

A. Follow-up to the Previous Review

1. In November 2018, under the 3rd UPR cycle, China (including Hong Kong) was reviewed at the 31st session of the Human Rights Council Universal Periodic Review and in February 2019, Hong Kong Government accepted five of the six recommendations related to Hong Kong. The most relevant UPR recommendation related to the **rule of law** in Hong Kong is **28.343** “Uphold the rights, freedoms and rule of law embodied in the one country, two systems framework for Hong Kong (Australia)” which was, according to the Hong Kong Government’s response¹, accepted and already implemented.
2. **Since then, however, there has been a significant deterioration of the rule of law and human rights situation in Hong Kong.**
3. Just before 1 July 2020, the National Security Law (NSL) was imposed on the people of Hong Kong; it was drafted in Beijing without any meaningful local public consultation² and promulgated only an hour before it came into force. The NSL creates four types of offences: “secession,” “subversion,” “terrorism,” and “collusion with foreign forces”, each carries a mandatory minimum sentence of imprisonment. The Hong Kong Bar Association warned in 2020 that the NSL’s imposition of mandatory minimum sentences has the effect of stripping away judicial discretion in sentencing.³
4. In autumn of 2020, Hong Kong Government revived the use of the colonial-era sedition laws (an offence which many other countries have now abolished or significantly circumscribed) to crack down on activists and journalists.⁴ Over the past three years, it has been used to arrest dozens of journalists, unionists, activists, and other residents. It has been criticized by both UN special rapporteurs and the UN Human Rights Committee as being incompatible with international human rights law; the UN Human Rights Committee has also urged the Hong Kong Government to repeal the sedition law and refrain from using it to suppress critical and dissenting opinions.⁵
5. As of May 2023, over 250 people had been arrested for national security offences under the NSL and the sedition laws.⁶ The conviction rate is so far 100%.⁷

B. Judicial Independence Undermined; Rule of Law Eroded

Designation of specified judges hearing NSL cases

6. In the Hong Kong Government’s response to the UPR recommendation 28.343⁸, it says, “[the] the rule of law is the paramount core value of Hong Kong and the independence of the judiciary is the key firmly underpinning our rule of law.” Nonetheless, numerous provisions in the NSL impose restrictions on the judiciary by diminishing judicial discretion. These include a presumption against bail, diminished discretion on sentencing, provision for trials without juries, and the designation of specified judges. Under the NSL, judges have no security of tenure and face the continuing threat that cases will be transferred to the People’s Republic of China (PRC) legal system based on nebulous criteria.⁹
7. In particular, the power of designation is given to the Chief Executive (CE)

only,¹⁰ who can also remove a judge from the designated NSL list if the judges “make any statement or behaves in any manner endangering national security”.¹¹ In addition, the CE has the power to certify whether an act involves national security or whether a piece of evidence involves state secrets.¹²

8. All NSL cases can only be heard by NSL designated judges. It has been widely criticized that such power of designation allows the CE to appoint judges who are expected to adjudicate in the government’s favour in NSL cases. For example, after an attacker pleaded guilty to knifing three pro-democracy supporters at a “Lennon Wall” in 2019, District Judge Kwok Wai-kin (Judge Kwok) commended the assailant as being “noble”.¹³ Despite the judiciary temporarily banning Judge Kwok from hearing protest-related cases, he was later reinstated and has now been designated by the CE as a national security judge hearing a number of high profile NSL cases like the “speech therapists picture book” case¹⁴, the Stand News “sedition” case¹⁵, a seditious case concerning the publication and distribution of leaflets¹⁶, two conspiracy to commit subversion cases¹⁷ concerning activists setting up street booths and distributing materials without actually committing any violence.¹⁸

Presumption of Bail Replaced

9. The presumption of bail is also replaced by a presumption against bail in cases involving national security — and not just under the NSL.¹⁹ Due to the Court of Final Appeal (CFA)’s judgment in the “speech therapists picture book” case, the presumption against bail within the NSL also applies to “sedition” cases. As of March 2023, more than 70 percent of defendants charged under the NSL and sedition-related offences were denied bail and detained indefinitely. Many of them had been detained for 1-2 years without trial.²⁰
10. For the offence of sedition, since it carries a maximum sentence of two years in jail, most of the defendants (if they are convicted) would have served most, if not all, of their sentence before the trial even began: see the Stand News “sedition” case.²¹ In the national security trial of 47 democrats (NSL 47 case), the defendants are pro-democracy legislators, politicians, activists, union leaders and community workers. They were charged under the NSL with conspiring to “subvert” state power for having participated in an unofficial pre-election primary. Most of them have been detained for almost two years prior to trial, with some even in solitary confinement.²²
11. In the NSL 47 case, a substantial majority of those who were denied bail decided to plead guilty to the charge while most of those who have bail pleaded not guilty. So as in the case of Apple Daily executives who are charged with the offence of collusion with foreign forces under the NSL; bails were denied to all six defendants who pleaded guilty to the charge after over a year’s pre-trial detention. Prolonged pre-trial detention exerts weighty pressure on a defendant to enter a guilty plea, undermining the chance of a fair trial and the rule of law.

Trial by Jury Removed

12. Within the span of two days in August 2022, Secretary for Justice (“SJ”) Paul Lam ordered the national security trials of the NSL 47 case²³ and of Jimmy Lai²⁴ to be heard without juries. Before that, SJ has also applied for a dispensation of

the jury trial under Article 46 of the NSL in *HKSAR v Tong Ying Kit*²⁵, the first NSL case. To date, no national security case has been tried by jury.

13. Trial by jury has been practised for over 170 years in Hong Kong.²⁶ In its Concluding Observations issued in July 2022, the UN Human Rights Committee expressed its concern that the no-jury provision in the NSL restricts the rights to access to justice and to a fair trial, and specifically asked the Hong Kong Government to refrain from exercising this power.²⁷

Mandatory Minimum Sentence

14. Mandatory minimum sentences are rare in common law jurisdictions, as they are potentially arbitrary and restrict courts' ability to take into account aggravating and mitigating factors when sentencing. Hence, the mandatory minimum sentence in the NSL has in effect stripped away judicial discretion in sentencing and overridden the conventional discount for a guilty plea: as in the case of *HKSAR v Lui Sai Yu* [2022] HKDC 384, District Court Judge Amanda Woodcock had originally considered 3 years and 8 months to be an appropriate term for imprisonment for a defendant who pleaded guilty to the offence of inciting secession. However, upon opposition from the prosecution, the judge revised the sentence to 5 years. As a result, Lui received only a token discount of 6 months for his guilty plea. The decision was reaffirmed on appeal.²⁸ The final appeal will be heard in August 2023.²⁹

Resignation of UK Supreme Court NPJ

15. In the Hong Kong Government's response to the UPR recommendation 28.343³⁰, it says "[since] the establishment of the HKSAR in 1997, eminent judges from the United Kingdom, ... have been invited to sit on our CFA. At the moment, we are privileged to have a total of 14 such overseas judges sitting in our CFA from time to time."
16. On 30 March 2022, the UK announced that two of its Supreme Court judges would no longer sit on Hong Kong's top court.³¹ UK Supreme Court President Lord Robert Reed stated that he and Lord Patrick Hodge "cannot continue to sit in Hong Kong without appearing to endorse an administration which has departed from values of political freedom, and freedom of expression, to which the Justices of the Supreme Court are deeply committed."
17. Their resignation forms part of a broader British rebuke of Hong Kong's claim that its courts are independent of political interference. British officials on the same day also issued comments explaining their decision to withdraw the judges from Hong Kong's highest court.³²
18. On 26 May 2022, leading international legal figures jointly warned that judicial independence in Hong Kong is being systematically eroded by the PRC and Hong Kong governments, and overseas judges have very limited power in practice to reverse the process.³³

C. Access to Justice

Legal Aid Reform

19. In the Hong Kong Government’s response to the UPR recommendation 28.343,³⁴ it says “[the availability of legal aid is instrumental to access to justice. It is an important pillar for the rule of law.” In October 2021, the Hong Kong Legal Aid Department (“**the LAD**”) proposed a number of changes to the city’s legal aid system which have substantially restricted the rights to access to legal aid and to a counsel of one’s choice, particularly for those charged under the NSL and for other national security offences.³⁵
20. Firstly, in criminal cases, an applicant for legal aid can no longer nominate a lawyer of their choice barring exceptional circumstances, such as the nominated lawyer having represented the defendant in lower court(s). Secondly, assignment limits are imposed in judicial review cases on lawyers funded by legal aid—a solicitor can only take a maximum of five legal aid cases of judicial review in a year, and a barrister a maximum of three cases.
21. The reforms have neutered the governmental legal aid system by preventing people seeking legal aid from choosing their own lawyers and limiting the number of judicial review cases which solicitors and barristers are allowed to take annually. Ironically, in the Hong Kong Government’s response to the UPR recommendation 28.343,³⁶ it was emphasized that “[*applicants*] for judicial review can also apply for legal aid to challenge the legality of legislation as well as government policies or administrative decisions.”

Defence Lawyers of Protestors attacked by PRC state media

22. In August 2021, the 612 Humanitarian Fund (“612 Fund”) which had provided legal assistance to arrested protestors from the 2019 pro-democracy protests dissolved after coming under investigation from the authorities.³⁷ In May 2022, former trustees of 612 Fund were arrested by the police³⁸. In July 2022, PRC state-owned newspapers Ta Kung Pao and Wen Wei Po attacked lawyers linked to the 612 Fund, exerting pressure on the city’s legal professional bodies to investigate those lawyers named.³⁹

Right to Overseas Lawyers Representation

23. On 30 December 2022, the Standing Committee of the National People’s Congress (NPCSC) issued its first interpretation of the NSL. The interpretation declared that, for national security cases, the Hong Kong courts must seek a certificate from the CE before allowing an overseas lawyer to represent a defendant;⁴⁰ where the courts do not obtain such a certificate from the CE, Hong Kong’s National Security Committee (an organ composed of the CE and various government ministers, joined by a Beijing-appointed "advisor") has the power to decide on the question.⁴¹
24. In effect, the interpretation has, for national security cases, removed the Hong Kong courts’ usual power to decide on the admission of overseas lawyers for national security cases; that power now rests entirely with the executive branch.
25. This interpretation is the result of the controversy arose in October 2022, after the High Court approved the admission of renowned London barrister, Timothy Owen KC, to represent Apple Daily founder Jimmy Lai in his national security

case. Hong Kong Government's appeal was rejected by the Court of Appeal,⁴² and then again by the CFA.⁴³ However, after losing the appeal, the CE John Lee immediately sought to overturn the CFA decision by requesting NPCSC to issue an interpretation of the NSL.⁴⁴

26. This interpretation confirms, yet again, that judicial independence is a mirage under Hong Kong's national security regime. Even after losing at all levels of the Hong Kong judicial process, the authorities can override the verdict by obtaining an override from Beijing. Ironically, in the Hong Kong Government's response to the UPR recommendation 28.343,⁴⁵ it was emphasized that “[judicial] independence is guaranteed under the Basic Law and the power of final adjudication is vested in the Court of Final Appeal (CFA).”

D. Right to Vote and Right to Stand for Election

Reform of the Legislative Council

27. In response to the UPR recommendation 28.345 “*Ensure the right of Hong Kong people to take part in government, without distinction of any kind (Canada)*”, Hong Kong Government claimed that it was being implemented in that “[both] the Central Authorities and the HKSAR Government are fully committed to achieving the ultimate aim of universal suffrage in accordance with the Basic Law and the relevant Interpretation and Decisions of the NPCSC.”⁴⁶
28. However, in March 2021, NPCSC changed the Hong Kong's electoral rules which tighten its control over the city; the Legislative Council (“**LegCo**”) has been reconstituted so that it is comprised almost entirely of pro-establishment members. The number of directly elected seats in LegCo has been cut almost by half, and prospective legislators will first be vetted by a pro-Beijing committee to ensure their loyalty to the mainland. While overall seats will increase from 70 to 90, the number of directly-elected representatives will fall from 35 to 20. The aim is to ensure only "patriotic" figures can run for positions of power.⁴⁷

Reform of District Councils

29. Besides, Hong Kong Government has also proposed reducing the elected membership of District Councils from 100% to 20%. It is because pro-democracy camp had a landslide victory in elections held in 2019 amid protests and unrest against the extradition bill.
30. Under the new reform, 470 seats would be appointed or chosen by three local pro-Beijing bodies. Only 88 seats will be selected by Hong Kong's 4.41 million registered voters.⁴⁸ Even the few directly-elected councillors will require nominations from government appointed committees, instead of just the local electorate. As a result, the district officers – government officials in charge of municipal-level administration – will chair the bodies while a new disciplinary mechanism will be introduced to monitor councillors' performance.

E. Recommendations

31. To repeal the NSL and the Sedition law.
32. To drop charges and to release all detainees arbitrarily under arrest and/or

- detention under the NSL and the Sedition law.
33. To stop harassing human rights lawyers and lawyers defending protestors.
 34. To ensure the independent appointment of judges.
 35. To refrain from interfering and undermining judicial independence and discretion.
 36. To take measures, including by establishing an independent legal aid authority, to guarantee the right to access to timely and competent legal aid and to counsel of one's choice, including those charged under the NSL.
 37. To abolish the current reforms of the Legislative Council and the District Council and implement universal suffrage for the election of the Chief Executive, the Legislative Council and the District Council.

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⁹ Articles 55, 56, NSL

¹⁰ Article 44, NSL

¹¹ Ibid

¹² Article 47, NSL

¹³ □□□□□□□ □ □□ [2020] HKDC 9

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