

Hong Kong's Transformed Criminal Justice System: Instrument of Fear

*Jerome A. Cohen**

Abstract

This essay demonstrates how recent, comprehensive changes in Hong Kong's criminal justice system have transformed it into an instrument of fear that has understandably intimidated a formerly vibrant society into political silence. An intensive surveillance system now reaches every aspect of society. Aggressive criminal investigation techniques now invade formerly protected freedoms of expression. Aided by reversal of the traditional presumption in favor of bail pending trial, government now punishes people under the new National Security Law (NSL) by detaining them for months or years before cases are finally decided. Recent restrictions on Legal Aid limit prospects for independent criminal defense. Political operatives now decide whether and what types of NSL prosecutions should be brought. Trial by jury has been eliminated for major NSL offenses, and only judges who are deemed politically reliable can adjudicate such trials. Also, appellate judges are under various pressures, and constitutional issues that were

* Jerome A. Cohen, a retired New York University School of Law professor and Faculty Director Emeritus of its US-Asia Law Institute, is Adjunct Senior Fellow for Asia at the Council on Foreign Relations. He formerly served as Associate Dean for international studies, Jeremiah Smith Professor and Director of East Asian Legal Studies at the Harvard Law School and, while practicing international law based in Hong Kong, as Honorary Professor at the Hong Kong University Law School.
Online: <http://publication.ias.sinica.edu.tw/82714022.pdf>.



formerly thought to be the exclusive province of the Hong Kong courts are now dictated by the Standing Committee of China's National People's Congress. Moreover, increasingly, local criminal procedures that do not fall under the NSL are nevertheless being adversely affected by the current obsession with national security. The NSL era's transformation of criminal justice has effectively suppressed popular protests and democratic practices.

KEYWORDS: national security, surveillance, criminal justice, investigation, bail, jury, defense lawyers, prosecutors, judges, Constitutional Law, human rights.

* * * * *

I welcome the decision of Academia Sinica's Law Institute to consider recent developments affecting Hong Kong's changing rule of law and am grateful for the invitation to take part. This topic is surely one of the most important in relations between the People's Republic of China (PRC) and the world's liberal democracies, and, understandably, many people in Taiwan have special interest in Hong Kong's fate.

In the 1984 Joint Declaration between the United Kingdom (UK) and the PRC,¹ and the PRC's 1990 Basic Law for Hong Kong,² the PRC promised that a "high degree of autonomy" would prevail in its Hong Kong Special Administrative Region (SAR). Now that "high degree of autonomy" has systematically been forced to yield to the

1 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 33.

2 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [Basic Law] art. 2 (H.K.).

“comprehensive jurisdiction” over the SAR recently imposed by the PRC central authorities. This was dramatically illustrated by the 2020 enactment of the National Security Law for Hong Kong (NSL)³ and its expansive application by the Hong Kong Government (HKG) under the instructions of the PRC Central Government and the Chinese Communist Party (CCP).

To be sure, even before the NSL's appearance, the HKG, drawing upon the arsenal of potentially repressive measures inherited from the British colonial regime, took many steps seeking to quell the protests of an increasingly restive populace.⁴ And it intensified its resort to those measures, including the pre-NSL criminal process, even after the NSL's implementation in a parallel enforcement policy that constituted a two-pronged offensive against political dissenters. Yet it was the NSL itself, secretly drafted by the PRC's Standing Committee of the National People's Congress without consulting the Hong Kong community and suddenly issued with the impact of a thunderbolt, which profoundly altered the local landscape.

How should we assess these developments? The Law Institute has invited several scholars to contribute their comments, and my hope is that our collective analyses will enhance an accurate understanding of the PRC's “comprehensive jurisdiction” over a helpless, indeed hapless, Hong Kong. We cannot, like some of the prominent defenders of Beijing's policies toward Hong Kong, content ourselves with the assurance of Voltaire's *Candide* that the current situation is indeed “the

³ The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region [hereinafter NSL], (2020) (H.K.).

⁴ See Victoria Tin-bor Hui, *The Bad Birth and Premature Death of “One Country, Two Systems” in Hong Kong*, 2022 ACADEMIA SINICA L.J. (SPECIAL ISSUE) 159 (2022).

best of all possible worlds”. If they are to be minimally persuasive, Beijing’s supporters cannot blithely sweep all the opposition’s chess pieces off the table. Many challenges must be recognized and answered.

My remarks will focus on some of the most salient features of the NSL’s ongoing transformation of the SAR’s criminal justice system. Some CCP supporters claim that the overnight “mute acceptance” of the new NSL regime by Hong Kong people, two million of whom had recently publicly protested against Beijing’s earlier repressive measures, should be attributed to a sudden reassertion of the community’s traditional “obsession with stability and security” more than to the HKG’s increasingly harsh law enforcement in the NSL era.⁵ This alleged startling return to conservative values, and supposed indifference to government and politics, seems far-fetched. Yet most contemporary Hong Kongers, even the many now passionately devoted to democratic values, do remain practical people. Understandably, they see no wisdom in sacrificing themselves to the stigmatization and imprisonment that the NSL, and the many recent prosecutions based on pre-NSL legislation prohibiting “sedition” and “unauthorized assembly”, have inflicted on many of the SAR’S democratic leaders and activists.

The CCP, the NSL agents it sent from the mainland, and its minions in the SAR government promptly demonstrated that the power to arbitrarily deprive people of their personal liberty, as well as their freedoms of expression, is the power to silence a dissatisfied community by destroying the careers, families and civic support systems of the targeted resisters. This is an application of Chairman Mao’s famous

⁵ See Lau Siu-kai, ‘*Color Revolution*’ Ends as Public Support Falters, CHINA DAILY (Oct. 10, 2021), <https://www.chinadailyhk.com/article/242373>.

maxim that “political power grows out of the barrel of a gun”. Beijing’s use of the NSL to manipulate and distort Hong Kong’s post-colonial criminal justice system has imposed the silence of the graveyard on a vibrant people. The fear that arbitrary criminal justice has long created among PRC citizens on the mainland has now been brought to their Hong Kong comrades.⁶

How has this been done? “Comprehensive” is indeed the right word. The entire SAR criminal process has been affected from start to finish. Surveillance — the various methods of police acquisition of information about the activities of Hong Kong residents — has been intensified to an unprecedented degree. The new law permits anyone to make an anonymous phone call to the police accusing others of possible NSL violations.⁷ PRC secret police, who formerly acted unobtrusively and to a limited, albeit ruthless, extent in the SAR, now are authorized to act openly through their newly-established and legally unrestricted Office for Safeguarding National Security.⁸ They not only “guide” and “assist” local police in relevant operations but also conduct their own independent investigations based on their experience managing the system of surveillance and informants that so effectively prevails on the mainland.

Radio, television, newspapers, social media, public meetings, civic groups, advertisements, theater, cinema and art museums are now

6 See Perry Link, *The CCP's Culture of Fear*, N.Y. REV. (Oct. 21, 2021), <https://www.nybooks.com/articles/2021/10/21/chinese-communist-party-ccp-culture-fear>.

7 *Official Launch of National Security Department Reporting Hotline*, HONG KONG POLICE FORCE, https://www.police.gov.hk/ppp_en/03_police_message/nsdrh.html (last visited Nov. 12, 2021).

8 NSL §§ 57-60 (H.K.). See also Donald Clarke, *Hong Kong's National Security Law: An Assessment*, CHINA LEADERSHIP MONITOR (July 13, 2020), <https://www.prcleader.org/clarke>.

scrutinized for possible “anti-patriotic” sentiments that the authorities might decide to brand as violations of one or more of the NSL’s vague prohibitions against secession, subversion, terrorism or collusion with foreign forces.⁹ The risk of criminal punishment has made many people afraid to express themselves, even in private messages on the Internet and telephone, whether local or international. If Hong Kong’s famous film industry were still free, it would soon have sufficient material to make a local sequel to the German movie “The Lives of Others” that so graphically depicted the protean impact of the former Communist East Germany’s infamous secret police, the Stasi.

The local police have been quick to employ the broad powers of criminal investigation authorized by the NSL to oppress a range of civic, human rights and even professional organizations, subjecting them to unreasonable demands in alleged searches for evidence of their suspected, ill-defined offenses.¹⁰ A leading example is the extensive

9 See Michael C. Davis, *Beijing’s National Security Law and the Destruction of the Liberal Constitutional Order in Hong Kong*, 2022 ACADEMIA SINICA L.J. (SPECIAL ISSUE) 21 (2022).

10 For critical analyses of the NSL, see, e.g., LYDIA WONG & THOMAS E. KELLOGG, HONG KONG’S NATIONAL SECURITY LAW: A HUMAN RIGHTS AND RULE OF LAW ANALYSIS, GEORGETOWN CENTER FOR ASIAN LAW (Feb. 2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf>; LYDIA WONG, THOMAS E. KELLOGG & ERIC YANHO LAI, HONG KONG’S NATIONAL SECURITY LAW AND THE RIGHT TO FAIR TRIAL: A GCAL BRIEFING PAPER, GEORGETOWN CENTER FOR ASIAN LAW (June 28, 2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf>; THOMAS E. KELLOGG & ERIC YANHO LAI, THE TONG YING-KIT NSL VERDICT: AN INTERNATIONAL AND COMPARATIVE LAW ANALYSIS, GEORGETOWN CENTER FOR ASIAN LAW (Oct. 20, 2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/10/TongYingKitVerdictGCAL.pdf>; Yu-Jie Chen, *The National Security Law for Hong Kong: Infringements of Hong Kong’s Rule of Law and Human Rights*, 5(4) TAIWAN HUM. RTS. J. 131, 131-158 (2020); Johannes M.M. Chan, *National Security Law 2020 in Hong Kong: One Year On*, 2022 ACADEMIA SINICA L.J. (SPECIAL ISSUE) 39 (2022).

notice sent to leaders of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China (Alliance), well-known for annually organizing the famous mass protests commemorating Beijing's June 4, 1989 massacre near Tiananmen Square. Ostensibly in pursuit of suspected "collusion with foreigners", this demand, which the police reluctantly acknowledged to the public and then only in very general terms, required the Alliance leaders to turn over a broad spectrum of information about its foreign contacts, membership, operations and funding.¹¹ Despite the NSL's assurance that it would not be applied retroactively,¹² the police demand for information was not limited to information accumulated after the new law's promulgation. Presumably the Alliance leaders, in their legal resistance to this demand, will invoke the principle of non-retroactivity. Certainly they should, in addition, assert their privilege against self-incrimination, which the NSL also purports to preserve.¹³

Criminal punishment is certain to follow if, for example, the authorities find evidence of statements as apparently innocuous and ambiguous as "Hong Kong, keep going" (jia you) and decide, in the secret and unreviewable exercise of their discretion, that such statements merit prosecution for a crime such as incitement to subversion or secession. To be sure, Hong Kong's vaunted independent court system,

11 Kenji Kawase, *Hong Kong Police Probe June 4 Vigil Organizer for Foreign Collusion*, NIKKEI ASIA (Aug. 25, 2021), <https://asia.nikkei.com/Spotlight/Hong-Kong-security-law/Hong-Kong-police-probe-June-4-vigil-organizer-for-foreign-collusion>.

12 *Respect Beijing's Right to Protect National Security in Hong Kong, Leader Carrie Lam Tells UN Rights Council*, HONG KONG FREE PRESS (June 30, 2020), <https://hongkongfp.com/2020/06/30/respect-beijings-right-to-protect-national-security-in-hong-kong-leader-carrie-lam-tells-un-rights-council/>.

13 NSL § 4 (H.K.).

despite significant NSL restrictions discussed below, may ultimately conclude that a proper interpretation of the law and the facts requires acquittal of the accused. Yet that result might well not come until several years after arrest. In the interim, most NSL defendants will remain incarcerated, since for NSL prosecutions the new law has replaced the traditional common law rule that favors granting bail in most cases. In its stead there is now what amounts to a prohibition against bail unless NSL defendants can demonstrate that, if granted freedom under bail's constrained conditions, they will not "continue to commit acts endangering national security", a negative that is very difficult to prove.¹⁴

This evidently contradicts Hong Kong's long-standing presumption of innocence and the guarantees in the Basic Law and the International Covenant on Civil and Political Rights (ICCPR) that the NSL purports to respect.¹⁵ It leaves most NSL suspects in jail during the slow processes of completing investigation, considering indictment, preparing for trial and, assuming conviction, undertaking appellate review. Thus most NSL suspects, having been deprived of their physical liberty, their freedoms of expression, and their employment, family and social life while confined for years in unpleasant jail conditions, will suffer devastating harm regardless of their case's eventual outcome. This means that, win or lose, the government succeeds in inflicting severe punishment by merely launching a prosecution. That power has effectively served as a desired official deterrent to many other would-be protesters against dictatorship. This is another respect in which Hong Kong's criminal

¹⁴ NSL § 42 (H.K.).

¹⁵ See Carole J. Petersen, *Hong Kong's First Conviction for Incitement to Secession: What Role for the ICCPR?*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS (Oct. 13, 2021), <https://www.asil.org/insights/volume/25/issue/22>.

justice has drawn closer to that in mainland China, where bail is normally denied to criminal suspects absent special circumstances.

The first thing that a NSL accused, whether or not detained, usually does is to seek to retain qualified defense counsel. Article 35 of the Basic Law guarantees the right to choose one's defense counsel. However, recent HKG changes in the local legal aid system have deprived suspects of that right if, as is often the case, they need legal aid because they cannot afford to pay the costs and fees of the SAR's able but very expensive lawyers. If suspects are eligible for legal aid and wish to take advantage of it, they must now accept counsel assigned by the Legal Aid Department, which, before the change, generally approved their free choice of counsel and paid the bill. As knowledgeable Hong Kong barristers have pointed out, the new legal aid system requiring recipient suspects to accept government-assigned counsel is similar in practice to that often prevailing in mainland China. There, criminal accused who lack the funds or are considered "politically sensitive" are generally denied the right to counsel of their own choosing. In Hong Kong not only many NSL defendants, but also many of the 2,600 people currently being prosecuted for pre-NSL offenses allegedly committed during the anti-extradition protests of 2019, will have no choice but to accept whatever lawyers are assigned by the government in the exercise of its discretion.¹⁶

¹⁶ See Selina Cheng, *Legal Aid Reform: Critics Fear Right to Choose Lawyer Will be Undermined but Hong Kong Gov't Advisor Says Plan Will be 'Fairer'*, HONG KONG FREE PRESS (Oct. 25, 2021), <https://hongkongfp.com/2021/10/25/legal-aid-reform-critics-fear-right-to-choose-lawyer-will-be-undermined-but-hong-kong-govt-advisor-says-plan-will-be-fairer>. See also Tim Hamlett, *Legal Aid: Another Respectable Hong Kong Institution Vandalised*, HONG KONG FREE PRESS (Nov. 6, 2021), <https://hongkongfp.com/2021/11/06/legal-aid-another-respectable-hong-kong-institution-vandalised>.

This “reform” inevitably raises doubts about the experience and vigor of the defense lawyers available to Hong Kong criminal defendants who need legal aid. These doubts are increased by other arrangements imposed by the “reform” that encourage the Legal Aid Department to assign counsel who have until now not been very active in undertaking controversial criminal cases. These arrangements appear designed to end the perceived prominence of “the small number of firms and barristers” that have specialized in such cases.¹⁷ There is a clear implication in these new arrangements that pro-establishment lawyers are henceforth likely to be favored in the assignment process.

A leading pro-establishment barrister, Executive Council member Ronny Tong, told the press that the new system will be fairer to those barristers in the Legal Aid roster who have not had a sufficient number of assignments. When asked whether the new system will undermine the rights of the accused, “Tong said they would have to accept what the system allows if they rely on taxpayers’ money. They could pay from their own pocket if they wished to choose”.¹⁸

Thanks to the NSL, there have also been disturbing changes in the prosecutors’ office within the Hong Kong Department of Justice (DoJ). Following arrest, the crucial decisions whether and on what grounds to prosecute NSL cases are not made in accordance with customary DoJ procedures but by a new secret group — the National Security Prosecution Division — that functions within the DoJ but under the

¹⁷ See Cheng, *supra* note 16. See also Bernard Chan, *Hong Kong Needs to Reform Legal Aid System to Prevent Further Abuse and Maintain Its Integrity*, SOUTH CHINA MORNING POST (Nov. 5, 2021), <https://www.scmp.com/comment/opinion/article/3154810/hong-kong-needs-reform-legal-aid-system-prevent-further-abuse-and>.

¹⁸ See Cheng, *supra* note 16.

guidance of the security officials imported from the mainland.¹⁹ Amazingly, this arrangement excludes from the decision-making process the Director of Public Prosecutions (DPP), who serves under the DoJ's Secretary for Justice and is ordinarily the second most important official in the DoJ. It even denies him knowledge of what this powerful group is up to. Consequently, the incumbent Director of Public Prosecutions, David Leung SC, resigned in protest and has been succeeded by a less experienced but reportedly more compliant newcomer.²⁰

A much more widely-noted distortion of Hong Kong's pre-NSL criminal process is the new law's authorization of the Secretary for Justice to deny a jury trial to defendants whose alleged NSL offense is serious enough to warrant trial in the High Court. The NSL broadly defines the circumstances that give the Secretary unreviewable discretion to deprive defendants of this hallowed common law protection. Given the immense unpopularity of the NSL in Hong Kong, the Communist Party plainly fears that some members of any jury might refuse to convict those accused of NSL offenses. Accordingly, in the first NSL prosecution that went to trial the Secretary for Justice eliminated a jury on the authorized ground that this was necessary in order to avoid possible harm to jurors or their families.²¹ This was a claim that she did not offer any facts to support and is a concern that in many jurisdictions is often alleviated by government protection of jurors.

¹⁹ See Clarke, *supra* note 8.

²⁰ Jennifer Creery, *Hong Kong's Director of Public Prosecutions David Leung Resigns over Differences with Justice Secretary*, HONG KONG FREE PRESS (Aug. 3, 2020), <https://hongkongfp.com/2020/08/03/hong-kongs-director-of-public-prosecutions-david-leung-resigns-over-differences-with-justice-secretary>.

²¹ See Petersen, *supra* note 15.

In place of the jury in such NSL prosecutions, three judges are assigned to decide the case. Yet those NSL judges are not chosen from among the large number of available judges by lot, random selection or some other impartial method. They must be selected by the Chief Justice from a secret, small list approved by Hong Kong's Chief Executive, after written agreement with her Beijing advisors.²² This arrangement was obviously designed to exclude judges whom the authorities fear might prove to be too independent to assure the desired outcome. Moreover, appointment of these designated NSL judges is only for an initial one-year term and subject to annual renewal as well as removal at any time for making a statement or engaging in conduct that, in the view of the Chief Executive, "endangers national security".²³ This keeps supposedly independent judges on an embarrassingly short leash. Removal from the list of designated judges following a disappointing decision or a disapproved statement could be damaging to their career and reputation.

The judges in the first two NSL trials concluded vindicated the faith invested in them. In the first case, the court might well have decided that the evidence did not prove beyond a reasonable doubt that the accused, in ramming his motorcycle through barriers and injuring policemen, had violated the NSL as well as the law against reckless driving. The slogans on the banners he displayed were susceptible of several interpretations, as certain witnesses indicated, but the judges chose to adopt the interpretation that they deemed sufficient to warrant NSL conviction and harsher punishment.²⁴ A jury, of course, might well have differed. Moreover, in their opinion justifying their decision, the panel, contrary to

22 NSL §§ 44, 46 (H.K.). *See also* Clarke, *supra* note 8.

23 NSL §§ 44, 46 (H.K.).

24 *See* Petersen, *supra* note 15.

the guarantees in the NSL itself as well as the Joint Declaration and the Basic Law, failed to consider the provisions of the ICCPR that protect the freedoms of expression involved.²⁵ In the second trial, which involved only issues of free speech and was tried in the Magistrate's court, the anointed judge also decided that the imprecise offending language violated the ambiguous and broad NSL provisions beyond a reasonable doubt.²⁶ Again, a jury might well have refused to convict.

Despite the substantial expense of conducting appeals without Legal Aid assistance, I hope that both cases can eventually reach Hong Kong's Court of Final Appeal (CFA) and be argued by counsel of defendant's choice. Yet the NSL regime has placed even high judges under pressures that impinge on their impartiality, as a variety of developments suggest.

First of all, it is unclear whether appellate judges who have not been designated to serve as NSL judges can take part in the consideration of NSL appeals. The NSL appears to preclude their participation.²⁷ Actual court practice to date is unknown due to the non-transparency of procedural details.

Beijing-sponsored Hong Kong newspapers incessantly attack those judges whose decisions displease them and have even reminded the courts that, if they make unacceptable decisions, as regarding NSL bail issues, the new law permits the Beijing-staffed Office for Safeguarding National Security, on its own, to transfer the prosecution from the Hong

²⁵ Hong Kong v. Tong Ying Kit, HCCC 280/2020 (C.F.I. July 27, 2021) (Legal Reference System) (H.K.).

²⁶ Hong Kong v. Ma Chun Man, DCCC 122/2021 (D.C. Oct. 25, 2021) (Legal Reference System) (H.K.).

²⁷ NSL § 44 (H.K.).

Kong legal system to that of the mainland for processing in accordance with the PRC's much more repressive procedures.²⁸ This widely-feared “nuclear option”, which Beijing has wisely not yet exercised, constitutes a sword of Damocles over SAR justice. Its exercise would in effect accomplish the extradition to the mainland that two million Hong Kong protesters successfully resisted in 2019, but without even the limited protection that the proposed extradition process would have provided.

After receiving published criticism, one judge with important administrative responsibilities was moved without explanation to a better-paid but less consequential position.²⁹ The Chief Justice, soon after the NSL's promulgation, openly met with the Chief Executive.³⁰ Their meeting undoubtedly dealt with conventional administrative topics, but failure of the government to confirm the content of their private discussion hardly inspired confidence in judicial independence of political influence.

The career path for judicial promotions is also now firmly in the hands of political powers. The SAR's Chief Secretary, whose duty it is to ensure that only “patriots” administer Hong Kong, is also in charge of the judiciary portfolio within the Hong Kong Government. It is his responsibility to table or not to table an individual's name to the Legislative Council for senior judicial appointment. There is nothing to

28 NSL §§ 55-56 (H.K.).

29 Kelly Ho, *Hong Kong Judiciary Dismisses Complaints Against Magistrate over 6 Protest Rulings*, HONG KONG FREE PRESS (Oct. 8, 2020), <https://hongkongfp.com/2020/10/08/hong-kong-judiciary-dismisses-complaints-against-magistrate-over-6-protest-rulings>.

30 Chris Lau, *Hong Kong Leader Carrie Lam Denies Interference Suggestion, After Reportedly Meeting Chief Justice Ahead of Jimmy Lai Hearing*, SOUTH CHINA MORNING POST (Feb. 2, 2021), <https://www.scmp.com/news/hong-kong/politics/article/3120192/hong-kong-leader-carrie-lam-categorically-denies>.

stop him from declining to put forward a name on national security grounds. Hong Kong legal circles have already been rife with reports of the exclusion of highly qualified candidates from judicial appointment because they were deemed too liberal by the pro-Beijing establishment. Maria Yuen, the able wife of the former chief justice, was widely expected to be appointed to the CFA, and David Leung, the recently-resigned director of public prosecutions, was thought to be nominated to the High Court, but they both failed to pass the new political tests. The deliberations of the government-dominated judicial appointments commission are shielded from the public.³¹

Not only judicial promotions and appointments are at stake. The tenure of sitting judges itself is in doubt in various ways. Early on, a distinguished Australian judge resigned from his service as one of the non-permanent foreign judges on the CFA due to concerns about the NSL that he declined to articulate.³² Furthermore, it is far from clear what role, if any, the remaining non-permanent foreign judges on the CFA will be allowed to play in reviewing NSL convictions.³³ Have they been designated among the “safe” NSL judges? In these circumstances one has to wonder how free Hong Kong’s higher judges feel in interpreting the ambiguous complexities of the NSL that cry out for restrained clarification in deference to civil liberties and their obligations under the ICCPR.

31 Judicial Officers Recommendation Commission Ordinance, (2015) Cap. 92, 4, § 3 (H.K.).

32 Greg Torode & Swati Pandey, *Australian Judge Quits Hong Kong Court, Citing National Security Law*, REUTERS (Sept. 18, 2020), <https://www.reuters.com/article/us-hongkong-security-judges-idUSKBN26912R>.

33 Dennis W. H. Kwok & Elizabeth Donkervoort, *The Risks for International Business under the Hong Kong National Security Law*, ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION (July 2021), <https://ash.harvard.edu/publications/risks-international-business-under-hong-kong-national-security-law>.

Even more serious is the recent weaponization of the oath-taking system established through the interpretation of Article 104 of the Basic Law and the adoption of the principle that “only patriots can administer Hong Kong”. All public office holders including all judges are required to take the oath of loyalty to the SAR. Those who, after a summary process, may be found to have broken that oath will have no recourse and will bear the consequences, including a clawback of their salaries and loss of their pensions. This has not yet happened but, as one knowledgeable recent participant in Hong Kong political-legal affairs remarked to me: “If I put a loaded gun to your head, I don’t need to pull the trigger to send a message”!

Moreover, the scope of independent judicial adjudication has shrunk. Contrary to the expectations generated among many observers by the Joint Declaration and the Basic Law, even the CFA lacks the final power to overturn NSL convictions on the ground that the constitutional rights of the accused have been violated. Even before promulgation of the NSL, the Standing Committee of the National People’s Congress made it clear that ultimate constitutional determinations are its exclusive prerogative, and the NSL confirmed this.³⁴ Thus Hong Kong NSL defendants cannot hope for final vindication of their constitutional claims by an independent judiciary, since that possibility has been eliminated.

Most of the above adverse changes to Hong Kong’s criminal justice system are the direct result of the NSL regime. At the same time, numerous adverse changes are also taking place as an indirect result of the new regime. Various examples are beginning to accumulate. Not

³⁴ NSL § 65 (H.K.).

long after the NSL's promulgation, a Hong Kong court, when dealing with the bail application of the suspect in a prosecution for violation of the local pre-NSL anti-sedition legislation, denied bail by explicitly applying the NSL's presumption against bail rather than the traditional common law standard.³⁵

Recent legislation overwhelmingly adopted by Hong Kong's Legislative Council, now purged of effective democratic opposition, has also endorsed some alarming changes in criminal procedure. An amendment to the city's censorship regime authorizes censorship agency inspectors, who are not police, to enter and search premises without a warrant when trying to halt an unauthorized film screening if it is "not reasonably practical to obtain a warrant".³⁶ More astonishing is the new amendment to The Personal Data (Privacy) Ordinance that empowers the Privacy Commissioner for Personal Data to initiate and conduct a criminal investigation on his own, again without involving the police, in assessing whether the new crime of disclosing personal data without consent, with an intent to inflict psychological harm, may have been committed. It also permits the Privacy Commissioner to access any electronic device without a warrant "under urgent circumstances". Moreover, the amendment even authorizes the Privacy Commissioner to initiate prosecutions without consulting the Department of Justice!³⁷

³⁵ Hong Kong v. Tam Tak Chi, DCCC 927, 928 & 930/2020 (D.C. Apr. 9, 2021) (Legal Reference System) (H.K.).

³⁶ Film Censorship Ordinance, (2021) Cap. 392, 8-14, § 23(3C)(b) (H.K.). *See also* Kelly Ho, *Hong Kong Passes Bill to Censor Films 'Contrary' to China's National Security — HK\$1m Fine, 3 Years in Jail for Offenders*, HONG KONG FREE PRESS (Oct. 27, 2021), <https://hongkongfp.com/2021/10/27/hong-kong-passes-bill-to-censor-films-contrary-to-chinas-national-security-hk1m-fine-3-years-jail-for-offenders>.

³⁷ Personal Data (Privacy) Ordinance, (2021) Cap. 486, 9-10, 9A-2, §§ 64C, 66D-I (H.K.).

One could go on with an even lengthier account of the many ways that the NSL era has transformed Hong Kong criminal justice. Yet enough has been said to demonstrate that the silence that has prevailed over the previously hyperactive Hong Kong political community since the NSL's enactment cannot largely be attributed to a sudden preference for its traditional preoccupation with stability and security. People now in fear want to avoid arbitrary punishment. The NSL era's transformation of criminal justice is proving effective.

References

- Chan, Johannes M.M. 2022. National Security Law 2020 in Hong Kong: One Year On. *Academia Sinica Law Journal* 2022 Special Issue:39-101.
- Chen, Yu-Jie. 2020. The National Security Law for Hong Kong: Infringements of Hong Kong's Rule of Law and Human Rights. *Taiwan Human Rights Journal* 5(4):131-158.
- Clarke, Donald. 2020. Hong Kong's National Security Law: An Assessment. In *China Leadership Monitor*, <https://www.prcleader.org/clarke>.
- Davis, Michael C. 2022. Beijing's National Security Law and the Destruction of the Liberal Constitutional Order in Hong Kong. *Academia Sinica Law Journal* 2022 Special Issue:21-37.
- Hui, Victoria Tin-bor. 2022. The Bad Birth and Premature Death of "One Country, Two Systems" in Hong Kong. *Academia Sinica Law Journal* 2022 Special Issue:159-194.
- Kellogg, Thomas E., and Eric Yanho Lai. 2021. *The Tong Ying-kit NSL Verdict: An International and Comparative Law Analysis*. In *Georgetown Center for Asian Law*, <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/10/TongYingKitVerdictGCAL.pdf>.
- Kwok, Dennis W. H., and Elizabeth Donkervoort. 2021. The Risks for International Business under the Hong Kong National Security Law. In *Ash Center for Democratic Governance and Innovation*, <https://ash.harvard.edu/publications/risks-international-business-under-hong-kong-national-security-law>.
- Link, Perry. 2021. The CCP's Culture of Fear. In *The New York Review*,

<https://www.nybooks.com/articles/2021/10/21/chinese-communist-party-ccp-culture-fear/>.

Petersen, Carole J. 2021. Hong Kong's First Conviction for Incitement to Secession: What Role for the ICCPR?. In *American Society of International Law Insights*, <https://www.asil.org/insights/volume/25/issue/22>.

Wong, Lydia, and Thomas E. Kellogg. 2021. *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*. In *Georgetown Center for Asian Law*, <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf>.

Wong, Lydia, Thomas E. Kellogg, and Eric Yanho Lai. 2021. *Hong Kong's National Security Law and the Right to Fair Trial: A GCAL Briefing Paper*. In *Georgetown Center for Asian Law*, <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf>.