Britain's "Treaty Rights" in Hong Kong

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Recent controversy over democratic reform in Hong Kong has, at its heart, the decision of August 2014 by the Standing Committee of the National People’s Congress (NPCSC) to restrict the choice of candidates while allowing the Hong Kong electorate to elect Hong Kong’s Chief Executive in 2017.

Critics say that Britain has a “treaty responsibility” in the matter. They intend to refer to treaty obligations arising under the Sino-British Joint Declaration of 1984. However, these obligations are res inter alios acta. Any suggestion that there could be treaty responsibilities which may be owed by Britain to Hong Kong, or its people, is unsound. Nothing in the conduct of successive British Governments seems to have ever suggested this. A more realistic proposition would be that China owes Britain certain treaty obligations, the current Hong Kong controversy involves a breach of Britain’s treaty rights, and since Britain has not hitherto pressed its rights it now has the “responsibility” to do so. All that can be meant by British “responsibility” is that Britain owes a moral responsibility to Hong Kong to press its own treaty rights against China.

For its part, Beijing has rejected any notion of British moral responsibility. More importantly, Beijing has also denied that there is any treaty right involved in the recent controversy let alone a breach of the Joint Declaration. The fact that the Joint Declaration states nothing about choosing Hong Kong’s Chief Executive by universal suffrage would tend to support Beijing’s view. The instrument in which such an express stipulation may be found, however, is Hong Kong’s Basic Law. Prior to the 1997 handover, the colonial government had attempted to democratise
Hong Kong’s Legislative Council (LegCo). But there never was any point in doing that which could easily be undone by Beijing upon Hong Kong’s return to China. Everything therefore depended upon the outcome of what were, then, ongoing discussions between 23 Hong Kong and 36 Beijing representatives on the enactment of a Basic Law for post-handover Hong Kong. As Lord Patten had acknowledged in a speech to LegCo in October 1992, any colonial initiative will as a practical matter have to converge with the Basic Law.

The upshot of all this was that, while it is merely a piece of Mainland Chinese legislation, all roads lead to the Basic Law. Today, it is the sole instrument which provides expressly for the possibility of a democratically-elected Hong Kong Chief Executive. Article 45 of the Basic Law states, in its first paragraph, that:

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.”

It goes on however, in a second paragraph, to state 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.”

Therefore, the promise that Hong Kong will have a Chief Executive who will be elected by universal suffrage is to all appearances a Chinese promise not an international treaty right. The Sino-British Joint Declaration reflects only the first of the two paragraphs quoted above. Paragraph 3(4) of the Joint Declaration simply states that: “[t]he Chief Executive will be appointed by the Central People’s Government on the basis of the results of elections or consultations to be held locally”. There is no reference in the text of the Joint Declaration to the selection of a Chief Executive by universal suffrage.

One consequence of this textual omission has been a temptation of late to argue that the Joint Declaration nonetheless says all that the Basic Law says. That argument needs to be spelled out and requires consideration of art.31(3) of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention). This provides in two sub-paragraphs that conduct subsequent to a treaty shall be taken into account in interpreting what the Treaty means:

“There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation …”.

If one says that the Basic Law is an important part of such subsequent conduct, this suggests a way around the problem that Chinese law grants the NPCSC ultimate legal authority to interpret the Basic Law; a proposition which Mr Swire, the Minister of State (Foreign and Commonwealth Office) had acknowledged (Hansard, HC Vol.586, cols 295WH and 296WH (October 22, 2014)). Calling the Basic Law such a “treaty” document removes the issue from the NPCSC’s sole domestic,
national authority and subjects any interpretative controversy to the methods of
treaty, as opposed to Chinese, interpretation.

The two subparagraphs of art.31(3) of the Vienna Convention apply in different
ways. Under subpara.(a), one looks for a subsequent “agreement between the
parties”. The Basic Law is unlikely to be considered an “agreement” between
Britain and China. Britain had no formal role in its formulation and enactment,
while examples of the application of subpara.(a) tend to show that some sort of
joint decision or resolution by the parties in which their “agreement” has been
recorded would at least be required (see Aust, *Modern Treaty Law and Practice*,

There is however an argument to be made under subpara.(b). In the convoluted
language of that provision, the Basic Law can be regarded as constituting
“subsequent practice in the application of the treaty”—i.e. the Joint
Declaration—“which establishes the agreement of the parties regarding its
interpretation.” It is a more flexible provision. That Britain had no part in the
drafting of the Basic Law, and indeed no formal role in respect of its enactment,
would be no bar to saying that as long as Britain and China had “agreed” to China’s
“subsequent practice”—i.e. in enacting a Basic Law for Hong Kong—then the
Basic Law’s terms “shall be taken into account” in interpreting the Joint
Declaration. The enactment of the Basic Law could also be said to constitute a
“subsequent practice in the application of the treaty” because the Joint Declaration
requires China’s “basic policies regarding Hong Kong” to be “stipulated, in a Basic
Law of the Hong Kong Special Administrative Region”, and requires these policies
to remain unchanged for 50 years upon Hong Kong’s return to China (Joint
Declaration, para.3(12)).

This “Vienna Convention” argument, as I will call it, needs to accomplish two
things. First, it is required to fill a void in the Joint Declaration (specifically, in
relation to the Chief Executive’s selection under para.3(4), quoted above). Secondly,
it is needed to apply an international method of treaty interpretation to the language
of the Basic Law, as opposed to a purely Chinese method of interpretation. As to
the first, much of what has been claimed about Britain’s “treaty” interests has in
the absence of specific language had to turn to general statements in the Joint
Declaration: namely, the provision in the Joint Declaration which states that Hong
Kong “will enjoy a high degree of autonomy” (para.3(2)). According to such a
view, what the words “a high degree of autonomy” mean is that Hong Kong shall
have a Chief Executive elected by equal, universal suffrage. But this claim fails
unless these words in the Joint Declaration are somehow taken to refer to the
express promise, contained only in the Basic Law, that Hong Kong will have an
elected Chief Executive. Secondly, if the argument succeeds in this first sense,
and brings the Basic Law’s promise of an elected Chief Executive into the
interpretation of the phrase “a high degree of autonomy” in the Sino-British Joint
Declaration, the terms of that promise would no longer be subject to a purely
Chinese interpretation but rather, to an international interpretation.

Mr Swire’s recent explanation of the British Government’s position leaves room
for this argument, while at the same time acknowledging the bare appearance of
the Joint Declaration (see *Hansard*, HC Vol.586, col.296WH (October 22, 2014)):
“Unlike with Hong Kong’s rights and freedoms, the joint declaration does not deal in the detail of Hong Kong’s democratic arrangements. It provides the essential foundation, including that the legislature be constituted by elections and that the Chief Executive be selected or elected locally. However, the detail of that is set out in the Basic Law, Hong Kong’s mini-constitution that came into force at the time of handover in 1997, and in associated decisions of China’s Parliament, the National People’s Congress.”

The statement suggests a carefully crafted piece of constructive ambiguity.

First, in order to appreciate the need for close international legal argument, one must appreciate the NPCSC’s wide powers of interpretation and legislation under Chinese law. Article 45 of the Basic Law, quoted earlier, goes on to state that: “[t]he method for selecting the Chief Executive shall be specified in the light of the actual situation” in Hong Kong “and in accordance with the principle of gradual and orderly progress”. Annex I of the Basic Law goes on to add other associated provisions; namely, that, “if there is a need” to amend the selection method “for the terms subsequent to the year 2007”, such an amendment must be endorsed by a two-thirds majority of LegCo as well as by the consent of the present Chief Executive, “and … shall be reported to” the NPCSC “for approval”.

All these additional terms require interpretation, but do they call for a purely Chinese interpretation by the NPCSC, or can the UK say that they ought to be construed according to international law?

Secondly, Britain appears not to have protested, and therefore appears to have accepted, the NPCSC’s role in the past 10 years. In 2004, the NPCSC had issued an interpretation of Annex I above, requiring the Chief Executive to make a recommendation to the NPCSC itself before tabling any amendment before LegCo (2004 interpretation). It then issued a decision (2004 decision) which precluded any reform before 2007; explaining that in light of the need to address the “actual situation” in Hong Kong and the need for “gradual and orderly progress”, it had found that while some people in Hong Kong desired reform by 2007, a broad consensus had not yet emerged.

In 2005, Hong Kong’s second Chief Executive proposed the enlargement of the election committee which is tasked to elect the Chief Executive from a body of 800 to 1,600 persons. That proposal was defeated in LegCo. But in 2007 consultations began anew with a Green Paper, leading to a further NPCSC decision (2007 decision). Again, the NPCSC preserved the existing system for the 2012 Chief Executive election, although a 2010 amendment subsequently increased the number of electors in the committee to 1,200 persons. The NPCSC added, however, in its 2007 decision that election by universal suffrage could take place in 10 years’ time—in 2017.

Consultations resumed in 2013, and culminated in the latest, controversial decision of the NPCSC of August 31, 2014. The 2014 decision envisages only “two to three” candidates, and requires a majority vote of the now 1,200 members of the re-styled “nomination committee”—since art.45 of the Basic Law speaks of a “nomination” committee not an “election” committee—for a candidate to be nominated for election in 2017. It is this nomination procedure which has caused the recent controversy in Hong Kong.
In short, the Basic Law’s own provisions are far from clear and require interpretation—but by whom, and by what methods? The Basic Law speaks of “universal suffrage” and a “broadly representative nominating committee”. But it requires account to be taken of the “actual situation in Hong Kong” and the principle of “gradual and orderly progress”. According to the Basic Law, having a democratically-elected Chief Executive is only an “ultimate aim”, and while it says that there should be a broadly representative nomination committee, the Basic Law does not say who shall be in it, and how precisely it should operate other than by a “democratic procedure”. Over the years, the NPCSC has stepped in to interpret what all of this means and under Chinese and Hong Kong law the NPCSC has the final word (see Chan and Lim (eds), Law of the Hong Kong Constitution (2011), at paras 2.077–2.090).

Lord Patten and other senior figures in Hong Kong say that Beijing has now gone too far and that Britain must protest. Patten cites Deng Xiaoping’s pledge of “one country, two systems”, Britain’s “treaty obligations” and the Joint Declaration’s stipulation that China’s policies regarding Hong Kong, including its policy of ensuring Hong Kong’s autonomy, will remain unchanged for 50 years. (Patten, Financial Times, September 2, 2014). Such claims need to be substantiated under treaty law. The Vienna Convention argument, which I have outlined above, attempts to do so by putting flesh on the Joint Declaration’s abstract promise of “a high degree of autonomy”. Such an interpretative argument would deny a purely Chinese interpretation being given to the Basic Law by saying that when China enacted the Basic Law, it did so as a matter of treaty obligation. Unlike subpara.(a) of art.31(3) of the Vienna Convention on the Law of Treaties, which requires a subsequent “agreement” between the parties and therefore the active participation of all parties, art.31(3)(b) simply requires any subsequent practice—namely China’s enactment of the Basic Law—to have received Britain’s tacit acceptance (see Aust, Modern Treaty Law and Practice (2013), at p.216). The absence of any formal or active participation by Britain does not prevent the argument that the Basic Law’s terms have also become a part of (the interpretation of) the Joint Declaration.

However, the Chinese news media and the Chinese Embassy in London have already stated that all treaty promises to Great Britain have been fulfilled and that Britain has no treaty rights left to press. (“Britain’s ‘Responsibility Theory’ is Groundless”, CCTV.com, December 3, 2014; Hansard, HC Vol.589, col.164 (December 2, 2014).) A spokesperson from the Chinese Foreign Ministry also announced from Beijing that the UK has “no sovereignty over, no governance of, and no superintendence” over Hong Kong. (“China Rejects Britain’s ‘Moral Duty’ to Hong Kong”, China Daily, Asia edn (December 3, 2014)). These statements were made in connection with the announcement of a Hong Kong entry ban against members of the House of Commons Committee on Foreign Affairs, chaired by Sir Richard Ottoway. In an emergency Commons debate, Mr Swire subsequently announced the British Government’s view that the UK has “a legal interest and a moral obligation” in the monitoring and implementation of the Joint Declaration (Hansard, HC Vol.589, col.203 (December 2, 2014)); whereas in relation to the controversy caused by Beijing’s restrictive nomination procedures, Mr Swire had previously employed a different form of words: “[w]e have a moral obligation and a legitimate interest in the preservation of the rights and freedoms of the people
of Hong Kong.” (Hansard, HC Vol.586, col.298WH (October 22, 2014)). The difference is immediately apparent, but neither statement suggests the violation of any treaty right regarding the electoral issue. Mr Swire’s later statement, compelled by reports of China’s denial of the status of the Joint Declaration, was a harmless tautology—Britain has a “legal interest” in the observance of a British treaty.

As a treaty matter that would be the end of it, barring any shift in the UK’s legal policy. Lord Patten and others wish to effect such a shift. They have framed the electoral issue as a matter involving the breach of a British treaty right. Their argument could even proceed a little further. Subparagraph (c) of art.31(3) of the Vienna Convention states that “any relevant rules of international law applicable in the relations between the parties” shall also be taken into account. Because the Joint Declaration (Pt XIII, annex I) also states that “the provisions of the International Covenant on Civil and Political Rights … as applied to Hong Kong shall remain in force”, it makes the rules of the Human Rights Covenant “relevant” to the interpretation of the Joint Declaration. These rules are “applicable” to any Sino-British treaty commitment concerning electoral reform because art.25(b) of the Covenant guarantees the “right to vote and to be elected at genuine periodic elections which shall be by equal and universal suffrage”. There is a British treaty reservation which had excluded art.25(b)’s application to colonial Hong Kong, and which China subsequently preserved, but the reservation applies only to the “establishment” of an elected “Executive or Legislative Council”. Arguably, Beijing has already decided to favour such “establishment” and Britain can say that the reservation no longer applies.

In sum, the argument for a British treaty right rests upon a prolonged argument about treaty interpretation, the essence of which is that commitments in the Joint Declaration ought to be amplified by terms contained in the Basic Law and that while Britain may have acquiesced to China’s previous interpretations of the Basic Law, this cannot now be taken for granted; not least, because the Human Rights Covenant also needs to be taken into account in interpreting the Joint Declaration.

It is difficult, however, to see how such an argument would dispel the impression of consistent, albeit tacit, British acquiescence not only in the NPCSC’s earlier views but also in the NPCSC’s role as the better judge of when and how Hong Kong will acquire an elected Chief Executive. The argument that a “British” treaty is involved also adds little to a separate argument based firmly upon the Human Rights Covenant.

In this regard, the Foreign Affairs Committee’s proposed visit had implied that it is not just the NPCSC which—under the Basic Law—ought to decide what Hong Kong requires. To that extent, it assumed some version of the Vienna Convention argument outlined above. China can also hardly have been expected to appreciate the constitutional nicety that the Committee’s views need not be those of the British Government.

Treaty practitioners know the difference between putting an argument before a tribunal or public opinion and persuading a treaty counterparty to reach a compromise over contestable treaty terms, and recent events have shown understandable restraint on the part of the British Government. The British Government has not declared a violation of any right in connection with the
NPCSC’s latest electoral decision. What Mr Swire has said is that the Joint Declaration, as a binding treaty, creates a concomitant British legal interest in its observance. In giving evidence to the Foreign Affairs Committee in January, Mr Swire also announced that, in any event, “Britain’s Foreign Office believes” that Beijing’s proposed electoral framework “does offer” voters a “genuine choice” (“Britain Adopts a Pragmatic Policy toward Hong Kong”, China Daily, January 21, 2015).

In the absence of actual denial of Beijing’s sole authority to interpret the Basic Law, the Vienna Convention argument described in this note is, even if it comes not too late, too reliant on the interpretation of too few facts. If a treaty is a disagreement reduced to writing, then there has been too little disagreement over too little writing. 

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China; Constitutional law; Election candidates; Hong Kong; Treaty interpretation