

SPECIAL ESSAY

# Beijing's Crackdown on Human Rights and the Rule of Law in Hong Kong

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## EXECUTIVE SUMMARY

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This essay examines how Beijing's escalating crackdown on Hong Kong has systematically imposed authoritarian policies that undermine international human rights and the rule of law, abandoning China's commitments both to the Hong Kong people and to the international community.

### MAIN ARGUMENT

Confidence in the "one country, two systems" model China promised Hong Kong has slowly drained away in the years since the 1997 handover. In 2019, as "one country" seemed set to gobble up "two systems" under the weight of a proposed law to allow the extradition of accused from Hong Kong to the mainland, the people of Hong Kong staged one of the world's largest ever protests to demand the autonomy, rule of law, and basic freedoms they were promised in the city's Basic Law. In the face of government indifference and aggressive police tactics, these protests morphed into a confrontation that carried on for months throughout the second half of 2019. In 2020, Beijing responded with a total crackdown, imposing a national security law that undermined the core liberal institutions that have long sustained Hong Kong. To ensure absolute control, Beijing this year amended the Basic Law to impose new rules under which electoral committees can bar from the political process anyone deemed disloyal to the Chinese Communist Party regime. The new rules create an electoral model that profoundly violates the International Covenant on Civil and Political Rights requirements applicable to Hong Kong.

### POLICY IMPLICATIONS

- International partners and organizations can play a more constructive role by focusing on meeting grassroots concerns. In this regard, recognition and support for autonomous territorial entities, such as Hong Kong, could be conditioned on adherence to relevant international and constitutional commitments to secure democratic representation, human rights, and the rule of law at the local level.
- To encourage central government engagement on critical issues relating to human rights and the rule of law, diplomatic efforts ought to be multilateral, targeted, and involve clear messaging on the importance of the rule of law and international standards of human rights.
- If Chinese and Hong Kong officials remain indifferent to both local and international concerns, immediate policies will need to focus on the exit and immigration concerns Hong Kong residents will face as they seek to escape the repressive conditions being imposed.

In the first week of March 2021, Hong Kong residents watched in horror as 47 candidates and organizers of a July 2020 primary election conducted by the political opposition—the pan-democratic camp—were charged with conspiracy to subversion under the territory’s new Beijing-imposed National Security Law (NSL).<sup>1</sup> The 2020 NSL imposes punishment for subversion, secession, terrorism, and collusion with foreign forces, including, upon conviction, potential imprisonment for three years to life. Like political primaries everywhere, the opposition primary was designed to select the best candidates to run in a planned September 2020 general election for the Legislative Council, which was later postponed at Beijing’s encouragement.<sup>2</sup> With these charges, nearly the entire political opposition in Hong Kong is on trial or in jail. Several senior members of the democracy movement, including Hong Kong’s “father of democracy,” barrister Martin Lee, were already tried and convicted—with sentences raging from 8 to 18 months—for organizing an unauthorized assembly in the form of a peaceful march in August 2019.<sup>3</sup>

Under Article 42, the NSL imposes a presumption for the denial of bail. This presumption against bail is contrary to the presumption of innocence principle that applies in Hong Kong. It effectively shifts to the defendants the burden to convince the court that they will not further violate the NSL, failing which they will likely be held in jail for months pending trial. The NSL’s definition of subversion and other crimes is sufficiently vague that defendants have been hard-pressed to meet this burden. At the same time, the defendants are afforded no effective avenue to challenge this onerous rule.

A massive bail hearing for the 47 politicians riveted public attention in the first week of March. In the February 2021 bail decision for media tycoon Jimmy Lai, for instance, which was the first case prosecuted under the NSL, the Hong Kong Court of Final Appeal already ruled that it has no jurisdiction to constitutionally review the NSL, given its status as a national law imposed

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<sup>1</sup> National People’s Congress of the People’s Republic of China (PRC), “The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region,” June 30, 2020 ∞ [https://www.elegislation.gov.hk/doc/hk/a406/eng\\_translation\\_\(a406\)\\_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

<sup>2</sup> “Explainer: How a Primary Got Hong Kong Activists in Trouble,” Associated Press, March 1, 2021 ∞ <https://apnews.com/article/beijing-primary-elections-democracy-hong-kong-elections-ccda7eb61403f721ba8e56423203f72a>.

<sup>3</sup> Shibani Mahtani and Theodora Yu, “Hong Kong Courts Find Veteran Pro-democracy Activists, Most Over 60, Guilty of Unauthorized Assembly,” *Washington Post*, April 1, 2021 ∞ [https://www.washingtonpost.com/world/asia\\_pacific/hong-kong-court-activists-china/2021/03/31/63ce27d6-921e-11eb-aadc-af78701a30ca\\_story.html](https://www.washingtonpost.com/world/asia_pacific/hong-kong-court-activists-china/2021/03/31/63ce27d6-921e-11eb-aadc-af78701a30ca_story.html). The government’s decision to prosecute these senior democrats, who have long promoted nonviolence and were generally not active in the 2019 protests, appears to be vindictive score-settling for their past activities.

by Beijing.<sup>4</sup> Thus, with no legal avenues to challenge the law and the language describing the offenses not compliant with international human rights standards, the NSL may generally mean whatever the government wants it to mean. In the face of such an impossible burden, the bail hearing for the 47 defendants carried on for most of the week, often late into the night. During the proceedings, 8 defendants were hospitalized for exhaustion.<sup>5</sup> Eventually all except 11 were denied bail.

Beijing's efforts to extinguish political freedoms did not stop with these prosecutions. In the following week, in a meeting of the National People's Congress (NPC), Beijing issued a decision on "electoral reform" aiming to permanently exclude most opposition candidates from the political process.<sup>6</sup> To carry out these NPC directions, on March 30, 2021, the NPC Standing Committee (NPCSC) enacted amendments to Basic Law Annexes I and II that comprehensively block political opposition in Hong Kong.<sup>7</sup> Under these amendments only "patriots" can run for political office. The chief executive will be chosen by the newly expanded Election Committee. Not only have directly elected seats in the Legislative Council been reduced to a mere 20 out of 90 seats, but Beijing-friendly committees, created and expanded under the amendments, will now vet all candidates for their loyalty to the Chinese Communist Party government. On top of vetting, under the new rules the Election Committee will itself choose 40 of the 90 legislators, blocking any hope of effective legislative opposition. The NPCSC has fully carried out its assignment to drain democracy from Hong Kong.

Democracy, human rights, and the rule of law in Hong Kong have all taken a big step backward. No democracy could reasonably label an electoral primary as subversion. The democratic effort to recall a political leader in accordance with a Basic Law provision, as attributed to the opposition, can

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<sup>4</sup> *HKSAR v. Lai Chee Ying, Final Appeal No. 1 of 2021* (Hong Kong Court of Final Appeal, February 9, 2021) ≈ [https://legalfref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=133491](https://legalfref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491). For an analysis of the court's decision and the difficult strategic position it faced, see Simon Young, "Hong Kong's Highest Court Reviews the National Security Law—Carefully," *Lawfare*, March 4, 2021 ≈ <https://www.lawfareblog.com/hong-kongs-highest-court-reviews-national-security-law-carefully>.

<sup>5</sup> "Democracy Is On Trial in Hong Kong—and China Is Fixing the Verdict," *Washington Post*, March 8, 2021 ≈ [https://www.washingtonpost.com/opinions/global-opinions/democracy-is-on-trial-in-hong-kong--and-china-is-fixing-the-verdict/2021/03/08/5bd54302-8030-11eb-81db-b02f0398f49a\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/democracy-is-on-trial-in-hong-kong--and-china-is-fixing-the-verdict/2021/03/08/5bd54302-8030-11eb-81db-b02f0398f49a_story.html).

<sup>6</sup> Keith Bradsher and Chris Buckley, "How China Plans to Control Hong Kong's Elections and Elevate 'Patriots,'" *New York Times*, March 11, 2021 ≈ <https://www.nytimes.com/2021/03/11/world/asia/china-hong-kong-elections.html>.

<sup>7</sup> NPCSC, "Method for Selection of the Chief Executive of the Hong Kong Special Administrative Region," Hong Kong Basic Law, Annex I ≈ <http://www.xinhuanet.com/english/download/2021-3-30/AnnexI.pdf>; and NPCSC, "Method for the Selection of the Legislative Council of the Hong Kong Special Administrative Region," Hong Kong Basic Law, Annex II ≈ <http://www.xinhuanet.com/english/download/2021-3-30/AnnexII.pdf>.

be considered criminal subversion only in a dictatorship. In the face of such repression, the people of Hong Kong can be excused for doubting Beijing's continued commitment to the "one country, two systems" model that was set up to guard the high degree of autonomy, local democratic self-rule, rule of law, and basic freedoms promised for Hong Kong. The international community should also question what has happened to these liberal democratic promises. Drawing on my recent book, an analytical memoir on the city's troubled experience leading up to this point, this essay provides an overview of these tragic developments and examines recent events.<sup>8</sup>

### THE PROMISE OF A LIBERAL DEMOCRATIC CONSTITUTIONAL ORDER

The situation was not always so dismal. Even prior to the 1997 handover of Hong Kong to the People's Republic of China (PRC) from the United Kingdom, the 1984 Sino-British Joint Declaration had promised a high degree of autonomy to the territory, with democratic institutions that respected human rights and the rule of law.<sup>9</sup> These were not just vague commitments but explicitly tied to maintenance of the existing common law system and international human rights covenants. Under the "one country, two systems" model, allowed under the PRC constitution, these promises were stipulated in the Hong Kong Basic Law, promulgated by the NPC as a national law in 1990—which serves as the city's constitution.<sup>10</sup> Expressing these commitments nearly word for word, the Basic Law in Article 39 incorporates the two international human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In fact, the former had been adopted verbatim as the statutory Hong Kong Bill of Rights Ordinance, which by incorporation into the Basic Law effectively took on constitutional stature.<sup>11</sup> Basic Law Articles

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<sup>8</sup> See Michael C. Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (New York: Columbia University Press, 2020).

<sup>9</sup> Constitutional and Mainland Affairs Bureau (Hong Kong), "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong," December 19, 1984 ∞ <https://www.cmab.gov.hk/en/issues/jd2.htm>. Although Chinese officials are fond of saying that the Joint Declaration was fulfilled upon the handover, the text in Article 7 binds both governments to fulfill all of its provisions.

<sup>10</sup> National People's Congress (PRC), "Full Text of the Constitution and the Basic Law" ∞ <https://www.basiclaw.gov.hk/en/basiclawtext/index.html>.

<sup>11</sup> Legislative Council of Hong Kong, "Cap. 383 Hong Kong Bill of Rights Ordinance" ∞ <https://www.elegislation.gov.hk/hk/cap383>.

45 and 68 added the promise of ultimate adoption of “universal suffrage” in selecting Hong Kong’s chief executive and legislative councillors

Demands for compliance with these promises have been the anchor for all protests and political debates in Hong Kong. For the public and Hong Kong’s international supporters, the ordinary meaning of the language in the Basic Law is the yardstick for Beijing’s compliance with its commitments. When people go to the streets, they are not asking for something new but rather China’s continued adherence to the liberal constitutional order in an open society that is promised in the Basic Law and Joint Declaration. While PRC leaders often seek to justify their increasingly repressive policies by referring to the disorderly demonstrations in Hong Kong, they overlook their own growing interference in the city’s affairs as the source of such protests.

To contain such interference by the mainland, the text of the Basic Law leaves little to chance. To secure the high degree of autonomy promised to the territory, Basic Law Article 22 includes the following provision: “No department of the Central People’s Government and no province, autonomous region or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.” It further states in Article 18: “National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.” Of relevance to the contentious national security issue, Article 23 states: “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets.” These provisions left no room for the wholesale intervention in Hong Kong affairs that has occurred in the last couple of years.

Beijing often cites the failure of the Hong Kong government to enact Article 23 legislation as the justification for its intervention in passing the NSL. But opposition to the government’s 2003 attempt to do so owed to the failure of that proposal to comply with Basic Law human rights requirements. Proper legislation that was fully compliant with international human rights requirements would have been unlikely to encounter such opposition. The government’s decision not to enact properly compliant legislation was no doubt guided by Beijing (or at least by local efforts to please Beijing).

PRC officials have also often condemned foreign efforts to call out the central government’s failure of compliance by labeling such foreign criticism as improper interference in China’s internal affairs. This overlooks Beijing’s

own invitation for countries around the world to rely on the assurances the PRC made in the Joint Declaration and the Basic Law. Both the treaty and the Basic Law were promoted in Hong Kong and capitals around the world by Chinese officials, who sought special recognition of Hong Kong as a distinct territorial entity under PRC sovereignty. Their invitation to engage Hong Kong distinctly from the mainland was taken up by both foreign governments and international businesses.

Beijing's somewhat restrained initial approach to Hong Kong was widely rewarded with international appreciation. In the first years after the handover, Hong Kong often secured the top spot in the Heritage Foundation's Index of Economic Freedom and saw its rule of law ranked among the top in the world.<sup>12</sup> Hong Kong had become truly a global city.

The Basic Law, however, had two fundamental flaws that would prove the source of nearly every crisis Hong Kong has faced. The first of these flaws went to the heart of Hong Kong's most important core value: the rule of law. With Basic Law Article 158 designating the NPCSC as the final interpreter of the law, the PRC put all these guarantees at risk. The "one country, two systems" model of autonomy was premised on the need to secure Hong Kong's rule-of-law-based system from the more repressive mainland system. But Beijing's unconstrained right to interpret the Basic Law without any binding and independent legal oversight became the vehicle for the intrusion of the mainland system when expedient. This flaw might have been overcome if PRC officials had exercised restraint in using such power.

Although Beijing exercised some restraint in the first couple years, it did not take long after the handover for its interpretative power to be deployed. While Basic Law Article 158 specified that request for NPCSC interpretations should come from the Hong Kong Court of Final Appeal and should relate only to matters of central authority or local-central relations, Beijing soon circumvented that seeming obstacle in the so-called right of abode case in 1999. In reviewing an immigration statute, the Hong Kong government, unhappy with the Court of Final Appeal interpretation of the Basic Law requirements, bypassed the court's ruling to get its preferred interpretation from the NPCSC.<sup>13</sup> From that point forward, the Hong Kong courts would be bound by NPCSC interpretations and face a risk of being overruled.

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<sup>12</sup> Natalie Lung, "Hong Kong Dumped from Economic Freedom List It Had Dominated," Bloomberg, March 3, 2021 ~ <https://www.bloomberg.com/news/articles/2021-03-04/hong-kong-dumped-from-economic-freedom-index-it-used-to-dominate>; and World Justice Project, Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index>.

<sup>13</sup> *Ng Ka Ling v. Director of Immigration*, Final Appeal No. 15 of 1998 (Hong Kong Court of Final Appeal, January 29, 1999) ~ <https://www.hklii.hk/en/cases/hkcf/1999/72>.

The threat of Beijing's intrusion would hang over nearly all politically sensitive cases up to the present, even though this power need rarely be exercised. Such interventions by Beijing, or official comments suggesting possible interventions, likewise became a constant source of popular protests.

The second flaw concerned the second element critical to defending Hong Kong's autonomy: democracy. Protesters' demands for democracy have generally been guided by the realization that judges alone, under the above noted restraints, could not sufficiently guard the territory's autonomy and the associated rule of law. With an unelected government that is often complicit in central government interventions, establishing a democratically elected government more responsive to popular concerns appeared to be the answer. However, reserving for itself the final say over democratic reform, Beijing used the specification of "gradual and orderly progress" in Articles 45 and 68, relating to the chief executive and the Legislative Council, respectively, to continually drag its feet on the promised democratic reform.

Instead, starting well before the handover, Beijing tasked its closest supporters with managing its affairs in Hong Kong and eventually the territory itself. Though holding Hong Kong government offices, these "patriots" appeared to represent Beijing's interests more than those of Hong Kong's people. Under Annex 1 of the Basic Law, before the recent amendments a 1,200-member election committee largely made up of Beijing supporters would select the chief executive. At the same time, functional sectors mostly friendly to Beijing would elect half of the current 70 seats in the Legislative Council. In the years that followed the handover, although the so-called pan-democratic camp consistently won nearly 60% of the popular vote in direct-election constituencies, it always remained a minority opposition in the Legislative Council, with no role in the government itself. Under these limitations, the people of Hong Kong well understood that the promised "universal suffrage" would be critical to Hong Kong's capacity to fully defend its autonomy and rule of law. This would enable the territory to maintain the existing open society in the interest of both mainland China and Hong Kong.

#### POPULAR PROTESTS AND HONG KONG'S AUTONOMY

Nearly every protest in Hong Kong up to the present has included demands for the promised democratic reforms, along with whatever liberty or human rights concern may be under threat. As mentioned above, in 2003, at Beijing's prompting, the Hong Kong government put forth proposals under Article 23 relating to treason, secession, sedition, subversion, and state secrets.



When the proposed law did not include adequate safeguards to protect human rights in conformity with the applicable International Covenant on Civil and Political Rights, the first huge protests after the handover occurred, attracting a half million people. Although the government eventually backed down in the face of the protests and the loss of support from the pro-Beijing Liberal Party in the Legislative Council, popular suspicion that the government was not up to guarding Hong Kong's autonomy set in. The protest over Article 23 was followed immediately in 2004 with massive protests demanding democratic reform to implement the promised universal suffrage. The connection between democracy and autonomous protection of core values such as the rule of law and human rights was clearly drawn.

Other protests to come would follow a similar pattern. China has used this pattern of protests as justification for the current crackdown. In doing so, PRC officials show little understanding of the ways that their own policies had nurtured the opposition forces. Such officials, lacking experience in an open society, were poorly served in this regard by their chosen supporters in Hong Kong. These local officials appointed by Beijing have often been more committed to supporting mainland policies than conveying local concerns, despite the latter being the more important task for them under an autonomy arrangement.

In 2012, again at Beijing's encouragement, the government put forth proposals for national education.<sup>14</sup> Chinese officials had long expressed concern that Hong Kong youth did not properly understand PRC history and were not sufficiently patriotic. This was, they reasoned, the basis for the protests in 2003 and 2004 and a somewhat smaller protest over a high-speed rail line in 2009. These national education proposals proved to be the impetus for mass youth protests against perceived brainwashing in 2012. Again, the government eventually backed down, but this protest had already given rise to a new generation of youthful protesters, some as young as fourteen. As in 2003, the 2012 protests would lead to further protests over democracy in the 2014 Umbrella Movement.

Although the 2014 protest was originally conceived by two professors and one minister (Professors Benny Tai and Kin-man Chan and the Reverend Yiu-ming Chu) as a movement to occupy Hong Kong's Central financial district—named Occupy Central in Love and Peace—it was quickly taken over by the youth movement that had its roots in the 2012 protests. The proposed

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<sup>14</sup> Keith Bradsher, "Hong Kong Retreats on 'National Education' Plan," *New York Times*, September 8, 2012. ∞ <https://www.nytimes.com/2012/09/09/world/asia/amid-protest-hong-kong-backs-down-on-moral-education-plan.html>.

Occupy Central movement was to be a nonviolent civil disobedience campaign that would coincide with the Beijing government's promise that Hong Kong could finally initiate steps to establish universal suffrage for the 2017 chief executive election. Pan-democrats and the opposition more broadly were fearful that the government would use the requirement of official nomination by a nominating committee in Basic Law Article 45 to vet candidates and bar anyone in the opposition from being presented to the voters. Accordingly, the planned nonviolent civil disobedience campaign was mostly focused on having a nomination process that would give voters genuine choice—in conformity with international human rights requirements.

After initial marches on campuses, the core protest was launched in the Admiralty District near the Legislative Council and government offices. In September 2014, when students fought off tear gas with umbrellas, the movement was branded the Umbrella Movement. Though the movement occupied the main highway into the Central District for 79 days, it failed to gain any concessions from the government. The most prominent student leaders, Joshua Wong, Nathan Law, Alex Chow, and Agnes Chow, among others, would later become household names around the world. At one point several student leaders even debated with Carrie Lam, then chief secretary, prominently on television. Lam, who in 2017 would be appointed chief executive, was chairing the government consultation over democratic reform. The government met all such protests and consultative proposals with indifference. With Beijing's blessing, it put forth an undemocratic "reform" proposal for a vetted election that was promptly voted down by the pan-democratic members of the Legislative Council.<sup>15</sup> With over a third of the seats in the chamber, these democratic legislators had just enough votes to block the proposed electoral changes, which under the Basic Law required two-thirds approval.

In the years to follow, the government, content with the existing undemocratic system, prosecuted the three Occupy Central leaders and their core supporters, as well as the youthful Umbrella Movement leaders, for their civil disobedience. For the Occupy leaders, rather than a simple charge of unauthorized assembly, the prosecution charged them with common law nuisance, netting sentences up to sixteen months. When the student leaders

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<sup>15</sup> Richard C. Bush, "Hong Kong Government Announces Electoral Reform Details," Brookings Institution, April 23, 2015 ~ <https://www.brookings.edu/blog/up-front/2015/04/23/hong-kong-government-announces-electoral-reform-details>; and Donny Kwok and Yimou Lee, "Hong Kong Vetoes China-backed Electoral Reform Proposal," Reuters, June 17, 2015 ~ <https://www.reuters.com/article/us-hongkong-politics/hong-kong-vetoes-china-backed-electoral-reform-proposal-idUSKBN0OY06320150618>.

were treated with leniency, as common law judges are prone to do in protest cases related to free speech, and were sentenced only to community service, the government appealed to secure jail time for them. These students got off only when the Court of Final Appeal held that the stiffer sentencing guidelines developed in the appeals court could not be retroactively applied. The government's disregard for popular concerns in this case set the stage for the massive 2019 protests to follow, while hard-line tactics in arresting and prosecuting protesters hardened hearts against the government.

### THE 2019 PROTESTS: THE CRACKDOWN BEGINS

When the government proposed a new extradition law in 2019 that would allow anyone in Hong Kong, local or foreign, facing any of a long list of possible mainland charges to be turned over to mainland officials for prosecution, the pent-up angst against the government took flight.<sup>16</sup> The people of Hong Kong could not accept that being subject to the mainland's criminal justice system, notorious for human rights abuse, was consistent with local commitments to the rule of law and human rights. An extradition arrangement had long been discussed between Hong Kong and mainland officials, but obstacles regarding human rights and due process had not been overcome. The proposed bill gave Hong Kong courts little power to withhold extradition based on such concerns. Observers had expected that new chief executive Carrie Lam would try again to put forward Article 23 legislation related to national security, but they were surprised by her choice instead to do an end run around the extradition obstacles. The speculation was that she imagined that this would be an easier way to test the waters.

Hong Kong residents would have none of it, and the largest protests to date soon filled the streets. As with the previous demonstrations, demands for democratic reform were soon added to the agenda, along with calls to moderate police behavior. As the protests grew, accompanied by a forceful police crackdown, it appeared to many in Hong Kong that the government was pursuing a policy of official violence to assert control. This included targeted arrests and prosecution of both protesters and

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<sup>16</sup> Mike Ives, "What Is Hong Kong's Extradition Bill?" *New York Times*, June 10, 2019 ~ <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>. Nine crimes were initially removed from the list at the request of local business chambers, who worried about the mainland's propensity to turn commercial disputes into crimes. But laws that were included, such as bribery and corruption, easily fill the gap. While political crimes were excluded, various crimes related to national security could function as substitutes to reach the same opposition activities.

traditional pro-democracy leaders. Before the protests had run their course, over 10,000 arrests were made.<sup>17</sup> The aggressive policies, along with official indifference and willingness to do the mainland government's bidding at all costs, raised grave public concern about Hong Kong's future. How could autonomy and the associated rule of law and basic freedoms be secured by a local government totally beholden to the Chinese government?

The protesters soon settled on five demands, as reflected in the popular slogan "five demands, not one less."<sup>18</sup> These included full withdrawal of the extradition bill, a commission of inquiry into allegations of police brutality, amnesty for arrested protesters, retraction of the classification of the protests as riots, and dual universal suffrage (meaning the ability to vote for both the Legislative Council and the chief executive). The demand for an independent investigation of police behavior enjoyed wide support in popular polls, measuring as high as 80%.<sup>19</sup> The first of the five demands was eventually met when the government withdrew the extradition bill on September 4, 2019. The rest were ignored by government officials.

After months of protests, the people of Hong Kong conveyed their views clearly in the November district council elections, where pro-democracy advocates took control of 17 of the 18 district councils, winning 389 out of 452 available seats.<sup>20</sup> While these district councils have little power, they are the only level of the Hong Kong government where nearly all the seats are directly elected. In 2019 the district council elections served as a referendum on the government's handling of the crisis. It seemed that the pan-democratic victory set off alarm bells in Beijing, which would decide in 2021 to cut back severely on democratic participation. The old adage that Beijing does not mind elections as long as it knows the outcome in advance has proved to be true.

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<sup>17</sup> Stephen Vines, "After Over 10,000 Arrests What Is Hong Kong Going to Do with All Its Dissidents?" *Hong Kong Free Press*, September 13, 2020 ~ <https://hongkongfp.com/2020/09/13/after-over-10000-arrests-what-is-hong-kong-going-to-do-with-all-its-dissidents>.

<sup>18</sup> Jeffie Lam, "Five Key Demands, Not One Less': Hong Kong Protesters Make Clear That Chief Executive Carrie Lam's Bill Withdrawal Is Not Enough," *South China Morning Post*, September 4, 2019 ~ <https://www.scmp.com/news/hong-kong/politics/article/3025750/five-key-demands-not-one-less-hong-kong-protesters-make>.

<sup>19</sup> Though Hong Kong has a so-called Independent Police Complaints Council, the council lacks independence and enjoys very little public support. See Maya Wang, "Still No Accountability for Hong Kong's Police Force," Human Rights Watch, November 19, 2020 ~ <https://www.hrw.org/news/2020/11/19/still-no-accountability-hong-kongs-police-force>; and "Hong Kong: Impotent and Biased IPCC Report into Protests Fails to Bring Justice Any Closer," Amnesty International, May 15, 2020 ~ <https://www.amnesty.org/en/latest/news/2020/05/hong-kong-impotent-and-biased-ipcc-report-into-protests-fails-to-bring-justice-any-closer>.

<sup>20</sup> Keith Bradsher, Austin Ramzy, and Tiffany May, "Hong Kong Election Results Give Democracy Backers Big Win," *New York Times*, November 24, 2019 ~ <https://www.nytimes.com/2019/11/24/world/asia/hong-kong-election-results.html>.

Early peaceful marches against the bill attracted first one million and then two million protesters, on June 9 and 16, 2019, respectively. Because the government largely ignored the nonviolent protesters' demands, during an occupation of the Legislative Council on July 1, demonstrators posted signs stating that "it was you who taught us that peaceful protests are futile."<sup>21</sup> Nightly media reports of police abuse began to drive increasing public support for the protests, even when some demonstrations turned violent on the margins. Abusive police tactics included excessive use of tear gas (reportedly over 16,000 canisters), rubber bullets, and water cannons, as well as a massive level of arrests (eventually to exceed 10,000) and prosecutions (over 2,400).<sup>22</sup> Media videos often showed police indiscriminately targeting fleeing protesters, even front-line medical workers as they passed nearby. Apprehended protesters were often shown receiving abusive treatment such as having their heads rammed into the pavement. Water cannons sometimes contained blue dye so protesters could be traced even into the hospitals where they sought medical help. In the famous case of Yuen Long, media coverage appeared to show police ignoring attacks on protesters and pedestrians by triad gang members. The causes for an independent investigation were many.

The no-objection permits that police are expected to issue under the Public Order Ordinance for planned protests became a rarity. As public anger increased, the protesters pursued a "leaderless campaign" with strategies using social media to direct protests across the city under the slogan "Be like water."<sup>23</sup> A running street battle ensued. While the protests remained largely nonviolent, as the level of police violence increased, hotheads among the protesters responded in kind by hurling bricks and Molotov cocktails at the police. Later in the year, large-scale occupations and protests at two university campuses, the Chinese University of Hong Kong and the Polytechnic University, as reflected in media reports shown around the world, looked like war zones. In my interviews, the volunteer lawyers handling the many arrests claimed that a majority of their clients showed signs of physical injury by the time they met with a lawyer.<sup>24</sup>

<sup>21</sup> Jacob Stokes, Jennifer Staats, and Rachel Vandenbrink, "Hong Kong's Turn to Violence Divides the Movement," United States Institute of Peace, July 3, 2019 ~ <https://www.usip.org/publications/2019/07/hong-kongs-turn-violence-divides-movement>.

<sup>22</sup> For a more in-depth summary of the 2019 protests and related police abuse discussed here, see Davis, *Making Hong Kong China*, chap. 5. See also Victoria Hui, "Crackdown: Hong Kong Faces Tiananmen 2.0," *Journal of Democracy* 31, no. 4 (2019): 122–37.

<sup>23</sup> Antony Dapiran, "Be Water!": Seven Tactics That Are Winning Hong Kong's Democracy Revolution," *New Statesman*, August 1, 2019 ~ <https://www.newstatesman.com/world/2019/08/be-water-seven-tactics-are-winning-hong-kongs-democracy-revolution>.

<sup>24</sup> Davis, *Making Hong Kong China*, chap. 5.

Other than eventually withdrawing the original extradition bill, the local and mainland governments seemed to show total indifference to public demands and the numerous complaints. Even though the five demands all fell squarely under Basic Law requirements respecting criminal justice, free expression, and democratic reform, the government appeared to wash its hands of the entire crisis by turning the matter over to the police. Lacking any authority to negotiate the demands, the police were left only to rely on increasingly aggressive enforcement. A widespread belief emerged that Beijing was calling the shots and was in no mood for compromise. While there were global concerns that Beijing would send in troops, doing so seemingly became unnecessary given that the Hong Kong police increasingly looked like Beijing's strike force. As I discovered, in interviews in December 2019, the protesters and their supporters continued to believe that Beijing would eventually give in to their demands.<sup>25</sup> Contrary to the wider view in the outside world, they appeared to believe that Beijing could not afford to destroy Hong Kong because party leaders had too much invested in the "one country, two systems" policy.

Ultimately, it was not the police that brought the protests to an end, nor the government, but rather the emerging pandemic in early 2020. Social distancing as a result of the Covid-19 crisis diminished people's willingness to take to the streets, leaving the public with a simmering anger at the Hong Kong government. Beijing was to have the final word. It enacted the NSL for Hong Kong, put in place intrusive institutions to orchestrate massive prosecutions, and eventually took direct control over the territory through its own version of "electoral reform."<sup>26</sup>

#### THE NATIONAL SECURITY LAW AND THE END OF HONG KONG'S LIBERAL CONSTITUTIONAL ORDER

If the crackdown on protesters in 2019 was a sign of things to come, what came after did not take long to arrive. Through the enactment of the NSL in mid-2020, China moved to take direct control of Hong Kong. The new NSL essentially transformed Hong Kong from a liberal constitutional territory into a remnant part of a security state under Beijing's direct control, with the PRC increasingly seen as directing local government policy. Special branches of the police and the Department of Justice have been set up, and the

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<sup>25</sup> Davis, *Making Hong Kong China*, chap. 5.

<sup>26</sup> For an in-depth discussion of the NSL as discussed in the following section, see *ibid.*, chap. 6.

courts are under severe pressure to align their decisions with the government's national security designs.

The NSL was imposed on Hong Kong without any public consultation on June 30, 2020, at eleven o'clock at night. Even the chief executive reportedly did not see the draft until the day it was promulgated. Beijing took liberties with the Basic Law requirement that national laws do not apply in Hong Kong unless listed in Annex III. It enacted a national security law specific to Hong Kong in lieu of the Article 23 requirement that the territory enact such legislation on its own. It is questionable whether the provision for listing select national laws in Annex III of the Basic Law contemplated a local law enacted by the central government only for application to Hong Kong. The enactment of a national law as the local national security law undermines Hong Kong's promised constitutional order, effectively overriding the Basic Law where any conflict exists.<sup>27</sup> As such, it amounts to an amendment to the Basic Law without going through the established procedure. In the Jimmy Lai bail case, the Court of Final Appeal in fact held that, unlike for other local laws, it had no power to review the NSL for conformity to the Basic Law.<sup>28</sup>

Ignoring legal requirements that mainland departments not interfere in Hong Kong affairs, the NSL creates major new bodies in Hong Kong that are directly subject to central control. Part 2 of the NSL requires the Hong Kong Special Administrative Region to establish a Committee for Safeguarding National Security headed by the chief executive and made up of several cabinet-level and law-enforcement officials. This committee is directly accountable to the central government and is assigned a mainland national security adviser, who by any estimate will be a dominant figure in the committee conveying central government preferences. The current adviser quickly appointed by the central government is the local head of the PRC's Hong Kong Liaison Office, Luo Huining. Under Article 14, the committee is in charge of assessing developments and coordinating major works and operations for safeguarding national security locally. Its deliberations are secret and its work is expressly not subject to judicial review.

Subsequent articles also create special branches in both the local police force and Department of Justice, whose heads are appointed on advice from a separate mainland Office for Safeguarding National Security. These entities'

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<sup>27</sup> Under Article 83 of the PRC's Legislation Law, a national law later in time and more specific, where conflict exists, overrides a more general earlier national law. National People's Congress of the PRC, "Legislation Law of the People's Republic of China (Order of the President No. 31)," March 15, 2000 [~ http://english1.english.gov.cn/laws/2005-08/20/content\\_29724.htm](http://english1.english.gov.cn/laws/2005-08/20/content_29724.htm).

<sup>28</sup> *HKSAR v. Lai Chee Ying*, Final Appeal No. 1 of 2021.

operations are subject to secrecy. One of the first acts of the Committee for Safeguarding National Security was to issue regulations for police operations under NSL Article 43 that include the possibility of conducting warrantless searches and secret surveillance.<sup>29</sup> It appears that the new Hong Kong secret police will freely track people to ferret out potential violations. Since, as discussed below, the police unit is also assigned to investigate all political candidates, the scope of its secret investigation activities will be very broad. Given that under the NSL most violations to date have been related to speech, it is likely that police operations will target both public and private communications.

Beijing's intrusion into local law enforcement and administration goes further. Article 48 of the NSL establishes an Office for Safeguarding National Security that is staffed entirely by mainland public and state security officers. This office has the full range of law-enforcement powers related to national security, including duties to oversee national security operations. Under Article 55, it can even recommend the transfer of a defendant to mainland courts for trial in serious or complex cases. The office is to oversee and provide guidance to local enforcement, and yet it is not subject to local jurisdiction, again opening the door to potentially lawless official behavior.

As noted above, the NSL addresses four vaguely defined crimes: secession, subversion, terrorism, and collusion with a foreign country or external element. These crimes apply worldwide to both local and foreign residents of Hong Kong, and they mostly target speech behavior, with little indication of any respect for international human rights that protect freedom of expression and generally require the threat of imminent harm to legitimate a national security prosecution.<sup>30</sup> Government prosecutions so far suggest a broad scope to these offenses. In the case of Jimmy Lai, the prosecution accused the prominent publisher of the pro-democracy newspaper *Apple Daily* of collusion with foreign forces, which appears to mostly relate to Lai's statements against the NSL in media interviews and printed ads. Others have been arrested and prosecuted for merely repeating often innocuous slogans that were used during the 2019 protests—in some cases even just for carrying a poster with such slogans in a knapsack.

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<sup>29</sup> "Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region Gazetted," Government of the Hong Kong Special Administrative Region, Press Release, July 6, 2020 ≈ <https://www.info.gov.hk/gia/general/202007/06/P2020070600784.htm>.

<sup>30</sup> These are expressed in such international declarations as the Johannesburg Principles. *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (London: Article 19, 1996) ≈ <https://www.article19.org/data/files/medialibrary/1803/joburg-principles.pdf>.



Most notorious has been the prosecution of the 47 opposition politicians for participating in a primary election they organized to narrow down their candidate field. The election organizers had in mind blocking the current government's budget if they secured enough seats in the Legislative Council. Under the Basic Law, if the budget fails twice to win enough votes, then the chief executive must resign. Efforts to win an election or recall a political leader in accordance with specific constitutional or basic law provisions are hardly a surprising goal for opposition politicians.

Showing a distinct distrust of Hong Kong's historically independent judges, the NSL allows only judges on a list designated by the chief executive to hear the statute's cases. Further, under Article 44, a designated judge shall be removed from the list "if he or she makes any statement or behaves in any manner endangering national security."<sup>31</sup> Since Hong Kong judges do not participate in politics, presumably such prohibited statements would relate to their rulings in court.

The procedural landscape is also formidable under the NSL. Under Article 46, in cases designated for trial in the Court of First Instance, where jury trials are allowed, the Hong Kong secretary for justice can issue a certificate directing that the case be tried without a jury, replaced by a three-judge panel. Article 43 and its above noted underlying regulations provide for wide-ranging searches, surrender of travel documents, seizure and confiscation of property, interception of communications, and requirements for organizations to turn over private information. When cases finally come to trial, other hurdles not yet tested in court will relate to the secret methods used in their investigation. With such extensive investigating authority, it seems unlikely there will be significant opportunity to exclude evidence due to improper process.

Perhaps most onerous among the procedural constraints is Article 42, which creates a presumption against bail. As described in this essay's introduction, this is contrary to the usual common law rule in favor of bail as part of the presumption of innocence—it is offensive to this presumed innocence for a defendant to be held for months without trial. The Court of Final Appeal in the Jimmy Lai prosecution ruled that this presumption against bail applies as an exception to the normal rule. This effectively shifts the burden to the defendant to prove he or she will not continue to commit acts endangering national security, and given

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<sup>31</sup> "In Full: Official English Translation of the Hong Kong National Security Law," *Hong Kong Free Press*, July 1, 2020 ≈ <https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law>.

the vagueness of the NSL crimes, this creates a nearly impossible burden. The vast majority of defendants so far have been denied bail, including 36 of the 47 primary election candidates. These defendants may linger in jail for months without a conviction while awaiting trial. In this case, they were denied bail in the first week of March, and the next scheduled hearing is currently set for the end of May. At the end of all these procedural obstacles is the risk of severe punishment. The NSL provides for punishment ranging from three years to life in prison, depending on the crime in question and the degree of seriousness determined at trial.

Alongside such legal hurdles has been the ever-present official and media pressure on courts to offer rulings favorable to the government. Judges who have dismissed prosecutions in related public order cases or granted bail to defendants over government opposition may find themselves under attack in reported statements from mainland officials or their supporters. These criticisms often appear in mainland or pro-Beijing media outlets. In the Jimmy Lai case, the mainland *People's Daily* condemned the granting of bail and offered a somewhat veiled threat that the NPCSC might intervene or the case might be transferred to the mainland if the Hong Kong Court of Final Appeal did not deny bail.<sup>32</sup> These pressures have raised concern in other common law jurisdictions that send judges to sit on the court—leading to threats of withdrawal of such arrangements.<sup>33</sup>

The reach of the NSL goes well beyond criminal prosecutions, as the Hong Kong government and these various committees and related officials are, under NSL Article 9, responsible “to take necessary measures to strengthen public communication, guidance, supervision and regulation...relating to schools, universities, social organizations, the media, and the internet.”<sup>34</sup> Under Article 10, they are to “promote national security education in schools and universities and through social organizations, the media, the internet and other means.”<sup>35</sup> The government has already issued stiff regulations on schools, and various official statements have warned universities and the

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<sup>32</sup> In the article, the leading state-run newspaper, after condemning Lai as a dangerous criminal, highlighted the mainland authorities' power to transfer such a complex case to the mainland for trial, surely signaling an intention to do so if the bail was not revoked on appeal. See Su Di, “Observer: Approving Jimmy Lai's Bail Harmful to Hong Kong's Rule of Law,” *People's Daily*, December 28, 2020. ~ <https://peoplesdaily.pdnews.cn/opinions/observer-approving-jimmy-lai-s-bail-harmful-to-hong-kong-s-rule-of-law-190555.html>.

<sup>33</sup> Cliff Buddle, “Loss of Overseas Judges Would Have Devastating Impact on Hong Kong,” *South China Morning Post*, March 21, 2021, <https://www.scmp.com/comment/opinion/article/3126301/loss-overseas-judges-would-have-devastating-impact>.

<sup>34</sup> “In Full: Official English Translation of the Hong Kong National Security Law,” Article 9.

<sup>35</sup> *Ibid.*, Article 10.

media about possible violations.<sup>36</sup> Beijing-controlled media have already attacked professors who speak out as “reactionary academics,” and even Beijing supporters could find themselves branded as “loyal rubbish.”<sup>37</sup> NGOs have also come under attack, including both local ones such as the Civil Human Rights Front and prominent overseas ones such as Human Rights Watch and Amnesty International.<sup>38</sup> Added to the anxiety over censorship, art exhibits and critical documentaries have also come under attack.<sup>39</sup> The Office for Safeguarding National Security has similar oversight under Article 54 over foreign NGOs and news agencies. With such vague laws, these forms of oversight reach across society and leave considerable uncertainty as to what is prohibited and what is not. They clearly aim to have a chilling effect on all voices in opposition to the government. All these policies and prosecutions have met with international condemnation.<sup>40</sup>

#### THE NPCSC AMENDS THE BASIC LAW TO DEGRADE THE ELECTORAL PROCESS

Unfortunately, Beijing did not stop its assault on Hong Kong’s freedoms and autonomy with the prosecutions, intimidations, and oversight tactics contained in the NSL. Nearly a year later in March 2021, the NPC issued

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<sup>36</sup> Education Bureau of Hong Kong, “Education Bureau Circular No. 2/2021: National Security Education in School Curriculum—Implementation Mode and Learning and Teaching Resources,” February 4, 2021 ∞ <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21002E.pdf>; and Education Bureau of Hong Kong, “Education Bureau Circular No. 3/2021: National Security: Maintaining a Safe Learning Environment Nurturing Good Citizens,” February 4, 2021 ∞ <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21003E.pdf>. The University Grants Council has already sent letters to public universities warning of the need for courses on national security at the risk of funding losses. Mimi Leung and Yojana Sharma, “Universities Pressed to Implement ‘Security Law’ Education,” *University World News*, March 24, 2021 ∞ <https://www.universityworldnews.com/post.php?story=20210324074153521>.

<sup>37</sup> Au Ka-lun, “A New Cultural Revolution Is on Its Way,” *Apple Daily*, March 26, 2021 ∞ <https://hk.appledaily.com/opinion/20210326/GDMGSIJ2AVBOLLW7QC5BUJUBUY4>.

<sup>38</sup> Selina Cheng, “Premier Hong Kong Protest Coalition Comes Under Fire from Pro-Beijing and State Media, Leader Vows to Continue,” *South China Morning Post*, March 19, 2021 ∞ <https://hongkongfp.com/2021/03/19/premier-hong-kong-protest-coalition-comes-under-fire-from-pro-beijing-and-state-media-leader-vows-to-continue>.

<sup>39</sup> H.G. Masters, “Hong Kong Arts Sector Faces New Political Scrutiny,” *ArtAsiaPacific*, March 18, 2021 ∞ <http://www.artasiapacific.com/News/HongKongArtsSectorFacesNewPoliticalScrutiny>; “Hong Kong’s Lam Vows ‘Full Alert’ for Art Endangering National Security, as Artist Warns of ‘Devastating Crackdown,’” *Hong Kong Free Press*, March 17, 2021, <https://hongkongfp.com/2021/03/17/hong-kongs-lam-vows-full-alert-against-artworks-endangering-national-security-as-artist-warns-of-devastating-crackdown>; and Candice Chau, “Hong Kong Campus Protest Documentary Screening Cancelled Hours before Showing Following Attack by Pro-Beijing Paper,” *Hong Kong Free Press*, March 15, 2021 ∞ <https://hongkongfp.com/2021/03/15/hong-kong-campus-protest-documentary-screening-cancelled-hours-before-showing-following-attack-by-pro-beijing-paper>.

<sup>40</sup> “2021 Hong Kong Policy Act Report,” U.S. Department of State, Bureau of East Asian and Pacific Affairs, March 31 2021 ∞ <https://www.state.gov/2021-hong-kong-policy-act-report>.

a decision directing the NPCSC to draft and promulgate amendments to Annexes I and II of the Basic Law.<sup>41</sup> Under the amendments issued by the NPCSC on March 30, the existing 1,200-member Election Committee that currently chooses the chief executive was increased to 1,500 members. This committee, even more heavily dominated by pro-Beijing forces than before, will have responsibility to vet and nominate all candidates both for chief executive and the Legislative Council, as well as choose nearly half of the legislative councillors.<sup>42</sup> The committee previously only chose the chief executive.

The provisions for vetting candidates for loyalty are pervasive. Beyond the vetting done by the Election Committee, the amendments also establish the small (under ten members) Candidate Eligibility Review Committee to separately vet all political candidates for office in the territory. This review committee will be advised by the Committee for Safeguarding National Security set up under the NSL, which in turn will be supported by investigations on every candidate conducted by the national security police unit. The investigations will be conducted in secret and the candidates will reportedly not be told why they are denied candidacy—rendering the choice to run for office a risky proposition with major privacy concerns. The new provisions also provide that there will be no appeal of any disqualification.

While the NSL largely uses intimidation to silence opposition, the new electoral requirements will effectively block opposition politicians from office. A variety of other detailed limitations make it highly unlikely that opposition candidates will participate in elections. Most, by virtue of the NSL prosecutions, will have little likelihood of qualifying. Any who have somehow escaped prosecution would judge their support in these heavily stacked bodies so insignificant that they would reasonably conclude that it is not worth the loss of privacy and possible risk of prosecution to run.

The chances of an opposition candidate clearing all these hurdles and then actually getting elected in most of the designated constituencies would appear to be nil. The Election Committee historically has been stacked so favorably to the pro-Beijing camp that opposition candidates running for chief executive could muster at most about 20% of the

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<sup>41</sup> Keith Bradsher and Austin Ramzy, “Demanding Loyalty, China Moves to Overhaul Hong Kong Elections,” *New York Times*, March 4, 2021 ≈ <https://www.nytimes.com/2021/03/04/world/asia/china-hong-kong-election-law.html>; and Changhao Wei and Taige Hu, “NP2021 NPC Session: NPC’s Hong Kong Electoral Overhaul Decision Explained,” NPC Observer, March 11, 2021 ≈ <https://npcobserver.com/2021/03/11/2021-npc-session-npcs-hong-kong-electoral-overhaul-decision-explained/#more-15567>.

<sup>42</sup> Amended Basic Law, Annexes I and II.

committee's votes. The projected changes will reduce further the number of committee members that might favor the opposition either for chief executive or for nomination or election to legislative seats.

The mainland system of top-down selection of local representatives has now largely been exported to Hong Kong. Presumably as a consequence of the opposition winning the last district council elections, elected district councillors, who previously held a large block of 117 seats in the Election Committee, have been removed from the committee entirely. They have been replaced by members of various pro-government district organizations, whose membership in some cases has been filled by government appointment. Three hundred new members from top-down Beijing-appointed bodies who supposedly represent Hong Kong in the central government will be added to the committee. Filling the Election Committee with government appointees creates a major conflict of interest, with current officials in many cases choosing or recommending people who may later re-elect them. Under the detailed guidelines in the amendments, corporate voters and other pro-Beijing forces dominate most of the remainder of the Election Committee, with further possible conflicts of interest implicated. In some cases, the amendments require that a portion of the candidates from some functional sectors be nominated by mainland-affiliated organizations such as the China Law Society or the Chinese Academy of Sciences. The end result is that a committee exceedingly dominated by pro-Beijing forces will select or gatekeep all elected offices. This will surely not change the outcome for selecting the chief executive, since the Election Committee was already heavily loaded against the opposition. Yet it could have a profound effect on the Legislative Council inasmuch as the committee's nomination process poses a major obstacle for opposition candidates.

Under the Basic Law amendments, the seats in the Legislative Council will be increased from 70 to 90 members, but the number of directly elected seats will be cut from 35 to only 20; the functional sectors, nearly all crafted to ensure pro-Beijing control, will have 30 seats; and the remaining 40 seats will be chosen by the Election Committee. It is too early to tell if opposition candidates will choose to run in this new highly vetted system. With no genuine choice, voters may not bother to vote or perhaps may formally or informally boycott the elections. International condemnation has already

flowed in—though advocating for such a boycott has now become a crime under the new local election law.<sup>43</sup>

## CONCLUSION

At this stage, the “one country, two systems” model with its promised liberal rule-of-law-based system under the Basic Law—including a high degree of autonomy, the liberal protection of human rights, and the ultimate aim of universal suffrage—has ended in all but name. PRC leaders claim they have acted to strengthen the Basic Law, but their efforts have achieved the opposite. The liberal constitutional promise of this extraordinary city has seemingly been transformed into a place with secret police, where political committees have been set up to vet for patriots and punish dissent. Critics are hauled off to jail. Teachers are admonished to teach national security to primary students. Public servants are required to swear allegiance and risk dismissal if they fail to do so. Students are silenced. Universities, the media, and NGOs are all watched closely. The world can only look on with a heavy heart as one of the great urban treasures and its vibrant people are put under autocratic rule.

What seems clear is that the Chinese Communist Party has had no idea how to run an open society, much less a global city, and that their appointed Hong Kong officials and supporters have had no idea how to guard the territory’s autonomy—or they simply lack the will to do so. Nor have these anointed local officials and their supporters understood the importance of their intermediate role under the autonomy arrangement. Chief among their obligations was the duty to convey Hong Kong concerns and needs to the central government. This task was left to protesters in the streets, and in the process the ordinary people of Hong Kong were backed into a corner. A society that started out largely apolitical was increasingly politicized, and to some extent radicalized, out of the necessity to respond to the mismanagement that threatened its way of life.

To attack the popular guardians of Hong Kong’s autonomy and system as unpatriotic would severely miss the point. In my first university class in Hong Kong in 1985, I asked the students what they preferred for a future arrangement. The class of middle- and working-class students responded that Hong Kong should be returned to China and then the PRC government

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<sup>43</sup> See, for example, Antony J. Blinken, “Assault on Democracy in Hong Kong,” U.S. Department of State, Press Statement, March 11, 2021 ~ <https://www.state.gov/assault-on-democracy-in-hong-kong>.

should hire the British to run it. This view, then popular, clearly reflected no disloyalty to China but rather a lack of trust in the Chinese system.

At the time of the Joint Declaration, Deng Xiaoping understood this. The “one country, two systems” model he invented sought to protect Hong Kong from mainland intrusion. He set a much lower standard for being a patriot than that now being promoted. According to Deng, patriots did not need to be faithful to the party: “We don’t demand that they be in favor of China’s socialist system; we only ask them to love the motherland and Hong Kong.”<sup>44</sup> The policies now being foisted on Hong Kong deviate profoundly from the promise of this model and the understanding of its founder.

Officials often argue that any country would have to take such measures as they are now taking in response to the 2019 protests. But this argument overlooks the reality that those protests were largely the result of the two governments’ failure to carry out their promised commitments. Rather, in the years since the handover, and even before, government policies in Hong Kong appeared chiefly aimed at establishing control behind the scenes by party loyalists. So a model that was designed to be inclusive and reassure the people that this freewheeling society would remain open was instead used to monopolize power and override popular concerns. The protesters over these many years have merely demanded compliance with China’s commitments.

With the institutions designed to protect Hong Kong’s autonomy and rule of law being co-opted by the government in Beijing and its supporters, street protests have been the only avenue for safeguarding the core values that were supposed to be secure under the Basic Law. Beijing’s recent moves have enhanced its authority to more directly rule Hong Kong. One can only wonder how much longer even Beijing’s Hong Kong supporters will be considered necessary to these policies. ◆

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<sup>44</sup> Deng Xiaoping quoted in “Hong Kong Patriotism Includes Party Loyalty: Chinese Official,” *Agence France-Presse*, March 9, 2021 ∞ <https://www.barrons.com/news/hong-kong-patriotism-includes-party-loyalty-chinese-official-01615276208>.

