

*Secretary for Justice v. Wong Chi Fung: Post-Umbrella Movement Convictions Presage an Era of Constraint on Hong Kong Citizens’ Freedom of Expression*

I. OVERVIEW ..... 337  
II. BACKGROUND ..... 339  
    A. *Evolution of the Occupy Movement*..... 339  
    B. *Media Responds to the Events of the Occupy Movement* ..... 340  
III. COURT’S DECISION..... 341  
IV. ANALYSIS ..... 343  
V. CONCLUSION ..... 346

I. OVERVIEW

Following a political decision that threatened the right to universal suffrage, vast crowds of people gathered together on various streets of Mongkok, Hong Kong (the Area) in a peaceful effort to advocate for democracy and political reform in the fall of 2014.<sup>1</sup> A series of congregations, which later became known as the “Occupy Movement,” persisted over the course of three months.<sup>2</sup> The protesters, largely composed of students,<sup>3</sup> sought to express their support for democratic voting by exercising the right to peaceful assembly that is afforded, by law, to all citizens of Hong Kong Special Administrative Region (Hong Kong).<sup>4</sup> These rights were threatened, however, after Au J issued an Injunctive Order that sought to suppress the Occupy Movement in response to the objections of taxi operators who were unable to drive on the occluded roads.<sup>5</sup> The court predicated the issuance of the Amended Injunctive Order on the notion that the Occupy Movement disrupted the lives of ordinary citizens.<sup>6</sup> This raised speculation and concern among several pro-democracy groups, including members of Scholarism, a

---

1. Sec’y for Justice v. Wong Chi Fung, [2019] 548 H.K.C.A. 1, 7.  
2. *Id.* at 5-6.  
3. Austin Ramzy, *9 Hong Kong Democracy Advocates Convicted for Role in 2014 Protests*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/world/asia/hong-kong-umbrella-revolution-occupy-central.html>.  
4. *Wong Chi Fung*, 548 H.K.C.A. at 15.  
5. *Id.* at 5-6.  
6. *Id.*

student-led political organization.<sup>7</sup> Although the members of Scholarism did not wish to prevent the execution of the Injunction, they did seek to understand its arrangement, and also shared concerns about the safety of protestors.<sup>8</sup> Thus, upon meeting to discuss the prospective termination of the movement, it was decided that seventeen-year-old student Wong Chi Fung (Fung) would attend the protest to clarify the clearance procedure.<sup>9</sup> Although Fung had not participated in the Occupy Movement himself, he agreed to attend based on both his interest in politics and in ensuring the safety of participating occupants.<sup>10</sup>

On November 26, 2014, the date on which the Injunction was scheduled for enforcement, officers issued a series of announcements ordering occupants to evacuate the Area.<sup>11</sup> However, despite repeated inquiries made by occupants such as Fung, officers failed to disclose the authority of the agents enforcing the order.<sup>12</sup> After issuing a final announcement, officers detained several members of the crowd, including Fung, for obstructing the Injunctive Order.<sup>13</sup>

As one of twenty contemnors facing committal proceedings for obstructionist acts,<sup>14</sup> Fung described to the court his limited affiliation with the Occupy Movement and his incorrupt motive behind attending the protest.<sup>15</sup> In support of these contentions, Fung recounted his activity from the protest, which was strictly limited to asserting questions, and also testified that, prior to the date of his arrest, he had merely passed by the Area no more than five times.<sup>16</sup> In hopes of avoiding imprisonment, Fung later admitted to criminal contempt and apologized for his actions.<sup>17</sup> Despite his assertions, however, the court sentenced Fung to three months imprisonment for criminal contempt based on its finding that Fung's participation in obstructing justice was "deep and extensive" and that he played a "leading role" in inciting disobedience.<sup>18</sup> Fung appealed, alleging that there was insufficient evidence to support such findings.<sup>19</sup> The High

---

7. *Id.* at 5, 13.

8. *Id.* at 13.

9. *Id.* at 13-14.

10. *Id.*

11. *Id.* at 7-11.

12. *Id.* at 12-13.

13. *Id.* at 12.

14. *Id.* at 2.

15. *Id.* at 13-14.

16. *Id.* at 13-14, 19.

17. *Id.* at 14.

18. *Id.* at 15.

19. *Id.*

Court of the Hong Kong Special Administration Region Court of Appeal *held* that Fung committed criminal contempt by intentionally, knowingly, and deliberately interfering with the due execution of the Amended Injunction Order, thereby interfering with and impeding the administration of justice, which is punishable by imprisonment. *Secretary for Justice v. Wong Chi Fung*, [2019] 548 H.K.C.A. 1, 1-3.

## II. BACKGROUND

The right to peaceful assembly and to peaceful public procession are fundamental freedoms that are considered to be integral components of the society of Hong Kong and are protected under both Basic Law and Article 17 of the Hong Kong Bill of Rights Ordinance (BORO).<sup>20</sup> Although the BORO permits limitations on the exercise of these freedoms under necessary circumstances, such limitations must be imposed upon adequate notice, and in a way that is consistent with preserving citizens' rights.<sup>21</sup> When determining whether such restrictions are permissible, the Commissioner must consider whether the limitation is (a) rationally connected with the purpose of the public order, and (b) no more than necessary to accomplish said purpose.<sup>22</sup>

### A. *Evolution of the Occupy Movement*

In efforts to promote universal suffrage and democratic reform, the Occupy Movement was formed in the fall of 2014 by a group of activists called Occupy Central with Love and Peace, who organized what was originally intended to be a sit-in around the city of Mongkok's financial district, where several government offices are located.<sup>23</sup> This sit-in, however, gained significant impulsion after police officers sprayed students with pepper spray and tear gas during the initial stages of the protest, requiring protesters to shield themselves with umbrellas.<sup>24</sup> In response to the officers' vicious attack, the Occupy Movement rapidly evolved into a mass revolution that continued for three months and was

---

20. Legis. Council of the H.K. Special Admin. Region of the People's Republic of China, LC Paper No. CB(2)1224/05-06(01), Guidelines on the Approach to the Public Order Ordinance in Relation to Public Meetings and Public Processions (Session 2005-2006), <https://www.legco.gov.hk/yr05-06/english/panels/se/papers/se1101cb2-1224-1e.pdf> [hereinafter Guidelines].

21. *Id.*

22. *Id.*

23. Rishi Iyengar, *Six Questions You Might Have About Hong Kong's Umbrella Revolution*, TIME (Oct. 5, 2014), <https://time.com/3471366/hong-kong-umbrella-revolution-occupy-central-democracy-explainer-6-questions/>.

24. *Id.*

joined by thousands of occupants, many of whom were young students.<sup>25</sup> Specific objectives underlying the movement included a push towards full democracy, universal voting rights, and resignation of Chief Executive Leung-Chun-ying.<sup>26</sup>

Despite its wide support among students and political activists,<sup>27</sup> the Occupy Movement was contested by several members of the Mongkok community,<sup>28</sup> particularly older residents<sup>29</sup> and taxicab drivers, many of whom were restricted from driving along a few of the city's widely used roads.<sup>30</sup> In response to these driving impediments, several taxi-cab drivers sought legal recourse by applying for an Injunctive Order with the High Court of Appeals, which was later granted by Au J.<sup>31</sup> Execution of the Amended Injunctive Order by officers on November 26, 2014, resulted in the arrest of several occupants, many of whom were subsequently convicted of public nuisance-related charges in proceeding cases.<sup>32</sup>

#### B. *Media Responds to the Events of the Occupy Movement*

As the Occupy Movement expanded along several of Hong Kong's major roads over the course of its seventy-nine-day duration,<sup>33</sup> it began to generate significant media attention around the world.<sup>34</sup> Many of these reports focused largely on the brutal attacks imposed on the crowd by police, as well as the verdicts imposed by several protesters subsequent to

---

25. See Ramzy, *supra* note 3.

26. Iyengar, *supra* note 23.

27. Sharon Hom, *The "Occupy Central 9" Cases: Rule of Law or Rule by Law in Hong Kong?*, JURIST (Apr. 30, 2019), <https://www.jurist.org/commentary/2019/04/sharon-hom-central-9-rule-of-law-hong-kong/>.

28. See generally Victor Zheng, Fanny M. Cheung & Po-san Wan, *Half of Hongkongers Oppose Occupy Central's Campaign for Universal Suffrage*, S. CHINA MORNING POST (Aug. 12, 2013), <https://www.scmp.com/comment/insight-opinion/article/1295910/occupy-central-survey-what-people-think-protest-campaign>.

29. Iyengar, *supra* note 23.

30. Sec'y for Justice v. Wong Ho Ming, [2018] 173 H.K.C.A. 1, 3.

31. *Id.* at 3, 5.

32. *Id.* at 1, 5, 9; see also Hom, *supra* note 27.

33. *Hong Kong: Freedom of Expression Under Attack as Scores of Peaceful Protesters Face "Chilling" Prosecutions*, AMNESTY INT'L (Sept. 26, 2017), <https://www.amnesty.org/en/latest/news/2017/09/hong-kong-freedom-of-expression-attack-peaceful-protesters-face-chilling-prosecutions>. [hereinafter *Hong Kong: Freedom of Expression*].

34. See, e.g., Larry Ong, *79 Days of Occupation: Umbrella Movement Interactive Timeline*, EPOCH TIMES (Dec. 16, 2014), [https://www.theepochtimes.com/79-days-of-occupation-umbrella-movement-interactive-timeline\\_1146111.html](https://www.theepochtimes.com/79-days-of-occupation-umbrella-movement-interactive-timeline_1146111.html); see also Iyengar, *supra* note 23; Zheng, Cheung & Wan, *supra* note 28.

their arrests.<sup>35</sup> Police officers' reaction to the protestors' activity raised significant questions about the scope of protection afforded to citizens under the laws of Hong Kong,<sup>36</sup> which had recently reinforced the right to peaceful public assembly and to freedom of speech in 1991 by its adoption of BORO.<sup>37</sup> In response to the Hong Kong government's management and control over the Occupy Movement, leaders and organizations around the world expressed their objections to Hong Kong's constriction on its citizens' rights to freedom of speech and peaceful assembly.<sup>38</sup>

Further, it was reported that instances of censorship became more prevalent following the Occupy Movement arrests.<sup>39</sup> For example, in months following the termination of the Movement, Hong Kong's government denied students' use of public vicinities to host a boycott.<sup>40</sup> In addition, Hong Kong's postal services refused to deliver flyers published by Scholarism.<sup>41</sup>

### III. COURT'S DECISION

In the noted case, the High Court of the Hong Kong Special Administration Region Court of Appeal (the court) considered whether an individual, who is present at the scene of a non-violent protest, and asserts questions therein, may be held liable for criminal contempt.<sup>42</sup> Seizing an opportunity to establish a more stringent standard for evaluating the lawfulness of protests, the court found that such conduct may constitute criminal contempt, particularly where the contemnor's actions were motivated by knowledge and intent.<sup>43</sup> First, the court found that the act and nature of Fung's contempt was "deep and extensive."<sup>44</sup> Second, the court found that Fung assumed a leading role in inciting obstructionist activity

---

35. See, e.g., Hom, *supra* note 27; see also *The Umbrella Revolution*, FOREIGN POL'Y (Sept. 29, 2014), <https://foreignpolicy.com/2014/09/29/the-umbrella-revolution/>.

36. *Hong Kong: Freedom of Expression*, *supra* note 33.

37. Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, 34, Introduction (H.K.); see also Guidelines, *supra* note 20.

38. See, e.g., *Hong Kong: Freedom of Expression*, *supra* note 33 ("Amnesty International wrote to Hong Kong's Secretary for Justice, Rimsky Yuen, to ask for clarification on the legal situation of all those arrested.").

39. Kong Tsung-Gan, *Censorship in Hong Kong Since the 2014 Umbrella Movement: An Overview and Tally*, H.K. FREE PRESS (Nov. 17, 2018), <https://www.hongkongfp.com/2018/11/17/censorship-hong-kong-since-2014-umbrella-movement-overview-tally/>.

40. *Id.*

41. *Id.*

42. Sec'y for Justice v. Wong Chi Fung, [2019] 548 H.K.C.A. 1, 2, 11-12.

43. *Id.* at 16-18.

44. *Id.* at 16.

among the occupants.<sup>45</sup> Finally, the court found the gravity of Fung's contempt to be "grave, contemptuous, and contumacious," as generated by his intentional interference with the due administration of justice.<sup>46</sup>

First, in considering the act and nature of Fung's contempt for purposes of determining his culpability, the court found that the evidence relied upon by the lower court was sufficient to support its finding that Fung's involvement in the obstruction was "deep" and "extensive."<sup>47</sup> In reaching this conclusion, the court rejected Fung's contention that he was "merely present" at the scene of the protest<sup>48</sup> and instead found that Fung had demonstrated substantial involvement by standing in an "elevated position" from 9:38 a.m. to 9:43 a.m., by inquiring about the authority of those he did not recognize to be officers, and by standing behind the barricades for four minutes as officers attempted to clear them.<sup>49</sup>

Second, in evaluating Fung's role in committing criminal contempt, the court found that Fung played a leading role in propagating obstruction, which further bolstered his culpability.<sup>50</sup> There was neither evidence to suggest that Fung had previously participated in the Occupy Movement, nor evidence that any occupants were following his endeavors on the day of arrest.<sup>51</sup> However, the court found that Fung's physical stance, as relied upon in its previous finding, demonstrated his principal authority.<sup>52</sup> Further, the court noted that, although Fung did not use any abusive language or violence, he spoke in an "aggressive and provocative tone," which it found to be indicative of his leading role in challenging the Injunction Order.<sup>53</sup>

Finally, in evaluating the gravity and effect of his actions, the court found Fung's criminal contempt to be "grave, contemptuous and contumacious," which derived largely from its belief that he knowingly and intentionally interfered with the due administration of justice.<sup>54</sup> Reaffirming its position in *Secretary for Justice v. Wong Ho Ming*, the court found that, due to a substantial risk that the administration of justice, authority of the court, and rule of law would otherwise be undermined,

---

45. *Id.*

46. *Id.* at 3, 21, 23.

47. *Id.* at 3, 15, 18.

48. *Id.* at 20.

49. *Id.*

50. *Id.* at 20-21.

51. *Id.* at 19.

52. *Id.* at 20.

53. *Id.*

54. *Id.* at 3, 23.

enforcement of the Injunction became necessary.<sup>55</sup> The court reasoned that, due to the wide publicity surrounding the Injunction, Fung must have been aware that the bailiff's purpose in executing the order was to prevent interference with the administration of justice.<sup>56</sup> The court further noted that, in choosing to engage in obstructive activity while surrounded by occupants who had similarly refused to vacate the Area, Fung must have been aware that his conduct would provoke others.<sup>57</sup> Thus, in the eyes of the court, Fung's culpability for criminal contempt was further bolstered by his apparent knowledge and intent in interfering with the due administration of justice.<sup>58</sup>

#### IV. ANALYSIS

The court's decision in the noted case, as well as all other convictions arising from the Occupy Movement, contravenes the right to peaceful protest that is said to exist under the laws of Hong Kong<sup>59</sup> and offers a formidable glimpse as to how citizens' rights will continue to be thwarted by Hong Kong's government.<sup>60</sup> The decision in this case is formed on an analytical framework that is inconsistent with the judicial principles by which the court claims to be governed and is violative of citizens' rights in accordance with the law.<sup>61</sup> In reaching its conclusion, the court readily reaffirmed the decision of the lower court in finding that Fung's conduct constitutes criminal contempt, without affording adequate consideration to the evidentiary challenges that were at issue on appeal.<sup>62</sup> Instead, the court rested its finding of culpability on nonspecific conduct and mere assumptions of fault.<sup>63</sup> Although the circumstances underpinning this case present a myriad of issues on various grounds, the analytical framework established by this decision is unfounded for two principal reasons.<sup>64</sup>

First, the court failed to provide a sufficient factual basis to support Fung's alleged culpability, and its evidentiary analysis is too broad to be

---

55. *Id.* at 23.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* Hom, *supra* note 27.

60. *See* Tiffany May, *Hong Kong Umbrella Movement Leaders Are Sentenced to Prison*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/world/asia/hong-kong-umbrella-movement.html>.

61. *See* Hom, *supra* note 27.

62. *Wong Chi Fung*, 548 H.K.C.A. at 4.

63. *See id.* at 18-19.

64. *Id.* at 19, 21. *See generally* Hom, *supra* note 27 (describing various concerns underlying the legal conclusions of the Occupy Movement cases).

of any value in providing guidance to lower courts.<sup>65</sup> In determining that Fung's involvement in the protest was "deep" and "extensive," and that he acted as a leader among occupants, the court relied primarily on evidence of his conduct, which was too general to provide insight as to his intentions and culpability.<sup>66</sup> Fung's alleged status as a leader among occupants hinged largely upon the court's perception of his manner and tone, which was described as "aggressive" and "provocative," although, as the court acknowledged, it did not include any abusive language or violence.<sup>67</sup> Although an individual's tone-of-voice or mannerisms may imply feelings of frustration or dislike, these characteristics, absent more compelling language or activity, are merely assumptions and reveal very little about Fung's motive or degree of involvement.<sup>68</sup> Moreover, the court found that Fung's tone and manner provoked the emotions and tensions of those around him and compelled others to engage in abusive language, thus causing a significant risk of physical violence.<sup>69</sup> There is, however, no factual evidence to substantiate these assumptions,<sup>70</sup> which are premised on an improbable notion that, in the midst of a protest, the tone and demeanor manifested by one person could have such a significant effect on others.<sup>71</sup> Under such unconfined evidentiary standards, Hong Kong's courts are permitted to assign liability for contempt based on their interpretation of ambiguous idiosyncrasies, despite how implausible their assertions may be.<sup>72</sup>

Second, the court's evidentiary analysis is lacking because it fails to account for all relevant facts and is instead strictly limited to those which frame the protesters in an unfavorable light.<sup>73</sup> The court's depiction of the Occupy Movement, particularly on the day the Injunction was executed, would suggest that the occupants were the sole aggressors, to which officers were required to combat.<sup>74</sup> This, however, is an inaccurate representation of what actually took place on the day in question, as evidenced by the wide range of media coverage that it spurred around the

---

65. See generally *Wong Chi Fung*, 548 H.K.C.A. at 10.

66. See *id.* at 19-20.

67. *Id.* at 20.

68. See *id.* at 19.

69. *Id.* at 19-20.

70. *Id.*

71. *Id.* at 21.

72. See, e.g., *id.* at 19-21.

73. See generally *id.* at 21; see also *Sec'y for Justice v. Wong Ho Ming*, [2018] 173 H.K.C.A. 1, 1, 20, 28.

74. *Wong Chi Fung*, 548 H.K.C.A. at 7, 11; see also *Wong Ho Ming*, 173 H.K.C.A. at 1, 20, 28.



world.<sup>75</sup> As noted by the court, the gravity of the alleged contemnor's conduct must be assessed under the totality of the circumstances, which it failed to do in its conviction of Fung.<sup>76</sup> For example, the court based its finding of culpability on nearly each distinct characteristic manifested by Fung on the day his arrest.<sup>77</sup> However, in analyzing Fung's conduct and its effect on the due administration of justice, the court failed to consider the impact that was had on protestors when officers sprayed tear gas and pepper spray in attempts to disperse them.<sup>78</sup> To the contrary, the court even refused to make impartial considerations, such as the generally tense nature of a protest, and its impact on attendees' emotions.<sup>79</sup> Thus, in failing to afford due consideration to the relevant facts in their entirety, the analytical framework employed by the court is inconsistent with the principles upheld by Hong Kong's judiciary and is incapable of rendering an accurate verdict.<sup>80</sup>

The court's decision in the noted case is indicative of the government's narrow interpretation of Hong Kong's Basic Law and Bill of Rights Ordinance, which are intended to protect citizens' rights to freedom of speech and freedom of assembly.<sup>81</sup> Like other decisions arising from the Occupy Movement, Fung's conviction demonstrates the government's newly adopted position that "freedom of expression is not absolute."<sup>82</sup> Similar to the public's initial reactions to the Occupy Movement, court decisions that have resulted from occupants' arrests have been of significant focus among media outlets around the world.<sup>83</sup> The sentences imposed on many of the Occupy Movement protestors have prompted concerns regarding Hong Kong's political structure and the

---

75. See, e.g., Adam Taylor, *The Humble Umbrella's Surprising Role in Hong Kong's Huge Protests*, WASH. POST (Sept. 29, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/09/29/the-humble-umbrellas-surprising-role-in-hong-kongs-huge-protests/>; see also Iyengar, *supra* note 23; see also *The Umbrella Revolution*, *supra* note 35.

76. *Wong Chi Fung*, 548 H.K.C.A. at 20.

77. See *id.* at 18-20 (describing Fung's behavior on the day of the arrest to support a finding of fault for criminal contempt).

78. Compare *Wong Chi Fung*, 548 H.K.C.A. at 19-20 (describing Fung's influence on the nature and conditions of the Occupy Movement on the day of his arrest), with *May*, *supra* note 60 (describing officers' use of teargas and pepper spray in attempts to disseminate protestors).

79. See *Wong Chi Fung*, 548 H.K.C.A. at 19-20.

80. See generally *id.* at 23, 29, 80.

81. Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, 34, Introduction (H.K.); see also Guidelines, *supra* note 20.

82. Kong, *supra* note 39.

83. See Ramzy, *supra* note 3; see also Victoria Tin-bor Hui, *9 Hong Kong Democracy Advocates Convicted for Role in 2014 Protests*, WASH. POST (May 2, 2019), <https://www.Washingtonpost.com/politics/2019/05/02/theres-new-chapter-hong-kongs-struggle-democracy-autonomy/>.

future status of citizens' rights.<sup>84</sup> The convictions of Fung and others have been subject to a wide range of criticism and have prompted several leaders and organizations across the world to express their deep concern for the future freedoms of Hong Kong's citizens.<sup>85</sup> Thus, although the future of Hong Kong's political structure is largely unknown, the noted case does serve as a daunting forecast of the government's inhabitation on citizens' rights to free speech, public assembly, and peaceful protest.<sup>86</sup>

## V. CONCLUSION

In conclusion, the court's decision in the noted case is one of several government actions to cast doubt on the freedoms afforded to citizens of Hong Kong. Not only are the officers' treatment of protestors contradictory to the laws of Hong Kong, but the judicial determinations that followed Occupy Movement violated both the judicial doctrines and basic laws upheld by Hong Kong. In the noted case, the court found that Fung committed criminal contempt by intentionally, knowingly, and deliberately interfering with the due execution of the Amended Injunction Order. In reaching its conclusion, however, the court failed to consider all relevant facts and instead relied solely on those favorable to the government. Not only was the court's analysis insufficient in producing an accurate finding of fault, but it was disproportionately prejudicial against Fung and violated the rights afforded to him by the laws of Hong Kong.

Addie Guida\*

---

84. Hom, *supra* note 27; *see also* Ramzy, *supra* note 3; *see also* Tin-bor Hui, *supra* note 83.

85. *See* Ramzy, *supra* note 3. Members of the United States Congress have described the protestors' convictions to "effectively punish peaceful political dissent and narrow the space for free expression and peaceful assembly." *Id.*; *see also* Tin-bor Hui, *supra* note 83 ("Foreign diplomats and NGOs like Amnesty International voiced concerns related to Hong Kong's freedoms of speech and assembly.").

86. *Hong Kong: Freedom of Expression*, *supra* note 33.

\* © 2020 Addie Guida. J.D. candidate 2020, Tulane University Law School; B.A., Public Policy Leadership, 2018, University of Mississippi. The author is interested in several areas of the law, including intellectual property and First Amendment law.