A Play in Two Acts: Reflections on the Theatre of the Law

The 'clarification' by the Court of Final Appeal in the right of abode case[1] was not about legal principles or doctrines. In trying to understand what it was about I am compelled towards the imagery of the theatre. Having sat through the greater part of the original, substantive proceedings and for all of the subsequent 'clarification' proceedings, in a courtroom which once served as a chapel, I find it hard, in any case, to escape the imagery of the theatre. But the imagery has been especially compelling because what transpired seemed like a farce.

Here is the HKSAR government, represented by Mr Geoffrey Ma, a leading barrister, duly bewigged and banded, asking the court to clarify the meaning of certain of its statements in its earlier judgment, at the same time as he acknowledges that he himself understands perfectly what it meant. The court carefully refrains from asking him why then was he wasting its time instead of explaining the meaning to his client, herself a lawyer of considerable experience, no less than the chief legal officer of the Region. The learned barrister then says that the court has a duty to clarify its judgment because it has become highly controversial while conceding that it is a correct judgment. The court again shows remarkable restraint. It does not ask obvious questions: Why controversial? Controversial to whom? Since when have attacks on a judgment become a basis of jurisdiction (outside contempt of court charges)?

Nor does the court ask Mr Ma, how does one clarify a clear and correct statement? Perhaps the clue lies in the word Mr Ma himself is too tactful to use but which is freely bandied about outside: 'rectification.' Nevertheless there are dark hints of it in Mr Ma's justification for a court revisiting its earlier decision: injustice. The court is too polite to ask, what injustice? When the court does provide 'clarification,' in considerably more perplexing text than its original judgment, it is hailed as dispelling all doubts.

Usually, except for the most perceptive audience, the theatre of the law lies not in its incongruity but in its solemnity and expression of authority. There is the strange attire in which judges and counsel robe themselves, which not only sets them off from us mere mortals but also reinforces hierarchies within the profession. The rules of procedure and the style of argumentation seek to highlight the rationality of the judicial process, the canvassing of different points of view, and the isolation, from the wider social and political contexts, of legal principles, to which alone fidelity is owed. There is an ostentatious, almost excessive, display of courtesy and politeness, in the midst of deep, and often contentious, inquiry into the law and facts. Proceedings are open and

[1] *Ng Ka-ling (an infant) v Director of Immigration* [1999] 1 HKC 425.

decisions are justified by reason and precedent. There is a high degree of deference to judges, to whose jurisdiction even the highest official of the executive must submit, as merely another litigant, equal in rights to an ordinary person. There is a sense of finality about judicial decisions, intended to bring the dispute to an authoritative settlement.

This is the theatre of power, and its subtle message is the responsibility and accountability of power holders, and a careful search for justice. It contrasts with other theatres of power, which words like 'rectification' bring to mind. The latter draw their strength from an overwhelming sense of righteousness, from a superior knowledge of history, from being a chosen instrument of destiny. In the eyes of their adherents, the ambiguities and balances of the law are merely a sign of weakness; their own certainties do not require the careful procedures of the law. They rely on a more patent exercise of power. When necessary they send their auxiliaries to storm the ramparts of reaction and wreck its institutions. They assert their dominance through the humiliation of, and self-abasement by, their opponents, and other forms of 'self-criticism' and 'confessions.'

Was the CFA caught between these two types of theatre? Certainly its January proceedings[2] were the classic case of the theatre of the law: measured, polite, probing, precedents demanded and offered, and a lengthy and considered judgment at the end. The Chief Justice delivered that judgment in a confident style, assured of the authority, and the prestige, that we confer upon or recognise in the judiciary. Things seemed very different in the aftermath. Highly improbable, irrelevant, and sometimes misleading submissions by the government, completely lacking in legal principle, were admitted by the court without any real probing. The impression was of a court and counsel trying to avoid getting to grips with the real issue at stake. The helpful and quite proper offer of assistance by the Bar Association, which might have thrown light on legal principles, was turned down. The judges appeared ill at ease throughout the case, as if unsure of their authority. The judgment, delivered after a short break, lacked the flow of the earlier decision, its prose somewhat convoluted, and its reasons scanty. Whereas the previous decision sought to lay broad guidelines for the future, here no explanation was given on the crucial question as to the 'exceptional' circumstances justifying a court in revisiting its earlier judgments.

I have been wondering, why the transformation? Certainly the January judgment did not receive the support of the HKSAR government. Various personages in Hong Kong, including august members of the Committee for the Basic Law, launched an attack on the court. The onslaught was intensified by the harsh criticisms of Mainland legal experts, some of them also members of

[2] [1999] 1 HKC 291.

the Basic Law Committee. The climax came with the endorsement of these criticisms by the State Council. The attacks never engaged with the reasoning of the court, which was detailed and had won wide support among the legal profession. There was a shift to political or economic grounds for disapproval of the judgment. It seemed as if the HKSAR judiciary, the only independent public authority in the Region, was being softened up. Law no longer seemed important to the resolution of the matter.

Our own Department of Justice weighed in by trying to turn these politically motivated attacks into a challenge cast in the medium of the law. If it had intended to undermine the independence and authority of our judiciary, it could not have hit upon a more effective strategy. Despite having its own battalion of lawyers, it asked the CFA to 'clarify' its decision. It was, and was widely seen, as an invitation to 'recant,' an occasion for 'self-criticism,' to appease the political forces that were so disdainful of the court's view of legality. Instead of sending in the red guards, it despatched the gentle and fair-minded Geoffrey Ma to assist in the process of judicial humiliation. Sitting in the court, we were all tantalised by the question: would the CFA go along with the deadly charade?

It is easy to criticise the judges for abdication of fidelity to legal principles, for there can be no doubt about the political nature of its decision to revisit the case. But it is our government which must bear greater responsibility for putting the judiciary in such a difficult position, as the refusal to take jurisdiction would be seen as further provocation. The distinguished Hungarian Marxist philosopher Georg Lukacs once said that, to destroy liberalism, it must be forced into violations of its own legality. This would destroy the myths which sustain liberalism's major institution of oppression, the rule of law. Is there a lesson for us here?

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