

United States Congressional-Executive Commission on China
Hearing on “One City, Two Legal Systems: Political Prisoners and the Erosion of the Rule of
Law in Hong Kong
11 May 2023
Testimony of Kevin Yam

1. Mr Chairman, Mr Co-Chairman, Members of the Commission, thank you for inviting me to testify before you today. The views expressed are my own and do not represent the views of any group or entity to which I belong.
2. I begin with a confession: there are lawyers more qualified to talk about Hong Kong criminal law than me. Unfortunately, some of them, like veteran activist lawyers Albert Ho¹ and 2023 Gwangju Prize for Human Rights winner Chow Hang Tung,² are languishing in jail. Others are still in Hong Kong fighting the good fight and cannot testify before the Commission lest they get their clients or themselves into trouble. Yet others who left Hong Kong dare not speak out, fearful of what might mean for their loved ones in Hong Kong.
3. By contrast, I no longer have close family connections with Hong Kong. I even brought my mother’s ashes back to Australia with me when I left Hong Kong in 2022. And I have practised as a lawyer in Hong Kong for over 17 years, including a little bit of criminal law, as well as lots of rule of law and democracy activism along the way. So while I might not be the most qualified lawyer to testify before the Commission, I am the most available.
4. My testimony today about Hong Kong’s rule of law start with the various trials against political dissidents and protesters. To a casual observer, one will mostly still see lawyers and judges decked out in their British-style wigs and gowns. The trials still follow common law’s detailed trial procedures, with questioning of witnesses by lawyers and judges. Legal submissions are still full of British-style legal jargon. As for judges, the majority would likely have convinced themselves that they are still independent. They get told this in public all the time by the Hong Kong government.³
5. Against this background, political trials in Hong Kong still have all the outward trimmings that can potentially hoodwink an international community which wants to believe in and get friendly with the Chinese Communist Party again in the post-COVID world. But this is precisely what makes the current situation in Hong Kong particularly insidious. The whole pantomime that is now played out in Hong Kong courts is an edifice that is decaying on the inside.
6. To begin with, as much as many judges might think of themselves as independent, they do not live in a vacuum. They can see the tone set by the current Chief Justice. Unlike his

¹ “UN calls for release of ailing Hong Kong rights lawyer Albert Ho”, *Radio Free Asia*, March 30, 2023.

² 2023 Gwangju Prize for Human Rights Winner Announcement, May 2, 2023:
<http://eng.518.org/sub.php?PID=0301&action=Read&idx=1032&ckattempt=1>.

³ See, eg, Hong Kong Department of Justice, *Our legal system – judicial system and the courts*:
https://www.doj.gov.hk/en/our_legal_system/judiciary.html.

predecessor,⁴ he refused to publicly defend separation of powers in Hong Kong after years of attacks against the concept by Beijing officials.⁵ He reinstated a judge⁶ disgraced for expressing explicit pro-Beijing political bias in court,⁷ and who is then promoted to hear national security cases.⁸ He saw fit to attend a party-political event in the form of the Chinese Communist Party's 100th anniversary celebrations.⁹

7. Hong Kong judges also saw the definition of their judicial oath being changed on them in 2021.¹⁰ By having sworn to uphold Hong Kong's Basic Law and bear allegiance to Hong Kong, they are now deemed to have subscribed to a whole set of political axioms, such as upholding "*the national sovereignty, unity, territorial integrity and national security of the People's Republic of China*". This is no mere formality, as a judge is required "*to intend to*" and "*in words and deeds*" to "*genuinely and truthfully observe, support, maintain and embrace*" the pledge.
8. Most importantly, what is becoming ever more apparent is that whenever any judge or court try to show a bit of backbone, they get viciously barked at by pro-Beijing media, by various Hong Kong versions of Benedict Arnolds who are doing Beijing's bidding, and even by Beijing officials. Just look at what happened when Jimmy Lai tried to bring in a British senior counsel for his National Security Law case in Hong Kong. The courts did initially let in the British senior counsel.¹¹
9. But then what? Beijing officials and mouthpieces rounded on the judges for applying international standards.¹² The Hong Kong Chief Executive ran crying to Granddaddy Xi for

⁴ Rhoda Kwan, "Explainer: Understanding Hong Kong's debate around the separation of powers and an executive-led system", *Hong Kong Free Press*, September 26, 2020:

<https://hongkongfp.com/2020/09/26/explainer-understanding-hong-kongs-debate-around-the-separation-of-powers-and-an-executive-led-system/>.

⁵ "Journalist questioned why no mention of separation of powers in speech, Chief Justice: too politicized, not appropriate to comment", *Inmedia.net*, January 11, 2021 (original in Chinese):

<https://www.inmediahk.net/node/1080146>.

⁶ Maisy Mok, "'Noble stabber' judge back on unrest cases", *The Standard*, Jul 30, 2021:

<https://www.thestandard.com.hk/section-news/section/4/232700/%27Noble-stabber%27-judge-back-on-unrest-cases>.

⁷ "Geoffrey Ma says judges expressing political views in public risks compromising impartiality", *The Standard*, May 25, 2020: <https://www.thestandard.com.hk/breaking-news/section/4/147844/Geoffrey-Ma-says-judges-expressing-political-views-in-public-risks-compromising-impartiality>.

⁸ Lau On-kei, "Kwok Wai-kin admits to being appointed designated National Security judge, had said that accused in Lennon Wall chopping person case had noble sentiments", *HK01*, September 16, 2021 (original in Chinese): <https://www.hk01.com/社會新聞/677828/郭偉健認獲委任為國安法指定法官-曾指連儂牆斬人被告情操高尚>.

⁹ *Chief Justice of the Court of Final Appeal and Chief Judge of the High Court to attend celebration activities of 100th anniversary of founding of Communist Party of China in Beijing*, June 27, 2021:

https://www.hkcfp.com/filemanager/PressRelease/en/upload/96/press_release_20210627_01en.pdf.

¹⁰ *Interpretation and General Clauses Ordinance* (Hong Kong), section 3AA

¹¹ *Re Timothy Wynn Owen KC* [2022] HKCFI 3233 (Hong Kong Court of First Instance); [2022] 5 HKLRD 726 (Hong Kong Court of Appeal); (2022) 25 HKCFAR 288 (Hong Kong Court of Final Appeal).

¹² "National security law for Hong Kong must be fully and accurately enforced", *Global Times*, November 29, 2022, <https://www.globaltimes.cn/page/202211/1280719.shtml>. This is an English translation of a summary of remarks by a spokesperson from the Hong Kong and Macao Affairs Office of the State Council of the People's Republic of China, the Chinese original of which can found here:

https://www.hmo.gov.cn/xwzx/xwfb/xwfb_child/202211/t20221128_23897.html.

a re-interpretation against the rulings.¹³ And the Hong Kong judiciary had to put out a statement stating their respect for the re-interpretation, and that the courts would uphold the National Security Law.¹⁴ It is as if one gets punched in the gut and then still have to smile and thank the thug for the punch.

10. So what does this mean? It means that the judges still serving in Hong Kong all know which way the winds are blowing. They know that the safest route to survival and promotion is to obey to the hilt. It means that for all the long political show trials with their ostentatious displays of common law court procedure, the will, whether consciously or subconsciously, almost inevitably side with the prosecution.
11. On one level, this makes things even worse in Hong Kong than in Mainland China. At least in Mainland China, the kangaroo court is brutally short, with no little pretence of trials being anything other than foregone conclusions. By contrast, the legal agony in Hong Kong is extended and expensive, but mostly with little palpable difference to the final result.
12. Beijing's pummelling of the Hong Kong judiciary also means that successful Hong Kong lawyers have been so unwilling to become judges that even the pro-Beijing camp had publicly sounded the alarm.¹⁵ Senior lawyer friends of mine who still live in Hong Kong say that this unwillingness extends even to pro-Beijing high-flyers in the profession, as they do not want to suffer reputational damage from with being associated with an increasingly politicised judiciary.
13. As a result, the Hong Kong judiciary is, with very few exceptions, only attracting and will only continue to attract mediocrities who are looking for not much more than income stability and possibly a life pension. This will not only impact on the impartiality of a judiciary looking to show career-boosting obedience in political cases. It will also affect the quality of justice and legal reasoning being meted out in commercial disputes, as top talent shy away from joining the bench.
14. Overall, what we have witnessed in Hong Kong is a death by a thousand cuts from Beijing to Hong Kong's rule of law and judicial independence. And the United Nations is also questioning the maintenance of judicial independence in Hong Kong in view of things such as the fact that only judges designated by the Hong Kong government can hear national security cases.¹⁶

¹³ *Statement by Chief Executive on submitting report to CPG on National Security Law and recommendation to request interpretation of National Security Law from NPCSC*, November 28, 2022:

<https://www.info.gov.hk/gia/general/202211/28/P2022112800736.htm>.

¹⁴ *Judiciary responds to interpretation of Hong Kong National Security Law by Standing Committee of National People's Congress*, December 30, 2022:

<https://www.info.gov.hk/gia/general/202212/30/P2022123000679.htm>.

¹⁵ Ambrose Lam San-keung, "Hong Kong Courts Need Move On From Dino Age", *The Standard*, February 13, 2023: [https://www.thestandard.com.hk/breaking-news/section/4/200218/\(Viewpoint\)-Hong-Kong-Courts-Need-Move-On-From-Dino-Age](https://www.thestandard.com.hk/breaking-news/section/4/200218/(Viewpoint)-Hong-Kong-Courts-Need-Move-On-From-Dino-Age).

¹⁶ Letter from Margaret Satterwaite, United Nations Office of the High Commissioner for Human Rights' Special Rapporteur on Independence of Judges and Lawyers to the Hong Kong Government, April 19, 2023, 2-3: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27992>.

15. Before concluding, I would like to turn to Hong Kong prosecutors in political trials. It is never easy for a lawyer to criticise fellow practitioners. I also appreciate that lawyers sometimes have to act on cases where they take positions that they do not personally believe in. And as someone who used to be my family's main breadwinner, I understand that it is sometimes not a simple case of quitting an unpleasant job when you have mouths to feed at home.
16. I would therefore have had some sympathy for prosecutors of political trials if it is clear that they are doing nothing more than going through the motions. But at least with some of them, that is far from the case. Instead, they are carrying out their roles as persecutors and not merely prosecutors with gusto. In doing so, they are ignoring common law requirements of prosecutorial fairness, as well as Hong Kong¹⁷ and international¹⁸ guidelines of prosecutors requiring them to uphold human rights.
17. Examples of such abuses include indiscriminately opposing bail for defendants in national security cases,¹⁹ and aggressively pursuing draconian sentences against juveniles as young as 14 years of age or otherwise have issues such as Asperger's Syndrome.²⁰ There are also attempts to prove national security breaches with perplexingly childish cross-examination questions, such as whether reporting comments from Putin on his rationale for invading Ukraine would affect Ukrainian citizens' morale and thus endanger national security.²¹
18. Taken together, what is clear is that some prosecutors in political cases are lowering their own of professionalism and, by extension, the quality of legal processes in courts down to the level of schoolyard boorishness. Not only is this grossly unjust for the defendants concerned, but when this is all that Hong Kong judges are facing day in, day out, it would in term affect the quality of justice, legal reasoning and the rule of law in courts generally, even in non-political or commercial cases. And prosecutors who pursue political cases in such a poor manner are rewarded with various promotions and awards.²²

¹⁷ Hong Kong Department of Justice, *Prosecution Code*, paras 3.12-3.16:

https://www.doj.gov.hk/en/publications/prosecution_ch3.html.

¹⁸ United Nations, *Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, para 2(b): https://www.doj.gov.hk/en/publications/prosecution_app1.html.

¹⁹ See, eg, Michael Shum, "Court battle drags on for 47 activists, politicians", *The Standard*, March 2, 2021: <https://www.thestandard.com.hk/section-news/section/11/227977/Court-battle-drags-on-for-47-activists,-politicians>.

²⁰ Chris Lau, "Hong Kong prosecutor who sought tougher penalties for protesters elevated to senior counsel", *South China Morning Post*, March 31, 2021: <https://www.scmp.com/news/hong-kong/law-and-crime/article/3127808/hong-kong-prosecutor-who-sought-tougher-penalties>.

²¹ "Chung Pui-kuen: if bin Laden agrees to be interviewed, it would be published; prosecution: this affects US citizens morale and endanger national security", *InMedia*, February 20, 2023 (original in Chinese): <https://www.inmediahk.net/node/1094542/>.

²² See, eg, footnote 20 above; Chris Lau, "Hong Kong prosecutor leading national security law case against 47 opposition figures takes key justice department role", *South China Morning Post*, August 13, 2021: <https://www.scmp.com/news/hong-kong/politics/article/3144895/hong-kong-prosecutor-leading-national-security-law-case>. Deputy Director of Public Prosecutions (Special Duties), Anthony Chau Tin-hang, was also rewarded with a Hong Kong Chief Executive's Commendation for Government/Public Service on 1 July 2021 "in recognition of his outstanding performance in the Department of Justice" – see page 72 of the following: https://gia.info.gov.hk/general/202107/01/P2021063000579_370988_1_1625057277705.pdf.

19. This then leads to the following questions for the Commission to consider. Should such individuals who are being rewarded and promoted by China for going the extra mile to take their prosecution to outright persecution be allowed to enjoy access to a global financial system of which the United States play a key role? Should they be allowed to send their children to places like the United States where they would enjoy high living standards and an education that encourages free thought, while youths in Hong Kong are being force-fed Mainland China-style nationalist education? Should they be allowed to enjoy holidays in free nations such as the United States?
20. To deny these Hong Kong persecutors (yes, I do mean persecutors) of such freedoms would admittedly be draconian. In this regard, however, I would take the Commission to the words of former United States Supreme Court Justice Oliver Wendell Holmes. In a letter to the British political theorist Harold Laski, Justice Holmes said that judges should hold a statute to be unconstitutional if it makes one want to “*puke*”.²³ Similarly, I would invite members of the Commission to consider this: do the repressive actions of these Hong Kong persecutors, who have chosen to be important cogs in destroying the Hong Kong’s rule of law and human rights, make you want to puke?
21. It is not for me to answer this question for the Commissioners. But what I would say is this: as someone who practised law in Hong Kong for a long time and will forever be grateful for everything that this previously free city had given to me, I want to puke when thinking about the persecutors who went and are going extra miles in their acts of repression. And I believe that all good people of conscience would join me in wanting this Holmesian puke.
22. Should members of the Commission feel the same way, then the next steps that should be taken in relation to these persecutors are, draconian as they may appear, clear.

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²³ Letter from Justice Oliver Wendell Holmes to Harold J Laski, Oct 23, 1926, reprinted in 2 *Holmes-Laski Letters* 887, 888 (Mark DeWolfe Howe edition, 1953), as cited in Andrew B Coan, “Well, Should They? A Response to If People Would be Outraged by Their Rulings, Should Judges Care?” 60 *Stanford Law Review* 213, 227. The letter in question (with the “puke” reference found as per the letter’s citation here) can also be seen here: https://archive.org/stream/holmeslaskilette017767mbp/holmeslaskilette017767mbp_djvu.txt.