HONG KONG WATCH

‘Political screening in Hong Kong’

The disqualification of candidates and lawmakers ahead of the March by-elections

Foreword by Sir Malcolm Rifkind, QC

"This Report makes very disturbing reading. In a measured, thoughtful and factual way it demonstrates that the obligations that the Chinese Government accepted in 1997 are being eroded.

The steps being taken as regards disqualification of candidates are not only unacceptable. They reinforce the concern, that has already been expressed, that there may be a strategy to diminish Hong Kong's autonomy in a step by step process over the years.

Such measures do not go unnoticed and are leading to growing criticism and controversy not just from the people of Hong Kong but, also, from Hong Kong's and China's friends throughout the world."

Sir Malcolm Rifkind QC

Sir Malcolm Rifkind, QC is a patron of Hong Kong Watch, who served as the United Kingdom's Foreign Secretary from 1995-1997 and Defence Secretary from 1992-1995. He held other senior positions in the Cabinet under Prime Ministers John Major and Margaret Thatcher.

Foreword by Sir Geoffrey Nice, QC

"This detailed Report demonstrates, line by line and law by law how things have developed for true democracy in Hong Kong once:

> 'The two lawmakers from Youngspiration, Baggio Leung Chung-hang and Yau Wai-Ching, referred to China as 'Chee-na' which is *widely considered to be offensive*. Yau Wai-Ching also referred to China with a *swearword*' (see body of Report).'

Hong Kong Watch supports 'one country, two systems', not Hong Kong Independence and its Report does not divert from that position. But the Report shows with clarity how these 'offensive' steps have been 'pounced on' by the Standing Committee of the National People's Congress (NPCSC). Such a powerful committee might have regarded the youthful enthusiasm of Baggio Leung Chung-hang and Yau Wai-Ching as understandable, correctable but acceptable. Instead it showed by the steps it took for the particular problem what must be its general underlying intent: to keep democracy and even freedom of thought in Hong Kong on a tight rein. In this it was able to rely on support from the Government and even the Judiciary of Hong Kong. There was some light, perhaps fearful, push-back by Hong Kongers happy to leave the hard work of resistance to some lawyers and those prepared to face sanction, prison and financial penalty in the interest of what they see as justice in a setting of the democracy they believed they enjoyed.

The hard work of putting right what has happened remains in part technical and certainly for locals to deal with within the Hong Kong legal and political systems. Outsiders can perhaps do little, although one 'outsider' - the UK Government - should not be looking away as it seems inclined to do when it has treaty obligations to meet, whatever upset this may cause to the Chinese government.

But outsiders can, from other experience, remind Hong Kongers and the Standing Committee of the National People's Congress (if it is remotely sincere in protestations of honouring the 'one country two systems' regime in Hong Kong) of this: in politics and in law, separately or in combination, the first step away from the path of right - the path of recognising right and rights - is what the insincere will always seek to achieve, knowing that from a first step second and subsequent steps will be ever easier and always less resisted.

The people of Hong Kong have a right to freedom of thought and speech and to free engagement in the democratic process. This Report shows why they should be able to count on support from others in the difficult work they must do to avoid a first step away from the open path of right and rights to the thorny undergrowth beside the open path and then to the dark forest in which they and their rights will be so easily consumed."

Sir Geoffrey Nice QC

Sir Geoffrey Nice QC is a patron of Hong Kong Watch. He is a British barrister who led the prosecution in the trial of Slobodan Milošević in The Hague and has subsequently worked at the International Criminal Court for countries and victims of crimes and elsewhere pro bono for victim groups who can achieve no representation at any court. He is co founder of the Geoffrey Nice Foundation.

EXECUTIVE SUMMARY

On 11 March 2018, Hong Kongers in four key constituencies will enter the polling booth for an election which has been shrouded in controversy. The by-elections have been tainted by government-sanctioned political screening which has resulted in the disqualification of elected lawmakers and candidates.

This report is an investigation of the legality of the disqualification of candidates from standing for election, and of the disqualification of lawmakers during the 'oath-taking saga' of 2016. We have found that in both cases fundamental rights have been unreasonably curtailed by the government of Hong Kong Special Administrative Region.

Photo: GovHK

The six disqualified lawmakers. Photo: Citizen News.

The Oath-Taking saga

In November 2016, the Standing Committee of the National People's Congress (NPCSC) issued a controversial 'Interpretation' of Basic Law Article 104. This provided the legal basis for the disqualification of six elected legislators on the basis that they failed to properly take their legislative council oaths. We have found that:

The Interpretation of Basic Law 104 by the Standing Committee of the National People's Congress infringes the 'high degree of autonomy' protected for Hong Kong under 'one-country, two-systems'.

'The Interpretation' of Basic Law Article 104 would be more accurately described as either an amendment to Basic Law or an interpretation of Hong Kong's local law.[1] Under Article 158 of the Basic Law, this is an unlawful intervention, and therefore 'The Interpretation' is an illegal infringement which undermines one-country, two-systems.

'The Interpretation' violates rights enshrined in Hong Kong's constitution, including freedom of speech and the right to stand in election enshrined in Article 26 and Article 27 of the Basic Law.

Under Basic Law, these rights can only be limited if they are 'prescribed by law'. The wording of Basic Law Article 104 is so vague that it does not provide a sufficient reason for the limitation of these rights. The limitation of these rights by the Interpretation was abused for political gain by the Hong Kong government under the former Chief Executive, C.Y. Leung**.**

The retroactive punishment of Legislative Council members undermines rule of law and common law principles, breaching the right to a fair trial.

The lawmakers were disqualified on the basis that the NPCSC Interpretation had supposedly applied since 1997. For the National People's Congress to change the rules and then act as though these rules have been in place since 1997 is patently absurd and undermines Hong Kong's autonomy. The demand that retroactively disqualified lawmakers repay their salaries, and the salaries of their staff, is a particular concern.

[1] 'The Interpretation' could be described as an Interpretation of Section 21 of the Oaths and Declarations Ordinance (ODO).

Edward Leung Tin-Kei. Photo: Reuters's Bobby Yip.

The disqualification of lawmakers

The disqualification of candidates in Legislative Council elections was unprecedented before 2016. The rise of localism, and particularly the unexpected success of Edward Leung Tin-Kei's by-election campaign in February 2016, was deemed threatening and unacceptable by the Hong Kong government and Beijing. Unfortunately, rather than using constitutional means of persuasion to counter localists or those advocating 'self-determination' after 2047, the Returning Officers of the Electoral Affairs Commission have been given the power to conduct unaccountable political screening. The report finds that:

Political screening is a breach of human rights which are guaranteed by Hong Kong's Basic Law, as well as Hong Kong's Bill of Rights Ordinance and the International Covenant on Civil and Political Rights

The actions of the Returning Officers in 2016 and 2018 violate the right to stand in elections and freedom of speech, rights that are enshrined in Articles 26, 27 and 39 of Hong Kong's Basic Law as well as Articles 1, 15, 16, 21 and 22 of Hong Kong's Bill of Rights Ordinance.

It is a breach of the Basic Law for the Returning Officer, a civil servant, to take the power to conduct political screening. These decisions should be the made by the judiciary.

The reason for this is that there is 'no fair, open, certain and clear procedure to regulate the process' and there is no 'timely remedy' or appeal process against an 'adverse decision' of the Returning Officer'.[2]

[2] Hong Kong Bar Association, 'Statement of the Bar Association on Disqualification', 14 February 2018

Conclusion

Hong Kong Watch supports 'one-country, two-systems', not Hong Kong Independence. However, the health of the 'one-country, two-systems' framework depends on Hong Kong having open political debate without censorship. The abuse of law by the Hong Kong government and the National People's Congress to screen out candidates and lawmakers is an unacceptable breach of human rights guaranteed by Basic Law and the Sino-British Joint Declaration. It undermines Hong Kong's rule of law and its reputation as a free and open city.

Edward Yiu Chung-yim, Nathan Law Kwun-chung, Lau Siu-lai & Leung Kwok-hung. Photo: South China Morning Post's Nora Tam.

RECOMMENDATIONS

In view of the findings of this report, Hong Kong Watch makes the following recommendations:

To the government of the Hong Kong Special Administrative Region (HKSAR)

- Consider cancelling the by-elections on 11 March 2018, and immediately reinstating all illegally disqualified lawmakers;
- Ensure that all interpretations of Basic Law comply with human rights provisions within the Basic Law, the Hong Kong Bill of Rights Ordinance and the ICCPR;
- Following an NPCSC interpretation, Hong Kong SAR government should, within six months, publish a report on whether the interpretation is procedurally and substantively compatible with human rights provisions of the Basic Law and HKSAR Bill of Rights. If the view is that the interpretation is not compatible, the report should state the effect of the interpretation and measures to ensure compatibility;
- Immediately release members of the Legislative Council who have been disqualified from demands to pay back their salaries, expenses and the salaries that they paid to staff while in office;
- Reform the electoral process so that the Returning Officer of the Electoral Affairs Commission does not carry the power to conduct political screening;
- Ensure that the decisions made by the Returning Officer of the Electoral Affairs Commission are transparent and that decisions can be more easily appealed;
- Consider establishing an independent commission regulating the confirmation and nomination process in the place of the Returning Officer;
- Ensure that decisions made by Returning Officers are made in accordance with the Basic Law and the ICCPR, in particular protecting the right to stand in elections and freedom of expression.

To the government of the People's Republic of China

- Ensure that all interpretations of Basic Law by the NPCSC comply with human rights provisions within the Basic Law, the Hong Kong Bill of Rights Ordinance and the ICCPR;
- Respect the autonomy of Hong Kong guaranteed under the 'one-country, two-systems' framework and the rule of law in Hong Kong, and refrain from putting undue pressure on Hong Kong's political system and judiciary;
- Encourage the government of Hong Kong to uphold human rights, including freedom of expression and the right to stand in free and fair elections.

To the government of the United Kingdom

- As a signatory of the Sino-British Joint Declaration, raise concern about the infringement by the NPCSC through the recent 'Interpretation' against the 'high degree of autonomy' which is guaranteed under the treaty;
- Urge the government of Hong Kong to safeguard against breaches of fundamental rights and freedoms in the electoral process;
- Continue to raise the case of disqualified candidates and the disqualified lawmakers with the government of Hong Kong;
- Further expand the expertise base in the Foreign and Commonwealth Office on Hong Kong to ensure that the Sino-British Joint Declaration is respected;

To members of the United Nations

- Raise the disqualification of candidates and lawmakers with the government of Hong Kong through all available diplomatic channels, in particular the 2018 Universal Periodic Review.

Photo: Progressive Layers Group

INTRODUCTION

On 11 March 2018, Hong Kongers will enter polling booths for four Legislative Council by-elections. The four seats are Kowloon West, Hong Kong Island, New Territories East and the functional constituency for Architectural, Surveying, Planning and Landscaping professionals. They were previously won by pro-democracy candidates but are being re-run following the disqualification of lawmakers. The electoral process has been shrouded in controversy. In Hong Kong Island, the party of the previous incumbent, Nathan Law, was not allowed to put forward a candidate for election on the basis that a belief in self-determination was incompatible with Hong Kong's Basic Law. International governments, including the UK and the European Union have questioned this and other disqualifications as an act of political screening and a breach of fundamental rights.

This report is an in-depth investigation into the legality of the disqualification of lawmakers and candidates. Hong Kong Watch has found that, in both instances, the government of the Hong Kong Special Administrative region has breached fundamental rights enshrined in Hong Kong's Basic Law and protected by Hong Kong's Bill of Rights Ordinance and the International Covenant on Civil and Political Rights.

The report begins with an examination of the oath-taking saga, evaluating the 'Interpretation' of Basic Law Article 104 by the Standing Committee of the National People's Congress, and critiquing the application of retroactive punishment against legally elected lawmakers. Following this, the report considers the disqualification of candidates from standing in election, highlighting that the actions of the Returning Officer of the Electoral Affairs Commission violate fundamental rights enshrined in the constitution and are unconstitutional in their scope.

Legislative Council. Photo: LegCo

THE OATH-TAKING SAGA

In November 2016, the Standing Committee of the National People's Congress (NPCSC) issued a controversial 'Interpretation' of Basic Law Article 104. This provided the legal basis for the disqualification of six elected officials on the grounds that they failed to properly take their legislative council oaths. This Interpretation undermines the 'high degree of autonomy' guaranteed for Hong Kong by its mini constitution, the Basic Law and has led to breaches of human rights.

The disqualification of lawmakers

On 12 October 2016, the Legislative Council of Hong Kong met for the oath-taking session in accordance with Section 21 of the Oaths and Declarations Ordinance.[3]

Since 2004, some pro-democracy legislators have used the oath-taking session as an opportunity to protest.[4] Leung Kwok-hung protested in every session since that date, and his oaths were generally accepted. In 2012, People Power legislator Wong Yuk-Man was asked to retake the oath after omitting certain phrases. He subsequently retook the oath and was accepted into the Legislative Council.[5]

Given this precedent, a number of lawmakers adapted their oaths in the 2016 oath-taking session. Two lawmakers from Youngspiration, Baggio Leung Chung-hang and Yau Wai-Ching, referred to China as 'Chee-na' which is widely considered to be offensive. Yau Wai-Ching also referred to China with a swearword. The Legislative Council Secretariat rejected their oaths.

Four other lawmakers, Nathan Law, Professor Edward Yiu, Leung Kwok-hung and Dr Lau Siu Lai, also adapted their oaths. Their oaths were more innocuous; Professor Yiu merely added the words: 'I will protect the justice system in Hong Kong, fight for true democracy, and serve Hong Kong for its sustainable development.'[6] The oaths of Nathan Law and Leung Kwok-hung were accepted by the president of the Legislative Council, while the other two were asked to retake their oaths.[7]

Edward Yiu Chung-yim. Photo: The London Globalist.

[3] Hong Kong Free Press, 'Explainer: Timeline – the oath fallout', 5 November 2016, https://www.hongkongfp.com/2016/11/05/explainer-timeline-the-oath-fallout-and-beijings-intervention-in-hong-kongs-mini-constitution/

[4] Taipei Times, 'Longhair' swears in with radical flair', 7 October 2004, http://www.taipeitimes.com/News/world/archives/2004/10/07/2003205885

[5] South China Morning Post, 'Wong Yuk-man retakes oath of office to Legco', 18 October 2012, http://www.scmp.com/news/hong-kong/article/1063341/wong-yuk-man-retakes-oath-office-legco

[6] Chief Executive and Secretary of Justice versus President of the Legislative Council, Nathan Law Kwun-chung, Leung Kwok-hung, Lau Siu Lai and Yiu Chung-yim, [HCAL 223-226/2016], 17 July 2017, http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=110350&QS=%2B&TP=JU&ILAN=en p.59

[7] CE and SJ vs President, Law, Leung, Lau, Yiu, [HCAL 223-226/2016], p.4

Following outrage at the oaths of Baggio Leung and Yau Wai Ching, the Hong Kong government took the unprecedented step of trying to stop the pair from being allowed to retake their oaths and mounted a legal challenge to disqualify them.[8] Although they were unable to stop them from retaking their oaths, the case went to the courts. The president of the Legislative Council said he opposed the government's decision to ban localist lawmakers from retaking their oaths on 18 October.[9]

Baggio Leung & Yau Wai Ching. Photo: Asia News.

The High Court began hearing the judicial review on 3 November 2016. In a shock move, the Standing Committee of the National People's Congress (NPCSC) issued an 'Interpretation' of Basic Law Article 104 on 7 November which stated that oaths must be taken 'sincerely'. This was supposed to be an interpretation which applied retroactively, since 1997. Hong Kong's lawyers held a silent march in protest of the decision on 8 November, but this did not stop the government from winning the judicial review. Yau Wai-Ching and Baggio Leung were promptly disqualified. The Court of Final Appeal rejected the pair's application for an appeal in September 2017 on the basis that the case, 'as the lower courts had found, would have led to the same conclusion to unseat the pair even without Beijing's interpretation.' [10]

The judge, Mr Justice Thomas Au, insisted that 'the Interpretation' did not change his decision on this case, although he did factor it into his decision-making process.[11] However, subsequently the Interpretation opened the way for the four other lawmakers to be disqualified. Their disqualification was justified primarily based on the Interpretation made by the NPCSC.

There are two reasons that the justification given for these disqualifications is profoundly problematic:

1) The Interpretation of Basic Law Article 104 by the Standing Committee of the National People's Congress is a reinterpretation of Basic Law which breaches the spirit of Basic Law and human rights guaranteed by the Basic Law and the Sino-British Joint Declaration

2) The retroactive punishment of Legislative Council members undermines rule of law and common law principles, and breaches human rights

[8] South China Morning Post, 'Hong Kong government fails to block localist duo from retaking Legco oaths, but wins right to seek judicial review', 18 October 2016, http://www.scmp.com/news/hong-kong/politics/article/2029124/hong-kong-government-fails-block-localist-duo-retaking-legco

[9] Hong Kong Free Press, 'Legco president says he opposes gov't legal bid to ban localist lawmakers from retaking oaths', 18 October 2016, https://www.hongkongfp.com/2016/10/18/breaking-legco-pres-says-he-opposes-govt-legal-challenge-to-ban-localist-lawmakers-from-retaking-oaths/hong-kong-government-fails-block-localist-duo-retaking-legco

[10] South China Morning Post, 'Top Hong Kong court explains rejection of lawmakes' appeal bid', 1 September 2017, http://www.scmp.com/news/hong-kong/politics/article/2109341/top-hong-kong-court-explains-rejection-lawmakers-appeal-bid

[11] Hong Kong Free Press, 'Court's ambiguity over Beijing's power to interpret Hong Kong's constitution is worrying', says lawyers, https://www.hongkongfp.com/2016/11/16/courts-ambiguity-over-beijings-power-to-interpret-hong-kongs-constitution-is-worrying-say-lawyers/

THE INTERPRETATION

Article 158(1) of Hong Kong's Basic Law gives the NPCSC a freestanding and plenary power of interpretation of the Basic Law.[12]

However, it is widely recognised that the abuse of this power could undermine rule of law and the high degree of autonomy that was promised to Hong Kong as part of the Sino-British Joint Declaration. The United Nations Human Rights Committee noted this in 2013:

> "The Committee takes note of Hong Kong, China's view that the power of interpretation of the Basic Law by the Standing Committee of the National People's Congress (NPCSC) is "in general and unqualified terms" and the principle is fully acknowledged and respected by Hong Kong, China's courts (CCPR/C/CHN-HKG/3, para. 322). However, the Committee remains concerned that a mechanism of binding constitutional interpretation by a non-judicial body may weaken and undermine the rule of law and the independence of judiciary (arts. 2 and 14)."[13]

The NPCSC's 'Interpretation' of Basic Law Article 104 was an abuse of the NPCSC's power. As a sign of this, the legal community took to the streets and the Bar Association described it as a 'severe blow' which would "seriously undermine" the confidence of Hong Kongers and the international community in the 'one-country, two-systems' framework, which guarantees the territory a high degree of autonomy.[14]

The right to interpret Basic Law, not local law

The first reason that the 'Interpretation' is a violation of Hong Kong's autonomy is that Beijing does not have the power to interpret or make amendments to local law in Hong Kong under Article 158.

Professor Albert Chen, a Basic Law Committee member, previously said that if the NPCSC acts in a way that falls outside powers given to it under the Basic Law, "Hong Kong courts can legitimately claim that they have no legal force in Hong Kong."[15]

'The Interpretation' of Basic Law Article 104 would be more accurately described as either an amendment to Basic Law or an interpretation of Section 21 of the Oaths and Declarations Ordinance (ODO).[16]

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12 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 158 (1), http://www.basiclaw.gov.hk/en/basiclawtext/index.html

13 HCHR, 'Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session,' 29 April 2013, p.2

14 Hong Kong Free Press, 'Deeply concerned' Hong Kong legal sector warns against Beijing's interpretation of Basic Law', 2 November 2016, https://www.hongkongfp.com/2016/11/02/deeply-concerned-hong-kong-legal-sector-warns-beijings-interpretation-basic-law/

15 Progressive Lawyers Group, 'FAQs: Legal perspectives on Beijing's ruling on Hong Kong's mini-constitution', 8 November 2016, Hong Kong Free Press, https://www.hongkongfp.com/2016/11/08/faqs-legal-perspectives-beijings-ruling-hong-kongs-mini-constitution/

16 Interpretation of Article 104 of the Basic Law, http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf

Article 104 of the Basic Law only states that oaths must be taken 'in accordance with the law'. The details and mode of oath-taking is regulated by local legislation, in this case ODO.

Yet 'The Interpretation' instructs that the oath must be taken 'sincerely', 'accurately', 'completely' and 'solemnly'. Such instructions are matters for the ODO, not the Constitution.

The Progressive Lawyers Group capture the argument well when they say:

> "The NPCSC interpretation amounts to an attempt to interpret, amend or rewrite the ODO in the guise of an interpretation of the Basic Law. There is nothing in Article 104 that gives room for the NPCSC to prescribe rules for oath taking in Hong Kong. Such prescriptions are matters of Hong Kong domestic law under the ODO. The prescriptions in this NPCSC interpretation are not found in the ODO, and are thus additional to or otherwise an attempt to "interpret" the ODO.
>
> Under the Basic Law, Hong Kong has a common law system and Hong Kong courts are empowered to interpret local legislation and clarify ambiguities of such legislation should there be any. To the extent the NPCSC interprets (or reinvents) local legislation, the NPCSC interpretation is acting outside of its powers under the Basic Law."[17]

This argument was presented by Yau Wai-Ching's lawyer, Mr Philip Dykes SC, who is now the president of the Bar Association. Mr Dykes stated that 'the Interpretation goes further than merely an interpretation of the meaning of BL104 and thus amounts to effectively a legislative act to amend BL104. As such, it is not made in compliance with BL158 and thus is not binding on this court.'[18] Mr Justice Thomas Au failed to respond adequately to this argument at the time, but subsequently an appellate judge stated that it would be 'arrogant and ignorant' for Hong Kong's courts to make statements on Beijing's interpretation of the Basic Law.[19] This judgement sets a concerning precedent for Hong Kong's common law system and judicial independence. The judgement implies that the courts are not entitled to hold Beijing to account, even in cases where 'Interpretations' fail to uphold human rights and the Basic Law. Rule of law requires an independent judiciary and therefore this judgment is erroneous.

It is unprecedented and unlawful for the NPCSC to rewrite local legislation and overrule the decision of the President of the Legislative Council. These actions violate the high degree of autonomy promised in the Sino-British Joint Declaration and the Basic Law, while also undermining judicial independence and the rule of law. This unsolicited infringement, not invited by the courts of Hong Kong, is an unacceptable breach of the autonomy promised at handover. In future, the NPCSC must only intervene lawfully and with proper regard to their international treaty obligations.

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[17] Progressive Lawyers Group, 'FAQs: Legal perspectives on Beijing's ruling on Hong Kong's mini-constitution', 8 November 2016, Hong Kong Free Press

[18] Chief Executive of Hong Kong and Secretary of Justice vs President of Legislative Council, Sixtus Leung and Yau Wai-Ching, [HCAL 185/2016], p. 41

[19] Hong Kong Free Press, 'Hong Kong courts would be 'arrogant and ignorant' to decide validity of Beijing's ruling on oath row, judge says', 24 November 2016, https://www.hongkongfp.com/2016/11/24/hong-kong-courts-arrogant-ignorant-decide-validity-beijings-ruling-oath-row-judge-says/

A violation of human rights

'The Interpretation' also violates rights enshrined in Hong Kong's constitution, including freedom of speech and the right to stand in election enshrined in Article 26 and Article 27 of the Basic Law.

The requirements on oath-taking following the 'Interpretation' constitute unreasonable restrictions on the right to stand for election and take part in the conduct of public affairs under Articles 26 and 39(2) of the Basic Law, as well as Article 21 of the Hong Kong Bill of Rights. Taken together the candidates received nearly 200,000 votes. The disqualifications deny these voters their democratic rights.[20] They also violate freedom of opinion and expression under Article 27 of the Basic Law, and Article 16 of the Hong Kong Bill of Rights.

These rights are only to be limited if they are 'prescribed by law'. The wording of Basic Law Article 104 is so vague that it does not provide a sufficient reason for the limitation of these rights.

Mr Justice Thomas Au rejected this point when Senior Counsel Martin Lee powerfully made it during the trial of Nathan Law,[21] on the basis that:

> "Mr Lee's submissions, put to its logical conclusion, amount to saying that the court could declare Basic Law 104, which itself is a provision of our constitution, to be "unconstitutional" if it does not meet the "prescribed by law" and proportionality requirements.
>
> "Basic Law 104 by itself is part of the constitution. There is no question that it can be said to be unconstitutional. This startling proposition that a court can declare BL104, a constitutional provision itself, to be "unconstitutional" simply cannot stand."[22]

This argument is totally misconceived. As already highlighted, the Interpretation of the NPCSC fundamentally changes the meaning of Basic Law Article 104 and goes well beyond the mandate given by Basic Law 158. Such a legal amendment could only conceivably be acceptable if it is within the spirit of Basic Law, which protects freedom of speech and the right to stand in free elections. In failing to do this, the Interpretation is not only unconstitutional but also a breach of Hong Kong's international human rights commitments and the Sino-British Joint Declaration.

Martin Lee. Photo: VOA.

[20] Hong Kong government, Election result 2016, http://www.elections.gov.hk/legco2016/eng/results.html?1519920974495

[21] CE and SJ vs President, Law, Leung, Lau, Yiu, [HCAL 223-226/2016], p.40, https://www.hongkongfp.com/2017/07/18/lawmaker-oaths-experts-say-beijings-actions-damaged-rule-law-may-violated-human-rights/

[22] *CE and SJ vs President, Law, Leung, Lau, Yiu,* [HCAL 223-226/2016], p. 40

The Political abuse of the Interpretation

Given that the Interpretation's implementation carries the cost of limiting fundamental rights including those protected by Article 26 and 27 of Basic Law, it should only be used as a last resort. Instead, moderate candidates like Professor Yiu were disqualified, and it appears that C.Y. Leung used the Interpretation to ensure that the pro-democracy camp lost enough seats to be stripped of their veto right in the Legislative Council.[23]

In the words of Michael Davis, former law professor at the University of Hong Kong: "It would have been appropriate for C.Y. Leung to approach the new interpretation in a restrained manner, not seeking to reverse the judgment of voters. But he declined to show such restraint, presumably to gain favour with Beijing."[24]

As the disqualified legislator, Leung Kwok-hung said "The National People's Congress has, through the interpretation, rewritten the [Legco] election results in September last year. This can't happen in any place with true democracy."[25]

Leung Kwok-hung. Photo: Inmedia.

In the 2013 session of the Universal Periodic Review process, the Human Rights Committee said that Hong Kong must "ensure the right of all persons to vote and to stand for election without unreasonable limitations."[26] The way that 'The Interpretation' has been used violates Article 25 of the ICCPR, which is unacceptable.

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[23] South China Morning Post, 'Legislative Council disqualifications shift the balance of power in Hong Kong', 14 July 2017, http://www.scmp.com/news/hong-kong/politics/article/2102733/legislative-council-disqualifications-shift-balance-power

[24] Time, 'Four more Hong Kong Law makers ousted in a blow to democratic hopes,' 14 July 2017, http://time.com/4856181/hong-kong-lawmakers-oath-china-disqualified/

[25] South China Morning Post, 'Court ruling disqualifying Hong Kong lawmakers over oath-taking controversy a 'declaration of war,'' 14 July 2017, http://www.scmp.com/news/hong-kong/politics/article/2102609/four-more-hong-kong-lawmakers-disqualified-over-oath-taking

[26] OHCHR, 'Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session,' 29 April 2013, p.2

Retroactive Punishment

The other problem with the application of the Interpretation during these disqualification cases is that the standards were applied retroactively, so that all six lawmakers have been punished for something which is currently deemed unlawful, but which was not unlawful at the time of their actions.

This is not only a breach of basic common law principles but also human rights law. Article 12 of the Hong Kong Bill of Rights Ordinance says:

> "No retrospective criminal offences or penalties (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."[27]

Since 2004, Lawmakers had used the Legislative Council oathtaking process as an opportunity to protest. This was deemed legal by the President of the Legislative Council and was not considered an offence worthy of the permanent disqualification of any lawmakers.

The government of Hong Kong are entitled to change these rules if the rule-changes are constitutional, but for the National People's Congress to change them and then act as though these rules have been in place since 1997 is patently absurd and violates Hong Kong's autonomy.

As Senior Counsel Philip Dykes said in his defence of Yau Wai-ching: "as the Interpretation is effectively an amendment, it also has no retrospective effect under common law."[28]

'The Interpretation' states that a mistaken oath is equivalent to declining to take the oath. Therefore, all candidates who can be proven to have failed to take the oath properly are deemed in law never to have taken their seats. Retroactive judgement of this sort is contrary both to the common law system which governs Hong Kong and the human rights commitments to which Hong Kong is a party.

To make matters worse, all six lawmakers were asked to refund their salaries, their expenses and the salaries of their staff on the basis that they were never properly sworn in. This ranges from a bill of HK$ 2.7 million to HK$3.1 million for the four lawmakers who were disqualified later on.[29] Such a levy on lawmakers for doing their job after they were sworn in by the Legislative Council President, and before they were officially disqualified, is an injustice contrary to common law and human rights, and these demands should be lifted immediately.

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[27] Hong Kong Bill of Rights Ordinance, Article 12, http://www.hab.gov.hk/file_manager/en/documents/references/papers_reports_others/human_rights/CAT2_Annex2_e.pdf

[28] Chief Executive of Hong Kong and Secretary of Justice vs President of Legislative Council, Sixtus Leung and Yau Wai-Ching, [HCAL 185/2016], p. 41

[29] South China Morning Post, 'Court ruling disqualifying Hong Kong lawmakers over oath-taking controversy a 'declaration of war,'' 14 July 2017, http://www.scmp.com/news/hong-kong/politics/article/2102609/four-more-hong-kong-lawmakers-disqualified-over-oath-taking

Lau Siu-Lai and Leung Kwok-hung are currently appealing their cases.[30] This provides an opportunity for the courts to reassess the acceptability of the disqualifications in light of the evidence. It is of paramount importance that the NPCSC does not intervene in this case, and if it is proven that the oath-taking saga was unconstitutional then these lawmakers should be reinstated and 'The Interpretation' overturned.

DISQUALIFICATION OF CANDIDATES FROM LEGISLATIVE COUNCIL ELECTIONS

The disqualification of candidates in Legislative Council elections was unprecedented before 2016. The rise of localism, and particularly the unexpected success of Edward Leung Tin-Kei's by-election campaign in February 2016, was deemed threatening and unacceptable by the Hong Kong government and Beijing.[31] Rather than using constitutional means of persuasion to counter localists or those advocating 'self-determination' after 2047, the Returning Officers of the Electoral Affairs Commission have been given the power to conduct unaccountable political screening. This resulted in the disqualification of six candidates in 2016 and a further three in 2018. These disqualifications violate human rights guaranteed in Hong Kong's Basic Law, the Hong Kong Bill of Rights Ordinance (BORO), and the International Covenant on Civil and Political Rights (ICCPR), to which Hong Kong is a signatory.

The disqualifications

The first round of disqualifications took place in July 2016. The six disqualified candidates were Yeung Ke-cheong of the Democratic Progressive Party; Andy Chan Ho-tin, the convenor of the Hong Kong National Party; Nakade Hitsujiko, a Nationalist Hong Kong candidate; Conservative Party candidate, Alice Lai Yee-Man; Hong Kong Indigenous leader, Edward Leung Tin-Kei; and James Chan Kwok-keung, who was standing as an Independent. They were disqualified by the Returning Officer of the Electoral Affairs Commission who claimed that none of the candidates could comply with Article 1 of the Basic Law because the candidates did not believe that Hong Kong was an inalienable part of China.

In 2018, a similar justification was given for the disqualification of candidates but this time they targeted those representing more moderate positions. While it was only pro-independence politicians who were denied the right to stand in the 2016 elections, Agnes Chow was banned in 2018 because the Returning Officer ruled that Demosisto's belief that Hong Kong should have 'self-determination' after 2047 'cannot possibly comply with electoral laws'.[32] Ms Chow had the backing of the entire pro-democracy movement and her disqualification was widely condemned internationally. Ventus Lau was also denied the right to stand despite publicly disavowing his support for 'Hong Kong Independence.'

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[30] Hong Kong Free Press, 'Ousted lawmakers Lau Siu Lai and Long Hair appeal disqualifications', 8 September 2017, https://www.hongkongfp.com/2017/09/08/ousted-lawmakers-lau-siu-lai-long-hair-leung-kwok-hung-lodge-appeal-disqualifications/

[31] South China Morning Post, 'Civic Party wins New Territories East by-election, but Edward Leung comes respectable third', 1 March 2016, http://www.scmp.com/news/hong-kong/politics/article/1918987/civic-party-wins-new-territories-east-election-edward-leung

[32] Guardian, 'Hong Kong authorities block pro-democracy candidate from by-election', 27 January 2018 https://www.theguardian.com/world/2018/jan/27/hong-kong-authorities-block-pro-democracy-candidate-from-byelection

Appeals against the decision are ongoing. In 2016, two candidates applied to appeal. Edward Leung Tin-kei did not receive legal aid and his application has not yet been heard, and Chan Ho-tin's case received a judgment on 13 February 2018.[33] This judgment sets a worrying precedent, legitimising civil service political screening. Further cases are likely to go to court and will provide opportunities for appeal.

Hong Kong Watch is concerned about the disqualifications for two key reasons:

1) Political screening is a breach of human rights which are guaranteed by Hong Kong's Basic Law, as well as Hong Kong's Bill of Rights Ordinance and the International Covenant on Civil and Political Rights

2) It is a breach of the Basic Law for the Returning Officer, a civil servant, to take the power to conduct political screening

A breach of human rights

The actions of the Returning Officer breach various fundamental human rights guaranteed by Hong Kong's constitution and the ICCPR. The actions of the Returning Officers in 2016 and 2018 are in violation of the right to stand in elections and freedom of speech, rights that are enshrined in **Articles 26, 27 and 39** of Hong Kong's Basic Law as well as **Articles 1, 15, 16, 21 and 22** of Hong Kong's Bill of Rights Ordinance (BORO), and various rights enshrined in the ICCPR.[34]

Human Rights Commitments:

Basic Law Article 26: Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

Basic Law Article 27: Hong Kong residents shall have freedom of speech

Basic Law Article 39: The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

BORO Article 1: The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

BORO Article 15: Freedom of thought, conscience and religion, including political opinions

[33] Chan Ho Tin vs Lo Ying-Ki Alan, HCAL 162/2016, [2018] HKCFI 345

[34] Basic Law Full Text (Part 3), http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html; Hong Kong Bill of Rights Ordinance, http://www.hab.gov.hk/file_manager/en/documents/references/papers_reports_others/human_rights/CAT2_Annex2_e.pdf; OHCHR, International Covenant on Civil and Political Rights, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

BORO Article 16: (1) Everyone shall have the right to hold opinions without interference.

(2) 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.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It 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; or (b) for the protection of national security or of public order (ordre public), or of public health or morals.

BORO Article 21: Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

BORO Article 22: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law

ICCPR Article 1: All peoples have the right of self-determination.

ICCPR Article 14: All persons shall be equal before the courts and tribunals. In the determination of any charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…

ICCPR Article 19: (1) Everyone shall have the right to hold opinions without interference.

(2) 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.

ICCPR Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

General Comment 25 of the United Nations Human Rights Committee states that "political opinion may not be used as a ground to deprive any person of the right to stand for election.".[35] In 2014, the Committee shared concerns that this right may be limited by the National People's Congress decree of 31 August 2014. The committee agreed that Hong Kong needed to ensure the implementation of "universal suffrage, which ***means both the right to be elected as well as the right to vote.*** The main concerns of Committee members were focused on the right to stand for elections without unreasonable restrictions," Konstantine Vardzelashvili, who chaired the session, said at its conclusion.[36]

Hong Kong's constitutional and international commitments prohibit political screening. The comment by the Human Rights Committee underlines that all permanent residents of the Hong Kong Special Administrative Region have the fundamental right to stand for election in accordance with law under Articles 26 and 27 of the Basic Law, as well as the fundamental right to free speech.

The government of Hong Kong has failed to protect these rights, instead choosing to use electoral regulations to conduct a campaign of political screening. On 14 July 2016, the Electoral Affairs Commission announced its plan to require all candidates to sign an additional 'confirmation form' to declare their understanding of Article 1 (that Hong Kong is an alienable part of China), Article 12, as well as Article 159 (4) of the Basic Law.[37] This confirmation form required all candidates for the Legislative Council to accept a certain understanding of the character of Basic Law and Hong Kong's constitution, or face disqualification.

This extra-constitutional requirement was criticised by Hong Kong Human Rights Monitor Director Law Yuk-kai as a move to "censor political ideas" and a breach of "freedom of thought".[38] In limiting the range of acceptable views that legislators could hold, it provided an interpretation of the electoral regulations which breached fundamental rights enshrined in the constitution by not giving due consideration to Articles 26 and 27.

Law Yuk-kai. Photo: Ming Hui.

[36] Reuters, 'UN rights watchdog calls for open elections in Hong Kong', 23 October 2014, https://in.reuters.com/article/hongkong-china-un/u-n-rights-watchdog-calls-for-open-elections-in-hong-kong-idINKCN0IC1IQ20141023

[37] Electoral Affairs Commission, 'Press statement by EAC on 2016 Legislative Council Election', 14 July 2016, http://www.info.gov.hk/gia/general/201607/14/P2016071400441.htm

[38] South China Morning Post, 'Accept Hong Kong is part of China or you can't run in LegCo elections', 14 July 2016, http://www.scmp.com/news/hong-kong/politics/article/1989910/accept-hong-kong-part-china-or-you-cant-run-legco-elections

Limited rights?

Of course, there are circumstances where it is appropriate to limit freedom of speech. National security or public order concerns are recognised in the Basic Law as circumstances in which it would be appropriate to deny candidates the right to take office. A proportionality analysis should be conducted in cases where there appears to be a contradiction between constitutional commitments; however past court rulings and international human rights law make it clear that any restriction on fundamental rights must be interpreted narrowly and should only take place in exceptional cases.[39] These cases are not exceptional and therefore constitute a breach of fundamental human rights by the Returning Officer.

In his judgment on Mr Chan Ho-tin's appeal, Mr Justice Thomas Au justifies upholding the ruling of the Returning Officer by drawing a parallel with the case of Martin McGuiness vs UK at the European Court of Human Rights.[40] The European Court of Human Rights ruled that the UK government were entitled to not allow Mr McGuiness and Mr Gerry Adams to take their seats if they refused to take an oath of allegiance to the Queen. The court rejected their argument that this violated their freedom of expression and right to stand in an election on the basis that the oath of allegiance served a legitimate aim to protect 'the constitutional principles which underpin a democracy', and therefore as such a condition is an 'integral part of the constitutional order', it is acceptable to require all Parliamentarians to take such an oath. Mr Justice Thomas Au says that the arguments in defence of the disqualified candidates are effectively the same as those advanced by Mr Adams and therefore the same reasoning applies.

This conclusion is misconceived because the situations are substantially different. The two Sinn Fein politicians refused to take the oath to the Queen at the UK Parliament, and the European Court of Human Rights ruled that oath-taking was an integral part of the UK democratic process and therefore that it was within the rights of the UK Parliament to enforce an oath-taking requirement. In the case of the recently disqualified Hong Kong legislators, the legislators all willingly filed their declaration forms promising to 'uphold the Basic Law' and were disqualified based on the Returning Officer's unwillingness to accept their sincerity. They were not given the benefit of the doubt, and several candidates were not even consulted. The Hong Kong constitution already has safeguards against those who can be proven to have taken their oaths fraudulently, so the Returning Officer's actions are therefore arbitrary and lack transparency.

This situation is more comparable to a scenario involving the United Kingdom civil service deciding to disqualify the Scottish National Party (SNP) from standing for election because of their aim of Scottish independence. Although the SNP's aim is to secure Scottish Independence, change the constitution, and break the Union, it would clearly be an outrageous breach of their fundamental human rights to deny them the right to stand in elections. This is because they aim to change the constitution via democratic means, and they are happy to swear allegiance to the constitution in the meantime. Like their counterparts in Hong Kong, they have no desire to undermine the democratic process, 'the constitutional principles which underpin a democracy'[41], and therefore they should be entitled to stand for election and sit in Parliament, despite their dissatisfaction with certain points in the constitution.

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[39] Progressive Lawyers Group, 'Progressive Lawyers Group's Statement on the Press Statement by the Electoral Affairs Commission on 14 July 2016,' July 2016

[40] Chan Ho Tin vs Lo Ying-Ki Alan, p.66-71; McGuinness v United Kingdom, European Court of Human Rights, App No 39511/98,

[41] In the words of the European Court of Human Rights judgement

As has already been mentioned, past court cases make it clear that any purported restriction on fundamental human rights must be interpreted narrowly. Freedom of expression and the right to stand in an election may not be 'absolute rights', but they are fundamental human rights and therefore restrictions should only be placed on them as a last resort. The Hong Kong constitution already has safeguards against those who can be proven have taken their oaths fraudulently. Article 79(7) states that if a lawmaker is censured for a breach of oath by a vote of two-thirds then they should be disqualified from office.[42] Furthermore, under Section 103 of the Electoral Affairs Commission Regulations, it is a criminal offence to knowingly make a false statement in an electoral declaration. These safeguards are sufficient to ensure the integrity of the constitution without additional extra-legal actions by the Returning Officer.[43]

International criticism

The actions of the Returning Officer are an unnecessary breach of human rights which undermine Hong Kong's international reputation. Following the disqualification of Agnes Chow, international governments raised this point with the government of the Hong Kong Special Administrative Region. The United Kingdom noted concern at news of the disqualification and underlined that "The right to stand for election is a fundamental right enshrined in Article 26 of the Basic Law".[44] The European Union said that:

> "Barring candidates from standing for election because of their political beliefs is in contradiction with the right under the International Covenant on Civil and Political Rights, whose application is guaranteed in Hong Kong by the Hong Kong Bill of Rights, to stand for election without unreasonable restrictions."[45]

The government of Hong Kong ought to listen to the censure of their international neighbours and uphold the human rights standards which they are committed to by their own constitution, the Sino-British Joint Declaration and the ICCPR. They could do this by reinstating the barred candidates, apologising for the inconvenience caused to those who were wrongly barred, and stopping the practice of political screening in the future.

Agnes Chow. Photo: Wall Street Journal.

[42] Basic Law, Article 79 (7)

[43] South China Morning Post, 'Did localist lawmakers in oaths row make false statements of loyalty in election pledges?' 27 October 2016, http://www.scmp.com/comment/insight-opinion/article/2040261/did-localist-lawmakers-oaths-row-make-false-statements

[44] Hong Kong Free Press, 'UK Foreign Office urges respect for rights after Agnes Chow banned from Hong Kong election', 1 February 2018, https://www.hongkongfp.com/2018/02/01/uk-foreign-office-urges-respect-rights-agnes-chow-banned-hong-kong-election/

[45] European Union Office to Hong Kong and Macao, 'Statement by the Spokesperson on the decision to bar Agnes Chow from running for a Legislative Council by-election', 29 January 2018, https://eeas.europa.eu/delegations/hong-kong/38968/statement-spokesperson-decision-bar-agnes-chow-running-legislative-council-election_en

The Returning Officer should not have the power to conduct political screening

Compounding the human rights issue is the fact that the disqualification decisions have been made by a mid-ranking civil servant rather than the judiciary. This demonstrates that the process is arbitrary, lacks transparency and fails to have an adequate appeal process. It undermines the separation of powers in Hong Kong and public faith in the rule of law.

The legal debate

Andy Chan Ho-tin. Photo: South China Morning Post's Winson Wong.

The legal basis in Basic Law for the actions of the Returning Officers in 2016 and 2018 is shaky and ought to be scrutinised further following Mr Justice Thomas Au's judgment on Andy Chan Ho-tin's case on 13 February 2018.[46] Regardless of the technical legality of the Returning Officers' actions, political screening by a civil servant breaks the spirit of the Basic Law and therefore the government of the Hong Kong Special Administrative Region ought to clarify the law by stating that the Returning Officer does not carry the power to make subjective political judgments.

During the trial, Senior Counsel Gladys Li, who represented Andy Chan, claimed that the Returning Officer should only have 'statutory power' to determine the formal validity of the Declaration requirement, rather than 'substantive' power.[47] In other words, she argued that the Returning Officer's role was solely to ensure that the Declaration requirement was complied with as a matter of formality, whether the Declaration has been signed, rather than whether it is a sincere Declaration.

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[46] Chan Ho Tin vs Lo Ying-Ki Alan, HCAL 162/2016, [2018] HKCFI 345; Hong Kong Free Press, 'Pro-independence activist loses bid to overturn 2016 legislative election after he was banned from running', 13 February 2018, https://www.hongkongfp.com/2018/02/13/just-pro-independence-activist-loses-bid-overturn-2016-legislative-election-banned-running/

[47] Chan Ho Tin vs Lo Ying-Ki Alan, p.40

The powers exercised by Returning Officers in recent elections are unprecedented. Prior to 2016, the Returning Officer's role was purely procedural. This was the original design of the Basic Law; the Returning Officer's role is to ensure that forms are properly filled in, not to make subjective political judgments. As Professor Michael Davis, formerly a legal academic at the University of Hong Kong, said: "When a candidate has filed the basic declaration provided in the statute, it seems anomalous for the Returning Officers to unilaterally make a decision that they are not sincere."[48]

A similar view was expressed in 2016 by 30 legal experts who sit on the 1,200-strong Election Committee, which is responsible for choosing Hong Kong's chief executive. The group of lawyers, which included former Bar Association chairmen Edward Chan King-sang SC and the present Bar Association chairman Philip Dykes SC, wrote that Section 40 of the Legislative Council Ordinance only requires a candidate to sign a declaration stating that he or she will uphold the Basic Law:

> "[The ordinance] does not give the **Returning Officer any power** to inquire into the so-called genuineness of the candidates' declarations, **let alone making a subjective and political decision** to disqualify a candidate without following any due process on the purported ground that the candidate will not genuinely uphold the Basic Law."[49]

Mr Justice Thomas Au's judgement rejected this reasoning. He instead refers to the problematic 2016 'Interpretation' of Basic Law Article 104 as proof that the Returning Officer has not only the power, but also the duty, to investigate the sincerity of candidates' declarations.[50]

There are significant problems with this conclusion. Either the ruling should be challenged, or the law should be changed to ensure that the Returning Officer does not carry these powers.

The Hong Kong Bar Association's statement on the disqualifications captures the problems with the judgment.[51] They raise three problems with the Returning Officer carrying the duty to politically screen candidates:

All three problems are evident in recent cases and therefore deserve consideration.

1) There is 'no fair, open, certain and clear procedure to regulate the process'

2) 'Upholding the Basic Law' is a vague and imprecise political concept which is now to be interpreted by a civil servant under a closed-door inquiry

3) There is no 'timely remedy' or appeal process against an 'adverse decision' of the Returning Officer'

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48 South China Morning Post, ''Hong Kong Returning Officers' powers to dismiss potential Legco candidates called into question', 2 August 2016, http://www.scmp.com/news/hong-kong/politics/article/1998335/hong-kong-returning-officers-power-dismiss-potential-legco

49 South China Morning Post, 'Lawyers question power of Returning Officers to disqualify Hong Kong poll candidates', 3 August 2016, http://www.scmp.com/news/hong-kong/politics/article/1998842/lawyers-question-power-returning-officers-disqualify-hong

50 See part 2 below, 'The Oath-taking saga', for analysis of the flaws of the Interpretation of BL104

51 Hong Kong Bar Association, 'Statement of the Bar Association on Disqualification', 14 February 2018, http://www.hkba.org/sites/default/files/20180214%20-%20%20Statement%20of%20the%20Bar%20Association%20on%20Disqualification%20%28SW%29%20%28WK%29%20%28LL%29%20%2814%20Feb%29%20English%20version%20at%201522.pdf

There is no fair, open, certain and clear procedure to regulate the process

One of the reasons that the decisions of the Returning Officer has been decried as 'political screening' is that the process lacks transparency and appears arbitrary.

Two of the six disqualified candidates in 2016, Edward Leung Tin-Kei and Nakade Hitsujiko, signed the controversial additional confirmation form but had their forms rejected on the basis that the Returning Officer believed them to be insincere. Only five months earlier, Edward Leung had been allowed to stand in the February by-elections. If anything, having now signed the confirmation form, he was representing a more moderate stance, yet the Returning Officer's judgement on his sincerity had the final word.

Meanwhile seven candidates who advocated self-determination or independence refused to sign the confirmation form but were accepted on the ballot paper. These included four candidates that ended up winning seats in the Legislative Council: Youngspiration candidates Yau Wai-Ching and Baggio Leung Chung-hang, Independent candidate Eddie Chu Hoi-Dick and Demosisto candidate Nathan Law Kwun-chung.[52]

The lack of transparency and double standards in the 2016 disqualifications show why it is inappropriate for the Returning Officer to be given the power to make decisions about the eligibility of candidates.

Agnes Chow. Photo: In-Media.

The problem inevitably recurred in 2018 when Agnes Chow, Ventus Lau and James Chan were all disqualified despite signing the confirmation form. Agnes Chow was selected as the Pan-Democrat candidate for Hong Kong Island by the entire pro-democracy camp. Moderate and radical democrats alike believed that she was an acceptable candidate, and therefore she was not required to stand in a primary. Nathan Law won the Hong Kong island seat for her party, Demosisto, in 2016, and was deemed an acceptable candidate by the Returning Officer at the time despite failing to sign the additional 'confirmation form'. Agnes signed the form, and the by-election was supposed to be Demosisto's chance to win back the seat. Yet she was disqualified on the basis that Demosisto's advocacy of "self-determination" after 2047 "could not possibly comply" with Basic Law, without being given the opportunity to make her case. This example shows that the goalposts have shifted since 2016, exposing the arbitrary nature of the current streaming process.

[52] South China Morning Post, ''Hong Kong Returning Officers' powers to dismiss potential Legco candidates called into question', 2 August 2016

Similarly, Ventus Lau was disqualified even though he denounced pro-independence views publicly and signed the confirmation form. He was given no chance to explain his position but was summarily disqualified without being given the opportunity to justify his views.[53]

Ventus Lau. Photo: South China Morning Post's Edward Wong

In one of the most positive and significant statements of his judgment, Mr Justice Thomas Au said that the Declaration Form should be "should constitute strong prima facie objective proof of the genuine intent of the candidate" unless "cogent, clear and compelling materials" are provided which demonstrate contrary motives *at the time of nomination*.[54] Furthermore, later in the judgment Mr Justice Thomas Au said that "fairness requires that generally the Returning Officer should give a reasonable opportunity to the candidate to respond to any materials that the Returning Officer says are contrary to an intention to carry out the obligations under the Declaration." The right to be heard is a fundamental principle of natural justice and is protected by Article 14 of the International Covenant on Civil and Political Rights, a covenant to which Hong Kong is a party.

The lack of transparency and arbitrary nature of a political screening process by civil servants are deeply problematic. It is quite clear that not all the disqualifications meet the criteria laid out by Mr Justice Thomas Au and therefore that there is a compelling case to suggest that the Returning Officer has disqualified candidates illegally. We question whether any of the decisions made by the Returning Officer are just.

There are already safeguards against candidates who make false declarations in law. It would be more appropriate, if candidates can be proved to have made false declarations, for them to be prosecuted and given a fair trial. They should not have been pre-emptively disqualified by a civil servant whose judgments lack transparency, are time-pressured and politically motivated.

'Upholding the Basic Law' is a vague political concept which should not be interpreted by a civil servant under a closed-door inquiry

The judgement made by Mr Justice Thomas Au gives civil servants the power to interpret the sincerity of candidates in their promise to 'uphold the Basic Law'. The complexity of what it means to 'uphold the Basic Law' exacerbates the problems which have just been described.

The Basic Law has 160 articles, so deciding what it means to promise to 'uphold the Basic law' is a vague concept. The government has recently decided that three articles – Article 1, Article 12 and Article 159 are non-negotiable requirements by which all candidates must abide, or else face disqualification.

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[53] Radio Free Asia, 'Ventus Lau: They gave me no chance to explain', 1 February 2018, https://www.rfa.org/english/news/china/hongkong-lau-02012018145255.html

[54] Chan Ho Tin vs Lo Ying-Ki Alan, p.33

There is nothing to stop the line shifting and other articles being added to this list. One can see how most candidates for the Legislative Council could be accused of not being sufficiently committed to upholding at least one, if not more, of the 160 articles in the Legislative Council. If viewed uncharitably, Carrie Lam herself has implied that she does not necessarily agree with Article 107 of the Basic Law, which concerns fiscal balance and government spending.[55] Most of Hong Kong's politicians would be at risk of disqualification on this count.

Section 40 of the Legislative Council Ordinance was not designed to provide guidance for the Returning Officer to pursue subjective investigations into the authenticity of a candidate's statements, and therefore it does not clearly stipulate what requirements must be met by candidates. The government of Hong Kong and the Returning Officer are subsequently in a position where they are able to abuse powers granted by this latest ruling on the Ordinance to ensure conformity to certain political ideas.

Lau Siu-kai, a top advisor to Beijing, recently said that he was uncertain whether Hong Kong's election candidates could be barred from future elections for opposing the legislation of a controversial national security law.[56] In the worst-case scenario, this would lead to the disqualification of the entire pro-democracy camp, despite the fact that they receive a higher percentage of the popular vote. This would be an outrageous breach of the rights to free and fair elections in Hong Kong, and a breach of the Sino-British Joint Declaration.

Lau Siu-kai. Photo: South China Morning Post's Xiaomei Chen.

No one should face disqualification on the basis that they disagree with parts of the constitution, as long as they respect the legality of the constitution.

There is not an adequate appeal process against an unjust decision

The final problem is that there is no adequate appeal process. Andy Chan Ho-tin's judicial review result took nearly two years to reach its conclusion. Edward Leung Tin-kei's legal aid application for the judicial review of his disqualification is yet to be granted by the courts.

Given that many of the decisions were made by the Returning Officer at short notice, with differing rationales and standards applied, sometimes without even consulting the candidates for their perspectives or defences, the process undermines the rule of law by taking away checks and balances which should be in place.

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[55] South China Morning Post, 'Hong Kong leader backs proposal to dump 'miserly' fiscal philosophy', 3 August 2017, http://www.scmp.com/news/hong-kong/politics/article/2105334/hong-kong-leader-backs-proposal-dump-miserly-fiscal

[56] Hong Kong Free Press, 'Uncertain whether Hong Kong election hopefuls may be banned for opposing security law, top Beijing adviser says', 6 February 2018, https://www.hongkongfp.com/2018/02/06/uncertain-whether-hong-kong-election-hopefuls-may-banned-opposing-security-law-top-beijing-adviser-says/

[57] South China Morning Post, 'Anson Chan slams Hong Kong's 'naked political screening' as she receives US justice prize', 11 February 2018, http://www.scmp.com/news/hong-kong/politics/article/2132885/anson-chan-slams-hong-kongs-naked-political-screening-she

Photo: ShutterStock

CONCLUSION

Hong Kong Watch supports 'one-country, two-systems' and the promises set out in the Sino-British Joint Declaration, and exists to advocate for Hong Kong's basic freedoms and autonomy. Hong Kong Watch categorically does not support calls for Hong Kong's independence in any way whatsoever. However, the health of the 'one-country, two-systems' framework depends upon Hong Kong having open political debate without censorship.

The use of law by the Hong Kong government and the National People's Congress to screen out candidates and lawmakers is an unacceptable breach of human rights guaranteed by Basic Law and the Sino-British Joint Declaration. The Interpretation of Basic Law 104 by the Standing Committee of the National People's Congress infringes on the 'high degree of autonomy' protected for Hong Kong under 'one-country, two-systems', and violates fundamental rights enshrined in the Constitution. The disqualification of candidates by the Returning Officer of the Electoral Affairs Committee breached fundamental rights enshrined in Basic Law and was an abuse of the office of Returning Officer. In the words of Anson Chan, the former Chief Secretary, we have witnessed 'naked political screening'.[57]

The actions of the Returning Officer of the Electoral Affairs Commission and the NPCSC Interpretation undermine Hong Kong's rule of law and its reputation as a free and open city. It is critical that all parties act to ensure that human rights in Hong Kong are upheld, and that Hong Kong's autonomy under 'one-country, two-systems' remains intact.

[57] South China Morning Post, 'Anson Chan slams Hong Kong's 'naked political screening' as she receives US justice prize', 11 February 2018, http://www.scmp.com/news/hong-kong/politics/article/2132885/anson-chan-slams-hong-kongs-naked-political-screening-she

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