



**HONG KONG BAR ASSOCIATION**

**PROPOSED NATIONAL SECURITY LAW**

**(Q & A)**

**(19 JUNE 2020)**

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## LIST OF ABBREVIATIONS

Basic Law	Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
Central People's Government	Central People's Government of the People's Republic of China
Decision	Decision of the National People's Congress to Establish and Improve a Legal System and Enforcement Mechanism for the Hong Kong Special Administrative Region to Safeguard National Security
HKBOR	The Hong Kong Bill of Rights
HKBORO	Hong Kong Bill of Rights Ordinance (Cap. 383)
HKSAR	Hong Kong Special Administrative Region
HKSAR Government	The Government of the Hong Kong Special Administrative Region
ICCPR	International Covenant on Civil and Political Rights
Johannesburg Principles	Johannesburg Principles on National Security, Freedom of Expression and Access to Information
Legislative Council	Legislative Council of the Hong Kong Special Administrative Region
Liaison Office	Liaison Office of the Central People Government in the Hong Kong Special Administrative Region
NPCSC	Standing Committee of the National People's Congress
Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
UK	United Kingdom of Great Britain and Northern Island

## Q1. What is national security legislation?

- In various jurisdictions, national security legislation has been introduced to protect legitimate national security interest from threats such as espionage, sabotage and terrorism. Whilst the exact scope of legislation varies across different jurisdictions, such legislation usually seeks to criminalize certain acts which threaten the country's national security.
- For instance, in the UK, a person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned, or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature.<sup>1</sup>
- Acts of espionage, sabotage and terrorism are commonly prohibited in national security laws around the world, for instance in Australia<sup>2</sup>, New Zealand<sup>3</sup>, Canada<sup>4</sup>, Malaysia<sup>5</sup>.
- Importantly, there are international principles governing the scope of national security legislation and its impact on the protection of human rights, notably the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (“**the Johannesburg Principles**”), and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (“**the Siracusa Principles**”) (see Q9 below).
- In general terms, under the Johannesburg Principles, a restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial sovereignty against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government (Principle 2).

<sup>1</sup> *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at §16 *per* Lord Slynn.

<sup>2</sup> Section 90.4 of the Criminal Code Act 1995.

<sup>3</sup> Section 2(1) of the New Zealand Security Intelligence Service Act 1969 (now repealed), as amended by the New Zealand Security Intelligence Service Amendment Act (No 2) 1999. See also section 58(2) of the Intelligence and Security Act 2017.

<sup>4</sup> Section 2 of the Canadian Security Intelligence Service Act 1984. See also section 2(1) of the Security of Canada Information Disclosure Act 2015.

<sup>5</sup> Section 4(a) of the National Security Council Act 2016.

- Similarly, under the Siracusa Principles, “national security” may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force (Principle 29). It cannot be invoked merely to prevent local or relatively isolated threats to law and order (Principle 30), or be used as a pretext for measures aimed at suppressing opposition to systematic violation of human rights or at perpetrating repressive practices against the people (Principle 32).

In Canada, for instance, the law expressly provides that lawful advocacy, protest or dissent is not prohibited unless carried on in conjunction with an activity that undermines national security.<sup>6</sup>

<sup>6</sup> Section 2(1) of the Security of Canada Information Disclosure Act 2015.

## **Q2. HKSAR is not a nation, does the HKSAR have to enact national security legislation and why?**

- Article 23 of the Basic Law provides that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.
- Accordingly, the HKSAR has a constitutional obligation to enact domestic laws to prohibit the acts stated in Article 23 of the Basic Law.
- Where domestic laws are to be enacted under Article 23 of the Basic Law, the human rights safeguards in the International Covenant on Civil and Political Rights (“**the ICCPR**”) which is a constitutional instrument entrenched under Article 39 of the Basic Law (see below) must be observed. The public debate in 2003 on legislative bill to implement Article 23 of the Basic Law focused on concerns over the infringement of personal liberties and fundamental rights of the draft legislation.
- It is to be noted that existing criminal offences in the HKSAR already cover most of the activities prohibited by Article 23 of the Basic Law. For instance, whilst acts of treason and subversion are prohibited by sections 2 and 3 of the Crimes Ordinance (Cap 200), sedition is prohibited under sections 9 and 10 thereof.

### Q3. Is the current proposed legislation to be enacted under Article 23 of the Basic Law?

- No.
- According to the “Decision of the National People’s Congress to Establish and Improve a Legal System and Enforcement Mechanism for the Hong Kong Special Administrative Region to Safeguard National Security” (“**the Decision**”), the Standing Committee of the National People’s Congress (“**the NPCSC**”) shall draft a national law to be added to Annex III of the Basic Law and applied to the HKSAR via promulgation. This means that the legislation will not be enacted by the Legislative Council of the HKSAR.
- Under Article 23 of the Basic Law, the obligation of the HKSAR is to enact domestic laws to prohibit the offences stated thereunder.
- It is to be noted that some of the acts to be prohibited under the proposed national security law are additional to those set out under Article 23 of the Basic Law or use different wording for some other acts. For instance, whilst Article 23 of the Basic Law mandates domestic laws to prohibit any act of “...subversion against the Central People's Government”, the Decision authorizes the NPCSC to draft a law to prohibit “subversion against the regime” (顛覆國家政權). Another example is the prohibition of terrorist acts that endanger national security (組織實施恐怖活動等嚴重危害國家安全的行為), which is not expressly referred to under Article 23.
- It is noted that the scope of the proposed legislation is exceedingly broad, and may cover finance, economy, communications, and even connection and collaboration between religious organizations and NGOs with foreign religious bodies and NGOs (non-governmental organisations). It may even cover normal academic collaboration between local universities and foreign bodies.
- Further, according to the Decision, when necessary, relevant national security organs of the Central People’s Government will set up agencies in the HKSAR to fulfill relevant duties to safeguard national security, which is not a matter covered under Article 23 of the Basic Law.

Subject to the final text of the national security legislation, one concern is that where the HKSAR shall be required to enact domestic laws to implement Article 23 of the Basic Law, whether there will be any conflict or inconsistency with the proposed national security law.



#### **Q4. How will the proposed law be made?**

- According to Article VI of the Decision<sup>7</sup>, the NPCSC is authorized to formulate the relevant law. The NPCSC shall then decide to include the aforesaid relevant law, which will be a national law of the People's Republic of China, in Annex III of the Basic Law, which shall be promulgated and implemented locally by the HKSAR.

<sup>7</sup> “Decision of the National People's Congress to Establish and Improve a Legal System and Enforcement Mechanism for the Hong Kong Special Administrative Region to Safeguard National Security”

**Q5. What is the status of the law to be added to Annex III of the Basic Law once made?**

- Under Article 18 of the Basic Law, national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region. They will then form part of the laws of the HKSAR.
- The NPCSC may add to or delete from the list of laws in Annex III (which will be elaborated in Q7).
- Annex III contained 6 pieces of national laws when the Basic Law was promulgated in 1990. Over the years, there have been 4 decisions to add to or delete from the list. At present, Annex III contains 13 pieces of national laws.<sup>8</sup>
- Amongst them, the followings are enacted through promulgation:
  1. Resolution of the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
  2. Resolution on the National Day of the People's Republic of China
  3. Declaration of the Government of the People's Republic of China on the Territorial Sea
  4. Nationality Law of the People's Republic of China
  5. Regulations of the People's Republic of China concerning Consular Privileges and Immunities
  6. Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone

1. Resolution of the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
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3. Declaration of the Government of the People's Republic of China on the Territorial Sea
4. Nationality Law of the People's Republic of China
5. Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities
6. Law of the People's Republic of China on the National Flag
7. Regulations of the People's Republic of China concerning Consular Privileges and Immunities
8. Law of the People's Republic of China on the National Emblem
9. Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone
10. Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region
11. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf
12. Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks
13. Law of the People's Republic of China on the National Anthem

7. Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region
  8. Regulations of the People's Republic of China concerning Consular Privileges and Immunities
  9. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf
- The Law of the People's Republic of China on the National Flag applies in Hong Kong through domestic legislation, namely, the National Flag and National Emblem Ordinance (Instrument A401). The Law of the People's Republic of China on the National Anthem also applies locally through domestic legislation, namely, the National Anthem Ordinance (Instrument A405), which has recently been passed in the Legislative Council and came into force on 12 June 2020.
  - The HKSAR Government intends to implement the Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks. However, such national law has not yet been applied through domestic legislation.
  - Laws listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by the Basic Law.
  - It is noteworthy that the former Secretary of Justice Mr. Rimsky Yuen Kwok-keung in 2015 said that national security laws were not within these categories.<sup>9</sup>

<sup>9</sup> LC Paper No. CB(4)878/15-16, para. 14

## Q6. What is promulgation?

- National laws are to be given effect in the HKSAR “by way of promulgation or legislation by the Region”.
- The Basic Law does not define the term “promulgation”. However, past experience shows that the Chief Executive will directly give notice in the *Gazette* to “promulgate” the laws without first tabling the relevant bills in the Legislative Council for three readings. Under this category, national laws are applied verbatim.
- Since 1997, there have been three occasions when the laws listed in Annex III are enacted by way of promulgation. In the Promulgation of National Laws 1997 (Instrument 402), 5 national laws were promulgated. In the Promulgation of National Laws (No. 2) 1997 (Instrument 403), 3 national laws were promulgated. In the Promulgation of National 1998 (Instrument 404), one national law was promulgated.
- The question as to whether a national law is to be implemented via local legislation made by the Legislative Council or whether it is to be promulgated was explained by the former Secretary for Constitutional Affairs, Mr. Michael Suen Ming-yeung, who advised in 1999 that if a national law which needs to be amended or adapted locally before it could be applied in the HKSAR, that law would be applied through legislation by the Legislative Council. Otherwise, the laws concerned would be applied by way of promulgation. If appropriate, a local law may also be enacted to complement the application of a certain national law in the HKSAR.<sup>10</sup>

<sup>10</sup> Official Record of Proceedings, 10 February 1999

## Q7. Would the public be consulted before a national law is promulgated?

- No. The public will not be consulted before a national law is promulgated.
- Article 18(3) of the Basic Law expressly provides that:  
*“The Standing Committee of the National People’s Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region.”*
- Hence, before a national law is added to or deleted from Annex III of the Basic Law, the NPCSC is only required to consult (i) the Basic Law Committee and (ii) the HKSAR Government.
- The Basic Law Committee is a working committee within the NPCSC, so there is no information with regard to the consultation mechanism and procedure between the two.
- The mechanism and procedure adopted by the HKSAR Government when being consulted by the NPCSC was discussed in a Legislative Council meeting on 10 February 1999, during which the then Secretary for Constitutional Affairs advised that:
  - (1) Based on the nature and content of that particular provision of the national laws, the bureaux and departments of the HKSAR Government as well as the Department of Justice will examine carefully whether that particular provision of the national laws relates to defence, foreign affairs or other laws outside the limits of the autonomy of the HKSAR as provided by the Basic Law. They would also consider whether that national law in question would have any practical or substantial effect on the HKSAR; and
  - (2) If any of the national laws to be added to Annex III of the Basic Law is to have substantial effect on the HKSAR, the matter will be brought up for discussion in the relevant panels of the Legislative Council, and the matter will also be consulted with the legal circle or other parties concerned.
  - (3) As to whether the HKSAR Government had any right to object to a proposed application of a national law, the answer is less clear. The then Secretary for Constitutional Affairs simply advised that opinion could be raised to the NPCSC if

it was found upon examination and consultation that the national law could not be added to Annex III of the Basic Law.

- It is not a requirement that the public has to be consulted directly before a national law is promulgated.

## Q8. Would the public be consulted on the proposed national security law?

- The national security law is expected to be applied in the HKSAR by way of promulgation. As discussed in the answer to the last question, Article 18(3) of the Basic Law does not require the NPCSC to consult the public before adding a national law to Annex III of the Basic Law and the promulgation procedure does not engage public consultation, although the HKSAR Government's past practice was to consult relevant government departments, relevant panels in the Legislative Council and the legal profession.
- However, it is to be noted that in the previous occasions when national laws were promulgated, the national laws in question relate to status of persons (e.g. Nationality Law of the People's Republic of China) or territory (e.g. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf). The Garrison Law relates to the obligations of the Chinese Garrison in the HKSAR. These laws do not affect the personal rights and liberties of residents of the HKSAR.
- From what have been provided by the government officials so far, it appears that there will be no formal public consultation in the HKSAR on the national security law. For instance:
  - (1) On 30 May 2020<sup>11</sup>, when being asked whether the public will be consulted on the national security legislation, the Secretary for Justice Teresa Cheng yuek-wah said public consultation is not a requirement in the Decision and under Article 18 of the Basic Law.
  - (2) On 3 June 2020<sup>12</sup>, the Chief Executive Mrs. Carrie Lam Cheng Yuet-ngor said central authorities will seek opinions from various sectors in the HKSAR via forums and other channels. For instance, the Legislative Council President Mr. Andrew Leung Kwan-yuen, legal experts, and local delegates to the national parliament, and the Chinese People's Political Consultative Conference will be consulted. The Chief Executive also added that the Central People's Government departments will also be organising forums in Shenzhen and Beijing to hear the views of academics and others.
  - (3) On 6 June 2020<sup>13</sup>, when being asked whether there will be a public consultation on the national security law, the Secretary for Labour and Welfare Mr. Law Chi-kwong said emphasis should not be placed on the form of the public consultation. He added that there

<sup>11</sup> <https://news.rthk.hk/rthk/ch/component/k2/1529274-20200530.htm>

<sup>12</sup> <https://news.rthk.hk/rthk/en/component/k2/1530001-20200603.htm>

<sup>13</sup> <http://app3.rthk.hk/special/pau/article.php?aid=3996>

are means for the public to voice their opinions and they will not go unnoticed. He queried the usefulness of a formal public consultation given the poor atmosphere in the society. Mr. Law explained that public consultation was conducted during the Article 23 legislation because it was a local legislation, and this is different from the national legislation procedure currently undertaken.

- In the current circumstances, given that the proposed new law will directly affect the individual rights and liberties of the HKSAR residents, the lack of proper public consultation is surprising, worrying and unprecedented.



**Q9. It has been said that freedoms usually enjoyed have to be restricted for the sake of national security. Is that the law?**

- The ICCPR<sup>14</sup> is one of the most important international human rights treaties. All parties to the ICCPR have obligations under international law to protect and respect certain fundamental rights and freedoms.
- The ICCPR as applied to the HKSAR continues to be in force in the HKSAR by virtue of Article 39 of the Basic Law. The Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBORO**”) implements the ICCPR in the HKSAR and therefore has constitutional force pursuant to Article 39 of the Basic Law. The Hong Kong Bill of Rights (“**HKBOR**”) in the HKBORO reproduces much of the ICCPR.
- Together with other guarantees of fundamental rights in Chapter III of the Basic Law, the ICCPR and the HKBOR form the bedrock of human rights protection in Hong Kong’s legal system.
- The ICCPR guarantees a number of fundamental rights and freedoms usually enjoyed by everyone, including the rights to life, freedom from torture or cruel, inhuman or degrading treatment and punishment, freedom of opinion and expression, privacy, and so on.
- In particular, Articles 14 and 15 the ICCPR (reproduced in Articles 10 to 12 of the HKBOR) contains a number of fundamental rights relating to the criminal process, such as the right to a fair hearing, the right to be presumed innocent until proved guilty, and protection against double jeopardy. It also provides for a number of “minimum guarantees” for a defendant in the criminal process, such as the right to be informed of the nature and cause of the charge against him, the right to defend himself in person or through legal assistance of his own choosing, and the right not to be compelled to testify against himself or to confess guilt.
- Moreover, the ICCPR prohibits retroactive criminal offences and punishment (Article 15(1) of ICCPR; Article 12(1) of HKBOR). This essentially means that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. This will be elaborated in greater detail under Q10 below.

<sup>14</sup> The International Covenant on Civil and Political Rights

- Some of the rights in the ICCPR are absolute in nature. This means they cannot be restricted in any circumstance. An example is the right to freedom from torture or cruel, inhuman or degrading treatment or punishment.
- Most other rights in the ICCPR are, however, non-absolute in nature. They can be restricted, but only subject to certain conditions. One such condition is that any restrictions to these rights must be prescribed by law. Generally speaking, this means they must be contained in laws that are certain and accessible.
- Another condition is that any restrictions to non-absolute rights must be justified upon the “proportionality test”. This means they must (1) pursue a legitimate aim; (2) be rationally connected with such an aim; (3) be no more than necessary in pursuit of such an aim; and (4) strike a fair balance between the societal interest pursued and the individual rights infringed.
- All domestic legislation in the HKSAR must comply with the above conditions if they restrict any (non-absolute) rights in the ICCPR and the HKBOR.
- Normally, in an appropriate case, Hong Kong Courts can examine whether a statutory provision in domestic legislation unjustifiably restricts any rights under the HKBORO, which has constitutional force by virtue of Article 39 of the Basic Law. If so found, they could declare such a provision to be unconstitutional and invalid.
- For example, in *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, the Court of Final Appeal held that a blanket restriction on professional legal representation in police disciplinary proceedings is incompatible with the right to fair hearing under Article 10 of the HKBOR. The Court therefore declared that the provisions which imposed such a restriction under the Police (Discipline) Regulations (Cap. 232A) are inconsistent with Article 10 of the HKBOR and Article 39 of the Basic Law and are unconstitutional, null, void and of no effect.
- While national security can sometimes be a legitimate aim for some restrictions of rights under the ICCPR (except for absolute rights), such restrictions must never be disproportionate or otherwise unjustified. The Hong Kong Courts, in assessing whether rights restrictions are unjustified, would take into account various factors, such as the importance of the aim pursued, the rationality of the measure in place, the importance of the right infringed and the extent of infringement.

- For example, in *A v Secretary of State for the Home Department* [2004] UKHL 56, the UK House of Lords found that a statutory power to indefinitely detain foreign terrorist suspects without trial was disproportionate to the pursuit of national security, and therefore declared the power to be incompatible with the Human Rights Act 1998. Even in grave terrorist situations, the Court nonetheless emphasized the prime importance of personal freedom as a fundamental right.
- Further helpful guidance on this question can be found in the Siracusa Principles and the Johannesburg Principles. They are widely considered to be authoritative by the international human rights community, including by various human rights bodies at the United Nations.
- For example, under Principle 29 of the Siracusa Principles, national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. This is similarly the case under Principle 2(a) of the Johannesburg Principles.
- Moreover, under Principle 6 of the Johannesburg Principles, expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.
- In conclusion, under the ICCPR and the HKBORO, national security can justify certain restrictions to certain rights, but only upon certain conditions. Whether the national security law that is now being drafted will comply with all such conditions remain to be seen.

## Q10. What is non-retrospectivity in criminal law?

- A retroactive law is a law that makes criminal or punishable or otherwise expressly apply to an act done before the law came into force.
- Retroactive laws can present a serious risk of offending the rule of law. It is part of the “core principle” of the rule of law as described by Lord Bingham that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.<sup>15</sup>
- There had previously been controversial retroactive laws, such as those relating to the retroactive imposition of taxes. An example is the Buyers Stamp Duty, which was first announced by the HK Government in October 2012. The implementing legislation – the Stamp Duty (Amendment) Ordinance 2014 – was enacted only in February 2014 but was expressly made to come into effect from October 2012 onwards. There is no prohibition against this kind of retrospective legislation<sup>16</sup>.
- However, retroactive criminal laws are a very different matter. In the HKSAR, there is an express prohibition under the HKBOR and the ICCPR on laws that retroactively create criminal offences or impose heavier criminal punishment.
- This prohibition is contained in Article 12 of the HKBOR, which reproduces Article 15 of the ICCPR. As mentioned above, the HKBOR and the ICCPR have constitutional force in the HKSAR by virtue of Article 39 of the Basic Law.
- Article 12(1) of the HKBOR provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed.”
- The only express exception to Article 12(1) of the HKBOR is in relation to criminal offences under international law, such as war crimes. This exception is contained in Article 12(2) of the HKBOR.
- The prohibition on retroactive criminal offences is of essential importance to human rights protection. It is “non-derogable” under the ICCPR and the HKBORO (Article 4(2), ICCPR;

<sup>15</sup> Lord Bingham, *The Rule of Law* (Penguin Books Ltd, 2010), p.8

<sup>16</sup> *Wong Chak Sin v The Collector of Stamp Revenue* [2016] 1 HKLRD 981

section 5(2)(c), HKBORO). This means that, even in time of public emergency which threatens the life and existence of the nation, the HK Government still cannot derogate from this prohibition on retroactive criminal offences.

- Any provision in domestic legislation which violates Article 12(1) of the HKBOR and Article 15(1) of the ICCPR would be unconstitutional and invalid. For example, in 1999, the Court of Final Appeal struck down such a provision in the Immigration (Amendment) (No 3) Ordinance 1997<sup>17</sup>.

<sup>17</sup> *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4

**Q11. Will the proposed national security law comply with the ICCPR?**

- As noted in the answer to a previous question (Q.9), the ICCPR is entrenched under Article 39 of the Basic Law.
- One principal question concerning the proposed national security law is whether such a law will be subject to the human rights protection under the ICCPR as applied to the HKSAR or the human rights provisions in the Basic Law.
- Both the Basic Law and the proposed national security law are national laws. On 15 June 2020, the Deputy Director of the Hong Kong and Macau Affairs Office, Mr. Deng Zhonghua said the national security law is “unchallengeable” and no local laws of the HKSAR are allowed to contradict the national security law.
- If the national security law is considered to have higher status than the Basic Law (as it is “unchallengeable”), the human rights provisions under the ICCPR may not be considered as applicable to the proposed national security law.

**Q12. Will the Courts in the HKSAR be able to ensure the proposed national law is consistent with the Basic Law and comply with the ICCPR?**

- There is no clear answer to this.
- Under Article 18 of the Basic Law, any national laws which can be added to Annex III of the Basic Law and applied in the HKSAR shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified by the Basic Law.
- Under Article 19, the Courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. Thus, if and insofar as a case under the proposed national security law involves an act of state such as defence and foreign affairs, such case may fall outside the jurisdiction of the Courts of the HKSAR.
- Even if the Courts of the HKSAR enjoy jurisdiction over cases under the national security law, questions may arise as to how the Courts are to interpret the law, being a national law enacted by the NPCSC. The Secretary for Justice said in her blog on 14 June 2020 that: “It is impracticable and unreasonable to expect that everything in a national law, the National Security Law, will be exactly as what a statute in the HKSAR common law jurisdiction would be like”. This further raises the degree of uncertainty brought by the proposed new law.
- The mainland approach to statutory interpretation could take matters very broadly. One example is the interpretation of the oath-taking requirement under Article 104 of the Basic Law as an eligibility requirement of allegiance for candidacy to run for the election. More recently, the Liaison Office has argued that it is not a department of the Central People’s Government for the purpose of Article 22 of the Basic Law and that it enjoys a “supervisory power” over the internal affairs of the HKSAR.
- In general, the Courts of the HKSAR on the other hand adopt the common law approach to statutory interpretation, following the ordinary canons of statutory construction under the common law. Article 84 of the Basic Law also provides that the Courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the HKSAR as prescribed in Article 18 of the Basic Law and “may refer to precedents of other common law jurisdictions”.
- A question arises if a Court of the HKSAR were to, for example, substantially restrict as a matter of ordinary statutory interpretation the scope of an offence under the national security

law, or declare a provision in the national security law null and void for contravening the human rights protection in the Basic Law, the HKBOR and/or the ICCPR. If the NPCSC disagrees with the court decision, it may interpret afresh the relevant provision of the Basic Law under Article 158 of the Basic Law. Furthermore, under Article 45 of the Legislative Act of the People's Republic of China, the NPCSC has power to interpret the national security law, which is a national law. An interpretation of a national law has the same status as the national law itself under Article 50 of the Legislative Act of the People's Republic of China, and the Courts of the HKSAR will then presumably have to apply the national security law as interpreted by the NPCSC (particularly so if the NPCSC's interpretation is also added to Annex III of the Basic Law). In the end, the Courts of the HKSAR may not in substance enjoy any freedom in interpreting the national security law, and whether an offence or a provision complies with the Basic Law and the human rights guaranteed under the HKBOR and/or the ICCPR.



**13. Special Courts: could special courts be set up under the proposed national security laws to deal with cases prosecuted under the proposed national security law? Are there advantages or disadvantages in having special courts?**

- It has been suggested that there should be a special court or tribunal to handle cases about national security.
- This suggestion may possibly not comply with Article 81 of the Basic Law which provides:

*“The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts shall be established in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the Court of First Instance.*

*The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region.”*

- If the special court or tribunal operates by different principles under the proposed legislation, e.g. precluding trial by jury, this may also contravene Article 87 of the Basic Law which provides:

*“In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.*

*Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”*

- Moreover, Article 86 of the Basic Law provides:

*“The principle of trial by jury previously practised in Hong Kong shall be maintained.”*

- The principle of trial by jury that applied prior to the Basic Law coming into effect was that an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General (now the Secretary for Justice)<sup>18</sup>.
- However, the District Court has limited powers in imposing penalties, including that it cannot impose any imprisonment exceeding 7 years<sup>19</sup>. The High Court has no such limit on their sentencing powers. In other words, the principle in the HKSAR has always been that, unless tried by a jury in a High Court, no person can receive any sentence for imprisonment exceeding 7 years for any offence.
- It remains to be seen as what the maximum sentences would be under the impending national security law. However, if it could result in imprisonment exceeding 7 years, yet jury trial is precluded, then this would be a significant departure from previous criminal procedure.
- In addition to principles relating to trial by jury, there are other fundamental safeguards for the right of a defendant to a fair trial in, for example, the Criminal Procedure Ordinance (Cap. 221), as well as at common law. They include, for example, the prosecution's duty of disclosure, which has its foundation in the right to fair trial, as well as the principle of open justice<sup>20</sup>.
- Finally, there are a set of minimum guarantees for a fair trial under Article 11 of the HKBOR, such as the right to examine, or have examined, the witnesses against him. Any departure from these minimum guarantees will be a major challenge to human rights protection in the criminal process under Hong Kong's legal system.
- There seems little justification for the setting up of a special court or tribunal in any event. National security law could cover activities that may also constitute ordinary crimes, such as arson or possession of offensive weapon. If a defendant is charged with the ordinary crimes, he will be tried by the ordinary courts. If he is charged for the same activities under national security law, he will be tried by a special tribunal. This would give rise to legitimate doubt of fairness and impartiality.

<sup>18</sup> *Chiang Lily v Secretary for Justice* (HCAL 42/2008, 9 February 2009) at paragraph 19

<sup>19</sup> Section 82(2), District Court Ordinance (Cap. 336)

<sup>20</sup> *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 at §143

**Q14. Special Judges: can or should foreign judges be excluded from hearing national security cases?**

- It has also been suggested that national security cases should only be tried by judges who have no foreign nationality and no right of abode in a foreign country.
- A nationality requirement for the appointment of judges would be inconsistent with Article 92 of the Basic Law, which provides that judges and other members of the Hong Kong judiciary shall be “chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions”. Under Article 88 of the Basic Law, judges in the HKSAR are appointed by the Chief Executive on the recommendation of the independent commission, namely, the Judicial Officers Recommendation Commission composed of local judges, persons from the legal profession and eminent persons from other sectors.
- Further, Article 82 of the Basic Law expressly permits the Court of Final Appeal to invite judges from other common law jurisdictions to sit on the Court of Final Appeal.
- Under the common law, judges take a judicial oath to administer the law fairly and impartially. This duty does not depend on his nationality. If there is any allegation of bias or conflicts of interests, this can already be handled under the existing system. Normally a foreign judge would recuse self if a national security issue arose and his or her nationality was an issue.
- If a nationality requirement is to require a judge to approach a case with patriotic principles, this will be an affront to the principle of judicial independence.

### **Q15. Mainland National Security Agency – what will it do in Hong Kong and will the personnel be bound by Hong Kong law?**

- The Decision<sup>21</sup> envisages that the mainland national security organization may, if necessary, set up a unit in the HKSAR to protect national security in accordance with law.
- On 15 June 2020, the Deputy Director of the Hong Kong and Macau Affairs Office, Mr. Deng Zhonghua said the Mainland Government shall assume jurisdiction over cases “*in very special circumstances*” and that the new Mainland security office in the city is an “*unequivocal demand*” of the government and will “*supervise*” enforcement of the new law.
- It is unclear what this unit would be, and it is uncertain whether it will be an office “set up in the Hong Kong Special Administrative Region by departments of the Central Government...” within the meaning of Article 22 of the Basic Law and whether the personnel at such unit will abide by the laws of the HKSAR.
- In the case of the Liaison Office, the HKSAR Government has now said that it is not an office set up by the Central People’s Government within the meaning of Article 22 of the Basic Law because it is a representative office of the Central People’s Government.
- The same label may be given to the national security unit in the HKSAR and it is uncertain whether the unit will be required to abide by the laws of the HKSAR, and whether the officers working for it will be immune from Court action or subject to scrutiny of the Legislative Council exercising its power under Article 73(5) and (6) of the Basic Law.<sup>22</sup>

<sup>21</sup> Decision of the National People’s Congress to Establish and Improve a Legal System and Enforcement Mechanism for the Hong Kong Special Administrative Region to Safeguard National Security

<sup>22</sup> Article 73 of the Basic Law provides:

“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

...

(5) To raise questions on the work of the government;

(6) To debate any issues concerning public interests;...”