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# HONG KONG'S NATIONAL SECURITY LAW AND THE RIGHT TO A FAIR TRIAL:

## A GCAL BRIEFING PAPER

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Cover photo caption: A protester tries to peacefully stop a police vehicle heading to the Legislative Council complex on June 12, 2019. Clashes between police and protesters on that day were a key turning point in the historic anti-extradition bill protests, which later led to Beijing's decision to pass the National Security Law.

*Simply put, the right to a fair trial in NSL cases is under threat. The government's aggressive approach to NSL cases documented in this report constitutes a direct assault on the rule of law in Hong Kong.*



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## I. INTRODUCTION

June 23, 2021 may eventually be seen as a turning point in Hong Kong's legal and political history: that day marked the opening of the first trial under Hong Kong's new National Security Law (NSL). The defendant in the case, Tong Ying-kit, 24, had been charged with terrorism and inciting secession, and also with dangerous driving under the local Road Traffic Ordinance. Would Tong be able to receive a fair trial on the serious NSL charges against him? Or would the government's wide-ranging legal powers under the NSL make it impossible for Tong to defend himself, or for the courts to apply constitutional human rights protections to the case?

As his trial began, Tong had reason to wonder whether his right to a fair trial might be in jeopardy. Just the day before, a High Court appeals judge denied his application for a jury trial, holding that Hong Kong's Secretary for Security had the unilateral authority to transfer his case to a three-judge panel.<sup>1</sup> The ruling marked a small but significant step backward for the rule of law in Hong Kong, and a departure from Hong Kong's rich common law tradition of relying on jury trials as a tool to preserve judicial independence and public trust in the courts.

Some observers worried that the jury decision would set the tone both for Tong's own criminal trial, and for other pending NSL trials: judges might pay lip service to Basic Law human rights protections in their verdicts, but in the end, many feared, they would side with the government on all consequential matters. As Tong's trial began, the government had to be satisfied with its in-court performance thus far: since the NSL went into effect on July 1, 2020, the government had brought charges against more than 50 individuals for alleged violations of the NSL, and had yet to have a significant judicial decision leveled against it. On matters ranging from trial by jury to bail to the judiciary's constitutional jurisdiction over the NSL itself, the government could boast a virtually unblemished won-loss record, one that it hoped to extend into criminal trials themselves.

As the first NSL trials begin, this briefing paper attempts to lay out core concerns on due process rights of individuals accused of NSL crimes. We document the curtailment of due process rights in three key areas: the right to an attorney of one's own choosing; the right to pre-trial release (or bail as it is more commonly known); and the right to a trial by jury. We also document concerns over judicial independence in NSL cases, and describe the ways in which the NSL's expanded investigatory powers can violate basic human rights.

Taken together, the moves by the government to limit due process rights while expanding its own investigatory powers put the fundamental right to a fair trial at risk. It is too early to say whether NSL defendants will in fact receive a fair trial, and this briefing paper offers no final conclusions on this front. Only after the trial process has fully played out, and the first few verdicts have been issued, can any full assessment of the right to a fair trial for NSL defendants be made.

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<sup>1</sup> [2021] HKCA 912.

Still, the limits on due process rights documented by this briefing paper are deeply troubling, not least because they cast doubt on the government's own commitment to human rights and the rule of law. Simply put, the right to a fair trial in NSL cases is under threat. The government's aggressive approach to NSL cases documented in this report constitutes a direct assault on the rule of law in Hong Kong, and may ensure that the Hong Kong government and Beijing are able to achieve a number of criminal convictions in pending NSL cases that otherwise might prove elusive.

As GCAL documented in a prior report, the NSL gives Beijing a number of new tools to crack down on its perceived political enemies in Hong Kong.<sup>2</sup> The law's vague and overbroad criminal provisions have been used to target peaceful protesters and Hong Kong's political opposition, while other provisions have been used to tighten Beijing's control over Hong Kong's government bureaucracy and its education system.

But the law also creates a new dilemma: how to ensure that Hong Kong's world-class judiciary, justly famous for its commitment to the rule of law, will deliver guilty verdicts under the NSL, even when doing so would – arguably, at least in some cases – go against the human rights protections found in the Basic Law? If the government can't deliver guilty verdicts for most or all of those charged under the NSL, then the law's overall impact will be dramatically reduced. It's also possible that the government could view not guilty verdicts as a political embarrassment, either in the eyes of the Hong Kong public, or – more importantly these days – in the eyes of Beijing.

The charge of inciting secession against Tong illustrates the government's dilemma: How can the charge, which seeks to criminally punish Tong merely for carrying an allegedly pro-independence banner, be reconciled with the Basic Law's guarantee of the right to free speech? If Tong is found not guilty of the NSL secession charge, the government may well worry that its chances for success in other NSL speech cases – which constitute roughly 25% of all NSL arrests thus far, according to our analysis – are low.<sup>3</sup>

It seems clear that Beijing has anticipated this potential hurdle. Over the past few months, a new prong of Beijing's strategy has emerged: chipping away at core due process protections, which in turn will make it easier to press judges to deliver guilty verdicts. Over the past year, the Hong Kong government, almost certainly acting in close coordination with the mainland Office for Safeguarding National Security, has taken steps to limit several key procedural protections in NSL cases. While such moves by no means guarantee a guilty verdict, nonetheless they make convictions that much easier to obtain.

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<sup>2</sup> Lydia Wong and Thomas E. Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, Georgetown Center for Asian Law report, February 2021.

<sup>3</sup> For an in-depth data analysis of the NSL arrests thus far, see Lydia Wong and Thomas Kellogg, "New Data Show Hong Kong's National Security Arrests Follow a Pattern," *ChinaFile*, May 3, 2021.

The government has also moved to expand investigatory powers of the National Security Department (NSD) of the Hong Kong Police. On July 6, 2020, the Committee for Safeguarding National Security (CSNS) issued highly detailed Implementation Rules (IRs) for the NSD. In general, the IRs remove procedural safeguards and limit judicial oversight, allowing the police to act unilaterally to search the homes of NSL suspects, to tap their phones, freeze their assets, and to censor online speech related to NSL crimes. Given that the NSL itself has regularly been used to target opposition politicians and grassroots activists, the Hong Kong government now has broad legal authority to keep close tabs on its critics, and to freeze their assets or censor their online speech.

As this briefing paper documents, the moves to limit due process rights and expand police investigatory powers are casting a long shadow over Hong Kong's vaunted legal system. The Hong Kong government should reverse course, and ensure that the due process rights of all NSL defendants are fully respected. The fairness of all NSL trials should be placed beyond doubt.

As the first NSL trials get underway, the government has a strong interest in being *seen* to be fair to NSL defendants: in order to be perceived as legitimate in the eyes of the Hong Kong public, NSL trials must be widely viewed as open, transparent, and fair. Tilting the playing field in favor of the government during the pre-trial stage further feeds widespread public perceptions that the NSL is merely a tool to crack down on Beijing's perceived political opponents, and not a narrowly-tailored law that targets legitimate public security threats.

As the one-year anniversary of the National Security Law approaches, the world is watching events in Hong Kong very closely. The first several NSL trials will serve as a key barometer for the international community of the Hong Kong government's commitment to human rights and the rule of law in the post-2019 era. As this briefing paper documents, the initial prognosis is decidedly mixed, and the future prospects for Hong Kong's legal system are uncertain.

## II. POLICE INVESTIGATORY POWERS: NSL ARTICLE 43

Article 43 of the NSL mandates the expansion of the investigatory powers of the NSD in seven key areas: police searches, including both physical searches and searches of electronic devices; surrender of travel documents by NSL suspects; freezing of assets of individuals accused of NSL crimes; censorship of online material that allegedly violates the NSL; power to compel testimony related to alleged NSL crimes by foreign political organizations; surveillance and interception of communications; and the power to compel testimony related to alleged NSL crimes by individuals in Hong Kong.

Article 43 also authorizes the CSNS to create new regulations covering these seven areas. The CSNS wasted no time in doing so: on July 6, just days after the NSL itself was issued, the CSNS gazetted Implementation Rules (IRs), covering each of those seven areas. Formally titled the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, the IRs went into effect the next day.

The IRs and the NSL are a study in contrasts: whereas the NSL use sweeping directives and vague, overbroad language, the IRs work through thorough and detailed drafting, making sure to cover a number of different possible scenarios. Schedule 4 of the IRs, for example, which covers censorship of online material, includes separate provisions on *hosting* service providers, *network* service providers, and *platform* service providers, and lists overlapping tools that can be used to make online content inaccessible, including outright removal of content and various so-called disabling actions.

The IRs and the NSL also differ in terms of their relationship to Hong Kong law. At times, the IRs explicitly claim – not always accurately – to be in harmony with key criminal procedure and police provisions, whereas the NSL directly states its separateness from, and at times supremacy over, the existing body of Hong Kong law.<sup>4</sup>

Given their level of detail and the repeated references to Hong Kong law, it seems highly likely that the IRs were drafted by Hong Kong government officials, most likely from the Department of Justice. (The English version of the IRs run to more than 60 pages of small type, roughly 20 pages longer than the NSL itself.) Such drafting most likely would have taken several weeks, and simply could not have been accomplished in a few days' time, which would mean that Department of Justice lawyers had access to the NSL text – which serves as the basis for the IRs – well before June 30, 2020. If so, then Chief Executive Carrie Lam's claim that she herself had not seen the text before June 30 must be called into question: it seems unlikely that working-level Justice Department lawyers had access to the NSL text, while the CE, who serves as the head of the executive branch, did not.<sup>5</sup>

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<sup>4</sup> NSL Article 62.

<sup>5</sup> Iain Marlow and Natalie Lung, "Hong Kong Leader Says She Still Hasn't Seen Draft Security Law," *Bloomberg*, June 22, 2020.

The drafting process for the IRs was entirely non-transparent and non-consultative: the first time that the IRs were made public was on July 6, the day before they went into effect. If, as seems likely, the Hong Kong government began drafting the IRs several weeks before they were issued, then it could have started a dialogue with key stakeholders in Hong Kong, including the Hong Kong Bar Association. The fact that it chose not to do so indicates a troubling willingness to adopt the Mainland's approach to public consultation, at least in this vitally important area of national security law-related matters.

Taken together, the seven schedules of the IRs constitute a significant expansion of Hong Kong police power. In general, the IRs remove procedural safeguards and limit judicial oversight, allowing the police to act unilaterally to search the homes of NSL suspects, to tap their phones, freeze their assets, and to censor online speech related to alleged NSL crimes. Checks on police power to investigate citizens are a key element of the rule of law, which means that the IRs undercut Hong Kong's commitment to the rule of law in important ways.

At the same time, any analysis of the IRs must take into account several key flaws of the NSL itself. As we documented in our prior report, the NSL's criminal provisions are vague and overbroad, and can be used to target peaceful political activity.<sup>6</sup> The IRs therefore create a series of expanded police powers that can be used to target, and even harass, opposition political figures, peaceful protesters, and others who have been critical of the government.

In general, peaceful political opposition figures and grassroots activists should not be subjected to surveillance or freezing of assets, regardless of whether such moves are taken in compliance with basic procedural safeguards. And yet, in the one year since the NSL and the IRs went into effect, several top opposition political figures have publicly complained about intrusive surveillance by unnamed individuals,<sup>7</sup> while others have seen their assets frozen pending trial for NSL crimes.<sup>8</sup> Still others had their passports confiscated, which meant that they were barred from leaving Hong Kong as NSL investigations into their activities continued.<sup>9</sup>

Even exile activists who have taken up residence far from Hong Kong have had to deal with the broad reach of the IRs: on June 3, London-based exile activist Nathan Law reported that the Israel-based internet company Wix had taken down the 2021 Hong Kong Charter website, in response to a threatening letter from the Hong Kong Department of Justice.<sup>10</sup> The

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<sup>6</sup> Wong and Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, February 2021, pp. 18-25.

<sup>7</sup> Among many others, pro-democracy activist Joshua Wong reported being followed by individuals whose background was unclear. "Hong Kong pro-democracy activist Joshua Wong reveals fears of arrest," AFP, August 23, 2020.

<sup>8</sup> Jessie Pang and Twinnie Siu, "Hong Kong freezes listed shares of media tycoon Lai under security law," *Reuters*, May 14, 2020.

<sup>9</sup> Lillian Cheng and Tony Cheung, "Hong Kong national security law: four big questions raised by mass arrests of 53 opposition figures," *South China Morning Post*, January 9, 2021.

<sup>10</sup> Paul Mozur, "In Hong Kong, Short-Lived Censorship Hints at a Deeper Standoff," *New York Times*, June 3, 2021.



Department's letter specifically cited the relevant provision of the IRs relating to online censorship. After a public outcry, Wix eventually restored the website. It is unclear how many other websites have been targeted by the authorities under the IRs over the past year.

A full analysis of the IRs is beyond the scope of this briefing paper. Instead, we focus here on three core elements of the IRs: search, surveillance, and investigation of "foreign political organizations and agents."

## *Search*

Under Schedule 1 of the IRs, the Hong Kong police may apply for warrants to engage in searches of both physical property and electronic devices of individuals with an alleged connection to NSL crimes. If, however, a sufficiently senior police officer determines that "it would not be reasonably practicable to obtain a warrant," the police may engage in a warrantless search.

The provision allowing warrantless searches when obtaining one would not be "reasonably practicable" raises concerns about the potential for NSD officers to push this provision beyond acceptable limits. Under existing law, the police generally must obtain judicial warrants to engage in searches. But warrantless searches are not unknown to Hong Kong law: in fact, the "reasonably practicable" standard for warrantless searches itself comes from the common law, and has been used by the Hong Kong courts in recent cases to create guidelines for the police for warrantless searches of, for example, cellphones.<sup>11</sup> In that sense, the IR provision on warrantless searches is not inherently problematic.

That said, there are real questions as to whether the Hong Kong courts can play the same role in judicially policing and limiting the power of the NSD to engage in warrantless searches. It is possible, for example, that the Hong Kong government could attempt to stretch NSL Article 14's limits on judicial review of CSNS actions, to cover individual decisions related to warrantless searches. After all, the IRs themselves were issued by the CSNS, which might, at a minimum, make them less vulnerable to constitutional challenge. Both the Commissioner of Police and the head of the NSD are members of the CSNS; Hong Kong activists expressed concern that their CSNS affiliations could be used to justify applying Article 14's exemption from judicial review to acts they take in their official police capacity.<sup>12</sup>

Assuming that warrantless searches can be challenged in court, then the question will be what level of freedom judges have to scrutinize the exercise of police power under the IRs, and what level of pressure will be brought to bear on judges who hear such challenges. As noted elsewhere in this briefing paper, judges hearing NSL cases have faced growing pressure – some of it aired publicly in pro-Beijing media outlets – to deliver verdicts acceptable to the central

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<sup>11</sup> Sham Wing Kan v. Commissioner of Police, [2020] HKCA 186.

<sup>12</sup> Author interview.

government.<sup>13</sup> It is possible that, in cases where warrantless searches are executed under the IRs, courts may want to avoid controversy over procedural matters, and instead focus on more controversial aspects of the NSL itself. In that context, NSL defendants may feel that their Basic Law rights – to privacy<sup>14</sup> and freedom from unlawful search<sup>15</sup> in particular – are less than fully protected.

### *Surveillance*

Surveillance is covered by Schedule 6 of the IRs. Under Schedule 6, the NSD can apply to engage in covert surveillance – usually through the use of surveillance devices and interception of communications – in order to “protect national security.” In most cases, such applications are reviewed and approved not by a judge, but by the Chief Executive herself. Under certain exigent circumstances, the use of surveillance devices can be approved on a temporary basis by the Commissioner of Police, although that authorization lasts only for a maximum of 48 hours, after which time it must be approved by the CE.

Perhaps the most problematic aspect of the Schedule 6 is its expanded scope: anyone suspected of engagement with an NSL crime can be targeted; others can be targeted if doing so protects national security. As noted above, given the political nature of NSL crimes, key political figures – including both activists and even elected politicians – can be subjected to electronic surveillance. This fact may explain the government’s desire to forego judicial oversight: it certainly is possible that electronic surveillance of political figures might be approved by a court, but judicial approval carries with it the risk of leaks, which in turn could prove embarrassing to the government.

Schedule 6 varies from existing Hong Kong law in that approval for covert surveillance stems not from a judge, but from the CE herself. Under the 2006 Surveillance Ordinance, most forms of electronic surveillance – including all wiretaps and other forms of electronic surveillance that require entering a private residence – must be approved by a special three-judge panel. Also, the Commissioner on Interception of Communications and Surveillance is empowered to oversee police surveillance, and to investigate allegations of abuse from members of the public. The Surveillance Ordinance is not without its critics: both the Hong Kong Bar Association and academic experts have criticized key provisions as insufficiently protective of basic rights.<sup>16</sup> Nonetheless, the Ordinance does achieve a basic level of judicial oversight and modest political accountability that the system had lacked prior to 2006.

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<sup>13</sup> Various media reports and expert analyses have documented the growing pressure faced by the judiciary since the NSL went into effect; see, e.g., Suzanne Pepper, “How Hong Kong’s national security law and common law system collided head on,” *Hong Kong Free Press*, January 17, 2021.

<sup>14</sup> Basic Law Article 30.

<sup>15</sup> Basic Law Article 29.

<sup>16</sup> Hong Kong Bar Association, “Interception of Communications and Surveillance Bill: Comments of the Hong Kong Bar Association,” March 24, 2006; Thomas E. Kellogg, “A Flawed Effort? Legislating on Surveillance in Hong Kong,” *Hong Kong Journal*, April 2007.

The different approach taken by Schedule 6 is difficult to justify: the Chief Executive has a strong political interest in being seen as vigorously enforcing the NSL, and therefore may hesitate to turn down any electronic surveillance requests. At the same time, many of those targeted under Schedule 6 will be her political opponents, including politicians and activists who have publicly criticized her, at times in the strongest possible terms. It will be hard for the CE to remain impartial in approving police use of this enormous power. Maintaining the check-and-balance approach of the existing Surveillance Ordinance scheme would eliminate that clear conflict of interest.

The exclusion of the Surveillance Commissioner from any oversight role is also deeply problematic. In January 2021, Commissioner Azizul Rahman Suffiad publicly confirmed that he has “no say” in the oversight of surveillance in NSL cases, and suggested that the CSNS and the CE would be responsible for handling any cases of non-compliance.<sup>17</sup> Commissioner Suffiad, a former High Court judge, did offer to make himself available to national security authorities so that they could take advantage of his experience and expertise. As far as is publicly known, the CSNS has not taken him up on the offer.<sup>18</sup>

### *Foreign “Political Organizations or Agents”*

Schedule 5 covers the provision of information by foreign “political organizations or agents” that are “pursuing political ends” in Hong Kong. Under Schedule 5, such organizations – whether or not they are formally based in Hong Kong – are legally required to provide information to the authorities about their activities and sources of funds, and can be held criminally liable if they refuse to do so.

Schedule 5 is somewhat different from other provisions of the IRs. Whereas most other schedules deal with various normal police powers, often expanding or strengthening them in some way, Schedule 5 creates a somewhat new authority under Hong Kong law, one with parallels both to the Mainland’s 2016 Foreign NGO Law and laws passed by other states to crack down on foreign NGO activity.

It’s possible that the primary goal of Schedule 5 is not to expand police investigatory powers, but rather to create yet another political threat that can be levied against foreign NGOs seeking to support local activists and political figures. Under Schedule 5, foreign NGO staffers can be questioned over their activities in Hong Kong – questions that could include the topics discussed in meetings with Hong Kong activists, which in turn could lead to allegations of collusion with foreign forces under Article 29 of the NSL. Given this very real risk, foreign NGOs will face difficult questions about whether to travel to Hong Kong, whom to meet with, or even

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<sup>17</sup> “截取通訊專員：無權監督所有國安法截取通訊、秘密監察 [Interception of Communications Commissioner: No Authority to Oversee All NSL Interceptions, Covert Surveillance],” *Stand News*, January 4, 2021.

<sup>18</sup> Natalie Wong, “Hong Kong surveillance watchdog concedes he has ‘no say’ over snooping in cases related to national security law,” *South China Morning Post*, January 4, 2021.

whether to continue working on human rights and democratic development in Hong Kong at all.

In part due to COVID-related restrictions on travel, Schedule 5 has yet to be used, at least as far as is publicly known. That said, Schedule 5 will make it all the more difficult for international human rights NGOs and pro-democracy groups – among others whose work could be considered “political” – to engage directly with their counterparts in Hong Kong. Going forward, international groups will have to deal with the challenges created by Schedule 5. While GCAL believes that international organizations should continue to support Hong Kong civil society groups, activists, and pro-democratic politicians, we also acknowledge that there are no easy answers to the risks posed by this provision of the IRs, and by the NSL itself.

### III. DUE PROCESS RIGHTS AND INSTITUTIONAL CONCERNS

Police use of the IRs have shaped NSL investigations and arrests in important ways. As trials begin, however, due process rights and judicial independence will come to the fore. Over the past year, the authorities have moved to curtail due process rights in three key areas: the right to pre-trial release (or bail as it is more commonly known); the right to an attorney of one's own choosing; and the right to a trial by jury. The NSL also undercuts judicial independence by assigning a greater role to the CE in judicial selection for national security cases.

This section discusses both due process rights and judicial independence concerns, in each case comparing the NSL approach to existing Hong Kong law and core Basic Law norms.

#### *Designated Judges and Judicial Independence*

Under Article 44 of the NSL, the CE is empowered to designate a pool of judges who try NSL cases. Such designated judges are selected for a term of one year, and can be removed from the designated list if they make statements or take actions that “endanger national security.” Thus far, the Hong Kong government has refused to make the list of designated judges public, claiming that doing so could create security risks judges who have been so named.<sup>19</sup>

The Article 44 designation process raises serious concerns about judicial independence: if the CE has the power to guide all NSL cases to a limited pool of judges, and also to exclude judges whom the executive branch feels is insufficiently sympathetic to the government's views, members of the public may have doubts as to whether NSL defendants are able to obtain a fair hearing. Outside observers may ask whether sufficiently neutral and open-minded judges are being screened out by the designation process.

Article 44's grant of a limited one-year tenure for designated judges is also puzzling: if the NPCSC wanted to allay concerns about the threats to judicial independence posed by the designation process, why grant designated judges such a limited tenure? Is the one-year term meant to weed out judges who rule against the government in key NSL cases? If not, what are the standards by which Article 44 designations are made, and what are the criteria for renewal of Article 44 status?

Once again, an NSL provision potentially conflicts with the Basic Law: under Article 85 of the Basic Law, judicial independence is guaranteed. And yet, there is no clear mechanism by which this latent legal conflict could be addressed: the Hong Kong courts would naturally be hesitant to take on a facial challenge to any NSL provision, especially one that is central to the day-to-day operation of the NSL itself.

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<sup>19</sup> Alvin Lum, “特首辦：毋須公開國安法官名單 [CE's Office: No need to disclose the list of national security judges],” *CitizenNews*, December 23, 2021.

Beijing has justified Article 44 on the basis of the need for judges with specialized expertise and experience. In response to a letter from the High Commissioner for Human Rights expressing concerns about the NSL, the Chinese government noted that “crimes against national security are more complex and sensitive than other cases, and among judges, it is the ones with more experience and stronger qualifications that must be selected to try such cases.”<sup>20</sup>

But this response raises a further question: why can't the normal judicial assignment process take account of these factors? Surely existing processes can ensure that properly experienced judges are assigned to NSL cases, without the potentially troubling involvement in by the Chief Executive?

Publicly Known Designated National Security Judges, June 2021	
<b>Court of Final Appeal</b>	
Chief Justice Andrew CHEUNG Mr. Justice R A V RIBEIRO Mr. Justice Joseph P FOK Mr. Justice Patrick CHAN Mr. Justice Frank STOCK	
<b>High Court</b>	
Mr. Justice S C POON Mr. Justice Wally YEUNG Mr. Justice Johnson LAM Madam Justice Esther TOH Madam Justice Anthea PANG Mr. Justice Anderson CHOW Mr. Justice Wilson CHAN Mr. Justice W T LEE	
<b>District Court</b>	
Mr. Judge Stanley CHAN Ms. Judge Amanda J WOODCOCK	
<b>Magistrates' Court</b>	
Mr. W T SO	

Both before and immediately after the NSL went into effect, many in the Hong Kong legal community raised concerns about Article 44.<sup>21</sup> Some pointed to Hong Kong's long-term commitment to the rule of law as a key element of Hong Kong's global competitiveness. They

<sup>20</sup> Communication from the Permanent Mission of the People's Republic of China to the United Nations Office at Geneva, No.GJ/64/2020, October 30, 2020.

<sup>21</sup> See, e.g., Hong Kong Bar Association, “Statement of the Hong Kong Bar Association on the Proposed Designation of Judges by the Chief Executive in National Security Cases,” June 23, 2020.

argued that any moves to undercut that commitment could damage Hong Kong's global standing as a premier financial center and dispute resolution hub.<sup>22</sup>

In response, the Hong Kong government has pointed out that the relevant members of the judiciary assign all NSL cases to individual designated judges, which means that, at the very least, the Chief Executive is not handpicking judges to handle specific cases.<sup>23</sup> And all designated judges must be drawn from the existing pool of Hong Kong's world-class judiciary, which provides at least some protection against manipulation of the courts in NSL cases.

In a somewhat unusual move, then-Chief Justice Geoffrey Ma himself weighed in on the Article 44 controversy, reiterating that the judiciary would be in charge of selecting specific designated judge for individual cases.<sup>24</sup> Chief Justice Ma also highlighted key Basic Law provisions that guaranteed judicial independence, and noted that foreign judges are in no way excluded from the designated list.<sup>25</sup>

Chief Justice Ma's statement was a welcome signal of the judiciary's commitment to judicial independence and the rule of law.<sup>26</sup> Still, the fact that Chief Justice Ma had to put out such a statement spoke to the level of unease and concern that has been generated by Article 44. It remains to be seen how the Hong Kong courts will handle politically-charged NSL prosecutions, and whether they will be able to fully deflect the significant pressure that is being directed toward them as these cases begin.

It's unlikely that Article 44 will be revised anytime soon. Therefore, the government should move to increase transparency: it could both publish the full list of designated judges, and also make clear the criteria by which judges are selected. Doing so would not fully eliminate concerns over Article 44, but would nonetheless be a welcome step in the right direction.

### *Access to Counsel*

The NSL contains no provisions restricting those accused of NSL crimes from access to an attorney of their own choosing. In fact, NSL Article 5 makes a clear – if somewhat indirect – reference to the right to counsel, making clear that the various “rights in judicial proceedings

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<sup>22</sup> Denis Brock, “The National Security Law and Dispute Resolution in Hong Kong: Back to Basics,” *Hong Kong Lawyer*, April 2021.

<sup>23</sup> For one of many examples, see Teresa Cheng, “Judicial Independence Guaranteed,” statement by the Secretary for Justice at the Ceremonial Opening of the Legal Year, January 11, 2021.

<sup>24</sup> Statement by Chief Justice of Court of Final Appeal, July 2, 2020.

<sup>25</sup> That said, as of this writing, no foreign judges have been selected to handle any NSL cases, and therefore it is not known whether the CE has added any foreign judges to the Article 44 designated judges list.

<sup>26</sup> By contrast, former Chief Justice Andrew Li criticized the CE's role in judicial selection under the NSL, calling the Article 44 framework “detrimental to the independence of the judiciary.” Gary Cheung, “National security law: chief executive picking judges to hear cases undermines judiciary, warns former Hong Kong chief justice,” *South China Morning Post*, June 23, 2020.

that a criminal suspect, defendant, and other parties are entitled to under law shall be protected.”

In the vast majority of the more than 100 NSL cases that have emerged thus far, the right to counsel has simply not been an issue. Thus far, almost all NSL defendants have been able to choose their own counsel, and have had reasonable access to their attorneys while in custody.

In a small number of cases, however, NSL defendants have dismissed their prior counsel in order to engage new lawyers, some of whom have deep ties to the pro-Beijing camp in Hong Kong. These moves have raised questions about whether these defendants were unduly pressured to both cooperate with prosecutors and the police, and also to change their legal representation. While any defendant has the right to choose to cooperate with the prosecution, such decisions must be made voluntarily. Putting pressure on individuals to change their legal representation, or to condition prosecutorial leniency on such a change, would be both highly unusual and deeply inappropriate.

Take the case of activist Andy Li. One of the so-called Hong Kong 12, Li had attempted to flee Hong Kong for Taiwan by boat in August 2020. Chinese coast guard vessels intercepted the boat, and took those aboard to Yantian, in nearby Guangdong Province. Li, an activist and a founding member of an election observer group, had been arrested for alleged NSL crimes just weeks before his abortive effort to escape to Taiwan. Both Li and the others were eventually tried and convicted in a mainland Chinese court of illegal border crossing, after which Li was sentenced to seven months in jail. He was returned to Hong Kong in March 2021, and was immediately taken into custody by the Hong Kong police.

On April 7, Li returned to court to face the NSL charge of collusion with foreign forces. The charge apparently stemmed from his advocacy efforts toward Western governments, which allegedly included efforts to lobby Western governments to impose sanctions on Hong Kong government officials.<sup>27</sup> Li was also charged with conspiracy to assist offenders in connection with the Taiwan escape attempt, and with illegal weapons possession, in connection with an alleged cache of spent tear gas rounds and other material found in a Sha Tin apartment on the day of his August 2020 arrest.

During that court appearance, Li was accompanied by his new lawyer, Lawrence Law Tat-hung. The process behind Law's appointment, and the reasons for Li's change in representation, remain shrouded in mystery: Law had no known prior contact with Li, and yet managed to be in contact with Li before members of his own family. Law, a longtime criminal attorney, had twice been suspended from practice due to complaints of misconduct, in 2005 and 2007. In both cases, Law was fined for breaches of the Bar's Code of Conduct.<sup>28</sup>

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<sup>27</sup> Chris Lau, "National security law suspect Andy Li makes first appearance in Hong Kong court following his return from mainland China," *South China Morning Post*, April 7, 2021.

<sup>28</sup> Kelly Ho, "Mystery lawyer appears in court for Hong Kong activist Andy Li, but family still don't know where he is," *Hong Kong Free Press*, March 31, 2021.



Law's firm, Olympia Chambers, issued a statement denying that Law had been appointed to the case by the Hong Kong government.<sup>29</sup> Instead, the firm clarified that it had received instructions from a private firm of solicitors. Yet at the same time, both Law and his firm refused to answer basic questions about Li's whereabouts or his lack of contact with his family. (Li's family eventually did establish contact with him. They have maintained a low profile since then.)

Around the same time, it emerged that Li's solicitor is Trevor Chan, of the firm of Au, Yeung, Chan and Ho. Facing reporters during one of Andy Li's initial court dates, Chan also denied being appointed to the case by the Hong Kong government, but declined to answer other basic questions about how he came to represent Li.<sup>30</sup> Chan's political views would seem to be more pro-Beijing than Li's prior counsel, making him an odd fit for the prominent pro-democracy activist. In 2017, Chan signed a petition decrying the "spread of 'Hong Kong independence' on university campuses, and has signed onto other pro-government petitions as well in recent years.<sup>31</sup>

Less than two months after hiring Law, Li changed counsel yet again. In May 2021, Li hired Alain Sham, former deputy director of public prosecutions at the Department of Justice, as his barrister.<sup>32</sup> Sham has close ties to pro-Beijing organizations in Hong Kong, including the Hong Kong Friendship Promotion Association. After the appointment became known, Sham also refused to answer questions about how he came to be involved in the case. It seems likely that Sham will remain as Li's counsel as his case goes to trial.

The practice of manipulating, or even dictating, legal representation for defendants in politically sensitive cases is all too common on the Mainland. Countless rights activists have been denied access to a counsel of their own choosing in recent years, and many were forced to accept lawyers whose political reliability had been vetted by the government.<sup>33</sup> The use of such so-called "government-appointed lawyers" (*guanpai lvshi*) provides a number of benefits to the Party-state apparatus, and to the procuratorate and judicial officials involved in the case: such lawyers will generally not make allegations regarding torture or ill-treatment, and will not push judges to rein in violations of due process by prosecutors or others. In general, such lawyers allow cases to proceed more smoothly, without the disruptions that can be generated by independent legal counsel who are intent on defending their client's rights.

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<sup>29</sup> "李宇軒代表律師所屬律師行聲明 [Law Firm Issued Statement for Lawyer Representing Li]," RTHK, April 1, 2021.

<sup>30</sup> Candice Chau and Kelly Ho, "Hong Kong activist Andy Li remanded in custody following first court appearance over security law charge," *Hong Kong Free Press*, April 7, 2021.

<sup>31</sup> "李宇軒案指示律師陳天立 與梁美芬聯署撐人大決定 [Andy Li's Solicitor Chen Tianli Signed a Petition with Priscilla Leung to Support the NPC Decision]," *Stand News*, March 31, 2021.

<sup>32</sup> "Ex-prosecutor 'has instructions' to represent national security suspect Andy Li," *Apple Daily*, May 19, 2021.

<sup>33</sup> Mainland lawyer Wang Quanzhang, for example, had his chosen legal counsel dismissed in 2017, to be replaced by a government-appointed lawyer. "Chinese Authorities 'Appoint' Government Lawyer for Detained Attorney Wang Quanzhang," *Radio Free Asia*, June 14, 2017. The practice of "appointing" pro-government lawyers to represent activists expanded dramatically in the wake of the 7.09 crackdown, a wide-ranging roundup of lawyers and activists across China launched by Beijing in 2015.

Li's case has led many in Hong Kong to wonder whether Mainland officials are importing this practice into the Hong Kong context, at least for some key NSL cases. If so, such a development would constitute a direct blow to human rights and rule of law in Hong Kong. More information is needed on the circumstances surrounding Li's decision to change legal counsel, in order to establish whether the change was truly voluntary, or whether it was the product of undue pressure applied to him during his time in Yantian.

Li is not the only NSL defendant who has switched his legal representation: Chan Tze-wah, a legal assistant charged with the NSL crime of collusion with a foreign power, also switched to a lawyer who is in the pro-government camp. Chan has close ties to Andy Li: he also faces charges relating to assisting Li in his efforts to flee Hong Kong. Activists Au Nok-hin and Pang Cheuk-kei, both charged with subversion in relation to the primary election case, have also switched, and are now represented by Paul Tse, a lawyer and legislator from the pro-government camp.

To be clear, as of this writing, no evidence has emerged to conclusively prove that Li was pressured to switch his legal counsel, or that he did so as part of a larger deal with the Hong Kong government or with Mainland authorities. Still, the lack of clarity surrounding the change has raised concerns among many that Li and other NSL defendants might face to trade away their own fundamental human rights in exchange for more lenient treatment.

### *Pre-Trial Release*

Pre-trial release – bail, in common parlance – has become a point of contention in NSL cases. Thus far, prosecutors have taken the view that, in general, NSL defendants should not be allowed bail, and for the most part, judges have agreed: among 56 individuals charged with NSL crimes, only 12 were granted bail. In many of those cases in which bail was granted, the individuals made broad statements about withdrawing from political life altogether, a troubling sign of the overtly political nature of NSL crimes.

Article 42(2) of the NSL states that “(n)o bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.” This provision has been read by some as creating a presumption against bail in NSL cases, in contrast to the presumption in favor of bail for most criminal cases under existing law. If read broadly, it could be used to deny bail to virtually all defendants.

Arrests under the NSL began immediately after the law went into effect on July 1, 2020, which meant that questions over the meaning of Article 42(2) were raised soon thereafter. One of the first NSL defendants, Tong Ying-kit, was denied bail in August 2020, but the judicial decision on bail did contain some hopeful elements: the judges held that Article 42(2) must be read in light of the rights protections found in the Basic Law, and that therefore it could not be read to deny

bail in all cases.<sup>34</sup> Given the violent nature of the accusations against him, Tong himself was denied bail, but an encouraging precedent was set.

Any positive momentum that was built up by the Tong bail decision was dissipated by the judiciary's handling of bail for media mogul Jimmy Lai. Lai was arrested for alleged collusion with foreign forces under Article 29 of the NSL on August 10, 2020. Lai was formally charged on December 12, and initially denied bail. Later in December, Lai was granted bail, though with extremely stringent conditions, which included both house arrest, and an order to refrain from media interviews and any use of social media. In the view of some, Lai's extensive bail restrictions were among the strictest in Hong Kong history.

Dissatisfied with this outcome, the prosecution appealed Lai's release, which gave the Court of Final Appeal its first chance to weigh in on the NSL. In its verdict, released on February 9, 2021, the CFA reversed the lower court's bail decision, and ordered that Lai remain in prison until trial.<sup>35</sup>

In the CFA's reading, Article 42(2) *does* in fact create a presumption against bail, contrary to existing Hong Kong law. In that context, the threshold for bail for NSL crimes is much more stringent: a judge must decide that she or he has "sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security." The judicial inquiry can be a broad-based one, taking into account any number of factors relating to the accused's circumstances, the nature of the alleged offence, or other matters.

When paired with the vagueness of the NSL criminal provisions, the extremely broad nature of the bail inquiry creates what one Hong Kong lawyer referred to as an "impossible task" – how to demonstrate to a judge that an individual won't take any of action that might, in the eyes of the national security authorities, constitute an NSL offense?<sup>36</sup> This lawyer worried that the CFA decision would make bail in NSL cases all but impossible, and others interviewed for this briefing paper shared similar concerns.

At the same time, the CFA decision also gives judges broad leeway to deny bail to NSL defendants on any number of different grounds. Following the CFA's decision, High Court Judge Anthea Pang pointed to Lai's wealth and the "determined and resolute" nature of his political beliefs as reasons for denying him bail. In an uncomfortable mirroring of the political nature of NSL crimes, Judge Pang seemed to be using Lai's strongly-held political beliefs and his financial status to justify the denial of bail. Her move to do so was aided by the CFA's encouragement of

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<sup>34</sup> For an analysis of the Tong Ying-kit bail decision and its implications for judicial protection of human rights in NSL cases, see Thomas E. Kellogg, "The Tong Ying-kit bail decision: a hopeful signal for Hong Kong's human rights and rule of law?," *Hong Kong Free Press*, September 19, 2020.

<sup>35</sup> The question of bail become less functionally relevant in April 2021, when Lai was sentenced to 14 months in prison for unlawful assembly, in connection with his participation in unauthorized protest marches in August 2019. Helen Davidson, "Hong Kong pro-democracy figures given jail terms of up to 18 months," *The Guardian*, April 16, 2021.

<sup>36</sup> Author interview.

a broad-based judicial inquiry, and by its blessing of a presumption against bail for NSL defendants.

The CFA's decision on its own jurisdiction over the NSL was an equally important element of the ruling. In essence, the court held that it did not have jurisdiction to weigh in on questions of constitutionality of key NSL provisions, which effectively put the NSL beyond any constitutional challenge. The CFA relied heavily on the 1999 so-called right of abode cases, in which the CFA held that it had no power to review acts of the National People's Congress or its Standing Committee.

The CFA does have grounds to fear a direct confrontation with the central government over its own constitutional review authority: any such challenge to Beijing would likely have been met with an immediate response, one that could deeply damage the institutional power of the courts.<sup>37</sup> One wonders, however, whether the CFA could have remained silent on the constitutional review question, given that such a determination was not strictly necessary to its ultimate decision.<sup>38</sup>

Regardless of the merits of the legal stand taken by the CFA, its decision to take the first opportunity to declare the limits of its authority over NSL questions speaks to the pressure that the courts are under, and also to the lingering shadow that the right of abode cases continue to cast over Hong Kong's autonomy and the rule of law.

To be sure, the ruling does contain some positive elements. The CFA reaffirmed that the NSL must be read in tandem with the Basic Law's human rights provisions, and that due attention should be paid to Articles 4 and 5, which highlight core human rights norms.<sup>39</sup> The CFA also declined to adopt some of the legal arguments put forward by the government, in particular its suggestion that bail could be denied for non-criminal acts that had a negative impact on national security.<sup>40</sup>

Overall, however, the CFA's ruling was a largely cautious, even conservative one, perhaps indicating that the CFA is looking to bide its time before issuing any rulings that directly challenge the government's legal conception of the NSL's core provisions. At some point, however, in order to fulfil its constitutional role in protecting basic human rights, the judiciary will have to be willing to issue rulings against the government in highly-charged NSL cases. Only then, after the world has a chance to witness the Hong Kong government's reaction – as well as Beijing's – to such a ruling, will we know whether the CFA's bail decision was a wise hedging tactic, or merely a delay of the inevitable.

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<sup>37</sup> Simon Young, "Hong Kong's Highest Court Reviews the National Security Law – Carefully," *Lawfare*, March 4, 2021. For a different view, see Cora Chan, "Can Hong Kong remain a liberal enclave within China? Analysis of the Hong Kong National Security Law," *Public Law*, 2021, pp. 191-92.

<sup>38</sup> Johannes Chan, "Judicial Responses to the National Security Law: HKSAR v Lai Chee Ying," undated draft on file with author.

<sup>39</sup> See, e.g., [2021] HKCFA 3, paragraphs 26-27, 41-42.

<sup>40</sup> *Ibid.*, paragraph 53(c)(ii).

The impact of the CFA's ruling on bail has been significant. Since the ruling was issued, only a precious few NSL defendants have been granted bail, in many cases only after they made broad promises to exit political life or otherwise voluntarily refrain from various forms of political speech or activism. The limited number of defendants granted bail in the January 6 primary elections case, for example, had to pledge to refrain from speaking with foreign government officials, from making political comments on social media, and even from participating in electoral politics, save for voting in pending elections.<sup>41</sup>

"The presumption is that [NSL defendants] need to concede their human rights to obtain bail," one defense lawyer involved in NSL cases told us. "To guarantee that I won't violate the NSL [and thus be eligible for bail], I shouldn't speak publicly, join political parties, participate in elections, or organize groups or events."<sup>42</sup> This lawyer suggested that NSL bail provisions are part of a larger effort to create new norms of mainstream public life for all politicians: the overall sanitization of political activity, including strict limits on public criticism of the government, and an outright prohibition on direct public criticism of the NSL itself.

The grounds for denying bail to NSL defendants has also dramatically expanded in the wake of the CFA's bail decision. In May 2021, for example, Judge Esther Toh cited pro-democracy politician Claudia Mo's private social media conversations with foreign journalists as grounds for denying her bail. In those exchanges, Mo, a former Legislative Councilor, referenced the declining human rights situation in Hong Kong. At one point, Mo told one journalist over text message that "the new security law and the spate of arrests have worked as a scare tactic, probably fairly successful – at sending a persistent political chill around the city."<sup>43</sup>

Such private exchanges should be considered protected political activity, and not a basis to deny bail. In essence, politicians and activists like Ms. Mo have been denied bail merely for exercising their basic right to criticize government policies, including the implementation of the NSL itself. Whether or not by design, the CFA's bail decision has become a tool for the *de facto* censorship of NSL arrestees, even in the absence of any final court judgment against them.

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<sup>41</sup> "47 人案保釋覆核首日 高院准黃碧雲保釋 [The First Day of Bail Review in the 47-Person Case, the High Court Granted Bail to Huang Biyun]," *Stand News*, March 11, 2021.

<sup>42</sup> Author interview.

<sup>43</sup> Rhoda Kwan, "Social media messages from Hong Kong democrat Claudia Mo to int'l media 'a threat to national security,'" *Hong Kong Free Press*, May 28, 2021.

## *Jury Trial*

NSL Article 46 is yet another key provision that allows the government to limit procedural rights of those accused of NSL crimes. That article allows for some cases to be tried without a jury if the secretary for justice believes that such a move is necessary to guard state secrets, to prevent foreign interference, or to protect the safety of would-be jurors and their family members.<sup>44</sup>

Article 46 represents a significant departure from existing Hong Kong law: the right to trial by jury has been part of Hong Kong's legal framework for more than a century. The right is enshrined in Article 86 of the Basic Law, which states clearly that "the principle of trial by jury previously practiced in Hong Kong shall be maintained." In practice, cases before Hong Kong's High Court have routinely been tried before juries, and neither prosecutors nor judges had the power to force a defendant to accept a non-jury substitute.

Legal experts, both in Hong Kong and beyond, acknowledge the role that jury trials play in guarding against politically motivated prosecutions—when prosecutors know that they will have to convince a group of disinterested citizens of a defendant's guilt, they will be less likely to try to prosecute individuals merely for criticizing the government.

The right to trial by jury also plays a key role in preserving judicial independence, by ensuring that judges cannot be so easily pressured by government officials to deliver guilty verdicts. Hong Kong's Court of Final Appeal—essentially the city's Supreme Court—has itself affirmed this point in a 2001 case, noting the role that juries play in bolstering judicial independence.<sup>45</sup>

NSL Article 46 specifically points to the need to shield potential jurors from potential risks, including the risk of attack by individuals seeking to pressure juries to deliver favorable verdicts. Yet the jury system has worked well in Hong Kong for decades, including in high-profile cases against other pro-democracy activists. Prominent pro-independence activist Edward Leung was tried by jury in a rioting case in 2018, for example. His trial proceeded smoothly, with no reports of any efforts by outside actors to pressure members of the jury. Leung was eventually convicted and sentenced to six years in jail.<sup>46</sup>

Article 46 was first put to use in the case of Tong Ying-kit, the first person to be tried for an NSL crime. A High Court judge ruled on May 20, 2021 that Tong was not entitled to a jury trial in his

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<sup>44</sup> This section draws from Thomas Kellogg and Eric Yan-ho Lai, "Death by a Thousand Cuts: Chipping Away at Due Process Rights in HK NSL Cases," *Lawfare*, May 28, 2021.

<sup>45</sup> *HKSAR v Lee Ming-tee and another* (2001), 4 HKCFAR 133 (FACC No.8 of 2000), paragraph 175.

<sup>46</sup> Austin Ramzy, "Hong Kong Activist Edward Leung Given 6 Years for Police Clash," *New York Times*, June 11, 2018. Leung's sentence struck many observers as unduly harsh; others criticized the government's use of the colonial-era Public Order Ordinance, with its at times vague and imprecise language, in such a high-profile and politically-charged case. Sum Lok-kei and Alvin Lum, "Hong Kong leader Carrie Lam hits back at critics 'politicizing' jail term for activist Edward Leung," *South China Morning Post*, June 12, 2018.

then-pending terrorism case; instead, his case is being handled by a three-judge panel.<sup>47</sup> That ruling was affirmed by the High Court's appeals chamber on June 22. Tong's trial began on June 23.

Tong, 24, was arrested on July 1, 2020, after riding his motorcycle into a group of police officers during a pro-democracy protest on the 23rd anniversary of Hong Kong's reversion to Chinese sovereignty. He was quickly charged with terrorism under the then brand-new National Security Law. He was also charged with the NSL crime of inciting secession because he was carrying a banner that the government deemed pro-independence. Additionally, Tong faces charges of "causing grievous bodily harm by dangerous driving" under the Road Traffic Ordinance.

Tong's counsel, prominent defense lawyer Philip Dykes, also raised the direct connection between jury trials and judicial independence during a May 10 hearing on the prosecution's move to hear Tong's case before a judicial panel. "Trial by jury helps ensure the independence and quality of judges ... by ensuring that they, and not judges appointed by the executive, actually deliver a verdict in a prosecution started by the government," Dykes said.<sup>48</sup> Dykes also noted that jury trials "might afford a defendant some protection against laws which they find harsh or oppressive."

High Court Judge Alex Lee was unmoved by Dykes' arguments, as was High Court Chief Judge Jeremy Poon, who heard Tong's appeal. Instead, both courts highlighted the power of the government to deny a defendant his right to a jury trial on security grounds,<sup>49</sup> as well as the power of the Secretary for Security to make such determinations on her own, without interference from criminal defendants or the courts.<sup>50</sup>

In his verdict, Chief Judge Poon made extensive reference to the CFA decision on Jimmy Lai's bail application to make clear that the NSL is not subject to constitutional review by Hong Kong courts.<sup>51</sup> Chief Judge Poon also referred to the CFA verdict to reaffirm the importance of NSL Articles 4 and 5, which make clear that basic human rights and rule of law protections also apply to NSL cases.<sup>52</sup> His decision suggests an emerging pattern: judges trying NSL cases continue to make reference to Articles 4 and 5, highlighting the importance of human rights, but then go on to rule in favor of the government.

As the first NSL trials get underway, this pattern raises the serious question of how much protection Articles 4 and 5 will concretely offer to NSL defendants: will these provisions – along with the human rights provisions of the Basic Law – actually shield those accused of NSL crimes from unjust treatment by the government, or will they merely serve as a fig leaf for government

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<sup>47</sup> "Hong Kong court denies jury trial to first person charged under national security law," *Reuters*, May 20, 2021.

<sup>48</sup> Frances Sit, "Hongkongers have no right to jury trial: prosecutors," *RTHK*, May 20, 2021.

<sup>49</sup> [2021] HKCA 912, paragraph 43.

<sup>50</sup> [2021] HKCA 912, paragraphs 68, 71.

<sup>51</sup> *Ibid.*, paragraph 31.

<sup>52</sup> *Ibid.*, paragraphs 39, 41-42.

abuse of power? How much protection will Article 4 and 5 concretely offer to some of Hong Kong's most prominent pro-democracy politicians and activists in NSL cases?

As his trial begins, Tong certainly will be interested to see how much protection he is afforded by Articles 4 and 5. That said, both for Tong and for other NSL defendants, a troubling precedent has been set: it now seems clear that the government has the unilateral authority to call for a three-judge panel under NSL Article 46. Tong Ying-kit may be the first NSL defendant to be denied his right to a jury trial, but he almost certainly will not be the last.



## IV. CONCLUSION

As this briefing paper has shown, the Hong Kong government – presumably acting at times at the direction of Beijing – has moved aggressively to curtail the procedural rights of individuals accused of NSL crimes. It has made vigorous use of its expanded investigatory powers under the IRs. And the CE has selected all of the judges who will try pending NSL cases, a move that calls judicial independence into question.

These moves tilt the playing field in the government's favor, and raise serious concerns as to whether NSL defendants will be able to get a fair trial. As noted above, any final analysis of the first-ever NSL trials can only be delivered after the process is fully played out. Nonetheless, initial signals coming out of Hong Kong are deeply troubling, and raise questions about the government's commitment to preserving the basic human rights of those accused of NSL crimes.

These developments also suggest one possible trajectory for Hong Kong's legal system. If current trends continue, the rule of law in Hong Kong will be steadily eroded, rather than instantly destroyed with one sudden and fatal blow. In such a context, the final end of the rule of law in Hong Kong would be difficult to pinpoint, but the outcome itself would be all too clear.

Both the Hong Kong government and Beijing need to understand the most likely outcome of their aggressive NSL push: they are on a clear path toward snuffing out the rule of law in Hong Kong. Recognition of this fact could push Hong Kong officials and Beijing to change their approach. While reform or outright repeal of the NSL is perhaps too much to hope for anytime soon, nonetheless a de-escalation in its use, and an end to the overall securitization of government affairs, remains a viable option.

The evidence of the ongoing institutional decline of Hong Kong's legal system continues to grow month by month. More prominent examples include: over the past ten months, two eminent foreign judges have resigned, in both cases citing the NSL specifically as a reason for quitting the bench.<sup>53</sup> In August 2020, Director of Public Prosecutions David Leung resigned from his post, citing his exclusion from NSL cases as a key reason for his departure. And a small number of judges have been transferred after delivering verdicts vindicating the rights of protesters in non-NSL cases; these moves raised concerns that judges were being punished – or at least sidelined – for delivering judicial decisions that protect human rights.<sup>54</sup>

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<sup>53</sup> Greg Torode and Swati Pandey, "Australian judge quits Hong Kong court, citing national security law," *Reuters*, September 18, 2020; Chris Lau, "National security law: former British top judge to quit Hong Kong's highest court with the 'jury still out' on Beijing-imposed legislation," *South China Morning Post*, June 4, 2021.

<sup>54</sup> Rachel Wong, "Hong Kong magistrate transferred, as pro-Beijing lawmakers hit out over protest rulings – local media," *Hong Kong Free Press*, September 8, 2020.

As this report was going to press, pro-Beijing legislators blocked the appointment of a judge to the Court of Final Appeal.<sup>55</sup> The scuttled appointment of Justice Maria Yuen, the wife of former Chief Justice Geoffrey Ma, marked the first time that Legislative Councilors had refused to accept a judicial appointment recommendation by the SAR's semi-independent Judicial Officers Recommendation Commission (JORC). Many saw the move as an effort by pro-Beijing legislators to influence judicial appointments, in ways that may conflict with judicial independence.

There may well be further changes to come. In November 2020, Zhang Xiaoming, deputy director of the central government's Hong Kong and Macao Affairs Office, called for further judicial reforms, and declared that patriotism – presumably defined as sufficiently robust political support for the Communist Party – would be an absolute requirement for all Hong Kong officials.<sup>56</sup> Pro-Beijing politician Tam Yiu-chung followed Zhang's comments with a call for specific reforms, including the creation of a so-called Sentencing Council that would guide judges on key sentencing questions.<sup>57</sup>

These and other damaging blows to Hong Kong's core legal institutions constitute a very real threat to the rule of law in Hong Kong. The international community should take note, and should press both the Hong Kong government and Beijing to change course. Otherwise, the 2<sup>nd</sup> anniversary of the National Security Law could be a very grim one indeed.

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<sup>55</sup> Primrose Riordan and Nicolle Liu, "Hong Kong pro-Beijing legislators intervene in judicial appointment," *Financial Times*, June 23, 2021.

<sup>56</sup> Tony Cheung and Lilian Cheng, "Beijing calls for judicial reform in Hong Kong, declaring patriotism is 'a legal requirement now,'" *South China Morning Post*, November 17, 2020.

<sup>57</sup> Ng Kang-chung, "Hong Kong not an 'independent judicial kingdom': pro-Beijing heavyweight doubles down on reform calls," *South China Morning Post*, January 4, 2021.