SPOTLIGHT CLE: THE HONG KONG ELECTION CRISIS AND INTERNATIONAL LAW

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I. INTRODUCTION

From September through December 2014, protests erupted in Hong Kong over the meaning of "universal suffrage" in connection with Hong Kong's upcoming 2017 election of a Chief Executive. In 2007, the People's Republic of China, the suzerain that governs over the "Hong Kong Special Administrative Region" ("SAR") promised Hong Kong voters "direct elections" for the 2017 Chief Executive contest in accord with Articles 45 and 68 of Hong Kong's "Basic Law," the SAR's mini-constitution. In August 2014, however, the Standing Committee of China's National People's Congress decided that voters will be restricted to choosing the Chief Executive from a list of two or three candidates selected by a Beijing-friendly nominating committee. Hong Kong democracy activists, concerned the nominating committee would screen out candidates not strictly towing Beijing's party line, interpret universal suffrage as allowing all eligible Hong Kong voters to pick the candidate of their choosing in accordance with Article 26 of the Basic Law. Throughout the controversy, in supporting their respective positions, both sides have focused almost exclusively on the provisions of the Basic Law, which provides a fifty-year guarantee of "one country, two systems," i.e., a high degree of SAR autonomy, including its own
legal system and fundamental civil liberties such as freedom of speech and assembly.\footnote{5}

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.\footnote{6} The 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.\footnote{7} The Chinese have argued that the terms of the Declaration, even if considered a "treaty," terminated upon the July 1997 transfer and effective date of the Basic Law.\footnote{8} And even if that were not the case, certain experts have opined that the direct language of the Declaration is too vague to offer meaningful interpretive assistance.\footnote{9} Some have pointed to the UK's exclusion of Hong Kong from Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR), which provides for universal suffrage.\footnote{10} But do these arguments withstand scrutiny when analysed in terms of the Vienna Convention on the Law of Treaties?

More importantly, is the current iteration of treaty law up to the task of analyzing this \textit{sui generis} situation? In other words, can it provide answers to the numerous legal issues raised by a colonizer-State relinquishing sovereignty of a territory to another State overlord while stipulating a political system different from the new overlord and meant to last fifty years? What kind of language would be used to describe this unusual political situation – especially if both the relinquishing State and receiving State were undergoing political transitions both internally and externally? Further, if reservations to multilateral human rights treaties had been made by the original colonizing State, would those reservations carry over post-decolonization in this unusual context? In order to answer all these questions,

\footnote{5} See Alvin Y.H. Cheung, "The International Law Case for Democracy in Hong Kong," Opinion Juris (Oct. 3, 2014, 1:52 PM), http://opiniojuris.org/2014/10/03/international-law-case-democracy-hong-kong/ (noting 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.") [hereinafter "Case for Democracy"].

\footnote{6} See \textit{id.}


\footnote{8} Grace Tsoi, "Does China Think the Sino-British Joint Declaration Is Void?," Foreign Policy, (Dec. 18, 2014), available at http://foreignpolicy.com/2014/12/18/does-china-think-the-sino-british-joint-declaration-is-void/ ("[T]he Chinese side signalled 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.").

\footnote{9} "Ever Promised Democracy," \textit{supra} note 2 ("The documents are ambiguous and can be interpreted to favour either side's argument . . . .").

\footnote{10} \textit{Id.} ("Crucially, however, [the United Kingdom] carved out Article 25 of the ICCPR and said it did not apply to Hong Kong.").
this Article suggests that certain reconceptualizations of the law of treaties might be in order.

But if new approaches to treaty law involve piercing the veil of the treaty text itself, what is revealed about the narrative of the Hong Kong handover? Many accounts stress that, in planning for the handover, the Chinese were concerned exclusively with allowing the perpetuation of a capitalist economic system in Hong Kong, not promoting democracy. But is it possible the Chinese viewed democracy as a necessary corollary to effective functioning of a capitalist economy? Furthermore, as the treaty was being implemented, what impact did the 1989 Tiananmen Square massacres have on the incorporation of democratic features into Hong Kong’s political system? Did it stymie pro-democracy drafters or aid them? This Article will answer these questions related to both the law of treaties and the narrative of the Hong Kong handover.

It will proceed in five parts. Part Two will consider the history of British-Hong Kong relations from the Opium Wars of the nineteenth 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 Three 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 Four will engage in an analysis of the potential arguments put forth by both sides of the dispute regarding the Sino-British 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 Declaration is still in full force and effect.

Moreover, pursuant to the law of treaties, textual examination of the treaty’s terms reasonably reveals an intention to provide for free and fair elections. However, to the extent the Declaration’s language is considered ambiguous, examining subsequent practice and the travaux préparatoires strongly suggests the Chinese and British envisioned universal suffrage as stipulated by Article 25(b) of the ICCPR. And the British 1976 ICCPR reservation for Hong Kong does not block application of Article 25(b). In particular, the reservation arguably expired with the implementation of the Basic Law and the institution of elective office for the legislature and chief executive. Similarly, the reservation would not appear to have survived the changed relationship between the UK and Hong Kong. Finally, Part Five will examine whether reconsidering the Joint Declaration in the context of Hong Kong’s election crisis might entail a reconceptualization of certain bedrock tenets of the law of treaties, including the rules regarding interpretation and reservations.

In the end, even on the basis of traditional treaty law’s pure textual interpretation, given logic and doctrinal constancy, the Article concludes that a right of universal suffrage may be read into the Sino-British Joint Declaration. Nevertheless, in light of Hong Kong’s unique situation and the possibility of others like it, the Article

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11 Kaiming Rong, "Four-Point Reflection on Firm Confidence in 'One Country, Two Systems'”, Acad. J. "One Country, Two Systems" Issue 4, at 19, http://www.ipm.edu.mo/ntfiles/upload/docs/research/common/1country_2systems/academic_eng/issue4/03.pdf (last visited May 27, 2015) (noting 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).
considers the inadequacies of and challenges to existing treaty law and proposes some fixes. For the first time in history a "joint declaration," typically treated as a "soft law" instrument lacking enforcement power, was treated as "hard law" and should now be commonly accepted as a "treaty." The doctrine of *pacta sunt servanda*, which requires that treaties be performed in good faith, needs added flexibility when States with conflicting political systems try to forge a finite-period new system with hybrid features.

Additionally, the traditional paradigm for interpreting treaties—which requires reliance on textual terms first—should perhaps permit preliminary consideration of political system incompatibilities of the negotiating parties in cases of new State or quasi-new-State creation. And treaty reservations should not be considered perpetual absent explicit termination as current law provides. Instead, in situations of fundamental change of circumstance, an implied expiration of reservations should be read into treaty law.

Finally, considering the more flexible interpretive criteria proposed for treaty law, a new perspective on the Hong Kong takeover becomes possible. The traditional narrative posits that China was focused exclusively or primarily on economic considerations when negotiating a new system for Hong Kong under its possession.12 While this may be true, looking into the extrinsic circumstances surrounding the 1984 treaty's text suggests that the Chinese viewed liberal parliamentary democracy, which Britain was working toward as it decolonized, as a way of stabilizing Hong Kong's economic prosperity.

Thus, rather than seeing it as an impediment, it seems to have seen democracy as a necessary corollary. Moreover, the 1989 Tiananmen Square incident, rather than entrenching anti-democratic tendencies toward Hong Kong within the Chinese leadership, further drew the Chinese toward democracy as a way of preventing brain drain within the former British colony. Thus, traditional textual analysis, along with a reconceptualization of both the law of treaties and the Hong Kong handover narrative, gives teeth to the argument that the Sino-British Joint Declaration envisioned universal suffrage for Hong Kong's citizens.

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 British 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.13 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,

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12 See id. at 20-21.

by 1842, had prevailed through superiority of modern arms. The Chinese were forced to sign the Treaty of Nanjing (and the Supplementary Treaty of the Bogue), which forced them to open to British trade and allow residence at the ports of Jinmen, Fuzhou, Ningbo and Shanghai. In addition, China was obligated to cede Hong Kong to Great Britain.

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

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. This time, an infuriated Britain and France occupied Beijing and burned the imperial summer palace. The Chinese were then forced to sign the Beijing Conventions of 1860, which obligated them to reaffirm the terms of the Treaty of Tianjin as well as make additional concessions.

B. UK Acquisition of the New Territories

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

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14 Id. at 571-72.


16 Id.

17 Id.

18 Id.

19 Id.

20 Andrew Yanne & Gillis Heller, Signs of a Colonial Era 60 (2009).

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. Unfortunately for Britain, by the middle of the twentieth century, its Empire was merely a shadow of its former self, depleted both by war and self-determination demands from its colonies. In contrast, China had been unified by the Chinese Communist Party (CCP), which established the People's Republic of China (PRC) and dragged the country into the modern age. This gave it power to negotiate with the British as the lease was set to terminate.

C. China's Liberalization

After Mao Zedong's death in 1976, Deng Xiaoping eventually took power and began a program of economic and political reform. The Communist Party ultimately loosened central control over the lives of Chinese citizens and the communes were replaced by private land leases. This period of liberalization was in full bloom by the time the Sino-British Joint Declaration was signed in December 1984. And it would culminate in the student protests that led to the massacres in Tiananmen Square. Thereafter, China clamped down on political liberalization while still promoting capitalist economic growth.

D. British Democratization of Hong Kong Pre-Handover

During British rule over Hong Kong prior to 1991, the constitutional order, reflected in Letters Patent and Royal Instruction, provided for an appointed British Governor, appointed Legislative and Executive Councils, a fairly autonomous career civil service, and an independent judiciary. This governing arrangement, emanating from a mother country with firmly rooted democratic traditions, had "substantial common law protection of rights, freedom and the rule of law." 

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23 "Deng Xiaoping Dies," supra note 22.

24 See "Liberal Hero," supra note 22.

25 Id.

26 Id.


28 Id.
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 and amended Hong Kong's mini-Constitution, then in force, the "Letters Patent," to incorporate the civil and political rights enshrined in the ICCPR. Michael Davis notes that "[T]hese reforms created considerable opportunity for the Hong Kong courts to gain experience with judicial review under a written bill of rights."

Additionally, 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. These reforms, ostensibly moving toward universal suffrage, included lowering the voting age from twenty-one to eighteen, 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, including agriculture and fisheries, textiles and garments, manufacturing, and hotels and catering. This meant including the entire working population of Hong Kong and expanding the electoral base by millions of individual citizen voters. The PRC threatened to unseat this new legislature upon taking control of Hong Kong in 1997.


A. The Sino-British Joint Declaration

Due to this professed hostility by the PRC, 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 entirely inconsistent with life in the PRC. Therefore, 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

29 Id. at 165
30 Id.
31 Raymond Wacks, The New Legal Order in Hong Kong 56 (1999)
32 Id.
33 Id.
34 Id. at 57.
35 Davis, "Politics v. Economics," supra note 27, at 188 ("By contrast, Hong Kong with a system that is usually described as . . . laissez faire, has historically had . . . little intervention on the economic front and a high degree of political and personal freedom.").
would not accept anything less than the complete and unequivocal return of the entirety of Hong Kong.\textsuperscript{36} 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 and the hand-over, along with those concessions, resulted in the 1984 Sino-British Joint Declaration (Joint Declaration).\textsuperscript{37}

1. An Overview of the Joint Declaration.

The Joint Declaration itself is not very long – only a preamble and eight paragraphs. 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 fifty years lands that had been granted by the British Hong Kong government). Also attached to the Joint Declaration are two Memoranda (one for each government) dealing with issues of citizenship.

2. Substantive Rights under the Joint Declaration.

For purposes of understanding substantive rights, the key provision of the Joint Declaration is Paragraph 3, which sets forth the basic policies of the People's Republic of China regarding Hong Kong in twelve paragraphs: (1) establishment of the Special Administrative Region (SAR); (2) the SAR will be directly under the authority of the PRC but will enjoy a high degree of autonomy, except in foreign and defense affairs; (3) the SAR will 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, the second one of critical importance for this paper -- (a) the SAR will be composed of local residents; (b) the chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally (emphasis added); and (c) principal officials will be nominated by the chief executive of the SAR for appointment by the PRC; (5) another vital provision in terms of the SAR's governance, in three key subsections – (a) the social and economic systems in place in Hong Kong will remain unchanged, and so will the life-style; (b) rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the SAR; (c) private property, ownership of enterprises, legitimate right of

\textsuperscript{36} Record of a Conversation between the Prime Minister and Premier Zhao Ziyang at the Great Hall of the People (Sept. 23, 1982 at 9:00am).

\textsuperscript{37} Joint Declaration, \textit{supra} note 7.
inheritance and foreign investment will be protected by law; (6) the SAR will retain the status of a free port and a separate customs territory; (7) the SAR will retain the status of an international financial center and the HK dollar will continue to circulate and be used; (8) the SAR will have independent finances without the PRC levying taxes on its residents; (9) the SAR may establish mutually beneficial economic relations with the United Kingdom and other countries; (10) the SAR may 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 will be the responsibility of the SAR Government; and (12) these policies will be incorporated into a Basic Law that will remain unchanged for fifty years after the transfer of sovereignty from the UK to the PRC.38

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 April 4, 1990.39 It would implement the terms of the Joint Declaration in terms of establishing the Hong Kong SAR for fifty years and the related "one country, two systems" policy.40 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.41


The Chief Executive is head of the HKSAR, and, working with an Administration consisting of twelve policy bureaus and sixty-one 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.42 The Chief Executive is assisted in these functions by the Executive Council, comprising thirty members, of which half are "non-official members." They are appointed by the Chief Executive and assist him in policy making and submission of bills and subsidiary legislation to the Legislative Council. The latter is Hong Kong's law-making body, half of whose seventy members are elected to four-year terms by geographical constituencies and the other half by occupation-based constituencies. The Judiciary, which administers justice in

38 Id.
39 Basic Law, supra note 4.
40 Id. at art. 5.
41 Id. at art. 2.
42 See id. at art. 48.
the SAR and consists of Magistrate Courts, District Courts, a High Court and a Court of Final Appeal, is independent and remains within the common law system.

2. The Initial Post-Handover Period.

Pursuant to the terms of the Joint Declaration, Hong Kong was handed over to China on July 1, 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. But it weathered the storm and the PRC essentially honored its "one country, two systems" autonomy commitments enshrined in the Joint Declaration (and then incorporated into the Basic Law).

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." It goes on to stipulate that "the 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." 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."45

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

The mechanics for selecting the Chief Executive are set out in Annex I of the Basic Law. It decrees that the Chief Executive shall be elected by a broadly representative Election Committee appointed by the PRC and consisting of 800 members 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 government bodies in Beijing, including Hong Kong deputies to the National People's Congress. According to Annex I, Chief Executive

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43 Id. at art. 45.
44 Id.
45 Id.
46 Id. at Annex I(2).
candidates may be nominated jointly by not less than one hundred members of the Election Committee. Each member may nominate only one candidate. 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.

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 1997 (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, saying 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.

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

At the same time, Article 39 of the Basic Law states:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international 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.

Article 25(b) of the ICCPR stipulates that "[e]very citizen shall have the right and the opportunity . . . without unreasonable

47 Id. at Annex I(4)
48 Id.
49 Id. at Annex I(5).
50 Id. at Annex I(1).
51 Id. at Annex I(7).
52 Id. at art. 39.
restrictions . . . to vote . . . by universal and equal suffrage . . . "53
It should be noted, however, that when ratifying the ICCPR, the
UK entered the following reservation: "The Government of the
United Kingdom reserves 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."54 But it
was not clear whether that reservation was incorporated into the
Basic Law.

C. The 2014 Election Crisis

In sum, based on Basic Law Article 45, which contemplates eventual
universal suffrage for selection of Hong Kong's Chief Executive, Annex I,
which ostensibly permits amendment of the selection method to
accommodate universal suffrage, as well as Article 39 seemingly
incorporating ICCPR Article 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 Article
68 and Annex II, respectively).


In 2007, consistent with these Basic Law provisions, Hong Kong
residents were looking to the PRC to sanction selection procedure
changes to achieve universal suffrage by 2012. Unfortunately,
their aspirations were not realized. 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
National People's Congress Standing Committee (NPCSC) in
December of that year.55 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 (i.e., in
2020).56

53 International Covenant on Civil & Political Rights, art. 25(b), Dec. 19, 1966, 999 U.N.T.S. 171
[hereinafter ICCPR].

54 Ratification of the ICCPR by the United Kingdom of Great Britain and Northern Ireland,
deposited May 20, 1976, 1007 UNTS 394 [hereinafter Ratification].

55 Peter T.Y. Cheung, "Intergovernmental Relations between Mainland China and the Hong Kong
SAR," in Public Administration in Southeast Asia: Thailand, Philippines, Malaysia, Hong Kong,
and Macao 272 (Evan M. Berman ed., 2011).

56 Id.
2. Beijing’s 2014 "White Paper”.

In the interim, the people of Hong Kong wondered how the government would implement a system that would ensure election by universal suffrage. In 2014 they found out. In June, ominous signs came from Beijing. Soon after Hong Kongers held a candlelight vigil commemorating the twenty-fifth 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." 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."58

3. The NPC’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 August 31, 2014 concerning the 2016 Legislative Council Elections and 2017 Chief Executive Elections," the Standing Committee of the National People’s Congress laid out the details regarding the suffrage issue.59

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." 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." 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 for the office of Chief Executive.

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58 Id.


60 Id.

61 Id.
candidates. Each candidate must receive the support of more than half of the members of the nominating committee. After popular election of one of the nominated candidates, the Chief Executive-elect "will have to be appointed by the Central People's Government."

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. 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. 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, but it could easily be used to arbitrarily bar candidates not to Beijing's liking. As if this were not enough, other intrusive filtering mechanisms include a 1,200 member nominating committee, 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 Decision sparked widespread protests that began on September 28, 2014. At first the protests were targeted at Hong Kong's financial district and collectively dubbed the "Occupy Central Movement." But they spontaneously spread to other parts of Hong Kong and morphed into the non-choreographed "Umbrella Movement" (based on the protesters carrying umbrellas, which became their symbol).

In response, police used tear gas, pepper spray, and batons in an effort to break up the protests. That tactic backfired, however, as it inspired thousands of additional citizens to mass in opposition at other large neighborhoods around Hong Kong, most prominently in Mong Kok. The Umbrella Movement attracted international attention and was featured prominently on the front pages of news sources around the globe. When Beijing refused to budge, the protesters dug in and set up encampments, living in tents and erecting make-shift, canvas-covered gathering places with tables to write about and engage in discussions about democracy. They demanded that the PRC permit authentic universal suffrage according to "international standards" for the 2017 chief executive

62 Id.
63 Id.
64 Id.
election. 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.

Throughout the Umbrella Movement there was discussion about the legal support for implementation of universal suffrage. The Basic Law referred to it but provided no definition or clear answers. Even the National People's Congress acknowledged the "divergent views" regarding the Basic Law provisions related to universal suffrage. So perhaps the singular focus on the Basic Law itself was misplaced. As a result, looking to the source of the Basic Law – the Joint Declaration -- would seem more logical. In fact, Hong Kong jurisprudence is supportive of such an approach. In Ng Ka Ling v. Director of Immigration, 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. 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 text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context.

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

65 See id.


67 Id. (emphasis added).
international law, in particular the law of treaties, should be consulted. In considering this body of law, five general areas of treaty law 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 is governed by conventional and customary international law. With respect to the former, the exclusive source is the Vienna Convention on the Law of Treaties (VCLT), which was concluded in 1969 and entered into force in 1980. The VCLT largely occupies the field, but parts of customary international law not incorporated into the VCLT still exist independently. The UK and China are both currently party to the VCLT although China did not accede to it until September 3, 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 Declaration constitutes a treaty). Nevertheless, post-1980, even Treaty relations between and among non-VCLT parties are governed by the VCLT as it is reflective of customary international law. So 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 Article 2 of the VCLT, "treaty" means "an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation."

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70 Dietz, supra note 68, at 154 n.103.


73 Vienna Convention on the Law of Treaties, art. 2.1(a), May 23, 1969, 1115 U.N.T.S. 331 (emphasis added) [hereinafter VCLT].
Therefore, 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 Article 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).74 Per Article 6 of the Vienna Convention, "every State possesses capacity to conclude treaties."75 Second, the text of the document itself indicates it was an agreement between the PRC and the UK. In particular, Paragraph 8 avers that "This Joint Declaration and its Annexes shall be equally binding."76 Third, even though all States have the ability to conclude treaties, Article 7 of the VCLT mandates that those who sign the treaty on behalf of the State possess "full powers" (a document evidencing authorization to conclude a treaty on behalf of a State) or be "Heads of State" or "Heads of Government."77 Here, the document was signed by "Heads of Government" -- Chinese Premier Zhao Ziyang and British Prime Minister Margaret Thatcher -- on December 19, 1984.78 Finally, the Joint Declaration entered into force on May 27, 1985, and was registered as a treaty by both governments at the United Nations on June 12, 1985.79 Thus, its title in no way detracts from its treaty status.

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 Kong.80 But that argument finds no support in law. In the first place, there is a general presumption that existing treaties continue in force.81 In particular, it is understood that, absent the applicability of one of the termination provisions in the VCLT, international law recognizes the ongoing validity of a treaty.82

74 Scoping Report, supra note 71, at 4.
75 VCLT, supra note 73, at art. 6.
76 Joint Declaration, supra note 7.
77 VCLT, supra note 73, at art. 7.
78 Scoping Report, supra note 71, at 4.
79 Id.
80 See, e.g., Tsoi, supra note 8 ("[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.").
2. The Termination Provisions of the VCLT.

The termination provisions of the VCLT are found in Part V, which governs invalidity, termination and suspension of the operation of treaties. VCLT Article 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."\(^{83}\) 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."\(^{84}\) As the British Institute of International and Comparative Law (BICL) has noted: "The treaty is of indefinite duration and contains no termination date and no provision for either side to withdraw."\(^{85}\)

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, contained in Part V, Section 2 of the VCLT, deal with the invalidity of a treaty related to defects in its formation\(^{86}\): 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 State representative (Art. 50); coercion of State representative (Art. 51); coercion of State by threat or use of force (Art. 52); and conflict with jus cogens norms (Art. 53).\(^{87}\) China has never publicly proclaimed the Joint Declaration invalid 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 Law.

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\(^{82}\) Lea Brilmayer & Isaias Yemane Tesfalidet, "Treaty Denunciation and Withdrawal from Customary International Law: An Erroneous Analogy with Dangerous Consequences," 120 Yale L.J. Online 217, 218-19 (2011) ("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.").

\(^{83}\) VCLT, supra note 73, at art. 42.

\(^{84}\) Mark Weston Janis, International Law 37 (5th ed. 2008).

\(^{85}\) Scoping Report, supra note 71, at 6.


\(^{87}\) VCLT, supra note 73, at arts. 46-53.
pursuant to the terms of the Joint Declaration.\textsuperscript{88} 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.\textsuperscript{89}

b. Termination Owing to Post-Treaty-Conclusion Events

Section 3 of the VCLT's Part V deals with "Termination and Suspension of the Operation of Treaties". 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.\textsuperscript{90} Articles 55 through 59 do not apply: (1) Articles 55 and 58 deal with multilateral treaties only but the Joint Declaration is a bilateral treaty;\textsuperscript{91} (2) Article 56 covers denunciation or withdrawal but neither party to the Joint Declaration has ever initiated these procedures, which explicitly require twelve months' notice – there is no evidence of any such notice here;\textsuperscript{92} (3) Article 57 is titled "Suspension of the Operation of a Treaty under Its Provisions or by Consent of the Parties" – there is no suspension provision in the Joint Declaration and nothing in the record indicates the parties attempted to suspend the treaty's provisions;\textsuperscript{93} and (4) Article 59 contemplates "Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty" but, pursuant to the terms of Article 59, there is no subsequent treaty between the parties "relating to the same subject matter."\textsuperscript{94}

\textsuperscript{88} Hong Kong Government Fact Sheet, "The Basic Law," (Dec. 2014), available at http://www.gov.hk/en/about/abouthk/factsheets/docs/basic_law.pdf ("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 [i.e., the PRC].") [hereinafter "Basic Law Fact Sheet"].

\textsuperscript{89} Scoping Report, supra note 71, at 4.

\textsuperscript{90} VCLT, supra note 73, at art. 54.

\textsuperscript{91} Id. at art. 55 ("Reduction of the Parties to a Multilateral Treaty below the Number Necessary for Its Entry into Force"); id. at art. 58 ("Suspension of the Operation of a Multilateral Treaty by Agreement between Certain of the Parties Only").

\textsuperscript{92} Id. at art. 56.

\textsuperscript{93} Id. at art. 57.

\textsuperscript{94} Id. at art. 59.
i. Later Treaty

With respect to Article 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. It is not an agreement between two States but rather "a constitutional document for the HKSAR."\(^{95}\) Therefore, there is no implied termination of the Joint Declaration by adoption of the Basic Law.

ii. Material Breach

Finally, Articles 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."\(^{96}\) Per Article 60(2), termination or suspension is justified here only in cases of "material" breach.\(^{97}\) 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.\(^{98}\) 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)\(^{99}\) or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Even if one could argue that China has materially breached the Joint Declaration by refusing to satisfy, or threatening to refuse, its obligations regarding elections, there is a formal procedure laid out in Section 4 of VCLT Part 5. According to Article 65(1), for example, if a party seeks to terminate a bilateral treaty, it must first notify the

\(^{95}\) Basic Law Fact Sheet, \textit{supra} note 88.

\(^{96}\) VCLT, \textit{supra} note 73, at art. 60.

\(^{97}\) \textit{Id}. at art. 60(2).

\(^{98}\) \textit{Id}. at art. 60(3).

\(^{99}\) \textit{See} Black's Law Dictionary (9th ed. 2009) ("A contracting party's words or actions that indicate an intention not to perform ... a threatened breach ... ").
other party of its claim. The notification must indicate the measure proposed to be taken with respect to the treaty and the reasons therefor and, per Article 67(1), it must be in writing. The other side is then permitted to raise objections, per Article 65(2). In cases of objection, there is a mandatory adjudication/conciliation procedure stipulated in Article 66. With respect to the Joint Declaration, failure to resort to any of the procedures described confirms an absence of termination pursuant to material breach.

iii. Supervening Impossibility of Performance

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"); (2) Article 62 "Fundamental Change of Circumstances" (no unforeseeable change of circumstances has occurred here – the Joint Declaration contemplated fifty years of the "one country, two systems" situation and that is what is currently in place); 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 MPs to enter Hong Kong during the Umbrella Movement protests as part of an inquiry into Hong Kong-UK relations thirty years after the Joint Declaration).

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100 VCLT, supra note 73, at art. 65(1).
101 Id. at arts. 65(1) & 70(1).
102 Id. at art. 65(2).
103 Id. at art. 66.
104 Id. at art. 61.
105 Id. at 63.
106 Id. at art. 63; see also The Guardian, "UK Politicians Refused Entry to Hong Kong," (Nov. 30, 2014), available at http://www.theguardian.com/world/2014/nov/30/mps-refused-entry-hong-kong (indicating the continued existence of diplomatic relations between the UK and the PRC by noting "the positive trend in UK-China relations over the past year, including the recognition during
c. Conclusion: The Treaty Remains in Force

In light of the preceding information, in the absence 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.107

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 fifty years after the handover – a period that does not expire until 2047. As the British Institute of International and Comparative Law notes: "China's obligation to keep the "basic policies" set out in the JD 'unchanged for fifty years' remains legally binding under international law, unless and until the treaty is wound up or amended by agreement between the two Governments."108

D. Treaty Interpretation

Therefore, the Sino-British Joint Declaration remains in force and the Basic Law is a product of the Declaration.109 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 . . . ."110 As a

result, according to Michael Davis, the Basic Law thus became "a matter of solemn international treaty obligations."\textsuperscript{111} 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 Human Rights Committee, which interprets and monitors compliance with the International Covenant on Civil and Political Rights, defines "universal suffrage" as the right of all eligible adult citizens "to stand for election and to vote" "without unreasonable restrictions."\textsuperscript{112}

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 covers "Observance, Application and Interpretation of Treaties" and, in particular, Section 3 is devoted to interpretation.\textsuperscript{113} It consists of three provisions, Articles 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 Articles 31 and 32 are relevant. We must begin with the General Rule of Interpretation.

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


\textsuperscript{111} Umbrella Movement, supra note 109.

\textsuperscript{112} Stephanie Nebehey, "U.N. Rights Watchdog Calls for Open Elections in Hong Kong," Reuters, (Oct. 23, 2014, 2:09 PM), http://www.reuters.com/article/2014/10/23/us-hongkong-china-unidUSKCN01C18V20141023. 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." India's Election Website, "Universal Adult Suffrage," (Sept. 24, 2014), http://www.elections.in/political-corner/universal-adult-suffrage/. This is also consistent with Hong Kong's existing legal voting age of eighteen. See The Government of Hong Kong Special Administrative Region, "Frequently Asked Questions—Geographical Constituency," Voter Registration, http://www.voterregistration.gov.hk/eng/faq.htm#1 ("If you are a Hong Kong permanent resident aged eighteen or above, and ordinarily reside in Hong Kong, you are eligible to sign up as geographical constituency elector.").

\textsuperscript{113} VCLT, supra note 73, Part III, Section 3.
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.\textsuperscript{114}

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

Art. 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 its object and purpose.\textsuperscript{115} 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 Article 3. It should be noted at the outset that, toward the beginning of Article 3 in subsection (2), the Joint Declaration makes clear that the Hong Kong Special Administrative Region (HKSAR or

\textsuperscript{114} Id. at art. 31.

\textsuperscript{115} Id.
Hong Kong) "will be directly under the authority of the Central People's Government of the People's Republic of China (collectively PRC)." ¹¹⁶ Nevertheless, it goes on to contextualize this language by suggesting its overall authority over Hong Kong will be over "foreign and defense affairs which are the responsibility of the Central People's Government." ¹¹⁷ Its plain language then suggests that, with respect to internal matters, Hong Kong "will enjoy a high degree of autonomy." ¹¹⁸

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; ¹¹⁹ (2) the laws currently in force in Hong Kong will remain basically unchanged; ¹²⁰ (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); ¹²¹ (4) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style; ¹²² Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research, and of religious belief will be ensured by law in the Hong Kong Administrative Region; ¹²³ (5) Hong Kong will have independent finances (with the PRC not levying taxes on it); ¹²⁴ and (6) the maintenance of public order in Hong Kong will be the responsibility of the Hong Kong government. ¹²⁵

Pursuant to the approach outlined in VCLT Article 31, this Joint Declaration's Article 3 "plain" language provides

¹¹⁶ Joint Declaration, supra note 7, at art. 3(2).
¹¹⁷ Id.
¹¹⁸ Id.
¹¹⁹ Id. at art. 3(3).
¹²⁰ Id.
¹²¹ Id. at art. 3(4).
¹²² Id. at art. 3(5).
¹²³ Id.
¹²⁴ Id. at art. 3(8).
¹²⁵ Id. at art 3(11).
important clues about the parties' view of the electoral arrangement in Hong Kong post-handover. Most importantly, in light of the initial language in Article 3(2), as Michael Davis has noted: "The Declaration guarantees Hong Kong a 'high degree of autonomy, except in foreign and defense affairs.'" This is reinforced by Article 3(8), which gives Hong Kong financial autonomy, and 3(11), which invests it with internal police powers.

Thus, Hong Kong is left to govern itself based on the nucleus of democratic values enshrined in provisions 3(3) through 3(5). Those provisions stress, in plain language, that the social, economic and "life-style" 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. The existence of these rights, in 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 Articles 3(3), (4) and (5) of the Joint Declaration are the hallmarks of a liberal democracy, which include core values such as "freedom of speech, press and association" and also involve "regular, fair and free elections." Harvard Law School scholars Robert Faris and Bruce Etling use an alternate term for "liberal democracy" – "thick democracy" and they state it includes attributes consistent with those in the Joint Declaration Article 3 rights cluster -- the rule of law, elections and protection of individual and group rights such as freedom of speech and

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126 Umbrella Movement, supra note 109, at 103.

127 Joint Declaration, supra note 7, at art. 3(5).

128 Rosa Gomez Dierks, Introduction to Globalization: Political and Economic Perspectives for the New Century 272 (2001); see also Karon Monaghan, "Constitutionalising Equality: New Horizons," 1 Eur. Hum. Rts. L. Rev. 20, 22 (2008) (noting that "liberal democracy" is underpinned by certain "fundamental values and freedoms" such as freedom of speech and includes the right to vote)
freedom of assembly.\textsuperscript{129} Within this list of "thick democracy" characteristics, Faris and Etling include "universal suffrage."\textsuperscript{130}

In a more concentrated form, Randall Peerenboom describes "democracy" as consisting of two elements encompassing the Joint Declaration Article 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 realized and that elections are carried out fairly).\textsuperscript{131} To this list, Peerenboom adds one other essential and interlinking attribute – the electoral dimension (requiring universal suffrage for the election of important political figures).\textsuperscript{132}

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."\textsuperscript{133} Pursuant to this doctrine, from a cluster 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,\textsuperscript{134} the Australian High Court found that legislative measures to disqualify all prisoners from voting were invalid because they interfered

\begin{footnotesize}
\begin{enumerate}
\item Robert Faris & Bruce Etling, "Madison and the Smart Mob: The Promise and the Limitations of the Internet for Democracy," 32-SUM Fletcher F. World Aff. 65, 72-73 (2008). They contrast this with "thin" democracies, in which there is the façade of elections but no meaningful civil and political rights undergirding them. \textit{Id.}
\item \textit{Id.}
\item Peerenboom, \textit{supra} note 131, at xix; see also Blanchard, \textit{supra} note 131, at 388 n.139.
\item Roach v. Electoral Commissioner (2007) 233 CLR 162 (Austl.).
\end{enumerate}
\end{footnotesize}
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. 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 center of participation in the life of the community and citizenship.

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. Former Australian Chief 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 Court said. This was that, in a Constitution which is otherwise

135  Id. at 174.


137  See Lange v. Australian Broadcasting Corporation (1997) 189 CLR 520 (Austl.) (finding that the freedom of political communication is derived from specific textual provisions implementing certain institutions of representative and responsible government); Stone, supra note 133, at 33 (noting that freedom of movement and association may also be implied from these provisions).
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. [From this is derived] an implied constitutional right to free speech.\textsuperscript{138}

The existence of a right logically inferred from an existing nucleus of other related rights has also been acknowledged in United States constitutional law. For example, although privacy is considered a fundamental right, it is not explicitly recognized in the U.S. Constitution. In the landmark 1965 case of \textit{Griswold v. Connecticut},\textsuperscript{139} the U.S. 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.\textsuperscript{140} In conducting this analysis, the majority opinion's author, Justice William O. Douglas, noted:

\begin{quote}
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 . . . .\textsuperscript{141}
\end{quote}


\textsuperscript{139} \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).

\textsuperscript{140} \textit{See id.} at 484-85.

\textsuperscript{141} \textit{Id.} at 482.
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 belief.\(^\text{142}\)

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, an implied right of "one person, one vote" can rationally be read into the Joint Declaration.

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 (\textit{i.e.} independent and impartial judiciary) . . . public promulgation of laws so that citizens might know what is reasonably expected of them . . . \textbf{free and fair elections} . . . the robust search for consensus and balance via representative assemblies . . . freedom of the press and other

\(^{142}\) See Joint Declaration, \textit{supra} note 7, at art. 3(5).
media; a credible and transparent financial system . . . .

Once again, in light of Hong Kong's retaining its common law moorings, free and fair elections (co-extensive 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 Articles 3(3) through 3(5). As the New York City Bar Association noted in analyzing 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 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.

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

Per Article 31(2) of the VCLT, context, for purposes 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 analyzed. It indicates that an overarching purpose of the Joint Declaration is “the


145 VCLT, supra note 73, at art. 31(2).
maintenance of the prosperity and stability of Hong Kong."\textsuperscript{146}

Annex I, attached to the Joint Declaration and 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 Part I, by supplementing Hong Kong's electoral rights. It specifies that "The legislature of the Hong Kong Special Administrative Region shall be constituted by elections."\textsuperscript{147} It then adds that the "executive authorities shall abide by the law and shall be accountable to the legislature."\textsuperscript{148}

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.\textsuperscript{149} It also stresses that "the laws previously in force in Hong Kong (\textit{i.e.} the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained."\textsuperscript{150} Similarly, Part 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."\textsuperscript{151} 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."\textsuperscript{152} Finally, a prosecuting authority "shall control criminal prosecutions free from any interference."\textsuperscript{153} Part IV deals with civil servants and specifies that British citizens may be recruited/hired for employment and may also serve as advisers.\textsuperscript{154} Hong Kong's previous British system of

\textsuperscript{146} Joint Declaration, \textit{supra} note 7, at Preamble.

\textsuperscript{147} \textit{Id.} at Annex I(1).

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.} at Annex I(2).

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.} at Annex I(3).

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.} at Annex I(4).
employing public servants and the personnel policies applied to them will be maintained.\textsuperscript{155}

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.\textsuperscript{156} Part VI assures continuation of "the capitalist economic and trade systems previously practiced in Hong Kong."\textsuperscript{157}

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

\begin{quote}
The HKSAR shall maintain the educational system previously practiced in Hong Kong. The HKSAR 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 HKSAR. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the HKSAR.\textsuperscript{158}
\end{quote}

Finally, and perhaps most importantly, the individual freedoms set forth in Article 3(5) of the Joint Declaration's main text are reemphasized, 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:

\begin{quote}
The HKSAR shall protect the rights and freedoms of inhabitants and other persons
\end{quote}

\textsuperscript{155} Id.

\textsuperscript{156} Id. at Annex I(5).

\textsuperscript{157} Id. at Annex I(6).

\textsuperscript{158} Id. at Annex I(10).
in the HKSAR. The HKSAR 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 organizations and believers may maintain their relations with religious organizations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organizations may be continued. The relationship between religious organizations in the HKSAR 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. 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.\[159\]

The net effect of these provisions in the preamble (emphasizing continued prosperity and stability for Hong Kong) and Annex I is the reinforcement of 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. 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 one person, one vote in the first instance (even with the possibility of a subsequent PRC veto).\[159\]

\[159\] Id. at Annex I(13).
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 . . . any 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." 160

In this case, the Basic Law qualifies as such an instrument. And Article 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 procedures." 161 This has the effect of explicitly tying the implied "free and fair elections" interpretation of the Joint Declaration's facial text with the "universal suffrage" pledge of the Basic Law.

Other provisions in the Basic Law leave no doubt in this regard. Article 25 stipulates that "all Hong Kong residents shall be equal before the law," 162 and Article 26 definitively reifies every permanent resident's "right to vote and the right to stand for election in accordance with law." 163 The implications of this are clear – all things being equal, every permanent resident should have the franchise right as well as the right to stand for election. 164

And the two instruments, 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 Y.H. Cheung observes:

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160 VCLT, supra note 73, at art. 31(2)(b).

161 Basic Law, supra note 4, at art. 45.

162 Id. at art. 25.

163 Id. at art. 26.

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 preordained 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 defense. 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 1997.165

2. Supplementary Means of Interpretation.

Pursuant to VCLT Article 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 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.166

165 Cheung, Case for Democracy, supra note 5.

166 VCLT, supra note 73, at art. 32.
Here, to the extent there remains ambiguity regarding the meaning of "universal suffrage," Article 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." From the British perspective, a "thirty-year rule" pertaining to sensitive documents generated by the government blocked access until December of 2014. 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." 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. The 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 than they did now. We would go steadily and surely. It was important to build securely, brick by brick."

In response to this statement, Premier Zhao echoed the sentiments of the British, having been recorded to say "[we] wanted to see more and more Hong Kong people working in

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167 Yash Ghai. "The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?" 37 Hong Kong L.J. 363 (2007).

168 Public Records Act, 1958, 6 & 7 Eliz. 2, c. 51 (U.K.).


Government departments in Hong Kong and playing an even greater role than hitherto.\textsuperscript{171}

In this regard, it is important to take note of Britain's making good on Margaret Thatcher's statement during the negotiations and enacting democratization reforms during the Patten administration of Hong Kong in the 1990s. 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.\textsuperscript{172} This has significance for treaty interpretation. For purposes of contextualizing treaty interpretation, VCLT Article 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."\textsuperscript{173}

Although China opposed these reforms, they help contextualize Thatcher's statements and Britain's ultimate intentions during treaty negotiations. Moreover, the value of considering Thatcher and Zhao'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.

In this respect, it is valuable to consider the individual circumstances of China's lead negotiator and signer of the Joint Declaration, Zhao Ziyang. After conclusion of the Sino-British Joint Declaration, Mr. Ziyang's star was on the rise and he was promoted to the position of the party's Secretary General. Zhao was a 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."\textsuperscript{174} Former Hong Kong governor David Wilson, a part of the British Joint Declaration negotiating team, stated that Zhao's response demonstrated "he did not view the development of representative government in Hong Kong before 1997 with a closed mind."\textsuperscript{175}

\textsuperscript{171} Id. at para. 14.

\textsuperscript{172} Wacks, supra note 31, at 56.

\textsuperscript{173} VCLT, supra note 73, at art. 31(3)(a).


In fact, in June 1989, Zhao sympathized with the Tiananmen Square students seeking greater democracy in the PRC.\textsuperscript{176} He visited them at the protest site and publicly demonstrated support for their cause.\textsuperscript{177} But that ended up bringing about his political downfall by hardliners who maneuvered behind the scenes to turn Deng Xioping against him.\textsuperscript{178} Within three weeks of the Tiananmen crackdown, he was ousted from all his government posts.\textsuperscript{179} And then he was placed under house arrest, a state of affairs that lasted until his death in 2005.\textsuperscript{180}

Thus, China's lead negotiator for the Sino-British Joint Declaration was sympathetic toward parliamentary democracy for purposes of economic reform. Within the context of VCLT Article 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 similarly relevant, as it had an impact on strengthening the terms of Hong Kong's eventual democratization in the Basic Law. As observed by Bob Beatty:

\begin{quote}
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 Hongkongers 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
\end{quote}


\textsuperscript{177} \textit{Id}.

\textsuperscript{178} \textit{Id}.

\textsuperscript{179} \textit{Id}.

\textsuperscript{180} Erik Eckholm, "Secret Memoir Offers Look Inside China's Politics," N.Y. Times (May 14, 2009), available at http://www.nytimes.com/2009/05/15/world/asia/15zhao.html?pagewanted=all& r=0. While under house arrest, Zhao secretly recorded his memoirs. They were smuggled out of China and, after his death, were published in 2009 as \textit{Prisoner of the State: The Secret Journal of Premier Zhao Ziyang}. \textit{Id}. 

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would be Hong Kong's "founding document," the Basic Law."¹⁸¹

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."¹⁸²

E. Treaty Reservations

Another key to understanding the universal suffrage guarantee lies in determining the applicability of Article 25 of the ICCPR. In particular, Article 25(b) of the ICCPR provides that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in [Art]icle 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."¹⁸³

Moreover, as will be recalled, Article 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."¹⁸⁴ 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 reserves 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."¹⁸⁵

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

1. For the purposes of the present Convention:

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¹⁸¹ Bob Beatty, Democracy, Asian Values and Hong Kong: Evaluating Political Elite Beliefs 21 (2003).


¹⁸³ ICCPR, supra note 53, at art. 25(b).

¹⁸⁴ Basic Law, supra note 4, at art. 39.

¹⁸⁵ Ratification, supra note 54.
(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; ... 186

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 Article 25(b). 187 However, 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. 188 The International Law Commission has formulated a test for whether reservations in a multilateral human rights treaty are compatible with the object and purpose of the treaty. In section 3.1.5.6 (Reservations to Treaties Containing Numerous Interdependent Rights and Obligations) to its 2011 "Guide to Practice on Reservations to Treaties," the ICL 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." 189

Consistent with this Article’s treaty text interpretation above, the ICCPR Article 25(b) franchise has been found to be a core right inextricably linked to the Covenant’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

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186 VCLT, supra note 73, at art. 2(1)(d).

187 Alvin Y.H. Cheung, "An Introduction to the Chief Executive Electoral Reform Debate," Human Rights in China (July 25, 2014), http://www.hrichina.org/en/china-rights-forum/introduction-chief-executive-electoral-reform-debate [hereinafter "An Introduction"] ("The Hong Kong and Beijing governments continue to rely on Britain’s reservation to Article 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.").

188 VCLT, supra note 73, at art. 19.

roots of the Covenant, for it negates the very basis of democracy on which other rights may be said to exist."

This analysis has been validated in practice. In particular, Kuwait made a reservation to Article 25(b) so as to deprive women of the franchise right. The Human Rights Committee, which is responsible for interpreting and enforcing the ICCPR, found this reservation inimical to the Covenant’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."191

What does that mean as far as the reservation’s legal status? Although VCLT Article 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.192 The leading case for this proposition is Belilos v. Switzerland,193 where the European Court of Human Rights ruled that Switzerland’s reservation to Article 6 (right to fair trial) of the European Convention on Human Rights was invalid as a reservation of a “general character” with respect to a core right.194 Similarly, the UK’s arguably invalid reservation for Hong Kong with respect to Article 25(b) of the ICCPR could 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 body charged with interpreting the ICCPR, the UN Human Rights Committee, has indicated that the reservation no longer applies. In its 1995 Concluding Observations in response to a periodic report submitted by Hong Kong, it 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


192 Hall, supra note 107, at 117.


194 Id. paras. 57-60.
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.  

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

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 organizations allows for the implicit modification of treaty terms when changed circumstances effect new institutional arrangements and practices. In the same vein, Article 62 of the VCLT allows for termination of treaties in cases of fundamental changes of circumstance. Although these two principles of international law do not explicitly pertain to reservations, their

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197 Id.

198 Id.

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

200 VCLT, supra note 73, at art. 62 (noting that termination is allowed 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 radically transforms the extent of the obligations still to be performed under the treaty).
logic may apply by extension to reservations. 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 Article 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 defense. 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 Article 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 is no longer valid.

V. RECONCEPTUALIZING 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 a much deeper, conceptual value to be uncovered in understanding the relationship between the Joint Declaration and the law of treaties. In all of history, the transfer of Hong Kong (along with Macau, which went back to China from Portugal) represents a unique historical phenomenon both in terms of international relations and law. The list of treaties arising out of or dealing with decolonization is a long one. So too is the list involving ordinary cessions of territory. 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 decolonization and recolonization involving States with two widely divergent political systems attempting to forge a short-term hybrid civic institution for the transferred possession.

A. The Relationship between "Soft Law" and "Hard Law" Instruments

This unusual situation poses challenges for traditional treaty legal analysis in several different ways. First, the name and form of the very instrument itself suggests a conceptual grey zone challenging traditional conceptions of treaties. The record indicates that China did not approach the document as a traditional treaty. Instruments known as "declarations" are often used in international law but they are considered "soft law" and do not have binding effect in the same way treaties do.\(^\text{201}\) They often consist of multi-lateral statements of principle that may crystalize into customary international law but do not create concrete and enforceable rights and duties.\(^\text{202}\) Beijing may have initially preferred the "joint

\(^{201}\) Lillian Aponte Miranda, "Indigenous Peoples as International Law Makers," 32 U. Pa. J. Int'l L. 203, 228 (2010) (explaining that "declarations" are considered "soft law" that is non-binding as opposed to treaties that are "hard law" with binding obligations).
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 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 . . . .203

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 United Nations.204 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 United Nations. 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.205

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"

202 Pierre-Michel Fontaine, "The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today," 2 Intercultural Hum. Rts. L. Rev. 149, 170 n.69 (2007) ("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, e.g. Universal Declaration of Human Rights . . . .").

203 Melissa Boey, "Regulating 'Bankerspace': Challenging the Legitimacy of the Basel Accords as Soft Law," 87 S. Cal. L. Rev. Postscript 74, 99 (2014); see also Andrew T. Guzman, "A Compliance-Based Theory of International Law," 90 Cal. L. Rev. 1823, 1879-80 (2002) (defining soft law as "promises made by states through instruments that fall short of full-scale treaties, such as . . . joint declarations . . . .").

204 Daniel C.K. Chow, "Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties," 14 Stan. Envtl. L.J. 256, 276 n.120 (1995) ("Since the end of World War II, more than 30,000 treaties have been registered with the United Nations.").

205 Signing of Joint Declaration, supra note 175.
means "an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation," 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. In the wake of the Joint Declaration, however, a "declaration" has been treated as the basis of a bilateral "treaty." In 1992, for example, the two States on the peninsula adjacent to Manchuria entered into the "Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula." The nongovernmental organization known as the "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."

B. Pacta Sunt Servanda

According to Article 26 of the VCLT "every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is the principle of "pacta sunt servanda," according to which, not only is every treaty in force binding upon the parties to it, but they must discharge their obligations thereunder in good faith. As a result, performance of treaty duties strictly according to the letter will not do. "The principle of good faith rather requires that a treaty is performed according to its spirit and in an honest, fair and reasonable manner."

206 VCLT, supra note 73, at art. 2.

207 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 75 (2008) ("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.").


210 VCLT, supra note 73, at art. 26.

211 Frank A. Engelen, Interpretation of Tax Treaties under International Law 125 (2004).

212 Id.
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 treaty obligation in a concrete case . . ."  

In the case of the Hong Kong handover, the Joint Declaration and the 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 colonizer 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 recognize "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-colonizer trying to create a *sui generis* version of democracy compatible with historical context and political reality, the challenge is immense. And that is why treaty interpretation becomes so important.

C. Adding a New Step to the Treaty Interpretation Sequence?

As alluded to previously, the traditional preference in international law, embodied in VCLT Article 31, is for strict textual interpretation.  

In other words, reference to external factors, such as the intent of the parties as gleaned through supplementary means, most typically the *travaux préparatoires*, should be exceptional. And the VLT specifies in Article 32 that extra-textual reference is to be had only to confirm the meaning gleaned from Article 31 analysis, or if Article 31 analysis leads to ambiguity or manifestly absurd or unreasonable results.

But what if the underlying circumstances surrounding negotiation of the treaty are so inherently confusing from the outset that following the prescribed Article 31-32 sequence of interpretation is counterproductive? That seems to describe the anomalous situation presented by the Sino-British Joint Declaration.

Although, as demonstrated previously, the Article 31-32 analytic sequence can result in a meaningful and credible interpretation of the universal suffrage guarantee, the bizarre circumstances surrounding the

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214 VCLT, *supra* note 73, at art. 31; see also Kenneth J. Vandevelde, "Treaty Interpretation from a Negotiator's Perspective," 21 *Vand. J. Transnat'l L.* 281, 294 (1988) ("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.").


216 VCLT, *supra* note 73, at art. 32.
Joint Declaration *ab initio* create certain significant challenges in performing that analysis. And so another step might be suggested. What if inherently dysfunctional or incompatible negotiating platforms between or among parties mandated a pre-31-32 step in the interpretation exercise? That step could consist of preliminary consideration of the negotiations posture – extrinsic to Article 32’s focus on the parties’ intentions. In fact, this would arguably promote an objectivist or textual approach by facilitating an *a priori* understanding of the treaty bargaining environment. The structurally unusual situation of incompatible political systems trying to create a Frankenstein monster version of short-term democracy ought to count for such a situation.

Thus, the Joint Declaration and the universal suffrage guarantee cause us to consider conceptually expanding the possible options of treaty interpretation by introducing a kind of prefatory option in cases of intrinsically confusing negotiation postures and/or circumstances. That could help render more efficient and effective the Article 31-32 analysis sequence demanded in such challenging cases.

**D. Implied Reservation Terminations**

As noted previously, the Sino-British Joint Declaration involves the unusual situation of assessing, post-decolonization, 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 Article 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). But reliance on such a narrow 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. 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

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217 See, e.g., “China: Keep Commitment to Hong Kong Democracy,” Human Rights Watch (Nov. 26, 2013), http://www.hrw.org/news/2013/11/26/china-keep-commitment-hong-kong-democracy (“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.”).

218 See von Bogdandy, *supra* note 199, at 1935 (discussing implied modification of treaty terms); VCLT, *supra* note 73, at art. 62 (providing for treaty termination in case of fundamental change of circumstances).
Kong's behalf, to Article 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 "Special Administrative Region" under the PRC and the application of the Basic Law to Hong Kong, which contains a guarantee of universal suffrage.219

V. CONCLUSION

It might be tempting to consider the Hong Kong handover as an entirely unique situation that may never be replicated. But that could be problematic. While its exact scenario may never occur again, the basic model with variations could certainly arise in the future. In other words, the specific sequence of decolonization, handover, and creation of a "special administrative region" is not required to implicate the issues discussed in this Article.

For example, there remains to be a final determination of the status of Western Sahara.220 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.221 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.222

And even closer to Hong Kong geographically and politically, although not involving a decolonization scenario *per se*, is the case of Taiwan.223 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 United States, which has upheld defense guarantees for Taiwan as legally required by the American "Taiwanese Relations Act."224 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

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219 Basic Law, *supra* note 4, at art. 45.


222 Western Sahara Profile, *supra* note 220.


224 Id.
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, the most significant legal concept with respect to the universal suffrage guarantee in Hong Kong is treaty interpretation.

In that regard, as a supplement to Articles 31 and 32 of the VCLT, the idea of including preliminary extrinsic assessment in advance of textual exegesis is critical. In the case of Hong Kong and the franchise right at the time of the treaty, this would entail recognizing a convergence toward "one person, one vote" during the sunset of British rule as well as Beijing's trajectory toward liberalization in China itself. Then, in Section 2 (per Article 31), 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 significant internal autonomy, lead to the logical and historically-sound doctrinal conclusion that the Joint Declaration includes a universal suffrage right. 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 evidence also focuses on the Chinese chief negotiator, Zhao Ziyang, a champion of liberal democracy who saw it as the key to stabilizing and growing a successful capitalist economy. It also includes consideration of 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 the massacres. When seen in this light, China's current regressive stance seems at odds with the Sino-British 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 Article 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. That reality, along with the sound policy results that follow in its wake, should give every Hongkonger the right to select candidates and vote for them fairly.