

The National Security Law of Hong Kong

Restoration and Transformation

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Contents

1. Introduction: Re-balancing Freedom and Security in Post-NSL Hong Kong <i>Hualing Fu and Michael Hor</i>	1
2. The National Security Law of the HKSAR: A Contextual and Legal Study <i>Albert H. Y. Chen</i>	20
3. The Hong Kong National Security Law: The Shifted Grundnorm of Hong Kong's Legal Order and Its Implications <i>Han Zhu</i>	49
4. Theories of Sovereignty in the Origins and Implementation of Hong Kong's National Security Law <i>Ryan Mitchell</i>	72
5. Hong Kong's Constitutional Order after the National Security Law <i>Jie Cheng</i>	94
6. National Security and Judicial Independence: A Clash of Fundamental Values <i>Johannes Chan</i>	119
7. Judging Hong Kong's National Security Law <i>Po Jen Yap</i>	149
8. Police Powers under the National Security Law: A Commentary <i>Simon N. M. Young</i>	167
9. The Return of High Policing in Hong Kong <i>Hualing Fu and Xiaobo Zhai</i>	187
10. State Secrets in the Hong Kong National Security Law <i>Zheng Tang and Xu Huang</i>	211
11. Extraterritorial Application of the Hong Kong National Security Law: A Legal Appraisal <i>Bing Ling</i>	231

12. Academic Freedom in the Shadow of Hong Kong's National Security Law	255
<i>Kelley Loper and Carole J. Petersen</i>	
13. The Business of National Security in Hong Kong: Do Human Rights Matter?	279
<i>Surya Deva</i>	
14. Echoes Enhanced to a Cacophony: Hong Kong's Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies	306
<i>Kent Roach</i>	
15. Media Freedom and Censorship under Post-Orwellian Authoritarianism	335
<i>Cherian George</i>	
16. The New National Security Law: Exploring a Meaningful Comparison with Singapore	358
<i>Michael Hor</i>	
List of Abbreviations	377
List of Contributors	379
Index	381

Introduction

Re-balancing Freedom and Security in Post-NSL Hong Kong

Hualing Fu and Michael Hor

Introduction

This book offers a dialogic study of the Law of the People's Republic of China on Safeguarding National Security Law (NSL) in the Hong Kong Special Administrative Region (HKSAR). It examines the text and the context of the NSL, what caused it and what it has caused, and highlights the changes—real, potential, or merely imagined—that the NSL has brought and is likely to bring to Hong Kong. Constitutional development is not brought about by isolated events but by a series of connected episodes that have taken place over a long duration with each act done in response to an earlier one and, in turn, generating future dialectical reactions in multiple fields, some contemplated and others unforeseen, or, perhaps, still unforeseeable. It is a complicated process and emotions may run high, but there is always a logic to be discovered and explained to make sense of what, at first sight, appear to be chaotic, random occurrences. This book studies the political and constitutional roots of the NSL as well as its practical operation in Hong Kong. The book also attempts to view the NSL in the larger Chinese, and comparative law, perspectives.

This introductory chapter first situates the enactment of the NSL in the context of Hong Kong's own constitutional context and, in particular, the failed attempt to enact Hong Kong national security law in 2003 as required by the Basic Law (BL), and the tortuous path of democratic pursuit that Hong Kong had trodden. The chapter then explores the constitutional and political roots of the NSL in the Chinese constitutional order. Part three addresses several key issues on the impact of the NSL on the legal system, academic freedom, business, and media among others. Finally, part four assesses the future prospects of Hong Kong's one country two systems doctrine (OCTS) and Hong Kong's freedoms under rule of law in the post-NSL era, assessed from a comparative perspective by referencing the development in national security law in mainland China, Singapore, and liberal democracies.

Balancing Article 23 and Article 45 of the Basic Law

The constitutional contention in Hong Kong over the past three decades has been centred on the tension between the imperative to protect national security and interest as demanded by the Central Authorities¹ and the imperative to safeguard autonomy in order to preserve and enhance democratic governance in Hong Kong. At the heart of the contention are two articles in the Basic Law and their implementation (or, more precisely, the lack of it): Article 23 which requires Hong Kong to enact laws “on its own” to protect China’s national security and to prevent Hong Kong from turning into a separatist and subversive base against the motherland, and Article 45 which, on the other hand, aspires to achieve ultimate democratisation in Hong Kong through a cautious and incremental process befitting Hong Kong’s unique circumstances. “One country two systems” is conditioned on and sustained by this unique bargain and trade-off between security and freedom. There are structural constraints, but human agency also matters in overcoming those constraints. Handled well, there are opportunities to achieve a win-win equilibrium between freedom and security. Misjudged and mismanaged, all parties lose.

While BL adjudication may have offered effective legal remedies for the basic rights and freedom of its residents, it is unable to resolve the fundamental contradiction between Article 23 and Article 45. These articles are framed in open-ended terms and crafted in aspirational language to allow maximum discretion in interpretation and provide opportunities for avoidance and manipulation. There is no authoritative and neutral organ in the BL structure to settle disputes within the OCTS framework. The BL is a well-designed constitutional document to facilitate reunification. It also embodies systematic tensions that were not sorted out politically but written into the document, thus temporarily putting aside and suppressing these unresolved issues. Not unexpectedly, they surfaced gradually but significantly soon after the implementation of OCTS.

As it turned out, neither constitutional imperative has been fulfilled since the enactment of the BL. Both sides, championing one or the other imperative, have been drifting further apart, leading to a near collapse in 2019 of the bargain that sustained the constitutional design. The “on its own” clause has empowered Hong Kong to decide when to legislate to protect China’s security, if at all; and “incremental” democratisation suitable for Hong Kong’s actual circumstances has been interpreted in ways that have been perceived to narrow and stall a genuine democratic process. The distrust between the two systems has run too deep to make an acceptable or, at least, tolerable trade-off between freedom and security. As the contention escalated, neither side found the other trustworthy and, as suspicion turned to hostility, each side decided to take the extreme position of denying each other’s

1. Central Authorities is a shorthand to decision-makers in the State Council, the National People’s Congress (NPC) or its Standing Committee (NPCSC), and above all the Communist Party.

legitimate requests, leading to a vicious cycle of two self-fulfilling prophecies: in 2019, Hong Kong, in the eyes of the Central Authorities and many others, turned out to be a subversive base against China after all, as Li Ho famously warned in the aftermath of 1989;² and the political logic of the Party State made OCTS inherently unstable, if not impossible, as cynical commentators may have prophesied to be the case.³ At a fundamental level, the BL has created two incompatible systems which have been forced to co-exist, aggravated by mismanagement at critical moments, making a trade-off envisaged by the BL impossible within the BL framework.

This contradiction within the OCTS made meaningful dialogue difficult. Constitutional dialogue takes place between institutions in stable democracies and rarely crosses the authoritarianism and democracy divide, although in countries experiencing democratic backsliding, the contention between a populist executive and a defiant court has introduced a new dimension to theories of constitutional dialogue.⁴ A constitutional dialogue is more likely to take place if there is a clear understanding of each other's original beliefs. If beliefs inform and guide political action then a false or biased belief would misinform and misguide political action, rendering a dialogue meaningless and indeed impossible. There must be common ground and a shared foundation for dialogue to be sustained and productive.⁵ This is the crucial element missing in the OCTS context. The foundation for dialogue was new and fragile; channels for dialogue were often informal, with a low level of institutionalisation; the level of trust between the parties was low. The informality of the process caused the parties in the dialogue to be uncertain, with proxies invariably participating on behalf of their invisible principals.⁶ OCTS is a grand political bargain that was struck between two fundamentally different political systems guided by opposing ideologies. Hong Kong is an excellent case for comparative study of an attempt at authoritarian and liberal dialogue.

Having created the Special Administrative Region (SAR) according to the OCTS design, China demanded a national security legislation. In 2003, the Hong Kong government proceeded to draft such a law to comply with Article 23, but the initiative was met with a passionate and well-organised resistance. Led by the Bar,

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2. See Hualing Fu and Richard Cullen, "National Security Law in Hong Kong: Quo Vadis: A study of Article 23 of the Basic Law of Hong Kong" (2002) 19 *UCLA Pacific Basin Law Journal* 185–230.
 3. See Benny Tai, "Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong" (2019) 29(1) *Social & Legal Studies* 107–145.
 4. See Kim Lane Scheppele, "Autocratic Legalism" (2018) 85(2) *The University of Chicago Law Review* 85–545; see also Martin Belov (ed), *Populist Constitutionalism and Illegal Democracies* (Cambridge: Intersentia, 2021).
 5. Geoffrey Sigalet, Gregoire Webber, and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019); for an Asian perspective, see Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press, 2015).
 6. See Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge: Cambridge University Press, 2019); see also Cora Chan, "Thirty Years from Tiananmen: China, Hong Kong, and The Ongoing Experiment to Preserve Liberal Values in An Authoritarian State" (2019) 17(2) *International Journal of Constitutional Law* 439–452.

the entire society was mobilised to push back what was perceived to be a major political encroachment of the mainland system into Hong Kong. While the proposed law may be considered to have complied with international human rights requirements, and to have been tightly drafted and rights-friendly, it was nevertheless not regarded as politically acceptable by those who opposed it. Half a million people took to the streets to express their discontent towards the proposed law, sending a strong signal which was perceived by the Central Authorities that the people of Hong Kong did not consider China's national security a significant matter. Faced with the massive and well-orchestrated protest and the collapse of a pro-government coalition, the government was forced to withdraw the National Security (Legislative Provisions) Bill (Bill). There are multiple explanations, with different degrees of persuasiveness, as to why fresh legislation was not thought to be urgent or necessary.⁷ Nonetheless, in the eyes of the Central Authorities, the reluctance or unwillingness of Hong Kong to enact such a law was regarded as a colossal failure to fulfil Hong Kong's constitutional duty and received with hostility.

The defeat of the Bill triggered the formation of a pan-democratic force in Hong Kong and created momentum for a fresh democratic reform impetus that the BL had promised. The success of the anti-Article 23 law effort popularised opposition political leaders, energised political society, and emboldened the people in Hong Kong, and their political leaders alike, to press forward for political reform. Having denied China a national security law, Hong Kong started to organise and strategise for democratisation.

Hong Kong celebrated the victory of the opposition and, riding on the tide of its success, shifted the battlefield from anti-security legislation to democracy promotion. The Central Authorities were delivered a wake-up call and started to reflect on its Hong Kong policy failure. It immediately took pre-emptive measures to fend off potential democratic reform initiated from Hong Kong. Four months after Hong Kong denied China a national security law, the Standing Committee of the National People's Congress (NPC) made a landmark interpretation of the Basic Law on the election of the Chief Executive and members of the Legislative Council. In that aggressive and carefully drafted interpretation, the Central Authorities took away the agenda-setting power of initiating constitutional reform from Hong Kong.⁸ The 2004 Interpretation formed the basis for other subsequent decisions that further shaped the direction of Hong Kong's democratic direction, marking the beginning

7. For the intellectual background of the debate and articulation of different perspectives, see Fu and Cullen n 2 above; Hualing Fu, Carole J. Petersen, and Simon Young, *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong: Hong Kong University Press, 2005); Cora Chan and Fiona de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Oxford: Hart Publishing, 2020).

8. See Ip, n 6 above.

of a constitutional escalation leading to the Occupy Central Movement,⁹ subsequent waves of disqualification of opposition lawmakers, and ultimately the 2020 NSL.

The reckless promotion of the Extradition Bill in 2019 became a rallying point for anti-government forces. The successful mobilisation of local and international forces to support the protest created a perfect storm that pushed the OCTS constitutional design to a breaking point. Shockingly, localism, which had started as a movement to advocate Hong Kong identity, radicalised into a secessionist movement, often through violence and mass destruction of property, fundamentally uncharacteristic of Hong Kong yet with not insubstantial, wide local buy-in and international support.¹⁰ The democratic pursuit, in the eyes of the Central Authorities, was intrinsically subversive and secessionist, a Trojan horse for a colour revolution, as Li Hou had warned, and with which the Central Authorities have always been concerned.¹¹

Hong Kong's alternative system has always presented a governance challenge to China. Governing a free society with rule of law and an independent judiciary, with the potential to fully democratise, is an alien, and indeed intimidating, concept to the Central Authorities. Engaging Hong Kong on Hong Kong's terms proved to be a frustrating process in which China faced a steep learning curve. Hong Kong is the only entity that fell outside the socialist system and was not under direct Party rule. When the Central Authorities conversed with Hong Kong, the Party had to check its authoritarian tendencies, put aside familiar governance tools, and step out of its comfort zone. The 2019 crisis was an open invitation to the Central Authorities to intervene directly, and the NSL is the game changer that allowed the Central Authorities to govern Hong Kong on its own terms. In that sense, the NSL is the second BL that facilitates the second reunification.¹²

The Sovereign Root of the NSL

Several chapters in the book present a focused analysis on the political-constitutional foundation of the NSL, repositioning Hong Kong's constitutional status in the NSL era from the perspective of the sovereign power of the Chinese state. The

9. See Brian Christopher Jones (ed), *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements* (New York: Routledge, 2017); Francis L. F. Lee and Joseph M. Chan, *Media and Protest Logic in the Digital Era: The Umbrella Movement in Hong Kong* (Oxford: Oxford University Press, 2018); Ching Kwan Lee and Ming Sing (eds), *Take Back Our Future: An Eventful Sociology of the Hong Kong Umbrella Movement* (Ithaca, NY: ILR Press, an imprint of Cornell University Press, 2019); Ngok Ma and Edmund W. Cheng (eds), *The Umbrella Movement: Civil Resistance and Contentious Space in Hong Kong* (Amsterdam: Amsterdam University Press, 2020).

10. See Albert H. Y. Chen, "Constitutional Controversies in the Aftermath of the Anti-Extradition Movement of 2019" (2020) 50(2) *Hong Kong Law Journal* 609–632.

11. Fu and Cullen, n 2 above.

12. See Anthony Bingliang Cheung, *Erci Guodu—Xianggang 2020 Zhengju Fansi: Weiji Yu Qiantu* [Second transition—reflections on Hong Kong's political situation in 2020: Crisis and the way forward] (Hong Kong: Chung Hwa Book Company, 2021).

immediate legal question concerns the NSL's compatibility with the BL: if Article 23 pre-empts the Central Authorities' intervention because Hong Kong is to act "on its own", how can the NSL be justified, it being an instance where the Central Authorities have legislated in a domain reserved for the SAR? The new understanding, as discussed in several of the chapters in this volume and elsewhere, might be rationalised as an exercise of concurrent jurisdiction or the doctrine of delegation. Concurrent jurisdiction means that matters of national security, notwithstanding Article 23, cannot be the exclusive jurisdiction of an SAR, and the sovereign necessarily has an inherent power of self-defence.¹³

The delegation theory stands on a narrower legal ground according to which the SAR was delegated the power to legislate on national security, but when the SAR fails to fulfil the duty in pre-empting and removing a national security risk exposing China to an imminent security crisis, the Central Authorities can withdraw the delegated power and act on its own. Zhu's chapter elaborates this principle and how its operation has been deliberated in the mainland scholarship. The combined effect of the two principles seems to have supported the legislative initiative.¹⁴ While the NPC and the National People's Congress Standing Committee (NPCSC) can pass stop-gap legislation, Hong Kong continues to be obliged to enact what remains of the requirements of Article 23 of the BL.

The theories of concurrent jurisdiction and delegated authority are both anchored in the Chinese Constitution, the application of which in Hong Kong has always been a contentious issue since the establishment of the SAR. The conventional view is that the BL is self-contained and that the Constitution does not apply directly in Hong Kong.¹⁵ Rather it is embodied in the BL *via* its Article 31. Although it was a view that dominated the field in the first decade of BL research and held dear by many, it needs to be revised. Since 2014 when the State Council released a White Paper on Hong Kong, the constitutional foundation, or the *grundnorm*, has been shifting decisively from the BL in and of itself to a joint enterprise of the Constitution and the BL. As it is stated in the White Paper, which has effectively become the new orthodoxy, the Constitution and the Basic Law jointly constitute the constitutional foundation for the governance of Hong Kong SAR.¹⁶ This is of

13. See Po Jen Yap, "Judging Hong Kong's National Security Law", Chapter 7 of this volume. See also Chen, n 10 above.

14. See Han Zhu, "The Hong Kong National Security Law: The Shifted *Grundnorm* of Hong Kong's Legal Order and Its Implications", Chapter 3 of this volume.

15. Yash Ghai, "Litigating the Basic Law", in Johannes Chan, Hualing Fu, and Yash Ghai (eds), *Constitutional Debate on the Right of Abode: Conflict on the Approach to Interpretation* (Hong Kong: Hong Kong University Press, 2000), p 46.

16. See Wenye Zha and Bo Zhao, "Xianfa He Xianggang Jiben Fa Gongtong Goucheng Xianggang Tebie Xingzhengqu de Xianzhi Jichu" [The Constitution and The Hong Kong Basic Law together form the constitutional basis of the Hong Kong Special Administrative Region], *Xinhua News Agency*, 10 June 2014, available at http://www.gov.cn/xinwen/2014-06/10/content_2697910.htm.

course not a rhetorical statement. It has real consequences and the NSL is an exhibit of that profound impact.

The NPC triggered the legislative process for the NSL through a Decision to authorise its Standing Committee to enact the NSL. In doing so, the NPC Decision relied directly on Art 62(2, 12, and 14) of the Constitution. Art 62 of the Constitution sets out the functions and powers of the NPC, and Art 62(2) gives the NPC the plenary power to supervise the implementation of the Constitution. The NPC Decision on the NSL is revolutionary and presents the most significant development in the history of OCTS jurisprudence. Constitutionally speaking, the NPC now has the power to enact a wide range of laws of national interest for Hong Kong as circumstances demand, leaving the door wide open for future legislative intervention from the Central Authorities.¹⁷ Once we accept the premise that sovereign power is the originating power in legislative competence over national security in the OCTS context, the BL is no longer controlling. The post-NSL world is Chinese Constitution-centric. As Chan¹⁸ points out, the question would no longer be whether the Central Authorities can make a national security law, but what kind of national security law they can make. We move to the next level of the substance of the legislation and the process of its implementation.

Fundamentally, we need to reconceptualise Hong Kong's legal status in China's constitutional order. Mitchell's chapter offers a clear map for that thought process. For him, the NSL extends far beyond policing and criminal law power per se and touches on security matters. It is about sovereign power in a moment of existential risk facing the state. It is indeed misconceived to examine the origin and implementation of the NSL principally from an Anglo-American public law stance that prioritises individual freedom and rights because the fulcrum has shifted to the sovereignty of the state and the fundamental structure of the polity beyond the constitutional text. The starting point of our analysis then shifts from the BL text to the political context of the Constitution. China relies on the theories of state and law derived from late nineteenth- to early twentieth-century conservative German ideas in building a twenty-first-century socialist rule of law state.

This is a view that Cheng confirms through her distinction between a normative view that is based on liberal values, as the Hong Kong court has traditionally

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17. See Hualing Fu, "National Security", in Johannes Chan and C. L. Lim (eds), *Law of The Hong Kong Constitution* (Pymont, New South Wales: Thomson Reuters Corporation Pte, 2021); commentaries on the NSL, see Carole J. Petersen, "The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong" (2020) 50(2) *Hong Kong Law Journal* 633; see also Cora Chan, "Can Hong Kong Remain a Liberal Enclave within China? Analysis of the Hong Kong National Security Law" (2021) *Public Law* 271–292; Simon N. M. Young, "Introductory Note to the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region" (2021) 60 *International Legal Materials* 1.
 18. See Johannes Chan, "National Security and Judicial Independence: A Clash of Fundamental Values", Chapter 6 of this volume.

based its jurisprudence on, and a positivist conception that the legal text of the NSL should not be underpinned by (liberal) normative values. For Cheng, the NSL represents authoritarian legalism of sorts in a bare, positive form, stripped of all trappings of values, convictions, or commitments based on normative theories. It is mainly, if not merely, about “facts and effects” on the narrow ground of the NSL. In that sense, what the NSL introduces to Hong Kong is still law-based but firmly anchored in the strong statist tradition of the Chinese Constitution with a thin, if any, commitment to liberalism. Under this positivist approach, the NSL realigns the Central-SAR relations, redesigns the SAR power relations, and places new restrictions on rights under the BL. She puts it directly: “But one thing is for sure: the NSL has put new restrictions on the human rights in Hong Kong and the courts could do little to negate these restrictions.”

The Impact of the NSL

The NSL has introduced transformative changes to Hong Kong’s legal system at multiple levels. First of all, new legal norms are created. They include new criminal offences which are far more restrictive of rights and freedom than what was proposed in the Bill which was withdrawn by the government in 2003 under much public pressure. Some of the offences, such as secession and foreign collusion, are more broadly defined than China’s own criminal law. Chen’s chapter offers a succinct discussion of the offences, showing similarities between the NSL offences and those in Chinese criminal law.¹⁹ The NSL, through Article 38, creates a broad extraterritorial jurisdiction aiming at all Hong Kong residents or companies and any other persons. It sends, and perhaps intends to, a global chilling effect. Ling’s chapter offers a careful analysis of the political and legal hurdles in the way of exercising such a far-reaching jurisdiction.²⁰

Second, procedural rules are tightened to limit rights of the suspects or defendants in the criminal process. The changed rules on bail offer an excellent example. Hong Kong’s liberal bail regime, effective as it was in managing ordinary offences, was considered to be ill-equipped to cope with a determined, well-organised, and often violent protest of 2019. The police-detain-judge-release revolving door was much lamented by the pro-government press. The NSL has effectively addressed this concern by restricting successful bail applications. The courts, through a series of cases, seem to be adapting, though painfully, to the new legislative and political environment by developing a jurisprudence that rests on a presumption against bail without slipping into a presumption of guilt, thus complying with the NSL

19. See Albert Chen, “The National Security Law of the HKSAR: A Contextual and Legal Study”, Chapter 2 of this volume; Jie Cheng, “Hong Kong’s Constitutional Order after the National Security Law”, Chapter 5 of this volume.

20. Bing Ling, “Extraterritorial Application of the Hong Kong National Security Law: A Legal Appraisal”, Chapter 11 of this volume.

requirement without endangering the integrity of the criminal process in Hong Kong.²¹

Correspondingly, the NSL empowers the police to investigate national security offences and weakens the traditional accountability mechanisms, and especially judicial oversight, in relation to police powers of search, seizure, or interception of communication. As Young's chapter clearly points out, the national security police enjoy all the powers currently available to deal with the most serious crimes, including powers to freeze and forfeit property, seize travel documents, and compel answers from persons on pain of penalty. They have also been given new powers to allow for the regulation of online content, the supply of information by foreign agents of their activities with foreign governments or foreign political organisations, and the interception of private communication and other kinds of surveillance. In expanding police powers and weakening accountability, Young echoes views expressed in other chapters that the NSL signals a new shift in the equilibrium of relations between the police and residents in the context of law enforcement in Hong Kong.

Indeed, judicial power, a core feature in any liberal legal system, is in general retreat in these national security cases. Several chapters in the book highlight the challenges that the judiciary faces and its vulnerability. Chan's chapter points out that the NSL has effectively created an exceptional zone in the criminal process for national security offences in which the regular criminal justice rules, and in particular the role of judicial oversight, no longer apply. Chan tracks the contraction of judicial power in adjudicating national security cases and offers a sharp comparison between the normal state of affairs of the criminal process and the departures mandated by the NSL. Similarly, Cheng highlights a number of pre-emptive or ousting provisions which keep the courts out of NSL decisions.

The institutional change is equally drastic. In designing the NSL regime, the Central Authorities focused on the enforcement mechanism. It sought not only to create new offences endangering national security but also to design a mechanism to ensure effective enforcement of the new law. As a result, a key aspect of the NSL, and the most contentious one, is the creation of a range of interlocking national security organs that are powerful, detached from the pre-existing institutions, and accountable to the Central Authorities, either directly or indirectly. The disbanded colonial Special Branch of the police²² has in fact returned with a vengeance. A special prosecution unit is to be set up for the prosecution of national security offences, and national security judges are specially appointed to hear national security cases. The NSL has created a seamless national security grid in Hong Kong that embeds the Central Authorities in the SAR decision-making process and has the

21. See Johannes Chan, "Judicial Responses to the National Security Law: HKSAR v Lai Chee Ying" (2021) 51(1) *Hong Kong Law Journal* 1–14.

22. See Hualing Fu and Richard Cullen, "Political Policing in Hong Kong" (2003) 33 *Hong Kong Law Journal* 199–230.

potential to unify the entire criminal process from investigation to final adjudication in the implementation of the NSL, making Hong Kong a perfectly securitised society, a point that Fu and Zhai and other authors raise.

The NSL also creates a “nuclear option”—a national jurisdiction in Hong Kong over three types of scenarios under Article 55. Under those three circumstances, which are open-ended, the Central Authorities are empowered to take jurisdiction and remove a case from Hong Kong. The presence of the national security office in Hong Kong, reinforced by wide surveillance and investigation power, and the power to trigger the national jurisdiction represent the most transformative change that raises a series of very thorny questions, ranging from the application of other national laws, such as the Chinese Criminal Procedure Law, to technical operations of the national jurisdiction, and to the overall accountability under Hong Kong law and national law. Several chapters highlight different aspects of the features of the national jurisdiction and address related concerns.

What impact has the NSL and its enforcement had in its first year?²³ There are two types of emergency powers: one is restorative and the other transformative. A restorative emergency power aims to return to and save the pre-existing legal order. The transformative one modifies and even destroys the old system and replaces it with a new one.²⁴ The NSL clearly has both a restorative and transformative dimension, as would be expected with any emergency law. The restorative imperative demands immediate corrective measures, manifesting in gap-filling legislation to restore law and order, enhanced enforcement of law, and criminal prosecution.

But an emergency law is not necessarily limited to temporary measures to address the symptoms of a security crisis, to be withdrawn once risk factors that triggered an emergency are removed. Indeed, most of the emergency laws passed in history have stayed on in their respective statute books, accumulating into a dense national security legal universe. More likely than not, emergency laws are intended not only to address the symptoms of risks, but they also aim to cure the underlining root causes of those risks. In the case of the NSL, the enforcement has gone far beyond the corrective measure of prosecution of individual leaders and key participants in the 2019 mobilisation, ranging from veteran politicians to young students. While each arrest generates its own uncertainties and creates its own deterrent effect, the direct application of the NSL remains limited, targeting the organisers and key participants of the 2019 protest and those who may be perceived as acting in defiance of the NSL after it came into force. While the rule of

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

24. See Schmitt's distinction between “commissary dictatorship” and “sovereign dictatorship” relevant to the discussion. See also Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle*, translated by Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2014).

non-retrospectivity continues to hold the line for NSL offences and there seems to be a degree of constraint,²⁵ the NSL seems to have prompted the resuscitation of the existing offence of sedition in the Crimes Ordinance, thereby diluting, in effect, the principle of non-retrospectivity. The direct application of the NSL remains volatile and continues to evolve, an issue this volume can only begin to grapple with.

If the restorative imperative addresses the symptoms of the problems which surfaced in Hong Kong in 2019, the transformative imperative aims to tackle the root causes and introduces correctives to the real or perceived structural flaws.²⁶ Beyond individuals who have been prosecuted are civil society organisations whose vibrancy and activism used to define Hong Kong. The protests of 2019 had the support of many of them. They have been forced to dissolve for what they may have done, real or perceived. *Apple Daily*, Hong Kong Professional Teachers' Union, Hong Kong Confederation of Trade Union, and, of course, Hong Kong Alliance in Support of Patriotic Democratic Movements of China, among several others, have ended their operations, fallen under the weight of the NSL. Others, such as the Bar, RTHK (Radio Television Hong Kong), and Hong Kong Journalists Association, had been placed under pressure and, although they still survive, have been duly warned to behave. To use a medical metaphor, those who are deemed to be primary "cancers" of Hong Kong are surgically removed, and lesser tumours are put under notice and subject to radiation therapy.

Beyond the strictly legal and political, the NSL has the potential to affect the broader culture and social ecosystem of Hong Kong society. Loper and Petersen analyse the impact of the NSL on educational autonomy and academic freedom in tertiary education. Their chapter offers a conceptual framework of academic freedom, examines the controversies and vulnerabilities of higher education in Hong Kong prior, and subsequent, to the NSL, and provides a balanced discussion of the impact of further inhibitions, real or potential, on academic freedom. They suggest some useful recommendations in response to these challenges. George focuses on the NSL's impact on media and the freedom of the press, an area that attracted the most political attention in the initial month of its operation. The media is a key pillar in China's understanding of political power and, as George points out, the action against *Apple Daily* and Jimmy Lai exemplified China's resolve to remove any anti-Beijing elements in the media sector. In contrast to the massive show of force and swift police action, the quieter purge of the RTHK and stern warnings sent to other media outlets have naturally maximised the NSL's deterrent and the chilling

25. See Greg Torode, "Court Rulings Free Hong Kong Police to Probe Older Offences Under Security Law", *Reuters*, 19 October 2021, available at <https://www.reuters.com/article/us-hongkong-security-legal-idAFKBN2H903C>.

26. See Simon Young, "Political System Transformation in Hong Kong", *Verfassungsblog*, 13 April 2021, available at <https://verfassungsblog.de/political-system-transformation-in-hong-kong/>; see also Richard Cullen, "HK's New Political Realities after 2019 Watershed Year", *China Daily*, 13 March 2021, available at <https://www.chinadaily.com.cn/a/202103/13/WS604c76cda31024ad0baaefd5.html>.

effect. George also raises questions on how far-reaching the persecution and purge would extend to the media sector and the extent of the detrimental impact that the NSL may create on the media in Hong Kong and the political culture in general.

Deva assesses the NSL's impact on business enterprises in Hong Kong in relation to their human rights obligations or responsibilities under relevant domestic and international norms. The chapter focuses on three types of legal and regulatory conflicts that international business enterprises have had to face: between the NSL and the long-arm legislation of foreign countries, in particular the conflicting demands of different legal authorities in the context of foreign sanctions against officials in Hong Kong; between the NSL and other laws of Hong Kong; and between the NSL and international human rights standards of business. While there is nothing new about the interface between global business transactions and national security concerns, the NSL poses a unique challenge for Hong Kong because of its traditional status as an international financial centre with its new role in geopolitical competition.²⁷

The Resilience of the OCTS

What remains of OCTS, which the Central Authorities in the post-NSL era insist on maintaining, though with a “correct understanding”? The exceptional measures in the NSL have been institutionalised and become permanent features of Hong Kong's political and legal systems. In that sense, the NSL has effectively routinised the exceptional. There is no doubt the NSL has had and will continue to have a significant impact on the political and legal systems, and it is for good reason it is sometimes referred to as the second Basic Law to bring about a second reunification of Hong Kong. The NSL clarifies the priority and significance of certain articles of the BL.²⁸ It supplements the BL where the latter is silent and modifies it to the degree necessary to safeguard China's national security and interest. But, except for a few radical voices, no one holds the view that, at this moment in time, OCTS, even in the era of NSL enforcement, has ceased to exist or is likely to end in the near future.

This is not to deny that the NSL has adjusted the course of Hong Kong's political development. Yet the OCTS doctrine, after these revisions and recalibrations, as discussed above, may continue to survive in terms of setting Hong Kong firmly apart from the Mainland even in the most sensitive area of the NSL. There divergence remains the rule, and convergence—especially in the circumstances of Article 55 to be enforced by the national office—will be exceptional. There are sound political, legal, and sociological reasons that national security rules and practices in the

27. Surya Deva, “The Business of National Security in Hong Kong: Do Human Rights Matter”, Chapter 13 of this volume.

28. In a novel manner, Article 2 of the NSL states that Articles 1 and 12 are “fundamental” provisions and the exercise of rights is subject to such provisions.

Mainland will not come across the border and be replicated in Hong Kong through the NSL in the foreseeable future, as chapters in this volume illustrate.

The political message from the Central Authorities focuses on the restorative imperative of the NSL, although the transformative effect is clearly evident. By enacting the NSL, the Central Authorities are merely asserting a constitutional authority they already had under the Chinese Constitution. The way in which the NSL was enacted and implemented in Hong Kong demonstrates a level of deference to the BL and the OCTS principle it enshrines, even in addressing the most challenging issues. It complies with the essential aspects of legality which Chinese law requires. Lawmakers in Beijing also reiterate that the NSL was enacted to stop the violence and lawlessness that Hong Kong tragically suffered from in 2019, and to restore law and order within the framework of OCTS.²⁹

The inclusion of the human rights provisions in the NSL and especially the reference to the International Covenant on Civil and Political Rights (ICCPR) and other international rights regimes are significant in signalling a commitment to maintaining OCTS. This should not be regarded as a mere window dressing exercise not meant to have any constraints over enforcement. The rights provisions in the NSL also anchor the NSL in the common law and connect an otherwise harsh legislation to the pre-existing rules and standards of Hong Kong. Significantly, while the NSL carves out a national jurisdiction and in various respects restricts the jurisdiction of Hong Kong courts, the application of the NSL is largely, if not entirely, in the hands of the Hong Kong courts, which follow a sound common law tradition.

For Loper and Petersen, with the inclusion of the ICCPR and the International Covenant on Economic, Social, and Cultural Rights, any policies adopted by Hong Kong's educational institutions should comply with both treaties, and cases litigated should use the ICCPR as a guide to interpret provisions in the NSL. The inclusion of the two Covenants invites the relevant UN monitoring bodies to offer guidance on matters relating to education and academic freedom and to support academic freedom and university autonomy.³⁰ George similarly notes the essentiality of media freedom which the ICCPR, an integral component of the NSL, recognises. As George notes, the jury is out on whether critical journalism can continue to exist in Hong Kong in post-NSL Hong Kong. Meaningful journalism is possible in diverse political environments, but Hong Kong journalists cannot now take liberalism for granted and will need to learn to thrive in a "navigable, though certainly dangerous, minefield."³¹

29. Chen, n 19 above; Cheng, n 19 above; and Han Zhu, "The Hong Kong National Security Law: The Shifted *Grundnorm* of Hong Kong's Legal Order and Its Implications", Chapter 3 of this volume.

30. Kelley Loper and Carole J. Petersen, "Academic Freedom in the Shadow of Hong Kong's National Security Law", Chapter 12 of this volume.

31. Cherian George, "Media Freedom and Censorship under Post-Orwellian Authoritarianism", Chapter 15 of this volume.

On judicial power, Yap points out there is still room for the court to provide “remedial” interpretations of the NSL so that it will operate within the broader BL framework. As he states, “while the [NSL] is a done deal, its *interpretation* is not.” Thus, interpretation should be taken seriously. Facing the dilemma of maintaining its worthy tradition of judicial autonomy and common law methodology, on the one hand, and addressing the Central Authorities’ political concerns over political stability, on the other, courts in Hong Kong have to be politically astute and strategic, as they have always been in BL interpretation.³² The NSL defines at least some offences with relative clarity. For the others, there are opportunities and, indeed, a duty to read criminal law offences strictly according to the common law tradition. The audience is not only in Hong Kong and the Mainland, but the world will be watching and evaluating the situation.

Fu and Zhai point out that OCTS, even in the area of national security, will continue in spite of the NSL. The enforcement of national security law needs more than legal provisions and institutions. Mainland-style enforcement requires a particular political structure and social milieu and, in particular, a series of authoritarian features, such as censorship of the press, restrictions on NGOs, cultivation of informants, other measures of early and proactive interventions, and above all, pervasive self-censorship. Hong Kong, on the other hand, has an intrinsically liberal political, institutional, and social background. This creates room for Hong Kong to manoeuvre to adapt to the NSL without becoming more authoritarian than is necessary.³³

A significant concern over the implementation of the NSL is the relevance of national criminal law and the degree to which mainland law punishing national security offences may be referred to as authority. It is true that the interpretative power of the NSL belongs to the NPCSC, consistent with the Chinese legislative tradition,³⁴ but it is also significant to note that Article 41 provides that, as a general principle, Hong Kong law continues to apply to procedural matters with respect to offences endangering national security. The NSL need not be a serious challenge to Hong Kong’s common law system. It is unlikely, judging by the BL interpretative practices of the NPCSC, that the NPCSC will intrude frequently into the interpretative space of the NSL. It lacks the will and capacity to make extensive and repeated interpretations to micromanage Hong Kong and its courts. It will intervene and give interpretations on what it perceives to be crucial issues at critical junctures, but it has to rely on the courts of Hong Kong to give much of the meaning to the NSL. Thus, Article 65 should be read as referring to the “ultimate or final interpretation”

32. See Po Jen Yap, “Judging Hong Kong’s National Security Law”, Chapter 7 of this volume and his “Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong” (2007) 37 *Hong Kong Law Journal* 449.

33. Hualing Fu and Xiaobo Zhai, “The Return of High Policing in Hong Kong”, Chapter 9 of this volume.

34. See Art 65, NSL.

of the NSL, modelled, in essence, on the interpretative structure of Article 158 of the BL.³⁵

It is certainly of academic interest to refer to Chinese criminal law and practices in relation to offences endangering state security, as Chen does in offering examples of subversion, secession, and terrorism prosecutions under Chinese criminal law,³⁶ as Fu and Zhai do in comparing national security enforcement in Hong Kong and mainland China, and as Tang and Huang do in offering insights on the state secrets law regime in the Mainland, rarely available in the English literature.³⁷ However, Hong Kong courts have so far refrained from considering cases decided by mainland courts. They have avoided doing this, though without straying from fidelity to the Chinese constitutional order and legal rules applying to Hong Kong. Chinese law on national security offences, given that it aims to protect the socialist system under one System, is not expected, and thus unlikely, to shed light on the meaning of the NSL, which was enacted explicitly to protect the national security in the capitalist system under the other System. Undoubtedly, the NSL relied extensively on the wording of Chinese national security laws. This should not be a surprise as it is a law drafted by mainland lawyers. Nonetheless, the lawmakers were at pains to differentiate the NSL from national laws, which they did by providing more detailed and clearer definitions for the offences created, and by laying down express provisions on the protection of rights and freedoms. The judicial decisions to date tend to show that Hong Kong remains deeply embedded in the common law universe in terms of authorities, methodology, and temperament despite all the challenges it faces.

The NSL reflects particularistic Chinese sensitivities concerning sovereignty and political order, and offences like secession and subversion, as defined in the NSL and enforced by the National Security Department, reflect specific historical and political concerns. It is precisely at this historical junction, when the socialist system encounters the liberal order, that the courts in Hong Kong have to step out and step up, to serve not only as the guardians of Hong Kong's legal order as it existed before the NSL, but also to make decisions that reflect national sentiment and transcend narrow political divisions, as they continue to develop Hong Kong's common law system in the post-NSL era.

35. For a critical comparison between common law interpretation and the NPCSC legislative interpretation, see Johannes Chan, "Reconciliation of the NPCSC's Power of Interpretation of the Basic Law within the Common Law in the HKSAR" (2020) 50(3) *Hong Kong Law Journal* 657.

36. Chen, n 19 above.

37. Zheng Tang and Xu Huang, "State Secrets in the Hong Kong National Security Law", Chapter 10 of this volume.

The NSL from Comparative Perspectives

The realm of political freedom, including political advocacy and political speech as practised prior to July 2020 and especially during 2019, has been and will be curtailed, and courts will be operating in a context of diminished political pluralism and enhanced political correctness, but Hong Kong is not the only jurisdiction that has been placed under a stress test, as Roach's chapter well illustrates. Many states have made secession illegal and criminal; defined national security offences broadly and vaguely; punished speech, such as provoking hatred or advocating terrorism, as a crime; extended their criminal laws extraterritorially; and conferred special powers to the police and prosecutors. These measures are among a long list of issues that show some, at least formalistic, similarities between the NSL and its counterparts in liberal democracies. Democracies should reflect on their own domestic practices while criticising the NSL.³⁸

Of course, the NSL is not an invitation to a tea party. Rather, it is a weapon to end what is perceived to be a revolt to turn Hong Kong into a site of struggle against the Central Authorities. Its purposes are to reset Hong Kong's political direction, transform the political structure, and move forward according to a "correct" understanding of OCTS. Yet, the harsh law is to be implemented in a society with a liberal tradition, supported by a mature common law system, an independent legal profession, and a still active civil society, including the media and the religious sector. As authors in several chapters reiterate, the jury is still out in assessing the structural impact on Hong Kong's governance. In that sense, the courts, with the support of remnants of the liberal institutions, can still offer some meaningful corrective to some of the potential political excesses—the authoritarian enhancement, distortion, and the cacophony that Roach points out.³⁹

Will Singapore be our future? In a fundamental sense, the two cities are not compatible because of the simple fact that Hong Kong is a part of a much larger political entity, and Singapore, a city-state, is what it is. While recognising the incompatibility at the foundational level, the mechanism to safeguard national security and exert political control in Singapore can shed some light on the path that Hong Kong may tread. Hor's chapter first identifies an anomaly: an analysis of the letter of the law—the NSL and Singapore's Internal Security Act (ISA)—reveals a potentially far more authoritarian administrative detention without trial in Singapore for national security offences, compared with the criminal law approach embodied in the NSL. So the anxieties that some people may have and the willingness to relocate to Singapore to escape from a national security legislation illustrate forcefully that the issue is not the text of the law but its political context and the

38. Kent Roach, "Echoes Enhanced to a Cacophony: Hong Kong's Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies", Chapter 14 of this volume.

39. *Ibid.*

resulting perception in Hong Kong and internationally.⁴⁰ What are the lessons that Hong Kong may draw from Singapore and what should be the best response from Hong Kong?

One answer is a depressing and brutal one: it takes time for people to get used to it and sooner or later people will get used to it. Nothing could be more general and vague and generate more uncertainty than the ISA test of “prejudicial to the security of Singapore”, but there is a “novelty effect” as Hor calls it. As Hor puts it, “Whatever is going on in Singapore has been going on for decades—more than enough time for the expected desensitization.” That Singapore is “like that” is no longer news. Hong Kong’s changes are fresh, barely a year old. Hong Kong is not supposed to be “like this”. That can change as time goes by.

More importantly, after the NSL has removed the real or perceived enemies and adversaries from the political landscape, the political context may stabilise, reducing the level of legal volatility in application of the NSL. As Singapore demonstrates, the stability in the political order and confidence of the ruling Party to govern effectively would necessarily lead to a more circumspect and cautious use of the ISA. The predominant perception in Singapore is that the limited use of ISA—essentially targeting religiously motivated terrorists—“is, if not justified, not unreasonable”. As the overall political atmosphere improves, Hong Kong judges may well regain their confidence to uphold the liberal standard and, by that time, they would have gained more experience and confidence in dealing with NSL cases and be ready to curtail some of the NSL excesses. The general lesson is that when societies encounter “scares”, the government responds expediently and repressively. But the repressive moment will pass when a more relaxed political context arrives.

While Hor sees some possibility of a convergence between Hong Kong and Singapore in the application of the respective national security law, George sees divergence in the management of the media sector in the two cities. George makes a convincing argument that scrutinising the legal text or its selective application can only reveal so much about the state of affairs of Hong Kong’s media freedom. Lawyers, law professors included, may dutifully imagine the worst-case scenarios, but the societal reactions may differ. The difference matters a lot in setting Hong Kong apart from Singapore when close examination is given to Hong Kong and Singapore in terms of the broader political control of media and the potential pushbacks by professionals and media organisations, which, of course, exist with a particular political background, with different resources and resilience, and in which journalists make their political judgments. George concludes that “the kind of hegemonic domination that the Singapore regime achieved over mainstream media—where resistance is conspicuous in its absence—may be harder to replicate.

40. Michael Hor, “The New National Security Law: Exploring a Meaningful Comparison with Singapore”, Chapter 16 of this volume.

This chapter explains why a Singapore-style equilibrium will elude Hong Kong's grasp."

There are answers from both the "supply" side and the "demand" side which showcase the differences between Hong Kong and Singapore. Similar to Hor's "novelty effect" argument, George points out the obvious difference that the effective censorship in Singapore was achieved through a decades-long direct and coercive censorship, begun with "a scorched earth strategy to remove once and for all any oppositional media in the 1960s and 70s." The enforcement of the NSL and the media ecosystem it is creating has not yet produced its Sword of Damocles as it did in Singapore. On the demand side, Singapore's censorship was designed at a particular historical moment. "Singaporeans were probably more easily persuaded in the 1970s and 1980s to exchange their civil liberties for economic rewards, than Hongkongers would be today." Given Hong Kong's political environment in the post-NSL era, legal repression is unlikely to be sustainable and to be used frequently against media outlets. A more likely scenario is the use of administrative and economic means to incentivise calibrated censorship and self-censorship to achieve compliance, although the distinct Singaporean style of media manipulation and control may not be replicated in Hong Kong.⁴¹

Conclusion

It is an understatement to say that 2019 was a difficult year for Hong Kong. Depending on one's political stance, it was a year of hope, a year of desperation, a year of chaos, or a year of crisis. Putting aside our normative positions, 2019 presented an emergency to the Central Authorities and a crisis that Hong Kong was ill-equipped to manage. This necessitated a constitutional intervention. What happened in Hong Kong in 2019, as it was presented to the Central Authorities in China, was so dramatic and extreme that the enactment of the NSL appeared to them a natural response. It also became a highly politicised matter internationally due to the geopolitical concerns that made Hong Kong a focal point.

The 2019 protest and the enactment of the NSL should be examined in the larger context of the contention between Articles 23 and 45 of the BL, and a dismal failure of constitutional dialogue between the Central Authorities and the SAR, resulting in a lose-lose situation on both freedom and security. The 2003 anti-national security movement, whether seen as a success or a failure, catalysed a sea change in China's Hong Kong policy. It resulted in, or at least contributed significantly to, the NPCSC Decision of 2014, which, arising from the decisive political changes in China in the Xi era, significantly limited the democratic reform of the election of the Chief Executive in 2017. The 2014 Decision in turn triggered a prolonged civil

41. Cheria George, "Media Freedom and Censorship under Post-Orwellian Authoritarianism", Chapter 15 of this volume.

disobedience that rocked Hong Kong. An escalation of confrontational political protest in Hong Kong led to the debut of violent confrontation between protesters and the police, and the beginnings of a potentially secessionist movement. The violent clashes and open advocacy of Hong Kong independence in 2019, though initially triggered by the ill-conceived Extradition Bill, should be seen as an eruption of all the pressures that had been building up in Hong Kong. The subsequent enactment of the NSL, in response to the violence and secessionist mobilisation, is part of that political continuum.

What is the future then? The historical success in the past relied on the establishment of stable political order and good governance.⁴² If security is undermined, then inevitably freedom diminishes and governance deteriorates. With a stable political order, rights can be respected and society can prosper. Freedom and the rule of law are enduring concerns for Hong Kong. The rule of law, as it was introduced to and then evolved in Hong Kong in its short 180-year history from a colonised territory to an SAR, has experienced periodic stress tests. External shocks and internal turmoil, in difficult historical times, have put the rule of law with its corresponding rights and freedom into a state of suspended animation. The year 2019 proved to be yet another challenging one, likely to catalyse significant political changes in Hong Kong, and perhaps the rest of China.

Many wondered in the aftermath of the NSL, as they probably did before, whether the system that was built is collapsing, whether the foundation for it is eroding, and whether the freedom and security that Hong Kong treasures dearly is to be lost. The NSL has restored law, order, and security to Hong Kong, but it has also created uncertainties, anxieties, and vulnerabilities. This book offers an exploratory study of the law and its impact on the legal system and the principle of the rule of law in Hong Kong. Hong Kong is a pragmatic place that always manages to create synergies between the larger political order and individual rights and freedom, thereby developing a symbiotic relationship between this highly autonomous city and core national interests, including security. Freedom under the rule of law with political stability is a universal human pursuit, and national security is the condition and foundation for freedom to nurture and the rule of law to flourish. This holds within it the possibility of a new equilibrium in Hong Kong in the age of the NSL.

42. See Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997); see also Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2006). See also Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (London: Profile Books, 2014).

Hong Kong's Constitutional Order after the National Security Law

Jie Cheng*

I. Introduction

The Law for Safeguarding National Security in Hong Kong (NSL) has triggered grave constitutional and legal concerns. Because the NSL has limited fundamental rights, many studies of the NSL have taken a normative approach. These reflections are indispensable for critical thinking. However, the normative approach has its limit: it presumes a higher normative ground and a higher court with constitutional jurisdiction. When these grounds are formally shifted, the normative analysis has to change course or else becomes political in nature. The result is partly reflected in the *Tong Ying Kit*¹ case and in the most recent *Lai Chee Ying*² case. In this chapter, I argue that in response to these concerns, we need both normative and positive perspectives. In particular, I hope to advance the discussion by investigating the NSL's impacts on the courts' constitutional jurisdiction and Hong Kong's (HK) constitutional order, including changing power dynamics within the Hong Kong Special Administrative Region (HKSAR) and between the HKSAR and China.

When speaking of normative and positive perspectives in legal studies, I take a relatively simplified understanding of the two terms: the positive legal approach is mainly about facts and effects, while the normative legal analysis is mainly about values and convictions.³ Lawrence Solum provides a list of theories for each category which we can also use to illustrate the differences. For example, in the

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1. *HKSAR v Tong Ying Kit*, HCAL 1601/2020, [2020] HKCFI 2133. (Challenging the legitimacy of the NSL's limitations on bail and punishments).
2. *HKSAR v Lai Chee Ying*, FACC 1/2021, [2021] HKCFA 3. (Challenging the constitutionality of the NPCSC enacting the NSL).
3. See generally Adrian Vermeule, "Connecting Positive and Normative Legal Theory" (2014) 10 *U. Pa. J. Const. L.* 387.

category of positive legal theory, we have doctrinal theories, explanatory theories, and effect theories. By contrast, normative legal theories tend to be entwined with more general normative theories, such as deontology, utilitarianism, and virtue ethics—three of the most important general normative theories that have had an influence on the law.⁴ The values of these two approaches have been well debated.⁵ This chapter is not intended to join this debate between different approaches of legal studies; rather, it aims to describe and explain the impacts of the NSL on HK's constitutional order.

In an earlier chapter, Professor Fu highlights some of the key issues of concern. These issues have clear constitutional implications: for example, the questions about the NSL's legal status and its relationship with the Basic Law (BL) and the Constitution explore the nature of the NSL; the issue of the terms and construction of the national security offences, which tests the boundaries of criminalisation; the legitimacy of national security agencies; and the issue of interpretation of the NSL and its impacts on judicial independence. Some of the issues such as the National People's Congress Standing Committee's (NPCSC) interpretation power and decision-making power were discussed before the promulgation of the NSL and are still being debated.

There are no simple answers to these issues, and the legal discourse can easily turn into political debates. This chapter takes a positive approach to examining the NSL's impacts on HK's constitutional order for two reasons. First of all, discussions from the normative perspective have limits because the NSL is a national law applied in HK as part of the BL. The semi-constitutional nature of the NSL means that there is only a weak possibility of challenging its validity according to the BL. What's more, the NSL has expressly limited the constitutional jurisdiction of the HK judiciary, which adds complexity to the normative claim. Second, law in the books and law in action are not always the same. While most normative studies presume the universal understanding of law and uniform application of law, positivist studies help us to understand the law understood by judicial authorities in the social and political context. The latter is especially critical when there are competing constitutional authorities or when the constitutional authorities are still in formation. This is exactly the case in HK where both the NPCSC and the HK Court of Final Appeal (CFA) have the power to interpret the BL.

The rest of the chapter proceeds as follows: Part II gives an overview of the major constitutional issues under debate and explains the difficult situation of

4. Lawrence Solum, "Legal Theory Lexicon: Positive and Normative Legal Theory", *Legal Theory Blog*, 29 January 2012, available at <https://lsolum.typepad.com/legaltheory/2012/01/legal-theory-lexicon-positive-and-normative-legal-theory.html>.

5. For an interesting debate between Richard Epstein and Duncan Kennedy, see Richard Epstein, "Positive and Normative Elements in Legal Education" (1985) 8:2 *Harvard Journal of Law and Policy* 255 and Duncan Kennedy, "Positive and Normative Elements in Legal Education: A Response" (1985) 8(2) *Harvard Journal of Law & Public Policy* 263.

normative analysis with the illustration of the *Tong Ying Kit* case. Part III examines how the NSL limits the courts' constitutional jurisdiction in terms of interpretation and scope of judicial review. Part IV studies how the NSL will impact Hong Kong's political developments due to its limitations on elections and its empowerment of the executive branch. Part V examines the growing presence of the Central People's Government (CPG) in HK and its relationship with the Special Administrative Region (SAR). Part VI offers a conclusion.

II. The NSL and Constitutional Issues

The NSL has triggered both domestic and international concerns. Most critiques have emphasised the immediate and potential threat to freedom of expression, right to privacy, and freedom from search and seizure in Hong Kong.⁶ The NSL has also prompted expressions of concern from the international community, including both the United States and the European Union.⁷ The United States even imposed sanctions on individual government officials⁸ and revoked HK's special trade status.⁹ Many concerns are of a constitutional nature. Three of them are most relevant and have attracted many discussions:

First, whether the NSL is ultra vires because it violates the principle of "One Country, Two Systems" (OCTS) as China has committed in the Sino-British Joint Declaration on HK and infringes HK's high degree of autonomy.

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6. See generally Kent Roach, "Echoes That Build to a Cacophony: Hong Kong's New Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies", Chapter 14 of this volume.
 7. See Jan van der Made, "Hong Kong National Security Law Triggers Angry Reactions Against China", *Radio France International*, 23 May 2020. Available at rfi.fr/en/international/20200523-china-hong-kong-new-security-law-trigger-protests-pro-democracy-groups-umbrella-movement-carrie-lam-national-peoples-congress.
 8. US President Donald Trump issued Executive Order (E.O.) 13936 on 14 July 2020, which provides for the imposition of sanctions on actors engaged in these malign activities. E.O. 13936 also builds on and implements provisions of the *Hong Kong Human Rights and Democracy Act* of 2019 and the *Hong Kong Autonomy Act* of 2020, available at federalregister.gov/documents/2020/07/17/2020-15646/the-presidents-executive-order-on-hong-kong-normalization. Subsequently, the US Treasury imposed sanctions on Carrie Lam, Chris Tang, Stephen Lo, John Lee Ka-chiu, Teresa Cheng, Erick Tsang, Xia Baolong, Zhang Xiaoming, Luo Huining, Zheng Yanxiang, and Eric Chan according to Executive Order (E.O.) 13936 on 7 August 2020, available at <https://home.treasury.gov/news/press-releases/sm1088>. As a result of the action, all property and interests in property of the individuals named above, and of any entities that are owned, directly or indirectly, 50 per cent or more by them, individually, or with other blocked persons, that are in the United States or in the possession or control of US persons, are blocked and must be reported to United States Office of Foreign Assets Control.
 9. The US revoked Hong Kong's special trade status as separate from mainland China and passed the *Hong Kong Autonomy Act*, which became law on 14 July 2020, authorising the President to "impose sanctions on foreign individuals and entities that materially contribute to China's failure to preserve Hong Kong's autonomy". See "H.R.7440—Hong Kong Autonomy Act", available at congress.gov/bill/116thcongress/house-bill/7440.

Second, whether the enactment of the NSL fails to comply with the BL and/or the procedural requirements set by the Legislation Law.¹⁰

Third, whether the NSL violates China and HK's commitment to international human rights law.

It is not difficult to find that a normative approach to these issues tends to result in divided responses. In response to the first issue, many have questioned the constitutionality of the NSL for sidestepping the boundary of HK's autonomy with a national law. For example, Joshua Rosenzweig, the head of Amnesty International's China Team, stated that "from now on, China will have the power to impose its own laws on any criminal suspect it chooses".¹¹ But the NSL is not the first and only national law that applies in HK. Therefore, many others have found it understandable¹² or defensible because the enactment could end the controversy of Article 23 legislation and restore social order after a year-long period of social unrest and protest against the proposed extradition law in HK.¹³ Regina Ip, a Legislative Council (LegCo) member and former government official, tried to explain "why Beijing's national security law for Hong Kong does not spell the end of 'one country two systems'" by affirming that "[o]nce [the NSL is] promulgated and applied in Hong Kong, the well-established common law safeguards of judicial review, habeas corpus, presumption of innocence and proof of guilt beyond reasonable doubt will kick in".¹⁴

In terms of procedural legitimacy, given the time and the manner in which it was promulgated, there are good reasons to have concerns regarding the legislation's adoption. In fact, there are several procedural hurdles that must be crossed in order for a law developed by the NPCSC to apply in HK—and some accused the NPCSC of failing to cross the hurdles in an appropriate manner. First, the NSL draft bill was

10. Adopted at the Third Session of the Ninth National People's Congress on 15 March 2000. The Law was recently revised in 2015.

11. Lily Kuo and Verna Yu, "China Passes Controversial Hong Kong National Security Law", *The Guardian*, 30 June 2020, available at [theguardian.com/world/2020/jun/30/china-passes-controversial-hong-kong-national-security-law](https://www.theguardian.com/world/2020/jun/30/china-passes-controversial-hong-kong-national-security-law). See also Alex Lee and Davin Wong, "China's National Security Law: Is This the End of Hong Kong's Promised Autonomy?" (2020) Macdonald-Laurier Institute, available at [macdonaldlaurier.ca/files/pdf/20200626_Davin_Wong_Alex_Lee_STRAIGHT_TALK_FWeb.pdf](https://www.maclaurier.ca/files/pdf/20200626_Davin_Wong_Alex_Lee_STRAIGHT_TALK_FWeb.pdf).

12. While calling Beijing's move understandable, Andrew Li argues that offences must be limited in scope, trials carried out openly, and defendants presumed innocent. See Andrew Li, "China-Enacted National Security Law Must Be Consistent with Hong Kong Legal Principles", *South China Morning Post*, 2 June 2020, available at [scmp.com/comment/opinion/article/3086946/china-enacted-national-security-law-must-be-consistent-hong-kong?utm_source=copy_link&utm_medium=share_widget&utm_campaign=3086946](https://www.scmp.com/comment/opinion/article/3086946/china-enacted-national-security-law-must-be-consistent-hong-kong?utm_source=copy_link&utm_medium=share_widget&utm_campaign=3086946).

13. Liping Gu, "Carrie Lam: Hong Kong National Security Law a 'Turning Point' to End Chaos", *China News*, 1 July 2020, available at <http://www.ecns.cn/news/politics/2020-07-01/detail-1fzrxvc0874286.shtml>.

14. "Why Beijing's National Security Law for Hong Kong Does Not Spell the End of 'One Country, Two Systems'", *South China Morning Post*, 31 May 2020, available at <https://www.scmp.com/comment/opinion/article/3086619/why-beijings-national-security-law-hong-kong-does-not-spell-end-one>.

not published for public comments before its promulgation,¹⁵ a step that is required by the Legislation Law.¹⁶ Second, the legislation was passed with only one reading, which was also uncommon.¹⁷ Last but not least, the legislation was added to the BL's Annex III without meaningful consultation with the BL Committee members. BL Article 18(3) states that the NPCSC “may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.” There were no signs that the Committee members from HK had access to the draft, because before the NSL was promulgated, all Committee members’ comments were limited to the explanation of the earlier draft.¹⁸ It was reported that the Basic Law Committee had been consulted in the afternoon of 30 June of 2020 after the NSL was passed on the same day.¹⁹ But given the time limit,

15. “China Passes Draft of Highly Criticized National Security Bill for Hong Kong”, *Global News*, 18 June 2020, available at globalnews.ca/news/7079527/china-draft-security-bill-hong-kong/.

16. Article 37 of the Legislation Law (as revised in 2015) states, “For bills that are on the agenda for a session of the Standing Committee, after the Standing Committee meeting, the draft law and an explanation of the drafting or revisions shall be released to the public for comments, except where the Council of Chairmen makes a decision to not release them. The period for release to the public for solicitation of comments is usually not to be less than thirty days. A report shall be made to the public on the solicitation of comments.” See Legislation Law, n 10 above, Art 37.

17. Article 28 of the Legislation Law (as revised in 2015) provides that, as a rule, a legislative bill placed on the agenda of a meeting of the Standing Committee shall be put to vote after deliberations at three meetings of the Standing Committee. See Legislation Law, n 10 above.

18. For example, the interview of Committee Vice Director Maria Tam Wai-Chu on 28 June 2020 mentioned only the NPCSC’s explanation of the draft. Nothing was mentioned about the draft itself. See *China News*, “Tan Huizhu: National Security Has Always Been the Responsibility of the Central Government, and Hong Kong Has Been Given Preferential Treatment” [譚惠珠：國家安全從來都是中央事權 香港已獲優待], 27 June 2020, video available at youtube.com/watch?v=KHNrebwobmE. For a summary of the interview, see “Tan Huizhu: Hong Kong’s Draft Law on Safeguarding National Security Conveys Four Strong Signals from the Central Government” [譚惠珠：香港維護國家安全法草案說明傳遞中央四個強烈信號], *Sohu*, 28 June 2020, available at sohu.com/a/404482430_260616. Of course, this should not mean that no individual members were involved in the drafting. But it is noteworthy that the Committee as an institution did not play a significant role in the process.

19. According to Xinhua News Agency, the NPCSC consulted the Committee before it was added to Annex III: “The Standing Committee of the National People’s Congress Passed the Law of the Hong Kong Special Administrative Region on Safeguarding National Security and Decided to Include its Annex III to the Basic Law of Hong Kong” [全國人大常委會通過香港特別行政區維護國家安全法並決定列入香港基本法附件三], *Xinhua News Agency*, 30 June 2020, available at xinhuanet.com/2020-06/30/c_1126178678.htm. However, given that the law was promulgated in the morning and the decision to add the NSL to Annex III was made in the afternoon, the consultation had to be minimal or symbolic to the utmost. For an interview of one of the Committee members, Huang Yushan, by *Ta Kung Pao*, a state-owned Chinese language newspaper from mainland China, see Lushan Shi, “Huang Yushan: The Basic Law Commission Supports the Inclusion of the ‘Hong Kong National Security Law’ in Annex III” [黃玉山：基本法委員會支持將“港區國安法”列入附件三], *Ta Kung Pao*, 30 June 2020, available at takungpao.com/hongkong/text/2020/0630/468882.html. The *Ta Kung Pao* article was dated “2020-06-30 15:45:01”, after the consultation was completed.

the consultation was likely minimal or symbolic. Of course, some may argue that all these procedures are not compulsory and the consultation could take different forms. Therefore, it is not a matter of legality, but rather a matter of standards in interpreting the rules of the law.

In response to the issue of human rights, views are also divided. Although the NSL commits to protecting human rights according to the BL and the International Covenant on Civil and Political Rights (ICCPR) as applied to HK (Article 4), for many observers, this is merely an empty promise because the enactment will inevitably infringe freedom of expression and have chilling effects. Voice of America reported that on the fourth day of the legislation becoming law, the Hong Kong Public Library immediately took at least nine political books off its shelves, including the works of Chen Yun, a scholar, Joshua Wong, an activist, and Tanya Chan, a Legislative Council member.²⁰ Some prominent political organisations such as Demosisto, Studentlocalism, and Hong Kong National Front disbanded due to concerns related to the law.²¹ But there are also reports and comments that support or defend the legislation. According to *Nature*, science researchers are divided on whether the law will affect research. Matthew Evans, dean of science at the University of Hong Kong, says he's seen no indication that publishing research on politically sensitive topics or participating in international projects and grants will be restricted under the law.²²

The NSL's impacts on Hong Kong's human rights will depend on courts' application of the NSL. But one thing is for sure: the NSL has put new restrictions on human rights in HK and the courts can do little to negate these restrictions.²³ In the past, Annex III national laws have been localised and courts have thus exercised constitutional jurisdiction over the local ordinances according to the BL and the ICCPR.²⁴ In addition, Simon Young argues that courts do not have to limit themselves to the ICCPR standards. He found that courts in the past have reviewed restrictions of Basic Law rights according to international conventions if these rights overlap with

20. Stacey Hsui, "National Security Law Threatens Hong Kong's Publishers, Booksellers", *VOA News*, 31 August 2020, available at [voanews.com/east-asia-pacific/voa-news-china/national-security-law-threatens-hong-kongs-publishers-booksellers](https://www.voanews.com/east-asia-pacific/voa-news-china/national-security-law-threatens-hong-kongs-publishers-booksellers).

21. "China: New Hong Kong Law a Roadmap for Repression", *Human Rights Watch*, 29 July 2020, available at [hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression](https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression).

22. Andrew Silver, "Hong Kong's Contentious National Security Law Concerns Some Academics", *Nature*, 12 June 2020, available at [nature.com/articles/d41586-020-01693-y](https://www.nature.com/articles/d41586-020-01693-y).

23. But see Po Jen Yap's chapter at page 11. (Noting that the CFA's decision of Ng Kong Siu is ostensibly dealing with the constitutionality of domestic legislation, but in reality was confronted with the local implementation of the PRC law. But he also admits that this approach may not be applicable to the NSL because the NSL is applied by promulgation and there is no local law passed to implement it).

24. Article 39 of the Basic Law says that "[t]he provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by HK residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article." See Basic Law, Art 39. Emphasis added.

The Return of High Policing in Hong Kong

Hualing Fu and Xiaobo Zhai

Introduction

“What a disgrace!” lamented Xia Baolong, Director of the Office for Hong Kong and Macau Affairs, the highest-ranking official in the Central People’s Government (CPG) in charge of Hong Kong affairs in a particularly condescending outburst to condemn the 2019 protests in Hong Kong.¹ That’s how Beijing, Hong Kong’s sovereign, perceived what happened in Hong Kong in 2019. For the CPG, what was presented as democratic protest by the international media was nothing short of systematic disorder and organised violence bordering on insurrection. What was shocking and extremely displeasing for the CPG was not only the level of violence and vandalism that some Hong Kong people proved to be capable of, but also the degree of sympathy and support they received from the larger communities in Hong Kong and internationally, and the incompetence and indifference of the Hong Kong government. In the CPG’s eyes, Hong Kong has turned from an economic asset into a political liability. More importantly, the CPG believed that the unrest in Hong Kong exposed China to hostile international forces and put China’s national security at grave risk.

The mass unrest creates the need—it also offers an opportunity—for the CPG to react forcefully and strongly to put violence to an end and to restore law and order. Its sharp and drastic action has taken the form of legislative suppression—the passing of the Law of the People’s Republic of China for Safeguarding National Security in the Hong Kong Special Administrative Region (NSL). The law aims both at the immediate goals of “preventing, stopping and punishing” activities endangering national security and the long-term goal of changing the constitutional

1. “田北辰引述夏寶龍指反修例示威‘成何體統’：形容丟臉”，*Radio Television Hong Kong*, 28 May 2020, available at <https://today.line.me/hk/v2/article/kNvRDk>.

structure of Hong Kong.² The law creates a range of new criminal offences, often broadly defined to cast a wide net against offences potentially endangering national security, exceeding China's own criminal law for some of the offences in its breadth.³ It establishes a web of national security agencies with interlocking jurisdictions and duties with Beijing sitting at a comfortable, commanding height. The NSL expands police power and correspondingly either ousts or limits judicial authorities at multiple entry points, ranging from restricting bail, excluding juries, and enhancing secrecy in judicial proceedings. Beyond the immediate impact, the NSL attempts to tackle the root cause of the national security risks as China perceives them in Hong Kong—a vibrant and politically charged civil society comprising non-governmental sectors, such as education, the media, the internet, religion, or NGOs that were against the government. Through the NSL, high policing has returned to Hong Kong.

This chapter offers a preliminary study of the role and functions of the high policing, also called political or national security policing, which the NSL has introduced in Hong Kong, and its initial and long-term impact on the rule of law and rights and freedoms in Hong Kong.⁴ The role that the political policing plays in Hong Kong largely depends upon the ultimate political end of the NSL. Beyond the immediate goal of ending violence, nipping the pro-independence movement in the bud, and stopping foreign political meddling in Hong Kong, to what degree does the CPG intend to reorient Hong Kong and to bring it into the Chinese orbit? Clearly, China continues to insist on the One Country Two Systems doctrine (OCTS), although to be enforced in a “correct way” that privileges its one country element. China, however, does not intend to turn it into just another Chinese city. In one of his speeches in 2017, President Xi Jinping highlighted Hong Kong's “distinctive strengths”, including its pluralist and cosmopolitan society and its status as a major international financial centre.⁵ China clearly stopped far short from imposing its own National Security Law (2015) upon Hong Kong, nor did it transplant its own national security practice in its entirety to Hong Kong. In enacting the NSL, China sent a clear signal that, while the excess in 2019 should not happen again, Hong Kong will remain a distinct Special Administrative Region (SAR) in the foreseeable

2. For the aims of the NSL, see Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security, and also Art 1 of the NSL.

3. Chen in this volume.

4. For high policing, see Jean-Paul Brodeur, *The Policing Web* (Oxford: Oxford University Press, 2010), pp 223–254, and “High Policing and Low Policing: Remarks about the Policing of Political Activities” (1983) *Social Problems* 30, 507 and 514. For a useful survey of literature, see Gary T. Marx, “High Policing”, *Encyclopedia of Criminology and Criminal Justice*, available at <https://web.mit.edu/gtmarx/www/highpolicing.html>.

5. “Xi Jinping Attended the HKSAR's Welcome Dinner and Delivered an Important Speech” (習近平出席香港特別行政區政府歡迎晚宴並發表重要講話), *Xinhua*, 30 June 2017, available at http://www.xinhuanet.com/politics/2017-07/01/c_1121244549.htm.

future. There is a long spectrum between the unrest in 2019 and the Chinese regime of national security: where would Hong Kong find itself in the post-NSL era?

This chapter explores three connected issues: 1) the political circumstances for the creation of the national security policing in Hong Kong; 2) the major features of the high policing that the NSL has created in Hong Kong, which are demonstrated by means of an analysis of the NSL and the immediate impact that the NSL may have on the rule of law and rights and freedoms in Hong Kong; and 3) a possible new equilibrium between the national security policing and Hong Kong's liberal rule of law under the OCTS doctrine.

I. The Prehistory of the NSL

The establishment of a network of national security apparatus, with a CPG-controlled enforcement mechanism, came as a shock to most, if not all, Hong Kong watchers. The CPG's demand for a national security law in Hong Kong and the latter's reluctance to deliver it had a long and tortured history which has been well documented.⁶ But all along, the debates on Article 23 had focused exclusively on offences—that is whether Hong Kong should legislate new offences to satisfy the Article 23 requirement—with the unchallenged presumption that the new law, if ever passed, would be enforced in Hong Kong and by Hong Kong police. In the 2003 controversy,⁷ how the offences were to be defined and how much power the Hong Kong police should have in enforcing the law were the only major concerns. Before the enactment of the NSL in 2020, it had been taken for granted that criminal law power lay exclusively within Hong Kong's autonomy and that Article 23 offences were criminal law matters pure and simple. It was settled that the operative words in Article 23 were “on its own”, which indicated that national security legislation and enforcement were exclusively in Hong Kong's control: the National People's Congress (NPC) had delegated criminal law power, in its entirety, to the SAR, and it was unimaginable that the CPG could have any direct involvement in defining the offences and enforcing the law. While the CPG had urged Hong Kong to enact the Article 23 law whenever opportunities arose, it agreed that it was for the SAR to make the call.

That foundational position of the CPG started to shift after the Occupy Central Movement (OCM) in 2014—the mass civil disobedience demanding “genuine” universal suffrage according to the prevailing international human rights standard. The aftermath of the OCM witnessed the sudden emergence of secessionist forces, the abandonment of peaceful advocacy, and the rise of extremist confrontations

6. Fu Hualing, Carole J. Petersen, and Simon N. M. Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong: Hong Kong University Press, 2005); Cora Chan and Fiona de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Oxford: Hart Publishing, 2020).

7. Fu, Petersen, and Young, n 6 above.

and violence. These new and serious challenges shifted the ground of the Article 23 debate. The Mong Kok riot, also dubbed the Fishball Revolution, in February 2016, was the first major mass unrest in Hong Kong since 1968.⁸ One month later, in an unprecedented move, an obscure Andy Chan created the Hong Kong National Party, announcing the goal to build an independent and free republic of Hong Kong.⁹ These two landmark events foreshadowed what was forthcoming in Hong Kong's large-scale street violence in 2019.

Over the years, the warnings given to Hong Kong not to encroach on China's security interest had become more and more frequent, coming from higher-ranking officials in more forceful and stern terms. As early as March 2013, in his capacity as a member of the Politburo Standing Committee, Yu Zhengsheng met with Hong Kong and Macau members of the Chinese People's Political Consultative Conference and gave a 20-minute speech, covering matters such as the contradictions between Hong Kong and the CPG, and the election of the Chief Executive (CE) by universal suffrage in 2017. Yu condemned protesters raising the "lion-dragon" flag of the colonial era as committing acts of subversion. He vowed that Hong Kong would not become a bridgehead for overthrowing China's socialist system and that protesters would not be allowed "to make irresponsible remarks" regarding the Mainland. Yu criticised the pro-Beijing camp's ambivalence and called for patriotic voices to turn up the volume, hinting that if Hong Kong were to be governed by people opposing the Central Government, this would be bad for Hong Kong and China. In short, "the consequences would be unimaginable".¹⁰

The Director of the Liaison Office, Zhang Xiaoming, made a speech on the Chinese New Year of 2015,¹¹ which represented Zhang's first public remark on the

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8. Stuart Lau, Jennifer Ngo, Chris Lau, Ernest Kao, and Nikki Sun, "Mong Kok Riot: How Hong Kong's First Night in the Year of the Monkey Descended into Mayhem", *South China Morning Post*, 10 February 2016, available at <https://www.scmp.com/news/hong-kong/article/1911341/mong-kok-riot-how-hong-kongs-first-night-year-monkey-descended-mayhem>; Rachel Blundy and Laura Ma, "Fishball Revolution: Hong Kong's Social Media Users React to Violent Mong Kok Hawker Protest", *South China Morning Post*, 9 February 2016, available at <https://www.scmp.com/news/hong-kong/law-crime/article/1910894/fishballrevolution-hong-kongs-social-media-users-react>.
 9. "Declaration of Establishment by the Hong Kong National Party" (香港民族黨宣布建黨), 28 March 2016, available at <https://www.facebook.com/hknationalparty/posts/478117092387250>; for a legal analysis of the government ban of the Party, see Carole Petersen, "Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights" (2018) 48 *Hong Kong Law Journal* 789.
 10. "Yu Zheng Sheng Indicates That Universal Suffrage Could Be Used for Subversion and the Chief Executive Must Love China and Love Hong Kong" (俞正聲指香港有人搞顛覆，普選特首須愛國愛港), *Radio France International*, 7 March 2013, available at <https://www.rfi.fr>; see also "Hong Kong Media Questioning Yu Zhengsheng's Accusation of Hongkongers' Subversion" (港媒質疑俞正聲有港人搞顛覆指責), *BBC News Chinese*, 7 March 2013, available at https://www.bbc.com/zhongwen/simp/china/2013/03/130306_hk_pressreview_npc.
 11. "The Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016" (全國人民代表大會常務委員會關於香港特別行政區行政長官普選問題和

OCM. Zhang noted that a high degree of autonomy under OCTS does not mean that Hong Kong was not subject to the jurisdiction of the CPG and that the arrangement of universal suffrage, as a major issue of the political regime, was the preserve of Beijing. Moreover, he said that this issue should not become an excuse for the propagation of “Hong Kong independence” and called for strengthening national security awareness.¹² Later, in relation to the discussion of “Hong Kong independence” in high schools, the Liaison Office’s legal chief, Wang Zhenmin, made an emotional appeal to the seven million people of Hong Kong not to allow “the poisoning of our children”, reiterating two principles: first, not to allow “Hong Kong independence” forces to enter the government, courts or legislature, and secondly, not to allow them to gain an inch in schools.¹³

One year after the OCM, China enacted its own National Security Law, which includes Hong Kong and Macau in its national security consideration. Article 40 of the law provides that “Hong Kong and Macau SARs shall fulfil the responsibility of safeguarding national security” (Article 40(3)), and Article 11 stipulates that “safeguarding national sovereignty, unity, and territorial integrity is the common duty of all Chinese people, including compatriots of Hong Kong, Macau, and Taiwan” (Article 11(2)). While this law is not applicable in Hong Kong, Hong Kong appeared for the first time on China’s national security horizon.

In the wake of the oath-taking controversy in 2016, the result of which was that elected Legislative Council (LegCo) members were not allowed to take office due to their inappropriate protests that betrayed independence leanings, the National People’s Congress Standing Committee (NPCSC) gave an interpretation of Article 104 of the Basic Law, which effectively disqualified these legislators.¹⁴ Li Fei, Chairman of the NPCSC’s Basic Law Committee, explained that the legislators had publicly insulted the Chinese nation and that the foul language, deeds, and ugly performance of the “Hong Kong independence” elements had aroused the ire of the people and were denounced by all Chinese at home and abroad. Li said that the “Hong Kong independence” movement amounted to separatism and, as such, gravely breached the People’s Republic of China (PRC) Constitution, Hong Kong’s

2016年立法會產生辦法的決定), 31 August 2014, commonly known as the 31 August Decision (八三一決定), available at <http://www.2017.gov.hk/filemanager/template/en/doc/20140831b.pdf>.

12. Zhang Xiaoming, “Speech at the Spring Reception of 2015 Held by the CPG’s Liaison Office in Hong Kong” (在中央政府駐港聯絡辦2015年新春酒會上的致辭), Liaison Office of the Central People’s Government in the Hong Kong SAR, 4 February 2015, available at http://www.locpg.hk/jstdt/2015-02/04/c_127458640.htm.
13. Wang Zhenmin, “Advocates of Hong Kong Independence Are Not Allowed to Enter the Judiciary, Legislature, Administration, and Schools” (中聯辦王振民：主張港獨者不可進入司法、立法、行政機關不可進中小學), *Standnews*, 16 August 2016.
14. Shirley Zhao, “Oath-Taking Antics: The Acts That Got Six Hong Kong Lawmakers Disqualified”, *South China Morning Post*, 14 July 2017, available at <https://www.scmp.com/news/hong-kong/law-crime/article/2102731/oath-taking-antics-acts-got-six-hong-kong-lawmakers>; see Zhu Han and Albert Chen, “The Oath-Taking Cases and the NPCSC Interpretation of 2016: Interface of Common Law and Chinese Law” (2019) 49(1) *Hong Kong Law Journal* 381.

Basic Law, and relevant local laws, harming national sovereignty, security, and interests, and the prosperity of Hong Kong.¹⁵ Shortly afterwards, Zhang Xiaoming proposed explicitly “three bottom lines”, namely, threatening national sovereignty and security, challenging the authority of the Central Government and the Basic Law, and using Hong Kong to infiltrate and subvert the Mainland.¹⁶ These three bottom lines were subsequently adopted almost verbatim by Xi Jinping in his speech on the twentieth anniversary of Hong Kong’s handover, which formed a direct and serious warning from the highest authority.¹⁷

Zhang’s replacement, Wang Zhimin, endorsed the “three bottom lines” on the first National Security Education Day in April 2018 when he said that the activities of “Hong Kong independence” extremist elements had violated the security of national sovereignty and exceeded the boundaries of academic freedom and the freedom of speech, calling upon the mass Hong Kong people to support the mission of national rejuvenation and the China Dream, and to show zero tolerance towards the independence movement.¹⁸ These words were soon translated into action in July when the Hong Kong Police Force issued a notice under the *Societies Ordinance* to the convener of the *Hong Kong National Party*, Andrew Chan, stating that the party was banned on grounds of undermining national security.¹⁹ The determination of the CPG to jealously guard the three bottom lines was reflected again in August when the *Foreign Correspondents Club* (FCC) hosted a lunchtime talk, providing a platform to Andrew Chan in spite of opposition from the CPG, the Hong Kong Special Administrative Region (HKSAR) government, and former Chief Executive C. Y. Leung. Vice-chair of the FCC Victor Mallet’s work visa was revoked on his return from a trip to Thailand.²⁰

The CPG continued to issue stern warnings to Hong Kong in the midst of the anti-extradition protests.²¹ In August 2019, at a symposium jointly hosted by

15. “NPCSC Unanimously Passes Interpretation of the Basic Law, Li Fei Meets Journalists” (全國人大常委會全票通過釋法，李飛見記者)，8 November 2016, available at http://www.locpg.hk/jsdt/2016-11/08/c_129355715.htm.

16. “Director of the Liaison Office Zhang Xiaoming Says One Country Two Systems Must Observe Three Bottom Lines” (港中聯辦主任張曉明：“一國兩制”須堅守三條底線)，*United Morning News* (聯合早報)，3 January 2017, available at <http://www.uzaobao.com/bolg/20170103/33027.html>.

17. “Xi’s Speech at Meeting Marking HK’s 20th Return Anniversary, Inaugural Ceremony of 5th-Term HKSAR Gov’t”，1 July 2017, available at <http://www.fmccprc.gov.hk/eng/Topics/pth/t1646265.htm>.

18. Wang Zhimin, “Adhere to OCTS’s Original Aspiration, and Safeguard Its Regime Safety” (王志民，“堅守‘一國兩制’初心，維護‘一國兩制’制度安全”)，Liaison Office of the Central People’s Government in the Hong Kong SAR, 15 April 2018, available at http://www.locpg.hk/jsdt/2018-04/15/c_129850781.htm.

19. Tony Cheung and Jeffie Lam, “Ban on Hong Kong National Party over ‘armed revolution’ call met with both cheers and fear”，*South China Morning Post*, 24 September 2018, available at <https://www.scmp.com/news/hong-kong/politics/article/2165439/hong-kong-issues-unprecedented-ban-separatist-party>.

20. Jeffie Lam, Sum Lok-kei, and Kimmy Chung, “Journalist Victor Mallet Allowed Back into Hong Kong—for Seven Days Only”，*South China Morning Post*, 8 October 2018, available at <https://www.scmp.com/news/hong-kong/politics/article/2167429/financial-times-journalist-victor-mallet-re-enters-hong-kong>.

21. For the anti-extradition protests in Hong Kong, see Heike Holbig, “Be Water, My Friend: Hong Kong’s

The New National Security Law

Exploring a Meaningful Comparison with Singapore

Michael Hor

This chapter compares the National Security Law in Hong Kong and the Internal Security Act in Singapore from the angle of their capacity to cause persons or entities dealing with or observing these jurisdictions to fear unacceptable abridgement of human rights and liberties. A technical analysis of the letter of the law reveals a potentially far more authoritarian executive detention without trial in Singapore, compared with even the modified criminal law embodied in the National Security Law of Hong Kong. Yet, the contrasting rights trajectory of Singapore and Hong Kong, and the more ominous current political context of the National Security Law, more than makes up for the initial favourable comparison. The chapter ends with a brief thought, gleaned from the Singapore experience, of how those who still care about human rights in Hong Kong should respond.

I. Moving to Singapore?

The coming into force of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL)¹ at 11 pm on 30 June 2020 sent shock waves which reverberated across the globe to wherever the future of Hong Kong's legal system mattered, and to whomever it mattered. Talk had already been brewing of looking for a substitute to Hong Kong since the 2019–2020 anti-extradition unrest which stunned Hong Kong, China, and its

1. GN (E) 72 of 2020, available at <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>. This English version is published only “for information”, the official text being in Chinese. This does have the potential of adding to the apprehensions of those who are not literate in Chinese or conversant with the way Chinese statutes are interpreted.

observers.² The NSL, meant by the Chinese Central Government to be the solution to the discontent, or at least a part of it, was regarded by many others as possibly the proverbial last straw on the little dragon's back.³ On not a few occasions has Singapore—that other dragon—been raised as the front-running alternative for those in Hong Kong who are disconcerted by these series of events.⁴ Too much goes into the stew of “Is Singapore any better?” than can be tackled comprehensively in this chapter. The ambition is more modest—it is to compare and evaluate the essential features of the legal regimes which have been put in place in Hong Kong, and in Singapore, to deal with activities which the authorities deem to be prejudicial to national security, and then to explore how the differences might be expected to affect the degree of confidence one might repose in either Hong Kong or Singapore.

II. NSL vs ISA: The Infant and the Septuagenarian

The Singapore counterpart of Hong Kong's NSL is the Internal Security Act,⁵ known and feared more by its acronym, the ISA. While the NSL is barely a year old, The ISA, in some form or other, has been in force in Singapore since shortly after the Second World War.⁶ Meant to deal with what has come to be known as the “Communist Insurgency”, it has proved so valuable to successive generations of governments that there is absolutely no indication, more than seven decades on, that its key provisions will be changed significantly or done away with anytime soon.⁷ Neither the passage of time nor the recession and disappearance of the original reason for the ISA has dampened its vitality—this is a sprightly septuagenarian. So, the first potential

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2. E.g., Alexander Gorchak, “Will Singapore or Taiwan Replace Hong Kong as Asia's Financial Hub?,” *Deutsch Welles*, 26 November 2020, available at <https://www.dw.com/en/g%C3%B6rlach-global-will-singapore-or-taiwan-replace-hong-kong-as-asias-financial-hub/a-55740513>; Nir Sadeh, “Looking beyond Hong Kong: What Are the Alternatives?,” *International Banker*, 3 September 2020, available at <https://internationalbanker.com/brokerage/looking-beyond-hong-kong-what-are-the-alternatives/>.
 3. “Will companies flee Hong Kong? New law could imperil business in one of the world's biggest financial hubs: Loss of autonomy could be ‘last straw’ for some companies,” 28 May 2020, Associated Press, available at <https://www.marketwatch.com/story/will-companies-flee-hong-kong-new-law-could-imperil-business-in-one-of-worlds-biggest-financial-hubs-2020-05-28>.
 4. E.g., Laura He, “Hong Kong Has Only One Real Rival for Businesses Thinking about Leaving,” *CNN*, 10 June 2020, available at <https://edition.cnn.com/2020/06/10/investing/singapore-hong-kong-american-companies-intl-hnk/index.html>.
 5. Internal Security Act (Cap 143), available at <https://sso.agc.gov.sg/Act/ISA1960>.
 6. Terence Foo, “Internal Security Act,” *Singapore Infopedia*, available at https://eresources.nlb.gov.sg/infopedia/articles/SIP_2014-10-13_105937.html; and Michael Hor, “Law and Terror: Singapore Stories and Malaysian Dilemmas,” in Victor V. Ramraj, Michael Hor, and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), Ch 13.
 7. The official attitude is very much that which is expressed by Minister of Home Affairs, K. Shanmugam, reported in Neo Chai Chin, “Substantial Support for ISA in Singapore, Says Shanmugam,” *Today*, 14 November 2016, available at <https://www.todayonline.com/singapore/substantial-support-isa-spore-says-shanmugam>.

source of difference—their vintage—turns out not to be of much consequence. We turn from history to substance.

III. Criminal Law vs Preventive Detention

In a nutshell, the primary difference between the NSL and the ISA is that, while the NSL hews to the traditional strategy of using the criminal law, the ISA sets out an alternative extra criminal regime for detention and restriction of freedoms.⁸ Indeed, the NSL contains a ringing declaration of respect for and protection of human rights and compliance with the Basic Law, and with the International Covenants of Civil and Political Rights and of Economic, Social and Cultural Rights.⁹ The ISA, on the other hand, needs a special constitutional dispensation from a host of fundamental rights and liberties in order to legalise the power of detention and restriction without trial. Article 149 of the Singapore Constitution¹⁰ expressly exempts the ISA from compliance with due process, retrospectivity and double jeopardy, equality, and freedoms of movement, speech, assembly, and association. As if to bring the point home, judicial review of ISA decisions is to be only on grounds of procedural irregularity, whatever the constitutional vesting of judicial power in the judiciary may mean in other contexts.¹¹

Yet the ISA does set up a body apart from the enforcers of the act—the Advisory Board—to receive representations from those who have been subjected to the ISA's powers of detention without trial, and to make recommendations as to the need to detain them any further.¹² It is clear that this Advisory Board procedure is meant to be a verisimilitude of a criminal trial. Yet, a brief look at the details will show that it does not have certain key features of a criminal trial, or at least one which purports to follow due process. Although the Board is believed to be, in practice, chaired by

8. Essentially s 8(1)(a) of the ISA, n 5 above, confers the power of detention, and s 8(1)(b) allows the Minister to impose a list of restrictions of movement, speech, and association which do not amount to detention.

9. NSL, Art 4.

10. Constitution of the Republic of Singapore, available at <https://sso.agc.gov.sg/Act/CONS1963>.

11. Article 149(3), read with s 8B of ISA. These provisions were put in place in response to a Court of Appeal decision which declared, on the basis of the constitutionally enshrined separation of powers and vesting of judicial power in the judiciary, that ISA decisions were reviewable on the usual common law grounds. A brief account is found in Michael Hor, "Constitutionalism and Subversion", in Li-ann Thio and Kevin Y. L. Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (London: Routledge, 2009), Ch 18 at p 277. Although there have been potentially pro-review developments in recent ouster clause jurisprudence (Swati Jhaveri, "Administrative Law in Singapore: Recent Developments and Looking Ahead", *Law Gazette*, May 2019, available at <https://lawgazette.com.sg/feature/administrative-law-in-singapore-recent-developments-and-looking-ahead/>), the ISA ouster clause appears to be not just regular legislation but constitutionally entrenched.

12. ISA, ss 12–16. For what it's worth, the Advisory Board procedure is constitutionally mandated by Art 151.

a sitting Supreme Court Judge,¹³ that is not a legal requirement. Its members are chosen by the government and do not enjoy judicial security of tenure. The proceedings are in secret, as is the advice of the Board.¹⁴ Critically, the recommendation of the Board does not bind the government unless the president agrees with it.¹⁵ It is clear that, were it not for the express exemptions, the Advisory Board process will not survive, for example, a constitutional due process challenge. In short, while under the NSL the locus of ultimate authority remains with the judiciary,¹⁶ under the ISA it rests with the executive government, essentially unsupervised by judicial review.¹⁷

The NSL, on the other hand, appears to adopt the essential features of the regular criminal process and to be in conformity with constitutional due process.¹⁸ Yet, there are aspects of NSL criminal law and procedure which are out of the ordinary.¹⁹ While it may not be particularly fruitful to inquire if these provisions of the NSL are or are not constitutional,²⁰ and the Court of Final Appeal has indeed ruled that it does not have the jurisdiction to embark on such an exercise,²¹ it is interesting to compare the NSL with Singapore's ISA regime.

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13. Although there is no consistent publicity regarding the membership of the Advisory Board, its composition is revealed from time to time. For example, see "Government Statement on the Recommendation of the Advisory Board on the Jemaah Islamiyah Case", 30 May 2002, available at <https://www.nas.gov.sg/archivesonline/data/pdfdoc/20020530-MHA.pdf>, p 1.
 14. ISA, s 16, gives the Minister and members of the advisory board and related public servants the discretion to refuse to disclose anything which they consider to be against the national interest to do so. They can, of course, do so voluntarily, as has happened on occasion in the past, see n 13.
 15. ISA, Art 13A and Constitution, Art 151(4).
 16. Subject, of course, to the NPCSC's power to interpret the NSL, and therefore the substantive and procedural criminal law therein, with finality. Although Art 65 of the NSL vests the power of interpretation only in the NPCSC, a political body, it does seem that practically, the courts of Hong Kong must perform some sort of initial interpretation when they hear NSL prosecutions. The degree to which the Hong Kong courts are "in charge" will depend on how hands-on the NPCSC is about its power of interpretation of the NSL, especially when it is unbidden by the courts of Hong Kong.
 17. The executive government in Singapore is, of course, broadly accountable for its use of the ISA through the electoral process, as the government has been at pains to point out: see n 7 above. But elections are obviously a very blunt measure of public approval of specific policies.
 18. As if to anticipate criticism on this score, the NSL expressly pays homage to human rights (Art 4) and the rule of law (Art 5). Specific rights like the presumption of innocence and double jeopardy are specifically mentioned, as is the principle against retrospectivity (Art 39).
 19. While Hong Kong law is presumptively applicable to NSL prosecutions (Art 5), where there is inconsistency, the NSL prevails (Art 62). In effect, the NSL has constitutional status at the level of the Basic Law, rather like Art 149 of the Singapore Constitution which legitimises the ISA.
 20. Technically, if I am right in that the NSL is at the same constitutional level as the Basic Law, where there is an inconsistency, the NSL will operate as a constitutional exception to the Basic Law. Notably, the NSL itself declares that none of its provisions are contrary to the Basic Law (Art 4). As the ultimate authority of interpretation of the Basic Law and the NSL is the NPCSC, and the source of the NSL is the NPCSC, it must be taken that the NPCSC, in settling on the words for the NSL, has impliedly issued a ruling that none of its provisions are contrary to the Basic Law.
 21. *HKSAR v Lai Chee Ying* [2021] 1 HKC 670, paras 30–37, available at <https://www.hklii.hk/en/cases/hkcfa/2021/3>. Compare the Court of Final Appeal's earlier and more general position that it does indeed have the power and indeed the obligation to review "legislative acts of the National People's

First, the NSL does create a handful of offences which have caused observers to be apprehensive about how they may impact adversely on the freedoms enjoyed in Hong Kong.²² Events since the coming into force of the NSL have given cause for concern about the breadth and clarity of the offence of “secession”.²³ While it is clear that activity in the nature of “separating Hong Kong” from the People’s Republic of China, with a view to undermining national unification, will fall foul of this provision, it is unclear if incitement thereof might include, for example, expressing a view that Hong Kong will be better off with greater and not less autonomy, or that the Central Government ought to “leave Hong Kong alone”. If so, there is a danger that meaningful discussion about the precise relationship between the Central Government and the Hong Kong government might be “chilled”.²⁴ Another offence which has become prominent is the offence of subversion in the form of seriously interfering in, disrupting, or undermining the functions of the Hong Kong

Congress or its Standing Committee”: *Ng Ka Ling v The Director of Immigration* [1999] HKCFA 72, paras 62–72, available at <https://www.hklii.hk/en/cases/hkcfa/1999/72>. Practically, in the current political climate and especially in the context of the NSL, it is difficult to imagine that, even if the Court of Final Appeal were to declare a provision in the NSL to be contrary to the Basic Law, the NPCSC would not immediately overrule that decision via its ultimate authority to interpret the Basic Law. In calmer times, it is conceivable that the NPCSC would consider such a ruling by the Court of Final Appeal more favourably and perhaps think of amending the legislation to be compliant to the Court of Final Appeal’s interpretation of the Basic Law. For an accessible discussion of the relationship between the Court and the NPCSC, see Cora Chan, “The Legal Limits on Beijing’s Powers to Interpret Hong Kong’s Basic Law”, *Hong Kong Free Press*, 5 November 2016, available at <https://hongkongfp.com/2016/11/05/legal-limits-beijings-powers-interpret-hong-kongs-basic-law/>.

22. For example, “Hong Kong Security Law: What Is It and Is It Worrying?”, *BBC*, 30 June 2020, available at <https://www.bbc.com/news/world-asia-china-52765838>.
23. Arts 20–21. Secession prosecutions have been launched against Adam Ma, former food delivery worker, for chanting slogans promoting Hong Kong independence at 10 locations: Brian Wong, “Hong Kong’s First National Security Law Prosecution for Pro-Independence Chanting Launches at Kowloon Court”, 24 November 2020, *Yahoo!News*, available at https://sg.news.yahoo.com/hong-kong-first-national-security-105448319.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS88&guce_referrer_sig=AQAAAMd8esi6FOBxasr0J4JQu07O2UxMb3i_lyXsh-wSqPrb8-bhQ2SzVyKmcapVbV6quazA_a3VZ-nvPb9MeGo2Fi3P--djCF8Ypt1c5ZD6OEWBqgVC-DAPj_TKyV1eLWmleTwQKwNE5fXjomt-l7O7XUi2rMCg7MMozJtaEGztHJ_0g. Tong Ying Kit, 23-years-old, for riding a motorcycle into a gathering of policemen, bearing a flag with the slogan “Liberate Hong Kong, Revolution of Our Times”: *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382; [2020] 6 HKC 110, para 6; Tony Chung, “localism” convenor for being responsible for social media content calling for a Hong Kong nation: see Kelly Ho, “Hong Kong Court Denies Bail to Activist Tony Chung, Charged with Secession under Security Law”, *Hong Kong Free Press*, 29 October 2020, available at <https://hongkongfp.com/2020/10/29/breaking-hong-kong-court-denies-bail-to-activist-tony-chung-charged-with-secession-under-security-law/>. While not enough is known about the prosecution of Tony Chung, Adam Ma’s alleged misdeeds hardly seem to be the stuff that would rattle national security, and Tong Ying Kit should, if the allegations are proven, be held accountable for injuring the police officers, and not so much that for the national security implications of the banner he was holding.
24. Briefly, the phenomenon of “chilling” lawful speech occurs when a potential speaker wants to say something but is unsure if it will subsequently be considered to be an offence, and so refrains from saying it, although that speech might turn out to be entirely lawful. It is the penumbral damage done to free expression which attends broad or vaguely defined offences. The terminology was developed in the United States Supreme Court in its constitutional jurisprudence.

government.²⁵ A band of opposition-related people has been charged thereunder for activities which in some other jurisdictions would have been the perfectly legitimate exercise of “primaries” preceding an election—on the basis that it was all meant to seriously undermine the workings of the Hong Kong government.²⁶ If the prosecutions succeed, difficult questions will arise with respect to what exactly a political “opposition” can or cannot do, and even if there can be such a thing as lawful opposition anymore. A third offence which has been in the limelight is that of “collusion with external elements” in the form of requesting a foreign entity to impose sanctions or engaging in “hostile activities” against Hong Kong or China.²⁷ Capable of being interpreted to prohibit a host of lobbying activity human rights proponents routinely do, this could well spell the end of human rights advocacy with respect to Hong Kong or China.

The ISA counterpart of an offence is the precondition for the exercise of executive powers of detention and restriction—the satisfaction of the executive government that it is necessary to prevent anyone acting “in any manner prejudicial to the security of Singapore” or to “the maintenance of public order or essential services.”²⁸ It is difficult to imagine a broader, or less specific, formulation of the triggering conduct than this. The government of Singapore has always sought to defend the breadth of this power by saying that it has been very judicious and circumspect in the actual exercise of that power.²⁹ We shall have occasion to look at that aspect of the ISA, but there is no denying that, on the face of it, and in terms of legal formulation, there is far greater uncertainty in the interpretation of “prejudicial to

25. NSL, Art 22(3).

26. Eric Cheung, Jadyng Sham, Helen Regan, Ally Barnard, and James Griffith, “47 Hong Kong Opposition Figures Charged under National Security Law”, *CNN*, 1 March 2021, available at <https://edition.cnn.com/2021/02/28/asia/hong-kong-lawmakers-charged-nsl-intl-hnk/index.html>.

27. Article 29(4). Prominent government critic, Jimmy Lai, has been famously charged for this offence: Theodora Yu, Shibani Mahtani, and Eva Dou, “Hong Kong Media Publisher Jimmy Lai Is Charged under National Security Law”, *Washington Post*, 12 December 2020, available at https://www.washingtonpost.com/world/asia_pacific/hong-kong-national-security-law-jimmy-lai/2020/12/11/58e7cc5c-3b69-11eb-aad9-8959227280c4_story.html. Activity amounting to the offence of collusion with foreign powers figured prominently in the removal of opposition Legislative Council (Legco) members which prompted the resignation of all opposition LegCo members. No question of criminal prosecutions arose as the activities concerned predated the NSL. There can be no doubt that similar activity now would potentially be prosecuted under the NSL. See the contrasting “spin” in Stephen McDonnell, “Hong Kong Pro-Democracy Lawmakers Resign after China Ruling”, *BBC*, 12 November 2020, available at <https://www.bbc.com/news/world-asia-china-54899171>; see also “The Four Disqualified Legislators Broke Rules on Foreign Collusion”, *CGTN*, 12 November 2020, available at <https://news.cgtn.com/news/2020-11-12/The-four-HK-legislators-disqualified-for-foreign-collusion-VIUjBSU7wA/index.html>.

28. ISA, s 8.

29. Minister of Home Affairs was reported as saying that “our population is highly educated and very aware of what’s happening and know that any abuse of the Act would immediately lead to consequences by the population”, see Neo, n 7 above.

the security of Singapore” than in the task of working out what the NSL offences potentially cover.³⁰

Second, the NSL creates a specialised or parallel track for the processing of national security offences, from a new Department of National Security of the Police Force,³¹ to a National Security Division in the Department of Justice to handle prosecutions,³² to specially designated judges at all levels to hear national security prosecutions.³³ While specialised enforcement agencies are certainly not unknown,³⁴ and specialised divisions in the Justice Department are uncontroversial,³⁵ specially appointed national security judges raise concerns about judicial independence.³⁶ This is especially so when it is the chief executive who holds the power of appointment, which is to be renewed, or not, on a yearly basis.³⁷ The fear and danger, of course, is that judges who are perceived by the chief executive not to be prosecution enough will not be appointed, or reappointed, with the result that the national security bench will become unfairly tilted towards the prosecution.³⁸ This innovation clearly raises questions about whether the chosen judges, as a whole, are seen to be independent enough to adjudicate national security prosecutions.

30. I explored this question in Hor, n 11 above.

31. NSL, Art 16.

32. *Ibid.*, Art 18.

33. *Ibid.*, Art 44.

34. Notably, the Independent Commission Against Corruption set up by the eponymous Independent Commission Against Corruption Ordinance (Cap 204).

35. There are six other divisions, apart from the National Security Prosecutions Division; see the organisation chart of the Department of Justice on its website, available at <https://www.doj.gov.hk/en/about/organisation.html>.

36. In the regular, non-national security context, while there is executive input in the appointment of superior judges (Art 88 of the Basic Law), the designation of judges to particular cases is, presumably, at the discretion of the head of that particular level of the Judiciary: see Hong Kong Bar Association, “Statement of the Hong Kong Bar Association on the Proposed Designation of Judges by the Chief Executive in National Security Cases”, 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%20Security%20Cases%20-%2028E%29.pdf>. The usually circumspect former Chief Justice Andrew Li was sufficiently moved to express his concern: see “National security law: chief executive picking judges to hear cases undermines judiciary, warns former Hong Kong chief justice”, 23 June 2020, South China Morning Post, available at <https://www.scmp.com/news/hong-kong/politics/article/3090156/national-security-law-chief-executive-picking-judges-hear>.

37. NSL, Art 44.

38. This is certainly not to say any appointed judge would be likely to act in bad faith. They are, after all, appointed as judges in general in the regular fashion. The reality is, however, that judges are human and they too will have particular “political” inclinations. Overall balance is achieved, in the normal course, by a bench with a spectrum of different inclinations. The power of the chief executive to select judges from this pool raises fears that only judges of particular inclinations will be chosen. Even if this does not happen in practice, it is enough that justice would not have been seen to be done.

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Index

- academic freedom
 - concept, 256–259
 - prior to National Security Law (NSL), 259–267
 - post-NSL, 267–277
- active personality, 238–240
- anti-extradition
 - background, 24–25, 126, 192–193
 - comparison of Extradition Bill with extradition measures under NSL, 134, 150
 - contradiction between socialist *Grundnom* and a self-contained legal system, 70
 - NSL offences, 27, 33, 37
 - institutional vacuum, 63
 - One Country, Two Systems, 5
 - Apple Daily*, 11, 46–47, 174, 178
 - crackdown, 336
- Article 23, Basic Law
 - constitutional duty, 23, 25, 52 n 10
 - duty under the NSL, 43 n 58
 - legislative history, 21–23
 - tension with Article 45, 2–5
- Article 45, Basic Law
 - tension with Article 23, 2–5
- bail
 - human rights, 370 n 65
 - lengthy pre-trial detention, 129, 131 n 45, 132 n 47, 138
 - presumption of/against bail, 135–139, 330 n 106, 365
- Singapore, 365
 - under NSL, 8, 44 n 62, 58, 62, 100–101, 207, 269–270
- Basic Law
 - asymmetric structure, 111–112
 - declaration to uphold, 110
 - interpretation of, 4, 6 n 15, 14, 15 n 35, 56, 75, 77, 89, 101, 102 n 34, 103, 157, 110, 121–122, 125, 130, 134, 145, 156–160, 191, 192 n 15, 331, 361 n 20, 372 n 80
 - legislative history, 21–22
 - National People's Congress Standing Committee (NPCSC) Interpretation, 23, 102 n 34, 103–104
 - NSL is the second, 5
 - NSL's compatibility with, 6–7, 13–14, 100, 151–159, 269, 361 n 20
 - relationship with NSL, 27, 45
 - two incompatible systems in, 2–3
- Benny Tai
 - Occupy Central, 75, 265–266
- Bill of Rights
 - NSL
 - construction of NSL, 135
 - subject to the NSL, 143
 - Type 2 dilemma, 280
 - university, 277
- Canada
 - constitutionality of citizenship oath, 324 n 84

- extradition treaty with Hong Kong, 312 n 28
- immigration detention, 314
- imports from Xinjiang-linked products, 282 n 18
- National Defence Act, 53
- police powers, 317
- pre-empt national security matters, 316
- right of secession, 310
 - Quebec, 325
- Security Intelligence Service, 168 n 9
- separatism, 307
- terrorism, 321
- Carrie Lam
 - COVID-19, 273
 - election as Chief Executive, 23
 - enact Art 23 Legislations, 24–25
 - executive-led, 326
- Catalonia, 310, 319–320
- Chief Executive
 - appoint judges, 147
 - appoint National Security judges, 100, 106, 130–133, 223, 328–329, 364, 370
 - contempt, 353
 - election, 4, 18, 107, 122, 158
 - emergency power, 126
 - judicial independence, 101
 - mainland, 273
 - national security certificates, 59, 105, 130
 - National Security Committee, 202
 - National Security Department, 168, 203
 - resignation, 23, 266
 - Schmitt, Carl, 91
 - state secrets, 224
 - universal suffrage, 107, 190, 265
 - university councils, 261
- Chief Executive in Council
 - emergency powers, 126
 - plenary power to legislate, 127
 - unlimited legislative powers, 145
- China. *See* People's Republic of China
- Chinese University of Hong Kong, 259, 265, 268
- civil servants, 88, 228
- collusion with foreign forces
 - academic freedom, 274–275
 - comparison with Chinese laws, 37–42, 59
 - extraterritorial application, 242
 - meaning, 59, 139 n 75, 165, 302
 - removal of LegCo members, 363 n 27
- co-location arrangement
 - Annex III, Basic Law, 54
 - Basic Law, 56
 - demarcation between two systems, 122
 - judicial deference, 158
 - mainland laws, 57
 - NPCSC decision, 145
- Constitution of the People's Republic of China
 - applied in Hong Kong, 54, 84
 - gap between Hong Kong legal system, 49–50
 - legality of National Security Law, 50–51, 55
 - legislative sovereignty, 83
 - legitimacy, 76
 - mother law, 51
 - Special Administrative Region, 26
 - ultimate supremacy, 93
- Court of Final Appeal
 - reference to mainland laws, 59
 - resignation of Non-Permanent Judges, 329
- Criminal Code of the People's Republic of China, 26
- democracy
 - backsliding, 3
 - capitalism, 166, 344
 - concern over, 79
 - development. *See* pursuit
 - governance, 2, 276
 - liberal, 16, 111, 305–334, 357
 - pursuit, 5, 122, 139, 357
 - reform, 6, 18, 125, 264, 266
 - secretive, 212
 - universal suffrage, 107
- democratic
 - accountability, 73
 - centralism, 83

- constitution, 199
 - control, 198
 - deficit, 123
 - dictatorship, 82
 - media, 353
 - movement, 136, 261
 - pedigree, 76
- democratisation
 - by peaceful means, 31–32
 - implement Art 23 of Basic Law, 23
 - incremental, 2
- educational autonomy, 255, 258, 260
- executive detention without trial
 - human rights, 109 n 61, 321 n 63
 - mainland, 68 n 90, 321 n 63, 357
 - Singapore, 16, 344, 360, 363, 365, 367, 374
 - United Kingdom, 314
- extradition under Art 55 NSL
 - comparison with Extradition Bill, 134, 150
 - comparison with US, 316
- extraterritorial jurisdiction
 - international legality, 232–236
 - under the NSL, 67, 240
- fair trial, 179, 214
- Freedom of Expression and Access to Information 1997, 211
- freedom of speech, 321–324
 - anti-government speech, 246, 251, 319
 - hate speech, 251
 - Human Rights Due Diligence (HRDD), 300
 - search warrant, 178
 - secession, 141
- Global Principles of National Security, 211
 - grundnorm*
 - joint enterprise of Chinese Constitution and the Basic Law, 6
 - NSL, 50
- hate speech, 251, 312
- Hong Kong and Macau Affairs Office, 72, 112
 - attack judges, 127
- Hong Kong Autonomy Act (HKA Act), 96 n 9, 285
- Hong Kong General Chamber of Commerce, 296
- Hong Kong University. *See* University of Hong Kong, the
- Implementation Rules, Art 43, NSL
 - breach, 173
- Implementation Rules for Art 43 NSL, 62
 - contravenes local ordinance, 62
 - criticisms, 62
 - in order for powers under Art 43 to be applied, 172
 - prescribe police powers, 172
- Johannesburg Principles on National Security, 211
- journalist
 - Apple Daily*, 336–337
 - potential soft spots under NSL, 207
 - press freedom, 224–226, 357
 - search warrant, 176
 - Singapore, 344–348
- judicial deference, 143–147
- judicial discretion, 129–132
- judicial independence, 91
 - ideology, 120–128
 - media pressure, 146
 - NSL judges, 100–101, 318, 328–329, 370
 - public confidence, 119
 - rule of law, 119, 318
 - special national security courts, 328–330
 - Supreme People's Court, 112
- judiciary
 - independent. *See* judicial independence
 - interpretation, 103–104
 - autonomy, 166
 - deferential, 118
 - manoeuvre, 135
 - NSL, 80
 - right-consistent outcome, 161

- Supreme Court of Canada, 321
 - jurisdictions
 - Annex III Basic Law, 157
 - National Security Committee, 62
 - National Security Office, 60
 - power to review NPCSC's legislative act, 103–106
 - Singapore, 360–361
- Legal Professional Privilege (LPP), 178
- Legislative Council (LegCo)
 - Anti-Extradition Movement
 - damage, 33
 - coalition government, 108
 - composition, 122
 - election
 - NPCSC interpretation 2016, 4, 89, 125, 191
 - universal suffrage, 23, 151
 - NPCSC decision 2020, 55–56, 110, 144, 325
 - primary election, 41, 139, 320
 - provisional, 102, 262
- Liberate Hong Kong; Revolution of Our Times, 140–141, 193, 206, 362 n 23
- localism
 - movement, 5, 193
 - oath-taking, 23
 - organization, 99, 111
- national identity, 264, 273
- national laws, 116, 153, 159 n 73
 - application, 10, 53, 57–59, 153–154
 - co-location arrangement, 54
 - jurisdiction of Hong Kong courts, 106, 117
 - NSL, 15
- national security
 - freedom of information, 211
 - human rights, 99, 136, 145, 208
 - legitimate aim, 176
 - managing, 280
 - British East India Company, 280
 - Huawei, 280
 - offences, 138, 143
 - offences endangering, 182
 - PRC, 154
 - protect, 21, 25
 - civil society, 199
 - constitutional duty, 25, 27
 - CPG's duty, 194
 - democratic, 199
 - interception communication, 45
 - police-centred, 198
 - preventive, 198–201
 - proactive, 200
 - rule of law, 182
 - two systems, 194
- National Security Advisor
 - connecting point, 64, 114
 - non-transparent, 326
- National Security Committee
 - executive-led government, 65
 - government approach, 315–316
 - Hong Kong's election, 66
 - National Security Advisor, 326
 - Special Prosecution Division, 65
- National Security Department
 - designation of terrorist organisation, 35
 - Special Branch under the British Colonial government, 115 n 79
 - unified intelligence, security, and police power, 65
- National Security Education, 23, 192, 200, 267–268, 313, 326
- National Security (Legislative Provisions) Bill 2003
 - impossible to introduce, 25
 - Central People Government's beginning to rebuild, 193
 - in your face, 333
 - separatism, 320
 - reintroduce, 23
 - secession, 318–319
 - state secrets, 213
 - vague, 311
- National Security Office, 133
 - court's jurisdiction, 327
 - deepen central authorities' reach into Hong Kong bureaucracy, 64, 66

- executive privilege, 109
- Hong Kong's election, 66
- interventionism, 85
- jurisdiction over NSL case, 133–134
- law which it is subject to, 59–60, 66–67, 327
- legal status, 59–60
- national security policing, 202
- NPC (National People's Congress), 25–26
 - Basic Law
 - Article 18, 22
 - Article 23 enactment, 189
 - authorisation of power, 51
 - Chinese Constitution
 - supervise, 7
 - electoral reform, 47
 - governance, 83
 - legislative acts, 155–160, 206
 - supreme organ, 25, 51, 82
- NPC decision
 - on universal suffrage (2014), 18, 190 n 11
 - to safeguard National Security in HKSAR (2020), 24, 52, 54, 208
 - constitutional basis for NSL, 59
 - one-off power, 54
- NPCSC decision, 115, 157–159
 - on Chinese version prevailing English version (1990), 70
 - on qualification of LegCo members (2020), 56, 110, 325
 - to approve co-location arrangement (2017), 54, 205
- NSL
 - “two-step approach” enactment, 20, 24–25
 - background, 24–25
 - constitutionality, 100
 - interpretation, 14, 60–63, 104, 151, 160–165, 302, 361 n 20
 - power to make, 25
 - product of mainland legal system, 26
 - protection of human rights, 99, 255, 269, 277, 291
- Occupy Central Movement, 23
- academic freedom, 265
- call to legislate NSL shifted to CPG, 189, 193, 261 n 29
- gives rise to a group of political leaders adopting more aggressive means, 70, 125, 189
- One Country, Two Systems, 2–3, 192 n 18
 - asymmetric structure, 112
 - enforcement difficulties, 70–71, 202
 - interpretations, 55
 - local autonomy, 111, 113, 115, 191, 201
 - NSL, 96, 115–116, 194, 209, 318, 333
 - resilience of, 12–15
 - shifting to “One Country”, 47
 - subversion under, 31
 - White Paper, 75
- open justice, 132
- Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD), 280
- conflict with NSL, 280
- passive personality principle, 234
- People's Republic of China
 - accountability, 70
 - arbitrary arrest, 129
 - authority, 109
 - civil society, 199
 - democratic constitution, 199
 - diplomatic procedures, 303
 - established basic policies, 55
 - mainland, 65
 - political monitoring, 200
 - protestors, 126
 - public law, 72
 - serious challenge to, 142
 - show identification, 146
 - state system, 76
 - state will, 77
- police power
 - Bills of Rights, 161
 - Chinese law, 175
 - constitutional review, 176
 - control, 193
 - expanded by NSL, 61, 188

- Implementation Rules under Art 43, 173
- in check, 175–176
- increased, 317
- of foreign countries regarding national security cases, 317
- United Security Council, 170
- unlawful exercise of, 179
- political agenda, 142, 322
- polity
 - application of central legislations, 83
 - beyond constitution text, 7, 73
 - national, 77, 89
 - overrule lesser norms, 73
 - Party leadership, 86
 - political sovereign decisions, 84
- pro-democracy camp
 - all or nothing, 375
 - legislators, 320, 330
 - mobilise social movements, 108, 111
 - movements, 297, 309, 311
 - National Security Department, 200
 - primary election, 41, 89
 - suppress, 302
 - tension with pro-establishment, 108
- protected information, 212, 214
- protection of privacy, 176
- protective principle, 234
 - extraterritorial jurisdiction, 238
 - jurisdiction, 240–246
- protest
 - abuse of power, 32
 - institutionalised, 108
 - Legislative Council, 33
 - policing, 203 n 61
 - political order, 117
 - violent, 8, 19, 24
- public hearing, 222–224
- Radio Television Hong Kong (RTHK), 298, 336, 354, 355 n 57, 372 n 77
- rights to information 2013, 211
- riots
 - 1967, 24
 - 2019, 332
- NSL, Art 29
- Robert Chung, 262
- Royal Canadian Mounted Police, 316 n 42, 317 n 46
- rule of law
 - administration of justice, 126
 - challenges, 57, 209
 - culture, 309–310, 318, 331
 - high policing, 188, 200–201
 - independent judiciary, 119–120
 - international confidence, 91
 - legitimacy, 351
 - monarchical Executive, 86
 - nullum crimen* principle, 247
 - secession, 320
 - socialist, 73
 - substance of the law, 311
 - Xi Jinping, 81
- secession
 - academic freedom, 271–273
 - comparison between the Hong Kong National Security Law and Chinese Criminal Code, 28–30
 - comparison with NSL subversion, 32
 - foreign laws, 310, 319–320
 - freedom of speech, 141, 362
 - incitement, 207, 270 n 73
 - Liberate Hong Kong; Revolution of Our Times, 141–142
 - movement, 5, 19, 189
 - peaceful advocacy of secessionist idea, 136
 - politically centred, 318–320
- sedition
 - colonial-era, 307 n 10, 321
 - designated judges, 44 n 63
 - National Security Department, 206
 - politically centred, 195
 - Singapore, 346
- self-defence, right, 6, 237
- separation of powers
 - design of Basic Law, 126
 - dominance on executive government, 124

- judicial independence, 120–121
 - oath, 88
 - rule of law culture, 309
 - school texts, 326
 - self-limitations, 91
 - Staatsrechtslehre*, 86
 - state unity, 86
 - structure between Central People's Government and Hong Kong, 112
- Singapore Press Holding, 345
- Sino-British Joint Declaration
 - applying Chinese laws, 21
 - autonomy, 75, 84
 - basic policies, 156
 - China's obligations, 285
 - dualism, 79
 - legal validity, 75
 - NSL, 74
 - political decisions, 78
 - practical significance, 74
 - subordinate, 78
 - transfer of sovereignty, 75
 - United Kingdom, 74–75
- sovereignty
 - exclusive, 73, 92
 - Hegel, 77
 - Hobbes, 197
 - legislative, 82–83
 - NSL
 - endanger, 40, 144 n 87
 - parliamentary, 102, 104
 - PRC's sovereignty on HKSAR
 - autonomy, 49, 84
 - CFA, 155–156
 - plenary jurisdictional authority, 75
 - protect, 52
 - resumption, 122, 155
 - Schmitt, Carl, 88
 - territory, 222–223, 239, 253
 - transfer, 75
- Spain
 - secession, 310, 318, 320 n 57
 - separatism, 307
- Special National Security Courts, 328
- Specialised National Security Crimes
 - Prosecution Division of the Department of Justice, 64
- state secrets, 37–42, 59, 105, 211–230
 - designation, 216
 - actual harm, 217
 - classification authority, 217–219
 - results-oriented, 216
 - trial in closed doors, 132, 150, 283, 315
 - tried without jury, 129–130, 315
- State Secrets Law of PRC
 - designation
 - decentralised in practice, 218
 - National Administration for the Protection of State Secrets, 217
 - source-based, 217
 - scope of state secrets, 215–216
- subversion, 165, 190
 - academic freedom, 273–274
 - comparison with Chinese law, 30–34
 - evidence, 143
 - Hong Kong as a subversive base, 2–3, 193
 - inciting subversion, 68
 - politically centred, 198, 318–319
 - primary election, 41 n 53, 65 n 78, 139, 311, 320
- Supreme People's Court
 - judicial interpretations
 - state secrets, 215
- terrorism
 - advocating terrorism, 46, 142
 - business companies, 303
 - comparative, 308 n 11, 313 n 31, 315, 317 n 45, 318 n 49, 319, 321–322, 366 n 47
 - comparison with Chinese law, 35–37, 42–43
 - extraterritorial, 242
 - Hong Kong pre-NSL existing law, 42–43
 - human rights, 62 n 61, 109 n 61
 - international scope, 233 n 12, 234 n 14
 - Northern Ireland, 199, 315
 - prevention, 199, 206 n 67

- prosecution of HKU Students' Union members, 46
- protective jurisdiction, 240–241
- Singapore, 17, 366–367
- United Kingdom, 239 n 51, 314
- United States 911 Attack, 258
- terrorist organisation
 - Commonwealth, 311
 - definition, 37
 - designation by the National Security Department, 35
- treason
 - Chinese Criminal Code, 28, 40
 - Hobbes, Thomas, 197
 - Turkey, 258
 - United Kingdom, 244
- United Nations Security Council
 - expanded security laws and practice, 308
 - illiberal elements, 309
 - police powers, 170
 - prevention of terrorist acts, 42, 313–314
 - without sufficient attention to human rights, accountability, 314
- universal suffrage, 23, 84, 107–108, 151, 153, 158 n 65–66, 189, 190–191, 265
- University of Hong Kong, the
 - advocating terrorism, 46
 - Benny Tai, 265–266
 - politically sensitive topics, 99
 - Robert Chung, 262–263
- White Paper on One Country, Two Systems grundnorm*, 6
 - judges, 124
 - loyalty, 124, 324
 - plenary jurisdictional authority, 75
- Xi Jinping
 - concept of national security, 26
 - concept of rule of law, 79–80
 - independent judiciary, 124
 - strengths of Hong Kong, 188