Brooklyn Journal of International Law

Volume 44
Issue 2 *07/01/2019*

Article 4

7-1-2019

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*Stuart Hargreaves**

INTRODUCTION

Though it is axiomatic that free speech is not absolute, in the liberal-democratic tradition, any limits on speech must be clear, precise, and subject to justification within the particular constitutional framework of a given jurisdiction. In the Hong Kong Special Administrative Region ("Hong Kong") of the People's Republic of China (PRC), the Court of Final Appeal (CFA) has developed a line of jurisprudence that explains under which circumstances the Government of Hong Kong ("the Government") may seek to limit the free speech provisions contained within the Basic Law, Hong Kong's quasi-constitution.[1] In its

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1. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa (中華人民共和香港特別行政區基本法) [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (promulgated by Presidential Order No. 26, Apr. 4, 1990, effective July 1, 1997) (China) [hereinafter The Basic Law].

fight against 'localists,'[2] however, rather than legislating a clear speech restriction that is consistent with this jurisprudence, the Government has instead attempted to suppress unwelcome political speech in a different way, by pushing back against localists across a number of policy domains. The Government, along with public bodies and other establishment voices, has justified these actions by claiming that open avocation or perhaps even mere discussion of localism is *itself* automatically unconstitutional under the Basic Law. This article argues, however, that the Basic Law is essentially vertical in its operation, defining the structure and values of the Region and, from there, its relationship to the citizen. Thus, it is not the people of Hong Kong who are directly bound by the terms of the Basic Law, but rather the Government itself. Nonetheless, the Government has advanced this false narrative to justify a wide-ranging campaign against localist voices. This article suggests that the Government has adopted this approach because it foresees losing a constitutional challenge to legislation that sought to explicitly ban the expression of localist sentiment in general.

Such a loss would likely provoke a new Interpretation[3] from the Standing Committee of the National People's Congress (NPCSC) that, in turn, would further erode the perception of Hong Kong's autonomy within the 'one country, two systems' (OCTS) model. This may be why the Government has chosen to embark upon an 'extra-legal' approach to limiting a certain type of political speech. This method, however, is ultimately counterproductive because it serves only to reinforce the perception amongst moderates that the OCTS model may not be as robust as previously believed, ratcheting up tension where the two systems intersect. If Beijing wishes for Hong Kongers to perceive themselves as part of a strong, stable, and rising China, then the

2. The tag of 'localist' can be applied to a range of political viewpoints in Hong Kong, ranging from those who argue that greater respect be given to the 'two systems' element of the 'one country, two systems' formulation that defines the relationship between Hong Kong and the rest of China, to those who advocate for increased autonomy for Hong Kong under that same formulation, and to those who advocate for outright independence for the Region.

3. Under Article 158 of the Basic Law, the NPCSC has the final right of interpretation over the Basic Law. The Basic Law, *supra* note 1, art. 158. For more, see MICHAEL RAMSDEN & STUART HARGREAVES, THE HONG KONG BASIC LAW HANDBOOK 483 (2d ed. 2019) [hereinafter THE HONG KONG BASIC LAW HANDBOOK].

values delineated in the Sino-British Joint Declaration of 1984[4] ("Joint Declaration") and given effect in the Basic Law cannot be diluted. Beijing has nothing to fear from Hong Kongers exercising their political speech rights, even if a minority of that speech is unwelcome or even unhelpful. Such speech is the inevitable price of the OCTS model, but for China's long-term stability and smooth rise to great-power status, it is very much a price worth paying. This article begins by offering a brief overview of the basic constitutional structure of Hong Kong and its relationship to the rest of China and outlines the rise of 'localist' sentiment in the wake of failed democratic reforms. Part II describes the constitutional status of speech rights under the Basic Law and review relevant jurisprudence. Part III describes the ways in which the Government has sought to suppress localist political speech in a number of different ways, noting that it justified those actions by a claim that localism was per se unconstitutional. Part IV argues that this is incorrect as a matter of legal theory, in that it is the Government that is bound by obligations under the Basic Law rather individuals. Finally, this article claims that an effort by the Government to directly legislate a restriction on localist speech is unlikely to withstand judicial scrutiny, and its survival would thus depend upon an intervention by the NPCSC under its Article 158 interpretive power.[5]

I. OCTS AND THE RISE OF LOCALISM

The Joint Declaration outlined the basic policies[6] intended to govern Hong Kong following the reestablishment of Chinese sovereignty over the British colony in 1997. That transition would inevitably pose challenges. For instance, how would a territory steeped in a largely liberal understanding of the rule of law and with a robust commitment to capitalism and free markets sit within a broader system that largely rejected those principles? During the negotiations that led to the Joint Declaration, Deng Xiaoping, then the 'paramount leader' of the PRC, had advanced

4. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.–China, Dec. 19, 1984, *available at* http://www.cmab.gov.hk/en/issues/jd2.htm.

5. *See supra* note 3.

6. *Id.* annex I.

the concept of OCTS as a way to reconcile the distinctive economic and legal system of Hong Kong[7] within the overarching sovereign power of the PRC.

Though OCTS was not explicitly articulated in the Joint Declaration, it was the guiding philosophy and was ultimately enshrined in the Preamble to the Basic Law—the quasi-constitutional[8] document that outlines the structure of Hong Kong's government, the rights of its residents, and the relationship between the Region and the rest of the PRC:

> Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems," the socialist system and policies will not be practised in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.[9]

The Basic Law goes on to delineate some critical aspects of the OCTS model, including that Hong Kong is an inalienable part of the PRC,[10] that Hong Kong nonetheless enjoys a high degree of autonomy including independent executive, legislative, and judicial power,[11] that Hong Kong's capitalist system and way of life is to remain unchanged for fifty years (i.e. 2047),[12] and that the previous legal system, including the common law and rules of

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7. OCTS was also applied to the re-establishment of Chinese sovereignty over Macau. It has also been floated by some within the PRC as a model for future reincorporation of Taiwan, which the PRC views as a renegade province. None of the major Taiwanese political parties advocate for OCTS, however, including those that are pro-unification. *See* Sean Cooney, *Why Taiwan is Not Hong Kong: A Review of the PRC's "One Country, Two Systems" Model for Taiwan*, 6 PAC. RIM L. & POL'Y J. 497 (1997).

8. The Basic Law looks in many ways like a constitution, however it is ultimately a national law enacted by the Standing Committee of the PRC.

9. The Basic Law, *supra* note 1, pmbl.

10. *Id.* art. 1.

11. *Id.* arts. 2, 17–19.

12. *Id.* art. 5.

equity, are to be maintained in Hong Kong following the resumption of Chinese sovereignty.[13] At the time of the handover, this "previous legal system" included not only the common law, but also the Hong Kong Bill of Rights Ordinance (BORO),[14] which had incorporated the International Covenant on Civil and Political Rights (ICCPR) into domestic law in 1991. The transfer of sovereignty did not, therefore, displace the many rights enjoyed by Hong Kongers; rather, they were further strengthened thanks to a series of enumerated rights in Chapter III of the Basic Law and a reiteration in Article 39 that the ICCPR remains in force and must be implemented through domestic law.[15]

Though the OCTS has proven largely successful, it is not without its challenges. This is understandable, given its attempt to reconcile the sovereignty of an authoritarian state with a civilian legal tradition, which has within its borders a liberal, quasi-democratic region wedded to a common law tradition. In particular, political tensions relating to the pace of Hong Kong's democratic development still remain. Though there are a variety of recriminations and blame as to the reason for this, parsing them in detail is beyond the scope of this article.[16] It is important to note, however, that the tensions in the last few years have ratcheted up significantly. In 2013, democratic protestors, who were largely, but not exclusively, secondary and post-secondary students, blocked major thoroughfares in Hong Kong for several months in an event known initially as 'Occupy Central' and later

13. *Id.* art. 8.

14. The Hong Kong Bill of Rights Ordinance, (1991) Cap. 383 (H.K.).

15. Rights protections may therefore overlap as between the BORO (as the local implementation of the ICCPR) and the Basic Law, as the content is not always identical. Chan and Lim have noted that the difference between rights under the BORO and the Basic Law can be significant when comes to the legitimate restrictions that may be applied and argue that this may lead to strategic choices in litigation (*see* Johannes Chan & C.L. Lim, *Interpreting Constitutional Rights and Permissible Restrictions*, *in* LAW OF THE HONG KONG CONSTITUTION 571 (Johannes Chan & C.L. Lim eds., 2d ed. 2015).

16. For example, though Article 45 of the Basic Law promises that the "ultimate aim" is the election of the Chief Executive by a process of universal suffrage, twenty years into the history of the SAR, this has still not been achieved. *See generally* SIMON M. YOUNG & RICHARD CULLEN, ELECTING HONG KONG'S CHIEF EXECUTIVE (2010).

'the Umbrella Revolution.'[17] The protests sought, in part, to reverse a decision[18] by the NPCSC regarding the methodology that would be used to select the next Chief Executive. Failure to achieve this goal and a perceived lack of willingness to compromise appears to have hardened attitudes amongst some of the protestors, leading to the emergence of various strains of what has been termed localism. These strains include those who demand recognition of what they describe as 'true' autonomy for Hong Kong within the OCTS model, those who seek self-governance for Hong Kong within the PRC, and a minority for whom the ultimate goal is Hong Kong's independence.

Beijing is constantly on guard for perceived threats to its territorial integrity; Taiwan, Tibet, and Xinjiang are all are considered to be issues of critical national security for this reason.[19] The localist movement in Hong Kong was, therefore, destined to be pounced upon by the Central People's Government (CPG)

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17. The 'Umbrella Revolution' was so dubbed after the images of students using plastic umbrellas to defend themselves against tear-gas wielding police flashed around the world. For more, see Stuart Hargreaves, *From the "Fragrant Harbour" to "Occupy Central": Rule of Law Discourse in Hong Kong's Democratic Development* 9 J. PARLIAMENTARY & POL. L. 519 (2014).

18. On Aug. 31, 2014, the NPCSC announced that the selection method for the Chief Executive in 2016 would not be based on universal suffrage and direct election. Instead, a nominating committee would be formed to select two or three candidates, from whom the population could then choose. The NPCSC would also retain the power to formally appoint the individual elected through this process, and that the individual in question would have to "love the country and love Hong Kong." *See* National People's Congress, Standing Committee, Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (Aug. 31, 2014), *available at* http://www.2017.gov.hk/filemanager/template/en/doc/20140831b.pdf [hereinafter Standing Committee Decision].

19. *See generally* M. TAYLOR FRAVEL, STRONG BORDERS SECURE NATION: COOPERATION & CONFLICT IN CHINA'S TERRITORIAL DISPUTES (2008); William A. Callahan, *National Insecurities: Humiliation, Salvation, and Chinese Nationalism*, 29 ALTERNATIVES: GLOBAL, LOCAL POL. 199 (2004); Xinbo Wu, *Four Contradictions Constraining China's Foreign Policy Behaviour*, 10 J. CONTEMP. CHINA 293 (2001). *See* Alan M. Wachman, WHY TAIWAN? GEOSTRATEGIC RATIONALES FOR CHINA'S TERRITORIAL INTEGRITY (NUS Press 2008); Elliot Sperling, *The Tibet-China Conflict: History and Polemics*, 7 POL'Y STUD. 62 (2004); Gardner Bovingdon, *Autonomy in Xinjiang: Han Nationalist Imperatives and Uyghur Discontent*, 11 POL'Y STUD. 77 (2004).

with vigour, at least in part to ensure it could not serve as a beacon to other groups that might similarly agitate elsewhere within the PRC. The CPG described the actions of localists as "subversive activities" that "damage [China's] sovereignty and security."[20] Though under the "high degree of autonomy"[21] granted to Hong Kong under the Basic Law the Central authorities do not govern Hong Kong directly, Beijing retains tremendous influence over the selection process for Chief Executive,[22] ensuring there is little to no daylight between the CPG and the local Government on key issues. As a result, under both the previous[23] Chief Executive, C.Y. Leung, and the current Chief Executive Carrie Lam, the Hong Kong Government has taken a hard line against localists of varying stripes. Chan has described it as a "storm of unprecedented ferocity."[24] Notably, this has included largely treating *all* localists as a single political bloc, regardless of any positional nuance they may hold in practice.[25]

II. SPEECH RIGHTS IN HONG KONG

Free expression is a precondition to robust debate and political change. It helps hold the government accountable. Free expression aids in the search for truth and allows contribution to the marketplace of ideas. It also allows the flourishing of art and literature. In addition, free expression is a contributor to human dignity.[26] For these reasons, protection for speech is found not

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20. Ben Blanchard, *China Says Won't Allow Hong Kong to Be Used as a Subversion Base*, REUTERS (Jan. 1, 2017), http://www.reuters.com/article/us-china-hongkong-idUSKBN14M017.

21. The Basic Law, *supra* note 1, art. 2.

22. *See supra* note 16.

23. CY Leung was Chief Executive from 2012 to 2017, serving only a single term of office.

24. Johannes Chan, *A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong*, 16 INT'L J. CONST. L. 373 (2018).

25. This may be shifting slightly. As this author was completing this article, the Government announced a particular set of measures forbidding the operation of the Hong Kong National Party, which had clearly advocated for the formation of an independent "Republic of Hong Kong"; these measures have not been taken against any other localist party. At the time of writing, it was also unclear whether the ban would be challenged in court.

26. *See, e.g.*, C. Edwin Baker, *Autonomy & Free Speech*, 27 CONST. COMMENT. 251 (2011); ERIC BARENDT, FREEDOM OF SPEECH (2d ed. 2005); Guy

only within the U.N. Declaration on Human Rights[27] but in the constitutions of virtually all states. Indeed, this holds true across the political spectrum: authoritarian states pay constitutional lip service to the value of free speech, even if they fail in practice to grant their own citizens a mechanism by which to hold the state accountable for suppressing free speech rights.[28] Yet even within self-described liberal-democratic states that champion free speech as a core value and create constitutional mechanisms that entrench it, in no jurisdiction is free speech considered to be *absolute*. In the United States, for example, which is considered to have one of the most maximalist approaches to speech in the world, the United States Supreme Court has found that certain kinds of speech are excluded from the ambit of First Amendment protection.[29] The nature of limits chosen, however, vary from jurisdiction to jurisdiction and often reflect the context of local history or political development.

Notwithstanding the existence of a sovereign with a diametrically opposed view of the rule of law, the importance of an independent judiciary, and the value of enforceable human rights, residents of Hong Kong enjoy a robust, judicially enforced right to free expression. This right is guaranteed in two separate, but

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E. Carmi, *Dignity — the Enemy Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 J. CONST. L. 957 (2007); WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS (1999).

27. G.A. Res. 217 (III) A, United Nations Declaration of Human Rights, art. 19 (Dec. 10, 1948).

28. For instance, Article 35 of the PRC Constitution promises its citizens "freedom of speech, of the press, of assembly, of association, of procession, and of demonstration" (XIANFA [CONSTITUTION] art. 35 (1982) (China)); Article 29 of the Russian Constitution "guarantees freedom of thought and speech" (KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 29 (Russ.)); Article 67 of the North Korean Constitution "guarantees freedom of speech, of the press, of assembly, demonstration, and association." (JOSEON MINJUJUUI INMIN GONGHWAGUK SAHOEJUUI HEONBEOP [CONSTITUTION] art. 67 (N. Kor.)). For more, see Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59 (2015).

29. The United States Supreme Court has concluded that defamation (N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)), obscenity (Miller v. California, 413 U.S. 15 (1973)), 'fighting words' (Chaplinksy v. New Hampshire, 315 U.S. 568 (1942)), and words intended to incite imminent lawless action (Brandenburg v. Ohio, 395 U.S. 444 (1969)) are not protected by the First Amendment guarantee, but almost everything else is. For more, see, e.g., Kathleen Sullivan, *Freedom of Expression in the United States: Past and Present*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY (Thomas R. Hensley ed., 2001).

overlapping, ways. First, the BORO guarantees that everyone in Hong Kong has

> the right to hold opinions without interference . . . [and] everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[30]

This language is lifted directly from the text of the ICCPR, the terms of which the Basic Law requires to be implemented through domestic law.[31] The Basic Law itself goes on to specifically guarantee that "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration."[32] The CFA possesses the right and duty to declare any law or action of the Government of no force and effect to the extent it violates any provision of Basic Law, thereby entrenching these protections.[33] The BORO predates the Basic Law (and also the creation of the SAR), but both continue to have relevance forming a "complex legal matrix of overlapping constitutional rights."[34] Nonetheless, in *Hong Kong Special Administrative Region* (HKSAR) *v. Ng Kung Siu*,[35] the CFA determined that there was no legally meaningful distinction between the freedom of speech and the freedom of expression (as between the Basic Law and the BORO), and so this article uses the two concepts interchangeably.

Under this framework, the right of expression of Hong Kongers has been well-protected.[36] Deeply linked to the rights of assembly and demonstration,[37] it is one which is "of cardinal importance for the stability and progress of society," and thus,

30. The Hong Kong Bill of Rights Ordinance, *supra* note 14, art. 16 (incorporating Art. 22 of the ICCPR).

31. The Basic Law, *supra* note 1, art. 39.

32. The Basic Law, *supra* note 1, art. 27.

33. *See* The Basic Law, *supra* note 1, art. 11; *see also* Ng Ka Ling v. Director of Immigration, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.) [hereinafter Ng Ka Ling].

34. Simon NM Young, *Restricting Basic Law Rights in Hong Kong*, 34 H.K. L.J. 109, 110 (2004).

35. H.K. Special Admin. Region (HKSAR) v. Ng Kung Siu, [1999] 2 H.K.C.F.A.R. 442 (C.F.A.) [hereinafter Ng Kung Siu].

36. *See* THE HONG KONG BASIC LAW HANDBOOK, *supra* note 3, at 115; Chan & Lim, *supra* note 15, at 733.

37. H.K. Special Admin. Region (HKSAR) v. Chow Nok Hang, [2013] 16 H.K.C.F.A.R. 837, ¶ 1 (C.F.A.).

"must be given a generous interpretation . . . [and any] restrictions must be narrowly interpreted."[38] This generous interpretation means protection is afforded not only to speech critical of government policy,[39] but also to commercial speech unconnected to political issues.[40] The constitutional protection extends to both verbal and non-verbal[41] communication, and incorporates the right to be able to both "receive and impart" communication.[42] Such robust protection for this and other related rights means that Hong Kongers do not labour under the same kind of intrusive surveillance and censorship regime[43] as do, for instance, their neighbours in Shenzhen.[44] As in many jurisdictions that nonetheless value and protect it, however, the speech right is not absolute.

Ng Kung Siu is the leading case on the restriction of the right of expression in Hong Kong. The defendants had participated in a pro-democracy parade, during which they carried two defaced flags—the national flag and the regional flag—and tied them to railings outside the Central Government Offices:

> Both flags had been extensively defaced. As to the national flag, a circular portion of the centre had been cut out. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character "shame" had been written in black ink on the four small stars and on the reverse side, a black cross had been daubed on the lowest of the four small stars. As to the regional flag, one section had been torn off obliterating a portion of the bauhinia design. A black cross had been drawn across that design. Three of the remaining four red stars had black crosses daubed over them. The Chinese character "shame" was written on the flag in black ink. As

38. *Id.* ¶¶ 31–32.

39. Sec'y for Justice v. Comm'n of Inquiry Re H.K. Inst. of Educ., [2009] 4 H.K.L.R.D. 11 (C.F.I.).

40. Med. Council of H.K. v. Helen Chan. [2010] 13 H.K.C.F.A.R. 248, ¶ 75 (C.F.A.).

41. Ng Kung Siu, *supra* note 35, ¶ 40.

42. Sec'y for Justice v. Ocean Tech. Ltd., [2009] 1 H.K.C. 271, ¶ 67 (C.F.A.).

43. *See, e.g.*, Jyh-An Lee, *Forbidden City Enclosed by the Great Firewall*, 13 MINN. J. L., SCI. & TECH. 125 (2012); Lokman Tsui, *The Panopticon as the Antithesis of a Space of Freedom: Control and Regulation of the Internet in China*, 17 CHINA INFO. 65 (2003).

44. Shenzhen is a city of 12 million people on the Hong Kong-PRC mainland border that is directly accessible via Hong Kong's subway system.

> was part of a Chinese character which had been rendered illegible by the tear in the flag. Similar damage appeared on the reverse side.[45]

The defendants were convicted of desecrating the flags. They appealed on the ground that, inter alia, the relevant laws[46] were an unconstitutional restriction upon their free expression rights. It was uncontested that such desecration was a form of non-verbal expression and that the laws prohibiting it were, therefore, a restriction upon the expression right.[47] Was, however, the restriction constitutionally permissible? Li CJ, writing for the majority, began his analysis with the determination that it was not relevant whether the restriction was interpreted as one on speech, as under the Basic Law, or on expression, as under the BORO: the content of both rights was found to be the same.[48] In either case, any restriction on a constitutional right had to be "prescribed by law," and any such restriction could not contravene the provisions of the ICCPR.[49]

The Hong Kong courts[50] have interpreted the 'prescribed by law' requirement as incorporating the 'proportionality test' familiar to the constitutional jurisprudence of various common law jurisdictions. This test is typically phrased as something approaching the following: for a restriction on a constitutional right to be upheld, it must first be shown to be prescribed by law (also described as the requirement of legality). This means any restriction must be clear and readily ascertainable by a member of the public and based upon a legitimate source. From there, the question then shifts to that of necessity, which is composed of several sub-requirements. First, is the restriction in the service of a legitimate objective? Second, is there a rational connection between the restriction and that objective? In other words,

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45. Ng Kung Siu, *supra* note 35, ¶¶ 25–26.

46. National Flag and National Emblem Ordinance, (1997) Instrument A401, § 7 (H.K.); Regional Flag and Regional Emblem Ordinance, (1997) Instrument A602, § 7 (H.K.).

47. Ng Kung Siu, *supra* note 35, ¶ 40.

48. Ng Kung Siu, *supra* note 35, ¶ 42.

49. *Id.* (citing The Basic Law, *supra* note 1, art. 39).

50. Chan & Lim, *supra* note 15, at 597.

does the former actually further the latter? Finally, is the restriction proportional—that is, does it impair the right no more[51] than is necessary in order to achieve the objective?[52]

Though the structure adopted in *Ng Kung Sui*—an early point in the CFA's proportionality jurisprudence—contains elements of this approach, it was conceptually collapsed by Li CJ as follows. First, is there a legitimate reason for the restriction?[53] If so, is the restriction necessary to meet that reason?[54] Though the second stage did consider the issue of proportionality, it did so in a manner lacking the nuance and precision afforded by the full test adopted in later rights-based jurisprudence.

Li CJ found that the ICCPR was exhaustive of the 'legitimate aims' of a restriction on the speech right:

> [The right of free expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[55]

From these, the Government had argued that the primary justification for the restriction was the maintenance of public order (*ordre public*).[56] In considering this submission, Li CJ first sought to determine the ambit of the '*ordre public*' aspect of this

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51. This 'minimal impairment' idea does not mean, however, that the Government has necessarily chosen the *least* impairing restriction to achieve the objective; the courts offer a margin of discretion to choose from various options providing it can show it is impairing the right as little as reasonably possible.

52. Though the concept is the same, the exact contours of the proportionality test have shifted slightly recently. See, e.g., Hysan Development Co. Ltd. v. Town Planning Board, [2016] 19 H.K.C.F.A.R. 372 (C.F.A.) [hereinafter Hysan Development Co. Ltd.], in which the CFA adopts a fourth step into the proportionality analysis: a balance of the detrimental and salutary impacts of the decision on society overall must also be considered (but only if the first three steps are met). Though this step was adopted into Canadian law more than 30 years ago (*see* R. v. Oakes, [1986] 1 S.C.R. 103 (Can.)), it is now also found in the English jurisprudence (*see, e.g.*, R (Quila) v. Sec'y of State for the Home Dep't [2012] 1 AC 621), which may explain the Court's decision to adopt it recently.

53. Ng Kung Siu, *supra* note 35, ¶ 45.

54. *Id.* ¶ 56.

55. *Id.* ¶ 45 (citing ICCPR, Art. 19(3)).

56. *Id.* ¶ 47.

concept. He concluded its inclusion indicated a much wider concept than simply "law and order," incorporating the "general welfare or… interests of the collectivity as a whole."[57] This was determined in large—though not exclusive[58]—part by reference to the Siracusa Principles[59] on derogation from the ICCPR:

> 22. The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).
>
> 23. Public order (*ordre public*) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
>
> 24. State organs or agents responsible for the maintenance of public order (*ordre public*) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.[60]

The Chief Justice then noted that despite this generally wide ambit, what is understood as *ordre public* nonetheless must remain a "function of time, place, and circumstances,"[61] drawing from *Wong Yeung Ng v. Secretary of Justice*.[62] In *Wong Yeung Ng*, the Court of Appeal had held that the administration of justice—specifically, a charge for contempt of court for harassing

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57. *Id.* ¶¶ 49, 54.

58. The Court also considered an advisory opinion on the American Convention of Human Rights, which also referred to the concept in the same manner. *See* The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

59. The Siracusa Principles were developed in 1984 following a conference of human rights, penal, and international law experts seeking to clarify the interpretation and application of the limitation and restriction clauses contained in the text of the ICCPR. Though the principles are not directly binding, they were considered to represent the general state of international law in this area at the time they were written. Thus, they provide a useful guide for courts seeking to interpret the application of the ICCPR to their domestic laws.

60. U.N. Econ. & Soc. Council, Comm'n on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, ¶¶ 22–24, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984), *available at* http://www.refworld.org/docid/4672bc122.htm (cited in Ng Kung Siu, *supra* note 35, ¶ 52).

61. Ng Kung Siu, *supra* note 35, ¶ 54.

62. Wong Yeung Ng v. Sec'y for Justice, [1999] 2 H.K.L.R.D. 293 (C.A.).

and publishing abusive articles about a member of the judiciary—fell within the concept of public order.[63] The Court determined that whether or not the administration of justice had been harmed necessarily turned on "local circumstances."[64] The differing constitutional and social structures of the United Kingdom, the United States, and Canada meant that similar cases in those jurisdictions held little persuasive value for the Court in answering such questions.[65]

With this understanding of public order (*ordre public*) in hand, Li CJ then turned to whether the state's interest in protecting its symbols[66] fit within it. In answering in the affirmative, the Chief Justice placed particular emphasis on Hong Kong's new constitutional order: the resumption of Chinese sovereignty over Hong Kong, thereby "fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong."[67] This was the relevant 'time, place, and circumstance': a recent constitutional transformation meant there were "legitimate societal interests" in protecting the national and regional flags and emblems as they were "part of the general welfare and the interests of the collectivity as a whole."[68] That, of course, was not the end of the analysis; having determined (in the current parlance) that the restriction was in the furtherance of a "legitimate aim," it remained to be determined whether or not the restriction was in fact necessary to achieve that aim.

In Li CJ's formulation, this was essentially the question of proportionality. "Essentially," insofar as the Chief Justice began his analysis by arguing that in determining necessity, it was important to give due weight to the decision of the Legislative Council to enact the relevant Ordinances.[69] On the one hand, the Legislative Council was *required* to enact the Ordinance related to the national flag.[70] On the other, it had *chosen* to enact the

63. *Id.* ¶ 34.
64. *Id.* ¶ 48.
65. *Id.* ¶¶ 48–50.
66. The Court noted that the assertion of this interest had been unchallenged. *See* Ng Kung Siu, *supra* note 35, ¶ 8.
67. *Id.* ¶ 55 (citing The Basic Law, *supra* note 1, pmbl.).
68. *Id.*
69. *Id.* ¶ 59.
70. National PRC laws do not apply in Hong Kong unless they are added to Annex III of the Basic Law by the NPCSC and then promulgated locally; the law relating to the protection of the national flag is one such law.

Ordinance related to the regional flag. Legislative decision-making, required or otherwise, however, seems like a thin ground for establishing 'necessity.' Indeed, it is axiomatic that the Legislative Council would have believed it had good reason to enact a law, so this alone cannot speak meaningfully to the question of necessity. In any event, the bulk of the necessity question in *Ng Kung Siu* still turned—as it should have—upon the issue of proportionality: were the restrictions on expression contained in the impugned Ordinances proportional to the "unquestionably legitimate societal and community interests" in the protection of important community symbols?[71]

Li CJ concluded that they were, but his analysis was rather brief and represent an approach to proportionality that is problematic. On the question of 'necessity,' the Chief Justice argued that "having regard to what is only a limited restriction on the right to the freedom of expression, the test of necessity is satisfied."[72] This lacks intellectual rigor. It not only appears to suggest that anything less than a complete elimination of the right will meet the necessity requirement, but it also conflates the need for a restriction on a right with the mechanism by which that need is met. This problem is further revealed by the Chief Justice's attempt to buttress his analysis by referring to the immediate political context:

> The limited restriction is proportionate to the aims sought to be achieved and does not go beyond what is proportionate. . . . The implementation of the principle of "one country, two systems" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression.[73]

Respectfully, the question of political context should only be relevant in determining the legitimacy of the aims of a given restriction, not the justifiability of the particular means selected to achieve that aim. Li CJ uses the immediate political context

71. Ng Kung Siu, *supra* note 35, ¶ 60.
72. *Id.*
73. *Id.* ¶ 61.

to not only establish the legitimacy of the restrictions by finding they served *ordre public*, but then also uses it, at least in part, to judge proportionality. In theory this approach could allow political necessity to bootstrap the constitutionality of virtually any law; the majority opinion in *Ng Kung Siu* seems to collapse a complicated legal analysis about proportionality into a question *only* of 'does the restriction on a constitutional right serve an apparent need at this moment in time?'

The difficulty and/or danger of this approach may also explain Bokhary PJ's decision in *Ng Kung Siu* to issue a separate concurrence. He (properly) focused the proportionality question on the narrowness of the restriction at issue, foreshadowing what would later be described as the 'minimal impairment' step of justifying rights restrictions.[74] He argued that only a narrow restriction on a constitutional right could be reconcilable with the purpose of the right.[75] In determining 'narrowness,' Bokhary PJ noted that a law could either attempt to restrict the *substance* of an expression—the content of a message—or the *mode* of an expression, or how the message is conveyed. Laws that attempt to restrict only the mode of expression are necessarily narrower than those that seek to limit substance. He approvingly noted that the impugned Ordinances in *Ng Kung Siu* focused only upon a particular mode of expression, defacing or otherwise damaging the national and regional flags:

> [The laws in question] place no restriction at all on what people may express. Even in regard to how people may express themselves, the only restriction placed is against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it. No idea would be suppressed by the restriction. Neither political outspokenness nor any other form of outspokenness would be inhibited.[76]

For Bokhary PJ, the Ordinances were narrowly targeted at protecting important societal symbols rather than broadly limiting critical speech, and so could be reconciled with the overall guarantees of free expression in the Basic Law and the BORO. It would, he suggested, be hard to imagine broad limitations on the content of the speech rights of Hong Kongers: "All persons in

74. Leung Kwok Hung v. H.K. Special Admin. Region (HKSAR), [2005] 8 H.K.C.F.A.R. 229, ¶ 36 (C.F.A.) [hereinafter Leung Kwok Hung].

75. Ng Kung Siu, *supra* note 35, ¶ 95.

76. *Id.* ¶ 97.

Hong Kong are—and can be confident that they will remain—equally free under our law to express their views on all matters whether political or non-political: saying what they like, how they like."[77] This approach to the proportionality question and the issue of mode versus substance is conceptually far more satisfying and helps ensure that, as Chan and Lim note, the principles of legality and proportionality are better retained as separate concepts.[78]

This may explain why in *HKSAR v. Koo Sze Yiu*,[79] though the CFA declined to revisit the constitutionality of the Ordinances at issue in *Ng Kung Siu*, it nonetheless chose to offer a relatively detailed explanation of its decision to decline leave to appeal. Most notably, Ma CJ offered his own gloss on the majority opinion in *Ng Kung Siu*, clarifying this issue of context. He suggested that the issue of "'time, place, and circumstances' is [only] a reference to a part of the legal test to determine whether or not the concept of public order (*ordre public*) applies."[80] Nonetheless, *Ng Kung Siu* remains good law and along with *Koo Sze Yiu* stands for the proposition that restrictions on the political speech rights of Hong Kongers can pass constitutional muster in certain circumstances.[81] Subsequent jurisprudence, however, more closely tracks Bokhary PJ's analytical approach: that is, answering the proportionality question primarily by interrogating the narrowness of the restriction imposed upon the right. This approach highlights the importance of the substance versus mode restriction. In *Kwok Hay Kwong*, for instance, the court deemed a total ban on medical practitioners from advertising their services to be an unjustifiable restriction on their expression rights, even though there was a legitimate aim to the law—preventing misleading medical advertisements.[82] By contrast, in *Medical Council of Hong Kong v. Helen Chan*, a professional code that

77. *Id.* ¶ 98.

78. Chan & Lim, *supra* note 15, at 596.

79. H.K. Special Admin. Region (HKSAR) v. Koo Sze Yiu, [2014] 17 H.K.C.F.A.R. 811 (C.F.A.).

80. *Id.* ¶ 12.

81. Yap has suggested there was also a political element at play the Court's decision in *Ng Kung Siu*, in that it was likely reluctant to come to a finding that a national law effectively breached the Basic Law. *See* Po Jen Yap, *Constitutional Review Under the Basic Law: The Rise, Retreat, & Resurgence of Judicial Power in Hong Kong*, 37 H.K. L.J. 449, 459 (2007).

82. Kwok Hay Kwong v. Med. Council of H.K., [2008] 3 H.K.L.R.D. 524 (C.A.).

prevented medical professionals from publicly or commercially endorsing medical products or services was upheld as a justifiable restriction on their expression rights, in part because it did not seek to prevent medical professionals from offering such commentary in other, non-commercial contexts.[83] In *Secretary for Justice v. Ocean Technology Ltd.*, a requirement to obtain a broadcasting license from Government was upheld in part because it was not tied to the content of any subsequent expressive use to which the license would be put; it was a proportional requirement given the need to allocate limited broadcast spectrum.[84]

In *Cho Man Kit v. Broadcasting Authority*, though not considering the constitutionality of a specific law and thus not dealing with the question of proportionality, the court took a dim view of an apparent attempt to regulate television programming on the basis of content.[85] The Broadcasting Authority had issued an official "admonition" to the broadcaster, RTHK, regarding a television programme that dealt with the lives and challenges faced by gays and lesbians in Hong Kong. The admonition claimed that the programme was "biased" in favour of homosexuality, meaning RTHK had failed to fulfill its obligation of impartiality under the relevant Codes.[86] The court found that this was "an impermissible restriction on the freedom of speech, a restriction founded materially on a discriminatory factor."[87] Hartmann J. (as he then was) cited European Court of Human Rights (ECtHR) jurisprudence to support his contention that the free speech right must apply not only to popular ideas, but also "those

83. Med. Council of H.K. v. Helen Chan, [2010] 13 H.K.C.F.A.R. 248, ¶ 81 (C.F.A.).

84. Sec'y for Justice v. Ocean Tech. Ltd., [2009] 1 H.K.C. 271, ¶¶ 130–34 (C.F.A.).

85. Cho Man Kit v. Broad. Auth., [2008] H.K.C. 383 (C.F.I.) [hereinafter Cho Man Kit].

86. The Generic Codes of Practice for Television are issued under the authority of the Broadcasting Ordinance, (2000) Cap. 562 (H.K.), and include standards related to programming content, advertising, and technical issues. They are updated regularly; for the current version, see *Policies & Regulations: Television*, COMM. AUTH., https://www.coms-auth.hk/mobile/en/policies_regulations/cop_guidelines/broadcasting/television/index.html (last visited Apr. 25, 2019).

87. Cho Man Kit, *supra* note 85, ¶ 91.

that offend, shock, or disturb."[88] Meanwhile in *Chee Fei Ming v. Director of Food and Environmental Hygiene*, a requirement to seek permission from a Government department before posting signs on public land was found to be a proportional restriction given the legitimate aim of preserving the cityscape; no evidence was introduced to show that the Government applied a content-based analysis when deciding to grant permission or not, and there were no restrictions on communicating the intended message in other ways.[89] All these cases indicate that while the courts of Hong Kong may be willing to accept certain limits on speech where the focus is purely on the mode of expression, they are far more skeptical of broad efforts to limit the *substance* of speech.

Hong Kong does shade closer to the latter in a few isolated categories, however. Take, for instance, the prohibition on the display, distribution, or publication (or importation for the purposes thereof) of 'obscene' materials.[90] The Control of Obscene and Indecent Articles Ordinance (COIAO) defines "obscenity" in a rather circular manner, in that a "thing is obscene if by reason of obscenity is not suitable to be published to any person."[91] In turn, suitability is to be determined by a Tribunal having regard to the "standards of morality, decency, and propriety that are generally accepted by reasonable members of the community."[92] Though this might seem ripe for a constitutional challenge and while scholars have raised concerns about a number of classification decisions reached by the Tribunal,[93] no such challenge has yet been brought. In common with a number of liberal-democratic jurisdictions,[94] Hong Kong also criminalizes hate speech.

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88. Lingens v. Austria, 8 Eur. Ct. H.R. 407, 418 (1986), *cited in* Cho Man Kit, *supra* note 85, ¶ 6.

89. Chee Fei Ming v. Dir. of Food and Envtl. Hygiene, [2014] 5 H.K.L.R.D. 771, ¶139 (C.A.).

90. The Control of Obscene and Indecent Articles Ordinance, (1987) Cap. 390 (H.K.).

91. *Id.* § 2(2).

92. *Id.* § 10(1).

93. *See* Po Jen Yap, *Freedom of Expression*, *in* LAW OF THE HONG KONG CONSTITUTION (Johannes Chan & C.L. Lim eds., 2d ed. 2011) 746–47; Johannes Chan, *Freedom of the Press: The First Ten Years of the Hong Kong Special Administrative Region*, 15 ASIA PAC. L. REV. 163, 182 (2007).

94. Canada, for instance, prohibits the "[willfull] promo[tion] of hatred against any identifiable group" (Criminal Code, R.S.C. 1985, c C-46 (Can.)).

The Race Discrimination Ordinance (RDO) makes it an offense to "incite hatred towards, serious contempt for, or severe ridicule of, another or members of a class of persons" on the ground of their race or membership in a particular class.[95] This law has also never been challenged in court, though one would anticipate it would withstand judicial scrutiny under the proportionality jurisprudence—narrowly defined, there is no 'benefit' to the incitement of hatred in a pluralistic society and a good deal of potential harm, including violence. But even the speech-restrictive provisions of the COIAO and RDO are not purely substance-based. The prohibition under the COIAO is limited to the publication or public display[96] of obscene materials (or importation for the purposes thereof), while the RDO applies only prohibits certain kinds of activities in public.[97] Neither, then, is a blanket prohibition on the substance of certain expressive content. Hong Kongers remain free to express racist opinions in private and to enjoy a wide range of material some might deem obscene in the comfort of their homes.

III. ESTABLISHMENT PUSHBACK AGAINST LOCALISM

This jurisprudential background may explain why the Government has seemingly chosen to pursue a series of non-legislative methods to combat localist speech, and it is in this way that the

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Likewise in France, the Penal Code prohibits speech intended to "provoke discrimination, hate, or violence towards a person…" because of their ethnic, national, racial, or religious identity (Code Pénal [C. Pén.] [Penal Code] art. R625–7 (Fr.), *available at* https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022376044&cidTexte=LEGITEXT000006070719). So too, in Germany, the Criminal Code forbids inciting hatred against identifiable parts of the population or to insult them in a manner contrary to their human dignity (Strafgesetzbuch [StGB] [Penal Code], §130 (Ger.)). In India, the Penal Code forbids speech that promotes "disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities" (Indian Penal Code, PEN. CODE, § 153A (India)). In New Zealand, the Human Rights Act forbids speech that is "likely to excite hostility against or bring into contempt any group of persons . . . on the ground of [their] colour, race, or ethnic or national or ethnic origin" (Human Rights Act of 1993, s. 61 (N.Z.)). This is not an exhaustive list, of course, but simply serves to demonstrate that the idea of regulating such speech is not uncommon.

95. Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

96. The Control of Obscene and Indecent Articles Ordinance, *supra* note 90, §§ 21–22.

97. Race Discrimination Ordinance, *supra* note 95, §§ 45(1), 46(1)(c) (H.K.).

edges of the (political) speech right in Hong Kong are being ground down. The Government first began by seeking to deny localist politicians the right to sit in the Legislative Council, either pre-emptively or ex post facto. Though Hong Kong residents cannot vote directly for their Chief Executive, they can do so for half of the seats in the Legislative Council. In the 2016 elections for those seats, a number of candidates put themselves forward on what could be described as a 'localist' platform. Immediately, the Government sought to block a number of them from running at all. The Electoral Affairs Commission (EAC) instituted a new requirement that all candidates for office sign a "confirmation form" that included a declaration that they would uphold the Basic Law and that they pledged allegiance to the Hong Kong SAR.[98] Chan Ho-tin, convenor of the Hong Kong National Party, declined to sign the form and was disqualified,[99] as was Yeung Ke-cheong of the Democratic Progressive Party.[100] Edward Leung of Hong Kong Indigenous signed the form, but was nonetheless disqualified after the Returning Officer did not believe him to be sincere.[101] A challenge to the declaration requirement was filed in May 2017—long after the election had actually occurred. The Court of First Instance found that the requirement was legitimate, but required that a Returning Officer should only question the validity of the Declaration if there was "cogent, clear, and compelling evidence which plainly shows *objectively* that the candidate, notwithstanding the signed Declaration,

98. Press Release, H.K. Electoral Affairs Comm'n, EAC's Request to Sign Confirmation Form Has Legal Basis (July 19, 2016), *available at* http://www.info.gov.hk/gia/general/201607/19/P2016071900950p.htm; though this form was new, the Legislative Council Ordinance, (1997) Cap. 542, § 40 (H.K.) had always held that the Electoral Affairs Commission could reject the candidacy of someone who did not make such a declaration.

99. Emily Tsang & Elizabeth Cheung, *Hong Kong National Party Convenor Disqualified From Running in Legislative Council Polls*, S. CHINA MORNING POST (July 30, 2016), http://www.scmp.com/news/hong-kong/politics/article/1996994/hong-kong-national-party-convenor-disqualified-running.

100. Jeffie Lam, "*I Was Disqualified": Second Hong Kong Localist Candidate Barred From Running in Legco Elections*, S. CHINA MORNING POST (July 31, 2016), http://www.scmp.com/news/hong-kong/politics/article/1997371/i-was-disqualified-second-hong-kong-localist-candidate.

101. Joyce Ng et al., *Protests Shut Down Electoral Commission Briefing as Hong Kong Indigenous' Edward Leung Disqualified from Legco Elections*, S. CHINA MORNING POST (Aug. 2, 2016), http://www.scmp.com/news/hong-kong/politics/article/1998201/hong-kong-indigenous-edward-leung-disqualified-legislative.

does not have the intention . . . to uphold the Basic Law and swear allegiance to the HKSAR. [Fairness] requires that generally the Returning Officer should give a reasonable opportunity to the candidate to respond."[102]

The Government defended all the disqualifications by arguing that the positions of the candidates were incompatible with the duties of a legislator to uphold the Basic Law. There was, it said, "no question of any political censorship, restriction of the freedom of speech, or deprivation of the right to stand for elections."[103] In total, six localist candidates were disqualified from running, with a number of others left in limbo until shortly before the election.[104] Nonetheless, three overtly localist candidate won seats: Yau Wai-ching and Sixtus Leung Chung-hang of Youngspiration, and Nathan Law Kwun-chung of Demosistō. These electoral victories triggered the second stage of legal actions against localist politicians.

Before councillors can formally take their seats, they are required to take the following oath:

> I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity.[105]

The basis for the oath requirement may be found Article 104 of the Basic Law, but it is subsidiary legislation that provides the actual text of the oath and the rules for how and when it is to be

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102. Chan Ho Tin v. Lo Ying-ki Alan, [2018] 2 H.K.L.R.D. 7, ¶ 80 (C.F.I.).

103. Press Release, H.K. Special Admin. Region, HKSAR Government Responds to Media Enquiries Regarding 2016 Legislative Council Election, (July 30, 2016), *available at* http://www.info.gov.hk/gia/general/201607/30/P2016073000700.htm.

104. Joyce Ng, *Two Radical Hong Kong Localists Await Their Fate While a Third Legco Candidate is Banned*, S. CHINA MORNING POST (Aug. 1, 2016), http://www.scmp.com/news/hong-kong/politics/article/1997860/two-radical-hong-kong-localists-await-their-fate-while-third.

105. Oaths & Declarations Ordinance, (1997) Cap. 11, pt. IV (H.K.).

taken.[106] During the oath-taking ceremony, a number of councillors appeared to violate the guidance provided in the relevant Ordinance. The two Youngspiration candidates declared their allegiance to the Hong Kong "nation" rather than the "SAR," intentionally mispronounced "China" in a derogatory way, and held flags with localist slogans.[107] Both were offered a second opportunity to read the oath correctly, which they initially declined.[108] Nathan Law also mispronounced "China" and then described the requirement as a "political tool."[109] He, too, refused to retake the oath.[110] Lau Siu-lai, an independent candidate associated with the pan-democrats, but not a member of a localist party, read an incorrect version of the oath.[111] She was offered and took a second opportunity to retake the oath, during which she read the correct version, but extremely slowly, taking over ten minutes.[112] Edward Yiu Chung-yim, also a pan-democrat, but not belonging to a localist party, added the phrase "for democracy and for Hong Kong's sustainable development" to his oath, and refused to retake it.[113] Leung Kwok-hung, a long-time activist known as "Long Hair," held a yellow umbrella during his reciting of the oath, the text of which he reordered while reading, and tore up a prop he said represented the earlier Decision[114] of the CPG regarding election methodology. A number of other councillors read the oath correctly, but then added extra statements at the end or carried props.[115]

The relevant Ordinance holds that a candidate who "declines or neglects" to take the oath shall be required to vacate the office if he or she has already entered it, or be disqualified from the

106. *Id.* § 19.

107. Ellie Ng, *Democratic Lawmakers Stage Protests and Alter Oaths as New Term Kicks Off at Hong Kong Legislature*, H.K. FREE PRESS (Oct. 12, 2016), https://www.hongkongfp.com/2016/10/12/breaking-democratic-lawmakers-stage-protests-alter-oaths-new-term-kicks-off-hong-kong-legislature/ [hereinafter Ng, *Democratic Lawmakers Stage Protests*].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Standing Committee Decision, *supra* note 18.

115. Ng, *Democratic Lawmakers Stage Protests*, *supra* note 107.

office if it has not yet been entered.[116] The President of the Legislative Council indicated he was prepared to allow the candidates who had failed to take the oath correctly another chance to do so if they applied in writing,[117] and a number did so.[118] Sensing an opportunity to bat down the localist cause, however, the Government sought a judicial review of the President's decision, arguing he did not have the right to allow re-taking of the oaths.[119] As the case was working its way through the local court system, the intense scrutiny of the CPG became apparent. Though Hong Kong's legal system is autonomous under the OCTS formulation, the final right of interpretation of the Basic Law belongs neither to its highest court nor to the Government of the Region. Instead, Article 158 deems that it belongs to the NPCSC, a political rather than judicial body located in the mainland. The text of Article 158,[120] however, *also* provides that the

116. Oaths and Declarations Ordinance, *supra* note 105, § 21.

117. Stanley Leung, *Lawmaker Who Took 10-Mins to Deliver 'Slow Motion' LegCo Oath Among Several Told to Repeat Pledge,* H.K. FREE PRESS (Oct. 18, 2016), https://www.hongkongfp.com/2016/10/18/lawmaker-who-took-10-mins-to-deliver-slow-motion-legco-oath-among-several-told-to-repeat-pledge/.

118. Ellie Ng, *Youngspiration Duo Make Requests to Retake LegCo Oaths Following Wording Controversy*, H.K. FREE PRESS (Oct. 18, 2016), https://www.hongkongfp.com/2016/10/18/youngspiration-duo-make-requests-to-retake-legco-oath-after-swearing-in-controversy/.

119. Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. President of the Legislative Council, [2016] HCAL 185/2016, ¶ 130 (C.F.I.).

120. The full text of Art. 158 reads:

> The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the

CFA may interpret the Basic Law in areas that are within the Region's competency. For those areas outside its competency, the CFA is required to approach the NPCSC for an Interpretation. Some of the most significant CFA jurisprudence deals with how this provision is to operate and, in particular, how to resolve disputes about what is and what is not within the Region's competency.[121] Though that jurisprudence has concluded[122] that the NPCSC retains a plenary right to interpret *any* provision within the Basic Law, any dispute as to whether a particular provision is within the competency of the Region or not can highlight friction in how the 'two systems' interact.

Prior to the oath-taking issue, the NPCSC's most controversial use of the interpretive power had come in 1999. In *Ng Ka Ling,* the CFA concluded that it did not need to seek assistance from the NPCSC in interpreting a provision of the Basic Law related to who had the 'right of abode' (a kind of permanent residency) in Hong Kong, arguing that such a matter fell within the competency of the Region under the OCTS model.[123] Following a request from the Government (a power not found within the text of the Basic Law), the NPCSC issued an Interpretation[124] in order to obtain the political result desired. So controversial was

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> relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

The Basic Law, *supra* note 1, art. 158.

121. *See* THE HONG KONG BASIC LAW HANDBOOK, *supra* note 3, at 483.

122. See Lau Kong Yung v Director of Immigration (1999) 2 HKCFAR 300 (CFA); Vallejos Evangeline B. v Commissioner of Registration, [2013] 2 HKLRD 533 (CFA).

123. Ng Ka Ling, *supra* note 33.

124. National People's Congress, Standing Committee, The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (June 26, 1999), *available at* http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc17.pdf.

this decision that it was later revealed that the entire Court considered resigning in protest.[125] Perhaps wary of triggering further controversy, between 2000 and 2015, the NPCSC appeared more restrained in its use of the interpretive power.[126] That restraint vanished, however, in the face of localism, an indication of how seriously Beijing takes the issue. Before the lower court had even reached a decision on the merits of the oaths case (let alone waiting for the case to work its way up the appellate chain), the NPCSC issued an Interpretation of Article 104.[127] To reiterate, the NPCSC did not and could not offer an interpretation of the Oaths and Declarations Ordinance, but only of the related Basic Law provision itself. The Interpretation was expansive, noting that the correct understanding of Article 104 was that the candidates had to take the oath seriously and correctly, and any errors could not be subsequently fixed:

> An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law. . . . An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article. . . . If the oath taken is determined as invalid, no arrangement shall be made for retaking the oath. [128]

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125. *See* Kemal Bokhary, *All City's Top Judges "Considered Quitting"*, S. CHINA MORNING POST (Sept. 8, 2011), https://www.scmp.com/article/978391/all-citys-top-judges-considered-quitting.

126. The NPCSC issued only three Interpretations over a fifteen-year period. One dealt with the meaning of whether the phrase "subsequent to 2007" included 2007, one dealt with the effects of a failure of the Chief Executive to complete a full term on the length of the term of their successor, and one related to whether or not Hong Kong adhered to the concept of restrictive or absolute state immunity. Only the last of these related to a case in the local court system, and in it the CFA had determined the relevant provisions of the Basic Law to be interpreted were within the competency of the NPCSC and duly approached it with the request for an Interpretation (*see* Democratic Republic of Congo v. FG Hemisphere Assoc. LLC, [2011] H.K.C.F.A.R. 95, 165 (C.F.A.)).

127. National People's Congress, Standing Committee, Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (Nov. 7, 2016), *available at* http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf.

128. *Id.* at 2.

This technique of constitutional interpretation—essentially a legislative inclusion into the Basic Law of an entirely new clause that alters a piece of subsidiary legislation—is very different to the kind of "reading in" interpretive technique familiar to common law constitutional jurisprudence. It is, however, uncontroversial and common within the PRC legal system.[129] Since the local courts were legally obligated to follow the Interpretation, this ensured the Government's action would succeed and the two Youngspiration candidates were duly barred from office.[130] In finding for the Government, however, Justice Au contended that he would have come to the same conclusion even in the absence of the Interpretation, arguing that "independent of the Interpretation, the laws of Hong Kong as set out in the relevant provisions [of the] Oaths & Declarations Ordinance, when properly construed, indeed carry effectively the same meanings and legal effects [as the Interpretation]."[131] The Court of Appeal took the approach that the Interpretation had independent effect and served to disqualify Leung and Yau, while the Ordinance required them to then vacate their offices upon disqualification.[132] The purpose of Article 104, according to Cheung CHJC writing for a unanimous panel, was to make taking the oath genuinely, solemnly, and sincerely a "prerequisite and precondition to the assumption of office" and the Interpretation put any question over this "beyond doubt."[133] In rejecting leave to further appeal, the CFA noted that the Interpretation declared what the law "is and always has been" since the Basic Law came into effect, and consequently, that it was dispositive.[134]

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129. See for instance Sophia Woodman, *Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law*, *in* INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 229, 229–41 (Hualing Fu et al. eds., 2007); Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism & Chinese Characteristics*, 3 H.K. L.J. 200 (2001).

130. Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. President of the Legislative Council, *supra* note 119.

131. *Id.* ¶ 120.

132. Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. President of the Legislative Council, [2017] 1 HLRD 460, ¶ 42 (C.A).

133. *Id.* ¶ 28.

134. Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. President of the Legislative Council, [2017] FAMV 7–10/2017, ¶ 35 (C.F.A.).

Buoyed by this success, the Government subsequently began similar actions against Lau Siu-lai, Edward Yiu Chung-yim, Nathan Law Kwun-chung, and Leung Kwok-hung, all of whom were subsequently disqualified.[135] In July of 2018, the Government announced it would take steps to formally ban the Hong Kong National Party entirely, preventing it from continuing operations.[136] The mechanism for banning the National Party was the application of the Societies Ordinances, Article 8, which allows the Secretary for Security to prohibit the operation of any organization if the Secretary believes it is necessary in the "interests of national security, public safety, or public order."[137] Though the National Party is perhaps the most extreme of the localist groups in explicitly calling for abolishment of the Basic Law and formation of a Republic of Hong Kong, the use of the Societies Ordinance to ban a political party—none of whose members have been charged with committing a crime—is remarkable. It harkens back to the colonial era,[138] when the Ordinance was used to restrict the operation of communist organizations.

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135. Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. Nathan Law Kwun Chung, [2016] HCAL 223/2016 (C.F.I.), Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. Leung Kwok Hung, [2016] HCAL 224/2016 (C.F.I.), Chief Executive of the H.K. Special Admin. Region (HKSAR) v. Lau Siu Lai, [2016] HCAL 225/2016 (C.F.I.), Chief Executive of the H.K. Special Admin. Region (HKSAR) v. Yiu Chung Yim, [2016] HCAL 226/2016 (C.F.I.) (all heard together, again in front of Au J). Leung Kwok Hung appealed, unsuccessfully: Chief Exec. of the H.K. Special Admin. Region (HKSAR) v. Leung Kwok Hung, [2019] HKCA 173. Yiu later ran in a by-election for another seat, though he lost. Given his earlier disqualification and the government's attempts to bar certain candidates, it was not initially clear if he would be allowed to stand for office again; however, the election authorities approved his candidacy after he stated that he would sincerely uphold the Basic Law and that he had accepted the legitimacy of his earlier disqualification. *See* Tony Cheung & Jeffie Lam, *Hong Kong Democracy Activist Edward Yiu Cleared to Run in Legco By-Election*, S. CHINA MORNING POST (Jan. 29, 2018), http://www.scmp.com/news/hong-kong/politics/article/2131043/hong-kong-democracy-activist-edward-yiu-cleared-run-legco.

136. Jeffie Lam, *Hong Kong Separatist Political Party Faces Landmark Government Ban in the Name of National Security*, S. CHINA MORNING POST (July 17, 2018), https://www.scmp.com/news/hong-kong/politics/article/2155566/hong-kong-separatist-political-party-faces-landmark.

137. Societies Ordinance, (2018) Cap. 151, 24 § 8 (H.K.).

138. Until the events described in this article, the Societies Ordinance had only been used post 1997 to combat organized crime groups (also known as 'Triads').

Actions against localist councillors or those who may have localist sympathies continue in other forms. For example, another individual was charged with desecrating the national flag after turning upside down a number of small PRC flags that pro-Beijing councillors had kept on their desks in the legislature. He was convicted, fined 5000 HKD, or about $650 USD, and was subsequently fired from his adjunct professor job at a local university.[139] Though he did not suffer any penalty as a legislative councillor per se, there were clear impacts on his personal and professional life in other contexts. Indeed, the possible risk of being associated with the localist cause is a central element of the message that is intended to be conveyed, and it comes from a wide range of public bodies and establishment interests. The police have begun using an expansive interpretation of the Crimes Ordinance and a relatively weak regime governing police access to user data to request removal of certain kinds of content online. I have argued elsewhere that this can allow political considerations to inappropriately enter into policing decisions and have chilling effects on political speech online.[140] In 2016 the Education Bureau warned secondary school teachers that they could be fired if they talked about independence in the classroom.[141] Universities were not immune from the controversy. Following protests on several campuses and conflicts between different groups of students, in 2017 the vice-chancellors of the local universities issued a joint statement stating that their institutions were places for learning rather than political protest, that free speech had limits, and that independence for Hong Kong "contravened" the Basic Law.[142] The same year, the Food

139. Joyce Ng & Christy Leung, *Localist Hong Kong Lawmaker Faces Charges for Turning Flags Upside Down in Legco Chamber*, S. CHINA MORNING POST (Apr. 10, 2017), http://www.scmp.com/news/hong-kong/politics/article/2086445/localist-hong-kong-lawmaker-faces-charges-turning-flags.

140. *See* Stuart Hargreaves, *Online Monitoring of 'Localists' in Hong Kong: A Return to Political Policing?*, 15 SURVEILLANCE & SOC'Y 425 (2017).

141. Ernest Kao, *Hong Kong Teachers Warned They Could Be Struck Off For Separatist Talk in Schools*, S. CHINA MORNING POST (Aug. 14 2016), http://www.scmp.com/news/hong-kong/politics/article/2003782/hong-kong-teachers-warned-they-could-be-struck-separatist.

142. Shirley Zhao & Peace Chiu, *Students Vow to Camp Out and Protect Hong Kong Independence Banners After Removal Threat*, S. CHINA MORNING POST (Sept. 15, 2017), https://www.scmp.com/news/hong-kong/education-community/article/2111365/let-hong-kong-universities-not-government-deal. Peter Mathieson (formerly Vice-Chancellor of HKU) subsequently back-tracked

and Environmental Hygiene Department denied a number of localist parties licenses to set up stalls at a Lunar New Year.[143] The justification offered by the Department was that it was necessary to avoid the threat of disruption to public order due to their controversial views. In 2018, a British journalist who had chaired a talk by the leader of the Hong Kong National Party at the Foreign Correspondent's Club found that a renewal of his work visa was denied without explanation.[144] Though the Government denied[145] there was a link between the talk and the visa, it was interpreted by many as an attack on press freedom.[146]

Pushback could also be felt from the financial sector—a dominant player in Hong Kong, which styles itself as a free-market hub. Though banks are not, of course, public bodies, they are nonetheless very much part of the establishment and appeared willing to follow the Government's lead in this area. Localist parties encountered seemingly coordinated difficulties in setting up bank accounts into which they could receive donations,[147] while

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after he took up a new position in Scotland. *See* Tom Peterkin, *Hong Kong Independence Row Dogs Edinburgh Uni's Incoming Principal*, SCOTSMAN (Sept. 24, 2017), https://www.scotsman.com/news/politics/hong-kong-independence-row-dogs-edinburgh-uni-s-incoming-principal-1-4568302.

143. Danny Mok, *Youngspiration and HKNP Barred From Operating Stalls at Hong Kong's Largest Lunar New Year Fair*, S. CHINA MORNING POST (Jan. 19, 2017), https://www.scmp.com/news/hong-kong/politics/article/2063479/youngspiration-and-hknp-barred-operating-stalls-hong-kongs.

144. Jeffie Lam, Tony Cheung, & Sum Lok-kei, *Backlash as Hong Kong Denies Visa Renewal for Financial Times Journalist Victor Mallet*, S. CHINA MORNING POST (Oct. 5, 2018), https://www.scmp.com/news/hong-kong/politics/article/2167149/hong-kong-denies-visa-renewal-foreign-journalist-who-chaired.

145. Tony Cheung & Sum Lok-kei, *I Will Defend Press Freedom but Not Allow Advocacy of Hong Kong Independence, City Leader Carrie Lam Says Amid Row Over Visa for British Financial Times Journalist*, S. CHINA MORNING POST (Oct. 9, 2018), https://www.scmp.com/news/hong-kong/politics/article/2167599/i-will-defend-press-freedom-not-allow-advocacy-hong-kong.

146. Alvin Lum, *Hong Kong's Denial of Work Visa for Journalist Victor Mallet Sends 'Chilling Message' About Erosion of Basic Rights, Financial Times Says*, S. CHINA MORNING POST (Oct. 8, 2018), https://www.scmp.com/news/hong-kong/politics/article/2167391/hong-kongs-denial-work-visa-journalist-victor-mallet-sends.

147. *HSBC Accused of Censorship for Refusing Hong Kong Student Leader's Account*, GUARDIAN (Apr. 6, 2016), https://www.theguardian.com/world/2016/apr/06/hsbc-accused-of-censorship-for-refusing-hong-kong-student-leaders-account.

the Bank of China and HSBC closed or froze the accounts of some of the disbarred councillors.[148] These actions are consistent with the attitude of much of the financial sector towards democratic agitation in general, which is deemed to be a threat to Hong Kong's stability and, thus, profitability.[149]

IV. IS LOCALISM UNCONSTITUTIONAL?

All these maneuvers—from efforts to bar political candidates from running for office to the dissuasion of political protest on university campuses—were justified by the Government on the ground that localism is *per se* unconstitutional. The Basic Law states that Hong Kong is an "inalienable" part of the PRC[150], and that it is a "local administrative region" of the PRC that comes directly under the authority of the CPG.[151] To use these provisions to ground a broad claim that localist *speech* is automatically "unconstitutional" is, however, misleading for a number of reasons. First, it ignores that most variants of localism, as this article has noted, do not call for outright independence.[152] Indeed, the majority of localists simply seek to protect the "high degree of autonomy" for Hong Kong *within* the PRC that both Article 2 and Article 12 of the Basic Law promise.[153] The dispute most localists have with the Government is simply over what that autonomy under OCTS entails. Autonomy is necessarily a contested concept, and it stretches credulity in a liberal-democratic system (or even a quasi-liberal democratic one like Hong

148. Kris Cheng, *Bank of China Closes Account of Localist Youngspiration Party as HSBC Freezes That of Ousted Lawmaker*, H.K. FREE PRESS (Feb. 20, 2017), https://www.hongkongfp.com/2017/02/20/bank-china-closes-account-localist-youngspiration-party-hsbc-freezes-ousted-lawmaker/.

149. *See, e.g.*, Gary Cheung, *Business Chambers Condemn Occupy Central in Newspaper Ads*, S. CHINA MORNING POST (June 12, 2014), http://www.scmp.com/news/hong-kong/article/1529895/business-chambers-condemn-occupy-central-newspaper-ads.

150. The Basic Law, *supra* note 1, art. 1.

151. *Id.* art. 12.

152. The Hong Kong National Party and its stated policy goal of abolishment of the Basic Law is the notable outlier here.

153. Section 40 of the Legislative Council Ordinance requires, inter alia, that a candidate declare that they will uphold the Basic Law; as currently being implemented by the EOC it seems unlikely that any candidate will be allowed to run on a platform pledging to abolish the Basic Law. Whether or not § 40 could actually withstand a constitutional challenge now that it is being used to ensure a substantive political belief requirement, is another matter, however. Legislative Council Ordinance, *supra* note 98, § 40.

Kong) to say that the government can a priori determine which particular understanding is acceptable and which is not as matter of public policy and law. More importantly, however, this position fundamentally misstates the way the Basic Law operates which, as with many constitutions, is essentially vertical: it defines the structure of the state (or in this case, the Special Administrative Region), the values to which it is committed, and the limits within which it must operate, given that structure and those values. The rights under the Basic Law are thus structured in a negative sense; they prevent the Government from encroaching upon enumerated freedoms, rather than creating obligations upon individuals.

This is why the Government must use subsidiary legislation to give effect to even those elements of the Basic Law the text of which might otherwise suggest the existence of positive individual obligations. Consider, for instance, the requirement created under Article 104 of the Basic Law for Government officials to take an oath of office. Although this requirement might appear to directly create an obligation, the obligation is actually given effect through the Oaths and Declarations Ordinance. While Article 104 refers to the need for the Chief Executive and other principal officials to take certain oaths, it states they must do so "in accordance with law." The correct understanding of Article 104, then, is that it requires the Government implement subsidiary legislation to give it effect, and indeed, this is precisely what the Government has done through the relevant ordinances. Recall that it was not Article 104 that was held by the courts in the oath-taking case to have independent effect; rather it was only the NPCSC Interpretation of it that could, in the Chinese style, effectively act as a legislative supplement (and thus create an obligation). This principle explains why even though the prohibition on desecration of the national flag comes from the incorporation of the relevant National Law into Annex III of the Basic Law, it is nonetheless still implemented through a subsidiary law.[154] Those who deface the national flag are charged not with violating an element of the Basic Law, but instead the National Flag Ordinance.

The vertical operation of the Basic Law means it would be ludicrous to suggest that a private book publisher who refused to publish books that contained certain political viewpoints would

154. National Flag and National Emblem Ordinance, *supra* note 46.

be acting 'unconstitutionally'. It means only that if the Government prohibited the publication of certain kinds of political materials, then *that* prohibition would almost certainly be contrary to the speech rights contained in Basic Law.[155] In short, the Basic Law does not create direct obligations on individuals; rather, it creates a political system and a set of rules and values that the Government must respect and abide by.

Under a vertical account of the Basic Law there is nothing incompatible between advocating for a particular interpretation of autonomy within the OCTS model and upholding the Basic Law. Indeed, to argue and debate and advocate for certain policy positions regarding vital political questions is the very function of a legislative councillor. It is not even contrary to the Basic Law to advocate that the Basic Law should be changed: Article 159 conceives that it may be amended and that the Legislative Council has a role to play in proposing such amendments. Now, it is true that Article 159(4) also holds that no such amendment can contravene the "basic policies" of the PRC regarding Hong Kong; those policies are elaborated in Annex I to the Joint Declaration, and essentially form a rough draft of the Basic Law itself. There is nothing, however, to suggest that those policies are set in stone.[156] The PRC itself has amended its own constitution in very significant ways on multiple occasions since 1955.[157] It would make no sense to argue that the PRC can amend its own constitution, but not its internal policies. The PRC itself has ar-

155. The Basic Law, *supra* note 1, art. 27. The Government is free, of course, to defend the constitutionality of its laws or actions in court, and there is a great deal of jurisprudence detailing how the Government may justify restrictions on rights contained in the Basic Law. See for instance Chan & Lim, *supra* note 15, 569–619.

156. Thus, no matter how odd it may sound, conceptually speaking the Hong Kong National Party's demand for abolishment of the Basic Law is not necessarily 'contrary' to the Basic Law, absent subsidiary legislation.

157. Significant structural changes were introduced in 1954, 1975, 1978, and 1982; smaller changes were made in 1988, 1993, 1999, 2004, and 2018. For amendments pre-2018, see QIANFAN ZHANG, THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS (2012). For the 2018 amendments, see *Translation: 2018 Amendment to the PRC Constitution*, NPC OBSERVER (Mar. 11, 2018), https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/.

gued that the Joint Declaration is an exhausted legal instrument, having fulfilled its purpose on July 1, 1997, and has suggested it believes those basic policies may be altered.[158]

It is absolutely true that a declaration of independence by the Hong Kong Government would violate Article 1 of the Basic Law. There is no question that such a declaration would be unconstitutional and have no force or effect, short of a complete collapse of the existing legal order. The corollary, however, is that it is not true that localist *speech* by individuals is automatically a constitutional violation because individuals are not directly bound by the content of Article 1. Yet, that is the impression the Government has tried to create. Should it wish to limit certain kinds of political speech, the Government must pass a clear legislative instrument to do so and be willing to have the constitutional validity of that instrument tested in the courts.

V. CAN LOCALIST SPEECH BE BANNED?

Not all jurisdictions agree on the proper limits of speech, of course. Though hate speech laws in Europe naturally come into conflict with the European Convention on Human Rights free expression guarantee,[159] the ECtHR has nonetheless generally found such laws to pass constitutional muster.[160] Canada's hate speech laws were also challenged as a violation of the free expression guarantee under the Canadian Charter of Rights and Freedoms,[161] they were ultimately deemed constitutionally valid by the Supreme Court of Canada as a limit that was "demonstrably justifiable in a free and democratic society."[162] In contrast, the courts of the United States have found that hate speech laws

158. *China Says Sino-British Joint Declaration on Hong Kong No Longer Has Meaning*, REUTERS (June 30, 2017), https://www.reuters.com/article/us-hongkong-anniversary-china/china-says-sino-british-joint-declaration-on-hong-kong-no-longer-has-meaning-idUSKBN19L1J1.

159. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, E.T.S 5, 213 U.N.T.S. 221.

160. *See, e.g.*, Kühnen v. Germany, App. No. 12194/86 (Eur. Comm'n H.R. May 12, 1988); Lehideux v. France, App. No. 24662/94, 1998-VII Eur. Ct. H.R. 2887; Garaudy v. France, App. No. 65831/01, 2003-IX Eur. Ct. H.R. 803 [hereinafter Garaudy].

161. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c 11, § 2(b) (U.K.).

162. R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

do not withstand constitutional scrutiny.[163] However, while the outcomes of challenges to limits on speech are not necessarily the same across jurisdictions, what is consistent is that the limits are legislated clearly before being subject to constitutional scrutiny by an independent judiciary. The Hong Kong Government has assuredly not, however, done this in its attempts to limit or contain what it sees as harmful political speech. Instead, as this article has shown, it has engaged in collateral attacks against it. This approach is inconsistent with the way in which rights may be limited under the Basic Law. But what *would* be a valid approach?

The first step would of course be drafting a law with sufficient precision to meet the 'prescribed by law' standard, perhaps forbidding the public avocation (orally or in writing) of the separation of Hong Kong from the rest of China. One might reasonably expect that such a law would immediately be challenged in the courts. A court applying the proportionality test would first (assuming the law is indeed sufficiently precise) ask if there were a legitimate aim to the limitation. As noted, the jurisprudence in Hong Kong considers that the only valid aims in restricting the speech right to be those found within the text of the ICCPR.[164] It seems likely that the Government would try and justify a hypothetical law as necessary in the interests of national security or public order (*ordre public*). Indeed at least one commentator arguing in favour of a law banning localist speech tried to make the national security claim through analogy to Holocaust denial laws: the argument goes that such laws are intimately tied to the lived history of certain places, and the lived history of China in the nineteenth and twentieth centuries was one of repeated

163. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The maximalist approach to speech in the United States also led to a very different outcome than in Hong Kong regarding a flag desecration law. The burning of the U.S. flag was a commonplace form of protest during the Vietnam War, and Congress attempted to criminalize it in 1968 (18 U.S.C. § 700 (1968)). In 1989, the Supreme Court found this law to violate the First Amendment, concluding that burning the flag was expressive conduct and the Government could not justify regulating such conduct that fell short of immediate incitement. *See Texas v. Johnson*, 491 U.S. 397 (1989). Congress immediately sought to pass a new law that attempted to skirt the Court's decision by banning any 'mistreatment' of the flag without regard to purpose, but this too was deemed unconstitutional on the same grounds. *See United States v. Eichman*, 496 U.S. 310, 312 (1990).

164. *See supra* note 55.

territorial incursions from hostile foreign states.[165] As a result, goes the argument, Hong Kong has a legitimate justification in banning any speech that might threaten the sovereignty or territorial integrity of the PRC.[166] The analogy rings hollow, however. It is true that, reflecting the atrocities of the twentieth century, a number of European nations, as well as Israel, specifically forbid the public approval or denial—both orally or in writing—of the Holocaust.[167] Those laws, however, are connected to preventing the reoccurrence of a historical genocide targeted at members of particular classes. Preventing incitement to violence is therefore a critical justification: "Denial can often be mixed with other, more direct, methods of incitement capable of concocting potent verbal cocktails that foment violence against victim groups."[168] In judging the legitimacy of Holocaust denial laws, the ECtHR "takes into account context and the actual likelihood of violence when judging a speech restriction,"[169] and also considers that "denying crimes against humanity is [itself] a form of racial defamation [and thus] incitement."[170] Without a proper anchor to security concerns, there is a risk that public denial laws can be improperly deployed to repress legitimate dissent. Allen and Norris show that this has been the case in

165. Tony Cheung, *Ban Advocacy of Hong Kong Independence, Beijing Mouthpiece Says Amid Banner Row*, S. CHINA MORNING POST (Sept. 11, 2017), https://www.scmp.com/news/hong-kong/politics/article/2110585/ban-advocacy-hong-kong-independence-beijing-mouthpiece-says.

166. *Id.*

167. *See, e.g.*, Strafgesetzbuch, *supra* note 94, § 130(3–5); Ustawy o Instytucie Pamięci Narodowej [Act on the Institute of National Remembrance] (1998 r. DZ. U. 1998 Nr 155, poz. 1016) (Pol.); Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale [Act on Punishing the Denial, Minimization, Justification or Approval of the Genocide Perpetrated by the German National Socialist Regime During the Second World War] of Mar. 23, 1995, MONTIEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 30, 1995, 7996; Denial of Holocaust (Prohibition) Law, 5746–1986, §2–4 (1986) (Isr.).

168. GREGORY GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 418 (2017).

169. *Id.* at 164.

170. Garaudy, *supra* note 160.

Rwanda, for instance.[171] For this reason, the Johannesburg Principles[172] seek to connect the national security justification to imminent violence. They hold that restricting speech (other than preventing the disclosure of state secrets or other protected information)[173] under the guise of national security requires a government to demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."[174] Moreover, the Johannesburg Principles specifically note that the following forms of expression should *not* be considered a threat to national security:

> (i) [that which] advocates non-violent change of government policy or the government itself; [or]
>
> (ii) [that which] constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials. . . .[175]

Localist speech is undoubtedly a thorn in the side of the Government, but it is much less clear that such speech poses an actual threat to national security on these grounds. There is no evidence that localist speech is part of a plan to destabilize the region or the PRC by hostile foreign actors. It does not incite hatred or risk of violence against any particular person, let alone

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171. Jennifer M. Allen & George H. Norris, *Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society*, 7 J. INT'L L. & INT'L REL. 146, 158 (2011).

172. The Johannesburg Principles were adopted in 1995 and are based on regional and international law and standards relating to the protection of rights under Article 19 of the ICCPR. *See* ARTICLE 19, JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (1996), *available at* https://www.article19.org/resources/johannesburg-principles-on-national-security-freedom-of-expression-and-access-to-information/.

173. *Id.* princ. 15. Preventing the release of 'state secrets' was the traditional aim of limiting speech rights in the name of 'national security,' and is common to even the most maximalist speech regimes. *See, e.g.*, Thomas M. Frank & James J. Eisen, *Balancing National Security and Free Speech*, 14 N.Y.U J. INT'L L. & POL. 339 (1982); David L. Sobel, *Free Speech & National Security*, 20 BILL OF RIGHTS J. 5 (1987); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L. J. 369 (2009).

174. ARTICLE 19*, supra* note 172, princ. 6.

175. *Id.* princ. 7.

all members of an identifiable class. The actual threat to the integrity of the state seems minimal. Though the Johannesburg Principles are not binding, there is no clear national security justification for limiting speech in the case of localists. Given the holding in *Ng Kung Siu*, its treatment of political context, and the current Chief Justice's views on the matter as expounded in *Koo Sze Yiu*, however, it seems much more likely that the Court would accept public order (*ordre public*) as a legitimate aim of a hypothetical law that sought to regulate localist speech: it would appear to be relatively straightforward to make the same arguments about the reinforcement of societal stability under the OCTS model being a legitimate aim in the context of separatist speech as was made in the flag cases. The more difficult challenge for the Government in this scenario would be meeting the 'rational connection' and 'minimal impairment elements of the proportionality test.[176]

Could there be a rational connection between a hypothetical law restricting localist speech and the goal of protecting national stability? This author suggests no, since where such speech *does* actually pose serious threats to public order or to stability generally there are already suitable laws in place. For instance, the Public Order Ordinance can already be used to prohibit political demonstrations that are likely to lead to breach of the peace (this limitation has survived constitutional scrutiny).[177] In terms of overall social or national stability, the Crimes Ordinance already contains provisions dealing with sedition: it is an offence to "excite [the] inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other

176. The new fourth step of the test under Hysan Development Co. Ltd., *supra* note 52, does not seem relevant here, as it seeks to insert consideration of the actual deleterious effects on an individual of the impugned rights limitation even if the Government has made out its case under the other steps of the test. Since I have argued that it is impossible for the Government to meet its burden under the rational connection and minimal impairment steps, there is no need to consider the fourth step in the analysis.

177. Public Order Ordinance, (2017) Cap. 245 (H.K.). In Leung Kwok Hung, *supra* note 74, the CFA found that the requirement that protestors obtain in advance from the Police provide a letter of 'no objection' was acceptable, though the grounds upon which the Police could deny to provide such a letter were limited. The Court severed *ordre public* as reason for denial from the scheme, though it agreed that the police could object to a proposed march for the more straightforward public order reasons.

matter in Hong Kong as by law established; incite persons to violence; or counsel disobedience to law or to any lawful order."[178] These provisions mean that any actions by localists to foment actual revolution against the sovereign or to agitate for the breakdown of the legal order through violence are already prohibited by Hong Kong law; no new speech limits are required to criminalize such activities.[179] Proving that a law regulating the actual content of certain types of political speech is rationally connected to protecting public order or general stability of the community would be a significant legal hurdle for the Government to clear at this stage of the legal analysis.

Assuming that the Government did meet that challenge, however, the question would then turn to that of impairment, and it is here that a law that sought to tightly regulate the expression of localist sentiment would almost certainly founder. Though it is true that the Government is granted a margin of discretion in its policy choices in achieving its goals, the Court will give much less leeway to the Government where core rights are at issue:

> It is convenient here also to remind ourselves that where the subject matter of the challenge has to do with fundamental concepts, in contradistinction to rights associated with purely social and economic policies, the courts will be particularly vigilant to protect the rights associated with such concepts, and consequently much less leeway or margin of appreciation will be accorded to the authority concerned. These fundamental concepts are those which go to the heart of any society. They

178. Crimes Ordinance, (2017) Cap. 200, § 9(1)(b, f, g) (H.K.).

179. The vast majority of self-described localists seek to do none of this, of course. They argue only for a particular understanding of the autonomy promised to Hong Kong under the Basic Law. The overwhelming majority of people in Hong Kong, including the vast majority of self-described localists, recognize the sovereign claims of the PRC over the Region and accept the OCTS model. There is also a long history in the common law world of using sedition laws to supress unpopular political views, leading to some calls for abolishment. Liberalization during the twentieth century led them to falling into disuse in many jurisdictions, with some calling for their formal abolishment. Only the 'war on terror' appeared to revive interest in using sedition laws to deal with those who would incite violence in others purely through speech. *See* Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 262 (2005); Laurence W. Maher, *The Use and Abuse of Sedition*, 14 SYDNEY L. REV. 287 (1992); Geoffrey Palmer, *Political Speech and Sedition*, 11 Y.B.N.Z. JURIS. 36 (2008–2009); SARAH SORIAL, SEDITION AND THE ADVOCACY OF VIOLENCE: FREE SPEECH AND COUNTER-TERRORISM (2011).

> include, for example, the right to life, the right not to be tortured, the right not to be held in slavery, the freedom of expression and opinion, freedom of religion (among others).[180]

It seems unlikely that a law aimed at the general restriction of localist sentiment in public would meet the minimum impairment threshold, particularly if the Government fails to draw distinctions between the various strains of localist advocacy. A ban on localist speech would necessarily have to be aimed at the very substance of the ideas contained within it, rather than use of those ideas to foment unrest since, as indicated, laws already exist to combat that problem. This means that justifying a total ban on localist avocation would require the CFA to entirely overturn its prior free speech jurisprudence, throwing out the substance versus mode question. Giving validity to such a law would gut the very essence of Hong Kong residents' rights and freedoms under the OCTS model, under which the benefits of a robust political exchange of views remain *even* in its challenging atmosphere. Per Li CJ in *Ng Kung Siu*,

> Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.[181]

A law that sought to prohibit localist discourse in general would require the Court to completely disregard not only its previous jurisprudence, but also the fundamental core of the free expression guarantee. There is no doubt that the majority of Hong Kongers find the localist position pointless, disagreeable, uncomfortable, offensive, or even harmful. The Basic Law, however, clearly protects the rights of Hong Kongers to hold such positions; rights are not and cannot be subject to the desires of the majority. Political speech of all kinds is inherently beneficial in a democratic society. As John Stuart Mill argued,

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion; still

180. Fok Chun Wa v. Hosp. Auth., [2012] 15 H.K.C.F.A. 409, ¶ 79 (C.F.A.).
181. Ng Kung Siu, *supra* note 35, ¶ 41.

> more those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[182]

Given the challenges outlined above, it is more likely that the Government would pass a law limiting a specific class of political speech and then seek to rely upon a helpful Interpretation from the NPCSC to ensure its constitutional survival. The NPCSC is not, as noted, bound by common law modes of constitutional interpretation when exercising its powers under Article 158. It could, therefore, interpret Article 39 and/or Article 27 of the Basic Law so as to explicitly specify that each is limited by the content of Article 1. In turn, this would provide constitutional cover for any subsidiary law that sought to ban the substance of pro-localist speech made in public, eliminating the need for CFA approval. Such a radical move, however, would no doubt inflame political tensions. Though localists hold a fringe political position, general uneasiness about the gradual erosion of the OCTS model is more widespread; indeed, it is a longstanding concern.[183] Though there was a large gap between the controversial Interpretations of 1999 and 2016, it is not clear that the public would tolerate another in short order, particularly if it is popularly understood to be a mechanism for the Government to conduct an end-run around civil liberties. An Interpretation by the Standing Committee designed to save a law that sought to limit

182. JOHN STUART MILL, ON LIBERTY 19 (Batoche Books Ltd. 2001) (1859).

183. The largest street protests Hong Kong has ever seen came in 2003 when the Government attempted to implement national security legislation that was seen by the public as being an overbroad, draconian crackdown on civil liberties. Over half a million people—nearly 10 percent of the entire population—participated in street protests, leading to the bill's withdrawal and various political figures to resign. *See* Albert H.Y. Chen, *Will Our Civil Liberties Survive the Implementation of Article 23?*, H.K. LAW. 80, 81–86 (2002); Tom Kellogg, *Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong*, 17 COLUM. J. ASIAN L. 307, 308 (2003); Carol J. Peterson, *National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's Consultation on Art. 23*, 32 H.K. L.J. 457, 468 (2002). Likewise, an initially aggressive crackdown by police on student protestors during Occupy Central also proved counterproductive, bringing many onto the streets in sympathy rather than out of strong political conviction for the goals. *See* Hargreaves, *supra* note 17.

certain kinds of political speech related to the relationship between Hong Kong and the mainland would likely be viewed by a large part of the population as a troubling erosion of the rights promised to them under the Basic Law. Even though the overwhelming majority of Hong Kongers disagree with the localist position, a draconian crackdown on speech rights might create blowback from moderates.

CONCLUSION

The Government of Hong Kong is faced with a number of choices in dealing with localist speech; it may find none of them to be ideal. Such is the reality of governing a complicated place in a complicated time. This article has suggested that though the Government may attempt to legislate restrictions on certain political speech, the CFA is unlikely to find that such a law comports with the Basic Law. The Government could wait for the NPCSC to issue an Interpretation that would circumvent this problem. Yet that is likely to provoke further political trouble. The Government could continue its method of batting down localists where they can through other methods, justifying a range of actions by creating a false impression in the minds of the public that the Basic Law automatically makes certain kinds of political speech unconstitutional. This, however, grinds down the edges of the political speech right in Hong Kong in a fashion that is inconsistent with the ideals laid out in the Joint Declaration of 1984 and in the Basic Law itself. The fourth choice—and most sensible, in this author's view—is to openly tolerate localist speech and to treat it is as the minor annoyance it is. That does not mean blindly approving of localist speech, nor does it mean shying away from intense criticism of such speech in the course of political dialogue. The only true way to combat localism is to prove to Hong Kongers that it is unnecessary—that their rights and freedoms and way of life are protected through the Basic Law, and that the OCTS commitment to the autonomy of Hong Kong under the sovereignty of the PRC remains the guiding principle. Tolerating unwelcome political speech serves precisely this goal. While the Government may believe itself to be acting rationally for the reasons this article has outlined (or may have effectively no choice in the matter—a separate issue), in the long run, its current approach to the suppression of unwelcome political speech is a deeply dangerous trend. If vital constitutional rights can be eroded outside the framework contemplated by the

constitution in the name of political necessity, then the entire foundation of the OCTS model is threatened.