

WHEN ‘ONE COUNTRY, TWO SYSTEMS’ MEETS ‘ONE PERSON, ONE VOTE’: THE LAW OF TREATIES AND THE HANDOVER NARRATIVE THROUGH THE CRUCIBLE OF HONG KONG’S ELECTION CRISIS

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In Hong Kong’s recent election crisis — a non-violent uprising against China pre-selecting candidates for Chief Executive and thus foreclosing civic nomination — both sides (establishment and pro-democracy) have attempted to interpret the term ‘universal suffrage’ based exclusively on its inclusion in Hong Kong’s mini-constitution, the Basic Law. In so doing, however, they have given short shrift to the agreement that gave rise to the Basic Law in the first place: the 1984 Sino–British Joint Declaration. But while the Joint Declaration provides important textual insights, it simultaneously raises significant issues regarding the application of the law of treaties. For example, did the Joint Declaration terminate upon Hong Kong’s July 1997 transfer to China and the effective date of the Basic Law? Even if still valid, is its language too vague to offer meaningful interpretive assistance? And does the United Kingdom’s 1976 Hong Kong exclusion reservation to art 25(b) of the International Covenant on Civil and Political Rights, which provides for universal suffrage, survive the handover? Applying the law of treaties ultimately reveals that the Joint Declaration is still in force and can be interpreted to provide for civic nominated elections in Hong Kong. Nevertheless, on deeper consideration, reliance on traditional treaty law in this context is cumbersome and inefficient. This article posits that the inherently confusing situation of the Hong Kong handover, wherein a decolonising liberal democracy negotiated what amounts to a recolonisation with a communist dictatorship stipulating creation of a hybrid political system, calls for new approaches to treaty doctrine, including formulation of a principle of implied reservation termination and re-sequencing treaty interpretation to allow consideration of extrinsic evidence, rather than pure text, in the first instance. A wider interpretive berth, in turn, reveals a China far more sympathetic to progressive features in Hong Kong’s constitution than commonly believed. Most significantly, Zhao Ziyang, China’s chief negotiator, emerges as a political liberal who embraced parliamentary features as capitalistic performance enhancers. And even after Zhao Ziyang’s post-Tiananmen Square downfall, the Chinese leadership reckoned that progressive elements were needed in the Basic Law to help curb Hong Kong brain drain after the Tiananmen Square massacres. Overall, this new approach to treaty law yields a better calibrated and historically more fulsome analysis which confirms that the Basic Law’s reference to ‘universal suffrage’ may be interpreted to contemplate civic nominated candidates in Hong Kong’s elections.

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I INTRODUCTION

From September through December 2014, protests raged in Hong Kong over the meaning of ‘universal suffrage’ in connection with the city’s upcoming 2017 election of a Chief Executive.¹ In 2007, the People’s Republic of China (‘PRC’), the suzerain that governs over the Hong Kong Special Administrative Region (‘SAR’), ostensibly promised Hong Kong voters ‘direct elections’ for the 2017 Chief Executive contest in accord with arts 45 and 68 of Hong Kong’s *Basic Law*,² the SAR’s mini-constitution.³ In August 2014, however, the Standing Committee of China’s National People’s Congress (‘NPCSC’) decided that

¹ ‘Police Clear Final Hong Kong Protest Site at Causeway Bay’, *BBC News* (online), 15 December 2014 <<http://perma.cc/5MLP-AAF9>>.

² *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* art 26 (‘*Basic Law*’).

³ Edward Cody, ‘China Denies Hong Kong Direct Vote on Leader in 2012’, *Washington Post* (online), 29 December 2007 <<http://perma.cc/T79A-SD33>>; ‘Fact Check: Was Hong Kong Ever Promised Democracy?’, *ABC News* (online), 16 December 2014 <<http://perma.cc/F4TL-74CN>>.

voters would be restricted to choosing the Chief Executive from a list of two or three candidates selected by a Beijing-friendly nominating committee.⁴ Hong Kong democracy activists, concerned that the nominating committee would screen out candidates not strictly toeing Beijing's party line, interpret universal suffrage as allowing all eligible Hong Kong voters to pick the candidate of their choosing in accordance with art 26 of the *Basic Law*.⁵ Throughout the controversy, in supporting their respective positions, both sides have focused almost exclusively on the provisions of the *Basic Law* — for example, a high degree of SAR autonomy, including its own legal system and fundamental civil liberties such as freedom of speech and assembly — which provides a 50-year guarantee of 'one country, two systems'.⁶

In the meantime, the disputants have given short shrift to the instrument that stipulated creation of the *Basic Law* in the first place: the Sino-British *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* ('*Joint Declaration*').⁷ The *Joint Declaration*, signed by the United Kingdom and the PRC in December 1984, provided for the July 1997 transfer of Hong Kong from the UK to the PRC, set out the premise and contours of the 'one country, two systems' guarantee and contained important language regarding civil and political rights.⁸ The Chinese have argued that the terms of the *Joint Declaration*, even if considered a 'treaty', terminated upon the July 1997 transfer and effective date of the *Basic Law*.⁹ And even were that not the case, certain experts have opined that the direct language of the *Joint Declaration* is too vague to offer meaningful interpretive assistance.¹⁰ Some

⁴ *Decision of the Standing Committee of the National People's Congress on Issues relating to the Selection of the 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* (People's Republic of China) National People's Congress Standing Committee, 10th Session, 31 August 2014 ('*NPCSC's August Decision*'); Andrew Stevens, 'Beijing Says No to Open Elections in Hong Kong', *CNN* (online), 5 September 2014 <<http://perma.cc/6SXJ-ZV8T>>.

⁵ Stevens, above n 4. See also *Basic Law*.

⁶ See Alvin Y H Cheung, 'The International Law Case for Democracy in Hong Kong' on *Opinio Juris* (3 October 2014) <<http://perma.cc/V6SH-DDS9>>. Alvin Cheung notes that 'a consistent theme' in the discourse regarding the election dispute 'has been that Hong Kong's democratisation should occur in accordance with the *Basic Law*, the city's quasi-constitution'. See also C L Lim, 'Britain's "Treaty Rights" in Hong Kong' (2015) 131 *Law Quarterly Review* 348, 349. C L Lim notes that the *Basic Law* 'is the sole instrument which provides expressly for the possibility of a democratically-elected Hong Kong Chief Executive'. See also *Basic Law*.

⁷ *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, signed 19 December 1984, 1399 UNTS 33 (entered into force 27 May 1985) ('*Joint Declaration*'); Cheung, 'Case for Democracy', above n 6.

⁸ See *Joint Declaration*.

⁹ Grace Tsoi, 'Does China Think the Sino-British *Joint Declaration* Is Void?', *Foreign Policy* (online), 18 December 2014 <<http://perma.cc/C6EQ-UCP4>>. Grace Tsoi states: 'What happened next is disputed, but [British House of Commons Foreign Affairs Committee Chairman Sir Richard] Ottaway believes the Chinese side signaled that the Sino-British *Joint Declaration*, an agreement signed between the two countries to decide on the handover of the former crown colony, ceased to be effective after Hong Kong returned to Chinese rule in 1997'.

¹⁰ 'Fact Check: Was Hong Kong Ever Promised Democracy?', above n 3: 'The documents are ambiguous and can be interpreted to favour either side's argument'.

have pointed to the UK's Hong Kong exclusion reservation to art 25(b) of the *International Covenant on Civil and Political Rights* ('ICCPR'),¹¹ which provides for universal suffrage.¹² But do these arguments withstand scrutiny when analysed in terms of the *Vienna Convention on the Law of Treaties* ('VCLT')?¹³

This article will conduct that analysis and conclude they do not. At the same time, it will show that examining the Anglo–Chinese pact strictly within the framework of existing treaty law is not enough. The *Joint Declaration* presents an unusual scenario wherein a decolonising liberal democracy negotiates what amounts to a recolonisation with a communist dictatorship that stipulates creation of a hybrid political system meant to last only 50 years.¹⁴ The instrument hammered out in the negotiations is styled a 'declaration', which has not been traditionally classified as a 'treaty'.¹⁵ The finite hybrid political system created is not clear about the division of rights and duties between the negotiating parties in the long-term and thus creates strains on the traditional doctrine of *pacta sunt servanda*, which mandates that treaty duties be carried out in good faith.¹⁶ The normal sequence of treaty interpretation, which stipulates initial reliance on textual analysis and then extrinsic evidence in case of ambiguity, inefficiently ignores, at the outset, certain inherent anomalies in the negotiations posture that might be better considered up-front.¹⁷ And, per the doctrinal status quo, the consideration of pre-existing reservations to other multilateral treaty arrangements, asserted by the first coloniser (the UK) on behalf of the colony decades previously, arguably survives the sovereignty switch, despite the fundamental change of circumstances that justified the reservation in the first place.¹⁸ Each of these issues points to the need to revisit and update certain tenets of traditional treaty law in odd decolonisation or territorial cession situations such as this.

At the same time, within the context of a better tailored approach to the law of treaties, a deeper appreciation for the Hong Kong handover narrative is possible. The conventional narrative simplistically posits that, given China's totalitarian tendencies at the time of negotiations, it would have automatically opposed the inclusion of more democratic features, as opposed to capitalistic ones, in the hybrid system created for Hong Kong.¹⁹ But that superficial account ignores

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹² *Ibid* art 25. See also 'Fact Check: Was Hong Kong Ever Promised Democracy?', above n 3: 'Crucially, however, [the United Kingdom] carved out Article 25 of the ICCPR and said it did not apply to Hong Kong'.

¹³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1115 UNTS 331 (entered into force 27 January 1980) ('VCLT').

¹⁴ See below nn 314–315 and accompanying text.

¹⁵ See below nn 288–290 and accompanying text.

¹⁶ See below nn 298–301 and accompanying text.

¹⁷ See below nn 307–312 and accompanying text.

¹⁸ See below nn 334–336 and accompanying text.

¹⁹ Rong Kaiming, 'Four-Point Reflection on Firm Confidence in "One Country, Two Systems"' (2011) 4 *Academic Journal of 'One Country, Two Systems' (English Edition)* 19, 19 <http://www.ipm.edu.mo/cntfiles/upload/docs/research/common/1country_2systems/academic_eng/issue4/03.pdf>. Rong Kaiming notes that under the 'one country, two systems' policy, the mainland maintains the socialist system, whereas Hong Kong continues to adhere to the capitalist system unchanged.

several important facts that come into focus through a deeper interpretive lens. First, China itself was undergoing quasi-political liberalisation at the time of the negotiations.²⁰ And Zhao Ziyang, its chief negotiator and treaty signer, second in the power hierarchy only to leader Deng Xiaoping, was a political liberal.²¹ Moreover, even if support for capitalism was the primary objective, there is evidence that China perceived democratic features as desirable for undergirding and stabilising Hong Kong's economic system — and this was in the context of Britain seeking to introduce electoral reform as it decolonised, a feature it consciously negotiated into the treaty.²² Finally, the 1989 Tiananmen Square incident, rather than entrenching anti-democratic tendencies toward Hong Kong within the Chinese leadership, further drew the Chinese toward democracy to help prevent brain drain from the former British colony as the *Basic Law* was being drafted.²³

This article proceeds in five parts. Part II will consider the history of British–Hong Kong relations from the Opium Wars of the 19th century to the advent of the Sino–British *Joint Declaration* in 1984 and then the first decade and a half of Chinese rule through the election crisis. Part III will then examine Hong Kong's 2014 election crisis and the specific provisions of the *Joint Declaration* and *Basic Law* at issue in efforts to resolve it. Part IV will engage in an analysis of the potential arguments put forth by both sides of the dispute regarding the Sino–British *Joint Declaration* in terms of the law of treaties. It will demonstrate that the explicit lack of a termination clause and the implicit suggestion of continuity mean that the *Joint Declaration* is still in full force and effect. And via traditional treaty interpretation and a common sense analysis of Britain's *ICCPR* voting reservation for Hong Kong, the *Joint Declaration* can be read to include a universal suffrage guarantee.²⁴ Finally, Part V will examine whether analysing the *Joint Declaration* in the unique context of the Hong Kong handover ought to entail a reconceptualisation of certain treaty law tenets. In addition to calling for an expanded scope of the 'treaty' concept and a more flexible approach to *pacta sunt servanda*, it concludes that, upon request for judicial notice in the right cases, allowing for re-sequencing of the treaty interpretation procedure would make sense as would including a doctrine of implied reservation termination.

In the end, any reasonable approach to treaty analysis confirms that the Anglo–Chinese pact includes a universal suffrage guarantee. The 2014 version of the 'Umbrella Movement' may have come to an end. But tensions remain at fever pitch in Hong Kong as the 2017 election looms ahead. Revisiting the *Joint*

²⁰ See below nn 50–56 and accompanying text.

²¹ See below nn 252–263 and accompanying text.

²² See below nn 68, 241, 251–252 and accompanying text. See also Dietmar Rothermund, *The Routledge Companion to Decolonization* (Routledge, 2006) 245–6. Dietmar Rothermund indicates that it was standard British policy to introduce parliamentary democracy into colonies about to undergo the decolonisation process.

²³ See below nn 264–265 and accompanying text.

²⁴ It should be noted, however, that certain experts do not see the value of relying on the Sino–British *Joint Declaration* to help navigate the interpretive roadblocks regarding the definition of 'universal suffrage' contained in the *Basic Law*. See, eg, Lim, above n 6, 351. Lim states: 'In the absence of actual denial of Beijing's sole authority to interpret the *Basic Law*, the *Vienna Convention* argument described in this note is, even if it comes not too late, too reliant on the interpretation of too few facts'.

Declaration might help the parties resolve their differences and ward off an even greater wave of civil unrest and erosion of democracy.²⁵

II BACKGROUND TO THE 2014 ELECTION CRISIS

A *Beginning of the Hong Kong–UK Relationship*

Britain's relationship with Hong Kong dates back to the First (1839–42) and Second (1856–60) Opium Wars with China. The root cause of those wars lay in Britain's efforts to open the Chinese market and redress a trade imbalance (largely owing to the British appetite for tea) by exposing the Chinese to Indian-cultivated opium, addicting them to it and then selling it to them against the wishes of Chinese authorities.²⁶ When Chinese officials tried to block British opium merchants from the port in Canton and confiscated their wares, the British launched a naval expedition that, by 1842, had prevailed through superiority of modern arms.²⁷ The Chinese were forced to sign the *Treaty of Nanjing*²⁸ (and the *Supplementary Treaty of the Bogue*)²⁹, which forced them to open to British trade and allow residence at the ports of Fuzhou, Jinmen, Ningbo and Shanghai.³⁰ In addition, China was obligated to cede Hong Kong to Great Britain.³¹

In 1856, the Second Opium War broke out in response to an allegedly illegal Chinese search of a British-registered ship.³² This time, British troops were joined by French in the attack and once again the Chinese were forced to sign a humiliating accord — the *Treaty of Tianjin* (1858)³³ — to which France, Russia, the United States and Britain were parties.³⁴ According to the terms of this treaty, China agreed to open 11 more ports, allow foreign legations in Beijing, permit Christian missionary activity and legalise the import of opium.³⁵

However, in the end, China tried to prevent the entry of Western diplomats into Beijing and fighting between China and the Western powers recommenced in 1859.³⁶ On this occasion, an infuriated Britain and France occupied Beijing

²⁵ See below nn 126–128 and accompanying text.

²⁶ William J Duiker and Jackson J Spielvogel, *World History* (Wadsworth, 7th ed, 2012) 571.

²⁷ *Ibid* 571–2.

²⁸ *Treaty of Peace, Friendship, and Commerce between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China*, signed 29 August 1842 (entered into force 26 June 1843).

²⁹ *Supplementary Treaty between Her Majesty the Queen of Great Britain and the Emperor of China*, signed 8 October 1843 (entered into force 10 July 1844).

³⁰ 'Opium Wars', *The Columbia Encyclopedia* (Columbia University Press, 6th ed, 2000) 2089.

³¹ *Ibid*.

³² *Ibid*.

³³ *Treaty of Peace, Friendship, Commerce and Navigation between France and China*, signed 27 June 1858 (entered into force 25 October 1860); *Treaty between the United States of America and the Chinese Empire*, signed 18 June 1858 (entered into force 16 August 1859); *Treaty of Peace, Friendship, Commerce, and Navigation between Russia and China* (signed and entered into force 13 June 1858); *Treaty of Peace, Friendship, and Commerce between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China*, signed 26 June 1858 (entered into force 24 October 1860).

³⁴ 'Opium Wars', above n 30.

³⁵ *Ibid*.

³⁶ *Ibid*.

and burned the Imperial Summer Palace.³⁷ The Chinese were then forced to sign the *Beijing Conventions* of 1860³⁸, which obligated them to reaffirm the terms of the *Treaty of Tianjin* as well as make additional concessions.³⁹

B *UK Acquisition of the New Territories*

The UK acquired further territory via the *Convention for the Extension of Hong Kong Territory* (also known as the *Second Convention of Peking*) (1898).⁴⁰ While the previous two treaties granted land to the UK in perpetuity, this one provided the UK with only a 99-year lease of the New Territories.⁴¹ At that time, the finite nature of the arrangement was strictly a matter of semantics for the British, who saw it as an outright cession but allowed the Chinese 'to save face' by calling it a lease.⁴² While this may not have seemed important at the time, it loomed large as the 99-year period neared its expiration.

As it turned out, Hong Kong was not a viable colony for the UK without the New Territories, which supplied it with a buffer from China and much of its needed resources.⁴³ Unfortunately for Britain, by the middle of the 20th century, its empire was merely a shadow of its former self, depleted both by war and self-determination demands from its colonies.⁴⁴ In contrast, China had been unified by the Chinese Communist Party ('CCP'), which established the PRC and dragged the country into the modern age.⁴⁵ This gave it power to negotiate with the British as the lease was set to terminate.

C *China's Liberalisation*

After Mao Zedong's death in 1976, Deng Xiaoping eventually took power and began a program of economic and political reform, focusing on two initiatives in particular: agricultural reform and the 'open-door' strategy.⁴⁶ With

³⁷ Ibid.

³⁸ *Convention of Peace between Her Majesty and the Emperor of China* (signed and entered into force 24 October 1860); *Convention between the Emperor of the French and the Emperor of China* (signed and entered into force 25 October 1860); *Traité Additionnel conclu le 14 Novembre 1860, à Pékin, entre sa Majesté l'Empereur de Toutes les Russies et sa Majesté le Bogdo-Khan de Chine* [Additional Treaty between the Emperor of Russia and the Emperor of China Concluded 14 November 1860 in Peking], signed 14 November 1860 (entered into force 20 December 1860).

³⁹ 'Opium Wars', above n 30.

⁴⁰ Andrew Yanne and Gillis Heller, *Signs of a Colonial Era* (Hong Kong University Press, 2009) 60; *Convention between the United Kingdom and China, Respecting an Extension of Hong Kong Territory*, signed 9 June 1898 (entered into force 6 August 1898).

⁴¹ Ibid.

⁴² Diana Preston, *The Boxer Rebellion: The Dramatic Story of China's War on Foreigners That Shook the World in the Summer of 1900* (Walker, 2000) 311; Stephen Vines, 'A Lease No One Thought Would Run Out', *The Independent* (online), 3 January 1997 <<http://perma.cc/KC75-QL3T>>.

⁴³ Vines, above n 42.

⁴⁴ William Roger Louis, 'Introduction' in Judith M Brown and William Roger Louis (eds), *The Oxford History of the British Empire: The Twentieth Century* (Oxford University Press, 1999) 1, 12. William Louis writes: 'Britain emerged from the 1939–45 war virtually bankrupt ... [and] was no longer a "world power".'

⁴⁵ William A Joseph, 'China' in Joel Krieger (ed), *The Oxford Companion to Politics of the World* (Oxford University Press, 2001) 128, 131–2.

⁴⁶ Miron Mushkat and Roda Mushkat, 'Economic Growth, Democracy, the Rule of Law and China's Future' (2005) 29 *Fordham International Law Journal* 229, 238.

respect to the former, the CCP loosened economic control over the lives of Chinese citizens and replaced communes with private land leases.⁴⁷ With respect to the latter, China ‘transformed key coastal areas into platforms for foreign investment, encouraging them to overhaul their ossified economic systems in the process’.⁴⁸

But these liberalisation measures were not strictly focused on the commercial.⁴⁹ Miron Mushkat and Roda Mushkat note that Deng Xiaoping also made ‘efforts to build a contingent of cadres capable of implementing his vision over a long period of time’.⁵⁰ He used a three-pronged strategy to realise this goal: (1) assigning his protégés, such as Zhao Ziyang and Hu Yaobang, to central power roles; (2) restoring old cadres who were stripped of influence during the Cultural Revolution; and (3) promoting loyal young party apparatchiks to positions formerly held by the old guard.⁵¹ With these policies and personnel in place, Deng Xiaoping sought to ‘revive formal institutions at national, regional, and local levels and inject a modicum of accountability and even transparency into the public decision-making process’.⁵²

As William Joseph notes: ‘Political change was also on Deng’s agenda. Curbs were placed on the arbitrary exercise of power and steps were taken to give some measure of regularity to the legal system’.⁵³ This period of liberalisation was in full bloom by the time the Sino–British *Joint Declaration* was signed in December 1984.⁵⁴ And it would culminate in the student protests that led to the massacres in Tiananmen Square.⁵⁵ Thereafter, China clamped down on political liberalisation while still attempting to promote capitalist economic growth.⁵⁶

D British Democratisation of Hong Kong Pre-Handover

During British rule over Hong Kong prior to 1991, the constitutional order, reflected in the *Letters Patent* and *Royal Instructions*, provided for an appointed British Governor, appointed Legislative and Executive Councils, a fairly autonomous career civil service and an independent judiciary.⁵⁷ This governing arrangement, emanating from a mother country with firmly rooted democratic

⁴⁷ ‘Chinese Leader Deng Xiaoping Dies’, *CNN* (online), 19 February 1997 <<http://perma.cc/6K4K-J2JD>>. The story chronicles China’s economic liberalisation.

⁴⁸ Mushkat and Mushkat, ‘Economic Growth, Democracy, the Rule of Law and China’s Future’, above n 46, 238.

⁴⁹ Joseph, ‘China’, above n 45, 130. Matt Schiavenza, ‘China’s Forgotten Liberal Hero’, *The Atlantic* (online), 16 April 2014 <<http://perma.cc/K26K-NWD2>>. The article discusses China’s political liberalisation.

⁵⁰ Mushkat and Mushkat, ‘Economic Growth, Democracy, the Rule of Law and China’s Future’, above n 46, 239.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Joseph, ‘China’, above n 45, 130.

⁵⁴ See Barry Naughton, *The China Circle: Economics and Electronics in the PRC, Taiwan, and Hong Kong* (Brookings Institution, 1997) 95: ‘During 1984 the political pendulum in the PRC swung strongly in the direction of liberalization’. See also Schiavenza, above n 49.

⁵⁵ Schiavenza, above n 49.

⁵⁶ *Ibid.*

⁵⁷ Michael C Davis, ‘Constitutionalism in Hong Kong: Politics versus Economics’ (1997) 18 *University of Pennsylvania Journal of International Economic Law* 157, 167.

traditions, had 'substantial common law protection of rights, freedom, and the rule of law'.⁵⁸

In the last few years before the Union Jack was removed from Hong Kong's government buildings, the UK introduced long overdue democratic reforms to its Crown colony. In 1991, the Hong Kong British Government enacted a *Bill of Rights*⁵⁹ and amended Hong Kong's then mini-constitution, the *Letters Patent*,⁶⁰ to incorporate the civil and political rights enshrined in the *ICCPR*.⁶¹ Michael Davis notes that 'these reforms created considerable opportunity for the Hong Kong courts to gain experience with judicial review under a written bill of rights'.⁶²

Then, Britain's last Governor for the colony, Chris Patten, implemented a series of democratic reforms that broadened the voting base for elections to the Hong Kong District Boards, Municipal Councils and Legislative Council.⁶³ These reforms, ostensibly moving toward universal suffrage, included lowering the voting age from 21 to 18, broadening the franchise of certain existing functional constituencies by replacing corporate voting with individual voting and introducing nine new functional constituencies, which included a wide range of occupational sectors such as agriculture and fisheries, textiles and garment, manufacturing and hotels and catering.⁶⁴ This meant including the entire working population of Hong Kong and expanding the electoral base by millions of individual citizen voters.⁶⁵ The PRC threatened to unseat this new legislature upon taking control of Hong Kong in 1997 and it eventually did.⁶⁶

III THE *JOINT DECLARATION*, THE *BASIC LAW* AND THE 2014 ELECTION CRISIS

A *The Sino-British Joint Declaration*

And so the imminent termination of British rule was regarded with dread by Hongkongers, whose economic system was based on principles of laissez faire capitalism and whose mother country was a democracy, features largely inconsistent with life in the PRC (with the exception of capitalism).⁶⁷ Therefore,

⁵⁸ Ibid. But see Ming Sing, *Hong Kong's Tortuous Democratization: A Comparative Analysis* (RoutledgeCurzon, 2004) 37–44. Ming Sing explains that, despite any conscious efforts at political liberalisation, Britain inadvertently hindered the development of democracy in Hong Kong and created a legacy that still impedes democratic progress by instituting an effective service bureaucracy and creating methods of cooptation that created alliances between middle class and capitalists elites with the government.

⁵⁹ *Bill of Rights Ordinance* (Hong Kong) cap 383.

⁶⁰ *Hong Kong Letters Patent 1917*.

⁶¹ Davis, 'Politics versus Economics', above n 57, 165.

⁶² Ibid.

⁶³ Benny Tai Yiu-Ting, 'The Development of Constitutionalism in Hong Kong' in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999) 39, 56.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Davis, 'Politics versus Economics', above n 57, 188. Michael Davis writes: 'By contrast, Hong Kong, with a system that is usually characterised as ... laissez faire, has historically had ... little government intervention on the economic front and a high degree of political and personal freedom'.

negotiations between the UK and the PRC were regarded as crucial. While the narrative of the negotiations differs, the British were taken aback by the entrenched objective of the PRC, which, based on the unequal treaties of the 1800s, would not accept anything less than the complete and unequivocal return of the entirety of Hong Kong.⁶⁸ Given the real potential for PRC military action to back its demands, as well as the UK's inability to counter such force, handing over Hong Kong was Britain's only rational choice. But the British fought hard for certain concessions, including electoral reform.⁶⁹ So the handover, with these concessions incorporated into the deal, resulted in the 1984 Sino–British *Joint Declaration*.⁷⁰

1 *An Overview of the Joint Declaration*

The *Joint Declaration* itself is not very long — only a preamble and eight articles.⁷¹ But attached to it are three annexes, dealing with, respectively, the PRC's Basic Policies regarding Hong Kong, the creation and functioning of the Sino–British Joint Liaison Group (set up to implement the *Joint Declaration*), and the Land Leases (protecting for 50 years lands that had been granted by the British Hong Kong Government).⁷² Also attached to the *Joint Declaration* are two memoranda (one for each government) dealing with issues of citizenship.⁷³

2 *Substantive Rights under the Joint Declaration*

For purposes of understanding substantive rights, the key provision of the *Joint Declaration* is art 3, which sets forth the basic policies of the PRC regarding Hong Kong in 12 paragraphs (each numbered paragraph is referred to in the parentheticals that follow): (1) establishment of the SAR; (2) the SAR would be directly under the authority of the PRC but would enjoy a high degree of autonomy, except in foreign and defence affairs; (3) the SAR would be vested with executive, legislative and independent judicial power, and then-current laws would remain in force; (4) the crucial provision relating to government, in three key subsections (corresponding to letters in parentheticals), the second one of critical importance for this article — (a) the SAR would be composed of local residents; (b) the Chief Executive would be 'appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally'; and (c) principal officials would be nominated by the Chief Executive of the SAR for appointment by the PRC; (5) another vital provision in terms of

⁶⁸ 'Record of a Conversation between the Prime Minister and Premier Zhao Ziyang at the Great Hall of the People, Peking' (Meeting Record, 23 September 1982) <<http://perma.cc/TWC4-XPWU>>.

⁶⁹ See Gao Wanglai, *Sino–British Negotiations on Democratic Reforms in Hong Kong* (PhD Thesis, Waseda University, 2009) 2 <<https://perma.cc/5J97-DN5P>>.

⁷⁰ *Joint Declaration*. See Sonny Shiu-hing Lo, 'Hong Kong' in William A Joseph (ed), *Politics in China: An Introduction* (Oxford University Press, 2010) 355, 355–7. Sonny Lo writes: 'The negotiations got off to a rocky start, but eventually Thatcher made an important concession by exchanging sovereignty over Hong Kong for Beijing's promise of a high degree of autonomy for the territory after the British departure'.

⁷¹ See *Joint Declaration*.

⁷² *Ibid* annex I ('*Elaboration by the Government of the People's Republic of China of Its Basic Policies regarding Hong Kong*') art III.

⁷³ *Ibid* app ('*Exchange of Memoranda*') <<http://perma.cc/GA7T-8V8E>>.

the SAR's governance, in three key subsections: (a) the *social* and economic systems in place in Hong Kong would remain unchanged, and so would the 'lifestyle'; (b) rights and freedoms, including those of the person, speech, the press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research and religious belief would be ensured by law in the SAR; (c) private property, ownership of enterprises, legitimate right of inheritance and foreign investment would be protected by law; (6) the SAR would retain the status of a free port and a separate customs territory; (7) the SAR would retain the status of an international financial center and the Hong Kong dollar would continue to circulate and be used; (8) the SAR would have independent finances without the PRC levying taxes on its residents; (9) the SAR could establish mutually beneficial economic relations with the UK and other countries; (10) the SAR could, on its own, maintain and develop economic and cultural relations and conclude relevant international agreements under the PRC's sovereignty; (11) the maintenance of public order in the SAR would be the responsibility of the SAR Government; and (12) these policies would be incorporated into a *Basic Law* that would remain unchanged for 50 years after the transfer of sovereignty from the UK to the PRC.⁷⁴

B *The Basic Law and the Initial Post-Handover Period*

The *Basic Law* was passed by the National People's Congress of the PRC on 4 April 1990.⁷⁵ It would implement the terms of the *Joint Declaration* by establishing the Hong Kong SAR ('HKSAR') for 50 years and the related 'one country, two systems' policy.⁷⁶ The *Basic Law* establishes a system of governance led by a Chief Executive and an Executive Council, with a Legislative Council and an independent judiciary.⁷⁷

1 *Government Structure under the Basic Law*

The Chief Executive is the top executive-branch officer of the HKSAR and, working with an administration consisting of 12 policy bureaus and 61 departments and agencies, staffed mostly by civil servants, is charged with implementing the *Basic Law*, signing bills and budgets, promulgating laws, making decisions on government policies and issuing Executive Orders.⁷⁸ The Chief Executive is assisted in these functions by the Executive Council, comprising 30 members, of which half are 'non-official members'.⁷⁹ They are appointed by the Chief Executive and assist him in policymaking and submission of bills and subsidiary legislation to the Legislative Council.⁸⁰ The latter is Hong Kong's lawmaking body, half of whose 70 members are elected to four-year terms by geographical constituencies and the other half by occupation-based

⁷⁴ Ibid art 3.

⁷⁵ See *Basic Law* preamble.

⁷⁶ Ibid.

⁷⁷ Ibid ch IV.

⁷⁸ Information Services Department, HKSAR Government, *Hong Kong: The Facts — Government Structure* (Fact Sheet, June 2015) <<https://perma.cc/M554-25TQ?type=source>>.

⁷⁹ Ibid.

⁸⁰ Ibid.

constituencies.⁸¹ However, art 68 of the *Basic Law* provides that: ‘The ultimate aim is the election of all the members of the Legislative Council by universal suffrage’.⁸²

The Judiciary, which administers justice in the SAR and consists of Magistrates Courts, District Courts, a High Court and a Court of Final Appeal, is independent and remains within the common law system.⁸³ As the Hong Kong Government states in a fact sheet posted on its website:

It is fundamental to Hong Kong’s legal system that members of the judiciary are *independent* of the executive and legislative branches of government ... It is a fundamental principle of *common law* jurisdictions that members of the judiciary are completely independent of the executive organ of government in the performance of their judicial duties. This principle has always been applied in Hong Kong. The exercise of the power to govern is itself accountable to the law.⁸⁴

2 *The Initial Post-Handover Period*

Pursuant to the terms of the *Joint Declaration*, Hong Kong was transferred to China on 1 July 1997. In the first few years after the handover, Hong Kong experienced difficult times with the late-1990s Asian financial crisis and then the early-2000s Severe Acute Respiratory Syndrome outbreak.⁸⁵ But it weathered the storm and the PRC essentially honoured its ‘one country, two systems’ autonomy commitments enshrined in the *Joint Declaration* (and then incorporated into the *Basic Law*).⁸⁶

Still, as the first decade of Chinese sovereignty passed, a fundamental governance question remained that was hanging over the parties. Article 45 of the *Basic Law* sets out the selection procedures for Hong Kong’s Chief Executive, declaring that he be chosen ‘by election or through consultations held locally and be appointed by the Central People’s Government’.⁸⁷ It goes on to

⁸¹ *Ibid.* Under the original form of the *Basic Law*, per annex II, the number of legislators was stipulated at 60. However, pursuant to the decision by the Standing Committee of China’s National People’s Congress (‘NPCSC’) dated 28 August 2010 (see Instrument 4 of the *Basic Law*), the total number of legislators was increased to 70.

⁸² *Basic Law* art 68.

⁸³ Information Services Department, HKSAR Government, *Hong Kong: The Facts — Government Structure*, above n 78.

⁸⁴ *Ibid.* (emphasis added).

⁸⁵ Alexandra A Seno and Alejandro Reyes, ‘Unmasking SARS: Voices from the Epicentre’ in Christine Loh (ed), *At the Epicentre: Hong Kong and the SARS Outbreak* (Hong Kong University, 2004) 1, 2: ‘SARS struck Hong Kong at a moment when ... [it] had endured the Asian financial crisis, the collapse of the property market and the effects of a global economic downturn, as well as the indirect effects of the 9–11 terrorist attacks and the wars in Afghanistan and Iraq’.

⁸⁶ Michelle Yeh, ‘Chinese Literature from 1937 to the Present’ in Kang-i Sun Chang and Stephen Owen (eds), *The Cambridge History of Chinese Literature* (Cambridge University Press, 2010) vol 2, 565, 645: ‘Having survived the Asian Financial Crisis of 1998 and the SARS epidemic of 2003, Hong Kong has bounced back economically’. See also Yun-Wing Sun, ‘Hong Kong’ in Joel Mokyr (ed), *The Oxford Encyclopedia of Economic History* (Oxford University Press, 2003) vol 2, 532, 533. Yun-Wing Sun writes: ‘Beijing has largely honoured its promise of non-interference in Hong Kong under the formula of “One Country, Two Systems”’.

⁸⁷ *Basic Law* art 45.

stipulate that '[t]he method for selecting the Chief Executive 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'.⁸⁸ Then, in a key passage, it states that the 'ultimate aim is the selection of the Chief Executive *by universal suffrage* upon nomination by a broadly representative nominating committee *in accordance with democratic procedures*'.⁸⁹

3 *The Basic Law and Selection of a Chief Executive*

The mechanics for selecting the Chief Executive are set out in the original annex I of the *Basic Law*, which has since been amended. It decreed that the Chief Executive would be elected by a broadly representative Election Committee appointed by the PRC and consisting of 800 members (amended to 1200 in 2010) from the following sectors: (1) industrial, commercial and financial sectors (200); (2) the professions (200); (3) labour, social services, religious and other sectors (200); and (4) members of the Legislative Council as well as other representatives to governmental bodies in Beijing, including Hong Kong deputies to the National People's Congress.⁹⁰ According to annex I, Chief Executive candidates may be nominated jointly by not less than 100 members of the Election Committee (currently 150 in annex I as amended).⁹¹ Each member may nominate only one candidate.⁹² The Election Committee shall, on the basis of the list of nominees, elect the Chief Executive designate by secret ballot on a one-person, one-vote basis.⁹³

Annex I specifies that the first Chief Executive be selected in accordance with procedures set by the PRC in connection with formation of the first post-handover government in 1997⁹⁴ (presumably, with re-election after a five-year term, this could have covered the period through 2007). For selection of the Chief Executive post-2007, the annex is not clear, stating only that if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval.⁹⁵

⁸⁸ Ibid.

⁸⁹ Ibid (emphasis added).

⁹⁰ Ibid annex I ('*Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region*'). See also *Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region* (People's Republic of China) National People's Congress Standing Committee, 16th sess, 28 August 2010; *Decision of the Standing Committee of the National People's Congress on Approving the 'Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'* (People's Republic of China) National People's Standing Committee, 16th sess, 28 August 2010.

⁹¹ *Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region*, annex I para 4.

⁹² Ibid.

⁹³ Ibid para 5.

⁹⁴ Ibid para 6.

⁹⁵ Ibid para 7.

4 *Incorporation of the International Covenant on Civil and Political Rights*

At the same time, art 39 of the *Basic Law* states:

The provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.⁹⁶

Article 25(b) of the *ICCPR* stipulates that '[e]very citizen shall have the right and the opportunity ... without unreasonable restrictions ... to vote ... by universal and equal suffrage'.⁹⁷ It should be noted, however, that when ratifying the *ICCPR*, the UK entered the following reservation: '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'.⁹⁸ But it was not clear whether that reservation was incorporated into the *Basic Law*.⁹⁹

C *The 2014 Election Crisis*

Therefore, based on *Basic Law* art 45, which contemplates eventual universal suffrage for selection of Hong Kong's Chief Executive, *Basic Law* annex I, which ostensibly permits amendment of the selection method to accommodate universal suffrage, as well as *Basic Law* art 39, seemingly incorporating *ICCPR* art 25, citizens of Hong Kong were left to wonder when their eligibility for full voting rights for Chief Executive would come into effect. This sense of anticipation was bolstered by similar provisions in the *Basic Law* that provided for universal suffrage for legislative elections and the possibility for amending the selection methods (in art 68 and annex II, respectively).¹⁰⁰

1 *Failure to Implement Universal Suffrage 2004–14*

In the first few years after the handover, consistent with these *Basic Law* provisions, Hong Kong residents were looking to the PRC to sanction selection

⁹⁶ *Basic Law* art 39.

⁹⁷ *ICCPR* art 25(b).

⁹⁸ *International Covenant on Civil and Political Rights: Ratification by the United Kingdom of Great Britain and Northern Ireland*, deposited 20 May 1976, 1007 UNTS 394.

⁹⁹ See Comment from Alvin Y H Cheung, 11 August 2014 on Mathias Cheung, 'The Hong Kong Government's Proposed Electoral Reform Violates the *Basic Law* and the Sino-British Joint Declaration' on *UK Constitutional Law Association* (11 August 2014) <<http://perma.cc/G3NA-RMKH>>. Alvin Cheung states: 'Successive Hong Kong arguments have argued that the UK's initial reservation to *ICCPR* Article 25 entered on behalf of Hong Kong in 1976 remains valid, although the HRC has taken a different view since at least 1995'.

¹⁰⁰ *Basic Law* art 68; annex II ('*Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures*').

procedure changes to achieve universal suffrage by 2012.¹⁰¹ Unfortunately, during the first few years of the HKSAR, their aspirations were not realised. As summarised by C L Lim:

In 2004, the NPCSC had issued an interpretation of Annex I [of the *Basic Law*] requiring the Chief Executive to make a recommendation to the NPCSC itself before tabling any amendment before LegCo (2004 interpretation). It then issued a decision (2004 decision) which precluded any reform before 2007 ... a broad consensus had not yet emerged. In 2005, Hong Kong's second Chief Executive proposed the enlargement of the election committee which is tasked to elect the Chief Executive from a body of 800 to 1,600 persons. That proposal was defeated in LegCo.¹⁰²

On assuming office as Hong Kong's Chief Executive in 2007, Donald Tsang initiated a public consultation process on elections and ultimately issued a Green Paper on Constitutional Development, which he submitted to the NPCSC in December of that year.¹⁰³ The NPCSC rendered a decision by the end of the month and determined that the Chief Executive could be elected by universal suffrage in 2017 and that the Legislative Council could be voted in by universal suffrage after that (ie in 2020).¹⁰⁴

2 *Beijing's 2014 'White Paper'*

In the interim, the people of Hong Kong pondered how the government might implement a system that would ensure election by universal suffrage. In 2014 they found out. In June, there were ominous signs from Beijing. Soon after Hongkongers held a candlelight vigil commemorating the 25th anniversary of the Tiananmen Square crackdown, China's State Council issued a 'White Paper' stating that 'as a unitary state, China's central government has comprehensive jurisdiction over all local administrative regions, including the HKSAR'.¹⁰⁵ It went on to warn: 'The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership'.¹⁰⁶

¹⁰¹ Lo, above n 70, 362. Lo notes that in 2007, the Hong Kong public supported democratisation of the electoral process with many wanting universal suffrage by 2012.

¹⁰² Lim, above n 6, 351.

¹⁰³ Peter T Y Cheung, 'Intergovernmental Relations between Mainland China and the Hong Kong SAR' in Evan M Berman (ed), *Public Administration in Southeast Asia: Thailand, Philippines, Malaysia, Hong Kong, and Macao* (CRC, 2011) 255, 272.

¹⁰⁴ Ibid. As noted in Part III(B)(3), in 2010, the Hong Kong Legislative Council approved an amendment to *Basic Law* annex I, stipulating an increase in the Chief Executive election committee membership from 800 to 1200 persons. The new package also increased the number of legislators in the Legislative Council from 60 to 70. See Elizabeth Yuan, 'Hong Kong Passes Electoral Reform', *CNN* (online), 25 June 2010 <<http://perma.cc/SD5V-NLJG>>.

¹⁰⁵ Information Office of the State Council of the People's Republic of China, *The Practice of the 'One Country Two Systems' Policy in the Hong Kong Special Administrative Region* (10 June 2014) <<http://perma.cc/MQW9-B8MT>> ('White Paper'). See also Chester Yung, 'China Reminds Hong Kong of Its Control', *The Wall Street Journal* (online), 10 June 2014.

¹⁰⁶ *White Paper*, above n 105, ch V.

3 The NPCSC's August Decision

If that was an ominous portent with respect to Beijing's interpretation of universal suffrage, the exact nature of its position was revealed later that summer. In its *Decision of 31 August 2014 concerning the 2016 Legislative Council Elections and 2017 Chief Executive Elections*, the NPCSC laid out the details regarding the suffrage issue.¹⁰⁷

In a preamble, it noted that:

Given the divergent views within the Hong Kong community on how to implement the *Hong Kong Basic Law* provisions on universal suffrage for selecting the Chief Executive ... the Standing Committee of the National People's Congress finds it necessary to make provisions on certain core issues ...¹⁰⁸

It then went on to mandate that the Chief Executive 'be a person who loves the country and loves Hong Kong' and added that 'the method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose'.¹⁰⁹ Thus, a 'nominating committee', similar to the 1200 member Election Committee already in place and selected by Beijing loyalists, would be formed to nominate two to three candidates.¹¹⁰ Each candidate must receive the support of more than half of the members of the nominating committee.¹¹¹ After popular election of one of the nominated candidates, the Chief Executive-elect 'will have to be appointed by the Central People's Government'.¹¹²

For the vast majority of Hongkongers, who had patiently waited for genuine 2017 electoral reform to achieve the universal suffrage guarantee of the *Basic Law*, the NPC's decision was devastating.¹¹³ According to the through-the-looking-glass logic of the decision, universal suffrage would be achieved because, technically, everyone could vote in equal proportions. But vote for whom? To the extent universal suffrage is valued for free choice, there would essentially be none.¹¹⁴ In the first place, only someone who 'loves the country and loves Hong Kong' could be elected. What this means is entirely unclear and open to subjective interpretation and could easily be used arbitrarily to bar candidates not to Beijing's liking.¹¹⁵ As if this were not enough, other intrusive filtering mechanisms include a 1200 member nominating committee,

¹⁰⁷ *NPCSC's August Decision*, above n 4. See also British Institute of International and Comparative Law, 'Legal Issues relating to Democratic Participation in Hong Kong' (Scoping Report, 17 October 2014) 2 <<http://perma.cc/746S-G5Q7>>.

¹⁰⁸ *NPCSC's August Decision*, above n 4.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Peter So et al, 'Hong Kong Pan-Dems, Occupy Organisers Vow "Long Fight" as Beijing Rules Out Open 2017 Election', *South China Morning Post* (online), 31 August 2014 <<http://www.scmp.com/news/hong-kong/article/1582236/china-parliament-rejects-public-nomination-2017-hong-kong-election?page=all>>.

¹¹⁴ See Alvin Y H Cheung, 'The Road to Nowhere: Hong Kong's Democratization and China's Obligations under Public International Law' (2015) 40 *Brooklyn Journal of International Law* 465, 531. Cheung alludes to Benny Tai's observation that a 'choice between a rotten apple and a rotten orange is no choice at all' and opines that, 'for other electoral rights to be effective, voters must have a free choice of candidates'.

¹¹⁵ Cheung, 'Case for Democracy', above n 6.

support from at least half of the nominators and allowing only two to three candidates to stand for election.

4 *The 'Umbrella Movement'*

Predictably, and as pro-democracy activists had threatened, the NPC's decision sparked widespread protests that began on 28 September 2014.¹¹⁶ At first the protests were targeted at Hong Kong's financial district and collectively dubbed the 'Occupy Central Movement'.¹¹⁷ But they spontaneously spread to other parts of Hong Kong and morphed into the non-choreographed 'Umbrella Movement' (based on the protesters carrying umbrellas to protect themselves against police pepper spray).¹¹⁸

In addition to pepper spray, police used tear gas and batons in an effort to break up the protests.¹¹⁹ That tactic backfired as it inspired thousands of additional citizens to mass in opposition at other large neighbourhoods around Hong Kong, most prominently in Mong Kok.¹²⁰ The Umbrella Movement attracted international attention and was featured prominently on the front pages of news sources around the globe.¹²¹ When Beijing refused to budge, the protesters dug in and set up encampments, living in tents and erecting makeshift, canvas-covered gathering places with tables to write about and engage in discussions about democracy.¹²² They demanded that the PRC permit authentic universal suffrage according to 'international standards' for the 2017 Chief Executive election.¹²³ By December, the protest sites were cleared out by the Hong Kong Government and the movement had failed to achieve its stated goal. Hundreds of protesters were arrested by Hong Kong police.¹²⁴

Nevertheless, even after the protest camps had been dismantled, Hong Kong's election crisis continued to pique global interest in the first half of 2015. For example, a Canadian parliamentary committee held hearings regarding the crisis

¹¹⁶ Chris Yeung, 'Don't Call Hong Kong's Protests an "Umbrella Revolution"', *The Atlantic* (online), 8 October 2014 <<http://perma.cc/A7ZL-87SX>>.

¹¹⁷ Rishi Iyengar, '6 Questions You May Have about Hong Kong's Umbrella Revolution', *Time* (online), 5 October 2014 <<https://perma.cc/Y6D4-L7KK?type=source>>. It has also been called the 'Umbrella Revolution'. Yeung, above n 116.

¹¹⁸ Iyengar, above n 117.

¹¹⁹ Lauren Hilgers, 'Hong Kong's Umbrella Revolution Isn't over Yet', *The New York Times* (online), 18 February 2015 <http://www.nytimes.com/2015/02/22/magazine/hong-kongs-umbrella-revolution-isnt-over-yet.html?_r=0>.

¹²⁰ Francis Moriarty, 'Hong Kong "Umbrella" Protest Thrives on Diversity, from Admiralty to Mongkok', *The Christian Science Monitor* (online), 9 November 2014 <<http://perma.cc/HF7B-BKH6>>.

¹²¹ Scott Neuman, 'Hong Kong's Pro-Democracy Activists Stage New Protests', *National Public Radio* (online), 1 February 2015 <<http://perma.cc/89GP-EFXJ>>.

¹²² Hilgers, above n 119.

¹²³ Rikkie Yeung, *Democracy for Hong Kong: The Modest Demands of the Umbrella Protesters* (7 November 2014) Brookings <<http://perma.cc/Q2YT-QNLD>>.

¹²⁴ Hilgers, above n 119.

and issued a report critical of Chinese tactics.¹²⁵ On 14 June 2015, in advance of a vote on China's election reform scheme, thousands of protesters marched from Victoria Park in Causeway Bay to the Legislative Council Building in Admiralty.¹²⁶ This was widely covered in the international press.¹²⁷ Four days later, Hong Kong's Legislative Council formally rejected Beijing's ham-handed proposal for universal suffrage.¹²⁸

Throughout the Umbrella Movement protests, and in their wake, there was discussion about the legal support for implementation of universal suffrage. The *Basic Law* referred to it but offered no definition or clear answers. Even the National People's Congress acknowledged the 'divergent views' regarding the *Basic Law* provisions related to universal suffrage.¹²⁹ So perhaps the singular focus on the *Basic Law* itself had been misplaced.

As a result, looking to the *source* of the *Basic Law* — the *Joint Declaration* — would seem more logical. And, in fact, Hong Kong jurisprudence is supportive of such an approach. In *Ng Ka Ling v Director of Immigration* ('*Ng Ka Ling*'),¹³⁰ the Hong Kong Court of Final Appeal held:

As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances. It is generally accepted that in the interpretation of a constitution such as the *Basic Law* a purposive approach is to be applied [ie looking at legislative intent]. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms ... The purpose of a particular provision may be ascertainable from its nature or other provisions of the *Basic Law* or relevant extrinsic materials including the Joint Declaration ... As to the language of its

¹²⁵ Standing Committee on Foreign Affairs and International Development, Parliament of Canada, *Hong Kong's Democratic Future* (2015) 2. The report notes Canada's concern as to 'respect for democratic rights and freedoms' and its strong belief 'in the importance of international norms and agreements'. See also Secretary of State for Foreign and Commonwealth Affairs, 'The Six-Monthly Report on Hong Kong: 1 January to 30 June 2015' (Report No 37, July 2015) 2, 13. This report expresses that the UK 'is disappointed by the outcome of this electoral reform process' and notes that 'a transition to universal suffrage is the best way to guarantee Hong Kong's stability and prosperity'.

¹²⁶ Phila Siu, Samuel Chan and Tony Cheung, 'Hong Kong Protesters March to Legislative Council in Protest at "Fake" Democracy', *South China Morning Post* (online), 14 June 2015 <<http://www.scmp.com/news/hong-kong/politics/article/1821643/hong-kong-protesters-march-legislative-council-urge-no-vote?page=all>>.

¹²⁷ See, eg, Alan Wong, 'Protesters Return to Hong Kong's Streets', *The New York Times* (online), 14 June 2015 <<http://www.nytimes.com/2015/06/15/world/asia/protesters-return-to-hong-kongs-streets.html>>; Scott Neuman, *Hong Kong Protesters Renew Push for Electoral Reform*, *National Public Radio* (online), 14 June 2015 <<http://perma.cc/CTA4-BPB8>>; 'Protesters Gather in Hong Kong ahead of Electoral Reform Debate', *DW* (online), 17 June 2015 <<http://perma.cc/C2K5-NRJN>>.

¹²⁸ Michael Forsythe and Alan Wong, 'Hong Kong Legislature Rejects Beijing-Backed Election Plan', *The New York Times* (online), 18 June 2015 <<http://www.nytimes.com/2015/06/19/world/asia/hong-kong-votes-down-beijing-election-plan.html>>.

¹²⁹ British Institute of International and Comparative Law, above n 107, 2. The report notes that the preamble of the *NPCSC's August Decision* states: 'Given the divergent views within the Hong Kong community on how to implement the *Hong Kong Basic Law* provisions on universal suffrage for selecting the Chief Executive'.

¹³⁰ [1999] 2 HKCFAR 4, 28 ('*Ng Ka Ling*').

text, the courts *must avoid a literal, technical, narrow or rigid approach. They must consider the context.*¹³¹

So, consistent with the ruling in *Ng Ka Ling*, an analysis of the *Joint Declaration*, with great emphasis on context and where appropriate, extrinsic materials, will follow. And the key to that analysis will be an examination of the law of treaties.

IV 'UNIVERSAL SUFFRAGE', THE LAW OF TREATIES AND THE SINO-BRITISH JOINT DECLARATION

If one is to turn to the Sino-British *Joint Declaration* to gain insight into the 'universal suffrage' guarantee of Hong Kong's *Basic Law*, one must first determine what law governs interpretation of the *Joint Declaration*. It is submitted that international law, in particular the law of treaties, should be consulted. In particular, five general areas of this jurisprudence must be considered: (1) treaty law sources and applicability; (2) treaty definition; (3) treaty validity; (4) treaty interpretation; and (5) treaty reservations. Each of these shall be treated in turn.

A *Treaty Law Sources and Applicability*

The law of treaties as between and among states is governed by conventional and customary international law.¹³² With respect to the former, the exclusive source is the *VCLT*, which was concluded in 1969 and entered into force in 1980.¹³³ The *VCLT* largely occupies the field but parts of customary international law not incorporated into the *VCLT* still exist independently.¹³⁴ The UK and China are both currently party to the *VCLT*, although China did not accede to it until 3 September 1997, so it was not a member at the time of the signing of the Sino-British *Joint Declaration* (assuming, for the moment, that the *Joint Declaration* constitutes a treaty).¹³⁵ Nevertheless, post-1980, even treaty relations between and among non-*VCLT* parties are governed by the *VCLT*

¹³¹ Ibid (emphasis added). Following the Hong Kong Court of Final Appeal's ('HKCFA') judgment, upon the unilateral application by the Hong Kong Government (via the State Council), the NPCSC issued an Interpretation which, in the main, overruled the HKCFA's interpretation of *Basic Law* arts 22 and 24: *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (People's Republic of China) National People's Congress Standing Committee, 10th sess, 26 June 1999. It should be noted, however, that the case of *Ng Ka Ling* itself was not overruled, nor was the HKCFA's collateral ruling that the *Basic Law* is a living instrument, that a purposive approach should be used and that the Sino-British *Joint Declaration* may be referred to.

¹³² Jeffrey S Dietz, 'Protecting the Protectors: Can the United States Successfully Exempt US Persons from the International Criminal Court with US Article 98 Agreements?' (2004) 27 *Houston Journal of International Law* 137, 154 n 103.

¹³³ Michael P Scharf, 'Accelerated Formation of Customary International Law' (2014) 20 *ILSA Journal of International & Comparative Law* 305, 310. As between states and international organisations or between international organisations exclusively, conventional law is governed by a separate agreement. See *VCLT*.

¹³⁴ Dietz, above n 132, 154.

¹³⁵ British Institute of International and Comparative Law, above n 107, 6 n 10.

as it is reflective of customary international law.¹³⁶ Thus, the analysis here will be through the lens of the *VCLT*.

B Treaty Definition

Given that the *Joint Declaration* refers to itself as a ‘declaration’, there could be some doubt regarding its legal status as a treaty. According to art 2 of the *VCLT*, ‘treaty’ means ‘an international agreement concluded between States in written form and governed by international law ... whatever its particular designation’.¹³⁷

However, notwithstanding its formal title, the *Joint Declaration* is in fact an international agreement concluded between two states in written form and governed by international law per art 2 of the *VCLT*. First, the instrument was negotiated bilaterally between the UK and Chinese governments, both states, over a period of two years (1982 through 1984).¹³⁸ Per art 6 of the *Vienna Convention*, ‘every State possesses capacity to conclude treaties’.¹³⁹ Secondly, the text of the document itself indicates it was an agreement between the PRC and the UK. In particular, para 8 avers that ‘[t]his *Joint Declaration* and its Annexes shall be equally binding’.¹⁴⁰ Thirdly, even though all states have the ability to conclude treaties, art 7 of the *VCLT* mandates that those who sign the treaty on behalf of the state possess ‘full powers’ (a document evincing authorisation to conclude a treaty on behalf of a state) or be ‘Heads of State’ or ‘Heads of Government’.¹⁴¹ Here, the document was signed by ‘Heads of Government’ — Chinese Premier Zhao Ziyang and British Prime Minister Margaret Thatcher — on 19 December 1984.¹⁴² Finally, the *Joint Declaration* entered into force on 27 May 1985, and was registered as a treaty by both governments at the United Nations on 12 June 1985.¹⁴³ Thus, its title, although typically denoting a non-treaty instrument, in no way detracts from its legal status as a treaty.¹⁴⁴

C Treaty Validity: Continuance in Force or Termination?

1 Presumption of Continuance in Force

Even if it is a treaty, the Chinese have argued that the *Joint Declaration* is no longer valid as it terminated upon Chinese assumption of sovereignty over Hong

¹³⁶ Joshua L Root, ‘Some Other Men’s Rea? The Nature of Command Responsibility in the Rome Statute’ (2013–14) 23 *Journal of Transnational Law & Policy* 119, 150 n 166. Joshua Root indicates that even among non-members, the *VCLT* controls treaty relations as it is reflective of customary international law.

¹³⁷ *VCLT* art 2.1 (emphasis added). Still, as will be analysed below, traditionally a ‘declaration’ has never been considered a ‘treaty’. See below nn 294–298 and accompanying text.

¹³⁸ British Institute of International and Comparative Law, above n 107, 4.

¹³⁹ *VCLT* art 6.

¹⁴⁰ *Joint Declaration*.

¹⁴¹ *VCLT* art 7.

¹⁴² British Institute of International and Comparative Law, above n 107, 4.

¹⁴³ *Ibid*.

¹⁴⁴ See Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong University Press, 1997) 140–1.

Kong.¹⁴⁵ But that argument finds no support in law. In the first place, there 'is a general presumption that existing treaties continue in force'.¹⁴⁶ In particular, it is understood that, absent the applicability of one of the termination provisions in the *VCLT*, international law recognises the ongoing validity of a treaty.¹⁴⁷

2 *The Termination Provisions of the VCLT*

The termination provisions of the *VCLT* are found in pt V, which governs invalidity, termination and suspension of the operation of treaties. *VCLT* art 42(2) specifies that 'the termination of a treaty ... may take place only as a result of the application of the provisions of the treaty or of the present *Convention*'.¹⁴⁸ In this case, with respect to the provisions of the treaty itself, the *Joint Declaration* is silent. There is no language in the treaty that 'provides for its own termination either after a fixed period or by a specified process'.¹⁴⁹ As the British Institute of International and Comparative Law ('BIICL') has noted: 'The treaty is of indefinite duration and contains no termination date and no provision for either side to withdraw'.¹⁵⁰

(a) *Termination via Defects in Formation*

Might termination have nevertheless taken place as a result of the provisions of the *VCLT*? A review of the relevant provisions indicates a negative answer. Articles 46 to 53, found in pt V s 2 of the *VCLT*, deal with the invalidity of a treaty related to defects in its formation:¹⁵¹ incompatibility with state law (art 46); lack of representative's authority to express state's consent (art 47); error (art 48); fraud (art 49); corruption of a state representative (art 50); coercion of a state representative (art 51); coercion of a state by threat or use of force (art 52); and conflict with *jus cogens* norms (art 53).¹⁵²

China has never publicly complained about the *Joint Declaration*'s invalidity on any of these grounds. To the contrary, the PRC has acted in such a way as to affirm its belief in the treaty's validity, most conspicuously by drafting the *Basic*

¹⁴⁵ See, eg, Tsoi, above n 9.

¹⁴⁶ Shannon A Middleton, 'Women's Rights Unveiled: Taliban's Treatment of Women in Afghanistan' (2001) 11 *Indiana International & Comparative Law Review* 421, 440.

¹⁴⁷ Lea Brilmayer and Isaias Yemane Tesfalidet, 'Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences' (2011) 120 *Yale Law Journal Online* 217, 218–19 <<http://perma.cc/G3BV-RNVE>>. Lea Brilmayer and Isaias Yemane state: 'Articles 42, 54, and 56 [*VCLT* provisions dealing with termination] establish a presumption that, absent one of these circumstances, a treaty will continue in force'.

¹⁴⁸ *VCLT* art 42.

¹⁴⁹ Mark Weston Janis, *International Law* (Wolters Kluwer, 5th ed, 2008) 37.

¹⁵⁰ British Institute of International and Comparative Law, above n 107, 6.

¹⁵¹ Alexia Solomou, 'Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies' (2014) 27 *Leiden Journal of International Law* 495, 511 n 123. Alexia Solomou observes that 'section 2 of Part V of the *Vienna Convention on the Law of Treaties*, arts 46–53 [covers] the grounds of invalidity of treaties'.

¹⁵² *VCLT* arts 46–53.

Law pursuant to the terms of the *Joint Declaration*.¹⁵³ Also consistent with the PRC's belief that the treaty was not invalid and continued to remain in force even after the 1997 handover, the PRC participated in the Sino–British Joint Liaison Group that dealt with issues related to Hong Kong's transition until it wound up at the end of 1999.¹⁵⁴

(b) *Termination Owing to Post-Treaty-Conclusion Events*

Part V s 3 of the *VCLT* deals with 'Termination and Suspension of the Operation of Treaties'.¹⁵⁵ Article 54 contemplates termination pursuant to the terms of the treaty (which, as demonstrated above, is not at issue here) or by consent of the parties after consultation.¹⁵⁶ Articles 55 through 59 do not apply: (1) arts 55 and 58 deal with multilateral treaties only but the *Joint Declaration* is a bilateral treaty;¹⁵⁷ (2) art 56 covers denunciation or withdrawal but neither party to the *Joint Declaration* has ever initiated these procedures, which explicitly require 12 months' notice¹⁵⁸ — there is no evidence of any such notice here; (3) art 57 is titled 'Suspension of the Operation of a Treaty under Its Provisions or by Consent of the Parties'¹⁵⁹ — there is no suspension provision in the *Joint Declaration* and nothing in the record indicates the parties attempted to suspend the treaty's provisions; and (4) art 59 contemplates 'Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty' but, pursuant to the terms of art 59, there is no subsequent treaty between the parties 'relating to the same subject matter'.¹⁶⁰

(i) *Later Treaty*

With respect to *VCLT* art 59, the PRC could argue that the *Basic Law* represents a 'later treaty' and thus implies termination of the *Joint Declaration*. But the *Basic Law* bears none of the indicia of a treaty.¹⁶¹ It is not an agreement between two states but rather 'a constitutional document for the HKSAR'.¹⁶² Therefore, there is no implied termination of the *Joint Declaration* by adoption of the *Basic Law*.

¹⁵³ Information Services Department, HKSAR Government, *Hong Kong: The Facts — The Basic Law* (December 2014) <<https://perma.cc/HWG4-E52R?type=source>>. It states: 'The Sino–British *Joint Declaration on the Question of Hong Kong* ... sets out ... the principle of "one country, two systems" ... stipulated in a *Basic Law* ... drafted by a committee composed of members of both Hong Kong and the Mainland [for example, the PRC]'.

¹⁵⁴ British Institute of International and Comparative Law, above n 107, at 4.

¹⁵⁵ *VCLT* pt V s 3.

¹⁵⁶ *Ibid* art 54.

¹⁵⁷ *Ibid* arts 55, 58.

¹⁵⁸ *Ibid* art 56.

¹⁵⁹ *Ibid* art 57.

¹⁶⁰ *Ibid* art 59.

¹⁶¹ See Lim Chin Leng, 'Hong Kong's Basic Law and Political Reform', *The Straits Times* (online), 17 October 2014 <<http://perma.cc/9P95-4DLK>>. Lim Chin Leng writes: 'Dubbed a "mini-Constitution" for Hong Kong, the *Basic Law* is no treaty, and is a document no more sacred than a piece of Mainland Chinese legislation'.

¹⁶² Information Services Department, HKSAR Government, *Hong Kong: The Facts — The Basic Law*, above n 153.

(ii) Material Breach

Finally, *VCLT* arts 60 through 63 deal with extreme changes of circumstances that result in termination of treaties. Again, none of these situations pertains to the *Joint Declaration*. Article 60 covers 'Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach'.¹⁶³ Per art 60(2), termination or suspension is justified here only in cases of 'material' breach.¹⁶⁴ Article 60(3) defines 'material breach' as: (1) a repudiation of the treaty not sanctioned by the present *Convention* or (2) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.¹⁶⁵ Again, nothing in the record reveals a repudiation of the *Joint Declaration* — the PRC has suggested it is no longer in force but has taken no legal action to effect a repudiation (which entails a threatened breach)¹⁶⁶ or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.¹⁶⁷

Even if one could argue that China had materially breached the *Joint Declaration* by refusing to satisfy, or threatening to do so, its obligations regarding elections, there is a formal procedure laid out in pt 5 s 4 of the *VCLT*. According to art 65(1), for example, if a party seeks to terminate a bilateral treaty, it must first notify the other party of its claim.¹⁶⁸ The notification must indicate the measure proposed to be taken with respect to the treaty and the reasons therefor and, per art 67(1), it must be in writing.¹⁶⁹ The other side is then permitted to raise objections, per art 65(2).¹⁷⁰ In cases of objection, there is a mandatory adjudication/conciliation procedure stipulated in art 66.¹⁷¹ With respect to the *Joint Declaration*, failure to resort to any of the procedures described confirms an absence of termination pursuant to material breach.¹⁷²

¹⁶³ *VCLT* art 60.

¹⁶⁴ *Ibid* art 60(2).

¹⁶⁵ *Ibid* art 60(3).

¹⁶⁶ See Bryan A Garner (ed), *Black's Law Dictionary* (Thomson Reuters, 10th ed, 2014) 1496: 'A contracting party's words or actions that indicate an intention not to perform ... a threatened breach'.

¹⁶⁷ Only an extremely egregious violation of treaty terms will be the grounds for invoking material breach and the record is void of any such grave violations being cited by the Chinese for termination of the Sino-British *Joint Declaration*. See Serena Forlati, 'Reactions to Non-Performance of Treaties in International Law' (2012) 25 *Leiden Journal of International Law* 759, 763:

This provision reflects one of the main concerns expressed during the Vienna Conference, namely that the stability of treaty relationships should be preserved: it is thus only egregious breaches (amounting to either a 'repudiation of the treaty' or the 'violation of a provision essential to the accomplishment of the object or purpose of the treaty') that may be relied upon in the context of Article 60.

¹⁶⁸ *VCLT* art 65(1).

¹⁶⁹ *Ibid* arts 65(1), 70(1).

¹⁷⁰ *Ibid* art 65(2).

¹⁷¹ *Ibid* art 66.

¹⁷² See Forlati, above n 167, 763–4:

Furthermore, the procedural conditions set forth by Articles 65 and 66 of the *Convention* have to be respected; since suspension or termination on grounds of breach is subject to conciliation under Article 66, a favourable finding by the Conciliation Commission may have to be accepted by the other party in order to allow for the actual denunciation or suspension of the treaty.

(iii) *Supervening Impossibility of Performance, Fundamental Change and Severance of Diplomatic or Consular Relations*

Similarly, there is no evidence of termination via: (1) article 61 ‘Supervening Impossibility of Performance’ (there is no impossibility of performing obligations under the *Joint Declaration* owing to ‘the permanent disappearance or destruction of an object indispensable for the execution of the treaty’);¹⁷³ (2) article 62 ‘Fundamental Change of Circumstances’ (no unforeseeable change of circumstances has occurred here — the *Joint Declaration* contemplated 50 years of the ‘one country, two systems’ situation and that is what is currently in place);¹⁷⁴ or (3) article 63 ‘Severance of Diplomatic or Consular Relations’ (diplomatic and consular relations are still in place between the UK and the PRC — notwithstanding the PRC’s refusal to allow a delegation of British Members of Parliament to enter Hong Kong during the Umbrella Movement protests as part of an inquiry into Hong Kong–UK relations 30 years after the *Joint Declaration*).¹⁷⁵

(c) *Conclusion: The Treaty Remains in Force*

Therefore, in the absence of an applicable termination provision, the treaty remains in force. This is true even if all treaty rights and obligations have been carried out and satisfied. According to Stephen Hall:

A treaty does not terminate simply because all obligations prescribed under it have been complied with. Although there remain no executory provisions under such a treaty, it nevertheless continues in force until terminated. A boundary treaty, for instance, does not terminate once the parties have established markers and displays of State sovereignty in accordance with its terms.¹⁷⁶

Thus, even assuming, arguendo, that China’s obligations were complied with after implementation of the *Basic Law*, the *Joint Declaration* would continue to remain in force until terminated. In the case of the Sino–British *Joint Declaration*, executory provisions arguably remain given China’s promise to maintain the ‘one country, two systems’ guarantee for 50 years after the handover — a period that does not expire until 2047. As the BIICL notes:

¹⁷³ *VCLT* art 61.

¹⁷⁴ *Ibid* art 62. In any event, to the extent the Sino–British *Joint Declaration* resulted in any adjustment of territorial boundaries, art 62(2)(a), which provides that a fundamental change of circumstances may not be invoked as a grounds for terminating or withdrawing from a treaty, would render art 62 nugatory. *Ibid* art 62(2)(a). Cheung has suggested this is the case. See Comment from Alvin Y H Cheung, 3 October 2014 on Cheung, ‘Case for Democracy’, above n 6: ‘I read the *Joint Declaration* as a treaty establishing a boundary, so *VCLT* Article 62(2)(a) applies (fundamental change of circumstances not invocable as ground for termination of or withdrawal from treaty)’. Additionally, even if, technically, there were no boundary adjustments in the *Joint Declaration*, the International Court of Justice has held that *VCLT* art 62(2)(a) covers treaties of cession as well as delimitation. See *Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment)* (1986) ICJ Rep 554, 563–4 [17].

¹⁷⁵ *VCLT* art 63. See also ‘UK Politicians Refused Entry to Hong Kong’, *The Guardian* (online), 30 November 2014 <<http://perma.cc/8PX6-QNM6>>. The news article indicates the continued existence of diplomatic relations between the UK and the People’s Republic of China (‘PRC’) by noting ‘the positive trend in UK–China relations over the past year, including the recognition during Premier Li’s visit to London in June 2014 that the UK and China have considerable shared interests in respect of Hong Kong’.

¹⁷⁶ Stephen Hall, *Principles of International Law* (LexisNexis, 4th ed, 2014) 122.

China's obligation to keep the 'basic policies' set out in the [*Joint Declaration*] 'unchanged for 50 years' remains legally binding under international law, unless and until the treaty is wound up or amended by agreement between the two Governments.¹⁷⁷

D *Treaty Interpretation*

So the Sino–British *Joint Declaration* remains in force and the *Basic Law* is a product of it.¹⁷⁸ A report from the UK Parliament's Select Committee on Foreign Affairs notes explicitly that 'the *Basic Law* reflects the provisions of the *Joint Declaration*'.¹⁷⁹ As a result, according to Davis, the *Basic Law* thus became a matter of 'solemn international treaty obligations'.¹⁸⁰ So what do the terms of the *Joint Declaration* tell us about the universal suffrage guarantee in the *Basic Law*?

First, as a threshold matter, it is necessary to have a working definition of 'universal suffrage' in accordance with 'democratic procedures' as set forth in the *Basic Law*. The UN Human Rights Committee, which interprets and monitors compliance with the *ICCPR*, defines 'universal suffrage' as the right of all eligible adult citizens 'to stand for election and to vote' 'without unreasonable restrictions'.¹⁸¹

To determine whether such a right can be read into the *Joint Declaration*, it is necessary to examine the provisions of the *VCLT* relating to treaty interpretation. Part III of the *VCLT* treats of 'Observance, Application and Interpretation of Treaties' and, in particular, s 3 is devoted to interpretation.¹⁸² It consists of three provisions, arts 31 through 33, covering 'General Rule of Interpretation', 'Supplementary Means of Interpretation' and 'Interpretation of Treaties Authenticated in Two or More Languages'. For our purposes, only arts 31 and 32 are relevant. We must begin with the General Rule of Interpretation.

¹⁷⁷ British Institute of International and Comparative Law, above n 107, 6.

¹⁷⁸ See Michael C Davis, 'Beijing's Broken Promises' (2015) 26(2) *Journal of Democracy* 101, 103.

¹⁷⁹ Select Committee on Foreign Affairs, United Kingdom House of Commons, *Hong Kong*, House Paper No 10, Session 1999–2000 (2000) [145] <<http://perma.cc/XV4A-ZXRY>>.

¹⁸⁰ Michael C Davis, 'The *Basic Law*, Universal Suffrage and the Rule of Law in Hong Kong' (2015) 38 *Hastings International and Comparative Law Review* 275, 280.

¹⁸¹ Stephanie Nebehay, 'UN Rights Watchdog Calls for Open Elections in Hong Kong', *Reuters* (online), 23 October 2014 <<http://perma.cc/6PUW-CU8P>>. That this right applies to adult citizens is implied but this limitation is made explicit in India's definition of universal suffrage. Article 326 of the *Indian Constitution*

grants universal adult suffrage, according to which, every adult citizen is entitled to cast his/her vote in all state elections unless that citizen is 'convicted of certain criminal offences' or 'deemed unsound of mind'. As per this concept, the right to vote is not restricted by caste, race, sex, religion or financial status.

Shubhojit, *Universal Adult Suffrage* (24 September 2014) Elections.in <<http://perma.cc/8F5T-Z99E>>. This is also consistent with Hong Kong's existing legal voting age of 18. See Voter Registration — The Government of Hong Kong Special Administrative Region, *Frequently Asked Questions — Geographical Constituency* (20 July 2015) <<http://perma.cc/2NXU-CKXC>>: 'If you are a Hong Kong permanent resident aged 18 or above, and ordinarily reside in Hong Kong, you are eligible to sign up as geographical constituency elector'.

¹⁸² *VCLT* pt III s 3.

1 *The General Rule of Interpretation*

Article 31 states:

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 the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (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.
4. A special meaning shall be given to a term if it is established that the parties so intended.

(a) *Article 31(1): Terms of the Treaty*

Article 31(1) specifies that a treaty must be interpreted: (1) in good faith; (2) in accordance with the ordinary meaning to be given to the terms of the treaty; (3) in their context; and (4) in the light of the treaty's object and purpose. Per this roadmap, the first step in the analysis is to consider the relevant terms of the treaty.

For our purposes, the most pertinent policy language in the *Joint Declaration* is contained in art 3. It should be noted at the outset that, toward the beginning of art 3 (in sub-s (2)), the *Joint Declaration* makes clear that the HKSAR 'will be directly under the authority of the Central People's Government' of the PRC.¹⁸³ Nevertheless, it goes on to contextualise this language by suggesting its overall authority over Hong Kong will be over 'foreign and defence affairs which are the responsibility of the Central People's Government'.¹⁸⁴ Its plain language then avers that, with respect to internal matters, Hong Kong 'will enjoy a high degree of autonomy'.¹⁸⁵

¹⁸³ *Joint Declaration* art 3(2).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

Within this context, the following language is arguably relevant: (1) Hong Kong will be vested with executive, legislative and independent judicial power, including that of final adjudication (art 3(3)); (2) the laws currently in force in Hong Kong will remain essentially unchanged (art 3(3)); (3) the Chief Executive will be appointed on the basis of elections or consultations to be held locally (appointment to be made by the PRC subsequent to the elections/consultations) (art 3(4)); (4) the current social and economic systems in Hong Kong will remain unchanged, and so will the lifestyle (art 3(5)); rights and freedoms, including those of the person, speech, press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research and religious belief will be ensured by law in the HKSAR (art 3(5)); (5) Hong Kong will have independent finances (with the PRC not levying taxes on it) (art 3(8)); and (6) the maintenance of public order in Hong Kong will be the responsibility of the Hong Kong government (art 3(11)).¹⁸⁶

Pursuant to the approach outlined in *VCLT* art 31, this *Joint Declaration* art 3 'plain' language provides important clues about the parties' view of the electoral arrangement in Hong Kong post-handover. Most importantly, in light of the initial language in art 3(2), as Davis has noted, the *Declaration* 'guarantees Hong Kong a "high degree of autonomy, except in foreign and defense affairs"'.¹⁸⁷ This is reinforced by arts 3(8), which gives Hong Kong financial autonomy and art 3(11), which invests it with internal police powers.¹⁸⁸

Thus, Hong Kong is left to govern itself based on the nucleus of democratic values enshrined in arts 3(3) through 3(5). Those provisions stress, in plain language, that the social and economic system and 'lifestyle' of Hong Kong will not change post-handover and shall include rights and freedoms of the person, speech, press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research and religious belief.¹⁸⁹ The existence of these rights, within Hong Kong's existing common law framework, which was preserved, supports the notion of a corresponding or implied right to free and fair elections based on three straightforward, logical, historically consistent and interlinked interpreting mechanisms of the text's plain language: (1) the nature of liberal democracy; (2) the doctrine of implied rights; and (3) the tradition of the common law.

(i) *Doctrinal Coherence: The Nature of Liberal Democracy*

The long list of rights enumerated in arts 3(3), (4) and (5) of the *Joint Declaration* are the hallmarks of a liberal democracy, which includes core values such as 'freedom of speech, press and association' and also involves 'regular, fair and free elections'.¹⁹⁰ Harvard Law School scholars Robert Faris and Bruce

¹⁸⁶ Ibid arts 3(3)–(5), (8), (11).

¹⁸⁷ Davis, 'The *Basic Law*, Universal Suffrage and the Rule of Law in Hong Kong', above n 180, 281.

¹⁸⁸ *Joint Declaration* arts 3(8), (11).

¹⁸⁹ Ibid arts 3(3)–(5).

¹⁹⁰ Rosa Gomez Dierks, *Introduction to Globalization: Political and Economic Perspectives for the New Century* (Rowman & Littlefield, 2001) 272. See also Karon Monaghan, 'Constitutionalising Equality: New Horizons' [2008] *European Human Rights Law Review* 20, 22. Karon Monaghan notes that 'liberal democracy ... [is] underpinned by certain fundamental values and freedoms such as freedom of speech and includes the right to vote'.

Etling use an alternate term for ‘liberal democracy’ — ‘thick democracy’ — and they state it includes attributes consistent with those in the *Joint Declaration* art 3 rights cluster: the rule of law, elections and protection of individual and group rights such as freedom of speech and freedom of assembly.¹⁹¹ Within this list of ‘thick democracy’ characteristics, Faris and Etling include ‘universal suffrage’.¹⁹² Davis explains that, in general, ‘universal suffrage’ ‘implies free and fair elections with the right to vote *and run for office* (ie implying the right of civic nomination)’.¹⁹³

In more concentrated form, Randall Peerenboom describes ‘democracy’ as consisting of two elements encompassing the *Joint Declaration* art 3 attributes: the participatory process dimension (requiring sufficient freedom of association, speech and press to ensure that candidates can compete effectively in the electoral process) and the rule of law dimension (requiring legal institutions to ensure that these freedoms are realised and that elections are carried out fairly).¹⁹⁴ To this list, Peerenboom adds one other essential and interconnected attribute — the electoral dimension (requiring universal suffrage for the election of important political figures).¹⁹⁵

Finding a right to free and fair elections as consistent with liberal democracy here is grounded in reasoning by analogy. Pursuant to this form of logic, observed similarities between two or more entities under consideration permit an inference regarding an additional similarity between the entities not yet definitively established.¹⁹⁶ More specifically, as explained above, experts have perceived that certain rights — such as freedom of speech and association and free and fair elections — are respected individually and packaged collectively in polities they have come to identify as ‘liberal democracies’. If Hong Kong, like standardly defined liberal democracies, affords its citizens this base package of comparable rights and there is a question as to whether one of those rights (ie free and fair elections) is honoured in Hong Kong, reference to the analogous polities, which include that right, supports an affirmative conclusion.

From a legal perspective, this conclusion is further buttressed by Ronald Dworkin’s theory of ‘law as integrity’.¹⁹⁷ According to this theory, conclusions about law are true if they result from principles of justice and fairness that yield

¹⁹¹ Robert Faris and Bruce Etling, ‘Madison and the Smart Mob: The Promise and Limitations of the Internet for Democracy’ (2008) 32(2) *Fletcher Forum of World Affairs* 65, 72–3. They contrast this with ‘thin’ democracies in which there is the facade of elections but no meaningful civil and political rights undergirding them.

¹⁹² *Ibid* 72.

¹⁹³ Davis, ‘The *Basic Law*, Universal Suffrage and the Rule of Law in Hong Kong’, above n 180, 285 (emphasis added). Davis points out as well that ‘[t]he General Comment on Article 25 issued by the *ICCPR* Human Rights Committee ... emphasizes that universal suffrage should provide the voters a genuine choice in a free and fair election’: at 286.

¹⁹⁴ Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge, 2004) xix. Adopting Randall Peerenboom’s democracy elements, see also Hal Blanchard, ‘Constitutional Revisionism in the PRC: “Seeking Truth from Facts”’ (2005) 17 *Florida Journal of International Law* 365, 388 n 139.

¹⁹⁵ Peerenboom, above n 194.

¹⁹⁶ Robert B Huber and Alfred C Snider, *Influencing through Argument* (International Debate Education Association, 2nd ed, 2006) 151.

¹⁹⁷ Ronald M Dworkin, *Law’s Empire* (Belknap, 1986) 225.

the best holistic interpretation of the other parts of the legal system.¹⁹⁸ Here, the conclusion that the right to free and fair elections in Hong Kong would be included with the other inventory of rights found in liberal democracies provides the most holistically satisfying conclusion in light of the principles of justice and fairness flowing from the ensemble of the other enumerated civil and political rights.¹⁹⁹

(ii) *Doctrinal Logic: Implied Right*

Related to this, a right to universal suffrage can logically be read into the text of the *Joint Declaration* from a method of interpretation known as ‘implication from text and structure’ or implied rights.²⁰⁰ Pursuant to this doctrine, from a nucleus of existing rights, an associated right can be presumed that inferentially flows from the others. In Australia, significantly, this doctrine has been employed by the country’s High Court in the electoral context. In *Roach v Electoral Commissioner*,²⁰¹ the Australian High Court found that legislative measures to disqualify all prisoners from voting were invalid because they interfered with a right for all citizens to vote that was read into Australia’s constitution based on rights of representative government, participation in the life of the community and citizenship.²⁰² Of this case, Professor Anthony Gray observes:

It is worth noting that, unlike most other Western nations, Australia lacks a bill of rights. Perhaps as a counterweight to this, some judges in the High Court of Australia have found implied rights in the Constitution. In ... *Roach v Electoral Commissioner*, a majority of the High Court deduced, from sections of the Constitution that mandated that the Parliament (Australian Congress) be directly chosen by the people, something approaching a right to vote ... Chief Justice Gleeson noted that the franchise was critical to representative government and lay at the centre of participation in the life of the community and citizenship.²⁰³

Consistent with this, the Australian High Court has gleaned an implied right of ‘freedom of political communication’ that is derived from the explicit rights of representative and responsible government.²⁰⁴ Former Australian High Court Justice Michael Kirby has said of this implied right:

[It] is elementary lawyering that documents have implications as well as express textual statements. It doesn’t seem to me, looking as objectively as I can to what was done in the implied rights cases, to be a very large statement to say what the

¹⁹⁸ Maverick S M, ‘Ronald Dworkin: Law as Integrity’ on *Theory of Jurisprudence* (4 December 2007) <<http://perma.cc/3CWQ-Q8GV>>.

¹⁹⁹ Of course, this has some conceptual overlap with the notion of implied right that will be treated in the next section.

²⁰⁰ Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29, 32.

²⁰¹ (2007) 233 CLR 162.

²⁰² *Ibid* 174.

²⁰³ Anthony Gray, ‘Securing Felon’s Voting Rights in America’ (2014) 16 *Berkeley Journal of African-American Law and Policy* 3, 12–13.

²⁰⁴ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The High Court stated that the freedom of political communication is derived from specific textual provisions implementing certain institutions of representative and responsible government. See also Stone, above n 200, 33. Adrienne Stone notes that freedom of movement and association may possibly be implied from these provisions.

Court said. This was that, in a *Constitution* which is otherwise very sparse in its text (but has quite detailed provisions for how we elect the Parliament), it is necessary, in order that such elections should not be a charade, that there be an entitlement to have a proper and effective national debate of the issues relevant to an election ... Even accepting an implied constitutional right to free speech, I don't think I would have struck down the statutory limits on electoral advertising for a Parliament chosen by the people. But that's not the question. The question is whether you can draw implications.²⁰⁵

The existence of a right logically inferred from an existing core of other related rights has also been acknowledged in US constitutional law. For example, although privacy is considered a fundamental right, it is not explicitly recognised in the *United States Constitution*.²⁰⁶ As Steven Bennett notes:

The notion that individuals have a right to privacy is not a new development, yet, this is not a right expressly protected in the *US Constitution*. Instead, the right of privacy receives protection from various sources, including scattered clauses of the *Constitution* and its amendments, common law and various statutes.²⁰⁷

Indeed, in the landmark 1965 case of *Griswold v Connecticut*,²⁰⁸ the US Supreme Court found that, from a list of enumerated liberties in the *Bill of Rights* — the right of association, the prohibition against the quartering of soldiers, freedom from unreasonable searches and seizures and the right against self-incrimination — an implied right of privacy existed.²⁰⁹ In conducting this analysis, the majority opinion's author, Justice William Douglas, noted:

The association of people is not mentioned in the *Constitution* nor in the *Bill of Rights*. The right to educate a child in a school of the parents' choice — whether public or private or parochial — is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment [guaranteeing freedoms concerning religion, expression, assembly, and the right to petition] has been construed to include certain of those rights ...²¹⁰

Similarly, the facial language of the *Joint Declaration* includes a treasure trove of freedoms and rights for Hongkongers — a high degree of autonomy, executive, legislative and independent judicial power, including that of final adjudication, the election of a Chief Executive on the basis of elections/consultations to be held locally (and then approved by Beijing), the maintenance of the existing social and economic systems, as well as lifestyles, freedom of person, speech, the press, assembly, association, travel, movement, correspondence, strike, choice of occupation, academic research and religious

²⁰⁵ James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33 *Melbourne University Law Review* 1032, 1042.

²⁰⁶ See Michael S Smiley, 'Privacy: State Statute Prohibiting the Promotion of Obscene Devices Did Not Violate the Defendant's Privacy Rights as Provided under the *Louisiana Constitution*' (2001) 32 *Rutgers Law Journal* 1113, 1115: 'The right to privacy is not a right enumerated in the *United States Constitution*, rather it is a right that grew out of those rights promulgated in the *Bill of Rights*'.

²⁰⁷ Steven C Bennett, 'United States Approach to Privacy Protection in Litigation' (2011) 12 *Sedona Conference Journal* 173, 173.

²⁰⁸ *Griswold v Connecticut*, 381 US 479 (1965).

²⁰⁹ *Ibid* 484–5.

²¹⁰ *Ibid* 482.

belief. Beginning with the right to elect a Chief Executive and then framing it with autonomy, independent governmental power and a large set of enumerated liberties, by extension, one might perhaps reasonably read into the *Joint Declaration* an implied right of 'one person, one vote' via civic nomination.

(iii) *Doctrinal Maintenance: A Common Law Vestige*

As established previously, the *Joint Declaration* preserves Hong Kong's common law tradition, including an independent court system. A hallmark of the common law tradition is free and fair elections. As observed by John Hart:

Britain's legal and institutional preferences have been of the utmost significance in the development of modern liberal democracies internationally ... England's common law tradition has been taken up in many countries [while its] precedents ... sometimes go back as far as medieval England ... independent courts (ie independent and impartial judiciary) ... public promulgation of laws so that citizens might know what is reasonably expected of them ... free and fair elections ... the robust search for consensus and balance via representative assemblies ... freedom of the press and other media; a credible and transparent financial system ...²¹¹

Consistent with this, the common law as a bulwark against usurpation of voting rights has been recognised in British case law. In *Moohan v The Lord Advocate*,²¹² in the context of a challenge to restrictions on the right of prisoners to vote, the appellant argued that the 'common law had developed to recognise as a fundamental or constitutional right a principle of universal and equal suffrage'.²¹³ In response to this argument, Lord Hodge, although not recognising a common law right extending to convicts and emphasising the central role played by Parliament in extending rights, did recognise common law protection of the right to fair elections:

I have no difficulty in recognising the right to vote as a basic or constitutional right ... [I]n the unlikely event that a parliamentary majority abusively sought to entrench its power by curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful.²¹⁴

Once again, in light of Hong Kong retaining its common law moorings, free and fair elections (coextensive with 'universal suffrage'), a hallmark of the common law tradition and culture, and consistent with the other enumerated common law rights contained in the *Joint Declaration*, can be understood to belong to the overall cluster of liberties in arts 3(3) through 3(5). As the New York City Bar Association noted in analysing the universal suffrage guarantee via the Sino–British *Joint Declaration*:

Freedom of speech, freedom of the press, freedom of assembly and freedom of association are not abstract principles embodied in the [Sino–British *Joint Declaration* and] *Basic Law* for cosmetic purposes. Rather, they are the

²¹¹ John Hart, *The National CV of Britain 2012* (The National CV Group, 2012) [2.8] (emphasis added).

²¹² [2015] 1 AC 901.

²¹³ *Ibid* [32].

²¹⁴ *Ibid* [33], [35].

foundations for an informed public to choose those who would govern, assure transparency in government, and determine who would be accountable for their actions. To support these four freedoms but deny universal suffrage to the citizens of Hong Kong is to weaken or frustrate the attainment of a truly democratic society.²¹⁵

(b) *Article 31(2): Context through Preamble and Annexes*

Per art 31(2) of the *VCLT*, context, for the purpose of gleaning the text's plain meaning, consists of the text itself as well as its preamble and annexes. In the case of the Sino-British *Joint Declaration*, the preamble does reinforce the context as just analysed. It indicates that an overarching purpose of the *Joint Declaration* is 'the maintenance of the prosperity and stability of Hong Kong'.²¹⁶

Annex I attached to the *Joint Declaration*, titled 'Elaboration by the Government of the People's Republic of China of Its Basic Policies regarding Hong Kong', also fleshes out and reaffirms the points already made regarding context. It begins, in pt I, by supplementing Hong Kong's electoral rights. It specifies that '[t]he legislature of the Hong Kong Special Administrative Region shall be constituted by elections'.²¹⁷ It then adds that the 'executive authorities shall abide by the law and shall be accountable to the legislature'.²¹⁸

Part II of the annex confirms that the legislative power shall be vested in the legislature and that it may, on its own, enact laws consistent with the *Basic Law*. It also stresses that 'the laws previously in force in Hong Kong (ie the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained'.²¹⁹ Similarly, pt III corroborates that the judicial power shall be vested in the courts, which 'shall have the power of final adjudication' and operate 'independently and free from any interference and may "refer to precedents in other common law jurisdictions"'.²²⁰ Judges shall be appointed by the Chief Executive and shall be chosen 'by reference to their judicial qualities and may be recruited from other common law jurisdictions'.²²¹ Finally, a prosecuting authority 'shall control criminal prosecutions free from any interference'.²²² Part IV deals with civil servants and specifies that British citizens may be recruited/hired for employment and may also serve as advisers.²²³ Hong Kong's previous British system of employing public servants and the personnel policies applied to them, will be maintained.²²⁴

²¹⁵ Committee on International Human Rights and Committee on Asia Affairs, "One Person, One Vote": The US Electoral System and the Functional Constituencies Embodied in the Basic Law for the Election of the Chief Executive and of the Legislative Council' (Paper, The Association of the Bar of the City of New York) 4 <<http://perma.cc/U6DP-EGJQ>>.

²¹⁶ *Joint Declaration* preamble.

²¹⁷ *Elaboration by the Government of the People's Republic of China of Its Basic Policies regarding Hong Kong* art I.

²¹⁸ *Ibid.*

²¹⁹ *Ibid* art II.

²²⁰ *Ibid* art III.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid* art IV.

²²⁴ *Ibid.*

Part V stipulates maintenance of the systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure and auditing public accounts.²²⁵ Part VI assures continuation of 'the capitalist economic and trade systems previously practiced in Hong Kong'.²²⁶

Part X, in reference to the education system, declares:

The Hong Kong Special Administrative Region shall maintain the educational system previously practiced in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications. Institutions of all kinds, including those run by religious and community organisations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.²²⁷

Finally, and perhaps most importantly, the individual freedoms set forth in art 3(5) of the *Joint Declaration's* main text, are re-emphasised, elaborated on and expanded and include fleshed out guarantees of due process in the courts, religious freedoms and personal autonomy and privacy, as well as the continued applicability of the *ICCPR*:

The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region ... The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.

Every person shall have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, and to obtain judicial remedies. Every person shall have the right to challenge the actions of the executive in the courts.

Religious organisations and believers may maintain their relations with religious organisations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organisations may be continued. The relationship between religious organisations in the Hong Kong Special Administrative Region and those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

²²⁵ Ibid art V.

²²⁶ Ibid art VI.

²²⁷ Ibid art X.

The provisions of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* as applied to Hong Kong shall remain in force.²²⁸

The net effect of these provisions in the preamble (emphasising continued prosperity and stability for Hong Kong) and the annexes (especially annex I) is to reinforce the previous bare-text analysis regarding the nature of elections in light of the object and purpose of the treaty as revealed by the treaty terms themselves. There was a high degree of continuity from the British governing institutions in the colony (right down to education) to the new ones in the SAR. Within this context, it is reasonable to infer that, for purposes of internal governance, a largely self-contained, liberal democracy with traditional common law features would ‘elect’ its Chief Executive via a civic nominated one person, one vote election in the first instance (even with the possibility of a subsequent PRC veto).

(c) *Article 31(2)(b): Context through Subsequent Instrument*

In case of any possible objection that such a contextually reasonable interpretation does not link explicitly with the term ‘universal suffrage’, the *VCLT* permits reference to subsequent related instruments to fill in any interpretive gaps. Article 31(2)(b) instructs that

context for the purpose of the interpretation of a treaty shall comprise ... [a]ny instrument that was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.²²⁹

In this case, the *Basic Law* qualifies as such an instrument. First, as reflected in the UK’s parliamentary debates at the time of the Umbrella Movement protests, the British accept the *Basic Law* as an instrument related to the treaty. On 16 October 2014, in a debate related to the situation in Hong Kong, Lord Luce observed that the Chinese

developed the *Basic Law* of Hong Kong, which put flesh on the principles expressed in the [*Joint Declaration*].²³⁰ One ultimate aim of the *Basic Law* was to introduce universal suffrage for both the Chief Executive and the Legislative Council.²³¹

This sentiment was echoed by Lord Sassoon, who opined during the same debate that Hong Kong’s success post-handover ‘has been achieved ... within the formula of “one country, two systems”, set out in the *Joint Declaration* and translated into law through the *Basic Law* in 1990’.²³²

And, as observed by Lord Luce, art 45 of that instrument explicitly states that the Chief Executive shall be selected by ‘universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic

²²⁸ Ibid art XIII.

²²⁹ *VCLT* art 31(2)(b).

²³⁰ United Kingdom, *Parliamentary Debates*, House of Lords, 16 October 2014, vol 756, col 343 (Lord Luce).

²³¹ *Basic Law* arts 45, 68.

²³² United Kingdom, *Parliamentary Debates*, House of Lords, 16 October 2014, vol 756, col 348 (Lord Sassoon).

procedures'.²³³ This arguably has the effect of tying the implied 'free and fair elections' interpretation of the *Joint Declaration's* facial text with the 'universal suffrage' pledge of the *Basic Law*.²³⁴

Other provisions in the *Basic Law* bolster this interpretation. Article 25 stipulates that 'all Hong Kong residents shall be equal before the law' and art 26 definitively reifies every permanent resident's 'right to vote and the right to stand for election in accordance with law'.²³⁵ In light of these sections, one might infer that, all things being equal, every permanent resident could have the franchise right as well as the right to stand for election (ie arguably a right of civic nomination).²³⁶

And the two instruments (*Joint Declaration* and *Basic Law*), one explicitly calling for creation of the other, are thus mutually reinforcing in terms of contextually fleshing out the precise meaning of the electoral guarantee in each. As Alvin Cheung observes:

I argue that the Article 31(1) factors point towards an interpretation of the *Joint Declaration* that, contrary to Beijing's assertions, imposes substantive requirements on how Hong Kong's Chief Executive can be elected. First, any interpretation of 'elections' or 'consultation' that permits a purely formal process in which the Hong Kong electorate 'elects' a candidate pre-ordained by the Nominating Committee strips such terms of any reasonable meaning. Second, the *Joint Declaration* was intended to guarantee that Hong Kong enjoyed a 'high degree of autonomy,' except in foreign affairs and defence. Giving the Hong Kong public a genuine choice in electing its Chief Executive can only be consistent with that purpose, without necessarily undermining Chinese sovereignty. Third, to the extent that the *Basic Law* is acknowledged by both China and the UK to be subsequent practice in applying the *Joint Declaration*, there is agreement that elections should be by 'universal suffrage.' Fourth — and most importantly — the *Joint Declaration* also declares, in Chapter XIII of Annex I, that the provisions of the *ICCPR* applicable in Hong Kong shall remain in force after 1997.²³⁷

2 *Supplementary Means of Interpretation*

Pursuant to *VCLT* art 32:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

²³³ *Basic Law* art 45.

²³⁴ *Ibid.*

²³⁵ *Ibid* arts 25–6.

²³⁶ It could be argued that the *Basic Law* cannot be relied on in this manner because art 158 vests interpretation of the *Basic Law* to the NPCSC which in the *NPCSC's August Decision* interpreted the *Basic Law* in a manner to preclude the universal suffrage interpretation offered herein. However, this argument would be specious. As Lim points out, the *Basic Law* represents 'subsequent practice in the application of the treaty' by the parties per *VCLT* art 31. Thus, he notes: 'Calling the *Basic Law* such a "treaty" document removes the issue from the NPCSC's sole domestic, national authority and subjects any interpretive controversy to the methods of treaty, as opposed to Chinese interpretation': Lim, above n 6, 349–50.

²³⁷ See Cheung, 'Case for Democracy', above n 6. But that argument must be leavened by the fact that, per art 45 of the *Basic Law*, the Chief Executive must be selected by 'universal suffrage upon nomination by a broadly representative nominating committee'.

confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.²³⁸

Here, to the extent there remains ambiguity regarding the meaning of ‘universal suffrage’, art 32 permits recourse to the treaty’s preparatory work, or *travaux préparatoires*, as well as other related supplementary reference points. But there is a paucity of them. First, from the PRC perspective, the *travaux préparatoires* ‘are protected under secrecy laws of China’.²³⁹ From the British perspective, a ‘thirty-year rule’ pertaining to sensitive documents generated by the government blocked access until December 2014.²⁴⁰ Now they are starting to trickle out and are helpful in deriving further insight into the *Joint Declaration*’s relevant terms.

Basic Law Institute Chairman Alan Hoo has suggested that, in the *Joint Declaration* negotiations, Great Britain urged China to move toward one person, one vote as the logical progression of the UK’s electoral reforms already envisaged and then carried out in the 1990s. ‘Britain had provided the blueprint for the city’s political system, including contentious elements such as functional constituencies and gradual democratic reform’.²⁴¹

On the final day of negotiations between Prime Minister Thatcher and Premier Zhao Ziyang, the former brought up the issue of constitutional development and the UK’s view on this important aspect of the *Joint Declaration*. A recently declassified memo provides an insight into her conception of a movement toward universal suffrage:

We were anxious to give the people the experience which they needed to run their own administration after 1997 to a greater extent that they did now. We would go steadily and surely. It was important to build securely, brick by brick.²⁴²

In response to this statement, Premier Zhao Ziyang echoed the sentiments of the British, having been recorded to say ‘[we] wanted to see more and more Hong Kong people working in Government departments in Hong Kong and playing an even greater role than hitherto’.²⁴³

In this regard, it is important to take note of Britain’s making good on Thatcher’s statement during the negotiations and enacting democratisation

²³⁸ VCLT art 32.

²³⁹ Yash Ghai, ‘The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?’ (2007) 37 *Hong Kong Law Journal* 363, 387.

²⁴⁰ *Public Records Act* 1958 (UK) 6 and 7 Eliz 2, c 51, s 3.

²⁴¹ Cliff Buddle, ‘Britain “Must Disclose Deals Made with China before the Handover of Hong Kong”’, *South China Morning Post* (online), 24 December 2014 <<http://www.scmp.com/news/hong-kong/article/1668561/britain-must-disclose-deals-china-over-hong-kong-says-basic-law?page=all>>. Significantly, the Basic Law Institute is a PRC-supported organisation and Alan Hoo is a pro-Beijing commentator.

²⁴² ‘Record of Meeting between the Prime Minister and Premier Zhao Ziyang at the Great Hall of the People, Peking’ (Meeting Record, 19 December 1984) 2 [7] <<http://perma.cc/76L3-Z4L8>>.

²⁴³ *Ibid* 4 [14].

reforms during the Patten administration of Hong Kong in the 1990s.²⁴⁴ This resulted in electoral changes that accorded the franchise right to the entire working population of Hong Kong and expanded the voter rolls by millions of individual citizens.²⁴⁵ This has significance for contextualising treaty interpretation as *VCLT* art 31(3)(a) allows consideration of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. According to Wanglai Gao, ‘[t]he British skillfully inserted the clause that the legislature of Hong Kong be constituted by elections to the final agreement, paving the way for their reforms [under Patten] in Hong Kong afterwards’.²⁴⁶

In this regard, it is also worth noting that China itself was undergoing a period of relative political liberalisation.²⁴⁷ Indeed, during the mid-1980s (through 1988), Chinese leader Deng Xiaoping sanctioned a special project on political reform that was led by none other than Zhao Ziyang himself, China’s chief negotiator for, and signer of, the Sino–British *Joint Declaration*.²⁴⁸ At that time, Deng Xiaoping and Zhao Ziyang ‘believed that political reform must be implemented to overcome the political obstacles to economic reform’.²⁴⁹

Further, although China *later* opposed Patten’s electoral reforms in Hong Kong, those moves toward meaningful suffrage rights help contextualise Thatcher’s and Zhao Ziyang’s statements and Britain’s ultimate intentions during treaty negotiations. In other words, the value of considering Thatcher and Zhao Ziyang’s statements lies in gleaning intent at the time the treaty was concluded. That aids immeasurably in understanding the significance of terms that were the object of negotiation and included therein.²⁵⁰

²⁴⁴ Although it should be noted that, post-treaty negotiations and the Tiananmen Square crackdown, during the time of Patten’s governorship in the 1990s, the Chinese were opposed to British democracy initiatives in Hong Kong. See Tony Cheung and Joyce Ng, ‘China Was Very Much against Democracy in Hong Kong Even before Handover, Says Chris Patten’, *South China Morning Post* (online), 21 November 2014. <<http://www.scmp.com/news/hong-kong/article/1645156/chris-patten-urges-us-act-firmly-beijing-over-bad-behaviour-hong-kong?page=all>>. The article quotes Chris Patten as saying ‘[t]he Chinese were very much against this moving to greater democracy ... because they thought it might lead people in Hong Kong to think they will eventually be independent like, say, Singapore’.

²⁴⁵ Tai, above n 63, 56.

²⁴⁶ Gao, above n 69, 2.

²⁴⁷ See Lily Kuo, ‘Hong Kong’s Democracy Fight Shows How Everyone Was Wrong about Reforms in China’, *Quartz* (online), 1 September 2014 <<http://perma.cc/6S28-8QQD>>: ‘In the 1980s, when Deng Xiaoping first negotiated the terms of Hong Kong’s handover, debate within the communist party and among parts of the public about political reform was at a peak’.

²⁴⁸ Minxin Pei, ‘Political Reform in China: Leadership Differences and Convergence’ (Paper presented at the Conference on Chinese Leadership, Politics, and Policy, Washington DC, 2 November 2005) 3 <<http://perma.cc/QDR4-URVL>>.

²⁴⁹ *Ibid* 4. However, Deng Xiaoping’s desire for reform did not go to the extent of wanting multi-party democracy: at 3.

²⁵⁰ For purposes of treaty interpretation, alluding to the importance of contemporaneous intent during treaty negotiations, see David A Koplow, ‘Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties’ (1989) 137 *University of Pennsylvania Law Review* 1353, 1410 n 231.

In this respect, it is valuable to consider the individual circumstances of China's lead negotiator and signer of the *Joint Declaration*, Zhao Ziyang.²⁵¹ After conclusion of the Sino–British *Joint Declaration*, Zhao Ziyang's star was on the rise and he was promoted to the position of the party's General Secretary (while holding many other important and powerful positions in the PRC).²⁵² Zhao Ziyang was a liberal reformer who praised western parliamentary democracy and warned: 'If we don't move toward this goal, it will be impossible to resolve the abnormal conditions in China's market economy'.²⁵³ According to the *South China Morning Post*, 'Zhao originally believed that economic reform alone would solve China's many problems. But by the mid-1980s he began to realise that economic reform was sustainable only if it was accompanied by political reform'.²⁵⁴

As a result, former Hong Kong Governor David Wilson, a part of the British *Joint Declaration* negotiating team, stated that Zhao Ziyang's views as revealed during the negotiation process demonstrated that 'he did not view the development of representative government in Hong Kong before 1997 with a closed mind'.²⁵⁵ In fact, consistent with this perception, Zhao Ziyang's take on democratisation was that it had far-reaching international implications. According to Minxin Pei:

[The] liberals, represented in the late 1980s by Zhao Ziyang saw democracy as inevitable [and] understood that China was at a moral disadvantage internationally if it failed to carry out political reforms ... They viewed reform as necessary, not just because it would remove the obstacles to economic reform, but also because it might be a proactive strategic adjustment to meet the inevitable tide of democratization. Additionally, they believed that to make it work, political reform would have to go beyond the narrow scope of bureaucratic rationalization and extend into many sensitive areas.²⁵⁶

In fact, Zhao Ziyang's proposed reform package was relatively extensive and included the

rule of law; the separation of party and government functions; increasing transparency in the work of the party and state organs; reducing the party's

²⁵¹ Gary Cheung, 'Signing of *Joint Declaration* Masked Deep Rift between Britain and China over Hong Kong's Future', *South China Morning Post* (online), 30 December 2014 <<http://www.scmp.com/news/hong-kong/article/1670619/1984-sino-british-joint-declaration-sowed-seeds-current-discord?page=all>>.

²⁵² 'Son of Purged Reformer Zhao Ziyang Tells of China's "Shame", 25 Years after Tiananmen', *South China Morning Post* (online), 19 May 2014 <<http://www.scmp.com/news/china/article/1515862/son-purged-liberal-leader-zhao-ziyang-tells-chinas-shame-25-years-after?page=all>>. The article notes that, by the time of the Tiananmen Square incident, Zhao Ziyang had become General Secretary of the party, politburo member, member of the Politburo Standing Committee (the top decision-making body) and first Vice-Chairman of the Central Military Commission.

²⁵³ Tania Branigan, 'Secret Tiananmen Square Memoirs of Chinese Party Leader to Be Published', *The Guardian* (online), 14 May 2009 <<http://perma.cc/5GN4-QEXK>>.

²⁵⁴ See above n 252 and accompanying text.

²⁵⁵ Cheung, above n 251.

²⁵⁶ Pei, above n 248, 4–5.

involvement in society; allowing more Political participation by non-government groups; and allowing more press freedom.²⁵⁷

To the extent these views were filtered into the Sino–British negotiations process by osmosis, they are also consistent with Deng Xiaoping's statement that Hong Kong people should 'put their hearts at ease', which 'became a general theme emphasised frequently in the early transition period so as to encourage wider Hong Kong acceptance'.²⁵⁸

As a result, in June 1989, not surprisingly, Zhao Ziyang sympathised with the Tiananmen Square students seeking greater democracy in the PRC.²⁵⁹ He visited them at the protest site and publicly demonstrated support for their cause.²⁶⁰ But that ended up bringing about his political downfall by hardliners who manoeuvred behind the scenes to turn Deng Xiaoping against him.²⁶¹ Within three weeks of the Tiananmen crackdown, Zhao Ziyang was ousted from all his government posts.²⁶² And then he was placed under house arrest, a state of affairs that lasted until his death in 2005.²⁶³

Hence, China's lead negotiator for, and signer of, the Sino–British *Joint Declaration* was sympathetic toward parliamentary democracy for purposes of economic reform and political stabilisation. Within the context of *VCLT* art 32, this information provides a significant supplementary means of interpretation regarding the electoral provisions of the Sino–British *Joint Declaration*.

What happened after the Tiananmen Square massacre is equally germane, as it had an impact on strengthening the terms of Hong Kong's eventual democratisation parameters in the *Basic Law*. As observed by Bob Beatty:

²⁵⁷ 'Son of Purged Reformer Zhao Ziyang Tells of China's "Shame", 25 Years after Tiananmen', above n 252. That said, to the extent Zhao Ziyang may have flirted with the idea of British-style parliamentary democracy during this time period, it is clear that any current notions of democracy in China are much more narrow and focus on models of 'consultative democracy' and/or a Singapore-type restrictive variant. See Mushkat and Mushkat, 'Economic Growth, Democracy, the Rule of Law and China's Future', above n 46, 253:

All the components of this structure serve as the mainstay of liberal-democratic regimes, but the strong emphasis placed on social consultation — as distinct from political representation — in the China context is fairly unique from a comparative perspective. It may thus be argued that the institutional configuration envisioned will eventually display attributes of a 'consultative rule of law system'.

Stephan Ortmann and Mark R Thompson, 'China's Obsession with Singapore: Learning Authoritarian Modernity' (2014) *27 Pacific Review* 433, 435: 'The "Singapore model" as constructed by its Chinese students provides "lessons" about ideology and governance that strengthen one-party rule and is part of an ongoing process of "illiberal adaption" in China'.

²⁵⁸ Davis, 'The *Basic Law*, Universal Suffrage and the Rule of Law in Hong Kong', above n 180, 279 n 16.

²⁵⁹ 'Obituary: Zhao Ziyang', *BBC News* (online), 17 January 2005 <<http://perma.cc/XQT4-39CB>>.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Erik Eckholm, 'Secret Memoir Offers Look inside China's Politics', *The New York Times* (online), 14 May 2009 <<http://www.nytimes.com/2009/05/15/world/asia/15zhao.html>>. While under house arrest, Zhao Ziyang secretly recorded his memoirs. They were smuggled out of China and, after his death, were published in 2009. See Zhao Ziyang, *Prisoner of the State: The Secret Journal of Premier Zhao Ziyang* (Bao Pu, Renee Chiang and Adi Ignatius trans, Simon & Schuster, 2009).

The events in Tiananmen Square had a definite impact on the *Basic Law*, especially concerning the establishment of a path for democratization. While the mainland was hesitant to specify in the *Joint Declaration* how Hong Kong's governing institutions would be composed, the *Basic Law* went much further. After Tiananmen Square the brain drain from Hong Kong had become a flood, and Beijing was worried about the colony collapsing even before they took over. With the local Hong Kongers on the *Basic Law* Drafting Committee pushing hard, Beijing agreed to set out the timetable for adding directly elected seats to Legco and also enshrined in the law the goal of full universal suffrage for electing Legco and the CE. Thus, the decision by Deng to 'take back the square' on the night of June 4, 1989, had a real and profound impact on what would be Hong Kong's 'founding document', the *Basic Law*.²⁶⁴

This point was underscored not long after, when Lu Pin, China's top official on Hong Kong matters publicly stated in March 1993: 'How Hong Kong develops its democracy in the future is completely within the sphere of the autonomy of Hong Kong. The Central government will not interfere'.²⁶⁵

E Treaty Reservations

Another key to understanding the universal suffrage guarantee lies in determining the applicability of art 25 of the *ICCPR*. In particular, art 25(b) provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.²⁶⁶

Moreover, as will be recalled, art 39 of the *Basic Law* provides that:

The provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.²⁶⁷

However, upon ratifying the *ICCPR* in 1976, when Hong Kong was still a British colony, the UK entered the following reservation: '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'.²⁶⁸

²⁶⁴ Bob Beatty, *Democracy, Asian Values and Hong Kong: Evaluating Political Elite Beliefs* (Praeger, 2003) 21. And it appears these concessions had the desired effect based on 'the reduced flow of emigrants out of Hong Kong': Davis, 'The *Basic Law*, Universal Suffrage and the Rule of Law in Hong Kong', above n 180, 282.

²⁶⁵ 'Britain's Betrayal of Hong Kong: London Fails to Call Beijing on Its Broken Promises of Autonomy', *The Wall Street Journal* (online), 23 September 2014.

²⁶⁶ *ICCPR* art 25.

²⁶⁷ *Basic Law* art 39.

²⁶⁸ See above n 98 and accompanying text.

In the law of treaties, reservations serve to limit the scope of a state's consent to be bound by the compact. According to art 2(1)(d) of the *VCLT*:

1. For the purposes of the present *Convention* ...
 - (d) 'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, or for accomplishing any other act with respect to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State ...²⁶⁹

So the question arises: does the reservation exclude or modify voting rights for Hongkongers? China contends that it does since it renders inapplicable the provisions of *ICCPR* art 25(b).²⁷⁰ But that assertion does not withstand scrutiny.

First, it is arguable that the reservation was never valid in the first place. Article 19 of the *VCLT* specifies that any reservation that is incompatible with the object and purpose of the treaty will be considered invalid.²⁷¹ The International Law Commission ('ILC') has formulated a test for whether reservations in a multilateral human rights treaty are compatible with the object and purpose of the treaty. In s 3.1.5.6 ('Reservations to Treaties Containing Numerous Interdependent Rights and Obligations') to its 2011 *Guide to Practice on Reservations to Treaties*, the ILC advises:

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that *interdependence* as well as the *importance that the provision* to which the reservation relates has *within the general tenor* of the treaty, and the *extent of the impact that the reservation has on the treaty*.²⁷²

Consistent with this article's treaty text interpretation *supra*, the *ICCPR* art 25(b) franchise has been found to be a core right inextricably linked to the *ICCPR*'s nucleus of other indispensable rights such that its exclusion via reservation would exert a disproportionate negative impact. According to Professor Yash Ghai, '[t]he disapplication of the rights to franchise and an elected legislature and executive strikes at the roots of the *Covenant*, for it negates the very basis of democracy on which other rights may be said to exist'.²⁷³

This analysis has been validated in practice. In particular, Kuwait made a reservation to art 25(b) so as to deprive women of the franchise right. The UN

²⁶⁹ *VCLT* art 2(1)(d).

²⁷⁰ Alvin Y H Cheung, *An Introduction to the Chief Executive Electoral Reform Debate* (25 July 2014) Human Rights in China <<http://perma.cc/PJ3Z-YAR6>>: 'The Hong Kong and Beijing governments continue to rely on Britain's reservation to art 25 of the *ICCPR* made on Hong Kong's behalf in 1976, the effect of which was to exempt Britain from an obligation to hold elections for Hong Kong's legislature and Governor'.

²⁷¹ *VCLT* art 19.

²⁷² International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Third Session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (26 April–3 June and 4 July–12 August 2011) 383 [3.1.5.6] (emphasis added).

²⁷³ Yash Ghai, 'Derogations and Limitations in the Hong Kong *Bill of Rights*' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993) 161, 166.

Human Rights Committee, which, as noted previously, is responsible for interpreting and enforcing the *ICCPR*, found this reservation inimical to the *ICCPR*'s *raison d'être*:

[G]iven the Committee's general comment on reservations, and the clear requirements of articles 2, 3, 4 [providing for equality among groups, right of effective remedy, and non-derogation] and 26 [equal protection and right of non-discrimination] of the *Covenant*, any reservation in respect of article 25 was not compatible with the object and purpose of the *Covenant*.²⁷⁴

What does that mean as far as the Hong Kong reservation's legal status? Although *VCLT* art 20 is silent as to the consequences of an impermissible reservation, there is a body of jurisprudence to the effect that such reservations to human rights treaties can be excised from the reserving state's consent to be bound.²⁷⁵ The leading case for this proposition is *Belilos v Switzerland*,²⁷⁶ where the European Court of Human Rights ruled that Switzerland's reservation to art 6 (right to fair trial) of the *European Convention on Human Rights*²⁷⁷ was invalid as a reservation of a 'general character' with respect to a core right.²⁷⁸ Similarly, the UK's arguably invalid reservation for Hong Kong with respect to art 25(b) of the *ICCPR* might be considered severed here.

Nevertheless, even if the reservation were considered valid at first, a strong argument can be made that it is no longer. First, the *ICCPR*'s enforcement body has indicated that the reservation no longer applies. In its *1995 Concluding Observations* in response to a periodic report submitted by Hong Kong, the Human Rights Committee stated:

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*.²⁷⁹

In other words, the Human Rights Committee has found that the reservation in relation to legislators lapsed once Hong Kong conducted legislative elections.²⁸⁰ It then follows that 'the same reasoning applies to Chief Executive elections'.²⁸¹ Cheung elaborates:

Although the *Joint Declaration* on its face permits the Chief Executive to be selected by means other than elections, its provisions must be interpreted in light of the conduct of the parties, as well as current rules of international law. Under

²⁷⁴ Human Rights Committee, *Summary Record of the 1852nd Meeting*, 69th sess, UN Doc CCPR/C/SR.1852 (24 July 2000) [27].

²⁷⁵ Hall, above n 176, 101.

²⁷⁶ (1988) 132 Eur Court HR (ser A) ('*Belilos*').

²⁷⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

²⁷⁸ *Belilos* (1988) 132 Eur Court HR (ser A), [57]–[60].

²⁷⁹ Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, UN Doc CCPR/C/79/Add.57 (9 November 1995) 4 [19].

²⁸⁰ See Cheung, *An Introduction*, above n 270.

²⁸¹ *Ibid.*

such rules, the word 'elections' in the *Joint Declaration* must be interpreted as having a substantive meaning; an 'election' in which only one person voted would have no meaning at all. As Beijing has chosen to appoint the Chief Executive after elections, it is bound to hold such elections in accordance with international standards. Beijing's 'bottom line' — its requirement that candidates for Chief Executive be pre-filtered for pliant political views — is inconsistent with these standards.²⁸²

Then again, the implied termination of the original reservation might be explained in larger, more conceptual terms in light of the changed structural arrangement between the UK and Hong Kong. By way of analogy, international law with respect to treaty-created organisations allows for the implicit modification of treaty terms when changed circumstances effect new institutional arrangements and practices.²⁸³ In the same vein, art 62 of the *VCLT* allows for termination of treaties in cases of fundamental changes of circumstance.²⁸⁴ Although these two principles of international law do not explicitly pertain to reservations, their logic may apply thereto by extension. In particular, the UK's ratification of the *ICCPR* in 1976 was during a time when Hong Kong was its colonial possession without any local electoral arrangements in place for Hong Kong citizens. It was in that context that the UK entered its reservation regarding art 25(b).

Over two decades later, circumstances had radically changed. Hong Kong was no longer a British colony, it had established a local electoral scheme and it was put under the sovereignty of China, which, pursuant to the *Joint Declaration* and the *Basic Law*, gave it significant internal autonomy outside the areas of foreign affairs and national defence. Using general principles of international law, there is an argument that a fundamental change in circumstances resulted in the implied expiry or lapse of the UK's 1976 reservation to *ICCPR* art 25(b). The reservation was meant to apply to a different time and a different place. Logic, sound policy and analogous provisions of international law compel the conclusion that the reservation, even if valid to begin with, is no longer.

V REVISITING THE LAW OF TREATIES IN LIGHT OF THE SINO–BRITISH *JOINT DECLARATION*

Beyond gaining better insights into the current Hong Kong election crisis, there is much deeper, conceptual value in understanding the relationship between the *Joint Declaration* and the law of treaties. In all of history, the transfer of Hong Kong (along with Macao, which went back to China from Portugal)²⁸⁵ represents a unique phenomenon both in terms of international relations and law.

²⁸² Ibid.

²⁸³ See Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* 1909, 1935. Armin von Bogdandy notes that initial treaty terms can be implicitly modified by deviations in the state of affairs governing when the treaty was first entered into.

²⁸⁴ *VCLT* art 62. When the change of circumstances was not foreseen by the parties and the existence of the circumstances that changed was an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.

²⁸⁵ Lo, above n 70, 454–5: 'A similar formula was applied to the nearby Portuguese colony of Macao on its return to Chinese sovereignty in 1999'.

The list of treaties arising out of or dealing with decolonisation is long.²⁸⁶ So is the list involving ordinary cessions of territory.²⁸⁷ These situations have involved naked land grabs by more powerful countries or mere transactions for value.

Hong Kong's case is unique given the awkward fusion of decolonisation and recolonisation involving states with two widely divergent political systems attempting to forge a short-term hybrid civic institution for the transferred possession. As a result, it might behove any analysis of this situation to reconsider certain traditional tenets of treaty law. In particular, issues related to the conceptual scope of treaties, the ancient principle of *pacta sunt servanda*, treaty interpretation and treaty reservations should perhaps be re-examined.

A Expanding the 'Hard Law' Lexicon?

One of the ways the unusual Hong Kong handover scenario challenges traditional treaty law relates to the very notion of what we consider to be a 'treaty'. First, the name and form of the very instrument itself, the Sino–British *Joint Declaration* suggests a conceptual grey zone reflective of China's apparent ambivalence toward obligations to the UK. In particular, the record indicates that China did not approach the document as a traditional treaty. Instruments known as 'declarations' are routinely used in international law but they are considered 'soft law' and do not have binding effect in the same way treaties do.²⁸⁸ They often consist of multilateral statements of principle that may crystallise into customary international law but do not create concrete and enforceable rights and duties.²⁸⁹

It appears Beijing may have initially preferred the 'joint declaration' nomenclature to achieve a more nuanced approach to the arrangement so as to have greater flexibility post-handover. As Melissa Boey explains:

In contrast to 'hard law', which consists of legally enforceable obligations and commitments — namely, the forms of laws aforementioned which are applied by

²⁸⁶ See generally Rothermund, above n 22. Rothermund describes numerous treaties effecting decolonisation, including those for India, Indonesia, Iraq, Jordan and Palau.

²⁸⁷ See, eg, *Cession of Louisiana*, United States–France, signed 30 April 1803, 8 Stat 200 (entered into force 21 October 1803) (memorialising the 'Louisiana Purchase' from France to the United States); *Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo)*, United States–Mexico, signed 2 February 1848, 9 Stat 922 (entered into force 30 May 1848) (as part of treaty ending the Mexican–American War of 1846–48, effecting the cession of modern day southwest United States from Mexico); *Cession of Alaska*, United States–Russia, signed 30 March 1867, 15 Stat 539 (entered into force 20 June 1867).

²⁸⁸ Lillian Aponte Miranda, 'Indigenous Peoples as International Lawmakers' (2010) 32 *University of Pennsylvania Journal of International Law* 203, 228. Lillian Miranda explains that 'declarations' are considered 'soft law' that is non-binding as opposed to treaties that are 'hard law' with binding obligations.

²⁸⁹ Pierre-Michel Fontaine, 'The 1951 Convention and the 1967 Protocol relating to the Status of Refugees: Evolution and Relevance for Today' (2007) 2 *Intercultural Human Rights Law Review* 149, 170 n 69:

United Nations Declarations, which constitute soft law, are of course not binding per se, but they do carry some weight and often evolve into conventions or they may, under certain circumstances, rise to the level of customary international law, eg *Universal Declaration of Human Rights*.

the ICJ — ‘soft law’ describes the much wider realm of promises made by states ... that fall short of full scale treaties, such as ... joint declarations ...²⁹⁰

This theory of China’s view of the instrument is bolstered by its post-negotiation stance toward the document. It is a routine practice, post-World War II, to register treaties with the UN.²⁹¹ But evincing China’s ambivalent views as to whether the *Joint Declaration* was a traditional treaty, the record suggests that Deng Xiaoping was at first reluctant to register the instrument with the UN. In the end, however, Britain won on this point:

The British government did succeed in persuading Beijing to register the joint declaration at the United Nations. Howe told [Chinese Foreign Minister Wu Xueqian] that it was an accepted practice among states to register international agreements at the UN ... The agreement was eventually registered at the UN by the Chinese and British governments in June 1985. A source familiar with the matter said Deng gave the green light to the UN registration.²⁹²

And so, in the end, an unusual document, the *Joint Declaration*, not necessarily viewed as a standard convention by China, took on the characteristics of a typical treaty. Although the *VCLT* states that ‘treaty’ means ‘an international agreement concluded between States in written form and governed by international law ... whatever its particular designation’,²⁹³ as stated previously, a ‘declaration’ has traditionally been a soft law instrument. But the Hong Kong handover negotiations pushed the law of treaties envelope and a ‘declaration’ became a hard law instrument.

To underscore this point, no other ‘joint declaration’ ‘treaties’ have been found in the historical record prior to the Sino–British version in 1984.²⁹⁴ In the wake of the *Joint Declaration*, however, ‘declarations’ have been treated as the basis of bilateral ‘treaties’. In 1987, for instance, a ‘Joint Declaration’ was signed by Portugal and Hong Kong that stipulated Macao’s reversion to China at midnight on 19 December 1999.²⁹⁵ Similarly, in 1992, the two states on the peninsula adjacent to Manchuria entered into the *Joint Declaration of South and*

²⁹⁰ Melissa Boey, ‘Regulating “Bankerspace”: Challenging the Legitimacy of the Basel Accords as Soft Law’ (2014) 87 *Southern California Law Review Postscript* 74, 99 <<http://perma.cc/2KXP-M2XE>>. See also Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90 *California Law Review* 1823, 1879. Andrew Guzman defines soft law as ‘promises made by states through instruments that fall short of full-scale treaties, such as ... joint declarations’.

²⁹¹ Daniel C K Chow, ‘Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan’s Direct Participation in International Environmental Law Treaties’ (1995) 14 *Stanford Environmental Law Journal* 256, 276 n 120: ‘Since the end of World War II, more than 30 000 treaties have been registered with the United Nations’.

²⁹² Cheung, above n 251.

²⁹³ *VCLT* art 2.

²⁹⁴ For example, in 1956, Japan and the Soviet Union signed the *Soviet–Japanese Joint Declaration*, which was not a treaty, merely stating the parties’ positions toward one another following the cessation of World War II hostilities (albeit well after the fact). See Hiroshi Kimura, *The Kurillian Knot: A History of Japanese–Russian Border Negotiations* (Mark Ealey trans, Stanford University Press, 2008) 75: ‘Although the [*Soviet–Japanese Joint Declaration*] may not have led to the conclusion of a peace treaty, it marked the official end of hostilities and paved the way for normal diplomatic relations through the establishment of embassies and consulates in each country’.

²⁹⁵ Rothermund, above n 22, 238.

North Korea on the Denuclearization of the Korean Peninsula.²⁹⁶ The non-governmental organisation Nuclear Threat Initiative describes this instrument as follows: ‘The *Joint Declaration* was a *treaty* in which South and North Korea agreed not to possess, produce, or use nuclear weapons, and prohibited uranium enrichment and plutonium reprocessing’.²⁹⁷

B A More Elastic Version of *Pacta Sunt Servanda*?

According to art 26 of the *VCLT* ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’.²⁹⁸ This is the principle of *pacta sunt servanda*, whose good faith obligation means performance of treaty duties mechanically and superficially, strictly according to the letter, will not do.²⁹⁹ ‘The principle of good faith rather requires that a treaty is performed according to its spirit and in an honest, fair and reasonable manner’.³⁰⁰ On the other hand, the primary function of good faith is ‘to allow the decision-making authority a fair degree of freedom of action in interpreting and applying the terms of the treaty obligation in a concrete case’.³⁰¹

In the case of the Hong Kong handover, the *Joint Declaration* and its universal suffrage guarantee, this tension within *pacta sunt servanda* raises novel issues. According to the subject matter of this treaty, for the first time in history a ‘special administrative region’ is established with a distinct political system slated to last for a set period of time. What does that mean in this context? The beneficiary of the agreement is the former coloniser which had deprived Hong Kong citizens of franchise rights for most of the colony’s life but introduced such rights toward the end. In that context, what is the extent of China’s obligation to recognise ‘in good faith’ the extent of any ‘universal’ suffrage right? And if good faith is to be measured from the perspective of a communist dictatorship and a mercantilist de-coloniser trying to create a *sui generis* version of democracy compatible with historical context and political reality, the challenge is immense. And that is why *pacta sunt servanda* must be treated with a greater degree of flexibility in this unusual treaty environment and treaty interpretation becomes all the more important.

C A Re-Sequencing Option for the Treaty Interpretation Process?

To situate the treaty interpretation issues arising in connection with the Sino–British *Joint Declaration*, it is helpful to classify the traditional schools of treaty interpretation and then the categories of treaties to which they apply. The

²⁹⁶ *Joint Declaration on the Denuclearization of the Korean Peninsula*, Democratic People’s Republic of Korea–Republic of Korea, signed 20 January 1992, 33 ILM 569 (entered into force 19 February 1992).

²⁹⁷ Nuclear Threat Initiative, *Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula* <<http://perma.cc/5SWK-NRVC>> (emphasis added).

²⁹⁸ *VCLT* art 26.

²⁹⁹ Frank A Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (IBFD Publications BV, 2004) 125.

³⁰⁰ *Ibid.*

³⁰¹ Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge University Press, 1989) 176.

great international law publicist Sir Gerald Fitzmaurice recognised three separate classifications of treaty interpretation: (1) the 'textual' school; (2) the 'intentions of the parties' school; and (3) the 'teleological school'.³⁰²

The prime object of the textual school is to establish what the text means according to the apparent signification of its terms.³⁰³ Fitzmaurice notes that 'the approach is therefore through the study and analysis of the text'.³⁰⁴ With respect to the 'intentions' school, the singular goal is to divine the intentions of the parties and then give them effect.³⁰⁵ For the 'teleological' school, the general purpose of the treaty is what counts. It is as though the treaty takes on an existence of its own and is endowed with a unique mission — apart from what may have been the preliminary wishes of the drafters. As Fitzmaurice notes:

The main object is to establish this general purpose, and construe the particular clauses in the light of it: hence it is such matters as the general tenor and atmosphere of the treaty, the circumstances in which it was made, the place it has come to have in international life, which for this school indicate the approach to interpretation.³⁰⁶

The traditional preference in international law, embodied in *VCLT* art 31, is for treaty interpretation to begin using the textual approach.³⁰⁷ In other words, reference to external factors, such as the parties' intent or the treaty's purpose as gleaned through supplementary means, can only be considered secondarily.³⁰⁸ Moreover, the *VCLT* specifies in art 32 that extra-textual analysis is permissible only to confirm the meaning derived from art 31 analysis or if art 31 analysis leads to ambiguity or manifestly absurd or unreasonable results.³⁰⁹ It is a step taken only after initial textual exegesis.

And it is an interpretation sequence applied to every kind of treaty, regardless of subject matter. But it is worth noting that treaties and/or treaty provisions may be generally classified into three distinct categories: contractual, legislative (or lawmaking) and constitutional.³¹⁰ 'Contractual' treaties entail exchanges of goods, services, or territory that are 'similar to a private contract' and 'enumerate the mutual obligations of the parties that are to be undertaken'.³¹¹ Lawmaking

³⁰² G G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Year Book of International Law* 1, 1–2.

³⁰³ *Ibid* 2.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid* 1.

³⁰⁶ *Ibid* 2.

³⁰⁷ *VCLT* art 31. See also Kenneth J Vandeveld, 'Treaty Interpretation from a Negotiator's Perspective' (1988) 21 *Vanderbilt Journal of Transnational Law* 281, 294: 'In explaining its preference for the textual approach in what would become the *Vienna Convention on the Law of Treaties*, the International Law Commission emphasized that the starting point of treaty interpretation is the text rather than the intent of the parties'.

³⁰⁸ *VCLT* art 31.

³⁰⁹ *Ibid* art 32.

³¹⁰ Nigel D White, 'Interpretation of Non-Proliferation Treaties' in Daniel H Joyner and Marco Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge University Press, 2012) 87, 117. Nigel White describes the 'different types of treaties — constitutional, law-making and contractual'.

³¹¹ Joseph F St Cyr, 'The International Jurisprudence and Politics of Hazardous Substances: Managing a Global Dilemma' (2004) 12 *Buffalo Environmental Law Journal* 90, 97.

treaties are concerned with the establishment of legal norms and regimes to which treaty parties agree to confine themselves.³¹² ‘Constitutional’ treaties establish governing institutions — the *Charter of the United Nations* being the most prominent example.³¹³

So how does all this relate to the Sino–British *Joint Declaration*? First, with respect to the treaty interpretation sequence, it is submitted that the traditional formula is problematic. This is so because the underlying circumstances surrounding negotiation of the treaty were so inherently confusing from the outset: two innately incompatible political systems trying to cobble together a 50-year quasi-democracy in the context of decolonisation followed by, what is in effect, recolonisation.³¹⁴ The fundamental legal DNA of the whole enterprise had a schizophrenic quality from the start.³¹⁵

How, then, could the traditional interpretation sequence be reformulated to work more effectively in such a scenario? This article posits that a two-step process would be most effective. First, one may assume the context of a litigation or alternative dispute resolution forum (arbitration/mediation/conciliation) — the most likely context for resolving interpretation issues.³¹⁶ In cases of inherently confusing negotiation environments or postures, such as that of the *Joint Declaration*, a procedural mechanism could be introduced allowing parties to ask the adjudicator/mediator to take judicial notice of such.³¹⁷ Then, if notice is taken, the mechanism would permit the parties to request modification of the interpretation sequence.³¹⁸

That is where the different categories of treaty provision become relevant. The progression could be rearranged as a function of the provision-category at issue — constitutional, legislative or contractual. In the case of the Sino–British *Joint Declaration*, its various provisions correspond to all three treaty categories: it is constitutional given the establishment of the SAR with each of its governmental organs;³¹⁹ it is legislative in light of the rights and duties

³¹² David H Ott, *Public International Law in the Modern World* (Pitman, 1987) 23.

³¹³ John Lunstroth, ‘Linking Virtue and Justice: Aristotle on Melian Dialogue’ (2006) 12 *International Legal Theory* 99, 134.

³¹⁴ See Gao, above n 69, 2. Wanglai Gao refers to the Sino–British negotiations postures as a ‘puzzle’. Bei Cai, ‘Promoting a Post-Cold War Agenda: The Role of the US Media in Shaping Competing Discourses over Democratic Development in Pre-Transfer Hong Kong’ (Paper presented at the Fourth Annual Kent State Symposium on Democracy, Kent State University, 2003) <<http://perma.cc/ETW9-GXA3>>: ‘[Hong] Kong’s transfer was orchestrated by those with competing ideologies, and nation-state political and economic interests all intertwined’.

³¹⁵ Referring to various shifts in China’s position, see Gao, above n 69, 2.

³¹⁶ Sam Foster Halabi, ‘The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in the Post-*Erie* Era’ (2012) 23 *Duke Journal of Comparative and International Law* 63, 81. Sam Halabi observes that treaty interpretation issues are commonplace in litigation. Kelley Connolly, ‘Say What You Mean: Improved Drafting Resources as a Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties’ (2007) 40 *Vanderbilt Journal of Transnational Law* 1579, 1599: ‘Treaty interpretation is an inherent aspect of the arbitration process’.

³¹⁷ Noting the benefit of pre-adjudication hearings to determine relevant factors, see Sandra Guerra Thompson, ‘Judicial Gatekeeping of Police-Generated Witness Testimony’ (2012) 102 *Journal of Criminal Law and Criminology* 329, 390.

³¹⁸ *Ibid.* The procedure of pre-adjudication consideration of relevant facts can focus the adjudicator on pertinent issues and render the proceeding more efficient.

³¹⁹ See *Joint Declaration* art 3(3).

prescribed, including the specific provisions concerning the economic system and civil rights, among others;³²⁰ and it is contractual since there is a territorial handover.³²¹

It stands to reason that the most foundational provisions of the treaty — the constitutional ones — should be the initial object of interpretation.³²² Logically, from such a ground zero underpinning, interpretation of the other provisions that build upon it — beginning with legislative and then contractual (in terms of descending foundational order and complexity) — could more readily be accomplished.³²³ A similarly cogent starting point, in terms of treaty interpretation schools, would be the intent of the parties.³²⁴ From there, it stands to reason that one could more readily glean the general purpose of the treaty (pursuant to the ‘teleological school’).³²⁵ Then, the naked text itself could be read in a more meaningful, efficient and context-rich manner (as prescribed by the ‘textual’ school).

With respect to the Sino–British *Joint Declaration*, this treaty category/interpretation-method matrix provides a much more efficient and logical path to finding and understanding the document’s arguable universal suffrage guarantee. If one begins with the intent of the parties, the lowest common denominator is democracy in support of capitalism (as opposed to democracy for democracy’s sake; as already established, Zhao Ziyang viewed it as a necessary component to a smoothly functioning capitalistic system). During treaty negotiations, both Thatcher and Zhao Ziyang spoke about more inclusion of Hongkongers in the governance of the country.³²⁶ And the constitutional provisions bear this out — they stipulate a nearly autonomous, internally self-governing Hong Kong with the exception of foreign policy and defence matters.³²⁷

From this, the ‘general purpose’ of the treaty can be more easily deduced.³²⁸ As demonstrated previously, internally, mainland China was moving toward a purely capitalistic system with incidental political reform to support economic stabilisation and efficiency.³²⁹ Britain was looking to bestow upon her former colony a guarantee of certain core civic prerogatives enjoyed by the mother country and was willing to relinquish sovereignty in exchange for that.³³⁰ Thus,

³²⁰ Ibid art.

³²¹ Ibid art 3(6).

³²² Noting the primacy of constitutions over legislative acts, see Joseph P Bauer, ‘Shedding Light on Shady Grove: Further Reflections on the *Erie* Doctrine from a Conflicts Perspective’ (2011) 86 *Notre Dame Law Review* 939, 944.

³²³ Ibid 944–6.

³²⁴ Observing that evidence of specific intention can ‘illuminate the general purpose and are consistent with other applications of it’, see William N Eskridge, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) 217.

³²⁵ Ibid.

³²⁶ See above nn 242–243 and accompanying text.

³²⁷ *Basic Law* arts 2, 13–14.

³²⁸ Eskridge, above n 324, 217.

³²⁹ See above nn 46–54; 253–254 and accompanying text.

³³⁰ See above nn 69–70 and accompanying text.

from a teleological perspective, the treaty aimed to impose a legal structure enabling a profit-driven polity with *complementary* democratic characteristics.³³¹

With this general purpose in mind, along with the intentions of the parties undergirding it, the legislative portions of the treaty emphasising economic continuation but providing for extensive civil liberties, economic, educational and local-police-power autonomy make more sense.³³² And, an arguably logical extension of this is civic nominated one person, one vote universal suffrage. Finally, that guarantee is ultimately leavened by the contractual provisions, stipulating the territorial handover, which call for Hong Kong to be under China's sovereignty. This completes the analysis by logically supporting the idea that China retains ultimate veto power over any candidate chosen through that electoral process.

Thus, the *Joint Declaration* and the universal suffrage guarantee cause us to consider conceptually expanding the parameters of treaty analysis by introducing a possible alternate sequence of interpretation in cases of intrinsically confusing negotiation circumstances. This would be consistent with the evolution of the law of treaty interpretation. Nigel White explains: 'An overview of the history of Western schools of thought regarding interpretation reveals that there has been a general move away from the text as the sole source of information'.³³³

As has been demonstrated, while the traditional arts 31–2 sequence may ultimately yield the same interpretive result regarding universal suffrage, the re-sequencing option can instil greater degrees of interpretive coherence and efficiency given an extremely complex and challenging negotiations environment. Allowing re-sequencing as an option thus makes good sense from both a resources and policy perspective.

D *Implied Treaty Reservation Terminations?*

As noted previously, the Sino–British *Joint Declaration* involves another unusual situation — assessing, post-decolonisation, the status of a colonial overlord's reservation to a multilateral treaty made in reference to specific contemporaneous conditions in the colony. With a change in sovereign control and different conditions on the ground, should that reservation continue to apply to the former colony? Many commentators have pointed to the Human Rights Committee's observations that the reservation to *ICCPR* art 25(b) (providing for elections by universal and equal suffrage) is now inapplicable in light of the creation of elective legislative and executive offices in Hong Kong (when there had been none at the time of the reservations).³³⁴ But reliance on such a narrow

³³¹ See Albert Hung Yee Chen, 'The Executive Authorities and the Legislature in the Political Structure of the Hong Kong SAR' [2009] (4) *Academic Journal of 'One Country, Two Systems'* 80, 80 <http://www.ipm.edu.mo/cntfiles/upload/docs/research/common/1country_2systems/academic_eng/issue4/09.pdf>. Albert Chen points out that the *Joint Declaration's* democracy guarantees were included so that 'the political structure should be conducive to economic prosperity ... and facilitate the development of Hong Kong's capitalist economy'.

³³² See above nn 219–232 and accompanying text.

³³³ White, above n 310, 90.

³³⁴ See, eg, Human Rights Watch, *China: Keep Commitment to Hong Kong Democracy* (26 November 2013) <<http://perma.cc/N77C-KHX4>>.

ground could mean missing a golden opportunity to expand the law of treaties on more fundamental, conceptual grounds.

Existing law provides for *implied modification of specific treaty terms* in situations of modified institutional arrangements and/or practices and wholesale *termination of an entire treaty* in cases of fundamental change of circumstances.³³⁵ What the Hong Kong situation points out is the need for *implied termination of specific treaty provisions* in such cases. Here, implied termination ought to apply to the UK's 1976 reservation, on Hong Kong's behalf, to art 25(b) of the *ICCPR*. The institution of electoral offices is only one of the factors to be considered. Other evidence of fundamental change of circumstances includes a change in Hong Kong's status from 'colony' under the UK to 'SAR' under the PRC and the application of the *Basic Law* to Hong Kong, which contains a guarantee of universal suffrage.³³⁶

VI CONCLUSION

It might be tempting to consider the Hong Kong handover as an entirely unique situation that may never be replicated. But consideration of the international law landscape reveals otherwise. Most obviously, there is Macao, which finds itself in a mirror situation to that of Hong Kong.³³⁷ And some have observed that the Macanese may want the same kind of civic nominated universal suffrage as Hong Kong. As David Gitter notes:

China's other special administrative region is not immune to the allure of democratic concepts coming from across the Pearl River Estuary. As Hong Kong's influence supplements new homegrown political and labor activism, the stage may be set for Macau's own grassroots democracy movement ... The political influence of Hong Kong is also apparent. The city's ongoing political unrest seems to have emboldened many Macau residents to take up the mantle of universal suffrage as well.³³⁸

Moreover, even if the exact Hong Kong/Macao SAR scenario may never occur again, the basic model with variations could certainly arise in the future. In other words, the specific sequence of decolonisation, handover, and creation of an 'administrative region' is not required to implicate the issues discussed in this article.

However, the UN Human Rights Committee maintained that the British government's reservation referred specifically to the introduction of elections, but once they were held they should conform to article 25 of the *covenant*. Since the chief executive is now selected by elections, the principles guaranteed in article 25 apply.

³³⁵ See von Bogdandy, above n 283 (discussing implied modification of treaty terms); *VCLT* art 62 (providing for treaty termination in case of fundamental change of circumstances).

³³⁶ *Basic Law* art 45.

³³⁷ See Shannon Tiezzi, 'Macao: The Poster Child for "One Country, Two Systems"', *The Diplomat* (online), 20 December 2014 <<http://perma.cc/XZ7J-MSUZ>>. Shannon Tiezzi indicates that Macao is a Special Administrative Region and has a 'one country, two systems' policy modelled on Hong Kong.

³³⁸ David Gitter, 'After Hong Kong, Macau?', *The Diplomat* (online), 11 October 2014 <<http://perma.cc/ES68-FSXE>>.

For example, there remains to be a final determination of the status of Western Sahara.³³⁹ While Spain has technically divested itself of the colony, its relationship with the territory may still have legal consequences vis-à-vis any assertion of dominion and attendant treaty negotiations with Morocco and/or Algeria, both of which have divergent political systems.³⁴⁰ Moreover, quite significantly, one of the key sticking points in the dispute between the competing countries over sovereignty is voting rights of Western Sahara residents.³⁴¹

And even closer to Hong Kong geographically and politically, although not involving a decolonisation scenario per se, is the case of Taiwan.³⁴² Chinese efforts at reunification with the island country, if they were to reach fruition, would certainly implicate comparably thorny treaty negotiations and likely involve the US, which has upheld defence guarantees for Taiwan as legally required by the US' *Taiwan Relations Act*.³⁴³ Consequently, many of the same issues regarding fusion of divergent political systems, creation of a special administrative region, and applicability of previous treaties would confront the parties. And so the lessons learned from the Hong Kong handover could apply with equal force.

Those lessons include adopting a more supple approach toward treatment of treaty form and continuance in force, *pacta sunt servanda*, as well as treaty interpretation and reservations. Of these, by far, the most significant legal concept with respect to the universal suffrage guarantee in Hong Kong is treaty interpretation.

In that regard, in lieu of the one-size-fits-all *VCLT* arts 31–2 sequence, which begins with strict word-based analysis of the entire treaty, a more refined approach in cases of inherently confusing negotiations postures is preferable. This would entail including the option of preliminary extrinsic assessment (encompassing the 'intention' and 'teleological' approaches), along with consideration of the types of provisions (constitutional and legislative) in advance of a blunderbuss textual exegesis.

In the case of Hong Kong and the franchise right at the time of the *Joint Declaration*, this involves recognising a convergence toward 'one person, one vote' during the sunset of British rule as well as Beijing's trajectory toward liberalisation on the mainland. Then, with respect to the treaty text itself, a fulsome consideration of the full panoply of civil and political rights in tandem with the free and fair franchise guarantee, along with the textual promises of

³³⁹ See 'Western Sahara Profile', *BBC News* (online), 7 January 2014 <<http://perma.cc/2XP3-SY8P>>. This details the complex territorial claims and status of the Western Sahara territory.

³⁴⁰ See European Forum for Democracy and Solidarity, *Morocco* (4 June 2014) <<http://perma.cc/7T9Y-NCT9>>. It describes Morocco's political system as 'carefully evolving from a strongly centralised monarchy to a parliamentary system'. European Forum for Democracy and Solidarity, *Algeria* (25 August 2014) <<http://perma.cc/JEV2-4WKP>>. It describes Algeria's political system as an authoritarian regime.

³⁴¹ 'Western Sahara Profile', above n 339.

³⁴² See Parris H Chang, 'Can Hu "Do Something Big" on Taiwan?', *The Diplomat* (online), 19 July 2012 <<http://perma.cc/6YG7-3JKD>>. Parris Chang explains the complex dynamics in potential scenarios of China–Taiwan reunification.

³⁴³ *Ibid*; *To Help Maintain Peace, Security, and Stability in the Western Pacific and to Promote the Foreign Policy of the United States by Authorizing the Continuation of Commercial, Cultural, and Other Relations between the People of the United States and the People on Taiwan, and for Other Purposes*, Pub L No 96-8, 93 Stat 14 (1979).

significant internal autonomy, lead to the logical and historically-sound doctrinal conclusion that the *Joint Declaration* includes a universal suffrage right. And that right, as defined by the UN Human Rights Committee, arguably includes civic nomination of candidates. This conclusion is then bolstered by reference to the subsequent acts of the parties, including the language in the *Basic Law* and the *travaux préparatoires*.

This supplementary focus also homes in on China's chief negotiator, Zhao Ziyang, a champion of liberal democracy who saw it as the key to stabilising and growing a successful capitalist economy. As Chris Yeung has noted, and Zhao Ziyang seemed to understand, '[f]reedom of choice ... is an integral part of the values of freewheeling, capitalist Hong Kong'.³⁴⁴

Also to be considered, in this regard, is the impact of the Tiananmen Square massacres on the drafting of the *Basic Law*. Far from chilling China's democratic impulses vis-à-vis the drafting of Hong Kong's mini-constitution, it intensified them as Beijing sought to stem the apparent brain drain from Hong Kong following that bloody crackdown. When seen in this light, the PRC's current regressive stance seems at odds with the Sino-British *Joint Declaration* and its by-product, the *Basic Law*.

The universal suffrage argument is also reinforced by an implied termination of the British reservation to *ICCPR* art 25(b) for Hong Kong. Thus, the treaty text, evidence extrinsic to it and the application of the *ICCPR* voting rights provision present a very compelling argument for *Joint Declaration*-mandated implementation of a universal suffrage regime starting in 2017. Zhao Ziyang seems to have had it right all those years ago — a liberal political regime in Hong Kong promotes rule of law and predictability, decreases corruption and leads to a flourishing economy.

At the same time, a liberal interpretation regime in the law of treaties gives us insight into the true negotiations posture between the UK and China as it hammered out the *Joint Declaration*. The textual-to-extrinsic analysis trajectory may ultimately get us to the same result. But extrinsic-to-textual, in this case, is more efficient and thorough. Either way, whatever the sequence, close scrutiny of the Sino-British *Joint Declaration* and what preceded and followed it arguably leads to the inexorable conclusion that Hongkongers are *legally* entitled to *nominate* and elect their candidates for Chief Executive fairly and freely.

Corrupt 19th century machine politician and Tammany Hall leader William Tweed (also known as 'Boss Tweed'), who at one point single-handedly controlled electoral politics in New York City, supposedly quipped: 'I don't care who does the electing, so long as I get to do the nominating'.³⁴⁵ Lawrence Lessig has wryly observed that Beijing's 2014 proposal for 'universal suffrage' in Hong Kong is 'Tweedism updated'.³⁴⁶ Tweed's stranglehold on New York City voting outcomes was eventually exposed in the press and brought to an end.³⁴⁷ Perhaps returning to the root source of 'one country, two systems' — the Sino-British

³⁴⁴ Yeung, above n 116.

³⁴⁵ See Lawrence Lessig, 'We Should Be Protesting, Too', *Huffington Post* (online), 1 October 2014 <<http://perma.cc/6CY5-44KW>>.

³⁴⁶ *Ibid.*

³⁴⁷ James L Aucoin, *The Evolution of American Investigative Journalism* (University of Missouri Press, 2007) 27.

Joint Declaration — can similarly help expose the folly and cynical revisionism of Beijing's proposed electoral scheme in Hong Kong and thereby contribute toward its demise.