

香港人權監察 HONG KONG HUMAN RIGHTS MONITOR

香港上環孖沙街二十號金德樓4樓

4/F Kam Tak Building, 20 Mercer Street, Sheung Wan, Hong Kong

電話 Phone: (852) 2811-4488 傳真 Fax: (852) 2802-6012

電郵地址 Email: contact@hkhrm.org.hk 網址 Website: <http://www.hkhrm.org.hk>

Chairperson: Paul Harris Deputy Chairpersons: John Clancey & Vivian To Secretary: Jackie Tang Treasurer: Lai Wing Yiu
Founder members: Andrew Byrnes Johannes Chen Philip Dykes Paul Harris Ho Hei Wah John Kamm Christine Loh Charles Mok Stephen Ng Phillip Ross
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The Hong Kong Human Rights Monitor Views on Constitutional Development 31 March 2004

The Constitutional Development Task Force is currently seeking public views on “the issues of principle and legislative process relating to constitutional development as laid down in the Basic Law”. The following outlines the Hong Kong Human Rights Monitor’s views on constitutional development and specific responses to the Task Force’s 12 questions on principles and legislative processes.

A. Overview

1. Democracy as a Universal Value

Democracy is a basic human right. Article 21 of the *Universal Declaration of Human Rights*¹ reads,

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...”

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

The *International Covenant of Civil and Political Rights*² (ICCPR) was extended to Hong Kong in 1976 and remains in force after the handover. Article 1 of the ICCPR first ensures people’s right of self-determination. The United Nations Human Rights Committee (UNHRC) then further elaborated on this right of self-determination as everyone’s right “to freely determine their political status and to enjoy the right to choose the form of their constitution or

¹ *Universal Declaration of Human Rights*. (<http://www.hkhrm.org.hk/database/english/et001.html>)

² *International Covenant of Civil and Political Rights*. (<http://www.hkhrm.org.hk/database/english/et003.html>)

government.”³ Article 25 of the ICCPR also guarantees every citizen’s “right and opportunity” “to vote and be elected” at “genuine” and “periodic elections” by “universal and equal suffrage” and “secret ballot” guaranteeing the “free expression of the will of the electors”.

Unfortunately, the UNHRC concluded twice in 1995⁴ and 1999⁵ that Hong Kong’s electoral system “does not meet the requirements of article 25, as well as articles 2 [on non-discrimination], 3 [on gender equality] and 26 [on equal protection of the law] of the Covenant ... the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions.” The UNHRC also recommended the Hong Kong Government to take “immediate steps ... to ensure that the electoral system be put in conformity with articles 21, 22 and 25 of the Covenant”, and “all necessary measures to maintain and strengthen democratic representation of HKSAR residents in public affairs”.

In addition, lagging behind in democracy affects our everyday life as well. The United Nations Committee on Economic, Social and Cultural Rights concluded in 2001⁶ that the “undemocratic features” of the LegCo election arrangement made it difficult for the HKSAR to fully realize the economic, social and cultural rights of Hong Kong people.

The Monitor calls on the Task Force to respond immediately to the UNHRC’s recommendations. Any principles or legislative procedures regarding constitutional development and all the proposals arising should conform to the standards laid down in the UDHR and ICCPR. The Monitor would like to remind the Task Force that any conclusion of the current constitutional review which is inconsistent with these international standards will be contrary to the acknowledged rights of Hong Kong people and will be condemned world-wide.

Democracy is also essential to a major objective of the Basic Law, that of the autonomy of Hong Kong. Autonomy means Hong Kong people ruling Hong Kong. It is not sufficient that the legislature and the executive are composed of the permanent residents of Hong Kong. It is vital that they should in fact be the freely chosen representatives of the people. Otherwise there is no real autonomy.

³ *The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96. CCPR General comment 25. (General Comments)*

(<http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/CCPR+General+comment+25.En?OpenDocument>)

⁴ *Concluding observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland. 09/11/95. CCPR/C/79/Add.57. (Concluding Observations/Comments).*

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⁵ *Concluding observations of the Human Rights Committee (Hong Kong): China. 12/11/99. CCPR/C/79/Add.117. (Concluding Observations/Comments).*

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⁶ *Concluding observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China. 21/05/2001. E/C.12/1/Add.58. (Concluding Observations/Comments).*

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2. Democracy Facilitates Economic Development

Democracy is not only about election. It is also about protection of liberties and freedom, respect for the rule of law, and guarantees of press freedom and free exchange of information. Under a democratic system, government must be accountable to public demand, and people can peacefully change their government when they find it unfit to stay in power. These factors together facilitate a level playing field for business competition, render public policy in line with people's needs and provide a stable political environment for business to develop. In fact, even the Hong Kong General Chamber of Commerce admitted in its submission to the Task Force that "there is evidence that democracy and prosperity go hands in hands"⁷.

The truth is that the most successful market economies are all democratic countries. Even if it is possible to establish a market economy without full democracy, it is impossible to sustain the market economy in the absence of democracy, particularly in this age of globalization with strong global competition and new technologies which depend on the openness of societies.

If in the face of widespread demand for democracy by the people of Hong Kong, there are no democratic reforms, the Executive and the Legislature will further lose legitimacy. A government which does not enjoy legitimacy is unable to mobilize the people in support of its policies and becomes increasingly ineffective. A government so handicapped will be unable to mediate between Hong Kong people and the CPG, and thus fail in one of its essential roles.

3. The Task Force Must Side with the Hong Kong People

Secretary for Constitutional Affairs Stephen Lam publicly mentioned a number of times during 2003 that the Government would announce a constitutional review timetable at the end of last year. However, after PRC President Hu Jin-tao expressed his "serious concern" about Hong Kong's constitutional development in early December last year, the promised timetable was shelved. During the recent so called "patriotic" propaganda campaign, not only has the Task Force failed to stand up to defend the rights and position of Hong Kong people, but Chief Executive Tung Chee-hwa and Secretary for Constitutional Affairs Stephen Lam have even joined the pro-Beijing forces to seriously criticize legislators Martin Lee, James To and Lee Cheuk-yan for lobbying US support in Hong Kong's constitutional review. These track records of Tung and the Task Force raise grave concerns as to whether they will defend the interests of Hong Kong people or simply unquestioningly sacrifice them in order to follow the Central Government line.

The Monitor would like to remind Chief Secretary Donald Tsang his promise not to betray

⁷ Hong Kong General Chamber of Commerce. (4 February 2004) *Views on the Constitutional Development Process*. (http://www.chamber.org.hk/memberarea/chamber_view/policy_statement_template.asp?id=1297)

the Hong Kong People. The Monitor urges the Task Force not to sacrifice the interests of the Hong Kong people, but to side with the Hong Kong people and vigilantly defend our rights. Voices and concerns of the Hong Kong people should be carefully listened to and fully reflected in its negotiation with the Central Government. The Task Force should follow clear guiding principles, such as transparency and impartiality, in carrying out their work so as to guard against the betrayal and exclusion of the Hong Kong people in the course of the decision-making process.

4. The Task Force Must Facilitate Public Participation in Consultation

Constitutional development is an issue affecting everyone. The Task Force should employ every means to ensure that everyone in the society is given the opportunity to receive comprehensive information and to participate in the discussion.

So far, regrettably, the Task Force has not set about its task in a manner likely to achieve these objectives. The Task Force has not issued a formal consultation paper, nor set a deadline for the current consultation. This violates the Government's own guidelines for public consultation⁸, leaving the public without comprehensive information for consideration or sufficient warning to send in a timely response. Secondly, the Task Force only publicized the 12 questions on which it is seeking responses by placing them on its Constitutional Development website and by publishing advertisements in newspapers on three consecutive Mondays in February and March 2004. It seemingly ignores the fact that 40% of Hong Kong households do not have a computer with Internet access⁹ and a substantial number of people do not even read newspaper, so that a large sector of the society are not able to participate in the constitutional review discussion.

The Monitor calls on the Task Force to deploy sufficient resources to carry out public hearings in local communities and conduct civic education programmes on constitutional review, so that the public will receive sufficient information and have adequate opportunity to participate in the discussion.

5. Stop the "Patriotic" Propaganda

The Monitor is concerned about the recent "patriotic" propaganda campaign. In just three weeks, the official Chinese media had published more than 40 articles trying to dominate Hong Kong's discussion on constitutional development. Pro-Beijing figures even went so far to

⁸ Constitutional Affairs Bureau. (November 2003) *Guidelines for Public Consultation*. (<http://www.legco.gov.hk/yr03-04/english/panels/ca/papers/ca1117cb2-337-2e.pdf>)

⁹ Digital 21. *Findings of the "Household Survey on Information Technology Usage and Penetration" and the "Annual Survey on Information Technology Usage and Penetration in the Business Sector" for 2003*. (http://www.info.gov.hk/digital21/eng/milestone/it_survey2003.html)

describe the four-people pro-democracy delegation to the US Senate hearing as “traitors” and “clowns”, and even criticized legislator Martin Lee’s late father.

The Monitor defends everyone’s right to freedom of speech. This includes the right of pro-Beijing figures to continue their irrational discussion of patriotism, although we regard many of their statements as both silly and offensive. Equally free speech includes Martin Lee’s right to express his views both locally and overseas. Nonetheless, the Monitor must warn that provocative references to patriotism and other provocative statements such as pro-Beijing spokespersons have made recently do not promote rational discussion of Hong Kong’s constitutional development, but may instead cause people to take to the streets again or force the people to use their voting power to support pro-democracy candidates in the coming LegCo election. In fact the “patriotic” propaganda campaign had already lowered the rate of trust in Beijing Government by 7% between December 2003 and February 2004, and increased the rate of distrust by 3%¹⁰.

In addition, the Monitor is aware that many of the pro-Beijing figures and Mainland legal scholars have added a qualifying criterion to be the office of Chief Executive – a patriot loving the party as well as the country. There is no place in the Basic Law explicitly or implicitly mentioning such a requirement. Since many of the “patriotism” supporters stress that Hong Kong’s constitutional development must follow the Basic Law, the Monitor also urges these people not to adopt a double-standard by adding a prerequisite for office as Chief Executive which is not set out in the Basic Law.

B. Response to the Task Force’s 12 Questions

1. Hong Kong is an inalienable part of China (Article 1 of the Basic Law)?

Hong Kong is an inalienable part of China. No one in history has ever strived for the independence of Hong Kong. However, while we emphasize “one country”, we should not undermine the importance of “two systems”. The Task Force must strike a balance between one country and two systems during the discussion of constitutional development.

2. HKSAR comes directly under the CPG (Article 12 of the Basic Law)?

Basic Law Article 12 not only stresses that HKSAR “comes directly under the CPG”, but also provides that the HKSAR is to “enjoy a high degree of autonomy”. The latter is what distinguishes Hong Kong from other cities in the Mainland. The Task Force and the HKSAR

¹⁰ HKU POP. (2 March 2004) *HKU POP SITE releases the latest figures on the popularity of SAR and Central Governments, people’s confidence in the future, and ratings of political groups.* (<http://hkupop.hku.hk/english/release/release170.html>)

Government must defend Hong Kong's high degree of autonomy or Hong Kong will become "one country one system", and fail to realize Deng Xiao-ping's vision to unite Hong Kong, Macau and Taiwan.

3. *The Chief Executive (CE) is appointed by the CPG. He is accountable to both the CPG and the HKSAR (Articles 43 and 45 of the Basic Law)?*

The Chief Executive is accountable to **BOTH** the CPG and the HKSAR. The Monitor would like to remind the current and future Chief Executives not to favour only the interests of the Central Government. The Basic Law has bound them to be accountable to both. The accountability to Hong Kong is in fact greater, since the Chief Executive is responsible ultimately for the welfare of the people of Hong Kong.

4. *What should "actual situation" constitute?*

First it should be pointed out that it is the actual situation *in the Hong Kong Special Administrative Region* (as against in other parts of China) which is the relevant consideration as set out in Articles 45 and 68 of the Basic Law.

The "actual situation" in Hong Kong is that, since the Handover, Hong Kong people's demand for universal and equal suffrage to elect the Chief Executive and all seats of the Legislative Council have grown dramatically and have never previously been as high as they have become recently. Hundreds of thousands of people took to the streets on 1 July 2003 and 1 January 2004 to demand "power to the people", and cast their ballots to support pro-democracy candidates in the 2003 District Council Elections. Even after a series of propaganda attacks from the Central Government and pro-Beijing figures, opinion polls¹¹ still showed a 62.4% and 60.5% of support rate for election by universal suffrage of the Chief Executive in 2007 and of all of the Legislative Councillors in 2008 respectively. The Monitor is afraid that any delay in granting equal and universal suffrage will force people once again to make their feelings felt by people power movements.

5. *How "gradual and orderly progress" should be understood?*

"Gradual and orderly progress" is still progress. "Progress" means "moving forward", not standing still. It certainly does not mean or permit moving backwards as the Hong Kong Government regrettably did when it reduced the franchise of the LegCo functional constituencies and restored appointed members to the District Councils.

¹¹ Public Opinion Programme, University of Hong Kong. (23 March 2004) Press Release: HKU POP SITE releases survey findings on constitutional reform. (<http://hkupop.hku.hk/english/release/release175.html>)

The first District Councils Election was held in 1982, and indirect election was introduced to the LegCo in 1985. By 2007, Hong Kong's political structure has already "gradually and orderly progressed" for a quarter of the century. The public can wait no longer for full universal suffrage.

There is always discussion whether Hong Kong is ready for democracy. Suggestions from some business leaders that Hong Kong is "not ready" for democracy are self-interested and insincere. The same "not ready" excuse was used by the South African apartheid regime to defend withholding the vote from the majority of South Africans.

The Monitor would like to argue the "not ready" statement from the opposite direction – Hong Kong is one of the few places in the world with a high GDP, a highly educated population, a sound legal system, free press, etc. that is without a full democratic political system. In fact, "A country does not have to be deemed fit for democracy; rather, it has to become fit through democracy."¹² Hong Kong will only become ready for democracy as democracy is increasingly practiced.

6. *Based on Mr. Ji's explanation in 1990, how could the development of Hong Kong's political structure meet "the interests of the different sectors of society"?*

The Monitor would like to stress in the first place that only the actual wordings of the Basic Law should be taken into consideration when interpreting the Basic Law. Any other comments or documents, no matter who they were from, can only be of reference value and should only be considered in the very limited circumstance where one cannot ascertain a rational meaning by reading the words of the Basic Law itself.

The Monitor believes that, the interests of the different sectors of society can only be met by one person, one vote. Currently, our Chief Executive is selected by an 800-person election committee; while in 2004, half of the 60 LegCo members will still be returned by functional constituencies, many of which have a very small number of electors. The continued existence of these functional constituencies means that the LegCo is biased towards the business and professional sectors and does not properly represent the great majority of citizens. In the 2000 LegCo Election, for example, more than three millions registered voters cast their ballots to return 24 legislators by geographical constituencies, but 173,779 voters alone returned 30 functional constituency legislators. The Monitor's own research in relation to the 1998 Legislative Council Election revealed that a few tycoons could personally control more than 30 votes by registering in different functional constituencies and as a result of the mechanism of corporate voting¹³.

¹² Sen, A. (1999) "Democracy as a Universal Value", *Journal of Democracy*, 10.3, pp3-17.

¹³ Human Rights Monitor. (1998) *Report on 1998 Legislative Council Elections*.

Functional constituencies are an archaic British feudal concept which have no place in the modern world and are not now used in the legislature of any country. They closely resemble and appear inspired by the "rotten boroughs" which dominated the British Parliament in the eighteenth century. It is these functional constituencies which led the United Nations to condemn Hong Kong's electoral system as quoted at the start of this submission.

Human Rights Monitor calls for the functional constituencies to be abolished completely in 2007 and replaced by direct election of all members of the Legislative Council from geographical constituencies.

7. How could the development of Hong Kong's political structure facilitate the development of the capitalist economy"?

As in A.2 above, a democratic political system is the structure well proven to facilitate the development of capitalist economy. Without democracy there can be no real accountability on the part of Government. Without Government accountability maintenance of the rule of law and of a level playing field in relation to Government tenders are very difficult. The rule of law and relative freedom from corruption are major economic strengths of Hong Kong which will be enhanced by more democratic accountability.

8. What is the most appropriate legislative procedure for amending the methods for selecting the CE and forming the LegCo set out in Annexes I and II:

Selection Method for Chief Executives

Basic Law Annex I paragraph 7 reads, "If there is a need to **amend the method for selecting the Chief Executives...**" That is, it is the "method for selecting the Chief Executives" being amended, not the main body or the annexes of the Basic Law. The selection method is set out in the Chief Executive Election Ordinance. Hence, if the method for selecting the Chief Executives is to be amended, the amendment only needs to be supported by two-third of all the LegCo members, consented by the Chief Executive and reported to the Standing Committee of the NPC for approval. There is no need to trigger the mechanism in Basic Law Article 159 nor to amend Annex I.

Formation Method of LegCo

Basic Law Annex II section III reads, "...if there is a need to **amend the provisions of this Annex...**" That is, if there is need to amend the formation method of LegCo after 2007, we

(http://www.hkhrm.org.hk/english/reports/eng_elerpt.html#9)

will need to first amend Annex II according to the procedure outlines in Annex II session III, and then amend related local legislation, such as the Legislative Council Ordinance, in order to complete the process.

The Monitor would like to point out that, regardless of whether the amendment is introduced by the Government or a LegCo member, the split voting method is not required for such amendment. Article II of Annex 2 states that "*Unless otherwise provided for in this Law, the Legislative Council shall adopt [the split voting method in case of motions or bills introduced by individual LegCo members]*". By use of the words "Unless otherwise provided" in Article 2 of Annex II and at the same time setting out a specific procedure for the amendment of the provisions of Annex II, which includes the endorsement of a two-third majority of the LegCo, it is very clear that the split voting method is not applicable to the amendment for the method of formation and the voting procedures of LegCo subsequent to the year 2007.

9. Do we need to follow the procedures set out in Article 159 of the Basic Law, if we amend the methods for selecting the CE or forming the LegCo as specified in Annexes I and II of the Basic Law?

There is no need to follow the procedures set out in Basic Law Article 159. We are amending the methods for selecting the Chief Executives or forming the LegCo, but not the Basic Law itself. Further, it is very clear that the conditions required for an Article 159 amendment are different from those required for the amendment of the methods of selecting the CE or forming the LegCo as specified in Annexes I and II. The former requires the consent of two-third of the Hong Kong deputies to the NPC whereas the consent of these persons is not required for the latter. This method of amending provisions of a constitution is not unusual. Sometimes a schedule to a constitution can be amended by using the ordinary legislative process. Also, as far as the provisions on the electoral system are concerned, the usual practice is for the constitution to specify the broad principle (as in Articles 45 and 68) when reference is made to the ultimate aim of universal franchise, leaving the details to be established through ordinary legislation.

10. How should any amendment relating to the methods for selecting the CE and for forming the LegCo be initiated?

The first step to trigger the amendment mechanism is a two-third majority in LegCo. Both the Government and members of the LegCo can introduce a motion and initiate the amendment.

The theme of "One Country Two Systems" is that the HKSAR is to be given a high degree of autonomy to manage its own business. The methods for selecting the Chief Executives and forming the LegCo primarily concern the HKSAR and should therefore be initiated by its

executive or its legislature. For amending the method for selecting the Chief Executives, the NPCSC has the ultimate power of approval of any proposal and it is unreasonable to further limit the initiation power to the Central Government.

11. Whether the method for formation of the third term LegCo could be used for the fourth term LegCo, if no consensus were reached on whether to amend the method for forming the LegCo after 2007?

Basic Law Annex II Section III read, "... if there is a need to amend the provisions of this Annex..." That is, if there is no consensus or the public finds there is no need to amend the method for forming the LegCo after 2007, the formation method for the third term LegCo simply continues until an amendment is adopted according to the procedure sets out in Annex II.

12. Whether the phrase "subsequent to the year 2007" should be understood to include 2007?

The full phrase in Annex I paragraph 7 should read "the terms subsequent to the year 2007". That is, 2007 refers not to calendar year but the term subsequent to the second term that ends on 30 June 2007. This interpretation is in line with Mr. Ji Peng-fei's address at the Seventh National People's Congress on March 28, 1990: "In the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is need to amend this method of election after that period..." The ten-year period started on 1 July 1997 and will end on 30 June 2007. In fact, Secretary for Constitutional Affairs Stephen Lam also mentioned in his speech at LegCo on 12 November 2003¹⁴ that after comprehensive internal research and consulting legal advice, the concluding view of the government was that it was possible to amend the method for selecting the third term Chief Executive. In the circumstance, the Monitor has difficulty in understanding why the Task Force still decided to consult the public on a legal question to which it already has an answer, instead of giving concrete proposals for constitutional review.

Conclusion

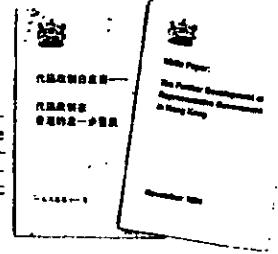
Democracy is a basic human right. The Monitor calls on the Task Force and the HKSAR Government to stand up for the right of the Hong Kong people to full democracy. The Task Force should wait no longer but to put forward concrete constitutional review proposals for a truly meaningful consultation.

¹⁴ *Amendment to method for selecting third term Chief Executive may be considered if there is need: SCA, 12 November 2003. (<http://www.info.gov.hk/gia/general/200311/12/1112298.htm>)*

The Zig-Zag Course of Democracy

Hong Kong had always been a British colony with freedom but not democracy. However, knowing that it would have to be returned to China upon the expiry of the lease, the British Government decided to provide channels for political participation in the territory. The 1982 District Council Election in Wong Tai Sin was among the first lot in this direction.

Two years later, the Colonial Government worked to enable participation at a higher level. Upon the release of the White Paper entitled *The Further Development of Representative Government in Hong Kong*, the Government devised reforms to open up the Legislative Council for public election, though an indirect one.



On 26 September 1985, the Legislative Council had its first indirect election. Via functional constituencies and electoral college, 24 lawmakers were elected, breaking the conventional practice of having all unofficial councillors appointed by the governor.



Voters were no longer satisfied with an indirect Legislative Council election after the first taste of democracy, albeit a partial one. They assembled to demand a comprehensive and direct Legislative Council election in 1988. Against the majority view, the Colonial Government ruled out chances for a direct Legislative Council election in 1988 after a 6-month-odd period of public consultation and preparation. It however agreed to expand the number of seats for functional constituencies for the same year. The White Paper also proposed to have 10 directly elected seats in the year 1991.



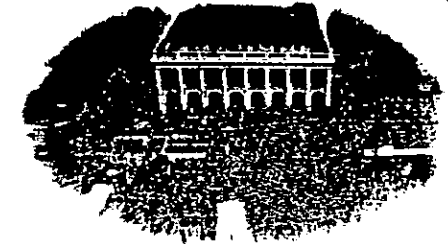
Chris Patten, whose visit to Beijing failed, was branded "sinner of thousand years" in a press conference by Lu Ping, then Director of Hong Kong and Macau Affairs Office of State Council. Lu reiterated China's intent to start anew in the establishment of the Hong Kong Special Administrative Region (HKSAR) Government if the British remained uncooperative.



While China intended to tighten its control, the British Government echoed then Hong Kongers' growing demand for democracy in the wake of the June 4th movement by increasing the number of directly elected seats from the proposed 10 to 18 in the 1991 Legislative Council Election. The new arrangement was so well received that a couple rushed to cast their ballot in the midst of the wedding ceremony.



On 4 April 1990, the National People's Congress (NPC) endorsed the Basic Law, which was seen as politically conservative, and achieved a taut control on the course of democratization in Hong Kong.



On 21 May 1989, a million Hong Kongers took to the street in support of the students' movement in Beijing. As the largest of its kind in the history of Hong Kong, the demonstration ignited the people's vehemence for democracy. However it also shocked the Chinese authority which promptly decided to tighten its control by adopting a more conservative approach on questions related to the democratic development in Hong Kong.



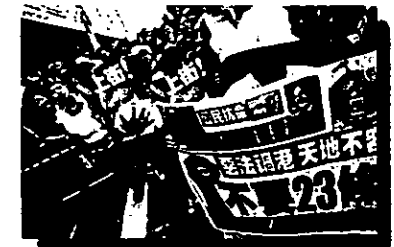
The Chinese and the British could not reach any agreement on the pace of democratization in Hong Kong. In addition to the setting up of the Preliminary Working Committee and Preparatory Committee for the HKSAR, the Chinese Government also appointed 60 members into the provisional legislature. The shuffle ruled out any chance for the legislators elected in 1995, to straddle the handover in 1997. On 25 January 1997, members of the Provisional Legislative Council held their first meeting in Shenzhen where more meetings were convened to conduct law reviews within the less than 6 months that followed. While new enactments were endorsed for the HKSAR, the existing more liberal laws were repealed.



On 30 June 1997, the 1995-elected Legislative Council was forced to dissolve due to the lack of "through train" arrangement. The Provisional Legislative Council commenced its official operation in Hong Kong on the next day.



The democratization of Hong Kong - often described as too late and too short-lived, was disabused as Chris Patten faded out from the local political scene. Tung Chee Hwa, the Chief Executive hand-picked by the Selection Committee, took over to become the new helm for Hong Kong's political future.



In the lack of a genuine and fair electoral system, Hong Kongers could have no alternative to Tung albeit their disgruntlements with his Administration. People were forced to take to the street on 1 July 2003 in order to make themselves heard. More than 500,000 people joined the "No to Article 23 and Return Power to the People" demonstration organized by the Civil Human Rights Front. However, the Central Government has by far made no move to accommodate the demand of Hong Kong people. Quite on the contrary, it has tried to step up its control on the course of democratization in the territory.