

The HKSAR National Security Law: An Introduction

Albert H.Y. Chen



Article 23 of the Basic Law and national security

- “The HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organization ...”
- Every country has laws to protect its national security
- Relevant provisions in the Chinese Constitution
 - Article 52 provides that Chinese citizens have the duty to safeguard the unification of the State and the unity of all its ethnic nationalities.
 - Article 54 provides that Chinese citizens have the duty to safeguard the security, honour and interests of the motherland, and that they must not commit acts detrimental to the security, honour and interests of the motherland.

Background to the introduction of the National Security Law (NSL)

- 2003: Failed attempt to introduce National Security (Legislative Provisions) Bill – legislative exercise shelved by CE Tung Chee-hwa after protest on 1 July 2003
- 2005-2012: Donald Tsang as CE; priority on political reforms and universal suffrage
- 2007: NPC Standing Committee decided on timetable for universal suffrage in election of CE (year of 2017)
- Implementation of Article 23 as pre-condition for introduction of universal suffrage? Liberal policy of the Central Authorities towards HKSAR

Developments in 2012-2017

- 2012-2017: Leung Chun-ying as CE
- Period of political instability
- Movement against introduction of national education (2012)
- Occupy Central Movement (2013)
- NPC Standing Committee decision on 31 Aug 2014 on electoral model for election of CE by universal suffrage
- Occupation of Admiralty and other districts (Umbrella Movement), Sept – Dec 2014
- Rise of activism for HK independence: Mongkok riot (spring 2016), 2016 LegCo election, disqualification of some LegCo members

Movement against proposed extradition law in 2019

- 2017: Mrs Carrie Lam as CE
- Spring 2019: Draft extradition law introduced in LegCo to deal with “legal loophole” highlighted by case of Chan Tong-kai (陳同佳) – HKSAR resident committing murder in Taiwan and then returning to HK – Taiwan authorities requested extradition
- No legal basis under existing HK law for extradition of fugitive offenders as between HKSAR and any part of China (including Mainland, Macau and Taiwan)
- Large-scale demonstration (9 June) followed by violent confrontations between protestors and police (12 June)
- Legislative exercise shelved indefinitely on 15 June 2019
- Civil unrest continued and developed into large-scale riots which continued for several months in second half of 2019

Enactment of the Law on Safeguarding National Security Law in the HKSAR (NSL)

- 2019: Central government considered that there existed an extremely serious loophole in HKSAR law that needed to be plugged urgently
- How to introduce national security law in HK?
- Legislation by HKSAR government and Legislative Council – not practicable due to crisis of governance brought about by the anti-extradition law movement
- Hence “two-step” approach adopted by central government: Decision by NPC (28/5/2020) followed by law-making by NPC Standing Committee under Article 18 of the Basic Law (30/6/2020)

NPC Decision

- “Two-stage process” in May – June 2020: NPC Decision and NPCSC’s enactment of the HKSAR National Security Law
- NPC Decision: consists of a preamble and 7 articles
- Preamble - background and rationale:
- National security risks in HK had become more serious in recent years
- “Various unlawful activities such as advocacy for HK independence, acts of secession (分裂國家), violence, and terrorism have seriously jeopardized national sovereignty, unity and territorial integrity. Certain foreign or external forces have flagrantly interfered in HK’s affairs and used HK to carry out activities that endangered China’s national security.”

The NPC Decision (cont'd)

- Article 1: While safeguarding national security and preventing and punishing acts that endanger national security, the State policy is to ensure the faithful implementation of “One Country, Two Systems” (OCTS), HK people ruling HK, HK enjoying a high degree of autonomy, governing HK in accordance with law, and defending the constitutional order established in HKSAR by the Chinese Constitution and the Basic Law
- Protection of national security – a necessary condition for correct and successful implementation of OCTS – bottom line of OC (as element of OCTS) need to be set
- Deviations from the correct path had taken place and need to be rectified

The NPC Decision (cont'd)

- Article 3: HKSAR has constitutional duty to safeguard national sovereignty, unity and territorial integrity, and to complete the task of legislating to protect national security in accordance with the Basic Law
- Basic Law, Article 23: 7 matters covered; only 2 of them (secession and subversion) to be covered by the NSL
- Article 4: HKSAR should establish institutions and mechanisms to safeguard national security. Central government will establish organ in the HKSAR in order to safeguard national security
- Article 6: NPCSC authorised to enact NSL for HKSAR

The NSL

- Chapter 1: General principles
- Chapter 2: Duties and government bodies of the HKSAR for safeguarding national security
 - Part 1 – Duties
 - Part 2 – Government bodies
- Chapter 3: Offences and penalties
- Chapter 4: Jurisdiction, applicable law and procedure
- Chapter 5: National Security Office of the CPG in the HKSAR
- Chapter 6: Supplementary provisions

NSL, chapter 1 (General principles)

- Central government – fundamental responsibility for national security matters in the HKSAR
- HKSAR – constitutional duty to protect national security
- Need to protect human rights while safeguarding national security (Article 4)
- Principles of the Rule of Law and the protection of the rights of the accused in criminal proceedings relating to national security (Article 5)
- Candidates for election to public office and persons taking up public office – statement or oath to support the Basic Law and owe allegiance to the HKSAR of the PRC (see also Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Ordinance 2021)

NSL, Chapter 2

- Part 1: Duties of the HKSAR in safeguarding national security
 - HKSAR should adopt measures in order to provide guidance on and supervision of matters relating to national security in schools, social organisations, the media and the Internet (Article 9)
 - HKSAR should promote national security education (Article 10)
 - Chief Executive of the HKSAR is responsible to the central government on matters of national security in the HKSAR, and should submit an annual report to the central government on these matters (Article 11)
- Part 2: Institutions responsible for the protection of national security in the HKSAR

Institutions established by the NSL

- HKSAR Committee for Safeguarding National Security (National Security Committee) – policy-making on matters of national security in HK
- National Security Adviser (currently the Director of the Liaison Office of the Central People’s Government in the HKSAR)
- National Security Office of the Central People’s Government in the HKSAR
 - Supervision, guidance and support for national security work of the HKSAR government
 - In certain special or exceptional situations – power to investigate national security cases, arrest suspects and transfer them to mainland for trial

NSL, chapter 3: Secession

- NSL, chapter 3: criminal offences: (1) secession, (2) subversion, (3) terrorism, (4) collusion with foreign countries or external elements to endanger national security
- Article 20: secession
- Article 21: Inciting others or assisting others to commit the offence in article 20
- Article 20 – organising or participating in activities aimed at secession (splitting up the country, destroying the unity of the country):
 - Separating HK or any part of China from the PRC;
 - Unlawfully changing the legal status of HK or any part of China;
 - Handing over HK or any part of China to a foreign country
- Example: advocacy of HK independence

Secession (cont'd)

- NSL has no retroactive or retrospective effect: Article 15 of the International Covenant on Civil and Political Rights (ICCPR); Article 39 of the NSL
- Note that under common law, if X is a criminal offence, then it is also a criminal offence to
 - Aid and abet another person to do X
 - Attempt to do X
 - Inciting another person to do X
 - Conspiring with another person to do X (conspiracy – agreement to engage in X jointly)
- Extra-territorial effect: articles 36-38

Subversion

- Article 22: Subversion
- Article 23: Inciting others or assisting others to commit an offence under article 22
- Article 22: organizing or participating in activities aimed at subversion of the regime *by the use of force, threat of force or any other unlawful means*
- Subversion covers 4 situations:
 - (1) To overthrow or undermine the basic system of the PRC
 - (2) To overthrow the central government or HKSAR government
 - (3) To seriously obstruct the operation of a political organ of the central or HKSAR government
 - (4) To attack and damage the premises and facilities of a HKSAR political organ

Subversion and punishment

- Provisions on punishment: Articles 20-23
- Three levels of punishment under Articles 20 and 22
 - Imprisonment for 10 years or more, or life imprisonment
 - Imprisonment for 3 to 10 years
 - Imprisonment for less than 3 years, or lenient sentence such as community service orders
- Two levels of punishment under Articles 21 and 23
 - Imprisonment for 5 to 10 years
 - Imprisonment for less than 5 years, or lenient sentence such as community service orders

Terrorism (Articles 24-28)

- Article 24: offence of terrorism
- Article 25: organising or being leaders of a terrorist organization
- Article 26: Providing assistance, funding, training, information or other kinds of support to terrorist organizations or persons engaged in terrorism; making or possession of explosives and other materials used for terrorism
- Article 27: Incitement of terrorism

Terrorism (cont'd)

- Article 24: organising, participating in, or threatening to commit any of 5 types of terrorist activities that cause serious harm to society, **and** the purpose of the activity is to force the central government or the HKSAR government or an international organization to accept one's political demand, or to intimidate members of the public, *so as to realise one's political agenda*
- Five types of activities:
 - Serious violence against a person
 - Explosion, arson, dissemination of poisonous substances
 - Sabotage of means of transport, transport facilities, electrical facilities
 - Sabotage or serious disruption of public services (water, electricity, gas, communication, Internet etc)
 - Using any other dangerous means to seriously jeopardize public health or safety

Terrorism (cont'd)

- Engaging in any of these five types of activities – already an offence under other parts of Hong Kong law
- Significance of offence of terrorism – may be heavier punishment
- Article 24 – if serious bodily injury, death or significant loss of property is caused by terrorist act – imprisonment for 10 years or more or life imprisonment; otherwise imprisonment for 3 to 10 years
- Whether act constitutes terrorism depends on motive or purpose – political agenda

Incitement offences and sedition

- Article 27: Inciting or promoting terrorism
- Previous provisions: also incitement of secession and subversion
- Another national security-related offence constituted by speech or writing: Seditious speech under the *Crimes Ordinance, sections 9-10*
- Speech or writing might constitute the offence of sedition if it falls within any of the 6 following situations and the speaker or writer has the intention to achieve any of the following.

Sedition

- (1) bringing into hatred or contempt, or exciting disaffection against, the Hong Kong government;
- (2) inciting people to attempt to change any lawfully established matter in Hong Kong by unlawful means;
- (3) bringing into hatred or contempt, or exciting disaffection against, the administration of justice (or the judicial system) in Hong Kong;
- (4) raising discontent or dissatisfaction among people in Hong Kong;
- (5) promoting feelings of ill-will and enmity between different classes of people in Hong Kong;
- (6) inciting persons to violence.

Sedition: defences

- But section 9 of the Crimes Ordinance also provides for 4 situations which will not constitute sedition. Speech or writing that is only intended to achieve any of the following will not constitute sedition:
 - (1) showing that the government has been misled or mistaken;
 - (2) pointing out errors or defects in government, law or administration of justice in Hong Kong with a view to correcting such errors or defects;
 - (3) persuading people to attempt to change matters in Hong Kong by lawful means;
 - (4) pointing out any matter producing feelings of ill-will and enmity between different classes with a view to their removal.

Collusion with foreign forces to endanger national security (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 offence;
- [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 offence: ...

Article 29[B]

- [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.

Procedure for handling national security cases

- Procedure largely governed by existing criminal procedure law of HK, also partly governed by the NSL
- Police – National Security Department – investigation of suspected offenders
- Police powers under general law (e.g. arrest of person reasonably suspected of having committed an offence, search and seizure)
- Police powers under article 43 of the NSL
- Detention after arrest; police bail
- No power to detain for more than 48 hours – decision to prosecute – defendant brought before magistrate's court

Procedure (cont'd)

- Decision to prosecute to be made by the Secretary for Justice
- Power to be exercised independently
- Policy – prosecution only if reasonable prospect of conviction, and it is in the public interest to prosecute
- Bail – provisions in the Criminal Procedure Ordinance and in article 42 of the NSL
- Trial – magistrate's court, District Court, High Court
- Possibility of trial in High Court by 3-judge panel (instead of jury trial)
- System of “designated judges”

Criminal trial

- At the trial, the court will hear the evidence produced by the prosecution and defence, including testimony of witnesses called by the prosecution and the defence
- Lawyers on both sides will conduct examination and cross-examination of witnesses, and put forward legal arguments for the court to consider
- The court will apply the law to facts of the case (as shown by the evidence); the court will convict the accused only if it is satisfied beyond reasonable doubt that the accused has committed the offence charged
- Interpretation of the NSL by the court; possibility of interpretation issued by the NPC Standing Committee (Article 65, NSL)