

LCQ9: National security law for Hong Kong

Following is a question by the Hon Lam Cheuk-ting and a written reply by the Secretary for Justice, Ms Teresa Cheng, SC, in the Legislative Council today (July 15):

Question:

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) came into operation at 11pm on June 30 this year. Some members of the public consider that NSL has seriously damaged the "one country, two systems" and Hong Kong's rule of law as well as undermined human rights. In this connection, will the Government inform this Council:

(1) whether it has assessed where the provisions of NSL are in conflict with those of the Basic Law, which provisions shall prevail, and of the relevant justifications;

(2) whether it has assessed where the provision about respecting and protecting human rights (i.e. Article 4) of NSL is in conflict with any other provisions therein, which provision shall prevail, and of the relevant justifications;

(3) as Article 42 of NSL stipulates that "no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security", whether it has assessed if the term "continue" used in this article carries the presumption that the suspect or defendant has actually committed acts endangering national security, and thus the presence of the term has rendered the article in conflict with the following provision in Article 5: a person is presumed innocent until convicted by a judicial body; if it has assessed and the outcome is in the affirmative, which one of these two provisions shall prevail; if the assessment outcome is in the negative, of the justifications for that;

(4) whether it knows if the penalties stipulated in NSL (the maximum penalty being life imprisonment) are applicable to those cases over which the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region (the Office) exercises jurisdiction; if they are not applicable, of the details, including whether a defendant who has been tried and convicted on the Mainland may be sentenced to death;

(5) as Article 35 of NSL stipulates that "a person who is convicted of an offence endangering national security by a court shall be disqualified from standing as a candidate in the elections of the Legislative Council and district councils of the Hong Kong Special Administrative Region, holding any public office in the Region, or serving as a member of the Election Committee for electing the Chief Executive", whether it has assessed if the disqualification of the convicted person shall be for life; if it has assessed and the outcome is in the negative, of the details; if the assessment outcome is in the affirmative, whether it has assessed if this article is in conflict with the provision in

Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR) which stipulates that every citizen shall have the right and the opportunity, without unreasonable restrictions, to vote and to be elected at elections; and

(6) whether it knows if the suspects in those cases over which the Office exercises jurisdiction are, after being arrested, entitled to the human rights provided for in Article 9(3) of ICCPR and the existing laws of Hong Kong (including the rights to meet their lawyers and to be released if no charges are laid within 48 hours from the time of arrest), and if the suspects may, during detention or trial on the Mainland, engage Hong Kong legal practitioners who do not hold a Mainland lawyer's practice certificate to defend for them?

Reply:

President,

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

Article 1 of the HK National Security Law declares at the outset that the Law 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".

Furthermore, Article 5 of the HK National Security Law also clearly lay down the principles of the rule of law that the HKSAR should adhere to in safeguarding national security, including that of conviction and punishment in accordance with the law; presumption of innocence; prohibition of double jeopardy; right to a fair trial (i.e. the right to defend himself or herself and other rights in judicial proceedings that a criminal

suspect, defendant, and other parties in judicial proceedings are entitled to under the law); non-retrospectivity; as well as respect and protection of human rights, protecting Hong Kong residents' rights and freedoms under the Basic Law and the provisions of the relevant international covenants as applied to Hong Kong.

My reply to Hon Lam Cheuk-ting's question is as follows:

(1) The HK National Security Law was enacted by the NPCSC in accordance with the Constitution, the Basic Law and the mandate given by the Decision of the NPC. It is in line with the constitutional provisions and principles, the "One Country, Two Systems" principle and the Hong Kong Basic Law, as well as the spirit of the Decision of the NPC. It improves the implementation of "One Country, Two Systems" and makes up for the deficiencies of the HKSAR in safeguarding national security at the legal and institutional levels. The NPC Decision on May 28 and the HK National Security Law complement each other. In the specific area of safeguarding national security, the HKSAR should implement the relevant provisions of the HK National Security Law to fulfill its constitutional obligation of safeguarding national security.

(2) Article 2 of the HK National Security Law stipulates that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. No institution, organisation or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms. Article 4 of the HK National Security Law goes on to stipulate that human rights shall be respected and protected in safeguarding national security in the HKSAR. The rights and freedoms, which Hong Kong residents enjoy under the Basic Law and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law. Article 5 also provides that the principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security.

The third paragraph of Article 3 of the HK National Security Law stipulates that the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the HK National Security Law and other relevant laws. Article 4 of the HK National Security Law does not contravene other provisions in the Law. All the work and law enforcement efforts for safeguarding national security will be undertaken in strict accordance with legal provisions, in line with statutory functions and powers, follow statutory procedures, and without prejudice to the lawful rights and interests of Hong Kong residents, legal persons and other organisations.

(3) As set out in the introduction, Article 5 of the HK National Security Law stipulates that the principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security; and a person is presumed innocent until convicted by a judicial body. The first paragraph of Article 42 also stipulates that when applying the laws in force in the HKSAR concerning matters

such as the detention and time limit for trial, the law enforcement and judicial authorities of the HKSAR shall ensure that cases concerning offences endangering national security are handled in a fair and timely manner. The second paragraph of Article 42 stipulates that "No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."

The principle of presumption of innocence in Article 5 is laid down in Chapter I (General Principles) of the HK National Security Law. Article 42 also requires that when applying the laws concerning detention, judicial authorities shall ensure that cases are handled in a fair manner. The provisions of the second paragraph of Article 42 do not contravene the principle of presumption of innocence laid down in the General Principles, and a defendant is entitled to the right to a fair trial.

(4) and (6) The offences endangering national security under the HK National Security Law and their penalties are detailed in Chapter III of the Law. The maximum penalty prescribed therein does not include death penalty. Article 55 of the HK National Security Law provides that the Office for Safeguarding National Security of the Central People's Government in Hong Kong (the Office) shall exercise jurisdiction over a case concerning offences endangering national security under the Law under one of three specific situations. According to Article 56, it is the court designated by the Supreme People's Court which shall adjudicate a case over which the Office exercises jurisdiction in accordance with the HK National Security Law. Article 57 stipulates that the Criminal Procedure Law of the People's Republic of China and other related national laws shall apply to procedural matters, including those related to prosecution, trial and execution of penalty, in respect of such cases. The relevant courts shall adjudicate such cases in accordance with applicable laws.

Article 58 of the HK National Security Law specifically provides that in a case over which jurisdiction is exercised pursuant to Article 55 of the Law, a criminal suspect shall have the right to retain a lawyer to represent him or her from the day he or she first receives inquiry made by the Office or from the day a mandatory measure is taken against him or her. A defence lawyer may provide legal assistance to a criminal suspect or defendant in accordance with the law. A criminal suspect or defendant who is arrested in accordance with the law shall be entitled to a fair trial before a judicial body without undue delay. As to whether a suspect can retain a Hong Kong legal practitioner not holding a Mainland lawyer's practice certificate to represent him or her when being detained or tried in the Mainland, it shall be determined in accordance with the relevant provisions of Mainland laws.

(5) Article 35 of the HK National Security Law provides that a person who is convicted of an offence endangering national security by a court shall be disqualified from standing as a candidate in the elections of the Legislative Council and district councils of the HKSAR, holding any public office in the HKSAR, or serving as a member of the Election Committee for electing the Chief Executive. As the provision has not set a limit on the convicted person's disqualification period, the disqualification may be construed as

permanent.

Article 25 of the International Covenant on Civil and Political Rights stipulates that citizens shall have the right to participate in public life without unreasonable restrictions. People convicted by the courts are found to have committed offences endangering national security, which are serious offences. The measures do not constitute "unreasonable restrictions". Section 39 (1) (c) of the current Legislative Council Ordinance (Cap 542) also stipulates that a person convicted of treason is disqualified from being nominated as a candidate at an election, and from being elected as a Member.

Ends/Wednesday, July 15, 2020