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The Authoritarian Resurgence

Lilia Shevtsova on Russia ■ *Javier Corrales on Venezuela*
Abbas Milani/Alex Vatanka on Iran ■ *Frederic Wehrey on Saudi Arabia*

Hong Kong's Umbrella Movement

Michael C. Davis ■ *Victoria Tin-bor Hui*

The Freedom House Survey for 2014

Arch Puddington

Zoltan Barany on Transitions from Military Rule
Yun-han Chu & Bridget Welsh on East Asia's Millennials
Elisabete Azevedo-Harman on Mozambique
Pierre Englebort on Zimbabwe
Harley Balzer on Vladimir Putin

Transitional Justice and Its Discontents

Duncan McCargo

Hong Kong's Umbrella Movement

BEIJING'S BROKEN PROMISES

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For almost three months beginning in late September 2014, the people of Hong Kong filled the streets of their city and made world headlines with a dramatic series of large, peaceful protests that became known as the Umbrella Movement. The protests' spark was a decision by the Standing Committee of China's legislature (the National People's Congress or NPC) in Beijing to renege on promised reforms meant to expand political participation in the former colony, which Britain had returned to the People's Republic of China (PRC) in 1997 under what Beijing had declared would be a "one country, two systems" approach enshrined in Hong Kong's Basic Law.

At bottom, the protesters' message was simple: Beijing had failed to fulfill key commitments under both the 1984 Sino-British Joint Declaration and the Basic Law.¹ This failure can be seen not only in the NPC Standing Committee's decision to reject genuine universal suffrage, but also in Beijing's recent cabinet White Paper on how the "one country, two systems" concept is now to be applied to the Hong Kong Special Administrative Region (HKSAR). According to the White Paper:

China's central government has comprehensive jurisdiction over all local administrative regions, including the HKSAR. The high degree of autonomy of HKSAR is not an inherent power, but one that comes solely from the authorization by the central leadership. The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership.²

By going back on the promise of universal suffrage, the White Paper

and the NPC decision undermine critical foundations of the rule of law upon which Hong Kong's survival as a distinct legal system has long depended. These actions have made it increasingly difficult for Hong Kong people and the international community to take Beijing's commitments at face value.

Deng Xiaoping came to grasp that the preservation of Hong Kong's distinctive capitalist system and hence its ability to boost China's economic development would depend on a rocklike commitment to the "one country, two systems" model.

The Joint Declaration aimed to carry out the "one country, two systems" policy, which was originally outlined in Article 31 of the PRC's 1982 Constitution. The Declaration was the product of several difficult years of Sino-British negotiations in the early 1980s. These talks followed on the heels of PRC leader Deng Xiaoping's famous 1979

statement that those investing in (or thinking of investing in) the booming commercial and industrial metropolis of Hong Kong should "put their hearts at ease."³

Amid the give-and-take of the negotiations, Deng had come to grasp that the preservation of Hong Kong's distinctive capitalist system—and hence its ability to boost China's economic development—would depend on a rocklike commitment to the "one country, two systems" model. That model, in turn, aimed to protect Hong Kong from the intrusion of China's socialist system. The PRC was then in the early stages of reform after the chaos of the 1960s and 1970s, years of turbulence that had culminated in a high-level power struggle following the death of Mao Zedong in 1976. Deng's aim was for Hong Kong to be returned to China in a way that would preserve prosperity and social order and enable the city's remarkably industrious and enterprising people to contribute to China's modernization and economic development. He no doubt hoped that this respectful, arms-length approach would kindle Hong Kong's loyalty in return.

In order to work, the model had to win the confidence of Hong Kong's people. The city's liberal, free-spirited, capitalistic populace was not going to be reassured by mere pronouncements from a regime that many of them justifiably distrusted. Similarly, the international acceptance needed for foreign governments and enterprises to treat Hong Kong as a distinct entity in their financial and commercial dealings would require more than vague promises.

The way to bridge this confidence gap, Beijing decided, was to embed the "one country, two systems" model in an international treaty. This is the Joint Declaration, which was duly registered as a treaty with the United Nations. It was presented in Hong Kong and world capitals

alike with repeated assurances that hearts could rest at ease about the city's future. The agreement stipulated (Article 3, Section 12) that its content was to be included in the Hong Kong Basic Law, which thus became a product of the Joint Declaration and hence a matter of solemn international-treaty obligations.

The Declaration guarantees Hong Kong a "high degree of autonomy, except in foreign and defense affairs." Promises of democracy, human rights, and the rule of law are spelled out at a length designed to leave no doubt about a basic commitment to keeping Hong Kong an open society. Regarding democracy, the Declaration stipulates that the future Hong Kong chief executive is to be chosen by "elections or consultations to be held locally," with the city's future legislature to be chosen "by elections."

The treaty makes clear the liberal nature of the human rights to be protected. It lists about sixteen basic rights, fully half of which relate to freedom of speech. These include press freedom, labor rights, academic research, and so on. Annex I requires continued application to Hong Kong of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR would become the source for the text of the Hong Kong Bill of Rights, which has been incorporated into the Basic Law by way of its Article 39, as Hong Kong courts have applied it since the 1997 handover.

According to Hong Kong opinion surveys, this structure's most important plank is the guarantee to maintain the city's existing common-law legal system and its associated rule of law. The Joint Declaration provides that existing laws—including the common law, rules of equity, local ordinances, and customary law—are to be maintained. The courts are to be independent, with the highest court of final appeal remaining in Hong Kong, whose people retain the right to challenge in court any public official believed to have violated the Basic Law. The Declaration calls for the inclusion of all these commitments in the Basic Law.

These various requirements in the Joint Declaration combined to lay a foundation for robust constitutionalism that has served Hong Kong well. After the handover, Hong Kong courts quickly came to understand that the Basic Law's supremacy under this model justified the exercise of that most important power of modern constitutional practice: constitutional judicial review. This gives courts the power to say whether official acts are constitutional or not, and has generally proven worldwide to be the best foundation for safeguarding human rights and the rule of law under a written constitution. Hong Kong's established common-law tradition offers the best guarantee that its courts will use this power without fear or favor, in a manner that is fair and independent.

In Hong Kong and the world at large, the solemn commitments enshrined in this international agreement were taken quite seriously. The

flow of emigrants leaving the city began to drop, and opinions about its future became more optimistic. Given what things had been like in China—and let us recall that even today the PRC lacks the Special Administrative Region’s level of constitutional development—Hong Kong people would never have put their hearts “at ease” based on some vague Beijing promises without the backing of an international agreement. Beijing officials made many trips to sell the “one country, two systems” model abroad, giving Hong Kong people even more grounds for having confidence in it.

It is surely the case that Hong Kong has done its part, as the Joint Declaration envisioned it would, to aid China’s economic development and modernization. As one of the world’s leading educational, financial, commercial, and cultural centers, it is a gigantic asset to the PRC. The catch is that Hong Kong will only remain so if the central government can be restrained from its natural tendency to intrude upon the city’s autonomy.

The Hong Kong Basic Law

The Basic Law should be an important means of ensuring that restraint, but it has some flaws. Particular shortcomings have to do with the independence and finality of the courts and the election and powers of the legislature. These shortcomings have contributed to the current impasse between the Umbrella Movement on the one hand, and the Beijing and Hong Kong authorities and their allies on the other. The limits placed on the courts and legislature of Hong Kong have opened the way to mainland interference in local affairs and fed growing public worry that cronyism and influence-peddling are creeping across the border. Other problems have come with this. Local-government initiatives (especially those undertaken with encouragement from Beijing) often run into public protests and have to be withdrawn, making Hong Kong look less governable.

The ultimate power to interpret the Basic Law rests with the NPC Standing Committee in Beijing, advised by a Basic Law Committee. The decisions of the Hong Kong Court of Final Appeal (CFA) are respected in the narrow sense that its judgments are final and binding with respect to the parties in the immediate case at hand. In one famous 1999 case (dealing with the “right to abode”), the NPC Standing Committee let the Hong Kong government, absent any authorizing language in the Basic Law, do an end run around the CFA by asking the Standing Committee to overturn the ruling as legal precedent.⁴ This end-run potential has roused public concern. The Standing Committee is required to consult the NPC’s Basic Law Committee in such cases, but the process is opaque. Until the issuance of the 2014 White Paper, the Standing Committee and the Hong Kong authorities kept public concerns under control by being slow to use such extraordinary powers.

The Basic Law has a bigger shortcoming that involves democratic elections—or more accurately, their lack. Every one of Hong Kong’s three chief executives since 1997 has been selected—the process falls under the Joint Declaration’s category of “consultation”—by an Election Committee⁵ that represents mostly elites. Similarly, the 70-member Hong Kong Legislative Council (LegCo) has nearly half its seats filled by narrow “functional constituencies” that often vote in a corporate fashion with no meaningful electoral competition involved. To Beijing’s credit, the Basic Law makes explicit what is implicit via the incorporation of the ICCPR: The “ultimate aim” is the adoption of “universal suffrage” in electing both the legislature and the chief executive. The failure to keep that commitment is what drives the Umbrella Movement and the current controversy.

The meaning of universal suffrage should be clear. The term generally implies free and fair elections with the rights to vote and to run for office. Article 39 of the Basic Law provides that “the rights and freedoms enjoyed by Hong Kong residents” shall not be restricted in any way that contravenes the ICCPR as applied in Hong Kong.⁶ Turning to the ICCPR, we read in its Article 25:

Every citizen shall have the right and the opportunity, without the distinctions mentioned in Article 2 and without unreasonable restrictions. . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . . guaranteeing the free expression of the will of the voters.

The General Comment on Article 25 issued by the ICCPR Human Rights Committee (HRC) emphasizes that universal suffrage should enable the voters to have a genuine choice in a free and fair election.⁷ Article 2 of the ICCPR bars discrimination based on (among other things) political opinion. Offering further assurances, Basic Law Article 26 guarantees Hong Kong residents “the right to vote and the right to stand for election in accordance with law.” Such law includes Basic Law guarantees of freedom of expression and equality.

And yet when it comes to democratic reform in Hong Kong, the NPC Standing Committee has continually dragged its feet. In a 2004 interpretation that overstepped the Basic Law’s amendment process, the NPC Standing Committee added a requirement for the Hong Kong government to submit for Standing Committee approval a report indicating that there is a need to change the method of electing either LegCo or the chief executive.⁸ Although the Basic Law specifies that the NPC Standing Committee must give its approval before there can be any change in the method of electing the chief executive, changes in LegCo election rules require only a report “for the record.”⁹ Under the 2004 interpretation, however, Beijing’s approval is required in advance for either reform.

In 2007, with a LegCo election coming up in 2008, the NPC Stand-

ing Committee decided not to increase the ratio of directly elected to functional-constituency seats. The Committee did rule, however, that a) “universal suffrage” would be allowed for the 2017 vote to choose a chief executive, and b) that if the 2017 election for chief executive went forward under universal suffrage, then the next LegCo election, set for 2020, could be by universal suffrage as well.¹⁰ Although the advance-approval requirement that had been set up in 2004 would still apply, even the very skeptical Hong Kong public felt its hopes rising.

The 2007 decision touched off a debate about what “universal suffrage” should mean in the context of choosing a chief executive. Basic Law Article 45 states as its “ultimate aim” the “selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.” But after years of delay, Hong Kong people had become suspicious regarding Beijing’s democratic promises.

In its 2007 decision, the NPC Standing Committee said that the “nominating committee” referred to in Article 45 “may be formed with reference” to the current Election Committee—a body that is well known for heavily favoring candidates from Hong Kong’s pro-Beijing establishment. It has historically nominated few prodemocracy candidates despite the low threshold (support from one-eighth of all Committee members) that is required. The suspicion stirred by the idea of using the Election Committee as a model was thus considerable. What would keep Beijing from manipulating the makeup of the new Nominating Committee just as it had long done with the Election Committee? As a hedge against this prospect, Hong Kong democrats began backing proposals for making public or civil nominations (that is, nominations first by the voters at large or by a political party) binding on the Nominating Committee. Beijing officials have attacked these proposals as violating the Basic Law, an ironic charge given that even if it is true, their own restrictions have violated that law more profoundly still.

Worries Come to a Head

The debate about universal suffrage in the 2017 chief-executive race got off to a raucous start. Wary of more foot-dragging and efforts to manipulate the public-consultation process set for January to May 2014, a prodemocracy group calling itself Occupy Central for Love and Peace warned that the adoption of any electoral model failing to meet international standards for freedom and fairness would spark a civil-disobedience campaign. In order to dramatize the situation and reveal the state of public sentiment, Occupy Central organized a late-June civic referendum that drew nearly 800,000 voters. This turnout—about a ninth of Hong Kong’s 7.2 million people—highlighted the level of public contempt for the just-published White Paper. In the minds of Hong Kong

people, there is a strong link that joins democracy to the city's autonomy and ability to maintain the rule of law. The White Paper threatened all three. Soon after the referendum, a half-million marchers showed up for the annual July 1 democracy march. The pro-Beijing camp responded with an "anti-Occupy" march.

Lines had now been drawn. In the White Paper, Beijing had declared itself the boss, with little said about putting hearts at ease. The Joint Declaration's twelve articles had become twelve preexisting Chinese principles that "come solely from the authorization of the central leadership," with little said about the international legal commitments that the Declaration entails.¹¹ As if to clear up any doubt about Beijing's stance, Chinese diplomats and Foreign Ministry officials would before the end of 2014 begin openly claiming that the 1997 handover had completely fulfilled the Joint Declaration and thereby rendered it "void."¹² Such claims, of course, fly in the face of clear language in the Joint Declaration's Article 7 that obligates both parties to implement all articles of the agreement. By undercutting the Joint Declaration, Beijing emphasized the NPC Standing Committee's full authority to interpret or amend the Basic Law as it chooses. It would subsequently use such authority to interpret "universal suffrage" in its own idiosyncratic way.

The White Paper calls the view that takes Hong Kong's high degree of autonomy seriously "confused or lopsided." A "high degree of autonomy" is said not to be "full autonomy"; the central government's "comprehensive jurisdiction" over Hong Kong is likened to its direct control over other local administrative regions; and the NPC Standing Committee is credited with not only "comprehensive jurisdiction" but also the power of "supervision" over local legislation.¹³ The White Paper paradoxically identifies the NPC Standing Committee as the guardian of Hong Kong's rule of law, with Hong Kong judges described as administrative or governing officials charged with upholding national security. The decidedly unrepresentative Election Committee is described as "an expression of equal representation and broad representativeness." The White Paper even says that the chief executive must be a person "who loves the country and loves Hong Kong," a phrase that is seen in Hong Kong as code for "must be a figure in tune with the pro-Beijing establishment."

Meanwhile, two documents put out by Hong Kong's local government officially started the democratic-reform process. The first summarized five months of consultations regarding electoral reform. The second was the HKSAR chief executive's report to the NPC Standing Committee on the need for reform.¹⁴ Together, these papers put forward the misleading claim that "mainstream opinion" (or "relatively more views") favored the outcomes that Beijing had called for (and would later require) on issues such as the patriotism of the chief executive and the Nominating Committee's makeup, procedures, and powers. Scrutiny later revealed that more than nine-tenths of the material conveyed in the consulta-

tion report consisted of *en bloc* submissions by elements aligned with the government.¹⁵ In January 2015 came first a report on the Umbrella Movement protests and then the launch of the second round of democratic-reform consultations. Nowhere

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has there been any attempt to correct the earlier misrepresentations of Hong Kong opinion or to address public concerns in a serious way.¹⁶

The NPC Standing Committee embraced the chief executive's report. Instead of the straight approval or disapproval specified in the 2004 interpretation, the Standing Committee imposed severe restrictions along with its approval.¹⁷ A requirement to model the Nominating Committee on the

Election Committee ensured that nominations will remain in the hands of unrepresentative and establishment-favoring elites. A 50 percent (as opposed to a 12.5 percent) threshold for nomination guaranteed that democratically minded candidates (known locally as "pan-democrats" to signify that they come from a range of parties and groups) would have no chance of getting through the door. As if to nail this down, there was also a requirement that the number of those nominated to be chief executive cannot exceed three. Like the White Paper, the decision worries about sovereignty and security, and stresses that the chief executive must love "the country" (that is, China) and Hong Kong.

The democratically minded legislators who hold slightly more than a third of LegCo's seats have vowed to boycott the second-round consultation and block the final bill (which needs two-thirds to pass). Some scholars have floated models that they argue may permit nomination of a figure from the "pan-democratic" camp to become chief executive in 2017, but nothing on offer seems sufficient to assure such a possibility, and it seems likely that Beijing would block the move anyway. Under the stringent guidelines that Beijing has imposed, compromise is doubtful.

Beijing has abandoned commitments that are fundamental to the "one country, two systems" model. The shift in tone from "hearts at ease" to "comprehensive [central] jurisdiction" would be worrying enough even without the White Paper's specific challenges to the Joint Declaration and the "one country, two systems" formula. The Declaration, for instance, does not contemplate making Hong Kong's courts subordinate to the NPC Standing Committee. Beijing's move to recast a solemn international treaty as a set of purely Chinese principles calls into question the security of the "one country, two systems" formula and with it, the rule of law in Hong Kong. A state of things in which Hong Kong

is under direct central control similar to that which Beijing exerts over China's other administrative regions cannot be consistent with the high degree of local autonomy that was once promised.

Beijing's purported "universal suffrage" has stripped the concept of all meaning. What kind of universal suffrage can exist when all opposition candidates are barred from an election? The Human Rights Committee that is charged with monitoring how states implement the ICCPR has already raised questions about Hong Kong's democratic development.¹⁸ By defending Beijing's severe restrictions, Hong Kong's local government has damaged its own credibility and cast a shadow across its own governance capacity as well as Hong Kong's precious international reputation as a place of freedom.

With the complete lack of democratic progress, Hong Kong people are left with no way to voice their objections other than their free-speech right of resistance through public protest. Civil disobedience is generally considered more justified in the face of a lack of democracy. Through its systematic interference and denial of democratic reform, Beijing has caused not less but more protest, thereby undermining its own desire for a more placid Hong Kong.

A change in policy to meet in full the commitments enshrined in the Joint Declaration and the Basic Law, as those commitments are commonly understood, is greatly needed. Allowing a thriving, self-governing Hong Kong to emerge will surely diminish confrontation and engender the patriotism that China has long sought. The first step is for leading officials in Hong Kong and Beijing to stop blaming the people of Hong Kong, and instead to look in the mirror. Then it will become clear that the best way to rule Hong Kong is in accord with the genuine democratic commitments reflected in the Basic Law. The fake democracy now on the table falls short of that standard.

NOTES

1. Especially relevant are Articles 45 and 68 of the Hong Kong Basic Law. The full text is at www.basiclaw.gov.hk/en/basiclawtext/index.html.

2. For the full text of the 10 June 2014 White Paper issued by the Chinese State Council (the PRC's cabinet), see http://news.xinhuanet.com/english/china/2014-06/10/c_133396891.htm. For the NPC Standing Committee's 31 August 2014 decision effectively denying Hong Kong universal suffrage, see www.scmp.com/news/hong-kong/article/1582245/full-text-npc-standing-committee-decision-hong-kong-2017-election. For the 19 December 1984 Sino-British Joint Declaration, see www.cmab.gov.hk/en/issues/joint3.htm.

3. Steve Tsang, *A Modern History of Hong Kong: 1841–1997* (London: I.B. Tauris, 2007), 215–25.

4. The Court of Final Appeal (CFA) upheld under Article 24 of the Basic Law the right of abode in Hong Kong of certain mainland children born of Hong Kong residents. See *Ng Ka Ling and Others v. Director of Immigration*, [1999] 1 H.K.L.R.D. 315, 318–19

(C.F.A.). The CFA had refused to refer the matter to the NPC Standing Committee, as it must do for certain matters of central authority and those involving local-central relations under Article 158. The Hong Kong government then referred the matter on its own and got the substantive ruling that it wanted when Beijing denied the right of abode.

5. The Election Committee, as specified in Basic Law Annex I, is formed by four broad sectors: 1) industrial, commercial, and financial; 2) the professions; 3) labor, social services, religious, and other; and 4) members of Legislative Council, representatives of the district-based organizations, and Hong Kong deputies to national legislative bodies. The net results are that the Committee is chosen by about a quarter-million voters, while about 85 percent of the Committee members belong to the pro-Beijing establishment camp.

6. Hong Kong's government has tried to avail itself of a forty-year-old British-colonial reservation to the electoral provisions in the ICCPR, but the UN Human Rights Committee has rejected this move. The British reservation, moreover, makes no reference to election of the chief executive.

7. International Covenant on Civil and Political Rights, General Comment 25, 27 August 1996. See www1.umn.edu/humanrts/gencomm/hrcom25.htm.

8. The NPC Standing Committee's 2004 interpretation is at www.npc.gov.cn/english-npc/Law/2007-12/12/content_1383900.htm.

9. Basic Law, Annex I and Annex II.

10. For the NPC Standing Committee's 2007 decision, see www.npc.gov.cn/english-npc/Law/2009-02/26/content_1473392.htm.

11. White Paper, Part I, Paragraph 2.

12. L. Gordon Crovitz, "China 'Voids' Hong Kong Rights: Beijing Abrogates 1984 Treaty It Signed with Britain to Guarantee the City's Autonomy," *Wall Street Journal*, 14 December 2014.

13. White Paper, Parts II, III, and V.

14. For the Hong Kong government's consultation report, see www.2017.gov.hk/en/consult/report.html; for the chief executive's report to the NPC Standing Committee, see www.2017.gov.hk/en/npsc/index.html.

15. Calvin Liu, Brian Yap, and Joyce Ng, "Hong Kong Political Reform Consultation Was Dominated by 'Orchestrated' Responses," *South China Morning Post* (Hong Kong), 18 August 2014.

16. See the "Report on the Recent Community and Political Situation in Hong Kong," January 2015, www.2017.gov.hk/filemanager/template/en/doc/rcps_report/rcps_report.pdf; "2017 Seize the Opportunity: Method for Selecting the Chief Executive by Universal Suffrage," January 2015, www.2017.gov.hk/en/second/document.html.

17. Beijing and Hong Kong officials had already claimed that there are no international standards for universal suffrage or that they are not applicable to Hong Kong. Chris Buckley and Michael Forsythe, "Beijing Rules Out Open Elections in Hong Kong," *New York Times*, 31 August 2014.

18. Joyce Ng, "UN Human Rights Committee to Discuss Universal Suffrage in Hong Kong," *South China Morning Post*, 10 September 2014.