

Speech by DSJ at Law Society of Hong Kong's Forum on Doing Business in Hong Kong in a Rapidly Changing World (English only) (with photo)

Following is the speech by the Deputy Secretary for Justice, Mr Cheung Kwok-kwan, at the Law Society of Hong Kong's Forum on Doing Business in Hong Kong in a Rapidly Changing World today (July 11):

President of the Law Society, fellow panel speakers, distinguished guests, ladies and gentlemen,

Good afternoon. It is my great pleasure to join the Law Society's Forum today and participate in this session on National Security Law (NSL).

Since the NSL has come into effect in June 2020, stability and security have been restored in the Hong Kong Special Administrative Region (HKSAR), providing business enterprises and investors with a secure environment to flourish. Nevertheless, we understand that some foreign investors still have concerns over the NSL. Today's session serves as an excellent opportunity for us to address those concerns and clarify misconceptions about the NSL.

Brief background - NSL as a national law

Before going into the details of the law, it would be helpful to first understand that the NSL, unlike other legislation, is a national law enacted by the Standing Committee of the National People's Congress (NPCSC). I would like to highlight a few points in such regard:

(a) National security concerns the core interests of a state and is undoubtedly within the purview of the Central Authorities. In other words, safeguarding national security is a matter within the purview of the Central People's Government (CPG) and outside the limits of the HKSAR's high degree of autonomy.

(b) Under the Article 12 of the NSL, the Committee for Safeguarding National Security of the HKSAR is specifically created to be responsible for affairs relating to and assume primary responsibility of safeguarding national security in the HKSAR. As affirmed by the Hong Kong Court of First Instance (Note), the supervisory power over the Committee is reserved to the CPG exclusively and the HKSAR courts are not

vested with any role or power over such matters.

(c) As a piece of national law, the power to interpret the NSL is vested in the NPCSC, as provided under the Article 65 of the NSL. This is in line with Article 67(4) of the Constitution of the PRC which provides that the NPCSC shall have the power to interpret laws.

(d) Although the NSL is a piece of national law, the NPCSC has taken into account the differences between the legal systems of Mainland China and the HKSAR in formulating the NSL and its 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 HKSAR.

Having looked at the nature of the NSL, let us now visit some of the misinformation about the NSL.

NSL respects human rights and rule of law

One common misconception about the NSL is that it takes away the rights and the rule of law enjoyed by the HKSAR. Let me put it this way. It is internationally recognised that rights and freedoms are not absolute. The two international covenants - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - expressly provide that many rights and freedoms may be restricted for common good including national security and public order. During the adoption of the NSL, the relevant contents of the international covenants were fully taken into consideration in the legislative process, with an emphasis placed on the fact that principles of human rights protection must be observed when safeguarding national security.

Extraterritorial application of the NSL

Other than misconception about the human rights and rule of law, there were concerns, especially raised recently, for extraterritorial application of the NSL. I would like to clearly point out that the scope of application of the law fully aligns with the principles of international law and practice and that such a practice is both necessary and legitimate. Let me explain the relevant legal principles.

The NSL serves the purposes of safeguarding national security as well as preventing, suppressing and imposing punishment for acts and activities endangering national security. A lack of extraterritorial effect actually means condoning activities such as secession and subversion carried out by ill-intentioned people overseas. Therefore, extraterritorial effect is an essential component of the NSL.

In general, the criminal law of the HKSAR only regulates acts that take place in the HKSAR, and this is known as the "territorial principle" in the international law and practice. At the same time, international law and practice have also established exceptions to the "territorial principle", including the "personality principle" and the "principle of protective jurisdiction". Every state has the right to formulate laws based on these principles to exercise jurisdiction over criminal acts committed outside its territory. The NSL formulated by the Central Authorities defines the scope of application of the law precisely in accordance with these principles of international law and practice.

The "territorial principle"

As regards the "territorial principle", the Article 36 of the NSL stipulates that this Law shall apply to offences under this Law which are committed in the HKSAR by any person. An offence shall be deemed to have been committed in the Region if an act of committing the offence or the consequence of the offence occurs in the Region. This provision is directed at criminal acts that are wholly or partly committed in the HKSAR, and reflects the "territorial principle".

Under certain situations in line with international law and practice, the criminal law may regulate acts that take place outside the HKSAR. The NSL provides for two types of situations as follows:

(1) The "personality principle"

The first type of situation concerns an offender whose identity has close connection with the HKSAR, rather than a foreigner who has absolutely no ties with the HKSAR, and this is known as the "personality principle". Under this principle, a state may exercise jurisdiction over criminal acts committed by its citizens outside its territory. As a matter of fact, every citizen or permanent resident of a country or region shall abide by the laws of the country or region, regardless of where he or she is.

(2) The principle of "protective jurisdiction"

The second type of situation arises when the criminal acts go against and undermine the security or the vital interests of Hong Kong, and this is the principle of "protective jurisdiction". Under the principle of "protective jurisdiction", if foreigners commit criminal acts 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 effect to exercise prescriptive criminal jurisdiction.

It is the inherent right and obligation of our country as a sovereign state to enact the NSL as well as exercising extraterritorial jurisdiction over the relevant offences endangering national security. It is the constitutional duty of the HKSAR to safeguard national security and the HKSAR Government would spare no effort to take all necessary measures in accordance with the law and to pursue the liability of those who have committed offences under the NSL outside Hong Kong.

Conclusion

To conclude, notwithstanding some unfortunate misconceptions, the enactment of the NSL is in line with the international practice of safeguarding national security and the sovereign rights of each state. Hong Kong's legal system and rule of law remain robust, providing quality and reliable legal support for international trade and investment. On such note, I look forward to the insightful views of the other panellists and our further exchanges today. Thank you.

Note: Lai Chee-ying v Secretary for Justice and Lai Chee-ying v The Committee for Safeguarding National Security of the HKSAR and Director of Immigration (Secretary for Justice as Putative Interested Party) (HCMP 253/2023 and HCAL 566/2023)

Photo

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