Hong Kong Special Administrative Region v. Tam Tak-chi

May 2022

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHORS

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

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The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice or any of the author's affiliated organizations.

EXECUTIVE SUMMARY

Elizabeth Wilmshurst, member of the TrialWatch Expert Panel, assigned this trial a grade of D:

This case—the first use of Hong Kong's colonial-era sedition law in decades—was brought against former opposition politician and radio host Tam Tak-chi for public statements he made urging people to nominate him to the Legislative Council, criticising the 2020 National Security Law, insulting the police, and chanting popular political slogans. The Court also convicted Tam Tak-chi of violations of Hong Kong's Public Order Ordinance for organising an unauthorised assembly, inciting others to join it, and disobeying a police order to disperse.

Many core procedural rights were respected in the proceedings. But the use of a specially designated judge under the National Security Law (not the law Tam Tak-chi was charged under) deprived him of the right to an impartial and independent tribunal.

The statute under which he was charged and convicted presents other fairness violations given the overbreadth of the statute and its criminalisation of political speech and activities. The authorities here applied an outdated, colonial-era ordinance on sedition to a range of political statements which are protected by human rights law.

Further, the sentence in this case—three years and four months in prison in addition to a fine—for political speech and organising an unauthorised assembly—are disproportionate sanctions on the exercise of the rights to freedom of expression and assembly. The charges against Tam Tak-chi were based on his very exercise of these rights. Inevitably, then, questions are raised as to whether the decision to prosecute in this case was tainted by improper motives, violating the defendant's right to equal and non-discriminatory treatment by the courts. The use of criminal proceedings against political speech and campaigning, in the context of the political environment, appears to have had the purpose of punishing Tam Tak-chi for his criticism of the authorities and also to chill public criticism and send a message that participation in pro-democracy election activity is now a national security offence.

In September 2020, Tam Tak-chi, a well-known radio host and opposition politician in Hong Kong, was charged with public order offences, such as holding an unauthorised assembly and disorderly conduct, based on a series of public events he spoke at between January and July 2020. The Hong Kong authorities also revived the colonial-era sedition law to arrest and prosecute Tam Tak-chi for "uttering seditious words" at these events, including political slogans such as "Liberate Hong Kong, revolution of our times", criticism of the 2020 National Security Law, and insults and criticism of the Chinese Communist Party and the police. By the time Tam Tak-chi was arrested in September 2020, the National Security Law had come into force and provisions of this new controversial law—notably the use of specially-designated 'national security judges'–were applied to this trial. Tam Tak-chi was denied

bail and detained throughout his trial, which was repeatedly delayed and rescheduled, ending with his conviction in March 2022 and with the sentence of 40 months and a HK$5,000 fine, delivered on April 20, 2022—almost 20 months after his detention began.

Of the 11 charges of which Tam Tak-chi was convicted, the longest sentence (two years) was given to the first charge, inciting others to knowingly participate in an unauthorised assembly in January 2020. The Court also issued a sentence of one-and-a-half years (3 months to be served consecutively) to Tam Tak-chi for holding or convening an unauthorised assembly in May 2020, in addition to a further one month for disorderly conduct and a fine for disobeying a police order, in violation of the Public Order Ordinance (POO). As to the counts of "uttering seditious words," the Court imposed a sentence of 21 months, of which 12 were to be served consecutively with other sentences.

In convicting Tam Tak-chi of "uttering seditious words", the Court held that he was inciting the public to hate the Chinese Communist Party and other government authorities—in particular, the police; criticising the 2020 National Security Law; and using seditious words to incite people to oppose the "pro-establishment camp" and vote for him in an upcoming primary election (Tam Tak-chi is also detained pending trial in a National Security Law case against 47 opposition leaders for attempting to organise this primary in 2020). The specific words he used that the Court found "seditious" include: "Liberate Hong Kong Revolution of Our Times" and "the National Security Law is in fact a party security law, guaranteeing party security but tramples human rights"; the Court also lists numerous other statements made, including comments about police brutality and statements urging people to nominate him to the Legislative Council.

Hong Kong's colonial-era sedition law had not been used for many years but had been repeatedly criticised by advocates in Hong Kong and UN officials for the overbreadth of its statutory language and the potential for its misuse to punish political speech. In this, the first trial under the sedition statute in decades, these fears were indeed realized.

In the proceedings against him, Tam Tak-chi was denied his procedural rights to a fair trial—in particular, the right to an impartial tribunal—and was charged and convicted under a vague and overbroad statute for making political statements. The judgment in this case expanded the already broad colonial-era law to take in new conduct (criticism of a law, calling for votes) and targets (the police and a political party), and leaves open the question of what limits—if any—there are to this resuscitated law.

This case raises significant concerns about the limits of free expression and political discourse in Hong Kong. Not only does the judgment resurrect and broaden Hong Kong's sedition law but it applies it to censure electoral campaigning—a novel and expansive use of the law. As such, it raises concerns both with the fairness of Tam Tak-chi's treatment in court and also with the future escalating use of the sedition law to chill political speech and activity in Hong Kong.

BACKGROUND INFORMATION

A. POLITICAL AND LEGAL CONTEXT

Hong Kong is an administrative region of the People's Republic of China that has been afforded significant political autonomy under a framework known as "one country, two systems." That legal and political architecture is increasingly under threat, given recent developments that restrict political life in Hong Kong, including changes to Hong Kong's electoral system, introduced in March 2021. Nevertheless, it remains the framework through which laws and rights are defined and implemented in Hong Kong.

The Legal and Political Framework of Hong Kong Special Administrative Region

On the evening of 30 June 1997, the People's Republic of China (PRC) resumed its exercise of sovereignty over Hong Kong, which had been under the colonial rule of the United Kingdom since 1842. In the years leading up to the 1997 transfer of power, the PRC and the UK negotiated over the way Hong Kong and its people would be treated by the PRC. These terms were memorialized in the Sino-British Joint Declaration of 1984 (Joint Declaration), a treaty registered with the United Nations, which designates Hong Kong as a "special administrative region" of the PRC and pledges that the Hong Kong Special Administrative Region (HKSAR) would enjoy a "high degree of autonomy" in its social and political affairs.[1]

After recent changes announced by the Chinese Government to Hong Kong's electoral system, the British government stated in March 2021 that the Chinese government was "in a state of ongoing non-compliance with the Sino-British Joint Declaration."[2] (The Chinese Government has at times dismissed the Joint Declaration as a "historical document"[3] and emphasized that the Hong Kong Basic Law should be considered the applicable instrument. This document is however a legally binding treaty and has formed the blueprint for both the political governance arrangements in Hong Kong and core rights and freedoms retained by the people of Hong Kong.)
Fundamental to the Joint Declaration was the agreement that the HKSAR would retain its governmental, political and economic systems for 50 years, i.e., up to 2047. Certain core

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[1] Joint Declaration of the Government of the United Kingdom of Great Britain and Norther Ireland and the Government of the People's Republic of China on the Question of Hong Kong ("Joint Declaration"), entered into force 27 May 1985, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf.

[2] Government of the United Kingdom, "Foreign Secretary statement on radical changes to Hong Kong's electoral system," Mar. 13, 2021, *available at* https://www.gov.uk/government/news/foreign-secretary-statement-on-radical-changes-to-hong-kongs-electoral-system.

[3] *Reuters*, "China says Sino-British Joint Declaration on Hong Kong no longer has meaning," June 30, 2017, *available at* https://www.reuters.com/article/us-hongkong-anniversary-china/china-says-sino-british-joint-declaration-on-hong-kong-no-longer-has-meaning-idUSKBN19L1J1; *see also* Permanent Mission of the People's Republic of China, "Statement by the Permanent Mission of China to the United Nations," May 28, 2020, *available at* http://chnun.chinamission.org.cn/eng/hyyfy/t1783532.htm ("The legal basis for the Chinese government's administration of Hong Kong is the Chinese Constitution and the Basic Law of the HKSAR, not the Sino-British Joint Declaration."). *But see* Consulate-General of the People's Republic of China in Lagos, "UK cannot question HK security law," July 14, 2020, *available at* http://lagos.china-consulate.org/eng/zlgxw/t1797659.htm ("The Chinese government has acknowledged the legal status of the Joint Declaration as a legally binding treaty.").

systems already in place in Hong Kong – including the common law legal system, an independent judiciary, the financial system and the protection of human rights – were to remain untouched during this period.

In order to implement the Joint Declaration's articles into a governing framework, a committee of 59 members selected by the Chinese government (36 from the PRC, 23 from Hong Kong) drafted a basic "mini-constitution" that would serve as the primary source of law in Hong Kong after the Handover. The resulting Basic Law, promulgated on 4 April 1990, sets out protections for fundamental rights and freedoms including freedom of speech and freedom of association, of assembly or procession and of demonstration.[4] However, it is not Hong Kong's judiciary but rather the Standing Committee of the National People's Congress (SCNPC) that has the ultimate voice in interpreting the Basic Law.[5]

Supplementing the Basic Law, the Hong Kong Bill of Rights Ordinance (BORO) was enacted on 8 June 1991 to implement the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic law.[6] The PRC is not a party to either of these human rights treaties, but they remain applicable to Hong Kong by virtue of the Joint Declaration and the Basic Law.[7]

Sedition in Hong Kong

1. The legal standard

The offence of sedition under Section 10 of the Hong Kong Crimes Ordinance is defined as follows:

> Any person who—
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> (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or
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> (b) utters any seditious words[8]; or
>
> (c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or
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> (d) imports any seditious publication, unless he has no reason to believe that it is seditious,
>
> shall be guilty of an offence and shall be liable for a first offence to a fine of $5,000 and to imprisonment for 2 years, and for a subsequent offence to

[4] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Basic Law"), 4 April 1990, *available at* https://www.basiclaw.gov.hk/en/basiclaw/.
[5] Article 158 of the Basic Law.
[6] Hong Kong Bill of Rights (hereinafter the "BORO"), (Cap. 383), June 8, 1991, https://www.elegislation.gov.hk/hk/cap383?xpid=ID_1438403137017_001; Constitution and Mainland Affairs Bureau, Government of Hong Kong Special Administrative Region of the People's Republic of China, *An Introduction to Hong Kong Bill of Rights Ordinance*, *available at* https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/BORO-InductoryChapterandBooklet-Eng.pdf.
[7] Article 39 of the Basic Law; Annex I Part XIII of the Joint Declaration ("The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.")
[8] Defined under Section 10(5) of the Crimes Ordinance as "words having a seditious intention" (13 of 1938 s. 2 incorporated).

> imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.[9]

Section 9 of the Crimes Ordinance defines a "seditious intention" as one:

> (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or
>
> (b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
>
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
>
> (d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
>
> (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
>
> (f) to incite persons to violence; or
>
> (g) to counsel disobedience to law or to any lawful order.

2. Historical Origins, Amendments to and Use of Sedition in Hong Kong

Hong Kong's sedition law initially emerged as part of the British colonial government's efforts to regulate and exert tighter control over the (largely Chinese-language) press in Hong Kong in the 19th century.[10] Later, a Sedition Ordinance was introduced in 1938, which mirrored the language of British sedition law in force at the time in its definitions. The current law is largely based on the 1938 Sedition Ordinance (indeed, the law still refers to "Her Majesty" throughout). In the 1950s and 1960s, the British colonial government in Hong Kong used the Sedition Ordinance to prosecute Chinese-language newspapers critical of the colonial government.[11] The last time a sedition charge was laid prior to 2020 was during the 1967 riots.

In 1971, the sedition law was folded into the current Crimes Ordinance, which also includes

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[9] Crimes Ordinance, Section 10 (13 of 1938 s. 4 incorporated. Amended 22 of 1950 Schedule; 30 of 1970 s. 3).

[10] Fu Hualing, "Past and Future Offences of Sedition in Hong Kong," in *National Security & Fundamental Freedoms* edited by Fu Hualing, Carole J. Petersen, and Simon N. M. Young (Hong Kong University Press, 2005), 217-249; Jeffery Wasserstrom & Peter Zarrow, "Publish and Be Damned: Dangers of Sedition in Old Shanghai and Post-Handover Hong Kong" in Times Literary Supplement, Apr. 1, 2016.

[11] Fu Hualing, "Past and Future Offences of Sedition in Hong Kong," in *National Security & Fundamental Freedoms* edited by Fu Hualing, Carole J. Petersen, and Simon N. M. Young, (Hong Kong University Press, 2005), 217-249; Benjamin Lotz, "Article 23 of the Hong Kong Basic Law: Whither Media Freedom?" *Verfassung und Recht in Übersee*, 45 No. 1 (2012): 67.

sections on treason, "incitement to mutiny," and "incitement to disaffection."[12] In 1997, before the end of British colonial rule, the Hong Kong legislature was reportedly in favour of repealing the sedition provisions entirely, with the Bills Committee noting, "The offence of sedition is archaic, has notorious colonial connotations and is contrary to the development of democracy. It criminalises speech or writing and may be used as a weapon against legitimate criticism of the government."[13] However, members of the Bills Committee only recommended amendments to the law, citing the "political reality" that the legislature would be likely to keep the sedition offence in accordance with Article 23 of the Basic Law,[14] which requires Hong Kong to enact laws on sedition and national security.[15]

The out-going Government agreed to amend the language of the law to require "the intention of causing violence or creating public disorder or a public disturbance"; although signed into law on June 26, 1997, this revision never came into effect under the new regime.[16] As discussed below, a further attempt in 2003 to revise the law on sedition through the passage of national security legislation also failed due to public opposition and concerns from the legal, media, and other professional communities that the proposed revisions to the sedition law were insufficient to address concerns with its breadth (and potential misuse), while removing some safeguards like the statute of limitations, and adding new sedition offenses.[17]

Today, then, the sedition law in effect is the archaic colonial-era offence. The United Nations Human Rights Committee and other human rights experts have repeatedly criticized this law for its overly broad definitions, warning that the law might infringe on the right to freedom

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[12] The law then remained untouched until the passage of the Hong Kong Bill of Rights (the BORO) in 1991; the Government then repealed the broad intent section of the Ordinance, which stated: 'In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.' Sedition Ordinance 1938, section 3(2); *see generally* Fu Hualing, "Past and Future Offences of Sedition in Hong Kong," in *National Security & Fundamental Freedoms* edited by Fu Hualing, Carole J. Petersen, and Simon N. M. Young, (Hong Kong University Press, 2005), 217-249.

[13] Report of the Bills Committee on the Crimes (Amendment)(No. 2) Bill 1996 (Papers) 13 June 1997, LegCo Paper No. CB(2)2638/96-97, para. 18, *available at* https://www.legco.gov.hk/yr96-97/english/bc/bc56/papers/report!!.htm#8.

[14] Report of the Bills Committee on the Crimes (Amendment)(No. 2) Bill 1996 (Papers) 13 June 1997, LegCo Paper No. CB(2)2638/96-97, para. 20, *available at* https://www.legco.gov.hk/yr96-97/english/bc/bc56/papers/report!!.htm#8

[15] Article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997). Article 23 states: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

[16] Fu Hualing, "Past and Future Offences of Sedition in Hong Kong," in *National Security & Fundamental Freedoms* edited by Fu Hualing, Carole J. Petersen, and Simon N. M. Young, (Hong Kong University Press, 2005), 231.

[17] *See* Legal opinions on sedition, police investigation powers and misprision of treason (prepared by Dr. YAN Mei Ning, Assistant Professor, Department of Journalism, Hong Kong Baptist University) for the Hong Kong News Executives' Association Submission on Article 23 of the Basic Law (Dec. 2002) http://www.nea.org.hk/ufiles/files/pr021220-2.pdf; Hong Kong Bar Association's Views on the National Security (Legislative Provisions) Bill 2003, Submission No. 53, *available at* https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55-s53-e-scan.pdf.

of expression and urging authorities to bring the law into compliance with HKSAR's human rights obligations.[18]

3. Sedition in Hong Kong Today

Since the 1997 Handover, however—and until this case against Tam Tak-chi—the Hong Kong authorities had not used the sedition law as a basis for charging and prosecuting people. The law has periodically been used as a basis to arrest individuals or call them in for questioning—for example, opposition politician Cheng Lai-king, arrested for an online post regarding a police officer who shot a journalist[19] and activist Benny Tai reported to the police for seditious comments about Taiwan.[20]

Since Tam Tak-chi's arrest, Hong Kong authorities have used the sedition law to charge and detain a number of individuals. In May 2021, for instance, sedition charges were brought against another radio host, Edmund Wan, who was accused of financing fugitives and hosting shows to incite revolt against Beijing and the Hong Kong government.[21] In July 2021, police arrested and charged five speech therapists with "conspiracy to publish seditious materials" for children's books depicting sheep protecting their community from wolves; authorities claimed these books 'incited hatred against the government' and that the wolves represented police.[22]

In the weeks after Tam Tak-chi's trial concluded, *Apple Daily* founder Jimmy Lai and six other former *Apple Daily* employees were charged with publishing "seditious publications" between 2019 and June 2020.[23] On December 29, 2021, the authorities raided the offices of the independent news outlet, *Stand News*, arresting several of its staff and current and

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[18] UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, CCPR/C/79/Add.117, Nov. 15, 1999; UN Human Rights Committee, Concluding Observations, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, Apr. 21, 2006, para. 14; UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013; Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, OL CHN 7/2020, Apr. 23, 2020.

[19] Jasmine Siu, *South China Morning Post,* "District councillor who doxxed police officer, family 'thankful' after getting suspended sentence," Oct. 19, 2020.

[20] Alvin Lum, *South China Morning Post*, "Hong Kong lawmaker Junius Ho pushes to have Occupy founder Benny Tai charged with sedition over independence remarks in Taiwan," Aug. 16, 2018, *available at* https://www.scmp.com/news/hong-kong/politics/article/2159924/hong-kong-lawmaker-junius-ho-pushes-have-occupy-founder.

[21] Brian Wong, *South China Morning Post*, "Hong Kong internet radio host facing money-laundering, sedition charges denied bail over Taiwan connections, High Court judge says," May 13, 2021, https://www.scmp.com/news/hong-kong/law-and-crime/article/3133408/hong-kong-internet-radio-host-facing-money-laundering.

[22] Selina Cheng, *Hong Kong Free Press*, "Hong Kong top court rejects bid to appeal bail refusal for speech therapist over 'seditious' children's books," Dec. 11, 2021, https://hongkongfp.com/2021/12/11/hong-kongs-top-court-rejects-bail-for-group-charged-with-sedition-over-childrens-picture-books/.

[23] *Deutsche Welle*, "Hong Kong: Jimmy Lai faces fresh sedition charge," Dec. 28, 2021, https://www.dw.com/en/hong-kong-jimmy-lai-faces-fresh-sedition-charge/a-60270914; Jasmine Siu, *South China Morning Post*, "Hong Kong prosecutors hit tycoon Jimmy Lai, 6 former Apple Daily employees with fresh sedition charge," Jan. 28, 2021, https://www.scmp.com/news/hong-kong/law-and-crime/article/3161304/hong-kong-prosecutors-hit-tycoon-jimmy-lai-6-former.

former board members for publishing allegedly "seditious materials."[24] *Stand News* ceased operations that day and on the following, December 29, 2021, officials filed sedition charges against two former senior editors of *Stand News*.[25] While the sentence in Tam Tak-chi's case was pending, authorities charged six people with sedition for clapping at a January 2022 court proceeding.[26]

In December 2021, in an application from one of the speech therapists charged with sedition for the children's 'sheep and wolf' book, Hong Kong's highest court, the Court of Final Appeal, ruled that sedition "qualifies as an offence endangering national security". The Court interpreted the language of the National Security Law (NSL) as having effect on *all* acts, activities and offences endangering national security. With this decision, the NSL's more stringent bail standard, discussed below, would now apply to individuals charged with sedition offences as well as any other non-NSL national-security offences under Hong Kong law.[27]

The 2020 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law" or "NSL")

1. Background: Article 23 of the Basic Law and the Introduction of the NSL

Article 23 of the Basic Law requires Hong Kong to enact laws "on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."[28]

Until 2020, however, attempts to introduce any such legislation in Hong Kong had stalled. During pre-Handover deliberations on a national security bill (1996-1997), the legislature's Bill Committee noted that the legal profession and other delegations opposed the creation of a new 'subversion' offence, noting that the Public Order Ordinance already protected

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[24] *Hong Kong Free Press*, "Stand News closes, content deleted following arrests and police raid; Chief Sec. slams 'evil elements'," Dec. 29, 2021, https://hongkongfp.com/2021/12/29/breaking-stand-news-closes-website-inaccessible-following-arrests-and-police-raid-chief-sec-slams-evil-elements/.
[25] Clare Jim & Sara Cheng, *Reuters*, "Hong Kong court denies bail to former Stand News editors charged with sedition," Dec. 30, 2021, https://www.reuters.com/business/media-telecom/hong-kong-leader-says-stand-news-arrests-not-aimed-media-industry-2021-12-30/.
[26] *The Washington Post*, "Hong Kong police arrest 6 accused of sedition," Apr. 6, 2022, https://www.washingtonpost.com/politics/hong-kong-police-arrest-6-accused-of-sedition/2022/04/06/985fafb4-b582-11ec-8358-20aa16355fb4_story.html?request-id=e380724f-0461-4bef-a44a-900084b40d6d&pml=.1.
[27] HKSAR and Ng Hau Yi Sidney, FAMC No. 32 of 2021, [2021] HKCFA 42 paras. 29, 31.
[28] Article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997). Article 23 states: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

public order and addressed 'subversion' and 'secession' offences. The Hong Kong Journalists Association opposed the creation of both 'subversion' and 'secession' offenses as a serious threat to the right to freedom of expression.[29] Furthermore, the Bills Committee, unanimously opposing the creation of the offenses of secession or subversion, concluded that "no case has been made for an immediate need to add such offences in the statute," and "full and searching discussions in the Bills Committee have failed to reveal any formulation of these offences which does not endanger the rights and freedom of Hong Kong people."[30]

Post-Handover, in 2003, legislators again attempted to introduce Article 23 national security legislation that would have defined and enacted a number of security-related offences, including treason, subversion, secession, and sedition.[31] The Hong Kong Bar Association opposed the creation of a new sedition offense to "criminalize an intention, and only an intention, which is not necessarily manifested in the public domain" and for the removal of the six-month statute of limitations on filing charges of sedition.[32] The Hong Kong Journalists Association objected to the 2003 Bill noting that the offence of sedition "is archaic and should be scrapped" and observing that the vagueness of the charge and its definitions could have a dangerous "chilling effect on freedom of expression."[33]

The proposed bill, and the rapid process by which it was introduced, were extremely unpopular in Hong Kong, with many concerned that the new laws would erode fundamental rights, suppress dissent, and restrict access to information.[34] In response, on July 1, 2003, approximately 500,000 people took to the streets to protest the proposed law, which the government ultimately shelved.[35]

Seventeen years later in May 2020, after a year of pro-democracy protests in Hong Kong,

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[29] Report of the Bills Committee on the Crimes (Amendment)(No. 2) Bill 1996 (Papers) 13 June 1997, LegCo Paper No. CB(2)2638/96-97, paras. 9-10, *available at* https://www.legco.gov.hk/yr96-97/english/bc/bc56/papers/report!!.htm#8

[30] *Id*. para. 13.

[31] *See* Elson Tong, *Hong Kong Free Press*, "Reviving Article 23 (Part I): The rise and fall of Hong Kong's 2003 national security bill," Feb. 18, 2018, *available at* https://hongkongfp.com/2018/02/17/reviving-article-23-part-i-rise-fall-hong-kongs-2003-national-security-bill/; Human Rights Watch, A Question of Patriotism: Human Rights and Democratization in Hong Kong (2004), *available at* https://www.hrw.org/legacy/backgrounder/asia/china/hk0904/index.htm

[32] Hong Kong Bar Association's Views on the National Security (Legislative Provisions) Bill 2003, Submission No. 53, *available at* https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55-s53-e-scan.pdf.

[33] Submission of the Hong Kong Journalists Association to the Legislative Council on the National Security (Legislative Provisions) Bill, para 6, Apr. 7, 2003, *available at* https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55-s56-e.pdf.

[34] Klaudia Lee, *South China Morning Post*, "Most people oppose security bill, poll shows," June 28, 2003; *CNN*, "Huge protest fills HK streets," July 2, 2003, *available at* https://edition.cnn.com/2003/WORLD/asiapcf/east/07/01/hk.protest/; RTHK, *The Pulse*, "Audrey Eu and Elsie Leung on political reform, Basic Law teaching materials controversy," May 15, 2015, *available at* https://podcast.rthk.hk/podcast/item.php?pid=205&eid=54201&lang=en-US; *CNN*, "Huge protest fills HK streets," July 2, 2003, *available at* edition.cnn.com/2003/WORLD/asiapcf/east/07/01/hk.protest/;.

[35] *See* Elson Tong, *Hong Kong Free Press*, "Reviving Article 23 (Part I): The rise and fall of Hong Kong's 2003 national security bill," Feb. 18, 2018, *available at* https://hongkongfp.com/2018/02/17/reviving-article-23-part-i-rise-fall-hong-kongs-2003-national-security-bill/; HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021 (discussing the previous attempts to introduce a NSL).

China's legislature, the National People's Congress (NPC), authorised its Standing Committee (NPCSC) to adopt and apply laws "to establish and improve the HKSAR legal system and enforcement mechanisms for the protection of national security."[36] NPC Vice Chairman Wang Chen, explaining the need for this legislation, cited alleged violence in connection with the 2019 protests, "obstruction and interference from anti-China forces disrupting Hong Kong," and Hong Kong's failure itself to pass national security legislation.[37] Under the Basic Law, certain national (i.e., PRC) laws, which are listed in Annex III of the Basic Law, are applicable to Hong Kong. Article 18 provides for the authority of the NPCSC to add additional laws "relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region" to this list.[38]

The new law, entitled the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law, or NSL),[39] was passed by the NPCSC and signed into law by President Xi Jinping on June 30, 2020, then promulgated into law by Hong Kong Chief Executive Carrie Lam at 11pm that same day, bypassing Hong Kong's legislature. The law came into force in Hong Kong at midnight on July 1, 2020. The text of the law was not available to the public until it came into force.[40]

In its first year, approximately 117 people[41] were arrested under the NSL, of whom four-fifths were accused for speech or expression-related conduct.[42] As of March 2022, the estimated number of NSL arrests was 183, although that number continues to rise.[43]

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[36] "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," unofficial English translation, May 28, 2020, https://www.elegislation.gov.hk/hk/A215.
[37] Article 23 of the Basic Law, *available at* https://www.basiclaw.gov.hk/en/basiclaw/chapter2.html.
[38] Article 18 of the Basic Law, *available at* https://www.basiclaw.gov.hk/en/basiclaw/chapter2.html
[39] The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (hereinafter "NSL"), (2020) *available at* https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf.
[40] The law was only provided in a Chinese text as the authoritative source. Both Chinese and English are used as official legal languages in Hong Kong.
[41] Pak Yiu & Anand Katakam, *Reuters*, "In one year, Hong Kong arrests 117 people under new security law," June 29, 2021, *available at* https://www.reuters.com/article/us-hongkong-security-arrests/in-one-year-hong-kong-arrests-117-people-under-new-security-law-idUSKCN2E608X; Xinqi Su, *AFP*, "'Unstoppable storm': rights take back seat under Hong Kong security law," June 28, 2021, *available at* https://sg.news.yahoo.com/unstoppable-storm-rights-back-seat-022429844.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAJ9y_jKrtXD-kB-rHBXDlknqUNJTQ2Q5LtOQu_aP8MJL2IunBvB-DVy2vtFyAB8U_dtje3XQKr3YujWY_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0IykhWlLdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf; *see generally*, Candice Chau, *Hong Kong Free Press*, "10,250 arrests and 2,500 prosecutions linked to 2019 Hong Kong protests, as security chief hails dip in crime rate," May 17, 2021, *available at* https://hongkongfp.com/2021/05/17/10250-arrests-and-2500-prosecutions-since-2019-hong-kong-protests-as-security-chief-hails-fall-in-crime-rate/; Lydia Wong & Thomas Kellogg, ChinaFile.com, "Individuals Arrested under the Hong Kong National Security Law or by the National Security Department," June 22, 2021, *available at* https://www.chinafile.com/reporting-opinion/features/new-data-show-hong-kongs-national-security-arrests-follow-pattern.
[42] Iain Marlow, *Bloomberg News*, "How China's Security Law Changed Hong Kong Forever in Just 12 Months," June 29, 2021, *available at* https://www.bloomberg.com/news/articles/2021-06-29/how-china-s-security-law-changed-hong-kong-forever-in-12-months.
[43] Eric Yan-ho Lai & Thomas Kellogg, *China File,* "Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong," Apr. 5, 2022, https://www.chinafile.com/reporting-opinion/features/arrest-data-show-national-security-law-has-dealt-hard-blow-free.

National security police have also arrested many others not formally charged under the NSL, and some of the NSL procedures may also be applied to these individuals. For example, in Tam Tak-chi's case a designated national security judge was appointed to hear his case.

2. Provisions of the 2020 National Security Law

The National Security Law marks a dramatic change in Hong Kong law, creating new offences, novel trial procedures, and expanded police investigatory authority. While the NSL did not replace related laws such as the colonial-era sedition statute and the Public Order Ordinance, nor does it replace the Basic Law and the BORO—all of which remain in force—where the NSL conflicts with the Basic Law and other Hong Kong laws, the NSL provides that it will prevail.[44] Although the NSL contains provisions that acknowledge the right to a fair trial and the continued application of the ICCPR rights,[45] some commentators have observed that procedural due process rights have already been severely restricted by the application of this law.[46]

With respect to NSL procedures, the NSL authorises the Chief Executive to designate 'national security judges' who can be removed if they make statements or take actions that "endanger national security."[47] It further creates a significantly heightened standard for bail,[48] upheld by the Court of Final Appeal.[49] Under the NSL, a trial can be closed to the

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[44] Article 62 of the NSL ("This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law.").

[45] The NPC Standing Committee has also stated that the NSL "fully reflects the internationally-practised rule-of-law principles such as conviction and punishment of crimes as prescribed by law, presumption of innocence, protection against double jeopardy, protection of parties' rights in litigation and to fair trial." Address at the Twentieth Session of the Standing Committee of the Thirteenth National People's Congress (30 June 2020) by Mr Li Zhanshu (6 July 2020), *cited by* HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021, para. 22. *See also* Article 5 of the NSL ("A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."").

[46] *See generally* Rebecca Mammen John & TRIALWATCH, HONG KONG SPECIAL ADMINISTRATIVE REGION V. TONG YING-KIT (2021), https://cfj.org/wp-content/uploads/2021/12/Tong-Ying-kit-Fairness-Report-December-2021.pdf; Lydia Wong, Thomas Kellogg & Eric Yan Ho Lai, Georgetown Law Center for Asian Law, *Hong Kong's National Security Law and the Right to a Fair Trial* (2021), https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf.

[47] Article 44 of the NSL.

[48] Article 42 of the NSL ("No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.").

[49] The CFA has in particular opined on the new bail standard as defined under section 42(2) of the NSL and explained its test at *HKSAR v Lai Chee Ying*, 24 HKCFAR 33, Feb. 9, 2021, para. 70:

- "In applying NSL 42(2) when dealing with bail applications in cases involving offences endangering national security, the judge must first decide whether he or she 'has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security'."
- "The judge should take the reference to 'acts endangering national security' to mean acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security."
- "If, having taken into account all relevant material, the judge concludes that he or she does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused."

public if it involves "State secrets or public order,"[50] and all HKSAR courts are required to obtain a certificate from the Chief Executive that certifies "whether an act involves national security and whether the relevant evidence involves State secrets."[51] This certification is not reviewable by Hong Kong courts. The law also significantly expands the police investigatory authority,[52] and allows the Office for Safeguarding National Security (NSO) to remove a case from the HKSAR courts' jurisdiction and to exercise jurisdiction itself if the case is "complex due to the involvement of a foreign country or external elements"; a "serious situation" makes the HKSAR government "unable to enforce" the NSL, or there is a "major and imminent threat" to national security.[53] The NSL created a range of new and broadly-defined offences, some of which are punishable with life imprisonment, including 'secession' and 'subversion'.

The Right to Freedom of Expression in Hong Kong

Hong Kong—but not the PRC—is a party to several core international human rights treaties, including the ICCPR and ICESCR, both of which it has incorporated into domestic law through the BORO and which are still recognized under Article 4 of the NSL.[54] The BORO states, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[55] Article 27 of the Basic Law further states, "Hong Kong residents shall have freedom of speech, of the press and of publication."[56]

The right to freedom of expression has likewise historically been a point of emphasis of Hong Kong's judiciary. In 2000, Chief Justice Li of the Hong Kong Court of Final Appeal wrote in *HKSAR v Ng Kung Siu*:

> Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of government officials.[57]

- "If, on the other hand, the judge concludes that taking all relevant material into account, he or she does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favour of bail."

[50] Article 41 of the NSL.
[51] Article 47 of the NSL.
[52] See Articles 42 & 44 of the NSL.
[53] Article 55 of the NSL.
[54] Article 4 of the NSL ("Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law.").
[55] Article 16 of the BORO.
[56] Article 27 of the Basic Law.
[57] *HKSAR v Ng Kung Siu*, [2000] 1 HKC 117, 135.

Despite these protections for free expression and peaceful assembly under Hong Kong law, authorities have cracked down on public demonstrations critical of the government, in particular through the colonial-era Public Order Ordinance (1967).[58] The UN Human Rights Committee has criticised the sedition provisions of the Crimes Ordinance, as well as the Public Order Ordinance, as posing excessive restrictions on the rights to freedom of expression and assembly.[59]

As TrialWatch documented in the trial of nine individuals accused of organizing a peaceful assembly in 2019 to protest police brutality, the Public Order Ordinance authorises imprisonment for failure to comply with an administrative authorisation scheme and, as such, is incompatible with human rights protections for peaceful assembly.[60] The first trial under the NSL—the trial of Tong Ying-kit—resulted in a nine-year prison sentence for 'inciting sedition' for displaying the slogan "Liberate Hong Kong Revolution of Our Times" at a political protest and for 'terrorist offences', stemming from Tong Ying-kit's collision with police officers at that protest. TrialWatch similarly found that this trial violated the right to freedom of expression and Tong Ying-kit's fair trial rights given the severe penalties assigned to his political speech, amongst other concerns.[61]

B. THE CASE: HKSAR V. TAM TAK-CHI

Tam Tak-chi is a 48-year-old opposition activist and vice chairman of the pro-democracy political party People Power; he is also a popular radio host in Hong Kong, known as 'Fast Beat'. On September 6, 2020, Tam Tak-chi was arrested by national security police on 13 charges including 8 counts of "uttering seditious words"; a 14th charge was added on November 4, 2020. At Tam Tak-chi's arrest, Hong Kong senior superintendent Li Kwai-wah said that Tam was charged for using words that "brought into hatred and contempt of the government and raised discontent and disaffection among Hong Kong people."[62]

The charges against Tam Tak-chi were consolidated for the instant trial in December 2020.

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[58] Public Order Ordinance ("POO") (Cap. 245) (1967), www.elegislation.gov/hk/hk/cap245. *See generally* Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 HONG KONG L.J. 279 (2002); Hong Kong Bar Association, *The Bar's Submissions on the Right of Peaceful Assembly or Procession*, Nov. 25, 2000, *available at* https://www.hkba.org/node/14200.
[59] UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013, para 10; UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, CCPR/C/79/Add.117, Nov. 15, 1999; UN Human Rights Committee, Concluding Observations, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, Apr. 21, 2006, para. 14; Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, OL CHN 7/2020, Apr. 23, 2020.
[60] Timothy Otty QC & TRIALWATCH, HKSAR v. Lai Chee Ying et al. (2021), *available at* https://cfj.org/wp-content/uploads/2021/07/Jimmy-Lai-et-al_July-2021_Fairness-Report.pdf.
[61] Rebecca Mammen John & TrialWatch, HKSAR V. TONG YING-KIT (2021), https://cfj.org/wp-content/uploads/2021/12/Tong-Ying-kit-Fairness-Report-December-2021.pdf.
[62] *Associated Press*, "Hong Kong activist Tam Tak-chi arrested for 'uttering seditious words'," Sept. 6, 2020, *available at* https://hongkongfp.com/2020/09/06/hong-kong-activist-tam-tak-chi-arrested-for-uttering-seditious-words/.

The alleged offences were:

- Uttering seditious words (7 counts)[63];
- Disorderly conduct in a public place (3 counts);[64]
- Holding or convening an unauthorized public assembly (1 count);[65]
- Incitement to knowingly take part in an unauthorized assembly (1 count);[66]
- Refusing or wilfully neglecting to obey an order by an authorized officer (1 count);[67] and
- Conspiracy to utter seditious words (1 count).[68]

As explained at trial in the prosecution's opening statement, Tam Tak-chi was charged with these 14 counts for the following alleged events:

(1) January 17, 2020 Charge 1 Incitement to knowingly take part in an unauthorized assembly and Charge 2 Uttering seditious words for using a loudspeaker at a Tai Po secondary school to talk to 500 students for 18 minutes. The prosecution further alleged that Tam incited participants to take part in a banned public procession on January 19, 2020.

(2) January 19, 2020 Charge 3 Disorderly conduct in public places: The prosecution alleged that Tam Tak-chi ran a street stand in Causeway Bay that attracted 70-80 participants and whom he led in chanting abuses at the police, ignoring police warnings to stop.

(3) March 15, 2020 Charge 4 Uttering seditious words and Charge 5 Disorderly conduct in public places: The prosecution alleged that Tam ran a street stand bearing the banner "rubbish government, citizens save yourselves" and distributed facemasks to people who correctly answered derogatory questions about the police.

(4) May 24, 2020 Charge 6 Organizing an unauthorized assembly, Charge 7 Disorderly conduct in public places, Charge 8 Refusing or wilfully neglecting to obey an order given by an authorized officer, and Charge 9 Uttering seditious words: The prosecution alleged that the defendant ran another street stand, ostensibly about public health, bearing the banner "the nation is secure but Hong Kong is in danger, pandemic public health lecture." At the stand, the prosecution said, Tam displayed posters accusing the police of arbitrary arrests and arbitrarily writing gathering ban tickets in the name of pandemic control; he appealed to people who had been written up to contest their charges. The prosecution claimed 70-80 people were gathered at the stand and that Tam never made any health-related statements. Instead, he stood on a ladder displaying a sign that read "the Communist Party is safe, Hong Kong is not" and "National Security Law is really the Communist Party Security Law, protecting the Party's safety but trampling human rights, killing off freedom, strangling democracy, ignoring the rule of law, harming Hong Kong."

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[63] Section 10(1)(b) of the Crimes Ordinance (Cap. 200 1971 Ed.).
[64] Section 17B(2) of the Public Order Ordinance (Cap. 245 1997Ed.).
[65] Section 17A(3)(b)(ii) of the Public Order Ordinance (Cap. 245 1997Ed.).
[66] Section 17E(2)(b) of the Public Order Ordinance (Cap. 245 1997Ed.).
[67] Section 17A of the Public Order Ordinance (Cap. 245 1997Ed.).
[68] Section 10(1)(a) of the Crimes Ordinance (Cap. 200 1971 Ed.).

Here again, the prosecution contended, he made derogatory remarks about the police and chanted pro-independence slogans. (At this point, the judge asked the prosecutor to pause as people were “smirking” in the gallery, and he reminded people to respect the court.)

(5) July 4, 2020 Charge 10 Uttering seditious words and Charge 11 Conspiracy to utter seditious words: Two days after the government published a statement to the effect that the slogan “Liberate Hong Kong, revolution of our times” may have been outlawed by the NSL and appealed to citizens not to test the law, the prosecution said, Tam set up another street stand, attracting around 30 people.

(6) July 8, 2020 Charge 12 Uttering seditious words: The prosecution alleged that Tam set up another street stand, attracting around 20 people. He allegedly made further statements against the central government and opposing the National Security Law.

(7) July 9, 2020 Charge 13 Uttering seditious words: The prosecution contended that Tam again set up a street stand and led a procession of 10 people. The prosecution alleged that Tam incited hatred against the Chinese government, the Hong Kong government and the police.

(8) July 19, 2020 Charge 14 Uttering seditious words: Finally, the prosecution alleged that Tam had organized another street stand leading around 25 people to chant “Liberate Hong Kong, revolution of our times” and “disband the police” and other slogans despite warnings from the police that this might violate the national Security Law. The prosecution again alleged that he had incited hatred against the Chinese government and saying that the attempt to criminalize slogans was “tyrannical” and violated freedom of expression. The prosecution further said that the defendant made baseless accusations against the police for harming civilians.

The trial took place over five days in the District Court, presided over by a national security judge, in July and October 2021, with closing statements presented in December 2021. The verdict was delivered on March 2, 2022, with the Court finding Tam Tak-chi guilty on 11 of the 14 charges. The sentence, first set off to March 31, 2022, was delayed again due to COVID-related court closures and delivered on April 20, 2022.

C. PRE-TRIAL PROCEEDINGS

After his arrest on September 6, 2020, Tam Tak-chi appeared in the Magistrate’s Court on September 8, 2020 holding a sign in court that said “You want me to shut up? I’ll speak even louder.”[69] His bail was denied and he was remanded in custody until the next hearing on November 17, 2020; his bail was again denied and he remained in pretrial detention until his trial started in July 2021.[70]

In November 2020, the Prosecution moved to have this case assigned to a specially-

[69] Kong Tsung-gan, Twitter Post, Sept. 8, 2020, *available at* https://twitter.com/KongTsungGan/status/1303304951280660482?s=20 (accessed September 20, 2021).
[70] In January 2021, while in detention and awaiting trial on these sedition charges, Tam Tak-chi was arrested under the National Security Law along with Joshua Wong (also in detention) and more than 50 other individuals for “subverting state power” for holding primaries in Hong Kong in 2020. (This trial is set to start in 2022.)

designated national security judge, a new mechanism created by the National Security Law (NSL). The Defence objected on the grounds that the sedition offences are not listed under the NSL but rather under the Crimes Ordinance. On December 2, 2020, the listing judge presiding over this case in District Court ruled that they would list the case before a designated judge, consistent with their obligation to ensure that cases are heard with a minimal delay, and in order to obviate the question as to whether a non-designated judge did or did not have jurisdiction to hear the case.[71]

In March 2021, Tam Tak-chi applied for a stay of proceedings on the sedition charges (seven charges of uttering seditious words and one charge of conspiracy to utter seditious words) on the grounds that the charges didn't comply with the indictment rules in light of the absence of necessary particulars about the offences; the charges were unconstitutional; and that the transfer of the case to a national security judge amounted to an abuse of process or was done without jurisdiction based on the classification of the offence.[72] On April 9, 2021, the District Court ruled on the jurisdiction issue, finding that sedition offences are indictable offences endangering national security, and under the NSL, can be heard in any of the Hong Kong courts including the District Court.[73]

In two separate decisions issued on April 26, 2021, the District Court ruled on the stay and indictment issues raised by the Defence. On the sufficiency of the indictment, the District Court held that the Prosecution, through its summary of facts and video footage, had complied with the Indictment Rules relating to the requirement to provide the Defendant with "reasonable information" as to the charges on sedition. In particular, the Court stated that "the Indictment Rules do not require the Prosecution to spell out the allegations in detail" and further "given the nature of the sedition offence," that it was "not practical, and also undesirable, to have a lengthy and complicated particulars of offence which could cause confusion or even misunderstanding."[74]

The Defence had also moved for a stay of proceedings under the Court's inherent power to prevent an abuse of process, arguing that the charges were a disproportionate restriction on freedom of expression and violated the Basic Law and the principle of legality. Here, the Court rejected the motion, holding that any challenge to the constitutionality of the charges should be addressed at trial and said it was not convinced that the prosecution was an abuse of process that would undermine a fair trial.[75]

Tam Tak-chi's trial, scheduled to start in May 2021, was rescheduled for July, when it

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[71] HKSAR v. Tam Tak Chi, [2020] HKDC 1153, Dec. 2, 2020, para.7 ("In my view, it is undesirable to leave a blemish on such an important issue so early in the proceedings, which may come back to haunt the parties in due course. In the exercise of my administrative function, I have decided to list the substantive argument before a designated judge to avoid any potential ultra vires problems and so that the parties may focus on their substantive argument and not sidetracked by collateral matters.").

[72] In Hong Kong, criminal offences may be either "summary" or "indictable", the latter being more serious offences in general that cannot be heard before the Magistrates' Court and carrying a higher sentence (maximum of seven years). These are heard by the District Court. The most serious criminal offences are tried before the High Court and generally with a jury. The Magistrates' Court by contrast can sentence defendants to a maximum of two years in prison. *See* Legislative Council Panel on Administration of Justice and Legal Services, LC Paper No. CB(4)569/13-14(04), *Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone*, (2014), *available at* https://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj0422cb4-569-4-e.pdf.

[73] HKSAR v. Tam Tak-chi, [2021] HKDC 424, April 9, 2021 (Ruling on Transfer & Stay).

[74] HKSAR v. Tam Tak-chi, [2021] HKDC 506, April 26, 2021 (Ruling on Indictment Rules), at para. 17.

[75] HKSAR v. Tam Tak-chi, [2021] HKDC 505, April 26, 2021 (Ruling on the Stay Application).

started but was continued again until October 2021. During this time, he remained in detention.

D. TRIAL PROCEEDINGS

July 29-30, 2021

The trial of Tam Tak-chi was scheduled to start in the District Court on July 26, 2021. However, the Court adjourned until July 29 as the Tong Ying-kit decision (which centred on the same slogan at issue in this case) was expected and was in fact delivered in the interim. On July 27, 2021, the Court of First Instance (the trial court of the High Court of Hong Kong[76]) convicted Tong Ying-kit of incitement to secession and terrorist activities for driving a motorcycle at a protest with a flag that had the slogan "Liberate Hong Kong, Revolution of Our Times" ("復香港, 時代革命") and crashing into police officers at the scene. (He was sentenced to a total of 9-and-a-half years in prison on July 30, 2021. TrialWatch monitored and published a report on this case.[77])

Tam's trial started on July 29, 2021.[78] At the outset, Judge Stanley Chan observed that around one-third of the public gallery had waved at the defendant as he arrived and admonished them to follow the rules of the court. The judge further noted that no one is permitted to make political expressions inside the courtroom and warned that he would order court security staff or the police to record the name and residential address of the persons involved. The prosecution then noted that with the sentence in the Tong Ying-kit case pending, there may be further amendments to the charges against Tam Tak-chi. The defence agreed but asked that the prosecution be required to strike new, allegedly seditious words from its opening statement, saying that the allegations advanced by the prosecution were like a "moving target." The judge refused, noting this was an evidentiary issue and that the prosecution had a duty to include all relevant information in its opening.

The parties then proceeded to discuss case management issues including timing. One issue that emerged was that Professor Janny Leung, one of the defence experts, had submitted her report and was in quarantine after traveling back from Canada; however, the report had yet to be fully translated into Cantonese. The prosecution raised its intention to object to this expert as not relevant. The judge appeared angered both by the tardiness of the prosecution's objection but also the expert's decision to write her report in English instead of Cantonese, resulting in potential delays to the trial.

The judge then identified four issues where the parties should be prepared to make submissions to assist the court:

(1) Is the Tong Ying-kit case (being decided at the Court of First Instance, not the Court of Appeal) binding or persuasive authority as regards the expertise of

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[76] *See supra* note 72 for discussion of the Magistrates' Court, the District Court, and the High Court.
[77] Rebecca Mammen John & TRIALWATCH, HKSAR v. Tong Ying Kit (2021), https://cfj.org/wp-content/uploads/2021/12/Tong-Ying-kit-Fairness-Report-December-2021.pdf.
[78] *See generally* TrialWatch Monitoring, July 29, 2021; *The Stand News*, "【譚得志被控煽動】控方詳列街站言論　指曾喊「光時」171 次　辦「健康工作坊」無健康訊息," July 29, 2021 (accessed December 14, 2021).

the expert witnesses on the subject of the slogan “Liberate Hong Kong, revolution of our times”?

(2) If binding, and the lower courts accept the expertise of the expert witnesses, does the court have any discretion to accept only part of the expert evidence?

(3) Is Tong Ying-kit binding authority or persuasive authority regarding the interpretation of the words “Liberate Hong Kong, revolution of our times” and can the lower courts only accept part of the Tong Ying-kit decision as fact?

(4) Should the court take a “reasonable man” approach in examining the expert evidence—that is to say, and thinking of the weight of the expert evidence, should the court apply the standard of the reasonable man, someone who is politically neutral, lives in contemporary Hong Kong, rational, holds the common understanding of society, capable of understanding the events of Hong Kong in 2019 and 2020 in a manner that reflects reality (貼地)?

The prosecution submitted that the witness’ expertise was a question of fact for the court. They further maintained that while the ruling of the Court of First Instance in *Tong Ying Kit* on this matter did not bind the court hearing Tam’s case, it was still of high persuasive value because the issues and expert witnesses involved were the same as the present case. They also argued that the court had discretion to accept only part of the expert evidence and similarly, that the court was not bound by the *Tong Ying-kit* court’s interpretation of the slogan "Liberate Hong Kong, revolution of our times " (“復香港, 時代革命") and had discretion to accept only parts of it. Finally, the prosecution opined that the court should take an objective reasonable man approach to consider the credibility, reliability and inherent probability of evidence, while also taking into account the intention of the defendant.

The defence argued that this and other lower courts are only bound by findings of law, not fact, and if the prosecution wished to challenge the admissibility of defence expert evidence, the court would have to consider it anew. The defence agreed that the court had discretion to accept only part of the expert evidence in *Tong Ying-kit* and similarly, that it had discretion to accept only parts of the *Tong Ying-kit* decision on the meaning of the political slogan, which was not binding precedent on the Tam court.

To this the judge replied that in the *Tong Ying-kit* case, three experienced justices made an authoritative and persuasive ruling on the meaning of the eight words ("Liberate Hong Kong, Revolution of Our Times" “復香港, 時代革命"), and so it may be inappropriate for the District Court hearing Tam’s case to re-consider the slogan’s meaning. The judge accepted however the proposal that the court take the “reasonable man approach” in dealing with the facts.

Next, the Court added a fifth question: as the *Tong Ying-kit* court found that the meaning of the slogan was specific to the particular time and place at which it was used, if the Court thought that the finding was highly persuasive, authoritative and applicable, did the Court need to hear from the expert witnesses?

The Court suggested that it would be most efficient if the parties agreed to adopt the *Tong Ying-kit* court’s ruling on the meaning of those words and only raised evidence or cross-examined witnesses on the application of this decision to the circumstances surrounding the 14 charges in Tam Tak-chi’s case. The parties then agreed that the experts’ evidence from *Tong Ying-kit* could be admitted into evidence as a “proof by written statement” under

the criminal procedure rules.[79] The prosecution next filed amendments to the charge sheet and Tam Tak-chi proceeded to plead not guilty to all 14 charges. The court adjourned for an hour for the defence team and their client to discuss the prosecution's amended admitted facts.

When court resumed, the judge again admonished the public gallery, stating that while he was pleased the public showed restraint and refrained from waving at the defendant, nevertheless, disorder in the courtroom could constitute intimidation. He then ordered the prosecution to prepare a camera and to record any disorderly behaviour, stating "if you do not respect the authority of the court, do not blame the judge for strictly enforcing the law." The judge next addressed the defendant and told him that his earlier words were not against Tam Tak-chi, who responded that he understood and also said "No decision before trial." The judge then chastised the defendant for his response and told him there is "no freedom of speech inside a courtroom" but that he would not apply any bias against Tam Tak-chi for the misconduct of his supporters.

Turning back to the evidence, the defence stated it was willing to admit prosecution expert Professor Lau's report and the prosecution was willing to allow in the defence expert reports, produced by the same two experts who testified for the defence in *Tong Ying-kit* (Professor Francis Lee and Professor Eliza Lee). The defence also said it would not call either Professor Lee to testify but would call its additional expert, Professor Janny Leung, a linguistics expert. The prosecution said it would still object to her inclusion among the experts.

The parties then turned to the opening of the case. The prosecution explained that there were 14 charges against Tam Tak-chi, stemming from his conduct in attending or hosting eight public meetings, campaign street stands or processions between January and July 2020.[80] The prosecution outlined its expert evidence from Professor Lau Chi-pang: that the slogan "Liberate Hong Kong, revolution of our times " / "復香港，時代革命" must be construed as a whole, taking into account factors such as Edward Leung's campaign speech and leaflet in his 2016 by-election campaign and the vandalism outside at the Liaison Office on July 21, 2019 where the slogan was chanted. The prosecutor said that the slogan, taking the context into account, must connote Hong Kong independence or secession.

After lunch, the prosecution showed videos of Tam Tak-chi's speeches at the January 17, 2020 secondary school public assembly and the January 19, 2020 public assembly. Following these initial videos, the prosecution presented its first witness, a senior inspector with the police department who testified that he ordered Tam Tak-chi to stop his speeches and heard him insult the police at the January 19 public assembly.

On July 30, 2021, the prosecution continued with videos of Tam Tak-chi's street stands and prosecution witness testimony. Another police officer testified that on May 24, 2020, he saw Tam Tak-chi running a stand with around 100 people gathered and warned him multiple

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[79] Criminal Procedure Ordinance (Cap. 221) s.65B(1): "In any criminal proceedings, other than committal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person."
[80] TrialWatch Monitoring, July 29, 2021; *The Stand News*, "【譚得志被控煽動】控方詳列街站言論　指曾喊「光時」171 次　辦「健康工作坊」無健康訊息," July 29, 2021 (accessed July 29, 2021).

times that this was an unauthorised assembly. He testified that Tam Tak-chi never mentioned any public health information while claiming this was a health talk and that many participants booed the police. The prosecution then showed another video of Tam Tak-chi leading the crowd in chanting slogans and then being arrested by the police. On cross-examination by the defence counsel, this police officer testified that while the defendant had said some of those gathered were medical professionals present at the stand to give talks, he did not investigate whether that was true. Questioned by the judge as to why Tam Tak-chi was speaking English in the videos, the officer also testified that Tam Tak-chi was trying to get the attention of foreign journalists.

After another video of Tam Tak-chi leading a crowd in chanting political slogans, the prosecution questioned another of its witnesses, a police officer who followed the public procession on July 4, 2020 in plain clothes and testified that people were following the defendant and shouting slogans. The prosecution clarified that the "conspiracy to utter seditious words" charge stemmed from this incident where the defendant shared his microphone with a man wearing black clothing. Finally, the prosecution submitted three more videos (for a total of 11 videos produced during the fact section of the trial). In the first, Tam Tak-chi was seen operating a street stand on July 8, 2020, making political statements, criticising the Communist Party and the National Security Law, and urging the crowd to vote him into the Legislative Council. In the second, from July 9, 2020, Tam Tak-chi was shown running an election campaign street stand, criticising the Communist Party, referring to police brutality, and shouting political slogans. The third video—from July 19, 2020—was similar, showing Tam Tak-chi running an election campaign street stand, criticizing the Communist Party and the police, and referring to police brutality.

The case was then adjourned to October 18, 2021 for the expert testimony.

The judge further ordered that both parties should, on or before September 24, 2021, write to court as to:

1) whether there is a dispute as to the expertise of the proposed defence expert witness—and if she is an expert, how to deal with her expert report (i.e. whether to admit her report into evidence under s65B Evidence Ordinance, dispensing with the need for examination-in-chief); and,
2) how to handle the defence's constitutionality challenge to Sections 9 and 10 of the Crimes Ordinance (Cap. 200) (i.e. the offence of uttering seditious words).

October 18-19, 2021

When the trial resumed in October, close to three months after it was suspended, the Court heard testimony first, from the prosecution expert and next from the additional defence expert, Professor Janny Leung, both opining on the meaning of the slogan "Liberate Hong Kong, Revolution of Our Times" ("復香港時代革命"). The prosecution expert, Lau Chi-pang, Professor of History at Lingnan University, previously testified for the prosecution in the *Tong Ying-kit* case; the defence expert was Professor Janny Leung, Professor of Linguistics at Hong Kong University (an additional expert supplementing prior experts reports by the two defence experts in the *Tong Ying-kit* case).

Professor Lau, also a council member of the semi-official Chinese Association of Hong Kong and Macau Studies think tank, testified that words such as “liberate” and “revolution” were used in Chinese history, including the Records of the Three Kingdoms written in the third century, and meant to “overthrow the government” or “take back Hong Kong” from “enemy hands” in addition to not recognising the regime governing Hong Kong. Professor Lau suggested that these slogans as well as the common phrase “Hongkongers, add oil” (used as a form of encouragement) could incite people to break the law.[81] He further testified that the slogan originated with Hong Kong activist and legislative candidate Edward Leung in 2016 and had been popularised in the 2019 protests. The prosecution played a video of one of Edward Leung’s rallies in 2016 but the judge interrupted to ask whether this was necessary when a video had already been accepted as evidence, and a transcript had been prepared. “Why does the prosecution have to play this person’s political declaration in such a solemn criminal court?” asked Judge Chan.[82]

The prosecution showed several additional videos including of the July 28, 2019 protest at the PRC liaison office in Hong Kong and other 2019 protests where people were chanting slogans including "Liberate Hong Kong, revolution of our times ", “Five Demands, not one less”, and “‘Fight for Freedom: Stand with Hong Kong.” In some videos, people were shown to be smashing Bank of China windows with bricks and metal poles; in others, they are carrying United States of America flags. These videos did not include images of the defendant. After 45 minutes, the audio appeared to stop working on the video. The videos were paused for discussion, during which time the judge rebuked people in the gallery for waving to Tam and ordered cameras to be prepared to film people in the public gallery in case of “any chaotic situation” in court.[83]

On cross-examination, and with further questions as to the meaning of the slogan and similar phrases used at protests, the defence counsel argued that Professor Lau was not an expert in linguistics. The prosecution next called on Superintendent Eddie Cheung who previously submitted a report and testified for the prosecution in the Tong Ying-kit trial. Cheung’s report, as he explained to the court, was based on viewing over 2, 000 videos from protests in 2019 and 2020 that detailed the occurrence of the slogan “Liberate Hong Kong, revolution of our times” and when this and other slogans were accompanied by violent acts (he did not reveal the numbers in his evidence, while answering questions on methodology from the prosecution and the court).[84]

Towards the end of October 18, the defence produced its expert witness, Professor Janny Leung. Throughout the testimony, the judge interrupted and asked questions of both the defence counsel and the expert witness about her report and its methodology. Professor Leung’s testimony centred on her report examining the contemporary use of the slogan in various social movements in Hong Kong (2012-2019). In part, the study relied on information pulled from Google to show the frequency with which the words were used in books or in the search engine. The report also relied on various definitions of the slogan

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[81] TrialWatch Monitoring, October 18, 2021; Brian Wong, *South China Morning Post*, “Chanting ‘Hongkongers, add oil’ or calling government ‘tyrannical’ could be seditious, court hears,” Oct. 18, 2021.
[82] TrialWatch Monitoring, October 18, 2021; Candice Chau, *Hong Kong Free Press*, “Experts dispute meaning of protest slogan as trial of Hong Kong activist Tam Tak-chi resumes after 2-month wait,” Oct. 18, 2021, *available at* https://hongkongfp.com/2021/10/18/experts-dispute-meaning-of-protest-slogan-as-trial-of-hong-kong-activist-tam-tak-chi-resumes-after-2-month-wait/.
[83] *Id.*
[84] *Id.*

and the specific words it contained, pulled from dictionaries, as well as articles and government statements in response.

Professor Leung testified that her findings departed from those of Professor Lau Chi-pang on the meaning of the term "Liberate" ("光復"). Specifically, she said that while the term appears to mean "restore" ("修復、恢") in some contexts or even to “improve” a problem, it did not necessarily mean to “overthrow the regime” and, she continued, there was no evidence that the people involved in the movements using the slogan wanted the territory or land to be split. She said that the historical examples provided by Professor Lau were just that: examples rather than definitions. Further, she testified that Professor Lau Chi-pang used the words "revolution" ("革命") and "transformation/change" ("變革") interchangeably, suggesting a level of fluidity to the terms and referring to various articles and social movements where these terms had been used in very different contexts. Asked by the prosecution whether “revolution” had a similar meaning in various political contexts, she said no, for example, American politician Bernie Sanders' presidential campaign slogan was "Our Revolution" but no one would interpret it as a will to overthrow the government.

Both the prosecution and the Court asked Professor Leung questions during cross-examination, and both suggested that her report did not have credibility and that she did not have the requisite expertise for the issues on which she was testifying.[85] In cross-examining Professor Leung, the prosecution observed that “the examples that you cited have one thing in common - they all pinpointed on mainlanders,” and at one point, the judge also asked Professor Leung about her cited news article sources and, in particular, why she focused so heavily on “Voice of America” articles.

The prosecution further argued that Professor Leung’s report was unreliable and inadequate because it did not include the context of violence and ‘subversive acts,’ which according to the prosecution was the context in which the slogan was used in 2019. Professor Leung stated that the slogan could not be equated with violence because it was also used in contexts where there were no violent acts. The prosecution asked whether she agreed that her failure to address these violent incidents was a “serious omission”, to which members of the gallery called out “disagree!”, prompting more warnings from the judge.[86]

Finally, Professor Leung said she had not been provided with, and so had not reviewed, the report compiled by Senior Inspector Eddie Cheung[87]. The judge chastised her for not requesting an adjournment to procure this report from the defence team and to review it in advance of her testimony.

At the conclusion of the expert testimony, the prosecution asked the court to adjourn the next hearing to December 14, 2021, noting that the defence wanted to include a constitutional challenge in its closing submissions. The court agreed and set the closing

[85] TrialWatch Monitoring, October 19, 2021; Candice Chau, *Hong Kong Free Press*, “Hong Kong judge bars man from court as activist Tam Tak-chi’s sedition trial continues,” Oct. 19, 2021, *available at* https://hongkongfp.com/2021/10/19/hong-kong-judge-bars-man-from-court-as-activist-tam-tak-chis-sedition-trial-continues/.
[86] TrialWatch Monitoring, October 19, 2021; Candice Chau, *Hong Kong Free Press*, “Hong Kong judge bars man from court as activist Tam Tak-chi’s sedition trial continues,” Oct. 19, 2021, *available at* https://hongkongfp.com/2021/10/19/hong-kong-judge-bars-man-from-court-as-activist-tam-tak-chis-sedition-trial-continues/.
[87] This report was also presented in the trial of Tong Ying-kit in June 2021.

arguments for December 14, 2021.

December 14, 2021[88]

On December 14, 2021, the Court heard closing submissions from the defence. Starting with the term "seditious intention", Tam's lawyers argued that this legal provision criminalized an extremely broad range of conduct, from bringing "hatred" to raising "discontent" to "promoting ill-will" and "enmity", with some of those words being ambiguous. As such, the defence argued, the law failed the constitutional requirement (under the Basic Law, incorporating the ICCPR) that any restriction on freedom of expression be "provided by law."[89]

The judge responded that bringing "hatred" clearly meant "to arouse the emotional reactions of others", which could indeed lead to actions such as, for example, assaults on Asians in the streets.[90] He also disputed that the meanings of "discontent" and "disaffection" were too vague or broad.

The defence insisted that the statutory provision was too ambiguous and said it was "difficult, if not impossible, to have a universal standard towards the understanding of the 'seditious words' concerned" and further, that it would not be possible to predict the impact on or reaction of the audience who heard those words "especially in a multicultural society like Hong Kong."[91]

The defence then referenced a 1950 case from the Supreme Court of Canada that discussed the origin of the offence of sedition pre-18th century, noting that this law emerged at a time when the ruler was viewed as superior and should not be criticised. In this case, the defence said, the Supreme Court of Canada had observed that with the emergence of the democratic state, the government is now seen as a servant of the people. Thus, critical discussions on the freedoms of thought and speech have become an indispensable part of everyday life.

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[88] *See generally* Citizen News, '快必煽動文字案：律政司指言論不尊重中共領導地位即可能犯法、憎警方或等如憎政府 、明年2.22裁決' [The Tam Tak Chi case on Publishing Seditious Words: The Department of Justice points out that speech that does not respect the leadership of the CCP may violate the law, and hatred in the police might equate to hatred in the Hong Kong Government. Verdict on 22 February next year], Dec. 14, 2021, https://bit.ly/3F1xGoi (accessed Dec. 14, 2021); *Headline Daily*, '「快必」涉發表煽動文字案押明年2.22裁決、官下令警啟錄影機拍攝公眾離去' [Verdict of the Tam Tak Chi case on publishing seditious words adjourned until 22 February next year. Judge instructed police to record members of the public leaving the courtroom after the hearing], Dec.14. 2021, https://bit.ly/32U1A0T (accessed Dec. 14, 2021); *Oriental Daily*, '**快必涉煽動案審結、明年2.22裁決**' [The Tam Tak Chi case on publishing seditious words comes to an end, verdict on 22 February next year], Dec. 14, 2021, https://bit.ly/3mXxQqz (accessed Jan. 29, 2022); *Epoch Times Hong Kong*, '「快必」譚得志涉煽動案 控方：憎警察等如憎政府' [The Tam Tak Chi case on Sedition – Prosecution: hatred in the police equates to hatred in the Hong Kong Government], Dec. 14, 2021, https://bit.ly/31vZnYN (accessed Jan. 29, 2022); *Inmediahk.net*, '快必煽動案明年2月裁決、 控方：不尊重共產黨領導地位即否定一國兩制' [Verdict of the Tam Tak Chi case on sedition on 22 February next year, Prosecution: disrespecting the leadership of the CCP means denying One Country, Two Systems], Dec. 14, 2021, (accessed Jan. 29, 2022).

[89] TrialWatch monitoring, December 14, 2021.

[90] This may have been a reference to the recent hate crimes against persons of Asian origin in the United States and other countries.

[91] TrialWatch monitoring, December 14, 2021.

The defence, citing *Hysan Development v Town Planning Board* from the Hong Kong Court of Final Appeal[92], next argued that the sedition offence did not meet the test of proportionality as it restricted legitimate rights (namely, the right to freedom of expression). The judge countered that all laws issued by a lawful government must be viewed as legitimate and so legislation that was lawfully passed and implemented could not be illegitimate. The judge then observed that many Canadian sources were cited in the defence submission, but this didn't reflect or take into account the post-World War II chaotic situation in China and Europe. The defence maintained that many common law jurisdictions have abolished the offence of sedition and, in response to a question from the judge on subsequent legislation, he noted that these countries have not implemented replacement laws that do not require a showing of violence.

Returning to the proportionality argument, the defence said that the restriction on Tam Tak-chi's freedom of expression (through a conviction for sedition) would be disproportionate if all that the authorities needed to show was that the individual had spoken the allegedly seditious words to establish 'incitement'. The lawyers further stated that there is no "exhaustive list of words" that constitute sedition, resulting in a situation where no one would know if their words violated the law until their arrest.

The defence then argued that on the day or days in which the defendant had made allegedly seditious public statements, the public events were overall peaceful and, the defence claimed, the defendant had tried to sooth the participants from time to time. The defence then concluded that the prosecution had not proved beyond a reasonable doubt that the defendant had committed sedition.

The judge raised the fact that Tam Tak-chi had allegedly shouted slogans such as "最大嘅黑社會就係共產黨" ("The Chinese Communist Party is the biggest triad"), presumably implying that these words violated the ordinance. The defence responded by pointing to the changes in the statute after the 1997 Handover, whereby "any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) ... shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China."[93] As the new interpretative guidance did not mention the Chinese Community Party (CCP), the defence said, the defendant's words about the CCP were not against the law.

In response to this, the prosecution countered that in accordance with the Constitution of the People's Republic of China, the CCP is the sole and supreme ruling party of the People's Republic of China. In practice, the prosecution argued, not respecting the CCP's leadership constitutes a denial of the constitutional foundation of the "One Country, Two Systems" principle and thus violated the law. The prosecution also brought attention to slogans the defendant allegedly shouted about the police, including "黑警死全家" ("Evil Cops, Death to your Entire Family"). According to the prosecution, statements bringing hatred against the police could also be equated with bringing hatred against the Hong Kong government.

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[92] *Hysan Development v Town Planning Board* (FACV 21/2015), where the CFA amended Hong Kong's position in regards to the well-established proportionality test: (a) serving a legitimate aim; (b) rationally connected to the aim; and (c) no more than necessary in attaining the aim. The CFA revised the test by including an additional fourth step which is (d) to weigh the detrimental impact of the decision against the societal benefits gained.
[93] Schedule 8 of Cap. 1 Interpretation and General Clauses Ordinance.

At this point, there was noise in the gallery, and the judge asked whoever was making noise to identify themselves. The judge then adjourned the trial until February 22, 2022, when the verdict would be read. He also instructed the police to turn on video recording equipment as people were leaving the courtroom.

March 2, 2022 Verdict

Ahead of Tam's verdict, scheduled to be announced in court on February 22, 2022, the Court delayed the decision for another week, to March 2, 2022.[94] The Court did announce the verdict on March 2, 2022, finding Tam Tak-chi guilty on 11 of the 14 charges and acquitting him of two counts of "disorderly conduct in a public place," and one count of "conspiracy to utter seditious words." He was convicted of seven counts of "uttering seditious words", one count of organizing an unauthorised assembly, one count of disorder in public places, one count of inciting others to participate in an unauthorised assembly, and one count of refusal to comply with police orders.

In the courtroom, the judge reportedly ordered the prosecution to record the public gallery, noting that it was an issue concerning "the dignity of the judiciary" and that the people's right to freedom of expression did not override the judiciary.[95]

The 62-page written decision was published in Cantonese with only a very brief summary of the decision in English—a break from Hong Kong's tradition of publishing legal decisions in full in both languages.[96] This left many non-Cantonese-speakers without detailed information on what language or conduct constituted sedition in the first such trial in several decades.

The Court's judgment rejected the defence arguments that the law on sedition was too vague and overly broad, observing that it was "sufficiently flexible" and "sufficiently applicable to the current situation to maintain the scope it covers":

> Very frequently, the offenses in ordinances cannot be strictly provided for because the ordinances move together with the times following changes in the environment, era, or the general mood of society (unless they are continuously revised). This makes the court able to explain and interpret conceptual words, such as "hostility", "ill will", "disaffection", "contempt", and "hatred" as appropriate to the situation.[97]

The Court also rejected the argument that a prosecution for political speech under the sedition ordinance was a disproportionate sanction, noting that the statute itself identified several exceptions and possible defences to the charge of sedition. Further, the Court

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[94] Timothy McLaughlin, Twitter Post, Feb. 21, 2022, https://twitter.com/TMclaughlin3/status/1495691180205813768?s=20&t=mboEbbCKD8Lej0uIgRSakQ.
[95] Candice Chau, *Hong Kong Free Press*, "Hong Kong pro-democracy activist found guilty under colonial-era sedition law over speech, slogans," Mar. 2, 2022, https://hongkongfp.com/2022/03/02/breaking-hong-kong-pro-democracy-activist-found-guilty-under-colonial-era-sedition-law-over-speech-slogans/.
[96] *South China Morning Post*, Opinion, "Hong Kong's system of open justice being lost in translation," Mar. 13, 2022, https://www.scmp.com/comment/article/3170321/hong-kongs-system-open-justice-being-lost-translation.
[97] HKSAR v. Tam Tak-chi, DCCC 927, 928 and 930/2020 (consolidated), [2022] HKDC 208, Reasons for Verdict, para. 54.

noted, the law was not a disproportionate restriction as sedition offences "constitute offences that jeopardize national security" under Hong Kong law and, as such, "naturally create restrictions in order to protect national security." [98] Such restrictions are justified and rational, the Court said, given "the interests of collective society to achieve peace and order in society."[99]

On the meaning of the slogan—"Liberate Hong Kong revolution of our times"—the Court first discussed the defence witness's testimony and evidence and observed that (a) she did not dispute the government's interpretation of the slogan;[100] and (b) her research methods—using Google search frequencies and other interview and sampling methods—were "unscientific", unreliable, and improperly selective.[101] It adopted then the prosecution expert's interpretation of the slogan, citing from its report:

> [T]he basic assertion and meaning the slogan 'Liberate Hong Kong, revolution of our times' is to bring about the secession of the indigenous territory from the sovereignty of the state, and that in the political context of Hong Kong, the appearance of this wording inevitably has the objective of causing the secession of the Hong Kong SAR from the People's Republic of China.[102]

Next, in addressing the defence argument that it was not sedition to criticize or raise concerns about the National Security Law, the Court said that this was not what the defendant was doing on July 1, 2020; his words, the Court said, did not display "a deep understanding of the text" of the law that had just come into effect nor did it appear that he had "carefully examined the total 66 articles of the National Security Law."[103] Rather, the Court found, the defendant was not criticising the law but was "inciting others to not pay attention to the National Security Law, challenge the authority of the police, hold in contempt, and violently attack the pro-establishment camp in the legislative assembly, and to call out far and wide for Legislative Council members that are well known by the public to be attacked."[104]

To the defence argument that Tam Tak-chi's words criticising the Chinese Communist Party (CCP) were not "seditious" because the CCP is not the same thing as the Central Government, the Court held:

> Even if the words regarding the Communist Party were removed, I believe that the defendant still had seditious intent in attacking the Government of the SAR. Because the Government of the SAR is authorized by the central authorities, this is also an attack on the central authorities.[105]

Similarly, the Court held that the defendant's words insulting the police and/or accusing them of brutality were also seditious as the police "plays an important role for the

[98] *Id.* at para. 57.
[99] *Id.* at para. 57.
[100] *Id.* at paras. 64, 66, and 67.
[101] *Id.* at para. 65-66.
[102] *Id.* at para. 68, citing from Paragraph 57 of the first report by the prosecution expert.
[103] *Id.* at para. 70.
[104] *Id.* at para. 72.
[105] *Id.* at para. 73.

Government of the SAR."[106]

The Court then found Tam Tak-chi guilty of 7 charges of uttering seditious words (charges 2, 4, 9, 10, 12, 13, and 14) for using the slogan "Liberate Hong Kong, revolution of our times" (through which "the defendant is naturally instigating through illegal means to change the structures of Hong Kong as prescribed by law"[107]), criticising the National Security Law, and insulting the police and the CCP at different rallies.

The Court further found Tam Tak-chi guilty of inciting others to knowingly participate in an unauthorised assembly on January 17, 2020 (charge 1), holding or convening an unauthorised assembly on May 24, 2020 (charge 6), and refusing to obey an order from a police office on May 24, 2020 (charge 8). The Court also convicted Tam Tak-chi of disorderly conduct (charge 3) for shouting slogans to a group of onlookers and using insulting speech on January 19, 2020.

April 20, 2022 Sentencing

On April 20, 2022, the District Court ordered Tam Tak-chi sentenced to 40 months in prison and a HK $5,000 fine after his conviction on 11 of the 14 charges. Specifically, the Court issued a two-year sentence for the first charge (inciting others to knowingly participate in an unauthorised assembly on January 17, 2020); for the seven sedition charges, the Court ordered a sentence of 21 months (12 months of which would be served consecutively to the other sentences. The Court also ordered Tam Tak-chi sentenced to one month in prison for disorderly conduct in a public place (charge three) and one-and-a-half years for holding an unauthorised assembly, three months to be served consecutively with the full sentence. Finally, the Court issued a HK $5,000 fine for charge 8, refusing or wilfully neglecting to obey an order given by an authorized officer on May 24, 2020.[108]

Because four of the counts of sedition took place after July 1, 2020, when the NSL became law, the Court gave these four charges a higher sentence, setting the range at 18 months (compared to 15 months for the three other sedition charges) then ordering that three of the 15 months for the first set of charges be served consecutively with the 18 months for the post-NSL charges.[109]

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[106] *Id.* at para. 82.
[107] *Id.*
[108] HKSAR v. Tam Tak-chi, [2022] HKDC 343, Summary of Judgment, April 20, 2022.
[109] *Id.*

METHODOLOGY

A. THE MONITORING PHASE

TrialWatch monitored the trial proceedings in Hong Kong from July through December 2021, as well as the verdict which took place on March 2, 2022 and the sentencing on April 20, 2022. TrialWatch compiled the pretrial decisions as well as the court's decisions on the verdict and sentence, which it translated from Cantonese to English.

B. THE ASSESSMENT PHASE

Elizabeth Wilmshurst, a member of the TrialWatch Expert Panel, reviewed the results of the monitoring and the Court's written decisions on pretrial matters, the verdict, and the sentence, in addition to reviewing the criminal statutes under which the defendants were charged. TrialWatch staff prepared drafts of the report that Ms. Wilmshurst reviewed and which facilitated her legal conclusions and grading of the trial.

ANALYSIS

A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR), made applicable to the Hong Kong Special Administrative Region by the Joint Declaration and Basic Law; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; and commentary from UN Special Procedures.

B. VIOLATIONS AT TRIAL

Many core procedural rights were respected throughout the trial, including the right to a public hearing, the right to be present, and the right to a public judgment. The Court issued public rulings in pre-trial and trial proceedings, and in its reasoning behind its verdict.

Nevertheless, the case raises serious concerns about a major component of Tam Tak-chi's right to a fair trial, namely, the right to be tried by an impartial and independent tribunal. The conviction and sentencing at the trial also violated Tam Tak-chi's right to peaceful assembly and freedom of expression. As regards the sedition offences, the trial and conviction raised questions under the principle of legality, as Tam Tak-chi was convicted under a broad and unspecific law for political speech. Finally, the context in which this case was brought and the analysis in the judgement suggest that the charges were brought in order to punish Tam Tak-chi for exercising his rights and for his political activism.

The Right to an Impartial and Independent Tribunal

Under the ICCPR, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[110] As explained by the UN Human Rights Committee, this requirement of competence, independence, and impartiality "is an absolute right that is not subject to any exception."[111] Tam Tak-chi's trial violated this important right since he was tried by a national security law judge, appointed through a process that violates the requirements of judicial independence and impartiality, taking also into account the political context surrounding and within this trial.

Judicial Independence

The Human Rights Committee (HRC) has held that the requirement of judicial independence encompasses:

> the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion,

[110] ICCPR, art. 14(1).

[111] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 19 [hereinafter HRC General Comment 32].

transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[112]

The HRC has further noted that a "situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."[113] As the Special Rapporteur on the Independence of Judges and Lawyers has observed, "undermining [judges'] independence jeopardizes most judicial guarantees."[114]

The Basic Principles on the Independence of the Judiciary further provide that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."[115] Likewise, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that "[a]ny method of judicial selection shall safeguard the independence and impartiality of the judiciary"[116] and encourage transparency and accountability in judicial selection.

In addition, human rights law requires that judges be protected by conditions of tenure that insulate them from removal or interference based on their rulings. The UN Human Rights Committee has said that judges should only be removed or suspended on "serious grounds of misconduct or incompetence."[117] Similarly, the Basic Principles on the Independence of the Judiciary note that any decisions in removal proceedings "should be subject to an independent review."[118] Further, Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe states, "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office."[119] The UN Human Rights Committee has, for instance, criticised a five-year term for judges to the Central Court in the Democratic People's Republic of Korea, which it considered endangered the independence of the judiciary.[120]

Although Tam Tak-chi was not charged with an offence under the NSL, the prosecution chose (and higher courts approved) that his case be heard by a designated national security judge on the grounds that sedition is a national security offence. But the procedure by which these judges are appointed, as well as their conditions of tenure, raise significant concerns regarding potential pressure from the Executive branch and thus may imply to a reasonable observer that these judges may not be fully impartial in the trials over which they preside.

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[112] *Id.*
[113] *Id.*; Human Rights Committee, Oló Bahamonde v. Equatorial Guinea, U.N. Doc. CCPR/C/49/D/468/1991, Nov. 10, 1993, para. 9.4.
[114] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Aug. 12, 2008, UN Doc. A/63/271, para. 36.
[115] Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 10, *available at* https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.
[116] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A(4)(h).
[117] HRC General Comment 32, para. 20.
[118] Principle 20.
[119] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, Principle 1(3).
[120] Human Rights Committee, Concluding Observations: Democratic People's Republic of Korea, U.N. Doc CCPR/CO/72/PRK, Aug. 27, 2001, para 8.

Article 44 of the NSL states:

> The Chief Executive shall designate a number of judges … to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office for the aforementioned designated judges shall be one year. A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.[121]

As previously discussed in TrialWatch's report on Tong Ying-kit's trial,[122] this regime for the appointment and removal of NSL judges presents several elements of concern. First, there is no public information at this point on the criteria by which the Chief Executive selects national security judges, but the text of the law suggests that there are no checks or limiting principles. While appointment by the Executive may not in and of itself be evidence of a human rights violation, the continued lack of transparency surrounding assignment procedures, in the context of the highly politicized nature of the law, must give ground for serious concern. The UN Special Rapporteur on the Independence of Judges and Lawyers has observed that "a non-transparent and subjective case-assignment system is vulnerable to manipulation and corruption."[123] This process raises similar concerns.

Article 44 also provides expansive grounds for removal of judges. While stating that a designated judge can be removed for statements or acts endangering 'national security,' it does not explain who can make that discretionary decision and based on what standard. Indeed, it even appears that Article 44 covers speech or actions that do not constitute national security *offences* but have an impact on what an official might subjectively view as national security—there is no clarity on this.[124] The lack of clarity and the apparently discretionary nature of decisions on removal suggest that national security judges may struggle to remain independent and also suggests that the speech and actions of judges will be closely monitored and policed. Moreover, not only can national security-designated judges be removed, but they serve in this capacity for only one year which, like the five-year regime criticized by the UN, may not provide sufficient length of tenure to insulate them from political pressure.

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[121] NSL, Article 44, https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf.

[122] Rebecca Mammen John & TRIALWATCH, HKSAR V. TONG YING-KIT (2021).

[123] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Aug. 13, 2012, UN Doc. A/67/305, para. 65.

[124] Absent further clarity on what speech or conduct is referred to, this provision may also infringe the judges' own rights to freedom of expression. As the UN Basic Principles on the Independence of the Judiciary state, "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary." Principle 8.

Impartiality

Article 14 of the ICCPR also requires that courts be impartial. This has two components: "First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."[125] The first component of this test is subjective—referring to the individual judge and whether their conduct or bias might impact decision-making in a specific case. The second component is objective and is tied to the principle that "[n]ot only must Justice be done; it must also be seen to be done."[126] If there is evidence that gives rise to justifiable doubts in the mind of the reasonable observer as to the court's impartiality, that court cannot be deemed impartial.[127]

In this case, the trial fails the objective test based on the potential for a lack of judicial independence inherent in the structure for the appointment and terms of tenure of a national security-designated judge, as discussed; it also inevitably gives rise to doubts, in light of the political context in which the charges emerged, as to whether justice can be seen to be done.

Over the last two years, mounting concerns have been raised regarding infringements of the independence of the judiciary in Hong Kong. For example, in April 2020 even before the NSL came into force, a report from *Reuters* cited concerns from senior judges in Hong Kong that their independence was under significant political threat and referred to statements in state-controlled media in the PRC warning judges in Hong Kong against "absolv[ing]" protesters arrested in the 2019 demonstrations.[128] In subsequent months, judges in Hong Kong were criticized in pro-Beijing publications for ruling in favour of individuals facing charges for participation in political protests in Hong Kong.[129]

Next, the Chief Executive has called those opposing the NSL "the enemy of the people" and said they were "colluding with foreign forces" and undermining security.[130] Even beyond demonstrations related to the NSL, the Chief Executive had warned that some

[125] HRC General Comment 32, Upara. 21. *See also* Human Rights Committee, Karttunen v. Finland, U.N. Doc. CCPR/C/46/D/387/1989, Nov. 5, 1992, para. 7.2.
[126] R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233.
[127] European Court of Human Rights, Incal v. Turkey, App. No. 41/1997/825/103, June 9, 1998, para 71.
[128] *Reuters*, Greg Torode & James Pomfret, "Hong Kong judges battle Beijing over rule of law as pandemic chills protests," Apr. 14, 2018, *available at* https://www.reuters.com/investigates/special-report/hongkong-politics-judiciary/.
[129] *See e.g.,* Kelly Ho, *Hong Kong Free Press*, "Hong Kong judiciary dismisses complaints against magistrate over 6 protest rulings," Oct. 8, 20220, *available at* https://hongkongfp.com/2020/10/08/hong-kong-judiciary-dismisses-complaints-against-magistrate-over-6-protest-rulings/; *Associated Free Press*, "Beijing loyalists target Hong Kong judges after protester acquittals," Nov. 8, 2020; Zen Soo, *Associated Press*, "Hong Kong's top judge cautious on calls for judicial reform," Jan. 5, 2021, *available at* https://apnews.com/article/hong-kong-54a6a1a2d3611dae2411188d30358013 (noting that "In recent weeks, Chinese officials and state-owned media have accused the semi-autonomous city's courts of misinterpreting Hong Kong's mini-constitution, the Basic Law, in rulings relating to last year's pro-democracy protests.")
[130] *Reuters*, "Hong Kong leader says opponents of security law are 'enemy of the people,'" June 15, 2020, *available at* https://www.reuters.com/article/us-hongkong-protests/hong-kong-leader-says-opponents-of-security-law-are-enemy-of-the-people-idUSKBN23N08U.

protests in Hong Kong were "terrorist" acts and serious security threats.[131] Such comments from the political official who appointed the judge in this case—without any oversight or transparency—could leave the public with the impression that the opinions and biases of the Executive may influence the panel or the selection of the judges included therein, thus undermining the impartiality of the tribunal.

Further, there has been significant public discussion of the concern that the PRC will exert control over criminal justice in Hong Kong by bringing cases under the NSL, which makes the PRC Standing Committee the ultimate interpreter of the law.[132] Indeed, this case concerns sedition, an offence not listed in the NSL, and yet it was tried by a designated national security judge.

Finally, a judge's conduct, even if not giving a clear indication of subjective bias, may raise impartiality issues under the objective test.[133] In this case, concern was occasioned by a handful of statements the presiding judge made in court, the tone of the judgement, and other statements made throughout the trial to the gallery.

In *Mohammadi v. Iran*, the Working Group on Arbitrary Detention found a violation of the presumption of innocence where a judge's hostile questioning of an accused person and their lawyer was coupled with comments stating and/or implying the accused was an agent of the West and verbally abused the accused's views on human rights. Similar concerns arise here where at trial and then in the judgment, the Court raised concerns about the defendant communicating to foreign media and criticising the NSL as violating human rights.[134] The Court also made a comment to the defence—during the latter's argument that the sedition law was unconstitutional—that all laws issued by a lawful government must be viewed as legitimate, which may give the impression that the Court would be unwilling to probe the constitutionality of any HKSAR law on its face and so may have been unwilling to engage with the defence arguments.

C. OTHER FAIRNESS CONCERNS

In addition, this case raises concerns regarding the treatment of protected conduct—namely the rights to peaceful assembly and freedom of expression—and what appears to be a deliberate use of the sedition law to criminalise political speech and activity in Hong

[131] *RTHK*, "Violence, hate speech threaten national security: CE," Apr. 15, 2020, *available at* https://news.rthk.hk/rthk/en/component/k2/1520716-20200415.htm; Helen Davidson, *The Guardian*, "China's top official in Hong Kong pushes for national security law," Apr. 15, 2020, *available at* https://www.theguardian.com/world/2020/apr/15/china-official-hong-kong-luo-huining-pushes-national-security-law; *The Times*, "Hong Kong politician condemns protest violence as 'terrorism,' echoing Beijing," May 26, 2020, *available at* https://www.thetimes.co.uk/article/china-defends-new-hong-kong-security-laws-as-protests-return-f7bb85kxx; Anthony Dapiran, *AsiaLink*, "Hong Kong's Alarming New Reality: Peaceful Protest as Terrorism," July 29, 2020, *available at* https://asialink.unimelb.edu.au/insights/Hong-Kongs-Alarming-New-Reality-Peaceful-Protest-as-Terrorism.

[132] Article 65 of the NSL; *see* Primrose Riordan and Nicolle Liu, *Financial Times*, "Hong Kong's independent judiciary braced for Beijing onslaught," Nov. 25, 2020, *available at* https://www.ft.com/content/d08b540f-f124-437b-976c-013c431f61cc; Mary Hui, *Quartz*, "Beijing is breaching Hong Kong's final line of defense: its judiciary," Dec. 29, 2020, *available at* https://qz.com/1944464/hong-kongs-judges-are-its-final-line-of-defense-from-beijing/

[133] European Court of Human Rights, Kyprianou v. Cyprus, App. No. 73797/01, Dec. 15, 2005, para. 119.

[134] UN Working Group on Arbitrary Detention, Opinion No. 48/2017 concerning Narges Mohammadi (Islamic Republic of Iran), A/HRC/WGAD/2017/48, Sept. 22, 2017, para. 47.

Kong.

Right of Peaceful Assembly

The rights to peaceful assembly and freedom of expression are core human rights under international law and are protected in the Basic Law of Hong Kong. They are also interrelated insofar as an assembly may be a vehicle for expressing political criticism. Indeed, the UN Human Rights Committee, the body that interprets and fosters compliance with the ICCPR, has explained that "the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of one's views and opinions."[135]

Article 21 of the ICCPR, which is applicable to Hong Kong, states:

> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[136]

The UN Human Rights Committee has explained that freedom of assembly "constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism."[137] Any restrictions on this right must be "for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant" (i.e., national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others). Further, any restriction must be necessary and proportionate under international law, meaning that any restriction must be the "least restrictive means" of achieving the asserted objective and must be balanced against the interests of those participating in an assembly.

As TrialWatch previously observed in the 2021 trial of Lai Chee Ying and eight others for organizing an unauthorised assembly,[138] the Public Order Ordinance (POO) in Hong Kong—also used to charge and convict Tam Tak-chi of inciting participation in and holding an unauthorised assembly—runs counter to Hong Kong's own protections for freedom of assembly and the parallel rights under international human rights law.

In the present case, Tam Tak-chi was convicted of inciting others to knowingly participate in an unauthorised assembly, for which he received a two-year prison sentence, and/or holding or convening an unauthorised assembly, for which he received a one-and-half year prison sentence. Nothing in the trial or judgment alleges that the assemblies were violent, only that they were unauthorised and that Tam Tak-chi refused police orders to disperse

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[135] UN Human Rights Committee, Tatyana Severinets v. Belarus, Communication No. 2230/2012, CCPR/C/123/D/2230/2012, Aug. 14, 2018, para. 8.5, *available at* https://ccprcentre.org/files/decisions/G1824884.pdf.
[136] United Nations International Covenant on Civil and Political Rights, Mar. 23, 1976, 14668 U.N.T.S. 172, art. 21.
[137] Human Rights Committee, General Comment No. 37, para 1.
[138] Timmony Otty QC & TRIALWATCH, HKSAR V. LAI CHEE YING ET AL. (2021), https://cfj.org/wp-content/uploads/2021/07/Jimmy-Lai-et-al_July-2021_Fairness-Report.pdf.

the crowds. His conviction and sentence to imprisonment does not meet the necessity and proportionality requirements under human rights law.

As the UN Human Rights Committee observes:

> Given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection.[139]

The UN Human Rights Committee has previously addressed the compatibility of the POO with human rights standards. Indeed, it expressed concern that some of the provisions of the POO "may facilitate excessive restriction to the Covenant rights" and that this and other laws have been used in the "increasing number of arrests of and prosecutions against demonstrators" in Hong Kong.[140] Commenting also on the case of Jimmy Lai, Margaret Ng, Martin Lee and others convicted under the POO, several UN experts observed in 2020 that the POO "establishes an authorisation process for assemblies, contrary to international human rights standards" and that "[n]obody should be subjected to administrative or criminal sanctions for taking part in a peaceful protest, even if the regime governing protests requires an authorisation."[141]

With respect to authorisation schemes similar to the one in the POO, the UN Human Rights Committee has held that "[*e]ven in case of an unauthorised assembly*, any interference with the right of peaceful assembly must be justified under the second sentence of article 21."[142] In its most recent General Comment on the right of peaceful assembly, the UN Human Rights Committee explicitly stated that "[a] failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or for imposing undue sanctions."[143] Further, the UN Human Rights Committee has explained, that "[w]here authorisation regimes persist in domestic

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[139] UN Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) [hereinafter General Comment No. 37], CCPR/C/GC/37, Sept. 17, 2020, para. 32; *see also* General Comment No. 34 (2011) on the freedoms of opinion and expression, paras. 34, 37–38 and 42–43. See generally Concluding observations on the initial report of the Lao People's Democratic Republic, UN Doc. CCPR/C/LAO/CO/1, Nov. 23, 2018, para. 33; General Comment No. 37, para. 48 ("Central to the realization of the right is the requirement that any restrictions, in principle, be content neutral, and thus not be related to the message conveyed by the assembly.").

[140] UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, para. 10; UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, Nov. 15, 1999, CCPR/C/79/Add.117, para. 19.

[141] OHCHR, Press Statement, "Hong Kong urged not to silence peaceful protest with criminal charges," May 13, 2020, .

[142] UN Human Rights Committee, Insenova v. Kazakhstan, U.N. Doc. CCPR/C/126/D/2542/2015, para. 9.6. *See also id*. para. 9.7 ("The Committee observes, that the State party relied only on the provisions of the law on public events, which requires a 10-day request and a permission of the local executive authorities for a peaceful assembly, which already in itself restricts the right of peaceful assembly. The State party has not attempted to demonstrate that the apprehension, trial and imposition of a sanction on the author for organization of a peaceful assembly was necessary in a democratic society and proportionate to the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as required under article 21 of the Covenant. The Committee therefore concludes that the State party has violated article 21 of the Covenant.)

[143] General Comment No. 37, para. 71.

law, they must in practice function as a system of notification, with authorisation being granted as a matter of course, in the absence of compelling reasons to do otherwise."[144] Such a system, relying on prior restraints, is particularly problematic in a democratic society because it may empower authorities to censure speech critical of the government.[145]

The UN Human Rights Committee has observed that even if participants and organisers fail to follow the notification procedures for an assembly, this "does not render the act of participation in the assembly unlawful, and must not in itself be used . . . for imposing undue sanctions, such as charging the participants or organizers with criminal offences."[146] International human rights bodies have also stressed that such criminal penalties are generally not a necessary or proportionate response to the kinds of breaches of domestic law at issue here (i.e., non-compliance with a notice-and-authorisation scheme, where the actual conduct of the assembly entailed only minor disruptions and no violence).[147]

The Human Rights Committee has, furthermore, been clear that a State cannot transform a peaceful assembly into criminal conduct simply by alleging a failure to comply with domestic regulations. As the Committee has explained, "If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organisers or participants does not, on its own, place the participants outside the scope of the protection of article 21."[148] This is consistent with the jurisprudence of the European Court of Human Rights.[149]

Necessity and proportionality

Under the necessity test for restricting an assembly, authorities cannot issue blanket prohibitions, nor can they prohibit assemblies based on an "unspecified risk of violence, or the mere possibility that the authorities will not have the capacity to prevent or neutralize the violence emanating from those opposed to the assembly."[150] Rather, to justify restricting a public gathering or procession, "the State must be able to show, based on a concrete risk assessment, that it would not be able to contain the situation, even if significant law enforcement capability were to be deployed."[151]

As applied in the present case, the POO is a restriction on the right to peaceful assembly which does not comply with the necessity test. Tam Tak-chi was arrested and convicted for

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[144] General Comment No. 37, para.73.
[145] *See* UN Human Rights Committee, General Comment No. 27, para. 37 (States should also consider allowing an assembly to take place and deciding afterwards whether measures should be taken regarding possible transgressions during the event, rather than imposing prior restraints in an attempt to eliminate all risks.); OSCE and Venice Commission, Guidelines on Freedom of Peaceful Assembly, paras. 132 and 220–222.
[146] General Comment No. 37, para. 71.
[147] *Cf.* European Court of Human Rights [GC], Navalny v. Russia, Application Nos. 29580/12 and 4 others, Nov. 15, 2018, para. 145 ("a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction and notably to deprivation of liberty.").
[148] General Comment No. 37, para. 16.
[149] European Court of Human Rights [GC], Navalny v. Russia, Application Nos. 29580/12 and 4 others, Nov. 15, 2018. para. 99 ("the question of whether a gathering falls within the autonomous concept of "peaceful assembly" in paragraph 1 of Article 11 and the scope of protection afforded by that provision is independent of whether that gathering was conducted in accordance with a procedure provided for by the domestic law.")
[150] General Comment No. 37, para. 52.
[151] *Id.* at para. 52.

organising a public assembly for political protests. According to the reasons for verdict in this case, in a speech on January 17, 2020, he urged people to attend a demonstration on January 19, 2020 at Causeway Bay, attended by approximately 300 people.[152] The Court also convicted Tam Tak-chi of holding an unauthorised assembly to protest the National Security Law on May 24, 2020, advertised on his Facebook page on the previous day.

The restrictions imposed by the POO, resulting in the conviction and prison sentences fail the necessity test and are infringements not only upon the right to peaceful assembly but also the right to free expression. The Court convicted Tam Tak-chi of uttering seditious words at both events; however, Tam Tak-chi's speech was protected expression. As explained in the next section, the authorities here convicted Tam Tak-chi not only in spite of his rights but rather *because* he exercised the right to free expression.

Further, where authorities impose administrative or criminal penalties on those involved in "unlawful conduct" during a peaceful assembly, the UN Human Rights Committee has confirmed that any such sanctions must be "proportionate" and cannot "suppress conduct protected under the Covenant."[153] The Committee, acknowledging that this clear line between peaceful and not peaceful conduct may not always exist, observed that "there is a presumption in favour of considering assemblies to be peaceful" and acts of violence by some participants should not be imputed to others or the organisers.[154] As the UN Human Rights Committee has previously made clear "[a]n assembly that remains peaceful while nevertheless causing a high level of disruption" should be tolerated unless "disruption is 'serious and sustained.'"[155]

In the present case, there was no allegation that there was a 'serious and sustained' disruption caused by the assemblies and no allegations of violence at the events. The only other unlawful conduct suggested by the Court was the failure to obey the police orders to disperse (which the Court convicted Tam Tak-chi of, sentencing him to a fine) and disorderly conduct under Section 17B(2)[156], where the Court sentenced Tam Tak-chi to one month in prison because "the words and actions of the defendant were clearly an attempt to rouse or had the distinct possibility of breaching the peace."[157]

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[152] Reasons for Verdict, paras. 75-80.
[153] General Comment No. 37, paras. 67, 71.
[154] General Comment No. 37, para. 17. The peaceful intentions of organizers and participants in an assembly are to be presumed, absent strong and convincing evidence that organizers or participants intend to use or incite imminent violence at an assembly. See, for example, European Court of Human Rights, Saghatelyan v. Armenia, Application No. 23086/08, Sept. 20, 2018, paras. 230-233; European Court of Human Rights, Karpyuk and others v. Ukraine, Applications Nos 30582/04 and 32152/04, Oct. 6 2015, paras. 198-207, 224 and 234. See Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Funding of associations and holding of peaceful assemblies), A/HRC/23/39, Apr. 24 2013, para. 50. See also Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Best practices that promote and protect the rights to freedom of peaceful assembly and of association), A/HRC/20/27, May 21, 2012, para. 25.
[155] General Comment No. 37, para 85.
[156] Section 17B(2) of the POO, Cap. 245 ("Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.")
[157] Reasons for Verdict, para. 94.

The significant prison sentences at issue here—two years for "inciting" participation in an unauthorised assembly and one and a half years for holding or convening an unauthorised assembly—are disproportionate sanctions under human rights law. Tam Tak-chi was engaging in protected conduct by organising or participating in peaceful assemblies; even if these assemblies were not pre-approved by the authorities, as earlier noted, this does not remove them from protection under human rights law.

Sedition and the Principle of Legality

The principle of legality, at the core of criminal law and the rule of law overall, requires that offenses be clearly defined and prohibits retroactive application of a law. This ensures that a person is not punished for an act or omission they would not have known to be a crime at the time and protects against arbitrary application of the law. The principle is embodied in Article 15 of the ICCPR, which states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[158]

As the European Court of Human Rights has explained, the principle of legality "embodies, more generally, the principle that only the law can define a crime and prescribe a penalty," which it must do clearly and precisely.[159] The Inter-American Court of Human Rights has further elaborated on the meaning of the legality principle, noting that it requires "a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment."[160] Indeed, as the Permanent Court of International Justice explained in 1935: "It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment."[161]

The present case raises several problems under the principle of legality. The judgment in this case applies the colonial-era ordinance on sedition to a range of political statements which are protected by human rights law. The statute is itself too broad.

Vagueness and Overbreadth

The District Court convicted Tam Tak-chi of seven counts of "uttering seditious words" under the Crimes Ordinance. Under Hong Kong law, seditious words are "words having a seditious intention"[162], which is in turn defined as an intent:

> (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or

[158] United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172, art. 15.
[159] European Court of Human Rights, Kokkinakis v. Greece, App. No. 14307/88, May 25, 1993, para. 52.
[160] Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, Series C, No. 52, May 30, 1999, para. 121.
[161] Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at 56-57.
[162] Section 10(5) of the Crimes Ordinance.

(b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
(d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
(e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
(f) to incite persons to violence; or
(g) to counsel disobedience to law or to any lawful order.[163]

The United Nations Human Rights Committee and other human rights experts have repeatedly criticized this law for its overly broad definitions, warning that it might infringe on the right to freedom of expression and urging authorities to bring the law into compliance with HKSAR's human rights obligations.[164] In the present case, this concern appears to have been realized.

Here, in the first sedition case in Hong Kong in decades, the Court convicted Tam Tak-chi for seditious speech and dismissed defence concerns about the vagueness of the statute. Specifically, the Court says that the vagueness of the statutory terms is not problematic because "ordinances move together with the times following changes in the environment, era, or the general mood of society" and so courts are entrusted "to explain and interpret conceptual words, such as 'hostility', 'ill will, 'disaffection', 'contempt', and 'hatred' as appropriate to the situation."[165]

That the words in the statute are so vague is problematic where they concern, under the Court's reading, a national security offence and where the Court is reading the defendant's words as a call to violence. The Rabat Plan of Action–adopted through expert workshops convened by the Office of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred–emphasizes that states must "ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant … and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others."[166]

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[163] *Id.* Section 9. After the 1997 Handover, "any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) ... shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China." Schedule 8 of Cap. 1 Interpretation and General Clauses Ordinance.
[164] UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, CCPR/C/79/Add.117, Nov. 15, 1999; UN Human Rights Committee, Concluding Observations, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, Apr. 21, 2006, para. 14; UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013; Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, OL CHN 7/2020, Apr. 23, 2020.
[165] Reasons for Verdict, para. 54.
[166] U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: "Rabat Plan of Action"), U.N.

Added to the vagueness of these phrases on their own, a further problem is the lack of interpretation of their meaning in the reasons for verdict, coupled with the overbreadth of their application. After the Court says, for example, that it has the authority to interpret these vague statutory phrases, there is no discussion for each of the charges regarding which part of the statute was violated; for the most part, it seems that all the defendant's comments—about the police, the Communist Party, and the NSL, and his use of slogans like "Liberate Hong Kong, revolution of our times" and "Five Demands"—are regarded as seditious words because they *could* urge or inspire "hatred" and/or encourage people to oppose the NSL.

Two immediate problems emerge from this wide interpretation. First, the Court appears to be expanding the already broad statute to cover conduct not listed in the ordinance. For example, where the Court says that phrases insulting to the police constituted language "abusing and slandering" the police,[167] it appears to be allowing an expansion of the statute to let in conduct like "slander" otherwise covered under Hong Kong defamation laws. Similarly, the Court's reasoning appears to allow a growing list of words addressing an escalating number of targets — including the Communist Party, the relatives of police officers and laws themselves — to be considered 'seditious', even though those people and institutions are not named in the statute. But it cannot be assumed that the defendant would have known that these phrases—some of which were commonly used in Hong Kong protests—would have constituted "seditious words" as required under the principle of legality.

And second, this overbroad application of the sedition statute to a huge range of phrases is problematic because it offers no guidance on what speech and criticism is in fact permissible. It is one thing for a statute to be elastic, as the Court's decision suggests, but the interpretative guidance provided in the decision does not then specify the range of speech or activities to which the law can be applied. The verdict presents all the phrases and statements at issue and then, with limited discussion, concludes that they are seditious without providing much guidance or interpretation.

Throughout the judgment, the Court suggests that Tam Tak-chi's words are not protected because he "misled the public"[168] and because he "groundlessly" insulted the police, thus "inciting people to be hateful" of the police.[169] The Court's words leave questions. Were Tam Tak-chi's words only seditious if incorrect—or is any criticism of the police sedition because these are government authorities, even if there is no showing of falseness, bad faith, intent, or the impact on the audience?

Phrases like "Five Demands" are not analysed under the statute in this decision, nor are innocuous phrases calling on people to vote for Tam Tak-chi. The Court repeatedly criticises Tam Tak-chi for "using seditious expressions to make declarations hoping to win the favour of some of voters from Kowloon East, just for the purpose of winning the favour of the voters" and so inciting people "to hate or despise the Communist Party and the SAR

Doc. A/HRC/22/17/Add.4, Jan. 11, 2013, para. 21. See also U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, Oct. 9, 2019, para. 31.

[167] Reasons for Verdict, para. 99.

[168] Reasons for Verdict, para. 72

[169] Reasons for Verdict, para. 70.

government, wanting to defeat the Establishment Camp."[170] The Court comes to this conclusion after listing dozens of statements Tam Tak-chi made, including "Saturday, remember to vote, I need many people to support me at the primary elections" and "Liberate Hong Kong." But the Court does not explain how these campaign statements (which it refers to as "inciting" people to vote for the defendant) violate the statute. Nor does this analysis explain how or why campaigning and "inciting" people to vote for him is sedition—or if it is just commentary by the Court.

Foreseeability

The principle of legality protects against "arbitrary prosecution, conviction and punishment."[171] Although courts have an inevitable role in clarifying the law through judicial interpretation, they must ensure that any development or construction of the law is both consistent with the essence of the offence and also could reasonably be foreseen.[172] Foreseeability is critical to guard against arbitrary application of the law.[173]

As noted above, Tam Tak-chi was convicted based on a number of different slogans and phrases, some of which were commonly used and many of which did not explicitly target individuals named in the statute. It was not foreseeable that the use of these phrases would lead to sedition charges given their common usage. Of those most clearly political phrases, for example, the slogan "Liberate Hong Kong, revolution of our times" was a common protest slogan. It was only after Tong Ying-kit's conviction in July 2021 that a legal precedent existed to the effect that this common slogan was a national security offence, based on the ruling finding that one *possible* interpretation of the slogan is to separate Hong Kong from the PRC.[174] Tong Ying-kit was himself arrested on the first day the NSL was in effect and his conviction, one year later, came approximately nine months after Tam Tak-chi was arrested and charged for using the same phrase. It was simply not foreseeable that between January and July 2020 (during most of which time, the NSL was not in existence) the slogan would have clearly been a national security or sedition offence.

Moreover, Tam Tak-chi's trial was the first time that a person was prosecuted, tried, and convicted of sedition in Hong Kong in decades, which suggests at a minimum that the sedition charges against Tam Tak-chi were not reasonably foreseeable at the time. Although close to 30 people in Hong Kong have now been charged with sedition offences since Tam Tak-chi's arrest, in 2020, Tam Tak-chi's arrest for "uttering seditious words" was a dramatic departure in the application of this law after years of disuse of what was largely regarded as an archaic and anachronistic statute. The Court's decision does not engage with much interpretation of the statute except to say that the law is "sufficiently flexible" and

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[170] Reasons for Verdict, para. 123.
[171] European Court of Human Rights, S.W. v. the United Kingdom, Nov. 22 1995, para. 34, Series A no. 335-B; European Court of Human Rights, C.R. v. the United Kingdom, Nov. 22 1995, para. 32, Series A no. 335-C; European Court of Human Rights, Case of Del Rio Prada v. Spain, Application No. 42750/09, Oct. 21, 2013, para. 77
[172] European Court of Human Rights, Vasiliauskas v. Lithuania, Application No. 35343/05, Oct. 20, 2015, para. 155; European Court of Human Rights, S.W. v. the United Kingdom, Nov. 22 1995, para. 36, Series A no. 335-B; European Court of Human Rights, C.R. v. the United Kingdom, Nov. 22 1995, para. 34, Series A no. 335-C; European Court of Human Rights, Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 93.
[173] European Court of Human Rights, Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 93.
[174] HKSAR v. Tong Ying-kit, Reasons for Verdict (HCCC 280/2020).

"sufficiently applicable" to this case.[175]

Right to Freedom of Expression

Tam Tak-chi's case is at its core about whether words critical of the government are still entitled to protection in Hong Kong under the law. He was convicted of "uttering seditious words" for statements he made that were allegedly supportive of Hong Kong independence and critical of and insulting to the Hong Kong authorities and the Communist Party of China. The Court's reasoning in this case accepts that statements critical of government authorities, laws, and policies—including the NSL—are both seditious and a national security offence. But under international human rights law, Tam Tak-chi's criticism of government agencies, parties, and policies are entitled to more, not less, protection as political expression.

Article 19 of the ICCPR, incorporated into Hong Kong's Basic Law and Bill of Rights,[176] states that everyone has the right to hold opinions and to freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds,"[177] including views considered to be "offensive."[178] Where the speech at issue is political, concerning public officials and public institutions, the Human Rights Committee has said, "the value placed by the Covenant upon uninhibited expression is particularly high."[179]

Given the centrality of this right to freedom of expression, the ICCPR requires that any laws restricting expression are (a) "provided by law"; (b) serve a legitimate purpose; and (c) meet the test of "necessity and proportionality" for the protection of other core rights and interests.[180] The UN Human Rights Committee has explained that laws implicating the right to freedom of expression must not "confer unfettered discretion … on those charged with its execution,"[181] as this could allow government authorities to punish speech they disagree with.[182]

The United Nations Human Rights Committee has more generally said that governments must take "extreme care" to ensure that any sedition or similar law that restricts freedom of expression meets the strict requirements of the ICCPR, namely that the restrictions are necessary, provided by law, and only for the purposes of (a) respecting the rights or

[175] HKSAR v. Tam Tak-chi, DCCC 927, 928 and 930/2020 (consolidated), [2022] HKDC 208, Reasons for Verdict, para. 58.
[176] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 39 (1990), *available at* https://www.basiclaw.gov.hk/filemanager/content/en/files/basiclawtext/basiclaw_full_text.pdf; Hong Kong Bill of Rights, Article 16 (1991), *available at* https://www.elegislation.gov.hk/hk/cap383.
[177] ICCPR, art. 19.
[178] UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter "General Comment No. 34"), September 12, 2011
[179] General Comment No. 34, para. 38.
[180] *Id.* para. 22.
[181] *Id.* para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.
[182] UN Human Rights Committee, Kim v. Republic of Korea, U.N. Doc. CCPR/C/64/D/574/1994, Jan. 4, 1999, para. 12.2.

reputations of others; or (b) the protection of national security or of public order (ordre public), or of public health or morals.[183]

As previously discussed, Hong Kong's law on sedition violates the first requirement ("provided by law") given the overbreadth of this statute. As applied in this case, it also violates the requirements of necessity and proportionality by punishing political speech and criticism of public institutions and officials under the guise of protecting national security.

Necessity and Proportionality

The Court convicted Tam Tak-chi for speech that criticised public figures, political parties, and legislation—topics that are entitled to more, not less, protection, under human rights law.

Where—as here—a state invokes 'national security' to justify limiting speech, the legal restriction imposed must note a specific threat[184] and explain the direct and immediate connection between the words and the threat.[185] The legal restriction must have "the genuine purpose and demonstrable effect of protecting a legitimate national security interest"[186], meaning, to protect a state from the use of force or violence to overthrow the government.[187]

Speech can only be punished on the grounds it is a threat to national security if the government can show that "(a) the expression is intended to incite imminent violence; (b) is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."[188] By contrast, speech that "advocates non-violent change of government policy or the government itself" or is criticism of the government, its agencies or officials, does not constitute a threat to national security.[189] Moreover, 'national security' cannot be used by authorities "as a pretext for imposing vague or arbitrary limitations", nor can it be invoked without adequate safeguards to prevent abuse, for purely local law and order matters, or as a justification for suppressing opposition to a State's systemic violation of human rights, such as the right to freedom of expression.[190]

Similarly, speech that allegedly incites hatred or violence should only be criminalised in the most severe cases of incitement[191] and as "last resort measures to be applied in strictly

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[183] General Comment No. 34, para. 30 (citing ICCPR article 19(3))
[184] Human Rights Committee, Kim v. Republic of Korea, communication No. 574/94, paras. 12.4–12.5.
[185] General Comment No. 34, para. 35, referring to Shin v. Republic of Korea (CCPR/C/80/D/926/2000).
[186] Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, [hereinafter 'Johannesburg Principles'], Principle 1.2, U.N. Doc. E/CN.4/1996/39 (1996).
[187] Johannesburg Principles, Principle 2; United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights [hereinafter 'Siracusa Principles'], U.N. Doc. E/CN.4/1985/4, Annex (1985)., para 29.
[188] Johannesburg Principles, Principle 6. *See also* U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: "Rabat Plan of Action"), U.N. Doc. A/HRC/22/17/Add.4, Jan. 11, 2013.
[189] Johannesburg Principles, Principle 7.
[190] Siracusa Principles, paras. 29-32.
[191] Rabat Plan of Action, at para. 18.

justifiable situations."[192] The Rabat Plan of Action, which provides guidance on where criminal prosecutions and penalties are appropriate in response to potential acts of incitement or advocacy of hatred, advises that incitement "refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[193] Speech allegedly constituting incitement must meet a six-part threshold test to be severe enough for criminal penalties, which examines: (a) the social and political context at the time the speech was made and disseminated, (b) the speaker's position or status within society and vis-à-vis the audience to whom the speech was directed, (c) the speaker's intent to incite hatred, (d) the content and form of the speech, (e) the extent of the speech act, and (f) the reasonable probability that the speech would cause imminent harm against the target group.[194] This is consistent with findings from the UN Special Rapporteur on the promotion and protection of the right to freedom of expression clarifying that although States may legitimately prohibit advocacy constituting incitement, such expression need not be criminalized.[195]

In the present case, Tam Tak-chi was convicted for speech critical of the police, the Communist Party of China, and the NSL, and for using political slogans that allegedly call for Hong Kong's independence from the PRC. Slogans and criticism of political figures and parties are clearly protected political speech under human rights law; expanding sedition to include any criticism of a law—here, the NSL— is a significant shift in the use of the law on its face that both limits the space for public debate and fails to meet any necessity test. Even a call to oppose or resist the law is not a call for violent opposition to it, nor does any general background political violence (only vaguely alleged or referred to by the Court in this case) justify criminalisation of speech.[196] And as previously discussed in TrialWatch's report on the trial of Tong Ying-kit, under human rights law, even speech or ideas that implicate territorial integrity should not be restricted by the government unless they include incitement to violence.[197]

Even if some of the phrases at issue in this case, when read in the most favourable light for the prosecution, could be construed as inciting violence, none of these statements provoked imminent harm to the police. The Court acknowledges that no violence was instigated by Tam Tak-chi's words,[198] and the authorities did not present evidence that on any of the dates at issue in this case from January through July 2020 there was violence or imminent harm arising from any of the speeches or assemblies. Indeed, although Tam Tak-chi was arrested in January 2020, he was not charged with sedition until many months and assemblies later in September 2020, which suggests that even the authorities were

[192] *Id.* at para. 34.
[193] Human Rights Council, Office of the High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: "Rabat Plan of Action"), U.N. Doc. A/HRC/22/17/Add.4, Jan. 11, 2013, para. 21, fn. 5.
[194] *Id.* at para. 29.
[195] U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, Oct. 9, 2019, para. 8.
[196] *See* European Court of Human Rights, Sürek and Özdemir v. Turkey, Applications Nos. 23927/94 and 24277/94, July 8, 1999, para.61.
[197] European Court of Human Rights, Sürek v. Turkey (No. 4), Application No. 24762/94, July 8, 1999, paras. 55-60; European Court of Human Rights, Ceylan v. Turkey, Application No. 23556/94, July 8, 1999, paras. 33-36.
[198] Referring to the January 19, 2020 assembly, for example, the Court writes that the reason the crowd did not descend into disorderly conduct "may have been the police officers on guard, or it may have been the self-discipline of those gathered. However, I am certain that the reason is not the actions of the defendant." HKSAR v. Tam Tak-chi, Reasons for Verdict at para. 94.

not concerned that the words incited violence and so the current severe restriction on his speech was not necessary.

Further, the focus on incitement in the Court's verdict appears to be incitement to *vote,* not to violence. Referring to his speeches on July 4, 2020, the Court notes that Tam Tak-chi used seditious words, inciting people to oppose the Communist Party and to support his election campaign.[199] In using the slogan "Liberate Hong Kong, revolution of our times", the Court said, Tam Tak-chi's "intention to incite is clear": "The defendant's goal is to use seditious means to incite resistance by the people to evoke a sentiment of resistance to make people vote for him, such that he could gain the so-called *primary election* qualification, and make his way into the Legislative Council with full confidence."[200]

But whereas the Court here appears to see Tam Tak-chi's intent to get voter support as an aggravating factor, under human rights law, political speech is entitled to a higher degree of protection. As such, Tam Tak-chi's conviction and punishment for political speech cannot be a "necessary" restriction.

The necessity requirement for a restriction on speech overlaps with the proportionality requirement, as the latter means that a restriction must be the "least intrusive instrument amongst those which might achieve their protective function."[201] Even where a law restricting freedom of expression may have a legitimate purpose, it may nevertheless "violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression."[202] States must meet a high threshold to institute criminal prosecutions for speech even or indeed especially when the speech at issue insults public authorities. As stated by the UN Human Rights Committee, "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties."[203]

Indeed, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has made clear that only the most serious of crimes—child pornography, incitement to terrorism, direct and public incitement to commit genocide, and advocacy for national, racial, or religious hatred—should ever be criminalized.[204] They have further clarified that although States may legitimately prohibit advocacy constituting incitement, such expression need not be criminalized.[205] Further, as previously noted, under the Rabat Plan of Action, criminal penalties should only be imposed in the most severe cases of incitement:[206] as "last resort measures to be applied in strictly justifiable situations."[207]

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[199] HKSAR v. Tam Tak-chi, Reasons for Verdict at paras. 123, 126-129.
[200] *Id.* at para. 129.
[201] *Id.* at para. 34.
[202] Siracusa Principles, para. 31.
[203] *Id.* at para. 38.
[204] U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40. See also Human Rights Council, Report of the Special Rapporteur on the promotion and protection of fundamental freedoms and human rights while countering terrorism, A/HRC/31/65, Apr. 29, 2016, para. 38; Johannesburg Principles, Principle 7.
[205] U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, October 9, 2019, para. 8.
[206] *Id.* at para. 18.
[207] *Id.* at para. 34.

Taking all the facts in the light most favourable to the prosecution, even if some of Tam Tak-chi's statements about the police were not protected speech and could be sanctioned, this does not mean that they (a) can be punished with imprisonment under the high bar set by human rights law, or (b) constitute sedition within the meaning of the statute.

Moreover, as a matter of proportionality, the sentence Tam Tak-chi received— 21 months for "uttering seditious words" –is too severe a punishment for speeches that did not create an imminent risk of harm; were not targeted at a protected community, within the meaning of the Rabat Plan; and included protected political expression.

Improper political motives and equality before the courts

Finally, the circumstances surrounding Tam Tak-chi's trial give concerns that the charges were brought for improper purposes, namely to punish him for public speeches critical of government authorities and of the new national security law and to chill similar speech and political activity. The most severe sentences in this case stem from the public assemblies Tam Tak-chi organised in January and May 2020, seemingly *because* of the political subject matter. Further, on the sedition charges, the focus of the verdict is on Tam Tak-chi's election campaigning, which suggests this trial was used to criminalise participation in the electoral process. The manner in which this case was carried out—by a national security judge in a trial that stretched over a year and a half from his arrest—also suggests that Tam Tak-chi was prosecuted in order to deter others from protesting against the NSL and Hong Kong authorities. These factors give the impression that the prosecution was motivated more by political considerations than by a non-discriminatory desire to enforce the law. As such, the case raises concerns that Tam Tak-chi was not being accorded his right to equality before the courts (Article 14(1), ICCPR) and, more broadly, to equal treatment under the law (Article 25, Basic Law and Article 26, ICCPR).

While the UN Human Rights Committee has yet to establish clear criteria for assessing such situations, European Court of Human Rights jurisprudence is instructive. The European Court evaluates whether a legal proceeding was driven by improper motives with regard to a range of factors: the political context in which the prosecution was brought;[208] whether the authorities undertook actions against the accused amidst their "increasing awareness that the practices in question were incompatible with [European] Convention standards;"[209] and whether the ultimate decision was well-reasoned and based on law.[210]

[208] European Court of Human Rights, "Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights," Aug. 31, 2018, para. 57 (citing European Court of Human Rights, Merabishvili v. Georgia, App. No. 72508/13, Nov. 28, 2017, para. 322; European Court of Human Rights, Khodorkovskiy v. Russia, App. No. 5829/04, May 31, 2011, para. 257; European Court of Human Rights, Khodorkovskiy and Lebedev v. Russia, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 901; European Court of Human Rights, Nastase v. Romania, App. No. 80563/12, Dec. 11, 2014, para. 107; European Court of Human Rights, Rasul Jafarov v. Azerbaijan, App. No. 69981/14, Mar. 17, 2016, paras. 159-161; European Court of Human Rights, Mammadli v. Azerbaijan, App. No. 47145/14, Apr. 19, 2018, para. 103; European Court of Human Rights, Rashad Hasanov and Others v. Azerbaijan, App. No. 148653/13, June 7, 2018, para. 124).

[209] European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. No. 29580/12, Nov. 15, 2018, para. 171.

[210] European Court of Human Rights, Nastase v. Romania, App. No. 80563/12, Dec. 11, 2014, para. 107

The Court will also consider the broader context, including any pattern of politicised arrests and prosecutions.[211]

The European Court has also made clear that a legal proceeding may have both proper and improper motives; it will nevertheless find a violation where the improper motives "predominated."[212] Further, acknowledging that it is often impossible for an applicant to adduce direct evidence of the state's bad faith, the European Court has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence.[213] In past cases, the European Court of Human Rights has looked to the relationship between prosecution and the exercise of rights under human rights law as one such kind of circumstantial evidence, as well as the behaviour of prosecuting authorities, including delays between the arrest and the laying of charges; and appearances of political interference in the case when there appears to be a correlation between hostile statements by public officials and the timing or wording of criminal charges against the applicant.[214] The European Court has emphasized that it is relevant whether the prosecution interferes with enjoyment of a protected right.[215]

This entire case concerns the exercise of Tam Tak-chi's rights to freedom of assembly and freedom of expression, protected rights under human rights law. The charges related to speeches made to public gatherings[216], criticizing the police, warning against the NSL and its implications for human rights[217], using political slogans like "Five Demands" and "Liberate Hong Kong revolution of our times," and, according to the Court, speeches urging the public to vote for him. Further, the verdict makes clear that the defendant's problematic "intent" was to get votes for an upcoming primary election.[218] Throughout the trial and verdict, there is evidence that the authorities' concern—including the Court's—was with Tam Tak-chi's use of political slogans and speech to criticise the CCP, the police, and the

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[211] European Court of Human Rights, Mammadov v. Azerbaijan (Grand Chamber), App. No. 15172/13, May 29, 2019, para. 187-89.

[212] European Court of Human Rights, Merabishvili v. Georgia (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, para. 305. The fact that restrictions to protected rights fit into a pattern of arbitrary arrest and detention can both contribute to circumstantial evidence of an illegitimate purpose and signal a broader context inimical to the fundamental ideals and values of the ECHR. European Court of Human Rights, Ibrahimov & Mammadov v. Azerbaijan, App. No. 63571/16, Feb. 13, 2020, para. 151; European Court of Human Rights, Aliyev v. Azerbaijan, App. Nos 68762/14 & 71200/14, Sept. 20, 2018, para. 223.

[213] European Court of Human Rights, Merabishvili v. Georgia (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, paras. 316-317; European Court of Human Rights, Ibrahimov & Mammadov v. Azerbaijan, App. No. 63571/16, Feb. 13, 2020, para. 147.

[214] See European Court of Human Rights, Kavala v. Turkey, App. No. 28749/18, Dec. 10, 2019, paras. 223-229; European Court of Human Rights, Demirtas v. Turkey (No 2), App. No. 14305/17, Nov. 20, 2018, para 170; European Court of Human Rights, Ismayilova v. Azerbaijan (No 2), App. No. 30778/15, Feb. 27, 2020, para. 14.

[215] European Court of Human Rights, Kavala v. Turkey, App. No. 28749/18, Dec. 10, 2019, para. 231.

[216] As evidence that Tam Tak-chi was inciting people to disrespect the police and disobey the law, the Court also refers to Tam Tak-chi giving the public the phone number for legal aid should they be arrested ("we all know the phone numbers for the lawyers ... we all know what our human rights are, we all know that they're making indiscriminate arrests, we're not breaking the law."). Reasons for Verdict, paras. 89, 119-120.

[217] *See, e.g.,* Reasons for Verdict para. 105 ("The defendant then continued to talk about the 'eternal tension' between the National Security Law and human rights.")

[218] *See, e.g.,* Reasons for Verdict para. 120: "The defendant clearly wished to garner support for his candidacy in the *democratic primaries* through insulting the police or people that hold a different opinion, so that he could get himself to represent Kowloon East in the Legislative Council, to conduct the defendant's so-called resistance with hostility towards persons or members of parliament with other political views by doing everything to fight them."

NSL, and to use these slogans and critical comments to convince the public to vote for him.[219] Indeed much of the evidence presented at trial and cited in the verdict are campaign posters and phrases like "nominate me".[220] (It is noteworthy that while this case was pending, in January 2021, Tam Tak-chi was one of 55 opposition candidates arrested under the NSL for their political campaigning activities, 47 of whom are now in pretrial proceedings.[221]) This suggests that the goal of the prosecution and conviction was to stop Tam Tak-chi from campaigning and sharing political opinions.

Further evidence of improper and discriminatory motives for the prosecution comes from the resurrection of the colonial-era law—unused for several decades and with vague and broad wording—to criminalize political speech. As the Human Rights Committee observed with regard to a law of the Maldives that was similarly vague and susceptible of wide interpretation, the law did not comply with the principle of legal certainty and predictability and had been used to prosecute and convict on political grounds.[222]

Tam Tak-chi was the first to be charged under Hong Kong's sedition law since at least the 1970s, and it appears that his trial has opened the door and will set a precedent for many more. While this case was pending, the authorities did not delay arresting or charging others with sedition; on the contrary, Tam Tak-chi's arrest preceded a new wave of sedition charges, again after half a century of the law's disuse. And yet, with the continued delays in this case—a case where there were no significant facts in dispute—more and more people were arrested for sedition without the benefit of a decision in this case that could have explained what speech is considered to be "seditious" so that members of the public could avoid liability.[223]

Tam Tak-chi is also one of 47 opposition leaders formally charged in 2021 under the NSL for organising a primary election in July 2020,[224] and his prior political candidacy was also mentioned in the Court's sentencing.[225] That trial is expected to start in 2023, two years after the accused were charged and arrested.

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[219] *See* Reasons for Verdict, paras. 70, 120-129

[220] *Id.* at paras. 20, 24, 27, 30, 70, 119, 120, 122-129.

[221] *The Standard* "Joshua Wong and Tam Tak-chi to be arrested today under national security law," Jan. 7, 2021, https://www.thestandard.com.hk/breaking-news/section/4/162850/Joshua-Wong-and-Tam-Tak-chi-to-be-arrested-today-under-national-security-law.

[222] Human Rights Committee, Nasheed v. Maldives, Comm. Nos 2270/2013 ||||&2851/2016, Apr. 4, 2018, paras. 5.6,8.3.

[223] Indeed, just after the trial closed but before the decision was issued (almost three months later), the authorities charged several people including the former editors of *Stand News* with publishing seditious materials and added a charge of publishing seditious materials to Jimmy Lai's ongoing charges. *Deutsche Welle*, "Hong Kong: Jimmy Lai faces fresh sedition charge," Dec. 28, 2021, ; Jasmine Siu, *South China Morning Post*, "Hong Kong prosecutors hit tycoon Jimmy Lai, 6 former Apple Daily employees with fresh sedition charge," Jan. 28, 2021, https://www.scmp.com/news/hong-kong/law-and-crime/article/3161304/hong-kong-prosecutors-hit-tycoon-jimmy-lai-6-former.

[224] *Al Jazeera*, "'Assumed as criminals': Hong Kong defendants find bail elusive," Jan. 27, 2022, https://www.aljazeera.com/news/2022/1/27/hong-kong-bail; *The Standard* "Joshua Wong and Tam Tak-chi to be arrested today under national security law," Jan. 7, 2021, ; *Hong Kong Free Press*, "Hong Kong security law: 47 democrats await trial over unofficial election, as case adjourned to Nov" Sept. 23, 2021, https://hongkongfp.com/2021/09/23/hong-kong-security-law-47-democrats-await-trial-over-unofficial-election-as-case-adjourned-to-nov/.

[225] HKSAR v. Tam Tak-chi, [2022] HKDC 343, Summary of Judgment, April 20, 2022.

The present sedition case must also be seen in the context of significant changes to Hong Kong's electoral system. In March 2021, while this case was pending and soon after the 47 opposition leaders (including Tam) were charged, the Hong Kong LegCo overhauled its election system so that only individuals vetted and designated as "patriots" were permitted to run for office.[226]

The use of criminal proceedings against political speech and campaigning, in the context of the political environment, appears to have had the purpose of punishing Tam Tak-chi for his criticism of the authorities and his activism and also to send a message to the broader public that criticism of Hong Kong laws and participation in pro-democracy election activity is now a national security offence. The trial seems to have been used to chill public debate and political campaigning and, at the same time, the continued delays in the case allowed the authorities to arrest a growing number of people for conduct that still had not been defined by the courts.

[226] *South China Morning Post*, "Hong Kong elections reform: a patriots-only game or circuit-breaker against radicalisation? The effect of Beijing's plans on city's opposing camps," March 6, 2021, https://www.scmp.com/news/hong-kong/politics/article/3124322/hong-kong-elections-reform-patriots-only-game-or-circuit

CONCLUSION AND GRADE

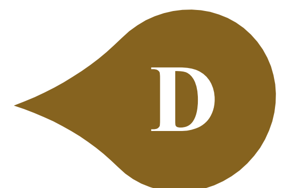
TrialWatch Expert Elizabeth Wilmshurst's Findings:

Based on a review of the TrialWatch monitoring of the trial, the Court's decisions on the verdict and sentence, and a review of the law at issue, the trial of Tam Tak-chi raises serious concerns regarding his right to a fair trial. While core procedural standards of a fair trial were adhered to, the use of a specially designated judge under the National Security Law, in the political context of the time, did not guarantee the right to an impartial and independent tribunal.

The conviction and sentence also infringed substantive rights to freedom of peaceful assembly and to freedom of expression; the charges against Tam Tak-chi were based on his very exercise of those rights. Further, the charges under the outdated sedition law raise concerns under the principle of legality, having regard to the breadth of the statute and lack of foreseeability. Inevitably, questions are raised as to whether the decision to prosecute in this case was tainted by improper motives, violating the defendant's right to equal and non-discriminatory treatment by the courts.

Accordingly, this trial and conviction did not meet international standards, notwithstanding that many procedural guarantees were met. As a result, this trial received a grade of "D" under the methodology set out in the Annex to this Report.

GRADE:



ANNEX

GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," (ICCPR Art. 26) and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant's reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.