

Assessing Recent Developments Affecting Judicial Independence in Hong Kong

A. Introduction

1. This opinion examines the recent state of judicial independence in Hong Kong.
2. Parts B, C, and D set out the basis under which the Hong Kong government has an obligation to maintain judicial independence. Part B (paragraphs 6-14) considers internationally recognised accounts of judicial independence. Part C (paragraphs 15-17) outlines the Hong Kong government's specific obligations to uphold judicial independence. Part D (paragraphs 18-21) sets out the relevant portions of Hong Kong's own Guide to Judicial Conduct.
3. Part E (paragraphs 22-103) describes developments since 1997 that have affected judicial independence in Hong Kong.
4. Part F (paragraphs 106-125) specifically considers the practice of allowing judges and former judges from jurisdictions other than Hong Kong - including current Justices of the UK Supreme Court - to sit as Non-Permanent Judges on the Hong Kong Court of Final Appeal (“**HKCFA**”).
5. Part G (paragraphs 126-131) concludes.

B. Internationally Recognised Accounts of Judicial Independence

6. Paragraphs 7 to 14 below set out several internationally recognised accounts of judicial independence. Although there are other definitions of judicial independence, this opinion will confine itself to accounts that have achieved broad international acceptance.

7. Paragraphs 1 and 5 of the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985¹ (“UN Basic Principles”), declare:

“1. *The judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. ...*

“5. *Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” (emphasis added)*

8. The United Nations’ Bangalore Principles of Judicial Conduct 2002 declares that judges should adhere to (among other values) the values of independence and impartiality:

“Value 1 Independence

Principle Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1. *A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious*

¹“Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985” OHCHR, <<https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>>, accessed 27 February 2022.

understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

- 1.2. *A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.*
- 1.3. *A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.*
- 1.4. *[...]*
- 1.5. *[...]*
- 1.6. *A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.*

Value 2 *Impartiality*

Principle Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

- 2.1. *A judge shall perform his or her judicial duties without favour, bias or prejudice.*
- 2.2. *A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.*
- 2.3. *A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.*
- 2.4. *A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor*

shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. *A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:*

(a) *The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;*

(b) *[...]*

(c) *[...]”*

9. Article 14 of the International Covenant on Civil and Political Rights (“**ICCPR**”) provides, so far as is relevant:

“1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
- (c) To be tried without undue delay;*
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- (g) Not to be compelled to testify against himself or to confess guilt.”*

10. Paragraphs 19-23 of General Comment 32 to Article 14 of the ICCPR give the following account of judicial independence:

“19. *The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual*

independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. *Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.*

21... *The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a*

judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.

22...

23. *Some countries have resorted to special tribunals of “faceless judges” composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives from the proceedings; restrictions of the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado; threats to the lawyers; inadequate time for preparation of the case; or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant. Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.” [emphasis added]*

11. Article 14 of the ICCPR is binding on Hong Kong by virtue of Annex I to the Sino-British Joint Declaration 1984 (see Part C below).
12. Jurisprudence from the European Court of Human Rights in Strasbourg also offers guidance on what judicial independence entails. Although the European Convention on Human Rights is not binding on Hong Kong, Hong Kong courts have frequently quoted, referred to and endorsed the views of Strasbourg jurisprudence in its judgements if similar human right issues were involved.²

²For example, *W v Registrar of Marriages* [2013] HKCFA 39, at para. 64, in which the HKCFA endorsed the ECtHR’s views on the nature of the right to marry.

13. *Incal v Turkey*, No 41/1997/825/1031 is a seminal case on judicial independence. Paragraph 65 lays out various criteria for judicial independence, including: the manner of appointment of judges and their term of office, the existence of safeguards against outside pressures, and whether the court presents an appearance of independence.
14. In *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, at para. 234, the Grand Chamber of the European Court of Human Rights reiterated the requirements of judicial independence and impartiality in these terms:³

“243 ... ‘Independence’ refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.”

C. The Hong Kong Government’s Obligations to Preserve Judicial Independence

15. The Sino-British Joint Declaration 1984 (“**Joint Declaration**”) imposes a duty on the government of the People’s Republic of China (“**PRC**”) - and, by extension, the Hong Kong government - to preserve judicial independence in the territory:
 - (a) Article 3(3) provides that Hong Kong shall be vested with “*independent judicial power, including that of final adjudication*”;

³Cited recently in *Xhoxhaj v Albania* (2021) 73 EHRR 14, at para. 291.

- (b) Annex I (incorporated by Article 3(12)), Part III declares:
*“Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. **The courts shall exercise judicial power independently and free from any interference.** Members of the judiciary shall be immune from legal action in respect of their judicial functions. The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions.”* (Emphasis added)
- (c) Annex I, Part XIII provides that the provisions of the ICCPR in force in Hong Kong prior to 1997 shall remain in force. The United Kingdom (“**UK**”) acceded to the ICCPR on Hong Kong’s behalf in 1976⁴; and
- (d) Article 3(12) declares that the PRC’s “basic policies” as set out in Article 3 and Annex I shall remain in force for 50 years after the transfer of sovereignty, i.e. until 2047.
16. As noted in Part B above, Article 14(1) of the ICCPR provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. General Comment 32 elaborates on the requirements imposed by Article 14.
17. The UK acceded to the ICCPR on Hong Kong’s behalf in 1976. The Hong Kong Bill of Rights Ordinance (“**BoRO**”), incorporating provisions of the ICCPR into domestic law, was enacted on 6 June 1991 and came into operation on 8 June 1991.

D. The Hong Kong Guide to Judicial Conduct

⁴United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4>.

18. In addition to the international standards referred to in Part C above, Hong Kong has its own standards for judicial conduct in the Guide to Judicial Conduct (published in October 2004).⁵
19. The Guide to Judicial Conduct lays out three guiding principles: (1) independence; (2) impartiality; and (3) integrity and propriety in all matters of conduct, both in and out of court.
20. Paragraphs 14 and 15 relate to the institutional independence of the judiciary and the independence of individual judges, respectively:
 - (a) Paragraph 14 requires that “*the Judiciary must be and must be seen to be independent of the executive and legislative branches of government*”; and
 - (b) Paragraph 15 provides that “*Judges must reject any extraneous attempt, direct or indirect, to influence them, by any means.*”.
21. Paragraphs 18 to 21 set out the requirements of impartiality, both in and out of court. Paragraphs 19 and 21 merit particular attention:
 - (a) Paragraph 19 is unequivocal about the need for actual and perceived impartiality: “*Justice must be done and must be seen to be done. Impartiality must exist both as a matter of act and as a matter of reasonable perception.*”
 - (b) Paragraph 21 lists examples of judicial conduct that may call a judge’s impartiality into question, such as a perceived conflict of interest, the judge’s behaviour on the bench, or the judge’s out-of-court associations and activities.

E. The State of Judicial Independence in Hong Kong

⁵Guide to Judicial Conduct, <https://www.judiciary.hk/en/about_us/judicial_conduct.html>, October 2004, Judiciary of Hong Kong SAR government, accessed 26 February 2022.

22. Since 1997, there have been four main threats to the independence and impartiality of the Hong Kong judiciary:
- (a) Threats to the final adjudication power of the HKCFA, primarily through the use of “interpretations” of the Basic Law (paragraphs 24-41 below);
 - (b) The imposition of the “National Security Law” in 2020 (paragraphs 42-66 below);
 - (c) Political pressure directed at the composition of the HKCFA (paragraphs 67-75 below); and
 - (d) Political pressure - including, in some cases, overt threats - by PRC state and state-affiliated actors directed at the judiciary as a whole (paragraphs 76-87 below).
23. These threats appear to have had an effect on judicial reasoning and on public confidence in the judiciary, as documented in paragraphs 88-98 and 99-103 respectively.

I. Threats to the Final Adjudication Power of the HKCFA

24. One of the better known threats to judicial independence in Hong Kong is the practice by the National People’s Congress Standing Committee (“NPCSC”) of issuing “interpretations” of the Basic Law. Between 1997 and 2019, the NPCSC issued five such “interpretations”; only one was issued at the request of the HKCFA.
25. Under Article 158 of the Basic Law, the NPCSC retains the power to interpret the Basic Law. However, Article 158(2) empowers the Hong Kong courts to interpret the

Basic Law with respect to matters within the scope of the territory's autonomy. Under Article 158(3), the HKCFA can request an NPCSC interpretation of the Basic Law.

26. The NPCSC is a political (and undemocratic) body whose proceedings take place behind closed doors, with no participation from the parties at suit. Its decisions are actuated by political considerations rather than legal evaluation and contain little to no reasoning.⁶
27. Article 158 creates an inherent risk to the Hong Kong courts' jurisdiction and autonomy, as any constitutional rulings by the Hong Kong courts unpalatable to the Hong Kong or PRC governments can be reversed by the NPCSC at any time. This risk led then-Chairman of the Hong Kong Bar, Ronny Tong SC to characterise the threat of NPCSC interpretations as a "Damocles sword" in 2000.⁷
28. The NPCSC first wielded this "interpretive weapon"⁸ against the Hong Kong courts in 1999 in the *Ng Ka Ling* case, which concerned the right of abode of children born in Mainland China to Hong Kong parents. The HKCFA initially ruled against the Government, and in the course of doing so held that it was within the Hong Kong courts' jurisdiction to examine whether any act of the NPCSC was consistent with the Basic Law.⁹ PRC officials and state media were outraged at the HKCFA's decision. As a result of this political pressure, the CFA was forced to issue a highly unorthodox "clarification", accepting that it had no power to "question the authority

⁶Johannes Chan & CL Lim (eds), *Law of the Hong Kong Constitution* (3rd edn 2021), at paragraph 11.068. See also Cora Chan, "The Legal Limits on Beijing's Powers to Interpret Hong Kong's Basic Law" *HKU Legal Scholarship Blog*, available at <http://researchblog.law.hku.hk/2016/11/cora-chan-on-legal-limits-of-beijings.html>, which explains: "The NPCSC does not have a principled approach to interpreting the law. In line with Leninist legal tradition, the law is viewed by the Chinese Government as a mere tool to facilitate Party agenda. Interpretations are issued to suit the political exigencies of the day."

⁷Hong Kong Bar Association, Submission Paper on "Rule of Law in Hong Kong" 13 September 2001, at paragraph 13. Available at <https://www.hkba.org/node/14871>.

⁸Alvin YH Cheung, "The Express Rail Co-Location Case: the Hong Kong Judiciary's Retreat" *Lawfare*, 10 January 2019, available at <https://www.lawfareblog.com/express-rail-co-location-case-hong-kong-judiciarys-retreat>.

⁹*Ng Ka Ling v Director of Immigration (No 1)* (1999) 2 HKCFAR 4, at 26.

of the NPCSC to do any act which is in accordance with the provisions of the Basic Law”.¹⁰ This does not seem to have been sufficient for the central authorities: shortly thereafter, the NPCSC (upon a formal request by the Hong Kong Government) issued an “interpretation” which effectively reversed the CFA’s substantive ruling. Hundreds of Hong Kong lawyers participated in a silent march in protest.¹¹

29. In a case decided later the same year¹², the CFA retreated even further. It conceded that the NPCSC’s power to interpret the Basic Law was general and unqualified; could be exercised at any time, even without any referral from the Hong Kong courts; and covered any provision of the Basic Law.¹³ This ruling effectively gave a blank cheque to the NPCSC to issue “interpretations” at will.
30. Subsequently, the Hong Kong and PRC governments have, on at least two occasions, used NPCSC “interpretations” to pre-empt imminent or pending litigation in Hong Kong.
31. In 2005, Tung Chee-hwa resigned from the position of Chief Executive of Hong Kong and was replaced by Donald Tsang. The Hong Kong government subsequently requested an NPCSC “interpretation” of Article 46 of the Basic Law to resolve the question of whether Tsang’s term was limited to the remainder of the period Tung would have served had he not resigned (i.e. until 2007).
32. In a speech to the Legislative Council on 6 April 2005 explaining the government’s reasons for actively seeking an NPCSC “interpretation”, Tsang specifically referred to the need to pre-empt imminent litigation in Hong Kong:

¹⁰*Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, at 142D.

¹¹Zheping Huang & Echo Huang, “A brief history: Beijing’s interpretations of Hong Kong’s Basic Law, from 1999 to the present day” *Quartz*, 7 November 2016.

¹²*Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, at 323-324

¹³On the right of abode saga, see generally Johannes 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 *Current Legal Problems* 85, at 95–7.

*“Madam President, ever since the issue of the term of office of the new Chief Executive became a subject of discussion in the community, the SAR Government has been listening attentively to the views of LegCo Members, the legal profession, media commentators and various sectors of the community. Some consider that it should be the remainder of the term; others consider that it should be a five-year term. We note that some LegCo Members have stated publicly their opposition to the Bill that we will submit today. **More importantly, a LegCo Member and individual members of the community have stated publicly that they will be seeking judicial review of the Bill. In fact, the courts have received one such application on 4 April. ...***

*“As regards judicial proceedings, it is highly likely that we will be facing challenge by way of judicial review. **Once the judicial process is initiated, it will take a relatively long time to go through the Court of First Instance, the Court of Appeal and the Court of Final Appeal.** Past experience has also shown that there are a range of uncertainties involved in this process. Furthermore, the CPG is vested with the substantive power to appoint the Chief Executive. The term of office of the Chief Executive is a matter which falls within the responsibility of the CPG, and which concerns the relationship between the Central Authorities and the SAR. Therefore, when a case is brought before the Court of Final Appeal, the Court will need to seek an interpretation by the NPCSC in accordance with Article 158(3) of the Basic Law.*

*“**Even if the courts could expedite the process in view of the urgency of the matter, we might not be able to finish the proceedings in time.** The request for interpretation by the NPCSC alone would take some time, and it has to fit in with the meeting schedule of the NPCSC. Therefore, if the interpretation by the NPCSC was sought through the judicial process, it is quite possible that we would not be able to elect a new Chief Executive in time on 10 July.”*

(Emphasis added)

33. The NPCSC duly delivered its “interpretation” on 27 April 2005, declaring - in agreement with the Hong Kong government - that Tsang’s term was limited to two years.
34. In November 2016, the NPCSC issued another interpretation (its fifth to date) in relation to Article 104 of the Basic Law, which required legislators and other officials in Hong Kong to swear an oath upon assuming office. The Hong Kong government brought proceedings against two opposition legislators-elect, seeking to unseat them on the basis that they had breached Article 104 in the process of taking their oaths of office.
35. In a singularly damaging blow to judicial independence, the NPCSC, on its own initiative, issued an “interpretation” *while the proceedings were pending* – indeed, after the first instance hearing had taken place but before judgment was handed down. The court, after hearing further submissions on the NPCSC “interpretation”, ruled in favour of the government.
36. The NPCSC’s pre-emptive “interpretation” during ongoing court proceedings was tantamount to an order to the Hong Kong courts dictating the outcome of that litigation.
37. The NPCSC “interpretation” also exceeded the NPCSC’s interpretive power over the Basic Law by effectively *amending a Hong Kong statute* (by adding detailed provisions on what constituted a valid oath).¹⁴ The Hong Kong Bar Association warned that the NPCSC’s interpretation would “*deal a severe blow to the independence of the judiciary and the power of final adjudication of the Hong Kong court*”¹⁵ and “*inevitably give the impression that the NPCSC is effectively legislating*

¹⁴Stuart Hargreaves, “Canaries or Colonials? The Reduced Prominence of the ‘Overseas Judges’ on Hong Kong’s Court of Final Appeal” (2022) *Asian Journal of Comparative Law* 1, at 26-27; Johannes Chan, “A storm of unprecedented ferocity: The shrinking space of the right to political participation, peaceful demonstration, and judicial independence in Hong Kong” (2018) 16(2) *International Journal of Constitutional Law* 373, at 377-381.

for Hong Kong”.¹⁶ Retired Court of Appeal judge Woo Kwok-hing commented that the interpretation would give “unnecessary pressure to judges”.¹⁷

38. The NPCSC’s “interpretation” enabled the government to unseat six more opposition legislators over the course of 2016 and 2017.¹⁸
39. On 11 November 2020, the NPCSC issued a “decision” on the qualification requirements for members of the Hong Kong Legislative Council. The “decision” added further circumstances in which a Legislative Council member would be deemed to have failed to uphold the Basic Law, or to pledge allegiance to the Hong Kong Special Administrative Region. These included when a legislator “solicits intervention by foreign or external forces in the HKSAR’s affairs” or “carries out other activities endangering national security”.¹⁹
40. The NPCSC’s 2020 “decision” was immediately used by the Hong Kong government to disqualify 4 opposition legislators.²⁰ In effect, this was a further

¹⁵Hong Kong Bar Association, “Statement concerning the possibility of the NPCSC to interpret the Basic Law concerning the incident of oath taking by legislative councillors” 2 November 2016, available at <https://www.hkba.org/sites/default/files/20161102%20-%20Statement%20re%20NPCSC%20proposed%20interpretation%20of%20BL%20on%20legislaiton..%20%28E%29.pdf>

¹⁶Hong Kong Bar Association, “Statement concerning the interpretation made by the National People’s Congress Standing Committee of Article 104 of the Basic Law” 7 November 2016, available at <https://www.hkba.org/sites/default/files/20161107%20-%20Statement%20re%20NPCSC%20interpretation%20BL104%20%28Eng%20Version-web%29.pdf>

¹⁷Naomi Ng, “Beijing pre-empting Hong Kong courts on oath-taking case would put ‘unnecessary pressure’ on judges, chief executive hopeful says” *South China Morning Post*, 2 November 2016, available at <https://www.scmp.com/news/hong-kong/politics/article/2042277/beijing-pre-empting-hong-kong-courts-oath-taking-case-would>.

¹⁸Johannes Chan, “A storm of unprecedented ferocity: The shrinking space of the right to political participation, peaceful demonstration, and judicial independence in Hong Kong” (2018) 16(2) *International Journal of Constitutional Law* 373, at 378-379.

¹⁹Hong Kong Government Press Release, “HKSAR Government announces disqualification of legislators concerned in accordance with NPCSC’s decision on qualification of HKSAR legislators” 11 November 2020, available at <https://www.info.gov.hk/gia/general/202011/11/P2020111100779p.htm>.

²⁰Lily Kuo & Helen Davidson, “Hong Kong opposition lawmakers all quit after four members ousted” *Guardian*, 12 November 2020, available at <https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust>.

enlargement of the NPCSC’s previous “interpretation” in 2016 of Article 104²¹ (although, as with the previous “interpretation”, the NPCSC’s move was really an act of legislation rather than an interpretation in the usual, common law sense of the term²²).

41. The NPCSC’s repeated use of “interpretations” has significantly restricted Hong Kong courts’ power to interpret the Basic Law. As Reuters reported in March 2018, judges were (at least in private) increasingly concerned that NPCSC “interpretations” would have the effect of dictating outcomes in cases involving major political and security issues. One judge, speaking anonymously, observed that “if they [the NPCSC] interpret too frequently, the risk is they will leave us nothing left on which to rule”.²³

II. Threats Posed by the National Security Law (“NSL”) to Judicial Independence

42. The NSL was passed by the National People’s Congress Standing Committee (“NPCSC”) in Beijing, and then promulgated by Hong Kong’s Chief Executive, Carrie Lam, on 30 June 2020. This was all done without any meaningful participation by or consultation with the people of Hong Kong:²⁴ no one in Hong

²¹See the analysis in *NPC Observer*, “NPCSC Clarifies “Allegiance” Requirements for Hong Kong Legislators, Disqualifies Pro-Democracy Legislators” 11 November 2020, available at <https://npcobserver.com/2020/11/11/npcsc-clarifies-allegiance-requirements-for-hong-kong-legislators-disqualifies-pro-democracy-legislators/>

²²On the disquieting legal precedent set by the NPCSC’s decision, see also Thomas E. Kellogg, “Beijing unbound: Hong Kong’s autonomy crumbles as China rewrites the law” *Hong Kong Free Press*, 17 November 2020, available at <https://hongkongfp.com/2020/11/17/beijing-unbound-hong-kongs-autonomy-crumbles-as-china-rewrites-the-law/>

²³Greg Torode & James Pomfret, “Hong Kong’s judges voice fears over China influence in judiciary” *Reuters*, 15 March 2018, available at <https://www.reuters.com/article/us-hongkong-law/hong-kongs-judges-voice-fears-over-china-influence-in-judiciary-idUSKCN1GR0LD>.

²⁴This has been noted by the Hong Kong Bar Association, “Statement on the Law of the People’s Republic China on Safeguarding National Security in the Hong Kong Special Administrative Region” 1 July 2020, at paragraph 2, available at <https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20Security%20in%20HKSAR.pdf>; Statement by more than 50 UN independent experts, “UN experts call for decisive measures to protect fundamental freedoms in China” 26 June 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E>; International Bar Association, “China’s National Security Law for Hong Kong contrary to rule of Law” 1 July 2020, available at <https://www.ibanet.org/article/c4379ed1-73b9-4394-8a59-f21878676598>.

Kong had even seen a draft of the law until after it came into effect. As of February 2022, there is still no legally binding English text of the NSL, despite English remaining an official language in the territory.

43. The NSL has been widely denounced by international legal and human rights experts for seriously degrading fundamental rights (including fair trial rights) and the rule of law in Hong Kong. Critics include the Bar Human Rights Committee of England & Wales²⁵, the Bar Council of England & Wales²⁶, the Law Society of England & Wales²⁷, numerous UN independent experts²⁸, the UN Human Rights Office²⁹, the

²⁵Bar Human Rights Committee of England & Wales, “Hong Kong: China’s proposed national security laws should be withdrawn with immediate effect” 27 May 2020, available at <https://www.barhumanrights.org.uk/hong-kong-chinas-proposed-national-security-laws-should-be-withdrawn-with-immediate-effect/>; Bar Human Rights Committee of England & Wales, “New national security law demonstrates a “chilling contempt” for the principles, fundamental rights and freedoms in Hong Kong” , 30 June 2020, available at <https://www.barhumanrights.org.uk/new-national-security-law-demonstrates-a-chilling-contempt-for-the-principles-fundamental-rights-and-freedoms-in-hong-kong/>.

²⁶Letter from the Bar Council of England & Wales and the Law Society of England & Wales to the Chief Executive of Hong Kong, 7 July 2020, available at <https://www.barcouncil.org.uk/uploads/assets/e2457ee2-58eb-4390-8b03b731a9691dcb/HK-statement-July-2020.pdf>.

²⁷Ibid.

²⁸Communication by 7 UN Special Rapporteurs regarding the NSL, 19 June 2020, OL CHN 13/2020, at pp. 3-5, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25354>; Statement by more than 50 UN independent experts, “UN experts call for decisive measures to protect fundamental freedoms in China” 26 June 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E>; Communication by 7 UN Special Rapporteurs regarding the NSL, 1 September 2020, OL CHN 17/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>; Statement by 4 UN Special Rapporteurs, “Hong Kong: Arrests under security law are serious concern, UN experts call for review” 12 October 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27648&LangID=E>.

²⁹Statement by the spokesperson for the UN High Commissioner for Human Rights, 3 July 2020, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=E>; comment by the UN Human Rights Office spokesperson, 7 January 2021, available at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26640&LangID=E>.

International Bar Association³⁰, the Union Internationale des Avocats³¹, the American Bar Association³², and the New York City Bar Association.³³

44. One of the many alarming features of the NSL is its grave intrusion into judicial independence (which has been noted by many of the above experts). The NSL imposes two main categories³⁴ of restriction on the Hong Kong judiciary:
- (a) Restrictions which diminish judicial discretion; and
 - (b) Provisions replacing Hong Kong legal institutions with Mainland institutions.
45. **Restrictions which diminish judicial discretion.** There are numerous provisions in the NSL which, both individually and collectively, seriously diminish judicial discretion. These include Article 44 (designation of NSL judges), Article 47 (Chief Executive’s certification of whether an act involves national security), Article 42 (presumption against bail), and Article 46 (juryless trials).
46. Article 44 grants the Chief Executive of Hong Kong the *exclusive* power (comprising both a designation power and a removal power) to select the list of judges who are eligible to hear NSL cases. It provides:

³⁰International Bar Association, “China’s National Security Law for Hong Kong contrary to rule of Law” 1 July 2020, available at <https://www.ibanet.org/article/c4379ed1-73b9-4394-8a59-f21878676598>; International Bar Association, “Hong Kong: IBA and IBAHRI condemn new wave of arrests under the National Security Law” 15 January 2021, available at <https://www.ibanet.org/article/3807B9DE-44AB-4B69-A396-59E9322137CF>.

³¹Union Internationale des Avocats, “Hong Kong National Security Law Threatens the Rule of Law “ 14 July 2020, available at <https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law>.

³²American Bar Association, “ABA President Judy Perry Martinez statement re new national security law in Hong Kong” 1 July 2020, available at <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--new-national-sec/>; Resolution 10E adopted by the American Bar Association’s House of Delegates, 3-4 August 2020, at pp.6-11, available at https://www.americanbar.org/news/reporter_resources/annual-meeting-2020/house-of-delegates-resolutions/.

³³New York City Bar Association, “Statement on Hong Kong National Security Law” 17 July 2020, available at <https://www.nycbar.org/media-listing/media/detail/statement-against-hong-kong-national-security-law>.

³⁴See, similarly, the analysis in Johannes Chan, *National Security Law 2020 in Hong Kong: One Year On*, 2022 Academia Sinica LJ (Special Issue) (forthcoming 2022), pp. 19-31.

“The Chief Executive shall designate a number of judges from the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of Appeal of the High Court, and the judges of the Court of Final Appeal, and may also designate a number of judges from deputy judges or recorders, to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office of the aforementioned designated judges shall be one year. A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office. The proceedings in relation to the prosecution for offences endangering national security in the magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall be handled by the designated judges in the respective courts.”

47. In other words:

- (a) Pursuant to Article 44, Hong Kong judges are eligible to hear NSL cases only if they have been designated as such by the Chief Executive.
- (b) In making such designation, the Chief Executive may “consult” the Committee for Safeguarding National Security (whose membership includes a “national security adviser” appointed by the PRC government: see Article 12 NSL). In practice, given the political realities in Hong Kong, it is extremely likely that the Chief Executive would be unable to designate a judge to the NSL list without the consent of the said Committee and the “adviser”.

- (c) The term of office for a NSL-designated judge is one year only. In effect, the designation of each NSL judge is subject to annual renewal by the Chief Executive, who has absolute discretion whether or not to renew.
- (d) Apart from the annual review, the Chief Executive also can remove a judge from the NSL list at any time if the judge “*makes any statement or behaves in any manner endangering national security*”. Notably, the NSL does not define what constitutes a statement or behaviour “endangering” national security. Even the concept of “national security” is not defined anywhere within the NSL. Designated NSL judges are, consequently, effectively removable at will.
48. This extraordinary ability by the Chief Executive to designate the pool of judges eligible to hear NSL cases (who are then subject to her annual re-approval), and to remove judges from that pool at any time, is a serious and systemic intrusion into judicial independence (both actual and perceived). A judge who serves at the pleasure of the executive is not one whom a reasonable objective observer could confidently regard as conducting trials in an independent, unbiased, and fair manner. The designation power could easily be abused by the government to select a pool of judges who are, by and large, expected to adjudicate in a favourable manner to the authorities.³⁵ It also flies in the face of the long-established practice in Hong Kong that judges (once appointed to the bench by the Chief Executive upon recommendation of the Judicial Officers Recommendation Commission) are allocated to particular cases by the judiciary itself, and not by any external party.
49. Unsurprisingly, Article 44 has been widely criticised by legal experts as fundamentally undermining the independence of the Hong Kong judiciary. For instance:

³⁵See further the analysis in Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, “Hong Kong’s National Security Law and the Right to a Fair Trial” 28 June 2021, Georgetown Center for Asian Law Briefing Paper, pp.10-12.

- (a) The Hong Kong Bar Association described this system of designated judges as “*unprecedented*” in Hong Kong and posing a “*threat (perceived or actual) to judicial independence*”. The HKBA pointed out that, in NSL cases, the Hong Kong government is the prosecuting party, and furthermore the Chief Executive is the chairperson of the Committee for Safeguarding National Security³⁶; therefore, it was contrary to justice and fairness for the Chief Executive to have the exclusive power to designate the pool of judges authorised to hear NSL cases.³⁷
- (b) Former Chief Justice Andrew Li, widely seen within Hong Kong as a moderate voice, wrote that it was “*detrimental to the independence of the judiciary*” for the Chief Executive to have the power to select NSL judges.³⁸ (Li was then criticised by the ex-deputy director of the PRC government’s Hong Kong and Macau Affairs Office for displaying “persistent misunderstanding” of the Basic Law.³⁹)
- (c) The Bar Council of England & Wales and the Law Society of England & Wales opined that the Chief Executive’s power to decide the pool of NSL judges, coupled with her power to remove judges from the list and the short, one-year tenure of judges thereon, “*not only allows for undue political interference with the judiciary in Hong Kong, but also violates the principle that judges should have tenure as a means to guarantee their independence*”.⁴⁰

³⁶Established under Article 12 NSL.

³⁷Hong Kong Bar Association, “Statement on the proposed designation of judges by the Chief Executive in national security cases” 23 June 2020, available at <https://www.hkba.org/sites/default/files/20200623%20-%20HKBA%20Statement%20on%20the%20Proposed%20Designation%20of%20Judges%20by%20the%20Chief%20Executive%20in%20National%20Secu%3Brity%20Cases%20%28E%29.pdf>.

³⁸Gary Cheung, “Hong Kong national security law: former chief justice expresses concern over provisions of legislation” 23 June 2020, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/politics/article/3090120/hong-kong-national-security-law-former-chief-justice>.

³⁹Gary Cheung, “National security law: former Beijing official accuses Hong Kong’s first post-handover chief justice of not grasping city’s Basic Law” 6 July 2020, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/politics/article/3092063/national-security-law-former-beijing-official-accuses-hong>.

- (d) The Union Internationale des Avocats concluded that the “*NSL poses a grave threat...to the independence of the Hong Kong judiciary*”, referring to, inter alia, Article 44.⁴¹
- (e) A group of 7 independent UN human rights experts highlighted Article 44 as one of the provisions in the NSL which appeared to “*undermine the independence of judges and lawyers.*”⁴²
- (f) The American Bar Association adopted a resolution robustly criticising the NSL, opining, inter alia, that Article 44 “*curtails the independence of the judiciary*” and “*undermines judicial impartiality*”.⁴³

50. The pernicious effect of Article 44 is exacerbated by the complete lack of transparency on the designation of judges to (and the removal of judges from) the NSL pool. Both the Hong Kong government and the Hong Kong judiciary have refused to publish (or even make available to litigants) the list of NSL-designated judges. Even the total number of NSL-designated judges is kept secret.⁴⁴ Thus, there is no way for the public to understand the process by which the government picks the pool of NSL judges, which makes it difficult to have confidence that the selection is not influenced by political considerations.

⁴⁰Letter from the Bar Council of England & Wales and the Law Society of England & Wales to the Chief Executive of Hong Kong, 7 July 2020, available at <https://www.barcouncil.org.uk/uploads/assets/e2457ee2-58eb-4390-8b03b731a9691dcb/HK-statement-July-2020.pdf>.

⁴¹Union Internationale des Avocats, “Hong Kong National Security Law Threatens the Rule of Law “ 14 July 2020, available at <https://www.uianet.org/en/news/hong-kong-national-security-law-threatens-rule-law>.

⁴²Communication by 7 UN Special Rapporteurs regarding the NSL, 1 September 2020, OL CHN 17/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>.

⁴³Resolution 10E adopted by the American Bar Association’s House of Delegates, 3-4 August 2020, at pp.7, 9, available at https://www.americanbar.org/news/reporter_resources/annual-meeting-2020/house-of-delegates-resolutions/.

⁴⁴Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, “Hong Kong’s National Security Law and the Right to a Fair Trial” 28 June 2021, Georgetown Center for Asian Law Briefing Paper, p.10; James Pomfret & Greg Torode, “Hong Kong’s top judge defends city’s rule of law in face of international concern” *Reuters*, 24 January 2022, available at <https://www.reuters.com/world/asia-pacific/hong-kongs-top-judge-defends-citys-rule-law-face-international-concern-2022-01-24/>.

51. *Article 47* requires the Hong Kong courts to obtain a certificate from the Chief Executive to certify (when such a question arises in the adjudication of a case) whether an act involves national security or whether a piece of evidence involves state secrets. Importantly, this certificate is *binding* on the courts.
52. The effect is that the Hong Kong government, through the issuance of a certificate, is able in particular cases to deprive the court of the power to determine whether, as a matter of law, a certain act involves national security. In other words, where the government issues a certificate, the scope of judicial determination is significantly narrowed, because the court is stripped of the ability to scrutinise whether the act had anything to do with national security in the first place, and is left only to determine the narrow factual questions of whether the alleged act has taken place and by whom. In effect, the issue of whether the act had anything to do with national security at all becomes a political determination (made by the executive authorities) instead of a legal determination (made by the courts).⁴⁵
53. Superficially, Article 47 of the NSL is reminiscent of the common law evidential principle of “fact of state”, i.e. that class of facts which the courts would leave to be determined by the executive, often by the issuance of a binding certificate (for example, whether a particular person is a member of a foreign diplomatic mission). However, there is a crucial difference. Under the “fact of state” doctrine, the executive’s certificate is treated as conclusive of the facts stated therein, but is *not* conclusive of any question of law⁴⁶; the determination of questions of law (on the basis of the certified facts of state) remains squarely for the courts.⁴⁷ By contrast, Article 47 deprives (in a situation where the Chief Executive has issued a certificate)

⁴⁵Dennis W.H. Kwok & Elizabeth Donkervoort, “The Risks for International Business under the Hong Kong National Security Law” July 2021, p.6, in Ash Center Occasional Papers Series, available at <https://ash.harvard.edu/publications/risks-international-business-under-hong-kong-national-security-law>.

⁴⁶Unless dictated otherwise by statute.

⁴⁷*Al Attiya v Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 (QB), at paragraph 60 per Blake J; *A Local Authority v X* [2019] Fam 313, at paragraphs 43-44 per Gwyneth Knowles J.

the Hong Kong court of any power to determine vital questions of law regarding the scope of national security (and what type of acts would endanger it).

54. *Article 42* provides that "no 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." Thus, it restricts judicial discretion by instituting a presumption against bail in national security cases.
55. The Hong Kong Court of Final Appeal has confirmed that Article 42 imposes a presumption against bail (*HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33). In doing so, it held that the Hong Kong courts have no jurisdiction to overturn any provisions of the NSL (which is a PRC national-level law) that violate the Hong Kong Basic Law or common law principles.⁴⁸
56. In light of Article 42, it has been exceedingly difficult for defendants to obtain bail for NSL offences. Given the wide wording of the offences in the NSL, it is an uphill task for a defendant to prove that he will not commit "acts endangering national security" while on bail. As of June 2021, among 56 defendants charged with NSL offences, only 12 were granted bail. The vast majority of defendants have been remanded for months awaiting trial. The few that were successful in obtaining bail largely did so by promising to exit political life and refrain from any political speech.⁴⁹
57. In a subsequent case, the Appeal Committee of the Court of Final Appeal held that the presumption against bail created by Article 42 applied to *all offences involving the endangerment of national security* (and not just offences under the NSL per se): *HKSAR v Ng Hau Yi Sidney* [2021] 6 HKC 822.

⁴⁸For a detailed analysis of this decision, see Johannes Chan, "Judicial Responses to the National Security Law" (2021) 51 HKLJ 1.

⁴⁹Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, "Hong Kong's National Security Law and the Right to a Fair Trial" 28 June 2021, Georgetown Center for Asian Law Briefing Paper, pp. 15, 17.

58. *Article 46* provides for NSL cases in the High Court (which is reserved for the most serious cases, and where criminal cases are normally tried by a jury) to be tried *without* a jury if the Secretary for Justice makes a decision to that effect. The Secretary for Justice may do so on the grounds of, inter alia, the protection of state secrets, involvement of "foreign factors" in the case, and the protection of the personal safety of jurors and their family members (which are extremely broad grounds).
59. Importantly, the decision is for the Secretary for Justice alone. This is yet another way in which judicial discretion is restricted by the NSL, and the government is able to limit the procedural rights of defendants who are accused of NSL crimes.
60. In *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350, the Hong Kong Court of Appeal confirmed that the government has power under Article 46 to deny a jury trial to a defendant in NSL proceedings, and that the courts had no jurisdiction to interfere with the government's choice in this regard. The Court also reiterated that the Hong Kong courts have no power to scrutinise the NSL for compatibility with the Basic Law.
61. **Provisions replacing Hong Kong state security and judicial institutions with Mainland Chinese institutions.** A group of provisions in the NSL creates a separate "national security" apparatus directly under the PRC government's control, and allows certain cases to be tried in the PRC's own criminal courts. The power to replace Hong Kong courts with Mainland Chinese courts has two major consequences:
- a. The PRC government maintains considerable control over the adjudication of cases in Mainland Chinese courts that it considers to be politically sensitive. As NSL trials will almost always be politically sensitive, any NSL defendant tried in a Mainland Chinese court is highly unlikely to receive a fair trial; and

- b. As with the NPCSC’s exercise of its powers to “interpret” the Basic Law under Article 158, these provisions serve as an implicit threat to Hong Kong courts: if they do not rule in the government’s favour, NSL-related cases may be removed from the Hong Kong judicial system altogether.
62. *Articles 48 and 60*: Article 48 creates the powerful National Security Office,⁵⁰ which directly represents the PRC central government. It is an intelligence gathering, advisory, executive, and law enforcement body. Notably, this is the first time since the 1997 handover that national security officers from Mainland China have been empowered to carry out official duties in Hong Kong (contrary to the longstanding general prohibition in Article 22 of the Basic Law⁵¹). The staff of this office are under the direct supervision of the central authorities⁵².
63. Article 60 is a judicial ouster clause which provides that the staff of the National Security Office, although present and operating in Hong Kong, are not subject to the jurisdiction of the Hong Kong courts (or, for that matter, Hong Kong law enforcement authorities). Thus, the NSL creates a powerful body with the potent ability to interfere with the liberty and privacy of Hong Kong people but without being subject to the jurisdiction of the Hong Kong courts.
64. *Articles 55-58* provide that, under certain circumstances, the National Security Office can directly exercise jurisdiction over an NSL case. These circumstances are vaguely defined (“complex”, “serious” or of “major and imminent threat to national security”) and there is no safeguard except for a requirement to obtain the approval of the PRC central government. Once the National Security Office exercises

⁵⁰The full name of this body is the Office for Safeguarding National Security of the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region.

⁵¹Article 22(1) of the Basic Law provides: “No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

⁵²Article 50 NSL.

jurisdiction, a defendant will be taken out of the jurisdiction of the Hong Kong courts; the case will be investigated, prosecuted, and tried by the PRC authorities instead. As part of that process, the defendant could be transferred out of Hong Kong to Mainland China. The Hong Kong courts would have no role to play whatsoever, and would be legally impotent to provide any protection to the defendant.

65. Article 12 establishes the Committee for Safeguarding National Security, which is to be responsible for affairs relating to and assume primary responsibility for safeguarding national security in Hong Kong. It is chaired by the Chief Executive and (as mentioned earlier) its membership includes a “national security adviser” appointed by the PRC government. The Committee’s actions (unlike the actions of the vast majority of public bodies in Hong Kong) are not subject to judicial review by the Hong Kong courts.⁵³

66. Article 65: This provides that the power of final interpretation of the NSL is vested in the NPCSC. As with the NPCSC’s Basic Law “interpretations” (discussed in paragraphs 24-41 above), this considerably diminishes the Hong Kong court’s autonomy by imposing an ever-present threat that a ruling which is unfavourable to the Hong Kong or PRC governments could be reversed by the NPCSC.

III. Political Pressure Directed at the Composition of the Court of Final Appeal

67. Before the transfer of Hong Kong to PRC sovereignty on 30 June 1997, the highest appellate court in Hong Kong was the Judicial Committee of the Privy Council in London.

68. From 1 July 1997, the HKCFA replaced the Judicial Committee of the Privy Council as the highest appellate court in Hong Kong. Article 4 of the Basic Law sets out the framework of the judiciary of Hong Kong as of 1 July 1997. Article 82 of the Basic

⁵³Article 14 NSL.

Law permits the HKCFA to invite judges from other common law jurisdictions to sit on the HKCFA.

69. Section 5 of the Court of Final Appeal Ordinance (Cap 484) (“**CFAO**”) provides for the composition of the HKCFA. Apart from the Chief Justice and permanent judges, the CFAO provides for a panel of non-permanent judges (“**NPJs**”) from Hong Kong and other common law jurisdictions who may be invited as required to sit on the HKCFA. The number of NPJs is capped at 30 under the CFAO.
70. Section 7 of the CFAO specifies that, in appointing or removing HKCFA judges (including NPJs from Hong Kong or other common law jurisdictions), the Chief Executive shall obtain the endorsement of the Legislative Council.
71. Since 2018, pro-Beijing legislators have objected to the appointment of some NPJs from other common law jurisdictions, purportedly because of their views on same-sex marriage and because of their perceived inability to protect the national interests of the PRC⁵⁴.
72. On 27 March 2018, in a meeting of the Legislative Council’s Subcommittee on Proposed Senior Judicial Appointments, pro-Beijing legislators raised various objections to the proposed appointment of two NPJs, UK Supreme Court President Baroness Hale and former Canadian Chief Justice Beverley McLachlin. Legislator and former President of the Law Society Junius Ho called for a public hearing regarding the proposed appointments and said that political considerations should be taken into account.⁵⁵ Although both judges were ultimately appointed to the HKCFA,

⁵⁴ 「批兩海外法官撐同志平權 或涉國家利益衝突 建制質疑又支持 終院 4 法官任命通過」 31 May 2018, MingPao Daily, <<https://life.mingpao.com/general/article?issue=20180531&nodeid=1527704508691>>, last accessed on 16 February 2022.

⁵⁵ Karen Cheung, “Pro-Beijing lawmakers query LGBT stances of overseas judges set to join Hong Kong’s top court” 31 March 2020, *Hong Kong Free Press*, <<https://hongkongfp.com/2018/04/27/pro-beijing-lawmakers-query-lgbt-stances-overseas-judges-set-join-hong-kongs-top-court/>>, accessed on 16 February 2022.

Baroness Hale declined to renew her appointment in 2021 without having sat on a single case (as discussed at paragraph 120 below).

73. Since September 2020, 18 pro-democracy legislators have resigned from the Legislative Council and 4 pro-democracy legislators were disqualified. The resignation and disqualification of the pro-democracy legislators resulted in the complete absence of opposition in the Legislative Council for the first time since the handover in 1997.⁵⁶
74. In June 2021, the *Financial Times* reported⁵⁷ that pro-Beijing legislators had blocked the proposed appointment of Madam Justice Maria Yuen as a permanent judge to the HKCFA. The Judicial Officers Recommendation Commission (“**JORC**”), a statutory body set up to put forward names for judicial appointments, had recommended Yuen’s appointment. The reason allegedly given by pro-Beijing legislators for objecting to Yuen’s appointment was that she was married to the previous Chief Justice, Geoffrey Ma. Ma had been the target of strong criticism by pro-Beijing politicians for defending the Hong Kong judiciary from previous political attacks. This is the first reported case of a proposed judicial appointment being shelved as a result of political pressure.
75. On 11 March 2021, the NPCSC amended Annex II to the Basic Law on the method for the formation of the Legislative Council of Hong Kong and its voting procedures. The NPCSC on March 30 adopted the amended Annex II to the Basic Law. The amendments include increasing the number of legislators from 70 to 90 members but reducing the number of directly elected seats from 35 to 20; eliminating the seats traditionally held by the separately elected District Council; changing the

⁵⁶“*Hong Kong’s pro-democracy legislators to resign en masse*” 11 November 2020, *Al-Jazeera*, <<https://www.aljazeera.com/news/2020/11/11/hong-kongs-pro-democracy-legislators-resign-en-masse>>, accessed on 25 February 2022.

⁵⁷Primrose Riordan and Nicolle Liu, “Hong Kong pro-Beijing legislators intervene in judicial appointment” 23 June 2021, *Financial Times*, <<https://www.ft.com/content/56de7f6d-c89a-4857-b2f9-5d184fa3d096>>, last accessed on 16 February 2022.

constituencies for "functional constituency" legislative seats to favour pro-Beijing organisations even further; shifting the membership of the Election Committee (already disproportionately composed of pro-Beijing interests) toward even more representation of pro-Beijing organisations; and adding a power for the Election Committee to elect 40 Legislative Council members. As a result of these arrangements, the Legislative Council election on 19 December 2021 resulted in all 90 seats being taken by pro-Beijing politicians.

IV. Threats by PRC State Actors

76. More broadly, the Hong Kong judiciary has faced incessant attacks from PRC officials, PRC state media, and other Beijing-affiliated actors, which have intensified following the imposition of the NSL. Paragraphs 77-87 below set out a few illustrative examples.
77. In 2014, the PRC State Council released a White Paper entitled ‘The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region’ (“the 2014 White Paper”):⁵⁸
 - (a) The 2014 White Paper asserted that the central authorities enjoy an “overall jurisdiction” over Hong Kong in accordance with the PRC constitution and the Hong Kong Basic Law;
 - (b) The 2014 White Paper defined judges and different levels of judicial personnel as “administrators” no different to executive officials or the civil service. It demanded that all such “administrators” be “patriotic” as a “basic political requirement”;

⁵⁸The official English translation is available online at:
http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm.

- (c) The 2014 White Paper further stated that judges and all judicial officers are obliged to safeguard the country's sovereignty, security, and development interests, and to ensure the long-term prosperity and stability of Hong Kong.
- (d) The 2014 White Paper was the first time that the PRC government explicitly demanded political loyalty of its judges - including, by necessary implication, overseas Non-Permanent Judges of the HKCFA.
- (e) Andrew Li, former Chief Justice (and the first Chief Justice of the HKSAR), expressed concern at the notion that judges should have a “basic requirement of loving the country”.⁵⁹ However, HKSAR government officials openly endorsed the 2014 White Paper, setting a precedent for undermining judicial autonomy and independence.

78. On 18 November 2019, the Court of First Instance (sitting, unusually, as a panel of two judges) struck down parts of the Emergency Regulations Ordinance and the Prohibition on Face Covering Regulation enacted pursuant to that Ordinance. The Court took pains to emphasise that it was *not* considering whether the Ordinance was unconstitutional insofar as it conferred powers on the Chief Executive during an emergency. It also stressed that the ban on face coverings remained lawful insofar as it applied to unlawful assemblies. Despite the court’s efforts to avoid pronouncing on emergency powers generally, Beijing officials and pro-Beijing politicians immediately attacked the ruling, characterising it as in need of “rectification”.⁶⁰

79. In October 2020, District Judge Sham Siu-man acquitted several protestors of rioting charges, and criticised the police witnesses for giving unreliable testimony. The next day, the PRC state-owned newspaper *Wen Wei Po* published a story under the title

⁵⁹Peter So, “Judges don’t need to be patriots, says former top judge Andrew Li” *South China Morning Post*, 15 August 2014, <https://www.scmp.com/news/hong-kong/article/1573867/judges-dont-need-be-patriots-andrew-li>.

⁶⁰RTHK, “Mask ban ruling must be ‘rectified’: Tam Yiu-chung”, <https://web.archive.org/web/20191220011028/https://news.rthk.hk/rthk/en/component/k2/1493192-20191119.htm>. As of 25 March 2022, this news article is no longer available on RTHK’s website.

“Strange opinion issued by the court.”⁶¹ The piece - which ran on the paper’s front page - displayed a photo of the judge in judicial attire, alongside images of protesters and burning barriers. Sham subsequently applied for early retirement (5 years in advance of the normal retirement age) to migrate to the United Kingdom with his family.⁶² This retirement was reported by Wen Wei Po with a quote commenting that it was a good thing for certain judges who had degenerated in quality (“變質”) to resign voluntarily.⁶³

80. In November 2020, Zhang Xiaoming, the deputy director of the PRC government’s Hong Kong and Macau Affairs Office, suggested (in a speech to Hong Kong legal professionals) that Beijing planned to “reform” the Hong Kong judiciary. He cited the views of retired Court of Final Appeal judge Henry Litton, who had criticised the Hong Kong courts, ostensibly because they had “*put a slant on the Basic Law, by applying obscure norms and values from overseas which are totally unsuited to Hong Kong’s circumstances*”. Zhang also stressed that “*the word ‘patriotic’ should be added before the core values of democracy, freedom and human rights upheld by Hong Kong society.*”⁶⁴
81. Zhang’s remarks were quickly echoed by pro-Beijing politicians in Hong Kong. Tam Yiu-chung (the sole Hong Kong delegate in the NPCSC) expressed regret that some people had misinterpreted judicial independence as “an independent judicial kingdom”. He exhorted judges to “cautiously execute the authorities conferred by

⁶¹Austin Ramzy, “Hong Kong’s courts are still independent. Some want to rein them in” 30 November 2020, *New York Times*, available at <https://www.nytimes.com/2020/11/30/world/asia/hong-kong-china-courts.html>. The original Wen Wei Po article is at <http://pdf.wenweipo.com/2020/11/01/a01-1101.pdf>.

⁶²Maisy Mok, “First judge leaves city for UK” 11 October 2021, *The Standard*, available at <https://www.thestandard.com.hk/section-news/section/4/234945/First-judge-leaves-city-for-UK>

⁶³Ge Ting (transliteration), “曾被批放生暴徒 法官沈小民辭職移英”, 9 October 2021, *Wen Wei Po*, available at <https://www.wenweipo.com/a/202110/09/AP6160ad15e4b08d3407defd48.html>

⁶⁴Primrose Riordan and Nicolle Liu, Hong Kong’s independent judiciary braced for Beijing onslaught” 26 November 2020, *Financial Times*, available at <https://www.ft.com/content/d08b540f-f124-437b-976c-013c431f61cc>; Tony Chueng & Lilian Cheng, “Beijing calls for judicial reform in Hong Kong, declaring patriotism is ‘a legal requirement now’” 17 November 2020, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/politics/article/3110123/top-beijing-official-tells-hong-kong-legal-summit-time-has>.

the Basic Law” and “not treat themselves as elites” and called for judicial reform. Tam also asserted that there was no separation of powers in Hong Kong.⁶⁵ Pro-beijing legislator Holden Chow Ho-ding complained that “some judges do not have a proper understanding of our constitutional order under one country two systems”, which required “rectification”.⁶⁶

82. Also in November 2020, Mr Justice Anderson Chow was denounced by Ta Kung Pao after ruling against the Hong Kong police in a judicial review case relating to their obligation to wear identification numbers. Ta Kung Pao reported the verdict under the headline “Thugs rule, no human rights for policemen”, and illustrated by a cartoon of a protester waving a weapon in front of a police officer and saying “The judge backs me!”⁶⁷ The Hong Kong Bar Association expressed its astonishment at the article, which in its view had gone beyond the boundary of acceptable criticism of judicial decisions. Despite the Hong Kong Bar Association urging the Hong Kong Secretary for Justice to defend the judiciary against the accusations in the article, the Secretary for Justice declined to take any substantive action.⁶⁸

⁶⁵Ng Kang-chung, “Hong Kong not an ‘independent judicial kingdom’ pro-Beijing heavyweight doubles down on reform calls” 4 January 2021, *South China Morning Post*, available at <https://sg.news.yahoo.com/hong-kong-not-independent-judicial-144942412.html>.

⁶⁶Tony Chueng & Lilian Cheng, “Beijing calls for judicial reform in Hong Kong, declaring patriotism is ‘a legal requirement now’” 17 November 2020, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/politics/article/3110123/top-beijing-official-tells-hong-kong-legal-summit-time-has>.

⁶⁷Iain Marlow, Kari Lindberg & Natalie Lung, “Hong Kong’s courts are the last check on Beijing’s growing power” 23 December 2020, *Bloomberg*, available at <https://www.japantimes.co.jp/news/2020/12/23/asia-pacific/crime-legal-asia-pacific/hong-kong-courts/>.

⁶⁸Hong Kong Bar Association, Letter to the Secretary for Justice entitled “Attack on Judges” 23 November 2020, available at <https://www.hkba.org/sites/default/files/20201123%20-%20Letter%20to%20SJ%20on%20Attack%20on%20Judges.pdf>; Secretary for Justice, reply to the Hong Kong Bar Association, 11 December 2020, available at https://www.hkba.org/sites/default/files/20201211-DoJ%20Reply%20to%20HKBA_0.pdf. See also Hong Kong Bar Association, “Statement Against Personal Attack on Judges” available, 23 November 2020, at https://www.hkba.org/sites/default/files/20201123%20-%20HKBA%20statement%20on%20Attack%20on%20Judges%20%28E%29_0.pdf; and Kelly Ho, “Hong Kong barristers urge ministers to defend judges against ‘virulent’ attack by state-owned newspaper, 24 November 2020, *Hong Kong Free Press*, available at <https://hongkongfp.com/2020/11/24/hong-kong-barristers-urge-minister-to-defend-judges-against-virulent-attack-by-state-owned-newspaper/>.

83. In 2020, two Hong Kong judges were reassigned to other posts after being accused by PRC state media and pro-Beijing politicians of being too lenient to protestors and opposition politicians:

- (a) In September 2020, magistrate Stanley Ho Chun-yiu acquitted an opposition District Councillor of assault against a police officer; he also criticised the police witnesses for lying under oath. Pro-Beijing politicians in Hong Kong reacted by lodging complaints against him and demanding that he be removed from protest-related cases. He was also attacked by PRC state media, including the newspapers Wen Wei Po, Ta Kung Pao, and Global Times; the latter warned that *“rioters in the future will be dealt with by yellow judges who will overtly become complicit in facilitating Hong Kong independence”* (yellow being the colour associated with the pro-democracy camp in Hong Kong). Shortly after these attacks, he was reassigned to an administrative post which did not involve hearing trials (although the judiciary has insisted that this reshuffle was unrelated to the acquittal).⁶⁹

- (b) In October 2020, magistrate Gary Lam Tsz-kan was accused by PRC state media of bias after acquitting several protestors (of assaulting police officers). The Ta Kung Pao called the acquittal “shocking” and said that the Hong Kong judiciary needed to be reformed to tackle the “ridiculous rulings” by “yellow judges”. Shortly afterwards, Lam was reassigned to a tribunal dealing with obscene

⁶⁹Rachel Wong, “Hong Kong magistrate transferred, as pro-Beijing lawmakers hit out over protest ruling” 8 September 2020, *Hong Kong Free Press*, available at <https://hongkongfp.com/2020/09/08/hong-kong-magistrate-transferred-as-pro-beijing-lawmakers-hit-out-over-protest-rulings-local-media/>; Chris Lau, “Hong Kong protests and national security law: are the courts becoming politicised and are judgements biased?” 14 September 2020, *South China Morning Post*, available at <https://sg.news.yahoo.com/hong-kong-protests-national-security-121459294.html>; Lau Siu-fung, “Hong Kong reassigns judges denounced by pro-China lawmaker, papers as ‘pro-protest’ 15 October 2020, *Radio Free Asia*, available at <https://www.rfa.org/english/news/china/hongkong-judges-10152020141455.html>; Erin Chan, “Magistrate transfer ‘not linked to acquittals’” 9 September 2020, *The Standard*, available at <https://www.thestandard.com.hk/section-news/section/11/222746/Magistrate-transfer-%27not-linked-to-acquittals%27>.

publications (where he would not be involved in criminal trials). Again, the judiciary insisted that this was based on “operation needs”.⁷⁰

84. In a continuing series of articles under the heading “Judicial Reform Series”, Ta Kung Pao has demanded that Hong Kong judges be patriotic. It has called, in particular, for establishing a council to set the length of sentences, an external panel to handle complaints about judges, and greater scrutiny over the judicial selection process.⁷¹
85. In May 2021, during a meeting between the President of the PRC Supreme People’s Court (Zhou Qiang) and the Chief Justice of Hong Kong (Andrew Cheung), Zhou expressed that he expects the Hong Kong judiciary to thoroughly and accurately implement the PRC Constitution, Basic Law, and HK NSL and to adhere to the principle of “patriots administering Hong Kong”. Zhou further cautioned Cheung to “*not fail the trust and heavy responsibility granted by the central authorities*”. Some senior legal figures noted that this type of top-down admonishment from the PRC Supreme Court to the Hong Kong courts (which, in theory, has no hierarchical relationship with the PRC courts) was unprecedented.⁷²
86. In another meeting a few days later, a high-ranking Beijing official (Yang Zhenwu, the secretary-general of the NPCSC) also told Chief Justice Andrew Cheung that

⁷⁰Kelly Ho, “Another Hong Kong magistrate reassigned after criticism of protest rulings” 14 October 2020, *Hong Kong Free Press*, available at <https://hongkongfp.com/2020/10/14/another-hong-kong-magistrate-reassigned-after-criticism-of-protest-rulings/>; Lau Siu-fung, “Hong Kong reassigns judges denounced by pro-China lawmaker, papers as ‘pro-protest’ 15 October 2020, *Radio Free Asia*, available at <https://www.rfa.org/english/news/china/hongkong-judges-10152020141455.html>.

⁷¹Austin Ramzy, “Hong Kong’s courts are still independent. Some want to rein them in” 30 November 2020, *New York Times*, available at <https://www.nytimes.com/2020/11/30/world/asia/hong-kong-china-courts.html>; Chris Yeung, “Ta Kung Pao dragged in war over judicial independence” *Voice of Hong Kong*, 29 November 2020, available at <http://www.vohk.hk/2020/11/29/ta-kung-pao-dragged-in-war-over-judicial-independence/>.

⁷²Chris Lau, “Hong Kong chief justice urged to implement national security law, ensure ‘patriots’ govern city in first Beijing meeting with China’s top judge” 19 May 2021, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3134022/hong-kong-chief-justice-urged-implement-national>; “Hong Kong judiciary delegation visits Beijing” 21 May 2021, *China Daily*, available at <https://www.chinadaily.com.cn/a/202105/21/WS60a78e15a31024ad0bac0ab6.html>.

Hong Kong judges were expected to have an “accurate understanding” of the PRC Constitution and the Basic Law, and to fully enforce the principle of “patriots governing Hong Kong.”⁷³ Zhou’s and Yang’s warnings appear to be a thinly veiled threat that adverse consequences (such as further NPCSC “interpretation” and “decisions” to overrule the Hong Kong courts, as discussed in paragraphs 24-41 above) could ensue if the Hong Kong judiciary did not toe the political line set by Beijing.

87. In the current political environment, the Hong Kong and PRC governments can effectively impose new laws and policies at will, in the absence of *any* legislative opposition. In such an environment, it would be difficult to assume that such attacks do not weigh in judges’ minds, especially when they rule on cases which are regarded by the PRC and Hong Kong governments as politically sensitive.

V. A Pattern of Judicial Retreat

88. Even before the imposition of the NSL in June 2020, Hong Kong’s judges have engaged in a pattern of strategic retreat, under which they have departed from established legal principles in order to display greater deference to (or to further empower) the Hong Kong and Mainland authorities. Examples include:
 - (a) In the wake of the NPCSC’s 2016 “interpretation” as discussed in paragraphs 34-38 above, the courts have chosen to implement the “interpretation” in ways that are inconsistent with a purposive interpretation of the Basic Law, and even with the presumption that legislation should not be retroactive.⁷⁴

⁷³Chris Lau, “Hong Kong judges told they need ‘accurate understanding’ of Chinese constitution and its impact on city during Beijing trip”, 21 May 2021, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3134435/hong-kong-judges-told-they-need-accurate-understanding>.

⁷⁴P.Y. Lo, “Twilight of the Idolised” in Cora Chan and Fiona de Londras (eds.), *China’s National Security: Endangering Hong Kong’s Rule of Law?* (2020) 144-45.

- (b) In 2018, the Court of First Instance upheld a checkpoint “co-location” arrangement for the express rail line connecting Hong Kong with Mainland China. The arrangement designated part of the rail terminus in Hong Kong as being subject to Mainland Chinese laws. However, under Article 18 of the Basic Law, Mainland legislation can only apply in Hong Kong if specifically listed in Annex III to the Basic Law and if it pertained to matters outside the scope of Hong Kong’s autonomy. On 27 December 2017, the NPCSC issued an unreasoned decision to the effect that the arrangement was consistent with the Basic Law - a decision that the Hong Kong Bar Association characterised as “just because the NPCSC says so.”⁷⁵ The Court of First Instance proceeded to take the NPCSC decision at face value, going so far as to describe the decision as “carefully considered” (para 75).
- (c) In two separate 2018 cases, the HKCFA found in favour of (1) [pro-democracy activists Joshua Wong, Alex Chow, and Nathan Law](#),⁷⁶ and (2) [thirteen land activists](#) protesting against proposed redevelopment.⁷⁷ In both cases, the HKCFA overturned the Court of Appeal on the narrow ground that the latter had retroactively imposed newer - and much harsher - sentencing guidelines. However, the HKCFA left the new guidelines intact. Notably, in both cases the HKCFA chose to issue a *per curiam* judgement in the name of the HKCFA.⁷⁸ Prosecutors have subsequently made extensive use of these harsher guidelines: see paragraph 123 below.

⁷⁵Hong Kong Bar Association, “Statement of the Hong Kong Bar Association on the Decision of the NPCSC of 27 December 2017 on the Co-operation Agreement Between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement”, [https://www.hkba.org/sites/default/files/20171228%20-%20Bar%20Co-Location%20Arrangement%20Statement%20\(English\)%20FINAL_0.pdf](https://www.hkba.org/sites/default/files/20171228%20-%20Bar%20Co-Location%20Arrangement%20Statement%20(English)%20FINAL_0.pdf).

⁷⁶*Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35.

⁷⁷*Secretary for Justice v Chow Koot Yin, Kole* [2018] HKCFA 43.

⁷⁸The HKCFA has increasingly issued judgments in the name of “the Court” i.e. without attributing authorship to any particular judge: see Stuart Hargreaves, “‘The Court’ Rises: The New Use of Depersonalised Opinions on the Hong Kong Court of Final Appeal” (2021) 51 HKLJ 141.

89. This trend of judicial backsliding has intensified after the imposition of the NSL. In particular, several post-NSL cases contain irregularities, or instances of judicial conduct, that might reasonably be perceived as calling the impartiality of the judiciary into question.
90. *HKSAR v. Tong Ying Kit* - the first NSL trial - contained several such irregularities:
- (a) Upon the request by the Secretary for Justice who is empowered by the NSL to do so, the trial took place before a panel of three judges assigned by the Chief Executive, rather than a jury;
 - (b) Immediately after Tong's arrest, the Hong Kong SAR government issued a statement that the slogan Tong carried represented Hong Kong independence. In its judgement, the court found that the two defence experts had not ruled out that one of the interpretations of "*Liberate Hong Kong, Revolution of our Times*" was the independence of Hong Kong, and that the slogan, when combined with the circumstances of Tang's crime, could be interpreted as impliedly advocating independence and having a political purpose;
 - (c) The court ruled that Tong's conduct, the way he drove and the fact that he was considered to have acted against a police officer, coupled with his political advocacy, already constituted the offence of terrorist activity, giving rise to concern that the threshold for conviction was quite broad and that a general criminal offence, such as dangerous driving, could be coupled with terrorist activity as long as it was promoted by political advocacy;
 - (d) Both the trial and the ruling devoted most of their time to the question of whether the phrase "*Liberate Hong Kong, Revolution of our Times*" had a "secessionist" connotation, without weighing whether the phrase was protected by the Hong Kong Basic Law; and

- (e) Although Articles 4 and 5 of the NSL purport to protect freedom of expression, the court offered no explanation of why the restrictions imposed by the NSL on free expression in Tong's case were justified.

Tong was found guilty of inciting others to secession and acts of terrorism, and sentenced to 9 years in prison.

91. In *HKSAR v. Ma Chun Man*, the second NSL case, Ma was charged with incitement under the NSL for chanting slogans and displaying slogans. The judge's reasoning, and his comments in open court, may reasonably be perceived to call his impartiality into question:

- (a) Designated District Court Judge Stanley Chan gave no consideration to freedom of expression, or whether the restrictions to that freedom imposed in this case were justified. Instead, he simply asserted that Ma "*repeatedly emphasised his right provided by the Basic Law but he turned a blind eye to article 1 in the first chapter of the law which stipulates that the HKSAR is an inalienable part of the PRC*".
- (b) Chan ruled that, since Ma was facing an incitement charge, **none of the following factors were relevant:**
 - (i) Whether Ma had any actual plan of splitting Hong Kong from China;
 - (ii) Whether anyone had committed secession because of Ma's words; or
 - (iii) Whether Ma acted alone.

Ma was found guilty of incitement and sentenced to 5 years and 9 months in prison.

92. In relation to paragraph 89(b), current international human rights norms provide that if the specific words or actions do not result in imminent violence, they should **not** be criminalised, particularly in the context of peaceful expression and political declarations⁷⁹. The NSL criminalises speech even if not accompanied by force - a fundamental departure from such standards.
93. In *Ma Chun Man*, Judge Stanley Chan further noted in the course of mitigation that some defendants had brought cards with legal support hotline numbers, which he said reflected the organisational nature and coverage of the group behind the incident. He then - in open court - insinuated, without elaboration, that the defendants' *pro bono* lawyers may have acted illegally or unethically:

「本席認為這些「忠告」或「法律指引」一定程度解釋被告人被捕時的反應。另一方面這亦反映這些事件背後的組織性和涵蓋面。本席不會評論這些人士或機構或公司是否屬於終審法院所提及的鼓勵者，或是從犯或是涉及尚未開始的刑責（accessorial or inchoate liability）。本席亦不評論有沒有人違反專業守則。」（香港特別行政區 訴 張漢東及另三人 [2022] HKDC 122 at para.153）

“These cards, produced in advance to offer somewhat ‘heartfelt reminders’ or ‘legal guidance’ explain, to a certain extent, the reaction of the defendants when they were arrested. On the other hand, these showed the organised nature of the crime and the groups behind the scenes. I will refrain from commenting whether these acts fall within the act of encouragement as mentioned by the HKCFA, or within accessorial or inchoate

⁷⁹Principle 6 of the 1996 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996) states that “Subject to Principles 15 (General Rule on Disclosure of Secret Information) and 16 (Information Obtained Through Public Service), expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.” See also Principle 29 of the 1984 Siracusa Principles on Limitation and Derogation Provisions in the ICCPR.

liability. I will also refrain from commenting whether anyone has breached the Guide to Professional Conduct.”

94. Chan added that the defendants were "heavily armed", citing as evidence the fact that the protesters had brought cooked eggs as food and an aerial camera to monitor police deployment.
95. In December 2020, pro-democracy tycoon Jimmy Lai (founder of the now-defunct *Apple Daily* newspaper) was granted bail by a lower court after being charged by Hong Kong authorities of committing “foreign collusion”, an offence under the NSL. PRC state media were quick to express their outrage. The People’s Daily (the official newspaper of the Chinese Communist Party) decried the judgement as “*inconceivable*” and questioned whether the Hong Kong courts had “*jurisdictional difficulty*”. It urged the higher courts to “*make the right decision*”. It also warned that there was sufficient legal basis for the PRC central authorities to assume jurisdiction over the case (pursuant to Article 55 of the NSL).⁸⁰
96. Then, four days before the HKCFA heard the appeal, Chief Justice Andrew Cheung met privately with Chief Executive Carrie Lam.⁸¹ The HKCFA (sitting, unusually, without any overseas NPJ) ultimately ruled in the prosecution’s favour, holding that there was a presumption against bail in NSL cases: see *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, discussed in paragraph 55 above.

⁸⁰Candice Chau, “Hong Kong media tycoon Jimmy Lai faces appeal against bail after Chinese state media raps ‘inconceivable’ decision”, *Hong Kong Free Press*, 29 December 2020, available at <https://hongkongfp.com/2020/12/29/hong-kong-media-tycoon-jimmy-lai-faces-appeal-against-bail-after-chinese-state-media-raps-inconceivable-decision/>; Natalie Wong, “Beijing mouthpiece slams Hong Kong court for granting ‘extremely dangerous’ Jimmy Lai bail, warns China can take over his national security law case” *South China Morning Post*, 27 December 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3115468/beijing-mouthpiece-slams-hong-kong-court-granting-dangerous>.

⁸¹Citizen News, 31 January 2021; Chris Lau, “Hong Kong leader Carrie Lam denies interference suggestion, after reportedly meeting chief justice ahead of Jimmy Lai hearing” *SCMP*, 2 February 2021, accessed at <https://www.scmp.com/news/hong-kong/politics/article/3120192/hong-kong-leader-carrie-lam-categorically-denies>.

97. Another alarming development for the Hong Kong legal system – which Hong Kong judges (including those on the CFA) are powerless to prevent – is the recent pattern of defendants charged with NSL offences abruptly dismissing their legal team and then instructing new lawyers, some of whom have close links to the pro-Beijing camp in Hong Kong. Such change was either imposed on the defendant or took place under unusual circumstances and with no clear explanation. This has given rise to serious concerns about whether defendants (particularly those facing NSL or protest-related charges) are able to freely select their legal counsel. There are uncomfortable echoes of the practice in Mainland China, where, in politically sensitive cases, defendants are frequently denied a free choice of counsel and forced to accept government-approved lawyers.⁸²

- a. Andy Li Yu-hin, an opposition activist arrested for the NSL crime of collusion with foreign forces, attempted to flee Hong Kong on a boat to Taiwan. He was intercepted by the PRC coast guard and was detained for 7 months in Mainland China before being transferred back to Hong Kong. Upon his return to Hong Kong, he appeared at a court hearing represented by a new legal team, which included a solicitor who had been a vocal supporter of the pro-government camp. The process behind the appointment of this legal team was shrouded in mystery: Li’s family said that they did not know the new lawyers and had not instructed them, and it was entirely unclear how Li was able to hire a legal team when he had been in custody for the past 7 months. A few months later, Li changed counsel again, hiring another barrister with close ties to pro-Beijing organisations in Hong Kong.⁸³

⁸²Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, “Hong Kong’s National Security Law and the Right to a Fair Trial” 28 June 2021, Georgetown Center for Asian Law Briefing Paper, pp. 13-15; Jerome A. Cohen, “Hong Kong’s Transformed Criminal Justice System: Instrument of Fear” 2022 Academia Sinica LJ (Special Issue) (forthcoming 2022), p.9.

⁸³Wallis Wang, “Andy Li family sees red on mystery lawyer” *Standard*, 1 April 2021, available at <https://www.thestandard.com.hk/sections-news-print/228923/Andy-Li>; 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*, 31 March 2021, available at <https://hongkongfp.com/2021/03/31/mystery-lawyer-appears-in-court-for-hong-kong-activist-andy-li-but-family-still-dont-know-where-he-is/>; Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, “Hong Kong’s National Security Law and the Right to a Fair Trial” 28 June 2021, Georgetown Center for Asian Law Briefing

- b. Chan Tsz-wah, a legal assistant charged with the NSL crime of collusion with a foreign power and with assisting Andy Li in his efforts to flee Hong Kong, also switched to a lawyer who is in the pro-government camp.⁸⁴
- c. Activists Au Nok-hin and Pang Cheuk-kei, both charged with the NSL offence of subversion (for organising and running in a primary election for pro-democracy councillors) likewise switched lawyers, in favour of being represented by Paul Tse Wai-chun, a solicitor and pro-Beijing legislator.⁸⁵
- d. Tong Ying Kit (as discussed above) was an opposition protester who had been convicted in the first NSL trial and sentenced to 9 years imprisonment. He appealed against the verdict. Unusually, the Legal Aid Department assigned his appeal to a different firm of solicitors than those who had represented him at trial. The new firm was founded by a former provincial-level committee member of the Chinese People’s Political Consultative Conference. Several months later, Tong dropped his appeal without explanation. His barrister (senior criminal practitioner Clive Grossman SC) said that Tong had not consulted him about the decision and he was not aware of any reasons Tong had given for abandoning the case.⁸⁶
- e. In August 2021, prominent human rights barrister and then-Chairman of the Hong Kong Bar Association, Paul Harris SC, was removed as counsel for Ma Chun Man, shortly before the latter was due to stand trial on NSL charges.

Paper, pp. 13-15.

⁸⁴Lydia Wong, Thomas E. Kellogg & Eric Yan-ho Lai, “Hong Kong’s National Security Law and the Right to a Fair Trial” 28 June 2021, Georgetown Center for Asian Law Briefing Paper, pp. 13-15.

⁸⁵Id.

⁸⁶Kelly Ho, “Hong Kong court to hear challenge to national security law conviction next March” *Hong Kong Free Press*, 26 November 2021, available at <https://hongkongfp.com/2021/11/26/hong-kong-court-to-hear-challenge-to-national-security-law-next-march/>; Brian Wong, “Hong Kong national security law: first person jailed under legislation drops appeal against 9-year sentence” *South China Morning Post*, 13 January 2022, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3163262/hong-kong-national-security-law-first-person-jailed>.

(As discussed above, Ma was ultimately convicted and sentenced to 5 years and 9 months in prison). As reported by the South China Morning Post, a few weeks before the trial, staff from the Legal Aid Department visited Ma in prison and warned him against hiring Harris. Although Ma continued to request Harris (who had by then already appeared on two bail applications for Ma) for the trial, the Legal Aid Department insisted on assigning a different counsel for Ma.⁸⁷

(It is notable that Harris had, during his tenure as Bar Chairman, been subjected to ferocious attacks by PRC state media, who derided him as an “anti-China politician”. He left the post after just one year, considerably earlier than the usual term of two years⁸⁸. Subsequently, in March 2022, Harris abruptly left Hong Kong after being questioned and cautioned by national security police over an alleged breach of the NSL.⁸⁹)

f. In October 2021, the Legal Aid Department adopted new policy guidelines which would prevent legally aided defendants from being able to choose their own lawyers; instead, unless there were exceptional circumstances, the lawyers would be chosen and assigned by the department.⁹⁰ This change has

⁸⁷Chris Lau, “Hong Kong Bar chief Paul Harris ‘removed’ from national security trial by legal aid officials against activist client’s wish” 30 November 2021, *South China Morning Post*, available at <https://www.scmp.com/news/hong-kong/politics/article/3157921/hong-kong-bar-chief-paul-harris-removed-national-security>.

⁸⁸Helen Davidson, “Beijing calls Hong Kong bar association chief an ‘anti-China politician’” 27 April 2021, *Guardian*, available at <https://www.theguardian.com/world/2021/apr/27/beijing-calls-hong-kong-bar-association-chief-an-anti-china-politician>; Chan Ho-him, Jennifer Creery & Primrose Riordan, “Beijing loyalists stalk Hong Kong civil society leaders” 28 December 2021, *Financial Times*, available at <https://www.ft.com/content/4947c416-1d16-40a4-94d2-3b4c7dff1584>.

⁸⁹Primrose Riordan & Chan Ho-him, “Hong Kong top lawyer leaves city abruptly after police questioning” 2 March 2022, *Financial Times*, available at <https://www.ft.com/content/0f70fb83-89e3-467f-87c1-106c14fb077f>; Hillary Leung, “Hong Kong Bar Assoc. ex-chief Paul Harris reportedly leaves city hours after meeting with national security police” 2 March 2022, *Hong Kong Free Press*, available at <https://hongkongfp.com/2022/03/02/hong-kong-bar-assoc-ex-chief-paul-harris-reportedly-leaves-city-hours-after-meeting-with-national-security-police/>.

⁹⁰Selina Cheng, “Legal aid reform: Critics fear right to choose lawyer will be undermined but Hong Kong gov’t advisor says plan will be ‘fairer’” 25 October 2021, *Hong Kong Free Press*, available at <https://hongkongfp.com/2021/10/25/legal-aid-reform-critics-fear-right-to-choose-lawyer-will-be-undermined-but->

been criticised by numerous observers, including the Hong Kong Bar Association, which warned that the changes “*may constitute a violation of Articles 10 and 11 of the Hong Kong Bill of Rights*” (provisions which guarantee that any person shall be entitled to fair and public hearings, and will have adequate time to communicate with a counsel of their own choosing) and said that it did “*not see any justification*” for the new mechanism.⁹¹

98. Unfortunately, Hong Kong judges are entirely impotent to investigate, counteract, or forestall these disturbing incidents, even though these incidents raise serious alarms about defendants’ freedom to choose their own legal counsel. This (in line with our observations in Section F below) again calls into doubt the ability of overseas NPs to safeguard the Hong Kong legal system in the post-NSL era.
99. Similar developments have taken place even in cases not prosecuted under the NSL. As noted in paragraph 57 above, the Appeal Committee of the HKCFA held that the presumption against bail created by Article 42 of the NSL applied to all offences involving the endangerment of national security, *including offences that were not specifically enumerated in the NSL: HKSAR v Ng Hau Yi Sidney* [2021] 6 HKC 822.

VI. Public Confidence in the Judiciary

100. In *Valente v The Queen* [1985] 2 SCR 673, the Supreme Court of Canada observed that the requirement that judges must be reasonably perceived as being independent is important, since independence and impartiality are fundamental to individual and public confidence in the administration of justice. This principle is also reflected in

[hong-kong-govt-advisor-says-plan-will-be-fairer/](https://www.hkba.org/hidden/circulars/c445dc0c340e472f321741ed0b8d00fdafac4447.pdf).

⁹¹Hong Kong Bar Association, “Position paper on proposed enhancement measures to the legal aid system in Hong Kong” 3 December 2021, at paras. 9, 21, available at <https://www.hkba.org/hidden/circulars/c445dc0c340e472f321741ed0b8d00fdafac4447.pdf>; see also Jerome A. Cohen, “Hong Kong’s Transformed Criminal Justice System: Instrument of Fear” 2022 *Academia Sinica LJ* (Special Issue) (forthcoming 2022), p.9.

paragraph 21 of General Comment 32⁹², and in paragraph 19 of the Hong Kong Judiciary’s Guide to Judicial Conduct.

101. Public confidence in Hong Kong’s judicial independence and the rule of law has diminished since 1997. According to surveys by the non-partisan Hong Kong Public Opinion Research Institute (PORI), public appraisal of the fairness of the judicial system decreased from 6.7 (out of 10) in July 1997 to 4.7 in February 2022⁹³; and impartiality of the courts from 6.9 in July 1997 to 5.0 in February 2022⁹⁴
102. A 2019 survey by the Bauhinia Foundation Research Centre, a pro-government think tank, revealed that more than half of respondents were displeased with the overall performance of the rule of law. The same survey showed declines from 2017 to 2019 in public perceptions of judicial autonomy (from 5.29 out of a possible 10 in 2017 to 4.12 in 2019) and the ability of the courts to prevent governmental abuses of power (from 5.23 in 2017 to 3.61 in 2019)⁹⁵.
103. A 2021 study by pro-government think tank Path of Democracy found that respondents’ perceptions of judicial independence in Hong Kong fell from 4.52 (out of 10) in August 2019 to 4.00 in January 2021⁹⁶.
104. Regardless of what the actual contributors to this decline of confidence in the judiciary are, the surveys, whether conducted by non-partisan or pro-government

⁹²“General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial” 23 August 2007, UN. Human Rights Committee (90th sess. 2007, Geneva), <<https://digitallibrary.un.org/record/606075?ln=en>>, last accessed on 17 February 2022.

⁹³Hong Kong Public Opinion Research Institute, “Appraisal of Degree of Fairness of the Judicial System” July 1997 - February 2022, <<https://www.pori.hk/pop-poll/rule-law-indicators-en/g004.html?lang=en>>, accessed on 28 February 2022.

⁹⁴Hong Kong Public Opinion Research Institute, “Appraisal of Degree of Impartiality of the Courts” July 1997 - February 2022, <<https://www.pori.hk/pop-poll/rule-law-indicators-en/g003.html?lang=en>>, accessed 28 February 2022.

⁹⁵The Bauhinia Foundation Research Centre, “Survey on public perceptions towards the rule of law in Hong Kong” 18 December 2019, <<http://www.bauhinia.org/index.php/english/research/106>>, accessed 28 February 2022.

⁹⁶Path of Democracy, “One Country Two System Index” March 2021, <http://pathofdemocracy.hk/wp-content/uploads/2021/05/PoD_Index_2021_March_online.pdf>, accessed 28 February 2022.

bodies, consistently suggest that the public perception of the judiciary *as a whole* has deteriorated. The continued inclusion of overseas NPJs in the HKCFA has not affected - and is unlikely to affect - that decline.

F. Role of Overseas Non-Permanent Judges in Hong Kong

105. Hong Kong officials have repeatedly pointed to the continued role of overseas Non-Permanent Judges on the HKCFA as evidence that Hong Kong’s judicial system as a whole remains independent. For example:

- (a) Speaking in 2014, then-Secretary for Justice Rimsky Yuen pointed to the continued presence of overseas NPJs on the HKCFA as “a strong testimony to the state of judicial independence and the rule of law in Hong Kong”;⁹⁷
- (b) Current Secretary for Justice Teresa Cheng has used the overseas NPJs’ continued participation in the HKCFA to reinforce the government’s position that Hong Kong’s ‘rule of law and independent judiciary are well recognized internationally.’⁹⁸ She relied in particular on the statements of three NPJs - Lord Neuberger of Abbotsbury⁹⁹, Beverley McLachlin PC¹⁰⁰ and Lord Sumption¹⁰¹, respectively - as evidence of judicial independence in Hong Kong; and

⁹⁷Remarks given by Rimsky Yuen SC at Chatham House, 15 October 2014,

<https://www.info.gov.hk/gia/general/201410/15/P201410151108.htm>.

⁹⁸Para.81, https://www.doj.gov.hk/en/community_engagement/speeches/20210310_sj1.html.

⁹⁹SJ’s Blog, “Judicial Independence” 5 January 2020. Accessed at

https://www.doj.gov.hk/en/community_engagement/sj_blog/20200105_blog1.html.

¹⁰⁰SJ’s Blog, “Judicial Independence” 5 January 2020. Accessed at

https://www.doj.gov.hk/en/community_engagement/sj_blog/20200105_blog1.html; citing Tom Blackwell, “Courts immune to pressure from China, ex-Canadian chief justice says after Hong Kong judging stint” *National Post*, 31 December 2019. Accessed at <https://nationalpost.com/news/courts-immune-to-pressure-from-china-ex-canadian-chief-justice-says-after-hong-kong-judging-stint>.

¹⁰¹See the SJ’s recent attempts to rebut two separate discussions on Hong Kong’s judicial independence - published by The Times and the Wall Street Journal in 2021. Teresa Cheng, “SJ’s letter-to-editor of The Times” 18 October 2021. Accessed at https://www.doj.gov.hk/en/community_engagement/speeches/20211018_letter1.html; and Tesesa Cheng, “SJ responds to the Wall Street Journal” 21 April 2021. Accessed at https://www.doj.gov.hk/en/community_engagement/speeches/20210421_letter1.html.

- (c) Chief Executive Carrie Lam specifically cited a statement made by Lord Reed of Allermuir PSC¹⁰² as evidence that judicial independence in Hong Kong had not been.¹⁰³ In commenting on the respective appointments of Lord Sumption and Lord Hodge as NPJs of the HKCFA, she reiterated that the presence of these ‘non-permanent judges manifests the judicial independence of Hong Kong.’^{104 105}

106. However, overseas judges play a limited role in Hong Kong’s judicial system outside of the HKCFA,¹⁰⁶ and (for the reasons set out in paragraphs 107-114 below) the HKCFA hears a relatively small number of cases compared to the rest of the judicial system. Even *within* the HKCFA, overseas NPJs’ involvement is limited (see paragraphs 115-120 below).

107. First, few cases ever actually reach the HKCFA. There is no appeal ‘as of right’ to the HKCFA; the threshold for leave to appeal is ‘*a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done*’.¹⁰⁷

¹⁰²During an annual evidence session with the constitution committee of the House of Lords, Lord Reed said that “If there was any undermining of the independence of the Hong Kong judiciary, or if it was expected to act contrary to rule of law, or if simply the situation in Hong Kong became one where we could in no longer good conscience serve there, then I would no longer be prepared to serve or to nominate other judges of the court to serve there.” See Annual Evidence Session held by Constitution Select Committee on 17 March 2021. Accessed at <https://parliamentlive.tv/Event/Index/43f93113-f762-43c2-8b66-656dcdfebf27>.

¹⁰³Nadia Lam, “Hong Kong leader Carrie Lam says city’s Judiciary is independent and stable in response to British judge’s resignation warning” *SCMP*, 23 March 2021. Accessed at <https://sg.news.yahoo.com/hong-kong-leader-carrie-lam-071753144.html?guccounter=1>.

¹⁰⁴See the statement re appointment of Lord Sumption. HKSAR Press Releases, “Senior judicial appointment: non-permanent judge from another common law jurisdiction of the Court of Final Appeal” 22 May 2019. Accessed at <https://www.info.gov.hk/gia/general/201905/22/P2019052200273.htm>.

¹⁰⁵See the statement re appointment of Lord Hodge. HKSAR Press Releases, “Senior judicial appointment: non-permanent judge from another common law jurisdiction of the Court of Final Appeal” 5 October 2020. Accessed at <https://www.info.gov.hk/gia/general/202010/05/P2020100500309.htm>.

¹⁰⁶We are aware of one appointment of a non-permanent resident to a lower court, although there may be others: see Alvin Lum, “Tony Blair’s Brother Serves as Judge at Hong Kong High Court” *South China Morning Post* (15 Apr 2018), <https://www.scmp.com/news/hong-kong/law-crime/article/2141755/tony-blairs-brother-serves-judge-hong-kong-high-court> (on the appointment of Sir William Blair as a deputy judge of the Court of First Instance).

¹⁰⁷s.32(2), Cap. 484 Hong Kong Court of Final Appeal Ordinance.

108. Leave to appeal to the HKCFA may be granted by the Court of Appeal or by the HKCFA Appeal Committee. However, foreign NPJs seldom (if ever) participate in the latter, and do not participate in the former at all.
109. Moreover, the HKCFA Appeal Committee is not required to provide detailed reasons for refusing leave to appeal.
110. This structure for granting leave to the HKCFA has the practical effect of diminishing overseas NPJs' ability to participate in (or to observe) the process of considering leave applications.
111. Over the past several years, the HKCFA Appeal Committee has made several decisions to refuse leave in politically controversial cases involving fundamental rights, effectively removing them from the purview of overseas NPJs:
- (a) in 2016, the HKCFA Appeal Committee refused to grant leave to appeal to two legislators-elect disqualified for their alleged failure to take an oath in accordance with Article 104 of the Basic Law (in which the NPCSC issued an "interpretation" during the course of first instance proceedings) on the ground that there were no arguable points of law of general and public importance¹⁰⁸;
 - (b) During 2019, the HKCFA Appeal Committee rejected several applications for leave to appeal involving applicants convicted of protest-related offences; and
 - (c) In refusing leave to appeal in *HKSAR v Ng Hau Yi Sidney* [2021] 6 HKC 822, the HKCFA Appeal Committee extended the NSL's presumption against bail to offences not specified in the NSL that also involved the endangerment of national security.

¹⁰⁸*Yau Wai Ching v. Chief Executive of the HKSAR*, (2017) 20 HKCFAR 390.

112. More significantly, several defendants convicted of national security offences have abruptly abandoned their appeals for ‘unknown reasons’.
113. Tong Ying-kit - the first person to be convicted of offences under the National Security Law - is a particularly noteworthy example. Tong was found guilty of terrorist activities and inciting secession, in what has been perceived to be a watershed moment for Hong Kong’s judicial system.
114. Although Tong initially indicated through his lawyer that he would appeal, he ultimately declined to do so, under opaque circumstances. As noted at paragraph 97 above, Tong’s counsel Clive Grossman SC indicated that he was not aware of why Tong dropped the appeal, adding that he was surprised by it.¹⁰⁹
115. Second, the administration and assignment of cases is handled locally, without the involvement of overseas NPJs. As of February 2022, this has resulted in one NSL case where no overseas NPJs participated in the panel at all. In *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, the HKCFA set out principles on the grant of bail to a person charged with an offence under the NSL. No overseas NPJ was assigned to the panel.
116. Cheung CJ has stated that overseas NPJs have made a ‘substantial contribution’ to the work of the CFA,¹¹⁰ and that there is no bar preventing them from hearing cases under the NSL.¹¹¹ However, Lord Reed PSC commented that ‘[w]hether judges of the Supreme Court can continue to serve as judges in Hong Kong will depend on whether such service remains compatible with judicial independence and the rule of

¹⁰⁹James Pomfret, “First person convicted under Hong Kong’s national security law drops appeal” *Reuters*, 13 January 2022. Accessed at <https://www.reuters.com/world/asia-pacific/first-person-convicted-under-hong-kongs-national-security-law-drops-appeal-2022-01-13/>.

¹¹⁰HKSAR Press Releases, “CJ’s speech at Ceremonial Opening of the Legal year 2021” 11 January 2021. Accessed at <https://www.info.gov.hk/gia/general/202101/11/P2021011100559.htm>.

¹¹¹Jonathan Ames, “British judges ready to enforce national security law in Hong Kong” *The Times*, 2 February 2022. Accessed at <https://www.thetimes.co.uk/article/british-judges-required-to-hear-cases-under-hong-kong-security-law-7mlg6d6pm>.

law’, after raising concerns about the national security law.¹¹² The spokeswoman for the Supreme Court also said that so far the Hong Kong authorities had made no request for Lord Reed or Hodge to sit this year or beyond, and that the Supreme Court’s assessment of Hong Kong’s judicial independence is “increasingly finely balanced”.¹¹³

117. As of February 2022, Lord Sumption is the only overseas NPJ who has unequivocally confirmed that he would hear any cases he was assigned to - including NSL cases.¹¹⁴
118. Third, each individual overseas NPJ participates in a limited number of substantive decisions. Although full data on all overseas NPJs is not currently available, Figure 1 below shows the number of times between 2018 and 2020 each overseas NPJ participated in a HKCFA decision on the substantive merits of a case.¹¹⁵

Figure 1. NPJ Participation in HKCFA Merits Decisions, 2018-2020

NPJ	HKCFA Merits Decisions 2018-2020
Lord Clarke of Stone-cum-Ebony	0 (retired 2020)
Lord Collins of Mapesbury	6
Robert French AC	4
Murray Gleeson AC GBS QC	5
William Gummow AC	3

¹¹²The Right Hon Lord Reed of Allermuir, “Role of UK judges on the Hong Kong Court of Final Appeal” 17 July 2020. Accessed at <https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal.html>.

¹¹³Jonathan Ames, “British judges ready to enforce national security law in Hong Kong” *The Times*, 2 February 2022. Accessed at <https://www.thetimes.co.uk/article/british-judges-required-to-hear-cases-under-hong-kong-security-law-7mlg6d6pm>.

¹¹⁴*Id.*

¹¹⁵As noted in paragraph 108 above, overseas NPJs rarely (if ever) participate in decisions over whether to grant leave to the HKCFA.

Baroness Hale of Richmond	0
Lord Hoffmann	8
Beverley McLachlin PC CC	3
Lord Millett	0
Lord Neuberger of Abbotsbury	6
Lord Phillips of Worth Matravers	2
Lord Reed of Allermuir PSC	4
James Spigelman AC QC	2 (resigned 2020)
Lord Sumption	3 (appointed 2019)
Lord Walker of Gestingthorpe	4

The Judiciary’s official caseload figures show that the HKCFA had 69 cases between 2018 and 2020, of which 39 were criminal cases.¹¹⁶

119. Three further points merit attention:

- (a) Baroness Hale of Richmond, who was appointed as a NPJ in 2018 despite the objections of pro-Beijing legislators (as detailed at paragraph 72 above), ultimately declined to renew her appointment in 2021¹¹⁷ - without having sat on a single case;
- (b) Overseas NPJs are present in Hong Kong only for the purpose of hearing appeals, and therefore spend a limited period of time in the territory;¹¹⁸ and

¹¹⁶Hong Kong Judiciary Annual Report 2021, https://www.judiciary.hk/en/publications/annu_rept_2021r/eng/caseload_fa.html; Hong Kong Judiciary Annual Report 2020, https://www.judiciary.hk/en/publications/annu_rept_2020r/eng/caseload_fa.html.

¹¹⁷See HKSAR Press Releases, “Statement by Judiciary on Baroness Hale’s term of office as non-permanent CFA judge” 4 June 2021. Accessed at <https://www.info.gov.hk/gia/general/202106/04/P2021060400779.htm>.

¹¹⁸See Simon NM Young and Antonio Da Roza, Judges and Judging in the Court of Final Appeal: a Statistical Picture” (*Hong Kong Lawyer*, Aug 2010) (overseas NPJs “will fly into Hong Kong ...to hear appeals for a short

- (c) Between 2018 and 2020, not a single overseas NPJ dissented from a majority judgement of the HKCFA.¹¹⁹
120. Moreover, to the extent that overseas NPJs *have* participated in cases relating to the protection of fundamental rights or that the Hong Kong government might regard as politically sensitive, the Hong Kong government has subsequently made use of the judgments issued in such cases to repress opposition politicians and civil society.
121. The HKCFA's judgement in *Secretary For Justice v Leung Kwok Hung* [2021] HKCFA 32 - a case in which Lord Reed PSC participated as an NPJ - provided the legal basis for the conviction of Fernando Cheung, the first Hong Kong (ex-) legislator to be imprisoned for a peaceful protest within the legislation chamber.
122. In *Leung Kwok Hung* the HKCFA had to decide whether legislators' expression in a meeting - including actions - were protected by parliamentary privilege. The HKCFA - in a judgement with which Lord Reed PSC agreed without qualification¹²⁰ - held that only the words and speeches of lawmakers were privileged. This ruling enabled the Hong Kong government to prosecute legislators and former legislators (including Cheung) for parliamentary contempt.
123. Overseas NPJs also participated in the 2018 HKCFA decisions referred to in paragraph 88(c) above, in which the HKCFA overturned several convictions on the basis that the Court of Appeal had retroactively applied much harsher sentencing guidelines for protest-related cases - but pointedly left the guidelines undisturbed. Lord Hoffmann was part of the panel that decided the appeals of Joshua Wong, Alex

period of time").

¹¹⁹Dissents by overseas NPJs have historically been rare: see Simon NM Young and Antonio Da Roza, Judges and Judging in the Court of Final Appeal (id).

¹²⁰See Eric Lai, "Foreign Judges Are Enabling Hong Kong's Legal Crackdown" *The Diplomat*, 11 February 2022. Accessed at <https://thediplomat.com/2022/02/foreign-judges-are-enabling-hong-kongs-legal-crackdown/>.

Chow, and Nathan Law; Lord Neuberger of Abbotsbury participated in the appeal involving thirteen land activists.

124. Prosecutors and courts have since relied on these 2018 judgments to impose markedly harsher sentences:

- (a) The Secretary for Justice applied for a review of sentencing in *Secretary for Justice v Chung Ka Ho* [2020] HKCA 990. In that case the defendant, who was convicted of participating in an unlawful assembly, was sentenced to 120 hours of community service. At paragraphs 52-56 of the judgment, the appellate court significantly modified, and extended, *Wong Chi Fung*, to cover unlawful assemblies that did not involve actual violence. It then took into account the sentencing principles laid down in *Wong Chi Fung* and imposed a sentence of 3 months' imprisonment.
- (b) In *HKSAR v Chan Ho Wun and others* [2021] HKDC 645, ten defendants were accused of offences including inciting other persons to take part in an unauthorised assembly, organising an unauthorised assembly, and taking part in an unauthorised assembly. Even though the defendants had called for a 'peaceful, rational and non-violent procession', they were each sentenced to 14 to 18 months' imprisonment.

G. Conclusions

125. As noted in Part C above, the PRC and Hong Kong governments are under an obligation to maintain judicial independence in Hong Kong by virtue of Article 3(3) and Annex I, Part III of the Sino-British Joint Declaration and Articles 2, 19, 85 of the Basic Law.

126. As noted in Part B above, internationally accepted accounts of judicial independence require the independence and impartiality - both actual and reasonably perceived - of the court system. The Hong Kong Judiciary's own Guide to Judicial Conduct (as discussed in Part D above) also contains these requirements.
127. However, there are systemic threats to Hong Kong's judicial independence that will continue - if not intensify - for the foreseeable future. These threats include:
- (a) NPCSC "interpretations" of the Basic Law to pre-empt imminent or pending litigation in Hong Kong. Based on Zhou Qiang's remarks as summarised in paragraph 85, such "interpretations" are likely to continue;
 - (b) Under the NSL, judges have no security of tenure and face the continuing threat that cases will be removed to the Mainland criminal law system based on nebulous criteria under Article 55 NSL; and
 - (c) Political pressure from pro-Beijing actors (including PRC-controlled media and Hong Kong legislators), including threats to reduce the Hong Kong courts' jurisdiction in the event that they do not decide cases in a manner that accords with the PRC's perceived interests. Such pressure has already affected judicial appointments and assignments, as noted in paragraphs 74 (HKCFA appointment) and 83 (reassignment of magistrates). The Secretary for Justice has declined to respond to these attacks.
128. There is evidence that these systemic threats have already undermined Hong Kong's judicial independence (as discussed in Part E above). The questionable judicial reasoning in NSL-related cases, the trend towards greater judicial deference towards the executive in ways that deviate from established legal principles, and the Hong Kong public's declining confidence in the judiciary, are particularly troubling. All of these developments have occurred despite the continued presence of overseas NPIs.

129. The continued presence of overseas NPJs is of considerable reputational benefit to the Hong Kong government, which has repeatedly asserted that the continued presence of overseas NPJs amounts to a vote of confidence in Hong Kong's judiciary *as a whole*.
130. However, the ability of foreign NPJs to exert a moderating influence in response to the various threats to Hong Kong's judicial independence is limited:
- (a) In the absence of appeals as of right, and in the absence of overseas NPJ participation in determining applications for leave to appeal, few cases will ever reach an overseas NPJ. The likelihood that more NSL defendants will abandon their appeals under suspicious circumstances is especially concerning;
 - (b) Each overseas NPJ sits on a relatively small number of cases involving merits decisions during their tenure, and will therefore have limited individual impact on HKCFA jurisprudence;
 - (c) Overseas NPJs are not involved in court administration and have, on a landmark NSL-related case, been excluded from participating in the HKCFA entirely; and
 - (d) To the extent that overseas NPJs have participated in HKCFA decisions, the Hong Kong government has exploited some of these decisions to further repress opposition politicians and civil society.

**Assessing Recent Developments Affecting Judicial Independence in Hong Kong:
Addendum**

A. Introduction

1. This Addendum should be read in conjunction with the opinion entitled “Assessing Recent Developments Affecting Judicial Independence in Hong Kong” (the “**Opinion**”). Terms and abbreviations used in this Addendum have been defined in the Opinion.
2. This Addendum specifically considers the extent to which the developments described in the Opinion are likely to affect the commercial and financial spheres in Hong Kong.
3. In brief:
 - (a) Part B (paragraphs 4 to 14 below) suggests that – even prior to the imposition of the NSL in 2020 – governmental administration affecting businesses, and the adjudication of commercial legal disputes, has been conducted in ways that systematically favour the interests of the PRC and/or Hong Kong governments; and
 - (b) Part C (paragraphs 15 to 24 below) considers the risk that ordinary financial or commercial disputes may be arbitrarily classified as implicating “national security”.

B. Pre-NSL Developments

4. This Part considers pre-NSL administrative (paragraphs 5 to 10) and judicial (paragraphs 11 to 14) conduct. Taken together, these developments suggest that “political” considerations had begun to enter the realm of ordinary commercial conduct well before the imposition of the NSL in 2020.

(i) *Governmental Administration*

5. This Part considers pre-NSL conduct by the Companies Registry (paragraphs 6 to 8), the postal service (paragraph 9), and the Food and Environmental Hygiene Department (paragraph 10). These incidents suggest a tendency within the Hong Kong government to conduct ordinary administrative tasks in a way that systematically favours the perceived interests of the PRC and/or Hong Kong governments.
6. **Companies Registry denying registration to political parties.** Hong Kong currently does not have specific legislative schemes to regulate charities or other non-profit organisations. Such organisations may take a variety of legal structures, including limited companies.
7. Due to the absence of specific legislation governing the registration and conduct of political parties, such parties typically register as companies with the Companies Registry (the “**Registry**”). The Registry typically approves a registration application within a matter of days.¹
8. However, the Registry has obstructed or denied several applications for company registration filed by political parties and civil society organisations. The effect of such denial of registration is substantially to hinder the party’s or organisation’s ability to operate; for instance, a political party denied registration cannot open a bank account in its own name.² Examples of the Registry’s obstruction or denial of applications include:

¹Cannix Yau, ‘Six Months and Counting: Demosisto Party Still Waiting for a Reply on Its Registration’ [2016] South China Morning Post
<<http://www.scmp.com/news/hong-kong/politics/article/2018409/six-months-and-counting-demosisto-party-still-waiting-reply>> accessed 13 December 2017.

²ibid.

- (a) On 12 May 2014, the Registry rejected an application by the Occupy Central civil disobedience movement. The *South China Morning Post* quoted an anonymous source who compared the movement to a triad society;³
- (c) Demosisto, the (now-defunct) political party established by Joshua Wong and Nathan Law, initially applied to the Registry for registration in March 2016.⁴ Four months later the Registry asked whether Demosisto was adhering to the Basic Law by advocating Hong Kong’s “self-determination” (but apparently without identifying a specific criminal offence that such advocacy would constitute).⁵ The Registry ultimately refused Demosisto’s application in January 2018;⁶
- (d) In 2017 the Registry refused an application to rename a shell company to “HKNP Limited” or “Hong Kong National Party Limited,” again purportedly because doing so would be contrary to the Basic Law;⁷ and
- (e) In March 2020 the Coming Dawn, a citizen-led initiative to promote businesses with a pro-democracy political stance, applied to the Registry to be registered as a limited company. The Registry replied, seeking clarification of the terms “fellow protesters,” “pro-independence,” “revolutions,” and “war of resistance” as part of an inquiry into the reasons for the proposed company name “The Coming Dawn Limited.”⁸

³Gary Cheung and Tony Cheung, ‘Occupy Central’s Bid to Set up Company Rejected’ *South China Morning Post* (12 May 2014)

<<https://www.scmp.com/news/hong-kong/article/1510153/occupy-centrals-bid-set-company-rejected>> accessed 27 March 2022.

⁴Lok-Kei Sum, ‘Were “Political Considerations” behind Rejection of Joshua Wong’s Party?’ *South China Morning Post* (18 April 2018)

<<https://www.scmp.com/news/hong-kong/politics/article/2142158/were-political-considerations-behind-rejection-joshua-wongs>> accessed 27 March 2022.

⁵ibid.

⁶ibid.

⁷Elson Tong, ‘Pro-Independence Hong Kong National Party Appeals against Companies Registry’s Denial of Registration’ (*Hong Kong Free Press*, 11 April 2017)

<<https://hongkongfp.com/2017/04/11/pro-independence-hong-kong-national-party-appeals-companies-registry-denial-registration/>> accessed 27 March 2022.

⁸Hong Kong Free Press, ‘Censorship Concerns as Hong Kong Companies Registry Grills Startup over Political Stance’ (*Hong Kong Free Press*, 1 June 2020)

9. **Postal service refusing to circulate electoral pamphlets.** In 2016 Hongkong Post, the government-operated postal service, sought legal advice from the Department of Justice regarding Demosisto’s proposed electoral campaign leaflets, which contained phrases such as “self-determination,” “civil referendum,” and “determine our future.”⁹ Hongkong Post ultimately approved a new set of pamphlets with the phrases replaced.¹⁰
10. **Food and Environmental Hygiene Department (“FEHD”) cancelling political parties’ Lunar New Year stall contracts.** Prior to 2017, political parties (both pro-democracy and pro-regime) have operated stalls at Lunar New Year markets organised by the FEHD and the Leisure and Cultural Services Department (“LCSD”).¹¹ However, in January 2017 – days before that year’s market was due to start – the FEHD terminated its stall license agreements with two political parties.¹² The FEHD asserted that the merchandise that the parties intended to sell would relate to the advocacy of Hong Kong independence, and that the large number of anticipated visitors – some of whom disagreed with such views – might endanger public order and public safety.

(ii) *Commercial Legal Disputes*

11. Two particular pre-NSL cases merit particular mention: *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 and *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 2)* (2011) 14 HKCFAR

<<https://hongkongfp.com/2020/06/01/censorship-concerns-as-hong-kong-companies-registry-grills-startup-over-political-stance/>> accessed 27 March 2022.

⁹Tony Cheung, ‘Undue Caution? Joshua Wong Blasts Hong Kong Officials over Hold-Ups in Demosisto Party Registration and Mailings’ *South China Morning Post* (4 August 2016)

<<https://www.scmp.com/news/hong-kong/politics/article/1999067/undue-caution-joshua-wong-blasts-hong-kong-officials-over>> accessed 27 March 2022.

¹⁰*ibid.*

¹¹See Danny Mok, ‘Youngspiration and HKNP Barred from Operating Stalls at Hong Kong’s Largest Lunar New Year Fair’ [2017] *South China Morning Post*

<<https://www.scmp.com/news/hong-kong/politics/article/2063479/youngspiration-and-hknp-barred-operating-stalls-hong-kongs>> accessed 16 October 2019.

¹²*ibid.*

395 (together, “the *FG Hemisphere* litigation”); and *The Hua Tian Long (No 2)* [2010] 3 HKLRD 611.

12. In the *FG Hemisphere* litigation, a vulture fund attempted to enforce debt owed by the Democratic Republic of the Congo (DR Congo) that it had purchased. In doing so, it lay claim to money located in Hong Kong that was due to be paid to the DR Congo – money that happened to be part of a major Chinese state-owned enterprise’s Congolese investment project. As a result, the Chinese Foreign Ministry attempted to intervene at every stage of the litigation. The case ultimately went to the National People’s Congress Standing Committee, at the request of the territory’s Court of Final Appeal. In its first and so far only “interpretation” of the Basic Law done at the Court of Final Appeal’s behest, the NPCSC “interpreted” the Basic Law to bestow blanket immunity on foreign states, such as the DR Congo, before Hong Kong courts. Not surprisingly, this outcome happened to shield the Congolese investment project from the vulture fund.
13. In the *Hua Tian Long* case, the Guangzhou Salvage Bureau, an arm of the PRC. Ministry of Communications, contracted with a client to use a crane barge the bureau owned, the *Hua Tian Long*. When the bureau failed to fulfill its contract, the client filed a lawsuit in a Hong Kong court. The bureau’s argued it enjoyed immunity from the suit in Hong Kong because it was a part of the PRC government. The Court of First Instance held that the bureau was in principle entitled to immunity, although it had waived immunity in that particular case.
14. In a client note from August 2011 discussing both cases, Messrs Linklaters concluded that “*there is a legitimate concern that, where a counterparty is a foreign State or the PRC government, the Hong Kong courts may not be the best forum for any potential dispute.*” (Emphasis added)

C. The NSL and the Commercial Sphere

(i) *The Meaning of “National Security”*

15. Neither the NSL itself, nor its implementing regulations, define “national security.” Accordingly, the only real guidance as to what “national security” means under the NSL comes from PRC law.

16. Article 2 of the PRC’s own National Security Law (“**PRC NSL**”) defines “national security” in the following terms, which are extremely wide:

“‘National security’ means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status.”¹³

17. Article 3 of the PRC NSL frames “national security work” in similarly expansive terms:

“All national security work shall adhere to the overall national security view, regard people’s security as the tenet, regard political security as the fundamental, regard economic security as the basis, regard military, cultural, and social security as the safeguard, and by promoting international security, maintain national security in all fields, build a national security system, and walk a path of national security with Chinese characteristics.”¹⁴

18. This expansive definition of national security has been explicitly echoed by top government officials in Hong Kong. For example, in April 2021, the Chief Secretary for Administration (the second highest-ranking official in Hong Kong) wrote that the concept of national security encompassed “*economic security, cultural security, social*

¹³“National Security Law of the People’s Republic of China (2015) [Effective] - Ministry of National Defense’ <https://web.archive.org/web/20170626223219/http://eng.mod.gov.cn/publications/2017-03/03/content_4774229.htm> accessed 27 March 2022 (official translation of Articles 1-24 only).

¹⁴ibid.

security, technology security, cybersecurity, ecological security, resource security, nuclear security, overseas interests security and some emerging aspects like biosecurity, outer space security, deep sea security and polar security."¹⁵

(ii) *Effects to date*

19. The following post-NSL developments illustrate the extent to which the NSL has already affected Hong Kong's commercial and financial environment:

- (a) In 2020 the German Chamber of Commerce in Hong Kong sought to hold a seminar on the NSL, but was unable to find any law firms willing to participate;¹⁶
- (b) Many Hong Kong-based law firms have directed their lawyers not to speak about the NSL;¹⁷
- (c) In May 2021, a survey conducted by the American Chamber of Commerce in Hong Kong found that 42 per cent of respondents were considering or planning to leave Hong Kong, and among that group, 62.3 per cent cited the NSL as a reason;¹⁸
- (d) In June 2021, the offices of Apple Daily (one of Hong Kong's largest newspapers) was raided by the Hong Kong police. Several of the newspapers' senior executives were arrested and charged under the NSL (and remain in custody to date, having been denied bail). Alarming, the Hong Kong authorities

¹⁵ Matthew Cheung Kin-chung, Chief Secretary for Administration, 'My Blog: 'No greater blessing than good governance, No greater harm than chaos: National security is our shared responsibility and everyone has a role to play' (11 April 2021), <<https://www.cso.gov.hk/eng/blog/blog20210411.htm>> accessed 27 March 2022

¹⁶ 'Business Navigates Hong Kong's New National Security Law' (*International Bar Association*, 25 September 2020) <<https://www.ibanet.org/article/ACD909C3-15D4-4817-8D2A-0EE0D39D3028>> accessed 27 March 2022.

¹⁷ *ibid.*

¹⁸ Anthony Wallace, 'Amcham finds 42% of members surveyed are planning or considering leaving Hong Kong' (CNBC, 12 May 2021)

<<https://www.cnbc.com/2021/05/12/hong-kong-security-law-amcham-finds-42percent-of-members-surveyed-plan-to-leave.html>> accessed 27 March 2022.

used their powers under the NSL¹⁹ to unilaterally freeze the assets of Apple Daily (amounting to US\$2.3 million). The asset freeze eventually forced the newspaper to shut down completely (even before the company and its executives had been convicted of any criminal offence).²⁰

As noted by Horace Yeung, associate professor at University of Leicester's law school, the Hong Kong authorities' broad asset-freezing powers under the NSL creates significant risks for businesses, because "Assets can [under the NSL] be frozen under some causes vaguely defined by the law." Global risk firm Verisk Maplecroft also observed that Apple Daily's forced closure and frozen assets "have rattled investors."²¹

- (e) In a July 2021 survey conducted by the Consulate-General of Japan in Hong Kong, the Japan External Trade Organisation's Hong Kong office, and the Hong Kong Japanese Chamber of Commerce and Industry, about 56.5 per cent of Hong Kong-based Japanese companies expressed concern about the NSL, up from 50.8 per cent in April;²²
- (f) In July 2021, the US Government issued a "business advisory" note, warning US companies that they faced serious and growing risks from operating in Hong

¹⁹ specifically, Article 43 of the NSL, and Schedule 2 of the Implementation Rules for Article 43 of the NSL.

²⁰ Helen Davidson, 'Painful farewell': Hongkongers queue for hours to buy final Apple Daily edition' (*Guardian*, 24 June 2021)

<<https://www.theguardian.com/world/2021/jun/24/hong-kong-apple-daily-queue-final-edition-newspaper>>

accessed 27 March 2022; AFP, 'Hong Kong's pro-democracy Apple Daily unable to pay staff after asset freeze – aide' (*Hong Kong Free Press*, 21 June 2021)

<<https://hongkongfp.com/2021/06/21/hong-kongs-pro-democracy-apple-daily-unable-to-pay-staff-after-asset-freeze-aide/>> accessed 27 March 2022.

²¹ 'National Security Law Seen Threatening Hong Kong's Financial Role' (*VOA*, 22 August 2021),

<https://www.voanews.com/a/east-asia-pacific_voa-news-china_national-security-law-seen-threatening-hong-kong-s-financial-role/6209847.html> accessed 27 March 2022.

²² Jeff Pao, 'Japanese Firms Spooked by Hong Kong Security Law' (*Asia Times*, 29 July 2021)

<<https://asiatimes.com/2021/07/japanese-firms-spooked-by-hong-kong-security-law/>> accessed 27 March 2022.

Kong, due to, inter alia, the NSL, which had the effect of “significantly reducing Hong Kong’s autonomy and undermining protected rights and freedoms.”²³

- (g) In a September 2021 interview, David Lesperance, a lawyer specialising in providing immigration advice to high-net-worth individuals, revealed that his clients “are now starting to assume there is no difference between Hong Kong and [Mainland] China”;²⁴
- (h) In December 2021 (in an incident closely reminiscent of Apple Daily’s shutdown six months earlier) the independent media outlet Stand News closed down after the Hong Kong authorities raided its premises, arrested its senior editors, and froze its assets (amounting to GBP 6 million) using the NSL. Within a matter of days, the media outlet was forced to shut completely due to lack of available funds, even without the company and its executives having been convicted of any criminal offence.²⁵
- (i) A European Chamber of Commerce in Hong Kong survey conducted between mid-January and early February 2022 revealed that around 25 per cent of responding companies planned to fully withdraw from Hong Kong within the next year, with a further 24 per cent planning partial move-outs.²⁶

²³ US Department of State, Department of Treasury, Department of Commerce, and Department of Homeland Security, ‘Hong Kong Business Advisory’, 16 July 2021, pp.

<https://home.treasury.gov/system/files/126/20210716_hong_kong_advisory.pdf> accessed 27 March 2022.

²⁴ Martin Farrer, ‘Hong Kong: International Companies Reconsider Future in Wake of Security Law’ *The Guardian* (7 September 2021)

<<https://www.theguardian.com/world/2021/sep/07/hong-kong-international-companies-reconsider-future-in-wake-of-security-law>> accessed 27 March 2022.

²⁵ Rhoda Kwan & Emma Graham-Harrison, ‘Hong Kong media outlet Stand News to close after police raid’ (*Guardian*, 29 December 2021),

<<https://www.theguardian.com/world/2021/dec/29/hong-kong-police-arrest-six-journalists-from-independent-media-outlet-stand-news>> accessed 27 March 2022; Zinnia Lee, ‘Hong Kong Pro-Democracy News Site Shuts Down After National Security Police Arrest Executives And Freeze Assets’ (*Forbes*, 29 December 2021)

<<https://www.forbes.com/sites/zinnialee/2021/12/29/hong-kong-pro-democracy-news-site-shuts-down-after-national-security-police-arrest-executives-and-freeze-assets/?sh=5dcb408410b2>> accessed 27 March 2022.

²⁶ Bloomberg News, ‘Nearly 50% of Foreign Firms in Hong Kong Plan to Relocate Staff - BNN Bloomberg’ (*BNN*, 24 March 2022)

(iii) *Likely additional effects*

20. In considering the likely further impact of Hong Kong’s post-NSL legal climate on commercial and financial activity, three particular points merit emphasis:

- (a) As noted in paragraphs 15-17 above, “national security” is not defined within the NSL. However, to the extent that the PRC NSL provides guidance as to the meaning of that term, “national security” encompasses a wide range of activity, including commercial and financial activity;
- (b) The NSL is extraterritorial in scope. It encompasses acts done outside of Hong Kong, regardless of whether they are conducted by Hong Kong residents or companies incorporated in Hong Kong: Articles 37 and 38 NSL; and
- (c) The Hong Kong authorities have applied the NSL retroactively. For instance, the allegations against the now-defunct *Apple Daily* newspaper encompass news articles dating back to 2019, *i.e.* well before the imposition of the NSL.²⁷

21. **Trade secrets can easily be treated as ‘state secrets’.** There are numerous provisions in the NSL that are targeted against the disclosure of ‘state secrets’: see Article 29 (making it an offence to unlawfully supply state secrets to a foreign country); Article 41 (which allows for closed-door trials where the case involves state secrets); Article 46 (which allows for juryless trials where the case involves state secrets); and Article 63 (which obligates legal advisors to keep state secrets confidential). However, the problem is that, under the PRC legal system, the concept of ‘state secret’ is vague and widely

<<https://www.bnnbloomberg.ca/nearly-50-of-foreign-firms-in-hong-kong-plan-to-relocate-staff-1.1742428>> accessed 27 March 2022.

²⁷Kelly Ho, ‘Hong Kong Police Raid Apple Daily Office, Editor-in-Chief among 5 Arrested under National Security Law over Articles’ (*Hong Kong Free Press HKFP*, 17 June 2021)

<<https://hongkongfp.com/2021/06/17/breaking-hong-kong-police-raid-apple-daily-office-editor-in-chief-among-5-arrested-under-national-security-law/>> accessed 27 March 2022.

drawn; it is capable of catching any information which is potentially linked to the PRC's national interests (including information which international businesses would normally classify as mere trade secrets).²⁸ This is illustrated by the case of Dr Xue Feng, a geologist and US citizen who in 2010 was sentenced by PRC authorities to 8 years in prison for allegedly leaking state secrets, which were simply the coordinates of certain oil wells belonging to PRC state-owned companies. As noted by Professor Jerome Cohen (a renowned specialist in PRC law) "by international standards, the trial was a farce", with defence counsel not able to question the PRC government's classification of state secrets.²⁹ Under the current political reality, in which the PRC government has profound influence over the way in which the Hong Kong authorities enforce the NSL, it is likely that the similarly vague and broad notions of state secrets will be deployed against defendants (including corporate defendants) in Hong Kong, particularly in cases that the government regards as touching on the PRC's national interests.

22. **Chief Executive's power to decide whether act involves national security or evidence involves state secrets.** The risk of defendants (including corporate defendants) being caught by a nebulous and sweeping concept of 'state secret' is exacerbated by Article 47 of the NSL. As already discussed in the main body of this report, Article 47 allows the Chief Executive to issue a certificate, binding on the Hong Kong courts, regarding whether an act involves national security. Importantly, Article 47 also allows the Chief Executive to issue a binding certificate on whether a piece of evidence involves state secrets. Consequently, any party that is litigating against the Hong Kong government or against PRC state-owned entities (whether in criminal or civil

²⁸ Fu Hualing, 'The Secrets about State Secrets: The Burden of Over-classification', (2019) 14 J. Comp. L. 249; Raymond Tran, 'Comply at Your Own Risk: Reconciling the Tension between Western Due Diligence Practices and Chinese State Secrets Law', (2017) 25(1) California International Law Journal 45 (at 48), available at <https://ssrn.com/abstract=3310006>

²⁹ Richard Bernstein, 'Beijing's Bluster, America's Quiet: The Disturbing Case of Xue Feng' (*ChinaFile*, 10 October 2010), available at <https://www.chinafile.com/library/nyrb-china-archive/beijings-bluster-americas-quiet-disturbing-case-xue-feng>; John Lee, 'The Uncurious Case Of Xue Feng's Jail Sentence' (*Forbes*, 7 July 2010), available at <https://www.forbes.com/2010/07/07/xue-feng-stern-hu-state-secrets-opinions-contributors-john-lee.html>; AFP, 'US geologist Xue Feng "released from prison in China"' (*Guardian*, 4 April 2015) available at <https://www.theguardian.com/world/2015/apr/04/us-geologist-xue-feng-released-from-prison-in-china>

proceedings) potentially faces a tremendous procedural disadvantage if the Chief Executive were to issue a certificate under Article 47. For instance, the party might be unable to obtain disclosure of the other side's documents (on the ground that they have been certified as state secrets), or there may even be evidence which the Court is allowed to examine but the party is not able to see (because they have been classified as state secrets).

23. **PRC Data Security Law.** National security interests under the PRC legal framework encompass a wide range of security concepts. Legislations in the PRC included the national-security related provisions of which the business sector could be easily caught by it. An example is the recently enacted “Personal Information Protection Law of the People’s Republic of China” which requires “no organization or individual may ... engage in personal information handling activities harming national security or the public interest.”³⁰ and “Where foreign organizations or individuals engage in personal information handling acts ... harming the national security or public interest of the People’s Republic of China, the State cybersecurity and informatization department may put them on a list limiting or prohibiting personal information provision, issue a warning, and adopt measures such as limiting or prohibiting the provision of personal information to them, etc.”³¹ Foreign organizations or individuals may find it difficult to comply with the requests by overseas law enforcements to transfer the personal information from China to overseas without the permission of the PRC. Worse, companies or their employees may face legal ramifications under PRC legal framework or retaliations by the PRC for complying with the legal requirements of foreign law enforcement.

24. **Executives face potential exit bans or detention.** In August 2021, Hong Kong’s Immigration Ordinance was amended (without any scrutiny or public consultation) to empower the Hong Kong authorities to stop any person from leaving the city, without

³⁰ Article 10 of the Personal Information Protection Law of the People’s Republic of China.

³¹ Article 42 of the Personal Information Protection Law of the People’s Republic of China

the need to obtain a court order and without being required to give any specific reason.³² The Hong Kong Bar Association noted its deep concern about conferring “*an apparently unfettered power*” on the Hong Kong government “*to prevent Hong Kong residents and others from leaving Hong Kong.*”³³ The chairman of Hong Kong’s International Chamber of Commerce also expressed concern that the amendment would “*affect business people coming and going from Hong Kong.*”³⁴ In the PRC, there have been numerous instances of international business executives being barred from leaving the country, due to purported economic disputes.³⁵ For instance, Richard O’Halloran, an Irish leasing executive, was barred from leaving the PRC for nearly 3 years over an alleged business dispute; he was only released in January 2022 after a deal was reached between the Irish and PRC governments.³⁶ Given the far-reaching powers now granted by Hong Kong’s Immigration Ordinance, there is a real risk that the Hong Kong authorities will start to impose PRC-style exit bans on not only domestic opposition activists, but also foreign business executives.

³² Thomas Chan, ‘Are Hong Kong’s doors closing?’ (*The Strategist*, 7 December 2021), available at <https://www.aspistrategist.org.au/are-hong-kongs-doors-closing/>

³³ Hong Kong Bar Association, ‘Further Submission on the Immigration (Amendment) Bill 2020 In respect of Clause 3 of the Bill’ (11 February 2021), available at <https://www.hkba.org/sites/default/files/Immigration%20%28Amendment%29%20Bill%202020%20-%20Clause%203%20-%20Further%20Submission%2011.2.2021.pdf>

³⁴ Primrose Riordan & Nicolle Liu, ‘Hong Kong immigration law change raises ‘exit ban’ fears’ (*Financial Times*, 28 April 2021), available at <https://www.ft.com/content/aece9707-38ea-49da-bbaa-c2e94789c36a>

³⁵ Harris Bricken, ‘China Hostage Situations: What You Need to Know’ (*China Law Blog*, 28 November 2020), available at <https://harrisbricken.com/chinalawblog/china-hostage-situations-what-you-need-to-know/>; Erika Kinetz, ‘No Remedy, No Rights: China Blocks Foreigners from Leaving’ (*The Diplomat*, 5 May 2020), available at <https://thediplomat.com/2020/05/no-remedy-no-rights-china-blocks-foreigners-from-leaving/>

³⁶ ‘Richard O’Halloran: Irish businessman held against his will in China for three years reunited with ‘unbelievably happy’ family’ (*Sky News*, 29 January 2022), available at <https://news.sky.com/story/richard-ohalloran-finally-home-irish-businessman-held-against-his-will-in-china-for-three-years-is-back-with-unbelievably-happy-family-12527949>