

Hong Kong No More: From Semi-democracy to Semi-authoritarianism

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Abstract

After the Umbrella Movement in 2014 in Hong Kong, the Chinese Communist Party adjusted its strategy towards Hong Kong. The systems in Hong Kong will have to be converted from semi-democratic to authoritarian by advancing the authoritarian rule of law in the territory to replace thicker understandings of the rule of law. Measures of authoritarian rule of law in the Hong Kong context include aggrandizing the Constitution of the People's Republic of China, normalizing the interpretation of the Basic Law by the Standing Committee of the National People's Congress, issuing decision on compatibility with the Basic Law by the Standing Committee of the National People's Congress, adding national laws to Annex III of the Basic Law, acting through the Hong Kong Special Administrative Region Government by enforcing existing laws, political prosecution, amending the Rules of Procedure of the Legislative Council and making new laws through the HKSAR Government. The strategic goals of the authoritarian rule of law in Hong Kong are to weaken the opposition camp, to generate pressure on the courts, to limit the freedoms of Hong Kong people and to

legitimize the rule of a Chief Executive not elected by Hong Kong people directly. Ultimately the Chinese Communist Party's rule over Hong Kong will be secured and Hong Kong cannot be used as a subversive base to threaten its rule in the Mainland. Facing the encroachment of the authoritarian rule of law, Hong Kong is still not fully authoritarianized. It is yet a semi-authoritarian system. Elements of thicker understandings of the rule of law continue to exist in Hong Kong and have not been eradicated yet. Limited elections are still being held. A substantial number of people in Hong Kong have not given up thicker understandings of the rule of law and they believe that law should constrain governmental powers and protect fundamental rights of citizens. Yet, there can still be hope. Everyone in the community must defend the rule of law to prevent further encroachment of authoritarianism.

Keywords: *rule of law, semi-democracy, authoritarianism, Hong Kong, Chinese Communist Party*

1. Introduction

Hong Kong is a very special place in China, in Asia and in the world. It was one of the four little dragons of Asia impressing the world by her rapid economic growth in the 1970s and 1980s. Now, Hong Kong has developed into one of the international financial centres.

Hong Kong was a British colony but did not follow the normal path of decolonization to become an independent state. During the colonial years, a common law system was transplanted to Hong Kong and it continues to thrive. Hong Kong remained to be under colonial rule until China resumed to exercise sovereignty over Hong Kong in 1997 in accordance with an agreement signed between the Chinese and the United Kingdom governments in 1985. Under the agreement,

Hong Kong would be allowed to continue to practice her economic, social, political and legal systems which are very different from the systems in Mainland China. According to the policy of “One Country Two Systems” advocated by the Chinese Communist Party (CCP), Hong Kong becomes a special administrative region of China and enjoys high degree of autonomy (Tai, 1999).

Hong Kong is neither genuinely democratic nor totally authoritarian. Both democratic and authoritarian elements can be found (Fong, 2013; Wong, 2015). Limited elections are allowed. More importantly, she is able to maintain a strong rule of law through which powers of the government are effectively constrained and citizens’ fundamental rights are adequately protected (Tai, 1999, 2007; Chen and Cheung, 2004; Cheung and Chen, 2004). Hong Kong is ranked the 16th among 113 countries and jurisdictions by the World Justice Project’s Rule of Law Index 2017 in its global ranking of the rule of law (World Justice Project, 2017).

This is exceptional not only in China, but also among ex-colonies of the British empire and even in the whole world. However, the uniqueness of Hong Kong is fading making it more and more like one of the many populous cities in China. Hong Kong may soon not be the same Hong Kong that many people in Hong Kong and people in other parts of the world used to recognize or would like the place to be.

This article aims to examine the signs showing that this change is coming, the reasons causing such a change and what can be done to withhold such a change.

2. Semi-democracy No More

The system of government that has been in practice in Hong Kong can be called semi-authoritarian or semi-democratic. Both may not be

wrong. However, for many years many people in Hong Kong prefer to recognize it as semi-democratic. There can be two reasons. First, the rule of law, a very important component of democracy, has long been entrenched in the territory. Second, the Basic Law, Hong Kong's constitution, states clearly the ultimate aim of the development of the political system of Hong Kong: The Chief Executive (CE) of the Hong Kong Special Administrative Region (HKSAR) is to be elected by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures and all members of the Legislative Council (LegCo) are to be elected by universal suffrage. Following the timetable provided in the Basic Law, Hong Kong would eventually become a genuine democracy even if the scheduled time was being postponed for several times. The condition is that the provisions of the Basic Law are given their natural meaning and are actually implemented.

However, the Standing Committee of the National People's Congress ("NPCSC"), a legislative arm of the CCP regime, issued a decision on the election method of the CE on 31 August 2014 ("Decision"). Very strict requirements on the election method of the CE, intended to start from 2017, were laid down in the Decision. The number of members, composition and formation of the nominating committee (NC) are to be made in accordance with the election committee for the previous CE. The NC can only nominate two to three candidates. Each candidate must have the endorsement of more than half of all the members of the NC.

These specific arrangements on the nomination process enable the CCP to screen out any unwanted candidate. As such, they cannot satisfy the international requirements on universal suffrage since Hong Kong electors would not have a free choice of candidates and unreasonable restrictions would be imposed on the right of any person to stand for

future CE elections (Forsyth *et al.*, 2014). The Decision triggered the 79-day occupation of the Umbrella Movement in late 2014. It also formally ended Hong Kong's era of semi-democracy as the Decision dashed any hope for genuine universal and equal suffrage in the near future in Hong Kong.

The original plan of the CCP as reflected from the Decision was to introduce into Hong Kong a controlled form of election maintaining a limited degree of competition to select future CEs. The purpose is to compensate the political legitimacy deficit long suffered by the HKSAR Government but ensure at the same time that the elected CE would still be under the CCP's control. However, the constitutional proposal to implement the Decision was vetoed by the opposition camp as it failed to get the required support from two-third of all members of the LegCo. The existing undemocratic procedures for electing the CE are to remain in the coming years.

The Umbrella Movement was the most direct and serious confrontation between the CCP and the opposition camp demanding democracy in Hong Kong (Hui and Lau, 2015; Ortmann, 2015). After the end of the street occupations, the CCP makes up her mind that genuine democracy cannot be trusted to Hong Kong people. The CCP started to adjust its strategy in dealing with the opposition camp and the continuing and growing demand for democracy in Hong Kong.

If the system is not going to be democratized, one option is to maintain the status quo, neither democratic nor authoritarian. However, the CCP has chosen to adopt another option by tightening her political control in the territory. By advancing authoritarianism in Hong Kong, any demand for genuine democratic development will be suppressed so as to preserve CCP's overall jurisdiction over this non-democratic regime.

A new agent was chosen to be the CE who is responsible for the actual operation of this plan. Carrie Lam, the Chief Secretary of the previous administration, replaced C.Y. Leung as the new CE. Unlike Leung who had only low popular rating from the first day he took up the office of CE in July 2012, Lam is a veteran civil servant and enjoys, at least initially, much higher popular support. Her rich experiences in public service and the general support she enjoys in the community might generate the much-needed political legitimacy at this critical moment facilitating the CCP to implement the new strategy of authoritarianizing Hong Kong.

3. Authoritarian Rule of Law

Ironically, the most important tool of the CCP in advancing authoritarianism in Hong Kong is the rule of law which has also been the most important component of Hong Kong's semi-democratic system in the past years. However, the rule of law in the hands of the CCP is something quite different from the rule of law that has been embraced by Hong Kong people for many years.

Making use of the contested nature of the rule of law of which there are many levels of understandings, the CCP adopts a very thin conception of the rule of law. Under a narrow understanding of this well accepted constitutional principle, the powerholder needs only to conform to some general procedural requirements and implement decisions through among other things independent courts in accordance with some vaguely drafted legal rules. The powerholder is not actually constrained by any substantive legal rules as all laws including the constitution can be given any meaning or even be changed as the powerholder likes. There is also no government institution including the court that can

impose actual constraint on the powerholder as all government institutions are subject to the highest legal authority of the powerholder. This understanding of the rule of law can also be referred as the authoritarian rule of law (Tushnet, 2015; Rajah, 2012).

Even if this understanding of the rule of law does not constrain the powerholders and protect fundamental rights of citizens, it may still be able to provide varying degree of legitimization for the authority depending on the legal culture of the community. That is also the reason why authoritarian rulers would like to adopt law as one of their tools of governing.

This thinnest conception is different from other much thicker understandings of the rule of law. Applying the teleological approach suggested by Martin Krygier (Krygier 2016; 2018), the fundamental differences between the understandings of the rule of law can be clearly illustrated. The teleological approach asks first what the ultimate and overriding goal of law under the rule of law is before what the constituents of the rule of law are and how it may be achieved.

The rule of law that the CCP together with the CE and the HKSAR Government want to promote in Hong Kong puts maintaining social order as the overriding function of law even at the costs of granting arbitrary powers to government officials and restricting fundamental rights of citizens disproportionately. Through emphasizing the importance of obedience to the law by all government officials and citizens, social order can be secured. Any person who refuses to obey the law will be considered to be damaging the rule of law (Yuen, 2015). If the authority of law is uncritically accepted by Hong Kong people, whatever its content is, the authority of the CE sugar-coated by law will be legitimized even though she is not elected by all Hong Kong people directly.

However, many Hong Kong people embrace much thicker understandings of the rule of law. Maintenance of social order is only considered to be the foundation of more sophisticated and advanced goals of law. Governmental powers must be constrained by law to prevent the powers from being exercised arbitrarily. An independent judiciary is a necessary but not sufficient condition to constrain the powers of the government. Having an independent judiciary does not mean that powers of the government could always be adequately constrained. Moreover, even if the powers of the government are being constrained, there is still no guarantee that the law can provide sufficient protection to citizens' rights. Therefore, law at the end must provide substantive protection to a range of citizens' rights.

According to the authoritarian rule of law, other goals of law are considered to be inferior to the need of maintaining social order through compliance and obedience to the law. The CCP's plan is to use the authoritarian rule of law to replace thicker understandings of the rule of law which are more generally shared by many Hong Kong people. Redefining the rule of law in Hong Kong as the authoritarian rule of law will help establish an authoritarian Hong Kong. The paradox is that Hong Kong's rule of law is now facing the biggest challenge from the advancement of authoritarianism by the CCP in the name of maintaining "the rule of law".

4. Authoritarianism by Law Step by Step

Many methods are now being used by the CCP to implement the authoritarian rule of law. Various incidents before and after Lam's replacement of C.Y. Leung as the CE can illustrate how the CCP together with the HKSAR Government is building up an authoritarian Hong Kong step by step through law.

4.1. Aggrandizing the Constitution of the People's Republic of China

There are many provisions of the Constitution of the People's Republic of China ("Constitution") that contradict with the Basic Law. That was the reason why the CCP created the principle of "One Country Two Systems" allowing Hong Kong to practice under the Basic Law political, legal, social and economic systems that are very different from the systems in the Mainland. Except Article 31 of the Constitution which authorizes the National People's Congress to establish special administrative regions when necessary, the Basic Law avoids mentioning other provisions of the Constitution. Article 11 of the Basic Law only provides that the systems and policies practised in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, should be based on the provisions of the Basic Law.

Since 2014, the CCP has started to emphasize the importance of the Constitution in the governance of Hong Kong in all official statements concerning Hong Kong. What have been accentuated are not the socialist provisions in the Constitution but the overriding interests of the nation including national sovereignty, national security, and development interests of the nation (Information Office of the State Council, 2014; Xi, 2017).

The provisions of the Constitution may not be directly enforceable in the Courts of Hong Kong. However, the CCP can reset the constitutional background of Hong Kong by aggrandizing the Constitution in Hong Kong. This is to pave way for advancing the authoritarian rule of law in Hong Kong especially through the power of interpreting the Basic Law by the NPCSC.

4.2. Normalizing the Interpretation of the Basic Law by the NPCSC and the Oath-taking Incident

The Basic Law is the constitutional foundation of the system of law in Hong Kong. Through the power to interpret the Basic Law enjoyed by the NPCSC, the CCP can give any meaning to the Basic Law whatever and whenever it desires even if the meaning is something which the language of the legal instrument cannot bear and such additional meanings are applicable retrospectively.

The CCP used to think that the power of interpreting the Basic Law should only be used in exceptional circumstances as any such use would weaken the judicial authority in Hong Kong. But now it is more prepared to use this convenient and powerful constitutional tool. Once a legal basis can be established for a controversial political decision through certain formal and authoritative decision-making procedures, many people in Hong Kong will accept its legitimacy. Not many people seem to know or care too much about the specific source of the legal intervention, the integrity of the legal procedures in generating the legal justification, or whether the legal justification is itself liberal or equitable. With this new insight, the CCP will normalize the use of the interpretation process to provide constitutional and legal supports for controversial political decisions.

Even if constitutional and legal disputes could have been resolved in judicial proceedings in Hong Kong, the CCP can issue an interpretation of the Basic Law before the judge in Hong Kong gives his ruling. This is a serious encroachment on the judicial independence of Hong Kong. It indicates that Hong Kong judges are not trusted by the CCP. There is no respect for Hong Kong's judicial autonomy. Previous worries that controversial political decisions would be challenged in the courts of Hong Kong may be reduced. Even though the NPCSC's understanding

of the concept of interpretation and the interpretations given by the NPCSC might go against the common law approach, the Hong Kong courts are found to have accepted the authority of the interpretations of the NPCSC unquestionably. It appears that Hong Kong judges do not dare to confront the sovereign power of the CCP and seem to be quite powerless to defend their understanding of the rule of law in front of their sovereign master who holds a very different understanding of the rule of law.

A good example to illustrate this measure of the authoritarian rule of law with Hong Kong characteristics is the oath-taking incident.

Article 104 of the Basic Law provides that members of the LegCo when assuming office must, in accordance with law, swear to uphold the Basic Law and swear allegiance to the HKSAR. In past sessions, several legislators from the opposition camp had used irregular swearing-in methods in the oath-taking ceremonies to express their political opinions against the HKSAR Government and the CCP. Attire or props were used while the official oath was being read. Words or slogans were added before or after the official oath was read. Even if the oath-taking might be considered to be invalid, they were always allowed to re-take the oath.

After the elections to the LegCo in September 2016, several new legislators from the “localist” camp, the more radical wing of Hong Kong’s opposition, were elected. Two of them, Sixtus Leung and Yau Wai Ching, were alleged to have used derogatory acts or words to express their separatist stance while they swore their oaths. Leung’s and Yau’s oaths were decided to be invalid but were allowed to retake the oath in the next session by the President of the LegCo. The CE and the Secretary for Justice commenced legal proceedings to obtain declarations that the invalid oaths had disqualified Leung and Yau from assuming office before they had the chance to swear for the second time.

The NPCSC issued an interpretation of Article 104 (“Interpretation”) just a few days before the Court of First Instance gave the ruling.

The Interpretation has in effect amended Article 104. It does not merely clarify the meaning of the constitutional provision. According to the Interpretation, an oath taker must take the oath prescribed by laws accurately, completely, solemnly and sincerely. Her failure to do so would be considered to be declining to take the oath. If oath taker is taken to have declined to take the oath, she will be disqualified from assuming the public office. The NPCSC added an arrangement that can hardly be found from the legal text. If the oath first taken is decided to be invalid, the oath taker cannot be given another opportunity to take the oath again.

All levels of courts of the Hong Kong including the Court of Final Appeal (“CFA”) accepted the constitutional authority of the Interpretation and Leung and Yau were successfully disqualified. Four other legislators from the moderate wing of the opposition camp were also disqualified in subsequent legal proceedings initiated by the CE and the Secretary for Justice on the basis that they failed to take the oath accurately, completely, solemnly and sincerely in accordance with the Interpretation.

4.3. Issuing Decision on Compatibility with the Basic Law and the Co-location Arrangement

Even though this is not a power explicitly mentioned in the Basic Law, the NPCSC has developed a new constitutional tool which can be considered an extension of its interpretation power. Foreseeing that there may be constitutional challenge to a measure to implement the authoritarian rule of law, the NPCSC has learnt to act preemptively by issuing a decision to confirm that the measure is compatible with the

Constitution and the Basic Law. In case the measure is still being legally challenged in the future, the NPCSC can give an Interpretation to grant constitutional status for the measure in question. As everyone can foresee that the NPCSC will definitely do so, it is hoped that such people who wants to challenge the measure would be scared off. An example is the decision by the NPCSC confirming the constitutionality of the co-location arrangement of the high-speed rail between Hong Kong and Guangzhou.

In 2010, the HKSAR Government pushed through the LegCo a controversial project getting funding support to construct a high-speed rail from Hong Kong to Guangzhou via Shenzhen to connect with the high-speed rail network on the Mainland. Owing to over-spending, the cost of the project is increased from around 60 billion to close to 90 billion Hong Kong dollars. One major attraction of the high-speed rail is that there will be a co-location arrangement for passengers to complete clearance procedures of both Hong Kong and the Mainland at a single location in one go.

In 2017, the HKSAR Government put forward the proposal that the co-location arrangement will be conducted at the terminal at West Kowloon. A Mainland Port Area (MPA) will be set up at the West Kowloon terminal, situated at the heart of the territory, in which the whole body of Mainland laws will be applicable, and the Mainland authorities will exercise jurisdiction over all matters except those matters reserved for the HKSAR.

Many people question whether the co-location arrangement is compatible with the provisions of the Basic Law. Article 18 of the Basic Law provides that national laws shall not be applied in the HKSAR except for those relating to defence, foreign affairs and other matters outside the limits of the autonomy of the HKSAR listed in Annex III of the Basic Law. Article 19 of the Basic Law provides that the courts of

the HKSAR shall have jurisdiction over all cases in the territory, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

In December 2017, the NPCSC passed a decision confirming that the co-location arrangement is compatible with the Basic Law. It states that the co-location arrangement will not change the territorial boundaries of the HKSAR, affect the high degree of autonomy of the HKSAR and decrease the rights and freedoms enjoyed by Hong Kong residents. In addition, it is beneficial to the economic development of Hong Kong. The decision was seriously criticised by the Hong Kong Bar Association that all the provisions of the Basic Law referred by the decision in their plain reading cannot provide a firm legal basis for the co-location arrangement and explain why it would not be contravening Article 18 (Hong Kong Bar Association, 2017).

With the confirmation from the NPCSC, local legislation on the co-location arrangement is in the process of being enacted by the LegCo. It is likely that the law will be challenged in the courts of Hong Kong on its compatibility with the Basic Law. Even though the decision is not formally an interpretation by the NPCSC, one can foresee that the chance to successfully invalidate that piece of legislation through judicial review will be very small. The NPCSC can simply pick any provision from the Basic Law and issue another interpretation to provide the constitutional support for the co-location arrangement. All constitutional disputes before the courts of Hong Kong will then be cleared.

Like the oath-taking incident, the co-location incident severely undermines the rule of law in Hong Kong. The CCP is now more and more prepared to use law to justify any decision she wants to make as she can totally control the constitutional process to interpret the Basic Law. Even if the reading given by the NPCSC is beyond the natural and plain meaning of the legal text and is not in accordance with prescribed

procedures of the Basic Law, no one could question its authority. As the Hong Kong Bar Association said, any act will be compatible with the Basic Law “just because the NPCSC says so”. Law will be used in such a manipulative way when the CCP believes that some “good things” can be done (Hong Kong Bar Association, 2017).

4.4. Adding National Laws to Annex III of the Basic Law and the National Emblem Law

According to Article 18 of the Basic Law, national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. The NPCSC may add a national law to Annex III if it is related to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified by the Basic Law. The laws listed in Annex III shall be applied locally by way of promulgation or legislation by the HKSAR.

All the laws now listed in Annex III are not politically controversial. Knowing that it has the ultimate power to determine whether a matter is within the scope of defence and foreign affairs or a matter outside the limits of the autonomy of the HKSAR, the CCP can easily convert the process under Article 18 and Annex III to become a back door to legislate for Hong Kong directly. Once a national law is said to be a matter concerning defence, foreign affairs or outside the limits of the autonomy of the HKSAR and is added to Annex III, the law will have to be implemented in Hong Kong even if the law’s real objective is to implement the authoritarian rule of law in Hong Kong. An example is the enactment of the National Anthem Law.

The National Anthem Law (“NLA”) was passed by the National People’s Congress in September 2017 and the law was added to Annex III of the Basic Law by the NPCSC in November 2017. The local legislation to implement the NLA is now in the process of enactment.

There are several provisions in the NLA that attract a lot of concerns that the freedom of expression of Hong Kong people might be infringed.

Article 6 of NLA provides that the national anthem must not be performed or sung in a manner harmful to the dignity of the national anthem. Article 7 states that those present when the national anthem is performed and sung should stand and deport themselves respectfully and must not display any behaviour that is disrespectful to the nation anthem. According to Article 15, any person who in a public venue deliberately alters the lyrics or the score of the national anthem or performs or sings the national anthem in a distorted or derogatory manner, or insults the national anthem in any other manner, shall be issued with a warning or be detained for up to 15 days by public security departments. Where the act constitutes a criminal offence, the offender is subject to criminal prosecution in accordance with law.

Many expressions in the NLA are not clearly defined. It is uncertain what kind of behaviours that will be covered by “manner harmful to the dignity of the national anthem”, “disrespectful to the nation anthem”, “derogatory manner”, or “insulting the national anthem”. If the local legislation were to adopt the expressions from the Chinese legislation directly, it may infringe the right to freedom of expression of Hong Kong people. The legal provisions might not be able to satisfy the constitutional requirements on limiting the right because they are so uncertain that it cannot be “prescribed by law”. In effect, the NLA can silence many people in Hong Kong from expressing their legitimate antagonism against the CCP.

Even if one may want to challenge the constitutionality of the local legislation implementing NLA, the courts of Hong Kong may be questioned whether they have the jurisdiction to review its constitutionality. This is still an unresolved constitutional question. If the courts of Hong Kong in the future conclude that they lack the

constitutional jurisdiction to review a piece of local legislation implementing an applicable national law under Annex III of the Basic Law, then the CCP may have a legal backdoor to disproportionately limit fundamental rights of Hong Kong people. This may compromise the protection that the rule of law can provide to Hong Kong people.

4.4. Acting through the HKSAR Government by Enforcing Existing Laws and Disqualification of Candidates by Returning Officers

The CCP now has the full cooperation of the Lam's Administration. The spirit of authoritarian rule of law is to utilize every possible room provided by the legal text to establish the legal authorization for a measure of authoritarianism. In doing so, the meaning of the legal text may be extended or twisted arbitrarily. Legal procedures may ignore any requirement of procedural fairness. Even if officials exercising the legal power to fulfill an authoritarian task may have to face judicial challenges the future, with the power to interpret the Basic Law as backup, the CCP can easily pick an article from the Basic Law and issue an interpretation of that article to provide the constitutional basis for the authoritarian measure. An example is the disqualification of candidates by returning officers on the ground that the candidates were not genuinely upholding the Basic Law.

After the successful disqualification of elected Legislative Councilors, the wave of disqualification extends to cover undesirable candidates. Section 40 of the Legislative Council Ordinance provides that for a person to be validly nominated as a candidate in the election of a constituency of the Legislative Council, she must sign a declaration to the effect that the person will uphold the Basic Law and pledge allegiance to the HKSAR ("Declaration").

Section 42A of the Legislative Council Ordinance authorises the Returning Officer to decide whether a person is validly nominated as a candidate, but the relevant provisions of the Legislative Council Ordinance had only been used by returning officers in the past to verify whether the Declaration included in the nomination form was properly signed.

Even though there is no express provision, returning officers in the elections of the LegCo since 2016 have exercised the above power to determine whether a nominee has a genuine and truthful intention to uphold the Basic Law. The nominations of several nominees were declared to be invalid on the basis that they had expressed opinions supporting independence of Hong Kong. In at least one case, a nominee had made an open statement that he no longer supported the stance of independence of Hong Kong but his nomination was still declared to be invalid. The returning officer's reason was that she was not satisfied that the nominee had genuinely changed his stance on the independence of Hong Kong.

The "red-line" continues to be redrawn. In the recent by-election of the Legislative Council in March 2018, the nomination of a nominee supporting the right of Hong Kong people to democratically decide Hong Kong's future was also declared to be invalid. This is also considered to be not upholding the Basic Law.

"To uphold the Basic Law" is not defined in the Basic Law and the Interpretation on oath-taking. However, since the election of the Legislative Council in 2016, all persons who want to be nominated as a candidate must also sign a confirmation form indicating that they understand that to uphold the Basic Law means to uphold the Basic Law including Article 1, 12 and 159(4).

Article 1 provides that the HKSAR is an inalienable part of the People's Republic of China. According to Article 12, the HKSAR shall

be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government. Article 159(4) states that no amendment to the Basic Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

It is likely that the returning officer will treat all opinions that deny, challenge, question or even suggest an alternative view to HKSAR's status as an inalienable part of the China to be not upholding the Basic Law. However, no one could know what exactly would be disallowed until the returning officer makes her decision. In other words, the returning officer is now exercising an arbitrary power with no clear standard to limit the political rights of Hong Kong people to stand in an election.

Unfortunately, a decision of the Court of First Instance confirmed that the returning officer does have such power and the judge relied very much on the Interpretation on the oath-taking. The judge only required the returning officer to satisfy certain requirements on procedural fairness in exercising the power. This decision may be overturned by higher courts in the future but until then, the returning officer has the legal power to disqualify potential candidates according to uncertain and moving standards.

The CCP can now act through public servants in the HKSAR Government and achieve the objective of the Decision that triggered the outbreak of the Umbrella Movement via another doorway. Undesirable persons can now be easily screened out and do not have the chance to stand in an election. One can foresee that the same power will be used in the elections of the CE and even the District Councils in the future unless the courts of Hong Kong are able to set things right before the elections.

4.5. Political Prosecution and Review of the Punishment of Young Protesters

According to Article 63 of the Basic Law, the Department of Justice of the HKSAR Government controls criminal prosecutions and is free from any interference. The Secretary for Justice enjoys independent prosecutorial power as the Attorney General in a common law system. Now the whole administration of the HKSAR is under the direction of the CCP, there is no difference to the prosecutorial power. It is now being used to serve political purposes and there are many examples of political prosecution in the past few years. Owing to limitation of space, only one case is reported here, i.e. the review of the punishment of young protesters.

At the beginning of the Umbrella Movement, three student leaders, Joshua Wong, Nathan Law and Alex Chow were involved in clashes at the government headquarters at Admiralty. They were found guilty of inciting others to take part in an unlawful assembly. The penalties of Law and Wong at the first trial were community service and Chow was given a suspended jail term. After they had served their penalties, the Secretary for Justice applied to the Court of Appeal to review the sentencing. Their penalties were revised by the Court of Appeal and they were jailed for six to eight months on the basis of a new set of sentencing guidelines developed by the Court of Appeal concerning cases disturbing public order. The new guidelines were developed by the Court of Appeal in light of the situations after the Umbrella Movement as there were more and more clashes between police and protesters involving violence.

A group of international legal experts criticised the decision of the Court of Appeal that it was outrageously unjust because the three student leaders had already served their sentences. The decision amounted to imposing new punishments on Wong and Law, who had already

completed their sentences of community service and may contravene the principle of double jeopardy that no one shall be punished again for the same offence (Alton *et al.*, 2017). The penalties were also considered to be too severe.

Though the decision to impose heavier penalties was made by the Court of Appeal, the decision to initiate the process to review the punishment was made by the Secretary for Justice. There may not be hard evidence supporting this claim, but it will not be unreasonable to suspect that the Secretary for Justice was politically motivated to make such a decision in order to fulfil a task assigned by the CCP.

However, the decision of the Court of Appeal reveals something that is even more worrying. This is the attitude of some of the judges in Hong Kong concerning the ultimate goal of law. Justice Wally Yeung, Vice-President of the Court of Appeal, said in the judgement: “In recent years, an unhealthy wind has been blowing in Hong Kong. Some people, on the pretext of pursuing their ideals or freely exercising their rights conferred by law, have acted wantonly in an unlawful manner. Certain people, including individuals of learning, advocate ‘achieving justice by violating the law’ and, under this slogan, they encourage others to break the law. These people openly flout the law. Not only do they refuse to admit their lawbreaking activities are wrong, but they even go as far as regarding such activities as a source of honour and pride. It is unfortunate that such arrogant and conceited ways of thinking have influenced some young people and have caused them to engage as they please in activities that are damaging the public order and disruptive of the peace at assemblies, processions or demonstrations.” The Court of Appeal also did not give any recognition to the civil disobedience motivation of the young protesters.

Fortunately, the judges of the CFA in their final judgement of the case disapproved the approach of Yeung. They disagreed that it is not a proper basis for sentencing since it ignores the culpability of the individual accused and instead seeks to attribute the culpability of other persons to them. Also, they ruled that the new sentencing guideline adopted by the Court of Appeal cannot be applicable retrospectively to this case. The original penalties of the three young protesters were reinstated. Unlike the Court of Appeal, the CFA makes it very clear that the court must consider civil disobedience motivation as a mitigating factor in determining the penalty of an accused. Civil disobedience is understood to be 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.

As reflected from the judgement of the Court of Appeal in this case, there are some judges in Hong Kong who see maintaining social order as overwhelmingly important. Their understanding of the rule of law seems to be not too different from the authoritarian rule of law so asserted by the CCP and the HKSAR government. If more and more judges in Hong Kong embrace this very thin understanding of the rule of law, one cannot expect law and the rule of law in Hong Kong to be able to constrain powers of the authorities effectively and protect fundamental rights of citizens adequately.

4.6. Clearing the Obstruction in the LegCo and the Amendment of the Rules of Procedure of the LegCo

The above measures to disqualify elected LegCo members from the opposition camp have successfully further weaken the opposition camp. Even though the pro-CCP camp is always the majority of the LegCo, the opposition camp can still use various rooms allowable by the Rules of

Procedure of the LegCo like filibustering to obstruct or delay controversial decisions of the HKSAR Government in the past. Now the pro-CCP camp holds even the special majority needed to amend the rules of procedure of the LegCo. The rules were amended and all allowable rooms in the legislative chamber to withstand the encroachment of the authoritarian regime by the opposition camp have in effect been removed.

More manipulation of the Rules of Procedures by the pro-CCP camp is underway. As the pro-CCP camp have the majority in the LegCo, the President of the LegCo and almost all chairpersons of committees of the LegCo are from the pro-CCP camp. Rule 45 of the Rules of Procedure of the LegCo authorizes the President of the LegCo and any chairman of a committee of the LegCo to make final decision on “point of order”. It should be a limited power and should only cover matters related to the observance of the rules of order during the meetings of the LegCo and its committees. Following the spirit of authoritarian rule of law, the pro-CCP camp wants to extend the scope of this power and assert that the President of the LegCo enjoys the power to make final decisions on all matters concerning the business of the LegCo. No debate is allowed on all final decisions of the President of the LegCo.

It would be very difficult to challenge a decision of the President of the LegCo through judicial review as the CFA has already ruled that the court will not interfere with the internal processes of the LegCo. As a result, the proceedings of the LegCo are now being totally dominated by the pro-CCP camp and the opposition camp can hardly use the processes in the legislative chamber to defend the thicker understandings of the rule of law.

4.7. Making New Laws through the HKSAR Government and Article 23 Legislation

One can foresee that after removing all obstacles in the legislative chamber, the HKSAR Government will soon make new laws needed for further authoritarianization in Hong Kong. The most important one must be the national security law under Article 23 of the Basic Law which provides that the HKSAR must enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government.

The last exercise of legislation was withdrawn in 2003 after more than half a million people demonstrated in the street against the legislation. Without the national security law, the CCP finds Hong Kong to be still an insecure place as Hong Kong may be used as a backdoor for anti-CCP forces to infiltrate into the authoritarian regime in the Mainland. For the past years, the CCP has been looking for opportunities to restart the legislative process but failed. The well planned actions to authoritarianize Hong Kong through advancing the authoritarian rule of law aim to pave way for this ultimate action.

One can also foresee that the Article 23 legislation to be reintroduced may not be the same as the one being shelved. Some people from the pro-CCP camp have expressed that the last bill was a toothless tiger as it cannot be used to prohibit any speech that merely advocates for independence of Hong Kong without inciting people to commit act of violence or other serious criminal act.

As the CCP is advancing authoritarianism in Hong Kong, the political red line is being drawn continuously. The national security law first must be able to disallow speeches that advocate for independence of Hong Kong. Then, speeches supporting self-determination by Hong Kong people to decide Hong Kong's political future are to be banned

too. Now, merely raising the possibility of considering the option of independence of Hong Kong if a democratic constitutional order were to be established to replace the collapsed authoritarian rule in the Mainland is also a kind of prohibited speech. It is likely that the political red line will be redrawn again at any time in the future depending on the political needs of the CCP. With the full cooperation of the CE, the HKSAR Government and the LegCo and justified by the authoritarian rule of law, new laws to serve the political purpose can be smoothly made by the HKSAR.

5. Strategic Goals of Authoritarianism in Hong Kong

At this stage, the CCP may not want to fully authoritarianize Hong Kong. A semi-authoritarian Hong Kong can still window-dress CCP's full authoritarian rule by demonstrating to the world that Hong Kong people are still governing themselves and enjoying a high degree of autonomy at least in certain aspects.

The processes to authoritarianize Hong Kong through advancing the authoritarian rule of law in the territory aim to achieve several strategic goals. The ultimate goal is to help the CE, who will never be democratically elected and must be under CCP's direction, find more political legitimacy. If this is successful, there will be no need to introduce genuine democracy in Hong Kong. The CCP worries that once democratic elections are fully implemented in Hong Kong, it will lose control over the territory and Hong Kong could be used as a subversive base to threaten CCP's rule in the Mainland. This is CCP's overriding concern.

From the CCP's perspective, the past failures of CEs were caused by the constraints imposed by different powers of check and balance in the territory. If the CE could have a free hand to gain legitimacy through

designing and implementing policies to improve the livelihood of Hong Kong people, the voice demanding democracy in Hong Kong will then be weakened. Therefore, the targets of the authoritarian rule of law are the sources of the constraining power in Hong Kong.

The most persistent and difficult opposing force in Hong Kong must be the democratic camp. Democrats consistently win 50-60% of the votes in territorial-wide elections in the past years. Even though they could not be the majority in the LegCo because of the constitutional design of the election methods and the composition of the LegCo, the democrats can still make use of the room allowable in the legislative chamber to successfully obstruct the governing of the HKSAR Government in various occasions.

To weaken the constraining power of the LegCo, the number of democrats in the LegCo must be reduced. In the 2016 elections, the opposition camp gained 30 out of 70 seats, the highest number in history. Through the disqualification of six LegCo members from the opposition camp, the democrat camp lost the critical minority in the LegCo and the Rules of Procedure of the LegCo were successfully amended removing almost all possible room in the legislative chamber to oppose the advancement of the authoritarian rule of law. The road is now cleared for the HKSAR Government to introduce policies that can be used to boost its legitimacy and other legislative proposals to impose further control over Hong Kong people. The CCP can even act preemptively for the same purpose through the power of the returning officers to invalidate nominations of candidates on the ground that they fail to genuinely uphold the Basic Law, a requirement ill-defined.

Another major constraining power is the Hong Kong courts. Like other judges working in an independent court under an authoritarian system, Hong Kong judges now understand their own political constraints. The overriding power of the interpretations of the Basic Law

by the NPCSC cannot be questioned. If not, Hong Kong's judicial autonomy will have to face even greater danger (Tai, 2010).

Some of the Hong Kong judges choose to avoid controversial constitutional issues in adjudicating cases (Tai, 2002; 2007; Yap, 2007). Some others, along with some senior members of the legal profession, actively offer help to the CCP and the HKSAR Government by providing legal arguments to justify controversial constitutional decisions. Though all judgments of the court will be packaged by the judges as decisions made only in accordance with law, politics can hardly be separated from law especially in controversial constitutional matters.

As they are less likely to be challenged now, this is also why the CCP is readier to make controversial constitutional decisions to consolidate the authoritarian rule over Hong Kong. Legitimized by the courts of Hong Kong, it will be more and more difficult for the opposition camp to mobilize large-scale street actions to challenge these controversial constitutional decisions.

Another important constraining power or may be the most important power in opposing the authoritarian rule of law is the civil society of Hong Kong. Many young people and the more educated in Hong Kong are very dissatisfied with the authoritarian rule. Though nothing substantial can be achieved in the Umbrella Movement, they are looking and waiting for another opportunity to strike a breakthrough. The political red-line is being redrawn again and again to generate chilling effect in the society so as to prevent anti-authoritarian sentiments from spreading and escalating in the territory. The opposing forces must also be stopped from developing better coordination and organization among themselves. Threat may be the only tool that the CCP can use to suppress Hong Kong's mature and robust civil society though the effectiveness is in question.

6. Authoritarianism Not Yet; Semi-authoritarianism for How Long?

Facing the encroachment of the authoritarian rule of law, Hong Kong is still a semi-authoritarian system. Elements of thicker understandings of the rule of law still exist in Hong Kong and have not been eradicated yet. Limited elections are still being held. A substantial number of people in Hong Kong still embrace thicker understandings of the rule of law believing law should constrain governmental powers and protect fundamental rights of citizens.

The semi-authoritarianism in Hong Kong, however, is unstable (Ottaway, 2003). The CCP may want to stabilize semi-authoritarianism in Hong Kong so that things in the territory will not get out of control and threaten the authority of the CCP in the Mainland. If achieved, there would be no need for the CCP to make Hong Kong fully authoritarian. Whether this plan works will depend on how Hong Kong people face the challenges to Hong Kong's rule of law arising from the encroachment of authoritarianism in the territory. At least three things can still be done.

6.1. Elections

There are still limited elections being held in Hong Kong. With the continuous support of 50-60% of the votes in elections, the democratic camp still has a chance to bring a liberalizing electoral outcome (Howard and Roessler, 2006). Unlike other semi-authoritarian societies, it is not possible for the opposition camp in Hong Kong to form the government even if they can win the majority in the LegCo. Nevertheless, they should be able to slow down the process of authoritarianization in Hong Kong more effectively.

To do so, the opposition camp must put aside their differences and form a political coalition (Pop-Eleches and Robertson, 2015; Lindberg, 2009; Walle, 2006). In addition, the election bloc so formed has to

organize a comprehensive political campaign to achieve the following things. First, elaborate voter registration and voter turnout drives are to be orchestrated. Second, voters have to learn how to strategize their votes. Third, candidates from the opposition camp must be made more politically attractive to voters. Fourth, the opposition camp has to send a clear political signal to voters that it has a strong commitment to win and demonstrate to voters that it has the capacity to govern effectively. Fifth, a widespread sense that victory is possible must be created. (Bunce and Wolchik, 2010) These demands are high as the mobilization, unity, skill, and heroism needed are far beyond what would normally be required for electoral victory in a democracy (Diamond, 2002).

6.2. Elites

In addition to the judges, the legal professionals in the Department of Justice and administrators in other departments of the HKSAR Government responsible for exercising governmental powers to implement policies and laws are the elites of Hong Kong. The CCP still needs to rely on them to directly govern Hong Kong. It is hoped that at least some of the Hong Kong elites have not given up their commitment to defend the thick understandings of the rule of law even though they are now working in very unfavourable environments.

Like the reform-oriented elites in other authoritarian regimes, these Hong Kong elites may try to do something to defend the thicker understandings of the rule of law at the margins without directly impinging on the core interests of the authoritarian regime (Ginsburg and Moustafa (eds), 2008). In using their discretionary powers under the law, they can smartly and strategically protect or even create more political space for activists to continue their struggle by organizing deliberate, strategic and repeated social actions against the authoritarian rule.

If the civil society of Hong Kong remains to be active in upholding the thick understandings of the rule of law, the elites of Hong Kong may be able to shield themselves from further direct and indirect interferences from their authoritarian master and may even create opportunities for Hong Kong to revert to the democratic path at a critical moment in the future.

How many Hong Kong elites are prepared to do so is difficult to know. One thing is sure that after leaving their official positions, they are still citizens of Hong Kong like everyone.

6.3. Education

As the CCP aims to implant the authoritarian rule of law as the public understanding of the constitutional principle in Hong Kong replacing thicker understandings, one can say that the battlefield is actually a cultural one. We must do the same thing as the CCP by cultivating our desirable understanding of the rule of law in the community. Education is the key and it can take many forms. It can be legal education at all levels of education, from primary school to law school. It can also be creative and multi-dimensional social education through the media (Stromseth, Wippman and Brooks, 2006). These methods can bring cultural changes through a comparatively long habit-building process.

Social movement can be also another kind of education to bring long-lasting change in a culture (Lee, 2015). The injustice of the system can be dramatized by a social movement of civil disobedience in such a way that no people can ignore its existence (King, 1991). Civil disobedience challenges people's established beliefs, values and attitudes. They cannot escape from reflecting the meaning and significance of truth and justice (Haksar, 2003). New attitudes or consciousness may be formed after existing attitudes towards current

institutions are being questioned and seriously reconsidered (Lofkowitz, 2007). This is what has been achieved by the Umbrella Movement.

Even if the Umbrella Movement failed to bring about immediate institutional change, the foundation for future actions to bring about institutional changes has been laid by the cultural changes that the movement brought. At constitutional moment (Ackerman, 1991), civil disobedience can be used by people to transform the system extra-constitutionally.

During the semi-authoritarian era, social movement of civil disobedience is still the most sustainable method to defend the rule of law though the cost for breaking the law is much higher than during the semi-democratic time. Protesters in Hong Kong has to be smarter, prepare itself better and vigilantly wait for the constitutional moment to come.

It may be too optimistic to say that there can still be a very slight chance for Hong Kong to revert to the democratic path but there can still be hope if everyone in the community is willing to do something to defend the rule of law to prevent further encroachment of authoritarianism.

Note

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