



CENTER FOR ASIAN LAW
GEORGETOWN LAW

Submission to the UN Human Rights Committee
on the Review of China's (Hong Kong SAR)
Fourth Periodic Report under the ICCPR

135th Session (27 Jun – 29 Jul 2022)

Center for Asian Law
Georgetown University Law Center
May 2022

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I. Introduction

Georgetown Center for Asian Law (GCAL) is a leading academic center for teaching and research on Asian law in the United States, with a particular focus on legal developments in China and Hong Kong. We are based at Georgetown University Law Center in Washington, D.C.

GCAL is submitting this briefing in light of the United Nations Human Rights Committee's review of China's (Hong Kong SAR) fourth periodic report on the implementation of the International Covenant on Civil and Political Rights (ICCPR). The submission provides GCAL's observations and recommendations in light of the application of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law, NSL) since July 2020, in relation to Articles 2, 7, 9, 10, 14, 15, 19, 21, 22, 25, and 26 of the ICCPR.

This submission provides additional information on political and legal developments in Hong Kong, in particular on six areas related to the implementation of the NSL. Because we focus on the impact of the NSL, most of the developments described in this submission took place after the List of Issues was released in August 2020.

The core issues covered in this submission are due process rights and the right to a fair trial in NSL cases. Specifically, this briefing covers judicial independence; presumption against bail; the right to trial by jury; the right to legal counsel and self-defense; police investigatory powers; and the crime of sedition as applied to peaceful protesters and peaceful political speech. Our focus is on documenting the ways in which national security trials have begun to deviate from standard practice for criminal trials in Hong Kong, in ways that put basic rights at risk.

This submission is adapted from GCAL's publications since 2021, including research reports, briefing papers, academic articles, and public-facing articles. Specific recommendations are provided at the end of each section. We also provide our recent article on our comprehensive database of arrestees and defendants under the NSL as a separate document for your reference. As far as we are aware, that article provides the most in-depth analysis of NSL arrests to date.

II. Judicial Independence (Articles 2, 14, 15, and 26 of the ICCPR; Questions 3 and 7 of the List of Issues)

Judicial independence has been undermined by the National Security Law (NSL). Under Article 44 of the NSL, the Chief Executive (CE) is empowered to designate judges to hear national security cases. Judges are designated for a period of one year. Although the CE must choose from the existing pool of sitting judges, and may not select particular judges for specific NSL cases, nonetheless, the enhanced role of the executive in the judicial selection process is deeply concerning. The Hong Kong government has refused to make the list of designated judges public, claiming that doing so could create security risks.¹

The Article 44 judicial designation scheme allows the CE to screen out judges who have been more active in applying human rights norms to specific cases, or who have previously sought to check the government's use of its extensive police and national security powers. The relatively short designation period also allows the government to remove designated judges whose NSL rulings it doesn't like.

To be fair, no concrete evidence has emerged to suggest that judges have been directly instructed by Hong Kong government officials to deliver specific rulings in specific cases. That said, the judiciary is under extreme pressure to deliver government-friendly verdicts in all NSL cases. Both Hong Kong government officials and senior Chinese central government leaders have threatened unspecified judicial reforms that would further erode judicial independence. GCAL believes that these proposed reforms are meant as a warning to Hong Kong judges: toe the government's line in all NSL cases, or face potentially far-reaching institutional changes that will permanently weaken the court system.

At a constitutional affairs conference in November 2020, for example, Zhang Xiaoming, deputy director of the central government's Hong Kong and Macau Affairs Office, called for judicial reforms that would enshrine "patriotism" as a key governing principle.² Zhang also called for the courts to respect what he referred to as the central government's "comprehensive jurisdiction" over Hong Kong. Such reforms have not yet been enacted, but they remain on the table.

At the same time, pro-Beijing media outlets have regularly signaled the central government's views on specific cases in no uncertain terms. After the prosecution of 47 pro-democratic politicians in February 2021, for example, the Communist Party mouthpiece *People's Daily* referred to the arrestees as "anti-China troublemakers," and declared that their prosecution

¹ Alvin Lum, "The Judiciary publishes list of civil and criminal judges, whereas the CE office said it is not necessary to disclose the list of NSL judges," [Citizen News](#), December 23, 2020 (in Chinese).

² Tony Cheung and Lilian Cheng, "Beijing calls for judicial reform in Hong Kong, declaring patriotism is 'a legal requirement now,'" [South China Morning Post](#), November 17, 2020.

under the NSL was necessary to preserve peace and stability in Hong Kong.³ Media reports like these make clear to the courts that Beijing is following NSL cases quite closely, and expects judicial rulings in line with its own views.

Pro-Beijing media outlets have also not hesitated to express their displeasure over verdicts that they don't like, in an apparent effort to influence the appeals process. In December 2020, for example, the *People's Daily* called media mogul Jimmy Lai "extremely dangerous" and an "insurgent," after he was released on bail in an NSL case. The newspaper further urged the Hong Kong court to "make the right decision" on the government's bail appeal.⁴ Lai's bail was quickly revoked by a higher court, and he was immediately returned to prison.

Article 55 of the NSL also undercuts the independence of the judiciary: it allows the NSL-created Office for Safeguarding National Security (OSNS) to take over a case it deems sufficiently "complex," or involving foreign elements. Once the OSNS asserts control over a case, it works with the Supreme People's Court in Beijing to transfer the case to mainland China.⁵ Given the Communist Party's more or less complete control over the Chinese judicial system, the case would then be handled according to the Party's instructions. Though the Article 55 mechanism has yet to be used, it serves as a clear warning to the Hong Kong courts: if NSL cases aren't handled in accordance with the Party's preferences, it could take those cases out of the hands of the Hong Kong judiciary altogether.

The government's unblemished record of success in NSL cases over nearly two years suggests that its efforts to pressure the judiciary are working. Since the NSL went into effect on July 1, 2020, the courts have issued procedural rulings in roughly 113 cases, and have also issued four substantive verdicts.⁶ They have also accepted at least six guilty pleas negotiated between prosecutors and defendants. Thus far, the courts have ruled in favor of the government on virtually all key procedural matters, including denial of bail and denial of trial by jury, save for one bail ruling that was quickly reversed on appeal. The government has won all four cases in which verdicts have been issued, and has generally seen its recommendations for heavy sentences taken up by the courts.

Other recent moves by the government further threaten judicial independence, even outside of NSL cases. The government has interfered with the judicial appointments process: in August 2021, the Chief Executive declined to act on the Bar Association's recommendation of prominent barrister Neville Sarony to the Judicial Officers Recommendation Committee (JORC), the body responsible for nominating judges. The unprecedented move left the JORC without

³ "Standing together with Hong Kong troublemakers is to be the enemy of the Hong Kong People," *People's Daily*, March 4, 2021 (in Chinese).

⁴ "Hong Kong's top court puts media tycoon Jimmy Lai back in custody," *Reuters*, December 31, 2020.

⁵ 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.

⁶ Eric Yan-ho Lai and Thomas E. Kellogg, "Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong," *Chinofile*, April 5, 2022.

any representation from the legal community for several months, until the Bar Association relented and put forward a new candidate in March 2022.⁷

The judiciary itself has also taken steps that could undermine the independence of individual judges. In May 2022, the judiciary announced a new annual review board was being created within the court system, to evaluate judicial performance. Though the Judiciary pledged that reviews would be done in a “comprehensive, objective, systematic and integrated manner,” nonetheless concerns remained that the review board mechanism could be used to enforce pro-government norms in key national security cases, or in other cases related to the 2019 protests.⁸

Recommendations

- The Hong Kong government should take steps to limit the applicability of the Article 44 designation scheme beyond the specific crimes created by the NSL itself. According to press reports, the Hong Kong government plans to move forward with new security laws under Basic Law Article 23, and with media control laws, some of which it believes are related to Hong Kong’s domestic security.⁹ Such laws, if they are passed, should not be included in the ambit of Article 44. Other provisions of the NSL that limit basic due process rights – including the rights to bail and trial by jury – should also not be applied to other, non-NSL crimes or cases.
- The government should promote greater transparency in the day-to-day implementation of the NSL. In particular, 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 in practice, and allow experts to make recommendations on how to improve implementation.
- The government should publicly state that it will accept judicial verdicts in all national security cases, including those cases in which the courts rule against the government. In general, the Hong Kong government should both publicly state and publicly demonstrate its commitment to the rule of law. A public commitment to accepting legal outcomes that it does not agree with would be a positive step toward rehabilitating the government’s reputation, and might start to undo the sustained damage that has been done to the judiciary’s legitimacy in the eyes of the public.

⁷ Greg Torode, “Hong Kong leader rejects barrister nominee to sensitive judges panel, appoints another,” [Reuters](#), March 25, 2022.

⁸ Jane Cheung, “Judges and judicial officers to come under more checks,” [Hong Kong Standard](#), May 4, 2022.

⁹ Candice Chau, “Local security legislation Article 23 ‘a priority,’ says Hong Kong leadership hopeful John Lee,” [Hong Kong Free Press](#), April 22, 2022; Rhoda Kwan, “Hong Kong gov’t and lawmakers back ‘fake news’ law plan,” [Hong Kong Free Press](#), July 21, 2021.

- The Chief Executive should announce that he will generally accept all recommendations for Article 44 designated judges from the Chief Justice of the Court of Final Appeal. To the extent possible, the Chief Executive should refrain from consulting with other non-judicial actors on the judicial designation process.

III. Presumption Against Bail/Arbitrary Detention (Articles 7, 9, 10, 14, 15, and 25 of the ICCPR; Questions 17 and 20 of the List of Issues)

Prior to the implementation of the NSL, Hong Kong criminal law generally followed international law and comparative best practice 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.”

Given the broad scope and vague nature of national security crimes, Article 42(2)’s prove-a-negative standard is an impossibly high bar that most defendants cannot overcome. According to data collected by GCAL, 74.3 percent of defendants charged with national security crimes were denied bail.¹⁰ In the most politically high-profile cases, denial of bail by the courts is virtually guaranteed.

At times, the courts have cited defendants’ exercise of their basic human rights as grounds to deny bail.¹¹ In the case of *HKSAR v. Mo Man Ching Claudia* (HCCC 134/2021), for example, the court denied bail to former legislator Claudia Mo, after she was arrested over her conversations with foreign journalists on WhatsApp. In *HKSAR v. Tam Man Ho Jeremy* (HCCC 114/2021), the court denied bail to former legislator Jeremy Tam, citing email messages that he had received from staff at the U.S. Consulate in Hong Kong.

Once bail is denied, pre-trial detention can become a form of indefinite detention without trial. In many cases, pre-trial detention can last up to six months or more: according to data collected by GCAL, as of April 2022, seventy-six individuals had served six months or more in pre-trial detention as they awaited trial for national security crimes.¹² For the several dozen politicians and activists charged with subversion on February 28, 2021, pre-trial detention has already lasted for over a year. Their case was recently adjourned until June 2022.¹³

¹⁰ Eric Yan-ho Lai and Thomas E. Kellogg, “Arrest Data Show...,” [ChinaFile](#), April 5, 2022.

¹¹ Lydia Wong, Thomas E. Kellogg, and Eric Yan-ho Lai, [Hong Kong’s National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper](#), Center for Asian Law, Georgetown University, June 28, 2021.

¹² Lai and Kellogg, “Arrest Data Show...,” [ChinaFile](#), April 5, 2022.

¹³ Kelly Ho, “47 democrats’ subversion case adjourned to June,” [Hong Kong Free Press](#), April 28, 2022.

Article 42(2)'s presumption against bail has also begun to be applied to some cases involving non-NSL crimes. In *HKSAR v. Ng Hau Yi Sidney* (FAMC 31/2021), the court reaffirmed a lower court's ruling that Article 42(2)'s higher standard for granting bail could be applied to cases involving non-NSL national security crimes, including sedition. Given the steady growth of the government's use of the Crimes Ordinance's sedition provision over the past two years, this ruling has meant that a growing number of individuals not charged with NSL crimes are also being held in lengthy pre-trial detention, stretching on for several months.

Pre-trial detention is fast becoming yet another tool for the government to suppress human rights: the government now has the nearly unfettered authority to detain without trial almost any individual it chooses for months at a time, without any effective judicial oversight, as long as that person has been accused of a national security crime.

In a small number of cases in which bail was in fact granted, individuals had to agree to a broad list of restrictive conditions. In some cases, these restrictions amounted to a near complete surrender of their basic political rights, including their rights to free speech, free association, and free assembly. On January 13, 2022, for example, pro-democratic activist Owen Chow had his bail revoked after he made various peaceful political comments on social media; those comments constituted a violation of his bail conditions. Chow was among the 47 pro-democratic activists and politicians arrested for subversion on January 6, 2022.

The government's approach to bail in NSL cases would seem to contravene key UN Human Rights Committee decisions and General Comments. The HRC's General Comment on the right to a fair trial (No. 32), for example, makes clear that the deprivation of liberty of criminal defendants denied bail by the court must not last longer than necessary, and that individuals charged with crimes must be tried as expeditiously as possible.¹⁴ In its General Comment on liberty and security of persons (No. 35), the Committee states that arbitrary detention, even when lawfully applied, is unjust. Therefore pre-trial detention must be reasonable and necessary in all circumstances.¹⁵ If trials are delayed, the court should consider alternatives to pretrial detention.¹⁶

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 Hong Kong government should refrain from requesting bail in almost all national security cases, and should signal its

¹⁴ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 2007, paragraph 35; also in *Sextus v. Trinidad and Tobago*, Communication No. 818/1998, paragraph 7.2.

¹⁵ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), CCPR/C/GC/32, 2014, paragraph 12; also in *Kulov v. Kyrgyzstan*, Communication No. 1369/2005, paragraph 8.3.

¹⁶ *Ibid.*, paragraph 37; also in *Taright v. Algeria*, Communication No. 1085/2002, paragraph 8.3.

willingness to abide by judicial rulings approving pre-trial release for national security defendants.

- The government should avoid expanding NSL A42(2)'s higher standard for bail to other criminal laws. The government should also refrain from using it as a model for new national security laws that, according to media reports, may be passed in 2022. The government has signaled that it will move forward with so-called Article 23 national security legislation very soon, and may also pass new laws regulating media outlets.¹⁷ These new laws, if enacted, should use the normal standard for bail, and not adopt the NSL's higher bar.

IV. Jury Trial (Articles 14, 15, and 26 of the ICCPR; Questions 3 and 17 of the List of Issues)

Under Article 46 of the NSL, the Secretary for Justice has the power to deny a defendant his or her right to a jury trial. If the Secretary believes that such a move is necessary to guard state secrets, to prevent foreign interference, or to protect the safety of would-be jurors or their family members, then she may direct that the case be heard by a three-judge panel instead. Under existing Hong Kong law, the right to a jury trial is guaranteed for all cases at the High Court's Court of First Instance.

In fact, jury trials can be especially useful in national security cases, as they ensure that the prosecution musters sufficiently strong evidence to convince members of the community that the defendant is guilty of what are usually very serious criminal charges. A return of a guilty verdict by an impartial jury can enhance the credibility of the criminal justice process, and can help maintain public trust in the legal system as a whole. The fact that jury trials can be jettisoned in NSL cases could serve to further erode the court system's public legitimacy. The move to eliminate jury trials also raises questions about the willingness of the SAR government to abide by basic due process norms that are deeply ingrained in Hong Kong law.

Thus far, only a handful of national security cases have proceeded to trial. Of those, only one – Tong Ying-kit's trial for terrorism and inciting secession under the NSL – was held in the High Court, where defendants generally have the right to request a jury trial. (The other three completed cases were held at the District Court level, where trials are generally heard by a single judge.) As Tong's case was about to begin, the Secretary for Justice invoked Article 46 and declared that Tong would stand trial before a three-judge panel. Tong's lawyers appealed the decision, to no avail. On July 27, 2021, Tong was convicted on both counts, and he was later sentenced to 9 years in prison.¹⁸

¹⁷ Candice Chau, "Local security legislation Article 23 'a priority' ...," [Hong Kong Free Press](#), April 22, 2022.

¹⁸ For an in-depth analysis of the court's verdict in Tong's case, see Thomas E. Kellogg and Eric Yan-ho Lai, [The Tong Ying-kit Verdict: An International and Comparative Law Analysis](#), GCAL Briefing Paper, October 20, 2021.

It is highly likely that the case of the 47 politicians and activists charged with subversion will soon proceed to trial at the High Court level. GCAL fears that, once again, the Secretary for Justice will invoke her NSL Article 46 powers to deny the 47 defendants their right to a jury trial, even though there are no factors afoot that would make it difficult to allow the case to be heard by a jury. If current trends continue, it's possible that the Secretary for Justice will deny jury trials in all eligible national security cases, simply as a matter of course.

As this report was being prepared for final submission, *Apple Daily* publisher Jimmy Lai and six of his media company colleagues appeared before a magistrate, who transferred their case to the High Court.¹⁹ Lai has been charged with collusion with foreign forces under the NSL, and with sedition under the Crimes Ordinance. GCAL believes that it is highly likely that Lai and his colleagues will be denied their right to a jury trial. That said, as of this writing, the Secretary for Justice has not yet issued an order denying Lai and his colleagues a trial by jury under NSL Article 46.

The Secretary for Justice's unilateral and unchecked authority to remove a jury trial appears to contravene UN Human Rights Committee jurisprudence on equality and equal protection before the law. In *Kavanaugh v. Ireland* (2001), the defendant challenged the decision of the Irish Director of Public Prosecution (DPP) to try a defendant in a Special Criminal Court, without access to a jury trial.²⁰ The Human Rights Committee found that the DPP's decision violated the defendant's rights to equality and equal treatment before the law under Article 26 of the ICCPR, because the Irish authorities failed to "demonstrate that the decision to try the author before the Special Criminal Court was based on reasonably and objective grounds."

The parallels between the Human Rights Committee's decision in *Kavanaugh v. Ireland* and the Hong Kong government's use of its NSL Article 46 authority are all too clear. Article 46 has been used in a similarly arbitrary and non-transparent way, with the Secretary for Justice generally failing to state specific reasonable and objective grounds for the denial of the right to a jury trial in Tong's case.

Recommendations

- The Hong Kong government should preserve the right to a trial by jury for national security cases as a matter of standard practice. Under no circumstances should the denial of the right to a jury trial – a right that is enshrined in Hong Kong's Basic Law – become the new norm for national security cases in Hong Kong.
- In line with the UN Human Rights Committee's decision in *Kavanaugh v. Ireland*, the Secretary for Justice should not invoke NSL Article 46 to deny NSL defendants their right to a jury trial, unless there are clear and compelling grounds, publicly stated, that justify

¹⁹ Candice Chau, "Hong Kong media tycoon Jimmy Lai to stand trial in High Court over national security, sedition charges," [Hong Kong Free Press](#), May 17, 2022.

²⁰ *Kavanaugh v. Ireland* (2001), UN Doc. CCPR/C/71/D/819/1998, paragraphs 10.1-10.3.

such a move. Also, Article 46 should not be expanded to cover non-NSL crimes, such as sedition under the Crimes Ordinance.

V. Right to Counsel and Self-Defense (Articles 2 and 14 of the ICCPR; Question 17 of the List of Issues)

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 legal aid scheme have limited access to counsel in key NSL cases, and also in other civil cases that are largely beyond the scope of this brief.

In November 2021, the government implemented various reforms to the legal aid scheme.²¹ Under the new scheme, the Legal Aid Department assigns lawyers to legal aid applicants in criminal cases, unless “exceptional circumstances” dictate allowing defendants counsel of their own choosing. 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.

The reforms were opposed by the Hong Kong Bar Association. The HKBA pointed out that the reforms likely violated Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance, which guarantee the right of equality before the courts and the right of criminal suspects to counsel of their own choosing, and which are based on Article 14 of the ICCPR.²² Article 35 of Hong Kong’s Basic Law also guarantees criminal defendants access to counsel of their own choosing.

The government claimed that the reforms were necessary to end what it saw as excessive concentration of cases – and thus funds – to a relatively small number of law firms. The HKBA called this concern unwarranted, and pointed out that the provision would create a two-tiered legal system, one in which more well-off defendants would be able to privately pay for counsel of their own choosing, whereas those who relied on the government-funded legal aid scheme would be forced to work with the lawyer assigned to them by the government.

GCAL fears that the government’s real goal is to assert greater control over key national security cases, and also over other cases related to the 2019 protest movement. 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 to otherwise act in ways that benefit the government. Or, lacking trust in their own legal counsel, they may abandon their own defense, and accept whatever punishment is doled out by the courts.

²¹ “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).

²² Hong Kong Bar Association, “[Position Paper on Proposed Enhanced Measures to the Legal Aid System in Hong Kong](#),” December 7, 2021.

The denial of access to counsel of one's own choosing has already apparently played a significant role in at least one NSL case. In January 2022, Tong Ying-kit abandoned his appeal of his nine-year criminal sentence for terrorism and inciting secession under the NSL. Although Tong has not spoken publicly about his case, many observers believe that his decision to drop his appeal was directly linked to the move by the Legal Aid Department to assign new lawyers to him in November 2021. One of the lawyers assigned to Tong's case worked for a firm with strong ties to both the Hong Kong government and to Mainland officials.

In at least some NSL cases, defendants may have been pressured by Mainland and Hong Kong officials to dismiss their prior legal counsel, and to hire new counsel with close ties to pro-Beijing groups in Hong Kong. Pro-democratic activist Andy Li may be one such case. He was detained by Mainland officials as he and others attempted to flee Hong Kong by boat in August 2020. Li and his colleagues were returned to Hong Kong in March 2021, and Li immediately faced charges of collusion with foreign forces under the NSL.

As his NSL case moved forward, it became clear that Li had switched counsel. His new solicitor, Trevor Chan, was more pro-Beijing in his outlook, having signed various pro-government petitions in the past.²³ In May 2021, Li changed counsel yet again, hiring Alain Sham, a former deputy director of public prosecutions at the Department of Justice, as his barrister. Sham's pro-Beijing affiliations are a matter of public record, and include ties to the pro-Beijing Hong Kong Friendship Promotion Association. The fact that Li, a prominent pro-democracy activist, would choose pro-Beijing lawyers to represent him in court was perplexing. The move defied any easy explanation.

As of this writing, Li remains in detention, and has not spoken publicly about his case, or about his decision to switch counsel. GCAL fears that Li was pressured to switch to legal counsel who would adopt a more cooperative attitude with the Hong Kong authorities, perhaps as part of a political bargain to limit his time in detention on the Mainland. If Li was indeed pressured to give up his right to counsel of his choosing, that move would represent a significant violation of his basic rights, both under the Basic Law, and under the ICCPR.

The government has also placed some limits on the right to self-defense in at least one NSL case. Barrister and rights activist Chow Hang-tung has been charged with inciting subversion, in relation to social media posts Chow made relating to remembering the June 4, 1989 Tiananmen Square massacre. Chow is currently serving a 15-month sentence for inciting unauthorized assembly, and therefore has had to prepare her defense from prison. In October 2021, Chow disclosed on social media that she had been denied access to certain books by prison officials. (The books, which were mailed to her by members of her support team, included widely-circulated titles by well-known Hong Kong pro-democracy activists.) According to the Correctional Services Department's publications adjudication committee, the books Chow

²³ Kelly Ho, "Mystery lawyer appears in court for Hong Kong activist Andy Li, but family still don't know where he is," [Hong Kong Free Press](#), March 31, 2021.

sought access to were “capable of affecting order in prison,” and contained “content [relating to] subversive acts.”²⁴ Chow has appealed the decision.

Recommendations

- The Hong Kong government should reconsider the recent reforms to the Legal Aid scheme. The government should work with key stakeholders – including the Hong Kong Bar Association – on new reforms that will return the right to counsel of one’s own choosing to the core of Legal Aid’s approach to its work. The government should also take seriously the UN Human Rights Committee’s prior recommendation that an independent legal aid body should be established.
- The Hong Kong government should publicly state its commitment to allowing all national security defendants to have access to counsel of their own choosing, and should investigate those cases in which defendants may have been pressured to take on new counsel with close ties to the Hong Kong government and to Beijing.
- The Hong Kong government should also guarantee the right of individuals to self-defense, as provided for in the ICCPR, and as further elaborated by UN Human Rights Committee’s General Comment No. 32 (paragraph 37). The Hong Kong government should guarantee equal access to information for imprisoned individuals who chose to act in self-defense.

VI. Police Investigatory Powers under the NSL (Articles 14, 15, 22, and 26 of the ICCPR; Questions 3, 4, 6, and 20 of the List of Issues)

National security cases are handled by the newly-created National Security Division (NSD) of the Hong Kong Police Force. Article 43 of the NSL allows for the creation of new rules governing the investigatory powers of the NSD. Just days after the NSL itself went into effect, the newly-created Committee for Safeguarding National Security (CSNS) issued new Implementation Rules (IRs) under Article 43. Although the new IRs had a far-reaching impact on police investigatory powers, nonetheless the process of drafting the new rules was entirely non-consultative and non-transparent. The public saw the text of the new IRs on the day that they went into effect, and has generally been denied any opportunity to discuss with the government how the new IRs will impact day-to-day life for the people of Hong Kong.²⁵

Article 43 of the NSL mandates the expansion of the investigatory powers of the NSD in seven key areas: police searches, including both physical searches and searches of electronic devices;

²⁴ Chow Hang-tung, “June 4, Uncle Wah, and order in prison: Correctional Services Department’s censorship of books,” [social media post](#), October 23, 2021.

²⁵ This section draws heavily on a prior GCAL report, [Hong Kong’s National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper](#), June 28, 2021.

surrender of travel documents by NSL suspects; freezing of assets of individuals accused of NSL crimes; censorship of online material that allegedly violates the NSL; power to compel testimony related to alleged NSL crimes by foreign political organizations; surveillance and interception of communications; and the power to compel testimony related to alleged NSL crimes by individuals in Hong Kong.

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

The flaws of the IRs are magnified when placed in the context of the vague and overbroad nature of the key NSL criminal provisions. As GCAL documented in an early analysis, the NSL's criminal provisions are vague and overbroad, and have been regularly used to target peaceful political activity.²⁶ The IRs therefore create a series of expanded police powers that can be used to target, and even harass, opposition political figures, peaceful protesters, and others who have been critical of the government.

Search of Places for Evidence (Schedule 1)

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

Under existing law, the police generally must obtain judicial warrants to engage in searches, both physical and electronic. That said, warrantless searches are not unknown to Hong Kong law: the Hong Kong courts set forward the circumstances under which such searches could pass muster in a 2020 case, for example.²⁷

When the police engage in warrantless searches outside the ambit of the NSL, defendants have the right to challenge the legality of such searches in court. Given that the NSL limits judicial review of certain key decisions by national security bodies and officials, it's not clear that the same judicial oversight exists for warrantless searches conducted under the IRs.²⁸ In that context, the NSD could well stretch its authority to engage in warrantless searches, secure in

²⁶ Wong and Kellogg, [Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis](#), February 2021, pp. 18-25.

²⁷ *Sham Wing Kan v. Commissioner of Police*, [2020] HKCA 186.

²⁸ NSL Article 14 exempts the Committee for Safeguarding National Security from judicial review.

the knowledge that any moves to engage in such searches would likely not be subject to outside review.

Freezing, Restraint, Confiscation, and Forfeiture of Property (Schedule 3)

Under Schedule 3 of the IRs, the Secretary for Security has the authority to freeze the property of individuals being investigated for alleged NSL crimes. The Secretary does not need a court warrant to do so, although individuals whose property has been frozen do have the right to judicial review of the Secretary's decision. Any renewal of the asset freeze must also be approved by the court. The freezing of assets can take place in the context of any national security criminal investigation, regardless of the connection (or lack thereof) between the alleged crime and the property being seized, and regardless of the credibility of the allegations against the individual.

In two key national security cases, Section 3 has been used to freeze the assets of media outlets, which were then forced to close down. In June 2021, for example, the NSD charged five editors and executive from the pro-democracy news outlet *Apple Daily* with colluding with foreign forces. Three companies linked to *Apple Daily* were also charged. The NSD froze HKD\$18 million in corporate assets as well, which created a serious liquidity crisis for the company. *Apple Daily* closed its doors just days later.

In December 2021, the NSD arrested seven individuals affiliated with the prominent independent news website Stand News. Those arrested included editors and current and former board members, many of whom are themselves well-known pro-democracy advocates. The NSD also froze HKD\$61 million worth of the news portal's assets. Stand News closed immediately following the arrests.

Removal of Electronic Messages "Endangering National Security" (Schedule 4)

Under Sections 6 and 7 of Schedule 4 of the IRs, the Secretary for Security has the authority to block online content that she believes to endanger national security. In the case of online content posted on local websites, the authorities can order that the content be removed altogether. Such a move would mean that, unless it is re-posted elsewhere, the removed content would no longer be available even to people outside Hong Kong. No warrant is needed for the Secretary for Security to take action under Sections 6 and 7, and there is no disclosure requirement – foreign websites that have been blocked usually find out after the blockage order has taken effect. Telecoms companies that fail to comply can face fines or imprisonment.

In essence, Schedule 4 gives the Hong Kong government the authority to censor online content that it doesn't like. Given the vagueness of the "endangering national security" standard, the government can easily target peaceful political content, including peaceful criticism of government policies, or even the websites of groups or individuals who have been critical of the central government in Beijing.

The total number of websites that have been blocked by the government over the past two years is not known. That said, it is clear that Schedule 4 has been used by the government to block at least some websites. In January 2021, for example, government officials ordered local telecoms providers to block the anti-government website HKChronicles.²⁹ The site, which emerged during the 2019 protests as a source of personal information – so-called doxing – on Hong Kong police officers and other government officials, immediately became inaccessible inside Hong Kong, although internet users using VPNs could continue to access the site.

The censoring of HKChronicles was believed to be the government’s first use of its Schedule 4 powers, but it was by no means the last. In April 2021, the government blocked the website of the Taiwanese Presbyterian Church, which had raised funds for Hong Kong protesters who had fled to Taiwan. In February 2022, the website of the UK-based advocacy group Hong Kong Watch was also blocked, raising fears that overseas groups that were critical of the Hong Kong government would also be censored.³⁰

Agents of Foreign or Taiwan Political Organizations (Schedule 5)

Under Sections 2 and 3 of Schedule 5, the Secretary for Security can require so-called foreign or Taiwan agents or political organizations to provide detailed information on staffing, activities, funding, assets, and expenditures. (The terms “foreign agent” and “foreign political organization” are defined extremely broadly, to include any organization or individual that receives foreign funding, or that is based overseas but “pursues political ends.”) Schedule 5 seems similar to foreign agent laws that have emerged in other countries, and seems geared toward imposing greater scrutiny, and greater political risk, on local non-government organizations that accept funding from foundations or other funders based outside Hong Kong.

Foreign agents and foreign organizations that fail to comply with information requests can face either fines or jail time. As with other key IR provisions, there are no warrant requirements or transparency provisions, nor are the authorities required to provide any basis for their assessment that an individual or organization is in fact a foreign agent or foreign political organization.

The government has already used its Schedule 5 powers to demand information from at least one key non-governmental organization, the Hong Kong Alliance in Support of Patriotic Democratic Movements of China. In August 2021, members of the Standing Committee of the Alliance received letters from the National Security Department, declaring that the group was a “foreign agent,” and demanding the provision of information related to the group’s activities

²⁹ Tom Grundy, “Hong Kong Broadband Network admits it blocked website under national security law,” [Hong Kong Free Press](#), January 14, 2021.

³⁰ Hwang Chun-mei, “Taiwan Church Website Blocked by Hong Kong National Security Police,” [Radio Free Asia](#), April 26, 2021; James Pomfret and Donny Kwok, “Hong Kong rights group says website not accessible through some networks,” [Reuters](#), February 15, 2022.

and funding.³¹ On September 8 and 9, the NSD arrested five Standing Committee members just days after the group announced that it would not comply with the police request. Since then, Standing Committee members Simon Leung and Chan Dor-wai have pleaded guilty to failing to provide information to the authorities; Leung was sentenced to three months in jail.³² The prosecution of the other three Standing Committee members is ongoing.

Interception and Covert Surveillance (Schedule 6)

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

The Schedule 6 scheme represents a significant departure from existing Hong Kong law. Under the 2006 Surveillance Ordinance, most forms of electronic surveillance must be approved by a special three-judge panel. Also, the government’s use of its surveillance powers is overseen by the Commissioner on Interception of Communications and Surveillance, but the Commissioner has been explicitly excluded from any oversight role in NSL cases.³³

Because there are no disclosure requirements under Schedule 6, it is simply not known how the government has used its new surveillance powers, or who has been targeted for warrantless surveillance under the NSL. Many Hong Kong-based activists now fear that they could be targeted, and have either started using encrypted communications applications for their more sensitive communications, or have stopped communicating with more prominent exile activists altogether.

Recommendations

- Because the IRs are administrative regulations issued jointly by the Chief Executive and the Committee for Safeguarding National Security (CSNS), they can be more easily amended than the NSL itself. Therefore, the CE and the CSNS should amend the IRs to better safeguard key ICCPR rights, including the right to privacy, the right to a fair trial, the right to free association, and the right to equal protection under the law.

³¹ Candice Chau, “Organisers of Hong Kong’s Tiananmen Massacre vigil refuse to comply with national security police data request,” [Hong Kong Free Press](#), September 6, 2021.

³² Candice Chau, “Ex-member of Tiananmen Massacre vigil group jailed after refusing to cooperate with national security police data request,” [Hong Kong Free Press](#), December 22, 2021.

³³ Natalie Wong, “Hong Kong surveillance watchdog concedes he has ‘no say’ over snooping in cases related to national security law,” [South China Morning Post](#), January 4, 2021.

- In particular, the government should amend Schedules 1, 3, 4, and 6 of the IRs to require the government to apply for judicial approval of searches, freezing of assets, removal of electronic messages, and electronic surveillance by the NSD.
- The government should also amend Schedule 5 of the IRs to narrow the definition of foreign or Taiwan agents or political organizations. In general, local non-governmental organizations should not be subjected to excessive government scrutiny merely because they accept funds from foundations or other funders based overseas.

VII. Sedition (Articles 19 and 22 of the ICCPR; Questions 3, 4, 6, and 20 of the List of Issues)

For years, Hong Kong's colonial-era sedition provision remained as part of Hong Kong's Crimes Ordinance. The Hong Kong government did not bring sedition charges against anyone for many years after the 1997 Handover, but it also refused to allow the provision to be stricken from the books.³⁴ In its previous reviews of Hong Kong's implementation of the ICCPR, the UN Human Rights Committee repeatedly expressed concerns that "the offenses of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under article 19 of the Covenant."³⁵

After the NSL went into effect, the Hong Kong government started using the sedition provision for the first time in decades. In a number of cases, the government has arrested individuals for sedition over acts that, in rights-respecting jurisdictions, would be considered peaceful, legally protected speech or advocacy. Deeply concerning examples abound: over the past two years, the government has pursued sedition cases against the authors of a children's book that included content related to the 2019 protest movement;³⁶ individuals who allegedly clapped their hands in response to comments made in court by pro-democracy activists;³⁷ and individuals who allegedly posted comments critical of government COVID policies on social media platforms.³⁸

According to data collected by GCAL, as of April 2022, national security officials arrested at least 33 individuals for allegedly seditious acts.³⁹ Of those, 26 were charged. Also, the parent

³⁴ Eric Yan-ho Lai, "Hong Kong's Sedition Law is Back," [The Diplomat](#), September 3, 2022.

³⁵ UN Human Rights Committee, *Concluding Observation of the Human Rights Committee on Hong Kong Special Administrative Region*, CCPR/C/79/Add.117, November 15, 1999, paragraph 18. The same observation can be found in the Committee's Concluding Observations in 2006 and 2013.

³⁶ "Five arrested in Hong Kong for sedition over children's book about sheep," [Agence France-Presse](#), July 22, 2021.

³⁷ "Hong Kong: 'Sedition' arrests after clapping in court a new low for human rights," Amnesty International press statement, April 6, 2022.

³⁸ Selina Cheng, "Covid-19: Hong Kong national security police arrest 2 for sedition over anti-vaxx posts," [Hong Kong Free Press](#), February 25, 2022.

³⁹ Lai and Kellogg, "Arrest Data Show...," [ChinaFile](#), April 5, 2022.

company of leading independent news outlet Stand News was also charged with seditious publication in December 2021; the media outlet itself folded just days before.

As it ramped up its use of the sedition provision, the government argued that sedition is a national security crime, and therefore that key NSL provisions – including several key provisions that weaken due process protections – could be applied to sedition cases. The courts have accepted that position, most recently in the Court of Final Appeal’s verdict in *HKSAR v Ng Hau Yi Sidney* (FAMC31/2021). As a result, defendants facing sedition charges can be denied bail under Article 42(2)’s much more stringent standard, and risk the denial of other key due process rights as well.⁴⁰

Pro-democracy activist Tam Tak-chi was the first person to be tried and convicted for sedition since the 1997 Handover. In April 2022, Tam was found guilty of sedition by District Court Judge Stanley Chan. Tam was also convicted of other charges, including unlawful assembly and inciting others to unlawful assembly. He was sentenced to 40 months in prison, including 21 months on the sedition charge.⁴¹ The evidence against Tam included various anti-government comments he made in public, as well as his use of various now-forbidden protest movement slogans. At no time did Tam advocate violence, nor did any violent acts ensue from his public comments.

Recommendations

- Because the sedition provision is part of the Crimes Ordinance, the Hong Kong government has the authority to work with the Legislative Council on amending that provision. The government should follow prior recommendations from the UN Human Rights Committee’s Concluding Observations in 1999, 2006, and 2013 to immediately amend both the sedition and the treason provisions of the Crimes Ordinance, to bring both in line with Hong Kong’s obligations under the ICCPR.
- At the same time, the government should review all pending sedition cases, to ensure that no one is being prosecuted for acts that would be considered peaceful political speech in other, rights-respecting jurisdictions. In line with the Siracusa Principles and the Johannesburg Principles, individuals should not be criminally prosecuted for speech that does not attempt to incite acts of imminent violence.

END OF SUBMISSION.

⁴⁰ Thomas E. Kellogg, “How a ruling by Hong Kong’s top court opens the door to a more intrusive security law,” [Hong Kong Free Press](#), December 17, 2021.

⁴¹ *HKSAR v. Tam Tak Chi* [2002], DCCC 927, 928&930/2020.