overriding concern of U.S. policy is that the reversion process does not entail a regression process of the very unique nature of Hong Kong's legal and human rights culture and system, and it is that concern that our very
distinguished panelists will be addressing. Unfortunately, these issues have to be addressed at a time of very daunting challenges overall in U.S./China policy, and given the complexity and enormously challenging nature of those policy issues, I think we are very fortunate that we have such a sophisticated and distinguished set of panelists to help us work through them.

I will introduce each panelist separately when they speak. Let me just briefly give you an indication of the order in which they will speak. First, Rick Kessler will speak about the initiatives underway in Congress. He will be speaking on behalf of Representative Howard Berman, who can’t be with us this morning because he is now the new banking member of the Ethics Committee, and I understand they have a full agenda these days. Rick will be talking about the U.S. initiatives in Congress to address the transition.

John Kamm then will give his perspective on the relationship between business and human rights in Hong Kong based on his very unique experience as both a business person with longstanding ties to Hong Kong and a human rights activist.

Then finally, Mike Jendrzejczyk will discuss the broader issues of U.S., Hong Kong, and China foreign policy and make some recommendations on steps that the United States can take to promote a constructive transition process.

Let me come back to introducing Rick properly. Rick is the Democratic professional staff member of the Asian-Pacific Subcommittee of the International Relations Committee of the House of Representatives. In that position, he is responsible for all foreign policy and trade issues for representative Howard Berman, who is the leading co-sponsor of the Hong Kong Reversion Act of 1997. Rick served in a similar capacity previously for the Senate Foreign Relations Committee, and any of you familiar with Asia policy, U.S.-Asia policy, will know that Rick is a long-standing expert in this area, and has been deeply involved in U.S.-Asia policy for many, many years. We are delighted to have Rick here.

MR. KESSLER: Thank you, Diane. Again, my apologies that I am here and not Congressman Berman. Then he would have had to get up early, and I could have slept late.

I am representing his views here, and so I should start as a caveat, wherever I get them right, they are his views, and wherever I get them wrong, they are my views. If there is any problem in discerning which are which, we can discuss that later.

I’d like to make some general comments first in terms of what is going on in the Congress and Hong Kong this year. It is very clear that 1997—actually, I think, probably starting the latter part of 1996, Congress became even more deeply immersed in Hong Kong than it had been in previous years.

One of the figures—I’m not quite sure on what basis it is derived, I think it is Richard Boucher, the Consul General in Hong Kong, that mentions that 20 percent of the American Congress has passed through Hong Kong in the last few months. And I wouldn’t be surprised if that figure doesn’t underestimate the numbers, particularly, as many of you know, Speaker Gingrich is about to take a
delegation—I think it is going to be a fairly large delegation—to the region in the Easter recess.

In addition to the visits, our committee has already held one hearing on the subject, and I imagine it will be holding more hearings before the end of the year. Legislation has already been enacted, at least in the House of Representatives, initiated by Congressman Bereuter, the chairman of the Asia-Pacific subcommittee, and co-sponsored by Howard Berman. The House of Representatives just voted out and sent to the Senate H.R. 750, the Hong Kong Reversion Act.

In addition to legislation—and I’ll get into more details about the legislation in the next few minutes—I think there are numerous policy statements that are starting to emanate from Congress right now. For example, there is a letter circulating inviting Martin Lee to address the Joint Session of Congress when he is here in April, a letter to Speaker Gingrich.

I think all of this attention, however, doesn’t necessarily mean that 1997 is going to be a critical year for U.S./Hong Kong relations. I think it is going to be a year of education, a year of increasing visibility, but not necessarily a year of increasing confrontation and conflict.

But 1998, I think, will probably be a more critical year, both because there are likely to be elections in Hong Kong for the legislative council, and there will be a report due to the Congress from the administration on Hong Kong status, which will be fairly detailed and probably have greater currency because it will occur after reversion.

In many ways, Hong Kong, I think, has become a—has the potential of being—a Trojan Horse in the bilateral relationship between China and the U.S. The Congress, I think, has taken deeply to heart, Chinese commitments to preserve the concept of one country, two systems, and it is doing its best to ensure that that is enshrined as much as possible in the U.S. relationship with Hong Kong.

American concerns, at least congressional concerns, focus in three major areas. First is the stability of the system of government in Hong Kong. Secondly, it is the continued free flow of information, i.e., the press and media in Hong Kong. And third is the viability of the legal system and the dependable rule of law, particularly including commercial law.

As many of you know, the initial status of relations between Hong Kong and the United States were first enshrined in ’92 with the Hong Kong Policy Act, which since then has been legislated. I was on the Senate Foreign Relations Committee at the time in which Senator McConnell initiated that act, and I think in retrospect, he was very farsighted in his concerns and involvement.

It required—and I think it is part of your package of information—fairly detailed reports from the President on bilateral relations. I won’t get into all of the specifics because you can read them, but I think it is important that one of the key factors he focused on was continued cooperation in commercial relations, particularly in export controls, and in the development of democratic institutions and how that was going. It, in particular, allowed the President to suspend laws if he
determines that Hong Kong is not "sufficiently autonomous." "Sufficiently autonomous" is one of those phrases that is always open for discussion, and I'll talk about that again a little bit later.

Right now, we are in the process of trying to enshrine Hong Kong’s unique status in its relations to the U.S. A number of agreements have been negotiated or are being negotiated in terms of investment and aviation. The previous panel mentioned those. To some degree, I would single out the issue of legal assistance, the extradition treaties, which have the potential to be very contentious. The Defense Department is negotiating over the issue of ship visits. We are going to continue Hong Kong’s unique status and its ability to import high technology goods that are now controlled.

What in effect is going on, I think, is creating an incredibly intricate web of ties, of standards, between the U.S. and Hong Kong, which I think is fairly unique in our relations with almost any country, and in creating a situation which could be jeopardized if China or Hong Kong’s new leaders fiddle with the integrity of these relationships.

Growing out of this concern, and growing out of the Hong Kong policy, was an initiative that Congressman Bereuter started this year, the Hong Kong Reversion Act, which in effect reiterates support for the autonomy of Hong Kong and the future well being of the Hong Kong people by ensuring the continuity of U.S. law with respect to Hong Kong.

Let me say a few specific items on this. It amends the Hong Kong Policy Act of 1992. It requires the President to base his determination of whether Hong Kong is not sufficiently autonomous to justify treatment under U.S. law on a report that assesses a number of critical areas.

First is the successful and timely conclusion of agreements and treaties. Second is continued cooperation with Hong Kong government agencies and their relations with the U.S. Third is the preservation of good government and the rule of law, and lastly is the preservation of the autonomy of the customs territory of Hong Kong.

These sufficient conditions, which in the bill are made much more explicit, include cooperation, for example, in customs enforcement, drug interdiction, prosecution and prevention of money laundering, counterfeiting, credit card fraud, organized crime. It requires the government to report on increased corruption in the government, efforts to suppress freedom of the press, acts or threats against non-violent civil disobedience, and looks at the whole issue of diversion of high technology exports to China, and of course export controls.

There is a whole series of very specific items that the President is required to make an assessment on in this report, and I expect, as H.R. 750 progresses through the Congress and next through the Senate, it will be further improved upon and amended before being enacted into law, which I think is highly likely. It passed with only one vote against it in the House of Representatives. This bill and the underlying legislation that it amends sets up fairly high standards, and it is very clear that Presidential determination in finding that Hong Kong is not suffi-
ciently autonomous will have enormous commercial consequences on Chinese investment in Hong Kong, and on the political relationships between China and the United States. It in effect sets up a potential crisis point in relations between China and the United States, but also as well between the Congress and the Executive Branch. I think it ensures that Hong Kong will become a much more potent issue in American foreign policy.

As I mentioned earlier, to a certain degree this is a Trojan Horse, I think, for Beijing. Chinese leaders may in the future come to regret July 1, rather than welcome it when they look at the extent that the United States is involving itself in trying to ensure the increased integrity of Hong Kong. It is a very, I think, unique situation, and as I mentioned earlier, the emphasis on the President trying to determine whether or not Hong Kong is sufficiently autonomous is going to be a critical one, a political debate in the Congress and with the Executive Branch.

Thank you.

PROFESSOR ORENTLICHER: Thank you very much. I am going to introduce our next panelist by quoting from testimony given last month by Deputy Assistant Secretary of State for East Asia and Pacific Affairs here.

He said, “Above all, Hong Kong is a place people go to do business. And the United States government is far from the only important player that can influence Hong Kong's future stability and prosperity. The decisions and behavior of thousands of private companies and individuals from the United States and elsewhere will be at least as important in determining the Hong Kong of the future. For this reason, we encourage them to speak frankly and directly to Beijing about their expectations as they assess their future involvement in Hong Kong. Their views and actions, and those of the Hong Kong people themselves, will be important in affecting Beijing.”

I immediately thought of John Kamm when I read that. John Kamm is almost as unique. He is an independent businessman and human rights monitor. I can’t think of many people that would apply to, that they say both of those things about.

As I indicated earlier, John has lived in Hong Kong. He lived there with his family from 1972 to 1995 as a businessman, and traveled frequently to China during that period and throughout Southeast Asia. Mr. Kamm was the Hong Kong representative of the National Council for U.S./China Trade from 1975 to 1979, and was president of the American Chamber of Congress in Hong Kong in 1990. You will immediately understand where that put him, at a central point in the debate about U.S. policy toward China in the wake of the Tiananmen massacre of 1989. And I think that was a very significant point in prompting John to become deeply involved in promoting human rights in China. From 1991 to 1996, he made 30 trips to Beijing in a private effort to engage the Chinese government in a dialogue on human rights, and has written and spoken extensively on the role of business in promoting human rights in China.

MR. KAMM: Thank you very much. It is a pleasure to be here. This is an unusual setting in that you have so much space between ourselves, you out there, us back here. The microphone is so far away that we have to lean forward. It’s kind
of a funny posture to be addressing you, but appropriate, I think, for a business person who is also involved in human rights. One finds oneself in funny positions acting out this particular role.

I have prepared remarks. I am going to move through them quickly because I think that the value of a session like this comes largely in the question and answer period.

What I would like to say briefly is that we know quite a bit about what Hong Kong will look like after July 1. We know the names of the Chief Executive-designate, his principle policy secretaries, and his Executive Council. We know the names of the members of the Beijing appointed Provisional Legislature. We have assurances that I think most people are comfortable with respect to the convertibility of the currency and taxation. We know what the flag will look like. We haven’t quite sorted out what the street names will be, but these are the kinds of things we know quite a bit about.

What we don’t know about concerns respect for human rights and the rule of law. We’ve been addressing these questions at this seminar, but just to tick off a few of them, we don’t know what activities, for instance, the law against subversion will outlaw. Article 23 of the Basic Law, as you well know, calls for the legislature of the SAR to pass a law against sedition, treason, theft of state secrets, and subversion.

The concept of subversion is alien to the people of Hong Kong. It is not in the common law. As I often point out to my interlocutors on the Chinese side, if we had a law against subversion in this country, at any given time, the members of the opposition party not in power would be in jail. In the first draft of the Basic Law, there was no Article 23. It was only after the Tiananmen Square massacre that Article 23 was inserted into the Basic Law.

We don’t know what this law is going to read like. We don’t know what the laws written to replace the now scrapped or soon to be scrapped Societies Ordinance and Public Order Ordinance will say. Will, in fact, demonstrations marking June 4th be allowed after July 1, 1997? Or will they be considered contraventions of the law against subversion?

Will newspapers be permitted to criticize China’s human rights record in, say, Tibet? Again, we don’t know. We are told that newspapers can’t advocate independence for Tibet of Taiwan, but what about simple criticism of the situation in Tibet, a situation that Rick Kessler is especially knowledgeable about. It is a very important question.

How will the provisions of the United Nations covenants continue to apply in light of the fact that China is not a state party to the covenants? The most important provision of the covenants is the reporting requirement. How can a report on the human rights situation in Hong Kong be filed if the sovereign power is not a state party? Maybe it is possible, but it is a big question. Again, the Basic Law says the provisions of the covenants will continue to apply.

Will the death penalty be reintroduced? I’m not sure this has been touched
upon here. The last execution in Hong Kong was in 1967. It has been 30 years since there has been an execution in Hong Kong. Meanwhile, across the border, as you are no doubt aware, executions have been proceeding at a record rate. The number of executions carried out in China is not known. It is a state secret. Once, I raised this question with an official in Beijing and I was told that it is a secret of the same order as the number of China's nuclear weapons. That's a pretty serious secret.

When I asked the official why the number of executions is a secret, he said that it is because the number is very, very large. We have some idea because we know from reports that something like 1,400 executions were reported on, I believe, in 1995, but that is a small fraction of the actual number of executions.

It may sound funny for an American to be sitting up here talking about capital punishment since our own record in this respect is hardly laudable. Even China does not execute people for crimes committed before the age of 18. We bear that distinction, I think, among major industrial countries. Nevertheless, the sheer number of executions, the absence of due process, the lack of protection of the rights of the individual, certainly indicate that a great many people who are innocent are being executed.

So again, will the death penalty be reintroduced? And what kind of effect will that have on society in Hong Kong? These are questions we don't know the answers to yet.

Will international human rights groups with offices in Hong Kong, like Amnesty International and Human Rights Watch, be allowed to continue operating in Hong Kong? Will American congressmen interested in examining the rule of law and human rights issues be allowed to freely travel to Hong Kong? Or will they have to be approved by Beijing? Again, these are very important questions. But we don't know the answers.

And of course, as I am sure Margaret Ng and Christine Loh have talked about, when will the first elections take place? What will be the rules governing those elections? Will people like Martin Lee and Emily Lao, or for that matter, Margaret and Christine—people who were democratically elected in 1995—will they be allowed to stand? Depending on who you talk to, it's a self-assured "yes" or it's a "well, we are not too sure." It certainly is a question to me.

These are vitally important questions. The fact that the markets in Hong Kong are so buoyant despite all of these questions is an indication that we—and I speak really about all of us—we still don't have a very good understanding about the relationship between a good human rights environment and business.

I think perhaps too many of us have swallowed the bromides of the business community in this respect, that it is a thriving economy that leads inevitably to respecting human rights. In fact, I have increasingly come to the conclusion that it is the other way around, that a good human rights environment and respect for rule of law lead to economic prosperity.

Here we have all of these questions about rule of law and the human rights en-
environment in Hong Kong, and we have these thriving markets at the same time. What is going on here?

Again, I think there is a lack of understanding about the relationship between business and human rights, and I think there is confusion about the concept of rule of law as opposed to rule by law. I think we are hearing more and more leaders—the appointed leaders, not the elected leaders refer to the success of the Singapore model, that this is something that Hong Kong should follow. In Singapore, we see a system where you have rule by law as opposed to rule of law. I don't think enough people have really thought the distinction through.

This session is about what the United States, in terms of policy, can do, and I think Rick Kessler has covered that ground quite well. In November, 1990, I gave a speech in New York which I believe was the first speech to advocate a Hong Kong Relations Act. I called it a Hong Kong Relations Act, but later, I was advised that too many people would see the parallel with the Taiwan Relations Act, so the name was changed to the Hong Kong Policy Act. That was a good bill, and I think the new Bereuter bill is a very good bill. Both bills were co-sponsored by Congressman Berman. Hopefully, that bill will move rapidly through the Senate. It was passed by the House about ten days ago, and eventually I hope it will have the President's signature.

Aside from legislation, what are some of the things that can be done? First of all, Hong Kong has to be on the American human rights agenda with China. Hong Kong should be raised during the so-called human rights dialogue, such as it is. Certainly, it should be raised, and I'm sure will be raised, during Vice President Gore's trip and Speaker Gingrich's trip. I think that when we look at the kind of things that should be a priority for that agenda, the human rights agenda with China, signing the international covenants, should be very close to the top, and that has, of course, a very direct relevance for Hong Kong, as I have just been speaking about.

If in fact China signs the covenant, then it would be possible, I think, to file reports on Hong Kong with the Human Rights Commission. It may still be possible without China's signature. I'm not sure. Certainly, if China signs the covenants, even without ratifying, then of course, without ratification, China itself would not have to report, but I think it would be possible to report on Hong Kong nevertheless.

I believe and I appreciate that my activities in this regard are considered, especially by the business community, to be controversial—that Hong Kong prisoners in China should be on the lists of prisoners that we regularly submit to the Chinese government—and that includes both political prisoners and business people who are detained in violation of due process. We don't know how many Hong Kong prisoners there are in Chinese jails. I understand that the number has gone up very significantly over the last year. You know, these are business people who very often are involved in U.S./China trade, and they're being held for two or three years without being formally charged.

I'm aware of one case where the fellow has been tried and convicted six
months ago, but no sentence has been announced. So these people should be, I think, the focus of our attention. They're business people.

Now, you know, intervention on behalf of prisoners sometimes works. We know that now. Six or seven years ago, the conventional wisdom was that the Chinese government would not release prisoners in response to international pressure. We know that that is not the case. The Hong Kong journalist Xi Yang, who was released after serving three years of a 12 year sentence just about a month ago, was the beneficiary of this pressure.

I would hope that very close to the top of our list of prisoners on whose behalf we are intervening is the journalist Gao Yu. This woman is serving a six year sentence in Beijing for writing articles for a Hong Kong magazine. So again, there is a direct relevance to Hong Kong. Her medical condition is very bad. From a simple humanitarian perspective, I would hope that she would figure in the lists that we submit to the Chinese government.

Another very important case, that NGOs are paying attention to, concerns two labor activists in Shenzhen. Their names are Li Wenming and Guo Baosheng. These men were tried and convicted in November 1996 of the crime of subversion, which carries a minimum ten year sentence. They were convicted for their activities organizing migrant workers employed in Hong Kong owned factories immediately north of the border. They have not been sentenced. They were convicted in November, and they have not been sentenced. That tells me that there are some people in China who are very uncomfortable with putting these guys away for a long time. We need to cast a spotlight on this specific case in our human rights talks with China.

The private sector can do a lot. It certainly can influence what happens in Hong Kong. Many of the people who will be running Hong Kong, at least for some period of time after July 1, are business people, and so it certainly stands to reason that the business community, the international business community, can in fact play a positive role.

In this respect, I'm very disappointed that among members of the international business community, including the American Chamber of Commerce, which I once headed, no voices have been raised about issues pertaining to human rights and the rule of law. That is tragic because, as I tried to point out, the success of business in Hong Kong after July 1, 1997, is directly related to the satisfactory resolution of the questions we have been considering.

In 1903, the social activist Jane Adams was asked to give a speech on the occasion of George Washington's birthday. I think her words bear a special relevance to those in public and private life who concern themselves with the conduct of American foreign policy. She said, "We will not count the opening of markets the one great field which our nation is concerned in, but that when our flag flies anywhere, it shall fly for righteousness as well."

Ladies and gentlemen, that flag flies today over our consulate and our businesses in Hong Kong. I think you and I owe it to those that follow us—to our children and to those who came before us to make sure that that flag represents
respect for human rights and the rule of law, at least as much as it symbolizes the pursuit of lucrative contracts and commercial advantage.

Thank you very much.

PROFESSOR ORENTLICHER: Our next speaker, Mike Jendrzejczyk, is a household name. It is a testament to Mike's singular activeness as an advocate for human rights in China generally that, perhaps, has mastered the spelling of his name frequently. Mike in recent years is an advocate for human rights concerns in U.S. policy in China. He has his capacity as director of the Washington office of Human Rights Watch Asia, formerly Asia Watch. He served in that capacity since April 1990.

MR. JENDRZEJCZYK: What is the appropriate role for the U.S. regarding Hong Kong? Ultimately this is a political issue as well as a question of law. What possible steps could the U.S. take, both bilateral and multilateral, to support those in Hong Kong who are working to preserve human rights and the rule of law—including non-governmental organizations (NGOs), the legal community, and elected legislators—to ensure that China upholds its international obligations towards Hong Kong? I'd like to make some comments and suggestions in response to these questions.

Secondly, what will be the impact of Hong Kong's reversion on U.S.-Sino relations, especially this year, in the sensitive post-Deng Xiaoping period and prior to the Chinese Communist Party Congress in October as the emerging leadership is trying to consolidate its position?

As Howard Lange from the State Department spelled out yesterday, the U.S. has a strong interest in seeing a smooth transition and in Hong Kong maintaining a "a high degree of autonomy." The U.S. also has a larger agenda with China, and a wide range of economic, security, and other interests with Beijing and in the region.

Given the importance of the U.S. relationship to Beijing—as evidenced by Albright's recent visit, literally the day before Deng's funeral—there is a potential leverage that could be used, in a constructive way, to press Beijing to live up to its commitments on Hong Kong.

1) Vice President Gore, on his upcoming visit, will be meeting with Premier Li Peng and President Jiang Zemin. We hope he'll express concerns about the decision by the National Peoples Congress to repeal and amend Hong Kong's laws, convey the unanimous opposition of the U.S. Senate to the abolition of the elected legislature (as expressed in a resolution adopted by the Senate last June), and urge early elections to put the Provisional Legislature out of its misery, as Christine Loh suggested yesterday, and Gore should make his comments about Hong Kong publicly, as well as privately.

Gore will be discussing plans for a presidential summit meeting between Clinton and Jiang. I was in Manila last November when the summit was agreed to, in principle, at a meeting around the edges of the APEC meeting (Asian-Pacific Economic Cooperation form), but the administration carefully, and cor-
rectly, avoided setting the date of a summit, due to the Hong Kong handover. Gore should reinforce the message that a summit in Washington in November is not possible without a smooth transition, and that future high-level exchanges—next year, when Clinton hopes to go to China, as well as this year—can only take place in the context of significant progress on human rights in China and full respect of Beijing's obligations towards Hong Kong. I should add that we were deeply disappointed by Gore's decision not to visit Hong Kong, as we and other human rights groups had urged. It was a missed opportunity, that could have sent a clear, positive message about U.S. concern and interest in Hong Kong's future.

2) The U.S. hosts the G-7 industrial leaders summit meeting this year in Denver on June 22, just days before the handover. It would be useful for the G-7 leaders, representing virtually all of China's major aid and trading partners, to include in their joint communiqué a strong, carefully worded call on China to respect its promises to maintain an elected legislature, independent judiciary, free press, and other basic freedoms in Hong Kong. The G-7 should also agree to assess, at their 1998 summit, China's compliance with these promises. I think that the United Kingdom, Japan, and other G-7 countries would go along with such an initiative, laying out joint, multilateral benchmarks for Hong Kong in very specific terms.

3) C.H. Tung, the first chief executive for the Special Administrative Region (SAR), is expected to visit the U.S. either this spring or sometime after July 1. His office says he wants to come here, and also visit Europe, to "dispel misconceptions" about Hong Kong. That presents an opportunity for the administration and for members of Congress to raise questions with him on many of the critical issues discussed at this conference.

I would also hope that concerns about Hong Kong would be on the agenda of C.H. Tung's colleagues in the U.S. business community when they speak to him. In our discussions with U.S. and other business people, here and in Hong Kong, it's apparent that there is definitely concern about Hong Kong and a feeling that Beijing "just doesn't get it," though publicly business projects great confidence. Some business people are communicating their concerns directly to Beijing, warning that if the authorities begin to restrict freedom of the press, or if the rule of law is undermined and corruption creeps into Hong Kong, this will have negative consequences. The role of the business community will become even more crucial after July 1, and it would be very helpful if they went beyond issues of immediate interest, and also emphasized to Beijing the essential role played by NGOs, civil society, and an elected legislature in making Hong Kong a thriving international financial center.

The World Bank/International Monetary Fund annual meeting in Hong Kong in late September, just a few months after the transition, will provide another opportunity for business people, finance and foreign ministers, and officials of the Bank and IMF, to make this point.

In terms of the impact of the reversion on U.S.-Sino relations, key members of Congress, such as Rep. Phil Crane of the House Ways and Means Committee (chairman of the trade subcommittee) and a recent delegation to China and Hong
Kong headed by Rep. Jim Kolbe, have stressed the linkage between the transition in Hong Kong and any prospect of permanent MFN (Most Favored Nation) trading status for China. Permanent MFN, doing away with the annual renewal process, has basically been ruled out as "politically unfeasible" at least for this year, because of the Hong Kong handover. As Kolbe's delegations stated upon its return in January:

If transfer goes smoothly and in conformity with the Basic Law, this will have encouraging implications for bilateral relations (between the U.S. and China). If, on the other hand, the transfer is marred by repression or reversal of previous agreements, political support in the U.S. for a comprehensive relationship with China will seriously erode. The U.S. should be watchful to ensure there is not erosion of economic, political or human freedoms in Hong Kong [in the months and years after the transition].

What is even more significant, is that Kolbe's delegation, in meetings with senior Chinese leaders, noted the relationship between the treatment of Hong Kong and China's pending application to join the World Trade Organization (WTO). The reversion of Hong Kong, they said, sends signals to the international community about China's ability and willingness to abide by other international agreements and obligations, including the rules governing the WTO. Hong Kong could also become an issue in China's WTO accession and the debate in the U.S., especially if Rep. Dick Gephardt's bill, giving Congress a vote on the President's decision to admit China into the WTO, is passed in both houses.

I would hope that Congress would take the lead in maintaining a high level of interest and support for human rights and the rule of law in Hong Kong and continue to do so long after the cameras have been packed up on July 2, 1997 and the international media's attention begins to drift elsewhere. Congress should react strongly, for example, to any new election laws passed by the Provisional Legislature that don't allow open and free elections, including the participation of some of Beijing's strongest critics in the current Legco. I would hope that members of Congress will continue to travel to Hong Kong, stay in touch with NGOs there, and actively monitor what goes on in Hong Kong beyond the annual report required of the administration under the U.S.-Hong Kong policy Act.

It would be a mistake to assume that the Clinton administration, given its dismal track record on human rights in China generally, and its crisis-driven approach to policy making, will give Hong Kong all the attention it deserves and needs. The administration is engaged in a constant balancing act, trading off various domestic interests and constituencies, rather than acting on the basis of a coherent, comprehensive strategy towards China in the crucial post-Deng transition period.

There is no question that Hong Kong's future could become the future of China more generally, and that should be a central factor in the Clinton administration's policy. If the rule of law and basic human freedoms can survive and even thrive in Hong Kong, that would be a hopeful indicator of the prospects for a more open, accountable, and transparent China in the future.