

A Message from the Free State of Prussia to Hong Kong

By Sean O'Brien

If the recently withdrawn Hong Kong extradition bill¹ (the Bill) had been given legislative effect it would have enabled the Chief Executive to make *ad hoc* orders for extradition of permanent residents of Hong Kong to mainland China. The Bill was plainly aimed at working around the Basic Law's express preclusion of surrender to other parts of China, or to paraphrase the Hong Kong government, to fix a 'loophole'.²

Concerns arose about the potential for abuse of the proposed law for the political ends of the Communist Party of China (CPC). The Hong Kong Bar Association referred tangentially to such concerns in observing:

'An important common restriction forbidding surrender is that a fugitive is sought in connection with "an offence of a political character". Another is that surrender is sought for an offence which is being pursued for extraneous reasons, which means reasons that are connected with the fugitive's status as a member of a political party or a religious group.'³

Under the Bill no scope was allowed for a Court to review an *ad hoc* extradition order on substantive grounds such as the political character of the offence or prosecution for extraneous political reasons. The form of judicial review proposed in the Bill was limited to an exercise confirming the procedural regularity of any executive order issued under it, lending it a veneer of legal legitimacy.

To whatever degree democracy pertains in Hong Kong under the Basic Law, the Bill was in severe tension with the civil liberties which underpin its continued viability. The tension was heightened by the potential influence on the Hong Kong Chief Executive of the Central People's Government who had appointed her under Article 45 of the Basic Law.⁴ Whether that influence was perceived or real, the antipathy of the CPC to civil liberties where exercised in a manner calling into question the legitimacy of its governance has been seen by some to have manifested itself in Hong Kong in the form of the force being used by police on protestors. In an open letter dated 9 October 2019 addressed to the Chief Executive of Hong Kong concerning the rule of law, the German Bar Association observed:



'We are deeply concerned by the recent events in Hong Kong which led to countless people being injured and/or arrested as well as to the destruction of public and private property. We are especially distraught by the indiscriminate use of tear gas and television and video footage of excessive force used by police officers to disperse protestors.

The respect of human rights and civil liberties, a government accountable to the public and an independent judiciary are essential components of the Rule of Law which is the corner-stone of any democratic society. It prescribes rules and obligations for all members of society, both private citizens and public officials. We understand the pressure you are acting under but call on you to respect the procedures set out in the basic law. No one would want Hong Kong to give the impression of moving from the rule of law towards a rule by law.'

With those concerns in mind it may be instructive to briefly reflect on an historical precedent of the use of law to legitimise 'rule by decree' under an authoritarian regime. The situation in which that most commonly arises is where emergency powers are invoked to justify executive measures aimed at quelling civil unrest. As Ernst Fraenkel observed in 1941:

'Martial law provides the constitution of the Third Reich.



The constitutional charter of the Third Reich is the Emergency Decree of February 28, 1933. [Reichstag Fire Decree]

On the basis of this decree the political sphere of German public life has been removed from the jurisdiction of the general law. Administrative and general Courts aided in the achievement of this condition. The guiding basic principle of political administration is not justice; law is applied in the light of "the circumstances of the individual case",



An emergency decree as declared by Paul von Hindenburg on an advertising column in Berlin. Prussian government officials, including Carl Severing, Albert Grzesinski, Bernhard Weiss and Magnus Heimannsberg, were all arrested during the coup by military authorities.

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the purpose being achievement of a political aim.¹⁵

The legal ground for issuing the Reichstag Fire Decree was arguably laid in 1932. Lacking majority support in the Reichstag, President von Hindenburg issued a decree on 20 July 1932, *'concerning the restoration of public safety and order in the area of the Land of Prussia'*. The alleged justification was the Prussian government's failure to suppress Communist threats to state order. The democratic government of Prussia was dismissed, a Reich Commissioner for Prussia was installed, and

the Reich Minister of Defence took over control of the police, effectively bringing the Free Prussian State under Reich administration. The executive measures taken under the decree were collectively labelled the 'Prussian Coup'.

The Free State of Prussia lodged a complaint in the Constitutional Court. The Court was tasked with interpreting Article 48(2) of the Weimar Constitution on which the Reich relied as the source of the President's power to issue the decree. Article 48(2) provided:

'48(2) In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to re-establish law and order, if necessary using armed force. In the pursuit of this aim, he may suspend the civil rights described in articles 114 [inviolability of personal liberty], 115 [inviolability of the home], 117 [privacy of mail, telegraph and telephone], 118 [freedom of opinion and of press], 123 [freedom of assembly], 124 [freedom of association] and 153 [inviolability of private property], partially or entirely.'

Counsel for the Free State of Prussia, Hermann Heller, argued that social conditions did not exist to justify the exercise of the discretion, the appointment of a commissioner was not a necessary measure for the return of public security and the decree was made for extraneous political reasons.⁶

Counsel for the Reich, Carl Schmitt, argued that it was the sole discretion of the President to decide whether grounds existed to invoke Article 48.⁷ The power granted to the President under Article 48 delimited his role as the guardian of the Constitution concerning political matters. Since the matters in question were essentially political, they were not within the Court's jurisdiction to decide. In those circumstances the President was constitutionally entitled to decide whether a state of emergency existed and who were the enemies of the state, free of legal constraints and independent of party politics. Enemies of the state were those who threatened the unity of the Reich, including political parties who adhered to a destabilising democratic system. A homogenous state was the fundamental political structure underpinning the Constitution. It followed that the President's sovereign decision was the unique means by which the homogeneity of the state as a political entity could be preserved and the Constitution ultimately upheld.

The Court considered that it was not its place to inquire into whether the social conditions existed for the valid exercise of the discretion.⁸ It found that it was not proven that the power had been invoked for political reasons, but even if that were true, it would not lead the Court to conclude that the measures taken were not aimed at the restoration of public order and safety.⁹ In the result, the Court upheld the constitutional validity of the decree despite finding the dismissal of the government to be an unlawful measure.

With the imprimatur of the Court, on 28 February 1933 the President issued the Reichstag Fire Decree expressly based on Article 48(2). The 'Decree for the Protection of People and State' permitted the Reich government to:

'... restrict the rights of personal freedom, freedom of opinion, including the freedom of the press, the freedom to organize and assemble, the privacy of postal, telegraphic and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.'

Under clause (2) of the Reichstag Fire Decree, the Reich took another step toward usurping democratic governance of the Free Prussian State, declaring:

'If in any German state the measures necessary for the restoration of public security and order are not taken, the Reich Government may temporarily take over the powers of the supreme authority in such a state in order to restore security.'

On 24 March 1933, the Reichstag passed the 'Enabling Law' conferring legislative power on the Reich Cabinet, including the power to make laws that deviated from the Constitution. Subsequently, the Reich cabinet promulgated a law combining the office of President and Chancellor and transferring the authority of both offices to the Fuhrer, Adolf Hitler.

From that point onward the Constitutional Court became *functus officio*, since the Fuhrer principle allowed for no review of the legality of executive decisions by an independent judicial body. The newly prevailing view of the Constitution was expounded by Hans Frank in a speech delivered in 1938 as Head of the Nazi Lawyers Association and the Academy of German Law:

'Constitutional Law in the Third Reich is the legal formulation of the historic will of the Fuhrer, but the historic will of the Fuhrer is not the fulfillment of the legal preconditions for his activity. Whether the Fuhrer governs according to a formal written Constitution is not a legal question of the first importance. The legal question is only whether through his activity the Fuhrer guarantees the existence of his people.'

Returning to the present and the ongoing protests in Hong Kong, it is to be noted that the Basic Law grants emergency powers to the Standing Committee, specifically Article 18 which states:

'In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.'

The role played by Article 48 in the dismantling of the Weimar Republic is an historical precedent which may shed light on any future decision of the Standing Committee to invoke Article 18. Straining in the other direction, the demonstrations which culminated in the Chief Executive's belated withdrawal of the Bill illustrate that popular sovereignty as a source of legal legitimacy, or lack thereof, is not simply a concept invented by political philosophers.

In relation to Article 48 it has been observed that:

'embedded in the Weimar Constitution was a fatal ambiguity between two conflicting political commitments. On the one hand was the commitment to the legitimacy of parliamentary democracy, on the other was the commitment to the legitimacy of a charismatic leader.'¹⁰

A similar ambiguity is embedded in the Basic Law between democratic elections underpinned by civil rights and an independent judiciary which protects those rights on the one hand, and on the other, the unity and security of the People's Republic of China, a constitutional linchpin of which is allegiance to the Central Government. The requirement for that kind of allegiance appears to extend to democratically elected members of the Legislative Council having to swear oaths of allegiance¹¹, and the current Chief Executive who has reportedly made statements indicating the difficulties arising from a 'constitutional' requirement to serve two political masters at the same time.¹² One hopes that the ambiguity is not fatal to the autonomy of Hong Kong as it was to the Free State of Prussia. **BN**

ENDNOTES

1. *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*.
2. See Hong Kong Bar Association Press Release issued 06.06.2019, *A Brief Guide to Issues Arising From the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, point 5.
3. *Ibid.*, point 16.
4. Article 45 sets out the requirements for selecting the Chief Executive. On 31 August 2014 the Standing Committee decided that at the 2017 election and onwards the Chief Executive would be appointed from three pre-approved candidates each of whom, 'loves the country and loves Hong Kong', but the proposal was voted down in the Legislative Council after demonstrations: see <https://www.economist.com/the-economist-explains/2017/03/21/how-hong-kong-picks-its-chief-executives>, downloaded 26/10/2019.
5. Fraenkel, E., *The Dual State – A Contribution to the Theory of Dictatorship*, Oxford University Press, New York, 1941, p. 3.
6. Skach, C., *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton University Press, Princeton, NJ, 2005, p. 65.
7. See discussion in Dyzenhaus, D., *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford University Press, Oxford, 1999, 121-134, at pp. 125-127.
8. Dyzenhaus, D., *ibid.*, p. 124-125.
9. Dyzenhaus, D., *ibid.*
10. Dyzenhaus, D., *op. cit.*, p. 131.
11. In 2016 the Standing Committee's interpretation of Article 104 of the Basic Law concerning the oath of allegiance effectively precluded two democratically elected politicians from taking their seats in the Legislative Council for expressing unpatriotic views towards the Central Government: see <https://www.bbc.com/news/world-asia-china-37893070> downloaded 26/10/2019.
12. The Chief Executive has been reported as saying, 'But ... once an issue has been elevated to a national level, to a sort of sovereignty and security level ... the political room for the Chief Executive who, unfortunately, has to serve two masters by constitution — that is the Central People's Government and the people of Hong Kong — that political room for manoeuvring is very, very, very limited': <https://www.abc.net.au/news/2019-09-03/carrie-lam-has-become-powerless-to-lead-or-quit/11474676>, downloaded 26/10/2019.



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