CHAPTER 11

Oath Taking and Legal Performance

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It was supposed to be a straightforward process, and a familiar scene. Following the 2016 elections for the Legislative Council, or Hong Kong's legislature, the incoming lawmakers took their oath of office one by one inside the Council's chamber. However, there was drama that year. When it was his turn, Leung Kwok-hung, a veteran legislator returning for a new term after a landslide victory, approached the stand holding a giant yellow umbrella and other props, and shouted pro-democracy slogans along the way. He read out the oath loudly and aggressively, and also inserted dramatic pauses at unexpected moments. Dissatisfied with the manner in which he took the oath, the Hong Kong government initiated proceedings against him. It argued that Leung's antics rendered his oath invalid and that he should be disqualified from office.

The Court of First Instance (CFI) agreed with the government. It opined that Leung's behaviour at the stand amounted to no more than a 'theatrical performance', and that he had therefore failed to exhibit the sincerity and solemnity required for the oath.[1] The Court of Appeal (CA) affirmed the lower court's decision.[2]

In this chapter, I take the *Leung* case as a point of entry for exploring the relationship between law, theatre, and performance. My question is: what does the courts' characterization of Leung's oath as theatrical performance

* The author would like to thank Albert Chen, Andrew Counter, the editors, and the anonymous readers for their insightful comments on the chapter.

1 *HKSAR* v. *President of the Legislative Council* [2017] 4 HKLRD 115 (CFI, 14 July, 2017), 247.

2 *Secretary for Justice* v. *Leung Kwok-hung* [2019] HKCA 173 (CA, 15 February, 2019).

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tell us about the nature and operation of law? In *Law as Performance*, Julie Stone Peters boldly contends that, far from being a set of 'jurisprudential footnotes', legal performance is 'a constitutive idea in Western jurisprudence'.[3] In other words, theatre and performance are crucial to understanding what law is. Moving from the ancient world to early modern Europe, she demonstrates how notions of theatricality ('law needs theatre') and anti-theatricality ('law must avoid theatre at all costs') lie at the heart of how we talk and think about law. By examining the case in light of Peters' insights, I posit that the proceedings can be understood as an encounter between law on the one hand, and performance on the other, that reconfigures the boundary between them in order to expose the nature of law as performance. I then analyse law's strategies at keeping that boundary in place.

I will begin by providing the legal and political context for the *Leung* case in Section 11.1. In Section 11.2, I interpret the case as a clash between Leung's theatricality and law's anti-theatricality. I then home in on law's anti-theatrical language in Section 11.3, and draw on J. L. Austin's lectures on the performative and the constative, as well as Jacques Derrida's reinterpretation of those two concepts, to explore the nature of legal performance. Theatricality and anti-theatricality appear to be on opposite sides in this case – Leung embraces theatre, the government (and the courts) reject it – but as Peters points out, the two are not necessarily polar opposites: while they are often marked out as 'antinomies', they can also be 'proximate' to one another, sometimes 'perilously' so. [4] In the final section, I examine how theatricality and anti-theatricality both stand apart and come together in the courts' reasoning, and contend that the judicial insistence that theatre has no place in the oath-taking process can be understood as an attempt on the part of law to disavow its own performative nature.

[3] Julie Peters, *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe* (Oxford: Oxford University Press, 2022), p. 9. For further discussions of law and performance, see Sean Mulcahy, 'Methodologies of Law as Performance' (2022) 16(2) *Law and Humanities* 165–182 and *Law and Performance*, ed., Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Amherst: Massachusetts University Press, 2018). See also Marrett Leiboff, *Towards a Theatrical Jurisprudence* (Abingdon: Routledge, 2019).

[4] Peters, *Law as Performance*, p. 9.

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11.1 THE LEGAL AND POLITICAL CONTEXT

The legal proceedings in *Leung* took place amidst a long-standing debate about the pace of democratization in Hong Kong. China resumed sovereignty over Hong Kong in 1997, after 156 years of British colonial governance in the territory. The Basic Law, Hong Kong's post-handover constitutional document, guarantees fundamental rights and freedom,[5] an independent judiciary[6] and the continuation of the common law system inherited from the British regime.[7] It also guarantees that the capitalist economic system and way of life before 1997 will 'remain unchanged for fifty years' after the retrocession.[8] The idea of 'One Country, Two Systems' is at the core of the post-colonial constitutional order: Hong Kong is part of China, a one-party socialist state, but it is meant to exist as a liberal enclave with 'a high degree of autonomy'.[9] Most importantly for understanding the oath-taking controversy, the Basic Law was understood by many people in Hong Kong at the time to guarantee a gradual transition to democracy: it states that the 'ultimate aim' is for both Hong Kong's leader (the Chief Executive) and its legislators to be selected by 'universal suffrage', and that the pace of democratization is to be determined according to the principle of 'gradual and orderly progress' and 'in light of the actual situation' in the city.[10] In the case of the Chief Executive, candidates for election would be nominated by a committee that is 'broadly representative' of Hong Kong society.[11]

In part because of these constitutional guarantees, questions of when and how Hong Kong would become democratized became a focus of political and constitutional debate in local society. As years passed, however, frustration grew at the slow pace of democratization. This frustration spilled over in Occupy Central, a civil disobedience movement in 2014 that lasted more than two and a half months, during which people occupied the main roads, flyovers and public squares to demand democratic elections. There also arose increasing localist and anti-China sentiments, and localist parties calling for Hong Kong's independence from China formed in the aftermath of Occupy. Alarmed by these

[5] Basic Law Article 4. [6] Basic Law Article 2. [7] Basic Law Article 8.
[8] Basic Law Article 5. [9] Basic Law Article 2. [10] Basic Law Articles 45 and 68.
[11] Basic Law Article 45.

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developments, the Central Government in Beijing began to tighten political control over the city, and sought to curb the influence of these pro-democracy and localist parties.[12] Leung belonged to the radical wing of these parties, and was also a prominent figure in Occupy Central. In this context, it becomes obvious that his election victory, and the victories secured by candidates at the same end of the political spectrum, were a major cause of consternation for the authorities in both Hong Kong and Beijing.

Leung was amongst a group of legislators whose oaths were held to be invalid by the courts. The text of the Legislative Council Oath is set out in the Oaths and Declaration Ordinance (ODO): an incoming legislator has to swear that they will 'uphold the Basic Law of' and 'bear allegiance to' the Hong Kong Special Administrative Region of the People's Republic of China, and that they will serve Hong Kong 'conscientiously, dutifully, in full accordance with the law, honestly and with integrity'.[13] The oath can be taken in English or Chinese. The fact that an incoming legislator who does not take a valid an oath is barred from office is closely tied to the history of this ordinance.[14] The ODO was first enacted in 1972; it was revised after the 1997 retrocession but the wording and structure remained essentially the same.[15] The 1972 ordinance was itself largely modelled on the United Kingdom's Promissory Oaths Act (1868). As Han Zhu and Albert Chen point out, there are two differences between the Hong Kong ordinances and the UK legislation that would turn out to be critical to the events of 2016.[16] First, the 1868 act applies to judges and holders of high-level public office in the UK, but it does not apply to

[12] For a more detailed discussion of Hong Kong's democratization up to the time of the *Leung* case, see Albert H. Y. Chen, 'The Hong Kong Basic Law and the Limits of Democratization Under "One Country, Two Systems"', 50 *The International Lawyer* (2017), 69–86.

[13] Oaths and Declarations Ordinance, Part IV, Schedule 2.

[14] Han Zhu and Albert H. Y. Chen, 'The Oath-Taking Cases and the NPCSC Interpretation of 2016: Interface of Common Law and Chinese Law', 49 *Hong Kong Law Journal* (2019), 381–415. For a discussion of the history of the legislation on oath-taking in the UK context, see Enid Campbell, 'Oaths and Affirmations of Public Office under English Law: An Historical Retrospect', 21(3) *Journal of Legal History* (2000), 1–32.

[15] Zhu and Chen, 'The Oath-Taking Cases', 391–392.

[16] Zhu and Chen, 'The Oath-Taking Cases', 392–393.

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legislators, whose oaths are governed by a separate statute known as the Parliamentary Oaths Act (1866). In contrast, the ODO applies to, amongst others, principal officials, judges and legislators. Second, while judges and other holders of high-level public office in the UK are disqualified if they do not take a valid oath under the 1868 Act, legislators who fail to take a valid oath are not automatically disqualified under the 1866 Act: they do not have to vacate their seat, even though they cannot sit in any debate or vote in parliamentary proceedings.[17] In contrast, ODO does not stipulate different consequences for different officials. Zhu and Chen demonstrate that the differences between UK and Hong Kong law can be traced to the structure of colonial governance: they note that the ODO was enacted in Hong Kong 'at a time when all major organs of the colonial government, including both the Legislative Council and the Executive Council, consisted of members appointed by the Governor, and there were no elected representatives of Hong Kong people in the legislature'.[18] Under those circumstances, there was no need to treat legislators more leniently on the grounds that they were chosen by the people, and hence no need for the ordinance to 'distinguish between the legal consequences of failing to take the required oath by Executive Council members and judges on the one hand and Legislative Council members on the other hand'. As a result of this historical legacy, an incoming legislator in twenty-first-century Hong Kong such as Leung whose oath is deemed invalid cannot take office.

There were two separate legal cases in the oath-taking saga of 2016. The first concerned Sixtus Leung (no blood relation to Leung Kwok-hung) and Yau Wai-ching. When the candidates took their oaths, they both carried a flag bearing the words 'Hong Kong is not China'. They referred to Hong Kong as an independent nation, and substituted 'China' with a derogatory word for the country which the Japanese used during the Second World War.[19] The president of the Legislative

[17] Section 5, Parliamentary Oaths Act (1866).

[18] Zhu and Chen, 'The Oath-Taking Cases', 394.

[19] *Chief Executive of the HKSAR* v. *President of the Legislative Council* [2016] 4 HKC 417 (CFI, 15 November 2016).

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Council determined that their oaths were invalid, but made the decision to allow them to retake them. This was the point at which the Hong Kong government initiated disqualification proceedings. Moreover, under Article 158 of the Basic Law the Standing Committee of the National People's Congress in Beijing has the power of final interpretation over the constitutional document. Its interpretations are binding on the Hong Kong courts.[20] Before Hong Kong's CFI decided on the case, the Standing Committee issued an interpretation of Article 104, which is the article governing oath-taking. The interpretation states that, according to the true meaning of Article 104 as decided by the Committee, the incoming lawmaker must (i) adhere to the form and content of the oath, without altering, adding to, or omitting any of the words, (ii) take the oath in a solemn and sincere manner, and (iii) sincerely believe in and strictly abide by the pledges in the oath. Furthermore, (iv) if the oath is invalid then the oath-taker will be disqualified from office without the opportunity to retake the oath.[21] Yau and Sixtus lost their case at both the lower courts and on appeal.[22]

The second case involved Leung and three other candidates. In addition to Leung, there was Nathan Law, who adopted what the courts called a 'distinct rising tone' of mockery whenever he pronounced the Chinese character for 'country'. He also prefaced the oath with an opening statement that included the English words 'You can chain me, you can torture me, you can even destroy this body, but you will never imprison my mind,' and concluded his oath with a renewed call for resistance. There was Yiu Chung-yim, who inserted extra words into the oath. And there was Lau Siu-lai, who separated the ninety words constituting the oath by placing six-second pauses between them as she read. Lau subsequently announced on her Facebook page that she intended her performance of the text not to be interpreted as the rendition of a coherent oath of office, but as the vocalization of ninety distinct words

[20] Article 158, Basic Law.

[21] Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (adopted 7 November 2016).

[22] *Chief Executive of the HKSAR* v. *President of the Legislative Council* [2017] HKLRD 460 (CA, 30 November 2016).

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that had no connection between them. They, like Leung, lost their case and were barred from taking office.[23] Out of the four legislators in the second case, Leung was the only one who appealed, and he also lost in the CA.[24]

The oath-taking cases generated strong reactions across the political spectrum in Hong Kong. While the behaviour of these legislators was widely condemned as disrespectful and even insolent, the high-handed disqualification of the candidates who were chosen by the electors as their representatives in the legislature gave rise to grave concerns that Beijing was undermining the city's autonomy and interfering with the independence of its judiciary, both of which are constitutionally guaranteed. Particularly troubling was the timing of the interpretation – the fact that it was rendered before the Hong Kong courts had had a chance to decide on the issue seemed to suggest that Beijing was pre-empting a ruling in favour of the candidates.[25]

Given that Leung's oath was the only one explicitly characterized by the courts as theatrical, I will focus on him in the remainder of this chapter. However, the legal and political context indicates that his case constitutes a focal point around which anxieties about the entanglements between politics, law, theatre and performance crystallized, and testifies to the efforts on the part of the authorities to separate them.

11.2 THE GREATEST SHOWMAN?

Leung's rendition of the oath was a political spectacle, and it is worth describing it in some detail. When the clerk called his name, Leung walked to the stand wearing a black T-shirt with the words 'Civil Disobedience' written in Chinese. In his right hand was a big yellow umbrella, the symbol of Occupy Central. Slogans were written on the umbrella, such as 'End One-Party Rule!' and 'Release the Prisoners!'. In his left hand, he held a piece of cardboard on which was written the title

[23] The *Leung* case (CFI). [24] The *Leung* case (CA).

[25] For further discussions of the oath-taking controversy, see Johannes Chan, 'A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong', 16 *I.CON* (2018), 373–388 (377–379) and Zhu and Chen, 'The Oath-Taking Cases'.

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of a legal decision on Hong Kong's democratization handed down by Beijing; a giant black cross was scrawled over the title. Beijing's decision, commonly known as the 831 Decision to mark the day it was handed down (31 August 2014), was regarded by many as China's way of ensuring that only candidates acceptable to the Communist Party would be eligible to run for the office of the Chief Executive, and it was the immediate trigger for Occupy.

As Leung approached the stand, he shouted slogans such as 'Self-determination for the people!', 'Civil disobedience without fear!', 'We will not be cowed!' and 'I demand double universal suffrage [for choosing both the Chief Executive and the legislators]!' When he read out the oath, he deliberately paused at random points and varied his rhythm in the text to disrupt its flow. The sloganeering began again as soon as he completed the reading. He then took out another replica of Beijing's Decision, tore it up in front of the clerk administering the oath, and, in a flamboyant final gesture, threw the paper fragments into the air.[26]

This was the performance which the CFI condemned, and its description of Leung's oath as theatre was not questioned by the CA. The CFI said that the sloganeering and the destruction of the Decision's replica were simply 'theatrical acts', and as such were 'totally unrelated' to the oath.[27] Moreover, it held that when interpreted against his 'theatrical conducts', Leung's characterization of his own attitude towards the ceremony as solemn seemed sarcastic at best. The import of this 'theatrical performance' in the Council Chamber, according to the CFI, was that the defendant had failed to respect the seriousness and importance of the oath-taking exercise.[28] The Court further observed that he had not demonstrated the sincere attitude the process required. His oath was therefore held to be invalid.

The proceedings can be thought of as a clash between two different conceptions of the place of theatre within the legal domain. The courts' stance can be described as anti-theatrical: in the eyes of law, Leung's theatrical performance signifies pretence, frivolity and impudence. As such, it is antithetical to the qualities that it regards as both prerequisites

[26] The *Leung* case (CFI) 115–119.
[27] The *Leung* case (CFI) 125.
[28] The *Leung* case (CFI) 247.

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for, and definitive of, oath taking, including 'sincerity', 'solemnness', 'respect' and 'seriousness' – these are words that appear repeatedly in the judgment.[29] The courts' approach here can be understood as a part of a long-standing cultural suspicion of theatricality. As Jonas Barish has argued, opposition to theatricality has persisted for centuries across multiple cultural domains: from Plato's distrust of mimetic experience to the modernist dramatists' interrogations of their own medium, theatricality has been associated with superficiality, falsity, immorality and danger. The judicial imagination, like the anti-theatrical mind which Barish explores, confers on theatricality the 'savor of forbidden fruit', and casts it as something that tantalizes, provokes, seduces and ultimately corrupts.[30]

Law's anti-theatrical stance lies at the core of a contrast it establishes between Leung's behaviour and the oath taking by pro-Beijing legislators who were allowed to take office. It could be argued that what the courts regarded as problematic here is not the fact that Leung performs, but that he gave the wrong kind of performance: if he had given the correct kind of performance, if he had taken his oath 'properly', he would have been able to take office. As such, what law objects to in reality is not performance per se, but a performance that goes against or beyond the theatrical norms that are legally acceptable. Yet if law does indeed accept some version of performance, it does not recognize itself as doing so. In other words, a crucial dimension of the courts' anti-theatricality is its refusal to associate oath-taking with performance. This non-recognition is reflected in the insistence on 'sincerity' as a defining element of the oath. Sincerity can be thought of as a form of transparency: to be sincere is to allow others to see directly into your heart, to observe your true feelings. By this logic, to do something sincerely is precisely to *not* engage in theatre or performance of any kind. The sincerity requirement, then, is tantamount to a legal requirement that Leung's oath be completely natural, that it give access to his true feelings, that it contain no form of acting. The Standing Committee's interpretation is clear on this

[29] The *Leung* case (CFI) 124.

[30] Jonas Barish, *The Anti-theatrical Prejudice* (Berkeley: University of California Press, 1981), p. 477.

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point: the oath taker must not only strictly abide by their oath, but 'must sincerely believe' in it, otherwise they would have taken 'a false oath'.[31] The demand for sincerity is therefore less a demand for a particular kind of performance, proper or otherwise, than a demand for artlessness and transparency. In the eyes of the law, Leung was playacting, while the successful candidates offered true, unmediated allegiance.

Ironically, though, what is striking about the process of oath taking in this context is that it has an inherently theatrical quality to it: unlike merely signing one's name on a piece of paper and putting it in the post, the legislative oath is publicly enacted and delivered *a viva voce*; as such, it requires an audience to see and hear it. There can be no effective or meaningful oath without sound, body and spectacle.[32] Leung clearly embraced theatricality, and deployed it as a way of advocating for Hong Kong's democratization. Through his performance, he makes bare the essence of oath taking as a kind of political performance and renders visible its inherently theatrical quality.

His oath taking constitutes a performance in two overlapping senses: performance as that which can '*describe* a *particular* form of expression' for a real or imagined audience, as in something theatregoers see in a playhouse, and performance as that which can '*diagnose* a *universal* ontological condition' about an entity such as law.[33] Leung's verbal expression and bodily presentation constitute, firstly, a performance in the more particular or conventional sense of the word: they are designed to draw attention, to put oneself on display for dramatic effect, to entertain and elicit a reaction from the audience. Given the Council's standard practice of filming its meetings and ceremonies, Leung may have had in mind an audience that extended beyond the incoming and existing lawmakers who were in the room with him, but that also included people likely to see the footage from the day on their television or computer screens.

Leung's words and actions can be further construed as a performance in the second, more ontological sense: law and politics come about

[31] Interpretation of Basic Law Article 104, p. 3.
[32] I thank Scott Veitch for this point.
[33] Peters, *Law as Performance*, p. 18.

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through a series of repeated gestures, and his deeds and utterances are arguably part of an ongoing attempt to bring about a change in the law, to enact a transformation in the political system, to hasten the coming-into-being of a different, more democratic, constitutional order. In *How to Do Things with Words*, J. L. Austin introduces a distinction between constative and performative utterances. He posits that constative utterances are those that describe an existing state of affairs: 'The grass is green' or 'I am hungry' are constative, in that they report on a reality that is already there. Performative utterances, by contrast, do not merely describe reality, but impact upon or enact a change in reality. An example Austin gives is 'I give and bequeath my watch to my brother' in the context of a will: [34] the statement is performative because the act of uttering it is, or at least partly constitutes, the performance of an action. As Başak Ertür succinctly glosses it, 'in Austin's scheme, performative utterances *do* rather than describe; they produce or transform a situation, or at least attempt to do so'.[35]

In this instance, Leung's sartorial choices, his sloganeering, his use of props such as the yellow umbrella, his dramatic tearing up of the mock Decision in public, and the ostentatiousness of his overall delivery and self-presentation can be collectively read as a performance that seeks to be politically and legally *performative*, in the sense of actively adding to, amplifying and furthering the efforts at creating concrete political and legal changes that were gaining momentum in Hong Kong society at the time. As Austin points out, oath making is already a performative act exemplar, and Leung's tactic of using it as a means to push for universal suffrage, political participation and more expansive rights and freedoms takes the performativity in a different direction from what was expected in the Legislative Council. Jacques Derrida has criticized Austin for placing intention at the core of his conceptualization of speech acts, and argues for foregrounding the role of iteration. While it could be questioned whether intention is indeed as central to Austin's framework as Derrida contends, the foregrounding of iteration helpfully brings the

[34] J. L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962), p. 6.
[35] Başak Ertür, *Spectacles and Specters: A Performative Theory of Political Trials* (New York: Fordham University Press, 2022), p. 54.

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force of Leung's performance into view.[36] As footage of his performance was relayed across televisual news channels and various social media outlets, as it proliferated on the front page of the broadsheets, they intensified discontent with Hong Kong's slow pace of democratization and galvanized the public's demand for reform, thereby compounding the impact of Leung's theatre. When seen through an anti-theatrical lens, however, these acts take the form of parodies or bastardized versions of the requisite oath, and as empty gestures with no legal effect. Theatre becomes indistinguishable from theatrics, political performance appears as farce and in a dynamic spanning hundreds of years that Barish has traced, theatricality slides once again into anti-theatricality.

11.3 LAW'S TEMPORAL PERFORMANCES

Leung's faith in the power of theatre was countered by an institutional distrust of theatre as sham in the proceedings, and the courts construed his actions as an empty performance and therefore as the antithesis of law. Yet in what sense might law itself be thought of as performance, as Peters contends? And if it is a kind of performance, is it *merely* performance, or does performance here signify differently such that it is not simply the opposite of the real? One of the doctrinal questions raised in the CA regarding the Standing Committee's interpretation serves as a point of entry: given that the interpretation was rendered after Leung attempted to take the oath, does it have retroactive effect so as to render his oath invalid?[37] In other words, does the interpretation take effect only from the moment it was rendered by the Standing Committee (in which case it does not apply to Leung), or does it take effect before that moment (in which case it does)?

The CA held that the interpretation applies retroactively: like the Standing Committee's other interpretations of the Basic Law, it 'has

[36] Jacques Derrida, 'Signature Event Context', in *Limited Inc.* (Evanston, IL: Northwestern University Press, 1977), pp. 1–25.

[37] A related question was raised regarding whether the interpretation constituted a clarification of or a supplementation to the Basic Law. The CFA has held that the Standing Committee had the power to both clarify and supplement laws in *Director of Immigration* v. *Chong Fung Yuen* (2001) HKCFAR 211.

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retrospective effect back to 1st July, 1997', or the day of the retrocession.[38] As such, the interpretations must be construed to state 'what the law has always been since the coming into effect of the Basic Law on that date'. This question about retrospectivity, or *temporality*, is crucial to understanding the relationship between law, theatre and performance. To understand why this is so, it is helpful to examine the judicial discussion of retroactivity in light of Derrida's contention that retroactivity can be 'fabulous' (in the sense of fiction, or fashioning, or forming).[39]

In 'Declarations of Independence', which examines the significance of the act of signing in the context of the US Declaration of Independence, Derrida posits that the signing constitutes a troubling of the distinction between the performative and the constative which then gives rise to a temporal disjuncture he calls 'fabulous retroactivity'. Derrida asks: what might it mean for the representatives from the thirteen colonies to sign 'in the name and by the authority of the good people'? Specifically:

> Is it that the good people have already freed themselves in fact and are only stating the fact of this emancipation in the Declaration? Or is it rather that they free themselves at the instant of and by the signature of his declaration?[40]

What, in other words, is the nature of the Declaration, and how does it operate? Is it a constative utterance, in the sense that the people in the thirteen colonies have 'already freed themselves', such that the Declaration is 'only *stating* the fact of this emancipation' in reality?[41] Or is it a performative utterance, in the sense that it is the signing of the Declaration that *produces* the state of freedom?

Derrida contends that the Declaration cannot be thought of as either constative or performative, but hovers undecidedly between the two registers. Crucially, he further posits that this undecidability is not a logical fallacy or error in the document, but is constitutive of the very

[38] The *Leung* case (CA), 52.
[39] Jacques Derrida, 'Declarations of Independence' [trans. Tom Keenan and Tom Pepper], 15 *New Political Science* (1986), 7–14 (10).
[40] Derrida, 'Declarations of Independence', 9.
[41] Derrida, 'Declarations of Independence', 9 (my italics).

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process of origination that the Declaration is meant to announce and achieve. The positing of a politico-legal regime rests on a fundamental 'equivocation', and in the American context, the Declaration depends on this equivocal undecidability to found the nation.[42]

He makes a similar argument in his analysis of the idea of the people in the Declaration. On the one hand, the representatives sign the Declaration in the name of the 'good people' who are already there to lend their authority to the signers. On the other hand, 'this people does not exist', in the sense that the category or concept of 'the people' that functions as the representatives' source of authority does not come into being before the signing. As such, 'the signature invents the signer'. The signature, then, both presumes the existence of 'the good people' and performatively brings them into being as such.

This dynamic is what Derrida calls 'fabulous retroactivity': the signature shuttles between being underwritten by a pre-existing freedom, and enacting the very freedom from which it draws its authority. In the same vein, the representatives sign in the name of the people, while also bringing the people into being through their signatures. The moment of signing produces, in the present, that which is already there all along. The Declaration therefore oscillates continuously between stating a reality and forging it, between the constative and the performative.

Ertür brilliantly teases out the theatrical implications of this relation of undecidability, and traces it back to Austin. She points out that early on in *How to Do Things with Words*, Austin underscores that some performatives can disguise themselves as constatives, in the sense of taking on the form of an utterance that describes the world when it is actually creates or transforms it. Austin calls these utterances 'masqueraders',[43] and as Ertür notes, his metaphor is noteworthy for its theatrical connotations:

> The metaphor brings the excluded theatrical through the back door into Austin's theory, as part and parcel of his initial definition of the performative. The performative, we are told, is that which often disguises

[42] Derrida, 'Declarations of Independence', 10.
[43] Austin, *How to Do Things with Words*, p. 4.

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> or passes itself off as constative. So there is already a staging involved in the performative, whereby it disguises the fact of its enactment.[44]

The 'undecidability between the two modes' of the performative and the constative is a masquerade – in other words, a form of theatre, or the 'staging' of a disguise.[45]

When we return to the question of the interpretation's retroactivity in *Leung* and place it in the interpretative frame that Derrida, Austin and Ertür give us, it becomes evident that, as a speech act, the interpretation is characterized by a similar relation of undecidability between the constative and the performative. The CA's reasoning relies heavily on *Lau Kong Yung* v. *Director of Immigration*, in which Hong Kong's CFA held that the temporal significance of a Standing Committee interpretation should be understood in the following way:

> The Interpretation ... dates from 1 July 1997 when the Basic Law came into effect. It *declared* what the law has always been.[46]
>
> The Interpretation has effect from 1 July 1997.[47]

The statements 'The Interpretation has effect from 1 July 1997' and 'The Interpretation ... dates from 1 July 1997 when the Basic Law came into effect' are constatives: they describe or report a state of affairs in reality, the state of affairs being that the meaning of the Basic Law as stated in the Standing Committee's interpretation has been there from the very beginning of Hong Kong's post-colonial existence. However, at the same time, the court acknowledges that the Interpretation '*declared* what the law has always been'. Verbs can be good indicators of performatives: 'I do' (as in a wedding ceremony) 'I order' (as spoken by a judge in court), 'I promise' and 'I bequeath' are some common examples. The verb here – 'to declare' – is a classic performative, a *doing* verb that creates a state of affairs in reality: by *declaring* what the meaning of the Basic Law from the very beginning, the interpretation *produces* the reality that the meaning it contains is the one that the text of the Basic Law has expressed all along. The interpretation is therefore a speech act that hovers

[44] Ertür, *Spectacles and Specters*, p. 65. [45] Ertür, *Spectacles, and Specters*, p. 67.
[46] *Lau Kong Yung* v. *Director of Immigration* [1999] 4 HKC 731 (CFA) 758G (my italics).
[47] *Lau Kong Yung* 759D.

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between the two registers of the constative and the performative, between describing and declaring, between stating and generating. If, as Derrida notes, the relations of undecidability between the performative and the constative are constitutive of the act of origination, and if, as Ertür foregrounds, the metaphor of the masquerade brings in the theatrical, then the situation analysed in *Lau Kong Yung* can be interpreted as a form of theatre, in the sense of a performative utterance which masquerades as a constative one. The temporality operative in this instance is a 'fabulous retroactivity' that destabilizes two linguistic registers.

To trace the ways in which the 'performative-constative masquerade' is at work here is not to offer a critique of Hong Kong law or Chinese law per se, nor to imply any wilful political deception by the authorities in the case.[48] Staging, disguise and masquerade – in short, elements of theatrical performance – are unavoidable in any act of linguistic interpretation undergirding a moment of founding, be it by the signatories and readers of the American Declaration of Independence, the members of the Standing Committee, or the judges of the law courts. In fact, the CFA in *Lau Kong Yung* explicitly makes reference to the common law declaratory theory of judicial decisions, the fiction whereby judges do not create law but merely find it, in its reasoning about the retroactivity of the Standing Committee's interpretations.[49] To underscore that undecidability, or masquerade, is constitutive of the speech acts of law is to make a jurisprudential inquiry into what law is and how law operates as a linguistic product and a process of interpretative reasoning.

This masquerade also takes the form of precedential reasoning in *Leung*. In 'Force of Law: the "Mystical Foundation of Authority"', Derrida famously observes that 'the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force'.[50] To interpret in the institutional context of law, to discern a pre-existing meaning in a legal text by turning to previous cases as common law lawyers are wont to do, is to actively posit and

[48] Ertür, *Spectacles and Specters*, p. 67. [49] *Lau Kong Yung* 758 G.

[50] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 920–1046, 941.

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perpetuate that meaning through acts of interpretation. An interpretative act not only restates meaning, but enforces and amplifies it; that is why the 'interpretative force' is also a 'performative force'. When interpreting the text of the Standing Committee's interpretation of Article 104, the CA cites, and re-cites, the previous cases on the nature of the Standing Committee's interpretation: it refers to its own judgment in the Sixtus Leung and Yau case, which states that the interpretation sets out the true and proper meaning of Article 104 'from day one'.[51] It then gives further force to this reading of the Standing Committee's interpretation by citing the CFA's decision in the same case, in which the Appeal Committee similarly concludes that a Standing Committee interpretation represents 'what the law is and has always been'.[52] By building the foundation of its judgment from these precedent cases, the decisions by the courts in each of these cases restate, constatively, what is already acknowledged as the reality of the Basic Law's meaning since the establishment of Hong Kong as a Special Administrative Region of China, but in doing so, they entrench and amplify that reality performatively, as a legal institution, through a highly visible recourse to a purely legal doctrine, that of *stare decisis*. To think of law as performance is emphatically not to think of it as *merely* performance, but to recognize that a continuous process of quotation, repetition and self-referencing lies at the core of the way it constitutes itself. The drama of common law reasoning here is the process through which the 'foundation' of law, or law's originary moment, becomes indissociable from the 'conservation' of law, or the performance of law as law.[53]

CONCLUSION: PERFORMANCE, THEATRICALITY, ANTI-THEATRICALITY

We are in a position to return to the question at the beginning of this chapter. What does the courts' view of Leung's oath as a theatrical

[51] The *Leung-Yau* case (CA) 53.

[52] *Chief Executive of the HKSAR* v. *President of the Legislative Council* 20 HKCFAR 390 (CFA 1 September 2017) at 35.

[53] Derrida, 'Force of Law', 943.

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performance tell us about the nature and operation of law? In other words, what is the jurisprudential significance of their anti-theatrical stance? The proceedings can be approached as an attempt, whether conscious or unconscious, to establish a relationship of absolute opposition between law on the one hand, and performance on the other. By adopting an anti-theatrical stance, law casts the performance of a man who embraces, and indeed relishes, his own theatricality as a kind of reckless playfulness that is ill suited for the occasion. At the same time, the anti-theatrical language, or the representation of an invalid oath not as an oath that is problematically performed but as one that is performed at all, enables law to represent the legally valid oaths as, by contrast, pure artlessness rather than instances of performance. In *Leung*, the qualities which law accepts and identifies with, such as solemnity, seriousness and sincerity, are framed as non-theatrical. The legal presents itself as synonymous with the absence of theatre. In other words, by representing Leung's performance as having no place in the legal domain, by framing it as little more than theatrics, the courts' anti-theatricality situates theatrical performance as the antithesis of law.

However, as I have argued in the previous sections, performance is in fact an integral part of law, even though law does not acknowledge it to be so. Both law and the man whom law condemns perform. There are two sets of inter-connected performances on each side. Leung's actions can be said to be a show that deliberately seeks to entertain, shock and even scandalize his audience. At the same time, they enact a form of advocacy and therefore 'perform' in Austin's sense of the word, as a set of utterances and bodily gestures which aim to bring into being a different political and constitutional order.

Law's performance can be understood firstly as a form of linguistic theatre that throws into question the division between the constitutive and the performative, and that enacts a Derridean fabulous retroactivity troubling the linear timelines on which legal reasoning depends. It can also be understood as a performance of law *as law*, in the form of a public citation and recitation of legal authorities that gives rise to a continuing and necessary spectacle of a hallowed 'artificial reason'

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that can be traced to Sir Edward Coke, whereby the judgment of law proceeds according to a foundation and logic specific to law itself.[54]

What the clash between (the Leung's) theatricality and (the courts') anti-theatricality in the case ultimately reveals is that the two stances are not only 'proximate' to one another, but 'perilously' so: they point to the fact that performance lies at the core of law as much as it lies at the core of the spectacle which the courts condemn.[55] When law and theatre collide, when they are read across one another, they begin to hum and echo in a way which exposes their common foundation of self-constitution in performance. In this uncanny encounter, the boundary between the two arenas starts to blur, the epistemological distinction between them starts to look less certain and law's performances start to become more visible.

In this light, law's anti-theatricality can be read as the symptom of a disavowal of its own nature as performance: the rejection of theatre constitutes a way for law to displace its gaze from the theatrical dimension of its own reasoning and the fictionality which, as Derrida points out, cannot be dissociated from the undecidability which gives rise to the temporal disjuncture known as fabulous retroactivity.[56] In other words, anti-theatricality can be said to be a way of exteriorizing performance: by aligning performance with a figure held to be lacking in the qualities of sincerity, solemnity and seriousness that define law, the courts suggest that performance cannot logically be part of law. The oath-taking saga in Hong Kong shows how anti-theatricality can be a means through which law expurgates performance from its discursive domain and stages its own formal existence.[57]

[54] The Case of Prohibitions [1607] EWHC J23(KB).

[55] Peters, *Law as Performance*, p. 9. [56] Derrida, 'Declarations of Independence', 10.

[57] The term comes, of course, from Stanley Fish. See *There's No Such Thing as Free Speech . . . And It's a Good Thing, Too* (Oxford: Oxford University Press, 1994), pp. 141–180.

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