

**National Security Law – A New Horizon for the
Successful Implementation of “One Country, Two Systems”**

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(1) **Introduction**

The Hong Kong Special Administrative Region (“HKSAR”) has experienced serious social unrest since the eruption of the opposition to the proposed legislative amendments to the Fugitive Offenders Ordinance. Violent incidents have occurred. Citizens and police officers have been injured. Shops, the Mass Transit Railway stations, government facilities and many other properties have been maliciously destroyed or damaged. Some radicals have been openly advocating “Hong Kong independence”, offering ideas that urge for separatism and even shamefully pleading for interference by external forces in China’s internal affairs and the affairs of the HKSAR as well as the imposition of sanctions to achieve their aims. Illegal firearms and explosives have been found, posing a real risk of terrorism. All these matters, if not curtailed, pose great threat to the public safety of the HKSAR and more importantly, a real risk to the national security of China.

The HKSAR has a constitutional obligation to legislate for certain specific national security offences in accordance with Article 23 of the Basic Law. It has failed to do so for the past 23 years and it is foreseeable that such obligation could not be fulfilled in the near future. Under these circumstances, the HKSAR became a gaping hole in China’s national security, posing a major security risk to its national sovereignty, unity and territorial integrity.

In addition to being a SAR of China, Hong Kong is an international metropolis, an international financial centre and a global investment hub. Criminal activities endangering national security have not only affected social stability, but also posed safety risks to foreigners residing in the HKSAR as well as businessmen and tourists, and also brought uncertainties to commercial and investment activities.

In view of the urgency and necessity in safeguarding national security, the 13th National People’s Congress (“NPC”) made, in its third meeting on 28 May, the “*Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*” (“528 Decision”), and entrusted its Standing Committee (“NPCSC”) to formulate the national security law. Having considered the views expressed by the Government of the HKSAR (“HKSARG”) and different sectors of the HKSAR’s society and taken into account the circumstances of the city, the NPCSC, in accordance with its mandate, passed in its 20th meeting on 30 June, the “*Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*” (“National Security Law”). In accordance with Article 18 of the Basic Law, the National Security Law was added to Annex III of the Basic Law, following consultation with the Basic Law Committee and the HKSARG. On the same day, the National Security Law was promulgated in the HKSAR and came into effect¹.

¹ Article 43 of the National Security Law stipulates various measures that the department for safeguarding national security of the Police Force of the HKSAR may take when handling cases concerning offences endangering national security, and authorizes the Chief Executive of the HKSAR, in conjunction with the Committee for Safeguarding National Security of the HKSAR to make relevant implementation rules (“Implementation Rules”) for the purpose of applying the measures stipulated under Article 43. The Implementation Rules have taken effect on 7 July, 2020. The Implementation Rules are formulated with reference to the various existing laws of the HKSAR, such as the Firearms and Ammunition Ordinance, the Prevention of Bribery Ordinance, the Organized and Serious Crimes Ordinance, the United Nations (Anti-Terrorism Measures) Ordinance and the Societies Ordinance, and

The NPC adopted a two-step approach “*Decision + Legislation*” for enacting and implementing the National Security Law. In fact, it is the first time since China’s resumption of the exercise of its sovereignty over Hong Kong that the NPC made a decision on the HKSAR². It is done with a view to providing a legal framework and enforcement infrastructure. The National Security Law serves as an important milestone for “One Country, Two Systems” to return to the right track and continue to move forward steadfastly.

In the international communities, some media, politicians or even foreign government officials and spokespersons have described the National Security Law as destroying “One Country, Two Systems”, taking away the high degree of autonomy of the HKSAR and turning “One Country, Two Systems” into “One Country, One System”. Such views are fundamentally flawed. These statements are either made for a political objective or premised on an improper understanding of “One Country, Two Systems” and are untenable from the legal perspective.

In the following sections, explanation in greater details will be provided and the concerns raised on the National Security Law will be addressed.

(2) **The enactment of the National Security Law is legitimate and constitutional**

(i) **Safeguarding national security is within the purview of the Central**

international practices. These measures are for the purpose of preventing, suppressing and punishing offences endangering national security. The Implementation Rules are also in compliance with the requirements concerned under the National Security Law and the Basic Law, including the requirements concerning the respect and protection of human rights.

² Prior to the reunification, the NPC have made eight decisions on various issues related to Hong Kong, namely:

- (i) “*Decision on Approving the Sino-British Joint Declaration*”;
- (ii) “*Decision on the Establishment of the Drafting Committee of the Basic Law of the Hong Kong Special Administrative Region*”;
- (iii) “*Decision on the Establishment of the Hong Kong Special Administrative Region*”;
- (iv) “*Decision on the Basic Law of the Hong Kong Special Administrative Region*”;
- (v) “*Decision on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*”;
- (vi) “*Decision on the Establishment of the Committee for the Basic Law under the Standing Committee of the National People’s Congress*”;
- (vii) “*Decision on the Establishment of the Preparatory Committee for the Hong Kong Special Administrative Region*”; and
- (viii) “*Decision on the Work Report of the Preparatory Committee for the Hong Kong Special Administrative Region*”.

(See Zhang Yong, “*National Security Legislation: Current Status and Prospects*” (Online seminar for the 30th anniversary of the promulgation of the Basic Law of Hong Kong, 8 June, 2020)).

Authorities

National security is a matter of top priority for any State in the world. It is the basic prerequisite and foundation for the survival and development of a State, and an important cornerstone of its stability. National security concerns the core interests of a State and the fundamental interests of its people, and it is vital for safeguarding national sovereignty, unity and territorial integrity. As such, safeguarding national security is undoubtedly within the purview of the Central Authorities. This is the basic principle of national sovereignty, and reflects the common practice of States around the world.

Regarding national security, President Xi once said, “*the insightful one takes preventive measures before crises even begin, and the wise one always considers how to tackle the troubles that may emerge in the future*”³. In the “*Decision of the CPC Central Committee on Major Issues Concerning Upholding and Improving the System of Socialism with Chinese Characteristics and Advancing the Modernization of China’s System and Capacity for Governance*” (adopted at the Fourth Plenary Session of the 19th Central Committee of the Communist Party of China in 2019), it is stipulated that China will “*resolutely safeguard national sovereignty, security, and development interests, maintain the long-term prosperity and stability of Hong Kong and Macau, and will never tolerate any behaviour that challenges the bottom line of “One Country, Two Systems”, and will never tolerate any secession of the country*” and “*legal system and enforcement mechanisms for the SARs will be establish and enhanced for safeguarding national security and strengthening the law enforcement power in the SARs*”.

Given that national security is directly related to the interests of the State and its people, it is a matter that is within the purview of the Central Authorities and is never a matter that falls within the scope of autonomy of the HKSAR under “One Country, Two Systems”. Undoubtedly, the Central People’s Government (“CPG”) has the greatest and ultimate responsibility for safeguarding the national security for all parts of China, including the HKSAR.

(ii) The Decision of the National People’s Congress is made in accordance with the Constitution

According to the Constitution of the People’s Republic of China (“Constitution”), the NPC is the highest organ of State power and exercises the legislative power of the State to enact laws and other legal documents⁴. Given that safeguarding national security is a matter that falls within the purview of the Central Authorities, it is trite that the NPC has the power to make the 528 Decision. The 528 Decision was made pursuant to Article 31 and Articles 62(2), 62(14) and 62(16) of the Constitution, and the relevant provisions of the Basic Law.

In particular, Article 31 of the Constitution provides that “[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s

³ Xinhua, “*Protecting the State – the views of President Xi Jinping on national security*” (15 April, 2019), available at http://www.xinhuanet.com/politics/xxjxs/2019-04/15/c_1124367882.htm.

⁴ See Articles 57 and 58 of the Constitution.

Congress in the light of specific conditions". According to Article 62(14) of the Constitution, the NPC has the power to decide on the establishment of the SARs and the systems to be instituted there. In this regard, it is pertinent to remember that the establishment of the HKSAR was based on the "*Decision on the Establishment of the Hong Kong Special Administrative Region*" made by the NPC in accordance with the Constitution on 4 April 1990. On the same day, the NPC enacted the Basic Law of the HKSAR pursuant to Articles 31 and 62(14) of the Constitution. Furthermore, Article 62 of the Constitution states that the NPC has the duty and power to oversee the enforcement of the Constitution and exercise other functions and powers that the highest State organ of power should exercise⁵.

As a matter of the constitutional order of China, the NPC has the power to make decisions and such decisions are binding within China⁶.

It is worth noting that the "*Explanation on the Draft Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security*" ("*Explanation on the Draft Decision*")⁷ expressly proposes the adoption of the two-step process of "*Decision + Legislation*" in respect of the legislative work of the National Security Law⁸.

The Explanation on the Draft Decision sets out five basic principles⁹ that must be followed in respect of establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security at the national level. Hence, when enacting the national security law, the NPCSC must adhere to and enhance "One Country, Two Systems" as well as upholding the rule of law in the HKSAR.

The 528 Decision contains seven articles in total. In particular, Article 3 provides that

⁵ See Articles 62(2) and 62(16) of the Constitution.

⁶ See Articles 57, 58 and 62 of the Constitution.

⁷ See Wang Chen, Vice Chairman of the NPCSC, at the third meeting of the 13th NPC (22 May, 2020).

⁸ According to the Explanation on the Draft Decision, it is stated that "the first step is for the NPC to make a decision on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in accordance with the Constitution and the Basic Law and lay down the basic provisions on certain issues. At the same time, the NPCSC is entrusted to formulate the relevant law on the establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security. As for the second step, NPCSC will formulate the relevant law in accordance with the Constitution, the Basic Law and the NPC's Decision, and in light of the specific circumstances of the HKSAR. The NPC also decides on including relevant law into Annex III of the Basic Law of the HKSAR of the PRC to be promulgated and implemented by the HKSAR locally".

⁹ These five basic principles include:

- (i) resolutely safeguarding national security;
- (ii) adherence to and enhancing "One Country, Two Systems";
- (iii) upholding the rule of law in the HKSAR;
- (iv) resolutely opposing foreign interference; and
- (v) effectively safeguarding the legitimate rights and interests of Hong Kong residents.

“[t]he HKSAR must complete the national security legislation stipulated in the Basic Law of the HKSAR at an earlier date”. It clearly shows that the HKSAR’s duty under Article 23 of the Basic Law still has to be fulfilled.

(iii) **The Standing Committee of the National People’s Congress has been authorised to formulate the National Security Law under Article 6 of the 528 Decision**

In respect of the two-step process of “*Decision + Legislation*”, according to Article 6 of the 528 Decision, the NPCSC is entrusted to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in order to effectively prevent, suppress and punish the offences of secession, subversion, terrorist activities and collusion with foreign or external forces that interferes with affairs of the HKSAR¹⁰. The 528 Decision provides that the relevant law is to be added to Annex III of the Basic Law of the HKSAR to be promulgated and implemented in the HKSAR.

Some commentators criticised that the enactment of the National Security Law may have been conducted in an overly hasty manner, with the process taking only around a month time when the NPC made the 528 Decision on 28 May and the NPCSC passed the National Security Law on 30 June. It should however be noted that the procedure through which the NPCSC formulated the National Security Law is in line with the legal principle of due process and is also in compliance with the Legislation Law of the People’s Republic of China¹¹.

¹⁰ The “*Explanation on the Draft Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*” (“*Explanation on the Draft Law*”)¹⁰ has clearly stated that the National Security Law has been formulated in accordance with the five basic principles as set out in the Explanation on the Draft Decision.

Furthermore, according to the Explanation on the Draft Law, the process through which the National Security Law was formulated in accordance with five working principles.

These five working principles include:

- (i) Strengthening confidence in the system, and striving to improve the system and mechanism of the HKSAR in accordance with the Constitution, the Basic Law and the NPC’s 528 Decision in light of the new situations;
- (ii) Adhering to a problem-oriented approach, and striving to resolve the legal loopholes, system deficiencies, and shortcomings of the HKSAR in respect of safeguarding national security;
- (iii) Highlighting the main body of responsibility, and striving to implement the constitutional responsibilities of the HKSAR for safeguarding national security;
- (iv) Coordinating the systemic arrangements, and striving to make systematic and comprehensive regulations at the national level and the level of the HKSAR, in respect of the legal system and the enforcement mechanisms; and
- (v) Taking into account the differences between Mainland China and the HKSAR, and striving to address the compatibility and complementarity between the National Security Law and the relevant national laws and laws of the HKSAR.

¹¹ Articles 30 and 37 of the Legislation Law of the People’s Republic of China respectively provide that “[a]s regards a bill that has been put on the agenda of a session of the Standing Committee, if various parties concerned have formed a preponderant consensus, the said bill may be put to a vote after deliberations at two sessions of the Standing Committee. As regards a bill that regulates only very

In terms of collecting opinions for formulating the National Security Law, the Central Authorities have taken into account the opinions and suggestions of the Chief Executive of the HKSAR, relevant principal officials, the Hong Kong deputies to the NPC as well as other representatives from all walks of life in the HKSAR, including the legal profession¹².

On the contrary, if we look at the USA Patriot Act 2001 adopted by the United States in response to the September 11 terrorist attack as an example, the enactment process took merely three days, with the bill introduced in the Congress on 23 October, 2001, passed by the Congress on the 25th of the same month, and signed by the President on the 26th.

(iv) The National Security Law does not replace or abrogate from Article 23 of the Basic Law

The Constitution and the Basic Law are the foundation of the constitutional order of the HKSAR. The preamble of the Basic Law has expressly stated that the purpose of establishing the HKSAR is to “[uphold] national unity and territorial integrity and [maintain] the prosperity and stability of Hong Kong”. Articles 1 and 12 of the Basic Law also stipulate that the HKSAR is “is an inalienable part of the People’s Republic of China” and “a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government”.

In respect of safeguarding national security, Article 23 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region 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 organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies”.

Article 23 of the Basic Law does not change the fundamental principle that national security and the power of enactment is a matter that falls entirely within the purview of the Central Authorities. Furthermore, what is set out under Article 23 is an obligation and a constitutional responsibility of the HKSAR to enact legislation in respect of certain offences relating to national security. The seven types of acts and activities that endanger national security as prescribed in Article 23 are far from covering the entirety

specific matters or that has only been partially revised, if various parties concerned have formed a preponderant consensus, the said bill may be put to a vote after deliberation at one session of the Standing Committee” and “[a]s regards a bill that has been put on the agenda of a session of the Standing Committee, the draft law, the notes on the drafting or revision thereof, etc. shall be promulgated for public comments upon completion of the session of the Standing Committee, unless non-promulgation is decided by the Chairman’s Meeting. The period of soliciting public comments shall generally not be less than 30 days. Information on the solicitation of opinions shall be communicated to the public”.

¹² The Explanation on the Draft Law has pointed out that after the Draft National Security Law was formulated, the CPG has specifically solicited the opinions of the HKSARG and relevant parties on the draft, and has fully considered the actual situation of the HKSAR, in order to make revisions and improvements to the Draft Law.

of the concept of national security¹³. For the reasons set out above, Article 23 of the Basic Law cannot be construed as the CPG abdicating its right to legislate for safeguarding national security if the need arises, especially when the HKSAR has been unable to fulfil its constitutional obligation under Article 23 of the Basic Law for 23 years since reunification. Moreover, Article 3 of the 528 Decision has made it clear that the enactment of the National Security Law did not replace or abrogate from Article 23 of the Basic Law. Article 23 of the Basic Law will continue to be effective, and the HKSAR has to fulfil its obligation by enacting on its own the national security legislation as required under the Basic Law as early as possible.

(v) **Promulgation of the National Security Law under Article 18 of the Basic Law**

Having established that national security is within the purview of the Central Authorities and has never been within the autonomy of the HKSAR, it is necessary to look at how the National Security Law becomes applicable in the HKSAR. Article 18 of the Basic Law provides that national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. It further provides that national laws that can be added to Annex III are confined to “*those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the [HKSAR] as specified by [the Basic Law]*”. It follows that the National Security Law can be included in Annex III, after consultation with the Basic Law Committee and the HKSARG in accordance with Article 18. Pursuant to the 528 Decision, the National Security Law was promulgated and became applicable to the HKSAR on 30 June 2020.

As such, in light of the aforesaid, the two-step process of “*Decision + Legislation*” adopted by the NPC for the enactment and the implementation of the National Security Law is not only constitutional and legitimate, but also reasonable in light of the circumstances¹⁴.

(3) **The National Security Law is in line with the international practice of safeguarding national security**

Safeguarding national security is a matter of national sovereignty. Sovereign equality is a basic norm of international relations and a fundamental principle of international law. The principle of sovereign equality is also entrenched under the Charter of the

¹³ National security can be broadly categorized into traditional security and non-traditional security. Traditional security includes political security (including the security of the political regime), homeland security, military security, etc. Non-traditional security includes financial security, biosecurity, cyber security, nuclear security, etc. (See Zhang Yong, “*National Security Legislation: Current Status and Prospects*” (Online seminar for the 30th anniversary of the promulgation of the Basic Law of Hong Kong, 8 June, 2020)).

¹⁴ See the blog articles by the Secretary for Justice of the HKSAR, Ms. Teresa Cheng, SC, “*Safeguarding National Security Law*” (24 May 2020), “*Correctly Understanding the National Security Legislation from the Perspective of Constitutional Order*” (26 May 2020), and “*Further Explanations on the National Security Law from Legal Perspective*” (14 June 2020). See also the article by the Secretary for Justice of the HKSAR, Ms. Teresa Cheng, SC, “*Enactment of the National Security Law is Constitutional and Legitimate*” (28 May 2020, Singtao Newspaper).

United Nations¹⁵.

According to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (“Friendly Relations Declaration”) unanimously passed by the General Assembly of the United Nations in 1970, the elements of sovereign equality include, *inter alia*, that each State enjoys the rights inherent in full sovereignty and the territorial integrity and political independence of the State are inviolable¹⁶. It is trite that the purpose of safeguarding national security is to protect the territorial integrity and political independence of the State. Enacting national security legislation is without a doubt an inherent right of every sovereign State.

In fact, many countries in the world have already enacted their national security laws. In terms of the number of specific national security-related legislations, for instance, the United States has at least 20¹⁷; the United Kingdom has at least 9¹⁸; Australia has at least 4¹⁹; Canada has at least 6²⁰; and New Zealand has at least 2²¹. In Asia, Singapore also has its Internal Security Act²². The offences dealt with under the National Security

¹⁵ See Article 2(1) of the Charter of the United Nations.

¹⁶ According to the Friendly Relations Declaration, the principle of sovereign equality includes the following elements:

- (i) States are judicially equal;
- (ii) Each State enjoys the rights inherent in full sovereignty;
- (iii) Each State has the duty to respect the personality of other States;
- (iv) The territorial integrity and political independence of the State are inviolable;
- (v) Each State has the right freely to choose and develop its political, social, economic and cultural systems; and
- (vi) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

¹⁷ See e.g. National Security Act 1947, USA Patriot Act 2001, Logan Act, Homeland Security Act 2002, Foreign Intelligence Surveillance Act of 1978, Foreign Mission Act, Foreign Agents Registration Act, Title 18 U.S. Code Ch. 115 Treason, Sedition, and Subversive Activities, Title 50 U.S. Code Ch. 23 Internal Security, Title 18 U.S. Code Ch.37 Espionage and Censorship, and National Security Agency Act of 1959.

¹⁸ See e.g. Treason Felony Act 1848, Official Secrets Act, Incitement to Disaffection Act 1934, and Terrorism Act 2006.

¹⁹ See e.g. National Security Law Amendment (Espionage and Foreign Interference) Act 2018, Foreign Influence Transparency Scheme Act and the offences of treachery, terrorism and foreign interference under the Criminal Code Act 1995.

²⁰ See e.g. National Security Act 2017, Canadian Security Intelligence Service Act, and the offences of terrorism, secession, subversion, treason and sedition under Criminal Code.

²¹ See e.g. the Intelligence and Security Act and the offences of treason and espionage under the Crime Act 1961.

²² Section 8 of the Internal Security Act provides that “[i]f the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is

Law are also similar to those in the national security legislations of other States.

Moreover, the objective of safeguarding national security is to safeguard the people's right to survival and development, and to protect national development interests. These objectives have been recognized in the Declaration on the Right to Development adopted by the General Assembly of the United Nations on 4 December, 1986. In particular, Article 3 of the Declaration states that "*States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development*" and "*[t]he realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*".

Under international law, a corollary to the principle of sovereign equality is the principle of non-intervention. According to the Friendly Relations Declaration, it is stated that "*[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal ... affairs of any other State. Consequently, ... all ... forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law*". The Friendly Relations Declaration further states that "*[n]o State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind*". In this regard, the International Court of Justice has, in the case of *Nicaragua v United States of America*, held that the use of coercive measures with the intent to interfere with another State's internal affairs is in violation of the principle of non-intervention, which is a fundamental principle of international law²³.

Since enacting national security legislation is an inherent right of every sovereign State and falls within the internal affairs of a sovereign State, the enactment and implementation of the National Security Law should be free from intervention by other States. Regrettably, however, some countries have adopted various unilateral coercive measures such as sanctions, some blatantly attempted and some seemingly to be attempts to exert pressure on China in respect of the National Security Law and interfere with China's internal affairs (including the affairs of the HKSAR). Such acts are arguably at odds with the international law principle of non-intervention and unbecoming of any civilised nations.

(4) General Principles of the National Security Law

The National Security Law was enacted in accordance with the Constitution, the Basic Law and the NPC's 528 Decision. In particular, Chapter I of the National Security Law has set out various General Principles, which are very important in guiding the application and interpretation of the provisions. First and foremost, Article 1 of the

necessary to do so, the Minister [charged with the responsibility for internal security] shall make an order ... directing that such person be detained for any period not exceeding two years" and "[t]he President may direct that the period of any order ... be extended for a further period or periods not exceeding two years at a time".

²³ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America).

General Principles makes it clear that the enactment of the National Security Law is to, *inter alia*, ensure the resolute, full and faithful implementation of the policy of “One Country, Two Systems”²⁴.

Articles 2 and 3 of the General Principles are of prime importance. Article 2 provides that Article 1 (i.e. the HKSAR is an inalienable part of China) and Article 12 (i.e. the HKSAR shall enjoy a high degree of autonomy and come directly under the CPG) of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. Article 3 reiterates the trite principle that the CPG has an overarching responsibility for national security affairs relating to the HKSAR²⁵.

(i) **The National Security Law respects and protects human rights and freedoms**

The National Security Law makes provisions for the protection of human rights and freedoms, but such rights and freedoms are not absolute. The International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) both provide for certain permissive restrictions on human rights on the ground of national security²⁶. Article 2 of the National Security Law states that no institution, organisation or individual in the HKSAR shall contravene Articles 1 and 12 of the Basic Law in exercising their rights and freedoms.

That said, Article 4 of the National Security Law expressly provides that in safeguarding national security, the HKSAR shall respect and protect, in accordance with the law, human rights which the residents of the HKSAR enjoy under the Basic Law²⁷, including freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration.

²⁴ See Article 1 of the National Security Law. The other purposes stated in Article 1 of the National Security Law are:

- (i) safeguarding national security;
- (ii) 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;
- (iii) maintaining prosperity and stability of the HKSAR; and
- (iv) protecting the lawful rights and interests of the residents of the HKSAR.

²⁵ Article 3 of the National Security Law further states that it is the duty of the HKSAR under the Constitution to safeguard national security and the HKSAR shall perform the duty accordingly.

²⁶ See e.g. Articles 12 – 14, 19 and 21 – 22 of the ICCPR and Article 8 of the ICESCR. For example, With respect to the right to hold opinions and the right to freedom of expression, Article 19(3) of the ICCPR provides that “[t]he exercise of [these rights] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”.

²⁷ See Article 39 of the Basic Law. It is also worth noting that according to Article 41 of the Basic Law, “[p]ersons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in [Chapter III of the Basic Law]”.

Hence, in implementing and enforcing the National Security Law, the legitimate rights and freedoms of Hong Kong residents will be respected and protected. This is reiterated in the judgement dated 13 July 2020 of the Court of First Instance of the High Court of the HKSAR²⁸ in which Judge Chow remarked that “the Judiciary should as far as possible, in line with legal principles and reasonableness, interpret the National Security Law and the fundamental rights of the Hong Kong residents under Chapter 3 of the Basic Law consistently”.

(ii) The National Security Law reflects important rule of law principles

The National Security Law is a national law formulated by the NPCSC. In formulating the Law, the NPCSC have taken into account the differences between the legal systems of Mainland China and the HKSAR. The provisions are designed to be compatible with, and complementary to the laws of the HKSAR in order to ensure the effective implementation of the legal framework for safeguarding national security in the SAR.

It is worth noting that Article 5 of the National Security Law reflects important rule of law principles that are practised in both civil law and common law jurisdictions, such as the presumption of innocence, protection against double jeopardy and fair trial²⁹.

(5) Overview on the National Security Law

The National Security Law is a unique and ground-breaking law³⁰. It comprehensively covers three aspects of laws, namely, the “Organizational Law” aspect³¹ that establishes the structure of the responsible institutions and entities, the “Substantive Law” aspect³² that sets out the offences and penalties, and the “Procedural Law” aspect³³ that governs the procedure for enforcement, prosecution and adjudication under the National Security Law. It is a fine illustration of how the differences in the terminologies and concepts of civil and common law jurisdictions can be addressed and

²⁸ In *Kwok Cheuk Kin v Chief Executive of HKSAR* [2020] HKCFI 1521, para. 7, Judge Chow also referred to Article 4 of the National Security Law and the Judiciary’s constitutional duty to protect the fundamental rights of Hong Kong residents under Chapter 3 of the Basic Law.

²⁹ See Article 5 of the National Security Law. It states that “[t]he principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law. A person is presumed innocent until convicted by a judicial body. 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 shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings”.

³⁰ See the opening remarks of the Secretary for Justice of the HKSAR, Ms. Teresa Cheng, SC, for the joint panel meeting of the Panel on Security, the Panel on Constitutional Affairs and the Panel on Administration of Justice and Legal Services of the Legislative Council (7 July 2020).

³¹ See Chapter II of the National Security Law.

³² See Chapter III of the National Security Law.

³³ See Chapter IV of the National Security Law.

practically dealt with in respect of the implementation and enforcement of the National Security Law in the HKSAR.

(i) The arrangement under the “Organizational Law” aspect

The “Organizational Law” aspect (Chapter II of the National Security Law) sets out the provisions regarding the composition and responsibilities of the Committee for Safeguarding National Security of the HKSAR. In this regard, the Committee shall be responsible for affairs relating to and assume responsibility for safeguarding national security in the HKSAR, and shall be under the supervision of and accountable to the CPG³⁴. The Committee is chaired by the Chief Executive and its members include other relevant principal officials of the HKSARG³⁵.

Pursuant to the National Security Law, the Police Force of the HKSAR has established a department for safeguarding national security³⁶ and the Department of Justice of the HKSAR has established a specialized prosecution division³⁷.

(ii) Provisions on the four types of offences endangering national security under the “Substantive Law” aspect

The four types of offences that the National Security Law seeks to prevent, suppress and punish are covered in the “Substantive Law” aspect of the National Security Law³⁸. It specifies the elements of each of these offences (including the required acts (*actus reus*) and intents (*mens rea*)), the respective penalties, and the scope of application.

These four types of offences set out under the National Security Law are in fact similar to those in the national security laws of foreign jurisdictions. For example, the United Kingdom’s Treason Felony Act 1848³⁹ and the Criminal Code of Canada⁴⁰ cover the

³⁴ See Article 12 of the National Security Law. According to Article 14 of the National Security Law, the duties and functions of the Committee for Safeguarding National Security of the HKSAR shall be:

- (i) analysing and assessing developments in relation to safeguarding national security in the HKSAR, making work plans, and formulating policies for safeguarding national security in the HKSAR;
- (ii) advancing the development of the legal system and enforcement mechanisms of the HKSAR for safeguarding national security; and
- (iii) coordinating major work and significant operations for safeguarding national security in the HKSAR.

³⁵ See Article 13 of the National Security Law.

³⁶ See Articles 16 and 17 of the National Security Law.

³⁷ See Article 18 of the National Security Law.

³⁸ The four types of offences under the National Security Law are 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.

³⁹ See section 3 of the Treason Felony Act 1848.

⁴⁰ See sections 46(2)(a) and 51 of the Criminal Code of Canada.

offences of secession and subversion. National security laws on terrorism are even more common in other jurisdictions, and some notable examples include the USA Patriot Act 2001 and the United Kingdom's Terrorism Prevention and Investigation Measures Act 2011. As far as the offence of collusion with a foreign country or with external elements to endanger national security is concerned, such offence can be found in the Logan Act of the United States and the National Security Law Amendment (Espionage and Foreign Interference) Act 2018 of Australia.

(iii) **The extraterritorial application of the National Security Law**

Criminal offences that are subject to the National Security Law endanger national sovereignty, unity and territorial integrity, which by nature are different from general criminal offences. Regardless of whether the criminal acts are committed within the HKSAR or in foreign jurisdictions, or whether the offender is a resident of the HKSAR or not, where the relevant criminal acts threaten the national security, unity and territorial integrity of China, such acts or conducts must be prevented, suppressed and punished. The National Security Law therefore has to provide for extraterritorial application. Article 38 of the National Security Law stipulates that it applies to the relevant offences committed against the HKSAR from outside the Region by a person who is not a permanent resident of the Region.

Such extraterritorial application of the National Security Law is in line with the well-recognized international law principle of “protective jurisdiction”. Under the principle of “protective jurisdiction”, if foreigners commit crimes abroad against a sovereign State that endanger its security or its vital interests (such as government systems or functions), the sovereign State can adopt laws with extraterritorial effects to exercise prescriptive criminal jurisdiction⁴¹. The principle of “protective jurisdiction” is followed in several international conventions against terrorism, such as the International Convention against the Taking of Hostages (1979)⁴², the International Convention for the Suppression of Terrorist Bombings (1997)⁴³, and the International Convention on the Suppression of the Financing of Terrorism (1999)⁴⁴.

Extraterritorial application is also a common feature of national security laws in many

⁴¹ See James Crawford, “*State Jurisdiction – Jurisdictional Competence*”, “*Brownlie’s Principles of Public International Law*” (2019) (Oxford University Press, 9th Edition), at pp. 446 – 447. See also Malcolm N. Shaw, “*International Law*” (2017) (Cambridge University Press, 8th Edition), at p.499. The principle of “protective jurisdiction” has been recognized as early as in the 13th and 14th centuries in the city-states of northern Italy, and has been widely accepted by countries around the world in the 19th century (See Cedric Ryngaert, “*Jurisdiction in International Law*” (2008) (Oxford University Press), at pp. 96 – 100, and Ian Cameron, “*International Criminal Jurisdiction, Protective Principle*” (2007), Max Planck Encyclopedias of International Law. The US court in *United States v Pizzarusso*, 388 F 2d 8, 10 (2d Cir 1968), cert denied, 392 US 936 (1968) defined the “protective jurisdiction” as “[the authority to] prescribe a rule of law attaching legal consequences to conduct outside [the State’s] territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems”.

⁴² See Article 5(1)(c) of the International Convention against the Taking of Hostages (1979).

⁴³ See Article 6(2)(d) of the International Convention for the Suppression of Terrorist Bombings (1997).

⁴⁴ See Article 7(2)(c) of the International Convention on the Suppression of the Financing of Terrorism (1999).

States. Some examples include:

- (1) Section 5 (Offences committed abroad with specific domestic connection) of the German Criminal Code, which covers extraterritorial conducts in respect of the offence of treason⁴⁵;
- (2) The Logan Act of the United States prohibits certain unauthorized correspondence of its citizens, wherever he or she may be, with foreign governments⁴⁶;
- (3) The Foreign Intelligence Surveillance Act 1978 of the United States allows surveillance and collecting overseas intelligence on foreign persons abroad⁴⁷; and
- (4) The Terrorism (Suppression of Bombing) Act⁴⁸ and the Protection from Online Falsehoods and Manipulation Act⁴⁹ of Singapore.

(iv) **The “Procedural Law” aspect – The HKSAR has jurisdiction under the National Security Law**

Safeguarding national security is a national matter, and this holds true in any States, be they unitary States or federal States. As stated in the General Principles of the National Security Law, the CPG has an overarching responsibility for national security affairs relating to the HKSAR, and it is the constitutional duty of the HKSAR to safeguard national security and the HKSAR shall bear responsibility in that regard⁵⁰.

⁴⁵ Article 5 of the German Criminal Code provides that “[r]egardless of which law is applicable at the place where the offence was committed, German criminal law applies to the following offences committed abroad: ... 2. high treason (sections 81 to 83); ... 4. treason and endangering external security (sections 94 to 100a)”.

⁴⁶ See Logan Act, 1 Stat. 613, 18 U.S.C. The Act states that “[a]ny citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both” (emphasis added).

⁴⁷ See Foreign Intelligence Surveillance Act 1978, 50 U.S.C. §1881a.

⁴⁸ Section 7 of the Terrorism (Suppression of Bombing) Act provides that “[e]very person who, outside Singapore, commits an act or omission that, if committed in Singapore, would constitute a terrorist bombing offence is deemed to commit the act or omission in Singapore and may be proceeded against, charged, tried and punished accordingly”.

⁴⁹ Section 7(1) of the Protection from Online Falsehoods and Manipulation Act provides that “[a] person must not do any act in or outside Singapore in order to communicate in Singapore a statement knowing or having reason to believe that — (a) it is a false statement of fact; and (b) the communication of the statement in Singapore is likely to — (i) be prejudicial to the security of Singapore or any part of Singapore; ... (v) incite feelings of enmity, hatred or ill-will between different groups of persons; or (vi) diminish public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board”.

⁵⁰ See Article 3 of the National Security Law.

Under Chapter IV of the National Security Law which deals with the aspect of procedural law, two important points are worthy of note. First, the HKSAR has been entrusted with the responsibility under the National Security Law to exercise jurisdiction over most of the cases, save for three specified situations⁵¹. Secondly, when the HKSAR exercises its jurisdiction, the criminal investigation, prosecution, trial, and execution of penalty are conducted in accordance with the National Security Law and the laws of the HKSAR and largely follow the existing legal procedures of the HKSAR. Hence, the Department of Justice continues to conduct prosecutions independently according to the evidence, the applicable law and the Prosecution Code, free from any interference as guaranteed under the Basic Law⁵².

The jurisdictional arrangement under the National Security Law is also very unique in the world. In both unitary State and federal State, it is either the central government or the federal government that is directly responsible for safeguarding national security, whereas the local government or the state government can only cooperate and assist with such work⁵³. Take the United States as an example⁵⁴, its national security laws are all enacted by the Congress and individual states have no right to enact such laws; enforcement of national security law falls within the jurisdiction of the Department of Homeland Security, the Federal Bureau of Investigation and the Central Intelligence Agency; federal prosecutors are responsible for prosecution of national security offenses; and the federal courts are responsible for the adjudication of national security related cases.

As explained above, the jurisdictional arrangement of giving the HKSAR jurisdiction over most of the cases under the “Procedural Law” aspect of the National Security Law is ground-breaking. Such arrangement, apart from reflecting the adherence to “One Country, Two Systems”, has demonstrated the high level of confidence and trust of the CPG in the HKSAR in implementing its own constitutional duty to safeguard national security.

(v) **The National Security Law does not undermine judicial independence**

In the HKSAR, the only criteria upon which judges are appointed is their judicial and professional quality, and their appointment by the Chief Executive is upon the recommendation of an independent statutory commission⁵⁵. No political vetting is involved in the appointment process. Furthermore, Judges enjoy security of tenure and

⁵¹ See Articles 40 and 55 of the National Security Law.

⁵² See Article 63 of the Basic Law.

⁵³ See Rao Geping, “*Establishing a Legal System for National Security and Creating a New Landscape for the Governance in Hong Kong*” (Bauhinia Magazine, 30 June 2020, available at <https://bau.com.hk/2020/06/42138>).

⁵⁴ See Wang Zhenmin, “*‘One Country, Two Systems’ and Hong Kong’s National Security Legislation*” (Bauhinia Magazine, 29 June 2020, available at <https://bau.com.hk/2020/06/42131>).

⁵⁵ See Articles 88 and 92 of the Basic Law.

immunity from legal action in the performance of their judicial functions⁵⁶, and can only be removed for inability to discharge duties or for misbehavior⁵⁷. Most importantly, judicial independence is constitutionally guaranteed under the Basic Law⁵⁸.

The courts of the HKSAR have been entrusted by the Central Authorities to exercise jurisdiction in adjudicating most of the cases involving the National Security Law. In respect of the adjudicators, according to Article 44 of the National Security Law, a list of designated judges who will handle cases concerning offences endangering national security is to be formed, and the power of designation rests on the Chief Executive⁵⁹. Furthermore, before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the HKSAR and the Chief Justice of the Court of Final Appeal.

When adjudicating cases under the National Security Law, judges remain independent and impartial in performing their judicial duties, free from any interference⁶⁰. Therefore, the arrangement on the designation of judges under the National Security Law does not undermine the highly respected judicial independence of the HKSAR. Indeed, the Chief Justice of the Court of Final Appeal on the HKSAR stated in a statement dated 2 July 2020 that “*designated judges, like all judges, are to be appointed on the basis of their judicial and professional qualities. These are the only criteria relevant to the appointment of judges. This therefore means, for example, that judges should not be designated [under the National Security Law] on the basis of any political considerations. This reinforces the principle that in the handling or determination of any legal dispute, only the law and legal principle will be considered*”.

(vi) The reserved jurisdiction of the Central People’s Government

Safeguarding national security ultimately involves national sovereignty and matters within the purview of the Central Authorities. In line with Article 3 of the National

⁵⁶ See Article 85 of the Basic Law.

⁵⁷ See Articles 89 and 90 of the Basic Law.

⁵⁸ Article 19 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication. The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained”. Article 85 of the Basic Law provides that “[t]he courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions”.

⁵⁹ Pursuant to Article 44 of the National Security Law, judges that may be designed include the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of Appeal of the High Court, and the judges of the Court of Final Appeal, as well as deputy judges or recorders.

⁶⁰ According to the late Chief Justice of the United Kingdom, Lord Bingham, the meaning of “judicial independence” is as follows: “*decisions are made by adjudicators who, however described, are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure, and impartial in the sense that they are, so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind*”.

Security Law, given that the offences involving national security can endanger and harm the fundamental interests of the entire State and its people, the Central Authorities bears the fundamental responsibilities in respect of safeguarding national security.

Chapter V of the National Security Law provides for the establishment of the Office for Safeguarding National Security of the CPG in the HKSAR (“CPG Office on National Security”)⁶¹.

In the situations where, for instance, the HKSAR cannot effectively perform its obligation under the National Security Law and the HKSAR becomes a risk to national security, it is certainly right for the Central Authorities to assume jurisdiction. Under Article 55 of the National Security, three such specified situations have been set out. One may categorize this as the reserved jurisdiction of the CPG.

(a) Reserved jurisdiction to be exercised by the CPG under three specific situations

In Article 55 of the National Security Law, three specified situations are set out⁶²:

- (1) The case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case;
- (2) A serious situation occurs where the HKSARG is unable to effectively enforce the National Security Law; or
- (3) A major and imminent threat to national security has occurred.

The first type of situations arises when cases related to the national security offences involving national defence and foreign affairs and are of such complexity that, as a local administrative region, the HKSAR has difficulties in handling. In such cases, only the CPG will have sufficient capability to effectively deal with the complex situations.

In respect of the second type of situations, naturally, where the HKSAR is unable to deal with situations threatening national security, the Central Authorities will assume jurisdiction.

⁶¹ See Article 48 of the National Security Law. According to Article 49 of the National Security Law, the CPG Office on National Security shall perform the following mandate:

- (i) analysing and assessing developments in relation to safeguarding national security in the HKSAR, and providing opinions and making proposals on major strategies and important policies for safeguarding national security;
- (ii) overseeing, guiding, coordinating with, and providing support to the HKSAR in the performance of its duties for safeguarding national security;
- (iii) collecting and analysing intelligence and information concerning national security; and
- (iv) handling cases concerning offence endangering national security in accordance with the law.

⁶² See Article 55 of the National Security Law.

The third type of situation in which the CPG may exercise the reserved jurisdiction under the National Security Law is for avoiding the extreme scenario of the NPCSC having to declare a state of emergency under Article 18(4) of the Basic Law⁶³. Such is the most serious situation. This will assist in ensuring that the HKSAR will remain stable and is in line with the primary purpose of “One Country, Two Systems”, which is to maintain the prosperity and stability of Hong Kong.

In respect of the three specified situations discussed above, the jurisdiction of the CPG Office on National Security will be engaged when the CPG approves its request or the request made by the HKSARG. In the event that the CPG decides to exercise the reserved jurisdiction under the National Security Law, the Central Authorities will conduct investigations, prosecutions, trials and execution of penalty in accordance with the Chinese laws⁶⁴. The HKSAR will have no jurisdiction over such cases.

(b) *The CPG Office on National Security shall abide by national laws and laws of the HKSAR when performing its duty*

Although the acts performed in the course of duty by the CPG Office on National Security and its staff in accordance with the National Security Law are not subject to the jurisdiction of the HKSAR⁶⁵, Article 50 of the National Security Law expressly provides that its staff shall comply with national laws and laws of the HKSAR⁶⁶. Furthermore, they will be subject to the supervision of the national supervisory authorities in accordance with law, which is set out under Section 7 of Chapter III of the Constitution⁶⁷.

⁶³ Under Article 18 (4) of the Basic Law, in the event that the NPCSC decides to declare a state of war or, by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the HKSAR, decides that the HKSAR is in a state of emergency, the CPG may issue an order applying the relevant national laws in the HKSAR.

⁶⁴ See Articles 56 and 57 of the National Security Law. In such scenario, the CPG Office on National Security will initiate investigation into the case; the Supreme People’s Procuratorate will designate a prosecuting body to prosecute it; and the Supreme People’s Court will designate a court to adjudicate it. Under such circumstances, the Criminal Procedure Law of the People’s Republic of China will govern the relevant procedures.

⁶⁵ See Article 60 of the National Security Law.

⁶⁶ Article 50 of the National Security Law provides that “[the CPG Office on National Security] shall perform its mandate in strict compliance with the law and be subject to supervision in accordance with the law. It shall not infringe upon the lawful rights and interests of any individual or organisation. The staff of the Office shall abide by the laws of the Hong Kong Special Administrative Region as well as national laws”.

⁶⁷ Article 5 of the Constitution provides that “[a]ll state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the Constitution and the law. Accountability must be enforced for all acts that violate the Constitution or laws. No organization or individual shall have any privilege beyond the Constitution or the law”. Furthermore, the Constitution provides that the National Commission of Supervision and commissions of supervision at all levels are the supervisory organs of the People’s Republic of China, and such supervisory organs shall supervise all public officials who exercise public powers in accordance with the Supervision Law of the People’s Republic of China. The CPG also has in place other public channels (such as the Supreme People’s Procuratorate) for handling complaints against the staff of the CPG Office on National Security.

(6) **The National Security Law has not undermined “One Country, Two Systems”**

National security concerns the 1.4 billion population of China and the CPG bears fundamental responsibilities in safeguarding national security. It is squarely within the purview of the Central Authorities and is never part of the autonomy of the HKSAR under “One Country, Two Systems”.

Under “One Country, Two Systems”, a fundamental principle is that “One Country” is the premise for the implementation of “Two Systems”. “One Country” is the prerequisite for the different legal and social systems to be practised by the HKSAR and Mainland China under “Two Systems”. On this basis, the National Security Law does not in any way diminish or modify the autonomy of the HKSAR conferred by the Basic Law⁶⁸.

The National Security Law has not changed the fact that under the Basic Law, the HKSAR continues to maintain its capitalist system and does not practise the socialist system and policies⁶⁹.

As in the past, the HKSAR will continue to practise the common law system⁷⁰, and safeguard judicial independence. The high degree autonomy enjoyed by the HKSAR under the Basic Law, in respect of matters such as independent finances⁷¹, independent taxation system⁷², monetary and financial system⁷³, non-adoption of foreign exchange control policies⁷⁴, free convertibility and flow of capital⁷⁵, free trade policy⁷⁶, economic policy⁷⁷, and immigration control⁷⁸, remain unaffected by the National Security Law.

The National Security Law does not derogate from any of the provisions of the Basic

⁶⁸ Article 2 of the Basic Law provides that “[t]he National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law”.

⁶⁹ See Article 5 of the Basic Law. Article 11 of the Basic Law also provides that “[i]n accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law”.

⁷⁰ See Articles 8 and 18 of the Basic Law.

⁷¹ See Article 106 of the Basic Law.

⁷² See Article 108 of the Basic Law.

⁷³ See Article 110 of the Basic Law.

⁷⁴ See Article 112 of the Basic Law.

⁷⁵ See Article 112 of the Basic Law.

⁷⁶ See Articles 114 and 115 of the Basic Law.

⁷⁷ See Article 119 of the Basic Law.

⁷⁸ See Article 154 of the Basic Law.

Law that seek to strengthen the HKSAR's roles as an international financial centre and a global investment hub. The HKSAR will continue to maintain its status as a free port⁷⁹ and protect in accordance with law the right of private ownership of property⁸⁰ as well as the ownership of enterprises and the investments from outside the HKSAR⁸¹. As provided under the Basic Law, the HKSAR will continue to be a separate customs territory and participate in the World Trade Organization in the name of "Hong Kong, China"⁸². Furthermore, with the authorization of the CPG, the HKSAR continue to, under the framework of the Basic Law, conclude free trade agreements and international investment agreements with overseas jurisdictions⁸³, and participate in appropriate capacities in the work of international organizations⁸⁴.

International commerce and investment activities can only thrive under a stable and rule of law-based social environment. Violent activities and social unrest that endanger national security will inevitably result in hindrance, uncertainty and unpredictability to these activities. The National Security Law has not only suppressed the rampant violence and social unrest in a timely manner, but also provided a solid foundation for the stable and long term development of "One Country, Two Systems". It is a pivotal measure that can restore the HKSAR to a harmonious, diverse and inclusive international metropolis where business as well as international trade and investment activities can be conducted as usual, and the legitimate rights and interests of Hong Kong residents and foreigners are safeguarded and can be exercised freely without concerns.

It is therefore fundamentally flawed to suggest that the enactment and implementation of the National Security Law has undermined "One Country, Two Systems". A proper and fair understanding of the constitutional order of China will inevitably lead to the conclusion regarding the legitimacy for the enactment of the National Security Law in accordance with the NPC's 528 Decision. One cannot help but think that assertions suggesting that the National Security Law undermines "One Country, Two Systems" or the high degree of autonomy of the HKSAR are made either out of ulterior motives or a failure in properly understanding the constitutional order of China.

(7) Conclusion

Since the eruption of turmoil in 2019, there have been increasing number of incidents endangering national security and activities advocating "Hong Kong independence" have become increasingly rampant. The train of "One Country, Two Systems" is facing a major risk of "derailment".

Following the reunification, the HKSAR has also been unable to enact laws on its own

⁷⁹ See Article 114 of the Basic Law.

⁸⁰ See Article 6 of the Basic Law.

⁸¹ See Article 105 of the Basic Law.

⁸² See Article 116 of the Basic Law.

⁸³ See Article 151 of the Basic law

⁸⁴ See Article 152 of the Basic Law.

in accordance with Article 23 of the Basic Law to safeguard national security. Under such severe and urgent circumstances, it is indeed reasonable and necessary for the CPG to enact and implement the National Security Law in a swift and decisive manner.

As a result, the enactment and implementation of the National Security Law through the two-step approach adopted by the NPC are constitutional and legitimate, and do not in anyway undermine “One Country, Two Systems”⁸⁵. Following the enactment of the National Security Law, the HKSAR continues to enjoy its high degree of autonomy in matters, such as finance, trade and economic policies.

The enactment and implementation of the National Security Law is in line with the international practice of safeguarding national security and the sovereign rights of China. The National Security Law has also addressed the practice of the civil law jurisdiction of Mainland China and the common law jurisdiction of the HKSAR.

The National Security Law is an important milestone that opens up a new horizon and starts a new chapter for the successful practice of “One Country, Two Systems”⁸⁶. It is expected that the National Security Law will further strengthen the unique position of the HKSAR as an international financial centre and international legal service centre⁸⁷, and allow the city to continue its important and irreplaceable gateway role for serving as a multilateral bridge for foreign capital to enter the enormous market of Mainland China and for Mainland enterprises to go global⁸⁸.

⁸⁵ According to the NPC’s Decision on the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted on 4 April 1990), it is stated that “[t]he Basic Law of the Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People’s Republic of China and in the light of the specific conditions of Hong Kong. The systems, policies and laws to be instituted after the establishment of the Hong Kong Special Administrative Region shall be based on the Basic Law of the Hong Kong Special Administrative Region”.

⁸⁶ Former President of the International Court of Justice, Judge Shi Jiuyong once remarked that “‘One State, Two Systems’ policy is an innovation by China, which uniquely contributes to the progressive development of contemporary international law” (See the speech by Judge Shi Jiu-yong, “One State, Two Systems”, China’s Contribution to the Progressive Development of Contemporary International Law, available in the conference proceedings (see pp. 37 – 44) of 2017 Colloquium on International Law: Common Future in Asia organized by the Asian Academy of International Law and the Chinese Society of International Law.

⁸⁷ According to the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (18 February 2019), it will consolidate and enhance the HKSAR’s status as international financial, transportation and trade centres as well as an international aviation hub, strengthen its status as a global offshore Renminbi (RMB) business hub and its role as an international asset management centre and a risk management centre, and establish the HKSAR as the centre for international legal and dispute resolution services in the Asia-Pacific region, and an international metropolis.

⁸⁸ See Basic Law Bulletin of the Department of Justice (Issue No.21) (December 2019), “Hong Kong as a Multilateral Bridge Connecting the Mainland and the World under the Pioneering “One Country, Two Systems””, available at https://www.doj.gov.hk/eng/public/basiclaw/basic21_3.pdf.

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