Opinion **Hong Kong politics**

**The rule of law in Hong Kong is in grave danger**

*Many judges have lost sight of their traditional role as defenders of the liberty of the subject*

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What is happening to the rule of law in Hong Kong?

On May 30 Hong Kong’s High Court handed down a landmark judgment convicting 14 prominent pro-democracy politicians of “conspiracy to commit subversion”, contrary to the Beijing-imposed National Security Law of 2020. The accused had organised unofficial primaries to select a common list of pro-democracy candidates for the elections to the Legislative Council. Half the Legco seats were subject to a restricted franchise. The plan was to campaign for a majority that would demand universal suffrage and other concessions as a condition of approving the budget.

The Basic Law (Hong Kong’s constitution) provides that universal suffrage is the “ultimate aim”. It expressly authorises Legco to reject the budget, and provides that if it does so twice, the chief executive must resign.

Nonetheless, the High Court decided that rejecting the budget was not a permissible means of putting pressure on the chief executive to change his policies. He would certainly reject the majority’s demands, they said, and so would have to resign. That would interfere with the performance of his functions. The result is that Legco cannot exercise an express constitutional right for a purpose unwelcome to the government. Putting a plan to do this before the electorate was branded a criminal conspiracy. The maximum sentence is life imprisonment, the minimum 10 years.

The fact that the decision is legally indefensible does not necessarily mean that the rule of law is dead. The appeal courts may yet put it right. The real problem is that the decision is symptomatic of a growing malaise in the Hong Kong judiciary. Hong Kong’s judges have been threatened with sanctions in the US, an idea that is crude, counterproductive and unjust. Most of them are honourable people with all the liberal instincts of the common law. But they have to operate in an impossible political environment created by China.

Their first problem is the terms of the National Security Law and a hitherto defunct colonial law against sedition. This illiberal legislation does not entirely curtail the judges’ freedom of action but it severely limits it. Judges have to apply the law.

Second, every judge knows that under the Basic Law, if China does not like the courts’ decisions it can have them reversed by an “interpretation” from the standing committee of the National People’s Congress in Beijing. The “interpretation” that reversed the decision of the courts to allow former media mogul Jimmy Lai to be represented by UK counsel shows how far China will go in using this power against its opponents.

Third, there is the paranoia of the authorities. The violent riots of 2019 were shocking but the ordinary laws of Hong Kong were perfectly adequate for dealing with them. The National Security Law was imposed in response to the threat of a pro-democratic majority in Legco in order to crush even peaceful political dissent. Pro-democracy media have been closed down by police action. Their editors are on trial for sedition. Campaign groups have been disbanded and their leaders arrested.

An oppressive atmosphere is generated by the constant drumbeat from a compliant press, hardline lawmakers, government officers and China Daily, the mouthpiece of the Chinese government. A chorus of outrage follows rare decisions to grant bail or acquit. There are continual calls for judicial “patriotism”. It requires unusual courage for local judges to swim against such a strong political tide. Unlike the overseas judges, they have nowhere else to go.

Intimidated or convinced by the darkening political mood, many judges have lost sight of their traditional role as defenders of the liberty of the subject, even when the law allows it. There are guarantees of freedom of speech and assembly in both the Basic Law and the National Security Law, but only lip-service is ever paid to them. The least sign of dissent is treated as a call for revolution. Hefty jail sentences are dished out to people publishing “disloyal” cartoon books for children, or singing pro-democracy songs, or organising silent vigils for the victims of Tiananmen Square.

Hong Kong, once a vibrant and politically diverse community is slowly becoming a totalitarian state. The rule of law is profoundly compromised in any area about which the government feels strongly.

I was an overseas judge of the Court of Final Appeal until my resignation last week. I remained on the court in the hope that the presence of overseas judges would help sustain the rule of law. I fear that this is no longer realistic. Others are less pessimistic. I hope that they are proved right.

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