



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES



JUDICIAL INDEPENDENCE IN HONG KONG SAR

BHRC Country Report using the 'Judicial Independence Monitor' Methodology
& Toolkit of the American Bar Association Rule of Law Initiative



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Introduction

Hong Kong is a special administrative region (SAR) of the People's Republic of China. The Chief Justice has recently reiterated the Judiciary's commitment to upholding the rule of law and judicial independence in Hong Kong guaranteed under the Basic Law, stating: 'All judges and judicial officers will continue to abide by the Judicial Oath and administer justice in full accordance with the law, without fear or favour, self-interest or deceit'.¹ This report uses the Judicial Independence Monitor toolkit and methodology developed by the American Bar Association Rule of Law Initiative to assess whether that commitment is being maintained in respect of judicial independence.²

Judicial independence is a fundamental component of the rule of law – where the law is applied equally to all persons (and entities) by an impartial judiciary. Judicial independence is intended to shield judges from inappropriate influences, be they from the government or other external actors, enabling them to make decisions based solely on the law and the evidence adduced. Given this fundamental role, judicial independence is an indicator in existing frameworks that can be used to assess the function of the rule of law, corruption risks, upholding of fundamental freedoms, and levels of economic competitiveness.³ However, these indices 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 that, at its most basic, requires judges to be free to adjudicate disputes based on the law and evidence alone, and that legal processes - and the regulators responsible for overseeing judges and court staff - remain impartial and accessible. However, judges and courts around the globe are facing increasing pressure due to various factors, including the growing political significance of court rulings, as well as impacts of globalisation, which increases the transnational nature of some disputes

The American Bar Association Rule of Law Initiative (ABA ROLI) Judicial Independence Monitor establishes a robust framework for assessing the rules and laws affecting a legal system and how those rules and laws are applied, as well as more intangible elements related to perception and trust in the legal process. The toolkit is designed to assess the vulnerabilities and strengths of judicial independence. It can be used by experts in legal practice, civil society, academia, government, or the private sector to assess their work on policy reform. The analysis offered by the Judicial Independence Monitor helps inform existing indices through a comprehensive analysis of judicial independence, subsequently becoming part of the larger feedback loop that already exists in assessing political and governance systems globally.⁴ It complements the Bangalore Principles of Judicial Conduct.⁵

1 Statement of Chief Justice of Court of Final Appeal <<https://www.info.gov.hk/gia/general/202406/07/P2024060600658.htm>>

2 American Bar Association Judicial Independence Monitor Toolkit <https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-rol-i-judicial-independence-monitor-toolkit-1222/>

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

4 American Bar Association Judicial Independence Monitor Toolkit <https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-rol-i-judicial-independence-monitor-toolkit-1222/>

5 The UN Bangalore Principles of Judicial Conduct <<https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>>

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 establishing appropriate safeguards to minimise influence for political ends and ensuring 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; and
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 accountable.

Careful consideration of rules and practices involved in each of these elements examining 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 can help to 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 judicial system as a whole is timely. The imposition of the Hong Kong National Security Law on Hong Kong by Beijing in 2020 (the NSL) has fundamentally changed the constitutional landscape in Hong Kong. In 2021, the Court of Final Appeal ruled that Hong Kong courts do not have jurisdiction to challenge the National Security Law nor the authority to declare any part of the NSL unconstitutional or invalid under the Basic Law and Bill of Rights, which serve as Hong Kong's 'mini' constitution. In December 2022, Hong Kong's executive branch exercised its discretion to request the National People's Congress Standing Committee in Beijing interpret provisions in the National Security Law. This request was made in connection with a case concerning whether individuals charged under the NSL have the right to instruct foreign legal counsel. Beijing's Interpretation overturned the Court of Final Appeal's decision to allow a foreign lawyer to participate in the defence team in a trial concerning national security charges.⁶ The Interpretation also expanded the role of the Committee for Safeguarding National Security of the Hong Kong SAR (the **National Security Committee**) empowering committee members to make legally binding decisions and judgments on questions of national security under Article 14 of the NSL.

The revocation of the right to judicial review, coupled with the apparent shift in judicial decision-making to political appointees from the National Security Committee or the National People's Congress, significantly undermines the core principles of rule of law. The legislation's absence of clear guidance or safeguards to constrain these unchecked powers poses serious threats to both judicial independence and the rule of law in Hong Kong. The enactment of the Safeguarding National Security Ordinance (SNSO) (also known as the Article 23 Legislation) in March 2024 amplifies these concerns. The SNSO was passed after a brief one-month consultation process and less than 3 weeks of legislative vetting. This law establishes new national security offences such as external interference and collusion with external forces, which are broadly defined, as well as creating new powers for law enforcement authorities to detain suspects for longer periods and to deny them access to legal consultation on grounds of national security. The body of this report will address these developments and their profound implications for the legal system in Hong Kong, and the rights and freedoms of individuals as at December 2024.

This report follows on from the Bar Human Rights Committee's first report on Hong Kong SAR judicial independence using the ABA ROLI Toolkit & Methodology, published in January 2023 and available at barhumanrights.org.

⁶ HKSAR v Lai Chee Ying (2021) HKCFA 3

Abbreviations & Acronyms

BL – Basic Law

CE – Chief Executive of Hong Kong SAR

CFA – Court of Final Appeal

CPG – Central People’s Government, PRC

JORC – Judicial Officers Recommendations Committee

HK SAR – Hong Kong Special Administrative Region

NSL – the Law of the PRC in Safeguarding National Security Law in Hong Kong SAR

NPC – National People’s Congress

NPCSC – National People’s Congress Standing Committee

PRC – People’s Republic of China

SNSO – Safeguarding National Security Ordinance



Hong Kong Police officers stand guard outside the West Kowloon Magistrates' Courts ahead of a hearing for former media mogul Jimmy Lai in Hong Kong

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 (**HK**) 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 [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.

All 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'. It is 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 guarantees to Hong Kong that its way of life and legal system would remain largely unchanged after the transfer of sovereignty and it contains provisions to reflect these constitutional guarantees which are designed to give the Hong Kong People a high degree of autonomy in governing their own affairs, except in defence and foreign affairs.

Type of Political System

Despite not fully developing 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, while the Chief Executive acts as the constitutional head of HK SAR with the power to appoint judges, s/he is not democratically elected but appointed by the CPG and his/her authority is subordinate to that of the CPG. Additionally, prior to 2021, only half the members of the Legislative Council were elected directly by the people, based on geographic constituencies. The remaining half were elected by professional or special interest groups known as 'functional constituencies' which can include people as well as entities.

Hong Kong's National Security arrangements have the greatest potential impact on judges' freedoms. This consists of the **Law of the People's Republic of China on Safeguarding National Security Law in the Hong Kong Special Administrative Region (the NSL)** and the **Safeguarding National Security Ordinance** (the SNSO). Both laws were passed in a way that broke with past practices on democratic principles of transparency and accountability. The NSL was enacted by the CPG in Beijing without any form of public consultation, bypassing Hong Kong's legislative process. Similarly, the SNSO, while introduced by Hong Kong's Legislative Council, was passed in less than three months, with no real

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 Committee to overhaul the election system in March 2021 to allow only the participation of 'patriots' – see Katja Drinhau, 'Hong Kong Elections: Beijing Redefines Democracy' (Merics, 22 December 2021) <<https://merics.org/en/short-analysis/hong-kong-elections-beijing-redefines-democracy>>; US State Department, Hong Kong 2021 Human Rights Report <https://www.state.gov/wp-content/uploads/2022/03/313615_HONG-KONG-2021-HUMAN-RIGHTS-REPORT.pdf>

public consultation. The Improving the Electoral System of the Hong Kong SAR law (the Election Law) was enacted by the National People's Congress in March 2021, without meaningful public consultation. The Election Law introduced significant changes to Hong Kong's legislative branch, which will likely have spillover effects on the judiciary as well. Most notably, as will be discussed below, the combined effect of the NSL and Election Law has led to the elimination of opposition parties in the Legislative Council, facilitating the passage of legislation like the SNSO without any substantive scrutiny.

In addition to the elimination of judicial review and potential to replace judges' decisions with that of political appointees, as described above, the ways in which the NSL and SNSO are being implemented raise concerns about the integrity of public institutions, including the judiciary. The ABA's Judicial Independence Monitor states: "Judicial independence is not merely a privilege of the judge—judges must exercise their authority both in accordance with rules—but it also has the goal of rendering fair and impartial decisions and serving justice".⁸ The use of the NSL and now the SNSO to undermine independent voices and erode freedom of expression, despite the NSL and the SNSO's purported adherence to the protection of human rights under the International Covenant on Civil and Political Rights⁹, creates an atmosphere of 'white terror' where only pro-government voices are tolerated.¹⁰ This resulting chilling effect is steadily shifting Hong Kong from a dynamic pluralistic society to one where everyone, including members of the judiciary and other public officials face pressure to conform with the official views of the PRC state. The breadth of application of the NSL, Election Law and now the SNSO raise serious concerns about the independence of Hong Kong courts which in turn pose a serious threat to the independence of the judiciary and the Hong Kong Bar Association, once a strong advocate of the rule of law.

The following is a summary of recent cases that have raised concerns:

In May 2024, 14 political opposition figures were found guilty of subversion under the NSL, while two were acquitted. This decision was based in part, on a ruling by the Court of Appeal that the use of violence or threat of violence is not a requisite element of the offence, and in so ruling, the Court of Appeal rejected the application of the Siracusa Principles on the Limitations and Derogation on free speech in the International Covenant on Civil and Political Rights.¹¹

Several other cases illustrate a broad interpretation of sedition, criminalising previously protected speech in Hong Kong. For instance, one man was charged with possession of seditious materials for receiving 18 copies of a book previously deemed seditious by the Hong Kong District Court.¹² A student returning home from studying in Japan was arrested for social media posts she made while abroad.¹³ Finally, the editors of popular online news platform Stand News were convicted for publishing criticisms of the NSL and other Hong Kong and PRC government policies.¹⁴ These decisions foster a chilling effect

8 American Bar Association Judicial Independence Monitor Toolkit <https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-rol-judicial-independence-monitor-toolkit-1222/>

9 Article 4 of NSL and Section 2(b) of the SNSO. It is also noted that under section 2(a) of the SNSO, it states "the highest principle of the policy of "one country, two systems" is to safeguard national sovereignty, security and development interests."

10 'Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong' (ChinaFile, 14 April 2022) <<https://www.chinafile.com/reporting-opinion/features/arrest-data-show-national-security-law-has-dealt-hard-blow-free>>; 'Three Years in, Hong Kong's National Security Law Has Entrenched a New Status Quo' (ChinaFile, 6 September 2023) <<https://www.chinafile.com/reporting-opinion/viewpoint/three-years-hong-kongs-national-security-law-has-entrenched-new-status>>; 'Hong Kong: Conviction of Stand News Journalists Another Attack on Press Freedom' (Amnesty International, 2 September 2024) <<https://www.amnesty.org/en/latest/news/2024/08/hong-kong-conviction-of-stand-news-journalists-another-attack-on-press-freedom/>>

11 Paragraphs 21 to 23 of HCCC 69/20222, [2024] HKCFI 1468, 30 May 2024; Paragraphs 115 to 129 of CACC 62/2022, 7 March 2024

12 Amnesty International, 'Hong Kong: Arrests for possession of 'seditious' children's books a new low for human rights' (17 March 2023) <<https://www.amnesty.org/en/latest/news/2023/03/hong-kong-arrests-for-possession-of-seditious-childrens-books-a-new-low-for-human-rights/>>

13 Reuters, 'Hong Kong student jailed for 2 months under sedition over social media posts in Japan' (03 November 2023) <<https://www.reuters.com/world/asia-pacific/hong-kong-student-jailed-2-months-under-sedition-over-social-media-posts-japan-2023-11-03/>>

14 Nick Marsh, 'HK journalists found guilty in landmark sedition case' BBC (29 August 2024) <<https://www.bbc.co.uk/news/articles/c4gq75qwve8o>>



Hong Kong Legislative Council

that not only stifles speech but in turn affects public scrutiny of laws. Absence of scrutiny reinforces repression, undermines democratic oversight and erodes independence of public institutions.¹⁵

The requirements for 'patriotism' under the reformed Election Law and the Public Offices (Candidacy & Taking Up Offices) (Miscellaneous Amendments) Ordinance¹⁶ give overarching power to an executive-led committee to vet candidates for public offices, which raises serious questions about the openness and freedom of Hong Kong elections.¹⁷ Persons deemed 'unpatriotic' by the Hong Kong Government or a 'threat to national security' are barred from standing in any election, and such decisions are not amenable to judicial review. Hong Kong's once vibrant civil society, independent media outlets and political opposition are thus stifled because the implementation of the NSL upsets the equilibrium established by 'One Country, Two Systems'. The Legislative Council election and the District Council elections were held in December 2021 and December 2023 respectively under the 'patriots only' structure revamped by the Hong Kong government.¹⁸ The number of directly elected seats in both elections has been dramatically reduced. The turnout for the elections was the lowest ever with only 27.5% for the District Council despite a massive publicity campaign by the government.¹⁹ These changes to the political system in Hong Kong have a profound impact on judicial independence as senior judicial appointments are required to be endorsed by the Hong Kong legislature under the Basic Law framework (i.e. Article 90). A Beijing controlled 'patriots only' legislature has been completely silent on rule of law issues, and has the power to veto any judicial candidate who is seen as not sufficiently 'patriotic' towards Beijing and the Hong Kong government.

This is in stark contrast to the last District Council elections held in 2019 where the democratic candidates won 90% of the seats with a 71% turnout.²⁰ The 'One Country, Two Systems' framework was designed to protect Hong Kong's common law system and free trade economic system and came with the promise of a high degree of autonomy for Hong Kongers with the ultimate aim of universal suffrage after the handover in 1997. It was intended that both the Chief Executive and members of the legislature would be elected by the Hong Kong people through universal suffrage, with each branch of government playing an important constitutional role in the judicial appointment process. This was the overall design for Hong Kong in safeguarding its freedom and rule of law after 1997 and paving the way for democratic reforms²¹

15 Walker T, '5 in Hong Kong Sentenced to Prison over Sheep Book' (Voice of America, 10 September 2022) <<https://www.voanews.com/a/in-hong-kong-sentenced-to-prison-over-sheep-book-/6739620.html>>; 'Hong Kong sedition verdict threatens more than just press freedom' (Washington Post, 03 September 2024) <<https://www.washingtonpost.com/opinions/2024/09/03/hong-kong-sedition-stand-news-case-press-freedom/>>; 'Tracking the Impact of Hong Kong's National Security Law' (ChinaFile, 14 November 2024) <<https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law/>>

16 'Oath-Taking Requirement Bill Gazetted' (Hong Kong's Information Services Department, 26 February 2021) <https://www.news.gov.hk/eng/2021/02/20210226/20210226_113140_843.html>; 'Public Offices (Candidacy and Taking up Offices)(Miscellaneous Amendments) Ordinance 2021 Comes into Effect Today' <<https://www.info.gov.hk/gia/general/202105/21/P2021052100273.htm>>

17 Yiu P, 'Turnout Hits New Low in Hong Kong "Patriots Only" Election' (Nikkei Asia, 19 December 2021) <<https://asia.nikkei.com/Politics/Turnout-hits-new-low-in-Hong-Kong-patriots-only-election>>; Bloomberg, 'Hong Kong Democrats Boycott Election Stage-Managed by Beijing' (Bloomberg.com) <<https://www.bloomberg.com/news/articles/2021-12-18/hong-kong-holds-first-patriots-only-election-after-overhaul>>; Xinhuanet, Communiqué of the Fourth Plenary Session of the 20th Central Commission for Discipline Inspection of the Communist Party of China <http://www.xinhuanet.com/english/2021-03/05/c_139788111.htm>

18 Jessie Pang and James Pomfret, 'Turnout Hits Record Low for Hong Kong's 'Patriots'-Only Election | Reuters' (Reuters, 19 December 2021) <<https://www.reuters.com/world/china/hong-kong-votes-overhauled-patriots-only-election-2021-12-19/>>

19 Chan Ho-him, 'Hong Kong's 'patriots-only' election draws record low turnout' (10 December 2023) <<https://www.ft.com/content/84ed9283-7693-41bf-8e8f-029061d40b8b>>

20 Graham-Harrison E, 'Hong Kong Voters Deliver Landslide Victory for Pro-Democracy Campaigners' (The Guardian, 25 November 2019) <<https://www.theguardian.com/world/2019/nov/24/hong-kong-residents-turn-up-for-local-elections-in-record-numbers>> accessed 8 January 2025

21 Michael C Davis and Thomas E Kellogg, The Promise of Democratization in Hong Kong, National Democratic Institute / Georgetown Center for Asian Law (2020) <https://www.ndi.org/sites/default/files/Final_04.11.20_The%20Promise%20of%20Democratization%20in%20Hong%20Kong.pdf>

Hong Kong once ranked comparatively highly 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 points.²² The Freedom House Index (monitoring the protection of fundamental human rights) also 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 institutions.²³ In the latest Freedom House Index, Hong Kong scored 41/100 in 2024, ranking at 134. In the latest Rule of Law Index, Hong Kong was ranked 23rd out of 142 in 2023 and 2024, and in the Corruption Perceptions Index, Hong Kong scored 75/100, or 14th in 2023.²⁴ Hong Kong ranks 135th out of 180 in the World Press Freedom Index compiled by Reporters Without Borders, marking a steep decline from 18th place in just two decades.²⁵

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).²⁶ 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 offences are handled by the District Court and magistrates' 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; following the handover, the Hong Kong Court of Final Appeal was created and now 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 (NPCSC). This power of interpretation is freestanding and can be utilised while proceedings are before the court.²⁷ Between 1996 - 2020, this interpretative power had been used by the NPCSC five times.

The Basic Law maintains the judiciary, legislature and executive as separate branches of government. Hong Kong courts adopt the separation of powers as a fundamental principle of Hong Kong's common law.²⁸ However, calls for "judicial patriotism" amongst pro-Beijing officials have persisted and intensified in recent years, mirroring the broader push of the Central People's Government to instill patriotism in government bodies in Hong Kong. For example, during a 2008 visit to Hong Kong, Xi Jinping explicitly urged the three branches of government to "work together".²⁹

²² Candice Chau, 'Hong Kong falls from top 20 in global Rule of Law Index' Hong Kong Free Press (26 October 2022) <<https://hongkongfp.com/2022/10/26/hong-kong-falls-from-top-20-in-global-rule-of-law-index/>>

²³ Freedom House, 'Hong Kong' (Freedom in the World 2022) <<https://freedomhouse.org/country/hong-kong/freedom-world/2022>>

²⁴ Freedom House, Countries and Territories <https://freedomhouse.org/countries/freedom-world/scores?sort=asc&order=Total%20Score%20and%20Status>; Irene Chan, Hong Kong falls for 3rd year on global rule of law index, as gov't says ranking remains higher than 'some countries' (Hong Kong Free Press, 26 October 2023) <https://hongkongfp.com/2023/10/26/hong-kong-falls-for-3rd-year-on-global-rule-of-law-index-as-govt-says-ranking-remains-higher-than-some-countries/>; Corruption Perceptions Index 2023 <https://www.transparency.org/en/cpi/2023>; World Justice Project, Hong Kong SAR, China 2024 <https://worldjusticeproject.org/rule-of-law-index/global/2024/Hong%20Kong%20SAR%2C%20China/>

²⁵ Rebecca Chong Wilkins, Hong Kong Convicts Journalists of Sedition, Deepening Press Freedom Concerns, TIME (30 August 2024) <<https://time.com/7015897/hong-kong-convicts-journalists-sedition-stand-news/>>

²⁶ Articles 8 and 18 of Basic Law (BL)

²⁷ 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

²⁸ Lo PY and Chen AHY, 'The Judicial Perspective of "Separation of Powers" in the Hong Kong Special Administrative Region of the People's Republic of China' (2018) 5(2) Journal of International and Comparative Law 337–362

²⁹ Radio Free Asia, 'Xi Jinping's 'Three Powers Cooperation Theory' has attracted the attention of Hong Kong lawyers' (10 July 2008) <<https://www.rfa.org/mandarin/yataibaodao/hongkong-07102008164550.html/ampRFA>>

This was reinforced by a 2014 State Council White Paper, which directed judges to be “patriotic” when performing their judicial duties.³⁰ These efforts culminated in the September 2020 declaration of Hong Kong’s Chief Executive (the head of the HK SAR) asserting that ‘separation of powers’ was obsolete and previous interpretations of the doctrine in Hong Kong’s constitutional framework had been incorrect.³¹

The erosion of the separation of powers framework in Hong Kong accelerated under the NSL in 2020, which shifted key decision-making powers from the judiciary to Hong Kong’s executive branch and the CPG. A significant example of this shift is the interpretation issued by the NPCSC in December 2022 regarding the appointment of overseas lawyers in cases involving national security charges. In December, the Court of Final Appeal (CFA) upheld a High Court ruling allowing an overseas barrister to represent a pro-democracy advocate and media tycoon Jimmy Lai in his defence against charges of collusion with foreign forces under the NSL. Following the CFA’s decision, the Hong Kong’s Secretary for Justice, requested the NPCSC to provide an interpretation of the NSL vis-a-vis the court’s authority to admit foreign lawyers in national security cases.³² The NPCSC is a political body comprised of appointees or delegates of the CPG, and thus, its decisions are political and a reflection of the CPG rather than independent legal judgement (the Interpretation).³³ In some circumstances, it may not be objectionable to require counsel to be a citizen to view national security material that may be relevant in a case, but, here, the issue is the broad definition of ‘national security’ controlled by the Executive, and being used to deny access to counsel, when the very independence of external counsel may be necessary to ensure a fair trial.

The NPCSC’s Interpretation gave the National Security Committee, a political body established under the NSL, power to make legally binding decisions on matters of national security. Once the Committee decides, its decision is final and binding on all government bodies, with no right to judicial review and have enforceable legal effect (per paragraph 1 of the Interpretation). The Interpretation further clarified that in cases concerning the charge of “endangering national security” the Court must obtain a certificate from the Chief Executive, under Article 47 of the NSL, to confirm whether the matter involves national security. If no certificate is issued, the Court must apply to the National Security Committee, and these decisions are not subject to judicial review. While the Interpretation does not prohibit overseas lawyers from representing clients in national security cases, it raises concerns about the risks and suggests such decisions be made by the Executive branch and not the courts.

A subsequent application by Lai to be represented by overseas counsel was rejected by the High Court in May 2023.³⁴

³⁰ The State Council, ‘The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region’, English.Gov. Cn <https://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm>; Radio Free Asia, ‘Hong Kong Lawyers in Mass Silent Protest Over China’s White Paper’ (27 June 2014) <<https://www.rfa.org/english/news/china/silent-06272014145550.html>>

³¹ Radio Free Asia, ‘No Separation of Powers’ in Hong Kong: Leader Carrie Lam (01 September 2020) <<https://www.rfa.org/english/news/china/powers-09012020144755.html>>; Global Times, HK has never adopted Western ‘separation of powers’ concept: State Council (07 September 2020) <<https://www.globaltimes.cn/content/1200196.shtml>>; Jennifer Creery, ‘No separation of powers in Hong Kong says Chief Exec. Carrie Lam, despite previous comments from top judges’ (Hong Kong Free Press, 01 September 2020) <<https://hongkongfp.com/2020/09/01/no-separation-of-powers-in-hong-kong-says-chief-exec-carrie-lam-despite-previous-comments-from-top-judges/>>

³² Articles 67(4) of the PRC Constitution and Article 65 of the NSL

³³ Changhao Wei & Taige Hu, ‘Explainer: NPCSC’s Interpretation of Hong Kong National Security Law over Jimmy Lai’s Foreign Defense Counsel’, NPC Observer (30 December 2022) <<https://npcobserver.com/2022/12/explainer-npcscs-interpretation-of-hong-kong-national-security-law-over-jimmy-lais-foreign-defense-counsel/>>

³⁴ In rejecting Mr Lai’s application for a declaration to uphold the Court of Final Appeal’s decision to allow Tim Owen KC’s ad hoc admission, the Chief Judge of the High Court held that “Reading NSL 12 and NSL 14 together as a coherent whole, by subjecting the NSC [(i.e. National Security Committee)] to direct supervision and control of the CPG and at the same time prohibiting any interference with NSC’s work by institutions, which plainly include the courts, and specifically excluding judicial review of NSC’s decisions, the legislative intent is clear. The duties and functions of the NSC under NSL 14 fall within the exclusive purview of the CPG having the overarching responsibility for the national security affairs relating to the HKSAR. The supervisory power over the NSC is hence reserved to the CPG exclusively. The HKSAR courts, as courts of a local administrative region, are not vested with any role or power over such matters of the CPG because they clearly fall outside the courts’ constitutional competence assigned to them under the constitutional order of the HKSAR.” See paragraph 35, *Lai Chee Ying v The Committee for Safeguarding National Security of the HKSAR* [2023] 3 HKLRD 275, [2023] HKCFI 1382

In so ruling, the High Court held: “The supervisory power over the National Security Committee is hence reserved to the Central People’s Government exclusively. The Hong Kong SAR courts, as courts of a local administrative region, are not vested with any role or power over such matters of Central People’s Government because they clearly fall outside the courts’ constitutional competence assigned to them under the constitutional order of the Hong Kong SAR” (per Poon CJHC in 2023 HKCFI 1382 at paragraph 35). This means the Hong Kong courts wholly accepted that the acts and decisions of the National Security Committee are beyond judicial review and/or scrutiny in Hong Kong.

Immediately following the Interpretation in December 2022, Hong Kong’s Legislative Counsel moved swiftly to pass the amendments to the Legal Practitioners Ordinance (Cap. 159) to disallow overseas counsel from acting in cases concerning national security unless a certificate has been obtained from the Chief Executive. The National Security Committee’s authority was further codified in the Safeguard National Security Ordinance, otherwise known as the Article 23 legislation (the SNSO). Section 112(3) of the SNSO provides that “if the law of the HKSAR confers any function on a person, any person, in making any decision in the performance of the function, must respect, and implement in accordance with the law, the judgments and decisions of the National Security Committee.” Additionally, the SNSO establishes new powers enabling the Secretary for Security and the Hong Kong Police Force to bar access to certain lawyers or law firms on national security grounds; the Secretary for Security is also authorized to cancel or suspend the legal professional qualifications of lawyers who have “absconded”. Lawyers whose licenses are affected have no recourse to appeal. This lack of appropriate guardrails threatens to erode the carefully established framework governing the legal profession and protecting its independence. Under the existing system, the rolls of barristers and solicitors are maintained by a senior judicial officer appointed by the Chief Justice, in accordance with the Legal Practitioners Ordinance. The Secretary for Security’s power to summarily cancel or suspend professional qualifications both supplants judicial decision-making powers under the Legal Practitioners Ordinance and undermines a framework to safeguard independence of the legal profession in Hong Kong. Although the power of the National Security Committee is confined to matters of ‘national security’, the term, as defined under section 4 of the SNSO, is very broad encompassing a wide range of matters and is nearly identical to the definition in the PRC’s National Security Law (Article 2). The similarities in definition, combined with newly established authorities with limited safeguards poses a risk to judicial independence within Hong Kong by putting the definition of national security in the hands of the Executive, by removing the judicial oversight of an independent legal profession and by removing appellate processes. Section 115 of the SNSO further broadens the Chief Executive’s power to intervene into any judicial proceedings by certifying whether an act or matter involves national security or whether any material involves state secrets. The courts are required to accept and follow this certification.

In the case of a student leader who was convicted for the common law offence of ‘incitement to wound with intent’ over his (and others) praising of a knife attack on the police in 2021, and in his application for early release on grounds of good behaviour (which an inmate would normally be eligible for a one-third discount), the National Security Committee intervened during the course of the court proceedings by issuing a decision to deny his application citing that this case involves matters of ‘national security’, despite the original criminal conviction not coming under the NSL. The court held that the student leader’s detention was lawful as the courts in Hong Kong have no jurisdiction to interfere with the decision of the National Security Committee.³⁵

The SNSO effectively imports the CPG’s “comprehensive national security” framework in Hong Kong, replacing the decision-making powers of judicial officers with that of the Executive, including political appointees, such as the Secretary for Security, the National Security Committee and the Chief Executive.

³⁵ Hans Tse, ‘Ex-Hong Kong student leader denied early release from jail following national security committee decision’, Hong Kong Free Press (24 September 2024) <<https://hongkongfp.com/2024/09/24/ex-hong-kong-student-leader-denied-early-release-from-jail-following-national-security-committee-decision/>>

Part B: Legislative Framework for Judicial Appointments

Original Framework under the Basic Law

As set out above, 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 pay.³⁶ Under the Basic Law, judges are to be selected on the basis of their judicial and professional qualities.³⁷ The retirement age for members of the judiciary is governed by local legislation.³⁸

Judicial appointments are made through a recommendations process established by the Judicial Officers Recommendation Commission (JORC) Ordinance. JORC is an advisory body to the Chief Executive³⁹ and is chaired by the Chief Justice, with members appointed by the Chief Executive⁴⁰ - among them, 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 Ordinance⁴¹). 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 are sent to the Chief Executive who then makes judicial appointments for all levels of the court system. The appointment 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 Council for each senior judicial appointment, and the appointment must be reported to the NPCSC for the record.⁴²

Each level of court has its court leader who oversees the administration and assignment of cases (i.e. the Chief Magistrate, the Chief District Court Judge, the Chief Judge of High Court), with each reporting to the Chief Justice. Every member of the judiciary must observe the Guide to Judicial Conduct.⁴³ 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 in order to give effect to judicial independence on the day to day management level.

³⁶ Articles 85, 91 & 93 of Basic Law

³⁷ Article 92 of Basic Law

³⁸ The Judicial Officers (Extension of Retirement Age) (Amendment) Ordinance 2019; S.11 A of Cap. 4, and s.13A of Cap. 484

³⁹ S. 6 of Cap. 92

⁴⁰ Cap. 92

⁴¹ Cap 159 Legal Practitioners Ordinance <<https://www.elegislation.gov.hk/hk/cap159>>

⁴² Article 90, Basic Law <<https://www.basiclaw.gov.hk/en/basiclaw/chapter4.html>>

⁴³ Preface, Guide to Judicial Conduct 2022 paras 1-7 <https://www.judiciary.hk/doc/en/publications/gjc_e.pdf>

Amendments to Hong Kong's constitutional framework after 2020

As noted above, Hong Kong's constitutional framework system has been transformed in recent years. As early as 2014, the 'One Country, Two Systems' framework began to be eroded, particularly following the adoption of the NSL in 2020. In 2014, by way of a State Council White Paper,⁴⁴ the CPG claimed 'comprehensive jurisdiction' over all official affairs in Hong Kong including the exercise of executive, legislative and judicial powers.⁴⁵ This had the effect of undermining the ultimate decision-making authority of the CFA as established under the Basic Law (with limited exceptions in matters of foreign affairs and national defence). 'Comprehensive jurisdiction' left no residual powers for Hong Kong itself. In 2021, the CFA held that the NSL is immune from challenge on grounds of non-compliance with the Basic Law.⁴⁶

The NSL further eroded the constitutional framework by creating separate procedures for national security cases. Under Article 44 of the NSL, all national security cases are presided over by a designated panel of judges selected by the Chief Executive in consultation with the politically appointed National Security Committee. NSL judges can be removed for making statements or behaving in a manner "endangering national security" during their term of office, which is one year. This one-year term is impractical as most national security cases take years to complete e.g. the NSL prosecution against the 47 opposition members who participated in the democratic primary took more than 3 years to complete. By limiting the term to one year, it risks judges being removed abruptly in the middle of a trial. Additionally, the NSL eliminates jury trials for NSL cases and requires defendants to meet extremely high standards to obtain bail. Moreover, the Interpretation of the NSL in 2022 detailed above, along with the plenary powers of the National Security Committee, removed many of the checks and balances on government powers such as judicial review, and legislative scrutiny.⁴⁷

Other legislative changes eroding safeguards to judicial independence established by the Basic Law include a 2016 NPCSC interpretation that the oath-taking requirement for all public officials (including judges) under Article 104 of the Basic Law is a substantive legal requirement.⁴⁸ 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 NPCSC.⁴⁹ Whilst this power has so far not been used against judges, the framework for the oath taking system could be construed as a tool to affect the independence of a public office holder in Hong Kong including judges and judicial officers.

⁴⁴ A State Council White Paper in the PRC is the official document setting out state policies in important areas.

⁴⁵ State Council White Paper 2014, The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region <http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm>

⁴⁶ Lai Chee-Ying v HKSAR 2021 HKCFA 3; Jerome A Cohen, The Long-Term Implications of the Jimmy Lai Bail Decision, The Diplomat (11 February 2021) <<https://thediplomat.com/2021/02/the-long-term-implications-of-the-jimmy-lai-bail-decision/>>; Senia Ng, The case of pro-democracy tycoon Jimmy Lai shows how the security law has shaken up Hong Kong's legal system, Hong Kong Free Press (12 February 2021) <<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/>>

⁴⁷ Article 44 of NSL

⁴⁸ Instrument 27, Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress <https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc27.pdf>

⁴⁹ Four 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. Human Rights Watch, China: Beijing Forces Out Hong Kong Opposition Lawmakers (12 November 2020) <<https://www.hrw.org/news/2020/11/12/china-beijing-forces-out-hong-kong-opposition-lawmakers>>

Part C: Analysis

Internal Independence of Judiciary: Procedural and Regulatory Protections

Regulation of the 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.

Case assignment and transfer of judges is done by the court leader (the Chief Justice, Chief Judge of High Court, Chief District Court Judge, and/or Chief Magistrate) 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 some degree of protection to judicial independence in Hong Kong. However, numerous potential points of pressure exist 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.⁵⁰ In practice, the JORC plays largely an advisory role, and the Chief Executive can reject JORC recommendations without giving reasons. 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 nomination / recommendation process.⁵¹

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, a barrister, a solicitor and other eminent non-legally trained persons 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 expected to be promoted to the High Court or CFA were not put forward or not appointed as had been expected.⁵² Furthermore, in 2021 the nominee for the membership of JORC put forward by the Hong

⁵⁰ JORC Ordinance Cap. 92 <<https://www.elegislation.gov.hk/hk/cap92>>

⁵¹ Lydia Wong, Thomas E Kellogg, Eric Yanho Lai, Hong Kong's National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper, Center for Asian Law / Georgetown Law (28 June 2021), p 10 <<https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf>>

⁵² Jennifer Creery, Hong Kong's director of public prosecutions David Leung resigns over differences with justice secretary, Hong Kong Free Press (3 August 2020) <<https://hongkongfp.com/2020/08/03/hong-kongs-director-of-public-prosecutions-david-leung-resigns-over-differences-with-justice-secretary/>>; The Standard, Ma's the word in CFA chase, The Standard (12 October 2020) <<https://www.thestandard.com.hk/section-news/section/11/223719/Ma's-the-word-in-CFA-chase>>

Kong Bar Association was rejected by the Chief Executive.⁵³ These incidents raise concerns about the politicisation of the appointment process.⁵⁴ Given that most of the judicial appointment process is not transparent to the public, there are now concerns with regards to the operation of JORC due to the 'national security' screening of candidates. The JORC also comes under the plenary power of the National Security Committee which significantly weakens its independence.

The appointment of judges under JORC has continued to face fresh challenges in light of the political and wider societal changes since the introduction of the NSL. At the High Court level, the vacancy ratio is at 36% as at Q1 of 2024. The High Court level is where most of the commercial and civil disputes are adjudicated, and the forum where some of the most serious criminal trials are held. On the commercial and civil side, there have always been complaints about the lengthy delays in listing hearings, and in the handing down of judgments.⁵⁵ In 2021, 6 candidates were nominated by the JORC for the High Court bench, but only three were ultimately appointed. The other 3 candidates apparently withdrew their candidacies due to reasons varying from national security to financial compensation. The 3 candidates who withdrew were all senior counsel and highly regarded members of the private bar in Hong Kong.⁵⁶ The Hong Kong private bar used to be the best pool of judicial candidates. Having enjoyed a successful career at the Bar, these individual practitioners are highly respected and competent. They generally joined the judiciary to serve the community as part of a tradition. These individuals are independent legal professionals. There is now a serious concern that given the national security screening of candidates and political pressure that comes with a judicial appointment, members of the private bar are increasingly reluctant to join the judiciary. This is likely to have a serious impact on judicial independence and the quality of judges in the future.

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

As a common law system, courts in Hong Kong have a well-established history of providing written judgements with full legal reasoning. Most judgments are accessible to the public via the Department of Justice's website, 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 can alternatively be made by a party to the case. Concerns have been raised that the broad definition of "national security" combined with the authority of the Chief Executive under Article 44(2) of the NSL (exercised in consultation with the politically appointed National Security Committee) to summarily remove judges without recourse to appeal or review could create a chilling effect on judicial decision making.⁵⁷

⁵³ Michael Shum, Potential push for pro-democracy counsel to land judge-vetting role, The Standard (24 August 2021) <https://www.thestandard.com.hk/section-news/section/11/233497/Potential-push-for-pro-democracy-counsel-to-land-judge-vetting-role>; Greg Torode, Hong Kong leader rejects barrister nominee to sensitive judges panel, appoints another, Reuters (25 March 2022) <<https://www.reuters.com/world/china/hong-kong-leader-rejects-barrister-nominee-sensitive-judges-panel-appoints-2022-03-25/>>

⁵⁴ 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>

⁵⁵ Gordon Oldham, Justice Delayed in Justice Denied, Hong Kong Lawyer (April 2021) <<https://www.hk-lawyer.org/content/justice-delayed-justice-denied>>

⁵⁶ Pak Yiu, Hong Kong neglects judicial nominations despite case backlog, Nikkei Asia (19 February 2024) <<https://asia.nikkei.com/Spotlight/Hong-Kong-security-law/Hong-Kong-neglects-judicial-nominations-despite-case-backlog#>>

⁵⁷ Freedom House, 'Freedom in the World 2024: The Mounting Damage of Flawed Elections and Armed Conflict' (2024) 16 <https://freedomhouse.org/sites/default/files/2024-02/FIW_2024_DigitalBooklet.pdf>

Concerns have also been raised about the oath requirements under Article 104⁵⁸ of the Basic Law, as interpreted by the NPCSC, which might also influence judicial decision making. Whether a public office holder has acted in breach of his or her oath is unilaterally determined by the NPCSC, with no appellate process or independent judicial review. Whilst this power has not been used against any judges in Hong Kong, it is sufficient to raise a serious concern that it will create a chilling effect on judicial decision making.

While assessing the individual independence of reasoning of judges is beyond the scope of this research, analysis of the judgments could be a possible indicator of influence over judicial decision making. For example, on 30 May 2024, a panel of three NSL judges found 45 pro-democracy opposition members guilty of conspiracy to commit subversion under the NSL for their participation in an election primary in 2020. At issue was a pledge made by the accused that, if elected, they would use their constitutional power to veto the budget, thereby prompting a dissolution of the Legislative Council and resignation of the Chief Executive unless the government responded to the demands of the Hong Kong people for, inter alia, universal suffrage. Such actions were explicitly authorized under Articles 50 and 51 of the Basic Law. However, the judges ruled that despite the legality of the actions proposed by the primary candidates and their supporters, they constituted the criminal act of subversion, which carries a maximum penalty of life imprisonment under the NSL. The 45 opposition members were sentenced on 19 November 2024. The heaviest sentence handed down was 10 years imprisonment for the constitutional law academic and democracy activist Professor Benny Tai, who is regarded by the court as the ‘mastermind’ behind the democratic primary election. Others were sentenced to around 4 to 8 years depending on their individual culpability.⁵⁹ The judgment closely mirrored the language of two official documents adopted by the National People’s Congress in Beijing in May 2020,⁶⁰ without the involvement of Hong Kong authorities or lawmakers. The wholesale adoption of NPC’s decisions and explanations without any judicial scrutiny is now a trend in the Hong Kong courts. Either the judges feel they have no choice but to follow these legal edicts pronounced by the NPC and/or that these are outside the jurisdiction of the Hong Kong courts.⁶¹

Also indicative of a chilling effect on judicial decision making are the statements of former members within the judiciary. In June 2024, two non-permanent judges (NPJ) on the Court of Final Appeal (CFA) from the UK announced their resignation. Lord Collins cited the ‘political situation’ in Hong Kong as the reason for his resignation, adding that he continued to have “the fullest confidence in the court and the total independence of its members”.⁶² The second judge, Lord Sumption elaborated in an opinion piece published in the Financial Times on 10 June 2024, noting that judges in Hong Kong are “forced to operate in an impossible political environment” in which they must apply illiberal legislation and risk having their judgments overturned by a the NPCSC, which, as noted previously, is a political and not legal body. Moreover, according to the former CFA judge, a “chorus of outrage follow[ing] rare decisions to grant bail or acquit” from the increasingly controlled press combined with ongoing calls for judicial ‘patriotism’ in his opinion have impacted the judiciary. In his view, this environment has significantly affected the independence of the judiciary, leading him to conclude “that rule of law has been profoundly compromised in any area about which the government feels strongly.”⁶³

58 Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress <<https://www.elegislation.gov.hk/hk/A115!en.assist.pdf>>

59 HKSAR v NG Gordon Ching-hang [2024] HKCFI 3298, Reasons for Sentence per Andrew Chan J, Alex Lee J and Johnny Chan J in Court dated 19 November <https://upload.wikimedia.org/wikisource/en/4/4f/HKSAR_v_Ng_Gordon_Ching-hang_and_others_%282024%2C_HKCFI%29.pdf>

60 [2024] HKCFI 1468 HCCC 69/2022, paras 17-25

61 (as per Poon CJHC in Lai v Secretary of Justice [2023] HKCFI 1382 at paragraphs 35 and 36)

62 Amy Hawkins, ‘Two more British judges resign from Hong Kong’s top court’ The Guardian (7 June 2024) <<https://www.theguardian.com/world/article/2024/jun/06/british-judges-resign-hong-kong-top-court-sumption-collins>>

63 FT Editorial, ‘The rule of law in Hong Kong is in grave danger’ Financial Times (30 May 2024) <<https://www.ft.com/content/60c825be-b70a-4152-895f-f6127974570a>>

Within the same week, another non-permanent judge from Canada announced that she would not be continuing to serve as an NPJ on the CFA at the end of July 2024. The former Chief Justice of the Supreme Court of Canada, Beverley McLachlin, did not respond to media request for comment.⁶⁴ In its official statement rebutting these allegations, the Hong Kong government did not propose any measures to address the concerns expressed by these departing judges.⁶⁵ In September 2024, Lord Phillips from the UK declined to be re-appointed to the CFA for “personal reasons”.

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 Judicial Officers Recommendation Commission (JORC) is the system by which judges and their staff are selected and regulated. Up until the passage of the NSL in June 2020, the JORC system functioned smoothly ensuring regulations of judges was relatively autonomous from the executive and legislative branches of the Hong Kong government. Criteria for selection of JORC members is clear, and traditionally members were sufficiently diverse and reflective of the views of both branches of the legal profession (barristers and solicitors).⁶⁶ Previously, the relatively small size of the Hong Kong legal community, combined with composition of the JORC, largely senior barristers or the Chairman of the Hong Kong Bar Association, reputed as a staunch advocate of rule of law and separation of powers, provided protection from undue influence in the selection and regulation of judges. For example, if an unknown candidate was to be recommended by JORC and appointed to the judiciary, it is likely that the legal profession and the public would immediately notice and question such an appointment. Similarly, any behaviour of a judge that suggested potential undue influence was likely to be noticed and capable of challenge.

However, the post-NSL national security regime detailed above and exacerbated by the SNSO, alongside the shuttering of numerous independent media outlets since 2021 along with the ‘patriots-only’ Legislative Council, have culminated in a serious curtailment of free speech in Hong Kong.⁶⁷ This makes it even harder for anyone to voice concern or ask questions. As a result, the informal safeguards intended to hold the JORC accountable have diminished. Given the lack of transparency inherent in the selection process, there is the potential that judicial independence and the status of judges will be strained or compromised under this indicator, affecting (at a minimum) the perception of influence, which can be equally damaging to judicial independence.⁶⁸ 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 and for

⁶⁴ Gail J. Cohen, ‘Another Judge to Leave Hong Kong’s Top Court’ Law.com International (10 June 2024) <<https://www.law.com/international-edition/2024/06/10/another-judge-to-leave-hong-kongs-top-court/>>

⁶⁵ Hong Kong Special Administrative Region Government, ‘HKSAR Government strongly disagrees with comments made by Lord Sumption’ (11 June 2024) <<https://www.info.gov.hk/gia/general/202406/11/P2024061100020.htm>>

⁶⁶ 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.

⁶⁷ In 2022, Hong Kong’s ranking by Reporters Without Borders from 80 to 148 out of 180 countries – see Reporters Without Borders, ‘Hong Kong’ <<https://rsf.org/en/country/hong-kong>>. Also, Hong Kong’s score for “free and independent media” in the Freedom in the World Index for 2022 also declined: Freedom House, ‘Hong Kong: Freedom in the World 2022 Country Report’ <<https://freedomhouse.org/country/hong-kong/freedom-world/2022>>

⁶⁸ As cautioned in the ABA ROLI Judicial Independence Monitoring methodology (p 23): “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.” See American Bar Association Judicial Independence Monitor Toolkit https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-rolj-judicial-independence-monitor-toolkit-1222/.

more open interference from Beijing. The new powers conferred on the National Security Committee by virtue of the Interpretation and the SNS Ordinance creates an unprecedented layer of risk for potential interference into the operation of JORC. The judicial selection and appointment process could well be regarded as part of the broad definition of ‘national security’ hence coming under the purview of the National Security Committee.⁶⁹ A once-trusted system based on the assessment of judicial merits has been compromised by this opacity combined with the introduction of national security screenings for court appointments and potential intervention by political bodies.

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.

Within the Hong Kong judiciary, investigation of alleged judicial misconduct is conducted by a panel of senior judges.⁷⁰ The judicial complaints mechanism was revised in 2021 with a two-tier process that includes non-judicial representatives which could potentially provide an inroad for political influence, thereby undermining judicial independence.⁷¹ This relatively new development will have to be monitored.

The criteria for removing a judge is clearly set out in Articles 89 and 90 of the Basic Law. However, the power of the CPG to remove a judge from office for failing to properly swear an oath of loyalty under Article 104 of the Basic Law and corresponding NPCSC Interpretation is a potential threat to judicial independence.⁷² According to NPCSC Interpretation (Instrument 27) ‘[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’. As in the case of the direct disqualification of pro-democracy lawmakers by the NPCSC for breaching their oath of office in November 2020⁷³, this overriding power under Instrument 27 also applies to all judges and judicial officers in Hong Kong as well. In practice, the CE may request the NPCSC to invoke its power to disqualify any public office holder in Hong Kong.⁷⁴ Once the decision is handed down by the NPCSC, it is not amenable to judicial review by Hong Kong courts.⁷⁵ There is currently no sign that the CE will request the NPCSC to invoke this power to disqualify judges, however, this creates a ‘hanging sword’ effect over members of the judiciary. Furthermore, the Legislative Council plays a critical constitutional function in the endorsement of senior judicial appointments who in turn hold key roles in the management of the judiciary. Now with a ‘patriots only’ legislature, this not only fosters a perception of potential political influence from the legislature over the judicial appointment process but also raises concerns about the potential impact on the integrity and independence of the judiciary.⁷⁶

⁶⁹ Section 4 of SNS Ordinance

⁷⁰ Hong Kong Free Press, ‘Hong Kong judiciary throws out complaints against Hong Kong judge and magistrate’ (23 May 2022) <<https://hongkongfp.com/2022/05/23/hong-kong-judiciary-throws-out-complaints-against-hong-kong-judge-and-magistrate/>>

⁷¹ Sonny Lo Shiu Hing, ‘Judicial reform in Hong Kong’ Macau Business (9 May 2021) <<https://www.macaubusiness.com/opinion-judicial-reform-in-hong-kong/>>; SCMP Editorial, ‘Judicial complaints body should steer well clear of politics’ South China Morning Post (13 August 2021) <<https://www.scmp.com/comment/opinion/article/3144840/judicial-complaints-body-should-steer-well-clear-politics>>

⁷² 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 – see Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress, Instrument A115 <<https://www.elegislation.gov.hk/hk/A115!en.assist.pdf>>

⁷³ Tony Cheung and Jeffie Lam, ‘Mass resignation of Hong Kong opposition lawmakers after Beijing rules on disqualification’ South China Morning Post (11 November 2020) <<https://www.scmp.com/news/hong-kong/politics/article/3109454/mass-resignation-hong-kong-opposition-lawmakers-after>>

⁷⁴ Xinhua News Agency, ‘Beijing reasserts its total control over Hong Kong in white paper’ (11 November 2020) <http://www.xinhuanet.com/politics/2020-11/11/c_1126725802.htm>

⁷⁵ 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

⁷⁶ SCMP Editorial, ‘Beijing emphasises its total control over Hong Kong in white paper’ (10 June 2014) <<https://www.scmp.com/news/hong-kong/article/1529300/beijing-reasserts-its-total-control-over-hong-kong-white-paper>>

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 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 candidates and address the shortage of judges, judicial salaries have been substantially increased in recent years.⁷⁷

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 opaque nature of JORC deliberations creates a potential 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. Whilst lack of transparency is a legacy from Hong Kong's colonial history, there is the potential for it to be exploited from within the current environment in which potential political intervention into judicial fields is increasingly a risk. The absence of any requirement to provide reasons in the judicial selection process creates uncertainty in how judges are selected. As noted above, JORC's independence is tied to the level of influence wielded by the Chief Executive, and the degree of influence exercised by the CPG and/or the National Security Committee is unclear. Furthermore, a judge can be summarily dismissed by the NPCSC 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 trials.⁷⁸ Veiled threats against the judiciary published by state-backed media can also undermine perceptions of judicial independence. 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' decision.⁷⁹ Each of these create a potential pressure point when judges are expected to refrain from making decisions which would be considered out of line by the Hong Kong government or Beijing. Senior judicial appointments have to be endorsed by the Hong Kong Legislative Council. After the imposition of the Election Law, the 'patriots-only' Legislative Council now consists of members who are deemed 'loyal' by the National Security Committee, and only after they have passed through the electoral vetting mechanism. Legal judgments may be scrutinised by Legislative Council members in the future when a particular judge is up for promotion.⁸⁰ A similar point was made by Lord Sumption about the 'oppressive atmosphere' in Hong Kong and the continued call for 'judicial patriotism'. Senior judicial offices such as Chief Judge of the High Court, Chief Justice and judges on the Court of Final Appeal have to be endorsed by the Legislative Council in accordance with the Basic Law.

⁷⁷ Standing Committee on Judicial Salaries and Conditions of Service, 'Report on Judicial Remuneration Review 2021' (September 2021) <https://www.jsscs.gov.hk/reports/en/jscs_21/jscs_21.pdf>

⁷⁸ Kari Soo Lindberg and Natalie Lung, 'Hong Kong's Top Court Sends Tycoon Jimmy Lai Back to Jail' (31 December 2020) <<https://www.bloomberg.com/news/articles/2020-12-31/hong-kong-s-top-court-orders-tycoon-jimmy-lai-returned-to-jail>>

⁷⁹ Straits Times, 'Chinese newspaper People's Daily slams Hong Kong court for releasing Jimmy Lai on bail' (27 December 2020) <<https://www.straitstimes.com/asia/east-asia/chinese-newspaper-peoples-daily-slams-hong-kong-court-for-releasing-jimmy-lai-on-bail>>

⁸⁰ American Bar Association Judicial Independence Monitor Toolkit, p 19 <https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news-rolj-judicial-independence-monitor-toolkit-1222/>



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).

The lack of transparency and the high degree of discretion afforded to court leaders and the Chief Justice in case assignment together create additional points of potential pressure on judicial independence. In Hong Kong, 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, creating a further layer of opacity in case-assignment whereby judges are selected by the Chief Executive and, as set out above, remain vulnerable to attempts to undermine or compromise their independence. There is no mechanism to review case assignment decisions, and there is no 'whistle-blowing' protection for judges if they report abuse within the judicial system. Under Article 44(2), a NSL judge could be removed at any time if he/she "makes any statement or behaves in any manner endangering national security". The National Security Committee could summarily decide these matters with no transparency and/or possibility of judicial review.

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 NPCSC to summarily dismiss any Hong Kong official, including judges.⁸¹ This creates the potential for several laws, including Hong Kong's oath taking system to pose a threat to judges who may be deemed "disloyal" by the NPCSC. Judicial immunity is not a defence to an allegation of breach of oath under the interpretation of Article 104. Whilst 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 officer holders is concerning and so also creates a potential pressure point on judicial independence.⁸²

⁸¹ Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, Instrument A115 <<https://www.elegislation.gov.hk/hk/A115!en.assist.pdf>>

⁸² Al Jazeera, 'Hong Kong disqualifies legislators for 'endangering security' (11 November 2020) <<https://www.aljazeera.com/news/2020/11/11/hong-kong-disqualifies-four-opposition-legislators>>

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 by Hong Kong courts. CPG and NPCSC actions are considered 'acts of state' not reviewable by the Hong Kong courts. However, post-2020, widespread criticisms have been made by pro-establishment lawmakers that judicial review has been abused by pro-democracy supporters and arguments have been put forward that the perceived trend of courts 'ruling' Hong Kong must be corrected.⁸³ Furthermore, under the NSL, decisions and judgments of the National Security Committee are exempt from judicial review.⁸⁴ The NPCSC has the power and ability to issue interpretations and decisions even whilst proceedings are sub judice. All of these issues point to potential sources of pressure on judicial independence.

The plenary power conferred on the National Security Committee by the Interpretation and the SNSO further erodes the ability of the Hong Kong courts to protect basic human rights and/or to exercise judicial review powers over the executive authorities. Section 2(a) of the SNS Ordinance states that the highest principle of the policy of "One Country, Two Systems" is to safeguard national sovereignty, security and development interests⁸⁵. Section 115 of the SNSO empowers the Chief Executive to intervene in any court proceedings on matters of national security and/or state secrets. Such intervention by way of certification power is binding on the Hong Kong courts.

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.

Prior to 2020, threats to judges' personal safety was not a serious concern, and people were generally free to criticise the courts. Anyone who now openly criticises a member of the judiciary may face prosecution under the Crimes Ordinance for sedition,⁸⁶ a criminal charge that is now frequently used by the Hong Kong authorities. In 2020, a High Court Justice extended a ban on the doxing⁸⁷ and harassment of judges and their families and criticised the Secretary for Justice for failing to address wrongful accusations.⁸⁸ The SNSO created additional offences against unlawful disclosure of personal data of persons handling cases or work concerning national security. This includes the protection of judicial officers and their personal information.

⁸³ Karen Cheung, 'Hong Kong's judicial review system is being abused, says former top judge' (3 December 2015) <<https://hongkongfp.com/2015/12/03/hong-kongs-judicial-review-system-is-being-abused-says-former-top-judge/>>

⁸⁴ Article 14 of the NSL

⁸⁵ Safeguarding National Security Ordinance (Instrument A305) <<https://www.elegislation.gov.hk/hk/capA305!en.pdf>>

⁸⁶ Amnesty International, 'Hong Kong: 'Sedition' arrests after clapping in court a new low for human rights' (06 April 2022) <<https://www.amnesty.org/en/latest/news/2022/04/hong-kong-sedition-arrests-after-clapping-in-court-a-new-low-for-human-rights/>>

⁸⁷ The unauthorized disclosure of private or personal information with the intent to shame or harm the individual – see Cambridge Dictionary, 'Doxing' <<https://dictionary.cambridge.org/dictionary/english/doxing>>

⁸⁸ Brian Wong, 'Ban on doxxing Hong Kong judicial officers, families extended, as High Court judge says 'prompt and firm' response needed' South China Morning Post (13 November 2020) <<https://www.scmp.com/news/hong-kong/law-and-crime/article/3109725/ban-doxing-hong-kong-judicial-officers-families>>

Threats to the judiciary in Hong Kong often come from pro-establishment and PRC-state-backed media outlets.⁸⁹ The most notable example is when a NSL judge granted bail to the owner of Apple Daily, Jimmy Lai, in late 2022. The pro-establishment news papers, including Wen Wei Po and Tai Kung Po, as well as some state-backed media in the PRC criticised the decision and threatened to remove the case from the Hong Kong court (pursuant to Article 55 of the NSL) if judges failed to reach the 'right' decision. The High Court's decision to grant bail was later overturned by the CFA, raising the question of whether this ruling was based on legal reasons or in response to political threats. A similar incident took place again when the Hong Kong courts granted leave to allow overseas counsel to defend Lai at his NSL trial. Media criticism of the courts' decision and attacks on the institutional legitimacy of the Courts in this context creates a significant pressure point on the Hong Kong judiciary.

Transparency: Judges to be seen to be independent

Code of Ethics

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.

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 Conduct.⁹⁰ The criteria established by the Judicial Code of Conduct sets out the guiding principles for judges' conduct both on and off the bench. To date there is no 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 no apparent points of pressure on judicial independence.⁹¹ However, with the recent 2021 revisions to the complaints mechanism for judges which now involves non-judicial representatives, the ability of the National Security Committee to reject judicial candidates whom are insufficiently 'patriotic', and political criticisms of court decisions by pro-Beijing and PRC-backed media, 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 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

⁸⁹ Austin Ramzy, 'Hong Kong's Courts are still independent. Some want to rein them in.' The New York Times (30 November 2020) <https://www.nytimes.com/2020/11/30/world/asia/hong-kong-china-courts.html>; Nicole Ko and Zen Soo, 'Hong Kong media tycoon Jimmy Lai jailed after bail revoked' (31 December 2020) <https://apnews.com/article/beijing-media-jimmy-lai-arrests-courts-d19d3e2977959fe193806056d2ef3601>; Cheryl Tung, 'Pro-China media issued 'veiled threat' over approval of Jimmy Lai's British lawyer' (26 November 2022) <https://www.rfa.org/english/news/china/china-jimmy-lai-11262022110338.html>; Anne Marie Roantree, 'Pro-Beijing media in Hong Kong denounce 'traitor' Jimmy Lai' (23 June 2021) <https://www.reuters.com/world/asia-pacific/pro-beijing-media-hong-kong-denounce-traitor-jimmy-lai-2021-06-23/>

⁹⁰ Hong Kong Judiciary, 'Judicial Conduct' <https://www.judiciary.hk/en/about_us/judicial_conduct.html>

⁹¹ Hong Kong Judiciary, 'Judicial Conduct' <https://www.judiciary.hk/en/about_us/judicial_conduct.html>

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

Access to court hearings is one way of ensuring transparency. In general, 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 user's guideline 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 court.⁹²

However, the changing situation in Hong Kong since the implementation of the NSL, broadening the concept of national security and increasing the ability of officials to unilaterally limit transparency in enforcement proceedings is concerning. In 2022 a group of citizens were arrested and charged with sedition for clapping in the public gallery of a courtroom.⁹³ When the High Court handed down its verdict in the case concerning the 47 opposition members who took part in the primary election, there were small and peaceful protests outside of the courtroom. A few individuals were arrested for public disturbance. 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 cases.⁹⁴ Pre-emptive control measures, where ordinary citizens, journalists and diplomats are frequently denied access to courts and are intimidated while congregating outside of courthouses in political cases have occurred in PRC.⁹⁵ Whilst these are not so far overt trends in Hong Kong, this area needs to be monitored.

⁹² Hong Kong Judiciary, 'Advice to Court Users Observing Court Proceedings' (February 2022) <https://www.judiciary.hk/en/court_services_facilities/court_proceeding_house_rule.html>

⁹³ Amnesty International, 'Hong Kong: 'Sedition' arrests after clapping in court a new low for human rights' (06 April 2022) <<https://www.amnesty.org/en/latest/news/2022/04/hong-kong-sedition-arrests-after-clapping-in-court-a-new-low-for-human-rights/>>

⁹⁴ Philip Dykes, 'Chow Hang-tung's landmark legal victory will let the press do its job properly' (14 August 2022) <<https://hongkongfp.com/2022/08/14/chow-hang-tungs-landmark-legal-victory-will-let-the-press-do-its-job-properly/>>

⁹⁵ Sui-Lee Wee, 'Trial of China rights lawyer lasts three hours, police block court access' (14 December 2015) <<https://www.reuters.com/article/world/trial-of-china-rights-lawyer-lasts-three-hours-police-block-court-access-idUSKBN0TX068/>>; Human Rights Watch, 'Dismantling a Free Society: Hong Kong One Year after the National Security Law' <https://www.hrw.org/feature/2021/06/25/dismantling-free-society/hong-kong-one-year-after-national-security-law>; Michael C Davis, 'Freedom Undone: The Assault on Liberal Values and Institutions in Hong Kong' Association for Asian Studies <https://www.asianstudies.org/store/freedom-undone-the-assault-on-liberal-values-and-institutions-in-hong-kong-michael-c-davis/>; OHCHR, 'UN Human Rights Committee issues findings on Hong Kong, Macao, Georgia, Ireland, Luxembourg and Uruguay' (27 July 2022) <https://www.ohchr.org/en/press-releases/2022/07/un-human-rights-committee-issues-findings-hong-kong-macao-georgia-ireland>; OHCHR, 'China/Hong Kong SAR: UN experts concerned about ongoing trials and arrest warrants under National Security Legislation' (09 October 2023) <https://www.ohchr.org/en/press-releases/2023/10/chinahong-kong-sar-un-experts-concerned-about-ongoing-trials-and-arrest>; Ole Tangen Jr, 'How is China's crackdown changing Hong Kong's identity?' DW (12 March 2021) <https://www.dw.com/en/hong-kong-how-is-chinas-crackdown-changing-the-citys-identity/a-60007287>; OHCHR, 'Hong Kong SAR: UN experts urge authorities to drop all charges against Jimmy Lai, call for his release' (22 January 2024) <<https://www.ohchr.org/en/press-releases/2024/01/hong-kong-sar-un-experts-urge-authorities-drop-all-charges-against-jimmy-lai>>

Diversity

Degree to which courts are diverse, representing a broad cross-section of society. This 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.

The local Hong Kong Bar and the Department of Justice remain the primary source of judicial candidates in Hong Kong. All judges are trained in the common law system and received their law degree in Hong Kong or from a law school in another common law system country. While the Hong Kong Judiciary does not keep official statistics on diversity, anecdotal evidence suggests a relatively balanced gender ratio across the judiciary as a whole. However, this balance is less evident in the CFA and court leadership positions. There has never been a female permanent judge appointed to the CFA, and two overseas female non-permanent judges declined to renew their appointments. It has been a long tradition that lawyers of non-Chinese descent were considered for judicial appointments, but recent anecdotal evidence suggests that Hong Kong lawyers with non-Chinese backgrounds are being turned down for judicial appointments ostensibly because they lack the Chinese language skills needed to handle bilingual cases. 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.

Part D: Conclusion & Recommendations

This analysis of judicial independence in Hong Kong assessed against the ABA ROLI Methodology, reveals there are multiple areas of potential vulnerability and significant risks to judicial independence in Hong Kong. Many of these revolve around the centralised authority of the Chief Executive, elected by a limited group of individuals from a shortlist of candidates approved by a CPG appointed committee, and around the lack of transparency on how decisions are made. Given the role of the Executive under the new national security regime, the analysis supports an urgent need for adequate safeguards to ensure courts operate impartially without undue political influence. Judicial independence in Hong Kong has traditionally been protected as a result of the Executive arm acting with restraint. This analysis demonstrates that this is now severely tested 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 – i.e. provision of reasons or right of review. Hong Kong’s current Chief Executive, John Lee, took office uncontested on 08 May 2022 and has since articulated strong support for increasing national security measures, creating an even greater potential risk to the external independence of the Hong Kong judiciary as national security cases are not subject to the same level of transparency or accountability as other types of cases handled by the Hong Kong courts.

This analysis also shows that the overturning of the Court of Final Appeal’s judgment through the use of the NPCSC interpretation powers (at the request of the Hong Kong executive authorities) in December 2022 is a deeply concerning event in the wider issues around judicial independence, particularly by the adoption of NPCSC decisions and interpretations by the Hong Kong courts without any judicial scrutiny.⁹⁶

The move to confer plenary powers on the National Security Committee to issue legally binding and enforcement decisions and/or judgments concerning national security has a more direct effect on judicial independence in Hong Kong where these decisions and/or judgments (which are not opened to the public unless the National Security Committee discloses them) are binding on the Hong Kong courts and not open to judicial review or scrutiny. The National Security Committee is chaired by the Chief Executive⁹⁷ and comprises of other senior political appointees within the Hong Kong Government. A national security advisor appointed by the CPG is legally entitled to sit in on all meetings and to provide advice to the committee on its duties and functions.⁹⁸ The legal scope of ‘national security’ covers a wide range of areas from military, state security, economy, finance to other major interests of the PRC.⁹⁹ This means that any court proceedings which touch on the national interests of the PRC state is under the purview and jurisdiction of the National Security Committee which has the power to intervene at any time and make legally binding decisions.

This analysis also shows that current risks to judicial independence in Hong Kong stem from perception and diminishing trust in the judiciary. Lack of transparency in both the institutional framework as set out above and judicial proceedings combined with growing number of politically sensitive cases fuel the perception that Hong Kong’s judiciary is not independent. In the immediate post-1997 era, there

⁹⁶ HKSAR v NG et al [2024] HKCFI 1468, HCCC 69/2022, para 24-26

⁹⁷ Article 13 of NSL

⁹⁸ Article 15 of NSL and s. 112 of the SNSO

⁹⁹ s. 4 of the SNSO

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.



A statue of Thames, the goddess of justice, stands on the Court of Final Appeal (HKCFA) of Hong Kong

appeared to be a willingness to act with some restraint, to ensure the original framework of ‘One Country, Two Systems’ was sufficient to preserve judicial independence, but this analysis suggests that accommodation has been eroded in recent years, including through the 2014 State Council White Paper decreeing ‘comprehensive jurisdiction’ over all domestic affairs of Hong Kong (undermining the authority of the CFA to interpret Hong Kong’s de facto constitution), the direct imposition of the NSL and related interpretation, the passage of the SNSO and the 2021 ‘Decision of the NPC on Improving the Electoral System of the Hong Kong SAR’.¹⁰⁰

This analysis also shows that with the imposition of the NSL and the National Security Committee, coupled with the expansive legal concept of ‘national security’, the CPG and the national security apparatus there are now many ways there may be interference in judicial decision making and the operation of the judiciary. The latest interpretation by the NPCSC in December 2022 enables the National Security Committee to directly exercise greater influence in the appointment of senior judicial positions whom they do not believe to be sufficiently ‘patriotic’. The legislative council chamber and can block senior judicial appointments and the make-up of that chamber lacks balance. From the perspective of an experienced senior barrister or a mid-career judge considering furthering their career in the judiciary, if they are criticised in state media, their career in the judiciary may be greatly affected or ended. This creates a non-quantifiable but critical pressure point, in that self-censorship may profoundly influence how a judge decides a case and could dissuade good candidates from a judicial career.

Opacity in the selection of national security judges, as well as JORC vetting system undermine trust and confidence in the independence on Hong Kong’s courts. The list of designated judges and judicial officers by the Chief Executive pursuant to the NSL¹⁰¹ is not open to the public, and the designated judges could be removed at any time by the Chief Executive with no appeal or possibility of review by a higher court. Furthermore, through its plenary powers acquired under the Interpretation and the newly enacted SNSO,¹⁰² this analysis shows that the National Security Committee now has the power to intervene into any judicial appointment process, and the JORC vetting and recommendation mechanism. Calls for judicial patriotism and ‘patriots only’ Legislative Council serve to further undermine confidence in the process. As noted above, the Legislative Council has the power to block the appointment of senior judicial officers by withholding its endorsement. Together with the potential for summary removal of judges under the NPCSC’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 ways by both the Hong Kong government and CPG, directly and indirectly.

Any deteriorating press freedom will also impacts the public’s perception of, and confidence in, the courts. As set out above, in recent years, the attacks on judicial decisions have risen. This combined with the intensification of calls for “judicial patriotism” questions undermining confidence in independence.

Another key indicator is the resignations of non-permanent judges on the CFA with 2 openly citing concerns over the effect of the NSL on the political situation in Hong Kong and its impact on the rule of law,¹⁰³ with one publicly warning that the rule of law in Hong Kong is in ‘grave danger’ and stating that many judges have “lost sight of their traditional role as defenders of the liberty of the subject”.¹⁰⁴

¹⁰⁰ Xinhua Net, ‘Full Text: Explanations on the Draft Decision of the National People’s Congress on Improving the Electoral System of the Hong Kong Special Administrative Region’ (05 March 2021) <http://www.xinhuanet.com/english/2021-03/05/c_139788111.htm>

¹⁰¹ Article 44 of NSL

¹⁰² See s112 of the SNS Ordinance

¹⁰³ Amy Hawkins, ‘Two more British judges resign from Hong Kong’s top court’ (07 June 2024) <<https://www.theguardian.com/world/article/2024/jun/06/british-judges-resign-hong-kong-top-court-sumption-collins>>

¹⁰⁴ Jonathan Sumption, ‘The rule of law in Hong Kong is in grave danger’ Financial Times (10 June 2024) <<https://www.ft.com/content/60c825be-b70a-4152-895f-f6127974570a>>

While other non-permanent judges from jurisdictions including Australia and the UK remain,¹⁰⁵ the sum totality of these events erodes confidence in Hong Kong's courts.¹⁰⁶

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. Article 35 of the Basic Law guarantees the right of individuals to challenge executive authorities through judicial review. This right, which is intrinsic to the separation of powers doctrine, is now significantly curtailed by the NSL. The following recommendations are made:**
 - 1.1 The Chief Executive and Legislative Council should reaffirm their commitment to and conform with separation of powers central to the 'One Country, Two Systems' framework as a first step to re-establishing public confidence in the judiciary. This should include a commitment to balanced media releases on judicial decision-making.
 - 1.2 The JORC should be given powers 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 for the recommendation of judicial appointments to concerned parties and to the public.
 - 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 established.
 - 1.3.4 The appointments to and decisions of the JORC should be more transparent and institutionalised.
 - 1.3.5 Clear safeguards against improper influence by the Executive.
 - 1.4 The internal assignment of all cases within the judiciary should be made transparent to allow for necessary accountability.

¹⁰⁵ Sean Fine and James Griffiths, 'Canada's Beverley McLachlin to remain on Hong Kong's highest court, despite top British judges' resignations' *The Globe and Mail* (30 March 2022) <<https://www.theglobeandmail.com/world/article-top-british-judges-withdraw-from-hong-kongs-highest-court/>>; Lee Yuk Yue and Lu Xi, 'Top British judges quit Hong Kong final appeal court, citing national security law' (30 March 2022) <<https://www.rfa.org/english/news/china/judges-03302022121200.html>>; Jonathan Ames and Catherine Baksi, 'Lady Hale suggests British judges should quit Hong Kong court' (16 November 2022) <https://www.thetimes.co.uk/article/lady-hale-suggests-british-judges-should-quit-hong-kong-court-3cwl3sgg>; Dennis Kwok, 'The delay in Jimmy Lai's trial in Hong Kong represents a denial of justice' *The Globe and Mail* (15 December 2022) <<https://www.theglobeandmail.com/opinion/article-jimmy-lai-trial-delay-democracy/>>

¹⁰⁶ Anecdotal evidence suggests 'liberal' judges have often been sidelined and not assigned 'politically' sensitive cases. Take for example Bokhary NPJ, one of the most senior and well-respected jurists in HK, best known for his dissenting judgments who has not been assigned any significant constitutional cases since his retirement in 2012 as he continued to sit as a non-permanent judge 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 whom 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, organised by the China Liaison Office and part of the United Front effort, which are designed as a screening exercise to ascertain a better understanding of the political leanings of individuals.

2. The decision-making structure under the NSL creates numerous risks to judicial independence. The following recommendations are made:

- 2.1 The current interpretation of Article 104 of the Basic Law should be repealed, similarly the NSL (especially parts which affect judicial independence such as Article 44), the Interpretation of December 2022, and the parts of the SNS Ordinance which affect judicial independence, and any future steps to enact new national security laws should be approached with respect to 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 immediately cease to apply.
 - 2.1.3 The Interpretation of the NSL by the NPC Standing Committee issued in December 2022 should immediately cease to apply.
 - 2.1.4 The provisions in the SNS Ordinance concerning the judiciary should immediately cease to apply.

3. For any future national security legislation, the following recommendations are made:

- 3.1 All existing and future national security legislations must adhere to the principles of legal certainty and clarity. The assignment of judges to preside over national security cases should be entirely a matter for the judiciary. Jury trials should be made available for all serious crimes, with suitable judicial orders on confidentiality.
- 3.2 The legislative process for any future national security legislations in Hong Kong should be enacted locally under the original framework of 'One Country, Two Systems'.
- 3.3 The internal assignment of NSL cases within the judiciary should be made transparent, with the necessary accountability.

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:

- 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 Respect the decisions of the Courts when it comes to ad hoc admission of foreign counsel for all kinds of cases. The Court's decision to allow foreign counsel to represent Jimmy Lai in the upcoming trial should be respected.¹⁰⁷

¹⁰⁷ Dennis Kwok, 'The delay in Jimmy Lai's trial in Hong Kong represents a denial of justice' The Globe and Mail (15 December 2022) <<https://www.theglobeandmail.com/opinion/article-jimmy-lai-trial-delay-democracy/>>

- 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. The SNS Ordinance contains new powers to enable the Secretary for Security and the Hong Kong Police to bar access to certain lawyers or law firms on national security grounds. These provisions should be abolished.
- 4.1.5 The provision in the SNS Ordinance which empowers the Secretary for Security to cancel or suspend the legal professional qualification of an 'absconder' under the NSL should be abolished.
- 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. The Hong Kong courts must retain the power to judicially review the acts of the executive including the National Security Committee.
 - 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.
 - 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. In this regard, the following recommendations are made:

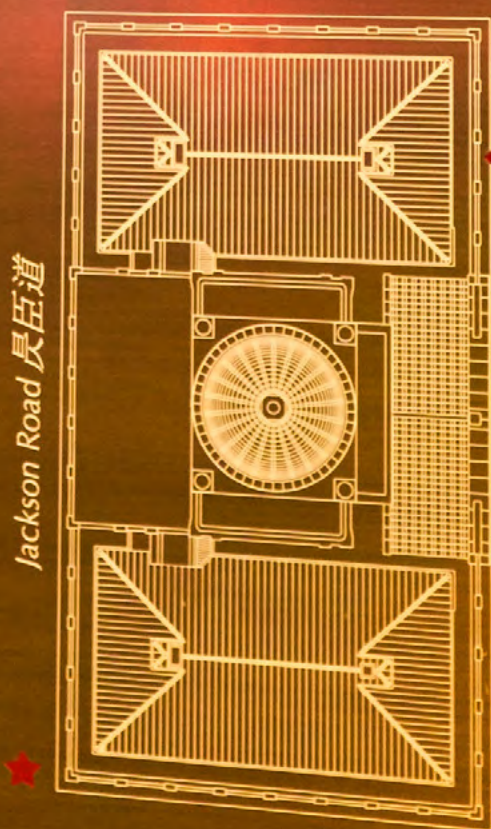
- 5.1 Given the powerful roles played by the Chief Executive and the Legislative Council in the judicial appointment process, universal suffrage as guaranteed under the Basic Law should be honoured.
- 5.2 The laws in relation to the NPC Decision in March 2021 on 'Improving the Electoral System of the Hong Kong SAR' should be abolished.

司法機構
JUDICIARY

終審法院 THE COURT OF FINAL APPEAL

昃臣道8號
8 JACKSON ROAD

Des Voeux Rd Central 德輔道中



Jackson Road 昃臣道

Statue Square 皇后像廣場

Chater Road 遮打道

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INAL APPEAL

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