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Hong Kong's Umbrella Movement and Beijing's Failure to Honor the Basic Law

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MICHAEL C. DAVIS, OCT 29 2014

Over the past few months, Hong Kong has been deeply embedded in political change and protests. These debates and confrontations in Hong Kong have had a particular constitutional character grounded in disputes over interpretation of the Hong Kong Basic Law's constitutional text. [1] Recent actions initiated by Beijing have, in the public eye, called into question solemn commitments made to Hong Kong under the "one country, two systems" model promised in the 1984 Sino-British Joint Declaration. [2] A series of reports and decisions issued this past year have been the source of public discontent. This paper will consider these causes and suggest avenues to a solution going forward.

The recent protests in Hong Kong have largely been driven by the Hong Kong Basic Law, which provides in Article 45 an "ultimate aim" of universal suffrage in Hong Kong. These disputes over democratic development are grounded in Article 31 of China's 1982 Constitution, which provides for a "one country, two systems" model for China to resume sovereignty over peripheral areas. [3] This model has so far been applied to Hong Kong and Macau, and is on offer to Taiwan.

For Hong Kong, this model took on precise international legal form in the 1984 Sino British Joint Declaration, which is a treaty fully registered with the United Nations by both parties. The Joint Declaration provides for the return of Hong Kong to China under a model that includes Hong Kong people ruling Hong Kong with a "high degree of autonomy, except in foreign and defense affairs." [4] To sustain this autonomy, the Joint Declaration provides guarantees of democratic reform, human rights, and the rule of law, and further stipulates its content into the Hong Kong Basic Law. [5]

The Hong Kong Basic Law was promulgated in 1990, and came into force in 1997 upon the handover. The Joint Declaration's requirement that the legislature be chosen by elections, and the chief executive by "elections or consultations to be held locally," took shape in Basic Law democratic reform commitments. Articles 45 and 68 of the Basic Law provide for gradual and orderly progress with the ultimate aim being universal suffrage to elect both the chief executive and the legislative council. This is accompanied by the promised guarantee of maintaining Hong Kong's existing legal system and a catalogue of liberal human rights, as stipulated in the Joint Declaration. Of particular contention over recent months has been that Article 45 of the Basic Law provides that "The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."

In 2007, the National People's Congress Standing Committee (NPC Standing Committee) issued a decision declaring that the ultimate aim of universal suffrage provided in the Basic Law could be achieved in the 2017 election of the chief executive and, after that, in 2020 for the legislative council. [6] The failure of Beijing to fully carry out this commitment has been the source of recent protest in Hong Kong. This failure has raised concern over Hong Kong's high degree of autonomy and rule of law that go beyond the mechanics of electoral democracy. The 2007 NPC Standing Committee Decision also indicated that the nominating committee "may be formed with reference to" the existing Election Committee that has elected the first three chief executives. [7] That the Election Committee is generally considered a heavily pro-Beijing body led to the suspicion that Beijing intended to manipulate the

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nomination process.

The Summer of Discontent

Two documents issued by Beijing have been the source of public discontent over recent months. On June 10, 2014, the People's Republic of China (PRC) State Council issued an unexpected White Paper on the "one country, two systems" policy applied in Hong Kong. [8] This was followed on August 31, 2014, by the NPC Standing Committee Decision on Election of the Chief Executive and the Legislative Council. [9] The NPC Standing Committee Decision imposed a system of vetting candidates to present to the voters that appeared to undermine the Basic Law promise of universal suffrage.

These documents combined to cause great public concern that Beijing is rolling back the commitments in the "one country, two systems" model in Hong Kong. The first response was a boycott of classes by university and secondary students. Student protesters from the boycott and the group called Occupy Central in Love and Peace (hereinafter "Occupy Central") combined to mobilize protesters to block the streets of the central commercial districts in Hong Kong. The public outrage over these Beijing moves, some preliminary reports by the Hong Kong Government, and some heavy-handed police tactics using tear gas brought tens of thousands of protesters to the streets. As reported around the world, protesters occupied and blocked key street arteries near the government offices in the Admiralty area near Central Hong Kong and in the dense commercial districts of Mong Kok and Causeway Bay. [10]

The reform discussions giving rise to these protests got started in 2013, with the Hong Kong Government scheduling a five-month consultation over democratic reform. [11] Such political reform was to be in furtherance of the Basic Law commitment to universal suffrage and the 2007 NPC Standing Committee Decision signaling it could go forward. The protesters also got an early start. Early in 2013, the Occupy Central movement proclaimed it would launch a campaign of civil disobedience to occupy Central Hong Kong if the Government proposal for democratic reform did not match international standards. [12]

As the Government's five-month consultation began in early 2014, issues began to take shape as various groups submitted their proposals for democratic reform to the Hong Kong Government committee set up to conduct the consultation. [13] This committee was lead by the number-two official in the Hong Kong Government with two key ministers rounding out the committee of three. Distrustful of Beijing's intentions, student groups and democratic politicians demanded a system of civil or party nominations to nominate the Chief Executive candidates to be presented to the voters. Though these proposals generally accepted that any such civil or party nominations had to pass through the nominating committee provided for in the Basic Law, the idea was generally that nomination of candidates with sufficient popular and/or party support would be binding to the nominating committee. Some so-called moderate proposals avoided the Basic Law challenge by advancing civil recommendations not binding to the nominating committee.

During the five-month consultation, a parade of Beijing officials, their political supporters, and some local officials lectured Hong Kong on their Beijing-friendly views of Basic Law requirements. Civil and party nominations were condemned as violating the Basic Law Article 45 requirement of nomination by a "broadly representative nominating committee in accordance with democratic procedures." Beijing and Government officials insisted that the nominating committee's powers must be substantive. Hong Kong was told that any candidate for chief executive "must love the country and love Hong Kong," an expression widely viewed as excluding candidates from the more popular pan-democratic camp. Pro-Beijing submissions to the consultation suggested that the nominating committee be roughly based on the existing Election Committee, a committee largely made up of Beijing supporters that was used to elect the first three chief executives. A fifty percent threshold for nomination was promoted and suggestions were made that the number of candidates nominated be limited to two or three. [14] Democrats suspected these proposals aimed to set up a system to vet candidates and exclude pan-democrats.

At the end of the consultation, the White Paper set the tone of the debate to follow. Though it said little about democratic reform, it clearly sent the message that Beijing is the boss. This tone greatly contrasted with the message given earlier to Hong Kong people in conjunction with the Joint Declaration and the Basic Law. Hong Kong investors

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and people were told throughout the handover period to “put their hearts at ease.” [15] These earlier documents were also taken by Beijing to the capitals of the world to invite foreign governments to treat Hong Kong separately for purposes of commercial and other external relations outside mainstream foreign policy and defense.

In a sharp change of tone, Hong Kong people were now being told in the White Paper that all authority for the Hong Kong model comes from Beijing. Some Hong Kong people were said to have “confused and lopsided” views. The White Paper appears to nearly dismiss the continued importance of the Sino-British Joint Declaration, claiming Beijing as the sole authority for the “one country, two systems” policy. As the sole source of this policy, Beijing was said to have the authority to interpret or amend the Basic Law as it chooses. In a surprising claim, given the lack of the rule of law on the mainland, the NPC Standing Committee is now identified as the guardian of the rule of law – a role most Hong Kong people associate with the Hong Kong courts. Over the strong objection of the Hong Kong Bar Association, judges are characterized as administrators and are expected to be patriots and guardians of national security. In a signal of what would come in the NPC Standing Committee Decision, the pro-Beijing Election Committee is characterized as “an expression of equal representation and broad representativeness.”

Adding to Hong Kong's anxiety, the mid-July Consultative Report [16] and the Report of the Chief Executive to the NPC Standing Committee [17] on the need to change the method for electing the chief executive were generally thought to misrepresent and distort popular Hong Kong views. This distortion tracked a long-held perception in Hong Kong that the Hong Kong Government generally represents Beijing more than it does Hong Kong. Regarding the consultation, the reports indicate that “mainstream opinion” favors exclusive power to nominate candidates in the nominating committee, that the “community generally agrees the Chief Executive should love the country and love Hong Kong,” that “relatively more views” agree the nominating committee should be formed like the current Election Committee, and that “quite a number of views” suggest candidates must obtain the support of a “certain portion” (meaning 50 percent) of the nominating committee to show “cross sector support” in the committee. No mention is made of the nearly 800,000 voters who effectively rejected all of these positions in a civil referendum organized by Occupy Central. Academics later reported that over 90 percent of the submissions considered by the Consultative Committee came from block submissions from the pro-Government camp. Conveniently, no effort was made to look beyond these submissions to more accurately gauge community sentiment.

The NPC Standing Committee accepted the Government reports without question and issued a very conservative decision noted above. That decision adopted the “number of members, composition and formation method” of the Election Committee as the basis for forming the nominating committee, required a 50 percent threshold for nomination by the nominating committee, and limited the number of nominees to two to three. The nominees are required to “love the country and love Hong Kong.” These devices under the control of a very conservative pro-Beijing nominating committee will effectively block any pan-democrat from nomination.

In blocking opposition candidates, Beijing dismisses the widely recognized international view that universal suffrage requires not only that everyone can vote, but also that they be given a free choice of candidates, without discrimination for political opinion or otherwise. These requirements were outlined by the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR) in its General Comment number 25 on ICCPR Article 25. [18] Beijing has claimed that there are no international standards for elections.

In taking such liberty with the term universal suffrage, the Standing Committee not only undermines Hong Kong's democratic development, but also clearly puts the rule of law in jeopardy. In simple terms, the rule of law requires that nobody is above the law and everyone is subject to the law applied in the ordinary manner. A central government that can take such liberty with terms such as universal suffrage that protect core human rights is clearly operating above the law. In this sense, the NPC Standing Committee Decision appears to exercise the broad authority claimed in the White Paper.

Popular Sentiment and the Looming Outcome

All of these moves generated the fierce public objection evident in the Hong Kong protests and occupation. Many Hong Kong people fear their core values of the rule of law, democracy, and human rights promised in the Basic Law

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are now being undermined. The widespread participation in the civil disobedience movement led by student activists and Occupy Central tends to demonstrate the gravity of this concern.

Civil disobedience has never been widely practiced in Hong Kong protests. The ongoing protests to the date of this writing have remained peaceful, though the police have used tear gas and anti-occupy demonstrators have used some violence against the pro-democracy protesters. These protests have involved a competition between the protesters and the Government for the hearts and minds of Hong Kong people. A Government that has generally been seen as representing Beijing over Hong Kong people and that issued the recent misleading reports has, to date, been losing the battle for hearts and minds. But the obstructions to daily life caused by the occupy movement, if allowed to persist, may tilt the scales back the other way.

Regardless of the outcome, it seems clear that trust in both the local and Beijing governments has been severely damaged. The public takes a dim view of the many official statements that misrepresent Basic Law guarantees and social reality. Since there is the widespread view that Beijing is unlikely to back down in the face of protests, it rests on the Hong Kong Government to redeem the Government's image. So far, the Government has made little effort to do so. After the disastrous use of tear gas by the police, the Government took a more passive "wait and see" approach. Government leaders first scheduled and cancelled talks with the student leaders. Then, after further protest, talks were held openly in a televised broadcast on October 21, 2014, though both sides mostly just restated their position with no significant compromise.

To redeem the Government's image, much more is required. The Government should be seen to take on board the important public concerns over the threat to core Hong Kong values and Basic Law commitments evident in the Beijing White Paper and NPC Standing Committee Decision. The Government should submit to the NPC Standing Committee an addendum to the earlier Hong Kong Government reports to more accurately reflect local views. [19] The Government should be seen to work with Hong Kong democrats to come up with a solution that opens up the electoral process to meet international standards.

The protesters have insisted on resignation of the current Chief Executive and Beijing's withdrawal of the NPC Standing Committee Decision. While the Chief Executive's resignation is desirable, it would not fully address the current impasse. Beijing is not likely to simply withdraw its decision in the face of protests. Avenues to regaining public trust will not fully be explored without a fundamental change in Hong Kong Government policy to more proactively defend Hong Kong's autonomy and represent public concerns. More honesty in official representations would be a good starting point. None of this would require directly confronting Beijing, but merely a better effort to secure Hong Kong's interests. Then avenues to build trust and secure Beijing's willingness to revise its decision might be explored. The autonomy model that has long served both the interests of Hong Kong and Beijing presumes such an intermediary role for the local government, a role that has long been in short supply. Such a moderate approach would clearly serve Beijing's interests better than the confrontational approach taken to date.

[1] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1990, came into force, July 1, 1997. (hereinafter "Basic Law") <http://www.basiclaw.gov.hk/en/basiclawtext/>

[2] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1984. (hereinafter "Joint Declaration") http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/034B10AF5D3058DB482575EE000EDB9F?OpenDocument

[3] Constitution of the People's Republic of China, 1982. (Hereinafter "PRC Constitution") http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm

[4] Joint Declaration, Article 3(2).

[5] Id., Article 3 and Annex I. The stipulation in Article 3(12) includes both the requirements of the Joint Declaration and the lengthy Annex I, which elaborates the commitments of the main text.

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[6] 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 Universal Suffrage, Adopted by the Standing Committee of the Tenth National People's Congress at its Thirty-first Session on 29 December 2007. (2007 NPC Standing Committee Decision) <http://www.fmcoprc.gov.hk/eng/syzx/tyflsw/t944943.htm>

[7] *Id.* Section 4.

[8] The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region, The Information Office of the State Council, June 10, 2014. (Hereinafter "White Paper") <http://www.fmcoprc.gov.hk/eng/xwdt/gsxw/t1164057.htm>

[9] 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, Adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014. (hereinafter "NPC Standing Committee Decision") <http://www.scmp.com/news/hong-kong/article/1582245/full-text-npc-standing-committee-decision-hong-kong-2017-election>

[10] See eg. Chris Buckley and Michael Forsythe, "Hong Kong Police Remove Barriers and Protester's Encampment," *New York Times*, October 14, 2014. (reporting on police efforts to end the protest and occupation)

[11] Method for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016, Hong Kong Special Administrative Region Government, Consultation Document, December 2013. <http://www.legco.gov.hk/yr13-14/english/panels/ca/papers/ca1209-cdoc20131204-e.pdf>

[12] "Occupy Central with Love and Peace," *Wikipedia*, 2014. http://en.wikipedia.org/wiki/Occupy_Central_with_Love_and_Peace

[13] See generally, Centre for Comparative and Public Law, University of Hong Kong, "Universal Suffrage and Nomination Procedures: Imperatives from Article 25 ICCPR," Background Brief, March 20, 2014. [http://www.law.hku.hk/ccpl/events/Background%20Brief%20\(Universal%20Suffrage%20and%20Nomination%20Procedures%20-%20Imperatives%20from%20Article%2025%20ICCPR\)%20\(Updated\).pdf](http://www.law.hku.hk/ccpl/events/Background%20Brief%20(Universal%20Suffrage%20and%20Nomination%20Procedures%20-%20Imperatives%20from%20Article%2025%20ICCPR)%20(Updated).pdf)

[14] *Id.*, Document 14.

[15] Steve Tsang, *A Modern History of Hong Kong: 1841-1997* (London: L.B. Tauris & Co., 2007) at p. 215.

[16] Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016, Government of the Hong Kong SAR, July 2014. <http://www.2017.gov.hk/en/report/>

[17] Report by the Chief Executive of the Hong Kong Special Administrative Region to the Standing Committee of the National People's Congress on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2016, July 2014.

[18] ICCPR Human Rights Committee, General Comment 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996). <http://www1.umn.edu/humanrts/gencomm/hrcom25.htm> The Hong Kong Government has sometimes sought to hide behind an earlier British colonial reservation to ICCPR Article 25, but that reservation was not a reservation to the entire article but merely "in so far as it may require the establishment of an elected Executive or Legislative Council"—a reservation that has no application to the Chief Executive and which the Human Rights Committee has ruled no longer applies to an now partially elected Legislative Council. See British Institute of International and

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Comparative Law, "Legal Issues Relating to Democratic Participation in Hong Kong," October 17, 2014, para 36.
<http://www.biicl.org/newsitem/6087>

[19] Rather than acknowledge its mistakes and offer to correct its previous report, the Government in the discussions with student leaders continued to claim its earlier report was accurate and offered to submit only a supplemental report to the State Council.

About the author:

Michael C. Davis, a professor in the Law Faculty at the University of Hong Kong, has held visiting chairs in human rights at Northwestern University Law School (2005-06) and Notre Dame Law School (2004-05), as well as the Schell Senior Human Rights Fellowship at the Yale Law School (1994-95). His publications include *Constitutional Confrontation in Hong Kong* (1990), *Human Rights and Chinese Values* (1995) and *International Intervention: From Power Politics to Global Responsibility* (2004), as well as numerous articles on human rights and development in leading academic journals in law and political science. Professor Davis, as a public intellectual, has contributed to the debate over constitutional reform and human rights in Hong Kong for over two decades.