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The Hong Kong Basic Law and the Limits of Democratization under One Country Two Systems

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The Hong Kong Basic Law and the Limits of Democratization Under "One Country Two Systems"

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I. Introduction

My last contribution to this Journal, published in 1999, was about the first constitutional crisis experienced by the Hong Kong Special Administrative Region (HKSAR) after it was established in 1997.[1] Since then, the drama of "One Country Two Systems" has continued to unfold. On July 1, 2003, there was a march of an estimated half-million people in Hong Kong against the proposed national security bill to implement Article 23 of the Hong Kong Basic Law. In fall 2014, an "Occupy Central" or "Umbrella" movement was launched to struggle for democratization in this Special Administrative Region (SAR) of the People's Republic of China (PRC). The occupation of key business and government districts in Hong Kong continued for more than two months, during which Hong Kong was in the limelight of the global media. The participants in this movement claimed that their demands were no more than the realization of what was promised to the people of Hong Kong by the Basic Law, the "mini-constitution" of the HKSAR, enacted by the National People's Congress of the PRC in 1990. What does the Basic Law actually say about Hong Kong's democratization? How has Hong Kong's political system evolved before and after the making of the Basic Law? In the aftermath of the Occupy movement, what are the prospects of democratization in the HKSAR? It is the purpose of this article to explore these questions.

II. The Development of Hong Kong's Political System: From Colony to Special Administrative Region

The British colony of Hong Kong was created and subsequently expanded by three treaties between the Qing Empire in China and the British Empire

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1. Albert H.Y. Chen, *Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review*, 33 INT'L LAW. 1025 (1999).

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in the nineteenth century.[2] The last of the three treaties provided for a ninety-nine-year lease by the Qing Dynasty to Britain of the "New Territories" (north of Kowloon Peninsula and Hong Kong Island, which were ceded to Britain by virtue of the first two treaties) in the midst of the foreign powers' "scramble for concessions in China" in 1898.[3] As the lease would expire in 1997, British Prime Minister Margaret Thatcher raised the question of Hong Kong's post-1997 constitutional status before PRC leaders when she visited Beijing in 1982. In September 1984, following almost two years of arduous negotiations between the British and Chinese governments, the Sino-British Joint Declaration on the Question of Hong Kong was concluded, and it provided for the return of the Hong Kong colony to China on July 1, 1997.[4]

The PRC's plan for the governance of Hong Kong after 1997 was based on the concept of "One Country Two Systems" (OCTS). The OCTS concept was developed by senior statesman Deng Xiaoping in the late 1970s, originally for the purpose of achieving peaceful reunification with Taiwan.[5] In the early 1980s, the PRC decided to apply this concept to the recovery of the British colony of Hong Kong and the Portuguese colony of Macau. In the Sino-British Joint Declaration of 1984, the PRC made various undertakings with regard to how Hong Kong would be governed as a Special Administrative Region (SAR) of the PRC after 1997. The HKSAR would enjoy a high degree of autonomy, with "Hong Kong people ruling Hong Kong."[6] Hong Kong would be allowed to retain its existing social and economic systems. The existing laws of Hong Kong would remain basically unchanged; civil liberties, human rights and private property rights would continue to be respected and protected.

The Joint Declaration also provided that the PRC's policies towards the HKSAR as stated in the Joint Declaration would be stipulated in a Basic Law of the HKSAR and would remain unchanged for fifty years. The National People's Congress of the PRC enacted such a Basic Law in 1990.[7] It came into force on July 1, 1997, when the colony finally achieved reunification with China and the HKSAR was formally established. The Basic Law is sometimes called Hong Kong's "mini-constitution": it is a constitutional

2. On Hong Kong's history, *see* G.B. ENDACOTT, A HISTORY OF HONG KONG (2d ed. 1964); STEVE TSANG, A MODERN HISTORY OF HONG KONG (2004); FRANK WELSH, A HISTORY OF HONG KONG (1993).

3. *See generally* PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 23-30 (2d ed. 1994).

4. *See generally* STEVE TSANG, HONG KONG: AN APPOINTMENT WITH CHINA (1997).

5. *See generally* Albert H.Y. Chen, *The Concept of "One Country, Two Systems" and Its Application to Hong Kong*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 353 (C. Stephen Hsu ed., 2003).

6. *Id.*

7. *See generally* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW (2d ed. 1999).

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instrument providing for what legal, political, economic and social systems the HKSAR should practice under the framework of OCTS.[8]

Although the British had transplanted to colonial Hong Kong its common law and its tradition of the Rule of Law, the British style of parliamentary democracy or the "Westminster-style" government was never exported to the colony of Hong Kong, which was governed by Governors appointed directly by London until 1997.[9] Before democratization began in the mid-1980s, the political system of Hong Kong had been described as an "administrative no-party state,"[10] a "bureaucratic polity,"[11] or a benign and enlightened authoritarianism.[12] Power was concentrated in the hands of the Governor (appointed directly by the British Crown) and senior expatriate officials of the colonial government of Hong Kong, who were appointed by the Governor. This formed the top tier of a civil service bureaucracy, which at its lower levels, was recruited largely from the local Chinese populace. The legislature—known as the Legislative Council—consisted of senior government officials and "unofficial members" chosen and appointed by the Governor from local British and Hong Kong Chinese business and professional elites.[13] The system was described as "administrative absorption of politics."[14]

After the Sino-British Joint Declaration was signed in 1984, the British began efforts to introduce a "representative government" in Hong Kong.[15] Mainly, this was accomplished by introducing elected seats in the colonial legislature—the Legislative Council.[16] The Joint Declaration had only briefly provided for the political system of the future SAR, while the Basic Law provides the details. One of the main areas of controversy during the drafting of the Basic Law was the extent to which the political system of the HKSAR should be democratic, given that the colonial political system at the time the Joint Declaration was signed in 1984 was hardly democratic in that neither the executive nor the legislature were elected by the people of Hong Kong.[17] The Joint Declaration did contemplate some degree of

8. *See* THE BASIC LAW AND HONG KONG'S FUTURE (Peter Wesley-Smith & Albert Chen eds., 1988).

9. *See* NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG (Oxford Univ. Press, 4th ed. 1986) (explaining the political system of colonial Hong Kong).

10. PETER B. HARRIS, HONG KONG: A STUDY IN BUREAUCRACY AND POLITICS ix (1988).

11. LAU SIU-KAI, SOCIETY AND POLITICS IN HONG KONG 25 (Chinese Univ. Press, 1984).

12. LAU SIU-KAI & KUAN HSIN-CHI, THE ETHOS OF THE HONG KONG CHINESE 28 (Chinese Univ. Press, 1988).

13. *See generally* KATHLEEN CHEEK-MILBY, A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY (Oxford Univ. Press, 1995).

14. Ambrose Y.C. King, *Administrative Absorption of Politics in Hong Kong: Emphasis on the Grassroots Level*, *in* SOCIAL LIFE AND DEVELOPMENT IN HONG KONG 127, ch. 7 (A.Y.C. King & R.P.L. Lee eds., 1981).

15. *See generally* LO SHIU-HING, THE POLITICS OF DEMOCRATIZATION IN HONG KONG (1997); ALVIN Y. SO, HONG KONG'S EMBATTLED DEMOCRACY: A SOCIETAL ANALYSIS (1999).

16. *See generally* KATHLEEN CHEEK-MILBY, A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY (1995).

17. *See generally* THE BASIC LAW AND HONG KONG'S FUTURE, *supra* note 8.

democratization of this colonial political system. On the mode of selection of the Chief Executive of the HKSAR, the person who would replace the colonial Governor as the head of the Hong Kong government, the Joint Declaration provided that the Chief Executive "shall be selected by election or through consultations held locally and be appointed by the Central People's Government."[18] And regarding the legislature, which was an entirely appointed body at the time of the Joint Declaration, the Joint Declaration provided that the HKSAR legislature "shall be constituted by elections," but did not elaborate further on the precise mode of election.[19] Furthermore, concerning the relationship between the executive and the legislature, the Joint Declaration provided that the executive "shall be accountable to the legislature."[20]

The provisions of the Basic Law on the political system of the HKSAR may be summarized as follows. The Basic Law declares that the "ultimate aim"[21] of the political evolution of the HKSAR is the election of both the Chief Executive (CE) and all members of the Legislative Council (LegCo) by universal suffrage.[22] But it is also provided that such political evolution depends on "the actual situation in the [HKSAR]" and should be "in accordance with the principle of gradual and orderly progress."[23] The Basic Law provides for a progressive increase in the number of directly elected members (i.e. members elected by universal suffrage in geographical constituencies in different parts of Hong Kong, as distinguished from members elected by the "functional constituencies" discussed below) of LegCo from twenty (out of a total membership of sixty) in the first-term LegCo of the HKSAR to twenty-four in the second LegCo, and then to thirty in the third LegCo.[24] With respect to the selection of the CE, it is provided that the first CE would be chosen by a Selection Committee of 400 members, and the second and third CEs would be elected by an Election Committee of 800 members, largely elected from four sectors of Hong Kong's society.[25] Then, the Central People's Government would appoint the elected candidate as CE.[26]

18. China and United Kingdom of Great Britain and Northern Ireland Joint Declaration on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 33.

19. *Id.*

20. *Id.*

21. XIANGGANG JIBEN FA (Hong Kong Basic Law) arts. 45, 68 (H.K.).

22. It is noteworthy in this regard that in the Basic Law of the Macao Special Administrative Region which is in most respects almost identical to the Hong Kong Basic Law, there is no mention whatsoever of the direction of political evolution or any eventual destination of universal suffrage for the election of the Chief Executive and all members of the legislature. This testifies to the relative strength of the democracy movement in Hong Kong in the 1980s.

23. XIANGGANG JIBEN FA arts. 45, 68 (H.K.).

24. *See* XIANGGANG JI BEN FA annex II (H.K.). In the first and second LegCos, ten and six members respectively were to be elected by an election committee. In the first, second and third LegCos, thirty members were to be elected by functional constituencies.

25. XIANGGANG JIBEN FA instrument 12 (H.K.).

26. *Id.*

Given the ultimate aim mentioned above of achieving universal suffrage, the question of when this would be achieved naturally arises. The Basic Law does not provide any timetable for the eventual realization of universal suffrage. But Annexes I and II to the Basic Law expressly provide that the methods for electing the CE and LegCo may change after 2007. They also expressly provide for the procedure for such constitutional change, which involves the support of a two-thirds majority in LegCo, the CE's consent, and the approval of (in the case of a change in the electoral method for the CE) or "reporting for the record" to (in the case of a change in the electoral method for LegCo) the National People's Congress Standing Committee (NPCSC).

The Basic Law, although enacted in 1990, would only come into full effect in 1997 upon the establishment of the HKSAR. In the "transition period" between 1984 (the year the Joint Declaration was signed) and 1997, the British colonial government continued to govern Hong Kong. It introduced a series of measures for Hong Kong's democratization in preparation for the handover of Hong Kong to China in 1997. Some of these measures were contested by the PRC government, which argued that constitutional reforms in Hong Kong during the transition period must "converge" with the model of the HKSAR political system prescribed by the Basic Law.[27] Beijing did not object to all of the political reforms introduced by the colonial government. In fact, some of the political institutions created by the colonial government during the transition period were recognized by and incorporated into the Basic Law itself. The most important of such institutions was that of "functional constituencies," the origins of which will now be elaborated.

In 1985, the colonial government introduced its first major measure towards Hong Kong's democratization by creating twenty-four elected seats in the LegCo.[28] Electoral colleges comprising the District Boards, the Urban Council, and Regional Council, which were largely consultative bodies at local levels, elected twelve of these seats. The other twelve seats were elected by "functional constituencies" consisting of business and professional groupings, such as chambers of commerce, industrialists' federations, trade unions and members of professions such as lawyers, doctors, engineers and teachers. The original logic of functional constituencies, as explained by the colonial government, was that they represented sectors of society from which appointed unofficial members of LegCo were formerly drawn, and in the course of democratization, it was appropriate that the corporate bodies or individual members of these sectors

27. *See generally* Albert H.Y. Chen, *From Colony to Special Administrative Region: Hong Kong's Constitutional Journey*, THE FUTURE OF THE LAW IN HONG KONG 76-126 (Raymond Wacks ed. 1989).

28. HONG KONG, WHITE PAPER: THE FURTHER DEVELOPMENT OF REPRESENTATIVE GOVERNMENT IN HONG KONG 4 (1984).

would elect their own representatives into LegCo.[29] These two modes of election of LegCo members—elections by electoral college and functional constituencies—were incorporated into the Basic Law when it was enacted in 1990. Thus, the first LegCo of the HKSAR would consist of twenty members elected by universal suffrage, thirty members elected by functional constituencies, and ten elected by an electoral college. The number of members elected by universal suffrage would increase to thirty in the third LegCo.

Functional constituencies also have a role to play in the election of the election committee for the Chief Executive of the HKSAR. As prescribed in Annex I to the Basic Law, the election committee would consist of persons from four sectors, with an equal number of members from each sector. The sectors are: (a) business (comprising mainly corporate voters in various commercial, financial, and industrial fields), (b) professional bodies, (c) labor and other social sectors, and (d) the political sector (including legislators, Hong Kong deputies to the NPC, and Hong Kong members of the Chinese People's Political Consultative Conference). Thus, in the election committee of 800 members, there were 200 members from each of the four sectors. (Annex I to the Basic Law was subsequently amended in 2010, increasing the size of the election committee to 1,200 members, including 300 members from each of the four sectors.)[30]

III. Political Developments in the HKSAR[31]

In the first few years of the history of the HKSAR, elections by the election committee to the office of the Chief Executive and elections of the LegCo took place in accordance with the relevant provisions of the Basic Law, with LegCo members elected partly by universal suffrage and partly by functional constituencies. A major turning point in the post-1997 history of Hong Kong was the Hong Kong government's attempt to enact a national security law for the purpose of the implementing Article 23 of the Basic Law, which requires the HKSAR to enact laws on treason, secession, sedition, subversion and protection of state secrets. The legislative exercise was aborted after a march of an estimated half-million people in opposition to the bill for the proposed law on July 1, 2003.[32] The bill was supported by the "pro-China" camp (also known as the "pro-establishment" camp) in Hong Kong politics but opposed by the "pro-democracy" camp (also known

29. *See generally* FUNCTIONAL CONSTITUENCIES: A UNIQUE FEATURE OF THE HONG KONG LEGISLATIVE COUNCIL (Christine Loh & Civic Exchange eds., 2006).

30. The political reform of 2010 is discussed below.

31. This section and the following section draw on Albert H.Y. Chen, *Development of Representative Government*, *in* LAW OF THE HONG KONG CONSTITUTION (Johannes Chan & C.L. Lim eds., 2d ed. 2015).

32. *See generally* NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY (Fu Hualing, Carole J. Petersen & Simon N.M. Young eds., 2005); Ngok Ma, *Civil Society in Self-Defense: The Struggle Against National Security Legislation in Hong Kong* 14 J. CONTEMP. CHINA 44, 465-482 (2005).

as the "pan-democrats"), which led the social movement against the bill.[33] With their prestige bolstered by their success in opposing the national security bill, the pro-democracy camp launched a movement to demand the speedy democratization of the HKSAR.[34] Pro-democracy politicians found in the Basic Law a powerful source of legitimacy for their demands. As mentioned above, the provisions of the Basic Law itself allows change to the existing system for the election of the third-term CE in 2007 and the fourth-term LegCo in 2008. Thus, the pan-democrats' slogan was "double universal suffrage": the introduction of universal suffrage for the election of the CE in 2007 and universal suffrage for the election of all legislators in 2008.

In early 2004, Beijing decided to respond to the democracy movement in Hong Kong. On April 6, 2004, the National People's Congress Standing Committee (NPCSC) issued an Interpretation of the Basic Law.[35] It elaborates upon Annexes I and II to the Basic Law by stipulating a procedure for initiating changes to the relevant electoral methods, dictating that the CE should first submit a report to the NPCSC on whether there is a need to introduce electoral reform, whereupon the NPCSC will decide the matter in accordance with Articles 45 and 68 of the Basic Law.[36] After this interpretation was promulgated, Chief Executive Tung Chee Hwa submitted a relevant report to the NPCSC on April 15, 2004.[37] Another session of the NPCSC was immediately convened to consider the report, and on April 26, the NPCSC promulgated its Decision on the matter.[38] The Decision ruled out the introduction of universal suffrage for the CE and all legislators in

33. The basic cleavage in the politics of the HKSAR has been the division between the "pro-China" camp and the "pro-democracy" camp or "pan-democrats." The pro-China camp supports the policies of the PRC government towards Hong Kong, including its cautious and gradualist approach to its democratization. The camp also supports one-party rule in mainland China and does not criticize its human rights record. The pan-democrats advocate western-style liberal democracy for Hong Kong, and is critical of authoritarian one-party rule in China and its human rights record.

34. *See generally* Ming Sing, *Public Support for Democracy in Hong Kong*, 12 DEMOCRATIZATION 2, 244-261 (2005) (explaining the upsurge in public support for democracy in Hong Kong since the rally of July 1, 2003).

35. This was the second interpretation of the Basic Law issued by the NPCSC. For the first interpretation, *see* HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Johannes M.M. Chan et al. eds., 2000).

36. *Id.*

37. Tung Chee Hwa, Chief Exec. of Hong Kong., *Report on Whether there is a Need to Amend the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in 2008* 1 (2004), http://www.cmab.gov.hk/cd/eng/executive/pdf/cereport.pdf; THE SECOND REPORT OF THE CONSTITUTIONAL DEVELOPMENT TASK FORCE: ISSUES OF PRINCIPLE IN THE BASIC LAW RELATING TO CONSTITUTIONAL DEVELOPMENT 31 (2004), *available at* http://www.legco.gov.hk/yr03-04/english/panels/ca/papers/ca0416cb2-report2-e.pdf.

38. *See* THE SECOND REPORT OF THE CONSTITUTIONAL DEVELOPMENT TASK FORCE: ISSUES OF PRINCIPLE IN THE BASIC LAW RELATING TO CONSTITUTIONAL DEVELOPMENT, *supra* note 37, at 2.

2007 and 2008 respectively, but permitted political reforms in 2007 and 2008 within certain parameters (e.g. the proportion of directly elected legislators to those elected by functional constituencies should remain unchanged).[39]

After the NPCSC Decision, the Hong Kong Government conducted public consultations on political reform for 2007–2008, leading to the publication of a reform proposal in October 2005.[40] This was a major initiative on the part of Donald Tsang, who had succeeded Tung Chee Hwa following the latter's resignation from the office of CE in spring 2005. The proposal involved the election of the CE in 2007 by an election committee of 1600 persons (which would include, *inter alia*, all members of the District Councils (formerly known as District Boards), and the expansion of LegCo in 2008 from sixty members to seventy members (including five new seats to be directly elected by universal suffrage and five new seats elected by District Councillors). Under Annexes I and II to the Basic Law, the adoption of the proposed reform would require the support of a two-thirds majority in LegCo. On December 21, 2005, the proposal was defeated by twenty-four "pan-democrats" in LegCo voting against it, mainly on the grounds that it was not democratic enough and that the Government had failed to provide a timetable for the introduction of universal suffrage.[41]

After the defeat of the political reform proposal in December 2005, discussion on political development continued to be carried out in the Committee on Governance and Political Development of the Commission on Strategic Development of the Hong Kong Government. Tsang established the Committee in late 2005, partly in response to criticisms that the Government was not able to provide any timetable for the introduction of universal suffrage.[42] The deliberations in this Committee led to the publication of the *Green Paper on Constitutional Development* on July 11, 2007, which initiated a three-month consultation on the subject.[43]

On December 12, 2007, the Government published its *Report on Public Consultation on the Green Paper on Constitutional Development*.[44] At the same time, Chief Executive Donald Tsang submitted his report to the NPCSC on "the Public Consultation on Constitutional Development and on whether

39. *See generally* Albert H.Y. Chen, *The Constitutional Controversy of Spring 2004*, 34 H.K.L.J. 215, 221-223 (2004); HONG KONG'S CONSTITUTIONAL DEBATES (Johannes Chan & Lison Harris eds., 2005).

40. CONSTITUTIONAL DEV. TASK FORCE, THE FIFTH REPORT OF THE CONSTITUTIONAL DEVELOPMENT TASK FORCE: PACKAGE OF PROPOSALS FOR THE METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2007 AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2008 (2005).

41. *See generally* Albert H.Y. Chen, *The Fate of the Constitutional Reform Proposal of October 2005*, 35H.K.L.J. 537, 537-38, 540-41 (2005).

42. *Id.* at 542.

43. *See generally* HONG KONG, GREEN PAPER ON CONSTITUTIONAL DEVELOPMENT (Hong Kong: Gov't Logistics Dep't 2007).

44. *Id.* The Green Paper on Constitutional Development was published on July 11, 2007, and the consultation period for the Green Paper ended on October 10, 2007.

there is a need to amend the methods for selecting the Chief Executive of the HKSAR and for forming the Legislative Council of the HKSAR in 2012."[45] On December 29, 2007, the NPCSC enacted its *Decision on Issues Relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the Year 2012 and on Issues Relating to Universal Suffrage.*[46] According to this Decision, neither the CE nor all legislators may be elected by universal suffrage in 2012. But the electoral arrangements for the CE and LegCo in 2012 may be amended in accordance with the "principle of gradual and orderly progress," provided that the ratio (50 percent to 50 percent) of legislators elected by universal suffrage to those elected by functional constituencies would remain unchanged.[47] The Decision also stated that the NPCSC was "of the view that . . . the election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage."[48]

On the basis of the 2007 Decision of the NPCSC, Mr. Donald Tsang introduced the political reform exercise of 2009-2010, which was designed to revise the models for the election of the CE and LegCo in 2012. This exercise began with the publication in November 2009 of the Government's Consultation Document on *Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012*,[49] which put forward proposals for electoral reforms in 2012 largely similar to, but designed to be an improved version of, the reform proposals of 2005. After considering the views of members of the public, the Government on April 14, 2010, formally announced its *Package of Proposals for the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012*—a constitutional

45. DONALD TSANG, CHIEF EXEC. OF HONG KONG, REPORT ON THE PUBLIC CONSULTATION ON CONSTITUTIONAL DEVELOPMENT AND ON WHETHER THERE IS A NEED TO AMEND THE METHODS FOR SELECTING THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN 2012 (2007), *available at:* http://www.cmab.gov.hk/doc/issues/Report_to_NPCSC_en.pdf.

46. DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON ISSUES RELATING TO THE METHODS FOR SELECTING THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION AND FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN THE YEAR 2012 AND ON ISSUES RELATING TO THE UNIVERSAL SUFFRAGE (adopted by the Standing Comm. of Nat'l People's Cong., Sept. 29, 2007) Special Supplement No. 5 Extraordinary No. 48/2007, *available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/F868A5B3391AB4B9482575EF002915AE/$FILE/CAP_2211_e_b5.pdf; *see* Albert H.Y. Chen, *A New Era in Hong Kong's Constitutional History*, 38 H.K.L.J. 1, 1-14 (2008), https://vpn.smu.edu/+CSCO+00756767633A2F2F75686F2E7578682E7578++/bitstream/10722/74646/1/content.pdf?accept=1.

47. *Id.* at 11.

48. *Id.*

49. The document was published on November 18, 2009 and was available in both hard copy and electronically.

reform proposal ("the Reform Package") that was basically the same as that proposed in the Consultation Document.

Since the publication of the Consultation Document, the pan-democrats had publicly stated their opposition to the Reform Package on the ground that it was not democratic enough. The scenario as of early June 2010 was that the motion for the Reform Package would be vetoed by the pan-democrats—a repetition of what happened in December 2005. To the surprise of most observers, the Government in the middle of June decided to grant a major concession to the pan-democrats by modifying the Reform Package substantially to adopt the Democratic Party's counter-proposal regarding the five additional District Councils functional constituency seats in LegCo being elected by all voters in Hong Kong who did not already have the right to vote in any existing functional constituency.[50] Although not all the pan-democrats in LegCo supported the modified Reform Package, the Government with the support of the Democratic Party secured the necessary two-thirds majority in LegCo for the modified Reform Package to be passed by LegCo on June 24-25, 2010.[51]

IV. The Struggle for "Genuine" Universal Suffrage in 2013-15

To the pan-democrats, the political reform of 2010 was only of limited significance since Hong Kong's political system was still far away from achieving the goals of what they called "double universal suffrage"—the election of the CE and the election of all members of LegCo by universal suffrage. As the NPCSC, in its 2007 Decision, had set the target date for the implementation of universal suffrage for the election of the CE at the year 2017, a third exercise in political reform (following the first two exercises in 2005 and 2010 respectively) would need to be conducted in 2013-15 to work out the precise model for such election. Pro-democracy activists in Hong Kong started to prepare for this exercise in early 2013.

On January 16, 2013, associate professor Benny Tai of the law school of the University of Hong Kong published a newspaper article in which he put forward the idea of an "Occupy Central" campaign to pressure Beijing and the Hong Kong government to introduce a model for universal suffrage that is consistent with international standards of democratic elections.[52] The idea was widely circulated on the Internet and received much media attention, snowballing into a real "Occupy Central" campaign supported by many civil

50. Approximately 200,000 persons had the right to vote in existing functional constituencies. According to the DP's proposal, more than three million registered voters would be enfranchised with regard to the five newly created LegCo functional constituency seats, and all voters in Hong Kong would have two votes—one in a geographical constituency, and one in a functional constituency.

51. *See generally* Albert H.Y. Chen, *An Unexpected Breakthrough in Hong Kong's Constitutional Reform* 40 H.K.L.J 259 (2010), http://hub.hku.hk/bitstream/10722/135145/1/content.pdf?accept=1.

52. The article was in Chinese and entitled "The most powerful weapon of civil disobedience" and was published in the Chinese newspaper Hong Kong Economic Journal.

society groups and the pro-democracy politicians in Hong Kong.[53] "Occupy Central" in this context referred to demonstrators practicing civil disobedience and occupying the Central District—the central business district of Hong Kong—to paralyze it in case the government failed to come up with a model for universal suffrage that complies with international standards on free and fair elections.[54]

On October 17, 2013, Chief Executive C.Y. Leung announced the establishment of a Task Force on Constitutional Development, which would launch a public consultation exercise on the electoral reforms for the LegCo and the CE to be elected in 2016 and 2017 respectively. The exercise formally commenced on December 4, 2013, with the publication of the Consultation Document on *Let's talk and achieve universal suffrage*.[55] During the consultation period, many political parties and civil society groups, including those which are "pro-China" and those which are "pro-democracy," put forward their proposed electoral models.[56] On July 15, 2014, the government released its report on the outcomes of the consultation exercise. On the same day, the Chief Executive submitted to the NPCSC his *Report on whether there is a need to amend the methods for selecting the Chief Executive of the HKSAR in 2017 and for forming the Legislative Council of the HKSAR on 2016*, recommending the introduction of universal suffrage for the election of the CE in 2017, and recommending no constitutional change regarding the electoral arrangements for LegCo in 2016.[57]

On August 31, 2014, the NPCSC rendered its Decision on political reform in the HKSAR.[58] It accepted the CE's recommendation that no constitutional change regarding the election of the LegCo was called for in 2016. On the question of the election of the CE by universal suffrage, the Decision stated that the CE of the HKSAR may be elected by universal suffrage "starting from 2017." As regards the "number of members, composition and formation method" of the "broadly representative

53. *See Occupy Central with Love and Peace*, http://www.oclp.hk (last visited Nov. 16, 2016).

54. *See generally* Alvin Y. Cheung, *Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law*, 40 BROOK. J. INT'L. L. 465, 494-98 (2014); Michael C. Davis, *The Basic Law, Universal Suffrage and Rule of Law in Hong Kong*, 38 HASTINGS INT'L & COMPARATIVE L. REV. 275, 289 (2015).

55. *See* METHOD FOR SELECTING THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE, *available at* http://www.2017.gov.hk/en/home/index.html (last visited Nov. 16, 2016).

56. REPORT ON THE PUBLIC CONSULTATION ON THE METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2017 AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2016, http://www.2017.gov.hk/tc/home/index.html (last visited Nov. 16, 2016).

57. *See* METHOD FOR SELECTING THE CHIEF EXECUTIVE, *supra* note 55.

58. DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON ISSUES RELATING TO THE SELECTION OF THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION BY UNIVERSAL SUFFRAGE AND ON THE METHOD FOR FORMING THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN THE YEAR 2016 (2014), *available at* http://www.2017.gov.hk/filemanager/template/en/doc/20140831a.pdf (hereinafter "Decision of the Standing Committee").

nominating committee" that would nominate candidates for the CE in accordance with Article 45 of the Basic Law, the Decision stated that provisions "shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth Chief Executive."[59] "The nominating committee shall nominate two to three candidate for the office of the Chief Executive in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee."[60] The Decision explained as follows:

> Since the Chief Executive of the HKSAR shall be accountable to both the HKSAR and the Central People's Government in accordance with the provisions of the Hong Kong Basic Law, the principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld. This is a basic requirement of the policy of 'one country, two systems.' It is determined by the legal status as well as important functions and duties of the Chief Executive, and is called for by the actual need to maintain long-term prosperity and stability of Hong Kong and uphold the sovereignty, security and development interests of the country. *The method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose.*[61]

The Decision of the NPCSC was met by strong protests from pro-democracy forces in Hong Kong, which condemned the electoral model as "fake universal suffrage" because it was perceived that only pro-China political figures and no pan-democrats would be able to gain majority support from the nominating committee so as to become candidates in the election of the CE by universal suffrage. Students and other democracy activists launched the "Umbrella Movement" or "Occupy Central Movement" that started in late September and continued until mid-December 2014, resulting in the occupation by demonstrators of central business and government districts in Admiralty, Causeway Bay and Mongkok.[62] After the occupation came to a peaceful end, the Government, on January 7, 2015, launched the "second round consultation" on political reform by publishing the consultation document entitled *2017 Seize the Opportunity: Method for Selecting the Chief Executive by Universal Suffrage Consultation Document*, for the purpose of consulting the public on the concrete model for electing the CE in 2017, which was to be formulated on

59. *See* The Basic Law of the HKSAR of the People's Republic of China, art. 45 (H.K.) (Article 45 refers to "the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures") (herineafter "The Basic Law of the HKSAR").

60. *Id.*

61. *Id.* (emphasis added).

62. *See generally* JASON Y. NG, UMBRELLAS IN BLOOM: HONG KONG'S OCCUPY MOVEMENT UNCOVERED (Hong Kong: Blacksmith Books, 2016).

the basis of the parameters set by the NPCSC Decision.[63] The pan-democrats boycotted the consultation exercise, stating that they would reject any electoral model that conformed to the parameters set by the NPCSC Decision.

On April 22, 2015, the Government published a policy document entitled *2017 Make It Happen! Method for Selecting the Chief Executive by Universal Suffrage: Consultation Report and Proposals*, proposing a concrete model for nominating candidates for and electing the CE in 2017.[64] The proposed model was subsequently introduced in the Legislative Council and put to a vote on June 18, 2015. With twenty-eight (including twenty-seven "pan-democrats") of the seventy members of the Council voting against the proposal, it failed to secure the requisite two-thirds majority for amendment of Annex I to the Basic Law.[65] The veto meant that the existing system of the election of the Chief Executive by a 1200-member Election Committee would continue in force in the foreseeable future.

V. Concluding Reflections: Contradictions and tensions inherent in the project of "One Country, Two Systems"

Why did Beijing design the electoral model for the election of the CE of the HKSAR by universal suffrage that was stipulated in the August 2014 Decision of the NPCSC? Why did the Occupy Movement and the pan-democrats reject the model?

Beijing would like to ensure that the candidates for election by universal suffrage to the office of the CE are all acceptable, trustworthy and appointable from Beijing's point of view, in the sense that they are not "confrontational" towards the Central Government or ideologically opposed

63. 2017 SEIZE THE OPPORTUNITY: METHOD FOR SELECTING THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE CONSULTATION DOCUMENT (2015), *available at* http://www.2017.gov.hk/filemanager/template/en/doc/second_round_doc/Consultation_Document_(Full)_Eng.pdf.

64. *Id.*

65. *Hong Kong Reform Package Rejected as pro-Beijing camp walk out in Miscommunication*, SOUTH CHINA MORNING POST (Jun. 18, 2015), http://www.scmp.com/news/hong-kong/politics/article/1823398/hong-kong-political-reform-package-voted-down-legco-leaving. Actually the Government's motion was rejected by a vote of eight (for the motion) to twenty-eight (against). *Id.* Less than one minute before the voting took place, thirty-one pro-Government legislators walked out of the chamber en masse, intending to precipitate an insufficient quorum so that the voting could delayed until one absent pro-Government legislator (Lau Wong-fat) could come back to vote with the others. *Id.* Due to failure in coordination and communication, nine pro-Government legislators did not join the walk-out, hence the quorum (half of the membership of LegCo) was still satisfied and the voting in the chamber was completed a few seconds after the walk-out. *Id.* In the state of confusion, one of the nine pro-Government legislators who stayed in the chamber failed to press the voting button in time, hence only eight votes in support of the Government's motion were recorded. *Id.* Jasper Tsang, President of LegCo, followed the convention of the President not voting. *Id.*

to the "socialist political system" in mainland China.[66] The system of nominations of candidates by a nominating committee as provided for in Article 45 of the Basic Law enables this objective to be achieved if the majority of the members of the nominating committee are "pro-China" or "patriots" and if the nominations the committee makes are "institutional nominations" expressing the majority will of members of the committee.[67] Thus, the 2014 Decision of the NPCSC requires the size and composition of the nominating committee to closely follow that of the pre-existing election committee for the Chief Executive. The political reality since the handover in 1997 has been that with the four-sector composition of the Election Committee and its members being largely elected by functional constituencies in these sectors, the majority of the committee's members were indeed "pro-China," "pro-Establishment," or "patriots," and those who were pan-democrats or sympathetic to them only constituted a minority (slightly more than one-eighth) in the Election Committee.[68]

On the other hand, the pan-democrats were firmly opposed to any "screening" to be performed by the nominating committee for the purpose of preventing persons (such as leading members of the pan-democrats) who have considerable public support among Hong Kong voters but are not "patriots" in Beijing's eyes from becoming candidates for election by universal suffrage to the office of the Chief Executive. In their view, this would be "fake" universal suffrage and inconsistent with international standards of democracy and elections, which prohibit unreasonable restrictions on the right to be a candidate in an election (such as restrictions or discrimination based on a person's political opinion).[69] "Genuine" universal suffrage, in their view, requires a truly competitive election in which candidates with different platforms and political opinions (including opinions critical of Beijing and its policies towards Hong Kong or the mainland itself) may freely and fairly compete for votes. Given that the pan-democrats had always obtained a majority of the popular votes for LegCo

66. Qiao Xiaoyang, Chairman of the Law Committee of the NPC, in his speech in Shenzhen to "pro-Establishment" Hong Kong legislators on March 24, 2013, stressed that the CE of the HKSAR must be a patriot and could not be someone who was "confrontational" towards the Central Government in Beijing or sought to change the socialist political system in mainland China. *See* Joshua But & Colleen Lee, *Opponents of Beijing Ineligible to be CE: Top Chinese Official* (Mar. 24, 2013), http://www.scmp.com/article/1199015/opposition-camp-members-cant-run-chief-executive-says-npc-official.

67. The concept of "institutional nomination" (jigou timing) was first mentioned by Qiao Xiaoyang in his speech on March 24, 2013. *Id.*

68. *See* The Basic Law of the HKSAR, *supra* note 59. In the existing system for election of the CE by the Election Committee under Annex I to the Basic Law, a candidate may be nominated jointly by at least one-eighth of the members of the Election Committee, followed by election by members of the Election Committee. In the CE elections of 2007 and 2012, persons supporting or sympathetic to the pan-democrats won more than one-eighth of the seats in the elections to the Election Committee, and thus Alan Leong (of the Civic Party) and Albert Ho (of the Democratic Party) were nominated respectively as one of the two candidates in the 2007 election and one of the three candidates in the 2012 election.

69. *See* Cheung, *supra* note 54, at 494-98; Davis, *supra* note 54, at 289.

seats that were elected by universal suffrage (as distinguished from seats elected by functional constituencies), they believed that any nomination system for the election of the Chief Executive by universal suffrage which makes it impossible for their leaders to be nominated as candidates would not be genuine universal suffrage.[70] Therefore, the pan-democrats and their supporters condemned the model for universal suffrage stipulated in the NPCSC Decision, vowed to boycott the government's "second round" of consultation regarding more detailed arrangements for universal suffrage, and eventually vetoed the Government's electoral proposal based on the model stipulated by the NPCSC.

The Decision of the NPCSC in August 2014 might be understood as the outcome of a cost-and-benefit analysis conducted by Beijing regarding the introduction of elections of the Chief Executive by universal suffrage in Hong Kong. The benefit would be the appearance of honoring the promise of universal suffrage made in the 2007 Decision of the NPCSC and in the Basic Law and to win the support of Hong Kong people who aspire towards democracy. Furthermore, some believed that the Hong Kong Government would become more effective if its CE was elected by universal suffrage and thus has a popular mandate and greater legitimacy to govern Hong Kong. On the other hand, an electoral model that was acceptable to the pan-democrats would be one in which the pan-democrats would have a reasonable chance of getting their leader(s) nominated by the nominating committee as candidate(s) in the CE election by universal suffrage. For Beijing, agreeing to such an electoral model means to accept that there is a chance that a pan-democrat would be the winner in the CE election by universal suffrage. Beijing would have assessed the likelihood of this scenario materializing, and considered how to deal with this scenario should it materialize. Would it appoint the pan-democrat as Chief Executive? Or would it decline to make an appointment—a power which it has under the Basic Law, so that another election should be held?[71] What would be the nature and magnitude of the political crisis in Hong Kong should this happen? How would such a crisis (taking into account its likelihood and its magnitude) compare with the crisis (including, for example, "Occupy Central" materializing) that would be precipitated by the electoral model favored by Beijing being unacceptable to the pro-democracy forces in Hong Kong? These, then, were probably some of the considerations which Beijing

70. Ever since direct election by universal suffrage was introduced for a portion of LegCo seats in 1991, the pan-democrats have consistently won approximately 55-60 percent of the popular votes in each election, and the pro-China camp approximately 40-45 percent of the popular votes. Such distribution has hardly changed in twenty years.

71. *See* The Basic Law of the HKSAR, *supra* note 59. Art. 15 of the Basic Law provides that "The Central People's Government shall appoint the Chief Executive and the principal officials of the executive authorities of the Hong Kong Special Administrative Region in accordance with the provisions of Chapter IV of this Law." *Id.* In Chapter IV, art. 45(1) provides that "The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government." *Id.*

took into account when it reached the Decision in August 2014 on the model for universal suffrage for the Hong Kong Chief Executive in 2017. The Decision implies, that according to Beijing's analysis, the risk and negative consequences of a non-patriot winning an election by universal suffrage and of a crisis precipitated by Beijing refusing to appoint him or her as CE are more serious than the risk and negative consequences of "Occupy Central" materializing or of any discontent or unrest flowing from Beijing's model for universal suffrage being rejected by the pro-democracy forces in Hong Kong.

Interestingly, a cost-and-benefit analysis may also be used to explain why the pan-democrats in LegCo vetoed the model of universal suffrage for the election of the CE proposed by the HKSAR Government on the basis of the NPCSC Decision of August 2014. As the composition of the Nominating Committee and the high nomination threshold specified by the Decision effectively rules out the possibility of at least one leader of the pan-democrats being nominated as a candidate to compete in the CE election by universal suffrage, the adoption by LegCo of the electoral model proposed by the Government would effectively mean that the CE election by universal suffrage in 2017 would be a competition among two or three "pro-China" candidates considered to be "patriots" by a majority of the members of the Nominating Committee. The candidate eventually elected can then claim a popular mandate and political legitimacy greater than that of any leader of the pan-democrats. This would work against the interests of the pan-democrats, because their claim would then be weakened that they represent the majority of Hong Kong voters—a claim which they have been able to make continuously so far because the majority of Hong Kong voters who voted in LegCo elections from 1991 to 2012 actually voted for the pan-democrats rather than "pro-China" or "pro-Establishment" candidates. For the pan-democrats, therefore, there was little to be gained, but much to lose, from the introduction of universal suffrage for the election of the CE in 2017 in accordance with the nomination model prescribed by the NPCSC Decision of August 2014. This, then, can explain why they vetoed the electoral package in LegCo, despite the fact that opinion polls showed that members of the public who supported the electoral reform outnumbered those who were opposed to it.[72]

72. *Public Opinion Programme*, UNIVERSITY OF HONG KONG, http://www.hkupop.hku/english/report/superSurvey2015/index.html (last visited Nov. 26, 2016). The LegCo vote on the electoral reform proposal took place on June 18, 2015. The following opinion polls conducted in June 2015 are thus particularly relevant. According to the "Survey on 2017 CE Election Proposal" conducted by the University of Hong Kong's Public Opinion Programme, among those polled on June 5-14, 2015, 51 percent supported LegCo adopting the proposal, while 37 percent were opposed to it. According to the "Joint-University Rolling Survey on 2017 CE Election Proposal," among those polled on June 12-16, 2015, 47 percent supported the Government's electoral reform proposal, while 38 percent were opposed to it. *Public Opinion Programme*, UNIVERSITY OF HONG KONG, http://www.hkupop.hku.hk/english/features/jointURollingSurvey/.

To conclude, it may be observed that the concept of "One Country, Two Systems" as embodied by the Hong Kong Basic Law has not only provided for the co-existence of two economic systems—one socialist and the other capitalist—within the PRC, but also envisioned a process of democratization in Hong Kong towards eventual election of the CE by universal suffrage and election of all legislators by universal suffrage, thus moving the political systems of Hong Kong and mainland China *further apart* in the course of time (unless the latter also democratizes). Here lies the inherent contradiction or tension within "One Country, Two Systems" under which the "One Country" adheres to the supremacy of the Chinese Communist Party and must resist Western-style liberal democracy in order to survive. The Occupy Central Movement and the failure of the political reform initiative of 2014-15 have revealed such contradiction or tension.

It is unlikely that this tension and contradiction can be resolved in the foreseeable future. The most likely scenario is that the existing "semi-democratic" political system in Hong Kong[73] will be maintained without further democratization, and the confrontation and stalemate between the "pro-China" camp and "pan-democratic" camp in the politics of the HKSAR will continue to plague it and make it difficult to govern.[74] Thus, there seems to be an inexorable logic that the political costs, and ultimately also the economic and social costs, of "One Country, Two Systems" are rising as a result of the clash between Hong Kong people's aspirations towards Western-style democracy and the Chinese Party-State's insistence that the Government of the HKSAR must be led by "patriots" loyal to the Party-State. Whether such costs can be contained and whether social stability and economic prosperity can continue to be maintained in Hong Kong, amount to a severe challenge for the people of Hong Kong and the government of the PRC in the years to come.

73. The existing political system of the HKSAR has been described as a semi-democracy. *See* MA NGOK, POLITICAL DEVELOPMENT IN HONG KONG, 26 (Hong Kong: Hong Kong Univ. Press, 2007); William H. Overholt, *Hong Kong: The Perils of Semidemocracy*, 12 J. OF DEMOCRACY 5 (2001); Ming Sing, *Origins of Anti-Partyism in Hong Kong*, 21 EAST ASIA 37 (2004); SONNY SHIU HING LO, HONG KONG'S INDIGENOUS DEMOCRACY: ORIGINS, EVOLUTION AND CONTENTIONS (New York: Palgrave MacMillan, 2015).

74. The difficulties of Hong Kong's governance have been exacerbated by the filibuster in LegCo by radical pan-democrats which has steadily increased in scale since 2012 and resulted in partial paralysis of the LegCo's functions of law-making and financial approval.

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