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National Security Deference or National Security Domination? The "Glory to Hong Kong" Injunction Saga and Hong Kong's Compromised Judiciary

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Report

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Prior GCAL Reports Related to the Hong Kong National Security Law

Anatomy of a Crackdown: The Hong Kong National Security Law and Restrictions on Civil Society; Olivia Chow, Thomas Kellogg, Eric Yan-ho Lai; March 2024

Submission on the Hong Kong Government Public Consultation Document, Safeguarding National Security: Basic Law Article 23 Legislation; GCAL; February 2024

The Hong Kong 2019 Protest Movement: A Data Analysis of Arrests and Prosecutions; Jun Chan, Eric Yan-ho Lai, Thomas Kellogg; October 2023

Human Rights in Hong Kong: The Impact of the National Security Law, Submission to the United Nations Universal Periodic Review of China; GCAL; July 2023

Submission to the UN Human Rights Committee on the Review of China's (Hong Kong SAR) Fourth Periodic Report under the ICCPR; GCAL; May 2022

The Tong Ying-kit NSL Verdict: An International & Comparative Law Analysis; Thomas Kellogg, Eric Yan-ho Lai; October 2021

Hong Kong's National Security Law and the Right to Fair Trial: A GCAL Briefing Paper; Lydia Wong, Thomas Kellogg, Eric Yan-ho Lai; June 2021

Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis; Lydia Wong, Thomas Kellogg; February 2021

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I. Introduction

In late 2022, a problem emerged for the Hong Kong government: when Hong Kong athletes and teams won medals at a series of sporting and cultural events, event organizers would play the pro-democracy anthem "Glory to Hong Kong," instead of the Chinese national anthem, "March of the Volunteers." All of these incidents appeared to be accidental: event organizers would search online for a Hong Kong national anthem, and "Glory to Hong Kong" would be the first song to come up. The song is slow and hymn-like, not unlike an actual state-approved national anthem, making it easy for mistakes to emerge.

Still, for the Hong Kong government, these incidents were deeply embarrassing. After it was released by a pseudonymous author in August of 2019, "Glory to Hong Kong" quickly became the central anthem of the pro-democracy protest movement. It was sung by hundreds of thousands on the streets of Hong Kong, and its poignant lyrics and simple melody often brought Hong Kongers to tears.[1] Whether accidental or not, the playing of "Glory to Hong Kong" at international sporting events represented a small but significant public relations fiasco for the Hong Kong government. It gave the pro-democracy protest movement a symbolic victory, inserting its own anthem for that of the Chinese state. These incidents also served as a reminder of the Hong Kong government's ongoing crackdown: each incident generated global headlines and stories that, inevitably, rehashed the events of 2019, and reminded a global readership that the Hong Kong government continues to imprison and arrest those who dare to speak out in favor of democracy, human rights, and the rule of law.

The Hong Kong government would have been within its rights to work with sporting event organizers to ensure that such mix-ups were avoided at future events. Any other government would have done the same. According to press reports, it did take some steps to encourage local sporting associations, and even Hong Kong athletes themselves, to engage with host countries to ensure that they had the right national anthem on hand if needed. The government also made a series of technical upgrades to its website to optimize search results, which also helped to guard against future mistakes.[2] As far as the Georgetown Center for Asian Law (GCAL) has been able to determine, the last anthem snafu occurred in February 2023, when "Glory to Hong Kong" was briefly played after an ice hockey match between the Hong Kong men's team and Iran in Bosnia and Herzegovina.

As these efforts suggest, increased engagement and outreach, along with technical improvements to the government's official national anthem website, have done much to fix the problem. Indeed, as discussed in more detail below, the government addressed the issue of Google search results before filing for an injunction against the song in June 2023.

[1] Robyn Dixon and Marcus Yam, "'Glory to Hong Kong': A new protest anthem moves singers to tears," *Los Angeles Times*, September 13, 2019.

[2] Fiona Sun, "Chinese national anthem finally tops Google search results after mix-ups with Hong Kong protest song at overseas sports events," *South China Morning Post*, April 19, 2023.

But the government also seemed to have a broader set of goals, above and beyond merely avoiding future mix-ups at other global sporting events. It sought to use the series of incidents as an opportunity to try to censor the song worldwide. Indeed, the government engaged in an extensive, multi-year campaign, first to pressure key tech companies like Google to limit or block access to the song, and then, when that failed, to press the Hong Kong courts to issue an injunction against the song itself. If the Hong Kong government had its way, "Glory to Hong Kong" would have been removed from circulation worldwide, making it unavailable even to listeners who had never set foot in Hong Kong. In the end, the government won a court injunction with local effect. That injunction led to geolocation blocking of the song by several leading global tech companies, which made it less available in Hong Kong itself.[3]

The effort to block access to "Glory to Hong Kong" pales in comparison to the core elements of the Hong Kong government's national security crackdown. Over the past five years, the government has used the 2020 National Security Law (NSL) and the local Hong Kong law of sedition to arrest hundreds of activists, politicians, journalists, rights lawyers, and everyday citizens.[4] Scores have been imprisoned, some for several years. In the vast majority of NSL cases, individuals were prosecuted merely for exercising their basic rights to free expression, association, and assembly. As this report was being prepared for publication, for example, the Hong Kong High Court announced its verdict in the Stand News case: former top editors Chung Pui-kuen, 55, and Patrick Lam, 36, were found guilty of sedition based on a series of news articles and editorials published in 2020 and 2021. The two journalists were sentenced to 11 months and 21 months respectively.[5]

In comparison with cases like Chung and Lam's, the government's decision to obtain an injunction against "Glory to Hong Kong" may seem like a regrettable footnote to the larger story. But the government's legal campaign against the song is very much worthy of note: it shows the extent to which the government remains obsessed with content related to the 2019 pro-democracy protest movement, and its willingness to invest significant resources to censor that content. It also shows that the government will drag leading international companies like Google into its censorship efforts, and will press them to become a part of its national security enforcement campaign. And it shows that, when it comes to the courts, the Hong Kong government won't take no for an answer: when it loses a case, it will continue to press the courts to change the outcome.

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[3] That local ban has also limited global access, even as the song remains generally available to those who seek it out: as discussed in more detail below, some tech platforms and streaming companies have removed the song, rather than deal with the legal risks stemming from the injunction.

[4] Even before the NSL went into effect, the Hong Kong government began using the colonial-era sedition law for the first time in decades to crack down on free expression. In 2024, Hong Kong amended its sedition law to both expand its ambit, and to increase criminal penalties for violating the law. It added other new criminal provisions as well with the passage of the so-called Safeguarding National Security Ordinance (SNSO). See *GCAL Submission on Hong Kong Government Consultation Document: Safeguarding National Security: Basic Law Article 23 Legislation*, February 27, 2024, section 2, pp. 6-9.

[5] Helen Davidson, "Hong Kong: stand News journalists given jail terms for 'sedition,'" *The Guardian*, September 26, 2024.

Last but not least, the injunction push shows that the Hong Kong government will continue to expand its national security toolkit. Criminal prosecution is the government's primary national security enforcement mechanism. But other legal tools, including injunctions that censor political content, are also in the mix. As time goes on, other elements, both legal and extra-legal, could also be added.[6]

This report proceeds in five sections. In Section Two, we analyze the series of incidents related to the national anthem and "Glory to Hong Kong," which led the government to seek an injunction. We also look at the steps that the government took prior to seeking an injunction. In Section Three, we analyze the decision of the Court of First Instance (CFI) that denied the government the request, largely on technical legal grounds. While the CFI failed to engage in any significant human rights analysis, nonetheless the court's decision handed the Hong Kong government a rare loss in a national security case: had it been allowed to stand, the verdict would have represented the first significant such loss for the government.

In Section Four, we examine the decision of the Court of Appeal (CA), which overruled the lower court judgment and issued an injunction. In particular, we focus on the CA's use – or, more accurately, misuse – of comparative case law to bolster its judgment, providing a false imprimatur of rigorous comparative analysis and justification. In Section Five, we consider what this case means for companies like Google, which were forced to respond to the injunction. We also analyze their response to the case, and to the government's repeated censorship demands. In our conclusion, we ask whether the "Glory to Hong Kong" injunction is an isolated action, or whether it is the beginning of a new trend of much broader internet censorship in Hong Kong.

This report is the latest in a series of GCAL reports on the implementation of the Hong Kong National Security Law. GCAL began tracking the impact of the NSL on human rights and the rule of law immediately after the NSL went into effect on July 1, 2020. Our February 2021 report, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, offered one of the earliest full-length analyses of the law itself, and also tracked the government's initial efforts to use the law as a key tool to reshape Hong Kong civil society. Since then, we have published several follow-up reports on core elements of the expanding national security state, including due process rights in national security cases and the human rights implications of the government's proposed Safeguarding National Security Ordinance.[7] Where appropriate, we have also published in-depth analyses of key national security verdicts, an approach which has allowed us to highlight the human cost of the national security crackdown.

Our goal has been simple: to provide real-time analysis of legal and political developments in Hong Kong, as relates to the implementation of the NSL and other national security laws. Given

[6] For more on the government's use of extra-legal tools to crack down on civil society activists in Hong Kong, *see* Chow, Kellogg, and Lai, *Anatomy of a Crackdown: The Hong Kong National Security Law and Restrictions on Civil Society*, GCAL report, March 2024, pp. 29-36.

[7] All of GCAL's Hong Kong NSL reports are available on our website: https://www.law.georgetown.edu/law-asia/publications/reports/.

the vast changes wrought by these laws, we make no claim to being comprehensive in our analysis of developments over the past four-and-a-half years. Still, we believe that our publications have given readers some sense of the damage done to Hong Kong's once proud legal system, and to the broader liberal, if undemocratic, constitutional order. As this latest report documents, the story is not yet over. More damage continues to be done.

All of GCAL's Hong Kong NSL reports have been published in collaboration with Hong Kong or mainland Chinese scholars, most of whom now live and work outside Hong Kong. GCAL is proud of its effort to create a platform for cutting-edge research on the NSL by Hong Kongers and Mainlanders. As the Hong Kong and mainland Chinese intellectual diaspora continues to grow in the wake of the crackdown on academic inquiry under Xi Jinping, we hope that other university centers and think tanks will consider this model of intellectual collaboration between Chinese, Hong Kong, and Western scholars. In our experience, such collaboration has deeply enriched our scholarly output, while at the same time serving as a small, modest effort to push back against the years-long campaign by Beijing and the Hong Kong government to silence critical voices – both within academic institutions and in society at large – inside China and in Hong Kong.

II. Background: the Road to the First Injunction

The national anthem mini-saga began in earnest on November 13, 2022, in Incheon, South Korea. "Glory to Hong Kong" was played at the start of the men's Rugby 7's final between Hong Kong and South Korea, instead of the People's Republic of China anthem, "March of the Volunteers."[8] (Hong Kong does not have its own anthem, and instead uses "March of the Volunteers" as its anthem at sporting events and other international gatherings.) The Hong Kong team immediately made their hosts aware of the error, apparently while the song was being played. Asia Rugby, the organizer of the event, later apologized for the snafu, stating that it was caused by "human error."[9]

The genesis of the mistake seems clear: rather than using the version of the anthem provided by the Hong Kong contingent, a low-level staffer searched online for the Hong Kong national anthem, and then downloaded the top result, which at the time was "Glory to Hong Kong." The correct song was later played during the event's prize ceremony.

[8] "Hong Kong demands probe as pro-democracy protest song played instead of anthem at Korean Rugby 7s," *Hong Kong Free Press*, November 14, 2022. Prior to that November 13 incident, on-screen captions for broadcast footage of two separate sporting events twice misidentified "March of the Volunteers" as "Glory to Hong Kong." The first such incident took place at a qualifying match for the 2023 Rugby World Cup on July 23, 2022. Perhaps because it was a lesser error, and did not involve the actual playing of "Glory to Hong Kong," these two earlier incidents failed to garner much attention.

[9] Sum Lok-kei, "Hong Kong criticizes rugby tournament after protest song is played instead of Chinese anthem," *The Guardian*, November 14, 2022.

Two days later, Chief Executive John Lee denounced the incident, stating that "Glory to Hong Kong" was associated with "violence," and with "advocacy for Hong Kong independence."[10] Legislative Councillor Michael Luk called the incident a violation of China's sovereignty, and an insult to the country.[11] He further suggested that the playing of the wrong anthem must have been intentional. That same day, the Hong Kong Police Force announced that they were opening an inquiry into the incident, and that it would be handled by the Organized Crime and Triad Bureau. No arrests were made, but the official opening of a criminal inquiry was chilling.

Over the next several weeks, the accidental switching of the national anthem was repeated at two other sporting events in different parts of the world. Each time, senior Hong Kong government officials responded with strong rhetoric and vague threats of consequences for those who were responsible for the error. On December 2, 2022, for example, "Glory to Hong Kong" was played during the medal ceremony at the Asian Classic Powerlifting Championship in Dubai.[12] Gold medalist Susanna Lin made a "time out" gesture while the song was played, which led to a pause in the music. After a slight delay, event organizers played the correct anthem. The day after the incident, the Hong Kong police once again announced that they were launching a criminal investigation.

In total, GCAL has been able to identify five incidents, spread out over a period of seven months. The last such mistake took place on February 28, 2023, in Bosnia and Herzegovina, during a men's ice hockey match between Hong Kong and Iran at the Ice Hockey World Championship's Division III, Group B tournament.

Within days of the South Korea Rugby 7s incident, Hong Kong government officials from the Innovation, Technology, and Industry Bureau (ITIB) met with Google executives in Hong Kong, and asked them to alter the search results so that the correct information would rise to the top.[13] According to press reports, Google officials refused the request, stating that Google policy is to refrain from such direct intervention in their search algorithm. The Office of the Government Chief Information Officer also wrote to Google, asking that action be taken to alter search results.

ITIB Secretary Sun Dong later told a local media outlet that he had asked Google to remove "Glory to Hong Kong" from its search results. In response, Google's government relations executives told him that such action could only be taken in the context of material that was clearly illegal. This exchange apparently contributed to the government's decision to seek an injunction against the song.

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[10] Peter Lee, "Hong Kong police probe playing of protest anthem at rugby match in South Korea as Lee links song to 'violence,'" *Hong Kong Free Press*, November 15, 2022.

[11] Kelly Ho, "National security police should investigate anthem error at rugby match, Hong Kong lawmakers say," *Hong Kong Free Press*, November 14, 2022.

[12] Tom Grundy, "Protest song 'Glory to Hong Kong' again played instead of Chinese national anthem at sporting finale," *Hong Kong Free Press*, December 2, 2022.

[13] Peter Lee, "Hong Kong asks search engine to place correct national anthem info in top results following rugby row," *Hong Kong Free Press*, November 26, 2022.

"Google said you must have evidence to prove that [the song] violated local laws, that [we] needed a court order," Sun said on local television. "Very well, since you brought up a legal issue, let's use legal means to solve the problem."[14]

Perhaps in response to Google's comments about the need for a legal basis, the Hong Kong Police Force submitted a formal request to Google in March 2023 that it remove two videos from YouTube showing "Glory to Hong Kong" being played at a sporting event. In May 2023, the Hong Kong police asked Google to remove a Google drive file that contained a form asking people to submit videos of themselves singing "Glory to Hong Kong." In both cases, the police claimed that the content in question violated local laws, including the National Anthem Ordinance and Articles 22 and 23 of the NSL. Google declined to remove the content in response to the requests.[15]

At some point in 2022, the central government in Beijing also contacted Google, and asked it to remove content related to "Glory to Hong Kong." Google also declined this request, according to its online Transparency Report.[16] Because Google Transparency Reports are not comprehensive, it is not known whether the Hong Kong government or the central government in Beijing submitted other removal requests to Google related to "Glory to Hong Kong."

Google does, however, publish some overall data related to removal requests. This data shows that Hong Kong government removal requests spiked in 2022, rising to a total of 330 items, of which 57 were related to national security.[17] This figure represents a roughly 285% increase over the 116 requests that were made in 2021, of which only 6 were related to national security. More than half of the Hong Kong government's takedown requests were made in the second half of the year, which could mean that a significant number of them are in fact related to the "Glory to Hong Kong" controversy. During this timeframe, Google declined to take action on Hong Kong government requests 48.1% of the time.[18]

On June 5, 2023, more than three months after the last sporting event mix-up, the Hong Kong government announced that it was seeking a court injunction against "Glory to Hong Kong."[19] The government's proposed injunction would have barred individuals from "broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying

[14] Hillary Leung, "Google required proof that 'Glory to Hong Kong' was illegal, technology chief says," *Hong Kong Free Press*, July 3, 2023.
[15] The requests are catalogued by Google in its online transparency report. *See* "Google Transparency Report: Government Requests to Remove Content, Hong Kong, Jan 2023-June 2023."
[16] "Google Transparency Report: Government Requests to Remove Content, China, Jul 2022-Dec 2022."
[17] "Hong Kong asked Google to remove 183 items in later half of 2022; national security takedown requests surged," *Hong Kong Free Press*, May 8, 2023.
[18] Google Transparency Report, 2022.
[19] "Application by HKSAR Government to Court for Injunction Order to prohibit unlawful acts relating to a song," Hong Kong government press release, June 6, 2023.

or reproducing in any way" the song, including online, with a secessionist or seditious intent, or with the intent to violate the National Anthem Ordinance.[20]

The proposed injunction also covered "willfully assisting, causing, procuring, inciting, aiding, [and] abetting others" to commit such acts, and "knowingly authorizing, permitting, or allowing others to commit" the listed acts. These provisions were drafted to ensure that online search engines like Google, and online video and music streaming platforms like YouTube and Spotify, would be covered by the injunction, and would face legal liability if they failed to respond to it.

The one positive element of the government's proposed injunction was that it did include an exemption for "lawful acts in connection with the Song," including "academic activity" and "news activity." Given recent prosecutions of Hong Kong journalists for their newsgathering activities, it is unclear what level of protection the provision would offer. Still, it was welcome addition to the government's proposed injunction.

In its initial writ to the court, the government listed 32 videos of the song found on YouTube, in several different languages, which it believed should be removed. What would become a nearly year-long legal wrangle had begun.

Performative Governance in Hong Kong: Playing to Beijing?

What does the government's initial response to the series of sporting event mix-ups tell us? First, it seems clear that the government wanted to make a strong political response to the incidents, perhaps over and above what was called for. Senior government officials, including both department heads, police officials, and the Chief Executive himself, all responded publicly to the incidents, often using strong rhetoric and suggesting – falsely – that event organizers were endorsing political violence, and that the incidents were in fact intentional. The public announcement of a criminal investigation by the Hong Kong Police Force was also meant to show a tough and vigorous public response, as were meetings with consular officials in Hong Kong who represented the countries where these incidents took place.

This strong public rhetoric did little to address the actual problem. But they did signal to the Hong Kong public that many of the key symbols of the 2019 protest movement were now considered unlawful by the government. Indeed, Hong Kong government officials have generally taken every opportunity to remind the public that certain talismans of the pro-democracy protests are forbidden, and that their public presentation, in any format, can lead to arrest and criminal prosecution.

That said, the most likely audience for the Hong Kong government's response was almost certainly the Communist Party leadership in Beijing. There is a performative aspect to senior Hong Kong officials' approach to national security matters: they want to be seen by Beijing as zealous in their enforcement of national security laws and norms, and as embracing a "zero

[20] Interim Injunction Order; the final text of the Order is available on the Hong Kong government website.

tolerance" approach to national security enforcement.[21] In so doing, Hong Kong officials are engaging in a Hong Kong-to-Beijing form of "biaotai," the Mainland practice of showing loyalty to the Party leadership, especially on issues deemed by Beijing to be at the top of the political agenda.[22]

This desire to be seen as tough, hard-hitting, and responsive to Beijing apparently also extends to issues like the "Glory to Hong Kong" sporting events anthem controversy, despite the fact that its domestic political impact was minimal, and its temporal effect – a little more than seven months – was limited.

There are real costs to this approach: it sends a clear message to the people of Hong Kong that their own government's political leadership has its eyes firmly fixed on Beijing. Senior officials like Chief Executive John Lee, security chief Chris Tang, and Secretary for Justice Paul Lam know that they owe their jobs to the Communist Party leadership.[23] They respond to the political cues emanating from the North, with seemingly little thought given to how their hardline rhetoric is resonating locally. This deep red public messaging could damage the Hong Kong government's reputation among the people it governs, and may foster the impression that the Hong Kong government has lost interest in preserving Hong Kong's autonomy under the "One Country, Two Systems" framework.

III. The First Injunction Decision: A Rare, Partial, and Complicated Victory for the Rule of Law

The Court of First Instance issued its decision on the government's injunction application on July 28, 2023. The CFI decision was a mixed bag: it denied the government's request on technical legal grounds, but it also held that the proposed injunction was an acceptable restriction on free expression.

The decision represented a rare loss for the government in a national security case: in the four years since the NSL went into effect, the judiciary has given the Hong Kong government almost everything it has asked for, and has not served as a meaningful check on the government's national security powers.[24] Given the extreme political pressure that the Hong Kong courts face

[21] We take the phrase "performative governance" from Iza Ding's insightful article of the same name, *World Politics* 72, no. 4 (Oct. 2020), pp. 525-56. While Ding is concerned with the efforts of Mainland Chinese officials to engage in acts of performative governance that will sway members of the public, we believe that some elements of her analysis could be applied to Hong Kong officials' efforts to influence the views of the Party elite. Ding, ibid., pp. 529-30.

[22] David Bandurski, "Bending the Knee for Xi," China Media Project, April 25, 2022.

[23] Many Hong Kong experts believe that Lee was chosen precisely for his loyalty to Beijing and his willingness to unswervingly follow the political direction set by the Party. As one local academic noted, "Beijing believes candidates from the disciplined services are more dependable, as they exhibit more political loyalty." Shibani Mahtani, "Beijing's handpicked candidate for Hong Kong signals tighter control," *Washington Post*, April 8, 2022. Other analysts have made similar points in private conversations with the authors.

[24] Kellogg and Yeung, "Three Years in Hong Kong's National Security Law Has Entrenched a New Status Quo," *ChinaFile*, September 6, 2023. As we noted then, "(i)nstead of acting as a check on government and defending

when deciding national security cases, the CFI's decision against the government's proposed injunction represented a rare instance of political courage by the judiciary. The CFI ignored clear signaling from the government that the injunction was a high priority, and instead issued a decision that made good use of well-established common law norms and existing case law to deny the government's request.

At the same time, the CFI's failure to engage in any meaningful human rights analysis was not without cost. That failure opened a door to the government on appeal: if it could address the technical legal arguments put forward by the CFI – or at least pay lip service to them – then the government's appeal would succeed. The potentially more significant constitutional barrier to the proposed injunction, that of the right to free expression under Article 27 of the Basic Law and Article 19 of the ICCPR, was ignored by the CFI, and was therefore not addressed by the Hong Kong government in its appeal.[25] Though it could have reopened the constitutional question, the Court of Appeal also declined to put forward any serious human rights analysis of the government's proposed injunction in its decision.[26]

Equally unfortunate was the CFI's decision not to analyze the government's claim that "Glory to Hong Kong" represented a national security threat. Instead, the CFI took the government's national security claims at face value, and also adopted a pro-government view of the 2019 pro-democracy protests, referring to them as "violent protests," and linking the song itself to public comments "advocating the separation of Hong Kong from the PRC."[27] No mention was made of the fact that the vast majority of protesters were non-violent, or of the democratic aspirations that fueled the movement.[28] Far from being incidental, this pro-government framing was essential to the CFI's human rights analysis.

In essence, the CFI largely affirmed the government's extensive national security powers, and approvingly cited various examples of the government's extensive efforts to criminally prosecute individuals for publicly playing the song.[29] Indeed, the court declined to issue an injunction against the song precisely because the government has a number of other tools at its disposal to respond to unlawful efforts to publicly perform the song, or to distribute it. In effect,

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basic rights, the court system's approach has been to bend to the enormous political pressure it faces, and to give the government more or less everything it wants in national security cases." That pattern continues today.

[25] The ICCPR is directly incorporated into Hong Kong law by Article 39 of the Basic Law.

[26] As discussed in more detail below, the Court of Appeal's ruling dismissed any concerns over limits on the right to free expression in a mere four paragraphs. Court of Appeal, Civil Appeal No. 274 of 2023, paragraphs 74-77, May 8, 2024.

[27] CFI decision, HCA 855/2023, [2023] HKCFI 1950, paragraph 12.

[28] Without doubt, violence by protesters was a real, if limited, aspect of the 2019 protest movement, but it was dwarfed by police brutality, other forms of excessive use of force by the state, and violence by pro-Beijing non-state actors. Thomas E. Kellogg, "Violence by Protesters Won't Advance Their Cause," *ChinaFile*, November 14, 2019. For an excellent short discussion of violence by police and by protesters themselves, see James Palmer, "Hong Kong's Violence Will Get Worse," *Foreign Policy*, November 11, 2019.

[29] CFI decision, paragraphs 15-19. As Judge Chan stated, "(t)here can be little doubt that the Song was used and used effectively by people with intention to incite secession and/or sedition."

the CFI was telling the Hong Kong government that it could legally penalize individuals who performed or distributed "Glory to Hong Kong." It just had to use the criminal law to do so.

Getting to No: the Utility Analysis and Conflict with Criminal Law

The CFI's decision focused on three key issues of analysis: first, the *utility* of the government's proposed injunction; second, whether the proposed injunction would *complement or conflict with* criminal law; and third, whether the proposed injunction would *limit free expression* in Hong Kong in constitutionally impermissible ways.

On the question of utility, the CFI, citing to Hong Kong case law, noted that injunctions in aid of the criminal law should only be issued in situations in which they would have a meaningful impact, above and beyond the deterrent effect created by the criminal law itself. When issued, such injunctions should only cover ground that is "really necessary and address(es) serious concerns."[30]

The court rightly found that, given that the injunction targets only criminal uses of "Glory to Hong Kong," which in turn will often depend on criminal intent, it was not clear that an injunction would be a useful addition to the deterrence already provided by Hong Kong criminal law. The criminal penalties for violations of the sedition provision of the Crimes Ordinance, or for violations of the NSL or the National Anthem Ordinance, are significant, Judge Chan noted.[31] At the same time, the NSL also creates new institutions that are meant to safeguard national security.[32] All of these criminal tools and institutions have been put to use by the government, and have led to a steady stream of criminal convictions.[33] The growing number of successful prosecutions should be enough to put would-be criminal offenders on notice, Judge Chan held, thus obviating the need for an injunction.

Judge Chan also rightly suggested that additional public outreach and education, along with more effective enforcement of the criminal law, would likely be enough to achieve the government's stated goals, and would further render a court-issued injunction unnecessary.[34]

Judge Chan also expressed concern regarding the compatibility of the proposed injunction enforcement with the existing criminal law and any future criminal prosecution. As Judge Chan noted, the NSL lays out its own extensive due process rules, including limits on bail and the right to a jury trial. It was not clear how these national security-specific rules and procedures would operate in tandem with existing civil enforcement rules: would a judge enforcing the

[30] CFI decision, paragraph 51.
[31] CFI decision, paragraph 47-8.
[32] GCAL has argued elsewhere that these new institutions are deeply problematic from a human rights perspective, and also do deep damage to Hong Kong's autonomy under the "One Country, Two Systems" framework. See Wong and Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, GCAL report, February 2021, pp. 12-15.
[33] CFI decision, paragraph 58.
[34] CFI decision, paragraphs 58-9.

government's proposed injunction, for example, have to be a designated judge under Article 44 of the NSL? Would such enforcement proceed only with the Secretary for Justice's written consent, as is required for NSL criminal prosecutions?[35] What about concerns over double jeopardy, given that any contempt proceeding would be based in part on the same set of facts that would serve as the basis for a criminal case?

All of these concerns led Judge Chan to conclude that there is real risk of conflict between the proposed injunction and pre-existing criminal law, including the NSL. According to Judge Chan, this potential conflict provided an additional reason why the injunction should not be issued.[36]

Judge Chan's decision is both deeply problematic and intriguingly creative: as noted above, he adopted a pro-government view of the 2019 protests, and repeatedly signaled his agreement that the NSL and other laws could be used to prosecute peaceful political speech, including public performance of "Glory to Hong Kong." These statements are highly problematic from a human rights perspective: as GCAL has made clear elsewhere, the courts have simply failed to apply international human rights jurisprudence to such cases.[37] Doing so would mean that performance of a song like "Glory to Hong Kong" could not be criminalized. Instead, for more than four years, they have allowed the Hong Kong government to use key laws – including the NSL, the sedition provision of the Crimes Ordinance, and the National Anthem Ordinance – as tools to crack down on what should be legally protected speech and dissent.[38]

But at the same time, Judge Chan was able to use those same laws, the government's extensive prosecution record under them, and the powerful new national security apparatus, as core reasons why an injunction should not be issued. As Judge Chan pointed out, given the legal regime's effectiveness and impact, an injunction was simply not necessary. Instead, he suggested that the government should continue to use the criminal law to achieve its goal of suppressing seditious use of "Glory to Hong Kong," and should not call on the courts to add civil injunctions to the long list of legal tools being used to enforce the national security regime.

The CFI deserves credit for its application of common law norms to rule against the government in a national security case, and for using the government's extensive national security powers as a basis for denying its injunction application. Still, as discussed in more detail below, while this creative move was welcome, it came at a cost: yet again, the courts signaled their support

[35] NSL Article 41.

[36] CFI Decision, paragraph 73.

[37] For a specific example of the judiciary's failure to apply international human rights norms to a national security case, see Kellogg and Lai, *The Tong Ying-kit NSL Verdict: An International and Comparative Law Analysis*, GCAL Briefing Paper, October 2021. In that case, we wrote that "the court… completely ignored all international human rights covenants to which Hong Kong is a party, and all comparative jurisprudence seeking to balance national security and human rights concerns…" *Ibid*., p. 14.

[38] In March 2024, the sedition provision of the Crimes Ordinance was replaced by a new and expanded sedition provision, as part of the so-called Safeguarding National Security Ordinance (SNSO). The SNSO included several new crimes, and yet again expanded the Hong Kong government's national security toolkit. For an analysis of the government's proposed SNSO amendments prior to final passage, including the revisions on sedition, *see* GCAL, *Submission on Hong Kong Government Consultation Document*, February 27, 2024.

for the government's national security crackdown. Yet again, they failed to protect the basic rights of Hong Kong citizens.

Human Rights and the Hysan Test: Counting Human Rights Out?

The CFI had one more prong to add to its analysis: was the government's proposed injunction an impermissible restriction on the right to free expression? To answer this question, Judge Chan applied the four-part *Hysan* test, set out in *Hysan Development Co. Ltd. v Town Planning Board*.[39] Under the *Hysan* test, the court must ask: (1) whether the proposed restriction on basic rights pursues a legitimate aim; (2) whether the restriction is rationally connected to that aim; (3) whether the proposed measure is no more than necessary for achieving that aim; and (4) whether a reasonable balance has been struck between the societal benefits being pursued and the encroachment on individual rights, with a particular focus on whether the proposed restriction "results in an unacceptably harsh burden on the individual."[40]

On this front, the CFI's analysis was deeply disappointing. In fact, the court largely eschewed an in-depth human rights analysis. Instead, it made a brief and conclusory declaration that the four prongs of the *Hysan* test had been satisfied, and that, but for the common law utility and necessity concerns discussed above, the injunction could be issued.

Had the court looked to comparative jurisprudence, it would have found a basis for taking a more probing approach, and for subjecting the government's national security claims to a more searching analysis. In 2012, for example, the European Court of Human Rights (ECtHR) held that, when restrictions on human rights are involved, national courts have an obligation to subject the government's national security claims to "some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence."[41] Failure to do so, the ECtHR held, would allow states to "encroach arbitrarily on rights."[42]

Simply put, the Hong Kong CFI should not have taken the government's national security claims at face value. Instead, it should have asked whether the Hong Kong government's national security claims were in fact legitimate. Did they have an adequate factual basis? Was the government right to invoke national security grounds to ask the court to censor the free speech rights of the people of Hong Kong?

These questions overlap directly with the key questions that the court should have asked under the *Hysan* four-pronged test. What would a rigorous and searching application of the *Hysan* test look like in this case? We believe that, had the CFI engaged in such an analysis, it would have found that the proposed injunction was in fact an impermissible restriction on the basic

[39] (2016) 19 HKCFAR 635.
[40] *Hysan*, paragraphs 134-5.
[41] *Janowiec and Others v. Russia*, 55508/07 and 29520/09, Judgment 16.4.2012, paragraph 213.
[42] Ibid.

right to free expression, which is protected by Article 27 of the Basic Law and Article 19 of the ICCPR.

There are serious questions as to whether *any* of the four prongs of the *Hysan* test could be satisfied in this case. Take the first prong, for example: in this case, the government's claimed aim is protecting national security. The protection of national security is a core government function, one that, properly defined, would easily satisfy the first prong of the *Hysan* test.

Unfortunately, the Hong Kong government has defined national security in such a vague and overbroad manner that is almost meaningless. To be sure, its national security actions over the past nearly five years have encompassed some legitimate responses to apparent security threats. But the government has primarily used its extensive national security powers to engage in politically-motivated efforts to punish political speech that it doesn't like. Recent national security prosecutions, for example, have targeted the public display of pro-democracy slogans and online criticism of Communist Party leader Xi Jinping.[43] In September 2024, for example, Hong Konger Chu Kai-pong, 27, pled guilty to sedition, and was sentenced to fourteen months in prison. He was arrested inside a subway station in June for wearing a t-shirt that said "Free Hong Kong" in English, and "Liberate Hong Kong, Revolution of Our Times," in Chinese. The government may find such sloganeering unpleasant or even embarrassing, but it is far from a genuine threat to national security.

As these and other examples make clear, the government has neither promulgated nor adhered to a clear and narrowly-tailored definition of national security. Instead, its definition of what constitutes a threat to national security is so vague and overbroad that it can easily sweep up peaceful political speech, including criticism of government policy unrelated to the 2019 protests.[44] As a result, the question of the government's legitimate aim is a more difficult one: is the government genuinely pursuing the goal of protecting national security, or is it yet again using national security grounds as a means to restrict speech? The vagueness of Hong Kong's national security laws makes it impossible to say for sure. This in turn complicates the first prong of the *Hysan* test.

But perhaps the deepest concerns lie with *Hysan's* second prong: is the proposed restriction, an injunction that would bar certain uses of the "Glory to Hong Kong" anthem, rationally connected to the government's stated aim of safeguarding national security?

Roughly five years after the 2019 protest movement, it is hard to argue that Hong Kong faces any serious and ongoing national security threat that could serve as the basis for restrictions on free expression. Public protests have ground almost completely to a halt, and public calls for

[43] David Pierson and Tiffany May, "This Is What Can Land You Jail for Sedition in Hong Kong," *New York Times*, September 27, 2024.

[44] *See*, e.g., Selina Cheng, "Covid-19: Hong Kong national security police arrest 2 for sedition over anti-vaxx posts," *Hong Kong Free Press*, February 25, 2022. In the years to come, GCAL is concerned that the government could use both the newly-revised sedition provision of the SNSO and the other NSL criminal provisions to silence criticism of government policy on issues that are sensitive or controversial.

political reform – which the government has deemed a threat – have been silenced. As GCAL has written elsewhere, the Hong Kong government was wrong to label a largely peaceful and pro-democratic protest movement as a threat to national security.[45] But even so, nearly half a decade later, the courts should not blithely allow the government to continue to use that arbitrary and inaccurate national security label as a blank check to restrict basic rights. Instead, it should assess the government's national security claims on the basis of the current situation in Hong Kong, which is both stable and peaceful. In that context, restrictions on "Glory to Hong Kong" are unnecessary: they are not directly connected to the government's stated objective of protecting national security.

Then there is the question of the "Glory to Hong Kong" anthem itself: does its public performance or distribution constitute a genuine national security threat? Or is the government merely censoring political speech that it doesn't like? Generally speaking, international human rights law and comparative best practice set a high bar for lawful censorship of political speech: such speech must be intended to incite political violence, and also be actually likely to incite such violence.[46] The lyrics of "Glory to Hong Kong" do not call for acts of violence, nor do they constitute a political attack on anyone, of the sort that could be considered a veiled threat. The song, therefore, should not be considered a genuine threat to national security.

In other words, neither the overall political environment in Hong Kong, nor the specific content the song itself, point to any connection to a genuine threat to national security. The government's claim of a connection between national security and the proposed injunction, therefore, is also very much in doubt, such that the second prong of the *Hysan* test is not satisfied.

Stooping to Conquer: Strategic Positioning at Work?

It is hard not to read the CFI's rejection of the government's injunction request as a highly strategic effort to find new ways to act as at least a minor and occasional check on the government's expansive national security powers. Perhaps knowing that blocking the government's injunction application on human rights grounds would put the court in the government's cross-hairs, the CFI instead wisely crafted a ruling that relied heavily on UK common law jurisprudence on injunctions. So crafted, the court's ruling is limited in its application: a rights-based ruling that declared "Glory to Hong Kong" to be protected political speech would have much broader implications for the government's ongoing national security crackdown. Instead, the CFI's ruling largely affirmed the government's national security powers, while at the same time denying it the injunction it sought.

[45] GCAL, *Submission on Hong Kong Government Public Consultation Document*, February 27, 2024, paragraphs 4.2-4.3.

[46] For a brief overview of international legal standards on free expression and incitement, see Pillay, "Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance," 14 New Eng. J. Int'l and Comp. L., 203-210 (2007).

The Hong Kong courts are no stranger to strategic positioning: as a common law judiciary committed to liberal values that are attached to a larger one-Party state that has explicitly and repeatedly rejected those values, the court system knows that it must tread carefully.[47] For more than two decades, Hong Kong judges have been forced to take the potential ramifications of their rulings into account. They have generally tried to avoid issuing any rulings that could lead to a backlash, while at the same time maintaining their commitment to core liberal values, including human rights. Generally speaking, the court system's "pro-regime or conservative tendency" emerges in cases that are a high priority for the central government: cases involving Beijing's authority under Article 158 of the Basic Law, for example, have more or less uniformly been decided in the central government's favor.[48] The courts have similarly delivered pro-government, pro-Beijing rulings in democratic reform cases, and in cases involving the desecration of national symbols. Other areas that are substantively vital but less politically sensitive, such as LGBT rights, receive continued judicial protection.[49]

This same conflict-avoidance approach has been employed in national security cases: in case after case, and with a vanishingly small number of exceptions, the courts have delivered pro-regime verdicts. This pattern includes both criminal convictions of roughly 150 individuals, and also judicial endorsement of the narrowing of core procedural rights, including the right to pre-trial release, the right to counsel of one's own choosing, and the right to a jury trial.[50] In our view, at least some judges are issuing pro-regime verdicts in order to advance their careers: the government's aggressive implementation of the NSL has sent a clear signal to individual judges that their professional advancement depends on toeing the government's ideological line, and delivering a steady stream of guilty verdicts.[51]

That said, we also believe that most judges have concluded that they simply have no choice. They seem to have concluded that any effort to block the government's weaponization of the

[47] As one prominent scholar put it, the judiciary is "keenly conscious of the consequences of its actions," and seems to know that ruling against Beijing's interests in certain key issue areas could invite an immediate backlash, one that could have significant long-term consequences for the courts, and for the legal system as a whole. Po Jen Yap, "Twenty Years of the Basic Law: Continuity and Changes in the Geoffrey Ma Court," *Hong Kong Law Journal*, vol. 29, pp. 209-38 (2019).

[48] Julius Yam, "Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts," *Law and Social Inquiry*, Vol. 46, Iss. 1 (Feb. 2021), p. 162. The list of cases in which the courts have sought to avoid conflict with Beijing is drawn from this same deeply insightful article, pp. 163-7.

[49] This trend has continued into the national security era. In September 2023, for example, the Court of Final Appeal ruled that the government must provide a legal framework for same-sex couples. Amnesty International, "Hong Kong: Same-sex marriage ruling a hope for LGBTI rights," AI press release, September 5, 2023.

[50] For more on due process rights in national security cases, *see* Wong, Kellogg, and Lai, *Hong Kong's National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper*, June 28, 2021.

[51] Given the lack of transparency, we can only engage in educated guesswork over judicial motives. For a rare assessment of the factors that may be driving judicial decision-making at the individual level, see Samuel Bickett, "How Kwok Wai-Kin rose from disgrace to become a powerful national security judge (Part I)," *Hong Kong Law and Policy Substack*, March 6, 2023.

law to crack down on its perceived political opponents would achieve little, and could lead Beijing to take further steps to limit judicial independence, at least in national security cases.[52]

This point of view was recently articulated in an unusually candid manner by former Non-Permanent Judge (NPJ) Lord Sumption, who resigned from the Hong Kong Court of Final Appeal in June 2024. In a podcast interview that he gave soon after he resigned his NPJ post, Lord Sumption recounted a conversation that he had had "a couple of years ago" with a "very senior" Court of Appeal judge. According to Lord Sumption:

> [This judge] said that the atmosphere has a significant influence over what judges decide, because Hong Kong is part of China, politically and geographically, it hasn't, there is no alternative. The judiciary cannot operate a guerilla war against the Chinese government and their effective agents in the Hong Kong government. The West has nothing to offer Hong Kong, other, [the judge] said, than moral lectures and second passports. What are we supposed to do? In the end, Beijing can always get its way because of the right to refer any case for a so-called interpretation to the relevant committee of the Beijing legislature. So, you know, we have to be realistic about this.[53]

This judge's comments mirror the analysis of several scholars who have looked at judicial decision-making in Hong Kong in the post-1997 era,[54] and likely reflects the mix of realism and fatalism that has guided many Hong Kong judges handling national security cases since the law went into effect.

The judiciary's decision to take an accommodationist approach is not without basis: one only need scan the pages of pro-Beijing newspapers in Hong Kong, including *Ta Kung Pao* and *Wen Wei Po*, to find clear signals from the Communist Party – often couched in strident, over-the-top language – that they expect all national security defendants to be convicted, and the NSL to be aggressively implemented across all sectors of Hong Kong government and society.[55] Party officials have delivered a similar message – at times in less shrill Party-speak – that they expect

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[52] This possibility was recently broached by the former dean of Hong Kong University Law School, Johannes Chan, in an excellent assessment of the judiciary's response to the 2019 protests and the NSL. According to Chan, "the court may believe that a conciliatory approach would avoid confrontation with other political branches that may lead to worse situations of undermining the rule of law and judicial independence." Chan refers specifically to the CFA, but we believe that his analysis applies to the Hong Kong judiciary as a whole. Johannes Chan, "Taking Rights Seriously: The Judiciary at a Challenging Time," 52 *Hong Kong Law Journal* 937 (2022), p. 961.

[53] "Hong Kong with Jonathan Sumption," Law and Disorder podcast, October 5, 2024. Lord Sumption's remarks on the political "atmosphere" in Hong Kong come at about 20 minutes into the discussion. The judge was likely referring to the NPCSC's authority to interpret the Basic Law, under Article 158(3). The NPCSC has a similar authority to interpret the NSL, under Article 65 of that law.

[54] See, e.g., Eric C. Ip, "Constitutional Competition Between the Hong Kong Court of Final Appeal and the Chinese National People's Congress Standing Committee: A Game Theory Perspective," *Law and Social Inquiry*, Fall 2014, Vol. 39, No. 4 (Fall 2014), pp. 824-848.

[55] For an excellent assessment of the political role that pro-Beijing news outlets play in Hong Kong, *see* Timothy McLaughlin, "How China Weaponized the Press," *The Atlantic*, September 9, 2021.

the courts to toe the line.[56] Hong Kong judges are getting the message, and the authors believe that they are acting on it.

In this fraught and highly politicized environment, the CFI's rejection of the government's request for an injunction against the "Glory to Hong Kong" anthem could be seen as an effort to start to bend the curve, to take a small step away from the judiciary's near-perfect pro-government record in national security cases over the past four-and-a-half years. Had it been allowed to stand, the CFI's injunction ruling would have been the first full-fledged loss for the government in a national security case since the law went into effect more than four years ago.[57]

As discussed in more detail below, this modest effort failed. After the CFI's verdict was issued, the government announced its intention to appeal. Less than a year later, the appeal succeeded: in May 2024, the Court of Appeal announced its verdict in favor of the government's injunction application. The blemish on the government's near-perfect win-loss record in national security cases was removed, and its unquestionable supremacy in national security matters was restored.[58]

IV. The Second Injunction Decision: The CA Retreats

After the CFI ruling, the Hong Kong government could have allowed the matter to drop. After all, by July 2023, the problem of mistaken anthem use at sporting events had ended, thus depriving the government of its core rationale for going to court in the first place. Had it allowed the CFI ruling to stand, the government also would have demonstrated its acceptance of one of the most fundamental tenets of the rule of law: acceptance of judicial rulings, including those that run counter to one's own interests.

Instead, on August 7, 2023, the government announced that it would appeal the ruling. The move came as no surprise: on the day the CFI had issued its ruling, CE John Lee stated publicly that he had told the Department of Justice to "take follow up actions as soon as possible."[59] Other pro-Beijing lawmakers also criticized the CFI ruling, some using particularly strong

[56] In an April 2023 speech in Hong Kong, for example, Xia Baolong, the Director of the State Council's Hong Kong and Macau Affairs Office, urged Hong Kongers to "stay vigilant against the resurgence of street violence, be wary of 'soft confrontations' with secret attempts to trigger chaos and also be wary of some anti-China activities overseas which might in the end affect the city." Jeffie Lam, "Hong Kong national security law: protesting not the only way to express views, Beijing's top man on city affairs says as he urges residents to focus on economy," *South China Morning Post*, April 15, 2023.

[57] The one possible exception is the acquittal of social worker Lee Yue-shun in the so-called Hong Kong 47 subversion case. Lawyer Lawrence Lau was also acquitted, but the government has announced its intention to appeal his not guilty verdict. Helen Davidson, "Hong Kong 47 trial: 14 activists found guilty of conspiracy to commit subversion," *The Guardian*, May 30, 2024.

[58] For a deeper analysis of the government's won-loss record in national security cases, see our subsection on the "micro-trend" of overruling positive national security decisions, *infra*, at note 81.

[59] Irene Chan, "Gov't launches bid to appeal court's rejection of ban on pro-democracy protest song 'Glory to Hong Kong,'" *Hong Kong Free Press*, August 7, 2023.

language. At least one pro-Beijing lawmaker suggested that the ruling should lead to unspecified "legal reforms."[60] Such statements were seen by some as suggesting that the courts should be institutionally punished ruling against the government in a politically sensitive case.

The Court of Appeal issued its decision more than nine months after the CFI's verdict, on May 8, 2024. That decision is a deep disappointment: rather than creatively using common law case law and norms to block the government's injunction request, the CA instead distorted key comparative jurisprudence to approve and issue the injunction.[61] At the same time, the CA also repeatedly emphasized the need for a seemingly heightened form of national security-focused deference by the courts to the executive branch in all national security cases. This additional element of the CA's decision could resonate for years to come: it will almost certainly shape future verdicts that similarly fail to protect basic rights.

The CA's decision mirrors that of the CFI in one key respect: it also declined to give Hong Kong's constitutional rights protections any meaningful legal weight, and failed to engage in any real human rights-based analysis of the government's proposed injunction. Instead, it quickly dispatched with the question of human rights, approvingly citing the CFI's flawed analysis.

The CA Verdict: National Security Deference, Democratic Accountability, and Constitutional Rights

Perhaps unsurprisingly, the Court of Appeal also adopted a pro-government framing of the 2019 protests. Like the CFI, the CA did not mention the democratic aspirations of the 2019 movement. It also failed to mention that the vast majority of protesters were non-violent. Instead, it adopted the sort of strong language that Hong Kong government officials themselves have used when describing the events of 2019: it labeled the protest movement a "sustained outbreak of massive violent public lawlessness," one whose impact on national security and public order were both "alarming" and "dire."[62] The CA directly links the "violent protests" to the "Glory to Hong Kong" anthem, comparing the song to the "umbrellas, bricks, stones, and petrol bombs" that were used as weapons by some protesters during the protest movement.[63]

As noted above, it is true that some protesters did resort to acts of violence as the protests continued into the fall of 2019. But the overall movement, perhaps one of the largest sustained street protest movements for democracy in world history, was largely peaceful, with millions of

[60] Ibid.
[61] The CA's distorted use of comparative jurisprudence presents an interesting parallel: the Hong Kong government's distorted use of comparative law to justify its own national security law reforms, including the 2024 Safeguarding National Security Ordinance. For more on this, *see* GCAL's *Submission on Hong Kong Government Public Consultation Document*, February 27, 2024. In our submission, we noted that some of the government's references to comparative law were "largely inaccurate," and concluded that its "references to the laws of other countries are, at best, disingenuous, and at worst, intentionally misleading." Ibid, paragraph 3.13.
[62] CA verdict, May 8, 2024, paragraph 3.
[63] CA verdict, paragraph 4.

Hong Kongers taking to the streets, week after week, for months at a time.[64] Their goal was to press their government – and, by extension, Beijing – to enact long-promised, and long-delayed, democratic reforms. The CA's mischaracterization of the movement was a clear signal of its intent to view both the events of 2019, and the current context, in a pro-government light, one that justifies limits on basic rights as both sensible and necessary.

The CA verdict then pivoted to an extensive legal analysis, focused on three core prongs: first, the proper judicial approach to a government's application in aid of the criminal law, when the criminal law in question relates to national security; second, the role of the court in assessing national security questions in the context of an injunction application, given the high degree of deference that the CA believes the courts should show to the executive on such matters; and third, the question of potential conflicts between contempt proceedings and the criminal law, and how such questions should bear on an injunction application.

The CA's analysis of the first prong focused on Articles 3 and 8 of the NSL, both of which emphasize the role of the courts – among other branches of government – in safeguarding national security, and in enforcing the NSL. The court's discussion, which stretches over nearly a dozen paragraphs, is notable for the extent to which the court attempts to highlight its deep dedication to the government's conception of national security, with no mention of other judicial roles or values. By our count, the court uses the phrase "national security" a full 26 times in this section, not including the multiple references to the NSL itself.

The overall effect of this repeated reference to the court's "duty… to safeguard national security" is to create an impression, intended or not, of political positioning: the court signals its acceptance of the government's national security agenda, and recognizes its role in the implementation of that agenda. The CA, for example, approvingly cites the Court of Final Appeal's comment in a 2022 ruling that "(t)he courts of the HKSAR are of course fully committed to safeguarding national security and acting effectively to prevent, suppress, and impose punishment for any act or activity endangering national security as required by NSL 3."[65]

This strong pro-government national security rhetoric is unfortunate. Beyond political signaling to the government, it also sends a message to national security defendants. They will know that the government's first priority is implementation of the government's conception of national security. The rights of the accused are, at best, a distant second, if they are considered at all. GCAL believes that national security defendants have picked up on this clear message: many decide to plead guilty rather than face a trial before a court whose political priorities are well-known.[66]

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[64] For an assessment of the 2019 protest movement, see Davis and Kellogg, *The Promise of Democratization in Hong Kong: Discontent and Rule of Law Challenges*, National Democratic Institute and Georgetown Center for Asian Law report, April 2020, pp. 15-29.

[65] CA decision, paragraph 40. The CFA ruling cited is *Secretary for Justice v. Timothy Wynn Owen KC* (2022) 25 HKCFAR 288, paragraph 33.

[66] Kellogg and Yeung, "Three Years In…," *ChinaFile*, September 6, 2023.

Even more important than the court's political signaling is the *legal* weight that it ascribes to key national security provisions. By our count, the court cites a full nine provisions of the NSL in this section, as well as the NSL as a whole, and all of Chapter 3, on Offenses and Penalties. The court also makes reference to other key national security-related laws, including s. 10 of the Crimes Ordinance and s. 7 of the National Anthem Ordinance. This web of extensive references to various NSL and national security provisions makes clear that the court is ascribing significant legal weight to the national security concerns alleged by the government in this case.[67] In case there is any doubt, the CA also directly states that "(t)he court must give the national security considerations raised by the Secretary such weight as is commensurate with their highest importance."[68]

It is true that the CA opens its legal analysis with an extensive review of UK case law on the issuing of injunctions. This case law does make clear that "the power to grant injunctions in aid of the criminal law must be exercised with great caution," only under "exceptional" circumstances.[69] But the decision's subsequent heavy emphasis on national security concerns, and on the NSL itself, serve as a clear signal of the court's fundamental priority. Common law guidance aside, the outcome of the case will be determined by the government's articulation of its national security needs. In effect, UK common law values and cases serve as window dressing, but the main legal work in the CA's decision is done by the NSL.

In its section on judicial deference in national security cases, the CA makes even more extensive use of UK case law to distort its ruling, painting a picture of adherence to the common law, when in fact it is applying common law norms and precedents to a very different Hong Kong context.

The CA opens its discussion of deference with an explication of several key UK cases, including several cases from the post-September 11, 2001 era.[70] As its reading of these cases makes clear, the UK courts have generally held that national security determinations should be made by the executive. Those determinations are not within the purview of the judiciary, which lacks the institutional expertise to make such assessments.[71] Measures adopted in response to such assessments are also given a high degree of deference. The CA notes that, under UK law, the judiciary should defer to the executive on the appropriateness of such measures, as long as they pass muster under an extremely permissive reasonableness standard.

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[67] Those articles are NSL 1, 2, 3, 6, 7, 8, 9, and 21. CA ruling, paragraphs 33-44. A few paragraphs later, in the following section, the court references NSL 62, which highlights the priority of the NSL over all local laws in the case of conflict.

[68] CA decision, paragraph 41.

[69] CA decision, paragraphs 26-27.

[70] Any assessment of the governmental and judicial response to the 9/11 terror attacks on the United States, and those that followed in other countries in later years, is beyond the scope of this assessment. Our discussion of UK case law is not meant to suggest an endorsement of those decisions, or the government actions under review. Instead, our goal is to shed light on their use in the Hong Kong context in the current national security era.

[71] CA decision, paragraphs 52-3.

The judiciary's role does not end there, however. Drawing on the key post-9/11 cases *Secretary of State for the Home Department v. Rehman*[72] and *A v. Secretary of State for the Home Department*,[73] the CA notes that, on matters that are not the exclusive province of the executive, the court system should play a more active role. Most importantly, on questions of basic human rights, the judiciary must perform its constitutional function: judges must engage in judicial review of the state action to determine whether the restriction on the right in question is justified.

At first glance, the Hong Kong CA's reference to key UK precedents, and its assertion of its role in protecting constitutional rights, would seem like a positive development. Instead, the CA's reference to these cases serves as mere window dressing, a comparative law façade that serves only to justify the CA's seemingly preordained decision to issue the injunction.

There are many problems with the CA's use of UK precedent, and with its overall argumentation in this section. We believe that two concerns in particular are worthy of note.

First, the CA applies the UK case law on national security deference to a very different political context in Hong Kong. The concept of democratic accountability is central to the UK judiciary's embrace of significant deference to the executive in national security cases. In the 1999 national security case *R v. DPP ex parte Kebeline*, the UK court stated that:

> In some circumstances, it will be appropriate for the courts to recognize that there is an area of judgement within which the judiciary will defer, *on democratic grounds*, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.[74]

The UK court in *Brown v. Stott* made a similar point in its decision:

> While a national court does not accord the margin of appreciation recognized by the European Court as a supra-national court, it will give weight to the decisions of a *representative legislature and a democratic government* within the discretionary area of judgment accorded to these bodies.[75]

Notably, the Hong Kong CA cited *Brown v. Stott* in its decision, without reference to the UK court's emphasis on democratic institutions and accountability.

Similarly, in *Rehman*, Lord Hoffman highlighted the crucial role that democratic accountability plays in judicial deference to the executive on national security matters:

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[72] [2003] 1 AC 153.
[73] [2005] 2 AC 68.
[74] [2002] 2 AC 326, paragraph 381. Emphasis added.
[75] [2003] 1 AC 681, paragraph 703. Emphasis added.

> I wrote this speech three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that *such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.* If the people are to accept the consequences of such decisions, *they must be made by persons whom the people have elected and whom they can remove*.[76]

As noted above, *Rehman* was also cited repeatedly by the Hong Kong CA in its decision, as the basis for its holding on deference to the executive in national security cases. The CA did not reference Lord Hoffman's comments on democratic accountability and its relationship to judicial deference in its discussion of the case.

As the UK courts have made clear, judicial deference in national security cases cannot be separated from democratic accountability: citizens themselves pass judgment on the government's use of its national security powers at the ballot box. Citizens themselves are the primary and fundamental check on the government.

Sadly, no such democratic check on the government's extensive national security powers exists in Hong Kong. Although the Basic Law promises gradual progress toward democracy in Hong Kong, Beijing dragged its feet on such reforms for years.[77] In 2021, the central government worked hand in glove with its Hong Kong counterpart to dramatically overhaul Hong Kong's political system, and remove even the partial elements of democracy that were in place. Since then, Hong Kong's once-vibrant – if only partially democratic – Legislative Council has been a shadow of its former self. Legislators have almost uniformly backed the government's national security crackdown, at times seeming to compete with each other in publicly showcasing their pro-government credentials. The Chief Executive, who was never subject to democratic oversight, remains politically beholden to Beijing, and has used the national security crackdown to maintain his standing with the Communist Party leadership.

The CA cannot, of course, do anything about the non-democratic nature of Hong Kong's political institutions. That said, it can control its own use of common law precedent. As noted above, the Hong Kong judiciary has a long history of using comparative law as a shield, both to

[76] *Rehman*, paragraph 62. Emphasis added.

[77] For an excellent overview of the lack of progress on democratic reform in Hong Kong after the 1997 Handover, *see* Michael C. Davis, "The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong," Hastings Int'l & Comp. L. Rev., Vol. 38:2 (2015), pp. 275-97.

safeguard human rights, and to more broadly protect Hong Kong's liberal legal system.[78] In this case, however, the CA has used UK case law to give its judgment a false imprimatur of comparative law consistency, one that, on closer examination, obscures the true nature of its ruling. The CA's decision owes its genesis not to UK case law, but to the political imperatives of the Hong Kong national security state.

This flawed application of the national security deference principle manifests itself most clearly in the very different conception of national security in Hong Kong, as compared with the UK context in the aftermath of the 9/11 attack on the U.S. and the 7/7 attack on the UK. Since the NSL went into effect, the government's national security targets have been opposition politicians, journalists, rights lawyers, civil society activists, and private citizens. (The law has also been used to target a small number of individuals who were apparently planning to engage in acts of politically-motivated violence.)

In other words, Hong Kong is a textbook case of the abuse of national security laws by the government to target civil society and democratic opposition.[79] Instead of pursuing national security, as traditionally defined by rights-respecting states, the Hong Kong government is using the NSL and other laws to pursue a form of *political* security, in which the law is used to protect the government's monopoly on power and shield it from political criticism.[80] The court system's endorsement of this abuse of the law cannot be meaningfully compared to judicial grappling with genuine questions of national security, counter-terrorism, and human rights in other contexts.

The second element of the CA's deference analysis that is worthy of note is its discussion of the role of the judiciary in protecting constitutional rights. At the core of the CA's deference analysis is its explication of the ways in which the UK courts have, even in the national security context, preserved their role as the fundamental arbiters and guarantors of basic human rights. The CA's review of UK court precedent is accurate: in *A v. Secretary of State for the Home Department*, for example, the House of Lords ruled in favor of the appellants, and against the government, finding that certain provisions of the 2001 Anti-terrorism, Crime and Security Act (ATCSA) were inconsistent with the European Convention on Human Rights.

The problem is this: the CA's analysis asserts its own authority in the very area where the Hong Kong courts have declined to act. The CA is claiming to carve out legal territory that it simply hasn't used. Time and time again, the Hong Kong courts have declined to use constitutional rights protections when they should have been invoked to limit the powers of the national security state. As GCAL has extensively documented, the Hong Kong government has used the NSL, along with other legal tools, to imprison its peaceful critics, and to crack down on human

[78] Yam, "Approaching the Legitimacy Paradox in Hong Kong," pp. 172-5.
[79] See also our analysis in section III, *supra*, at note 35 and accompanying text.
[80] For an excellent recent global study on the use of counter-terrorism and national security laws to target civil society, see United Nations Human Rights Special Procedures, *Global Study on the Impact of Counter-Terrorism on Civil Society and Civic Space*, 2023. The report describes a "playbook of counter-terrorism… misuse, including through judicial harassment…." Special Procedures report, p. 11.

rights. And the courts have signed off on all of these uses, without interruption, for more than four years, with no end in sight.

In this deeply troubling context, the CA's reference to its constitutional rights protection role rings hollow. The CA's high-minded citations to UK case law reads as mere posturing by a court that has no intention of living up to its lofty rhetoric. And as a practical legal matter, the CA's discussion of these cases borders on irrelevant: in practice, the legal effect of constitutional human rights protections in national security cases has been close to zero.

The Micro-Trend: Overruling Positive National Security Decisions

The CA's ruling is itself part of a micro-trend in national security cases in Hong Kong: the pattern of small, relatively insubstantial positive rulings being appealed by the government, and quickly overturned, or otherwise undone. Since the NSL went into effect in July 2020, Hong Kong courts have issued rulings on two procedural matters that went against the government: in December 2020, the CFI released media mogul Jimmy Lai on bail, with a number of onerous restrictions.[81] Just days later, on December 31, 2020, Lai was returned to prison as the Court of Final Appeal considered the government's appeal.[82] In February 2021, the CFA ruled in favor of the government, overturning the CFI verdict and adopting a much stricter standard for bail in national security cases.[83]

The second positive verdict issued by a Hong Kong court also involved Jimmy Lai. In November 2022, the Court of Final Appeal affirmed a High Court decision allowing UK barrister Tim Owen to be a part of Lai's defense team in that same national security case.[84] The government had sought to block Owen's participation, citing alleged confidentiality concerns, among other objections. After the judicial effort failed, the government applied to Beijing for an interpretation of the NSL, using its authority under Article 65 of that law.[85] In short order, the National People's Congress Standing Committee (NPCSC) did just that, issuing an interpretation of the NSL in December 2022 that placed the authority to allow participation of foreign counsel in the hands of the Committee for Safeguarding National Security (CSNS).[86]

It is worth underscoring that, in this case, the CFA did, for the first time, uphold a ruling against the government in a national security case. However, once the CFA did so, the government promptly asked to Beijing to intervene. As far as the Hong Kong government is concerned, no

[81] Vivian Wang and Tiffany May, "No Tweets, No Interviews: Jimmy Lai's Unusual Bail Conditions," *New York Times*, December 23, 2020.
[82] Jerome A. Cohen, "The Long-term Implications of the Jimmy Lai Bail Decision," *The Diplomat*, February 11, 2021.
[83] *HKSAR v. Lai Chee Ying*, [2021] HKCFA 3, February 9, 2021. For a broader discussion of the human rights and rule of law implications of the Jimmy Lai NSL case, *see* Kellogg and Wong, "The Jimmy Lai case: The National Security Law and the future of dissent in Hong Kong," *Melbourne Asia Review*, April 12, 2021.
[84] Candice Chau, "Top court dismisses Hong Kong gov't bid to prevent media tycoon Jimmy Lai from hiring UK lawyer," *Hong Kong Free Press*, November 28, 2022. Owen was administratively barred from participating in Lai's defense as the case wended its way through the courts, and eventually to Beijing.
[85] The NPCSC also cited its authority to interpret legislation under Article 67(4) of the PRC State Constitution.
[86] Kevin Yam and Thomas E. Kellogg, "In Hong Kong, Another Blow to the Rule of Law," *Lawfare*, May 23, 2023.

liberal national security ruling should be allowed to stand, even one issued by Hong Kong's highest court.

The immediate stakes in the Tim Owen matter were relatively low: allowing Owen to take part in Lai's defense would not alter the trajectory of the case. Why, then, ask Beijing for an interpretation overturning the CFA's decision? The Hong Kong government likely wanted to avoid setting a precedent that might embolden the CFA to uphold other, more consequential liberal rulings in the future. And it also likely wanted to send a message about the level of power, authority, and control that it exercises in national security cases, and the very limited ability of the courts to check that power.

Though CFA's decision on Owen's participation was effectively overturned by the NPCSC, nonetheless it should serve as something of a deeply imperfect model for the Hong Kong courts. When the stakes are relatively low, and the risks of a harmful backlash are limited, the courts should issue rights-respecting rulings that limit the negative impact of the NSL. In other words, where possible, the courts should decline to do Beijing's dirty work: wherever possible, they should leave it to the Hong Kong government and to the NPCSC. This approach is by no means cost-free: NPCSC interpretations damage the integrity of the Hong Kong legal system, and can be seen as an infringement of Hong Kong's autonomy under the One Country, Two Systems framework. Still, such an approach would also send a welcome signal that the courts continue to look for ways to reassert their constitutional role as a check on government power, even though they know that their rulings can be quickly wiped out by Beijing.

Last but not least, as noted above, two of the so-called Hong Kong 47 subversion defendants were acquitted of the charges against them in May 2024. With the issuance of that verdict, Lawrence Lau and Lee Yue-shun became the first two – and, as of this writing, the only – individuals acquitted of a national security charge since the NSL went into effect. The government announced its intention to appeal the verdict against Lau, but has made no similar announcement regarding Lee's acquittal.[87]

The Court of Appeal's reversal of the CFI's "Glory to Hong Kong" injunction verdict continues this trend. If the Hong Kong courts rule against the government in a national security case in the months to come, we will likely see this same pattern play out yet again.

This mini-pattern speaks volumes about the compromised position of the courts in national security cases. But it also illustrates the government's own uncompromising attitude toward judicial review of its extensive national security powers. Put simply, the government is not content to win almost all the time. Instead, it believes that its litigation record must remain unblemished, its national security authority unchecked. Even on smaller, less consequential matters like the "Glory to Hong Kong" injunction, the government insisted on appealing, even though it could have won some small measure of praise for refraining from doing so. A first-

[87] Hilary Leung, "Hong Kong justice dept. will not appeal acquittal of democrat cleared in city's largest national security case," *Hong Kong Free Press*, June 14, 2024.

ever exercise of restraint, and a willingness to honor a court decision against it, would have sent a small but positive signal about the government's respect for the courts and the legal process. But it was not to be.

Going forward, we predict that the government will continue to maintain this unbending attitude toward the courts in national security cases. For the foreseeable future, the Hong Kong government will likely accept nothing less than 100% success, and it will continue to press the courts to deliver on that expected success rate.

V. Google's Response and the Politics of Geoblocking-Based Censorship

Once the CA issued the injunction against "Glory to Hong Kong," global tech companies and other stakeholders faced a decision: should they comply with the court order? If so, how? What would compliance actually mean in this context?

No doubt aware of the need to balance legal exposure in Hong Kong against potential global reputational costs, leading tech companies and platforms generally sought to respond to the ruling without taking steps that could be seen as excessive or unnecessary. The core of the solution implemented by Google was geoblocking: removing access to the material listed in the injunction order in Hong Kong, but maintaining access to it in the rest of the world.

The injunction order applied to all companies and individuals, across the board, regardless of their location or level of connection to Hong Kong itself. That said, the government was particularly interested in ensuring that Google, the world's leading search engine, complied with the order, and that YouTube, which is owned by Google, also complied. Our analysis will largely focus on the response of these two leading players, but many of the concerns that we raise about their response, and about the Hong Kong government's treatment of them, are also relevant to other actors, including Meta, Apple, and Spotify.

Tech companies responded to the CA's injunction within days. In a statement released roughly a week after the injunction was issued, a YouTube representative said that the company was "disappointed by the court's decision," but that the company was "complying with its removal order by blocking access to the listed videos for viewers in Hong Kong."[88] The company representative also noted that the local blocking would also impact Google search: the blocked videos would no longer appear in Google search results in Hong Kong.

Without doubt, the implementation of the injunction by leading tech companies was a win for the Hong Kong government: Google representatives in Hong Kong had initially told government officials that they needed a court order before they would act. Now the government had one, and Google and other companies were forced to respond. Still, the victory was a limited one: YouTube responded by removing local access to the 32 videos listed in the injunction order, but not by removing other, non-listed links to the song. Local media outlets reported that versions

[88] Tiffany May, "YouTube Blocks Access to Protest Anthem in Hong Kong," *New York Times*, May 14, 2024.

of “Glory to Hong Kong” could still be accessed online from Hong Kong, including on YouTube itself, after the injunction was issued.[89]

From an access perspective, the injunction was a mixed bag: it did not lead to a full-scale blockage of access to “Glory to Hong Kong” in the city. Anyone with a reasonable degree of technical proficiency could find the song online. Music distributors – whose decisions impact the availability of music on major streaming platforms, including Apple Music and Spotify – have been deeply inconsistent in their response, in ways that have jeopardized access to the song, both locally and globally.

This lack of rigorous follow-up suggests that the Hong Kong government’s efforts were more symbolic and performative, and less geared toward a specific substantive outcome. Fully ending access to “Glory to Hong Kong” for would-be listeners in Hong Kong wasn’t the goal; showing Beijing that it was taking action in response to the sporting event national anthem mix-ups likely was.

The government’s long-sought injunction did limit global access to the song in one additional way: a number of digital music distribution companies have declined to distribute the song, complicating its availability on leading music streaming services and other platforms. On May 24, 2024, for example, “Glory to Hong Kong” became unavailable on most streaming platforms, after UK-based digital music distributor EmuBands removed the song globally in response to the injunction. “It was our decision to remove the song and yes, this is because of the court order,” a company representative told the AFP wire service.[90] Though access to the song was soon restored, a pattern of sorts emerged: other companies picked the song up and, in some cases, put it down again, while many refused to deal with it altogether. In August 2024, the song’s producer, Dgxmusic, expressed concern that “Glory to Hong Kong” would “fully disappear from streaming platforms very soon,” as the number of distributors willing to touch the song continued to decline.[91]

As of this writing, however, the song remains available outside Hong Kong, both online and on leading streaming platforms. Inside Hong Kong, access is more limited, but by no means impossible. Any public performance or presentation of the song in the city would almost certainly lead to criminal prosecution, but Hong Kongers wishing to listen to the song in private can still do so.

Geoblocking: a Less Restrictive Form of Censorship?

[89] Harvey Kong et al., “Backup versions of Hong Kong protest song found on YouTube even after site blocks access to 32 clips following court order,” *South China Morning Post*, May 15, 2024.
[90] AFP, “Glory to Hong Kong: Distributor removes Hong Kong protest song from Spotify, Apple Music after court order,” May 24, 2024. *See also* Hans Tse, “Protest Song ‘Glory to Hong Kong’ removed from streaming platforms again,” *Hong Kong Free Press*, June 7, 2024.
[91] Emily Hung, “‘Glory to Hong Kong’ protest song may be pulled from online sites, producer says,” *South China Morning Post*, August 20, 2024.

Geoblocking refers to a platform's technical capacity to restrict content based on the user's geographic location. In the early years of the Internet era, geoblocking technology did not exist, which meant that content could be blocked either globally or not at all.[92] This all-or-nothing dynamic created huge headaches for leading tech companies, as they sorted out how to respond to censorship demands from different players in different countries, all of which would have had truly global effect.

The emergence of geoblocking gave tech platforms a much less restrictive option, allowing them to censor content based on location. Companies like Google continue to remove content globally, based on their own policies: pornographic content is not permitted on YouTube, for example. But much of the content censorship that Google and YouTube engage in comes in response to national governments and courts, enforcing their own laws.

The censorship of "Glory to Hong Kong" is not unique: many authoritarian governments seek to restrict political content that could not be censored in more fully open, rights-respecting societies. In 2005, for example, the Turkish government ordered YouTube to remove videos posted on the site that it said insulted Mustafa Kemal Ataturk, Turkey's founding father, in violation of Turkish law.[93] A year later, the Thai government made a similar demand, claiming that certain videos posted on the site included illegal criticisms of the Thai King. In each case, and scores of others like it, Google lawyers had to determine whether the content in question violated national laws. If it did, then YouTube would usually block access to it at the national level. Access to the material outside of the country would remain uninhibited, unless the content also violated Google's own content policies.

The question was not whether such content could be barred under United States law – given broad U.S. constitutional protections for political content, it almost certainly could not be – but rather whether governments were right in their assessments of their own laws. In other words, Google and other companies will act as a government's censor at the national level, if that country's national laws embrace political censorship. Geoblocking gives companies like Google the means to respond to national-level requests in a way that limits the damage, but leaves governments in charge of censorship at the national level.

In some cases, Google and other companies have fought against efforts by national-level and supra-national governments and courts to impose broader, sometimes global, content-based bans. In the Canadian Supreme Court case *Google v. Equustek*,[94] for example, Google resisted efforts by the Canadian courts to impose an injunction against Google that would have global effect.[95] Similarly, Google has pushed back against EU judicial efforts to impose European "Right

[92] David R. Johnson and David Post, "Law and Borders: The Rise of Law in Cyberspace," *Stanford Law Review*, Vol. 48, No. 5 (May 1996), pp. 1370-76.
[93] Jeffrey Rosen, "Google's Gatekeepers," *New York Times Magazine*, November 28, 2008.
[94] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.
[95] For an in-depth analysis of the case's broader free expression implications, *see* Robert Diab, "Search Engines and Global Takedown Orders: *Google v. Equustek* and the Future of Free Speech Online," *Osgoode Hall Law Journal* 56.2 (2019: 231-70.

to be Forgotten" norms worldwide, instead only censoring some search results within the Eurozone.[96]

Google's response to pressure from the Hong Kong government and from Beijing to censor "Glory to Hong Kong" fits within this longstanding global pattern: Google refused requests to censor search results and to take down specific videos worldwide, agreeing only to respond to a court order or other specific legal finding that such content was illegal. Once the injunction against "Glory to Hong Kong" was issued, both Google and YouTube declined to take action at the global level, instead responding with more narrow geoblocking of the specific content listed in the injunction itself.

As far as is publicly known, the Hong Kong government seems satisfied with this response: it has not demanded that Google take further action to restrict access to the song outside Hong Kong, nor has it pushed the company to monitor video uploads on an ongoing basis to ensure that new versions of the song are not posted to YouTube. Such moves would likely lead to a more direct confrontation between Google and the Hong Kong government, one that both sides would likely prefer to avoid.

Still, Google has been forced by the Hong Kong government to become a party to political censorship: as of May 2024, it has become a minor player in the government's ongoing national security crackdown. While Google may have plenty of prior experience with such national-level censorship regimes, it cannot relish the fact that Hong Kong is now on the list of jurisdictions where facilitating government-ordered censorship of peaceful, pro-democratic content is part of the cost of doing business.

Dodging a Bullet – For How Long?

Several months after the injunction was issued, Google may feel as though it dodged a bullet: the Hong Kong government did not ask it to take steps that were beyond what it was willing to do to preserve access elsewhere: the level of censorship it was being asked to engage in was relatively minor, as compared with government requests in other parts of the world. Thirty-two videos of a single song does not put Hong Kong in the top tier of government censors that Google is forced to deal with on a day-to-day basis.

Google and other tech companies were also likely relieved that the reaction in the U.S. was also relatively muted. On June 4, 2024, the co-chairs of the Congressional-Executive Commission on China (CECC), Representative Chris Smith and Senator Jeff Merkley, wrote to Google CEO Sundar Pichai and YouTube CEO Neal Mohan, expressing concern over Google and YouTube's decision to take down the 32 videos listed in the CA injunction order.[97] Smith and Merkley

[96] Mary Samonte, "Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law," *European Papers*, 4.3 (2020), pp. 839-51.
[97] "Chairs Ask Google to Restore Censored Hong Kong Protest Anthem," Congressional-Executive Commission on China press release, June 5, 2024.

urged the two executives to take steps to "limit the negative impact on free speech and on the free flow of information," and to "consider alternative ways of complying [with the injunction], such as providing a warning message."[98]

Other than that single letter, official Washington was largely silent on the matter, at least publicly. In response to a press query on Smith and Merkley's letter, a YouTube spokesperson said that the company is "continuing to investigate our options for an appeal."[99] As of this writing, neither YouTube nor its parent company Google have announced any plans to challenge the injunction, either in court in Hong Kong or elsewhere.

Despite the current level of quiet, Google and other tech companies should be deeply concerned. A troubling precedent has been set. Now that the Hong Kong government has successfully deployed civil injunctions as a new censorship tool, it may seek to use this new tool more often. For example, will the Hong Kong government seek court injunctions against the online writings of leading exile Hong Kong pro-democracy advocates like Dennis Kwok, Finn Lau, and Anna Kwok? What about analyses of allegations of police brutality during the 2019 protests, accessible either on leading scholarly databases or on overseas NGO websites? Or will the government push for injunction-based censorship of online discussion of the June 4, 1989 crackdown, just as it has barred any commemoration of the June 4 anniversary in Hong Kong itself? Such moves would put companies like Google in an impossible position. They would have to decide whether to ignore a duly-issued Hong Kong court injunction, and face the potential legal consequences, or comply with more far-reaching censorship requests, and face a political backlash – and a possible legislative response – in the U.S. and elsewhere.

What could Google and other leading tech companies have done differently, to try to avoid this precedent-setting outcome? Any suggestions on this front should be clear-eyed about the potential impact, or lack thereof. As the above analysis makes clear, the Hong Kong government was intent on achieving the injunction, and would not have been easily deterred from their desired outcome. That said, Google could have done what it has done elsewhere in the world when its rights and interests are under threat: it could have gone to court.

Instead, over the roughly one year of the "Glory to Hong Kong" injunction saga, Google and other tech companies stayed largely silent. They watched the judicial process play out, but they declined to engage with it in any way. If companies like Google were worried about speaking out in their own name, they could have worked with regional industry groups like the Asia Internet Coalition (AIC) to craft a robust response. Instead, as far as is publicly known, they said and did nothing of any consequence.[100] An opportunity to stand up for internet freedom in

[98] Ibid.

[99] Tom Grundy, "US lawmakers urge Google to restore protest song 'Glory to Hong Kong,' saying tech firm over-complied with injunction," *Hong Kong Free Press*, June 6, 2024.

[100] The AIC did release a statement, stating that it was reviewing the implications of the injunction, "to determine its impact on business." The AIC also stated its view that "a free and open internet is fundamental to the city's ambitions to become an international technology and innovation hub." Zeyi Yang, "Hong Kong is targeting Western Big Tech companies in its ban of a popular protest song," *MIT Technology Review*, May 9, 2024.

Hong Kong was lost. A chance to signal to the Hong Kong government that companies like Google oppose Hong Kong's ongoing mini-wave of internet censorship was missed. And a chance to increase the reputational cost paid by the Hong Kong government went by the wayside.

Just after the government filed for the injunction, senior officials at least paid lip service to the notion that all interested parties could take part in the case. At a June 2023 media forum, Secretary for Justice Paul Lam claimed that the proposed injunction would not affect ordinary Hong Kongers, and urged those who did have concerns to "come forward and take part in the legal proceedings."[101] Those critical of the government's proposal would have reason to take his invitation with a grain of salt: one of the few Hong Kongers who did attempt to intervene, imprisoned rights lawyer Chow Hang-tung, was blocked by the court from doing so.[102]

Notably, both the Hong Kong Bar Association (HKBA) and the Law Society of Hong Kong declined to intervene in the case. The HKBA was once a leading voice for human rights and rule of law in Hong Kong. However, since the NSL came into force, it has become much less outspoken, and has generally sought to maintain a lower profile. It has also sought to defend the Hong Kong judiciary from foreign criticism over its handling of national security cases, claiming – despite abundant evidence to the contrary – that judicial independence and the rule of law remain untouched by the NSL.[103] To be fair, the HKBA has not completely abandoned its longstanding rights advocacy role: at times, the HKBA has offered some critical and rights-focused feedback on the government's legislative proposals.[104] GCAL fears that its silence on the "Glory to Hong Kong" injunction was interpreted by the Hong Kong legal community as support for the government's position.

An effort by Google or other tech companies, or by a leading industry group like the Asia Internet Coalition, would have been handled very carefully by the government and the courts. It is unlikely that either Google or AIC would have been barred from participating in the proceedings, as the government would not want to send a signal that the legal system was closed to the international business community. And while that participation would almost certainly not have altered the ultimate outcome, it would have sent a signal to the government that leading tech companies are deeply concerned about the government's online censorship efforts. And it might have made the government think twice about applying for more civil injunctions to censor online content.

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[101] Ng Kang-chung, "Hongkongers free to speak up about application to ban protest song 'Glory to Hong Kong,' justice minister Paul Lam tells Post forum," *South China Morning Post*, June 20, 2023. The Hong Kong Journalists Association had initially planned to file papers in the case, but later changed course after the DoJ agreed to include a journalistic and scholarly exception in its proposed injunction.

[102] Hans Tse, "Hong Kong court reject activist Chow Hang-tung's request to be heard as 'party' in gov't bid to ban 'Glory to Hong Kong,'" *Hong Kong Free Press*, October 31, 2023.

[103] James Pomfret et al., "Two British judges quit Hong Kong's top court," *Reuters*, June 7, 2024.

[104] *See, e.g.*, Hong Kong Bar Association, *Comments on the Public Consultation Document titled "Safeguarding National Security: Basic Law Article 23 Legislation" Published by the Security Bureau, The Government of the Hong Kong Special Administrative Region, in 1.2024,* February 28, 2024.

This chance to get on the record was sadly missed. Though they declined to intervene directly in this case, Google, AIC, and others should consider participating in future injunction application hearings, if and when the government seeks to use this mechanism to censor additional political content.

VI. Conclusion: Expanding the National Security Crackdown to Cyberspace?

This report's analysis has focused primarily on the legal system. It has shown that the Hong Kong government will put pressure on the courts to achieve their desired outcome, even on matters that have been largely resolved through other, non-judicial means. And it has shown that Hong Kong judges have generally declined to apply basic human rights principles to national security cases. Sadly, the Court of Appeal went one step further, distorting key comparative case law in order to deliver a verdict in the government's favor. These trends do not bode well for human rights and the rule of law in Hong Kong.

But the "Glory to Hong Kong" injunction saga is also noteworthy for what it says about the willingness of the Hong Kong government to make leading tech companies a part of the national security crackdown. For the first time, with the issuance of the civil injunction order in May 2024, leading international companies like Google and YouTube have been given a political censorship order by the Hong Kong government, and they have acted on it. The government's decision to use civil injunctions against global tech companies suggests that some national security priorities will trump even the government's once-vaunted reputation as a global business hub.

To be fair, it is possible that the Hong Kong government will stop here. It may prefer to focus on the NSL's criminal provisions as the main tool for enforcing national security censorship and social control. If that happens, then the long-term impact of the civil injunction issued by the Court of Appeal will be both deeply regrettable and comparatively small. Any act of political censorship is a violation of the basic rights of the people of Hong Kong. But taken on its own, this limited act of censorship would not be in the first tier of rights violations committed by the Hong Kong government, and approved by the courts, over the past four years. Thus far at least, the bulk of the censorship work has been done by the NSL's four core criminal provisions, and by the sedition provision of the Crimes Ordinance.[105]

But will the Hong Kong government stop here? Will it put this new civil injunctions tool aside indefinitely? It is hard to say, and there is ample reason for pessimism: Hong Kong's current political leaders know they were put in place by Beijing to crack down, and that is exactly what they have done. Senior officials like John Lee and Chris Tang are national security hatchet

[105] As noted above, the sedition provision of the Crimes Ordinance was expanded, and is now a part of the 2024 Safeguarding National Security Ordinance (SNSO).

men.[106] They have enthusiastically embraced their extensive national security powers to remake Hong Kong society, dramatically reshaping mainstream politics, the media, academia, and civil society. It is not clear if they are even aware of the damage they've done to Hong Kong's once vibrant civic and cultural life, or if they particularly care about the dramatic losses suffered by what was once one of the world's leading cities. But they no doubt do know that Beijing wants them to continue targeting pro-democracy voices and content. They will continue to do that. The only question is, what tools will they use?

Going forward, the government's use of civil injunctions to censor the internet will be a key metric to watch, as will the level of overall internet censorship in Hong Kong. Thus far, the Hong Kong government has focused its efforts on the more traditional "offline" elements of civil society, including political parties, non-governmental organizations, unions, professional associations, and the like. Internet censorship has been a relatively minor – though by no means completely neglected – aspect of the national security crackdown.[107] If the government decides to step up its internet censorship efforts, using both civil injunctions and other legal and technical tools, that would be a clear signal that the government's national security campaign continues to expand, embracing new targets and goals.[108] And it will be yet another sign that the Hong Kong the world knew for decades prior to 2020 – liberal, open, boisterous, and culturally dynamic, if undemocratic – continues to vanish, before our very eyes.

[106] For an excellent journalistic assessment of Lee, one that focuses on his steady rise through the police and security ranks to Hong Kong's top job, see Timothy McLaughlin, "The Symbol of a New, Darker Hong Kong," *The Atlantic*, May 25, 2022.

[107] For a very useful account of the Hong Kong government's small but growing internet censorship efforts in recent years, *see* HKFP staff, "Explainer: Websites blocked in Hong Kong – when, how, and why the list is growing," *Hong Kong Free Press*, October 11, 2024.

[108] Samsudin et al., *iMAP Hong Kong (China) 2023 Internet Censorship Report*, Sinar Project Report, no date. The report noted that websites related to "political criticism and government" were more likely to be blocked by the Hong Kong government. In total, the report identified only a limited number of websites in its political criticism category that had been blocked. A growth of the number of blocked websites in this category could indicate a shift in the government's tolerance of local access to such critical voices.