

Current vs. Envisioned Parliamentary System in Hong Kong Special Administrative Region

The future of the Hong Kong Special Administrative Region was sealed in the Joint Declaration of 1984 and the Basic Law of 1990 between the United Kingdom and the People's Republic of China. Was the United Kingdom genuine and realistic when it publicly defended Hong Kong's right to complete and universal democratic elections in the 1990s and in the last few years? The legal rights and obligations set out in the Joint Declaration and the Basic Law, a legal document in Hong Kong with legal standing equivalent to a national constitution, tend to support a different approach. In this article, the author argues that the terms agreed upon in those two fundamental documents established Hong Kong as a region with greater socio-economic and political autonomy, while setting obstacles to the development of a government elected through universal suffrage.

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Before the first Opium War (1842), Hong Kong was not a land of particular interest for China. The population was a mere 7,500, with very few foreigners. Hong Kong Island was transferred to the United Kingdom after the war (1843), and the remaining part of the current Hong Kong territory by 1898. Until the 1980s, local residents of the British Crown Colony of Hong Kong were not involved in the government, but the demand for participation was also negligible as Hong Kong enjoyed economic development and civil liberties. With the announcement of the *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* (referred to as the *Joint Declaration* hereinafter) in 1984 on the transfer of Hong Kong to China in 1997, the UK introduced election reforms in the hopes of establishing and securing a democratic government on the territory.

The *Joint Declaration*, along with the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, legal document to which all post-1997 laws must conform, set the grounds for all branches of government. Comprehending the role and

influence of the National People's Congress Standing Committee is central to understanding the current parliamentary system in the Hong Kong Special Administrative Region (HKSAR). There is an ongoing concern about the extent to which parliamentary traditions introduced prior to the hand-over to the PRC will lead to a democratic system in Hong Kong. The upcoming election of the Chief Executive in 2017 is particularly important as it will set the bar for the Legislative Election of 2020 and the type of governance in Hong Kong. This article compares the current system in HKSAR with what was envisioned by the UK, the PRC and the Hong Kong people prior to the 1997 hand-over.

The United Kingdom-Hong Kong Relations

The *Treaty of Nanking* ceded the Hong Kong territory to the United Kingdom in 1843.¹ Then, territories surrounding Hong Kong, namely the New Territories, along with more than 235 islands, were transferred to the United Kingdom by the two Conventions of Peking (1860 and 1898). The Second Convention, signed when a Qing Dynasty in decline who refused to cede in perpetuity more territories, leased for 99 years the New Territories, which explains the return of Hong Kong in 1997. By the end of the 1960s, life in Hong Kong had improved significantly and opposition to British rule by Hong Kong residents declined accordingly. The socio-economic benefits that trickled-down to Hong Kong residents were enough for the majority of them to accept restricted access to governance.

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The UK and the People's Republic of China (PRC) began discussing the 1997 handover of Hong Kong to China in 1982 and ratified the *Joint Declaration* in 1984.² However, certain factors, mainly the 1989 Tiananmen Square tragedy, and the increasing fear of currency instability by foreign investors, affected the talks around the democratization of the Hong Kong legislative and executive branches.

Moreover, the sentiment of the local population with regard to greater participation of Hong Kong residents in the government evolved as fears grew of potential economic and social changes in their way of life under Chinese sovereignty. Of course, a shift from a capitalist to a communist system was never in the cards. China understood that such change would have (1) strongly impacted Hong Kong and indirectly China's economy and (2) potentially been counterproductive for China's ultimate goal to showcase the "one country, two systems" as a successful approach that could in turn be applied to the PRC's territorial conflict with Taiwan. However, the future of Hong Kong residents' ability to participate democratically in governance through free elections and limited candidacy restrictions and to enjoy civil liberties was less certain.

Discussion between the United Kingdom and the People's Republic of China

The negotiation around the terms of the transfer began during the visit of British Prime Minister Margaret Thatcher to China in 1982. The discussions touched on the administrative procedure for the handover and the governance system that would be in place in Hong Kong after July 1, 1997, among others. The *Joint Declaration* was the result of substantial discussions over a period of two years between British and Chinese officials; Hong Kong's government and population were not included in those talks, however. General terms, including the slow reform of the legislative and executive branches, were agreed upon with an understanding that these would be later detailed in the *Basic Law* (1990). This document, however, provides little detail on timeline for democratization and leaves the PRC in charge of its interpretation.

With the arrival of the last British Governor to Hong Kong, Chris Patten, in 1992 and the announcement of legislative reforms in October 1992, the future of Hong Kong's legislature changed. The PRC publicly criticized the reforms, claiming that it contravened the *Joint Declaration*, stopped all communications

with the British Governor in Hong Kong until the first round of the 17 Round Talks on April 22, 1993, and the PRC created the Preparatory Working Committee in July 1993. On 15 December 1993, Patten officially introduced, with the support from most British government officials, the 1994-1995 *Patten Reform Package* proposals to the Council, which it approved in June 1994.

Reforms included the abolition of all appointed seats, the reduction of the voting age from 21 to 18-years-old, the direct election of 20 out of 60 seats; the election of the 40 remaining seats would be through Functional Constituencies and an Electoral College. Ultimately, the reform proposal led the National People's Congress Standing Committee³ to announce that it would "start a new path"⁴ and would abolish the Legislative Council on July 1, 1997. The UK's unilateral decision with regard to reforms was perceived as forcing the hand of the PRC on a matter of great interest for the stability of Mainland China. As Patten described, this was understood by the UK as "Hong Kong is at one and the same time China's window on the world (...) and paradigm for the world of what China as a whole could become".⁵

Nevertheless, direct and indirect elections of District Board, municipal and legislative members were undertaken by the Legislative branch of the Government of Hong Kong in September 1994, March 1995 and September 1995 respectively.

In January 1995, the PRC created the Preparatory Committee to establish the rules around the Provisional Legislative Council. The Council was established on March 20, 1996 to take over the role and functions of the Legislative Council and to be the transitional body before the election of a post-1997 Legislative Council.

As per Patten's comments on China's fear of democracy's influence on Mainland China, the PRC might have felt less threatened if pro-Communist candidates had been more successful in the 1995 legislative elections. Beijing publicly supported the pro-Beijing Democratic Alliance for the Betterment of Hong Kong but was angered when the party only managed to elect six candidates. By contrast, the Hong Kong United Democrats, a pro-democracy party, won 19 seats, both via direct and indirect elections. An additional 10 to 12 candidates, who had pledged to join the pro-democracy United Democrats if victorious, were elected in the functional constituencies.⁶

In brief, the discussion between the United Kingdom and the PRC was moving forward smoothly until the arrival of Governor Patten. Both sides had agreed to the terms of the handover and the system to be in place in Hong Kong post-1997. Tensions rose with the announcement of legislative reforms and the loss of pro-Beijing candidates in the 1995 Legislative Council elections. The PRC's leadership also began to fear losing its 'iron fist' within the mainland due to democratic influences from Hong Kong.

The Parliamentary System that was Envisioned for Hong Kong after 1997

Prior to the arrival of Patten, there had never been a strong appetite within the UK government to establish a fully democratic society in Hong Kong, which included local representation and participation in decision-making. There was a proposal for democratization in the 1940s, but lack of local demand for such reforms played a role in this stasis. The Tiananmen Square tragedy considerably altered the popular desire for democratization. While the British position on the democratization of Hong Kong did not change simultaneously, the event later provided strong support to the reform package proposed by Governor Patten.

The *Joint Declaration* indicates that HKSAR "will be vested with executive, legislative and independent judicial power" and that both the Chief Executive and the legislature of Hong Kong would be established by elections. The language is vague on the method of elections and on the timeline of implementation, however. The *Basic Law* does not provide any greater precision. It only stipulates that:

the method for forming the Legislative Council shall be specified in the light of the actual situations 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**.⁷ (*emphasis added*)

Articles 66 to 79 of the *Basic Law* describe a parliamentary system with both unicameral and bicameral characteristics. The Legislative Council acts as a bicameral system for "the passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council", by requesting a majority vote from members elected

by geographical and functional constituencies respectively.⁸ All other votes are majority votes within the Legislative Council, merging both types of elected members.

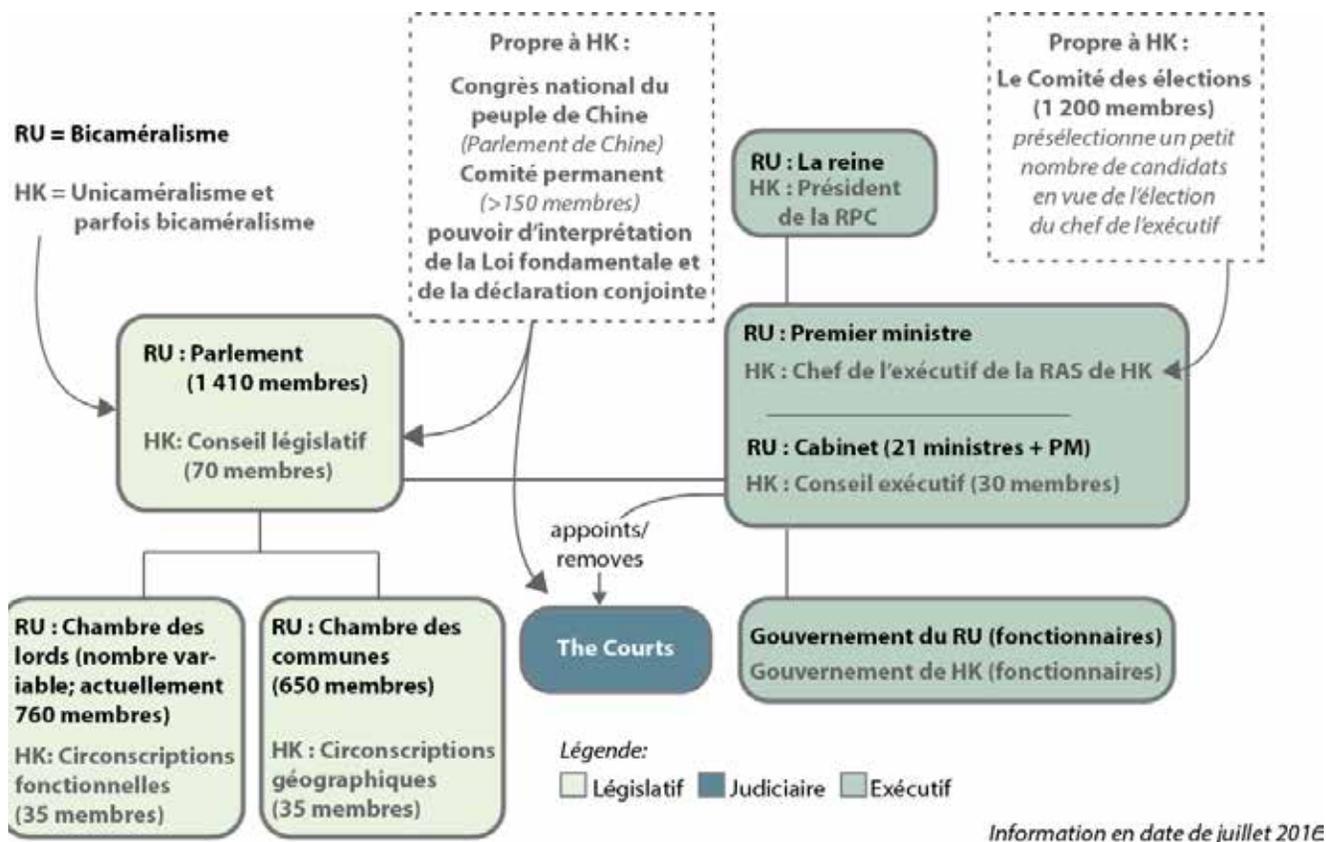
Since 1984-85, the United Kingdom slowly decreased the number of ex officio and appointees in the Council, while increasing indirect elections by functional constituencies and electoral colleges.⁹ The 60-member Council was formed via Electoral College boards, functional constituencies and geographic functions (10/30/20 in 1998, 6/30/24 in 2000 and 0/30/30 in 2004). The composition of 2008 was the same as the 2004 Council.¹⁰

With regard to the Chief Executive, head of the Executive branch, article 45 of the *Basic Law* describes its selection "by universal suffrage upon nomination by a broadly representative nominating committee". The broad committee was composed of 400 members in 1996 for the Provisional Legislative Council, and increased to 800 after the handover, according to Annex I of the *Basic Law*.

Current Parliamentary System in HKSAR

Since the fifth parliamentary elections in 2012, the Legislative Council is composed of 70 seats, 35 directly elected from geographic constituencies and 35 indirectly elected by a smaller portion of the population via functional constituencies.¹¹ Functional constituencies represent experts from targeted sectors, such as engineers, financiers and medical professionals. Functional constituencies remain very controversial as less than 10 per cent of the electorate votes for 50 per cent of the Council.¹² More than 90 per cent of the population then elects members of the Geographical constituencies, representing the other half of the Council. Contemporary debate revolves around demands from locals for universal suffrage to elect all members of the legislature, including functional constituency candidates.¹³

The Standing Committee of the National People's Congress's decision of August 31, 2014 made it impossible to discuss the envisioned parliamentary system in Hong Kong without addressing the election of the Chief Executive. This ruling created a method of Chief Executive election where the Election Committee, composed of strong supporters of the PRC, would pre-select and approve a small number of candidates; it subsequently ignited significant discontent among the Hong Kong population.



The Standing Committee indicated that:

it also helps the various sectors of the Hong Kong community to focus their efforts on addressing the issues concerning universal suffrage for selecting the Chief Executive first, thus creating the conditions for attaining the aim of electing all the members of the Legislative Council by universal suffrage after the implementation of universal suffrage for the selection of the Chief Executive.¹⁴

The Chief Executive is currently still elected by the Election Committee that is appointed by the National People's Congress in China. This 1,200-member Committee is mainly composed of pro-PRC Hong Kong residents, an increase from the 400-member committee in 1996. The current debate surrounding the 2017 Chief Executive election arises from the pre-selection of a few candidates by the pro-Beijing Election Committee. These PRC-vetted candidates would then compete in an election under universal suffrage.¹⁵ The Legislative Council faces a similar dilemma in terms of approval of candidates for the direct elections of all of its members in 2020 and the abolition of functional constituencies.

The judiciary and the executive both participate in the legislative system in a restricted capacity. First, while Hong Kong possesses a Final Court of Appeal, the National People's Congress Standing Committee is the ultimate body that interprets the *Joint Declaration* and the *Basic Law*. It produces recommendations that the Final Court of Appeal must follow when delivering its rulings. Second, the Chief Executive must approve bills affecting public policies, sign bills approved by the Legislative Council and promulgate them, approve motions that touch on Legislative Council finances and has the ability to dissolve the Council, among other powers.

Comparison and Analysis of the Parliamentary System in HKSAR

The Westminster Parliamentary system in place in the UK abides by democratic principles, derived from civil and common laws, and includes a head of state (Queen), a head of government (Prime Minister), a House of Commons composed of elected representatives, and a House of Lords composed of appointed individuals. It slowly progressed from a traditional monarchical government led by the

royal family and a handful of individuals from the aristocracy to an increasingly sophisticated form of democratic representation.¹⁶ Hong Kong has a similar Legislative structure, with two distinct 'chambers', and it is attempting to transition from an elite-led to a popular-led government.

The main difference between the two systems is the participation of the National People's Congress Standing Committee in legal decisions and interpretations. As previously mentioned, this is particularly important in the HKSAR parliamentary system as the National People's Congress Standing Committee has the power of interpretation of the *Basic Law* and the *Joint Declaration*. This is central in guiding the HKSAR legislature, as both documents are relatively vague and require the interpretation of controversial issues, particularly the democratization path of the HKSAR government.

Several characteristics defining the Westminster parliamentary system are also found in HKSAR: the confidence convention, parliamentary privilege and the Queen's prerogative to dissolve parliament and call for elections at any time. Interestingly, the prerogative to dissolve the legislature and call for elections lie in the hands of the Chief Executive in Hong Kong, rather than the President of the PRC.¹⁷ While, Hong Kong possesses a codified parliamentary system in the *Joint Declaration* and the *Basic Law*, convention, practices and precedents continue to play a significant role.¹⁸

Conclusion

Although the *Joint Declaration* and the *Basic Law* provided the foundation of the three branches of Government of Hong Kong post-1997, the vagueness of these documents has resulted in open debate between the UK and PRC, and Hong Kong since post-1997, on their interpretation. While the United Kingdom and China agreed that the system in HKSAR would "remain unchanged for 50 years",¹⁹ they did not indicate if the system would be the one in place in 1984 or in 1997. As a result, the PRC strongly rejected the 1994-1995 election reform proposal.

HKSAR inherited several characteristics of the Westminster parliamentary system, such as the confidence convention and parliamentary privilege, due to the British legacy and the reform package announced by Governor Patten in 1992

The most obvious distinction is the lack of judicial independence in Hong Kong, with the participation of the National People's Congress Standing Committee in the interpretation of the *Joint Declaration* and the *Basic Law*.

Finally, the election of the Chief Executive through universal suffrage, which has been intensely debated in the media for the past two years, is crucial to the subsequent election of the Legislative Council. According to the August 31, 2014 decision of the Standing Committee; "the implementation of universal suffrage for the selection of the Chief Executive"²⁰ is a pre-requisite for the election of all members of Legislative Council.

Overall, China has methodically framed the system to balance their need to keep the capitalist system in place in Hong Kong, guarantee continuous foreign investments, and open a window to the world, while never seriously considering implementing a truly democratic government in the autonomous region for fear of losing its 'iron fist' in mainland China.

Notes

- 1 "Treaty of Nanjing, 1842", US-China Institute, 2016. URL: <http://china.usc.edu/treaty-nanjing-nanking-1842>.
- 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. URL: http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/034B10AF5D3058DB482575EE000EDB9F.
- 3 The Standing Committee is composed of more than 150 members of the National People's Congress in charge of law making, interpreting and amending. Members are pro-Beijing and align with the ruling Communist officials. "Explainer: Inside China's National People's Congress", *Aljazeera*, March, 6 2016. URL: <http://www.aljazeera.com/news/2016/03/explainer-china-national-people-congress-160306041304243.html>
- 4 Raymond Wacks, ed. "The New Legal Ordering Hong Kong". Hong Kong University Press: Hong Kong, 1999, p. 57.
- 5 Jack F. Matlock, "Chinese Checkers", *The New York Times on the Web*, September 13, 1998.
- 6 David Wen-Wei Chang. *The Politics of Hong Kong's Reversion to China*. St. Martin's Press Inc.: New York, 1999, 274 pp.
- 7 Joint Declaration, 1984, s. 3(3). and Annex I "Elaboration by the Government of the People's Republic of China of its basic policies regarding Hong Kong" URL: [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/84A057ECA380F51D482575EF00291C2F/\\$FILE/CAP_2301_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/84A057ECA380F51D482575EF00291C2F/$FILE/CAP_2301_e_b5.pdf).

- 8 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1990, "Annex II (II) Procedures for voting on bills and motions in the Legislative Council". URL: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.
- 9 The 1991 Legislative Council elections are the first to include the direct elections of candidates (18 out of 60). The 1991 Legislative Council election is also central due to the abolition of ex-officials and appointments. By then 30 seats were indirectly elected via functional constituencies, 10 through Electoral College and 20 by direct elections. Sonny Shiu-Hing Lo, "Hong Kong's Indigenous Democracy," Palgrave MacMillan: New York, 2015, 186 pp.
- 10 Shiu-Hing Lo, Sonny. Hong Kong's Indigenous Democracy: Origins, Evolution and Contentions. First. Palgrave MacMillan: New York, 2015. 186 pp.
- 11 Functional constituencies represent professional associations, such as engineers, financiers and medical professionals. A number of seats are elected per group. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, "Instrument 4" amending Annex II of the Basic Law, 6th session Standing Committee 11th National People's Congress. URL: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.
- 12 In 2012, a new functional constituency was created. While members who would compete in direct election were nominated by a small portion of society, nominees then completed and were elected by members of the geographic electorate – representing more than 9 per cent of the whole population. Other functional constituencies' members were elected by experts of professional associations – representing less than 10 per cent of the electorate.
- 13 "HKSAR LegCo Election", Constitutional and Mainland Affairs Bureau, 2005, <http://www.cmab.gov.hk/en/issues/electoral2.htm>.
- 14 NPC Standing Committee, August 31, 2014, Instrument 23 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, "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" URL: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.
- 15 The Chief Executive Election is in September 2016. Technically, the public demand for a universal suffrage of the Chief Executive has already been defeated. Nevertheless, demands continue from the population, and greater demonstration closer to the election could revive this debate.
- 16 Instruments such as the *Magna Carta* (1215), the *Petition of Rights* (1628) and the *Bill of Rights* (1689) have significantly changed the rights and immunities of the Crown and the people it governed under the law.
- 17 The Select Committee on Foreign Affairs of the UK has noted the Chief Executive is the equivalent of the Prime Minister and the President is the counterpart of the Queen. Select Committee on Foreign Affairs, Third Report, "Legal Matters", Parliament of the United Kingdom, August 7, 1998.
- 18 Commonwealth Parliamentary Association, and Athabasca University. "Units and Self-Tests." Module on Parliamentary Democracy., 2016. <http://parliamentary-democracy.athabasca.ca/chapters/chapter2.html>.
- 19 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. 1990. Article 5. URL: http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.
- 20 "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", Tenth Session of the Standing Committee of the Twelfth National People's Congress, August 31, 2014.