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Hong Kong's National Security Law Turns Three

One of Hong Kong's leading legal scholars surveys the law's devastating impact

By Johannes Chan
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Hong Kong's National Security Law (NSL) came into effect on June 30, 2020. As of May 25 of this year, nearly the three-year mark, 251 people had been arrested for national security offenses under this and other laws. That is, someone was arrested on average every 4.2 days. Those arrested include legislators, journalists, students, academics, and political activists. Recently a Hong Kong student who allegedly posted pro-independence messages on social media while studying in Japan was arrested on a brief visit to Hong Kong, becoming the first person arrested for actions taken outside Hong Kong. Nearly four in five of those charged with national security offenses have been denied bail, and some have spent more than two years in detention awaiting trial. The conviction rate so far is 100%.

Yet the impact of the NSL has gone far beyond the number of arrests or convictions. Major media organizations have been forced to close. Over 60 civil society organizations, including political parties, trade unions, humanitarian funds, professional groups, students unions, and human rights groups, have disbanded or moved out of Hong Kong. Books have been removed from the shelves of public libraries. A core secondary school class called Liberal Studies, alleged to have led young people to the streets in the 2019 civil unrest, has been abolished. The Legislative Council has been reconstituted so that it is comprised almost entirely of pro-establishment members, and the government has proposed reducing the elected membership of District Councils from 100% to 20%. The National Security Office tips hotline received over 400,000 reports from its launch on November 5, 2020 through April 2023, or more than 442 reports every day. In a city once known for its vibrant and diverse public square, no one feels comfortable sharing critical or even lightly satirical remarks or cartoons about the government in public, or sometimes even among friends in private.

Apart from introducing vague criminal offenses, the NSL has significantly impacted the due process of law. The presumption of bail is replaced by a presumption against bail in cases involving national security — and not just prosecution under the NSL. (See *HKSAR v Ng Hau Yi Sydney* [2021] HKCFA 42.) The secretary for justice is empowered to waive the right to jury trial for national security offenses, and so far has done so in all national security trials before the High Court. In April 2023, the secretary for justice proposed amending the Criminal Procedures Ordinance to allow the government to appeal national security acquittals reached by the High Court without a jury. The effect would be to allow the prosecution to appeal an acquittal by a three-judge panel of the High Court, which would not be possible after a jury acquittal in the High Court.

The government justified the amendment as plugging a “loophole” in the existing law so as to bring the practice of the High Court in line with that of lower courts, where there are no jury trials and acquittals can be appealed if the prosecution believes the court has made a significant error of law. This is hardly convincing. First, there is no need for consistency with lower court practice when the High Court is a much more experienced court. Secondly, it will create a potential anomaly if two defendants facing the same national security charges are treated differently regarding their right of appeal merely because one is allowed to have a jury trial and the other is not. Thirdly, this is

a self-serving justification, as the loss of a jury trial is the prosecution's decision and the defendant has no right to object. The proposed amendment shows how far the government is prepared to go to secure a conviction, especially in certain high-profile cases that are in progress or coming to trial later this year. Unfortunately, with a compliant legislature, the proposal is unlikely to meet with any objection.

The right to have a lawyer of one's own choice is another fundamental right in criminal trials. In 2022, the government ceased its previous practice of allowing defendants who availed themselves of free legal aid to choose their own lawyers. Some defendants have decided to proceed without lawyers because they lacked confidence in the lawyers who were assigned. The government has also severely restricted the number of legally aided judicial review cases that a lawyer can accept, meaning that many of these cases will be handled by inexperienced lawyers.

More recently, the government has taken over the decision as to whether a defendant in a national security-related case may hire foreign counsel, a decision that used to be made entirely by the judiciary. This change was achieved in dramatic fashion. Former Apple Daily publisher Jimmy Lai, probably the most prominent national security defendant, intended to retain Timothy Owen, a British King's Counsel (a very senior trial lawyer, colloquially referred to as a "London silk"), to represent him. Until recently, Hong Kong courts had the jurisdiction to admit foreign counsel to appear on a case-by-case basis when deemed to be in the public interest. Considerations included the importance of the legal issues to the development of local jurisprudence, the nature and complexity of the legal arguments involved, the experience and possible contribution of the foreign counsel to the development of local jurisprudence, and the availability of suitable local counsel.

The Court of First Instance granted Lai's application. The government appealed but its appeal was dismissed by the Court of Appeal, which also refused to grant leave to appeal to the Court of Final Appeal. The government then appealed to the Appeals Committee of the Court of Final Appeal, which also refused to grant leave to appeal. (See *Re Timothy Owen KC* [2022] HKCFI 3233 (first instance); [2022] HKCA 1689 (appeal on admission); [2022] HKCA 1751 (leave to appeal to the CFA); [2022] HKCFA 23 (leave to appeal to the CFA).) In other words, all seven judges involved in the process unanimously agreed that the admission of the London silk to represent Jimmy Lai was in the public interest. The Court of Appeal rejected the government's argument that national security was unique to Hong Kong so that overseas

experience was of no or limited relevance. It also noted that the secretary for justice agreed that no national secrets were involved in the case.

Within hours of the Court of Final Appeal's decision, Hong Kong Chief Executive John Lee invited the Standing Committee of the National People's Congress in Beijing to intervene. It responded by interpreting the NSL to give the chief executive the power to decide whether a foreign lawyer may appear in a case involving national security. The Hong Kong Legislative Council then amended the Legal Practitioners Ordinance to require overseas lawyers to seek permission from the chief executive before applying to the court to represent clients in national security cases. The chief executive will not give permission unless he is satisfied that there are exceptional circumstances such that the case does not involve national security, it will not be contrary to the interest of national security to admit a foreign lawyer, and the admission of the proposed foreign lawyer is not contrary to the interest of national security. "Foreign lawyer" is defined as a lawyer who has no general right to practice in Hong Kong.

The amendment introduces two major changes to the previous law. First, it introduces a presumption against admission of overseas counsel unless there are exceptional circumstances. Under the previous law, while the overseas counsel must show his admission is in the public interest, the government must substantiate with objective evidence a claim that admission would be contrary to national security. The amendment reverses the burden of proof, making it very difficult for overseas counsel to be admitted in national security cases. This affects not only the defense but also the prosecution, especially when the pool of suitable local counsel is rather small. Secondly, and of greater concern, the amendment effectively removes the power of the courts regarding admission of overseas counsel. This will further dampen the already weak public confidence in the legal system and judicial independence.

Supporters of the change argue no one has the right to be represented by a foreign lawyer. This is misleading. Under the prior law, the defendant had a right to apply for admission of an overseas lawyer to represent him, and he had a right to have his application heard and determined by an independent and impartial court in an open and transparent manner. Now this right is taken away and his application is to be decided by a politician in an opaque political process with no clear principles or criteria, no right to be heard, no restriction on admissible evidence or matters to be taken into consideration,

no reasoned decision, and no right to appeal or to seek judicial review of the decision. The revised ordinance expressly states (in Section 27F) that the decision of the chief executive cannot be questioned in any court of law. The vague meaning of "national security" effectively gives the chief executive unfettered discretion to determine whether foreign lawyers will be admitted in any case. It would not be surprising if political rather than legal considerations dominate.

The secretary for justice defended the new rules by saying that defendants can still choose from among over 1,600 barristers in Hong Kong. This is hardly convincing. If a case warrants the admission of a London silk, it is hardly a justification to say that many junior counsel are available. There is only a limited pool of local barristers with sufficient seniority and experience to handle this type of case, and almost all of them are already tied up in other national security cases.

Notwithstanding the courts' decision to admit Timothy Owen in Jimmy Lai's case before the rule change, which was said not to operate retrospectively, immigration authorities refused to extend Mr. Owen's work visa. On judicial review, it was disclosed that the National Security Committee (NSC) set up under the NSL decided Mr. Owen's admission was not in the interest of national security. This decision was made secretly and was disclosed only in the court proceedings. The court held that it had no jurisdiction over the decisions of the NSC and dismissed the judicial review.

Procedural protection and the right to a fair hearing are core principles of the common law system. The readiness of the local and central governments to intervene and reverse the decisions of the courts in the Jimmy Lai case leaves the public to wonder how far the judiciary is still able to operate independently. With the government pulling all its weight against Jimmy Lai, a reasonable observer may wonder whether the outcome of the trial is already ordained. The coming trial is no longer only a trial of Mr. Lai, but a trial of the independence of the judiciary and the integrity of the legal system.

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Johannes Chan is a visiting professor of law at University College London and the former dean of faculty and chair of public law at the University of Hong Kong; he has served as leading counsel in many major public law cases.

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