



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

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BHRC Special Report on Judicial Independence in Hong Kong SAR

APPLYING THE ABA JUDICIAL INDEPENDENCE
MONITOR TOOLKIT

Bar Human Rights Committee of England & Wales Special Report on Judicial Independence in Hong Kong SAR

Applying the ABA Judicial Independence Monitor Toolkit

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About the Bar Human Rights Committee of England & Wales

The Bar Human Rights Committee of England and Wales (BHRC) is the independent, international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges, and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is independent of the Bar Council.

Our vision is for a world in which human rights are universally protected, through government and state actors' adherence to international law obligations and internationally agreed norms.

Our mission is to protect and promote international human rights through the rule of law, by using the international human rights law expertise of some of the UK's most experienced human rights barristers.

BHRC members are primarily barristers called to the Bar of England and Wales, as well as pupil barristers, legal academics, and law students. Our members include some of the UK's foremost human rights barristers, legal practitioners, and academics.

Our Executive Committee and members offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies. BHRC is supported by a Project Team of two project officers and a project administrator.

For more information on our work, advocacy and strategic priorities, please visit barhumanrights.org.uk.

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Foreword by Stephen Cragg KC, Chair of BHRC

As Chair and on behalf of the Bar Human Rights Committee of England & Wales (BHRC), I am pleased to announce the launch of this special report on judicial independence in Hong Kong which applies the Judicial Independence Monitor, a innovative and valuable toolkit developed by the American Bar Association Rule of Law Initiative (ABA ROLI). The toolkit is designed to assess vulnerabilities and strengths of judicial independence in different jurisdictions¹.

BHRC was proud to partner with ABA ROLI in 2021-2022 on the *Edge of Law* virtual panel series, which explored salient business and human rights issues in Asia. These included forced labour and modern slavery; sanctions; data protection and digital privacy; and judicial independence. The virtual panel series culminated in a full-scale report of the frank, insightful, often challenging but always inspirational discussions of our expert panel speakers. We delivered a set of viable, far-reaching, and action-oriented recommendations for bar associations, legal practitioners, and civil society representatives to uphold human rights standards and respect for the rule of law in practice and in policy.

Following the launch of the BHRC / ABA ROLI *Edge of Law* report in September 2022, with its key chapter on judicial integrity and impartiality in the Asia Pacific region, BHRC now elaborates on some of the concerns raised in the report and the *Edge of Law* dialogues. BHRC has applied the ABA ROLI toolkit to produce this important report which concisely and authoritatively sets out the current situation and critical challenges to judicial independence in Hong Kong for members of the judiciary, the legal profession, and civil society (as at December 2022).

In recent years, the imposition of the Hong Kong National Security Law on Hong Kong by Beijing has fundamentally changed the constitutional landscape with profound implications for the legal system and for fundamental freedoms and human rights in Hong Kong. This has kindled what Freedom House has called a 'democratic crisis', with '[m]illions of people in Hong Kong protesting democratic deterioration and rights violations, amid increasing police brutality and other violence against them'².

As this report finds, members of the judiciary and the legal institutions in Hong Kong face extraordinary pressures in this area. Subject issues include the call to repeal national security laws which fail to respect the separation of powers doctrine that is so central to the One Country, Two Systems framework; the need to ensure full transparency, meritocracy, and integrity in the appointment of judges; and the need to ensure the independence of the legal professional bodies and practitioners and non-interference with the freedom of members of the legal profession. This last issue raises the challenge to guarantee the protection of lawyers, particularly those who take on sensitive political cases, from harassment, intimidation and attacks in line with the Basic Principles on the Role of Lawyers established by the United Nations (1990). The recommendations at the end of the report aim to address many of these points. All of us at BHRC commend the ABA ROLI team for their development and publication of the Judicial Independence Monitor and we look forward to seeing it applied to other jurisdictions in the future.

1 ABA Judicial Independence Monitor Toolkit, available at: <https://www.americanbar.org/content/dam/aba/directories/roli/other/aba-rolj-judicial-independence-monitor-toolkit.pdf>

2 Annie Boyajian and Sarah Cook, Democratic Crisis in Hong Kong: Recommendations for Policymakers, Freedom House, <https://freedomhouse.org/report/policy-brief/2019/democratic-crisis-hong-kong-recommendations-policy-makers>

About the Judicial Independence Monitor Toolkit

Judicial independence is critical to the American Bar Association Rule of Law Initiative's goal of promoting access to justice and strengthening rule of law around the globe. The independence of the judges and the judiciary, including administrators and staff, is fundamental to ensuring the law is equally applied to all persons and organizations. Genuine independence is also crucial to the systems of checks and balances necessary to hold governments accountable.

It is only when judges and all those involved in the judicial process are free from undue influence—whether from other branches of the government, companies, or individuals—that they can make decisions based solely on the law and evidence. Perceptions of independence are also essential to establish trust in the judicial process. If people do not have faith in the judiciary to resolve conflicts in accordance with the law, they are less likely to use it, leading to extra-legal resolutions that undermine the rule of law. In an era of progressively polarized and sensationalistic media, these types of resolutions are a challenge to legal systems around the globe.

The importance of judicial independence is reflected in its incorporation into major international treaties and laws including the Universal Declaration of Human Rights, the American Convention on Human Rights, and ASEAN Human Rights Declaration. Judicial independence is also included as a metric in indexes assessing everything from economic competitiveness to governance, corruption, and rule of law to human rights. However, these indexes address judicial independence in general and do not look at the full scope of what judicial independence encompasses. To help inform this discussion and our understanding, ABA ROLI has developed the Judicial Independence Monitor, a toolkit to assess vulnerabilities to judicial independence in a given jurisdiction, along three broad categories:

- (1) Internal independence, how the judiciary governs itself
- (2) External independence, from undue influence from other branches of government
- (3) Transparency, the degree to which the judiciary is perceived as independent.

The Judicial Independence Monitor is a toolkit designed to be used by experts, be they in civil society, academia, government, or private sector, to conduct an assessment to inform their work on policy reform. The analysis offered by the Judicial Independence Monitor will help inform existing indexes through a more comprehensive analysis of judicial independence, subsequently becoming part of the larger feedback loop that already exists in assessing political and governance systems globally. To download the Toolkit, please click [here](#).

Introduction

Judicial independence is a fundamental component of the rule of law, which requires that the law be applied equally to all persons (and entities) by an impartial judiciary. Judicial independence shields judges from inappropriate influences from the government or other external actors, enabling them to make decisions based solely on the law and evidence. Given this fundamental role, judicial independence is a key indicator in existing frameworks assessing rule of law, corruption, freedom, and economic competitiveness³. However, these indexes do not fully capture the complex nature of judicial independence or the multitude of ways in which it may come under threat. Judicial independence is a complex and nuanced topic; at the most basic level, it requires that judges are free to adjudicate disputes based on the law and evidence alone and that the legal process, and the regulators responsible for overseeing judges and court staff, should remain impartial and accessible. The judiciary is also under constant strain due to the growing political significance of court decisions to the impact of globalisation and market forces, making disputes transnational in nature.

ABA ROLI's *Judicial Independence Monitor* establishes a robust framework for assessing the rules and laws affecting the legal system, and how those rules and law are applied, as well as more intangible elements, of perception and trust in the legal process. The framework for analysis looks at judicial independence through 121 indicators in three broad categories:

1. **Internal independence:** the rules and practices governing the judiciary, ensuring judicial decisions are based on the rule of law free from undue influence.
2. **External independence:** the laws and practices establish appropriate safeguards to minimise influence for political ends and ensure courts operate fairly and impartially. External independence also refers to the degree to which actors outside of the government, such as the media, may influence judicial proceedings.
3. **Accountability and trust:** recognising that both the government and public actors outside the judiciary have a role to play in ensuring the judiciary serves and protects the needs of people, this framework assesses the mechanisms available to hold the judiciary accountable⁴.

Careful consideration of rules and practices involved in each of these elements supporting judicial independence can give policymakers, civil society organisations (CSOs) and businesses a more comprehensive understanding of the vulnerabilities and risks to their operations, while the recommendations can inform future policy actions. Furthermore, when conducted over time, the analysis provided through the *Judicial Independence Monitor* (as applied by the Bar Human Rights Committee in this report) can help highlight the effects of certain rules or legal frameworks on judicial independence over time and the potential trajectory of independence.

The question of judicial independence has loomed large in Hong Kong in recent years and a critical analysis of the system as a whole is necessary, as the imposition of the Hong Kong National Security Law on Hong Kong by Beijing has fundamentally changed the constitutional landscape in Hong Kong. In 2021, the Court of Final Appeal held that the courts in Hong Kong do not have jurisdiction to challenge the National Security Law on the basis that it is in

³ Such as the Global Competitiveness Index https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2020.pdf; Rule of Law Index <https://worldjusticeproject.org/rule-of-law-index/>; Corruption Perceptions Index <https://www.transparency.org/en/cpi/2021>; and Freedom in the World <https://freedomhouse.org/report/freedom-world>

⁴ ABA Judicial Independence Monitor Toolkit, available at: <https://www.americanbar.org/content/dam/aba/directories/roli/other/aba-rol-judicial-independence-monitor-toolkit.pdf>

contravention of the Basic Law, Hong Kong’s ‘mini’ constitution⁵. This has profound implications for the legal system in Hong Kong.

This report shares the findings arising from BHRC’s application of ABA ROLI’s *Judicial Independence Monitor*, to assess the vulnerabilities and strengths of judicial independence in Hong Kong as at December 2022⁶.

List of abbreviations

BL – Basic Law
CE – Chief Executive of Hong Kong SAR
CFA – Court of Final Appeal
CPG – Central People’s Government
HK SAR – Hong Kong Special Administrative Region.
JORC – Judicial Officers Recommendations Committee
NSL – National Security Law for Hong Kong
NPC – National People’s Congress
PRC – People’s Republic of China

Part A: Systemic Context

Hong Kong Special Administrative Region (**HK SAR**) in its current formation was established in 1997, when sovereignty was transferred from Britain to the People’s Republic of China (**PRC**). Hong Kong went from being a British colony to a special administrative region of the PRC. Governance arrangements for the current HK SAR are founded on the basis of the [Sino British Joint Declaration](#) signed in 1984 (an international treaty registered with the United Nations) granting Hong Kong people the right to a high degree of autonomy, basic freedoms supported by the rule of law and an independent judiciary, and with a constitutionally guaranteed path to universal suffrage. These guarantees were explicitly set out in HK’s *de facto* constitution, the [Basic Law](#), and provide for what became known as ‘One Country, Two Systems’, the constitutional system designed to preserve Hong Kong’s existing legal system and rule of law prior to the handover in 1997. The Basic Law is enacted under Article 31 of the PRC Constitution. It is a national law pertaining to the governance of Hong Kong as a special administrative region. Under the Basic Law, the PRC promised Hong Kong that its way of life and legal system would remain largely unchanged after the transfer of sovereignty. The constitutional promises stemmed from the Sino British Joint Declaration. The Basic Law contains provisions to reflect these constitutional guarantees.

Type of Political System

Despite never becoming a fully developed democracy, since the transfer of sovereignty in 1997 the HK SAR has practiced and observed some of the core principles of a liberal constitutional democracy: separation of powers, a free media, the protection of basic human rights, and an independent judiciary. It has also conducted regular elections at the regional and district levels, at the local council level, and for the Hong Kong Legislative Council (the legislative body in HK)⁷. However, it should be noted that the Chief Executive is the highest

⁵ HKSAR v. Lai Chee Ying (2021) HKCFCA 3

⁶ ABA Judicial Independence Monitor Toolkit, available at: <https://www.americanbar.org/content/dam/aba/directories/roli/other/aba-rol-judicial-independence-monitor-toolkit.pdf>

⁷ Chapters II and III of the Basic Law governed the fundamental human rights and political structure in Hong Kong. The Hong Kong electoral system was partially free and democratic prior to the decision by the National People’s Congress Standing Congress to overhaul the election system in March 2021 to allow only ‘patriots’

office holder in Hong Kong and he/she acts as the constitutional head of Hong Kong SAR with the power to appoint judges. The Chief Executive is not democratically elected but appointed by the CPG. Additionally, only half the members of the Legislative Council are elected directly by the people, based on geographic constituencies. The remaining half are elected by professional or special interest groups, known as ‘functional constituencies’ which can include people as well as entities.

The passage of legislative decisions by the National People’s Congress, such as the [Law](#) of the People’s Republic of China on Safeguarding National Security Law (NSL) in the Hong Kong SAR on 30 June 2020, and the ‘Improving the Electoral System of the Hong Kong SAR’ (**Election Law**) in March 2021, have sparked a significant transformation of Hong Kong’s political system. Most notably, the NSL was passed by the Central People’s Government (CPG) in Beijing, without any form of public consultation, completely bypassing Hong Kong’s legislative process. Furthermore, the NSL takes precedence over the Basic Law. While the NSL guarantees the protection of human rights under the [International Covenant on Civil and Political Rights](#)⁸, the arrest and detention without bail of many political opposition figures⁹ and the investigation of independent media and CSOs¹⁰ since the implementation of the NSL, raise serious concerns about the state of human rights and media freedom in Hong Kong.

New requirements for “patriotism” under the reformed Election Law and oath-taking regulations give overarching power to an executive-led committee to vet candidates for public offices. This raises serious questions about the openness and freedom of Hong Kong elections¹¹. Persons deemed unpatriotic by the Hong Kong Government or a ‘threat to national security’, are barred from standing in any election. Such decisions are not amenable to judicial review. The once-vibrant civil society, independent media outlets, and political opposition, have been stifled since June 2020, with the amendments upsetting the equilibrium established by One Country, Two Systems. The One Country Two Systems framework protected Hong Kong’s common law system and capitalist system, and promised a high degree of autonomy for Hong Kongers and the ultimate aim of universal suffrage after the handover in 1997. Hong Kong still ranks comparatively high on indexes such as the World Justice Project Rule of Law Index in 2020 (measuring the general state of the legal system and rule of law), and the Corruption Perceptions Index (measuring the level of corruption and transparency of government). However, its ranking in the 2022 World Justice Report dropped three points¹² and in the Freedom House Index (monitoring the protection of fundamental human rights) dropped substantially after 2020 to 43 out of 100 (previously it stood at 52 out of 100), suggesting a downward trend in Hong Kong’s democratic institutions¹³.

Type of Legal System

The Basic Law, Hong Kong’s *de facto* constitution adopted in 1997, explicitly preserves the British common law system (including reliance on English and Commonwealth legal authorities, and the rules of equity)¹⁴. The High Court handles most civil and serious criminal cases. Cases are heard by the Court of First Instance, with a right of appeal to the Court of Appeal. Less serious criminal offenses are handled by the District Court and magistrates’

to participate in - <https://merics.org/en/short-analysis/hong-kong-elections-beijing-redefines-democracy>; https://www.state.gov/wp-content/uploads/2022/03/313615_HONG-KONG-2021-HUMAN-RIGHTS-REPORT.pdf

8 Article 4 of NSL

9 Professor Michael Davis, Hong Kong: How Beijing Perfected Repression (January 2022) Vol. 33 Issue 1 p.g 100 (Journal of Democracy)

10 Ditto

11 <https://asia.nikkei.com/Politics/Turnout-hits-new-low-in-Hong-Kong-patriots-only-election>; <https://www.bloomberg.com/news/articles/2021-12-18/hong-kong-holds-first-patriots-only-election-after-overhaul>; http://www.xinhuanet.com/english/2021-03/05/c_139788111.htm

12 <https://hongkongfp.com/2022/10/26/hong-kong-falls-from-top-20-in-global-rule-of-law-index/>

13 <https://freedomhouse.org/country/hong-kong/freedom-world/2022>

14 Articles 8 and 18 of Basic Law (BL)

courts. Prior to the handover, any further appeals from the Court of Appeal were heard by the Judicial Committee of the Privy Council in London. After the handover, the Hong Kong Court of Final Appeal was created and sits as the highest appellate court in Hong Kong. The ultimate power of interpretation of the Basic Law is vested in the NPC Standing Committee, and this power of interpretation is free-standing and can be utilised while proceedings are before the court¹⁵.

The judiciary, the legislature, and the executive branch are separately delineated in Chapter IV of the Basic Law. However, since the adoption of the NSL in June 2020, this constitutional structure has come under question. The 'separation of powers' has previously been adopted by Hong Kong courts as a fundamental common law principle and part of Hong Kong's legal system¹⁶. However, in September 2020 the Chief Executive (the head of the Hong Kong SAR) declared that the 'separation of powers' system was obsolete and that there has been an incorrect understanding of the constitutional framework in Hong Kong¹⁷. It has long been argued by pro-Beijing politicians in Hong Kong that there was no separation of powers under the British Colonial system, where the governor of Hong Kong used to chair the Legislative Council meetings up until 1993, and had the power to appoint most of its members up until several years before 1997. Beijing argued that this 'executive-led' system should continue after 1997, meaning no separation of powers.

Part B: Legislative Framework

The Basic Law establishes the authority of the various levels of Hong Kong courts and their judicial powers, including principles of judicial independence and judicial immunity, and security of tenure and pay¹⁸. Under the Basic Law, judges are to be selected on the basis of their judicial and professional qualities¹⁹. The retirement age for members of the judiciary is governed by local legislation²⁰.

Judicial appointments are made through a recommendations process established by the Judicial Officers Recommendation Commission (JORC) Ordinance. The JORC is an advisory body to the Chief Executive²¹, chaired by the Chief Justice, with members appointed by the Chief Executive²² and includes members nominated by the Hong Kong Bar Association and Hong Kong Law Society (the two self-regulating legal professional associations established under a local law known as the Legal Practitioners Ordinance). The Secretary for Justice (**SJ**), a political appointee supervised by the Chief Executive and CPG, is an *ex officio* member of the JORC. JORC's recommendations for appointment and removal are sent to the Chief Executive who then makes judicial appointments for all levels of the court system. The appointment and removal of CFA judges and the Chief Judge of the High Court requires the endorsement of the Legislative Council with a majority vote of all members of the Legislative

15 Ng Ka Ling v Director of Immigration (No. 2) 1999 A HKCFAR 141; The Rule of Law in the Shadow of the Giant: The Hong Kong Experience – The Hon. Sir Anthony Mason AC KB Sydney Law Review Vol. 33:623

16 <https://www.researchgate.net/profile/P->

[Lo/publication/329308508_The_Judicial_Perspective_of_%27Separation_of_Powers%27_in_the_Hong_Kong_Special_Administrative_Region_of_the_People%27s_Republic_of_China/links/5c41638b92851c22a37d6832/The-Judicial-Perspective-of-Separation-of-Powers-in-the-Hong-Kong-Special-Administrative-Region-of-the-Peoples-Republic-of-China.pdf?origin=publication_detail](https://www.researchgate.net/publication/329308508_The_Judicial_Perspective_of_%27Separation_of_Powers%27_in_the_Hong_Kong_Special_Administrative_Region_of_the_People%27s_Republic_of_China/links/5c41638b92851c22a37d6832/The-Judicial-Perspective-of-Separation-of-Powers-in-the-Hong-Kong-Special-Administrative-Region-of-the-Peoples-Republic-of-China.pdf?origin=publication_detail)

17 <https://www.rfa.org/english/news/china/powers-09012020144755.html>; <https://www.globaltimes.cn/content/1200196.shtml>;

<https://hongkongfp.com/2020/09/01/no-separation-of-powers-in-hong-kong-says-chief-exec-carrie-lam-despite-previous-comments-from-top-judges/>

18 Articles 85, 91 & 93 of Basic Law

19 Article 92 of Basic Law

20 The Judicial Officers (Extension of Retirement Age) (Amendment) Ordinance 2019; S.11 A of Cap. 4, and s.13A of Cap. 484

21 S. 6 of Cap. 92

22 Cap. 92

Council for each senior judicial appointment, and the appointment must be reported to the NPC Standing Committee for the record²³.

Each level of court has its court leader who is in charge of the administration and assignment of cases i.e. the Chief Magistrate, the Chief District Court Judge, the Chief Judge of High Court, and each reports to the Chief Justice. Every member of the judiciary must observe the Guide to Judicial Conduct²⁴. The judiciary's annual budget is included as part of the government budget announced by the Financial Secretary each year. The judiciary has no control over this budgetary process, but it has complete authority over how to use the allocated resources in the performance and discharge of its duties and functions. Senior members of the judiciary administration are senior government civil servants. The Chief Secretary (the second highest official in the government) is the official in charge of overseeing the judiciary portfolio including resources allocation, and the tabling and moving of motions in the Legislative Council for the appointment of senior judges. Once the resources are allocated to the judiciary, it is for the judiciary to decide how to apportion those resources within its organisation.

As noted above, Hong Kong's political system is in a period of transition which accelerated after the adoption of the NSL, and there has been an erosion of the One Country Two Systems framework since at least 2014. Under the Basic Law, the Court of Final Appeal (**CFA**) has ultimate jurisdiction, except for matters pertaining to foreign affairs and national defence. However, by way of a State Council White Paper²⁵ issued in 2014, the CPG claims 'comprehensive jurisdiction' over all official affairs in Hong Kong including the exercise of its executive, legislative and judicial powers²⁶. Under this format, all powers emanate from the CPG, and there is no residual power for Hong Kong itself. 'Comprehensive jurisdiction' was a new constitutional concept alien to the Basic Law, which was further expanded in a 2021 decision, where the CFA confirmed that the NSL cannot be challenged on the basis of its non-conformity with the Basic Law²⁷.

The NSL further erodes the system established by the Basic Law by establishing entirely separate procedures for national security cases, including the involvement of the Committee for Safeguarding National Security – a committee led by the CPG's Liaison Office—and removing many of the oversight functions mentioned above²⁸. Other changes eroding safeguards set up under the Basic Law include a 2016 NPC Standing Committee decree²⁹ that the oath taking requirement for judges under Article 104 of the Basic Law is a substantive legal requirement and anyone who refuses to take the oath will not be allowed to assume public office, and anyone who breaches the oath could be summarily removed. What amounts to a 'breach' is unilaterally determined by the NPC Standing Committee³⁰.

23 Article 90 of Basic Law

24 https://www.judiciary.hk/doc/en/publications/gjc_c.pdf; see the Chief Justice's introduction to the Guide in paragraphs 1-7 where the Bangalore Principles were mentioned.

25 A State Council White Paper in the PRC is the official document setting out state policies in important areas.

26 State Council White Paper 2014; http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm

27 *Lai Chee-Ying v HKSAR* 2021 HKCFA 3; <https://thediplomat.com/2021/02/the-long-term-implications-of-the-jimmy-lai-bail-decision/>;

<https://hongkongfp.com/2021/02/12/the-case-of-pro-democracy-tycoon-jimmy-lai-shows-how-the-security-law-has-shaken-up-hong-kongs-legal-system/>

28 Article 44 of NSL

29 Instrument 27

30 4 pro-democracy lawmakers were summarily removed by the NPC Standing Committee at the request of the Chief Executive on grounds that they breached their oath of office and contravened the requirements of Article 104. Article 104 and its subsequent re-interpretation by the NPC Standing Committee apply to all public officers. <https://www.hrw.org/news/2020/11/12/china-beijing-forces-out-hong-kong-opposition-lawmakers>

Part C: Analysis

Category 1 – Internal Independence of Judiciary

The degree to which the judiciary has authority to regulate itself or to be regulated by a body separate from the executive and legislative branches of governance and includes formal and informal structures of governance (Toolkit, p4)

Procedural and Regulatory Protections

Case assignment and transfer of judges is done by the court leader (Chief Justice) at each level of court. This internal control over the assignment of cases and transfer of judges protects judicial independence by limiting the extent to which external actors - and the political branches of government in particular - can exert influence over court proceedings, providing a degree of protection to judicial independence in Hong Kong. However, there exist numerous potential points of pressure in the internal regulation of judges in Hong Kong. In Hong Kong, the JORC is the closest equivalent to the Council for the Judiciary, overseeing and regulating the judiciary.

While the rules related to the JORC are clear, the power to appoint judges is relatively centralised under the Chief Executive who has ultimate authority to appoint members of the JORC. The Legislative Council is not involved in the initial selection of judges (except at the later endorsement stage for senior judicial appointments) and the JORC provides recommendations only with the appointment power resting with the Chief Executive. In practice, the JORC largely plays an advisory role and the Chief Executive can reject JORC recommendations without reason. Under the special procedures set up by the NSL, the Chief Executive also has the power to assign specific judges to handle national security related cases (and to remove them). While NSL judges are selected from the existing pool of judges, the selection is ultimately centralised under the Chief Executive's authority exclusively and the process for selection, removal, or renewal of an NSL judge's term by the Chief Executive is opaque and without any recommendation process.

According to s3(1) of the JORC Ordinance, only three of the nine members of the JORC are judges. The remainder are ex officio appointees such as the Secretary for Justice, and others are appointed directly by the Chief Executive. Theoretically, if the Chief Executive were to give reasons or reject recommendations of the JORC this decision could be subject to judicial review. To date, the Chief Executive has never rejected a judge recommended by the JORC thereby necessitating a review. However, in 2021 several widely respected candidates who had been expected to be promoted to the High Court or CFA had their appointments derailed³¹. Furthermore, in 2021 the nominee for the membership of JORC put forward by the Hong Kong Bar Association was rejected by the Chief Executive³². These incidents raise serious concerns about the politicisation of the appointment process³³.

31 Directors of Public Prosecution (DPP) are usually expected to be appointed to the High Court bench after their service as DPP (with a few exceptions). A recent DPP left the Department of Justice on bad terms and open conflict with the Secretary of Justice and was not appointed to the High Court, even though he was widely expected to be so appointed. In another incident a well-respected Court of Appeal judge was widely expected to be promoted to the CFA as the first female permanent judge on the court. However, her appointment was never put forward by the JORC on the alleged rumour that the pro-Beijing camp saw her husband, himself the former Chief Justice of the CFA, as being too 'liberal' and a potential negative influence on his wife. <https://hongkongfp.com/2020/08/03/hong-kongs-director-of-public-prosecutions-david-leung-resigns-over-differences-with-justice-secretary/>; <https://www.ft.com/content/56de7f6d-c89a-4857-b2f9-5d184fa3d096>; <https://www.thestandard.com.hk/section-news/section/11/223719/Ma's-the-word-in-CFA-chase>

32 <https://www.thestandard.com.hk/section-news/section/11/233497/Potential-push-for-pro-democracy-counsel-to-land-judge-vetting-role>;
<https://www.reuters.com/world/china/hong-kong-leader-rejects-barrister-nominee-sensitive-judges-panel-appoints-2022-03-25/>

33 Georgetown University Centre for Asian Law Submissions to the UN Human Rights Committee p. 3 https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2022/06/GCAL_HRCSubmission_220615.pdf

Decision-making Freedom

The degree to which judges can make decisions “free from any undue pressure from their superiors or their colleagues within the judiciary.

The Hong Kong judiciary has a long tradition of explaining their judicial decisions with full legal reasoning. Most judgments are accessible to the public or at least to the parties involved in the matter. Judges follow the common law tradition of self-recusal in cases involving a conflict of interest or a serious potential conflict of interest, or a recusal application could be made by a party. As explained by Hong Kong legal scholars, there is a concern amongst the Hong Kong public that the NSL will slowly change these existing legal traditions³⁴. For example, judges who are responsible for hearing national security cases would be designated by the Chief Executive pursuant to Article 44 of the NSL. Before the designation, the Chief Executive consults the Committee for Safeguarding National Security which consists of Mainland officials.

Substantive protection of the Independent Status of Judges: Status of Judges

The degree to which selection/appointment criteria for judges is fair and impartial.

The JORC system was largely working well before the introduction of the NSL in June 2020. Criteria for selection of JORC members is clear. Traditionally, members were sufficiently diverse, inclusive and reflective of the views of both branches of the legal profession (barristers and solicitors)³⁵. Whilst the public has no direct say or insight into the process, overt pressure on JORC was difficult as its members largely consist of senior members of the judiciary and chairman of Bar Association. The legal community in Hong Kong is relatively small and if an unknown candidate was to be recommended by JORC and appointed to be a member of the judiciary, it is likely that the legal profession and the public would immediately notice and question such an appointment. However, with the decline in press freedom³⁶, in particular the shuttering of numerous independent media outlets since 2021, it is unclear whether this environment and the ability of the legal profession to scrutinise such appointments will continue.

As indicated above, the independence of JORC is tied to how the authority to appoint its members is exercised by the Chief Executive. A lack of transparency in both formal and informal processes (when senior members of the judiciary will informally approach members of the legal profession to gauge their interest in joining) makes it difficult to assess whether tacit pressure is applied in the appointment and selection process. Given the lack of transparency inherent in the selection process, there exists potential pressure on judicial independence and the status of judges under this indicator and at a minimum, affects the perception of influence, which can be equally damaging to judicial independence³⁷. With the ‘comprehensive jurisdiction’ of the CPG and the NSL now in place, there is the potential for even more external pressure on the selection process as this provides the legal basis for more open interference from Beijing.

34 <https://www.eastasiaforum.org/2022/10/26/judicial-repression-becomes-the-norm-in-hong-kong/>

35 Hong Kong’s legal system mirrors that of the UK where lawyers are divided into two self-regulating categories: barristers, regulated by the Bar Association, and solicitors, regulated by the Law Society.

36 In 2022, Hong Kong’s ranking by Reporters Without Borders from 80 to 148 out of 180 countries. <https://rsf.org/en/country/hong-kong>

Hong Kong’s score for “free and independent media” in the Freedom in the World Index for 2022 also declined. <https://freedomhouse.org/country/hong-kong/freedom-world/2022>

37As cautioned in the JIM methodology: “If citizens believe that they cannot get redress from the judiciary to protect their rights because government officials can control or influence judges, it means there is no judicial independence, and this negatively affects perceptions of judicial independence and undermines public confidence in the justice system.” page 23

Security of Tenure & Immovability

The degree to which processes for termination or transfer are clear, objective and followed in a transparent manner that is open for review – the more decisions are at the discretion of an individual and opaque the greater potential risk to judicial independence.

The imposition of disciplinary action and impeachment creates degrees of pressure on the independence of individual judges. Within Hong Kong, there is some evidence that investigations of alleged judicial misconduct by panels of senior judges are carried out impartially and independently³⁸. The judicial complaints mechanism was revised in 2021 and a new two tier process introduced, including a role for participation of non-judicial representatives which could provide an inroad for political influence, thereby undermining judicial independence³⁹.

A further possible point of pressure is the (so far unused) power on the part of CPG to directly remove a judge from office for failing to properly swear an oath of loyalty using its powers under Article 104 of the Basic Law⁴⁰. Paragraph 3 of the Interpretation of Article 104 of the Basic Law issued by the NPC Standing Committee (Instrument 27) states that "[a]n oath taker who makes a false oath, or, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law". This provision gives an overriding power to the NPC Standing Committee to disqualify any public officer holder (including judges) who is deemed to have acted in breach of his or her oath of office. As in the case of the direct disqualification of pro-democracy lawmakers by the NPC Standing Committee, this overriding power under Instrument 27 also applies to all judges and judicial officers in Hong Kong.

In practice, the CE may request the NPC Standing Committee to invoke its power to disqualify any public office holder in Hong Kong⁴¹. Once the decision is handed down by the NPC Standing Committee, it is not amenable to judicial review by Hong Kong courts. As previously held by the Hong Kong courts⁴², a decision made by the NPC Standing Committee is outside the jurisdiction of Hong Kong courts. Furthermore, as stated above senior judicial appointments must be endorsed by a majority of Legislative Council members who are selected by the CPG. With increasing incidents of CPG influence in domestic issues (including judicial matters via the China Liaison Office, the CPG representative in Hong Kong, under the guise of 'comprehensive jurisdiction' and state owned media), this is a potential risk to judicial independence that should be monitored closely going forward.

Salary

The degree to which processes for salary determination are clear, objective and followed in a transparent manner that is open for review – ensuring judges have the freedom to decide cases based on rule of law without fear or favour. The more decisions are at the discretion of an individual and opaque the greater potential risk to judicial independence.

Pressure on this aspect of judicial independence is relatively low. Judges' salaries and pensions are protected by contract and the review mechanism itself including the Standing Committee on Judicial Salaries and Conditions of Service. In an effort to attract suitable

38 <https://hongkongfp.com/2022/05/23/hong-kong-judiciary-throws-out-complaints-against-hong-kong-judge-and-magistrate/>

39 <https://www.macaubusiness.com/opinion-judicial-reform-in-hong-kong/>

40 Under a 2016 interpretation of Article 104, any person who refuses to take the oath or is not sincere in their swearing the oath is disqualified from office. <https://www.elegislation.gov.hk/hk/A115/en.assist.pdf>

41 http://www.xinhuanet.com/politics/2020-11/11/c_1126725802.htm “第十三届全国人民代表大会常务委员会第二十三次会议审议了《国务院关于提请就香港特别行政区立法会议员资格问题作出决定的议案》。上述议案是应香港特别行政区行政长官的请求而提出的。”

42 *Leung Lai Kwok Yvonne v The Chief Secretary for Administration*, HCAL 31/2015, unreported, 5 June 2015, per Au J (as he then was) at [30], that Hong Kong courts have no power to determine whether the NPCSC Decision is invalid under Hong Kong laws

candidates and address the shortage of judges, judicial salaries have been substantially increased in recent years⁴³.

Career Progression

The degree to which decisions concerning a judge's career are based on objective criteria and merit, enabling judges to render decisions that follow the law and are not politically expedient. The more decisions are at the discretion of an individual and opaque the greater potential risk to judicial independence.

The lack of a formal system for promotions combined with the closed-door and non-transparent nature of JORC deliberations creates a possible point of pressure on judicial independence under this indicator. The range of judicial career progression goes from the magistracy level to the Court of Final Appeal (with a huge difference in both pay and hierarchy). Lack of transparency is a holdover from Hong Kong's colonial history that can be exploited by the current government. Within the current politically charged environment, the absence of reasons make it unclear how criteria for judicial selections are applied, and the lack of transparent decision-making or right of appeal make the potential for pressure high.

As noted above, JORC's independence is tied to the level of influence wielded by the Chief Executive and it is unclear the level of influence the CPG has on decisions related to judges within the JORC structure. Furthermore, a judge can be summarily dismissed by the NPC Standing Committee under the interpretation of Article 104 of Basic Law on the grounds of breach of oath and/or under Article 55 of the NSL, jurisdiction of the case can be removed from the Hong Kong courts and be transferred to the PRC for criminal trials⁴⁴. How cases are treated within the media also causes concern, by creating a perception of improper influence which can undermine confidence in the judicial system. For example, in the Jimmy Lai (application for bail) case, the People's Daily newspaper openly warned the courts in relation to making the 'right' decision⁴⁵. Each of these create a possible pressure point with more ambitious judges encouraged to refrain from making unpopular decisions in order to impress the people responsible for their promotion⁴⁶.

Case Assignment

The degree to which processes for assigning cases to judges are conducted in a transparent manner that minimizes the ability of parties to pick and choose their judge, and possibly manipulate or pressure them into deciding in a certain way (through threats or other incentives).

Lack of transparency and a high degree of discretion afforded to court leaders and the Chief Justice in case assignment, create several potential pressure points on judicial independence. The internal case assignment process within the judiciary is completely non-transparent. The NSL designated list of judges under Article 44 of the NSL is confidential, and this creates a further layer of opacity in case-assignment, where judges are selected by the Chief Executive and, as set out above, are vulnerable to potential pressure on their independence. There is no mechanism to review these decisions, and there is no 'whistle-blowing' protection for judges if there is abuse within the judicial system.

43 https://www.jsscs.gov.hk/reports/en/jscs_21/jscs_21.pdf

44 <https://www.bloomberg.com/news/articles/2020-12-31/hong-kong-s-top-court-orders-tycoon-jimmy-lai-returned-to-jail>

45 <https://www.straitstimes.com/asia/east-asia/chinese-newspaper-peoples-daily-slams-hong-kong-court-for-releasing-jimmy-lai-on-bail>

46 Toolkit Methodology, p19

Category 2 – External Independence

External influence refers to the formal and informal structures established to prevent undue influence from the government, including elected and unelected officials, as well as the public, including the media on judges and the way they decide individual cases (Toolkit, p4).

Immunity

To freely make decisions based on the law and evidence, judges, when acting in good faith and in their official capacity, should be immune from personal liability for the decisions they render.

Judges are generally immune from both civil and criminal liability relating to their decisions or the performance of judicial duties. The interpretative decision over Article 104 of the Basic Law allows the NPC Standing Committee to summarily dismiss any Hong Kong official, including judges⁴⁷. This has weaponised several laws, including Hong Kong's oath taking system, and poses a threat to judges who may be deemed "disloyal" by the NPC Standing Committee. Judicial immunity is not a defence to an allegation of breach of oath under the interpretation of Article 104. While the power to disqualify a holder of public office has so far not been used on a member of the judiciary, the trend of disqualification of public office holders is deeply worrying for officials and judges alike posing a possible pressure point on judicial independence⁴⁸.

Judicial Review

If citizens believe that they cannot get redress from the judiciary to protect their rights because government officials can control or influence judges, it means there is no judicial independence. This negatively affects perceptions of judicial independence and undermines public confidence in the justice system.

Before the introduction of the NSL in June 2020, acts and omissions of government officials, including the executive branch, but excluding the CPG and/or the NPCSC, were subject to judicial review. CPG and NPCSC actions are considered 'acts of state' not reviewable by the Hong Kong courts. However post-2020, widespread criticisms has been made by pro-establishment lawmakers that judicial review has been abused by pro-democracy supporters and arguments put forward that the perceived trend of courts 'ruling' Hong Kong must be corrected⁴⁹. Furthermore, under the NSL decisions of the Committee for Safeguarding National Security of Hong Kong are exempt from judicial review⁵⁰, and the NPCSC has the ability to issue opinions on cases, even while they are before the courts. All of these issues point to potential pressure on judicial independence.

Threats to judges

There are two types of violence against courts: targeted, where violence is premediated against specified parties to the judicial process – requiring protection at courthouse and judges' homes – and nontargeted requiring standard security measures at the courthouse.

Threats to judges' personal safety was not a concern in the past; people were free to criticise the courts, but anyone threatening a member of the judiciary would face prosecution under the Crimes Ordinance for sedition⁵¹. In 2020, a High Court justice extended a ban on the

47 <https://www.elegislation.gov.hk/hk/A115len.assist.pdf>

48 <https://www.aljazeera.com/news/2020/11/11/hong-kong-disqualifies-four-opposition-legislators>

49 <https://hongkongfp.com/2015/12/03/hong-kongs-judicial-review-system-is-being-abused-says-former-top-judge/>

50 Article 14 of the NSL

51 <https://www.amnesty.org/en/latest/news/2022/04/hong-kong-sedition-arrests-after-clapping-in-court-a-new-low-for-human-rights/>

doxing⁵² and harassment of judges and their families, and criticised the Secretary of Justice for failing to address wrongful accusations against judges⁵³. Furthermore, threats from pro-establishment newspapers and even state authorities on court rulings⁵⁴ suggest that the influence of the CPG continues to loom large over the courts in Hong Kong. This creates a huge pressure point on the Hong Kong judiciary.

Category 3 – Accountability & Transparency

The degree to which standards by which the public can scrutinise judicial behaviour are clear, and establish a mechanism for judges to be held accountable (Toolkit, p5).

Code of Ethics

Standards by which the public can scrutinise judicial behaviour establish a key mechanism for judges to be held accountable to the public and are set out in Hong Kong's Judicial Code of Conduct⁵⁵. The criteria established by the Judicial Code of Conduct sets out the guiding principles for judges' conduct, on and off the bench. To date, there has been no overt evidence of officials or others in authority submitting spurious complaints against judges for the purposes of undermining or threatening them. Furthermore, judges are also able to defend themselves from complaints. As such, there are with no apparent points of pressure on judicial independence under this indicator⁵⁶. However, recent revisions to the complaints mechanism for judges as described above, as well as the ability of the China Liaison Office to reject judicial candidates believed to be insufficiently "patriotic" raise potential concerns over undue influence on the judiciary.

Corruption and Disciplinary Action

The ability of external stakeholders to hold judges accountable for misconduct. One of the most common forms of misconduct in the context of judicial independence is corruption – to what extent are judges or judicial staff can or do use their public office for personal gain. In assessing this indicator, monitors can refer to the Judicial Corruption Decision from the World Bank, which provides data to identify problem areas, and provide guidance on the design of reforms and monitor impacts.

Pressure in this area is not apparent. The well-established Judicial Code of Conduct coupled with strong anti-corruption laws in Hong Kong have created an environment of a public service generally free from corruption which extends especially to members of the judiciary. In relation to disciplinary action recent developments include the power to remove a designated NSL judge from the list if he or she engages in conduct which endangers national security and, as explained above, judges can potentially be removed from office if deemed to be in breach of the oath of office under Article 104 of the Basic Law and its interpretation by the NPC Standing Committee. This may be used as a form of summary disciplinary action against judges who do not act in accordance with the political expectations of pro-Beijing forces in Hong Kong and Mainland China.

Transparency

The degree to which rules of procedure ensure decisions are read out to open court, and that parties to the cases understand the consequences of such decisions. This indicator also assesses the degree to which court processes are accessible to parties so they can participate

52 The unauthorized disclosure of private or personal information with the intent to shame or harm the individual. <https://en.wikipedia.org/wiki/Doxing>

53 <https://www.scmp.com/news/hong-kong/law-and-crime/article/3109725/ban-doxing-hong-kong-judicial-officers-families>

54 Davis 'Perfected Repression', p 105; <https://www.nytimes.com/2020/11/30/world/asia/hong-kong-china-courts.html?referringSource=articleShare>

55 https://www.judiciary.hk/en/about_us/judicial_conduct.html

56 https://www.judiciary.hk/en/about_us/judicial_conduct.html

in cases that involve their rights., including physical and virtual access. Without transparency, parties cannot say whether their cases were adjudicated independently.

In most cases, the public has a right to attend trials, and judgments by courts above the magistrate level are accessible to the public. Anyone who does not follow the court users' guidelines in judicial proceedings, including an absolute prohibition on using any recording and/or mobile device in court without permission, could be held to be in contempt of court⁵⁷.

The situation in Hong Kong post-2020 is increasingly concerning. Access to court hearings, which is one way of ensuring transparency, is subject to policing. In 2022, a group of citizens was arrested and charged with sedition for clapping in the public gallery of a courtroom⁵⁸. By using the Covid-related restriction on social gatherings⁵⁹, authorities are also trying to clamp down on a large number of people attending court galleries and in the outside vicinity when cases are protest-related, and where the defendants are political activists or opposition members. These arrests have created a chilling effect within the community. Furthermore, NSL and sedition cases are not heard in public and until the summer of 2022, were subject to strict media bans negatively impacting public perception of the courts and the state of rule of law. However, in July 2022 Chow Hang Tung, the barrister and vice chairperson of the Hong Kong Alliance in Support of Patriotic Democratic Movements in China (the group responsible for organising the June 4th commemoration at Victoria Park) was charged under the NSL for foreign collusion. She successfully challenged the media reporting ban placed on her case (and possibly others) thus allowing the media to continue to report on NSL cases⁶⁰. This could have a positive impact on the transparency of NSL cases.

Diversity

Degree to which courts are diverse, representing a broad cross-section of society. It can mean a number of things, including (though not exclusively) gender representation, ethnic or geographical representation so that parties feel their cases have been understood.

So far, the recruitment of Hong Kong judges is mostly from the local Hong Kong Bar and the Department of Justice. Virtually all received their law degree from Hong Kong or an overseas common law system. All are trained in the common law system. The female and male ratio is fairly balanced across the judiciary as a whole, but less balanced in the CFA and court leadership positions. There has never been a female permanent judge appointed to the CFA. There is no formal report measuring diversity within the Hong Kong judiciary. It has been a long tradition that lawyers of non-Chinese descent were considered for judicial appointments. While Hong Kong is officially a bilingual system (English and Chinese), in practice, most trial proceedings are conducted in Chinese only and/or where Chinese documents are heavily relied upon without translation. This trend is expected to continue in the years to come thereby reducing the potential for non-Chinese judges to be appointed.

57 https://www.judiciary.hk/en/court_services_facilities/court_proceeding_house_rule.html

58 <https://www.amnesty.org/en/latest/news/2022/04/hong-kong-sedition-arrests-after-clapping-in-court-a-new-low-for-human-rights/>

59 <https://www.info.gov.hk/gia/general/202003/28/P2020032800720.htm>

60 <https://hongkongfp.com/2022/08/14/chow-hang-tungs-landmark-legal-victory-will-let-the-press-do-its-job-properly/>

Conclusion

As can be seen from BHRC's assessment of judicial independence in Hong Kong utilising the ABA ROLI's toolkit⁶¹, there are multiple areas of potential vulnerability to judicial independence in Hong Kong. Many of these revolve around the centralised authority of the Chief Executive, who is elected by a limited group of individuals from a shortlist of candidates approved by a CPG appointed committee, and a lack of transparency around how decisions are made. Since the government, including the executive branch, has a role in administering courts, adequate safeguards need to be embedded into legislation to ensure courts operate impartially without undue political influence. Judicial independence in Hong Kong has largely been protected as a result of officials acting with restraint, rather than adequate safeguards being in place. This is particularly the case under the framework established by the NSL, where the Chief Executive wields ultimate authority in appointing judges, absent any of traditional safeguards to minimise potential for political influence, such as provision of reasons or right of review. Hong Kong's current Chief Executive John Lee took office uncontested on 8 May 2022 and has articulated strong support for increasing national security measures, creating an even greater potential risk to the external independence of the Hong Kong's judiciary, as national security cases are not subject to the same level of transparency or accountability as other cases handled by the Hong Kong courts.

*External Independence:
Judges and court
proceedings should be free
to decide cases in
accordance with the law,
free from political
interference by the executive
and legislative branches of
government and actors
outside of the government
(media, corporations etc.).*

Lack of transparency also poses a risk to judicial independence, not only by providing opportunities for undue pressures to go unseen, but also puts in jeopardy the reputation of the judiciary, thereby undermining trust in the judicial process overall. When confidence in the court system is low, people are less likely to use it which can in turn negatively impact the ability for the courts to function, resulting in greater discontent. Declines in press freedom will likely further jeopardise the court's reputation. The overturning of a media ban by the Court of First Instance in the Chow Hang Tung case⁶² is a positive step in mitigating such reputational risks. However, in May 2022, two UK Supreme Court judges resigned their posts as Non-Permanent Judges on the CFA citing concern over the effect of the NSL on judicial independence. While other non-permanent judges from jurisdictions including Australia and Canada remain⁶³, this reputational damage also affects the public's perception of independence in Hong Kong⁶⁴.

61 ABA Judicial Independence Monitor Toolkit, available at: <https://www.americanbar.org/content/dam/aba/directories/roli/other/aba-rol-judicial-independence-monitor-toolkit.pdf>

62 <https://www.scmp.com/news/hong-kong/politics/article/3187435/hong-kong-activist-detained-inciting-state-subversion-wins>

63 <https://www.theglobeandmail.com/world/article-top-british-judges-withdraw-from-hong-kongs-highest-court/>;

<https://www.rfa.org/english/news/china/judges-03302022121200.html>; <https://www.thetimes.co.uk/article/lady-hale-suggests-british-judges-should-quit-hong-kong-court-3cwr13sqg>

64 Anecdotal evidence suggests 'liberal' judges have often been side-lined, not be assigned 'politically' sensitive cases. Take for example Bokhary NPJ, one of the most senior and well-respected jurists in HK, he is best known for his dissenting judgments⁶⁴. He has not been assigned any significant constitutional cases since his retirement in 2012 as he continues to sit as a non-permanent judge (NPJ) of the CFA. Increasing influence of the CPG and NPCSC also pose potential reputational risks to the judiciary. Given there is only a small pool of potential candidates from the HK Bar and the Department of Justice who would be considered suitable for judicial appointments later in their career, it is quite feasible for the China Liaison Office to screen candidates who they could rely on to deliver the results they want to see. Some current High Court judges were invited to attend "China Study" courses at the Chinese Communist Party School in Shanghai prior to taking office. These courses are organised by the China Liaison Office and part of the United Front effort. They are designed to get a better understanding of the political leanings of individuals, like a screening exercise. The NSL designated list of judges is shrouded in secrecy therefore the public will not find out until another NSL case reach the CFA in the future.

The political involvement of Beijing is now largely affecting Hong Kong judicial careers. 'One Country, Two Systems' established a framework protecting Hong Kong's legal system, based on the rule of law, separation of powers and alignment with international human rights treaties such as the International Covenant on Civil and Political Rights. In the immediate post-1997 era, the CPG was willing to act with self-restraint and the framework was sufficient to preserve judicial independence. However, this accommodation of sorts has been eroded in recent years. Indications of this change include the 2014 State Council White Paper decreeing 'comprehensive jurisdiction' over all domestic affairs of Hong Kong – undermining the ultimate authority of the CFA to interpret Hong Kong's de facto constitution – and the 2021 'Decision of the NPC on Improving the Electoral System of the Hong Kong SAR'⁶⁵. The latest decision enables the China Liaison Office to directly exercise greater influence in the appointment of senior judicial positions whom they do not believe to be sufficiently "patriotic". Pro-Beijing lawmakers now dominate the legislative council chamber and can block senior judicial appointments. Together with the potential summary removal of judges under the NPC Standing Committee's interpretation of the oath provision in Article 104 of Basic Law, the institutional independence of the Hong Kong judiciary can be influenced in numerous unseen ways by both the HKSAR government and CPG. From the perspective of an experienced barrister or a mid-career judge considering furthering their career in the judiciary, once they have been criticised by a PRC state media, their career in the judiciary may be greatly affected. This creates a non-quantifiable but critical pressure point, where self-censorship may influence how a judge decides a case and could dissuade good candidates from a judicial career.

Part D: Recommendations

1. Separation of powers is fundamental to the independence of a judiciary and for the achievement of rule of law – dispersing power to prevent abuse by one branch of government. Hong Kong SAR officials, in particular the Chief Executive, should respect this principle of the rule of law and refrain from politicising court decisions through statements to the public. Article 35 of the Basic Law guarantees the right of individuals to challenge executive authorities through judicial review. This right is now significantly curtailed by the NSL.

Recommendations:

- 1.1 The Chief Executive and Legislative Council should reaffirm their commitment to and conform with the separation of powers doctrine, which is central to the One Country, Two Systems framework, as a first step to re-establishing public confidence in the judiciary.**
- 1.2 The – Judicial Officers Recommendations Committee (JORC) should be given actual power to appoint judges based on merit, integrity, and qualifications and not merely make recommendations to the Chief Executive.**
- 1.3 Clear and concise rules detailing the criteria for selecting, promoting, and dismissing judges and members of JORC should be adopted by the Hong Kong legislative framework governing the establishment of the JORC. In particular,:**
 - 1.3.1 A requirement to provide detailed reasons for decisions related to judicial appointments to concerned parties and to the public.**

⁶⁵ http://www.xinhuanet.com/english/2021-03/05/c_139788111.htm

- 1.3.2 **Clear limits on the degree of discretion exercised by the Chief Executive in selecting, promoting, and dismissing judges.**
 - 1.3.3 **Clear limits on the Chief Executive's role in the appointment of JORC members.**
 - 1.3.4 **The appointments to and decisions of the JORC should be more transparent and rule-based.**
 - 1.3.5 **Clear safeguards against improper influence in the appointment of judges by the HK SAR Executive, Legislative branches or the Central People's Government.**
- 1.4 **The internal assignment of all cases within the judiciary should be made transparent, with the decisions of the Chief Justice and court leaders made more accountable.**
2. The decision-making structure under the NSL creates numerous risks to judicial independence.

Recommendations:

- 2.1 **Any future steps to enact new national security laws should respect the separation of powers established under the One Country, Two Systems framework.**

In the interim,

- 2.1.1 **Provisions governing the designation of NSL judges should immediately cease to apply. Full judicial autonomy should be given back to the judiciary. Any national security laws should be enacted within the Hong Kong legislative system in accordance with the Basic Law.**
 - 2.1.2 **The provisions in the NSL barring judicial review of matters concerning national security and the decisions of the Committee for Safeguarding National Security of Hong Kong should be immediately repealed.**
3. For any future national security legislation:

Recommendations:

- 3.1 **The appointment of national security judges should be transparent and accountable to the public and rule-based in any future national security legislation.**
- 3.2 **The internal assignment of NSL cases within the judiciary should be made transparent, with the decisions of the Chief Justice and court leaders made more accountable.**

4. Judicial independence is a complex and nuanced topic affected by many factors including many beyond the scope of this assessment. However, in the process of analysing indicators, vulnerabilities in other areas were clearly identified for which the following recommendations are made:

Recommendations

4.1 Independence of the legal professional bodies should be respected by the Chinese authorities including the Hong Kong Government, the National People's Congress and the China Liaison Office. This includes:

- 4.1.1 **Not interfering with the freedom for members of the legal profession to choose and elect office holders within the Hong Kong Bar Association and the Hong Kong Law Society.**
- 4.1.2 **Ensuring the nominees from each of these respective legal bodies to the JORC are automatically appointed to the JORC.**
- 4.1.3 **Respecting the decisions of the Courts when it comes to *ad hoc* admission of foreign counsel for all kinds of cases. The recent decision of the Hong Kong government to seek to overturn the Court's decision to allow counsel from the UK to represent Jimmy Lai in the upcoming trial on national security, is one such example of the concerns in this area⁶⁶.**
- 4.1.4 **Adopting laws to protect lawyers, particularly those who take on sensitive political cases, from harassment, intimidation and attacks in line with the Basic Principles on the Role of Lawyers established by the United Nations (1990). The Hong Kong SAR should explicitly subscribe to these Basic Principles.**
- 4.1.5 **Given the powerful roles played by the Chief Executive and the Legislative Council in the judicial appointment process, universal suffrage as guaranteed under the Basic Law should be honoured**

4.2 The Hong Kong and China Authorities should fully respect the framework of 'One Country, Two Systems' as laid down in the Basic Law, established to protect Hong Kong's common law legal system.

- 4.2.1 **Rules with specific application to Hong Kong should be adopted through the legal process established by the Basic Law or at a minimum with full consultation with the Hong Kong public and be fully transparent. The principles of certainty and clarity of the law should be observed especially in serious criminal offences.**
- 4.2.2 **Decisions of the NPC Standing Committee touching on national security should be limited to what is strictly necessary and prohibited from encroaching upon the internal domestic affairs of Hong Kong. Save for foreign affairs and defence, all matters should be within the domestic autonomy of Hong Kong.**

⁶⁶ <https://www.theglobeandmail.com/opinion/article-jimmy-lai-trial-delay-democracy/>

- 4.2.3 The interpretative power of the NPC Standing Committee should only be used with great restraint and transparency. Legal reasoning of its interpretation should be provided, and the consultative procedure under the Basic Law should be open and accountable.**
5. The power under the interpretation of Article 104 of the Basic Law to summarily remove public office holders, including judges, should be repealed.

Recommendation

- 5.1 The Central People's Government should take immediate concrete steps to remove the interpretation of Article 104 of the Basic Law, of the NSL (especially parts which affect judicial independence such as Article 44) which would permit the removal of judges, without review, for a breach of their oath of office.**



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