

A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration and Judicial Independence in Hong Kong

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As the ICON-S Conference 2018 will be held in Hong Kong, it could not be more timely to review some of the major constitutional controversies in Hong Kong, which has just celebrated its 20th anniversary of reunification with China. These constitutional controversies, arising as an aftermath of the controversial Occupy Central Movement and the rise of the sentiment of the so-called “localism”,¹ are attributable to three inter-related factors: (1) as time goes by, the inherent conflicts between the two systems have become more apparent, notably in relation to the independence of the judiciary and the supremacy of state; (2) these escalating tensions have intensified mutual mistrust between Hong Kong and the Central Government; and (3) partly due to the rise of “localism”, the Central Government has decided to adopt a more interventionist approach in Hong Kong affairs by emphasizing the primacy of sovereign power.

Inherent Conflicts between the Common Law System and the Socialist/Civil Law System

Hong Kong became a special administrative region of China (“the HKSAR”) on 1 July 1997 under the constitutional model of One Country, Two Systems, by which Hong Kong is to retain its own economic, social and legal systems. Common law continues to apply in the HKSAR, and fundamental rights and freedoms are guaranteed. Socialist laws and policies across the border will not apply to the HKSAR. This constitutional model is guaranteed by the Basic Law, which serves as the constitution of the HKSAR.

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¹ Broadly speaking, the “localist” sentiments refer to a general sentiment that the Hong Kong Government has not sufficiently focused its policies on Hong Kong, and instead, it has put all its efforts in maintaining a good relation with China at the expense of Hong Kong. They also argue that Hong Kong people should have a greater say in domestic affairs and a right to participate if not determine the future of Hong Kong come 2046 when the promise for One Country, Two Systems in the Joint Declaration expired. Some have gone further to suggest secession and independence.

While there are many examples of co-existence of a number of different legal systems within the same country, a federal state being a prime example, never have the two systems been so different as in the case of Hong Kong and China. On one side of the border, the common law system rests on western liberalism and the doctrine of separation of powers, with the power of interpretation of law vested solely in an independent judiciary. On the other side of the border, the socialist civil law system rejects separation of powers, and the highest organ of the state, the National People's Congress, exercises legislative, executive and judicial power. While China has emerged from a state of lawlessness since the end of the Cultural Revolution in the late 1970s, and has enacted an impressive array of legislations in the last forty years, law is still primarily a means to serve higher political ends and hence its interpretation is subject to the whim of prevailing political wisdom and policies. There are inherent ideological and systemic conflicts between the two systems, and to make the situation worse, it is a highly asymmetrical model. When the Joint Declaration was ratified in 1985, Hong Kong was responsible for over 80% of China's foreign incomes. Three decades later, China has emerged as the second largest economy in the world, and Hong Kong accounts only for about 2.4% of her GDP. With her growing economic power and confidence, and her determination to play a leading role in global affairs, China has become less tolerant of a different system with a different or even contradictory set of values and ideology, especially if that may be perceived to challenge the authority of the Central Government. When all political and economic powers are vested in one side, and in the absence of any mechanism for dispute resolution, this constitutional model is highly precarious and depends entirely on self-restraint on the part of the sovereign. Unfortunately, restraint of sovereign power is a concept unknown to China in her long history, and this is reinforced by the recent amendment to the Constitution of the Communist Party of China ("CPC") at its 19th Congress that was held in October 2017.

China after the 19th Congress: Re-assertion of the Supremacy of State and Party

When the global limelight on the 19th Congress of the CPC was focused on how President Xi Jinping was able to consolidate further his unprecedentedly wide powers as well as what personnel changes were to be made at the highest level in China's political leadership, an amendment to the CPC Constitution that fundamentally changed the relationship between the Communist Party and the government has largely escaped foreign attention.

A perennial problem in the Chinese constitution is whether the Communist Party is bound by the constitution and the law. In the early days of modernization of China, Deng Xiaoping recognized that separation of the party from the government would be an essential element of any political reform in China. He believed that a modern government should be run by an executive government that is separated from the dominant political party the role of which should mainly be ideological and the operation of which should be in accordance with

the constitution and the law. His thought was written into the CPC Constitution, which, as appeared in the 2012 version, provided that “Leadership by the Party means mainly political, ideological and organizational leadership”. This provision was repealed and replaced by a new statement at the 19th Congress, which reads: “The leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavour in every part of the country.”² The second sentence is taken from a slogan adopted by Chairman Mao as part of his propaganda at the height of the Cultural Revolution, conveying the extreme leftist thought of the superiority of the Communist Party. The amendment also clarifies that the Party shall uphold absolute leadership over the People’s Liberation Army and other people’s armed forces.³ These amendments mark the end of Deng’s policy of separation between party and government.⁴ While China will continue to modernize its economy, its political system is likely to revert back to authoritarianism under which the highest organ of the country, under the absolute leadership of the Party, will have absolute and unchecked powers. Xi Jinping, being the President of the country, Secretary-General of the Party, and Commander of the People’s Liberation Army, becomes the personification of both the State and the Party, and has wielded powers not enjoyed by any of his predecessors.⁵ This reassertion of the supremacy of the state organs and the Party and the concentration of powers is likely to dampen any hope of constitutionalism in China in the foreseeable future.

An immediate impact of this new conception of socialism with Chinese characteristics will be on the development of an independent judiciary in China, as this concept does not sit well with the supremacy of the State. The judiciary in China has not and will not be able to act as the safeguard against excesses or abuses of power on the part of the government. In China’s view, the judiciary

² The Chinese version of the second sentence reads “黨政軍民學，東西南北中，黨是領導一切的。”，which, literally translated, means “The Party, politics, military, civil society, and education, north, east, south, west or centre, the Party leads in everything.”

³ As opposed to the more subtle provision in the 2012 constitution, which provided that “The Communist Party of China persists in its leadership over the People's Liberation Army and other armed forces of the people”.

⁴ It is true that the Constitution still provides that “The Party must conduct its activities within the framework of the Constitution and other laws. It must see to it that the legislative, judicial and administrative organs of the state and the economic, cultural and people's organizations work with initiative and independent responsibility and in harmony”. Yet this provision has now had to be read subject to the absolute leadership of the Party.

⁵ In March 2018, the National People’s Congress resolved to amend the PRC Constitution to remove the restriction of the appointment of the President for two terms, which was a measure introduced by Deng Xiaoping to prevent a State leader from being in position indefinitely, and to provide beyond doubt the supremacy of the Communist Party.

will only be as independent as it is permitted by the state to be, and will not be allowed to stand in the way of any national interest. Such conception of the judiciary has been consciously exported to Hong Kong.

When Xi Jinping was still the Vice-President, he commented, on his visit to Hong Kong in 2008, that there should be mutual understanding and support among the executive authorities, the legislature and the judiciary. It was immediately pointed out that this was a misunderstanding of the constitutional position in Hong Kong. However, in the PRC White Paper on One Country, Two Systems in 2014, the judiciary was again described as part of the administration and as such, judges should be patriotic and love the country, which was regarded as “a basic requirement for Hong Kong’s administrators”.⁶ It prompted the former Chief Justice to reply in a public statement that judges should only be faithful to the law and should not be predisposed to any party in litigation, whether the party is the government or otherwise, if this is what patriotism was intended to mean.⁷ It was further said that judges would have satisfied the requirement of patriotism by taking the statutory judicial oath.

As time passes, it has become clear that Beijing’s comments on Hong Kong’s judiciary is not out of misunderstanding but, instead, is a conscious attempt to mould Hong Kong’s judiciary to become a compliant judiciary that is more aligned with that of the Mainland. The judiciary is not expected or permitted to challenge decisions of the Central Government, even when those decisions are patently inconsistent with the Basic Law.

The conflict becomes apparent in the interpretation of the Basic Law, which is both the constitution of the HKSAR and a piece of national law of China. Under the common law system, the court approaches the Basic Law in the same way as any common law court approaches its constitution. A liberal and purposive approach of interpretation is adopted. Any restriction on fundamental rights is to be placed under strict scrutiny, and has to satisfy the familiar constitutional tests of legality and proportionality. However, under the socialist/civil law system, the Standing Committee of the National People’s Congress (“NPCSC”) has the power to interpret the Basic Law. It can do so either on its own motion or pursuant to a referral by the Court of Final Appeal under certain circumstances as set out in Article 158 of the Basic Law. The interpretation is legislative in nature, and is binding on the courts of Hong Kong. Since the resumption of sovereignty in 1997, the NPCSC has invoked the power of interpretation on five occasions, the last occasion in 2016 being the most controversial and most damaging to judicial independence, which deserves examination in some detail.

⁶ State Council of the PRC, White Paper on the Practice of “One Country, Two Systems” Policy in Hong Kong, 10 June 2014: http://www.chinadaily.com.cn/china/2014-06/10/content_17576281.htm

⁷ Andrew Li, “Judges don’t need to be patriots”, South China Morning Post, 15 Aug 2014: <http://www.scmp.com/news/hong-kong/article/1573867/judges-dont-need-be-patriots-andrew-li>

The Rise of Localism and the Right to Political Participation: The Oath Cases

The outbreak of Occupy Central in late 2014 is frequently perceived as one of the causes of the rise of “localist” sentiments in Hong Kong. Occupy Central occurred in response to the constitutional reform for the election of the Chief Executive of Hong Kong. The nomination proposal was regarded by many people in Hong Kong as being too contrived to ensure that the Chief Executive position would only be filled by a Beijing-supported candidate. Demands for a more liberal nomination process were rejected, and when the Central Government eventually decided on a model that was more conservative than any of the models proposed in Hong Kong, demonstrators took to the streets and occupied the main thoroughfares for 79 days. The demonstration was supported by many young people, and it was ended by a court order of injunction.⁸ The uncompromising attitude of the Central Government on political reform bred resentment among many people in Hong Kong, especially the younger generation; and they responded by advocating greater autonomy, self-determination and even independence, which in turn reinforced China’s suspicion and led to further uncompromising responses from the Central Government.

In 2016, a number of the so-called “localist” candidates were duly elected to the Legislative Council in the general election. Article 104 of the Basic Law requires all legislators to take an oath, in accordance with law, to uphold the Basic Law,⁹ and to swear allegiance to the HKSAR upon assumption of office. The requirements and the procedures for oath taking are prescribed in the Oaths and Declarations Ordinance. Two newly elected legislators (Messrs Leung and Yau) used insulting language when they referred to China in taking the legislative oath and displayed a banner that “Hong Kong is not China” while they purported to take the oath. Their behaviour was widely condemned by the community. Another four legislators expressed their political beliefs short of advocating independence immediately before or after they took the statutory oath. In those cases where the President of the Legislative Council had ruled that their oath was invalidly taken, he was prepared to accede to their requests to have their oath re-taken.

Before Messrs Leung and Yau could retake their oaths, the Secretary for Justice took out disqualification proceedings, initially against them only, and later against the other four legislators, on the ground that they had declined to take the mandatory legislative oath, and argued that the President had no power to allow them to retake the oath under the Oaths and Declarations Ordinance. In the Leung and Yau case, the legislators argued that whether they had validly taken the oath should be an internal matter for the Legislature; that by virtue of the doctrine of separation of powers, the court should be slow to interfere with

⁸ *Chiu Luen Public Light Bus Company v Persons unlawfully occupying or remaining on the public highway* [2014] 6 HKC 298.

⁹ Art 1 of the Basic Law provides that Hong Kong is an inalienable part of China.

the internal operation of the Legislature and should defer to its decision, and that it was within the discretion of the President of the Legislative Council to allow them to retake the oath.

Judgment was reserved, and during the court 's adjournment, the NPCSC decided to render an interpretation of Article 104 of the Basic Law. The NPCSC elaborated on the requirements of a valid oath under Article 104, namely that the oath must be taken sincerely and solemnly; that no words could be added or omitted to the statutory oath; that the oath-taker must sincerely believe in and strictly abide by the relevant oath, and that anyone who fails to take a valid oath shall be disqualified forthwith with no arrangement for re-taking the oath.

The court, after hearing further submissions from the parties on the interpretation, upheld the disqualification on the ground of its interpretation of the local statute and expressly stated that there was no need to rely on the NPCSC interpretation.¹⁰ This position was a sensible compromise, though it did not render the attempt of the NPCSC to undermine the independence of the judiciary any less disturbing.

On appeal, the Court of Appeal upheld the judgment of the court below but did so expressly on the ground that the NPCSC interpretation was binding on the court. This gave rise to a further issue whether the NPCSC interpretation would have retrospective effect, as it was made well after the oath has been taken by the legislators. The Court of Appeal held that it was not for common law lawyers to argue whether the NPCSC interpretation, which was made under a different legal system, has retrospective effect. It also affirmed the judgment of the court below that the requirement of taking an oath was a matter of law, and the final power of determining whether an oath taken was valid was a matter for the court, not for the legislature.¹¹ To the surprise of many observers, the Court of Final Appeal refused to grant leave to appeal on the ground that there was no arguable points of law of general and public importance.¹²

Shortly after the Court of Appeal decision in the Leung and Yau case, the Secretary for Justice, in another highly controversial move, took out disqualification proceedings against another four legislators on the same ground that they had refused or declined to take the legislative oath.¹³ The focus of the arguments was whether they had complied with the requirements of sincerity and solemnity in taking the oath; what did sincerity require given that an oath of allegiance is highly political in nature; what did solemnity require in the absence of any clear formality regarding the manner of taking an oath; even if the power of final determination on the validity of an oath is vested in the court, whether

¹⁰ *Chief Executive of the HKSAR v President of the Legislative Council* [2016] HKEC 2487 (CFI)(15 Nov 2016).

¹¹ *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460 (CA).

¹² *Yau Wai Ching v Chief Executive of the HKSAR* (2017) 20 HKCFAR 390.

¹³ *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 4 HKLRD 115.

the court should afford a wide margin of appreciation to the decision of the Legislature, given the political consequences of disqualification of a duly elected legislator; and whether mandatory disqualification of an elected legislator without an opportunity to retake the oath was a proportionate restriction of the right to election. This time the court relied heavily on the NPCSC interpretation and held that an oath was not a mere ritualistic formality, and that their manner of taking the oath amounted to a decline or refusal to take an oath under both the Oaths and Declarations Ordinance and the NPCSC interpretation.¹⁴ All four legislators, who were duly elected and returned by the people in a general election, were disqualified from assuming the office. The Legislative Council then sought to recover the salary and allowances that were paid to them during the ten months when they faithfully discharged their duties as legislators.¹⁵

Blatant Interference with Judicial Independence

The NPCSC interpretation is most disturbing and unwarranted. There was no urgency to make the interpretation, as the Hong Kong court had already seized the matter. There was no reason to believe that the Hong Kong court would not be able to address the issue professionally, objectively and impartially. Indeed, the Secretary for Justice had openly informed the court that he had not sought the interpretation of the NPCSC and he believed that this matter could be resolved within the Hong Kong legal system. The NPCSC interpretation covered precisely the issues that were before the court. The interpretation was rushed through on a Sunday evening so as to ensure that the court could not deliver its reserved judgment without taking into consideration of the interpretation; and of course, under Article 158 of the Basic Law, the interpretation is binding on Hong Kong courts. This was the first time an interpretation was rendered in the course of a pending litigation, and the intention to interfere with the judicial process could not have been clearer. It also put pressure on the HKSAR Government to take out the second set of disqualification proceedings, as it is clear that the interpretation was also directed at their manner of taking the oath.

¹⁴ As the court was bound by the decision of the Court of Appeal on the effect of the NPCSC interpretation, all parties have reserved their position on the relevance and applicability of the NPCSC interpretation.

¹⁵ The disqualification took effect to the date when they took the oath. As they continued to discharge their duties as legislator until the court pronounced their disqualification almost a year later, the Legislative Council has resolved to claim for the return of the salary and allowances that were given to them from the date of their taking the oath. The claim was resisted on restitution grounds of unfair enrichment and quantum merit. In March 2018, the HKSAR Government agreed to write off any amount of the salary and allowances that were not recovered by Legislative Council from the disqualified legislators:

<http://news.rthk.hk/rthk/en/component/k2/1386874-20180320.htm?spTabChangeable=0>.

Further, Article 104 lays down the requirement to take an oath “in accordance with law”, which is hitherto taken to mean that the details would be prescribed by local legislation. Hence, it is arguable that the NPCSC interpretation is usurping the function of the legislature to prescribe the requirements of an oath “in accordance with law”, or alternatively, the interpretation was indeed an interpretation of the local law, which the NPCSC has no power to interpret, rather than the interpretation of the Basic Law.

The NPCSC interpretation has also gone beyond the scope of Article 104 in another aspect. This article is about the duty of a qualified person to take an oath upon assumption of office. It is not about the qualification itself. The interpretation extends the requirement to uphold the Basic Law and to swear allegiance to the HKSAR to any person standing for election in respect of the relevant public office, again with a view to pre-empting another pending litigation.

In that case, a pro-independence candidate was disqualified to run for the general election in 2016. While he has filed a statutory declaration to uphold the Basic Law and swear allegiance to the HKSAR, the returning officer decided to conduct his own enquiry, and came to a view that, notwithstanding the statutory declaration, he did not believe that the intending candidate sincerely and solemnly believed in his declaration in light of his stance on Hong Kong independence. In rejecting his election petition,¹⁶ the court, relying on the NPCSC interpretation, held that the declaration was a substantive requirement to run for election and not a mere formality; and that the returning officer had a duty to ensure that the nomination was valid and hence a power to investigate into the sincerity or beliefs of the oath taker in taking the declaration. In so doing he has a duty to act fairly, but on the facts of that case, it was found that there was no breach of this duty.¹⁷

The decision of the court is disappointing in that it endorses a process of political screening of candidates to exclude their right to stand for election on the ground of their political beliefs. The screening is based on the vague and arbitrary test of sincerity to uphold the Basic Law, which may cover situations other than advocacy for self-determination or independence. This test is to be administered by a returning officer with no clear statutory procedure, no transparency and no effective and timely remedy. There is a strong case that the restriction on one’s right to stand for election would fail on the ground of legality alone, an argument which the court has not addressed. Advocacy of one’s political belief is also an exercise of one’s political speech. Given the court’s traditional emphasis on the value of political speech, it is not easy to reconcile an effective ban on peaceful

¹⁶ *Chan Ho Tin v Lo Ying Ki Alan* [2018] HKCFI 345 (13 Feb 2018).

¹⁷ In 2018, shortly before this judgment, another candidate, Agnes Chow, was disqualified by the returning officer to run as a candidate in a by-election because she belonged to a group, which has in its constitution, expressed support for self-determination (but not independence). It is clear that the returning officer has failed to discharge his duty to act fairly in this case.

advocacy for self-determination and independence with the constitutional guarantee of free speech.¹⁸

Of even greater concern is that this is not about an individual candidate. Article 104 applies to a range of public offices, including the judiciary. The effect of the NPCSC interpretation is that the right to stand for election, and the broader right to take part in public affairs, could be restricted by one's political belief. The legislature should be an institution that could accommodate divergent political beliefs. It would be contrary to the rule of law and democratic values if only candidates who are regarded by the governing regime as politically acceptable could run for election. The independence of the judiciary would be undermined if members of the judiciary have to be cleared of their political beliefs before they could take office.

The Politics of and Judicial Approach to Public Assemblies and Demonstrations

Occupy Central has triggered an increasing number of mass demonstrations where demonstrators have resorted to provocation, confrontation, disorder and varying degrees of violence. The prosecutions of both demonstrators and police officers who have abused their powers in maintaining law and order have invariably attracted widespread publicity and intense, sometimes heated, public discourse. The courts have been the subject of wide ranging attacks, and some judges have even been singled out for personal ridicule, based on their race, nationality or even colour of the skin. Increasingly the criticisms are directed towards whether the decisions are politically acceptable rather than the reasoning of the judgment.¹⁹

Underlying these public controversies lies a perennial problem of public and peaceful demonstrations. The right to freedom of expression and public demonstrations inevitably causes inconvenience and obstruction to other users of public places. As Mr Justice Bokhary reminds us, "the mere fact that an assembly, a procession or a demonstration causes some interference with free passage along a highway does not take away the constitutional protection... unless the interference caused is unreasonable in the sense of exceeding what the public can reasonably be expected to tolerate... the most obviously relevant consideration are .. how substantial the interference is and how long it lasts....

¹⁸ See also Richard Clayton, "Keeping a sense of proportion: Political protest and the Hong Kong Courts" [2018] *Public Law*

¹⁹ Thus, the court was criticized by a quarter of the community for convicting some demonstrators who had incited public disorder, and attacked by another quarter of the community for convicting seven police officers for assaulting a demonstrator, who was already subdued and handcuffed, at a dark corner at the site of a public demonstration: *HKSAR v Wong Cho Sing*, DCCC 980/2015, [2017] HKEC 255 (14 Feb 2017); leave to appeal to the Court of Appeal was granted: [2018] HKCA 99.

But, the court must always remember that preservation of the freedom in full measure defines reasonableness and is not merely a factor in deciding what is reasonable.”²⁰ In a civil society, a certain level of disruption to ordinary life, including disruption of traffic, will have to be tolerated. On the other hand, the disruption may be regarded as unacceptable because of the nature of the venue or of excessive interference with the rights of others.

In the first place, there is in general no right to demonstrate in a private place where one is refused permission to enter, as forceful demonstration in such circumstances may amount to an interference with private property rights.²¹ If the entry was met with resistance, the demonstrators may no longer be regarded as exercising the right of peaceful assembly. A particular difficulty lies in the ambivalent nature of many places in public, such as private places that are normally open to the public (eg, the public part of a shopping mall, an open campus of a university or the forecourt of a government building which is open to the public without any restriction of access, or public places that are temporarily used exclusively for a function that is not open to the public). In *HKSAR v Lai Man Lok*,²² the Home Affairs Department of the Government closed off the Bauhinia Square, which is a public place, for its exclusive use of a ceremony. The demonstrators who entered the premises to hold a demonstration were held not to be exercising a right to peaceful assembly and freedom of expression lawfully. Likewise, in *HKSAR v Wong Chi Fung*,²³ the forecourt outside the Government headquarters (commonly known as the Civic Square) used to be open to the public without restriction. It was also a place that the defendants had successfully led a major demonstration against the Government’s plan to introduce a “moral and national education” programme into the secondary school curriculum two years before. Since then the Square was fenced off with restricted access to the public. When the defendants forcibly climbed over the fence and entered the Square shortly before the outbreak of Occupy Central in September 2014, the Court of Appeal held that they were no longer exercising the right to peaceful assembly as they could reasonably anticipate that their entry would be resisted and violence would ensue, even though there were only minor injuries that could not be attributable to the defendants. On the other hand, as the Court of Final Appeal has held, it is far better to regard these cases as justifiable restriction of a fundamental right than

²⁰ *HKSAR v Yeung May Wan* (2005) 8 HKCFAR 137, at para 144.

²¹ A better way to explain this is that the restriction of the right to freedom of expression and peaceful assembly in private premises will easily satisfy the proportionality test: *HKSAR v Fong Kwok Shan Christine* [2017] HKEC 2115 (4 Oct 2017) where the Court of Final Appeal favoured the orthodox approach of an assumption of universal application of fundamental rights (at paras 60-64).

²² [2017] 3 HKLRD 338.

²³ CAAR No 4 of 2016. The judgment of the Court of Appeal was reversed on appeal: see below.

to adopt an approach of arguing whether a fundamental right was *a priori* engaged when it was exercised on private premises.²⁴

Even if the venue of demonstration is a public place, the court would have to balance the inconvenience caused to the public by prolonged occupation of the public venue. In response to the global financial crisis, massive demonstrations appeared in many different parts of the world, following the occupation of Wall Street in New York. A common feature of these demonstrations is that they involved a large number of demonstrators who occupied public places for a prolonged period of time. Many of these demonstrations were ended by an order of injunction, although a variety of approaches have been adopted. In London, the demonstrations took the form of a “Democracy Village” opposite the Houses of Parliament and the public place outside St Paul’s Cathedral. The court accepted that these demonstrations fell within the scope of protection of the constitutional right to freedom of expression and peaceful assembly.²⁵ In considering whether an order of injunction should be granted, the court should take into consideration factors such as “the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the right of any members of the public.”²⁶

In Melbourne, while the court found that the manner of removing the tents of the protesters in a park did not reflect well on the local Council, the court nonetheless upheld the removal on the ground that it was a proportionate response to ensure the protection, preservation and regulation of the equitable use of the Council’s park.²⁷ In Sydney, the court held that the prohibition of camping or staying overnight in St Martin’s Square in the city centre was a proportionate restriction as the protesters were free to communicate their views without having to stay overnight and to occupy other sites in the city in order to communicate their view.²⁸ In neither of the two decisions did it appear that the court had carefully considered the range of factors that the London court had taken into consideration. While the exact balance to be drawn is often fact-sensitive, it may also often be determined by the court’s propensity to allow maximum tolerance or to prefer civil and orderly manner of conducting affairs in society.

In these cases, the application for an injunction was taken out by the local government. In contrast, in Hong Kong, a similar injunction was applied, not by the government, but by private associations of taxis and public light buses on the basis that the occupation of public thoroughfares for a considerable period of

²⁴ *HKSAR v Fong Kwok Shan Christine* [2017] HKEC 2115 (4 Oct 2017), paras 64-69.

²⁵ *Mayor of London v Hall* [2011] 1 WLR 504, at para 37.

²⁶ *City of London v Samede* [2012] HRLR 14, at para 39, per Lord Neuberger MR.

²⁷ *Kerrison v Melbourne City Council* [2014] 228 FCR 87.

²⁸ *O’Flaherty v City of Sydney Council* [2014] FACFC 56 (8 May 2014).

time constituted public nuisance and the applicants had suffered “particular, substantial and direct damage” as a result of the public nuisance.²⁹ The application was unsatisfactory in a number of respects. The Secretary for Justice refused to join the proceedings. A fundamental principle of English constitutional law is that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney General representing the public. The rights of the public are vested in the Crown, and they are enforced by the Attorney General as an officer of the Crown.³⁰ The court held, somewhat unconvincingly and artificially, that this case did not involve an individual asserting a public right but private individuals asserting a private right on the basis that they have suffered particular, substantial and direct damage. The distinction between a private right and a public right is particularly artificial in these circumstances, especially when after the interlocutory injunction order had been granted, the Government deployed over 5,000 policemen to help the applicants to clear the site, as neither the applicants nor the bailiffs of the court were able to implement the court order. Moreover, the claim in public nuisance was accompanied by an application for an interlocutory injunction. The test whether to grant an interlocutory injunction is one of balance of convenience, which is a far less rigorous standard than the proportionality test for determining the constitutionality of a restriction of a fundamental right. The issue before the court was whether the alleged damages likely to be suffered by the applicants if the injunction order was not granted would outweigh the inconvenience of the protesters if the injunction was granted. The applicants would only need to make out a prima facie case of the damage that they would suffer if the injunction was not granted. Whether such allegations of damage could be substantiated would be a matter for the substantive hearing. The reality is that once an interlocutory injunction is granted, there will be no incentive to proceed to the substantive hearing, and the alleged suffering, on which basis a substantive right is restricted, would never be substantiated. When a constitutional right is at stake, a balance of convenience is obviously too low a standard.

Civil Disobedience

Another aspect of Occupy Central is that it claimed to be justifiable as a form of civil disobedience to protest against the contrived model of political reform. Could civil disobedience be a justification or a mitigating factor in criminal prosecution? John Rawls defined “civil disobedience” as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”.³¹ It is inherent in the concept that the protesters know that their action is unlawful and

²⁹ *Chiu Luen Public Light Bus Company v Persons unlawfully occupying or remaining on the public highway* [2014] 6 HKC 298.

³⁰ See *Gouriet v Union of Postal Workers* [1978] AC 435, at 481, per Lord Wilberforce.

³¹ John Rawls, *A Theory of Justice* (revised edition, 1999), p 320.

punishment is expected. Indeed, it is by accepting the punishment that the protesters seek to draw attention to the alleged injustice against which they are demonstrating. It is hence a political concept which provides no defence to a criminal offence, but should it be a major mitigating factor? On the one hand, Lord Hoffmann noted that “civil disobedience on conscientious grounds has a long and honourable history in this country [the UK]... It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind.”³² On the other hand, Justice Wood took the view that if one seeks to change the law “by deliberately disobeying it [he] threatens the continued existence of the very instrument, indeed the only instrument through which [he] may eventually achieve the end [he] seeks. Such conduct is not only illegal, it is completely self-defeating.”³³ In *HKSAR v Wong Chi Fung*,³⁴ the Hong Kong Court of Final Appeal had to grapple with this issue. The defendants were three young leaders of a public demonstration that took place before the Central Government Offices. They were convicted of the offence of taking part or inciting others to take part in an unlawful assembly for forcibly entering into the forecourt of the Central Government Offices which were fenced off to the public. Upon conviction, they were sentenced to performing community service, which they served. The magistrate took into account, inter alia, that the level of violence was not serious, and that the offence was committed out of their idealism and for a cause perceived to be just without any motive of personal gain. The Secretary for Justice considered that the sentences were manifestly inadequate and applied to the Court of Appeal for a review of sentence. This appeal was widely perceived to be a political attempt to silence the young leaders. The Court of Appeal allowed the appeal. It adopted a different approach, emphasizing the need to impose deterrent sentence, and imposed a custodial sentence of 6-8 months on the defendants. The convictions, the sentence, the review and the custodial sentence have given rise to intense public debate. As the Court of Final Appeal observed, “strong expressions of opinion have been voiced and feelings on both sides of the debate have run high.”³⁵

While the Court of Final Appeal accepted that it is relevant to the background and context of a criminal offence that the offence arose out of an occasion when constitutional rights to peaceful assembly and protest were being exercised, it was held that once a demonstrator became involved in violence or the threat of violence, he had crossed the line and could no longer claim to be exercising the constitutional right, as there was no constitutional justification for violent unlawful behaviour.³⁶

Likewise, while the concept of civil disobedience is recognized, the essence of the concept is that the act has to be peaceful and non-violent. Further, quoting from Lord Hoffmann, the Court held that “there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other.

³² *R v Jones (Margaret)* [2007] 1 AC 136, para 89.

³³ *Everywoman’s Health Centre Society (1988) v Bridges* (1989) 61 DLR (4th) 154.

³⁴ [2018] HKCFA 4 (6 Feb 2018).

³⁵ *Ibid*, at para 4.

³⁶ *Ibid*, at paras 67-70.

The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law.”³⁷ Thus, in furtherance of an ostensibly peaceful demonstration a protester commits an act infringing the criminal law which involves violence and is therefore not peaceful nor non-violent, a plea for leniency at the stage of sentencing on the ground of civil disobedience will carry little, if any, weight, since by definition that act is not one of civil disobedience.³⁸

If the behaviour conforms to the hallmarks and the conventions of civil disobedience, this is something a sentencing court could properly take into consideration, though the weight to be attached to it would necessarily vary depending on many other circumstances, including the facts of the offence and its consequences and the need for deterrence and punishment. The court should, however, not enter into an evaluation of the worthiness of the cause espoused, as it would necessarily be a political judgment. It is not the task of the courts to take sides on issues that are political or to prefer one set of social or other values over another.³⁹

In this regard, the Court distinguished between two types of behaviour: “One type of behaviour consists of breaches of a particular law which is believed by the protesters to be an unjust law. The other is law-breaking done in order to protest against perceived injustice or in order to effect some change in either the law or society.”⁴⁰ When the target of the protest is not the law which the protesters have violated, there is no reason why the protesters should not be punished in the same way as any other person who has transgressed the law. A conscientious objector has no right not to be punished. Once again, the Court endorsed the observation of Lord Hoffmann in *Sepet v Home Secretary*:⁴¹

“... while the demonstrator or objector cannot be morally condemned, and may indeed be praised, for following the dictates of his conscience, it is not necessarily unjust for the state to punish him in the same way as any other person who breaks the law. It will of course be different if the law itself is unjust. The injustice of the law will carry over into its enforcement. But if the law is not otherwise unjust, as conscription is accepted in principle to be, then it does not follow that because his objection is conscientious, the state is not entitled to punish him. He has his reasons and the state, in the interests of its citizens generally, has different reasons. Both might be right.”

³⁷ Ibid, at para 72, quoting Lord Hoffmann in *R v Jones (Margaret)*, *supra*, at para 89. Lord Hoffmann also served as the non-permanent judge of the Court of Final Appeal in this case.

³⁸ Ibid, at para 74.

³⁹ Ibid, at paras 71, 75-76.

⁴⁰ Ibid, at para 71.

⁴¹ [2003] 1 WLR 856 at para 33; quoted at *ibid*, at para 73.

This is a helpful judgment that clarifies the ambit and the role of civil disobedience in the criminal justice system and would be a welcome contribution to the literature on civil disobedience. It, however, still leaves a few questions unanswered. First, if the target of protest is the unjust law, Lord Hoffmann's observation does not explain what the position will be. One possibility is that the unjust law itself will be subject to constitutional scrutiny if there is a constitution, but if there is no higher constitutional right, the court will be placed in the classic dilemma of whether to perpetuate the injustice of the law by enforcing the law, or to mitigate harsh law by mercy. Secondly, the court emphasizes that civil disobedience has to be peaceful and non-violent, and once a protester engages in an act of violence, the act is by definition no longer civil disobedience. A difficulty is that there would be a full range of degrees of violence in any major public demonstration and confrontation, running from the extremely trivial to those that are riotous in nature. Much may depend on how the sentencing court approaches the assessment of the extent of violence in any specific case. Another problem is that when a leader consistently advocates for peaceful demonstration, how far could he be made responsible for the violent acts of other demonstrators?⁴² This problem is aggravated by the prevalence of social media, where a massive demonstration can be assembled within a very short time, with no clear leadership, organizer, structure of command and discipline on the participants. Finally, while it is right that the court should not engage in an evaluation of the worthiness of the cause of civil disobedience, it is inevitable that the court's own view on the cause will to some extent affect the question of how much weight should be given to this factor in the sentencing process.

The Court of Final Appeal endorsed the new sentencing guidelines laid down by the Court of Appeal and emphasized the need to take a much stricter view where disorder or violence is involved. However, it would not be fair to apply these guidelines retrospectively and therefore, the Court set aside the custodial sentence imposed by the Court of Appeal and restored the community service order. Not surprisingly, the judgment of the Court of Final Appeal was attacked left, right and centre. The demonstrators regarded it as a "poison with sugar coating". It was argued that the judgment will hinder democratic development as it would have a chilling effect on any person intending to take part in a public demonstration. While it is a fair point that it is unclear what constitutes violence and disorder such that it warrants a strict sentencing approach, the Court of Final Appeal did emphasize that it would be incumbent on the sentencing court to take into account the extent of violence and the circumstances of each case. It is not the intention of the court to suggest that custodial sentence is to be imposed mechanically. At the other end of the spectrum, an influential Mainland commentator expressed concern at the court's recognition of the concept of civil disobedience. It is argued that any protest against the decision of the NPCSC, which is the supreme authority in the Mainland, would amount to a challenge to the Basic Law, and no civil

⁴² This question may arise in the trial of the three instigators of Occupy Central, when they have all along advocated for a peaceful and non-violent movement, but as the movement rolled on, it got out of their control.

disobedience in such a context should be tolerated.⁴³ Another Mainland commentator criticized the court's reasoning on retrospectivity as illogical and unsound, and a failure to exert the authority of the rule of law.⁴⁴ The refusal of the Court of Final Appeal to impose a deterrent sentence amounted to condoning unlawful activities and was not conducive to restoring law and order after the unlawful activity of Occupy Central. While these views are to be respected, they vividly highlight the huge differences in the legal values between the two legal systems.

Epilogue

Recent constitutional controversies in Hong Kong have demonstrated the tension between two major legal systems in the world. The PRC's approach to independence of the judiciary and the interpretation of law reinforces the socialist ideology that the judiciary and the laws are to serve national political interest. An independent judiciary is by definition uncontrollable, and is therefore undesirable. Thus, important issues such as those touching on sovereignty or self-determination should not be left to individual judges, and if the court is seized of such matters, it will be appropriate for the NPCSC to indicate to the court how it should decide the case by issuing a timely interpretation. Likewise, if there is national or economic interest of sufficient importance, the law should not be interpreted in a way to obstruct such economic development. This manner of interpreting the law may be alien to common lawyers, but it is how Chinese law is understood and implemented on a daily basis.

In furtherance of her One Belt One Road Initiative, China has recently set up three commercial courts respectively in Xian, Beijing and Shenzhen to deal with commercial disputes arising in the countries along the Belt Road. She is also proposing other disputes resolution mechanisms with these countries that will primarily be led by China. As China is determined to play a more active role in international affairs, her approach to the independence of the judiciary and the law will be of immense interest to the global community.

At the same time, Hong Kong has just entered the 20th anniversary of its establishment as a special administrative region of China. One Country, Two

⁴³ Professor Rao Geping, Peking University, Vice-Chairman of National Hong Kong and Macau Research Society and Member of the Basic Law Committee, as reported in People's Daily (Overseas Edition), 12 Feb 2018: http://paper.people.com.cn/rmrbhwb/html/2018-02/12/content_1836426.htm

⁴⁴ Professor Chau Ping Xue, Director of Hong Kong and Macau Research Society and Director of Hong Kong and Macau Basic Law Research Centre, Shenzhen University, as reported in Stand News, 12 Feb 2018: <http://www.facebook.com/standnewshk/posts/1584360234982924>.

Systems is a great experiment on the peaceful transfer of sovereignty with guarantees of fundamental rights and the rule of law. In the last twenty years or so, the Hong Kong courts have laid down some of the most exciting jurisprudence in constitutional law and human rights. Yet they have become a victim of their own success, and their independence is under greater threat than at any other time in their history. When the sovereign power is a powerful authoritarian regime, the courts of the HKSAR have to tread their steps carefully so as to maintain the rule of law without overstepping themselves such that it could lead to their own destruction. There is no reason to doubt the sincerity of the Chinese leaders to maintain One Country, Two Systems, as this also serves the best interest of China, but their understanding of this constitutional model is increasingly shaped by their own ideology. Self-determination and independence are now out of bounds. Other issues touching on the sovereign power, or perceived to be so by the Mainland authorities, would become sensitive or controversial. The public space for the exercise of political rights is shrinking, and it has threatened the fabric of the rule of law.⁴⁵ Within this shrinking space, the courts have to secure their own institutional space. Upon his retirement from the Court of Final Appeal in 2012, Justice Bokhary predicted that a storm of unprecedented ferocity was gathering.⁴⁶ At this point in time, the rule of law and the independence of the judiciary are still by and large thriving in Hong Kong, but they are increasingly under pressure both from within and without. Will the constitutional experiment of One Country, Two Systems be successful, or are we going to witness a constitution in the unmaking? Will liberal values survive a rising and powerful authoritarian regime? Only time will tell, but what is at stake here is the destiny of seven million inhabitants.

⁴⁵ Political philosophers have long written about public space and institutionalized freedom by law and institutions. Institutionalisation provides freedom and public space durability and ensure their continuity, and yet a balance is always threatened by autocratic tendencies to power on the one hand and extreme radicalism on the other: see, for example, Hannah Arendt, "Freedom and Politics", in Hunold A (eds), *Freedom and Serfdom* (Dordrecht: Springer, 1961), and Andrea Thuma, "Hannah Arendt, Agency, and the Public Space", in M. Behrensen, L.Lee and A.S. Tekelioglu (eds), *Modernities Revisted* (Vienna: IWM Visiting Fellows Conferences, Vol. 29, 2011).

⁴⁶ (2012) 15 HKCFAR 861 at 866, para 6.