

HONG KONG'S POLITICAL AUTONOMY AND ITS CONTINUING STRUGGLE FOR UNIVERSAL SUFFRAGE

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Hong Kong has faced tremendous transitions as the United Kingdom and China negotiated its political future which culminated in China's resumption of sovereignty over Hong Kong in July 1997. Whilst massive human rights violations in Hong Kong have not materialised after 1997, the autonomy as has repeatedly been promised to the people of Hong Kong by the British and Chinese governments has been eroded. We will assess whether Hong Kong is entitled to the right of self-determination under international law and, if so, what the right entails and whether and how it has been violated or implemented. We will then discuss how the ultimate aim of universal suffrage in Hong Kong continues to be diluted. Finally, we will examine the constitutional implications of the Standing Committee of the National People's Congress' power and use of interpretation of a law that is meant to be the ultimate law of Hong Kong.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹

– *Universal Declaration of Human Rights*

Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.²

– Thomas M. Franck

Hong Kong has faced tremendous transitions in the past two decades, as the United Kingdom and the People's Republic of China between 1982 and 1984 negotiated the political future of Hong Kong without the consent or consultation of the people of Hong Kong, which culminated in the *Sino-British Joint Declaration*³ entered into

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¹ *Universal Declaration of Human Rights*, adopted and proclaimed by G.A. Res. 217A(III) of 10 December 1948, art. 21(3).

² Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 A.J.I.L. 46 at 46.

³ *Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the Question of Hong Kong*, 23 I.L.M. 1366 (1984) [*Sino-British Joint Declaration*].

between the two sovereign States in 1984 which provided for China's resumption of sovereignty over Hong Kong on 1 July 1997. Whilst massive human rights violations in Hong Kong under Chinese (communist) rule which Hong Kong during the 1990s feared have not materialised after 1997, the autonomy as has repeatedly been promised to the people of Hong Kong by the British and Chinese governments as well as in the *Sino-British Joint Declaration* and ultimately the *Basic Law of Hong Kong*,⁴ promulgated by China's National People's Congress in 1990 as the prospective mini-constitution of post-colonial Hong Kong, has nonetheless been eroded. The erosion of autonomy has particularly been caused by and manifested in the existence and use of the mechanism laid down in Article 158 of the *Basic Law of Hong Kong* which vests the power of interpretation of the *Basic Law of Hong Kong* ultimately in the Standing Committee of the National People's Congress, a legislative body of China. Universal suffrage, the cornerstone and ultimate indication of every a developed society, continues to be denied the people of Hong Kong, even though it was explicitly promised by the *Joint Declaration* and which the *Basic Law of Hong Kong* reiterates as the ultimate aim of governance of Hong Kong.⁵

In this article, we will assess the political autonomy or otherwise of Hong Kong and its continuing struggle for universal suffrage. In Part I, we will assess the question of whether Hong Kong is entitled to the right of self-determination in and under international law and, if so, what the right entails and whether and how it has been violated or implemented. In Part II, we will discuss whether and how the ultimate aim of universal suffrage in Hong Kong continues to be diluted, particularly through the intervention of the Standing Committee of the National People's Congress of the People's Republic of China in which Article 158 vests the power of interpretation of the *Basic Law of Hong Kong* ultimately. In Part III, we will examine the constitutional implications of the Standing Committee's power and use of interpretation of a Law that is meant to be the ultimate law of Hong Kong. As will be demonstrated in this article, Hong Kong is a quintessential example that demonstrates that democracy has still not materialised as a global entitlement more than a decade since Franck's promising conjecture, and that collective international processes may indeed play a significant role in *undermining* democracy instead of promoting and protecting it.

I. HONG KONG AND THE RIGHT OF SELF-DETERMINATION

A. *Is Hong Kong Entitled to the Right of Self-Determination?*

Before we proceed to answer this question, a background understanding of the development of the right of self-determination in international law is essential. Upon the end of World War I, in order to prevent the escalation of nationalistic sentiment that had been seen in the Balkan peninsula, it was agreed by the victorious nations, in

⁴ *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China as adopted by the Seventh National People's Congress at its Third Session on 4 April 1990 in pursuance of the Sino-British Joint Declaration*, 29 I.L.M. 1519 [*Basic Law of Hong Kong*].

⁵ *Ibid.*, arts. 45 and 68.

Article 22(1) of the *Covenant of the League of Nations*, that:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The forbearance of continued foreign rule of peoples implicit in the provision aside, self-determination was not specifically mentioned in the Covenant. On the contrary, in 1920 when called upon by the League of Nations to advise on the *Aaland Islands Question*,⁶ the International Commission of Jurists rejected the notion of a positive right of self-determination.

Proponents of a right of self-determination will find the *Charter of the United Nations*,⁷ and the 1948 *Universal Declaration of Human Rights*, similarly disappointing. Self-determination as a principle, and not as a positive right, is mentioned only twice in the *UN Charter*, in Articles 1(2) and 55 respectively, and it is not at all mentioned in the Declaration. Nonetheless, Chapter XI of the *UN Charter* does provide, *inter alia*, for the utmost promotion, the interests and well-being of non-self-governing territories (i.e., territories occupied by World War II-victorious States prior to the war, including Hong Kong by the United Kingdom), with a view to developing self-government⁸ and 'the progressive development of their free political institutions'.⁹ Independence is not stated to be an objective of Chapter XI. For those territories that were formerly occupied by World War II-defeated States, Chapter XII of the *UN Charter* establishes an international trusteeship system that declares as one of its basic objectives the promotion of 'their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement'.¹⁰

Be that as it may, with colonies subsequently decolonised and transformed into independent States and their attendant admission to the United Nations, recognition of a right of self-determination began to gain momentum, culminating in the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*¹¹ which 'solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'.¹² The 1960 *Declaration* declares that '[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and

⁶ "The Aaland Islands Question: Report of the Committee of Jurists" League of Nations Official Journal: Special Supplement 3 (1920).

⁷ *Charter of the United Nations*, signed at San Francisco on 26 June 1945 and entered into force on 24 October 1945 [*UN Charter*].

⁸ *Ibid.*, art. 73(b).

⁹ *Ibid.*

¹⁰ *Ibid.*, art. 76(b).

¹¹ Adopted by G.A. Res. 1514(XV) of 14 December 1960 [*1960 Declaration*].

¹² *Ibid.*

cultural development.¹³ Yet, the final paragraph of the 1960 *Declaration* reaffirms ‘the sovereign rights of all peoples and their territorial integrity’,¹⁴ which is further reinforced by paragraph 6 of the same which categorically states that ‘[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the *Charter of the United Nations*’¹⁵—thus confirming the supremacy of the centuries-old principle of territorial integrity over the right of self-determination.

Ultimately, the right of self-determination finds its rightful place in the *International Covenant on Civil and Political Rights*¹⁶ and in the *International Covenant on Economic, Social and Cultural Rights*,¹⁷ both signed in 1966 effective in 1976. Common Article 1 of the two *Covenants* states that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’¹⁸ The provision is then reinforced by the 1970 *Friendly Relations Declaration*,¹⁹ adopted by the United Nations General Assembly by consensus, which contains an explicit section on the principle of equal rights and self-determination of peoples in which the right is qualified by the principle of territorial integrity.²⁰

It is historical fact that Hong Kong was ceded to Great Britain in perpetuity under the 1842 *Treaty of Nanjing* (in respect of the segment now known as Hong Kong Island) and the 1860 *Treaty of Beijing* (the Kowloon Peninsula and Stonecutters’ Island). The segment of Hong Kong that is now known as the New Territories as well as all outlying islands were leased to Great Britain for 99 years under the 1898 *Treaty of Beijing*.²¹ As a consequence of these three treaties, Hong Kong at the material times after the Second World War and the entry into force of the *UN Charter* was a Crown Colony of the United Kingdom. Hong Kong was classified by the United Nations as a non-self-governing territory, which Principle IV of the United Nations General Assembly Resolution 1541(XV) defines as ‘a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it’, and was thus placed on the list of non-self-governing territories deemed entitled to the right of self-determination, necessitating the obligations on the part of the United Kingdom to transmit information under Chapter VII of the *UN Charter* with a view to developing self-government²² and ‘the progressive

¹³ *Ibid.*, at para. 2.

¹⁴ *Ibid.*, at para. 7.

¹⁵ *Ibid.*, at para. 6.

¹⁶ Adopted and opened for signature, ratification and accession by G.A. Res. 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976.

¹⁷ Adopted and opened for signature, ratification and accession by G.A. Res. 2200A(XXI) of 16 December 1966 and entered into force on 3 January 1976.

¹⁸ *International Covenant on Civil and Political Rights*, art. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 1.

¹⁹ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, proclaimed by G.A. Res. 2625(XXV) of 24 October 1970.

²⁰ *Ibid.*, The Principle of Equal Rights and Self-Determination of Peoples.

²¹ Both the then Republic of China and the People’s Republic of China governments maintain that treaties that were previously entered into under duress or as a result of war, including the three treaties pertaining to Hong Kong, were unequal treaties and therefore invalid. The validity of these treaties goes beyond the scope of this article. For a discussion on this important question of international law, see Stuart S. Malawer, *Imposed Treaties and International Law* (Buffalo, New York: W. S. Hein, 1977).

²² *UN Charter*, art. 73(b).

development of their free political institutions²³ in the Colony. The British government readily acknowledged its international obligations, with its Foreign Secretary Francis Pym stating as late as 1982 that the guarantee of the right of self-determination constituted a 'fundamental' part of its foreign policy.²⁴

However, in 1971 shortly after the Republic of China government was replaced with the People's Republic of China government in China's membership of the United Nations,²⁵ China demanded that Hong Kong, together with Macau, be removed from the United Nations' list of non-self-governing territories, with Chinese Ambassador Huang stating that 'the settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.'²⁶ In due course, the Chinese demand was granted which encountered no protest from London save that the United Kingdom considered that such removal 'in no way affects the legal status of Hong Kong'.²⁷

Nonetheless, the metaphysics of a right or entitlement must be such that its normativity cannot be destroyed. In respect of the right of non-self-governing territories to self-determination, the General Assembly maintained that 'in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the *UN Charter*, the administering Power concerned should continue to transmit information under Article 73(e) of the *UN Charter* with respect to that Territory.'²⁸ The General Assembly made no such decision with respect to Hong Kong, and Hong Kong thus continued to remain a non-self-governing territory.²⁹ As Jayawickrama states, 'the fact that Hong Kong was deleted, in these circumstances, from the agenda of the Special Committee on Decolonization does not alter its legal status as a colonial territory.'³⁰ McCorquodale is adamant that even if such removal did change Hong Kong's legal status on the international plane, it would not have mattered as 'Hong Kong [was until 1997] still a colony and so its inhabitants are a "people" entitled to the right of self-determination.'³¹ In its advisory opinion in *Western Sahara*,³² the International Court of Justice categorically maintained that:

the consultation of the people of a territory awaiting decolonization is an inescapable imperative. ... Thus even if integration of territory was demanded

²³ *Ibid.*

²⁴ Robert McCorquodale, "Negotiating Sovereignty: The Practice of the United Kingdom in regard to the Right of Self-Determination" (1995) 66 *Brit. Y.B. Int'l L.* 283 at 286–87.

²⁵ G.A. Res. 2758(XXVI) of 25 October 1971.

²⁶ Letter from the People's Republic of China's Ambassador Huang Hua to Chairman of the Special Committee (10 March 1972), reprinted in D. Jones, "A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgement of Individual Rights and Local Autonomy" (1987) 12 *Yale J. Int'l L.* 250 at 255; as quoted in McCorquodale, *supra* note 24 at 291.

²⁷ Letter from the United Kingdom's Permanent Representative to the United Nations to the Secretary-General of the United Nations (19 December 1972); as quoted in McCorquodale, *ibid.*

²⁸ G.A. Res. 41/13 of 31 October 1986.

²⁹ McCorquodale, *supra* note 24 at 292.

³⁰ Nihal Jayawickrama, "The Right of Self-Determination" in Peter Wesley-Smith, ed., *Hong Kong's Basic Law: Problems & Prospects* (Hong Kong: Faculty of Law, The University of Hong Kong, 1990) 85 at 93.

³¹ McCorquodale, *supra* note 24 at 293.

³² (1975) I.C.J. Rep. 12.

by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.³³

It is conceded, however, that the exercise of the right of self-determination is not necessarily synonymous with independence and statehood. Hannum elucidates that:

Independence is not necessarily an option in situations in which (1) forcible incorporation of adjacent territory has led to absorption or displacement of the former population, and the resulting exercise of sovereignty has been generally accepted by the international community; or (2) the colony in question is ethnically, historically, or culturally related to a large independent non-European neighbour.³⁴

Admiral Harcourt's pre-emptive repossession of Hong Kong immediately after Japan surrendered in August 1945 prevented China from recovering its lost territory as it had done in respect of the island of Taiwan. The colonial status quo of Hong Kong therefore remained. As was seen in China's demand that Hong Kong be removed from the United Nations' list of non-self-governing territories, China's ambitions in recovering Hong Kong cannot be doubted. The Chinese and British governments thus entered into a series of negotiations, culminating in the signing of the *Sino-British Joint Declaration* in 1984 which was duly lodged with the United Nations Secretariat as an international agreement between China and the United Kingdom. The *Sino-British Joint Declaration* proclaimed that the sovereignty over Hong Kong was to be restored to China,³⁵ and that Hong Kong 'will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government.'³⁶ Significantly, the *Sino-British Joint Declaration* required that the Legislative Council of post-colonial Hong Kong be constituted by elections,³⁷ which necessitated that the political structure as it existed in Hong Kong in 1984 be substantially reformed.

In the whole process, however, the people of Hong Kong were not at all meaningfully consulted. Although the British government, as will be seen, did consult the people of Hong Kong regarding their own political future, the consultation was brought forth only after the *Sino-British Joint Declaration* had already been signed. McCorquodale asserts that such consultation 'cannot be seen as a genuine (or efficient) ascertainment of the wishes of the Hong Kong people.'³⁸ As the author went on to elucidate:

The mere fact that there is a competing sovereignty claim about a territory does not mean that the exercise of the right of self-determination of its people is automatically limited. An administering State must, at the very least, ensure that there is a free and genuine ascertainment of the wishes of the people of the territory it is administering. To do otherwise, as the United Kingdom has done in Hong

³³ *Ibid.*, at 81.

³⁴ Hurst Hannum, "Rethinking Self-Determination" (1993) 34 Va. J. Int'l L. 1 at 33.

³⁵ *Sino-British Joint Declaration*, *supra* note 3, art. 2.

³⁶ *Ibid.*, art. 3(2).

³⁷ *Ibid.*, Annex I: Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, art. I.

³⁸ McCorquodale, *supra* note 24 at 307.

Kong by not ascertaining the wishes of the people of Hong Kong, could be an infringement of the right of self-determination of the people of the territory.³⁹

The International Commission of Jurists likewise concluded in its report on Hong Kong⁴⁰ that '[w]e regard it as intolerable for the British Government to transfer British citizens in Hong Kong to the jurisdiction of the People's Republic of China without their own consent and without any opportunity having been given to them to participate in deciding on their own future.'⁴¹ It was all the more deplorable as the British government had by then enacted the *British Nationality Act 1981*, which replaced the British citizenship to which the people of Hong Kong had generally been entitled with a special British Dependent Territories citizenship which entailed no right of abode in the United Kingdom.⁴²

Hong Kong is now firmly under the sovereignty of China. The above discussion on the right of self-determination demonstrates that the people of Hong Kong were and continue to be entitled to the right of self-determination, notwithstanding the 1984 *Sino-British Joint Declaration* and the United Kingdom's transfer of sovereignty over the territory to China in 1997. Whilst we concede that the right of self-determination does not necessarily carry independence and statehood, 'the rules pertaining to self-determination, freedom of expression and the right to participate in free and open elections are closely interwoven strands of a single fabric.'⁴³ The key meaningful question which this article hopes to answer is thus whether the people of Hong Kong have been able to exercise their right of self-determination through such autonomy—universal suffrage in particular—as has repeatedly been promised to them since 1984.

B. The Implementation of the Sino-British Joint Declaration between 1984 and 1997

The manner in which the British government eventually consulted the Hong Kong people upon their own political future was fraught with anomalies. In a process which Ghai denounces as shameful and manipulative,⁴⁴ after the *Sino-British Joint Declaration* had already been signed by China and itself the British government set up a special assessment office to collect public views on the *Joint Declaration* for London's consideration:

The idea of a referendum, or any kind of vote, was rejected. Instead, an assessment office, manned by local civil servants, was established to collect opinions and pronounce judgement on the people's views. Potential respondents were warned, however, that the agreement had to be considered as a whole, that it could not be

³⁹ *Ibid.*, at 325.

⁴⁰ International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong* (Geneva: Author, 1992).

⁴¹ *Ibid.*, at 56.

⁴² *British Nationality Act 1981* (c.61), Part II. For a discussion on the subject matter, see International Commission of Jurists, *ibid.*, Ch. VI.

⁴³ Franck, *supra* note 2 at 77.

⁴⁴ Yash Ghai, "Putting the Cat Among the Pigeons: The Politics of the Referendum" (2004) Hong Kong L.J. 433 at 444.

amended in part, and that the alternative to its acceptance was a unilateral plan for the future of the territory drawn up by the Chinese government. Faced with this kind of choice, a majority of those who bothered to respond to the call to express their opinions opted in favour of the agreement. But their endorsement of the proposals was at best lukewarm and it did not escape many of those who did respond, and possibly most of those who did not, that this was an agreement which was being imposed by the British and Chinese governments on the people of Hong Kong.⁴⁵

In July 1984, the Hong Kong government issued a *Green Paper* on representative government,⁴⁶ indicating that the intention was 'to develop progressively a system of government the authority for which is firmly rooted in Hong Kong, which is able to represent authoritatively the views of the people of Hong Kong, and which is more directly accountable to the people of Hong Kong'.⁴⁷ The *Green Paper* proposed that in 1985 and in 1988, respectively, a number of seats in the Legislative Council be open to election by an electoral college as well as to indirect election using a restricted functional franchise referred to as functional constituencies⁴⁸ (based on 'people's common interests, such as commerce, industry, law, medicine, finance, education, trade unions, etc.').⁴⁹ Subsequently in November 1984, the Hong Kong government issued a *White Paper* on representative government,⁵⁰ concluding that '[p]ublic reaction was generally in favour of the aims of the *Green Paper* and the gradual and progressive nature of the proposals made in it. The need to ensure that the prosperity and stability of Hong Kong are not put at risk by introducing too many constitutional changes too rapidly was widely recognized. Many people supported the proposals as being a realistic and practical framework for the development of representative government at the central level during the next few years.'⁵¹ The consultation remains of pivotal relevance to Hong Kong's continuing struggle for universal suffrage. As Chen, a member of the Basic Law Consultative Committee, points out:

The force of originalism as one of the legitimate and most important modes of constitutional interpretation need not and cannot be denied. The real question is how originalism is to be applied. As discussed above, originalism does not necessarily mean giving effect to the subjective intent of the framers and adopters of the constitution. How the constitutional text was understood by members of the community at the time of enactment of the constitution can be an even more important consideration. In the case of the Basic Law, the relevant members of the community would include the people of Hong Kong. Hence how they understood the wording and promise of the Basic Law in the late 1980's and 1990 . . . does

⁴⁵ Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press, 1989) at 2.

⁴⁶ Hong Kong, Government Printer, "Green Paper: The Further Development of Representative Government in Hong Kong", 1984.

⁴⁷ *Ibid.*, at para. 7(a).

⁴⁸ *Ibid.*, at para. 25.

⁴⁹ *Ibid.*, at para. 22.

⁵⁰ Hong Kong, Government Printer, "White Paper: The Further Development of Representative Government in Hong Kong", 1984.

⁵¹ *Ibid.*, at para. 4.

matter. And since much of the content of the Basic Law simply reproduces the text of [the] Sino-British Joint Declaration, how the people of Hong Kong understood the wording and promise of the Joint Declaration in 1984 also matters.⁵²

Not surprisingly, Beijing was dismayed with the ongoing consultation. Beijing viewed that London was seeking to establish representative government in Hong Kong in order to pass the administration of Hong Kong on to the people of Hong Kong and not to Beijing, and that London's proposed reform was to nullify Chinese communist rule rather than to preserve capitalism⁵³ (are they not one and the same?). Meanwhile, Richard Luce, who was Minister of State, Foreign and Commonwealth Office with special responsibility for Hong Kong at the material times, was evasive, merely stating that London was in charge of Hong Kong until 1997, including the responsibility for constitutional development. Decoded, the British government, according to Luce, would be neither capable of nor responsible for determining what might happen to Hong Kong after 1997. Such a view was contrary to international law, which prescribes that '[a]ny change of sovereignty over a territory without any exercise of the right of self-determination by the peoples of that territory does not absolve the old or the new sovereign of the responsibility to protect the right of self-determination of the people of that territory.'⁵⁴ As McCorquodale points out:

under both treaty and customary international law, the right of self-determination of the people of Hong Kong is not limited by any treaty. Indeed, the action of the United Kingdom in entering into a treaty with China without allowing the people of Hong Kong to exercise their right of self-determination is a breach of the United Kingdom's treaty obligations (under the International Human Rights Covenants) to protect the right of self-determination. Because common Article 1 requires all States at all times to 'facilitate realization of and respect for the right of peoples to self-determination', irrespective of the dependency of those peoples on that State, the United Kingdom retains a legal obligation to the people of Hong Kong in regard to their right of self-determination after 1997.⁵⁵

By June 1985 when China announced the formation of the Basic Law Drafting Committee, Beijing had made known that Hong Kong's political structure should be altered by the United Kingdom or the Hong Kong colonial governments only in ways that 'converged' with the *Sino-British Joint Declaration*.⁵⁶ Cottrell opines that '[t]he accommodation of "convergence" produced perhaps the most regrettable action of the British and Hong Kong governments during this difficult period: the publication of a further *Green Paper* on representative government in 1987,⁵⁷ which was designed to dampen earlier hopes for a brisk pace of democratization, not by an

⁵² Albert H. Y. Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 Hong Kong L.J. 380 at 421.

⁵³ Michael B. Yahuda, *Hong Kong: China's Challenge* (London and New York: Routledge, 1996) at 74.

⁵⁴ McCorquodale, *supra* note 24 at 331.

⁵⁵ *Ibid.*, at 329.

⁵⁶ Robert Cottrell, *The End of Hong Kong: The Secret Diplomacy of Imperial Retreat* (London: John Murray, 1993) at 182–83.

⁵⁷ Hong Kong, Government Printer, "Green Paper: The 1987 Review of Developments in Representative Government", 1987.

admission of China's successful intransigence, but by a farrago of leading questions designed to insinuate that the change of heart had come from Hong Kong itself.⁵⁸ The government's survey office received 361,398 responses, of which 124,228 responses concerned direct elections to the Legislative Council.⁵⁹ The office concluded that the majority of the public, despite their enthusiasm in 1984 for direct elections, were now against introducing direct elections in 1988.⁶⁰ The government then decided that the first directly elected seats in the Legislative Council would be created only in 1991, which had support from only 5.4 per cent of the respondents.⁶¹ As a consequence, Beijing was able to finalise the Hong Kong's post-colonial electoral arrangements to be incorporated into the *Basic Law of Hong Kong* being drafted at the time.

It was against this background, and the Tiananmen Massacre in Beijing in June 1989, that more than one million people held mass demonstrations in Hong Kong demanding immediate progress towards direct elections. Ultimately, in January 1990, Beijing agreed to an increase in the number of directly elected seats in the Legislative Council in 1991.⁶² In the eventual *Basic Law of Hong Kong*, various international agreements—notably the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*—are also given positivist constitutional force as part of the laws of Hong Kong,⁶³ with the *Hong Kong Bill of Rights Ordinance* enacted by the Legislative Council in July 1991 as the municipal legislation implementing the *International Covenant on Civil and Political Rights*. As will be discussed in Part II, the *Basic Law of Hong Kong* contains explicit references to universal suffrage as the ultimate aim of governance of Hong Kong.⁶⁴

The 1991 Legislative Council election was a watershed in Hong Kong's political history. Of the 60 seats excluding that of the Governor, eighteen seats were returned by universal suffrage, most of which were won by those in support of a faster pace of democratic reform. In his inaugural Policy Address in October 1992, Governor Chris Patten indicated to the Legislative Council that 'we must make possible the widest democratic participation by the people of Hong Kong in the running of their own affairs, while reinforcing certainty about Hong Kong's future'. Patten proposed that the functional constituency franchise be widened from approximately 70,000 contemplated for the 1991 election to over three million for the 1995 election. Beijing objected to such an arrangement and warned that it would not abide by the *Joint Declaration* that the Hong Kong legislature elected in 1995 was to continue to subsist into 1999 if the proposed reform were implemented. Patten proceeded nonetheless and, consequentially, Beijing arranged the set-up for an appointed Provisional Legislative Council to be put in place on 1 July 1997 so that new laws could immediately be passed to narrow the electoral franchise in Hong Kong's first post-colonial election contemplated for May 1998.

⁵⁸ Cottrell, *supra* note 56 at 183.

⁵⁹ Hong Kong, Government Printer, "White Paper: The Development of Representative Government: The Way Forward", 1988, at para. 18.

⁶⁰ *Ibid.*, at para. 21.

⁶¹ *Ibid.*, at para. 29.

⁶² Leo F. Goodstadt, *Uneasy Partners: The Conflict between Public Interest and Private Profit in Hong Kong* (Hong Kong: Hong Kong University Press, 2005) at 85.

⁶³ *Basic Law of Hong Kong*, art. 39.

⁶⁴ *Ibid.*, arts. 45 and 68.

Throughout the final years of British colonial rule in Hong Kong and the early years of the Hong Kong Special Administrative Region, Chinese leaders continued to assess Hong Kong affairs with longstanding consternation that foreign powers seek to frustrate China's exercise of sovereignty over its territory. The Chinese government was concerned about the possible development of anti-China and secessionist tendencies in Hong Kong, indicating that Hong Kong should remain an 'economic city' and not become a 'political city'. Davis warns that '[t]his talk of an economic rather than a political city aims at rationalizing authoritarian political practices, with all the attendant risks of corruption and influence peddling, and without the economic developmental benefits which usually are said to justify such practices';⁶⁵ and that '[t]o reintroduce rule by business elites at a time when the rule of law and freedom, as checks on the system, are already under threat may (especially in the face of China's own problems with corruption) produce the unintended consequences of corruption and influence peddling.'⁶⁶ It is thus not surprising that the business and professional elites in Hong Kong, unlike those in other developed jurisdictions—and certainly within China itself—constitute a formidable if not controlling force in the shaping of Hong Kong politics.

C. The True Function of the Functional Constituencies

Needless to say, the removal of an elected legislature immediately upon the transfer of sovereignty on 1 July 1997 was controversial and highly unpopular in Hong Kong, particularly as it was replaced with one entrusted with enacting new electoral laws that were to narrow significantly the franchise for future elections. In the first post-colonial Legislative Council election that took place in May 1998, only twenty legislators were returned by universal suffrage, whilst thirty were returned by functional constituencies and ten by an Election Committee whose 800 members were all appointed by Beijing. In the 2000 election, the number of legislators elected by the Election Committee was reduced to six whilst the number of directly elected legislators was increased to 24; in the 2004 election, the six Election Committee seats were replaced by those returned by universal suffrage. Thus, currently the Legislative Council is composed of thirty directly elected Members based on five geographical constituencies (New Territories East, New Territories West, Kowloon East, Kowloon West, and Hong Kong Island), and thirty from a variety of functional constituencies concerned predominantly with business and professional interests.

From this composition of the Legislative Council and those *Basic Law of Hong Kong* provisions governing the procedures of the legislature, Ghai points out that:

The relationship between the chief executive and the legislature is tilted in favour of the former—the chief executive can veto legislation, dissolve the legislature once in a term in case of conflict with the legislature, and can prevent the submission of legislative bills relating to government policies by members of the legislature. Members cannot introduce bill or other motions dealing with public expenditure,

⁶⁵ Michael Davis, "Constitutionalism in Hong Kong: Politics versus Economics" (1997) 18 U. Pa. J. Int'l Econ. L. 157 at 190.

⁶⁶ *Ibid.*, at 193.

political structure or the operation of the government. The composition and procedure of the legislature are designed to assist the chief executive, principally through a large majority of functional constituency members whose election by small electorates easy to influence or control by the Central Authorities, and chosen from sectors who can be expected to support the government. The dominant influence of these members is facilitated through a complex system of voting in which they act as a second chamber, voting separately from the directly elected members, and thus have a veto over all initiatives of legislators. Research on the voting pattern shows the heavy dependence of the government on functional constituency members.⁶⁷

Indeed, as Secretary for Justice Elsie Leung pointed out:

The reduction of the size of the electorate [for the 1998 Legislative Council election] is a result of restoring functional constituencies to their original purposes and nature. They were never intended to be a form of general franchise, but to ensure that certain important sectors within the community that have made significant contributions are duly represented.⁶⁸

II. UNIVERSAL SUFFRAGE AS THE ULTIMATE AIM?

The implementation of universal suffrage in Hong Kong that has been promised by successive British administrations and by the Chinese government, especially through its National People's Congress' promulgation in 1990 of the *Basic Law of Hong Kong*, to the people of Hong Kong is stipulated in two provisions of the *Basic Law of Hong Kong*:

Article 45:

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.

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. 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.

The specific method for selecting the Chief Executive is prescribed in Annex I: 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'.⁶⁹

⁶⁷ Ghai, *supra* note 44 at 446.

⁶⁸ Elsie Oi-Sie Leung, "Freedom of Speech Alive and Well" *South China Morning Post* (29 August 1997) A21.

⁶⁹ *Basic Law of Hong Kong*, art. 45.

Article 68:

The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

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

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures'.⁷⁰

Article 7 of Annex I and Article III of Annex II to the *Basic Law of Hong Kong* then stipulate the procedures for changes to be made in the respective selection and formation methods. Both Annexes state that if there is a need to make such changes for the terms subsequent to the year 2007, the changes have to be endorsed by a two-thirds majority of the Legislative Council; obtain the consent of the Chief Executive of Hong Kong; and then be submitted by the Standing Committee of the National People's Congress for approval (in the case of the selection of the Chief Executive)⁷¹ or for the record (in the case of the formation of the Legislative Council).⁷²

A. *The Article 23 Controversy and Demands for Universal Suffrage*

Article 23 of the *Basic Law of Hong Kong* mandates that '[t]he Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.'⁷³ After Tung Chee-hwa, sitting Chief Executive of Hong Kong, was confirmed in 2002 for a second term of office, it was announced that the provision would be implemented with a *National Security (Legislative Provisions) Bill*⁷⁴ so duly presented to the Legislative Council in February 2003 for passage. When legislators sought more time in order to scrutinise the *Bill* the Hong Kong government refused, confident that with a pro-government majority in the Legislative Council — essentially through the traditionally pro-Beijing, pro-government functional constituency legislators — the *National Security Bill* would be passed without hindrance.

A joint series of mass demonstrations in which more than half a million people took part eventually ensued in July 2003. Whilst initially insistent on the *National*

⁷⁰ *Ibid.*, art. 68.

⁷¹ *Ibid.*, Annex I (7).

⁷² *Ibid.*, Annex II(III).

⁷³ *Ibid.*, art. 23.

⁷⁴ *National Security (Legislative Provisions) Bill 2003*, Legal Supplement No.3 to the Government of the Hong Kong Special Administrative Region Gazette, Vol. 7 (January–April 2003) at C125-C185 (14 February 2003) [*National Security Bill*].

Security Bill's passage as scheduled, the Hong Kong government changed its course when on 7 July 2003 the traditionally pro-government Liberal Party chairman James Tien resigned his membership of the Executive Council and supported calls for further consultation. As it realised that without the support of the Liberal Party the *National Security Bill* would no longer generate sufficient votes for passage, the government was forced to withdraw it. Plans for the enactment of Article 23 legislation have since been shelved indefinitely.

In response to the constitutional crisis and public calls for universal suffrage, Tung in his January 2004 Policy Address announced that a special Constitutional Development Task Force, headed by Secretary for Administration Donald Tsang (as he then was) joined by Secretary for Justice Elsie Leung and Secretary for Constitutional Affairs Stephen Lam, be set up in order to examine 'the serious concern and principled stance' of Beijing; to understand the relevant provisions of the *Basic Law of Hong Kong*; and to consult relevant authorities in Beijing on political reform in Hong Kong. A week later, the Constitutional Development Task Force issued a consultation paper,⁷⁵ which set out five legal questions for consultation:

1. What legislative process should be used for amending the methods for selecting the Chief Executive and for forming the Legislative Council as set out in Annex I and Annex II to the *Basic Law of Hong Kong*;
2. Whether it is necessary to invoke Article 159 of the *Basic Law of Hong Kong* if the amendment procedures as prescribed in Annexes I and II are used;
3. What is the initiation mechanism for introducing amendments relating to the methods for selecting the Chief Executive and for forming the Legislative Council;
4. Whether the method for forming the third term Legislative Council as prescribed in Annex II may apply to the fourth term and subsequent terms of the Legislative Council; and
5. How the phrase 'subsequent to the year of 2007' should be understood?⁷⁶

Subsequently in March 2004, the Task Force issued its *First Report*,⁷⁷ pointing out that:

Hong Kong's constitutional development involves the relationship between the Central Authorities and the HKSAR, and relates to the systems used to implement 'One Country, Two Systems' and the Basic Law. Therefore, the Central Authorities have powers and responsibilities on matters relating to Hong Kong's constitutional development.⁷⁸

The *First Report* went on to elucidate what legislative process should be used for selecting the Chief Executive and for forming the Legislative Council as set out in

⁷⁵ Hong Kong, Constitutional Affairs Bureau, "Legislative Council Panel on Constitutional Affairs Paper: Task Force on Constitutional Development", 14 January 2004.

⁷⁶ Johannes Chan, "Some Thoughts on Constitutional Reform in Hong Kong" (2004) 34 Hong Kong L.J. 1 at 5. See Constitutional Affairs Bureau, *ibid.*, Appendix: Issues on Legislative Process and Related Legal Issues concerning Constitutional Development in the Basic Law, at 9-13.

⁷⁷ Hong Kong, Constitutional Development Task Force, "The First Report of the Constitutional Development Task Force: Issues of Legislative Process in the Basic Law relating to Constitutional Development", 30 March 2004 [*First Report*].

⁷⁸ *Ibid.*, at para. 1.5.

Annexes I and II to the *Basic Law of Hong Kong*,⁷⁹ and concluded that the amendment procedures stipulated in Article 159 of the *Basic Law of Hong Kong* need not be invoked as long as any amendment to the Annexes is not inconsistent with Articles 45 and 68.⁸⁰

On 6 April 2004, the Standing Committee of the National People's Congress adopted its *Interpretation of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*,⁸¹ in the following terms:

The provisions in the two above-mentioned Annexes that any amendment 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 shall be reported to the Standing Committee of the National People's Congress for approval or for the record mean the requisite legislative process through which the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions are amended. Such an amendment may take effect only if it has gone through the said process, including the approval or recording ultimately given or made by the Standing Committee of the National People's Congress in accordance with law. The Chief Executive of the Hong Kong Special Administrative Region shall make a report to the Standing Committee of the National People's Congress as regards whether there is a need to make an amendment; and the Standing Committee of the National People's Congress shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, make a determination in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council.⁸²

The Standing Committee on 26 April 2004 proceeded to promulgate its *Decision on Issues relating to the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region in 2007 and the Method for the Formation of the Legislative Council in 2008*:⁸³

⁷⁹ *Ibid.*, at paras. 3.4-3.7.

⁸⁰ *Ibid.*, at para. 3.8.

⁸¹ Standing Committee of the National People's Congress of the People's Republic of China, *The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004 [*Interpretation*].

⁸² *Ibid.*, at para. 3.

⁸³ Standing Committee of the National People's Congress of the People's Republic of China, *The 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 in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008*, adopted by the Standing Committee of the Tenth National People's Congress at its Ninth Session on 26 April 2004 [*Decision*].

The election of the third Chief Executive of the Hong Kong Special Administrative Region to be held in the year 2007 shall not be by means of universal suffrage. The election of the Legislative Council of the Hong Kong Special Administrative Region in the fourth term in the year 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged. The procedures for voting on bills and motions in the Legislative Council are to remain unchanged.⁸⁴

Chen maintains that:

The Decision may also be regarded as an advance indication of what changes to the electoral system the NPCSC would find to be inconsistent with the Basic Law when the changes are ultimately submitted to the NPCSC for approval (in the case of the election of the CE) or for the record (in the case of the election of the Legislative Council).⁸⁵

Subsequently, the Constitutional Development Task Force issued its *Second Report*,⁸⁶ pointing out the adamant view of the Central Government that the Chief Executive of Hong Kong is accountable to both the Central Government and the Hong Kong Special Administrative Region; and that the appointment thereof by the Central Government is a substantive power and is neither merely ceremonial nor a formality.⁸⁷ No proposed amendments to the electoral system in Hong Kong may therefore affect such a substantive power of appointment which the Central Government enjoys.⁸⁸ The *Second Report* emphasised that the political structure of Hong Kong is an 'executive-led' one headed by the Chief Executive,⁸⁹ and explained that:

'Executive-led' is an important principle underlying the design of the political structure in the HKSAR, and is a crucial feature giving effect to State sovereignty. Any proposed amendments must aim at consolidating the executive-led system headed by the Chief Executive and must not deviate from this principle of design. At present, the executive authorities and the legislature do not co-ordinate fully with each other, thus affecting the executive-led system and administrative efficiency. Therefore, any proposed amendments should aim at perfecting the executive-led system, and should not lead to a deterioration of the co-ordination problem of the current relationship between the executive authorities and the legislature.⁹⁰

⁸⁴ *Ibid.*, at para. 1.

⁸⁵ Albert H. Y. Chen, "The Constitutional Controversy of Spring 2004" (2004) 34 Hong Kong L.J. 215 at 223.

⁸⁶ Hong Kong, Constitutional Development Task Force, "The Second Report of the Constitutional Development Task Force: Issues of Principle in the Basic Law relating to Constitutional Development", 15 April 2004 [*Second Report*].

⁸⁷ *Ibid.*, at para. 5.09.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, at para. 3.25.

⁹⁰ *Ibid.*, at para. 5.12.

Chen discerns that the unequivocal prominence given to the role and power of the Chief Executive in the political structure of Hong Kong and the nature of his or her appointment by the Central Government is on account of the fact that:

It seems that the high degree of autonomy of the HKSAR under 'one country, two systems' is predicated on the assumption that the CE of the HKSAR is someone whom the Central Government considers to be trustworthy and loyal to the Central Government. That is why Beijing repeatedly stresses that the political system of the HKSAR is an executive-led one, and that Beijing's power to appoint the CE (after he or she is elected locally by the electoral college) is a substantive power and not merely a ceremonial procedure or formality. For it is the executive rather than the legislature which Beijing can trust, and therefore Beijing would like to ensure that the executive is the predominant branch of the government in Hong Kong.⁹¹

Meanwhile, the *Second Report* stated that '[r]ecent opinion polls have indicated that more than 50 per cent of those polled are in favour of selecting the Chief Executive by universal suffrage in 2007, while around 60 per cent of those polled support election of all members of the Legislative Council by universal suffrage in 2008. At the same time, considerable reservations exist in the community.'⁹² Ghai criticises the reports of the Task Force as the Task Force 'had failed to indicate accurately the depth of public support for universal franchise; instead it had given the impression that the public was deeply divided on this issue (its style was to state: "some people said this, some said that" without any quantitative analysis). Some felt that it was on the basis of its misleading reports, that the Standing Committee had made its restrictive ruling.'⁹³ Subsequently in May 2004 the Task Force put forward its *Third Report*,⁹⁴ which simply reiterated the conclusions expressed in the *Second Report* and the views of the Standing Committee in its *Interpretation and Decision*.⁹⁵ The *Third Report* also noted that the Standing Committee was of the view that:

The HKSAR Government and the various sectors of the community will, in accordance with the relevant provisions of the Interpretation and the Decision of the NPCSC and on the basis of cultivating a broad consensus in the community, put forth relevant specific proposals which will be reported to the NPCSC for approval or for the record, so that the relevant issues relating to [the] HKSAR's constitutional development can be properly dealt with.⁹⁶

Lastly, the *Third Report* announced that a public consultation was to be launched thence and invited views and specific proposals from the community as to how the methods for selecting the Chief Executive and for forming the Legislative Council may be amended.⁹⁷

⁹¹ Chen, *supra* note 85 at 225.

⁹² *Second Report*, *supra* note 86 at para. 3.21.

⁹³ Ghai, *supra* note 44 at 439.

⁹⁴ Hong Kong, Constitutional Development Task Force, "The Third Report of the Constitutional Development Task Force: Areas which may be Considered for Amendment in respect of the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008", 11 May 2004 [*Third Report*].

⁹⁵ *Ibid.*, at paras. 1.05-1.10.

⁹⁶ *Ibid.*, at para. 1.11.

In the September 2004 election, a record number of voters went to the polls for the thirty geographical constituency seats (55.64 per cent) in the Legislative Council. Whilst the pro-democracy camp received the largest number of votes for these constituency seats (60 per cent), it did not do as well as had been expected due to poor campaign and co-ordination strategies. With the pro-government camp doing better than had been expected in the geographical constituency election despite its ardent support for Article 23 legislation that had enraged the citizenry, Beijing believed that it had less to fear from the democracy-camp politicians and that universal suffrage in 2007 and 2008 was no longer a priority for the Hong Kong electorate.

Nonetheless, calls for universal suffrage have continued to subsist. Indeed, it was Fernando Chiu-Hung Cheung, representative for the Social Welfare Functional Constituency, who tabled a motion that a Hong Kong-wide referendum be held on universal suffrage as well as related electoral arrangements, on the basis that Secretary for Constitutional Affairs Stephen Lam repeatedly emphasised that reform proposals should be built upon consensus. In a detailed examination Ghai has dissected the relevant train of events,⁹⁸ and it is not the intention of this article to repeat the account by the distinguished scholar; we will confine to summarising the views of the Hong Kong and Central governments.

The main gist of the governments' stance on a referendum on universal suffrage in Hong Kong was that it if held would be 'irrelevant, inappropriate and unconstitutional'.⁹⁹ Specifically, according to Ghai, one constitutional argument is that:

the referendum would violate the interpretation and decision of the NPCSC, which had outlawed full suffrage for 2007 and 2008 and which the HKSAR had no power to disregard. Tung said that the NPCSC had made its decision 'strictly in accordance with legal procedures after consulting various sectors in Hong Kong ... The NPCSC is the highest organ of state power [actually it is the NPC]. The HKSAR must abide by and implement this decision'.¹⁰⁰

Ghai discerns that:

The Central Government opposed the referendum because in it and through it, the Central Government saw the popularisation of politics and a crisis of formal structures of state. The NPCSC interpretation introducing further restrictions on reform and clamping down on democratic forces produced great resentment. The constitution review process, which looked increasingly manipulated and driven from the Mainland, added to the frustration and anger.¹⁰¹

In the strongest terms Ghai criticises the Constitutional Development Task Force:

What was being demanded was obsequiousness and submission. What else was the point of constant references to the 'dangers of upsetting the central authorities', not damaging 'cordial relations', 'playing with fire' and 'losing what is realistic in the search for more'? What is the significance of the unending mantra of

⁹⁷ *Ibid.*, at paras. 1.12-1.13.

⁹⁸ Ghai, *supra* note 44.

⁹⁹ *Ibid.*, at 435.

¹⁰⁰ *Ibid.*, at 441-442 (clarification original).

¹⁰¹ *Ibid.*, at 447.

'consensus' (at a time when the NPCSC closes doors to a consensus and Beijing is refusing to meet democrats it does not like) other than to submit to Beijing's will? This submission is secured not only by veiled (but not so subtle) threats but also through appeals to legality—thus the constant references to the Basic Law or the 'national system', the finality of the interpretations of the NPCSC and the supremacy of the NPC (and the wheeling out of 'legal guardians' and resort to threadbare arguments about even oaths of office). Much of the controversy was used to reinforce the status of the NPCSC and the legal powers of the Central Authorities, and to strengthen the force of the NPCSC interpretation and decision on constitutional reform—the paucity of precise legal points notwithstanding ... The acquiescence of the Tung administration and the pro-China lobby in these tactics and interpretations bodes ill for the remaining vestiges of Hong Kong's autonomy. Experience shows that each time there is a controversy about Hong Kong's relations with the Central Authorities, Hong Kong is diminished.¹⁰²

The 'obsequiousness and submission' of which Ghai charges the Constitutional Development Task Force was illustrated by the indication of the Task Force in its *Fourth Report*,¹⁰³ issued in December 2004, that views and specific proposals, which it invited in its *Third Report* invited as to how the methods for selecting the Chief Executive and for forming the Legislative Council may be amended, that contradicted the *Interpretation* or the *Decision* of the Standing Committee would not be entertained.¹⁰⁴

A surprising event then took place in Hong Kong politics. Ostensibly on account of pressures from Beijing alarmed by his increasing unpopularity in Hong Kong as had manifested in the July 2003 mass demonstrations, Tung resigned his office of the Chief Executive on 10 March 2005. Nonetheless, another constitutional crisis occurred over the term of office for his successor. Article 46 of the *Basic Law of Hong Kong* states that:

The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms.¹⁰⁵

Article 53 provides that:

In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law.¹⁰⁶

The provision goes on to state that it is the Secretary for Administration, the Secretary for Finance or the Secretary for Justice, in that order of precedence, to serve as Acting Chief Executive during the period of vacancy.¹⁰⁷ In an answer to the Legislative

¹⁰² *Ibid.*, at 445.

¹⁰³ Hong Kong, Constitutional Development Task Force, "The Fourth Report of the Constitutional Development Task Force: Views and Proposals of Members of the Community on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008", 15 December 2004 [*Fourth Report*].

¹⁰⁴ *Ibid.*, at para. 1.05.

¹⁰⁵ *Basic Law of Hong Kong*, art. 46.

¹⁰⁶ *Ibid.*, art. 53.

¹⁰⁷ *Ibid.*

Council on 5 May 2004, Secretary for Constitutional Affairs Stephen Lam maintained that:

Article 46 of the Basic Law provides that the term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. Article 53 provides that in the event that the office of the Chief Executive becomes vacant, a new Chief Executive shall be elected within six months in accordance with the provisions of the Basic Law ... The term of office of the Chief Executive, as prescribed in the Basic Law, is five years. This provision applies to any Chief Executive. There is no exception.¹⁰⁸

However, soon after the appointment of Acting Chief Executive Donald Tsang (as he then was)—over whose perceived inclinations towards the United Kingdom during Hong Kong's colonial era the Central Government apparently continued to have suspicions—Secretary for Justice Elsie Leung changed the position of the Hong Kong government such that the term of office of the succeeding Chief Executive in the circumstance should now be two years.¹⁰⁹

The Secretary for Justice maintained that the Hong Kong government had applied the common law rule of interpretation in interpreting Articles 46 and 53 of the *Basic Law of Hong Kong* which resulted in the previous position of the government as was stated by Secretary for Constitutional Affairs Stephen Lam in May 2004 that the term of office of the Chief Executive be five years, a conclusion which the Secretary for Justice held by implication to have been reached erroneously. In justifying the new position of the government, the Secretary for Justice relied on the fact that the *Basic Law of Hong Kong* was enacted in accordance with Article 31 of the *Constitution of the People's Republic of China*¹¹⁰ and should therefore be interpreted in accordance with such rules of interpretation and constitutional conventions as may apply in China, a fundamental juridical error which this article will scrutinise in Part III. The Secretary for Justice furthermore referred to the decision of the Standing Committee of the National People's Congress regarding the methods for the selection of the Chief Executive in 2007 and for the formation of the Legislative Council in 2008 to deduce that it must have been the intention of the Standing Committee that the selection of the Chief Executive in 2007 must preclude any term of office from transgressing the year 2007 which a five-year term of office for Tung's successor in the circumstance would. However, as Tai points out:

The decision was made to deal with the question whether the CE to be elected in 2007 would be returned by universal suffrage. The wording 'third term' was used to specify that the CE to be elected in 2007 would be the third CE. There is

¹⁰⁸ Written response of Secretary for Constitutional Affairs Stephen Lam to the Legislative Council on 5 May 2004, as quoted in Benny Y. T. Tai, "A Tale of the Unexpected: Tung's Resignation and the Ensuing Constitutional Controversy" (2005) 35 Hong Kong L.J. 7 at 8.

¹⁰⁹ Hong Kong Government, Press Release "Statement by the Secretary for Justice on the Term of the New Chief Executive" (12 March 2005) (<http://www.info.gov.hk/gia/general/200503/12/03120310.htm> – last accessed at 3 November 2006).

¹¹⁰ Article 31 of the Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on 4 December 4 1982, states that '[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.'

no indication that the Standing Committee when making its decision at that time had foreseen that Tung would resign before his term expired. Furthermore, the Standing Committee is not empowered to alter the meaning of any provisions of the Basic Law in such an informal and casual manner.¹¹¹

In due course, Acting Chief Executive Donald Tsang (as he then was) submitted a report to the State Council requesting that the Standing Committee of the National People's Congress yet again use its power to interpret Article 53(2) of the *Basic Law of Hong Kong* regarding the term of office of the Chief Executive succeeding in the circumstance. Tai laments that '[g]iven that the reason leading to the interpretation does not involve any fundamental principle concerning the relationship between "One Country" and "Two Systems", such an interpretation will further show that Hong Kong's autonomy is in reality not that "high".'¹¹² The Standing Committee eventually decided that the successor in the circumstance should serve two years only. By then it had become clear that Tsang managed to receive Beijing's endorsement and on 2 June 2005 he duly declared his candidacy for the office of the Chief Executive and was elected unopposed two weeks later.

Ultimately, the Constitutional Development Task Force issued its *Fifth Report*¹¹³ in October 2005. The *Fifth Report* reiterated the Hong Kong government's proposal, approved by Beijing, for electoral reform in 2007 and 2008 respectively, that ten new seats in the Legislative Council be introduced in the 2008 election, with five seats each assigned to the geographical and the functional constituencies.¹¹⁴ The new functional constituency seats would be reserved entirely for the existing District Council Functional Constituency, which has hitherto returned one legislator only but would in future return six legislators through election amongst the 529 District Councillors.¹¹⁵ Meanwhile, the Election Committee which will select the Chief Executive in 2007 would be expanded from 800 to 1,600 members.¹¹⁶ Such reform would then govern the political landscape of Hong Kong until at least 2012 when the next selection of the Chief Executive and formation of the Legislative Council are scheduled; the Task Force is unwilling to commit to a timetable as to when universal suffrage would be achieved in Hong Kong.¹¹⁷ Lacking support from the democratic-camp legislators, the proposed reform as set out in the *Fifth Report* was defeated in the Legislative Council in December 2005.

All in all, it is fair to conclude that the consultation that the Constitutional Development Task Force has purported to provide for—and with—the people of Hong Kong has resembled that which was done by the United Kingdom and the Hong Kong colonial governments during the 1980s after the *Sino-British Joint Declaration* had already been entered into in 1984, and that both consultations were meaningless if not manipulative political manoeuvres.

¹¹¹ Tai, *supra* note 108 at 13.

¹¹² *Ibid.*, at 15-16.

¹¹³ Hong Kong, Constitutional Development 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", 19 October 2005 [*Fifth Report*].

¹¹⁴ *Ibid.*, at para. 5.16.

¹¹⁵ *Ibid.*, at para. 5.17.

¹¹⁶ *Ibid.*, at paras. 5.04-5.05.

¹¹⁷ *Ibid.*, at para. 5.26.

III. CONSTITUTIONAL IMPLICATIONS OF THE STANDING COMMITTEE
OF THE NATIONAL PEOPLE'S CONGRESS' POWER AND USE OF INTERPRETATION
OF THE *BASIC LAW OF HONG KONG*

In a democratic polity governed by the established constitutional principle of the separation of powers, an independent judiciary whose powers and exercise thereof are fettered solely and only by the law of the land is of pivotal importance, and the role and duty of the independent judiciary as the ultimate guardian of the constitution of the polity must be accepted implicitly.

As the constitution of the Hong Kong Special Administrative Region, the *Basic Law of Hong Kong* provides autonomy and self-government, including an independent judiciary with the power of final adjudication,¹¹⁸ for Hong Kong. However, such autonomy and self-government is of a circumscribed kind. We are concerned here particularly with the power of interpretation of the *Basic Law of Hong Kong* which Article 158 thereof vests in the Standing Committee of the National People's Congress of the People's Republic of China ultimately and is delegated to the courts of Hong Kong only in cases that fall within the autonomy of Hong Kong:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.¹¹⁹

¹¹⁸ *Basic Law of Hong Kong*, arts. 2, 82 and 85.

¹¹⁹ *Ibid.*, art. 158.

In *Lau Kong-Yung and 16 Others v. Director of Immigration*,¹²⁰ the Hong Kong Court of Final Appeal maintained that:

The Standing Committee's power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases. So the expression 'in adjudicating cases' makes it clear that the power of interpretation enjoyed by courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing Committee under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law. This conclusion may seem strange to a common lawyer but, in my view, it follows inevitably from a consideration of the text and structure of Article 158, viewed in the light of the context of the Basic Law as the constitution for the HKSAR embodied in a national law enacted by the PRC.¹²¹

The most worrisome aspect of the Article 158 mechanism is that the Hong Kong government has now found it convenient to rely on a legislative body of China in order to achieve or justify what it wants or has done, to the extent that it would seek to nullify a ruling of the final appellate court in Hong Kong that was deemed to be dispositive of the matter (i.e., the right of abode in Hong Kong).¹²² It is feared most that the rule of law, which has long been the distinguishing feature of Hong Kong *vis-à-vis* China, as well as the high degree of autonomy as promised by the United Kingdom and Chinese governments repeatedly and in the *Sino-British Joint Declaration* and the *Basic Law of Hong Kong* are on the road to irrelevance and, soon, disappearance.

In a polity where the rights and freedoms which its citizens enjoy are constitutionally guaranteed from external pressures and influence, continuing judicial independence and the availability of effective judicial review are essential. Davis argues that:

Having the Standing Committee interpret and review laws appears to violate the Joint Declaration's specific provisions requiring maintenance of the common law and specifying that laws be submitted to the Standing Committee 'for the record'. Having the courts refer matters to the Standing Committee for interpretation also violates the Joint Declaration's requirements of independence and finality.¹²³

Nonetheless, the Hong Kong government has persisted in alluding to the fact that the People's Republic of China, unlike common-law Hong Kong, adopts a civil-law legal system, where legislative interpretation of a law is common practice. At a

¹²⁰ [1999] 3 HKLRD 778.

¹²¹ *Ibid.*, at 820-821, per Sir Anthony Mason N.P.J.

¹²² *Ng Ka Ling (an infant) v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Cheung Lai Wah (an infant)* [1999] 1 HKC 291; Standing Committee of the National People's Congress of the People's Republic of China, *Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, as adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999, 38 I.L.M. 1469 (1999); *Lau Kong Yung and 16 Others v. Director of Immigration* [1999] 3 HKLRD 778.

¹²³ Davis, *supra* note 65 at 165.

Legislative Council House Committee meeting in 1999, Secretary for Justice Elsie Leung elucidated that:

It is natural for those familiar with the common law system to object to a non-judicial body revising an interpretation of the law given by a final appellate court. However, Hong Kong is part of the People's Republic of China, which has a civil law system. Under the mainland's system, the ultimate power to interpret statutes is vested in the NPCSC ... The NPCSC's power to interpret the Basic Law may be exercised by it in the absence of any reference to it by the CFA. It may also be exercised in respect of any provision in the Basic Law.¹²⁴

The Secretary went on to maintain that:

The Basic Law is derived from Article 31 of the Chinese Constitution. By virtue of Article 158(1) of the Basic Law the ultimate authority to interpret the Basic Law is given to the NPCSC, not to the SAR courts. If the NPCSC exercises its power of interpretation, it would not be depriving Hong Kong of any legal powers granted to it, or diminishing Hong Kong's autonomy.¹²⁵

Thus, the view of the Hong Kong government is that under the 'one country, two systems' arrangements the two systems are thereby *merged into one*.

Chen, however, maintains that:

The better view is that the use of 'legislative interpretation' in the legal system of the PRC is a feature of the socialist (or communist) rather than the Civil Law heritage of this system. ... Legislative interpretation is not part of the legal systems of leading Continental European members of the Civil Law family today, such as Germany, France, Italy, Spain and Austria. Instead they have constitutional courts that specialise in the task of constitutional interpretation and review of the constitutionality of legislation. Indeed, Germany's Constitutional Court has been so successful and enjoys such a high prestige that it has served as the main model for imitation in the worldwide movement of expansion of judicial control of constitutionality...¹²⁶

The author proceeds to explain that in a socialist legal system, the courts are themselves accountable to the legislative branch of government, which in turn is led by the executive government of the state,¹²⁷ where '[t]here [are] no enforceable constitutional limitations on the powers of either the party central committee (or its political bureau) or the national assembly. The "constitution" of the socialist countries [operates] more like political-philosophical declarations than as legally binding norms.'¹²⁸ Gewirtz concurs, pointing out that in understanding the *Constitution of the People's Republic of China*, from which the *Basic Law of Hong Kong* derives authority:

¹²⁴ "Speech by the Secretary for Justice Ms. Elsie Leung at the Legislative Council House Committee Meeting of 18 May 1999" in Johannes M. M. Chan, H. L. Fu & Yash Ghai, eds., *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000) 320 at 321-322.

¹²⁵ *Ibid.*, at 324.

¹²⁶ Chen, *supra* note 52 at 408-09.

¹²⁷ *Ibid.*, at 409.

¹²⁸ *Ibid.*, at 409-410.

The most basic question is whether the PRC Constitution is 'law' at all. Many perceive it to be more of an ideological document, a political document, or an aspirational document, than a legal one. Certainly it does not function in Chinese society the way constitutions function in other societies where the constitution is viewed as law. It has not been used by the courts in the course of deciding cases. Indeed, it is not regularly interpreted by any government body. It does not function day-to-day as a superior law.

My specific point here is that constitutional interpretation in the PRC will not develop into something significant and something similar to constitutional interpretation in other countries until there is a decisive crystallisation of the idea that the PRC Constitution is *law* and indeed 'superior' law. My more general point is that the enterprise of constitutional interpretation everywhere, including both in Hong Kong and in the Mainland, is shaped by a conception of what the constitution is.¹²⁹

According to Ludwikowski in the context of the newly independent Eastern European States after the collapse of the Soviet Union, constitutional review by the judiciary of legislation and executive acts is considered, therefore, as 'the greatest novelty of the post-socialist world'.¹³⁰

How then can we reconcile the socialist legal system in China with the common-law legal system in Hong Kong? It is submitted that they need *not* be reconciled at all, for under the 'one country, two systems' arrangements the plurality of the two legal and political systems is perforce recognised and given force and effect. The system of Hong Kong is subject to the unity of China as a country and not to the system that China practises. Ghai maintains that the 'essence' of the system of Hong Kong consists of 'a high degree of autonomy, a democratic political order (at least in the fullness of time), independent judicial powers, rights and freedoms of residents, the capitalist system and the Hong Kong way of life, the common law, and an autonomous civil society'.¹³¹ Sin discerns that 'it is not just "law", but common law, which carries with it cultural values, [originating] and inherited from the West, that differentiates and defends Hong Kong from China'.¹³² By and under Article 8 of the *Basic Law of Hong Kong* the exclusive common-law legal system as was previously in force in colonial Hong Kong shall continue to do so upon China's resumption of sovereignty over Hong Kong on 1 July 1997. Nowhere in the *Basic Law of Hong Kong* is the socialist (or civil-law) legal system of China given force and effect, except insofar as the Preamble thereto states that the *Basic Law of Hong Kong* was enacted by the National People's Congress under Article 31 of the *Constitution of the People's Republic of China*. On the contrary, Article 5 of the *Basic Law of Hong Kong* expressly guarantees that the socialist system that China practises shall not be practised in Hong Kong. By promulgating the *Basic Law of Hong Kong*, the

¹²⁹ Paul Gewirtz, "Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics" (2001) 31 Hong Kong L.J. 200 at 208.

¹³⁰ Rett R. Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance* (Durham, North Carolina: Duke University Press, 1996) at 212.

¹³¹ Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd ed., (Hong Kong: Hong Kong University Press, 1999) at 222.

¹³² Sin Wai-Man, "Law, Politics and Professional Projects: The Legal Profession in Hong Kong" (2001) 10 Social & Legal Studies 493 at 494.

National People's Congress explicitly recognised and guaranteed the continuity of the exclusivity of the common-law legal system in Hong Kong. To merge in Hong Kong the common-law legal system in Hong Kong with or into the socialist or civil-law legal system in China will thus nullify the common-law legal system in Hong Kong and the high degree of autonomy that the Chinese government promises the people of Hong Kong through a law which its legislative body enacted. Indeed, Ghai argues that in order to maintain the exclusivity of the common-law legal system of Hong Kong, the power of interpretation of the *Basic Law of Hong Kong* which Article 158 thereof vests in the Standing Committee ultimately should be 'judicialised' in accordance with common-law principles and conventions:

This means that all decisions should be based on legal arguments presented to any body which makes the decision or recommendations. Lawyers should be allowed at each stage, right up to the Standing Committee. The deciding body must give reasons for its decisions, which would also help towards the development of precedents in this area. And the members of the Committee for the Basic Law should avoid entering into public controversies on the interpretation of the Basic Law and commenting on cases pending before the courts. Such restraint would avoid any appearance of bias having made up their mind before they are consulted by the NPCSC before making an interpretation. The development of some conventions as to how the NPCSC will exercise its powers would also be desirable. One might be that the [Standing] Committee would not proceed to the interpretation of the Basic Law before the Hong Kong courts have given their decision giving the Committee the benefit of the courts' analysis (which may involve points of common law). Another might be that the Committee for the Basic Law should provide its reasons if it disagrees with a Hong Kong court's interpretation on a point on which it is consulted by the NPCSC. In such circumstances, a third convention might usefully be adopted—that the NPCSC as a rule would follow the recommendations of the Basic Law Committee.¹³³

IV. CONCLUSION

The government of Hong Kong, as well as that of China, seeks to promote Hong Kong as Asia's world city. However, such a title, which bears enormous international prestige, must be earned, as a world city is 'a city which ties a region to the global economy. A world city has a global role in bringing information and financing to an entire region and beyond, and it relies on a highly educated population with access to the latest information and requires reliable support systems, especially the rule of law. Individual dignity and freedom must be respected, so that individuals and the organizations they serve will fully realize the vast potential afforded by these emerging circumstances. There seems little room at the helm of such a city for a controlling authoritarian regime.'¹³⁴ For a major international financial metropolis such as Hong Kong to be imposed upon by authoritarianism, particularly through its own constitution whereby it is the Standing Committee of the National People's Congress of

¹³³ Yash Ghai, "Framework to Judge Law" *South China Morning Post* (6 October 1997) A21.

¹³⁴ Davis, *supra* note 65 at 191.

the People's Republic of China which has the ultimate power and authority to interpret that same constitution, carries such undesirable endangerment of Hong Kong's stature that:

The economic risks of employing this authoritarian shell are enormous. They include loss of the system's information base, diminution of entrepreneurial spirit, loss of the contractual reliability and personal dignity insured by the rule of law, emigration of creative talent, and increased corruption and influence peddling.¹³⁵

The continual denial of universal suffrage, the cornerstone and ultimate indication of every a developed society, to the people of Hong Kong in respect of their own leader and legislators therefore constitutes not merely a severe deprivation of the people's fundamental liberty and of democracy and their right of self-determination but also exposes the Hong Kong and Chinese governments to international ridicule and the city of Hong Kong to a potential devastating loss of investors' confidence and entrepreneurship upon which the success of the city has long been based.

¹³⁵ *Ibid.*, at 192.