

Money Lending, Bitcoin, and the Basic Law
Case: ESMP001432/2015

Dr. Joseph Wang
Bitquant Research Laboratories (Asia) Limited
Licensed Money Lender #811/2015

Loans funded in Bitcoin

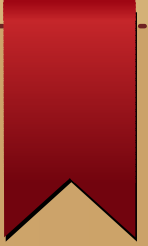


TL:DR

- Watch the episode Fawlty Towers episode Waldorf Salad



Fintech and Constitutional Law



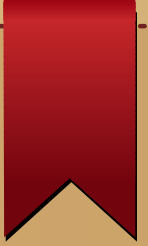
- Most legal interactions don't involve constitutional law because you can use standard operating procedures
- But what happens when the standard operating procedure doesn't make sense
- Also technology can change the basic rules of society
- Constitutional law is a set of meta-rules
- What do you do if you do not know what to do



Fintech and Basic Law

- The basic problem with Hong Kong and fintech has to do with the constitutional structure of Hong Kong
- What does the Sino-British Joint Declaration and the Basic Law say? Nothing basically changes until 2047
- That is why fintech has such a difficult time. The system was designed to freeze Hong Kong in 1985

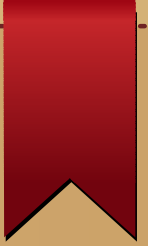
Money Lending License



- I did not need the license
- I did need the experience of pushing something through the HK bureaucracy and judiciary
- Wanted to beta test some constitutional theories



Outline



- Timeline
- Legal framework
- People
- Documents
- Arguments
- Implications



Bureaucracy – Invented by the Chinese, Perfected by the British



Time Line

- May 2015 – Application submitted
- June 2015 – Police interviews and site inspection
- July 2015 – Letter with six objections
- August 2015 – Hearing (five minutes)
- August 2015 – Submit response
- October 2015 – Hearing (five minutes). Police ask for delay
- December 2015 – Hearing (ten minutes. Judge screams at police) – Letter with three objections

Time Line

- January 2016 – Hearing (one and a half hour)
- February 2016 – Mention hearing (15 minutes) – Letter with one objection
- March 2016 – Final hearing (five minutes) – Government issued no objection day before hearing – License granted with one condition

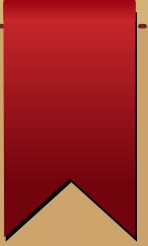
Money Lending Ordinance

- Extraordinarily well drafted piece of legislation – Passed 1981 – drafted by AG John Calvert Griffiths QC
- Registry administered by the companies registry
- Police does investigation / Interview and site visit
- Anyone can submit an objection
- No objection within 60 days – License granted
- Any objections – License Court decides
- Fit and proper person
- Suitable premises

Why the MLO is such a great law

- Hong Kong law for Hong Kong conditions
- Designed to have minimal impact on legitimate business
- Time limits – 60 day time limit government cannot drag on a case indefinitely
- You are not negotiating with God. If there is a dispute you and the government both go to God.

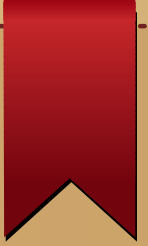
British Administrative Law



- Thank you, Benny Tai
 - <http://www.law.hku.hk/courses/hkadmlaw/>
- Wednesbury rules
 - So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
- Really, really hard to overturn administrative decision



British Administrative Law



- British judges do not want to make political decisions and belief is that if you don't like the rules you can vote the bums out
- British administrative law does not look at legislative intent
- British system has many unwritten rules, and is uncodified
- Very different from US system



A primer on the HK government

- Yes, Minister – The UK government in 1985. The HK government today.



Basic Law of Hong Kong

- Interface German/Soviet socialist authoritarian legal system with British liberal legal system
- Worry was that the British system of unwritten restrictions on power would not survive handover
- List of rights – Bill of rights ordinance and ICCPR incorporation
- Continuing discussion on what that means

Rights under the Basic Law

- Proportionality rule – If a right is involved, then the restriction on the right must be proportional to the social purpose – Started in Germany and went through Canada
- Authorization by the legislature may be necessary (Surveillance cases)
- Measure of difference - Judiciary will defer to judgment of executive or legislature
- Thank you, Long Hair

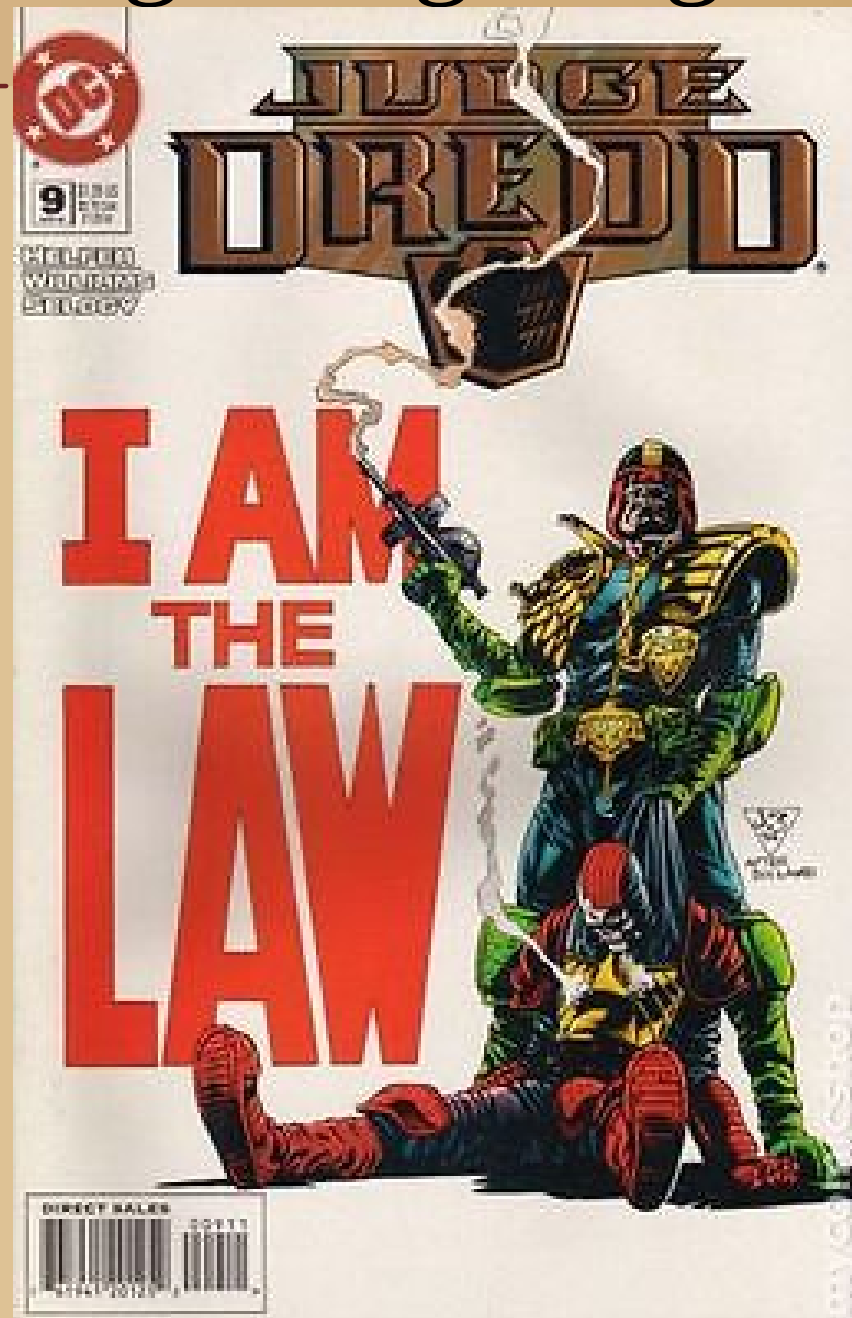


The Hong Kong Police

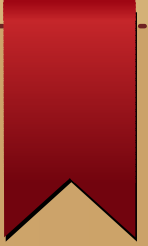
- Really really good at listening
- Pass messages up the ladder
- Everything is paper. Decisions are made by a shadowy body
- Robots unable to make a decision



Hong Kong Judges



Judges



- Scheduling judge – Court one
- Trial judge – Court five
- A lot of court etiquette
- Trial bundles and clerks
- Judge did not know about this particular law
- Judge wants parties to work something out



Department of Justice

- Problem is that the police did not have a lawyer
- Found lawyer at the Department of Justice / Civil division in December, Good at legal kung fu.
- Communications through PDF attachments with phone followup



Also involved

- Company Registry – We do not care
- Financial Services and Treasury Bureau – Not our problem
- Clerks

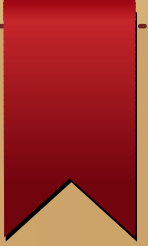
Police interview

- Notice of interview was given by e-mail
- Police had a laptop and filled in the blanks
- Seems like Q&A but was interactive
- Immediately mentioned that working from a co-work space was going to be a problem
- Last question of the interview – Do you have anything else to say?

Six Reasons Why You Suck

- Not enough documentation to establish fit and proper person for me and my wife (withdrawn March)
- Loans compound interest (withdrawn February)
- Loans payments go first to interest then to principal (withdrawn February)
- Could not provide a one year tenancy agreement and consent from landlord (withdrawn December)
- Premises unsuitable (withdrawn December)
- Bitcoin is a virtual currency and not a commodity, and money changing requires a money services license (withdrawn December)

Trial bundle



- Documents for trial
- Usually joint submission to judge – In this case it was separately submitted
- My secret weapon – <http://www.bundledocs.com/>
- Skeleton arguments for opposing counsel



Suitable premises

- Police had an unwritten policy that you could not operate a money lending business from a co-work space
- Tried a Section 33B exemption to financial services
- Article 109 – International finance center requires that government justify policies on the basis of current social and technology changes
- Rents are too high and separate office is not necessary given we were operating without cash and online
- Government withdrew objection in December

January Hearing



Hearing in January

- DOJ argument – Judge should rule if loans were legal
- If loans were legal did not require license, I shouldn't get the license
- If the loans were illegal, then I was a horrible person that shouldn't get the license
- Counterargument: Maybe I will need a license
- Judge: If you need a license later then maybe you should not get a license now
- Me: Section 26!!!! Need the license for advertising
- Judge: Delay hearing, please talk to a lawyer.

Final Showdown


- Between January and February. I rewrote loan documents to be compliant with MLO, and also got an inquiry for personal lending.
- Claim was that I did not provide enough documentation to establish that I was a fit and proper person to conduct money lending
- Burden of proof was on me to show that I was a fit and proper person - Lo Kwan Yin v. Attorney General

Counterargument

- Fit and proper is context dependent – ABT v. Bond (1990) 170 CLR 321 – High Court of Australia
- Fit and proper in MLO refers only to character and not to qualifications from legislative intent, case law, and Basic Law
- Legislative intent – Interpretations Ordinance
 - Use Google and look up Hanserd
- Case Law – Example of an unfit person – Lo Kwan Yin v. Attorney General

General Principles

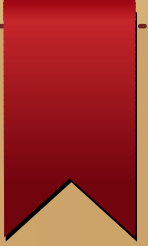


- Articles 109 and 118 – Government has responsibility to promote HK as international financial center and to promote technology development
 - Article 5 – The socialist system should not be practiced in Hong Kong and the capitalist system must remain unchanged for 50 years.
 - Article 11 – All legislative, executive, and judicial decisions must be consistent with Basic Law
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Basic Law

- Article 110 – Government must have legislative authorization to enact financial regulation (analogy to *Leung Kwok Hung and Another v. HKSAR HKCFI 123*)
- Articles 30 and 115 – Hong Kong residents have freedom of occupation and the right to move capital freely (cite *R. v. Oakes (1986) 1 S.C.R. 103*)
- Judicial economy – This argument can be used by anyone to object to anything and will cause judicial chaos which was unintended by the legislature

Checkmate



- All of my arguments had counterarguments, but if the government had argued for this it would have taken a lot of time and effort, and would have put them at huge risk
- Give up and fight another day
- License issued 23 March 2016 – One extra condition
 - All books, records, and documents of the money lending business must be kept on the premises specified in the license



One country

- Mainland China has a better legal framework for fintech than Hong Kong does
- Constitutional entrepreneurship – Mark Jia
- Mainland China is more influenced by US than HK is
- Written rules should reflect reality
- Use of economic rights to advance governmental policy
- Mechanism of constitutional argumentation – Separate basis of decision from reasoning for decision

Two systems

- First use of Basic Law rights not derived from the ICCPR
- First use of “pure economic” provisions of Basic Law
- Right to capitalism and free enterprise solely part of Hong Kong law
- Half way to 2047
- Local human rights – Post-unipolar world

What next

- Blockchain to record non-judicial decisions – Tierion / IPFS
- Thank you notes
- SFC
 - Legal fight not necessary
 - Regulatory sandbox
 - Sandpaper for the sandbox
- SVF legislative interpretation
- AML-KYC regulations – Article 112 – No exchange controls and free convertibility of Hong Kong dollar

Broader issues

- Economic rights and political rights
- Uber
- LGBT rights
- Half way to 2047

What this is all about?

