

**Presentation of Ms. Teresa Cheng, SC**

**Secretary for Justice**

**“Unpacking Hong Kong’s National Security Law” Webinar**

**Organised by AAIL and CDRF**

**25 September 2020 (Friday)**

Good evening Dr. Neoh [Dr. Anthony Neoh, Chairman of the Asian Academy of International Law], Mr. Lu [Mr. Lu Mai, Vice Chairman of the China Development Research Foundation], Esteemed Panelists, Distinguished Guests, Ladies and Gentlemen,

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

2. National security is a matter of top priority for any State, a basic prerequisite and foundation for the survival and development of a State, and an important cornerstone of stability.

It concerns the core interests of a State and the fundamental interests of its people, and is vital for safeguarding national sovereignty, unity and territorial integrity. Safeguarding national security is undoubtedly within the purview of the Central Authorities, and is never a matter within the scope of the autonomy of the Hong Kong Special Administrative Region (“HKSAR”) under “One Country, Two Systems”. This is the basic principle of national sovereignty and reflects the common practice of States, irrespective of whether they operate as a unitary or federal state. Therefore, the Central People’s Government (“CPG”) has the greatest and ultimate responsibility for safeguarding national security for all parts of China, including the HKSAR.

3. The 13<sup>th</sup> National People’s Congress (“NPC”) adopted a two-step “Decision + Legislation” approach for enacting and implementing the National Security Law. In its third meeting on 28 May this year, the NPC made the *“Decision on Establishing and Improving the Legal System and Enforcement Mechanisms*

*for the Hong Kong Special Administrative Region to Safeguard National Security*” (the “NPC decision”), and delegated its Standing Committee (“NPCSC”) to formulate the national security law.

4. In its 20<sup>th</sup> meeting on 30 June, the NPCSC passed the *“Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region”*<sup>1</sup>. Pursuant to the NPC decision and Article 18 of the Basic Law, the National Security Law was added to Annex III of the Basic Law, promulgated and became applicable to the HKSAR<sup>2</sup>. The enactment of the National Security Law is not only constitutional and legitimate, but also reasonable in light of the circumstances that prevailed in Hong Kong since 2019.

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<sup>1</sup> An English translation of the National Security Law (published for information) can be found at [www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf](http://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf).

<sup>2</sup> Article 18 of the Basic Law provides that national laws shall not be applied in the HKSAR except for those listed in its Annex III. It further confines those national laws that can be added to Annex III 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]”. As national security is within the purview of the CPG, the National Security Law was promulgated and became applicable to the HKSAR on 30 June 2020 following consultation with the Basic Law Committee and the HKSARG.

5. 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*<sup>3</sup> unanimously passed by the General Assembly 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 inviolable<sup>4</sup>. The purpose of safeguarding national security is to protect these sovereign rights. As a matter of international law and practice, enacting and implementing national security legislation is without a doubt an inherent right of every sovereign State and falls within the internal affairs of a sovereign State, and should be free from intervention by other States as enshrined in

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<sup>3</sup> “*Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*” (the “*Friendly Relations Declaration*”), adopted by the United Nations General Assembly on 24 October 1970 (resolution 26/25 (XXV)).

<sup>4</sup> According to the *Friendly Relations Declaration* (1970), 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.

the international law principle of non-intervention<sup>5</sup>.

## **General Principles of the National Security Law – Chapter I**

### **of the National Security Law**

#### *Articles 1 and 12 of the Basic Law are Fundamental Provisions*

6. When considering the National Security Law, one must first note that Article 1 stipulates that it is enacted to, *inter alia*, “ensuring the resolute, full and faithful implementation of [China’s] policy of “One Country, Two Systems””<sup>6</sup>. Article 2 provides that the legal status of the HKSAR as set out in Articles

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<sup>5</sup> For example, the *Friendly Relations Declaration* (1970) reiterates that armed intervention and all other forms of interference violate international law, and the *United Nations Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* (1987), which provides that every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the UN purposes (paragraph 1). See also the International Court of Justice case of *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, where the ICJ held that the principle of non-intervention is part of customary international law.

<sup>6</sup> 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.

1<sup>7</sup> and 12<sup>8</sup> of the Basic Law (i.e. the HKSAR is an inalienable part of China, enjoys a high degree of autonomy, and comes directly under the CPG) are fundamental provisions and should not be contravened when rights and freedoms are exercised.

*Article 5 of the National Security Law – important rule of law principles*

7. Article 5 expressly protects important rule of law principles that are recognised in both civil and common law jurisdictions, such as the presumption of innocence, protection against double jeopardy and fair trial<sup>9</sup>.

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<sup>7</sup> Article 1 of the Basic Law reads: “The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China”.

<sup>8</sup> Article 12 of the Basic Law reads: “The Hong Kong Special Administrative Region shall be 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.”

<sup>9</sup> Article 5 of the National Security Law reads: “The 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”.

## **Overview of the National Security Law**

### *Chapter III of the National Security Law – the “Substantive Law” aspect*

8. Chapter III sets out the four types of offences under the National Security Law, which are secession, subversion, organisation and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security.

9. It cannot be stressed enough that the provisions clearly specify 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 similar to those in the national security laws of foreign jurisdictions, such

as those in the United Kingdom<sup>10</sup>, Canada<sup>11</sup>, the United States<sup>12</sup>, and Australia<sup>13</sup>.

10. Perhaps of particular interest is the concern surrounding the offence of collusion. It should be noted that, like the other three offences provided in the National Security Law, Article 29 clearly sets out the elements of the offence of collusion, including the required acts, and intents. Prosecutors must prove that the necessary mental element of the offence are present, and the courts in adjudicating the specific case would consider the relevant facts and circumstances of that particular case.

*Chapter IV of the National Security Law – the “Procedural Law” aspect*

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<sup>10</sup> See, e.g., Section 3 of the Treason Felony Act 1848 (UK) in relation to secession and subversion, and the Terrorism Prevention and Investigation Measures Act 2011 (UK) in relation to terrorism.

<sup>11</sup> See, e.g. Sections 46(2)(a) and 51 of the Criminal Code of Canada in relation to secession and subversion.

<sup>12</sup> See, e.g., USA Patriot Act 2001 in relation to terrorism and the Logan Act in relation to the offence of collusion with a foreign country or with external elements to endanger national security.

<sup>13</sup> See, e.g. the National Security Law Amendment (Espionage and Foreign Interference) Act 2018 in relation to the offence of collusion.



11. Under Chapter IV, the HKSAR has been entrusted with the responsibility under the National Security Law to exercise jurisdiction over most cases, with the criminal investigation, prosecution, trial, and execution of penalty (if convicted) largely following the existing legal procedures of the HKSAR. On this point, Article 63 of the Basic Law provides that the Department of Justice shall control criminal prosecutions, free from any interference. Any prosecutorial decisions (including those made with regards to offences under the National Security Law) will be considered upon the evidence, the law, and on the basis of the Prosecution Code, and never upon any political, improper or undue influence<sup>14</sup>.

*Other issues – the extraterritorial application of the National Security Law*

12. Turning to the issue of extraterritorial application, Article 38 stipulates that the National Security Law applies to the

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<sup>14</sup> SJ's blog: "Prosecutorial decisions never involve political considerations" at [www.doj.gov.hk/eng/public/blog/20200426\\_blog1.html](http://www.doj.gov.hk/eng/public/blog/20200426_blog1.html).

relevant offences committed from outside the Region by a person who is not a permanent resident of the Region<sup>15</sup>.

13. Such extraterritorial application is in line with the well-recognized international law principle of “protective jurisdiction”. As the International Law Commission notes, this principle “*may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State*”<sup>16</sup>. This principle is recognized also by the International Court of Justice in the case of the *Democratic Republic of the Congo v Belgium*<sup>17</sup>, and followed in several international conventions against terrorism<sup>18</sup>, such as the International Convention against the Taking of Hostages (1979). This principle is also a common

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<sup>15</sup> Article 38 of the National Security Law reads: “This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.”

<sup>16</sup> Report of the International Law Commission on the work of its fifty-eight session, A/CN.4/SER.A/2006/Add.1 (Part 2), Annex V at 13.

<sup>17</sup> *Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000)*, International Court of Justice, Judgment of 14 February 2002, Separate opinion of President Guillaume at 4.

<sup>18</sup> See, e.g., the *International Convention for the Suppression of Terrorist Bombings* (1997), and the *International Convention on the Suppression of the Financing of Terrorism* (1999).

feature of national security laws in many States, for example in Germany<sup>19</sup>, the United States<sup>20</sup>, and Singapore<sup>21</sup>.

### *Other issues – Judicial independence*

14. Another issue is judicial independence. Contrary to innuendos in unfair and inaccurate statements in some media, Hong Kong's judges are free to decide their cases in accordance with law and evidence and indeed they are bound to so do under the judicial oath. 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 commission<sup>22</sup>. No political vetting is involved in the appointment process. Judicial independence is premised on the solid infrastructure that has been

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<sup>19</sup> See, e.g., Section 5 (Offences committed abroad with specific domestic connection) of the German Criminal Code, which covers extraterritorial conducts in respect of the offence of treason

<sup>20</sup> For example, the Logan Act of the United States prohibits certain unauthorized correspondence of its citizens, wherever he or she may be, with foreign governments, while the Foreign Intelligence Surveillance Act 1978 of the United States allows surveillance and collecting overseas intelligence on foreign persons abroad

<sup>21</sup> See, e.g., The Terrorism (Suppression of Bombing) Act and the Protection from Online Falsehoods and Manipulation Act of Singapore.

<sup>22</sup> Articles 88 and 92 of the Basic Law.

laid down in the Basic Law - the security of tenure<sup>23</sup>, the immunity of judges<sup>24</sup>, the non-revolving door<sup>25</sup>, and importantly the expressed provision in Article 85 of the Basic Law that guarantees judicial independence, free from any interference<sup>26</sup>.

15. The courts of the HKSAR have been entrusted by the Central Authorities to exercise jurisdiction in adjudicating most cases involving the National Security Law. Article 44 provides that 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 Executive<sup>27</sup>. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the HKSAR

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<sup>23</sup> Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehaviour.

<sup>24</sup> Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

<sup>25</sup> Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This “non-revolving door” system prevents perceived conflicts of interest and enhances the independence of the judiciary.

<sup>26</sup> Article 85 of the Basic Law reads:

“The 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.”

<sup>27</sup> 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.

and the Chief Justice of the Court of Final Appeal.

16. When adjudicating cases under the National Security Law, judges remain independent and impartial in performing their judicial duties, free from any interference<sup>28</sup>. Therefore, the arrangement on the designation of judges under the National Security Law does not undermine the highly respected judicial independence of the HKSAR. Any criticism on the National Security Law's effect on judicial independence is unwarranted. Indeed, the Chief Justice of the Court of Final Appeal 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*

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<sup>28</sup> 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”.

*the principle that in the handling or determination of any legal dispute, only the law and legal principle will be considered”<sup>29</sup>.*

17. In the Court of First Instance case of *Tong Ying Kit v HKSAR*<sup>30</sup>, Judges Anderson Chow and Alex Lee remarked:

*“[t]here is no proper or sufficient basis to contend that, in relation to cases concerning offences under the National Security Law, the Chief Executive or the Government is in a position “to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists”, or that the liberty of any member of the Judiciary in Hong Kong “in adjudicating individual disputes and in upholding the law and values of the constitution” is, or will be, interfered with by the Chief Executive exercising her power under Article 44... It must be borne in mind that a judge is bound by the Judicial Oath taken by him upon his appointment, which requires him to, inter alia, discharge his judicial duties in full accordance with the law and without fear or*

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<sup>29</sup> [www.info.gov.hk/gia/general/202007/02/P2020070200414.htm](http://www.info.gov.hk/gia/general/202007/02/P2020070200414.htm).

<sup>30</sup> *Tong Ying Kit v HKSAR* (2020) HCAL 1601/2020 (judgment of 21 August 2020).

*favour.*”<sup>31</sup>

*Other issues – The Central People’s Government’s Reserved Jurisdiction*

18. A final issue is the ultimate responsibility and role of the CPG in safeguarding national security under this law. Chapter V of the National Security Law provides for the establishment of the *Office for Safeguarding National Security of the CPG in the HKSAR*<sup>32</sup>.

19. In situations where the HKSAR cannot effectively perform its obligation under the National Security Law and becomes a risk to national security, it is certainly right and proper for the CPG to assume jurisdiction. Under Article 55, three such

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<sup>31</sup> *Tong Ying Kit v HKSAR* (2020) HCAL 1601/2020 (judgment of 21 August 2020) at 55, 58.

<sup>32</sup> 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.

situations are specified: where 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; where serious situation occurs which the HKSARG is unable to effectively enforce the National Security Law; and where a major and imminent threat to national security has occurred<sup>33</sup>.

20. In the above three specified situations, the jurisdiction of the *CPG Office on National Security* will only be engaged after approval from the CPG upon a request from either the Office or from the HKSAR Government.

### **The National Security Law and “One Country, Two Systems”**

21. Lastly, I would like to say a few words on “One Country, Two Systems”. I wish to reassure you that the National Security Law has not changed the fact that the provisions under the Basic

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<sup>33</sup> Article 55 of the National Security Law.



Law continues to apply to Hong Kong. Hong Kong continues to maintain its capitalist system<sup>34</sup>, practice the common law system<sup>35</sup>, and uphold judicial independence<sup>36</sup>. The high degree of autonomy enjoyed by the HKSAR under the Basic Law in respect of matters such as independent finances<sup>37</sup>, independent taxation system<sup>38</sup>, monetary and financial system<sup>39</sup>, free convertibility and flow of capital<sup>40</sup>, free trade<sup>41</sup> and economic<sup>42</sup> policy, and immigration control<sup>43</sup>, remain unaffected by the National Security Law.

22. The HKSAR also continues to be a separate customs territory and participate in the World Trade Organization as “Hong Kong, China”<sup>44</sup>. Furthermore, as provided under the Basic

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<sup>34</sup> 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”.

<sup>35</sup> Articles 8 and 18 of the Basic Law.

<sup>36</sup> See Article 85 of the Basic Law.

<sup>37</sup> See Article 106 of the Basic Law.

<sup>38</sup> See Article 108 of the Basic Law.

<sup>39</sup> See Article 110 of the Basic Law.

<sup>40</sup> See Article 112 of the Basic Law.

<sup>41</sup> See Articles 114 and 115 of the Basic Law.

<sup>42</sup> See Article 119 of the Basic Law.

<sup>43</sup> See Article 154 of the Basic Law.

<sup>44</sup> See Article 116 of the Basic Law.

Law, with the authorization of the CPG, the HKSAR will continue to conclude free trade and investment agreements with overseas jurisdictions<sup>45</sup>, and participate in appropriate capacities in the work of international organizations<sup>46</sup>.

### **Concluding remarks**

23. To conclude, there is nothing in the National Security Law that inhibits or affects the normal operation of commercial activities and businesses. In fact it expressly stipulates that legitimate rights of residents in the HKSAR are protected<sup>47</sup>. The National Security Law is targeted at activities that endanger national security and it is far-fetched and fanciful to suggest that commercial activities or the daily lives of residents in the HKSAR would be adversely affected. On the contrary, the law brings about stability and predictability, an environment conducive to economic and human development much desired by all. Thank

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<sup>45</sup> See Article 151 of the Basic Law.

<sup>46</sup> See Article 152 of the Basic Law.

<sup>47</sup> See Articles 4 and 5 of the National Security Law.

you very much.