

Tom Lantos Human Rights Commission

Hearing
on
The State of Civil and Political Rights in Hong Kong

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Background

The Commission is very familiar with the special status of Hong Kong both as one of the world's leading financial and cultural centers and with the special commitments made to Hong Kong under the Sino-British Joint Declaration¹ and the Hong Kong Basic Law². These commitments sought to maintain Hong Kong's special character as an open and rule-of-law-based society and to preserve the international human rights protections long-afforded its people.

The guarantees for Hong Kong include a high degree of autonomy, human rights, and the rule of law, as well as promises of self-rule through "universal suffrage". The Basic Law provides that mainland laws will not apply in Hong Kong except for a limited number beyond autonomy listed in Annex III,³ and that mainland officials shall not "interfere in affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this law."⁴ Basic Law article 23 provides that Hong Kong shall enact national security protections "on its own."

Both Hong Kong people and the international community were asked to rely on these solemn commitments and largely did so for over two decades after the 1997 handover—even while Beijing began slowly eroding those commitments. Despite such erosion, Hong Kong often secured the top spot in the Heritage Foundation's Index of Economic Freedom and saw its rule of law ranked among the top in the world.⁵ Weaknesses in the model included Beijing's complete control over interpretation of the Basic Law and its foot-dragging over realization of the

¹ "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong," (hereinafter "Joint Declaration") December 19, 1984, <https://www.cmab.gov.hk/en/issues/jd2.htm>.

² The Basic Law of the Hong Kong Special Administrative Region (hereinafter, "Basic Law") <https://www.basiclaw.gov.hk/en/basiclaw/index.html>

³ Basic Law, Article 18 allows for some mainland laws outside the scope of autonomy to be added to Annex III.

⁴ Basic Law, Articles 22.

⁵ "Hong Kong Dumped from Economic Freedom List It Had Dominated," Bloomberg, March 3, 2021, <https://www.bloomberg.com/news/articles/2021-03-04/hong-kong-dumped-from-economic-freedom-index-it-used-to-dominate>; and World Justice Project, Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index>

promised universal suffrage. These two limitations have led to the many protests over the years, as Hongkongers feared the growing degrading of their promised autonomy.

Any basis for reliance on Beijing's commitments largely unraveled in 2019 with a massive crackdown on protesters demanding compliance with those commitments and in 2020 with Beijing's imposition of a National Security Law (NSL)—and later in 2021 with new electoral laws.⁶ In the past couple years, the crushing of the rule of law and the abandonment of core human rights has been unprecedented for a modern highly developed open society. Beijing's model for external control has become evident, fundamentally changing the constitutional order.

Criminal Justice: The Crushing of Human Rights and the Rule of Law

The NSL undercuts the foundation of the rule of law in delivering criminal justice under Hong Kong's common law system. Passed without any public consultation, the NSL imposed four crimes in the speech area—secession, subversion, terrorist activities, and collusion with foreign forces—whose vagueness leave speakers with little sense of what is prohibited and what is not. These crimes apply worldwide to both residents and non-residents. The NSL has been used to silence opposition voices in Hong Kong, including street protesters, the media, academics, the arts and numerous politicians. Many of those arrested have been highly respected community leaders simply fighting for the guaranteed freedoms. With a presumption against bail, a majority of those prosecuted—165 arrest and 96 prosecutions—languish in jail for months awaiting trial.⁷

Such NSL arrests are only the tip of the criminal justice iceberg. Well over ten-thousand protesters were arrested for the 2019 protests under existing public order laws, with over 2,500 charged and hundreds already convicted, many with long jail terms.⁸ Prominent political leaders well known to this Commission, including Martin Lee, Margaret Ng, Jimmy Lai, Joshua Wong and Cheuk-yan Lee have been among those convicted.⁹ These prominent leaders had all advocated non-violence during the recent protests.

NSL prosecutions have targeted a large portion of the political opposition. By prosecuting Jimmy Lai and the management and editorial teams of the Apple Daily newspaper, along with the use of financial tools to force the paper's closure, the leading media opposition voice has been silenced.

⁶ National People's Congress of the People's Republic of China (PRC), "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region," June 30, 2020, [https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_\(a406\)_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

⁷ Lydia Wong and Thomas Kellogg, "New Data Show Hong Kong's National Security Arrests Follow a Pattern," *China File*, May 3, 2021. <https://www.chinafile.com/reporting-opinion/features/new-data-show-hong-kongs-national-security-arrests-follow-pattern>

⁸ "More than 10,200 arrested in connection with unrest since 2019," *South China Morning Post*, April 9, 2021. <https://www.scmp.com/news/hong-kong/politics/article/3128836/hong-kong-protests-more-10200-arrested-connection-unrest>

⁹ Hong Kong pro-democracy figures given jail terms of up to 18 months," *The Guardian*, April 16, 2021. <https://www.theguardian.com/world/2021/apr/16/jimmy-lai-martin-lee-hong-kong-pro-democracy-figures-sentenced>

Jimmy Lai's bail denial went all the way to the Court of Final Appeal, where the court concluded that it had no power to overturn any provisions of the NSL that violate Basic Law or common law principles and thereby upheld the presumption against Bail in NSL article 42.¹⁰

The arrests and prosecutions under the NSL of opposition politicians for organizing and participating in a political primary sent a clear message of political intolerance. Of the 47 charged, 36 were denied bail and have languished in jail for months. Their alleged subversion appears to relate to an intention, should they win enough seats in the then planned Legislative Council election, to vote down the government's budget and thereby force the resignation of the Chief Executive.¹¹ Hong Kong may stand alone as a place, where using a constitutional provision to defeat the government in power is treated as subversion. Both these cases and the many others not mentioned here all relate to speech crimes in one form or another.

The prosecution of a young street activists, Tong Ying Kit, is the only NSL trial completed so far. Tong was charged after he drove his motorcycle into a police cordon causing some minor injuries. In what appeared as a reckless driving case, he was convicted for incitement to secession for carrying a flag with the popular slogan, "Liberate Hong Kong, Revolution of Our Times."¹² In the high court he was denied a jury under a special NSL provision allowing the prosecution to opt for a three-judge panel. Even though NSL article 4 provides for continued application of the international human rights guarantees under the Basic Law, the court's judgment did not even mention human rights, as usually applicable regarding incitement in national security cases.¹³ His reckless driving resulted in a further terrorism conviction, without any discussion of the popular fear. His total sentence for both charges was 9 years.

We should be skeptical about due process rights in the coming NSL trials. The NSL, effectively the new constitution, completely undermines Basic Law commitments to autonomy and the rule of law, introducing mainland control and methods into the Hong Kong system. It creates a local Committee for Safeguarding National Security (headed by the Chief Executive with a mainland adviser) and an Office for Safeguarding National Security, the latter staffed entirely by mainland public security officials. Both oversee local national security investigations and requirements, and neither is subject to judicial review by the local courts. These oversight organizations are backed up by special branches in both the Hong Kong police and the Department of Justice, who

¹⁰ *HKSAR v. Lai Chee Ying*, Final Appeal No. 1 of 2021 (Hong Kong Court of Final Appeal, February 9, 2021), <https://scmp.com/comment/opinion/article/3143634/national-security-trial-ruling-setback-human-rights-hong-kong> [/legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491).

¹¹ "Explainer: How a Primary Got Hong Kong Activists in Trouble," Associated Press, March 1, 2021, <https://apnews.com/article/beijing-primary-elections-democracy-hong-kong-elections-ccda7eb61403f721ba8e56423203f72a>.

¹² *HKSAR v. Tong Ying Kit*, (2021) HKCFI 2200 (Hong Kong Court of First Instance, July 27, 2021). https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137456&currpage=T

¹³ See Michael C. Davis, "National security trial ruling a setback for human rights in Hong Kong," *South China Morning Post*, August 4, 2021. <https://scmp.com/comment/opinion/article/3143634/national-security-trial-ruling-setback-human-rights-hong-kong>

operate in secret. The Committee for Safeguarding National Security has already issued special regulations for police that provide for warrantless searches, surrender of travel documents, seizure and confiscation of property, interception of communications and secret surveillance.¹⁴

These mainland intrusions have put the courts and the legal profession under severe stress, compromising judicial independence and fair trial rights. Beijing's distrust of independent judges is on open display under the NSL, which requires that only judges designated by the Chief Executive can hear NSL cases. Such designated judges are subject to removal from the list if they make statements that offend national security—presumably in court. Result oriented oversight does not stop there. The Secretary for Justice can withhold the right to a jury in High Court cases where juries are typically allowed, as was done in the Tong Ying Kit case. Judges have been under pressure, being subject to public attacks by Beijing officials or their supporters if they dismiss cases or grant bail. The Court of Final Appeal faced a seeming threat published in the *People's Daily*, that the case might be removed to the mainland for trial if Jimmy Lai were granted bail.¹⁵ An NSL provision allows official discretion for such removal in complex cases.

Lawyers have not escaped these attacks, with the *People's Daily* recently likening the Hong Kong Bar to “street rats” and warning the Law Society to stay out of politics in its leadership election. The then Bar President, Paul Harris, was attacked for suggesting revisions to the NSL. The lawyer representing the legal functional sector in the Legislative Council, Dennis Kwok, was also forced out of office, resulting in all opposition Legislative Council members resigning in protest. Even lawyers' groups formed to promote due process or provide pro-bono legal services to protesters, including the Progressive Lawyers Group and the 612 Humanitarian Relief Fund, have been threatened with prosecutions and forced to disband.

Undercutting Political Freedom

The NSL does not just provide for national security prosecutions, but rather in Article 9 requires the government “to take necessary measures to strengthen public communication, guidance, supervision and regulation...relating to schools, universities, social organizations, the media, and the internet. This includes a requirement in Article 10 to “promote national security education in schools and universities and through social organizations, the media, the internet and other means...” The government has issued regulations requiring schools at all levels to teach national security and has warned universities and the media about possible violations—presumably

¹⁴ “Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region Gazetted,” Government of the Hong Kong Special Administrative Region, Press Release, July 6, 2020, <https://www.info.gov.hk/gia/general/202007/06/P2020070600784.htm>

¹⁵ See, Su Di, “Observer: Approving Jimmy Lai's bail harmful to Hong Kong's rule of Law,” *People's Daily*, December 28, 2020. <https://peoplesdaily.pdnews.cn/opinions/observer-approving-jimmy-lai-s-bail-harmful-to-hong-kong-s-rule-of-law-190555.html>

involving critical views that do not match CCP orthodoxy.¹⁶ These efforts at brainwashing have led thousands to emigrate or send their children abroad for study.¹⁷ Professors have been attacked in official media as “reactionary academics” and even supporters as “loyal rubbish.”¹⁸ Student organizations have also come under attack and student unions have disband, as has the 95,000-member Professional Teachers Union (PTU), which was characterized by China’s Xinhua news agency as a “malignant tumor.”¹⁹ Even statues commemorating 1989 are being removed from campuses, including the “Pillar of Shame” at HKU.²⁰ The Global Public Policy Institute has given Hong Kong a D-rating on academic freedom in its global survey.²¹

Intimidation stretches well beyond campuses. Government officials, elected or otherwise, have been forced to take loyalty oaths. Such oaths are then used to disqualify people who have supported the political opposition or said anything judged disloyal in their past. Civil servants, subsequently judged to have made a false oath, face a loss of job and even pensions, being dismissed for cause. Recognizing this purpose, a large portion of the District Council, being the only level of government that had previously been directly elected, resigned, rather than take the oath. Most opposition District Counsellors who stayed on to take the oath were then disqualified, with their historic opposition being used to question their loyalty.

Most independent civil society organizations, who traditionally supported the opposition, have now been threatened with prosecution and forced to disband.²² Similar to the PTU, intimidation and disbanding has included, eg., the Civil Human Rights Front, Labor Party, Confederation of Trade Unions, Social Workers General Union, League of Social Democrats, and Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. The arrest of a member

¹⁶ Education Bureau of Hong Kong, “Education Bureau Circular No. 2/2021: National Security Education in School Curriculum - Implementation Mode and Learning and Teaching Resources,” February 4, 2021, <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21002E.pdf> ; and Education Bureau of Hong Kong, “Education Bureau Circular No. 3/2021: National Security: Maintaining a Safe Learning Environment Nurturing Good Citizens,” February 4, 2021, <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21003E.pdf>.

¹⁷ “‘This Drop Came So Quickly’: Shrinking Schools Add to Hong Kong Exodus,” *New York Times*, October 11, 2021. <https://www.nytimes.com/2021/10/11/world/asia/hong-kong-population-drop.html>

¹⁸ Au Ka-lun, “A new Cultural Revolution is on its way,” *Apple Daily*, March 26, 2021. (no longer available)

¹⁹ “‘Hong Kong’s biggest teachers’ union ‘seeks to speed up dissolution by changing its rules’ as Beijing attack continue,” *South China Morning Post*, August 11, 2021. <https://scmp.com/news/hong-kong/politics/article/3144711/hong-kongs-biggest-teachers-union-seeks-speed-dissolution>

²⁰ “Hong Kong’s ‘Pillar of Shame’ sculpture for Tiananmen victims faces removal,” *Washington Post*, Oct. 13, 2021. https://www.washingtonpost.com/world/asia_pacific/hongkong-pillar-shame-tiananmen/2021/10/13/2a897036-2b0a-11ec-b17d-985c186de338_story.html

²¹ “Hong Kong’s Global Academic Freedom Index regresses C-level to D-level, lower than Vietnam, causing concern,” *Apple Daily*, April 2021. https://hk.appledaily.com/international/20210316/TNKQG3RI2VBDBOKXGFEJBLY7AY/?utm_source=HRIC+Updates&utm_campaign=686911b077-HRIC_DAILY_BRIEF_COPY_01&utm_medium=email&utm_term=0_b537d30fde-686911b077-259232682

²² Suzanne Pepper, “Hong Kong’s civil society: the candidates the election, then the democracy movement itself,” *Hong Kong Free Press*, September 3, 2021. <https://hongkongfp.com/2021/09/03/hong-kongs-civil-society-under-fire-the-candidates-the-election-then-the-democracy-movement-itself/>

(along with four other members) of the latter organization, lawyer Ms. Chow Hang-tung, has been condemned by UN experts: "Terrorism and sedition charges are being improperly used to stifle the exercise of fundamental rights, which are protected under international law, including freedom of expression and opinion, freedom of peaceful assembly and the right to participate in public affairs."²³ The experts also raised concern that Hong Kong was imposing undue restrictions in accusing such organizations of collusion merely for receiving foreign funding.

Media intimidation likewise reaches beyond the forced closure of the Apple Daily, including most prominently the growing pressure on RTHK, the public service broadcaster long modeled on the BBC, that has now issued a 100-plus page editorial guideline for reporters that aims to insure NSL compliance and top-down control.²⁴ The government has announced an intention to pair RTHK with the mainland's CCTV to encourage a stronger patriotism among viewers.²⁵ The government has also appointed a new Director of Public Broadcasting from the Hong Kong civil service to better insure compliance—resulting in diminished independence and critical programming being withdrawn. Across the city art exhibits and critical documentaries have also come under attack.²⁶ In the most extreme case, two speech therapists have been charged with sedition for publishing a children's book depicting sheep attacked by wolves.

The Rollback of Democracy

Beijing has completely remodeled the electoral system to exclude the pro-democracy opposition from any role in government. The new electoral amendments in the Basic Law, set up a comprehensive system for vetting candidates to include only "patriots." While the number of legislative seats has been increased from 70 to 90, the number directly elected by geographical constituencies has been reduced from 35 to 20. Forty of the legislators are now to be selected by the Beijing friendly Election Committee. Historically, the 1200-member Election Committee was selected mostly by functional sectors, whose makeup effectively insured 80 percent would invariably support a Beijing-friendly candidate. The Committee is now further tilted.

The Election Committee is now increased from 1200 to 1500 members, with the additional 300 being Beijing-selected Hong Kong representatives to the Central Government. The functional sectors have now been modified in comprehensive ways to guarantee only "patriots" are elected

²³ "Hong Kong: Arrests under security law are serious concern, UN experts call for review," *UN OHCHR*, October 12, 2021. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27648&LangID=E>

²⁴ Editorial Policies and Processes of Radio Television Hong Kong, September 2021. http://rthk9.rthk.hk/about/pdf/epp_eng.pdf

²⁵ "Hong Kong's RTHK will become state media after partnership with China's CCTV, says press group chief," *Hong Kong Free Press*, August 11, 2021. <https://hongkongfp.com/2021/08/11/hong-kongs-rthk-will-become-state-media-after-partnership-with-chinas-cctv-says-press-group-chief/>

²⁶ HG Masters, "Hong Kong Arts Sector Faces New Political Scrutiny," *ArtAsiaPacific*, March 18, 2021. <http://www.artasiapacific.com/News/HongKongArtsSectorFacesNewPoliticalScrutiny>; Candice Chau, "Hong Kong campus protest documentary screening cancelled hours before showing following attack by pro-Beijing paper," *Hong Kong Free Press*, March 15, 2021. <https://hongkongfp.com/2021/03/15/hong-kong-campus-protest-documentary-screening-cancelled-hours-before-showing-following-attack-by-pro-beijing-paper/>

to the committee. The seats previously held by the elected District Councilors have been given over to mainland affiliated organizations. As a result of these and other changes, in the recent Election Committee election 75 percent of the seats were filled uncontested.²⁷

The Election Committee is now required to vet all candidates for Chief Executive and the Legislative Council on top of choosing the Chief Executive and 40 legislators. A small Candidate Eligibility Review Committee, composed of Beijing loyalists, will first vet the candidates and submit its findings to the Election Committee. This vetting committee will vet all candidates for elective office. It will be overseen by the Committee for Safeguarding National Security and all candidates will be investigated by the national security police unit. Opposition candidates run at their peril, at risk of being disqualified as non-patriots, and possibly prosecuted. No candidates from the leading Democratic Party are participating in the coming Legislative Council election. It is now illegal for anyone to advocate boycotting the election or spoiling ballots, though voters can do so individually—as seems very likely.

A Path Forward

The one country, two systems model promised Hong Kong has surely been abandoned. Both Hong Kong people and the wider world long engaged with Hong Kong will now face a challenge of what to do in the face of such overwhelming oppression. In my own judgment, the narrow sanctions that have been used so far have very little impact and may at worst cause more draconian measures as blowback, as reflected in Beijing's recently proposed anti-sanctions law.²⁸ Concerned governments will have to examine their international trade and exchange policies in a more comprehensive and multilateral way that advances the international human rights policies long reflected in the international human rights regime. It is in every country's national interest that trade and finance does not operate outside national policies that seek to promote human rights. Human rights should be at the core US foreign policy and the US needs a regulatory regime that incentivizes appropriate human rights behavior. Rather than unilateral sanctions this might best be achieved in a multilateral framework. Such an approach might begin by initiating a UN review to bring about wider consensus. While this is taking shape, Hong Kong might best be served by policies already enacted and under discussion to better facilitate immigration and ultimately citizenship for those seeking refuge. Hongkongers will certainly bring a needed talent pool to the US.

²⁷ "Record number of uncontested seats for Hong Kong Election Committee polls—and Li Kashing is not throwing his hat into the ring, for the first time since 1997," *South China Morning Post*, August 12, 2021.

<https://scmp.com/news/hong-kong/politics/article/3144856/hong-kong-politics-record-number-uncontested-seats-election>

²⁸ "No timetable for Hong Kong's anti-sanctions law, finance chief Paul Chan say," *South China Morning Post*, October 1, 2021. <https://scmp.com/news/hong-kong/politics/article/3150925/no-timetable-hong-kong-anti-sanctions-law-finance-chief>