Asian Journal of International Law (2025), 1–27
doi:10.1017/S2044251325100787

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

International Law in Hong Kong's Court of Final Appeal: An "Apex Court" Operating in the Shadow of Beijing

Carole J. PETERSEN

William S. Richardson School of Law, University of Hawai'i at Mānoa, Honolulu, HI, USA
Email: carolep@hawaii.edu

(Received 14 February 2025; revised 11 August 2025; accepted 11 August 2025)

Abstract

This article explores the role of international law in Hong Kong's Court of Final Appeal (CFA). The CFA makes extensive use of international and comparative materials, particularly the International Covenant on Civil and Political Rights (ICCPR). However, it avoids issuing judgments that would clash with Beijing's core interests and accepts its broad definition of "national security". This arguably facilitates authoritarian interpretations of the ICCPR and undermines the authority of the Human Rights Committee. Yet, in March of 2025, the CFA granted an appeal and upheld the right to fair trial, emphasizing that the ICCPR continues to enjoy constitutional status in Hong Kong. Moreover, the CFA continues to advance the rights of vulnerable groups, including the LGBT community. The CFA's contributions to comparative jurisprudence on international human rights law are decidedly mixed. But this is arguably inevitable, given its unusual status as an "apex court" operating in the shadow of Beijing.

Keywords: Hong Kong; China; regional autonomy; international human rights

In some respects, international law is the *sine qua non* of Hong Kong. A bilateral treaty, the Sino-British Joint Declaration, determined that Hong Kong would transition from a British colony to a Special Administrative Region of China in 1997.[1] The Joint Declaration described, in significant detail, the "One Country, Two Systems" (OCTS) model of autonomy and provided much of the text for the Hong Kong Basic Law, the regional constitution.[2] OCTS was initially viewed as an exceptionally robust model of territorial autonomy, one that provided Hong Kong with its own international legal personality[3] and a form of internal

[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*, 19 December 1984, 1399 U.N.T.S. 33 (entered into force 27 May 1985) [*Joint Declaration*].

[2] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 4 April 1990, National People's Congress (entered into force 1 July 1997), online: National People's Congress <https://www.basiclaw.gov.hk/en/basiclaw/index.html> [*Basic Law*]; For the drafting history, see Ming K. CHAN and David J. CLARK, eds., *The Hong Kong Basic Law: Blueprint for Stability and Prosperity under Chinese Sovereignty?* (Hong Kong: Hong Kong University Press, 1991).

[3] See generally Roda MUSHKAT, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997); and C.L. LIM and Roda MUSHKAT, "External Affairs" in Johannes CHAN and C.L. LIM, eds., *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell Hong Kong, 2011), at 83-125.

self-determination.[4] The Hong Kong Court of Final Appeal (CFA) holds the power of final adjudication in particular cases; but the Standing Committee of the National People's Congress (NPCSC) can also issue legislative interpretations of the Basic Law, which must be followed in subsequent cases. OCTS also provides for the continued application of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),[5] which has never been ratified by China but enjoys constitutional status in Hong Kong.[6]

Although the Joint Declaration promised only 50 years of "no change",[7] Beijing encouraged the community to believe that OCTS could become a permanent arrangement.[8] Unfortunately, escalating conflicts regarding local democracy and protests against proposed "extradition" legislation reached a crisis in 2019.[9] Beijing responded, in 2020, by imposing a harsh National Security Law (NSL),[10] which transformed Hong Kong's criminal justice system for political offences.[11] The crackdown has impacted all aspects of public life and adversely affected Hong Kong's relations with foreign governments.[12] It has also placed Hong Kong judges (particularly those designated to preside over national security cases) in an extremely difficult position.

Strictly speaking, the ICCPR still enjoys constitutional status in Hong Kong. But the CFA has declared that it has no power to review the constitutionality of national legislation that Beijing applies to Hong Kong.[13] The CFA also appears to be deferring to Beijing's very broad definition of "national security", as reflected in the NSL and in the Safeguarding National Security Ordinance of 2024 (SNSO).[14] This does make it easier for the Hong Kong government to assert – both locally and in international forums – that the new restrictions on civil liberties do not violate the ICCPR, despite the strong criticism from the United Nations (UN) Human Rights Committee in its last review of Hong Kong.[15] While Hong Kong is a tiny jurisdiction, the CFA had built a certain reputation since its creation in 1997, particularly in

[4] See generally Carole J. PETERSEN, "Territorial Autonomy as a Tool of Conflict Resolution? Lessons from 'One Country, Two Systems' in Hong Kong" (2022) Academia Sinica Law Journal 195; and Jamie TRINIDAD, *Self-Determination in Disputed Colonial Territories* (Cambridge: Cambridge University Press, 2018) at 21-69 and 243-44.

[5] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [*ICCPR*].

[6] Basic Law, *supra* note 2, art. 18.

[7] Joint Declaration, *supra* note 1, para. 3(12).

[8] Danny GITTINGS, "What Will Happen to Hong Kong After 2047?" (2011) 42 California Western International Law Journal 37 at 49-51 (summarizing public statements by Deng Xiaoping).

[9] See Cora CHAN, "Demise of 'One Country, Two Systems'? Reflections on the Hong Kong Rendition Saga" (2019) 49 Hong Kong Law Journal 447.

[10] *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, 7 July 2020, online: Committee for Safeguarding National Security of the Hong Kong Special Administrative Region <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf> [*NSL*].

[11] See generally, Hualing FU and Michael HOR, eds., *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong: Hong Kong University Press, 2022).

[12] For regular updates on prosecutions and other impacts of the security crackdown, see "National Security Hong Kong" *Hong Kong Free Press* (15 April 2024), online: Hong Kong Free Press <https://hongkongfp.com/hong-kong-national-security-law/>; For examples of foreign governments' reactions, see Carole J. PETERSEN, "The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong" (2020) 50 Hong Kong Law Journal 633.

[13] *HKSAR v. Ng Ngoi Yee, Margaret* [2024] H.K.C.F.A. 24, para. 33 (discussed further below).

[14] *Safeguarding National Security Ordinance*, 23 March 2024, Instrument A305, online: <https://www.elegislation.gov.hk/hk/A305> [*SNSO*], especially section 4.

[15] See Carole J. PETERSEN, "Window Dressing or Meaningful Constraint? The Role of the International Covenant on Civil and Political Rights and the United Nations Human Rights Committee in Hong Kong's Legal System" (2022) 52 Hong Kong Law Journal 1031.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

the Asia-Pacific region. It is, therefore, arguable that the CFA's jurisprudence in security-related cases will not only facilitate Hong Kong's transition to authoritarianism but also undermine more liberal interpretations of the ICCPR and the authority of the UN Human Rights Committee, as the treaty-monitoring body for the ICCPR. If so, the Hong Kong case study may ultimately strengthen the position of those scholars who claim that ratification of UN human rights treaties does not improve the state of human rights and may even help to legitimize authoritarian governments.[16]

However, this article takes a slightly different view. I argue that any assessment of the CFA's jurisprudence must begin by acknowledging the enormous power that Beijing can exercise over Hong Kong. Many people have now emigrated from Hong Kong as a direct result of the security crackdown. But the vast majority of Hong Kong residents either cannot or will not leave their city. For the 7.5 million people who still live in Hong Kong, the situation could become far worse if China decided to eliminate Hong Kong's separate court system or transfer security-related cases to Mainland China. Thus, the CFA would be gambling with Hong Kong's future if it were to attempt to strike down provisions in the NSL or interpret them in a way that directly contradicts Beijing's core interests. Instead, it has been searching for a more strategic path, using international law where possible to protect human rights but avoiding any direct confrontation with Beijing, which would surely end badly for the people of Hong Kong.

The first section of the article summarizes Hong Kong's unusual status, including its capacity to enter into agreements with foreign states, maintain its own membership in international organizations, and have different obligations than Mainland China under international law. It also introduces Hong Kong's CFA, which conducts constitutional review of local legislation and exercises the power of final adjudication, albeit in the shadow of the Central Government's power to issue "legislative interpretations" of the Hong Kong Basic Law.[17]

The second section of the article analyses the role that the ICCPR played in Hong Kong's constitutional jurisprudence prior to the security crackdown. China promised (in both the Joint Declaration and Article 39 of the Basic Law) that the ICCPR would continue to be enforced through the laws of Hong Kong. The ICCPR was also expressly incorporated into the local legal system, through the Hong Kong Bill of Rights Ordinance (BRO).[18] This gave local courts the opportunity to develop and apply "the methodology of international and comparative jurisprudence" when assessing restrictions on rights.[19]

Unfortunately, as discussed in the third section of the article, the ICCPR has been undermined in Hong Kong by the NSL, which prevails over inconsistent local laws.[20] Although the NSL purports to preserve the ICCPR,[21] it criminalizes many peaceful speech acts, restricts access to bail and jury trials, and exempts powerful new security institutions from judicial

[16] For a sample of scholarship on this debate, see Oona A. HATHAWAY, "Do Human Rights Treaties Make a Difference?" (2002) 111 Yale Law Journal 1935; Jack L. GOLDSMITH and Eric A. POSNER, *The Limits of International Law* (Oxford: Oxford University Press, 2005), especially at 119-132; and Adam S. CHILTON, "Experimentally Testing the Effectiveness of Human Rights Treaties" (2017) 18 Chicago Journal of International Law 164.

[17] See generally Albert Hung-yee CHEN and Po Jen YAP, *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* (London: Bloomsbury Publishing, 2023), especially chapter 5.

[18] *Hong Kong Bill of Rights Ordinance*, 8 June 1991, Cap. 383 [*BRO*].

[19] LO Pui Yin, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society After 1997* (Hong Kong: Hong Kong University Press, 2014) at 80.

[20] NSL, *supra* note 10, art. 62 (providing that "[t]his Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law").

[21] NSL, *supra* note 10, arts. 4 and 5.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

review.[22] Civil liberties were further restricted in March 2024, when local legislation implementing Article 23 of the Hong Kong Basic Law was enacted.[23] This section reviews the CFA's limited jurisprudence in security-related cases, which has largely supported the local government. However, the CFA's March 2025 judgment on the right to fair trial is a notable and very welcome exception.

Moreover, in areas of law that are of less concern for Beijing, international law is still promoting human rights in Hong Kong. The fourth section of the article demonstrates this in the context of the rights of lesbian, gay, bisexual, and transgender (LGBT) residents, where strategic litigation continues and the CFA is regularly ruling against the government. The fifth section then analyses the right to *non-refoulement* for asylum seekers and claimants under the Convention Against Torture (CAT),[24] another field in which the CFA has cited international law to compel changes to government policies.

The article concludes by assessing the CFA's overall contributions and arguing that the CFA can do more to protect the rights of other vulnerable communities, including the many residents of Hong Kong who live in poverty. Litigants have sought to enforce the International Covenant on Economic, Social and Cultural Rights (ICESCR)[25] but these claims have generally failed in court. This is partly because the CFA treats the ICESCR as an unincorporated treaty, although it is referred to in Article 39 of the Basic Law in exactly the same language as the ICCPR. This may be an opportune time to advocate for better enforcement of this important treaty.

I. Hong Kong's autonomy and the CFA'S constitutional role

On paper, the Basic Law endows Hong Kong with an extraordinarily high degree of autonomy. Hong Kong has "independent finances", issues its own currency, and is not subject to taxation by the Central Government.[26] Hong Kong also issues its own passports and visas, monitors its land and sea borders, and operates its own immigration and customs regimes.[27] Beijing promised to limit its own governance over Hong Kong to the areas of defence and foreign affairs.[28] Even in that arena, Hong Kong is expressly authorized to "conduct relevant external affairs", by participating in international organizations and by entering into agreements with foreign states.[29] This is an important element in Hong Kong's claim to international legal capacity, one that has been widely recognized, not only by scholars but also by foreign governments and courts.[30] The local government publishes a long list of its bilateral agreements with foreign governments, as well as the multilateral agreements that apply to the territory.[31]

Hong Kong has maintained its membership (under the name "Hong Kong, China") in numerous international organizations, including the World Health Organization, the Asian

[22] *Ibid.*, at arts. 20-21, 42, 46, 48-54, and 60.

[23] SNSO, *supra* note 14.

[24] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force 26 June 1987) [*CAT*].

[25] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [*ICESCR*]. China is now a state party to the ICESCR but Hong Kong still files its own report to the UN Committee on Economic, Social and Cultural Rights.

[26] Basic Law, *supra* note 2, arts. 106-17.

[27] *Ibid.*, especially at 58-59, 62-64, and 104, arts. 2-8, 16-19, 154.

[28] Joint Declaration, *supra* note 1, para. 3(1); Basic Law, *supra* note 2, arts. 13-14.

[29] Basic Law, *supra* note 2, arts. 151-52.

[30] See Lim and Mushkat, *supra* note 3 at 77-85.

[31] See "HKSAR's External Affairs, International intergovernmental organisations not limited to states" (15 January 2024), online: Constitutional and Mainland Affairs Bureau, The Government of the Hong Kong Special Administrative Region of the People's Republic of China <https://www.cmab.gov.hk/en/issues/external2.htm>.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Development Bank, and the Asia-Pacific Economic Forum (APEC).[32] Hong Kong was a founding member of the World Trade Organization (WTO) and continued to maintain its separate membership, even after Mainland China was admitted in 2001.[33] Hong Kong also regularly participates in organizations that are formally limited to "states" (designated either as an "associate member" or as part of the China delegation).[34]

For the first two decades after the handover, the international community continued to recognize Hong Kong as a separate territorial unit, one with a good reputation for rule of law and transparency. These factors are important when foreign governments determine whether they can trust officials not to misuse or re-export sensitive technology and other controlled exports. Many foreign governments also negotiated Mutual Legal Assistance Agreements directly with the Hong Kong government.[35] Prior to 2020, these governments knew that a fugitive who was extradited to Hong Kong would not be transferred to Mainland China because there was no extradition agreement between the two governments. This lack of an extradition mechanism was not the result of some "loophole" in Hong Kong's legal system (as the local government implied during the "anti-extradition" protests of 2019). Rather, the legislature had consciously chosen not to provide for the possibility of extradition to other parts of China.[36]

Pursuant to Article 153 of the Hong Kong Basic Law, international agreements that applied to Hong Kong prior to 1997 (including human rights treaties) continued to apply after the handover. Beijing also promised to seek the views of the Hong Kong Government before applying any new treaties to the territory.[37] Hong Kong has used this autonomy to "opt out" of certain treaties that apply to China generally. For example, although the United Kingdom and China are both states parties to the 1951 Convention on the Status of Refugees[38] and its 1967 Protocol,[39] both governments agreed not to apply this treaty to Hong Kong, in deference to the Hong Kong government's "firm policy of not granting asylum to or determining the refugee status of anyone".[40] Similarly, when China ratified the

[32] *Ibid.*

[33] See "Hong Kong, China, and the WTO" *World Trade Organization* (1 February 2024), online: World Trade Organization <https://www.wto.org/english/thewto_e/countries_e/hong_kong_china_e.htm>.

[34] "HKSAR's External Affairs, International intergovernmental organisations not limited to states", *supra* note 31; see also Basic Law, *supra* note 2, art. 152 (requiring the central government to take any necessary steps to enable Hong Kong to maintain its memberships and to facilitate its participation in international organizations).

[35] For a list of countries that negotiated such agreements with Hong Kong (including those that have now been suspended due to the imposition of the NSL), see "List of Mutual Legal Assistance Agreements" (24 September 2021), online: Department of Justice, The Government of the Hong Kong Special Administrative Region <https://www.doj.gov.hk/eng/laws/table3ti.html>.

[36] See Malcom RIFKIND, "There is no 'loophole' in Hong Kong's current extradition law. Rather, it provides a necessary 'firewall' to protect the legal system" *South China Morning Post* (4 June 2019), online: South China Morning Post <https://www.scmp.com/comment/opinion/article/3012853/there-no-loophole-hong-kongs-current-extradition-law-rather-it?module=perpetual_scroll_0&pgtype=article>.

[37] Basic Law, *supra* note 2, art. 153.

[38] *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*Refugee Convention*].

[39] *1967 Protocol relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) [*1967 Protocol*].

[40] See "Making a Claim for Non-refoulement Protection in Hong Kong" (1 August 2021), online: Immigration Department, The Government of Hong Kong Special Administrative Region of the People's Republic of China <https://www.immd.gov.hk/eng/useful_information/non-refoulement-making-claim.html>. However, as discussed later in this article refugees and asylum seekers have benefited from international law, as applied by the CFA and other Hong Kong courts.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

UN Trafficking Protocol,[41] it agreed not to apply the treaty to Hong Kong.[42] China has also filed special reservations for Hong Kong regarding a number of treaties.[43]

The drafters of the Joint Declaration and the Basic Law were well aware of the need to reassure Hong Kong residents that civil liberties would be maintained after reunification with China. Both instruments therefore promise that Hong Kong residents shall continue to enjoy the freedoms of speech, assembly, association, travel, religious belief, academic research, choice of occupation, the right to form trade unions and to strike.[44] The Joint Declaration and Basic Law also provide that the ICCPR, the ICESCR, and various International Labour Organization (ILO) conventions "shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region".[45]

Hong Kong residents (and the business community) also needed to be reassured that no court in Mainland China would hear appeals from Hong Kong. The CFA was thus established, replacing the Judicial Committee of the Privy Council in Hong Kong's chain of appeal. The CFA sits as a bench of five judges: the Chief Justice; three "permanent judges" of the CFA; and a fifth "non-permanent" judge. The fifth judge can be selected from a panel of foreign judges (although there is no requirement that a foreign judge participate in every case). The practice of including foreign judges was authorized in the Basic Law as a means of enhancing confidence in Hong Kong's legal system and many esteemed judges from other common law jurisdictions have served.[46] Of course, there have been some noteworthy resignations by foreign judges since the NSL was enacted in mid-2020.[47]

The CFA hears appeals from Hong Kong's Court of Appeal (an intermediate appellate court) and the Court of First Instance (CFI) (which exercises both criminal and civil jurisdiction). There is no appeal beyond the CFA and no mechanism by which a court in Mainland China (or any other central authority) can overturn a CFA judgment in a particular case. Although the Basic Law does not expressly state that Hong Kong courts have the power to engage in constitutional review of local legislation, the CFA has held that this power is implicit in Article 11 of the Basic Law, which states that no law enacted by the local legislature shall contravene the Basic Law.[48] The CFA thus serves as a constitutional check on the local legislature and the local government. It should be noted, however, that some scholars from Mainland China have questioned whether the CFA holds the power to judicially review local laws.[49]

Moreover, the CFA does not hold the *ultimate* power to interpret the Hong Kong Basic Law. Unfortunately, this issue was not expressly addressed in the Joint Declaration. Common law lawyers reading the Joint Declaration in 1984 likely assumed that the power of interpretation would rest with Hong Kong's independent judiciary, as an inherent part of its

[41] *2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime*, 15 November 2000, 40 I.L.M. 335, UN Doc. A/55/383 (entered into force 25 December 2003) [*UN Trafficking Protocol*].

[42] For discussion of the Hong Kong government's long-standing resistance to the UN Trafficking Protocol, see Carole J. PETERSEN, "Sex Work, Migration, and the United States Trafficking In Persons Report: Promoting Rights or Missing Opportunities for Advocacy?" (2015) 25 Indiana International and Comparative Law Review 115.

[43] See, e.g. *Reservations filed by China on behalf of Hong Kong regarding the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD)*.

[44] Joint Declaration, *supra* note 1, para. 5 and Annex I, § XIII; Basic Law, *supra* note 2, arts. 24-38.

[45] Joint Declaration, *supra* note 1, Annex I, § XIII; Basic Law, *supra* note 2, art. 39.

[46] Basic Law, *supra* note 2, art. 82.

[47] Johannes CHAN, "A Reputation Tarnished: Reflections on the Resignations of Overseas Judges from Hong Kong's Court of Final Appeal" *USALI Perspectives* (25 May 2022), online: USALI Perspectives <https://usali.org/usali-perspectives-blog/a-reputation-tarnished-reflections-on-the-resignation-of-overseas-j-dges-from-hong-kongs-court-of-final-appeal>.

[48] *Ng Ka Ling v. Director of Immigration*, [1999] Hong Kong Court of Final Appeal, 1 H.K.L.R.D. 315.

[49] See Lo, *supra* note 19, at chapter 15.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

power of final adjudication. However, in China's socialist legal system, the power of interpretation rests with the body that originally enacted the relevant legislation. The issue was extremely controversial during the drafting of the Basic Law. Mainland Chinese members of the Drafting Committee insisted that the power of interpretation should rest with the Standing Committee of the National People's Congress (NPC) because the NPC would enact the Basic Law.[50] Hong Kong members of the Drafting Committee opposed this because the Standing Committee is not an independent court but rather a political body within China's one-party system. The final version of Article 158 of the Basic Law reflects an awkward compromise. It begins by stating that the power of interpretation of the Basic Law "shall be vested" in the NPC Standing Committee.[51] It then states that Hong Kong courts are authorized to interpret the Basic Law in the course of adjudicating cases; but the CFA must seek an interpretation from the NPC Standing Committee before issuing a final judgment that requires an interpretation of a provision of the Basic Law concerning "affairs which are the responsibility of the Central People's Government" or "the relationship between the Central Authorities and the Region".[52]

Article 158 of the Basic Law would be far less problematic if the Standing Committee only used its power to interpret Hong Kong's Basic Law when the Hong Kong CFA requested an interpretation. But that expectation disappeared soon after the handover. In 1999, after the local government lost two actions for judicial review in the CFA, Hong Kong's first Chief Executive (Tung Chee-hwa) requested an interpretation from the Standing Committee of Articles 22 and 24 of the Basic Law (which define who enjoys the "right of abode" in Hong Kong).[53] Prior to this, it was widely assumed that any requests for interpretation would come from the CFA, through the process described in Article 158. Nonetheless, Tung insisted that the broad executive powers in the Basic Law implicitly empowered him to also request interpretations. Beijing apparently agreed because the Standing Committee issued the requested interpretation and essentially overruled the CFA. This did not change the outcomes in the two cases (because Article 158 provides that judgments previously rendered shall not be affected) but Hong Kong courts were obligated to apply the new interpretation in subsequent cases. The saga made it clear that Beijing would not hesitate to use its power of interpretation, despite the negative impact on the public's perception of the CFA's authority and Hong Kong's autonomy.

The CFA has since acknowledged the binding force of interpretations issued by the Standing Committee and the fact that it need not wait for a judicial reference.[54] The CFA has also acknowledged that interpretations by the Standing Committee can be legislative in nature and have the effect of supplementing the text.[55] Unfortunately, this has become an easy way for Beijing to amend the Basic Law without admitting that it is doing so. Yet the CFA still applies common law rules when following Standing Committee interpretations.[56] For example, the CFA has held that interpretations by the Standing Committee apply

[50] See Martin LEE, "A Tale of Two Articles" in Peter WESLEY-SMITH and Albert H.Y. CHEN, eds., *The Basic Law and Hong Kong's Future* (Hong Kong, Singapore and Kuala Lumpur: Butterworths, 1988), at 309-25.

[51] Basic Law, *supra* note 2, art. 158.

[52] *Ibid.*

[53] *Ng Ka Ling v. Director of Immigration, supra* note 48; and *Chan Kam Nga v. Director of Immigration*, [1999] Hong Kong Court of Final Appeal, 1 H.K.L.R.D. 304. For an analysis of the right of abode cases and the resulting constitutional crisis, see Johannes M. M. CHAN, H. L. FU, and Yash GHAI, eds., *Hong Kong's Constitutional Debate: Conflict Over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

[54] *Lau Kong Yung v. Director of Immigration*, [2002] Hong Kong Court of Final Appeal, 5 H.K.C.F.A.R. 415.

[55] *Director of Immigration v. Chong Fung Yuen*, [2001] Hong Kong Court of Final Appeal, 4 H.K.C.F.A.R. 211, at para. 6.1.

[56] *Ibid.*, at para. 6.3.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

retrospectively, from the time the Basic Law took effect.[57] It would seem more appropriate to apply such interpretations prospectively, particularly when the interpretation itself does not purport to apply retrospectively.[58]

The five official "interpretations" of the Basic Law by the NPC Standing Committee are only the tip of the iceberg. The Central Government regularly uses the *power* of interpretation to achieve Beijing's desired outcomes, generally under the heading of a "decision" by either the NPC Standing Committee or the NPC itself.[59] For example, in 2018, the NPC Standing Committee issued a decision pronouncing that the co-location arrangement (which provides for the application of Mainland China's law and jurisdiction at its immigration checkpoint in a Hong Kong train station) is fully compliant with the Basic Law, pre-empting a constitutional challenge in the Hong Kong courts.[60] Beijing has also made it clear that it is willing to use its power of interpretation to influence pending litigation, as it did during the "oath taking" controversy in 2016.[61]

In this environment, it is probably pointless for the CFA to issue judgments that conflict with core interests of the Chinese Communist Party. Professors Chen and Yap have argued that the CFA has responded to this dilemma by taking a "middle path" – it develops constitutional rights in certain areas but avoids issuing judgments that will prompt a conflicting interpretation of the Basic Law from Beijing, which would further undermine the public's faith in the CFA's power of final adjudication.[62]

Finally, it should be noted that the CFA did not use the judicial reference mechanism in Article 158(3) of the Basic Law until 2011, when it sought the NPC Standing Committee's views regarding the scope of "foreign affairs" and "acts of state".[63] The Standing Committee decided that the words "acts of state such as defense and foreign affairs" in Article 19(3) of the Basic Law included the determination by the Central Government as to rules of state immunity and that the courts of Hong Kong must, therefore, apply the principle of "absolute" immunity, which China had consistently applied in its relations with other sovereign states. But that situation did not last long: on 1 September 2023, China enacted the Foreign State Immunity Law, which took effect on 1 January 2024 and adopted the restrictive approach to state immunity.[64] Thus foreign states will no longer enjoy sovereign immunity

[57] *Yau Wai Ching v. Chief Executive of the HKSAR*, [2017] Hong Kong Court of Final Appeal, 20 H.K.C.F.A.R. 390.

[58] For further discussion, see Chen and Yap, *supra* note 17 at 131-32.

[59] *Ibid*., at 48-51. The Hong Kong government presents these Interpretations and Decisions as equivalent to the text of the Basic Law; see "*Other Instruments* (grouped together with the Annexes to the Basic Law)" *Basic Law* (26 August 2021), online: Basic Law <https://www.basiclaw.gov.hk/en/basiclaw/annex-instrument.html>.

[60] "Decision of the Standing Committee of the National People's Congress on Approving Co-Operation Arrangement Between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port At the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement" (27 December 2017), online: Standing Committee of the Twelfth National People's Congress <https://www.tlb.gov.hk/eng/policy/transport/policy/colocation/EN%20Decision%20(2%20Jan).pdf>.

[61] The NPC Standing Committee issued an interpretation of Article 104 of the Basic Law three days after a judge in the Court of First Instance had heard a case on the validity of the oaths taken by two elected legislators but before the judge had issued his decision. See "Instrument 27: Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, Basic Law" (7 November 2016), online: Basic Law <https://www.basiclaw.gov.hk/en/basiclaw/annex-instrument.html>.

[62] Chen and Yap, *supra* note 17, at 131-32.

[63] *Democratic Republic of Congo v. FG Hemisphere Associates LLC*, [2011] Hong Kong Court of Final Appeal, 14 H.K.C.F.A.R. 95 and 14 H.K.C.F.A.R. 395.

[64] See Changhao WEI, "China to Allow Some Suits Against Foreign States: A Summary of the Foreign State Immunity Law" *NPC Observer* (11 September 2023), online: NPC Observer <https://npcobserver.com/2023/09/china-foreign-state-immunity-law/>.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

in litigation relating to commercial transactions and execution against state assets in Hong Kong which are used in commercial activities.

II. The impact of the ICCPR in Hong Kong prior to July 2020

As a common law legal system, Hong Kong adheres to the dualist approach to unincorporated treaties.[65] Thus, although the United Kingdom (UK) ratified the ICCPR and the ICESCR in 1976 and applied both treaties to Hong Kong, they were not directly enforceable in the courts. The situation changed, with respect to the ICCPR, after the crackdown in Beijing in June 1989. In an effort to rebuild public confidence, Hong Kong's colonial government proposed to draft a local BRO, which would be largely copied from the ICCPR. This was a logical choice because Beijing had already promised that the ICCPR and the ICESCR would continue to apply in Hong Kong.[66]

The BRO was introduced into the Legislative Council in 1990 and enacted in 1991.[67] As originally enacted, the BRO stated (in the long title and in section 2(3)) that its purpose was to provide for the incorporation of the ICCPR as applied to Hong Kong. The UK simultaneously amended the Letters Patent (the colonial constitution for Hong Kong) in order to give the ICCPR constitutional force.[68]

Beijing initially threatened to invalidate the BRO in 1997, using its powers under Article 160 of the Basic Law.[69] However, the BRO was not invalidated, probably because this would have been perceived as a violation of Article 39 of the Basic Law and of the Joint Declaration.[70] Instead, the NPC Standing Committee declared only three provisions (sections two-three, three, and four) invalid, on the grounds that they purported to give the BRO a superior status. In practice, these provisions were superfluous and their deletion did not affect the local judiciary's application of the BRO and the ICCPR.[71]

Because the CFA was not established until 1997, it initially fell to Hong Kong's lower courts to interpret and apply the BRO. In an important early decision, the Court of Appeal stated that Hong Kong judges can take guidance from courts in jurisdictions that have constitutionally entrenched bills of rights, as well as from the European Court of Human Rights, the European Human Rights Commission, and the decisions and comments of the UN Human Rights Committee.[72] Ironically, the Privy Council in London (which served as Hong Kong's highest court of appeal prior to the handover) urged a more cautious approach

[65] See generally Michael RAMSDEN, "Dualism in the Basic Law: The First 20 Years" (2019) 49 Hong Kong Law Journal 1.

[66] China is also now a state party to the ICESCR but Hong Kong still prepares its own report for the UN Committee on Economic, Social and Cultural Rights, as well as for other human rights treaty bodies. However, unlike the ICCPR, the ICESCR has not been expressly incorporated though a local Hong Kong ordinance.

[67] See Hong Kong Bill of Rights Ordinance, *supra* note 18.

[68] For additional discussion of the enactment of the Bill of Rights and the simultaneous amendment to the Letters Patent see Yash GHAI, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd ed. (Hong Kong: Hong Kong University Press, 1999) at 419-22.

[69] Basic Law, *supra* note 2, art. 160 (providing that laws "previously in force" in Hong Kong would be adopted as laws of the Hong Kong Special Administrative Region, except for those determined by the NPC Standing Committee to be in contravention of the Basic Law).

[70] Danny GITTINGS, *Introduction to the Hong Kong Basic Law*, 2nd ed. (Hong Kong: Hong Kong University Press, 2016) at 277-79.

[71] Section 2 stated that the purpose of the BRO was to incorporate the ICCPR (which remained in the long title of the BRO); section three stated the general principle that a new statute prevails over an older statute if there is an irreconcilable conflict; section 4 required courts to attempt to interpret legislation enacted after the BRO so as to comply with the ICCPR, which they should do in any event, even in a dualist system. See Peter WESLEY-SMITH, "Maintenance of the Bill of Rights" (1997) 27 Hong Kong Law Journal 15.

[72] *R v. Sin Yau Ming*, [1991] Hong Kong Court of Appeal, 1 H.K.P.L.R. 88 (holding that certain provisions in the Dangerous Drugs Ordinance violated the presumption of innocence).

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

with respect to the use of comparative materials.[73] But Hong Kong judges have continued to cite foreign and international judgments. Lawyers in Hong Kong have also become very adept at using international and comparative materials in their arguments.

In 1999, the CFA decided *Ng Kung Siu*, a landmark judgment on the status of the ICCPR in Hong Kong's legal system.[74] The defendants had been convicted of violating two local ordinances that prohibited desecration of the national and regional flags. The Court of Appeal held that the restrictions violated the right to freedom of expression, which is protected by Article 27 of the Basic Law and Article 16 of the BRO (copied from Article 19 of the ICCPR). In its successful appeal to the CFA, the Hong Kong government relied heavily on the fact that certain democratic nations that have ratified the ICCPR also enforce laws prohibiting flag desecration. The CFA cited these examples in its judgment and upheld the two ordinances. It also cited several international sources (including the Siracusa Principles and an Advisory Opinion of the Inter-American Court of Human Rights) to strengthen its conclusions that the concept of "*ordre public*" was wide enough to include societal interests in protecting the national and regional flags and that the restriction on expression imposed by the ordinances was a proportionate means of achieving that legitimate aim. Thus, the restrictions could be justified under Article 16(3)(b) of the BRO (equivalent to Article 19(3)(b) of the ICCPR).

At the time, at least one local law professor was highly critical of the CFA's judgment.[75] However, one has to bear in mind that one of the local ordinances under review had implemented the National Flag Law, one of the few laws that China had applied to Hong Kong at that time.[76] If the CFA had agreed with the Court of Appeal that the ordinance was unconstitutional, then it would have risked a second "re-interpretation" from the NPC Standing Committee, very soon after the first re-interpretation. Thus, the CFA apparently decided that Hong Kong could live with that narrow restriction on the form of political expression.

It is also noteworthy that the CFA took the opportunity in *Ng Kung Siu* to rule that the Hong Kong BRO provides for the incorporation of the ICCPR into the laws of Hong Kong and that any restriction on freedom of expression cannot contravene the ICCPR as it was applied to Hong Kong. In a subsequent case (upholding mandatory life sentences for murder) the CFA implied that this incorporation is actually *required* by Article 39 of the Basic Law, stating that the BRO "effects the necessary incorporation into our domestic laws of the ICCPR as applied to Hong Kong".[77] The CFA also cited the UN Human Rights Committee, the European Court of Human Rights, and numerous foreign courts regarding the meaning of Article 5 of the BRO (which incorporates Article 9 of the ICCPR).[78] Thus, although these two early CFA judgments largely sided with the local government, they also established important precedents regarding the status of the ICCPR in Hong Kong's legal system and the relevance of international and foreign case law, particularly when applying the proportionality test.[79]

In *Leung Kwok Hung and Others v. Hong Kong SAR*, the CFA held that a clause giving the police the power to restrict or prohibit a demonstration on the ground of *ordre public* was unconstitutionally vague and failed to meet the ICCPR's requirement that any such restriction be prescribed by law.[80] The CFA therefore severed the words *ordre public* from the Public Order Ordinance. This was arguably a conservative judgment because the CFA upheld the prior

[73] *A.G. v. Lee Kwong-kut*, [1992] Privy Council in London, 3 H.K.P.L.R. 72.

[74] *Hong Kong SAR v. Ng Kung Siu,* [1999] Hong Kong Court of Final Appeal, 2 H.K.C.F.A.R. 442.

[75] See Raymond WACKS, "Our Flagging Rights" (2000) 39 Hong Kong Law Journal 1.

[76] Basic Law, *supra* note 2, at Annex III (listing the national laws that were applied to Hong Kong with effect on 1 July 1997).

[77] *Lau Cheong v. Hong Kong SAR*, [2002] Hong Kong Court of Final Appeal, 2 H.K.L.R.D. 612, at para. 32.

[78] *Ibid.*, at paras. 43-47 and 111-29.

[79] For more analysis of the proportionality test in the CFA's jurisprudence, see Lo, *supra* note 19, at chapter 21.

[80] [2005] Hong Kong Court of Final Appeal, 3 H.K.L.R.D. 164.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

notification requirement and did not condemn the criminal penalties that can be imposed for merely failing to notify the police of a peaceful demonstration. But the CFA emphasized that freedom of assembly is a fundamental right and that the Commissioner of Police must exercise his powers in such a manner that any restriction imposed upon the demonstrators "is no more than necessary" to accomplish the relevant statutory legitimate purpose. It also stated that the Police Commissioner must give reasons for restrictions, which must be specific enough to "show that he has properly applied the proportionality test in making his decision".[81] Interestingly, the CFA cited Hong Kong's *Second Periodic Report* to the UN Human Rights Committee as support for the proposition that the right of assembly imposes a positive duty on the government to enable lawful assemblies to take place.[82] It also cited the Siracusa Principles, Nowak's commentary on the ICCPR, the European Court of Human Rights, and many foreign courts.

In this author's view, the CFA's 2005 judgment in *Yeung May-wan and Others v. Hong Kong SAR* was one of the CFA's strongest judgments regarding civil liberties.[83] The CFA did not have to invoke its constitutional jurisdiction in this case but it did consider how constitutionally protected rights interact with criminal law and the powers of the police. A group of Falun Gong practitioners had been protesting peacefully outside the Hong Kong offices of the Liaison Office of the Central People's Government and refused to obey a police order to move to another location. The Court of Appeal overturned their convictions for obstruction of a public place but the CFA went further and also reversed the convictions arising from certain defendants' efforts to resist arrest. The judgment interpreted the freedom of assembly in Article 17 of the Hong Kong BRO (Article 21 of the ICCPR) and also the right to have one's conviction reviewed by a higher tribunal, which is protected by Article 11 of the BRO (Article 14 of the ICCPR). The CFA cited the Human Rights Committee's General Comment 13 on Article 14 of the ICCPR as well as foreign authorities on the law of obstruction and the question of what constitutes a "reasonable suspicion" for the purposes of determining whether an arrest is lawful. The CFA then reached the fairly dramatic conclusion that the police were not even acting in the "due execution" of their duties when they arrested the defendants. The CFA made it clear that foreign case law had influenced its analysis, noting that the police had been presented "with a difficult situation in relation to an area of the law which has been developing".[84] The CFA took a similar approach in 2013 when it had to interpret a provision in the Public Order Ordinance that prohibits acting "in a disorderly manner" at a public gathering for the purposes of preventing the transaction of business.[85] It cited the European Court of Human Rights and several foreign courts and ultimately held that it was necessary to give this statutory prohibition a narrow interpretation because it restricts the freedoms of speech and assembly.[86]

This is just a small sample of the decisions in which the CFA has used international law and foreign jurisprudence in the context of civil liberties. In contrast, international law has played virtually no role in promoting local democracy. The Joint Declaration was

[81] *Ibid*., at para. 59.

[82] *Ibid*., at para. 23.

[83] [2005] Hong Kong Court of Final Appeal, 2 H.K.L.R.D. 212.

[84] *Ibid.,* at para. 115. For further discussion of the case see Carole J. PETERSEN, "From British Colony to Special Administrative Region of China" in Randal PEERENBOOM, Carole J. PETERSEN, and Albert. H.Y. CHEN, eds., *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (Milton Park, Abingdon, England; Boca Raton, FL: Taylor & Francis, 2006), especially 239-42.

[85] *HKSAR v. Chow Nok Hang*, [2013] Hong Kong Court of Final Appeal, 16 H.K.C.F.A.R. 837, at para. 52 (citing section 17B of the Public Order Ordinance).

[86] *Ibid*., at paras. 59-61.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

vague on this point but it *implied* that Hong Kong would develop democracy[87] and the colonial government certainly encouraged that expectation.[88] For example, during the public consultation on the Joint Declaration, the colonial government went so far as to circulate a "Green Paper" proposing a parliamentary system of government.[89] Even after disputes developed with Beijing, the British government continued to assure the UN Human Rights Committee that it was pursuing measures to "establish a fully democratic system in Hong Kong" before 1997.[90] In the end, however, even the modest reforms implemented in 1995 were undone in 1997 by the Provisional Legislative Council established by Beijing.[91] The conflicts over democracy have plagued Hong Kong ever since.[92]

This is one area in which Article 21 of the BRO (which was copied from Article 25 of the ICCPR) has not assisted, largely because the "as applied to Hong Kong" language in Article 39 of the Basic Law has been interpreted as preserving the reservations to the ICCPR filed by the UK in 1976.[93] In any event, Beijing has repeatedly used its powers of interpretation of the Basic Law to block democracy reforms.[94] The NPC Standing Committee's Decision of 31 August 2014 was particularly devastating and effectively launched the Occupy Central and "umbrella" movements.[95] While these movements remained peaceful, they also failed to generate any meaningful reforms.

After Occupy Central ended, Beijing became far more adept at curtailing political speech and interfering in local governance, decreasing confidence in OCTS.[96] This set the stage for the 2019 protests, which began as a peaceful protest against a government proposal to amend Hong Kong's law of extradition but evolved into a massive anti-government movement, including a good deal of property damage and some violent clashes with the police.[97] In early October, the Hong Kong government invoked the Emergency Regulations

[87] See, e.g. Joint Declaration, *supra* note 1, para. 3(4) and Annex I(I).

[88] Alvin Y. SO, *Hong Kong's Embattled Democracy: A Societal Analysis* (Baltimore, MD: John Hopkins University Press, 1999) at 78-81; See also Ming K. CHAN, "Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90" in Ming K. CHAN and David J. CLARK, eds., *The Hong Kong Basic Law: Blueprint for Stability and Prosperity under Chinese Sovereignty?* (Hong Kong: Hong Kong University Press, 1991) at 3-35.

[89] "Green Paper: The Further Development of Representative Government in Hong Kong" *Hong Kong Government* (July 1984), online: Hong Kong Government <https://ia800200.us.archive.org/22/items/greenpaperfurthe00hong/greenpaperfurthe00hong.pdf>.

[90] *Addendum to the Fourth Periodic Reports of States Parties Due in 1994, United Kingdom of Great Britain and Northern Ireland, Supplementary Report on the Dependent Territories, Hong Kong*, UN Human Rights Committee, U.N. Doc. CCPR/C/95/Add.5 (1995), at 3, art. 1.

[91] For analysis, see Albert H.Y. CHEN, "The Provisional Legislative Council of the SAR" (1997) 27 Hong Kong Law Journal 1; and Johannes CHAN, "The Jurisdiction and Legality of the Provisional Legislative Council" (1997) 27 Hong Kong Law Journal 374.

[92] Albert H.Y. CHEN, *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two Systems"* (Hong Kong: City University of Hong Kong Press, 2021) at 31-56.

[93] See generally C.L. LIM, "The Right to Vote and Right to Political Participation" in *Law of the Hong Kong Constitution, supra* note 3, at 851-82.

[94] See generally Alvin Y.H. CHEUNG, "Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law" (2015) 40 Brooklyn Journal of International Law 465 at 481–504.

[95] "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method of Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (English Translation)" *Standing Committee of the Twelfth National People's Congress* (31 August 2014), online: Standing Committee of the Twelfth National People's Congress <https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclawtext_doc25.pdf>.

[96] See generally Carole J. PETERSEN and Alvin Y.H. CHEUNG, "Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of 'One Country, Two Systems'" (2017) 42 North Carolina Journal of International Law 665.

[97] See Albert H.Y. CHEN, "A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders" (2019) 49 Hong Kong Law Journal 419.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Ordinance (ERO) to promulgate the Prohibition on Face Covering Regulation (PFCR), which criminalized the wearing of masks by protesters. Pro-democracy legislators immediately challenged the PFCR and the Court of First Instance (CFI) decided that the ERO was not compatible with the Basic Law and was therefore unconstitutional. The CFI also held that the prohibitions in the PFCR, in respect of unauthorized assemblies, public meetings and public processions, were unconstitutional because they placed disproportionate restrictions on the freedoms of assembly and speech and the right to privacy, as protected in the Basic Law and the Hong Kong Bill of Rights.[98] This decision provoked a very worrying statement from a spokesperson from the Legislative Affairs Commission of the NPC Standing Committee, claiming that only the NPC Standing Committee possessed the power to declare whether a local Hong Kong ordinance complies with the Basic Law.

Of course, if the NPC Standing Committee had pursued that position in an official "Interpretation" it could have destroyed the longstanding practice of constitutional review by Hong Kong courts. Fortunately, that has not occurred. But that may have something to do with the fact that the CFI's decision was later reversed by Hong Kong's Court of Appeal[99] and the CFA.[100] The CFA walked a careful path in its decision. On one hand, it applied the BRO and the ICCPR and cited the European Court of Human Rights[101] and also the Human Rights Committee's General Comment 37, which provides that participants in a public assembly should be allowed to maintain their anonymity unless there are *compelling reasons* not to allow it.[102] But the CFA then determined that those compelling reasons existed by late 2019 because approximately 30% of public gatherings were ending in violence and the ability to conceal one's identity might encourage certain people to engage in unlawful acts. Thus, although the CFA sided with the government on this particular restriction, its judgment can be seen as an attempt to maintain the general principle that restrictions adopted in the name of public order cannot be disproportionate.

However, while Hong Kong judges debated the scope of the right to protest, the Chinese Communist Party was devising a way to eliminate it. The Party reportedly decided, as early as October 2019, to draft a national security law for Hong Kong, although it did not announce it until May 2020.[103] As explained in the next section, the NSL has marginalized the ICCPR in Hong Kong, particularly with respect to the right to fair trial and the freedoms of expression, assembly, and association.

III. The reduced role of the ICCPR in Hong Kong's security era

Article 18 of the Basic Law gives the Central Government the power to add national laws to Annex III but states that such laws "shall be confined to those relating to defense and foreign affairs as well as other matters outside the limits of the autonomy" of Hong Kong.[104] Annex III was initially quite short; it included, *inter alia*, laws relating to the national flag, nationality, and China's Declaration on the territorial sea.[105] However, in May 2020, the NPC

[98] *Kwok Wing-hang and Others v. Chief Executive in Council*, [2019] Hong Kong Court of First Instance, H.K.C.F.I. 2820.

[99] *Kwok Wing-hang and Others v. Chief Executive in Council*, [2020] Hong Kong Court of Appeal, H.K.C.F.A. 192. The Court of Appeal held that the PFCR was lawfully enacted under the ERO. It also overruled the CFI in part on the issue of proportionality, holding that the prohibition on wearing face coverings at unauthorized assemblies was proportionate but the prohibitions on face coverings at public meetings and public processions were disproportionate.

[100] *Kwok Wing Hang and 23 Others v. Chief Executive in Council*, [2020] Hong Kong Court of Final Appeal, 23 H.K.C.F.A.R. 518.

[101] *Ibid.*, at paras. 118 and 135.

[102] *Ibid.*, at paras. 133 and 135-36.

[103] Chen and Yap, *supra* note 17, at 25-26.

[104] Basic Law, *supra* note 2, art. 18.

[105] *Ibid.*, at 121, Annex III.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

adopted a Decision authorizing the NPC Standing Committee to adopt a law safeguarding national security in Hong Kong.[106] This arguably violated Articles 18 and 23 of the Basic Law, which provides that Hong Kong "shall enact laws on its own" to protect national security.[107] Hong Kong did have pre-existing legislation that fell within the scope of national security. But the local government withdrew, in 2003, a bill to fully implement Article 23 (due to public opposition) and it never proposed a modified bill.[108] This was a mistake, as Beijing would later point to this failure to legislate locally as one of the justifications for applying the NSL to Hong Kong in 2020.[109]

The NSL was enacted on 30 June 2020 and brought into force by 11:00 pm that evening.[110] There was no opportunity for residents to read the law before it came into force. The NSL criminalizes subversion, secession, collusion with foreign forces and "terrorist acts". The NSL defines the new offenses (as well as the inchoate offenses associated with them, such as "incitement to secession") in very broad language, so as to criminalize at least some peaceful speech acts.[111] As with the Basic Law, the courts of Hong Kong may interpret the NSL in the course of adjudication; but the Standing Committee of the NPC holds the overriding authority to promulgate interpretations.[112] Beijing has already used this power to override the Hong Kong courts, ensuring that Jimmy Lai could not retain a British barrister (Timothy Owen) to defend Lai in his national security trial.[113] In the event of a conflict with local law, the NSL expressly prevails.[114]

The NSL also established powerful new security institutions, which are now operating in Hong Kong but accountable only to Beijing. This is a major change to OCTS, as Beijing was not supposed to play a role in law enforcement in Hong Kong.[115] Beijing has established its own Office for Safeguarding National Security of the Central People's Government in Hong Kong.[116] Hong Kong police and customs officials have no jurisdiction over the staff from this new Office and cannot search their vehicles.[117]

[106] "Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security (English Translation)" *Standing Committee of the Thirteenth National People's Congress* (28 May 2020), online: Standing Committee of the Thirteenth National People's Congress <https://www.legco.gov.hk/yr19-20/english/panels/se/papers/ajlscase20200707-ln135-e.pdf>.

[107] For a review of the different views on this issue, see Yap, "Judging Hong Kong's National Security Law" in Fu and Hor, *supra* note 11, at 151-53.

[108] See Carole J. PETERSEN, "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003" in Hualing FU, Carole J. PETERSEN, and Simon N.M. YOUNG, eds., *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong: Hong Kong University Press, 2005), at 13-62.

[109] In 2024 (after a "patriots only" Legislative Council had been installed), local legislation to fully implement Article 23 of the Basic Law was easily enacted. See SNSO, *supra* note 14. However, this legislation supplements rather than replaces the NSL.

[110] *Promulgation of National Law 2020*, Hong Kong Government Gazette, LN 136 of 2020 (2020).

[111] See Kent Roach, "Echoes Enhanced to a Cacophony: Hong Kong's Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies" in Fu and Hor, *supra* note 11, at 306-334.

[112] NSL, *supra* note 10, art. 65.

[113] *Lai Chee-Ying v The Committee for Safeguarding National Security of the HKSAR and another* [2024] HKCA 400; and "Interpretation by the Standing Committee of the National People's Congress of Article 14 and Article 47 of the PRC Law on Safeguarding National Security in the Hong Kong Special Administrative Region" *Hong Kong e-Legislation* (30 December 2022), online: Hong Kong e-Legislation <https://www.elegislation.gov.hk/hk/A304>.

[114] NSL, *supra* note 10, art. 62.

[115] Joint Declaration, *supra* note 1, para. 3(3) and Annex I (XII); Basic Law, *supra* note 2, art. 14.

[116] NSL, *supra* note 10, arts. 48–55.

[117] *Ibid*, art. 60.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

There is also a new "special branch" within the Hong Kong police to investigate NSL offenses, which can recruit personnel directly from the Mainland.[118] It was given extraordinary powers of investigation, including the power to conduct warrantless searches.[119] A Committee for Safeguarding National Security was also created, which has promulgated rules for warrantless searches, as well as "operating guidelines and principles" for covert surveillance.[120] Acts of this Committee are shielded from judicial review.[121] The NSL also provides for a special prosecution division for NSL offenses. The prosecutors are appointed by the Secretary for Justice but only after obtaining consent from the Committee for Safeguarding National Security.[122]

Perhaps most concerning are the changes to Hong Kong's rules of criminal procedure for "security-related" cases. The NSL requires these cases to be tried by certain specially designated judges and a judge can be removed from the list if she "makes any statement or behaves in any manner endangering national security" during the term of office.[123] Although Hong Kong residents normally have a right to jury trial for serious offenses, the NSL empowers the Secretary for Justice to require a bench trial.[124] As a result, there have been no jury trials thus far for NSL offenses. The normal presumption in favour of bail in Hong Kong has also been reversed, which means that defendants have languished in pre-trial detention for months and even years.[125] The government now routinely opposes bail applications in NSL cases, even when the alleged crimes were entirely peaceful. The UN Human Rights Committee criticized this practice in its fourth periodic review of Hong Kong, conducted in July 2022.[126]

One of the few positive aspects of the NSL is that Articles 4 and 5 purport to preserve the right to fair trial, the right to be presumed innocent, and other important human rights, including those stated in the ICCPR and the ICESCR. The Hong Kong government repeatedly pointed to this language during the UN Human Rights Committee's 2022 review. But the Committee was not convinced, partly because the government's replies to questions indicate that it considers virtually any enforcement action as compliant with the ICCPR, as long as it is done according to law (the NSL) and in the name of protecting national security.[127]

Professors Fu and Hor have argued that the human rights clauses in the NSL – and especially the reference to the ICCPR – "should not be regarded as a mere window dressing exercise not meant to have any constraints over enforcement".[128] But, in practice, the only way that Articles 4 and 5 of the NSL will have practical impact is if the judiciary enforces them. We cannot expect Hong Kong courts to invalidate specific provisions in the NSL (despite the obvious conflicts with the ICCPR). Indeed, the CFA has gone out of its way to state that legislative acts of the NPC Standing Committee are not subject to judicial review in Hong Kong "on the basis of any alleged incompatibility with the Basic Law or the ICCPR

[118] *Ibid*, art. 43.

[119] For analysis of these powers, see Simon N. M. Young, "Police Powers under the National Security Law: A Commentary" in Fu and Hor, *supra* note 11, at 167-186.

[120] "Safeguarding National Security in Hong Kong" *Hong Kong Government* (7 July 2020), online: Hong Kong Government <https://www.isd.gov.hk/nationalsecurity/eng/law.html>.

[121] NSL, *supra* note 10, art. 14; see also Young, *supra* note 119 at 176-81.

[122] NSL, *supra* note 10, art. 18.

[123] *Ibid.*, art. 44.

[124] *Ibid.*, art. 46.

[125] *Ibid.*, art. 42.

[126] *Concluding Observations on the Fourth Periodic Report of Hong Kong, China*, UN Human Rights Committee, U.N. Doc. CCPR/CHN-HKG/CO/4 (2022), especially paras. 15 and 35.

[127] *Ibid.;* see also Petersen, *supra* note 15.

[128] "Introduction" in Fu and Hor, *supra* note 11, at 13.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

as applied to Hong Kong".[129] However, local courts should be able to use the ICCPR as a guide to interpreting the vague language in the NSL, particularly in light of the express reference to the ICCPR in the Basic Law.[130]

The CFA's opinion in *HKSAR v. Lai Chee Ying* (in which the government successfully appealed a lower court decision granting bail to Jimmy Lai) appeared to endorse such an approach.[131] The CFA held that Article 42(2) is a specific exception to Hong Kong's ordinary bail regime and must be enforced. But it also stated that Articles 4 and 5 are "centrally important to the interpretation of the NSL" and that "those rights, freedoms and values are to be protected and adhered to" in applying the NSL.[132] This implies that any vague language restricting civil liberties should be interpreted to comply with the ICCPR, which allows restrictions to protect national security but only to the extent that they are necessary and proportionate.[133] The UN Human Rights Committee regularly reminds governments that they cannot invoke "national security" as a blanket justification for suppressing political expression.[134] Rather, a restriction must be a proportionate response to a tangible threat. Hong Kong's CFA has developed a similar proportionality test in its own pre-NSL jurisprudence.[135]

Unfortunately, the CFA's 2021 judgment in *HKSAR v. Ng Hau Yi* revealed that it will not require the government to justify expansive interpretations of its new powers under the NSL. In that case the CFA agreed with the government that the presumption against bail provided in Article 42 of the NSL can be applied even to non-NSL offenses (such as seditious speech, which is not covered in the NSL but rather in local legislation).[136] Given that the language in Article 42 of the NSL is ambiguous, the CFA could have looked to Article 19 of the ICCPR for guidance and not given the presumption against bail in Article 42 of the NSL a broader interpretation than necessary. For some reason, the CFA also took the opportunity to hold that the extraordinary investigation powers conferred by Article 43 of the NSL also apply to these non-NSL offenses, although there was no need to address this issue in an appeal relating to a bail application.[137]

Thus far, the CFA has had few opportunities to review actual convictions for national security offenses. One missed opportunity was the case of Tong Ying Kit, the first person to be convicted under the NSL. On 1 July 2020, less than 24 hours after the NSL came into force, Tong drove his motorcycle through the streets of Hong Kong flying a banner that stated:

[129] *HKSAR v. Ng Ngoi Yee, Margaret* [2024] H.K.C.F.A. 24, para. 33. The statement was striking because the case did not concern the NSL or any other legislative act by the NPCSC. Rather it was an appeal from convictions under the local Public Order Ordinance.

[130] See Yap, "Judging Hong Kong's National Security Law" in Fu and Hor, *supra* note 11, at 160-66; and Ryan MITCHELL, "Theories of Sovereignty in the Origins and Implementation of Hong Kong's NSL" in Fu and Hor, *supra* note 11, at 79-80 and 93; and Kelley LOPER and Carole J. PETERSEN, "Academic Freedom in the Shadow of the National Security Law" in Fu and Hor, *supra* note 11, at 267-71.

[131] *HKSAR v. Lai Chee Ying*, [2021] Hong Kong Court of Final Appeal, 24 H.K.C.F.A.R. 33.

[132] *Ibid.*, at paras. 41-42.

[133] See, e.g. ICCPR, art. 19(3); see also *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Human Rights Committee, U.N. Doc. CCPR/C/GC/34 (2011).

[134] *Tae-Hoon Park v. Republic of Korea*, Views of the UN Human Rights Committee of 20 October 1998, U.N. Doc. CCPR/C/64/D/628/1995 (1998), para. 10.3. For additional examples, see Carole J. PETERSEN, "Article 23 of the Hong Kong Basic Law: International Law and Institutions as Sources of Resilience" in Cora CHAN and Fiona De LONDRAS, eds., *China's National Security: Endangering Hong Kong's Rule of Law?* (London: Bloomsbury Publishing, 2020), at 231-49.

[135] See, for example, *HKSAR v. Ng Kung Siu*, [1999] Hong Kong Court of Final Appeal, 2 H.K.C.F.A.R. 442; and *HKSAR v. Fong Kwok Shan Christine*, [2017] Hong Kong Court of Final Appeal 20 H.K.C.F.A.R. 425.

[136] *HKSAR v. Ng Hau Yi*, [2021] Hong Kong Court of Final Appeal, 24 H.K.C.F.A.R. 417.

[137] See Thomas E. KELLOGG, "How a Ruling by Hong Kong's Top Court Opens the Door to a More Intrusive Security Law" *Hong Kong Free Press* (17 December 2021), online: Hong Kong Free Press <https://hongkongfp.com/2021/12/17/how-a-ruling-by-hong-kongs-top-court-opens-the-door-to-a-more-intrusive-security-law/>.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

"Liberate Hong Kong. Revolution of our Times" (a slogan that was common at that time). He refused to stop at police barricades and ultimately collided with a group of policemen. He was charged with "terrorist activities" and "incitement to secession"[138] under the NSL, denied bail, and also denied a jury trial. He was convicted of both offenses by three specially designated national security judges and sentenced to nine years. The trial court's judgment never mentioned freedom of expression and made no attempt to use the ICCPR when interpreting the new offense of "incitement to secession".[139] Unfortunately, Tong mysteriously withdrew his appeal, apparently without consulting his lawyer.[140]

However, appeals from other convictions in security-related cases are gradually making their way to the CFA. In March of 2025, the CFA issued two notable judgments. In the most important of these two cases the CFA unanimously quashed the convictions of Chow Hang Tung (who had served as the Vice-Chairperson of the now-disbanded Hong Kong Alliance in Support of Patriotic Democratic Movements of China (HKA)) and two of HKA's committee members. The defendants were convicted by a Magistrate of failing to comply with notices served by the Commissioner of Police (CP), an offense provided under the Implementation Rules of the NSL (which are adopted by the Committee for Safeguarding National Security).[141] The notices claimed that HKA was a "foreign agent" and demanded extensive documentation, including information about members and staff, and the minutes of meetings. The defendants had responded by stating, in an open letter, that they were not foreign agents and would challenge the legality of the notices. The CFA held that the appellants could challenge the validity of the notices as part of their criminal defense, overruling the determination by the judge in the CFI (who heard the appeal from the conviction) that such challenges would constitute an impermissible collateral attack.[142] It also held that the lower courts had erred by holding that it was sufficient for the CP to assert that he had "reasonable grounds" to believe that HKA was a foreign agent. Rather, the government had the burden of proving that HKA was a foreign agent, as an element of the offense.[143] The CFA further stated that the prosecution had disabled itself from establishing that point by heavily redacting the only documents that were introduced to prove that HKA was a foreign agent.[144] The lower court had upheld the prosecution's claim that non-disclosure was necessary for an important public interest (the protection of national security). But this did not eliminate the duty to consider whether non-disclosure of the redacted facts would deprive the defendants of the right to fair trial.[145] In this case, the redactions deprived the appellants of all information relevant to the government's claim that HKA was a foreign agent.[146] Thus, their "convictions involved a miscarriage of justice and would in any event not have been permitted to stand".[147]

[138] *HKSAR v. Tong Ying Kit*, [2021] Hong Kong Court of First Instance, 3 H.K.L.R.D. 87.

[139] For additional critique of the court's analysis, see Carole J. PETERSEN, "Hong Kong's First Conviction for Incitement to Secession: What Role for the ICCPR?" *ASIL Insights* (13 October 2021), online: ASIL Insights <https://www.asil.org/insights/volume/25/issue/22>; and Yan-Ho LAI and Thomas E. KELLOGG, "Departure from International Human Rights Law and Comparative Best Practice: HKSAR v. Tong Ying Kit" (2022) 52 Hong Kong Law Journal 465.

[140] See Michael SHUM, "Tong Surprises with Refusal to Appeal" *The Standard* (14 January 2022), online: The Standard <https://www.thestandard.com.hk/section-news/section/4/238009/Tong-surprises-with-refusal-to-appeal>.

[141] *HKSAR v. Tang Ngok Kwan and others*, [2025] Hong Kong Court of Final Appeal, H.K.C.F.A. 3, paras 2-8.

[142] *Ibid.*, paras. 36-61.

[143] *Ibid.*, paras. 19-25.

[144] *Ibid.*, paras. 79-98, and 102(e).

[145] *Ibid.*, paras. 79-98.

[146] *Ibid.*, paras. 95-98.

[147] *Ibid.*, para. 102.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Granted, this case involved a fairly minor offense (and Chow Hang Tung is still in prison due to other convictions). However, the CFA's judgment is the most positive one to be issued in a security-related case and it established an important principle: a defendant simply cannot be denied access to information or material that could enable her to prove her innocence or raise a reasonable doubt as to her guilt. In those situations, the prosecution must make a choice: either make the disclosure and proceed with trial or withhold disclosure and discontinue the prosecution.[148] The CFA also cited English case law and made it clear that common law principles of a fair trial still apply, at least if there is no express legislation to the contrary. It also affirmed that the ICCPR has constitutional status in Hong Kong's legal system and that the NSL preserves ICCPR-protected rights.

Of course, Beijing could override the CFA's judgment on the right to fair trial by having the NCP Standing Committee issue a contrary interpretation. But it is interesting that a member of the Hong Kong Executive Council published, in *China Daily*, an opinion piece that described the CFA's judgment in a positive light, as demonstrating that the right to fair trial is still being protected in Hong Kong.[149] That may indicate that the central and local governments are willing to tolerate this judgment, at least for now.

In any event, the Hong Kong government was, no doubt, pleased by the other judgment that the CFA issued on 6 March 2025. It rejected the appeal of Tam Tak Chi from his conviction for "uttering seditious words", which was governed at the time by Hong Kong's colonial-era law of sedition. (The law was dormant for decades but the government began enforcing it again as part of the security crackdown.) In particular, the CFA held that there was no need for the prosecution to prove that the defendant intended to incite third parties to violence or public disorder.[150] By the time the CFA heard the appeal, the legislation at issue had already been replaced by the 2024 legislation to implement Article 23.[151] But the judgment still matters because it provides an indication of how the CFA will approach appeals from convictions under the new law of sedition. It appears that the CFA largely accepts the government's broad view of what constitutes national security. Indeed, this approach was already discernible in 2024, when the Appeals Committee held that Tam Tak Chi's third point on appeal (which sought to argue that the offenses would be unconstitutionally invalid if they did not require proof of an intention to incite third parties to violence or public disorder) was not reasonably arguable.[152] What is particularly striking about that decision is that the Appeals Committee actually quoted from the SNSO's definition of national security (although the SNSO was enacted in 2024, after Tam Tak Chi committed his alleged offenses).[153] This new statutory definition goes well beyond the political or territorial integrity of China and includes the much broader concepts of unity, the welfare of the people, sustainable economic and social development, and other major interests of the state.[154] In future cases, this broad definition of national security would enable the CFA to claim that it is still applying the traditional proportionality analysis while actually departing from the views of the UN Human Rights Committee on what restrictions can be justified under Article 19(3) of the ICCPR.

[148] *Ibid.*, paras. 88-89.

[149] See Ronny TONG, "CFA Verdict shows Rule of Law Prevails in Hong Kong" *China Daily* (24 March 2025), online: China Daily <https://www.chinadailyhk.com/hk/article/607762>. (The op ed was also published on a local Hong Kong website; "Ronny Tong: CFA verdict shows rule of law prevails in HK" *Path of Democracy* (25 March 2025), online: Path of Democracy <https://pathofdemocracy.hk/en-us/article/1146>.)

[150] *HKSAR v. Tam Tak Chi,* [2025] H.K.C.F.A. 4.

[151] SNSO, *supra* note 14, section 139.

[152] *HKSAR v. Tam Tak Chi,* [2024] Hong Kong Court of Final Appeal H.K.C.F.A. 25, paras. 3-24.

[153] *Ibid.*, paras. 14-16.

[154] *Ibid.*, quoting from SNSO (*supra* note 14), section 4.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Over time, more appeals will eventually work their way to the CFA because the Hong Kong government has been enforcing the NSL with great enthusiasm. A particularly striking example was its decision to prosecute 47 pro-democracy politicians with "conspiracy to commit subversion" for what would be considered ordinary politics in a democratic system. The defendants were accused of organizing or participating in a political primary, with the goal of maximizing their political power in the Legislative Council and then using that power (e.g. by threatening to veto government budgets) to compel the government to implement democracy reforms and other demands of the 2019 protest movement. Most of the defendants were denied bail and held in pre-trial detention for more than three years. Eventually, 31 of the defendants decided to plead guilty (perhaps because the government had a perfect conviction rate at the time and a guilty plea could lead to a shorter sentence). Of the 16 defendants who maintained their not guilty pleas, only two were acquitted (the first acquittals under the NSL) and 14 were convicted.[155] The Court of Appeal is expected to rule on the pending appeals (by 12 of the defendants) by April of 2026.[156] The other major pending case is that of Jimmy Lai (the former publisher of Apple Daily newspaper). As of this writing, Lai had spent close to five years in custody and is still on trial.[157] The trial court will hear closing arguments in August of 2025 but the verdict is unlikely to be issued until 2026.

Thus far, all prosecutions for NSL offenses have occurred in Hong Kong. However, under Article 55 of the NSL, the central authorities can take jurisdiction over a case in three situations: (1) the case is "complex" due to the involvement of a foreign country or external elements; (2) a serious situation occurs where the Hong Kong government is unable to effectively enforce the law; or (3) a major and imminent threat to national security has occurred. The procedures for shifting jurisdiction are shockingly simple: the Central Government only needs to approve a request from Hong Kong's Chief Executive (who is appointed by Beijing and increasingly seen as a mere figurehead). There does not appear to be any procedure (such as an extradition hearing) which would allow an individual to challenge the Chief Executive's decision to request that a case be transferred to the central authorities.

After the NSL was imposed in Hong Kong, the British government accused Beijing of violating the Joint Declaration[158] and many governments stopped treating Hong Kong as a separate jurisdiction for the purposes of trade, extradition and other agreements.[159] At least ten nations have suspended their Surrender of Fugitive Offender Agreements and/or Mutual Legal Assistance Agreements with the Hong Kong Special Administrative Region.[160]

[155] *HKSAR v. Ng Gordon Ching-hang and others* [2024] HKCFI 1468. For a detailed analysis of the trial court's approach, see LO Pui Yin, "The 'Hong Kong 47' Verdict: An Explainer" *VerfBlog* (14 July 2024), online: VerfBlog <https://verfassungsblog.de/the-hong-kong-47-verdict/>.

[156] James Lee, "Hong Kong Court to Rule on Appeals in City's Largest National Security Case in Nine Months" *Hong Kong Free Press* (17 July 2025), online: Hong Kong Free Press <https://hongkongfp.com/2025/07/17/hong-kong-court-to-rule-on-appeals-in-citys-largest-national-security-case-within-9-months/>.

[157] "Hong Kong's Jimmy Lai Trial" *Hong Kong Free Press*, online: Hong Kong Free Press <https://hongkongfp.com/hong-kongs-jimmy-lai/>.

[158] See, e.g. "Six-monthly report on Hong Kong: 1 January to 30 June 2021" (14 December 2021), online: Gov.UK Secretary of State for Foreign, Commonwealth and Development Affairs <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-january-to-june-2021/six-monthly-report-on-hong-kong-1-january-to-30-june-2021>.

[159] See Petersen, *supra* note 12.

[160] See The Government of the Hong Kong Special Administrative Region of China, *supra* note 35, at "List of Surrender of Fugitive Offenders Agreements (Legislative References) (As at 9.11.2020)" *Department of Justice* (9 November 2020), online: Department of Justice <https://www.doj.gov.hk/en/external/table4ti.html> and "List of Mutual Legal Assistance Agreements (Legislative References) (As at 24.09.2021)" *Department of Justice* (24 September 2021), online: Department of Justice <https://www.doj.gov.hk/en/external/table3ti.html>.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

This is understandable given the enormous changes to Hong Kong's criminal justice system. However, some of the responses from foreign governments were arguably unfair to the people of Hong Kong.[161] A good example is the Trump administration's determination that goods imported to the United States from Hong Kong must be labelled "made in China" rather than "made in Hong Kong", which generated a predictable dispute in the WTO.[162] In this author's view, proposals to sanction Hong Kong judges are also likely to be counterproductive.[163] Despite the enormous impact of the NSL, the right to fair trial is still better protected in Hong Kong than in Mainland China. That is largely because of the quality and independence of Hong Kong judges and lawyers. Indeed, many solicitors and barristers are working hard on behalf of defendants, in the hope that they may be able to at least mitigate the impact of the new security laws.

Perhaps the most striking example is the advocacy by Chow Hang Tung, a well-known barrister and human rights activist.[164] Although in jail, she has continued to advocate for the right to fair trial and has also secured some important victories. In addition to the CFA's judgment of March 2025 overturning the convictions of Chow and her two colleagues (discussed above), she also successfully applied for judicial review of a magistrate's refusal of her request to lift the reporting restrictions for her committal proceedings.[165] To a large extent, the judgment relied upon the plain meaning of section 87A(2) of the Magistrate's Ordinance, which simply does not give a magistrate the discretion to refuse to lift reporting restrictions when the accused has made the request.[166] But the judge also cited the right to fair trial, the common law principles of open justice, and the freedom of the press. As he observed, these principles are protected by the ICCPR and the Hong Kong BRO, which were not displaced by the NSL.[167] Decisions like these demonstrate the risks of proposals to sanction Hong Kong judges, as they may cause some good judges to simply resign. This would not stop the security crackdown in Hong Kong and it might make the situation of individual defendants even worse.

Moreover, the Hong Kong judiciary (including the CFA) is still issuing judgments that embrace international human rights norms and improve the lives of vulnerable citizens, albeit in areas of law that do not particularly concern Beijing. The next section of the article demonstrates this in the context of gender equality and the rights of gay and transgender residents of Hong Kong.

[161] For critique of some of the sanctions applied by the US government, see Carole J. PETERSEN, "Sanctions and Human Rights: Lessons from Hong Kong" *USALI Perspectives* (20 October 2021), online: USALI Perspectives <https://usali.org/usali-perspectives-blog/sanctions-and-human-rights-lessons-from-hong-kong>.

[162] See "Dispute Settlement, DS597: United States – Origin Marking Requirement" *W.T.O.* (17 February 2023), online: W.T.O. <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm>.

[163] See "One City, Two Legal Systems: Hong Kong Judges' Role in Rights Violations Under the National Security Law" *Congressional Executive Commission on China* (10 May 2023), online: Congressional Executive Commission on China <https://www.cecc.gov/publications/commission-analysis/one-city-two-legal-systems-hong-kong-judges%E2%80%99-role-in-rights>.

[164] See "Hong Kong: Chronology of Harassment Against Human Rights Defender Chow Hang-tung" *Civicus* (29 November 2022), online: Civicus <https://www.civicus.org/index.php/media-resources/news/6172-hong-kong-chronology-of-harassment-against-human-rights-defender-chow-hang-tung>.

[165] *Chow Hang Tung v. Secretary for Justice*, [2022] Hong Kong Court of First Instance, H.K.C.F.I. 2225.

[166] *Ibid.*, at para. 58.

[167] *Ibid.*, at para. 51.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

IV. Gender equality and the rights of gay and transgender residents

When the UK ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[168] it decided not to apply the treaty to Hong Kong. This was almost certainly because there were many discriminatory laws and policies in the colony at that time, including a prohibition on female inheritance of land in the New Territories (a remnant of Chinese customary law).[169] The appointed colonial government had no interest in reforming these laws; nor did it wish to enact anti-discrimination legislation that would apply to the private sector, given its longstanding commitment to free-market policies.

However, the women's movement gained leverage in the early 1990s, partly due to the BRO but also because limited democracy reforms were introduced in preparation for 1997. In December 1992, Emily Lau (one of the first directly elected legislators) introduced a resolution calling for CEDAW to be extended to Hong Kong, which passed overwhelmingly.[170] Although this motion was not binding, it compelled the government to start a public consultation process, which eventually showed strong support for CEDAW. Meanwhile, another female legislator, Anna Wu, introduced the first anti-discrimination legislation, which led to the enactment of a compromise bill, the Sex Discrimination Ordinance (SDO). These developments helped to clear the way for CEDAW, which was applied to Hong Kong in 1996. Although China is also a party to CEDAW, Hong Kong produces its own report and receives a separate set of Concluding Observations from the CEDAW Committee.

The CEDAW reporting process has generated a number of reforms and the CFI has used CEDAW as a guide to interpreting the SDO.[171] However, the right to gender equality is still undeveloped in Hong Kong, partly because some of the most controversial policies were carefully protected from litigation.[172] For example, the Small House Policy is protected by express exemptions in the SDO, by reservations to CEDAW, and by Article 40 of the Hong Kong Basic Law; these provisions were enforced by the CFA when the Small House Policy was challenged.[173]

On the other hand, the ICCPR has played a very important role in redressing discrimination against gay and transgender residents of Hong Kong. This process started in the early 1990s when the Hong Kong government introduced legislation to decriminalize male-to-male sexual relations. Although many legislators did not want to decriminalize, the colonial government persuaded them to do so, partly by pointing out that the existing laws would conflict with the right to privacy in the ICCPR, which was about to be incorporated through

[168] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force 3 September 1981) [*CEDAW*].

[169] For an analysis of examples of gender discrimination in the colonial period, see Carole J. PETERSEN, "Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong" (1996) 34 Columbia Journal of Transnational Law 334.

[170] *Hong Kong Legislative Council Official Record of Proceedings* (16 December 1992) at 1451.

[171] See Carole J. PETERSEN and Harriet SAMUELS, "The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong" (2002) 26 Hastings International and Comparative Law Review 1.

[172] See generally Kelley LOPER, "Gender, Sexuality, and Constitutionalism in Hong Kong" in Wen-Chen CHANG, Kelley LOPER, Mara MALAGODI, and Ruth RUBIO-MARÍN, eds., *Gender, Sexuality and Constitutionalism in Asia* (London: Bloomsbury Publishing, 2024).

[173] *Kwok Cheuk Kin v. Director of Lands and Others v. Heung Yee Kuk* (Interested Party), [2021] Hong Kong Court of Final Appeal, 24 H.K.C.F.A.R. 349 (upholding the constitutionality of the Small House Policy). While the Small House Policy is complex, in essence it allows an indigenous male villager who is descended through the male line from a resident in 1898 of a recognized village in the New Territories, an entitlement to apply for permission to build a three-story house on land in his village. It is extremely controversial, in part because indigenous women are not eligible but also because of the shortage of land. See Lisa HOPKINSON and Mandy Lao Man LEI, "Rethinking the Small House Policy" (2003) Civic Exchange 1.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

the BRO.[174] In order to make the idea more acceptable to local legislators, the colonial government initially put forth a legislative package that included a higher age of consent for anal intercourse than for vaginal intercourse. But that law was successfully challenged in *Leung TC William Roy v. Secretary for Justice*[175] (*Leung*). The CFI cited the ICCPR, the UN Human Rights Committee,[176] and other international and comparative jurisprudence. The Court of Appeal rejected the government's appeal and confirmed that the ICCPR prohibits discrimination on the ground of sexual orientation because it falls within "other status" in Articles 2 and 26 of the ICCPR.[177] The Court of Appeal also noted that courts should not simply defer to the legislature when a criminal law discriminates on the ground of sexuality. Rather, judges should intensely scrutinize the legislature's purported justification for unequal treatment and "protect minorities from the excesses of the majority".[178]

In 2007, Hong Kong's CFA took a similar approach in *Secretary for Justice v. Yau Yuk Lung,*[179] which challenged the offense of "buggery" with another man otherwise than in private. The CFA agreed with the lower courts that the statute was unconstitutional under both Article 25 of the Basic Law and Article 22 of the BRO (equivalent to Article 26 of the ICCPR). The CFA also endorsed the approach taken in *Leung*, noting that gay men constitute a minority and that the courts should scrutinize "with intensity" whether a difference in legal treatment was justified.

The CFA has also gradually expanded the rights of same-sex couples. For example, in 2018, in *QT v. Director of Immigration*, it held that the Hong Kong Immigration Department could not limit spousal dependent visas to expatriates in heterosexual marriages.[180] The CFA did not have to rely on its powers of constitutional review in this case, as the Immigration Department's policy was found to be both irrational and unreasonable in the *Wednesbury* sense.[181] Nonetheless, it cited the European Court of Human Rights and other foreign sources, noting the "convergence in the approaches of various courts, including our own, to what constitutes discrimination, influenced by international human rights instruments".[182] Similarly, in 2019, the CFA held that it was unconstitutional for the Civil Service to deny spousal benefits to same-sex couples who were married overseas and for the Inland Revenue Department to prohibit same-sex couples from filing joint tax returns.[183]

Thus far, the CFA has not recognized a constitutional right to same-sex marriage. Here the CFA's frequent reliance on the Human Rights Committee's interpretations of the ICCPR appears to have slowed progress in Hong Kong. The Human Rights Committee has not interpreted the ICCPR as requiring a right to same-sex marriage because it views Article 23

[174] For further discussion of the de-criminalization process, see Carole J. PETERSEN, "Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong" (1997) 19 Loyola of Los Angeles International and Comparative Law Journal 337.

[175] [2005] Hong Kong Court of First Instance, 3 H.K.L.R.D. 657; upheld on appeal at Hong Kong Court of Appeal, [2006] 4 H.K.L.R.D. 211.

[176] *Toonen v. Australia*, Views of the UN Human Rights Committee of 31 March 1994, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

[177] The Court of Appeal noted that the government also accepted that homosexuality is a "status" for the purposes of Articles 1 and 22 of the Bill of Rights, which are copied from Articles 2 and 26 of the ICCPR. See *Leung TC William Roy v. Secretary for Justice, supra* note 175, at para. 46.

[178] *Ibid.*, at para. 53 (citing *Ghaidan v. Goldin-Mendoza*, [2004] UK House of Lords, UKHL 30; 2 AC 557, at 568).

[179] [2007] Hong Kong Court of Final Appeal, 10 H.K.C.F.A.R. 335.

[180] [2018] Hong Kong Court of Final Appeal, 21 H.K.C.F.A.R. 324.

[181] *Ibid.*, at para. 24.

[182] *Ibid.*, at para. 30.

[183] *Leung Chun Kwong v. Secretary for the Civil Service,* [2019] Hong Kong Court of Final Appeal, 22 H.K.C.F.A.R. 127.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

as controlling the issue.[184] In *Sham Tsz Kit v. Secretary for Justice*,[185] the CFA took a similar approach. It applied the doctrine of *lex specialis* and held that the right to marry in Hong Kong is limited to opposite-sex couples, due to the language in Article 37 of the Basic Law and Article 19 of the BRO (Article 23 of the ICCPR). However, the CFA granted a declaration that the local government is in breach of a *positive* obligation under Article 14 of the BRO (Article 17 of the ICCPR) to establish an alternative framework for legal recognition of same-sex partnerships (such as a registered civil partnership or civil union). The CFA suspended its declaration for a period of two years to give the government time to comply with its obligations. In July of 2025, the Hong Kong government responded by introducing the "Registration of Same-Sex Partnerships Bill".[186] If enacted, it will permit a same-sex couple who has already entered into a marriage or civil partnership in a foreign jurisdiction to register that partnership in Hong Kong and obtain a specified range of legal benefits. While the bill reflects a rather narrow reading of the CFA's judgment, it would represent progress and LGBT groups are actively supporting it.[187] If it is not enacted (due to opposition from some very conservative legislators in the new "patriots only" Legislative Council) then the government may ask the CFA to revise its original order and give it additional time to comply.[188] However, if the government fails to provide an alternative form of legal recognition that complies with the CFA's judgement then Sham Tsz Kit will also have the right to seek further remedies from the CFA, without the need to begin a new action for judicial review.[189]

Meanwhile, the lower courts continued to issue decisions to alleviate the practical disadvantages of not being able to marry. For some reason, the Hong Kong government also continued to appeal these judgements, although it was clear that they would fail in the CFA. For example, in October 2024, the CFA rejected the government's appeals from lower court decisions holding that it was unlawful to exclude same-sex couples married overseas from equal access to public housing and also unlawful to exclude spouses in same-sex marriages conducted in foreign countries from their legal entitlements and benefits under the intestacy and inheritance laws of Hong Kong.[190]

The CFA has also issued a number of decisions advancing the rights of transgender individuals. For example, in *W v. Registrar of Marriages*,[191] it upheld the right of a transgender woman who had completed gender-affirmation surgery to marry in her acquired gender. The CFA applied Article 37 of the Basic Law and Article 19(2) of the BRO (equivalent to Article 23(2) of the ICCPR) and determined that it is unconstitutional to exclude a post-operative "male-female transsexual" when interpreting and applying Hong Kong's marriage laws.

[184] *Joslin v. New Zealand*, Views of the UN Human Rights Committee of 17 July 2002, U.N. Doc. CCPR/C/75/D/902/1999 (2002). Article 23 of the ICCPR refers to the right of "men and women" to marry but is not expressly limited to heterosexual marriage.

[185] [2023] Hong Kong Court of Final Appeal, H.K.C.F.A. 28.

[186] Recognition of Same-Sex Partnerships Bill, Hong Kong Government Gazette, Legal Supp. No. 3 at C3765 (11 July 2025), online: <https://www.elegislation.gov.hk/hk/2025/07/11/supp3/1!en>.

[187] Vivian AU and Edith LIN, "Hong Kong LGBT Groups in Push to Get Public's Support for Same-Sex Rights Bill" *South China Morning Post* (2 July 2025), online: South China Morning Post <https://www.scmp.com/news/hong-kong/society/article/3319469/hong-kong-lgbtq-groups-push-get-publics-support-same-sex-rights-bill>.

[188] In its order on relief and costs, the CFA noted that the government could apply for a further extension, "on the understanding that the government will endeavour to complete each step as expeditiously as is practicable and that any application for an extension would be supported by compelling reasons". *Sham Tsz Kit v Secretary for Justice,* [2023] H.K.C.F.A. 31.

[189] *Ibid.*

[190] *The Hong Kong Housing Authority v. Infinger, Nick*, [2024] Hong Kong Court of Final Appeal, H.K.C.F.A. 29 (access to public housing); and *Secretary for Justice v. Li Yik Ho*, [2024] Hong Kong Court of Final Appeal, H.K.C.F.A. 30 (survivor benefits for same-sex partners married overseas).

[191] [2013] Hong Kong Court of Final Appeal, 16 H.K.C.F.A.R. 12.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Similarly, in *Q v. Commissioner of Registration*, the CFA applied the right to privacy (protected by Article 14 of the BRO, equivalent to Article 17 of the ICCPR) to hold that the government could not refuse to change the gender markers on the identity cards of two transgender men simply because they had not undergone certain surgery (including the removal and construction of sex organs).[192] The CFA issued orders quashing the government's decision to refuse to alter the gender markers and a declaration that the government's policy guidelines violated the constitutional right to privacy. The Hong Kong government was initially very slow to revise its guidelines, leading to another legal challenge in March 2024; two weeks later, the government announced that it had revised its policy.[193] While this policy is also imperfect, there is a good chance that it will be further refined after a new action for judicial review.

The CFA's recent decisions advancing the rights of LGBT residents demonstrate that in cases that are not security-related it is still willing to rule against the government and enforce rights protected under the BRO and the ICCPR. The next section of the article explores another field of law in which the CFA has relied upon international law to compel the local government to change its policies.

V. Protection against refoulement

The Refugee Convention and its 1967 Protocol have never applied to Hong Kong (despite the fact that they were ratified by the UK and by China). For many years, the Hong Kong government refused to screen asylum seekers although it would allow them to stay in the territory as "overstayers" while they were being screened by the Office of the United Nations High Commissioner for Refugees (UNHCR). Because the UNHCR does not give reasons for its decisions, there was no way for an applicant to challenge a negative decision by the UNHCR.[194]

The first important case in this field to reach the CFA was *Prabakar v. Secretary for Security*[195] (*Prabakar*). Immigration officials detained Mr Prabakar after determining (in the transit area of the Hong Kong airport) that he was holding a forged Canadian passport. While in detention, he wrote a letter to the UNHCR and the Immigration Department, alleging that he had suffered torture in Sri Lanka and would be subjected to torture again if deported. Nonetheless, the Secretary for Security signed a deportation order, relying on the fact that the UNHCR had decided not to recognize Mr Prabakar as a refugee.

Article 3 of CAT had not been expressly incorporated into Hong Kong's domestic legal system. But the CFA noted that the Hong Kong government's stated policy (according to a periodic report that it had submitted to the UN Committee Against Torture) was not to deport a person with a well-founded fear of torture. The CFA held that this policy must be implemented with a high standard of fairness, which could not possibly be met by merely following the UNHCR's unexplained rejection of refugee status.[196] This holding led the government to establish its own screening mechanism for torture claimants. In 2012, the CFA

[192] [2023] Hong Kong Court of Final Appeal, 26 H.K.C.F.A.R. 25.

[193] Kelly HO, "After 'Painful Wait' Since Landmark Ruling, Hong Kong Revises Policy on Changing Gender Marker on ID Card" *Hong Kong Free Press* (3 April 2024), online: Hong Kong Free Press <https://hongkongfp.com/2024/04/03/after-painful-wait-since-landmark-ruling-hong-kong-revises-policy-on-changing-gender-marker-on-id-card>.

[194] For a more in-depth analysis, see Kelley LOPER, "Human Rights, Non-refoulement, and the Protection of Refugees in Hong Kong" (2010) 22(3) International Journal of Refugee Law 404; and Michael RAMSDEN, "Using International Law in Hong Kong: An Examination of Non-Refoulement Litigation" (2013) 42 Common Law World Review 351.

[195] [2004] Hong Kong Court of Final Appeal, 7 H.K.C.F.A.R. 187.

[196] *Ibid.*, at paras. 10, 46-50.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

further held that the Hong Kong government must also independently assess claims by persons who allege that they will be subjected to cruel, inhuman or degrading treatment or punishment.[197]

In 2013, the CFA went further and decided that the government also had a responsibility to screen non-refoulement claims under the Refugee Convention, despite the fact that Hong Kong has never been bound by the Refugee Convention.[198] The appellants (and also the UNHCR, which intervened in the case) argued that the principle of non-refoulement is now a rule of customary international law. However, the CFA offered no views on that issue. Instead, it took an approach that was similar to that used in *Prabakar*: the CFA determined that it was the *practice* of Hong Kong's Director of Immigration to have regard to whether an asylum seeker's claim is based on a well-founded fear of persecution when deciding whether to use his power under the Immigration Ordinance to remove the asylum seeker. The government tried to distinguish *Prabakar* because it dealt with claims under CAT, which applied to Hong Kong. However, the CFA held that this distinction was immaterial because Article 3 of CAT had not been incorporated into domestic legislation. Thus, *Prabakar* had been decided on the basis of the government's stated policy, which the CFA viewed as indistinguishable from the "practice" of taking into account whether an asylum seeker's claim was well founded. The CFA thus held that the Director must make a determination as to whether the claim was well-founded and apply a high standard of fairness, having regard to the gravity of the consequences of the determination.

As a result of these decisions, the government was compelled to create a unified screening system (USM), which is now used for claimants under CAT and asylum seekers under the Refugee Convention. The USM has not changed the government's firm policy of not recognizing anyone as a refugee under the Refugee Convention.[199] Thus, if a person's *non-refoulement* claim is substantiated under the USM on grounds of persecution then the government will refer that case to the UNHCR for recognition as a refugee and resettlement to a safe third country.

There are still many problems with the Hong Kong government's treatment of asylum seekers and torture claimants, including restrictions on their ability to work and flaws in the USM itself. These problems are particularly significant in light of the credible argument that the duty of *non-refoulement* is now a rule of customary international law. However, the process does allow for appeals[200] and the possibility of judicial review when it does not meet the high standard of fairness required by the CFA.[201]

VI. Conclusion

In 2007, I described the ICCPR as Hong Kong's "gold standard", not only because the courts were enforcing it but because the government also regularly acknowledged its binding force.[202] Interestingly, local government officials still like to emphasize the ICCPR's status in

[197] *Ubamaka v. Director of Immigration*, [2012] Hong Kong Court of Final Appeal, 15 H.K.C.F.A.R. 743.

[198] *C. v. Director of Immigration*, [2013] Hong Kong Court of Final Appeal, [2013] 16 H.K.C.F.A.R. 280.

[199] "Making a Claim for Non-Refoulement Protection in Hong Kong", *supra* note 40.

[200] "Torture Claims Appeal Board/Non-refoulement Petitions Office" (30 January 2025), online: Security Bureau of the Government of Hong Kong Special Administrative Region <https://www.sb.gov.hk/eng/links/tcab/index.html>.

[201] See, e.g. *Villarico Loutherliz Talag v. Torture Claims Appeal Board*, [2018] Hong Kong Court of First Instance, H.K.C.F.I. 468 (quashing the decision of the Torture Claims Appeal Board and remitting the appeal for reconsideration by a new adjudicator).

[202] Carole J. PETERSEN, "Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence" in Hualing FU, Lison HARRIS, and Simon YOUNG, eds., *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (London: Palgrave Macmillian, 2007), at 34-39.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

Hong Kong, particularly when they are marketing the city as a good place to do business.[203] But the local government has also fully embraced Beijing's broad definition of "national security" and regularly uses it to justify very broad restrictions on ICCPR-protected rights, including the freedoms of expression, association, and assembly and the right to fair trial. Thus far, Hong Kong courts have not done much to counter this view. Indeed, it appears that the CFA has decided to embrace the government's very broad definition of "national security". While this makes it easier for the CFA to avoid clashing with Beijing, it also means that the CFA's jurisprudence will likely be cited by the Hong Kong government to support its position that the new restrictions on civil liberties are "necessary" to protect national security. It may also be cited by other authoritarian governments who hope to undermine the UN Human Rights Committee's much narrower interpretation of the "legitimate aim" of protecting national security.[204] While this is disappointing, it is also understandable, given Beijing's extensive powers and the many restrictions that the NSL has placed on Hong Kong's judiciary.[205] In essence, the NSL has created a separate criminal justice system for political offences, one that is largely insulated from judicial review and ensures punishment for political opponents of the Chinese Communist Party. Thus, while the "shadow of Beijing" has been present since the handover in 1997, it has become far more prominent in post-2020 Hong Kong. Perhaps it is simply not possible for a small territory to preserve a high degree of civil liberties inside such a large and powerful authoritarian nation.[206]

Nonetheless, Beijing's shadow has not cast darkness on all areas of law in Hong Kong. The Hong Kong judiciary still has room to develop human rights and to apply international and comparative jurisprudence in a meaningful manner. This is particularly evident in the jurisprudence advancing the rights of the LGBT community and, to some extent, in the decisions compelling the government to create a USM for asylum seekers and individuals who could be subjected to torture if deported. Eventually, the CFA may be able to apply the ICCPR in a manner that at least mitigates the negative effects of the NSL and the SNSO.[207] In this regard, the CFA's March 2025 judgment on the right to fair trial is encouraging.

The CFA could do more to protect the rights of vulnerable groups in Hong Kong, including migrant workers, asylum seekers, persons living with disabilities,[208] and the many Hong Kong residents who live in poverty.[209] Although Hong Kong has traditionally prioritized civil liberties, Article 39 of the Basic Law refers to the ICESCR in precisely the same language as

[203] See, e.g. "Report on Hong Kong's Business Environment: A Place with Unique Advantages and Unlimited Opportunities Hong Kong Special Administrative Region" (27 September 2021), online: Hong Kong Economy, the Government of Hong Kong Special Administrative Region <https://www.hkeconomy.gov.hk/en/pdf/Business_report_2021.pdf>, at 53.

[204] See, e.g. *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Human Rights Committee, U.N. Doc. CCPR/C/GC/34 (2011), paras 29-30; and *General Comment No. 37, Article 21: Right of Peaceful Assembly*, UN Human Rights Committee, U.N. Doc. CCPR/C/GC/37 (2020), paras 41-42.

[205] See Johannes CHAN, "National Security and Judicial Independence: A Clash of Fundamental Values" in Fu and Hor, *supra* note 11, at 119-48.

[206] See Cora CHAN, "From Legal Pluralism to Dual State: Evolution of the Relationship Between the Chinese and Hong Kong Legal Systems" (2022) 16(1) Law and Ethics of Human Rights 99.

[207] SNSO, *supra* note 14.

[208] See, e.g., Daisy CHEUNG, *et. al*., "Articulating Future Directions of Law Reform for Compulsory Mental Health Admission and Treatment in Hong Kong" (2020) 68 International Journal of Law and Psychiatry 101513; and Kelley LOPER and Carole J. PETERSEN, "Legal Capacity and the Convention on the Rights of Persons with Disabilities: An Alternative Framework to Promote Law Reform in Hong Kong and Beyond" (2021) 16(2) The Journal of Comparative Law 692 (arguing that the current legal framework violates both the ICCPR and the Convention on the Rights of Persons with Disabilities and proposing reforms to promote the right to legal capacity).

[209] See, e.g. Karen KONG, "Social Welfare as a Constitutional Right" in *Law of the Hong Kong Constitution, supra* note 3, at 787-808; and Michael RAMSDEN, "Using the ICESCR in Hong Kong Courts" (2012) 42(3) Hong Kong Law Journal 839.

https://doi.org/10.1017/S2044251325100787 Published online by Cambridge University Press

the ICCPR. Unfortunately, there is no single Hong Kong ordinance incorporating the ICESCR and the CFA has described Article 39 of the Basic Law as "declaratory" of the dualist principle.[210] This holding appears to preclude any argument that Article 39 was sufficient to incorporate the ICESCR into domestic law and to give it constitutional status. Hong Kong courts have also been rather reluctant to hold that other laws (such as the Employment Ordinance) have incorporated specific articles in the ICESCR.[211] Nevertheless, there is no reason why the courts cannot use the ICESCR as a guide to interpreting relevant provisions in the Basic Law, such as Article 36 (right to social welfare)[212] and the many ordinances that the Hong Kong government cites when it drafts its periodic reports to the UN Committee on Economic, Social and Cultural Rights.[213]

Indeed, there has been a steady increase in income inequality in Hong Kong since 1997[214] and at least some commentators argued that economic pressures and a lack of upward mobility contributed to the sustained protests of 2019.[215] This is, therefore, an opportune time to dispel the myth that socio-economic rights are "aspirational" and not suitable for judicial enforcement. Better enforcement of the ICESCR might also help to rebuild public confidence, not only in the role of international law in Hong Kong's legal system but also in the future of one of the world's great cities.

Acknowledgements. This article was initially presented on 15 March 2024 at the Oxford University Workshop on International Law in Asian Constitutional Courts. The author thanks the conference organizers and participants for comments on the draft paper, Ms Katelyn Atanasio for her research and editorial assistance, the anonymous reviewers for their comments, and the Cades Foundation and the William S. Richardson School of Law for supporting the research. Please email comments to: carolep@hawaii.edu.

Funding statement. None.

Competing interests. None.

Carole J. PETERSEN is the Cades Foundation Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa.

[210] *GA v. Director of Immigration*, [2014] Hong Kong Court of Final Appeal, 17 H.K.C.F.A.R. 60, at para. 58.

[211] *Ibid.* (Article 6 of the ICESCR is not incorporated by the Immigration Ordinance); and *Lubiano Nancy Almorin v. Director of Immigration*, [2020] Hong Kong Court of Appeal, H.K.C.A. 782 (inadequate evidence of an objectively manifested legislative intent to incorporate Article 7 of the ICESCR through the Employment Ordinance).

[212] In *Kong Yunming v. Director of Social Welfare*, [2013] Hong Kong Court of Final Appeal, 16 H.K.C.F.A.R. 950, the CFA interpreted Article 36 of the Basic Law to have a minimum content and invalidated a policy of requiring all recipients of the Comprehensive Social Security Assistance Scheme (CSSA) to have resided in Hong Kong for at least seven years. Justice Bokhary's concurring opinion cited the ICESCR, as well as the views of the UN Committee on Economic, Social and Cultural Rights and Hong Kong's report to the Committee.

[213] See Michael RAMSDEN, "Judging Socio-Economic Rights in Hong Kong" (2018) 16(2) International Journal of Constitutional Law 447.

[214] Thomas PIKETTY and Li YANG, "Income and Wealth Inequality in Hong Kong, 1981-2020: The Rise of Pluto Communism?" *World Inequality Lab* (June 2021), online: wid.world <https://wid.world/document/income-and-wealth-inequality-in-hong-kong-1981-2020-the-rise-of-pluto-communism-world-inequality-lab-working-paper-2021-18/> (noting a very large increase in wage inequality since 1981 and especially since the handover in 1997).

[215] See, e.g. Daniel T. L. SHEK, "Protests in Hong Kong (2019-2020): Perspective Based on Quality of Life and Well-Being" (2020) 15 Applied Research in Quality of Life 619; and David S. LEE, "Understanding Hong Kong's Turbulent Summer" *Harvard Business Review* (23 September 2019), online: Harvard Business Review <https://hbr.org/2019/09/understanding-hong-kongs-turbulent-summer>.

Cite this article: PETERSEN CJ (2025). International Law in Hong Kong's Court of Final Appeal: An "Apex Court" Operating in the Shadow of Beijing. *Asian Journal of International Law*, 1–27. https://doi.org/10.1017/S2044251325100787