

Defending the Rule of Law and the Role of Civil Society

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Abstract

From Britain's last colony to China's first Special Administrative Region, Hong Kong has been synonymous with the rule of law. Fifteen years after the handover, a metaphorical "ferocious storm" hanging over this defining institution illuminates the fundamental precariousness of "One Country, Two Systems". Since Beijing's first interpretation of the Basic Law in 1999, society has witnessed its "high degree of autonomy" gradually slip away as democratisation stalled and judicial independence under threat. So much so that the reformist-minded increasingly looked to the court as an alternative battlefield against an unpopular government alongside street politics. A politicised judiciary, however, does not bode well for the rule of law. At stake is a societal consensus over the value of judicial process in defending the constitution, not confronting or assisting the administration. That requires a vigilant public versed in the idea of rule of law, and faith in the integrity of the constitutional gatekeeper. Despite the gloom cast over Hong Kong's political future, its thriving civil society and maturing civic activism attest to the enduring strength of this dynamic people. Come what may, their unwavering commitment of the rule of law will see Hong Kong through the most ferocious of storms.

Introduction

1 July 1997, the return of Hong Kong to Chinese rule, marked a watershed for Hong Kong's collective legal consciousness. Its mostly law abiding but politically aloof residents found themselves instantaneous participants of the unprecedented "One Country, Two Systems" experiment premised upon "a high degree of autonomy". The ensuing years witnessed a series of constitutional disputes-turned-crises, deadlocks in political reforms, and most worrying of all, perceived erosions into Hong Kong's vaunted judicial autonomy. At the same time, there emerged a more alert citizenry who are becoming ever more vigilant in defending their rights against a government devoid of a popular mandate. That saw a steady rise, on the one hand, in the number of organised mass protests and assemblies, and judicial reviews challenging the law or official acts, on the other. Politics in both the street and the court bear witness to a post-colonial liberal society in search of its place as a Special Administrative Region (SAR) under Chinese rule.

Its blossoming civil society contrasts a less promising development. A series of incidents in the SAR's formative years raised questions about government's sincerity in defending Hong Kong's "high degree of autonomy". Concerns arose following the decision of *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 772 [*David Ma*], where an act of the Central People's Government (CPG) was challenged a week after the

handover. Holding a narrow view of Hong Kong's autonomy, the SAR government argued that local courts have no power to review acts of or legislation passed by the PRC which reigns over all affairs of Hong Kong (with which the Court of Appeal agreed, only to be overruled two years later, as discussed below). The following years saw all manner of controversy in which government was seen either second-guessing the CPG in cross-border jurisdictional matters or going soft on state agents or Beijing-friendly individuals suspected to be in breach of the law (Ghai, 2000, pp.7-8); so much so that its political will in defending the rule of law has been thrown into question (Tsang, 2001, pp.1-12; Tai, 2010, pp.303, 306). But the gloom cast over the fate of "two systems" under "one country" should come with a caveat: the success of this "barren-island-turned-prosperous-town" (Ghai, 1999, p.25) has always lay in the strength and resilience of its people. Hence, I argue that it is the "collective commitment of the people to the rule of law" that helps to sustain Hong Kong's "high degree of autonomy" (Bokhary, 2012, p.374). Such a commitment can only be found in an educated public versed and confident in the idea of the rule of law.

Rule of Law under Trial (again)

One and a half decades after reunification, the precariousness of "One Country, Two Systems" remains the phantom lying in the depth of Hong Kong politics. Its shadow emerged as the superior court, the Court of Final Appeal (CFA), in a controversial decision, *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 [*Ng Ka Ling*], granted the right of abode to Mainland-born children of Hong Kong permanent residents based on its interpretation of the Basic Law, the SAR's constitution. Besides, the CFA's bold declaration of judicial mandate to review even acts of the CPG, effectively overruling *David Ma*, offended the Chinese authorities. But it was the reaction of the SAR government — asking China's top political body, National People's Congress Standing Committee (NPCSC), to (re)interpret the relevant Basic Law provisions pursuant to Art 158, so as to overturn the decision that shook the rule of law to its core two years after return to Chinese rule.

Fast forward to 2012; this time, the phantom lurked at the background of passing remarks from Elsie Leung, vice-chairwoman of the Basic Law Committee and former Secretary for Justice. During a seminar, she reportedly opined that the legal profession - judges included - failed to understand the relationship between Beijing and Hong Kong, resulting in flawed court rulings and usurpation of the central government's power (Chiu, *SCMP*, 11.10.12). She went on to say that Hong Kong government should seek NPCSC to interpret the Basic Law, so as to plug a legal gap and fix a host of social problems arising from a skyrocketing number of Mainlanders giving birth in the city. The influx of the so-called "double negative" pregnant Mainland women - where neither themselves nor their spouses are Hong Kong permanent residents - was widely attributed to the CFA's decision in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 [*Chong Fung Yuen*] that upheld the right of abode of Chinese nationals born in Hong Kong (disregarding a comment the NPCSC made after *Ng Ka Ling*). Leung's remarks brought to mind the spectre of the 1999 right-of-abode saga,

prompting the two professional bodies, the Bar Association and the Law Society, to go on the defensive, which in separate statements cautioned against seeking another NPCSC interpretation of the Basic Law (Ng, *SCMP*, 13.10.12). Yet it was only the beginning.

Three weeks later, in his farewell speech, retiring CFA judge Kemal Bokhary spoke of "a storm of unprecedented ferocity" clouding the rule of law in Hong Kong (Chiu, *SCMP*, 25.10.12). He was apparently referring to the call for reviewing the judgment of *Chong Fung Yuen* (Ng, *SCMP*, 13.3.12), alongside the "atmosphere created by the mere fact that this call is being made." Then, in a rare television appearance, Bokhary — famous for his vigorous dissenting judgments and whose departure was rumoured to be linked to his known liberalism — admitted, "If you were asking if I believe that the reason why I wasn't extended is because of my liberal judgments, then I would tell you that I do believe that." (Ng, *SCMP*, 5-11-12).

In the gathering storm, two Beijing-friendly Basic Law experts reportedly endorsed a Chinese nationals-only CFA to reflect its status as a "national court" (Lee, *SCMP*, 5.11.12)¹, only to be promptly refuted by the Secretary for Justice that such a move would contravene the Basic Law². Later, Andrew Li, retired Chief Justice who presided over the right-of-abode decisions in the past decade, spoke at the city's oldest law school of Hong Kong's political challenges under the Basic Law, and urged everyone in society, the legal profession in particular, to be vigilant in defending the rule of law³. On the same day, a state-controlled newspaper *Global Times* published an interview with Elsie Leung over "One Country, Two Systems", in which Leung reportedly said that the Basic Law does not rule out changes in Hong Kong. She said, the "legal system itself is ever changing" (*Global Times*, 8.11.12). That reminded one to revisit Deng Xiaoping's 50-year "unchanged" promise the proviso of which finally reared its head⁴. Deng said in 1984, "not all changes are bad". "If some people say there will be no changes whatever, don't believe them." Referring to Hong Kong people's worry about "intervention" from the central authorities, he said, "again, we should not fear all interventions; intervention in some cases may be necessary."

The row continued in relation to the more recent controversy over the right of abode for foreign domestic helpers. In an unprecedented move, the Secretary for Justice asked the CFA to seek an NPCSC interpretation of the Basic Law in order to resolve, once and for all, the right-of-abode disputes for both foreign domestic helpers and Chinese nationals born in Hong Kong of Mainland parents. As expedient such a move may appear, objection lay in the fact that the requested interpretation would affect provisions not being immediately argued and the latter group who was not legally represented in the case (Moy & Chiu, *SCMP*, 19.10.13). At the end, the CFA refused to seek an interpretation while ruling against the domestic helpers, giving a momentary sigh of relief as far as Hong Kong's judicial autonomy is concerned (Moy, *SCMP*, 26.3.13).

This latest round of legal dramas illuminates the high stakes which rule of law continues to yield in the *laissez faire* former colony fifteen years into its reunion with

its communist one-party-rule motherland. Can a judicial storm ruin Hong Kong, as an editorial of a leading local newspaper once headlined? (*Ming Pao*, 6.11.12) The answer, to a large extent, lies in whether or not its people continue to trust - and support - the rule of law, the viability of which under Chinese rule has always been questioned (Berring, 1997). To advocates of constitutionalism, it entails two fundamental concerns. First, the public must put trust in those who are obliged to uphold the rule of law without fear or favour. Further, this people must be prepared to "act in some way to force those custodians to keep to their trust." (Parry, 1976, p.140). To achieve this, it requires "some consensus that the rule of law is valuable and is to be made effective"; it requires some agreement among a broad spectrum of society over "the value of constitutional procedures". Fundamentally, it comes down to instilling in the public the idea of the rule of law, and for them to make an informed decision in which direction society should go.

Public Trust in the Rule of Law

A people amid a changing mindset

It is no exaggeration to say that Hong Kong was founded on the rule of law (Beatty, 2003, p.93). In colonial times, the transplant of the British common law system helped create the lure of this barren rock to overseas traders and its transformation into a major financial centre (Ghai, 1999, p.25). Back then, the rule of law — practised as a doctrine of procedural fairness — was an effective governing tool when democracy and political accountability ran short⁵. It was also an anchor securing the hearts and minds of a hardworking people largely made up of Chinese migrants fleeing across the border yearning for a better life (Hsu, 1992, p.21). But its ideology is even more powerful (Cottrell & Ghai, 1999, p.127). Emphasising the unique status of rule of law in Hong Kong community, the last colonial governor Chris Patten said this: "It is the Rule of Law which provides a safe and secure environment for the individual, for families and for businesses to flourish. This is the best safeguard against arbitrary and overbearing government. It is the very essence of our way of life." (Patten, 1995, para.6). For all the limits inherent in a colonial common law system, it, in tandem with the rule of law, established an enduring norm that law keeps the state in check and protects people's lives (Ghai, 1999, pp.24-26).

As change of sovereignty neared, the ideology of the rule of law played a role in raising "public consciousness of rights and the value of fair administration" (Ghai, 1999, p.26). Central to this ideology is a view that sees law as "an instrument of justice and not merely an instrument of power" (Bokhary, 2004, p.135). In the run-up to the handover, it helped set a benchmark of a credible legal system to pacify an unsettled population as well as skeptical local and international business and political leaders amid continued wrangles between the Chinese and British governments, for example, over the establishment of the CFA as the SAR's final appellate court (Lo, 2000, pp.226, 230). To a large extent, the ideology of rule of law helped lay the foundation for Hong Kong's legal system post-1997 that is the rising assertiveness of its people (Bokhary, 2012, pp.383-384), who not only expect "more of the government and more from the

government" (Bokhary, 2012, p.379), but are also "sensitive to legal issues and interested in discussing and debating them." (Chen, 2006, p.682) On the other hand, this ideology is probably one of a few things that unite political elites of all stripes. As a study conducted during 1997-2002 found, legislators across the political spectrum "were unwilling to make any compromise regarding the rule of law" (Beatty, 2003, p.97). Together, they are telling signs of a society not yet fully democratic but having virtually all the trappings of a liberal rule-of-law polity (Chen, 2006, p.682). Despite qualms about the snail's pace of democratisation, one may take solace in the recent "upgrading" of Hong Kong's democratic rating from a "hybrid regime" to a "flawed democracy", being on a par with Taiwan and a far cry from China's "authoritarian" status (*Economist*, 2013).

To most common law lawyers, the rule of law is "closely linked with the values of a liberal democracy" (Steyn, 2004, p.133). Yet, for decades, Hong Kong has bucked this conventional wisdom as being liberal but undemocratic. That had Chris Patten conclude that Hong Kong was the only place he has yet been able to call "liberal but not (alas) democratic" (Patten, 2006, p.284). This situation went largely unchallenged in the erstwhile *laissez-faire* colonial society, where individuals ceded democracy for liberty under a fairly clean and efficient government. But regime change came with it a fundamental shift in people's mindset about what they expect of a leader purportedly from one of their own (Bokhary, 2012, pp.378-379). Deng Xiaoping's notion of "Hong Kong people running the affairs of Hong Kong" (Deng, 1994, p.70), under the auspices of the Basic Law's "high degree of autonomy", appeared to have upped public expectations on political liberalisation after reuniting with the motherland in 1997. The mindset is of a people who could finally be "the master of their own destiny" in a once borrowed land they have long called home. Hong Kong's democratic deficit, with which veteran activists have been grappling for decades (Sing, 2004), awaited a final solution under the promise of "universal suffrage" according to Arts 45 and 68 of the Basic Law.

Yet, genuine progress was sparse. An electoral reform package was vetoed by all pan-democratic legislators in 2005 for want of a roadmap for universal suffrage (Chen, 2005). Five years later, a twist of events led to a dramatic compromise from the Democratic Party (DP), and a split within itself and the pan-democratic force as a whole. That happened in early 2010 when core members of DP met Chinese officials at the PRC's Hong Kong Liaison Office behind the door over electoral reform. The resulting compromise package — which increased the number of directly elected Legislators but retained the controversial functional constituencies — won DP's backing that saw its passage in the Legislative Council but at a huge cost. DP's unilateral U-turn bitterly divided the then loosely aligned pan-democrats as well as the Hong Kong public (Cheung, Wong & Fung, *SCMP*, 25.6.10). Frustrations over the deadlock of democratisation prompted certain segments of society to radicalise. DP's image of capitulating to Beijing was etched onto the minds of many supporters, resulting in a heavy trouncing by the rising radical forces in the following election, and a society getting increasingly polarised (Ma, 2011).

Today, gathering clouds over the city's political future have thrown society into

increasing disarray. Universal suffrage becomes a dream ever more elusive despite Beijing's initial promise for it to be held in 2017 and 2020 respectively for electing the Chief Executive and all members of the Legislative Council. The 2013 maiden Policy Address of the beleaguered Chief Executive C.Y. Leung, who has weathered one scandal after another since taking up office in July 2012, made little mention of the electoral arrangements come 2017°. Meanwhile, a constitutional law expert threw down the gauntlet, boldly espousing civil disobedience based on his idea of "justice through law" as a last resort to achieve universal suffrage. (But, *SCMP*, 16.2.13). That apparently touched the raw nerve of the CPG, who, through various Mainland officials, reiterated that only patriots, defined as those who "love the country and Hong Kong", are eligible to rule Hong Kong (But & Lee, *SCMP*, 25.3.13). Such rhetoric culminated in comments made by the NPC Law Committee chairman Qiao Xiaoyang in March 2013 that, consultation on political reforms should not begin until society agreed that those who confront the CPG should not become Chief Executive (Lee, *SCMP*, 29.3.13).

Perceived threats to Hong Kong's "high degree of autonomy" and deadlocks in democratisation coincided with increasing public frustrations over public governance. A yawning wealth gap, escalating cross-border tensions, and an identity crisis are but some of the acute challenges facing Hong Kong ever since the handover (Cheung, 2009). At the same time, a societal transformation is underway. A series of social malaises helped catalyse the emergence of various grassroots groups taking the task of changing society into their own hands (Chen, 2009; M Chan, 2009). Over the past decade, Hong Kong people have become increasingly at ease with the idea of staging mass protests and assemblies to air grievances and demand government accountability (Drew, *NY Times*, 1.7.11). Their diverse concerns range from publicly funded projects seen as surrendering local interests for the rich and powerful such as the construction of the Hong Kong segment of the Mainland's high-speed rail networks (Lee, *China Post*, 16.1.10) and development of the North-East of the New Territories (Lai, *SCMP*, 21.9.12), to introduction of an allegedly "brain-washing" national education curriculum to local schools (Chen, *WSJ*, 2.9.12), and demanding resignation of an unelected and unpopular Chief Executive (*Aljazeera*, 1.1.13). It saw the total number of mass rallies and assemblies rise from below 2000 in 1997 to nearly 7000 in 2011, a threefold jump in 14 years (Lam, *SCMP*, 6.1.13). What's more, the anniversary marking reunification with China has turned into a yearly civic ritual to demand full democracy for Hong Kong (*BBC*, 1.7.12).

Changing society through law?

Such was the changing mindset of a people whose assertiveness grows as society's democratic deficit exacerbates — largely a result of Hong Kong's underdeveloped electoral system, the reform of which has been held back by institutional barriers under the Basic Law and the close watch of Beijing (Ghai, 2007, pp.403-404; Ma, 2008, pp.158-163), which favours neither western-style multi-party politics nor separation of powers (*China Daily*, 10.3.09). With a chief executive produced by a "controlled" small-circle election and a dysfunctional legislature institutionally designed to

disempower its members (Ghai, 1999, Ch.7), let alone those returned by popular votes, there is little surprise that aspiring reformists turned to the most "undemocratic" of the three institutions — the judiciary — to challenge the government by way of judicial review (Chan, 2007, pp.409-410; Ghai, 2007, pp.373-374).

The right to challenge executive acts in court had long existed under colonial rule. But it was after the enactment of the 1991 Bill of Rights Ordinance incorporating international human rights standards into domestic law, that ushered in an era of judicial review on grounds of constitutional rights well into Hong Kong's new constitutional order (Chen, 2006, pp.653-656). Article 39 of the Basic Law ensures the continued application of international human rights law in Hong Kong under Chinese rule. That opened a legal channel through which disfranchised ordinary people take part in addressing Hong Kong's democratic deficit. In Geraint Parry's words, it is to force the custodians of government to keep to their trust. While judicial review cases had averaged around 70 annually in the few years before return to Chinese sovereignty, its number soared steadily after July 1997. According to statistics, on average 100 to 120 judicial review cases reached the CFA every year in the decade between 1998 and 2008, after the peak of nearly 4000 cases plateaued in 2002 when right-of-abode litigations were at their height (C Chen, 2009, p.8). Today, "public interest litigation" by way of judicial review remains a popular idea among NGOs and social activists in their political manoeuvring with government (Kong, 2009, p.328).

That "the legitimacy of an unelected judiciary to strike down legislation properly enacted by the Legislature has never been questioned" (Chan, 2007, p.410) speaks volumes about the state of political community in Hong Kong. The result is what Yash Ghai perceptively described: "There is a tendency to convert political and social issues into legal issues, due to the weakness of the political structure and the relative strength of the legal system." (Ghai, 2000, p.8) It handed the conventionally politically aloof judiciary an unenviable task of having to confront the executive, and sometimes, the CPG (Ghai, 2000, pp.8-10). On the one hand, the court found itself grappling, with both activism and restraints (Chen, 2006, pp.629-630), a plethora of policy and moral issues concerning, for example, resources allocations⁷ and rights of sexual minorities⁸, that make for political deliberation both in depth and in width; and on the other, it must navigate, with great delicacy, between two inherently conflicting legal systems and political cultures (Weng, 2001, pp.69-70), when adjudicating over the extent of CPG's powers under the Basic Law as seen in the right-of-abode controversies since 1997.

Needless to say, there has been incremental pressure on the judiciary to delve in an expanding variety of political-dressed-as-legal matters. While it might well be a positive sign of civic engagement⁹, the court was certainly aware, as then Chief Justice Andrew Li has spoken in two consecutive annual judicial ceremonies, of the pitfalls of habitually bypassing the political process¹⁰. For one, the court can never provide a panacea for the various political, social, and economic problems society constantly faces. As Li reiterated in his 2006 speech, "It is only through the political process that a suitable compromise may be found, reconciling the conflicting interests and

considerations in question and balancing short term needs and long term goals. The responsibility for the proper functioning of the political process in the interests of the community rests with the Administration and the Legislature." In concurrence, Johannes Chan shared his concern that the continued "politicisation" of the judiciary might one day wreak havoc upon itself. It is because the judicial process does not always produce a result that finds favour with the litigants. Once court decisions fail to meet popular demands, its own integrity and independence, and even the rule of law, will likely suffer (Chan, 2007, pp.446-447).

Undesirable as the situation may be, it does indicate a substantial degree of trust which the court, arguably the only and remaining independent branch in Hong Kong government (Martin, 2004, p.475), commands. Of course, one should not idealise the judicial process, not only because it is not a panacea to all social ills, but also because it is also "never perfectly objective or completely constrained by pre-existing law, and judges are necessarily influenced by all kinds of extra-legal factors, of which 'political reality' is perhaps the most significant." (Wesley-Smith, 2003, p.172) Yet, for all its limitations, the court provides an alternative forum, besides the streets, for citizens to raise concerns and garner support over issues of public interest (Chen, 2009, p.72), and subject the executive to rigorous scrutiny through an open and reasoned process (Ghai, 2000, p.9). Since reunification, Hong Kong courts, in particular, the CFA, have articulated human rights and constitutional principles in a long line of cases that established the judiciary as the bastion of rule of law (most notably in the series of right-of-abode decisions), and in some cases, a springboard of social reforms (Bokhary, 2010, pp.228-232). The enfranchisement of non-indigenous villagers in electing village representatives in the New Territories (*Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459), and harmonising treatment between heterosexuals and homosexuals under the Crimes Ordinance (*Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335) on the grounds of equality, are but some of the prominent examples where the judicial process helped accomplish what government has not accomplished due to inertia or politics.

Paying the Price for Rule of Law

Its myriad achievements notwithstanding, the judicial process can be a double-edged sword for the rule of law. While it can strengthen support to the legal system, for example, as a result of a generally well-received court decision, it can also invite attack when it fails to deliver what people desired. No matter how proud one may be of Hong Kong's judicial independence and sophisticated civil society, it is when a principled court decision falls short of public demand that the people's commitment to the rule of law is put to the test (Tsang, 2001, p.12). A willingness to challenge government policies through the judicial process, therefore, is not conclusive as far as the degree of civic commitment to the rule of law is concerned. From a social activist's perspective, the law is itself "a medium and arena of social struggles" with its accompanying legal norms and rights discourse. In that sense, litigation is an important "institutional" channel for social movements to publicise their causes, mobilize support, and arouse discussions, in addition to street politics in the form of protests and assemblies (Chen,

2009, p.71). A thriving scene of public interest litigations, therefore, does not necessarily translate into a strong rule of law culture for society as a whole. At stake is whether society is prepared to pay the price for commitment to the rule of law, that is, to respect a decision made in accordance with sound legal principles, even though it means accepting results that one may not want to see, be it mere inconveniences or undesirable social or economic eventualities (Tsang, 2001, p.12).

In this light, how has Hong Kong fared so far? Despite its reputation as an exemplar of rule of law, over the past one and a half decades, society has experienced occasional lapses when its commitment to it was under challenge. The first test arrived as soon as the former colony returned to Chinese rule, when the right of abode for tens of thousands of Mainland-born children of Hong Kong permanent residents immediately became a question. Before 1997, their entries were subject to restrictions from both Mainland and Hong Kong authorities. Upon handover, foreseeing a possible influx of migrants across the border, the SAR government swiftly amended the Immigration Ordinance imposing restrictions on those children including the requirement of a "one-way permit" issued by Mainland authorities. Nevertheless, they counted on Art 24(2)(3) of the Basic Law which, in plain language, unconditionally confers permanent residency on Chinese nationals born outside the territory of Hong Kong Chinese permanent residents. A series of right of abode litigation ensued and culminated in the landmark case, *Ng Ka Ling*, in which the CFA in January 1999 declared unconstitutional the amended immigration provisions and upheld the claimants' right of abode.

That rattled the SAR government. Going on the offensive, it claimed that, on the basis of its own surveys undertaken immediately after the judgment, an estimated 1.67 million Mainlanders would be eligible to settle in Hong Kong at a whopping public cost of \$710 billion (plus an annual \$33 billion for related services) in the coming decade (Lo, 2008, p. 98) — an unbearable price for society. If that was not burdensome enough, then Secretary for Security, Regina Ip, reportedly suggested that such an influx of migrants might bring more crimes and plunge the SAR into chaos. The government's doomsday lyrics, controversial in themselves (Fung, 2004, pp.107-108), reverberated through the scores of pro-establishment press (Bernama, 29.4.1999), Beijing-loyalist Legislators, Executive Councilors, and to some extent, the Law Society (Lo, 2008, p. 101; Ghai, 2000, pp. 398-399), gradually drumming up public support as it prepared to make the case in seeking an NPCSC interpretation of the Basic Law so as to overturn CFA's decision.

Despite warnings from legal experts and pan-democratic Legislators (including two former Hong Kong members of the Basic Law Committee) on the likely damage to Hong Kong's judicial independence (Lo, 2008, p. 99)¹¹, the government's scare tactics apparently pulled the public on its side, as indicated by several public opinion polls conducted at the time. According to one commissioned by the Chinese University in early May 1999, 78.5% of respondents found the CFA judgment wrong because of its adverse effects to society (Wen, 2001). A month later, the same pollster found that 60.1% supported the government's move while 32.9% opposed it. When asked to choose from a list of factors the principal of which determines whether Mainland

children of Hong Kong parents should have the right of abode, the majority, 63.3%, chose "the collective interest of society", while only 12.2% picked "the legal viewpoint" and 11.7% "human rights." Other surveys conducted during the same period saw similar results, in which the general public appeared to care more about the immediate result than principle in the face of an imminent influx of Mainland migrants, and its nightmarish consequences (Wen, 2001). That provided explanation to a high level of public support to inviting Beijing's interference with the court decision (Cheung & Chen, 2004, p. 82; Ren, 2007, pp. 310-311).

The dynamics in public opinion in the right-of-abode saga also says something about the ethos of Hong Kong society, especially its juxtaposition with a colonial-turned-Chinese-SAR regime yet to find a firm footing (Ku, 2000, p.354). In a way, a strengthening notion of "Hong Kong Identity" (Chan et al., 1999, pp. 16-17), coupled with an embedded "hegemonic discourse of success" that features a tendency to disparage the inferior "others" — back then, new Mainland migrants (Ku, 2002, p.355), somehow played into the hands of a novice administration dogged by "a certain degree of idiosyncrasy, inconsistency, and bias in its interpretation of the meanings of rule of law, individual freedom, and democracy without showing a genuine commitment to such principles." (Ku, 2002, p.354) At the same time, steeped in the mantra of an "executive-led government" — a colonial inheritance which the CPG favours (Delisle & Lane, 2004, p.1681; Tai, 1999, pp.43-44), the SAR leadership bent on steering public discourse towards the ideas of stability, prosperity, and administrative efficiency. Although not undesirable in nature, the dominance of this pragmatist ideology has the effect of undermining alternative discourses such as democracy, especially when the latter entails unwelcome consequences (Ku, 2002, p. 357).

Such was in full display in the right-of-abode narrative in the aftermath of *Ng Ka Ling*. At its core were two seemingly competing discourses, in the form of "stable and prosperous governance" and "judicial autonomy (rule of law)". As spokesperson for the former, the government succeeded not only in stoking fear through the doomsday imaginations of Hong Kong public of an "invasion" of Mainlanders, but also in aggravating the deep-seated prejudice against this group by painting them as unruly and parasitic — in parallel to a present-day narrative where the same group is seen by many as "locusts" in their insatiable craze for the city's consumer goods and daily necessities (Chow, *WSJ*, 1 Feb 12). In all that, the ideology of "stable and prosperous governance", crafted as the key to Hong Kong's success, overshadowed that of the rule of law, and possibly reduced it to a means of resolving a social crisis (Ku, 2002, p.356). The resulting high support to the SAR's decision to invite NPCSC interference can be seen through this lens of "prosperity and stability over all else", in resonance with Deng Xiaoping's immortal thesis "the need for stability overwhelms everything else" (He, 2001, p.471-472) that undergirds PRC policies over all else, including that of Hong Kong (Cheung & Lee, *SCMP*, 18.3.13).

If that "inconvenient" judgment was a litmus test for Hong Kong's rule of law, this episode did not bode well in terms of the commitment of the public. For one, it revealed

the existence of an instrumentalist view of law that stresses "consequentiality", i.e. the outcome, over "appropriateness", i.e. compliance with legal norms and principles (Ng & Kuan, 2006, pp.34-35). This tendency is more obvious when adherence to the latter means advancing the rights of minority groups at the expense of the majority (Wen, 2001). In this connection, the mostly adverse response over foreign domestic helpers' claim for the right of abode under the Basic Law on grounds of equality becomes strikingly familiar. Soon after several applicants filed their judicial reviews in 2010, the government announced that approximately 125,000 foreign domestic helpers, mostly of Southeast Asian origins, have been living in Hong Kong for at least seven years, essentially hinting at the number of potential immigrants (Cheung & Chiu, SCMP, 15 Aug 12). Pro-establishment politicians waded in after the Court of First Instance ruled in an applicant's favour, in *Vallejos Evangeline Banao v Commissioner of Registration and Another* (30/09/2011 HCAL124/2010). Members of the Federation of Trade Unions (FTU) protested outside the High Court (Guo, *China Daily*, 27.10.11). The Democratic Alliance For the Betterment and Democracy of Hong Kong (DAB) went further, warning that unemployment rate would rise from 3.5% to 7% should all these people enter the job market at the same time, and skyrocketed to 10% if their families were included, with the estimated number of immigrant intake totalling 500,000. It followed that such an influx of people would incur huge burden on welfare, education, housing, and healthcare (Li, *China Daily*, 27.7.11). Suggestions of seeking Beijing's intervention were floated by a major employers' group (Drew, *NY Times*, 30.9.11), and alas, a legislator with a law background (Guo, *China Daily*, 27.10.11).

Public opinion, in *déjà vu*, was drawn to the government side, and sentiment flared up following an applicant's initial triumph. In a political twist, the Civic Party, a popular party founded by several senior lawyers, shouldered much of the blame. It suffered a sudden plunge in support as one of its founders was found to have represented the successful domestic helper, adding to the simmering antagonism against the party as a result of its earlier support to the applicant of another controversial judicial review case, that had briefly halted the construction of Hong Kong-Zhuhai-Macau Bridge and allegedly "wasted" tens of millions of public money (Chong, SCMP, 14.8.12). Sensations surrounding the domestic helpers' cases saw 10,000 people from a band of obscured groups take to the street, targeting the Civic Party for having "imposed the opinion of a minority onto the general public". (Li, *China Daily*, 10.10.11) That prompted the party into a damage-control mode, and its leaders to distance themselves from the lawsuits by reiterating the party's non-involvement in the matter (Civic Party, 9 Aug 11).

The list could go on, in which judicial reviews concerning matters of social significance were criticised as harming sectorial interest. *Lo Siu Lan v Hong Kong Housing Authority* [2005] 2 HKLRD 208 (CFA), a pensioner's eleventh-hour legal challenge against the initial public offering (IPO) of Link Reit in 2004, is another classic example. Widely anticipated as a lucrative investment opportunity, the ensuing disruption to Link Reit's public listing attracted overwhelming attacks targeting Madam Lo and her supporters. The unsuccessful challenge was later vindicated, as tenants

suffered skyrocketing rents in formerly government-owned commercial properties, now under the management of the eventually listed Link Reit trust¹². In this case and others, law was regarded as a means to an end and valued for its functionality instead of normality. This rather "positivist" view - that sees law as partly policy (Fiss, 1998, p.496) - contrasts a "naturalist" view whereby law is to be applied in accordance with "substantive standards of what justice demands of a sovereign" (Delisle & Lane, 2004, p.1469).

The tendency to see law's role as fulfilling majority expectations further illustrates why its double-edged-sword nature can undermine the rule of law, when judgments, however principled, fail to satisfy the "instrumental" demands of the public. If the rule of law is indeed a value Hong Kong people hold dear, it pays to articulate what a commitment to the rule of law really means. At this point, worth-pondering is what Mark Daly, lawyer representing the domestic helper litigants who lost their final appeal for the right of abode, said after the judgment: "While we respect the judgment we disagree with it", and it is "not a good reflection of the values we should be teaching youngsters and people in our society." (*BBC*, 25.3.13).

Fostering a Rule-of-law Culture Through Education

Law is fundamentally about values. Values interlock with culture. With Hong Kong's continued democratic deficit amid ever-growing civic activism, it is imperative to foster a rule-of-law culture. Facing an administration devoid of a popular mandate and a semi-democratic legislature with limited clout, powerless citizens can only look to the court to keep the government in check. However incompetent the judiciary may be in resolving society's myriad problems, it is constitutionally obliged to ensure that "the political agenda is not hijacked by the majority in parliament so as to prejudice the legitimate rights and interests of the minorities." (Chan, 2007, p.446) But as the court of law, there remains a limit as to how far it can go in addressing public expectations, especially when society becomes ever more pluralistic and interests ever more diverse.

In those right-of-abode cases, for example, be it concerning Mainland born children of Hong Kong permanent residents, Chinese nationals born in Hong Kong of Mainland parents, or foreign domestic helpers having lived in Hong Kong for seven years, there are genuine rights and interests on both sides of the disputes worthy of considering, however selfish or parochial some of them appear to be. Under the adversarial nature of the judicial process, one of the parties is bound to be disappointed. When this happens to be a party having a lot of interests under its belt, or whose claims the majority backs, an unfavourable judgment may in some cases backfire in the court of public opinion. That in turn puts the judiciary in a difficult position, to the point that its decision may be considered to be against public interest albeit sound from a legal perspective. What happened in the aftermath of *Ng Ka Ling* and in the lead up to the final appeal of the domestic helper's case perhaps show just that.

A vital element of the rule-of-law culture is an appreciation of the court's role in defending the constitution and people's rights, not assisting or confronting the

administration. On this account, Hong Kong people appear to be at a crossroads in endorsing one or the other. In a 1990 survey, respondents were asked to choose from three purposes of law: (1) to facilitate the rule of the government, (2) to protect citizens' rights, and (3) both. 1% of them chose (1), 22.8% chose (2), and an overwhelming 70% went for both (Kuan, 1992, p.163). Not a surprising outcome given Hong Kong people's pragmatism. The same questions asked by the same researcher five years later yielded a mixed result. This time, 2.9% chose (1), and a higher proportion, 43.9% chose (2), while 42.2% opted for both (Kuan, 1997, p.173). Interpreting the 1995 findings, Kuan Hsin-chi wrote that given the plurality of respondents sitting on the fence, they might not represent an "outright rejection of political expediency in favour of civil rights" (Kuan, 1997, p.173). More revealing was what Kuan said of his 1990 findings: "when citizens' rights are juxtaposed with the need for administrative convenience in simple terms, the people of Hong Kong would definitely go for the former. It is only when adversary implications of 'protecting citizens' rights' in terms of public order become obvious, that the people of Hong Kong have second thoughts." (Kuan, 1992, p.164) Looking back at a decade of right-of-abode controversies, his comment encapsulated Hong Kong people's ambivalence towards the rule of law and the rule of expediency.

What is the court's role in defending rule of law in the face of expedient demands? In a famous footnote in constitutional law, the U.S. Supreme Court stated the value of judicial review in reining in the power of the majority. In *U.S. v Carolene Products Co* 304 US 144, 152 n. 4 and accompanying text (1938) (Stone J.), said that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities". What Hong Kong faces nowadays is more than inequality of the minorities. At issue is a perpetual imbalance of political powers between the elite and the citizenry. At the core is a chief executive election that excludes the majority of the population; a legislature skewed towards the establishment under the auspices of functional constituencies that prevents those popularly elected from holding any sway. While it is understandable then for people to treat the court as the last bastion of rights protection, it is important for society to reach a consensus over "the value of constitutional procedures" and their proper functioning, so that judicial review would be seen as it is. In any case, the judicial process is not the proxy of the legislature and incapable of resolving problems the political process could not.

Culture evolves over time. In the process, education is the key to instilling ideas and nurturing consciousness. While Hong Kong people have always been proud of this defining feature of their society, the articulation of the idea of rule of law is a totally different matter. Its being the exclusive realm of judges, legal practitioners, law students, and politicians is an untenable situation in the face of an increasingly sophisticated and rights-conscious society (Kuan, 2005, p.40). In this regard, the government has an undeniable duty in promoting the rule of law in schools and the wider community. Yet, its lack of commitment in strengthening human rights awareness in its three decades of promoting civic education mirrors the meagre attention given to that of rule of law. (Chong, Kwok & Law, 2010, pp.11-15) An overhaul of the secondary school

curriculum in 2009, that introduced Liberal Studies as a mandatory subject to broaden student learning including legal knowledge, could have been an educational opportunity on the rule of law for all. Regrettably, research found that many Liberal Studies teachers lacked sufficient understanding of, or even held biased views against the rule of law. (Centre for Governance & Citizenship, HKIED, 2011, Ch. 5; Ho, *SCMP*, 12.2.12) Under this circumstance, what becomes of their students is a topic that educators and all concerned parties should address post haste. A vibrant civil society powered by the growing league of grassroots and student-led organizations will no doubt play an active role in nurturing a culture of rule of law and rights discourse.

Social scientists have long acknowledged the "ideological" function of civil society (Ma, 2008, p.156). As a "counter-image of the state", a strong civil society "alters the balance of power between the state and society, disciplines and monitors the state, redefines the rules of the political game along democratic lines, and acts as an intermediary between the state and society." (Ma, 2008, p.157). Since emerging in the 1970s, civil society organizations in Hong Kong have been characterised as being largely *ad hoc*, topical, and apolitical (Ma, 2008, pp.161,163). Detachment from mainstream politics, however, helped preserve their autonomy, flexibility, and after 1997, immunity from state encroachment (Ma, 2008, p.167). Their *ad hoc* nature broadened participation from all walks of life, as seen from the mass protest against national security legislation on 1 July 2003, to the city-wide campaign against national education in 2012. United by an overriding concern, for example, civil liberties in both cases, the respective movements succeeded in mobilising those who would normally shy away from anything political. While spontaneity may mean limited staying powers, both campaigns, a decade apart, played an educational role in enlightening the public by encouraging discourse and countering official narratives.

The 2012 campaign, in particular, revealed Hong Kong's civic strength. Remarkable was how an initial alliance of anonymous secondary school students and concerning parents catapulted into an united societal front, leading to an abrupt government compromise (Lau, Nip & Wan, *SCMP*, 9 Sep 12). Instead of fading away, members of the spearheading students' group, *Scholarism*, remain active, ensuring the staying powers of their cause while pressing for other social and political reforms (Lau, *SCMP*, 30.12.12). In many ways, this anti-national education movement is a collective educational experience for all. Incessant media coverage and Internet communications spawned intensive and extensive public discourse over the subject matter. Students, teachers, parents, NGOs, religious groups, novice and veteran social activists lobbied alongside concerning citizens, making it a city-wide movement. Their accomplishment went beyond an official back-down. More profound was the resulting sense of vigilance over government's future endeavours, as its insidious efforts in steering civic education towards a nationalistic course over the past 15 years were thrown into the spotlight (Tse, 2007, pp.163-166).

Likewise, civil society serves an important "ideological function" in fostering a rule-of-law culture in Hong Kong (Ma, 2008, pp.156,175; Tse, 2007, p.162). Standing between society and the state, it plays an important role in disseminating alternative

discourses other than the propaganda of "prosperity over all else". Schools, families, communities and civil society organizations are places where such education begins. Of course, every free-thinking citizen is allowed to reject the morals of rule of law and embrace those of expediency; "but his education should be such that, if he does so, he does it by deliberate choice, with awareness of the consequence for himself and others, and not by sluggish self-deception." (Lasswell & McDougal, 1943, p.212)

Conclusion

One may have many reasons to worry about the "ferocious storm" hanging over Hong Kong's rule of law. Its maturing civil society and civic consciousness provide other reasons for one to stay positive. From NPCSC's first Basic Law interpretation in 1999, to 2003's mass protest against national security legislation, and the all-out movement against national education in 2012, Hong Kong people have weathered one storm after another; their quest for rule of law ever stronger. At times, they might lose "their bearings" when political expediency got the better of them (Cheung & Chen, 2004, p.82). Yet, they will keep defending this defining trait of Hong Kong. There is a saying: "the price of freedom is constant vigilance" (Luk, *Standard*, 7.1.13). For Hong Kong, survival of the rule of law demands both constant vigilance and a rule-of-law culture.

Barry Hsu wrote in 1992: "The successful operation and continuance of the Rule of Law in Hong Kong depends on the extent to which the Chinese population struggles for its rights both before and after the People's Republic of China resumes sovereignty over Hong Kong." (Hsu, 1992, p.54). Three decades on, the rule of law, for all the ups and downs, twists and turns, lives on; and it will, should society refuse to let go of Hong Kong's enduring source of success, that is, "a collective commitment of the people to the rule of law" (Bokhary, 2012, p.374).

Notes

1. Alan Hoo SC has since "clarified" his stance. See Colleen Lee & Lauren Ho, "Basic Law Expert Alan Hoo Clarifies View on Chinese-only Judges", *SCMP* (13 Nov 12).
2. Articles 82 and 92 of the Basic Law authorize the appointment of overseas judges to the CFA and other levels of court. Nationality requirements only apply to the Chief Justice of the CFA and the Chief Judge of the High Court under Art 90. See Rimsky Yuen, SC's statement on 6 November 2012, available at <http://www.info.gov.hk/gia/general/201211/06/P201211060506.htm>.
3. Speech at the Dedication Ceremony for Cheng Yu Tung Tower at the University of Hong Kong, 8 Nov 12. Available at Http://www.cpao.hku.hk/media/121108_LiSpeech_E.pdf See para 5.
4. "Maintain Prosperity and Stability in Hong Kong (Oct 3, 1984)" 80-84, 80-81 in

Selected Works of Deng Xiaoping Vol III (1982-1992)(Beijing: Foreign Languages Press, 1994).

5. For an updated and comprehensive definition of the rule of law, see Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce & Christine S. Pratt, *WJP Rule of Law Index@2012-1013* (Washington D.C.: The World Justice Project); http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.
6. "Administration and Constitutional System" features in the penultimate chapter (before Conclusion) of the Chief Executive's 2013 Policy Address, comprising only two short paragraphs with a vague promise of initiating public consultations and constitutional procedures over electoral reform "at an appropriate juncture". See paras. 194-195 of the 2013 Policy Address, available at <http://www.policyaddress.gov.hk/2013/eng/p194.html>
7. *Ho Choi Wan v Hong Kong Housing Authority* (2005) 4 HKLRD 706.
8. *Leung T.C. William Roy v Secretary of Justice* (2006) 4 HKLRD 211.
9. *Building Trust Through Civic Engagement* (New York: United Nations, 2008); <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan028357.pdf>
10. The Chief Justice's Speeches at the Ceremonial Opening of the Legal Years 2005 And 2006 are available at <http://www.info.gov.hk/gia/general/200502/17/02170118.htm> ; <http://www.info.gov.hk/gia/general/200601/09/P200601090137.htm>.
11. For an official account of the heated discussions in the Legislature, see *Council Meeting (Hansard)* 19 May 99. Available at <http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/990519fe.htm>.
12. Alex Lo, "Ugly Side of the Link Reit", *SCMP* (11 Aug 12).

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