



Hong Kong and the Premature End of the One Country Two Systems Experiment

“China has become a superpower, and that has brought not confidence or magnanimity, but menace and insecurity. The country’s expanding wealth and hawkish posturing conceal a shrinking civic space.”

These are the words of Yangyang Cheng, a particle physicist at Cornell University reflecting on her motherland in the context of a story on traditional Chinese medicine in an opinion piece titled “The China I carry”.¹ She notes:

[The Beijing municipal government plans to] criminalize the ‘[defamation] or slander’ of traditional Chinese medicine. Even badmouthing acupuncture or herbal remedies could amount to ‘picking quarrels and provoking trouble,’ an offense in the penal code that covers neighborhood brawls as well as political dissent.

Are thought crimes coming to Hong Kong?

LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON SAFEGUARDING NATIONAL SECURITY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION (“NSL”)

At 11 pm on 30 June 2020, the eve of the 23rd anniversary of the return of Hong Kong to China from British colonial rule in 1997, China promulgated a new Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“NSL”).

To a human rights lawyer, there is something jarring to seeing draconian legislation in print. The last time I had a similar feeling was when reviewing the Internal Security Act (“ISA”) in Malaysia² in the knowledge that there were very few, if any, human rights protections, and realizing its potential for abuse.

The undemocratic opaque process by which the NSL was foisted upon Hong Kong, the vague substantive provisions, as well as the anticipated usage and future associated problems have prompted most independent observers to pronounce the end to any meaningful autonomy that Hong Kong had once possessed to distinguish it from the system in Mainland China. Some are even using the term “second handover”.

¹ New York Times, 27 June 2020.

² As an international trial observer for Amnesty International.

CONTEXT—THE BASICS--A QUICK RECAP

Space won't allow but here are some of the relevant basics for context.

China has a long and proud history spanning from “ancient times” as apparent from the Preamble to the Basic Law of the Special Administrative Region of the People’s Republic of China, which says:

[Hong Kong] was occupied by Britain after the Opium War in 1840. On 19 December 1984, the Chinese and British governments signed the Joint Declaration on the Question of Hong Kong, affirming that the Government of the People’s Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, thus fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong.

The Basic Law is Hong Kong’s mini-constitution and is to reflect the Joint Declaration—an international treaty. “Under the principle of “one county, two systems”, the socialist system and policies will not be practiced in Hong Kong.”³

SLOW EROSION

To a constitutional and public law lawyer⁴ the gradual erosion of Hong Kong’s legal system and autonomy has been, in large part, the result of the increasing use of “interpretations” by the NPCSC with little restraint and by the decision to renege on the promise of democracy for Hong Kong. To override the Hong Kong courts –after the first “interpretation” by Beijing, relating to the right of abode cases in 1999, some have since called Hong Kong’s highest court the Court of “Semi” Final Appeal—is anathema to the Rule of Law⁵, and in particular the separation of powers and an independent judiciary, and caused great concern at the time (including somber marches by the typically conservative legal community). Regrettably, the use of “interpretations” by the NPCSC has increased and each misuse continues to diverge from the principle of institutional forbearance, eroding confidence in the Rule of Law in Hong Kong.

Fast forward to the fifth NPCSC “interpretation” in 2016, which showed less restraint and did not even wait for the issue to be resolved by the Hong Kong courts relating to taking an oath for office (used to disqualify pro-democratic legislators). The interpretation was followed by a decision on the co-location joint checkpoint scheme, an arrangement which independent constitutional experts deemed unconstitutional. The pattern has been set. The Hong Kong government - and

³ Quoting from the Basic Law.

⁴ I have lived and practiced law in Hong Kong for around 25 years.

⁵ I use the United Nations definition of the Rule of Law (see UN Rule of Law website).

when need be the NPCSC - rode roughshod over the carefully-crafted provisions of the Basic Law without hesitation by seeking interpretations when the Rule of Law was inconvenient.

UMBRELLA MOVEMENT

The Umbrella Movement of 2014 was sparked by the NPCSC decision to prescribe a selective pre-screening of candidates for the 2017 election of the Hong Kong chief executive. The NPCSC Decision was widely seen as being contrary to the Basic Law, the Joint Declaration and most pressing, genuine universal suffrage, casting further doubt on the “one country, two systems” formula. Despite the promise of the Basic Law and, as written therein, the hope that things would be better than in colonial Hong Kong, the reality is that the promises have not been kept.

THE DAM HAS BURST

The promulgation of the National Security Law (“NSL”), 6 Chapters and 66 Articles, came out of a black box, bypassing not only the expected constraints of the Basic Law and without scrutiny of the legislative process of the Hong Kong SAR, but also without any input or consultation with the people of Hong Kong. Effective at 11 pm on 30 June 2020 by stealth, the NSL didn’t even have an English translation (an official language in Hong Kong) until 5th July 2020.

KEY INITIAL CONCERNS

A comprehensive critique of the NSL, both procedurally and substantively, is outside the scope of this article⁶; however, here are a few of the key initial concerns, most of which arise from the fact that Mainland Law or socialist legality is now being foisted or grafted, onto or into, our developed and respected Common Law justice system⁷:

--the power of interpretation is vested in the NPCSC (Article 65) can undercut the independent exercise of judicial power by the Courts of the Region and raises questions about how such a power sits with the Basic Law. Unlike Article 158 of the Basic Law, the Hong Kong courts are not expressly authorised to interpret the NSL;

--the Hong Kong Government has already stated that slogans such as “Liberate Hong Kong, the revolution of our times” are now considered subversions of state power, which raises alarm bells regarding the introduction of thought crimes;

⁶ Please see the Hong Kong Bar Association report 1 July 2020

⁷ Please see *The World Justice Project Rule of Law Index* issued by World Justice Project dated 11 March 2020. The report indicates that Hong Kong currently ranks 16th while China ranks 88th in the Rule of Law Index 2020, a ranking system that examines a locality’s adherence to the rule of law. Similar disparities in ranking between the two are also evident in indices regarding protection of fundamental rights and constrains on government power.

--the vague and broad definitions - without common law precedent as well as ultimate oversight handed to authorities in Beijing make the legislation antithetical to the Rule of Law in every respect;

--reserving the power to remove suspects to face trial in the Mainland (Articles 55-57) seems to be introducing extradition by stealth, which was a major reason for the massive demonstrations in Hong Kong last year;

--the CE designating judges to hear NSL cases undermines the independence of the judiciary (article 44);

--Mainland NSA not subject to local jurisdiction (Article 60) and are above the law;

--judicial control of covert surveillance is removed (Article 43);

--Reversal of presumption on bail (Article 42);

--SJ can direct that a case be tried without a jury (Article 46);

--National Security Council is not subject to judicial review (Article 14);

--further concerns arise with respect to what is meant by “measures to strengthen the management of and services for organs of foreign countries and international organizations in the Region, as well as non-governmental organizations and news agencies” (Article 54);

and generally, the offences are vaguely worded without the necessity for violence, are not drafted within Common Law tradition, and lack definitions. All of this combined inevitably leads to uncertainty, fear and unpredictability, which is in itself contrary to the Rule of Law.

Interestingly, the vagueness and unpredictability of the NSL did not seem to stem from a lack of awareness of the legislators. If any, it seems that the ruling elite is, in fact, well informed of the potential consequences of the enactment of the NSL, and some have “resorted to the level of escape plans to foreign countries”⁸.

“They do so because, in their hearts of hearts, they know that true, lasting stability is only achieved in countries where governments are elected, where the rule of law is supreme and where there is no fear of a knock on the door at midnight”.⁹

⁸ Vines, Stephen Hong Kong’s ruling elite fight to extinguish freedom whilst clutching foreign passports, money and property abroad Hong Kong Free Press 4 July 2020 (online version)

⁹ Ibid.

AND WHY?

Kindled by the proposed Fugitive Offenders amendment bill (last year), the anti-extradition bill movement has significantly impacted Hong Kong's sociopolitical landscape. Within months, the movement evolved from a demonstration revolving around a single demand, to a movement concerning the city's deeply-rooted dissatisfaction with the government. In light of the government's formal withdrawal with the bill, many question the reason behind China's determined and swift enactment of the NSL.

A prevailing theory is that the local and Central People's Government, intimidated by the solidarity shown by the 2 million marching mostly peaceful Hongkongers in the summer of 2019, the subsequent overwhelming victory of the pro-democracy camp in the District Council elections, and the prolonged intense protests, felt the need to stifle the resistance before the flame spreads even further. In fact, one may even claim that the Hong Kong Government's call for the "silent majority"¹⁰ following their underestimation of the District Council election results served as a lesson and, more importantly, a prophetic warning that the same might happen in the upcoming Legislative Council election in September 2020.

In a way, the NSL serves as both a hurdle for the democratic movement in Hong Kong and a safety net for the Central People's Government to ensure that Hong Kong's law-making body remains in control – a hurdle, for it heightens the bar for targeted individuals to enter and partake in political and public affairs; a catch-all safety net, for the law's vague definitions may be used to silence opposing voices even in the event of the successful election of these individuals in the name of subversion, secession and undermining the state. While many find the expediency of the enactment process unexpected and unprecedented, a quick glance at the Party's rationale would reveal the ideology behind the swift enactment of the National Security Bill. As seen in the Communiqué on the Current State of the Ideological Sphere¹¹ (the Communiqué), which was widely circulated within China's Communist Party, great emphasis has been placed on "[the promotion of] unification of thought" by "expanding and strengthening positive propaganda". The party line of the Communist Party of China has always been clear - the Party's rule is supreme and unquestionable; it seeks to promote "unification of thought" and pursues an "unwavering adherence to the principle of the Party's control of media". As contended by scholar Phil C. Chan, this poses a threat to universal values such as freedom of speech and the Rule of Law, for instead of appreciating these principles for their inherent significance, the principles are being used to "supplant the core values of Socialism". To quote the words of Xi himself, "The Rule of Law is a fundamental principle by which the Party leads the people in running the country". It is therefore of great concern that any discussion about judicial independence, freedom of speech and the like may, in Beijing's eyes, endanger national security and render the speaker liable to prosecution.

¹⁰ This refers to the alleged hidden supporters of pro-establishment candidates who did not vote in the District Council elections which took place in November 2019

¹¹ Please see *Document No.9*, a document which was circulated within the Chinese Communist Party by the General Office of the Communist Party of China in April 2013.

That said, it may only be a matter of time before Beijing sees a need to assert tighter control upon Hong Kong, even when that means publicly further undermining the “one country, two systems” regime and possibly eviscerating the foundation of Hong Kong’s Rule of Law in the eyes of international stakeholders.

“In recent years we have witnessed a creeping and gradual erosion of human rights in Hong Kong. No more. With this law, the process is dramatically accelerated, as Beijing discards any pretence of fulfilling its international promises made in the run-up to the 1997 handover.”¹²

FUTURE

“Once the cardinal principles of Rule of Law, notably the existence of an independent judiciary, has been undermined, this does not just put a dent in the system, it shakes its foundations.”¹³

With the National Security Bill’s broad application and steep penalties, one can no longer deny the reality of China’s tightening grip on Hong Kong’s societal, political and legal practices. Moreover, many questions remain unanswered in light of the executive unpredictability.

Under the National Security Bill, Hong Kong has, in a way, become an ideological laboratory for the world; with its “one country, two systems” regime in place, Hong Kong had the perfect set-up to potentially reconcile China’s socialistic values and Western ideologies of the Rule of Law and international human rights. However, whether Hong Kong will prove to be a positive precedent or casualty in the midst of China’s experimental approach remains a question to be answered.

“If this succeeds, sooner or later English rule of law may be seen as ill-suited to a Hong Kong which is now more Chinese in complexion. For the Hong Kong Chinese, their belief in English rule of law may thus become at once a defining sensibility of civilized society, but also a betrayal of Chinese values.”¹⁴

Despite the uncertainties that follows the NSL’s enactment, one must not hastily rule out or underestimate the repercussions that are to come of this law, be it for the Hong Kong population, the Chinese government, or the international community.

Most independent legal experts, academics, UN experts (UN Experts call for decisive measures to protect fundamental freedoms in China) and Bar Associations (see International Bar Association statement among others), the international community, and human rights groups, are critical of the NSL –not only the way it was brought in but also in substance. Who is supporting it? Very few outside those mandated to sell it or who are on the payroll to varying degrees.

¹² Wetzel, Jan For a terrifying glimpse into Hong Kong’s future, look at how China abuses its own national security law *Amnesty International* 1 June 2020 (online version)

¹³ Vines, Stephen Hong Kong’s ruling elite fight to extinguish freedom whilst clutching foreign passports, money and property abroad *Hong Kong Free Press* 4 July 2020 (online version)

¹⁴ Jones, Carol *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, Routledge 1999, 56

REACTION

Even the UK and Australia—not known for liberal immigration regimes—are offering to take in those fleeing Hong Kong. More specifically, apart from Australia’s plan to potentially offer an escape route to asylum-seeking Hongkongers, the United Kingdom has also proposed to extend the existing rights enjoyed by British National Overseas passport holders while Taiwan has set up a new office to offer a safe haven for those in need. This undoubtedly speaks volumes for the gravity and significance of the enactment of the National Security Bill, and its potentially negative consequences. Yet regardless of the uncertainties ahead, one thing remains apparent is the sense of frustration – “Hongkongers are the offspring of the dissenters that the Chinese Communist Party did not manage to kill off – the successors of those who rebelled against their tyrannical regime. You tried to bury us, but you didn’t know we were seeds. Persecution has ever only made us grow.”¹⁵

Thank you Lydia Ching for her assistance with the article.

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¹⁵ Chan, Christina ‘We just really f***ing love Hong Kong’: Can you criminalise us? *Hong Kong Free Press* 4 July 2020 (online version)
