

INTRODUCTORY NOTE TO THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON
SAFEGUARDING NATIONAL SECURITY IN THE HONG KONG SPECIAL
ADMINISTRATIVE REGION
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Introduction

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) was passed on June 30, 2020, by the Standing Committee of the National People's Congress (NPCSC).¹ It did not have immediate direct effect in the Hong Kong Special Administrative Region (HKSAR). After consulting the Committee for the Basic Law of the HKSAR (BLC) and the Government of the HKSAR (HKSARG), the NPCSC added the NSL to Annex III of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) before the Chief Executive of the HKSAR (Chief Executive) promulgated the NSL for local application.² All of this happened on June 30, enabling the NSL to enter into force at 11 p.m., just ahead of the twenty-third anniversary of the establishment of the HKSAR on July 1, 2020.³

Background

When the People's Republic of China (PRC) resumed the exercise of sovereignty over Hong Kong on July 1, 1997, it was contemplated Hong Kong would enact its own laws to protect national security, and the PRC's national security laws would not apply in Hong Kong. While pre-existing English offences of treason, sedition, and official secrets were adapted for continued application after July 1997, the Central People's Government (CPG) and HKSARG considered these laws as insufficient to meet the requirements of Article 23 of the Basic Law, which required the enactment of laws to prohibit treason, secession, sedition, subversion, theft of state secrets, and certain activities of foreign and local political organizations or bodies. An attempt to have the Hong Kong legislature pass a bill to implement Article 23 was aborted in 2003 when the HKSARG withdrew the bill after mass protests and a shift in political support of some pro-government legislators.⁴ As for anti-terrorism laws, Hong Kong enacted mainly terrorist financing laws after September 11, 2001, to adhere to the requirements of United Nations Security Council resolutions and recommendations of the Financial Action Task Force.⁵ Hong Kong did not have a general offence of terrorism before the passage of the NSL.

Subsequent Hong Kong administrations avoided the Article 23 issue due to a highly polarized Legislative Council. A civil disobedience movement, mainly involving young people, emerged in 2014 in protest against nomination restrictions imposed by the NPCSC on an official proposal to elect the Chief Executive by universal suffrage. In June 2019, widespread protests erupted resulting in violent clashes with the police over an extradition reform bill that would have enabled ad hoc extradition arrangements to be concluded with the Mainland, Macau, Taiwan, and other jurisdictions.⁶ Even after the bill was withdrawn, protests and violence continued resulting in considerable damage to public and private property, including the Legislative Council building, and conflicts not only between protesters and police but also amongst members of the public. As a result of concerns with the ongoing protests and violence and given the inability of the Hong Kong government to pass Article 23 legislation since 1997, the CPG decided to draft a national security law for Hong Kong and apply it locally pursuant to Article 18 of the Basic Law.

On May 28, 2020, the National People's Congress adopted a decision to improve the systems and mechanisms for Hong Kong to safeguard national security.⁷ The preamble to the decision noted recent activities giving rise to risks to national security including "advocacy for 'Hong Kong independence'" and foreign or external forces "flagrantly" interfering in Hong Kong's affairs and using Hong Kong to "carry out activities endangering national security." The National People's Congress empowered the NPCSC to

formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in order to effectively prevent, stop and punish acts and activities to split the country, subvert state power, organise and carry out terrorist activities and other behaviours that seriously endanger national security, as well as activities of foreign or external forces interfering in the affairs of the HKSAR.⁸

The Chief Executive was required to "regularly report to the CPG on the HKSAR's performance of the duty to safeguard national security, carry out national security education, forbid acts and activities of endangering national security in accordance with the law."⁹ The HKSARG still had to complete its task of implementing Article 23, the NSL being only a partial implementation.¹⁰

The NSL was not the first time Article 18 was used to promulgate a national law added to Annex III for direct application in Hong Kong. Laws listed in Annex III are "confined to those relating to defence and foreign affairs as well as other matters outside the limits" of the HKSAR's autonomy.¹¹ Other examples of national law applied locally by promulgation include those concerning Chinese nationality, the military forces stationed by the CPG in Hong Kong, and the international law of the sea as implemented by the PRC. The NSL, however, is the first promulgated national law providing for criminal offences, punishment, and police powers, also the first to be promulgated without any public disclosure of its draft terms, even to members of the BLC.

Contents of the Law

As a national law, the NSL prevails over local Hong Kong laws.¹² The NPCSC has the power of interpretation of the NSL,¹³ though in practice it is unlikely to override a judicial interpretation unless exceptionally necessary (see its practice in interpreting the Basic Law). It is noteworthy that Articles 4 and 5 provide, respectively, that "[h]uman rights shall be respected and protected in safeguarding national security" and the "principle of the rule of law shall be adhered to".

The NSL's 66 articles create new criminal offences, establish institutions to oversee national security policy and administer the new law, and provide for new procedures and police powers for the effective enforcement of the law. The four categories of new offences relate to secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security.¹⁴ Though drafted in the form of Chinese legislation, the NSL shows sensitivity to the common law traditions and principles of drafting criminal laws. However, punishment levels are severe, providing, distinctly from the perspective of Hong Kong criminal law, minimum terms of imprisonment of between ten years to life for principal offenders. Prescriptive extra-territorial jurisdiction is also conferred extensively.¹⁵

A new high level national security committee is established, chaired by the Chief Executive, but with CPG oversight in the role of the National Security Adviser.¹⁶ Decisions of the committee are not amendable to judicial review.¹⁷ Both the Department of Justice and Hong Kong Police Force must have new departments to handle national security cases.¹⁸ While no special courts are established, the Chief Executive must designate those judges and magistrates allowed to hear NSL cases.¹⁹ A new Mainland office of national security is established in Hong Kong.²⁰ In exceptional cases, such as where a case is complex and too difficult for the HKSAR to exercise jurisdiction, this new office will take over the case and apply Mainland laws for the arrest, trial and punishment of defendants.²¹ Acts of this office and its staff performed in the course of duty and in accordance with the NSL are not subject to Hong Kong's jurisdiction.²²

Persons charged with NSL offences are to be tried on indictment generally following existing procedures.²³ However, trials may exceptionally be closed to the media and public, jury trials may be replaced by trials presided over by three High Court judges, and certificate evidence binding on the court may be adduced.²⁴ New police powers to investigate national security offences are conferred on the Hong Kong police.²⁵ They are detailed in a set of Implementation Rules made by the Chief Executive in conjunction with the new Mainland office pursuant to Article 43 of the NSL and coming into operation on July 7, 2020.²⁶

Reaction to the Law

Many industrialized western nations reacted critically to the NSL, expressing concerns with the law's potential impact on human rights and Hong Kong's loss of autonomy. The United States imposed sanctions on Hong Kong and Mainland officials "for undermining Hong Kong's autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong."²⁷ The United States, United Kingdom, Canada, Australia, New Zealand, Germany, Finland, Ireland, and the Netherlands suspended their extradition treaties with Hong Kong because of the risk that a person extradited to Hong Kong might now be subjected to trial and punishment on the Mainland under Chinese laws.²⁸ Some countries, including the United Kingdom, Australia, Canada, United States, and Germany have indicated an intention to grant asylum or special visas to Hong Kong residents.

In the first Hong Kong judicial decision to consider the NSL, in the context of a *habeas corpus* application, the Court of First Instance held that courts "should continue to adopt the common law approach in the construction" of the NSL and provisions of the NSL ought "to be construed and applied, so far as reasonably possible, in a manner which is consistent with the protection of fundamental rights."²⁹

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¹《中華人民共和國香港特別行政區維護國家安全法》passed by the NPCSC on June 30, 2020 and gazetted in Hong Kong in the schedule to L.N. 136 of 2020 [hereinafter NSL].

² Basic Law, 29 I.L.M. 1511 (1990).

³ PROMULGATION OF NATIONAL LAW 2020, L.N. 136 of 2020.

⁴ See generally NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY (Hualing Fu, Carole Petersen & Simon NM Young eds., 2005) and CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW (Cora Chan & Fiona De Londras eds., 2020).

⁵ See Simon NM Young, *Security Laws for Hong Kong*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 357 (Victor Ramraj et al. eds., 2d ed. 2012).

⁶ See Albert H.Y. Chen, *A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders*, 49 HKLJ 419 (2019) and Johannes Chan, *Ten Days that Shocked the World: The Rendition Proposal in Hong Kong*, 49 HKLJ 431 (2019).

⁷ DECISION OF THE NATIONAL PEOPLE'S CONGRESS ON ESTABLISHING AND IMPROVING THE LEGAL SYSTEM AND ENFORCEMENT MECHANISMS FOR THE HONG KONG SPECIAL ADMINISTRATIVE REGION TO SAFEGUARD NATIONAL SECURITY, L.N. 135 of 2020 (unofficial English translation).

⁸ *Id.* ¶ 6.

⁹ *Id.* ¶ 5.

¹⁰ *Id.* ¶ 3.

¹¹ Basic Law, *supra* note 2, art. 18(3).

¹² NSL, *supra* note 1, art. 62.

¹³ *Id.* art. 65.

¹⁴ *Id.* arts. 20-30.

¹⁵ *Id.* arts. 36-38.

¹⁶ *Id.* arts. 12, 15.

¹⁷ *Id.* art. 14.

¹⁸ *Id.* arts. 16, 18.

¹⁹ *Id.* art. 44.

²⁰ *Id.* art. 48.

²¹ *Id.* arts. 55-59.

²² *Id.* art. 60.

²³ *Id.* art. 41.

²⁴ *Id.* arts 41, 46-47.

²⁵ *Id.* art. 43.

²⁶ IMPLEMENTATION RULES FOR ARTICLE 43 OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON SAFEGUARDING NATIONAL SECURITY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION, L.N. 139 of 2020. See also OPERATING PRINCIPLES AND GUIDELINES FOR APPLICATION FOR AUTHORIZATION TO CONDUCT INTERCEPTION AND COVERT SURVEILLANCE ISSUED PURSUANT TO SECTION 20 OF SCHEDULE 6 OF THE IMPLEMENTATION RULES FOR ARTICLE 43 OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON SAFEGUARDING NATIONAL SECURITY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION, G.N. (E.) 74 of 2020, July 7, 2020.

²⁷ "Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy", Press Release, U.S. Department of the Treasury (Aug. 7, 2020), <https://home.treasury.gov/news/press-releases/sm1088>.

²⁸ "List of Surrender of Fugitive Offenders Agreements (Legislative References)", Department of Justice, HKSAR Government, <https://www.doj.gov.hk/en/external/table4ti.html>.

²⁹ *Tong Ying Kit v. HKSAR* [2020] HKCFI 2133, ¶¶ 49, 38 (Aug. 21, 2020).