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Title: RECONCILIATION BETWEEN CENTRAL GOVERNMENT'S CONCERNS OVER RELAXING THE NOMINATION PROCESS AND THE CONSTITUTIONAL HUMAN RIGHTS PROTECTION: A POSSIBLE WAY FORWARD FOR HONG KONG

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# RECONCILIATION BETWEEN CENTRAL GOVERNMENT'S CONCERNS OVER RELAXING THE NOMINATION PROCESS AND THE CONSTITUTIONAL HUMAN RIGHTS PROTECTION: A POSSIBLE WAY FORWARD FOR HONG KONG

*Zhang Qijin*

*The Standing Committee of National People's Congress of People's Republic of China (NPCSC) announced its decision on how the Chief Executive (CE) of Hong Kong should be elected in 2017. While the NPCSC and Hong Kong government continue to assert that this decision is the sole basis for the CE election, this paper analysed the implication of the International Covenant on Civil and Political Rights (ICCPR) and the relevant human right provisions in the Basic Law of Hong Kong Special Administrative Region (BL), and summarises the requirements of public election provided in these documents. The paper also assesses the human rights provisions in BL and ICCPR and the concerns of the Chinese government, and submits that they are not mutually exclusive. A possible middle ground solution is proposed, and is followed by the political and constitutional considerations.*

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## I. INTRODUCTION

On 31 August 2014, the Standing Committee of National People's Congress (NPCSC) announced the decision on selection of the Chief Executive (CE) by universal suffrage and on the method for forming the Legislative Council in the Year 2016 (the 831 Decision).<sup>1</sup> This is arguably the most influential NPCSC decisions and interpretations to the Basic Law:<sup>2</sup> It set up the framework for future democratic development of Hong Kong SAR, and directly triggered the "Occupy Central with Love and Peace" and "Umbrella Movement", the first massive civil disobedience movement that the history of Hong Kong has ever seen.

The 831 Decision provided restrictions for the CE election, for example, a person had to acquire the majority consent from a 1200-member Nominating Committee before running for the election, and there can be no more than 3 candidates. These restrictions may effectively prevent the opposition party from becoming a candidate, although the human rights provisions require that the election must be universal, equal, and free from discrimination, as will be discussed later in this article.

While many people focus on the seemingly irreconcilable conflict between the 831 Decision and the human rights protections in Hong Kong, few considered the possible settling. However, a resolution is desirable to stabilise the Central-Hong Kong relations and essential to maintain the prospect of Hong

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<sup>1</sup> *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*, 31 August 2014 ("the 831 Decision"), available at <http://www.2017.gov.hk/filemanager/template/en/doc/20140831a.pdf> (last modified: 7 January 2015)

<sup>2</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) 29 I.L.M. 1519 ("Basic Law")

Kong.

This article seeks to analyse the requirements of human rights provisions in the Basic Law. In particular, attention is paid to the status of the reservation to the right to vote in Hong Kong. It will be argued that the Reservation to Article 25(b) of International Covenant on Civil and Political Rights<sup>3</sup> (ICCPR) is valid and effective in Hong Kong; yet it does not cover the election of CE; and once the CE is to be elect by universal suffrage, the election must comply with the requirements of Article 25(b). The article will go on to deliberate Central Government's concerns over relaxing restrictions on the nomination process. Such a deliberation goes beyond the original text of the 831 Decision; it will further examines the speeches and conversations made by the main officials of Central Government and official academic researches. It can be revealed that the major concern of the Central Government is to maintain the control over Hong Kong. This article will then propose a possible reconciliation satisfying both the 831 Decision and the human rights requirements in the Basic Law. Finally, the advantages and disadvantages of adopting the possible government proposal will be weighted.

## II. THE HUMAN RIGHTS REQUIREMENTS IN THE BASIC LAW

### A. BASIC LAW ARTICLE 39

The Basic Law, the highest law in Hong Kong, provides extensive human rights protection. It is extensive in a way that it not only equips the people with direct and comprehensive protection,<sup>4</sup> but also entrenches one of the most important human rights instruments in history – ICCPR – in Article 39:

*“Article 39*

*The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”*

### B. ICCPR ARTICLE 25

The ICCPR has been applied to Hong Kong since as early as 1976 when the United Kingdom ratified and extended it to Hong Kong. In the scenario of public elections, the relevant provision of ICCPR are Articles 25(a) and 25(b):

*“Article 25*

*Every citizen shall have the right and the opportunity, without any of the distinctions motioned in Article 2<sup>5</sup> and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

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<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, (“ICCPR”) available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 9 February 2015]

<sup>4</sup> Chapter III. For example, Article 24 provides residential rights, Article 27 freedom of speech.

<sup>5</sup> Article 2 of ICCPR reads: “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;”*

However, when the United Kingdom extended ICCPR to Hong Kong, it entered into several reservations, one of which relates to Article 25(b) of ICCPR and has been relied on by Central Government officials to deny the application of this provision in respect of CE election.<sup>6</sup> The reservation reads:

*“The Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong [...].”*<sup>7</sup> (the Reservation)

A reservation is a unilateral statement made by a State Party purports to exclude or modify the legal effect of any provision of the treaty in their application to that State when signing or ratifying a treaty.<sup>8</sup>

Although a reservation is open to withdrawal, modification, and objection,<sup>9</sup> the validity of the Reservation made by the United Kingdom regarding Article 25(b) is not challenged in this paper, since the Reservation has not been withdrawn or modified ever since 1976, and since the application of ICCPR to Hong Kong, including the Reservation, was accepted by the People's Republic of China.<sup>10</sup> However, in order to determine whether Article 25(b) of ICCPR constitutes a necessary condition of the CE election in Hong Kong or not, one must delve into the effectiveness and scope of the Reservation.

## C. THE EFFECTIVENESS OF THE RESERVATION

### 1. STATE SUCCESSION

A reservation to a treaty is a unilateral statement, and it can only exclude the legal effect of a treaty of the State that made such reservation.<sup>11</sup> It was the United Kingdom, not China, which made the Reservation. Therefore, for the Reservation to preserve its effectiveness after China resumed sovereignty over Hong Kong, the issue of state succession must be reviewed.

One of the arguments against the effectiveness of the Reservation is that the new sovereign could not rely upon a reservation entered by the old sovereign.<sup>12</sup> However, this argument is not strong, since Article 39 of the Basic Law provides for the continued application of the provisions of ICCPR as applied to Hong Kong. When China assumed responsibility of continuing to apply ICCPR to Hong Kong,<sup>13</sup> it

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<sup>6</sup> Rao Geping, *Yiguoliangzhi xia de Xianggang Xingzheng Zhangguan Puxuan Wenti (Issue of Universal Suffrage of Chief Executive of Hong Kong under “One Country Two Systems”)*, available at: <http://www.bjtm.com/?c=news&m=view&id=173> [accessed 12 February 2015]

<sup>7</sup> *Declarations and Reservations to the ICCPR*, online: United Nations Treaty Collection, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec) (last modified: 21-02-2015)

<sup>8</sup> United Nations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 12 March 1986, Article 2(1)(d)

<sup>9</sup> *Ibid.* Article 20-22

<sup>10</sup> *Historical Information*, online: United Nations Treaty Collection, available at: <https://treaties.un.org/HistoricalInfo.aspx?#China> [accessed 14 February 2014] “Note 3 III. “*The Government of the People's Republic of China has already carried out separately the formalities required for the application of the treaties listed in the aforesaid Annexes, including all the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997.*”

<sup>11</sup> See n 9 above.

<sup>12</sup> Seren S.T. Tang, “Status of the Reservation to the Right to Vote in Hong Kong,” (2008) *Centre for Comparative and Public Law, HKU*, Occasional Paper No.17, p 6.

<sup>13</sup> See n 10 above.

preserved the reservations entered into by the United Kingdom simultaneously.<sup>14</sup> Since on the issue of state succession, “principles of acquiescence and estoppel are often dominant”,<sup>15</sup> it cannot be simply concluded that once sovereignty state of Hong Kong changed from the United Kingdom to China, the Reservation ceased to be effective.

## 2. MEANING AND EXTENT OF ARTICLE 39 OF BASIC LAW

Article 39 of Basic Law provides that provisions of ICCPR “as applied to Hong Kong” shall remain in force. It is a plain argument that the application of Article 25(b) of ICCPR to Hong Kong is subject to the effect of the Reservation. According to the literal meaning of Article 39 of Basic Law, Article 25(b) of ICCPR should remain subject to such a reservation in Hong Kong after 1997. The judgment of Court of Final Appeal in *Ubamaka Edward Wilson v Secretary for Security & Another*<sup>16</sup> is a strong support for this argument.

In *Ubamaka*, the Court of Final Appeal was asked to consider the effectiveness of another reservation made by the United Kingdom – the immigration reservation. Ribeiro PJ opined that “[i]t is common ground (and plainly correct) that [the words “as applied to Hong Kong” in Article 39 of Basic Law] refer to the original application of the Covenant to Hong Kong by the United Kingdom when it ratified the ICCPR in 1976 and declared that its acceptance extended to Hong Kong. Such application was obviously subject to the stipulated reservations, including the immigration reservation.” The judgment referred to reservations in general, and clearly included the Reservation to Article 25(b) of ICCPR.

Despite of this judgment on Article 39, it may be argued that this article is still ambiguous for it did not mention the Reservation. If the meaning of the language of the text is ambiguous when construed in the light of its context and purpose, it is a well-established principle that the court may refer to pre-enactment legislative materials.<sup>17</sup> As will be argued below, such legislative materials are positive factors pointing to the validity of the Reservation.

In the discussion paper of Basic Law Consultative Committee (BLCC) dated 19 March 1987,<sup>18</sup> Annex C explicitly indicated Article 25(b) of ICCPR was subject to the reservation of the United Kingdom. Moreover, in the consultation report of the draft Basic Law of BLCC dated 1 October 1988,<sup>19</sup> there was suggestion to delete “as applied to Hong Kong” in Article 39 since it might denote that the reservations of United Kingdom would be preserved. However, such suggestion was not adopted and the words “as applied to Hong Kong” were kept in Article 39. It can be inferred from these materials that the Reservation was being well aware of at the time of drafting the Basic Law.

Therefore, it is submitted that the Reservation is effective and continue to affect the application of Article 25(b) of ICCPR to Hong Kong.

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<sup>14</sup> *Ibid.*

<sup>15</sup> James Crawford, *Brownlie's Principle of Public International Law 8<sup>th</sup> Edition* (Oxford: Oxford University Press, 2012), p 438.

<sup>16</sup> [2013] 2 HKC 75

<sup>17</sup> *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211

<sup>18</sup> *Discussion Paper on the Basic Rights and Duties of Hong Kong Inhabitants*, online: Basic Law Drafting History Online, available at: <http://ebook.lib.hku.hk/bldho/articles/BL0421.pdf> [accessed 12 February 2015]

<sup>19</sup> *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions): consultation report (5)*, online: Basic Law Drafting History Online, available at: <http://ebook.lib.hku.hk/bldho/articles/BL0221.pdf> [accessed 12 February 2015]

## D. THE SCOPE OF THE RESERVATION

Although it is argued that the Reservation is still effective and the application of Article 25(b) of ICCPR is still subject to it, it is not necessary true that this article can not be applied to Hong Kong whatsoever the circumstances. The word “as” in Article 39 of Basic Law bears the meaning of “extent or degree”.<sup>20</sup> In addition, it is the general principle of interpreting a reservation that it “shall be interpreted... in their context and in the light of its object and purpose”.<sup>21</sup> Therefore, it is unreasonable to conclude that Article 25(b) of ICCPR as a whole cannot be applied to Hong Kong due to the reservation without looking into the extent of the reservation.

### 1. ELECTED “EXECUTIVE COUNCIL” NOT ELECTED “EXECUTIVE”

First of all, the Reservation provides that Article 25(b) of ICCPR is reserved “*in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong*”. One may interpret the Reservation as exempting the government from establishing an elected *Executive* and elected *Legislative Council*, but such an interpretation deviates from the context of the Reservation.

Since the Reservation was made in 1976, the context can be found in the Hong Kong Letters Patent 1917-1976,<sup>22</sup> which provides the political system in colonial Hong Kong. According to the Letters Patent, there shall be a Governor in and over the Colony of Hong Kong,<sup>23</sup> an Executive Council in and for the Colony,<sup>24</sup> and a Legislative Council in and for the Colony.<sup>25</sup> There was not any organ of the government called *Executive* in 1976. Thus at the time when the United Kingdom entered into the Reservation, it must have meant to relieve the government from establishing an elected *Executive Council* and *Legislative Council*.

This interpretation of the Reservation gains support from both sides: it is adopted not only by the Hong Kong Bar Association,<sup>26</sup> but also by mainland members of Basic Law Drafting Committee. While discussing the Reservation in his book *Introduction to Basic Law of Hong Kong Special Administrative Region*, Professor Wang Shuwen, member of Basic Law Drafting Committee, clarified that the United Kingdom reserved the right not to apply Article 25(b) of ICCPR “on issues relating to the establishment of an elected *Executive Council* and *Legislative Council*”.<sup>27</sup>

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<sup>20</sup> Oxford Dictionaries (2015 Oxford University Press), available at: <http://www.oxforddictionaries.com/definition/english/as?searchDictCode=all>

<sup>21</sup> See n 8 above, Article 31(1)

<sup>22</sup> Legislative Council InfoPack No. LC04/2011-12, Encl. 4& 10, online: Legislative Council Library, available at: <http://www.legco.gov.hk/general/english/library/infopacks/yr11-12/1112infopacks-lc-04-e.pdf> [assessed 13 February 2015]

<sup>23</sup> *Ibid.* Article I

<sup>24</sup> *Ibid.* Article V

<sup>25</sup> *Ibid.* Article VI

<sup>26</sup> Hong Kong Bar Association, “The International Obligations of the People’s Republic of China in respect of the Election of the Chief Executive in Hong Kong: Article 25 of the International Covenant on Civil and Political Rights: Analysis of the Hong Kong Bar Association,” (2014) paras 26-30, online: Hong Kong Bar Association News Head Lines, available at: <http://www.hkba.org/whatsnew/misc/3-HKBA%20ConstDev%20Appendix%20final.pdf> [accessed 15 February 2015]

<sup>27</sup> Wang Shuwen, *香港特別行政區基本法導論 (Xianggang Tebie Xinghengqu Jibenfa Daolun) (Introduction to Basic Law of Hong Kong Special Administrative Region)* (Beijing: 中共中央黨校出版社 (Zhonggong Zhongyang Dangxiao Chubanshe), 3.2006), p 202. “聯合王國政府保留權利，在涉及須在香港設立一個經選舉產生的行政局和立法局的問題上，不引用第25條 (b)。”

## 2. POSITIONS OF HUMAN RIGHTS COMMITTEE AND HONG KONG COURTS

As the independent monitor body of ICCPR, the Human Rights Committee (HRC) issues Concluding Comments on the implementation of ICCPR. Although the Comments are not legally binding, the court of Hong Kong should consider them as of the greatest assistance and give to them considerable weight when they reflect the interpretation of articles in ICCPR, and are directly related to Hong Kong.<sup>28</sup>

The HRC has touched on the scope of the Reservation since as early as 1995 in its Concluding Observations of that year.<sup>29</sup> The HRC took the view that although there was a valid Reservation to Article 25(b) of ICCPR, “once an elected Legislative Council is established, its election must conform to Article 25 of [ICCPR]”.<sup>30</sup> The HRC maintained the same view in the Concluding Observations of 1999 and 2006.<sup>31</sup> In 2013, the Concluding Observations took a step forward and suggested the government should “consider ... withdrawing [the Reservation]”.<sup>32</sup>

The Hong Kong court shared the view with HRC in 1995-2006. In *Lee Miu Ling & Another v A-G of Hong Kong*,<sup>33</sup> the plaintiffs challenged that the election in Legislative Council had infringe Article 21 of Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO), which mirrored Article 25 of ICCPR. The colonial government tried to rely on section 13 of the HKBORO, the domestic counterpart of the Reservation. Keith J held that because the Letters Patent had been amended to provide for an elected Legislative Council, section 13 of HKBORO could no longer be used to justify a departure from the rights guaranteed by Article 21 of HKBORO.

Therefore, both the HRC and the Hong Kong court hold the view that even though the Reservation is effective, once an elected Legislative Council is established, its election must conform to Article 25 of ICCPR. Accordingly, a reasonable inference can be drawn that even if the Reservation exempted Hong Kong from establishing an elected *Executive*, when the *Executive* is to be elected, Article 25(b) applies. Moreover, the Reservation hinders the enjoyment of political rights of Hong Kong residents and shall be withdrawn.

### E. ICCPR ARTICLE 25(A)

In any event, the Reservation only extends to Article 25(b) of ICCPR and has no implication in Article 25(a). By virtue of Article 39 of Basic Law, Article 25(a), as the provision of ICCPR applied to Hong Kong, shall remain in force and constitute a part of constitutional rights.

Article 25(a) reads that “Every citizen shall have the right and the opportunity, without any of the distinctions motioned in Article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives.” Therefore, any discrimination on candidates, such as discrimination on political or other opinions, is repugnant in nature to the requirement of Article 25(a).

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<sup>28</sup> *R v Sin Yau-ming* [1991] 1 HKPLR 88

<sup>29</sup> *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, Human Rights Committee, UN Doc. CCPR/C/79/Add.57 (9 November 1995)

<sup>30</sup> *Ibid* para 19

<sup>31</sup> *Concluding observations of the Human Rights Committee: Hong Kong Special Administrative Region*, Human Rights Committee, UN Doc. CCPR/C/79/Add.117 (15 November 1999), para 12; *Concluding Observations of the Human Rights Committee Hong Kong Special Administrative Region (HKSAR)*, Human Rights Committee, UN Doc. CCPR/C/HKG/CO/2 (21 April 2006), para 18.

<sup>32</sup> *Concluding observations on the third periodic report of Hong Kong, China*, Human Rights Committee, UN Doc. CCPR/C/CHN-HKG/CO/3 (29 April 2013), para 6

<sup>33</sup> [1995] HKLY 558

## F. BASIC LAW ARTICLES 25 AND 26

Besides the provisions ICCPR entrenched by Article 39 of the Basic Law, the Basic Law provides extensive human rights protection in itself. In the context of CE election, the most relevant provisions are Articles 25 and 26.

Article 25 of Basic Law provides the protection of right to equality by requiring that “all Hong Kong residents shall be equal before the law.” The merit of Article 25 is extended when read in conjunction with Articles 2 and 26 of ICCPR (Articles 1 and 22 of HKBORO), which specified that all persons are entitled without any discrimination to the equal protection of the law, and the law shall prohibit any discrimination on any ground.<sup>34</sup>

It should be noted that differential treatment on any of the grounds mentioned above is not necessarily unconstitutional. When searching for discrimination, the Hong Kong court would conduct a two-stage test established by the Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung Zigo & Another*.<sup>35</sup> First, the court would consider whether the two cases, one with alleged discrimination and the other without, are of comparable situations; second, the court would examine whether the differential treatment could satisfy the proportionality test.<sup>36</sup>

Article 26 of Basic Law is more specific than Article 25. It protects the right to vote and the right to stand for election of permanent residents of Hong Kong in accordance with law. Such rights shall not be subject to any form of discrimination or unreasonable restrictions as provided in Articles 2 and 25 of ICCPR (Articles 1 and 21 of HKBORO). It is also well established that restrictions to constitutional rights must satisfy the proportionality test.<sup>37</sup> Therefore, restriction to the right to stand for election on the ground of political or other opinion is unconstitutional unless it can be proved that such restriction is rationally connected to the pursuit of a legitimate aim, and it is no more than is necessary for achieving such an aim.

## G. CONCLUSION

To sum up, the human rights provisions in the Basic Law in relation to CE election include Articles 25 and 26. Article 39 of Basic Law entrenched the constitutional status of the provisions of ICCPR as applied to Hong Kong, including Articles 2, 25(a) & (b), and 26. It is found that the Reservation to Article 25(b) of ICCPR is valid and effective in Hong Kong. However, the Reservation does not cover the election of CE; and nevertheless, once the CE is to be elect by universal suffrage, the election must comply with the requirements of Article 25(b) of ICCPR.

By virtue of the above provisions, the CE election must be universal and equal, and citizens must have the right and opportunity to free choice. There must be no distinction or discrimination on any ground, including political and other opinions, over the CE candidates, and it must be free from restrictions, unless such restrictions can satisfy the proportionality test.

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<sup>34</sup> Articles 2 and 26 of ICCPR, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statuses.

<sup>35</sup> [2007] 3 HKC 545

<sup>36</sup> *Ibid.* paras 19-20 per Li CJ

<sup>37</sup> *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, paras 33-39; *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, p 461A-B; *Ming Pao Newspapers Ltd & Others v A-G of Hong Kong* [1996] AC 907, p 917D-E

### III. CENTRAL GOVERNMENT'S CONCERNS

Mainland China has a judiciary substantially dissimilar with that of Hong Kong. It is not a common law jurisdiction; the National People's Congress (NPC) is not only a legislative organ<sup>38</sup> but also an executive organ of the country;<sup>39</sup> the role of legal system bears more policy objectives; the legislative and executive actions are to serve the fundamental policies. Therefore, when considering the Central Government's concerns over relaxing restrictions on the nomination process, the analysis methods to be adopted should vary according to the legal and political characteristics of Mainland China. Besides the materials widely used in common law legal interpretation, such as pre-enactment legislative materials of Basic Law and the 831 Decision, attention shall also be paid to official documents and the speeches and conversations made by NPC officials.

#### A. CONCERNS WHEN DRAFTING THE BASIC LAW

Article 45 of 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 order to fully understand the concerns of Central Government over relaxing restrictions on the nomination process, one shall first examining the intention of setting up the nominating committee. The pre-enactment legislative materials offer a promising start.

There were in total 9 drafts of Article 45,<sup>40</sup> and the requirement of nominating committee first appeared in the 8<sup>th</sup> draft (16 February 1990),<sup>41</sup> which is identical to the final version of the Article. In the 7<sup>th</sup> draft (21 February 1989), there was no such a requirement of nominating committee, and it only specified that "[t]he ultimate aim is the selection of the Chief Executive by universal suffrage."<sup>42</sup> Therefore, the legislative materials dated between the 7<sup>th</sup> and 8<sup>th</sup> drafts of Article 45 are critical to determine the legislative intention of adding the requirement of nominating committee.

On 1 Nov 1989, the Basic Law Consultative Committee published the consultation report on the draft Basic Law.<sup>43</sup> There were 2 opinions of the members reported in this Consultation Report relating to the establishment of nominating committee. The first is that:

*"If there is no nominating committee, the quantity and quality of nominees are difficult to control, and it will result to administrative inconvenience. Furthermore, there are similar nominating processes in the United States presidential election and the United Kingdom prime minister election, so this system*

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<sup>38</sup> *Constitution of the People's Republic of China* [China], 4 December 1982, available at: [http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm) [accessed 16 February 2015], Article 58

<sup>39</sup> *Ibid.* Article 63(13), (14) & (15)

<sup>40</sup> Li Haoran, *香港基本法起草過程概覽 (中冊)* (*Xianggang Jibenfa Qicao Guocheng Gailan (2)*) (*Outline of the Drafting Process of Hong Kong Basic Law (2)*) (Hong Kong: 三聯書店(香港)有限公司 (*San lian shu dian (Xianggang) you xian gong si*)), pp 400-471.

<sup>41</sup> *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 16 February 1990. Online: Basic Law Drafting History Online, available at: <http://ebook.lib.hku.hk/bldho/articles/BL0133.pdf> [accessed 15 February 2015]

<sup>42</sup> *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 21 February 1989. Online: Basic Law Drafting History Online, available at: <http://ebook.lib.hku.hk/bldho/articles/BL0103.pdf> [accessed 15 February 2015]

<sup>43</sup> *Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions): consultation report (1)*, 8 December 1989. Online: Basic Law Drafting History Online, available at: <http://ebook.lib.hku.hk/bldho/articles/BL0257.pdf> [accessed 15 February 2015]

*is not necessarily undemocratic.*”<sup>44</sup>

The second opinion reads:

*“Suggests limiting the nomination of Chief Executive candidate. Since there is yet no mature party in Hong Kong, an overly open nomination will bring risks.”*<sup>45</sup>

These officially recorded opinions indicate that the intention of adding the requirement of nominating committee was to control the quantity and ensure the quality of the CE candidates and to prevent administrative risks.

## B. CONCERNS WHEN DRAFTING THE 831 DECISION

When going through the official documents and speeches of Mainland China, one may easily reveal the common grounds of these materials: they are usually highly repetitive, the wordings and notions are loosely or never defined, and lack of detailed reasoning. Consequentially, the analysis of the 831 Decision and its explanations is merely the beginning, and further reference must be made to a wide range of materials—from the Communist Party of China's fundamental policies over Hong Kong to the conversations between official of NPCSC and Hong Kong Legislative Council members.

Firstly, the 831 Decision provides that “the provisions for the number of members, composition and formation methods of the nominating committee shall be made in accordance with [those] of the Election Committee for the Fourth Chief Executive.”<sup>46</sup> The major considerations are covering representative figures from all sectors of the Hong Kong community, achieving balanced participation of all sectors, conforming to the actual situation of Hong Kong, and fending off various risks during election of the CE by universal suffrage.<sup>47</sup>

Secondly, the 831 Decision stipulates that the nominating committee shall nominate 2 to 3 candidates for CE.<sup>48</sup> The intention was to ensure a competitive election and avoid problems of complicated electoral procedures and high election costs caused by having too many candidates.<sup>49</sup>

Thirdly, the 831 Decision requires each candidate must have the endorsement of more than 50 per cent of all the members of the nominating committee.<sup>50</sup> This requirement was set to reflect the collective will of the nominating committee, as it collectively exercises the power to nominate candidate of CE. It is also beneficial to balanced participation, meeting various interests in Hong Kong, and facilitating consensus building in Hong Kong.<sup>51</sup>

Last but not least, the preamble of 831 Decision specified that the principle that the CE has to be a person who loves the country and loves Hong Kong must be upheld, since the CE is accountable to both

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<sup>44</sup> *Ibid.* p.91 “如果沒有提名委員會，則難以控制被提名者的質與量，而且亦會構成行政上的不便。何況，美國總統和英國首相的選舉，亦有類似的提名過程，可見此制度亦非一定不民主。”

<sup>45</sup> *Ibid.* “建議限制行政長官候選人的提名。因為現時香港仍未有成熟的政黨出現，過於開放的提名會帶來危險。”

<sup>46</sup> *See* n 1 above. Article II(1)

<sup>47</sup> *Explanations on the Draft 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*, 27 August 2014, p 7, available at <http://www.2017.gov.hk/filemanager/template/en/doc/20140831a.pdf> (last modified: 7 January 2015)

<sup>48</sup> *See* n 1 above. Article II(2)

<sup>49</sup> *See* n 47 above, p 8.

<sup>50</sup> *See* n 1 above. Article II(2)

<sup>51</sup> *See* n 47 above, pp 8-9.

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Hong Kong and the Central Government.<sup>52</sup>

In order to delve into the concerns of the Central Government, the fundamental policy concerning Hong Kong should be considered, since the decision of NPCSC is heavily, if not solely, policy-driven. Each specific decision made is to serve the fundamental policy. According to Hu Jintao's report at 18th National Congress of Communist Party of China, the underlying goal of the principles and policies adopted by the Central Government concerning Hong Kong is, first, to uphold China's sovereignty, security and development interests and, second, to maintain long-term prosperity and stability of Hong Kong.<sup>53</sup> The 831 Decision is made to fulfil these golden principles.

This position is further elaborated by Qiao Xiaoyang, the Chairman of the Law Committee of NPC, in his speech at a seminar with some Members of the Legislative Council.<sup>54</sup> The crux of the universal suffrage of CE, according to Qiao, is whether or not to allow a person who confronts with the Central Government to be CE.<sup>55</sup> The person who manages Hong Kong cannot be one who confronts with the Central Government or attempts to overthrow the leadership of Communist Party or to change the exercise of Socialism in Mainland China.<sup>56</sup> It is not only for national security and interest, but also for preserving the interest of Hong Kong.<sup>57</sup> The risk of having a person who confronts with the Central Government is unbearable for the purpose of upholding the fundamental policy concerning Hong Kong just announced at the 18th National Congress of Communist Party of China.<sup>58</sup>

Professor Rao Geping, law professor of Peking University and member of NPCSC Basic Law Committee, took a step forward. In his lecture notes for Hong Kong senior officers, he agreed with Qiao that the crux is whether an anti-Central person is allowed to be CE. He further opined that the reality behind such dispute is the struggling for the control over Hong Kong.<sup>59</sup>

### C. CONCLUSION

There are practical elements in the Central Government's concerns over relaxing restrictions on the nomination process: the quality of candidate may not be easily maintained, and the cost for election may be increased.

However, as argued above, the main purpose of the 831 Decision is to serve the fundamental policy of Central Government concerning Hong Kong. The major concerns over relaxing the nomination process are losing the control over Hong Kong and the consequential damages to the sovereignty, national security, and development interest of China.

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<sup>52</sup> See n 1 above, p 3.

<sup>53</sup> Hu Jintao, "Report at 18th National Congress of Communist Party of China," (17 November 2012), available at: [http://news.xinhuanet.com/english/special/18pcnc/2012-11/17/c\\_131981259\\_11.htm](http://news.xinhuanet.com/english/special/18pcnc/2012-11/17/c_131981259_11.htm) (last modified 17 November 2012)

<sup>54</sup> *The Chairman of the Law Committee of the National People's Congress Qiao Xiaoyang's speech at a seminar with some Members of the Legislative Council*, 24 March 2013, available at: <http://www.2017.gov.hk/filemanager/template/tc/doc/20130324.pdf> [assessed 20 February 2015]

<sup>55</sup> *Ibid* para 4

<sup>56</sup> *Ibid* para 5

<sup>57</sup> *Ibid* para 7

<sup>58</sup> *Ibid* para 8

<sup>59</sup> See n 6 above.

## IV. POSSIBLE RECONCILIATION

At a first glance, the 831 Decision and the human rights requirements in Basic Law are seemingly irreconcilable. However, a more detailed inspection can reveal that both ends are flexible.

On the one hand, although the 831 Decision seems to be exceptionally harsh, it has left space for further development. For example, the Decision specified that the number of members, composition and formation methods of the nominating committee shall be the same as those of the Election Committee, but it left space for amendments within the 4 sectors of the nominating committee, including the sub-sectors and their specific number of members. On the other hand, the human right provisions in Basic Law are widely construed, as well as the provisions in ICCPR entrenched by Basic Law. Human rights standards relating to elections are broad in nature and thus may be achieved through a wide variety of political systems.<sup>60</sup> Therefore, there may exist a middle ground between the 831 Decision and the human rights provisions in the Basic Law.

One may ask that even if the 831 Decision is satisfied, the middle ground proposal may not necessarily gratify the Central Government. However, the 831 Decision sets restrictions over the nomination process, and these restrictions can be regarded as the bottom lines of the Central Government. It is implied that any proposal that satisfies all the restrictions provided in the 831 Decision will be accepted by the Central Government, or else the thresholds would not have been set so high by the Central Government.

Therefore, the mission of the proposal is to push the 831 Decision to the limit, and decide whether such a boundary proposal can satisfy the requirements of universality, equality, freedom from discrimination on any ground, and ensuring a plurality of participation.<sup>61</sup>

The possible middle ground proposal is as followed:

1. *The sub-divisions within the 4 major divisions of Nominating Committee may be amended, including deleting or adding sub-divisions and amending the seat distribution among the sub-divisions. Also, the elector basis of Nominating Committee should be substantially improved.*<sup>62</sup>
2. **Non-binding Popular Recommendation**
  - 2.1. *Each qualified elector may recommend one qualified Permanent Resident to be CE candidate, and each recommendation should be submitted to and confirmed by the Electoral Affairs Commission.*
  - 2.2. *There will be no upper limit to the number of recommendation a person can get.*
  - 2.3. *The result of Popular Recommendation is for the reference of members of Nominating Committee, but not binding. The public pressure may be able persuade the members of Nominating Committee.*
3. **Recommendation by the members of Nominating Committee**
  - 3.1. *Each qualified Permanent Resident has to obtain no less than 100 recommendations by members of Nominating Committee for passing to next stage. Each member can only recommend one qualified person.*
  - 3.2. *A maximum number of 100 recommendations is set to ensure there to be 10-12 candidates-to-be.*
4. **Nomination by the members of Nominating Committee**
  - 4.1. *Firstly, each member of Nominating Committee has one vote to vote for his favourite*

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<sup>60</sup> Centre for Human Rights, *Human Rights and Elections: A Handbook on the Legal, Technical, and Human Rights Aspects of Elections* (New York and Geneva: United Nations Press, 1994), p 3.

<sup>61</sup> See n 26 above, p 13.

<sup>62</sup> Hong Kong Special Administrative Region Government, "Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016," (July 2014), para 3.26: "Around 60% of the respondents agree that the electorate base of the NC should be expanded substantially."

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- candidate-to-be. The first 3 candidates-to-be with the most votes will form a Candidate List.*
- 4.2. *Secondly, all members of Nominating Committee shall vote for the Candidate List. If the Candidate List obtains consent of more than 50 per cent of the members, the people on the Candidate List shall become the final Candidates of Chief Executive. If not, the election procedure shall start all over again from step 3.*
5. **Universal Suffrage**
- 5.1. *Each qualified electors can vote for one of the 3 Candidates.*
- 5.2. *The number of "for" votes must be larger than that of blank ballots for a Candidate to be elected.*

The above proposal is one of the possible middle ground reconciliations. It satisfies every restriction of the 831 Decision, while fulfilling the requirements of universality, equality, and freedom from discrimination. At the same time, stages 2 and 4.1 are specifically designed to maximize the possibility of members from the minority party running for the election, ensuring the plurality of CE election.

### V. POLITICAL CONSIDERATIONS

Although this paper proposes the above reconciliation, there may be a wide variety of derivatives from this proposal. There is no guarantee that the Hong Kong government may adopt this middle ground and propose it to the Legislative Council. The 831 Decision is ambiguous, in one end it maximizes the human rights protections, in the other end ignores them. It is possible that in the government's proposal, the Nominating Committee may be a copy of the Election Committee, and that no participation is allowed in the nominating process. The political considerations on whether or not to adopt such a proposal are complicated.

Rejecting such a proposal may manifest the determination of unwillingness to stand for a fake election, but rejection means making no headway according to the 831 Decision,<sup>63</sup> without guarantee for more bargaining power and a more significant political progress in the future. Moreover, the Central Government would be furious and ashamed had the Legislative Council not approved the government proposal. However, on the other hand, accepting such a proposal may lead to some progress, but the resulting election system may be long lasting, and any amendment to it may become more difficult.

By comparing the pros and cons, it seems that it is a better option to adopt the government proposal, since it can prevent a catastrophic deterioration of Central-Hong Kong relations and gain an instant benefit for the future of Hong Kong. It is simply too risky for Hong Kong to abandon the instant benefit in return for a long term benefit that no one can promise. However, the amendment of the method of CE election requires the support from 2/3-majority of the members of Legislative Council of Hong Kong.<sup>64</sup> If the government proposal strictly follows the 831 Decision, it will effectively exclude the minority parties from becoming a candidate of CE election, and not to mention winning it. The possibility for such a proposal gaining the endorsement of 2/3-majority in the Legislative Council is, therefore, infinitesimal.

The current political deadlock in Hong Kong is resulted from an exceptional combination of its legal, political, and historical factors. However, the process of striking a balance between protection of human rights and the will of a sovereign state can benefit the international society generally. Although protection of human rights can be achieved through various political systems,<sup>65</sup> there should be a red line that cannot be crossed by the state. It is therefore the duty of legal scholars to determine such red line for human right protection – ambiguous at first it might be – and to evaluate whether or not it is crossed in each specific political system.

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<sup>63</sup> See n 1 above, Article 4.

<sup>64</sup> Annex I, Basic Law

<sup>65</sup> See n 60 above

## VI. CONCLUSION

“It was the best of times, it was the worst of times.” No other phrase can better describe the current dilemma of Hong Kong. Maybe ten years later, when the citizens of Hong Kong recall the 31<sup>st</sup> August of 2014, they will be surprised by the long march in democracy they have achieved; or maybe ten years later, the citizens of Hong Kong will have already abandoned the endeavour to have a freely chosen Chief Executive, and an equal right to stand for election will still be beyond reach. The future of Hong Kong may go either way. Predictions of this kind go beyond the purpose of this paper: it cannot tell which way Hong Kong will go, but it can testify that each and every political decision today will have a profound influence not only on the life of each and every citizen of Hong Kong, but also on those of its future generations.