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Introduction: the lie of the land

At his inauguration on 1 July 1997, the first Chief Executive of the Hong Kong Special Administrative Region (HKSAR), Tung Chee-hwa, declared that ‘for the first time in history, we, the people of Hong Kong, will be master of our own destiny’.¹ On 1 July 2014, the anniversary of Hong Kong’s retrocession to China, almost 500,000 people took to the streets protesting against Beijing’s governance of Hong Kong. A week earlier, 800,000 voted in an informal referendum for the right to freely choose their government. Clearly, they did not feel that they were masters of their own destiny.

The protest on 1 July 2014 was the latest in what has become a tradition of anti-mainland and anti-government marches. Each year since 1997, the anniversary of the handover has been a day of mass demonstration, accompanied by banners, chants slogans, a variety of art works, videos and performances – even a mock tomb symbolising the death of democracy and a mock wedding signifying a forced union. Lawyers dressed in black mark the death of the rule of law. Hong Kong, city of law, has become a theatre of protest.

Lawyers and the rule of law play a central part in these protests. In recent years, the role of lawyers as fighters for political freedom has become of interest to law and society scholars. It is not a new role; as Halliday, Karpik and Feeley demonstrate, when the foundations of

¹ J. M. Carroll, *A Concise History of Hong Kong* (Plymouth: Rowman & Littlefield, 2007), p. 206.

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liberal politics were laid down in eighteenth- and nineteenth-century Europe, lawyers were in the vanguard.² In a variety of ways, they argue, the legal profession has ‘sought the moderation of state power via judicial independence, the creation and mobilisation of a politically engaged civil society, and the vesting of rights in subjects as citizens who would be protected by judiciaries’.³ This is exactly the part currently played by lawyers in the fight against the demise of liberalism and the rise of authoritarianism in post-1997 Hong Kong.

As a British colony, Hong Kong inherited the English system of common law. Before 1997, its legal system was characterised by a separation of powers, an independent judiciary, due process, habeas corpus and the right to own property, as well as freedom from arbitrary arrest, freedom of speech, freedom of association and of assembly, freedom of religion and freedom of travel – what Halliday and others call basic legal freedoms and protections. Much like nineteenth-century England, however, these did not include the right to vote. For a variety of reasons – including opposition from China – Britain never introduced democracy into Hong Kong. Historically, in England itself political rights did not automatically accompany the rule of law. Universal suffrage was only won after long political struggle, though its eventual adoption owed much to the state’s need to incorporate a discontented population whose marginalisation threatened its ‘right to rule’.

As I have argued elsewhere, in Hong Kong a regime of legal liberalism developed in the 1970s, and when it did, it played a similar role to the ideology of rule of law in eighteenth- and nineteenth-century England, absorbing demands for political change by offering, instead, justice, rights and equality before the law.⁴ Limited democratic rights were later developed in Hong Kong by the Patten administration but these, along with administrative channels of consultation developed in the 1970s, were systematically dismantled by China after 1997. Only the rule of law remained intact. However, this too has suffered attack, and it is now unlikely that legal liberalism alone can repeat

² T. Halliday, L. Karpik and M. Feeley (eds.), *Fighting for Political Freedom: Comparative Studies in the Legal Complex and Political Liberalism* (Oxford: Hart, 2007), pp. 1–2.

³ Halliday, Karpik and Feeley, *Fighting for Political Freedom*, pp. 1–2.

⁴ C. A. G. Jones, ‘Politics postponed: law as a substitute for politics in Hong Kong and China’, in K. Jayasuriya (ed.), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1990), pp. 45–68.

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its 1970s performance as a safety valve for sociopolitical grievances. It is nevertheless the case, as I argue here, that rule of law has become deeply embedded in Hong Kong's culture. Indeed, partly because of China's attacks upon it, rule of law has become the ruling idea of the time.

THE POLITICAL CONTEXT

In 1997, when Hong Kong was handed back to China, its inhabitants were promised a 'high degree of autonomy' and the introduction of universal suffrage for the elections of their Chief Executive (CE) and their political representatives in the Legislative Council (LEGCO). By 2014, they were still waiting for the right to vote, and a White Paper issued by Beijing placed their 'high degree of autonomy' on notice. Unanticipated by China, Hong Kong had become a highly politicised city. For Beijing, however, Hong Kong's value lies partly in its status as a marker on the road to the (re)creation of 'One China', a forerunner to reunification with Taiwan. Nonetheless, events in Hong Kong since 1997 have made it unviable as a blueprint for Taiwanese reunification, and Hong Kong's usefulness now lies primarily in its role as an international financial centre and conduit to global commerce. Hong Kong enjoys world standing as an international financial centre, and Beijing supposes this to depend upon stability, 'Stability and Prosperity' having become the mantra of the Communist Party since the repression of the pro-democracy movement of June 1989. 'Stability' in this sense means the maintenance of one-party rule; 'instability' means anything that challenges it. From this view, democracy is politically dangerous. It cannot be allowed in Hong Kong lest it subvert Communist Party rule on the mainland.

However, even amongst those with the greatest investment in Hong Kong's prosperity – the business elite – there is no longer a consensus that democracy is harmful to economic success. In 2014, for example, at the height of a row over Hong Kong's constitutional reforms, the Chinese Manufacturers' Association argued that universal suffrage would mean that Hong Kong's leaders would enjoy a stronger mandate to rule and that this would in fact be good for stability. Dozens of other financial and banking executives issued an open letter to President Xi Jinping demanding universal suffrage and the protection of Hong Kong's core values. Some – including hedge fund managers – even pledged to join the civil disobedience movement Occupy Central,

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which called for universal suffrage.⁵ In an advertisement placed in several leading newspapers, the group stated that Hong Kong's political system 'has become the stumbling block to the city's long-term social, political and economic growth, and is the root cause of social division and disharmony'.⁶ Other international corporations also declared their support for democracy on the basis that it offered greater stability in the long term. Pro-Beijing opponents responded with their own advertisement in three Chinese-language newspapers, arguing that Occupy Central would disrupt business and deter foreign investors. The 'Big Four' accountancy firms declared their opposition to Occupy Central, a position for which they were called to account by the British Parliament. In an unprecedented move, however, dozens of their employees publicly distanced themselves from these remarks, despite a warning that they might lose their jobs if Beijing retaliated by preventing accountants from doing business in the mainland. The proposed Occupy Central sit-in (of 10,000 people in the Central business district) was, they argued, likely to cause no more disruption to business than one of the strong typhoons that hit Hong Kong each summer. Pro-Beijing figures, however, warned of 'blood on the streets' and the deployment of the People's Liberation Army (PLA).

The lack of elite consensus left the government without its traditional centre of support and raised questions about whether, in the event of a Tiananmen-style crackdown on Occupy Central, it would be able to effectively validate its actions. Since its inauguration in 1997, the government of the Hong Kong Special Administrative Region (HKSAR) has adopted a restricted and statist interpretation of the rule of law. It has proved insistent, for example, that 'the law is the law' and that 'rule of law' means 'law and order'. Participants in protests – such as civil disobedience – are seen as law breakers and troublemakers. Mostly, what they have been protesting about since 1997 is the government's failure to guarantee the rights and freedoms associated with the liberal view of the rule of law. Since 1997, this tension has recurred, played out on the streets and in the courts of law. In court, lawyers have repeatedly challenged the government's somewhat statist interpretation of the law and called it to account for infringing the rights of citizens. Out of court, the Bar Association has been in the vanguard of civil

⁵ T. Chong, 'Hong Kong business elite demand 2017 universal suffrage in open letter', SCMP, 23 April 2014.

⁶ Chong, 'Hong Kong business elite'.

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society's defence of the rule of law. In 2014, at the peak of the government's strong law and order rhetoric condemning the Occupy Central movement, the Bar Association's chairman reminded the government that the rule of law required: (i) checks on the legality of governmental discretion; (ii) guarantees as to protection of rights in the laws passed by the legislature; and (iii) an independent judiciary and an equally independent legal profession, free from control or influence of the government or business interests. In a reference to the 'law is the law' approach, he added:

If all we have are laws and the machinery to enforce those laws against ordinary mortals, then 'law' will be nothing more than a mere tool to govern people, and the Government would be able to justify everything on the basis that it was only 'doing things according to law'. It would not be 'Rule of Law' but 'Rule by Law' ... [A]t the end of the day, the flourishing of the Rule of Law depends on the moral fabric of society and the civic qualities of its citizens. Some may call it the 'collective conscience' ... The moral fabric of a society is really what ancient wisdom called a sense of 'justice, righteousness and honour'. If it crumbles, it may take years to rebuild.⁷

Society, the chairman cautioned, needed to remain vigilant in defending the rule of law and the independence of judiciary; judges needed the support of citizens in the exercise of their constitutional function, even when their decisions were unpopular. Citing an English judge, he added, 'there are countries in this world where every judicial decision finds favour with the government, but they are not places where one would want to live.' He ended this speech with a rallying cry to lawyers to 'keep the faith'. On the face of it, this looks very much like Hong Kong lawyers in the vanguard of liberalism. However, Hong Kong has a split legal profession, and the leader of the Law Society – the solicitors' branch – publicly criticised the Bar's stance, opposing the Occupy Central campaign on the basis that it would be bad for business.

This conflict with the Bar is not new – on previous occasions when the Bar has led the charge against human rights infringements, the Law Society has preferred the status quo. As I argue here, this divergence of views very much reflects the different structural position of these two

⁷ Paul Shieh, Speech of the Chairman of the Hong Kong Bar Association at the opening of the legal year 2014, 13 January 2014.

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branches of the profession, solicitors having more to lose if they offend Hong Kong's new sovereign. One question for Hong Kong is whether (and how) this fragmentation of the legal profession limits lawyers' role in fighting the rise of authoritarianism after 1997.

AUTHORITARIANISM

On 10 June 2014, China's State Council issued a White Paper on the 'one country, two systems' policy in Hong Kong. This stated in no uncertain terms that China controlled Hong Kong.⁸ It claimed, somewhat disingenuously, that the 'one country, two systems' policy under which China governed the HKSAR had the 'wholehearted support' of Hong Kong compatriots, was internationally recognised as successful and had secured Hong Kong's continuing stability and prosperity. Hong Kong had, it stated, benefitted from reunion with the Motherland – China had assisted in the fight against the 2003 SARS epidemic, in the Asian financial crisis and in the 2008 global recession.⁹ The White Paper listed a swathe of statistics testifying to the health of the territory's fiscal and foreign exchange reserves; its international rating as a leading international banking centre, securities market, international port and financial development centre; and the level of its external merchandise trade and foreign direct investment. The list itself is a telling indication of how Beijing views Hong Kong and its inhabitants. Essentially, it regards the Hong Kong citizen as *homo economicus*, a self-seeker after wealth who will always trade political freedom for the freedom to make money.

Given this litany of successes, the question is why did Beijing feel the need, in the same document, to 'read the riot act' to Hong Kong in 2014?¹⁰ The White Paper claimed that it was because 'some people' had a 'confused or lopsided' understanding of the 'one country, two systems' policy that needed to be corrected. Many 'wrong views' were rife in Hong Kong. The authors of the White Paper reiterated that the central government held comprehensive jurisdiction over HKSAR,

⁸ For the full text, see www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special.

⁹ Hongkongers remember, rather, that China sought to conceal the outbreak of SARS on the mainland. The epidemic reached Hong Kong via the border.

¹⁰ M. DeGolyer, quoted in A. Wong, 'Beijing's White Paper sets off a fire storm in Hong Kong', SCMP 11 June 2014.

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BATTLE LINES

that Hong Kong was just another administrative region in the People's Republic of China, and that 'one country, two systems' referred only to Hong Kong's retention of a capitalist economic system; it did not mean that the two systems were 'on a par'. Indeed, the 'two systems' was subordinate to 'one country'. Moreover, Hong Kong's 'high degree of autonomy' was neither inherent, nor full autonomy nor decentralised power. There was no such thing as 'residual power'. Any autonomy enjoyed by Hong Kong was held at the grace of Beijing. The clear implication was that what Beijing gave, it could also take away.

The tone of this warning was new, but its substance was not. In 2007, Wu Bangguo had already declared that the 'high degree of autonomy' was something bestowed by the central government; it was not a right.¹¹ Cheng Jie, another mainland scholar, also argued that the high degree of autonomy of the HKSAR was not inherent, there was no locus to counteract the Central Authorities and the HKSAR must accept their supervision.¹² The 2014 White Paper ratcheted up this rhetoric, reminding recalcitrant Hongkongers that all the executive, legislative and judicial practices in the HKSAR 'must conform to the Basic Law' and that all individuals, groups and organisations must obey it. It thus signalled an escalation in Beijing's determination to rein in Hong Kong, and it categorically contradicted Tung's promise that, after 1997, Hongkongers would be masters of their own destiny.

BATTLE LINES

The guarded optimism with which Hongkongers had greeted the 1997 handover had dissipated by 1999 and turned to anger by 2003. This culminated in a mass march on 1 July 2003, when 500,000 people demonstrated against a proposal to introduce mainland-type anti-subversion laws into the HKSAR. The size of the protest shocked the Central Government, which reacted with a mix of 'iron fist' and 'velvet' glove tactics, ranging from intensified efforts to inculcate patriotism at one

¹¹ The comments were made by Wu Bangguo, then head of the NPC. See J. M. Carroll, 'Ten years later: 1997–2007 as history', in Kam Louie (ed.), *Hong Kong Culture: Word and Image* (Hong Kong: Hong Kong University Press, 2011), p. 11.

¹² Cheng Jie, 'The Central Authorities' governing power and special administrative region's high degree of autonomy – using the delegation relationship under the basic law as the framework', *Legal Science* 8 (2007), 61–8, cited in Lo, *Judicial Construction of Hong Kong's Basic Law*, pp. 31–2.

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extreme, to veiled threats to deploy the PLA against protestors at the other. The battleground in between was the courts.

What I have here termed ‘the law wars’ began soon after the handover. The 2014 White Paper was simply the latest in a series of skirmishes centring on interpretation of the Basic Law. The White Paper reminded Hongkongers that the power to interpret and amend the Basic Law was vested in the National People’s Congress Standing Committee (NPCSC) and that although courts of the HKSAR had the power of final adjudication and could provide their own interpretation of matters that lay within the autonomy of the HKSAR, the NPCSC had the final power to interpret the law. The Basic Law might permit Hong Kong to be governed by ‘Hong Kong people’ but:

There are lines and criteria to be observed in implementing ‘Hong Kong people governing Hong Kong’, that is what Deng Xiaoping stressed, Hong Kong must be governed by the Hong Kong people with patriots as the mainstay, as loyalty to one’s country is the minimum political ethic for political figures. Under the policy of ‘one country, two systems’, all those who administrate Hong Kong, including the chief executive, principal officials, members of the Executive Council and Legislative Council, judges of the courts at different levels and other judicial personnel, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country’s sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong. In a word, loving the country is the basic political requirement for Hong Kong’s administrators.¹³

This was the first time Beijing had explicitly stated that it considered judges to be ‘administrators’ who need to be ‘patriots’. This was a step too far for Hongkongers, for whom judicial independence has become, as I seek to show, a core value. The immediate response was a silent protest by a legal profession dressed in mourning black. Civil society activists burned copies of the White Paper, and a firestorm of reaction followed. An estimated 500,000 attended the annual 1 July anti-government demonstration, the largest turnout since 2003, and almost 800,000 defied Beijing by voting in an unofficial Occupy Central referendum calling for constitutional reform. Hong Kong’s *homo economicus* was, it seemed, no longer simply interested in money.

¹³ State Council White Paper, *The Practice of ‘One Country, Two Systems’ in the Hong Kong Special Administrative Region* (Beijing: Xinhua), 10 June 2014.

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By 2014, the legitimacy of the CE, C. Y. Leung, had hit a low point. A few months earlier, in December 2013, a toy wolf called 'Lufsig' flew off the shelves of Hong Kong stores, having become a symbol of protest. Leung is known as a 'wolf' in popular culture, and protestors threw the toy at the CE during demonstrations. The 2014 annual 4 June vigil to commemorate Tiananmen Square witnessed one of the biggest turnouts since 1997, with 180,000 people defying the government's exhortation to be patriots and 'put away the baggage of history'.¹⁴ So low had Beijing's standing fallen that a poll conducted in March 2013 showed that, given the option, 91 per cent of respondents would opt to become a British overseas territory like the Falkland Islands.¹⁵ In March 2014, a visit to Hong Kong by the former colonial governor, Chris Patten, attracted a crowd of 'Hong Kong People First' supporters carrying the colonial flag, singing the British national anthem, and calling for a complete break from Chinese rule. A similar display in March 2013 prompted Beijing officials to denounce the flag-wavers and warn that 'centrifugal forces' would not be allowed in the HKSAR.

The White Paper's release was sabre rattling in the face of this mounting discontent with Beijing's governance. Its publication was seen as an attempt to rewrite the Joint Sino-British Declaration and the Basic Law. The Joint Declaration 3(3) and Article 2 of the Basic Law promise that the HKSAR will enjoy executive, legislative, and independent judicial power. Beijing, however, declared that it alone held ultimate authority, that the NPCSC was free to interpret and amend the Basic Law as it wished and that, in the event of disturbances, it had the power to declare a state of emergency in Hong Kong.¹⁶ International commentators warned that, should the Hong Kong unrest end as another Tiananmen Square episode this would:

alarm Taiwan, disrupt Hong Kong's thriving and vibrant economy [and] destroy China's credibility as a partner that respects legally binding agreements. A violent crackdown would also alarm Japan, Vietnam, the Philippines, Malaysia and Brunei, which worry about China's

¹⁴ Hong Kong is the only Chinese city where the law permits such a gathering.

¹⁵ E. Tran, 'SCMP's Falkland's-inspired poll sparks Hong Kong colonial debate', SCMP, 15 March 2013.

¹⁶ See M. C. Davis, 'With White Paper, Beijing may have achieved the opposite of what it wants', SCMP, 16 June 2014. That the White Paper breached the terms of the 1984 Joint Declaration was reiterated by Bao Tong, a former aide to Zhao Ziyang, who signed the treaty in 1984.

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belligerent posturing in the East and South China seas. Beijing must carefully weigh its Hong Kong options; ordering a violent crackdown is certainly not the best one.¹⁷

Though locally seen as an attempt to scare Hongkongers into silence, the White Paper's belligerence actually swelled support for the Occupy Central movement.¹⁸ But there was also pessimism. Polls in June 2014 showed that fewer than half of the Hong Kong population thought that the 'one country, two systems' arrangement would last.¹⁹ Politics had become more polarised. Pro-Beijing radical groups (such as Justice Alliance, Caring Hong Kong Power, and Defend Hong Kong) had emerged and were strident in their opposition to the democracy campaign. Violence broke out at political rallies. As one political commentator argued, 'the clashes we see on the streets now are a natural extension of [the] two line struggle approach, first advanced by the Red Army in the 1930s. In a nutshell, one is either a friend or an enemy'.²⁰

MAINLANDISATION

What this and previous episodes of unrest illustrate is that, apart from a few short years after 1997, Beijing's resumption of sovereignty over Hong Kong has been beset by resistance to the mainland's attempts at legal, social, cultural and economic re-colonisation and subject (re)formation.²¹ A number of writers have likened the processes of Hong Kong's reintegration to mainland China to re-colonisation, and certainly there are similarities to the strategies of colonisation.²² Here,

¹⁷ M. Mehta, 'Beijing's treatment of Hong Kong protests watched by a wary region', SCMP, 9 July 2014.

¹⁸ Occupy Central is a campaign for universal suffrage. It promised a sit-in of 1,000 people in the Central business district if the government failed to produce proposals which accord with international standards.

¹⁹ A. Wong, 'Beijing's White Paper sets off a firestorm in Hong Kong', *New York Times*, 11 June 2014.

²⁰ A. Cheng, 'Rise of the radical anti-democracy groups in Hong Kong', SCMP, 5 June 2014.

²¹ See H. van Houtem, O. Kramsch and W. Zierhofer (eds.), *B/Ordering Space* (Aldershot: Ashgate, 2005).

²² See, S. Lo, 'The mainlandization and recolonization of Hong Kong: A triumph of convergence over divergence with mainland China' in J. Y. S. Cheng (ed.), *The Hong Kong Special Administrative Region in its First Decade* (Hong Kong: City