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**ARTICLE**

**AN OATH: CONSTITUTIONAL DIALOGUE BETWEEN  
CHINESE LAW AND COMMON LAW**

Priscilla M.F. Leung\*

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## AN OATH: CONSTITUTIONAL DIALOGUE BETWEEN CHINESE LAW AND COMMON LAW

Priscilla M.F. Leung

### *Abstract*

*This Article provides an analysis that though there are many occasions that the courts in the HKSAR differ from the NPCSC in terms of the interpretation on the Hong Kong Basic Law, there are some occasions that common law and Chinese law agree, and the occasion to uphold the solemnity and legality of the oaths taken by public officers is one of those. The author compares the legal and political impact of an oath in the Eastern and Western world since ancient times. She further establishes her arguments that no matter by common law or Chinese law, the interpretation of Article 104 of the Hong Kong Basic Law would arrive at the same conclusion. Through detailed discussion on common law cases on the validity of an oath, the author observes that it is foreseeable that the legislators who breached the form as well as content of the Legislative Council of Hong Kong oath in 2016 would be disqualified if one paid attention to an earlier judgement in 2004 in relation to whether the format of swearing the oath may be deviated. The answer from the Court is “NO”. The interesting point is that 12 years later there is an NPCSC Interpretation on Article 104 of the Hong Kong Basic Law, the content of which very much resembles common law principles on the validity of an oath and its legal implication if the oath is not sworn solemnly by legislators in the prescribed form. Therefore, the author argues that regarding an oath, common law and Chinese law agree.*

### I. BACKGROUND

Four legislators were disqualified for their breach of oath in failing to pledge allegiance to the Hong Kong Special Administrative Region (the “HKSAR”) of the People’s Republic of China and failing to uphold the Basic Law of the HKSAR (the “Hong Kong Basic Law”) on November 11, 2020.<sup>1</sup> The Hong Kong Government announced their decision to disqualify the four legislators instantaneously with pursuance to an earlier decision concerning the qualification of the legislators of the HKSAR<sup>2</sup> (the “NPCSC Decision 2020”)

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<sup>1</sup> Alvin Yeung, Dennis Kowk, K.K. Kwok and Kenneth Leung were disqualified as legislators by virtue of the promulgation of the HKSAR Government on November 11, 2020.

<sup>2</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Lifa Weiyuanhui Yiyuan Zige Wenti de Jueding (全国人民代表大会常务委员会关于香港特别行政区立法会议员资格问题的决定) [Decision of the Standing Committee of the National People’s Congress on Issues

promulgated by the National People's Congress Standing Committee (the "NPCSC") on the same date. The NPCSC Decision 2020 was based on Article 52 and Article 54 of the Constitution of the People's Republic of China (the "Constitution") as well as the Law of the People's Republic of China on Safeguarding National Security of the HKSAR (the "National Security Law") and the NPCSC Interpretation on Article 104 of the Hong Kong Basic Law on November 7, 2016<sup>3</sup> (the "NPCSC Interpretation 2016"). The decision to disqualify the four legislators must be traced back to the conduct of the four legislators to call for other countries to sanction Hong Kong since May 2019. These acts are deemed to have breached the oath of Article 104 and constituted a failure to pledge loyalty to the HKSAR nor to uphold the Hong Kong Basic Law. Specifically, the NPCSC Decision 2020 made a clear reference to the decision of the Election Officer who decided not to allow the four legislators to run the Legislative Council election originally scheduled on September 6, 2020.<sup>4</sup> Namely, they were found not to have complied with the requirement of a candidate for the Legislative Council election.

After the promulgation of the National Security Law on June 30, 2020, a candidate of the Legislative Council shall not have breached the National Security Law nor Article 104 of the Hong Kong Basic Law and the related NPCSC Interpretation 2016;<sup>5</sup> otherwise, he is not qualified to be a public officer nor a candidate of a public post of the HKSAR including Legislative Council or District Council.

An oath is a very serious public promise for public officers, Legislative Councilors, judicial officers, as well as the Chief Executive and her team of civil servants as it is a promise of loyalty to one's country. Leung Kwok Hung, a former legislator, started the challenge of the Legislative Council by judicial review to ask for permission from the court to deviate from the statutory oath as early as 2004.<sup>6</sup> His application failed. He was, however, let go many times at the Legislative Council when he deviated a bit from the original version of the required oath either in form or in content by the serving Secretariat or the President of the Legislative Council. Not until 2016, when more and more

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Concerning the Qualifications of Members of the Legislative Council of the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective Nov. 11, 2020) (Chinalawinfo).

<sup>3</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Di Yibailingsi Tiao de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第一百零四条的解释) [Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Nov. 7, 2016) (Chinalawinfo) [hereinafter *NPCSC Interpretation 2016*].

<sup>4</sup> The election of the Legislative Council was postponed for one year because of the third wave of explosion of covid-19 in Hong Kong in July 2020.

<sup>5</sup> Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa (香港特别行政区维护国家安全法) [Law on Safeguarding National Security in the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020), art. 35 (Chinalawinfo).

<sup>6</sup> Leung Kwok-Hung v. Legis. Council Secretariat, [2004] H.K.C.F.I. 883.

newly elected members would like to ruin the dignity of China and her people in their oaths to assume duty as a Legislative Councilor of the HKSAR, they were not let go as their acts either in form or in content<sup>7</sup> attempted to humiliate China at the Legislative Council of her Special Administrative Region. These conducts are not acceptable for a person to serve as a legislator of the HKSAR.<sup>8</sup> The most serious humiliation came from Sixtus Leung Chun Hang and Yau Wai Ching who were refused the chance to retake the oath and were disqualified instantaneously.<sup>9</sup> The other four members-elect Leung Kwok Hung, Lau Siu Lai, Yiu Chung Yim and Nathan Law Kwun Chung who either got the chance to finish their oath or retake the oath, were also disqualified through another judicial review proceeding.<sup>10</sup>

This Article will examine the prestigious status of an oath reflected by the above significant cases as well as in the Eastern and Western world. And, there is a constitutional moment where Chinese law and common law might agree.

## II. THE SOLEMNITY OF AN OATH IN THE EAST AND THE WEST

An oath carries solemn and serious promise since early human history. The author took the view that in terms of upholding the solemnity of an oath, common law and Chinese law may agree. This is not only an observation derived from court cases but also from how an oath is being treated in human society both in the East and the West.

### A. Status of Oath in Ancient and Modern China

In ancient China, for example, in the Han Dynasty, “*Shuo Wen Jie Zi*” (说文解字), the word “*Shi*” (誓言) (誓言) has a binding effect.<sup>11</sup> In “*Liji, Quli*” (礼记·曲礼), “*Shi*” has a legally binding effect.<sup>12</sup> For the military purpose, an example is “*Shang Shu, Gan Shi*” (尚书·甘誓),<sup>13</sup> the phrase “*Gan Shi*” (甘誓)<sup>14</sup> refers to an order for the military army to get ready for war. For the

<sup>7</sup> Many members of the opposition camp either added some content or deliberately slowed down the pace of the oath to twist the oath. At the end, six members were disqualified as legislators. They are Sixtus Leung, Yau Wai Ching, Leung Kwok-Hung, Lau Siu Lai, Yew Chung Yim and Nathan Law Chung.

<sup>8</sup> The incidents of these problematic oaths happened on October 12, 2020 when elected persons took their oaths for the Sixth Term of the Legislative Council of the HKSAR.

<sup>9</sup> Chief Exec. of the HKSAR and Secretary for Justice v. President of the Legis. Council and Sixtus Leung Chun Hang and Yau Wai Ching, HCAL 185/2016 (Legal Reference System) (H.K.) [hereinafter *Leung and Yau Case*].

<sup>10</sup> Chief Exec. of the HKSAR and Secretary for Justice v. President of the Legis. Council and Nathan Law Kwun Chung, Leung Kwok-Hung, Lau Siu Lai and Yiu Chung Yim, HCAL 223–226/2016 (Legal Reference System) (H.K.) [hereinafter *Law, Leung, Lau and Yiu Case*].

<sup>11</sup> XU SHEN (许慎), *SHUOWEN JIE ZI* (说文解字) [EXPLAINING GRAPHS AND ANALYZING CHARACTERS], Overseas Chinese Publishing House, City University of Hong Kong library record link 2012 (last visited Dec. 25, 2020)

<sup>12</sup> LIJI (礼记) [BOOK OF RITES] 21 (Wang Qifa trans., Sanqin Press 1999).

<sup>13</sup> SHANGSHU (尚书) [DOCUMENTS OF ANTIQUITY] 50 (Thread-Binding Books Press 2007).

<sup>14</sup> SHANGSHU ZHENGYI (尚书正义) [DOCUMENTS OF ANTIQUITY] para. 1, <https://ctext.org/wiki.pl?if=en&chapter=950675&remap=gb> (last visited Jan. 16, 2021).

non-military purpose, in “*Zuo Zhuan, Zhao Gong Sixteenth Year*” (左传·昭公十六年),<sup>15</sup> the civilians rely on this oath, trust each other, do not betray each other, and do not steal nor grab each other’s property.<sup>16</sup> In the Spring and Autumn and the Warring States Period (春秋战国)<sup>17</sup> in Chinese history, the King had that oath with the merchants as a format of promise. An oath was a noble and solemn act which was treated as a guarantee as signing a contract of promises which in modern days carries civil liability. If the King breached the oath, it might lead to disastrous legal and political consequences.<sup>18</sup>

In modern history, in 1912, Sun Yat-sen made an oath when he assumed the position of Interim President of Republic of China<sup>19</sup> In 1930, the Republic of China promulgated the “The Law of Oath” (宣誓条例).<sup>20</sup> The Law stipulated a clear system of the requirement of taking an oath for public positions of village head or above. In 1946, the Government of the Republic of China passed the Constitution of the Republic of China (the “ROC Constitution”). The ROC Constitution explicitly required the President of the country, in the official ceremony of taking the job, to take an oath to abide by the ROC Constitution and to execute his job faithfully and loyally to the country and to the people, to guard the country and if breaching the oath, the President would bear serious sanctions and penalties.<sup>21</sup>

In recent history, in 2015, the People’s Republic of China also developed and adopted an oath system for certain public positions. In July 2015, the NPCSC passed a decision<sup>22</sup> (the “NPCSC Decision 2015”) to implement an oath system under the Constitution. The Decision requires all members of National People’s Congress (the “NPC”) and NPCSC, State Council, Central Military Members, Supreme People’s Court, Supreme People’s Procuratorate, other local NPC delegates and people’s government, people’s courts and people’s procuratorates to take an oath publicly when being appointed or

<sup>15</sup> ZUOZHUAN (左传) [COMMENTARY OF ZUO] 278 (Yuelu Press 2006).

<sup>16</sup> CHUNQIU ZUOZHUAN ZHAOGONG SHILIU NIAN (春秋左传·昭公十六年) [SPRING AND AUTUMN ANNALS COMMENTARY OF ZUO — ZHAO GONG SIXTEENTH YEAR] para. 2, <https://ctext.org/chun-qi-zuo-zhuan/zhao-gong-shi-liu-nian/zh> (last visited Jan. 16, 2021). The Chinese version is “昔我先君桓公，商人皆出自周，庸次比耦，以艾杀此地，斩之蓬蒿藜藿而共处之，世有盟誓，以相信也，曰尔无我叛，我无强贾，毋或勾夺，尔有利市宝贿，我勿与知，恃此质誓，故能相保，以至于今。”

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Zhonghua Minguo Chengli Yu Sun Zhongshan Ren Linshi Dazongtong* (中华民国成立与孙中山任临时大总统) [*The Creation of the Republic of China and Sun Yat-sen as the First Provisional President*], ZHONGGUO WENHUA YANJIUYUAN (中国文化研究院) [ACADEMY OF CHINESE STUDIES], <https://chiculture.org.hk/tc/photo-story/2158> (last visited Jan. 9, 2021).

<sup>20</sup> Xuanshi Tiaoli (宣誓条例) [The Law of Oaths] (promulgated by the Republic of China, May 17, 1930, effective May 27, 1930).

<sup>21</sup> *Id.* The Chinese version is “余谨以至诚，向全国人民宣誓：余必遵守宪法，尽忠职务，增进人民福利，保卫国家，不负国民付托。如违誓言，愿受国家严厉之制裁。谨誓。”

<sup>22</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Shixing Xianfa Xuanshi Zhidu de Jueding (全国人民代表大会常务委员会关于实行宪法宣誓制度的决定) [Decision of the Standing Committee of the National People’s Congress on Implementing the Constitutional Oath System (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 2015, effective Jan. 1, 2016) (Chinalawinfo).

elected before the Constitution. The oath emphasizes on the loyalty to the Constitution, the determination to safeguard the authority of the Constitution, the faithful execution of statutory duties, the loyalty to the country and its people, no corruption and being subject to people's supervision as well as making all efforts to build up a prosperous, strong, democratic, culturally advanced and harmonious socialist country. The NPCSC Decision 2015 became effective on January 1, 2016.<sup>23</sup>

In 2018, the solemnity of the oath and its legal effect was further emphasized in the highest law in China. The requirement of taking an oath is a constitutional duty for state officials in paragraph 3 of Article 27 of the Constitution. Very clearly, one must take the oath very seriously, especially for state officials in China.

In the HKSAR and the Macao Special Administrative Region, the oaths requirement for senior and public officials was also written in their Basic Law.<sup>24</sup> Article 104 of the Hong Kong Basic Law took effect the moment Hong Kong returned to China on July 1, 1997. Moreover, regarding the oaths, earlier in Hong Kong, the Oaths and Declarations Ordinance was passed in 1972, which was amended in 1997. One may easily remember the moment of the first team of the first Government in the HKSAR taking their oaths together before Chairman Jiang Zemin at the moment of handover on July 1, 1997.

#### B. Status of Oath in Ancient and Modern Western Countries

In the West, the most famous oath must be Abraham's oath to the Lord in the Bible. The prestigious status of an oath does not only arise in Chinese history. It is also bred in the Western culture. In the history of the West, the solemn and sacred status of oaths should be traced back to the Bible's Three Oaths in the Old Testament. The First Oath is God's Oath to His Son:<sup>25</sup> *"The Lord has sworn and will not change his mind [...]. You are a priest forever in the order of Melchizedek [...]. The Lord is at your right hand; he will crush kings on the day of his wrath."* The Second Oath is God's Oath to Abraham:<sup>26</sup> *"[...] The angel of the Lord called to Abraham, ['I swear by myself, declares the Lord, that because you have done this, and have not withheld your son, your only son, I will surely bless you and make your descendants as numerous as the stars of Heaven and as the sand on the seashore [...].']"* The Third Oath is

<sup>23</sup> The prescribed form of the oath is updated and amended on March 12, 2018 to add the words "beautiful" and "strong" in the last sentence of the original oath as follows: "我宣誓: 忠于中华人民共和国宪法, 维护宪法权威, 履行法定职责, 忠于祖国、忠于人民, 恪尽职守、廉洁奉公, 接受人民监督, 为建设富强民主文明和谐美丽的社会主义现代化强国努力奋斗!"

<sup>24</sup> Xianggang Tebie Xingzhengqu Jiben Fa (香港特别行政区基本法) [The Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997), art. 104 (Chinalawinfo); Aomen Tebie Xingzhengqu Jiben Fa (澳门特别行政区基本法) [The Basic Law of the Macao Special Administrative Region] (promulgated by the Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999), art. 102 (Chinalawinfo).

<sup>25</sup> *Hebrews* 7: 21; *Psalms* 110: 4–5.

<sup>26</sup> *Hebrews* 6: 13–14; *Genesis* 22: 15–17.

God's Oath to the Israelites:<sup>27</sup> "[...] For forty years, I was angry with that generation. I said. [']They are a people whose hearts go astray, and they have not known my ways. So I declared on oath in my anger, they shall never enter my rest.[']" These are the three most famous oaths as recorded by the Holy Bible,<sup>28</sup> which have marked the trace of human history. Oaths enjoy a sacred status in many countries, especially for those who claim to have religious beliefs adopted for the country when it was built up.<sup>29</sup> The oaths of their top leaders always receive high regards from the ordinary people. The laws of those countries, mostly written in their Constitution, protect the promises stated in the oaths in an unreserved way. These legal protection and requirement also apply to public officers or state functionaries in most Western countries.

An oath of office in the modern world refers to an oath or affirmation a person takes before assuming the duties of an office, usually in government.<sup>30</sup> It became a necessary element and legal requirement for public officers or state functionaries in many countries both in the East and in the West. The manner of the oath-taker while taking the oath before assuming their duties must be "solemn and sincere and truly declare", and in many countries, states, or regions with a religious background, the oath may be prescribed as "swear by the Almighty God that followed by the words of the oath prescribed by law",<sup>31</sup> or the affirmation must be made in a "solemn, sincere and truly declare" manner. For example, the same is stipulated in the Oaths and Declarations Ordinance of Hong Kong<sup>32</sup> For people who have religious beliefs, to swear by Almighty God may bear more serious consequences than legal consequences if they breach their oath. It is absolutely a very solemn manner for them to swear to their Almighty God.

An oath is a legally binding declaration by a public officer of allegiance to a government or its institutions.<sup>33</sup> And, swearing allegiance to the system of the country and upholding laws of the State is a norm for public officers in many countries.<sup>34</sup> In some countries like Canada and the United States, it may be considered as heavy as treason or a high crime if the public officer violates the sworn oath of office.<sup>35</sup> The oath is definitely a solemn promise which carries significant legal consequences. In the United States, the protection of the oaths for office is written down in their Constitution Article VI that "The

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<sup>27</sup> Hebrew 3: 10–11; Psalm 95: 10–11.

<sup>28</sup> *Id.*

<sup>29</sup> The United Kingdom in particular England is primarily under the Anglican Church but also has mainstream denominations like the Baptists and the Methodists.

<sup>30</sup> See Congressman Mike Turner, <https://turner.house.gov/> (last visited Jan. 9, 2021).

<sup>31</sup> Oaths and Declarations Ordinance, Cap.11 § 5 (1) (2017) (H.K.).

<sup>32</sup> *Id.* § 7(3).

<sup>33</sup> Research Office of Legislative Council Secretariat, *Research Task: Oath-taking requirements for public officers and the consequences of non-compliance in selected places*, RT03/20-21, para. 1.1 (Dec. 24, 2020), <http://library.legco.gov.hk:1080/articles/1225724.339615/1.pdf> (last visited Jan. 9, 2021).

<sup>34</sup> *Id.* para. 1.2.

<sup>35</sup> See Official Oaths, The Governor General of Canada, <https://www.gg.ca/en/official-oaths> (last visited Jan. 9, 2021).

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*Senators and Representatives [...] and all executive and judicial Officers, both of the United States and of Several States, shall be bound by Oath or Affirmation, to support this Constitution [...].*<sup>36</sup> Though there is no statute to provide consequences for violation of an official oath of office, in the federal level, Section 3 of the Fourteenth Amendment to the Constitution of the United States provides a disqualification for a Member who had taken an oath of office and had then “engaged in insurrection or rebellion ‘or’ given aid to comfort to the enemies thereof.”<sup>37</sup> In the State level, for example, in the State of Georgia, in order to convict an officer of violating his oath of office, the State must prove that the defendant was actually administered an oath, that the oath was prescribed by law, and that the officer violated the terms of the oath.<sup>38</sup> It may cover the conducts of the officer while they are off duty. The issue is not whether they are on duty or off duty, but whether there is some connection between the offense and the public officer’s official duties.<sup>39</sup>

The defense of the public officer is to argue that he was not administered an oath, or that the oath was not prescribed by law. Then they will not be guilty of a felony.<sup>40</sup> Therefore, whether the oath is prescribed by law is a key element to determine the charge.

In the United Kingdom, Members of Parliament have to take an oath of allegiance. This oath is similar to a declaration of loyalty to the State.<sup>41</sup> A declaration in common law bears legal liability if one violates it, and public officers such as Members of Parliament are no doubt included.

In the United Kingdom, Members must bear allegiance to the British Monarchy.<sup>42</sup> There is no statute stating the consequences for violation of oath; however, there is the Treason Felony Act 1848 under which a Member convicted of treason will be disqualified.<sup>43</sup>

In Canada, the House of Commons and its Members shall also before taking his seat therein take an oath of allegiance, should they wish to assume public office.<sup>44</sup>

Citing the examples of the above well-established common law jurisdictions with regards to the legal status of an oath for public officers before they assume duties is to serve as a reference for Hong Kong to consider our own situation when persons-elect for Legislative Council offend, insult and/or deviate from the manner, form and content in their oaths as prescribed by law.

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<sup>36</sup> U.S. CONST. art. VI.

<sup>37</sup> Research Office of Legislative Council Secretariat, *supra* note 33, para. 2.2.

<sup>38</sup> *Dimauro v. State*, 341 Ga. App. 710 (2017).

<sup>39</sup> *Barnes v. State*, 230 Ga. App. 884 (1998).

<sup>40</sup> *See* Georgia Association of Chiefs of Police, <https://gachiefs.com/> (last visited Jan. 9, 2021).

<sup>41</sup> *See* UK Parliament, <https://www.parliament.uk/> (last visited Jan. 9, 2021).

<sup>42</sup> Research Office of Legislative Council Secretariat, *supra* note 33, para. 2.2.

<sup>43</sup> Research Office of Legislative Council Secretariat, *supra* note 33, para. 2.2.

<sup>44</sup> *See* Parliament of Canada, <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/status-index> (last visited Jan. 9, 2021).



### III. A REVISIT: THE 2016 OATHS SCANDAL IN HKSAR

Out of the oaths scandal of the Legislative Council of Hong Kong (the “LegCo”) in 2016, some of the elected persons were not qualified to assume the positions as legislators according to the law. To fill up those vacant seats, by-elections have to be conducted accordingly. In the process of assessing whether a person is qualified to be a candidate, the District Election Officers exercise their power to determine whether the person genuinely adheres to the Hong Kong Basic Law where he pledges loyalty to One Country Two Systems.

Some were disqualified (the “DQ”) as candidates in the by-elections held on March 11, 2018 and November 25, 2018 respectively. The series of DQ incidents drew the attention of all on the interpretation and enforcement of the Hong Kong Basic Law regarding the oaths conduct as well as the threshold laid down by the Hong Kong Basic Law for running public posts in Hong Kong, which requires statutory declaration to affirm one’s loyalty to One Country Two Systems.

In this Article, the author would like to do a thorough analysis on the 2016 oaths scandal which led to the subsequent DQ incidents from a constitutional perspective of Hong Kong under One Country Two Systems.

During the oath-taking inauguration in the first meeting of the LegCo on October 12, 2016, a few<sup>45</sup> LegCo members departed from the statutory content and evinced manners to humiliate China, her people and her government. The NPCSC made an interpretation of Article 104 of the Hong Kong Basic Law on November 7, 2016. As clearly stated in Rule 1 of the Rules of Procedure of the LegCo, “[...] no Member of the Council shall attend a meeting or vote therein until he has made or subscribed an oath or affirmation in accordance with the provisions of the Oaths and Declarations Ordinance (Cap. 11).”<sup>46</sup>

To examine the standard of the content and format of the LegCo Oath, it must go back to an earlier case that the Hon Hartmann J handed down a judgement on oath-taking in *Leung Kwok-Hung v. Legislative Council Secretariat* as early as in 2004<sup>47</sup> (the “2004 judgement”). In 2004, Leung Kwok-Hung wished to decline taking the LegCo Oath as prescribed in the Oaths and Declarations Ordinance. After his prior written application to the LegCo Secretariat for taking a self-written oath was declined, Leung applied for judicial review. In adjudicating, the judge found the case not arguable and henceforth declined to grant leave to judicial review. The Hon Hartmann J, who was in charge of adjudicating the case, explicitly expressed in his verdict that

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<sup>45</sup> *Leung and Yau Case*, *supra* note 9; *Law, Leung, Lau and Yiu Case*, *supra* note 10.

<sup>46</sup> Rules of Procedure of the Legis. Council of the Hong Kong Special Administrative Region, Rule 1 (2019) (H.K.). “Oath or Affirmation: Except for the purpose of enabling this Rule to be complied with, no Member of the Council shall attend a meeting or vote therein until he has made or subscribed an oath or affirmation in accordance with the provisions of the Oaths and Declarations Ordinance (Cap. 11). Where a general election is held, a Member who had previously made or subscribed such oath or affirmation shall again do so in compliance with this Rule before he attends a meeting or votes in the Council.”

<sup>47</sup> *Leung Kwok-Hung v. Legis. Council Secretariat*, [2004] H.K.C.F.I. 883.

there must be uniformity in the form of oaths. Hartmann J further held that it is not unreasonable or oppressive to have the uniform oath but to let the members know the basic rules that they should all follow because a uniform oath reflects the integrity of the legislature. The judge further pointed out that the format and content in the taking of the oath must conform to the Hong Kong Basic Law. Article 104 of the Hong Kong Basic Law makes it clear that “members [...] of the Legislative Council [...] must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”<sup>48</sup> The court repetitively stated that the oaths as well as Article 104 of the Hong Kong Basic Law shall not be “offended”.<sup>49</sup> Hartmann J stated clearly in his judgement that LegCo members must take their oaths in accordance with the prescribed LegCo Oath as required by the Oaths and Declarations Ordinance. He further elaborated that “if the applicant insisted on taking the oath in accordance with his own wording, it was likely that he would be held not to have taken the oath in accordance with law.”<sup>50</sup> Hartmann J laid down very clear principles of the strict requirements of the Oath for a legislator in HKSAR. Twelve years later, serious consequences did arise from elected persons who offended Article 104 of the Hong Kong Basic Law.

The landmark case in 2016 involved two members *Yau Wai Ching* and *Sixtus Leung Chung Hang* who mispronounced the word “China” as “Geenna” or “Sheen-na” (支那). Yau even mispronounced the word “Republic” in a way that sounds like foul language in “People’s Republic of China”. She further displayed a banner with “HONG KONG IS NOT CHINA” written on it. The Secretariat of LegCo refused to administer the oaths of Leung and Yau immediately. Referring to the 2004 judgement by Hartmann J, each and every LegCo member has to understand his own oaths and the meaning of oaths of all other members. This is set by the commoners’ standards, as well as the expectations of the public. As specified by the Hon Hartmann J, “a uniform oath is required to ensure the integrity of a legislature”.<sup>51</sup> The judge went further to point out that “Article 79(7) of the Basic Law makes all members of the Legislative Council liable for expulsion from office for a breach of their oaths. That uniform liability is, in my judgment, only manageable in a rational way if there is uniformity in the form of the oaths.”<sup>52</sup>

On October 12, several LegCo members did not take their oaths in compliance with the prescribed content and format of the LegCo. Although the Secretariat offered a second chance to those who did not take their oaths in line with the statutory required manner, the law does not allow. These offensive

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<sup>48</sup> *Id.* para. 9; The Hong Kong Basic Law, art. 104.

<sup>49</sup> *Id.* paras. 28–29.

<sup>50</sup> *Id.* para. 9.

<sup>51</sup> *Id.* paras. 28–29.

<sup>52</sup> *Id.* para. 28.

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conducts, in the eyes of law, already constituted “declining” and/or “neglecting” subject to Section 21 of the Oaths and Declarations Ordinance and already amounted to LegCo members, who have not sworn their oaths properly, being disqualified instantly.

With pursuance to Section 19 of the Oaths and Declarations Ordinance, LegCo members “shall, as soon as possible after the commencement of his term of office, take the Legislative Council Oath”; in Section 21 of the same Ordinance, any member of the LegCo who declines or neglects to take an oath as duly requested shall vacate or be disqualified. The usage of “shall” in Section 21 is “mandatory”.

*A. Constitutional Power and Duty of the President of the Legislative Council*

Whether the President or the Secretariat has the power to offer a second chance to those who do not swear the LegCo Oath properly is a moot point in the court. While the President allowed Leung, Yau, Yiu and Lau to take their oaths on October 19, 2017, the pro-establishment members boycotted the oath-taking of Leung, Yau and Lau by walking out of the Chamber resulting in lack of quorum. As a result, only Yiu Chung Yim was allowed to retake his oath on the same day. In order to avoid halting the operation of LegCo, LegCo President Andrew Leung Kwan Yin ordered to adjourn the oath-taking inauguration of Leung and Yau until the date of judgement of the judicial review applied by the Department of Justice on October 18, 2016 while allowing Lau Siu Lai to retake her oath on October 26, 2016 again. According to Rule 1 of the Rules of Procedure, LegCo members who have not successfully taken their oaths cannot attend any meeting or voting. Yet, during the Council Meeting on October 26, 2017, Leung and Yau would like to forcefully enter the Chambers of LegCo and take the oaths themselves but failed. Under the chaotic circumstances, the President had no choice but to adjourn the meeting on October 26, 2016 again after Lau Siu Lai retook her oath. The President of LegCo has to execute his power and duty in compliance with the Hong Kong Basic Law and other sources of law including statutes and common law.<sup>53</sup> Article 72(2) of the Hong Kong Basic Law grants the President the power and entrusts him the duty to “decide on the agenda, giving priority to government bills for inclusion in the agenda”. Moreover, the President of LegCo must strictly exercise the Rules of Procedure when presiding the meeting of the LegCo.

*B. Disqualification is the Foreseeable Consequence in both Common Law and Chinese Law*

Firstly, this is not a case of the court interfering the legislature, but a case concerning execution of law. Under the division of work and checks and balances system of the three powers in Hong Kong, the LegCo only has the role

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<sup>53</sup> The Hong Kong Basic Law, art. 8.

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to pass law, not to execute the laws. The job to execute the laws belongs to the law enforcement agencies, namely the role of the relevant Government departments such as the Department of Justice (the “DOJ”) and the police. The moot point here is whether the President of LegCo may allow a second chance of oath taking after those members already breached the law by declining to take the oath. The answer of the court is “No”. Once the members breach the law, from that single moment onwards, it is the job of the execution, no more in the hands of the President of LegCo who only plays the role to preside the LegCo meeting.

Secondly, the significance of this case is the constitutional element of an oath which carries the meaning of the loyalty to the sovereign country China and the faithfulness of one’s duty as a legislator in HKASR which is an inalienable part of China. From the author’s point of view, this is the constitutional moment where Chinese law and common law agree.

If referring to the 2004 judgement, it is quite clear that Leung and Yau by insulting China when taking their oaths clearly constituted to “declining” or “neglecting” the Oath. At that moment, they already breached Section 21 of the Oaths and Declarations Ordinance and should not be given another opportunity to swear the oath.<sup>54</sup> Disqualification is a foreseeable consequence from the perspective of the Hong Kong Basic Law, common law and local law. In this regard, it is no more a matter for the LegCo President or Secretariat to decide, rather it is for the DOJ to decide how to execute the law.

The responsibility of the President of LegCo is to implement, adjudicate, and preside the meetings and sessions of the LegCo in accordance with the Rules of Procedure of the LegCo and the Hong Kong Basic Law. But whether he has the power to decide whether or not to give Leung and Yau another chance to take their oaths is a matter of law which relates to the execution of the Oaths and Declarations Ordinance. The Rules of Procedure of the LegCo does not state whether the LegCo President has the discretion to administer their oaths again once the LegCo members decline or neglect to take the oath. Obviously, in 2016, the LegCo took the view that the President has the power and discretion to decide whether to allow a member to retake the oaths. However, the Oaths and Declarations Ordinance does not provide such power to the President of the LegCo. The author is of the view that under the checks and balances system amongst the legislative, judiciary, and executive branches, it is the role of the DOJ to execute the laws in Hong Kong. A hindsight of this was the DOJ joining as a party in the proceeding of the 2004 judgement.

In the series of cases in 2006 involving the validity of oaths, the DOJ held the same view. The DOJ applied for judicial review against the decision of the President on October 18, 2016, claiming that the President of the LegCo has no jurisdiction to administer the oaths of a failing legislator. The court granted leave to schedule a hearing. The grant of leave by the Court shows that the

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<sup>54</sup> Oaths and Declarations Ordinance, §21.

evidence raised by the DOJ demonstrated an arguable and meritorious case.<sup>55</sup> If the DOJ won, both Leung and Yau would be disqualified and the LegCo President would have no power to allow them to retake their oaths. Looking back the history, it was not the first time that members deviated from the form and content of the Legislative Council Oath (the “LegCo Oath”). In 2012, the then President of the LegCo Jasper Tsang Yok Sing arranged a retaking of the oath for the then legislator Wong Yuk Man. The rearrangement was not challenged by judicial review in 2012. In the 2004 judgement, the Court held that taking an oath not only symbolizes the embodiment of values such as integrity and loyalty, but also represents the affiant’s respect and commitment to the oath.<sup>56</sup> It is believed that if the case of Wong Yuk Man was subject to judicial review, Wong would face a disqualification subject to the *ratio decidendi* of the 2004 judgement in which Leung Kwok-Hung only insisted on adding phrases in the beginning and the end of the oath without amending the core content of the oath. It is mindful that Leung Kwok-Hung could not get leave from the court. In the event of Leung and Yau, they not only neglected the oath, but also used offensive gestures, adding insulting content and pronunciation. It was crystal clear that those were offensive behaviors against Article 104 of the Hong Kong Basic Law which are strictly forbidden according to common law and statutory law.

#### IV. CIRCUMSTANCE FOR JUDICIAL INTERVENTION

In this present case, the core issue is whether the manners of Leung and Yau’s taking of the oath should be considered as “neglecting” or “declining” to take an oath and/or offended Article 104 of the Hong Kong Basic Law, and whether the DOJ on behalf of the Hong Kong public, as the executor of the Oaths and Declarations Ordinance, has the *locus standi* to apply for judicial review. The Court of Appeal determined that Article 104 of the Hong Kong Basic Law imposes a constitutional requirement on a member of the LegCo validly to take the LegCo Oath.<sup>57</sup> When such a question arises, the Courts are bound to inquire and adjudicate.<sup>58</sup>

As this has been the first time that the government applied for a judicial review challenging the legislature’s decision, it is predictable that the President of the LegCo would contest. The DOJ as the executor of the Hong Kong Basic Law and the Oaths and Declarations Ordinance acted against the President of the LegCo who is the executor of the Rules of Procedure of the Legislative Council. The powers between the two authorities are being clarified for the first time.

<sup>55</sup> Chief Exec. of HKSAR and Another v. President of Legis. Council, [2016] 6 H.K.C. 144.

<sup>56</sup> Leung Kwok-Hung v. Legis. Council Secretariat, [2004] H.K.C.F.I. 883, para. 22–23.

<sup>57</sup> *Leung and Yau Case*, *supra* note 9, para. 18.

<sup>58</sup> *Leung and Yau Case*, *supra* note 9, para. 13.

Leung and Yau opposed the DOJ's application on the grounds that the court could or should not intervene in the matters of the legislative branch. Their main arguments were based on: (1) the non-intervention principle; and (2) the LegCo member's immunity provided under Article 77 of the Hong Kong Basic Law<sup>59</sup> and Sections 3 and 4 of the Legislative Council (Power and Privilege) Ordinance (Cap. 382).<sup>60</sup>

The case was scheduled and being heard at the Court of First Instance on November 3, 2016. After a two-day hearing, and prior to the handing down of judgement by the court, the NPCSC promulgated an interpretation on Article 104 of the Hong Kong Basic Law with pursuance to Article 158(1) of the Hong Kong Basic Law.

#### A. *Comparison of the Oaths Scandal and the Filibustering Case*

This case was often compared with the filibustering case (the "*Leung Kwok-Hung 2012*").<sup>61</sup> In *Leung Kwok-Hung 2012*, also known as the filibustering case, the court adhered to the non-intervention principle and stated that if there is any ambiguity, the courts would rule in favor of the Legislative Council with respect to the internal mechanism of the legislative branch except that the decision of the Legislative Council has breached the existing laws of Hong Kong or the Hong Kong Basic Law. "As a matter of interpretation of the Basic Law, a court would lean against an interpretation displacing parliamentary privilege, and real ambiguity would be resolved in favor of non-intervention."<sup>62</sup>

The scope and limit of the non-intervention principle as applied in Hong Kong has been laid down by the court in the filibustering case; nevertheless, in the same case, the court stated that the courts are empowered to intervene the LegCo under the following circumstances: One possible example is where the Legislative Council has conducted its business in such a way as to infringe the constitutionally protected right of an individual which is intended by the Hong Kong Basic Law to be enforceable in a court of law, overriding parliamentary privilege.<sup>63</sup> Another occasion is "in the local context, the Court is empowered and indeed inquires into the internal workings of the LegCo to the extent that the Basic Law so requires." A third example is where "the Rules of Procedure, made by the Legislative Council pursuant to Article 75(2), are said to be in contravention of the Basic Law."<sup>64</sup> Deriving from the Court of Final Appeal judgement in the *Leung and Yau* case, "(1) the principle of non-intervention as applied in Hong Kong is necessarily subject to the constitutional requirements of the Basic Law; (2) where the Basic Law confers law-making powers and

<sup>59</sup> Author's edition. In the judgement, the judge used the abbreviation of "BL 77".

<sup>60</sup> The High Court of the HKSAR Court of First instance, *Constitutional and Administrative Law List* (Press Summary, No. 185 of 2016 and Miscellaneous Proceedings No. 2819 of 2016), para. 6, <https://webb-site.com/codocs/HCAL185-2016-161115.pdf> (last visited Jan. 9, 2021).

<sup>61</sup> *Leung Kwok-Hung v. President of Legis. Council*, CACV 123/2012 (Legal Reference System) (H.K.).

<sup>62</sup> *Id.* para 25.

<sup>63</sup> *Id.* para 24.

<sup>64</sup> *Id.* para. 24.

functions on the legislature, the court has powers to determine whether the legislature has particular power, privilege or immunity; and (3) what can be properly regarded as the [‘]internal business[’] or [‘]internal process[’] of the LegCo must be viewed under the above caveat.”<sup>65</sup>

Regarding the enforcement of the Oaths and Declarations Ordinance and the constitutionality of the oaths taken by Leung and Yau, the court held that this fell outside the scope of non-intervention but fell within the scope of law enforcement of the DOJ. When it comes to the constitutionality of a decision of the LegCo, the courts shall assert adjudication power. The Court of Appeal also acknowledged that Hong Kong is not practicing the same kind of separation of powers of Westminster Parliament in the United Kingdom nor as the separation of power in United States. Rather, Hong Kong is practicing a unique system of checks and balances of the three branches under the Hong Kong Basic Law of the One Country Two Systems.<sup>66</sup>

In the *Leung and Yau* case, the courts in Hong Kong have set a precedent which has significant value for different functions and roles amongst the three branches in Hong Kong.

Different from the filibustering case, the court in the *Leung and Yau* case rejects the opposition ground based on the non-intervention principle. The principle has its origin in common law based on the doctrine of separation of powers as practiced in England, where there is the principle of parliamentary supremacy and the absence of a written constitution.<sup>67</sup> The court pointed out that in Hong Kong, the written Hong Kong Basic Law is the highest law. HKSAR is not practicing parliamentary supremacy as Hong Kong is not a sovereign. Hong Kong does not practice western sense of separation of three powers. Rather, the three powers serve checks and balances amongst each other under One Country Two Systems under the Chinese constitutional framework.<sup>68</sup> “The non-intervention principle as applied in Hong Kong therefore does not prohibit the court from determining the questions of whether an oath taken by the LegCo member complies with the important constitutional

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<sup>65</sup> *Leung and Yau Case*, *supra* note 9, para. 53; the High Court of the HKSAR Court of First instance, *supra* note 60, para. 15. See also PRISCILLA LEUNG, THE HONG KONG SAR BASIC LAW, FROM THEORY INTO PRACTICE 231–32 (2015).

<sup>66</sup> Zhang Xiaoming (张晓明), *Zhengque Renshi Xianggang Tebie Xingzhengqu Zhengzhi Tizhi de Tedian — Zai “Jibenfa Banbu Ershiwu Zhounian Yantaohui” Shang de Zhici* (正确认识香港特别行政区政治体制的特点——在“基本法颁布二十五周年研讨会”上的致辞) [*To Correctly Understand the Characteristics of the Political System of the HKSAR — Speech on the 25th Anniversary of the Hong Kong Basic Law*], Sep. 12, 2015, [http://big5.locpg.hk/gate/big5/www.locpg.hk/jsdt/2015-09/12/m\\_128222889.htm](http://big5.locpg.hk/gate/big5/www.locpg.hk/jsdt/2015-09/12/m_128222889.htm) (last visited Jan. 9, 2021). The Chinese version is “行政权与立法权相互制约、相互配合，司法独立。我们讲行政主导并不意味着行政管理权独大，不是说立法会要放弃对行政机关的监察责任，更不会妨碍立法权和司法权的正常行使。关于行政和立法之间的关系，基本法草委会主任姬鹏飞先生在《关于〈中华人民共和国香港特别行政区基本法（草案）〉及其有关文件的说明》中将之概括为‘既互相制衡又互相配合’”；see also PRISCILLA LEUNG, HKSAR BASIC LAW: HYBRID OF COMMON LAW AND CHINESE LAW 257–60 (2007).

<sup>67</sup> *Leung and Yau Case*, *supra* note 9, para. 51.

<sup>68</sup> Zhang, *supra* note 66.

requirements under Article 104 of the Basic Law.”<sup>69</sup> The scope went beyond the internal operation of the LegCo under the Rules of Procedure but involved enforcement of the Oaths and Declarations Ordinance. The court also rejected the ground based on the LegCo members’ immunity. The court further adjudicated that the protection provided under Article 77 of the Hong Kong Basic Law and Sections 3 and 4 of the Legislative Council (Powers and Privileges) Ordinance only cover statements and speeches made by a LegCo member in the course of an official debate on the floor of the LegCo when exercising one’s powers and discharging one’s functions as a LegCo member. The court therefore held the words expressed by a LegCo member in taking an oath cannot be properly regarded as speeches in an official debate as he has not yet validly assumed the office.<sup>70</sup>

The Chief Judge of the High Court and the Justice of Appeal of the Court of Appeal of the High Court, the Hon Mr. Justice Cheung, further clarified on the disputation over the separation of powers. Moreover, he pointed out that the interpretation from the NPCSC has solved the myth brought by Article 104 of the Hong Kong Basic Law. The court was clear that an elected person would lose his qualification automatically if he did not fulfil the constitutional requirements under Article 104 when taking his oath. The nature of taking an oath is a constitutional duty, instead of an internal business of the LegCo.

#### *B. Distinction Between Internal Matter and Constitutional Matter*

In the filibustering case of Leung Kwok-Hung, Leung insisted that he had the right to speak as a legislator and the President had no power to stop a legislator from giving his speech under Section 38(1)(a) of the Rules of Procedure. The President of the LegCo, after allowing 1306 amendments and 33 hours of debate, decided to put the item to a vote. As it has been the first time for such kind of filibustering to occur at the LegCo, the President has invoked his constitutional power to preside the meeting subject to Article 72(1) of the Hong Kong Basic Law as well as his inherent power as the President to preside the meeting under Section 92 of the Rules of Procedure. Leung was aggrieved with the decision of the President and lodged a judicial review against it. It was under this occasion that the Court made it clear that this decision of the President was completely an internal matter of the LegCo as to how long the President would like to allow a debate to continue, and when to put a bill to a vote. The court shall not interfere with the President’s decision on this internal matter.

Different from the filibustering case, the court in the *Leung and Yau* case took the view that the requirement to strictly comply with the content and format of the Oaths is a constitutional matter, required by the Hong Kong Basic

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<sup>69</sup> *Leung and Yau Case*, *supra* note 9, para. 54.

<sup>70</sup> *Leung and Yau Case*, *supra* note 9, para. 87; *see also* The High Court of the HKSAR Court of First Instance, *supra* note 60, para. 18; Oaths and Declarations Ordinance, §21.



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Law as well as the Oaths and Declarations Ordinance<sup>71</sup> Thus, whether the legislator is disqualified by failing the oath and whether he may be allowed to retake an oath go beyond the Rules of Procedure but fall under the Hong Kong Basic Law and law enforcement of the Oaths and Declarations Ordinance. It explained why the court took a different view and determined that they shall interfere in the oaths case.

## V. CONSTITUTIONALITY OF AN OATH

### A. *The Oaths Ordinance and the Basic Law*

The oaths scandal sparked the hierarchy and application of existing laws in Hong Kong concerning taking oaths and making declarations *vis-à-vis* the constitutional requirement of Article 104 of the Hong Kong Basic Law. It triggered the discussion whether the existing law is sufficient to protect the dignity and sovereignty of the country and to ensure the loyalty of the public officers in Hong Kong.

Sections 16 and 19 of the Oaths and Declarations Ordinance further require that an elected LegCo member must take the LegCo Oath in the form prescribed under the Oaths and Declarations Ordinance. Section 21 of the Oaths and Declarations Ordinance further provides that if a LegCo member, who “*declines or neglects*” to take the LegCo Oath when requested to do so, shall vacate the office (if he has already entered on it), or shall be disqualified.<sup>72</sup>

Article 104 of the Hong Kong Basic Law states: “*When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.*”<sup>73</sup> The judge did give an articulate summary for his judgement, that “BL104<sup>74</sup> constitutionally mandates, among others, an elected LegCo member when assuming his office to take an oath in accordance with the laws under the Oaths and Declarations Ordinance (a) to swear to uphold the Basic Law and (b) to swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”<sup>75</sup> The judge further said, “These proceedings concern the questions (a) whether the oaths purportedly taken by Mr. Leung and Ms. Yau at the LegCo meeting on October 12, 2016 before the Clerk to the LegCo contravene the requirements under Article 104 of the Basic Law and/or

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<sup>71</sup> *Leung and Yau Case*, *supra* note 9, para. 24.

<sup>72</sup> *Leung and Yau Case*, *supra* note 9; *see also* The High Court of the HKSAR Court of First instance, *supra* note 60, para. 3; Oaths and Declarations Ordinance, §21.

<sup>73</sup> The Hong Kong Basic Law, art. 104.

<sup>74</sup> *Id.*

<sup>75</sup> The High Court of the HKSAR Court of First instance, *supra* note 60, para. 2.

the Oaths and Declarations Ordinance, and (b) if so, whether they shall be regarded as having vacated their respective office of a LegCo member as a matter of law.”<sup>76</sup>

In terms of the content of the oath, both Leung and Yau deliberately twisted the pronunciation of People’s Republic of China to insulting words as discussed before. In terms of the manner, they both behaved in a way that obviously demonstrated they did not want to abide by the oaths even from a third reasonable man. The banner they brought with them with the words “*Hong Kong is not China*” during the oaths together with the clothes on their back surely demonstrated that they were not solemn and sincere to the words of the oaths.

The definition in law for the words “*declines*” or “*neglects*” has become magnificently important to deal with the cases of the oaths. What is the common law definition of “*declines or neglects*” under the Oath Ordinance? Did Leung and Yau’s actions and behavior at the Oaths ceremony constitute “decline” or “neglect” to take the oath? As pointed out earlier, the sources of common law in Hong Kong mainly rely on precedents. In this regard, however, there is hardly any precedent in Hong Kong. The Hong Kong Basic Law does not only carry the characteristics of common law, but also carries the characteristics of Chinese law. It is in fact a hybrid of common law and Chinese law.<sup>77</sup>

This has been the first precedential case. Nonetheless, Hong Kong courts not only have to consider sources of law from common law, but also the Hong Kong Basic Law, which is a kind of special national law in the People’s Republic of China as well as the highest law of Hong Kong. Under Article 8 of the Hong Kong Basic Law, “[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, etc.” shall not contradict with the Hong Kong Basic Law. Accordingly, the Oaths and Declarations Ordinance shall be read and interpreted in line with the constitutional requirement for public officers in Article 104.

The Court of First Instance emphasized that it may arrive at the same conclusion even without the NPCSC Interpretation 2016.<sup>78</sup> The judge also went further to state that it was not necessary for him to determine the other contentions in views of his conclusions on the issues in favor of the Chief Executive and Secretary for Justice without reference to the NPCSC Interpretation 2016.<sup>79</sup> This conclusion of the judge is not unpredictable. If one looks at the 2004 judgement as well as the practice of other common law jurisdictions, it is easy to see that the legal consequences of breach of the Oath of Office are significant. The Court of Appeal affirmed this view. Both

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<sup>76</sup> The High Court of the HKSAR Court of First instance, *supra* note 60, para. 1.

<sup>77</sup> LEUNG, *supra* note 65.

<sup>78</sup> The High Court of the HKSAR Court of First instance, *supra* note 60, para. 9; *see also Leung and Yau Case*, *supra* note 9, paras. 120, 125.

<sup>79</sup> *Leung and Yau Case*, *supra* note 9, paras. 123–25.

common law and Chinese law emphasize the sincerity and solemnity of an oath taken before assumption of office for public officers and would not provide any room for an oath taker to offend the prescribed oath.

*B. Position of Chinese Law: the NPCSC Interpretation*

Though common law may agree to the same conclusion with regards to the solemnity requirement of an oath, China decided to declare her position in this solemn matter by way of an NPCSC interpretation.

On November 7, 2016, the NPCSC promulgated the interpretation on Article 104 of the Hong Kong Basic Law, in which the NPCSC stated that “the taking of the oath stipulated by Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China is a legal pledge made by the public officers specified in the Article to the People’s Republic of China and its Hong Kong Special Administrative Region, and is legally binding.”<sup>80</sup> The wording “and” represents that public officers of the HKSAR have to be loyal to the HKSAR as well as to the People’s Republic of China.<sup>81</sup>

The interpretation is believed to specially address the oaths scandal at the LegCo on October 12, with the wish to safeguard the effective operation of One Country Two Systems, and to resolve the misconception of some Hong Kong residents on the understanding of the Hong Kong Basic Law.<sup>82</sup> The Hong Kong Basic Law is described as a “mini constitution” of Hong Kong by many commoners; but more articulately, it is a national law of China. Despite its being the highest law in the HKSAR,<sup>83</sup> the Hong Kong Basic Law is not the Constitution of Hong Kong under One Country Two systems. The only constitution of China is the Constitution of People’s Republic of China. The implementation of One Country Two Systems, in accordance with the Constitution, does not grant Hong Kong any status or power of a sovereign state. Article 31 of the Constitution says, “The state may establish special administrative regions when necessary and the laws as to be passed by the National People’s Congress.”<sup>84</sup> These laws are the Hong Kong Basic Law and the Macau Basic Law. The two Basic Laws passed by the NPC are national laws of the People’s Republic of China, not local laws of Hong Kong nor Macau.<sup>85</sup>

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<sup>80</sup> *Id.* “The taking of the oath stipulated by Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China is a legal pledge made by the public officers specified in the Article to the People’s Republic of China and its Hong Kong Special Administrative Region, and is legally binding. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.”

<sup>81</sup> *Id.*

<sup>82</sup> LEUNG, *supra* note 65, at 10.

<sup>83</sup> The Hong Kong Basic Law, art. 8.

<sup>84</sup> XIANFA art. 31, § 1 (2018) (China).

<sup>85</sup> LEUNG, *supra* note 65, at 10.

The Preamble and Article 1 of the Hong Kong Basic Law state clearly that Hong Kong has always been part of China. According to the interpretation, being loyal to the Hong Kong Basic Law, is in essence the same as being loyal to the People's Republic of China. The essence of One Country Two Systems is: Hong Kong implements her own system of capitalism with high degree of autonomy in the judiciary, legislature and executive branches; however, no matter how high is the level of autonomy, Hong Kong does not have absolute autonomy. There is only one sovereign country for the HKSAR — People's Republic of China. The word "and" in the NPCSC Interpretation 2016 emphasizes that Hong Kong is only a Special Administrative Region of the People's Republic of China under the governance of the Central People's Government.

This interpretation, initiated by the NPCSC in light of the power with pursuance to Article 158(1) of the Hong Kong Basic Law, was promulgated during the trial process and before a judgement was rendered. Opposition argues that this is not acting in accordance with the procedure in Article 158(3) of the Hong Kong Basic Law. But people holding this view may have disregarded the fact that apart from *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC*, all the other four NPCSC interpretations<sup>86</sup> were invoked not according to the procedure of Article 158(3),<sup>87</sup> but with pursuance to Article 158(1) of the Hong Kong Basic Law. In the *Lau Kong Yung* case,<sup>88</sup> the Court of Final Appeal reiterated the power of

<sup>86</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Di Ershier Tiao Di Si Kuan He Di Ershisi Tiao Di Er Kuan Di San Xiang de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第二十二条第四款和二十四条第二款第(三)项的解释) [Interpretation of Paragraph 4 in Article 22 and Category (3) of Paragraph 2 in Article 24 of the Basic Law of the HKSAR of the PRC by the Standing Committee of the National People's Congress] (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1999, effective June 26, 1999) (Chinalawinfo); Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Fujian Yi Di Qi Tiao he Fujian Er Di San Tiao de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》附件一第七条和附件二第三条的解释) [Interpretation of Article 7 of Annex I and Article 3 of Annex II to the Basic Law of the HKSAR of the PRC by the Standing Committee of the National People's Congress] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 6, 2004, effective Apr. 6, 2004) (Chinalawinfo); Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Di Wushisan Tiao Di Er Kuan de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第五十三条第二款的解释) [Interpretation of Paragraph 2 in Article 53 of the Basic Law of the HKSAR of the PRC by the Standing Committee of the National People's Congress] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2005, effective Apr. 27, 2005) (Chinalawinfo); Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa Di Shisan Tiao Di Yi Kuan he Di Shijiu Tiao de Jieshi (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第十三条第一款和第十九条的解释) [Interpretation of Paragraph 1 in Article 13 and Article 19 of the Basic Law of the HKSAR of the PRC by the Standing Committee of the National People's Congress] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 26, 2011, effective Aug. 26, 2011) (Chinalawinfo).

<sup>87</sup> *Lau Kong Yung v. Director of Immigration*, [1999] 2 H.K.L.R.D. 516.

<sup>88</sup> *Id.*

the NPCSC to interpret the Hong Kong Basic Law may be involved at any time, in unqualified term when it is necessary; the NPCSC's power to interpret the law is not qualified by the occasion of Article 158(3) of the Hong Kong Basic Law but is derived from Article 67(4) of the Constitution as well as Article 158(1) of the Hong Kong Basic Law.

In the NPCSC Interpretation 2016, para 2(2), "[...] An oath taker must take the oath sincerely and solemnly and must accurately, completely and solemnly read out the oath prescribed by law [...]." In para 2(3), "An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article [104]." The captioned content nearly echoed in the same way as the statutory law in Hong Kong<sup>89</sup> It is believed that by common law,<sup>90</sup> by statutes<sup>91</sup> and by the Hong Kong Basic Law, the same conclusion will be reached with or without the NPCSC Interpretation 2016. The necessity for China to promulgate the NPCSC Interpretation 2016 is believed to be related to some past experience where the Court of Final Appeal and the NPCSC might differ in their views on the interpretation on the Hong Kong Basic Law. For example, in both the *Ng Ka King* case<sup>92</sup> and the *Chong Fung Yuen* case,<sup>93</sup> the Court of Final Appeal gave their verdicts on Article 24, which were found not consistent with the legislative intent of the NPCSC. Clearly, Leung and Yau's behaviors are totally unacceptable and extremely offensive to the sovereign country China, and huge embarrassment has been caused to Chinese people worldwide. Consequentially, the NPCSC Interpretation 2016 not only clarifies the words "decline" and "neglect" but also addresses the manner and behavior when one takes the oath. Paragraph 2(2) of the NPCSC Interpretation 2016 says that oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law, the content of which includes "will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."<sup>94</sup> Paragraph 2(3) states, "An oath taker is disqualified forthwith from assuming the public office specified in the Article if he declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or

<sup>89</sup> Oaths and Declarations Ordinance, § 7 and § 21.

<sup>90</sup> *Leung and Yau Case*, *supra* note 9; *see also* Leung Kwok-Hung v. Legis. Council Secretariat, [2004] H.K.C.F.I. 883.

<sup>91</sup> Oaths and Declarations Ordinance, § 19 and § 21.

<sup>92</sup> *Ng Ka Ling v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 4.

<sup>93</sup> *Director of Immigration v. Chong Fung Yuen*, [2001] 2 H.K.L.R.D. 533.

<sup>94</sup> *NPCSC Interpretation 2016*, *supra* note 3, art. 1.

takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article.”<sup>95</sup>

Under this interpretation of NPCSC on Article 104, absolutely no ambiguity is left. The form and content of the oaths taken by Leung and Yau, as well as the oaths taken by the other four,<sup>96</sup> shall not be valid. Without taking a valid oath, the six were disqualified as members of the LegCo. The Court of First Instance adjudicated that Leung and Yau’s conduct amounted to “*failing*” and “*declining*” to take the oath and thus both shall be disqualified to be legislators in HKSAR. The Court also made a note that even without the NPCSC interpretation 2016 the Court would arrive at the same conclusion under the common law. Leung and Yau appealed, but the appeal was dismissed.<sup>97</sup>

### C. Disqualification for Deviation of Oath

Following the *Leung and Yau* case, the Chief Executive and the Secretary for Justice lodged a judicial review against four other legislators:<sup>98</sup> Nathan Law Kwun Chung, Leung Kwok-Hung, Lau Siu Lai and Yiu Chung Yim, as well as against the Clerk and /or the President of the LegCo, who gave a second chance to the four to retake the oath. The following are the conducts that led to their disqualification by constituting “declining” or “neglecting” the LegCo Oath. Among the four legislators, Nathan Law Kwun Chung, while swearing the oath on October 12, 2020, added the content “you can chain me, you can torture me, you can destroy this body, but you will never imprison my mind”<sup>99</sup> before the prescribed oath and then purported to take the LegCo Oath by adopting an apparent and distinct rising tone. Leung Kwok-Hung was wearing a black T-shirt with the words “civil disobedience” (公民抗命)<sup>100</sup> and carrying an open yellow umbrella printed with words including “ending the Dictatorial Rule of the Communist Party” (结束一党专政).<sup>101</sup> Lau Siu Lai purported to take the LegCo Oath by starting with a few sentences of political statements attacking the Government, including upholding the road of democratic self-determination.<sup>102</sup> She then purported to read out the following words of the

<sup>95</sup> NPCSC Interpretation 2016, *supra* note 3, art. 2(3).

<sup>96</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10.

<sup>97</sup> *Leung and Yau Case*, *supra* note 9, paras. 120, 125.

<sup>98</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10.

<sup>99</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10, para. 80. The Chinese version is: “今日呢个神圣仪式(宣誓), 已经沦为政权嘅工具, 强行令民意代表屈服嘅制度同埋极权之下……我今日要完成必要嘅程序, 但系唔代表我会屈服嘅极权之下。香港市民永远系我哋服务同埋团结嘅对象, 我系绝对唔会效忠于残杀人民嘅政权。”

<sup>100</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10, para. 116. The Chinese version is: “公民抗命! 无畏无惧! 人民自主自决! 无须中共批准!”

<sup>101</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10, para. 116.

<sup>102</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10, para. 146. The Chinese version is: “共同开创民主自决之路。推倒高墙, 自决自强。”

LegCo Oath at a slow pace with a clear pause lasting about six seconds to read one Chinese character word. The whole process took 13 minutes<sup>103</sup> and she told the public that she deliberately slowed down the pace in order to let the public know she was not sincere to the words she swore in the LegCo Oath which she saw as hypocritical.<sup>104</sup> Yiu spoke out words which do not accord with the wordings of the LegCo Oath which included “fighting for genuine universal suffrage”, “fighting for Hong Kong’s continuous developing services”.<sup>105</sup> On top of the additional content, Law, Leung, Lau, Yiu also did not accord to the solemnity and sincerity in their manner to take the purported LegCo Oath. The Court adjudicated that both the decision of the Clerk and the ruling of the President to provide a second chance for the oath taker to retake the oath were invalid and *ultra vires*. The LegCo Oaths purportedly taken by the four were invalid accordingly, and the four shall be disqualified from assuming their position as legislators as of October 12, 2016.

These series of judicial reviews against the persons-elect who manifestly refused and willfully omitted, and therefore declined and neglected to take the LegCo oath<sup>106</sup> should have woken up many legislators. Unfortunately, things have not improved for some legislators, who continue to have some conducts obviously contrary to their oaths to pledge allegiance and loyalty to People’s Republic of China and her HKSAR. Some legislators’ going overseas to plea for other countries to sanction the HKSAR are seen to be an act harmful to the interest of Hong Kong and adversely affect the survivability of Hong Kong. This is harmful to the HKSAR as well as to China. To pledge loyalty are commonly understood words both for China as well as in common law jurisdictions. Those coming legislators failed to adhere to their Oaths, which triggered further elaboration from the sovereign country to announce the NPCSC Decision 2020 to disqualify the legislators, who have committed acts unfaithful and harmful to China as well as her HKSAR on November 11, 2020. As the Hon J. Au said in the oaths case of the four legislators, “It is a requirement of the law whether under the Basic Law or the common law that an oath taker must take the oath in a solemn and sincere manner. Members-elect are expected to know the law, and ignorance of the law is never a valid excuse for failing to comply with it.”<sup>107</sup>

From what have been discussed, the same act will not be acceptable both in common law and Chinese law. When an oath comes into the picture, it is believed Chinese law and common law will agree.

<sup>103</sup> Law, Leung, Lau and Yiu Case, *supra* note 10, para. 147.

<sup>104</sup> Law, Leung, Lau and Yiu Case, *supra* note 10, paras. 152, 155. The Chinese version is: “我却要传达一个讯息：流畅铿锵的宣誓是虚伪的，和谐的议会也是虚伪的。”

<sup>105</sup> Law, Leung, Lau and Yiu Case, *supra* note 10, para. 187.

<sup>106</sup> Leung and Yau Case, *supra* note 9, para. 46.

<sup>107</sup> Law, Leung, Lau and Yiu Case, *supra* note 10.

## VI. CONCLUSION

The oaths cases are really good examples of illustrating the hybrid nature of the Hong Kong Basic Law, namely, a combination of Chinese law and common law. The blood, the skeleton and the framework of the Hong Kong Basic Law carry the characteristics of Chinese law as the Hong Kong Basic Law was passed by the NPC as a piece of special national law;<sup>108</sup> however, when the Hong Kong Basic Law grows by taking in the nutrients of common law through different court judgements, it also reflects common law characteristics. There are some occasions, where these legal parents differ in their views of interpreting the Hong Kong Basic Law; however, there are occasions where they agree. The oaths cases fall exactly into this second category.

Both Chinese law and common law pay high regards to the solemnity of an oath, both legally and politically. In the HKSAR, the *Leung and Yau case*<sup>109</sup> and the *Law, Leung, Lau, Yiu case*<sup>110</sup> are serious. Leung and Yau swore an oath which was highly offensive and insulting to China as a sovereign country and to the Chinese people. Law, Leung, Lau, Yiu conducted their oaths by either adding contents, deviating from the pledge of loyalty to China, or swearing it in a form indicating that they were not sincere to the oath.<sup>111</sup> These acts not only led to disastrous consequences socially and politically, but also resulted in legal consequences. According to common law,<sup>112</sup> statutory law<sup>113</sup> and the Hong Kong Basic Law, both Chinese law and common law will arrive at the same conclusion, that an oath taken by a person-elect must be in a solemn manner and may not deviate at all in form and content when he swears the oath; otherwise, disqualification is a definite result even without the NPCSC Interpretation 2016.<sup>114</sup>

In conclusion, in respect of sovereignty, dignity and esteem of China such as upholding the solemnity of a LegCo oath for a legislator, there exists no room for any kind of deviation but solemn and sincere adherence to the content and form as prescribed by law.

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<sup>108</sup> LEUNG, *supra* note 66, at 45; WANG SHUWEN, GUIDING PRINCIPLES OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION BASIC LAW 43 (China Democratic Legal Press & Chinese Communist Party Publ'g House 3d ed. 2006).

<sup>109</sup> *Leung and Yau Case*, *supra* note 9.

<sup>110</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10.

<sup>111</sup> *Law, Leung, Lau and Yiu Case*, *supra* note 10 para. 153. Lau Siu Lai who spent about 13 minutes to swear her oath and later on in her Facebook declared the reason to do so is to make sure other people understand she would not adhere to the content of the oath.

<sup>112</sup> *Leung Kwok-Hung v. Legis. Council Secretariat*, [2004] H.K.C.F.I. 883.

<sup>113</sup> Oaths and Declarations Ordinance, §21.

<sup>114</sup> NPCSC Interpretation 2016, *supra* note 3.