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## THE HONG KONG NATIONAL SECURITY LAW AND THE STRUGGLE OVER RULE OF LAW AND DEMOCRACY IN HONG KONG

### I. INTRODUCTION

On the night of 30 June 2020, barely an hour before the 23<sup>rd</sup> anniversary of Hong Kong's return to Chinese sovereignty in 1997, the government of Hong Kong promulgated the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('National Security Law' or 'NSL').<sup>1</sup> The passage of the NSL was preceded by sustained tensions between the Hong Kong government, and by extension the central authorities in Beijing, and diverse, vocal, and agile oppositional forces challenging existing political arrangements through the courts and legislature, as well as in the streets. Since the NSL's enactment, many members of the pro-democracy opposition are being criminally investigated and prosecuted, some under the new law's stringent provisions.<sup>2</sup>

In this article, we examine the NSL in relation to two constitutional struggles that Hong Kong has experienced since the Handover in 1997. The first of these is a struggle over preserving rule of law principles protected in Hong Kong's regional constitution, the Hong Kong Basic Law ('the Basic Law') and international treaty obligations. The second is a struggle for democratisation, pursuant to constitutional commitments in the Basic Law.

We argue that the NSL damages Hong Kong's much-vaunted rule of law, as well as its ability to govern itself as a (relatively) liberal-democratic enclave within autocratic China. In Section 1 below, we situate the intertwined struggles to preserve rule of law and to democratise within Hong Kong's constitutional framework and history. In Section 2, we discuss the enactment and content of the NSL. In Section 3, we consider the NSL's implications for the constitutional struggles over rule of law and democratisation. Far from strengthening the rule of law and the 'One Country, Two Systems' framework, as the Hong Kong government and central authorities have declared, the NSL undermines the separation of powers and operationalises rule by fear, which has thus far been characteristic of governance in Mainland China.

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<sup>1</sup> The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('National Security Law' or 'NSL'), LN 136 of 2020, B2345 (in Chinese); an unofficial translation is available at <<https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>>.

<sup>2</sup> Eric Lai, Jeremy Huai-Che Chiang and Henry Litton, 'Ask the Experts: Has Democracy in Hong Kong come to an end?,' *London School of Economics Blog* (Blog Post, 26 May 2021) <<https://blogs.lse.ac.uk/cff/2021/05/26/ask-the-experts-has-democracy-in-hong-kong-come-to-an-end/>>.

## II. CONTEXT AND TRAJECTORY OF CONSTITUTIONAL STRUGGLE

### A. *Hong Kong's Constitutional Framework*

Hong Kong has the status of a Special Administrative Region of the People's Republic of China ('PRC' or 'China') based on international treaty obligations under the Sino-British Joint Declaration, a bilateral treaty between the PRC and the United Kingdom.<sup>3</sup> The territory is allowed, for a fifty-year period, to maintain a 'high degree of autonomy'. This 'One Country, Two Systems' framework is implemented through Hong Kong's regional constitution, the Basic Law.<sup>4</sup>

Under the Basic Law, common law principles and precedents continue to apply in Hong Kong, and the independence of the judiciary is expressly protected.<sup>5</sup> The Basic Law also recognises a range of civil and political rights.<sup>6</sup> In addition, the Basic Law requires Hong Kong to implement the International Covenant on Civil and Political Rights<sup>7</sup> ('ICCPR') through domestic law.<sup>8</sup> Hong Kong courts can, with some restrictions, interpret and apply the Basic Law.<sup>9</sup> Moreover, the Hong Kong judiciary has the power of final adjudication over legal disputes, with the apex court being the regional Court of Final Appeal rather than the Supreme People's Court in Beijing.<sup>10</sup> The Basic Law prescribes a limited degree of executive accountability to the legislature and aspires (albeit with some textual ambiguities) to develop democratic governance.<sup>11</sup>

These constitutional commitments to fundamental rights, representative government, and separation of powers were particularly remarkable in the context of the PRC. The PRC, since its inception, has been a *de facto* one-party state based on the Leninist and Maoist principles of 'democratic centralism' and the 'people's democratic dictatorship'.<sup>12</sup> It has consistently rejected the very idea of separation of powers, has repressed dissent, and has sought, in principle, to 'guide' political, economic, and social life. As a regional constitution, the Basic Law necessarily has to provide ways for the (markedly dissimilar) Hong Kong and Mainland legal systems to interact. The text of the Basic Law contains creative mechanisms for this interaction. Two such mechanisms are particularly salient for the discussion that follows. First, Mainland laws not expressly included in the Basic Law's appendices

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<sup>3</sup> *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, signed 19 December 1984, 1399 UNTS 33 (entered into force 27 May 1985) <<https://www.cmab.gov.hk/en/issues/jd2.htm>>.

<sup>4</sup> *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* ('Basic Law').

<sup>5</sup> Basic Law (n 4) art 8, art 19(1), art 85, art 87.

<sup>6</sup> Basic Law (n 4) art 24–33, art 34–36, art 37–39.

<sup>7</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976) ('ICCPR').

<sup>8</sup> Basic Law (n 4) art 39, which provides that the ICCPR, in addition to other international human rights treaties, 'as applied to Hong Kong', shall be implemented through the region's law.

<sup>9</sup> Basic Law (n 4) art 158.

<sup>10</sup> Basic Law (n 4) art 19(1), art 82.

<sup>11</sup> Basic Law (n 4) art 45, art 68.

<sup>12</sup> 中华人民共和国刑事诉讼法 [Constitution of the People's Republic of China] art 1, art 3, <<https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>>.

do not apply directly to Hong Kong except in a state of emergency.<sup>13</sup> Second, the power to interpret the Basic Law is shared by the Standing Committee of the PRC legislature, the National People's Congress ('NPCSC'), and the Hong Kong judiciary.<sup>14</sup>

B. *Constitutional Struggles for Rights and Democracy, 1997–2013*

In the initial years following the Handover, there was considerable optimism about Hong Kong's prospects for protecting civil and political rights and expanding democratic suffrage. This was due in large part to the anticipated trajectory of politico-legal reform in Mainland China. After all, Hong Kong's constitutional arrangement had been negotiated on the Chinese side by the leader who initiated the far-reaching and, in many ways, liberalising reforms of the post-Mao era: Deng Xiaoping. Under Deng Xiaoping, the idea of 'ruling the country in accordance with law' was written into the national constitution.<sup>15</sup> More importantly, between the late 1970s and the early 2010s, the Chinese Communist Party reconstructed the legal system: it enacted new laws, rebuilt legal institutions; and to some extent tolerated the emergence of an embryonic civil society engaged in legal advocacy. In this process, some scholars suggested that Hong Kong's legal system could serve as a model for deepening rule-of-law within the PRC.<sup>16</sup>

However, as a strengthening civil society mounted greater challenges to autocratic Party-state governance, those seeking to put the idea of liberally conceived constitutionalism (*xianzheng*), into practice attracted ever more severe repression. By the time Xi Jinping ascended to the highest positions within the Party and state in late 2012/early 2013, it was already clear that no further political liberalisation could take place in Mainland China. Soon after, the very concept of 'Western constitutionalism' was banned from official discourse. From 2014 onwards, journalists, lawyers, academics, and advocacy groups faced widening campaigns of civil society repression.<sup>17</sup>

Contestation over the rule of law in Hong Kong emerged very soon after the Handover. The Court of Final Appeal ('CFA'), in its first major constitutional decision in 1999, enforced the right of abode of Hong Kong permanent residents in the Mainland who were barred from entering Hong Kong by the prevailing immigration regime.<sup>18</sup> It also asserted obiter that it had not just the power but also the duty to judicially review any laws – even central laws – that applied in Hong Kong for compatibility with the Basic Law.<sup>19</sup> At the instigation of the Chief Executive

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<sup>13</sup> Basic Law (n 4) art 18.

<sup>14</sup> Basic Law (n 4) art 158(1).

<sup>15</sup> 中华人民共和国刑事诉讼法 (n 12) art 5.

<sup>16</sup> Eva Pils, 'The Party and the Law,' in Willy Lam (ed), *Handbook on the Chinese Communist Party* (Routledge, 2018).

<sup>17</sup> See, eg, Andrew Scobell, 'Hong Kong's Influence on China: The Tail That Wags the Dog?' (1988) 28(6) *Asian Survey* 599.

<sup>18</sup> *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315 (Li CJ).

<sup>19</sup> *Ibid* 337.

of Hong Kong, the NPCSC overturned the Court of Final Appeal's ruling.<sup>20</sup> This move, which jeopardised the very idea of final adjudication under the rule of law, triggered unprecedented protest from the legal profession, which held a silent march to signal its deep disquiet. It is reported (though has never been confirmed) that CFA judges considered resigning.<sup>21</sup> Thereafter, Hong Kong courts have proceeded very cautiously when adjudicating cases of interest to the central authorities.<sup>22</sup>

In 2003, contestation over rule of law spilled onto Hong Kong's streets. The Hong Kong government proposed a national security law pursuant to its obligation in this regard under the Basic Law.<sup>23</sup> Many feared that legislating new national security offences such as subversion would bring into Hong Kong the harsher criminal law standards of the Mainland legal system.<sup>24</sup> Lawyers and activists campaigned vigorously against the measure, highlighting its effects on the rights to freedom of expression, assembly, privacy and a fair trial.<sup>25</sup> On 1 July 2003 – the anniversary of the Handover – over 500,000 people demonstrated against the proposed law. Faced with public disapproval on such a scale, key pro-government legislators balked at supporting the bill, and the government was forced to withdraw it. Thus, quite early after the Handover, it was evident that large numbers of Hong Kongers prized rights-based rule of law and wanted the region's legal system to remain distinct from the Mainland.

Given the Basic Law's commitment to the 'ultimate aim' of choosing both the legislature and the Chief Executive, by universal suffrage,<sup>26</sup> it was perhaps inevitable that democratisation would emerge as a site of constitutional struggle. The Chief Executive of Hong Kong was chosen by a 1200-member election committee,<sup>27</sup> (approximately 0.03% of the general electorate)<sup>28</sup> with committee members themselves selected through a process that ensured overwhelmingly pro-

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<sup>20</sup> The Interpretation of the Standing Committee of the National People's Congress of Articles 22(4) And 24(2)(3) of the Basic Law of The Hong Kong Special Administrative Region of the People's Republic of China, < <https://www.elegislation.gov.hk/hk/A106!en.assist.pdf> >.

<sup>21</sup> Gary Cheung and Chris Ip, 'All city's top judges "considered quitting"' *South China Morning Post* (online, 8 September 2011) <<http://www.scmp.com/article/978391/all-citys-top-judges-considered-quitting>>.

<sup>22</sup> See, eg, Johannes M M Chan, 'A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State' (2019) 72(1) *Current Legal Problems* 85, 95–98.

<sup>23</sup> Basic Law (n 4) art 23; National Security (Legislative Provisions) Bill 2003 < <https://www.basiclaw23.gov.hk/english/download/s3200307077.pdf> >.

<sup>24</sup> Carole J Petersen, 'Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003' in Fu Hualing, Carole J. Petersen and Simon N.M. Young (eds), *National Security and Fundamental Freedoms Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005) 19–20.

<sup>25</sup> *Ibid* 46–53.

<sup>26</sup> Basic Law (n 4) art 45, art 68.

<sup>27</sup> Between 1997 to June 2010, the election committee for the Chief Executive had 800 members. This was increased to 1200 members in 2010 when political reforms permitted by the NPCSC garnered the two-thirds Legislative Council supermajority necessary to pass.

<sup>28</sup> Government of the Hong Kong Special Administrative Region, 'Voter Registration Statistics', *Voter Registration* (Web Page, 8 February 2022) < [Voter Registration - Voter Registration Statistics](#) >.

government sympathies.<sup>29</sup> In any event, Chief Executive candidates were unlikely to prevail without a tacit nod from Beijing.<sup>30</sup> The post-Handover legislature was more representative, but fell far short of being genuinely democratic.<sup>31</sup> It was structured to ensure a critical mass of loyalist legislators in 'functional constituency' seats assigned to particular occupational sectors.<sup>32</sup> Meanwhile, opinion polls and public consultations consistently showed strong support in Hong Kong for democratisation.<sup>33</sup> Liberal-left political parties in the region urged progress towards representative government, in accordance with the Basic Law.<sup>34</sup>

In 2004, the NPCSC seized greater control over political reform in Hong Kong. As originally drafted, the Basic Law gave the NPCSC the power to approve or reject electoral reform passed by the Hong Kong legislature and government.<sup>35</sup> Through its 2004 interpretation, however, the Standing Committee assumed authority over whether and to what extent political reform could even begin to be considered in Hong Kong, in apparent conflict with the text of the Basic Law.<sup>36</sup> On the three occasions that electoral reform has since been attempted, the NPCSC has permitted only superficial changes designed to ensure an acquiescent legislature and strong central control over the election of the Chief Executive.<sup>37</sup>

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<sup>29</sup> Basic Law (n 4) Annex I (repealed and replaced in April 2021); For a concise analysis of this system, see Cora Chan, 'Legalizing Politics: An Evaluation of Hong Kong's Recent Attempt at Democratization' (2017) 16(2) *Election Law Journal* 296, 300–302.

<sup>30</sup> Benny Tai, 'The Chief Executive' in Johannes Chan & C.L. Lim (eds.), *Law of the Hong Kong Constitution* (Thomas Reuters, 2015), 7.-026 - 7.098 [online edition].

<sup>31</sup> See, eg, Ngok Ma, *Political development in Hong Kong: state, political society, and civil society* (Hong Kong University Press, 2007), 117 – 133.

<sup>32</sup> Simon N.M. Young and Anthony Law, *Privileged to vote: Inequalities and anomalies of the FC system* (Civic Exchange, 2004), 59-110; Ma (n 31) 142-145.

<sup>33</sup> Constitutional and Mainland Affairs Bureau, *Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012*, (Government of the Hong Kong S.A.R. 2012), 4; Constitutional Development Task Force, *The Fourth Report of the Constitutional Development Task Force*, (Government of the Hong Kong S.A.R. 2012), 7. See also 'Hong Kong democracy 'referendum' draws nearly 800,000', *BBC*, (online 30 June 2014) <<https://www.bbc.com/news/world-asia-china-28076566>>.

<sup>34</sup> Albert Chen, 'Development of Representative Government' in Johannes Chan & C.L. Lim (eds.), *Law of the Hong Kong Constitution* (Thomas Reuters, 2015), 8.059-8.078, 8.090-8.098 [online edition].

<sup>35</sup> Basic Law (n 4), Annex I and Annex II (amended by the NPCSC on 30 March 2021).

<sup>36</sup> Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex 1 and Article III of Annex 2 to the Basic Law of the Hong Kong Special Administrative Region of the Peoples' Republic of China (6 April, 2004).

<sup>37</sup> Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2007 and for Forming the Legislating Council of the Hong Kong Special Administrative Region in 2008 (NPCSC, 26 April 2004); Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage (NPCSC, 29 December 2007); Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (NPCSC, 31 August, 2014). For a discussion of these decisions, see Swati Jhaveri, 'Reconstitutionalizing Politics in the Hong Kong Special Administrative Region of China' (2018) 13(1) *Asian Journal of Comparative Law* 27, 30–33.

### C. *The Umbrella Movement and after*

In 2013, with two disappointing political reform exercises behind them and a third on the horizon, civil society advocates launched the 'Occupy Hong Kong with love and peace' campaign, declaring that they would occupy the city's business district if upcoming reform to the election of the Chief Executive did not include genuine universal suffrage. When the reforms permitted in 2014 fell short even of conservative reform proposals,<sup>38</sup> hundreds joined sit-ins on some of the busiest roads in Hong Kong.<sup>39</sup> The sit-ins lasted 79 days, but prompted no concessions from the Hong Kong government or Beijing.<sup>40</sup> Unsurprisingly, pan-democrat legislators voted against the NPCSC-authorized reforms en masse.<sup>41</sup>

Another watershed occurred in 2019. The Hong Kong government proposed a statutory amendment to enable the extradition of criminal suspects to Mainland China.<sup>42</sup> The 'extradition bill' provoked contestation over the rule of law as well as representative government. As in 2003, the prospect of closer engagement with Mainland criminal law caused widespread unease.<sup>43</sup> Anxieties over rule of law had been sharpened by the abduction in 2015 of Hong Kong booksellers<sup>44</sup> stocking critical publications about Chinese political leaders, and heavy-handed intervention by the NPCSC in judicial decision-making.<sup>45</sup> In the largest of several protest marches, an estimated 2 million of Hong Kong's 7.5 million residents took to the streets.<sup>46</sup> Mass protests continued even after the Hong Kong government suspended the extradition bill, morphing into mobilisation for political reform.<sup>47</sup>

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<sup>38</sup> For a brief analysis, see Chan (n 29) 301–305.

<sup>39</sup> Samson Yuen and Edmund W. Cheng, 'Neither Repression nor Concession? A Regime's Attrition against Mass Protests' (2017) 65(3) *Political Studies* 611, 614–615.

<sup>40</sup> Samson Yuen, 'From Repression to Attrition: State Responses towards the Umbrella Movement' in Ngok Ma and Edmund Cheng (eds), *The Umbrella Movement* (Project Muse, 2019) 185, 199–201.

<sup>41</sup> Donny Kwok and Yimou Lee, 'Hong Kong vetoes China-backed electoral reform proposal', *Reuters* (online, 18 June 2015) <<https://www.reuters.com/article/us-hongkong-politics-idUSKBN00Y06320150618>>.

<sup>42</sup> Anti-Extradition Law Amendment Bill, which proposed to amend the Fugitive Offenders Ordinance (Cap. 503).

<sup>43</sup> Francis Lee et al, 'Hong Kong's Summer of Uprising: From Anti-Extradition to Anti-Authoritarian Protests', (2019) 19(4) *China Review* 1, 16–18.

<sup>44</sup> Michael Forsythe and Alan Wong, 'Bookseller's Account of Abduction Rekindles Fear of Lost Rights in Hong Kong', *New York Times* (online, 17 June 2016) <<https://www.nytimes.com/2016/06/18/world/asia/hong-kong-bookseller-lam-wing-kee.html>>.

<sup>45</sup> Surabhi Chopra, 'Yau Wai Ching v Chief Executive of HKSAR: A Landmark Blow to Liberal Constitutionalism (Symposium on Constitutional Landmark Judgments in Asia)', *IACL-AIDC Blog*, (Blog Post 15 December, 2020).

See 《中華人民共和國香港特別行政區基本法》 [Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (People's Republic of China) National People's Congress Standing Committee, Instrument A115, 7 November 2016.

<sup>46</sup> "Nearly 2 million" people take to streets, forcing public apology from Hong Kong leader Carrie Lam as suspension of controversial extradition bill fails to appease protesters', *South China Morning Post* (online, 17 June 2019) <<https://www.scmp.com/news/hong-kong/politics/article/3014737/nearly-2-million-people-take-streets-forcing-public-apology>>.

<sup>47</sup> Francis L F Lee et al, (n 43).

#### D. Sites and Repertoires of Struggle

Thus, by the time the NSL was imposed, contention over preserving rule of law and furthering democracy permeated politics, public law, and public space in Hong Kong. The national and local legislatures were particularly important in the struggle over political reform.<sup>48</sup> Hong Kong's legislature also played a prominent part in specific rule of law struggles, like the 2003 crisis over national security legislation. On a more quotidian basis, it served as a space for pan-democrat legislators to query government officials and debate policy and governance.<sup>49</sup> Since 1997, Hong Kong courts have engaged closely with questions about the limits of freedom of expression and assembly, but, particularly after 2014, tended to deflect and defer to the executive on questions about the right to vote and stand for election.<sup>50</sup>

Hong Kong's thoroughfares and public parks have also been crucial sites of constitutional struggle. Large numbers of Hong Kongers have demonstrated *for* democratisation and *against* measures perceived as curbing freedoms of expression, assembly, and association. Since 1997, ritualised protest, such as demonstrations on the anniversary of the Handover or the Tiananmen Square massacre have been accompanied by occasional mass mobilisation around more pointed questions of political reform and rule of law. When large numbers of young people joined the 'Umbrella Movement' in 2014, the virtual sphere also emerged as an important site of contestation. By 2019, social media was integral to conceptual debate, tactical deliberation, emergency calls for assistance, satire, and disseminating information about police violence.<sup>51</sup>

As the struggles over rule of law and representative government intensified from 2014 onwards, the repertoires of struggle across different sites and actors also evolved. The first fifteen years after the Handover were characterised by intransigence and occasional, minimalist compromise by the PRC and Hong Kong governments on political reform. But during the Umbrella Movement protests, the governmental repertoire moved from hasty teargassing to non-violent attrition, waiting out the protesters while litigating against them through private proxies.<sup>52</sup> After 2014, the central and regional governments were more openly adversarial; for

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<sup>48</sup> Margaret Ng, 'The Legislature as a "Vetogate"' in Cora Chan and Fiona De Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart, 2020) 168–176.

<sup>49</sup> Isabella Steger, 'Two years later, the last of the vanished Hong Kong booksellers has been "freed" in China' *Quartz* (online, 24 October 2017) <<https://tinyurl.com/sjznfdb9>>.

<sup>50</sup> Jhaveri (n 37) 40–48.

<sup>51</sup> For scholarly discussion, see Francis LF Lee, Michael Chan and Husan-Ting Chen, 'Social Media and Protest Attitudes During Movement Abeyance: A Study of Hong Kong University Students' (2020) 14 *International Journal of Communication* 4932; Luwei Rose Luqiu and Shuning Lu, 'Bounded or Boundless: A Case Study of Foreign Correspondents' Use of Twitter During the 2019 Hong Kong Protests' (2021) 7(1) *Social Media + Society* doi: 10.1177/2056305121990637: 1-10; Sylvia Frosina, 'Digital Revolution: How Social Media Shaped the 2019 Hong Kong Protests', *Italian Institute for International Political Studies* (Blog Post, 9 June 2021) <<https://www.ispionline.it/en/pubblicazione/digital-revolution-how-social-media-shaped-2019-hong-kong-protests-30756>>. For reportage, see Grace Shao, 'Social media has become a battleground in Hong Kong's protests', *CNBC* (Web Page, 15 August 2019) <<https://www.cnbc.com/2019/08/16/social-media-has-become-a-battleground-in-hong-kongs-protests.html>>; Danny Mok, 'The doxxing and the duelling' in Jeffie Lam and Zuraidah Ibrahim (eds), *Rebel City: Hong Kong's Year of Water and Fire* (South China Morning Post, 2020), 313-319.

<sup>52</sup> Yuen (n 40).

example, legislation and judicial review were deployed strategically to oust activist politicians from the electoral sphere.<sup>53</sup> In 2019, stonewalling and then compromise in the form of withdrawing the extradition bill was accompanied by unbridled police violence against protesters.

Since 1997, pan-democrat politicians and progressive civil society groups have used fundamental rights litigation and legislative debate to demand constraints on the executive as well as political reform. This commitment to judicial and legislative mechanisms has held even after 2014, when political activists disqualified from contesting elections challenged their disqualification in court or protesters appealed criminal sentences, and many young Umbrella Movement activists contested elections.

Given the limited representativeness of the legislature, peaceful protest has also been unusually important in the Hong Kong context. Protest has been particularly prominent at some junctures. Mass mobilisation in 2003, 2014, and 2019 provided spaces for informal, but very public, deliberation and debate. In 2014, such deliberation included close engagement with Basic Law provisions on universal suffrage. It was characterised by many-sided political criticism, both in a formal register as well as through public art<sup>54</sup> and rapid-fire memes, tweets, and videos. During both protest movements, many participants emphasised the need for civil disobedience in pursuit of democracy. On the other hand, 2019 also saw considerable violence by a hard core of protestors, and valorisation of such violence in the movement's rhetoric.<sup>55</sup> Among other things, such violence suggested an embrace of extra-constitutional tactics.

It was into this volatile environment that the National Security Law was introduced in June 2020.

### III. THE IMPOSITION OF THE NATIONAL SECURITY LAW

On 30 June 2020, the NPCSC unveiled the National Security Law<sup>56</sup> and the Chief Executive of Hong Kong promulgated it.<sup>57</sup> Below, we briefly examine how this landmark law was introduced and what it contains.

#### A. Introduction of the NSL

When the NPCSC enacted the NSL, it was added to Annex III of the Basic Law, in compliance with the constitutional procedure for applying national laws to the region.<sup>58</sup> However, while Basic Law *procedure* for applying Mainland laws to Hong

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<sup>53</sup> See, eg, Ng (n 48).

<sup>54</sup> Sebastian Veg, 'Creating a Textual Public Space: Slogans and Texts from the Umbrella Movement' in Ngok Ma and Edmund W Cheng (eds) *The Umbrella Movement: Civil Resistance and Contentious Space in Hong Kong* (Amsterdam University Press, rev ed, 2020) 149.

<sup>55</sup> Jeffie Lam and Zuraidah Ibrahim (eds), *Rebel City: Hong Kong's Year of Water and Fire* (South China Morning Post, 2020) 53–191.

<sup>56</sup> Decision of the NPC on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security (adopted at the 3rd Session of the 13th NPC on 28 May 2020).

<sup>57</sup> Promulgation of National Law 2020, LN 136 of 2020, B2345.

<sup>58</sup> Basic Law (n 4) art 18.

Kong was followed, *substantive* constraints on such legislation were disregarded when the NSL was introduced.

Under Article 18 of the Basic Law, national laws applied in Hong Kong must pertain to defence, foreign affairs or 'other matters outside the autonomy of the region'.<sup>59</sup> This substantive restriction on national legislation is displaced only in extremis, if the Standing Committee of the National People's Congress decides to declare a state of war<sup>60</sup> or exercises its wide emergency powers under the Basic Law. A state of emergency can be declared 'by reason of turmoil' within Hong Kong 'which endangers national unity or security and is beyond the control of the government of the Region'.<sup>61</sup> While a state of emergency prevails (the Basic Law does not impose a time-limit in this regard), national laws can be applied directly to Hong Kong<sup>62</sup>.

The National Security Law - a criminal statute - does not fit within any of the categories of national legislation that can be applied to Hong Kong according to the Basic Law.<sup>63</sup> While the law has prompted diplomatic concern, it cannot be characterised as being primarily *about* 'foreign affairs' or 'defence'. Nor does this law pertain to 'other matters outside the limits of the autonomy of the Region'. Article 23 of the Basic Law directs Hong Kong to pass national security legislation 'on its own' to tackle the very same security crimes that are codified in the NSL, leaving no doubt that passing security legislation is clearly *within* the region's autonomy. While national laws outside these three Article 18 categories can be applied directly to the S.A.R. in a state of war or emergency, at no point did the central or regional authorities declare a state of emergency during 2019 or 2020. (Hong Kong's status as an international financial centre no doubt renders a formal state of emergency deeply undesirable.) Absent the declaration of a state of emergency, the ordinary constitutional restrictions on national laws should hold. Thus, on the face of it, the imposition of the NSL is not compatible with express Basic Law provisions on national security legislation and the application of Mainland laws to Hong Kong.<sup>64</sup>

#### B. *Offences Created by the NSL*

The NSL creates three offences that are categorically new to Hong Kong criminal law: secession,<sup>65</sup> subversion,<sup>66</sup> and collusion with a foreign country or with external elements to endanger national security ('collusion').<sup>67</sup> It also creates terrorism offences,<sup>68</sup> which add to pre-existing statutory offences on terrorism.<sup>69</sup>

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<sup>59</sup> Ibid art 18(2),18(3).

<sup>60</sup> Ibid art 18(4).

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid art 18.

<sup>64</sup> For a detailed analysis of constitutionality, see Cora Chan, 'Can Hong Kong Remain a Liberal Enclave Within China? Analysis of the Hong Kong National Security Law' (2021) *Public Law* 271, 272-275.

<sup>65</sup> NSL (n 1) art 20, 21.

<sup>66</sup> Ibid art 22, 23.

<sup>67</sup> Ibid art 29, 30.

<sup>68</sup> Ibid art 24, 25, 26, 27.

<sup>69</sup> *United Nations (Anti-Terrorism Measures) Ordinance* (Hong Kong) cap 575.

All four offences can be committed in a number of different ways; some of these *actus reus* modalities are reasonably specific and require a high threshold of individual or societal harm, but one or two modalities under each offence are vague and highly malleable. Further, each of these four, very serious offences are defined such that they can be committed through non-violent means. While space does not permit a detailed discussion of each offence, we illustrate both these statutory features through a few examples below.

The offence of terrorist activities under the NSL is defined to include organising, planning, committing, threatening to commit, or participating in, *inter alia*, 'other dangerous activities which seriously jeopardise public health, safety or security', while 'causing or intend[ing] to cause grave harm to society' and 'with a view to coercing the Central People's Government, the Government of the Hong Kong SAR or an international organisation or intimidating the public in order to pursue a political agenda'.<sup>70</sup> Peaceful civil disobedience could potentially be brought within the scope of this modality of the 'terrorist activities' offence.

The offence of subversion can be committed by 'overthrowing' or 'undermining' the 'basic system' of the PRC or its 'bodies of power'.<sup>71</sup> On a plain reading, the threshold for committing subversion in these ways is high. Subversion can also be committed by using force against or damaging government or legislative facilities to a degree that would disable the ordinary functioning of the relevant body. However, a further modality of subversion is much vaguer: 'seriously interfering in, disrupting, or undermining the performance of duties and functions ... by the body of central power of the People's Republic of China or the body of power of the Hong Kong SAR'.<sup>72</sup> This is particularly concerning when coupled with the fact that subversion can be committed 'by force or threat of force or *other unlawful means*'.<sup>73</sup> Myriad forms of peaceful dissent that might constitute relatively minor public order offences could be characterised as 'disrupting' the government or legislature from performing their respective functions, and become the basis for a subversion charge punishable by a maximum penalty of life imprisonment.<sup>74</sup>

The offence of collusion, too can be committed in a wide range of ways, some reasonably specific (such as spying or unlawfully providing national security intelligence to a foreign country) and others startlingly vague.<sup>75</sup> The offence includes, for example, requesting or conspiring with 'a foreign country or institution, organisation or individual' outside the PRC to 'impos[e] sanctions or blockade, or engaging in *other hostile activities*' against Hong Kong or the PRC.<sup>76</sup> Similarly malleable is the collusive act of 'seriously disrupting the formulation and implementation of laws or policies' by the regional or central governments in a

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<sup>70</sup> NSL (n 1) art 24.

<sup>71</sup> *Ibid* art 22.

<sup>72</sup> NSL (n 1) art 22.

<sup>73</sup> *Ibid* art 22 (emphasis added).

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* art 29.

<sup>76</sup> *Ibid* (emphasis added).

manner ‘which is likely to cause serious consequences’.<sup>77</sup> In aggregate, the various modes of collusion seem specifically designed to target peaceful political speech and advocacy.

The NSL recognizes three levels of culpability for primary as well as inchoate offences,<sup>78</sup> and specifies sentences for each level. Convicts face the further penalty of potentially permanent disqualification from holding public office and contesting elections.<sup>79</sup>

### C. Special Procedures

The NSL introduces special procedures for national security investigations and trials, some of which we highlight below. The police’s new national security division has enhanced powers of investigation, search, seizure, and surveillance.<sup>80</sup> The Hong Kong government has inserted some procedural checks in NSL powers to search, interfere with property, or restrict movement.<sup>81</sup> Even so, the police have a far freer hand when investigating national security offences as compared to other crimes.

The NSL also expands the executive’s authority over court proceedings. It requires Hong Kong’s Chief Executive to designate judges at every level of the court system, including the apex Court of Final Appeal, to adjudicate national security cases.<sup>82</sup> The Secretary of Justice (rather than a court) can decide to replace the jury with a three-judge panel, based, concerningly, on an open-ended list of criteria.<sup>83</sup> This is a departure from ordinary criminal procedure in Hong Kong, whereby trials on indictment before the High Court are before a jury.<sup>84</sup> In the first trial under the NSL, the Secretary for Justice certified that a jury trial could not be conducted, to protect the personal safety of jurors and their family members, and to avert risks to the administration of justice.<sup>85</sup> The Court of First Instance<sup>86</sup> and the Court of Appeal<sup>87</sup> upheld her decision. More concerning still is the provision that allows closed trials in cases involving state secrets, public order, or other unspecified sensitivities.<sup>88</sup> In such circumstances, only the judgment need be delivered in open court.<sup>89</sup>

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid art 30.

<sup>79</sup> Ibid art 35.

<sup>80</sup> Ibid art 16, 17, 18, 43(1).

<sup>81</sup> *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* (Hong Kong) LN 139 of 2020, B2397 schs 1- 3 (‘Implementation Rules’).

<sup>82</sup> NSL (n 1) art 44.

<sup>83</sup> Ibid art 46.

<sup>84</sup> *Criminal Procedure Ordinance* (Hong Kong) cap 221, s 41(2).

<sup>85</sup> *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397, [24].

<sup>86</sup> *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397.

<sup>87</sup> *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912.

<sup>88</sup> NSL (n 1) art 41.

<sup>89</sup> Ibid.

The usual presumption in favour of bail is reversed by the NSL, which provides that bail shall be *denied* unless ‘the judge has sufficient grounds for believing’ that the accused would not ‘*continue* to commit acts endangering national security’.<sup>90</sup> It is worth noting that this framing tacitly undercuts the presumption of innocence even as it makes it harder to secure bail.

#### D. *Jurisdictional innovation*

Perhaps the most striking innovation of the NSL is the bifurcation of jurisdiction over national security offences. While NSL offences would ordinarily be tried in Hong Kong, the gravest such offences can be tried in Mainland China.<sup>91</sup> Cases can be transitioned to the Mainland system if (1) they are complex due to ‘foreign or external elements’ that make it difficult for Hong Kong to exercise jurisdiction, or (2) ‘a serious situation occurs’ that renders the Hong Kong government unable to effectively enforce the NSL, or (3) ‘a major and imminent threat to national security has occurred’. The central government decides if this threshold has been met,<sup>92</sup> and once a case is classified as meeting this threshold, it is investigated, prosecuted, and tried under the Mainland legal system.<sup>93</sup> It is clear from the law that the decision to route a case out of Hong Kong can be made even before investigation has begun, i.e. before *prima facie* evidence implicates the suspect. Further, this decision, which has significant consequences for suspects, defendants, and lawyers, involves no judicial oversight.

While the NSL expands the jurisdiction of the central authorities, it contracts the jurisdiction of the Hong Kong courts. It establishes two new institutions which are significantly or wholly excluded from judicial scrutiny. The first of these is the Committee for Safeguarding National Security, headed by Hong Kong’s Chief Executive, which supervises national security operations and makes national security policy for Hong Kong<sup>94</sup> under the guidance of the central government.<sup>95</sup> The second is the Office for Safeguarding National Security,<sup>96</sup> a central body tasked with policy-making, intelligence, investigation and prosecution, and supervising national security operations in Hong Kong.<sup>97</sup> Even though the Office is located in Hong Kong and exercises very consequential power, its decisions, acts, and staff are not subject to Hong Kong’s administrative or judicial jurisdiction.<sup>98</sup>

The NSL also stakes out an extraordinarily wide claim to extra-territorial jurisdiction. It claims to apply not only when a permanent resident or entity from

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<sup>90</sup> Ibid art 42 (emphasis added).

<sup>91</sup> Ibid art 55.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid arts 56–57.

<sup>94</sup> NSL (n 1) art 15.

<sup>95</sup> Ibid arts 12–13.

<sup>96</sup> Ibid art 48.

<sup>97</sup> Ibid arts 49–51.

<sup>98</sup> Ibid arts 60, 37.

Hong Kong allegedly commits an NSL offence outside Hong Kong, but also to NSL offences committed outside Hong Kong by individuals who are *not* Hong Kong permanent residents.<sup>99</sup> Thus, it asserts jurisdiction over individuals who neither reside in Hong Kong nor have a long-term connection to it, who might be engaging in activities that are *legal* in their countries of residence.

#### IV. THE IMPLICATIONS OF THE NSL

Below, we explore the NSL's implications for the intertwined struggles over the rule of law and democratisation in Hong Kong.

##### *A Implications for the Struggle Over the Rule of Law*

Past contestation over the rule of law in Hong Kong has demonstrated that large numbers of Hong Kongers want to hold fast to fundamental freedoms, and that legislative debate, public protest, and judicial review have all been avenues for defending these freedoms (with mixed success). The Hong Kong government's early willingness to compromise in this regard (in 2003, for example) evolved into escalating measures to bar critics from formal politics, and in 2019 into harsh repression of protesters. The NSL attenuates the rights that have facilitated and have themselves been the focus of contestation.

By lowering the threshold for coercive state action in multiple respects, the NSL significantly restricts the rights to freedom of expression, assembly, and association as well as the rights to privacy, legal advice, and a fair trial under the Basic Law and the ICCPR (which is domestically implemented through the *Hong Kong Bill of Rights Ordinance*).<sup>100</sup> Space does not permit detailed analysis of restrictions on each of these rights. But across these various rights, the wide and ambiguous scope of NSL offences and police powers means that the restrictions on fundamental rights are correspondingly wide and indeterminate.

From a rule of law perspective, those provisions of the NSL that apparently conflict with higher-order human rights and the rule of law guarantees ought to be subject to judicial review. Yet, a recent decision by Hong Kong's highest court has already indicated that the NSL will be treated as constitutionally unassailable.<sup>101</sup> This decision dilutes a stance previously taken by the Hong Kong judiciary. As discussed in Section 1, the judiciary has been cautious since the NPCSC reversed its 'right of abode' decision in 1999. In a subsequent decision a few months later, a chastened CFA adopted the widest possible reading of the NPCSC's power to interpret the Basic Law. It declared that the NPCSC had plenary power to interpret any provision of the Basic Law at any time, and such interpretations were binding upon Hong

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<sup>99</sup> *Ibid* art 38.

<sup>100</sup> *Hong Kong Bill of Rights Ordinance* (Hong Kong) cap 383.

<sup>101</sup> *HKSAR v Lai Chee Ying* (2021) HKCFA 3, [36]–[37] (*'Lai Chee Ying'*).

Kong courts.<sup>102</sup> This reading perfectly fitted the reductionist conception of law appropriate to a system which rejects the principle of separation of powers. Under such a system, the distinction between powers to make and interpret laws holds little salience.<sup>103</sup> Once the view that the regional constitution can be changed at will by the NPCSC is accepted, it follows that none of the NPCSC's pronouncements can be challenged in court.

And yet, until its recent decision on bail for Jimmy Lai, the CFA had neither explicitly abandoned its stance that it could review Mainland legislation that applied in the region, nor made a decision actually striking down such legislation. Article 1 of the NPCSC-drafted NSL formulaically declares that it has been passed 'in accordance with...the Basic Law'.<sup>104</sup> In substance, however, there are grievous doubts about the compatibility between NSL provisions and rights protected by the Basic Law. But when confronted with the NSL provision effectively creating a presumption against bail, the CFA declined to consider whether the provision intruded too far on the fundamental rights to liberty and the presumption of innocence.<sup>105</sup> The CFA went on to say:

in the light of *Ng Ka Ling v Director of Immigration (No 2)*, the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong.<sup>106</sup>

This circumlocutory statement lends itself to different interpretations. It could be read as narrowly deferential, with the Court stating that it would not review the NSL-specific legislative acts of the central legislature while preserving the jurisdiction to review the constitutionality of NSL provisions. But it could also be read as holding that the NSL cannot be reviewed for compatibility with constitutional fundamental rights. The tone of the judgment as well as the manner in which the NSL provision on bail was parsed suggests that the CFA was indeed surrendering constitutional jurisdiction over the NSL. It should be noted that other even more striking dissonances between Hong Kong's constitutional rights guarantees and NSL provisions, such as the apparent criminalisation of political speech, have not yet been directly addressed by the courts.

It would have been fairly easy for the central authorities to follow the Basic Law's constitutional amendment procedure<sup>107</sup> and expressly allow the application of a bespoke national law on national security to Hong Kong. While arguably against the spirit of 'One Country, Two Systems', this would have been procedurally faithful to the Basic Law and more respectful of the rule of law. Instead, the PRC chose swift,

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<sup>102</sup> *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300, 323B–C.

<sup>103</sup> The correlated principle 'who enacts, reviews' (谁制定谁审查) is discussed, for example, in Wang Zhenmin, (王振民), *中国违宪审查制度 [Constitutional Review in China]* (Chinese University of Politics and Law Press, 2004).

<sup>104</sup> NSL (n 1) art 1.

<sup>105</sup> *Lai Chee Ying* (n 101) [34]–[37].

<sup>106</sup> *Ibid* [37].

<sup>107</sup> Basic Law (n 4) art 159.

unilateral imposition. This is not the first time that the PRC has taken steps that are difficult to reconcile with the Basic Law. On matters of particular importance to the central authorities, dissonance with constitutional provisions has been brushed aside without much ado on some previous occasions too. As discussed in Section II(B), the NPCSC spontaneously interpreted Basic Law provisions on political reform in 2004 so as to control whether reform could be proposed and what such proposals could contain. More recently, ignoring the Basic Law's commitment to judicial independence, the NPCSC interpreted a Basic Law provision on oaths of office<sup>108</sup> to ensure that two legislators-elect were ousted while the High Court in Hong Kong was judicially reviewing whether the two people in question were necessarily disqualified from assuming office.<sup>109</sup> What makes the NSL momentous is how far it goes. It intertwines the Mainland and Hong Kong criminal justice regimes and routinises PRC operations and decision-making within the Hong Kong legal system to an unprecedented degree.<sup>110</sup>

Thus, NSL provisions are immune from fundamental rights review. The NSL weakens the rule of law by ousting or reducing judicial scrutiny in other respects too. It expressly bars judicial review of policies or decisions by the institutions it establishes, namely the Committee and the Office for Safeguarding National Security.<sup>111</sup> As a result, policies that might have serious implications for fundamental rights cannot be challenged in court. Further, various interventions that ordinarily require judicial oversight can be authorised purely by the government for NSL offences. For example, covert police surveillance or interception of communications ordinarily requires judicial approval in Hong Kong. Indeed, the CFA has held that, absent judicial oversight, such measures would violate the right to privacy of communication under the Basic Law.<sup>112</sup> Under the NSL, this past constitutional ruling is overridden and the Chief Executive's approval suffices for covert surveillance and interception.<sup>113</sup> In 'exceptional circumstances', even lawyers' offices and homes can be covertly surveilled and their communications intercepted without judicial scrutiny.<sup>114</sup> Further, Mainland national security personnel present in Hong Kong are expressly and entirely excluded from the jurisdiction of Hong Kong courts and the local police force in relation to acts performed within Hong Kong territory.<sup>115</sup> This implies that even the most established of common law remedies - such as the ancient writ of habeas corpus - would be unavailable if someone is detained by Mainland personnel. Moreover, staff

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<sup>108</sup> 《中華人民共和國香港特別行政區基本法》 [Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] (People's Republic of China) National People's Congress Standing Committee, Instrument A115, 7 November 2016.

<sup>109</sup> *Chief Executive of HKSAR v President of Legislative Council* [2016] HKEC 2487.

<sup>110</sup> Carole J Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a NSL and Operate National Security Institutions in Hong Kong' (2020) 50 *Hong Kong Law Journal* 633, 656.

<sup>111</sup> NSL (n 1) arts 14, 60.

<sup>112</sup> *Koo Sze Yiu v Chief Executive of HKSAR* [2006] 3 HKLRD 455.

<sup>113</sup> Implementation Rules (n 82) sch 6.

<sup>114</sup> *Ibid* s 13.

<sup>115</sup> NSL (n 1) art 60.

of the Office for Safeguarding National Security cannot be ‘inspected, searched, or detained’ by Hong Kong police.<sup>116</sup>

So, the NSL creates a vacuum within the Hong Kong legal system in relation to national security policies, institutions, and Mainland personnel. This is coupled with the possibility of transferring cases to the Mainland criminal justice system, within which suspects, defendants, and lawyers would contend with much harsher legal rules in relation to arrest, investigation, trial, and punishment. Moreover, these harsher *legal* norms in Mainland China operate alongside well-documented unlawful but systematic practices of torture and arbitrary detention in underground prisons.<sup>117</sup>

Constraints on public power, respect for individual rights, the separation of powers, and access to legal remedies are hallmarks of the rule of law. The NSL dilutes or dispenses with these bedrock principles. How might Hong Kong’s struggle over the rule of law evolve in its wake? For the reasons discussed above, the NSL diminishes judicial review as a strategy and the judiciary as the central arbiter in contestation over the rule of law. Chan has explored how the judiciary can, within its reduced jurisdiction, deploy the ‘common law tool-kit’ to moderate the erosion of rights by the NSL and attendant security policies.<sup>118</sup> In the months since the NSL came into force, administrative law principles have in fact been a force for mild moderation. Rules issued by the Hong Kong government have imposed procedural checks on NSL powers of, inter alia, search, seizure, asset freezing, surveillance, communications-interception, and censorship.<sup>119</sup> Strict statutory construction can also have moderating effects. For example, in the first trial under the NSL, the court declined to construe the offence of terrorism under the NSL as broadly as the prosecution urged, and ruled that ‘great harm to society’ had to be proven for the offence to be established.<sup>120</sup>

However, decisions on a range of procedural questions and bail applications in NSL as well as non-NSL cases against opposition politicians suggest that the judiciary is hesitant to deploy the ‘common-law toolkit’ to soften the NSL’s impact on the right to a fair trial. In the *Lai Chee Ying* decision reversing bail for media entrepreneur Jimmy Lai, for example, the CFA affirmed that the threshold for bail in relation to NSL offences was stricter than the ordinary standard under Hong Kong criminal law.<sup>121</sup> In so doing, the CFA overturned the narrow, rights-protective interpretation of the NSL bail provision by the courts below. Bail decisions in NSL cases over the course of 2021 indicate that the test for bail under the NSL is being applied expansively, with bail being denied to individuals who pose little risk to public

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<sup>116</sup> Ibid.

<sup>117</sup> Eva Pils, *Human Rights in China: A Social Practice in the Shadows of Authoritarianism* (Polity Press, 2018).

<sup>118</sup> Chan (n 64) 286–287; see also Swati Jhaveri, ‘Administrative Law as a Modest Guardian of the Rule of Law’ in Cora Chan and Fiona De Londras (eds) *China’s National Security: Endangering Hong Kong’s Rule of Law?* (Hart Publishing, 2020) 113–132.

<sup>119</sup> Implementation Rules (n 82).

<sup>120</sup> Brian Wong, ‘Judges in Hong Kong’s first national security law trial rule that ‘great harm to society’ must be proven to secure terrorism conviction’, *South China Morning Post* (online, 29 April 2021)

<<https://www.scmp.com/news/hong-kong/law-and-crime/article/3131658/judges-hong-kongs-first-national-security-law-trial>>.

<sup>121</sup> *Lai Chee Ying* (n 101) [70].

safety or the administration of justice. Thirty-one of the 47 opposition figures arrested in January 2021 were initially denied bail, leading some suspects to abandon their bail applications.<sup>122</sup> More recently, bail was denied to three university students who had, as members of a student union, passed a resolution ‘appreciating the sacrifice’ of a man who had killed himself after seriously injuring a police officer on the 24<sup>th</sup> anniversary of the Handover on 1 July 2021.<sup>123</sup> Notwithstanding the relative youth of the university students and the ‘pure speech’ nature of their alleged offence – they are accused of advocating terrorism under art 27 of the NSL – they were remanded in custody. Barrister Chow Hang-tung, vice-chair of the group that organises the city’s annual Tiananmen Massacre vigil, was also denied bail in relation to charges of inciting subversion. The court also rejected Chow’s application for lifting media restrictions on covering NSL bail proceedings, reportedly to preserve the integrity of the judicial process and prevent the court from being used as a forum for political advocacy.<sup>124</sup>

The Court of First Instance and the Court of Appeal upheld the government’s decision disallowing a jury trial in the case of Tong Ying-kit, who was charged with terrorism and inciting secession for driving a motorcycle into police officers while holding a protest banner.<sup>125</sup> Given that the NSL countermands the procedural norm that trials on indictment are before a jury, Tong Ying-kit’s arguments that he should have been given the opportunity to make representations on the issue, and that the Secretary of Justice had failed to give adequate reasons for her decision, deserved serious consideration. The judges hearing the case could have rejected Tong’s argument that he had a constitutional right to a jury trial, but accepted that the government’s power to dispense with a jury trial was moderated by a duty to give robust, appropriately evidenced reasons for such a decision, and a duty to give the defendant a reasonable opportunity to be heard. However, the Court of First Instance<sup>126</sup> firmly rejected any suggestion of procedural impropriety. The Court of Appeal too neglected the question of procedural checks on declining an NSL-accused a jury trial.<sup>127</sup>

## B *Implications for the Democratic Process and the Struggle over Democratisation*

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<sup>122</sup> Jasmine Siu and Nadia Lam, ‘Hong Kong national security law: bail blow for another defendant in city’s largest prosecution under Beijing-imposed legislation, others drop their bids’, *South China Morning Post* (online, 19 March 2021) <<https://www.scmp.com/news/hong-kong/law-and-crime/article/3126085/hong-kong-national-security-law-bail-blow-another>>.

<sup>123</sup> Candice Chau, ‘Hong Kong court denies bail to 3 student leaders charged under national security law with ‘advocating terrorism’, *Hong Kong Free Press* (online, 19 August 2021) <<https://hongkongfp.com/2021/08/19/hong-kong-court-denies-bail-to-3-student-leaders-charged-under-national-security-law-with-advocating-terrorism/>>.

<sup>124</sup> Candice Chau, ‘Hong Kong Tiananmen Massacre vigil group leader denied bail over ‘inciting subversion’ national security charge’, *Hong Kong Free Press* (online, 10 September 2021) <<https://hongkongfp.com/2021/09/10/hong-kong-tiananmen-massacre-vigil-group-leader-denied-bail-over-inciting-subversion-national-security-charge/>>.

<sup>125</sup> ‘National security suspect’s jury trial bid rejected’, *RTHK* (online, 20 May 2021) <<https://news.rthk.hk/rthk/en/component/k2/1591783-20210520.htm>>.

<sup>126</sup> *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397, [36]–[42].

<sup>127</sup> *Ibid* 912.

As discussed in Section II, political advocacy, debate, and protest have been significant modes of engaging with the authorities over the rule of law in Hong Kong. These forms of political engagement have also long been essential to nurturing a democratic culture of challenging political decision-makers. Indispensable as freedom of speech and the closely associated freedom of assembly and association, and the right to political participation are in any liberal democracy,<sup>128</sup> the importance of these rights is further heightened in settings where, as is the case in Hong Kong, the legislative process is not fully democratic. Precisely because formally-elected state actors such as Legislative Council members lack robust democratic legitimacy, the role of advocacy groups and wider civil society, as well as the media, is heightened in Hong Kong. Indeed, proponents of democratisation among the city's legislators have long relied on the resilience of these actors.<sup>129</sup> It is therefore a blow not only to the rule of law, but also to the democratic process and promotion of democracy in Hong Kong that the NSL has drastically thinned out the range of civil society actors advocating for civil and political rights, separation of powers, and democratisation, as well as the range of opinions that can be comfortably aired.

Peaceful political expression has been the main target of NSL arrests so far, including (widespread) calls for greater autonomy, (fringe) demands for independence, and advocacy directed at foreign governments. Since July 2020, approximately one person a month has been arrested under the NSL, including a startling 53 people in January 2021. Wong & Kellogg note that for several decades prior, the use of criminal provisions related to national security was vanishingly rare.<sup>130</sup> Approximately one-fourth of the over 105 arrests by security police so far (as of 15 May 2021)<sup>131</sup> are for political speech. Many are 'pure' speech cases, i.e., the accused chanted, displayed, or had in their possession allegedly secessionist / seditious material but were not committing any violent or disorderly acts.<sup>132</sup> Some arrests, including of activist Agnes Chow, former legislator Claudia Mo, and media entrepreneur Jimmy Lai, seem to rest largely upon peaceful political advocacy predating the NSL despite the law's express bar on retroactive prosecution.<sup>133</sup> Many civil society actors have adapted by policing themselves. A few prominent pro-democracy groups disbanded immediately before or soon after the NSL came into force, for fear of violating the law by their very existence.<sup>134</sup> Leaders of these groups,

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<sup>128</sup> As the United Nations Human Rights Council has noted, freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and development (see Human Rights Council, *Safety of Journalists*, Human Rights Council Resolution 21/12, UN GAOR, 21<sup>st</sup> sess, 37<sup>th</sup> mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/21/2, (27 September 2012)). On the inherent connections between the four rights mentioned here, see, eg, Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014) 257.

<sup>129</sup> See Ng (n 48).

<sup>130</sup> Lydia Wong and Thomas Kellogg, *Hong Kong's NSL: A Human Rights and Rule of Law Analysis* (Report, Georgetown Centre for Asian Law, February 2021) 28–29.

<sup>131</sup> This includes arrests made for offences under the NSL and arrests made for non-NSL offences by the NSL-created National Security Division of the Hong Kong police.

<sup>132</sup> Wong & Kellogg (n 130) 29, 66–70.

<sup>133</sup> *Ibid* 37–38.

<sup>134</sup> Nicolle Liu and Yuan Yang, 'Hong Kong pro-democracy groups disband after security law passed' *Financial Times* (online, 30 June 2020) <<https://www.ft.com/content/28aa95f9-e3b1-4b00-b25f-8de3d349f660>>.

including activists Joshua Wong and Agnes Chow, resigned in advance of dissolution to protect the larger membership. More recently, some of Hong Kong's largest unions and long-standing human rights groups have disbanded.<sup>135</sup> Media articles suggest that the NSL is already affecting the conduct of research<sup>136</sup> and teaching in Hong Kong.<sup>137</sup> Scholars and teachers report feeling fearful and scrutinised.<sup>138</sup> With the increased possibility of lawyers' premises being surveilled, even confidential legal advice might be affected.

Alongside self-policing, the NSL incentivises institutional censorship. The law provides for organizational or institutional liability for offences in addition to individual liability.<sup>139</sup> Companies and other private organizations convicted of an offence can be fined or lose permission to operate.<sup>140</sup> Bearing in mind that the threshold for aiding or abetting widely drafted NSL offences can be low and malleable, universities and thinktanks could become reluctant to host research critical of the authorities. Similarly, businesses are likely to be increasingly sensitive to opinions expressed in a private capacity when hiring and contracting.

Just as the NSL constricts political critique within Hong Kong, it also inhibits global engagement with the region, which has long been crucial to public scrutiny of the political process and debate about democratisation in Hong Kong. Wong & Kellogg note that 13 out of 105 national security cases so far involve contacts with foreign entities, and six involve allegations of collusion with foreign forces.<sup>141</sup> Interaction with foreign governments, CSOs, and journalists exposes Hong Kong-based political activists (and, as a matter of law, the overseas entities themselves) to prosecution. In May 2021, the prosecution successfully deployed a Whatsapp exchange between former legislator Claudia Mo and the Wall Street Journal to defeat Mo's application for bail on subversion charges. Using Mo's texts criticising the targeting of pan-democrats, the government argued that she 'had always maintained close connection with the foreign diplomats of various countries', and the judge decided on this basis that there was a risk Mo might 'continue to commit acts endangering

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<sup>135</sup> Chan Ho-him, 'Hong Kong's largest opposition trade union confirms disbandment, expects to fold by early October' *South China Morning Post* (online, 15 August 2021) < <https://www.scmp.com/news/hong-kong/politics/article/3149319/hong-kongs-largest-opposition-trade-union-confirms> >; Chan Ho-Him and Ng Kang-chung, 'Hong Kong's biggest teachers' union drops political bombshell, announcing its disbandment after authorities cut ties' *South China Morning Post* (online, 10 August 2021) < <https://www.scmp.com/news/hong-kong/politics/article/3144518/hong-kongs-biggest-teachers-union-set-disband-after> >; Jeffie Lam, 'Hong Kong protests: as Civil Human Rights Front folds, police and Beijing warn legal troubles far from over' *South China Morning Post* (online at 15 August 2021) < <https://www.scmp.com/news/hong-kong/politics/article/3145093/hong-kong-protests-civil-human-rights-front-confirms-it> >.

<sup>136</sup> See, eg, 'China is killing academic freedom in Hong Kong' *The Economist* (online, 23 August 2020) < <https://www.economist.com/china/2020/08/23/china-is-killing-academic-freedom-in-hong-kong> >; Lucy Craymer, 'Hong Kong University Fires Democracy Advocate as China Clamps Down', *Wall Street Journal* (online, 28 July 2020) < <https://www.wsj.com/articles/hong-kong-university-fires-democracy-advocate-as-china-clamps-down-11595954251> >.

<sup>137</sup> Chan Ho-him, 'Will national security law force exodus of Hong Kong's teachers, students over fears of shrinking academic freedom?', *South China Morning Post* (online, 23 April 2021) < <https://www.scmp.com/news/hong-kong/education/article/3130660/will-national-security-law-force-exodus-hong-kongs> >.

<sup>138</sup> *Ibid.* See also *The Economist* (n 137) and Craymer (n 137).

<sup>139</sup> NSL (n 1) art 31.

<sup>140</sup> *Ibid.*

<sup>141</sup> Wong & Kellogg (n 130) 29.

national security if bail is granted'.<sup>142</sup> When former opposition legislator Ted Hui fled Hong Kong in January 2021 with the help of some Danish legislators, the government declared that it was willing, in theory, to press criminal charges against overseas actors who aid Hong Kong activists facing criminal trials to abscond.<sup>143</sup> While the government does not appear to have taken any concrete action (yet) against the two legislators from Denmark, its statements suggest that human rights organisations or other entities that support activists who leave Hong Kong and seek asylum elsewhere might face serious consequences, particularly if they are located in states that have extradition agreements with Hong Kong.

While the NSL weakens critical voices in rule of law contestation, it galvanises pro-establishment non-state actors in a manner reminiscent of the Mainland system's conception of a United Front. Concerted non-state campaigns by pro-establishment media outlets against individuals, such as Benny Tai or Jimmy Lai, or organisations, such as the Civic Human Rights Front, often foreshadow government action against them. For example, when the director of a museum stated that works of art regarding the Tiananmen massacre or by artist Ai Weiwei could still be exhibited, the museum was accused by a legislator of showcasing work that 'spread hatred' against China. In response, the Chief Executive asserted that the police would be on 'full alert' to ensure the city's museums do not undermine national security.<sup>144</sup> Judges and lawyers handling criminal proceedings related to the 2019 protests have been excoriated by government-owned newspaper *Ta Kung Pao* for acquittals or sentences deemed insufficiently harsh.<sup>145</sup> More recently, the central government's Liaison Office in Hong Kong described the chair of the Hong Kong Bar Association as 'an anti-China politician' with 'close connections with foreign countries'. This prompted the Chief Executive to state that the government could 'take action' on 'complaints about the Bar not acting in accordance with the Hong Kong law'.<sup>146</sup> Labelling entities as dangerous or traitorous, demanding that they be silenced or punished is a well-worn tactic of control in authoritarian states. The NSL gives teeth to this tactic in Hong Kong, intertwining informal and formal repression of dissent.

In addition to these inhibiting effects that percolate through political discourse in Hong Kong, the NSL has been used concertedly over the past year against the pro-

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<sup>142</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* (online, 28 May 2021) <<https://hongkongfp.com/2021/05/28/social-media-messages-from-hong-kong-democrat-claudia-mo-to-intl-media-a-threat-to-national-security/>>.

<sup>143</sup> In response to a question in the Legislative Council, Secretary for Security John Lee stated, *inter alia*, that "the Police will actively investigate and pursue their legal liabilities under the existing legal framework" against "any person (including foreign politicians)...suspected of having committed the crime for organising, planning or aiding the abscondence": Hong Kong, *Parliamentary Debates*, Legislative Council, 6 January 2021, 14:00 (Secretary for Security John Lee) It is important to note that the discussion pertained to the possibility of prosecution under the Criminal Procedure Ordinance (Cap. 221) rather than the NSL.

<sup>144</sup> Violet Wong, 'We won't let arts undermine security: Carrie Lam' *RTHK* (online, 17 March 2021) <<https://news.rthk.hk/rthk/en/component/k2/1581040-20210317.htm>>.

<sup>145</sup> For a factual account, see Kelly Ho, 'Hong Kong barristers urge minister to defend judges against 'virulent' attack by state-owned newspaper' *Hong Kong Free Press* (online, 24 November 2020) <<https://hongkongfp.com/2020/11/24/hong-kong-barristers-urge-minister-to-defend-judges-against-virulent-attack-by-state-owned-newspaper/>>.

<sup>146</sup> 'Hong Kong leader says govt could intervene in Bar Association if necessary' *Reuters* (online, 27 April 2021) <<https://www.reuters.com/world/asia-pacific/hong-kong-leader-says-govt-could-intervene-bar-association-if-necessary-2021-04-27/>>.

democracy political opposition in Hong Kong. Fifty-three politicians and activists were arrested on a single day on 6 January 2021. They are accused of subversion for their involvement in an unofficial 'primary election' organised by pan-democrat political parties in July 2020. The primary election aimed to identify the most popular pan-democrat candidates in order to concentrate the reformist vote in upcoming elections for the Legislative Council. This initiative was similar in many respects to civil society referenda organised in the past. But an op-ed by academic-activist Benny Tai, where he argued that securing an electoral majority would allow pan-democrats to block the government's policy initiatives, was seized upon by the government. The Office for Safeguarding National Security and the Liaison Office hailed the mass arrests, castigating Tai's 'evil intentions'.<sup>147</sup> Hong Kong's Secretary for Security stated that those arrested were allegedly involved in 'overthrowing or interfering seriously to destroy the Hong Kong government's legal execution of duties'.<sup>148</sup> Some prominent pro-democracy figures, such as media entrepreneur Jimmy Lai, have been charged with multiple offences. Other reformist stalwarts, such as Martin Lee and Margaret Ng, have recently been convicted of non-NSL offences for participating in unauthorised but peaceful protest in 2019.

Further blows have been dealt to the existing electoral system since the NSL was introduced. In November 2020, the NPCSC decided that Hong Kong legislators would be removed from their seats if they were deemed to have, *inter alia*, endangered national security or refused to support China's sovereignty over Hong Kong,<sup>149</sup> and the government immediately ousted four pan-democratic legislators.<sup>150</sup> This triggered resignations in protests by all pan-democratic legislators but one.<sup>151</sup> In March 2021, the NPCSC unveiled a decision on 'improving the electoral system of Hong Kong'.<sup>152</sup> This decision, unilaterally and without consultation, revised the rules governing elections to ensure a system of 'patriots governing Hong Kong'. Local legislation instituting these changes was duly passed by Hong Kong's Legislative Council (largely shorn, by this point, of any pro-democracy members) on 27 May

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<sup>147</sup> Natalie Wong et al, 'Hong Kong national security law: 53 former opposition lawmakers, activists arrested; authorities accuse them of plot to 'overthrow' government' *South China Morning Post* (online, 6 January 2021) < <https://www.scmp.com/news/hong-kong/law-and-crime/article/3116573/dozens-hong-kong-opposition-lawmakers-activists> >.

<sup>148</sup> Yanni Chow and Yoyo Chow, 'Hong Kong arrests 53 for plot to 'overthrow' government in latest crackdown on dissent' *Reuters* (online, 5 January 2021) < <https://www.reuters.com/article/us-hongkong-security-idCAKBN29B01K> >.

<sup>149</sup> Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region, (People's Republic of China) Standing Committee of the National People's Congress, Instrument 29, 11 November 2020.

<sup>150</sup> Government of Hong Kong SAR, 'HKSAR Government announces disqualification of legislators concerned in accordance with NPCSC's decision on qualification of HKSAR legislators' (online, 11 November 2020) < <https://www.info.gov.hk/gia/general/202011/11/P2020111100779.htm> >.

<sup>151</sup> Tony Chueng and Jeffie Lam, 'Mass resignation of Hong Kong opposition lawmakers after Beijing rules on disqualification' *South China Morning Post* (online, 11 November 2020) < <https://www.scmp.com/news/hong-kong/politics/article/3109454/mass-resignation-hong-kong-opposition-lawmakers-after> >.

<sup>152</sup> Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region, (People's Republic of China) Standing Committee of the National People's Congress, Instrument 30, 11 March 2021. ('Electoral System Decision'), [https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext\\_doc31.pdf](https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc31.pdf).

2021.<sup>153</sup> These changes substantially dismantle the democratic elements previously contained in the electoral system and embed NSL institutions within new mechanisms to screen election candidates.

Since 1997, the Election Committee has selected the Chief Executive of Hong Kong through a “small-circle” election that was a conduit for installing the central government’s favoured candidate.<sup>154</sup> The Election Committee itself is chosen through elections in various ‘sub-sectors’ organized on an economic or professional basis. Recent amendments have expanded the size of the Election Committee from 1,200 to 1,500 members, with the expansion designed to strengthen the pro-Beijing loyalties of the body.<sup>155</sup> The ‘sub-sectors’ electing committee members too have been restructured to exclude political progressives, replace significant numbers of individual votes with votes by corporate bodies, and concentrate electoral power in fewer, more predictable hands. Five hundred and eighteen members of the 1,500-member committee will be nominated by the government or will themselves be government officials.

Hong Kong’s seventy-member legislature too has been expanded. It will now comprise 90 members.<sup>156</sup> But while previously *half* of all legislators were elected through universal suffrage,<sup>157</sup> now less than a fourth – i.e., 20 legislators – will be. The Election Committee will choose 40 out of 90 legislators, and also serve as gatekeeper for the 20 that are directly elected: electoral hopefuls must secure the Election Committee’s support before they can contest elections in a geographical constituency.<sup>158</sup> Functional constituencies within the Legislative Council, long criticised for reinforcing the political might of the wealthy,<sup>159</sup> have been rendered even less representative. Thirty Legislative Council members – a third of the total – will now come from functional constituencies,<sup>160</sup> but past reforms that had expanded the electorate in five such seats have been reversed. As with Election Committee

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<sup>153</sup> *Improving Electoral System (Consolidated Amendments) Ordinance 2021* (Hong Kong),

<sup>154</sup> Benny Tai, ‘The Chief Executive’ in Johannes Chan and C.L. Lim eds. *The Law of the Hong Kong Constitution* (Sweet & Maxwell 2021), 7.013–7.098.

<sup>155</sup> The 1,200-member Election Committee comprised four 300-member sectors, which were in turn elected by various sub-sectors. A new 300-member sector has been added to the Election Committee, which includes members of five designated national organisations, National People’s Congress delegates, as well as members of the Chinese People’s Political Consultative Conference (CPPCC), the country’s highest political advisory body: See Electoral System Decision (n 152) art 2.

<sup>156</sup> Electoral System Decision (n 152) art 4.

<sup>157</sup> Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage, (People’s Republic of China) Standing Committee of the National People’s Congress, Instrument 19, 29 December 2007), art 1.

<sup>158</sup> Basic Law (n 4), art 8, annex II, as amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People’s Congress on 30 March 2021. Candidates for a geographical constituency “shall be nominated by at least 100 but no more than 200 voters for the geographical constituency as well as at least 2 but no more than 4 members from each sector of the Election Committee”.

<sup>159</sup> See for example, Ma (n 31), 117 – 133.

<sup>160</sup> Basic Law (n 4) art 1, Annex II, as amended at the Twenty-Seventh Meeting of the Standing Committee of the Thirteenth National People’s Congress on 30 March 2021.

sub-sectors, individual votes in several functional constituencies have been reduced and corporate votes increased.

Even before elections can commence, electoral hopefuls for the Election Committee, the Legislative Council, or the Chief Executive position will be vetted by a government-run committee.<sup>161</sup> This committee assesses whether potential candidates bear allegiance to the S.A.R., comply with the NSL, and are capable of genuinely upholding the Basic Law.<sup>162</sup> Intertwining the institutional machinery on national security and elections, the candidate eligibility review committee will consult the Committee for Safeguarding National Security, which in turn will be advised by the national security division of the police.<sup>163</sup> The vetting committee's decisions cannot be judicially reviewed or appealed.<sup>164</sup> This echoes, and indeed, flows from the NSL's ouster of judicial review: since the candidate eligibility review committee's decisions draws upon the findings of the Committee for Safeguarding National Security, they are immune from judicial scrutiny.

The candidate eligibility review committee strengthens an electoral screening mechanism that was introduced when several young pro-democracy activists entered the electoral fray after 2014. Decisions by government officials that pro-democracy candidates were incapable of genuinely upholding the Basic Law were often opaque, sparsely reasoned, and based upon tendentious interpretations of social media posts, interviews, and public talks by the individuals concerned. Judicial review of some of these refusals reiterated some basic tenets of procedural fairness, and even reversed the government's decision on occasion.<sup>165</sup> It is worth noting that these rare victories in court came too late to allow the electoral hopefuls to contest. After the recent electoral overhaul, pro-democracy candidates have lost the only forum where they could challenge an official rejection of their candidacy and assert their constitutionally-protected right to stand for election.<sup>166</sup>

In sum, the NSL has severely damaged Hong Kong's democratic process and its democracy movement, both by its deep inroads into the fundamental constitutional rights central to democratic contestation, and by the direct deployment of the NSL against key figures in Hong Kong's democracy movement. It seems fair to say that whatever democratic electoral process existed in Hong Kong is now defunct.

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<sup>161</sup> Electoral System Decision (n 152) art 5; *Improving Electoral System (Consolidated Amendments) Ordinance 2021* (n 153), s 269(5).

<sup>162</sup> Basic Law (n 4), art 5, annex II, as amended and effective 31 May 2021.

<sup>163</sup> *Ibid.*

<sup>164</sup> Basic Law (n 4) art 5, annex II as amended and effective 31 May 2021; *Improving Electoral System (Consolidated Amendments) Ordinance 2021* (n 154) s 271, which inserts Section 3B into the *Legislative Council Ordinance* (Cap. 542).

<sup>165</sup> See, eg, *Kwok Wai Fun, Franco (Returning Officer for The Kowloon West Geographical Constituency) v. Lau Siu Lai and Another* (2020) 23 HKCFAR 338. See also *Chan Ho Tin v Lo Ying Ki Alan* [2018] HKCFI 345 (Au J at 101[80]).

<sup>166</sup> Basic Law (n 4) art 26.

## V. CONCLUSION

As the preceding sections have shown, the NSL marks a sharp turning point in Hong Kong's intertwined constitutional struggles over rule of law and democracy. But notwithstanding the weakening of rule of law and near-obliteration of a representative legislature, these struggles continue.

The imposition of security *legislation* (rather than pursuing their desired outcomes through the sort of *ad hoc* NPCSC decisions made over the preceding decade) suggests that the PRC and Hong Kong governments remain keen to claim that Hong Kong possesses strong rule of law. Legislation has the advantage of being more systematic while also imparting a legitimising sheen to the measures it contains. In so doing, the authorities have to some extent exploited ongoing contention about the concept of the rule of law as it applies to Hong Kong. While the authorities (and the British colonial government before them) espoused a thin conception of rule of law, this concept was given a wider and (in our view) more persuasive, substantive meaning by key protagonists in Hong Kong's constitutional struggles.<sup>167</sup> Although the NSL and further measures introduced in its wake have succeeded in muffling protest, there is at this point no indication that the authorities have won the argument about which conception of rule of law is preferable. Indeed, the scale of public protest in 2019 suggests that the NSL may well serve to *strengthen* support for the substantive conception of rule of law, including robust human rights protection and separation of powers.

Prospects for democratisation appear to have reached an all-time low. Given the NSL's intimidating effects as well as its tacit rejection of separation of powers, it is difficult not to conclude that Hong Kong is on a trajectory towards autocracy. But this does not mean that democratic values have been entirely suppressed. As long as a skilled and still considerably independent judiciary continues to be able to protect fundamental rights, the system remains very different from that of a fully-fledged autocracy. And pro-democracy campaigners continue their advocacy within and – increasingly – outside Hong Kong.

These tentative conclusions raise the question whether Hong Kong's future might be characterised by 'authoritarian legality'. Ginsburg and Zhang have claimed that 'social demand for legality' – which they define as adherence to legal rules – 'can be disentangled from social demand for democracy, civil liberties, or 'Western style constitutional review' and that the Party-State has enhanced authoritarian legality,

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<sup>167</sup> For a discussion of this conceptualization of rule of law, see Benny Tai et al, 'Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong' *Social & Legal Studies* (2020) 29(1), 107–145. On a normatively ambitious conception of the rule of law, see also Thomas Bingham, *The Rule of Law* (Penguin, 2011). On an account of juxtaposing formalistic and substantive conceptions of the rule of law, see Jeremy Waldron, 'The Rule of Law' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition).

as they define it, in Mainland China.<sup>168</sup> Critics of this argument have not only questioned its coherence but also pointed out that gaining empirical insight into views held in a highly repressed society is difficult.<sup>169</sup>

However, Hong Kong's past and currently unfolding experience calls into question whether authoritarian legality as defined above could ever reflect a genuine 'social demand'<sup>170</sup> on the part of Hong Kong society. This experience also highlights the challenges of mapping the effects of a shift to rule by fear. As our discussion of the NSL has shown, its effects are not exhausted by the creation of new rules enhancing the coercive power of the state. Perhaps even more importantly, the NSL has the capacity to intimidate well beyond the letter of its provisions by creating rules and mechanisms to suspend legal protections altogether. It remains to be seen if Hong Kong society, despite its impressively demonstrated ability to resist authoritarian encroachment, will be able to sustain civil and political rights and advocacy for democracy under these conditions.

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<sup>168</sup> Zhang Taisu and Tom Ginsburg, 'China's Turn toward Law,' *Virginia Journal of International Law* (2019) 59(2) 306, 316-17, 370-5, 376-89.

<sup>169</sup> See, for example, Eva Pils, 'Rule-of-Law Reform and the Rise of Rule by Fear in China' in Weizeng Chen and Hualing Fu (eds), *Authoritarian Legality in Asia : Formation, Development, and Transition* (Cambridge University Press, 2019) 90.

<sup>170</sup> Taisu & Ginsburg (n 168).