

September 8, 2021
Professor Michael C. Davis
Global Fellow, Woodrow Wilson International Center; Professor of Law and International
Affairs, Jindal Global University; and a former Professor of Law, University of Hong Kong
Testimony before the US-China Economic and Security Review Commission
Hearing on “US China Relations in 2021: Emerging Risks”

Background

The situation in Hong Kong before the recent crackdown is well known to this Commission and the world. Hong Kong has long been viewed as a global city at or near the top of global rankings for basic freedoms and the rule of law. It has been a widely admired city with a distinct brand of local culture lodged between East and West, a global financial center on par with other great centers of finance and trade, and at the same time a hub of the arts and culture that has long captured the world’s imagination, all very much secured by a vigorous civil society, human rights and the rule of law.

In the 1984 Sino-British Joint Declaration,¹ China guaranteed under its “one country, two systems” formula, that Hong Kong’s way of life would be preserved for fifty years from the 1997 handover, along with its core values of human rights and the rule of law. This was all to be included in a Basic Law, which was ultimately promulgated in 1990.²

The Basic Law provides for the promised high degree of autonomy, human rights, and the rule of law, as well as the “ultimate aim” of “universal suffrage.” With limited exception, related to matters outside the scope of autonomy,³ mainland laws were not to apply, and mainland officials were not to “interfere in affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this law.”⁴ Conditioned on these commitments, foreign governments, including the US, recognized Hong Kong as a distinct entity for purposes of trade and other exchanges. Critical weaknesses that would prove the undoing of the model included Beijing control over the interpretation of the Basic Law, with the courts in a subordinate role,⁵ and Beijing’s foot-dragging over the promised democratic reform to achieve universal suffrage.

¹ Constitutional and Mainland Affairs Bureau (Hong Kong), “Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong,” (hereinafter “Joint Declaration”) December 19, 1984,

<https://www.cmab.gov.hk/en/issues/jd2.htm>. Although Chinese officials often say the Joint Declaration was fulfilled upon the handover, Article 7 binds both governments to fulfill all of its provisions extending for fifty years.

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

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

⁴ Basic Law, Articles 22.

⁵ Basic Law, Article 158 assigns the power of interpretation to the National People’s Congress Standing Committee (NPCSC), with local courts allowed to interpret it in adjudicating cases. While courts review local legislation, they are not allowed to review national legislation and are bound by NPCSC rulings. *Lau Kong Yung v. Director of Immigration*, FACV Nos. 10 and 11 of 1999 (Hong Kong Court of Final Appeal, December 3, 1999),

In spite of these weaknesses, Hong Kong's rule of law and its status as an open society remained largely intact in the first few years after the handover. Hong Kong often secured the top spot in the Heritage Foundation's Index of Economic Freedom and saw its rule of law ranked among the top in the world.⁶ The draining away of autonomy and associated guarantees was mostly a matter of growing Beijing interference long before the hardline takeover we are seeing today.⁷

The undemocratic government subservient to Beijing proved not to be adept at guarding Hong Kong's autonomy. The first blatant warning signs came in 2003 when the Hong Kong government proposed the so-called Article 23 legislation. Article 23 of the Basic Law required Hong Kong "on its own" to enact certain national security legislation. When the Beijing appointed Chief Executive and his cabinet put forth draft legislation, which posed several risks to basic freedoms, alarm bells rang. A half-million protesters took to the streets to demand retraction of the bill, as would ultimately be done when one of the government's supporters, the Liberal Party, bulked and withdrew its support from the bill.

Growing public awareness that Hong Kong's capacity to guard its autonomy would depend on the promised democratic reform, led to equally large protests for democracy in 2004. This demand would become a constant theme in Hong Kong politics, in the 2012 protests against the government's proposed patriotic education, in the 2014 "umbrella movement" protesting government foot-dragging over the promised democratic reform, and in the 2019 protests against the government's proposed extradition bill. The flawed extradition bill aimed to jump over the long-stalled negotiations with the mainland over an extradition arrangement and would have allowed people to be extradited to the mainland without sufficient human rights protections. When the bill was withdrawn the protest again morphed into protests for democratic reform.

As evident in the continuing protests demands for Basic Law compliance, Hong Kong protesters have not sought a local government constantly at odds with Beijing, but they have clearly hoped for a government that would find its voice to guard autonomy and protect the city's core values. Long ignoring popular demands to fulfill Basic Law commitments, the Beijing and Hong Kong governments only have themselves to blame for the growing opposition. The 2020 National Security Law⁸ (NSL), imposed directly by Beijing, represents a refusal to take responsibility for this failure and profoundly undermines the "one country, two systems" model.

The Degraded Criminal Justice Process Under the NSL

⁶ "Hong Kong Dumped from Economic Freedom List It Had Dominated," Bloomberg, March 3, 2021, <https://www.bloomberg.com/news/articles/2021-03-04/hong-kong-dumped-from-economic-freedom-index-it-used-to-dominate> ; and World Justice Project, Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index>

⁷ See Generally, Michael C. Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Columbia University Press, 2021). <https://cup.columbia.edu/book/making-hong-kong-china/9781952636134>

⁸ National People's Congress of the People's Republic of China (PRC), "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region," June 30, 2020, [https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_\(a406\)_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

With four vague crimes—secession, subversion, terrorist activities, and collusion with foreign forces—regulating speech in one form or another, the NSL represents a frontal attack on freedom of expression and political opposition in Hong Kong. These four crimes apply worldwide to both residents and non-residents, for actions both inside and outside Hong Kong. Hong Kong people and the city’s friends abroad have watched in horror as people representing the city’s leading voices for democracy and the rule of law have been arrested or forced to flee into exile. The reach of this oppression has included street protesters, the media, academics, the arts, and opposition politicians, with well over a hundred arrests in the first year of the NSL.

The parade of prosecutions began on the very first day of the NSL, with the arrest of Tong Ying Kit, a young protester who recklessly drove his motorcycle into cordons of police. His has been the first and only case so far to go to trial. In what appeared to be a reckless driving case, he was convicted for incitement to secession for carrying a flag with the popular slogan, “Liberate Hong Kong, Revolution of our Times.” A special three judge panel of NSL designated judges found him guilty, based on his alleged intent to promote independence.⁹ The court relied on a mere supposition that one possible meaning of the slogan was a call for independence. Although both the Basic Law and Article 4 of the NSL call for continuing application of the ICCPR, the court did not address the generally applicable human rights standard for incitement, that a speaker intend imminent violence and that such imminent violence be likely to occur. His reckless vehicle operation landed him a further conviction for terrorism, receiving a sentence of 9 years in total.¹⁰

Nearly all the remaining NSL cases involve political speech alone. Among the most notorious has been the prosecution of the prominent publisher of the Apple Daily, Jimmy Lai for collusion with foreign forces, presumably based on publications attacking the NSL and encouraging foreign pressure on Hong Kong. Several of his administrative staff and editors were likewise arrested. Mr. Lai languishes in jail after a bail denial that went all the way to the Court of Final Appeal.¹¹ The police raided his newspaper and eventually forced it to close by freezing its assets.

Perhaps, most shocking in the parade of NSL cases is the prosecution of nearly the entire active political opposition, asserting that participation in a July 2020 opposition-organized primary election amounted to conspiracy to subversion. Like political primaries everywhere, the opposition primary was designed to select the best candidates to run in the then planned September 2020 general election for the Legislative Council, an election that was later postponed at Beijing’s

⁹ *HKSAR v. Tong Ying Kit*, (2021) HKCFI 2200 (Hong Kong Court of First Instance, July 27, 2021).

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137456&currpage=T

¹⁰ See Michael C. Davis, “National security trial ruling a setback for human rights in Hong Kong,” *South China Morning Post*, August 4, 2021. <https://scmp.com/comment/opinion/article/3143634/national-security-trial-ruling-setback-human-rights-hong-kong>

¹¹ *HKSAR v. Lai Chee Ying*, Final Appeal No. 1 of 2021 (Hong Kong Court of Final Appeal, February 9, 2021), <https://scmp.com/comment/opinion/article/3143634/national-security-trial-ruling-setback-human-rights-hong-kong> [/legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491). For an analysis of the court’s decision and the difficult strategic position it faced, see Simon Young, “Hong Kong’s Highest Court Reviews the National Security Law—Carefully,” *Lawfare*, March 4, 2021. <https://www.lawfareblog.com/hong-kongs-highest-court-reviews-national-security-law-carefully#>

direction.¹² Of the 47 being charged, 36 would languish in jail for months after bail denial.¹³ The accusation of conspiracy to subversion relates to the plan by some opposition politicians, if they win a majority in the Legislative Council, to use a Basic Law provision respecting budget approval to force resignation of the Chief Executive. It seems only in Hong Kong does trying to defeat the government in accordance with constitutional requirements amount to subversion.

The repressive policies that animate the NSL, which on its face has no retroactive application,¹⁴ extend well beyond the NSL itself. This has included the pre-existing public order laws, with the relentless prosecution of over 2,500 protesters from the 2019 protests. Prosecutions under these prior public order laws have targeted several senior opposition politicians, who during the 2019 protests were among the prime advocates that protesters stick to peaceful non-violent discipline. Among those convicted were the prominent barrister and Hong Kong's "father of democracy" Martin Lee. Mr. Lee was given an 11-month sentence, suspended for two years, while several of his colleagues were sent to jail.¹⁵ Even the old British sedition law that had not been used in decades, has been resurrected to apply to statements made prior to the NSL.

The NSL suffers from much more than vague language. It represents a comprehensive threat to Hong Kong's autonomy, rule of law and basic freedoms. One would be hard-pressed to devise a more comprehensive plan to shut down an open society and inhibit the free-wheeling debate that has long characterized Hong Kong. Imposed without any public consultation, the NSL effectively stands above the Basic Law. The Hong Kong Court of Final Appeal (CFA) made this clear in the above noted denial of bail in the Jimmy Lai case, refusing to overturn the NSL's presumption against bail, which runs contrary to the common law presumption of innocence that has long prevailed in Hong Kong. The CFA expressly found it had no power to review the NSL for conformity to the Basic Law and that the bail provision is an exception to the usual rule.¹⁶ Does this signal that any NSL deviation from human rights standards will be treated as an exception?

Other NSL provisions undermine Basic Law commitments to autonomy and the rule of law. Ignoring the legal requirements that mainland departments not interfere in Hong Kong affairs, the NSL creates both a Committee for Safeguarding National Security and an Office for Safeguarding National Security, both under the direct supervision of the Central Government. The former is made up of local officials with a mainland national security adviser, while the latter is completely staffed by mainland public and state security officials. For both, deliberations are secret and not subject to judicial review.

¹² "Explainer: How a Primary Got Hong Kong Activists in Trouble," Associated Press, March 1, 2021, <https://apnews.com/article/beijing-primary-elections-democracy-hong-kong-elections-ccda7eb61403f721ba8e56423203f72a>.

¹³ NSL Article 42 creates a presumption against bail, contrary to the usual common law rule.

¹⁴ NSL, Articles 39 and 66.

¹⁵ Hong Kong pro-democracy figures given jail terms of up to 18 months," *The Guardian*, April 16, 2021. <https://www.theguardian.com/world/2021/apr/16/jimmy-lai-martin-lee-hong-kong-pro-democracy-figures-sentenced>

¹⁶ Supra note 11, *HKSAR v. Lai Chee Ying*, Final Appeal No. 1 of 2021.

The NSL likewise creates special national security branches in both the police and the Department of Justice, which operate in secrecy and whose heads are appointed on the advice of the mainland Office for Safeguarding National Security. One of the first tasks carried out by the Committee for Safeguarding National Security was to issue special regulations for police operations under the NSL. These regulations allow for warrantless searches, surrender of travel documents, seizure and confiscation of property, interception of communications and secret surveillance.¹⁷ It would appear that Hong Kong's newly minted secret police, both in the mainland Office for Safeguarding National Security and in the local special branches have a pretty free hand to conduct surveillance and target opposition figures with little chance of judicial oversight.

The Courts and Legal Profession Under Stress

Judicial independence and oversight are likewise compromised. Reflecting Beijing's distrust of Hong Kong's historically independent judges, the NSL provides that only designated judges can hear NSL cases. If designated judges make any statement, presumably in court, that officials believe offend national security then they can be removed. The Secretary for Justice can also choose to withhold the right to a jury in High Court cases where juries are typically allowed and replace such jury with a three-judge panel, as was done in the above noted *Tong Ying Kit* case. Added to these structural limitations, has been open pressure on judges, as Beijing and its supporters may publicly attack judges who stand in the way of government efforts to deny bail or convict. In the Jimmy Lai bail case noted above, the mainland *People's Daily* condemned the granting of bail and offered a somewhat veiled threat that the NPCSC might intervene, or if the CFA granted bail, the case might be transferred to the mainland.¹⁸ This would not be an idle threat.

On top of all the restraints and pressure on the courts, the NSL allows the transfer of certain complex cases to the mainland for prosecution. This would be determined by the Office for Safeguarding National Security with the permission of the Chief Executive, a permission sure to be given. In considering the significance of all these structural and procedural hurdles one should bear in mind the harsh NSL punishments at risk—ranging from 3 years to life.

Hong Kong's prized legal profession likewise feels pressure under the NSL. China's official *People's Daily* recently likened the Hong Kong Bar Association to "street rats" and warned the Law Society to stay out of politics ahead of its leadership election—a view sadly echoed by the

¹⁷ "Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region Gazetted," Government of the Hong Kong Special Administrative Region, Press Release, July 6, 2020, <https://www.info.gov.hk/gia/general/202007/06/P2020070600784.htm>

¹⁸ In the article, translated in the *People's Daily Observer*, the leading state-run newspaper, after condemning Jimmy Lai as a dangerous criminal highlighted the mainland authorities' power to transfer such a complex case to the mainland for trial, surely signaling an intention to do so if the bail was not revoked on appeal. See, Su Di, "Observer: Approving Jimmy Lai's bail harmful to Hong Kong's rule of Law," *People's Daily*, December 28, 2020. <https://peoplesdaily.pdnews.cn/opinions/observer-approving-jimmy-lai-s-bail-harmful-to-hong-kong-s-rule-of-law-190555.html>

Hong Kong Secretary for Justice.¹⁹ The Bar Association is widely respected for carrying out its responsibility to defend the rule of law. The president of the Hong Kong Bar Association, Paul Harris, was repeatedly attacked in mainland media when he had the temerity to suggest revision of the NSL to bring it in line with Basic Law requirements.²⁰ The representative of the legal functional sector in the Legislative Council, Dennis Kwok, was likewise repeatedly attacked for using legislative maneuvers to block enactment of a national anthem law. Mr. Kwok was eventually expelled from the Legislative Council and has since fled into exile.²¹ All of the remaining opposition legislators resigned in protest after Kwok and three other lawmakers were expelled.²² Professor Johannes Chan, a senior barrister and the former Law Dean at the University of Hong Kong, likewise came under withering attack when he defended the Student Union's free speech right after they passed a resolution of condolences and sympathy for the perpetrator of an attack on a police officer, the perpetrator having later committed suicide.²³ More recently four of the Student Union leaders have been arrested, accused of inciting terrorism in the resolution.

Lawyers were quite active in providing representation for the 2019 protesters and advocating more generally for upholding basic rights. In the face of attacks on other civil society groups, such groups as the Progressive Lawyers Group and the 612 Humanitarian Relief Fund (which provided legal assistance and other support to arrested protesters) have disbanded.²⁴ Even academic lawyers who have generally spoken out on human rights issues have, with few exceptions, largely gone silent. I have found I receive more calls overseas from the media because journalists find more difficulty finding legal experts willing to offer expert comment on human rights issues.²⁵

¹⁹ "Hong Kong's Justice Sec. warns law societies to steer clear of politics after Chinese state media blasts barristers," *Hong Kong Free Press*, August 16, 2021. <https://hongkongfp.com/2021/08/16/hong-kongs-justice-sec-warns-law-societies-to-steer-clear-of-politics-after-chinese-state-media-blasts-barristers/>

²⁰ "Beijing's top office in Hong Kong ratchets up attack on Bar Association chief Paul Harris, denouncing him as an 'anti-China politician'," *South China Morning Post*, April 25, 2021. <https://www.scmp.com/news/hong-kong/politics/article/3131025/beijings-top-office-hong-kong-ramps-attack-bar-association>

²¹ For a careful analysis of the constitutional difficulties of the disqualifications see, Thomas E. Kellogg, "Beijing unbound: Hong Kong's autonomy crumbles as China rewrites the law," *Hong Kong Free Press*, November 17, 2020. <https://hongkongfp.com/2020/11/17/beijing-unbound-hong-kongs-autonomy-crumbles-as-china-rewrites-the-law/>

²² "Hong Kong opposition lawmakers all quit after four members ousted," *The Guardian*, November 11, 2020. <https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust>

²³ "Outspoken Hong Kong law professor Johannes Chan 'has left post at end of HKU contract,'" *South China Morning Post*, July 9, 2021. <https://scmp.com/news/hong-kong/politics/article/3140496/outspoken-hong-kong-law-professor-johannes-chan-leaves-post>

²⁴ The Progressive Lawyers Group has long focused on advocacy for human rights and the rule of law, while the 612 Humanitarian Relief Fund has focused on legal defense and support for arrested protesters. "Security Law: At least 8 Hong Kong pro-democracy groups disband in past 2 weeks, including lawyer's group," *Hong Kong Free Press*, July 6, 2021, <https://hongkongfp.com/2021/07/06/security-law-at-least-8-hong-kong-pro-democracy-groups-disband-in-past-2-weeks-including-lawyers-group/>; "Humanitarian fund helping arrested Hong Kong Protesters will halt operations by October 31," *Hong Kong Free Press*, August 18, 2021. <https://hongkongfp.com/2021/08/18/humanitarian-fund-helping-arrested-hong-kong-protesters-will-halt-operations-by-october-31/>

²⁵ "Why are Hong Kong academics quitting newspaper columns, and what's the fear over new 'red lines'? Three words: national security law," *South China Morning Post*, June 24, 2021. <https://scmp.com/news/hong-kong/politics/article/3138478/why-are-hong-kong-academics-quitting-newspaper-columns-and>

Undercutting Academic Freedom

Beijing has long been unhappy with Hong Kong's youthful opposition and has sought to impose a more patriotic brand of education, presumably to drain away youthful support for popular protests. In 2012, long before the imposition of the NSL, at Beijing's encouragement, the government had put forth proposals for national education.²⁶ They seemingly reasoned that liberal education was the basis for public support of the massive protests in 2003 and 2004 and a somewhat smaller protest over a high-speed rail in 2009. The government's 2012 national education proposal clearly backfired, generating even more political opposition. The proposal proved to be the impetus for the 2012 mass youth protests against brainwashing. Again, the government eventually backed down, but this protest had already given rise to a new generation of youthful protesters, some then as young as 14. As in 2003, the 2012 protest against patriotic education would lead to further later protests over democracy in the 2014 Umbrella Movement.

Beijing has built its long-standing education concerns into the NSL. Under NSL Article 9, the Hong Kong government is responsible "to take necessary measures to strengthen public communication, guidance, supervision and regulation...relating to schools, universities, social organizations, the media, and the internet."²⁷ Under Article 10, it is to "promote national security education in schools and universities and through social organizations, the media, the internet and other means..."²⁸ The government has already issued regulations requiring schools at all levels to teach national security, and various official statements have warned universities and the media about possible violations.²⁹ Beijing's official media have already attacked professors who speak out as "reactionary academics" and even Beijing supporters could find themselves branded as "loyal rubbish."³⁰ University leadership has offered no resistance to government directives. A culture of fear and self-censorship prevails on university campuses.³¹

The culture of intimidation is sometimes targeted directly at students. The ruling Hong Kong University Council, overriding academic discipline procedures, barred the above noted student leaders from campus after officials condemned their resolution of condolences over the suicide of

²⁶ Keith Bradsher, "Hong Kong Retreats on 'National Education' Plan," *New York Times*, September 8, 2012, <https://www.nytimes.com/2012/09/09/world/asia/amid-protest-hong-kong-backs-down-on-moral-education-plan.html>.

²⁷ "In Full: Official English Translation of the Hong Kong National Security Law," Article 9.

²⁸ "In Full: Official English Translation of the Hong Kong National Security Law," Article 10.

²⁹ Education Bureau of Hong Kong, "Education Bureau Circular No. 2/2021: National Security Education in School Curriculum - Implementation Mode and Learning and Teaching Resources," February 4, 2021, <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21002E.pdf>; and Education Bureau of Hong Kong, "Education Bureau Circular No. 3/2021: National Security: Maintaining a Safe Learning Environment Nurturing Good Citizens," February 4, 2021, <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21003E.pdf>. The University Grants Council has already sent letters to public universities warning of the need for courses on national security at the risk of funding losses. Mimi Leung and Yojana Sharma, "Universities pressed to implement 'security law' education," *University World News*, March 24, 2021. <https://www.universityworldnews.com/post.php?story=20210324074153521>

³⁰ Au Ka-lun, "A new Cultural Revolution is on its way," *Apple Daily*, March 26, 2021. <https://hk.appledaily.com/opinion/20210326/GDMGSIJ2AVBOLLW7QC5BUJUBY4/>

³¹ "As Hong Kong Law Goes After 'Black Sheep,' Fear Clouds Universities," *The New York Times*, November 7, 2020. <https://www.nytimes.com/2020/11/07/world/asia/hong-kong-china-national-security-law-university.html>

the attacker. The university administration had already severed relations with the Student Union, which had passed and then later apologized for the resolution.³²

With the local NSL education regulations in place, Beijing in mid-2021 targeted its wrath below the tertiary level at the Professional Teachers Union (PTU), accusing this 48-year-old teacher's labor union of being too political and the teachers themselves of brainwashing students against China. Reminiscent of mainland style political purges, both China's Xinhua news agency and the *People's Daily* in commentary referred to the 95,000 member PTU as a "malignant tumor."³³ The Hong Kong government then severed all relations with the union with which it had cooperated for decades, and the police announced a criminal investigation. This led to the union's decision in August 2021 to disband. Beijing officials have made clear that leading members should still be pursued. These attacks on academic freedom in Hong Kong have left their mark, with the Global Public Policy Institute giving Hong Kong a D-rating on academic freedom in its global survey.³⁴

Civil Society Organizations Under Severe Pressure

A broad spectrum of civil society and labor organizations are also feeling the heat, with organizations such as the Labor Party, the Confederation of Trade Unions, the Social Workers General Union, the League of Social Democrats, and the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China (which had organized the June 4th vigils every year until such vigils were banned) often the target of official condemnation. The most recent target was the Civil Human Rights Front. Speculation is that that the Confederation of Trade Unions, which gathers trade unions under one umbrella, will likely be the government's next target.

The Civil Human Rights Front (CHRF), which for 19 years had been an umbrella organization uniting many pro-democracy organizations in organizing public protests, has especially come under severe pressure. It had for years cooperated with government to submit proper applications for the many peaceful protest marches it organized and was noted for its insistence on non-violent strategies. On December 10, 2019, when I interviewed one of its leaders, this leader described their efforts that day to organize one of the first protests permitted on Hong Kong Island in recent months. They had persuaded the police that if aggressive enforcement tactics were not used, they expected the protest would come off without violence—as in fact occurred. But official tolerance changed dramatically in 2021: first, in March rumors surfaced that the police were investigating the front under the NSL; in May the then convenor of the organization, Figo Chan Ho-wun, was jailed for 18 months for participating in a 2019 unauthorized protest; then Beijing's Hong Kong and Macau Affairs Office accused the organization of colluding with foreign forces and attempting

³² "University of Hong Kong bypassed normal disciplinary procedure in banning student leaders from campus, insiders say," *South China Morning Post*, August 3, 2021. <https://www.scmp.com/news/hong-kong/politics/article/3143884/university-hong-kong-bypassed-normal-disciplinary-procedure>

³³ "'Hong Kong's biggest teachers' union 'seeks to speed up dissolution by changing its rules' as Beijing attack continue," *South China Morning Post*, August 11, 2021. <https://scmp.com/news/hong-kong/politics/article/3144711/hong-kongs-biggest-teachers-union-seeks-speed-dissolution>

³⁴ "Hong Kong's Global Academic Freedom Index regresses C-level to D-level, lower than Vietnam, causing concern," *Apple Daily*, April 2021. https://hk.appledaily.com/international/20210316/TNKQG3RI2VDBBOKXGFEJBL7AY/?utm_source=HRIC+Updates&utm_campaign=686911b077-HRIC_DAILY_BRIEF_COPY_01&utm_medium=email&utm_term=0_b537d30fde-686911b077-259232682

to stage a “color revolution;” and, finally, under Beijing pressure, the police repeatedly signaled their intention, even after the organization folded, to investigate the group’s leaders for criminal behavior. This led to several organization, including the above-noted PTU withdrawing from the front. Under pressure, the CHRF announced that it had disbanded on August 13, 2021.³⁵

Prominent overseas organizations such as Human Rights Watch, the US National Endowment for Democracy and affiliates, the Hong Kong Democracy Council and Amnesty International have also been attacked in state media and targeted for sanctions.³⁶ International businesses have not been immune from pressure. A recent survey by the American Chamber of Commerce in Hong Kong revealed that even 42 percent of its business members plan to leave the city.³⁷

Media Censorship

Local news organizations, art exhibits and critical documentaries have also come under attack.³⁸ Most notorious in this regard was the above-noted systematic effort to shut down the leading opposition newspaper, the Apple Daily, first arresting its publisher, Jimmy Lai and several of his executives, charged with collusion under the NSL, then raiding the newspaper offices and eventually arresting several editors and freezing the papers assets. The last move brought the paper to an end and cost over 1000 workers their jobs.³⁹

Even the independent public broadcaster, RTHK has been targeted, with the government putting in place a new Director of Broadcasting taken from the civil service to tame the broadcasters’ coverage. Along the way several reporters were dismissed, and documentary and public affairs shows critical of the government or of the police were cancelled. In the latest move RTHK is being partnered with Chinese state media, CCTV, as Hong Kong Chief Executive Carrie Lam put it, to

³⁵ “Hong Kong protests: Civil Human Rights Front confirms it has disbanded as members steer clear amid police investigation,” *South China Morning Post*, August 15, 2021, <https://scmp.com/news/hong-kong/politics/article/3145093/hong-kong-protests-civil-human-rights-front-confirms-it> ; “From fledgling alliance to protest powerhouse: A tumultuous 19 years for Hong Kong’s Civil Human Rights Front,” *South China Morning Post*, August 15, 2021. <https://scmp.com/news/hong-kong/politics/article/3145116/fledgling-alliance-protest-powerhouse-tumultuous-19-years>

³⁶ Selina Cheng, “Premier Hong Kong protest coalition comes under fire from pro-Beijing and state media, leader vows to continue,” *South China Morning Post*, March 19, 2021. <https://hongkongfp.com/2021/03/19/premier-hong-kong-protest-coalition-comes-under-fire-from-pro-beijing-and-state-media-leader-vows-to-continue/>

³⁷ “Security Law: US business group warns 42% of members plan Hong Kong exit, as police chief issues warning on ‘fake news’,” *Hong Kong Free Press*, May 12, 2021. <https://hongkongfp.com/2021/05/12/security-law-us-business-group-warns-42-per-cent-of-members-plan-hong-kong-exit/>

³⁸ HG Masters, “Hong Kong Arts Sector Faces New Political Scrutiny,” *ArtAsiaPacific*, March 18, 2021. <http://www.artasiapacific.com/News/HongKongArtsSectorFacesNewPoliticalScrutiny> ; “Hong Kong’s Lam vows ‘full alert’ for art endangering national security, as artist warns of ‘devastating’ crackdown,” *Hong Kong Free Press*, March 17, 2021. <https://hongkongfp.com/2021/03/17/hong-kongs-lam-vows-full-alert-against-artworks-endangering-national-security-as-artist-warns-of-devastating-crackdown/> ; Candice Chau, “Hong Kong campus protest documentary screening cancelled hours before showing following attack by pro-Beijing paper,” *Hong Kong Free Press*, March 15, 2021. <https://hongkongfp.com/2021/03/15/hong-kong-campus-protest-documentary-screening-cancelled-hours-before-showing-following-attack-by-pro-beijing-paper/>

³⁹ “What next for the workers laid off at Hong Kong’s Apple Daily?” *China Labor Bulletin*, August 10, 2021. <https://clb.org.hk/content/what-next-workers-laid-hong-kong-s-apple-daily>

air more programs to “nurture a stronger sense of patriotism” among viewers.⁴⁰ Lam also announced that RTHK will produce its own programming on the importance of national security. The Chair of the Hong Kong Journalist Association (HKJA), Ronson Chan, worries that this public broadcaster, created in the image of the BBC, is quickly being turned into a state propaganda mouthpiece. Chan expressed doubt most Hong Kong people would watch such programming.

The HKJA is itself at risk and reasonably fears it will be next on the list of organizations forced to disband. The Beijing controlled Wen Wei Po newspaper has already attacked it as an “anti-government political organization.”⁴¹ The paper accused the HKJA of “wantonly smearing the Hong Kong government, the police and the national security law.” HKJA’s chair defended the organization’s role of defending its member and press freedom.

Other signs of the closing media space abound. Perhaps the most notorious free speech case, beyond the closing of the Apple Daily, has been the arrest of two speech therapists, Lai Man-ling and Melody Yeung, along with three other members of the General Union of Hong Kong Speech Therapist, for simply publishing a children’s book about sheep being under attack by wolves.⁴² Presumably the Hong Kong and Beijing governments presume they are the wolves. National security police have also been monitoring the internet. The police closed a website called HKChronicles, that was dedicated to publishing first-hand accounts of the 2019 protests, claiming the power to monitor such under NSL article 43.⁴³

The Office for Safeguarding National Security, under NSL Article 54, is afforded similar oversight over foreign NGOs and news agencies. The obvious risk early on caused the New York Times to move some of its operations out of Hong Kong.⁴⁴ With such vague laws, these forms of oversight reach across the society and leave considerable uncertainty as to what is prohibited and what is not. They clearly aim to have a chilling effect on media voices in opposition to the government. These policies and prosecutions have met with international condemnation.⁴⁵

Degrading the Democratic Process

⁴⁰ “Hong Kong’s RTHK will become state media after partnership with China’s CCTV, says press group chief,” *Hong Kong Free Press*, August 11, 2021. <https://hongkongfp.com/2021/08/11/hong-kongs-rthk-will-become-state-media-after-partnership-with-chinas-cctv-says-press-group-chief/>

⁴¹ “Beijing-controlled paper labels Hong Kong press union an ‘anti-govt political organization,” *Hong Kong Free Press*, August 13, 2021. <https://hongkongfp.com/2021/08/13/beijing-controlled-paper-labels-hong-kong-press-union-an-anti-govt-political-organisation/>

⁴² “Hong Kong women who ‘published seditious children’s books about sheep’ remanded in custody,” *Hong Kong Free Press*, July 23, 2021. <https://hongkongfp.com/2021/07/23/hong-kong-women-who-published-seditious-childrens-books-about-sheep-remanded-in-custody/>

⁴³ “Hong Kong police use national security law for first time to block access to website anti-government protests, officer’ details,” *South China Morning Post*, January 9, 2021. <https://www.scmp.com/news/hong-kong/law-and-crime/article/3117072/hong-kong-police-use-national-security-law-block>

⁴⁴ “New York Times Will Move Part of Hong Kong Office to Seoul,” *New York Times*, July 14, 2020. <https://www.nytimes.com/2020/07/14/business/media/new-york-times-hong-kong.html>

⁴⁵ 2021 Hong Kong Policy Act Report, US Department of State, Bureau of East Asian and Pacific Affairs, March 31 2021. <https://www.state.gov/2021-hong-kong-policy-act-report/>

If the intention to exclude all opposition to the government were not clear enough, it was made even more clear in March 2021 when Beijing again intruded directly on the Hong Kong system to amend the electoral provisions in Annexes I and II of the Basic Law.⁴⁶ Under the amendments issued by the NPCSC on March 30, 2021, the previous Beijing-friendly 1200-member Election Committee that chose only the chief executive was expanded to 1500 members. This committee, whose members are to be chosen mostly by pro-Beijing forces via a small circle election of functional and official sectors, vetted as “patriots,” will have the responsibility to vet and nominate all candidates both for chief executive and the Legislative Council, as well as elect the chief executive and nearly half of the legislative counsellors.

Beijing has carefully stacked this powerful Election Committee with its loyalists. The shift from 1200 to 1500 members is achieved by adding 300 new members from top-down Beijing appointed bodies who supposedly represent Hong Kong in the central government. This creates a major conflict of interest with, in many cases, current officials choosing or recommending people who may later re-elect them. 117 District Counsellors, who sat on the previous Election Committee have been replaced by representatives of various loyalist organizations. Corporate voters and other pro-Beijing forces dominate most of the remainder of the Election Committee, with further possible conflicts of interest implicated. In some cases, the amendments require that a portion of the candidates from some functional sectors be nominated by mainland affiliated organizations such as, for example, the China Law Society or the Chinese Academy of Sciences.

It is widely believed that Beijing took these drastic actions against democratic development because its favored candidates were roundly defeated in the 2019 District Council (DC) elections, with opposition candidates taking 90 percent of the seats. The DC has very little power, but it is the only level where most seats were directly elected. Both Beijing and the opposition had cast the 2019 DC election as a referendum to show opposition to or support for protest demands. The support camp clearly won. The Hong Kong government then moved to disqualify the elected opposition counsellors based on a planned oath and loyalty test, resulting in most eventually resigning to avoid investigations and possible charges.⁴⁷

The new election law, both in the Beijing template, and the local law enacted to carry it out, will effectively bar the pan-democratic camp from the political process. In its first outing, Beijing’s attempt to paint this model as democratic was quickly rebutted at the close of candidate registration for the Election Committee in August 2021 when it was reported that 75 percent of those registering for the small circle election to this powerful election body would be running unopposed.⁴⁸ The mainland electoral system had arrived in Hong Kong, there being barely more

⁴⁶ NPCSC, “Method for Selection of the Chief Executive of the Hong Kong Special Administrative Region,” *Hong Kong Basic Law, Annex 1*, <http://www.xinhuanet.com/english/download/2021-3-30/AnnexI.pdf>; NPCSC, “Method for the Selection of the Legislative Council of the Hong Kong Special Administrative Region, Hong Kong Basic Law,” <http://www.xinhuanet.com/english/download/2021-3-30/AnnexII.pdf> (hereinafter “Amended Basic Law Annexes”)

⁴⁷ “‘Ten thousand apologies’: Dozens of pro-democracy district councillors step down amid reports of impending disqualifications,” *Hong Kong Free Press*, July 8, 2021. <https://hongkongfp.com/2021/07/08/ten-thousand-apologies-dozens-of-pro-democracy-district-councillors-step-down-amid-reports-of-impending-disqualifications/>

⁴⁸ “Record number of uncontested seats for Hong Kong Election Committee polls—and Li Kashing is not throwing his hat into the ring, for the first time since 1997,” *South China Morning Post*, August 12, 2021.

candidates than there were seats available. It seems the old saw, that Beijing officials do not mind elections, as long as they know the outcome ahead of time is being proven.

One need only look at the onerous process to vet candidates for loyalty to understand why there is little opposition interest in participating in upcoming elections. Beyond the vetting done by the Election Committee, the amendments also establish a small Candidate Eligibility Review Committee to separately vet all political candidates for office in the territory. That small committee is dominated by officials and long-tested pro-Beijing figures. The review committee will in turn be advised by the Committee for Safeguarding National Security set up under the NSL, which in turn will be supported by investigations of every candidate by the national security police unit. Such investigations will be conducted in secret and the candidates will reportedly not be told why they are denied candidacy—rendering the choice to run for office a risky proposition with major privacy concerns. The new provisions also provide there will be no appeal of any disqualification.

The chances of an opposition candidate clearing all these hurdles and getting elected in most of the small-circle Beijing-friendly constituencies is nil. The Election Committee historically has been so stacked with Beijing loyalists that opposition candidates running for chief executive could muster at most about 20% of the committee’s votes. The projected changes will reduce the number of committee members that might favor the opposition, either for electing the chief executive or for nomination or election to the 40 legislative seats controlled by the Election Committee.

Under the Basic Law amendments, the total seats in the Legislative Council will be increased from 70 to 90 members, but the number of directly elected seats will be nearly cut in half, from 35 to only 20. The functional sectors, crafted to ensure pro-Beijing control, will have 30 seats and the remaining 40 seats will be chosen by the Election Committee. It is too early to tell if opposition candidates will even bother to run in this new highly vetted system. For the Election Committee itself, at the close of nomination none had. Even for the minority of 20 directly elected seats, with no genuine choice, voters may not bother to vote or perhaps may boycott the elections. To avoid a campaign to submit blank ballots or not vote in the Legislative Council election the government has already passed a local law making advocacy of a boycott or blank voting illegal, though a voter doing either on their own is perfectly legal. International condemnation has already flowed in.⁴⁹

While the NSL largely uses intimidation to silence opposition, the new election laws will effectively block opposition politicians from office. A variety of other detailed limitations make it highly unlikely opposition candidates will participate in elections. Most, by virtue of the massive NSL prosecutions, will have little likelihood of qualifying. Any who have somehow escaped prosecution would judge their support in these heavily stacked bodies so insignificant that they

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

⁴⁹ “Election revamp: Urging people not to vote or spoil ballots may be criminalized, even without proof of intent to sabotage poll,” *Hong Kong Free Press*, April 23, 2021.

<https://hongkongfp.com/2021/04/23/election-revamp-urging-people-not-to-vote-or-spoil-ballots-may-be-criminalised-even-without-proof-of-intent-to-sabotage-poll/> See also, Antony J. Blinken, Secretary of State, “Assault on Democracy in Hong Kong,” Press Statement, March 11, 2021. <https://www.state.gov/assault-on-democracy-in-hong-kong/>

would reasonably conclude it not worth the loss of privacy and possible risk of prosecution to run.

International Policy Initiatives

In the couple years since the 2019 crackdown against protesters began foreign governments have tried a number of strategies to sway China to return to its commitments in Hong Kong. In the US this began with enacting the Hong Kong Human Rights and Democracy Act. This was quickly followed with the withdrawal of the recognition of Hong Kong's special status, as had previously been upheld under the Hong Kong Policy Act. Since then, a variety of legislation and executive orders have sought to ease the path for Hong Kong residents and activists to seek refuge in the US.⁵⁰ These strategies were supplemented by targeted sanctions on individual officials in Hong Kong and Beijing. In its era of "great power" and "wolf warrior" diplomacy,⁵¹ Beijing has shown no inclination to heed these expressions of international concern. Rather it has tended to escalate its interventions in Hong Kong.

Other strategies, encouraged under the Biden administration, have invoked human rights and democracy more broadly and have encouraged the strengthening of related alliances, consistent with widely shared global values. There also appears to be growing appreciation of the need for the United States to get its own house in order, in terms of policies related to the democratic processes, infrastructure and the global environment. Multi-lateral work with partners, the United Nations or other international governmental organizations work best when consistent with domestic policies. International institutions can serve as vehicles to express shared values in resolutions and fact-finding, and for setting guidelines for participation and applying appropriate pressures where needed.⁵² When criticisms targeting China's human rights violations or aggressive policies have only been unilateral, China has often responded with the usual whataboutism arguments about the US's own failings. A multilateral approach that encourages participation in shared norms may be more effective. At the same time, it will be important to sort out ways to use economic incentives to encourage compliance.

Within this broader context, the impact of sanctions on Beijing's policies in Hong Kong has been negligible. China has continued its harsh crackdown on the opposition in Hong Kong. Beijing recently indicated plans to extend the national Anti-Foreign Sanctions Law to Hong Kong, though this was put on hold in the late August NPCSC meeting. If that plan is taken up again the law will presumably be added to Annex III of the Basic Law, with further enactment of local

⁵⁰ Since Samuel Chu and the Hong Kong Democracy Council have been directly involved with various legislative initiatives, I will assume Samuel Chu will discuss these in greater detail.

⁵¹ China Media Project, "Growling Back at the West," August 8, 2021.

<https://chinamediaproject.org/2021/08/08/growling-back-at-the-west/>

⁵² "National security law: UN rights official calls on Beijing to allow fact-finding mission to Hong Kong," *South China Morning Post*, July 2, 2021. <https://scmp.com/news/hong-kong/politics/article/3139525/national-security-law-un-rights-official-calls-beijing> ; Activists urge UN official to visit Hong Kong and investigate 'disappearance of freedoms' under security law," *Hong Kong Free Press*, July 2, 2021. <https://hongkongfp.com/2021/07/02/activists-urge-un-officials-to-visit-hong-kong-and-investigate-disappearance-of-freedoms-under-security-law>

legislation. This local law, as in the national law, would presumably sanction foreign officials, entities, or individuals worldwide who act to enact or carry out foreign sanctions against China. The national law includes in its tool kit denials of visas, asset seizures and deportation. It also opens the door to civil actions by Chinese companies hurt by a foreign company that executes foreign sanctions. While the offending actions can occur anywhere, the property or individuals reached must be in China. Both passing this law on the mainland and putting it on hold in Hong Kong shows China's heightened sensitivity to foreign initiatives that may have an economic impact. The elements of required reporting and allowance of civil suits over foreign sanctions highlights the centrality of concern over economic isolation.

One possible move that might deflect such a tit-for-tat response, would be for the US to emphasize the importance of human rights and the rule of law as a central US policy concern and then to build that concern more systematically into our commercial regulatory regime and foreign policy outreach. Couching US policy as sanctions may simply invite an equal response. Multilateral alliances and agreements can be used to address human rights concerns more effectively, even if the realization of the policy objectives may be less immediate.

Of course, Hong Kong people cannot wait for the US or international community to get their house in order regarding these important priorities. The short-term response should be focused on immigration, to afford both Hong Kong protesters and ordinary people an escape. In the face of hopelessness, the response to this extraordinary crackdown is becoming clear, the exit of Hong Kong's best and brightest, reportedly at the rate of about 1000 per day.⁵³

In this age of the aging labor force there is great self-serving advantage to welcoming Hongkongers fleeing tyranny to our shores. But in terms of our human rights and rule of law priorities such offer of a haven is imperative. President Biden has announced an 18-month visa extension, with permission to work, for Hongkongers already in the US. I would suggest this allowance be extended to allow conversion to permanent residence and citizenship. I would further suggest the US follow Canada in allowing a path to permanent residence for Hongkongers completing degrees at US universities.⁵⁴ The US could only benefit from acquiring such talent and a lot of the activism in Hong Kong was centered in universities. Opening our academic door to students leaving Hong Kong could be a path to citizenship.

⁵³ "Hong Kong experiences 'alarming' population drop, but government says not all 90,000 leaving city because of national security law," *South China Morning Post*, August 12, 2021. <https://www.scmp.com/news/hong-kong/society/article/3144845/hong-kongs-experiences-alarming-population-drop-government> Jason Wardie, opinion, "The current exodus from Hong Kong isn't like pre-1997—these people won't be returning. And that changes the city," *South China Morning Post*, July 22, 2021. <https://www.scmp.com/magazines/post-magazine/article/3141995/current-exodus-hong-kong-isnt-pre-1997-these-people-wont-be>

⁵⁴ "Two new paths to permanent residence launched for Hongkongers in Canada as minister cites 'deteriorating human rights situation,'" *Hong Kong Free Press*, June 9, 2021. <https://hongkongfp.com/2021/06/09/two-new-paths-to-permanent-residence-launched-for-hongkongers-in-canada-as-minister-cites-deteriorating-human-rights-situation/>