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Taking a 'common law' approach to national law: National security adjudication and sentencing in Hong Kong after '47 Democrats'

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In June 2020, the National Security Law took effect in Hong Kong. A sui generis piece of legislation which was directly promulgated by Beijing in the jurisdiction, its implications on constitutional and criminal law have been the focus of academic commentary. This comment looks at the latest development in judicial application of this law in HKSAR v Ng Ching-Hang*, which dealt with 'conspiracy to commit subversion' for the first time. Though a first-instance decision, its verdict and sentencing judgments are enlightening as to how judges navigate the increasingly complex landscape of nationally and domestically enacted security legislation. While the court insists upon using 'common law' methods to interpret and apply the law and its penalties, the judgments reveal an approach which prioritises national security over fundamental common law values such as legal certainty and separation of powers. The implications of this 'national security first' approach for future jurisprudence are discussed.*

Keywords: Hong Kong; conspiracy; subversion; statutory interpretation; sentencing

Introduction

While 'subverting the state' is a well-used offence in the People's Republic of China (PRC) in the suppression and punishment of dissent,[1] *HKSAR v Ng Gordon Ching-Hang and others*[2]—the '47 Democrats' case—saw its Hong Kong equivalent argued in court for the first time since

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[1] See, recently, the case of human rights lawyers Xu Zhiyong and Ding Jiaxi: Laurie Chan, 'China hands lengthy jail terms to two lawyers in rights crackdown' (*Reuters*, 11 April 2023), https://www.reuters.com/world/china/china-hands-lengthy-jail-terms-two-rights-lawyers-crackdown-2023-04-10/ (accessed 6 January 2025).

[2] [2024] HKCFI 1468 (Reasons for Verdict); [2024] HKCFI 3298 (Reasons for Sentence).

the Beijing-imposed National Security Law (NSL) came into effect in 2020.[3] The highly publicised case, involving not one, not several, but *47* defendants charged with 'conspiracy to commit subversion', provides an important test case for the application of the once-unfamiliar offence and its penalty in the Hong Kong courts.

The matter began in early 2021, when 55 people—politicians, activists, trade unionists, social workers, lawyers, and academics—were arrested for their role in organising or participating in the pro-democracy primaries for the (ultimately postponed) 2020 Legislative Council (LegCo) election. Forty-seven were eventually charged with 'conspiracy to commit subversion', contrary to section 159A of the Crimes Ordinance (Cap. 200) and article 22 the NSL ('NSL22'). The first of these sets out the offence of conspiracy in the same manner as English law, while the latter is a close clone of article 105 of the Criminal Law of the PRC on 'subverting the State power'. The essence of the characteristically 'hybrid' charge was that the defendants had '[come] to an agreement to participate in [a] Scheme', upon gaining majority in the LegCo, to 'indiscriminately refuse to pass any [government] budgets or public expenditure', thus compelling the Chief Executive to dissolve the LegCo and eventually to resign.[4] These planned actions would, according to the prosecution, constitute 'seriously interfering in, disrupting or undermining the performance of duties and functions in accordance with law by the body of power of the HKSAR by unlawful means with a view to subverting the State power',[5] as prohibited under NSL22(3).

[3] There have been, since 2020, several cases involving 'conspiracy to invite the commission by other persons of the offence of subversion' or 'incitement to subversion', the less serious subversion-based offence set out under article 23 of the NSL. All offenders in these cases pleaded guilty. See *香港特別行政區 訴 阮嘉謙* [2022] HKDC 1147; *香港特別行政區 訴 蔡永傑* [2023] HKDC 214; *香港特別行政區 訴 王逸戰* [2022] HKDC 1210; *HKSAR v Wong Denis Tak-Keung* [2023] HKDC 168.
[4] Reasons for Verdict, above n. 2 at [2].
[5] Ibid. at [3].

Of the 47 defendants charged, 31 pleaded guilty, amongst whom four went on to testify for the prosecution. Most of the defendants were denied bail during the lengthy legal process, in accordance with the more stringent conditions set by the NSL and endorsed by the Court of Final Appeal previously in *Lai Chee-Ying*.[6] A judge-only trial for the 16 defendants pleading not guilty took place over 10 months in 2023, with the verdict finally delivered in May 2024. Fourteen were convicted while two, barrister Lawrence Lau and former District Councillor Lee Yue-Shun, were acquitted on the facts. Six months later, the Reasons for Sentence for all 45 defendants convicted of conspiracy to commit subversion were handed down by the same court. The defendants were given jail sentences ranging from 4 years and 2 months to 10 years.

The *47 Democrats* case has assumed legal and political significance, first of all, for bringing into question the legality of what appeared to be constitutionally guaranteed exercises of civil-political rights—legislators' power to 'examine and approve budgets introduced by the government' under the Basic Law,[7] the territory's mini-constitution. The issue, moreover, took place against a backdrop of heavy-handed clampdowns on such freedoms by national security and related legislation, backed by judicial decisions, in recent years.[8] Second, whilst the verdict and sentencing judgment are both first-instance decisions, they serve as apt demonstration of how Hong Kong judges have continued to navigate the increasingly complex landscape of national security legislation—the 'socialist legal transplant' that is the NSL,[9] alongside the new, 'homegrown' Safeguarding National Security Ordinance (No. 6 of 2024) (SNSO)—following ostensibly 'common law' methods and a growing corpus of local jurisprudence in the area. A

[6] NSL, art. 42; *HKSAR v Lai Chee-Ying* [2021] HKCFA 3. See, for a critical analysis of the apex court's decision on the presumption in favour of bail, J. Chan, 'Judicial Responses to the National Security Law: *HKSAR v Lai Chee Ying*' (2021) 51 HKLJ 1.
[7] The Basic Law of the Hong Kong Special Administrative Region of the PRC ('Basic Law'), art. 73(2).
[8] See, for a comprehensive critique of judicial practice in relation to NSL and other national security-related offences such as seditious publication, J. Chan, 'Responsive Judicial Review without Democracy: The Hong Kong Experience' (2023) 53 HKLJ 507.
[9] D. Pascoe, 'Hong Kong's National Security Law: A Socialist Legal Transplant?' (2022) 10 Chinese Journal of Comparative Law 28.

close reading of the court's reasoning reveals, however, an overall shift *away* from common law values and assumptions towards an outlook which prioritises 'national security' at all costs, and which would seem to further substantiate concerns about 'rule of law backsliding' in Hong Kong.[10]

A 'national security first' approach

Commentators have before highlighted the inclusion of non-forceful acts under certain NSL offences and their generally broad definitions as points of concern regarding the NSL text.[11] These issues took centre-stage in the *47 Democrats* verdict as the defence argued that the offence element of acting 'by … other unlawful means' under NSL22 should be confined to 'unlawful means with the use of force or threat of force' or to acts constituting criminal offending.[12] A similar challenge was raised in relation to the very meaning of 'subverting the State power', which counsel argued 'lacked certainty', as neither 'subvert' nor 'State power' was defined in the statute itself.[13]

The first strand of these arguments was easily rejected by the court for being 'contrary to the legislative purpose of the NSL'.[14] Following previous authorities on judicial constructions of the NSL such as *Lai Chee-Ying* and *Lui Sai-Yu*,[15] the panel of three judges first insisted upon a 'common law approach' to interpreting NSL22, that is, to have regard to 'its ordinary meaning, purpose and context'.[16] In doing so, the court also followed authorities in highlighting 'the primary purpose of the NSL … to safeguard national security' as well as the

[10] P. Lo, 'Twilight of the Idolised: Backsliding in Hong Kong's Legal and Judicial Cultures' in C. Chan and F. De Londras (eds.), *China's National Security: Endangering Hong Kong's Rule of Law?* (London: Bloomsbury Publishing, 2021) 153.
[11] See, for example, C. L. Lim, 'Hong Kong's new law' (2021) 137 LQR 11; M. Jackson, 'Two Years on: Reviewing the Implementation of the National Security Law in the HKSAR' (2022) 52 HKLJ 875.
[12] Reasons for Verdict, above n. 2 at [12], [36].
[13] Ibid. at [47].
[14] Ibid. at [26].
[15] *Lai Chee-Ying*, above n. 6; *HKSAR v Lui Sai-Yu* [2023] HKCFA 26.
[16] Reasons for Verdict, above n. 2 at [16]–[17].

judiciary's 'responsibility in safeguarding national security'.[17] Notably, across the judgments, the same consideration was never given to 'protecting the lawful rights and interests of' Hong Kong residents, despite it also being listed as part of the NSL's purpose under article 1. On this construction, the court found that to interpret the provision narrowly 'would go against the stated purpose of the NSL',[18] as 'the NSL was enacted in full awareness that national security in Hong Kong *could* be undermined' by non-violent and non-criminal acts.[19] Acts with the effect of 'paralysing the operation of the legislature' would, furthermore, constitute 'a serious challenge to the bottom line of the "One Country, Two Systems" principle, the rule of law and national sovereignty, security and development interests',[20] as the court faithfully quoted from the 'Explanation' provided by the Standing Committee of the National People's Congress in the NSL's drafting process,[21] also the main 'extrinsic material' relied upon by the courts in *Lai Chee-Ying* and *Lui Sai-Yu* in coming to their purposive constructions of the NSL.[22] Any discussion of legal certainty or the possibility of reading down the provision in line with the demands of the rule of law—which was itself subsumed within national security-related concerns—thus stopped at the finding that the far-reaching nature of the NSL was intended upon its enactment, as necessary for the protection of national security from *any* risk regardless of its nature (whether a violent or criminal act was involved) or likelihood (including all acts which '*could*' undermine national security without more).

As to the second challenge regarding the meaning of 'subversion' and 'State power', the court referred to other local legislation, dictionaries, and, significantly, 'the social context

[17] Ibid. at [18]–[19].
[18] Ibid. at [37].
[19] Ibid. at [22] (emphasis added).
[20] Ibid. at [37].
[21] 'Explanation on the 'Draft Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region'' (addressed to the 19th Session of the 13th Standing Committee of the National People's Congress by the Responsible Official of the Legislative Affairs Commission under the Standing Committee of the National People's Congress, 18 June 2020).
[22] *Lai Chee-Ying*, above n. 6; *Lui Sai-Yu*, above n. 15.

leading to the enactment of the NSL', 'hostile activities … which gave rise to "the increasingly notable national security risks in the HKSAR"'.[23] Having recited these materials—without necessarily engaging with them[24]—and defined 'State power' expansively as 'the powers of the Government of the HKSAR and the duties and functions performed by [its] various organs',[25] it concluded, in a rather circular manner, that 'seriously interfering in, disrupting, or undermining the performance of duties and functions' by the Government '*could amount to an act 'subverting the State power*'.[26] Further, it found that 'once any of the three prohibited acts [under NSL22] … had been committed with the intention to bring out the respective consequences …, that would amount to subversion'.[27] In other words, without actually giving 'subversion' a more concrete definition, the court merely referred to the offence itself and its self-evident necessity in the face of 'national security risks' as proof of its clarity and certainty. One should know a risk to national security when one sees (or creates) it.

A further defence argument was that the defendants would only be 'exercising their constitutional duty' should their plans to veto government budgets come to fruition.[28] The court, however, found these proposed actions to constitute an abuse of power in breach of Hong Kong's mini-constitution and unlawful for the purpose of NSL22.[29] This was despite the fact that legislators' power to reject government budgets is granted by article 73 of the Basic Law, with its consequences, including the dissolution of the LegCo and the Chief Executive's resignation, foreseen by articles 50 to 52. Without further justification, the court simply

[23] Reasons for Verdict, above n. 2 at [49]–[60].
[24] There was no consideration of, for example, why a particular dictionary was chosen as an aid to interpretation or how the definitions provided therein related to the statutory context, an issue which has previously been highlighted in relation to the Court of Appeal's method of interpreting article 33 of the NSL in *HKSAR v Lui Sai-Yu* [2022] HKCA 1780: see U. Chiu and A. H. L. Wong, 'When socialist Chinese law meets common law interpretation: Mandatory sentencing and mitigation under the Hong Kong National Security Law' (2024) 45 Statute Law Review hmae046.
[25] Reasons for Verdict, above n. 2 at [52].
[26] Ibid. at [61].
[27] Ibid. at [64].
[28] Ibid. at [75].
[29] Ibid. at [77]–[78].

asserted that 'a deliberate refusal … to examine the budgets regardless of their contents and merits *would be a clear violation of [article 73 of the Basic Law] and [article 3 of the NSL]*'.[30] While the latter stipulates the legislature's responsibility to 'effectively prevent … any act or activity endangering national security',[31] there is nothing in the former to qualify legislators' powers to 'examine and approve budgets introduced by the government'.[32] Nor was the court's other claim, that the 'presumption of lawful exercise of power' under section 38 of the Interpretation and General Clauses Ordinance (Cap. 1) implied the concept of an 'unlawful exercise of power', satisfactory;[33] the section offers no assistance as to what 'lawful' or 'unlawful' exercises of power might entail. Ultimately, the constitutionality or lawfulness of the exercise of veto power seemed to be determined not by reference to existing constitutional principles but, in another act of circular reasoning, by reference to NSL22 and the new duties created by the NSL, as the court concluded:

> '[I]ndiscriminate vetoing of the budgets … had all along been an act in violation of upholding the Basic Law as stipulated in [articles 73 and 104 of the Basic Law], *not to say if such acts were accompanied with a view to seriously undermining the power and authority of the Government or the Chief Executive*.'[34]

Indeed, in the sentencing judgment, the judges acknowledged that 'what the defendants had agreed to do was not criminal *until after the enactment of the NSL*'.[35]

It was thus by recourse to the all-important 'purpose and context' of the NSL that the judges came to an incredibly broad construction of the subversion offence, one which, in

[30] Ibid. at [77] (emphasis added).
[31] NSL, art. 3.
[32] Basic Law, art. 73(2).
[33] Reasons for Verdict, above n. 2 at [76].
[34] Ibid. at [88] (emphasis added).
[35] Reasons for Sentence, above n. 2 at [34] (emphasis added).

conjunction with the well-established conspiracy offence, could comfortably encompass the defendants' participation in a primary election and otherwise constitutional plans to vote down government budgets. The factual issues in proving a conspiracy to subvert then turned straightforwardly on the existence of the alleged agreement, each defendant's knowledge of it, and their intention to subvert.[36] The effect of the court's attempts to clarify the meaning of NSL22 was, moreover, to widen its scope indefinitely: a non-criminal and non-violent act 'seriously interfering in, disrupting or undermining' government duties and functions—which might include *any* such functions performed by *any* government department or bureau—could become unlawful by virtue of its being done with a subversive intention; such intention would, in turn, be found in one's specific intent to carry out that (otherwise lawful) act. It remains to be seen whether future courts might, as Jackson has cautioned, construct 'unlawful means' so that it might even be triggered by a breach of the 'common responsibility of all the people of China' to not 'engage in any act or activity which endangers national security' under article 6(2) of the NSL.[37] The nebulous definition of subversion put forth in *47 Democrats* is certainly in line with official rhetoric about the need for hypervigilance against the 'constantly arising security risks and threats' within an 'ever-changing' international landscape.[38] The effect of such an understanding of national security risk is that one will only know it when one sees it.

Conspiring in tiers

In the verdict, the court indicated that the sentencing of all 45 guilty defendants would be done 'follow[ing] the three-tier penalty regime provided by the NSL'.[39] In the Reasons for Sentence

[36] Reasons for Verdict, above n. 2 at [107].
[37] Jackson, above n. 11 at 903.
[38] 'Safeguarding National Security: Basic Law Article 23 Legislation' (Security Bureau, Government of the HKSAR, 13 May 2024), https://www.sb.gov.hk/eng/bl23/faq.html (accessed 6 January 2025).
[39] Reasons for Verdict, above n. 2, Annex C at [7].

six months later, however, the judges appeared at first glance to have taken a different route in order to arrive at the final sentences.

The sentencing judgment began with the court's response to a defence challenge regarding the applicability of the mandatory sentencing bands stipulated under NSL22 to the present case, which concerned a *conspiracy* to commit subversion rather than subversion itself. The defence cited section 159C of the Crimes Ordinance on the penalties for conspiracy—a replica of section 3 of the English Criminal Law Act 1977—and related English cases,[40] all of which pointed to the inapplicability of a full offence's *minimum* penalty to its inchoate version. The court agreed, concluding that 'the penalty banding as prescribed in NSL22 … should not be strictly applicable'.[41] Nevertheless, it 'could make reference to the penalty banding … in order to determine the starting point for each individual defendant'.[42] Interestingly, the court in coming to this conclusion also rejected the prosecution's submission based on section 109 of the SNSO, passed by the LegCo in March 2024, which states unambiguously that 'if a person is convicted of conspiracy to commit any offence under the [NSL], any provision concerning the penalty for the NSL offence … also applies'. The court cited the principle of non-retroactivity and the 'logic' that the SNSO, a domestic law, could not be used to interpret the NSL, a national law.[43] Arguably, though, section 109 pertains to the 'domestic' offence of conspiracy, governed by the Crimes Ordinance, rather than the NSL offence of subversion. The effect of the SNSO provision remains an open question for future NSL conspirators, depending on how future judges understand the 'hybrid' charge and the relationship between the 'domestic' and 'national' national security laws.

[40] Reasons for Sentence, above n. 2 above at [6]–[7], citing *R v Sajid Khan* [2007] EWCA Crim 687, *AG's Reference Nos 48 and 49 of 2010* [2011] 1 Cr App R (S).
[41] Ibid. at [10].
[42] Ibid. at [15].
[43] Ibid. at [18]–[19].

What was the significance of the court's rejection of the direct applicability of the NSL sentencing regime in this case? The Court of Final Appeal (CFA) has previously considered how the NSL, which provides two to three levels of gravity and corresponding penalties for each of its offences, may operate in 'convergence, compatibility and complementarity' with the generally more flexible common law sentencing norms.[44] Considering the purpose of the NSL, the CFA's solution was to give precedence to the NSL's sentencing tiers and built-in mitigating factors,[45] allowing established common law factors, such as a timely guilty plea, to take effect only *within* those tiers.[46] In the case of NSL22, that would mean handing down 10 years' to life imprisonment for a 'principal offender', 3 to 10 years' imprisonment for an 'active' participant, and no more than 3 years' imprisonment for 'other participants'.[47] The court's decision here to take the NSL sentencing regime only *as reference* meant, in theory, that it would not be bound by the sentence thresholds and could apply extra-NSL mitigating factors more freely.

It was on this basis that the court proceeded to consider each defendant's role in the offence and their sentence. The heaviest sentence was given to legal academic Benny Tai, who was deemed to have been the 'mastermind' behind the scheme, an 'organiser' of the primaries, and a 'principle [sic] offender' under NSL22.[48] He was given a 15-year starting point, which was reduced by one-third to 10 years for his early guilty plea, as is customary in common law.[49] The three other recognised 'organisers' of the primaries were given similar starting points (15 years for Au Nok-Hin and Andrew Chiu; 12 years for Chung Kam-Lun) but much lower final

[44] *Lui Sai-Yu*, above n. 15 at [22].
[45] NSL, art. 33.
[46] See, for a detailed summary and critique of the case, Chiu and Wong, above n. 24.
[47] With the omission of 'deprivation of political rights', NSL22 provides almost exactly the same penalties as its mainland Chinese equivalent under article 105 of the Criminal Law of the PRC. Arguably, however, the 'deprivation of political rights' is provided for under article 35, which disqualifies anyone 'convicted of an offence endangering national security by a court' from the LegCo, district councils, and other public office.
[48] Reasons for Sentence, above n. 2 at [41].
[49] Ibid. at [46].

sentences ranging from six years and one month to seven years. This was largely due to the 45–50% reduction each received for having provided 'material assistance' to the prosecution as witnesses.[50] The rest of the defendants, who apart from Gordon Ng had stood in the primaries, were all categorised as 'active participants' and given sentences between four years and two months and seven years and nine months depending on their plea, criminal record, involvement in the scheme, and personal circumstances.

Notably, though the court ostensibly did *not* follow NSL22's three-tier regime, all defendants' sentences did ultimately fall within the prescribed tiers. Tai's post-discount 10-year sentence, for example, still lay within the top penalty tier under NSL22. While his co-organisers' final sentences dropped below the 10-year threshold after the court's application of the common law discount based on assistance to authorities,[51] this was in fact in line with the NSL regime, which expressly allows for one's penalty to be moved to a lower tier for providing 'material information' in aid of the authorities.[52] All other active participants' sentences fell between 3 and 10 years. The judges thus managed to maintain a 'common law' approach to sentencing in the case whilst, presumably, paying heed to the NSL sentence thresholds and careful in avoiding (any appearance of) posing a challenge to them. On the one hand, this may be seen as a 'victory' of common law jurisprudence over the growing Mainlandisation of the Hong Kong legal system post-NSL. On the other hand, the heavy sentences finally delivered for *taking steps towards* what were arguably constitutional exercises of political rights surely cast doubt on the substance and utility of judges' continued insistence upon such an approach. In any case, future courts may well decide to apply section 109 of the SNSO to the sentencing of inchoate

[50] Ibid. at [48]–[72].
[51] *Z v HKSAR* (2007) 10 HKCFAR 183, cited ibid. at [58].
[52] NSL, art. 33.

NSL offenders, thus rendering the theoretical flexibility of a common law approach to sentencing irrelevant.

HKSAR, China as an insecurity state

By recourse to 'safeguarding national security' as the primary rationale informing all NSL provisions *and* the court's role in applying them, the judges in *47 Democrats* were able to sidestep challenging questions about the potential incompatibility of the NSL offences with fundamental constitutional values of legal certainty and separation of powers in their reasoning.[53] The CFA has previously stated, in endorsing an exception created by the NSL to the presumption in favour of bail, that, '*[a]s far as possible*, [the NSL] is to be given a meaning and effect compatible with those rights, freedoms and values' found in the Basic Law and the Bill of Rights;[54] the *47 Democrats* verdict confirms that the possible scope of such constitutional demands stops at the paramount purpose of the NSL 'as a means to protect national security'.[55] If there were, in earlier days of its operation, doubts about the NSL's constitutional or 'quasi-constitutional' status,[56] it is now clear that the 'local laws of the HKSAR' over which the NSL is said to prevail[57] include even the most basic of rule of law assumptions. Despite the court's persistent claims of employing 'common law' methods of statutory interpretation, there was, evidently, not 'even a feeble attempt to reconcile the protection of fundamental democratic values with protection of national security'[58] or to 'read

[53] See, for a discussion about constitutional values rooted in ideas of the rule of law and the separation of powers which have been applied in Hong Kong courts, P. Y. Lo and A. H. Y. Chen, 'The judicial perspective of 'separation of powers' in the HKSAR of the PRC' (2018) 5 JICL 337.
[54] *Lai Chee-Ying*, above n. 6 at [42] (emphasis added).
[55] Reasons for Verdict, above n. 2, [33].
[56] *See*, for discussions about potential conflicts between the NSL and constitutionally entrenched rights in Hong Kong, C. J. Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong' (2020) 50 HKLJ 633; C. Chan, 'Can Hong Kong remain a liberal enclave within China? Analysis of the Hong Kong National Security Law' [2021] Public Law 271; J. Chan, 'National Security Law 2020 in Hong Kong: One Year On' (2022) Special Issue, Academia Sinica Law Journal 39.
[57] NSL, art. 62.
[58] J. Chan, 'Taking Rights Seriously—The Judiciary at a Challenging Time' (2022) 52 HKLJ 937, 960.

down' NSL provisions[59] in the present case. Instead, the judges showed complete deference to the purpose of 'safeguarding national security' and the NSL text itself in defining what was lawful and constitutional. As Johannes Chan predicted, the very presence of articles 4 and 5 of the NSL, which pay lip service to human rights and the rule of law, seems to mean that '[t]he constitutionality of the NSL is *fait accompli*'.[60]

Judicial discourse and practice in national security cases in the courts, in parallel with public statements coming from PRC and HKSAR officials, have increasingly reflected those of an 'insecurity state', which, always assuming its own weakness, 'can only see threats'.[61] As the courts uncritically accept state assertions of its vulnerability to security risks and the need for ever-more pre-emptive and punitive measures against such 'diversified forms' of danger,[62] even ordinary exercises of constitutionally granted power could, paradoxically, be construed as 'leading to constitutional crisis'.[63] Whether the Central Government's 'long standing and now entrenched fear' about the continued stability of the One Country, Two Systems policy and Hong Kong's 'growing impulse towards democracy' is justified,[64] a criminal legal framework which makes insecurity its primary rationale is unstable, unsustainable, and would tend to become oppressive in the long run. Ramsay has argued in relation to certain preventive English criminal legislation that '[o]nce the protection of vulnerability is the justification for penal law, any perceived instrumental ineffectiveness in existing security law only creates demand for more extensive and intrusive security laws'.[65] With both the Government and

[59] As suggested by P. J. Yap in 'Judging Hong Kong's National Security Law' in H. Fu and M. Hor (eds.), *The National Security Law of Hong Kong: Restoration and Transformation* (Hong Kong; HKU Press, 2022).
[60] J. Chan, above n. 56 at 91.
[61] P. Ramsay, *The Insecurity State* (Oxford: OUP, 2012), p 230.
[62] *HKSAR v Tam Tak-Chi* [2024] HKCA 231 [129], cited in Reasons for Verdict, above n. 2 at [22]: 'Modern experiences show … activities endangering national security now take many diversified forms. Some involve violence or threat of violence. Some involve non-violent means but can be equally damaging. There is no valid basis for criminalising the former and but not the latter.'
[63] Reasons for Verdict, above n. 2 at [6].
[64] 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?* (London: Bloomsbury Publishing, 2021) 42.
[65] Above n. 61 at 230.

judiciary becoming hypervigilant against ill-defined threats to national security and elevating the protection of such security above all other constitutional rights and freedoms, the fear is that Hong Kong has already entered that 'vicious cycle of penal insatiability'.[66] It may be time to acknowledge that, rather than balancing or achieving 'convergence, compatibility and complementarity' between common law principles and national security concerns, judges' repeated references to a 'common law' approach only serve, intentionally or not, to legitimise unjustified intrusions upon civil-political rights in the name of an ever-elusive notion of national security.

Postscript

At the time of writing, the Government has filed an appeal against Lawrence Lau's acquittal, and 14 defendants (Raymond Chan, Cheng Tat-Hung, Owen Chow, Gwyneth Ho, Kalvin Ho, Lam Cheuk-Ting, Leung Kwok-Hung, Gordon Ng, Michael Pang, Tam Tak-Chi, Helena Wong, Wong Ji-Yuet, Clarisse Yeung, and Winnie Yu) have each filed an appeal against their conviction and/or sentence.

[66] Ibid. at 230.