

HKSAR v. Lai Man Ling and Others: Seditious Children’s Books? Interpreting a British Colonial-Era Law in Hong Kong After the Handover

I.	OVERVIEW	351
II.	BACKGROUND	352
	A. <i>Does The Seditious Publication Law Apply to The “Central Authorities” of The PRC?</i>	354
	B. <i>Did the Defendants Intend to Publish Seditious Materials?</i>	355
	C. <i>Is the Law Prohibiting Seditious Publication an Unconstitutional Violation of Defendants’ Rights to Free Speech?</i>	356
	D. <i>Were the Contents of the Children’s Books Seditious?</i>	357
III.	COURT’S DECISION.....	357
IV.	ANALYSIS	362
V.	CONCLUSION	365

I. OVERVIEW

Five speech therapists in Hong Kong were charged with conspiracy to print, publish, distribute, display and/or reproduce seditious materials for publishing children’s books which depicted a flock of sheep resisting the tyrannical rule of a pack of wolves.¹ The books referenced political movements and protests which took place in Hong Kong from 2019 to 2020 and depicted the people of Hong Kong as sheep and the government of the People’s Republic of China (PRC) as oppressive wolves.² The books also depicted the chief executive of the Hong Kong Special Administrative Region (HKSAR) as a wolf in sheep’s clothing.³

The defendants were charged under a law prohibiting seditious publications against “Her Majesty,” referencing the Queen of England,

1. Hong Kong v. Lai Man Ling et al., DCCC 854/2021, ¶¶ 1, 124 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

2. *Id.* ¶ 14, 124. In 2019, when the government of Hong Kong proposed the Extradition Bill, which would allow citizens of Hong Kong to be extradited to mainland China for trial. In response, thousands of people in Hong Kong protested and many of those protests became violent.

3. *Id.* ¶ 124.

because the law was enacted in Hong Kong while it was under British colonial rule before the handover to the PRC in 1997.⁴ All five defendants pleaded not guilty, arguing that the charge was an unconstitutional violation of their rights to freedom of expression, speech, publication, and literary or artistic creation, which are all guaranteed by the Hong Kong Basic Law and the Hong Kong Bill of Rights Ordinance.⁵ The defendants also argued that the colonial-era seditious publication law referencing “Her Majesty” should be interpreted to apply to the HKSAR, not to the “Central Authorities” of the PRC under the “one country, two systems” constitutional principal which governs the separation of the two governing systems of Hong Kong and mainland China.⁶ In addition, the defendants argued that the content of the books was not intended to be seditious.⁷ They claimed the books intended to help parents educate their children about the political and social events in Hong Kong in 2019 and 2020.⁸ The District Court of the Hong Kong Special Administrative region *held* that all five defendants were guilty as the sedition law did not violate their constitutional rights to free speech, the law does apply to the “Central Authorities” of the PRC, and the content of the books was seditious as it would likely lead children to have hatred or contempt for the PRC government. *Hong Kong v. Lai Man Ling et al.*, DCCC 854/2021 ¶¶ 128, 148-50, 157 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

II. BACKGROUND

The defendants were charged under Section 10(1)(c) of the Hong Kong Crimes Ordinance, which prohibits individuals from printing, publishing, selling, distributing, displaying, or reproducing any seditious material.⁹ The Crimes Ordinance defines seditious publications as “publications having a seditious intention.”¹⁰ It further defines seditious intention as:

- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty’s dominions or

4. *Id.* ¶¶ 53-54.

5. *Id.* ¶ 4.

6. *Id.* ¶¶ 57-58.

7. *Id.* ¶ 117.

8. *Id.*

9. *Id.* ¶ 49.

10. *Id.* ¶ 50.

2023]

HKSAR v. LAI MAN LING

353

of any territory under Her Majesty's protection as by law established;

- (b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
- (c) to bring into hatred or contempt or to excite disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
- (d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
- (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
- (f) to incite persons to violence; or
- (g) to counsel disobedience to law or to any lawful order.¹¹

The court identified six major legal questions to decide in this case.¹² First, the court had to determine whether the seditious publications offense covered the "Central Authorities" of the PRC, or if it could be limited to only apply to the local authority in Hong Kong, the HKSAR.¹³ Second, the court had to determine whether the defendants violated the elements of the crime and had the proscribed seditious intention.¹⁴ Third, the court evaluated whether the offense charged was unconstitutional.¹⁵ Fourth, the court had to determine whether the children's books were seditious publications.¹⁶ Fifth, the court evaluated whether all five defendants conspired to publish seditious materials.¹⁷ Finally, the court had to determine whether prosecution of the offense was time-barred by a six-month statute of limitations.¹⁸ Of these, the four main issues for consideration were whether the law applied to the "Central Authorities" of the PRC, whether the defendants intended to publish seditious material,

11. *Id.* ¶ 51.

12. *Id.* ¶ 52.

13. *Id.* ¶ 53.

14. *Id.* ¶ 52.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

whether the seditious publications law was unconstitutional, and whether the contents of the books themselves were seditious in nature.¹⁹

A. *Does The Seditious Publication Law Apply to The “Central Authorities” of The PRC?*

First, the court evaluated whether the seditious publications law of the Crimes Ordinance should apply to the PRC government, the HKSAR, both, or neither.²⁰ Because the children’s books in question depicted the PRC negatively, interpreting the law as applied to solely the HKSAR may have allowed defendants to avoid liability.²¹ The seditious publications law dates back to colonial-era Hong Kong, so the court had to interpret which governing powers the phrase “Her Majesty” applies to, as the language of the statute has not been amended despite the PRC obtaining sovereignty over Hong Kong in 1997.²² Laws like the Crimes Ordinance, which were enacted in Hong Kong prior to the handover, were adopted as the laws of the HKSAR under the Basic Law.²³ The Basic Law is a 1997 agreement between Britain and China governing the handover that now serves as Hong Kong’s constitution.²⁴ It governs the adaptations of colonial-era Hong Kong laws to conform with the status of Hong Kong as a newly acquired region of the PRC.²⁵ The colonial-era laws are interpreted by the HKSAR using the Interpretation and General Clauses Ordinance (IGCO).²⁶ In the noted case, the court had to interpret whether the phrase, “Her Majesty,” in the colonial-era seditious publications law should be applied to the local HKSAR, the sovereign PRC, both, or neither of the authorities.²⁷ The prosecution argued that according to the IGCO, “Her Majesty” should be construed to reference the “Central Authorities” of the PRC as well as the HKSAR.²⁸ According to Section 1 of the IGCO:

19. *Id.* ¶¶ 148, 157. Regarding whether the defendants conspired to commit the crime and whether the prosecution of the offense was time barred, the court held that the defendants did conspire as they agreed to publish the materials and the offense was not time barred by the six-month statute of limitations.

20. *Id.* ¶ 53.

21. *Id.* ¶ 57.

22. *Id.* ¶¶ 52-54.

23. *Id.* ¶ 54.

24. XIANGGANG JIBEN FA, pmb., (H.K.).

25. Hong Kong v. Lai Man Ling et al., DCCC 854/2021, ¶ 54 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

26. *Id.*

27. *Id.* ¶ 53.

28. *Id.* ¶ 54.

Any reference in any provision to Her Majesty, the Crown, the British Government, or the Secretary of State where the content of the provision (a) relates to title to land in the Hong Kong Special Administrative Region; (b) involves affairs for which the Central People's Government of the People's Republic of China has responsibility; (c) involves the relationship between the Central Authorities and the Hong Kong Special Administrative Region, shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China.²⁹

On the other hand, the defense argued that any reference to "Her Majesty" in the Crimes Ordinance refers only to the government of the HKSAR because this case does not involve title to land or the relationship between the HKSAR and Central Authorities, which should render IGCO Sections 1(a) and (c) irrelevant.³⁰ Second, the defense argued that under the Basic Law, the HKSAR is solely responsible for safeguarding national security in the region, and, therefore, section 1(b) of the IGCO is not relevant either.³¹ According to the defense's reasoning, Section 1 of the IGCO should not apply in this case, and instead Section 2 of the IGCO should be used to interpret "Her Majesty."³² Section 2 of the IGCO provides, "Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State . . . in contexts other than those specified in Section 1 shall be construed as a reference to the Government of the Hong Kong Special Administrative Region."³³ In its evaluation, the court had to determine which of these sections of the IGCO should apply to the seditious publication law of the colonial-era Crime Ordinance.³⁴

B. Did the Defendants Intend to Publish Seditious Materials?

Second, the court had to determine whether the defendants published truly seditious publications and had the proscribed *mens rea* in doing so.³⁵ The elements of the offense prohibiting seditious publications are "(a) he prints, publishes, sells, distributes, displays or reproduces any publication; (b) the publication is having seditious intention, (c) the at the time when the defendant performs the proscribed act, (i) he intends to perform the prescribed act, (ii) he knows the publication is having a seditious

29. *Id.*

30. *Id.* ¶ 58.

31. *Id.*

32. *Id.*

33. *Id.* ¶ 55.

34. *Id.* ¶ 52.

35. *Id.*

intention, and (iii) he has a seditious intention.”³⁶ In *Tong Yiu Wah v. HKSAR*, the court established that the prosecution bears the burden of proving that the defendants had one of the seditious intentions set forth in Section 10(1)(c) of the Crimes Ordinance.³⁷

C. *Is the Law Prohibiting Seditious Publication an Unconstitutional Violation of Defendants’ Rights to Free Speech?*

Next, the court evaluated whether the seditious publications law infringes on the defendants’ constitutional rights to free speech, publication, expression, and literary or artistic creation.³⁸ This right is guaranteed by the Basic Law and the Hong Kong Bill of Rights Ordinance (HKBOR).³⁹ However, Article 16, Section 3 of the HKBOR provides that this right is subject to certain restrictions including for the protection of national security, public order, public health, or morals.⁴⁰ In *HKSAR v. NG Kung Siu*, the court held that these restrictions must be narrowly interpreted and that freedom of expression includes freedom to criticize governmental institutions.⁴¹

To determine whether the seditious publications law was constitutional, the court looked at two factors.⁴² First, the *actus reus* of the offense must be written clearly enough that individuals can regulate their conduct to avoid liability.⁴³ Prior case law established that, under this test, when a fundamental freedom of speech is involved, the level of certainty as to the proscribed act must be exceptionally high.⁴⁴ In this statute, the criminal act in question is incitement of “hatred,” “contempt,” “disaffection,” or “discontent.”⁴⁵ Second, to determine the constitutionality of the seditious publications law, the court had to evaluate whether the restriction on speech is proportionate in comparison

36. *Id.* ¶ 73.

37. *Hong Kong v. Tong Yiu Wah*, [2007] 10 H.K.C.F.A.R. 324, ¶ 24 (C.F.A.).

38. *Hong Kong v. Lai Man Ling et al.*, DCCC 854/2021, ¶ 88 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

39. *Id.* ¶ 4.

40. XIANGGANG JIBEN FA art. 27 (H.K.); Hong Kong Bill of Rights Ordinance, (1991) Part II, 2-22-2-24, § 3, art.16 (H.K.).

41. *Hong Kong v. NG Kung Siu*, [1999] 2 H.K.C.F.A.R. 442, 468 (C.F.A.).

42. *Hong Kong v. Lai Man Ling et al.*, DCCC 854/2021, ¶ 92 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

43. *Id.*

44. *Hong Kong v. NG Kung Siu*, [1999] 2 H.K.C.F.A.R. 442, 468 (C.F.A.).

45. *Hong Kong v. Lai Man Ling et al.*, DCCC 854/2021, ¶ 92 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

to the societal benefit of the restriction.⁴⁶ To determine this, the court applied a four-step analysis that was set out in *Hysan Development Co. Ltd. v. Town Planning Board*.⁴⁷ The analysis includes evaluating (1) whether the restriction pursues a legitimate aim; (2) whether the restriction is rationally connected to the legitimate aim; (3) that the restriction is no more than necessary to accomplish the legitimate aim, and; (4) that the balance between the restriction and the societal benefits do not unacceptably burden individuals.⁴⁸ The court in the noted case applied these two tests to determine whether the colonial-era seditious publications law violated defendants' constitutional rights to free speech, expression, publication, and artistic or literary creation.⁴⁹

D. Were the Contents of the Children's Books Seditious?

Fourth, the court had to evaluate the content of the books and determine whether the books had seditious intent as a matter of law.⁵⁰ Under the law, for a defendant to be convicted of publishing seditious materials, the defendant must have the intent to publish seditious materials and the materials themselves must be seditious.⁵¹ The prosecution argued that the books did have seditious intent as they were geared toward children which are an impressionable audience; there was a risk of violence due to the wide-spread public dissatisfaction with the PRC Government in Hong Kong, and the books were published shortly after the 2019 protests, which indicates intent to influence public opinion against the PRC.⁵² The defendants argued that the books were not intended to be seditious, but were merely intended to help parents explain the social events in Hong Kong and to teach children basic virtues.⁵³

III. COURT'S DECISION

In the noted case, the District Court of the Hong Kong Special Administrative region upheld the seditious publications law as constitutional, amended it to refer to both the PRC and HKSAR instead

46. *Id.* ¶ 97.

47. *Hysan Dev. Co. Ltd. v. Town Plan. Bd.*, [2015] 19 H.K.C.F.R. 372, ¶¶ 135-36 (C.F.A.).

48. *Id.*

49. *Hong Kong v. Lai Man Ling et al.*, DCCC 854/2021, ¶ 97 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

50. *Id.* ¶ 111.

51. *Id.* ¶ 113.

52. *Id.* ¶ 115.

53. *Id.* ¶ 117.

of “Her Majesty,” and found all five defendants guilty of conspiracy to publish seditious materials.⁵⁴ The court held that “Her Majesty” should be construed as a reference to the Central Authorities of the PRC and the local authorities of the HKSAR.⁵⁵ Then, the court held that all five defendants had the intent to publish seditious materials.⁵⁶ Third, the court determined that the law was not a violation of the defendants’ constitutional rights to free speech or publication.⁵⁷ Finally, the court held that the content of the books was in fact seditious.⁵⁸

Regarding whether the colonial-era law which prohibited inciting hatred or disaffection for “Her Majesty” the court interpreted the law to cover the HKSAR and the Central Authorities of the PRC.⁵⁹ The court rejected the defendants’ argument that Section 2 of the IGCO should be applied rather than Section 1.⁶⁰ The court held that the publications in this case did fall under Section 1(b) of the IGCO which provides that any reference to “Her Majesty” shall be construed as a reference to the PRC when the matter involves affairs for which the Central People’s government of the PRC has responsibility.⁶¹ Under the 2020 National Security Law in Hong Kong, the PRC has an overarching responsibility to protect national security in the HKSAR, and the HKSAR is an inalienable part of the PRC.⁶² Therefore, the court reasoned, the governmental authority mentioned in the law must include the PRC as well as the HKSAR.⁶³ The court amended the law to now read, “A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against the Central Authorities, or against the Government of Hong Kong.”⁶⁴

Next, the court turned to the issue of whether the defendants committed the crime of sedition.⁶⁵ The defendants argued that intent to incite violence or create public disturbance should necessarily be part of the intent to commit sedition.⁶⁶ The defendants cited to previous cases in

54. *Id.* ¶ 157.

55. *Id.* ¶ 62.

56. *Id.* ¶ 87.

57. *Id.* ¶¶ 108-110.

58. *Id.* ¶¶ 127-28.

59. *Id.* ¶ 62.

60. *Id.* ¶ 59.

61. *Id.* ¶¶ 58-59.

62. *Id.* ¶ 60.

63. *Id.*

64. *Id.* ¶ 70.

65. *Id.* ¶ 73.

66. *Id.* ¶ 81.

which sedition was limited to offenses where the seditious materials created a risk of upsetting the political and social order.⁶⁷ Because the defendants did not intend to incite violence and there was no risk of political upheaval, they argued, they could not have seditious intent.⁶⁸ The court disagreed.⁶⁹ It noted that the previous cases cited by defendants were extremely dated and they originated in English common law.⁷⁰ The court pointed out that in those days, the only way to upset the political and social order was to incite violence.⁷¹ It went on to say that the situation has changed drastically.⁷² Today, the social and political order is more often disrupted by spreading rumors, hatred, and misinformation.⁷³ The court therefore held that the prosecution did not need to show that the defendants had intent to incite violence in order to convict the defendants of sedition.⁷⁴

Third, the court addressed the defendants' constitutional challenge to the sedition charge.⁷⁵ Under the HKBOR, citizens of Hong Kong have the right to freedom of expression, but that right is subject to restrictions, including when speech must be limited to protect national security or public order.⁷⁶ The defendants argued that the law prohibiting sedition was an unconstitutional restriction of their free speech, which includes the freedom to criticize governmental institutions under both the Basic Law and HKBOR.⁷⁷ In order to determine whether the law was constitutional, the court first had to evaluate whether the law had a "sufficiently formulated core," which would enable a person to regulate their conduct so as to avoid liability.⁷⁸ Under the seditious publication law, the criminal act listed was to "incite hatred, contempt, disaffection, and discontent."⁷⁹ The defense argued that the words "hatred," "contempt," "disaffection," and "discontent" were too vague and that the law should be unconstitutional as it would likely require individuals to overly limit their

67. *Id.* ¶ 85.

68. *Id.* ¶ 81.

69. *Id.* ¶ 85.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* ¶ 87.

75. *Id.* ¶ 88.

76. *Id.* ¶ 90.

77. *Id.* ¶ 91.

78. *Id.* ¶ 92.

79. *Id.* ¶ 93.

speech in order to avoid liability.⁸⁰ The court disagreed with this argument, holding that words “hatred,” “contempt,” “disaffection,” and “discontent” were clear enough for individuals to know the type of speech that would lead others to feel these emotions.⁸¹ It elaborated on that point, describing any activity or speech that would have the effect of demeaning the Central Authorities, damaging their legitimacy, or estranging the relationship between the governmental institution and its people would necessarily violate the sedition law.⁸²

Second, to determine the constitutionality of the law, the court applied a four-part test to determine whether the restriction was a proportionate measure compared with the social benefit.⁸³ The first step in the test was to determine whether the restriction was in pursuit of a legitimate aim.⁸⁴ The court held that criminalizing sedition was clearly legitimate as it “disturbs the tranquility of the state,” and “endeavor[s] to subvert the Government and the laws.”⁸⁵ The second part of the test is to evaluate whether the restriction is rationally connected to the legitimate aim.⁸⁶ The court held that criminalizing seditious publications was rationally connected to the aim of preserving public order.⁸⁷ Third, the court had to determine whether the restriction was no more than necessary to achieve the legitimate aim.⁸⁸ The court carefully considered to what extent free speech can be restricted to preserve public order.⁸⁹ Here, the court reiterated that, “Nowadays, the existence of a nation, its territorial integrity or political independence can be threatened not just by force or threat of force but by propaganda spreading rumors, misinformation and disinformation that make people no longer trust and even hate their government, resulting in serious social unrest and chaos.”⁹⁰ The court also focused on the political and social climate of the HKSAR following the 2019 protests of the Extradition Bill, which became quite violent. The court noted that protestors did not recognize the sovereignty of the PRC over Hong Kong and did not support the “One Country, Two Systems”

80. *Id.*

81. *Id.* ¶ 94.

82. *Id.*

83. *Id.* ¶ 97.

84. *Id.* ¶ 98.

85. *Id.*

86. *Id.* ¶ 97.

87. *Id.* ¶ 99.

88. *Id.* ¶ 100.

89. *Id.* ¶ 101.

90. *Id.* ¶ 102.

governing policy.⁹¹ The court also said it was important to take into account that, while the situation in the HKSAR appears to have calmed down after the National Security Law passed in 2020, “the seeds of unrest are still there,” and “[t]he political situation is calm on the surface but very volatile underneath.”⁹² For these reasons, the court held that there was an especially strong need to protect national security, and, therefore, the law prohibiting seditious publications was no more than necessary to protect national security and public order.⁹³ Finally, the court applied step four of the test, which required determining whether the rights of the individual were properly balanced with the societal interest in preserving public order so as to ensure that the burden on the individual was not unacceptably harsh.⁹⁴ In regard to step four, the court held that there was nothing to suggest the burden on the individual was disproportionate to the societal interest.⁹⁵ Because the court held that the law passed all four sections of this test, the defendants’ constitutional challenge failed.⁹⁶

Finally, the court had to determine whether the content of the children’s books was seditious.⁹⁷ The court considered many relevant factors, including the defendants’ stated intention, the nature of the audience, and the time, place, and mode of publication.⁹⁸ The defense argued that the books were just children’s fables, that the stories were told at a high level of abstraction and not clearly related to the PRC, that the books were a tool to help parents explain recent events in Hong Kong, and that the books were merely a record of social and political events in Hong Kong.⁹⁹ The court was unpersuaded by these arguments and ultimately held that the content of the books was seditious.¹⁰⁰ The court ruled that the books were not abstract as the foreword and epilogue of the books referenced specific events, including the Anti-Extradition Bill Movement.¹⁰¹ In addition, the court noted that one of the main problems with the books was that after the story, children would be told the story is real: that they are the sheep and the PRC are the wolves.¹⁰² The court

91. *Id.* ¶ 104.

92. *Id.*

93. *Id.* ¶ 108.

94. *Id.* ¶¶ 97, 109.

95. *Id.* ¶ 109.

96. *Id.* ¶ 110.

97. *Id.* ¶ 111.

98. *Id.* ¶ 115.

99. *Id.* ¶ 117.

100. *Id.* ¶ 128.

101. *Id.* ¶ 121.

102. *Id.* ¶ 123.

stated that the books would lead children to believe that the Central Authorities want to hurt them, that they will be sent to prison if they do not obey the Central Authorities, and that they must resist the Central Authorities and use force if necessary.¹⁰³ Because of the impressionable nature of the young audience, the current political climate in Hong Kong, and the implications of the stories, the court concluded that the books did contain seditious content.¹⁰⁴

IV. ANALYSIS

The noted case is the first seditious publications case to go to trial after the PRC's imposition of the National Security Law on Hong Kong in 2020.¹⁰⁵ The seditious publication law had hardly been used at all in recent years and because this was the first case of its kind after the National Security Law, the ruling turned on the court's interpretation of the statute and of the Basic Law.¹⁰⁶ The Basic Law protects the right to freedom of speech in Hong Kong—a right that does not exist in mainland China.¹⁰⁷ In 2020, however, the PRC imposed the National Security Law on Hong Kong to stifle the region's protests of the proposed Extradition Bill.¹⁰⁸ Since the National Security Law was imposed on Hong Kong, rights to free speech in the region have been deteriorating.¹⁰⁹

The National Security Law criminalizes acts of succession, subversion (undermining the government), terrorism, and collusion with foreign forces in Hong Kong.¹¹⁰ Many believe that the National Security Law conflicts with the Basic Law, which protects the right to free speech and expression in Hong Kong.¹¹¹ In addition, under the Basic Law, the

103. *Id.* ¶ 124.

104. *Id.* ¶ 128.

105. Jessie Pang & Kiki Lo, *Five in Hong Kong Found Guilty of Sedition for 'Anti-government' Children's Books*, REUTERS (Sept. 7, 2022, 8:43 AM), <https://www.reuters.com/world/asia-pacific/five-hong-kong-found-guilty-sedition-anti-government-childrens-books-2022-09-07/>.

106. John Yoon, *Hong Kong Sentences Five to Nineteen Months for Children's Books Deemed 'Seditious'*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/world/asia/hong-kong-childrens-books-free-speech.html>.

107. *Hong Kong: How is it Run, and What is the Basic Law?*, BBC NEWS (July 1, 2022), <https://www.bbc.com/news/world-asia-china-49633862> [hereinafter BBC News].

108. *Id.*

109. Lydia Wong et al., *Hong Kong's National Security Law and the Right to Fair Trial: A GCAL Briefing Paper in* GEORGETOWN LAW CENTER FOR ASIAN LAW 18 (2021), <https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf>.

110. BBC NEWS, *supra* note 107.

111. Wong et al., *supra* note 109, at 2.

HKSAR courts are responsible for determining whether governmental actions (like restricting speech) are legal. However, the National People's Congress Standing Committee (NPCSC) is China's highest law-making body and it ultimately holds more power than the HKSAR courts.¹¹² Since the National Security Law was enacted, many journalists and activists have been arrested for criticizing the government.¹¹³ Several media outlets and political NGOs were even forced to close following its enactment.¹¹⁴ In addition, the two U.K. judges who were still serving on the Hong Kong Court of Final Appeal resigned over the oppressive limits to human rights that resulted from the National Security Law.¹¹⁵

The noted case fell within the ambit of the National Security Law. The National Security Law influenced the court's ruling, as the court interpreted whether the publications were able to be restricted as an exception to free speech under the Basic Law. In its interpretation of the relevant constitutional provision of the Basic Law, the court focused on the fact that both the PRC and HKSAR have a strong constitutional responsibility to ensure national security in Hong Kong.¹¹⁶ The PRC's responsibility for protecting national security in Hong Kong was expanded by the National Security Law in 2020.¹¹⁷ This strong governmental interest following the passage of the National Security Law empowered the court in the noted case to stifle speech related to political dissent, so long as it upheld the restriction in the interest of preserving national security.

In addition, the noted case has been widely criticized for being over-broad and too restrictive of free speech in Hong Kong.¹¹⁸ The ruling is quite broad, especially in the court's analysis of whether the content of the books was seditious. The court was heavily influenced by the social and political climate of Hong Kong at the time of ruling.¹¹⁹ The court could have interpreted the sedition law much more narrowly,

112. BBC NEWS, *supra* note 107.

113. Dr. Ewelena U. Ochab, *National Security Law Is Curtailing The Right To A Fair Trial In Hong Kong*, FORBES ¶ 1 (Oct. 17, 2022), <https://www.forbes.com/sites/ewelinaochab/2022/10/17/national-security-law-is-curtailing-the-right-to-a-fair-trial-in-hong-kong/?sh=1996070a34f2>.

114. *Id.*

115. *Id.*

116. Hong Kong v. Lai Man Ling et al., DCCC 854/2021, ¶ 58 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

117. *Id.* ¶¶ 59-60.

118. Pang & Lo, *supra* note 105.

119. Hong Kong v. Lai Man Ling et al., DCCC 854/2021, ¶ 124 (D.C. Sept. 7, 2022) (Legal Reference System) (H.K.).

criminalizing only acts or speech that were likely to lead to violence.¹²⁰ However, the court focused on how many people in Hong Kong are unsupportive of the “One Country, Two Systems” policy and resist the PRC’s sovereignty over Hong Kong.¹²¹ These tensions have led to violent protests in Hong Kong in the past and the court justified its broad interpretation of the sedition law by asserting that it is necessary to restrict speech which is critical of the PRC to prevent protests and violence.¹²² In addition, in determining how to interpret “Her Majesty,” the court went with the broadest option, amending the law to prohibit inciting hatred, contempt, or disaffection for both the PRC and the HKSAR authorities.¹²³ As a result, this holding made it significantly easier to be convicted of publishing seditious materials in Hong Kong.

Finally, the noted case was decided by a judge who was not impartial. Cases that fall under the rule of the National Security Law are

subject to an entirely different procedural system for investigation, prosecution, and trial.¹²⁴ These types of cases are not guaranteed to include a public trial, they are heard by specially selected judges, known as designated national security judges, and defendants may face extradition to mainland China for trial. In the noted case, the ruling judge was a designated national security judge.¹²⁵ This means he was specially selected by the chief executive of the HKSAR to hear cases related to endangering national security.¹²⁶ Designated national security judges are selected to serve for one year but they can be removed if they rule in a way that threatens national security.¹²⁷ This process poses a serious threat to judicial independence in Hong Kong and raises concerns about whether those tried under the National Security Law are receiving a fair trial.¹²⁸ Judicial independence is guaranteed by the Basic Law, so the National Security Law may be in conflict with the Basic Law in this area as well.¹²⁹

120. *Id.* ¶ 85.

121. *Id.* ¶ 125.

122. *Id.* ¶¶ 125-28.

123. *Id.* ¶ 58.

124. Ochab, *supra* note 113, ¶ 7.

125. *Id.*

126. Wong et al., *supra* note 109, at 10-11.

127. *Id.* at 10.

128. *Id.*

129. *Id.*

2023]

HKSAR v. LAI MAN LING

365

V. CONCLUSION

Overall, the noted case is an example of the PRC using the National Security Law to expand its political control over Hong Kong and to suppress criticism of the Central Authorities in the region. The court's interpretation of the constitutionality of the law under the Basic Law combined with its broad interpretation of what kinds of speech are seditious has created an unprecedented suppression of free speech in Hong Kong. The ruling is so broad that it could reasonably be interpreted to restrict any speech that is critical of the government. The content of the children's books did portray the PRC negatively, but it would likely not rise to the level of sedition in other nations.¹³⁰ In fact, the United Nations Human Rights committee spoke out against Hong Kong's use of sedition laws to suppress criticism of its government earlier this year.¹³¹ The noted case's expansion of the colonial-era seditious publication law significantly restricts rights to free speech and expression in Hong Kong and further diminishes human rights in the region after the PRC's imposition of the National Security Law in 2020.

Bridget Snyderstrup*

130. *Hong Kong: Conviction of Children's Book Publishers an Absurd Example of Unrelenting Repression*, AMNESTY INT'L (Sept. 7, 2022), <https://www.amnesty.org/en/latest/news/2022/09/hong-kong-conviction-of-childrens-book-publishers-an-absurd-example-of-unrelenting-repression/>.

131. *Id.*

* © 2023 Bridget Snyderstrup, J.D. Candidate 2024, Tulane Law School. The author would like to thank her friends and family for their support, as well as members of the *Tulane Journal of International and Comparative Law* for their efforts in preparing and publishing this piece.