

Fake News Legislation in Hong Kong: The Limitations of Current Laws to Counter the Fake News Wildfire

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Hong Kong government is planning to legislate a new law that can fight against digital wildfire fake news. Hong Kong has faced two waves of fake news digital wildfires in the past few years: The 2019 social unrests in Hong Kong and the 2020 COVID-19 pandemic. The city has witnessed how fake news can undermine social trust and social cohesion, causing large-scale damage to both societies and governments. Fake news brings substantial damage to society due to the erosion of the credibility of governments, rule of law, and the democratic system's human security. The government's announcement of legislation has received criticisms and objections. One of the main objections is that the current laws are sufficient to combat against fake news, hence new legislation is not necessary. Yet, our study shows the contrary. We studied laws that have been used by the prosecution to deal with publication and speech related public-order crimes, which are within the Hong Kong National Security Law, the old common law offence Outraging Public Decency, and Crime Ordinance. The study results show that those laws are either outdated or applicable to deal with current fake news problem. Therefore, we argue that a contemporary fake news legislation is indeed needed, but the government should study thoroughly about how the new law can strike an equilibrium between civilian's freedom and public safety.

Keywords: *Fake news; Public-order crimes; Criminal liability; False information; Freedom of speech.*

Introduction

Technological advancement has transformed our way of living and relationships. Especially since the emergence of smartphones and social media in 21st century, ordinary people have become empowered with privatisation of public communication for distributing information and messages instantly and boundlessly. Smartphone combined with social media enable people to build extensive social networks and enhance their mobilisation ability in a cost-effective manner. Obviously, this changes the mediascape and has many advantages, allowing people to share news, messages and information much faster with others. Yet, it has become deemed as a double-edged sword. It also heightens people's

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sense of outrage, expedites arguments and creates a path for inaccurate and unchecked information bombardment against persons or organisations.

In 2013, the World Economic Forum issued Global Risks 2013 Eighth Edition, warning that fake news acts as 'digital wildfires' in a hyperconnected world. It warned the global community that the wildfire of fake news could bring large-scale damage to both societies and governments, bringing substantial threats to human security due to the erosion of the credibility of governments, rule of law, and democratic system. It urged regional or national governments to start preparing together for a global wildfire that was seemingly beyond their control or influence.

After nearly a decade, the 2013 warning has been proved valid, and even far more beyond our expectation. An unaccountable quantity of fake news that is disseminated over the internet has posed a significant challenge to societies. Remarkably, the events of the 2016 United Kingdom European Union membership referendum, the 2016 United States presidential election and the 2017 French presidential election all suffered from a painful experience regarding the fake news wildfire. The world witnessed how fake news could disintegrate the social solidarity of well-developed democratic societies.

Statistically, fake news could be deemed as one of the greatest threats against human security. As defined by Wardle & Derakhshan¹, fake news consists of three types: Mis-information, dis-information and mal-information. Fake news can be satire or parody, misleading content, manipulated content, false connection, false context, imposter content and fabricated content². Various surveys and research studies reflected that people from around the world are facing the same problem. For example: the Centre for International Governance Innovation's survey named *2019 CIGI-IPSOS Global Survey Internet Security & Trust*³ (from 21st December 2018 to 10th February 2019) received around 25,000 respondents from 25 economic regions showing that over 86% of the respondents admitted to having fallen victim; the Flash Eurobarometer survey (with around 26,000 respondents from 28 European Union member states) indicated 37% of the respondents suffered from fake news every day, but only 15% of them have sufficient ability to distinguish them confidently⁴. Moreover, nearly 85% of respondents believe that fake news will harm democratic society. Breakstone et al.⁵ also conducted a national students' civic online study (with 3,446 participants) to test the students' ability to differentiate between 'true' and 'fake' information. Not surprisingly, over 75% of participants failed to identify advertisement content and true news.

Recently, the Government of Hong Kong Special Administrative Region (hereinafter HKSAR) declared that the administration is planning to legislate an anti-fake news law in the name of promoting social, internet and national

¹Wardle & Derakhshan (2017). According to their study, misinformation are false connection and misleading content; dis-information are false content, imposter content, manipulated content and fabricated content; mal-information are information leaks, harassment and hate speech.

²Wardle (2017).

³Simpson (2019).

⁴Directorate-General for Communications Networks of European Commission (2018).

⁵Breakstone et al. (2021).

security⁶. Similar to other economically developed regions/countries that have promulgated the relevant anti-fake news law (such as Singapore, Germany, France), the Hong Kong announcement received a wide range of dissent, criticisms and concerns from the civic society⁷. Most of them argue the necessity of the legislation and express their apprehensions about potentially weakening the freedom of expression and press, their main argument being that the current laws are sufficient to protect the public from fake news threats, a new law thus is unnecessary⁸. However, their argument may not be true. On the contrary, Hong Kong does not have a fake news law and the current legislations and common law offence are not effective against fake news.

Purpose and Methodology

There are two purposes in this article: To explain why it is necessary to legislate fake news law, and to study why the current legislations are not sufficient or effective to counter against fake news. In order to achieve these purposes, this article unfolds mainly in two parts: First, the article conducts a literature review to overview the fake news problem in Hong Kong, and explains how the fake news problem has damaged Hong Kong society in the past few years in detail. Then, the article explains why current laws are ineffective by explaining their characteristics and legal applications.

The research is based on the documentary research concept. It will specifically focus on analysing the laws of Hong Kong, and the judicial ruling that impacted the application of the law against a person's speech-related misbehaviour. Therefore, the primary sources are respectively the ordinances, court judgments, legislative papers, and records as well as other relevant official government responses.

Background of Legislation against Fake News in Hong Kong

The background of the proposed legislation was rooted in a societal political saga and public health insecurities. Hong Kong, known as one of the busiest international cosmopolitans with a solid cultural fusion of East-meets-West business activities, is one of the most digitally connected regions with active social media usage in the globe for both recreation and leisure, business, and tourism purposes.

According to the latest report of *Digital 2022: Hong Kong*, social media penetration and usage recorded a historical high. As of January 2022, 88% of the people in Hong Kong use social media (approximately 6.68 million users), and the top social media platforms used by Generation Z & Millennials (18 - 40 years old) were Instagram (86.1%), WhatsApp (85.5%), YouTube (77%), Facebook/Meta

⁶The Government of HKSAR (2022b).

⁷Kihara (2021); International Federation of Journalists (2021); Cheung et al. (2022).

⁸Cheung et al. (2022).

(58%) and WeChat (40%)⁹. They use those platforms mainly for entertainment, social and news access. Due to the high penetration rate, the internet platform is the primary source of news access the local population with 76% in 2020, which doubled in number compared to the statistic in 2010. The *Reuters institute digital news report 2019* found that 41% of the total population used WhatsApp as their primary source for receiving daily news¹⁰.

Because of the highly digitalised and hyper-connected living environment, Hong Kong is no exception and is vulnerable to this wildfire. According to the *2019 CIGI-IPSOSs Global Survey Internet Security and Trust*, around 64% of surveyed respondents from Hong Kong reported that they had accessed fake news on the internet, in which half of them trust and rely on those fake news¹¹. Notably, this survey was conducted in the period between December 21, 2018 and February 10, 2019. At that time, during the period of 2019 Hong Kong Social Unrest and the 2020 Covid-19 Pandemic the fake news threat soared.

First-wave of Fake News Wildfire - The 2019 Social Unrests in Hong Kong

The first wave of the fake news wildfire was the 2019 Hong Kong Social Unrest. It involved many causes and reasons, but the common understanding is that it was mainly triggered by the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 proposed by the Government of HKSAR¹². The bill was introduced by the Government of HKSAR to establish a fugitive transfer to other parts of China (including Mainland China, Taiwan, and Macau), which are currently excluded in accordance with the existing clause. Although the government's intention was to remove the legal loophole, it was highly controversial. The bill's introduction did not gain sufficient public support and received strong criticism and objections from both the domestic and international communities, and subsequently became the greatest socio-political crisis after the 1997 Handover of Hong Kong¹³.

It was a dire situation marked as catastrophic, leaderless, violent-oriented social unrest with extremely widespread and severely radicalised crimes¹⁴. It resulted in a sharp rise in crime figures and delinquencies, socio-psychological damages that were comparable to regions experiencing terrorist attacks and large-scale human and natural disasters, the erosion of political legitimacy and government authority, and mass political violent radicalisation¹⁵.

A number of studies showed that the crisis had been fuelled by fake news and hate speech, where both sides (pro-and-anti-government) *weaponised* fake news as political propaganda to gain advantages in this psychological warfare. For example: Lee, based on his observations and preliminary research findings,

⁹Kemp (2022).

¹⁰Chan, Lee & Chen (2019).

¹¹IPSOS (2019).

¹²Author (2021); Shek (2020); Luk (2020).

¹³Purbrick (2019); Luk (2021).

¹⁴Purbrick (2019); Panel of Security of the Legislative Council of HKSAR (2020).

¹⁵Luk (2021).

explained how the politics of fake news and rumours helped the pro-establishment to delegitimise the social unrest and how the protest camp, in contrast, pressurised their political power to sustain itself¹⁶; The Hong Kong Youth Association conducted an *ad hoc* fake news survey with the Chinese University of Hong Kong to study how citizens perceived the relationship between fake news and social unrest¹⁷. The results showed nearly 80% of the interviewees reported that more fake news was circulating during the social unrest, and 74% of those surveyed felt that fake news dominated social media platforms; The author explained in detail how the characteristics of Hong Kong environment and social media created a channel for messages (including mis-and-disinformation) to amplify the pro-and-anti-government camps' organising capabilities and political propaganda¹⁸.

While the international city was suffering an ongoing socio-political crisis with unprecedented social division, distrust and hostility and still struggling to restore society back to normal, the COVID-19 pandemic suddenly struck Hong Kong hard in January 2020; When it rains, it pours. In fact, Hong Kong was one of the earliest places to get hit by the virus since the outbreak in Wuhan City located in Mainland China in mid-January 2020 due to its high volume of international travellers and transportation. The first confirmed case in Hong Kong was recorded on 23 January 2020.

Second-wave of Fake News Wildfire - The 2020 COVID-19 Pandemic

Fortunately, notwithstanding public trust and political legitimacy at the historic lowest level, society still had the community capacity to mobilise its resources to face the upcoming novel public health crisis, based on the previous SAR pandemic experiences. The crisis response was deemed unexpectedly efficient, effective as well as comprehensive against all odds¹⁹. The public had implemented non-pharmaceutical measures (mainly by wearing protective facemasks) much earlier than the government's intrusive anti-pandemic policies to mitigate the transmission of COVID-19. Therefore, the COVID-19-related infection and death rate in Hong Kong was relatively low compared to other cities and areas throughout 2020 - 2021²⁰.

However, the success story was no longer sustainable after early 2022. While the public was enjoying a certain relatively high degree of safety from the Alpha and Delta pandemic variants due to the implementation of comprehensive strict pandemic control measures, the growth of the vaccination rate was unexpectedly slow and limited. Therefore, when Hong Kong was hit by the fifth wave of the pandemic starting from mid-December 2021 (where the virus had evolved to a more transmittable variant - SARS-CoV-2 Omicron B.1.1.529 variant), the government documentation showed that the vaccination rate of the first dose only reached to around 71% with around 4,780,000 people at that time, which was

¹⁶Lee (2020).

¹⁷Cheung et al. (2020).

¹⁸Author (2021).

¹⁹Hartley & Jarvis (2020).

²⁰Kwok et al. (2020); Ngai, Singh & Yao (2022).

much lower than comparable cities like Singapore and Shanghai. More importantly, the rate for the elderly aged 80 or above was only 19%²¹.

After the highly contagious Omicron variant broke out into Hong Kong's strict containment measures, the spread of the virus inside the world's most populated city was rapid and uncontrollable. It had dragged Hong Kong society out of the illusion of being free from viruses, hence unvaccinated populations flocked to vaccination in the hope of self-protection. There was a rapid increase in the vaccination rate from 3,900 doses of a 7-day moving average (as of 15th December 2021) to 34,000 (as of 15th February 2022)²². Yet the race against the virus was deemed to be unsuccessful. The elderly population's fully effective vaccination rate remained low; it resulted in a large number of hospitalised cases and deaths (around 7000 cases), among them (mainly elderlies and chronic patients who were unvaccinated and not fully or effectively vaccinated elderly)²³.

One of the main reasons behind the low and slow vaccination rate among vulnerable groups was largely related to online mis-and-disinformation. Recent emerging epidemiological studies from both eastern and western societies reflected a similar situation, where people's exposure to vaccine-related misinformation reduced their intention to be vaccinated²⁴. Most of the misinformation could be divided into three categories: (1) safety concerns - vaccination might cause sudden death or serious illness, (2) conspiracy theories (government's control against human rights) and (3) efficacy concerns (little or no difference between unvaccinated and vaccinated persons). The more exposure to this kind of false and inaccurate information, the stronger vaccine hesitancy was.

Hong Kong is no exception – COVID-19 vaccine misinformation played a large part in affecting citizens' motivation to get vaccinated²⁵. The Hong Kong Baptist University²⁶ analysed the characteristics of misinformation and fake news during the pandemic in Hong Kong by gathering the data from four local public fact-checking organisations. The results showed that only 4 out of 120 pieces of online suspicious information related to COVID-19 pandemic and vaccines were rated as 'true'. Others were rated as false or partially false. Those false and inaccurate messages about COVID-19 vaccines included inaccurate descriptions of the side effects, risks in the administration process, and conspiracy beliefs about the vaccines. All in all, citizens' confusion, distress and mistrust against the safety of vaccines and their distrust of the government vaccination policy had significantly hindered their motivation to get vaccinated.

To summarise, fake news and misinformation have already brought tremendous damage to Hong Kong society. From 2019 until the present, fake news continues to confuse the public with many inaccurate and untruthful messages and information. Regarding the 2019 political saga, fake news itself did not create

²¹The Government of HKSAR (2022a).

²²The Government of HKSAR (2021).

²³Cheung, Chan & Jin (2022).

²⁴For example: Loomba et al. (2021); Carrieri, Madio & Principe (2019); Lockyer et al. (2021); Kanzoia & Arya (2021).

²⁵Ngai, Singh & Yao (2022); Zhang (2022); Sun (2022).

²⁶Hong Kong Baptist University (2021).

Hong Kong's 2019 protests, yet created intangible politically-oriented power that energised capabilities of sustaining and empowering both pro-and-anti movements.

During the 2020 COVID-19 pandemic, society was able to contain the virus during the early stage, yet fake news and misinformation regarding the pandemic and vaccination, so widespread on the internet realm and on social media, caused a situation where the growth of vaccination rate was low for a long period of time. Once the Omicron variant broke through Hong Kong's pandemic measures, our society suffered heavy casualties among the elderly population due to the low, fully effective vaccination rate.

There is no doubt that fake news divides society, incites hatred, provokes discontent, compromises public order and safety, and damages public trust. Especially, the false news in Hong Kong's environment in those years facilitated political and public health crises, both of which are still ongoing. Therefore, it is necessary to address this problem seriously and squarely.

The Government of HKSAR has implemented a soft and hard strategy to combat the spread of fake news²⁷. For the soft approach, they will actively find any erroneous information circulating widely on social media and the internet, then will try to stop the spread of those rumours and fake news with clarification through both traditional and non-traditional channels such as press conferences, press releases, statements on social media etc. For the hard approach, the government is planning to take stringent legal enforcement against any person making inappropriate speech online that may involve criminal elements.

Existing Legislations and their Limitations to Counter Digital Fake News

As mentioned earlier, after the government's announcement of legislating anti-fake news law, community stakeholders from different backgrounds raised a dissenting voice against it. One of their main arguments was that the laws of Hong Kong were currently sufficient to combat the spread of fake news and disinformation²⁸. In that case, this article will study whether this argument is valid or not.

Before the fake news wildfire, Hong Kong had different ordinary laws to regulate and outlaw any mis-and-disinformation, similar to the UK's common law system. For example - the Caption 210 Theft Ordinance outlawed dishonest acts where the offender uses deceit, including reliance on false and misleading information, to cause harm to the victim or to the benefit of a third party²⁹. This Ordinance is aimed at two specific groups of people - *perpetrators* who perform dishonest acts for a personal gain, and third-party gain against the *victims*. Caption 362 Trade Descriptions Ordinance outlaws false and deceptive information and descriptions for goods (section 7) and services (section 7A)³⁰. Under this law, merchants must provide accurate information on the goods and services they sell

²⁷The Government of HKSAR (2022b).

²⁸Cheung et al. (2022).

²⁹*Caption 210 Theft Ordinance*.

³⁰*Caption 362 Trade Descriptions Ordinance*.

or offer, including origin, product composition, and related information. The Ordinance is aimed at two specific groups of people - *merchants* who supply goods and services and *consumers* who purchase them. Merchants that violate this law generally aim at enhancing private gains, such as promoting the sale of products.

In summary, these ordinary laws are designated to regulate specific targets, circumstances, and elements. When the government legislates a corresponding law in various fields to protect life and property of Hong Kong citizens, provisions for prohibiting false information will inevitably be included in those corresponding laws accordingly. Furthermore, the most prominent element of those existing legislations is that there must be clear subjects and victims of each case, and that the transfer of interests is also involved. However, in the case of dissemination of fake news, the relationship between perpetrators and victims and the causal relationship between the victims' *loss* and perpetrators' *gain* is generally ambiguous and hard to establish. Therefore, it will be extremely difficult to fulfil the general principles for prosecution³¹.

On that account, laws against public-order crimes (which are defined as deviant behaviours that contradict society's shared norms, values and customs and interfere with the operations of society and the ability of people to function efficiently) would be our article's focus. We identify that (1) Hong Kong National Security Law, (2) Crime Ordinance³² and (3) common law offence Outraging Public Decency are the laws that restrain freedom of speech and publication by criminalizing certain speeches and publications' deviant acts that are harmful to public order.

While studying whether those laws are effective in combating fake news, a number of court cases are cited for study. It is because the Hong Kong legal system follows the UK's common law system practice that adopts a strong legal doctrine of *stare decisis* and *ratio decidendi* that would deeply affect how the scope of laws and how those laws are being applied nowadays.

The Hong Kong National Security Law

*Hong Kong National Security Law*³³ (hereinafter Security Law) is a piece of national law that is directly enacted and passed by the Standing Committee of the National People's Congress of the People's Republic of China on 30 June 2020, and is listed under Annex III³⁴ of the Hong Kong Basic Law³⁵. It is later on

³¹This situation also occurred in other places like France and the United Kingdom. For example, Couzigou (2022), Department for Digital, Culture, Media & Sport et al. (2022).

³²*Caption 200 Crime Ordinance.*

³³*The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.*

³⁴Basic Law's Annex III: "*The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region*". It includes 13 pieces of Chinese national laws relating to diplomatic, defence and the foreign affairs relating to the HKSAR, such as laws of Declaration on the Territorial Sea, Nationality Law, Diplomatic Privileges and Immunities, Consular Privileges and Immunities, Law of the People's

promulgated and enforced by the Hong Kong government pursuant to article 18(2)³⁶ and (3)³⁷ of the Basic Law, bypassing the city's legislature.

The Security Law enjoyed a higher legal status by overruling local laws in cases of conflict (article 62)³⁸. It lists four crimes against public interest in a national security perspective, which are respectively (1) secession (article 20), (2) subversion (article 22), (3) terrorist activities (article 24) and (4) collusion with a foreign country or with external elements to endanger national security (article 29). Those crimes are punishable by a maximum sentence of life imprisonment. Normally, relevant cases are tried in the Hong Kong judiciary; yet when Hong Kong government is unable to enforce the law, or when the case is effectively due to complex involvement of foreign countries or external elements which makes the Government of HKSAR difficult to exercise jurisdiction over the case, it could be enforced by the Supreme People's Procuratorate and tried in the Supreme People's Court (article 55).

The Security Law is a relatively new law that still requires a lot of legal clarifications. It therefore faced a lot of tests and judicial reviews after its implementation³⁹, for example: *Tong Ying Kit v HKSAR*⁴⁰ where Tong asked for *habeas corpus* application by challenging the Security Law's article 42(2)⁴¹; *Tong Ying Kit v Secretary for Justice*⁴² where Tong challenges the Department of Justice's decision to issue certificate directing the criminal case be tried without jury pursuant to Security Law's article 46⁴³. Among cases related to the Security

Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region and etc.

³⁵An organic law and constitution of Hong Kong SAR and special national law of People's Republic of China.

³⁶Article 18(2): "National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region."

³⁷Article 18(3): "The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law."

³⁸Article 62: "This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law."

³⁹Kong (2021).

⁴⁰HCAL 1601/2020; [2020] HKCFI 2133.

⁴¹Article 42: "When applying the laws in force in the Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence. No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."

⁴²CACV 2923/2021; [2021] HKCA 912.

⁴³Article 46: "In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors

Law, one of the most vital precedents of the Security Law is the case *HKSAR v Tong Ying Kit*⁴⁴, where Tong was also the first person to be tried under this law.

A brief introduction of the background to Tong's case is needed. Tong rode his motorcycle through the streets of Hong Kong with a black banner stating "*Liberate Hong Kong. Revolution of our Times*" (this slogan was widely used by the protesters during the 2019 Hong Kong Social Unrest). He refused to follow the police order multiple times to stop before the police defence line, hence crashing into the defence line at high speeds and injuring three officers. He was immediately arrested. He was subsequently charged with the incitement to secession under article 20⁴⁵ and terrorist activities under article 24⁴⁶.

The High Court of First Instance analysed the elements of these two offences respectively. In this landmark case, the court had to decide whether Tong's actions were the actus reus of secession and terrorism, especially whether his act of carrying the slogan "*Liberate Hong Kong. Revolution of our Times*" could be an element of secessionist activity. Both sides had summoned academic scholars to argue the etymology of the slogan and the actual political message brought by the slogan at that time⁴⁷.

As noted by the verdict, all judges said their focal point was simply whether the message of secession (separate Hong Kong from China) was a natural and reasonable effect of displaying the slogan on the black flag⁴⁸. The prosecutors, with the testimonial support of a Chinese history professor, insisted the catchphrase that Tong was advocating at that time and during that particular political environment was literally intended to deliver a political message that was regarding Hong Kong independence and the rejection of the sovereignty of the

and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges."

⁴⁴HCCC 280/2020; [2021] HKCFI 2200.

⁴⁵Article 20: "A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence: (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China; (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country."

⁴⁶Article 24: "A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence: (1) serious violence against a person or persons; (2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances; (3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities; (4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or (5) other dangerous activities which seriously jeopardise public health, safety or security."

⁴⁷Wong (2021).

⁴⁸HCCC 280/2020; [2021] HKCFI 2200, para. 40.

Chinese central government⁴⁹. In contrast, the defendant proposed a counterargument that it could have an alternative meaning, quoting two academic social scientists who contended its de facto message was unclear. But, during the cross-examination, the defendant had not challenged and did not dissent the prosecution's point that the slogan could carry a secessionist meaning⁵⁰. It became a critical point that affected the result of the case, as the court was being convinced that the slogan carried a profound pro-independence political message, meant to incite secessionist action by those who read it (which is *liberate Hong Kong from Chinese authority*)⁵¹.

Furthermore, with regard to the terrorist act, the court had to decide whether Tong's dangerous actions on that day involved serious violence against persons that could jeopardise public safety for the sake of pursuing his political agenda was an act of terrorism which is defined by the Security Law. As stated by the Security Law's Article 24 - "*A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence*": it includes (1) serious violence against a person or persons; and (5) other dangerous activities which seriously jeopardise public health, safety or security". The Court stated that the element of *pursuing a political agenda and causing*⁵² or *intended to cause grave harm to the society*⁵³ are satisfied.

It further explained that, in view of the fact that his act of dangerous driving, which was not challenged by the defence, was an act of serious violence against a person, it had obviously fallen into the scope of a terrorist act defined by the Security Law. Considering those facts, criminal elements and the socio-political context (which are the dangerous and violent manner as he rode his motorcycle, his state of mind and intention at the time of the offence and displaying the banner with that catchphrase, and his repeated aggressive challenge to the police order), judges ruled out that Tong was found guilty of secession and terrorism in Hong Kong's first security law trial.

The ruling had a far-reaching impact on the implication and application of the Security Law, as it became a legally binding precedent, influencing other relevant cases in the future. In accordance with this case, there is no doubt that the case has somehow directly restrained the freedom of expression and speech by banning the use of the slogan "*Liberate Hong Kong Revolution of our Times*" for political purposes and banning any acts (including spreading and promoting a secessionist political message and information verbally or physically) that can be deemed as a successive activity (where the context of circumstantial evidence also supports

⁴⁹Ibid, para. 103-116.

⁵⁰Ibid, para. 126.

⁵¹Ibid, para. 141.

⁵²Ibid, para 149 & 163.

⁵³Ibid, para. 133.

such claim), but this Security Law could not be used as a law against fake news spreading.

In the Tong case, the court's judgment had repeatedly emphasised that the context of circumstantial evidence and the political atmosphere at that period (politically-oriented and anti-government social unrest) was much more vital than other factors. In other words, if the case did not involve any element of threatening national security and if the circumstantial evidence is not sufficient, then the Security law is not applicable to the case simply about spreading or creating fake news against society.

Outraging Public Decency - An Old Common Law Offence

Another law that the law enforcement agencies had used for criminalising speech related public-order crime is the Outraging Public Decency Order. It is an offence of common law for a person to do an act or acts which outrage public decency, and punishable under section 101I of the Caption 221 Criminal Procedure Ordinance. The order is intended to prevent the corruption of the mind and the destruction or erosion of values of decency, morality and good order⁵⁴. In general, it applies to all grossly disgraceful behaviour or behaviour that is openly and outrageous indecent or is offensive and disgusting, or is injurious to public morals by intending to corrupt them. However, the court has ruled out that this offence does not apply to online misbehaviour after the ruling of a remarkable appeal case *HKSAR v. Chan Yau Hei*⁵⁵.

In 2010, a netizen named Chan Yau Hei posted allegedly “inflammatory” messages on a popular online discussion forum named HKGolden. He published a message on the forum stating that “*we have to learn from the Jewish people and bomb the Liaison Office of the Central People’s Government* [English translation]” in June 2010. The message was sent from his computer at his home. After a Police investigation, he was arrested that same month, and he admitted that he was the one who had participated in the discussion and posted the message. He defends his act by claiming that his act was “for fun only” with “no intention to commit any offence”. Law enforcement agencies decided to charge him with “committing an act outraging public decency.”

The defendant, at first, had pleaded guilty before a magistrate, and then changed to a plea of not guilty, after seeking alternative counsel advice. It was contended by the defendant that the act was not conducted in *public* as it was conducted on the *internet forum* where it was not possible for two or more people to see. The Magistrate rejected this contention, confirmed the conviction and sentenced the defendant to twelve months of probation. The defendant appealed to the Court of First Instance in November 2011, but his appeal was dismissed. Finally, he appealed to the Court of Final Appeal (Criminal).

⁵⁴Community Legal Information Centre (2021); Legal Aid Department (n.d.).

⁵⁵FACC 3/2013.

First of all, in order to satisfy the law's requirements, the court took the case *R v Hamilton*⁵⁶ as a guideline to set two elements of the law, which were the indecency requirement (nature of the act done); and the publicity requirement (being known as the public element of the offence). In Chan's case, the Court of Final Appeal relied on a broad interpretation of 'indecency' and 'obscenity' in which it can be both sexual and non-sexual. Therefore, there was no controversy regarding the indecency requirement. However, the case's focal point was whether this old common law offence could be committed by posting a message on an *internet discussion forum*⁵⁷.

In order to satisfy this element, the prosecutor must prove that an offence was committed in public space which is defined as the "public has access or in a place where what is done is capable of public view."⁵⁸ According to the "two-person" rule, the public nature of this offence "can only be satisfied if the act is capable of being seen by two or more persons who are actually present, even if they do not actually see it."⁵⁹ Since previous relevant precedents showed that the offence's public element only includes "actual or physical, tangible place"; in this regard the Court was not convinced that the internet can be a *public place*, hence ruled out that the internet website *de pure* did not fall within the meaning of a physical, tangible place, but a *de facto virtual place*⁶⁰. Furthermore, the defendant posted the message at his home, not a place of publication. It also means the place that the defendant posted the message did not satisfy the publicity element. The prosecution must prove the indecent acts were committed in *public*, in circumstances where there is a real possibility of public members capable of witnessing the act.

Despite the Court agreeing that the inflammatory message posted by the appellant on the internet discussion forum was profoundly indecent⁶¹, the public element of the offence was not satisfied in this case⁶². The Lordships further explained that the internet is regarded as a medium and not a place under the scope of this offence⁶³. The Court of Final Appeal, therefore, allowed the appellant's appeal, and quashed the appellant's conviction for the offence of outraging public decency⁶⁴.

In essence, this case becomes the precedent, banning the use of an old common law offence Outraging Public Decency to broadly control indecent online speech and message that does not fall into the public element. It can only be applied when the indecent and outrageous online message on a mobile internet device was displayed in a physical, tangible realm where the members of the public have actual access or is capable of public view.

⁵⁶(2008) QB 224.

⁵⁷FACC 3/2013, para. 4.

⁵⁸Ibid, para. 22.

⁵⁹Ibid, para. 23 & 26.

⁶⁰Ibid, para 50.

⁶¹Ibid, para. 87.

⁶²Ibid, para. 90.

⁶³Ibid, para. 63.

⁶⁴Ibid, para. 93.

Caption 200 Crimes Ordinance - Section 161 Access to Computer with Criminal or Dishonest intent

Another law that was often used by the prosecution to ban the use of computer-committed offence is subsection 161 access to computer with criminal or dishonest intent under the Caption 200 Crimes Ordinance. Notably, the ruling of the High Court case *Secretary for Justice v. Wong Ka Yip Ken*⁶⁵ had extended the scope of the law, stating mobile phones fall under the definition of *computer* in subsection 161. The Department of Justice previously used this law as a catch-all charge to prosecute a wide range of computer and smartphone-related crimes and offences. Before a landmark ruling by the Court of Final Appeal in 2019 (which will be explained later), prosecutors had extended and utilised the use of this law to charge any offences that can be linked to the dishonest use of computers and mobile phones, including - but not limited to - online fraud, illegal intrusion, clandestine photo-taking using smartphones in non-public places, urging or inciting others to engage in illegal activities, online publication, false or misleading message and information on the internet⁶⁶. One of the most important but controversial extensions is the control of online speech. Cases showed that it had been used to prosecute people based on their online provocative or hate speech, and offenders who used computers to send mis-and-disinformation through email⁶⁷. This law thus is known as a one-size-fits-all charge. Yet, the scope and application of the law was being challenged in 2019 with the case *Secretary for Justice v Cheng Ka Yee & Others*⁶⁸, where the Court had set a new legally binding guideline in the final appeal case about its application.

The case arose in 2016, where four teachers were accused of leaking the questions of the school entrance examination through their own smartphones. They took photos of the exam paper and subsequently distributed them without authorisation. They had been charged under this subsection 161(1)(c). The section 161 concerning access to computer with criminal or dishonest intent reads as follows:

- (1) *Any person who obtains access to a computer -*
 (a) *with intent to commit an offence;*
 (b) *with a dishonest intent to deceive;*

⁶⁵[2013] 4 HKLRD 604. In 2013, a defendant Mr. Wong used his smartphone to secretly record a video in the ladies' washroom of his office. The phone was discovered; and he admitted that he had an intention to film a female colleague secretly with it. The prosecution cited section 161 of the Crime Ordinance against his criminal and dishonest act. The central question of this law was whether a mobile phone could be legally identified as a "computer", since the term of computer was undefined by the Legislative Council while drafting the provision in 1992. The lower court held in its findings, did not agree that a mobile phone was a computer. The Secretary for Justice appealed against the acquittal. The judge of the High Court, after considering the expert's professional opinion, ruled that mobile phones could be defined as "computers". He also further emphasized that this was in line with judgments in other jurisdictions as well.

⁶⁶Cheung (2017); the Government of HKSAR, 2014.

⁶⁷HKSAR v Yip Kim Po and others [CACC 353/2010].

⁶⁸[2019] HKCFA 9.

- (c) *with a view to dishonest gain for himself or another; or*
 (d) *with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.*

- (2) *For the purposes of subsection (1) gain and loss are to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and*
 (a) *gain includes a gain by keeping what one has, as well as a gain by getting what one has not; and*
 (b) *loss includes a loss by not getting what one might get, as well as a loss by parting with what one has.*

The case was first heard in the magistrates' court. The magistrate ruled that the prosecutor failed to prove the objective limb of the Ghosh test on *honesty* beyond a reasonable doubt⁶⁹. As a result, the defendants were acquitted. The prosecution then appealed to the Court of First Instance, the Judge pointed out that the use of a person's own mobile smartphones, or use of computer which is not authorised, to leak questions did not amount to "*obtaining access to computer*"⁷⁰. The Judge therefore rejected the appeal. Prosecution was not satisfied with the decision and appealed. The case was heard by the Court of Final Appeal⁷¹.

The Judges of Court of Final Appeal raised the major concern in this case. It was about whether the terminology and phrase *obtain access to a computer* should be interpreted as *gaining access* to a computer belonging to someone else, or simply *using* any computer. The fact that four defendants used their own smartphone and computer to commit the misconduct, such acts *prima facie* was conflicted against the provision's meaning.

The Judges first applied the literal rule to interpret the *de facto* meaning of the provision. They pointed out, inter alia, as a matter of semantics, the word *obtain* basically referred to "*come into the possession or enjoyment of; secure or gain as the result of request or effort, acquire, get*" according to the Oxford Dictionary. Therefore, they stated that "[it] is not a word which sits easily with the use by a person of their own device. Nor is the word 'access' which, used as a noun, ordinarily means 'admittance (to the presence or use of)'"⁷². As a verb, it includes in its usage *gain access to something*⁷³. The Judges further explained that, as a matter of language, one always *obtains* access to something to which *one did not have access before*⁷⁴. Other than the literal meaning approach, the Judges also reviewed the legislative history. They found out that the "*interpretive provision 'a person obtains access to a computer if (and only if) he causes a computer to*

⁶⁹ HKSAR v Cheng Ka Yee & others KCCC 2932/2015.

⁷⁰ [2018] HKCFI 2418.

⁷¹ [2019] HKCFA 9.

⁷² Ibid, para. 38–39.

⁷³ Ibid.

⁷⁴ Ibid.

perform any function' was deleted"⁷⁵. The words '(obtaining access) with or without authority' did not appear in the bill either"⁷⁶. The judges construed the provision based on their interpretation of the text and purpose, and ruled that "the use of one's own computer to set up a phishing website" does not fit the provision's *actus reus*. Despite this, the appellant urges the Court to adopt a construction that advances the policy of combating related crime due to the technological advancement in recent years. But the judges rejected the appellant's request, by stating that it was not the function and responsibility of the Court in statutory construction.⁷⁷ As a result, the judges rejected the final appeal, and set a new guideline that has in effect narrowed the scope and application of this law after a legal clarification.

There is no doubt that the Offence has been criticised for its excessive usage, but it could be statutory to fight against the perpetrator who intentionally creates and spreads fake news. After the Court of Final Appeal's judgement in 2019, the laws had lost their previous function. If the perpetrator spreads fake news and mal-information by using his own computer device, then it was not criminal behaviour under section 161.

Discussion and Conclusion

Freedom of expression, speech and publication are an individual basic right. The popularisation of new social technologies that can facilitate rapid, instant yet unverified information sharing and large-scale information cascades enabling the spread of fake information. As mentioned, Hong Kong has experienced two waves of fake news wildfires: first wave of 2019 social unrest and the second wave of COVID-19. Both waves have significantly damaged social trust and solidarity.

The value of this article could be as a pioneer study to analyse in-depth the limitations of current legislation against fake news in Hong Kong, and to counter the argument raised by the groups who stand against the fake news legislation. The objectors argue that current laws are sufficient to fight against fake news, but our study reflects a different story. The law enforcement agencies of Hong Kong have tried different laws to serve that purpose, yet they were to a certain extent ineffective because of their scope and the limit of their legal application. In other words, there is no profound legal basis that can be used by the government to stop the spread of fake news and deter potential preparators from creating them. In fact, the judiciary had expressed their opinions, suggesting that the government shall introduce statutory provisions to criminalise the posting on the internet of certain outraging and extremely improper materials for the sake of closing the legal loophole⁷⁸.

⁷⁵Ibid, para. 40.

⁷⁶Ibid.

⁷⁷Ibid, para. 47.

⁷⁸In the case of HKSAR v Chan Yau Hei - Mr Justice Fok PJ stated in his judgement that "For a number of reasons, there would seem to be a strong case for introducing statutory provisions to

We argue that anti-fake news legislation helps to promote better public trust since the legislation would allow the government to have the legal basis to specifically target those fake news that may cause profound harm to public safety and persons who maliciously spread fake news with criminal intentions; secondly, it could improve the online environment and curtail the speed of news spreading by coercively increasing social media platform's legal liabilities and responsibilities; and thirdly, it will help to promote anti-fake news public education and deter potential offenders.

There is no doubt that the legislation will inevitably capture the public's attention (especially from the civic organisations) and trigger international consciousness. However, it does not necessarily mean the government and public should choose to ignore its presenting threats and potentially further damage. Referencing the global trend, according to the latest summary report conducted by Poynter⁷⁹, nearly 53 countries or regions have implemented different kinds of tangible and intangible policies to fight against fake news to a certain extent - which respectively, but are not limited to, setting up a government and parliamentary task force, formulating non-legally binding regulations with private sectors, anti-fake news law legislation, organizing community campaign and education to fight against the issue.

In fact, countries like France, Germany, Singapore, and the United Kingdom face similar socio-political pressures from domestic and international communities while legislating relevant laws⁸⁰. Even though they suffer from heavy bombardments of public criticism and scepticism, the government still takes responsibility enacting relevant laws to protect society from fake news wildfire.

It will be the same in the Hong Kong case. It is expected that the Government of HKSAR will face a lot of local and international pressure, especially since the current socio-political environment is highly intense. Therefore, our suggestion is that the Government should take an active role in consulting the civic communities from both local and international sectors. This should help to enhance the new law's legitimacy and its effectiveness in targeting fake news, and to strike an equilibrium between civilians' freedom and public safety.

In a nutshell, we should bear in mind that the worst is yet to come. Indeed, there are an increasing amount of evidence and scholarly articles showing that AI technological development will worsen the fake news problem, such as deep fake technology, bots, etc. Netizens will face increasing disadvantages in spotting and exposure to high-quality fake content. Recalling the old English adage, "time and tide wait for no man," curtailing the spread of fake news is similar to the control of

criminalise the posting on the internet of certain material like that [hate speech] in the present case". In the case of Secretary for Justice v Cheng Ka Yee and others: Mr Justice Robert French NPJ explained that "Those forms of offending, it was submitted, could not have been foreseen at the time of the enactment of the Computer Crimes Ordinance 1993. [...] the second submission appears to offer a desirable public policy and urges the Court to adopt a construction that advances that policy. But that is not the function of the Court in statutory construction. The Court seeks to ascertain the purpose of the statute to inform its construction. It does not identify a purpose which it thinks would be beneficial and then construe the statute to fit it." Para. 45-47.

⁷⁹Funke & Flamini (2022).

⁸⁰For example: Teo (2021); Claussen (2018); Carson & Fallon (2021).

wildfire, which must be conducted in a timely manner. Therefore, Hong Kong should take vital precautionary steps to equip itself against the future fake news wildfire.

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