



# ASIA MAIOR

Vol. XXXI / 2020

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## Asia in 2020: Coping with COVID-19 and other crises

Edited by  
**Michelguglielmo Torri**  
**Nicola Mocci**  
**Filippo Boni**

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A large, intricate decorative floral pattern, similar in style to the logo, is positioned on the right side of the cover, extending from the middle to the bottom. It features complex geometric and organic shapes in a light brown color.



CENTRO STUDI PER I POPOLI EXTRA-EUROPEI “CESARE BONACOSSA” - UNIVERSITÀ DI PAVIA

# ASIA MAIOR

The Journal of the Italian think tank on Asia founded by Giorgio Borsa in 1989

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Articles meant for publication should be sent to Michelguglielmo Torri (mg.torri@gmail.com), Nicola Mocchi (nicola.mocchi@unifi.it) and Filippo Boni (filippo.boni@open.ac.uk); book reviews should be sent to Oliviero Frattolillo (oliviero.frattolillo@uniroma3.it) and Francesca Congiu (fcongiu@unica.it).



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# HONG KONG 2020: THE DOWNFALL OF «ONE COUNTRY TWO SYSTEMS»\*

Sheldon Wong

Asia Maior – An Italian think tank on Asia  
asiamaior@gmail.com

*In this watershed year the Hong Kong Special Autonomous Region (HKSAR) was fundamentally reshaped by the concatenation of two major events, namely COVID-19 and the roll out of the National Security Law (NSL). While Beijing had already set in train advanced plans for the «second takeover», with mass protest snuffed out the arrival of the global pandemic provided perfect subterfuge for ushering in the NSL. The law effectively ended the city's «high degree of autonomy», belying the strategic gamble behind One Country Two Systems (OCTS) that Hong Kong would change China before China changed Hong Kong. As the reification of the central government's «comprehensive jurisdiction» the NSL acted as a vehicle for the institutional and constitutional repurposing of OCTS towards a system of direct rule, adding to the statute books four capacious new criminal offences qua instruments of lawfare and psychological warfare. Having rolled back the separation of powers through executive capture, co-opting the police and subduing the legislature, a full-frontal assault was launched on the city's independent judiciary. By the end of the year, OCTS had been hollowed out to the point of existing in name only to legitimise the exercise of raw political power. If not already dead, it was moribund. While reactive measures such as sanctions, lifeboat policies, human rights scrutiny and moral suasion manifestly failed to deter a more assertive Beijing under Xi Jinping from exploiting what it perceived to be a closing window of opportunity to pursue revisionist objectives in Hong Kong, the second handover shaped wider regional and global geopolitics, deepening the strategic competition between China and the US and its allies with some describing events in Hong Kong as the trigger for a «new cold war».*

**KEYWORDS – Hong Kong; China; National Security Law; One Country Two Systems; Comprehensive Jurisdiction; Direct Rule.**

*A list of the acronyms used hereafter, together with their full version, can be found at the end of this article.*

\* Relevant terms and expressions are reported in English followed by a transcription in Chinese characters. Traditional characters are used for terms and statements drawn from Hong Kong sources, while simplified characters are used for terms and statements drawn from Chinese sources. Given the lack of a standardised system for proper nouns, people's names and place names are transliterated either in Wade-Giles or in Jyutping (for Cantonese sources), following their most common usage. Proper nouns from the PRC are transliterated in Hanyu Pinyin.



## 1. *Introduction*

This essay explores the developments which occurred in the Hong Kong Special Autonomous Region of the People's Republic of China – hereafter HKSAR – in the fields of law, politics, Pekingology, the domestic economy and international politics in 2020, with an emphasis on the impact of the «Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Autonomous Region» (中華人民共和國香港特別行政區維護國家安全法, NSL) on «One Country Two Systems» (一國兩制, OCTS).<sup>1</sup> The first section, charting the incubation of the NSL, consists of three segments. The first examines Beijing's anaemic Hong Kong policy and elite drivers of the NSL to peak behind the bamboo curtain in Zhongnanhai (中南海). The second segment shows how the coronavirus (COVID-19), which spread to the HKSAR from Wuhan, extinguished the anti-extradition protests, clearing the way for a mass campaign in Hong Kong to roll out the NSL covered in the third segment. The second part of the essay then assesses in three segments the profound institutional and constitutional changes to OCTS and the content of the NSL in that order. Building on this foundation, the third section describes how the NSL has insinuated itself into all four corners of Hong Kong society, analysing in as many segments the repercussions for freedom of speech in the media and the academy, the legislative branch, law enforcement and the judiciary. While the previous sections concentrated on political and legal developments in the HKSAR, the final section concludes by situating these developments within a broader two-part discussion of international politics and economics based on official data and forecasts.

## 2. *Beijing's Hong Kong policy: eradicating two types of virus*

Two major events shaped the Hong Kong Special Autonomous Region's (HKSAR) trajectory in 2020. The first was the global coronavirus pandemic (hereafter COVID-19) which brought an abrupt end to the anti-extradition street protests that had been branded as a «political virus» having convulsed the city since the second half of 2019. The second was the NSL, the unilateral imposition of which by Beijing breached the OCTS firewall around Hong Kong's rule of law and, under the cover of COVID-19, pro-

1. The Sino-British Joint Declaration provides the framework for OCTS, outlining the «basic policies of the PRC regarding Hong Kong» (for full text see: <https://www.cmab.gov.hk/en/issues/joint3.htm>). In essence, OCTS granted the HKSAR a «high degree of autonomy» for 50 years after Hong Kong was returned to China such that Hong Kong would retain the capitalist economic system, its own currency, its legal system, legislative system and the same basic human rights and freedoms at least until 2047.

vided new tools of «lawfare» for an accelerated round of repression rolling back fundamental rights and freedoms and institutionalising a policy shift towards direct rule.

### 2.1. *Drivers of the NSL*

For two decades after the handover in 1997, Beijing had struggled to assert control over Hong Kong indirectly through the institutional framework of OCTS. It inherited a «liberal autocracy with multi-party elections» that favoured smaller parties in the Legislative Council (LegCo) and prohibited the Chief Executive from having any party affiliation. This in turn rendered the task of building a stable governing coalition practically impossible for any incumbent, whether elected or selected. After renegeing on the Basic Law's democratic reform pledges for 2007, Beijing became increasingly reliant on a clientelist network centred around the Liaison Office of the Central People's Government of the Hong Kong Special Autonomous Region (中央人民政府驻香港特别行政区联络办公室, the Liaison Office). That patronage network leveraged United Front Work (统战工作) to co-opt civil society, business and professional elites to control LegCo and Chief Executive elections. However, a lack of popular accountability engendered a series of high-profile miscalculations culminating in the anti-extradition protests of 2019, which brought into sharp-focus the shortcomings of indirect rule.<sup>2</sup>

The exercise of Beijing's «comprehensive jurisdiction» (全面管治权) that emerged more fully in the NSL as a solution to this impasse was first asserted in a white paper released by the State Council in June 2014. The white paper instrumentally redefined the Basic Law as a tool of *direct* control primarily through the exercise of an unlimited power of constitutional interpretation by the Standing Committee of the National People's Congress (NPC), China's rubber stamp parliament; and characterised Hong Kong's fiercely independent judiciary as administrative officers subservient to the exigencies of national security.<sup>3</sup> Against this backdrop at the height of the protests in July 2019 the Politburo (政治局) met to decide the fate of OCTS.<sup>4</sup> Formulations from that meeting trickled into the state media and from September the Minister of Public Security, Zhao Kezhi (赵克志), appeared in Hong Kong system meetings as «deputy chair» (副组长) of the Hong Kong

2. For discussion of a «liberal democracy with multiparty elections» see: Eliza W. Lee, 'United Front, Clientelism, and Indirect Rule: Theorizing the Role of the «Liaison Office» in Hong Kong', *The Journal of Contemporary China*, Vol. 29, No.125, 2019, pp. 763-75.

3. PRC Information Office of the State Council, '《一国两制》在香港特别行政区的实践白皮书' (The Practice of the «One Country, Two Systems» Policy in the Hong Kong Special Administrative Region), 10 June 2014 (<http://www.scio.gov.cn/tt/Document/1372801/1372801.htm>).

4. Sebastian Veg, 'The «Restructuring» of Hong Kong and the Rise of Neostatism', *Tocqueville 21*, 27 June 2020.

and Macau Affairs Leading Small Group (中央港澳工作领导小组), portending the elevated role of national security concerns in Beijing's Hong Kong policy.<sup>5</sup> By 31 October 2019, the 4<sup>th</sup> Plenum of the 19<sup>th</sup> Central Committee passed a resolution containing a blueprint for the NSL.<sup>6</sup> Changes emerged on the ground in January and February 2020 with a reshuffle of the heads of two major bureaucracies, namely the Liaison Office in Hong Kong and the Hong Kong and Macau Affairs Office (HKMAO) in Beijing, reflecting their incompetent handling of the extradition law. Unlike outgoing officials Zhang Xiaoming (张晓明) and Wang Zhimin (王志民), their replacements Luo Huining (骆惠宁) and Xia Baolong (夏宝龙) have no experience of Hong Kong affairs. Instead, they are Xi Jinping loyalists with a track record of ruthless enforcement.<sup>7</sup> It thus seems likely that the NSL was intended to be adopted by the NPC in March within the usual time frame of the Two Assemblies (两会), but COVID-19 would intervene.

## 2.2. *The two viruses*

In retrospect, statistics tend to confirm Hong Kong's relatively effective institutional and community response to COVID-19. With a population of 7.5mn, in 2020 there were 8,847 cases and 148 deaths without any full-scale lockdowns.<sup>8</sup> This may be ascribed to the experience of the SARS epidemic in 2003, which provided a policy template for adopting efficient measures in the early stages of the pandemic.<sup>9</sup> However, from the outset health policy was politicised and it was unclear whether immigration decisions pertinent to public health policy were made locally or in Beijing. While Hong Kong continued to allow direct flights from Wuhan in early February, neighbouring countries such as Vietnam and the Philippines responded by banning all flights from Hong Kong.<sup>10</sup> HKSAR Chief Executive Carrie Lam's refusal to close the border with China triggered the first medical strike in the history

5. Naito Hiroko, 'Legalization of the Chinese Communist Party's governance over Hong Kong', *Journal of Contemporary East Asia Studies*, Vol. 9, Issue 2, 2020, p.10.

6. '中共中央关于坚持和完善中国特色社会主义制度推进国家治理体系和治理能力现代化若干重大问题的决定' (Important Miscellaneous Decisions of the Central Committee of the Chinese Communist Party on Upholding and Improving the System of Socialism with Chinese Characteristics to Advance the System of National Governance and Modernise Governance Capacity), *Xinhua*, 5 November 2019, see Par. 12 (2).

7. Willy Wo-Lap Lam, 'Beijing's Appointment of Xia Baolong Signals a Harder Line on Hong Kong', *China Brief*, Vol. 20, Issue 4, 28 February 2020.

8. Real-Time Dashboard, LKS Faculty of Medicine School of Public Health, 1 January 2021 (<https://covid19.sph.hku.hk>).

9. Samuel Y.S. Wong, Kin On Kwok & Francis K.L. Chan, 'What can countries learn from Hong Kong's response to the COVID-19 pandemic?', *Canadian Medical Association Journal*, Vol. 192, Issue 19, May 11, 2020.

10. 'Hong Kong Tightens Border as Medical Workers Call for Shutdown', *New York Times*, 3 February 2020.

of Hong Kong, in which 10% of hospital workers struck for four days from 3 February.<sup>11</sup> Luo Huining sardonically ridiculed the strikers as «a political form of the coronavirus».<sup>12</sup> He would subsequently claim that the NSL had averted a «colour revolution» in Hong Kong,<sup>13</sup> although in fact it was the coronavirus that miraculously quelled the mass unrest.

Sweeping emergency powers for managing the pandemic created opportunities for repression through the selective enforcement of COVID-19 regulations, for example, targeting students, pro-democracy politicians and «yellow restaurants», namely eateries frequented by consumers sympathetic to the anti-extradition protest movement.<sup>14</sup> In May when new COVID-19 cases flatlined and social distancing measures were relaxed, outdoors emergency measures were temporarily extended to 4 June, as a result of which the annual candlelit vigil for the victims of the 1989 Tiananmen Incident was symbolically cancelled for the first time in 17 years.<sup>15</sup> Conversely, amidst tightening COVID-19 restrictions on National Day, unhampered by police pro-Beijing groups marched *en masse* through one of Asia's most densely crowded shopping districts.<sup>16</sup> With mass protest extinguished and the attention of the international community focused on fighting the pandemic, the road was cleared for the national security juggernaut to roll into Hong Kong.

### 2.3. *A national security campaign*

In the grip of the pandemic, pro-Beijing groups explored new means of mobilising local support for the NSL. Junius Ho (何君堯), a lawmaker linked in the local media to the «721» triad violence in Yuen Long in 2019,<sup>17</sup> claimed

11. 'Coronavirus: mandatory quarantine for all arriving in Hong Kong from mainland China as city leader rebuts claims of slow response', *South China Morning Post*, 5 February 2020.

12. 'HK troublemakers are a political virus: Luo Huining', *Radio Television Hong Kong* (RTHK), 20 February 2020.

13. 'Beijing's Liaison Office chief Luo Huining says security legislation ended unrest in Hong Kong', *Hong Kong Free Press*, 30 September 2020.

14. Elson Tong, 'Explainer: After months of protests, is Hong Kong selectively enforcing covid-19 laws?', *Hong Kong Free Press*, 17 April 2020.

15. 'Hong Kong police ban Tiananmen vigil for first time', *Financial Times*, 1 June 2020.

16. 'China National Day: Hong Kong police deploy in force, dozens arrested, as hundreds defy protest ban', *Hong Kong Free Press*, 1 October 2020.

17. On 21 July 2019, a white-shirted mob indiscriminately attacked civilians, including black-clad protestors, elderly, children, lawmakers, journalists and a pregnant woman in and around the Yuen Long Mass Transit Rail station. The absence of a police response despite advanced warning, thousands of phone calls from members of the public and the presence of undercover police officers observing the violence as it unfolded has triggered allegations about collusion between the police and local triad gangs. For further information on the links with organised crime please see: Elson Tong, 'Explainer: The Yuen Long mob attacks and Hong Kong's triads – why do some consider the New Territories «lawless»?', *Hong Kong Free Press*, 27 July 2019.

that Alliance 23, a newly established organisation supporting the enactment of national security legislation under Article 23 of the Basic Law, had garnered over 1mn signatures online, although only 23% of participants self-reported as living in Hong Kong. Extrapolating from 1,400 signatures collected at 36 locations, which also distributed free masks and hand-wash, Ho estimated that with 300 booths another 2mn signatures could be collected.<sup>18</sup> On 1 June, chair of Alliance 23 and NPC Standing Committee (NPCSC) member Tam Yiu-chung (譚耀宗) duly delivered a petition with 2.93mn signatures supporting the NSL to the Liaison Office.<sup>19</sup>

In May the volume of the national security campaign was amped up ahead of the third session of the 13<sup>th</sup> Committee of the Chinese People's Political Consultative Conference (中国人民政治协商会议, CPPCC). The HKMAO labelled last year's «black violence» a «political virus» (政治病毒),<sup>20</sup> eerily echoing the «ideological virus» metaphor used to justify repression in Xinjiang.<sup>21</sup> In his speech opening the CPPCC, Wang Yang (汪洋), CCP Politburo member with responsibility for United Front work, called for improving OCTS but omitted the usual references to Hong Kong's «high degree of autonomy» (高度自治). The 2020 session featured a prominent role for HKSAR delegates, including former Financial Secretary Henry Tang (唐英年) who painted a dystopian vision of a nascent terrorist threat. According to Tang, that threat had emerged because of legal loopholes, which had been exploited by external forces and opposition politicians to foment violent chaos.<sup>22</sup> After the biggest fall in the Hang Seng Index in 5 years,<sup>23</sup> the vice-premier and Politburo member with responsibility for Hong Kong affairs, Han Zheng (韓正), sought to assuage concerns by assuring the CPPCC that the NSL will only target «a small group of people».<sup>24</sup>

On 28 May the NPC decided by 2,878-1 to authorise the NPC Standing Committee (NPCSC) outside of the usual two sessions timetable to

18. 'Lawmaker hails 1 million-strong petition urging national security law, but most signatories not Hong Kong-based', *Hong Kong Free Press*, 16 March 2020.

19. 'Nearly 2.93 mln HK residents show support of national security legislation by signing Petition', *Xinhua*, 2 June 2020.

20. 国务院港澳办新闻发言人: “黑暴”一日不除, 香港一日不宁 (HKMAO Spokesman: Hong Kong cannot be Peaceful until it Eliminates «Black Violence»), 6 May 2020 ([http://www.xinhuanet.com/gangao/2020-05/06/c\\_1125947767.htm](http://www.xinhuanet.com/gangao/2020-05/06/c_1125947767.htm)).

21. Sheena Chestnut Greitens, Myunghee Lee & Emir Yazici, 'Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang', *International Security* 2020, Vol. 44, Issue 3, pp. 42-3.

22. John Dotson, 'Themes from the CPPCC Signal the End of Hong Kong Autonomy – and the Effective End of the «One Country, Two Systems» Framework', *China Brief*, Vol. 20, Issue 10, May 29, 2020.

23. 'Hong Kong stocks dive on China's plans for security law', *Financial Times*, 22 May 2020.

24. 'Two Sessions 2020: Hong Kong national security law will only target «small group of people», Vice-Premier Han Zheng says as Beijing hits back at critics', *South China Morning Post*, 23 May 2020.

directly enact the NSL, thereby circumventing the HKSAR legislature.<sup>25</sup> Constitutional lawyers, including Johannes Chan (陳文敏), offered erudite opinions. For example, Chan pointed out that invoking Article 18 to enact national security legislation for insertion into Annex III of the Basic Law was unconstitutional because that article was never intended to be a mechanism by which the NPC could legislate directly for Hong Kong; and that so doing also breached Article 23, which empowered Hong Kong to enact national security laws *on its own*. However, by then the Basic Law had already become politically irrelevant in the face of the national security juggernaut bearing down on the city.<sup>26</sup>

Hong Kong's oligarchs duly lined up with varying degrees of enthusiasm to express support for enacting the NSL,<sup>27</sup> which Li Ka-shing (李嘉誠) described as a «mission-critical task» for long-term stability<sup>28</sup> and Peter Woo Kwong-ching (吳光正) hailed as essential in «the new cold war».<sup>29</sup> Retired Court of Final Appeal judge, Henry Litton CBE, was galvanised to persuade the legal profession of the necessity for the NSL without which Hong Kong was vulnerable to exploitation «as a proxy for a wider power conflict». Repeating the familiar terrorism and Cold War framing, Litton controversially called for «radical changes at all levels ..., no less than in the judiciary».<sup>30</sup> And despite the fact that the drafting of the NSL was conducted secretly without public consultation, the HKSAR government poured HK\$ 7mn into advertisements promoting a law the contents of which it had not seen.<sup>31</sup> Multinational companies maintaining a studious silence such as HSBC were punished: the bank's stocks plummeted by 3% after it was singled out by former Chief Executive C.Y. Leung.<sup>32</sup>

25. 全国人民代表大会关于建立健全香港特别行政区维护国家安全的法律制度和执行机制的决定 (‘Establishing and Improving the Legal System and Enforcement Mechanisms for Hong Kong to Safeguard National Security’), *Xinhua*, 28 May 2020.

26. Johannes M.M. Chan, ‘Five Reasons to Question the Legality of a National Security Law for Hong Kong’, *Verfassungsblog*, 1 June 2020.

27. Alison Tudor-Ackroyd & Chad Bray, ‘What HSBC and Cathay Pacific’s bow to Beijing on Hong Kong national security law tells investors about management in political crises’, *South China Morning Post*, 4 June 2020.

28. ‘李嘉誠：國安立法發揮長遠穩定發展的正面作用’ (‘Li Ka Shing: Legislating for National Security Will Positively Foster Long Term Stability’), *Ta Kung Pao*, 27 May 2020.

29. ‘National security law: Hong Kong tycoon Michael Kadoorie backs legislation but urges government to secure public approval’, *South China Morning Post*, 5 June 2020.

30. Henry Litton, ‘Why Beijing’s national security law for Hong Kong deserves the full support of the judiciary and lawyers’, *South China Morning Post*, 1 June 2020.

31. ‘Hong Kong spends almost HK\$7m of taxpayers money on promoting security law; «One-way brainwashing», says democrat’, *Hong Kong Free Press*, 26 June 2020.

32. ‘Former HK leader calls out HSBC following UK criticism of security law’, *Reuters*, 29 May 2020.

The chilling effect was felt even before the NSL came into force, augmented by the opacity of the drafting process and a blackout of reliable information. The first high-profile casualty was former Chief Secretary Anson Chan who announced her retirement from politics, provoking shrill editorial tirades in state media taunting the 80-year-old ex-No.2 that «traitors» will not «escape judgment day».<sup>33</sup> In quick succession, pro-democracy and localist groups Demosistō, the Hong Kong National Front and Studentlocalism disbanded and two prominent activists Nathan Law and Wayne Chan fled the city.<sup>34</sup> Shortly before promulgation of the NSL, social media users frantically scrubbed accounts to delete traces of political content foreshadowing a rising tide of self-censorship.<sup>35</sup> Approved 162-0 by the NPCSC, the Chinese text of the NSL was finally revealed at 11pm on 30 June, just one hour before it came into effect.<sup>36</sup> While HKMAO officials heralded the «birthday gift» as «a Sword of Damocles hanging over the heads of people threatening China's national security»,<sup>37</sup> the last governor of Hong Kong lamented that OCTS had come to an end.<sup>38</sup> Despite the chill, however, in pointed contrast to market reaction to the NPC decision in May, for the next three days stocks soared as hot money flowed into Hong Kong from China and abroad to pump up the Hang Seng by 697 points.<sup>39</sup>

### 3. *The second handover, one country one system begins*

The farcical spectacle of police unfurling purple banners, warning protesters to disperse or risk violating the NSL, captivated media attention on 1 July, «HKSAR Establishment Day».<sup>40</sup> However, far more potent for the purpose of instilling fear *qua* instrument of lawfare and psychological warfare

33. 'Chinese state media warns Hong Kong's former No. 2 «retiring from politics» won't be the end', *Apple Daily*, 27 June 2020.

34. 'Hong Kong national security law: future of city's localist movement hangs in balance as groups disband, activists quit or flee city', *South China Morning Post*, 30 June 2020; 'National security law: those convicted could face life imprisonment as Beijing holds meeting to finalise bill set to be passed imminently', *South China Morning Post*, 28 June; 'Nathan Law «fled HK on eve of security law», *Standard*, 3 July 2020.

35. 'Hongkongers, spooked by Beijing's new national security law, are scrubbing their digital footprints', *South China Morning Post*, 7 July 2020.

36. Despite the fact that Hong Kong is officially a bi-lingual jurisdiction, the NSL has no official translation, which raises rule of law issues with respect to the law's accessibility.

37. 'National security law is a special gift for HK's 23rd anniversary of return', *China Global Television Network (CGTN)*, 1 July 2020.

38. 'One Country, Two Systems is over: Chris Patten', *RTHK*, 30 June 2020.

39. '恒指「七翻身」 騰訊港交所猛漲' ('Hang Seng's «July Bounceback», Ten-cent HKEX Soar'), *Sing Tao Daily*, 3 July 2020.

40. 'Hong Kong's New Weapon Against Protesters: A Purple Warning Flag', *New York Times*, 2 July 2020.

were the thousands of national flags that sprouted up overnight along the main thoroughfares. Whereas less skilful authoritarian regimes may have hoisted something more macabre atop lampposts, plastic red flags whose desecration is punishable by up to 3 years' imprisonment sent a provocatively powerful signal. The following three subsections provide an overview of institutional and constitutional restructuring and the content of the NSL in that order. They will outline the fundamental repurposing of OCTS as part of the shift towards direct rule from Beijing, amounting to the beginning of a policy of One Country One System in all but name as a prelude to analysing the implementation of the NSL in the next section.

### 3.1. *Institutional restructuring, the «four-layered wedding cake»*

As well as greenlighting PRC intelligence agencies to set up offices and conduct operations overtly, the NSL establishes a series of institutions that extend Beijing's influence directly into heart of the executive and judiciary, reflecting its deep-seated mistrust of the HKSAR government. Political scientist Andrew Nathan described the institutional restructuring as a «Four-Layered Wedding Cake».<sup>41</sup> At the base is the Committee for National Security (維護國家安全委員會), which is nominally chaired by the Chief Executive but supervised and controlled by a Beijing-appointed advisor, Luo Huining.<sup>42</sup> Proceedings of the Committee for National Security – which runs national security units within the police force (警務處維護國家安全部門, the Department for Safeguarding National Security), the Department of Justice (律政司國家安全犯罪案件檢控部門, the National Security Crimes Prosecution Division) and the Immigration Department, and is involved in the appointment of judges to hear NSL cases – are secret and its decisions are not amenable to judicial review.<sup>43</sup> Article 43 of the NSL and its Implementation Rules grant sweeping powers to the Department for Safeguarding National Security to conduct warrantless searches, to intercept communications, freeze assets and confiscate travel documents and to require internet service providers and suspects to delete information – all without court authorization.

The second layer comprises the Office for Safeguarding National Security (維護國家安全公署), which is funded by the central government and staffed by the Ministry of State Security (国家安全部) and the Ministry of Public Security (公安部). The Office exercises extensive powers of

41. Hong Kong Democracy Council, 'Tele-Press Conference Responding to New National Security Law in Hong Kong', 30 June 2020.

42. 'Liaison office director Luo Huining appointed national security advisor to HK', *Global Times*, 3 July 2020.

43. NPC, '中华人民共和国香港特别行政区维护国家安全法' (Law of the Hong Kong Special Administrative Region of the People's Republic of China on Safeguarding National Security: <http://www.npc.gov.cn/npc/c30834/202007/3ae94fac8ae-c4468868b32f8cf8e02ad.shtml>), see Articles 12, 13, 15, 16, 17, 18, 43, 44.



intelligence collection and analysis and for the management of diplomatic missions, NGOs and the media.<sup>44</sup> Zheng Yanxiong (郑雁雄), a Cantonese-speaking hardliner who earned his spurs suppressing villagers protesting landgrabs in Wukan, Guangdong, was appointed head of the Office for Safeguarding National Security.<sup>45</sup> Zheng promptly proceeded to requisition a four-star hotel in Causeway Bay as temporary headquarters for the Office for Safeguarding National Security.<sup>46</sup> Given the Department for Safeguarding National Security is empowered to employ PRC agents and mechanisms are established for coordination with the Committee for National Security and Office for Safeguarding National Security,<sup>47</sup> Ministry of State Security and Ministry of Public Security personnel also likely exercise enforcement powers.<sup>48</sup> While Office for Safeguarding National Security staff are technically bound to observe local and national laws, when acting in the course of duty they are not subject to the jurisdiction of Hong Kong police or courts.<sup>49</sup>

With the Committee for Safeguarding National Security and Office for Safeguarding National Security both reporting directly to Beijing, a third, air-tight layer of control is built in through Article 55, which provides for *de facto* extradition to the Mainland without procedural safeguards. This applies to «complex cases» involving foreign or external elements, where the local government is unable to enforce the NSL or if there is a major, imminent threat to national security.<sup>50</sup> In such cases, PRC criminal law, including the death penalty, applies.<sup>51</sup> Finally, Article 65 adds a forth layer of control by vesting the final power of interpretation of the NSL in the NPCSC rather than HKSAR courts.

### 3.2. *Constitutional restructuring, «national security constitution»*

While there is debate among lawyers as to the constitutional effect of the NSL, with activists and practitioners momentarily more optimistic or at least seeking to preserve, if not push, the envelope of rights and freedoms still in existence under the Basic Law, a number of preliminary observations

44. *Ibid*, Articles 48-54.

45. 'Hardliner will head agency in Hong Kong', *South China Morning Post*, 4 July 2020.

46. 'Hong Kong hotel transformed into national security office', *Hong Kong Free Press*, 8 July 2020.

47. *Ibid*, Articles 16, 53.

48. Peter Mattis, 'Beyond Spy vs. Spy: The Analytic Challenge of Understanding Chinese Intelligence Services', *Studies in Intelligence*, Vol. 56, No. 3 (September 2012), pp. 47-57.

49. NSL, Article 50 cf 60 (1).

50. The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (English Translation for Reference), *Xinhua*, 30 July 2020.

51. 'Not for us to say who could get death penalty: gov't', *RTHK*, 1 July 2020.

can be made. According to the Dean of HKU Law Faculty, Fu Hualing (傅華伶), a basic law is technically superior to other national laws because of its quasi-constitutional status.<sup>52</sup> However, coining the term «National Security Constitution»,<sup>53</sup> Michael Davis persuasively argues that in effect the Basic Law has been amended by the NSL because both are national laws and under Articles 83 and 85 of the PRC Legislation Law, as a national law that is more specific and adopted after, the latter will prevail over the former. Moreover, given that the power of final adjudication of both laws is vested in the NPCSC, a political organ of the Chinese legislature, if HKSAR courts attempt to review the NSL for compliance with the Basic Law it is highly likely that they will be overruled.<sup>54</sup> This view would tend to be borne out by the fact that the NPC Decision of 28 May invoked a broad range of powers under the Chinese Constitution, including powers to set up special administrative regions and decide the systems in place therein as well as to change and revoke earlier NPCSC decisions, suggesting profound constitutional reengineering was indeed intended.<sup>55</sup> For the avoidance of doubt, mainland scholars have called for amending the Basic Law if it is inconsistent with the NSL.<sup>56</sup>

### 3.3. NSL offences

The NSL creates four criminal offences, namely secession, subversion, terrorism and collusion, together with inchoate offences for inciting, aiding or abetting each offence, thus going well beyond the scope of Article 23 of the Basic Law.<sup>57</sup> These capacious offences are vaguely drafted with draconian minimum sentences of 10 years up to life imprisonment for «grave» (重大) transgressions. The NSL applies not only to acts committed by persons and corporations in Hong Kong,<sup>58</sup> but also by virtue of sweeping extraterritoriality provisions to acts committed abroad, including by non-Hong Kong permanent residents.<sup>59</sup> Rights to a fair trial are potentially undermined by procedural provisions of the NSL, including the introduction of closed-door trials without juries, a presumption against bail and because only judges

52. Fu Hualing, 'A Note on the Basic Law and the National Security Law', *HKU Legal Scholarship Blog*, 12 August 2020.

53. Michael C. Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law*, Columbia University Press, 2020, p. 8.

54. *Ibid.*, pp. 78-9.

55. See NPC, 'Constitution of the PRC', Articles 31, 62(2), 62(12), and 62(14), ([http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm)).

56. Prof. Lin Feng speaking in HKU Webinar on 'China's National Security: Endangering Hong Kong's Rule of Law?' (<https://video.law.hku.hk/webinar-book-talk-cora-chan-and-fiona-de-londras-eds-chinas-national-security-endangering-hong-kongs-rule-of-law-2020-hart-publishing>).

57. NSL, Articles 20-30.

58. *Ibid.*, Articles 31, 36.

59. *Ibid.*, Articles 37-8.

designated by the Chief Executive after consultation with the Committee for Safeguarding National Security can hear national security cases.<sup>60</sup>

Further rule of law issues arise due to questions over compliance with human rights and international legal obligations. Whereas Article 4 of the NSL purports to guarantee rights and freedoms under the Basic Law, the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, six special UN rapporteurs took the unusual step of publishing a 14-page letter to the Chinese government. The communiqué questioned the NSL's compliance with international human rights obligations under the UN Declaration of Human Rights and ICCPR due to the overly broad and imprecise drafting of offences, the criminalization of free speech acts, interference with freedom of assembly and a definition of terrorism that goes beyond that of the Security Council by criminalising criminal damage not committed with the intent to cause death or serious bodily harm.<sup>61</sup> It is likely that many aspects of the NSL do not comply with the Johannesburg Principles, which set international standards for drafting national security legislation, for example because the law criminalises speech that is that not directly connected to or likely to incite immediate violence.<sup>62</sup> As to compliance with the Joint Declaration, UK Prime Minister Boris Johnson declared that the NSL was in «clear and serious breach» of paragraph 3 due to violations of the high degree of autonomy of executive and legislative powers and independent judicial authority.<sup>63</sup>

In 2020 the courts adjudicated on only one NSL test-case for compliance with the Basic Law. On 1 July the accused, Tong Ying-Kit (唐英傑), rode a motorbike displaying a flag bearing the protest slogan «Liberate Hong Kong, Revolution of Our Times» (光复香港, 时代革命) around the Wan Chai area and collided with a cordon of police officers as they fanned out across the road to stop him. Tong was charged under the NSL with inciting secession and terrorism. In a 51-page combined judgement of unprecedented length for what was essentially a bail application by the ordinary standards of court reporting, the Court of First Instance took great pains to stress coherence between the NSL and Basic Law and stated that its decision would have been the same whether applying the common law or the NSL.<sup>64</sup> It is impossible to know the reasons for refusing bail because the relevant 12 paragraphs of the judgment are redacted, but ultimately the application was denied for what prior to the NSL would have been a charge of «furious

60. NSL, Articles 41, 46, 42, 44.

61. 'UN Legal Experts Urge China to Review, Reconsider National Security Law to Comply with Its International Obligations', *Human Rights in China*, 6 September 2020.

62. Breach of principle 6, Article 19 report, p. 9.

63. Foreign, Commonwealth and Development Office, UK, 'Six-monthly report on Hong Kong: 1 January to 30 June 2020', p. 3.

64. *Tong Ying Kit v HKSAR* [2020] HKCFI 2133.

driving», moreover the Court appears to place particular weight on people «committed to certain radical ideologies ... presenting a higher than usual 'risk of re-offending'». At the end of 2020, Tong languished in jail awaiting trial to begin around mid-2021.<sup>65</sup>

#### 4. *Multiple organ failure: the cardiac arrest of OCTS*

If COVID-19 left the body politic in suspended animation for the first half of 2020, by the end of the year OCTS was on life-support. The NSL had an immediate chilling impact, inducing widespread self-censorship as Beijing's proxies used new tools to consolidate direct rule. After pan-democrats resigned *en masse* pro-establishment groups assumed total control of LegCo and in the second half of 2020 the campaign for «comprehensive jurisdiction» trained its cross hairs on Hong Kong's judiciary. The fourth section thematically assesses the impact of the NSL in four parts, which in order include its effect on the media and the academy, the legislature, law enforcement and the security services, and finally the judiciary.

##### 4.1. *Chilling freedom of speech and academic freedom*

To paraphrase UN High Commissioner for Human Rights Michelle Bachelet, Hong Kong saw a rapid shrinking of civic space in 2020, especially after the chilling effect of the NSL.<sup>66</sup> The goal was to consolidate Beijing's control over the media and the academy and instil a climate of fear and self-censorship so that, in the Orwellian words of Luo Huining, people will follow the NSL «of their own free will».<sup>67</sup> To this end a decapitation strategy was deployed targeting prominent media tycoons, journalists and academics, but which soon spilled-over beyond a «small group of people».

##### 4.1.1. *The media*

In 2020 before the NSL came into effect, NGOs, academics and journalists were banned from entering Hong Kong;<sup>68</sup> and government broadcaster RTHK's (Radio and Television Hong Kong) satirical news program «Headlin-

65. *HKSAR v Tong Ying Kit* [2020] HKCFI 2196, par. 15.

66. 'UN rights chief warns Hong Kong national security law having «chilling effect» on basic freedoms', *South China Morning Post*, 9 December 2020.

67. 'National security law starting to show its might', *RTHK*, 4 December 2020.

68. 'US photography professor who covered ongoing protests barred from Hong Kong', *Hong Kong Free Press*, 4 January 2020; 'The Human Rights Watch Head Was Barred From Entering Hong Kong. Activists See Worrying Trend', *Time Magazine*, 13 January 2020; 'Beijing to oust US reporters from New York Times, WashPo, Wall Street Journal from China and bar them from journalism in Hong', *Hong Kong Free Press*, 18 March 2020.

er» was cancelled having mocked the police force for commandeering more personal protective equipment than the Department of Health.<sup>69</sup> The NSL provided new levers for accelerating the campaign to exert «comprehensive jurisdiction» over freedom of speech. It introduced pure speech crimes, with the government claiming that protest slogans and then blank placards were illegal – and arrests followed on this basis.<sup>70</sup> Foreign correspondents experienced substantial delays and denials of visas since the setting up of a national security division within the Immigration Department.<sup>71</sup> By refusing to give assurances in relation to press freedom or explicitly lay down red lines, the government exploited uncertainty to maximise fear and self-censorship.<sup>72</sup>

As the crackdown unfolded in real-time, the proprietor of Hong Kong's only remaining pro-democracy newspaper *Apple Daily* (蘋果日報), Jimmy Lai (黎智英), was a high-value target. In a carefully choreographed PR operation 200 police officers raided the newspaper's offices, parading the handcuffed 72-year-old Lai in front of selected media before taking him away. The alleged charges evolved from collusion to fraudulent use of offices for secretarial purposes to inciting secession on the basis of Tweets and setting up an English language edition of *Apple Daily*.<sup>73</sup> Embroiled in protracted legal wrangles over bail, at the end of 2020 Lai remained in custody awaiting trial on 16 April 2021.<sup>74</sup> The police introduced a *de facto* press accreditation system and public relations officers wielding «PPRB Live» microphones jostled for space with journalists on protest frontlines, literally trying to wrest control of «discursive power» (话语权).<sup>75</sup> As Hong

69. 'China's Leash on Hong Kong Tightens, Choking a Broadcaster', *New York Times*, 9 July 2020.

70. '«GFHG, SDGM» Hong Kong netizens reimagine illegal slogan as protesters find Workarounds', *Hong Kong Free Press*, 3 July 2020; «Hong Kong police arrest 8 at 'blank placard» silent protest, *Hong Kong Free Press*, 6 July 2020; 23/8. Note criminal law expert Simon Young is of the opinion that technically merely displaying slogans is not in breach of the NSL.

71. '«Five demands» chant may violate law, police warn', *RTHK*, 23 August 2020.

72. Foreign Correspondents' Club of Hong Kong, 'An Open Letter to the Hon. Carrie Lam Cheng Yuet-ngor on the National Security Law', 24 June 2020; 'Hong Kong press freedom assured if media give 100% guarantee they will not commit security offences, says Lam', *Hong Kong Free Press*, 7 July 2020.

73. 'Jimmy Lai Is Arrested in Hong Kong, Freedom Loses Again', *New York Times*, 11 August 2020; 'Hong Kong pro-democracy media tycoon Jimmy Lai denied bail, remanded in custody over alleged fraud', *Hong Kong Free Press*, 3 December 2020; 'Hong Kong pro-democracy media mogul Jimmy Lai faces national security charge, bail denied as prosecution cites tweets', *Agence France Press*, 12 December 2020.

74. 'Hong Kong media tycoon Jimmy Lai back in custody as top court accepts government bid to challenge bail', *Hong Kong Free Press*, 31 December 2020.

75. 'National Day Hong Kong police deploy livestream «presenters» at protest sites after tightening controls on media', *Hong Kong Free Press*, 1 October 2020. On discursive power see: Kejin Zhao, 'China's Rise and its Discursive Power Strategy', *Chinese Political Science Review*, Vol. 1, No.1, pp. 539-564, 4 July 2016.

Kong dropped 7 places to 80/180 countries in the World Freedom Index, ranking just below El Salvador, the trend was clear.<sup>76</sup> International media began to vote with their feet, the *New York Times* being the first to relocate one third of its bureau staff to Seoul.<sup>77</sup>

#### 4.1.2. *The academy*

A similar pattern can be observed with respect to academic freedom as the chilling effect of the NSL began to bite. Prior to the NSL a music teacher was sacked for allowing pupils to sing a protest anthem.<sup>78</sup> Post-NSL, selective persecutions intensified with two teachers deregistered for life by the Education Bureau for allowing a brief discussion of the topic of Hong Kong independence in a life education class and making a factual error in a lesson about the opium wars. The Chief Executive pledged to eliminate «bad apples» after a vitriolic campaign by the state-owned *Tu Kung Pao* newspaper.<sup>79</sup> Generally, in the primary and secondary sectors where self-censorship was less effective, there seems to have been a greater reliance on direct censorship. Following the removal of books written by democracy activists from public libraries,<sup>80</sup> the critical-thinking subject Liberal Studies became a focal point of the ideational inquisition. Teaching unions expressed concern after textbook revisions deleted references to «the separation of powers»,<sup>81</sup> provoking a terse response from the Chief Executive and HKMAO that «Hong Kong has no separation of powers».<sup>82</sup> Finally, the Education Secretary announced sweeping changes to Liberal Studies that effectively gutted the subject, laying the ideological foundation for the promotion of Beijing's direct rule.<sup>83</sup>

76. Reporters Without Borders (RSF), 2020 World Press Freedom Index.

77. 'New York Times Will Move Part of Hong Kong Office to Seoul', *New York Times*, 14 July 2020.

78. 'Teacher fired from «patriotic» school over democracy anthem «Glory to Hong Kong» (YP) *South China Morning Post*, 10 June 2020.

79. 'Hong Kong teacher struck off for allegedly promoting independence as Lam vows more action against «bad apples»', *Hong Kong Free Press*, 6 October 2020; 'Second Hong Kong teacher sacked, this time for Opium War blunder as lawmaker says punishment too harsh', *Hong Kong Free Press*, 13 November 2020.

80. 'Democracy activists' books unavailable in Hong Kong libraries after new law', *Reuters*, 6 July 2002.

81. Hong Kong Professional Teachers' Union, '教協回應高中通識教科書修訂通識課本「諮詢服務」不專業「政治審查」真干預' (Hong Kong Professional Teachers' Union Replies to Amendment of High School General Education Textbooks «Consultation» not professional «Political Screening» amounts to real interference'), 19 August 2020 (<https://www.hkptu.org/73399>).

82. 'Beijing agencies express support for Chief Exec. Carrie Lam's stance that Hong Kong has no separation of powers', *Hong Kong Free Press*, 9 September 2020.

83. 'Govt to rip up liberal studies for a «fresh start»', *RTHK*, 26 November 2020.

In the tertiary sector, «Lennon Walls»<sup>84</sup> were destroyed, then banned.<sup>85</sup> As in secondary schools, in accordance with Article 10 of the NSL curricula are being prepared for national security education.<sup>86</sup> With the legal appeals process exhausted, academics jailed for civil disobedience during the Umbrella Movement Shiu Ka-chun (邵家臻) and Benny Tai (戴耀廷) were respectively purged from Baptist University and HKU. Tai was tenured, but the university's governing Council packed by former Chief Executive and University Chancellor C.Y. Leung with Beijing loyalists – with less than half the membership being academic staff – acted against the Faculty Senate's advice in voting to dismiss him.<sup>87</sup> Described as «poetic justice» by the Liaison Office, this sent a chill down the spine of the academy.<sup>88</sup> Beijing further entrenched its direct control over HKU with the appointment of two Tsinghua professors as vice-chancellors, both CCP members, although one of them concealing it.<sup>89</sup> The chill was reflected in Hong Kong's Academic Freedom Index, which dropped from 0.8 to a historic low of less than 0.5 (on a scale of 0-1).<sup>90</sup>

84. Inspired by the original Lennon Wall that spontaneously appeared in Prague on the eve of the Velvet Revolution in 1988 to mourn the murdered pop-icon John Lennon in 1988, but which soon became a forum for the expression of dissent against the communist regime of Gustáv Husák, «Lenon Walls» re-emerged in Hong Kong during the 2014 pro-democracy Umbrella Movement and again in 2019 amidst the anti-extradition protests. Composed of a colourful, collage of pro-democracy messages scrawled onto Post-It notes, Lennon Walls serve as a site of social mobilisation and a symbol of public protest.

85. 'University of Hong Kong pro-democracy message board destroyed', *Hong Kong Free Press*, 13 July 2020.

86. 'Hong Kong Catholic diocese urges schools to promote national security education', *Hong Kong Free Press*, 7 August 2020.

87. '香港中联办发言人：香港大学解雇戴耀廷是惩恶扬善、维护正义之举', (Hong Kong Liaison Office Spokesman: HKU's Dismissal of Dai Yiuting is Poetic Justice'), *People's Daily*, 29 July 2020.

88. 'Hong Kong academics may stay away to evade new law', *Times Higher Education*, 6 July 2020; 'Hong Kong universities rattled by new security law', *American Association for the Advancement of Science*, 1 July 2020.

89. '兩清華海歸學者獲薦任港大副校 申作軍接查詢後刪黨委職銜' (The Appointment of Two Overseas Returnee Tsinghua Scholars Accepted, After Enquiry Shen Zuojun Deletes Party Title), *Citizen News*, 23 October 2020. Shen Zuojun claimed to Council he was not a party member, but local media reported that he is listed as a Party member on Tsinghua's industrial engineering faculty website, which was subsequently deleted. Shen then said the title was bestowed without his knowledge and he had renounced Party membership. However, United Front expert Dr Gerry Groot confirmed it is not possible to give up Party membership.

90. 'Free to Think 2020', *Scholars at Risk Network*, pp. 87, 90.

#### 4.2. *Subduing the legislative branch*

2020 saw the culmination of an intense power struggle between pan-democrat and pro-Beijing parties for control of the LegCo ending in decisive victory for the latter. This ignited when Benny Tai published an article in the *Apple Daily* in late March that, seeking to build on the success of the 2019 district council elections in which the pro-democrat camp won control of 19/20 councils, outlined his plan to tactically advance democratic reforms by winning a majority of more than 35 seats in LegCo.<sup>91</sup>

LegCo had been deadlocked since October 2019 due to a row over the passing of a controversial bill that would criminalise insulting the national anthem punishable by up to 3 years imprisonment. When the pro-establishment chair of the House Committee Starry Lee (李慧琼) stepped down to seek re-election, democrat Dennis Kwok (郭榮鏗) was left to preside over the committee that controls the introduction of all bills into LegCo. Filibustering over the course of 16 subsequent meetings provoked a torrent of invectives from the HKMAO and Liaison Office accusing Kwok of adopting «political scorched earth policies» (政治攙炒) to paralyse the legislature.<sup>92</sup> The deadlock in LegCo was broken by force in April when, on the basis of flimsy external advice which contradicted the opinion of LegCo's own legal officer, Starry Lee, flanked by security guards, was reinstalled to preside over the House Committee to select a pro-Beijing chair who would oversee her re-election.<sup>93</sup> In the aftermath of the ensuing bedlam, eight democrat legislators were arrested. Not only was a pro-Beijing legislator who dragged his colleague along the floor of the house not arrested,<sup>94</sup> but the Secretary for Justice, Theresa Cheng (鄭若驊), intervened in active legal proceedings to prevent their private prosecution.<sup>95</sup>

Having forcibly retaken control of LegCo, the National Anthem Bill was passed and Beijing explored options to dissipate the momentum of Benny

91. Benny Tai, '立會過半是大殺傷力憲制武器' (A Legislative Council majority is the most lethal constitutional weapon), *Apple Daily*, 31 March 2020.

92. Liaison Office, '香港中聯辦發言人就立法會內務委員會問題發表談話譴責部分議員惡意“拉布”違背誓言' (Hong Kong Liaison Office spokesman in respect of LegCo House Committee problem denounces some legislators malicious «filibustering» as a breach of oath), 13 April 2020; HKMAO, '国务院港澳办新闻发言人：郭荣鏗议员蓄意违背誓言、严重滥权行为涉嫌公职人员行为失当' (HKMAO Spokesman: Legislator Dennis Kwok intentionally broke his oath, seriously abused power, committed misconduct in public office), 21 April 2020.

93. 'Chaos at Hong Kong's legislature as lawmakers battle for control of committee', *Hong Kong Free Press*, 8 May 2020.

94. 'Hong Kong police arrest 7 democrats in connection with chaos during May legislative meeting', *Hong Kong Free Press*, 1 November 2020. '8th Hong Kong democrat arrested following chaotic legislative meeting, as lawmakers decry political oppression', *Hong Kong Free Press*, 2 November 2020.

95. 'Department of Justice intervenes and halts Raymond Chan's private prosecution', *Standard*, 6 November 2020.



Tai's 35-Plus strategy.<sup>96</sup> Primary elections were organised by the pro-democracy camp to strategise how to win a LegCo majority without splitting the vote. The significant turnout, with 610,000 people voting despite or perhaps because of the Chief Executive's fearmongering that participation in the primaries could amount to subversion under the NSL, tipped the balance in favour of Beijing adopting a harder line.<sup>97</sup> 12 pro-democracy candidates were disqualified on wide-ranging grounds, including opposition to the NSL. Then on the following day, the Chief Executive announced that the September 2020 LegCo elections would be postponed for a year due to COVID-19.<sup>98</sup> Breaching Article 69 of the Basic Law that requires elections be held every 4 years, the decision was subsequently ratified in November by NPC fiat – *an exercise of Beijing's direct control* which underscored the shift from a rule of law to *ruling by law*.<sup>99</sup>

The foregoing set the stage for a final *coup de grâce* by which the NPCSC issued a decision empowering the HKSAR government to disqualify legislators deemed to have violated their oaths of allegiance under Article 104 of the Basic Law.<sup>100</sup> Neither an amendment nor an interpretation, the Basic Law had become irrelevant except as a fig-leaf of legitimacy for the exercise of raw political power.<sup>101</sup> Four sitting LegCo members, including Dennis Kwok, were immediately disqualified, prompting the remaining 19 pan-democrats to resign *en masse*, finally transforming LegCo into a rubber stamp legislature.<sup>102</sup> The UK government declared the second breach of the Basic Law in one year.<sup>103</sup> In December, a Sichuanese-born investment banker and CPPCC

96. 'Hong Kong passes China national anthem bill amid protests by democracy lawmakers', *Reuters*, 4 June 2020; 'White-collar Chinese in Hong Kong face shock tax bills from mainland', *NAR*, 10 July 2020; 'Gov't proposal to allow Hongkongers in southern China to vote draws concerns from democrats over potential fraud', *Hong Kong Free Press*, 4 August 2020.

97. 'Chief Executive: «Primary election» may have breached National Security Law', *China Daily*, 7 July 2020; 'More than 610,000 vote in Hong Kong's pro-democracy opposition primary elections', *South China Morning Post*, 13 July 2020.

98. HKSAR Government, 'HKSAR Government supports Returning Officers' decisions to invalidate certain nominations for Legislative Council General Election', 30 July 2020; 'Hong Kong postpones legislative election for a year citing Covid-19', *Hong Kong Free Press*, 31 July 2020.

99. '全国人大常委会表决通过关于香港特别行政区第六届立法会继续履行职责的决定' (NPCSC passes resolution to decide that the 6th LegCo of the HKSAR can continue to discharge its duties, *Xinhua*, 4 August 2020; Hong Kong Bar Association, 'Statement of the Hong Kong Bar Association on the Hong Kong Government's decision to postpone the Legislative Council election', 2 August 2020.

100. '全国人民代表大会常务委员会关于香港特别行政区立法会议员资格问题的决定' (NPCSC Decision Regarding Qualification Issues of HKSAR LegCo Members), *Xinhua*, 11 November 2020.

101. Johannes Chan, 'Basic Law becoming irrelevant', *RTHK*, 12 November 2020.

102. 'Hong Kong pro-democracy lawmakers resign after China ruling', *BBC News*, 12 November 2020.

103. Foreign, Commonwealth and Development Office, UK, *Foreign Secretary declares breach of Sino-British Joint Declaration*, 12 November 2020.

member, Li Shan (李山), announced the formation of the Bauhinia political party (紫荊黨). The Bauhinia Party immediately courted Li Ka-shing and ambitiously aims to unite disparate pro-Beijing factions, proposing to turn LegCo into a bicameral parliament with elections in the lower house and an appointed upper house to ensure «100 years of OCTS». <sup>104</sup> With a puppet executive and comfortable control of the legislature, the separation of powers was broken and Beijing turned its focus to subjugating the judiciary, but before assessing the fallout and implications for the rule of law this article looks briefly at policing and the security services because arguably the rule of law cannot meaningfully exist without independent and professional law enforcement.

#### 4.3. Law enforcement and the security services

In contrast to the disproportionate use of crowd control measures verging on torture that were meted out during the anti-extradition protests in 2019, <sup>105</sup> with street mobilisation in abeyance during the pandemic and equipped with the NSL, coercive objectives were achieved with less violence in 2020. «Asia's finest» having been co-opted by Beijing, ironically one of the logical drivers of violent repression – and conversely also an instrumental driver for the NSL – was the independence of Hong Kong's legal system. For an independent judiciary in 2019 meant, notwithstanding a policy of mass arrests, in the absence of genuine wrongdoing it was difficult to secure convictions. Hence, the police acted as vectors of state-sponsored coercion, imposing immediate costs on protestors by direct violence. <sup>106</sup> This was borne out statistically by a relatively low conviction rate of 52.8% for protest cases across all courts in 2020. <sup>107</sup> According to police statistics, of 10,171 protest-related arrests made by 30 November, charges had been laid in about 2,300 cases resulting in 436 convictions, with charges withdrawn or an acquittal made in 147 cases to date. <sup>108</sup> The scores of acquittals were frequently accompanied with withering criticisms from judges of police officers as «unreliable witnesses» who «told lie after lie» (大話咁大話) and whose testimony «resembled a

104. 'Pro-mainland Chinese financiers based in Hong Kong launch new Bauhinia Party aimed at reforming Legco, restraining «extremist forces»', *South China Morning Post*, 6 December 2020.

105. 'Disproportionate use of crowd-control gear by Hong Kong police akin to torture – Amnesty report', *Hong Kong Free Press*, 11 December 2020.

106. Victoria Tin-bor Hui, 'Beijing's Hard and Soft Repression in Hong Kong', *Orbis*, Vol. 64, Issue 2, p. 289. For more on co-option since 2014 see: Willy Wo-Lap Lam, 'Will Xi Jinping Deploy the PLA Garrison to Quell Hong Kong's «Turmoil»?', *China Brief*, Vol. 19, Issue 15, 14 August 2019.

107. 53.9%, 73.3% and 79.3% for the Magistrates, District and Court of First Instance respectively in 2008, source: Hong Kong Lawyer, 'Conviction Rates', September 2010.

108. 'Hong Kong Courts Are the Last Check on Beijing's Growing Power', *Bloomberg*, 23 December 2020.

parallel universe». Officers were further excoriated by the courts for failing to display identification numbers and warrant cards and for unreasonable use of force.<sup>109</sup>

In spite of such criticism, with the protestors' «five demands» a distant memory there are no prospects of the police being held to account through an independent judicial inquiry. A 999-page Independent Police Complaints Commission Report (IPCC) that effectively exonerated the force from any wrongdoing was rejected as a whitewash by the pro-democracy camp and international human rights experts.<sup>110</sup> Hired foreign consultants resigned in protest of the IPCC's lack of powers to summon witnesses and collect evidence, separately publishing their findings that show abundant evidence of the excessive use of police force at practically every single protest after 12 June.<sup>111</sup>

As illustrated elsewhere in this essay, selective, politicised law enforcement and non-enforcement continued in 2020.<sup>112</sup> A particularly vivid case in point was the singling out of 15 democracy activists, including 82-year-old Martin Lee (李柱銘), for participating in a peaceful unauthorised assembly together with 1.7mn Hong Kong citizens.<sup>113</sup> Without the difficulties of collecting evidence in the thick of mass protests and equipped with new instruments of lawfare under the NSL, there has been a wave of arbitrary arrests. Nebulous NSL offences together with carefully selected national security judges enhance the chance of a conviction. Even if ultimately acquitted, the police can confiscate the travel documents of those they have arrested and, with bail denied, suspects are imprisoned for months awaiting trial. Police have not released figures but it appears that in 2020 30-50 people were arrested under the NSL only four of whom have been

109. '裁判官斥警員「大話咁大話」網傳擄警者擬集體投訴' (Magistrate rebukes police «told lie after lie», online rumours police supporters planning mass complaints), *Oriental Daily News*, 15 August 2020; 'Hong Kong pair accused of assaulting police acquitted after magistrate rules officers used «unnecessary»', *South China Morning Post*, 16 September 2020; 'Hong Kong woman cleared of weapons charge after police admit to wrongly handling evidence', *South China Morning Post*, 2 September 2020. '社工被指拒出示身分證阻差罪脫獲訟費官：穿制服非不出示委任證理由' ('Social worker who refused to show ID card cleared of obstructing police charge and gets costs, Judge: wearing uniform is not a reason for not showing warrant card'), *Ming Pao*, 17 September 2020.

110. 'Absurd, preposterous, whitewash': Reactions pour in as Hong Kong police watchdog clears force of wrongdoing', *Hong Kong Free Press*, 15 May 2020.

111. 'Hong Kong protests: police used disproportionate force and made poor decisions, says British expert who resigned from IPCC review', *South China Morning Post*, 23 May 2020.

112. As a further example of the latter, see 'Hong Kong police accused of protecting attackers at pro-democracy message board', *Hong Kong Free Press*, 11 May 2020.

113. 'Patten, Rifkind, other politicians and Hong Kong Watch condemn mass arrests of democracy activists', *Hong Kong Watch*, 18 April 2020.

charged.<sup>114</sup> Although the NSL does not have retroactivity, up to 20 people were arrested for offences relating to online political speech before the law was passed. Without any hope of conviction, the primary aim would appear to be intimidation.<sup>115</sup>

As a backdrop to the NSL, HKSAR police and state security personnel were reinforced by 4,000 People's Armed Police Force (PAPF), the paramilitary wing of the People's Liberation Army (PLA) which – in breach of the Basic Law – were deployed into Hong Kong by air, sea and land from Shenzhen under the cover of darkness in August 2019 during the PLA's annual rotation.<sup>116</sup> *Reuters* confirmed that PAPF at minimum participated covertly in an observational role monitoring protest tactics last year,<sup>117</sup> prompting questions from legislators in March.<sup>118</sup> The PLA presence has been surged to 12,000 and with 30,000 police officers Hong Kong has one of the highest officer to citizen ratios in Asia.<sup>119</sup> In lockstep with the NSL, an uptick of PLA military signalling, including combined special forces exercises demonstrating an ability to intercept fugitives fleeing by boat on the same day that the new law was passed, coincided to ratchet up fear.<sup>120</sup> Not without irony, when «the Hong Kong 12» fled to Taiwan by speedboat there appears to have been a degree of co-ordination with mainland authorities to allow fugitives first to escape, then to orchestrate an interdiction by the Guangdong marine police in Chinese contiguous waters so as to maximise punishment and psychological deterrence. This tends to be confirmed by open source flight tracking data that showed an HKSAR Government Flying Service plane continuously circling above the speedboat before it left the small fishing village Po Toi O up until the

114. Prof. Simon Young speaking in US-Asia Law Institute Webinar on 'Criminal Justice in Hong Kong Under the National Security Law'.

115. 'Hong Kong police sift the past to pursue new security law crimes', *Agence France Press*, 28 August 2020.

116. Office of the Secretary of Defense, *Military and Security Developments Involving the People's Republic of China 2020 – Annual Report to Congress*, p. 99.

117. 'China's internal security force on frontlines of Hong Kong Protests', *Reuters*, 18 March 2020.

118. '«Come clean» Democrat demands answers after report says Chinese security forces were at Hong Kong protests', *Hong Kong Free Press*, 20 March 2020.

119. 'China's internal security force on frontlines'.

120. 'Hong Kong PLA garrison troops chase fugitives in drill as national security law is passed', *South China Morning Post*, 30 June 2020; see also, 'Hong Kong police conduct large-scale anti-terror drill near border', *Hong Kong Free Press* 20 March 2020; 'National security law: video of Hong Kong PLA garrison troops doing live-fire training could be «warning to separatists»: analyst', *South China Morning Post*, 29 June 2020; 'PLA video shows armoured personnel carriers driving through streets of Hong Kong before conducting live-fire exercise', *South China Morning Post*, 8 November 2020.

point of capture.<sup>121</sup> The «Hong Kong 12» were detained *incommunicado* for months without access to family-appointed lawyers before a secret trial in which the Yantian District People's Court in Shenzhen sentenced them for up to three years' imprisonment on the Mainland.<sup>122</sup>

#### 4.4. *The judiciary, the last defender of the rule of law*

Judicial independence has traditionally been described as the cornerstone of Hong Kong's rule of law. The most resilient of the three branches of government, notwithstanding some weakening by appointments and promotions of regime loyalists, at its core the judiciary is staffed by professional judges who decide cases by strict application of the law to the facts adduced in evidence.<sup>123</sup> However, as outlined elsewhere in this essay Beijing and its proxies deny Hong Kong's separation of powers and have made no secret of their intention to assert the Centre's comprehensive jurisdiction over the city.

In late March it was announced that Andrew Cheung (張舉能) would become the next Chief Justice when Geoffrey Ma retires in January 2021.<sup>124</sup> The choice is not without controversy for Cheung upheld the constitutionality of an NPCSC interpretation in 2016 that effectively amended the Basic Law by retrospectively disqualifying lawmakers for deficiencies in swearing oaths, a decision that is officially cited by the British government as the first publicly declared breach of the Joint Declaration.<sup>125</sup> Shortly afterwards three senior judges anonymously told Reuters that judicial independence was at the heart of a battle for Hong Kong's autonomy playing out behind closed doors in the rarefied cloisters of the judiciary. Sources highlighted three major concerns, namely a dangerous overuse of the NPCSC's power of interpretation, relentless pressure on the outgoing Chief Justice by CCP *apparatchiks* and the potential for interference in judicial appointments.<sup>126</sup> So far, the latter has been limited, but this convention hangs by a thread given that the Judicial Officers Recommendation Committee whose deliberations are secret by law comprises the Chief Justice, the Secretary of Justice and 7 other members appointed by the Chief Executive. Pro-Beijing lawmakers fired a clear shot across the bows in 2018 when they questioned

121. '12港人送中 飛行服務隊兩度出動疑追蹤12人快艇 「不知情」說法揭警謊' (12 Hong Kongers «Extradited to China» Flying Service Scrambled Twice giving lie to police claims of ignorance), *Apple Daily*, 5 October 2020.

122. 'China: Hong Kong youths at risk of torture after being convicted in unfair trial', *Amnesty International*, 30 December 2020.

123. 'Beijing's Hard and Soft Repression'.

124. 'Andrew Cheung, who upheld disqualification of lawmakers, to become Hong Kong's new Chief Justice', *Hong Kong Free Press*, 24 March 2020.

125. 'Foreign Secretary declares breach'.

126. Greg Torode & James Pomfret, 'Hong Kong judges battle Beijing over rule of law as pandemic chills protests', *Reuters*, 14 April 2020.

whether Baroness Hale, then president of the UK Supreme Court, was too socially liberal to serve on the Court of Final Appeal.<sup>127</sup> After the passing of the NSL, pressure on the judiciary has been ramped up, Henry Litton's calls for judicial reform recently being echoed by Zhang Xiaoming who called for «anti-China» judges to be replaced with «patriots».<sup>128</sup>

Despite these pressures, under Chief Justice Ma the judiciary has vigilantly guarded against allegations of bias, both real and apparent. When a district court judge described protestors as «a terrorist army» and significantly departed from sentencing guidelines, expressing sympathy for a man who stabbed three people, they were refrained from hearing protest cases. The Chief Justice issued an unprecedented public rebuke against expressing «unnecessary political views».<sup>129</sup> By the same token, a judge discovered by pro-Beijing media to have signed a petition against the Extradition Offenders Bill in 2019 was removed from protest cases to avoid the *appearance* of possible bias.<sup>130</sup>

While the latter was calculated to demonstrate even-handedness to keep the judiciary out of the political fray, it likely had precisely the opposite effect: having taken their first judicial scalp, the pro-Beijing media were emboldened. Following the aforementioned slew of acquittals, media linked to the Liaison Office ran an anonymous «one person one word» (一人一言) campaign that singled out five «yellow judges» (黃官) for allegedly lenient sentences and «releasing violent fugitives on bail» (放生暴徒著草).<sup>131</sup> *Ta Kung Pao* published a list of cases as «evidence of bias» and ran an editorial that screamed «when he made his verdict, it seems he forgot his role as the judge, and became the defence lawyer».<sup>132</sup> Henry Litton chimed in denying the existence of a separation of powers and criticising the courts for fettering the executive by «cutting off its hands and

127. *Ibid.*

128. Jerome A. Cohen, «The Intensifying Pressures to Further «Reform» Hong Kong's Courts», *The Diplomat*, 23 November 2020.

129. «Hong Kong judge airs sympathy for anti-protest man who stabbed 3 citizens, blames pro-democracy movement», *Hong Kong Free Press*, 26 April 2020; «Hong Kong judge removed from protest-related cases after expressing sympathy with attacker», *Hong Kong Free Press*, 28 April 2020; HKSAR Government, *Statement by Chief Justice of Court of Final Appeal*, 25 May 2020 (<https://www.info.gov.hk/gia/general/202005/25/P2020052500233.htm>).

130. «Hong Kong protests: judge who signed petition against extradition bill barred from handling related cases», *South China Morning Post*, 29 May 2020.

131. «一圖睇|這些「黃官」放生暴徒「着草」公眾質疑破壞法治» («Table Showing how «yellow judges» let go violent fugitives «on bail»»), *Dotdot News*, 29 August 2020.

132. «部分法官輕判暴亂案 市民質疑偏頗» («Some judges give light sentences in riot cases, citizens suspect bias»), *Ta Kung Pao*, 4 September 2020; «社評:司法機構要有自我改革的勇氣» («Editorial: the judiciary needs courage to reform itself»), 10 September 2020.

legs» (斬手斬腳).<sup>133</sup> Two of the judges under attack, essentially because the prosecution had failed to make their case beyond reasonable doubt, were transferred to the Registry and Obscene Articles Tribunal and disbarred from hearing criminal cases due to «normal operational needs».<sup>134</sup> Graffiti has appeared outside courts attacking «dog magistrates» (狗官). Pro-Beijing legislators and the former deputy head of the Independent Commission Against Corruption Tony Kwok launched broadsides against the Chief Justice, lamenting «preposterous verdicts», letting off «blackshirts» and chastising Ma for not heeding Litton's calls for reform.<sup>135</sup> The Bar Association wrote to Secretary of Justice Theresa Cheng stating that such attacks amounted to contempt of court, urging her in vain to defend the judiciary's vestigial independence.<sup>136</sup>

Politicisation of the judiciary aside, the power conferred on the Chief Executive by the NSL to determine which judges can hear national security cases introduces a real potential for actual bias. Despite the Chief Justice's comments that foreign judges are «expressly permitted» under the Basic Law to hear all cases,<sup>137</sup> an Indian-born magistrate was passed over to hear NSL cases reputedly because of her nationality.<sup>138</sup> The risk of bias is further elevated by a sleight of hand that allowed an NSL judge to decide to take over the non-NSL case of a radio DJ accused of «conspiring to utter seditious words»; as a consequence, «DJ Fast Beat» was denied bail until his trial begins in May 2021.<sup>139</sup>

With the Chief Executive denying the separation of powers, there has been heightened executive interference in the administration of justice through the office of the Secretary of Justice. In addition to the vast number of acquittals suggesting many groundless, politically motivated prosecutions, the Department of Justice dropped charges against a man accused

133. '大公訪談: 法庭對特首施政斬手斬腳' ('Interview: Courts cut off the hands and legs of the Chief Executive'), *Ta Kung Pao*, 5 September 2020.

134. 'Magistrate transfer «not linked to acquittals», *The Standard*, 9 September 2020.

135. '«Disappointed» pro-Beijing lawmakers say Hong Kong Chief Justice fails to ease concerns over judicial impartiality', *Hong Kong Free Press*, 24 September 2020; Tony Kwok, 'Time for judiciary to clean up house with an independent review', *China Daily*, 5 October 2020.

136. 'Hong Kong barristers urge minister to defend judges against «virulent» attack by state-owned newspaper', *Hong Kong Free Press*, 24 November 2020.

137. HKSAR Government, *Statement by Chief Justice of Court of Final Appeal*, 2 July 2020.

138. '港版國安法: 報道指有裁判官因外籍身份不獲委任 護法: 國安法官要達「升級標準」' (Hong Kong NSL: Report indicates magistrate not appointed because of foreign nationality: NSL judges must meet higher threshold), *Apple Daily*, 4 July 2020.

139. 'National security judge assigned to Hong Kong pro-democracy activist Tam Tak-chi's sedition case', *Hong Kong Free Press*, 3 December 2020.

of threatening protestors with a 10-inch knife *after* the trial started.<sup>140</sup> The nominal «justice department» frustrated prosecution in the case of a woman who claimed to have been gangraped inside a police station and sought its help when police refused to cooperate to identify the offender using DNA evidence from an aborted fetus.<sup>141</sup> Further to section 4.2, the Secretary of Justice has intervened without providing reasons to block several private prosecutions, including those of a police officer who shot a secondary school student at point blank range in the left lung 3 cm from the his heart and a taxi driver who mowed down three female protestors when he drove into a crowd.<sup>142</sup> It is not clear who is making decisions in the Department of Justice. The Secretary of Justice has the power to initiate a prosecution, but operationally in the ordinary course would delegate that decision to the Director of Public Prosecutions. David Leung Cheuk-yin resigned as Director of Public Prosecutions in July citing differences of opinion with the Secretary of Justice over whether there was sufficient evidence to lay charges and if prosecutions were in the public interest, together with the fact that he had been excluded from NSL prosecution decisions.<sup>143</sup>

Further threats to the rule of law arise from the undermining of due process and the right to a fair trial. In addition to the procedural issues mentioned at 3.3, Legal Aid was denied in the case of the secondary school student shot in the lung and a bus company refused to provide legal assistance to a driver charged with «careless driving» for beeping his horn at police blocking the road *unless* he pleaded guilty.<sup>144</sup> Charged with inciting an unauthorised assembly under antiquated colonial legislation that requires police permission for public gatherings of more than three people, activist Joshua Wong (黃之鋒) said he changed his plea to guilty because he no longer hoped to receive a fair trial.<sup>145</sup> The legal profession has faced increasing pressure. During elections for the Law Society's governing Council, the President emailed hundreds of senior solicitors urging

140. 'Hong Kong Justice Dep't again drops charges after knifeman allegedly threatens Protesters', *Hong Kong Free Press*, 22 July 2020.

141. 'Hong Kong woman who accused officers of gang rape defends claim after police chief says she must be arrested for lying', *Hong Kong Free Press*, 13 May 2020.

142. 'Hong Kong democrat says Dep't of Justice intervention in his police shooting case «overrides» rule of law', *Hong Kong Free Press*, 19 August 2020; '抗暴之戰: 撞斷少女腳的士司機 代表律師何君堯向許智峯索訟費8.2萬' ('War On Violence: Lawyer of taxi driver who broke young girls legs Junius Ho seeks HK\$ 82,000 for costs'), *Apple Daily*, 22 August 2020.

143. '刑事檢控專員梁卓然發出內部電郵全文' (Full text of internal email sent by Director of Public Prosecutions David Leung), *Citizen News*, 31 July 2020.

144. '新巴車長9.6向警響按被控不小心駕駛 倘不認罪公司拒法律支援' (New First World Bus driver beeping police on 9 June prosecuted for careless driving, refused legal support unless guilty plea), *Apple Daily*, 3 November 2020.

145. Hong Kong Democracy Council, *Joshua Wong, Agnes Chow, and Ivan Lam Remanded in Custody: Trio pled guilty to protest charges expressing no faith in Hong Kong's Judiciary system*, 22 November 2020.



them to back Beijing's preferred candidates and offering to cast proxy votes on their behalf, then failed to recuse herself from chairing a meeting to discuss her conduct.<sup>146</sup> The right to a fair trial is imperilled by new powers not subject to judicial oversight for state security forces to surveil and intercept communications between clients and their defence lawyers.<sup>147</sup>

As Beijing launched a headlong assault on the judiciary to realise its direct rule over Hong Kong, the gravity of the situation is underscored by the resignation of James Spigelman,<sup>148</sup> an Australian non-permanent justice of the Court of Final Appeal, and the UK Supreme Court President's decision to review whether it is appropriate for UK judges to continue to serve on the Court of Final Appeal.<sup>149</sup> *Thus far resilient, with the other two branches of government in cardiac arrest, in 2020 the fate of the judiciary hung in the balance together with the survival of the rule of law no less.*

##### *5. International relations and the economy: Lifeline for Hong Kong but cold comfort for OCTS*

International politics and economics are a footnote to this essay because they were not the drivers of change in Hong Kong in 2020. Beyond the proximate causes of the NSL discussed in section 2.1 it may be that in the context of intensifying strategic competition with the US and the Trump administration's maximalist pushback, Beijing perceived a narrowing of the window of opportunity for revisionism in Hong Kong. This perception propelled it to act swiftly in 2020 to reintegrate Hong Kong with the motherland on its own terms.<sup>150</sup> However, the withdrawal of trade privileges, sanctions, life boat policies, moral suasion and human rights scrutiny were fundamentally reactive policies incapable of deterring the NSL, Beijing having correctly calculated that its actions would be met with minimal economic costs. On the contrary, internationally, Hong Kong's second takeover and the evisceration of OCTS shaped deeper geopolitical forces at work in

146. '律師會改選：會長彭韻儀向數百人發電郵推介5人名單、稱歡迎授權她投票 張達明籲會員郵寄選票' ('Law Society Elections: President Melissa Pang emails hundreds of solicitors recommending a list of 5 candidates, welcomes authorization for casting proxy votes, Eric Cheung calls on members to vote by mail'), *Citizen News*, 12 May 2020.

147. Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Instrument No. A406A), s. 13.

148. 'Australian James Spigelman resigns as judge of Hong Kong appeals court over new national security law', *Australian Broadcasting Corporation News*, 18 September 2020.

149. 'Six-monthly report on Hong Kong', p. 4.

150. Giulio Pugliese, 'COVID-19 and the Reification of the US-China «Cold War»', *Japan Focus: The Asia-Pacific Journal*, Vol. 18, Issue 15, No.3, August 1, 2020.

the intensifying strategic competition between China and the United States and her allies, some authors heralding the emergence of «a new cold war» with Hong Kong as the tipping point,<sup>151</sup> and Joshua Wong describing the city as «the new Berlin».<sup>152</sup> While history rhymes, it does not repeat itself. Hong Kong is analogous to Berlin in one way, namely both cities were of little if no geostrategic importance to any of the great powers, while their significance is as a symbol in the battle of ideas and their survival indeed has implications for the credibility of international law and the confidence of US allies in the rules and norms-based international order more broadly. It was not by coincidence that Hong Kong was mentioned six times in Secretary of State Pompeo's Nixon Library Speech that framed Sino-US rivalry as a struggle between «freedom and tyranny».<sup>153</sup> Moreover, Pompeo later castigated China for «turning Hong Kong into the East Berlin of yesteryear» in preventing «the HK 12» fleeing from tyranny.<sup>154</sup>

### 5.1. *International politics*

UN human rights experts and a UK All-Party Parliamentary Group on Hong Kong began to probe human rights abuses during the anti-extradition protests in early 2020,<sup>155</sup> prompting deputy commissioner of police Oscar Kwok to dismiss accusations of police brutality as vilification by protesters in order to extort demands.<sup>156</sup> The HKSAR government awarded a £5mn contract to a Mayfair-based PR firm, previously used by Saudi Prince Mohammed bin Salman following the assassination of Jamal Khashoggi, to rebrand Hong Kong.<sup>157</sup> This demonstrated that image matters to Beijing, but perhaps more as an exercise in damage limitation with an eye to reassuring international investors, neighbouring states and BRI partners, as well as to resuscitate the OCTS brand as a source of domestic legitimacy. As a senior Liaison Office official told Hong Kong-based Sinologist Katō Yoshikazu,

151. Prof. Barry Buzan speaking in a Daiwa Anglo-Japanese Foundation webinar, 'Hong Kong – the wider implications', 22 October 2020.

152. 'My town is the new Cold War's Berlin: Hong Kong activist Joshua Wong', *Reuters*, 9 September 2019.

153. US Department of State, Michael R. Pompeo, *Communist China and the Free World's Future* (Speech), 23 July 2020.

154. Secretary of State, Michael R. Pompeo, Tweet, 'The Hong Kong 12 should be released immediately', 19 December 2020.

155. 'Arrests of human rights defenders threaten rights to freedom of assembly and expression in Hong Kong', *Front Line Defenders*, 20 April 2020; All-Party Parliamentary Group on Hong Kong, *The Shrinking Safe Space for Humanitarian Aid Workers in Hong Kong: Inquiry into Violations of Human Rights and Humanitarian Principles by the Hong Kong Police Force*, August 2020.

156. '«Playing the victim» Hong Kong democrat slams police force after top cop denies brutality accusations at UN', *Hong Kong Free Press*, 11 March 2020.

157. 'Hong Kong government hires London PR firm to improve image', *Guardian*, 1 July 2020.

when it comes to China's national security «the value of Hong Kong is less than zero».<sup>158</sup> With few economic levers given Hong Kong's trade structure – about half of imports and exports go to China and the rest are fairly diversified – perhaps the only deterrent capable of inducing path-correction might have been a diplomatic strategy that clearly communicated via the HKSAR government a credible threat to break the dollar peg unless Beijing reconsidered the NSL.<sup>159</sup> If the aim of the Hong Kong Human Rights and Democracy Act 2019 was deterrence then, notwithstanding Washington's timely decertifying of the HKSAR's autonomous status the day before the fateful NPC decision in May, manifestly it failed. In the same respect, Prime Minister Johnson's *South China Morning Post* article of 3 June that exhorted Beijing to pull back from the brink or else «the British government will change our immigration rules» was downright Quixotic.<sup>160</sup> A joint US-UK effort in June to raise the issue at a virtual meeting of the UN Security Council was readily blocked by China on grounds of interference with its «internal affairs».<sup>161</sup>

In the aftermath of the NSL's promulgation, the fallout soon spilled over into self-censorship on US and UK university campuses due to the long-arm jurisdiction of Article 38. The Chinese ambassador declared a breach of the NSL by people protesting on UK soil. As foreign citizens, including those without HKSAR permanent residence, became wanted fugitives,<sup>162</sup> the international community was jolted into action. The US moved quickly to dismantle Hong Kong's status as a separate customs territory and in 2020 sanctioned 29 Chinese officials for undermining Hong Kong's autonomy, extending secondary sanctions to foreign financial institutions conducting «significant transactions» with targeted individuals through the Hong Kong Human Rights and Democracy Act and the Hong Kong Autonomy Act that

158. '逆來順受的中國人，對得起自己經受過的苦難嗎？《自由不是免費的》代序' ('Has This Submissive Nation Squandered Its Suffering? In Lieu of an Introduction to «Freedom Is Not Free»'), *The New Lens*, 23 October 2010. Jeremy Barmé's translation of the interview with Katō is available at: <http://chinaheritage.net/journal/adieu-china-jianying-zhas-long-farewell>.

159. For a breakdown of Hong Kong's trade composition see Economist Intelligence Unit, 'Hong Kong Country Report', December 2020, p.14.

160. Boris Johnson, 'For Hongkongers fearing for their way of life, Britain will provide an alternative', *South China Morning Post*, 3 June 2020.

161. 'Seven former foreign secretaries urge UK to take lead on Hong Kong', *Guardian*, 1 June 2020.

162. 'Ambassador demands UK take action after protesters chant slogans, burn Chinese flag outside embassy', *Hong Kong Free Press*, 7 October 2020; 'China's National-Security Law Reaches Into Harvard, Princeton Classrooms', *Wall Street Journal*, 19 August 2020; 'Oxford moves to protect students from China's Hong Kong security law', *Guardian*, 28 September 2020; 'Exile is no protection from Hong Kong security law, says US dissident Samuel Chu – wanted for «secession»', *Hong Kong Free Press*, 1 August 2020.

was recently passed in June.<sup>163</sup> After declaring that the NSL breached the Joint Declaration, London overcame longstanding diplomatic inertia and made good on its promise to provide «a path to citizenship» by offering renewable five-year visas to at least 3 million British National Overseas passport-holders,<sup>164</sup> with some limited efforts in 2020 by Five Eyes<sup>165</sup> partners to pick up the slack through life-boat policies to provide asylum and emigration opportunities for the other 4.5 million people, the vast majority of whom were *not* born or settled in Hong Kong after 1997.<sup>166</sup>

Multinational coordination was confined mainly to joint statements between Five Eyes countries and Japan at the G7, UN General Assembly and Human Rights Council.<sup>167</sup> Nevertheless, with the Interparliamentary Alliance providing a powerful motivating force there has been some policy convergence on cancellation of extradition treaties and mutual legal assistance agreements, starting with Ottawa and followed by Canberra, London, Wellington, Berlin, Paris and Washington.<sup>168</sup> Of the 20 agreements in place

163. US Department of State Press Statement, Michael R. Pompeo, *U.S. Department of State Imposes Visa Restrictions on Chinese Communist Party Officials for Undermining Hong Kong's High Degree of Autonomy and Restricting Human Rights*, 26 June 2020; The White House, *The President's Executive Order on Hong Kong Normalization*, 14 July 2020; US Department of Treasury Press Release, *Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy*, 7 August 2020; US Department of State Press Statement, Michael R. Pompeo, *Designations of Four PRC and Hong Kong Officials Threatening the Peace, Security, and Autonomy of Hong Kong*, 9 November 2020; 'U.S. Sanctions New Group of Chinese Officials Over Hong Kong', *Bloomberg*, 7 December 2020.

164. 'Hong Kong migration to UK could hit 200,000', *Financial Times*, 13 July 2020; 'UK urges details of new visa offering many Hongkongers pathway to citizenship', *Hong Kong Free Press*, 23 October 2020.

165. The Five Eyes is an intelligence-sharing alliance between Australia, Canada, New Zealand, the UK and US, whose existence became a matter of public record after the 2013 Snowden leaks.

166. 'Australia warns citizens on travel to Hong Kong over security law', *Financial Times*, 9 July 2020; Hong Kong Watch, 'Canada's lifeboat scheme for Hong Kongers: HKW explainer', 12 November 2020.

167. 'G7 urges China to reconsider new Hong Kong security laws', *Guardian*, 17 June 2020; Six-monthly report on Hong Kong', pp. 4, 16.

168. 'Canada suspends extradition treaty with Hong Kong over new security law', *Canadian Broadcasting Corporation*, 3 July 2020; 'China accuses Australia of «gross interference» after offer of safe haven for Hong Kong visa holders', *Financial Times*, 10 July 2020; 'UK suspends extradition deal with Hong Kong, halts arms exports following enactment of security law', *Hong Kong Free Press*, 20 July 2020; 'New Zealand suspends Hong Kong extradition treaty over China national security law', *Guardian*, 27 July 2020; 'Germany suspends extradition treaty with Hong Kong citing election delay – minister', *Agence France Press*, 31 July 2020; 'Security law: France halts ratification of extradition treaty with Hong Kong', *Agence France Press*, 4 August 2020; 'Hong Kong: US suspends extradition treaty over national security law', *BBC News*, 20 August 2020.

before the NSL, ten have been suspended.<sup>169</sup> Ironically, as Beijing sought to create a moral equivalence through retaliatory suspension of extradition agreements,<sup>170</sup> Hong Kong has now become the haven for criminals that the 2019 Extradition Bill purportedly was proposed to avoid. With 43.9% of Hong Kongers saying they would emigrate if given the opportunity, for one third of whom Taiwan is the preferred destination, the island played a cautious role in resettling 5,858 Hong Kongers in 2019 up 41% from the previous year.<sup>171</sup> If the international community was unable to prevent the NSL dealing a fatal blow to OCTS, it has offered a lifeline to some of Hong Kong's people.

## 5.2. Economics

Reeling after months of protest and the US-China trade war and already in recession in 2019,<sup>172</sup> Hong Kong's economy nosedived in 2020 due to COVID-19, contracting 9.1% and 9.0% in the first and second quarters followed by a smaller shrinkage of 3.5% in the third quarter when unemployment soared to 6.4%.<sup>173</sup> The government responded with four rounds of fiscal stimulus, including HK\$ 71 bn of universal cash hand-outs and some targeted measures such as limited wage subsidies, widening its fiscal deficit to 6% of GDP.<sup>174</sup> Nevertheless, Hong Kong's economy was insulated from the the shocks of COVID-19 and limited sanctions by strong financial fundamentals, including ample fiscal reserves, a minimal debt burden and US\$ 486bn of foreign currency reserves.<sup>175</sup> Under the Basic Law the city does not remit taxes to the central government, which assumes the burden of PLA basing. Overall in 2020, Hong Kong's nominal GDP was US\$ 363.9bn, which was slightly larger than Malaysia and just below Singapore.<sup>176</sup>

Notwithstanding robust financial health, the HKSAR is beset with deep structural problems arising from a sclerotic, oligopolistic system of

169. Department of Justice, List of Surrender of Fugitive Offenders Agreements. Remaining countries Czech Republic, India, Indonesia, Republic of Korea, Malaysia, Philippines, Portugal, Singapore, South Africa, Sri Lanka.

170. 'China suspends Hong Kong extradition treaty in reply to New Zealand', *Guardian*, 5 August 2020; 'Australia's treaty row with Hong Kong means help with police investigations «on hold», *Guardian*, 24 September 2020.

171. Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, Survey Findings on Views about Emigration from Hong Kong, 6 October 2020, (<https://www.cpr.cuhk.edu.hk/resources/press/pdf/5f7bd68361f1a.pdf>); 'Taiwan eyes Hong Kong exodus warily', *Financial Times*, 6 July 2020.

172. Office of Financial Secretary, HKSAR Government Report, *2019 Economic Backgrounds and 2020 Economic Prospects*, February 2020, p. 1.

173. 'Hong Kong Country Report', pp. 10, 12.

174. *Ibid.*, p. 6.

175. Hong Kong Monetary Authority, *Annex: Hong Kong's Latest Foreign Currency Reserves*, 7 December 2020.

176. 'Hong Kong Country Report', pp. 11, 17.

entrenched monopolies («地产霸权») stifling competition and engendering low productivity, high inequality, stagnant wages and social mobility, shortages of affordable housing and high living costs.<sup>177</sup> The lack of popular accountability and the end of democratic opposition in LegCo was reflected in a 2020 Policy Address that heavily emphasised deeper integration with the Greater Bay Area and mega-urban redevelopment vanity projects designed to achieve the schizophrenic objectives of balancing poverty alleviation through the provision of public housing with placating the interests of real estate tycoons. The government withdrew all legislation to accelerate the passage of a controversial bill through the rubberstamp parliament that had stalled for a decade to authorise HK\$ 624bn for the Lantau Tomorrow Vision project;<sup>178</sup> and went on to exempt infrastructure projects of less than HK\$ 50mn from LegCo approval.<sup>179</sup>

In 2020, multinational businesses were squeezed between the Scylla of sanctions and the Charybdis of China's national security imperatives, the fortunes of HSBC whose shares tumbled to a 25-year low after Beijing hinted it could be added to an «unreliable entity list» typifying this dilemma in microcosm.<sup>180</sup> Western Big Tech companies announced the suspension of cooperation on data requests with the HKSAR government shortly after the NSL came into effect, however, US State Department officials expressed concerns about covert compliance.<sup>181</sup> Hong Kong's Securities and Futures Commission attempted to reassure investors that it is «not aware» that investment research and short-selling, both of which have been targeted on grounds of national security by mainland regulators, violate the NSL.<sup>182</sup> However, rumours of Xi Jinping's personal intervention in halting the US\$34bn joint-listing in Shanghai and Hong Kong of Jack Ma's Ant Group, were a stark reminder that markets are not immune from the vicissitudes of CCP factional politics.<sup>183</sup> Against this bleak backdrop, the OCTS firewall having been breached and the rule of law in retreat, together with

177. Alice Poon, *Land and the Ruling Class in Hong Kong* (2nd edition), Singapore, Hong Kong, Enrich Professional Publishing, 2011.

178. 'Controversial HK\$624 billion Lantau Tomorrow housing project to go ahead', *Hong Kong Free Press*, 25 November 2020; 'Details of HK\$60 billion Hong Kong-Shenzhen joint innovation zone unveiled', *Hong Kong Free Press*, 25 November 2020; 'Salary subsidies for 2,000 recent Hong Kong graduates to work in the mainland', *Hong Kong Free Press*, 25 November 2020.

179. 'Hong Kong lawmakers question move to exempt more infrastructure projects from approval by legislature', *Hong Kong Free Press*, 18 December 2020.

180. 'HSBC shares plunge to 25-year low after China «unreliable list» report', *Hong Kong Free Press*, 21 September 2020.

181. 'Big tech firms may be handing Hong Kong user data to China', *Guardian*, 30 September 2020.

182. Securities and Futures Commission, *Policy Statement by the Securities and Futures Commission*, 19 July 2020.

183. 'China's President Xi Jinping Personally Scuttled Jack Ma's Ant IPO', *Wall Street Journal*, 12 November 2020.

accelerating technological decoupling,<sup>184</sup> companies began to reconsider their options. The South Korean firm Naver relocated its Hong Kong data centre to Singapore and Vanguard, the second largest asset manager in the world with a portfolio of US\$ 5.7tn, moved to Shanghai.<sup>185</sup> With 53% of businesses surveyed by the American Chamber of Commerce considering leaving,<sup>186</sup> Hong Kong ended the year in ignominy having lost its coveted crown atop the Heritage Foundation's Index of Economic Freedom which it had held consecutively for 25 years.<sup>187</sup>

## 6. Conclusion

This year saw the (*national*) “*securitization*” of the HKSAR as the PRC abruptly terminated the OCTS experiment 27 years before the scheduled Second Handover.<sup>188</sup> Outflanked by COVID-19 and hamstrung by social distancing restrictions that precluded effective mobilisation, civil society was powerless to mount a final stand. The NSL was drafted in secret without public consultation and foisted upon Hong Kong extra-legally outside the framework of the Basic Law in «clear and serious breach of the Joint Declaration». Through institutional and constitutional restructuring, the introduction of the NSL marked a fundamental shift in Beijing's Hong Kong policy towards thinly veiled direct rule.

With the separation of powers shattered by executive capture, cooption of local law enforcement, the overt greenlighting of operations by the PRC security services in the HKSAR and the total subjugation of the legislature, political warfare was redirected at the city's independent judiciary. Wielding four new capaciously drafted criminal offences with draconian penalties as weapons of lawfare and psychological warfare, the last bastion

184. ‘Google considers alternatives to Hong Kong for undersea cable’, *Financial Times*, 24 June 2020.

185. ‘South Korea's Naver relocates Hong Kong data centre to Singapore’, *Financial Times*, 21 July 2020; ‘Vanguard to exit Hong Kong and move regional HQ to China’, *Financial Times*, 26 August 2020.

186. ‘Some four in 10 AmCham members considering leaving Hong Kong over national security law fears survey finds’, *South China Morning Post*, 13 August 2020.

187. Heritage Foundation, 2020 Index of Economic Freedom: Hong Kong.

188. «Securitization» here is taken to mean the process of state actors transforming subjects from ordinary political issues into matters of «security», thereby justifying the deployment of extraordinary measures on the grounds of security. See Barry Buzan, Ole Wæver & Jaap de Wilde, *Security: A New Framework for Analysis*, Boulder: Lynne Rienner Publishers, 1998, p. 25. For a discussion that traces the root of the concept beyond the Copenhagen School to the work of Carl Schmitt, see Michael C. Williams, ‘Words, Images, Enemies, Securitization and International Politics’, *International Studies Quarterly*, Vol. 47, Issue 4, December 2003, pp. 515-521. For an illustration of the application to China see Yuhua Wang & Carl Minzner, ‘The Rise of the Chinese Security State’, *The China Quarterly*, Vol. 222, June 2015, pp. 339-359.

of Hong Kong's cherished rule of law is fighting a rear-guard campaign against proxies of the Central Government. With strident attacks amounting to contempt of court on judges increasingly commonplace in the pro-Beijing media, isolated cases of politicised judgments, the absence of independent law enforcement and evidence collection, signs of united front control of the prosecutorial apparatus and infiltration of the Law Society, and the real risk of interference in judicial appointments, the new Chief Justice faces an uphill struggle if he wishes to avoid the fate of judges being reduced to mere administrative officers of the state.

Despite the NSL obviating the need for the state-sanctioned direct violence that was endemic during the protests, against a backdrop of ramped up repression in 2020, what began as a decapitation strategy targeting «a small group of people» quickly metastasised as the chilling effect took hold. Even if eventually acquitted, denied bail and arbitrarily imprisoned for months pending the completion of police investigations and the commencement of judicial proceedings with passports confiscated, the state is able to exploit the NSL's weakening of procedural safeguards to advance its coercive objectives. Events in Hong Kong this year together with COVID-19 have triggered a re-examination of many countries' China policies, both in the region and further afield, especially among allies and partners of the United States. With the rule of law in retreat, economic depression and accelerated technological decoupling, footloose international companies maintaining a footprint in the HKSAR also began to reconsider their options. In the final analysis, in 2020 Beijing made significant progress towards its objective as defined by Jiang Shigong (强世功) in the 2014 white paper of asserting its «comprehensive jurisdiction» over Hong Kong – without rolling in the tanks and without a shot fired.<sup>189</sup> However, if the NSL was conceived as a tool of limited lawfare, rather than a surgical strike to penetrate the OCTS firewall around Hong Kong's rule of law, its deployment was more akin to actually detonating a tactical nuclear weapon. At the end of the year, blackened shards of the «Pearl of the Orient» glistened among the ashes as invisible fallout radiated across a formerly «Fragrant Harbour».<sup>190</sup>

189. It is acknowledged that the white paper is anonymous, however, as discussed by Veg, the author is widely believed to be Jiang Shigong. See Sebastian Veg, 'The «Restructuring» of Hong Kong and the Rise of Neostatism'.

190. In Chinese, the literal meaning of Hong Kong (香港) is «fragrant harbour».



CCP	Chinese Communist Party
CPPCC	Chinese People's Political Consultative Conference
HKMAO	Hong Kong and Macao Affairs Office
HKSAR	Hong Kong Special Autonomous Region
HKU	University of Hong Kong
ICCPR	International Covenant on Civil and Political Rights
LegCo	Legislative Council
Liaison Office	Liaison Office of the Central People's Government
HKSAR	Hong Kong Special Autonomous Region
NPC	National People's Congress
NPCSC	Standing Committee of the National People's Congress
NSL	Law of the PRC on Safeguarding National Security
OCTS	One Country Two Systems
PAPF	People's Armed Police Force
PLA	People's Liberation Army
PPRB	Police Public Relations Branch
PRC	People's Republic of China
RTHK	Radio Television Hong Kong