


SPECIAL ISSUE ARTICLE

# Managed freedom in precarious times: Maintaining academic freedom in transitional Hong Kong

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## Abstract

This article examines the status of academic freedom in Hong Kong in light of the increasing securitization of higher education since the implementation of the National Security Law (NSL) in 2020. It provides an analytical framework to comprehend the changing landscape of academic freedom in Hong Kong, highlighting the impact of the NSL and the conflict between the necessity of political control on securitized campuses and the demand for international, free, and high-quality universities to make Hong Kong a global hub for higher education. The article concludes by asserting that the NSL has reshaped and will continue to impact academic freedom and university autonomy concerning core security issues, but there is still a possibility to establish a defensible space for genuine academic freedom in classrooms.

**Keywords:** academic freedom; despotic power; infrastructural power; national security

## Introduction

The introduction of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) in 2020 and the subsequent enactment of the Safeguarding National Security Ordinance (NSO) in 2024, along with the revival of the sedition offense and aggressive prosecution, has ushered Hong Kong's macro-political system into a new era of securitization.<sup>1</sup> This transformation presents a new, unique, and significant challenge to academic

<sup>1</sup>[https://www.legislation.gov.hk/fwddoc/hk/a406/eng\\_translation\\_\(a406\)\\_en.pdf](https://www.legislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf); and <https://www.elegislation.gov.hk/hk/A305>. H Fu and M Hor (eds), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong University Press, 2022); C Chan, 'Can Hong Kong Remain a Liberal Enclave within China? An Analysis of the Hong Kong National Security Law' (2021) 2 *Public Law* 271–92; S Chopra and E Pils, 'The Hong Kong National Security Law and the Struggle over Rule of Law and Democracy in Hong Kong' (2022) 50 (3) *Federal Law Review* 292–313; and H Zhu, 'A Chinese Law Wedge into the Hong Kong Common Law System: A Legal Appraisal of the Hong Kong National Security Law' (2023) 21 *Northwestern Journal of Human Rights* 43–108.

freedom and university autonomy.<sup>2</sup> These security measures were imposed in response to the prolonged and occasionally violent protests in 2019. The NSL has not only brought about a paradigm shift but has also introduced a host of new uncertainties and vulnerabilities.<sup>3</sup> This has led to a palpable sense of apprehension, anxiety, and fear among university administrators, faculty members, and students. The concern is not just that academic freedom in Hong Kong is under threat but may already be extinguished, a notion that some have already begun to suggest.<sup>4</sup>

This article examines the state of academic freedom in Hong Kong in light of the increasing securitization of higher education in post-NSL Hong Kong. It also presents an analytical framework to understand the shifting landscape of academic freedom better, highlighting the impact of the NSL and the tension between the need for political control on securitized campuses and the desire for international, free, and high-quality universities that can establish Hong Kong as a global hub for higher education. Furthermore, the article suggests practical measures that can provide meaningful protection for academic freedom during tumultuous and unstable times. Ultimately, the article concludes that while the NSL has altered and will continue to affect academic freedom and university autonomy, the real possibility remains to establish a defensible space for genuine academic freedom within the classroom.

The main argument presented in this article is that Hong Kong has operated under a dual form of constitutionalism, acting as a liberal enclave within a more extensive authoritarian political system. While it remains committed to global constitutional principles and the protection of rights and freedoms, it also demonstrates a greater deference to China's sovereign interests, particularly in politically sensitive matters. What sets Hong Kong's dualistic constitutionalism apart is that it possesses a liberal core encased within an authoritarian shell, unlike the more typical scenario of an authoritarian core

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<sup>2</sup>Academic freedom is defined as “professional freedom” to carry out scientific research, higher education teaching, and learning. See K Kovacs and J Spannagel, ‘Academic Freedom: Global Variations in Norm Conceptualization, Diffusion, and Contestation – Special Issue Introduction,’ and M Kumm, ‘Academic Freedom in Liberal Constitutional Democracies. Justifications, Limits, Tensions, and Contestations’ (2024) SCRIPTS Working Paper No. 42, Berlin: Cluster of Excellence 2055 “Contestations of the Liberal Script (SCRIPTS)”. For recent scholarship on risks to academic freedom, see H Reichman, *The Future of Academic Freedom*, (Johns Hopkins University Press, 2019); JW Scott, *Knowledge, Power, and Academic Freedom* (Columbia University Press, 2019); C Evans, A Stone and J Roberts, *Open Minds: Academic Freedom and Freedom of Speech of Australia* (La Trobe University Press, 2021); and DD Gueorguiev (eds), *New Threats to Academic Freedom in Asia* (The Association for Asian Studies, 2023); D Gordon, *What is Academic Freedom? A Century of Debate, 1915-Present* (Routledge, 2023). For a sober assessment of academic freedom in Hong Kong since the implementation of the NSL, see C Chan, ‘Scholarship in Times of Constitutional Transformation: A View from Hong Kong’ (2023) 24 *Human Rights Law Review* 1–15.

<sup>3</sup>H Fu and M Hor, ‘Introduction: Rebalancing Freedom and Security in Post-NSL Hong Kong,’ in H Fu and M Hor (eds), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong University Press, 2022), 1–19; DF Vukovich, *After Autonomy: A Post-Mortem for Hong Kong’s First Handover, 1997-2019* (Palgrave Macmillan, 2022); and MC Davis, *Making Hong Kong China: The Rollback if Human Rights and Rule of Law* (Columbia University Press, 2020).

<sup>4</sup>P Baehr, ‘Hong Kong Universities in the Shadow of the National Security Law’ (2022) 59 *Society* 225–39; S Cook, ‘Hong Kong’s Academic Freedom Withers under National Security Law,’ Freedom House, Perspectives, November 23, 2020; CA Holz, ‘Hong Kong’s Contested Academic Freedom,’ *The Diplomat*, January 27, 2022; Y-F Lai, ‘The Multiple Challenges to Hong Kong’s Academic Freedom,’ available at <https://www.mpiwg-berlin.mpg.de/feature-story/multiple-challenges-hong-kongs-academic-freedom>; and T McLaughlin, ‘How Academic Freedom Ends,’ *The Atlantic*, June 6, 2021.

masked by a democratic facade.<sup>5</sup> This liberal core has been nurtured over time through a historical process, solidified through constitutional practices since the 1990s, and enshrined in the Basic Law, which serves as Hong Kong's mini-constitution.<sup>6</sup> This article draws on Fraenkel's normative and prerogative power concepts and Mann's despotic and infrastructural power ideas. It argues that this distinctive blend in Hong Kong has significant implications for the resilience of academic freedom in the region.

### An analytical framework from Ernst Fraenkel to Michael Mann

The starting point to study the impact of the NSL is Fraenkel's dual state framework<sup>7</sup> which has been used to argue that the implementation of the NSL has created a dualistic structure of power in Hong Kong, gradually but decisively replacing the rule of law system previously in existence. In this account, the NSL establishes a prerogative domain in Hong Kong that intersects with and impacts the normative domain, which is the institutional arrangements based on the legal order.<sup>8</sup> For Fraenkel, prerogative power is necessarily arbitrary, essentially lawless, and exercised for political expediency.<sup>9</sup> Seen from Hong Kong, the NSL, originating from Chinese national constitutional law and operating largely outside the scope of the Basic Law, may be a classic example of prerogative power, targeting political risks to China's national security and deviating significantly from Hong Kong's normative legal system. Viewed through the dual state framework lens, the prerogative domain emerges as a distinct zone of power characterized by new constitutional and legal norms established by the central state. These norms are implemented through specialized institutions, supported by a specific ideology, and operate independently from the accountability mechanisms outlined in the Basic Law. Creating a prerogative domain has ushered in a new age of a dual state, where the prerogative domain co-exists with the normative domain in its shadow, competing for power and jurisdiction. Over time, this new prerogative domain may pose an existential threat to Hong Kong's current rule of law system, potentially undermining its foundations. Following this line of argument, it is possible that the NSL, which carries significant political implications and possesses nearly unlimited powers, could extend its influence beyond national security, eventually eroding Hong Kong's liberal system upheld by the rule of law.<sup>10</sup>

Fraenkel's conceptualization offers a pessimistic outlook on Hong Kong's constitutional future. The NSL has created a prerogative domain of national security that not only

<sup>5</sup>AHY Chen, *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two System"* (City University of Hong Kong Press, 2021); AHY Chen and PJ Yap, *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* (Hart, 2023); E Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge University Press, 2019); and J Yam, *Judging for Democracy* (Cambridge University Press, 2025).

<sup>6</sup>Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997).

<sup>7</sup>E Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (The Lawbook Exchange, Ltd. 2010, 2010); and J Meierhenrich, *The Remnants of the Rechtsstaat* (Cambridge University Press, 2018). For a careful discussion of the historical origin of the dual state theory and its application in China, see E Pils, 'China's Dual State Revival Under Xi Jinping' (2023) 46 *Fordham International Law Journal* 339–75.

<sup>8</sup>C Chan, 'From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders' (2022) 16 (1) *Law & Ethics of Human Rights* 99–135.

<sup>9</sup>See (n 7) 3; (n 7) 342.

<sup>10</sup>See (n 7) 3.

co-exists but also challenges the remaining normative domain. Based on the broad security concept embedded in Chinese national security law and armed with extensive powers, the prerogative domain occupies a dominant position in the political and legal landscape, seeking to blur the boundaries between the two domains, weaken the defenses of the normative system, and exploit its vulnerabilities. While the normative system may occasionally succeed in resisting the excesses of prerogative power, it will ultimately be left salvaging the remnants of a weakened and partial rule of law system.<sup>11</sup> In that sense, the dual state framework tends to overlook the resilience of institutions in the normative domain and the agency of individuals in constraining the overreach of prerogative power. It also overlooks the potential for self-discipline within the prerogative power itself.<sup>12</sup> According to this interpretation, the NSL, with its momentum, will continue to expand its influence and reshape Hong Kong by its national security logic until the remaining normative system collapses.

The theory of infrastructural power, proposed by Michael Mann, allows for greater agency and the potential for institutional resilience within the normative system, highlighting the point that the prerogative power of the NSL would have to work with and through the institution in place. For Mann, state power can be either ‘despotic,’ meaning ‘the range of actions which the elite is empowered to undertake without routine, institutionalized negotiation with civil society groups,’<sup>13</sup> and ‘infrastructural,’ defined as ‘the capacity of the state to actually penetrate civil society, and to implement logistically political decisions through the realm.’<sup>14</sup> While despotic power is sharp and decisive, infrastructural power tends to be corporatist, resilient, and grounded in ‘the organizational entwining between state agencies and civil society organizations...’<sup>15</sup> In essence, despotic power could be autonomous, and infrastructural power must be local if it exists. Embedded in society and with a high level of institutionalization, infrastructural power has grown as capitalist democracies and modern bureaucracies develop.<sup>16</sup>

Mann would categorize the NSL powers as ‘despotic’ because they are imposed by the sovereign power onto Hong Kong during a political crisis. Without negotiation with or consent from society, the law aims to impose changes. Because the NSL is not embedded within pre-existing institutions, it lacks local accountability and has been implemented in a manner fundamentally distinct from Hong Kong’s legal order.<sup>17</sup> Indeed, the NSL responds to the massive political and institutional failure to preempt a grave political

<sup>11</sup>See (n 7) 3.

<sup>12</sup>For the possibility of developing the normative state in authoritarian contexts, see J Meierhenrich, ‘What the rule of law is...and is not’ in J Meierhenrich and M Loughlin (eds.), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021). For a case of the possible stability between the prerogative and normative domains, see H Fu ‘Between the Prerogative and the Normative States: The Evolving Power to Detain in China’s Political-Legal System,’ (2022) 16 *The Law and Ethics of Human Rights* 61–79; and Michael Hor, ‘The New National Security Law: Exploring a Meaningful Comparison with Singapore,’ in Fu and Hor, See (n 1), 358.

<sup>13</sup>M Mann, ‘The Autonomous Power of the State: Its Origins, Mechanisms and Results’ (1984) 25 (2) *European Journal of Sociology* 185–213; M Mann, *The Sources of Social Power*, Volume II (Cambridge University Press, 1993).

<sup>14</sup>See (n 13).

<sup>15</sup>H Soifer and M vom Hau, ‘Unpacking the Strength of the State: The Utility of State Infrastructural Power’ (2008) 43 *Studies in Comparative International Development* 219–30.

<sup>16</sup>See (n 13).

<sup>17</sup>See (n 5).

crisis. It aims to remove the security risks and fundamentally transform the existing system that created those risks.<sup>18</sup>

For Mann, despite its formidable and unaccountable nature, despotic power is inherently constrained in its reach and impact. In contrast to Fraenkel's notion of a powerful prerogative state that exploits the vulnerability of a fragile normative state, Mann's concept of despotic power is balanced and constrained by infrastructural power. Wielded by a small group of elites, often disconnected from the society they seek to govern, despotic power lacks effective institutionalization and the support of civil society groups. As such, it operates only in an 'imperial' manner, exerting control *over* a society rather than operating *through* it. Consequently, despotic power remains detached from and unable to permeate the societal infrastructure, relying primarily on coercion and repression and instilling fear in its enforcement.<sup>19</sup>

On the one hand, infrastructural power is positive and assertive, permeating society and acting as a central force in coordinating everyday life. It operates through institutions, including courts, the press, churches, and, of course, universities, radiating state powers to society through enforcing rules and, at the same time, securing the participation and acceptance of social actors.<sup>20</sup> Throughout history, state power has shifted towards relying more on infrastructural power. The stronger the infrastructural power, the weaker the despotic power becomes, although authoritarian states may develop high despotic and infrastructural powers simultaneously. The state is most powerful when it can co-opt and integrate social forces and is made accountable to them.<sup>21</sup>

In Mann's formulation, the NSL has yet to develop into an infrastructural power. As an alien power of the sovereign not institutionalized and embedded, utilized harshly against its enemies and adversaries, the NSL cannot bring about institutional and cultural changes in Hong Kong it aims to even if it has been used harshly against the enemies and adversaries. It is not easy to judge, under Mann's theory of state power, whether repressive prosecution is a sign of state strength or weakness or, more generally, whether the political trial of dissidents turns out to be a trial of the state itself. Hong Kong has established a robust governance structure that exercises its infrastructural power across various sectors, including higher education, which the NSL cannot ignore or is not meant to destroy. For the NSL to become an infrastructural power, it has to integrate itself into the existing infrastructure power through cooperative arrangements. That can only be achieved through effective engagement with existing institutions and social groups, embedding the power in society, and becoming locally accountable and legitimate. As Mann puts it: 'Infrastructural power is a two-way street. It also enables civil society parties to control the state...' <sup>22</sup> When that happens, the NSL will no longer be a despotic power.

<sup>18</sup>H Fu and X Zhai, 'The Return of High Policing in Hong Kong,' in Fu and Hor, See (n 1) 187.

<sup>19</sup>See (n 13); and 'Infrastructural Power Revisited' (2008) 43 *Studies in Comparative International Development* 355–65.

<sup>20</sup>For an elaboration of infrastructural power, see H Soifer, 'State Infrastructural Power: Approaches to Conceptualization and Measurement' (2008) 43 *Studies in Comparative International Development* 231–52.

<sup>21</sup>See (n 13); and 'Ruling Class Strategies and Citizenship' (1987) 21 (3) *Sociology* 339–54. For this state in society approach, see also, JS Migdal, 'State in Society' in *Studying How State and Societies Transform and Constitute One Another* (Cambridge University Press, 2012).

<sup>22</sup>See (n 15). For an analysis of the dynamic relationship between despotic and infrastructural power, see J Lucas, 'The Tension between Despotic and Infrastructural Power: The Military and the Political Class in Nigeria, 1985–1993' (1998) 33 (3) *Studies in Comparative International Development* 90–113.

Which scenario will ultimately prevail in Hong Kong? Will the prerogative power of the NSL continue to weaken and erode the normative system in Hong Kong? Or will Hong Kong's infrastructural power be able to limit the reach of the NSL and constrain the impact of securitization? The implications for academic freedom are significant. If the former scenario unfolds, university autonomy and academic freedom will continue to decline, eventually leading to complete political control of universities. However, if the latter scenario takes hold, universities would be able to maintain the status quo, struggling to address the core concerns of national security while preserving critical aspects of their autonomy and freedom, ultimately to achieve a new equilibrium.

### Hong Kong under the National Security Law

Hong Kong has been a Special Administrative Region (SAR) of socialist China since its reunification in 1997. It operates under the constitutional framework of One Country Two Systems (OCTS). According to OCTS, the existing capitalist system can continue for 50 years. The Basic Law guarantees many constitutional rights, including the freedom to engage in academic research, artistic creation, and cultural activities.<sup>23</sup> It also incorporates international human rights standards, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), into Hong Kong's legal framework. Moreover, the Basic Law grants the Hong Kong SAR government autonomy in formulating education policies and ensures universities' institutional autonomy and academic freedom.<sup>24</sup>

The rule of law has evolved into a core value of Hong Kong after a lengthy historical process.<sup>25</sup> It has also demonstrated a strong commitment to liberal values and compliance with international human rights law, as evidenced by its extensive jurisprudence, which has developed since the early 1990s.<sup>26</sup> This rule-based and rights-supportive system provided fertile ground for academic freedom to thrive in Hong Kong. While bound by constitutional constraints in interpreting the Basic Law, the city's courts have played an active and independent role in safeguarding civil and political rights, including academic freedom, and exerting control over the executive branch. Additionally, a vibrant civil society and independent press have served as a robust support structure, ready to mobilize to defend academic freedom at any sign of infringement.<sup>27</sup>

The Basic Law promises eventual universal suffrage with certain conditions and qualifications. Still, the people of Hong Kong had anticipated and struggled for the fulfillment of these promises on their terms.<sup>28</sup> The dramatic street protests and the tragic

<sup>23</sup> Article 34, Basic Law for the Hong Kong Special Administrative Region.

<sup>24</sup> Article 137, Basic Law. See K Loper and CJ Petersen, 'Academic Freedom in the Shadow of Hong Kong's National Security Law,' in Fu and Hor, See (n 2) 255–78.

<sup>25</sup> M Ng, *Political Censorship in British Hong Kong: Freedom of Expression and the Law (1842-1997)* (Cambridge University Press, 2022); and CAG Jones, *Lost in China: Law, Culture and Identity in Post-1997 Hong Kong* (Cambridge University Press, 2015).

<sup>26</sup> Chen and Yap; See (n 5); PY Lo, *The Hong Kong Basic Law*, (Lexi Nexis, 2011); and J Chan and CL Lim, *Law of The Hong Kong Constitution*, (3rd edn, Sweet & Maxwell, 2021).

<sup>27</sup> J Currie, CJ Petersen and K Mok, *Academic Freedom in Hong Kong* (Lexington Books, Lanham, 2006); CJ Petersen, 'Preserving Academic Freedom in Hong Kong: Lessons from the "Robert Chung Affair" (2000) 30 (2) *Hong Kong Law Journal* 165–76; and JMMChan and D Kerr, 'Academic Freedom, Political Interference, and public Accountability: The Hong Kong Experience,' (2016) 7 *Journal of Academic Freedom*, available at <https://www.aaup.org/sites/default/files/ChanKerr.pdf>.

<sup>28</sup> Chen and Yap, See (n 5).

outcomes were all rooted in the perceived granting and subsequent non-fulfillment of these aspirations. In this sense, Hong Kong was a prime example of a resilient rule of law and robust rights protection without full democratization. During the colonial era, peace, order, and good governance were achieved through administrative rather than political absorption. Following the reunification, rights and freedoms continued to be safeguarded under the law, thanks to an active judiciary and a vibrant civil society rather than through significant political liberalization.<sup>29</sup>

Hong Kong also aspires to establish itself as an international hub for higher education. The reunification with China coincided with the expansion of the higher education sector in Hong Kong. As widely documented, the higher education system in Hong Kong has been well-funded, highly ranked, and internationally recognized. While occasionally controversial, the governance structure of higher education has allowed universities to operate with a high degree of autonomy.<sup>30</sup> Before the arrival of the NSL, academic freedom had been routinely practiced and asserted, even in an increasingly precarious environment. In cases where interference with academic freedom and university autonomy had occurred, it often met with strong community support and legal protection.<sup>31</sup> It is worth emphasizing that the government's political inference has consistently been regarded as the primary threat to academic freedom in Hong Kong. Comparatively, adverse effects on academic freedom due to political correctness and commercialization, seen as imminent concerns in other places, are far less significant.<sup>32</sup>

Hong Kong's pursuit of democracy, particularly the civil disobedience movement in 2014,<sup>33</sup> saw active participation from academics and students and strong support from universities. However, this ultimately set the stage for a collision course with the Central Authorities, leading to politicization, polarization, and radicalization of the campus. As a result, university autonomy and academic freedom came under significant stress.<sup>34</sup> The 2019 protests, triggered by an extradition bill that authorized repatriation of fugitive offenders to mainland China,<sup>35</sup> essentially continued the unsuccessful 2014 civil

<sup>29</sup>AY King, 'Administrative Absorption of Politics in Hong Kong: Emphasis on the Grass Roots Level' (1975) 15 (5) *Asian Survey* 422–39; MK Chan, 'The Legacy of the British Administration of Hong Kong: A View from Hong Kong' (1997) *The China Quarterly*; and ABL Cheung and PCW Wong, 'Who Advised the Hong Kong Government?' *The Politics of Absorption before and after 1997* (2004) 44 (6) *Asian Survey* 874–94. On the rule of law as a legitimizing tool in Hong Kong, See (n 25).

<sup>30</sup>P Altbach and G Postiglione, 'Hong Kong's Academic Advantage,' (2012) 66 *International Higher Education* 22–7; WYL Lo and H-HH Tang, 'Dancing with Global Trends: Higher Education Policy and University Governance in Hong Kong, 1997–2012' (2016) 49 (1) *Journal of Educational Administration and History* 53–71.

<sup>31</sup>See (n 27).

<sup>32</sup>L Jackson, 'Academic Freedom As Experience, Relation and Capability: A View from Hong Kong' in R Watermeyer, R Raaper and M Olssen (eds), *Handbook on Academic Freedom*, (Edward Elgar Publishing, 2022), 227–42.

<sup>33</sup>H Fu, 'Political Protest in High-Income Societies: The Case of the Occupy Central Movement in Hong Kong,' in BC Jones (eds), *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements* (Routledge, 2017) 83–99.

<sup>34</sup>A Chen, 'The Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013–15' (2016) *Asian Journal of Law and Society* 189; and J Chan, 'A Storm of Unprecedented Ferocity,' (2018) 16 (2) *International Journal of Constitutional Law* 373; CJ Petersen and AYH Cheung, 'Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of "One Country, Two Systems,' (2016) 42 *North Carolina Journal of International Law* 1.

<sup>35</sup>A Chen, 'Constitutional Controversies in the Aftermath of the Anti-Extradition Movement of 2019' (2020) 50 *Hong Kong Law Journal* 609.

disobedience movement. This time, the campus became the critical battlefield, with students serving as core organizers and participants, leading to paralysis and literal destruction. The protests of 2019 brought Hong Kong's rule of law system to the brink of collapse and, from the perspective of the Central Authorities, undermined China's national security.<sup>36</sup> The NSL was made and extended to Hong Kong at the historical juncture to restore order and stability after the outbreak of violence in 2019.

The NSL shares key features of 'prerogative' and 'despotic' powers, as identified by Frankel and Mann. First, it is a law made outside of Hong Kong without consultation and imposed on Hong Kong during a political crisis. The principles, institutions, and procedures of the NSL are imported from the mainland Chinese system and differ from those previously in place in Hong Kong. Second, this law is political, created with a clear mission, and implemented against a specific political target. Third, despite being applied through the Hong Kong legal system, the NSL wields tremendous legal and political powers with a significant deficit in judicial oversight, which is uncharacteristic of Hong Kong's legal tradition.

The new security regime is structurally and institutionally external to the legal and social systems in Hong Kong and is not effectively integrated into Hong Kong's legal system. The NSL creates four new offenses endangering national security that are pertinent to academic freedom: secession, subversion, terrorist activities, and foreign collusion, all including far-reaching inchoate offenses of incitement and conspiracy,<sup>37</sup> creating tangible and real results among academic staff and students alike and a significant chilling effect on academic freedom and the freedom of expression in general, as detailed later in the article. The NSO further widens and thickens the security net by supplementing new offenses, enhancing punishment, and empowering the executives.

While the NSL is intended to be implemented through Hong Kong's legal system and the pre-existing procedures and rules will apply in national security cases, the NSL has created significant new exceptions for national security cases. The national security legal system is qualitatively and manifestly different from the rest in its lack of judicial accountability and the power it wields.<sup>38</sup> Although the NSL was not enacted as emergency legislation under the Chinese Constitution or the Basic Law, it was passed in response to a political crisis in Hong Kong and, in substance, adopted and normalized extraordinary measures.<sup>39</sup>

The NSL establishes a series of prerogative institutions, particularly the interlocked central and Hong Kong security agencies with extraordinary political and legal power to recommend policies, gather intelligence and information, and conduct criminal investigations. They operate with a high degree of secrecy. With the enactment of the NSL, national security has decisively become a central affair belonging to the One Country in the OCTS equation, which is to be placed in the firm control of the Central Authorities.<sup>40</sup>

<sup>36</sup>H Fu and X Zhai, 'The Return of High Policing in Hong Kong,' in Fu and Hor, See (n 1).

<sup>37</sup>A Chen, 'The National Security Law of the HKSAR: A Contextual and Legal Study,' in Fu and Hor, See (n 1) 20–48.

<sup>38</sup>T Kellogg and Y-h Lai (2021) Death by a Thousand Cuts: Chipping Away at Due Process Rights in HK NSL Cases. *Lawfare*, 28 May; available at <https://www.lawfareblog.com/death-thousand-cuts-chipping-away-due-process-rights-hk-nsl-cases>; and JMM Chan, 'National Security and Judicial Independence: A Clash of Fundamental Values,' in Fu and Hor (eds) See (n 2) 119–48.

<sup>39</sup>H Fu, and Zhai, X, 'Two Paradigms of Emergency Power: Hong Kong's Liberal Order Meeting the Authoritarian State,' (2020) 50 *Hong Kong Law Journal* 489–515

<sup>40</sup>See (n 18).



In particular, it creates a central national security office in Hong Kong with independent law enforcement power not accountable to Hong Kong law. It is worth noting that this is the first time the central government agency has enjoyed law enforcement power, with agents of central authorities directly operating on the ground. With the arrival of the national security office, political surveillance is no longer remote, carried out from a distant mainland as it used to be, but now onshore.<sup>41</sup>

While legalized by the sovereign power, mainland Chinese lawyers drafted the NLS, which lifted terms and concepts from Chinese criminal law.<sup>42</sup> Many of the provisions in the NSL are necessarily broadly framed and therefore capable of expansive interpretation, posing a real challenge in understanding the relationship between the NSL text as lawyers and judges in Hong Kong read them and the political context in which the law was made as the lawmakers in Beijing interpret them. Struggles abound between the Central Authorities and Hong Kong courts over legal interpretation, including the NSL,<sup>43</sup> but the power of final interpretation rests with the Standing Committee of the National People's Congress.<sup>44</sup> Through the combined process of law-making and legislative interpretation, the NSL brings new norms to Hong Kong and ensures they are faithfully applied as initially intended. The Central Authorities made the law, interpreted its meaning, and shielded it from any challenge to its constitutionality.

The new security design serves a clear political purpose. It is thus unambiguously political, even though it was wrapped in legal form, written in legal language, and implemented through Hong Kong's legal institutions. The NSL is a legal instrument of sovereign power, and the text is intertwined with the political context in which it was prepared. It demands and enables the legal process and the common law to achieve the Central Authorities' objectives. It is political because its ultimate goal is not to apply legal standards to determine liabilities in a politically neutral manner. As it has turned out, the NSL has been effectively used to punish those responsible for the 2019 protest and riots, remove them from political and institutional positions, and reduce, if not eliminate, their social influence through legal or political measures. The fists of the NSL are hard and forceful in removing enemies, who are now mostly behind bars, censored, closely monitored, or self-exiled in foreign countries.

The NSL has an apparent spill-over effect, extending its power beyond the NSL itself. For example, the NSL prosecution has reactivated the charge of the archaic offense of sedition, allowing the government to prosecute what many argue to be critical speech, including constitutional speech.<sup>45</sup> It has also led to the extensive use of public order offenses against those involved in and related to the 2019 protest.<sup>46</sup> Finally, it compelled the de-registration of NGOs, leading to the investigation and prosecution of societies for

<sup>41</sup>For an examination of the National Security Office of the Central People's Government in Hong Kong, See (n 18).

<sup>42</sup>HKSAR v Lui Sai Yu [2022] HKDC 384.

<sup>43</sup>See (n 5) 52.

<sup>44</sup>Art 65, NSL.

<sup>45</sup>PY Lo, 'Reactivated and Re-Energized: The Sedition Offences in 'New Era' Hong Kong,' (2022) 52 (3) *Hong Kong Law Journal* 913–36.

<sup>46</sup>J Chan, EY-H Lai and TE Kellogg, The Hong Kong 2019 Protest Movement: A Data Analysis of Arrests and Prosecutions, available at <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2023/10/GCAL-HK-2019-ARREST-DATA-REPORT-FINAL-OCT-2023.pdf>.

contravention of the Societies Ordinance held responsible for organizing or leading the 2019 protest and their past political activities.<sup>47</sup>

All these prosecutions have occurred in the larger context of foundational political changes. The new Chief Executive came from a police and security background, and the Director of the Liaison Office of the Central Government, the highest-ranking official to represent the Central Authorities, was the founding Commissioner of the National Security Commission of the Central Government in Hong Kong, all symbolizing the continuing securitization of Hong Kong. Supported by the NSL, central authorities revamped the electoral systems to elect the chief executive and the legislative council. They created an effective system to vet all candidates for public offices, including judges, who are now subject to vigorous national security vetting, to screen out those not regarded as patriotic.<sup>48</sup> The NSL can reshape the higher echelon of Hong Kong's superstructure. Political power, that is, the control of the three branches of the government, which has been a contentious matter since the beginning of the Sino-British negotiation,<sup>49</sup> is now firmly in the hands of the Central Authorities.

The idea of extending the power of the Central Authorities to all aspects of governance in Hong Kong has gained momentum since 2014, when the Central Authorities devised the concept of comprehensive control of Hong Kong.<sup>50</sup> According to that concept, the power of the Central Authorities is not limited to what has been allocated under the Basic Law, i.e., defense, foreign affairs, and matters relating to the relationship between the Central Authorities and Hong Kong. In this way, the Central Authorities have directly resorted to the supremacy of the Chinese Constitution, which they were reluctant to do before 2019 in the OCTS context,<sup>51</sup> and applied it directly to Hong Kong, marginalizing the political constraints built into the Basic Law, accumulating in the direct enactment of the NSL for Hong Kong. As a result, the controlling status of the Basic Law was relegated. Instead, the NSL, sometimes called the second Basic Law, was used to undergird comprehensive control of the Central Authorities in Hong Kong. Given the pan-national security concept in China – an inclusive national security concept that embraces culture, religion, food security, environment protection, natural resources management, the internet, and, of course, higher education.<sup>52</sup> Every policy area may contain a national security risk and thus become the subject of national security scrutiny.<sup>53</sup> China is a sincere subscriber to the Copenhagen

<sup>47</sup>Y-H Lai, 'Securitization or Autocratization? Hong Kong's Rule of Law under the Shadow of China's Authoritarian Governance,' (2023) 58 (1) *Journal of Asian and African Studies* 588–25; See (n 1).

<sup>48</sup>See (n 5) 105.

<sup>49</sup>CL Lim, *Treaty for a Lost City: The Sino-British Declaration* (Cambridge University Press, 2022).

<sup>50</sup>For a review of the constitutional development in Hong Kong, see C Chan, 'Thirty years from Tiananmen: China, Hong Kong, and the Ongoing Experiment to Preserve Liberal Values in an Authoritarian State,' (2019) *International Journal of Constitutional Law*, 439–52; 'From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders,' (2022) 16 (1) *Law and Ethics of Human Rights* 99–135; and BCH Fong, 'Practicing Autonomy within a Communist State: Hong Kong's Autonomy from Handover to Anti-extradition Bill Movement, 1997 to 2019' (2020) 53 (4) *Communist and Post-Communist Studies* 68–90.

<sup>51</sup>H Fu, 'China's Imperatives for National Security Legislation' in C Chan and F De Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing, 2020) 41–60.

<sup>52</sup>National Security Law of People's Republic of China (2015), available at [http://www.gov.cn/zhengce/2015-07/01/content\\_2893902.htm](http://www.gov.cn/zhengce/2015-07/01/content_2893902.htm).

<sup>53</sup>See (n 52). See for example, L Xie and J Warner, 'The Politics of Securitization: China's Competing Security Agendas and Their Impacts on Securitizing Shared Rivers,' (2022) 63 (3) *Eurasian Geography and Economics* 332–61.

School of Securitization, which has shifted the focus of national security to the broader social and economic arena.<sup>54</sup> Whether, when, or how the securitized state can exercise comprehensive control in Hong Kong is, in principle, no longer a matter of power but a matter of discretion. The NSL offered the much-needed justification and leverage for the Central Authorities to govern Hong Kong directly through their operational and supervisory authority over Hong Kong's affairs. A wide range of otherwise academic decisions for higher education have become potential security concerns.

### “Despotic power” in operation

The impact of the NSL on universities is express and tangible. The NSL demands the Hong Kong government ‘take necessary measures to strengthen public communication, guidance, supervision and regulation over matters concerning national security [on university campuses],’<sup>55</sup> and ‘promote national security education [in universities].’<sup>56</sup> Effective actions have been taken to meet the NSL and other legal obligations.

First and foremost, the NSL brings symbolic changes on campus. All universities have raised national flags, and flag-raising ceremonies are performed solemnly. The national anthem is now integral to university events and has become a well-established practice.<sup>57</sup> Equally spectacular is the removal of sculptures and symbols that were regarded as subversive and seditious, chief among them being the Pillar of Shame at HKU and the Goddess of Democracy in the Chinese University of Hong Kong (CUHK), which were set up to memorialize the victims of the 1989 bloodshed and to symbolize the pursuit of democracy in Hong Kong.<sup>58</sup>

All universities have designed their national security education courses to comply with NSL requirements and government demands, with a high degree of flexibility in style and substance. They are primarily designed as a general education course, giving credits and forming part of the graduation requirement. The style of the course varies significantly. HKU runs the course entirely online, and students are required to watch pre-recorded videos and read recommended materials, followed by a computer-facilitated online test. Substance-wise, the course includes the NSL, an essential aspect of Hong Kong's legal system. Other universities have opted for in-person teaching, covering NSL and content on Chinese history and civilization.<sup>59</sup> The government, having demanded compulsory national security education, left the implementation entirely to the universities.

<sup>54</sup>C Baker-Beall and R Clark, ‘A ‘Post-Copenhagen Analysis of China’s Securitization of the Uyghur: A Counterproductive Securitization,’ (2021) 17 (4) *Democracy and Security* 427–54.

<sup>55</sup>Article 9, NSL.

<sup>56</sup>Article 10, NSL.

<sup>57</sup>The presentation of the national anthem in sports events has proven to be a more difficult task. See for example, J Lam, available at <https://www.scmp.com/news/hong-kong/politics/article/3213246/national-anthem-blunders-hong-kongs-sports-minister-vows-get-tough-ice-hockey-association-if-it>.

<sup>58</sup>C Chau, ‘Two more Hong Kong universities tear down Tiananmen Massacre Monuments in early hours of Fri,’ available at <https://hongkongfp.com/2021/12/24/breaking-two-more-hong-kong-universities-tear-down-tiananmen-massacre-monuments-in-early-hours-of-fri/>.

<sup>59</sup>See for examples, National Security Law Education (NSLE0001) in Baptist University, available at <https://sa.hkbu.edu.hk/ccl/nsle0001/national-security-law-education>; UGCP1001 Hong Kong in the Wider Constitutional Order, available at <http://ugcp1001-1002.oge.cuhk.edu.hk/> and An Overview of National Security, available at <https://www.cpr.cuhk.edu.hk/en/event/national-security-the-bigger-picture-an-over-view-of-national-security-law/>, in CUHK; and for the course in HKU, see Dawna Fung, ‘HKU’s national security course explains the law but fails to answer where the red line is drawn, students say,’ available at

Beyond the symbolic and ceremonial changes, the NSL has a clear ideological dimension.<sup>60</sup> Whether university management ‘responded to the new law by disciplining students, monitoring faculty, and cleansing universities of anything deemed hostile to the new order’<sup>61</sup> is debatable, Baehr correctly identifies the two distinct impacts of the NSL on striking the enemy and engendering cultural changes, including cleansing universities of seditious thoughts and subversive activities and rooting out intellectual support for political dissent in Hong Kong.<sup>62</sup> Nevertheless, punitive action on campus has been highly selective and targeted. Individually, the two professors who initiated the Occupying Central Movement in 2014, Benny Tai of the Faculty of Law from HKU and Chan Kin-man from the CUHK, were prosecuted for the offense of public nuisance. Tai received a sentence of 16 months of imprisonment and was subsequently dismissed from the university following a controversial and divisive internal disciplinary proceeding.<sup>63</sup> Subsequently, Tai has been charged with some political activities, including the serious offense of conspiracy to subvert state power in violation of the NSL.<sup>64</sup>

For academic staff, contracts, contract renewal, and post-retirement retention were also weaponized, to a limited degree, as censorship tools in targeting politically controversial academics from teaching positions. Baehr mentioned cases where a university refused to renew the contracts of two adjunct faculty members because of their political views.<sup>65</sup> The political standard was used for contract renewal decisions in other cases, though they remained isolated. There were also variations among different universities and faculties within the same university, indicating the existence of discretion and self-censorship in university and faculty administrations in handling sensitive cases. The government may raise concerns and request attention. Still, it is up to individual universities to take action to address the problems, which may lead to some universities censoring more than others, depending on their respective risk assessments. Baehr’s harsh condemnation of university management may apply to a particular case of one university but would have no general application.<sup>66</sup>

Of course, universities are not the final arbitrators on that matter. For faculty members (both existing and prospective) who need employment visas, the increasingly rigorous national security vetting through immigration represents another hurdle. As the case of Ryan Thoreson and others forcefully illustrated, a work visa is a powerful tool to stop people from being employed in Hong Kong on the grounds of national security concerns.<sup>67</sup>

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<https://hongkongfp.com/2022/10/04/hkus-national-security-course-explains-the-law-but-fails-to-answer-where-the-red-line-is-drawn-students-say/>.

<sup>60</sup>Holze See (n 4); Baehr See (n 4).

<sup>61</sup>Baehr See (n 4).

<sup>62</sup>Baehr See (n 4).

<sup>63</sup>E Lin, ‘Ex-Hong Kong academic and opposition activist Benny Tai gets 10 months’ jail in election expenses case,’ available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3178925/ex-hong-kong-academic-and-opposition-activist-benny>.

<sup>64</sup>K Leung, ‘Subversion trial for Hong Kong political activists opens,’ available at <https://abcnews.go.com/Politics/wireStory/subversion-trial-hong-kong-political-activists-opens-96914998>.

<sup>65</sup>Baehr, See (n 4).

<sup>66</sup>For experiences in other two Universities in Hong Kong. See Holz, See (n 4); and McLaughlin, See (n 4).

<sup>67</sup>S Heung, ‘US human rights professor denied visa by Hong Kong immigration authorities for university teaching position’ available at <https://www.scmp.com/news/hong-kong/education/article/3165584/us-human-rights-professor-denied-visa-hong-kong>; Hong Kong denies visa to scholar of China’s 1989 Tiananmen crackdown (ft.com).

Immigration rules have been increasingly invoked to address the thorny national security issue.<sup>68</sup>

The government has become more vigilant in monitoring universities and has developed more capacity to collect intelligence. The NSL authorizes national security agencies to ‘collect and analyze’ intelligence and information concerning national security.<sup>69</sup> Due to the enhanced intelligence-gathering capacity, the authorities are now well-positioned to monitor academic activities on campus and demand action if any event becomes politically suspicious. With more effective monitoring, censorship becomes timelier and more effective. The combination of subtle influences, political pressures, and naming and shaming in government media has rid universities of political controversies in Hong Kong.<sup>70</sup> In the post-NSL era, political objectives can be achieved through either power or influence without resorting to legal prohibitions, such as the case of not allowing ex-opposition party members to gather for a banquet.<sup>71</sup>

Media owned or controlled by the central government is another prerogative institution that wields sharp powers against dissenting voices.<sup>72</sup> Public naming and shaming have become a regular practice when certain official newspapers censure scholars regarded as unpatriotic or anti-China, often in derogative and highly incriminatory language and sometimes alleging national security offenses to send a clear deterrent message. One academic staff was targeted this way for her work on racial equality projects. It was criticized for partially receiving funding from what was regarded as hostile foreign forces.<sup>73</sup> A school teacher similarly named another academic staff for spending her sabbatical in NHC (National Humanities Center), hence the allegation of being an agent of the US government in Hong Kong to smear Hong Kong and the Chinese government.<sup>74</sup> Several academics in various universities have been labeled ‘academic thugs’ and put on the metaphorical pillory for their critical scholarship, connections with foreign funding agencies, and other academic activities.<sup>75</sup> Those open attacks had such a powerful chilling

<sup>68</sup>FT journalist, Victor Mallet’s application for visa renewal was rejected for chairing a separatist party leader at the Foreign Correspondents Club. See Alvin Lam, ‘Hong Kong’s denial of work visa for journalist Victor Mallet sends ‘chilling message’ about erosion of basic rights, Financial Times says,’ available at <https://www.scmp.com/news/hong-kong/politics/article/2167391/hong-kongs-denial-work-visa-journalist-victor-mallet-sends>. British KC Timothy Owen was not allowed to represent Jimmy Lai in a pending trial of a NSL offence through immigration measures, despite the fact that the court has given him the permission to do so. Available at <https://www.thestandard.com.hk/breaking-news/section/4/202520/Jimmy-Lai-files-another-judicial-review-over-British-lawyer%E2%80%99s-work-visa-application>.

<sup>69</sup>Article 17(2) and Article 49(3), NSL.

<sup>70</sup>Baehr, See (n 4) 228.

<sup>71</sup>J Lam, ‘Hong Kong’s Democratic Party forced to cancel spring dinner at last minute again after venue says gas meter malfunctioned,’ available at <https://www.scmp.com/news/hong-kong/politics/article/3211032/hong-kongs-democratic-party-forced-cancel-spring-dinner-last-minute-again-after-venue-says-gas-meter>.

<sup>72</sup>For a discussion of the concept of sharp power, see C Walker, ‘What is “Sharp Power”?’ (2018) 29 (3) *Journal of Democracy* 9–23.

<sup>73</sup>Mimes Media, ‘Puja Kapai’s status behind professor surfaced,’ Puja Kapai 教授背後的身份浮出水面 | 博客文章 (bastillepost.com).

<sup>74</sup>J Mo, ‘The Chinese University of Hong Kong should Eliminate a “Academic Thug” who has been anti-China and destabilizing Hong Kong,’ available at <https://www.wenweipo.com/a/202302/28/AP63fd1530e4b03b588d8fa175.html>.

<sup>75</sup>For attaches on other academics in Hong Kong. See Holz, See (n 3); and TK Pao, ‘The University Grants Committee Deteriorating into the ATM Machines,’ available at <http://www.takungpao.com.hk/news/232109/2022/0208/684110.html>.

effect that most of those who received them felt offended and threatened and decided to leave Hong Kong.<sup>76</sup> While media censure and attachments predated the NSL and are thus nothing new,<sup>77</sup> the explicit or implied allegation of NSL violation greatly amplifies the fear and the power of intimidation. It serves as an alternative governance tool instead of existing institutions. Once that happens, the immediate concern is no longer what legal remedies are available in the legal system. Instead, the immediate concern is what will come next and how deep one is in politically troubled waters. Indeed, none of the academics subject to a media campaign took legal action against the media outlets, notwithstanding that they were *prime facie* corporate entities under Hong Kong law.<sup>78</sup> One has to face the prerogative state up close to feel its overwhelming force when the state demonstrates its sharp power.

While politicians and professors, prosecuted for their leadership and organizing roles in the 2019 protest, may have received wide international attention, it is the students who have been most impacted by police arrest and prosecution, primarily for public order offenses unrelated to the NSL. According to government statistics provided to the Legislative Council,<sup>79</sup> as of 31 July 2021, 10,265 persons were arrested for crimes committed in relation to the 2019 protest. Among them, 4009 were students, and 1754 of them were under the age of 18. Among the 2,684 who were prosecuted, 1,102 of them were students, and 489 were under the age of 18. The court has only been able to complete the judicial proceedings of 1,527 individuals [as of 31 July 2021]. Facing the caseload and social pressure, there seems to be strong political will in 2023 to offer an amnesty of sorts for the remaining 6,000 or so individuals who were arrested for a public order offense but not charged, ironically with police playing the leading role in recommending the policy for leniency.<sup>80</sup>

The prosecution of four student leaders at the University of Hong Kong for inciting terrorism is an apt example of the despotic power of the NSL on display, the force of infrastructural power in place, and the interactions between different forces at play in a unique circumstance.

On the evening of 1 July 2021, Leung Kin-fai, a Hong Kong merchandiser, stabbed a police officer, So King-cho, in the back on the street in Causeway Bay. Leung committed suicide immediately afterward by stabbing himself. The attack took place on a day when three sensitive dates converged: the anniversary of Hong Kong's reunification with China, the 100th anniversary of the Chinese Communist Party, and one year (and a day) after the implementation of the NSL.

Some residents in Hong Kong mourned Leung in Causeway Bay a few days after the incident. Some people laid down white flowers at the scene. The police dispersed the crowd and stopped and searched people who passed by, appearing to be there to mourn Leung. On 7 July 2021, the Hong Kong University Students' Union Council (HKUSUC)

<sup>76</sup>C Ho-him, "Hong Kong universities under pressure as academics head for exits (ft.com)".

<sup>77</sup>Holz, See (n 4). Johannes Chan, the former Dean of the HKU Faculty of Law was named over 300 times in the organized media campaign against him, See Chan and Kerr, See (n 27).

<sup>78</sup>Holz, See (n 4).

<sup>79</sup>Press Release. The 17<sup>th</sup> Question in the Legislative Council: Statistics of Social Events. Available at <https://www.info.gov.hk/gia/general/202109/29/P2021092900631p.htm>.

<sup>80</sup>See (n 46). J Lam, 'Hong Kong protests: cases dropped after 3 years against some of the 6,000 arrested but not charged, lawmakers reveals,' available at <https://www.scmp.com/news/hong-kong/politics/article/3214326/hong-kong-protests-cases-dropped-after-3-years-against-some-6000-arrested-not-charged-lawmaker>.

held an Emergency Council Meeting. During the meeting, HKUSUC observed a minute of silence before the commencement of the meeting for Leung. Subsequently, a motion was passed to 'express deep sadness to the death of Leung, offer sympathy and condolences to his family and friends, and appreciate his sacrifice for Hong Kong.'<sup>81</sup>

Official responses were swift. On 8 July 2021, the Security Bureau condemned an unnamed student organization for beautifying and glorifying the act of Leung, equalizing such acts with bolstering and supporting terrorism, contravening humanity, and acting as the enemy of the people of Hong Kong. On the same day, the Secretary for Education and HKU issued a public letter condemning the act of the HKUSUC.

On 9 July 2021, some members of the HKUSU, including the executive committee and some councilors, held a press conference and formally apologized for the impugned resolution.<sup>82</sup> The most significant development was the public statement of the then Chief Executive, Carrie Lam, an alumnus of HKU, condemning the act of HKUSUC in a journalist reception on 13 July 2021. She stated that, despite the rescission of the resolution and the public apology, the University should follow up on the incidents. She said that the decision to take whatever actions should be in the hands of the University. She also mentioned that if the police believe legal action is needed, she would not object to them taking action against students responsible.<sup>83</sup>

Legal actions soon followed. On 16 July 2021, the National Security Department (NSD) of the Hong Kong police searched the SU office with a warrant from the Magistrate to investigate a suspected offense under Article 27 of the NSL.<sup>84</sup> On 18 August 2021, the NSD arrested four members of the Council, including the Council Chairperson and the President of the Union. They were subsequently charged on 19 August 2021 with 'advocating terrorism' under Article 27 of the NSL. The group also faced an alternative charge of 'incitement to wound with intent' for allegedly inciting others to 'unlawfully and maliciously wound police officers' to cause 'grievous bodily harm.' All four were eventually released on bail, one of the few NSL cases in which bail was granted.<sup>85</sup> On 11 September 2023, all students pleaded guilty to the alternative charges, and the prosecution dropped the more serious charge of advocating terrorism.<sup>86</sup>

HKU took some drastic action initially but then moderated its measures. Following its July 8 statement condemning the SU resolution, the University issued a statement on 13 July 2021, stating that HKUSU would no longer be recognized for its role in the University.<sup>87</sup> Following the police search on campus, the HKU Council decided

<sup>81</sup>C Lau and L Cheng, Top Hong Kong University official reveals he would welcome national security probe into student union leaders over resolution lauding 'sacrifice' of man who stabbed police officer | South China Morning Post (scmp.com).

<sup>82</sup>GT staff reporter, Carrie Lam condemns HKU student union for attacker sympathy motion - Global Times.

<sup>83</sup>See (n 82).

<sup>84</sup>N Lam, C Lo and J Lam, Hong Kong national security police raid university student union as part of investigation into stabbed officer motion | South China Morning Post (scmp.com).

<sup>85</sup>For one of bail decisions, see HKSAR and Cheung King-sang Kinson, Kwok Wing-ho, Todorovski, Chris Shing-hang. Available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=140622&QS=%24%28hccp%2C446%2F2021%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=140622&QS=%24%28hccp%2C446%2F2021%29&TP=JU).

<sup>86</sup>Available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3234163/4-former-university-hong-kong-student-leaders-plead-guilty-inciting-violence-praise-knife-attack>.

<sup>87</sup>The University of Hong Kong Statement on the HKUSU Council. Available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=140622&QS=%24%28hccp%2C446%2F2021%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=140622&QS=%24%28hccp%2C446%2F2021%29&TP=JU).

on 4 August 2021 that, as a risk assessment measure, all students who participated in the impugned meeting would not be allowed to enter the university precinct or to use any university services and facilities pending a university risk assessment of the matter. On 4 August 2021, the Registrar invited all HKUSU members to meet with the university management regarding their role in the 7 July HKUSU Council meeting as part of the university's risk assessment.<sup>88</sup> After the meeting, students involved were allowed to return to campus to continue their studies, including the four students released on bail.<sup>89</sup>

In the meantime, the University faced the pressure to take disciplinary proceedings against the HKUUA Council members for their behavior. After deliberations and seeking legal advice, the University concluded that the university disciplinary rules, as contained in the University Statutes, did not give any ground for the University to punish any of the students. As a clear demonstration of the independence and force of the University process, no disciplinary action has been taken against any of the students subject to the result of the trial of the four students charged with advocating terrorism. However, as a remedial measure, the University Council moved to amend the University Statutes, creating a new ground for disciplinary action against any student for bringing the University into disrepute.<sup>90</sup>

In addition to disciplining students, a most visible change relates to punishing the student unions, the student representative body. Historically, SUs were at the forefront of Hong Kong's vibrant civil society, advocating and mobilizing social changes.<sup>91</sup> They are well-resourced by mandatory membership fees, collected by the University on the SUs' behalf, supported by society as a legacy of higher education in Hong Kong, and autonomous from the respective universities in their structure and management. Unsurprisingly, university students were active and often vital in the OCM in the 2014 and 2019 protests. For that, SUs received harsh treatment from the government. As a standard response, all universities have decided not to collect member fees for the SUs and denied their access to university facilities, particularly office space they had generously provided. Several universities, including HKU, officially severed ties with their SUs.

The severance of links with the SUs has posed a constitutional challenge in university management since SUs are an integral part of university governance, and students participate primarily through their SUs. Having severed ties with their SUs, universities in Hong Kong have stepped in to manage student affairs, including organizing elections to choose student representatives to various governing bodies of the universities, such as the Senate and Council. However, the lack of a functioning SU at the university level has not significantly affected student activities since faculty-based student associations and student-led clubs have continued to operate independently. Nevertheless, all universities in Hong Kong face the challenge of restructuring student representation on the ruins of dissolved or marginalized SUs.

<sup>88</sup>University management calls for meetings with HKUUA Council members in relation to the condolence motion, '校方高層就評議會通過哀悼議案一事約見評議員 | 學苑 (undergrad.hk).

<sup>89</sup>Good Summary from Undergrad, HKUSU. Available at [https://issuu.com/undergrad2014/docs/\\_final](https://issuu.com/undergrad2014/docs/_final).

<sup>90</sup>South China Morning Post, "HKU proposes disciplining students for 'bringing disrepute' to university, raising concerns over freedom of speech - YP | South China Morning Post (scmp.com).

<sup>91</sup>W-W Law, *Politics, Managerialism, and University Governance: Lessons from Hong Kong under China's Rule since 1997* (Springer, Singapore, 2019); T Chan, 'The Death of Hong Kong's University Student Unions,' *The Death of Hong Kong's University Student Unions – The Diplomat*.



### “Infrastructural power” in practice

The survival of academic freedom in Hong Kong depends on the strength of the infrastructural power of Hong Kong’s universities and the agency of faculty members and students in their collective efforts to maintain freedom. Thus, it is important to note that the NSL has to be implemented and interpreted in the larger constitutional context of OCTS, and any NSL-triggered change is subject to the reconciliation between the OCTS principle and the demands of China’s national security interests. The political structure, particularly relating to the election and operation of the legislative body, has changed beyond recognition; changes in institutional design and governance structure below the high politics remain limited and indirect. The NSL has to be implemented through those institutions.

The Central Authorities have reiterated that the OCTS doctrine, as reinterpreted, will remain unchanged in the post-NSL era, and the common law will continue to exist as Hong Kong’s legal system.<sup>92</sup> The NSL also purports to uphold the core principle of respecting human rights and the rule of law.<sup>93</sup> Based on that principle, the Hong Kong court has affirmed the continuing relevance of the previous human rights regime.<sup>94</sup> The significance of the political and legal reassurance of the protection of rights and freedom is not that the NSL will not bring changes to Hong Kong but that no matter what changes have and will take place, Hong Kong will always be significantly different from the mainland in offering more robust protection of rights and freedoms. How the balance between rights, freedoms, and national security on campus will be struck is an issue of significant concern. There is a high degree of awareness across the broad political spectrum in Hong Kong that enforcing the NSL is like catching mice in a ceramics shop. This delicate scenario requires great care, caution, and accuracy. Otherwise, one may break all the treasures into pieces without catching the mice.

A comparison with higher education institutions in mainland China can highlight the differences in Hong Kong. Universities in China are under tight control, with censorship embedded, institutionalized, and routinized. Censorship in China is thorough and effective not because of criminal prohibitions but because of the institutional design and ecosystem in which universities are embedded. The censorship in China, which has been intensified since 2023, includes the party structure being embedded in all university levels, the imposition of political dogmas, structured monitoring of faculty members and students alike, and the mobilization of students as informants. Suppressive and ideological controls trickle down into institutions and the fabric of society, becoming absorbed, internalized, and accepted as part of the routine. Censorship becomes a part of academic life that is tolerated and taken for granted.<sup>95</sup>

<sup>92</sup>X Wang, ‘Upholding common law, tackling vested interests: Xi’s vision of Hong Kong strikes a chord,’ Upholding common law, tackling vested interests: Xi’s vision of Hong Kong strikes a chord | South China Morning Post (scmp.com).

<sup>93</sup>Article 4 of the NSL itself reiterates the protection of “rights and freedoms, including the freedom of speech, of the press, of publication, of association, of assembly, of procession and of demonstration.”

<sup>94</sup>HKSAR and LC Ying (Final Appeal; No 1 of 2021 (Criminal)), available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=133491&QS=%2B&TP=JU&ILAN=en](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133491&QS=%2B&TP=JU&ILAN=en).

<sup>95</sup>M Burnay and E Pils, ‘Authoritarianism and Marketisation in Higher Education: Implications of China’s Rise for Cosmopolitan Academic Citizenship,’ (2022) 26 (10) *The International Journal of Human Rights* 1761–81; J Jue, ‘Academic Freedom in China: An Empirical Enquiry through the Lens of the System of Student Informants (Xuesheng Xinxiyuan),’ in DD Georghiev (ed) See (n 1) 101–32; T Pringle and S

The NSL is robust, delivering shock and awe impact to overwhelm Hong Kong in the aftermath of the protest. Yet, it has yet to be embedded in the dense and diverse institutions of Hong Kong and to change their governance structure. NSL remains primarily external to and above universities and is not institutionalized enough to diminish the pre-existing university governance structure. There is no official omnipresent party system or control network in Hong Kong. Indeed, the very concept of party leadership remains a delicate and sensitive issue to be addressed with great subtlety and care. On the one hand, it is crystal clear that the Party leadership is the core of Chinese socialism, as expressly stated in Article 1 of the Constitution.<sup>96</sup> On the other hand, the Basic Law provides that socialism, as practiced in China, does not apply in Hong Kong. While the Party no longer hides its presence and has openly manifested itself occasionally publicly, it essentially operates outside the public purview. It does not exercise its leadership as it has done on the mainland. Constitution-wise, the Party has not entirely rid itself of the image of being an underground party in Hong Kong, asserting control from the shadows.<sup>97</sup>

Hong Kong's higher education system has retained its structure from the colonial era, with its strengths in internationalization, faculty and student body diversity, resourcefulness, high ranking, and political vulnerabilities. Academic freedom and university autonomy are part of the success story. The defense of academic freedom and university autonomy is possible because the mechanisms in mainland academic institutions that put academic freedom under government control are mainly absent in Hong Kong. The same university infrastructure has primarily remained intact in the post-NSL era, with its governance structure characterized by transparency, accountability, and long-term sustainability. The universities' institutions have seen no structural changes, ranging from student admissions, academic recruitment, tenure, and promotion decisions to research directions, programming, curriculum designs, academic exchange, and teaching and learning. There have been changes in individual institutions, such as the restructuring of the University Council in CUHK, which has triggered some political concerns.<sup>98</sup> However, as significant as they are, the changes do not transform the governance structure of universities in Hong Kong.

There is no institutionalized censorship as commonly observed and tolerated at peer institutions in the mainland, and no mechanisms exist for the government to give political directives beyond what has been directly mandated by the NSL. There are no party secretaries or equivalents at the faculty level to monitor research and teaching, and universities do not permit students to monitor and report on teachers. Student informants remain an alien and offensive concept in Hong Kong and are looked upon with great suspicion and outright hostility. Despite all the controversies and legitimate criticisms, the traditional design of university autonomy from the government still holds its ground to support academic freedom in the new era, with faculty members remaining essentially

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Woodman, 'Between a Rock and a Hard Place: Academic Freedom in Globalizing Chinese Universities,' (2022) 26 (10) *The International Journal of Human Rights* 1782–802.

<sup>96</sup>S Bian, 'Political but Incontestable: A Review of "Political Constitutionalism in China," (2021) *Global Constitutionalism* 10; and F Hualing and Z Xiaobo, 'What Makes the Chinese Constitution Socialist?' (2018) 16 *International Journal of Constitutional Law* 655–63.

<sup>97</sup>C Loh, *Underground Front: The Chinese Communist Party in Hong Kong* (Hong Kong University Press, 2010).

<sup>98</sup>See E Lin, Chinese University of Hong Kong adds 5 political, business heavyweights to governing body, weeks after revamp bill passed | South China Morning Post (scmp.com).

free in programs and curricula. The new pro-established political party, the Bauhinia Party, explicitly commented on university governance, stating that universities in Hong Kong must be governed by professors, detached from political interests, and become more autonomous, following the American example.<sup>99</sup>

The most significant increase in faculty members across Hong Kong universities comes from ‘overseas returnees’ – West, particularly US-trained Chinese scholars. Their sudden increase has caused concerns about the lack of diversity and the diminishing cosmopolitan nature of Hong Kong’s otherwise global universities.<sup>100</sup> However, those returnees, most of whom have extensive experience in Western research and education institutions, should be able to bring overseas academic culture to Hong Kong to entrench liberal values in their new environment further.

### Reconciling despotic and infrastructural powers

In the face of sudden changes to the political and legal landscape in Hong Kong, including criminal prosecution, demands for censorship, and naming and shaming, universities need to consider how to maintain academic freedom within the emerging security framework. The NSL has created a fragmentation effect, creating a deep chasm between political powers and society, including universities. The NSL has led to the centralization of political power in Hong Kong into the hands of those regarded as true patriots, reducing political participation and representation in the broad society.<sup>101</sup>

This chasm reduces effective communication between the government and society, which is not surprising given the polarization in society and the violent confrontation between protesters and the police in 2019.<sup>102</sup> On the critical matter of NSL enforcement, sudden raids by national security police and decisions of arrest are the only signals that the government sends out, and beyond the direct application of the NSL and relevant criminal law, there are very few institutional channels between the universities and the government to establish meaningful communication and develop dialogue. Given the circumstances in Hong Kong, this missing link may prove detrimental to the interests of students and universities. Still, it is also a morally controversial matter, given the nature of the academy, and should be handled with great care to advance the university’s autonomy and maximize academic freedom through such dialogues.<sup>103</sup>

Hong Kong is an anomaly. In democracies with a mature legal system where academic freedom is taken seriously, established channels exist to maintain effective

<sup>99</sup>Bauhinia Party, ‘大學治理要國際化、多元化、年輕化’ (University governance needs to be internationalized, diversified, and rejuvenated). Available at [https://www.hk01.com/article/953583?utm\\_source=01articlecopy&utm\\_medium=referral](https://www.hk01.com/article/953583?utm_source=01articlecopy&utm_medium=referral).

<sup>100</sup>The percentage of mainland Chinese overseas returnees (海歸) in universities in Hong Kong has increased to 35%, forming the largest cultural group, surpassing those from Hong Kong (33%). Available at <https://www.zaobao.com/news/china/story20230925-1436799>.

<sup>101</sup>One example is the low turnout for the geographical constituency for the legislative council in 2021, See J Pang and J Pomfret, ‘Turnout hits record low for Hong Kong’s “patriots”-only election,’ Turnout hits record low for Hong Kong’s ‘patriots’-only election | Reuters.

<sup>102</sup>P Wang, P Joosse and LL Cho, ‘The End of Soft-Style Protest Policing in a Hybrid Regime: Evidence from Hong Kong,’ in W Chen and H Fu (eds), *Regime Type and Beyond: The Transformation of Police in Asia* (Cambridge University Press, 2023).

<sup>103</sup>L Francis Gearson, ‘Campus Conspiracies: Security and Intelligence Engagement with Universities from Kent State to Counter-Terrorism,’ (2019) 40 (3) *Journal of Beliefs and Values* 284–302, 292.

communication between universities and security agencies. In the post-9/11 era, for example, the CIA and FBI have engaged universities on a large and often excessive scale in designing a variety of protective measures to enhance national security protection on campus.<sup>104</sup> Security and intelligence agencies have also kept universities under surveillance to prevent hostile ideological or economic influences, real or imagined, from the Cold War with the Soviets<sup>105</sup> to the emerging new Cold War with China.<sup>106</sup> The UK has also designed a new security concept that has brought universities into the overall national security framework, resulting in the ‘securitization of education’<sup>107</sup> and ‘securitized university’.<sup>108</sup> The Counter-Terrorism and Security Act 2015 mandates a ‘prevent duty’ on universities to demonstrate ‘due regard to the need to prevent people from being drawn into terrorism.’<sup>109</sup> This institutional design makes academic institutions integral to the UK’s national security policy. While universities have been critical of intrusive monitoring and prevention duties, as they can target minority groups and create a chilling impact on academic freedom and free speech in classrooms, the securitization of education has become a global trend in liberal democracies. It poses complicated moral issues at the heart of academic institutions.<sup>110</sup>

In China, the power of national security is embedded in the university through the machinery of the Party. In sensitive matters, improved communication between universities and the government could be instrumental in moderating repression within the particular political structure where the rule of law is wanting. Chinese police can communicate with universities through the Party mechanisms on political issues involving students and faculty members. Communication and mutual trust give universities space to maneuver when handling sensitive political issues and can pre-emptively apply blunt police power on campus.<sup>111</sup> It is well known that several professors in China have been subject to censorship and political scrutiny. However, the police and the Party have primarily left the issue to the political mechanism within the respective universities, and sometimes within faculties, to internalize. Hence, censorship and censure occur within universities, which can remain a far more open and free space to sort out those matters.

In the Chinese work-unit culture<sup>112</sup> a public institute such as a university is an autonomous small society with delegated authority to manage and discipline its members.

<sup>104</sup>See (n 103).

<sup>105</sup>P Deery, ‘The AAUP, Academic Freedom, and the Cold War,’ (2010) 1 *Journal of Academic Freedom*, available at <https://www.aaup.org/JAF1/aaup-academic-freedom-and-cold-war#.ZDpIGXZBxD8>; and E Schrecker, ‘Academic Freedom and the Cold War,’ (1980) 38 (3) *The Antioch Review* 313–27.

<sup>106</sup>MK Lewies, ‘Criminalizing China,’ (2020) 111 *Journal of Criminal Law and Criminology* 145. For FBI’s China Initiative, see *The China Threat*, available at <https://www.fbi.gov/investigate/counterintelligence/the-china-threat/chinese-talent-plans>.

<sup>107</sup>C Mattsson, N Hammaren and Y Odenbring, (2016) 8 (3) ‘Youth at “Risk”’, 8 (3) *Power and Education*, available at <https://journals.sagepub.com/doi/full/10.1177/1757743816677133>.

<sup>108</sup>Gearson, See (n 103).

<sup>109</sup>Home Office, Statutory guidance: Revised Prevent duty guidance for England and Wales (Updated 1 April 20210). Available at <https://www.gov.uk/government/publications/prevent-duty-guidance/revised-prevent-duty-guidance-for-england-and-wales>.

<sup>110</sup>Gearson, See (n 103) 285. See also L Zedner, ‘Counterterrorism on Campus,’ (2018) 68 *University of Toronto Law Journal* 545–87.

<sup>111</sup>DA Bell, *The Dean of Shandong: Confessions of a Minor Bureaucrat at a Chinese University* (Princeton University Press, 2023).

<sup>112</sup>DBray, *Social Space and Governance in urban China: The Danwei System from Origins to Urban Reform* (Stanford University Press, 2005).

Members are expected to develop a collective identity, a common interest, and a sense of belonging. Management in those institutions is comprehensive, touches on members' professional, social, and political lives, and is paternalistic in style, going far beyond work. Even on politically sensitive matters, the security agencies, for example, see a professor first and foremost as a member of a university and would be bound to liaise with the university and leave the matter for the university to handle according to the internal political process. With rare exceptions, such as the case of Xu Zhangrui, a law professor at Tsinghua University who his university dismissed,<sup>113</sup> Universities in China have been allowed to internalize the problems with their politically challenging faculty members, taking some collective responsibilities and shielding their professors from the direct force of criminal law and state-sponsored public naming and shaming.

It is neither possible nor proper to compare mainland China's political control with censorship in Hong Kong, nor is it permissible under the OCTS principle to apply China's model of university governance to Hong Kong. Universities in China have built a governance structure that remains alien and incompatible with Hong Kong, which cannot and shall not be replicated. However, the point is that improved communication between universities and security agencies, given the diverse interests and identities involved, would help universities gain more understanding, trust, and influence so that universities could address security concerns on their own terms. Such practices are not uncommon in liberal democracies that have better alignment between the security agencies and the universities. In mainland China, professors who tread sensitive territory would usually not be named and shamed publicly and intimidated through legal powers. A chat over tea with Party secretaries, who could hypothetically be a personal friend, may secure a better understanding and achieve a compromise on particular issues of concern without invoking criminal law.

Improving communication would not solve core security problems relating to a university, but it could address some practical difficulties in challenging times. When authorities in charge of national security have decided to search a facility and arrest some students, no communication can stop the police action. However, effective communication may ease tension and de-escalate conflict. For example, the University of Hong Kong had a well-established protocol with the police regarding police entry into the campus,<sup>114</sup> which proved helpful in managing police-student relations during the height of the protest and gave the university management confidence in asserting its authority. Effective communication also dispelled rumors during the 2019 protests, such as those that circulated on campuses of imminent police raids, which naturally agitated students to take preventative actions. Enhanced comprehension of the police's stance towards student protests on and around campus, including the road blockage incident near HKU's main campus in 2019, proved beneficial for the university in diffusing tensions. The future reinstatement of student unions in Hong Kong universities, the revival of student activities, and enhanced academic exchanges among geopolitical rivalries would inevitably draw security scrutiny, underscoring the importance of establishing effective communication channels to fend off exaggerated and unnecessary concerns. It is an

<sup>113</sup>G Rui, 'China leadership critic Xu Zhangrun sacked one day after release, friends say,' available at <https://www.scmp.com/news/china/politics/article/3093119/china-leadership-critic-xu-zhangrun-sacked-one-day-after>.

<sup>114</sup>Reply to the University Affairs Committee concerning the established protocol on police entry onto campus (Acting Executive Vice-President), available at [https://www.hku.hk/press/news\\_detail\\_20095.html](https://www.hku.hk/press/news_detail_20095.html).

opportunity for the university to inject its moral influence into a significant issue in an otherwise opaque process.

There is a second significant chasm that exists – there is now little effective communication between university management on one hand and faculties and student bodies on the other. The NSL caught universities by surprise, and its members, ranging from university presidents, professors, and students, were ill-prepared to receive the shock. All had their questions and concerns about the newly enacted laws. In the immediate aftermath of the NSL, few, if any, were in a position to clarify, with any confidence, to a young professor in potential or actual political trouble at the moment of panic about what exactly constitutes sedition or advocacy of secession or subversion – and no one would have believed it if clarification was offered. Beyond restating the principle of upholding academic freedom, there is little that a university could do to help.

In general, universities are not well-positioned to address the concerns and anxiety created by the NSL and the new political environment to allay fears that arise, some real and others far-fetched and imagined. In the earlier days of the implementation of the NSL, there were intense demands from faculty members for universities to clarify some of the uncertainties and to take a clear stance on how universities could protect academic freedom in challenging times. Unfortunately, even with good intentions, there is little that any university authority can do beyond restating legal rules and defending legal rights as provided in the NSL, including academic freedom. One cannot defy legal rules to insist that peaceful advocacy of the independence of Hong Kong should not be a criminal offense when the NSL clearly states the opposite. When pressed, there is little that a publicly funded university can offer if a student or faculty member is investigated for an NSL violation. Generally speaking, academic freedom is a fragile right at volatile times when it is precisely needed. In the post-NSL era, faculty members in Hong Kong are worried about a broad range of issues, including whether it raises national security concerns for the Tiananmen Square Incident in 1989 to be referred to as a massacre if it is allowed to be taught at all; whether the Cultural Revolution or the Great Leap Forward can continue to be assessed critically as they used to be; whether the protests of 2019 in Hong Kong and the NSL itself can be subject to critical scrutiny, or if criticisms of government policies, such as the One Belt, One Road Initiatives, are still possible in classrooms. University policy statements, ubiquitous and always in demand whenever a threat to academic freedom appears, often do not go far beyond the repetition of some well-versed principles that have little practical relevance to an issue at hand. Some universities have tried, primarily in vain, to address faculty and student concerns and allay fears of any NSL violations.<sup>115</sup> The enactment of the NSO still only exacerbates the matter.

By failing to provide legal and normative guidance to faculty and students, universities cannot provide mechanisms to address some of the direct concerns, leaving controversial

<sup>115</sup> HKU, for instance, proposed to set up a space in the Presidential Office to address concerns that students and faculty members may have. The proposal was leaked to the press when it was going through internal consultation. Once in the public domain, doubts were cast whether the universities were trying to enforce censorship on campus, and the adverse publicity prematurely sent the proposal to the dustbin. H Jiaxinxi, 'HKU reported to set up a new committee to assess NSL risks,' available at <https://www.hk01.com/%E7%A4%BE%E6%9C%83%E6%96%B0%E8%81%9E/612351/%E5%A0%B1%E9%81%93%E6%8C%87%E6%B8%AF%E5%A4%A7%E6%93%AC%E8%A8%AD%E7%AB%8B%E6%96%B0%E5%A7%94%E5%93%A1%E6%9C%83-%E8%A9%95%E4%BC%B0%E6%B6%89%E9%81%95%E5%9C%8B%E5%AE%89%E6%B3%95%E6%8C%87%E6%8E%A7>.

issues and anxieties unaddressed. A student allegedly reported faculty members to the National Security Department. At the same time, faculty members felt deeply frustrated for not being able to secure assurance from universities that everyday teaching and research could continue under the NSL.<sup>116</sup> Hong Kong's universities face particular national security concerns derived from the peculiar political and social circumstances in the unique context of OCTS. At this specific moment, when political and civil rights, as commonly practiced in Hong Kong, are placed under a stress test, universities must strategize how to maintain academic freedom in a precarious time through engagement with different stakeholders.

## Conclusion

Academic freedom is closely related to other political rights, especially the freedom of expression. At a structural and macro level, academic freedom and political rights generally face common challenges. They rise or fall together. Any attack on political rights will necessarily create a chilling effect on academic freedom.<sup>117</sup> Yet, academic freedom is a unique political right that serves a distinct political function and demonstrates its unique features. It is narrow in scope and eligible only for academics who endeavor to produce and transfer knowledge in academic institutions. Like the right of the press and the privilege of the legal profession, academic freedom hinges on the unique identity of the rights bearer: academics who produce and transfer knowledge. It is a right bestowed upon academics for who they are and what they do.<sup>118</sup>

Undoubtedly, the NSL, subsequent legislation, and the ongoing prosecution against sedition have significantly impacted universities, and the effect will continue to evolve and develop. The anxieties and concerns generated in the post-NSL era and felt by academics and students are real and often consequential.<sup>119</sup> However, significant changes in the political structure induced by the NSL notwithstanding, its direct impact on university governance and academic freedom has been limited, less direct, and less visible. The liberal values embedded in the infrastructural power of Hong Kong's higher education, while affected and diminishing, have retained their core and are surviving NSL's impact in a reconfigured and more limited form, having so far not been shaken at its foundation. The dual powers, as conceptualized by Frankael and Mann, have coexisted. In Frankael's original formulation,<sup>120</sup> they coexist in an antagonistic relationship, with the prerogative domain occupying a commanding height to seize powers and jurisdictions from the normative domain until the latter's total submission. For Mann,<sup>121</sup> the despotic and infrastructural powers are more sequential than antagonistic, with the possibility of reconciliation in what he calls a cooperative arrangement. In the case of Hong Kong, Mann's theory offers a hopeful and feasible option.

Under that dual structure, it is possible to offer adequate protection for academic freedom, which Hong Kong's unique constitutional design demands and permits. In

<sup>116</sup>The Standard, 'Postgraduate student reports HKU faculty members to national security tip line,' Postgraduate student reports HKU faculty members to national security tip line | The Standard.

<sup>117</sup>Kovacs and Spannagel, See (n 2) 2.

<sup>118</sup>M Stachowiak-Kudia, S Westa, C Santos Botelho and I Bartha, 'Academic Freedom as a Defensive Right,' (2023) 15 *Hague Journal on the Rule of Law* 161–90.

<sup>119</sup>Chan, See (n 2) 10.

<sup>120</sup>Fraenkel, See (n 7).

<sup>121</sup>Mann, See (n 13).

Hong Kong's context, the key to academic freedom under the NSL is the pursuit of scholarship with political detachment, the maintenance of a sharp distinction between advocacy and scholarly discussion, and the rebalancing of freedoms and rights in the academy with an enhanced awareness of and attention to the security concern of the sovereign.<sup>122</sup> The NSL punishes the advocacy of the offenses it enumerates, particularly secession and subversion, which require a specific and active state of mind to achieve particular objectives that the law prohibits. Scholarly pursuit and academic discussion in a classroom should not constitute advocacy, and *prime facie* does not violate the NSL. Advocacy involves urging, persuading, or influencing another to commit an offense. There can and should be a hard line between academic discussion of sensitive and controversial issues in a classroom setting, which is lawful, and the advocacy of criminal activities as specified by the NSL.

In the meantime, much remains to be done by universities to protect the existing rules and procedures on academic matters and the supportive infrastructure to uphold the sanctity of the classroom and the freedom and openness of the universities in Hong Kong and, in the future, to assert a free space in which academic research, teaching, and learning can be carried out without fear of a gazing NSL. As it has turned out, the normative system of Hong Kong, with all its rules and procedures institutionalized over the decades, remains largely intact, showcasing the resilient infrastructural power of Hong Kong's higher education. With their intense demands for legality, procedural propriety, and proportionality, Hong Kong's administrative law rules could defend the remaining academic space more effectively, even when the direct constitutional protection of academic freedom may have been weakened due to NSL-triggered restrictions.

The continuation of Hong Kong as a hub of higher education in Asia and universities in Hong Kong as the bastion of freedom will also provide much-needed legitimacy to the power in the post-NSL era. But to achieve that aim, the power under the NSL would need to engage universities and the larger society in a dialogical and mutually respectful and influencing way in building a university infrastructure that could maximize both security *and* academic freedom suitable to the unique circumstances of Hong Kong. Pervasive cynicism in a precarious time notwithstanding, academic freedom in a new equilibrium in Hong Kong, with some well-understood qualifications suitable to Hong Kong's unique situations, remains a real possibility.

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<sup>122</sup>This is akin to Khaitan's critique of scholasticism in a different context, which argues against any combination of scholarship and activism to pursue what he calls the scholarly pursuit of "specific material outcome." T Khaitan, "On Scholasticism in Constitutional Studies: Skeptical Thoughts," (2022) 20 (2) *International Journal of Constitutional Law* 547–56.