
IS THERE A RIGHT TO NEWSGATHERING IN HONG KONG? PUTTING THE CFA JUDGMENT OF CHOY YUK LING IN CONTEXT

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Abstract

In Hong Kong, the Court of Final Appeal in *HKSAR v Choy Yuk Ling* (CFA 2023) quashed the convictions of a journalist who was accused of knowingly making false statements in her search requests of a government-maintained vehicles register containing personal data crucial to newsgathering. The Court held that the relevant search purposes should not be narrowly construed to exclude *bona fide* journalism; regard has to be given to freedom of speech and of the press; and data protection law permits disclosures of personal data in the public interest for news activity purposes. However, this decision was soon overturned by the Government's new measures which in effect prevent any search of the register for journalistic purposes. In early 2024, the enactment of the Safeguarding National Security Ordinance by the Government has further eroded the right to newsgathering of Hong Kong journalists.

Keywords: Hong Kong; Court of Final Appeal; newsgathering; freedom of speech and of the press; protection of personal data; Safeguarding National Security Ordinance 2024.

[A] INTRODUCTION

In June 2023, the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (HKSAR or Hong Kong) handed down the judgment in *HKSAR v Choy Yuk Ling* (CFA 2023). This is the first time that a criminal case arising from newsgathering activity has reached the CFA for a full appeal hearing since the Court and the HKSAR came into being on 1 July 1997 upon the 1997 handover.¹ Choy Yuk Ling, a veteran journalist, was accused of knowingly making false statements in her

¹ On 1 July 1997, Hong Kong was returned by the UK to the People's Republic of China (PRC), becoming a special administrative region with its own legal system and local government in accordance with Article 31 of the Constitution of the PRC. This is known as the 1997 handover.

search requests in respect of a government-maintained vehicles register.² Choy's prosecution had induced a chilling effect among journalists in Hong Kong, causing them to stop performing similar searches.

The CFA unanimously allowed Choy's appeal and quashed her convictions, upholding the constitutionally protected freedoms of speech and of the press. However, this decision was in effect overturned in early 2024 by the HKSAR Government's new measures that in practice almost completely prevent any search of the vehicles register for journalistic purposes. Also, in early 2024, the enactment of the Safeguarding National Security Ordinance (NSO) by the HKSAR Government has further eroded the right to newsgathering of Hong Kong journalists.

This paper explores the importance of the right to newsgathering in the protection of media freedom and examines how determinative government policies, laws and court decisions can be in acknowledging the right to newsgathering. Indeed, from a closer examination of *Choy's* case and considering some other unfavourable factors—the recent enactment and enforcement of national security legislation in particular—it is clear that the right to newsgathering has been fragile in Hong Kong for some time now, and that it will continue to be so in the foreseeable future.

[B] FACTS OF THE CASE

In Hong Kong, most vehicles used on the road are registered with and licensed by the Transport Department. The Commissioner for Transport (Commissioner) maintains a register of vehicles (vehicles register) containing 18 particulars of each vehicle, including the name, address and identification document of the vehicle owner (Road Traffic Regulations 1984, regulation 4(1)). For many years until early 2024, any member of the public could conduct searches of the vehicles register by applying for a "Certificate of Particulars of Motor Vehicles" (certificate) (Road Traffic Regulations 1984, regulation 4(2)).

Choy was arrested and prosecuted in November 2020 after conducting two public searches of the vehicles register earlier that year in her preparation of a documentary for *Hong Kong Connection*, a flagship television programme of Radio Television Hong Kong (RTHK), the city's public broadcaster. The television episode investigated alleged collusion between the police and gangsters in a high-profile ambush on protesters and train passengers inside a subway station on the evening of 21 July

² In Chinese, the surname comes first. Choy is the last name of the accused and Yuk Ling is her first name.

2019 (the 7.21 Attack) during the height of the political unrest which occurred that year throughout Hong Kong.

To track down the gangsters of the 7.21 Attack for interview, Choy and her colleagues gathered CCTV footage from shops near the subway station showing the gangsters carrying bamboo sticks and canes arriving in private vehicles before the attack. But only one van's plate number could be seen. In the summer of 2020, Choy accessed the vehicles register twice, inputting the plate number of the van, completing an application form, and obtaining a certificate each time. The two certificates included the name and address of the registered owner of the van. It turned out that the registered owner was a company and the address given was that of another company. Choy eventually managed to get in touch with a Mr But, whom she interviewed on the phone. She asked him whether he had driven the van to the vicinity of the subway station shortly before the 7.21 Attack. The documentary, which was aired on 13 July 2020, included a clip of the interview with Mr But.

On 3 November 2020, Choy was arrested after Mr But made a complaint to the police. She was later prosecuted for two counts of knowingly making a false statement in a material particular for the purpose of obtaining a certificate, contrary to section 111(3)(a) of the Road Traffic Ordinance 1982. This legal provision generally prohibits the making of a false statement when applying for various licences and documents from the Transport Department. Choy pleaded not guilty to both counts.

[C] RELEVANT REGULATORY MEASURES AND 2019 CHANGES

To better understand the arguments presented in Choy's prosecution, the following provides an overview of the procedures for public searches of the vehicles register. In 2003, the Transport Department introduced several administrative measures relating to the application of a certificate in order to strengthen the protection of the personal data of registered car owners (HKSAR Legislative Council 2011). These included a reminder on the application form stating that personal data of the registered vehicle owners should only be used for "traffic and transport related matters". According to these measures, to indicate the purpose of the application, an applicant must select one of the three options provided on the application form: (1) for legal proceedings; (2) for sale and purchase of vehicles; and (3) for other uses ("please specify"). In addition, an applicant must confirm their understanding that making a false statement constitutes an offence.

An internal survey by the Transport Department showed that 50,400 certificates were issued in 2010 but 44 per cent of the applicants did not specify the purpose of their application. Nearly 3,000 such applications were made by news or media organizations. Moreover, the department noted in 2011 that no applicant had ever been prosecuted for making a false statement in the application process. No further statistics have been available since 2011.

Also, in 2011, the HKSAR Government announced its intention to amend the law to offer better protection of the personal data of registered vehicle owners (HKSAR Transport Department 2011). The main proposal was to issue certificates strictly according to several specified purposes. However, the public consultation on the proposed amendments was not followed up by any legal enactment.

Instead, in the wake of the 2019 political unrest, subtle revisions were made to the application form due to increasing incidents of doxxing, many of which targeted police officers and their family members (Hale 2019). Without any public consultation, the third option was changed in late 2019 from “other uses” to “other traffic and transport related matters” and the phrase “please specify” was deleted (*Ming Pao Daily News* 2023).

These 2019 changes were significant. Choy had previously applied for certificates but had never got into any trouble. When conducting her two searches in 2020, however, Choy could no longer specify her exact purpose of “newsgathering” and had to select the much narrower third option on the application form. In addition, Choy had to declare that she understood that the personal data provided in the certificate should only be used for “activities related to traffic and transport matters”.

[D] DECISIONS OF THE LOWER COURTS

At trial, there were three major issues: 1) whether Choy’s statement as to the purpose of her application was material; 2) whether the statement was false; and 3) whether Choy knew that the statement was false in a material particular.

The magistrate decided that the stated purpose by an applicant is material to the success of the application (*HKSAR v Choy Yuk Ling* 2021). The Commissioner safeguards the rights of the registered vehicle owners and does not arbitrarily disclose information for access by others. Moreover, the stated purpose should be the intended usage of the certificate by the applicant (for news reporting in *Choy’s* case) and had nothing to do with the usage of the vehicle (whether the van had been

used to transport attackers and weapons). Choy did knowingly make a false statement because she selected the third option stating her purpose was for “other traffic and transport related matters”, and she made the declaration that she would use the personal data obtained for activities relating to traffic and transport matters. But Choy knew well that the real reason for applying for the certificates was newsgathering and the making of a television episode.

The magistrate added that it is immaterial whether Choy had a good intent in seeking the information. An applicant must not make any false statement, even if the three options provided are irrelevant. Choy should try some other means, such as writing to the Transport Department, requesting the information needed for her newsgathering and reporting. The magistrate convicted Choy of the two counts of the offence charged and fined her HKD3,000 on each count, making her the first journalist to be convicted of the offence (Wong 2023).

An appeal against Choy’s convictions in the Court of First Instance was dismissed (*HKSAR v Choy Yuk Ling* CFI 2023). The High Court judge hearing the appeal agreed with the magistrate on all three disputed issues. Choy sought the information with good intent, the judge noted, but this was not a defence. The judge elaborated on the protection of personal data. As a data user, the Commissioner has a statutory duty to act in accordance with the Personal Data (Privacy) Ordinance 1995 (PDPO). Meanwhile, the judge also acknowledged the significance of the flow of information and press freedom to an open and democratic society. But he found that the PDPO provision relied on by the defence was not relevant to Choy’s appeal. The judge also declined to interpret the meaning of “other traffic and transport related matters” in a wide sense and in line with public perception. The only way to expand the right of journalists or other people to access the information on the register would be to go through public consultation and then resolve this through legislation.

[E] THE COURT OF FINAL APPEAL DECISION

Mr Justice Joseph Paul Fok delivered the judgment on behalf of the CFA. On the issue of materiality, the Court held that the courts below were correct in deciding in the prosecution’s favour. In accordance with the PDPO, Mr Justice Fok noted, the Commissioner is a data user who has an inherent duty to manage responsibly the personal data kept in the vehicles register and to minimize the risk of potential abuse of such data. Thus, the Commissioner was entitled to require Choy to state the reason for the supply of a certificate by selecting one of the three purposes

specified on the application form. That statement of purpose by Choy was material to the application. If Choy's statement of purpose was relevantly false, potential liability for the offence under section 111(3)(a) might arise.

The CFA went on to hold that the issues of falsity and knowledge were wrongly decided against Choy. Mr Justice Fok disagreed with the narrow interpretation made by the magistrate and the judge regarding "other traffic and transport related matters" (ie the third category of the stated purposes on the application form). First, the Road Traffic Ordinance governs a wide variety of activities in relation to road traffic. The overall statement of purposes on the application form also uses the phrase "activities relating to traffic and transport matters". As such, "other traffic and transport related matters" as the third category of stated purposes must be understood to be a catchall for any other activities which relate to traffic and transport matters.

Second, Mr Justice Fok preferred to read the third category of stated purposes in a wider sense so as to include serious investigative journalism undertaken by Choy in relation to the use of the vehicle. This approach sits more naturally with the catchall nature of the category. Third, such a construction also reflects the principle against doubtful penalization.

Fourth, and more importantly, the Court held, it is a constructional choice which gives effect to the constitutionally protected freedom of speech and of the press contained in Article 27 of the HKSAR Basic Law 1990 and Article 16 of the Hong Kong Bill of Rights 1991.³ Choy was exercising her freedom of speech and of the press in the investigation of the 7.21 Attack. This fact should be taken into consideration when ruling on Choy's alleged offence. The CFA further held that "whilst such rights are not absolute and may be restricted where necessary, there is no reason to proceed from a starting point that *bona fide* journalism should be excluded from the phrase 'other traffic and transport related matters'" (paragraph 62).

Fifth, Mr Justice Fok opined that the judge's interpretation of section 61 of the PDPO was unduly narrow and wrong. In fact, section 61(2) provides an exemption to Data Protection Principle 3, allowing a data user to disclose the collected personal data to another data user who is engaging in news activity if the person has reasonable ground to believe such disclosure is in the public interest.

³ Article 27 of the HKSAR Basic Law guarantees freedom of speech and of the press. Article 16 of the Hong Kong Bill of Rights, which replicates Article 19 of the ICCPR, guarantees the right to freedom of expression. As noted by UN General Comment No 34, freedom of expression includes freedom of speech and of the press.

Based on these five reasons, the Court concluded that Choy did not make a false statement by selecting the third category of “other traffic and transport matters” as her purpose when she applied for a certificate.

The Court further held that the inference of knowledge of falsity drawn by the courts below was not justified and, in convicting Choy on that inference, substantial and grave injustice was done to her. The phrase “other traffic and transport related matters” is not clear and unambiguous. Moreover, even if the phrase were objectively construed as excluding a journalistic purpose, Choy could well be honestly mistaken in thinking that her journalistic purpose was included as one “relating to traffic and transport matters”. This was particularly so given the large volume of certificates previously issued to media and news agencies.

[F] THE HKSAR GOVERNMENT’S OVERTURNING OF THE CFA DECISION

The Chief Executive of the HKSAR, John Lee, welcomed the CFA judgment saying it reflected Hong Kong’s fair judicial system and the rule of law (Lee 2023). Lee also indicated that search procedures of the vehicles register would be reviewed so as to give effect to the judgment. Nonetheless, the Transport Department soon introduced what it called “refined” arrangements which have in effect prevented any search of the register for journalistic purposes.

From 8 January 2024 onwards, the Transport Department will only issue a certificate to three categories of applicants: a) the registered owner of the vehicle; b) an applicant who has obtained written consent from the vehicle owner to acquire a certificate; or c) an applicant whose interests are directly affected by the ownership or use of the vehicle, who has a need to ascertain the particulars of the vehicle, and for whom such information would only be used for specified purposes. These include sale and purchase of the vehicle; insurance claims; compensation/claims; recovery of fines etc; removal of the trespassing vehicle; legal proceedings involving the vehicle; and safety recalls.

All other applicants, including media outlets, are required to write to the Transport Department making an application under exceptional circumstances. They should demonstrate a ground of significant public interest and prove they have no alternative ways of obtaining the information. The written submission should provide details including the purpose of obtaining the name and address of the vehicle owner, how

the data will be used and publicized, and the measures taken by the applicant to ensure the privacy of the vehicle owner will not be invaded.

The Commissioner will personally review any application from media outlets to assess whether the benefits accrued to the public interest outweigh the owner's rights to privacy. New guidelines also provide that an application will be rejected if the Commissioner reasonably believes that the issuance of a certificate will be contrary to the interests of national security or is likely to threaten public safety or prejudice the maintenance of public order. No indication has been given on how long it will take to process a written submission.

The Hong Kong Journalists Association (HKJA) criticised these "refined" arrangements because they exclude genuine news activity from public searches of the vehicles register and therefore run counter to the CFA judgment (HKJA 2024). In early April 2024, the HKJA applied for judicial review of these new restrictive arrangements (Ho 2024; *The Hong Kong Journalists Association v The Commissioner for Transport* 2024).

[G] ARE THERE ANY PROTECTIONS OF THE RIGHT TO NEWSGATHERING IN HONG KONG?

Access to information and the United Nations reminders

The HKSAR Basic Law stipulates the constitutional arrangements and the protection of human rights in Hong Kong after the 1997 handover. Article 39 guarantees that provisions of the International Covenant on Civil and Political Rights 1966 (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the HKSAR laws. Article 19 of the ICCPR requires states parties to guarantee the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. But neither media freedom nor the right to newsgathering is explicitly protected by the ICCPR. A similar deficiency also exists in Article 10 of the European Convention on Human Rights 1950 (ECHR). Meanwhile, constitutions of many states parties duly recognize freedom of the press but without mentioning the right to newsgathering.

As such, journalistic bodies around the world have for years been lobbying for better protection of the right to newsgathering. This includes adequate access to public records and venues of news events, and the

protection of journalistic sources (International Federation of Journalists 2021; Reporters Committee for Freedom of the Press 2023). In particular, the police should not hinder journalists on assignments, not to mention attack or arrest them (International Press Institute 2020). Overall, journalists should be facilitated in their daily newsgathering and should never become criminals simply because they are doing their job.

In 2011, the Human Rights Committee of the United Nations (UN) issued General Comment No 34, which expounds on various aspects of Article 19 ICCPR protection (UN 2011). The document stipulates that “The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function” and Article 19(2) embraces a right of access to information held by public bodies. Moreover, the processing of requests for information should be in a timely manner according to clear rules. Appeals should be available in cases of refusals to provide access to information and failures to respond to requests.

The UN Special Rapporteur on Freedom of Expression in her 2023 annual report again highlighted the importance of access to information, which is at the heart of freedom of expression, serving as a vital tool to expose and counter corruption and other illegal activities (UN 2023). Investigative journalism plays a vital watchdog role. States parties should enact or revise laws on access to information so as to ensure compliance with international and regional standards and to avoid overly broad or vaguely framed exemptions based on national security or official secrecy.

The Special Rapporteur also noted that access to information, even in some Western democracies, is excluded and requests are denied regularly on the pretext that disclosures of personal information would violate the right to privacy and obligations regarding data protection. She agreed that the relationship between data protection, the right to privacy and the right to information is complex and requires a careful balancing of interests. Laws and policies should therefore be clearly defined so as to facilitate the maximum disclosure of information whenever the public interest in the release of personal data is more important than the privacy interest.

Choy’s case: harms done to journalism and the public’s right to know

Clearly, Choy enjoyed very little Article 19 protection. Queries were raised whether she had fallen victim to selective prosecution, possibly due to her investigations into the 7.21 Attack (BBC 2020; Kwan 2023). Furthermore,

deviating from the usual practice of issuing a summons to the accused, the authorities arrested Choy at home and detained her for hours before she was granted police bail. Such an intimidating and frightening experience induces a chilling effect. It adversely impacts not only public searches by journalists of the vehicles register but also investigative journalism of politically sensitive topics such as the 7.21 Attack.

Choy's mishap reflected how vulnerable a Hong Kong journalist can be. She worked for RTHK for nearly a decade and left on her own accord in 2016 (Yan 2023; 2024). She rejoined RTHK as a freelancer in 2019 and worked on the documentary investigating the 7.21 Attack. After her arrest, RTHK terminated her contract. The public broadcaster also refused to provide her with any legal assistance. Choy finally won the case mostly because of her own resilience. However, harm had already been done, not only to Choy personally but also to the public's right to know (Chan 2023).

On a closer examination of the CFA judgment, one can detect the usual judicial restraint. The Court did not address the two chronic issues facing journalism in Hong Kong: namely, that the right to newsgathering has never been explicitly protected and that there is a lack of access to information legislation. Moreover, the Court apparently agreed to a possible future tightening of access to the vehicles register. It noted "if reform were required, the application process and regulatory framework for that process should be strengthened", referring to the proposed amendments made by the HKSAR administration in 2011 (paragraph 66).

Meanwhile, the restrictive measures introduced for the vehicles register in early 2024 by the HKSAR administration are largely in line with a new practice adopted in recent years. Public searches of company, land, marriage, voter registers, etc have either been much restricted or even stopped by the HKSAR authorities on the pretext of protecting privacy and preventing doxxing (*Ming Pao Daily News* 2023; HKJA 2021). Unfortunately, the joy over Choy's victory was short-lived.

Hong Kong does not have any legislation facilitating access to information, despite years of lobbying by the HKJA and some civil society bodies (HKJA 2019a). Shortly before the 1997 handover, the colonial Government issued a code on access to information (The Code 1995). In late 2018, a subcommittee of the Hong Kong Law Reform Commission published a consultation paper on access to information, stating that, even though the existing code is effective and cost-efficient, legislation should be introduced to implement an access to information regime with statutory backing (Hong Kong Law Reform Commission 2018). As

of 31 March 2024, the Commission has not published a final report on this topic.

Recent ECHR developments

In Choy's judgment, the CFA did not mention any decisions of the European Court of Human Rights (ECtHR). Nonetheless, over the years, the CFA has quite often referred to ECtHR decisions when dealing with appeals arising from human rights issues, including the right to freedom of expression (*HKSAR v Fong Kwok Shan Christine* 2017).

In the past decade or two, the ECtHR has heard cases concerning the right to newsgathering (ECtHR 2022: 54-57). For example, in 2018, the ECtHR held that Russia had violated Article 10 of the ECHR when arresting and convicting a Ukrainian journalist covering protests in St Petersburg during the 2006 G8 Summit. The ECtHR reiterated that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (*Butkevich v Russia* 2018: paragraph 123).

This was again stressed in 2019 in another ECtHR judgment. The court held that Hungary had violated Article 10 of the ECHR when refusing access by a journalist to a refugee reception centre. The court opined that obstacles created in order to hinder access to information which is of public interest may prevent journalists from performing their vital role as "public watchdogs", and their ability to provide accurate and reliable information may be adversely affected (*Szurovecz v Hungary* 2016: paragraph 52).

Meanwhile, the Council of Europe issued guidelines in 2016 on the protection of journalism, noting that the participation of journalists in public debate on matters of legitimate concern must not be discouraged by measures that make access to information more cumbersome or by arbitrary restrictions and the like because they may become a form of indirect censorship (Council of Europe 2016).

The guidelines also ask the authorities to show restraint in resorting to criminal proceedings:

A chilling effect on freedom of expression can arise not only from any sanction, disproportionate or not, but also the fear of sanction, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future (Council of Europe 2016: paragraph 34).

The guidelines further remind that:

a chilling effect also results from the arbitrary use of administrative measures such as registration and accreditation schemes for journalists, bloggers, Internet users, foreign correspondents, NGOs, etc., and tax schemes, in order to harass journalists and other media actors, or to frustrate their ability to contribute effectively to public debate (Council of Europe 2016: paragraph 37).

The wider picture in Hong Kong

For decades, there has in practice been little protection for the right to newsgathering in Hong Kong despite the incorporation of Article 19 of the ICCPR into the Hong Kong Bill of Rights and the HKSAR Basic Law (Yan 2003). Reporters have at times been badly treated and even assaulted by the police when covering public demonstrations (Yan 2014). Situations have obviously worsened in the past decade and came to a head during the 2019 political unrest. When covering peaceful demonstrations or conflicts between protestors and the police that year, journalists were often subjected to obstruction, verbal abuse, tear gas, or some other physical attacks by the police (International Federation of Journalists 2020). The relationship between the police and the press has remained strained ever since.

In September 2022, the incumbent HKJA Chair, Ronson Chan, was arrested whilst on his way to an assignment for refusing to show his HKSAR identity card to a plain-clothed police officer. He was later convicted of obstructing a police officer and sentenced to five days' imprisonment (Leung 2023). As of 31 March 2024, Chan was still on bail, awaiting an appeal hearing. Chan was also subjected to smear campaigns conducted by pro-Beijing local media soon after he became HKJA Chair in mid-2021 (Davidson 2022).

Meanwhile, the HKJA has also been targeted and attacked by pro-Beijing groups and media (Leung 2023). In addition, the HKSAR authorities and top officials openly found fault with the HKJA (Ni 2022). In late 2023, the Inland Revenue Department demanded that the union pay a backdated profit tax amounting to HKD400,000. The HKJA raised an objection, maintaining it had completed auditing and tax returns properly (*The Standard* 2024). In early 2024, Chris Tang, the Secretary for Security, again criticized the HKJA and, this time, for being unrepresentative because it had only a few hundred members (Tse 2024).

Like most other trade unions in Hong Kong, the HKJA does not enjoy collective bargaining status and its membership is entirely voluntary.

Nonetheless, the union has been lobbying for press freedom since its inception more than 50 years ago. More recently, for example, the HKJA had repeatedly urged the police to treat journalists properly during the 2019 political unrest (HKJA 2019b). Other HKJA efforts in the past decade include seeking judicial review of the accreditation of journalists by the HKSAR authorities (*Re Hong Kong Journalists Association* 2017) and attempting to intervene in injunction applications sought by The University of Hong Kong to prevent disclosure of confidential meeting minutes (*The University of Hong Kong v Hong Kong Commercial Broadcasting Co* 2016).

Weaponization of the law in the aftermath of the 2019 political unrest

From the 1980s onwards, Hong Kong was noted for being a modern city enjoying a high respect for the rule of law, despite not being a democracy. In the first two decades after the 1997 handover, Hong Kong apparently still enjoyed the rule of law but its common law system was based on an increasingly shaky foundation as Beijing was getting tougher on Hong Kong (*The Economist* 2017).⁴ The most drastic transformation occurred soon after the 2019 political unrest, which resulted in frequent international criticism that the law and the justice system in the HKSAR had been weaponized (Chan 2021; Georgetown University Center for Asian Law 2023; Columbia Journalism School & Ors 2023).

The 2019 political unrest was labelled by Beijing as a “colour revolution” instigated by hostile foreign forces (Cheong 2019). The central authorities in Beijing swiftly enacted the HKSAR National Security Law (NSL) in mid-2020, imposing on Hong Kong various vague and far-fetched offences prohibiting subversion, secession, terrorist activities and collusion with foreign powers (Articles 20-30) (Chopra & Pils 2022).

The NSL also introduced new procedures and practices such as trial by designated judges without a jury (Articles 44, 46), making presumptions against the granting of bail (Article 42) and conferring on the police increased investigative powers (Article 43; Implementation Rules for Article 43 2020). Meanwhile, Beijing set up an NSL office in Hong Kong supervising the implementation of this new legislation, advising top HKSAR officials, and directly handling NSL cases, which are considered too complex for the HKSAR law enforcement and judiciary to deal with (Articles 48-61).

⁴ Beijing or the central authorities refers to the central Government of the PRC in Beijing.

Locally, the HKSAR Legislative Council enacted a law in mid-2020 to protect the national anthem (National Anthem Ordinance 2020). The legislation punishes any disrespectful acts towards the national anthem and indirectly prohibits any songs that are considered to be advocating Hong Kong independence (Amnesty International 2020).

Since the 2019 political unrest, leading activists and politicians, ordinary protestors and netizens, and professional journalists have been arrested under the NSL or for the offences of riots or sedition, etc (Georgetown University, Center for Asian Law 2023). As of 31 March 2024, some of the accused have been detained without bail for more than three years while waiting for trial or sentencing (Chan 2024). For those whose court trials have been completed, most were convicted and given lengthy prison sentences. Many trial and appeal hearings are still in progress.

Against this background of weaponization of the law and the justice system, freedom of expression has been among the most obvious casualties. Soon after the implementation of the NSL, the police raided *Apple Daily*, a Chinese newspaper that enjoyed the second largest circulation in Hong Kong and which had taken a leading role in advocating the city's democratization (Grundy 2020). Its owner, Jimmy Lai, was arrested but granted bail. A second raid took place in mid-2021, when Lai and several editors were arrested and detained without bail. All of them were prosecuted for violating the NSL and for committing sedition (Sum 2022). This soon led to the closure of *Apple Daily*.

The offence of sedition dating back to the colonial era has been revived, resulting in frequent prosecutions and convictions. Two editors from *Stand News*, an online news portal that rose to prominence during the 2019 political unrest, were first arrested under the NSL and later prosecuted for the offence of sedition. Their arrests in late 2021 soon led to the closure of *Stand News* and some other news outlets for fear of possible prosecutions.

Some ordinary Hong Kong people have also been convicted of sedition for expressing views allegedly hostile to the HKSAR or Beijing (AFP 2023). Demonstrations and protests have literally disappeared from Hong Kong streets. The UN, Western governments and legislatures, and overseas concerned groups have repeatedly requested the HKSAR Government to stop these human rights violations originating from the weaponization of the law, but to no avail (UN 2024a).

The enactment of the Safeguarding National Security Ordinance in March 2024

In early 2024, freedom of expression and other human rights conditions further deteriorated in Hong Kong. Article 23 of the HKSAR Basic Law stipulates that the HKSAR shall enact local legislation to protect national security (Hutton 2024). An attempt to enact such legislation was made in 2003 but was soon aborted after mass street protests broke out in Hong Kong (Petersen 2005). In March 2024, the HKSAR authorities finally completed the long-delayed task of legislating on Article 23 by a speedy enactment of the Safeguarding National Security Ordinance (NSO) in less than two weeks (HKSAR Government 2024).

The NSO aims to prevent, suppress and punish acts and activities endangering national security (The Preamble, NSO). Replicating the definition contained in Article 2 of the nationwide National Security Law (NSL 2015), section 4 of the NSO stipulates an extremely broad definition of “national security”:

a reference to national security is a reference to the status in which the state’s political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security.⁵

The NSO covers a wide range of prohibited activities, and thus not only supplements but also expands the NSL that was imposed on the HKSAR by Beijing in 2020. This new local legislation bans and punishes treason, insurrection, incitement to mutiny, acts with seditious intention, theft of state secrets, espionage and collaboration with external forces to exert interference using improper means, etc.

Previously, the offence of treason inherited from the British colonial era, which carried a maximum sentence of life imprisonment, punished the levy of war against the monarch, assisting foreign enemies to invade the United Kingdom (UK) or any British territory, or the use of force against the monarch. Since the 1997 handover, these punishable acts referred to those committed against the central authorities and the Chinese territories. In other words, the definition of “treason” encompassed an element of the use of force. However, the NSO has much widened the

⁵ This journal article has mentioned three pieces of legislation on national security. They are: a) the HKSAR NSL, which was enacted by the central authorities in Beijing for Hong Kong in 2020; b) the NSO, which is a local legislation enacted by the HKSAR Government in early 2024; and c) the nationwide NSL, which was enacted by the central authorities in Beijing in 2015 for the whole of China except Hong Kong and Macau.

scope of “treason” so that a Chinese citizen who uses force or threatens to use force “with intent to endanger the sovereignty, unity or territorial integrity of China” will also be liable (section 10).

Meanwhile, the definition of “state secret” given in the NSO goes beyond the usual scope of national defence and foreign affairs. State secrets have been expanded to include secrets of economic, social and technological development of China or the HKSAR, or secrets in the relationship between the central authorities and the HKSAR, etc (section 29).

In the NSO, the offence of espionage, which carries a maximum prison sentence of 20 years, is widely defined so as to punish a variety of acts alleged to have been committed with an intent to endanger national security. Such acts include approaching, inspecting, passing over or under, entering or accessing a prohibited place, or being in the neighbourhood of a prohibited place (section 43(2)). Again, prohibited places are broadly defined (section 41). Also considered as espionage are many other acts such as obtaining, collecting, recording or communicating to any other person, any information or document, etc that is calculated to be, or is intended to be, directly or indirectly useful to an external force. The list of external forces is long, including entities such as a government of a foreign country, a political party in an external place, an international organization, or an individual related to any such entities (section 6).

In addition, collusion with an external force to publish a statement of fact that is false or misleading is also considered as espionage (section 43(3)). If convicted, the maximum sentence would be imprisonment for 10 years. To become liable for the offence, the accused had the intent to endanger national security or was reckless as to whether national security would be endangered when publishing the statement, and that the individual knew that the statement was false or misleading. It would also be considered as an act of espionage should the accused be found to have the intent to endanger national security, while publishing a statement that person had reasonable grounds to believe that the statement was false or misleading.

The NSO also toughens some existing punishments. Notably, the maximum jail term for the offence of carrying out an act with “seditious intention” is increased from two years to seven years, and further increased to 10 years if collusion with an external force is involved (section 24). This toughening of penalties is particularly alarming given that the meaning of “seditious intention” has remained broad and vague (section 23) and new provisions have been introduced clarifying that in convicting an accused it is not necessary to prove that person had an intention to incite public

disorder or to incite violence in the commission of acts with a seditious intention (section 25).

Moreover, the NSO equips the police with new investigatory powers, allowing for detention of suspects without charge for up to 16 days and denial of their access to legal advice for the first 48 hours (sections 78 and 80(3)(b)). Unprecedented restrictions have also been placed on lawyers in their offering of legal assistance to the accused (sections 79-80). Meanwhile, the Secretary for Security is equipped with direct power to ban any organizations endangering national security, foregoing any judicial oversight (section 60).

Many Western governments and international organizations strongly criticized the passage of the NSO, fearing it would result in a continuing systemic erosion of autonomy, freedoms and rights in Hong Kong (Amnesty International 2024; Pomfret 2024). The UN Special Rapporteur on the Protection of Freedom of Expression together with five other special rapporteurs jointly sent an 18-page communication to the HKSAR Government voicing their deep concerns about the NSO (UN 2024b). These human rights experts pointed out in their communication that the NSO “includes numerous measures that would significantly and unduly limit the exercise of human rights and fundamental freedoms” and would be incompatible with the Universal Declaration of Human Rights 1948, the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

These UN experts noted that definitions of “national security” and some other crucial terms are overly broad and vague. Moreover, the NSO set low thresholds for commission of offences and exercise of executive powers. They worried that the constitutional and legal framework of the HKSAR would fail to give effect to the primacy of international human rights law. The ordinance would then be interpreted and applied so as to override international human rights law in the event of any inconsistency between the two (UN 2024b: 5).

They urged the HKSAR Government to carry out a full review and reconsideration of the Ordinance to ensure that it complies with international human rights norms and standards which are binding on the HKSAR. They also requested that the HKSAR Government inform the UN about how to bring into line with the international human rights standards the definitions of national security, collusion with external forces, political ends, international organizations, etc to ensure compatibility with the principle of legal certainty established under the ICCPR (UN 2024b: 17).

Also, these six UN experts asked the HKSAR Government to clarify that the offence of “colluding with external forces” excludes instances of cooperations with the UN, in particular its human rights bodies and mechanisms. They also reminded in their communication that the UN Human Rights Committee had requested in 2022 that the HKSAR Government should take concrete steps to repeal the NSL and to refrain from applying the legislation in the meantime (UN 2024b: 2).

The possible adverse impact of the NSO on freedom of expression

The six special rapporteurs remarked that the broad categories of speech-based offences in the NSO together with the broad definitions contained in the NSL “may unnecessarily and disproportionately limit the exercise of freedom of expression, including the work of journalists, civil society actors, human rights defenders and anyone seeking to exercise her/his rights and freedoms”. The communication reminded the HKSAR authorities that: “Media plays a crucial role in society by informing the public on issues of public interest, while civil society can make valuable inputs and recommendations to State entities on a number of policy areas” (UN 2024b: 9).

The UN experts also observed the lack of clarity in the basic concepts stipulated in the NSO such as what is sufficient to bring persons into “hatred”, “contempt” or “disaffection against” their governments for the purposes of sedition. They recalled that the UN Human Rights Committee had raised concerns about the use of sedition charges in the HKSAR against academics, journalists and representatives of civil society for having legitimately exercised their right to freedom of speech. The experts further argued that seditious intention, an antiquated concept inherited from the British colonial era and which did not require the incitement of any violence or physical harm, is in fact aimed at suppressing political dissent (UN 2024b: 11).

The UN experts also noted that the term “state secret” is so widely defined that state secrets potentially include information about ordinary matters of public interest in social, economic, political, scientific and foreign affairs and that they may already be in the public arena in forms such as media reports. They referred to the “Global Principles on National Security and the Right to Information”, which states that “it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions” (UN 2024b: 12).

Indeed, many NSO provisions can have a possible adverse impact on freedom of expression. Espionage offences and what constitutes a “state secret” are broadly defined. As such, newsgathering and reporting may easily be mistaken as acts of espionage or unauthorized disclosure of state secrets. Media outlets and journalists may also be prosecuted for espionage if their stories are perceived as false or misleading. Furthermore, acts with a “seditious intent” have now become strictly “word crimes”, punishable under the NSO even though there is no intention to incite violence or disorder. This is against the trend of abolition of the political offence of sedition that has taken place amongst many common law jurisdictions (Smith & Ors 2022).

Also, notably, the NSO codifies the archaic common law offence of “misprision of treason”, which carries a maximum sentence of 14 years’ imprisonment (section 12). This provision punishes a Chinese citizen who, knowing someone else has committed, is committing, or about to commit the offence of treason under the NSO, does not report to the police as soon as reasonably practicable. Criminal liability will only not be incurred if the act of treason has already been in the public domain. The codification of the offence of “misprision of treason” represents an about-turn by the HKSAR Government that proposed the abolition of this common law offence in 2003 (National Security (Legislative Provisions) Bill 2003).

Until now, journalists in Hong Kong have not enjoyed the privilege of protecting their news sources (Yan 2014: 185-193). At common law, journalists do not have an immunity to preserve the confidentiality of their sources, and it is up to the judge to decide whether to force journalists to disclose them. As such, journalists’ refusal to give evidence can amount to contempt of court. This is despite the recommendation made by the Hong Kong Law Reform Commission in the mid-1980s that statutory protection against a general disclosure of sources of published information should be introduced to Hong Kong along the lines of section 10 of the UK’s Contempt of Court Act 1981 (Hong Kong Law Reform Commission 1986: paragraph 5.49). In recent years, journalists have at times been summoned to give evidence in the HKSAR courts, involving either the disclosure of their news sources or their witness accounts of protests and demonstrations (Chan 2013).

Section 12 of the NSO has made the position of Hong Kong journalists even more difficult. Given the offence of treason is so vaguely defined, journalists in their daily newsgathering may come across interviewees whose remarks can be considered by the HKSAR police as a threat to use

force “with intent to endanger the sovereignty, unity or territorial integrity of China”. In other words, a journalist will be liable for the offence of misprision of treason if they do not report their interviewee to the police as soon as possible.

Overall, many of the above-mentioned NSO provisions have presented immense difficulties for journalists working in Hong Kong. Their right to newsgathering and reporting will be severely hampered because of the new legislation. A terrifying chilling effect has been created in Hong Kong and the right to freedom of expression has largely been deprived.

[H] CONCLUSION: IN THE FORESEEABLE FUTURE?

To conclude, over the years, the right to newsgathering has not been adequately protected in Hong Kong. Journalists have never enjoyed any legislation guaranteeing access to information in their daily newsgathering activities. Moreover, they have sometimes been hindered or even attacked by the police when covering public demonstrations and other news events.

As far as *Choy’s* case is concerned, there are suspicions of selective prosecution and police harassment. The eventual CFA finding in favour of Choy was perceived by many as proof that judicial independence remained intact, at least in the highest appellate court. But any protection offered by the CFA to the right of newsgathering has proved to be minimal. By introducing restrictive new measures that preclude journalists from conducting searches of the vehicles register, the HKSAR Government has shown a blatant disrespect for the Court’s decision. As such, any optimism about the rule of law and freedom of expression in the HKSAR has largely been shattered.

In sum, given the current political situation in Hong Kong, the vigorous implementation of the NSL, and the introduction of numerous draconian offences by the newly enacted NSO, the prospects for protection of the right to freedom of expression, which incorporates the right to newsgathering, are certainly bleak for the foreseeable future.

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