



CENTER FOR ASIAN LAW
GEORGETOWN LAW

HUMAN RIGHTS IN HONG KONG: THE IMPACT OF THE NATIONAL SECURITY LAW

Submission to the United Nations Universal Periodic Review of

China

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I. INTRODUCTION

1. This stakeholder report by the Georgetown Center for Asian Law (GCAL) documents key elements of the dramatic decline in human rights and rule of law in Hong Kong since the implementation of the National Security Law (NSL) on July 1, 2020. All of the developments described in this report took place after China's 3rd UPR review in November 2018.

2. The impact of the NSL on human rights and rule of law in Hong Kong is difficult to overstate: the law has been used to arrest and imprison human rights activists, opposition politicians, journalists, academics, and everyday citizens speaking out in favor of democracy and human rights. Hong Kong's once-vibrant civil society is now a shadow of its former self: dozens of civil society organizations have been closed, top media outlets have been shuttered, and several political parties have folded in the face of enormous political pressure and the threat of arrest under the NSL.

3. This report does not attempt to document the wide-ranging impact of the NSL on all aspects of civic life in Hong Kong. Instead, we focus on three key elements of the NSL: the criminal provisions of the NSL and the sedition provision of the Crimes Ordinance; the NSL's procedural flaws, which directly contribute to pro-government outcomes; and the law's extraterritorial reach, as well as recent moves to use the law to target family members of rights activists outside Hong Kong.

4. GCAL is one of the leading U.S.-based centers for research and advocacy on legal developments across Asia, with a particular focus on China and Hong Kong. Working in collaboration with lawyers and activists from Hong Kong, GCAL has published a series of cutting-edge reports and shorter analyses on the NSL, and has maintained a real-time database of national security arrests and prosecutions.ⁱ Our work is regularly used by governments, U.N. bodies, non-governmental organizations, and media outlets around the world, and our analyses have been cited by many as offering a rigorous portrait of the NSL's impact on human rights and rule of law in Hong Kong.

5. This submission can be published on the OHCHR website for the UPR and for public information purposes.

II. THE NSL CRIMINAL PROVISIONS AND THE SEDITION PROVISION OF THE CRIMES ORDINANCE: CRIMINALIZING BASIC RIGHTS

6. The NSL has four core criminal provisions: it covers secession, subversion, terrorism, and collusion with foreign entities, as well as incitement to engage in these actions, or other forms of support for them.ⁱⁱ All four criminal provisions are vague and over-broad, and can be easily used to cover peaceful political activity.

7. Take, for example, secession, which is covered by Article 20 of the NSL. The provision prohibits (*inter alia*) “separating” Hong Kong from the People’s Republic of China, or “altering by unlawful means the legal status” of Hong Kong, or “surrendering” the Special Administrative Region (SAR) to a foreign country. The use or threat of force is not a required element of the crime. The Hong Kong government has repeatedly used this provision to criminally prosecute those who peacefully call for Hong Kong independence, or – more often – those who use slogans from the 2019 pro-democracy movement in public.

8. The other tool that the government has used to crack down on basic rights is the sedition provision of the Crimes Ordinance. The Hong Kong government did not bring sedition charges against anyone for many years after the 1997 Handover, but kept the provision on the book.ⁱⁱⁱ After the NSL went into effect, the Hong Kong government started using the sedition provision for the first time in decades. In virtually all cases, the government has arrested individuals for sedition over acts that, in rights-respecting jurisdictions, would be considered peaceful, legally protected speech or advocacy.

9. Examples of the use of the law to crack down on free expression abound: over the past three years, the government has pursued sedition cases against the authors of a children’s book that included content related to the 2019 protest movement;^{iv} individuals who allegedly clapped their hands in response to comments made in court by pro-democracy activists;^v and individuals who allegedly posted comments critical of government COVID policies on social media platforms.^{vi} All of those who have been prosecuted for sedition have either been convicted or pleaded guilty.

10. RECOMMENDATIONS

- The central government in Beijing should immediately repeal the National Security Law. In the meantime, the Hong Kong government should refrain from any new prosecutions under the NSL’s criminal provision, and should halt those prosecutions that are currently ongoing.
- Consistent with the recommendations from the U.N. Human Rights Committee’s Concluding Observations in 2022, the Hong Kong government should immediately call for the repeal of the sedition provision of the Crimes Ordinance. Until that time, the government should suspend all prosecutions currently in process, and should refrain from any new arrests or prosecutions under the law.

III. PROCEDURAL RIGHTS UNDER THE NSL: ENDING THE RIGHT TO A FAIR TRIAL?

11. Procedural rights – and the effective denial thereof – have been at the core of the Hong Kong government’s rollout of the NSL over the past three years.^{vii} The NSL is very much designed to curtail basic procedural rights of the accused, in order to ensure that defendants

are effectively denied their right to a fair trial, and – more importantly, from the government’s perspective – to ensure that a guilty verdict is reached in all NSL cases.

12. The NSL’s procedural provisions cover virtually every important aspect of the criminal justice process. Generally speaking, these provisions allow procedural rights to be exercised only with official approval: under the NSL, the Hong Kong government has the authority to approve, limit, or outright deny key procedural rights. Take the right to a jury trial, for example: under Article 46 of the NSL, the Secretary for Justice can deny a defendant his or her right to a jury trial, and instead direct that the case be heard by a three-judge panel. As of this writing, no national security case has been held before a jury.

13. In this section, we focus on three issues: judicial independence, the presumption against bail, and limits on the right to counsel.

Judicial Independence

14. Judicial independence has been significantly undermined by the NSL. Under Article 44, the Chief Executive (CE) is empowered to designate judges to hear all national security cases. Judges are designated for a period of one year, and their appointment can be renewed. Although the CE must choose from the existing pool of sitting judges, the enhanced role of the executive in the judicial selection process is deeply concerning.

15. The Article 44 judicial designation scheme allows the CE to designate judges for NSL cases on an ideological basis, and screen out judges who have been more active in applying human rights norms to specific cases. The relatively short designation period also allows the government to remove designated judges whose rulings it doesn’t like.

16. The government’s unblemished record of success in NSL cases over three years suggests that its efforts to pressure the judiciary are working. Since the NSL went into effect on July 1, 2020, the courts have ruled in favor of the government on virtually all key procedural matters, and on substantive verdicts as well: the government has won 100% of the cases that have proceeded to a verdict. Sentencing has also generally followed recommendations put forward by prosecutors.

17. RECOMMENDATIONS

- Following the recommendation of the U.N. Human Rights Committee in 2022, the Chinese authorities should repeal the NSL. Pending the repeal of the NSL, the Hong Kong government should take steps to limit the applicability of the Article 44 designation scheme beyond specific NSL crimes.
- The government should publish a full list of Article 44 designated judges, and should inform the public when judges are removed from the list. The greater transparency will

allow the public to better understand how the NSL works, and allow experts to make recommendations on improving implementation.

Presumption Against Bail

18. Prior to the implementation of the NSL, Hong Kong criminal law generally followed international law in granting bail to criminal defendants in most cases, unless a judge held that there was a sufficient risk that the defendant would reoffend or abscond. The presumption in favor of bail has been removed for NSL cases: under Article 42(2) of the NSL, “(n)o bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.”

19. Article 42(2)’s prove-a-negative standard is an impossibly high bar that defendants cannot overcome. Once bail is denied, pre-trial detention can become a form of indefinite detention without trial. Troublingly, the presumption against bail has also begun to be applied to some cases involving non-NSL crimes, including sedition.

20. Other U.N. bodies have registered concern over the NSL’s presumption against bail: in May 2023, the Working Group on Arbitrary Detention (WGAD) issued an opinion on the case of rights lawyer Chow Hang-tung, currently on trial for inciting subversion under the NSL.^{viii} In that opinion, the WGAD concluded that Chow’s two years in pre-trial detention lacked legal basis and therefore constituted arbitrary detention under international law. The WGAD’s conclusions in Chow’s case would apply to most other NSL defendants in pre-trial detention as well.

21. RECOMMENDATIONS

- The Hong Kong legal system, including both the courts and the prosecutor’s office, should return to the general principle that bail should be granted in criminal cases, barring exceptional circumstances. In particular, the government should refrain from requesting bail in most national security cases.
- Consistent with the recommendations of the U.N. Working Group on Arbitrary Detention, the government should revise A42(2) of the NSL, and consider a full-fledged repeal. The government should release Chow Hang-tung immediately, and review the ongoing pre-trial detention of other national security defendants who have been denied pre-trial release.

Right to Counsel

22. Crucially, the NSL does not place limits on the right of the accused to counsel of his or her choice. And yet, since the NSL went into effect, reforms to the government’s legal aid scheme have limited access to counsel in some NSL cases.^{ix} Under the new scheme, the Legal Aid Department assigns lawyers to legal aid applicants in criminal cases, barring “exceptional

circumstances.” The new approach undermines the right to counsel of one’s own choosing for indigent defendants, effectively barring any criminal defendants who rely on legal aid from choosing their own defense lawyer.

23. GCAL fears that the real goal of the legal aid reforms is to assert greater control over key NSL cases. If national security defendants can be forced to work with counsel chosen by the government, then they may be nudged by that counsel to seek a plea deal. Or, lacking trust in their own legal counsel, they may abandon their own defense, and plead guilty.

24. More recently, the Hong Kong government moved to limit defendants’ access to foreign counsel in national security trials. In December 2022, China’s central government issued an interpretation of the NSL, stating that foreign lawyers could only participate in national security cases with the express approval of the Hong Kong government.^x Following Beijing’s announcement, Hong Kong’s Legislative Council codified the restrictions in local law.^{xi} As with other elements of due process, the right to counsel is becoming less a right, and more a conditional privilege, one that is subject to government oversight and control.

25. RECOMMENDATIONS

- The Hong Kong government should reconsider the recent reforms to the Legal Aid scheme. The government should review the new policy by working with key stakeholders on reforms that will return the right to counsel of one’s own choosing to the core of Legal Aid’s approach to its work.
- Consistent with the recommendations of the U.N. Human Rights Committee in 2022 (para. 37) and the suggestions of the Special Rapporteur of Independence of Judges and Lawyers in her letter of April 2023, the authorities should improve access to legal aid by establishing an independent legal aid authority to “guarantee the rights to timely and competent legal aid and to counsel of choice, including in the case of persons charged under the National Security Law.”
- Following the recommendations of the Special Rapporteur of Independence of Judges and Lawyers in her allegation letter of April 2023, the authorities should review the amended Legal Practitioners Ordinance, to fulfil the international standards that “tribunals should be independent of the executive and legislative branches of government and enjoy independence in deciding legal matters.”

IV. IMPLEMENTATION: EXTRATERRITORIALITY AND INTIMIDATION OF FAMILY MEMBERS

26. A full accounting of the implementation of the NSL is beyond the scope of this briefing paper. In this brief section, we focus instead on two elements of NSL implementation that have recently emerged as key concerns: the overseas application of the NSL, and threats and reprisals against family members and colleagues of those accused of NSL crimes.

27. The NSL has an extremely broad extraterritorial scope: it applies both to acts committed by individuals and organizations in Hong Kong, and to acts committed by others – including Hong Kong citizens and others who have no ties to Hong Kong – anywhere else in the world. When combined with the vague and overbroad language of the NSL’s core criminal provisions, the law’s extraterritorial application suggests an effort on the part of the Hong Kong government to influence – or even intimidate – individuals outside Hong Kong.

28. Just as this report was being finalized for submission, the Hong Kong government took action to pressure overseas activists. In July 2023, Steve Li, the chief of the Hong Kong Police Force National Security Department (NSD), announced arrest warrants against eight prominent exile and overseas activists. Those named included former legislators, NGO activists, trade unionists, and lawyers. Li also announced that the Hong Kong government was offering bounties of up to HKD\$1million (USD\$127,748) for information that would lead to their arrest and prosecution.

29. Given that all eight reside in countries that are unlikely to turn peaceful activists – who are in some cases citizens of the countries in which they now reside – over to the Hong Kong government, it is unclear whether the move will lead to any additional arrests or prosecutions. It seems likely that the government’s main goal is less legal than political: it seeks to isolate top activists from the broader Hong Kong overseas community, by discouraging contact with prominent overseas activists. Given the broad scope of the NSL, the Hong Kong government could prosecute any overseas Hong Konger who has been in contact with any of the eight named individuals. This risk may nudge some overseas Hong Kongers to limit their own freedom of association, assembly, and expression.

30. Also in July 2023, Hong Kong national security officials briefly detained the parents and brother of prominent exile activist Nathan Law. The three were questioned over their contacts with Law, as part of an official investigation into whether they had “assisted” Law in acts that violated the NSL. Law was later forced to publicly declare that he has no financial or professional ties to his own family, and that any suggestion that his family members were assisting with his work was “pure nonsense.”

31. RECOMMENDATION

- The Hong Kong government should end the practice of issuing warrants for overseas activists merely for engaging in peaceful acts of free expression, association, and assembly, and should end its efforts to intimidate the members of the Hong Kong diaspora.

END OF SUBMISSION

ⁱ For our most recent analysis of NSL arrest data, see Lai and Kellogg, “Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong,” *ChinaFile*, April 5, 2022; our raw data on all NSL arrests and prosecutions can also be found on the *ChinaFile* website, <https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law> .

ⁱⁱ For a detailed analysis of the NSL’s criminal provisions, see Lydia Wong and Thomas E. Kellogg, *Hong Kong’s National Security Law: A Human Rights and Rule of Law Analysis*, Georgetown Center for Asian Law report, February 2021, <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf> .

ⁱⁱⁱ Eric Lai, “Hong Kong’s Sedition Law is Back,” *The Diplomat*, September 3, 2022, <https://thediplomat.com/2021/09/hong-kongs-sedition-law-is-back/>

^{iv} AFP, “Five arrested in Hong Kong for sedition over children’s book about sheep,” *The Guardian*, July 22, 2021, <https://www.theguardian.com/world/2021/jul/22/five-arrested-in-hong-kong-for-sedition-over-childrens-book-about-sheep> .

^v Amnesty International, “Hong Kong: ‘Sedition’ arrests after clapping in court a new low for human rights,” April 6, 2022, <https://www.amnesty.org/en/latest/news/2022/04/hong-kong-sedition-arrests-after-clapping-in-court-a-new-low-for-human-rights/> .

^{vi} Selina Cheng, “Covid-19: Hong Kong national security police arrest 2 for sedition over anti-vaxx posts,” *Hong Kong Free Press*, February 25, 2022, <https://hongkongfp.com/2022/02/25/covid-19-hong-kong-national-security-police-arrest-2-for-sedition-over-anti-vaxx-posts/> .

^{vii} For a detailed analysis of procedural rights in NSL cases, see Wong, Kellogg, and Lai, *Hong Kong’s National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper*, Georgetown Center for Asian Law briefing paper, June 2021, <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf> .

^{viii} <https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session96/A-HRC-WGAD-2023-30-AEV.pdf>

^{ix} “Government-assigned Lawyers: Many Defendants Unable to Nominate Own Lawyers; Legal Aid Department Said 20 Solicitors and 19 Barristers are Assigned in National Security Cases,” *Stand News*, November 29, 2021 (in Chinese), <https://lihkg.com/thread/2790775/page/1> .

^x <https://hongkongfp.com/2022/12/30/beijing-gives-hong-kong-leader-power-to-bar-foreign-lawyers-after-loss-at-top-court/>

^{xi} Eric Lai, “Hong Kong Is Trying to Salvage Its Image. Who Is It Fooling?” *The Diplomat*, March 27, 2023, <https://thediplomat.com/2023/03/hong-kong-is-trying-to-salvage-its-image-who-is-it-fooling/> .