Hong Kong's Changing Rule of Law
Academia Sinica Law Journal
2022 Special Issue, pp. 39-101 (May 2022)

National Security Law 2020 in Hong Kong:*

One Year On

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Abstract

Enacted by the National People's Congress for the HKSAR, the National Security Law (NSL), which came into effect on 30 June 2021, has changed the social, legal and political landscape in Hong Kong in a most pervasive manner. This article examines the constitutional, legal and social impact of the NSL, and how it affects the nature and prospect of the "One Country, Two Systems" constitutional model in the HKSAR. It challenges the *raison d'etre* of enacting the NSL that there is a failure of the HKSAR to discharge its constitutional duty to enact national security law under Article 23 of the Basic Law. Apart from enhancing the protection of national security, it is argued that NSL further serves the dual purposes of implementing of the Mainland Government's conception of "full jurisdiction" over Hong Kong and of containing the judiciary. Sadly, it finds the performance of the judiciary in protecting fundamental rights under the NSL less than encouraging. It concludes that the NSL underlines the Mainland's blueprint of "One Country, Two Systems", the goal of which is to maintain an economic system in Hong Kong that is run by patriots who would not challenge the authority of the

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* I am grateful to Hong Kong University Press for granting permission to reproduce part of my chapter *National Security and Judicial Independence: A Clash of Fundamental Values*, *in* HONG KONG'S NATIONAL SECURITY LAW: RESTORATION AND TRANSFORMATION (Hualing Fu and Michael Hor eds., forthcoming 2022).

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Online: http://publication.iias.sinica.edu.tw/92014022.pdf.

executive government, and who are supported by a compliant legislature and a deferential judiciary. It highlights the room for a responsive judiciary under such constraints, but it argues that the hope of maintaining an independent judiciary is less than optimistic.

KEYWORDS: National Security Law, judicial independence, "One Country, Two Systems", Basic Law Article 23, incitement to secession, designated judges, presumption of bail, right to jury trial.

Contents

The 23rd anniversary of the establishment of the Hong Kong Special Administrative Region (HKSAR) was met with the imposition of the National Security Law (NSL). Enacted by the National People's Congress (NPC) for the HKSAR, the NSL was pushed through the legislative process within a short period of time without any meaningful consultation of the people of Hong Kong, and since its enactment, it has changed the social, legal and political landscape in Hong Kong in a most pervasive manner. This article examines the constitutional, legal and social impact of the NSL, and how it affects the nature and prospect of the "One Country, Two Systems" constitutional model in the HKSAR.

Part I of the article sets out the background leading to the enactment of the NSL. Part II challenges the argument that there is a failure of the HKSAR to discharge its constitutional duty to enact national security law under article 23 of the Basic Law (The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China). Part III identifies three objectives of the NSL. Apart from enhancing the protection of national security, it is argued that NSL further serves the dual purposes of implementing the Mainland Government's conception of "full jurisdiction" over the HKSAR and of containing the judiciary. Part IV examines the case law under the NSL and argues that the performance of the judiciary in protecting fundamental rights under the NSL is less than encouraging. Part V highlights other legal, political and social impact of the NSL. Part VI concludes that the NSL underlines the Mainland's blueprint of "One Country, Two Systems". It is really about "One Country, Two Economic Systems", under which the goal is to maintain an economic system in Hong Kong that is run by patriots who would not challenge the authority of the executive government, and who are supported by a compliant legislature and a deferential judiciary. The article further explores the room for a responsive judiciary under such constraints, but it argues that the hope of maintaining an independent judiciary is less than optimistic.

I. Background Leading to the Enactment of the NSL

Under the One Country, Two Systems constitutional model, the HKSAR is to retain its economic, legal, and social systems. Over the years, with rapid economic development in the Mainland and the extensive interaction of people through business and travel, the legal system is now the only major difference between the two systems. The

difference is ideological in nature. On one side of the border, the common law system is built upon western ideas of liberalism and individualism, with a strong emphasis on protection of fundamental rights and freedoms, which are institutionally protected, among other things, by an independent judiciary. There is strong acceptance of the rule of law, which is built upon an aspiration for democracy and a diverse civil society. On the other side of the border, there is a one-party system which ideologically rejects a separation of powers and expects a compliant judiciary. The function of law is primarily to maintain law and order and to implement state policies rather than to control state power. The interpretation of law, the power of which is vested in a political organ, is a political process that could be determined by expediency rather than an objective analysis undertaken by an independent judiciary that is constrained by the language of the law.

As time passes, these ideological conflicts became intensified. There is a strong social demand in Hong Kong for a faster pace of democratization as well as an active judiciary that is ready and willing to subject executive and legislative acts to judicial scrutiny. The Central Government[1] was skeptical of the democratization movement, worrying that such development would weaken its control over the HKSAR and turn the HKSAR into a subversive base against the sovereign. The former concern has led to repeated assertions since the outbreak of the Occupy Central Movement in 2014 that the Central Government has full power of control over the HKSAR; the latter concern, in light of the deteriorating international relationship with the United States and its allies, has fostered an exaggerated sense of national insecurity. The

1 The term "Central Government" is used generically to include the Central People's Government or the National People's Congress, as the case may be.

response is a clear shift towards One Country in the One Country, Two Systems constitutional model.[2]

The immediate triggering incident is the abortive attempt to enact the Extradition Bill in 2019.[3] Taking advantage of a sensational murder case in Taiwan where the suspect was in Hong Kong, the HKSAR Government claimed that it was necessary to plug a legal loophole as there was no extradition arrangement with Taiwan. Yet instead of focusing on the extradition arrangement with Taiwan, the Extradition Bill allows extradition of Hong Kong residents to the Mainland. This has sparked off the fear of many people of a demolition of the only legal firewall between the two legal systems. The Bill received strong opposition, and when the Government was prepared to rely on its support in the Legislative Council to push through the Bill, protestors stormed the Legislative Council in June 2019 which effectively halted the passage of the Bill. This incident is significant in four respects. First, this was the first time in the history of the HKSAR that public demonstration has turned into violence. Secondly, the success in halting the passage of the Bill convinced the more radical fraction of the protestors that peaceful demonstrations would not be effective. Had it not been the protestors storming the Legislative Council, the Extradition Bill would have become law. In the following months, the community witnessed an increasing number of violent public demonstrations and

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2 For a more detailed discussion, *see* Johannes M.M. Chan, *A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and the Socialist-Leninist Sovereign State*, 72 CURRENT LEGAL PROBS. 85 (2019).

3 For a more detailed discussion, *see* Albert H.Y. Chen, *A Perfect Storm: Hong Kong-China Rendition of Fugitive Offenders, 2019*, 49 HKLJ 419 (2019); Johannes M.M. Chan, *Ten Days that Shock the World: The Rendition Proposal in Hong Kong*, 49 HKLJ 431 (2019); Cora Chan, *Demise of "One Country, Two Systems"? Reflections on the Hong Kong Rendition Sage*, 49 HKLJ 447 (2019).

confrontations. The stubborn refusal of the Government to withdraw the Extradition Bill has also resulted in greater public tolerance of more radical strategies in public demonstrations, and in a way sidelined the moderate voice in the democratic movement. Thirdly, the Extradition Bill has reminded the public of the lack of respect for fundamental rights and the right to fair trial in the criminal justice system in the Mainland. Fourthly, it also brought to the forefront the undemocratic nature of the Legislative Council. The functional constituency system, which is an election among the elites, returns half of the members of the Legislative Council who are largely pro-establishment. Until the 2016 election, the pan-democratic fraction consistently won about 60% of all votes in all elections, yet this gave them only around 30% of all seats in the Legislative Council and rendered them a forever minority. This incident reinforced the demand for the early introduction of a fully elected Legislative Council by universal suffrage, a goal that was promised in the Basic Law.[4]

In the following months, violent confrontations between the police and the protesters escalated. Public transport and businesses were paralysed; public facilities were damaged; there were major incidents of arson and personal attacks. Many Mainland institutions became the targets of attack. In the meantime, while the police were under immense pressure to maintain law and order, there were also numerous reported incidents that the police responded with excessive force and brutality. In October 2019, the Chief Executive in Council invoked emergency power to introduce the Prohibition of Facial Recognition Regulation (the Anti-Mask Regulation), which prohibited the wearing of masks in all public

4 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [hereinafter Basic Law] art. 67 (H.K.).

demonstrations, including peaceful and lawful demonstrations. Twenty-four legislators from the pan-democratic camp soon launched a judicial review to challenge the constitutionality of both the Emergency Regulations Ordinance and the Anti-Mask Regulation. In November 2019, the Court of First Instance held that the Emergency Power Regulations and some parts of the Anti-Mask Law were inconsistent with the Basic Law and hence null and void.[5]

While peace and order were largely restored in the early part of 2020 due to the outbreak of the pandemic, the Central Government took the view that the violent demonstrations were supported, if not instigated, by foreign elements. This period coincided with the strained relationship between China and the United States. The condemnation of the foreign governments against the HKSAR Government for using excessive force against peaceful protesters strengthened the suspicion of the Central Government of foreign interference in the violent protests. It also considered that the matter has gone out of hand of the HKSAR Government and drastic action was required to restore law and order and to protect national security. The NSL was prepared in the spring of 2020. Despite its sweeping nature, it was enacted without any meaningful participation of the people of Hong Kong, let alone that it was published for the first time only after it has come into effect.

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5 Kwok Wing Hang and others v. Chief Executive in Council and another, [2020] 1 H.K.L.R.D. 1 (C.F.I.). The decision was subsequently reversed, partially by the Court of Appeal, [2020] 2 H.K.L.R.D. 771 (C.A.) and entirely by the Court of Final Appeal, (2020) 23 H.K.C.F.A.R. 518 (C.F.A.).

II. Two Fallacies

Article 23 of the Basic Law provides that the HKSAR Government "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." In 2003, the HKSAR Government tried to introduce national security law, but it received strong public opposition.[6] After a million people took to the street and the deflection of the Liberal Party to support the National Security Bill, the Government withdrew the Bill and since then there was no further attempt to introduce national security law. The enactment of the NSL by the NPC is defended on the ground that as the HKSAR has failed to discharge its constitutional duty to enact national security law, it is legitimate and lawful for the Central Government to enact national security law for Hong Kong. This argument involves two assumptions. First, the HKSAR has failed to discharge its constitutional duty under article 23 to protect national security. Second, the NPC could enact national security law without being subject to the constraints in the Basic Law. Both assumptions are doubtful.

On the first assumption, the purpose of article 23 is to impose a duty on the HKSAR to enact law to protect national security, but it does

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6 For a detailed account of the 2003 incident, *see* Carole J. Petersen, *Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003*, *in* NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY 13 (Hualing Fu et al. eds., 2005).

not prescribe the means of implementation, let alone that the only means of implementation is by the enactment of a specific statute on national security. Colonial law did provide for offences against treason and various offences against the Crown, including incitement to mutiny and seditious publication.[7] Upon the change of sovereignty, the Interpretation and General Clauses Ordinance was amended by the Hong Kong Reunification Ordinance so that section 2A(1) of the Interpretation and General Clauses Ordinance states that "all laws previously in force shall be construed with such modifications, adaptations, interpretations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administration Region of the People's Republic of China." In particular, Schedule 8 of the Ordinance expressly provides that "any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision… (b) involves affairs for which the Central People's Government of the People's Republic of China has responsibility; (c) involves the relationship between the Central Authorities and the Hong Kong Special Administrative Region, shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China."[8] Thus, in one stroke, the offences against the Crown in the Crimes Ordinance were amended to become offences against the Central People's Government.[9] The Public Order Ordinance and the Societies Ordinance

7 Crimes Ordinance, (2021) Cap. 200, Parts I and II (H.K.).

8 Interpretation and General Clauses Ordinance, (2021) Cap. 1, § 2A(3) and Schedule 8 (H.K.).

9 It is unfortunate that the Department of Justice did not update the relevant statutes with this general amendment and hence it gives a misleading impression that the relevant law is still directed at the British Crown.

were also amended to repeal the liberal amendments that were introduced by the colonial Government shortly before 1997.[10] The Official Secrets Ordinance prohibited espionage and unlawful disclosure, including the offence of spying.[11] Part III of the Ordinance prohibits unlawful disclosure of security and intelligence information, which includes damaging disclosure of information relating to defence,[12] international relations,[13] commission of offences and criminal investigation,[14] as well as information resulting from spying[15] and entrusted in confidence to territories, States or international organizations.[16] Disclosure of information relating to defence is damaging if the disclosure "endangers the interest of the People's Republic of China or Hong Kong elsewhere, seriously obstructs the promotion or protection by the People Republic of China (PRC) or Hong Kong of those interests or endangers the safety of Chinese nationals or Hong Kong permanent residents elsewhere."[17] It has been said that the existing law does not cover secession and subversion. Yet it is difficult to

10 The amendments to the Public Order Ordinance in 1995 and the Societies Ordinance in 1992 that liberalised respectively the control on public assemblies and societies were among the law that the NPCSC decided as inconsistent with the Basic Law: Decision of the NPCSC Concerning the Handling of the Laws Previously in Force in Hong Kong in accordance with article 160 of the Basic Law of the HKSAR of the PRC (Adopted at the 24th Meeting of the Standing Committee of the 8th NPC on Feb. 23, 1997: HK Constitutional Instrument A206.) The pre-amended Public Order Ordinance and the Societies Ordinance were brought back to force by the Provisional Legislative Council in 1997.

11 Official Secrets Ordinance, (2020) Cap. 521, § 3 (H.K.).

12 *Id.* § 15.

13 *Id.* § 16.

14 *Id.* § 17.

15 *Id.* § 19.

16 *Id.* § 20.

17 Official Secrets Ordinance, (2020) Cap. 521, § 15(2) (H.K.), as modified by Interpretation and General Clauses Ordinance, (2021) Cap. 1, § 2A(3) and Schedule 8 (H.K.).

see why they are not included in the treasonable offences, which include, reading in light of section 2A(1) and Schedule 8 of the Interpretation and General Clauses Ordinance, any overt act or publication with intention to dispose the Central People's Government of the People's Republic of China.[18] These amendments put it beyond doubt that the HKSAR Government has amended existing laws to protect national security of the People's Republic of China pursuant to its constitutional duties under article 23 of the Basic Law.

Nor is there any evidence to suggest that these laws are inadequate to protect national security.[19] The evidence is, indeed, quite the contrary. The Secretary for Security has the power to prohibit the operation of a society if he reasonably believes that its prohibition is necessary in the interests of national security or public safety, or if the society is a political body that has a connection with a foreign political organization or a political organization in Taiwan.[20] The Hong Kong National Party, which advocated the independence of Hong Kong, was declared an unlawful society under the Societies Ordinance, and as a result, any office bearer, any person managing or assisting in the management,[21] and any person providing financial or other aids to the unlawful society[22] commits an offence. In *HKSAR v. Tam Tak Chi*,[23] the

18 Crimes Ordinance, (2021) Cap. 200, § 3 (H.K.). Note also the broadly defined sedition offence in §§ 9 and 10, which are also wide enough to cover secession or subversion.

19 It was suggested that these colonial laws may not pass muster the Bill of Rights or the Basic Law. This is a weird argument, as it boils down to this: as the colonial laws may violate the Bill of Rights, the solution is to adopt even more draconian law and exclude any scrutiny from the Bill of Rights and the Basic Law.

20 Societies Ordinance, (2021) Cap. 151, § 8(1) and (3) (H.K.).

21 *Id.* § 19.

22 *Id.* § 20(1).

23 Candice Chau, *Hong Kong Democrat Tam Tak-chi Faces 13 Months on Remand as*

defendant was charged with uttering seditious words contrary to section 10 of the Crimes Ordinance for chanting various slogans in public. In July 2021, five members of a pro-democracy Hong Kong union that published children's books about sheep trying to hold back wolves from their village were arrested for sedition.[24] Since the outbreak of the social unrest in 2019, over 10,200 protesters have been arrested; among them more than 600 people were already convicted, with 2,521 charged with a variety of offences including rioting and unlawful assembly under the Public Order Ordinance.[25] Those who were convicted of the offences of riot or unlawful assembly have received heavy imprisonment sentences.[26] Many legislators and candidates for election have been

Sedition Trial Suspended until October, HONG KONG FREE PRESS (July 30, 2021), https://hongkongfp.com/2021/07/30/hong-kong-democrat-tam-tak-chi-faces-13-months-on-remand-as-sedition-trial-suspended-until-october/; Mary Hui, *A Law that Once Outlawed Insulting the Queen is Now being Used to Stifle Speech in Hong Kong*, QUARTZ (Sept. 9, 2020), https://qz.com/1901125/hong-kong-uses-colonial-era-sedition-law-to-stifle-speech/.

24 Agence France-Presse, *Five Arrested in Hong Kong for Sedition over Children's Book about Sheep*, THE GUARDIAN (July 22, 2021), https://www.theguardian.com/world/2021/jul/22/five-arrested-in-hong-kong-for-sedition-over-childrens-book-about-sheep.

25 Ng Kang-chung, *Hong Kong Protests: More than 10,200 Arrested in Connection with Unrest since 2019, Government Tells Lawmakers*, SOUTH CHINA MORNING POST (Apr. 9, 2021), https://www.scmp.com/news/hong-kong/politics/article/3128836/hong-kong-protests-more-10200-arrested-connection-unrest.

26 *See*, for example, Brain Wong, *Hong Kong Protests: Four Jailed for Up to 56 Months over National Day Riot, Judge Says Non-Violent Participants at Scene Share Culpability*, SOUTH CHINA MORNING POST (May 5, 2021), https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3132366/hong-kong-protests-four-jailed-56-months-over; Helen Davidson & Agencies, *Hong Kong Court Jails Three on Riot Charges Despite No Evidence of Rioting*, THE GUARDIAN (May 6, 2021), https://www.theguardian.com/world/2021/may/06/hong-kong-court-jails-riot-charges-joshua-wong-tiananmen-vigil-protest; Jennifer Jett & Austin Ramzy, *From Protester to Prisoner: How Hong Kong Is Stifling Dissent*, N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2021/05/28/world/asia/hong-kong-arrests-court.html; *Hong Kong Activists Jailed for Unauthorised Protest in 2020*, ALJAZEERA (Oct. 16, 2021), https://www.aljazeera.com/news/2021/10/16/seven-hong-kong-activists-jailed-over-unauthorised-protest-in-2020.

disqualified for failing to meet the oath requirement of upholding the Basic Law and swearing allegiance to the HKSAR.[27] Indeed, the fact that there is no incident suggesting national security has been compromised in the last twenty-three years is already the best evidence that there are sufficient laws in Hong Kong to protect national security!

Thus, it is patently wrong to suggest that the HKSAR has failed to discharge its constitutional duties to protect national security under article 23. Amendments to pre-existing laws were made to protect national security of the sovereign since the changeover. It must be within the autonomy of the HKSAR to decide how best to implement article 23. Whether these legislative amendments are adequate to protect national security is a different question. It must be fundamental to the maintenance of two systems that the Central Government would not make law for Hong Kong except in clearly defined exceptional circumstances. It would be a dangerous proposition that the Central Government could intervene and make law for Hong Kong on a bare allegation that the efforts of the HKSAR Government are inadequate, as this could apply to any area of law and would effectively take away the

27 A number of disqualified legislators/candidates challenged the decision of disqualification, but most challenges were unsuccessful. *See*, for example, Chan Ho Tin v. Lo Ying Ki Alan and others, [2018] 2 H.K.L.R.D. 7 (C.F.I.); Chow Ting v. Teng Yu Yan Anne (Returning Officer for the Hong Kong Island Geographical Constituency) and another, [2019] 4 H.K.L.R.D. 459 (C.F.I.); Chan Tak Cheung and another v. Electoral Affairs Commission, HCAL 134/2016 (C.F.I. Dec. 7, 2018) (Legal Reference System) (H.K.); Secretary for Justice v. Leung Kwok Hung, CACV 200/2017 (C.F.A. Feb. 15, 2019) (Legal Reference System) (H.K.); Wong Tai Hoi v. Au Nok Hin and another, [2018] 2 H.K.L.R.D. 789 (C.F.I.); Yau Wai Ching v. Chief Executive of the HKSAR, Secretary for Justice, (2017) 20 H.K.C.F.A.R. 390 (C.F.A.); Chief Executive of the HKSAR and another v. President of the Legislative Council, [2017] 4 H.K.L.R.D. 115 (C.F.I.). *See also* Benny Tai, *Round Three of Hong Kong's Constitutional Game: From Semi-Democracy to Semi-Authoritarianism*, 49 HKLJ 335 (2019).

legislative autonomy of the HKSAR.

Even assuming that the HKSAR has to enact a specific law on national security and has failed to do so, it does not necessarily follow that the Central Government could then enact law for the HKSAR. Article 23 provides that HKSAR shall enact national security law "on its own". This phrase was inserted to allay the fear of the people of Hong Kong of the application of anti-revolutionary law of the Mainland to Hong Kong. While anti-revolutionary crime has been repealed on the Mainland, the fear of Hong Kong people, namely the fear of an extension of arbitrary and draconian political offences on the Mainland to the HKSAR, remains the same, as witnessed by the strong public reaction to the proposed Extradition Bill in 2019. While it is recognized that the HKSAR has a duty to protect national security, the phrase "on its own" in article 23 ensures that this is done within the confines of common law tradition and principles so that there would be a proper balance between protection of national security and fundamental rights. Hence, the phrase "on its own" serves two purposes. First, it serves as a procedural restriction on the residual power of the Central Government to enact law on national defence. While it is not in dispute that the Central Government must have a power to enact law on national defence for the HKSAR, this power is of a residual nature and should not be exercised as long as article 23 delegates the power to enact national security law to the HKSAR. If the Central Government is to exercise this residual power, it should first amend article 23 by repealing the phrase "on its own".

The argument that the Central Government has a concurrent power to enact national security law for the HKSAR at any time is not persuasive. Firstly, this argument is not supported by the drafting history

and would render the phrase "on its own" practically redundant and meaningless. It could not have allayed the fear of the Hong Kong people if the Central Government retained a concurrent power that could be exercised at any time as it decided. It would be highly doubtful that the Sino-British Joint Declaration or the Basic Law would be acceptable to the people of Hong Kong if this had been made clear to them at the time of the promulgation of the Joint Declaration or the drafting of the Basic Law. Secondly, this phrase also imposes a restriction on the substantive content of any national security law that is to apply to Hong Kong. The law should be consistent with the core values of the common law system, including the principle of legality and proportionality. The law should not be so vague that its effect is not reasonably foreseeable, and there should be a proper balance between the protection of national security and respect for fundamental rights. In enacting the NSL for the HKSAR, the Central Government simply side-stepped the restriction in article 23 as if it were not binding on the Central Government. The very concept of the rule of law requires a government to abide by its own law which, unfortunately, is not a view that is taken seriously, if at all, by the Central Government.

III. Three Main Purposes of the NSL and the Distrust of the Judiciary

The NSL is the only piece of legislation that was drafted by the NPC for the HKSAR without any meaningful participation of the people of Hong Kong.[28] It serves three main purposes. The first purpose is to

28 The Basic Law was drafted with substantial participation of the people of Hong Kong.

introduce a range of national security offences to the HKSAR.[29] It creates four main categories of offences: secession, subversion, terrorist activities, and collusion with a foreign country or external elements to endanger national security. Unlike the common law tradition of legislative drafting, these offences are vague and sweeping, and backed up by heavy mandatory minimum sentences. Unlike the offence of subversion, the offence of secession can be committed "whether or not by force or threat of force."[30] A person could also be guilty of inciting others to commit the offence of secession, which could be based on a verbal and peaceful act without any action.[31]

The second purpose is to implement the Mainland conception of "full jurisdiction" (全面管治) over the HKSAR. While article 23 of the Basic Law envisages that the national security law is to be administered by the HKSAR, new structures are established under the NSL that allow Mainland officials to have a formal and official role in the governance of the HKSAR.[32]

The third purpose is to weaken the judiciary. The Central Government has long been sceptical of the independence of the judiciary. As early as in 2008 when Xi Jinping was still the Vice-Premier of China, he expressed the view during his visit to Hong Kong that the executive, the legislature and the judiciary should mutually accommodate and

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The Garrison Law applied only to the People's Liberation Army stationed in Hong Kong and there were also substantial inputs from Hong Kong.

29 For a general critique of the NSL, *see* Carole J. Petersen, *The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong*, 50 HKLJ 633 (2020).

30 Basic Law art. 20 (H.K.).

31 HKSAR v. Ma Chun Man, DCCC 122/2021 (D.C. Nov. 11, 2021) (Legal Reference System) (H.K.).

32 *See infra* Section III. C.

support one another (互相理解，互相支持).[33] The principle of mutual support was reiterated again in the *White Paper on One Country, Two Systems*, which was issued in June 2014 shortly before the outbreak of the Occupy Central Movement.[34] The *White Paper* treated judges as part of the government administration and required judges, alongside other administrators of the HKSAR, to be patriotic.[35] It underlined the Central Government's dissatisfaction with the judiciary, and foreshadowed the position that the doctrine of separation of powers was the synonym of dominance of the judiciary.[36] The decision of the Standing Committee of the NPC (NPCSC) to make an interpretation on the requirements of a valid oath under article 104 of the Basic Law shortly before the court was to render a judgment on the disqualification of two legislators for failing to take the legislative oath upon assumption of office is the most blatant example of the Mainland's distrust of the Hong Kong judiciary.[37] On 1 September 2020, the Chief Executive

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33 *Xi Jinping 08 Nian Yi Chang Hezuo Linzheng 12 Nian Hou Zhongjie Sanquanfenlilun* (習近平08年已倡「合作」 林鄭12年後終結「三權分立論」), APPLE DAILY (Sept. 1, 2020), https://collection.news/appledaily/articles/K4FXZI4AJZA6XH52CU6ILXKHUY. In refute, the Hong Kong Bar Association pointed out that the judiciary is not part of the executive government.

34 *White Paper on the Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region*, THE STATE COUNCIL THE PEOPLE'S REPUBLIC OF CHINA (June 10, 2014), http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm.

35 *Id*. at Section V(3).

36 The former Chief Justice sought to explain that judges owe only a duty to the law and the requirement of patriotism would be satisfied by taking the judicial oath to faithfully and impartially apply the law: Peter So, *Judges Don't Need to be Patriots, Says Former Top Judge Andrew Li*, SOUTH CHINA MORNING POST (Aug. 15, 2014), https://www.scmp.com/news/hong-kong/article/1573867/judges-dont-need-be-patriots-andrew-li.

37 Chief Executive and Secretary for Justice v. President of Legislative Council, [2016] 6 H.K.C. 417 (C.F.I.); Chief Executive and Secretary for Justice v. President of Legislative Council, [2017] 1 H.K.L.R.D. 460 (C.A.); Yau Wai Ching v. Chief

declared that the constitutional system in Hong Kong was never one of separation of powers. She stated that the three institutions are all accountable to the Central Government under an executive-led system of governance and the three institutions should work together.[38] This was generally perceived to be targeted at the judiciary. Shortly thereafter, Zhang Xiaoming, Deputy Director of Hong Kong and Macau Affairs Office, commented without any details that it was an appropriate time to consider judicial reforms in Hong Kong.[39] This was the first time a senior Chinese government official called for judicial reform in Hong Kong. He further reiterated that patriotism was a legal requirement, and that HKSAR has never practiced separation of powers. In January 2021, the Hon Tam Yiu Chung, the only Hong Kong member on the NPCSC, stated that the court should pay greater respect to the power of the Central Government and the policy-making power of the Executive Government of the HKSAR. It should not "arbitrarily create new law, adopt an elitist attitude in discharging its duties, and excessively inflate its power and its role".[40] The message is clear: the courts have

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Executive of the HKSAR, (2017) 20 H.K.C.F.A.R. 390 (C.F.A.). For a more detailed analysis, *see* Chan, *supra* note 2.

38 Jennifer Creery, *No Separation of Powers in Hong Kong Says Chief Exec. Carrie Lam, Despite Previous Comments from Top Judges*, HONG KONG FREE PRESS (Sept. 1, 2020), https://hongkongfp.com/2020/09/01/no-separation-of-powers-in-hong-kong-says-chief-exec-carrie-lam-despite-previous-comments-from-top-judges/.

39 Tony Cheung & Lilian Cheng, *Beijing Calls for Judicial Reform in Hong Kong, Declaring Patriotism is 'a Legal Requirement Now'*, SOUTH CHINA MORNING POST, (Nov. 17, 2020), https://www.scmp.com/news/hong-kong/politics/article/3110123/top-beijing-official-tells-hong-kong-legal-summit-time-has; *Zhang Xiaoming Yinshu Liexianlun, Shi Shihou Jinxing Sifa Gaige* (張曉明引述烈顯倫　是時候進行司法改革), RTHK (Nov. 17, 2020), https://news.rthk.hk/rthk/ch/component/k2/1560388-20201117.htm.

40 *Tam Yiu Chung: Sifa Gaige Yingdang Yushi Jujin* (譚耀宗：司法改革應當與時俱進), HKTKWW (Jan. 11, 2021), https://www.tkww.hk/a/202101/11/AP5ffc17c5e4b060b720375253.html.

overstepped the acceptable limits.

This theme of distrust of the judiciary is evident in the NSL. While the NSL is to be interpreted by the Hong Kong judiciary,[41] it has imposed various restrictions on the judiciary. These restrictions can be grouped under three board categories: (a) general directives; (b) restrictions removing judicial discretion; and (c) restrictions removing the jurisdiction of the courts altogether.

A. Policy Directives

Article 3 of the NSL provides that the judiciary, alongside the executive authorities and the legislature, shall "effectively prevent, suppress and impose punishment for any act or activities endangering national security in accordance with this Law and other relevant laws." Article 8 further casts this directive as a constitutional duty of the judiciary to "fully enforce this Law and the laws in force in the Region concerning the prevention of, suppression of, and imposition of punishment for acts and activities endangering national security." Such kind of directives is rare in the common law system. To the extent that it requires the judiciary to enforce the law, it is stating the obvious. The duty of the judiciary is to impartially and fairly apply and enforce the law in accordance with evidence. The directive, in contrast, emphasizes the duty to *prevent, suppress, and punish* acts and activities endangering national security, and under article 3, this should be done "effectively." Such policy directive is fairly common in mainland legislation and

41 Art. 45 of the NSL provides that the courts in Hong Kong shall handle proceedings in relation to the prosecution of offenses endangering national security in accordance with the laws of the HKSAR, "unless otherwise provided by this Law."

serves as an overall policy guide to the interpretation of the law.[42] This directive, which reflects the Chinese approach that the judiciary should co-operate with other branches of government, could be seen to set the general tone for the interpretation of the NSL — to err on the strict side in the interpretation of the NSL. While it is unlikely that the judiciary would convict without sufficient evidence and the long-term impact of such directives remains to be seen, the case law so far suggested that the courts are ready to take an expansive interpretation of national security offences at the expense of fundamental rights, as well as a greater readiness to impose a harsh sentence upon conviction of public order offenses after the coming into force of the NSL.[43] Another implication of the expressed duty to enforce the NSL is that it may serve as an injunction to the judiciary to challenge the constitutionality of NSL. It cannot enforce the NSL "effectively" by declaring its provisions unconstitutional.

B. Restrictions on Judicial Discretion

The second category of restrictions imposes restrictions on judicial discretion. Article 42 provides that "no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for

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42 A similar policy directive appears in the National Anthem Ordinance, which is to implement the PRC National Anthem Law.

43 For bail cases, *see infra*. For public order offenses, *see* HKSAR v. Wong Chi Fung, [2018] 2 H.K.L.R.D 657; HKSAR v. Wong Chi Fung and others, WKCC2289/2020 (D.C. Dec. 2, 2020) (Legal Reference System) (H.K.), where the court adopted the sentencing guidelines for violent behaviour in public assembly and applied them to a public assembly with no violence; appeal by Chow Ting was dismissed, *see Agnes Chow's Jail Sentence Serves as "Warning to Others", High Court Says*, THE STANDARD (Dec. 16, 2020), https://www.thestandard.com.hk/breaking-news/section/4/161282/Agnes-Chow's-jail-sentence-serves-as-%22warning-to-others%22,-High-Court-says. *See also* HKSAR v. Chow Nok Hang, (2013) 16 H.K.C.F.A.R. 937 (C.F.A.), paras. 38-40.

believing that the criminal suspect or defendant will not continue to commit acts endangering national security." It purports to restrict judicial discretion over the granting of bail. This article will be considered in more details in the next section. Suffice to point out that only a handful of defendants charged with national security offenses have been granted bail. A lengthy pre-trial detention has a strong chilling effect, and the readiness to deny bail encourages police practice of arbitrary arrest and prosecution, especially when the police seem to have adopted an extremely broad meaning of national security in enforcing the NSL.

Article 46 provides that in criminal trials before the High Court, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of state secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. These are extremely broad grounds. Jury has been considered as "the bulwark of liberty" in the common law system and is regarded as particularly valuable in trials of offenses of a political nature.[44] Despite the shortcomings of the jury system, it is particular significant in political trials when the conviction has to rest on the conscience of the general public. Public abhorrence to oppressive prosecution or draconian law may serve as an ultimate safeguard for liberty.[45] While the Secretary for Justice already controls the availability of a jury trial by controlling the venue of trial, as there is no jury trial at the District Court, article 46 gives the Secretary for Justice a further power to remove jury trials from

44 *See*, for example, the well-known *Ponting* case and PATRICK DEVLIN, TRIAL BY JURY 160-61 (1956).

45 Although there are studies suggesting that Hong Kong jury tends to be more conviction-minded than a single judge, these studies are dated and do not cover politically sensitive prosecution.

High Court criminal trials. Once the Secretary for Justice has issued the certificate, the case shall be tried by a panel of three judges, thus ensuring that no defendant could be acquitted once they come within the letters of the NSL.

Article 47 provides that the courts shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves state secrets when such questions arise in the course of adjudication, and the certificate is binding on the courts. Under article 19 of the Basic Law, there is a similar requirement that the courts shall obtain a certificate from the Chief Executive on questions of facts concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases, and such a certificate is likewise binding on the courts. This is to a large extent an echo of the common law evidential principles of fact of state. Article 47 of the NSL goes far beyond article 19 of the Basic Law or the common law principle in that, first, national security is a much wider concept than defence and foreign affairs; secondly, article 47 is not confined to questions of evidence but also the legal definition of whether an act involves national security. It goes beyond the common law principle governing acts of state under which it is for the court to determine whether certain act amounts to an act of state, and the court will have no jurisdiction after it has determined that the issues before the court involves an act of state.[46] In contrast, article 47 deprives the court of the power to determine, as a matter of law, whether any act involves

46 *See* Mohammed and others v. Ministry of Defence and another [2017] 2 WLR 287 (UKSC) (appeal taken from Eng.). For a more detailed discussion on acts of state, *see* Johannes M.M. Chan, *Maintaining Institutional Strength: The Court, the Act of State and the Rule of Law*, *in* CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW? 251 (Cora Chan & Fiona de Londras eds., 2020).

national security. This is particularly worrying as some of the offenses in the NSL are broadly worded to cover mere speeches without any action, and such certificate may pre-empt any determination of the causal relationship and effect between an act and national security, leaving the courts to decide only the narrow factual questions whether the act has taken place and by whom. Such an interpretation will drastically reduce the scope of judicial determination in criminal proceedings. While a robust court could reject such an interpretation as the determination of cause and effect must form part and parcel of judicial determination, the power of final interpretation of article 47, and indeed the entire NSL, rests not with the courts, but with the NPCSC.[47]

The most glaring restriction on the judiciary lies in article 44, which empowers the Chief Executive to designate judges to handle cases concerning offenses endangering national security. The designation shall be for one year only, subject to renewal. It sends a worrying message that some judges are preferred by the government, and the Chief Justice is not to be trusted to assign the right judge to handle national security cases. Article 44 expressly states that no judge shall be designated, or if designated, a judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office. While it is certainly inappropriate for a judge to express his personal view on a social or political event such that he may be perceived to be biased in discharging his judicial duties, these are matters that could be dealt with adequately by the judiciary. Article 44 is at best unnecessary as it is already a constitutional requirement for any judge to be impartial in discharging his or her judicial duties and is

47 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region [hereinafter NSL], (2020), § 65 (H.K.).

at worst an exercise of discipline by the executive government over the judiciary. Under article 44, "statement or behavior endangering national security" is far broader than "giving an impression of being bias," and could easily be interpreted to mean a disapproval of the judge's decision in a particular case, such as a decision to acquit a defendant which the Central Government considers plainly guilty. While there are established mechanisms to address judicial bias within the judiciary, it is, under article 44, for the Chief Executive to decide if the statement or behaviour of the judge concerned amounts to an act endangering national security, and the removal from the designation list could serve as a form of summary discipline on the judge.[48] In *HKSAR v. Tong Ying Kit*, the court rejected a challenge against article 44 as ludicrous,[49] suggesting that a professional judge would not lose his independence or impartiality merely because he was designated to handle national security cases. While this is no doubt laudable, it does not explain why the Chief Executive should be given a power to designate judges in the first place. Judicial independence means not only actual independence of the judges, but also public confidence in the independence of the judges. In this regard, public perception of independence is as important as actual independence in maintaining the rule of law. It is accepted that there is

48 A worse scenario is that the behaviour of the judge justifying a removal from the designation list could form the basis for a charge of a breach of judicial oath, which under art. 35, could result in the removal of a judge from his office. A judge under this article is treated in the same way as any other public officers. It is unclear how this article is to be reconciled with the procedures for protecting removal of judges under the Basic Law. The designated judge system was heavily criticized by the United Nations (UN) experts: Communique of 6 UN Special Rapporteurs and the Vice-Chairman of the Working Group on Arbitrary Detention to China on NSL, OL CHN 17/2020, (Sept. 1, 2020), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25487.

49 Tong Ying Kit v. HKSAR, [2020] 4 H.K.L.R.D. 382 (C.F.I.), paras. 54, 55, 58, 59, 64.

no reason to doubt the actual independence and impartiality of the designated judges, but the perceived risk that the executive government could temper with judicial independence by removing a judge from the designation list is equally damaging to the maintenance of the rule of law. The public concern is even more justified in the case of magistrates who do not enjoy security of tenure.

The Chief Executive justified this requirement by suggesting that this is no different from designating judges for specialized types of cases such as Admiralty or Family Law and denied that this would interfere with judicial independence as it is still for the Chief Justice to assign designated judges to take charge of national security cases. This is hardly convincing, as it does not explain why a designation system is needed in the first place. There is already a serious problem in listing criminal cases due to a shortage of judges and a large number of prosecutions arising from the confrontations in 2019.[50] The requirement would only aggravate the problem of delay, which is particularly serious given most defendants are denied bail. The designated judge system clearly restricts the discretion of the Chief Justice and allows the Chief Executive to pick judges with similar predisposition. The discretion would be non-existent if only a small number of judges are designated as national security

50 Some of these defendants have their cases listed till 2023 and were denied bail. According to an internal survey of the Hong Kong Bar Association, it is not uncommon to have up to 1-year pre-trial detention: Bar Circular 090/21 (June 22, 2021): For concerns on lengthy pre-trial detention under the National Security Law, *see* Sophie Mak, *From Bail Bans to Solitary Confinement: Concerns about the Treatment of Detained Lawmakers and Protesters #ReleaseMyCandidate*, HONG KONG WATCH (Dec. 20, 2021), https://www.hongkongwatch.org/all-posts/2021/12/20/pol-prisoners-bail-ban; Jennifer Jett & Austin Ramzy, *From Protester to Prisoner: How Hong Kong is Stifling Dissent*, N.Y. TIMES (Sept. 5, 2021), https://www.nytimes.com/2021/05/28/world/asia/hong-kong-arrests-court.html.

judges, which appears to be the case. Ironically, the government refused to disclose the number and the identity of designated judges on the ground of protecting the judges concerned. It would also mean that the removal of designated judges would not be transparent. The refusal to make disclosure is absurd, but the more worrying concern is the cloak of secrecy that is to be imposed on judicial determination when open justice lies at the heart of fair administration of justice.

Article 63 of the NSL imposes on judges and lawyers a duty of confidentiality in handling national security cases. Article 41 allows trial behind closed doors when the trial involves state secrets or public order, a matter that could be certified by the Chief Executive. When these provisions are taken together, the system of designated judges could easily lead to the development of a non-transparent political court for national security cases. Examples are abundant in history that such kind of courts is more conducive to achieving injustice than dispensing justice.

C. Ousting the Jurisdiction of the Courts

The third kind of restrictions is to remove the jurisdiction of the courts altogether. Article 12 of the NSL requires the HKSAR to set up a Committee for Safeguarding National Security, which shall be responsible for affairs relating to and assume primary responsibility for safeguarding national security in the Region. This high-power Committee is chaired by the Chief Executive.[51] Its membership includes

51 NSL § 13 (H.K.). Its members include the Chief Secretary for Administration, the Financial Secretary, the Secretary for Justice, the Secretary for Security, the Commissioner of Police, the head of the department for safeguarding national security of the Hong Kong Police Force established under art. 16 of the NSL, the Director of Immigration, the Commissioner of Customs and Excise, and the Director of the Chief Executive's Office. The Secretary-General of the secretariat shall be

the National Security Advisor who shall be designated by the Central People's Government; the head of the national security unit of the Hong Kong Police Force, who shall be appointed by the Chief Executive upon consultation of the Office for Safeguarding National Security of the Central People's Government in the HKSAR (National Security Office); and the Secretary General of the secretariat, who shall be appointed by the Central People's Government upon nomination by the Chief Executive. Their presence ensures strong influence if not also control of the Central Government. Its functions include formulating policies for safeguarding national security in the HKSAR, advancing the development of the legal system and enforcement mechanisms of the Region for safeguarding national security, and coordinating major work and significant operations for safeguarding national security in the HKSAR. These decisions may have major implications for the community and cover many different policies aspects, including education. Indeed, the Education Bureau has since mandated the teaching of national security in primary and secondary school curriculum and is considering introducing a requirement on all teachers to take an oath of allegiance.[52] This is the first time since the establishment of the HKSAR that senior Mainland officials are given an official position in a government body of the HKSAR, let alone a high power body with wide-ranging policy making responsibility. Under article 14, information relating to the work of this Committee shall not

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appointed by the Central People's Government upon nomination by the Chief Executive. It shall also have a National Security Advisor under art. 15, who shall be designated by the Central People's Government.

52 Wu Zhuo An (吳倬安), *Jiaoyuju: Zheng Yanjiu Zizhu Xuexiao Jiaoshi Xuanshi Anpai, Zhiyuan Jiaoshi Jiaodao Youer Renshi Guojia* (教育局：正研究資助學校教師宣誓安排、支援教師教導幼兒認識國家), HK01 (Sept. 1, 2021), https://www.hk01.com/政情/671023/教育局-正研究資助學校教師宣誓安排-支援教師教導幼兒認識國家.

be subject to disclosure, and its decisions shall not be amenable to judicial review.

Article 48 is another worrying provision that could have long-term impact. It establishes the powerful National Security Office, which represents the Central People's Government in Hong Kong.[53] It is an intelligence gathering, an advisory, as well as an executive body with specific powers. Its mandate includes, among other things, collecting and analyzing intelligence and information concerning national security, advising the HKSAR on major strategies and important policies for safeguarding national security, and overseeing, guiding, coordinating with and providing support to the HKSAR in the performance of its duties for safeguarding national security, including approaching ordinary people of Hong Kong. A permanent office will acquire a life of its own, and this is the first time that national security officers of the Mainland are given an official presence to carry out official duties in Hong Kong. A mere visit from the staff of the Office could already pose a threatening effect on the persons visited, such as the family members of a political activist. Its staff are under the direct supervision of the national authorities.[54] While the staff of this Office are required to abide by the

53 This is the fourth official body of the Central People's Government in Hong Kong after the China Liaison Office, the Office of the Commissioner of the Foreign Affairs Ministry, and the Garrison. The relationship among them, and notably between the National Security Office and the China Liaison Office, is rather unclear: *see* NSL § 52 (H.K.). For a critique, *see* Petersen, *supra* note 29.

54 The National Security Office set up its office in Hong Kong within days after the NSL was adopted by the NPCSC. It occupied an entire hotel in Causeway Bay overlooking Victoria Park, the venue for many major public demonstrations and the annual Candle Lights Virgil in commemoration of the 4 June event in Tiananmen Square in 1989. Since then a permanent site has been allocated for the National Security Office.

laws of the HKSAR,[55] article 60 ousts the jurisdiction of the court over the acts performed by the officers of this Office in the course of duty. It is almost unthinkable that a body with power to interfere with the liberty and privacy of the people could operate without being subject to the jurisdiction of the courts.

The most worrying power of the National Security Office is that it may, under three situations, exercise jurisdiction over a case concerning offenses under the NSL.[56] These three situations include: (1) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case; (2) a serious situation occurs where the HKSAR government is unable to effectively enforce the NSL; or (3) a major and imminent threat to national security has occurred. These situations are vaguely defined, and the only safeguard is a requirement to seek the approval of the Central People's Government. The request could be made by either the HKSAR or the National Security Office. There is nothing on the procedure or the standard of scrutiny of such requests. Nor is it likely that the procedure would be transparent. Once the National Security Office exercises jurisdiction, a defendant would be taken out of the jurisdiction of the Hong Kong courts. The National Security Office will initiate investigation into the case (with unspecified powers), and the defendant will be prosecuted and tried by the mainland authorities.[57] This power of the National Security Office poses a serious threat to the integrity of the criminal justice system in the HKSAR, as a defendant who has allegedly committed a crime in Hong Kong could be

55 NSL § 50 (H.K.).
56 *Id.* § 55.
57 *Id.* §§ 56-58.

tried in another jurisdiction and loses all the protection that is afforded to him under the legal system in the HKSAR. Extradition of a fugitive offender from the HKSAR would at least have to go through a judicial process so that a judge is satisfied that a prima facie case has been made out and all the safeguards in an extradition arrangement have been complied with, whereas under article 55, a person could be removed out of jurisdiction physically or legally without any transparent procedure or due process. The Hong Kong courts would have no role to play at all. The dividing line between the two legal systems becomes extremely fragile.

Finally, although the Hong Kong courts would have power to interpret the NSL, the power of final interpretation is vested in the NPCSC.[58] In the mainland legal system, the power of interpretation is a legislative process that can be invoked to fill a gap in existing legislation. It can also be exercised at any time. As in the oath case, the NPCSC can give an interpretation on the issues that the Hong Kong court is to decide in a pending case so as effectively to direct how the Hong Kong court should decide the case.[59] This power is to ensure that the Hong Kong courts could not interpret the NSL in a manner that is unacceptable to the central authorities.

While it is possible to rationalize some of these provisions, their cumulative effect is clearly to undermine the dominance of the judiciary and to keep it under close monitor. Central and comprehensive control is the key. Thus, while article 4 provides that the rights and freedoms

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58 *Id.* § 65.

59 For a comment of the NPCSC's exercise of the power of interpretation, *see* Johannes M.M. Chan, *Reconciliation of the NPCSC's Power of Interpretation of the Basic Law with the Common Law in the HKSAR*, 50 HKLJ 657 (2020).

enshrined under the Basic Law and the International Bills of Rights as applied to Hong Kong shall be protected, it is highly doubtful if the Central Government would tolerate a decision of the HKSAR court to strike down any provision of the NSL for contravening the human rights provisions of the Basic Law or read down any provision in a matter that is not acceptable to the Central Government. There could still be an independent judiciary, but it would have little room to manoeuvre.

IV. Judicial Responses to the NSL

The responses of the judiciary to the NSL are less than encouraging. The Court of Final Appeal has readily accepted the loss of the presumption of bail. By setting up a high standard for granting bail, its decision has resulted in many cases of lengthy pre-trial detention. The Court of Appeal has played down the time-honoured right to jury trial, and the Court of First Instance, in convicting the defendant in the first NSL case, made no reference to the constitutional protection of fundamental rights at all.

A. Loss of the Presumption of Bail

In *HKSAR v. Tong Ying Kit*, the first NSL case,[60] the applicant applied for habeas corpus after he has been refused bail. A Division Bench comprising Chow J (as he then was) and Lee J held that article 42 did not change the existing legal principles on bail. The court emphasized that it is under a duty to protect fundamental rights under the Basic Law and the Bill of Rights, and the provisions of the NSL shall be

60 Tong Ying Kit v. HKSAR, [2020] 4 H.K.L.R.D. 382 (C.F.I.).

construed, as far as reasonably practical, to be consistent with the Basic Law and the ICCPR as applied to Hong Kong.[61] The court further added that it should adopt the common law approach in construing the NSL.[62] Thus, construing article 42(2) of the NSL in light of the presumption of innocence, the Divisional Bench held that article 42(2) merely provided for a specific situation where bail should not be granted and did not impose absolute prohibition or even a presumption against bail.[63] In assessing whether a defendant is likely to continue to commit acts endangering national security, which is a relevant factor in any bail application, the court should resolve any reasonable doubt in favor of the accused person. Thus, the court concluded that while there is a difference of emphasis between section 9G(1) of the Criminal Procedures Ordinance (Cap. 221) and article 42 of the NSL, the impact of article 42 of the NSL is more apparent than real, as the practical application is unlikely to result in a different outcome in a bail application in the vast majority of cases.[64]

This is an enlightening judgment where the court tried to reconcile the NSL with protection of fundamental rights and read down the broad and sweeping provisions of the NSL. These general principles were reiterated in the subsequent bail review of this case. However, bail was eventually refused on consideration of the conventional factors of flight risk and risk of re-offending, although Lee J held that article 42 did contemplate that there would be cases where bail might be granted, if

61 *Id.* at paras. 38-42, 48. The Court also relied on §§ 4 and 5 of the NSL that these rights are to be protected.
62 *Id.* at para. 49.
63 *Id.* at paras. 36, 48.
64 *Id.* at paras. 38-45.

needed be with the imposition of tailor-made conditions.[65]

Lee J provided more details in refusing to grant bail in *HKSAR v. Ma Chun Man*.[66] The defendant was charged with the offence of incitement to secession contrary to articles 21 and 22 of the NSL. The charge was based on nineteen incidents during which he chanted various slogans, including "Hong Kong, the Only Way Out" and "Armed Revolt." The defendant argued, *inter alia*, that there was not a likelihood of conviction or a likelihood of lengthy sentence. On the first point, it was argued that articles 21 and 22 did not criminalize "peaceful advocacy for secessionist ideas," even though the articles expressly state that the offence could be committed "whether or not by force or the threat of force." It was argued that the phrase "not by force" referred to "non-violent acts that are both unlawful and unacceptable such as terrorist acts or other serious unlawful acts."[67] The court rejected that argument as a matter of literal interpretation.[68] While it accepted that articles 21 and 22 have to be interpreted purposely and, as far as reasonably possible, consistently with fundamental rights as protected by the Basic Law and the Bill of Rights, the court emphasized that articles 1 and 12 of the Basic Law, which provide that Hong Kong is an inalienable part of China and is only a special administrative region with a high degree of autonomy, as the foundation of the Basic Law. It also rejected the argument that the offence in articles 21 and 22, taking into account the background of the enactment of the NSL, is indefensible in

65 HKSAR v. Tong Ying Kit, [2020] 4 H.K.L.R.D. 416 (C.F.I.).
66 HKSAR v. Ma Chun Man, HCCP 711/2020 (C.F.I. Dec. 29, 2020) (Legal Reference System) (H.K.).
67 *Id.* at paras. 7, 20.
68 *Id.* at paras. 21-23.

light of the guarantee of freedom of expression.[69] On the likelihood of a lengthy sentence, while the defendant's case is not the most serious of its type, the court indicated that, in light of what was before the court, a custodial sentence of not less than three months was to be expected. While these views are necessarily tentative and do not represent the final view of the court, they appear to be a retraction from the liberal sentiment as expressed in *Tong Ying Kit*. They are indicative that the court is not prepared to read down the offence in articles 21 and 22 or accept that a peaceful advocacy for secession is protected by the right to freedom of expression. It also takes a serious view on a conviction of national security offence where a custodial sentence is to be expected.

Considering these cases, the decision of Lee J in *HKSAR v. Lai Chee Ying* came as a surprise,[70] and as a result it attracted severe criticism from the pro-China quarter. The applicant, a media mogul and supporter of democratic movement in Hong Kong, was initially charged with an offence of fraud and was later charged with an offence of collusion with a foreign country or foreign elements to endanger national security. The fraud offence is nothing more than a breach of a condition of permitted user in a land lease by allowing a secretarial company to use about 50 sq m or 0.13% of the land, which sounds like a civil matter inflating into a criminal charge. The court applied the general principles in bail application and focused on the weight and evidence of the prosecution case. On the fraud charge, the court found that the evidence on the element of deceit and dishonesty were in favor of the defendant.

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69 *Id.* at paras. 25-30. The defendant was eventually convicted and sentenced to imprisonment of 5 years and 9 months.

70 HKSAR v. Lai Chee Ying, HCCP 727/2020 & HCCP 738/2020 (C.F.I. Dec. 29, 2020) (Legal Reference System) (H.K.).

On the national security charge, the charge was primarily based on what the applicant said in some articles, in interviews with various overseas media and in Twitter posts. The court found that these views on their face appeared to be comments and criticisms rather than requests. In light of the relatively weak prosecution case, the court was prepared to grant bail, albeit upon very stringent conditions. Apart from a very substantial cash bail (ten million Hong Kong dollars), the usual reporting obligations and surrender of all travel documents, the applicant was required to stay at his residence at all times (except going to court or to police station for reporting), not allowed to meet with any official of a foreign government, attend or host any interviews or express any views in public, including any form of social media. Effectively he was put under house arrest.

The prosecution appealed to the Court of Final Appeal.[71] At issue was whether the court was right to apply the common law principles to grant bail and the relationship between articles 21 and 22 of the NSL and the ICCPR as applied to Hong Kong, that is, whether *Tong Ying Kit* was rightly decided. This is a fair question of great public importance, and it is right that the Court of Final Appeal should grant leave. However, what is surprising is that the Court of Final Appeal then revoked the bail of the applicant on the ground that since the legal principle that the bail judge has adopted is arguable, the Court would be seen to treat the bail judge's decision as correct by granting bail. This line of reasoning is hardly convincing. First, the reverse is equally true. By revoking bail the Court

71 HKSAR v. Lai Chee Ying, FAMP 1/2020 (C.F.A. Dec. 31, 2020) (Legal Reference System) (H.K.). The Court held that it has no jurisdiction to entertain an appeal on bail, but it has jurisdiction to entertain an appeal on a question of law arising from the bail application.

could be seen to treat the bail judge's decision as incorrect before the Court has a chance to consider the merits of his decision. Secondly, the issue is one of law. It is trite that until a court's decision is reversed by a higher court, the decision of the lower court on law remains the correct interpretation of the law. The mere fact that leave to appeal has been granted does not undermine the authority of the judgment under appeal regarding its interpretation of the law.[72] Thirdly, while it is possible to justify the decision of the Court to preserve the status quo before it has an opportunity to consider what the appropriate bail principles should be, there is no explanation why the very stringent bail conditions or further additional restrictions are insufficient to reduce the risk of absconding. The only consolation is that the Court ordered an expedited hearing of the appeal within a month, but that is not a sufficient reason to deprive someone of his liberty.

The decision of the Court of Final Appeal turned out to be rather disappointing.[73] While the Court held that article 42 of the NSL must be given a meaning and effect compatible with the rights and freedoms and the rule of law under articles 4 and 5 of the NSL, this appears to be nothing more than lip service. The Court readily accepted that the presumption of bail was reversed by article 42 without explaining how the reversal of the presumption of bail would be consistent with the protection of personal liberty and the presumption of innocence under articles 4 and 5 of the NSL. Instead, it introduced a two-stage test: first, the court has to determine whether, on all the evidence available, there is

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72 A v. Director of Immigration, [2008] 4 H.K.L.R.D. 752 (C.A.), para. 8.

73 HKSAR v. Lai Chee Ying, FACC 1/2021 (C.F.A. Feb. 9, 2021) (Legal Reference System) (H.K.). For a more detailed analysis, *see* Johannes M.M. Chan, *Judicial Responses to the National Security Law: HKSAR v Lai Chee Ying*, 51 HKLJ 1 (2021).

any reason to believe that the defendant would not commit any national security offence whilst on bail. This requires the establishment of a negative state of affairs. Bail shall be denied unless this negative state of affairs could be established. It is only when this negative state of affairs is established the court would then consider other factors pertaining to normal bail applications, such as the strength of the prosecution case or the risk of abscond of the defendant. The Court overruled *Tong Ying Kit* and acknowledged that the threshold that it imposed for granting bail was very high. Not surprisingly, very few defendants managed to get bail after this Court of Final Appeal's decision.

There is no legal basis for this two-stage test. The Court of First Instance's approach in *Tong Ying Kit* of giving prominence to the factor of risk of committing national security offence but without excluding the consideration and balancing of this factor against other factors, is equally consistent with the language of article 42 and a better reflection of the right to be presumed innocent under article 5 of the NSL. The purpose of bail is to ensure the appearance of a defendant to face the trial, and not to punish the defendant. It is contrary to the long standing practice that bail consideration should be a holistic process. It is artificial to separate the consideration of bail into two stages, and isolating one factor to the exclusion of other factors in the first stage is unsound in principle. Nor is there any justification to impose a requirement of satisfaction of a negative state of affairs, which would set the standard for granting bail extremely high. There is no consideration of whether such a high standard is appropriate when personal liberty is at stake and when the suspect is presumed innocent, especially when other factors such as the strength of evidence against him are to be excluded in the first stage. The absurdity of the two-stage test is best reflected in the *Lai Chee Ying* case

itself: bail could be denied even when the prosecution case rests on a flimsy evidential basis.[74] The Court of Final Appeal's approach encourages arbitrary arrest and prosecution of an NSL offence, which would create a strong chilling effect irrespective whether the charge would eventually be substantiated. While the Court of Final Appeal has accepted the bail conditions could be taken into account in assessing the risk of the defendant committing national security offences whilst on bail, it does not appear in any subsequent cases that bail conditions are able to tilt the balance.

In *HKSAR v. Tam Tak Chi*,[75] the defendant was charged with seditious uttering under the Crimes Ordinance (Cap. 200) for chanting slogans and distributing leaflets on the street. This charge was laid apparently after the police was advised that there was no case under the NSL.[76] Nonetheless, the prosecution asked for a designated judge to handle the case on the ground that the charge was in the nature of national security and the court applied the same bail principle under the NSL to deny bail. It is difficult to see why a provision in the NSL could be transported to a criminal offence under another Ordinance without any clear statutory indication. The decision seems to be a clear violation

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74 The case was remitted to another judge for consideration. Just the day before the rehearing of the bail application, the prosecution preferred a further charge against Lai Chee Ying to ensure that he would not get bail. Bail was denied by Anthea Pang Po-kam (as she then was): HKSAR v. Lai Chee Ying, HCCP 738/2020 (C.F.I. Feb. 23, 2021) (Legal Reference System) (H.K.).

75 Hui, *supra* note 23.

76 *See* Helen Davidson, *Hong Kong Activist Denied Bail after being Charged with Sedition*, THE GUARDIAN (Sept. 17, 2020), https://www.theguardian.com/world/2020/sep/17/hong-kong-activist-denied-bail-after-being-charge-with-sedition-tam-tak-chi; *See also* the news report by Hong Kong International Business Channel, *Activist Tam Tak-chi Still Might be Charged with National Security law*, FACEBOOK (Dec. 3, 2020), https://www.facebook.com/hkibcnews/posts/1267092566999784.

of the principle of legality,[77] and the court seems to be too ready to go along with the prosecution.

Another noticeable case is the arrest of about 50 activists and former politicians for participation in a primary election in preparation of the election to the Legislative Council scheduled for September 2021, which was subsequently postponed for a year. The organizer aimed at winning a majority in the Legislature and proposed, if elected, to veto major Government bills and the budget to pressurize the Government to speed up the democratic process. Participants in the primary election did not have to agree with that aim. Eventually 46 of them were charged with the offence of secession and only a few were granted bail.[78] The arrest and prosecution were widely perceived to be a major crackdown on the opposition. At the time of writing, the defendants have been detained for over 10 months, and the trial is expected to take place not before 2023.

B. Loss of the Right to Jury

Back to the *Tong Ying Kit* case, the Secretary for Justice applied for a dispensation of the jury trial allegedly on the ground of protection of

77 A v. The Commissioner of the Independent Commission Against Corruption, (2012) 15 H.K.C.F.A.R. 362 (C.F.A.), paras. 68-69. (fundamental rights are not presumed to be taken away or restricted in the absence of clear wording or necessary implication). *See also* Regina v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131, per Lord Hoffmann.

78 One of the organizers, Benny Tai, was already in jail for organizing Occupy Central in 2014. The accused included many well-known activities in the pan-democratic camp. Some were denied bail on the most flimsy basis. For example, Tam, a former legislator, was invited to meet with members of a foreign consulate. He did not reply to the invitation and was prepared to undertake not to meet with any foreign government officials whilst on bail. The court held that the invitation meant that he would be able to commit an offence of collusion with foreign government and bail was denied. The bail application of 46 accused lasted for 4 days, during which most accused were denied food and adequate rest.

jurors and their family members under article 46 of the NSL[79] In an earlier case, given that jury trial is only available at the High Court and that it is for the Secretary for Justice to determine the venue of trials, the Court of Final Appeal held that there was no right to jury trial in Hong Kong.[80] In the *Tong* case, the defendant argued that once the Secretary for Justice has decided to proceed by way of indictment which has to be heard at the High Court, there was a right to jury trial. This was rejected by the Court of First Instance on two grounds.[81] First, the defendant could not waive the right to jury trial at the High Court, and there could not be a right that could not be waived. Secondly, the Court has a power to remit the case back to the District Court, where there is no jury. Hence there could not be a right to jury trial if it could be defeated by transferring the case to the District Court. Neither ground is convincing. One may not waive the right to be killed or the right not to be tortured. It does not follow that he has no right to life or no right not to be tortured. Likewise, the mere fact that a right could be limited, especially when this is done by the court after hearing the parties, does not mean that the right does not exist. Most rights could be restricted. Nonetheless, the judgment was upheld on appeal.[82] Despite the wealth of common law authorities that described the immense value and unique features of jury trial, the Court of Appeal downgraded jury trial to merely a mode of criminal trial that is subject to prosecutorial discretion. What is more worrying is that the Court treated the NSL as a law of constitutional

79 NSL art. 46 allows the Secretary for Justice to issue a certificate to direct a trial without jury on the ground of, inter alia, protection of national secrets, involvement of foreign factors, and protection of jurors and their family members.

80 Chiang Lily v. Secretary for Justice, (2010) 13 H.K.C.F.A.R. 208 (C.F.A.).

81 Tong Ying Kit v. Secretary for Justice, [2021] 2 H.K.L.R.D. 1036 (C.F.I.).

82 Tong Ying Kit v. Secretary for Justice, [2021] 3 H.K.L.R.D. 350 (C.A.).

status and adopted a broad and purposive approach of construction.[83] It is well established that this approach is most apt for construing constitutional rights. By a twist of logic, the Court of Appeal adopted this approach in interpreting, not rights, but restrictions of rights.

The loss of the right to jury trial is of particular significance in this case. The main issue in this case is the meaning of a slogan, which forms the basis of a charge of incitement of others to commit secession. This is an issue that is particularly suitable for jury trial. The Court of Appeal emphasized that the defendant's right to fair trial has not been hampered as he could not argue that he could not have a fair trial under the alternative of a trial by three judges.[84] This argument missed the point. Jury trial is not just to ensure a fair trial, but more importantly, it is to instill a sense of public judgment of what is right and wrong in the criminal justice system, which is of particular significance in a political trial.

C. A verbal offence to commit another verbal offence

The trial of *Tong Ying Kit* took place in June 2021 before a panel of three judges at the Court of First Instance.[85] The facts were largely not in dispute. On 1 July 2020, the defendant rode his motorcycle with a backpack from which a black flag containing a slogan of "Liberate Hong Kong; Revolution of our Times" was hoisted upward and publicly displayed while he drove the motorcycle. He ignored police's attempts to stop him and eventually injured three policemen. He was charged with

83 *Id.* at paras. 34-36.

84 *Id.* at para. 28.

85 HKSAR v. Tong Ying Kit, [2021] 3 H.K.L.R.D. 87 (C.F.I.). I am grateful to Professor Carole Petersen for sharing with me her draft article on *Hong Kong's First Conviction for Incitement to Secession: Is the ICCPR Still a Guide to Statutory Interpretation?*.

two NSL offences of incitement of others with a view to committing secession and carrying out terrorist activities, with an alternative charge of causing grievous bodily harm by dangerous driving.

The argument focused on the meaning of the slogan "Liberate Hong Kong; Revolution of Our Times". Both sides adduced expert evidence. The prosecution expert, a history professor, testified from a historical perspective that the phrase carried a secessionist meaning. This interpretation was disputed by two experts on the defence side, a political scientist and a professor in journalism. Their evidence is that the slogan has to be interpreted in context and carried a multitude of meanings. Different persons may interpret and understand the slogan differently. Without resolving the dispute, the Court held that the slogan was at least capable of carrying a secessionist meaning, and that was sufficient for the offence of an incitement to secession. It also held that the defendant, by choosing to carry out the act on a date of political significance, clearly intended to carry out the act to intimidate the public with a view to pursuing a political agenda. He was convicted of both NSL offences and was sentenced to 9 years' imprisonment.

A surprising feature of the judgment is that it made no reference at all to the constitutional right to freedom of expression. Given that the offence could be committed without the use or the threat of use of force, an offence of incitement to secession is essentially a verbal offence leading to a verbal offence. Such kind of offence should call for the most stringent scrutiny of the court, but no such scrutiny was undertaken by the court. An incitement offence requires the proof that the incitement is to incite someone to do a criminal offence, with the intention that if the other person does as the defendant asks he will commit a criminal

offence.[86] The court applied the common law of incitement and held that it was sufficient for the offence of incitement if the inciting act or word was "capable of referring to a criminal offence." It relied on a few English and New Zealand cases, which were related to the offence of murder, procuring unlawful sexual intercourse, and assaulting a police officer.[87] These were relatively well-defined offences in the common law system. It was reasonably clear in these cases what the inciting messages were and what the incitee was asked to do that would constitute an offence. In contrast, the offence of secession is ill-defined and unknown to the common law system. In the present case, the only evidence in support of the offence of secession is a slogan that could carry a variety of meanings, and the act of incitement was nothing more than displaying the slogan while he was driving in public. It is unclear what the message was that constituted the incitement, or what the incitees were asked to do that was said to constitute the offence of secession. The audience of the incitement is the ordinary member of the public. If the meaning of the slogan can only be ascertained by an expert, how could it incite anyone who is not an expert? And if the experts could not agree among themselves of the meaning, is there not a reasonable doubt that it would be able to incite the public? And what is the public incited to do? The court has asked the wrong question. The right question is not just whether the slogan is capable of carrying a secessionist meaning, but also whether it can be proved beyond reasonable doubt that if an audience understands the incitement and

86 DPP v. Armstrong, [1999] EWHC (QB) 270; HKSAR v. Tai Yiu Ting and others, DCCC480/2017 (D.C. Apr. 9, 2019) (Legal Reference System) (H.K.), para. 75.

87 HKSAR v. Tong Ying Kit, [2021] 3 H.K.L.R.D. 87 (C.F.I.), paras. 17-34. The cases were respectively R v. Most (1881) 7 QBD 244; R. v. M. [2014] EWCA (Crim) 2823; Invicta Plastics Ltd v. Clare [1976] RTR 251; R v. Goldman [2001] EWCA (Crim) 1684; and Young v. Cassells (1914) 33 NZLR 852.

carries out the act as incited it will amount to an offence of secession. There was no evidence of how the incited act was to be carried out. Indeed, there are many different ways of receiving the meaning of the slogan, and even if the audience adopts the secessionist meaning, there are still many different ways of carrying it out, not every way will necessarily amount to a secession act. Without such evidence, there is nothing more than a mere possibility — a possibility that the audience will understand the vague meaning and adopt one of the meanings that is "capable of carrying a secessionist meaning" and then the possibility of carrying out the secessionist meaning in a way that is unlawful. It could hardly be shown that such a standard would be able to satisfy the proportionate requirement for restricting a constitutional right to freedom of expression.

The reasoning is equally weak in relation to the terrorist offence. There is no question that the act amounted to causing serious harm to others by dangerous driving, which the court found unnecessary to deal with. There was little evidence that the act was carried out to intimidate the public. The only evidence in this regard was a driver in a vehicle who witnessed the Defendant's motorcycle crashed into some police officers. Any reasonable person would be frightened in such circumstances, but the fear has nothing to do with the political nature of the act. There was also little evidence that the act caused grave harm to society. The court took the view that a serious challenge to the police would "instill a sense of fear amongst the law-abiding members of the society" that there would be a breakdown of law and order, and thereby "grave harm would certainly be caused to society".[88] This is a rather

88 HKSAR v. Tong Ying Kit, HCCC 280/2020 (C.F.I. July 27, 2021) (Legal Reference System) (H.K.), para. 162.

tenuous argument, as any notorious crime or any attack at the police could be said to have this effect but certainly not all such criminal offences could be regarded as a terrorist act. For a terrorist offence, it would be reasonable to require the harm to society to reach a certain degree of severity and the criminal act to aim at causing harm to at least a considerable segment of society rather than an act of reckless driving causing serious harm to a few police officers. The court also adopted a rather loose meaning of political agenda. Despite the ambiguous meaning of the slogan, the court held that a meaning to recover what was lost and the need for a fundamental change in Hong Kong could equally amount to a political agenda.[89] While such acts could loosely be regarded as political in nature, it is highly doubtful that they could be considered a political agenda for a terrorist offence that could carry a maximum sentence of life imprisonment. Such an offence certainly requires a much more precise and narrower definition, or otherwise any advocacy for reform could run the risk of being a terrorist act if it results in a confrontation with the police. Finally, what exactly is the political agenda, which has to be proved beyond reasonable doubt? Expert evidence was divided on the meaning of the slogan, and this weakness could hardly be remedied by the political significance of the chosen date for the display or the fact that he drove along the road a few times with a view to displaying the slogan.

Tong Ying Kit was followed in *HKSAR v. Ma Chun Man*, the second national security case.[90] The defendant was charged with the offence of inciting others to commit secession under article 21 of the NSL. Unlike

89 *Id.* at para. 165.

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

Tong Ying Kit, Ma's case involved no violence. He was found to be expressing a sincere and heartfelt expression of his beliefs and feelings on multiple occasions. He relied on his freedom of expression, which was rejected by the court on the ground that he clearly ignored the major principle in article 1 of the Basic Law, namely that Hong Kong is an inalienable part of the PRC. This is a disappointingly crude analysis. There is no analysis of the proportionality requirement for a restriction on the constitutional right of freedom of expression. Article 1 of the Basic Law by itself does not prohibit any ideology or political belief. The inalienability or integrity of the nation is to be protected by, *inter alia*, the offence of secession. If the defendant has taken no action to implement his political belief, and has not advocated any action, it is difficult to see what he was inciting others to do. The court stated that the effect of incitement could be imperceptible,[91] but that did not provide an answer to whether preaching his political belief alone, or more accurately, chanting some vague slogans without more, would have the effect of breaking up the country and whether such prohibition would be a proportionate restriction of the right to freedom of expression. While the defendant is not charged with the offence of secession, there has to be some causal link between the incitement and the offence of secession, for otherwise the incitement offence would become a stand alone prohibition on thoughts and beliefs that is characteristic of a totalitarian regime. By failing to consider such causal link, the court is effectively punishing the defendant for holding and expressing his political belief. While the court may not be able to strike down such an offence,[92] it is at least within the court's jurisdiction, if not also the

91 *Id.* at para. 77.
92 *See infra* Section VI.

court's duty, to read down the scope of such sweeping offence.

V. Other Legal, Political and Social Impact of the NSL

Since the NSL came into effect, there has been a hardening of judicial approach towards public order offences. Protesters involved in the social unrest in 2019 were charged with various public order offences and were met with heavy custodial sentences upon conviction.[93] This is so even when the public demonstration was entirely peaceful. In *HKSAR v. Lai Chee Ying*,[94] the defendants were convicted of two offences of participating and organizing an unauthorized assembly. It was not in dispute that the demonstration lasted for only a few hours and was entirely peaceful. The only evidence on organizing an unauthorized assembly was that the defendants agreed to hold the banner at the front of the procession which they knew was unauthorized.[95] The court rejected the defendants' submission that the offence was a disproportionate restriction on the right to peaceful assembly when the procession was entirely peaceful and no violence broke out. They were given a range of custodial sentence between 6 and 18 months, with 3 defendants given a suspended sentence of 2 years. The conviction did not sit well with the well-established jurisprudence

93 For example, 5 ex-Chinese University students were given almost 5 years' imprisonment for the confrontation on the University campus in Nov 2019: Selina Cheng, *5 Hong Kong Ex-Students Sentenced to Nearly 5 Years' Jail for Rioting during 2019 Campus Clashes*, HONG KONG FREE PRESS (Oct. 19, 2021), https://hongkongfp.com/2021/10/19/5-hong-kong-ex-students-sentenced-to-nearly-5-years-jail-for-rioting-during-2019-campus-clashes/.

94 HKSAR v. Lai Chee Ying and others, DCCC 536/2020 (D.C. Apr. 1, 2021) (Legal Reference System) (H.K.).

95 *Id.* at paras. 179-82.

that a peaceful demonstration should not, in principle, be subject to the threat of a criminal sanction, and notably the deprivation of liberty.[96] The mere fact that an assembly was not authorized by the police did not take away the defendants' right to peaceful assembly.

On the political front, 4 pan-democrat legislators were first disqualified from participating in the then scheduled election of Legislative Council in September 2020 for opposing the NSL, and then disqualified from continuing to serve as members of the extended Legislative Council when the election was postponed. This triggered an *en masse* resignation of another 15 legislators from the pan-democrat front, resulting in a Legislative Council virtually without any opposition.[97] In 2021, the Government substantially overhauled the election process. Under the "improved system", the number of directly elected seats was reduced to 20 out of 90 (as opposed to 35 out of 70).[98] A new Election Committee was established which will return 40 candidates.[99] This Committee is also responsible for nomination of candidates.[100] The composition of the Election Committee and

96 *See*, for example, Kudrevičius v. Lithuania, App. No. 37553/05, 62 Eur. H.R. Rep. 34 (2016), para. 146; Gül v. Turkey, App. No. 4870/02, 52 Eur. H.R. Rep. 38 (2011), para. 43; and HKSAR v. Chow Nok Hang, (2013) 16 H.K.C.F.A.R. 837 (C.F.A), para. 43.

97 Cliff Buddle, *Loss of an Opposition in Hong Kong's Legislative Council is a Tragedy for the City*, SOUTH CHINA MORNING POST (Nov. 18, 2020), https://www.scmp.com/comment/opinion/article/3110170/loss-opposition-hong-kongs-legislative-council-tragedy-city; *Hong Kong: Entire Opposition Quits Legislative Council after 4 Pro-Democracy Lawmakers Expelled*, DW (Nov. 11, 2020), https://www.dw.com/en/hong-kong-entire-opposition-quits-legislative-council-after-4-pro-democracy-lawmakers-expelled/a-55559840.

98 Legislative Council Ordinance, (2021) Cap. 542, § 19 (H.K.).

99 *Id.* § 21B.

100 Each candidate requires the nomination of 2-4 members of the Election Committee from each of its 5 sectors: HONG KONG SPECIAL ADMINISTRATIVE REGION IMPROVE ELECTORAL SYSTEM, https://www.cmab.gov.hk/improvement/en/legco-ele/index.html (last visited Oct. 27, 2021)

functional constituencies is redefined to minimize the opportunities of the opposition to get elected. All candidates running for election would be subject to a political screening process to ensure that only patriots could stand for election.[101] The result of the reform is that there would be no significant presence of any opposition, if any at all, at the Legislative Council. At the District Board level, the requirement of all District Board members to take an oath of allegiance and the threat that any member who were disqualified for breach of the oath would be required to repay a substantial sum of over HK$1 Million representing their renumeration and allowances resulted in a large number of resignation of pan-democrat members. By the time the oath requirement came into force, over 230 out of a total of 452 directly elected District Council members had resigned;[102] as a result, more than 11 District Councils were paralysed.[103]

On the civil/social side, within a year of the NSL coming into effect, civic rights organizations, human rights organizations,[104] media

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101 Legislative Council Ordinance, (2021) Cap. 542, § 42A (H.K.). A Candidate Eligibility Review Committee is set up under § 9A of the Chief Executive Election Ordinance (Cap. 569) and its decision on the eligibility of a candidate for the Legislative Council election is not subject to judicial challenge: Legislative Council Ordinance, (2021) Cap. 542, § 3B (H.K.).

102 Jeffie Lam, *Hong Kong's District Councils: With Opposition Members Resigning in Droves as Oath Looms, What Happens Next to These Local Bodies?*, SOUTH CHINA MORNING POST (July 16, 2021), https://www.scmp.com/news/hong-kong/politics/article/3141388/why-are-hong-kongs-district-councillors-resigning-droves.

103 *At Least 11 District Councils Paralyzed after Resignations*, THE STANDARD (Sept. 6, 2021), https://www.thestandard.com.hk/breaking-news/section/4/179924/At-least-11-district-councils-paralyzed-after-resignations.

104 Amnesty International is the latest human rights organisation to join the list: Helen Davidson, *Amnesty International to Close Hong Kong Offices due to National Security Law*, THE GUARDIAN (Oct. 25, 2021), https://www.theguardian.com/world/2021/oct/25/amnesty-international-to-close-hong-kong-offices-due-to-national-security-law.

organizations, professional teachers' unions, labour trade unions, university's students' unions were dissolved or relocated elsewhere one after the other.[105] The Hong Kong's Alliance for the Support of Patriotic Democratic Movements in China, the organization responsible for organizing the annual candlelight vigil in Victoria Park in the last three decades in commemoration of the Tiananmen event in 1989, was investigated for alleged collusion with foreign forces. The Alliance decided to disband itself, and within days, all of its assets were frozen by national security police.[106] The annual candlelight vigil stands as a symbol of political freedom in Hong Kong and attracts tens of thousands of participants each year. This peaceful event was banned for two successive years in 2020 and 2011, allegedly on ground of pandemic control, despite that Hong Kong has an extremely low infection rate by June 2021. Many award-winning current affairs programmes on RTHK, the public broadcaster, were removed or discontinued after a new Director was appointed by the Government. Massive arrest of people suspected of committing NSL offences and the lengthy pre-trial detention have effectively silenced the critics. Even everyday life is affected. Hong Kong Marathon runners were not allowed to bear tattoos or political slogans in their apparel.[107] By September 2021, more than

105 *See* Toru Kurata, *Hong Kong's National Security Law: An Attack on Civil Society*, NIPPON.COM (Sept. 22, 2021), https://www.nippon.com/en/in-depth/d00746/.

106 Cannix Yau & Jasmine Siu, *National Security Police Freeze All Assets of Hong Kong Group behind Annual Tiananmen Vigil*, SOUTH CHINA MORNING POST (Sept. 29, 2021), https://www.scmp.com/news/hong-kong/politics/article/3150594/national-security-police-freeze-all-assets-hong-kong-group; *Hong Kong June 4 Vigil Organizers to Disband Amid Crackdown*, AP NEWS (Sept. 25, 2021), https://apnews.com/article/china-hong-kong-political-activism-democracy-83054fecd10f66751d688403f8cc75d0.

107 Helen Davidson, *Hong Kong Police Tell Marathon Runners to Cover up 'Political' Clothing and Tattoos*, THE GUARDIAN (Oct. 25, 2021), https://www.theguardian.com/world/2021/oct/25/hong-kong-police-tell-marathon-runners-to-cover-up-political-clothing-and-tattoos. The "political" slogans include "Hong Kong Add Oil", a slogan

65,000 Hongkongers have applied to live in the United Kingdom under its new visa scheme that was opened for application on 31 January 2021.

VI. Conclusion

The NSL has been in force in Hong Kong for just over a year. Yet it has changed Hong Kong dramatically. Those who support the NSL say that it is effective in restoring law and order, and that the Central Government has already been quite restrained in enforcing the NSL. They pointed out that the inclusion of articles 4 and 5 on the protection of fundamental rights is unusual in Mainland legislation and represents a compromise between protecting national security and consideration of the special situation of the HKSAR. The Central Government introduced the NSL only as a last resort when the HKSAR has failed to discharge its constitutional duty under article 23 of the Basic Law to enact national security legislation.

It has been argued that the justification for introducing the NSL could not withstand scrutiny. Even if the HKSAR had failed in its constitutional duty, there is no justification why the NSL has to go beyond article 23 of the Basic Law by establishing Mainland enforcement agencies and personnel in the HKSAR and by providing for power to remove a suspect from the jurisdiction of the HKSAR under article 56 of the NSL. These provisions only make sense when the NSL is understood to be a means to enable the Central Government to exercise full control over the governance in the HKSAR. That is, it

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that has been chanted on many sports occasions, presumably because this slogan has been used by the protesters during the social unrest in the last two years.

represents a step to claw back the extent of autonomy of the HKSAR granted under the Basic Law. This is further reinforced by the recent overhaul of the election process. Only patriots would be allowed to stand for election to the Legislative Council. The purposes of the NSL are not just to plug the legal loopholes to protect national security. It is also to implement the Mainland's policy of exercising full jurisdiction over Hong Kong as well as weakening the judiciary, as judicial independence is the only remaining hurdle to the achievement of full jurisdiction over the HKSAR.

The NSL provides an inroad to many fundamental rights, and while it is still too early to make any definite conclusion, the record of the judiciary so far in protecting fundamental rights is less than impressive. Articles 4 and 5 of the NSL are effectively a dead letter. The Court of Final Appeal has not explained how the reversal of the presumption of bail could sit consistently with the protection of fundamental rights under these provisions. The Court of Appeal paid lip service to them in downgrading the right to jury trial to nothing more than a mode of trial that is to be determined by the Secretary for Justice, whose decision could not be challenged short of showing bad faith. The Court of First Instance simply ignored these fundamental rights in convicting the defendant for national security offences in *Tong Ying Kit*, whereas the District Court made only a passing remark to these provisions in *Ma Chun Man.*

What options do the court have?

An obvious option is to challenge the constitutionality of the sweeping offenses in the NSL. It has been argued that this option is precluded by the general duty of the judiciary to enforce the NSL

effectively. This argument apart, these offenses, if challenged, would most likely be held to be constitutional. Firstly, under article 62 of the NSL, the NSL prevails over any local law of the HKSAR, including the Bill of Rights. Secondly, while the reference to "local law" in article 62 may not include the Basic Law, this is likely to be a moot point. Leaving aside whether the Basic Law would prevail over the NSL, any argument based on the Basic Law is unlikely to go beyond the argument whether the NSL offenses are consistent with articles 4 and 5 of the NSL. The co-existence of these two articles and the NSL offenses in the same law by itself precludes any argument that the sweeping national security offenses would be inconsistent with the human rights provisions in the NSL. The constitutionality of the NSL is *fait accompli*.

Hence, the more realistic option is that the courts could read down the sweeping national security offenses to ensure their consistency with articles 4 and 5 of the NSL.[108] In this regard, there are potentially plenty of rooms for Hong Kong judges to mitigate the draconian nature of the national security offenses. The decision of the Divisional Bench in *Tong Ying Kit* is encouraging, as it exemplifies the attempt of the judiciary to bring the NSL provision on bail in line with the common law principles. It is also open to the court to adopt the common law principles to interpret the NSL. These principles may include a strict approach to interpreting penal provisions, the requirement of *mens rea* and a presumption against strict liability offenses; the legality principle that Parliament is not presumed to restrict liberty and freedoms without the

108 *See*, for example, Surya Deva, *Putting Byrnes and Hong Kong in a Time Machine: Human Rights in 2021 under the Shadow of Beijing's National Security Law*, 27(3) AUSTL. J. HUM. RTS. 467(2021); Po Jen Yap, *Judging Hong Kong's National Security Law*, *in* HONG KONG'S NATIONAL SECURITY LAW: RESTORATION AND TRANSFORMATION (Hualing Fu & Michael Hor eds., forthcoming 2022).

clearest language,[109] and the well-known principle of proportionality. There are also rooms for judicial creativity on procedural or evidential matters. It is open to the court to require a reasonable degree of proximity or a causal link between an act and the object of substantive national security offences such as secession or subversion. In particular, the courts enjoy considerable latitude in the finding of facts and drawing of inferences. The burden and the standard of proof in criminal trials would likely prove to be of particular significance, especially when the evidence is flimsy.

However, this approach suffers from a few constraints. First, an obvious constraint is the language of the text. The court could not adopt an interpretation that the language could not bear.[110] Thus, the court in *HKSAR v. Ma Chun Man* found it impossible to read down the clear words of "whether or not by force or threat of force."[111] The corollary is that it would require a great deal of imagination and creativity on the part of the judiciary to adopt a responsive approach of interpretation. Secondly, in adopting a purposive approach, the court may be constrained by the purpose of the NSL, which was explained by the NPCSC in the broadest sense to suggest that mere advocacy for Hong Kong independence is sufficient to constitute a threat to national security.[112] The cautious and

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109 Regina v. Secretary of State for the Home Department, ex parte Simms, [2000] 2 AC 115, 131; A v. Commissioner of ICAC, (2012) 15 H.K.C.F.A.R. 362 (C.F.A.), paras. 68-69; R (Unison) v. Lord Chancellor [2017] 3 WLR 409 at para 65, 68.

110 Comilang Milagros Tecson and another v. Director of Immigration, [2018] 2 H.K.L.R.D. 534 (C.F.A), paras. 66-67; Director of Immigration v. Chong Fung Yuen, (2001) 4 H.K.C.F.A.R. 211, 223-25 (C.F.A).

111 HKSAR v. Ma Chun Man, HCCP 711/2020 (C.F.I. Dec. 29, 2020) (Legal Reference System) (H.K.) (bail application). The Court in *Tong Ying Kit* found this to be obvious: HKSAR v. Tong Ying Kit, HCCC 280/2020 (C.F.I. July 27, 2021) (Legal Reference System) (H.K.), para. 11.

112 "The [Third Session of the Thirteenth NPC] considered that the risks for national

deferential approach to interpretation adopted in *HKSAR v. Ma Chun Man*, including its ready acceptance of the broad purpose of the NSL, does not inspire confidence that the court would adopt a highly imaginative or critical approach to interpretation of the NSL.

Thirdly, the NSL is the result of decades of ideological conflicts between the two systems. The NSL represents a shift to a more interventionist Central Government and a determined attempt to curb the powers of the judiciary. It is unlikely that the Central Government would allow the Hong Kong courts a free rein to interpret or apply the NSL. An NPCSC interpretation to pre-empt or reverse a judgment of the court is not a remote possibility. Indeed, the purpose of article 62 of the NSL on the power of final interpretation of the NSL is to ensure that the Hong Kong courts would not go beyond what is acceptable to the Central Government. The tide has changed.

In this regard, the courts are rather exposed.[113] It has been a convention in the common law system for the Secretary for Justice to

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security in the Hong Kong Special Administrative Region (HKSAR) have become notable in recent years. Various unlawful activities such as advocacy for 'Hong Kong independence' as well as acts of secession, violence and terrorism, etc have seriously jeopardised national sovereignty, unity and territorial integrity. Certain foreign or external forces have flagrantly interfered in Hong Kong's affairs and utilised Hong Kong to carry out activities endangering national security." Hence the NSL was introduced "to safeguard national sovereignty, security and development interests, uphold and improve the 'one country, two systems' regime, safeguard the long-term prosperity and stability of Hong Kong, and safeguard the legitimate rights and interests of Hong Kong residents." *See* Decision of the NPC on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security, Hong Kong Constitutional Instrument A215 (May 28, 2020).

113 As Chief Justice Geoffrey Ma observed at his retirement speech, the judiciary has been subject to intense attacks and scurrilous abuses in recent years: Farewell Sitting for the Honourable Mr Justice Geoffrey Ma CJ, (2021) 24 H.K.C.F.A.R. 1.

defend the judiciary, as it is inappropriate for the judiciary to engage in any public debates. Yet in the last few years, the Secretary for Justice has to be reminded of her duties on a number of occasions. In November 2020, the NPCSC disqualified four opposition legislators. This led to the *en masse* resignation of all pan-democrat legislators in protest. Thus, as from November 2020, the Legislative Council became essentially a compliant body with no opposition. The enhanced election process is designed to ensure a compliant Legislature. Without the support and protection of both the Legislature and the Executive Government, the judiciary becomes particularly vulnerable.[114]

Fourthly, there are signs that the courts, and notably the Court of Final Appeal, have become increasingly deferential. Space constraint does not allow a full exposition of this fascinating topic of deference.[115] In applying the NSL, the core question at the end of the day is how far the courts are prepared to accept inroads to fundamental rights and freedoms for the protection of national security. This is a question of proportionality, which is ultimately a value judgment. Studies elsewhere have shown that since the adoption of the *Hysan* test, the courts have tended to be more deferential.[116] In the oath case, the Court of Appeal could have affirmed the decision of the lower court to disqualify the two

114 Michael C. Davis as quoted by Hui, *supra* note 23.

115 *See*, for example, Cora Chan, *Rights, Proportionality and Deference: A Study of Post-Handover Judgments in Hong Kong*, 48 HKLJ 51 (2018); Rehan Abeyratne, *More Structure, More Deference?: Proportionality in Hong Kong*, *in* PROPORTIONALITY IN ASIA 25 (Po Jen Yap ed., 2020); Johannes M.M. Chan, *Proportionality after Hysan: Fair Balance, Manifestly Without Reasonable Foundation, and Wednesbury Unreasonableness*, 49 HKLJ 265 (2019) [hereinafter Chan, *Proportionality*].

116 *See* Abeyratne, *supra* note 115; Alec Stone-Sweet, *The Necessity of Balancing: Hong Kong's Flawed Approach to Proportionality, and Why it Matters*, 50 HKLJ 541 (2020); Chan, *Proportionality*, *supra* note 115.

legislators under local law without reliance on the controversial interpretation of the NPCSC, but it chose to embrace fully the NPCSC interpretation which was made after the event. This reasoning gave rise to an important issue of retrospective effect of the NPCSC interpretation and its impact on existing judicial proceedings, but the Court of Final Appeal refused to grant leave on the nebulous ground that retrospectivity of the NPCSC interpretation was well settled.[117] In the colocation case, the court readily accepted that an NPCSC decision could provide the legal basis for introducing wholesale the law of the Mainland to the HKSAR without compliance with the requirements of the Basic Law, and accepted that any attempt to challenge the decision would be futile.[118] In December 2020, the Court of Final Appeal held that both the Emergency Regulation Ordinance and the Regulation were constitutional.[119] Regarding the former, the Court was prepared to uphold the almost unlimited legislative power of the Chief Executive in Council in the undefined circumstances of public danger, and was satisfied with the unrealistic safeguards that the decision to invoke this power is subject to judicial review.[120] Regarding the latter, the Court upheld the Regulation prohibiting the wearing of facial covering in peaceful public assemblies on the ground that preventive action was necessary to prevent these public assemblies from becoming violent. Its

117 *See* Chan, *supra* note 2.

118 Kwok Cheuk Kin v. Secretary for Justice [2019] 1 H.K.L.R.D. 292 (C.F.I.); decision affirmed on appeal: [2021] 3 H.K.L.R.D. 140 (C.A.)

119 Kwok Wing Hang v. Chief Executive in Council, (2020) 23 H.K.C.F.A.R. 518 (C.F.A.).

120 The Chief Executive in Council is under no duty to provide reasons for declaring an emergency, let alone the vague notion of public danger. An attempt to seek discovery of the discussion at the Executive Council will be strenuously resisted on the ground of public interest immunity. Nor is there any realistic ground to challenge the failure to bring an emergency to an end.

decision to uphold the prohibition of face masks when practically everyone in the community has been wearing health masks as a result of the pandemic for almost a year is so divorced from reality that it would hardly command public respect. The decisions of various courts to refuse bail in national security cases when the facts of those cases involved no more than peaceful advocacy could hardly inspire confidence. Within a year of the entry into force of the NSL, the courts have given up the presumption of bail, the right to jury trial, and adopted a low standard of scrutiny over verbal offences. The prosecution of Jimmy Lai is widely perceived to be political persecution, yet the Court of Final Appeal did not seem to demonstrate the sensitivity that is called for when personal liberty is at stake.

It was unfortunate that political pressure has continuously been asserted on the judiciary. When Chow J held that the police were in breach of the Bill of Rights by failing to show their identification whilst on duty,[121] *Ta Kung Pao* launched a virulent attack at the judge.[122] Attempts to put pressure on the Court of Final Appeal to revoke the bail of Jimmy Lai were both intense and blatant. *People's Daily* carried an article suggesting that if bail were to be granted by the Court of Final Appeal, it would have justified intervention under article 55 of the NSL to take the matter out of the jurisdiction of the Hong Kong courts and urged the Court of Final Appeal to "make the correct decision." *Ta Kung Pao* also carried an editorial suggesting that the High Court's decision to

121 Hong Kong Journalists Association v. Commissioner of Police and another, [2021] 1 H.K.L.R.D. 427 (C.F.I.).

122 Anita Yip, *Letter of the Hong Kong Bar Association to the Secretary for Justice*, HONG KONG BAR ASSOCIATION (Dec. 28, 2020), https://www.hkba.org/sites/default/files/Letter%20to%20Secretary%20for%20Justice%2028%20Dec%202020%20re%20Attack%20on%20Judges.pdf.

grant bail to Mr. Lai was not only contrary to the rule of law but had a shadow of foreign interference behind it. These statements, which were published shortly before the hearing before the Court of Final Appeal, could be perceived by the public as putting pressure on the judiciary in relation to extant legal proceedings and bordered on a contempt of court.[123] While it may be accepted that the Court of Final Appeal has not been affected by these comments, its unconvincing decision to revoke bail unfortunately reinforces the public perception that the court has succumbed to such political pressure. The readiness of the court to give up fundamental rights and to convict on tenuous grounds gives no cause for comfort about judicial independence.

Of course, in all these cases, it is easy to put the blame on the draconian law and argued that there is no ground to believe that the court is not discharging its duties independently. The problem is that the court is too ready to give significant weight to national security or public order and too deferential to the authority even regarding draconian measures. It may be thought that the adoption of a deferential approach could spare the attacks on the judiciary and hence allowing judicial independence in other less sensitive areas. This is a self-defeating proposition, for independence carved is independence lost. While judicial independence and judicial deference are two different issues, the consequences may be the same. One is about resistance to external pressure; the other is about internalization of external pressure. The former is apparent and may be temporary; the latter is subtle and long lasting, and arguably more damaging in an authoritarian era, for it tends to provide intellectual

123 This led the Hong Kong Bar Association to appeal to the Secretary for Justice to take appropriate actions to uphold the rule of law: *see id.* No action has been taken by the Secretary for Justice.

rationalization for a repressive regime and renders the court part of the repressive regime. The loss of public confidence in an independent judiciary is equally, if not more damaging to the maintenance of judicial independence.

The NSL has brought to the forefront and deepened the long existing ideological conflicts. In Hong Kong, judicial independence is about the rule of law. For the Mainland, judicial independence is about power and authority. What it wants is a compliant judiciary. Judicial independence may still be tolerated, but only to the extent that it does not interfere with what the Central Government regards as national interest. In a system of the rule of law, the function of law is to protect fundamental rights and freedoms of the governed. In a system of rule by law, law becomes predominantly an instrument to govern and to consolidate the power and position of the governing. So far, the NSL has achieved remarkable success in wiping out the opposition, stifling the dissenting views and destroying a civil society. It has turned what used to be peaceful and lawful exercise of fundamental rights into criminal offences, and the judiciary seems willing to condone such consequences. Legislators, journalists, social workers, academics, and students are rigorously pursued by the prosecution for what appears to be entirely peaceful acts and have been put under lengthy pre-trial detention. Civic rights groups, political parties, media organizations, teachers' unions, labour unions, and students' unionss have either been disbanded or simply collapsed one after the other. These developments shed light on the Mainland's conception of "One Country, Two Systems". What it envisages is a separate economic system that is run by chosen patriots who would not challenge the authority of the Central Government or the executive government of the HKSAR, and the system is to be supported

by a compliant legislature, a deferential judiciary and an unquestioning public. But when a civil society is destroyed, when the judiciary is becoming increasingly compliant or deferential, and when people begin to vote by their feet, what more is left of the two systems in the "One Country, Two Systems constitutional model" except in name? Worse still, vague law carries uncertainty; uncertainty allows arbitrary exercise of power; arbitrary power instills fear; fear generates self-censorship. In this regard, the NSL marks not only the beginning of the end of two systems, but also the beginning of an authoritarian era.

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