ANALYSIS

Reckoning with Hong Kong's National Security Law and its Impact on Civic Freedoms

On June 30, 2020, the Chinese National People's Congress enacted a new *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* ("National Security Law" or "Law"). The Law was effective immediately on its passage by the National People's Congress. In the month since its enactment, the Law has rocked Hong Kong and international society, transforming the city's reality and that of its residents. Many people in Hong Kong have already been arrested under the Law for actions that were legal just one month prior to its enactment.[1] Meanwhile, civil society, governments, businesses, and international actors are scrambling to adapt.

Under the "one country, two systems" principle enshrined in Hong Kong's Basic Law (in effect since the end of British rule in 1997), Hong Kong has enjoyed a certain degree of autonomy as a Special Administrative Region (SAR) of China. The Basic Law protects rights such as freedom of assembly and freedom of speech and preserves some degree of judicial autonomy to Hong Kong courts.

The National Security Law threatens to upend the relative freedoms enjoyed by Hong Kong residents, representing a sea change to the status quo. This new reality is being shaped by three powerful new bodies tasked with implementing the Law in Hong Kong:

1) the Committee for Safeguarding National Security, set up by the Hong Kong government under the supervision of the Central People's Government in Beijing to deal with a broad array of policy issues;

2) the Department for Safeguarding National Security of the Hong Kong Police Force, vested with law enforcement capacity, whose head is vetted by Beijing prior to appointment; and

3) the Office for Safeguarding National Security of the Central People's Government, established directly by the Chinese government to oversee implementation of the Law with respect to all its targets, including civil society organizations (CSOs), schools and universities, international organizations, and the media.

Article 55 of the Law gives the Chinese government the authority to transfer cases to mainland law enforcement and judicial authorities, further undermining the

1 Associated Press, *Hong Kong police make first arrests under new security law*, LA Times, 1 July 2020, https://www.latimes.com/world-nation/story/2020-07-01/hong-kong-protest.

legal protections afforded to Hong Kong residents under "one country, two systems," including rights to freedom of assembly and expression.

The precise contours of this new era are still unknown. Much will depend on how the new regulatory bodies choose to implement the National Security Law. In this period of uncertainty, we consider the likely impact of the National Security Law on civic freedoms, civic participation, and philanthropy.

The Law has already curtailed freedom of assembly in Hong Kong.

Although Article 4 of the Law purports to protect the rights and freedoms "of assembly, of procession and of demonstration," events in Hong Kong since the Law's enactment suggest that in practice, a curtailment of assembly rights is in full force. At least 370[2] protesters were arrested in the first 24 hours after the Law was enacted, with police specifically instructed to arrest those waving an independence flag or chanting for independence.[3]

Although not all those arrested were charged under the new Law, the focus on actions such as possessing flags and signs, or singing or chanting anything perceived as pro-independence, is new and likely stems from the Law's broad definitions of activities that could be perceived as inciting "secession" or "subversion," two of the four primary acts the Law criminalizes (the other two being "terrorism" and "collusion with foreign forces").

Protesters have since been arrested for holding blank pieces of papers,[4] and Hong Kong police are now collecting DNA samples from arrested protesters.[5] While dedicated activists and residents are still attempting to stage protests and peaceful acts of dissent, they are likely to face increasing barriers to many forms of legal assembly as authorities continue to suppress this fundamental right in Hong Kong.

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2 Hong Kong Police Force Twitter Account, see: https://twitter.com/hkpoliceforce/status/1278337644636680192?s=20 (last accessed 24 July 2020). See also Abigail Ng, *Hundreds arrested in Hong Kong protests, as analysts weigh in on national security law's impact*, CNBC, 2 July 2020, https://www.cnbc.com/2020/07/02/hong-kong-national-security-law-protests-hundreds-arrested.html.

3 Helen Regan & Joshua Berlinger, *Protests break out in Hong Kong as first arrest made under new security law*, CNN, 1 July 2020; *see also* Verna Yu, Helen Davidson, & Lily Kuo, *Hong Kong: hundreds arrested as security law comes into effect in Beijing*, The Guardian, 1 Jul 2020, https://www.theguardian.com/world/2020/jul/01/hong-kong-protesters-arrested-as-security-law-comes-into-effect.

4 Tom Grundy, *Security law: Hong Kong police arrest 8 at 'blank placard' silent protest*, Hong Kong Free Press, 6 July 2020, https://hongkongfp.com/2020/07/06/security-law-hong-kong-police-arrest-8-at-blank-placard-silent-protest/.

5 Jamie Tarabay, *Arrested Under New Law, Hong Kong Protesters Get Swabbed for DNA*, Bloomberg Politics, 6 July 2020, https://www.bloomberg.com/news/articles/2020-07-07/arrested-under-new-law-hong-kong-protesters-get-swabbed-for-dna.

The Law poses significant threats to free expression.

The Law extends to anyone who "incites, assists in, abets or provides pecuniary or other financial assistance or property" to persons who commit secession or subversion,[6] as well as to anyone who "incites the commission of a terrorist activity."[7] It also criminalizes the potential "organizing" or "planning" of secession, subversion, or terrorism,[8] as well as sending instructions or conspiring to "seriously disrupt the formulation and implementation of laws or policies" in Hong Kong.[9] Indirect actions, such as providing information or venues to support "terrorist" activity, may also be criminalized.[10]

Under these ambiguous provisions, a wide range of speech, including speech that was previously protected, may be illegal under the Law. For example, the popular protest slogan "Liberate Hong Kong; revolution of our times" is now being interpreted as an act of subversion.[11] As noted, even holding blank pieces of paper has been cause for arrest, and satirical or generic quotes could be next.

The chilling effect of the Law's all-encompassing reach has been immediate: many in Hong Kong have pulled their social media accounts, taken down posters, removed political writings from bookstores and libraries, and self-censored to avoid potential arrest. Some have fled the city. Journalists wearing official press credentials have been fined and harassed for merely covering protests.[12]

Despite the wide and uncertain reach of the Law, civil society actors have adapted quickly to find new ways to express their views, using coded language and other subtle forms of dissent.[13]

6 The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, English Translation for Reference, available here: http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm, at arts 21, 23 [hereinafter NSL].

7 *Id.* at art 27.

8 *Id.* at arts 20, 22, 24.

9 *Id.* at art 29.

10 *Id.* at art 26.

11 Reuters, *'Liberate Hong Kong, revolution of our times' slogan is illegal, government says*, The Jakarta Post, 3 July 2020, https://www.thejakartapost.com/news/2020/07/03/liberate-hong-kong-revolution-of-our-times-slogan-is-illegal-government-says.html.

12 Jennifer Creery, *Hong Kong press body 'extremely concerned' after police fine journalists covering protest*, Hong Kong Free Press, 24 July 2020, https://hongkongfp.com/2020/07/24/hong-kong-press-body-extremely-concerned-after-police-fine-journalists-covering-protest/.

13 *Hong Kong protesters use 'hidden language' to dodge security law*, Al Jazeera, 4 July 2020, https://www.aljazeera.com/news/2020/07/hong-kong-protesters-hidden-language-dodge-security-law-200704072812933.html.

The Law will narrow the space for civil society organizations in Hong Kong.

In addition to restrictions on their advocacy and research, Hong Kong-based civil society organizations (CSOs) are likely to face additional operational barriers as their funding and international ties come under increased scrutiny – particularly if their work is related to China in any way. Some CSO activities may be viewed as falling under Articles 29 and 30 of the Law regulating collusion with foreign countries and external elements. For instance, if an organization works on political or legal policy issues and "directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution," it could be seen as "seriously disrupting the formulation and implementation of laws or policies by the Government of the Hong Kong Special Administrative Region or by the Central People's Government which is likely to cause serious consequences."[14]

Under the Law, the Office for Safeguarding National Security and other administrative bodies will "take necessary measures to strengthen the management of and services for organs of foreign countries and international organisations in the Region, as well as non-governmental organisations and news agencies."[15] Consequently, CSOs – particularly rights organizations and foreign CSOs – will likely be increasingly "managed" by the Office for Safeguarding National Security. This may extend to collecting intelligence and information related to national security and increased monitoring of CSOs, including the potential surveillance and harassment of CSO staff (on a greater, more formal scale than what has already been occurring).

Article 31 of the Law extends its reach and penalties directly to organizations themselves (both incorporated and unincorporated), which can face criminal fines, suspension, or dissolution if they are found to violate the Law. While service delivery organizations are expected to persist, organizations that focus on human rights, labor, democracy, or other sensitive issues may disband (as some already have), move their operations offshore, or face surmounting challenges in Hong Kong. Hong Kong CSOs are likely to adapt to the new era much as Chinese civil society organizations have to security laws on the mainland.

International engagement and cooperation will be significantly curtailed.

Hong Kong civil society and international actors will likely still be able to communicate and enjoy some forms of engagement, where such interactions do not threaten China or relate to sensitive issues around rights,

14 NSL, *supra* note 6, at art 29.

15 *Id.* at art 54.

democracy, or in all likelihood, the Law itself. That said, the type of free engagement, travel, and exchange that existed prior to the Law is probably a relic of the past.

Article 29 of the Law criminalizes both Hong Kong and international actors who commit a "collusion offence" through the provision or receipt of "instructions, control, funding or other kinds of support." It further specifically calls for the conviction and punishment of the "institution, organisation and individual outside the mainland" providing such support. Such provisions are likely to create a chilling effect on a wide range of civil society activities, including receiving foreign funding, assistance, or communications from outside partners or entities. As a result, Hong Kong CSOs may become increasingly isolated and have difficulty accessing resources.

In addition, Article 38 of the Law extends its application to offenses committed by "a person who is not a permanent resident of the Region" – in other words, to everyone. Even non-residents and foreign nationals can run afoul of the Law for saying or doing anything deemed a threat by Chinese authorities.

The extraterritorial and collusion provisions heighten risk for all parties, domestic and foreign. This includes foreigners traveling or transiting through Hong Kong. An individual who has spoken, or merely shared an article or liked a post about Hong Kong or China in the past may choose not to travel to Hong Kong for an unrelated event in order to avoid the risk of possible apprehension under the incitement provisions or other applicable offenses of the Law. Even the holding of conferences and events around policy issues could fall under the Law's purview and result in serious consequences for all actors involved.

The Law will exert a chilling effect on academic institutions, partnerships, and exchange.

As the Law is applicable to all institutions, organizations, and individuals in Hong Kong (including non-Chinese, non-Hong Kong groups, and individuals), its reach extends to schools and universities. The Law also specifically aims to "strengthen public communication, guidance, supervision, and regulation over matters concerning national security, including those relating to schools [and] universities," and to "promote national security education in schools and universities."[16] As a result, academic institutions may be subject to increasing encroachment by new regulatory bodies. Pro-democracy professors have already been fired from Hong Kong universities, raising the likelihood of increased politicization and interference with educational institutions.[17]

16 *Id.* at arts 9 and 10, respectively.

17 Rachel Wong, *'End of academic freedom': University of Hong Kong to fire pro-democracy activist and law prof. Benny Tai*, Hong Kong Free Press, 28 July 2020, https://hongkongfp.com/2020/07/28/breaking-hong-kong-university-to-fire-pro-democracy-activist-and-law-prof-benny-tai-source/.

Statements, activities, and writings by academics and institutions outside Hong Kong could also fall under government oversight if they relate to anything deemed offensive under the Law. A number of prominent international academic societies have noted that the Law "will significantly inhibit the possibilities for academic inquiry and exchange in and relating to Hong Kong," including partnerships and scholarly research. Combined with the Law's other impacts on expression, academic freedom in Hong Kong could be significantly curtailed.

The exercise of rights online will face greater obstacles.

The digital sphere has played an important role in advocacy in Hong Kong, allowing activists to communicate to coordinate actions and engage in mass mobilization outside of China's Great Firewall. Although these efforts may continue, they will likely face significant obstacles in light of increasing surveillance and digital control by Chinese authorities in Hong Kong. Article 9 of the Law empowers the Government of Hong Kong to "take necessary measures to strengthen … regulation over matters concerning national security, including those relating to … the internet," while Article 10 calls for the promotion of national security education through the internet. Article 43 empowers the Hong Kong Police Force to search electronic devices, require "a person who published information or the relevant service provider to delete the information or provide assistance," and to intercept communications and conduct covert surveillance on anyone suspected (on reasonable grounds) of being involved in the commission of an offense endangering national security.

The Law's passage has had an immediate effect on global social media and technology companies with operations or users in Hong Kong. Google, Facebook, Microsoft, Twitter, and Zoom have paused their processing of Hong Kong authorities' user data requests, while Tik-Tok has stated that it will leave Hong Kong altogether.[18] Technology platforms may depart or scale down operations in Hong Kong, given that companies can also be penalized under any of the broadly defined and widely discretionary activities of the Law. Articles 31 and 37 extend the Law's reach to companies as well as organizations, with similar penalties for violating the Law (criminal fines, suspension, and the revocation of a license or business permit). Even employees of a company – whether foreign or Hong Kong-based – could be held personally liable for an offense under the Law. Thus, where a technology company hosts organizational pages or postings by CSOs or individuals in or outside Hong Kong that authorities find offensive,

18 Richard Altieri & Benjamin Della Rocca, *Tech Giants Halt Hong Kong Data Requests; The US Considers Banning TikTok*, Lawfare, 20 July 2020, https://www.lawfareblog.com/tech-giants-halt-hong-kong-data-requests-us-considers-banning-tiktok; Rebecca Heilweil, *TikTok pulls out of Hong Kong as tech companies push back against new security law*, Vox, 7 July 2020, https://www.vox.com/recode/2020/7/6/21315060/google-facebook-twitter-hong-kong-china-user-data-request.

both the company and its individual employees could potentially face criminal penalties for non-compliance with the Law.

Donors and philanthropists will confront challenges in supporting Hong Kong civil society in this new era.

Under Articles 29 and 30, foreign countries, institutions, organizations, or individuals outside the mainland or Hong Kong who send "instructions, control, funding or other kinds of support from a foreign country or an institution" could fall under scrutiny if their actions are seen to support local organizations or individuals engaged in any of the Law's four main crimes.[19] Similarly, providing "pecuniary or other financial assistance or property for the commission" of the offenses of secession or subversion is also illegal under the Law.[20]

Thus, foreign funders and their grantees in Hong Kong and beyond could be prosecuted for grants and information activities in or outside Hong Kong. Cross-border funding flows into and out of Hong Kong – particularly between organizations – may be increasingly monitored. Hong Kong civil society organizations are already drawing up lists of potentially sensitive sources of foreign funding they will no longer accept. Resources may shift to organizations based elsewhere in the region (particularly if Hong Kong-based organizations relocate their operations to a third country). All of this would represent a substantial shift from Hong Kong's relatively open environment for donors and CSO funding.[21]

The Law heralds diminished opportunities for safe public participation and citizen engagement in Hong Kong.

People in Hong Kong have historically demonstrated high levels of civic engagement and a desire to participate in public affairs. Hong Kong has commemorated the Tiananmen Square massacre in Beijing with vigils attracting enormous crowds to Victoria Park every June 4 for the past thirty years.[22] Hundreds of thousands of

19 NSL, *supra* note 6, at art 29.

20 *Id.* at arts 21, 23.

21 Anita Venanzi, Vincent Chong & Jessica Batke, Here's How NGOs Are Allowed to Operate in the P.R.C., Hong Kong, and the United States, The China NGO Project, 6 June 2018, https://www.chinafile.com/ngo/analysis/heres-how-ngos-are-allowed-operate-prc-hong-kong-and-united-states.

22 This year the June 4 vigil was banned (for the first time in three decades) under a coronavirus public health justification; 13 opposition figures have since been charged with inciting people to take part in an unauthorized assembly, albeit not under the new National Security Law. For more see Brian Wong, Hong Kong media tycoon Jimmy Lai and 12 others face incitement charges over June 4 Tiananmen vigil, South China Morning Post, 13 July 2020, https://www.scmp.com/news/hong-kong/law-and-crime/article/3092957/hong-kong-media-tycoon-jimmy-lai-and-12-others-face.

Hong Kong residents have protested their exclusion from input into measures like the Extradition Bill and the National Security Law. Such displays of civic activism may now be impossible.

The new Law has also resulted in the arrest of pro-democracy politicians,[23] and government officials have warned that merely voting in the primaries for the 2020 Legislative Council elections could be illegal under the Law.[24] Nevertheless, the July 11-12, 2020 primaries saw high turnout, with more than 600,000 people showing up to cast their votes. As avenues for public input are increasingly constrained or controlled under the Law, the people of Hong Kong may shift and continue to find creative ways to engage in public affairs.

ICNL will continue to monitor developments around the National Security Law in Hong Kong and stands ready to assist civil society in navigating and understanding these new regulations. For more information, please contact asia@icnl.org.

ICNL

1126 16th Street NW, Suite 400, Washington, DC 20036 USA
www.icnl.org facebook.com/ICNLAlliance twitter.com/ICNLAlliance info@icnl.org

23 Hong Kong police arrest pro-democracy politician set to run for legislature, Reuters, 17 July 2020, https://www.reuters.com/article/us-hongkong-security/hong-kong-police-arrest-pro-democracy-politician-set-to-run-for-legislature-idUSKCN24I1KF.

24 Austin Ramzy, Elaine Yu & Tiffany May, Hong Kong Voters Defy Beijing, Endorsing Protest Leaders in Primary, NY Times, 13 July 2020, https://www.nytimes.com/2020/07/13/world/asia/hong-kong-elections-security.html.