2015

Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law

Alvin Y.H. Cheung

Follow this and additional works at: http://brooklynworks.brooklaw.edu/bjil

Recommended Citation
Available at: http://brooklynworks.brooklaw.edu/bjil/vol40/iss2/3

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized administrator of BrooklynWorks. For more information, please contact matilda.garido@brooklaw.edu.
ROAD TO NOWHERE: HONG KONG’S DEMOCRATIZATION AND CHINA’S OBLIGATIONS UNDER PUBLIC INTERNATIONAL LAW

Alvin Y.H. Cheung*

INTRODUCTION: WE’RE NOT LITTLE CHILDREN ..............467
I. BACKGROUND AND HISTORY ........................................475
   A. The United Kingdom’s Acquisition of Hong Kong ....475
   B. Background to the Joint Declaration .........................476
   C. The Drafting of the Basic Law ..................................478
   D. 1990-1997: A Day Late and a Dollar Short ............479
   E. 2003-2004: Beijing Usurps Initiative .....................481
   F. 2007: Jam Tomorrow ..............................................484
   G. 2009-2010: Divide and Conquer .............................485
   H. 2012: Playing Charades .........................................487
   I. The Current Debate ................................................488
      1. 2013: The Moderates Lose Patience .......................489
      2. 2014: Beijing’s Gloves Come Off; Hong Kong’s Umbrellas Come Out ........................................494
      3. Who Gets to Nominate? .......................................498
II. APPLICABLE LAW ....................................................504

* Visiting Scholar, U.S.-Asia Law Institute, NYU School of Law; of the Hong Kong Bar, barrister (non-practicing). I am grateful to Professors Jerome A. Cohen, Ira Belkin, and Margaret Satterthwaite, and to Alyssa S. King (J.D., Yale 2012) for their comments on earlier versions of this article. I am also indebted to Gloria Chan (LL.B., HKU 2016) for her assistance with preliminary factual research. All errors remain my own.
A. The Contested Basis of Hong Kong’s New Legal Order .................................................................................................504
B. The PRC’s Attitude Toward Treaties ........................... 506
   1. The Vienna Convention on the Law of Treaties (“VCLT”) ......................................................................................506
   2. Customary International Law ............................................. 508
C. The Joint Declaration .................................................. 509
D. The Basic Law ............................................................... 510
E. The ICCPR ................................................................. 513
   1. Interpreting the ICCPR .................................................. 514
   2. Status of the Reservation to Article 25(b) ...................... 515
   3. Universal Suffrage and the Right to Vote ................ 520
   4. Equal Suffrage ........................................................... 521
   5. The Right to Be Elected ................................................ 521
F. The Right to Self-Determination .................................. 523
G. A Right to Democracy in Customary International Law? ................................................................................................. 523
H. Breaches of Public International Law ......................... 526
   1. The Joint Declaration .................................................. 526
   2. The ICCPR ................................................................. 530
   3. Customary International Law ........................................ 531

III. REMEDIES .................................................................. 531
A. The Joint Declaration .................................................. 532
B. The ICCPR ................................................................. 532
C. Customary International Law: Obligations Erga Omnes? ................................................................................................. 533
D. Means of Enforcement ................................................ 535
   1. Absence of Individual Right of Petition ....................... 535
   2. The PRC’s Refusal to Accept ICJ Jurisdiction ....536
3. Difficulty in Enforcing Obligations *Erga Omnes*. 537
4. Potential Solutions.......................................................... 537

**CONCLUSION: THEY’LL MAKE A FOOL OF YOU ............... 542**

“Today, we have entered the home stretch to universal suffrage.”
– Carrie Lam Cheng Yuet-ngor, Hong Kong Chief Secretary, December 4, 2013

“[T]he principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld.”
– National People’s Congress Standing Committee, August 31, 2014

“We do not consider that the terms of the 31 August . . . decision offer ‘genuine choice’ in any meaningful sense of the phrase, nor do we consider the decision consistent with the principle that Hong Kong should enjoy a high degree of autonomy.”
– U.K. House of Commons Foreign Affairs Committee, March 6, 2015

**INTRODUCTION: WE’RE NOT LITTLE CHILDREN**

On August 31, 2014, the National People’s Congress Standing Committee ("NPCSC") ruled out democratic elections

---


\(^{b}\) Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti He 2016 Nian Lifa Hui Chansheng Banfa De Jueding (全國人民代表大會常務委員會關於香港特別行政區行政長官選舉問題和 2016年立法會產生辦法的決定) [Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region In the Year 2016] (adopted by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2014).

\(^{z}\) Foreign Affairs Committee, The UK’s Relations With Hong Kong: 30 Years After the Joint Declaration, 2014–15, H.C. 649 (U.K.).
for Hong Kong’s legislature in 2016 and for its Chief Executive in 2017. The NPCSC’s Decision (“the 2014 Decision”) declared that the implementation of universal suffrage in Hong Kong implicated China’s “sovereignty, security and development interests.” It therefore imposed strict conditions on nomination and candidacy to ensure that candidates were politically acceptable to Beijing. Meanwhile, Beijing inveighed against collusion with external forces by democratic activists in Hong Kong and sought to block a British inquiry into developments in the former U.K. colony on the basis that it constituted “interference in China’s internal affairs.”

This was not the first time foreign concern over Hong Kong’s democratization had drawn a harsh Chinese response. In an op-ed published in Hong Kong’s Chinese- and English-language papers of record on September 14, 2013, Hugo Swire, Minister of


3. See Buckley & Forsythe, supra note 1.


State for the Foreign and Commonwealth Office ("FCO") of the United Kingdom, stated his support for the introduction of universal suffrage in Hong Kong. Swire reiterated the United Kingdom’s commitment to Hong Kong under the Sino-British Joint Declaration of 1984 ("Joint Declaration"), adding, “the U.K. stands ready to support [Hong Kong’s transition to universal suffrage] in any way [it can].”\(^6\)

Official responses ranged from the unfriendly to the vitriolic. Leung Chun-ying (梁振英; commonly known as “C.Y. Leung”), the city’s Chief Executive, asserted that Hong Kong needed no foreign support to implement universal suffrage.\(^7\) The People’s Republic of China (“PRC”) Foreign Ministry denounced British intervention in Hong Kong’s internal affairs.\(^8\) Official media cited ominous warnings from Hong Kong-based pro-Beijing papers about the influence of British spies “across the city’s government, judiciary, chambers of commerce and the media.”\(^9\) Pro-democracy remarks by Clifford Hart, the American Consul-General, were met with a similarly hostile response.\(^10\)

\(^6\) Id.


\(^8\) Chong & Lau, supra note 7.


Beijing’s shrill response to foreign comments on Hong Kong may belie unease about its failure to meet its international legal commitments. In the Joint Declaration, China promised Hong Kong a “high degree of autonomy” under the doctrine of “One Country, Two Systems” (一國兩制). Hong Kong would have an elected legislature after the resumption of Chinese sovereignty in 1997. The city’s Chief Executive—its head of government—would be selected through elections or consultations.\textsuperscript{11} The provisions of the International Covenant on Civil and Political Rights (“ICCPR”) that the United Kingdom had acceded to on Hong Kong’s behalf would continue to apply.\textsuperscript{12} China later enshrined its commitments to Hong Kong’s democratization in the Basic Law, the constitutional instrument for the country’s first Special Administrative Region (“SAR”).\textsuperscript{13} Articles 45 and 68 of the Basic Law proclaimed that the “ultimate aim” would be for Hong Kong to choose its Chief Executive and its legislature through universal suffrage.\textsuperscript{14} Yet, more than seventeen years after the transfer of sovereignty, China’s promises of democratization in Hong Kong ring increasingly hollow. China butted heads with the United Kingdom over electoral arrangements for the city’s Legislative Council (“Legco”) throughout the 1990s;\textsuperscript{15} it ultimately reversed British reforms by setting up its own shadow legislature.\textsuperscript{16} After

\textsuperscript{11} See “B. Background to the Joint Declaration,” infra, at 14. See also “C. The Joint Declaration,” infra, at 46.

\textsuperscript{12} See “E. The ICCPR,” infra, at 50.


\textsuperscript{14} See infra Part II.D.


\textsuperscript{16} See infra Part I.D.
1997, the NPCSC repeatedly pushed back the deadline for democratization.\textsuperscript{17} In 2007, the NPCSC promised universal suffrage in the 2017 Chief Executive elections.\textsuperscript{18} Yet the 2014 Decision spells out—more clearly than any previous statement—that China’s “bottom line” is a power of veto over candidates with political views it deems repugnant.\textsuperscript{19}

Beijing’s repeated moving of the goalposts is significant because it calls into question the PRC’s willingness to abide by its obligations under international law. As a result, it has prompted growing international fears for the territory’s future. Despite the hostile Chinese reception to the statements by Swire and Hart, the German Consul-General added his voice to the chorus in early 2014, stating, “[w]ith universal suffrage, our understanding is everybody has a vote and everybody can run.”\textsuperscript{20} Sir Richard Ottaway, the Chair of the U.K. House of Commons Foreign Affairs Committee, declared on September 2, 2014, that there was “a prima facie case” that the 2014 Decision violated the Joint Declaration.\textsuperscript{21}

Beijing’s lengthy history of default has had two major consequences. First, the absence of electoral reform has created an ongoing crisis of legitimacy. In 2012, C.Y. Leung was selected as

\textsuperscript{17} Lorenz Langer, \textit{Electoral Reform in Hong Kong: From Schedule to Substance}, 22 H.K. J. (2011).


\textsuperscript{20} On Democracy, supra note 10.

Chief Executive by an Electoral Committee of 1,200 people in a process the Economist described as a “farce.”\textsuperscript{22} In the same year, half of the legislative seats were chosen through a “functional constituency” voting system previously condemned by the U.N. Human Rights Committee as a system of unequal suffrage.\textsuperscript{23} Second, public cynicism about “One Country, Two Systems” has taken root. The Hong Kong Government’s consultation on Chief Executive electoral reform for 2017 was met with suspicion, even before the consultation document’s release.\textsuperscript{24} In December 2013, a University of Hong Kong survey revealed that 42.3 percent of respondents had no confidence in “One Country, Two Systems.”\textsuperscript{25} The perception of bad faith in the part of Beijing and Hong Kong Governments even prompted calls for mass civil disobedience,\textsuperscript{26} culminating in the Umbrella Movement protests of 2014.\textsuperscript{27}

\textsuperscript{22} Hong Kong’s Chief-Executive “Election”: The Worst System, Including All the Others, Economist, Mar. 31, 2012, http://www.economist.com/node/21551482. See also infra Part I.H.


\textsuperscript{26} See discussion of “Occupy Central with Love and Peace” infra Part I.I.1.

Although there has been extensive discussion since 1984 of Hong Kong’s post-1997 constitutional order, there has been relatively little discussion outside of Hong Kong legal academia regarding the impact of events after 1997. Even within Hong Kong legal academia, discussion of recent milestones in electoral reform has been limited. This paper brings the academic discussion of post-1997 Hong Kong up to date in light of developments during 2013 and the first three quarters of 2014, with limited consideration of the Umbrella Movement and its aftermath. It also examines the PRC’s public international law obligations with respect to Hong Kong specifically.

Part I sets out the background to the resumption of Chinese sovereignty over Hong Kong in 1997. It posits that China laid the foundations for its later defaults on democratization as early as 1972, when it requested Hong Kong’s removal from the United Nations’ list of Non-Self-Governing Territories. The British policy of acquiescence during the 1980s aided and abetted future Chinese backsliding. Newfound and belated British assertiveness in the 1990s was insufficient to undo the damage done by years of British appeasement. Part I then provides an account of Beijing’s attempts to undermine democratic reform in Hong Kong from 2003 to date, culminating in the current round of debates regarding Chief Executive electoral reforms for 2017. After the NPCSC usurped the power to initiate electoral reform in Hong Kong in 2004, it pledged in 2007 that Hong Kong could


31. YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 11, 38 (2d ed. 1999); see also Boasberg, supra note 28, at 288–89.


33. See infra Part I.D.

34. See infra Part I.E.
elect its own Chief Executive through universal suffrage in 2017. Yet Beijing remains adamant on maintaining a power of veto by controlling the nomination process.

Part II considers the applicable international legal framework. It contends that any attempt by Beijing to impose political criteria on Chief Executive candidacy violates obligations imposed by the Joint Declaration, the ICCPR, and customary international law. First, the object and purpose of the Joint Declaration, the PRC’s subsequent practice in promulgating the Basic Law, and other rules of treaty interpretation suggest that Beijing may not render the Joint Declaration’s references to “elections” nugatory. Second, the provisions of the ICCPR requiring universal suffrage, equal suffrage, and the right to be elected regardless of political affiliation apply with full force to Hong Kong, despite insistence by pre-1997 and post-1997 Hong Kong Governments that they do not. The latter position is inconsistent with the Human Rights Committee’s conclusions, established rules of treaty interpretation, and emergent rules of customary international law. Third, although customary international law does not support a right to democracy per se, it arguably supports a principle of “democratic teleology” or a right to democratization.

Part III considers possible remedies and means of enforcement. In the absence of compulsory jurisdiction by the International Court of Justice (“ICJ”) or of individual communications under the Optional Protocol to the ICCPR, the options for enforcing the PRC’s international law obligations are limited. Yet alternatives remain available. Unilateral monitoring by the United Kingdom, the prospect of a General Assembly request for an Advisory Opinion, or conduct by third States, provide possible—if unlikely—means of enforcement. Ultimately, the most effective means of exerting pressure on the PRC to abide by its international law obligations may not involve State actors. It may not even involve public international law at all. However, China’s increasing hostility toward democracy and “universal values” warrants pessimism toward the prospects of democratization in Hong Kong.

35. See infra Part I.F.
36. See infra Part I.I.
37. Document No. 9, an internal memorandum issued by the Chinese Communist Party in 2013, declared that “constitutional democracy,” “universal values,” human rights, and other “Western” ideas were subversive and should be
I. BACKGROUND AND HISTORY

Beijing’s attempts to stymie Hong Kong’s democratization began well before 1997. These efforts continued after the signing of the Joint Declaration and intensified after the transfer of sovereignty, especially after landmark protests in 2003 against national security legislation. Between 2003 and 2010, Beijing seized the power to initiate democratic reform in Hong Kong, delayed democratization until 2017 at the earliest, and created schisms within the pro-democracy camp. Despite these efforts, demand for democratization continued to build. The debacle surrounding the Chief Executive selection process in 2012 provided further impetus for reform. Despite—or perhaps because of—the growing clamor for reforms, the 2014 Decision entrenched Beijing’s stranglehold over the nomination of candidates for Chief Executive.

A. The United Kingdom’s Acquisition of Hong Kong

The United Kingdom acquired control over Hong Kong through three treaties with China during the nineteenth century. As part of the settlement of the First Opium War, China ceded the island of Hong Kong to the United Kingdom in perpetuity in 1842, under the Treaty of Nanking.38 China ceded the Kowloon Peninsula under the First Convention of Peking of 1860 at the conclusion of the Second Opium War.39 Under the third treaty, the Second Convention of Peking of 1898, China granted the United Kingdom a ninety-nine-year lease over the New Territories and Outlying Islands.40

38. GHAI, supra note 31, at 4.
39. Id. at 4–5.
40. Id. at 5–6.
Successive Chinese governments harbored resentment over the treaties on Hong Kong, but no Chinese government attempted to recover Hong Kong until 1982. Prior to 1982, the PRC maintained that the treaties imposed on China in the nineteenth and early twentieth centuries were void as unequal treaties, but that it would recover Hong Kong at an appropriate time. Pursuant to that stance, the PRC successfully sought the removal of Hong Kong from the United Nations’ list of Non-Self-Governing Territories in 1972.

B. Background to the Joint Declaration

By the early 1980s, the looming end of the British lease over the New Territories forced the British government to enter talks with Beijing over the future of Hong Kong. China also found it expedient to negotiate. In 1978, the PRC secretly established the Hong Kong and Macau Affairs Office (“HKMAO”); by 1979 Deng Xiaoping had become General Secretary of the Communist Party of China. The recovery of Hong Kong would not only preserve face for China; it would also aid China’s economic development and damage Deng’s hard-line rivals in Beijing.

The Chinese were determined to regain sovereignty over Hong Kong at all costs. The British soon discovered the extent of that determination; Deng reacted angrily to Thatcher’s claim that the treaties regarding Hong Kong remained valid. The PRC further strengthened its bargaining position by threatening a unilateral declaration of its policies toward Hong Kong after 1997. Faced with an obdurate Chinese negotiating position, the Brit-
ish abandoned their proposal to exchange sovereignty for administrative rights in late 1983.\(^{52}\) Chinese proposals provided the basis for further negotiations.\(^{53}\)

China’s plan for Hong Kong rested on the concept of “One Country, Two Systems,” under which Hong Kong would be ruled by Beijing but allowed to retain its capitalist economy. Deng promised that post-1997 Hong Kong would have a “high degree of autonomy” (高度自治) and that “Hong Kong people will rule Hong Kong” (港人治港).\(^{54}\) Beijing encapsulated this policy in twelve points, which were presented to the United Kingdom on June 27, 1984.\(^{55}\) These points included guarantees that:

1. Hong Kong would not be run by Beijing’s plenipotentiaries;
2. Hong Kong would have a “mayor” elected by Hong Kong inhabitants, who should be a “patriot”;
3. Except in matters of foreign affairs and defense, Beijing would not interfere in Hong Kong’s governance; and
4. The PRC would tolerate political activities in Hong Kong, provided they did not constitute sabotage.\(^{56}\)

Deng hoped that “One Country, Two Systems” held the key to resolving the questions of Hong Kong and Macau—and, ultimately, to reunification with Taiwan.\(^{57}\) To that end, the PRC’s 1982 Constitution (promulgated as part of Deng’s comprehensive reforms) included a provision allowing the creation of SARs, with systems of government to be prescribed by the National People’s Congress (“NPC”) “in the light of the specific conditions.”\(^{58}\)

---

52. Boasberg, supra note 28, at 294; GHAI, supra note 31, at 47–48. See also 英鴿派當道談判節節敗退 [British Doves Prevailed, Repeatedly Retreated in Negotiations], supra note 31 and accompanying text.
55. GHAI, supra note 31, at 49–50.
56. Id. at 49–50.
57. Boasberg, supra note 28, at 291; Jackson, supra note 28, at 422.
58. XIANFA art. 31 (1982) (China).
China had initially been reluctant to enter into a binding treaty on the future of Hong Kong, although Deng ultimately relented.59 The Joint Declaration was initialed on September 24, 1984 and came into force on May 27, 1985.60 It was registered with the United Nations on June 12, 1985.61

C. The Drafting of the Basic Law62

Following ratification of the Joint Declaration, the PRC set up the Basic Law Drafting Committee (“Drafting Committee”). The Drafting Committee consisted of fifty-nine members from Hong Kong and Mainland China, with Mainland members forming the majority.63 The Drafting Committee was aided by a Basic Law Consultative Committee (“Consultative Committee”), ostensibly intended to introduce a degree of public participation.64 The United Kingdom played a minimal role in the drafting process;65 it had agreed not to engage in any constitutional reforms that would be inconsistent with the Basic Law, a policy referred to as “convergence.”66 The drafting process ultimately became an attempt by a minority of liberal-minded Drafting Committee members to prevent erosion of Chinese commitments in the Joint Declaration.67 With respect to democracy, they achieved only

59. GHAI, supra note 31, at 53.
60. Id. at 55–56.
63. GHAI, supra note 31, at 57.
65. See GHAI, supra note 31, at 59–60.
66. Id. at 59–60; Davis, supra note 15, at 170. The practical consequence—and, indeed, the intent—of “convergence” was to “contain the pace of political reform.” CHRISTOPHER PATTER, EAST AND WEST: CHINA, POWER, AND THE FUTURE OF ASIA 25 (1998).
67. Davis, supra note 15, at 162.
limited success, especially after the Tiananmen Square Massacre of 1989.68

The provisions governing Hong Kong’s political system were particularly contentious.69 Pro-Beijing conservatives sought to limit direct elections of the legislature and to have the Chief Executive selected through an electoral college.70 Pro-democracy liberals sought the election of both the legislature and the Chief Executive through universal suffrage.71 The conservatives—with Beijing’s blessing—ultimately won the argument.72

The process of negotiating the Joint Declaration—and, to a lesser extent, the drafting process of the Basic Law—was remarkable for its lack of representation of the interests of the Hong Kong public. When then-Governor Sir Edward Youde declared in 1982 that he represented the interests of Hong Kong, the PRC Foreign Ministry responded that Youde could only be present as a representative of the United Kingdom.73 During the drafting of the Basic Law, attempts by the Hong Kong public to make their views known had little impact on the Drafting Committee.74 Chinese attitudes hardened further after the Tiananmen Square Massacre as hardliners consolidated their position;75 by the end of the drafting process, Beijing was “increasingly dictating the terms of the Basic Law.”76

D. 1990-1997: A Day Late and a Dollar Short

The administration of Hong Kong between 1984 and 1997 raised thorny difficulties, even before 1989. The United Kingdom purported to retain administrative authority over Hong Kong.77 Yet the PRC also claimed an interest in the prosperity and stability of the Crown Colony.78 A smooth transition would only have been possible with the full cooperation of the United

68. Id. at 162–63.
69. GHAI, supra note 31, at 63.
70. Id.
71. Id.
72. Id.
73. STEVE TSANG, A MODERN HISTORY OF HONG KONG 222 (2007).
74. GHAI, supra note 31, at 60–61.
75. Id. at 60.
76. Id. at 61.
77. Id. at 75.
78. Id.
Kingdom and PRC and of Hong Kong’s domestic institutions.\textsuperscript{79} Instead, the two sovereigns began jockeying for power almost immediately.\textsuperscript{80}

The United Kingdom made an early push for Hong Kong’s democratization in 1984 in a consultation document (a “Green Paper”) that contained detailed proposals for a Parliamentary democracy;\textsuperscript{81} however, the Green Paper fell victim to the United Kingdom’s policy of “convergence.”\textsuperscript{82}

The United Kingdom would come to regret its policy of appeasement. The bloody suppression of the 1989 democracy movement shattered the Hong Kong public’s confidence in Beijing, prompting mass emigration during the 1990s.\textsuperscript{83} London came under pressure—both from Hong Kong and internationally—to hasten democratization and protect rights and freedoms;\textsuperscript{84} for its part, Beijing fought British attempts at political reform at every turn.\textsuperscript{85} The Memorandum of Understanding on Hong Kong’s new airport, signed in 1991, also prompted the United Kingdom to reconsider its concessions to China.\textsuperscript{86} The British negotiating position would harden after 1991, but this would have little effect in securing greater Chinese commitment to Hong Kong’s democratization.

\textsuperscript{79} Id. at 73.
\textsuperscript{80} See id. at 75.
\textsuperscript{81} See id. at 76.
\textsuperscript{82} See supra note 64 and accompanying text. See also Ghai, supra note 31, at 76.
\textsuperscript{84} Ghai, supra note 31, at 76.
\textsuperscript{85} Id.
\textsuperscript{86} The Memorandum of Understanding imposed various substantive and procedural requirements on the construction of the new Hong Kong International Airport, the effect of which was to require consultation or consent of the PRC and to dictate the Hong Kong treasury’s fiscal reserves. The Memorandum also established an Airport Committee under the Joint Liaison Group (the latter being a creation of the Joint Declaration); the Airport Committee operated in secret, setting “a bad precedent for public participation, policy making and accountability.” Ghai, supra note 31, at 77. See also Alvin Y. So, The Tiananmen Incident, Patten’s Electoral Reforms, and the Roots of Contested Democracy in Hong Kong, in THE CHALLENGE OF HONG KONG’S REINTEGRATION WITH CHINA 49, 61–62 (Ming K. Chan ed., 1997).
The most prominent symbol of the United Kingdom’s newfound assertiveness was the appointment of Chris Patten, a senior Conservative politician, as Hong Kong’s last governor in 1992.\(^{87}\) In October 1992, without consulting Beijing, Patten announced Legco electoral reforms for 1995, which, although conforming to the letter of the Basic Law, hastened the pace of democratization.\(^{88}\) Beijing’s reaction was vituperative.\(^{89}\) After seventeen rounds of talks, Sino-British negotiations failed;\(^{90}\) Legco passed Patten’s reform package substantially unchanged.

Following the passage of the Patten reforms, Beijing went its own way. It declared that the “through train” arrangement, under which legislators elected in 1995 could remain in office until 1999, had been derailed.\(^{91}\) It also hastened arrangements for its own shadow government, the Preliminary Working Committee (PWC),\(^{92}\) and created a “provisional legislature”—a creature foreign to the Basic Law.\(^{93}\) The deterioration of Sino-British relations after 1989 thus resulted in two tracks of government, with each track intent on undoing the reforms instituted by the other. This pattern of Chinese recalcitrance was an ominous sign of things to come. It showed, to many, a “cavalier attitude towards the Basic Law.”\(^{94}\) Subsequent events would prove the skeptics correct.

**E. 2003-2004: Beijing Usurps Initiative**

On July 1, 2003, an estimated 500,000 people marched in protest against proposed national security legislation.\(^{95}\) Demands

---

87. See GHAI, supra note 31, at 78.
88. See So, supra note 86, at 63–64; see also GHAI, supra note 31, at 78.
91. See So, supra note 86, at 67–68; see also GHAI, supra note 31, at 75–78.
92. So, supra note 86, at 67–68.
93. GHAI, supra note 31, at 78. The creation of the Provisional Legislature will be revisited at the end of this paper.
94. Id.
for democratization followed. Advocates of democracy, fortified by high protest turnout, called for the election of the Chief Executive by universal suffrage in 2007. They also demanded the abolition of “functional constituency” legislators, who made up half of Legco and entrenched the influence of business and professional interests, by 2008.96

The Beijing and Hong Kong Governments swiftly moved to dominate all subsequent discussion.97 On January 7, 2004, then-Chief Executive Tung Chee-hwa (董建華) announced the creation of a Constitutional Development Task Force headed by Sir Donald Tsang Yam-kuen (曾蔭權), then-Chief Secretary,98 to consult the Central People’s Government (“Central Government”) on constitutional development. Tsang explained the need to consult Beijing in the following terms:

Taking into consideration our duty to uphold the Basic Law, as well as political reality, we believe that we need to first initiate discussions with the central authorities before determining the appropriate arrangements for the constitutional review . . . At the most basic level, this will avoid the central authorities and the Hong Kong community reaching different understandings of those Basic Law provisions regarding constitutional development. Such a scenario could cause serious confrontation between the Hong Kong community and our sovereign government. Obviously, we do not want to precipitate such a situation.99

On the same day, the HKMAO – an arm of the Beijing government – issued a press release emphasizing Hong Kong’s political development related to the implementation of “One Country, Two Systems” and to the relationship between the Central Government and the Hong Kong SAR.100

97. Chen, Constitutional Controversy, supra note 96 at 216.
98. Second in line only to the Chief Executive in Hong Kong’s executive hierarchy.
100. Chen, Constitutional Controversy, supra note 96 at 216.
Beijing would soon dictate its views on democratic development to Hong Kong. On March 26, 2004, the NPCSC announced that it would consider issuing an interpretation of the Basic Law provisions governing Hong Kong’s political development at its next meeting. The deliberations were brief. On April 6, 2004, the NPCSC delivered its interpretation of Annexes I and II of the Basic Law (the “2004 Interpretation”). The 2004 Interpretation required the Chief Executive to report to the NPCSC on the necessity of political reform, after which the NPCSC would determine whether such reform was indeed necessary. The NPCSC thus seized the political initiative for electoral reform. The Chief Executive obligingly submitted a report, stating that there was a need to amend the electoral arrangements for 2007 and 2008, but that “development towards the ultimate aim of universal suffrage must progress in a gradual and orderly manner step by step. The pace should not be too fast.” Armed with the Chief Executive’s reservations, the NPCSC ruled out universal suffrage in 2007 and 2008 in its Decision of April 26, 2004 (the “2004 Decision”). A public relations offensive followed the
legal offensive. Between 2004 and 2005, Beijing officials and their Hong Kong supporters let loose a “barrage” of hostility toward advocates of democratization.\textsuperscript{107}

\textit{F. 2007: Jam Tomorrow}

In March 2007, twenty-one pro-democracy legislators presented their proposal for electoral reform in 2012. Under this proposal, all legislators would be elected through direct elections, putting an end to functional constituencies. The Chief Executive would be elected by universal suffrage from a list of candidates nominated by at least fifty members of a 1200-strong nominating committee.\textsuperscript{108} The reform proposal became a key issue in the 2007 debates between Donald Tsang—by then running for re-election as Chief Executive—and Alan Leong Ka-kit (梁家傑), the pro-democracy candidate. Confronted with continued public demand for democratization, Tsang pledged that he would pursue a timetable for democratization if he were re-elected.\textsuperscript{109} Tsang was duly re-elected; throughout April and May 2007, democrats pressed Tsang to abide by his promise of a timetable for reform.\textsuperscript{110}

Beijing reacted quickly. On June 6, 2007, Tsang was summoned before NPC President Wu Bangguo (吳邦國), who declared that the SAR had no “residual power” to decide on political reforms.\textsuperscript{111} On December 29, the NPCSC handed down its 2007 Decision—ruling out universal suffrage for any elections in 2012.\textsuperscript{112} The earliest possible date for Chief Executive elections by universal suffrage, the NPCSC declared, was 2017—twenty

---

\textsuperscript{107} Davis, supra note 106, at 172–75.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 448.
\textsuperscript{112} 2007 Decision, supra note 18.
years after the establishment of the SAR and more than thirty years after the signing of the Joint Declaration.\textsuperscript{113}

\textit{G. 2009-2010: Divide and Conquer}

The first clash over electoral reform after the 2007 Decision began in November 2009, when the Hong Kong Government released its “Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012” (the “2009 Proposals”).\textsuperscript{114} Under the 2009 Proposals, the Election Committee would swell in numbers to 1200 people, but its basic contours would remain unchanged.\textsuperscript{115} The number of Legco seats would increase from sixty to seventy, with five new geographical constituency and five new functional constituency seats.\textsuperscript{116} The new functional constituency seats would be chosen by elected members of District Councils (local consultative assemblies).\textsuperscript{117}

Pro-democracy politicians criticized the 2009 Proposals for their lack of ambition, but became bitterly divided over how to react.\textsuperscript{118} Legislators from the League of Social Democrats (社會民主連線, also known as 社民連; “LSD”) and the Civic Party (公民黨; “CP”) resigned in an attempt to trigger a “de facto referendum” on democratic reform. However, their efforts were hamstrung by the refusal of the Democratic Party of Hong Kong (民

\begin{footnotes}
\footnotetext[113]{\textit{Id.}}
\end{footnotes}
主黨；“Democratic Party”）—then Hong Kong’s largest pro-democracy party—to participate. Instead, the Democratic Party and other “moderate” democrats formed the Alliance for Universal Suffrage (終極普選聯盟) to negotiate with the Hong Kong and Beijing Governments.

Beijing adeptly exploited the divisions between “moderate” and “radical” democrats. It strongly condemned the “de facto referendum”; pro-Beijing politicians boycotted the by-elections. Meanwhile, the Central Government’s Hong Kong liaison office (the “Liaison Office”) hosted an unprecedented series of meetings with “moderate” democrats. As a result of these talks, the 2009 Proposals received Legco approval in 2010, with minimal modifications.

The Democratic Party’s decisions to negotiate with Beijing and to vote in favor of the revised 2009 Proposals provoked widespread recriminations. Beset by criticism from other pro-democracy parties and accused by the public of betrayal, the party won only four out of thirty-five available Geographical Constituency seats in the 2012 Legco elections. Its Faustian pact not only split the pro-democracy parties into “moderate” and “radical” camps; it also highlighted the steep political price of advancing proposals deemed to be politically unambitious.


120. Chen, Unexpected Breakthrough, supra note 118, at 260.

121. Id. at 260–61.

122. Id. at 261.

123. Id. at 262–64. As with the original 2009 Proposals, elected District Councilors would nominate candidates for the five new Functional Constituency seats. However, Hong Kong voters not already enrolled in an existing Functional Constituency would choose among the nominated candidates. See id. at 263.

124. See id. at 265.


H. 2012: Playing Charades

The decline of “moderate” democrats was not the only factor to shape subsequent political debate. The process by which C.Y. Leung was selected to be Hong Kong’s third Chief Executive threw a spotlight on the defects of the existing system of selection.127

Leung’s anointment ended a long, bruising campaign between Leung (previously Convenor of the Executive Council, Hong Kong’s cabinet) and Henry Tang Ying-yen (唐英年; previously Chief Secretary).128 Tang, originally the front-runner,129 was soon embroiled in scandals over marital infidelity and an unauthorized underground extension in his home.130 Leung, for his part, was tarred with suggestions that he was an underground member of the Communist Party131 and that he had proposed the use of “riot police and tear gas” to quell protests in 2003.132 Members of the Election Committee alleged that the Liaison Office had openly urged them to support Leung.133 Others sought to divine Beijing’s chosen candidate.134 By the final stages of the

---

127. The Economist described the process as “Byzantine” and “[b]orn of China’s fear of leaders with a genuine electoral mandate” calculated to “cloak a decision taken elsewhere in some semblance of popular consultation.” Hong Kong’s Chief-Executive “Election”: The Worst System, Including All the Others, supra note 22.


129. Id.


131. Lee, supra note 64.


race, some electors were considering whether to force a new election by casting blank ballots.\textsuperscript{135}

Meanwhile, attempts at introducing public opinion, if not participation, were savaged. Hao Tiechuan (郝鐵川), propaganda chief at the Liaison Office, suggested the regulation of opinion polls, ostensibly to reduce partisan influence.\textsuperscript{136} Perhaps not surprisingly, an electronic public mock election organized by the University of Hong Kong came under sustained hacking attacks, forcing voters to cast paper ballots.\textsuperscript{137}

Leung’s selection did not end the controversy. Shortly after winning the “election,” Leung made a ninety-minute visit to the Liaison Office—three times as long as his meeting with outgoing Chief Executive Donald Tsang—raising suspicions that the Liaison Office had intervened to secure Leung’s election.\textsuperscript{138} Leung’s credibility suffered further damage when—ironically—the press later discovered illegal structures at his own home.\textsuperscript{139}

\textit{I. The Current Debate}

Professor Albert Chen (陳弘毅), writing about the 2007 Decision, observed that “[i]t is . . . unlikely that the Decision will have the effect of reducing significantly controversies regarding Hong

\begin{footnotesize}
\begin{enumerate}
\end{enumerate}
\end{footnotesize}
Kong’s political development.” That remark has proved prescient. The NPCSC’s 2004 and 2007 Decisions delayed democratic elections for Chief Executive from 2007 to 2017. The subsequent attempt by the Democratic Party to achieve compromise on electoral reform in 2010 split the pro-democracy camp and resulted in electoral defeat. The 2012 “election” of C.Y. Leung again exposed the shortcomings of the existing method of selection. The effect of Beijing’s continued prevarication over electoral reform was not the abandonment of demands for democracy, but the intensification and radicalization of such demands.

1. 2013: The Moderates Lose Patience

Beijing’s interference with Hong Kong’s democratic development had long been a source of public anger. The eruption of that resentment in 2013 was nonetheless surprising, both in its source and its ferocity. March 27 marked the debut of a social movement called Occupy Central with Love and Peace (讓愛與和平佔領中環, also known as 佔領中環; “Occupy Central”). A reaction to growing frustration with Beijing’s continued opposition to democracy in Hong Kong, the movement had three cardinal principles. First, Hong Kong’s electoral system must comply with international standards of universal suffrage—encompassing the number of votes per person, the weight to be accorded to each vote, and the right to stand for election. Second, concrete proposals for reform should be decided through deliberation and

141. See Chen, Unexpected Breakthrough, supra note 118.
142. See, e.g., Langer, supra note 17.
143. “Central” refers to Hong Kong’s central business district.
civic authorization.\textsuperscript{146} Third, any act of civil disobedience in the struggle for universal suffrage must be nonviolent.\textsuperscript{147} The substantive proposals themselves would be decided in a series of Deliberation Days.\textsuperscript{148}

Occupy Central was not an isolated phenomenon. Six days earlier, on March 21, twelve pro-democracy political groups formed the Alliance for True Democracy (真普選聯盟; “ATD”) to garner public support in the debate over political reform.\textsuperscript{149} It, too, called for universal and equal suffrage and rejected any “filtering” of Chief Executive candidates.\textsuperscript{150}

The concern shared by Occupy Central and the Alliance for True Democracy—that Beijing would never allow truly democratic elections in Hong Kong—was not unfounded. On March 24, Qiao Xiaoyang (喬曉陽), Chairman of the NPC’s Law Committee, stated in a closed-door meeting that “chief executive candidates must be persons who love the country and love Hong Kong, while the methods in the universal suffrage must match with the Basic Law and the decisions by the [NPCSC].”\textsuperscript{151}

Qiao maintained that it was the “clear and consistent” policy of the Central Government that no person who “confronts” the Central Government could become Chief Executive, citing Deng Xiaoping’s statement that Hong Kong must be run by people who “love the motherland and Hong Kong.”\textsuperscript{152} Although Qiao admitted “confronting the Central Government” could not be defined

---

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. The idea of Deliberation Day originated from BRUCE A. ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004).
\textsuperscript{152} Deng Xiaoping, One Country, Two Systems, PEOPLE’S DAILY (Jun. 22–23, 1984), http://english.peopledaily.com.cn/dengxp/vol3/text/c1210.html. Qiao did not, however, cite Deng’s explanation of what he meant by a “patriot.” “A patriot is one who respects the Chinese nation, sincerely supports the motherland’s resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong’s prosperity and stability. Those who meet these requirements are
with substantive criteria or written law, he insisted that the Nominating Committee, the Hong Kong electorate, and the Central Government should each decide whether a candidate met that requirement. Most disturbingly for pro-democracy politicians, he hinted that the Central Government’s patience had limits and that no consultation on political reform could begin unless they accepted that no “confrontational” candidate could ever become Chief Executive.153

Pro-democracy politicians derided Qiao’s comments as paving the way for a pre-selection mechanism inconsistent with universal suffrage.154 Audrey Eu Yuet-mee (余若薇) of the Civic Party described Qiao’s speech as a “big con.”155 Beijing has done little to assuage such concerns.156 Zhang Xiaoming (張曉明), head of the Liaison Office, emphasized the need to eliminate politically undesirable candidates.157 Professor Albert Chen and Maria Tam Wai-chu (譚惠珠), both members of the NPCSC’s Basic Law

patriots, whether they believe in capitalism or feudalism or even slavery. We don’t demand that they be in favour of China’s socialist system; we only ask them to love the motherland and Hong Kong.” Id.

153. Qiao, supra note 19.

154. 鄭小明高調定底線 中央架空港府應戰泛民 [Qiao Xiaoyang’s High-Profile Setting of a Bottom Line; Central Government Going Over the H.K. Government’s Head to Fight Pan-Democrats], HOUSE NEWS (Mar. 25, 2013) (copy on file with author).

155. Id.


Committee (“BLC”), have differed in their proposals for nominations—but both have assumed that the public will have no power to make binding nominations.158

The pro-Beijing counter-mobilization continued over the summer and autumn of 2013. On August 8, the pro-Government group “Silent Majority for Hong Kong” (幫港出聲) was set up, with no clear agenda other than opposition to Occupy Central.159 The Hong Kong and Beijing Governments brusquely rebuffed statements by the U.K. FCO and the U.S. Consul-General in support of universal suffrage.160 Comments by Lord Patten of Barnes (as Chris Patten had become) dismissing attempts at resisting increased political freedom as “spitting in the wind” drew harsh comments from the PRC Foreign Ministry and official media.161

Beijing continued to ratchet up its rhetoric in late 2013. In November 2013, Hong Kong media reported that former HKMAO Deputy Director Chen Zuo-er (陳佐洱), known for his bellicose Hong Kong policy, would set up a think-tank on Hong Kong and Macau policy.162 In the same month, BLC Chairman Li Fei (李飛


160. See supra Introduction.


162. See 陳佐洱出山組超級智囊團 [Chen Zuo-er Emerges From Retirement to Form Super Think-Tank], SING TAO DAILY (H.K.), Nov. 11, 2013, http://std.stheadline.com/yesterday/loc/1126ao01.html. See also 星島：陳佐洱辦智庫研港政改 劉兆佳任副會長 [Sing Tao: Chen Zuo-er to Form Think-Tank on
emphasized, during a high-profile visit to Hong Kong, that the power to nominate rested in a Nominating Committee and that the post of Chief Executive “must be taken up by a person who loves the country as well as Hong Kong.”

Beijing’s increasingly bombastic tone put the Hong Kong Government in an invidious position. Yet the latter did little to lower the political temperature. It released its consultation document on 2017 electoral reform in December 2013, amidst widespread suspicion that the consultation was purely cosmetic. The consultation document quoted extensively from speeches by Mainland officials, prompting allegations that the Hong Kong Government treated the speeches as “holy orders.” It was also replete with leading questions regarding the composition of the Nominating Committee. Yet the document made no reference to the ICCPR, Article 39 of the Basic Law, or the Bill of Rights Ordinance (transposing part of the ICCPR into Hong Kong).

---


164. 2013 CONSULTATION DOCUMENT, supra note 24.

165. See Chong & Lau, supra note 24; see also Chong & Cheung, supra note 24.


167. 2013 CONSULTATION DOCUMENT, supra note 24, ch. 5, ¶¶ 5.01–.05, at 38–39.
Worse still, it avoided the elephant in the room—what the phrase “loving the country and loving Hong Kong” actually meant. The explanation by Chief Secretary Carrie Lam Cheng Yuet-ngor (林鄭月娥)—that the meaning of the phrase was “self-evident”—did nothing to dispel public suspicions. Nor did the Government’s dismissal of a public poll commissioned by Occupy Central and conducted by the Hong Kong University Public Opinion Program. The fact that the then-Chairman of the Hong Kong Bar Association warned the Hong Kong Government against presenting political objections to reform proposals as legal objections illustrates the extent to which the latter was suspected of whitewashing.

2. 2014: Beijing’s Gloves Come Off; Hong Kong’s Umbrellas Come Out

As 2013 gave way to 2014, Beijing’s hardline stance showed no signs of abating. On January 9, 2014, Hao Tiechuan declared that the Central Government would declare a state of emergency if events in Hong Kong went “out of control,” presumably a threat directed at Occupy Central. On March 6, 2014, Zhang Dejiang (張德江), Chairman of the NPC, declared that any person selected for Chief Executive would have to “love the country.

---

168. See FINDING THE RIGHT PATH TO UNIVERSAL SUFFRAGE, supra note 166, ch. 2, ¶¶ 2.02–03.
169. 愛國被指不言而喻 [Patriotism Described as Self-Evident], APPLE DAILY (H.K.), Dec. 5, 2013. See also But, supra note 149.
172. 郝鐵川：中央可宣佈香港緊急狀態 [Hao Tiechuan: Central Government Can Declare State of Emergency in Hong Kong], HOUSE NEWS (Jan. 9, 2014) (copy on file with author).
and love Hong Kong.” He also asserted that there were no absolute rules for democratic development and that emulation of democratic practices from overseas could result in social and economic catastrophe. On June 10, 2014, the State Council Information Office issued a White Paper on the Implementation of “One Country, Two Systems” in Hong Kong (“the White Paper”); it asserted that Beijing “directly exercises jurisdiction over the HKSAR” and reiterated that “all those who administer Hong Kong” were required to be “patriotic.”

Despite these efforts, the pro-democracy camp remained undeterred. Between June 20 and June 29, Occupy Central held a referendum with the assistance of the Hong Kong University Public Opinion Program. Despite “one of the largest and most sophisticated denial-of-service attacks in the Internet’s history,” nearly 800,000 voters participated. All three electoral reform proposals on the ballot involved civil nomination of Chief Executive candidates; collectively, the three proposals received support from 91 percent of participating voters. In addition, 87.8 percent of participating voters agreed that Legco should veto any proposal that was inconsistent with international standards. Galvanized by the White Paper and the Occupy Central referendum, 510,000 people participated in the annual


174. Id.


176. Id. The implications of the White Paper for judicial independence are outside the scope of this article.


180. Id.
July 1 pro-democracy march;\(^{181}\) 500 engaged in an overnight sit-in in Central.\(^{182}\)

Beijing’s supporters stepped up their opposition to democrats over the summer of 2014. In June, the Hong Kong offices of the “big four” accounting firms warned against Occupy Central in a print advertisement.\(^{183}\) An anti-Occupy Central petition allegedly gathered 1.4 million signatures, some of dubious origin or procured under suspicious circumstances;\(^{184}\) C.Y. Leung even signed the petition in his “personal capacity.”\(^{185}\) A subsequent protest march on August 17 against Occupy Central was attended by a large number of paid and bussed-in protesters, many of whom were from Mainland China.\(^{186}\)

The Hong Kong and Central Governments also played a role in the city’s summer of discontent. On July 15, 2014, the Hong Kong Government released its Consultation Report (the “2014 Consultation Report”) and submitted a report to Beijing on electoral reform.\(^{187}\) The reference in the 2014 Consultation Report’s reference to “mainstream opinion” backing political vetting of

---


186. See *Learning From the Enemy*, supra note 184.

candidates vindicated critics’ skepticism toward the consultation process.\textsuperscript{188} Although the 2014 Consultation Report left limited scope for compromise,\textsuperscript{189} commentators nonetheless remained optimistic.

All such hopes, however, were dashed with the 2014 Decision. In its wake, Benny Tai declared, “[t]he road of dialogue has come to the end.”\textsuperscript{190} In protest against the 2014 Decision, the Hong Kong Federation of Students (HKFS), a group representing university students, organized a weeklong class boycott starting on September 22, 2014, which was joined by secondary school students on September 26.\textsuperscript{191} On the night of September 26, protesting students scaled a fence to enter the forecourt of Hong Kong Government Headquarters, known as Civic Square.\textsuperscript{192} Police moved in with batons and pepper spray and took the protesters—including HKFS leaders Alex Chow (周永康) and Lester Shum (岑敖暉), as well as Joshua Wong (黃之鋒), leader of the student protest group Scholarism—into custody.\textsuperscript{193} In the early


\textsuperscript{189} See Pepper, \textit{Telling Beijing}, supra note 188.


hours of September 28, after police moved to surround protesters gathered near Civic Square in support of the students, Benny Tai declared that Occupy Central had begun—days earlier than the movement’s originally scheduled date of October 1. Later that day, the police deployed teargas against the assembled, unarmed crowd. The Umbrella Movement had begun in earnest.

3. Who Gets to Nominate?

As the debate over election of the Chief Executive in 2017 developed, controversy has centered on the nomination process, including the composition of the Nominating Committee and the criteria for nomination. Although there was some initial debate over the process of appointment—in particular, whether Beijing may veto a duly elected candidate—nomination remains the central cause of disagreement.

Over the course of 2013, several nomination proposals emerged, varying in levels of public participation. One of the earliest and most conservative proposals came from Martin Lee Chu-ming (李柱銘), a founding member of the Democratic Party. Lee proposed that the current Election Committee be renamed as the Nominating Committee, but that it be required to nominate five candidates. The latter requirement, Lee reasoned,

---


196. On the genesis and chronology of the Umbrella Movement, see generally Lauren Hilgers, Hong Kong’s Umbrella Revolution Isn’t Over Yet, N.Y. TIMES MAG., Feb. 18, 2015, http://www.nytimes.com/2015/02/22/magazine/hong-kongs-umbrella-revolution-isnt-over-yet.html. A detailed exposition of the Umbrella Movement and its aftermath is beyond the scope of this article.
would secure the nomination of at least one pro-democracy politician.\textsuperscript{197} Lee’s proposal—which he had not discussed with the Democratic Party—met with a “cool reception”; Lee retracted it within two days.\textsuperscript{198}

On May 8, 2013, the ATD set out what it described as “initial views for consultation.” Among the initial views were the following propositions:

1. The electoral system must guarantee the right to vote, the right to be elected and the right to nominate;
2. There should be no “preliminary election,” “screening,” or conditions for candidacy that cannot be objectively defined, such as “no confrontations with Beijing”;
3. The Nominating Committee infringes free and fair democratic principles. It should be formed by universal suffrage and should ultimately be scrapped; and
4. If a set proportion of Hong Kong voters nominates a particular person by signatures, the nominated person should become a candidate after the Nominating Committee verifies and endorses the public nomination.\textsuperscript{199}

Two months later, on July 20, the ATD unveiled its three substantive proposals for 2017:

1. **Proposal One.** The Nominating Committee would resemble the current Election Committee in composition, albeit with the addition of directly elected District Councilors. Any candidate would have to be nominated by at least one tenth of the Committee’s members, or by at least 2% of registered voters in geographical constituency elections;

2. **Proposal Two.** The Nominating Committee would be directly elected by registered voters in geographical constituencies, by proportional representation. Any

\textsuperscript{197} Suzanne Pepper, *An Old Cat Sings His Whiskers*, CHINA ELECTIONS & GOVERNANCE BLOGS (May 2, 2013, 6:46 AM), http://chinaelectionsblog.net/hkfocus/?p=574.

\textsuperscript{198} Id.

candidate would have to be nominated by at least one tenth of the Committee’s members; and

(3) Proposal Three. The Nominating Committee would be composed of all elected District Councilors, and all elected Legislative Councilors. Any candidate would have to be nominated by at least one tenth of the Committee’s members, or by at least 2% of registered voters in geographical constituency elections.200

Establishment figures responded with skepticism. Pro-Beijing politician Tam Yiu-chung (譚耀宗) argued that the Nominating Committee should be chosen from social sectors, along the lines of the current Election Committee.201 Rao Geping (饒戈平), a senior BLC member, criticized the civil nomination process as having no legal basis in the Basic Law.202

The failure of more moderate proposals to gain momentum left an opening for more bolder suggestions. On July 29, 2013, the secondary school student activist group, Scholarism (學民思潮), announced that it would devote its energies to canvassing for political reform.203 Two days later, it declared that it would demand civil nomination of candidates for Chief Executive.204 How could there be a more “broadly representative” Nominating Committee, Scholarism asked, than a body composed of the entire Hong Kong electorate?205

202. Ip, supra note 201.
203. Press Release, Scholarism, 729 政改晚會聲明 [Declaration on the Political Reform Gathering on the Evening of July 29] (Jul. 29, 2013), http://scholarism.com/2013/07/31/729%e6%94%bf%e6%94%b9%e6%99%9a%e6%9c%83%e8%81%b2%e6%98%8e/.
204. Press Release, Scholarism, 聲明：政改底線 寸步不讓 [Declaration: We Will Not Yield an Inch on the Bottom Line for Political Reform] (Jul. 31, 2013), http://scholarism.com/2013/07/31/%e8%81%b2%e6%98%8e%ef%bc%9a%e6%94%bf%e6%94%b9%e5%ba%95%e7%b7%9a-%e5%a1%b8%e6%ad%a5%e4%b8%8d%e8%ae%93/.
205. Id.
The Beijing and Hong Kong Governments fulminated against any suggestion that the public should be allowed to nominate candidates. Zhang Xiaoming refused to attend a forum organized by the Civic Party, curtly stating that Article 45 of the Basic Law only permitted nominations to be made by a Nominating Committee. C.Y. Leung spoke out against civil nomination, alleging that the Basic Law does not permit it. Professor Albert Chen has suggested that “nominations” by the public be treated as purely advisory. The Hong Kong electorate, it seemed, was free to suggest a name—but the Nominating Committee was equally free to ignore it. Rao Geping went further, asserting that even “civil recommendation” was impermissible.

The debate regarding nomination suggests that the official position from both Hong Kong and Beijing is that the Basic Law means, “[W]hatever Beijing officials say it means, whenever they choose to say it.” As a result, subsequent proposals for reform were clouded by defeatism. On January 8, 2014, the ATD proposed a “three-track” plan involving civil nomination, politi-
cal party nomination, and Nominating Committee nomination. However, the “three-track” plan would involve no changes to the composition of the Nominating Committee compared to the composition of the current Election Committee. On March 20, 2014, think-tank Hong Kong 2020, headed by former Chief Secretary Anson Chan (陳方安生), issued a proposal that made no provision for nomination by the public or by political parties. The Hong Kong 2020 proposal altered the composition of the Nominating Committee, but provided that the support of 10 percent of nominators should be sufficient for candidacy. On April 2, eighteen academics proposed a “civil recommendation” system under which any person could become a candidate for Chief Executive if they received the recommendation of 2–3 percent of the electorate, in addition to the support of one eighth of the Nominating Committee. Ultimately, the “three-track” plan became one of three proposals listed on the Occupy Central referendum ballot in June 2014; despite—or perhaps because of—its relative lack of ambition, it was ultimately endorsed by a majority of voters participating in the referendum.

Despite these apparent concessions from the democratic camp, the 2014 Decision showed no signs of reciprocation. The 2014 Decision emphasized the Chief Executive’s responsibilities both to the HKSAR and to the Central Government and declared that the requirement of “loving the country and loving Hong Kong” was a corollary of that dual mandate.

215. Id.
216. 18 學者不違憲方案設公民推薦 [18 Scholars’ Constitutional Proposal Provides for Civil Recommendation], MINGPAO (H.K.), Apr. 3, 2014.
217. See Press Release, Occupy Central with Love and Peace, supra note 179.
218. See 2014 Decision, supra note 2.
that candidates (of which there would be between two and three) had to be selected by a Nominating Committee with the same composition as the existing Election Committee. Each candidate would have to receive the support of at least half of the members of the Nominating Committee. The practical effect of these requirements, taken in conjunction, would be to make it “effectively impossible” for any pro-democracy politician to stand for election.

The 2014 Decision came with an embedded threat: if electoral reforms could not be approved, the 2017 election would continue to use the same arrangements as the much-maligned 2012 election.

The tough line from Beijing reflected in the 2014 Decision not only frustrated Hong Kongers’ democratic aspirations; it also made the explosion of public discontent in the Umbrella Movement inevitable.

The Hong Kong Government has conducted a second round of public consultations on electoral reform. However, it proceeded on the basis of the much-maligned 2014 Decision. Despite efforts to salvage the 2014 Decision—most notably by Albert

---

219. Id.
220. Id.
221. See, e.g., Shannon Tiezzi, China Drafts Rules for Hong Kong Elections, DIPLOMAT, Aug. 29, 2014, http://thediplomat.com/2014/08/china-drafts-rules-for-hong-kong-elections/. This seems to have been the intended effect. See James Pomfret, China Asserts Paternal Rights Over Hong Kong in Democracy Clash, REUTERS, Sept. 11, 2014, available at http://www.reuters.com/article/2014/09/11/us-china-hongkong-insight-idUSKBN0H600120140911 (citing anonymous sources stating that Zhang Xiaoming told Hong Kong democrats that the fact that they were allowed to stay alive was abundant reflection of Chinese inclusiveness).
222. See 2014 Decision, supra note 2.
Chen—pan-democrats have vowed to veto any proposal based on the framework it prescribes. Beijing’s response was to make the pan-democrats an offer they could not refuse: if the reform was vetoed, Rao Geping declared, all future reforms would proceed on the basis of the 2014 Decision.

II. APPLICABLE LAW

This Part shall discuss the legal underpinnings of the post-1997 Hong Kong legal order, before turning to the PRC’s attitude toward treaties and the relevant provisions of the Joint Declaration, the Basic Law, and the ICCPR. It will then consider the potential applicability of customary international law, insofar as it is reflected in the Universal Declaration of Human Rights (“UDHR”) and other indicia of customary international law.

A. The Contested Basis of Hong Kong’s New Legal Order

Mainland Chinese commentators have emphasized that post-1997 Hong Kong is a creature of the PRC Constitution. Peking University’s Qiang Shigong (強世功) has asserted that the Basic Law derives its normative nature from the PRC Constitution.


228. 饒戈平：倘若拉倒日後仍循8·31 [Rao Geping: If Vetoed, Future Proposals Will Follow August 31 Decision], MINGPAO (H.K.), Mar. 3, 2015, http://news.mingpao.com/pns/%E9%A5%9F%E6%88%88%E5%B9%B3%EF% B0%95%E5%80%88%E6%8B%89%E5%80%92%20%E6%97%A5%E5%BE%8 C%E4%BB%8D%E5%BE%AA8%E2%80%A731-%E3%80%8C%E4%BA%BA%E5%A4%7%E6%A1%86%E6%9E%B6%E7%84 %A1%E4%BF%AE%E6%94%B9%E5%8F%AP%E8%83%BD%E3%80%8D/we b_tc/article/20150304/s00001/1425405749443.
not the Joint Declaration.\textsuperscript{229} Similarly, the White Paper devotes only one paragraph to the Joint Declaration,\textsuperscript{230} referring to it merely as “confirmation” of China’s resumption of sovereignty.\textsuperscript{231}

Such accounts of Hong Kong’s legal order, framed purely in terms of Chinese domestic law, are misleading. The Preamble to the Basic Law expressly states that it has been enacted “to ensure the implementation of the basic policies of the [PRC] regarding Hong Kong.”\textsuperscript{232} The “basic policies” referred to in the Preamble could only be those referred to in the Joint Declaration; indeed, Article 3(12) of the Joint Declaration declares that the basic policies would be “stipulated” in the Basic Law.\textsuperscript{233} Xiao Weiyun (蕭蔚雲), a member of the Drafting Committee hailed as one of the “guardians” of the Basic Law,\textsuperscript{234} acknowledged that the Joint Declaration “has its legal status and effect” and that it “affirms the task to enshrine in law the principle of ‘one country, two systems.’”\textsuperscript{235}

Nonetheless, even if one accepts that China intended to implement the Joint Declaration through the Basic Law, it does not follow that the Basic Law achieves that objective. This article proceeds on the basis that the provisions of the Basic Law admit of an interpretation consistent with the Joint Declaration. However, the compatibility of the Basic Law with the Joint Declaration—in particular, whether its provisions on “elections” are consistent with the Joint Declaration—remains an open question.\textsuperscript{236}

\textsuperscript{229} Shigong Qiang, 國際人權公約在香港：被誤讀的國際條約 [The ICCPR in Hong Kong: The Misinterpreted International Treaty], MINGPAO (H.K.), Aug. 25, 2014.

\textsuperscript{230} See White Paper, supra note 175.

\textsuperscript{231} Hong Kong pro-democracy tabloid Apple Daily alleged that Qiang was one of the co-authors of the White Paper. 撰文撐中央干預港事務 強世功幕後黑手 [Qiang Shigong Mastermind of Articles Advocating Central Intervention in Hong Kong Affairs], APPLE DAILY (H.K.), June 12, 2014.

\textsuperscript{232} Basic Law, supra note 62, at Preamble.

\textsuperscript{233} Joint Declaration, supra note 61, art. 3(12).


\textsuperscript{236} Id. at 67–69; Boasberg, supra note 28.
B. The PRC’s Attitude Toward Treaties

1. The Vienna Convention on the Law of Treaties (“VCLT”)

The PRC acceded to the VCLT on September 3, 1997.237 Xue Hanqin (薛捍勤), writing in a personal capacity prior to her appointment to the ICJ, suggested that, as a party to the VCLT, “China should comply with its treaty obligations in good faith and should not use its internal law as a justification for evading its international obligations, as provided in Article 27 of the Convention.”238 Even prior to the PRC’s accession to the VCLT, it considered many of the VCLT’s provisions to reflect existing principles of customary international law.239

The VCLT, and the rules of customary international law it reflects, are relevant to the observance and interpretation of treaties, including the Joint Declaration and the ICCPR. They are also relevant to the validity of reservations to the ICCPR.

The rules governing the observance of treaties are uncontroversial. The Article 26 rule of *pacta sunt servanda* (“agreements must be kept”) was well established by Ulpian’s time;240 its validity has never been questioned by any international tribunal.241 Similarly, the rule in Article 27 that a party’s domestic law does not excuse its non-performance of a treaty reflects customary international law.242

The VCLT’s provisions regarding treaty interpretation and reservation are more problematic. Under Article 31(1), “[a]
treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Article 31(2) defines what the “context” of the treaty is for the purposes of interpretation. Article 31(3) provides that, in addition to the context, the following factors should be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

Article 31(3)(c) does not specify whether the “relevant rules” are the rules applicable at the time the treaty was entered into or the rules applicable at the time of interpretation. Scholarly opinion differs as to the question of intertemporality. Judge Mark Villiger, writing extrajudicially, suggests that the applicable rules are those in force at the time of interpretation. Such an interpretation creates the possibility that customary rules may substantially modify treaty provisions over time. Professors Ulf Linderfalk and Campbell McLachlan, however, suggest that it is only appropriate to consider the rules in force at the time of interpretation if the parties had so intended. Professor McLachlan identifies three indicia of intent to adopt a term or concept with an ambulatory meaning:

244. Id. art. 31(2), (3).
246. Villiger, supra note 240, at 433.
247. Id.
(1) Use of a term which carries an evolving meaning as a matter of general international law, without adopting a specific definition;

(2) Entry into a treaty which commits the parties to a program of progressive development; and

(3) Description of obligations in general terms, which must be read in light of changing circumstances.249

Article 32 permits the use of supplementary means of interpretation, including the travaux préparatoires (preparatory works) and the circumstances of its conclusion, to confirm an interpretation made under Article 31 or to determine the meaning when an interpretation under Article 31 is ambiguous, obscure, or leads to a “manifestly absurd or unreasonable” result.250

Article 19 permits reservations to treaties unless the reservation is prohibited by the treaty, the reservation falls outside a closed list of reservations enumerated in the treaty, or the reservation is otherwise incompatible with the object and purpose of the treaty.251 However, Article 19 does not state the legal consequences of a legally impermissible reservation. The International Law Commission suggests that such a reservation may be severable if the reserving State intended to be bound by the treaty without the benefit of the reservation.252

2. Customary International Law

Even prior to the PRC’s accession to the VCLT, it considered the VCLT’s provisions—in particular, the provisions governing treaty interpretation and termination—to be binding, insofar as they reflect customary international law.253

250. VCLT, supra note 243, art. 32.
251. Id. art. 19.
253. Goldstein, supra note 239, at 177–78.
Articles 26 and 27 of the VCLT codify pre-existing rules of customary law on the duty to observe treaties.\textsuperscript{254} The position regarding Articles 31 and 32 is less certain. The existence of any customary rules regarding treaty interpretation prior to the VCLT is questionable.\textsuperscript{255} However, it is at least arguable that Articles 31 and 32 now reflect emerging customary law.\textsuperscript{256} Similarly, it appears that the VCLT’s provisions on reservations (including Article 19) may not have reflected pre-existing customary law, but have given rise to a new customary norm.\textsuperscript{257}

C. The Joint Declaration

The PRC’s “basic policies” toward Hong Kong are set out in Article 3 of the Joint Declaration, with further elaboration in Annex I.\textsuperscript{258} These basic policies include the following:

1. Hong Kong would enjoy “a high degree of autonomy, except in foreign and [defense] affairs”;

2. The Central Government would appoint the Chief Executive based on the results of elections or consultations;

3. “Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region;” and

4. The basic policies would be set out in the Basic Law and would remain unchanged for 50 years after the creation of the Hong Kong SAR.

Section I of Annex I explained the means by which the Chief Executive and legislature would be chosen:

The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The

\begin{itemize}
\item \textsuperscript{254} Villiger, supra note 240, at 363, 370.
\item \textsuperscript{255} Id. at 439–40, 448.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id. at 324–25. See also Thomas Giegerich, Treaties, Multilateral, Reservations to, Max Planck Encyclopedia of Pub. Int’l Law, http://opil.ouplaw.com/home/EPIL (enter title as search term) (last visited Jan. 6, 2014), ¶ 7.
\item \textsuperscript{258} Joint Declaration, supra note 61, art. 3 & Annex I.
\end{itemize}
chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People’s Government. The legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.\(^{259}\)

Article 8 of the Joint Declaration provided that the provisions of the Joint Declaration and of its annexes “shall be equally binding.”\(^{260}\)

On its face, the Joint Declaration merely requires selection of the Chief Executive by one of two means: election or consultation. It imposes no specific requirements regarding the election or consultation process.\(^{261}\) However, in promulgating the Basic Law, Beijing has elected to select the Chief Executive using an “election” process—albeit (from the perspective of advocates of democratization) a fundamentally flawed one.

**D. The Basic Law**

The Basic Law is not a treaty. However, it is partly a creature of the Joint Declaration.\(^{262}\) The drafting process was fraught with tensions between liberal and conservative Drafting Committee members;\(^{263}\) after 1989, Beijing threw its weight behind the conservative faction. The structure of Legco from 1997 to 2007 reflected the extent of the conservative victory. During that period, half of its members were selected through functional constituencies,\(^{264}\) cementing the influence of business and professional interests.\(^{265}\) During the same 10-year period, the number

\(^{259}\) Id. Annex I, ch. I.

\(^{260}\) Id. art. 8. See also Xiao, supra note 235, at 13.


\(^{262}\) See Xiao, supra note 235, at 13.

\(^{263}\) See supra Part I.C.

\(^{264}\) Boasberg, supra note 28, at 331–32; Ghai, supra note 31, at 259–60.

\(^{265}\) Boasberg, supra note 28, at 332; Ghai, supra note 31, at 260–61.
of directly elected members increased from twenty to thirty over the course of three electoral terms. Nonetheless, Article 68(2) of the Basic Law declared:

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

Annex II to the Basic Law provides that amendments to the composition of Legco can only be made after 2007. Provided “there is a need” for such amendment:

[S]uch amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for the record. (Emphasis added)

The selection of the Chief Executive was a similar combination of the reactionary with the aspirational. To select the first Chief Executive, the NPC would appoint a Preparatory Committee, which would in turn appoint a Selection Committee, which would in turn recommend a candidate. Subsequent Chief Executives would be chosen by an 800-member Election Committee from a list of candidates, each nominated by at least one hundred electors. The Central Government would appoint members of the Election Committee from four interest groups (selecting 200 members from each group):

(1) The industrial, commercial and financial sectors;
(2) The professions;

267. Basic Law, supra note 62, art. 68(2).
268. Id. Annex II.
(3) Labour, social services, religious and other sectors; and

(4) Members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.²⁷¹

Article 45(2) of the Basic Law provides that the “ultimate aim” is for the Chief Executive to be selected “by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.”²⁷²

Annex I to the Basic Law governs amendments to the selection method of the Chief Executive after 2007. If “there is a need” for amendment:

[S]uch amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval.²⁷³ (Emphasis added)

Neither Article 45 nor Article 68 set a deadline for democratization. The only apparent stipulation is that no changes may take place before 2007.²⁷⁴

Despite its promises of universal suffrage for the Chief Executive and Legco elections, the Basic Law provides a multitude of methods for Beijing to block democratization in Hong Kong. Legco electoral methods must comply with “the actual situation” in Hong Kong and “the principle of gradual and orderly progress.”²⁷⁵ Yet the Basic Law offers no guidance on who determines the “actual situation” in Hong Kong or what criteria are relevant to that determination. Similarly, the Basic Law does not define what “broadly representative” means in the context of nominations of candidates for Chief Executive. Nor does it state who determines whether there is a “need” for amendment. Perhaps most damningly, the Basic Law does not prescribe any

²⁷¹ Basic Law, supra note 62, Annex I.
²⁷² Id. art. 45(2).
²⁷³ Id. Annex I.
²⁷⁴ Id. Annexes I and II.
²⁷⁵ Id. art. 68(2). The language of “gradual and orderly progress” also appears in art. 45(2), governing Chief Executive electoral reform.
timeline for democratization—except that no changes may take place before 2007. The power to determine the “actual situation” in Hong Kong or the “need” to amend the electoral process would amount to a power of veto over democratic development. A particularly obstructive NPCSC might determine that the “actual situation” in Hong Kong demanded political stagnation until 2047, when the PRC’s basic policies toward Hong Kong expire. Alternatively, the NPCSC could dictate terms of reform inconsistent with internationally accepted conceptions of democracy. The NPCSC could interpret “broadly representative” to permit exclusion of discrete minorities from the Nominating Committee. The reference to “democratic procedures” suggests a particularly thin conception of democracy in the nominating process, without regard to substantive rights associated with democracy.

E. The ICCPR

The last paragraph of Chapter XIII of Annex I in the Joint Declaration and Article 39 of the Basic Law both provide that the provisions of the ICCPR, “as applied to Hong Kong,” will remain in force after 1997. These provisions include Article 40, which imposes the obligation to submit reports to the Human Rights Committee.

When the United Kingdom ratified the ICCPR in 1976, it entered (inter alia) the following reservation in respect of Hong Kong:

The Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.

Article 25(b) of the ICCPR provides that every citizen shall have the right “[t]o vote and to be elected at genuine periodic

276. Id. Annexes I and II.
elections which shall be by universal and equal suffrage . . . guaranteeing the free expression of the will of the electors.\textsuperscript{280} Such a right shall not be subject to distinctions of, \textit{inter alia}, political opinion, nor shall it be subject to unreasonable restrictions.\textsuperscript{281}

1. Interpreting the ICCPR

Scholars have debated whether normal rules of treaty interpretation apply to the interpretation of the ICCPR. Dr. Ba\c{s}ak \c{C}ali has argued that the interpretation of human rights treaties involves a specialized application of the VCLT, rather than a distinct set of interpretive principles.\textsuperscript{282} In Dr. \c{C}ali’s account, the starting point in interpreting human rights treaties is the principle of effectiveness.\textsuperscript{283} As a corollary of the good faith requirement of Article 31 of the VCLT, the proper interpretation of human rights treaty provisions is an interpretation that makes their provisions “effective, real, and practical.”\textsuperscript{284} The effectiveness principle has two aspects. First, provisions should be interpreted in a manner that confers effective, rather than formal, rights.\textsuperscript{285} Second, interpreters should adopt a teleological approach and ask what circumstances allow other concerns to trump human rights treaty provisions.\textsuperscript{286} As a result of the effectiveness principle, interpreters have favored dynamic interpretation over original intent in interpreting human rights instruments.\textsuperscript{287}

A further corollary of Article 31 of the VCLT in the human rights treaty context is the principle of coherence. Interpreters of human rights treaties typically interpret treaties in light of general international law and other treaties and instruments.\textsuperscript{288}

\begin{itemize}
  \item \textsuperscript{280} ICCPR, \textit{supra} note 278, art. 25(b).
  \item \textsuperscript{281} \textit{Id.} art. 2 & art. 25(b).
  \item \textsuperscript{282} Ba\c{s}ak \c{C}ali, \textit{Specialized Rules of Treaty Interpretation: Human Rights}, \textit{in The Oxford Guide to Treaties} 525, 533–37 (Duncan B. Hollis ed., 2012).
  \item \textsuperscript{283} \textit{Id.} at 538.
  \item \textsuperscript{284} \textit{Id.}
  \item \textsuperscript{285} \textit{Id.} at 539.
  \item \textsuperscript{286} \textit{Id.}
  \item \textsuperscript{287} \textit{See Id.} at 547.
  \item \textsuperscript{288} \textit{Id.} at 541–42.
\end{itemize}
Other rules of international law may be excluded, deemed to displace human rights treaty interpretation, or accommodated in the interpretation of human rights treaties.\textsuperscript{289}

Reservations to human rights treaties raise further questions. In General Comment 24, the Human Rights Committee considered that, in general, incompatible reservations may be severed from the ICCPR.\textsuperscript{290} However, General Comment 24 drew strong criticism from, \textit{inter alia}, the United Kingdom.\textsuperscript{291} The International Law Commission has rejected the idea that a special regime applies to reservations to human rights treaties;\textsuperscript{292} in its Guide to Practice, it espouses a more generalized approach to severability, under which severability depends on whether the reserving State intended to be bound without the benefit of the reservation.\textsuperscript{293}

2. Status of the Reservation to Article 25(b)

When the United Kingdom ratified the ICCPR on behalf of Hong Kong in 1976, it entered a reservation in respect of Article 25(b), insofar as Article 25(b) required the establishment of an elected Executive or Legco in Hong Kong. Opponents of democratization have cited the reservation as evidence that Article 25(b) does not apply to Hong Kong at all. In its submissions to the Human Rights Committee, the SAR Government—and, prior to 1997, the U.K. Government—maintained that the reservation continues to apply.\textsuperscript{294} BLC members Maria Tam and Rao

\textsuperscript{289} Id. at 541–45.

\textsuperscript{290} Human Rights Comm., Gen. Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereeto, or in Relation to Declarations Under Article 41 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994). See also Swaine, \textit{supra} note 252, at 295–96; Çali, \textit{supra} note 282, at 533–37; and \textsc{Joseph \& Castan}, \textit{supra} note 23, at 886–87.

\textsuperscript{291} Çali, \textit{supra} note 282, at 536. See also \textsc{Joseph \& Castan}, \textit{supra} note 23, at 886.

\textsuperscript{292} Swaine, \textit{supra} note 252, at 298.

\textsuperscript{293} ILC Guide to Practice, \textit{supra} note 252, ¶ 4.5.3; see also Swaine, \textit{supra} note 252, at 296–98.

Geping have argued that Article 25(b) does not apply to Hong Kong, as has Qiang Shigong.

The Human Rights Committee, however, contends that the reservation no longer applies. In considering the existence of functional constituency seats in Legco, the Committee concluded that, once an elected legislature was established, its election must conform to the requirements of Article 25(b):

The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant.

Successive Hong Kong Governments, both before and after 1997, have given four responses to the Human Rights Commit-
tee. First, the Human Rights Committee overlooked the reservation to Article 25(b). Second, the system of functional constituencies did not give rise to any incompatibility with any of the provisions of the ICCPR as applied to Hong Kong. Third, functional constituencies served a historical function in providing representation to Hong Kong’s economic and professional sectors to reflect their importance in the community. Fourth, functional constituencies are a transitional measure in the pursuit of the ultimate aim of universal suffrage.

However, none of these arguments withstands scrutiny. The first and second arguments amount to the assertion that Article 25(b) never applied to Hong Kong. Such an assertion begs the question of the continued relevance of the reservation to Article 25(b). The third and fourth arguments presuppose that Article 25(b) applies to Hong Kong, but that there is no breach of the obligations contained therein. The 1995 iteration of the Human Rights Committee rejected that premise. It found that functional constituencies gave “undue weight to the views of the business community” and therefore, contravened the equal suffrage requirement of Article 25.

It is not entirely clear how the Human Rights Committee reached its conclusion that, once a legislature is constituted by elections, its election must comply with the requirements of Article 25(b). Nonetheless, the Human Rights Committee’s conclusion may be supported by interpreting the ICCPR in light of customary international law, under Article 31(3)(c) of the VCLT.

Article 40 of the ICCPR imposes a reporting obligation, under which state parties must regularly submit reports on, inter alia,

---

299. Id.
300. 1996 SUPPLEMENTARY SUBMISSIONS, supra note 294, ¶ 34; 1999 SUBMISSIONS, supra note 294, ¶ 461(b); Tang, supra note 298, at 5.
301. Tang, supra note 298, at 5.
302. Id.
303. Id. at 5–6.
304. 1995 CONCLUDING OBSERVATIONS, supra note 23, ¶ 19; JOSEPH & CASTAN, supra note 23, at 742. For the views taken by subsequent iterations of the Committee, see infra.
305. Tang, supra note 298, at 5.
the “progress made” in the enjoyment of ICCPR rights.\textsuperscript{306} It imposes ongoing duties on parties to ensure that all individuals subject to their respective jurisdictions enjoy ICCPR rights.\textsuperscript{307} Hence, insofar as it is necessary to consider customary international law in interpreting the ICCPR, current customary law regarding democracy and democratization is relevant to the interpretation of Article 25(b).\textsuperscript{308} If there were indeed a right to democratization as a matter of customary international law, Article 25(b) would require a party that has embarked on a process of democratization to continue with that process. Read in such a light, once the United Kingdom introduced elected seats to Legco, its reservation to Article 25(b) could no longer be consistent with the object and purpose of Article 25(b).

The invalidity of the reservation to Article 25(b) would likely only result in severance of the invalid reservation. The Joint Declaration and Basic Law both provide that the provisions of the ICCPR previously in force in relation to Hong Kong shall continue to apply.\textsuperscript{309} This is inconsistent with the suggestion that invalidity of the reservation to Article 25(b) would nullify all of the provisions of the ICCPR, as applied to Hong Kong. Thus, in the absence of evidence that the reservation was a fundamental condition of the United Kingdom’s assent to the ICCPR, Article 25(b) applies in full force to Hong Kong, along with other provisions of the ICCPR.\textsuperscript{310} The PRC would therefore be obliged to secure the rights guaranteed by Article 25(b) in respect of Hong Kong, including the right of universal suffrage and the right to be elected. Any conditions imposed on the exercise

\begin{flushleft}
\textsuperscript{306} ICCPR, \textit{supra} note 278, art. 40(1).  \\
\textsuperscript{307} ICCPR, \textit{supra} note 278, art. 2(1); Human Rights Comm., Gen. Comment No. 3: Implementation at the National Level, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).  \\
\textsuperscript{308} On the applicable customary international law, see \textit{infra} Part II.G.  \\
\textsuperscript{309} Joint Declaration, \textit{supra} note 61, Annex I, ch. XIII; Basic Law, \textit{supra} note 62, art. 39.  \\
\textsuperscript{310} ILC Guide to Practice, \textit{supra} note 252, ¶ 4.5.3.
\end{flushleft}
of these rights must be based on “reasonable and objective criteria.”\[^{311}\] In particular, political or other views are an impermissible reason for restricting these rights.\[^{312}\] The application of Article 25(b) to Hong Kong would therefore be fatal to the notion that candidates for Chief Executive should be “screened” for ideological purity.

Nonetheless, despite its previous position regarding the inapplicability of the reservation to Article 25(b), the Human Rights Committee now appears to accept that the reservation remains in place. The Concluding Observations issued in 2013 expressed “concern” about the continuation of the reservation and recommended that the Hong Kong Government “consider steps leading to withdrawing the reservation to article 25(b) of the Covenant.”\[^{313}\] This represents a marked—and unexplained—departure from previous Concluding Observations by the Committee, which maintained that the reservation no longer applied.\[^{314}\] The Human Rights Committee returned to the issue of voting rights in Hong Kong on October 23, 2014, in light of the 2014 Decision.\[^{315}\] Although the Committee demanded information on measures taken to withdraw the reservation to article 25(b), it declared that “universal suffrage” included both the right to vote


\[^{312}\] Id. ¶ 15; ICCPR, supra note 278, art. 2.


and the right to stand for election. It therefore sought further information on the proposed Chief Executive electoral reforms and their compatibility with the ICCPR.

3. Universal Suffrage and the Right to Vote

The Human Rights Committee considers that the right to vote “should be available to every adult citizen.” Thus, states parties are required to “ensure that the broadest pool of voters be allowed to cast ballots.” The exercise of such rights may only be suspended or excluded as prescribed by law and on objective and reasonable grounds. The ICCPR does not impose any particular electoral system. However, it does not follow that there are no “international standards” at all (as Li Fei asserted in announcing the 2014 Decision).

The Election Committee in its present form does not comply with the requirement of universal suffrage under Article 25. Nor is the selection of members of the Election Committee open to all registered voters in Hong Kong. However, the main controversy regarding Chief Executive electoral reform has been that of nomination, rather than the actual process of choosing between candidates. General Comment 25 does not prescribe any particular nomination mechanism or process; it merely requires that nomination criteria not constitute an unreasonable barrier to entry.

317. Id.
324. See infra Part II.E.5.
4. Equal Suffrage

The ICCPR does not prescribe any particular electoral system.\(^{325}\) However, any such system must “give effect to the free expression of the will of the electors.”\(^{326}\) Thus, although electoral systems such as electoral college systems are permissible, the functional constituency system is not.\(^{327}\) The Human Rights Committee found that functional constituencies gave “undue weight to the views of the business community” and therefore, contravened the equal suffrage requirement of Article 25.\(^{328}\)

The Election Committee’s composition is, in essence, the functional constituency system writ large. It privileges the views of social sectors “deemed to be friendly to Beijing,” such as the commercial and agricultural sectors, at the expense of sectors considered politically hostile.\(^{329}\) Any retention of the Election Committee as an electoral body will therefore violate Article 25.

5. The Right to Be Elected

Although General Comment 25 does not prescribe a specific nomination mechanism or process, it does not follow that it is silent on issues relating to nomination.\(^{330}\) In paragraphs 15–17 of General Comment 25, the Human Rights Committee emphasized that limits on the right to stand for election can only be

\(^{325}\) See Gen. Comment 25, supra note 311, ¶ 21.

\(^{326}\) Id.

\(^{327}\) JOSEPH & CASTAN, supra note 23, at 742.

\(^{328}\) Id.


As of 2012, members of the Election Committee included 241 members of pro-Beijing political parties, Hong Kong deputies to the National People’s Congress, Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference, and members of the New Territories Heung Yee Kuk (representing the interests of indigenous villagers in the New Territories). Id.

\(^{330}\) Qiang Shigong has asserted that the ICCPR is silent on issues of nomination, but without apparent reference to General Comment 25. See Shigong Qiang, The ICCPR in Hong Kong: The Misinterpreted International Treaty, supra note 229.
based on “objective and reasonable criteria.” In particular, it stated that political affiliation was not a permissible ground for barring a person from standing for election. Nor may states require candidates to be members of parties or of specific parties.331

The Human Rights Committee considered discrimination on the ground of political opinion in Bwalya v. Zambia (314/1988). Bwalya, a Zambian national, ran for a parliamentary seat as a member of an opposition party. The Zambian authorities subjected him to threats and intimidation, expelled him and his family from their home, and detained him for belonging to a political party banned under Zambia’s one-party Constitution. The Human Rights Committee found that Zambia had violated Article 25.332 More recently, in a series of cases concerning Belarus’ system of registering electoral candidates, the Committee held that arbitrary denial of registration, and denial of registration to candidates whose registrations appeared to be lawful, violated Article 25.333

However, even the Human Rights Committee has recognized that some political affiliations are beyond the pale; it has taken the view that Article 25 permitted a ban on far-right parties. It justified such a ban by invoking Article 5(1), under which groups aiming to undermine or destroy the ICCPR rights of others cannot avail themselves of the ICCPR.334 The exception to the principle that candidacy cannot be refused on grounds of political affiliation is therefore a narrow one. Any attempt by the PRC to exclude pro-democracy politicians from candidacy for Chief Executive would not fall within the exception.335

334. JOSEPH & CASTAN, supra note 23, at 746.
F. The Right to Self-Determination

Academic and lay observers have at various times suggested that the right to self-determination applies to Hong Kong.\(^{336}\) The circumstances of Hong Kong’s removal from the list of Non-Self Governing Territories in 1972 suggest two possible explanations. The first is that the right of the Hong Kong people to self-determination was violated by the PRC, with the connivance of the United Kingdom.\(^{337}\) The second is that the lease of the New Territories, coupled with the largely ethnic Chinese population of the territory, warrant the setting aside of self-determination.\(^{338}\) Regardless of which view is correct, the issue of self-determination for Hong Kong—at least insofar as it encompasses external self-determination—is now politically unfeasible.\(^{339}\)

G. A Right to Democracy in Customary International Law?

In the event that ICCPR Article 25(b) does not apply to Hong Kong, it falls to consider the extent to which customary international law protects a right to democratic participation. Neither the UDHR, nor any other evidence of customary international law, provides a strong foundation for any obligation by the PRC to democratize Hong Kong. Nineteen years after Professor Thomas Franck referred to an “emerging right to democratic


\(^{337}\) See Dagati, supra note 336, at 154–55; Head, supra note 336, at 298–304.


governance,” the right has not yet become consolidated as a norm of customary international law. Even if such a norm has come into being, the PRC would be considered a persistent objector.

Under Article 21(3) of the UDHR, “[t]he will of the people shall be the basis of the authority of government,” as expressed in “periodic and genuine elections which shall be by universal and equal suffrage.” When the UDHR was first drafted and adopted, it was treated as a non-binding instrument. Although many of its norms are now considered binding as a matter of customary international law, it is doubtful that a right to democracy per se—as formulated in Article 21(3) of the UDHR or otherwise—has attained the status of customary international law.

However, there may be sufficient evidence to support a principle of “democratic teleology”—a right to democratization, rather

---


342. d’Aspremont, supra note 341, at 557. Professor d’Aspremont suggests that the rise of the PRC as a world power has helped to undermine the emergence of the norm altogether, by enticing emerging democracies with the promise of cooperation without ideological baggage. Id. at 562–63.


344. Davis-Roberts & Carroll, supra note 319, at 421.

345. Id.

346. Petersen, supra note 341, ¶¶ 17–18.
than a right to democracy. Dr. Niels Petersen, writing in the Max Planck Encyclopedia of Public International Law, identifies a series of General Assembly resolutions entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.” Resolutions prior to 1992 consisted mainly of normative statements, implying the existence of a right to democracy. Subsequent resolutions focused on electoral assistance provided by the Secretariat. The latter set of resolutions refer to the “continuation and consolidation of the democratization process” or to efforts to “consolidate and regularize the achievements of previous elections.” Petersen cites the teleological connotations of the words “promoting” and “consolidating” as supporting the idea of a duty to develop toward democracy. This idea finds further support in a separate series of General Assembly resolutions. Following General Assembly Resolution 55/96 on Promoting and Consolidating Democracy, the General Assembly passed a series of resolutions on the promotion and consolidation of new or restored democracies.
these resolutions contain language suggesting that states are under a duty to democratize.\footnote{355}{See, e.g., G.A. Res. 64/12, \textit{supra} note 354 and G.A. Res. 66/285, \textit{supra} note 354.}

State practice may also support a duty to democratize. Petersen, citing mechanisms within the OAS and the AU to sanction unconstitutional removal of elected governments, suggests that “[i]nternational practice is . . . principally directed against setbacks in the democratization process.”\footnote{356}{Petersen, \textit{supra} note 341, ¶ 21.}


may provide further evidence of an international norm against democratic “back-sliding.”

\textbf{H. Breaches of Public International Law}

Sections A to G of this Part considered the PRC’s obligations under the Joint Declaration, the ICCPR, and customary international law. This section argues that the PRC’s history of obstructing democratic development in Hong Kong, as set out in Part I of this article, violates these obligations.

\textbf{1. The Joint Declaration}

The question of whether the PRC’s obstruction of Hong Kong’s democratization violates the Joint Declaration hinges on the interpretation of the Joint Declaration. Both the United Kingdom and the PRC adopt the rules set out in Article 31 of the VCLT on treaty interpretation. Thus, any interpretation of the Joint Declaration must consider:

(1) The requirement of good faith;

(2) The ordinary meaning of its provisions in context;
(3) Its object and purpose;
(4) Subsequent agreements regarding its interpretation or application;
(5) Subsequent practice establishing the parties’ agreement regarding its interpretation; and
(6) Other rules of public international law governing Sino-British relations.  

As the travaux préparatoires of the Joint Declaration have not yet been made public, Article 32 of the VCLT has limited relevance.  

On its face, the Joint Declaration merely requires “elections” or “consultation,” before appointing the Chief Executive. The Joint Declaration does not itself define “elections.” However, the interpretive criteria in Article 31 of the VCLT militate against restrictions on the electoral process. First, any interpretation of “elections” or “consultation” that allows a merely formal process of “election” or “consultation” would denude these terms of meaning. An “election” in which only one man had one vote, for example, would be consistent neither with the requirements of good faith, nor with the ordinary meaning of the word “election.” An expansive interpretation is also consistent with the object and purpose of the Joint Declaration. One of the main purposes of the Joint Declaration was to secure a “high degree of autonomy” for Hong Kong, except in foreign affairs and defense. Any attempt at “watering down” the involvement of the Hong Kong public in electing the Chief Executive would frustrate the purpose of securing autonomy to Hong Kong after 1997.

Further, to the extent that the United Kingdom has acquiesced to the Basic Law, Article 45 may be treated as subsequent practice in the application of the Joint Declaration. That Article requires a “broadly representative nominating committee” and elections by “universal suffrage.” These terms should be given their ordinary meaning.

359. See supra pp. 40–41.
361. See PATTEN, supra note 66, at 32–33. Xiao Weiyun states that the obligation to enact the Basic Law stems from the Joint Declaration. See XIAO, supra note 235, at 13.
Lastly, other applicable rules of public international law point toward an expansive interpretation of “elections.” The term “elections” is not defined in the Joint Declaration. However, China has succeeded to the United Kingdom’s obligations relating to Hong Kong under the ICCPR; its provisions, for reasons set out above, are also relevant to the election of the Chief Executive.

Further, rules of customary international law—in particular, emerging norms regarding democratization—are also relevant to interpretation of the Joint Declaration. The following factors in the Joint Declaration suggest that the parties intended “elections” to have an ambulatory meaning:

1. The absence of a specific definition of “elections”;
2. Under Article 3(12), the PRC has committed itself to maintaining its basic policies for 50 years after the establishment of the Hong Kong SAR, i.e. it is under ongoing obligations with respect to Hong Kong; and
3. China described its “basic policies” in general terms, the implementation of which will necessarily be context-sensitive. 362

In that light, current or recent rules of customary international law in favor of democratization should also shape the interpretation of the Joint Declaration. Read in light of the ICCPR and current rules of customary international law, the word “elections” in the Joint Declaration must admit of a substantive meaning, rather than a merely formal one. Restrictions on the electoral process by manipulating nomination criteria would render the term “elections” nugatory. They are therefore inconsistent with the PRC’s obligations under the Joint Declaration.

This argument is not universally accepted, even by advocates of Hong Kong’s democratization. 363 But the Chinese and Hong

362. See supra p. 41.
Kong governments have gone much further than merely arguing over interpretation, instead seeking to contest the Joint Declaration’s continued validity. In response to an inquiry into the implementation of the Joint Declaration by the U.K. House of Commons Foreign Affairs Committee (“FAC”), Ni Jian, China’s Deputy Ambassador to the United Kingdom, claimed that the Joint Declaration lapsed with the transfer of sovereignty in 1997. Hong Kong’s Secretary for Constitutional and Mainland Affairs, Raymond Tam, echoed these sentiments. In response to a question from a Hong Kong legislator, Tam asserted that the Joint Declaration’s provisions “have been fully implemented, and its purpose and objectives have also been fully fulfilled.” In response to further legislative questioning, Tam went even further—arguing that China’s “basic policies” in Article 3 were a unilateral declaration by China, implying that they had no binding effect.

Neither of these arguments withstands scrutiny. The notion that the Joint Declaration lapsed in 1997 flatly contradicts the 50-year entrenchment of China’s “basic policies.” It also ignores other provisions in the Joint Declaration that survived the transfer of sovereignty in 1997, such as those regarding the Sino-British Joint Liaison Group. Although Tam’s argument regarding Article 3 being a unilateral declaration is ingenious, it does not survive a context-sensitive reading of Article 3. Under

---


367. Joint Declaration, supra note 61, art. 3(12) & Annex I, ch. I.

368. Id., Annex II.
Article 8, the entirety of the Joint Declaration—along with all of its Annexes—are equally binding. Although the invocation of international law by Beijing and Hong Kong officialdom marks a welcome departure from bluster over “color revolutions” and “external forces,” the arguments that have emerged are neither legally nor logically sound.

2. The ICCPR

If one accepts that the Joint Declaration remains in place and that the reservation to Article 25(b) has been severed, the method of selection of the Chief Executive in 2017 must comply with the requirements of Article 25(b). Article 25(b) must be interpreted in accordance with the principle of effectiveness. Thus, the right of universal suffrage, the right to vote, equality of suffrage, and the right to be elected must be interpreted as conferring substantive rights on Hong Kong residents, not merely formal rights. The PRC seeks to maintain control over the nomination of Chief Executives. These proposed restrictions directly impinge upon the right to be elected. That right may only be restricted based on objective and reasonable criteria. Subject only to the limited exception in Article 5(1) of the ICCPR, affiliation with a political party or political opinion are criteria that are neither objective nor reasonable. As Qiao Xiaoyang candidly admitted, the filtering of candidates for Chief Executive by the criterion of “non-confrontation” with Beijing does not admit of objective definition. The use of political criteria in “filtering” candidates therefore infringes Article 25(b).

369. Id., art. 8.
371. See supra Part II.E.1.
372. See supra pp. 57–60.
373. Qiao, supra note 19.
374. As the Human Rights Committee has stated, “political opinion may not be used as a ground to deprive any person of the right to stand for election.” Gen. Comment 25, supra note 311, ¶ 17.
The question of civil nomination is slightly less clear-cut. On its face, Article 25 requires only that the nomination process not constitute an unreasonable barrier to candidates. Neither Article 25, nor General Comment 25, offers guidance as to the mechanics of the nomination process. This raises the question of whether the Hong Kong public has a “right to nominate” under Article 25. Maria Tam and Suzanne Pepper have suggested that it does not. However, for other electoral rights to be effective, voters must have a free choice of candidates. As Professor Benny Tai (戴耀廷), a founder of Occupy Central, observed, a choice between a rotten apple and a rotten orange is no choice at all.

3. Customary International Law

The PRC has opted to implement the Joint Declaration by appointing a Chief Executive after “elections,” rather than after consultations. It has also declared in the Basic Law that the “ultimate aim” is the election of the Chief Executive by universal suffrage. Even as a matter of customary international law, the PRC is arguably under a duty not to engage in acts that would undermine democratic development in the SAR—and perhaps a positive duty to democratize Hong Kong. Thus, it would no longer be open to the PRC to adopt a system of appointing the Chief Executive after only conducting local consultations, notwithstanding the provisions of the Joint Declaration.

III. Remedies

Breaches of duty mean little without remedies. Unfortunately for Hong Kong, there are few effective remedies for the PRC’s breaches of public international law. Members of the Hong Kong public have no standing to enforce China’s duties under customary international law; the United Kingdom or other States could only enforce such duties if they are obligations erga omnes. Neither the ICCPR, nor the Joint Declaration, provides for dispute

375. Lau & Lee, supra note 295; Pepper, Exploring the Options, supra note 200. I refer here to the right to nominate, not the right to be nominated.
resolution mechanisms that apply to Hong Kong. Nor has the PRC accepted ICJ compulsory jurisdiction.

A. The Joint Declaration

The Joint Declaration contains no provisions for enforcement. It would not be open to the United Kingdom to withdraw from the Joint Declaration; the treaty establishes a boundary and therefore, falls within the proviso under Article 62(2)(a) of the VCLT barring withdrawal due to a fundamental change in circumstances.\(^\text{378}\) Although the PRC’s stated “basic policies” will purportedly remain unchanged over fifty years, the PRC has vehemently resisted any attempts by the United Kingdom to hold the PRC to its promises.\(^\text{379}\) An early skirmish in 1996 suggests that the prospects for arbitration or adjudication are bleak. In response to the PRC’s unilateral decision to replace the Legco members elected in 1995 with a “provisional legislature” selected by a 400-member Selection Committee (itself chosen by the PRC), then Foreign-Secretary Malcolm Rifkind threatened to refer the establishment of the provisional legislature to the ICJ.\(^\text{380}\) His Chinese counterpart, Qian Qichen, brusquely responded that it was “futile” to “play the ‘international card.’”\(^\text{381}\)

B. The ICCPR

Although individuals may not enforce the PRC’s obligations with respect to Hong Kong under the ICCPR, it is open to other parties to the ICCPR to do so. On May 17, 1976, the U.K. Government made a declaration under Article 41 of the ICCPR that it recognized the competence of the Human Rights Committee to receive and consider communications submitted by other States parties that had also made Article 41 declarations at least

---

380. HERSCHENSOHN, supra note 29, at 21.
381. Crowell & Law, supra note 379.
twelve months before the date of the submitted communications. Article 41 continues to apply to Hong Kong by virtue of Annex III, Chapter XIV of the Joint Declaration, and Article 39 of the Basic Law. However, proceedings under Article 41 do not result in legally binding judgments.

C. Customary International Law: Obligations Erga Omnes?

The PRC’s obligations under customary law in respect of Hong Kong are only enforceable by third States if they are obligations erga omnes. The ICJ defined obligations erga omnes in the seminal Barcelona Traction case (Second Phase), when considering whether Belgium had standing to sue on behalf of shareholders of a company incorporated in Canada that had been declared bankrupt by a Spanish court. The ICJ held that Belgium lacked standing. However, it held (in obiter dicta) that there was a distinction between obligations owed vis-a-vis other States in the field of diplomatic protection, and obligations erga omnes—obligations “towards the international community as a whole” and which were “the concern of all States.” Such obligations derived from the prohibition of “acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” Obligations erga omnes also arose from “international instruments of a universal or quasi-universal character.”

The ICJ held that the obligation to respect a people’s right to self-determination is an obligation erga omnes in the Palestine Wall and East Timor cases. In the East Timor case, Portugal, the former colonial power in East Timor, brought proceedings against Australia, challenging the latter’s Timor Gap Treaty

382. Status of the International Covenant on Civil and Political Rights, supra note 279.
386. Id. ¶ 34.
with Indonesia. Portugal alleged that Indonesia had no authority to negotiate the treaty as it had illegally invaded East Timor in 1975 and subsequently occupied it illegally. Portugal further alleged that the treaty violated the right of the people of East Timor to self-determination. The ICJ declined to rule on the lawfulness of Indonesia’s conduct, but held that Portugal’s submission that the right to self-determination was assertable *erga omnes* was “irreproachable.”388 In the *Palestine Wall* case, the U.N. General Assembly sought an advisory opinion regarding the legal consequences of Israel’s construction of a wall through the occupied West Bank to prevent would-be attackers from entering Israel. The General Assembly made the request after the United States vetoed a draft Security Council resolution condemning the wall. The ICJ held that the wall amounted to *de facto* annexation of the West Bank and that the wall, along with related measures, severely impeded the Palestinian people’s right to self-determination.389

However, the relevance of the right to self-determination to Hong Kong is questionable. Although the existence of a “people” deserving of a right to self-determination has often been assumed without discussion, there is still no generally agreed-upon definition of the term “people.”390 As Professor Cassese observed, the population of Hong Kong has remained largely Chinese in ethnic composition.391 On the other hand, University of Hong Kong survey data has shown that, with few exceptions, more respondents have identified as “Hongkongers” or “Hongkongers in China” than as “Chinese” or “Chinese in Hong Kong” since August 1997.392 Although earlier data is not available, proponents of a distinct Hong Kong identity have grown more assertive after 1997.393 Nonetheless, the factual basis for

---

393. Veg, *supra* note 83.
referring to Hong Kong’s population as a distinct “people” remains uncertain.

The right to democratization is on shakier ground still. The Barcelona Traction case suggests that obligations deriving from basic human rights may be obligations *erga omnes*, yet it offers no guidance as to how to identify specific rights that give rise to obligations *erga omnes*. No consensus has emerged in academic literature. Although Professor Christian Tams identifies a “core of obligations *erga omnes*” deriving from peremptory norms of international law, he concedes that identifying obligations *erga omnes* outside of *jus cogens* is “considerably more difficult.”394 Similarly, Dr Maurizio Ragazzi identified five common elements of existing obligations *erga omnes*, but added that they were not rigid prescriptive criteria.395 It is therefore unclear whether the right to democratization—if it exists at all—gives rise to an *erga omnes* obligation to respect that right.

**D. Means of Enforcement**

Three main difficulties arise with respect to enforcement: the absence of any individual right of petition, the PRC’s refusal to accept ICJ jurisdiction, and the issue of how obligations *erga omnes* should be enforced.

1. Absence of Individual Right of Petition

Traditionally, public international law only recognized States as actors; individuals enjoyed no rights under international law and were not subject to duties under it.396 To bring claims before international judicial bodies, individuals had to persuade the government of their home State to bring a claim in the exercise of diplomatic protection.397 Although individual access to judicial proceedings is now available in specific fields, such as international human rights and international commercial arbitration, individual access is a creature of international treaties and is

---

397. Id. ¶ 19.
not universal.\textsuperscript{398} None of the treaty-created exceptions to the customary rule apply to Hong Kong. The PRC is not a party to the First Optional Protocol to the ICCPR, which provides for individual complaints to the Human Rights Committee.\textsuperscript{399} It would therefore fall to the United Kingdom to enforce the PRC’s duties under the Joint Declaration. Alternatively, the United Kingdom—or a third State—could enforce the PRC’s obligations under the ICCPR, or its obligations \textit{erga omnes} under customary international law.

2. The PRC’s Refusal to Accept ICJ Jurisdiction

The PRC has not accepted the compulsory jurisdiction of the ICJ. It has also entered a reservation to Article 66 of the VCLT, providing for references of treaty disputes to the ICJ, arbitration, or conciliation. Nor is China likely to accept voluntary ICJ jurisdiction in any dispute with the United Kingdom regarding implementation of the Joint Declaration or of the ICCPR. The PRC has jealously guarded control over Hong Kong, viewing it as an internal matter;\textsuperscript{400} any request by the United Kingdom for arbitration or litigation would likely be viewed as impinging on the PRC’s sovereignty. The PRC has long rejected forms of dispute resolution involving a neutral third party in matters involving its sovereignty, most recently with respect to the Philippines’ request for arbitration of the East Philippine Sea / South China Sea dispute.\textsuperscript{401} It will likely adopt a similar approach with respect to Hong Kong, as it did in 1996 in the provisional legislature dispute.\textsuperscript{402}

\textsuperscript{398} Id. ¶¶ 25–26.
\textsuperscript{400} Chong & Lau, supra note 7.
\textsuperscript{401} Embassy of China in Phil., Chinese Spokesperson Hong Lei’s Remarks on China Returned the Philippines’ Notification on the Submission of South China Sea Issue to International Arbitration (Feb. 19, 2013) http://ph.chinaembassy.org/eng/xwfb/t1014903.htm.
\textsuperscript{402} See supra Part III.A.
3. Difficulty in Enforcing Obligations *Erga Omnes*

The *Barcelona Traction* case suggests that obligations deriving from basic human rights may be obligations *erga omnes*, yet it also states that human rights instruments do not confer on States the capacity to protect victims of human rights infringement regardless of nationality.\(^{403}\) In the *Palestine Wall* case the ICJ held that, as far as self-determination was concerned, all States were under several primary obligations. First, States could not recognize the illegal situation resulting from the Israeli wall. Second, States could not render aid or assistance in maintaining that situation. Third, States were bound to ensure (within the limits of the U.N. Charter and international law) that any impediment to the Palestinian people’s right to self-determination is brought to an end.\(^{404}\)

Thus, although it would likely not be open to a third State to challenge the PRC’s conduct in respect of Hong Kong before the ICJ, it may be open to such a State to encourage the PRC to comply with its obligations *erga omnes* in respect of Hong Kong by other means.\(^{405}\)

4. Potential Solutions

These difficulties are not insurmountable. Despite Chinese intransigence, it may nonetheless be possible to exert pressure on China to comply with its international law obligations in respect of Hong Kong through unilateral conduct by the United Kingdom or through attempts to refer the underlying legal issues to the ICJ. Enforcement by third States may also be possible, insofar as the PRC has breached obligations which are *erga omnes* in nature.

First, the United Kingdom could, of its own motion, publicly monitor the PRC’s compliance with the Joint Declaration,\(^{406}\) and

---

405. See infra Part III.D.4.
406. Lord Patten of Barnes has publicly argued that the United Kingdom is “honour bound to speak up for Hong Kong.” Chris Patten, *Britain is Honour Bound to Speak Up For Hong Kong*, FINANCIAL TIMES, Sept. 2, 2014, http://www.ft.com/intl/cms/s/0/6458d53c-328c-11e4-93c6-00144feabcdc0.html#axzz3IKVOqmcC.

The FCO has prepared six-monthly reports to Parliament on the implementation of the Joint Declaration since July 1997; continued six-monthly reports by the FCO, as well as public statements similar to Hugo Swire’s statement on September 14, 2013, could help draw attention to the PRC’s continued delinquency over Hong Kong’s democratic development. However, to date, the FCO has shown minimal interest in doing so. Its most recent report, issued in February 2015, maintained that “the best way to preserve Hong Kong’s strengths is through a transition to universal suffrage, which delivers a genuine choice for the people of Hong Kong.”\footnote{408. FOREIGN & COMMONWEALTH OFFICE, THE SIX-MONTHLY REPORT ON HONG KONG: 1 JULY TO 31 DECEMBER 2014, at 2 (2015).} Regrettably, this language is much weaker than that in earlier reports. The FCO’s July 2013 report, for instance, insisted that Hong Kong’s stability and prosperity were best guaranteed by “moving to a democratic system of universal suffrage in line with public consultations, the promised timetable and international standards.”\footnote{409. Id. at 8.} In a similar vein to the February 2015 report, the FCO’s initial response to the 2014 Decision, issued on September 4, 2014, stated merely that there was “no perfect model” for universal suffrage and asserted that the details were for the Hong Kong and Central Governments and the people of Hong Kong to decide.\footnote{410. Press Release, Foreign & Commonwealth Office, Foreign Office Responds to Hong Kong Reform Plans (Sept. 4, 2014), \url{https://www.gov.uk/government/news/foreign-office-responds-to-hong-kong-reform-plans}.} Audrey Eu tartly responded that it would have been preferable for the FCO to say nothing at all.\footnote{411. Letter from Audrey Eu, Chairman, Civic Party, to Caroline Wilson, Consul-General, British Consulate-General, H.K. (Sept. 5, 2014), \url{http://www.post852.com/} (enter “not to speak at all” as search term).}
In the absence of resolute action from the FCO, Parliament has stepped in. In 2014 the FAC launched its own inquiry into implementation of the Joint Declaration. Despite being barred from entering Hong Kong, the FAC finished obtaining oral evidence in January 2015, and published its report on March 6, 2015. In its report, the FAC roundly criticized the FCO for its


414. See The UK’s Relations With Hong Kong: 30 Years After The Joint Declaration, supra note 412.

“misleading” and “evasive” language in defending the 2014 Decision,\textsuperscript{416} as well as the FCO’s weak response to the Chinese refusal to allow the FAC to visit Hong Kong.\textsuperscript{417} The FAC also expressed concern that the FCO’s “lack of clarity” in commenting on Hong Kong’s constitutional development led to the perception that the FCO was primarily concerned with maintaining trade relations with China.\textsuperscript{418} Regrettably, it seems unlikely that the report will result in more robust British attitudes.\textsuperscript{419}

Alternatively, the United Kingdom may threaten—or seek to commence—international judicial proceedings. Although the PRC’s lack of cooperation hinders the ability to bring such proceedings, it does not preclude them entirely. For instance, despite Chinese non-participation, the Philippines’ arbitration proceedings in respect of the East Philippine Sea / South China Sea dispute may nonetheless exert moral and political pressure on China.\textsuperscript{420} Although contested ICJ proceedings cannot take place without Chinese cooperation, a British offer to refer disputes


\textsuperscript{417} See FAC Report, supra note 415, ch. 1, ¶¶ 4–7, at 10–11.

\textsuperscript{418} Id. at 7, ¶¶ 90–92, at 47–48.

\textsuperscript{419} The FCO rejected many of the recommendations in the FAC Report. See Foreign & Commonwealth Office, Government Response to the House of Commons Foreign Affairs Committee Report: The UK’s Relations With Hong Kong: 30 Years After the Joint Declaration, 2015, Cm. 9038.

over Hong Kong’s democratization to the ICJ—perhaps in conjunction with an effort to procure a U.N. General Assembly request for an Advisory Opinion, as occurred with the *Palestine Wall* case—may be capable of exerting similar pressure on China.

Conduct by third States provides a further, if less plausible, possibility for enforcement. Hong Kong’s limited international capacity is a function of its constitutional order under the Basic Law. It may therefore be open to third States to enforce the PRC’s obligations *erga omnes* with respect to Hong Kong (insofar as such obligations exist) by ceasing to recognize Hong Kong as having any separate international capacity at all. Hong Kong currently enjoys its own bilateral economic and cultural ties with the United States and the European Union; Hong Kong SAR passport holders enjoy visa-free access to a significantly larger number of countries than holders of ordinary PRC passports. Any suspension or cessation in third States’ recognition of Hong Kong’s limited international personality—as contemplated in the US—Hong Kong Policy Act—may constitute a valid countermeasure under international law in the event of severe Chinese inroads into Hong Kong’s autonomy under the Joint Declaration and the Basic Law.

Ultimately, however, the efficacy of such measures is questionable. As Langer observed in 2008, the United Kingdom was not in a position to impose its own views on the Joint Declaration on

422. *Id.* at 339–41.
China. China’s subsequent growth in economic stature can only have weakened the United Kingdom’s position further, as reflected in the FCO’s insipid response to the 2014 Decision and to Chinese obstruction of the FAC inquiry. Perhaps most alarmingly, PRC leadership under Xi Jinping has shown increasing hostility toward universal values and constitutional government. The PRC may be in grave dereliction of its international law duties with respect to Hong Kong, but it is unlikely to respond to international remonstration for the foreseeable future.

CONCLUSION: THEY’LL MAKE A FOOL OF YOU

Hong Kong’s current predicament flows, in large part, from China’s consistent refusal to allow Hong Kong’s own population to have any meaningful participation in deciding its own future. The removal of Hong Kong from the list of Non-Self-Governing Territories took place at the PRC’s behest, with no consultation of the Hong Kong public. Sir Edward Youde’s presence as a representative of the Hong Kong people (albeit an unelected one) at the Sino-British negotiations leading to the Joint Declaration was roundly rejected by the PRC Foreign Ministry. Hong Kong civil society had minimal input in the drafting of the Basic Law; pro-democracy voices in the Drafting Committee were expelled or ignored after the Tiananmen Square Massacre of 1989. After the establishment of the Hong Kong SAR in 1997, the PRC has consistently moved to seize control of the political reform process and throttle democratic reforms. Faced with a cri de coeur from pro-democracy advocates in the form of Occupy Central, Beijing’s representatives in Hong Kong threatened to declare a state of emergency. Although the Umbrella Movement

426. Langer, supra note 378, at 343.
428. See Document 9, supra note 37.
430. Declassified British Government papers show that, as early as 1984, then-Prime Minister Margaret Thatcher predicted Beijing would interfere in Hong Kong’s affairs after 1997, as “[t]he Chinese had no concept of a free society.” 憂回歸後中央干預 翩士元倡「築壩」 [Fearing Central Government Interference After Handover, Sir David Akers-Jones Suggested “Dam-Building”], MINGPAO (H.K.), Jan. 4, 2014.
did not end with the large-scale bloodshed some feared, there are signs of an ongoing campaign of governmental recriminations.\textsuperscript{431} The PRC’s lengthy history of obstructing democratization in Hong Kong violates its commitments under the Joint Declaration, the ICCPR, and customary international law. The PRC’s promulgation of the Basic Law shows that it has chosen to allow the Chief Executive to be chosen by elections rather than by consultations; in such circumstances, a purposive interpretation of the Joint Declaration militates against democratic “back-sliding.” Established rules of treaty interpretation and emergent rules of customary international law both suggest that Article 25(b) of the ICCPR applies to Hong Kong, notwithstanding the United Kingdom’s initial reservations; any attempt by Beijing to dictate political criteria for Chief Executive candidacy is therefore a breach of Article 25(b). The emergent principle of “democratic teleology” in customary international law further suggests that the PRC may not renege on its promise of democracy in Hong Kong.

Nonetheless, the prospect of enforcing China’s international law obligations in respect of Hong Kong is slim. In the absence of any individual right to petition or of ICJ compulsory jurisdiction, available options for enforcement are limited. Other options for enforcement such as unilateral monitoring by the United Kingdom, the threat of an advisory opinion, or third-State conduct exist. However, Chinese obstinacy—even toward the United Kingdom, its counterparty in the Joint Declaration—casts doubt on the effectiveness of such measures.

Ultimately, the enforcement of China’s international law obligations with respect to Hong Kong’s democratization may depend on non-State actors. China has long emphasized that it values Hong Kong’s economic stability and prosperity;\textsuperscript{432} democratic reforms are therefore likely to be justifiable to Beijing only insofar as they fulfill these objectives. The U.S.-Hong Kong Policy Act—with its implicit threat that the United States will cease


to recognize Hong Kong as having any distinct international legal personality—is an especially potent economic incentive. Nonetheless, private actors, with none of the political baggage that governmental intervention carries, can bring greater pressure to bear. American Bar Association President James Silkenat warned that failed political reforms might drive international financial and legal institutions to Shanghai and Singapore. Ultimately, a combination of foreign investment and Hong Kong civil society may be the most effective means to prevent China from backtracking further on its commitments to Hong Kong. However, in light of increasing PRC invective against the “value bombs” of constitutionalism and human rights, and continued hostility toward democracy by pro-Beijing politicians in Hong Kong, the prospects for genuine elections in Hong Kong remain grim.

China’s disregard of the Joint Declaration also holds broader lessons, at home and abroad. Hong Kongers should be alarmed by Beijing’s overt abandonment of the Joint Declaration. Absent political willingness in the Hong Kong and Beijing Governments to protect Hong Kong’s autonomy and allow meaningful democratization, international law may become one of the few effective remaining means of exerting pressure. Beijing’s disregard for the Joint Declaration suggests that Hong Kong residents, already wary of growing Mainland encroachment into their city’s


434. Party media and officials have increasingly turned to “militaristic metaphors” in criticizing ideas, such as constitutionalism. Value Bombs, CHINA MEDIA PROJECT, http://cmp.hku.hk/2013/10/02/34224/ (last visited Nov. 8, 2013). See also Document 9, supra note 37.

435. Ann Chiang Lai-wan, a member of the pro-Beijing Democratic Alliance for the Betterment and Progress of Hong Kong (DAB), claimed that popular elections would result in “many incidents.” 蔣麗芸：普選會製造很多事端 [Ann Chiang: Universal Suffrage Will Create Numerous Incidents], MINGPAO INSTANT NEWS (Jan. 5, 2014, 5:01 PM), http://news2.mingpao.com/ins/%E8%94%A3%E9%BA%97%E8%8A%B8%EF%BC%9A%E6%99%AE%E9%81%B8%E6%9C%83%E8%A3%BD%E9%80%A0%E5%BE%88%E5%A4%9A%E4%BA%8B%E7%AB%AF/web_tc/article/20140105/s00001/1388912533900.
affairs, should expect further incursions into their civil liberties, ostensibly guaranteed by the ICCPR and the Joint Declaration.

China’s treatment of the Joint Declaration should also alarm its international neighbors, despite its newly conciliatory tone in foreign relations. ASEAN members, for instance, would be right to wonder whether China would abide by a maritime Code of Conduct—even if one could ultimately be agreed upon. For all of Beijing’s professed respect for the “international rule of law,” China’s disregard of its obligations toward Hong Kong suggests that such rhetoric—like the emphasis on domestic “rule of law” issues at the Fourth Plenum in 2014—should be viewed with skepticism.


