



Revoked Promises: Hong Kong in Crisis

NATIONAL DEMOCRATIC INSTITUTE

April 2021



Manson Yim on Unsplash

Table of Contents

Executive Summary	3
<hr/>	
2020-21 Hong Kong Timeline	4
<hr/>	
I. Introduction	6
<hr/>	
II. January-June 2020 – rising tensions, escalating threats	7
<hr/>	
III. The National Security Law	9
<hr/>	
NSL institutional structures	9
NSL criminal provisions	10
NSL due process provisions: judicial independence in doubt?	12
<hr/>	
IV. NSL implementation: targeting Beijing’s opponents	13
<hr/>	
NSL criminal cases – targeting Beijing’s enemies	13
The January 6 arrests – targeting the political opposition	14
<hr/>	
V. The November 11 LegCo Disqualifications	15
<hr/>	
Political ramifications	16
<hr/>	
VI. The March 2021 electoral reforms: cementing Beijing’s effective control	18
<hr/>	
VII. Conclusion	20
<hr/>	

Executive Summary

The 1997 handover of Hong Kong’s sovereignty from Britain to the People’s Republic of China (PRC) was carried out under conditions set forth by the Sino-British Joint Declaration and guaranteed by the Basic Law. The Joint Declaration, a UN-registered treaty, established a high-level of autonomy following the handover, including the provision that Hong Kong “will be vested with executive, legislative and independent judicial power, including that of final adjudication.”¹ A key component of the Basic Law was the promise of democratic development and political reform that would allow the Hong Kong people to elect Legislative Council (LegCo) members and the chief executive by universal suffrage. While progress was slow, the Hong Kong people leveraged their limited voting opportunities and used mass mobilization efforts to push for further democratization. Their efforts reached an apex in 2019 when Hong Kongers turned out in record numbers to protest an extradition bill and to elect the first pan-democratic majority in the District Councils. Beijing responded by implementing a draconian national security law and democratically regressive political reforms, thus backtracking on the promises made under the Basic Law and Joint Declaration.

Beginning with the abrupt implementation of the National Security Law (NSL) in June 2020, Beijing launched a series of actions aimed at increasing its control over Hong Kong government institutions and altering Hong Kong’s political system and status as a liberal, rule of law society. The NSL adopts the mainland’s one-party definition of national security, which classifies political opposition and dissent as a threat to regime stability, and therefore national security. This creates massive constitutional, legal and societal conflicts when applied to Hong Kong’s liberal, rule of law political order.

The NSL violates the core principle of the Basic Law that provides Hong Kong autonomous governing authority with limited interference from Beijing. The law upends the one country, two systems framework by creating new national security bodies partially or fully controlled by PRC officials; enacting vague and broadly-worded criminal provisions, which can be used to punish peaceful political activity; and, decreasing Hong Kong’s judicial independence. The new law has been swiftly used to purge the political system of pro-democratic opposition voices and reduce Hong Kong governing autonomy.

Within this increasingly restricted political environment, leaders in Beijing and Hong Kong have used their new levers of control to diminish political opponents. The November 2020 removal of four pro-democratic

lawmakers, followed by the resignations of 15 pan-democratic legislators, left the LegCo with barely any pan-democratic representation. By March 2021, Beijing focused its attention on restructuring the Hong Kong electoral system to ensure opposition figures will be unable to run for LegCo or have a role in electing the next chief executive through an electoral reform package passed by the National People’s Congress (NPC). By decreasing the number of LegCo seats elected through universal suffrage, the electoral reform proposal represents a fundamental challenge to the Sino-British Joint Declaration and Hong Kong’s Basic Law.



April 18, 2020. Former lawmaker and pro-democracy activist Martin Lee (C) talks to members of the media as he leaves the Central District police station in Hong Kong on April 18, 2020, after being arrested and accused of organizing and taking part in an unlawful assembly in August 2019. | Photo credit: Getty Images ISAAC LAWRENCE / Contributor

Since the release of NDI’s last “Promise of Democratization in Hong Kong” report in April 2020, Hong Kong’s political and legal environment has been fundamentally reshaped, reversing the city’s path towards democratic development. However, despite Beijing’s apparent success in sidelining dissent and consolidating power, Hong Kongers’ determination for democratic reform ensures that Hong Kong’s future remains undecided. Further, international support for Hong Kong’s burgeoning diaspora communities and pro-democracy actors within Hong Kong remains a critical factor in whether or not Hong Kong’s promise of democracy is realized.

¹ “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,” *UN Treaty Series*, Volume 1399, 1985.

2020-21 Hong Kong Timeline

April
2020

APRIL 18: Fifteen pro-democracy politicians and activists are arrested for non-authorized assemblies held in August and October 2019.

May
2020

MAY 21: National People's Congress Standing Committee (NPCSC) issues a decision on enacting a National Security Law (NSL) in Hong Kong.

June
2020

JUNE 30: NPCSC approves and signs the NSL, taking effect immediately. Pro-democracy Demosisto Party disbands.

July
2020

JULY 1: 300 protesters are arrested, including 10 under the NSL. Tong Ying-kit becomes the first person charged under the NSL on July 3 for terrorism and inciting secession.

JULY 2: Hong Kong government bans the slogan "Liberate Hong Kong, Revolution of Our Times." Activist and former lawmaker Nathan Law leaves Hong Kong.

JULY 11-12: Unofficial pan-democratic Legislative Council (LegCo) elections are held; 600,000 people participate.

JULY 13: Beijing's Liaison Office declares opposition primaries illegal and Hong Kong government launches investigation into primaries.

JULY 30: Twelve pro-democracy LegCo candidates are disqualified, including four sitting lawmakers.

JULY 31: LegCo elections are postponed and rescheduled for September 2021.

August
2020

AUGUST 10: Media tycoon Jimmy Lai, his two sons and four management staff of *Apple Daily* are arrested and police search *Apple Daily* HQ. Agnes Chow is also arrested.

AUGUST 23: Twelve pro-democracy activists are intercepted by China's coastguards while trying to escape to Taiwan and detained in Shenzhen.

AUGUST 26: Lawmaker Lam Cheuk-ting and former lawmaker Ted Hui are arrested.

September
2020

SEPTEMBER 1: Carrie Lam affirms that Hong Kong's constitutional system has no separation of powers between the executive, legislature and judiciary.

SEPTEMBER 6: Tam Tak-chi, vice-chairman of People Power, is arrested under the NSL and charged for "uttering seditious words" on September 14.

October
2020

OCTOBER 27-29: Tony Chung, a former leader of Studentlocalism, is arrested under the NSL and charged with secession, money laundering and conspiring to publish seditious content.

November
2020

NOVEMBER 11: NPCSC decides on four new grounds for LegCo member disqualification. As a result, four pro-democracy lawmakers are disqualified, provoking resignation of another 15 pro-democracy lawmakers.

December
2020

DECEMBER 2: Jimmy Lai is arrested again and charged with fraud. Joshua Wong, Ivan Lam and Agnes Chow are sentenced to jail terms of 7 to 13.5 months over the June 2019 unauthorized protest.

DECEMBER 8: Eight pro-democracy activists, including former lawmakers Eddie Chu, Leung Kwok-hung and Wu Chi-wai are arrested on suspicion of violating the Public Order Ordinance over protest on July 1, 2020.

DECEMBER 11: Jimmy Lai is further charged under the NSL with an additional count of collusion with foreign powers.

January
2021

JANUARY 6-7: 55 pro-democracy politicians and activists are arrested under the NSL for their participation in the July pan-democratic unofficial primaries.

February
2021

FEBRUARY 26: Public Offices (Candidacy and Taking Up Offices) Bill requiring public allegiance oath by election officials, including district councilors, is signed.

FEBRUARY 28: 47 of the 55 pro-democracy politicians and activists arrested in January are charged with “conspiracy to subvert state powers” under the NSL.

March
2021

MARCH 11: NPC issues the decision for a proposal to “refine” Hong Kong’s electoral system.

MARCH 30: NPCSC unanimously approves the electoral reform package by revising Annexes I and II of the Basic Law.

April
2021

APRIL 1: Seven prominent pro-democracy activists and politicians, including Martin Lee, Jimmy Lai, Margaret Ng, Cyd Ho, Lee Cheuk-yan, Albert Ho and Leung Kwok-hung are found guilty of organizing and taking part in an unauthorized assembly in August 2019.

I. Introduction

In 2020 and early 2021, Hong Kong experienced a precipitous decline in democratic governance and a series of attacks on virtually all of the city's core democratic and legal institutions, including the Legislative Council (LegCo), the civil service, the courts, Hong Kong's vibrant independent media, schools and universities, pro-democratic movement activists, and grassroots civil society organizations.

Simply put, 2020 was by far the worst year for democratic development since the 1997 handover. Beijing's efforts have extended well beyond restraining its most vocal critics and it now seeks to silence not only activists, but large swaths of citizens by inhibiting civil and political rights.

Hong Kong is facing a full-blown political crisis, and there are no signs the situation will improve. The next several months could see a continued effort by the central government in Beijing and the Hong Kong government to further undermine Hong Kong's political institutions, with far-reaching implications for Hong Kong's status as a liberal and open society.

The year 2020 actually began with a sense of optimism among many in the pan-democratic camp. Fresh from historic wins in the November 2019 District Council elections, activists and politicians at the core of Hong Kong's democratic movement began planning furiously for the then-pending September 2020 LegCo elections. During a December 2019 assessment delegation in Hong Kong, NDI spoke to multiple pro-democracy stakeholders who were hopeful that the pan-democratic camp could finally achieve a historic, first-ever majority in the Legislative Council.² However, as the COVID-19 crisis emerged in early 2020, the Hong Kong government took steps to limit public gatherings, including the large-scale protests that had formed the backbone of the 2019 anti-extradition bill movement. Despite the legitimate public health basis for the COVID-19 measures, some believe political considerations – especially the government's desire to prevent the return of pro-democracy demonstrations – led Chief Executive Carrie Lam's administration to keep stringent restrictions on public gatherings in place longer than strictly necessary.

Those initial restrictions paled in comparison to the National Security Law (NSL), which was abruptly implemented on June 30, 2020. The National People's Congress Standing Committee (NPCSC) in Beijing drafted, passed and imposed the law with no input from the Hong Kong people or their government representatives.

On the first full day the law was implemented, 10 pro-democratic protesters and activists were arrested – many of them for merely possessing pro-independence materials or shouting slogans from the 2019 protest movement. More than one hundred individuals have been arrested by the newly-created National Security Department of the Hong Kong Police Force since July 1, 2020, the vast majority for ambiguously-defined national security crimes.

Along with the NSL, Beijing has taken additional steps to tighten its direct control over Hong Kong's political system. In November 2020, the NPCSC issued a decision that effectively removed four pro-democratic lawmakers from Hong Kong's Legislative Council. In response, the remaining 15 pro-democratic legislators resigned *en masse*, removing almost all pro-democratic representation from the LegCo for the first time since the 1997 handover.³

The Hong Kong government also intensified its crackdown on prominent political activists. In December 2020, youth activists Joshua Wong, Agnes Chow, and Ivan Lam pled guilty to charges of unlawful assembly in relation to an unauthorized protest outside a police station in June 2019 and were sentenced to terms up to 13 months.⁴ All three remain imprisoned, and Wong and Chow could be sentenced to additional prison time under separate ongoing NSL criminal investigations. On February 28, Hong Kong prosecutors announced their decision to charge 47 pro-democratic actors with conspiracy to commit or organize subversion under Article 22 of the NSL. The move marked a significant escalation of the government using the NSL against opposition lawmakers and other elected officials, and highlighted the political nature of the new law.

The NSL presents a grave threat to human rights and rule of law in Hong Kong, and strikes a death knell to Hong Kong's treasured autonomy established within the Sino-British Joint Declaration and maintained under the one country, two systems framework.

² Davis, Michael C. and Thomas E. Kellogg. *The Promise of Democratization in Hong Kong: Discontent and Rule of Law Challenges*, No. 17, National Democratic Institute and Georgetown Center for Asian Law, April 2020.

³ Soo, Zen. "Hong Kong's pro-Democracy Lawmakers to Resign En Masse," *Associated Press*, November 12, 2020.

⁴ Davidson, Helen. "Hong Kong Activist Joshua Wong Jailed for 13 and a Half Months over Protest," *The Guardian*, December 2, 2020.

This report outlines and analyzes political and legal developments in Hong Kong over the past year, since the release of NDI's last "Promise of Democratization in Hong Kong" report in April 2020. The key findings include:

- Hong Kong's already-flawed hybrid political structure rapidly deteriorated in the last year. Beijing is quickly moving to fundamentally reshape Hong Kong's core political institutions, increasing uncertainty regarding the city's future democratic development.
- The NSL is the most significant step Beijing has taken to exert more direct control over Hong Kong. The new law compromises Hong Kong's autonomy in several fundamental ways, and disproves Beijing's commitment to the one country, two systems framework.
- The November 11, 2020 removal of four pro-democratic lawmakers, followed by the resignations of 15 pan-democratic legislators, left Hong Kong's Legislative Council without almost any pan-democratic representation. Given the ongoing restrictions on pan-democratic political parties and elected officials, as well as the recent electoral reforms, it is clear that opposition figures will be unable to return to the LegCo in the short term.
- The move to purge the political system of pro-democratic voices and tighten control over other elements of Hong Kong's political system directly impacts the Hong Kong government's legitimacy. The political system continues to lose functional governing ability, as pathways to engage with the public narrow and the government itself loses touch with the public.
- The government has vigorously utilized the NSL, with over 100 individuals arrested by the newly-created national security apparatus, including prominent pro-democracy voices and lesser-known figures. In particular, the January 6, 2021 arrest of 55 pro-democratic lawmakers and activists, and the decision to formally charge 47 of them with conspiracy to commit or organize subversion under the NSL in late February, marked a fundamental turning point as it criminalized mainstream opposition politics and politicians.
- The March 2021 electoral reform proposal proposed by the National People's Congress and then adopted by the body's standing committee shores up Beijing's effective control over the

chief executive selection process and creates a new level of authority over LegCo elections. The reform package presents the most far-reaching reforms of Hong Kong's political system since 1997 and represents a fundamental challenge to the Sino-British Joint Declaration and Hong Kong's Basic Law.



July 1, 2020. Riot police raise orange and black warning flags during a demonstration against the new national security law. | Photo credit: Yu Chun Christopher Wong / Shutterstock.com

II. January-June 2020 – rising tensions, escalating threats

The political picture on the ground in Hong Kong in January 2020 was decidedly mixed. Many in the pro-democratic movement felt renewed momentum after a stunning victory for pan-democratic candidates in the November 2019 District Council elections – Hong Kong's only institution fully decided through direct democratic vote, though fairly limited in power. Simultaneously, there was no sign of either the Hong Kong government or the central government in Beijing changing course. Instead, it looked likely that the stalemate that had solidified in the final months of 2019 would persist with neither side willing to back down, and Beijing – realistically, the only party able to offer an initial compromise to kickstart negotiations – maintaining its hard line.⁵

As the new year began, the protest movement was anxious to signal its continued strength. Tens of thousands joined a New Year's Day protest to continue the push

⁵ For a brief account of the on-the ground situation in Hong Kong in early 2020, see *The Promise of Democratization in Hong Kong: Discontent and Rule of Law Challenges*, joint National Democratic Institute and Georgetown Center for Asian Law report, April 2020, pp. 6-7.



March 1, 2021. Hong Kong government charged 47 democrats under the national security law on February 28, 2021. Hundreds of people and supporters stand outside the Court as they wait for a seat. | Photo credit: Ryan K.W.Lai / Shutterstock.com

for the so-called Five Demands.⁶ But, on January 25, the government declared a public health emergency in light of rising COVID-19 cases, closing down various public venues and cancelling public events. Protest organizers declared a moratorium on protests in early February due to the pandemic – a move seen as temporary and not the beginning of the end of legally-sanctioned public protests in Hong Kong. In late March, the government introduced a ban on gatherings of more than four people, which some activists believed was implemented in part to deprive the protest movement of its most potent weapon: massive demonstrations meant to pressure the government into accepting key demands.⁷

To many, it seemed as though the Hong Kong government was taking advantage of COVID-imposed restrictions on large gatherings, since it could crack down on leading activists and prominent political figures without fear of sparking street protests in response to such moves. On April 18, 2020, for example, the police arrested 15 leading pro-democracy activists and politicians for participating in unauthorized protests in August, September and October 2019.⁸ Longtime pro-democracy figures Martin Lee and Margaret Ng, media tycoon Jimmy Lai and labor leader Lee Cheuk-yan were among the arrested. The central government also seemed to use this as an opportunity to take a more direct role in Hong Kong politics. On April 13,

the Hong Kong and Macao Affairs Office (HKMAO) issued a statement slamming key pan-Democratic legislators for using delay tactics to impede bills from moving forward.⁹ The HKMAO mentioned leading LegCo member Dennis Kwok by name, and suggested that he and others violated their oaths of office, which suggested that they might be barred from re-election in the then-pending September 2020 LegCo elections. That same day, the Hong Kong Liaison Office expressed “strong condemnation” of the “malicious” efforts by pan-democrats to use filibuster tactics to block proposed legislations and thereby prevent the LegCo from performing its constitutional duties, echoing the HKMAO’s reference to the legislators’ oath of office.

The comments by both the HKMAO and the Liaison Office were seen by many as a violation of Article 22 of the Basic Law, which forbids central government entities from interfering in Hong Kong affairs. The Liaison Office responded that it was not bound by Article 22 and could intervene directly in Hong Kong politics and legal matters whenever it saw fit. The Liaison Office’s statement reinterpreted a decades-long understanding of a key Basic Law provision and was quickly refuted by leading academic experts¹⁰ and the Hong Kong Bar Association.¹¹ On April 15, Luo Huining, the newly-installed head of the Hong Kong Liaison Office, called for a new national security law for Hong Kong in response to the 2019

⁶ The five demands became core to the protest movement as early as June 16, 2019, after alleged police brutality during a June 12 protest and the announcement made by the government on June 15 that the anti-extradition bill would merely be suspended. It became a slogan chanted by protesters and a rallying gesture made with two hands risen as “Five demands, not one less” (五大訴求，缺一不可). These five key demands were initially: 1) the complete withdrawal of the extradition bill; 2) the retraction of the characterization of “riot” to describe the June 12 protest; 3) the release and exoneration of arrested protesters; 4) the establishment of an independent commission of inquiry into police behavior; and 5) the resignation of the chief executive. After July 1, this fifth demand morphed into a demand for dual universal suffrage, meaning universal suffrage for both the LegCo and the chief executive elections.

⁷ “Hong Kong Bans Public Gatherings of More than Four People,” *Reuters*, March 27, 2020.

⁸ Yu, Elaine, and Austin Ramzy. “Amid Pandemic, Hong Kong Arrests Major Pro-Democracy Figures,” *The New York Times*, April 18, 2020.

⁹ Ng, Kang-chung. “Hong Kong and Macau Affairs Office and Liaison Office slam Hong Kong’s opposition lawmakers for not taking their oath seriously,” *South China Morning Post*, April 13, 2020.

¹⁰ Chan, Johannes. “A Strained Interpretation of the Basic Law: Article 22 and Non-Intervention in Hong Kong Affairs,” Hong Kong University legal scholarship blog, April 20, 2020.

¹¹ “Further Statement of the Hong Kong Bar Association on Article 22 of the Basic Law,” April 20, 2020. Hong Kong Bar Association.

protests.¹² In a video address released as part of National Security Education Day, Luo categorized the 2019 protests as “a major blow” to rule of law in Hong Kong and pressed for immediate legislative action.¹³

Limited by COVID-19 restrictions, protesters searched for ways to respond to what was becoming a wide-ranging crackdown on Hong Kong’s constitutional structure and rule of law. On May 10, small groups of protesters convened in various shopping malls across Hong Kong to chant slogans and to sing the 2019 protest movement anthem, *Glory to Hong Kong*.¹⁴ Over 200 individuals were arrested throughout the day, mostly for unlawful assembly. In some ways, instead of demonstrating the movement’s resilience, the May 10 protests showcased its dependence on public protests as the key tool to push for government accountability and democratic reform. Once COVID-19 took that tool away, the pro-democracy movement has been left with few alternatives for political engagement and mobilization.

Finally, on May 21, the central government formally announced its own national security law for Hong Kong. “National security is the bedrock underpinning the stability of the country,” National People’s Congress (NPC) spokesman Zhang Yesui said, noting that the NPC would “establish and improve a legal framework and mechanism for safeguarding national security” in Hong Kong during its annual meeting.¹⁵

III. The National Security Law

Though the NSL was passed by the NPCSC on May 28, 2020, its actual content remained unknown as the people of Hong Kong, and even senior Hong Kong government leaders, were kept in the dark over the law’s core provisions until June 30.¹⁶ The month-long delay instilled a growing sense of fear and unease among many in Hong Kong, leading some activists to flee. When the text of the law was finally released, the overall reaction was one of shock and awe.¹⁷

One of the core problems with the NSL is its baseline conception of national security: it adopts the mainland’s one-party definition of national security, which classifies political opposition and dissent as a threat to regime stability, and thus to national security. Applied to Hong Kong’s liberal, rule of law context, this concept creates massive constitutional, legal and societal conflicts, which could lead to the evisceration of Hong Kong’s fundamental political order.

The NSL includes three key aspects that disrupt Hong Kong’s democratic development: 1) the creation of new national security bodies, which are partially or fully controlled by People’s Republic of China (PRC) officials, in violation of the Basic Law; 2) the creation of vague and broadly-worded criminal provisions, which can easily be used to punish peaceful political activity; and, 3) the implications of decreased judicial independence in Hong Kong through the new law.

NSL institutional structures

The institutional structures created by the NSL have powers that should be held by the Hong Kong government under the Basic Law and the guiding mantra of “Hong Kong people ruling Hong Kong.” Three bodies in particular are of primary importance: the Committee for Safeguarding National Security (CSNS); the Office for Safeguarding National Security (OSNS); and, the Department for Safeguarding National Security (NSD) within the Hong Kong Police Force.

The CSNS is a hybrid institution primarily staffed by senior Hong Kong government officials and chaired by the chief executive; however, it also includes a newly-created national security advisor post appointed directly by the State Council in Beijing. On July 3, 2020, Luo Huining, currently director of the central government’s Hong Kong Liaison Office, was appointed as the first national security advisor. The CSNS mandate includes policy formulation as well as the coordination and oversight of “major work and significant operations for safeguarding national security

¹² Initial directives for a new national security law in Hong Kong were given during the fourth plenary session of the 19th Chinese Communist Party Central Committee. And, some commentators were already suggesting that the effort could bypass Article 23; Sheng, Yang. “Fourth Plenary Session of the CPC Central Committee Passes Document to Improve Socialist System and to Modernize Governance,” *Global Times*, November 19, 2019.

¹³ Davidson, Helena. “China’s Top Official in Hong Kong Pushes for National Security Law,” *The Guardian*, April 15, 2020.

¹⁴ Sum, Lok-kei, Tony Cheung, and Zoe Low. “Hong Kong protests: more than 250 arrested after crowds gather in shopping malls across city to chant slogans, stage sing-alongs,” *South China Morning Post*, May 10, 2020.

¹⁵ Kuo, Lily, Verna Yu, and Helen Davidson. “This Is the End of Hong Kong’: China Pushes Controversial Security Laws,” *The Guardian*, May 21, 2020.

¹⁶ Horsley, Jamie P. “Chinese Law Requires Public Consultation in Lawmaking: What Does It Mean for the Hong Kong National Security Legislation?”, *The Brookings Institution*, January 14, 2021.

¹⁷ Brown, Adrian. “‘Shock and Awe’ for Hong Kong as China Targets Elections,” *Al Jazeera*, March 5, 2021.

in the Region.”¹⁸ Further, the CSNS is beyond the reach of judicial review, and its work products – documents, memos, emails, and so on – are not subject to public record disclosure rules.¹⁹ Further, the LegCo has no authority over the CSNS budget – nor over NSL-related matters – although the government is required to submit an annual report to the LegCo on NSL-related expenditures.²⁰

The OSNS is the first mainland entity with government authority to operate in Hong Kong. The OSNS mandate includes threat assessment, oversight, intelligence collection, and the direct handling of national security cases.²¹ In some cases, the OSNS can directly take over a specific criminal case and help transfer the case to the mainland. These OSNS powers have deep implications for both judicial independence in Hong Kong and the right of the accused to a fair trial, which is protected by Article 87 of the Basic Law. The OSNS and CSNS have overlapping mandates, which illustrates a key aspect of the NSL: the Chinese Communist Party (CCP) has built redundancy and flexibility into the system allowing it to use different mechanisms to deal with various situations and cases as it sees fit.

Finally, the NSD serves as the main day-to-day agency implementing the NSL and has carried out more than 100 NSL-related arrests since June 30, 2020. Critically, the NSD strengthens ties between mainland officials and the Hong Kong police. Under Article 17 of the NSL, the OSNS has the authority to approve the appointment of the NSD head.²² Article 17 also allows non-Hong Kong “professionals and technical personnel” to be recruited to work for the NSD, including individuals from the mainland.

These new structures represent a significant violation of the Basic Law and undermine the one country, two systems framework. The core principle of the Basic Law is that Hong Kong legal and political institutions exercise autonomous governing authority to handle Hong Kong’s affairs with limited interference from Beijing. Under Article 16 of the Basic Law, for example, the Hong Kong government is vested with executive power and granted the authority to “conduct the administrative affairs of the Region” on its own.²³

The new structures take power away from the Hong Kong government, the LegCo, and the judiciary.²⁴ After 1997, Beijing protected its interests in Hong Kong largely by operating *through* the chief executive, whose appointment was heavily influenced by Beijing, and through pro-Beijing LegCo members, who enjoyed a decisive advantage given the undemocratic elements of Hong Kong’s legislative design.

The passage of the NSL represents a shift in governing strategy by Beijing, from indirect influence to direct oversight and control.

The new NSL bodies are another barrier to Hong Kong’s democratic development. The governance structures Beijing has placed in Hong Kong will play a key role in day-to-day issues related to domestic security, while also limiting the authority that any future Hong Kong government and LegCo could exercise. Therefore, even if Beijing were to allow the democratic reforms promised by the Basic Law in the future, such as universal suffrage, the newly-created NSL structures will limit the governing authority of those democratically elected officials and legislators.

NSL criminal provisions

The NSL criminalizes secession, subversion, terrorism, and collusion with foreign entities. All of the crimes, except for collusion, also include a provision on incitement, which is punished by lesser, though still significant, penalties. All four criminal sections are vague and could be used easily to punish peaceful political activity. Simultaneously, all four provisions seem aimed at particular activities and groups that emerged during the 2019 protests.

Article 20 on secession, for example, seems geared toward curbing pro-independence speech as it prohibits efforts to “separate” Hong Kong from the PRC or to “alter by unlawful means the legal status” of Hong Kong. There is no force requirement, which means that mere advocacy of independence for Hong Kong could lead to criminal penalties. In serious cases, individuals convicted of secession can be sentenced to life in prison; in lesser cases, terms of three to ten years are proscribed. It’s important to note that peaceful political advocacy for independence is protected under international law. International human rights bodies have generally taken the view that governments that want to crack down on pro-independence speech should demonstrate that criminal penalties are

¹⁸ NSL, Article 14(1)(3).

¹⁹ NSL, Article 14(2).

²⁰ NSL, Article 19.

²¹ “Central Govt Office for Safeguarding National Security in HKSAR Inaugurated,” *CGTN*, July 8, 2020.

²² NSL, Article 17.

²³ Basic Law, Article 16. Articles 17 and 19 grant similar autonomous legislative and judicial powers to Hong Kong’s Legislative Council and its courts.

²⁴ Basic Law, Article 12.



March 1, 2021. People outside the West Kowloon Law Courts Building in Hong Kong holding banners in support of pro-democracy figures charged with subversion under the NSL. | Photo credit: YT HUI / Shutterstock.com

“necessary to avert a real, and not only hypothetical, danger to the national security or democratic order” of the state.²⁵ In other words, pro-secessionist speech or advocacy is not inherently criminal as official statements from pro-Beijing media outlets have suggested.

Article 22 on subversion uses similarly vague language to punish efforts to overthrow either the central government or the Hong Kong government. Acts that “seriously interfere in, disrupt, or undermine” the governments in Hong Kong or Beijing can also be punished under Article 22. As with the secession provision, force or the threat of force is not required; the use of “other unlawful means” is sufficient to trigger the offence. Anti-subversion laws have a deeply troubled history: few countries have enacted criminal provisions on subversion, while the countries that have pursued such provisions mostly use anti-subversion laws to punish peaceful political speech.²⁶ In part for this reason, the Hong Kong government was roundly criticized for its efforts to create a new anti-subversion law in 2003 and had to withdraw its proposals under withering criticism from both experts and the public.

The subversion provision seems likely to target both politicians and activists whose obstructive tactics—blocking building entrances, for example, so that government business is temporarily suspended—have angered Beijing. As discussed in more detail below, in practice, national

security authorities have used the subversion provision to punish even mainstream political activities such as holding a primary election.

The most sparsely-used NSL criminal provision thus far has been Article 24, which covers terrorism. To be fair, the terrorism provision hews a bit more closely to internationally-accepted legal definitions of terrorism and also includes a force requirement, which could limit its application. Some experts worry that the provision could be used to target activists who take part in protests that turn violent or cause property damage, while Hong Kong activists fear that Beijing could cite this provision to use similar tactics deployed against the Uyghur community in Xinjiang.²⁷

Since the September 11, 2001 terror attacks on the United States, concerns have grown over the potential misuse of counter-terror laws by governments in ways that could violate human rights. To guard against such abuses, the U.N. Security Council and other bodies have consistently highlighted the need to engage in counter-terror activity in ways that protect human rights,²⁸ and have sought to define terrorism in ways that potentially limit its misapplication.

Article 29 prohibits collusion with foreign forces. As with the other NSL criminal provisions, it too employs overbroad language. Individuals who “directly or indirectly

²⁵ Petersen, Carole J. “Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights.” *Hong Kong LJ* 48 (2018): 789.

²⁶ Kellogg, Thomas E. “Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong.” *Colum. J. Asian L.* 17 (2003): 307.

²⁷ To be sure, in some cases, individuals who take part in protests that turn violent, or that lead to property damage, could be charged with criminal offences. That said, charging such individuals with terrorism, generally considered one of the most serious crimes, would seem to miss the mark.

²⁸ U.N. Security Council resolution 1456 (2003).

receive instructions, control, funding or other kinds of support from a foreign country” or other foreign actor, and who “seriously disrupts the formulation... of laws or policies” by the Hong Kong government or who works to “impose sanctions” would be guilty of an offence. Since 2019, the PRC has targeted international NGOs, including NDI, through ambiguous sanctions. These actions seem to be in part retaliation for U.S.-imposed sanctions, but also aim to build a false narrative that deflects accountability for Hong Kong citizens’ frustrations with its government and Beijing.

As with the other offences, it seems clear that Article 29 was written with specific actions linked to the 2019 protests in mind.²⁹ After the massive marches, a steady stream of activists traveled to key Western capitals to urge the United States and European countries to impose sanctions on both Hong Kong government officials and members of the Communist Party leadership in Beijing. Given the broad language of Article 29, it is possible that this provision could be used to criminalize, and thus decrease, ties between Hong Kong activists and their counterparts in the West or to punish Hong Kong civil society groups for raising the human rights abuses in Hong Kong in discussion with global stakeholders. Doing so would be a violation of international human rights law and the free speech protections found in the Basic Law itself.

Taken together, these four criminal provisions have significant implications for democratic development in Hong Kong.

All four provisions could be used to target peaceful political activists, including those who participated in the 2019 protests. At the same time, both the subversion and collusion provisions allow the government to target mainstream pro-democratic politicians in order to either force them to curb their political activities or purge them from politics altogether.

NSL due process provisions: judicial independence in doubt?

Given the NSL’s ambiguous criminal provisions, the role of the judiciary in protecting against the misuse of the NSL to punish peaceful political expression becomes all the more important. And yet, several key NSL provisions undercut the judiciary’s independence.

As noted above, under Article 14 the work of the CSNS is placed beyond the scope of judicial review, which means those who would seek to check the extensive powers provided to the CSNS are left without any obvious avenue to do so. At the same time, Article 62 places the NSL in a position above that of other Hong Kong laws, which means that laws like the Bill of Rights Ordinance cannot be used to narrow the application of key NSL provisions. That said, Hong Kong judges can still use the Basic Law’s rights provisions in NSL criminal cases, as the Basic Law is a national-level law passed by the National People’s Congress.

Articles 55 and 56 constitute perhaps the greatest threat to judicial independence in that they allow the OSNS to remove an NSL case from Hong Kong courts if the case is judged to be sufficiently “complex.” Under Article 56 of the law, the Supreme People’s Court in Beijing is empowered to assign such cases to mainland courts; no further guidance is given as to how courts will be selected under the Article 56 mechanism.

Whether or not by design, Articles 55 and 56 will put pressure on the Hong Kong courts to make sure that their decisions in NSL cases are at least acceptable to Beijing. In particular, the chief executive is the one, as per Article 44, designating “a [tiny] number of judges” from the magistracy at large to handle these cases with prior consultation of both the CSNS and the Chief Justice of the Court of Final Appeal. Otherwise, Article 55 would allow the OSNS to simply take over a case that Beijing views as being improperly handled. In such scenarios, Hong Kong judges may well conclude that it is better to hedge certain decisions – including but not limited to bail decisions – in favor of the government rather than risk seeing a defendant shipped off to the mainland where prospects for a fair trial would be severely limited.

In some recent NSL cases, prominent media outlets that serve as key mouthpieces for CCP leadership have harshly criticized certain judicial rulings, leading some observers to conclude that Beijing is seeking to pressure local judges to overturn such decisions or avoid similar decisions in the future. In the case of media tycoon Jimmy Lai, for example, pro-Beijing media outlets excoriated the December 2020 decision by a High Court judge to grant Lai bail in his pending NSL prosecution.³⁰ Lai was later denied bail after a lengthy appeals process.

²⁹ The focus on collusion with foreign forces was popularized among Beijing and Hong Kong government officials during the 2014 Umbrella Movement by then-chief executive CY Leung; “Admin & Civic Affairs Central Authorities Fully Support HK Gov’t,” October 19, 2014.

³⁰ “Granting bail to Jimmy Lai was a ‘serious error,’ says Hong Kong’s pro-Beijing media,” *Apple Daily*, December 26, 2020.

IV. NSL implementation: targeting Beijing's opponents

Since the NSL went into effect, implementation of the law has been robust with over 100 individuals arrested, including both high-profile critics of Beijing and more moderate politicians. On January 6, 2021, the NSD, working in tandem with Hong Kong police officers, arrested 53 pan-democratic politicians and activists, accusing them of subversion under Article 22 of the NSL. The arrests stemmed from an effort to hold a democratic primary election in July 2020, part of a larger pan-democrat camp plan to capture its first majority in the LegCo in the then-pending September 2020 elections.³¹

A third category of individuals arrested under the NSL includes younger protesters, many of whom were arrested solely on the basis of displaying or carrying pro-independence materials or for publicly shouting forbidden slogans from the 2019 protests. In general, these individuals have been arrested for secession or subversion under the NSL. A number of individuals have been formally charged with NSL crimes, with a small but growing number of defendants denied bail, leaving them to spend months in custody as they prepare for trial.

Although a comprehensive analysis of the government's use of the NSL thus far is beyond the scope of this report, a few key conclusions can be stated. First, it seems clear that the NSL is being used to target key activists and mainstream members of Hong Kong's political opposition. In other words, it seems clear that decisions about whom to investigate, arrest and charge align with Beijing's political agenda and its broader effort to reshape Hong Kong's core political institutions.

Second, the vast majority of cases that have emerged thus far seem to target peaceful political speech and advocacy, and as such would not be considered national security crimes in other liberal law-based jurisdictions.³² In many cases, those arrested will be able to make a strong claim that they were merely exercising their rights under Hong Kong's Basic Law, which is tied to international human rights law.

Third, though the core criminal provisions of the NSL have garnered perhaps the most press attention, other provisions

of the law are being used by the government to reshape the government bureaucracy and key public policies. The government has signaled that education curriculum, internet regulations, media oversight and civil society organizations provisions must be reviewed and potentially revised in light of the NSL.³³

Finally, the NSL has also had a strong chilling effect, leading many writers, journalists and experts to think twice before commenting on the news of the day. In other cases, editors, publishers and other gatekeepers have – not without basis – been forced to quash individual stories or even entire book projects. Although the government has yet to arrest any journalist or author under the NSL for what they have written, there have been some efforts by the police to use other laws to deter journalists from reporting on sensitive issues.³⁴

NSL criminal cases – targeting Beijing's enemies

A closer look at some key NSL cases from the past eight months unveil the political dynamics that seem to be driving NSL investigations and arrests. No case illustrates the fraught politics surrounding NSL cases better than that of Jimmy Lai. Arrested on August 10, 2020, Lai was charged four months later with both fraud and the NSL crime of collusion with foreign forces. Nine other individuals were also arrested that same day, including youth activist Agnes Chow and four executives at Lai's Next Media. The charges against Lai seem to stem from his financial support to the group Stand With Hong Kong (SWHK), which advocated for sanctions against key Hong Kong officials during the 2019 protest movement and has launched a global campaign to garner international support for Hong Kong's pro-democracy movement.³⁵ CCP leadership has also sought to undermine Lai's media empire, in particular the outspoken and very popular tabloid *Apple Daily*, for years. Jailing Lai for collusion with foreign forces would both remove him from the global conversation on Hong Kong and perhaps also deal a significant blow to *Apple Daily*'s long-term viability. "This seems likely a key part of their ideological control over Hong Kong," pro-democratic lawmaker Claudia Mo said in a media interview on the day Lai was formally charged. "They hate Lai's high political profile and find his media influence more than bothersome."³⁶ After a series of court hearings, Lai was denied bail on February 18, 2021.

While Jimmy Lai's case generated global headlines, the prosecution of Tony Chung unfolded largely outside of the limelight. Chung, 19, is one of the founders of the pro-independence group Studentlocalism, which regularly

³¹ On July 31, the government announced that the LegCo elections, originally scheduled for September 2020, would be postponed for a full year. Though the government claimed that coronavirus restrictions necessitated the change, many observers viewed the move as a politically-motivated effort to shield pro-Beijing candidates from potentially devastating losses at the polls.

³² Wong, Lydia, and Thomas E. Kellogg. *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, February 2021, p. 2.

³³ "Hong Kong: New National Security Guidelines on Schools Further Stifle Freedom of Expression on Campus," February 5, 2021. Amnesty International.

³⁴ Lau, Chris. "Hong Kong protests: RTHK journalist denies breaking law with online databases research for programme about Yuen Long mob attack," *South China Morning Post*, January 14, 2021.

³⁵ Suwanrumpha, Lillian. "Hong Kong Activist Agnes Chow Warns Dissent Being Silenced," *AFP*, September 1, 2020.

³⁶ Wang, Vivian, and Chris Buckley. "Jimmy Lai, Media Mogul, Is Charged Under Hong Kong's Security Law," *The New York Times*, December 11, 2020.

made pro-independence statements throughout the 2019 protests, but publicly announced its dissolution on June 30, 2020, just hours before the NSL went into effect. Chung and three of his colleagues were arrested on July 29, 2020. The NSD alleged that they had continued to post pro-independence statements online even after July 1, some of which, according to the NSD, could be considered incitement to secession under Article 21 of the NSL. Chung denied violating the NSL and was released on bail roughly 48 hours later. For months following his arrest, neither Chung nor the other members of Studentlocalism were formally charged. Their arrests may have been meant to send a signal to young activists to steer clear of any pro-independence rhetoric. But, perhaps fearing further action on his case, Chung sought to enter the U.S. Consulate in Hong Kong on October 27, 2020 to seek political asylum, but was arrested by NSD officers before he could do so. Two days after his arrest, Chung was formally charged with secession under the NSL, and also with sedition and money laundering under Hong Kong's Crimes Ordinance.³⁷

Tony Chung's case has garnered much attention within Hong Kong, in particular by younger activists who were at the front lines of the 2019 protests. The decision to re-arrest and formally charge Chung was seen by some as retribution for Chung's decision to seek asylum at the U.S. Consulate and to dissuade young Hong Kongers from contacting U.S. diplomatic officials. At the same time, the move to put Chung on trial over statements he allegedly made related to Hong Kong's political status is also deeply troubling given international law protections to peacefully advocate for independence.

The January 6 arrests – targeting the political opposition

Over the first six months after the passage of the NSL, NSD authorities deployed the law against a number of different targets, making roughly 40 total arrests. And yet, one group largely evaded arrest under the NSL: mainstream politicians who made up the core of Hong Kong's pro-democratic parties. That changed on January 6, 2021 with the arrest of 53 pan-democratic politicians and activists.³⁸ This wave of arrests, across Hong Kong, involved more than 1,000 police officers, presumably operating under the direction of the NSD. Police raided several locations, including a local law office working on human rights cases and a prominent local polling firm. Police officials also announced that they had frozen more than \$200,000 in funds that day.

The charges came from the pan-democratic primary election in July 2020. The primary was part of a larger peaceful political strategy called "the ten-step mutual destruction plan." According to Benny Tai, who devised

the plan, if the pro-democracy parties could win a majority in the LegCo, they could then use Basic Law mechanisms to force the resignation of Chief Executive Carrie Lam and to bring the Hong Kong government to a standstill. The resulting instability could, Tai argued, force CCP leadership to finally negotiate with the pro-democracy camp over political reforms. The plan that Tai laid out was based on provisions of the Basic Law that allowed for the dissolution of the LegCo and the resignation of the chief executive under certain circumstances, but was seen as highly improbable to actually happen. Nonetheless, national security officials referred to the plan as "evil" and suggested that those who organized and participated in the primary elections were attempting to overthrow the government.³⁹ More than 600,000 Hong Kong citizens participated in the primary elections, far outpacing organizers' estimates. In general, so-called localist candidates outperformed more moderate voices, a signal of the public's displeasure over Beijing's hardline policy on Hong Kong.⁴⁰

The January 6 arrests constituted a who's who among pan-democratic lawmakers and activists, including sixteen former legislators and twenty district councilors. The district councilors' arrests raised questions about whether they would be expelled from their seats like the four LegCo members in November. The police also arrested a number of lesser-known activists and politicians, many of whom were not as vocal on the core political issues that drove the 2019 protests. Jeffrey Andrews, an ethnic Indian social worker and activist who focuses on ethnic minority rights in Hong Kong, was among those arrested, as was Lee Chi-yung, a disability rights activist who campaigned to make Hong Kong more accessible after witnessing the struggles of his daughter, who uses a wheelchair.⁴¹ Both men lost their primary election races.

The arrests signaled a major escalation in Beijing's crackdown on mainstream political opposition in Hong Kong, and suggested that PRC leadership was seeking to fundamentally alter not just the structure of Hong Kong's political system, but also Hong Kong's political parties. Through the mass arrests, Beijing signaled to Hong Kong's political class that the fundamental parameters of acceptable political activity had narrowed and the cost of crossing that narrowing red line had dramatically increased.

On February 28, 2021, the Hong Kong prosecutor's office announced charges against 47 of the arrestees. All 47 were charged with conspiracy to commit subversion under Article 22(3) of the NSL, which can be punished with sentences of up to life in prison, depending on the

³⁷ Ho, Kelly. "Hong Kong court denies bail to activist Tony Chung, charged with secession under security law," *Hong Kong Free Press*, October 29, 2020.

³⁸ The total number of individuals being investigated for subversion in relation to the July 2020 primary election was 55; activists Joshua Wong and Tam Tak-chi were both already in detention on January 6.

³⁹ Sung, Timmy. "Arrests Aimed at Those Behind 'Evil Plan', Says Govt," *RTHK*, January 6, 2021.

⁴⁰ Soo, Zen. "Young Activists, Localists Top Hong Kong pro-Democracy Polls," *Associated Press*, July 15, 2020.

⁴¹ Wang, Vivian and Austin Ramzy. "With Mass Arrests, Beijing Exerts an Increasingly Heavy Hand in Hong Kong," *The New York Times*, January 6, 2020.



November 24, 2019. Citizens queue up to cast their vote for the District Council Ordinary Election in Shatin, Hong Kong. | Photo credit: JEROME FAVRE/EPA-EFE/Shutterstock

severity of the offense. Those charged included Benny Tai, the architect of the July primary election strategy, Claudia Mo, a leading figure in the pro-democratic HK First Party, Eddie Chu Hoi-dick, the highest vote-getter of the 2016 LegCo election, and Wu Chi-wai, the former chairman of the Democratic Party. For reasons that are unclear, the prosecution declined to bring charges against eight individuals, including Democratic Party stalwarts James To and Roy Kwong; American human rights lawyer John Clancey; and local activists Jeffrey Andrews and Lee Chi-yung.⁴² The charges signaled that the NSL would be used not just to intimidate and harass opposition figures, but also to actually punish them for peaceful political activities.

The charges against the 47 opposition politicians and activists also signaled Beijing's determination to do deep and lasting damage to the pan-democratic camp.⁴³ While the January 6 arrests once again sent the pan-democratic camp into crisis mode and disrupted efforts to prepare for the September 2021 LegCo elections, the decision to formally charge the 47 indicated that the government, almost certainly acting at the behest of Beijing, is looking to permanently hamstring the opposition camp in ways that could resonate for years to come.

Finally, the charges may also be part of a larger effort by Beijing to manage public sentiment and convince voters that elections are in fact meaningless. Encouraging growing public alienation from even limited forms of political participation and driving down voter turnout would then benefit pro-Beijing candidates in the September 2021 LegCo elections.

V. The November 11 LegCo Disqualifications

After the passage of the NSL, perhaps one of the most significant moves taken by Beijing and the Hong Kong government was the decision to disqualify four pro-democratic legislators on November 11, 2020. The disqualifications were immediately followed by the resignations of the remaining 15 pro-democratic legislators, leaving the LegCo without any meaningful opposition representation for the first time since the 1997 handover.

The four disqualified legislators included some of the most prominent voices in the pan-democratic camp: Alvin Yeung, Dennis Kwok, Kwok Ka-ki and Kenneth Leung.⁴⁴ Dennis Kwok and Alvin Yeung had signed a public letter to U.S. senators calling for sanctions on Hong Kong officials. Kenneth Leung had not made any public statements in favor of sanctions, but he had traveled to the U.S. as part of a broader delegation of Hong Kong legislators; government officials accused him of indirectly supporting sanctions against Hong Kong. For his part, Kwok Ka-ki neither traveled to the U.S. nor spoke out in favor of sanctions; the government cited his political party affiliation as a key basis for disqualifying him.⁴⁵

The disqualifications stemmed from a decision by the Hong Kong government issued on July 30, 2020 to bar the four from running for re-election in the then-pending LegCo election. Eight others were also barred from participating

⁴² Wong, Natalie. "National security law: 47 Hong Kong opposition figures charged with conspiring to subvert state power, after arrests over roles in bloc's primary," *South China Morning Post*, February 28, 2021.

⁴³ Lo, Chloe, Kari Soo Lindberg, and Natalie Lung. "Historic Round-up of Hong Kong Opposition Draws Defiant Protest," *Bloomberg News*, February 28, 2021.

⁴⁴ Alvin Yeung, Dennis Kwok, and Kwok Ka-ki are all members of the Civil Party; Kenneth Leung was the LegCo member for the Professionals Guild.

⁴⁵ Heng, Cheryl. "Who are Hong Kong's four ousted Legco members, and what exactly did they do?," *South China Morning Post*, November 11, 2020.

at that time, including prominent pro-democracy advocates Joshua Wong and Gwyneth Ho. The government listed several grounds for disqualification, including: advocating for Hong Kong independence; soliciting intervention by foreign governments in local affairs; expressing opposition to the National Security Law; and pledging to “indiscriminately” vote against government proposals in the LegCo.⁴⁶ A few days later, the Hong Kong government postponed the September 2020 LegCo elections.

The decision to postpone the elections raised the question of whether the disqualified legislators could continue to serve in office for an additional year. Initially, the NPCSC and the government had declared that the four could stay on until their successors were chosen. Although the government has never formally explained the reasons for the about-face, many believe that CCP leadership demanded the immediate removal after they persisted with their delaying tactics in the LegCo.

At the very least, it’s clear that the legal order to unseat four lawmakers came from Beijing. The NPCSC’s November 11 decision listed various acts that would serve as the basis for the immediate expulsion, including advocating for Hong Kong’s independence, lobbying foreign actors to interfere in Hong Kong affairs or otherwise endangering national security.⁴⁷

The NPCSC decision was framed as a further interpretation of Article 104 of the Basic Law, but relied on other legal and constitutional authorities. Under Basic Law Article 104, Legislative Councilors must pledge to uphold the Basic Law and also pledge allegiance to Hong Kong. Starting in 2016, the NPCSC and the Hong Kong government began to impose substantive requirements on would-be office holders, creating standards by which candidates for political office could be judged. If individuals were found wanting, they could be blocked from running for election. Ultimately, the NPCSC’s decision offered additional grounds by which an individual could both be barred from running for office as well as immediately expelled from the LegCo.

Given its expansive content, the NPCSC decision was seen by many as less an interpretation of Article 104, and more as a substantive amendment to the Basic Law itself.⁴⁸ Under Article 158 of the Basic Law, the NPCSC does have the authority to issue interpretations of the Basic Law more or less on its own, but any amendment of the Basic Law must pass through some additional procedural hurdles and can in some cases involve the Legislative Council and the chief executive.



May 18, 2020. Hong Kong media tycoon and founder of Apple Daily newspaper Jimmy Lai Chee Ying arrives at the West Kowloon Magistrates' Courts. | Photo credit: Yung Chi Wai Derek / Shutterstock.com

Troublingly, for the first time, the NPCSC also relied quite heavily on other legal grounds, citing specific articles of the Chinese state constitution and the NSL as key sources of authority above and beyond the Basic Law itself. In doing so, the NPCSC dramatically expanded its legislative authority vis-a-vis Hong Kong in that it no longer had to peg any new rules to specific Basic Law provisions.⁴⁹ The innovative move also ensured that future NPCSC decisions would be insulated from interference by Hong Kong institutions. For example, whereas Hong Kong courts also have the power to interpret the Basic Law in deciding cases, they have no such authority over the PRC Constitution nor any NPCSC decision that stems from that document.

Political ramifications

The decision to resign *en masse* was no doubt a difficult one for the pan-democratic camp, but had been on the table since July and had become even more pressing with the organization of a ‘stay-or-go’ poll in September.⁵⁰ There was a need for remaining LegCo members to express solidarity with their disqualified brethren and significant pressure from core supporters to make a strong statement rejecting Beijing’s unprecedented interference in Hong Kong politics. At the same time, the resignations also meant further erosion of the LegCo as a meaningful platform for the pan-democratic camp to both express dissent and influence government policy.⁵¹ Further, removing opposition members from the LegCo stripped away a rare element of accountability from the system as constituents and civil society stakeholders who relied on those lawmakers to pressure the government now have no representation.

⁴⁶ “HKSAR Government supports Returning Officers’ decisions to invalidate certain nominations for Legislative Council General Election,” Hong Kong Government press release, July 30, 2020.

⁴⁷ Wei, Changhao. “NPCSC Clarifies ‘Allegiance’ Requirements for Hong Kong Legislators, Disqualifies Pro-Democracy Legislators,” *NPC Observer*, November 11, 2020.

⁴⁸ “Basic Law becoming irrelevant, says Johannes Chan,” *RTHK*, November 12, 2020.

⁴⁹ Kellogg, Thomas E. “Beijing unbound: Hong Kong’s autonomy crumbles as China rewrites the law,” *Hong Kong Free Press*, November 17, 2020.

⁵⁰ Ho, Kelly. “Hong Kong democrats to stay in legislature during interim year as public opinion split,” *Hong Kong Free Press*, September 29, 2020.

⁵¹ Perhaps unsurprisingly, senior Democratic Party officials expressed ambivalence about the wave of resignations in the months following the November 11 purge. See, e.g., “Interview: Democratic Party, tangled up in 50 lawsuits, anticipates spending more than HK\$25million, and needs to raise funds,” *Sing Tao Daily* (in Chinese), February 17, 2021.

At the same time, the resignations also had a more immediate, much more practical effect: the absence of any pan-democratic LegCo members effectively gave the government a free hand to pass its agenda, unfettered by the blocking tactics that had been previously deployed – in many cases successfully – by the pan-democrats. True, the government would have to win over its traditional pro-Beijing allies in the LegCo, but that has not proved too difficult: more than five months after the disqualifications, Chief Executive Carrie Lam heralded the strong working relationship between her administration and the LegCo, and acknowledged that she would not have been able to bring certain proposed bills before the legislature if the members of the pan-democratic camp were still in office.⁵²

Perhaps unsurprisingly, in the wake of the pan-democratic purge the government immediately signaled that it would move forward with an ambitious agenda that included efforts to politically hamstring the pan-democrats. In early February, Chief Executive Carrie Lam announced that the government would seek to amend the Oath Taking Ordinance to broaden its reach in line with NPCSC decisions and the NSL. A new Public Offices (Candidacy and Taking Up Offices) Bill was introduced on February 23, barring lawmakers and district councilors from contesting elections for five years if disqualified for improper oath-taking or failure to uphold the Basic Law.⁵³ The government has also announced plans to work with the LegCo on revisions to education policy, reflecting the NSL mandate to incorporate national security education into school curricula.

The government will also look to collaborate with the LegCo on certain apolitical reforms, in an effort to demonstrate to the people of Hong Kong that the pro-Beijing camp can indeed get things done for the people of Hong Kong.⁵⁴ Given the functioning of the LegCo in the past few months in plenary and panel sessions, there's already doubt that the absence of any political opposition will in fact turn the LegCo into a productive, effective and technocratic legislative body. Instead, it's increasingly looking like the lack of any genuine political opposition will encourage the remaining legislators to rely too heavily on assurances from the government for its legislative proposals.

For the pan-democratic camp, the disqualifications and the subsequent wave of resignations have come at a significant cost: it has cut off their access to significant public resources, both in terms of salaries for lawmakers themselves and in terms of funding for staff, many of whom

are themselves considered key up-and-coming democratic voices. At a time when the Democratic Party has had to dedicate millions of Hong Kong dollars from its coffers to cover the legal defense of its members who face criminal prosecution for their peaceful political activities, the loss of these public resources has been especially painful.⁵⁵

Along with the increased financial burden, the pan-democratic camp has also lost its primary platform for communicating with the people of Hong Kong. Perhaps unsurprisingly, the sustained and repeated attacks on dozens of its members by the Hong Kong government and Beijing has left the pan-democratic camp in disarray and struggling to formulate a strategy, both for responding to future attacks and for finding a way to successfully contest the next LegCo election.



October 29, 2020. Former founder and convenor of pro-independence group Studentlocalism, Tony Chung Hon-lam arrives at West Kowloon Magistrates' Courts in a police van after he was arrested under the national security law in Hong Kong. | Photo credit: REUTERS / TYRONE SIU - stock.adobe.com

At the same time, the continued attacks on pro-democratic political parties and politicians raises the question of whether Beijing is even willing to allow opposition politics as usually construed in an open, liberal political system.

In other words, if Beijing is determined to fundamentally reshape Hong Kong politics to make meaningful political opposition impossible, then questions of long-term strategy on the part of the pan-democratic camp may become more or less moot.

⁵² Ho, Kelly. "Hong Kong's Carrie Lam says 'normal' legislature lets gov't make 'bold' proposals, vows action on 'fake news' and doxxing." *Hong Kong Free Press*, February 4, 2021.

⁵³ Legislative Council of the Hong Kong Special Administrative Region - Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Bill 2021, February 2021. <https://www.legco.gov.hk/yr20-21/english/bc/b202102261/general/b202102261.htm>

⁵⁴ As one prominent ex-lawmaker and government official wrote, "it is time for the pro-establishment camp to show that it is not hopelessly mired in gridlock but can free itself to serve wider public interests." Loh, Christine. "What's left of Hong Kong's Legislative Council must show it can work for city's interests." *South China Morning Post*, November 28, 2020.

⁵⁵ *Ibid.*, *Sing Tao Daily* (in Chinese), February 17, 2021.

VI. The March 2021 electoral reforms: cementing Beijing's effective control



November 2012. Chinese leaders gathered at the start of the 18th National Congress of the Communist Party of China at the Great Hall of the People in Beijing. | Photo credit: Remko Tanis on Flickr

On March 11, 2021, China's National People's Congress issued a decision that broadly reshaped Hong Kong's electoral system, further skewing the electoral framework in Beijing's favor.⁵⁶ By March 30, the NPCSC formally adopted the proposal, launching the most far-reaching reforms of Hong Kong's political system since 1997 and marking a stunning retreat from even the limited democratic reforms that had been allowed in the last two decades. The March electoral reforms solidify Beijing's continued effective control over the chief executive selection process, infuses national security within Hong Kong's electoral system, and sets up a new level of authority over the LegCo elections. The changes ensure that pro-Beijing political parties will maintain a majority in the LegCo by creating lasting structural reforms and strengthening the mechanisms by which Beijing can exclude pro-democratic candidates from running.

The reasoning behind the reforms is the guarantee that Hong Kong is governed by "patriots," which has long been used as a code word for full loyalty to CCP leadership.⁵⁷ Though references to patriotism have long been a staple of Beijing's Hong Kong-focused political rhetoric, it has played an especially prominent role in central government statements after the rollout of the National Security Law. Under the March electoral reforms proposal, the patriotism concept will be elevated to a formal legal standard – however vague and amorphous – by which would-be

candidates for elective office will be rigorously evaluated and candidates deemed insufficiently patriotic will be barred from participating in elections.

Beijing claimed that the reform package was needed to guard against exploitation of the existing system by "destabilizing forces and radical localists" who would seek to win elections to "blatantly carry out anti-China and destabilizing activities."⁵⁸ A closer look at the reform package as a whole, however, suggests that a key motivation was in fact the pan-democratic movement's success at the ballot box in the November 2019 District Council elections. The pan-democrats' sweeping victory in the District Council elections upended long-held assumptions about the impregnability of the existing undemocratic electoral framework and led many activists and politicians to start searching for ways to achieve a similar outcome in the LegCo elections.⁵⁹ A resounding victory in the then-pending LegCo elections also would have further strengthened pan-democratic representation on the Election Committee, which selects Hong Kong's Chief Executive, and may have forced the pro-Beijing camp to allow the pan-democrats to play some role in the selection of the next chief executive selection. The March electoral reforms proposal presents several key structural reforms that put a stop to this effort, through the following changes.⁶⁰

The primary vehicle through which Beijing will exercise increased control is the Election Committee (EC). Under existing law, the EC both nominates and selects the chief executive; in the first years after 1997, the EC also selected a small number of LegCo members as well. The structure of the EC is such that its composition was dominated by



January 6, 2021. Benny Tai, associate professor of law at the University of Hong Kong and co-founder of activist group Occupy Central with Love and Peace (OCLP), is arrested by police. | Photo credit: Getty Images : Anthony Kwan / Stringer

⁵⁶ The Decision, formally titled the Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region, is available in English online at: <https://www.chinalawtranslate.com/en/hkelectoralreformdecision/>.

⁵⁷ For more on the use of patriotism rhetoric in Hong Kong, see A Question of Patriotism: Human Rights and Democratization in Hong Kong, Human Rights Watch briefing paper, September 9, 2004.

⁵⁸ "Explanation on the Draft Decision of the National People's Congress On Improving the Electoral System of the Hong Kong Special Administrative Region," March 5, 2021. The Explanation is available online at: http://www.xinhuanet.com/english/2021-03/05/c_139788111.htm.

⁵⁹ Davis, Michael C. and Thomas E. Kellogg. *The Promise of Democratization in Hong Kong: Discontent and Rule of Law Challenges*, No. 17, National Democratic Institute and Georgetown Center for Asian Law, April 2020, p. 23.

⁶⁰ For an excellent analysis of the Decision, see Wei, Changhao and Taige Hu. "2021 NPC Session: NPC's Hong Kong Electoral Overhaul Decision Explained," *NPC Observer*, March 11, 2021.

pro-Beijing voices, which in turn ensured that Beijing's views would be given decisive weight. While there was some limited room for pan-democrats to maneuver within the EC, ultimately in the 23 years since 1997, the EC has largely ratified Beijing's preferences.



November 11, 2020. Former pan-democratic legislators Alvin Yeung Ngok-kiu, Kwok Ka-ki, Kenneth Leung and Dennis Kwok speak to the media after they were disqualified when China passed a new resolution in Hong Kong | Photo credit: REUTERS / TYRONE SIU - stock.adobe.com

The March electoral reform proposal expands the total number of EC members from 1200 to 1500 and adjusts its composition to maintain Beijing's control. Under existing EC rules, for example, district councilors play a role in selecting 117 EC members and elect their own EC representatives. After the 2019 District Council elections, pan-democrats would be able to control the allocation of most, if not all, of the EC seats selected by the District Councils. Unsurprisingly, the March proposal also revokes the 117 EC district councilor seats. Absent the decision's far-reaching changes, pan-democratic representation in the EC might have risen as high as 30 percent or 40 percent for the 2022 chief executive election, given pan-democrats' plans to target certain sector seats. This move now eliminates the possibility of the emergence of even that limited leverage.⁶¹ The March electoral reform proposal also mandates that would-be chief executive candidates must receive at least 15 votes from each of the five sectors that make up the EC.⁶²

Finally, the March electoral reform proposal implements extensive – and deeply regressive – changes to the Legislative Council electoral framework. Under the existing electoral framework, LegCo's 70 members are elected by an equal mix of geographic constituencies (35 seats) and functional constituencies (35 seats). The March 11 decision expands the total number of LegCo seats to 90: 20 geographic and 30 functional constituency seats as well as 40 seats reserved for election committee members.

By reintroducing EC seats, a feature abandoned in 2004, Beijing has signaled intent to not only stall, but actually undo Hong Kong's democratic development. Finally, the reforms also create a complicated, multi-faceted candidate review system that will screen all potential LegCo candidates and all but ensure that any opposition candidates will be unable to run.

These reforms further cement Beijing's control over both the electoral process and outcomes, and hand a seemingly permanent structural advantage to pro-Beijing political parties. As such, these changes are hard to reconcile with the Basic Law's promise of "gradual and orderly progress" toward direct election of both the chief executive and the Legislative Council.⁶³ In that sense, it could be argued that these changes violate the Basic Law itself, and flout Beijing's promise to continue to uphold the one country, two systems framework.

And yet, any constitutional analysis of the decision and its far-reaching implications for the future of democratic development in Hong Kong would merely be an academic exercise as the role of the Hong Kong judiciary in reviewing actions by the National People's Congress has been severely circumscribed.⁶⁴ Further, the highly-charged atmosphere currently pervading Hong Kong politics would make it impossible for any Hong Kong court to even hear a judicial challenge to the constitutionality of the decision's substantive content.

⁶¹ "China Formalizes Sweeping Hong Kong Electoral Shake-up, Demands Loyalty," *Reuters*, March 30, 2021.

⁶² The existing EC has only four sectors; the newly-created fifth sector will be made up of an increased number of Hong Kong representatives to national bodies and groups, including Hong Kong delegates to the National People's Congress and the Chinese People's Political Consultative Congress, who were previously part of the fourth sector. Further, it's likely that the social welfare sub-sector—a pan-democrat stronghold—will be replaced by a yet-to-be-determined "grassroots" sub-sector. Wong, Natalie. "Hong Kong social welfare sector worried overhaul of electoral system will muffle its voice on policy advocacy for needy," *South China Morning Post*, March 11, 2021.

⁶³ Hong Kong Basic Law, Articles 45 and 68.

⁶⁴ Gittings, Danny. *Introduction to the Hong Kong Basic Law*. Hong Kong University Press, 2013, pp. 178-84.

VII. Conclusion

In the early months of 2021, Hong Kong's political system remained mired in crisis. Chief Executive Carrie Lam remains deeply unpopular, the post-November 11 LegCo has yet to produce a meaningful legislative agenda focused on improving the lives of the Hong Kong people, and Beijing has continued its astro-turf legislation strategy unabated.⁶⁵ Despite promises to subject government proposals to rigorous scrutiny, the newly-constituted LegCo has mainly focused its efforts on backing Beijing's crackdown on the pan-democratic camp and unconditionally supporting the Hong Kong government. As the government and the diminished LegCo seek to signal loyalty to Beijing, communication pathways between the government and the public have deteriorated significantly, creating what one prominent public opinion researcher referred to as a "powder keg waiting to go off."⁶⁶ Further, avenues for young people to express their discontent with government, even in less politically sensitive policy areas, have steadily decreased. The growing discontent and fear within Hong Kong is pushing people to reconsider their future in the city. The political vibrancy that once defined Hong Kong, marked by annual marches, political debate within the media and a multi-party system, has now become a basis for criminal prosecution under an increasingly rule by law system.

Through both COVID-19-related restrictions and the passage of the NSL, the central government and the Lam administration put a lid on the boisterous dissent that rocked Hong Kong in 2019. However, the absence of protests does not mean the problems that led to the massive 2019 protests have been solved. Instead, they have been swept aside. The new structural institutions – the CSNS, OSNS, and NSD – and criminal provisions created under the NSL infringe on Hong Kong's autonomy while stifling the judicial independence necessary for a rule of law system. Additionally, the March electoral reforms further entrench the democratic regression caused by the NSL and the disqualification of pro-democracy politicians into the Hong Kong political system. The Beijing and Hong Kong governments have therefore exacerbated exactly the unstable and politically precarious environment they claim the NSL is meant to combat. As NDI argued in its 2020 "Promise of Democratization in Hong Kong" report, further repression will only exacerbate existing tensions and will likely lead to anomic social relations, sporadic protests and multiform acts of resistance.

The events of the past year have fundamentally reshaped Hong Kong's political and legal environment. In response, many pro-democracy actors have fled the city and it is likely many more will continue to leave in the immediate

future. However, Beijing's success in pursuing its agenda in Hong Kong over the last year does not mean that Hong Kong's future is decided. For the last two decades, Hong Kongers have proven to be resilient and dedicated to fighting for the city's fundamental freedoms and democratic development. Despite political crackdowns and electoral reforms that foster an increasingly undemocratic system, Hong Kongers' aspirations for a democratic Hong Kong are alive within and outside of the city. It is paramount that the international community support the Hong Kong people, both abroad and within the city, as they continue to pursue the restoration of the promise of democracy for Hong Kong.

⁶⁵ According to a Public Opinion Program survey by the Hong Kong Public Opinion Research Institute (PORI), Lam's popularity rating stood at 32.8 out of 100 from March 22 to 25, 2021.

⁶⁶ "Hong Kong is a powder keg waiting to explode," *RTHK*, January 3, 2021.

The National Democratic Institute:

The National Democratic Institute (NDI) is a nonprofit, nonpartisan, nongovernmental organization working to strengthen and respond to the aspirations of people around the world to live in democratic societies that recognize and promote basic human rights. Founded in 1983, NDI has worked with local partners in 156 countries and territories, bringing together individuals and groups to share ideas, knowledge, experiences and expertise. NDI works with political parties, civic groups, parliaments, and other organizations and individuals to strengthen democratic institutions, safeguard elections, advance citizen engagement, and promote open and accountable government. NDI's multinational approach reinforces the message that while there is no single democratic model, certain core principles are shared by all democracies.



National Democratic Institute
455 Massachusetts Ave., NW, 8th Floor
Washington, DC 20001-2621
Phone: 202-728-5500
Fax: 888-875-2887

www.ndi.org