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The National Security Law of the HKSAR: A Contextual and Legal Study

Albert H.Y. Chen

Introduction

The adoption by the National People Congress (NPC) in May 2020 of a Decision on Safeguarding National Security in the Hong Kong Special Administrative Region (HKSAR), and the enactment shortly thereafter by the Standing Committee of the National People Congress (NPCSC) of the HKSAR National Security Law (NSL), were momentous events in the history of the HKSAR, marking a new era in the implementation of the "One Country, Two Systems" (OCTS) policy. Critics have suggested that these acts by the government of the People's Republic of China portend the end of OCTS. On the other hand, defenders of the Chinese action argue that, given the riots and turmoil Hong Kong had experienced in 2019, the imposition of the NSL was necessary and was designed to and likely to ensure the continued operation of OCTS.

This Chapter attempts to understand the nature, significance and implications of the NSL. Part I situates the Chinese action within the relevant constitutional, legal, political and historical contexts. Part II examines the NSL in the light of Chinese law relating to matters of national security. Part III considers the impact of the NSL on Hong Kong's existing law. Part IV concludes by reflecting on the significance and implications of the NSL in the context of the evolution of the OCTS policy and changing circumstances in Hong Kong.

I. The Legal and Political Context of the NSL

In this part of the Chapter, we seek to understand why the Chinese Central Authorities intervened to legislate on national security in the HKSAR in mid-2020. There are two related questions: Why did the intervention occur at this point in time? And why did the intervention take the form it did, i.e. the "two-step approach" of an NPC Decision followed by a law enacted by the NPCSC and applied to the HKSAR

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under Article 18 of the Basic Law (BL)? We shall begin by looking into the legislative history of the BL. This will be followed by a brief review of relevant developments since the BL began to be implemented in 1997.

Although this issue was not dealt with in the Sino-British Joint Declaration (1984), it was soon recognized during the process of BL drafting (in 1985–1990) that there was a need for certain Chinese laws to be applied to the HKSAR, and a need for laws in the HKSAR to protect China's national security. Provisions corresponding to what were eventually enacted as Articles 18 and 23 of the BL first appeared in the draft of Chapter 2 of the BL (on the Central-SAR relationship) presented to the fourth plenary session of the Basic Law Drafting Committee (BLDC) in April 1987.[1] Article 5 of this draft Chapter contained two alternative models for the application to the HKSAR of "laws enacted by the NPC and the NPCSC" (without indicating the subject-matters which such laws may deal with).[2] Article 12 provided that "the HKSAR shall make laws to prohibit any activity that splits the nation or subverts the Central People's Government."

In the revised draft of Chapter 2 presented to the fifth plenary session of the BLDC in August 1987, the revised Article 7 (on the application of Chinese laws in the HKSAR) limited the Chinese laws that could be applied to the HKSAR to those that related to foreign affairs or defence, or those that gave effect to national unity and territorial integrity and were outside the high degree of autonomy of the HKSAR. Article 12 required the HKSAR to legislate to prohibit any activity that "damages national unity or subverts the Central People's Government."

[1] *See* Basic Law Drafting Committee (BLDC) Secretariat, *Zhonghua renmin gongheguo Xianggang tebie xingzhengqu jibenfa qicao weiyuanhui quanti huiyi wenjian huibian* (Collection of Documents of Plenary Sessions of the HKSAR Basic Law Drafting Committee of the PRC 1985-1990), available at http://sunzi.lib.hku.hk/bldho/bldhoSearch.action; https://library.legco.gov.hk.

[2] In the papers for the fourth plenary session (*ibid.*), there was a footnote stating that some members of the BLDC suggested that such laws should be confined to those relating to defence and foreign affairs. During the discussion at the fourth plenary session, one suggestion was that such laws should relate to defence, foreign affairs or matters that were not within the high degree of autonomy of the HKSAR and that should be managed by the Central Authorities: *see* Han Dayuan, "The process of formation of Article 18 of the Basic Law of the HKSAR and its normative content" (2020) 1 *Faxue Pinglun* [Law Review] 14.

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At the seventh plenary session of the BLDC held in April 1988, the first draft of the BL was finalized and published for the first round of public consultation.[3] In Article 17 of this draft, the scope of the subject-matters dealt with by laws enacted by the NPC or NPCSC that could be applied to the HKSAR was the same as that formulated at the fifth plenary session. Article 22 followed the wording of draft Article 12 as formulated at the fifth plenary session.

Upon completion of the consultation exercise, the draft was fairly extensively revised; the second draft was adopted by the eighth plenary session of the BLDC in January 1989 and then published for a second round of consultation.[4] Article 18 of the second draft introduced a new mechanism of listing applicable "national laws" in an Annex III to the BL. Such national laws were limited to those relating to defence, foreign affairs and other matters not within the autonomy of the HKSAR. The revised Article 23 required the HKSAR to legislate to prohibit treason, secession, sedition and theft of state secrets.

In the final version of Article 18 of the BL adopted by the NPC in April 1990, the scope of subject-matters dealt with by national laws applicable to the HKSAR remains the same as that defined in the second draft. In the final version of Article 23 (BL23), acts to be prohibited include not only treason, secession, sedition and theft of state secrets, but also subversion (a word that had appeared before in the first draft of the BL), foreign political organizations' activities in the HKSAR and ties between local and foreign political organizations.

It may therefore be seen that two policies relevant to our present study were developed in the course of the drafting of the BL. First, one of the sources of HKSAR law should be national laws (or "laws made by the NPC or NPCSC"—an expression used in an earlier draft of Article 18) that concern defense,

[3] *The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions*), (Secretariat of the Basic Law Consultative Committee, April 1988).
[4] *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)* (Secretariat of the Consultative Committee for the Basic Law, February 1989).

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foreign affairs and other matters outside the autonomy of the HKSAR (which probably include "national unity and territorial integrity"—an expression used in an earlier draft of Article 18). Secondly, the HKSAR should discharge a constitutional duty to legislate to protect national unity and security and to prevent subversion of the regime in the Mainland. In a footnote to an earlier draft of BL23,[5] it was pointed out that the existing Crimes Ordinance (Cap 200) contained provisions on matters such as treason against Britain, but these provisions would not be applicable after 1997; hence the need to have new laws on national unity and security in the HKSAR. It is also noteworthy that at the time the BL was drafted, the mainland law on matters of national security took the form of the criminal law on "counter-revolutionary offenses."[6] "Offenses against national security" did not exist then; the concept of such offenses was only introduced in 1997 when a new Criminal Code of the People's Republic of China (PRC) was enacted. It was obvious that the concept of counter-revolutionary offenses, which was a uniquely socialist legal concept, was not appropriate for the HKSAR. Hence there was no question of applying existing mainland Chinese law on this matter to the HKSAR.

We now turn to post-1997 developments. The failed attempt to legislate to implement BL23 in 2002–2003 was well-known. Although it is widely believed that the resignation of Chief Executive (CE) Tung Cheehwa in early 2005 was largely a result of the BL23 episode, his successor Donald Tsang, elected in 2005 for the remainder of Tung's term and re-elected in 2007 to serve a full five-year term, did not make any attempt to re-introduce a BL23 Bill. Instead, he prioritized the project of political reform towards the goals of universal suffrage for the election of the CE and the whole of the Legislative Council (LegCo). It is noteworthy that during the Tsang era, the Central Authorities were willing to let the

[5] *Documents of the Fourth Plenary Sessions of the HKSAR Basic Law Drafting Committee of the PRC* (n 1 above), note to draft Article 12 of Chapter 2 (relationship between the Central Authorities and the HKSAR) of the Basic Law.
[6] *See* Chapter 1 (counter-revolutionary crimes) (Art 90–104) of the PRC Criminal Code enacted in 1979. In the new Criminal Code enacted in 1997, this Chapter was replaced by a new chapter on "crimes endangering national security"; the concept of counter-revolutionary crimes was thus removed from the Criminal Code.

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HKSAR move forward in the domain of political reform and democratisation without requiring or insisting that it should first fulfil its constitutional duty to implement BL23.

If no BL23 Bill was put forward during the Tsang era because of a lack of will, the lack of progress in this regard when Leung Chun-ying was the CE (2012–2017) was due to socio-political circumstances beyond the CE's control. Soon after Leung took office as CE, he was confronted by a social movement against the proposed "national education" curriculum in schools, which ultimately led to the curriculum reform being abandoned. As the timetable (set by the NPCSC in 2007)[7] for universal suffrage in the election of the CE stipulated 2017 as the target date, the "Occupy Central" movement unfolded in 2013 to press for "genuine universal suffrage," culminating in the actual occupation of Admiralty and other districts in autumn 2014. What opposition politicians condemned as a "fake universal suffrage" proposal was vetoed by LegCo in 2015.[8] The LegCo election of 2016 saw the rise of "localist" political forces. As a result of court proceedings and the NPCSC's interpretation of Article 104 of the BL issued in late 2016, six legislators in the "localist" and "pan-democrat" camps were disqualified for failing to comply with the oath-taking requirement in the BL.[9] With all these dramatic developments occurring, Leung was not able to devote much attention to the issue of BL23 during his term as CE.

When Carrie Lam campaigned for election as CE in 2017, her platform emphasized issues of economy and people's livelihood; she admitted that BL23 was not a priority for her. For many years, the HKSAR government's official stance was that the HKSAR had the constitutional duty to implement BL23, but the government did not have any timetable yet on this matter. This position was reiterated by Carrie

[7] *Decision of the NPCSC on Issues relating to the Methods for Selecting the Chief Executive of the HKSAR and for Forming the Legislative Council of the HKSAR in the Year 2012 and on Issues relating to Universal Suffrage*, available at https://www.legco.gov.hk/yr07-08/english/panels/ca/papers/ca0121-ppr071229-e.pdf.
[8] *See* Chen, Albert, "The Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013-15" (2016) 3 *Asian Journal of Law and Society* 189.
[9] *See* Chan, Johannes, "A Storm of Unprecedented Ferocity" (2018) 16(2) *International Journal of Constitutional Law* 373.

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Lam in her speech at the "National Security Day" seminar on 15 April 2019.[10] Instead of addressing the issue of Article 23 legislation, Lam's attention was diverted to the issue of extradition law by the Chan Tongkai incident.[11]

In 2019, a political storm in Hong Kong was generated by resistance to the creation of an institutional channel of extradition of Hongkongers to the Mainland. The anti-extradition movement resulted in the most severe and prolonged civil unrest in the history of the HKSAR,[12] unparalleled in the history of Hong Kong itself except possibly the riots of 1967. The intensity and scale of both peaceful and violent protests and their persistence for months despite Lam's decision to shelve the Extradition Bill and subsequently to withdraw the Bill revealed the depth and breadth of discontent in Hong Kong society with not only the Carrie Lam administration and the police action in quelling the riots, but also the political and constitutional arrangement of OCTS itself. The anti-government and anti-China sentiments expressed by protesters and the violence they resorted to, as well as the social movement to enlist foreign governments to put pressure on the Hong Kong and Chinese governments to accede to the protesters' "five principal demands," apparently convinced the Chinese authorities that decisive actions were required to quell the unrest and to fundamentally reverse these political trends in Hong Kong.

When it was announced in May 2020—to the surprise of the Hong Kong and international community—that the NPC was going to make a decision on national security in Hong Kong, it was disclosed that the Chinese authorities had already decided at the fourth plenary session of the Nineteenth Central Committee of the Chinese Community Party (CCP Central Committee) in November

[10] For the full Chinese text of the speech, *see* "Hong Kong should have the obligation to protect National Security—Full Script of Hong Kong Chief Executive Carrie Lam's Speech on 2019 National Security Day in Hong Kong Seminar", *Wen Wei Po*, 16 April 2019, p A12.

[11] *See* Chen, Albert, "A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders" (2019) 49 *Hong Kong Law Journal* 419.

[12] *See* generally Ibrahim, Z. and Lam, J. (eds), *Rebel City: Hong Kong's Year of Water and Fire* (Singapore: World Scientific, 2020); Lo, Sonny; Hung, Steven; and Loo, Jeff, *The Dynamics of Peaceful and Violent Protests in Hong Kong: The Anti-extradition Movement* (London: Palgrave Macmillan, 2021).

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2019 to take direct actions to safeguard national security in the HKSAR.[13] It was subsequently also disclosed that the Chinese authorities had considered several alternative courses of action for the purpose of achieving this objective.[14] It was eventually decided to adopt the "two-stage approach" of NPC decision followed by the NPCSC's enactment of a national security law for Hong Kong.

Although there was no official explanation of why this two-stage approach was chosen in preference to the other options, we may seek to understand the rationale or considerations behind this approach as follows. The original design of the BL was such that the HKSAR should enact laws to protect national security under BL23. However, the reality was that twenty-three years after the handover, the HKSAR had not yet discharged this constitutional duty. The circumstances revealed by the anti-extradition movement were such that there was now an urgent need to plug this legislative loophole and to put in place a set of laws on matters of national security such as secession and subversion.

Yet the socio-political situation in Hong Kong was such that it was now practically and politically impossible to get a BL23 Bill through LegCo. The resistance to any such legislative exercise would not be less than, but would probably even be stronger than, the widespread and violent resistance to the Extradition Bill. Indeed, when the proposed decision of the NPC on national security in the HKSAR was announced in May 2020, Carrie Lam publicly admitted that the HKSAR was not in a position to enact a BL23 law in the present circumstances.

The situation was therefore as follows. The Central Authorities had not instructed previous CEs to resurrect the BL23 exercise, probably because it was not perceived that there was an urgent need for a BL23 law to be enacted. The Central Authorities were willing to leave the timing of the BL23 exercise

[13] "*Wangchen Zuo Guanyu 'Quanguo Remin Daibiao Dahui Guanyu Jianli Jianquan Xianggang Tebiexingzhengqu Weihu Guojia Anquan de Falu Zhidu he Zhixing Jizhi de Jueding (Caoan)' de Shuoming*" [Wang Chen explains the Bill for Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security], *Xinhua News,* 22 May 2020, available at www.xinhuanet.com/politics/2020-05/22/c_1126019468.htm.

[14] *Ibid.*

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to the discretion of the CE. Apparently this was still the case at the time when Carrie Lam assumed office. But then the situation changed drastically during the anti-extradition movement. From the perspective of the Central Authorities, there was now an urgent need to put in place a set of national security laws and an effective enforcement machinery for them. However and ironically, the very circumstances that necessitated the national security laws had made it difficult for such laws to be pushed through LegCo in the midst of anticipated opposition in society. This explains why the Central Authorities considered that their direct intervention was the only viable option.

As I have explained elsewhere, the power to make national security laws applicable to the HKSAR is a concurrent power of the Central Authorities and the HKSAR rather than an exclusive power of the HKSAR.[15] It may not, strictly speaking, be necessary for the Central Authorities to adopt the two-stage approach. A single step of the application by the NPCSC of a national security law to the HKSAR under BL18 would suffice.[16] The two-stage approach involves the making of a decision by the NPC that sets out some basic principles and then authorizes the NPCSC to make a national security law for the HKSAR. The adoption of this approach may perhaps be understood as follows. The NPC is the supreme organ of state power in the PRC. It has the highest political and legal standing and speaks in a more authoritative voice than the NPCSC. The NPC has never acted with regard to the HKSAR since April 1990 when the NPC enacted the BL. The making of a decision on matters of national security in the HKSAR by the NPC itself is a solemn declaration that the content of the decision is of the highest possible legal and political authority within the PRC system. It removes any possible doubt from a legal or political standpoint regarding the constitutional and legal basis of a national security law made by the NPCSC and applied to the HKSAR under BL18.

[15] Chen, Albert, "Constitutional controversies in the aftermath of the anti-extradition movement of 2019" (2020) 50 *Hong Kong Law Journal* 609.
[16] *Ibid.*, pp 625–627.

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The preamble of the NPC Decision refers to both Articles 31 and 62 of the PRC Constitution. Article 31 is the article that provides for the existence of SARs and enables the NPC to decide on the systems to be practiced in an SAR. The NPC Decision may therefore be regarded as an act by the NPC to supplement the BL previously made by the NPC itself in response to the changing circumstances of Hong Kong. For example, the Decision expressly provides for the possibility of the establishment in the HKSAR by the Central Authorities of an organ specializing in national security protection in Hong Kong. This provides a firmer legal basis for such an organ and its activities than if the organ were established merely by a law made by the NPCSC without direct authorization by the NPC itself.

II. The NSL and Chinese law

The PRC Criminal Code promulgated in 1997 contains a chapter—actually the first chapter among many chapters on substantive offenses—on crimes against national security. In the Xi Jinping era, a very broad conception of national security and national security laws has been developed.[17] In theory, the Central Authorities could have chosen to apply some of these laws directly to the HKSAR under BL18. Fortunately—from the perspective of Hong Kong—the Central Authorities have not done so, but have chosen to introduce a national security law tailor-made for Hong Kong that is of limited scope or coverage. The drafting of the NSL drew mainly on the relevant mainland law rather than Hong Kong law or the common law. The NSL is significantly different from both the BL23 Bill in 2003 and the National Security Law enacted by Macau's legislature in 2009. In this part of this Chapter, we will demonstrate how the NSL can be understood as a product of the mainland legal system, but also

[17] The concept of national security embraces not only the security of the regime, national unity and territorial integrity, but also matters of economy, technology, information, society, culture, and the environment. Laws on national security include not only the National Security Law, but also other laws such as the Anti-Espionage Law, National Intelligence Law, Anti-Terrorism Law, National Defence Law, Anti-Secession Law, Law on Martial Law, Internet Security Law, Biological Security Law, etc. *See* generally Qiao Xiaoyang (ed), *Zhonghua Renmin Gongheguo Guojia Anquan Fa Shiyi* [Commentary on the PRC National Security Law] (Beijing: Law Press, 2016); Zheng Shuna (ed), *Zhonghua Renmin Gongheguo Guojia Anquan Fa Jiedu* [Understanding the PRC National Security Law] (Beijing: China Legal System Press, 2016)

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containing some provisions specially tailored for the HKSAR and its circumstances, particularly those that emerged during the anti-extradition movement of 2019.

The scope of the offenses to be covered by the NSL was specified in the NPC Decision. There were to be four categories of offenses: secession, subversion against the regime, terrorism and foreign interference with HKSAR affairs. These four categories overlap with but do not directly correspond to the seven kinds of acts to be prohibited under BL23. The NPC Decision expressly provides that the HKSAR should as soon as possible complete the task of legislating to protect national security as required by the BL. Official comments have confirmed that the HKSAR still has to legislate to fulfill the requirements of BL23 despite the enactment of the NSL.[18]

The relationship between BL23 and the NSL may perhaps be understood as follows. The NPC Decision authorized and required the NPCSC to legislate on four types of matters pertaining to national security that needed to be more urgently dealt with given the circumstances prevailing in Hong Kong. As for matters in BL23 that have not been covered by the NSL, the HKSAR still has the constitutional duty to legislate on them.

As regards the four categories of offenses covered by the NSL, only two—secession and subversion—correspond to subjects covered by BL23. As far as subversion is concerned, the NSL deals with subversion against the regime, which is broader than subversion against the Central People's Government under BL23. As indicated by Article 22 of the NSL, subversion against the regime includes subversion of the local SAR government.

As regards terrorism, this is not covered by BL23 at all. This subject was included in the NSL probably because some of the activities that occurred during the anti-extradition movement could be considered terrorist attacks in the sense that they were violent acts designed to intimidate the

[18] "*Guowuyuan Xinwenban Jiu Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa Youguan Qingkuang Juxing Fabuhui*" [State Council Information Office holds press conference on the Law of the PRC on Safeguarding National Security in the HKSAR], 1 July 2020, available at http://www.gov.cn/xinwen/2020-07/01/content_5523217.htm.

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government and members of the public and to force the government to accede to the protestors' demands.

As regards foreign interference in Hong Kong affairs, this overlaps with but is broader than the provision in BL23 prohibiting foreign political organisations from engaging in political activities in the HKSAR and prohibiting ties between Hong Kong and foreign political organizations. The inclusion in the NPC Decision of the prohibition of foreign interference in Hong Kong affairs can probably be explained by the fact that the anti-extradition movement was perceived by the Central Authorities as having the flavour of a "colour revolution" (aimed at subversion of the regime) that was supported by foreign political forces.[19] However, in the NSL that was eventually enacted, the concept of foreign interference in Hong Kong affairs was replaced by that of collusion with foreign forces to endanger national security, which is probably a narrower concept.

(a) Secession (NSL, Articles 20 and 21)

In the Chinese Criminal Code (CCC), "secession" and "incitement of secession" are both dealt with in Article 103, which is the second article of Chapter 1 (offenses against national security) of Part II ("special provisions", as distinguished from the "general provisions" in Part I) of the Code. The first article of Chapter 1—Article 102—concerns collusion with foreign states or foreigners to endanger the sovereignty, territorial integrity and security of the PRC (the offense in Article 102 may be translated as treason).[20]

In the NSL, Part 1 of Chapter 3 (offenses and penalties) consists of two articles: Article 20 (secession) and Article 21 (incitement of secession, assisting in, abetting secession, etc). On the basis of

[19] "*Gangaoban Jiu Xianggang Jushi Da Jizhe Wen*" [Hong Kong and Macau Affairs Office speaks to press on Hong Kong situation], *Chinese Review News,* 3 September 2019, available at http://hk.crntt.com/doc/1055/3/1/0/105531031.html?coluid=93&kindid=10095&docid=105531031.

[20] *See* Wang Aili (ed), *Zhonghua renmin gongheguo xingfa jiedu* [Understanding the PRC Criminal Law) (Beijing: China Legal System Press, 5th ed, 2018), p 159.

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a textual comparison of Article 103 of the CCC and Articles 20 and 21 of the NSL, and taking into account published commentaries on Article 103, the following observations may be made.

The core concepts and terms used on Articles 20 and 21 can be traced back to Article 103. Generally speaking, the two NSL Articles are expressed in more detailed language than Article 103. Also, part of the content of Article 20 is not covered by Article 103; Article 20 of the NSL may therefore be said to have a broader coverage (in terms of acts prohibited and punishable by the law) than Article 103 of the CCC.

Article 20 refers to "organising, planning, implementing [committing] or participating in implementing' activities that "split the nation" or "damage national unity." These words, with the exception of "participating in implementing," can also be found in Article 103. However, Article 20 is more detailed than Article 103 in that it elaborates the meaning of secession by specifying three kinds of circumstances: (1) separating the HKSAR or any other part of the PRC from the PRC; (2) altering by unlawful means the legal status of the HKSAR or any other part of the PRC; and (3) surrendering the HKSAR or any other part of the PRC to a foreign country. It seems that (1) and (3) are implicit in Article 103, while (2) is a new formulation that probably goes beyond what is already in Article 103 of the CCC.

Whereas (1) and (3) refer to the withdrawal of a piece of geographical territory from the PRC, (2) does not refer to territorial secession but to a change in the legal status of the HKSAR or any other part of China. Thus, an attempt to alter by "unlawful means" the status of the HKSAR as a SAR and give it a different constitutional status—even if still as a region within the PRC—may be covered by Article 20.

It is noteworthy that the penalty provision (which prescribes three penalty ranges depending on the circumstances) in the last paragraph of Article 20 is identical to that in Article 103. The terms used to express the penalty are those applicable in the PRC legal system rather than those used in Hong Kong. There is another provision in the NSL—Article 64—that provides for how these mainland-style penalties are to be "converted" into modes of punishment under Hong Kong's legal system.

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Article 103(2) of the CCC provides for the offense of incitement of secession, while Article 21 of the NSL deals with incitement as well as "assisting in, abetting or providing pecuniary or other financial assistance or property for the commission by other persons of" an Article 20 offense. The latter activities, though not expressly covered by Article 103(2), would also be punishable under the CCC as Chinese criminal law, like Hong Kong or English law, also provides for jointly committed offenses and accomplice liability.[21] As far as financial assistance is concerned, this is covered by Article 107 of the CCC.

As Articles 20 and 21 of the NSL were partly derived from and modelled on Article 103 of the CCC, published commentaries and case law on Article 103 may be relevant to our understanding of these NSL Articles.[22] Commentaries have pointed out that whereas incitement to secession under Article 103(2) may be committed by a lone person (inciting one or more other persons), secession under Article 103(1) is usually committed by a group of persons led by persons in some positions of importance or influence or by ethnic nationalists.[23] "Organising" means recruiting people and organising them into a group with a common purpose. "Planning" means developing plans of actions for the purpose of achieving the objective. "Implementing" refers to actually carrying out acts that have been planned. Thus, the three words refer to different stages in the execution of the criminal activities concerned.[24] It has also been pointed out that offenses under Article 103 may be committed even if the harmful consequence concerned has not materialized.[25] Thus, secession can be committed even if there is no actual splitting up of the nation; incitement to secession can be committed even if the persons incited are not persuaded to believe in the content of the incitement or do not commit the act incited.

[21] *See* PRC Criminal Code (1997), Art 25–29.
[22] For commentaries, *see* Wang, n 20 above, pp 161-163; Lang Sheng (ed), *Zhonghua Renmin Gongheguo Xingfa Shiyi* [Commentary on the PRC Criminal Law] (Beijing: Law Press, 6th ed, 2015), pp 116–117; Zhang Jun (ed), *Xingfa (fenze) JI Peitao Guiding Xinshi Xinjie (shang)* [Criminal Law (Specific Provisions) and Related Provisions (Part I)] (Beijing: People's Court Press, 2nd ed, 2011), pp 21–24.
[23] Wang, n 20 above, p 162; Lang, n 22 above, p 116; Zhang, n 22 above, pp 21-23.
[24] Wang, n 20 above, p 162; Lang, n 22 above, p 117; Zhang, n 22 above, p 21.
[25] Zhang, n 22 above, pp 21-22.

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There are some reported cases in mainland courts of convictions under Article 103, mainly for incitement and sometimes for secession itself.[26] One of the most publicized cases is that of 伊力哈木.土赫提(Ilham Tahti), lecturer at the Central Minzu University in Beijing and organizer of the "Uyghur Online" website, who was convicted of secession in 2014 and sentenced to life imprisonment.[27] Seven students at this University were also convicted for participating in secessionist activities and sentenced to three to eight years' imprisonment.[28] Most of the other reported cases were in the context of alleged separatists in Xinjiang and Tibet. Mere private communications of materials considered "sensitive" in such a context may amount to incitement to secession. The mainland case law is unlikely to be of much reference value in Hong Kong, since the provisions in the NSL on secession are more detailed in defining the elements of the offense, and Hong Kong courts may take into account human rights standards (as set out in the International Covenant on Civil and Political Rights) in interpreting the nature and scope of the offense.[29]

In particular, the offense under Article 21 of the NSL is more precisely defined and is probably narrower than the corresponding offense under Article 103(2) of the CCC. Whereas the latter refers generally to "inciting secession and damage to national unity," Article 21 refers to "inciting the commission of an offense under Article 20"; Article 20 refers to "organizing, planning, implementing or participating in implementing" the relevant activities with the requisite intention.[30]

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[26] I am grateful to Adrienne Lam, PhD student at the Faculty of Law, University of Hong Kong, for sharing with me relevant materials on secession cases in the PRC which will form part of her doctoral dissertation on issues of secession in Hong Kong.

[27] In 2019, the EU Parliament awarded the Sakharov Prize to Tohti. *See* "Sakharov Prize: Jailed Uighur academic Ilham Tohti wins award", *BBC*, 24 October 2019, available at https://www.bbc.com/news/world-asia-china-50166713.

[28] *See* generally information on the Ilham Tahti case at www.pkulaw.com.

[29] Art 4 and 5 of the NSL expressly give recognition to principles of human rights protection and Rule of Law. The Court of Final Appeal in *HKSAR v Lai Chee Ying* [2021] 1 HKC 344, para 41 held as follows: "NSL 4 and NSL 5 … which emphasi[z]e protection and respect for human rights and adherence to rule of law values while safeguarding national security, are also centrally important to the interpretation of the NSL generally."

[30] It is noteworthy in this regard that in *HKSAR v Tong Ying Kit* [2021] HKCFI 2200 – the only NSL case at the time of writing that has been tried and decided by the court, the Court of First Instance expansively interpreted the incitement provision in Article 21; such interpretation renders it not significantly different from Article 103(2) of the CCC. This case is on appeal to the Court of Appeal (CACC 175/2021).

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(b) Subversion (Articles 22 and 23)

The internal structures of Articles 22 and 23 of the NSL are similar to those of Articles 20 and 21 respectively. And the relationship between Articles 22 and 23 of the NSL and Article 105 of the CCC is similar to that between Articles 20 and 21 of the NSL and Article 103 of the CCC. The basic concepts and terms used in Articles 22 and 23 are derived from Article 105, but Articles 22 and 23 contain more detailed language and have a broader coverage than Article 105, except with regard to one element which makes the relevant NSL offenses narrower than those under Article 105. As in the case of penalties for secession, the relevant penalty provisions for subversion in the NSL and the CCC are also the same.

Article 105(1) provides for the offense of 'organizing, planning, and implementing subversion of the State's regime or the overthrow of the socialist system'. The related offense of incitement to subversion is provided for in Article 105(2), which refers to inciting subversion of the regime or the overthrow of the socialist system "by spreading rumours, defamation or other means."

These provisions may be compared with Articles 22 and 23. Like Article 105, Article 22 also refers to "organising, planning, implementing" particular activities (and adds "participating in implementing" the activities), but is narrower than Article 105 insofar as it provides that the relevant activities must involve the use of "force, threat of force or other unlawful means." The relevant activities must be intended to subvert the regime by one of four means: (1) overthrowing or undermining the basic system of the PRC established by its Constitution; (2) overthrowing an organ of the regime of the Central Authorities or an organ of the HKSAR political system; (3) interfering with, obstructing or undermining the discharge of functions and duties in accordance with law by an organ of the regime of the Central Authorities or an organ of the HKSAR political system; or (4) attacking or damaging the premises and facilities of an organ of the HKSAR political system so as to render it incapable of discharging its normal functions and duties.

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Among these four elements, elements 1 and 2 are probably implicit in Article 105. Insofar as elements 3 and 4 are probably not covered by Article 105, the subversion offense under Article 22 has a broader coverage than Article 105. However, unlike Article 105, the offense under Article 22 is limited to circumstances involving the use of "force, threat of force or other unlawful means." This requirement does not exist in Article 105.[31] Therefore, Article 22 is narrower than Article 105 as regards situations covered by elements 1 and 2 above.

This narrower scope of Article 105 is highly significant and reveals a legislative intent that the criteria for the criminalization of subversion in the HKSAR under OCTS need not be as strict (and entailed as broad a coverage) as those applicable in the Mainland. In mainland China, the offense of subversion and the related offense of incitement of subversion (both provided for in Article 105) have been used to prosecute critics of the regime,[32] advocates of political reform and democratization by peaceful means,[33] as well as *weiquan*—rights-defence—lawyers (also known as human rights lawyers) who mobilized

[31] Published commentaries on Art 105 point out that where the subversion involves an armed rebellion or armed riot, it will be dealt with under Art 104 (on organizing, planning or implementing an armed rebellion or armed riot). *See* Wang, n 20 above, p 166. It would appear that the offenses under both Art 104 and 105 of the CCC is in the case of Hong Kong covered by Art 22 of the NSL.

[32] It has been pointed out that Art 105 involves "crimes of expression" or "speech crimes". *See* Pils, Eva, *Human Rights in China* (Cambridge: Polity Press, 2018), pp 82–83. Teng Biao, a legal scholar and human rights advocate, wrote that those "convicted of crimes of 'subverting state power" are "political prisoners—prisoners of conscience". *See* Teng Biao, "The Political Meaning of the Crime of subverting State Power", in Beja, Jean-Philippe; Fu Hualing; and Pils, Eva (eds), *Liu Xiaobo, Charter 08 and the Challenges of Political Reform in China* (Hong Kong: Hong Kong University Press, 2012), p 271 at p 278. Another scholar pointed out that "In order to understand the nature of these prohibitions against subversion, one must recognize their roots in earlier laws covering 'counter-revolutionary' crime." *See* Rosenzweig, Joshua,"The Sky is Falling: Inciting subversion and the defense of Liu Xiaobo", in Beja, Jean-Philippe; Fu Hualing; and Pils, Eva (eds), *Liu Xiaobo, Charter 08 and the Challenges of Political Reform in China* (Hong Kong: Hong Kong University Press, 2012), p 31 at p 32. "Any word or act opposing the Communist Party or the government, opposing the official ideology, or opposing individual leaders' words or acts could all lead to a person being branded a 'counter-revolutionary'". *See* Teng Biao, "The Political Meaning of the Crime of subverting State Power", in Beja, Jean-Philippe; Fu Hualing; and Pils, Eva (eds), *Liu Xiaobo, Charter 08 and the Challenges of Political Reform in China* (Hong Kong: Hong Kong University Press, 2012), p 271 at p 273.

[33] E.g. Liu Xiaobo (convicted for incitement of subversion in 2009 and sentenced to eleven years' imprisonment; he was awarded a Nobel Peace Prize in 2010 and died in prison in 2017); Tan Zuoren (who advocated, among other causes, commemoration of the June 4th events; convicted for incitement of subversion in 2009 and sentenced to five years' imprisonment); Lee Mingcheh (a philosophy scholar in Taiwan arrested while visiting the mainland; convicted of subversion in 2017 and sentenced to five years' imprisonment).

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public criticism and protests against alleged abuse of power by the police,[34] NGO activists who fought for the rights of the under-privileged,[35] and "underground church" leaders.[36]

It is noteworthy that the limitation of relevant proscribed activities in Article 22 of the NSL to those involving "force, threat of force or other unlawful means" does not exist in Article 20 with regard to the secession offense. This shows that the legislative intent behind the NSL was to cast a wider criminalizing net with regard to secession than subversion. As far as the latter is concerned, "organising, planning, implementing or participating in implementing" potentially subversive activities is not criminalized so long as the activities concerned do not involve "force, threat of force or other unlawful means." The extent to which this expression limits the scope of Article 22 would depend crucially on whether "other unlawful means" is to be narrowly or broadly interpreted.[37]

Elements 3 and 4 mentioned above, which make the offense under Article 22 broader than the subversion offense under Article 105, were obviously included in Article 22 with a view to deterring certain actions that occurred in Hong Kong during the anti-extradition movement, such as protesters breaking into LegCo on 1 July 2019 and destroying many of its facilities, or large crowds of people on different dates during 2019 besieging the LegCo building, buildings which house offices of the HKSAR

[34] E.g. lawyers arrested during the "709 Crackdown" on 9 July 2015 and subsequently convicted of subversion (Zhou Shifeng, Hu Shigen, Zhai Yanmin, Guo Hongguo were all convicted in 2016. Zhou and Hu were sentenced to seven years' imprisonment, whereas Zhai and Guo were given suspended sentence; Wu Gan was convicted in 2017 and sentenced to eight years' imprisonment; Wang Quanzhang was convicted in 2018 and sentenced to four and a half years' imprisonment) or incitement of subversion (Jiang Tianyong was convicted in 2017 and sentenced to two years' imprisonment; Xie Yang was convicted in 2017 and exempted from punishment). Other well-known cases of human rights lawyers being convicted of incitement to subversion include Gao Zhisheng (sentenced to three years' imprisonment in 2011), Tang Jingling (convicted in 2016 and sentenced to five years' imprisonment), and most recently Yu Wensheng (convicted in 2020 and sentenced to four years' imprisonment). All information is available at www.chrlawyers.hk.

[35] E.g. the case of the NGO known as "Changsha Funeng," (長沙富能) in which Cheng Yuan, Liu Dazhi and Wu Gejianxiong were convicted for subversion and sentenced to imprisonment in 2021. I am grateful to my colleague Dr Zhu Han for drawing my attention to this case. See Han Zhu and Lu Jun, "The Crackdown on Rights-advocacy NGOs in Xi's China", *Journal of Contemporary China* (forthcoming).

[36] E.g. Wang Yi, founder and leader of the Qiuyu church in Chengdu, was convicted of incitement of subversion in 2019 and sentenced to nine years' imprisonment.

[37] *See* the discussion in the next paragraph of the case of the "primary election" in July 2019.

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government, police stations, and even the building of the Liaison Office of the Central People's Government in the HKSAR. Whether Article 22(3) may be used to convict opposition politicians who organized or ran as candidates in the unofficial "primary election" in July 2019 to select candidates for the September 2019 election is more arguable.[38] As they had threatened to veto the government's budget proposal in LegCo (so as to force the CE to dissolve LegCo and eventually to resign) if the government did not accede to the "five principal demands" of the anti-extradition movement, they were charged with conspiracy to commit an offence under Article 22(3).[39] Whether any prosecution against them would succeed depends crucially on what evidence as to "unlawful means" is produced at trial, and how "unlawful means" is to be interpreted by the court.[40]

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[38] Fifty-three persons were arrested on 6 January 2021 on the ground of suspected violation of Art 22 of the NSL in organizing the "primary election". *See* Wong, Brian, "All 53 Hong Kong opposition figures arrested under national security law released, except former lawmaker who failed to surrender BN(O) passport", *South China Morning Post,* 8 January 2021, available at https://www.scmp.com/news/hong-kong/law-and-crime/article/3116892/former-hong-kong-lawmaker-returned-jail-after-failing; Cheng, Lilian and Cheung, Tony ,"Hong Kong national security law: four big questions raised by mass arrests of 53 opposition figures", *South China Morning Post*, 9 January 2021, available at https://www.scmp.com/news/hong-kong/politics/article/3117010/hong-kong-national-security-law-four-big-questions-raised. Among the 53 persons, 47 were eventually charged with conspiracy to commit an offence under Art 22 (case number WKCC813/21): Wong, Natalie, "Opposition hit with subversion charges", *South China Morning Post*, 1 March 2021; Lau, Chris and Wong, Brian, "Hundreds gather at court as bail hearing commences", *South China Morning Post*, 2 March 2021. As of mid-August 2021, 13 of the defendants had been granted bail pending trial. For the bail judgments, see www.judiciary.hk, cases nos. HCCP 110/21, 111/21, 112/21, …, 118/21, 119/21, 120/21, 126/21, 134/21, 135/21, 136/21, 137/21, 141/21, 294/21, 417/21. The trial is expected to take place in the High Court.

[39] For the official position of the HKSAR government, *see* its press releases: HKSAR government, "HKSAR Government will not tolerate any offense of subversion", 6 January 2021, available at www.info.gov.hk/gia/general/202101/06/P2021010600675.htm; HKSAR government, "S for S speaks on police arrest of people on suspicion of subversion", 6 January 2021, available at www.info.gov.hk/gia/general/202101/06/P2021010600580.htm. The persons arrested were suspected of attempting to implement the "10-step plan for mutual destruction" (攪炒 *landchao*) proposed by former legal academic Benny Tai in an article published in *Apple Daily* on 28 April 2020: "*Zhen Lanchao Shibu, Zheshi Xianggang Xiuming*" ['真攪炒十步，這是香港宿命'; Ten steps for the true mutual destruction, this is the fate of Hong Kong], *Apple Daily*, 28 April 2020, available at https://hk.appledaily.com/local/20200428/MTCUWRHKCIZT2RJXAUP6W4TNXA/.

[40] In the absence of evidence of any criminal offense and any act attracting civil liability, the government is likely to argue that voting down the budget in LegCo irrespective of its content and with the sole purpose to bring down the government is an abuse of power akin to "misconduct in public office" and thus an "unlawful means" for the purpose of Art 22. For relevant legal discussion, *see* Kwok, Tony, "NSL arrests in the SAR fully supported by law, evidence", *China Daily (Hong Kong edition)*, 8 January 2021, available at https://www.chinadailyasia.com/article/154353 (arguing that the proposed veto of the budget in LegCo would constitute the common law offense of "misconduct in public office"); Cross, Grenville, "National security arrests: Criminal justice dominant throughout entire process",

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As regards Article 23, the wording is similar to that of Article 21. Like Article 21, Article 23 is more broadly worded than its mainland counterpart in Article 105(2) as Article 23 applies not only to incitement but also to "assisting in, abetting or providing pecuniary or other financial assistance or property for" subversion.[41] However, as far as incitement is concerned, the offense under Article 23 is more precisely defined and has a narrower coverage than Article 105(2). Whereas Article 105(2) criminalizes "incitement of subversion of the regime or the overthrow of the socialist system by spreading [rumors], defamation or other means," Article 23 applies only to incitement of the commission of an offense under Article 22, which requires an element of force, threat of force or other unlawful means. Thus, if there is no incitement of the use of force, threat of force or other unlawful means to achieve the subversive end, the offense under Article 23 cannot be established. This means that whereas in the Mainland, strong criticisms of its political system might amount to an offense under Article 105(2),[42] the same criticisms might not constitute an offense under Article 23 so long as the speech or writing concerned does not incite the commission of any offense as defined in Article 22.

As mentioned above, much depends on how "unlawful means" in Article 22 is to be interpreted. If the acts incited are to be committed in Hong Kong, there is little doubt that Hong Kong law should be used in determining what is unlawful. (It is arguable whether only the criminal law of Hong Kong is relevant in this regard, or whether a tort or other act which results in civil liability may also be considered an unlawful act for the purpose of Article 22. In the abovementioned case of the "primary election," an issue may be whether an alleged abuse of power by legislators is an unlawful act for the

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DotDotNews, 10 January 2021, available at https://english.dotdotnews.com/a/202101/10/AP5ffa7023e4b00123a56464cb.html; Henry Litton, "Mass arrests: the sinister aspect of democrats' '35-plus' primaries strategy for the Legco elections", *South China Morning Post*, 26 January 2021, available at https://www.scmp.com/comment/opinion/article/3119167/mass-arrests-sinister-aspect-democrats-35-plus-primaries-strategy. *See* also Cullen, Richard, "'35-plus' violates the spirit of HK Basic Law", *China Daily Global*, 23 July 2020, available at http://global.chinadaily.com.cn/a/202007/23/WS5f18e119a31083481725b78b.html .

[41] In the CCC, financial assistance for secession and subversion is criminalized by Art 107.

[42] *See* n 32 above and the accompanying text.

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purpose of Article 22.[43]) If it is intended that the acts incited are to be committed in Mainland (even though the incitement takes place in Hong Kong), it is arguable that mainland law should be used for the purpose of determining whether an "unlawful means" is involved for the purpose of Article 23.

(c) Terrorism (Articles 24-28)

The next few articles in the NSL deal with offenses relating to terrorism. Before investigating into these articles, the mainland law relating to terrorism may first be summarized. In the CCC, offenses relating to terrorism are provided for in Chapter 2 (offenses against public order) of Part II of the Code, which should be read together with the Anti-Terrorism Law.

The relevant CCC provisions underwent a process of development until they took their present form in 2015. When first enacted in 1997, the CCC already contained Article 120, which criminalizes the organizing of, leadership of and participation in "terrorist organizations" (which were not defined in the CCC itself). In 2001, under the third amendment to the CCC, this Article was revised to increase the penalty concerned. At the same time, Article 120(1) was introduced which criminalizes financial assistance to terrorist organizations or individuals engaged in terrorist activities.

Then, in August 2015, the ninth amendment to the CCC introduced additional articles relating to terrorism or "extremism." Finally, in December 2015, the Anti-Terrorism Law (ATL) was enacted by the NPCSC. The predecessor of this law was the Decision of the NPCSC on Several Questions relating to the Strengthening of Anti-terrorism Work promulgated in 2011.

The ATL provides definitions of terrorism, terrorist activities, terrorist organizations, terrorist personnel and terrorist incidents. The ATL establishes a "state organ for leadership of anti-terrorism work"(SOAT).[44] The public security department (police), the national security department and the

[43] *See* n 40 above and the accompanying text.

[44] This is the State Council's organ entitled the 國家反恐部工作領導小組 *Guojia Fankong Bu Gongzuo Lingdao Xiaozu* [Leading Group on the State's Anti-terrorism Work], available at https://baike.baidu.com/item/%E5%9B%BD%E5%AE%B6%E5%8F%8D%E6%81%90%E6%80%96%E5%B7%A5%E4%BD%9C%E9%A2%86%E5%AF%BC%E5%B0%8F%E7%BB%84/13979388?fr=aladdin.There also exists the Central

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foreign affairs department of the State Council, as well as provincial organs for leadership of anti-terrorism work, may apply to SOAT for the designation of particular groups and individuals as terrorist organizations and terrorist personnel. In the course of the trial of a criminal case, the court may make such designations.

We now turn to the provisions on terrorism in the NSL. On the basis of a textual comparison with the relevant mainland law, the following observations may be made. Article 24 of the NSL in effect creates an offense of terrorism or committing a terrorist act. It does not have a direct counterpart in mainland law. (In mainland law, terrorist acts such as killing, bombing, arson, etc. are criminalized by laws that directly criminalize such acts rather than by anti-terrorism provisions.) However, the concepts of terrorism and terrorist used in Article 24 are based on the ATL. As regards Articles 25–27, there do exist counterparts in mainland law. Article 25 and Article 120 of the CCC have similar coverage. So do Article 26 and Articles 120(1) and (2) of the CCC, and Article 27 and Article 120(3) of the CCC. The penalty provisions are also similar.[45]

An offense under Article 24 is committed by "organi[z]ing, planning, implementing, participating in implementing or threatening to implement" a "terrorist act" that "causes or is intended to cause grave social harm," "for the purpose of reali[z]ing one's political objectives by coercing the central or HKSAR government or an international organi[z]ation or intimidating members of the public." A "terrorist act" is one that falls within any of five specified categories.

The concept of terrorism in Article 24 is similar to, though not identical to, that in Article 3 of the ATL. Article 3(2) defines "terrorist activities" as any of five specified types of activities that are terrorist in nature. What is terrorist in nature has to be understood in light of Article 3(1), which stipulates that

National Security Committee established by the Third Plenum of the eighteenth CCP Central Committee in November 2013.

[45] Except that the most severe penalty range under Art 26 and 27 is five to ten years' imprisonment, while that under Art 120(1), (2) and (3) is imprisonment for five years or more (without any upper limit).

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terrorism consists of "opinions and actions that seek to reali[z]e one's political or ideological objective by means of violence, sabotage or intimidation, causing panic in society, endangering public security, violating persons or property, or coercing state organs or international organi[z]ations."

Article 24 is mainly based on the first of the five specified types of activities in the definition of terrorist activities in Article 3(2), together with the definition of terrorism in Article 3(1). As regards the other elements of the definition of terrorist activities in Article 3(2), they are dealt with in Articles 25–27 of the NSL. The description of the concrete ingredients of different types of terrorist activities in Article 24—particularly the five limbs of terrorist activities—is more detailed than in Article 3(2). As in Article 3(1), Article 24 refers to the element of intimidation and coercion of the government or international organizations for the purpose of realizing one's political objective. However, realization of one's "ideological objective" (as distinguished from "political objectives") is mentioned only in Article 3(1) but not in Article 24. Article 3(2)(1) includes a reference to "serious damage to property," but this is not explicitly mentioned in Article 24.

As discussed in the next part of this Chapter, committing a terrorist act is not in itself an offense under Hong Kong's existing law, but the act would be punishable under other laws such as those on homicide, arson, wounding or inflicting grievous bodily harm, etc. The position is similar under mainland law, where there is also no specific offense of committing a terrorist act. By contrast, in some other jurisdictions, anti-terrorism law has included the creation of an offense of committing a terrorist act.[46]

It may be questioned why the Central Authorities in drafting the NSL decided to go beyond the existing approach in Chinese law and to create a new offense of committing a terrorist act. This was probably due to the need to deter acts of violence like those which took place during the anti-extradition movement for the purpose of putting pressure on the government to accede to the

[46] *See* e.g. s 6A of New Zealand's Terrorism Suppression Act 2002, providing as follows: "(1) A person commits an offense who engages in a terrorist act. (2) A person who commits a terrorist act is liable on conviction to imprisonment for life or a lesser term."

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protesters' demands. The creation of an offense of committing a terrorist act sends a clear signal to society that the kind of violence that occurred during the anti-extradition movement designed to intimidate the government and members of the public would not be tolerated in the future, and would be subject to particularly heavy punishment. This, then, is probably the intended deterrent effect of Article 24. It is noteworthy that Article 24 provides that persons convicted under it will be sentenced to at least three years' imprisonment, even if no serious bodily injury, death or significant loss of property has been caused by the terrorist act.

Article 25 criminalizes the "organi[z]ing or exercising leadership of a terrorist organi[z]ation," and defines terrorist organizations as organizations that commit or intend to commit the offenses specified in Article 24, or participate in or assist the commission of such offenses. This definition of terrorist organizations is similar to but slightly more elaborated than that under the ATL, which defines a terrorist organization as a group formed by three or more persons for the purpose of committing terrorist activities. However, unlike the ATL, there is no mechanism under the NSL for designation of a group of persons as a terrorist organization by any administrative authority.

(d) Collusion with Foreign Forces to Endanger National Security (Articles 29-30)

In terms of drafting, Article 29 is probably the most complicated provision in the NSL. Understanding Article 29 is made difficult by its complex structure and absence of numbered subsections and paragraphs. To facilitate discussion of this Article, we can insert numbering or designations (in square brackets below; the numbers in round brackets are in the original text of Article 29) for subsections or paragraphs:

Article 29

[A] A person who steals, spies, obtains with payment, or unlawfully provides State secrets or intelligence concerning national security for a foreign country … shall be guilty of an offense;

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[B] a person who

[a] requests a foreign country or an institution, … , or

[b] conspires with a foreign country or an institution, … , or

[c] directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, … ,

to commit any of the following acts shall be guilty of an offense:

(1) waging a war against the PRC, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the PRC;

(2) seriously disrupting the formulation and implementation of laws or policies by the Government of the HKSAR or by the Central People's Government, which is likely to cause serious consequences;

(3) rigging or undermining an election in the HKSAR, which is likely to cause serious consequences;

(4) imposing sanctions or blockade, or engaging in other hostile activities against the HKSAR or the PRC; or

(5) provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the Government of the Region, which is likely to cause serious consequences.

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It may be observed that Article 29 actually creates two independent offenses. The first is created by Article 29[A], and is concerned with leakage of official secrets to foreigners. The second is that covered by Article 29[B]; this offense is committed where the existence of any of [a], [b] or [c] is combined with any of (1), (2), (3), (4) or (5). In theory, this can give rise to 3x5=15 possible scenarios. In practice, as this author has written elsewhere,[47] given the language used in various limbs of Article 29[B] and considering what are natural or logical connections (between any of [a], [b] and [c] and any of (1), (2), (3), (4) and (5)), some combinations are impossible or unlikely. For example, as far as (4) (imposing a sanction etc. on the HKSAR or the PRC) is concerned, its natural and logical combination is with [a] (requesting) or [b] (conspiring) rather than with [c] (receiving funding from or acting under the direction or control of foreigners); the criminalization of [a]+(4) (requesting a foreign government to impose a sanction on the HKSAR or PRC—such requesting being actually committed by some Hong Kong politicians and activists during the anti-extradition movement) is the mischief that Article 29[B](4) was designed to address. The corollary is that banks that are required by foreign law (e.g. United States law) to comply with certain rules that form part of a sanction imposed by the foreign state on the HKSAR or the PRC should not incur criminal liability under Article 29[B].[48]

We now turn to study Article 29 from the perspective of Chinese law. As in the case of the previous articles, we can discern a close connection between Article 29 and the existing law in the PRC. However, some of the provisions in Article 29 were apparently designed to address Hong Kong circumstances and do not have counterparts in mainland law. In particular, Article 29[A] and Article 29[B](1) correspond to existing provisions in Chinese law, while Article 29[B](2), (3), (4) and (5) are specially tailored for the HKSAR. The concept of "collusion," which is referred to in the title of Article 29

[47] Chen, Albert and Young, Simon, "Liability for Imposing Sanctions under Hong Kong's National Security Law" (2020) 50 *Hong Kong Law Journal* 353.
[48] Ibid. It may also be argued that banks in such circumstances do not have the relevant mens rea for the purpose of the offence.

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and is implicit in Article 29[B](a), (b) and (c), is a concept in Chinese law. These points will be elaborated below.

Article 29[A]: this provision creates an offense of leakage of state secrets or intelligence to foreigners. It is almost identical in wording to Article 111 of the CCC, which criminalizes the supply of state secrets or intelligence to foreigners. The only main difference between the two provisions is that in Article 29[A], the reference to "state secrets or intelligence" is limited to those that "concern national security." What are "'state secrets or intelligence concerning national security" is not defined in the NSL, although Article 47 provides that where an issue arises in a court case regarding whether particular materials are state secrets, the court should obtain a certificate from the CE on the issue.

What are state secrets for the purpose of Article 29[A] should probably be understood in the context of Chinese law. The main Chinese law on state secrets is the Law on Safeguarding State Secrets enacted by the NPCSC in 1988 and amended by it in 2010.[49] Other relevant legal sources include the Interpretation of the Supreme People's Court in 2000 on Several Questions regarding the Concrete Application of the Law in the Adjudication of Cases concerning Theft, Spying, and Purchase of and Unlawfully Providing State Secrets and Intelligence for Foreigners,[50] and the Implementing Rules enacted in 2014 for the Law on Safeguarding State Secrets.

Article 29[B]: Article 29 is entitled "collusion with a foreign country or with external elements to endanger national security," but the word "collusion" does not appear in the text of Article 29 itself.

[49] Art 9 of this Law provides a definition of state secrets consisting of 7 categories. Art 10 provides for a three-tier classification of state secrets. Art 17 provides for the stamping of signs on documents to show that they are state secrets. *See* generally Fu Hualing, "The Secrets about State Secrets: The Burden of Over-classification" (2019) 14(2) *Journal of Comparative Law* 249.

[50] The Chinese title of this Interpretation is 最高人民法院關於審理為境外竊取、刺探、收買、非法提供國家秘密、情報案件具體應用法律若干問題的解釋. Art 1 of this Interpretation defines the terms "state secrets" and "intelligence" that appear in Art 111 of the CCC. Art 5 provides that where the defendant knows or ought to know that a particular piece of information which is not stamped a state secret concerns national security and interest and steals, spies on or purchases it and/or unlawfully provides it to foreigners, Art 111 of the CCC is applicable. Art 7 provides that in the trial of a case concerning leakage of state secrets to foreigners, if a question arises as to whether a particular piece of information is a state secret or as to the degree of secrecy classification applicable to it, the matter will be determined by the relevant state organ for the work of safeguarding state secrets.

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However, as explained below, the concept of "collusion" in Chinese law is reflected in the language of Article 29[B][b] and [c]. The word 勾結 *goujie*—collusion—is used in Article 102—the first article in Chapter 1 (offenses against national security) of Part II of the CCC.

Article 102 creates the offense of collusion with a foreign state or foreign organizations or individuals to endanger the sovereignty, territorial integrity and security of the PRC. Chinese scholars refer to this as the offense of treason.[51] The meaning of "collusion"' is not elaborated in the CCC itself, but was defined in Article 7 of the Implementing Rules (enacted in 1994) of the PRC National Security Law (enacted in 1993). Article 4 of this Law provided that acts that endangered national security included specified acts committed by foreign organizations or individuals, or by persons under the direction of or receiving funding from foreign organisations or individuals, or by local organizations or individuals in collusion with foreign organisations or individuals. Article 7 of the Implementing Rules provided that such collusion refers to any of three specified situations.

In 2014, a new Anti-Espionage Law was enacted and the National Security Law (1993) was repealed, although a new National Security Law was enacted in 2015. The Implementing Rules for the old National Security Law (1993) have now been replaced by the Implementing Rules (enacted in 2017) for the new Anti-Espionage Law, but the definition of 'collusion' has remained unchanged and can be found in Article 7 of the new Implementing Rules.

Article 29[B][c] of the NSL contains the wording of "acting under the direction or control of, or receiving funding or other forms of support from, foreign organi[z]ations and personnel." Such wording can be traced back to the definition of collusion in the Implementing Rules mentioned above. Article 29[B][b] refers to conspiracy between a person and a foreign state, organization or individual. The meaning of "conspiracy" is similar to elements of the definition of collusion in the Implementing Rules

[51] *See* n 20 above.

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such as “planning together and jointly committing” an act against national security. It may therefore be said that Article 29[B][b] and [c] are both based on the concept of collusion in mainland law.

When Article 29[B][b] or [c] is combined with paragraph (1) (waging war, etc.), the offense produced is akin to that of treason under Article 102 of the CCC as discussed above. This NSL offense is narrower than Article 102, as the latter refers to collusion with foreign states and forces to “endanger the sovereignty, territorial integrity and security of the PRC,” while the NSL offense only covers collusion with foreigners to “wage war against the PRC,” or to ‘use force or threat of force to seriously undermine the sovereignty, unity and territorial integrity of the PRC.”

The more original provisions in Article 29 that do not have counterparts in mainland law and were probably specially drafted to deal with Hong Kong’s circumstances are Article 29[B][a] (“requesting”) and Article 29[B](2) (serious obstruction of the enactment or enforcement of law by the HKSAR government or the Central Government), (3) (manipulating or undermining an election), (4) (imposing sanctions on the HKSAR or PRC), and (5) (using unlawful means to provoke hatred against the central government or the HKSAR government). The term and concept of “requesting” is arguably a natural extension of the concept of “collusion” as discussed above. The “requesting” limb in Article 29[B][a] refers to requesting a foreign state or institution to commit one of the specified acts against China’s national security. Thus, among the acts specified in Article 29[B](1), (2), (3), (4) and (5), “requesting” would be more relevant to (1) (requesting foreign invasion of the PRC) and (4) (requesting a foreign state to impose sanctions on the PRC or the HKSAR). The legislative intent behind adding the “requesting” limb to the concept of collusion is probably the intent to penalize Hongkongers who request or lobby foreign states to impose sanctions against the PRC or HKSAR. Such requests or lobbying did occur during the anti-extradition movement. The NSL is not retroactive and cannot be used to prosecute those who committed such acts in the past, but it will have a deterrent effect in the future.

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Paragraphs (2) and (5) were probably also framed with what happened during the anti-extradition movement in mind. During the movement, riots and unlawful assemblies took place that were aimed at the obstruction of legislative and other government activities in Hong Kong. The mass media and social media were flooded with news (in many cases considered by the authorities to be fake news) promoting hatred against the Hong Kong and mainland authorities. The Beijing authorities considered that foreign forces were at work in supporting or promoting such political opposition against the HKSAR government.[52] As the objective of this part of the NSL was, in the words of the NPC Decision of May 2020, to deter and prohibit foreign interference with Hong Kong affairs, these NSL provisions were introduced to address these situations.

Foreign interference with Hong Kong politics may also take the form of giving support to local opposition forces participating in elections in Hong Kong. Article 29[B](3) was probably designed to forestall such foreign intervention in electoral politics in Hong Kong. The term and concept of "manipulating (alternatively translated as 'rigging') or undermining an election" is rather vague and how it may be interpreted remains to be seen. When the "pro-democracy" camp held its own "primary election" in July 2020 to choose candidates whom it would nominate to compete in the September 2020 LegCo election, one of the accusations was that this would amount of "manipulating or undermining" the election.[53] However, in the absence of evidence of "collusion" with foreign forces, mere "manipulation" of an election would not of itself amount to an offense under Article 29[B](5).

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[52] Hong Kong and Macau Affairs Office speaks to press on Hong Kong situation, n 19 above.

[53] *See* the press statement of the Hong Kong and Macau Affairs Office of the State Council: Hong Kong and Macau Affairs Office of the State Council, "*Juebu Rongxu Caokong Xianggang Lifahui Xuanju*" [Manipulation of Hong Kong LegCo election should not be allowed], 14 July 2020, available at www.locpg.gov.cn/jsdt/2020-07/14/c_1210702247.htm. The statement on this matter issued by the Liaison Office of the Central Government in Hong Kong on 13 July 2020 warned that the "primary election" could be manipulation of election as well as subversion under Art 22 of the NSL: Liaison Office of the Central Government, "*Yanli Qianze Fanduipai Cedong Feifa Chuxuan Pohuai Lifahui Xuanju Gongping, Juebu Rongxu Waibu Shili Caokong Xianggang de Zhengzhi Shiwu*" [We strongly condemn the opposition's organizing an unlawful 'primary election' that undermines a fair LegCo election; external forces must not be allowed to manipulate Hong Kong political affairs], available at www.locpg.gov.cn/jsdt/2020-07/13/c_1210700891.htm. In March 2021, the organizers of and candidates for the "primary election" were charged under Art 22 (rather than Art 29) of the NSL: *see* n 38 above and the accompanying

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III. Impact on the Existing Law and Implications for the Future

The approach adopted by the NSL may be compared and contrasted with that of the BL23 Bill of 2003. The latter Bill dealt with five (treason, secession, subversion, sedition, and theft of state secrets) of the seven matters mentioned in BL23 by proposing amendments to the existing Crimes Ordinance (Cap 200) (which in colonial times already contained provisions on treason and sedition), the Societies Ordinance (Cap 151) (the proposed amendment introduced a new scheme for proscribing a local organization that endangers national security, including one that is subordinate to an organization in the mainland that has been proscribed on the ground of national security) and the Official Secrets Ordinance (Cap 521). The two remaining matters (regarding foreign political organizations and their ties with local political organizations in Hong Kong) in BL23 were not dealt with in the legislative exercise in 2003, because the revised version of the Societies Ordinance introduced in 1997 already contained provisions prohibiting connections between local and foreign political organizations and empowering the government to ban a society on the ground of national security.[54]

Although the NSL overrides any existing local law in Hong Kong that is inconsistent with it,[55] it has not expressly amended any existing legislation of the HKSAR. In this respect, it is very different from the 2003 Bill. The approach of the NSL is to create a new set of legal rules that exist side by side with Hong Kong's existing law. Among the four types of offenses created by it are concerned, secession, subversion and collusion with foreign forces to endanger national security are entirely new offenses grafted onto Hong Kong's legal system. As regards the anti-terrorism law in Articles 24–28 of the NSL, it has been superimposed on Hong Kong's existing anti-terrorism law.

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text.

[54] Societies Ordinance (Cap 151), ss 2, 5A, 5D and 8; Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), ss 360B and 360C.

[55] NSL, Art 62.

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Such law is mainly contained in the United Nations (Anti-terrorism Measures) Ordinance (Cap 575) (UNATMO) enacted in 2002, which is supplemented by the Anti-Money Laundering and Counter-Terrorist Financing Ordinance enacted (Cap 615) in 2011. The UNATMO was introduced mainly for the purpose of implementing the United Nations Security Council's decision on 28 September 2001 regarding measures for the prevention of terrorist acts. The UNATMO provides definitions of "terrorist act," "terrorist," "terrorist associate" (which means an entity owned or controlled by a terrorist), and "terrorist property." It introduces two "specification" mechanisms with regard to terrorists, terrorist associates and terrorist property. It also provides for criminal prohibitions against supplying funds or weapons to, or making funds or financial services available to, terrorists and terrorist associates. The government is authorized to freeze funds suspected to be terrorist property. However, the Ordinance has not created any offense of committing a terrorist act itself.

The new NSL offense of committing a terrorist act does not overlap with the existing Hong Kong law (which does not provide for such an offense); this offense-creating provision in Article 24 can operate independently of the existing anti-terrorism law. The definition of terrorist act in the NSL overlaps with but is not identical to the definition of terrorist act in the UNATMO.[56] For example, the latter definition includes a terrorist act for the purpose of "advancing a religious cause" (in addition to "political or ideological cause"), but "religious cause" is not mentioned in the NSL. The definition in the UNATMO includes an express reference to "causing serious damage to property," but this limb is not expressly mentioned in the NSL. On the other hand, the definition in the UNATMO expressly excludes, in the context of three specified circumstances (that would otherwise amount to terrorism),[57] "the use or threat of action in the course of any advocacy, protest, dissent or industrial action," but this exclusion does not appear in the NSL.

[56] UNATMO, s 2.

[57] The specified circumstances involve "serious risk to the health or safety of the public", and "seriously interfering with or seriously disrupting an electronic system" or "an essential service, facility or system."

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In practice, the differing definitions of a terrorist act in the NSL and in the UNATMO are unlikely to cause problems. The NSL definition will be used in dealing with cases under Articles 24–27 of the NSL. As regards offenses relating to terrorist organizations in Articles 25–26, since there is no scheme of "specifications" in the NSL that is similar to that in the UNATMO, the court will directly apply the definition of terrorist organizations in Article 25(2) of the NSL. On the other hand, any prosecutions or government actions under the UNATMO will of course be based on the relevant definitions, specifications and provisions in that Ordinance.

Although the offense-creating provisions of the NSL form a legal regime that can operate independently of the law on other criminal offenses under Hong Kong's existing law, this does not mean that the NSL will not have any significant impact on the operation of Hong Kong's existing law as regards non-NSL offenses. This is because the NSL has made it clear that it is not the only law relating to national security in the HKSAR, and some of its provisions are applicable to other national security-related laws in Hong Kong.[58]

There is however no definition of "national security" in the NSL. As regards what are the other Hong Kong laws relating to national security, Zhang Xiaoming, Deputy Director of the Hong Kong and Macau Affairs Office of the State Council, speaking at a press conference held on 1 July 2020 immediately after the NSL was passed, mentioned the Crimes Ordinance (Cap 200), Societies Ordinance (Cap 151), Public Order Ordinance (Cap 245) and Official Secrets Ordinance (Cap 521).[59] He probably meant that some though not all provisions of these laws are relevant to national security.

[58] The following articles in the NSL are relevant in this regard. Art 3 requires the executive, legislative and judicial organs of the HKSAR to effectively prevent, stop and punish acts and activities endangering national security in accordance with the NSL and other relevant laws. Art 6(2) requires organizations and individuals in Hong Kong to comply with the NSL and other Hong Kong laws concerning national security. Under Art 7, the HKSAR should as soon as practicable complete the legislative work on national security (this probably refers to BL Art 23 laws). Art 8 provides that law enforcement and judicial organs should effectively enforce the NSL and Hong Kong's existing law on the prevention and punishment of acts and activities endangering national security.

[59] State Council Information Office holds press conference on the Law of the PRC on Safeguarding National Security in the HKSAR, n 18 above.

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The Court of Final Appeal (CFA) in the *Lai Chee Ying* case[60] "construe[d] 'acts endangering national security' in the context of the NSL 42(2) requirement as referring to acts of that nature capable of constituting an offense under the NSL *or the laws of the HKSAR safeguarding national security*."[61] The CFA judgment provides examples of national security offenses outside the NSL: "the offenses of treason, incitement to disaffection or sedition under Parts I and II of the Crimes Ordinance."[62] This means that the statutory provisions on these offenses form part of HKSAR laws relating to national security.

The question of whether a particular law or legal provision concerns national security is practically significant because there are several NSL articles which are applicable to legal proceedings in cases concerning offenses endangering national security. A prosecution under a legal provision relating to national security, irrespective of whether the provision is in the NSL or in another law, would trigger the operation of the NSL articles concerning trial by "designated judges,"[63] bail,[64] the possibility of

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[60] *See* n 29 above.

[61] *See* para 53(c)(ii) of the judgment; emphasis supplied.

[62] In footnote 40 of the judgment. Footnote 74 of the judgment pointed out that the Court of First Instance in *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382 at para 37 "erroneously limits 'acts endangering national security' to offenses under the NSL."

[63] In *HKSAR v Tam Tak Chi*, DCCC 927, 928, 930/2020; [2020] HKDC 1153; [2020] HKCU 4184, Tam, vice-chairman of the political group People Power, was charged with several non-NSL offenses, including "uttering seditious words" under s 10 of the Crimes Ordinance (Cap 200). The prosecution argued that because sedition was an offense against national security, Tam should be tried before a "designated judge" under the NSL. The District Court, without deciding whether the sedition offense must be tried before a "designated judge" as a matter of law, arranged for Tam's case to be heard by a "designated judge." *See* the judgment at [2020] HKDC 1153; Siu, Jasmine, "Hong Kong judge to decide if cases facing People Power activist warrant national security law appointee", *South China Morning Post*, 2 December 2020, available at https://www.scmp.com/news/hong-kong/law-and-crime/article/3112301/hong-kong-judge-decide-if-cases-facing-people-power; Ho, Kelly, "National security judge assigned to Hong Kong pro-democracy activist Tam Tak-chi's sedition case", *Hong Kong Free Press*, 3 December 2020, available at https://hongkongfp.com/2020/12/03/national-security-judge-assigned-to-hong-kong-pro-democracy-activist-tam-tak-chis-sedition-case/. Subsequently, the District Court decided that it had jurisdiction to hear this sedition case, and refused to grant a stay of proceedings. The defendant's lawyer indicated that he would challenge the constitutionality of the sedition offence. See Siu, Jasmine, "District Court has jurisdiction on sedition cases", *South China Morning Post*, 10 Apr 2021; Siu, Jasmine, "Court rejects bid to quash colonial-era sedition charges", *South China Morning Post,* 27 Apr 2021. The trial before the District Court commenced on 29 July 2021, and was adjourned until 18 Oct 2021.

[64] In *HKSAR v Wan Yiu Sing Edmund* WKCC534/2021, 4076/2020; HCCP 143/2021, DCCC 615/2021. Wan (also known as "Giggs"), radio host at the online radio channel "D100", was charged with several counts of sedition under s 10 of the Crimes Ordinance (Cap 200) but not any NSL offense. On 10 February 2021, Chief Magistrate Victor So Wai-tak—a "designated judge" under the NSL—rejected Wan's bail application after hearing the prosecution's argument that the test of deciding whether to grant bail should be that prescribed by Art 42(2) of the NSL as interpreted by the CFA

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dispensing with a jury,[65] and the possibility of a non-public trial. Where there is doubt about whether the case concerns national security, Article 47 of the NSL enables the court to obtain a certificate from the CE regarding whether a relevant act in that case concerns national security.

It is also noteworthy that some of the enforcement powers under the NSL extend beyond circumstances in which there is suspicion that an offense against national security has been committed or there is a need to prevent an offense against national security. In particular, interception of communications and covert surveillance may be practiced not only for the purpose of "preventing or detecting offenses endangering national security," but also for the purpose of "protecting national security" where "there is reasonable suspicion that any person has been, is, or is likely to be, involved in … any activity which constitutes or would constitute the relevant threat to national security."[66]

IV. Concluding reflections

This Chapter was written one year after the enactment of the NSL. We are still in the early stage of its enforcement. As of 30 June 2021, 117 persons had been arrested under the NSL, and among them 64 had been charged (including the 47 defendants in the 'primary election' case mentioned above).[67]

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in the *Lai Chee Ying* case (n 29 above). *See* Siu, Jasmine, "Radio host remanded in custody on sedition charges", *South China Morning Post*, 11 February 2021. Subsequently, the High Court (HCCP 143/2021) also rejected Wan's bail application without deciding whether Art 42(2) of the NSL was applicable. The trial before the District Court is expected to commence on 12 Oct 2021.

[65] In *HKSAR v Tong Ying Kit (No 1)* [2020] 4 HKLRD 382; [2020] 6 HKC 110 and *HKSAR v Tong Ying Kit (No 2)* [2020] 4 HKLRD 416; [2020] 6 HKC 141; HCCC 280/2020—the first case of prosecution under the NSL, the Secretary for Justice for the first time invoked her power under Art 46 of the NSL to direct a trial in Court of First Instance without a jury but before a 3-judge bench. Judicial review proceedings (HCAL 473/2021) brought to challenge the procedural aspects of the decision not to have a jury trial were unsuccessful: *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397, [2021] HKCA 912.

[66] Rules on Application for Authorisation to Conduct Interception and Covert Surveillance, Implementation Rules for Article 23 of the NSL, Instrument A406A, Sch 6, s 2.

[67] Xia Baolun, "*Quanmian shenru shishi Xianggang guoanfa*" [The full implementation of the Hong Kong National Security Law] (speech on 16 July 2021 at conference on the first anniversary of the promulgation of the NSL), *Bauhinia Magazine* (*Zijing zazhi*), August 2021 issue, p 4. See also Lydia Wong and Thomas E. Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis* (Georgetown Center for Asian Law, Feb 2021), https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf; Thomas Kellogg, "New data show Hong Kong's national security arrests follow a pattern" (3 May 3021), https://www.chinafile.com/reporting-opinion/features/new-data-show-hong-kongs-national-security-arrests-follow-pattern.

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Since then and until August 2021, highly publicized national security (NSL and sedition) cases include (a) the prosecution under article 29 of the NSL of 4 more members of the senior management of Apple Daily,[68] (b) the prosecution for sedition of 5 leading members of the General Union of Hong Kong Speech Therapists, who published three picture books for children alleged to be seditious,[69] and (c) the prosecution under article 27 of the NSL for advocating terrorism of 4 leading members of the HKU Students' Union involved in passing a motion to 'thank' a suspected terrorist who attacked a policeman and then committed suicide on 1 July 2021.[70] As of August 2021, the *Tong Ying Kit* case[71] was the only NSL case in which the court has rendered a verdict as to the defendant's guilt.[72] We do not yet have a full picture of how the NSL will be enforced by the authorities and interpreted and applied by the courts.

The better scenario is that the NSL achieves a deterrent effect, very few prosecutions need to be brought, the prosecutions that are brought concern cases of relatively clear violations of the NSL, and the National Security Office established by the Central Authorities in Hong Kong never needs to resort to its power under Article 55.[73] The worse scenario is that numerous prosecutions are brought, and they include high-profile cases in which it is controversial—as a matter of law and evidence—whether the defendants are guilty. Judges who want to apply liberal values in the Basic Law and in the International Covenant on Civil and Political Rights[74] may then be put into a difficult position. There will also be

[68] Lo, Clifford and Lam, Jeffie, "4 ex-Apple Daily staff expected to be charged", South China Morning Post (SCMP), 22 July 2021; Lau, Chris, "Four former Apple Daily employees denied bail", SCMP, 23 July 2021.
[69] Lo, Clifford and Cheung, Tony, "5 held over 'seditious books' for children", SCMP. 23 July 2021; Wong, Brian and Cheng, Lilian, "No bail for publishers accused of sedition", SCMP, 24 July 2021; Wong, Brian and Lo, Clifford, "Sedition charge for 3 over children's books", SCMP, 31 August 2021.
[70] Cheng, Lilian and Lo, Clifford, "HKU students arrested over motion on police attacker", SCMP, 19 Aug 2021; Lau, Chris and Lo, Clifford, "Bail for student in security law case", SCMP, 20 Aug 2021.
[71] See n 30 above.
[72] There was another NSL case (regarding Art 29) in which the defendants (Li Yu-hin Andy and Chan Tsz-wah) pleaded guilty but the hearing has been adjourned to January 2021: Wong, Brian, "Lai key player in sanctions plot, High Court told", 20 Aug 2021.
[73] Art 55 provides for 3 kinds of special or exceptional circumstances in which the National Security Office may directly investigate an NSL case, arrest and detain suspects and arrange for defendants to be prosecuted and tried in the mainland.
[74] *See* NSL, Art 4.

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increasing risks of conflict between the courts' interpretation and application of the NSL and the expectations of the Central Authorities, which may result in interpretations issued by the NPCSC or even the National Security Office exercising its jurisdiction.

It has been said that the HKSAR's political system is characterized by a kind of hybrid constitutionalism[75] or liberal authoritarianism[76] in which both liberal and authoritarian elements co-exist. The enactment of the NSL, together with the electoral reform of 2021 introduced by the NPC,[77] rigorous law enforcement actions taken against opposition politicians and other activists who participated in the anti-extradition movement, and political pressures leading to the closure of Apple Daily and the dissolution of the Hong Kong Professional Teachers' Union, the Civil Human Rights Front and the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, have increased the authoritarian elements and reduced the liberal elements in Hong Kong's political and legal system, and shifted the balance of OCTS towards the "One Country" principle.[78] What remains to be seen is what will be the degree of increase of authoritarian elements or "rule by law" in the future, or what will be the magnitude of the shift towards the "One Country" principle. It is impossible to predict at this stage how the increasingly challenging practice of OCTS will develop. In the final analysis, future developments depend on Beijing's Hong Kong policy, the internal dynamics of Hong Kong society, as well as the mutual interaction between Hong Kong and the Central Authorities.

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[75] Ip, Eric C., *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge: Cambridge University Press, 2019).

[76] Lau Siu-kai, *Huigui hou Xianggang de dute zhengzhi xingtai* [The Unique Political Form in Post-Handover Hong Kong] (Hong Kong: Commercial Press, 2017); Lau Siu-kai, *The Practice of "One Country, Two Systems" Policy in Hong Kong* (Hong Kong: Commercial Press, 2017)

[77] For relevant materials, see <https://www.cmab.gov.hk/improvement/en/home/index.html>.

[78] Zhang Xiaoming, Deputy Director of the Hong Kong and Macau Affairs Office, said at the press conference on the NSL on 1 July 2020 (in translation): "Hong Kong has seen phenomena deviating from the correct path of OCTS, some even challenged the bottom line of OCTS. This Law in a sense rectifies the situation, or, to put it figuratively, it pushes Hong Kong a little in the direction of 'One Country.' Ultimately, this is done in order to insist upon and improve OCTS, and not to change OCTS." *See* State Council Information Office holds press conference on the Law of the PRC on Safeguarding National Security in the HKSAR, n 18 above.

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