

## Comment on Professor Ghai's Lecture

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Professor Yash Ghai clearly illustrated and discussed the predicament Hong Kong now faces under the “One State Two Systems” scheme. As a constitutional scholar lacking in knowledge of both Hong Kong and mainland China, I would just like to present a viewpoint from which, I hope, we can appreciate both similarities and differences between Hong Kong-China relation and Japan-USA relation.

First of all, why do we need “One State,” that is, sovereignty at all? A widely received view among liberal constitutional scholars may be that a state is necessary to solve the prisoner's dilemma, that occurs in the Hobbesian state of nature. The line of reasoning runs as follows. People in the state of nature want peaceful lives. But they also want to lead “good lives” in accordance with their comprehensive moralities that are incommensurable with one another. Yet, to wage war ferociously against one another in order to realise a “good life” from each one's viewpoint is contrary to everyone's interest. Hence, people should agree to set up a sovereign government to realise “political” peace instead of leaving everyone to pursue his or her “true good” in their private spheres. ‘[I]n those things which concerne the Common Peace and Safetie, men should submit their Wills. Every one to his [sovereign's] Will, and their Judgements, to his Judgement.’<sup>1</sup> Under an authority of state securing peace, everyone can participate in deliberation and decisions about public interest as a rational citizen in the public sphere on the one hand, and lead a life as a private person pursuing his or her own

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<sup>1</sup> Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge University Press, 1996), p.120.

happiness on the other hand.<sup>2</sup>

However, in this post-modern world, the authority establishing preconditions of liberal constitutional democracy in a given area is not necessarily a state that claims legal sovereignty there. Certain transnational organisations or even a foreign government may assume this function expected in general from a state in modern constitutionalism. Let us look at the case of Japan after the Second World War, where the United States has had Japan develop a liberal constitutional system both in its political and economical dimensions under American military presence.

In pre-war Japan it was above all the armed forces (and the emperor) that obstructed the development of the public sphere where reasonable political deliberation should take place. Under the occupation just after the war, American forces demilitarised Japan and the new constitution, mainly engineered and drafted by the occupying forces, prohibits the government from maintaining any armed force.<sup>3</sup> Although the “Self-defence forces” were established afterwards, they are still deprived of their former legitimacy, their actions strictly restrained under the constitution. These deprivation and limits imposed upon the armed forces have brought about a precondition of the establishment of the public sphere in this country.

On the other hand, the United States has had an interest in economic prosperity of Japan as a capitalist free market. They also recognised that Japan should become a bulwark of American opposition to Soviet expansionism, at least after their realising that the government of Chiang Kai-shek could not stem the advance of the Chinese communists. Besides, from the propagandist viewpoint

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<sup>2</sup> See my ‘Why we should not take sovereignty too seriously’ in *National Constitutions in the Era of Integration*, ed. by Antero Jyränki (Kluwer, 1999).

<sup>3</sup> Art.9 of the Constitution of Japan states: ‘Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.’

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognised.’

it was in the interest of the US to let the Japanese people enjoy sufficient scope of civil liberties. Therefore, it should come as no surprise that both a free market economy and a liberal public sphere thrived in Japan, exceptionally in the area other than the western world, under the peace kept by American defence service.

Having said that, we should note that the agenda on defence service have to a large extent been excluded from the rational deliberative process in this country, though they did sometimes become hot, that is, irrationally disputed issues. If one of the functions to be performed by a constitution is to exclude some issues from the agenda of the public sphere when they are too provocative to be deliberated rationally in the day-to-day political process,<sup>4</sup> Art.9 of the Constitution of Japan succeeded only partially in this regard since it could not prevent defence issues from becoming hotly disputed, though it did prevent them from being deliberated rationally. However, as I indicated earlier, this article has served and still performs a great function in creating a precondition of liberal constitutional democracy.

It seems that the public sphere as a basic component of liberal democracy has not yet sufficiently developed either in mainland China or in Hong Kong. Professor Ghai indicates that the "One State Two Systems" scheme is the only option for conveniently maintaining economic prosperity of Hong Kong and ascribing its sovereignty to China at the same time. China would plainly benefit from Hong Kong's preserving its economic strength under the capitalist system. And for that purpose, guaranteeing the rule of law and economic freedom is essential, whereas guaranteeing other civil liberties such as freedom of expression has only derivative and/or instrumental value at most.

Does China have any interest in allowing an autonomous public sphere to be established in Hong Kong? My guess is that it may, but only in so far as such public spheres come to be developed in the mainland, too. And the crucial question here is whether people under

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<sup>4</sup> See Stephen Holmes, 'Gag rules or the politics of omission', in *Constitutionalism and Democracy*, eds. by Jon Elster and Rune Slagstad (Cambridge University Press, 1988).

the present Chinese sovereignty share a common culture to such an extent as leading to a construction of a common public sphere covering its whole territory. If there is not such a social basis, allowing any autonomous public sphere to be developed may lead to a disintegration of the whole country. For its integration to be preserved China may need a Schmittian sovereign who, standing above and beyond its legal system, distinguishes “friends” from both internal and external “foes,” decides on the unity of the people and re-establish a concrete order which is deemed to be proper to the state.<sup>5</sup> A standing constituent power (*pouvoir constituant*) like this is plainly irreconcilable with the liberal conception of constitutional democracy or even that of the rule of law. In the liberal thought the constituent power is regarded as consumed fully at the moment of state building, unable to wield its power again afterwards. Other constituted powers, including the amending power, can be exercised only in the scope permitted by the constitution.<sup>6</sup>

If leading figures of China see such risks and corresponding needs, it is quite unlikely that they are willing to restrain themselves and let people in Hong Kong enjoy a considerable degree of civil liberties, which are luxuries only sufficiently homogeneous states can afford. And this Schmittian hypothesis may explain to some degree why Chinese political leadership has always been personalised. However, a serious tension is likely to emerge from the sociological fact that after the end of the Cold War few people would admit that liberal democracy is a luxury.

On this scenario, Hong Kong can acquire its public sphere only when China itself is divided into so many public spheres. And in the view of Chinese leaders aiming to maintain the apparent unity of China, the “One State Two Systems” scheme is just another dilatory compromise that postpones and adjourns ultimate decisions which may make explicit latent contradictions in mainland China.

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<sup>5</sup> See e.g. Carl Schmitt, *Verfassungslehre* (Duncker & Humblot, 1928); also his *Der Begriff des Politischen* (Duncker & Humblot, 1932).

<sup>6</sup> Cf. Olivier Beaud, *La puissance de l'État* (Presses universitaires de France, 1994).