

Oath of Allegiance: Law or Politics

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1. The disqualification proceedings against Leung Kwok Hung and others have attracted widespread public concern.¹ While there was less public sympathy regarding the earlier disqualification proceedings against Leung/Yau,² who had used derogatory language and gesture suggesting their advocacy for Hong Kong independence, none of the legislators in the second set of disqualification proceedings had suggested anything about Hong Kong independence; nor was their manner of taking oath much different from what legislators had done in previous sessions. Their disqualification calls for reflection on the nature of an oath of allegiance and the proper approach of the court in determining if an oath of allegiance was taken solemnly and sincerely.
2. The Oaths and Declarations Ordinance (“ODO”) provides for disqualification of an elected legislator who has refused or neglected to take an oath. The disqualification process calls into question the right to election, as the process, if successfully invoked, would frustrate the popular will of the electors as expressed through a general election. There is no point of having an election if the elected person can be arbitrarily removed or disqualified. Thus, **the right to election** was engaged, and the criteria for removal or disqualification must have to satisfy the legality and proportionality test, which means the criteria have to be reasonably clear and proportionate to the objectives to be achieved in the requirement of taking an oath.
3. In applying the proportionality test, the first question is what purpose the requirement of taking an oath is to serve. There are **3 different oaths**: (1) to uphold the Basic Law; (2) to bear allegiance to the HKSAR; and (3) to serve the HKSAR dutifully, honestly and with integrity while in office. The oath of allegiance is the most controversial because it contains **promises of future conduct that are usually made to a person representing a set of political, social and legal values, such as the Queen, or a symbol representing these values, such as a constitution. Difficulties arise when a person has moral, personal, religious or**

¹ Two of the disqualified legislators have lodged an appeal.

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ideological objection to the object of the oath, eg, a republican refusing to swear to the Queen or the Queen as head of a Commonwealth country. Foreigners in legal services or even legal profession (Australia and UK Barrister until 1868). The content of some of the oaths are strange and redundant – an oath not to commit bribery or corruption for an intending candidate to LegCO, or offend against a law that will result in him being sentenced to death: s 40 of the Legislative Council Ordinance.

4. Where did the ODO come from? It had its origin in English law that were implanted with purpose to discriminate on the grounds of religion and conscience for hundreds of years apparently to safeguard the royal succession to the English throne initially, and later to the British throne. The modern oath of allegiance arose as a result to resolve **Henry VIII's problem of divorcing Queen Catherine of Aragon in order to marry Anne Boleyn.** Upon objection from Pope Clement VII, Henry VIII declared himself Head of the Church of England by the **Act of Supremacy 1534**, and granted retrospective annulment of his marriage with Queen Catherine in 1533. He required a compulsory **oath of loyalty** to seal the support of the new regime, which oath was punishable by treason under the **Treason Act 1534**, under which Sir Thomas More, the Lord Chancellor who had maintained silence about the divorce and whose silence was generally known to be his objection, was executed for failing to take the oath. After Henry VIII's death, **Mary 1** repealed all religious acts and burned nearly 300 Protestants. This was reversed when Elizabeth I came to the throne by passing the **New Act of Supremacy 1558** to re-assert the authority of the Church of England. Coercive measures were imposed to subdue any threat of invasion of **Catholic powers, then later the Baptists, the Moravians, the Quakers, and finally the Jews in the following 150 years** whenever a royal Protestant succession was uncertain or threatened.
5. **As John Selden noted:** "Now oaths are so frequent, they should be taken like pills, swallowed whole; if you chew them, you will find them bitter. If you think what you swear, it will hardly go down."
6. **Samuel Butler was equally critical about the institution of oaths:** "Oaths are but words, and words but wind; too feeble implements to bind; And hold with deeds proportion, so As shadows to a substance do."
7. In the 18th century, gradual reforms were introduced to allow non-conformists to take public office, except Catholics and Jews. The final impetus came with the **Union of Ireland Act 1800**, when it became possible to refuse admission of Catholics to Parliament. In 1847 **Lionel Rothschild**, a Jew, was elected to Parliament, but he was excluded from taking up the seat. He sought a private member Bill to enable him to take up the seat but failed to secure its passage. Similarly, **David Salomons**, who was fined for voting without taking a Christian vote, failed to change the law. Finally, the **Parliamentary Oaths Act 1866** made provision for **affirmation** instead of swearing for non-conformists, and the Promissory Oaths Act 1868 introduced the modern oaths of allegiance to serve Her Majesty. Yet the 1866 Act did not allow an **atheist** to affirm. **Charles Bradlaugh** made a number of attacks without success. He was finally allowed to take the oath on the basis that he could be prosecuted under the 1866 Act. He took it, and there was no charge. In 1888, he saw his private bill passed and

repealed the last religious vertiges. **The ODO** took it from the **Promissory Oaths Act 1868**. Yet there was a major difference. In the UK, a member who fails to take an oath does not lose his seat. He remains a member but is subject to a fine if he takes part in the business of the House and vote.

8. Historically, an oath **always serves a political purpose** and is always coercive in nature. Its value and significance lie in its being taken. It is not about what one believes or convicts. The general, and sometimes highly controversial content, makes it difficult to be enforced, and is more often than not invoked only to persecute the political opposition. It is in substance a **political tool and a political ritual**, with no offence to those taking oath seriously. Its nature is an unenforceable unilateral promise to divinity or to an abstract entity like the constitution to bind one conscience and yet this ritual has been elevated to something almost sacred by the attending formality. It is a political pledge, and serves its political purpose, not so much by what is pledged, but by requiring a person to take it in accordance with the prescribed formality.
9. Therefore, to be consistent with the right to election and the right to free speech, as, after all, taking an oath is a political speech, **the requirement of solemnity and sincerity has to be construed in light of such context.**
10. **Seen in this light, the requirement of sincerity is not about conviction or belief.** It does not matter if you do not believe a single word you utter so long as you take the oath solemnly in the sense of complying with the formal requirement. Your own subjective belief is none of the business of the law. Henry VIII would be very pleased and satisfied if Sir Thomas More was prepared to take the oath; what Sir Thomas More sincerely or honestly believed or thought in taking the oath would be of the least concern to Henry VIII.
11. Thus, sincerity must be presumed once the formal requirement is complied with. It can be rebutted, but it would require the clearest and the most cogent evidence of refusal to take an oath. If the conduct is ambiguous or open to different interpretations, the benefit of the doubt should go to the oath taker, bearing in mind that political speech is highly valued and the right to election is at stake, both of which are rights of the highest order.
12. The taking of an oath is **not inconsistent with simultaneously conveying a political message.** The obvious example is to wear a poppy while taking an oath, or wearing a pink tie to associate with the LGBT community. The mere fact that there may be an embedded message is not inconsistent with the requirement of sincerity.
13. **Likewise, solemnity** has to mean compliance with whatever formality is prescribed. It can only be as solemn as the formal requirement prescribed, and the formal requirement has to be clearly set out and defined.
14. **The requirement of clarity** is about the manner and the form of the oath. The precise wording of the oath has to be followed, but beyond that, there is nothing specific in the legislation. The question boils down to what amounts to acceptable conduct or acceptable

departure of demeanour, which must be dependent on **the tradition, history, culture, values and practice of the institution. What is acceptable at a** Chinese wedding banquet may not be acceptable at a formal High Table Dinner. The best person to judge on what is acceptable conduct would be the institution itself, taking into account, in particular, its own culture and **past practices**. In the legislative context, it means the court shall normally defer to the Legislature when it comes to what amounts to acceptable conduct. The Court rejected that argument on the ground that what constitutes a valid oath is a matter of law. But Is it? Taking into account the drastic of consequence of disenfranchising an elected legislature, should the question be a matter of mixed law and politics?

15. Take the case of Lau Siu Lai. She took the oath in an exceedingly slow speed, with a pause of 6 seconds between each word, resulting in taking an oath that took almost ten times longer to complete than what it would usually take. Yet, in her case, her demeanour was solemn. There was nothing untoward regarding her demeanour, tone, expression, voice or attire. She was not playful, contemptuous, insulting or ridiculing. She did not utter any additional word. The only complaint was that she read too slowly! Yes, she was exploiting the loophole of the formality, but none of the previous warnings said you could not read the oath slowly. There was nothing to suggest that her oath was not comprehensible or understandable. Not one legislator had made a complaint about that. She was the 62nd person to take an identical oath that day.
16. She has not refused to take the oath. Her explanation was that an oath is only as meaningful as one is to take it seriously, and the mere fact that an oath is taken out smoothly does not mean anything if one does not act accordingly. Thus, ironically, she was sincere and solemn, otherwise how could she expose the hypocrisy of a sincere and solemn oath, which is what she intended to do?
17. It was clear that she intended to convey a message by her slow pace. There is nothing wrong about that. The message was not about the oath itself. Why would a simultaneous message be destructive of the original political pledge in the oath itself?
18. One may take different views about her manner of taking the oath, but this is basically a political judgment, not merely a legal one. A **wide margin** has to be accorded when one comes to what an appropriate political judgment should be. Note that **the Clerk to the Legislative Council who has vast experience in administering oaths has accepted her oath**. Who would be better than the Clerk to decide on the acceptability of an oath? **The President of the Legislature reversed that decision, albeit under political pressure**, but allowed her to retake the oath. This highlights another issue. Even if the oath is invalid, the institution itself has to have sufficient power to deal with the matter. After all, the President still has a LegCo to run, and all Presidents would have an eye on the consequences of refusing a legislator to take an oath in determining how to deal with an invalid oath. The issue is a question of mixed law and politics.
19. **It is thus artificial to separate the question of what a valid oath is and the consequences of refusal or decline to take an oath. The main problem** of an oath is from time to time the

content of the oath itself. An oath of office is not controversial, but an oath of allegiance would be, and this is not the peculiar problem of Hong Kong. The content could be **highly political and controversial**, and the oath is a political compulsion to make a particular pledge. There is **a coercion element there**. The right of election requires that **the more drastic the consequences, the greater the room for determining what a valid oath should be**.

20. It is suggested that there should be **a distinction between refusal/decline and failure to take a valid oath**, the former will receive mandatory disqualification while the latter would give the Legislature a discretion to deal with the matter. The former should be reserved for the most flagrant and obvious case that evinces a clear intention to refuse or neglect to take the oath. **What constitutes an invalid oath and a refusal to take an oath is a matter for the LegCo, and the court should only interfere when the decision of the LegCo is Wednesbury unreasonable**. The court rejected this argument, and suggested that while the content of the oath may be political, the taking of the oath is a matter of law that does not allow any margin of appreciation. **But is it just a matter of law, or a matter of mixed law and politics?** The court's decision seems to spring from a narrow **legalistic decision that is devoid of reality and its political context**.

21. **The NPCSC Interpretation** does not address the meaning of sincerity and solemnity. Nor has it addressed the relationship between BL104 and BL26 and 27. I have argued elsewhere that whether the NPCSC interpretation should have retrospective effect is a matter for HK law, not PRC law, though, even if it were a matter of PRC law, the position in PRC law is unclear on this point. I was at a loss how this point was not even arguable for leave to appeal to the CFA in the Leung/Yau case.³

³ The Court of Final Appeal has refused to grant leave to appeal: