

LCQ6: Laws listed in Annex III to Basic Law

Following is a question by the Hon Claudia Mo and a reply by the Secretary for Justice, Ms Teresa Cheng, SC, in the Legislative Council today (July 15):

Question:

Certain provisions of the Basic Law, which make references to the common law, stipulate among other things that: the laws previously in force in Hong Kong which shall be maintained include the common law (Article 8), reference may be made to precedents of other common law jurisdictions in the adjudication of cases in accordance with the laws (Article 84), and the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal (Article 82). On the other hand, pursuant to Article 18 of the Basic Law, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the National Security Law) was added to the list of national laws in Annex III to the Basic Law and applied in Hong Kong by promulgation on the 30th of last month. In this connection, will the Government inform this Council:

(1) whether it has studied if the aforesaid Basic Law provisions, which are related to the common law, are applicable to the criminal proceedings instituted under the national laws (including the National Security Law) listed in Annex III to the Basic Law; and

(2) of the justifications for the Secretary for Justice to make the following statement: "it is impracticable and unreasonable to expect that everything in a national law, the National Security Law, will be exactly as what a statute in the Hong Kong Special Administrative Region common law jurisdiction would be like"?

Reply:

President,

The National People's Congress (NPC) adopted the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region (Decision) on May 28, 2020. Paragraph 6 of the Decision authorises the Standing Committee of the NPC (NPCSC) to enact relevant laws on establishing and improving the legal system and enforcement mechanisms for safeguarding national security in the Hong Kong Special Administrative Region (HKSAR). The NPCSC adopted unanimously on June 30, 2020 The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL) in accordance with the Constitution, the Basic Law and the NPC Decision, and added it to Annex III to the Basic Law in accordance with Article 18 of the Basic Law on the same day after consulting the Basic Law Committee and the HKSAR Government. The Chief Executive then gave notice that the HKNSL applied in the HKSAR from 11 pm on the same day.

Article 1 of the HKNSL declares at the outset that the HKNSL is enacted for the purpose of "ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; safeguarding national security; preventing, suppressing and imposing punishment for the offences of secession, subversion, organisation and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the HKSAR; maintaining prosperity and stability of the HKSAR; and protecting the lawful rights and interests of the residents of the HKSAR".

The HKNSL is divided into six chapters: general principles; the duties and the government bodies of the HKSAR for safeguarding national security; offences and penalties; jurisdiction, applicable law and procedure; office for safeguarding national security of the Central People's Government in the HKSAR; and supplementary provisions, with 66 sections in total. It is a comprehensive piece of legislation comprising substantive law, procedural law and organisation law.

The Department of Justice now provides the following detailed reply to the questions raised by the Hon Claudia Mo.

(1) Article 41, paragraph 1, of the HKNSL provides that the HKNSL and the laws of the HKSAR shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the Region exercises jurisdiction. Article 45 provides that unless otherwise provided by the HKNSL, magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the HKSAR.

The HKSAR largely applies existing local laws and procedure when exercising jurisdiction over offences endangering national security in accordance with the HKNSL. It is true that the HKNSL makes different provisions for the legal procedure under certain special circumstances, but they are necessary for the prevention of, suppression of, and imposition of punishment for acts endangering national security given the special nature of cases involving national security.

The Basic Law was enacted by the NPC in accordance with Articles 31 and 62 of the Constitution. It is a national law that applies in Hong Kong, prescribing the systems to be practised in the HKSAR, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong. The HKNSL is a national law enacted by the NPCSC in accordance with the authority delegated by the NPC Decision specifically for the establishment and improvement of the legal system and enforcement mechanisms for safeguarding national security in the HKSAR. It is listed in Annex III to the Basic Law by the NPCSC and applies in the HKSAR by way of promulgation.

The local laws of the HKSAR consists of the laws previously in force in Hong Kong referred to in Article 8 of the Basic Law, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR. On February 23, 1997, the NPCSC adopted a Decision on the treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law. According to that Decision, some of the ordinances and subordinate legislation previously in force in Hong Kong were not adopted as the laws of the HKSAR. In addition, local laws also include laws enacted by the legislature of the HKSAR in exercise of the legislative power under Article 73 of the Basic Law.

Article 62 of the HKNSL provides that the HKNSL shall prevail where the provisions of the local laws of the HKSAR are inconsistent with the HKNSL. As stated above, local laws of the HKSAR mean the laws previously in force in Hong Kong, including the common law, referred to in Article 8 of the Basic Law as well as laws enacted by the legislature of the HKSAR. Hence, in accordance with the provisions of Article 8 of the Basic Law, Article 84 provides that precedents of other common law jurisdictions may be referred to by the courts of the HKSAR when adjudicating cases. Article 82 of the Basic Law which provides that the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on the Court continues to apply.

(2) The HKNSL is a special and innovative national law because it comprises three different types of laws, namely, an organisation law which establishes the relevant responsible bodies, a substantive law which provides for offences and penalties, and a procedural law in relation to law enforcement, prosecution and trial. Although the HKNSL is a national law enacted by the NPCSC, it has taken into account the differences between the legal systems of the State and the HKSAR. Many provisions are included to ensure that the HKNSL and local laws are reconcilable, compatible and complementary with each other. The common purpose of these two major characteristics is to ensure that the laws on safeguarding national security can be fully and effectively enforced in the HKSAR. Hence, one cannot demand that the legal provisions of the HKNSL are drafted in the language of Hong Kong common law.

Thank you, President.

Ends/Wednesday, July 15, 2020