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# **The Chilling Effect: Hong Kong's Securitisation and the Erosion of Rights-Based Environmental Protection**

**Mateusz Tokarz**

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## **Abstract**

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) threatens the exercise of rights-based approaches (RBAs) to environmental protection. Enacted in 2020, the NSL has been criticised for its draconian and ambiguously formulated provisions that contravene China's obligations under the Sino-British Joint Declaration of 1984 and international law. This paper posits that the NSL undemocratically constrains the fundamental rights required to exercise RBAs for environmental protection, thereby facilitating long-term risks to ecocentric legislative activity in the Hong Kong Special Administrative Region (HKSAR). It also investigates the capacity of civil society to demand accountability for environmentally focused HKSAR policies and laws. Challenges to environmentalism in the post-NSL era are examined, evaluating the law's impact on environmental activism. The paper concludes that the NSL has facilitated the erosion of environmentalism in the HKSAR, limiting the activities of nongovernmental organisations (NGOs), muzzling free expression, and suppressing political opposition. Given the current political environment, the prospect of legal reform appears bleak. Sustained international support for local environmental human rights defenders is necessary, and future research must focus on developing alternative strategies for environmental advocacy in restrictive political settings.

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# 1 Introduction

*“If we fail our environment, we fail to protect our human rights” – Ban Ki-moon <sup>1</sup>*

This paper assesses the effect of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region<sup>2</sup> (NSL) on the exercise of rights-based approaches (RBAs) to environmental protection. Promulgated in 2020, the NSL has been subject to widespread condemnation due to its draconian and ambiguously formulated provisions, which contravene China’s international obligations,<sup>3</sup> and its commitments to preserve the autonomous common law system retained after the 1997 handover from Britain.<sup>4</sup> Once crowned as the ‘Pearl of the Orient’<sup>5</sup> for maintaining judicial independence from Mainland China, the Hong Kong Special Administrative Region (HKSAR) now mourns the decline of constitutional human rights protections.

The planetary environmental crisis threatens the enjoyment of fundamental human rights, which are increasingly recognised as interdependent with the natural environment.<sup>6</sup> In the HKSAR, environmental interest groups have traditionally played a significant role in holding the government accountable for environmental governance, thereby ensuring it fulfils its international human rights obligations.<sup>7</sup> Focusing on the former aspect, this paper discusses how the NSL has affected the ability of HKSAR environmental groups to pursue rights-based approaches and considers the broader implications for the future of human rights protection in the jurisdiction.

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<sup>1</sup> “‘If We Fail Our Environment, We Fail to Protect Our Human Rights,’” Warn UN Experts on Earth Day’ (OHCHR) <<https://www.ohchr.org/en/press-releases/2013/04/if-we-fail-our-environment-we-fail-protect-our-human-rights-warn-un-experts>> accessed March 1 2024.

<sup>2</sup> Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, passed by the NPCSC on June 30 2020 (hereafter NSL), English translation available at <[http://www.xinhuanet.com/english/2020-07/01/c\\_139178753.htm](http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm)> accessed March 1 2024.

<sup>3</sup> Han Zhu, ‘A Chinese Law Wedge into the Hong Kong Common Law System: A Legal Appraisal of the Hong Kong National Security Law’ (2023) 21 *Northwestern Journal of International Human Rights* 43, 46.

<sup>4</sup> Brendan Clift, ‘Hong Kong’s Made-in-China National Security Law: Upending the Legal Order for the Sake of Law and Order’ (2020) 21 *Australian Journal of Asian Law* 1.

<sup>5</sup> Chan RCK and Lin GCS, ‘From a Colonial Outpost to a Special Administrative Region: Hong Kong’s First Decade of Reunion with China’ (2008) 8 *China Review* 1 <<https://www.jstor.org/stable/23462258>>.

<sup>6</sup> UNGA ‘The Human Right to a Clean, Healthy and Sustainable Environment’ (28 July 2022) UN Doc A/RES/76/300; Louis Jacobus Kotzé and Duncan French, ‘The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene’ (2018) *Global Journal of Comparative Law* 5.

<sup>7</sup> Hung SC-F, ‘Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective’, *Interest Groups and the New Democracy Movement in Hong Kong*, vol 1 (1st edn, Routledge 2018), 213.

Extant literature on RBAs for environmental protection has advanced to acknowledge the importance of employing human rights arguments to challenge states on the implementation of adaptation and mitigation measures for environmental degradation.<sup>8</sup> The efficacy of RBAs is contingent upon the ability to exercise fundamental rights,<sup>9</sup> including freedom of expression,<sup>10</sup> peaceful assembly,<sup>11</sup> and association,<sup>12</sup> which enable public participation in environmental governance and accountability. Despite extensive research on how security legislation affects human rights,<sup>13</sup> discourse concerning its effect on RBAs to environmental protection remains notably absent. Given environmental protection's recognition as a required component of national security,<sup>14</sup> and the HKSAR's contribution to one of the world's largest greenhouse gas emitters (GHGE), China, this omission is conspicuous. Previous studies<sup>15</sup> conducted by international human rights organisations<sup>16</sup> concur on the NSL's human rights impact but omit the issue of environmentalism.

This paper aims to contribute to the extant body of scholarship by examining the influence of security legislation on environmentalism in politically restrictive jurisdictions. Part 1 evaluates the theoretical foundations of RBAs to environmental protection, considering the requirements of additional freedoms in order to undertake RBAs. Part 2 contextualises the NSL within the HKSAR's politico-legal history and its implications for fundamental rights and environmental advocacy. Part 3 investigates the feasibility of legal reform, and the broader human rights risk associated with climate crises. The paper concludes by reaffirming the importance of balancing anthropocentrism and ecocentrism within legal frameworks, the need for future research on

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<sup>8</sup> Ceri Warnock and Brian Preston, 'Climate Change, Fundamental Rights, and Statutory Interpretation' (2023) 35 *Journal of Environmental Law* 47, 49.

<sup>9</sup> Brian Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 *Chinese Journal of Environmental Law* 133.

<sup>10</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter, ICCPR), Art. 19.

<sup>11</sup> *Ibid.*, Art. 21.

<sup>12</sup> *Ibid.*, Art. 22.

<sup>13</sup> See for example, Myriam Feinberg, 'International Counterterrorism – National Security and Human Rights: Conflicts of Norms or Checks and Balances?' (2015) 19 *International Human Rights* 388; P Sean Morris, 'National Security and Human Rights in International Law' (2020) 8 *Groningen Journal of International Law* 123.

<sup>14</sup> United Nations Trust Fund for Human Security (UNTFH), 'Human Security Handbook: An integrated approach for the realization of the Sustainable Development Goals and the priority areas of the international community and the United Nations system' (January 2016), 7.

<sup>15</sup> Surya Deva, 'Putting Byrnes and Hong Kong in a Time Machine: Human Rights in 2021 Under the Shadow of Beijing's National Security Law' (2021) 27 *Australian Journal of Human Rights* 467.

<sup>16</sup> International Service for Human Rights, 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022) <[https://ishr.ch/wp-content/uploads/2022/09/ISHR\\_Report-Impact-of-HK-National-Security-Law\\_web.pdf](https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf)> accessed 3 May.

environmental advocacy in restrictive jurisdictions, and the prudent recognition that national security requires environmentalism.

## **2 Reconciling Environmental Protection with Human Rights**

To examine the impact of the NSL on RBAs to environmental protection, it is necessary to define RBAs and their theoretical basis. Recent academic debate concerning RBAs can be attributed to two historic developments: the United Nations (UN) General Assembly's recognition of the right to a clean, healthy, and sustainable environment,<sup>17</sup> and a preceding resolution by the UN Human Rights Council acknowledging the same right.<sup>18</sup> Despite the watershed moment linking human rights with environmental concerns, development in this area of international law has faced significant obstacles. Political resistance and competing views on the value of RBAs have remained ongoing challenges<sup>19</sup> since contemporary discourse on environmental rights was initiated<sup>20</sup> by the Stockholm Declaration.<sup>21</sup>

Part I is comprised of three sections. Section 1.1 delineates RBAs to environmental protection by considering foundational theoretical principles. Section 1.2 discusses the efficacy of RBAs in the context of environmental litigation. Section 1.3 concludes by emphasising the significance of procedural rights in the implementation of RBAs to combat environmental degradation. It is posited that RBAs are necessary for ensuring state accountability in attaining environmental and human rights obligations.

### **2.1 Anthropocentrism versus Ecocentrism: Justifying RBAs**

The absence of a universal definition of RBAs has resulted from ongoing debate and disagreement in the literature concerning their theoretical principles.<sup>22</sup> It is beyond the purpose of this paper to examine all these debates or the study of human rights philosophy. However, considering the primary theoretical arguments is necessary to determine their value and identify

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<sup>17</sup> UNGA 'The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/RES/76/300.

<sup>18</sup> UNHRC 'The Human Right to a Clean, Healthy and Sustainable Environment' (8 October 2021) UN Doc A/HRC/RES/48/13.

<sup>19</sup> Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and Its Practical Advantages' (2023) 23 Human Rights Law Review 1.

<sup>20</sup> Jonas Ebbesson, 'Getting It Right: Advances of Human Rights and the Environment from Stockholm 1972 to Stockholm 2022' (2022) 52 Environmental Policy and Law 79.

<sup>21</sup> Report of the United Nations Conference on the Human Environment, Stockholm, 15-16 June 1972 (adopted 16 June 1972) UN Doc A/CONF.48/14/Rev.1 (hereafter, Stockholm Declaration), ch 1.

<sup>22</sup> E Donald Elliott and Daniel C Esty, 'The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law' (2021) 29 New York University Environmental Law Journal 505, 514.

a suitable definition of RBAs for the subsequent analysis. Leib classifies contemporary environmental thought into two perspectives, anthropocentrism and ecocentrism.<sup>23</sup> Anthropocentrism places humans at the centre of moral consideration.<sup>24</sup> Adopting a moral view of this nature facilitates environmental destruction by prioritising human interests.<sup>25</sup> Hardin convincingly articulated the dangers of this by arguing that ecological collapse is inevitable when individuals exploit the shared environmental ‘commons’ for personal benefit and that law and policy must be employed to control our exploitative tendencies.<sup>26</sup> Hardin’s fear has undeniably manifested in the HKSAR.

Scholars have challenged these assertions by claiming they are inherently flawed and have not adapted to contemporary thought.<sup>27</sup> Most convincingly, it has been suggested that this conception of the human–nature relationship has been “translated into global legal instruments”.<sup>28</sup> For example, the 1972 Stockholm Conference<sup>29</sup> and its subsequent Declaration<sup>30</sup> placed environmental protection at the centre of “human well-being and economic development”.<sup>31</sup> Although the Declaration was nonbinding, its political influence persisted. The Paris Agreement’s<sup>32</sup> preamble demonstrates the continued influence of anthropocentrism in international law. It reinforces the idea that environmental protection is not just for our planet’s sake but for the benefit of human development.<sup>33</sup> Although anthropocentrism may underpin the relationship between human rights and the environment in international law, it cannot singularly justify the rationale behind advancing RBAs. Recognising anthropocentrism’s limitations is necessary, namely its potential to marginalise

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<sup>23</sup> Linda Hajjar Leib, *Human Rights and the Environment [electronic Resource]: Philosophical, Theoretical and Legal Perspectives*. (BRILL 2011), 26.

<sup>24</sup> Allen Thompson, ‘Anthropocentrism: Humanity as Peril and Promise’, *The Oxford Handbook of Environmental Ethics* (Oxford University Press 2017).

<sup>25</sup> *Ibid.*

<sup>26</sup> Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* (American Association for the Advancement of Science) 1243.

<sup>27</sup> Jonathan M Karpoff, ‘The Tragedy of “The Tragedy of the Commons”; Hardin Versus the Property Rights Theorists’ (2022) 65 *The Journal of Law and Economics* S65; Sayem MA, ‘Lynn White, Jr.’s Critical Analysis of Environmental Degradation in Relation to Faith Traditions: Is His “The Historical Roots of Our Ecological Crisis” Still Relevant?’ (2021) 56 *Journal of Ecumenical Studies* 1,

<sup>28</sup> Marie-Catherine Petersmann, ‘Narcissus’ Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame’ (2018) 30 *Journal of Environmental Law* 235.

<sup>29</sup> Stockholm Declaration (n. 21).

<sup>30</sup> *Ibid.*, ch 1.

<sup>31</sup> ‘Report of the United Nations Conference on the Human Environment’ (Stockholm 5-16 June 1972) (1973) UN Doc A/CONF.48/14/Rev.1, 3.

<sup>32</sup> ‘Adoption of the Paris Agreement’ (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1, 20, Annex (hereafter, Paris Agreement).

<sup>33</sup> *Ibid.*

nonhuman life and essential ecological processes.<sup>34</sup> By focusing on human liberty and economic interests, the law neglects the interests of indigenous communities with connections to their natural environments and those disproportionately affected by environmental degradation.<sup>35</sup>

Conversely, ecocentrism challenges the anthropocentric narrative of international law by emphasising the interdependence of humans and the environment, displacing us from our superior moral position.<sup>36</sup> By adopting this approach, ecocentrism reorients our anthropocentric legal frameworks to value nature beyond its utility to humanity.<sup>37</sup> International documents, such as the Earth Charter, demonstrate that ecological integrity had been acknowledged internationally, to a certain degree, prior to recent developments in environmental jurisprudence.<sup>38</sup> Recent judicial decisions, such as those in New Zealand<sup>39</sup> and Colombia,<sup>40</sup> have increasingly begun recognising nature's rights as equal to human rights.<sup>41</sup> These decisions indicate that we are witnessing a growing awareness of the importance of ecocentric law. However, studies caution that the need for practical solutions in complex legal scenarios tempers the potential of such approaches.<sup>42</sup>

Consequently, despite addressing the main limitations of anthropocentric thought, ecocentrism remains an imperfect solution. Critics rightly argue that its idealism is utopian and can conflict with the needs of human survival.<sup>43</sup> While ecocentrism's attempt to recognise nonhuman life as a beneficiary of international law is necessary, we must not forget to consider human requirements. Balancing anthropocentric and ecocentric law is the solution to protecting the

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<sup>34</sup> Louis J. Kotze & Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5, 12–14.

<sup>35</sup> Lisa Mardikian and Sofia Galani, 'Protecting the Arctic Indigenous Peoples' Livelihoods in the Face of Climate Change: The Potential of Regional Human Rights Law and the Law of the Sea' (2023) 23 *Human Rights Law Review* 1.

<sup>36</sup> Vito De Lucia, 'Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law' (2017) 8 *Journal of Human Rights and the Environment* 181, 186.

<sup>37</sup> *Ibid.*

<sup>38</sup> Earth Charter Commission, 'The Earth Charter' (2000) <<https://earthcharter.org/read-the-earth-charter/>> accessed 25 March 2024.

<sup>39</sup> *Michael John Smith v Fronterra Co-operative group Ltd and others* [2024] NZSC 5.

<sup>40</sup> Judgement T-622/16 (The Atrato River Case), Constitutional Court of Colombia [2016], translated by the Dignity Rights Project and available at <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161125\\_T-62216\\_judgment.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161125_T-62216_judgment.pdf)> accessed 25 March 2024.

<sup>41</sup> Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 *Journal of Environmental Law* 531.

<sup>42</sup> Dirk Hanschel, 'Ecocentric Rights: A Global Trend towards Protection of Nature', Max Planck Institute for Social Anthropology <<https://www.eth.mpg.de/6285606/news-2023-07-19-01>> accessed March 25, 2024.

<sup>43</sup> Linda Hajjar Leib, *Human Rights and the Environment [electronic Resource]: Philosophical, Theoretical and Legal Perspectives*. (BRILL 2011), 39.

planet and human rights. Accordingly, the most suitable definition of RBAs for this paper's analysis must reflect this balanced approach. Gauri and Gloppen's "rights-talk approach" aligns with this requirement.<sup>44</sup> The proposed approach acknowledges the power of rights-based claims and social accountability as a mechanism for marginalised individuals to advance their environmental interests, and those of nonhuman life, against powerful actors, including the state and corporations.<sup>45</sup> This will be demonstrated in the subsequent section's discussion concerning environmental litigation.

The Office of the High Commissioner of Human Rights' (OCHCR) framework for applying RBAs to climate change corresponds to Gauri and Gloppen's approach.<sup>46</sup> This framework is based on international human rights commitments and aims to safeguard rights by identifying right-bearers, their entitlements – alongside duty bearers – and their obligations.<sup>47</sup> By emphasising the promotion of non-discriminatory participation, providing access to information, and upholding the rule of law,<sup>48</sup> the OCHCR rightly acknowledges that environmental degradation is unevenly distributed and disproportionately affects the most vulnerable, including indigenous communities, women and children, and nonhuman life. Adherence to these principles enables the chosen definition of RBAs to recognise the necessity of protecting human interests while acknowledging the value of nature's rights for environmental protection. Unifying ecocentrism and anthropocentrism provides a strong framework for achieving environmental adaptation and mitigation by advancing rights discourse in policy development and litigation.

## 2.2 Evaluating RBA Efficacy in Litigation

In recent years, an emerging category of environmental litigation has assumed considerable importance. 'Climate rights' consist of actions that assert the legal rights of individuals and communities for climate mitigation and adaptation based on domestic and international commitments.<sup>49</sup> Scholars convincingly argue that these rights are inherent in existing

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<sup>44</sup> Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy' (2012) 44 *Polity* 485, 494.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Office of the UN High Commissioner for Human Rights (OHCHR), 'Application of a Human Rights Based Approach in Climate Change Negotiations, Policies and Measures' <<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf>> accessed 25 March 2024.

<sup>48</sup> *Ibid.*

<sup>49</sup> Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot' Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy (2023), 32.



constitutional and human rights laws.<sup>50</sup> Similarly, these rights can be mandated by international treaties such as the Paris Agreement,<sup>51</sup> which can be interpreted as a legally binding human rights document,<sup>52</sup> a view supported by the Brazilian Supreme Court.<sup>53</sup> By considering fundamental rights, including life and health, these RBAs support academics' assertions of a "rights turn"<sup>54</sup> in environmental litigation that is facilitating the "greening of rights".<sup>55</sup>

The seminal decision in *Urgenda v. State of Netherlands*<sup>56</sup> demonstrates the efficacy of adopting RBAs to influence state action on environmental protection. In the landmark judgment, the Dutch Supreme Court held that its government must reduce GHGE by at least 25%. Importantly, by grounding this decision in Articles 2<sup>57</sup> and 8<sup>58</sup> of the European Convention on Human Rights (ECHR), the court adopted RBAs for environmental protection throughout its opinion. This ruling set a historic precedent by suggesting that governments have legally binding obligations, based on existing human rights law, to protect their citizens from environmental degradation. Increased citizen action in other countries reinforces the view of *Urgenda*<sup>59</sup> having demonstrated the potential of RBAs in environmental litigation.

For instance, in *Daniel Billy and Others v. Australia*,<sup>60</sup> the UN Human Rights Committee cited the precedent set by *Urgenda*.<sup>61</sup> It was concluded that by failing to reduce GHGE and continuing fossil fuel use, Australia had failed to prevent foreseeable loss of life and violated the rights of the plaintiffs<sup>62</sup> under Article 6 of the International Covenant on Civil and Political

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<sup>50</sup> John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79, 83.

<sup>51</sup> Paris Agreement (n.32).

<sup>52</sup> See John H Knox, 'The Paris Agreement as a Human Rights Treaty', *Human Rights and 21st Century Challenges* (Oxford University Press 2020).

<sup>53</sup> *PSB et al v. Brazil (on Climate Fund)* (ADPF 708) [2022], [17], unofficial translation available at <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220701\\_ADPF-708\\_decision-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220701_ADPF-708_decision-1.pdf)> accessed March 26 2024.

<sup>54</sup> Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 39.

<sup>55</sup> Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and Its Practical Advantages' (2023) 23 Human Rights Law Review 1, 3 – 5.

<sup>56</sup> *Urgenda Foundation v. State of the Netherlands, Supreme Court of the Netherlands*, Case No. 19/00135, 20 December 2019 (hereafter, *Urgenda*).

<sup>57</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (hereafter, ECHR) art 2.

<sup>58</sup> *Ibid*, Art 8.

<sup>59</sup> *Urgenda* (n. 56).

<sup>60</sup> *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)*, United Nations Human Rights Committee, CCPR/C/135/D/3624/2019 (23 September 2022).

<sup>61</sup> *Urgenda* (n. 56).

<sup>62</sup> *Ibid*, Annex III, [1].

Rights (ICCPR).<sup>63</sup> This demonstrates the growing success of RBAs in influencing states to protect fundamental rights through climate adaptation and marks the first time a UN body determined that inadequate policies could constitute a breach of international human rights law. However, previous analyses of these “systematic mitigation” actions<sup>64</sup> have raised noteworthy criticisms of RBAs in environmental litigation that merit consideration. Academics point to the application of a ‘common ground’ test to determine emission-reduction targets<sup>65</sup> as a primary challenge.

Jurisprudence of the European Court of Human Rights (ECtHR) supports this approach by noting the importance of applying accepted international standards in interpreting the provisions of the ECHR.<sup>66</sup> This method was effective in the *Urgenda*<sup>67</sup> case, allowing the court to determine that a 25–40% reduction target was appropriate based on the Intergovernmental Panel on Climate Change’s (IPCC) AR4 report, widely referenced in climate change conferences.<sup>68</sup> Despite its demonstrable strengths, academics are right to express concern that this method may experience difficulties within post-Paris Agreement actions.<sup>69</sup> The Paris Agreement’s<sup>70</sup> framework for nationally determined contributions is a departure from the fixed targets and timelines mandated by the previous international agreement on emissions reduction, the Kyoto Protocol.<sup>71</sup> Consequently, decisions employing *Urgenda*-style reasoning will face difficulties, as plaintiffs are more likely to struggle to cite specific emission reduction targets. Although these criticisms are substantial and merit consideration, recent judicial decisions have successfully contested this view.

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<sup>63</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter, ICCPR).

<sup>64</sup> Orla Kelleher, ‘Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach’ (2022) 34 Journal of Environmental Law 107.

<sup>65</sup> Margaretha Wewerinke-Singh and Ashleigh McCoach, ‘The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-based Climate Litigation’ (2021) 30 Review of European Community and International Environmental Law 275, 278.

<sup>66</sup> *Oluic v Croatia* App no 61260/08 (ECtHR, 20 May 2010) [60].

<sup>67</sup> *Urgenda* (n. 56).

<sup>68</sup> *Ibid*, [6.1] – [7.6.2].

<sup>69</sup> Wewerinke-Singh M and McCoach A, ‘The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-based Climate Litigation’ (2021) 30 Review of European Community and International Environmental Law 275, 278.

<sup>70</sup> Paris Agreement (n. 32)

<sup>71</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) UNTS vol. 2303, p.162.

In *Milieudefensie et al v. Shell*,<sup>72</sup> the Hague District Court held that Shell must reduce its greenhouse gas emissions by 45%. The court determined these obligations pursuant to the Dutch Civil Code,<sup>73</sup> which imposes a duty to act in accordance with “what can be regarded as proper social conduct”,<sup>74</sup> an open duty that judges can interpret in line with current social norms such as consensus on climate change. When determining specific reduction targets, the court referred to IPCC reports and the Paris Agreement,<sup>75</sup> ruling that both were relevant to non-state actors, including corporations.<sup>76</sup> This ruling demonstrates that emission reductions can still be successfully determined and enforced in the post-Paris era and is supported by its replication in similar decisions.<sup>77</sup> Similarly, the case of *Neubauer et al. v Germany*<sup>78</sup> led the German Federal Constitutional Court to rule that parts of Germany’s Climate Protection Act were unconstitutional due to the inadequacy of mitigation targets for protecting human rights. Consequently, the court mandated that the legislature establish clear post-2030 reduction objectives.<sup>79</sup> Invoking constitutional rights in this manner has proven successful in other instances,<sup>80</sup> thereby strengthening the proposition that RBAs to environmental protection can be attained post-Paris without significant challenges.

More substantially, the most significant development in environmental litigation was achieved when the ECtHR issued judgements on three cases related to climate change in 2024. While the cases filed by *Careme*<sup>81</sup> and *Agosthino*<sup>82</sup> were declared inadmissible for reasons unrelated to their substance,<sup>83</sup> it ruled in favour of the applicants in *KlimaSeniorinnen Schweiz and Others v. Switzerland*.<sup>84</sup> The court determined that Switzerland had breached its human rights

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<sup>72</sup> *Milieudefensie et al. v. Royal Dutch shell plc.*, The Hague District Court, C/09/571932/HA ZA 19-379 (25 April 2022) Official English translation available at <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526\\_8918\\_judgment-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf)> accessed 28 March 2024.

<sup>73</sup> Burgerlijk Wetboek (Civil Code of the Netherlands) English translation available at <<http://www.dutchcivillaw.com/civilcodegeneral.htm>> accessed 28 March 2024.

<sup>74</sup> *Ibid*, [4.4.1].

<sup>75</sup> Paris Agreement (n. 32).

<sup>76</sup> *Ibid*, [4.4.34].

<sup>77</sup> See for e.g. *Mullaley Gas and Pipeline Accord Inc v. Santos NSW (Eastern) Pty Ltd*, New South Wales Land and Environment Court, NSWLEC 147 (16 December 2021); *Guyane Nature Environnement and France Nature Environnement v. France, Council of State of France* N°2001348 (10 February 2022).

<sup>78</sup> *Neubauer et al. v. Germany, Federal Constitutional Court of Germany* Case No. BvR 2656/18/1 (29 April 2021) Official English translation available at <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210324\\_11817\\_order-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210324_11817_order-1.pdf)> accessed 28 March 2024.

<sup>79</sup> *Ibid*, 266.

<sup>80</sup> See for e.g. *ClientEarth v. Poland (on Behalf of P.N)* Sygn. akt XIV C 493/21, Poznan Regional Court (20 December 2021).

<sup>81</sup> *Careme v. France* App no. 7189/21 (ECtHR, 9 April 2024).

<sup>82</sup> *Duarte Agosthino and Others v. Portugal and 32 others* App no. 39371/20 (ECtHR, 9 April 2024).

<sup>83</sup> *Careme v. France* App no. 7189/21 (ECtHR, 9 April 2024), para [75] – [88].

<sup>84</sup> *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* App no. 53600/20 (ECtHR, 9 April 2024).

obligations by failing to take adequate climate mitigation measures.<sup>85</sup> This had harmed the applicant's right to family life due to the adverse effects of climate change.<sup>86</sup> Notably, the ECtHR held that ECHR Article 8<sup>87</sup> encompasses an individual's right to adequate protection by state authorities from the severe consequences of climate change on their life, health, well-being, and quality of life.<sup>88</sup> One arguable shortcoming is that the court declined to specify the measure that should be implemented to comply with the judgement due to the broad discretion given to the state in this area.<sup>89</sup> Despite this, the ruling is bound to be influential as it has affirmed that states have positive obligations to address environmental degradation under the ECHR<sup>90</sup> to protect the fundamental rights of their citizens. Indisputably, the judgement has demonstrated the efficacy and importance of exercising RBAs for protecting the planet and human rights.

In sum, recent judicial decisions have demonstrated the effectiveness of RBAs at both international and domestic levels in influencing states and corporations to protect the environment. Judiciaries have adopted progressive methods to determine specific reduction targets in the post-Paris era. These decisions refute criticisms which assert that *Urgenda*-style reasoning is ineffective within a nationally determined reduction target framework and that RBAs underestimate the collective consequences of environmental harm. RBAs can succeed in future environmental litigation by adapting to new scientific research and international agreements. Law can be a solution in the Anthropocene, transforming environmental protection from a policy or business choice to a human rights obligation. Having established their value in environmental litigation, the final section evaluates the potential challenges in implementing RBAs and the rights required for their success.

## 2.3 Towards Effective Implementation of RBAs

A significant challenge in implementing RBAs has been identified in the literature, arguing that their application relies on rights-bearers' ability to exercise their rights.<sup>91</sup> This argument is strong, correctly identifying the importance of procedural rights such as access to information, association, and participation in ensuring the successful implementation of RBAs. The role of

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<sup>85</sup> Ibid, para [327].

<sup>86</sup> Ibid, para [546].

<sup>87</sup> ECHR (n.61) art 8.

<sup>88</sup> Ibid, para [519].

<sup>89</sup> Ibid, para [653].

<sup>90</sup> ECHR (n. 65).

<sup>91</sup> Madebwe T, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience' (2015) 15 African Human Rights Law Journal 110, 112.

procedural rights in implementing RBAs has been evident since the adoption of the Aarhus Convention,<sup>92</sup> which guaranteed access to information, public participation, and justice in environmental matters. More recently, the Escazú Agreement<sup>93</sup> also recognised the protection of these rights as necessary for the role of environmental defenders. The UN's proposed Framework Principles on Human Rights and the Environment, support this by emphasising the importance of access to these rights. Principles 5 and 9 propose that states should facilitate public participation and protect the rights to freedom of expression, association, and peaceful assembly.<sup>94</sup> These proposals were reaffirmed in a further report outlining good practices for states to follow when implementing RBAs for environmental protection. Similarly, this report correctly drew attention to the role of procedural rights in this process.<sup>95</sup>

In many cases, existing environmental laws explicitly guarantee the protection of these procedural rights. For example, Montenegro's Law on the Environment<sup>96</sup> protects citizens' right to be informed about the environment and to participate in related matters. Similar constitutional provisions protecting procedural rights exist in nearly forty constitutions.<sup>97</sup> Therefore, the significance of safeguarding procedural rights in environmental protection has long been acknowledged and is critical to using RBAs as an accountability mechanism against the state. Case law supports the importance of access rights by demonstrating the consequences of restricting them in the context of environmental activism. In *Bryan and others v. Russia*,<sup>98</sup> the ECtHR held that Russia had violated the freedom of expression of Greenpeace activists during a protest at a Russian offshore oil-drilling platform. Notably, the ECtHR emphasised that in reaching its decision, it considered the importance of the activists' ability to express their opinion on a matter of social interest, namely the environmental consequences of continued oil drilling.<sup>99</sup> Similarly, in *Bumbes v Romania*,<sup>100</sup> an activist was fined for protesting proposed mining activities. Again, the ECtHR ruled that the domestic courts' imposition of a

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<sup>92</sup> Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) (adopted 25 June 1998) UNTS vol. 2161, p. 447.

<sup>93</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement) LC/PUB.2018/8/Rev.1.

<sup>94</sup> UNHRC Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' 'Framework Principles on Human Rights and the Environment', (24 January 2018) UN DOC A/HRC/37/59.

<sup>95</sup> UNHRC 'Right to a healthy environment: good practices' (30 December 2019) UN DOC A/HRC/43/53.

<sup>96</sup> Law on Environment ("Official Gazette of Montenegro", No. 052/16, 073/19) English translation available at <<https://leap.unep.org/en/countries/me/national-legislation/environmental-law-0>> accessed 30 March 2024.

<sup>97</sup> Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17 International Journal of Peace Studies 71.

<sup>98</sup> *Bryan and other v. Russia* App no 22515/14 (ECtHR 12 July 2018).

<sup>99</sup> *Ibid*, [85].

<sup>100</sup> *Bumbes v. Romania* App no 18079/15 (ECtHR 3 May 2022).

fine on the activists had violated Articles 10<sup>101</sup> and 11<sup>102</sup> of the ECHR and was unnecessary in a democratic society.<sup>103</sup> The significance of implementing RBAs and the documented consequences of their restriction are widely recognised in the literature, with scholars asserting that they play “an important role in limiting climate change”.<sup>104</sup>

In sum, RBAs should be implemented for environmental protection. RBAs have been successfully employed in recent environmental litigation supporting their efficacy in protecting human rights and the environment. For RBAs to be effectively implemented, rights bearers must be empowered to exercise human rights, such as freedom of expression, access to information, and public participation. The next section will consider their relevance to the HKSAR NSL. The NSL has raised important questions concerning the continued viability and efficacy of RBAs in the region. The section will, firstly, contextualise the NSL’s enactment, and then critically discuss existing research concerning its effect on procedural rights and environmental governance.

### 3 Environmentalism Within the Constraints of Security

Part 3 evaluates the implications of the NSL on the rights necessary to exercise RBAs to environmental protection. Section 3.1 contextualises the evaluation by tracing the NSL’s origins and development. Section 3.2 evaluates whether the NSL’s restrictions on procedural rights directly impact environmental activists and their initiatives.

#### 3.1 The Emergence of Hong Kong’s National Security Legislation

Provisions of the NSL can be traced back to the nineteenth-century British governance of the HKSAR. Although this may initially seem a remote point of reference for contextualising legislation enacted in 2020, “any discussion on freedoms and the rule of law in Hong Kong needs to be situated in an informed understanding of its history”.<sup>105</sup> Academics have previously observed that much of the HKSAR legal system was shaped by its colonial past, which enacted laws for media censorship, controlling mass movements, and prohibiting opposition politics.<sup>106</sup>

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<sup>101</sup> ECHR (n. 61) art 10.

<sup>102</sup> *Ibid*, art 11.

<sup>103</sup> Bumbes (n. 105), [24] – [25].

<sup>104</sup> Svitlana Kravchenko, ‘Procedural Rights as a Crucial Tool to Combat Climate Change’ (2010) 38 Georgia Journal of International and Comparative Law 613.

<sup>105</sup> Wu C and others, *Political Censorship in British Hong Kong: Freedom of Expression and the Law (1842-1997)* / Michael Ng, University of Hong Kong. (Cambridge, United Kingdom; New York, NY: Cambridge University Press 2022, 5

<sup>106</sup> Yan-ho Lai, ‘Securitisation or Autocratisation? Hong Kong’s Rule of Law Under the Shadow of China’s Authoritarian Governance’ (2023) 58 Journal of Asian and African Studies (Leiden) 8, 3.

Notably, libel prosecution in English-language newspapers, like the *Hong Kong Telegraph*, was used to limit freedom of speech and suppress the publication of criticism to support Britain's geopolitical interests in East Asia.<sup>107</sup> Many of these colonial-era laws were adapted or revived after the 1997 handover of the region to China. Certainly, media censorship has been a consistent feature of Mainland Chinese governance.<sup>108</sup>

The legal continuity of colonial-era authoritarianism was observable during the 2019 anti-extradition bill protests. The Emergency Regulations Ordinance,<sup>109</sup> used to suppress port strikes against the colonial government in 1922,<sup>110</sup> was adapted by the HKSAR government (HKSARG) to prohibit face coverings at protests.<sup>111</sup> Importantly, political analysts identified the use of this ordinance as “signalling the start of authoritarian rule” in the region.<sup>112</sup> Recent commentary supports this view, demonstrating a regression to colonial-era restrictions on freedom of assembly, association, and expression.<sup>113</sup> It is evident that colonial legal continuity has constrained the fundamental rights necessary for RBAs to environmental protection.

The revival of colonial-era regulations during the 2019 demonstrations facilitated a slide towards human rights erosion under the NSL. However, it is more compelling to propose that colonial legal continuity existed prior to this period and remains embedded in the region's ‘quasi-constitution’, the Basic Law (BL),<sup>114</sup> to ensure Mainland China's politico-legal sovereignty over the HKSAR. Negotiations leading to the handover from Britain to the People's Republic of China (PRC) in 1997 culminated in the ratification of the Sino-British Joint Declaration<sup>115</sup> on the Question of Hong Kong (JD).<sup>116</sup> The JD delineates the policies the

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<sup>107</sup> Wu C and others, (n.105), 14.

<sup>108</sup> Ankit Kumar, ‘Internet Censorship in China: The Struggle to Swat “Flies” Away’ (*ICS Research Blog*, 10 October 2023) <<https://icsin.org/blogs/2023/10/10/internet-censorship-in-china-the-struggle-to-swat-flies-away-2/>> accessed 1 May 2024.

<sup>109</sup> Emergency Regulations Ordinance (Cap. 241).

<sup>110</sup> David Law, ‘Hong Kong's 1922 General Strike: When the British Empire Struck Back’ (*The Conversation*, 8 June 2023) <<https://theconversation.com/hong-kongs-1922-general-strike-when-the-british-empire-struck-back-177793>> accessed 1 May 2024.

<sup>111</sup> Wu C and others (n.105), 195.

<sup>112</sup> Guardian reporter in Hong Kong, ‘Hong Kong Emergency Law “Marks Start of Authoritarian Rule”’ (*The Guardian*, 5 October 2019) <<https://www.theguardian.com/world/2019/oct/05/hong-kong-emergency-law-marks-start-of-authoritarian-rule>> accessed 1 May 2024.

<sup>113</sup> See e.g. Secretary of State for Foreign, Commonwealth and Development Affairs, ‘The Six-Monthly Report on Hong Kong: 1 July to 31 December 2023’ (15 April 2024), 24.

<sup>114</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereafter, BL) English translation available at <<https://www.basiclaw.gov.hk/en/basiclaw/index.html>> accessed 1 May 2024.

<sup>115</sup> Instrument A301, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (hereafter JD) English translation available at <[https://www.legco.gov.hk/general/english/procedur/companion/chapter\\_1/mcp-part1-ch1-n24-e.pdf](https://www.legco.gov.hk/general/english/procedur/companion/chapter_1/mcp-part1-ch1-n24-e.pdf)> accessed 1 May 2024.

<sup>116</sup> Paul Fifoot, ‘China's Basic Law for Hong Kong’ (1991) 10 *International Relations* (London) 301.

PRC aimed to implement upon reassuming sovereignty in 1997 and establishes a foundation for the post-colonial constitution of the HKSAR, the BL.<sup>117</sup> Importantly, the BL<sup>118</sup> “expressly confers constitutional status”<sup>119</sup> on human rights protected in the Hong Kong Bill of Rights Ordinance (BORO).<sup>120</sup>

The BL was intended to operationalise the policies within the JD and was drafted by the PRC’s primary legislative body. However, Mainland Chinese appointees oversaw the process.<sup>121</sup> Consequently, the drafting of the BL aligned with Chinese legal principles rather than maintaining the HKSAR’s distinct common law system which preceded the handover. This contravenes the plural governance framework under “One Country, Two Systems”, which guaranteed that the HKSAR’s legal and human rights principles would be preserved for a minimum of fifty years after 1997.<sup>122</sup> This indicates that the PRC’s intention to assimilate the HKSAR into a more unified state to safeguard China’s sovereignty existed prior to the NSL’s enactment. Considering this, it is unsurprising that colonial-era censorship laws have been reintroduced in the NSL era to achieve this objective. Scholars endorse this position and correctly conclude that “One Country, Two Systems” was inherently to impose “assimilation and stringent direct control by the central government”.<sup>123</sup>

The PRC’s stance towards BL Article 23<sup>124</sup> is indicative of its paranoia and can be traced directly to the NSL’s enactment. Article 23<sup>125</sup> imposes an obligation on the HKSARG to implement its own national security regulations to protect against threats to China’s Central People’s Government. China’s heightened focus on internal threats to national security after the Tiananmen Square massacre may have facilitated conflicts between Article 23 and the BL’s rights provisions due to the massacre’s influence on the drafting process.<sup>126</sup> The 2003 protests,

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<sup>117</sup> *Ibid.*

<sup>118</sup> BL (n. 114), Ch III.

<sup>119</sup> Po Jen Yap and Francis Chung, ‘Statutory Rights and ‘de Facto’ Constitutional Supremacy in Hong Kong?’ (2019) 17 International Journal of Constitutional Law 836, 837.

<sup>120</sup> Hong Kong Bill of Rights Ordinance (Cap. 383).

<sup>121</sup> Paul Fifoot, ‘China’s Basic Law for Hong Kong’ (1991) 10 International Relations (London) 301–302.

<sup>122</sup> Stephen Vines, *Defying the Dragon: Hong Kong and the World’s Largest Dictatorship* (London: Hurst & Company 2021), 19.

<sup>123</sup> Gary Ho, ‘The Chessboard of Hong Kong and Chinese Politics: The Downfall of “One Country, Two Systems”’ (The University of Waikato, 2018), 10.

<sup>124</sup> BL (n.114) art 23.

<sup>125</sup> *Ibid.*

<sup>126</sup> Wendy Dullea Bowie, ‘The Effect of the Tiananmen Square Massacre upon Negotiations for the Draft Basic Law of the Hong Kong Special Administrative Region’ (1990) 8 Dickinson Journal of International Law 245, 248.



which led to the withdrawal of the HKSARG's proposed National Security Bill,<sup>127</sup> support this assertion.<sup>128</sup>

Although the 2003 protests temporarily halted the PRC's autocratic ambitions, the HKSARG's continued failure to implement national security legislation provoked impatience in Mainland China.<sup>129</sup> This impatience was compounded by a governance crisis in 2018 when Chief Executive of the HKSAR, Carrie Lam, proposed a bill that included provisions for extradition to Mainland China.<sup>130</sup> Concerns over the bill's erosion of judicial autonomy led to the most extensive and sometimes violent protests in the region's history.<sup>131</sup> Notwithstanding early success in halting the legislation,<sup>132</sup> Beijing reasserted its authority bypassing the HKSAR Legislative Council (Legco), which resulted in the NSL coming into force in 2020 despite widespread concerns regarding the protection of rights.<sup>133</sup> For instance, lawyers and human rights activists expressed concern over ambiguous definitions for proposed offences and their potential for arbitrary application.<sup>134</sup>

Evidently, although BL Article 23<sup>135</sup> accords the HKSAR legislative autonomy on matters of national security, this does not inherently negate Beijing's constitutional authority. The NPC and its standing committee (NPCSC) still have the power to establish Special Administrative Regions (SARs), like Hong Kong, and dictate their governance,<sup>136</sup> possessing legislative and judicial oversight which can be exercised for preserving sovereignty.<sup>137</sup> Therefore, while the HKSAR theoretically retains legislative independence under the BL,<sup>138</sup> it is not absolute and can be superseded by Beijing in direct opposition to the principle of "One Country, Two Systems". Scholars have correctly identified that the BL "contains the means to undermine

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<sup>127</sup> National Security (Legislative Provisions) Bill (gazetted 14 February 2003, lapsed 22 July 2004).

<sup>128</sup> Ngok Ma, 'Civil Society in Self-Defense: The Struggle Against National Security Legislation in Hong Kong' (2005) 14 *The Journal of Contemporary China* 465.

<sup>129</sup> Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 *Comparative Education* 187, 195.

<sup>130</sup> Stephen Vines, *Defying the Dragon: Hong Kong and the World's Largest Dictatorship* / Stephen Vines. (London: Hurst & Company 2021), 79.

<sup>131</sup> *Ibid.*, 83.

<sup>132</sup> Jeffie Lam and Zuraidah Ibrahim, *Rebel City: Hong Kong's Year of Water and Fire*. (Singapore: World Scientific Publishing Co Pte Ltd; Hong Kong: South China Morning Post Publishers Limited 2020), 13.

<sup>133</sup> Stephen Vines (n.143), 82; Jeffie Lam and Zuraidah (n.132), 11.

<sup>134</sup> Jeffie Lam and Zuraidah (n.132), 473.

<sup>135</sup> BL (n.124), art. 23.

<sup>136</sup> Conveyed by Articles 31 and 62 of the Constitution of the People's Republic of China 2018 (Adopted at the Fifth Session of the Fifth National People's Congress and promulgated by the Announcement of the National People's Congress on December 4, 1982; amended in accordance with the *Amendment to the Constitution of the People's Republic of China* adopted at the First Session of the Thirteenth National People's Congress on March 11, 2018) (hereafter, PRC Constitution).

<sup>137</sup> *Ibid.*

<sup>138</sup> BL (n.124), art. 23.

Hong Kong's autonomy".<sup>139</sup> Thus, it cannot be refuted that the NSL's encroachment on human rights violates the principle of legality.

The NSL's origin and the legislature's recent motivations are a continuation of colonial repression and a reassertion of Beijing's sovereignty. During British governance, the rights necessary to exercise RBAs were subject to London's security considerations for public order and geopolitical interests.<sup>140</sup> These rights are now subject to Beijing's national security paranoia and autocratic ambitions. The 1997 handover was not just a territorial transfer but a handover of repressive measures that continued to exist under a different guise. Dishearteningly, the PRC's distinct conception of human rights condemned rights protections in the HKSAR to conflict with considerations of sovereignty, unity, and national security. The concept of "One Country, Two Systems" was never a sincere guarantee of autonomy for the HKSAR, but rather a statement that should have been met with scepticism. This is unsurprising, given that neither the JD nor the BL contain any reprimand or rationale for the signatories to fulfil their obligations. Having examined the history and legal motivations underpinning the NSL, its effect on the exercise of RBAs to environmental protection can now undergo analysis.

### 3.2 Challenges to Environmental Advocacy Post-NSL

As of 31 January 2024, there have been 292 individual arrests, 159 indictments and 71 convictions under the NSL.<sup>141</sup> The breadth of these statistics is unsurprising, given the NSL's conflict with the requirement of legal certainty.<sup>142</sup>

Four principal offences were introduced under NSL Chapter III:<sup>143</sup>

1. Secession – attempts to withdraw the HKSAR from the PRC;<sup>144</sup>
2. Subversion – undermining the authority of the central government;<sup>145</sup>
3. Terrorism;<sup>146</sup> and

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<sup>139</sup> Amy Stein, 'Rule of Law v Rule of Law: The Doomed Fate of Hong Kong's Autonomy' (2021) 17 Colum Undergraduate L Rev 43.

<sup>140</sup> Wu C and others (n.105), 195.

<sup>141</sup> 'Tracking the Impact of Hong Kong's National Security Law' (*ChinaFile*, 9 April 2024).

<<https://www.chinafile.com/tracking-impact-of-hong-kongs-national-security-law>> accessed 1 May 2024

<sup>142</sup> Office of the High Commissioner for Human Rights (OHCHR), joined by 7 mandates, Communication on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, 1 September 2020, UN Doc. OL CHN 17/2020, 2.

<sup>143</sup> NSL (n.1) Ch. III.

<sup>144</sup> Ibid, Art. 20-21.

<sup>145</sup> Ibid, Art. 22-23.

<sup>146</sup> Ibid, art.24-28.

#### 4. Collusion with foreign or external forces.<sup>147</sup>

These offences incur a maximum penalty of life imprisonment and criminalise acts that are considered a danger to the HKSAR's security and, by extension, Beijing's authority. Beyond this, the NSL revived the colonial offence of sedition which outlaws violence, disaffection, and other offences against the government.<sup>148</sup> It can be argued that these offences are necessary to fulfil the HKSARG's constitutional obligation to enact its own national security legislation pursuant to BL article 23.<sup>149</sup> The NPCSC emphasised the necessity of this obligation to protect rights and the rule of law in the HKSAR.<sup>150</sup> NSL articles 4<sup>151</sup> and 5<sup>152</sup> would appear to demonstrate the sincerity of this justification, stating that all rights shall be protected, including those within the ICCPR.<sup>153</sup> Indeed, the development of laws that limit fundamental rights has previously been considered proportionate to address global security concerns in the wake of 9/11.<sup>154</sup> This is a position that Beijing itself has asserted in defence of the NSL.<sup>155</sup> From a constitutional and security perspective, the NSL's necessity appears justifiable, aligning with contemporary rule of law.

However, national security is often subject to political interpretation and lacks a universally accepted definition.<sup>156</sup> Extensive reporting by international human rights organisations and the FCDO have demonstrated that the absence of a definition within the NSL has created dangerously vague offences.<sup>157</sup> This view is widely shared by the international community, with the UN Human Rights Office expressing ongoing concerns about the NSL.<sup>158</sup> They rightly emphasise that ambiguously worded legislation can result in "discriminatory or arbitrary

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<sup>147</sup> Ibid, Art. 29–30.

<sup>148</sup> Crimes Ordinance (Cap. 200) s. 9.

<sup>149</sup> BL (n.124), art. 23.

<sup>150</sup> Consulate General of the Peoples Republic of China in Edinburgh, 'Embassy Spokesperson on the Legislation on Article 23 of the Basic Law of Hong Kong' (*Edinburgh China Consulate*, 20 March 2024) <[http://edinburgh.china-consulate.gov.cn/eng/zygsgfyr/202403/t20240320\\_11262852.htm](http://edinburgh.china-consulate.gov.cn/eng/zygsgfyr/202403/t20240320_11262852.htm)> accessed 2 May 2024.

<sup>151</sup> NSL (n.1), art. 4.

<sup>152</sup> Ibid, Art. 5.

<sup>153</sup> Ibid, Art. 4.

<sup>154</sup> Connor Gearty, 'Liberty and Security' (2013) 6 European Human Rights Law Review 660.

<sup>155</sup> Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 Comparative Education 187, 199.

<sup>156</sup> New Books Network, 'Roberts R S, The War on the Uyghurs' (24 March 2021) <<https://newbooksnetwork.com/the-war-on-the-uyghurs>> accessed 25 January 2024.

<sup>157</sup> The International Service for Human Rights 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022) <[https://ishr.ch/wp-content/uploads/2022/09/ISHR\\_Report-Impact-of-HK-National-Security-Law\\_web.pdf](https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf)> accessed 3 May 2024; Secretary of State for Foreign, Commonwealth and Development Affairs, 'The Six-Monthly Report on Hong Kong: 1 July to 31 December 2023' (15 April 2024), 4 – 6.

<sup>158</sup> UN Human Rights Committee, 'Concluding observations on the fourth periodic report of Hong Kong, China' (11 November 2022) UN Doc CCPR/C/CHN-HKG/CO/4.

interpretation and enforcement which could undermine human rights protection”.<sup>159</sup> The PRC have responded to these concerns by arguing that the “rights and freedoms of Hong Kong residents are better protected in a safer and more orderly environment”<sup>160</sup> under the NSL. Despite these claims, seminal prosecutions since 2020 have conveyed an alternate reality to the official position maintained by Beijing.

Cases tried under the NSL have consistently undermined the rights necessary for the effective implementation of RBA approaches to environmental protection. The NSL has been employed to incarcerate protestors, restrict free expression by sentencing accredited professionals for their publications, and curtail press freedom by charging pro-democracy media persona, Jimmy Lai, for his criticisms of the PRC and HKSARG.<sup>161</sup> In 2021, his independent news outlet, *Apple Daily*, was ordered to cease operations.<sup>162</sup> Although Lai’s prosecution has received significant attention due to his status, many other independent journalists and media outlets have become targets under the NSL.<sup>163</sup> The closure of a sustainable transport news website run by environmental activist James Ocdken is a significant example, as research indicates that press freedom coincides with greater environmental protection.<sup>164</sup> Restricting access to information contributes to a lack of public and political support for environmental action and policymaking. Undoubtedly, press freedom, expression, and access to information have been primary targets under the NSL.

Provisions of the NSL have also targeted free association, public participation, and peaceful assembly. Notably, the Hong Kong National Party was banned for its pro-independence advocacy,<sup>165</sup> while numerous pro-democracy activists continue to be imprisoned for expressing

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<sup>159</sup> Colville R, ‘Press Briefing Note on China / Hong Kong SAR’ (*United Nations Human Rights Office of the High Commissioner*, 3 July 2020) <<https://www.ohchr.org/en/press-briefing-notes/2020/07/press-briefing-note-china-hong-kong-sar?LangID=E&NewsID=26033>> accessed 3 May 2024.

<sup>160</sup> Constitutional and Mainland Affairs Bureau, ‘Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review’ (23 December 2023), 2.

<sup>161</sup> HKSAR v Lai Chee Ying [2020] HKCFI 3161, para [4].

<sup>162</sup> ‘Hong Kong: Apple Daily Closure Is Dark Day for Press Freedom’ (*Amnesty International*, 8 August 2022) <<https://www.amnesty.org/en/latest/news/2021/06/hong-kong-apple-daily-closure-is-press-freedom-darkest-day-2/>> accessed 4 May 2024.

<sup>163</sup> Chan Miu Ling E, ‘The Fate of Hong Kong’s Journalists under China’s Rule: Seven Stories of Broken Dreams, Perseverance and Hope’ (*Reuters Institute for the Study of Journalism*, 30 June 2022) <<https://reutersinstitute.politics.ox.ac.uk/fate-hong-kongs-journalists-under-chinas-rule-seven-stories-broken-dreams-perseverance-and-hope>> accessed 4 May 2024.

<sup>164</sup> Grundy T, ‘Transport News Site Transit Jam Becomes Latest Hong Kong Outlet to Close’ (*Hong Kong Free Press HKFP*, 9 May 2023) <<http://hongkongfp.com/2023/05/09/transport-news-site-transit-jam-becomes-latest-hong-kong-outlet-to-close/>> accessed 4 May 2024.

<sup>165</sup> Richardson S, ‘China: Hong Kong Party Banned’ (*Human Rights Watch*, 27 October 2022) <<https://www.hrw.org/news/2018/09/25/china-hong-kong-party-banned>> accessed 4 May 2024.

their views against the government and judiciary.<sup>166</sup> Recently, forty-seven activists were charged with subversion after holding unofficial pre-election polls to choose opposition candidates for LegCo elections.<sup>167</sup> These judgments contravene international human rights standards, which state that national security cannot be invoked as a reason to limit rights to express different political views or other human rights under the ICCPR.<sup>168</sup> Accordingly, NSL prosecutions are not a proportionate restriction of fundamental rights. The NSL's impact on civil society's ability to exercise the rights necessary for RBAs is far-reaching and indisputable. Although international consensus has been attained regarding this perspective, no specific assessment has been conducted to evaluate the NSL's impact on environmentalism.

In the years preceding the NSL's promulgation, the HKSAR's environmental governance shifted from a state-driven approach to a more inclusive model enabling participation from nongovernmental organisations and activist groups through various channels.<sup>169</sup> Previously, environmental policymaking was not prioritised.<sup>170</sup> However, following the handover, scholars observed that government management gained momentum<sup>171</sup> as the new government adopted environmental policy initiatives.<sup>172</sup>

The introduction of the Environmental Impact Assessment Ordinance<sup>173</sup> and strategic environmental assessments<sup>174</sup> enabled public involvement in developing policies and strategies to identify and address environmental issues.<sup>175</sup> Yet, despite efforts to increase public engagement in environmental governance, their prevalence has been limited. This can be ascribed to the fact that provisions concerning economics and the region's relationship with Mainland China are more detailed in the BL than those concerning the environment.<sup>176</sup>

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<sup>166</sup> See for example, *HKSAR v Tam Tak Chi* [2021] HKDC 506; *HKSAR v Ma Chun Man* [2022] 5 HKLRD 246.

<sup>167</sup> *HKSAR v. Ho Kwai Lam* [2023] HKFCI 541.

<sup>168</sup> UN Economic and Social Council, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (September 28, 1984) UN DOC E/CN.4/1985/4, 8-9.

<sup>169</sup> Steven Chung-Fun Hung, 'Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective', *Interest Groups and the New Democracy Movement in Hong Kong*, vol 1 (1st edn, Routledge 2018), 210.

<sup>170</sup> Stephen Wing Chiu et al., *The Dynamics of Social Movement in Hong Kong* (Hong Kong University Press 2000), 261.

<sup>171</sup> Benjamin L. Liebman, 'Autonomy through Separation: Environmental Law and the Basic Law of Hong Kong' (1998) 39 *Harvard International Law Journal*, 239.

<sup>172</sup> Chiu SW and others (n.191), 286.

<sup>173</sup> Environmental Impact Assessment Ordinance (Cap. 499).

<sup>174</sup> Stephen Tsang et al., 'Trust, Public Participation and Environmental Governance in Hong Kong' (2009) 19 *Environmental Policy and Governance* 99, 105.

<sup>175</sup> *Ibid.*

<sup>176</sup> Lisa A. Royce, 'The Basic Law of Hong Kong and Its Effects on the Environment' (2000) 9 *Currents: International Trade Law Journal* 55, 57.

Consequently, environmentalism has remained low on the political agenda. Scholars have observed that the limited opportunities to participate in policy development and distrust of the government have led residents to seek alternative methods of expressing their opinions and safeguarding their rights.<sup>177</sup>

Aside from criticising government policies through media outlets, public possession and mass demonstrations have been an invaluable mechanism for public participation in environmental issues.<sup>178</sup> Influential NGOs, notably Green Peace East Asia, have demonstrated the success of these methods in their campaigns to oppose projects that endangered the region's environment and biodiversity. For example, in 2010, the Secretary for the Environment responded to Greenpeace's "No Nuclear HK" campaign and released the demanded consultation report on nuclear power for input from HKSAR residents.<sup>179</sup> Again, in 2014, the organisation successfully influenced the withdrawal of an Initial Public Offering application from Hong Kong's Stock Exchange, which would have exacerbated overfishing in the Pacific Ocean.<sup>180</sup> These efforts would have proven unsuccessful without the campaigner's ability to exercise their rights to freedom of expression and association. The "proliferation of environmental groups" operating within the HKSAR since the 1990s<sup>181</sup> demonstrates the role of these rights in enabling environmental groups to demand action from the government successfully. Such efforts depict a prior era of influential public engagement in environmentalism that promoted environmental awareness.<sup>182</sup>

Alongside enabling activism and formulating policies promoting public engagement on environmental issues, the HKSAR has implemented numerous laws and regulations to combat the persistent issue of waste-induced pollution. For instance, the Shipping and Port Control Ordinance<sup>183</sup> prohibits sea pollution by oil from land-based and marine sources. Additionally, the Public Health and Municipal Services Ordinance<sup>184</sup> aims to prevent waste and remove litter from any location. While this indicates that the HKSAR has previously possessed a legal

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<sup>177</sup> Stephen Tsang et al. (n.174), 105.

<sup>178</sup> Ibid.

<sup>179</sup> Greenpeace, 'Achievements' (*Greenpeace East Asia*) <<https://www.greenpeace.org/eastasia/achievements/>> accessed 5 May 2024.

<sup>180</sup> Ibid.

<sup>181</sup> Steven Chung-Fun Hung, 'Interest Groups and the Democracy Movement in Hong Kong: A Historical Perspective', in Shiu Hing Lo (eds) *Interest Groups and the New Democracy Movement in Hong Kong* (1st edn, Routledge 2018), 213.

<sup>182</sup> Chiu SW and others, *The Dynamics of Social Movement in Hong Kong* (Hong Kong University Press 2000), 286.

<sup>183</sup> Shipping and Port Control Ordinance (Cap. 313).

<sup>184</sup> Public Health and Municipal Services Ordinance (Cap. 132).

framework that recognises environmental management's importance, it remains evident that environmental protection in the region has historically relied on the ability of civil society to exercise RBA associated rights.

The NSL has facilitated a significant decline in environmentalism in the region by terminating the government's previously responsive relationship with NGOs. There are increasing concerns that communicating with international organisations, even the UN, will be interpreted as colluding with foreign forces.<sup>185</sup> Many high-profile organisations such as Amnesty International have ceased operations and left the area due to fear of prosecution. This fearmongering arguably violates Principle 4 of the proposed Framework Principles on Human Rights and the Environment, which emphasises the importance of establishing an environment absent of threats and violence towards organisations involved in human rights and environmental issues.<sup>186</sup> The ongoing controversies surrounding the Northern Metropolis Plan and the Kau Yi Chau Artificial Islands projects, which aim to convert wetland and farmland for economic benefit with significant potential environmental harms,<sup>187</sup> have exposed the repercussions of limiting NGO autonomy. Notably, the HKSARG's decision to omit the public from the initial consultation<sup>188</sup> demonstrates that without NGOs exercising RBAs against these projects, Hongkongers' fundamental rights remain at risk.

However, this has not been the sole consequence of recent events. Peaceful environmental activism has undoubtedly waned. In one of the first approved demonstrations since the NSL's enforcement, protestors marching against a proposed land reclamation and rubbish processing project were required to wear numbered lanyards<sup>189</sup> in an Orwellian display of Beijing's control over the right to freedom of expression and assembly. Hong Kong police only authorised the protests on the condition that the organisers ensured it would not engage in any displays or

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<sup>185</sup> International Service for Human Rights, 'The National Security Law for Hong Kong: Impacts on Civic Space and Civil Society Engagement with the UN' (*International Service for Human Rights*, September 2022), 18 – 20 <[https://ishr.ch/wp-content/uploads/2022/09/ISHR\\_Report-Impact-of-HK-National-Security-Law\\_web.pdf](https://ishr.ch/wp-content/uploads/2022/09/ISHR_Report-Impact-of-HK-National-Security-Law_web.pdf)> accessed 5 May 2024.

<sup>186</sup> UNHRC Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' 'Framework Principles on Human Rights and the Environment', (24 January 2018) UN DOC A/HRC/37/59, 9.

<sup>187</sup> Curtis Lam, 'Hong Kong's Lantau Tomorrow Vision: How (Not) to Respond to Criticism as a Policymaker' (*Earth.Org*, 7 March 2023) <<https://earth.org/lantau-tomorrow-vision/#:~:text=The%20Lantau%20Tomorrow%20Vision%2C%20or,and%20the%20ongoing%20housing%20crisis.>> accessed 5 May 2024.

<sup>188</sup> Ibid.

<sup>189</sup> Jessie Pang, 'Hong Kong Police Keep Tight Tabs on First Authorised Protest in Years | Reuters' (*Reuters*, 27 March 2023) <<https://www.reuters.com/world/asia-pacific/hong-kong-police-keep-tight-tabs-first-authorised-protest-years-2023-03-26/>> accessed 5 May 2024.

speech deemed seditious.<sup>190</sup> Such control limits public awareness and engagement in environmental governance.

Since the reporting of this protest, actions by environmental groups have continued to decline, and activism has been limited to isolated cases of a reduced scale compared to the pre-NSL era. Few notable instances of post-NSL exercises of RBAs to environmental protection can be identified. These include animal welfare groups protesting City University's cattle importation plans,<sup>191</sup> environmental groups opposing land reclamation developments and the destruction of wetlands.<sup>192</sup> In 2024, only a dozen animal welfare activists were reported assembling outside the venue of the HKSAR International Fur Fair.<sup>193</sup> While it is reasonable to conclude that the NSL has affected RBAs to environmental protection in the HKSAR, it would be inaccurate to claim that environmental protection has become an explicit target of prosecution. The recent directive for environmental groups to sign a national security declaration marks the sole instance of direct targeting.<sup>194</sup> It is more accurate to conclude that RBAs to environmental protection have been an indirect victim of the NSL's chilling effect alongside all declining civil society activity since 2020.

While environmentalism has not been explicitly targeted, this conclusion should not diminish the significant decline in its prominence since the momentum it enjoyed following the handover. The NSL has exacerbated the de-prioritisation of environmental activism, which has been ever-present due to the overwhelming political issue of the Hong Kong–China identity struggle, through restricting rights essential to the effective exercise of RBAs to environmental protection. Without the freedom to express dissenting views, assemble protests, elect environmentally conscious politicians, or form unions to lobby for environmental rights, Hongkongers' capacity to protect their fundamental rights against environmental degradation

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<sup>190</sup> Ibid.

<sup>191</sup> Rural and New Town Planning Committee, 'Application for Permission Under Section 16 of the Town Planning Ordinance' (City University of Hong Kong represented by P.K NG & Associates (HK) Limited, 15 May 2020) RNTPC Paper No. A/NE-LT/662D, 13.

<sup>192</sup> Peter Lee, '11 Hong Kong Green Groups Boycott Closed-Door Gov't "briefing" over Proposed Lantau Artificial Islands' (*Hong Kong Free Press HKFP*, 14 February 2023) <<https://hongkongfp.com/2023/02/07/11-hong-kong-green-groups-boycott-closed-door-govt-briefing-over-proposed-lantau-artificial-islands/>> accessed 11 May 2024.

<sup>193</sup> Lo Hoi-ying, 'Hong Kong Fur Show Set to Open to Public for First Time despite Protest at Venue' (*South China Morning Post*, 22 February 2024) <<https://www.scmp.com/news/hong-kong/society/article/3252825/fur-and-fury-hong-kong-animal-rights-activists-protest-against-trade-show-calling-end-industry>> accessed 5 May 2024.

<sup>194</sup> Ying Cheung and Harry McKenny, 'Hong Kong Orders Funded Environmental Groups to Sign National Security Declaration' (*The Epoch Times*, 27 July 2023) <<https://www.theepochtimes.com/china/hong-kong-orders-funded-environmental-groups-to-sign-national-security-declaration-5387786>> accessed 5 May 2024.



is limited. To address these issues, it is imperative to critically analyse the potential for legal reform of the NSL, assessing whether the established impact on RBAs to environmental protection can be rectified and identifying the risks of persisting down the present path for human rights in the region in light of climate change.

## **4 Two Countries, One Future**

This section considers whether legal reform could mitigate the adverse effects of the NSL on civil society and RBAs to environmental protection. Section 4.1 will argue the NSL perpetuates anthropocentric policies which prioritise economic and political interests over concerns of environmental degradation. This misdirection endangers the region's climate targets and contradicts the NSL's objective of national security. Section 4.2 will address and critically evaluate the feasibility of repealing the NSL, noting the supremacy of the NSL over the BL, the erosion of judicial and electoral independence, recent legislative developments, and Beijing's response to UN condemnation to emphasise the rigidity of its stance to legal reform. It is concluded that sustained international pressure has proven ineffective and efforts to repeal the NSL to enable public participation in environmental decision-making to address the human rights implications of environmental degradation are unlikely to succeed.

### **4.1 Security at What Cost?**

The HSKAR's economic prosperity has come at the expense of significant environmental problems,<sup>195</sup> rendering it a "first world economy with a third world environment".<sup>196</sup> Economic freedom's threat to the region's environment has gradually intensified since the handover.<sup>197</sup> Rapid urbanisation and regulatory inertia have exacerbated severe concentrations of air pollutants, exceeding World Health Organisation air quality guidelines,<sup>198</sup> landfill saturation,<sup>199</sup>

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<sup>195</sup> See for example, Peter Hills and William Barron, 'Hong Kong: The Challenge of Sustainability' (1997) 14 Land Use Policy 41; Ka-Ho Mok and Maggie Lau, 'Changing Government Role for Socio-Economic Development in Hong Kong in the Twenty-First Century' (2002) 23 Policy Studies 107.

<sup>196</sup> Benjamin Liebman, 'Autonomy through Separation: Environmental Law and the Basic Law of Hong Kong' (1998) 39 Harvard International Law Journal 231, 239.

<sup>197</sup> Agboola MO and Alola AA, 'The Energy Mix-Environmental Aspects of Income and Economic Freedom in Hong Kong: Cointegration and Frequency Domain Causality Evidence' (2023) 12 Journal of Environmental Economics and Policy 63.

<sup>198</sup> Environmental Protection Department, The Government of the Hong Kong Special Administrative Region, 'Latest Annual Aqi' <<https://www.aqhi.gov.hk/en/annual-aqi/latest-annual-aqi.html>> accessed 6 May 2024.

<sup>199</sup> Ming Hung Wong, 'Integrated Sustainable Waste Management in Densely Populated Cities: The Case of Hong Kong' (2022) 2 Sustainable Horizons Article 100014, 1-2.

coastal plastic contamination,<sup>200</sup> and biodiversity loss.<sup>201</sup> Extreme weather and flooding further threaten the built environment, negatively impacting local food production and causing disease transmission.<sup>202</sup> As detailed in Part 1, jurisprudence increasingly recognises that these issues can endanger fundamental rights, including health,<sup>203</sup> food,<sup>204</sup> work,<sup>205</sup> education,<sup>206</sup> and life.<sup>207</sup>

As a Chinese Special Administrative Region, the HKSAR bears obligations mandated by the Paris Agreement.<sup>208</sup> The HKSAR appears to be actively pursuing its positive obligations to fulfil these mandates and safeguard its residents' human rights against environmental degradation. In 2021, the HKSARG introduced its Climate Action Plan, which delineates decarbonisation strategies, including energy-saving buildings, electric vehicle infrastructure, waste reduction, and net-zero electricity generation, to achieve carbon neutrality by 2050.<sup>209</sup> Notably, the plan emphasises the necessity of cooperation and support from civil society to realise these objectives.<sup>210</sup> As discussed, this requirement remains in conflict with the NSL's constraints on civil society's capacity to exercise RBAs. Consequently, despite ambitious decarbonisation plans, the political issue of 'Mainlandisation' has assumed priority over environmental concerns.

For instance, the HKSAR Education Bureau reforms mandate national security curricula across all subjects.<sup>211</sup> Academic freedom is now subject to Beijing's "programme of thought reform",<sup>212</sup> displacing opportunities to integrate climate literacy in favour of ideological conformity to central government directives. The increasing probability of producing a generation inadequately prepared to critically assess policy deficiencies or address systemic environmental failures is becoming apparent. Such divergences are alarming considering the 2023 IPCC report's conclusion that climate impacts are more extensive and severe than

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<sup>200</sup> YY Tsang et al., 'Spatial and Temporal Variations of Coastal Microplastic Pollution in Hong Kong' (2020) 161 *Marine Pollution Bulletin* Article 111765, 1.

<sup>201</sup> Wang X and others, 'Effects of Coastal Urbanization on Habitat Quality: A Case Study in Guangdong-Hong Kong-Macao Greater Bay Area' (2023) 12 *Land (Basel)* 34, 19.

<sup>202</sup> Emma Ferranti, Joanna Ho Yan Wong and Surindar Dhesi, 'A Comparison of Government Communication of Climate Change in Hong Kong and United Kingdom' (2021) 13 *Weather, Climate, and Society* 287, 13.

<sup>203</sup> ICCPR (n. 67) Art. 12.

<sup>204</sup> *Ibid*, Art. 11.

<sup>205</sup> *Ibid*, Art. 6.

<sup>206</sup> *Ibid*, Art. 13.

<sup>207</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 3

<sup>208</sup> Paris Agreement (n. 32).

<sup>209</sup> Hong Kong's Climate Action Plan 2050' (*CNSD.GOV.HK*, October 2021) <[https://cnsd.gov.hk/wp-content/uploads/pdf/CAP2050\\_booklet\\_en.pdf](https://cnsd.gov.hk/wp-content/uploads/pdf/CAP2050_booklet_en.pdf)> accessed 7 May 2024.

<sup>210</sup> *Ibid*, para 3.10.

<sup>211</sup> Edward Vickers and Paul Morris, 'Accelerating Hong Kong's Reeducation: 'mainlandisation', Securitisation and the 2020 National Security Law' (2022) 58 *Comparative Education* 199.

<sup>212</sup> *Ibid*, 200.

anticipated.<sup>213</sup> Critically, there is a greater than 50% probability that global temperature increase will surpass 1.5 degrees between now and 2040, indicating a significant risk of failing to attain the Paris Agreement’s objectives.<sup>214</sup> Unprecedented weather events<sup>215</sup> are expected to become increasingly frequent. These changes are already manifesting in the HKSAR, where climate projection data predicts a sustained worsening of conditions.<sup>216</sup> For instance, rising sea levels are anticipated to increase the threat of tropical typhoons,<sup>217</sup> such as Typhoon Haikui, which facilitated the HKSAR’s worst flash flooding in 140 years in September 2023.<sup>218</sup>

Ultimately, the HKSAR’s environmental policy framework is caught between progressive aspirations and political machinations. Despite nominal commitments to sustainability, the predominance of security narratives and “Mainlandisation” policies subordinates environmental protection to ideological and economic priorities. This undermines the very rights (assembly, expression, education) that enable RBAs, leaving climate responses technocratic and fragmented. Without legal reforms to reconcile security laws with environmental imperatives, the HKSAR risks perpetuating a governance model that entrenches ecological harm while eroding the civic freedoms necessary to combat it.

## 4.2 Pathways to Reform

Reform of the NSL is highly improbable due to two substantive factors: (a) the structural limitations within the HKSAR’s politico-legal framework, which compromise judicial independence and rule of law safeguards, and (b) the ineffectiveness of international pressure to effect change. These obstructions are symptomatic of the broader authoritarian turn in the jurisdiction, which fundamentally weakens RBAs to environmental protection by restricting legal and political space for reform.

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<sup>213</sup> Intergovernmental Panel on Climate Change, ‘Climate Change 2023: Synthesis Report. Summary for Policymakers’ (IPCC 2023), 7.

<sup>214</sup> Ibid, 9, Box SPM.1.

<sup>215</sup> Ibid, 12 – 13.

<sup>216</sup> Hong Kong Observatory ‘Climate Projections for Hong Kong’ (*Hong Kong Observatory (HKO) Climate Change*) <[https://www.hko.gov.hk/en/climate\\_change/future\\_climate.htm](https://www.hko.gov.hk/en/climate_change/future_climate.htm)> accessed 7 May 2024.

<sup>217</sup> Hong Kong Observatory ‘Mean Sea Level Projection for Hong Kong’ (*Hong Kong Observatory (HKO) Climate Change*) <[https://www.hko.gov.hk/en/climate\\_change/proj\\_hk\\_msl.htm](https://www.hko.gov.hk/en/climate_change/proj_hk_msl.htm)> accessed 7 May 2024.

<sup>218</sup> Gavin Blair and Richard Spencer ‘Hong Kong suffers worst flash flooding in 140 years’ *The Times* (8 September 2023) <<https://www.thetimes.co.uk/article/hong-kong-suffers-worst-flash-flooding-in-140-years-zt2tkp0zs>> accessed 7 May 2024.

The NSL has been subject to widespread condemnation from the United Nations,<sup>219</sup> European Parliament,<sup>220</sup> human rights organisations,<sup>221</sup> and Western nations,<sup>222</sup> who have collectively called for its immediate repeal and urged China to adhere to its international human rights obligations. Despite the passage of several years, the situation in the HKSAR remains unchanged; as previously concluded, civil society has experienced a significant decline. China's response to the concerns raised by UN expert bodies and other nations during the recent universal periodic review is telling. Its denial of the human rights violations documented in UN reports concerning the NSL demonstrates its rigid stance concerning the legislation<sup>223</sup> and the continued priority of mainland politics over environmental degradation. The absence of academic research examining the potential for repealing the NSL is indicative of the current outlook concerning the improbability of NSL reform.

“The existence of the rule of law and an independent judiciary” have historically set the HKSAR apart from the PRC.<sup>224</sup> Their role in constitutional review is necessary for protecting fundamental rights.<sup>225</sup> Accordingly, BL Article 11 requires that any law contradicting the BL be declared unconstitutional,<sup>226</sup> enabling reform. Despite the presence of this safeguard in the BL, the NSL raises doubts about its constitutionality, as it supersedes both the BL and other local HKSAR laws where they are inconsistent with the NSL. “Inconsistency” lacks a precise definition, facilitating arbitrary application.<sup>227</sup> Consequently, the NSL has limited the authority of domestic courts and judicial autonomy. The court of final appeal demonstrated this when stating that it cannot declare any provision of the NSL unconstitutional or invalid under the BL or BORO.<sup>228</sup> It cannot challenge the legislative acts of the NPC.<sup>229</sup>

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<sup>219</sup> OHCHR, joined by 7 mandates, Communication on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, 1 September 2020, UN Doc. OL CHN 17/2020, 2.

<sup>220</sup> Amnesty International Briefing, Hong Kong: In the Name of National Security: Human Rights Violations Related to the Implementation of the Hong Kong National Security Law (Amnesty International, 29 June 2021).

<sup>221</sup> European Parliament, ‘Deterioration of fundamental freedoms in Hong Kong, notably the case of Jimmy Lai’ Resolution P9\_TA (2023)0242 of 15 June 2023.

<sup>222</sup> ‘Joint Statement from the UK, Australia, Canada, and United States on Hong Kong, Foreign & Commonwealth Office <<https://www.gov.uk/government/news/joint-statement-from-the-uk-australia-canada-and-united-states-on-hong-kong>> accessed 7 May 2024.

<sup>223</sup> Constitutional and Mainland Affairs Bureau, ‘Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review’ (23 December 2023), 2.

<sup>224</sup> Steve Tsang and Jui-sheng Tseng, *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001), 1.

<sup>225</sup> Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (1st edn, Oxford University Press 2017), 137.

<sup>226</sup> BL (n.124), art. 11.

<sup>227</sup> NSL (n. 1) art. 62.

<sup>228</sup> *HKSAR v. Lai Chee Ying* [2021] HKCFA 3, para [32].

<sup>229</sup> *Ibid.*

The establishment of four extra-judicial bodies not subject to HKSAR courts<sup>230</sup> has further undermined the judiciary's independence by granting Beijing control over national security matters in the region.<sup>231</sup> Crucially, the NSL's vagueness can allow Beijing to exert this control where it deems necessary. For instance, the Committee for Safeguarding National Security (CSNS) can designate judges and reject those deemed to endanger national security,<sup>232</sup> strengthening Beijing's capacity to intervene in the HKSAR justice system. This indicates that the Mainland Chinese government has assumed supremacy over the HKSAR judiciary and, consequently, that the NSL is not subject to review for supposed incompatibility with human rights protections. These provisions contravene the rule of law, making legislative reform increasingly remote. Beijing has attained complete control of the local judiciary.

The obstacles to reform are exacerbated by the NSL's influence on electoral integrity. Post-NSL reforms have created a new Candidate Eligibility Review Committee to determine who is eligible to run in elections.<sup>233</sup> The evaluation process heavily relies on the opinions of the CSNS and background checks by the National Security Department, with no possibility of judicial review.<sup>234</sup> These modifications have resulted in the judiciary relinquishing its role as the final arbiter of electoral integrity and political opposition being precluded from participating in elections. This reinforces the compromises on the rule of law, the prospects for free and fair elections, and the right to participation. With the erosion of democratic institutions and an autonomous judiciary, the urgent need for the NSL's repeal cannot be addressed by the judiciary or politicians in the HKSAR.

While it is true that these provisions restrict the capacity of local courts and politicians to scrutinise the legitimacy of the NSL and advocate for change, this does not necessarily preclude the potential for legislative reforms altogether. Prospects for reform may still exist at the national level in China. Nonetheless, this argument appears unpersuasive, as it is unclear what could prompt the repeal of the NSL in Mainland China. According to BL Article 5, the HKSAR will be integrated into China in 2047,<sup>235</sup> and given that China already possesses its own national

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<sup>230</sup> Amy Stein, 'Rule of Law v Rule of Law: The Doomed Fate of Hong Kong's Autonomy' (2021) 17 Columbia Undergraduate Law Review 43, 63.

<sup>231</sup> Ales Karmazin, 'The Hong Kong National Security Law and the Changing Character of Rule in the China–Hong Kong Relationship' (2023) 59 China Report (New Delhi) 25, 30 – 31.

<sup>232</sup> *Ibid*, 35.

<sup>233</sup> Surabhi Chopra and Eva Pils, 'The Hong Kong National Security Law and the Struggle over Rule of Law and Democracy in Hong Kong' (2022) 50 Federal Law Review 292, 310.

<sup>234</sup> *Ibid*, 311–312.

<sup>235</sup> BL (n.124) art. 5.

security law,<sup>236</sup> there appears to be little incentive for the HKSAR or Beijing to act. Instead, it is more likely that both parties will continue to gradually implement the ‘Mainlandisation’ of the region rather than delay a complete integration of the HKSAR into China until 2047.

Furthermore, it is doubtful that any international actor could exert sufficient pressure on Beijing or the HKSAR to alter their position on this issue. Efforts by the UN and other organisations to date have demonstrated this. Despite sustained appeals for economic sanctions, previous academic studies indicate that measures such as the Hong Kong Autonomy Act<sup>237</sup> have proven ineffective.<sup>238</sup> Furthermore, while China has experienced economic challenges that could make it cautious of attracting sanctions,<sup>239</sup> its GDP and growth rate indicate that it remains a significant global economic power.<sup>240</sup> Consequently, the imposition of economic sanctions appears to be improbable, particularly at a time when the maintenance of positive diplomatic relations between China and the West is crucial to address global economic, security, and human rights threats such as climate change and escalating conflicts in Europe and the Middle East.

This conclusion is supported by the recent enactment of the Article 23 Law in the HKSAR.<sup>241</sup> This legislation exhibits a more direct historical lineage to the BL and repressive colonial law than the 2020 NSL and severely penalises further offences while bolstering the police’s powers and the executive’s authority to enact subsidiary legislation without oversight.<sup>242</sup> Under the shadow of the new legislation, the HKSAR has “gone quiet”.<sup>243</sup> Despite further calls for repeal

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<sup>236</sup> China National People’s Congress, National Security Law of the People’s Republic of China (passed at the 15<sup>th</sup> Meeting of the 12<sup>th</sup> National People’s Congress Standing Committee on 1 July 2015) Unofficial English translation available at <<https://digichina.stanford.edu/work/national-security-law-of-the-peoples-republic-of-china/>> accessed May 7 2024.

<sup>237</sup> Brendan Clift, ‘Hong Kong’s Made-in-China National Security Law: Upending the Legal Order for the Sake of Law and Order’ (2020) 21 The Australian Journal of Asian Law 1, 19.

<sup>238</sup> Justine Yu, ‘The United States’ Ineffective Response towards Hong Kong’s National Security Law’ (2022) 73 Hastings Law Journal 161,

<sup>239</sup> Anne Stevenson-Yang, ‘Opinion, China’s Dead-End Economy is Bad News for Everyone’ (11 May 2024) The New York Times <<https://www.nytimes.com/2024/05/11/opinion/china-economy-dead-end.html>> accessed 11 May 2024.

<sup>240</sup> United Nations Department of Economic and Social Affairs, Statistics Division, ‘Country Profile: China’ (United Nations, December 2023) <<https://unstats.un.org/unsd/snaama/CountryProfile?ccode=156>> accessed 11 May 2024.

<sup>241</sup> Instrument A305 Safeguarding National Security Ordinance (23 March 2024), English translation available at <[https://www.elegislation.gov.hk/hk/capA305!en?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/capA305!en?INDEX_CS=N)> accessed 11 May 2024.

<sup>242</sup> Amnesty International, ‘What is Hong Kong’s Article 23 Law? 10 Things You Need to Know’ (24 March 2024) <<https://www.amnesty.org/en/latest/news/2024/03/what-is-hong-kongs-article-23-law-10-things-you-need-to-know/>> accessed 11 May 2024.

<sup>243</sup> Amy Hawkins and Helen Davidson, ‘The old days are no more: Hong Kong goes quiet as security laws tighten their grip’ (*The Guardian*, 12 April 2024) <<https://www.theguardian.com/world/2024/apr/12/hong-kong-national-security-law-2020-impacts>> accessed 11 May 2024.

of the new law from international organisations<sup>244</sup> and the UN,<sup>245</sup> no substantive action has been taken, indicating that the HKSAR is not deemed important enough by any nation to take risks on in the present global environment. Coupled with constraints on academic freedom, limitations on freedom of expression, and the capacity of NGOs to interact with the UN, the potential for demanding accountability and reform through RBAs or otherwise is presently improbable and may result in imprisonment under the NSL. Unfortunately, a positive outcome for the protection of human rights appears increasingly unlikely. Given that such guarantees are not features of contemporary China, this shouldn't be surprising. As the HKSAR transitions towards reunification in 2047, these protections will no longer be features of the HKSAR. Within this context, the erosion of RBAs to environmental protection should not be seen as an isolated issue, but rather as part of a broader dismantling of the institutional structures required for environmental and human rights accountability.

## 5 Conclusion

This paper's findings demonstrate that balancing anthropocentric and ecocentric legislative action is necessary to address the erosion of fundamental rights and environmental degradation resulting from repressive legal systems. Integrating RBAs in litigation and policymaking can ensure the law protects both human and nonhuman interests. Regrettably, the undemocratic limits imposed on RBAs by the NSL in the HKSAR represent a regression to colonial era limitations on fundamental rights. These limitations align with China's authoritarian legal system more than the autonomous common law system that protected human rights under the "One Country, Two Systems" principle. Historical analysis demonstrates that the NSL is part of a politically driven lineage of colonial legal continuity and authoritarian governance in the HKSAR to ensure China's sovereignty and further facilitate the NSL's influence on environmental governance in the HKSAR.

The arbitrary application of NSL offences has criminalised the right to freedom of expression, association, assembly, and public participation, essential for the success of RBAs. This erosion of fundamental rights profoundly impacts environmental advocacy, limits the activities of NGOs, silences forms of expression, and suppresses political opposition. Although the NSL did not explicitly prosecute environmental activists, the law's chilling effect in imposing a

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<sup>244</sup> International Service for Human Rights, 'UN Voices Unanimously Condemn Hong Kong's New National Security Law' (28 March 2024) <<https://ishr.ch/latest-updates/un-voices-unanimously-condemn-hong-kongs-new-national-security-law/>> accessed 11 May 2024.

<sup>245</sup> OHCHR, joined by 6 mandates, Communication on the Safeguarding National Security Ordinance under article 23 of the Basic Law of Hong Kong, 22 March 2024, UN Doc. JOL CHN 5/2024.

culture of fear and self-censorship amongst educators, politicians, and the judiciary, has muted effective environmental campaigns and the mobilisation of civil society.

The PRC's political focus on the "Mainlandisation" of the HKSAR under the guise of fabricated internal threats to national security has diverted attention from the legitimate danger of environmental degradation. This misdirection undermines environmental protection efforts and threatens the realisation of human rights. The prospects for legal reform appear bleak given the present political environment, entrenched extrajudicial power structures, and the HKSAR's predetermined reunification in 2047. However, gradual changes might be realised through continual international support for local environmental organisations and activists.

Further research and discussions are required at the international level to determine alternative methods of holding China accountable to its human rights obligations; previous methods, including economic sanctions and UN recommendations, have proven ineffective. Future research must develop new strategies for environmental advocacy in restrictive political settings. Comparative studies of comparable regions under authoritarian rule could provide valuable conclusions concerning methods of promoting environmental protection under legal constraints.

If preserving national security is of paramount importance for the PRC, it would be prudent for Beijing to recognise that anthropocentric legislation, such as the NSL, perpetuate environmental degradation in the pursuit of economic and political stability. The PRC would be fatally unwise to overlook the fact that "there are no human rights on a dead planet".<sup>246</sup> Equally, on a dead planet, there is neither security nor authority for the PRC.

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<sup>246</sup> Kumi Naidoo, 'Human Rights and the Climate Crisis: International and Domestic Legal Strategies' (2020) 25 *UCLA Journal of International Law and Foreign Affairs* 1, 5.