《香港國安法》法律論壇

National Security Law Legal Forum

國家安好

Security Brings Prosperity

2021.07.05

匯編 Proceedings

律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

前言

全國人民代表大會於2020年5月28日通過《關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定》，授權全國人大常委會就建立健全香港特別行政區維護國家安全的法律制度和執行機制制定相關法律。2020年6月30日，全國人大常務委員會制定《中華人民共和國香港特別行政區維護國家安全法》(《香港國安法》)，並通過列入《香港基本法》附件三，由特區政府同日公布實施。

《香港國安法》充分體現“一國兩制”方針的實施，填補了香港特區維護國家安全的制度“短板”，對維護國家安全及保持香港長期繁榮穩定具有深遠影響。

律政司於2021年7月5日舉辦的《香港國安法》法律論壇，以“國安家好”為主題，與一眾國內外及本地法律界精英聚首一堂，就《香港國安法》的應用和詮釋進行深入討論及交流，旨在提高社會大眾對《香港國安法》的正確認識。

今次法律論壇得以成功舉辦，我衷心感謝中央政府和各位講者、專家的鼎力支持，與我們分享他們對《香港國安法》的深入研究與精闢見解。律政司將所有嘉賓的致辭、演講及討論彙編成書，讓社會各界仔細思考嘉賓的真知灼見，更深入地理解《香港國安法》。

法律論壇的舉行和匯編的出版見證《香港國安法》的實施讓香港由亂轉治，由治及興，社會重回法治安穩，市民重拾正常生活，並讓“一國兩制”的實踐行穩致遠，奠定香港長治久安的基礎。

最後，我在此特別感謝律政司同事和亞洲國際法律研究院的努力和悉心籌備，同心協力安排今次法律論壇。我亦感謝政府新聞處及政府物流服務署在設計和編輯方面的傾力協助，令這本別具意義的匯編順利出版。

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中華人民共和國香港特別行政區
行政長官

全國政協副主席梁振英、中聯辦副主任陳冬、國安公署署長鄭雁雄、外交部駐港特派員劉光源、駐港部隊副政治委員王兆兵少將、立法會主席梁君彥、終審法院首席法官張舉能、各位嘉賓、各位同事：

早晨！歡迎大家出席或在網上參與今天由香港特區政府律政司舉辦的《香港國安法》一周年法律論壇。這是繼律政司去年十一月成功舉辦的《基本法》三十周年法律高峰論壇後，另一個請來重量級嘉賓講者的法律盛事，我在此首先要感謝律政司司長和她的同事為是次論壇做了大量的工作，亦要感謝中央人民政府駐香港特別行政區聯絡辦公室和駐港國家安全公署支持今次的活動。

我們談到香港的獨特優勢，往往放在最優先位置的是法治社會。支撐法治社會的，除了是清晰明確的法律，堅實的法律機關，不受干預的檢控權和獨立的司法權外，更需要市民有守法意識，而認識法律的條文及應用，至為重要。特區政府近年更多舉辦推廣《憲法》、《基本法》和《香港國安法》的活動，正正是為了鞏固和提升香港的法治精神。

去年六月三十日，全國人大常委會制定《香港國安法》，並通過列入《基本法》附件三，由香港特區同日在香港公布實施，建立健全香港特區在維護國家安全方面的法律制度和執行機制。到今天，《香港國安法》已實施一年有多了。《香港國安法》在第一章總則的第一條開宗明義說明，制定《香港國安法》是為了要堅定不移並全面準確貫徹「一國兩制」、「港人治港」、高度自治的方針，是要維護國家安全，保持香港特區的繁榮和穩定，這個根本宗旨正好反映在今日論壇的主題：「國安家好」，「Security Brings Prosperity」。事實上，維護國家主權、安全和發展利益，是香港特別行政區的憲制責任，亦是確保香港長治久安的必然要求。因此，《香港國安法》的實施，不單是針對二〇一九年六月「修例風波」的止暴制亂，更是從根本上堅持和完善「一國兩制」的制度體系，確保「一國兩制」行穩致遠。

《香港國安法》是香港由亂轉治的重大轉捩點，其發揮「定海神針」的效果是有目共睹、無可爭議的。在《香港國安法》實施前長達一年的時間，香港社會飽受創傷，鼓吹「港獨」、「自決」等組織公然挑戰中央和特區政府的權威，激進分子策劃恐怖活動，以暴力破壞公共設施和阻撓警方執法，反中亂港分子勾結外國和境外勢力干預中國和香港特區的事務，動員國際力量制裁香港，完全罔顧國家和港人利益，嚴重危害國家安全。這股反中亂港的勢力亦削弱了特區政府早期的抗疫成效。《香港國安法》實施後，香港社會恢復穩定，「黑暴」絕跡，市民的生命和財產得到保障，並可再次依法享有他們的基本權利和自由。

儘管事實擺在眼前，別有用心的外國政客和媒體仍不斷質疑甚至抹黑《香港國安法》，他們詆毀《香港國安法》會損害人權、壓制言論、集會等自由、破壞法治、摧毀香港作為國際金融中心的地位，或者弱化香港的營商環境等。但過去一年的種種事實和

數據，說明這些指控都是站不住腳的；反之，只突顯批評者的虛偽、偏見和持雙重標準的立場。

一如我們反覆強調，《香港國安法》針對的只是極少數危害國家安全的違法分子和行為，絕大多數市民的人權和自由絲毫不受影響。以新聞自由為例，根據政府新聞處的新聞發布系統，目前登記在系統內的本地、海外以及網上媒體分別有93、69及39間，比去年有增無減。傳媒以及普羅市民每天都在行使監督的權利及批評特區政府施政的自由，而海外媒體亦不斷發放有關《香港國安法》的消息，訪問不同立場的人士，沒有受到半點阻撓。過去一年大家都知道，公眾集會活動未能舉行是因為疫情關係，情況和世界不同地方一樣；任何人都不應以此借題發揮，胡亂批評市民權利受損。

香港的法治及司法獨立在《香港國安法》實施後依然穩如磐石。香港特區的司法機構一如以往獨立運作，行使《基本法》賦予的獨立審判權；行政長官繼續根據《基本法》規定，按司法人員推薦委員會的建議，委任海外普通法地區資深及地位顯赫的法官出任終審法院非常任法官。過去一年，獲新委任的是曾任英國最高法院副院長的賀知義勳爵，而接受延任的則有另外三位海外法官。現時我們一共有13位來自其他普通法地區的終審法院非常任法官，這些出色的法官願意參與香港法院的工作，就是香港司法獨立的最佳佐證。值得一提的是其中一位來自英國的非常任法官岑耀信勳爵曾在今年三月在英國報章發文，表示中央及特區政府從沒有干預特區的司法獨立權，而《香港國安法》亦有保障人權的條文。

此外，在《香港國安法》下，香港的國際金融中心地位沒有半點動搖。過去一年，本港的新股集資額超過5,000億港元，比對上一年增加超過五成。聯繫匯率制度一如既往運作良好，港元

市場於二〇二〇年錄得資金淨流入，單在去年七月《香港國安法》實施後至十月期間流入港元體系的資金就超過3,000億港元。現時本港銀行體系的總存款額比去年增加超過百分之五；香港去年底的基金管理資產淨值亦比二〇一九年年底增加大約兩成。這些數字反映投資者不但不會因《香港國安法》而對香港卻步，反而因為《香港國安法》令社會回復穩定，他們對香港市場更有興趣，對香港的金融發展前景更有信心。

現時有約9,000間內地及海外企業在香港設有辦事處，其中超過四成是以香港作為其區域總部或區域辦事處。通過特區政府官員的接觸和相關機構的觀察，它們早期對《香港國安法》的疑慮、關注已不斷減退，而代之而起的是關注「十四五」規劃帶來的機遇、粵港澳大灣區的最新發展和甚麼時候可以恢復香港與內地以至其他地方的跨境人員往來，讓它們可以進行正常的商業活動。我特別留意到香港法國工商會在它們最近出版的刊物中，就指出了香港是絕佳的營商地點，也是進入周邊地區的國際平台，很多法國商界人士亦在這份刊物中分享了他們在香港的成功故事及愉快的生活體驗。香港英商會的主席也曾公開表示，非常看好香港及粵港澳大灣區的前景，該商會最近舉辦了高峰論壇，而我亦獲邀出席，與在港英國企業分享如何把握大灣區的機遇。這些外國商界領袖的說話以及實際行動，充分說明了香港的營商環境在《香港國安法》實施後不但沒有受損，反而變得更好。

回顧過去一年，特區根據《香港國安法》設立維護國家安全的機構和執行機制，包括由我擔任主席的維護國家安全委員會，負責規劃、推進和協調維護國家安全的工作。警務處國安處果斷執法，截至今年六月三十日，共拘捕117名犯罪嫌疑人，並檢控其中64人，首宗《香港國安法》案件亦已進入法庭審訊程序。

除了懲治犯罪分子外，《香港國安法》亦有防範和制止危害國家安全行為的功能。其中，第六條要求香港居民在參選或者就任公職時應當依法簽署文件確認或者宣誓擁護《基本法》、效忠香港特別行政區。為進一步鞏固公務員隊伍應恪守這核心價值，特區政府已完成要求所有公務員簽署有關聲明或宣誓的工作。立法會亦於今年五月十二日三讀通過法例，闡明了有關擁護《基本法》、效忠香港特區的法定要求和條件，引入區議員須作出宣誓的規定，完善處理違反誓言的情況的機制等。

我們又按《香港國安法》的要求，展開對學校、社會團體、媒體、網絡等涉及國家安全的事宜進行宣傳、指導、監督和管理的工作。我們通過舉辦活動，例如每年的「國家憲法日」和「全民國家安全教育日」，提高市民的國家安全和守法意識。教育局亦以「多重進路、互相配合」的方式，提供行政及教育指引，協助學校在課堂內外推動國民教育，讓老師和學生建立牢固的國家觀念和國民身分認同，以及維護國家安全的責任感。

在未來，特區政府會繼續強化、深化維護國家安全的工作。我們會以總體國家安全觀的概念來推進香港的維護國家安全工作，確保全面理解、全力推進和全方位實踐，涵蓋特區不同政策範疇，包括政治、社會、經濟、文化、科技、網絡、金融、公共衞生等。我們也會繼續動員全社會參與，切實提高香港市民的國家安全意識和守法意識，務求做到「維護國安，人人有責」。

今天的《香港國安法》一周年法律論壇，我們非常榮幸邀請了一眾國內外及本地法律界精英聚首一堂，聚焦研究討論《香港國安法》的條文及實踐。今天論壇的環節包括一系列與《香港國安法》相關的主題演講；還有三場座談會，深入研究探討《香港國安法》的實體法及程序法條文，以及與其他海外司法管轄區的國家安全法進行比較研究。我相信由各位知名法律專家從多角度

仔細分析，一定能讓各位與會者和社會各界人士更深入認識和了解《香港國安法》。

我預祝今天法律論壇圓滿成功。多謝大家。

陳冬

中央人民政府駐香港特別行政區聯絡辦公室副主任

尊敬的梁振英副主席、林鄭月娥行政長官、鄭若驊司長、鄭雁雄署長、劉光源特派員，各位專家、各位朋友：

大家上午好！我很高興第二次參加律政司舉辦的一年一度法律論壇。論壇選擇重要時點，圍繞重大議題，匯聚各方專家學者，開展學術交流研討，具有很強的時效性、針對性和實踐價值。

7月1日，慶祝中國共產黨成立100周年大會在北京隆重舉行，習近平總書記發表重要講話。這一綱領性的講話高屋建瓴、思想深刻、內涵豐富，具有強大的道義感召力、理論穿透力和心靈震撼力，引發了香港社會持續關注、熱烈響應、廣泛共鳴。在這一時刻，我們結合《香港國安法》實施一年來的實際成效，深入學習領會習近平總書記的重要講話精神，意義重大。藉此機會，我與大家分享三點體會。

第一，《香港國安法》有效實施，特別行政區維護國家安全的制度機制不斷健全。習近平總書記強調，要落實特別行政區維護國家安全的法律制度和執行機制，維護國家主權、安全、發展利益，維護特別行政區社會大局穩定，保持香港長期繁榮穩定。

一年來，駐港國安公署依法成立運行，特區國安委、特區政府律政司國安檢控部門、警隊國安處有效開展工作，依法打擊危害國家安全的違法行為，對反中亂港分子形成有力震懾。去年至今已拘捕117人，並對其中64人提出檢控。司法機構適用《香港國安法》審理案件，形成了判例指引。同《香港國安法》執行相配套的制度機制相繼出台，一些本地相關法律得到激活和更新。超過17萬名公職人員按照規定完成宣誓。《香港國安法》成為公職人員入職、媒體信息監管、社會組織註冊等必須遵守的基本法律規範。國安法的實施，補齊了特區維護國家安全的制度短板，結束了國家安全在香港「不設防」的歷史。

第二，《香港國安法》有效實施，「國安家好」的觀念逐步深入人心。習近平總書記2020年新年賀詞中充滿深情地說：「香港局勢牽動着大家的心。沒有和諧穩定的環境，怎會有安居樂業的家園！真誠希望香港好，香港同胞好。」一年來，特區國安委首次舉辦「全民國家安全教育日」活動，超過100萬人次瀏覽活動網站。特區政府與勵進教育中心等有關機構配合，面向450所學校的6萬名學生和8000名教師開展《香港國安法》教育活動。司法機構首次舉辦《香港國安法》培訓，200多名法官及司法人員、法律界人士踴躍參加。許多媒體策劃製作「國安有法 香港安穩」等專題節目，形成廣泛社會效應。300多個社團組織發動義工2.5萬人次，設立5400多個街站，把「國安家好」的美好期盼送到千家萬戶。宣傳教育的全面鋪開，提高了廣大市民維護國家安全的意識，增強了責任感、歸屬感和認同感。

第三，《香港國安法》有效實施，實現了由亂及治的重大轉折。習近平總書記指出：「安全和發展是一體之兩翼，驅動之雙輪，要始終把安全作為發展的首要前提。」一年來，「修例風波」期間的街頭暴力不再肆虐，社會秩序得到恢復，市民安寧得以保障。據統計，今年第一季度罪案同比下降約10%，本地生產

總值同比增長7.9%，3月至5月失業率回落至6%，過去數月有高達500億美元的資金流入香港。上半年香港新股募集資金較去年同期翻倍，預計到年底將達到破紀錄的5000億港元，繼續在全球處於領先地位。國際貨幣基金組織日前發布的報告再次肯定香港國際金融中心的地位。紫荊研究院近期民調顯示，82.6%的受訪市民認為社會秩序和治安狀況有好轉，72%表示增強了對「一國兩制」前景的信心。

法治香江，國安家好。事實證明，《香港國安法》是維護香港整體利益和市民根本福祉的定海神針。但同時我們也要清醒看到，反中亂港勢力還未完全死心，個別極端分子仍然一意孤行，甚至製造「孤狼」式恐襲；一些別有用心的人竟然明目張膽地支持美化暴力行為；有的團體和個人還披着法律專業的外衣從事亂港活動；還有外部勢力肆意妄為，干預香港事務。這些都說明，全面落實好《香港國安法》，任重道遠，還有許多工作要做。我們堅定支持特區政權機關嚴格執法、公正司法，堅決捍衛國家安全，維護社會大局穩定。希望社會各界珍惜當前來之不易的局面，共同維護國家主權、安全、發展利益，保持香港長期繁榮穩定，確保「一國兩制」實踐行穩致遠。

預祝論壇圓滿成功！謝謝大家！

鄭雁雄

中央人民政府駐香港特別行政區維護國家安全公署署長

尊敬的梁振英副主席、林鄭月娥行政長官、陳冬副主任、劉光源特派員、王兆兵少將，各位嘉賓：

大家上午好！

《香港國安法》刊憲實施一年來，成效有目共睹，是香港維護國家安全、保持繁榮穩定的定海神針。林鄭特首帶領的管治、司法、執法團隊作出了大量艱辛卓著的努力，社會各界、廣大市民對此傾心傾力支持，為此，我代表駐港國安公署表示衷心的感謝和誠摯的敬意！借此機會，我想與大家分享我從多個維度領悟中央對《香港國安法》立法原意的一點體會。

一、從“兩個大局”的維度

習近平主席深謀遠慮提出“兩個大局”的重大命題，其實，世界百年未有之大變局與中華民族偉大復興戰略全局密切相關。對中國的復興，有的高興，有的恐慌；有的期待，有的不爽，這就是當今世界的複雜心態。判斷這一走向，其實也不難。第一，中國歷史性地戰勝新冠疫情，歷史性地消滅絕對貧困，歷史性地全面建成小康社會，歷史性地開啟全面建成社會主義現代化強國新征程，這不是偶然所得，是制度性成果，是規律性、可持續的

優勢，大勢已不可逆轉。第二，儘管美西方意圖聯手打壓，但這種打壓不會真正妨礙中國發展。中國人講究“小成功靠聰明，中成功靠朋友，大成功靠對手”。實際上這種打壓正是我們發展所需的倒逼外力。第三，中華民族偉大復興不可能去搞霸權、搞擴張，最大的關切，就是香港不能搞“顏色革命”，臺灣不能搞獨立。香港維護國家安全，就是中華民族偉大復興進程中絕不能退讓的底線。

二、從“一國兩制”的維度

“一國兩制”是中國特色社會主義制度的偉大創舉。中國共產黨十九大報告把堅持“一國兩制”方針確定為新時代堅持和發展中國特色社會主義基本方略的內容，這已經用執政黨的最高規格固化了“一國兩制”的政治地位。“一國兩制”的根本宗旨是維護國家主權、安全、發展利益，保持香港長期繁榮穩定；根本原則是始終堅持“愛國者治港”；根本底線是香港不得從事任何形式的危害國家主權安全，不得挑戰中央權力和《香港基本法》權威，不得利用香港對內地進行滲透破壞的活動。這些根本宗旨、根本原則、根本底線，都直指維護國家安全。可以說，香港維護國家安全是“一國兩制”行穩致遠的根本前提。

三、從總體國家安全觀的維度

習近平主席創造性提出總體國家安全觀，是國家安全理論劃時代的重大創新，對新時代佈局大國安全戰略、打好維護國家安全主動戰意義重大，也警醒我們要從全局、長遠、本質的角度看待國家安全問題。美西方處心積慮搞港版“顏色革命”，目的就是通過反中亂港勢力的搗亂，要麼通過“港獨”“自決”直接搞分裂，要麼通過“攪炒”“黑暴”搞垮香港，從而否定“一國兩制”，進而遲滯或阻斷中華民族偉大復興，這就是我們必須堅決防止的事關

國家核心利益的全局性風險。在這個問題上，我們絕不能也不可能犯戰略性、顛覆性錯誤。

四、從法治思想的維度

習近平主席在治國理政實踐中形成的法治思想，不僅深刻回答了新時代為什麼實行全面依法治國、怎樣實行全面依法治國等一系列重大問題，也回答了如何維護香港法治、如何運用法治思維和法治方式確保“一國兩制”行穩致遠和香港長治久安的問題。習近平主席反覆強調，堅持依法治港治澳，是全面依法治國的應有之義。要善於從法律層面考慮問題，推動完善有關法律規定，提高維護國家政治安全法治化水準。在2019年香港“修例風波”鬧到忍無可忍的時候，中央依然堅守法治精神不動搖。中國共產黨十九屆四中全會提出建立健全香港維護國家安全的法律制度和執行機制，十三屆全國人大三次會議作出決定，十三屆全國人大常委會第二十次會議通過了《香港國安法》。這一立法，堵塞了香港國家安全長期不設防的重大法治漏洞，成為香港維護國家安全和長期繁榮穩定的治本之策。設立駐港國安公署和特區國安委兩套機制，既是立法與執法協同的法理需要，也是制度與執行、治理體系與治理能力辯證關係的體現。這充分證明中央堅守依法治港、維護香港法治的決心、信心和苦心。

五、從“愛國者治港”的維度

習近平主席深刻指出，要確保“一國兩制”實踐行穩致遠，必須始終堅持“愛國者治港”，這是事關國家主權、安全、發展利益，事關香港長期繁榮穩定的根本原則。這為推動“一國兩制”行穩致遠、保持香港長治久安指明了根本方向。管治權安全是國家安全的重要組成部分，政權出了問題是嚴重的國家安全失守。回歸後的香港要由愛國者治理，確保管治權牢牢掌握在愛國者手中，才能更有效維護國家安全，而不是任何人都可以掌權治港，

在這個問題上絕不可以所托非人。放眼世界和歷史，這是一條基本政治倫理。還有，《香港國安法》第三條規定，特區行政機關、立法機關、司法機關應當依據國安法和其他有關法律規定，有效防範、制止和懲治危害國家安全的行為和活動，不是“愛國者”怎麼可能做到這一條呢？實際上，“愛國者治港”就是對香港管治團隊落實維護國家安全職責的最通俗表述，是“高度自治”與“高度放心”辯證關係的必然邏輯。

六、從鬥爭哲學的維度

習近平主席在紀念中國人民志願軍抗美援朝出國作戰70周年大會上向全世界莊嚴宣示，我們決不會坐視國家主權、安全、發展利益受損，決不會允許任何人任何勢力侵犯和分裂祖國的神聖領土。一旦發生這樣的嚴重情況，中國人民必將予以迎頭痛擊。2019年“修例風波”中的香港，可以說已經發生了這樣的嚴重情況，國家主權、安全、發展利益面臨嚴重威脅，香港根本利益面臨嚴重破壞。這已經不是什麼民主思潮、自治呼聲、言論自由，而是徹頭徹尾的顛覆政權、侵犯主權，而且其中的“攬炒”“黑暴”極端活動則更是演化為毫無人道的嚴重反社會犯罪行為，對此沒有任何妥協、懷柔可言，不可以抱任何幻想，不可以給予任何可乘之機，唯有鬥爭，唯有法辦，除此別無他法。

法律是治國之重器。從上面這六個維度的分析，我們可以清楚地看到，《香港國安法》作為一部全國性法律，立法原意清清楚楚、明明白白，是一部維護國家核心利益、具有相當凌駕意義的特殊法律。中央對香港維護國家安全的決心是最堅強的國家意志，是不可動搖、不可撼動的。《香港國安法》刊憲實施以來，反中亂港活動得到有效打擊，百姓重享安定祥和，香港實現了由亂到治的重大轉折，充分證明中央的這份決心意志和良苦用心已經轉化為強大的法治威力，為護佑香港最廣大市民安全福祉兜

牢了底線，任何人、任何勢力還想試探中央對香港維護國家安全的決心和底線，甚至膽敢在這一問題上輕舉妄動，只能是自取其辱。

值得一提的是，《香港國安法》的有效實施，中央負有根本責任，特區負有憲制責任，共同的責任是正確理解《香港國安法》的立法原意、嚴格依法執法司法、有效維護國家安全，這一責任包括特區每一位管治、司法、執法人員，履行這一職責與所謂“政治中立”無關，與維護香港司法制度不矛盾，與維護香港的法治精神、市場環境、公眾利益完全一致，任何人沒有任何藉口在維護國家安全上不作為、亂作為。

駐港國安公署將堅定落實中央對香港維護國家安全的戰略意圖、政治決心，以更堅定的法治意識、更強烈的法治擔當、更有效的法治手段，堅決、穩妥、依法、有效履職，與特區國安委一道緊密合作，與特區管治、司法、執法團隊並肩作戰，全力以赴打好打贏香港維護國家安全的整體戰、主動戰，為“一國兩制”行穩致遠作出應有貢獻。

謝謝大家！

劉光源
中華人民共和國外交部駐香港特別行政區特派員公署特派員

尊敬的梁振英副主席，
尊敬的林鄭月娥行政長官，
尊敬的陳冬副主任、鄭雁雄署長、王兆兵副政委，
各位嘉賓、各位朋友，女士們、先生們：

我們剛剛隆重慶祝了中國共產黨百年華誕和香港回歸祖國24周年，也一同見證了《香港國安法》實施一周年。在中國共產黨堅強領導下，“一國兩制”這艘巨輪劈波斬浪、開拓前行，成為中國共產黨百年偉業的絢麗篇章。《香港國安法》作為中央堅持和完善“一國兩制”制度體系的重要標誌性法律，發揮了“一法安香江”的重大成效，香港迎來國安家好、海晏河清的新氣象。

今天，中央和特區政府官員、兩地專家學者從法律角度對《香港國安法》做“周年盤點”，回顧總結《香港國安法》實施一周年的成功經驗，對於進一步理解好、宣傳好、實施好《香港國安法》具有重大意義。下面，我願圍繞《香港國安法》與大家分享幾點看法。

第一，《香港國安法》是保障“一國兩制”行穩致遠的“安全閥”。“一國兩制”方針是中國的基本國策，是中國對人類政治實

踐的一大貢獻。沒有誰比中國更瞭解“一國兩制”的真諦，沒有誰比中國更有決心維護“一國兩制”。“一國兩制”事業的初心是維護國家的統一和領土完整，保持香港的繁榮穩定。維護國家安全是“一國兩制”方針的核心要求。面對“修例風波”造成的香港長時間的社會動盪，中央堅持依法治港，果斷推進香港國安立法，堵塞特區的法律漏洞，把“一國兩制”原則底線進一步法律化，為“一國兩制”實踐提供法治保障。一些外國反華政客所謂《香港國安法》改變“一國兩制”的說法都是源於無知與偏見的惡意中傷。

第二，《香港國安法》是契合國際實踐的高標準“示範法”。維護國家安全是一國生存發展的基本前提，是國家主權最核心、最基本的要素。世界上無論是單一制國家，還是聯邦制國家，無論是普通法國家，還是大陸法國家，都高度重視國家安全立法，都會切實採取有效措施維護國家安全。《香港國安法》終結了特區在維護國家安全方面長期不設防的歷史，符合國際通行實踐，並且與國外立法相比，《香港國安法》在尊重和保障人權上秉持更高標準，明確列出香港居民享有的權利自由及各項重要法治原則，體現“懲治極少數，保護大多數”原則。一些西方國家自身國安立法密不透風，在打擊國安犯罪上毫不留情，甚至泛化國家安全概念，蠻橫打壓別國企業，卻對《香港國安法》持續污名化、妖魔化，這是典型的“雙重標準”。

第三，《香港國安法》是反對外部干預的“霹靂劍”。香港回歸以來，一些外部勢力利用特區存在的制度漏洞，頻繁插手香港事務，妄圖把香港變成一個獨立或半獨立的政治實體，變成一個對內地進行分裂、顛覆、滲透、破壞的橋頭堡，嚴重威脅中國國家安全。《香港國安法》劍指危害國家安全的罪行，對那些企圖分裂國家、顛覆國家政權、組織實施恐怖活動和勾結外國或者境外勢力危害國家安全的不法之徒形成有力震懾，有效阻遏外部勢力勾結本土反中亂港分子干預香港事務。一些國家在《香港國安法》

制定後，氣急敗壞地對中國和香港揮舞“制裁”大棒，這只能說明他們被擊中“七寸”要害，更加證明《香港國安法》“立”之有理、正當其時。

第四，《香港國安法》是維護香港繁榮穩定的“守護神”。《香港國安法》的出台消弭國際社會對香港長期發展的憂慮。《香港國安法》實施後，香港社會恢復穩定和秩序，思穩求安的共識廣泛凝聚，團結發展的正氣不斷上揚。香港銀行體系的結餘額升至近四年的高位，港交所IPO集資額創10年新高，在港運營的內地和海外企業超9000家，其中1200多家是地區總部，不少國際金融機構紛紛在港增聘人手，國際貨幣基金組織發表報告再次肯定香港的國際金融中心地位。這些數字和事實充分說明《香港國安法》讓香港市場和投資環境更加穩定，國內外投資者在港開展業務更加安心、更有信心，有力回擊“唱衰香港”的謬論。90多國在聯合國支持中方涉港問題立場，顯示出《香港國安法》得到國際社會的廣泛力挺。可以說，支持《香港國安法》順利實施，就是守護香港的獨特地位和成功優勢，就是擁抱中國和香港發展的機遇，就是維護和促進各國自身在港的利益。

各位嘉賓，各位朋友！

習近平總書記強調，中國政府維護國家主權、安全、發展利益的決心堅定不移，貫徹“一國兩制”方針的決心堅定不移，反對任何外部勢力干預香港事務的決心堅定不移。在座各位很多是法律專家，相信大家深知，主權平等和不干涉內政是國際社會公認的國際法基本原則和國際關係基本準則，《聯合國憲章》和眾多聯大決議均對此予以明確闡釋。《維也納外交關係公約》《維也納領事關係公約》也都明文規定，外交和領事人員“負有尊重接受國法律規章之義務”，“並負有不干涉該國內政之義務”。香港回歸祖國後，處理香港特區的事務完全是中國內政，用不著任何外

部勢力指手畫腳。中國維護國家主權、安全、發展利益的意志堅如磐石，絕不允許任何外部勢力干預香港事務！任何搞霸權、霸道、霸凌的行徑，都是死路一條！上個月，中國制定反外國制裁法，再次彰顯中國反對霸權主義和強權政治，維護國家主權、尊嚴和核心利益的堅定決心，任何損害中國利益的行為都必將遭到包括香港同胞在內的14億中國人民的堅決反擊！

各位嘉賓，各位朋友！

中國共產黨已成立100周年，回顧百年奮鬥史，我們無比堅信，中華民族偉大復興的前進步伐勢不可擋，“一國兩制”完全行得通、辦得到、得人心。國安家好，法護香江。我們完全相信，隨著《香港國安法》的深入實施和特區選舉制度的完善，隨著國家“十四五”規劃加速推進和香港更好融入國家發展大局，香港定將迎來更加美好燦爛的明天！

謝謝大家！

主題演講

楊萬明

中華人民共和國
二級大法官及最高人民法院副院長

女士們、先生們、朋友們：

大家上午好！非常高興和榮幸，在中國共產黨成立一百周年、《香港國安法》頒佈實施一周年之際，與各位嘉賓、各位同仁就《香港國安法》相關議題“線上”研討交流。

去年6月30日，十三屆全國人大常委會第二十次會議通過了《香港國安法》，開啟了香港由亂及治的重大轉折。今天，舉辦這個論壇紀念《香港國安法》頒佈實施一周年，對於推動這部法律的學習、宣傳和貫徹、實施都具有重大意義。

維護國家主權和安全，保持香港長期繁榮穩定，是“一國兩制”方針的根本宗旨。為實現這一宗旨，堵塞香港維護國家安全法律制度漏洞、補齊香港維護國家安全執行機制短板，全國人大常委會根據全國人大有關決定的授權，嚴格遵循法定程序，廣泛聽取各界意見，制定《香港國安法》這一兼具實體法、程序法、組織法內容的綜合性法律，對香港維護國家安全制度機制作出了法律化、規範化、明晰化的具體安排。

《香港國安法》充分體現了“一國”和“兩制”的統一、中央對港全面管治權和特別行政區高度自治權的統一、維護國家主權安全發展利益和保障香港市民合法權益的統一，是一部具有鮮明中國特色、實踐特色的法律，是“一國兩制”的創造性實踐。它的頒佈實施，對維護國家安全和香港長治久安、繁榮發展，對確保“一國兩制”事業行穩致遠，具有重大現實意義和深遠歷史意義。

法律的生命在於實施，法律的權威也在於實施。作為一部全國性法律，全面有效實施《香港國安法》，既是香港司法機構的責任，也是內地司法機關的責任。《香港國安法》頒佈實施以來，兩地法院均精心組織學習培訓，為貫徹執行這部法律打下了良好基礎。下面，我想從五個方面，與大家交流一下學習《香港國安法》的體會，分享一下對兩地法院全面有效實施《香港國安法》的思考。

一、增強責任意識，共同擔當維護國家安全司法職責。“一國兩制”下，中央人民政府和香港特別行政區共同承擔維護國家安全的責任。其中，中央人民政府承擔根本責任，特別行政區負有憲制責任。這一點充分體現在管轄制度設計上。《香港國安法》規定由香港特別行政區處理絕大多數危害國家安全犯罪案件，駐港國家安全公署和國家有關機關僅在特定情形下對極少數危害國家安全犯罪案件行使管轄權。中央授權特別行政區管轄絕大多數案件，是對特別行政區高度自治的尊重，也是對特別行政區的充分信任；同時，中央保留特定情形下對極少數案件的管轄權，是中央對港全面管治權的重要體現，目的是為香港維護國家安全守住底線。基於此，兩地法院應當各負其責、共同擔當，發揮司法職能，履行好維護國家安全的法定職責，切實防範、制止和懲治危害國家安全犯罪，全面、有效保障《香港國安法》的實施。

二、恪守憲制基礎，準確理解法律規定和精神實質。兩地執法、司法機關實施、適用《香港國安法》時，不可避免會涉及對條文的理解。《香港國安法》第一條開宗明義指出，根據《憲法》、《基本法》和全國人大有關決定，制定本法。因此，全面準確貫徹《香港國安法》，要求香港和內地有關執法、司法機關嚴格在《憲法》和《基本法》以及全國人大有關決定的框架內理解和把握這部法律，嚴守《憲法》和《基本法》構成的特別行政區憲制基礎，謹遵《香港國安法》的立法精神與立法目的，在出現分歧、爭議的情況下，參酌立法背景、根據實踐需求，對條文作出合憲合法合理解讀。在這方面，《關於〈全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定（草案）〉的說明》和《關於〈中華人民共和國香港特別行政區維護國家安全法（草案）〉的說明》，特別是兩個《說明》中關於指導思想和基本原則的部分，比較直接地反映了立法意圖，屬於權威的立法資料，對於正確理解、執行《香港國安法》具有重要參考作用。要特別指出的是，根據法律規定，《香港國安法》的解釋權屬於全國人大常委會，除全國人大常委會外，其他任何機關均無解釋權。如果司法機關遇到需要進一步明確法律規定的具體含義，或者出現新的情況需要明確適用法律依據的情形，應當請求全國人大常委會作出立法解釋。

三、堅持法治原則，統籌兼顧懲罰犯罪與保障人權。《香港國安法》在總則部分明確規定了應當遵循的重要法治原則，包括罪刑法定、無罪推定、一事不再理等等。這些原則，在內地法律中也均有規定或體現。例如，法無明文規定不為罪、法無明文規定不處罰是《刑法》規定的基本原則之一；未經人民法院依法判決，對任何人都不得確定有罪，是《刑事訴訟法》規定的重要原則。在審理危害國家安全刑事案件過程中，內地法院將堅持嚴格落實罪刑法定、疑罪從無等法律原則，切實貫徹寬嚴相濟刑事政

策，以事實為根據、以法律為準繩，準確定罪量刑，突出人權保障職能，做到罰當其罪，防止重罪輕判、輕罪重判，努力讓人民群眾在每一個司法案件中感受到公平正義。

四、遵循程序規則，通過程序公正保障實體公正。在程序方面，《香港國安法》對特別行政區的規定相對具體，對內地管轄相關案件的立案偵查、審查起訴、審判和刑罰的執行等訴訟程序事宜，僅明確適用《中華人民共和國刑事訴訟法》等相關法律的規定。內地《刑事訴訟法》自1979年7月頒佈以來，歷經三次修正，在辯護制度、證據規則、偵查措施、審判程序等方面日臻完善，為有效懲罰犯罪、有力保障人權、切實維護社會穩定提供了堅實程序保障。基於內地成文法特點和不斷完善的法律制度體系，人民法院辦理內地管轄的相關案件，一定能夠做到嚴格執行《刑事訴訟法》，充分保障被告人各項訴訟權利和辯護律師依法有效行使辯護權，確保無罪的人不受刑事追究，有罪的人受到公正審判，切實維護程序公正和實體公正。

五、統一裁判尺度，有效確保司法公正高效權威。近年來，內地法院不斷深化司法體制改革和智慧法院建設，充分發揮司法解釋、指導性案例作用，持續推進量刑規範化工作，探索實施類案與關聯案件強制檢索制度，形成了一套完整成熟的統一裁判尺度工作機制。我們在學習討論《香港國安法》過程中感到，對於有關法律條文、法律概念，基於內地法律的系統性、整體性加以理解和把握，一般不會產生分歧和爭議。比如，對於國家秘密，內地法官一般可參考《中華人民共和國刑法》《中華人民共和國保守國家秘密法》等法律，來幫助理解《香港國安法》的有關規定。《香港國安法》第三十三條規定了“從輕、減輕處罰”，但沒有明確具體含義。內地刑法對此是有明確規定的，即所謂從輕處罰，是在法定刑幅度內，適用相對較輕的刑種或者處以相對較短的刑期；所謂減輕處罰，是在法定最低刑以下判處刑罰，對於規定有

數個量刑幅度的，則要在法定量刑幅度的下一個量刑幅度內判處刑罰。司法實踐中，內地法官可參考上述具體情形理解把握《香港國安法》所規定的“從輕、減輕處罰”的具體含義。在貫徹執行《香港國安法》的過程中，內地和香港都需要在各自法律體系中結合相關法律來理解和適用有關規定。但是，兩地畢竟執行的是同一部法律，不能出現太大差異，因此，加強雙方交流互鑒是十分必要的。

女士們、先生們，國家安全事關個人幸福、社會進步、民族復興。全面、準確、有效實施《香港國安法》，是內地司法機關和香港司法機構的共同責任，最高人民法院將繼續堅定支持香港司法機構依據《香港國安法》和其他有關法律規定，防範、制止和懲治危害國家安全的行為與活動，切實維護香港法治，有效保障國家安全。

我堅信，在以習近平為核心的黨中央堅強領導下，在“一國兩制”方針的科學指引下，在包括香港同胞在內的全國人民廣泛支持和參與下，我們一定能貫徹執行好《香港國安法》，為維護國家主權安全和發展利益、實現香港長期繁榮穩定提供有力司法保障。

謝謝大家！

張勇

全國人民代表大會常務委員會法制工作委員會副主任

尊敬的林鄭月娥行政長官，各位嘉賓，各位朋友：

大家上午好！

感謝香港特別行政區律政司的邀請，在《中華人民共和國香港特別行政區維護國家安全法》實施一周年法律論壇與大家進行線上交流。

“法者，治之端也”。《香港國安法》的制定和實施，是堅持和完善“一國兩制”制度體系、堅持依法治港的重大制度性成果，彌補了香港特別行政區維護國家安全的制度漏洞。《香港國安法》實施一年來，成效顯著，迅速扭轉了“修例風波”導致的動盪不安的社會政治局勢，使廣大香港同胞能夠在一個穩定安寧的社會環境中安居樂業。

法律的生命在於實施，法律的權威也在於實施。戰國時期偉大的思想家韓非子曾說過，“世不患無法，而患無必行之法”。作為全國人大常委會制定的、主要在實行普通法制度的香港特區實施的一部全國性法律，《香港國安法》的全面、準確、順利實施，

需要我們經常性地相互切磋、深化認知、增進共識。下面，我談三點體會與大家分享。

一、在總體國家安全觀的指導下實施《香港國安法》

“備豫不虞，為國常道”。國家安全是一個國家存在和發展的前提條件，涉及多方面、多層次、多領域，既有全局性的國家安全事務，也有區域性的國家安全問題。《香港國安法》的立法目的是在香港特區維護我國的國家安全。在整體國家安全法律制度體系中，《香港國安法》只是其中的一部重要法律。因此，這部法律具有特別法和區域法的特徵。要全面準確地實施《香港國安法》，有必要對構建我國國家安全法律制度體系的指導思想、方針政策和有關法律制度有所瞭解、有所認識。

面對新時期錯綜複雜的國際國內局勢，習近平主席多年前就提出了總體國家安全觀重要思想，其基本內涵是：堅持中國特色國家安全道路，堅持政治安全、人民安全、國家利益至上有機統一，以人民安全為宗旨，以政治安全為根本，以經濟安全為基礎，捍衛國家主權和領土完整，防範化解重大安全風險，為實現中華民族偉大復興提供堅強安全保障。根據總體國家安全觀，國家安全的範圍十分廣泛，既包括傳統安全如政治安全、國土安全和軍事安全，也包括各種非傳統安全如經濟安全、社會安全、生物安全，等等。

在總體國家安全觀指導下，近十年來，全國人大及其常委會全面系統地構建起維護國家安全的法律制度和體制機制，制定了一系列維護國家安全的重要法律。這些法律自成體系，有其獨特的法理基礎和內在的邏輯關係。《香港國安法》作為國家安全法律制度體系的一部分，在條款表述、內涵釋義以及具體適用等方面，與其他的國家安全法律法規一脈相承，有著共性特徵和內在聯繫。比如，《香港國安法》在禁止危害國家安全行為和活動方

面，就採用了《中華人民共和國國家安全法》中“防範、制止和懲治”的概念，而這三種禁止方式在我國刑法中有其特定的含義。因此，要全面準確地實施《香港國安法》，需要有更廣闊的視野和更多維的角度，深刻領會維護我國國家安全的根本指導思想即總體國家安全觀、全面認識維護我國國家安全的基本制度和體制機制、主動瞭解維護我國國家安全的全國性法律法規。

二、在全國人大有關決定的框架內實施《香港國安法》

《香港國安法》實施一年來，我注意到一個現象：大家都很關心、關注《香港國安法》的內容及其適用，但很少有人提及全國人大在《香港國安法》通過之前作出的“5•28”決定，即《全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定》。我認為，在香港特區維護國家安全，需要進一步深刻理解和全面落實全國人大“5•28”決定。

首先，全國人大“5•28”決定具有更高的法律效力。全國人民代表大會是我國的最高國家權力機關，全國人大常委會是它的常設機關。全國人大“5•28”決定體現了最高國家權力機關的意志和要求，具有最高的法律效力和約束力。《香港國安法》是全國人大常委會依據全國人大“5•28”決定的授權而制定的。《香港國安法》第一條就明確規定，《憲法》、《香港基本法》和全國人大“5•28”決定是這部法律的立法依據。

其次，全國人大“5•28”決定具有廣泛的內涵要求。全國人大“5•28”決定對在香港特區維護國家安全提出了總體要求和基本原則，包括：堅決維護國家安全、堅持和完善“一國兩制”制度體系、堅持依法治港、堅決反對外來干涉、切實保障香港居民合法權益。同時，這項決定還提出建立健全多層次、多方面的制度和機制，包括：香港特區應當儘早完成《香港基本法》規定的維護國家安全立法；香港行政機關、立法機關、司法機關應當有

效防範、制止和懲治任何危害國家安全的行為；香港特區應當建立健全維護國家安全的相關機構和執行機制；中央有關機關在香港設立相關機構並履行職責；行政長官應當履行維護國家安全的職責，開展國家安全推廣教育，定期向中央人民政府提交有關報告，等等。

第三，全面理解全國人大“5•28”決定的立法授權。全國人大“5•28”決定第六條授權全國人大常委會就建立健全香港特區維護國家安全的法律制度和執行機制制定相關法律。這是一項概括性授權，體現了原則性與靈活性、全面性與有限性的結合，包括三層含義：一是授權目的是要求全國人大常委會就建立健全香港特區維護國家安全的法律制度和執行機制制定相關法律。為實現這一授權目的，全國人大常委會可以制定任何相關法律，包括但不限於已經制定的《香港國安法》。二是立法範圍是切實防範、制止和懲治任何嚴重危害國家安全的行為和活動，包括但不限於《香港國安法》已經列明禁止的四類犯罪。全國人大常委會可以根據實際需要，通過制定或者修改法律等方式進一步禁止其他嚴重危害國家安全的犯罪。三是明確全國人大常委會相關法律在香港特區的實施方式，即列入《香港基本法》附件三，由香港特區在當地公佈實施。

在“一國兩制”原則下，在香港特區有效維護國家安全是一項全面系統、久久為功的工程，制定並實施《香港國安法》是重要措施之一，但並不是全部。因此，有必要進一步理解和落實全國人大“5•28”決定，全方位構建在香港特區維護國家安全的法律制度和執行機制。

三、在香港特區法律體系的融合中實施《香港國安法》

作為一部列入《香港基本法》附件三、在香港特區公佈實施的全國性法律，《香港國安法》已經成為香港特區法律體系的一

部分。在香港特區全方位構建維護國家安全的法律制度和執行機制，需要《香港國安法》與香港本地法律和制度有機融合、有效銜接。

第一，確立共同一致的法理基礎。無論是《香港國安法》，還是香港本地有關法律和制度，共同目的是在香港特區維護我國的國家安全。它們建基於共同的法理基礎，有三方面內容：一是維護國家安全是中央事權。中央政府對包括香港特區在內中華人民共和國任何地方的國家安全負有根本性責任，依據《憲法》行使主權權力，通過法律明確責任義務，構建制度機制。二是香港特區作為一個地方行政區域，在依法享有高度自治權的同時，對在香港維護國家安全負有憲制性責任。三是維護國家安全是包括香港同胞在內的全中國人民的共同義務。這既是憲法義務，也是公民責任。

第二，完善銜接互補的法律制度。《香港國安法》規定了四類危害國家安全的犯罪，這顯然不足以涵蓋在香港可能發生的危害國家安全的行為和活動。我國《刑法》第一章規定了十一類危害國家安全的犯罪，《香港基本法》第23條也明確禁止七類危害國家安全的行為和活動。在香港形成一整套維護國家安全的法律制度，需要《香港國安法》與香港本地法律和制度進行有效銜接，相互補充。這方面，還有大量的工作：一方面，儘早完成《香港基本法》規定的維護國家安全立法。這是全國人大“5•28”決定的明確要求，也是香港特區的憲制責任。另一方面，及時開展香港原有法律中維護國家安全內容的適應化。1997年2月23日全國人大常委會關於處理香港原有法律的決定對此作出了具體規定。這既是香港原有法律“去殖民化”的必然要求，也是“激活”香港原有法律、有效維護國家安全的現實需要。

第三，建立協同有力的執行機制。《香港國安法》在實體法方面禁止四類危害國家安全的犯罪，同時，還在程序法和組織法方面作出了不少相關規定，比如，明確處理危害國家安全罪須遵循的基本原則，包括尊重和保障人權、罪刑法定、無罪推定、保障訴訟權利等；要求香港特區和中央有關機關設立維護國家安全的相關機構和組織；規定了審理危害國家安全罪的案件管轄、法律適用以及訴訟程序，等等。這些程序法和組織法方面的規定不僅適用於《香港國安法》所禁止的四類犯罪，也同樣適用於其他危害國家安全的犯罪。

各位嘉賓們、朋友們！

今年7月1日，是中國共產黨建黨一百周年。這是中國共產黨領導中國人民全面建成小康社會、實現第一個百年奮鬥目標的終點，也是我們再接再厲，邁向建成社會主義現代化國家、實現第二個百年奮鬥目標的新起點。中國共產黨是“一國兩制”偉大事業的創立者，也是“一國兩制”成功實踐的領導者；只有在中國共產黨的領導下，才能夠長期堅持並不斷完善“一國兩制”制度體系。《香港國安法》的制定和實施是一個重要的里程碑。讓我們攜手同行，為實現“國安家好”這一論壇主題而共同努力！

謝謝大家！

鄧中華
國務院港澳事務辦公室
副主任

尊敬的林鄭月娥行政長官，
尊敬的陳冬、張勇副主任，楊萬明副院長，
尊敬的鄭雁雄署長、劉光源特派員，
各位嘉賓、各位朋友：

大家上午好！

很高興參加香港特區政府律政司主辦的這次論壇。首先，我謹代表全國政協副主席、國務院港澳辦主任夏寶龍對論壇的舉行表示熱烈祝賀！

一年前，面對香港回歸後出現的最為嚴峻的局勢，中央果斷決策，制定實施《香港特別行政區維護國家安全法》(以下簡稱《香港國安法》)，支持香港特區政府防範、制止和懲治危害國家安全犯罪行為，有效維護了國家安全，迅速恢復了社會、法治秩序，香港實現了由亂及治的重大轉折。這部法律是繼《香港基本法》之後，中央為香港特區量身訂制的又一部重要法律，是中央完善治港方略的新標誌，意義重大，影響深遠。今天，我們齊聚一堂，回顧《香港國安法》不平凡的制定實施歷程，總結實踐經驗，

探討法律問題，對全面準確理解和實施《香港國安法》很有意義。我全程見證了這個歷程，深有感慨。借此機會，我談三點看法。

一、制定實施《香港國安法》是應對香港嚴峻局勢的必要、及時和有效之舉

《香港國安法》是在極其特殊的背景下制定出台的。一方面，由於法律制度和執行機制缺失導致香港特區維護國家安全“不設防”狀態長期持續。不僅《香港基本法》23條賦予特區立法禁止叛國、分裂國家、煽動叛亂等危害國家安全行為的憲制責任在特區回歸23年裡遲遲沒有完成，香港原有法律中有關維護國家安全的有關規定也長期處於“休眠”狀態，還有香港特區在維護國家安全的機構設置、力量配備和執法權力等方面存在諸多缺失和限制。另一方面，香港在國家安全領域面臨的風險日益凸顯，並在“修例風波”時達到巔峰。當時的香港，“港獨”猖獗、“黑暴”肆虐、“攬炒”盛行，香港陷入曠日持久的動盪，社會秩序和公共安全遭到嚴重破壞，“一國兩制”原則底線受到嚴重挑戰、國家安全和香港繁榮穩定受到嚴重威脅。短時期內香港已不具備自行完成維護國家安全法律制度和執行機制構建的條件。正是在這樣的背景下，中央被迫果斷出手，制定並實施《香港國安法》。

《香港國安法》實施一年來，香港特區維護國家安全執行機制的主體框架以及中央和特區層面相關協調協作機制已經基本建立，運行順暢；《香港國安法》各項執法司法配套制度機制逐步建立，執法有力，運行良好；特區教育、網路、媒體等領域維護國家安全有關行政管理方面的制度逐步落實，積極持續推進。《香港國安法》的制定實施，有力打擊了反中亂港勢力，有效遏制了反中亂港活動，開啟了香港撥亂反正、正本清源的新進程，提高了全社會維護國家安全意識，激發了愛國愛港的正能量，促進了社會政治生態改善。社會安定、市民安全、人心安寧，居民安

居樂業、經濟社會持續發展的良好社會環境重臨香江。香港依然是全球金融投資、人才聚集、興業發家的寶地。事實證明，《香港國安法》的制定實施是必要、及時、有效的，這是一部匡正祛邪、固本強基之法，是一部保護香港居民權利自由、保障香港長治久安之法，是一部符合國家、香港和廣大港人利益之法。

二、《香港國安法》充分貫徹了“一國兩制”原則和精神

維護國家主權、安全和發展利益，保持香港長期繁榮穩定，是“一國兩制”的根本宗旨。中央制定《香港國安法》的出發點和落腳點，就是為了全面準確貫徹“一國兩制”方針，保障“一國兩制”行穩致遠，實現這一根本宗旨。《香港國安法》的立法目的明示了這一點。《香港國安法》第1條開宗明義規定，“*為堅定不移並全面準確貫徹‘一國兩制’、‘港人治港’、高度自治的方針，維護國家安全，……，保持香港特別行政區的繁榮和穩定，保障香港特別行政區居民的合法權益，……，制定本法*”。《香港國安法》從形式到內容都充分體現了“一國兩制”的原則和精神。

一**是**《香港國安法》確立了香港國家安全事務屬於中央事權，明確了中央和特區在香港維護國家安全問題上的關係，即中央人民政府對香港有關國家安全事務負有根本責任和對香港特區履行維護國家安全職責的監督、指導職責；香港特區負有維護國家安全的憲制責任、主體責任和在立法、執法、司法、行政管理方面相應的具體職責。

二**是**在罪行設立上，只規定分裂國家、顛覆國家政權、恐怖活動和勾結外國或境外勢力危害國家安全等四類嚴重罪行，規定犯罪構成時既在原則上與《中華人民共和國刑法》保持一致，又充分考慮到香港特區在維護國家安全方面的現實風險和普通法的特點，對有關犯罪行為的具體表現形式作出清晰的界定。

三是在管轄和執行機制上，建立了香港特區管轄和中央管轄兩個層面的執行機制，並做好相互銜接、配合，明確香港特區對絕大多數國安案件行使管轄權，中央只保留在特定情形下對極少數案件的直接管轄權，還要求中央和特區兩個層面的執法機構做好銜接、配合工作。

四是充分考慮香港特區實際和普通法的特點，強調人權、法治等原則，規定保護香港特區居民根據《香港基本法》享有的結社、集會、遊行等權利和自由，強調堅持罪刑法定、無罪推定、訴訟權利保障、一事不再理等法治原則。

五是在形式上，中央沒有將《國家安全法》或《中華人民共和國刑法》等全國性法律直接列入《香港基本法》附件三適用於香港特區，而是專門制定《香港國安法》，並且在立法過程中廣泛聽取香港特區政府和香港社會各界意見。同時，除做好與有關全國性法律有機銜接外，《香港國安法》還在法律概念、用詞用語和立法方式等方面儘量體現香港普通法的特色。

所有這些，都體現了《香港國安法》充分貫徹“一國兩制”的原則和精神，既堅持“一國”原則，又尊重“兩制”差異，既堅定維護國家安全，又充分保障香港居民依法享有的權利和自由，既切實落實中央全面管治權，又有效維護特區高度自治權。

三、全面準確實施《香港國安法》需要把握好與香港本地法律之間的關係

《香港國安法》是全國人大常委會依據《憲法》、《香港基本法》和全國人大有關決定制定，列入《香港基本法》附件三在特區公佈實施的一部全國性法律，是香港特區法律制度體系的重要組成部分。《香港國安法》並沒有涵蓋香港維護國家安全的所有方面、所有環節，因此需要將其納入特區法律體系中，與特區其他相關

法律相互配合、一體執行。只有準確認識和把握《香港國安法》與香港本地法律的關係，才能全面準確實施《香港國安法》。

一是，《香港國安法》在實體法和執行機制方面填補香港特區本地法律制度漏洞的規定，必須嚴格執行。《香港國安法》關於分裂國家、顛覆國家政權、恐怖活動、勾結外國或者境外勢力危害國家安全四類罪行的規定，關於香港特區設立維護國家安全委員會、警務處設立維護國家安全部門、律政司設立國家安全犯罪案件檢控部門的規定，都是對香港維護國家安全法律制度和執行機制漏洞缺失的填補。全面準確實施《香港國安法》，首先需要根據這些規定，精準對標罪與非罪的界限，規制有關行為和活動，特區行政、執法、司法機關必須嚴格依照《香港國安法》履行相關的職責。

二是，《香港國安法》在法律適用和程序方面作出新制度安排的規定，必須優先適用。《香港國安法》針對危害國家安全犯罪案件的特殊性和複雜性作出了一些新的制度安排，比如，有關保釋、陪審團以及警方執法權的規定等，都不同於香港本地法律的一般性規定。其中，關於保釋的規定，《香港國安法》第42條第2款確立了危害國家安全的保釋制度，即以不保釋為原則、保釋為例外。除非法官有充足理由相信犯罪嫌疑人、被告人不會繼續實施危害國家安全行為的，不得准予保釋。關於陪審團的規定，《香港國安法》第46條賦予律政司司長基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟不採用陪審團的權力，有關案件改由三名法官組成審判庭進行審理。關於警方執法權力的規定，《香港國安法》第43條賦予香港警方在辦理國安案件時可採取有別於一般刑事案件的特殊措施，包括搜查有關地方、要求犯罪嫌疑人交出旅行證件及限制出境等七項措施。這些都是為及時、有效防範、制止和懲治危害國家安全犯罪，確保案件得到公正處理的現實需

要。全面準確實施《香港國安法》，需要根據《香港國安法》第62條規定，在處理國安案件時，準確適用這些規定。

三是，《香港國安法》沒有作出具體規定，但提出了原則性要求的，要通過香港本地法律予以落實。《香港國安法》在規定刑事罪行和處罰的同時，也對香港特區加強學校、社會團體、媒體、網路等涉及國家安全事宜監管，以及開展國家安全教育工作提出了原則性要求。這些需要特區通過制定相應的法律或修訂已有法律，或出台必要的行政措施加以落實。一年來，特區政府積極履行《香港國安法》的主體責任，完成公務員宣誓程序，陸續公佈國家安全教育課程框架，修訂《電影檢查條例》的《檢查員指引》、《警察通則》等本地法律，制定《電訊（登記用戶識別卡）規例》，加強對公務員、教育界和媒體的監管；持續開展國家安全教育活動，推動《香港國安法》進校園、進社區等，取得了較好的工作成效。特區政府還要在這方面繼續強化落實。

四是，在程序法和組織法方面，《香港國安法》作出規定的，適用於所有危害國家安全犯罪案件的辦理；《香港國安法》沒有作出規定的，對危害國家安全犯罪案件的辦理，適用香港特區本地法律的相關規定。《香港國安法》第41條規定，“香港特區管轄危害國家安全犯罪案件的立案偵查、檢控、審判和刑罰的執行等訴訟程序事宜，適用《香港國安法》和香港特區本地法律”。《香港國安法》對特區管轄危害國家安全犯罪案件在程序法組織法方面作出的規定，不僅適用於《香港國安法》規定的四類犯罪案件，也同樣適用於其他危害國家安全的犯罪案件。而對於《香港國安法》規定的四類危害國家安全犯罪案件的處理，《香港國安法》沒有明確規定的程序事宜，則適用香港本地法律的相關規定。

我們欣喜地看到，一年來，香港社會特別是執法司法機關對《香港國安法》逐步形成了正確認識和理解，特別是在保釋制度、

陪審團制度、指定法官制度、警方執法權特別授權等方面逐步落實了相關制度安排，較好地處理了《香港國安法》與香港本地法律的關係，較好地落實了有關立法本意。這對進一步維護《香港國安法》的權威、推進《香港國安法》的有效執行，無疑是十分重要的。

各位嘉賓，各位朋友！

7月1日，習近平總書記在慶祝中國共產黨成立一百周年大會上莊嚴宣告，經過全黨全國各族人民持續奮鬥，我們實現了第一個百年奮鬥目標，在中華大地上全面建成了小康社會，歷史性地解決了絕對貧困問題，正在意氣風發向著全面建成社會主義現代化強國的第二個百年奮鬥目標邁進。關於港澳工作，習近平總書記在講話中強調指出，“要落實特別行政區維護國家安全的法律制度和執行機制，維護國家主權、安全和發展利益，維護特別行政區社會大局穩定，保持香港、澳門長期繁榮穩定”。當前，香港正處在由亂轉治、經濟復蘇、各項事業重返正軌的發展新階段。我們相信，在中央和有關部門支持下，在特區管治團隊和各界人士的共同努力下，香港特區一定能全面準確實施好《香港國安法》，切實維護國家安全，保障香港繁榮穩定，譜寫“一國兩制”成功實踐的新篇章，為國家實現第二個百年奮鬥目標作出香港新貢獻！

最後，祝《香港國安法》一周年法律論壇圓滿成功！

謝謝大家！

第一節座談會：

《香港國安法》條文研讀 — 實體法

主持人

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李浩然：各位來賓，無論是線上或線下的，鄭若驊司長，大家早上好。這是今天第一節的論壇，關於條文研讀。《香港國安法》已經實施了一年的時間，香港社會，以至經濟各方面都已恢復秩序，我相信大家都是有目共睹的。在《香港國安法》實施一年後，我們今年的論壇會更進一步、深入地就具體的執行進行探討，而這一場的內容主要集中在實體法方面。

完善香港的法律制度，包括設立《香港國安法》，在今時今日這個比較混亂的國際局勢之下，由於一些國家無視國際法的法治或者規則，而胡作非為所帶來了國際亂象的這種局面之下，顯得尤為重要。當然，我們也明白在實施《香港國安法》的時候，可能還是會有一些擔憂。這些擔憂來自於一些新事物，亦可能是來自於很多的不理解，或者不清晰、不明白，甚至是在執法和法律運用的過程當中，可能都會有一些擔憂。這些擔憂一方面可能是主觀的，主觀方面可能有些人不明就裡，又或者特別是在被抹黑的時候，會覺得這些法律是否會被惡意運用呢?又或者在客觀上來說，的而且確在運用的過程中，可能會遇到一些客觀的挑戰，而往往有一些講法會將客觀的困難和挑戰誤解為主觀的惡意。就這方面，稍後江樂士榮譽教授將會和我們作更多的解說和分享，主要會從宏觀的角度去審視《香港國安法》實施之後，對香港的安定和安全的貢獻，以至可以看到這個法律其實是一個正常的立法，一個整體的國安法，並不是如一些人所謂的抹黑的內容去探討這個問題。

在法律實施的過程中，有很多條文可能都會引起一些關注。例如在《香港國安法》第三十八條說到關於管轄一些非香港永久性居民在香港特區以外犯法的情況，這些人的管轄權的問題。香港的法律一直以來都是主要針對屬地的原則，例如陳同佳案就是一個典型的例子。除了一些極為極端的行為犯罪，例如涉及到兒童色情罪行等，這些犯罪有一些新發展之外，其實香港一直以來都

是以屬地為原則。亦因為這個原因，導致有些人認為國安法好像並不是這個情況，因而帶來了很多疑問。我們應該看看國安法或者國家安全其實是一個國家排除其他國家整體安全威脅的一個整體概念，因此一般來說，在所有國家整個立法都是以中央立法作為主導的模式，所謂中央事權。我們看到在這種情況下，明白到影響面是這麼廣大，那麼為何不能與時並進去處理這個問題呢?

其實，國安法更涉及到國家身份、國民身份認同的問題，以至守法意識的問題。如果我們進一步看待這個問題，其實亦不是涉及到這麼多純粹所謂域外問題，或者是非香港藉人士的問題。例如，如果涉及到鼓吹危害國家安全、在外面作出的，而並非香港永久性居民所作的一些犯罪行為時，實質的結果，以至是主要的犯罪行為，如果是在香港以至是整個國家的時候，其實對於任何的刑事法律來看，都會作出這些管轄的安排。因此，這條條文就不存在所謂是外國人或是域外的問題，亦因此第三十八條的立法是正常的立法，即使是在香港的普通法之下，也是可以追究的。而這條條文也和中國《刑法》第八條說的保護管轄權有一定的相關，因為中國《刑法》第八條所提及的就是外國人在外國針對中國或者中國公民的犯罪行為，所以《刑法》第八條的條文也是採納了國際認同的兩項標準，就是一般刑法的屬人與屬地的兼用原則，在這方面我們看到國安法和刑法相吻合的這種寫法也是很正常的。這個問題我們將會得到黃風教授為我們作進一步解說。

最後，黎宏教授也會特別提到在《香港國安法》中，如何因為要特別照顧到香港的「一國兩制」，以至我們的普通法，而進行和內地國安法系統不同的專門的立法。其實在整個《香港國安法》的實施過程中，有非常多的誤解，包括我一直以來都說，對於內地其實也有「無罪推定」等原則，但似乎在香港往往都被誤解。雖然它並不是寫在《刑法》中，而是寫在《刑事訴訟法》的第十二條。但我們要明白內地的成文法對於法律體系的重視，以至

是法律與法律之間的關係，其實和我們的看法，在香港的普通法有一定的不同。

非常高興今天有三位嘉賓和我們作進一步的詳細分享，包括香港大學法律學院的江樂士榮譽教授，北京師範大學的黃風教授，以及清華大學的黎宏教授。事不宜遲，馬上把時間交給三位演講嘉賓。謝謝江樂士先生和我們分享他對於《香港國安法》的看法。女士們、先生們，有請江樂士先生。

■ ■ ■ ■ ■

江樂士：女士們、先生們，早上好。

非常感謝律政司司長邀請我參加今天的論壇。我打算跟大家分享一下我對《香港國安法》量刑制度的一些看法。

罪犯的判刑

儘管《香港國安法》制定至今已一年多，暫未有人因該法的罪行被判刑。由於《香港國安法》屬嶄新條文，其確切地位尚待確定。《香港國安法》的一大顯著特色，就是設有最低刑期，這樣較為罕見。

法院對罪犯判刑時，須權衡多項因素，而這些因素往往相互對立。法院必需決定判刑因素中孰主孰次；然而罪行越嚴重，法院的迴旋餘地越小。舉例來說，若有關罪行涉及持械搶劫、集團式貪污或騷擾兒童等嚴重罪案，則判刑難免須顯示思維正確者對此的公憤，因此減刑因素的影響通常較輕。

法庭可能別無選擇，只能重判來阻嚇他人，因為此舉有助防止罪案。不過，這並非防止罪案的唯一方法。如果可以感化罪

犯，特別是年輕罪犯，亦會有助保護社會。近年來，立法機關和法院更強調以更生方向判刑，寬大判刑或有助罪犯遠離罪行，免其終生犯罪。然而，判刑絕不簡單，有些法官說，相比起判刑，審判罪犯便屬輕易。

雖然香港的法律訂明最高刑罰，但法院判處罪犯時仍享有廣泛的酌情權，只有少數情況例外。儘管被裁定犯謀殺罪的成年罪犯面臨強制性終身監禁[1]，而被裁定在公眾地方非法管有攻擊性武器的成年罪犯面臨刑期可長可短的強制性監禁刑罰[2]，但這類刑罰罕見。不過，總有一些罪行，立法機關已表明預期法院的量刑等級為何，《香港國安法》只是其中一例。

分級罰則：《香港國安法》第二十二條

根據《香港國安法》第二十二條，顛覆國家政權罪的罰則分為三級，這些等級亦見於其他國家安全罪行（第二十一條的分裂國家罪、第二十七條的宣揚恐怖主義罪及第二十九條的勾結罪）。凡被裁定犯顛覆國家政權罪者："首要分子"面臨監禁十年至終身監禁的刑罰；"積極參加的"可被判監三至十年不等；而"其他參加的"則可被判處三年以下有期徒刑，又或處以"拘役或者管制"，這便容許法院考慮其他判刑選擇，包括較短的監禁刑期、勞教中心令、教導所令、社會服務令或感化院令（《香港國安法》第六十四條）。因此，這意味着與其他多類別罪行相比，法院對國家安全罪行的判刑酌情權相對減少，而採用"分級罰則"旨在強調國家安全罪行的嚴重性。

縱有論者指稱，《香港國安法》第二十二條及其他條文所訂的"分級罰則"，與本地的刑事司法體系格格不入，但這是不

1 香港法例第212章《侵害人身罪條例》第2條

2 香港法例第245章《公安條例》第33(2)條

正確的。同一罪行設不同罰則，早有其他先例。以香港法例第148章《賭博條例》為例，在賭場內非法賭博罪的最高刑罰，首次定罪者為監禁3個月及罰款10,000元，第二次定罪者增至監禁6個月及罰款20,000元，第三次定罪者則提升至監禁9個月及罰款30,000元。同樣，根據香港法例第238章《火器及彈藥條例》，任何人被首次裁定管有仿製火器可處監禁2年，但如在10年內再犯另一同類罪行或相關罪行，可處刑罰則升至監禁7年。

強制性量刑如此罕見，原因是素有意見認為，量刑是一門藝術而非科學，而為求達致公正的結果，不應過於束縛審判法院的酌情權。這意味法院經考慮加刑和減刑因素，並在顧及罪犯的情況、罪行對受害者的影響及罪行是否盛行（可能須判阻嚇刑罰以儆效尤）等事宜後，應盡量可自由上下調整刑罰。當然，有些罪行受上訴法院所發的判刑指引規限，這些指引顯然限制了審判法院的酌情權。但即使如此，上訴法庭一直極力強調，判刑指引並非一成不變，法官或裁判官若具充分理由可有所偏離。[3]

協從方：《香港國安法》第二十二及二十三條

根據一般刑事法，協從方（或從犯）可就主犯所干犯的同一罪行而被檢控和定罪。[4]這即是說，法院可按審判主犯的相同方式來審理和判罰協助犯、教唆犯、慫使犯或促致犯。[5]雖然罪責低於主犯的協從方可能被判處較輕的刑罰，但這絕非勢所必然，各人一旦罪成仍會面臨同一最高刑罰。

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3 *Attorney General v Yau Koon Yau* [2002] 4 HKC 685案。

4 香港法例第221章《刑事訴訟程序條例》第89條。

5 *R v Wong Hoi* [1966] HKLR 386案；*R v Wong Kwai Fun* [1993] 2 HKLR 171案；*R v Stringer* [2012] QB 160案。

不過，根據《香港國安法》涉及顛覆國家政權罪的第二十三條（涉及分裂國家罪的第二十一條亦然），另一較寬大的不同取向卻予適用。某人如煽動、協助、教唆、以金錢或者其他財物資助他人實施第二十二條規定的顛覆國家政權犯罪，即屬犯罪；然而該人的刑罰並非與主犯的看齊。“情節嚴重的”，罪犯會面臨監禁5至10年；“情節較輕的”，罪犯則會面臨5年以下有期徒刑、拘役或者管制。

因此，從表面看來，《香港國安法》對被裁定犯國家安全罪的協從方所訂的量刑取向，相比一般刑事法現存就其他各類從犯所訂者，屬較為溫和。一旦協從方與主犯面臨的最高刑罰不再相同，兩者可能被判處的刑罰現時便有天淵之別。要理順箇中道理並不容易，例如有時候，煽動犯罪的協從方與執行罪行的主犯，兩者罪責不相上下，則情況尤其如此。

鑑於《香港國安法》的目的，協從方可處刑罰的緩和令人詫異，但條文措辭明確便不容誤解。

罪犯分類：《香港國安法》第二十二條

在結束談論《香港國安法》第二十二條前，我應先處理一個可能具挑戰性的議題。有別於本地其他法律，《香港國安法》開首不設釋義部分，對於《香港國安法》第二十二條描述三類不同罪犯（即“首要分子”、“積極參加的”和“其他參加的”）所涉罪責的用語有何涵義，便須由法院來解答。法院的裁定至關重要，並會影響判處罪犯刑罰的量刑級別。顛覆國家政權活動的主腦或場上領袖，無疑是“首要分子”；擔當非領袖角色的歹徒，例如利便犯罪或提供後援者，大抵屬“積極參加者”的類別；至於稱為“其他參加者”的一類不法分子，大概涵蓋一些周邊人物，也許是辦次要差事從旁協助犯罪之徒。由於罪犯的實際判刑很大程度取決於其罪責被如何標籤，在這個議題上，法院無疑會面對法律爭議

並須作出裁定。在某些情況下，這可能並不容易，特別當有關犯罪行為介乎兩個不同類別間的分野，而罪責程度受到爭議，則尤其如此。

因此，這表示檢控官在審訊前必須能把每名被告人的犯罪行為歸類，然後提出證據令法院信納其分類的合法性。這是一個新局面，但凡參與其中都需要作好準備。

強制性量刑 對 司法酌情權

到目前為止，只出現過一宗就《香港國安法》的判刑作司法審議的案件。案中被告人因保釋被拒而向高等法院提出人身保護令申請，辯稱強制性監禁刑罰使獨立司法酌情權無法行使[6]。這項陳詞受到冷待，法庭指出原則上立法機關就任何個別罪行訂明固定罰則（例如謀殺罪判終身監禁）或刑罰範圍（包括最高及最低刑罰），再由法官按個別案件的案情判定適當刑罰，做法並無不妥。法庭裁定，《香港國安法》的罪行條文只就被定罪者訂明刑罰範圍，而非所須施加的實際刑罰，意即香港在行使司法權力方面並無受到不能容許的干預。

誠然，強制性最低刑罰在其他普通法適用地區絕非陌生，並可發揮其效用。這類刑罰能夠且確實對打算犯罪的人起着強大的阻嚇作用，當罪行在某司法管轄區越趨盛行，這便是重要的考慮因素。以澳大利亞為例，聯邦議會最近通過，海外侵犯兒童的性罪犯須被判處最少6年監禁。在加拿大，一些與火器相關的罪行可判處的最低刑罰為監禁4年。由此可見，《香港國安法》訂定最低刑罰，雖然在本地法律並不常見，但這絕非與其他普通法司法管轄區的判刑模式脫節。

6 *唐英傑 訴 香港特別行政區* [2020] 4 HKLRD 382, [2020] HKCFI 2133案。

減刑理由：《香港國安法》第三十三條

疑犯一旦被判罪名成立，減刑理由對量刑必然有所作用。然而，罪行越嚴重，減刑理由可能影響越小。何事與減刑相關，何者無關，法院在眾多判決中已有確定，亦顯示了個別因素在多大程度上可賴以為據。[7]不過，儘管法例有時會包含加刑因素，尤見於香港法例第374章《道路交通條例》，但在某項法律加入具體減刑因素，以供判刑法院考慮，這若非前所未見，亦屬極不尋常。

然而，《香港國安法》第三十三條載有一項嶄新條文，審判法院可藉此在下述三種情形下，分別“從輕”、“減輕”處罰，或如犯罪較輕則可“免除”處罰。第一，被控人在犯罪過程中，自動放棄犯罪，或者自動有效地防止犯罪結果發生的；第二，被控人自動投案，如實供述自己罪行的；又或是第三，被控人揭發他人犯罪行為，或者提供線索協助當局偵破另一刑事罪行的。雖然《香港國安法》沒有解釋法院“從輕”處罰與“減輕”處罰兩者之間有何區別，但法例草擬者顯然視其為截然不同的兩回事。

“從輕處罰”，看來是指在特定刑罰等級內的較低刑罰。因此，以顛覆國家政權罪為例，假若法院決定採納監禁10年（即顛覆國家政權罪中“積極參加者”的最高刑罰）作為量刑起點，而上述三項減刑因素如有其中一項，則刑罰可予調低。然而，法院能否因應其他減刑因素（例如無定罪紀錄、年邁或者精神紊亂）而再予寬減，則尚不清晰；而鑑於法例草擬者只挑出三個因素作為減刑依據，當然大可爭辯說不能。

然而我猜想，法院會設法確保在“從輕處罰”時仍可考慮其他減刑因素（儘管相對次要），做法也許就是，裁定第三十三條的效力在於，法院須更著重考慮條例所強調的三項因素，但非完

7 *Sentencing in Hong Kong* (第9版，律商聯訊) 第30章。

全排除其他因素。《香港國安法》第三十三條對其他各式減刑理由有何效力須待確定，若法院對此感到不妥，可能需要按照《香港國安法》第六十五條的規定，提請人大常委會解釋。

至於"減輕"處罰，看來是指判刑低於指明等級的最低刑罰。因此，舉例來說，某案涉及顛覆國家政權罪的"積極參加者"，最低刑罰為監禁3年，案中如有上述三項減刑因素其中一項，則法院可酌情減刑至3年以下。這似乎是要指出，其他減刑因素不能同樣使刑期減為3年以下，因此應不予理會。

免除處罰：《香港國安法》第三十三條

《香港國安法》第三十三條所帶出的另一問題涉及以下條文：如犯罪"較輕"的，而三項減刑因素有其中一項，則可"免除"處罰。這大抵意指，法院裁定被控人罪名成立後，可毫不對其施以任何刑罰。不過，即時產生的問題是，此舉看來有悖確立已久的原則，即定罪包含兩項要素，分別是裁斷有罪和判處刑罰。[8]因此，如被控人被判有罪後並無因此受罰，若干後果便在所難免。比如說，該項定罪無法列入其刑事紀錄，求職時便無先前定罪紀錄可予披露，假若再次被指控干犯同一罪行，他便不能提出曾就此罪行被定罪。

然而，有一方法可避開這個困局，就是無條件釋放。如法院將《香港國安法》第三十三條"免除處罰"的規定等同於無條件釋放，便可能於現有判刑框架內將之合理化。儘管無條件釋放欠缺懲罰作用，但本身仍不失為一項判刑。無條件釋放雖然比較罕見，但在法院認為案中不必實際判罰時，仍會如此頒令。[9]這情況一般見於一些微不足道或不涉及道德罪責的罪行，一如某些嚴

8 *HKSAR v Ho Tung Man* [1997] 3 HKC 375案。

9 *R v Fung Chi Wood* [1991] 1 HKLR 654案。

格法律責任罪行，但似乎沒有法律理由說無條件釋放不能同樣用於《香港國安法》第三十三條所指因犯罪較輕而免除處罰的情形。

結論

我對《香港國安法》判刑的這些想法，是否反映法院判案時所採取的立場，只有時間方可驗證，而當中必然有不同解讀的空間。我所觸及的上述待決議題，如在法律的實踐過程中最終不構成任何實際困難，大家便可大鬆一口氣。雖然《香港國安法》的量刑制度明顯嚴厲，但亦力圖衡量罪責程度，並按罪犯的實際犯罪行為論罪處罰，這點他們大可放心。只要新量刑制度全面投入運作，必定可使香港成為一片更安全、更安居樂業之地。

謝謝各位。

■ ■ ■ ■ ■

李浩然：接下來我們要換一下台，我把時間交給黃風教授，黃教授會就著三十八條給大家作一個深入的分析研究，謝謝。

黃風：大家上午好，《香港國安法》頒布彌補了香港特別行政區法治中最薄弱的環節，從而使香港法治獲得了更強有力的活力和具有更根本性的保證。一年來的事實與實踐已經充分證明這一點。我今天想，作為學者，談一談對於《香港國安法》第三十八條的一些個人思考。

《香港國安法》第三十八條規定：*"不具有香港特別行政區永久性居民身份的人在香港特別行政區以外針對香港特別行政區實施本法規定的犯罪的，適用本法。"*這一關於保護管轄的規定實際上特別符合保護國家根本法益的現實需要，同時也體現著各國在維護國家安全刑事立法方面的有益經驗和發展趨勢。

一、第三十八條所體現的立法通例

中國《刑法》第八條規定：外國人在中華人民共和國領域外對中華人民共和國國家或者公民犯罪，可以適用本法，但按照犯罪地的法律不受處罰的除外。相對於《刑法》的這一個規定，《香港國安法》第三十八條刪除了“但按照犯罪地的法律不受處罰的除外”這一雙重可罰性條件。

我們也注意到，中國《刑法》第八條將中華人民共和國國家和公民並列為保護管轄的保護對象，從這個角度講，如果外國人在外國針對中國公民個人實施侵犯行為，在某些情況下需要考慮雙重可罰性條件，也就是說，需要考慮有關行為是否在行為地國家同樣應受處罰，例如：非法拘禁行為、誹謗行為、強迫勞動行為、重婚行為，等等。

但是，如果侵害行為針對的是國家安全和國家的重大利益，對雙重可罰性條件的考慮則是不必要的。因為一個國家的主權、安全和基本利益往往具有專屬性，對這類法益的保護不應當以行為地國家是否處罰相關行為為條件，也就是說，即使行為地國家對有關行為持放任態度，甚至持認可或者支持的態度，也不影響受到侵害的國家依照本國刑事法律對該行為定罪處罰。

從目前各國的立法通例看，在保護管轄問題上，將對國家安全的保護與對公民個人的保護分別加以調整，使得對國家安全的保護更具有主權性，不受其他法域各種政治、社會、法律因素的影響，從而使得外國人在外國實施的危害一個國家安全的行為，無論根據行為地法律是否應受處罰，受到侵害的國家均可對其適用本國刑法予以處罰，不要求具備雙重可罰性條件。在這方面，實際上很多國家的立法都為我們提供了實例。

- 《德國刑法典》第5條規定：無論行為地法律如何規定，德國刑法適用於在國外實施的叛亂罪、叛國罪及外患罪。
- 《瑞士聯邦刑法典》第4條規定：在外國實施針對瑞士國家的重罪和輕罪以及從事被禁止的間諜活動，適用瑞士聯邦刑法典定罪處罰。
- 《意大利刑法典》第7條規定：公民或者外國人在外國實施國事罪，依照意大利法律處罰。
- 《俄羅斯聯邦刑法典》第12條第三款規定：不在俄羅斯聯邦境內常住的外國公民和無國籍人在俄羅斯聯邦境外實施犯罪的，如果犯罪侵害的是俄羅斯聯邦的利益，應依照本法典承擔刑事責任。
- 《日本刑法》第2條規定：任何人在日本外實施內亂罪、誘使外患罪，包括預備或者陰謀實施上述犯罪，均依照日本刑法典定罪處罰。
- 《法國刑法典》也有同樣規定，它的第113條之10規定：法國刑法適用於依照本法典第四卷第一編之規定懲處的危害國家基本利益罪。

上述我列舉的這些關於保護管轄的法律例文都沒有規定雙重可罰性條件。

二、適用第三十八條時需考慮的條件

(一) 侵害行為的嚴重程度

保護管轄涉及到刑法的域外效力，是在維護國家安全問題上採取的一種較為嚴厲的刑法制度，並且可能導致法律衝突，因而在適用時應當遵循審慎原則，打擊面不宜過寬，只有當對國家安全的侵害達到一定嚴重程度時，我個人認為才應當行使保護管轄。

關於在域外實施的危害我國國家安全犯罪嚴重程度的標準，我個人覺得可以考慮確定為有關犯罪“依照《香港國安法》的規

定，最低刑為三年以上有期徒刑”。也就是說，只有當《香港國安法》規定對有關侵害行為至少應判處三年以上有期刑時，才考慮行使保護管轄；如果法定最低刑為三年以下有期徒刑、拘役或者管制，則無需行使保護管轄，例如剛才江樂士教授提到的《香港國安法》第二十二條，關於組織、策劃、實施或者參與實施顛覆國家政權罪中第二款規定的“對其他參加的，處三年以下有期徒刑、拘役或者管制”，對於這類情況，我個人覺得就不必行使保護管轄。

（二）對犯罪嫌疑人、被告人的實際控制

再一個條件就是涉及保護管轄適用的實際可能性問題，為了有效地懲治犯罪，在一般情況下，基於《香港國安法》第三十八條保護管轄而提起的刑事訴訟需要以犯罪嫌疑人、被告人受到實際控制為條件。這裡所說的“實際控制”是指犯罪嫌疑人、被告人處於香港特別行政區或者中國內地。是否有可能對犯罪嫌疑人、被告人實現實際控制，這主要是需要由檢控機關，例如香港律政司、內地的人民檢察院，掌握的追訴條件，這不影響執法機關開展初期的證據和情報搜集工作。

對犯罪嫌疑人、被告人的實際控制可以理解為《香港國安法》第三十八條規定的一般性條件，但不宜理解為適用第三十八條不可或缺的必要條件。在駐香港特別行政區維護國家安全公署根據《香港國安法》第五十五條規定行使管轄權的情況下，經最高人民檢察院核准，中國內地司法機關可以依據《刑事訴訟法》第291條的規定，針對《香港國安法》規定的嚴重危害國家安全的罪行採用缺席審判程序進行刑事追訴，也就是說，可以對處於中國內地以及香港特別行政區以外的犯罪嫌疑人、被告人依照《香港國安法》第三十八條進行缺席審判。

三、“不具有香港特別行政區永久居民身份的人”之理解

（一）關於涉嫌觸犯《香港國安法》的中國內地居民

最後，我想談一談我個人對《香港國安法》第三十八條提到的“不具有香港特別行政區永久居民身份的人”的這個概念的一些理解。《香港國安法》第三十八條所講的“不具有香港特別行政區永久居民身份的人”是一個相當寬廣的概念，不僅包括外國人或者無國籍者，還涵蓋中國內地居民、澳門特別行政區居民和台灣地區居民。

對於在香港特別行政區以外實施《香港國安法》規定的罪行的內地居民，如果該人處於中國內地，我個人覺得駐港國安公署應當依據《香港國安法》和《刑事訴訟法》的相關規定，在當地司法機關的配合下將其緝捕歸案，並且根據不同的情況，將其送交香港特別行政區警務處維護國家安全部門審理或者移送內地司法機關審理。

（二）關於在外國設立的公司、團體等法人或者非法人組織

“不具有香港特別行政區永久居民身份的人”應當理解為以自然人為限。由於對在外國設立的公司、團體等法人或者非法人組織難以實現實際控制，難以對它們實際執行財產處罰和資產追繳措施，而且各國法律在法人制度及其法律責任問題上存在著較大差異，甚至可能涉及主權豁免問題，因而，我覺得在適用《香港國安法》第三十八條時不宜將在外國設立的公司、團體等法人或者非法人組織納入犯罪嫌疑人、被告人的範圍。

但是，對於以實施《香港國安法》列舉的危害國家安全犯罪為目的成立的組織、團體，即使在境外進行了合法登記或者註冊，仍可認定為犯罪集團或者恐怖活動組織，對其組織者、領導者依照《香港國安法》的有關規定予以懲處。

以上就是我關於《香港國安法》第三十八條的一些理解和思考，敬請各位批評指教，謝謝大家!

■ ■ ■ ■ ■

李浩然：最後，我們請黎宏教授就著《香港國安法》和內地的國家安全法律的一個比較作發言，請黎宏教授。

黎宏：謝謝主持人！大家好！感謝香港特區政府律政司的邀請。非常高興有機會參加這次盛會。由於疫情的原因，不能親臨現場聆聽各位的高見，但在網絡時代，天涯不遠，近在咫尺，雖然我現在遠在2000公里之外的北京，但實際感受和現場沒有任何差別。

按照會議的安排，我想就2020年6月30日十三屆全國人大常委會第二十次會議表決通過《中華人民共和國香港特別行政區維護國家安全法》（以下簡稱《香港國安法》）中涉及刑法實體規定的相關內容，從和內地《刑法》相比較的角度來談一下我膚淺的看法。主要有以下幾點：

一是《香港國安法》中所規定的犯罪，實際上是濃縮了內地《刑法》分則第一章危害國家安全罪的主要內容。有一種說法認為，內地《刑法》第二編第一章規定了十幾項危害國家安全罪，但是，《香港國安法》僅規定了四項，其目的就是有重點地打擊當前在香港發生的危害國家安全行為。這種說法正確但不準確。確實，目前發生在香港的危害國家安全行為，主要是分裂國家、顛覆國家政權、勾結外國或者境外勢力危害國家安全以及恐怖活動。但是，《香港國安法》中規定的危害國家安全罪，絕不相當於內地《刑法》中的四項罪名，而是四類罪名。其濃縮了內地《刑法》分則第一章所規定的危害國家安全罪的主要罪名。

具體來說，《香港國安法》中的分裂國家罪，就包括了內地《刑法》第103條規定的分裂國家罪、煽動分裂國家罪、以及第107條規定的資助危害國家安全犯罪活動罪；《香港國安法》中的顛覆國家政權罪就包括了內地《刑法》第105條規定的顛覆國家政權罪、煽動顛覆國家政權罪、以及第107條規定的資助危害國家安全犯罪活動罪的內容；《香港國安法》中的勾結外國或者境外勢力危害國家安全罪，就包括了內地《刑法》第102條規定的背叛國家罪、第104條規定的武裝叛亂、暴亂罪、第110條規定的間諜罪、第111條規定的為境外竊取、刺探、收買、非法提供國家秘密、情報罪、第112條規定的資敵罪的相關內容。

其次，《香港國安法》還將內地《刑法》分則第二章危害公共安全罪中的相關內容納入了其中。這就是《香港國安法》第三節所規定的恐怖活動罪。其實際上就是內地《刑法》分則第二章危害公共安全罪第120條規定的組織、領導、參加恐怖組織罪、第120條之一規定的幫助恐怖活動罪、第120條之二規定的準備實施恐怖活動罪、第120條之三規定的宣揚恐怖主義、煽動實施恐怖活動罪等的全部內容。將恐怖主義犯罪納入危害國家安全罪之中，這是對我國有關危害國家安全罪立法的一個重大突破。雖說當今世界，人們對恐怖犯罪的理解不太一致，恐怖主義者關於自己的行為也另有一套認識和邏輯，但絕大多數人認為，無論出於什麼樣的目的、信仰，用殘忍的恐怖手段都是非法的，特別是近年來，恐怖活動的形式已經發生了巨大的變化，從刺殺政治人物轉向了向更易於得手的小人物、缺乏抵抗能力的無辜市民，即濫殺無辜。恐怖分子之所以如此，就是為了製造恐怖氣氛、形成國際影響，以通過國際社會給某個主權國家施壓，從而達到分裂該主權國家的目的。從此意義上，恐怖主義犯罪，本質也是一種對國家主權、國家安全的犯罪。正因如此，當今的國際社會中，不少國家，如澳大利亞聯邦《刑法》在第5章“聯邦安全”部分，在

規定叛國罪、間諜罪之後，就規定了恐怖主義犯罪，即將恐怖主義犯罪作為危害國家安全的犯罪對待；同樣，法國《刑法》也將“恐怖主義犯罪”放在第四卷“危害民族、國家及公共安寧之重罪與輕罪”中的“危害國家基本利益罪”和“危害國家權威罪”之間加以規定，作為危害國家安全的犯罪對待。

再次，和內地《刑法》中的相關規定相比，《香港國安法》中有關危害國家安全罪的規定更加明確具體。如內地《刑法》規定有12種具體的危害國家安全罪。但不是每一種犯罪的成立標準都非常具體，有些條文比較概括。相比之下，《香港國安法》的規定則具體得多。如就“分裂國家罪”而言，內地《刑法》第103條第一款就是簡單的一句話，即“組織、策劃、實施分裂國家、破壞國家統一”，而《香港國安法》第二十條則將其具體化為三種行為類型，即：(一)將香港或者中國其他任何部分從中國分離出去；(二)非法改變香港或者中國其他任何部分的法律地位；(三)將香港或者中國其他任何部分轉歸外國統治。同樣，顛覆國家政權罪，內地《刑法》第105條第一款將其規定為“組織、策劃、實施顛覆國家政權、推翻社會主義制度的”行為，但《香港國安法》第二十二條則將其具體化為四種行為類型，即：(一)推翻、破壞中國憲法所確立的中國根本制度；(二)推翻中國中央政權機關或者香港政權機關；(三)嚴重干擾、阻撓、破壞中國中央政權機關或者香港政權機關依法履行職能；(四)攻擊、破壞香港政權機關履職場所及其設施，致使其無法正常履行職能。還有，如背叛國家罪，內地《刑法》第102條也是一句話，即“勾結外國，危害中華人民共和國國家安全、領土完整和安全”，但《香港國安法》第二十九條則將其具體化為，為外國或者境外機構、組織、人員竊取、刺探、收買、非法提供涉及國家安全的國家秘密或者情報；請求外國或者境外機構、組織、人員實施，與外國或者境外機構、組織、人員串謀實施，或者直接或者間接接受外國或者境外

機構、組織、人員的指使、控制、資助或者其他形式的支援實施以下行為，即：（一）對中國發動戰爭，或者以武力或者武力相威脅，對中國主權、統一和領土完整造成嚴重危害；（二）對香港政府或者中央人民政府制定和執行法律、政策進行嚴重阻撓並可能造成嚴重後果；（三）對香港選舉進行操控、破壞並可能造成嚴重後果；（四）對香港或者中國進行制裁、封鎖或者採取其他敵對行動；（五）通過各種非法方式引發香港居民對中央人民政府或者香港政府的憎恨並可能造成嚴重後果。從內地《刑法》第3條所規定的罪刑法定原則即什麼行為構成犯罪、應當予以什麼樣的處罰，事先必須有明確的法律規定的角度來看，應當說《香港國安法》的相關規定更為合理妥當一些。

最後，國家將危及其存在的侵害行為，作為最嚴重的犯罪，予以最嚴厲的制裁，這是國家自我防衛本能的體現，故包括內地《刑法》在內的古今中外刑法對於危害國家安全的犯罪，都嚴刑峻罰。就內地《刑法》中的危害國家安全罪的處罰而言，具有以下特點：在處罰階段上最早，對在尚未著手實施階段上的組織、策劃行為，就單獨定罪進行處罰；處罰範圍最寬，對處在實行行為外圍的煽動（教唆）、幫助（提供資金支持）行為，單獨定罪處罰；所處刑罰最重，12個罪名中，有8個掛有死刑，且都可以處以沒收財產。

這一點，在《香港國安法》中也得到了充分的體現。如就分裂國家罪而言，第二十一條規定，煽動、協助、教唆、以金錢或者其他財物資助他人實施分裂國家罪的，即屬犯罪。同樣，就顛覆國家政權罪而言，第二十三條規定，煽動、協助、教唆、以金錢或者其他財物資助他人實施本罪的，即屬犯罪。因為考慮到從外部實施分裂國家、顛覆國家政權的行為，比從內部實施分裂國家、顛覆國家政權更加危險，因此，內地《刑法》第106條規定，與境外機構、組織、個人相勾結，實施分裂國家、武裝叛亂、暴

亂、顛覆國家政權罪的，依照各該條的規定從重處罰。與此相應，《香港國安法》第三十條規定，為實施本法第二十條（分裂國家罪）、第二十二條（顛覆國家政權罪）規定的犯罪，與外國或者境外機構、組織、人員串謀，直接或者間接接受外國或者境外機構、組織、人員的指使、控制、資助或者其他形式的支援的，依照各該條的規定從重處罰。

總之，《香港國安法》在實體規定上，不僅借鑒吸收了內地《刑法》中危害國家安全罪以及危害公共安全罪的相關內容，而且在尊重和保障人權、堅持法治原則方面，有比內地《刑法》更加完善合理之處，值得內地《刑法》在規定和適用危害國家安全罪時加以借鑒。

以上就是我在閱讀內地《刑法》相關條文和《香港國安法》的實體規定之後的一些感想。不當之處，還請大家批評指正！謝謝大家聆聽！

■ ■ ■ ■ ■

李浩然：就剛才幾位教授，就三個方面，我作一個總結。第一方面，就如去年《基本法》頒布三十周年，我們其中一節論壇也講到《香港國安法》。因為《香港國安法》是由全國人大授權全國人大常委會訂立，作為一部成文法系的法律文件，在香港的普通法法庭執行時，的而且確可以預見會有一些挑戰。例如，其實我們的普通法是一個平台，一套規則，一套機制，我們一直有行之有效的做法去處理一些其他成文法的案件。但在這個過程當中，如果我們要請到一些證人，或者需要一些案例的時候，我們在《香港國安法》裡面，目前在這個問題上，當時我們可以看到、預見是沒有的。因為《香港國安法》如果我們請內地的法律專家去解釋，問題是也沒有針對《香港國安法》的一些案例。但我們

可以看到在這一年裡的一些案件中，以及各方學界、司法界的同仁也一起去進行探索和逐步探討出路。

第二方面的總結就是剛才江樂士教授和黃風教授兩位就著一些具體的條文，選擇了出來，然後做了介紹，也結合了現實的狀況作出解釋。

第三方面就是剛才黎宏教授亦提及到跟內地的法律比較，帶出了一個很重要的訊息，就是《香港國安法》的訂立並不只是純粹為了香港去訂立一套香港適用的法律，亦是我們國家在國家安全法律訂立方面的一大突破。這個突破包括了正如黎宏教授所提及的，可能包括將一些恐怖襲擊犯罪放入條文當中，而這個做法亦有些類似加拿大《國防法》，在1985年時，已經將對外和對內的一些規限或者界線，不再是很死板地劃分出來，我們也可以看到這是一個重大的突破。

而事實上我們亦可以看到內地的國家安全法律系統和香港的做法也有相當大的不同。例如，如果在內地，我對黎宏教授比較具體的一些條文內容作一個比較宏觀的補充，內地的國家安全法律簡單來說可以劃分、理解為三層，首先有國家安全法律，然後有一些非常具體、針對不同主題的法律，包括《反國家分裂法》，或者相關的其他法律，再來就是《刑法》、《刑事訴訟法》，以至是《民法典》的一些相關條文，所以這個體系的而且確和香港的做法有比較大的差別。所以我們這一節的內容，主要是就著一些剛才所說的條文，特別是實體法裡面做了簡單的介紹。

我想現在的時間也差不多了，這一節就先完結，然後把時間交給大會主持。再一次感謝江樂士榮譽教授、黃風教授，還有黎宏教授，也謝謝各位及律政司今天的安排。祝今天的會議順利，也祝大家身體健康。

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《香港國安法》條文研讀——《香港國安法》的量刑制度

江樂士資深大律師, GBS, SC

罪犯的判刑

- 判刑目的
- 阻嚇性刑罰
- 減刑因素
- 罪犯更生
- 法官的判刑酌情權
- 最高及最低刑罰

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分級罰則：《香港國安法》第二十二條

- 三級罰則
- 罪犯分類
- 分級罰則並非陌生
- 強制性量刑罕見
- 達致公正的結果

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協從方：《香港國安法》第二十二及二十三條

- 一般刑事法
- 從犯及主犯
- 常見最高刑罰
- 《香港國安法》第二十三條：從犯判刑較輕
- “情節嚴重的”
- “情節較輕的”

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罪犯分類：《香港國安法》第二十二條

- 首要分子
- 積極參加者
- 其他參加者
- 如何釐定分類
- 檢控官須證明分類合理

強制性量刑 與 司法酌情權

- *唐英傑 訴 香港特別行政區*【2020】4 HKLRD 382 案
- 容許固定刑罰
- 刑罰範圍是否合法
- 法院決定實際刑罰
- 《香港國安法》：表明刑罰範圍而非判刑
- 澳大利亞、加拿大：最低刑罰

減刑理由：《香港國安法》第三十三條

- “從輕處罰”與“減輕”處罰
- 一般刑事法：減刑因素
- 第三十三條：三項特定因素
- 自動放棄犯罪
- 自動投案
- 揭發犯罪行為
- 其他減刑因素的相關性

免除處罰：《香港國安法》第三十三條

- 免除處罰
- 不處罰：後果
- 定罪：裁斷有罪及判處刑罰
- 不判刑、不定罪
- 無條件釋放：無實際處罰

結論

安樂未來

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《香港國安法》中實體規定的特點

清華大學法學院　黎宏

首先，《香港國安法》中的犯罪，濃縮了內地刑法分則第一章危害國家安全罪的主要內容。

《香港國安法》中的分裂國家罪，就包括了內地刑法第103條分裂國家罪、煽動分裂國家罪、以及第107條資助危害國家安全犯罪活動罪的內容；

《香港國安法》中的顛覆國家政權罪就包括了第105條顛覆國家政權罪、煽動顛覆國家政權罪、以及第107條資助危害國家安全犯罪活動罪的內容；

《香港國安法》中的勾結外國或者境外勢力危害國家安全罪，就包括了內地刑法第102條背叛國家罪、第104條武裝叛亂、暴亂罪、第110條　間諜罪、第111條為境外竊取、刺探、收買、非法提供國家秘密、情報罪、第112條資敵罪的相關內容。

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其次，將恐怖主義犯罪納入危害國家安全罪，是對危害國家安全罪立法的重大突破。

《香港國安法》第三節所規定的恐怖活動罪。其實際上就是內地刑法分則第二章危害公共安全罪第120條組織、領導、參加恐怖組織罪、第120條之一規定的幫助恐怖活動罪、第120條之二準備實施恐怖活動罪、第120條之三宣揚恐怖主義、煽動實施恐怖活動罪、第120條之五強制穿戴宣揚恐怖主義服飾、標誌罪、第120條之六非法持有宣揚恐怖主義物品罪的全部內容。

再次，和內地刑法中的相關規定相比，《香港國安法》中有關危害國家安全罪的規定更加明確具體。

分裂國家罪：

內地刑法第103條第一款：“組織、策劃、實施分裂國家、破壞國家統一”

《香港國安法》第20條則將其具體化為三種行為類型，即：（一）將香港 特別行政區或者中華人民共和國其他任何部分從中華人民共和國分離出去；（二）非法改變香港特別行政區或者中華人民共和國其他任何部分的法律地位；（三）將香港特別行政區或者中華人民共和國其他任何部分轉歸外國統治。

再次，和內地刑法中的相關規定相比，《香港國安法》中有關危害國家安全罪的規定更加明確具體。

顛覆國家政權罪：

內地刑法第105條第一款：“組織、策劃、實施顛覆國家政權、推翻社會主義制度的”行為，但《香港國安法》第22條則將其具體化為四種行為類型，即：（一）推翻、破壞中華人民共和國憲法所確立的中華人民共和國根本制度；（二）推翻中華人民共和國中央政權機關或者香港特別行政區政權機關；（三）嚴重干擾、阻撓、破壞中華人民共和國中央政權機關或者香港特別行政區政權機關依法履行職能；（四）攻擊、破壞香港特別行政區政權機關履職場所及其設施，致使其無法正常履行職能。

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再次，和內地刑法中的相關規定相比，《香港國安法》中有關危害國家安全罪的規定更加明確具體。

背叛國家罪：

內地刑法第102條“勾結外國，危害中華人民共和國國家安全、領土完整和安全”

《香港國安法》第29條：為外國或者境外機構、組織、人員竊取、刺探、收買、非法提供涉及國家安全的國家秘密或者情報；請求外國或者境外機構、組織、人員實施，與外國或者境外機構、組織、人員串謀實施，或者直接或者間接接受外國或者境外機構、組織、人員的指使、控制、資助或者其他形式的支援實施以下行為之一的，均屬犯罪：

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再次，和內地刑法中的相關規定相比，《香港國安法》中有關危害國家安全罪的規定更加明確具體。

（一）對中華人民共和國發動戰爭，或者以武力或者武力相威脅，對中華人民共和國主權、統一和領土完整造成嚴重危害；

（二）對香港特別行政區政府或者中央人民政府制定和執行法律、政策進行嚴重阻撓並可能造成嚴重後果；

（三）對香港特別行政區選舉進行操控、破壞並可能造成嚴重後果；

（四）對香港特別行政區或者中華人民共和國進行制裁、封鎖或者采 取其他敵對行動；

（五）通過各種非法方式引發香港特別行政區居民對中央人民政府或者香港特別行政區政府的憎恨並可能造成嚴重後果。

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最後，《香港國安法》和內地刑法一樣，對危害國家安全行為嚴厲處罰。

內地刑法中的危害國家安全罪的處罰而言，具有以下特點：在處罰階段上最早，對組織、策劃行為單獨定罪；處罰範圍最寬，對煽動（教唆）、幫助（提供資金支援）行為單獨定罪；所處刑罰最重，12個罪名中，有8個掛有死刑，且都可以處以沒收財產。

《香港國安法》：對犯分裂國家罪的，除了對首要分子可以處以最高刑的無期徒刑之外，還規定，煽動、協助、教唆、以金錢或者其他財物資助他人實施分裂國家罪的，即屬犯罪（第21條）。同樣，對犯顛覆國家政權罪的首要分子或者罪行重大的，要處無期徒刑或者10年以上有期徒刑之外，第23條還規定，煽動、協助、教唆、以金錢或者其他財物資助他人實施本罪的，即屬犯罪，要予以刑法處罰。

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第二節座談會：

《香港國安法》條文研讀 — 程序法

主持人

梁美芬，SBS，JP

全國人民代表大會常務委員會香港特別行政區
基本法委員會
委員

講員

雷建斌

全國人民代表大會常務委員會
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中國政法大學
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梁美芬：司長、各位嘉賓，今天我很榮幸可以在這個非常有意義的研討會上，主持這一節關於《香港國安法》在香港實施的程序問題。

首先，為什麼會有「一國兩制」呢?其實「一國兩制」就是為了和平，和平解決重大的歷史問題的一個偉大工程，而《基本法》就是落實「一國兩制」的憲法體現。香港是以法治為金漆招牌，法治也是香港社會繁榮穩定的基石。國家等了香港23年，非常希望香港可以在「一國兩制」下，自己制定國家安全的法律。但是由於種種原因，香港在2020年仍未完成《基本法》二十三條立法的憲制責任。早於1999年、2003年和2015年，我自己就著這個問題都曾經作出預測，只要國際形勢有改變，香港社會萬一出現不穩定的因素，國家可能被迫要直接為香港制定有關國家安全的法律。結果，在2019年香港出現社會動盪，《中華人民共和國香港特別行政區維護國家安全法》(《香港國安法》)是國家以歷史的高度去為香港制定，也希望以法治亂。我想大家都可以看到如果沒有《香港國安法》，在香港，普通人的生命財產安全都得不到保障。我自己的辦事處一天內就曾經有三個汽油彈，是有人在裡面的時候出現。所以我相信在這一年裡，大家都可以看到《香港國安法》是可以給大家一顆定心丸，人民的生命財產是得到保障的。

今天這一節提到《香港國安法》在香港，特別是在法庭和執法方面，大家非常重視的程序問題。剛才張勇副主任提到《香港國安法》其實是特別法和區域法的一個結合，所以《香港國安法》雖然作為一部全國性法律，是為香港特別行政區度身訂做。例如除了《香港國安法》第五十五條提到是極嚴重或者是極例外的情況下，所有關於國安法的案件都由香港的司法機構，我們的法院根據普通法來審理，充分體現了在「一國兩制」下，香港審理國安法時有著香港法律傳統的特色。剛才也有不同的嘉賓、講者提到我們的普通法特別重視程序公義，有關「無罪推斷」、「疑點歸

於被告」等，充分反映在我們的法庭審訊程序當中。要有效推行《香港國安法》，執法和審理是最重要的，所以在這一節，我們請到了三位非常尊貴及有經驗的講者。

第一位是雷建斌主任，他將會就《香港國安法》第五十五條，大家最關心的在什麼情況下，有機會有關案件不是交由香港的法院去管理，在非常例外的情況才會發生。雷建斌主任是全國人大常委會法制工作委員會的憲法室主任，他曾經參與中國的《刑法》、《刑事訴訟法》幾次的修訂，對於中國的《刑法》、《刑事訴訟法》、我們國家的《憲法》和《香港基本法》的實施，特別《香港國安法》如何適用的問題，有非常深入的了解。現在我們把時間交給雷建斌主任，請大家鼓掌。

■ ■ ■ ■ ■

雷建斌：謝謝主持人。感謝各位嘉賓和聽眾耐心聆聽。

《香港國安法》是“一國兩制”事業中具有里程碑意義的一部法律。和很多人一樣，我對於《香港國安法》的出台很關注，在法律通過後第一時間即做了認真研讀。很高興也很榮幸有這個機會與大家分享個人的一些看法。我今天談的主要內容，是關於《香港國安法》第五十五條中央管轄案件規定的理解。

第五十五條是《香港國安法》非常重要的一個條款。之所以說重要，一個原因是本條與第四十條共同明確了《香港國安法》規定的危害國家安全案件的管轄。大家知道，《香港國安法》在內容上具有綜合性，包含有相當部分的刑事實體規範和刑事程序規範。對於刑事程序而言，案件管轄是重要的基礎性制度。

稱其重要的另一個原因，是本條規定涉及到中央對於《香港國安法》規定的危害國家安全案件的管轄，在香港，中央對案件的管轄自然是備受各方關注的。

關於第五十五條的內容，可以簡單概括為三點：一**是確立中央管轄管道，**即特定情形下，中央要對《香港國安法》規定的危害國家安全案件進行管轄。二**是明確中央管轄案件的具體情形，**即在本條（一）（二）（三）項所分別列明的，什麼情況下，中央將對案件行使管轄。三**是明確中央管轄案件的具體程序，**包括由誰提出、經誰批准、由誰行使管轄。

在進一步就第五十五條的內容展開具體討論之前，我想先就幾個前提性問題談談個人看法。因為這幾個前提性問題，有助於全面準確理解在中央管轄案件這一重要問題上，《香港國安法》第五十五條制度設計之本意。

第一，關於中央和香港特區的關係。中央和香港特區的關係，源於《憲法》以及根據《憲法》制定的《香港基本法》，《憲法》和《香港基本法》共同構成香港特別行政區的憲制基礎。根據《憲法》和《香港基本法》的規定，香港特別行政區是直轄於中央人民政府的一個地方行政區域（《憲法》第30、31條、《基本法》第12條）。我國是單一制國家，作為一個地方行政區，香港特別行政區依法實行高度自治，但自治權根本上源於中央的授權（《基本法》第2條）。這是包括《香港國安法》第五十五條在內的整部國安法的法律基礎。**因此，中央的全面管治權在案件管轄上應當予以體現。**

第二，關於中央和香港特區在維護國家安全方面的責任。國家安全事項性質上屬於中央事權，這是國家安全的性質和特點決定的，世界各國凡實現有效治理者，莫不如此。同時，有效維護

國家安全，需要中央和香港特區都切實履行相應責任。其中，中央作為主權者，對國家安全負有根本責任；香港特區作為地方，對所轄區域守土有責，也負有維護國家安全的相應憲制責任。對此，《香港國安法》第三條做了明確的規定。我理解，所謂根本責任，應當是指最大的、最終的責任。**因此，中央和香港特區的不同責任，在案件管轄上應當予以體現。**

第三，關於堅持"一國兩制"原則。香港是中華人民共和國的一個享有高度自治權的地方行政區域。實行"一國兩制"，設立香港特別行政區，這是國家在恢復對香港行使主權時確立的方針，是由《憲法》及根據《憲法》制定的《香港基本法》所保障的。為此，《香港國安法》開宗明義，在第一條中就明確將堅定不移並全面準確貫徹"一國兩制"、"港人治港"、高度自治的方針，作為其立法目的之一。這充分體現了中央對香港特區的信任。**因此，上述立法目的，在案件管轄上應當體現。**

第四，關於危害國家安全犯罪的特殊性。危害國家安全犯罪的特點，一是危害嚴重，因此，各國均給予最高關注，嚴密法網，嚴厲制裁；二是事關國家安危存亡，須嚴密防範危險的發生，並及時予以制止，不容等待其實際造成嚴重危害結果才採取行動；三是往往涉及國家秘密和國家利益，表現形式上有很強的隱蔽性，涉案因素上可能有外國或境外勢力非法介入、裡外勾連等特點，這就需要專門的人員、專門的信息、專門的程序應對，很多情況下需要國家動員充分資源方能有效應對。基於危害國家安全犯罪的以上特點，防範和打擊犯罪不容有失，有關維護國家安全的法律必須得到切實執行，必要時必須由國家出手。**這一點在案件管轄上也應當體現。**

下面，基於對以上四個問題的看法，進一步談談對《香港國安法》第五十五條的理解。此前，我已經對第五十五條的內容做

了簡單概括，即：確立管轄管道；明確管轄情形；明確管轄程序。

第一，第五十五條最直接的法律效果，是建立了中央直接管轄案件的管道。基於這一管道，對於《香港國安法》規定的危害國家安全案件，形成了香港特區管轄和中央管轄兩個路徑。由中央直接行使管轄，這是一個重要的制度安排。正如前面談到的，無論是從中央與香港特區的關係，還是國家安全事項的中央事權屬性看，由中央管轄特定案件都是有堅實法理基礎的。這是中央對香港特區行使全面管治權的重要體現，也有利於支持和監督香港特區自身切實履行維護國家安全的憲制責任。同時，危害國家安全犯罪的特殊性，香港回歸以來維護國家安全的實踐、《香港基本法》第23條規定的特區應當履行的立法責任遇阻和修例風波以來的亂象等情況，充分證明只有中央在特定情形下行使管轄，才能夠切實維護國家安全。中央保留必要時出手的可能性，是"一國兩制"不走形，不變樣的根本保證。"兩條腿走路"，就是為了保證"一國兩制"行穩致遠，香港長期繁榮穩定。簡而言之，中央依法當管、有責任管、不得不管。

第二，中央管轄案件包括三種情形。根據第五十五條的規定，中央管轄案件限於三種情形：一是案件涉及外國或者境外勢力介入的複雜情況，特區管轄確有困難。這是指特區行使管轄遭遇外部嚴重障礙的情況。事實證明，香港發生的危害國家安全案件，背後多有閒不住的"黑手"。即便如此，個人理解，除非案件使得香港特區管轄遭遇難以進行的障礙，否則案件原則上仍由香港特區依據《香港國安法》第四十條規定管轄。二是出現香港特區政府無法有效執行本法的嚴重情況。這是指特區政府因來自特區內的嚴重障礙，自身不能有效執行《香港國安法》，必須由中央直接管轄以確保有效執法的情況。三是出現國家安全面臨重大

現實威脅的情況。這是指國家安全面臨嚴重危險，而且這種危險非常緊迫，必須由中央立即採取措施以防止危害發生的情況。

《香港國安法》第五十五條關於三種情形的規定，充分表明中央管轄案件是基於中央維護國家安全的根本責任。中央管轄案件是對香港特區的堅定支持、有力保護，當然也是嚴格監督。

第三，中央管轄案件有明確的程序規定。根據第五十五條的規定，如果出現法律明確規定的需要中央管轄的三種情形，駐港國安公署並不能自行決定立案管轄，而是需經過嚴格的批准程序。首先需要香港特區政府或者駐港國安公署提出，然後需要由中央人民政府批准，只有經中央政府批准，駐港國安公署方可行使管轄。這樣嚴格的程序規定，進一步表明中央堅定不移並全面準確堅持“一國兩制”方針的誠意。

回想起來，香港修例風波及隨後的亂局令人非常憂心和痛心。我想，真正關心香港繁榮穩定，希望“一國兩制”行穩致遠的人，應有同感。轉眼間《香港國安法》實施已經一周年，成效有目共睹。《香港國安法》的進一步有效實施，有賴於各方面共同努力。希望個人以上的淺見，有益於大家對於法律的理解。

最後，祝願本次論壇“國安家好”的心願得到實現！祝願有《香港國安法》“護航”，香港這顆東方明珠重歸美麗祥和！

■ ■ ■ ■ ■

梁美芬：非常感謝雷建斌主任，非常詳細地給我們講解了《香港國安法》第五十五條，大家很關心的管轄權如何分工的問題。第二位我們的嘉賓就是楊美琪專員。楊美琪專員是律政司的刑事檢控專員。她在一九九四年加入律政司，專長在網絡、白領犯罪，在刑事檢控方面有非常豐富的經驗。而就著近日很多不同

的案件，特別包括保釋的問題，或者陪審團的問題，楊專員將會在她的發言中詳細為大家講解《香港國安法》第四十二條、四十六條相關執行及應用的問題，讓我們歡迎楊專員。

楊美琪：各位尊敬的嘉賓、司長、各位同事，我今天講的是香港特區管轄的危害國家安全犯罪案件適用甚麼法律和程序，主要關乎《香港國安法》第四章的規定。

香港特區管轄的「危害國家安全犯罪案件」

首先，我會解釋甚麼案件屬於香港特區管轄的「危害國家安全犯罪案件」。以下是四種例子。

第一種，是《香港國安法》規定的危害國家安全罪行，即分裂國家、顛覆國家政權、恐怖活動、勾結外國或者境外勢力危害國家安全四類罪行。除非出現國安法第五十五條規定的特定情形，否則都是由香港特區行使管轄權。[1]

第二種，是《香港國安法第四十三條實施細則》所規定的罪行。《實施細則》就執法機關辦理危害國家安全犯罪案件時可採取的措施作出規定，並就不遵從要求或影響調查等行爲訂定罪行。[2]

第三種，是香港本地法律規定的其他危害國家安全罪行，例如《刑事罪行條例》規定的叛逆罪和煽動罪，《官方機密條例》規定的罪行等。

第四種，是香港特區根據《基本法》第23條立法時規定的危害國家安全罪行。《香港國安法》第七條規定香港特區應當儘早完成相關立法，完善相關法律。

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1 《香港國安法》第四十條規定，香港特區對《香港國安法》規定的犯罪案件行使管轄權，但第五十五條規定的情形除外。

2 例如《香港國安法第四十三條實施細則》附表3，第3(8)條（在沒有合法授權下處理被保安局局長凍結的危害國家安全罪行相關財產）。

香港特區管轄危害國家安全犯罪案件適用甚麼法律？

我接著介紹香港特區管轄的危害國家安全犯罪案件的法律適用問題。根據《香港國安法》第四十一條第(1)款，香港特區管轄危害國家安全犯罪案件的立案偵查、檢控、審判等訴訟程序事宜，適用《香港國安法》和香港本地法律。第四十五條進一步規定，除《香港國安法》另有規定外，各級法院應當按照香港特區其他法律處理有關案件的刑事檢控程序。第六十二條亦同時規定，香港本地法律規定與《香港國安法》不一致的時候，適用《香港國安法》規定。

因此，除非《香港國安法》另有規定，否則香港本地法律關於刑事司法的規定繼續適用於特區管轄的案件，例如《刑事訴訟程序條例》、《裁判官條例》、《高等法院條例》等等。

維護國家安全與保障人權和維護法治

維護國家安全同尊重保障人權，從根本上來說是一致的。有效防範、制止和懲治危害國家安全的違法行為，正是為了更好地保障香港居民的生命財產安全，更好地保障基本權利和自由[3]。所以《香港國安法》第四條規定，香港特區維護國家安全應當尊重和保障人權，依法保護香港居民根據《基本法》和《國際人權公約》[4]適用於香港的有關規定享有的權利和自由。

《香港國安法》第五條亦規定了防範、制止和懲治危害國家安全犯罪的法治原則，包括罪刑法定、無罪推定、保障訴訟權利、

3 關於《全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定（草案）》的說明（2020年5月22日，全國人大常委會副委員長 王晨）。

4 即《公民權利和政治權利國際公約》和《經濟、社會與文化權利的國際公約》。

一事不再審等原則。第三十九條亦反映刑事罪行沒有追溯力的原則。這些都與《基本法》、《香港人權法案》的規定一致[5]。

當然，大部分的權利和自由都不是絕對，而是可以受依法並為達致保障國家安全、公共秩序等合法目的而必須作出的規定所限制。在維護國家安全和保障個人權利之間作出平衡時，必須顧及《香港國安法》第二條的規定：《基本法》第1條和第12條的規定是根本性的條款，任何機構、組織和個人行使權利和自由，不得違背這兩條的規定。事實上，早在1999年一宗涉及侮辱國旗及區旗的案件中，終審法院便已指出，貫徹"一國兩制"的方針和維護國家統一及領土完整都極之重要，並可為這些目的對一些權利施加限制[6]。

終審法院本年初在*黎智英*案中指出，除《香港國安法》規定的特別例外情況外，人權和法治原則及特區一般適用的規則，在涉及《香港國安法》的案件中繼續適用。這些特別例外情況原意就是與憲制權利和自由及其他法定的常規一同運作，是一個有連貫性的整體的其中一部分。[7]

《香港國安法》特別規定的程序

由「指定法官」處理危害國家安全犯罪案件

接著，我會討論《香港國安法》在程序方面幾項特別規定。首先，負責處理危害國家安全犯罪案件的法官，必須是香港特區行政長官按照《香港國安法》第四十四條從各級法院的法官中指定。行政長官在指定法官前可徵詢香港特區國安委和終審法院首席法官意見。

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5 《香港人權法案》第10、11條。

6 *香港特別行政區 訴 吳恭劭及另一人* (1999) 2 HKCFAR 442, 第461D-E頁。

7 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第42段。

時任終審法院首席法官馬道立去年解釋，有關案件的排期、處理、委派哪一位指定法官負責處理案件，是由相關級別的法院領導決定。這些事情全屬司法機構的職責範圍[8]。

原訟法庭亦在*唐英傑（第1號）*案強調，行政長官不是指派或任命某一位法官負責審理某宗案件。法官會遵守司法誓言，依法履職，不會因為行政長官有權指定若干名法官而讓行政長官或政府可以干預法官的審判工作。合理、持平和知情的旁觀者不會認為處理案件的法官僅因為他是行政長官指定的法官而失去獨立性。[9]

被告人申請保釋的程序

接著，我會討論《香港國安法》第四十二條第(2)款關於保釋的規定，就是「*對犯罪嫌疑人、被告人，除非法官有充足理由相信其不會繼續實施危害國家安全行為的，不得准予保釋。*」另一方面，《刑事訴訟程序條例》則包含了「有利於保釋的推定」。

終審法院在*黎智英*案裁定，理解《香港國安法》第四十二條時需要留意《香港國安法》的立法背景和目的。[10]對第四十二條的理解，除了要顧及第一條列出的立法目的之外，還應盡可能兼容第四條和第五條關於保障人權和堅持法治原則的規定。[11]

雖然《香港國安法》第六十二條規定，香港本地法律與《香港國安法》不一致的時候，適用《香港國安法》規定，所以第四十二條對本地法律「有利於保釋的推定」定下一個特別的例外情況，

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8 https://www.info.gov.hk/gia/general/202007/02/P2020070200412.htm?fontSize=1

9 *唐英傑 訴 香港特別行政區* [2020] HKCFI 2133, 第54-60及64段。

10 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第8段。

11 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第42段。

但是除此之外，關於人權、自由、法治和保釋的一般規定繼續適用於危害國家安全犯罪案件[12]。

終審法院據此裁定，法官必須首先決定有沒有「充足理由相信被告人不會繼續實施危害國家安全行為」。所謂被告人「不會繼續實施危害國家安全行為」，應理解為不會繼續做性質屬於可構成危害國家安全犯罪的行為，符合無罪推定原則[13]。法官應考慮一切相關因素。如果法官認為沒有充足理由相信被告人不會繼續實施危害國家安全行為，便應拒絕保釋申請。[14]

如果法官認為有充足理由，便應進一步考慮所有與批准或拒絕保釋相關的事宜以決定是否准予保釋，期間適用「有利於保釋的推定」。這包括考慮有沒有實質理由相信被告人將不依期歸押、在保釋期間犯罪、干擾證人或者妨礙司法公正。[15]

在原訟法庭由陪審團或三名法官組成審判庭審理國家安全案件

《香港國安法》第四十六條規定，對原訟法庭進行的就危害國家安全犯罪案件提起的刑事檢控程序，律政司司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。如律政司司長發出證書，有關案件便會由三名法官組成的審判庭審理。

最近上訴法庭在唐英傑就律政司司長根據《香港國安法》第四十六條發出證書提出的司法覆核申請案裁定，《香港國安法》

12 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第42段。

13 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第 53(c)(ii)及70(d)(ii)。

14 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第 53(b) 及 70(d) 及 (e) 段。

15 *香港特別行政區 訴 黎智英* [2021] HKCFA 3, 第70(f) 段。

第四十六條應根據《香港國安法》的整體立法背景和目的，並與第四條和第五條，以及《基本法》及《香港人權法案》的相關條文一併解讀，確保符合防範及制止危害國家安全的行為這個基本目的、控方維護公平審訊的權益和保障被告人得到公平審訊的權利。

上訴法庭指出，陪審團審訊不是刑事司法程序中唯一可達致公平的方式，這亦不是《基本法》和《香港人權法案》有關公平審訊規定不可或缺的元素。如果出現令陪審團達致公平審訊的目的有受影響的風險的情況，則只有根據《香港國安法》第四十六條不設陪審團而由三位法官組成的審判庭審理案件，才能確保公平審訊[16]。

法庭亦援引終審法院2010年*蔣麗莉案*有關律政司選擇審訊法院級別決定的案例，並裁定，律政司司長根據《香港國安法》第四十六條作出的決定屬《基本法》第63條規定由律政司負責作出的檢控決定，再加上《香港國安法》第四十二條第(1)款有關及時辦理案件的規定，因此不能以一般的司法覆核理由提起訴訟。[17]法庭最後駁回有關司法覆核申請。

我的介紹到此為止。謝謝大家！

■ ■ ■ ■ ■

梁美芬：很多謝楊專員以很多案件，包括近日出名的案件來跟大家解釋《香港國安法》在法庭內的檢控工作，大家特別關注的程序問題。接著我們有另一位專家熊秋紅教授。熊秋紅教授

16 *唐英傑 訴 律政司司長* [2021] HKCA 912, 第37-43段。

17 *唐英傑 訴 律政司司長* [2021] HKCA 912, 第55-71段。 只有在不誠實、不真誠或其他特殊情況的有限理由下，才可覆核檢控決定。

是中國政法大學刑事訴訟法院長，她也是中國人權研究理事會理事，曾經參加中美、中歐人權對話。熊教授將會為大家進一步解釋在《香港國安法》，萬一出現《香港國安法》第五十五條的情況下，相關的管轄權怎麼進行，而相關的條文是《香港國安法》的第五十六條、五十七條、五十八條。相關的條文和討論，現在我們請熊教授。

熊秋紅：《香港國安法》建立了雙軌制的危害國家安全犯罪案件的管轄和訴訟機制，總體上形成兩個閉環。目前，香港特別行政區管轄案件的訴訟機制已經啟用，但中央管轄案件的訴訟機制尚未啟動。《香港國安法》對中央管轄案件的法律適用和訴訟程序做了原則性規定，對於其中的主要內容，我個人認為，可以做以下解讀。

一、中央管轄案件的法律適用

《香港國安法》第三章規定了“罪行和處罰”，具體包括對分裂國家罪、顛覆國家政權罪、恐怖活動罪、勾結外國或者境外勢力危害國家安全罪的定罪和處罰的規定。據此，中央管轄案件的定罪和處罰問題，即實體法問題，適用《香港國安法》。

中央管轄案件的訴訟程序事宜，根據《香港國安法》第五十七條的規定，適用《中華人民共和國刑事訴訟法》（以下簡稱《刑事訴訟法》）等相關法律的規定。這裡的相關法律指的是《律師法》、《監獄法》等法律，《律師法》涉及對律師的業務和權利、義務等方面的規定，而《監獄法》規定了刑罰的執行、獄政管理、對罪犯的教育改造等內容。

二、中央管轄案件的分工負責機制

根據《香港國安法》第五十六條的規定，中央管轄的案件，由駐港國安公署負責立案偵查，最高人民檢察院指定有關檢察機

關行使檢察權，最高人民法院指定有關法院行使審判權。對上述規定，可作以下三點解釋。

第一，該條規定中央管轄案件的立案偵查權、檢察權、審判權三種權力分別由不同的機關行使，體現了駐港國安公署、檢察院、法院三機關分工負責、互相制約的原則。

第二，既然是中央管轄案件，則應由中央一級的執法、司法機構分別行使相關執法、司法權力，這是法理層面的解釋。駐港國安公署是中央人民政府在香港特別行政區設立的機構，屬於中央執法機構；而最高人民檢察院、最高人民法院均屬於中央司法機構。

第三，中央管轄的案件，由於以兩審終審制為原則，被告人享有絕對的上訴權，為了保障兩審終審制的貫徹，《香港國安法》第五十六條規定，最高人民檢察院指定有關檢察機關行使檢察權，最高人民法院指定有關法院行使審判權。比如，最高人民法院指定深圳市中級人民法院作為一審法院、廣東省高級人民法院作為二審法院。

三、中央管轄案件的辦案流程

根據《香港國安法》第五十六、五十七、五十八條的規定，中央管轄案件的辦案流程大體如下：

1、立案偵查。立案是一個獨立的訴訟程序，必須經中央人民政府正式批准立案，駐港國安公署才能圍繞案件開展相關的偵查活動，比如，對犯罪嫌疑人採取拘留、逮捕等限制人身自由的強制措施；採取訊問犯罪嫌疑人、詢問證人、勘驗、檢查、搜查、查封、扣押、查詢、凍結等偵查措施收集證據。駐港國安公署在採取上述措施時，形成相應的法律文書，如拘留證、逮捕

證、搜查證等，根據《香港國安法》第五十七條的規定，這些法律文書在香港特別行政區具有法律效力。

2、審查起訴。如果最高人民檢察院指定深圳市人民檢察院、廣東省人民檢察院行使檢察權，那麼，駐港國安公署偵查終結，就會將案件移送至深圳市人民檢察院審查起訴。深圳市人民檢察院在對案件進行審查的過程中，應當訊問犯罪嫌疑人，聽取辯護人、被害人及其訴訟代理人的意見；經審查，如果認為案件事實不清、證據不足，可以退回駐港國安公署補充偵查；如果認為犯罪事實清楚，證據確實、充分，則應當向深圳市中級人民法院提起公訴。

3、審判。如果最高人民法院指定深圳市中級人民法院、廣東省高級人民法院行使審判權，那麼，深圳市人民檢察院提起公訴的案件，將由深圳市中級人民法院進行一審；如果被告人不服一審裁判，可上訴至廣東省高級人民法院對案件進行二審；如果被告人對二審裁判還是不服，可以申請最高人民法院對案件進行再審。

4、刑罰的執行。如果被告人被判有罪，刑罰由中央執法、司法機構負責執行。

四、中央管轄案件的犯罪嫌疑人、被告人權利保障

《刑事訴訟法》等相關法律給予犯罪嫌疑人、被告人充分的權利保障，主要包括：

1、中央執法、司法機構辦案，在每個訴訟階段，都必須告知犯罪嫌疑人、被告人所擁有的訴訟權利，如委託律師辯護的權利、提出上訴的權利、提出申訴的權利等；

2、犯罪嫌疑人在偵查活動一開始就有權請律師。《香港國安法》第五十八條規定，駐港國安公署第一次訊問或者採取強制措施之日起，犯罪嫌疑人就有權委託律師作為辯護人。

3、給予犯罪嫌疑人、被告人充分的法律援助。所有犯罪嫌疑人、被告人都可以得到值班律師的幫助；案件進入審判階段，如果被告人沒有請律師，則由法院通知法律援助機構指派律師為其提供辯護。

4、辯護律師享有與在押的犯罪嫌疑人、被告人會見、通信，調查取證，查閱控方證據，申請變更強制措施等一系列訴訟權利。

5、被告人享有獲得公正審判的權利，包括司法機關依法獨立行使職權、法律面前人人平等、申請司法機關調取證據、申請排除非法證據等等。

《刑事訴訟法》於1979年頒布，經歷了1996年、2012年、2018年三次修改，人權保障水準不斷提高。中國政府於1998年簽署了《公民權利和政治權利國際公約》，此後三次發佈《國家人權行動計劃》（2009-2010、2012-2015、2016-2020），其中包括保障被羈押人的權利和被告人獲得公正審判的權利。《刑事訴訟法》等相關法律關於犯罪嫌疑人、被告人權利保障的規定總體上符合《公民權利和政治權利國際公約》的相關要求。

■ ■ ■ ■ ■

梁美芬：非常感謝熊教授，詳細解釋了在《香港國安法》第五十五條下，根據內地的管轄權要執行的時候，各方面的程序問題。我們三位嘉賓都已經非常詳細地向大家講解了《香港國安法》的情況。接下來，我想對剛才各位講者的發言作一個簡單的總結。

首先，大家聽到雷建斌主任說，國家制定《香港國安法》，提到五十五條的時候，處處反映了國家對香港的信任和愛護。五十五條提到，是在極少數的情況下，比如外國、境外勢力是非

常複雜，甚至是阻礙了有關的調查、執法，才有可能啟動《香港國安法》第五十五條。

其實國家制定《香港國安法》，並沒有將中國的《國家安全法》直接透過附件三適用香港，已經體現了「一國兩制」很大的特徵，就是在一部全國性法律中，規定了程序法很大部分規定是用香港的法院程序，是根據普通法傳統的程序。而且根據楊專員剛才再三講到，在《香港國安法》第四條、第五條，是根據香港的法律原則，還有就是普通法、人權法。大家看到在講者裡面，特別是熊教授，她是參與中美、中歐人權的對話，所以在制定《香港國安法》的時候，是國家級的專家、決策者，我相信是充分考慮到怎樣在保障人權方面，同時要保障我們的國家安全。在成文條例第四、第五條特別提到「無罪推斷」，這是普通法非常強調的一個法律原則。

《香港國安法》亦都充分體現對香港司法機構的信任，這個信任度是透過我們近日，楊專員提到幾個重要的案件，其實仍在審理當中，包括有就著保釋案的，包括有就著陪審團的，也有提到究竟律政司就法院關於層級管轄權所作的決定是否司法覆核的問題。這些都充分反映了香港普通法的特徵，即是有關的案件在經過香港法院的程序，程序公義一直充分受到保障，最後才會形成一個重要的判例，這完全反映普通法的精神。

當然，幾位講者，特別是雷主任都提到，到了沒有辦法的時候，國家難道不管香港嗎？這是不可能的。比如我們現時的法律對於有人可以利用法律的漏洞癱瘓議會，又或者出現一些恐怖襲擊，我們沒有國安法的時候，根本沒有辦法處理。當然，根據《憲法》和《基本法》，破壞者的行為一定是違反《基本法》的立法原意，但是法例不清晰，以致很多事都拖延很久。現在有了《香港國安法》，很多問題都清晰了，包括我相信大家也清晰了，例

如呼籲其他人制裁自己的地方和國家、香港、癱瘓議會等等，已經是很清晰，絕對是違反《香港國安法》。

不過，楊專員也有提到《香港國安法》第七條，我們香港有責任儘快自行就《基本法》第23條立法。就像張勇副主任剛才所說的，立法的範圍是包括但並不局限於《香港國安法》，已經為我們香港做了的部分，即是說在研究的範圍裡面，我們就著香港可能近日再次出現不同的情況，也要積極加把勁，應該珍惜自行立法的機會。我認為這是國家託付給香港特別行政區的責任，以及高度信任的體現。我自己也有參與部分的討論。其實國家要做這個部分很容易，為什麼不做呢? 就是給香港一個機會，而且是更加符合香港的政治和法律的文化來做。

對於市民因為不了解就會產生憂慮，這是理解的，大家也明白。熊教授剛才所說，熟悉中國法律體系和《刑事訴訟法》的朋友應該非常清楚，現時中國的司法體系是相當嚴格及高度陽光。我自己在過去二十年都參與了中國在司法人員培訓這方面的工作。事實上，他們的司法人員在工作時，壓力是相當大的。剛才提到，如果萬一真的在很罕有的情況下，香港無法處理，那麼國家都是要處理的。當要實行管轄權的時候，他提到立案程序都是非常嚴格，要經過中央政府正式批准，國安署才可進行、展開拘留、調查、偵查的工作，而且當事人一旦接受國家的管轄權的時候，其實處處體現了保障他們的上訴權、再審權、辯護權、申訴權，以及申請法律援助的權利。

我明白熊教授為什麼要這樣提到，在內地，法律援助這方面也是非常積極的在推動。在這方面，熊教授參與了中美、中歐的人權對話。在刑事訴訟，特別包括國家安全、洩露國家機密等等的程序，內地在立法方面是非常完備，各個方面都考慮到。我希望大家有進一步的了解，而我們也在各個方面確保公平、公正的

審訊。我再一次強調，我感受到國家在頒布《香港國安法》的時候，是充分考慮到香港特別行政區的特色，以致仍然保留有保釋和陪審團這個部分的適用，在適用上是有清晰的程序和原則的規定。

我認為一個新的法律的通過，除了阻止同類型的犯罪行為，比如我不希望我的辦事處再出現一天有那麼多的汽油彈，市民義工在裡面，但那些人都可以隨便擲汽油彈入內，保留這樣的事情發生在愛護和平、愛護法治的香港社會，我希望是不會再出現。但同時，法律是要執行才能達到效果，在這方面我是非常敬佩律政司的同事，甚至是法院的法官。我明白法官是兼任了很大的壓力，律政司的同事也是兼任了很大的壓力，因為現在經常對執法人員、司法人員暴力威脅，很多這樣的情況。要絕對地向暴力說不，《香港國安法》在香港才能夠真正成為有法可依、有法必依、執法必嚴、違法必究。而在未來的工作，我相信立法會、司法機構和行政機構要充分互相合作，才可以做好這個工作，將和平、法治、文明的社會交回給香港的市民。

今天很榮幸可以主持這一節的會議，也希望大家有不明白的地方，我們在其他場合可以進一步的交流，謝謝大家。


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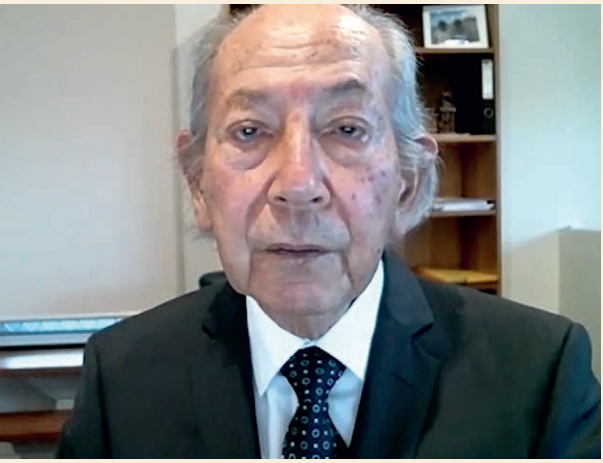
國家好
國安好



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尊敬的梁副主席（全國政協副主席梁振英）、各位嘉賓、各位朋友：

大家好！「國安家好」是今天法律論壇的主題。國家安全是任何一個國家的頭等大事，是國家生存與發展的基本前提。國家安全，是以人民安全為宗旨，保障每一位國民的根本利益，也是社會繁榮穩定、人民安居樂業的必要條件。所以，「國安」則「家好」，先有國家安全才有美好家園。

維護國家主權、安全、發展利益，堅持全面貫徹落實「一國兩制」，維護香港長期繁榮穩定，保障香港居民合法權益，是國家的堅定立場。中央以「決定+立法」方式制定《香港國安法》並列入《基本法》附件三，於去年六月三十日由行政長官在特區頒布實施。

過去一年，《香港國安法》有效遏止了對國家安全構成嚴重威脅的行為和活動。《香港國安法》對維護國家安全的成效有目共睹，讓香港走出自二〇一九年中開始的困局，由亂及治。

接下來，我會為大家從五點去分析，希望能讓大家對《香港國安法》有正確的理解。

第一點，《香港國安法》體現中央對香港特區的信任。《香港國安法》總則指出中央政府對香港特區的國家安全事務負有根本責任，而香港特區負有維護國家安全的憲制責任。在今年年初，終審法院在*黎智英*案中清楚指出，《香港國安法》的制定是建基於維護國家安全是中央事權，並不屬於特區自治範圍，中央政府對特區有關的國家安全事務負有根本責任[1]。

《香港國安法》第四十條說明除了第五十五條列明的三類特定的例外情況，其他案件，也就是絕大部分案件都是由香港特區行使管轄權。特區在行使管轄權時，是依據《香港國安法》和特區本地法律負責偵查、檢控、審判和處罰等事宜。

在所有國家，不論是單一制國家或是聯邦制國家，維護國家安全事務是由中央政府或聯邦政府直接負責執行，而地方政府或州政府只有配合協助的角色。因此，香港特區可以對涉及《香港國安法》的絕大多數案件行使管轄權，實屬一項開創性的安排，展示中央政府對香港特區履行維護國家安全憲制責任的信心和信任，切實體現「一國兩制」的精神。

第二點，《香港國安法》與本地法律銜接、兼容和互補。全國人大常委會法制工作委員會作出關於《香港國安法（草案）》的說明中，提到研究起草的五項工作原則，其中之一便是兼顧兩地差異，着力處理好《香港國安法》與國家有關法律、香港本地法律的銜接、相容和互補關係。

《香港國安法》的設計和規定充分體現這個立法原意。《香港國安法》是全國人大常委會制定的全國性法律，但當中也兼顧了國家和特區在「一國兩制」下兩個法律制度的差異，確保維護

1 *香港特別行政區 訴 黎智英* [2021] HKCFA 3（終院刑事上訴2021年第1號），判辭第32段。

國家安全的法律制度能在特區切實有效執行。《香港國安法》第四十一條訂明，由香港特區管轄的危害國家安全犯罪案件，適用《香港國安法》和香港特區本地法律。

另一方面，《香港國安法》的目的是維護和保障整個國家和全國人民的安全和發展利益，也是為了解決香港特區在維護國家安全方面存在的法律漏洞、制度缺失和工作「短板」的問題，所以根據第六十二條，若本地法律的規定與《香港國安法》不一致，會適用《香港國安法》的規定。

《香港國安法》的條文反映維護國家安全的根本重要性，與保釋有關的條文便是一個例子。終審法院在*黎智英*案中裁定，第四十二（二）條對「有利於保釋的假定」的一般規則，衍生了一個特別例外情況，為保釋申請加入了較為嚴格的門檻要求。在處理保釋申請時，法官必須先決定有沒有「充足理由相信犯罪嫌疑人或被控人不會繼續實施危害國家安全行為的」。如果法官認為沒有充足理由相信該人不會繼續實施危害國家安全行為的話，便應拒絕保釋申請[2]。

另一個例子是《香港國安法》有特別機制確保危害國家安全案件的公平審訊。《香港國安法》第四十六條指出，律政司司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟無須在有陪審團的情況下進行審理。上訴法庭在*唐英傑*一案中指出，不應假設陪審團審訊是刑事法律程序中達致公平的唯一方式。在陪審團達致公平審訊的目的有受影響的風險的情況下，要確保達到公平審訊，

2 *香港特別行政區 訴 黎智英* [2021] HKCFA 3（終院刑事上訴2021年第1號），判辭第53(b)、70(b)、(d)及(e)段。

唯有不設陪審團而由三位法官組成的審判庭審理案件；此舉符合控方維護公平審訊的權益和保障被告人得到公平審訊的權利[3]。

第三點，《香港國安法》尊重和保障人權、維護法治。《香港國安法》第四條規定，香港特區維護國家安全應當尊重和保障人權，依法保護香港居民根據《基本法》及國際人權公約適用於香港有關規定享有的權利和自由；而第五條規定了防範、制止和懲治危害國家安全犯罪，應當堅持法治原則，包括罪刑法定、無罪推定、保障訴訟權利、一事不再審等原則；第三十九條則說明《香港國安法》所訂罪行沒有追溯力。

當然，大部分的權利和自由並不是絕對的，而是可以根據法律並為達致保障國家安全、公共秩序等合法目的，而作出規定限制。在這方面，《香港國安法》第二條強調《基本法》第一條和第十二條是根本性條款，「香港特別行政區任何機構、組織和個人行使權利和自由，不得違背香港特別行政區基本法第一條和第十二條的規定」，這正是為個人權利和自由與維護國家安全之間取得平衡。正如終審法院在*黎智英*案中提到，全國人大及人大常委會在草擬國安法時已經考慮並平衡了人權因素，就是在維護國家安全的同時，也要強調保障和尊重人權並堅持法治價值。這些條文對於《香港國安法》的整體理解，至為重要[4]。

舉個例子來說，言論和新聞自由受《基本法》和《香港人權法案》保障。不過，《香港人權法案》第十六條訂明，行使有關權利附有「特別責任及義務」，可依法律規定，為保障國家安全、公共秩序，公共衞生或風化、或尊重他人權利或名譽而受到必須的限制。新聞從業員與其他人一樣都有義務遵守所有法律，包括

3 *唐英傑訴律政司司長* [2021] HKCA 912 (民事上訴2021年第293號)，判辭第43-44段。

4 *香港特別行政區訴黎智英* [2021] HKCFA 3 (終院刑事上訴2021年第1號)，判辭第42段。

刑事法律。有關人權法的案例早已確立「負責任新聞作業」的概念。新聞從業員必須按「負責任新聞作業」原則真誠地行事，以提供準確可靠的資訊，方可獲言論和新聞自由權利保障[5]。報章出版人和編輯也同樣須要遵從新聞活動中的特別責任及義務。

第四點，《香港國安法》具有域外效力，是符合國際法的原則，亦是國際通行的做法。涉及《香港國安法》的犯罪行為危害國家主權、統一、領土完整和發展利益，與一般犯罪行為不同。若相關的犯罪行為威脅國家安全，無論是在外地或本地發生、犯罪者是否香港居民，國家都不能視若無睹，必須予以防範、制止和懲治。因此，《香港國安法》規定了相關的域外效力。

這個做法符合國際法下的「保護管轄」原則。在「保護管轄」原則下，若身處境外的任何人對於一個主權國家進行危害其安全或核心利益（例如政府體制或職能）的犯罪行為，該主權國家可透過有域外效力的法律行使刑事管轄權。不少國家的國家安全法律也具備域外效力，例如德國《刑法典》第五條針對叛國罪的域外行為[6]、美國針對勾結外國和境外勢力活動的《盧根法》[7]等。「保護管轄」原則也常見於反恐怖主義的國際公約內[8]。

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5 例見*Pentikäinen v Finland* (2017) 65 EHRR 21，判辭第90段。

6 德國《刑法典》第5條訂明 "*Regardless 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)*" (英文翻譯)。

7 見《盧根法》，1 Stat. 613, 18 U.S.C. § 953。《盧根法》訂明 "*[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*"。

8 例如《反對劫持人質國際公約》（1979）、《制止恐怖主義爆炸事件的國際公約》（1997）、及《制止向恐怖主義提供資助的國際公約》（1999）。

第五點，《香港國安法》第三章清楚列明構成四類罪行的各種具體犯罪行為及要素。以第二十九條「勾結外國或者境外勢力危害國家安全罪」為例，「勾結」只是條文的標題，而具體犯罪行為則在條文中清晰列出。

制定「勾結罪」，符合國際法的原則。主權平等和不干預他國內政是國際關係基本準則和國際法基本原則。制定此罪行的目的是為了維護國家的主權獨立，免受外部勢力干涉，其正當性顯然易見。有關罪行並不針對，更不會影響在香港的機構或個人與外地的正常接觸，例如學術交流和商業交易等。但是，在香港的機構或個人都不應配合外國實施針對中國或香港的制裁或其他敵對行為。

類似的罪行在其他地方也常見。例如，美國針對勾結外國和境外勢力活動的《盧根法》，訂明任何美國公民，無論身在何處，在未經美國政府授權下，直接或間接與任何外國政府或其官員或代理人作書信往來，意圖影響他們就涉及美國爭端或爭議的事宜所作的措施或行為，或作出損害美國的措施，則屬刑事罪行。澳洲的《刑事法典》當中包含有關涉及外國干預、資助或接受外國情報機構資助危害國安等等的罪行。

我希望以上五點能加深大家對《香港國安法》的正確認識和理解。我在此衷心感謝今次論壇的各位講者、專家，非常感謝他們抽時間親身來，或以在線形式，出席參與今天的論壇，與我們分享關於《香港國安法》的精闢見解和寶貴意見。我要特別感謝中央人民政府駐香港特別行政區聯絡辦公室、駐港國家安全公署和中華人民共和國外交部駐香港特別行政區特派員公署，及中國人民解放軍駐香港部隊對今天活動的支持和協助。我亦要特別感謝律政司的同事和亞洲國際法律研究院的努力，同心協力安排這個論壇。

最後，我希望各位參與今天的論壇後，更能體會到《香港國安法》對國家安全及香港市民安定生活的偉大貢獻。我和律政司同事將一如既往，致力維護國家安全，務求達致「國安、家好」。

多謝各位。

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尊敬的梁副主席（全國政協副主席梁振英）、律政司司長鄭若驊女士、各位朋友：

大家好，今天我很高興能夠獲邀參加由律政司主辦的《香港國安法》法律論壇。在上午的主題演講及座談會中，以及剛才律政司司長的發言，主要都是從法律角度，就《香港國安法》進行深入的研討。我想藉此機會，從執行《香港國安法》方面，向大家講述一下保安局連同紀律部隊在維護國家安全工作方面的經驗、《香港國安法》實施的效果，以及香港在維護國家安全方面所面對的一些挑戰。

自從二〇一九年六月開始一年多的時間內，「黑暴」肆虐，相信大家都不會忘記。暴徒肆無忌憚破壞商店、鐵路及其他公共設施，縱火，強闖及破壞立法會，肆意毆打持不同意見的人。外部勢力干預非常嚴重，有人乞求外國制裁中國及香港特區政府，更有人圖謀要顛覆國家政權，香港面對前所未有的國家安全威脅。

上述的「黑暴」，涉及三個與國家安全相關的重要元素，分別是外國勢力插手破壞、「港獨」的肆無忌憚，以及暴力及破壞的嚴重程度。我在以下時間會就各元素為大家作出分析。

第一，外國勢力為其自身的政治利益，透過不同途徑，包括提供資金及物資予他們在香港的「代理人」，推動及支持香港暴徒的暴行。一個與外國政府有聯繫的組織，在自己的國會聽證會上面曾經公開承認，曾經撥款給香港暴徒在網絡上隱藏自己的身分，逃避追查。亦有境外組織於「黑暴」期間，公開為暴徒籌款及籌集物資和裝備，包括頭盔、防毒面具及濾芯等。我相信大家都察覺到，於「黑暴」肆虐期間，暴徒具有高度的組織性，而且在每次暴亂過後，都會留低大量物資，毫不吝嗇，可見資金及物資的供應非常充裕。

第二個元素，是「港獨」的肆無忌憚。大約於10年前，抗拒國家的「本土主義」，以及帶有「自決」、「港獨」意識的活動開始冒起。其後，發生了二〇一二年的「反國教事件」、二〇一四年的非法「佔中」、二〇一六年的旺角暴動，以及二〇一八年因為鼓吹「港獨」而被禁止的香港民族黨等事件。直至二〇一九年的「黑暴」事件，鼓吹「港獨」的人揮舞「港獨」旗幟、展示「港獨」標語、呼喊「港獨」口號，公然挑戰中央及特區政府。

第三，於「黑暴」期間，暴力及破壞的嚴重程度，是前所未有的。暴徒投擲超過5,000個汽油彈，警方亦檢獲超過10,000個汽油彈，其中在一次事件中，更加搜獲3,900個汽油彈。此外在「黑暴」期間，有約22,000平方米的行人路磚，被人拆走，即是有多大呢？即相當於足以鋪滿約兩個香港大球場；被拆除的欄杆長度約60公里，即超過由石澳至赤鱲角機場的距離；更加有人不幸被暴徒用磚頭擲死，亦有人被暴徒淋上易燃物體然後再點火，以致身體嚴重燒傷。「黑暴」大大削弱了香港人，特別是年輕人的守法意識，有人刻意散播錯誤的意識，宣揚只要自己認為是對的事，犯法都可以做。許多年輕人就這樣被人推入犯法的深淵，要坐監及留有案底。

《香港國安法》在去年六月三十日頒布實施，效果立竿見影，發揮了震懾力，令到香港由亂變治，市民生活回復正常，經濟、民生都可以重新出發。在建立維護國家安全的法律制度上，《香港國安法》帶來的效果，主要體現於兩方面：第一，香港自回歸以來，由於未能就《基本法》第23條立法，於維護國家安全方面的法律，存在一個漏洞。《香港國安法》填補了這方面的漏洞，清楚訂明了四類危害國家安全的罪行，當中的「勾結外國或者境外勢力危害國家安全罪」，有助防止外部勢力及「港獨」勢力連成一線，減低受外部勢力干預的風險；至於「顛覆國家政權罪」，則可以減低有人透過發動「顏色革命」，企圖奪取管治權的風險；至於「分裂國家罪」，則有助遏止「港獨」分子從事分裂國家的行為。

此外，《香港國安法》強化了現行法律中針對恐怖活動的法律框架，訂明為脅迫中央人民政府、香港特區政府或國際組織，或者威嚇公眾，以圖實現政治主張，組織、策劃、實施、參與實施或者威脅實施造成嚴重社會危害的恐怖活動，即屬犯法，令到執法部門於處理危害國家安全的恐怖活動方面，有法可依。

執法方面，自《香港國安法》生效以來，警方一共拘捕超過110人，雖然與「黑暴」期間，被拘捕的超過10,000人比較，只是很少的數目，但有關的執法行動，已經成功打擊大部分嚴重危害國家安全的犯罪活動，被捕人士當中，包括圖謀透過所謂「35+」初選，涉嫌顛覆國家政權的團夥；以及以新聞工作做包裝，涉嫌串謀勾結外國勢力，危害國家安全的人物。

《香港國安法》發揮強大的震懾力，以前參與勾結、與外部勢力同盟的人紛紛退場，有人解散了自己的組織，亦有人潛逃至外國，國家安全的風險已經大為減少。

然而，我們絕不能掉以輕心，於維護國家安全方面，我們仍然要面對不少挑戰。治安方面，社會的整體守法意識，特別是年輕人方面仍然薄弱，雖然近期整體罪案數字有所下跌，但「黑暴」已經大大削弱香港人的守法意識。更令人擔心的是，香港近年出現了「犯罪年輕化」的情況。青少年被捕人數在二〇二〇年比二〇一八年增加超過四成。看到近期涉及青少年的犯罪個案，是非常嚴重，包括有中學生被另外一些青少年濫用私刑，被掌摑、拳打腳踢；亦有青少年三五成群打劫金鋪、販毒、刑事毀壞等，這些事件實在令人痛心。

此外，雖然《香港國安法》的實施，遏止了「黑暴」、「港獨」的囂張違法行為，但「港獨」分子並沒有完全放棄，仍然死心不息，繼續利用媒體、文化藝術、刊物等不同的「軟對抗」方式，進行鼓吹及滲透，灌輸「港獨」思想。近期不時仍然有宣揚「港獨」的組織在不同的地方擺設街站；亦有大學學生會內閣的參選宣言及政綱，仍然將暴徒稱為「義士」，宣稱要對抗政權；有「港獨」分子為規避調查，不斷改頭換面，成立新組織，並且招攬新會員；有人以播放紀錄片為名，以文化滲透暴力、「港獨」為實，美化暴徒；亦有書店在售賣教學和兒童書籍期間，出售宣揚抗爭的書籍、攝影集、小說、自傳等，荼毒年輕人。因此，我們要保持警覺，亦要呼籲香港市民遠離被「港獨」騎劫的活動，不應被人利用作為「港獨」的保護傘。

另一個挑戰，是本土恐怖主義的潛伏。「黑暴」至今，一共有超過20宗涉及爆炸品、槍械或者子彈的案件。檢獲的爆炸品都是外國恐襲常用的炸藥。今年四月，法庭就一宗涉及相關炸藥的案件，判處被告12年的監禁。在另一宗案件中，警方檢獲兩個共重約10公斤的土製炸彈，一旦引爆，足以炸毀100米範圍內的建築物。另有一宗案件，警方檢獲一支半自動步槍。同樣的步槍，在美國拉斯維加斯曾經被使用向出席音樂會的人群掃射，造

成50多人死亡。最近一宗案件，發生於今年六月底，警方搗破了一宗涉嫌藏有爆炸品及仿製槍械的案件，被捕人士在社交網站聲稱要殺死多名知名政治人物及血洗警署。種種跡象顯示，香港潛藏着本土恐怖主義的風險，犯案人有能力、有知識，更加有實際的行動去策劃本土恐怖主義。我們更要防範自我激化的人，他們表面正常，但可以突然變成「孤狼」，做出恐怖行為，造成嚴重死傷。就在剛剛的七月一日，有人突然以利刀刺向正在執勤的警員，然後自殺，初步調查顯示，正正就是這些所謂「孤狼式的本土恐怖襲擊」。但仍然有人繼續誤導和荼毒市民，嘗試美化、英雄化這些行為，甚至將責任推給警方，我們必須要嚴正譴責。

針對以上的風險，除了嚴正執法以外，我們亦會加強情報分析的工作，令到罪行能防範於未然。我們亦會透過宣傳及教育，重建守法意識，以及向市民講解經常見到的犯罪手法，令到市民提高警覺。在這方面，政府、保安局及轄下的紀律部隊，以及社會各界，都要共同努力，重建正確價值觀及守法意識。

過去一年，在《香港國安法》的開局之年，雖然仍然有上述的潛在風險，需要我們繼續去處理，但《香港國安法》的震懾力已經顯露無遺，對維護香港安全及穩定，成績有目共睹。但我想強調，《香港國安法》是一部全新法律，在執法過程中，需要理順法律不同方面的實施細節，就此保安局與警務處國家安全處，得到律政司大力支持及協助，就調查案件時所需採取的執法措施的法律依據，以及進行檢控時對相關罪行條文的詮釋，相關證據是否充分，以至當執法及檢控工作都受到法律挑戰時，控方應提出哪些法律依據等，都給予我們很多專業意見。在處理上述事情當中，律政司的同事做了大量研究工作，並與保安局及負責有關案件的國家安全處同事緊密溝通，令有關的法律及司法程序得到最妥善的處理，執法行動得以暢順、有效進行，我對此非常感謝。

踏入《香港國安法》實施的第二年，隨着執法及宣傳工作雙軌進行，法庭亦開始就危害國家安全犯罪案件進行審訊及判決，市民與社會各界的國家安全意識，將會進一步提升。保安局會一如既往，帶領紀律部隊，堅定不移履行維護國家主權、安全及發展利益的責任，竭盡所能，做好維護國家安全的工作。保安局與轄下的執法機構，亦會繼續與律政司緊密合作，以認真、不偏不倚及無畏無懼的態度去執行《香港國安法》，繼續為「國安家好」的目標作出貢獻。

多謝各位！

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前終審法院常任法官

感謝律政司司長邀請我參與論壇。在此略抒己見，謹供參詳。淺見來自長年累月的法律經驗，從中我至少學會一事：尊重普通人的智慧，此乃普通法精髓所在。其次的一課也許是：歷史長流，影響深遠。

1815年，中國清朝嘉慶年間天下太平，英國則忙於帝國大業而陷入戰事。

1815年6月滑鐵盧之役後，英軍指揮官威靈頓公爵被問及對戰果有何看法。他言簡意賅，一語回應：“這是險勝一場”。

他的步兵佈成重重方陣，抵禦拿破崙軍隊可怕騎兵的連環猛攻。方陣中並無一旅脫陣，紀律最終戰勝一切。

從1815年6月滑鐵盧激戰，轉觀2019年11、12月的香港街頭，我們看到什麼呢？香港警隊嚴密列陣守護市民性命財產。警員保持冷靜克制，抵禦施襲者的強攻。施襲者均身穿防護裝備，佩戴武器級防毒面罩，揮舞削尖的鐵枝，投擲汽油彈。香港警隊就這樣月復一月持續抗暴。

我設身處地，想像自己是一名普通警員。他這樣抗暴六個多月了。姓名遭人在社交媒體平台公開，不僅自己被起底，孩子亦不能倖免，在學校受到欺凌。所住宿舍被投擲汽油彈。妻子惶惶不可終日。岳母再三問他："幹嗎你保護別人的財產，卻不保護自己的家園、家人呢？"

每次奉命拘捕暴徒，他行使的必須是"合理武力"，且不論其意為何。他要緝拿的暴徒卻毫不講理、絕不留手。拘捕過程風險重重，他可能因此身受重傷；若干同僚已負傷送院。暴徒不會攜帶身份證，不會透露姓名，不會合作讓人拍照或套取指紋，不會接受警方准予保釋外出，亦不能被落案起訴，因此48小時後便無條件釋放，下個周末又重施惡行。

香港險些便徹底淪陷，到底有多險呢？這，我們普羅市民將永不知道，而政府基於明顯原因亦永不透露。但作為局外旁觀者，我會說："這是險勝一場"。

只要任何一隊警員脫陣，說："我們受夠了"，整個警隊就會分崩離析。然而，警隊堅守紀律，始終如一；為此，社會各界應該永存感激。

在我看來，這才是審視《香港國安法》該着眼的實況，其他的都不過穿鑿附會而已，欲置香港政府於萬劫不復境地。

香港面對的是一場叛亂，要推翻政府，不折不扣是這樣。

叛亂者犯下懦夫、校園欺凌的典型錯誤。他們把政府的低調回應、克制，視為軟弱的表現。所以數月以來，叛亂領袖趾高氣揚站到台上，儼如獨領風騷。他們獲冠名"自由鬥士"，登上《時代雜誌》封面。他們給數百萬名市民帶來禍害，也造成數十億元的破壞，卻絲毫不負責任，最終由香港納稅人埋單。

2019年8月18日周日發生的事件是個好例子。對於維多利亞公園舉行的大型集會，警方不予反對，只要主辦者安排200名糾察控制人群便可；但警方反對以中環為終點的遊行及其後在該處舉行的大型集會。眾領袖公然挑戰法律，舉起巨型橫額帶領遊行隊伍沿公路行至中環，吹噓能置身法外不受懲處。他們自鳴得意，沖昏頭腦，卻忘了法律的固有威力 —— 法網恢恢，疏而不漏。

回顧過去，可見叛亂種子早已埋下多年。正如高禮文教授近日闡釋，世界各地大多受西方優勢觀念所支配，長達兩百多年。西方交戰，加速晚清中國的沒落。

可是二戰之後，開始時移勢易。美國儘管船堅炮利，卻在朝韓遇上僵局，在越南戰敗，在古巴被逐。

隨後，文化大革命結束，八十年代初起，中國驚人崛起。勢力板塊開始挪移，但西方思維仍固步自封 —— 只管牢守西方優勢觀念。這體現在一個方面，就如高禮文教授所言，“西方媒體惶惑不安猛然反撲”；這種“反撲”，反映出西方列強那固守自許優勢的立場。

隨著九十年代初蘇聯解體，中國愈發被視為一個威脅，恐其危及西方的主導地位。如何抗衡呢？搞亂香港是其中一途。

這種想法似乎思路如下：今天，中國是統一的民族強國；可沒多久前，它還是四分五裂，軍閥擁兵，各據一方吧。好吧，說不定這片完整領土又可再被分裂呢。

假如，八十年代末，波羅的海小港口格但斯克某個蹩腳船廠釀成工業行動，竟足以令蘇維埃帝國最終瓦解；那麼，在香港播下叛亂種子，難不成可照樣畫葫，瓦解中國的領土完整呢？

這場運動的苗頭隨處可見。

別的不用看，單看《香港國安法》的爭端從何而起便知。

眾所周知，《基本法》（第二十三條）規定，香港特別行政區應自行立法禁止叛國、分裂國家、顛覆國家政權等行為。殖民時期沿襲下來的法規中，相關法律散列於三條條例，但顯然均不敷此用。

因此，回歸五年後，政府就實施第二十三條發表諮詢文件，理據強而有力，陳述如下：

“環顧世界各國，……，均在其法典內明訂條文，防止和懲處危害國家的主權、領土完整和安全的罪行。作為公民，一方面享有受其國家保護的權利，另一方面則有責任透過不作出威脅國家存亡的刑事行為，並支持禁止該等行為的法例，來保護國家。”

相關建議對以下方面的各項憲法保證，均予考慮：言論自由、表達自由、新聞自由等個人自由；免受任意逮捕的權利；家庭不可侵犯的權利等等。

凡有思考的人都會明白，第二十三條立法是絕對必要的。中央政府將此託付香港特區，責任相當重大。

當時需要的不是*地區*安全法，乃是*國家*安全法，影響的不止地區安全，而是全國的安危。為強調香港的高度自治，這項法律交由香港特區“*自行*”制定。

《國家安全（立法條文）條例草案》於2003年2月提交立法會，原本以為所有社會領袖理應給予支持，細節上縱有不善之處，在法案委員會大可迎刃而解。

全面反對條例草案並無合理依據。若非本地立法機關自行立法，唯一可行方法，就只剩下中央政府頒布法律了。

然而，社交媒體有人散播不實訊息，以訛傳訛，煽動情緒。黑暗勢力從中作梗，要推倒條例草案。最終，條例草案未能通過。

時間快轉到2019年初，另一法例《逃犯及刑事事宜相互法律協助法例(修訂)條例草案》惹起爭議。

國際社會當時非常關注跨國犯罪、洗黑錢和恐怖分子資金籌集問題。為使香港與其他已發展經濟體步伐一致，有必要改變現行條例，因此便須修訂該法規。

有人卻透過社交媒體危言聳聽，製造恐慌。條例草案被人渲染，稱其容許內地特工在香港街頭抓人過境受審。

街上爆發事端，更演變成香港歷來最具破壞力的動亂。

前行政長官董建華先生於2019年5月評論如下：

“香港二十多年來未能自行制定安全法，因而容易落入目標，遭外國敵對機會主義者破壞公共秩序，香港實際上淪為工具，用以引發更廣泛的權力衝突。”

2019年6月12日星期三，立法會大樓圍封範圍外，一批有組織暴徒衝擊大樓，要闖入其內，這迫使條例草案暫停二讀。

政府三天後宣布撤回條例草案。

行政長官發表講話，精心措辭，為求平定民心，安撫民憤。其辭克己謙卑，堪為典範。她說：

“我想說我們進行修例的初心出自我和我的管治團隊對香港的熱愛和對香港人的關心；但由於我們工作上的不足和種種原因，令這兩年來相對平靜的香港社會再次出現很大的矛盾和紛爭、令很多市民感到失望和痛心，我感到十分難過和遺憾。我們會以最有誠意、最謙卑的態度接受批評，加以改進，繼續與市民同行。”

想當然以為，示威者訴求就此已達。他們要求撤回條例草案，既已撤回，於願足矣。

事實卻絕非如此，可見毫無疑問，這場運動包藏的禍心，還要黑暗得多。

7月1日星期一是公眾假期，慶祝香港特區回歸中國。當天，一批有組織群眾闖入立法會大樓，大肆破壞議事廳，污損中國國徽，高舉香港殖民時期旗幟。該批暴徒向政府及現有憲制秩序宣戰。

這也是一場民主戰爭，如同1933年希特勒的暴徒火燒國會大樓一樣。這正是時候，好讓民主運動資深領袖和立法會“泛民”議員來跟這場運動撇清界線，譴責種種暴力及褻瀆行為。然而，他們並無一人這樣做，那便是與運動的暴徒為伍，關係密不可分了。

再快轉到2020年7月11及12日，《香港國安法》剛剛頒布。當時，多名煽動者聯手發起其所謂的“初選”，物色最佳人選，參選該年稍後舉行的立法會選舉。其後，他們涉嫌觸犯新法例的顛覆國家政權罪，因而被捕。

在一份提交國會的報告中，英國外交大臣多米尼克・拉布指《香港國安法》正被用來“扼殺政治反對聲音”。

可悲的是，這位外交大臣似乎未得事實的全貌；否則，像他這樣地位的人，又怎會故意歪曲真相呢？

此事的真相大都有公開紀錄。所謂的“初選”，在整個處心積慮推翻政府的大陰謀中，只屬一小部分。這稱為“真攪炒十步”的行動，羅列於2020年4月底的《蘋果日報》。這場陰謀的名目是“攪抄”，意指“玉石俱焚”，取材自流行電視劇集的對白。從表面看來，這是叛亂者的最後一着，孤注一擲，試圖推翻政府。

事實未盡呈現，調查仍在進行，案件還未開庭審理。

比如說，究竟開了甚麼條件，誘使選民現身“初選”投票？大概對不同選民，說的也不盡相同；這又可能涉及別的問題，即究竟所言是否屬實。據警方表示，選民獲付巨款參與投票，涉款港幣160萬元已被凍結。箇中意義如何重大，有待探究。

在此情況下，英國外交大臣斷言《香港國安法》正用來“扼殺異見”又何對之有？

時至今日，英國國會上提出了一項法案，題為《2021年警察、罪案、判刑及法庭法案》。普羅大眾對此大力反對，紛紛上街抗議。政策文件內容如下：

“抗議，在這充滿活力、寬懷包容的民主社會裏，屬重要一環。根據人權法，人人有權聚集和表達意見，但這些權利並非絕對。這個事實帶出一些重要問題，讓警方以至整個社會考慮，到底社會可容忍多大程度的擾亂，以及如何處理違法的抗議者。我們應在個人權利與社會整體利益之間取得公正平衡……”

舉例來說，該法案第59條廢除了“妨擾公眾”的普通法罪行，取而代之的是一項法定罪行，涵蓋範圍非常廣泛，一經循公訴程序定罪，可處監禁10年。

比如說，香港政務司司長就這項條文或就英國應如何取得“公正平衡”發表評論，這樣做對嗎？顯然不對。既然如此，對方倒過來強加評論，又豈能成理？

再者，《香港國安法》處理的要比所謂“公正平衡”更具根本意義。《香港國安法》實施，讓香港政府自回歸以來，首度能以有效立法應對叛亂。

《香港國安法》開宗名義列出總則，訂明全面保障香港居民的合法權益。規管刑事審訊的普通法原則，包括無罪推定、排除不利證據等，亦受保障。

試看美國的《2001年愛國者法令》，較之《香港國安法》，對比鮮明。

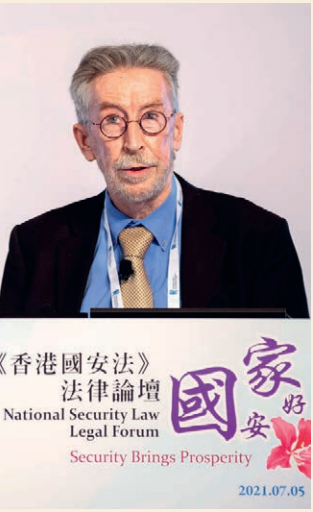
該法令旨在阻嚇和懲處美國及世界各地的恐怖主義行為，從法律文本極難判斷其整體效力。它不僅是賦權法令，也是修訂法令，同時修訂其他多項成文法則。除非熟悉其他該些成文法則，否則無法理解該法令。

然而，該法令的引言段落叫人吃驚。內容如下：

"本法令任何條文……適用於任何人或情況時，須解作獲予法律所容許的最大效力，除非所持的解讀方式屬完全無效或不能強制執行，而在這種情況下，有關條文須當作可與本法令分割……"。

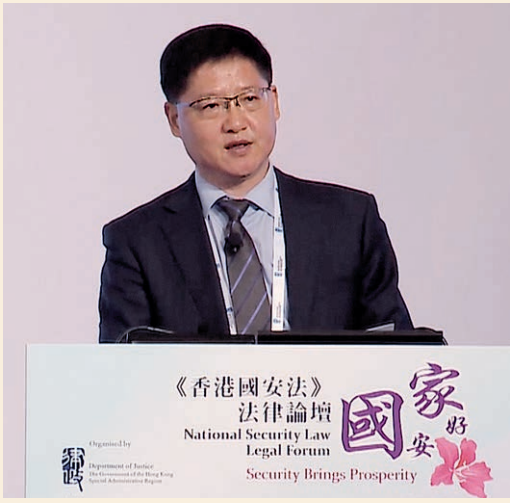
文中片字不提無罪推定，被告人權利的保障條文也都欠奉。

西方領袖和媒體連番指責，所謂北京利用《香港國安法》扼殺香港的自由，此說與現實大相逕庭，難免令人有此結論：一如董建華先生所言，香港正淪為引發更廣泛權力衝突的工具。



第三節座談會：

國家安全法的比較研究



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朱國斌：各位嘉賓、各位同事、先生女士，下午好！

《香港國安法》通過和實施，這一着叫很多人始料不及。然而，事態發展至此，實屬順理成章。《香港國安法》立竿見影，迅速穩定社會，恢復社會秩序，重建信心。中央政府直接行使立法權力在香港特別行政區（“香港特區”）維護國家安全，此乃合憲合法。中央政府旨在防範和懲治危害國家安全的行為，同時敦促香港特區政府履行維護國家安全的憲制義務。

《香港國安法》通過並在香港特區實施，無疑將為香港的政治、法律、社會、理論、實踐及其他多方面帶來深遠影響。這將見於制度上，影響深遠流長，程度甚至會遠超預期。對於香港法律制度的影響，會體現於憲制秩序、人權保護、刑事法律、刑事訴訟程序和司法制度。鑑於《香港國安法》實施只有一年，很多問題、疑題和難題均未盡呈現。因此，現時最為必要的是，繼續觀察這項新法如何施行，並進行全面而深入的討論和研究。

今早法律論壇兩節座談會討論過《香港國安法》“實體法”和“程序法”方面的事宜，現在進入第三節：“國家安全法的比較研究”。

事實上，世上大多國家及地區，均各自訂有法律，維護國家領土完整及國家主權。國家安全涉及一個國家或一個地區的根本利益。鑑於政治制度及法律制度上有別，規管國家安全的法律條文亦因司法管轄區而異，這亦可以理解。不過，當中總會有些共通的價值、原則、制度，甚至立法技巧及經驗，可予適用。這就是我們今天討論的課題。

為此，今次論壇非常榮幸邀請到三位知名學者，跟我們分享其研究成果及心得。他們分別是：香港大學法律學院的高禮文教

授、香港中文大學法律學院的Professor LIM Chin Leng，以及香港大學法律學院的趙雲教授，而趙教授也是海牙國際私法會議亞太區域辦事處代表。本人朱國斌是香港城市大學法律學院法律教授，亦是國際比較法學院院士。

高禮文教授是香港大學法律學院客座教授，曾於澳洲蒙納士大學及香港城市大學任教，也曾在奧地利、比利時、加拿大、中國、英國、日本及瑞士多間大學擔任訪問學者，於不同國家、地區的研討會及會議上發表演講。他以作者及合著者身分著書，以及撰寫共200多篇文章、扎記及評論。今天高禮文教授談的是“國家安全法：澳大利亞與新加坡的比較研究”。

Professor LIM Chin Leng現任香港中文大學法律學院教授，也是倫敦國王學院的客座教授及英國國際法和比較法學院的名譽高級研究員。在他眾多著作中，我想特別一提他合編的 *Law of the Hong Kong Constitution*。Professor LIM將會談的是“國家安全法：英美比較研究”。

趙雲教授是鄭家純基金國際法教授及香港大學法律學系系主任，亦是內地多所著名大學的客座教授。趙教授現任中國國際法學會常務理事、香港互聯網論壇始創理事、巴黎國際空間法學會會員、亞太法律協會及北京國際法學會會員。趙教授的講題是“從國際法角度看《香港國安法》”，特別對照“歐陸地區的實踐”。

從各講者擬備的大綱所見，演講特別涵蓋的課題及議題，範圍廣泛豐富，並會對照香港的法律與實踐來進行討論。這些題目及議題包括：憲制秩序及國家安全法、國家的角色、國家安全法的法律體制、執法機構及機制、引渡及政治罪行、法律的域外適用、國家安全法下的個人權利、保護公眾利益與保障個人權利和自由之間的緊張關係，以及法院的角色。

現在，有請各位講者開始發言，依次是高禮文教授、Professor LIM Chin Leng和趙雲教授。有請各位。

■ ■ ■ ■ ■

高禮文：各位嘉賓、各位朋友，下午好。

感謝朱國斌教授剛才的介紹。在此，也感謝律政司邀請我來法律論壇演講。

在一個理想的世界，不需要國家安全法；我們身處的世界很美好 —— 卻遠非理想。2019年香港發生的事，警醒我們這個定理。這場叛亂，源自連串大型示威遊行，卻由此蔓延開來，及至當年6月初，形成一股號召力，隨後持續多月，形勢嚴峻。

在正常現實世界中，國家安全法的實施由來已久，至今數百年了，各地形式有所不同。例如於1351年，英格蘭金雀花王朝愛德華三世統治期間，該地制定《叛國法令》，將普通法的叛國罪編纂為成文法則。

隨着時間的推移，各地的國家安全法發展起來，較前詳細和複雜得多。這與時勢有莫大關連。自2001年美國發生911襲擊後，美國率先大力加強國家安全立法，隨後各國也紛紛跟隨（儘管如此，香港卻原地踏步，直至去年才有此舉措）。

有見及此，今天要討論的範圍甚廣。為此，我計劃分配時間如下：

- 概述“澳大利亞國家安全框架”的主要方面；
- 簡要討論新加坡的“國家安全框架”；及

- 考慮兩者的相關個案研究，從而說明兩套國家安全制度有何影響。

澳大利亞國家安全框架的主要方面

“五眼安全聯盟”—— 歷史與意義

“五眼安全聯盟”起初是“雙眼聯盟”—— 只有英國與美國。在二次大戰期間，英美兩國的解碼員根據1941年美國參戰前不久達成的《大西洋憲章》，建立了工作夥伴關係，效用極高。1946年3月，英美兩國達成秘密條約，實際上便是“雙眼聯盟”的成立，將美國國家安全局和英國政府通訊總部的工作聯繫起來。

加拿大於1948年參與其中，澳大利亞和新西蘭也於1956年加入行列。隨着其他別國退出，不再正式參與，如今所知的“五眼聯盟”就此確立，成員就是二次大戰的五個主要英語盟國。“五眼聯盟”在成員國加強聯合安全框架方面，扮演着重要的角色。

2013年，曾任職美國國家安全局的愛德華・斯諾登 (Edward Snowden) 提供洩密文件，披露聯盟國不僅在外國從事間諜活動，還監視彼此的公民，然後互相分享所得資訊。這便另闢蹊徑，得以規避本土國家安全法適用於監視公民的限制。該聯盟還通過安全部門合作，對外國策動暗中政治干預，當中包括1953年在伊朗和1973年在智利發動推翻當地政府。

廣泛的澳大利亞法律框架

澳大利亞政府網站概述了適用的主要國家安全法，以及依此等法律運作的各類國家安全機關。這些是聯邦法律，部分屬載有重要國家安全條文的普遍適用法律。另有其他相關法律，適用於國家級別。下述聯邦摘要，只列出最突顯的既定國家安全法，未予盡錄。

簡要來說，最重大的聯邦法令如下：

- 《1903年國防法令》
- 《1914年刑事罪行法令》
- 《1945年聯合國憲章法令》
- 《1979年澳大利亞安全情報組織法令》
- 《1979年電訊（截取及取用）法令》
- 《1989年刑事罪行（人質）法令》
- 《1991年刑事罪行（航空）法令》
- 《1992年刑事罪行（船舶及固定平台）法令》
- 《1995年刑事法典法令》
- 《2004年航空運輸安全法令》
- 《2004年國家安全資訊（刑事及民事法律程序）法令》
- 《2004 年監察器材法令》
- 《2018年國家安全立法修正案（間諜及外國干預）法令》（《外國干預法令》）

在澳大利亞運作的安全機關包括專門機關和其他涵蓋安全保護責任的機構。主要安全機關有：

- 澳大利亞安全情報組織 —— 主要負責本土安全職責
- 澳大利亞安全情報局 —— 主要負責海外安全職責
- 澳大利亞聯邦警察局
- 澳大利亞邊防局
- 澳大利亞刑事情報委員會
- 澳大利亞交易報告及分析中心

該國近年對國家安全制度作重大檢討，正據此陸續大幅增加相關的撥款和權力（見下文）。澳大利亞至少有13項重大國家安全法（包括2018年通過《外國干預法令》作出全面修訂及更新），並設六個主要機關參與實施這些法律。還須緊記，這些是聯邦

法律和機構，背後還得到若干安全相關的國家級法律和機構所支援。

上列的法律涵蓋了最廣泛的安全關注事宜，包括：

- 叛國、叛逆、破壞；海盜行為；間諜活動、恐怖主義、恐怖分子資金籌集；劫持人質；干擾船舶或航空；外國干預澳大利亞國內政治；以及外國入侵澳大利亞。

處理的程序事宜包括：

- 關於被控犯恐怖主義罪行者不得保釋或須依較嚴格條件保釋的規定；連同加強規管、監察；以及搜查權和資訊收集權。

《1995年刑事法典法令》也具域外效力的範圍，訂明任何人在澳大利亞境外罔顧後果或蓄意對澳大利亞人造成嚴重傷害，即屬犯罪。

最近，嶄露頭角的澳大利亞法律學者伊夫琳•杜埃克(Evelyn Douek) 主張，根據2018年通過的新訂《外國干預法令》，*“任何人明知而代表[定義甚廣的]外國主事人從事秘密行為或欺騙，意圖影響澳大利亞政治進程、投票權的行使，或損害國家安全，即屬違法。”*有關行為若屬蓄意，最高刑罰為監禁20年；若是出於罔顧後果的行為，最高刑罰則為監禁15年。另有其他條文訂明，凡就任何政治進程向目標對象施以影響，均屬刑事犯罪。杜埃克指，這些條文可能涉獵甚廣。

國家安全制度的近期重大檢討

澳大利亞安全情報組織前局長鄧尼斯•李察遜(Dennis Richardson) 進行了《國家情報界別法律框架全面檢討》(“《李察遜檢討》”)。該項檢討指出，自911襲擊以來，聯邦議會接獲

逾120項關乎國家情報界別的法令提案，使該國的國家安全制度，位居全球最複雜之列。

《李察遜檢討》長達1,300多頁，載有204項建議。李察遜相信，要完成他就國家安全法所建議的徹底改革，需額外斥資1億澳元（還未計及2018年新訂《外國干預法令》所作修訂的費用）。僅是進行這項檢討，就已耗資1,800萬澳元。

各州在國家安全方面的角色

根據《澳大利亞憲法》及其現行的聯邦制度，六個州及兩個領地負責訂立和實施各自的一般刑事法。澳大利亞沒有如加拿大聯邦制度所設的一般聯邦刑事法。因此，許多可能構成違反《聯邦國家安全法》的刑事罪行，可能同時嚴重觸犯了州或領地的刑事法制度。此外，違反國家安全的案件，往往可能由州或領地的警隊率先處理。

每個州和領地設立各自的專門協調機構，藉以在各別司法管轄範圍內打擊國家安全威脅。他們監督地方級別事宜，例如：反恐怖主義監察及行動；重整基建措施；管控危險品供應；生物危害方面的保護規劃；以及緊急衛生及福利服務。

各州及領地獲指示須與國家協調合作，共同應對國家安全威脅。

新西蘭的觀點

新西蘭固然自成一套國家安全制度，但它不如澳大利亞般繁複。

在華盛頓倡議下，堪培拉對於可利用“五眼聯盟”來施加某程度的同步地緣政治壓力，帶來潛在利益，似乎愈來愈感吸引。

換言之，堪培拉和華盛頓察覺到，可如何推展“五眼”*安全保護平台*，使得在尤其關乎中國的若干爭議問題上，“五眼聯盟”可連番協調起來作出*政治回應*。

在這個議題上，新西蘭的立場與澳大利亞不同。新西蘭總理和外交部長表示，他們重視“五眼聯盟”作為安全聯盟的成員身分。但新西蘭不同意利用此*安全聯盟*，藉着提出聯合地緣政治主張，向中國施加*政治壓力*。他們以強力論據反駁，指此聯盟明確關注安全保護事宜，若要聯手政治施壓，理應在聯盟以外進行。

針對新西蘭的回應，美國之音 、美國有線電視新聞網及澳大利亞版“六十分鐘時事雜誌”等媒體，在報導中出力落井下石，大力渲染，指堪培拉和華盛頓現正重拳還擊，回攻新西蘭的立場。

新加坡國家安全框架的主要方面

新加坡一再列入現時港人移居上選，這是可以理解的。馬凱碩 (Kishore Mahbubani) 說，要評定社會成就如何，特別是在東亞，重點測試是衡量經濟成果，審視社會廣泛分享成果的程度。馬凱碩以此標準清晰指出，新加坡創造了舉世最成功的社會。

雖然是否能膺“舉世最成功”可再作別論，但新加坡畢竟成就斐然，這點清楚不過。 然而，新加坡如此吸引移居者，到底核心原因何在？

最重要的是，新加坡給予居民、企業和訪客長久穩定和高度個人安全，跨越公共領域亦然，加上這裏有着勤努不懈、繁榮廣享的精神，這就是箇中原因。 新加坡的法治制度堅守“免於恐懼的自由”這核心原則，但此一戒條於2019年在香港卻飽受摧殘。

新加坡有效的法治制度賴以成功的關鍵，是其國家安全框架。新加坡約有20條個別法律協助維護國家安全，其中最重要的是《內部安全法令》(《內安法令》)。據國際法學家委員會指，《內安法令》訂定重大行政權力，例如容許新加坡總理能以國家安全為由禁制某些刊物，亦能將某些區域頒布為“安全區”（可適用規例範圍甚廣）。

總理在某些情況下還能根據《內安法令》頒令作出長達兩年可予再續的不經審判拘留。當然，這樣便完全排除了保釋的可能。若針對依《內安法令》所作決定提出司法覆核，則只有為確保程序得以遵行時，方可得直。在極為嚴重的國家安全案件中，死刑可予適用。

與此同時，新加坡的媒體監管比香港嚴密得多。路透社研究所 (Reuters Institute) 指出，印刷和廣播媒體主要由兩大公司經營，兩者均與執政黨有所關聯，在網媒中亦各佔主導地位。自由之家 (Freedom House) 說，新加坡的媒體必須極為謹慎，避免發表“煽動性、誹謗性或傷害宗教情感”的言論。

新加坡於2019年訂立強而有力的反假新聞法，打擊那些專門“利用”國內“隔閡”無中生有的虛假資訊（尤其網上者）。有人權評論員認為，這是言論自由的災難。

根據透明國際 (Transparency International) 近日的報告，新加坡榜列最清廉司法管轄區的前百分之二。約與此同時，美國的《世界公義報告》評定新加坡的法治奉行程度，（全球）排名前百分之十一。然而，無國界記者組織 (Reporters without Borders) 最近卻評定，論新聞自由，在眾司法管轄區中，新加坡位列最末的百分之十六。與此相比，香港特別行政區相應排名如下：清廉方

面榜列前百分之八；法治奉行程度排名前百分之十三；新聞自由度屬前百分之四十。

馬來西亞

馬來西亞主要以兩項法律，應對國家安全（特別是恐怖主義）的事宜：

- 《2012年安全罪行（特別措施）法令》(《安全罪行（特別措施）法令》)；及
- 《2015年防範恐怖主義法令》。

前者（《安全罪行（特別措施）法令》）取代了《1960年內部安全法令》（馬來西亞《內安法令》）。馬來西亞《內安法令》，一如新加坡的同名法令，歷史可追溯至英國殖民統治時期。

馬來西亞的人權倡導者一直主張廢除反恐怖主義法，但不見得能說服政府。當局亦提出強力的專家論點駁斥，強調這些法律對保護馬來西亞國家安全向來至關重要。

個案研究

澳大利亞

此澳大利亞個案研究關乎的是，澳大利亞廣泛的國家安全制度與當地大學界別（包括澳大利亞多所知名大學）之間近日的相互關係。瞭解背景，對掌握事情始末來說，十分重要。

普遍認為，相比1989年6月初天安門事件以來的任何時候，堪培拉與北京現時關係最為緊張。“澳大利亞恐華症正處高峰嗎？”—— 近日有人撰文侃談當前中澳關係的概況，標題便有此一問。撰文者是澳大利亞迪肯大學 (Deakin University) 的史葛特・伯切爾 (Scott Burchill)，文章刊於2021年4月網上公共政策期刊《珍珠與刺激》(Pearls and Irritations)。

伯切爾開宗明義提出，“近年來在澳大利亞，有些天真的國會議員、機會主義學者和幼稚的記者，紛紛鼓吹恐華風，這股風氣現已步入新麥卡錫主義階段。”文章接着細述論點如下，支持開首表明的立場，印證文章標題貼切不過。

澳大利亞政圈某些曾任高官的中左翼政客，包括前總理保羅・基廷 (Paul Keating) 和前外交部長傑洛斯・伊凡斯 (Gareth Evans)，對於澳大利亞安全部門現時過度影響堪培拉政府的對華決策，深表關注。這些澳大利亞機關與一貫鷹派的美國主要安全部門互有密切聯繫，更叫人憂心不已。

《悉尼先驅晨報》(Sydney Morning Herald) 2021年3月的報告解釋，澳大利亞知名大學過去三年來，有感中國及其他外國政府干預日益加劇，於是“大大加強〔與澳大利亞安全情報組織的相互關係〕”。澳大利亞安全情報組織亦於同一報告證實，該組織2020年曾60次與多間澳大利亞知名大學進行接觸。一些大學包括新南威爾斯大學，呼籲安全機關再多加介入和提供協助。關於海外相互關係(尤其與中國方面)，當局新訂嚴格指引，現予適用。

情況非比尋常。此外，對於高等學府如此欣然接受這種諜報式的意見和影響，主流媒體卻鮮有提出關注。

伯切爾繼而指出，一些澳大利亞知名大學認為有必要表明自己全然愛國，更不惜大灑金錢委聘顧問公司作私人風險評估。該公司領航人曾任記者，自稱為精通中國共產黨運作的專家。由此可見，這些大學信不過其學術人員能遵從新指引。伯切爾續說，“[這一委聘，]究竟旨在對堪培拉漸入膏肓的恐華症刻意奉迎，還是想防患未然，望能避過政府進一步蠶蝕學術獨立自主，目前尚不清晰。”

安婕娜・雷曼 (Angela Lehman) 是墨爾本專業國際教育組織Lygon Group的研究主管。她在比較研究方面的經驗，至少可作為直接的測量方法，衡量澳大利亞安全機關與當地大學大力加強相互關係，究竟帶來甚麼影響。

她2021年6月也在網上公共政策期刊《珍珠與刺激》發表文章闡述，自己在中國生活和從事研究十年，有數年曾於廈門大學任職助理教授。現在回到澳大利亞，她在文中指出，“在一所中國大學駕馭監察機制和文化，遠比駕馭澳大利亞現時的意識形態監察要簡單得多。”她又說：“我們這個自由民主國家是熱愛自由、暢所欲言的，但我發現自己在此反而更在意地自我審查，對華方面甚麼能說、甚麼不能說，情況較身處彼邦的經歷更甚。”

雷曼還評論說，在華中國學生，毫不遜於澳大利亞的學生，但他們會憑着自身的共同經歷，思考“大格局”，和“想要瞭解自己在世界有何席位”。

與此同時，伯切爾語帶尖銳地說：“對於外國的干預，[澳大利亞] 政府也非事事操心。就舉美國、英國和以色列三國為例，論學術合作，澳大利亞與它們之間的協作，程度要高得多。幾乎可以肯定，該三國[在澳大利亞]的間諜活動，均比中國進行的要多，但澳大利亞安全情報組織對它們干預澳大利亞內政，卻仍輕鬆自若，處之泰然。”

最近，傑夫・斯派羅 (Jeff Sparrow) 在《衛報》撰文揭示，1970年代駐堪培拉的若干美國外交官員，與當時澳大利亞勞工運動的主要領袖、後來的澳大利亞總理鮑勃・霍克 (Bob Hawke)，兩者之間如何長期密切接觸。這些人互有往來 —— 還有其他澳大利亞工黨主要人物也參與其中 —— 清楚說明美國密使如何暗佈網絡。斯派羅亦指出，2018年的新訂《外國干預法令》

可“至少以一紙法律，將數十年來美國人此等樂此不疲的干預行為，訂為刑事犯罪。”

新加坡

我們先前看到，新加坡總理（經政府建議後）如何能在某些情況下根據《內安法令》頒令作出長達兩年可予再續的不經審判拘留。這項權力不常行使；但也非休眠權力。

新加坡公民姚俊威 (Dickson Yeo) 於2020年因以外國勢力（中國）非法代理人的身分行事而於美國被拘留。他對此認罪，在美國服刑14個月，2020年12月被遞解出境，遣返新加坡。回國後，他被新加坡內部安全局（“內安局”）拘捕。隨後於2021年1月，他依《內安法令》被拘留兩年。內安局表示，他曾在新加坡從事外國（中國）的有償代理人。內安局解釋，他們的調查仍在進行，有必要根據《內安法令》延長姚俊威的拘留，以全盤揭露其不當活動。

總結

上文已廣泛評析：

- 澳大利亞與新加坡的國家安全制度；並綜論
- 兩個具指向性的個案研究；

據此，我來總結一下個人的見解。

*見解一：*所有司法管轄區均有權利和責任保護自身的國家安全。

*見解二：*50年前，道路交通的法律異常簡單；今天，它們遠比從前廣泛、詳細、複雜得多。立法保護國家安全，進程也是類同。

這兩種情況下，在維護公共利益與維護個人利益之間均存在角力。這種角力，於國家安全法而言尤其強烈，因為一旦違反懲罰非同小可。

*見解三：*新加坡訂立了強力有效的國家安全制度，按任何標準來說亦然。該制度在新加坡國內廣受認同，顯然是繁榮穩定的基石。許多港人強調，今時今日，香港特別行政區已實施新訂的《香港國安法》，因此新加坡作為移居之選甚為吸引。這倒耐人尋味，因為新加坡長設明確、極嚴且成功的國家安全規管，而這些規管比自2020年6月30日起香港目前所實施的，大為嚴厲得多。

*見解四：*澳大利亞國內現時不惜工本大力加強全面國家安全規管，驅使這一切的背後原因，最重要的是有一派說法，言之鑿鑿強調中國正威脅澳大利亞的國家安全，此說自2018年起更甚囂塵上。這些規管的影響正日益擴大，尤以專上教育界別為甚。

*最後：*本評析提出若干原則，我相信，對於應如何實行國家安全制度，可給予一點導向。凡任何國家安全法賦予政府莫大權力，則務請注意：

- 該等權力必要時應堅決施行，但切忌衝動；
- 施行權力時應冷靜沉着，無懼無私；
- 施行權力時不應因當前任何過度的政治熱潮有所偏頗；及
- 該等權力應始終如一謹慎施行。

謝謝。

■ ■ ■ ■ ■

Lim Chin Leng：律政司司長，非常感謝這次的邀請。尊敬的觀眾、各位朋友、先生女士。我獲邀為大眾講解比較法，感

到非常高興，這實在是我有生以來首次呢。我只知道兩類人會談論比較法：執業律師，為甚麼，因為這有利可圖；另外就是學者。學者會討論比較法。我有幸參與一家期刊的工作，該期刊過去125年一直探討如何比較法律。我知道現在是下午4時，繼Richard之後我只有15分鐘時間。我真的十分感謝Richard，因為正如大家所見，我手上只有一小頁紙，所以我不會給大家來一場小型講座談論如何比較法律。相信大家感興趣的是，將《香港國安法》與英美的同類法律作一比較會有何發現。

十分感謝主持人朱教授的美言，剛才的介紹過譽了。他請我談談域外效力。我想這是因為很多於香港以外論及《香港國安法》的人士都非常關注此法的域外效力條文吧。今天較早時，我們聽過第三十七及三十八條的解說。就讓我由此說起吧。接着，我會說說英美國家安全法的歷史。然後，我將提出一個觀點 —— 那就是，當你把《香港國安法》與英美的同類法律作一比較，實際而言，那會有何顯著、有何特殊之處，以及這樣比較會有何發現呢。

談到域外效力，最為人知的英國案例涉及一位名叫William Joyce的人。他於二戰期間為打擊英國民眾的士氣而在德國進行廣播，內容大意是：英國人民，你們完蛋了。二戰過後，他被逮捕審判。時任大法官喬伊特勳爵 (Lord Jowitt) 說：問題不在於他從何處廣播這些信息，他從德國進行廣播，但他是誰呢，是英國國民。儘管他的英國護照很可能是欺詐得來，他終究是英國國民，故有權要求官方保護，因此他們把他問吊了。我在期刊《法律報告季刊》(Law Quarterly Review) 這樣寫道：問題不是叛國罪在何處犯的，而是由誰所犯，倘若總算是國民，便不會引起爭議。

英國把《2000年恐怖主義法令》的適用範圍擴至國民及居民，涵蓋如炸彈襲擊、恐怖分子資金籌集的行為，並修訂該法令，推

而擴及從事恐怖主義海外訓練等事宜。所指的是，你本身的國民遠赴海外培訓，從而在英國或針對英國駐外使館，幹些極為不堪、反社會之事。

那麼，關於域外效力這點，英美法律所構想的，英美律師本身所設想的，與身處香港或內地的我們所看到的，可能迥然不同。英美法律觀念有一強力推定，就是反對任何具域外效力的法律。因此，若參照美國最高法院在1983至2021年間的司法判例，舉例來說，我們會發現，1983年的*Hartford Fire*案中，法官蘇特 (Justice Souter) 於美國反壟斷或競爭法的背景下有此論述：“倘若你不論身在何處皆可遵守美國法律，而不論你身在何處遵守美國法律也非違法，那麼無論你在何處都應該遵守美國法律。”這是1983年高峰時的情形。然而，到了2004年的*Empagran*案，同一最高法院決定撤回該立場。大多數評論員指，原因是當時半個世界都已採納美國法律，便不必再藉此方法叫人遵守美國法律和遵從美國《謝爾曼法令》，因為競爭法無處不在：西西里、首爾、東京和香港的律師今天都在談論競爭法。那是美國法律。

到了2013年，我們有《外國人侵權法令》或《外國人侵權請求法令》，可藉其提出人權訴訟，例如在*Kiobel*案針對荷蘭皇家石油公司所提出者。大家終於看到美國司法管轄權的勢頭退卻，因為在*Kiobel*案，美國最高法院基本上應用2010年*Morrison*案的判決，表明除非某事在足夠程度上觸及和關涉美國，否則不會對該事宣示司法管轄權。

所以，如果你設身處地從英美法律的觀點、從美國法學的觀點看世界，你會同樣認為人們不應把法律擴及海外。而當你檢視國家安全法一類法律，便覺得它看來彆扭，因其載有域外效力條文，但這只是我們置身英美法律之內所看到的印象。我們在香港

亦感受到美國法律，近月甚至近年以來在香港和內地都可感受得到。

2020年7月14日頒布的行政命令，是繼《國際緊急經濟權力法令》出現所應運而生的。現在，我們對《國際緊急經濟權力法令》追本溯源，就會發現它源自與敵貿易法例。所以，我們今天提到的制裁，美國對香港施加的制裁，其實源自一項具域外效力的國家安全法。我們通常不會把制裁想成國家安全法，所以這並不罕見，大家對此體會深切呢。

至於英美國家安全法的歷史方面，《美國憲法》的叛國罪條文十分聞名，它訂明被控人須在兩名證人指證下，或須在公開法庭上親身招認，始會被裁定犯了叛國罪。早期的叛國案件甚至涉及對美國前副總統亞倫・伯爾 (Aaron Burr) 提出檢控，當時他是托馬斯・傑斐遜 (Thomas Jefferson) 的副總統。其後，多宗二戰案件涉及援助敵人。1947年的*Haupt*案涉及一名父親包庇兒子。

至於較近代，著名的案件有*United States v Rahman*案：*Rahman*案與世貿中心爆炸案有關。那是1999年的案件，案中人被控“串謀煽動叛亂罪”。而有趣的是，*Rahman*案援引了另一名案，那就是1951年的*Dennis*案。*Dennis*案的案中人為何被控告呢？他們是因策劃傳授的內容而被檢控，他們策劃傳授馬克思主義，策劃傳授列寧主義等等。

此時，大家可能會認為，即使在1951年，美國已有發表自由這東西。而美國最高法院當時表示：是的，他們可自由討論馬克思，可自由討論列寧、恩格斯、史達林或任何想討論的事；但當變成宣揚推翻政府，他們便越界了。在該*Dennis*案，美國最高法院也摒棄所謂“明確和即時危險”的驗證，指不必有明確和即時危險。我提及這點不是出於批評，而是因為有這麼一種誤解，

以為在涉及國安情況下保障權利是頭等大事。但通常來說，你一旦牽涉國安事宜，就會發現實情並非如此。不幸的是，在涉及國安的情況下，權利通常並不重要。

在*Dennis*案，案中人入獄經年。在1999年的*Rahman*案，案中人也入獄多年。"串謀煽動叛亂罪"可用言論及文字等作為提控證據。你可能又會認為，人們有權表達己見、發表言論及寫作。最高法院則表示："沒錯，但我們還是可用其所寫所說的來提出檢控，還是可用之作為證據。"

2001年英國訂定《反恐怖主義、罪行及安全法令》(Anti-Terrorism, Crime and Security Act)，第21至23條現已廢除。但我們看到那數年間，僅憑懷疑、依據國務卿所發的一紙證明書，便可不經審訊無限期剝奪個人自由，而有關決定不可在法庭席前覆核，情況就是如此。在英國，這樣為防範罪行而作出拘留，做法由來已久，手法低俗。在北愛爾蘭的情況中，就曾使用過。*The United Kingdom v Ireland*是英聯邦的有名案件，相信Richard已講述過。我們看到了不經審訊作無限期拘留以防止罪行，這樣的歷史遺風。

我嘗試很快作個總結，好讓摯友趙雲有20分鐘時間。今天，英國有人認為《叛國法令》並不足夠，當初頒布的《1351年叛國法令》幾乎已有700年之久。若參看法律書籍*Archbold*或*Blackstone's Criminal Practice*，就會發現兩部權威典籍皆指，提控叛國罪的可能性微乎其微。然而，今時今日，一些顯要人物倡議改革關於叛國的法令，並認為應訂立背叛國家罪及資敵罪。

總的來說，比較法律，其實是在做甚麼呢？比較的甚至是同一事物嗎？我們是否在比較可比之事？港外人士看《香港國安法》，會說："啊！看看域外效力條文"。通常，他們的注意力全落

於第五十五條：就是今早提述的條文，大家也聽過了。香港法院的司法管轄權何時不在？只有三類非常例外的情況才會如此。舉例來說，如政府無法執行《香港國安法》，情況必屬非常極端了；或是，出現國家安全面臨重大現實威脅的情況；又或是另一非常極端的情況，即涉及外國或境外勢力介入。這些統統都是極例外的情況。最有意思的問題卻在於：為何？為何會有第五十五條呢？因為香港屬國家的一個地區 —— 解釋就這麼簡單。沒甚麼可作比較。那樣比較並不恰當。

恰當的比較應是這樣：第四條保障我們的基本自由。它藉提述《基本法》來保障我們的基本自由。它藉提述《公民權利和政治權利國際公約》依法適用於香港的有關規定來保障我們的基本自由。若將其與英美法律史上涉及國家安全的實況相比，每每發現對比極為鮮明。這是我就比較法提出的唯一觀點。多謝。

■ ■ ■ ■ ■

趙雲：謝謝主持人，各位下午好，很榮幸獲邀為今次論壇發言。

國家安全法就國家如何處理其政府、價值及存續所面對的威脅訂立方針。國家安全概念聚焦於國家價值，保護其免於遭受外部武裝侵犯、內部武裝叛亂、顛覆國家政權及經濟上的限制。比較研究向來能做到從各法律制度歸納出明顯的法律相似性。故此，我希望這一環節有助大家以國際視野來對比分析《香港國安法》。某程度上，鑑於國家及民族的關鍵價值，以及在國家和國際層面上負責維護國家安全的機制和組織，均邁向標準化，國家安全法亦不再純屬國家層面了。我的一眾同事已就若干司法管轄區的情況，作過精彩簡報。這次的簡報中，我會講述一下歐陸地

區的概況，從國際法的角度討論若干議題，包括引渡及《香港國安法》的域外適用範圍。

自二戰以來，國家安全一直是歐洲的重大議題。幾乎所有歐陸國家都為此立法，形成所謂“具歐洲特色的國家安全法律制度”。有別於其他司法管轄區的綜合立法模式，歐陸國家一般不會就國家安全專訂一項綜合法律，而是把相關條文納入個別國家法律當中，特別是刑事法。

歐陸國家不斷完善保護國家安全的法律制度，可見兩大特點。第一，歐陸各國強調維護憲制秩序的重要，首要是維護基本政治體制及以憲法為本的核心價值。第二，歐陸各國均仰賴強大執行機關的支援，儘管各別執行機制會因應歷史及傳統背景而有所不同。舉例來說，法國着重反恐工作，故採取措施打擊恐怖主義及其他國安相關的犯罪；德國則因其納粹歷史而更着眼極端主義，故較多採取措施防患未然。指導思想方面，法國較重視綜合國家安全觀（包括政治及社會安全），德國則較着重傳統的政治安全。

現在，我以德國為例，闡述國家安全制度。我得承認，這是就歐陸國家的相關條文作非常概略的介紹。

德國《刑法典》訂明，凡針對其聯邦、針對該地，而“將該[地]的全部或部分領土……納入別地，或將該[地]的一部分從其分離出去”，不論有否使用武力，均屬犯重大叛國罪。《刑法典》還訂明，凡準備從事重大叛國行為，亦屬犯罪。

關於域外效力，《刑法典》明確規定，其條文適用於海外所作的行為：“不論犯罪地點適用法律為何，德國刑事法均適用於海外所犯罪行，包括重大叛國罪。”

對於其他罪行，亦作出了相類安排。《刑法典》訂明，凡準備犯嚴重暴力的危害國家罪行，即屬犯罪。若有關準備在海外作出，《刑法典》亦予適用。

《刑法典》亦將以下行為，另訂為叛國罪：間諜活動、透露國家秘密、叛國間諜活動、刺探國家秘密、泄露國家秘密、以代理人身分從事叛國活動、從事情報組織代理人的工作。

《刑法典》還訂有破壞國防設施罪、危害國家安全情報活動罪、危害國家安全圖像罪。不論犯罪地點適用法律為何，如該等罪行是海外所犯，德國刑事法均予適用。

談到被控人的各項權利，《刑法典》容許在危及國家安全的案件中摒除辯護律師的參與。《法院憲法法令》訂明，若案件有可能危害國家安全、公共秩序或公眾道德，法院有權禁止公眾旁聽聆訊。如在緊急情況下懷疑某人犯罪並有理由將其拘留(例如有潛逃的危險)，即符合審前拘留的先決條件。

接下來，轉從國際法的角度，探討幾個特定的議題。首先是公開審訊。

《公民權利和政治權利國際公約》第十四條訂明："法院得因民主社會之風化、公共秩序或國家安全關係，禁止新聞界及公眾旁聽審判程序之全部或一部；但除保護少年有此必要外，刑事民事之判決應一律公開宣示。"《香港國安法》有公開審訊的推定，但在引起公共秩序議題／國家秘密議題的情況下容許閉門聆訊，並規定無論如何均須公開判決，故此《香港國安法》與《公民權利和政治權利國際公約》相符。

接着轉談第二個議題：引渡。

《香港國安法》實施後，數個國家暫停履行與香港簽訂的引渡條約。務應注意的是，香港在引渡方面的現有法律保障持續有效（包括適用《公民權利和政治權利國際公約》及《經濟、社會與文化權利的國際公約》）；再者，引渡要求受限於不同被要求方司法管轄區的司法程序；第三，涉及《香港國安法》罪行的引渡要求可因政治罪行例外情況而被拒。

政治罪行免作引渡是早已確立的國際法原則，香港的情況亦然。上述協定，不論持續有效或暫停履行者，均有共通或類同的條款，訂明如下："如被要求方有充分理由相信該人被控或被定罪的罪行屬政治性質的罪行，則不得移交該人"

我現在來談最後一個議題：域外適用範圍。

《香港國安法》第三章第六節包含三項條文，訂定此法可能具域外效力的情況。刑事法的屬地管轄權乃根本重要，是國家主權的要素。換言之，國家對其領土內的所有人及事物均具司法管轄權。然而，國際法並無禁止域外刑事管轄權。

管轄權原則提供依據，讓刑事法例可適用於海外所犯的罪行。該等原則包括屬地原則、國籍原則、保護原則及普遍原則。某程度而言，這表示罪行須與立法國有足夠的密切關聯，域外司法管轄權方可行使。

《香港國安法》第三十六條不受爭議，原因是該條明確依循屬地原則，因為所述罪行與所屬國家密切相關，涵蓋了罪行縱在外國干犯而僅犯罪結果在香港境內發生的情況。至於在香港註冊的船舶或者航空器內所犯的罪行，這也公認為準屬地管轄權及國家領土自然延伸的涵蓋範圍。

任何國家可將其法律施於國民，即使他們身在海外亦然。此項國籍原則在國際上已廣為接納，惟此司法管轄權的行使，不得侵犯別國的領土主權。第三十七條正正適用此項原則。香港永久性居民，即使非中國籍者，均依香港法例享有廣泛的各項法律權利。因此，根據該條行使司法管轄權，理據堅實。

第三十八條的域外司法管轄權是最具爭議的條文，適用於非香港永久性居民在香港以外針對香港實施的犯罪。這是按照保護原則作出的安排。早經確立的是，任何國家可將其法律施於外國人在該國境外所作危害該國國家安全的行為。國家安全，向來是保護原則所涵蓋的首要國家利益。行使域外司法管轄權屬國家主權範圍。國家可自行判斷何謂危害情況，如何維護本身安全。然而，難題在於保護原則的適用有欠清晰及共識。例如：須保護的國家利益範圍為何？須懲處的罪行類別為何？諸如此類。大家通常預期，這僅限對國家屬基要或關鍵的國家利益，而此類罪行包括間諜活動、恐怖主義行為及謀殺政府官員等。

任何國家應以符合國際法律義務的方式履行國家安全的保護工作。《香港國安法》第四條訂明，香港維護國家安全應當尊重和保障人權。《公民權利和政治權利國際公約》及《經濟、社會與文化權利的國際公約》將繼續適用。

總的來說，所有國家總設某類國家安全法，總對國家安全有所關注。因此，這並非新事，主要問題在於如何執行。舉例來說，“保護原則”是國際法認可的原則，但問題是如何詮釋和應用“重大利益”及“必要性”等用語的準則。一般而言，引渡及域外適用方面已設法律保障，包括繼續適用《公民權利和政治權利國際公約》和保障人權。所以，對我們來說，當前更重要的，是探討此法的實施情況，而非純粹着眼法律本身。

《香港國安法》仍在實施初期，對於法院將如何詮釋和應用《香港國安法》，我們還未觀得全貌。在此希望，藉着比較研究《香港國安法》與其他司法管轄區的相關法律，能對此法的實施有所裨益。

■ ■ ■ ■ ■

朱國斌：根據議程，我們會有15分鐘進行座談會討論。我聆聽在座意見之餘，也準備了一些問題提問大家。先由Richard開始吧！新加坡不論大小還是生態系統都與香港十分相似，當地的經驗於對我們來說是相關的。但如何相關呢，哪些方面可向新加坡取經呢？

高禮文：剛才您提到兩地相似，我也同意，就先由此說起。這部分淺白易明。這兩個司法管轄區，論經驗，各自都有150多年由英國統治，奉行普通法制度，諸如此類。兩地大小、經濟運作相若，人口皆以華人為主。新加坡經驗，進一步來看，對我而言，重點是該地的國家安全體系早已行之穩健。我們新訂的《香港國安法》實施至今才一年而已。目前沿用的成文法典仍載有舊英國法律，但坦白說，放諸現代情況已相當不合時宜。據我了解，新加坡在立法方面與時並進，就看當地已推行新法例規管網上資訊便知。我認為，就國家安全法的要旨而言，此法看來是廣受認同的，也許只有像姚先生這類人才不以為然，因為他剛被囚兩年，或須再待在那裏兩年、兩年又兩年。但對大部分人來說，國家安全法是鞏固繁榮穩定的制度之一環，所以較廣受認同。至於當中運作如何，恕我非這方面的專家。我只按一般解讀，但相信該法得以如此，乃因其依原則而行。國家安全法可以極為嚴厲，但決非貿然施行，只有在政府認為有必要防微杜漸或掌控局勢時始會施行，對全國人民造成的不利影響極其有限。大部分人只要想到國家安全法在維持穩定上發揮正面作用，自當明白。轉

談香港，我認為，未來五年就是驗證期，且看《香港國安法》實施的成效如何。到目前為止，儘管有藍韜文等人的極端言論，甚或令人擔憂的言論，但我認為《香港國安法》一直行之有效，顯然利大於弊。不過，這事並非毫無代價。相比起一年前，我們現受若干約束，限制了有何可為、有何不可為。然而，此法正正發揮預期之效。但正如我剛才所說，一切需時。江樂士教授之前提出的一點亦十分重要，就是我們需要待時觀望法院如何處理和應用《香港國安法》，始可從實踐經驗中得到更多確論。在這意義上看來，我相信倘若我們能達新加坡現時的水平 —— 我認為香港不太像新加坡 —— 不過我們若可在未來五年達此水平，那會是很好的基準。

朱國斌：謝謝。讓我們多談一些美國的情況吧，例如美國人制定了很多國家安全法律。可否給我們歸納一下，有何理據支持美國制定域外法律呢？也讓我們談談法院吧。

Lim Chin Leng：我們不必談到法院，這真的取決於個別而言，取決於誰入主白宮。以布殊政府為例，布殊政府做過什麼呢？它把某些人標籤為非法戰士。此舉頗具用心。好了，你們統統都是非法戰士。那有三重意義。首先，我們認為，戰時保護戰士的《日內瓦公約》並不屬美國法律，那些條約是給香港的。它也許亦是《公民權利和政治權利國際公約》，我們說，適用的條文繼續適用吧，我們就是反其道而行。對布殊政府而言，這些通常適用的條約不屬美國法律，這是第一着。第二着就是說，即使這些條約適用作為美國法律，這些人亦不會受到保護，因為他們並不真的是戰士。他們是非法戰士，就連戰士的權利也沒有。再來是第三着。好吧，要是國際人道主義法保護不了他們，因為就算他們是戰士，或稱他們為戰士，但畢竟是非法或違法的戰士，那麼他們還有任何其他人權可言嗎？沒有，因為他們是戰士。因

此，在戰時適用的國際人道主義法應予適用的情況下，國際人權法通常不予應用。現在，你要是能看懂這一切複雜套路、各式花招，就會發現布殊政府設法做的，是不讓涉嫌與阿爾蓋達組織有所連繫的人得享任何權利。這些人全都在海外行動，統統都是。想到的例子有*Hamdan*案，另一案稱*Hamdi*，*Hamdi*及*Hamdan*。在*Hamdan*案，美國最高法院基本上表示：繼續吧，你可不經一般審訊拘禁他們、剝奪他們的自由。其餘的，我們都知道他們被拘禁何處，諸如此類。我不會向美國借鏡，真的不會。我真的認為這裏的國家安全法較為可取。多謝。

朱國斌：謝謝。您正正道出了美國法院在維護國家安全上確實扮演着角色。

Lim Chin Leng：何種角色？

朱國斌：何種角色？積極、能動、保守？

Lim Chin Leng：正如我在*Dennis*案提到，早有案例說：“好的，你可以在涉及國家安全的情況下剝奪人們的自由。”何謂涉及國家安全的情況，就是對美國構成明確和即時危險。在1951年的*Dennis*案，一批人想傳授馬克思主義，法庭在處理各人時表示：不，不，沒此必要。這是美國法學史上一段令人極其不安的歷史，但它依然存在。而在*Dennis*案，法庭表示：你們可以討論馬克思主義，但本庭認為你們已經越界。你們在策劃當中，即使未至於傳授，但策劃傳授都已越界，屬於宣揚推翻美國政府了。*Rahman*案指，若然我有言論自由或寫作自由，所謂有該自由，到底什麼意思？你卻可利用我的所言所寫指控我：“你犯了串謀煽動叛亂罪。”那麼該自由算甚麼意思？所以，不，我認為不應向其借鑑。

朱國斌：謝謝。對國家安全法眾多關注之一，是人權、個人權利及自由的保障。例如，政治犯或罪便與此相關。現在，我想請趙教授闡釋一下政治犯或罪這點或其定義，是否應把犯政治罪行的嫌疑人引渡來港或引渡離港。謝謝。

趙雲：謝謝。是的，我認為政治罪行是一個頗為重要的議題。國際上，我指國際法方面，政治罪行不作引渡是早已確立的做法。所以是很清晰的，政治罪行不會作出引渡。不過，問題在於如何理解或詮釋“政治罪行”。我們如何理解？我們如何詮釋？目前來講，在國際層面上，政治罪行可劃分為純粹政治罪及相對政治罪。純粹政治罪方面，我覺得某程度上是非暴力性質，若非計及政治考量，並不構成罪行。至於相對政治罪，則總是涉及一項或多項帶有政治考量的普通罪行。因此，當中一大議題是探究所涉普通罪行與該政治因素、政治考量之間的關係。該普通罪行與政治考量的關係有多密切呢？目前，我們對政治罪行、相對政治罪仍未有明確定義。但國際上來講，趨勢相當明顯，輿論或學界對政治事件或政治罪行例外情況頗有共識。意即，國際社會日益難以容忍暴力犯罪或暴力恐怖主義。我們愈加發現，國際社會把暴力行為排諸於外，不讓其受惠於上述例外情況。

朱國斌：謝謝。我們還有一分鐘時間。最後一個問題請教三位講者，大家大概可從香港法律專業人員的角度各抒己見。我想談談平衡，即如何在利益、公眾利益與個人權利和自由之間取得平衡。大家可以暢所欲言。是的，這個議題非常重要，我亦很關注。

高禮文：我們達此平衡的工作是不能間斷的，必須時刻關注兩者的情況，既要保護國家安全，亦要保障個人權利。我認為我們得學會接受，現已失去某些空間，亦即讓我們想做能做、隨時想做就做的空間。這是毫無疑問的。然而，我覺得有一點相當

好，現在我們知道定位了，確知其實紅線何在。那就是做出一些危害國家安全的事情，做出一些試圖引起恐慌或散播恐慌的事情，主動作出和掩飾此類行徑，又或是時下用語所謂美化此類行徑稱之值得表揚。但在臨界周圍卻會持續緊張，我覺得這是無庸置疑的。我認為尚會遇到另一情形，就是大家必須能看出，有些行為儘管煽風點火，但基於行事者的身分，又或那只是某人一番傻話，所以影響不大。我們要學會自行摸索，領略箇中一切。但我認為更需認真看看，大家也知，很多人會說，在新加坡權利與國家權利之間的平衡過於偏側，太側重國家一方。然而，可供我們借鑑的是，他們如何維持平衡的方法。我們未必想跟着照做，但至少新加坡清楚知道應如何定位，亦明確說服大家這符合新加坡全體國民的利益。

Lim Chin Leng：我認為，對於有人說："喔，看看《香港國安法》，法官不能各司其職了。"法官未真正開腔，代勞發聲的已大有人在。里德勳爵很快發言，派下定心丸說：大家拭目以待吧。廖柏嘉勳爵說：這裏有充足氧氣讓我高歌。此話出自他與福克納勳爵一場精彩辯論，在此向大家推介。那是內殿律師學院的活動，內容豐富翔實。大家也讀過喬納森・薩姆欣 (Jonathan Sumption) 所寫的。兩星期前，我應邀向法規學會 (The Statute Law Society) 致辭，有傳媒問我："對何熙怡女男爵有何看法？"我只說這屬個別法官自行決定的事。就由他們決定吧。我們先別過早定論。且拭目以待，看他們會怎麼做吧。

朱國斌：謝謝。

趙雲：我覺得平衡公眾利益與個人權利的過程可以非常艱鉅。當然，這不僅僅發生在國家安全法的領域，很多其他領域亦然。當我們考慮保障公眾利益，其實公眾利益這個概念亦隨時日變遷。所以，我們需要研究具體的社會情況，始可界定公眾利益

這個概念。至於個人權利，同樣地，也是相當重要的。但若看看《公民權利和政治權利國際公約》或一些關於人權的文件，當中已提到，在緊急狀態下 (例如危害國家安全的情況)是可就這些權利減免義務的。因此，在達致平衡方面，我認為採取以下兩步程序相當重要。第一步是要看看是否必要，我們是否真的需要採取該等措施；第二，所採取的措施應與既定目的相稱。所以，相稱測試作為平衡公眾利益與個人權利的第二步來說，相當重要。

朱國斌：謝謝。既然大家是比較法的專家，不如談談這些外國經驗、外國制度在多大程度上與香港相關吧。

高禮文：不如您先說吧？

Lim Chin Leng：我還以為此刻大家早已想我閉嘴呢。我認為，據我們發現，涉及國家安全的情形，可致民情高漲。但從海外情況所見，在英國即使權利遭立法受限，就是先前提過的《反恐怖主義、罪行及安全法令》，英國也會根據《歐洲人權和基本自由公約》就英國《人權法令》第1及2條提出減免義務，使《人權法令》不予適用。他們亦根據《公民權利和政治權利國際公約》終止減免義務。這一切都在大眾支持下完成。反對《反恐怖主義、罪行及安全法令》的人畢竟屬於少數，而這些情況下，容我這麼說，正是區別立見。我們欠缺的是，這種廣泛的公眾支持，在須訂立此類法例時，提高國安意識，使這些料想在英美一般不獲認同的法例，可以容易被人接受。這是情況上不同。

高禮文：我覺得比較法有其價值。從比較角度看事情，尤其法律上及從兩個層面來看，我會說這是重要的。其中一個，我稱之為基本政治或地緣政治層面，相信以地緣政治為主。今時今日，美國不少人說現正陷入新冷戰，或有類似言論。因此，對於這類指手劃腳，還有華盛頓先前的長篇說教，甚麼其本土法律

如何處理同樣事情的，凡此種種，我們必須還以反擊，這十分重要。剛在今天也看到了，此事極其重要。然後再來多點技術層面。我們可借鏡海外的法律，從而大大優化本地的立法工作；但務須顧及的是，海外與本地情況有所不同。

朱國斌：我應大會要求就此作結。我想再次感謝各位講者。剛才各位講解豐富翔實，比較研究饒具意義、極其相關，評論精闢，灼見獨到。在此也感謝各位觀眾專注聆聽。現藉此機會，稍作總結：

第一，《香港國安法》頒布實施經已一年，此法的實施將是我們今後的重點。為了鞏固《香港國安法》對社會帶來的正面影響，由行政長官領導的香港特區政府應牽頭施行《香港國安法》，並完善相關制度。

第二，《基本法》第二十三條和《香港國安法》為依法解決國家安全問題提供宏觀框架。香港特區政府須繼續完成尚未完成的國家安全立法工作，履行其憲制責任。可透過的方法有，重啟第二十三條立法，或修訂現有香港法例，包括：《刑事罪行條例》、《社團條例》、《官方機密條例》、《公安條例》及《刑事訴訟程序條例》。

第三，在執法過程當中，我們應充分考慮保障人權的價值，遵循國際社會所公認的基本標準及規則，從而在國家安全利益與保障個人權利之間達致合理平衡。

第四，我們應借鑑其他國家及地區的經驗教訓，完善規管國家安全方面的法律制度。

第五，尚待進一步研究的議題包括：

A. 《香港國安法》對現行憲制及人權法可能帶來的影響，這包括：

(a) 《基本法》與《香港國安法》之間關係的理論；

(b) 如何儘快實施《基本法》第二十三條；

(c) 在保護權利與國家安全利益之間取得適當平衡；及

(d) 《香港國安法》如何真正融入香港的憲制及法律制度。

B. 《香港國安法》對香港司法制度及原則的影響，這包括：

(a) 國家安全法官的委任及司法獨立；

(b) 維護國家安全委員會所作的決定不受司法覆核；

(c) 駐港國安公署在香港特區司法管轄範圍以外運作；及

(d) 全國人大常委會獲賦予專屬解釋權。

C. 國家安全刑事法制度與香港刑事法制度之間的協調，這包括：

(a) 《香港國安法》罪行與本地條例所訂罪行的融合；

(b) 內地的刑事法及刑事法理論對香港的影響

D. 《香港國安法》對香港現行刑事司法及訴訟程序的影響，這包括：

(a) 在香港實施《香港國安法》所規定的特定刑事程序，關乎以下方面：保釋、公開審訊、陪審團審訊及國家機密的裁決；

(b) “內地司法管轄權”啟動後相關刑事訴訟程序予以適用，包括：指定的司法機關、犯罪嫌疑人及被告人的辯護權，以及作證的義務。

我們應在《香港基本法》的前提下，以積極進取的態度未雨綢繆，進行理論探索，提出實踐策略，以確保香港安定、“一國兩制”行穩致遠。

謝謝大家。

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國家安全法的比較研究：
澳大利亞與新加坡

高禮文
香港大學

國家安全法的比較研究：
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大學及新訂國家安全規管措施對學府的影響

新加坡：

根據《內部安全法令》作出拘留

國家安全法的比較研究：澳大利亞與新加坡

總結

- 所有司法管轄區均有權利和責任保護國家安全。
- 50年前，道路交通的法律異常簡單；今天已遠比從前廣泛、詳細、複雜得多。立法保護國家安全，進程也是類同。
- 這兩種情況下，在維護公共利益與維護個人利益之間均存在角力。
- 這種角力，於國家安全法而言尤其強烈，因為一旦違反懲罰非同小可。

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從國際法角度看《香港國安法》對照歐陸地區的實踐

趙雲教授
海牙國際私法會議
亞太區域辦事處代表

引言

- 國家安全法就國家如何處理其政府、價值及存續所面對的威脅訂立方針。
- 比較研究向來能做到，從各法律制度歸納出明顯的法律相似性。
- 某程度上，鑑於國家及民族的關鍵價值，以及在國家和國際層面上負責維護國家安全的機制和組織，均邁向標準化，國家安全法亦不再純屬國家層面了。
- 我會講述一下歐陸地區的概況，從國際法的角度討論相關議題。
  - ❑ 《香港國安法》的域外適用範圍
  - ❑ 引渡

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歐洲大陸的國家安全及主要特點

- 自二戰以來，國家安全一直是歐洲的重大議題。有別於其他司法管轄區的綜合立法模式，歐陸國家一般不會就國家安全專訂一項綜合法律，而是把相關條文納入個別國家法律當中，特別是刑事法。
- 強調維護憲制秩序的重要
  - ❑ 首要是維護基本政治體制及以憲法為本的核心價值
- 仰賴強大執行機關的支援(因應歷史及傳統背景等而有所不同)；工作重點、工作方法及指導思想不盡相同。

德國《刑法典》：罪行

- 針對其聯邦、針對該地（不論有否使用武力）的重大叛國罪；及準備從事重大叛國行為罪。
  - ❑ 域外效力："不論犯罪地點適用法律為何"，均適用於海外所作的行為。
- 準備犯嚴重暴力的危害國家罪行（在海外作出準備）；叛國罪（間諜活動、透露國家秘密等）；破壞國防設施罪、危害國家安全情報活動罪、危害國家安全圖像罪。

德國《刑法典》

- 被控人的權利：容許在危及國家安全的案件中摒除辯護律師的參與。
- 《法院憲法法令》訂明，若案件有可能危害國家安全、公共秩序或公眾道德，法院有權禁止公眾旁聽聆訊。
- 如在緊急情況下懷疑某人犯罪並有理由將其拘留(例如有潛逃的危險)，即符合審前拘留的先決條件。

公開審訊

- 《公民權利和政治權利國際公約》（第十四條）：法院得因民主社會之風化、公共秩序或國家安全關係，禁止新聞界及公眾旁聽審判程序之全部或一部；但除保護少年有此必要外，刑事民事之判決應一律公開宣示。
- 《香港國安法》與《公約》相符：
  - **(a)** 有公開審訊的推定，但在引起公共秩序議題／國家秘密議題的情況下容許閉門聆訊；及
  - **(b)** 規定無論如何均須公開判決。

引渡

- 香港在引渡方面的現有法律保障持續有效（包括適用《公民權利和政治權利國際公約》及《經濟、社會與文化權利的國際公約》）；
- 引渡要求受限於不同被要求方司法管轄區的司法程序；
- 涉及《香港國安法》罪行的引渡要求可因政治罪行例外情況而被拒。

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域外適用範圍：屬地管轄及國籍原則

- 刑事法的屬地管轄權乃根本重要，是國家主權的要素。
- 國際法並無禁止域外刑事管轄權，但規定罪行須與立法國有足夠的密切關聯。
- 任何國家可將其法律施於國民，即使他們身在海外亦然。惟此司法管轄權的行使，不得侵犯別國的領土主權。

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域外適用範圍：保護原則

- 最具爭議的條文關乎非香港永久性居民在香港以外針對香港實施的犯罪
- 保護原則：早經確立的是，任何國家可將其法律施於外國人在該國境外所作危害該國國家安全的行為。
- 通常僅限對國家屬基要或關鍵的國家利益，而此類罪行包括間諜活動、恐怖主義行為及謀殺政府官員等。
- 任何國家應以符合國際法律義務的方式履行國家安全的保護工作：《香港國安法》第四條訂明，香港維護國家安全應當尊重和保障人權;《公民權利和政治權利國際公約》及《經濟、社會與文化權利的國際公約》繼續適用。

總結

- 所有國家總設某類國家安全法，總對國家安全有所關注。主要問題在於如何實施。
- 所以，對我們來說，當前更重要的，是探討此法未來的實際施行。
- 比較研究望能對此有所裨益。

閉幕式致辭


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李家超
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國家好安

李家超，SBS，PDSM，JP
中華人民共和國香港特別行政區
政務司司長

尊敬的梁振英副主席（全國政協副主席）、方建明副特派員（中華人民共和國外交部駐香港特別行政區特派員公署副特派員）、譚耀宗常委（全國人民代表大會常務委員會委員）、譚惠珠副主任（全國人民代表大會常務委員會香港特別行政區基本法委員會副主任）、鄭若驊司長（律政司司長）、各位嘉賓、各位同事、各位朋友：

《香港國安法》已經落實一周年，律政司今日舉辦《香港國安法》法律論壇，正好是回顧和展望國安法與香港發展的大好機會。我首先感謝各位參與今日論壇，也衷心感謝中央人民政府駐香港特別行政區聯絡辦公室和駐港國家安全公署全力支持。

《香港國安法》的實施有三個重要範疇，即防範、制止和懲治危害國家安全的行為和活動。在今日論壇上、下午的各個環節，各位來自內地、海外和香港的講者從法律角度及執法角度，就《香港國安法》的實施進行了深入討論。我在此感謝各位的真知灼見，你們的分享令大家獲益良多。

《香港國安法》的實施立竿見影，扭轉了過去肆意鼓吹「港獨」和社會嚴重暴力的亂局，社會都看到，破壞秩序和社會安寧的行

為大大減少，社會恢復穩定。這證明執法可達到制止和懲治的效果。然而，七月一日晚上發生的「孤狼式恐怖襲擊」，兇徒在大街上持刀襲擊一名警員，企圖謀殺，導致他嚴重受傷，事件令人髮指，亦引起了社會廣泛關注。這件案亦顯示，國家安全威脅雖然受控，但風險依然存在。我留意到有些人更加鼓吹及支持這些「孤狼式恐怖襲擊」，散播仇恨意識，更嘗試美化或「英雄化」這些涉及意圖謀殺的暴力行為，無疑助長和鼓勵這些極端行為，威脅香港的安全和秩序，所以我們必須共同努力阻止本土恐怖主義在香港滋生。

要徹底根除香港特別行政區（特區）的國家安全威脅，我們必須居安思危，有效防範危害國家安全的行為和活動。這些並不是一、兩個部門的工作，也不單是政府的工作，而是整個特區的共同責任。就此，《香港國安法》第三條訂明，香港特區行政機關、立法機關、司法機關應當依據《香港國安法》和其他有關法律規定有效防範、制止和懲治危害國家安全的行為和活動。《香港國安法》第六條亦訂明，維護國家主權、統一和領土完整是包括香港同胞在內的全中國人民的共同義務。

在過去一年，整個政府團隊已從多方面着手工作，將維護國家安全的概念，融入特區政府的工作當中。例如：公職人員管理方面，政府已經要求所有政府官員和公務員依法宣誓或作出聲明，確認擁護《基本法》、效忠特區，以及對特區政府負責。另外，特區政府已修訂法例，加入要求所有區議員都須依法宣誓擁護《基本法》、效忠特區。政府亦會逐步界定及要求若干合適法定機構的人員，以「公職人員」身分依法宣誓或簽署文件確認擁護《基本法》、效忠香港特區。我們亦正加強公務員有關《香港國安法》的培訓，幫助公務員全面了解《香港國安法》，增強他們對國家安全的意識。

在學校方面，教育局已經於今年二月向全港學校發出通告，就維護國家安全提供學校行政及教育指引，並公布國家安全教育在學校課程的推行模式及相關的學與教資源，協助學校落實相關措施，提升對國民身分的認同感及建立國家觀念。此外，因應《香港國安法》實施，政府已修訂《電影檢查條例》指引，如果影片可能危害國家安全或危害維護國家安全，電影檢查員應得出影片不宜上映的結論。民政事務總署也協助舉辦社區參與活動，向社會各界解說《香港國安法》。各政策局和部門會繼續努力推進相關工作，務求確保政府各方面的施政，均能做到《香港國安法》對特區政府行政機關的要求，有效防範、制止和懲治危害國家安全的行為和活動。

培養社會整體的國家安全和守法意識，必須推展至政府以外，推動市民大眾一起維護國家安全。除了上述針對特區政府、公務員團隊及學校的培訓和教育的工作外，政府透過不同的機制及計劃，將國家安全和守法意識帶到社會各階層。

舉例而言，由於《香港國安法》是列於《基本法》附件三的全國性法律，與《憲法》和《基本法》環環緊扣，是香港市民必須認識的重要課題，因此政府會善用基本法推廣督導委員會的平台，統籌制定《憲法》、《基本法》和《香港國安法》的推廣策略和計劃。此外，不同政府部門或機構亦透過舉辦不同活動，大力推廣維護國家安全的概念，包括由特區維護國家安全委員會舉辦的「全民國家安全教育日」活動、由保安局策劃並於上周推出的《香港國安法》一周年網上展覽，以至律政司今日舉辦富有意義的法律論壇等。這些都是向香港市民介紹國家安全的理念和《香港國安法》的多方面項目。在未來，各政策局和部門都會繼續推進相關工作。

隨着香港社會同心協力落實《香港國安法》，我們必定能夠構建全民國家安全意識，令「一國兩制」這個香港特區一直賴以成功的制度，可以行穩致遠。「一國兩制」是保持香港長期繁榮穩定的最佳制度安排，而過往一段頗長的時間，「港獨」分子肆無忌憚，加上外部勢力插手破壞，令香港受到前所未有的破壞和損害，亦令香港成為國家安全的缺口。

制定、落實和執行《香港國安法》，目的就是要打擊危害國家安全的勢力，讓香港特區能重新聚焦「一國兩制」的根本。

我必須強調，《香港國安法》在維護國家安全的同時，市民在特區一貫依法享有的自由和權利獲得充分保障，包括對特區政府作出批評，以及如常進行國際交流、學術交流和自由營商等。《香港國安法》第四條清楚訂明：「*香港特別行政區維護國家安全應當尊重和保障人權，依法保護香港特別行政區居民根據香港特別行政區基本法和《公民權利和政治權利國際公約》、《經濟、社會與文化權利的國際公約》適用於香港的有關規定享有的包括言論、新聞、出版的自由，結社、集會、遊行、示威的自由在內的權利和自由。*」

《香港國安法》的實施，發揮了強而有效的震懾力，使香港迅速回復安全、穩定，成績有目共睹。《香港國安法》亦使香港經濟可重新出發：與二〇一九年年底比較，證券市場每日成交金額上升約百分之一百四十；市價總值上升約百分之四十；初創企業的數目亦上升了約百分之六。香港更被評選為最受歡迎仲裁地點第三位。穩定的社會，亦有利香港把握《十四五規劃綱要》所帶來的機遇。《十四五規劃綱要》表明支持香港更好地融入國家發展大局，包括建設粵港澳大灣區這個國家開放程度最高、經濟活力最強，以及擁有超過香港十倍人口、生產總值達一萬七千億美元的龐大市場。

國家安全和政權安全是不可分割的，要真正達致國家安全，管治權必須掌握在愛國者的手上。全國人大常委會於今年三月三十日通過新修訂的《基本法》附件一和附件二，立法會於五月通過落實完善特區選舉制度的本地法律。

完善選舉制度將有助立法會恢復其憲制職能，作為行政機關與立法機關之間進行理性互動的平台，以切實提升管治能力。政府現正全力以赴籌備未來三場選舉。這一年內中央的兩大舉措穩住了香港的大局，為全面準確貫徹「一國兩制」、「港人治港」、高度自治方針奠下了重要及堅實的基礎。

我深信，在實施《香港國安法》、完善選舉制度及落實「愛國者治港」之後，香港將會迎來建設和有效施政的新篇章。只要大家攜手起來，團結一心，努力維護「一國兩制」的全面貫徹落實，在國家的全力支持下，國安家好，「一國兩制」必定會行穩致遠，香港亦必定會長期繁榮穩定，欣欣向榮。

最後，我特別感謝律政司所有同事為籌備這個論壇所做的大量工作，使今日論壇圓滿成功。我也再次感謝各位專家講者的珍貴分享。多謝。

National Security Law Legal Forum – **Security Brings Prosperity**

Proceedings

Foreword

The National People's Congress adopted on 28 May 2020 the Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security, which authorises the Standing Committee of the National People's Congress (NPCSC) to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the Hong Kong Special Administrative Region (HKSAR) to safeguard national security. On 30 June 2020, the NPCSC enacted the Law of the People's Republic of China on Safeguarding National Security in the HKSAR (National Security Law), which was added to Annex III to the Basic Law of the HKSAR and applied in the HKSAR by way of promulgation by the HKSAR Government on the same day.

The National Security Law has fully reflected the implementation of the "One Country, Two Systems" policy, and patched up the deficiencies of HKSAR's system in safeguarding national security. It has profound implications for the safeguarding of national security and the maintaining of Hong Kong's prosperity and stability in the long run.

The Department of Justice held the National Security Law Legal Forum, themed "Security Brings Prosperity", on 5 July 2021. It gathered a host of elites in the legal profession at home and abroad for thorough discussions and exchange of views on the application and construction of the National Security Law, thereby promoting the proper understanding of the National Security Law among the general public.

I am greatly indebted to the Central People's Government and all the speakers and experts for their tremendous support, in-depth study and insightful sharing on the National Security Law in making

this Legal Forum a success. To enable the community to reflect on the speakers' inspirational comments and better understand the National Security Law, the Department of Justice has prepared the proceedings of the Legal Forum, which comprise the speeches, presentations and discussions of the eminent speakers.

The holding of the Legal Forum and the publication of the proceedings witness that the implementation of the National Security Law has enabled Hong Kong to move from chaos to order, and from order to prosperity. With the restoration of law and order as well as stability in society, people's lives have been brought back to normal. This ensures the steadfast and successful implementation of "One Country, Two Systems", and lays the foundation for Hong Kong's long-term peace and stability.

Lastly, I would like to extend my heartfelt appreciation to my fellow colleagues in the Department of Justice and to the Asian Academy of International Law for their concerted efforts and dedicated preparations in organising this Legal Forum. My gratitude also goes to the Information Services Department and the Government Logistics Department for their unstinting assistance with design and editing in bringing to fruition this meaningful and commemorative publication.

Ms Teresa Cheng, GBM, GBS, SC, JP
Secretary for Justice
Hong Kong Special Administrative Region

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Welcome Remarks

LAM CHENG, Yuet-ngor Carrie, GBM, GBS

Chief Executive,
Hong Kong Special Administrative Region
of the People's Republic of China

Vice-Chairman of the National Committee of the Chinese People's Political Consultative Conference, Mr C Y Leung; Deputy Director of the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region (HKSAR), Mr Chen Dong; Head of the Office for Safeguarding National Security of the Central People's Government in the HKSAR, Mr Zheng Yanxiong; Commissioner of the Ministry of Foreign Affairs in the HKSAR, Mr Liu Guangyuan; Deputy Political Commissar of the Chinese People's Liberation Army Hong Kong Garrison, Major General Wang Zhaobing; President of the Legislative Council, Mr Andrew Leung; Chief Justice of the Court of Final Appeal, Mr Andrew Cheung Kui-nung, ladies and gentlemen, colleagues,

Good morning! I welcome you all for joining us today, either in person or online, at this National Security Law Legal Forum - Security Brings Prosperity hosted by the Department of Justice (DoJ) of the HKSAR Government in commemoration of the first anniversary of the National Security Law. This is yet another important legal forum featuring heavyweight guest speakers following the Basic Law 30th Anniversary Legal Summit organised by the DoJ last November. I would like to thank the Secretary for Justice and her colleagues for their efforts. My thanks

also go to the Liaison Office of the Central People's Government in the HKSAR and the Office for Safeguarding National Security of the Central People's Government in the HKSAR for their support.

When we talk about the unique advantages of Hong Kong, the rule of law is always among the first to be mentioned. To support the rule of law in society, in addition to having clear and explicit laws, robust legal institutions, prosecution power free from any interference and independent judicial power, we need the public to abide by the law and in this regard, it is important for the public to understand the legal provisions and their application. The HKSAR Government has therefore organised more activities in recent years to promote the Constitution, the Basic Law and the National Security Law, with a view to consolidating and strengthening the rule of law in Hong Kong.

The Standing Committee of the National People's Congress enacted the National Security Law and listed the legislation in Annex III to the Basic Law on June 30 last year. On the same day, the law was applied by promulgation in the HKSAR to establish and improve the legal system and enforcement mechanisms for safeguarding national security in the HKSAR. Today, the National Security Law has come into force for more than one year. Article 1 of the General Principles in Chapter I of the National Security Law states, first and foremost, that the purpose of enacting the National Security Law is to ensure the full and faithful implementation of the policy of "One Country, Two Systems", "Hong Kong people administering Hong Kong" and the HKSAR enjoying a high degree of autonomy; safeguarding national security; and maintaining prosperity and stability of the HKSAR. This fundamental principle is well reflected in the theme of the forum today - Security Brings Prosperity. Indeed, safeguarding the country's sovereignty, security and development interests is the constitutional responsibility of the HKSAR. They are also the prerequisites for Hong Kong's long-term

prosperity and stability. The implementation of the National Security Law therefore not only aims to end the chaos and violence associated with the legislative amendment exercise in June 2019, but also to uphold and improve the institutional system of "One Country, Two Systems" fundamentally, ensuring the steadfast and successful implementation of "One Country, Two Systems".

The National Security Law is the major turning point in Hong Kong's transition from chaos to order. Its effect in stablising the society is indisputable. Over the year-long period before the implementation of the National Security Law, the Hong Kong community was badly traumatised. Organisations advocating "Hong Kong independence" and "self-determination" blatantly challenged the authority of the Central Authorities and the HKSAR Government. Terrorist activities were orchestrated by radicals. Public facilities were vandalised with violence and enforcement actions by the Police were obstructed. Anti-China forces colluded with foreign or external forces to interfere into the affairs of China and the HKSAR, and mobilised international forces to impose sanctions on Hong Kong, totally disregarding the interests of the country and Hong Kong people and seriously endangering national security. The anti-China forces also undermined the effectiveness of the Government's anti-epidemic efforts in the early period of the pandemic. After the implementation of the National Security Law, stability has been restored in society and riots have disappeared. People's life and property are protected and they can once again enjoy their legitimate rights and freedoms.

Despite the clear facts, foreign politicians and media with ulterior motives continue to query and even smear the National Security Law, claiming that it would undermine human rights, suppress freedoms of speech and of assembly, damage the rule of law, devastate Hong Kong as an international financial centre and weaken the city's business

environment and more. Nevertheless, what happened in the past year and various data show that these accusations could hardly stand up to challenge. They, on the contrary, only underscore the hypocrisy, bias and double standards of the critics.

As we have been emphasising repeatedly, the National Security Law only targets an extremely small minority of criminals and acts which endanger national security, whereas human rights and freedoms enjoyed by the overwhelming majority of the citizens will not be affected at all. Taking press freedom as an example, 93, 69 and 39 local, overseas and online media organisations, respectively, have registered in the Government News and Media Information System of the Information Services Department at present, showing an increase over the past year. The media and the general public exercise their right to monitor the Government's work and the freedom of criticising policies every day, while overseas media disseminate information about the National Security Law continuously, interviewing people with various stances without any interference. We all know that it was because of COVID-19 that public assemblies could not be held. It is the same as in other parts of the world. It should not be used as an excuse to accuse Hong Kong that people's rights have been undermined.

The rule of law and judicial independence in Hong Kong after the implementation of the National Security Law are as robust as ever. The Judiciary of the HKSAR operates independently as in the past, exercising the independent judicial power enshrined in the Basic Law. The Chief Executive continues to appoint senior and prominent judges from overseas common law jurisdictions as non-permanent judges of the Court of Final Appeal on the recommendations of the Judicial Officers Recommendation Commission as stipulated in the Basic Law. In the past year, Lord Hodge who was Deputy President of the Supreme Court of the United Kingdom has been newly appointed, and three other

overseas judges have agreed to extend their service. At present, we have a total of 13 non-permanent judges of the Court of Final Appeal from other common law jurisdictions. The willingness of these distinguished judges to participate in the work of the Hong Kong courts is the best evidence of Hong Kong's judicial independence. It is worth mentioning that Lord Sumption, one of the non-permanent judges from the United Kingdom, published an article in a British newspaper in March this year, pointing out that the Chinese and Hong Kong Governments have done nothing to interfere with the independence of the judiciary and that the National Security Law contains express guarantees of human rights.

In addition, under the National Security Law, Hong Kong's status as an international financial centre has not wavered at all. In the past 12 months, the IPO funds raised in Hong Kong exceeded HK$500 billion, representing an increase of more than 50 per cent compared to the previous 12 months. The linked exchange rate system has, as always, worked well. The Hong Kong dollar market recorded net capital inflows in 2020. In the four months from the implementation of the National Security Law in July to October last year, the amount of funds flowing into the Hong Kong dollar system exceeded HK$300 billion. The total deposits in the Hong Kong banking system have increased by more than five per cent over last year, while the net asset value of funds management in Hong Kong at the end of last year also increased by some 20 per cent over the end of 2019. These figures reflect that investors have not been deterred by the National Security Law. Rather, with social stability restored by the National Security Law, they are more interested in the Hong Kong market and have more confidence in the prospect of Hong Kong's financial development.

At present, about 9,000 Mainland and overseas companies have set up offices in Hong Kong, with more than 40 per cent of them using Hong Kong as their regional headquarters or regional offices. Through the

contacts of the Government officials of the HKSAR and observations by relevant institutions, those early worries and concerns of the business community about the National Security Law have been easing continuously. Corporations and business people are now more interested in the opportunities brought about by the 14th Five-Year Plan, the latest developments of the Guangdong - Hong Kong - Macao Greater Bay Area (GBA) and the timing of the resumption of cross-boundary travel between Hong Kong and the Mainland as well as other places for their business activities. I have particularly noticed that the French Chamber of Commerce and Industry in Hong Kong pointed out in its recent publication that Hong Kong is an excellent place to do business and an international platform for access to the surrounding areas, with many French people in the business community sharing in the publication their success stories and pleasant living experiences in Hong Kong. The Chairman of the British Chamber of Commerce in Hong Kong has also publicly said that he is very optimistic about the prospects of Hong Kong and the GBA, and the Chamber hosted a summit recently, which I was also invited to attend, to share with the British enterprises how to seize the opportunities presented by the GBA. The words and deeds of these foreign business leaders fully demonstrate that the business environment in Hong Kong has not been undermined after the implementation of the National Security Law. On the contrary, it has become even better.

Looking back to the past year, the HKSAR has established institutions and enforcement mechanisms for safeguarding national security in accordance with the National Security Law, including the Committee for Safeguarding National Security, which is chaired by me, to plan, enforce and co-ordinate work on safeguarding national security. The National Security Department of the Hong Kong Police Force has been taking resolute law enforcement actions. As of June 30 this year,

117 criminal suspects were arrested, of which 64 were prosecuted, and the first case involving the National Security Law is in the court for trial.

In addition to imposing punishment on offenders, the National Security Law also serves the purpose of preventing and suppressing acts that endanger national security. In particular, Article 6 requires a Hong Kong resident who stands for election or assumes public office to confirm in writing or take an oath to uphold the Basic Law and swear allegiance to the HKSAR. To further strengthen the upholding of this core value by the civil service, the HKSAR Government has completed the work to require all civil servants to sign the relevant declaration or take the oath. The Legislative Council also passed the legislation on May 12 this year, which stipulates the legal requirements and preconditions for upholding the Basic Law and bearing allegiance to the HKSAR, introduces the oath-taking requirements for members of the District Councils, and enhances the mechanism to deal with breach of oath and more.

We also carried out public communication, guidance, supervision and regulation over matters concerning national security, including those relating to schools, social organisations, the media and the Internet, as required by the National Security Law. We have organised activities, such as the annual Constitution Day and the National Security Education Day to raise awareness of national security and the obligation to abide by the law among members of the public. The Education Bureau also adopts a multi-pronged and co-ordinated approach to provide guidelines on school administration and education to facilitate schools to promote national security education inside and outside the classroom, cultivating a strong sense of belonging towards the country and a sense of national identity as well as a sense of responsibility to safeguard national security among teachers and students.

In the future, the HKSAR Government will continue to strengthen and deepen the work on safeguarding national security. We will take forward the work of safeguarding national security in Hong Kong according to the concept of overall national security, and ensure that the related work is fully understood and implemented at full steam and in a holistic manner, covering the areas including politics, society, economy, culture, technology, the Internet, finance, and public health. We will also continue to engage the whole community in our efforts to raise Hong Kong people's awareness of national security and the obligation to abide by the law, so as to make it everybody's responsibility to safeguard national security.

In the National Security Law Legal Forum today, we are honored to have a host of elites in the legal profession at home and abroad to study and discuss together the provisions of the National Security Law and their implementation. Today's forum features a series of keynote speeches in relation to the National Security Law and three panel discussions to examine the substantive and procedural aspects of the National Security Law, and deliver a comparative study of national security laws of other overseas jurisdictions. I believe that the in-depth analysis by reputable legal experts from different perspectives will definitely enable all participants and people from various sectors in the community to have a deeper understanding of the National Security Law.

I wish today's legal forum a great success. Thank you.

CHEN, Dong

Deputy Director,
Liaison Office of the Central People's Government
in the Hong Kong Special Administrative Region

The Honorable Vice-Chairperson Leung Chun-ying, Chief Executive Carrie Lam Cheng Yuet-ngor, Secretary for Justice Teresa Cheng Yeuk-wah, Director Zheng Yanxiong, Commissioner Liu Guangyuan, experts and dear friends,

Good morning, everyone! I'm very pleased to participate for the second time in the annual Legal Forum hosted by the Department of Justice. This Forum is held at a momentous time and centers around key topics. Gathering experts and scholars from all quarters for academic exchanges and discussions, the Forum offers strong timeliness, pertinence and practical values.

On 1 July, General Secretary Xi Jinping gave his keynote address at the grand ceremony celebrating the centenary of the Communist Party of China (CPC) held in Beijing. With its elevated vision and profound ideas, this guidance address is rich in contents and carries its powerful moral appeal, impactful theory and soul-stirring vigour. It has evoked sustained awareness, enthusiastic response and widespread resonance in Hong Kong society. So at this very moment, it is of great significance for us to deepen our study and understanding of the spirit of General Secretary Xi's keynote address by summing up the practical benefits

of the National Security Law over the past year of its implementation. I would like to take this opportunity to share with you my three observations.

First, with the effective implementation of the National Security Law, the HKSAR's systems and mechanisms for safeguarding national security have continued to improve. General Secretary Xi stresses the necessity to implement the legal system and enforcement mechanisms for safeguarding national security in the HKSAR so as to safeguard national sovereignty, security and development interests of the State, maintain the general social stability of the HKSAR and preserve its long-term stability and prosperity. Over the past year, the Office for Safeguarding National Security of the Central People's Government in the HKSAR was established and has operated in accordance with the law. The Committee for Safeguarding National Security of the HKSAR, the National Security Prosecutions Division of the Department of Justice and the National Security Department of the Police Force in the HKSAR have commenced their work effectively to combat in accordance with the law illegal acts endangering national security. This has served as a mighty deterrent against anti-China Hong Kong disruptors. So far since last year, 117 people have been arrested, of whom 64 have been prosecuted. The Judiciary has applied the National Security Law in its adjudication of cases, which have become case precedents. Some relevant local laws have been activated and updated as complementary systems and mechanisms for enforcing the National Security Law came into place one by one. More than 170,000 public officers have completed their oath of allegiance as required. The National Security Law has become the basic legal norm which must be observed in public officer admission, media information regulation, social organization registration and so on. The implementation of the National Security Law has patched up the system deficiencies of the HKSAR in safeguarding

national security, ending the history of "security vacuum" for national security in Hong Kong.

Second, the effective implementation of the National Security Law has gradually ingrained in everyone the concept of "security brings prosperity". In his 2020 New Year address General Secretary Xi heartily remarked, "The situation in Hong Kong has tugged at our heartstrings. Without harmony and stability, how could one have a home base for a peaceful life and a happy career? I sincerely wish Hong Kong well and our Hong Kong compatriots well." In the past year, the Committee for Safeguarding National Security of the HKSAR held the event of National Security Education Day for the first time and the event website attracted over one million visits. The HKSAR Government worked with related institutions including Endeavour Education Centre and launched an education campaign on the National Security Law for some 60,000 students and over 8,000 teachers of 450 schools. The Judiciary for the first time organized training on the National Security Law, which was well attended by over 200 judges, judicial officers and members of the legal profession. Many media outlets planned and produced feature programmes, such as "National Security Law - Bedrock of Community", which have generated a widespread social effect. More than 300 social organizations mobilized some 25,000 volunteers and set up over 5,400 street booths for bringing the spirit of "security brings prosperity" to thousands of households. The full-scale publicity and education have raised the awareness of safeguarding national security and fostered senses of responsibility, belonging and identity among the general public.

Third, the effective implementation of the National Security Law has achieved a major transition from chaos to governance. General Secretary Xi pointed out, "Security and development are the two wings of a bird, or the two wheels of a cart. Security must always take primacy as a precondition for development." Over the year, street violence that

rampaged throughout the "legislative amendment turmoil" ceased while social order has restored and public peace is assured. Statistics show that the crime rate dropped by 10 percent year-on-year in the first quarter of this year. Hong Kong's GDP grew by 7.9% year-on-year. Unemployment rate eased down to 6% between March and May. And over the last couple of months, as much as US$50 billion of capital flowed into Hong Kong. Hong Kong's IPO fundraising doubled in the first half of the year as compared with the same period last year, and is expected to reach a record-high of HK$500 billion by the end of the year, maintaining its leading position in the world. In its report released recently, the International Monetary Fund reaffirms Hong Kong's status as an international financial centre. According to a recent opinion poll conducted by Bauhinia Research Institute, 82.6% of the respondents considered that the social order and the law-and-order situation had improved, and 72% said that their confidence in the prospect of "One Country, Two Systems" had grown.

Hong Kong upholds rule of law and security brings prosperity. As proven by facts, the National Security Law is the lynchpin of stability in safeguarding the overall interests of Hong Kong and the fundamental well-being of the people here. But at the same time, we should also remain lucid that forces of anti-China Hong Kong disruptors have not fully given up, and individual extremists are still hell-bent on carrying out their own agendas, even to the point of staging "lone-wolf" terrorist attacks. Some people with ulterior motives went so far as to brazenly support the glorification of violence, while certain groups and individuals have even engaged in activities to wreak havoc in Hong Kong under the cloak of legal professionals. There are also external forces which have wantonly interfered in the affairs of Hong Kong. All these illustrate that the full implementation of the National Security Law is a long and arduous journey where much work remains to be done. We firmly

support the authorities of the HKSAR in their strict law enforcement, fair administration of justice, resolute defence of national security, and maintenance of general social stability. The current state of affairs has not come easy, and I hope that all sectors of the community will cherish it by working together to preserve our national sovereignty, security and development interests and maintain Hong Kong's long-term prosperity and stability to ensure the enduring success of "One Country, Two Systems".

May I wish this Forum every success! Thank you!

ZHENG, Yanxiong

Head,
Office for Safeguarding National Security of
the Central People's Government in
the Hong Kong Special Administrative Region

The Honorable Vice-Chairperson Leung Chun-ying, Chief Executive Carrie Lam Cheng Yuet-ngor, Deputy Director Chen Dong, Commissioner Liu Guangyuan, Major General Wang Zhaobing, distinguished guests,

Good morning!

Over the past year since its gazettal and implementation, the National Security Law has shown its effectiveness evident to all. The Law stands as the lynchpin of stability for Hong Kong to safeguard national security and maintain its prosperity and stability. The Chief Executive Mrs. Carrie Lam and the governing, judicial and law enforcement teams under her leadership have made huge painstaking and distinguished efforts, which receive wholehearted support from all sectors of the community and the general public. In this connection, I wish to express our heartfelt gratitude and sincere respect for them on behalf of the Office for Safeguarding National Security of the Central People's Government in the HKSAR. I would like to take this opportunity to share with you my understanding of the Central Authorities' legislative intent for the National Security Law from various dimensions.

1. From the dimension of "Two Overall Situations"

President Xi Jinping has put forward the major proposition of "Two Overall Situations" with foresight. As a matter of fact, the world's profound changes unseen in a century and the strategy for the Chinese nation's great rejuvenation are closely interlinked in their entirety. In response to China's rejuvenation, some are happy while others panic; some are looking forward to it while others are displeased — such is the complex mentality of the world today. It is indeed not difficult to discern this course. First of all, China has achieved its historic victory over the COVID-19 epidemic, its historic eradication of extreme poverty, its historic completion of a moderately prosperous society in all respects, and its historic launch of a new journey towards the full realization of a great modernized socialist country. All these did not come by chance, but are results of institutional achievements as well as our regular and sustainable advantages. The momentum of such is inexorable. Second, albeit the intention of the US and other western countries to join hands in suppressing us, such suppression would not really hinder China's development. Chinese people trust that "small success relies on brains, medium success on friends, and big success on rivals". The fact is that such suppression is exactly the kind of external pushback we need for our development. Third, it is impossible for China to achieve its nation's great rejuvenation by means of hegemony and expansion. Our foremost concern is that Hong Kong must not stage a "colour revolution" and Taiwan must not seek independence. Safeguarding national security in Hong Kong is a bottom line that cannot be compromised in the process of the Chinese nation's great rejuvenation.

2. From the dimension of "One Country, Two Systems"

"One Country, Two Systems" is a pioneering masterpiece under socialism with Chinese characteristics. The report delivered at the 19th

National Congress of the Communist Party of China (CPC) has confirmed adherence to the "One Country, Two Systems" principle as part of the basic strategy for upholding and developing socialism with Chinese characteristics in the new era. This has cemented the political status of "One Country, Two Systems" to the highest standard of the ruling party. The fundamental objective of "One Country, Two Systems" is to safeguard national sovereignty, security and development interests while maintaining the long-term prosperity and stability of Hong Kong. Its fundamental principle is persistent adherence to "patriots administering Hong Kong". Its fundamental bottom line is this: Hong Kong must not engage in any form of conduct that endangers national sovereignty and security; it must not challenge the authority of the Central Authorities and that of the Hong Kong Basic Law; and Hong Kong must not be used for activities of infiltration and sabotage against the Mainland. These fundamental objective, principle and bottom line all point directly to the safeguarding of national security. It can be said that safeguarding national security in Hong Kong is the fundamental prerequisite for the enduring success of "One Country, Two Systems".

3. From the dimension of holistic view of national security

The holistic view of national security innovatively put forward by President Xi Jinping is epoch-making as a major novelty for national security theories. This bears great significance to strategizing on security as a great power in the new era and fighting well the proactive war to safeguard national security. This also reminds us the need to view the issue of national security from panoramic, long-term and intrinsic perspectives. The U.S. and the West have made calculative efforts to scheme a Hong Kong version of "colour revolution". Their aim is to wreak havoc through anti-China Hong Kong disrupters either by directly committing secession through "Hong Kong independence" or "self-determination", or by wrecking Hong Kong through "mutual

destruction" and "violent riots". This is done so as to repudiate "One Country, Two Systems" thereby further stalling or halting the great rejuvenation of the Chinese nation. This is an overarching risk to our core national interests that we must staunchly prevent. On this issue, we absolutely cannot and will never possibly make any strategic or fundamental mistake.

4. From the dimension of rule-of-law thinking

President Xi Jinping has developed his thinking on rule of law in the practice of state governance. Not only does it profoundly respond to a series of important questions as to why and how to adopt a holistic approach of law-based state governance in the new era, but it also answers the questions as to how to safeguard the rule of law in Hong Kong and how to adopt a rule-of-law mindset and take a law-based approach to ensure the enduring success of "One Country, Two Systems" as well as Hong Kong's long-term stability and safety. President Xi has repeatedly emphasized that adherence to the law-based governance of Hong Kong and Macao is an integral part of the country's holistic law-based governance. It is imperative for us to consider the issues from a legal perspective, promote the improvement of the relevant legal provisions and raise the rule-of-law standards for safeguarding national political security. When the "legislative amendment turmoil" in Hong Kong had grown beyond tolerance in 2019, the Central Authorities remained unswerving in their adherence to the rule-of-law spirit. The Fourth Plenary Session of the 19th CPC Central Committee proposed to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security. The relevant decision was made at the Third Session of the Thirteenth National People's Congress and the National Security Law was adopted at the Twentieth Session of the Standing Committee of the Thirteenth National People's Congress. This piece of legislation has plugged the major rule-of-law loophole of

Hong Kong's long-term "security vacuum" in national security, and has become the ultimate solution for Hong Kong to safeguard national security and its long-term prosperity and stability. The establishment the two mechanisms, namely the Office for Safeguarding National Security of the Central People's Government in the HKSAR and the Committee for Safeguarding National Security of the HKSAR, is not only out of a jurisprudential need for the synergy of legislation and law enforcement, but also a manifestation of the dialectical relationship between institution and execution and that between governance system and governance capacity. This fully demonstrates the Central Authorities' determination, confidence and assiduity to firmly uphold the law-based governance of Hong Kong and to safeguard the rule of law in Hong Kong.

5. From the dimension of "patriots administering Hong Kong"

President Xi Jinping has insightfully remarked that in order to ensure the enduring success of "One Country, Two Systems" in practice, we must always adhere to the principle of "patriots administering Hong Kong", which relates to the fundamental principle of national sovereignty, security, development interests as well as that of Hong Kong's long-term prosperity and stability. This provides a fundamental direction for promoting the enduring success of "One Country, Two Systems" and maintaining Hong Kong's long-term stability and prosperity. Security of governance power is a key integral part of national security. Any problem in the political regime may seriously endanger national security. Hong Kong after the reunification must be administered by patriots to ensure that the governance power remains firmly in the hands of patriots so as to better safeguard national security. Not just anyone can be in charge of Hong Kong, and there can be no mistake about who to trust on this issue. By looking around the world and throughout history, you will see that this is but a basic political ethic. What's more, Article 3 of the National Security Law stipulates that the executive authorities,

legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the National Security Law and other relevant laws. How would anyone other than a "patriot" manage to do so? Indeed, "patriots administering Hong Kong" is the most colloquial way to describe how Hong Kong's governance team should fulfil its duty of safeguarding national security, and is the natural logic of dialectics between "a high degree of autonomy" and "a high degree of peace of mind".

6. From the dimension of fighting philosophy

On the occasion commemorating the 70th anniversary of the Chinese People's Volunteers army entering the Democratic People's Republic of Korea in the war to resist US aggression and aid Korea, President Xi Jinping solemnly declared to the world that we will never stand by and watch our national sovereignty, security and development interests being undermined, and that we will never allow anyone or any force to encroach on or split our sacred territory of motherland. In the event of such, the Chinese people will definitely fight it head on. It can be said that Hong Kong found itself in such a grave situation during the 2019 "legislative amendment turmoil", which posed a serious threat to national sovereignty, security and development interests and dealt a serious blow to Hong Kong's fundamental interests. This was no longer any democratic thinking or call for autonomy and freedom of speech, but outright subversion of State power and infringement of sovereignty. Amidst this, such extreme activities as "mutual destruction" and "violent riots" even escalated into utterly inhuman and serious anti-social crimes. In this respect, there is no room for compromise or conciliation. We must not allow any fantasy or opportunity to be exploited. There is no alternative but to fight and have the laws enforced.

Law is a vital organ for state governance. From the above six dimensions of analysis, we can see clearly that the National Security Law, as a national law, has a clear and unequivocal legislative intent, and is a special law with considerable overriding significance to safeguard the core interests of the State. The Central Authorities' determination to safeguard national security in Hong Kong is the strongest national will, which is unshakable and irrefutable. Since the gazettal and implementation of the National Security Law, the activities of anti-China Hong Kong disruptors have been effectively combatted, the people have regained stability and peace, and Hong Kong has made a significant transition from chaos to order. It is amply evident that the determination, strong will and well-intended efforts of the Central Authorities have transformed into a formidable power under the rule of law. This has fastened a firm bottom line for the protection of the safety and well-being of the general public in Hong Kong. Anyone or any force that still tries to test the Central Authorities' determination and bottom line for safeguarding national security in Hong Kong, or even dares to tread rashly on this issue, will only be making a disgrace of themselves.

It is worth mentioning that the Central Authorities have an overarching responsibility while the HKSAR has the constitutional duty for the effective implementation of the National Security Law. Both have the common responsibility to accurately understand its legislative intent, conduct law enforcement and administration of justice in strict accordance with the law and effectively safeguard national security. This duty is shouldered by each and every officer of the administration, judicial and law enforcement teams in the HKSAR. The discharge of this duty has nothing to do with the so-called "political neutrality", and is not in conflict with safeguarding the judicial system of Hong Kong. It is entirely consistent with safeguarding the rule-of-law spirit, market environment and public interests in Hong Kong. No one shall have any

excuse for inaction or misdeeds when it comes to safeguarding national security.

The Office for Safeguarding National Security of the Central People's Government in the HKSAR will firmly implement the Central Authorities' strategic intention and political determination to safeguard national security in Hong Kong. With our stronger awareness, keener commitment and more effective approach as regards the rule of law, we will resolutely, prudently and effectively discharge our duty in accordance with the law. We will also work in close collaboration with the Committee for Safeguarding National Security of the HKSAR and side by side with the HKSAR's administration, judicial and law enforcement teams. By doing so, we will do our utmost to fight and win the overall proactive battle for safeguarding national security in Hong Kong, and make our due contribution to the enduring success of "One Country, Two Systems".

Thank you!

LIU, Guangyuan

Commissioner,
Ministry of Foreign Affairs of
the People's Republic of China in
the Hong Kong Special Administrative Region

The Honorable Vice-Chairperson Leung Chun-ying,
The Honorable Chief Executive Carrie Lam Cheng Yuet-ngor,
The Honorable Deputy Director Chen Dong, Director Zheng Yanxiong,
Deputy Political Commissar Wang Zhaobing,
Distinguished guests, dear friends, ladies and gentlemen,

We have just celebrated the centenary of the Communist Party of China (CPC) and the 24th anniversary of Hong Kong's reunification with the Motherland, and together we have also witnessed the first anniversary of the implementation of the National Security Law. Under the strong leadership of the CPC, the giant ship of "One Country, Two Systems" has chopped through the waves and forged ahead to create a glorious chapter in the CPC's centennial success. As an iconic law for the Central Authorities to uphold and improve the "One Country, Two Systems" policy, the National Security Law has restored peace to Hong Kong. Hong Kong thus welcomes a new outlook of stability and prosperity.

Today, the officials of the Central Authorities and the HKSAR Government, as well as experts and scholars of both places, have come together to conduct an "annual review" to revisit and recap the successful

experiences in the implementation of the National Security Law for the past year. This is of great significance to a better understanding, publicity and implementation of the National Security Law. In the following, I would like to share with you some of my thoughts on the National Security Law.

First, the National Security Law is a "safety valve" to ensure the enduring success of "One Country, Two Systems". The principle of "One Country, Two Systems" is China's fundamental state policy, and its major contribution to political practice in human history. No one understands better than China the true essence of "One Country, Two Systems", and no one is more determined than China in safeguarding "One Country, Two Systems". The initial objective of "One Country, Two Systems" is to safeguard the country's unity and territorial integrity while maintaining Hong Kong's prosperity and stability. Safeguarding national security is a core requirement of the "One Country, Two Systems" principle. In the face of the prolonged social turbulence in Hong Kong over the legislative amendment bills, the Central Authorities have adhered to law-based governance of Hong Kong and decisively taken forward the enactment of the National Security Law to plug the legal loopholes of the HKSAR, set in law a clearer bottom line of "One Country, Two Systems" and provide legal support for "One Country, Two Systems". Some foreign anti-China politicians' claim that the National Security Law has, so to speak, changed "One Country, Two Systems" is a vilification born out of ignorance and prejudice.

Second, the National Security Law is a "model law" of a high standard in line with international practice. Safeguarding national security is the very prerequisite for a state's existence and development, as well as the most core and fundamental element of national sovereignty. All countries in this world, be they unitary or federal, common law or civil law ones, attach great importance to national security legislation

and adopt effective measures to safeguard national security. The National Security Law has put an end to the HKSAR's long history of "security vacuum" in safeguarding national security and is in line with the prevailing international practice. In addition, compared with overseas legislation, the National Security Law upholds an even higher standard in respecting and protecting human rights, by clearly stating the rights and freedoms enjoyed by Hong Kong residents as well as the various essential rule-of-law principles in manifestation of the principle of "targeting a very small minority for protecting the vast majority". Certain countries have persistently smeared and demonized the National Security Law despite their own relentless combat against national security crimes with their own airtight national security legislation even to the extent of abusing the concept of national security into suppression of foreign enterprises. That is a typical case of "double standards".

Third, the National Security Law is a "sharp sword" to guard against external interference. Since Hong Kong's reunification, some external forces have frequently interfered in Hong Kong's affairs by exploiting the existing institutional loopholes of the HKSAR, in their vain attempt to render Hong Kong into an independent or semi-independent political entity and a bridgehead for their activities of secession, subversion, infiltration and sabotage against the Mainland China. This has posed a serious threat to China's national security. The National Security Law targets offences endangering national security and serves as a mighty deterrent to those offenders who attempt to commit secession, subversion, organization and perpetration of terrorist activities and collusion with a foreign country or with external elements to endanger national security, and effectively curbs external forces' collusion with local anti-China Hong Kong disrupters to interfere in the affairs of Hong Kong. The fact that some countries have sanctioned against China and Hong Kong following the enactment of the National

Security Law only shows that they have been given a "home thrust", and further proves that the National Security Law was justifiably and timely enacted.

Fourth, the National Security Law is the "body guard" that safeguards Hong Kong's prosperity and stability. The National Security Law has allayed the concerns of the international community over Hong Kong's long-term development. Upon the implementation of the National Security Law, Hong Kong society has regained stability and order and is seeking greater stability and security, while its solidarity and development have been on the rise. The balance of Hong Kong's banking system has grown to a four-year high, while the IPO fundraising at the HKEX has hit a record high in 10 years. Of the more than 9,000 Mainland and overseas enterprises operating in Hong Kong, over 1,200 are regional headquarters. Many international financial institutions have recruited more staff in Hong Kong. A report released by the International Monetary Fund has reaffirmed Hong Kong's status as an international financial hub. These figures and facts fully demonstrate that the National Security Law has enhanced the stability of Hong Kong's market and investment environment and given investors both from the Mainland and abroad greater peace of mind and confidence in starting their business in Hong Kong. All these have strongly refuted the fallacy of "badmouthing Hong Kong". The fact that over 90 countries of the United Nation support the stance of the Central Authorities on Hong Kong-related issues indicates that the National Security Law is well backed by the general international community. We may put it this way — with our support for the smooth implementation of the National Security Law, we are guarding Hong Kong's unique status and success edges, embracing the opportunities for the development of China and Hong Kong, as well as protecting and promoting the respective interests of other countries in Hong Kong.

Distinguished guests, dear friends!

General Secretary Xi Jinping has emphasized that the Chinese Government stands unswerving in its determination to safeguard national sovereignty, security and development interests, to implement the "One Country, Two Systems" principle, and to oppose interference in Hong Kong's affairs by any external forces. As many of you are legal experts, I believe you are well aware that sovereign equality and non-interference in internal affairs are fundamental principles of international law and basic norms of international relations universally recognized by the international community. This has been clearly articulated in the Charter of United Nations and numerous resolutions of the UN General Assembly. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations also clearly provide that diplomatic and consular personnel are under "the duty to respect the laws and regulations of the receiving State" and "have a duty not to interfere in the internal affairs of that State". Since Hong Kong's return to China, it is solely China's internal affair to deal with the affairs of the HKSAR. There is no need for any external forces to point the finger at us. China will safeguard our national sovereignty, security and development interests with rock-solid determination and will never allow any external forces to interfere in Hong Kong's affairs. Any hegemonic, domineering or bullying acts are doomed to failure. Last month, China enacted the anti-foreign sanctions law. This once again manifests China's resolve to counter hegemonism and power politics and to safeguard our national sovereignty, dignity and core interests. Any acts detrimental to China's interests will be resolutely countered by China's 1.4 billion people, including our Hong Kong compatriots.

Distinguished guests, dear friends!

It has been a centenary since the founding of the CPC. Looking back on a century of struggle, we are convinced that the Chinese nation is advancing with unstoppable momentum towards great rejuvenation. "One Country, Two Systems" is workable, attainable and well-received by the people. Security brings prosperity, and the National Security Law protects Hong Kong. With the further implementation of the National Security Law and improvement of the HKSAR's electoral system, along with the advancement of the "14th Five-Year Plan" and Hong Kong's greater integration into China's overall development, we fully believe that Hong Kong will embrace an even brighter future!

Thank you!

Keynote Speeches

YANG, Wanming

Justice and Vice-President of Supreme People's Court, The People's Republic of China

Ladies and gentlemen, dear friends,

Good morning, everyone! At the centenary of the Communist Party of China (CPC) and the first anniversary of the promulgation of the National Security Law, I'm very pleased and honored to join all the guests and peers for "online" discussion and exchange on the relevant topics of the National Security Law.

On 30 June last year, the National Security Law adopted at the Twentieth Session of the Standing Committee of the Thirteenth National People's Congress (NPC) initiated a major transition from chaos to governance for Hong Kong. Today, this Forum is held to commemorate the first anniversary of the promulgation of the National Security Law, which is of immense significance to the study, publicity, implementation and enforcement of this Law.

Safeguarding national sovereignty and security while maintaining Hong Kong's long-term prosperity and stability is the fundamental objective of the "One Country, Two Systems" principle. In order to achieve this objective, plug the loophole of Hong Kong's legal system in safeguarding national security and patch up the deficiencies in enforcement mechanisms for Hong Kong to safeguard national

sovereignty, the Standing Committee of the National People's Congress (NPCSC), in accordance with the mandate of the NPC's relevant Decision, strictly followed the statutory procedures, listened extensively to the views of all sectors, and enacted the National Security Law. It is such a comprehensive piece of legislation comprising substantive law, procedural law and organisation law, which provides specific arrangements for the legalisation, standardisation and clarification of the institutional mechanism for Hong Kong to safeguard national security.

The National Security Law fully embodies - the unity of "One Country" and "Two Systems"; the unity of the Central Authorities' overall jurisdiction over the HKSAR and its high degree of autonomy; as well as the unity of safeguarding national sovereignty, security and development interests and protecting the lawful rights and interests of Hong Kong citizens. As a law with distinctive Chinese characteristics and practical features, the National Security Law is a creative practice of "One Country, Two Systems". Its promulgation is of major pragmatic significance and profound historical significance in safeguarding national security as well as Hong Kong's long-term stability, safety and prosperous development, and in ensuring the enduring success of the "One Country, Two Systems" cause.

The life of a law lies in its implementation, so does its authority. The full and effective implementation of the National Security Law, as a national law, is both the responsibility of the Hong Kong Judiciary and that of the Mainland judicial authorities. Since the promulgation of the National Security Law, courts in both places have made meticulous efforts in organising studies and training to lay a sound foundation for the thorough implementation of this Law. In the following, I would like to share with you my experience in studying the National Security Law from five aspects, as well as my thoughts on the full and effective implementation of the National Security Law by courts in both places.

First, we should enhance our sense of responsibility and jointly assume our judicial functions to safeguard national security. Under "One Country, Two Systems", the Central People's Government (CPG) and the HKSAR share the responsibility of safeguarding national security, amidst which the CPG has an overarching responsibility while the HKSAR has the constitutional duty to do so. This is fully reflected in the design of the jurisdictional system. The National Security Law stipulates that the vast majority of cases concerning offences endangering national security shall be handled by the HKSAR while the Office for Safeguarding National Security of the CPG in the HKSAR and relevant State authorities shall exercise jurisdiction over a very small minority of such cases only under specified circumstances. The fact that the Central Authorities authorise the HKSAR to exercise jurisdiction over the vast majority of cases shows their respect for its high degree of autonomy and also their full confidence in the HKSAR; whereas the Central Authorities' retention of jurisdiction over a very small minority of cases under specified circumstances is an important manifestation of their overall jurisdiction over Hong Kong, with the purpose to defend the bottom line for safeguarding national security in Hong Kong. As such, the courts of both the Mainland and Hong Kong must assume their respective responsibilities while undertaking a joint role in bringing their judicial functions into play, aptly performing their statutory duties in safeguarding national security, thereby effectively preventing, suppressing and imposing punishment for any offences endangering national security to ensure the full and effective implementation of the National Security Law.

Second, we should uphold our constitutional basis and accurately understand the legal stipulations and spiritual essence. Statutory interpretation is inevitable when it comes to the implementation and application of the National Security Law by the law enforcement and

judicial authorities in the Mainland and Hong Kong. Article 1 of the National Security Law makes clear from the outset that the Law is enacted in accordance with the Constitution, the Basic Law and relevant Decision of the NPC. Therefore, the full and faithful implementation of the National Security Law requires that the law enforcement and judicial authorities concerned understand and grasp this Law strictly within the framework of the Constitution, the Basic Law and the NPC's relevant decision; and in the event of any discrepancy or dispute, that they interpret the provisions in a constitutional, lawful and reasonable manner having regard to the legislative background and practical needs with strict adherence to the HKSAR's constitutional basis as formed by the Constitution and the Basic Law and in due compliance with the legislative spirit and the legislative intent of the National Security Law. In this regard, both the Explanation on the Draft Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security and the Explanation on the Draft Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, particularly the sections in the two Explanations on guiding ideology and basic principles, have reflected the legislative intent more directly. These are authoritative legislative materials that provide important references for the proper understanding and enforcement of the National Security Law. Notably, as stipulated in the National Security Law, the power of interpretation of the National Security Law is vested in the NPCSC, and no organ other than the NPCSC has the power to interpret it. In the event that the judicial authorities encounter a need for further clarification on the specific meaning of a statutory provision, or if new circumstances arise that require clarification on the applicable legal basis, a legislative interpretation shall be sought from the NPCSC.

Third, we should uphold the rule-of-law principles and strike a balance between penalising offences and protecting human rights. The General Principles of the National Security Law clearly stipulate the important rule-of-law principles to be observed, such as "conviction and punishment of crimes as prescribed by law", "presumption of innocence" and "protection against double jeopardy". These principles are also stipulated or enshrined in the laws of Mainland China. Examples are these. "No crime or penalty without a law" is one of the fundamental principles of our Criminal Law. It is an important principle of our Criminal Procedure Law that no person shall be found guilty without being judged so by a people's court in accordance with the law. In the process of adjudicating criminal cases of offences endangering national security, the Mainland courts shall adhere to the strict application of such important legal principles as "conviction and punishment of crimes as prescribed by law" and "innocent until proven guilty". They should effectively implement the criminal policy of "tempering justice with mercy" by entering proper convictions and sentences with facts as the basis and law as the yardstick while highlighting the function to protect human rights. We must ensure that punishment is commensurate with the crime committed so as to prevent undue sentencing disproportionate to the gravity of the offence. We should endeavour to bring fairness and justice to the people in every judicial case.

Fourth, we should observe the procedural rules to safeguard substantive justice through procedural justice. As far as the procedures are concerned, the provisions of the National Security Law are relatively specific in respect of the HKSAR, whereas for procedural matters, including those related to criminal investigation, examination and prosecution, trial, and execution of penalty in respect of cases over which jurisdiction is exercised by the Mainland, it is only specified that the Criminal Procedure Law of the People's Republic of China and other

related national laws shall apply. Since its promulgation in July 1979, the Criminal Procedure Law of the People's Republic of China has been amended thrice and gradually improved in areas such as the defence system, evidential rules, investigative measures and trial procedures, providing solid procedural safeguards for effective punishment of crimes, vigorous protection of human rights and effective maintenance of social stability. Given the characteristics of the Mainland's statute law and its ever-improving legal system, the people's courts in dealing with cases under their jurisdiction will certainly be able to strictly enforce the Criminal Procedure Law and fully protect a defendant's various rights in judicial proceedings and right to effective defence by a defence counsel in accordance with the law so as to ensure that the innocent are free from criminal conviction and the guilty are given a fair trial for effective maintenance of procedural and substantive justice.

Fifth, we should unify the standard of adjudication to effectively ensure efficiency and authoritativeness in the fair administration of justice. In recent years, Mainland courts have continued to deepen the reform of the judicial system and the construction of smart courts. They have given full play to their functions in providing judicial interpretations and guiding precedents. Sustained efforts have been made to advance the standardisation of sentencing and explore the implementation of a mandatory retrieval system for analogous and related cases. This has formed a comprehensive and mature working mechanism for unifying the standard of adjudication. During our study and discussion of the National Security Law, we feel that discrepancies or disputes are generally unlikely to arise when the relevant legal provisions and legal concepts are understood and grasped on the basis of the systemic and integral nature of Mainland laws. For example, in respect of state secrets, Mainland judges can generally refer to the Criminal Law of the People's Republic of China and the Law of the People's Republic of China on

Guarding State Secrets to facilitate their understanding of relevant provisions of the National Security Law. Article 33 of the National Security Law stipulates that "[a] lighter penalty may be imposed, or the penalty may be reduced", but does not specify its exact meaning. This is however clearly prescribed in the Criminal Law of the People's Republic of China, in that a lighter punishment is one imposed within the limits of the prescribed punishment and applicable to relatively lighter penalties or relatively shorter sentences; whereas a reduced punishment is one imposed below the minimum statutory penalty or, in such cases where several prescribed ranges of sentence are available, one imposed within the next range below the statutory range. In judicial practice, Mainland judges may refer to the specific circumstances under which these provisions apply to understand and grasp the exact meaning of "[a] lighter penalty may be imposed, or the penalty may be reduced" under the National Security Law. In the process of implementing the National Security Law, both the Mainland and Hong Kong need to interpret and apply the relevant provisions in the context of the relevant laws in their respective legal systems. Nevertheless, as the same Law is enforced in both places after all, there must not be any major divergence. Therefore, it is imperative to strengthen exchanges and mutual learning between the two sides.

Ladies and gentlemen, national security is a matter of personal fortune, social progress and national rejuvenation. The full, faithful and effective implementation of the National Security Law is the common responsibility of the Mainland's judicial authorities and the Hong Kong Judiciary. The Supreme People's Court will continue its steadfast support to the Hong Kong Judiciary in the prevention, suppression and punishment of acts or activities endangering national security in accordance with the National Security Law and other relevant laws,

so as to uphold the rule of law in Hong Kong and safeguard national security in a practical and effective manner.

I firmly believe that under the strong leadership of the CPC Central Committee with Xi Jinping at its core, the scientific guidance of the "One Country, Two Systems" principle, and with the nationwide support and participation of all our people including Hong Kong compatriots, we will definitely achieve effective implementation of the National Security Law and provide a strong judicial protection for safeguarding national sovereignty, security and development interests and realising Hong Kong's long-term prosperity and stability.

Thank you!

ZHANG, Yong

Deputy Director,
Legislative Affairs Commission of
the Standing Committee of
the National People's Congress

The Honorable Chief Executive Carrie Lam Cheng Yuet-ngor, distinguished guests, dear friends,

Good morning!

I would like to thank the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) for inviting me to exchange with you online at this Legal Forum held on the first anniversary of the implementation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law).

"Law is the beginning of governance". The enactment and implementation of the National Security Law is a major institutional achievement in upholding and improving the "One Country, Two Systems" regime and adhering to the law-based governance of Hong Kong. This closed a loophole in the system of the HKSAR for safeguarding national security. Over the past year since its implementation, the National Security Law has achieved remarkable results in swiftly reversing the turbulent socio-political situation arising from the "legislative amendment turmoil", enabling our fellow Hong

Kong compatriots to live and work happily and peacefully in a stable and tranquil social environment.

The life of a law lies in its implementation, so does its authority. Han Feizi, a great thinker of the Warring States period, once said, "The world does not suffer from lawlessness, but from the absence of a law that must be implemented." The National Security Law is a national law enacted by the Standing Committee of the National People's Congress (NPCSC) which applies in the HKSAR where the common law system is practiced. As such, its comprehensive, faithful and smooth implementation requires our regular discussions, deepened knowledge and enhanced consensus. So coming up, I would like to share with you my thoughts on three points.

I. Implementing the National Security Law under the guidance of the holistic view of national security

"Preparedness for eventualities is essential for a country". National security is a prerequisite for the very existence and development of a country. It is multifaceted, multidimensional and multi-disciplinary, involving national security matters both nationally and regionally. The legislative intent of the National Security Law is to safeguard our national security in the HKSAR. The National Security Law is only one of the important laws in the overall national security legal system. Therefore, this law has the characteristics of a special law and a regional law. To fully and faithfully implement the National Security Law, it is necessary for us to understand and grasp the guiding ideology, principles and policies as well as the relevant legal system under our national security system.

In face of the intricate international and domestic situations in the new era, President Xi Jinping put forward the important idea of

holistic view of national security many years ago. Its basic contents are these. We should adhere to the path of national security with Chinese characteristics. We should uphold the organic unity of political security, people's safety and supremacy of national interest. We should take people's safety as tenet, political security as root, and economic security as foundation. We should defend national sovereignty and territorial integrity. We should prevent and resolve major security risks. By doing so, we will provide a strong security protection for realising the great rejuvenation of the Chinese nation. According to the holistic view of national security, the scope of national security is very broad. Not only does this include traditional security areas, such as political security, homeland security and military security; but it also covers various non-traditional security areas, such as economic security, social security, biological security and so on.

Guided by the holistic view of national security in the past decade, the NPC and its Standing Committee have comprehensively and systematically built a legal system and an institutional mechanism for safeguarding national security, and enacted a series of important laws for safeguarding national security. These laws are self-contained and have their own unique jurisprudential bases and inherent logical relationships. As a part of the national security legal system, the National Security Law is in line with other national security laws and regulations by virtue of their common features and intrinsic links, in terms of provision formulation, interpretation and specific application. For example, in prohibiting acts and activities endangering national security, the National Security Law adopts the concept of "prevention, suppression and punishment" from the National Security Law of the People's Republic of China. These three types of prohibitions have their own specific meanings in our criminal law. Therefore, in order to fully and faithfully implement the National Security Law, we need to take

a broader view and a more multidimensional perspective, so as to — deeply understand the fundamental guiding ideology for safeguarding our national security, namely the holistic view of national security; fully grasp the basic system and the institutional mechanism for safeguarding our national security; and proactively understand the national laws and regulations for safeguarding our national security.

II. Implementing the National Security Law within the framework of the relevant NPC decision

Since the implementation of the National Security Law last year, I have noticed a phenomenon — everyone is very keen on and concerned about its contents and applicability; but few have mentioned the "May 28" Decision made by the NPC before the adoption of the National Security Law. That is the Decision of the National People's Congress on Establishment and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security. In my view, safeguarding national security in the HKSAR requires a deeper understanding and full implementation of the NPC's May 28 Decision.

First, the NPC's May 28 Decision has a superior legal force. The NPC is the highest organ of State power in our country, and the NPCSC is its permanent organ. The NPC's May 28 Decision embodies the will and the requirement of the highest organ of State power. It has the supreme legal force and binding effect. The National Security Law was enacted by the NPCSC under the mandate of the NPC's May 28 Decision. Article 1 of the National Security Law clearly stipulates that the Constitution, the Hong Kong Basic Law and the NPC's May 28 Decision are the legislative bases for the Law.

Second, the NPC's May 28 Decision has a wide range of essential requirements. The NPC's May 28 Decision sets out the general requirements and basic principles for safeguarding national security in the HKSAR, including: resolutely safeguarding national security, upholding and improving the regime of "One Country, Two Systems", upholding that Hong Kong be administered in strict accordance with the law, resolutely opposing foreign interference and effectively safeguarding the legitimate rights and interests of Hong Kong residents. At the same time, this Decision also proposes to establish and improve the multi-level, multifaceted system and mechanisms, including that: the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Hong Kong Basic Law; the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act endangering national security; the HKSAR shall establish and improve the relevant institutions and enforcement mechanisms for safeguarding national security; relevant organs of the Central Authorities will set up relevant agencies in Hong Kong to fulfil the duties; the Chief Executive shall perform duties of safeguarding national security by carrying out national security promotion and education, submitting relevant reports to the Central People's Government on a regular basis and so on.

Third, the legislative mandate of NPC's May 28 Decision should be understood comprehensively. Article 6 of the NPC's May 28 Decision authorises the NPCSC to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security. This is a general mandate, which embodies a combination of principle and flexibility, comprehensiveness and restrictiveness. It contains three levels of meaning. First, the purpose of the mandate is to request the NPCSC to formulate relevant laws on establishing and improving the legal system and enforcement

mechanisms for the HKSAR to safeguard national security. To achieve the purpose of this mandate, the NPCSC may formulate any relevant laws, including, but not limited to the already enacted National Security Law. Second, the scope of legislation is to effectively prevent, suppress and punish any acts and activities that seriously endanger national security, including but not limited to the four types of offences already prohibited under the National Security Law. The NPCSC may, in accordance with actual needs, further prohibit other offences that seriously endanger national security by enacting or amending laws. Third, it is made clear how the relevant laws of the NPCSC shall be implemented in Hong Kong, namely they shall be added to Annex III to the Hong Kong Basic Law and shall be applied locally by way of promulgation by the HKSAR.

Under the principle of "One Country, Two Systems", the effective safeguarding of national security in the HKSAR is a comprehensive, systematic and unremitting project. The enactment and implementation of the National Security Law is one of the important measures, but by no means the entirety. Therefore, it is necessary to further understand and implement the May 28 Decision of the NPCSC and to holistically construct the legal system and enforcement mechanisms for the HKSAR to safeguard national security.

III. The implementation of the National Security Law by integration with the HKSAR's legal system

As a national law included in Annex III to the Hong Kong Basic Law and applied by way of promulgation by the HKSAR, the National Security Law has become part of HKSAR's legal system. The holistic construction of the legal system and enforcement mechanisms for the HKSAR to safeguard national security requires the organic integration and effective convergence of the National Security Law with Hong Kong's local laws and systems.

First, a common and consistent jurisprudential basis should be established. Both the National Security Law and Hong Kong's relevant local laws and systems share the common objective, which is to safeguard our national security in the HKSAR. They are built on a common jurisprudential basis, and consist of three aspects. First, safeguarding national security is within the purview of the Central Authorities. The Central Government has an overarching responsibility for national security affairs relating to any place in the People's Republic of China, including the HKSAR, to exercise its sovereign power in accordance with the Constitution, specify the responsibilities and obligations through laws and construct systems and mechanisms. Second, while the HKSAR as a local administrative region enjoys a high degree of autonomy in accordance with the law, it has a constitutional duty to safeguard national security in Hong Kong. Third, it is the common obligation of all the people of China, including the people of Hong Kong, to safeguard national security. This is both a constitutional obligation and a civic responsibility to do so.

Second, we should improve the convergence and complementarity with the legal system. The National Security Law provides for four categories of offences endangering national security, which are clearly insufficient to cover all acts and activities endangering national security that may occur in Hong Kong. Chapter I of our country's Criminal Law provides for 11 categories of offences endangering national security and Article 23 of the Hong Kong Basic Law also clearly prohibits seven categories of acts and activities endangering national security. The formation of the entire legal system for safeguarding national security in Hong Kong requires the effective convergence and complementarity between the National Security Law and Hong Kong's local laws and systems. In this regard, there is still a great deal of work to be done. One aspect is the early completion of legislation on safeguarding national

security as stipulated in the Basic Law. This is a clear requirement of the NPC's May 28 Decision and also a constitutional duty of the HKSAR. Another aspect is the timely adaptation of the contents on safeguarding national security in the laws previously in force in Hong Kong. The NPCSC's decision dated 23 February 1997 on treatment of the laws previously in force in Hong Kong made specific provisions on this. This is not only a necessary requirement for the "decolonisation" of the laws previously in force in Hong Kong, but also a practical need to "activate" the laws previously in force in Hong Kong and to effectively safeguard national security.

Third, a synergistic and powerful enforcement mechanism should be established. While the National Security Law prohibits four types of offences endangering national security in terms of substantive law, it also makes quite a number of relevant provisions in terms of procedural law and organisation law. For example, it specifies the basic principles to be followed in dealing with offences endangering national security, such as the respect for and protection of human rights, conviction and punishment of crimes as prescribed by law, presumption of innocence, and protection of rights in judicial proceedings; it requires the HKSAR and relevant organs of the Central Authorities to set up relevant agencies and organisations to safeguard national security; it provides for the jurisdiction, applicable laws and procedures for adjudicating cases of offences endangering national security, and so on. These provisions of procedural and organisation laws not only apply to the four categories of offences prohibited by the National Security Law, but also apply to other offences endangering national security.

Distinguished guests and dear friends!

July 1 this year marks the centenary of the founding of the Communist Party of China (CPC). It is the finishing line for the CPC

in leading the people of China to build a moderately prosperous society in all respects and realise our first centenary goal of struggle. It is also the new starting point for our renewed strides toward building a modernised socialist country and achieving the second centenary goal of struggle. The CPC is the founder of the great cause of "One Country, Two Systems" and the leader of the successful practice of "One Country, Two Systems". Only under the leadership of the CPC can "One Country, Two Systems" regime be maintained and continuously improved in the long run. The enactment and implementation of the National Security Law is an important milestone. Let's join hands and work together to realise the theme of the Forum – Security Brings Prosperity!

Thank you!

DENG, Zhonghua

Deputy Director,
Hong Kong and Macao Affairs Office of
the State Council

The Honorable Chief Executive Carrie Lam Cheng Yuet-ngor,
The Honorable Deputy Director Chen Dong,
Deputy Director Zhang Yong, Vice-President Yang Wanming,
The Honorable Director Zheng Yanxiong,
Commissioner Liu Guangyuan,
Distinguished guests, dear friends,

Good morning, everyone!

It's my great pleasure to join this Forum hosted by the Department of Justice of the HKSAR Government. First of all, I would like to extend my warm congratulations to the opening of this Forum on behalf of Mr. Xia Baolong, Vice-Chairman of the National Committee of the Chinese People's Political Consultative Conference and Director of the Hong Kong and Macao Affairs Office of the State Council.

One year ago, faced with the gravest situation since Hong Kong's return to the motherland, the Central Authorities resolutely decided to enact and implement the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) to support the HKSAR Government in preventing, suppressing and imposing punishment for any acts endangering national

security. This has effectively safeguarded national security, swiftly restored social and legal order, and achieved a major transition from chaos to governance for Hong Kong. This Law is another important piece of legislation tailor-made for the HKSAR by the Central Authorities after the Basic Law. It also stands as a new icon of the Central Authorities' strategy to improve the governance of Hong Kong, which is of great significance and profound implications. Today, we are gathered here to review the extraordinary journey of enacting and implementing the NSL, conclude practical experiences and examine legal issues. This is very meaningful for our full and accurate understanding and implementation of the NSL. I have witnessed the whole journey which has struck a chord deep within me. I would like to take this opportunity to share my three observations.

1. The enactment of the NSL is a necessary, timely and effective measure to address the grave situation in Hong Kong

The NSL was introduced and enacted against a very exceptional background. On the one hand, the deficiencies in the legal system and enforcement mechanisms have resulted in a prolonged state of "security vacuum" for safeguarding national security in the HKSAR. Not only has the constitutional responsibility as conferred by Article 23 of the Basic Law on the HKSAR to legislate against acts endangering national security such as treason, secession and sedition not been fulfilled after 23 years since the HKSAR's reunification, the relevant provisions on safeguarding national security in the laws previously in force in Hong Kong have also long lain "dormant". There were also many deficiencies and limitations in areas such as institutional building, capacity building and law enforcement powers of the HKSAR in safeguarding national security. On the other hand, the national security risks faced by Hong Kong had become increasingly notable and culminated in the "legislative amendment turmoil". Back then, Hong Kong was plunged

into a prolonged turmoil when advocacy of "Hong Kong independence" ran rampant, violent riots rampaged and "mutual destruction" prevailed. Social order and public safety were seriously disrupted. The bottom line of the "One Country, Two Systems" principle was severely challenged and the national security, prosperity and stability of Hong Kong gravely threatened. In the short run, Hong Kong was no longer in a position to complete by itself the construction of its legal system and enforcement mechanisms to safeguard national security. It is exactly against this background that the Central Authorities felt obliged to take decisive actions by enacting the NSL for implementation in Hong Kong.

Over the year since the implementation of the NSL, the principal framework of the HKSAR's enforcement mechanisms for safeguarding national security and relevant coordination and collaboration mechanisms at both the Central Authorities' and the HKSAR's levels have been basically established and operating smoothly. Under the NSL, various institutional mechanisms supporting law enforcement and administration of justice have gradually come into place while seeing robust law enforcement and functioning well. The administrative and management systems for the HKSAR to safeguard national security in the domains of education, the internet and media have been gradually implemented for proactive and continuous progression. The enactment of the NSL has dealt a strong blow to those who are opposed to China and attempt to destabilize Hong Kong (OCDHK). It has effectively curbed OCDHK activities which are disruptive to Hong Kong. It has started a new course of bringing order out of chaos and fundamental rectifications in Hong Kong. It has enhanced the territory-wide awareness in safeguarding national security, stimulated the positive energy of patriotism and love for Hong Kong and promoted the improvement of the socio-political ecology. Hong Kong has once again enjoyed its favorable societal conditions with social stability, public safety, tranquility, peace of mind

both at work and home, as well as a sustainable social and economic development. Hong Kong remains a treasure trove of global financial investments, talents and prosperity. It has been proven by facts that the enactment and implementation of the NSL was necessary, timely and effective. This is a law of redress against evil for a reinforced foundation. This is a law to protect the rights and freedoms of Hong Kong residents while ensuring Hong Kong's long-term peace and stability. This is also a law that serves the interests of our country, Hong Kong and the people of Hong Kong in general.

2. The NSL fully implements the principle and spirit of "One Country, Two Systems"

Safeguarding national sovereignty, security and development interests while maintaining Hong Kong's long-term prosperity and stability is the fundamental objective of "One Country, Two Systems". The Central Authorities' formulation of the NSL both set out and anchored on this fundamental objective of fully and faithfully implementing the "One Country, Two Systems" principle while ensuring its enduring success. The legislative intent of the NSL is clear on this point. Article 1 of the NSL stipulates from the outset that "[t]his Law is enacted … for the purpose of: "ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy; safeguarding national security, … maintaining prosperity and stability of the [HKSAR]; protecting the lawful rights and interests of the residents of the [HKSAR]". The NSL fully embodies the principle and spirit of "One Country, Two Systems" from form to substance.

First, the NSL establishes that national security affairs relating to the HKSAR is within the purview of the Central Authorities and clarifies the relationship between the Central Authorities and the HKSAR on

the issue of safeguarding national security in Hong Kong. That is, the Central People's Government has an overarching responsibility for national security affairs relating to Hong Kong as well as a duty to oversee and guide the HKSAR in the performance of its duties for safeguarding national security. The HKSAR has constitutional and primary responsibilities, as well as specific duties in legislation, law enforcement, judiciary and administrative management to safeguard national security.

Second, in respect of the creation of offences, the NSL only provides for four categories of serious offences, namely succession, subversion, terrorist activities and collusion with foreign countries or with external elements to endanger national security. In stipulating the constituents of these offences, the NSL is both consistent in principle with the Criminal Law of the People's Republic of China while having full regard to the real risks for the HKSAR to safeguard national security as well as the characteristics of the common law, and provides a clear definition of the specific manifestations of the relevant criminal offences.

Third, in respect of jurisdictions and enforcement mechanisms, the NSL has put in place enforcement mechanisms at two levels, namely the jurisdiction of the Central Authorities and that of the HKSAR, and facilitated their mutual convergence and coordination. It makes clear that the HKSAR exercises jurisdiction over a vast majority of national security cases while the Central Authorities only retains direct jurisdiction over a very small number of cases under specified circumstances. It also requires the law enforcement agencies at both the Central and HKSAR levels to maintain good convergence and coordination with each other.

Fourth, the NSL takes full account of the actual situation in the HKSAR and the characteristics of the common law, and emphasises such principles as human rights and the rule of law. It provides for the

protection of rights and freedoms, including the freedoms of association, of assembly, and of procession, which the residents of the HKSAR enjoy under the Basic Law. It emphasises adherence to the principles of the rule of law of HKSAR, such as conviction and punishment of crimes as prescribed by law, presumption of innocence, protection of rights in judicial proceedings and protection against double jeopardy.

Fifth, from a formal perspective, the Central Authorities have not directly incorporated national laws such the NSL of the People's Republic of China and the Criminal Law of the People's Republic of China into Annex III to the Basic Law for application to the HKSAR. Instead, the NSL is specifically enacted for Hong Kong, while the views of the HKSAR Government and all sectors of Hong Kong society are extensively solicited in its legislative process. At the same time, in addition to ensuring its organic convergence with relevant national laws, the NSL also reflects as far as possible the characteristics of Hong Kong's common law in terms of legal concepts, terminology as well as the legislative approach.

All of the above reflect that the NSL fully implements the principle and spirit of "One Country, Two Systems". It upholds the principle of "One Country" while respecting the differences between the "Two Systems". It firmly safeguards national security while fully protecting the rights and freedoms that the residents of Hong Kong enjoy in accordance with the law. It effectively implements the overall jurisdiction of the Central Authorities while effectively maintaining the HKSAR's high degree of autonomy.

3. The full and faithful implementation of the NSL requires a good leverage of its relationship with the local laws of Hong Kong

The NSL is a national law enacted by the Standing Committee of the National People's Congress (NPCSC) in accordance with the Constitution, the Basic Law of HKSAR and the relevant Decision of the National People's Congress (NPC) for addition to Annex III to the Basic Law of HKSAR to be promulgated and implemented by the HKSAR. It forms an integral part of the legal system of the HKSAR. The NSL does not cover all aspects and areas of work in safeguarding national security in Hong Kong, and therefore needs to be integrated into the HKSAR's legal system for alignment and enforcement in tandem with other related laws. It is only through accurate understanding and leverage of its relationship with the local laws of Hong Kong that we can fully and faithfully implement the NSL.

First, the provisions of the NSL that plug the loopholes in the HKSAR's legal system in terms of substantive law and enforcement mechanisms must be strictly enforced. Its provisions on the four categories of offences being secession, subversion, terrorist activities and collusion with foreign countries or with external forces to endanger national security, as well as its provisions on the establishment of a committee for safeguarding national security by the HKSAR, the establishment of a department for safeguarding national security by the Hong Kong Police Force and the establishment of a specialised prosecution division responsible for the prosecution of offences endangering national security by the Department of Justice all serve to fix the loopholes and deficiencies in the legal system and enforcement mechanisms for Hong Kong to safeguard national security. The full and faithful implementation of the NSL requires, first and foremost, the precise demarcation of crimes and non-crimes, the regulation of the relevant acts and activities, and the performance of the relevant duties by

the executive, law enforcement and judicial authorities of the HKSAR in strict accordance to the NSL.

Second, the provisions of the NSL which provide for new institutional arrangements in statutory application and procedures must be applied with priority. Under the NSL, certain new institutional arrangements have been put in place to address the specificity and complexity of cases concerning offences endangering national security. For example, the provisions such as those relating to bail, jury and police's law enforcement powers are different from the general provisions of Hong Kong's local laws. Among them, in respect of the provisions on bail, Article 42(2) of the NSL establishes a bail system for cases endangering national security, under which the granting of bail is the exception rather than the rule. No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing the criminal suspect or defendant will not continue to commit acts endangering national security. With regard to the provisions on jury, Article 46 empowers the Secretary for Justice to issue a certificate directing that the case shall be tried without a jury but by a panel of three judges on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. As to the provisions on the police's law enforcement powers, Article 43 of the NSL authorises the Hong Kong police in handling national security cases to take special measures that are different from those in general criminal cases, including seven measures such as search of premises, ordering the suspect to surrender travel documents and prohibiting him from leaving Hong Kong. All these serve the practical need for timely and effective prevention, suppression and punishment for any offence endangering national security and for assurance that cases are handled fairly. The full and faithful implementation of the NSL requires the

proper application of those provisions in accordance with Article 62 of the Law when handling national security cases.

Third, as the NSL makes no specific provisions but sets out requirements of principle, it must be implemented through the local laws of Hong Kong. The NSL not only provides for criminal offences and punishment but also sets out requirements of principle for the HKSAR to strengthen supervision over national security matters, including those relating to schools, universities, social organisations, the media, and the internet, and to promote national security education among them. All these need to be accomplished through the enactment of corresponding laws or amendment to existing laws, or the introduction of necessary administrative measures. Over the past year, the HKSAR Government has actively fulfilled its primary responsibility under the NSL. They have completed the oath-taking procedure for civil servants. They have progressively announced the Curriculum Framework of National Security Education in Hong Kong. Amendments have been made to the local laws of Hong Kong including the guidelines for censors under the Film Censorship Ordinance and the Police General Orders. The Telecommunications (Registration of SIM Cards) Regulation was enacted. Efforts have been made to strengthen regulation of civil servants, the education sector and the media. On-going initiatives have been taken to promote the NSL in schools, universities and the community through the launch of national security education activities. All of the above have achieved remarkable results. The HKSAR Government needs to keep up its efforts to strengthen implementation in this regard.

Fourth, the matter of procedural and organisation laws, where so provided for under the NSL, such provisions shall apply to the handling of all cases concerning offences endangering national security; where not so provided for under the NSL, the relevant provisions of the HKSAR's local laws shall apply to the handling of

such other cases concerning offences endangering national security. Article 41 of the NSL stipulates that "[the NSL] and the laws of the [HKSAR] shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the [HKSAR] exercises jurisdiction". The provisions of the NSL on procedural and organisation laws in respect of cases concerning offence endangering national security over which the HKSAR exercises jurisdiction are applicable not only to the four categories of offences so prescribed under the NSL, but also to other offences endangering national security. In handling the four categories of offences endangering national security prescribed under the NSL, for those procedural matters not expressly provided therein, the relevant provisions of the laws of Hong Kong shall apply.

We are delighted to see that over the past year, Hong Kong society, especially the law enforcement and judicial authorities, have gradually develop a correct knowledge and understanding of the NSL. In particular, relevant institutional arrangements have been gradually implemented in areas such as bail system, jury system, the system of designated judges and special authorisation for the police's law enforcement powers. This has better addressed the relationship between the NSL and the laws of Hong Kong, and better realized the relevant legislative intent. This is undoubtedly a crucial step towards further safeguard of the authority of the NSL as well as the advancement of its effective implementation.

Distinguished guests, dear friends!

On 1 July, General Secretary Xi Jinping made a solemn declaration at the ceremony in celebration of the centenary of the founding of the Communist Party of China. Through the continued efforts of the whole Party and the entire nation, we have realised the first centenary goal of

building a moderately prosperous society in all respects on our land. We have brought about a historic resolution to the problem of absolute poverty in China, and we are now marching in confident strides towards the second centenary goal of building China into a great modern socialist country in all respects. Regarding the initiatives of Hong Kong and Macao, General Secretary Xi stressed in his speech, "We will … implement the legal systems and enforcement mechanisms for the two special administrative regions to safeguard national security. While protecting China's national sovereignty, security, and development interests, we will ensure social stability in Hong Kong and Macao, and maintain lasting prosperity and stability in the two special administrative regions." At present, Hong Kong is at a new development stage from chaos to governance and economic recovery with all businesses back on track again. We believe that with the support of the Central Authorities and relevant departments, as well as the concerted efforts of the HKSAR's governing team and people from all walks of life, the HKSAR will definitely be able to fully and faithfully implement the NSL, effectively safeguard national security and ensure the prosperity and stability of Hong Kong, so as to usher in a new chapter for the successful implementation of "One Country, Two Systems" and make Hong Kong's share of new contributions to the nation's realisation of the second centenary goal!

Finally, I wish a resounding success to this Legal Forum on commemorating the first anniversary of the NSL!

Thank you!

Panel I:

A Focused Study Of The Hong Kong National Security Law Provisions – Substantive Law Aspect

Moderator

LEE, Hoey Simon, MH, JP

Member,
Basic Law Promotion Steering Committee of
the Government of the Hong Kong Special
Administrative Region of
the People's Republic of China

Panellists

CROSS, Ian Grenville, GBS, SC

Honorary Professor,
Faculty of Law of The University of Hong Kong

HUANG, Feng

Professor,
Law School of Beijing Normal University

LI, Hong

Professor,
School of Law of Tsinghua University

Lee Hoey Simon: Dear guests, whether you are joining online or in person, and Secretary for Justice Teresa CHENG Yeuk-wah. Good morning. This is Panel 1 of the Forum today, which is the focused study of the provisions. One year on after the implementation of the National Security Law, order has been restored to Hong Kong's society and economy, and I believe this is evident for all to see. Our Forum this year will go further and deeper into the implementation of the National Security Law, one year after its launch, and this panel will focus on the substantive law aspect.

The improvement of Hong Kong's legal system, including the enactment of the National Security Law, is particularly important in the current rather chaotic international situation, where some countries have taken no heed of the rule of law or the rules of international law and acted wantonly in a way that has brought about international chaos. Of course, we also understand that there may still be some worries in the implementation of the National Security Law. These worries may arise from the newness of things, from the much lack of understanding or the lack of clarity or comprehension, or there may be concerns on the process of enforcement and application of the law. On the one hand, these worries may be subjective. Subjectively speaking, some people may not know the ins and outs of matters or, especially when there are malicious smear and allegations, may wonder whether the law would be applied maliciously. Objectively speaking on the other hand, there may indeed be some objective challenges in the process of application, while assertions often come along to misinterpret objective difficulties and challenges as subjective malice. In this regard, Honorary Professor CROSS will explain and share more with us shortly. He will mainly examine from a macro point of view the National Security Law's contributions to Hong Kong's stability and security since its implementation. This will enable us to see that the Law is in fact a normal piece of legislation and national

security law as a whole, rather than an issue to be explored in such a smearing light as some people have claimed.

In the course of the implementation of the National Security Law, many of the provisions may have drawn some attention. For example, Article 38 of the National Security Law deals with the jurisdiction over offences committed outside the HKSAR by non-permanent residents of Hong Kong, which is a question of jurisdiction over such persons. The laws of Hong Kong have always primarily focused on the territoriality principle and CHAN Tong-kai's case is a typical example. Apart from some offences of highly extreme behaviours, such as those involving child pornography, which were new endeavours, Hong Kong has in fact always adopted the territoriality principle. It is precisely for this reason that some people have felt things to seem different for national security law and this has raised many queries. We should see national security law or national security as actually an overall concept whereby a country removes threats to its overall security by other countries. Therefore, generally speaking, all countries adopt centralised legislation as their predominant mode of legislation as a whole. This is known as a matter within the purview of the Central Authorities. Given these circumstances, we can realise the magnitude of the implications. So why can't we keep up with the times and address the issue?

In fact, national security law also involves the issue of recognition with state identity and national identity, as well as the issue of law-abiding awareness. By taking a further look at the matter, we can see that this is indeed not so much purely an issue relating to, so to speak, extraterritoriality or non-Hong Kong residents. For example, when it comes to offences which advocate endangering national security and are committed outside by non-permanent residents of Hong Kong where the actual results as well as the material criminal acts take place in Hong Kong or even nationwide, jurisdictional arrangements such as the

present ones will be made under any criminal law. Therefore, there is no question of so-called jurisdiction over foreigners or extraterritoriality in this provision. And therefore, the enactment of Article 38 is a normal piece of legislation, which can be invoked even under the common law of Hong Kong. This provision is also to a certain extent related to the protective jurisdiction stated in Article 8 of the Criminal Law of the People's Republic of China. This is because Article 8 of the Criminal Law of the People's Republic of China refers to criminal acts committed in foreign countries by foreigners against the People's Republic of China or any of its citizens. As such, Article 8 of the Criminal Law of the People's Republic of China adopts two internationally recognised standards, namely the dual use of personality and territoriality principles in general criminal law. In this regard, it is perfectly normal to see such consistent drafting between national security law and criminal law. So for this matter, we will have Professor HUANG Feng for further explanation.

Finally, Professor LI Hong will also highlight how the special regard given to Hong Kong's "One Country, Two Systems", as well as our common law, has led to the specific enactment of the National Security Law as distinct from the Mainland's national security law system. In fact, there have been a lot of misunderstandings throughout the implementation of the National Security Law. This includes, as I have always said, the very fact that such principles as "presumption of innocence" do exist in the Mainland, which however seems to be often misunderstood in Hong Kong. Albeit not stated in the Criminal Law of the People's Republic of China, it is laid down in Article 12 of the Criminal Procedure Law of the People's Republic of China. However, we have to understand that the importance attached by the Mainland's statute law to the legal system, and indeed to the relationship among

laws, is in fact somewhat different from our view under the common law in Hong Kong.

So we are most delighted to have three distinguished guests with us today to share their views in further detail. They are Honorary Professor Ian Grenville CROSS from the Faculty of Law of The University of Hong Kong, Professor HUANG Feng from Beijing Normal University, and Professor LI Hong from Tsinghua University. Without further delay, let me turn the floor over to the three speakers right away. Our thanks go to Mr. CROSS for sharing with us his views on the National Security Law. Ladies and gentlemen, please welcome Mr. CROSS.

■ ■ ■ ■ ■

Cross, Ian Grenville: Good morning, Ladies and gentlemen.

I am indebted to the Secretary for Justice for inviting me to participate in today's forum, and I propose to share with you my thoughts on the sentencing regime created under the National Security Law for Hong Kong.

Sentencing of offenders

Although it is over a year since the National Security Law (NSL) was enacted, nobody has yet been sentenced for an offence under it. As the NSL contains provisions which are novel, their precise standing has, therefore, yet to be determined. One striking feature of the NSL is its deployment of minimum sentences, which is rare.

When courts sentence offenders, they have to weigh up numerous factors, often competing. They need to decide what things the sentence needs to prioritize, and what not, although the more serious the offence the less leeway they enjoy. If, for example, the offence involves a severe

crime, like armed robbery, syndicated corruption, or child molestation, a sentence which marks the abhorrence of right-minded members of the public will be unavoidable, and the impact of the mitigating factors will, at most, be minimal.

A court may have no choice but to impose a severe sentence as a deterrent to others, as this can help to prevent crime. But that is not the only way of preventing crime, and if an offender, particularly if young, can be reformed, this will also help to protect the community. In recent times, greater emphasis has been placed by both the legislature and the courts on rehabilitative sentences, and a lenient sentence may turn an offender away from a life of crime. Sentencing, however, is rarely simple, and some judges say that in comparison with the sentencing of an offender the trying of him is easy.

Although Hong Kong's laws prescribe maximum sentences, the courts, with very few exceptions, enjoy a wide discretion when sentencing offenders. Although an adult offender who is convicted of murder faces mandatory life imprisonment[1], and an adult offender convicted of unlawful possession of an offensive weapon in a public place faces a mandatory sentence of imprisonment[2], which may be long or short, such sentences are rare. However, there are certainly offences for which the legislature has indicated the levels of sentencing it expects the courts to impose, and the NSL is, therefore, in good company.

Tiered penalties: NSL Art. 22

Under NSL Art.22, there are three penalty tiers in relation to the offence of subversion, and these are also reflected elsewhere in respect

1 Offences Against the Person Ordinance (Cap.212), s.2

2 Public Order Ordinance (Cap.245), s.33(2)

of other national security offences (Art.21, secession; Art.27, terrorism; Art.29, collusion). Whereas a "principal offender" convicted of subversion will face imprisonment of between 10 years' imprisonment and life imprisonment, an "active participant" may be sentenced to anywhere between 3 and 10 years' imprisonment, while "other participants" will be liable to a fixed term of not more than 3 years' imprisonment or else to "short-term detention or restriction", which leaves the door open to alternative sentences, including a lesser term of imprisonment, a detention centre order, a training centre order, a community service order or a reformatory school order (NSL Art.64). This means, therefore, that the sentencing discretion of the courts in regard to national security offences is reduced in comparison with many other types of crime, and the use of "tiered penalties" serves to underline the gravity with which such criminality is viewed.

Although some commentators have asserted that the "tiered penalties" in NSL Art.22, and elsewhere in the Law, are alien to our criminal justice system, this is incorrect. Different penalties for the same offence already exist in some other situations, for example, under the Gambling Ordinance (Cap.148). Whereas the offence of unlawful gambling in a gambling establishment attracts a maximum sentence of 3 months' imprisonment and a fine of $10,000 on a first conviction, this rises to 6 months' imprisonment and a fine of $20,000 on a second conviction, and to 9 months' imprisonment and a fine of $30,000 on a third conviction. Again, under the Firearms and Ammunition Ordinance (Cap.238), someone who is convicted of possession of an imitation firearm is liable to 2 years' imprisonment on a first conviction, although this rises to 7 years' imprisonment if, within 10 years, he or she commits another such, or a related, offence.

The reason why mandatory sentencing is so rare is that the view has always been taken that sentencing is an art and not a science, and

that, in achieving a just outcome, the discretion of the trial courts should not be overly fettered. This means that they should, so far as possible, be free to adjust the sentence upwards or downwards, taking account of the aggravating and mitigating features, and after having had regard to such things as the circumstances of the offender, the impact of the crime upon the victim, and the prevalence of the offence, which may necessitate a sentence which will deter others. Of course, some offences are subject to sentencing guidelines issued by the appellate courts, and these obviously limit the discretion of the trial courts. But, even then, the Court of Appeal has been at pains to emphasize that guidelines are not strait-jackets, and that a judge or magistrate may depart from them for good reason.[3]

Secondary parties: NSL Art.22 & Art. 23

Under the general criminal law, secondary parties, or accessories, are liable to be prosecuted and convicted of the same offence as that committed by the principal offender.[4] This means that an aider, abettor, counsellor or procurer is liable to be dealt with at trial and punished in the same way as the principal offender.[5] Although a secondary party whose culpability is below that of a principal may receive a lesser sentence, this is by no means a given, and they will each face the same maximum penalty for the offence of which they have been convicted.

However, under NSL Art.23, in relation to subversion (and also under Art.21, in relation to secession), a different, more lenient, approach, applies. If somebody incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission of the offence of

3 *Attorney General v Yau Koon Yau* [2002] 4 HKC 685.

4 Criminal Procedure Ordinance (Cap.221) s.89.

5 *R v Wong Hoi* [1966] HKLR 386; *R v Wong Kwai Fun* [1993] 2 HKLR 171; *R v Stringer* [2012] QB 160.

subversion under Art.22, then he or she is guilty of an offence, although the sentence is not aligned to that of the principal. If the circumstances of the offence are of "a serious nature", the offender will face a term of imprisonment of between 5 and 10 years. But if the circumstances are of "a minor nature", the offender will face imprisonment of up to 5 years, or else short-term detention or restriction.

On its face, therefore, the NSL has introduced a sentencing approach for secondary parties convicted of national security offences which is milder than that which exists in relation to other types of accessories under the general criminal law. The secondary party and the principal no longer face the same maximum sentence, and a world of difference, therefore, now exists in terms of their possible punishments. This is not easy to rationalize, particularly as, for example, the culpability of a secondary party who incites the commission of an offence will sometimes be on a par with that of the principal who executes it.

That the NSL has moderated the penalties imposable on secondary parties is surprising, given its objectives, but the wording is clear, and leaves no room for misunderstanding.

Categories of offender: NSL Art.22

Before parting with NSL Art.22, I should deal with an issue which may be challenging. The NSL does not, unlike many local laws, contain an interpretation section at its outset, and the meaning of the terms used in NSL Art.22 to describe the culpability of the three different types of offenders, namely, "principal offender", "active participant", and "other participant", will, therefore, need to be resolved by the courts. Their determinations will be crucial, and will affect the sentencing band under which the offender is to be punished. A mastermind of the subversive activity, or a leader on the ground, will undoubtedly be a "principal

offender", while culprits who assume non-leadership roles, such as facilitating the crime or providing back-up support, will presumably fall into the category of "active participant". As regards the class of miscreant described as "other participants", this presumably covers peripheral figures, perhaps operating on the sidelines to assist the offence in a less than significant way. Since the actual sentence to be imposed on the offender depends so much upon the label attached to his or her culpability, the courts will undoubtedly face legal arguments on the issue, and they will be required to make rulings. In some cases, this may not be easy, particularly where the criminality in question is on the borderline between two distinct categories, and the degree of culpability is disputed.

This means, therefore, that prosecutors must be in a position to categorize the criminality of each defendant in advance of trial, and then to satisfy the court by evidence as to the legitimacy of their various categorizations. This is a new situation, and everybody involved will need to prepare themselves.

Mandatory sentencing v judicial discretion

Only one case has arisen so far in which sentencing under the NSL has been judicially considered, and that occurred when the accused person argued in the High Court, in a habeas corpus application arising out of a refusal of bail, that mandatory sentences of imprisonment neutralized the exercise of independent judicial discretion[6]. This submission received short shrift, with the judges pointing out that, as a matter of principle, it is not objectionable for the legislature to prescribe a fixed punishment, such as life imprisonment for murder, or a range of sentences, including a maximum and minimum sentence, for a particular offence, leaving it

6 *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382, [2020] HKCFI 2133

to the judge to determine the appropriate sentence on the facts of the case. The NSL offence provisions, they ruled, only prescribed the ranges of sentence for convicted persons, and not the actual penalty to be imposed, and this meant there was no impermissible interference with the exercise of judicial powers in Hong Kong.

Indeed, mandatory minimum sentences are by no means unknown elsewhere in the common law world, and they may perform a useful function. They can and do provide a potent deterrent to those who are contemplating a crime, and this is an important consideration when the crime in question is becoming prevalent in a particular jurisdiction. In Australia, for example, the federal parliament has recently adopted a minimum sentence of 6 years' imprisonment for sex offenders who abuse children overseas. In Canada, some of its firearms offences are punishable with a minimum sentence of 4 years' imprisonment. It can be seen, therefore, that the minimum sentences contained in the NSL, while not common in our domestic law, are by no means out of step with the sentencing patterns which have emerged in other common law jurisdictions.

Mitigation: NSL Art.33

After a suspect has been convicted, mitigation invariably plays a role in determining the sentence. However, the more serious the offence the less its impact is likely to be. What is and is not relevant to mitigation has been determined by the courts in numerous judgments, and these indicate the extent to which reliance can be placed upon particular factors.[7] What, however, is highly unusual, if not unprecedented, is for a particular law to incorporate specific mitigating factors for the sentencing

7 *Sentencing in Hong Kong* (9th ed., LexisNexis) Ch.30.

court to consider, even though aggravating factors have sometimes been included, notably under the Road Traffic Ordinance (Cap.374).

However, NSL Art.33 contains a novel provision by which the trial court may impose a "lighter penalty", or the penalty may be "reduced", or, in the case of a minor offence, "exempted", in three situations. These arise: firstly, if the accused person has, during the commission of the offence, voluntarily discontinued his or her involvement or effectively forestalled its consequences; secondly, if the accused person has voluntarily surrendered himself or herself and given a truthful account of the offence; or, thirdly, if the accused person has reported an offence committed by others, or provided information which assists the authorities in solving another criminal offence. Although the difference between a court imposing "a lighter penalty", on the one hand, and the penalty for the offence being "reduced", on the other, is not explained, the drafters obviously saw them as distinct entities.

As regards the "lighter penalty", this apparently refers to a lower sentence within the specified tier. So, using subversion as an example, if a court decides to take 10 years' imprisonment, which is the maximum for an "active participant" in subversion, as the starting point for sentence, this may be lowered if any of those three mitigating factors is present. What, however, is unclear is whether it can be further reduced for other mitigating factors, such as clear record, old age, or mental disorder, and it is certainly arguable that it cannot, given that the drafters have only singled out three factors as a basis for sentence reduction.

I suspect, however, that the courts will try to find a way of ensuring that other mitigating factors can still be taken into account when a "lighter penalty" is imposed, albeit to a lesser extent, perhaps by holding that the effect of Art.33 is to require that greater emphasis is placed upon the three factors it highlights, without wholly excluding the others.

The effect of NSL Art.33 on other forms of mitigation will need to be determined, and, if the courts find this problematic, an interpretation by the NPCSC, as contemplated by NSL Art.65, may be necessary.

Turning to the "reduced" penalty, this apparently refers to a penalty below the minimum sentence in the specified tier. So, for example, in a case where the minimum sentence for an "active participant" in subversion is 3 years' imprisonment, the presence of any one of those three mitigating factors will provide the court with a discretion to reduce the sentence to below 3 years. This seems to suggest, therefore, that other mitigating factors cannot also reduce the sentence below 3 years, and should be disregarded.

Exempted penalty: NSL Art.33

One other issue arises in NSL Art.33, and this concerns the provision that, if the offence is "minor" in nature, the penalty may be "exempted" if any of the three mitigating factors is present. This, presumably, means that the court, having found the accused person guilty, can then impose no sentence at all on him or her. The immediate problem with this, however, is that it apparently conflicts with the long-established principle that a conviction comprises of two elements, namely, a finding of guilt plus a sentence.[8] If, therefore, an accused person has not been sentenced for an offence of which he has been adjudged guilty, certain consequences inevitably follow. There is, for example, no conviction to enter on his criminal record, he has no prior conviction to reveal when he seeks employment, and he cannot plead *autrefois convict* if he were to be charged again with the same offence.

8 *HKSAR v Ho Tung Man* [1997] 3 HKC 375.

There may, however, be a way around this dilemma, and it involves the absolute discharge. If the NSL Art.33 exemption from penalty is equated by the courts with an absolute discharge, it may be possible to rationalize it within the existing sentencing framework. An absolute discharge, notwithstanding its lack of punitive impact, nonetheless ranks as a sentence in its own right. An absolute discharge, though comparatively rare, is imposed in circumstances where the court concludes that no actual penalty is necessary.[9] This generally arises if the offence is trivial or is otherwise devoid of moral culpability, as with some strict liability offences, but there seems to be no legal reason why it cannot also be deployed in the situation contemplated by NSL Art.33, when the penalty for a minor offence is exempted.

Conclusion

Only time will tell if my thoughts on NSL sentencing reflect the stances the courts adopt in their adjudications, and there is certainly room for different interpretations. If some of the unresolved issues I have touched upon turn out not to pose any real difficulty in practice, it will be a great relief. Although the NSL sentencing regime is clearly tough, it also seeks to gauge degrees of culpability and to punish offenders according to their actual criminality, which they, at least, will find reassuring. Once the new sentencing regime is fully functional, it will hopefully make Hong Kong a safer, and, therefore, a happier, place in which to live.

Thank you.

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9 *R v Fung Chi Wood* [1991] 1 HKLR 654.

Lee Hoey Simon: Now, let's change a topic. I shall give the floor to Professor HUANG Feng. Professor HUANG will share with us his in-depth analysis of Article 38 of the National Security Law. Thank you.

Huang Feng: Good morning, everyone. The promulgation of the National Security Law has bridged the weakest link in the rule of law in the Hong Kong Special Administrative Region (HKSAR), thus giving Hong Kong's rule of law a stronger vitality and a more fundamental guarantee. The facts and implementation over the past year have fully proved this. Today, I would like to discuss some of my personal thoughts, as an academic, on Article 38 of the National Security Law.

Article 38 of the National Security Law stipulates that, *"[t]his 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."* This provision on protective jurisdiction indeed particularly meets the practical need for the State to protect its fundamental legal interests. It also reflects the fruitful experience and development trend of other countries in acting and legislating to safeguard national security.

I. General legislative practice embodied in Article 38

Article 8 of the Criminal Law of the People's Republic of China (PRC) stipulates that *"[t]his Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of the People's Republic of China against the State of the People's Republic of China or against any of its citizens, [...]; however, this does not apply to a crime that is not punishable according to the laws of the place where it is committed"*. In contrast to this provision of Criminal Law, Article 38 of the National Security Law has removed the double

punishability condition of *"however, this does not apply to a crime that is not punishable according to the laws of the place where it is committed"*.

We may also note that, Article 8 of the Criminal Law of the PRC makes both the State of the PRC and any of its citizens the subjects of protection under its protective jurisdiction. From this perspective, if a foreigner commits an act of infringement against a PRC national personally in a foreign country, it is necessary to consider the condition of double punishability under certain circumstances, namely whether the act in question is likewise punishable in the country where it was committed, e.g. false imprisonment, defamation, forced labour, bigamy, etc.

However, if the infringement is directed against national security or material national interests, then consideration of the double punishability condition is unnecessary. This is because a state's sovereignty, security and fundamental interests often carry specificity and the protection of such legal interests should not be conditional on whether the act in question is punishable in the state where it was committed. In other words, even if the state where the act was committed is permissive towards or even approving or supportive of the act, this does not affect the infringed state's penalization of the act in accordance with its own criminal law.

As seen from the general legislative practice worldwide, the protection of national security and that of individual citizens have been separately adjusted in terms of protective jurisdiction. This has added sovereignty to the protection of national security and made it free from the influence of other jurisdictions or various political, social and legal factors. That makes the acts committed by foreigners against a state's security in a foreign country can be penalised by the infringed state in accordance with its own criminal law, regardless of whether such acts

are punishable under the domestic law in the place of commission and without the requirement of double punishability. In fact, legislation in many countries provides us with practical examples in this regard.

- Section 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: [...] high treason; [...] treason and endangering external security.*
- Article 4 of the Criminal Code of the Swiss Confederation states that the Criminal Code of the Swiss Confederation applies to the commission of felonies and misdemeanors against the State of Switzerland and of the prohibited espionage in a foreign country.
- Article 7 of the Italian Penal Code states that any citizen or foreigner who commits any offence against the state abroad shall be punished under the Italian law.
- Article 12(3) of the Criminal Code of the Russian Federation provides that: *"[f]oreign nationals and stateless persons who do not reside permanently in the Russian Federation and who have committed crimes outside the boundaries of the Russian Federation shall be brought to criminal liability under this Code in cases where the crimes run against the interests of the Russian Federation [...]."*
- Article 2 of the Japanese Penal Code provides that any person who commits outside the territory of Japan the offences of insurrection and instigation of foreign aggression, including preparations or plots to commit any such offences, shall be penalised in accordance with the Japanese Penal Code.
- Article 113-10 of the French Penal Code provides that French criminal law applies to crimes defined as violations of the fundamental interests of the nation and punishable under Title I of Book IV of the Code.

None of the statutory examples on protective jurisdiction that I have cited above is conditional on double punishability.

II. Conditions to be considered in applying Article 38

(1) Severity of the infringement

Protective jurisdiction involves the extraterritorial effect of criminal law and is a more stringent criminal law system for the protection of national security, and it may lead to conflict of laws. Therefore, we should adhere to the principle of prudence in its application as the net should not be cast too wide. I personally believe that protective jurisdiction should only be exercised when the infringement on national security reaches a certain degree of severity.

With regard to the standard of severity for offences endangering our national security committed extraterritorially, I personally think that we may consider prescribing for the relevant offences "a minimum punishment of fixed-term imprisonment of not less than three years in accordance with the provisions of the National Security Law". In other words, the exercise of protective jurisdiction will only be considered when the infringement is punishable by a fixed-term imprisonment of at least three years under the National Security Law. If the statutory minimum penalty is a fixed-term imprisonment of not more than three years, short-term detention or restriction, then it is unnecessary to exercise protective jurisdiction. For example, as just mentioned by Professor CROSS, under Article 22 of the National Security Law concerning the offence of organising, planning or committing or participating in the subversion of State power in the second paragraph, it is stipulated that "other participants shall be sentenced to fixed-term imprisonment of not more than three years, short-term detention or restriction". In

such circumstances, I personally think that it is unnecessary to exercise protective jurisdiction.

(2) Physical control of criminal suspects and defendants

Another condition relates to the practicality of the application of protective jurisdiction. For the effective punishment of crimes, criminal proceedings instituted under the protective jurisdiction of Article 38 of the National Security Law generally require that criminal suspects or defendants be under physical control. By "physical control" here, we mean that criminal suspects or defendants shall physically remain in the HKSAR or Mainland China. Whether it is possible to exercise physical control over the criminal suspects or defendants is primarily a matter for the prosecution authorities, such as the Department of Justice in Hong Kong and the People's Procuratorates in the Mainland, to grasp the conditions for prosecution. This does not affect the collection of evidence and intelligence at the initial stage by the law enforcement authorities.

Physical control over criminal suspects or defendants can be understood as a general condition under Article 38 of the National Security Law, but it is inappropriate to understand it as an indispensable requisite for applying Article 38. Where the Office for Safeguarding National Security of the Central People's Government in the HKSAR exercises jurisdiction under Article 55 of the National Security Law, and with the approval of the Supreme People's Procuratorate, the judicial authorities of Mainland China may, in accordance with Article 291 of the Criminal Procedure Law, adopt the procedures of trial in absentia for criminal prosecution of offences that seriously endanger national security as stipulated in the National Security Law. In other words, criminal suspects and defendants who are located in Mainland China or outside the HKSAR can be tried in absentia and dealt with in accordance with Article 38 of the National Security Law.

III. Understanding of "person who is not a permanent resident of the Hong Kong Special Administrative Region"

(1) In relation to Mainland China residents suspected of violating the National Security Law

Finally, I would like to talk about my personal understanding of the concept of "person who is not a permanent resident of the Hong Kong Special Administrative Region" under Article 38 of the National Security Law. The concept of "person who is not a permanent resident of the Hong Kong Special Administrative Region" referred to in Article 38 of the National Security Law is a rather broad one, covering not only foreigners or stateless persons, but also residents of Mainland China, the Macao Special Administrative Region and the Taiwan region.

As regards a Mainland resident who has committed an offence under the National Security Law outside the HKSAR, if that person is physically in Mainland China, my personal opinion is that the Office for Safeguarding National Security of the Central Authorities in the HKSAR ought to, in accordance with relevant provisions of the National Security Law and our Criminal Procedure Law, have him or her arrested with the coordination of local judicial authorities and, depending on the circumstances, handed over to the National Security Department of the Hong Kong Police Force of the HKSAR or the Mainland judicial authorities for trial.

(2) In relation to incorporated or unincorporated bodies such as companies or organisations established in foreign countries

The understanding of "person who is not a permanent resident of the Hong Kong Special Administrative Region" should be limited to the natural person. As regards incorporated or unincorporated bodies such as

companies or organisations established in foreign countries, it is difficult both to exercise physical control over them and to practically enforce property penalties and asset recovery measures against them. Moreover, there are rather considerable differences between the laws of different countries in respect of the legal person system and legal liabilities therein, and even the issue of sovereign immunity may be involved. So I think it is undesirable to bring incorporated or unincorporated bodies such as companies or organisations established in foreign countries within the scope of criminal suspects or defendants when applying Article 38 of the National Security Law.

Nevertheless, organisations or bodies established for the purpose of committing offences endangering national security, even if lawfully registered or incorporated abroad, may still be identified as criminal syndicates or terrorist organisations, and those who organise or take charge of them shall be punished in accordance with relevant provisions of the National Security Law.

The above is my understanding and some thoughts in relation to Article 38 of the National Security Law. Your comments and feedback are most welcome. Thank you very much!

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Lee Hoey Simon: Last but not least, we have Professor LI Hong to talk about the comparison between the National Security Law and the national security law in the Mainland. Please welcome Professor LI.

Li Hong: Thank you, Dr. LEE! Good morning, everyone! Thanks for the invitation by the Department of Justice of the HKSAR. I'm most delighted to have the opportunity to join this great event. Due to the pandemic, I'm unable to come and listen to your insights in person. But

in this cyber age, people are never too far apart but are always within reach of one another. So, my actual experience is no different from being there, even though I'm now 2,000 km away in Beijing.

According to the rundown of the Forum, I would like to talk about my humble views on the relevant contents of the substantive provisions relating to criminal law under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (hereinafter "the National Security Law" in brief), which was adopted by vote at the Twentieth Session of the Standing Committee of the Thirteenth National People's Congress on 30 June 2020. I'll do so from the perspective of comparing it with the PRC Criminal Law. The main points are as follows.

First, the offences provided for in the National Security Law reflect the main features of Chapter I: Offences Endangering National Security under Specific Provisions of the PRC Criminal Law. It has been suggested that Chapter I under Part Two of the PRC Criminal Law provides for over a dozen offences endangering national security whereas the National Security Law provides for only four, the purpose of which is to focus on combating the acts endangering national security in Hong Kong right now. This suggestion is correct but imprecise. Indeed, the acts endangering national security currently perpetrated in Hong Kong are mainly secession, subversion, collusion with a foreign country or with external elements to endanger national security, and terrorist activities. However, the offences endangering national security under the National Security Law are by no means equivalent to four offences under the PRC Criminal Law, but rather four categories of them. They are a condensation of the main offences endangering national security as stipulated in Chapter I under Specific Provisions of the PRC Criminal Law. Specifically, the offence of secession under the National Security Law covers the offences of splitting the State and inciting others to split

the State under Article 103 of the PRC Criminal Law, and the offence of providing funds to criminal activities that endanger national security under Article 107 of the PRC Criminal Law. The offence of subversion under the National Security Law includes the offences of subverting the State power and inciting others to subvert the State power under Article 105 of the PRC Criminal Law, and the offence of providing funds to criminal activities that endanger national security under Article 107 of the PRC Criminal Law. The offence of collusion with a foreign country or external elements to endanger national security under the National Security Law covers the offence of treason under Article 102 of the PRC Criminal Law, the offences of armed rebellion and riot under Article 104 of the PRC Criminal Law, the offence of espionage under Article 110 of the PRC Criminal Law, the offence of stealing, spying into, buying or unlawfully supplying State secrets or intelligence for a party outside the territory of China under Article 111 of the PRC Criminal Law, and the offence of aiding the enemy under Article 112 of the PRC Criminal Law.

Second, the National Security Law also incorporates the relevant contents of Chapter II: Offences Endangering Public Security under Specific Provisions of the PRC Criminal Law. This is the offence of terrorist activities as stipulated in Part 3 of the National Security Law. It is in fact the entirety of the offence of forming, leading or participating in a terrorist organisation under Article 120 of Chapter II: Crimes of Endangering Public Security under Specific Provisions of the PRC Criminal Law, the offence of providing funds to terrorist activities under Article 120a, the offence of preparing for carrying out terrorist activities under Article 120b, and the offence of propagating terrorism and instigating the terrorist activities under Article 120c. The inclusion of terrorism as an offence endangering national security is a major breakthrough in our country's legislation for offences endangering national security. Although the world today is not unanimous in its

understanding of terrorist crimes, and terrorists have their peculiar set of knowledge and logic behind their acts, the vast majority of people still believe that the use of brutal terror is illegal regardless of its purpose or belief. This is particularly so in recent years when the form of terrorism has changed dramatically from assassinating political figures to the easier targeting of petty, defenceless and innocent civilians, hence the indiscriminate killing of the innocent. Terrorists do so to create an atmosphere of terror and form international influence with a view to pressuring a sovereign state through the international community and thereby achieving the purpose of seceding that sovereign state. In this sense, the crime of terrorism is in essence a crime against national sovereignty and national security. It is precisely for this reason that many countries in the international community nowadays have treated the crime of terrorism as a crime against national security. For instance, Australia has prescribed the offence of terrorism, after those of treason and espionage, in "Chapter 5 — Security of the Commonwealth" of its Federal Criminal Code. Similarly, the French Penal Code also treats criminal acts of terrorism as a crime against national security by placing them between "Violations of the Fundamental Interests of the Nation" and "Violation of the Authority of the State" in Book IV "Felonies and Misdemeanors against the Nation, the State and the Public Peace".

Again, when compared with the relevant provisions of the PRC Criminal Law, the National Security Law's provisions on offences endangering national security are more clear and specific. For instance, the PRC Criminal Law provides for 12 specific offences endangering national security. However, the constituent criteria for every of them are not always very specific and some of the provisions are more general. By contrast, the provisions in the National Security Law are far more specific. For example, for the offence of "secession", while Paragraph 1 of Article 103 of the PRC Criminal Law simply contains the simple

phrase of "organise, plot or carry out the scheme of splitting the State or undermining unity of the country", Article 20 of the National Security Law specifies it into three types of acts, namely: (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China; (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country. Likewise, the offence of subversion is defined in Paragraph 1 of Article 105 of the PRC Criminal Law as acts in which a person "organises, plots or carries out the scheme of subverting the State power or overthrowing the socialist system", whereas Article 22 of the National Security Law specifies it into four types of acts, namely: (1) overthrowing or undermining the basic system of the People's Republic of China established by the Constitution of the People's Republic of China; (2) overthrowing the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; (3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; or (4) attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions. Furthermore, the offence of treason, for example, is also stated in Article 102 of the PRC Criminal Law simply by the phrase "colludes with a foreign State to endanger the sovereignty, territorial integrity and security of the People's Republic of China". This is however specified in Article 29 of the National Security Law as acts in which a person steals, spies, obtains with payment, or unlawfully provides State secrets

or intelligence concerning national security for a foreign country or an institution, organisation or individual outside the Mainland, Hong Kong, and Macao of the People's Republic of China; requests a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, or conspires with a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, to commit any of the following acts: (1) waging a war against the People's Republic of China, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the People's Republic of China; (2) seriously disrupting the formulation and implementation of laws or policies by the Government of the Hong Kong Special Administrative Region or by the Central People's Government, which is likely to cause serious consequences; (3) rigging or undermining an election in the Hong Kong Special Administrative Region, which is likely to cause serious consequences; (4) imposing sanctions or blockade, or engaging in other hostile activities against the Hong Kong Special Administrative Region or the People's Republic of China; or (5) provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the Government of the Region, which is likely to cause serious consequences. The principle of "conviction and punishment of criminal acts as prescribed by law" is stipulated in Article 3 of the PRC Criminal Law, which states that there must be prior and clear statutory provisions on what constitutes an offence and what punishment shall be imposed. From this perspective, the relevant provisions in the National Security Law may be considered more reasonable and appropriate.

Last, it is the manifestation of self-defence instinct for a state to treat infringements which endanger her very existence as the gravest crimes and sanction them most severely. As such, ancient and modern criminal laws both at home and abroad, including the PRC Criminal Law, impose severe penalties for offences endangering national security. The penalty for offences endangering national security under the PRC Criminal Law have the following characteristics. It includes penalty for the earliest stage of crime perpetration, with separate conviction and sentence for an act of organising and planning that has yet to be carried out. It covers the widest scope of punishment, with separate conviction and sentence for an act of inciting (abetting) and aiding (providing financial support) peripheral to the crime perpetrated. It imposes the most severe sentences, where 8 of the 12 offences are punishable by death penalty while all of them punishable by confiscation of property.

This is fully reflected in the National Security Law as well. For example, for the offence of secession, Article 21 stipulates that a person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of the offence of secession shall be guilty of an offence. Similarly, concerning the offence of subversion, Article 23 stipulates that a person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of this offence shall be guilty of an offence. In view of the fact that committing secession and subversion from outside is more dangerous than doing so from within, Article 106 of the PRC Criminal Law thus stipulates that whoever commits the crimes of carrying out the scheme of splitting the State, armed rebellion or riot, or the scheme of subverting the State power in collusion with any organ, organisation or individual outside the territory of China shall be given a heavier punishment according to the provisions stipulated in these Articles respectively. In echo with this, Article 30 of

the National Security Law stipulates that a person who conspires with or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organisation, or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China to commit the offences under Article 20 (offence of secession) or Article 22 (offence of subversion) of this Law shall be liable to a more severe penalty in accordance with the provisions therein respectively.

To sum up, in terms of its substantive provisions, the National Security Law not only draws on and incorporates the relevant contents of the PRC Criminal Law in respect of offences endangering national security and public security, but also respects and protects human rights and adheres to the rule-of-law principles in a more comprehensive and reasonable manner than the PRC Criminal Law. This is worthy of reference by the PRC Criminal Law in the stipulation and application of offences endangering national security.

Those are my thoughts after reading the relevant provisions of the PRC Criminal Law and the substantive provisions of the National Security Law. I stand to be corrected if anything is amiss. Thank you all for being the audience.

■ ■ ■ ■ ■

Lee Hoey Simon: Having listened to our professors, I would like to draw a conclusion on three aspects. First, the National Security Law was also discussed at one of the panels in the Basic Law 30th Anniversary Forum last year. Since the National Security Law was enacted by the Standing Committee of the National People's Congress (NPC) under the NPC's mandate as a legal instrument under the civil law system, challenges are indeed foreseeable when it is applied in Hong Kong's

common law courts. For example, as a matter of fact, our common law is a platform, a set of rules and a mechanism where we have well-established practices to handle cases that involve other statute laws. But should there be any need to call witnesses or adduce any case law in the process, neither is available under the National Security Law as the matter now stands, which was visible and foreseeable to us back then. It is an issue that if we invite Mainland legal experts to explain the National Security Law, there are no precedents that are specific to the National Security Law. That said, we can see from some of the cases during the year that peers from the academia and the judicial sector have made joint efforts to explore and gradually work a way out.

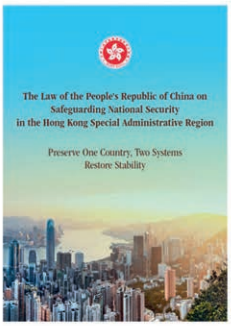
The second aspect of my conclusion is that just now Professor CROSS and Professor HUANG Feng have selected and introduced to us certain specific provisions. They have also explained them in the context of the actual situations.

The third aspect is that the comparison with the Mainland laws mentioned by Professor LI Hong just now has brought out a very important message, that is, the enactment of the National Security Law is not simply for the purpose of enacting a set of laws applicable to Hong Kong, but is also a major breakthrough in legislating for national security in our country. This breakthrough covers, as Professor LI Hong has mentioned, the inclusion of provisions for offences of terrorist attacks. This approach is somewhat similar to that of the Canadian National Defence Act, which in 1985 removed the rigid restrictions or delineations between external and internal aspects. We can also see that this is a major breakthrough.

In fact, we can also see that the national security legal system in the Mainland is considerably different from the practice in Hong Kong. For example, as far as the Mainland is concerned, if I may expand from

a more macro perspective on the specific provisions mentioned by Professor LI Hong. The laws on national security in the Mainland can simply be divided and understood as having three tiers. First, there is the national security law. Then there are some very specific laws targeting different subjects, such as the Anti-Secession Law or other relevant laws. Furthermore are the Criminal Law, the Criminal Procedure Law and the relevant provisions of the Civil Code. Therefore, this system is indeed considerably different from the practice in Hong Kong. So this panel gives a brief introduction to some of the provisions that we have just mentioned, especially on the aspect of substantive law.

So I guess it's about time now and we will conclude this panel here. I will pass the floor back to the moderators. Once again, I would like to thank Honorary Professor CROSS, Professor HUANG Feng and Professor LI Hong, to all of you and to the Department of Justice for the arrangements today. May I wish everyone good health and a smooth forum today.



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A Focused Study of the Hong Kong National Security Law Provisions: The Sentencing Regime of the National Security Law

Ian Grenville Cross, GBS, SC

Sentencing of Offenders

- Objectives of sentencing
- Deterrent sentences
- Mitigating factors
- Rehabilitation of offender
- Judges' sentencing discretion
- Maximum and minimum sentences

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Tiered Penalties: NSL Art 22

- Three penalty tiers
- Categories of offender
- Tiered penalties not unknown
- Mandatory sentencing rare
- Achieving just outcomes

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Secondary Parties: NSL Art 22 & Art 23

- General criminal law
- Accessories and principals
- Common maximum sentence
- NSL Art 23: lower sentences of accessories
- Offence of "serious nature"
- Offence of "minor nature"

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Categories of Offender: NSL Art 22

- Principal offender
- Active participant
- Other participant
- Determination of categories
- Prosecutors justifying categorizations

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Mandatory sentencing v Judicial discretion

- *Tong Ying Kit v HKSAR* [2020] 4 HKLRD 382
- Fixed punishment permissible
- Range of sentences legitimate
- Court determining actual sentence
- NSL: indicates range, not sentence
- Australia, Canada: minimum sentences

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Mitigation: NSL Art 33

- "Lighter penalty" v "reduced" penalty
- General criminal law: Mitigating factors
- Art 33: Three specific factors
- Voluntary discontinuance
- Voluntary surrender
- Reporting of offence
- Relevance of other mitigation

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Exempted Penalty: NSL Art 33

- Exemption of penalty
- No punishment: consequences
- Conviction: guilt and sentence
- No sentence, no conviction
- Absolute discharge: no actual penalty

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CONCLUSION

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Features of Substantive Provisions in the Hong Kong National Security Law

LI Hong
School of Law of Tsinghua University

First, the offences provided for in the Hong Kong National Security Law reflect the main features of Chapter I: Offences Endangering National Security under Specific Provisions of the PRC Criminal Law

The offence of secession under the Hong Kong National Security Law covers the offences of splitting the State, inciting others to split the State under Article 103 of the PRC Criminal Law, and the offence of providing funds to activities that endanger national security under Article 107 of the PRC Criminal Law;

The offence of subversion under the Hong Kong National Security Law includes the offences of subverting the State power, inciting others to subvert the State power under Article 105 of the PRC Criminal Law, and the offence of providing funds to activities that endanger national security under Article 107 of the PRC Criminal Law;

The offence of collusion with a foreign country or external elements to endanger national security under the Hong Kong National Security Law covers the offence of treason under Article 102 of the PRC Criminal Law, the offences of armed rebellion and riot under Article 104 of the PRC Criminal Law, the offence of espionage under Article 110 of the PRC Criminal Law, the offence of stealing, spying into, buying or unlawfully supplying State secrets or intelligence for a party outside the territory of China under Article 111 of the PRC Criminal Law, and the offence of aiding the enemy under Article 112 of the PRC Criminal Law.

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Second, the inclusion of terrorism as an offence endangering national security is a major breakthrough in mainland legislation for offences endangering national security

The offence of terrorist activities as stipulated in Part 3 of the Hong Kong National Security Law is in fact the entirety of the offence of forming, leading or participating in a terrorist organisation under Article 120 of Chapter II: Offences Endangering Public Security under Specific Provisions of the PRC Criminal Law, the offence of providing funds to terrorist activities under Article 120a, the offence of preparing for carrying out terrorist activities under Article 120b, the offence of propagating terrorism and instigating the terrorist activities under Article 120c, the offence of forcing others to wear or adorn the dresses or symbols that propagate terrorism under Article 120e, and the offence of illegally possessing items that propagate terrorism under Article 120f.

Again, when compared with the relevant provisions of the PRC Criminal Law, the Hong Kong National Security Law's provisions on offences endangering national security are more clear and specific

The offence of secession:

Paragraph 1 of Article 103 of the PRC Criminal Law: "organise, plot or carry out the scheme of splitting the State or undermining unity of the country".

Article 20 of the Hong Kong National Security Law specifies it into three types of acts, namely:

(1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China;

(2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or

(3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country.

Again, when compared with the relevant provisions of the PRC Criminal Law, the Hong Kong National Security Law's provisions on offences endangering national security are more clear and specific

The offence of subversion:

Paragraph 1 of Article 105 of the PRC Criminal Law: acts in which a person "organises, plots, or carries out the scheme of subverting the State power or overthrowing the socialist system, " whereas Article 22 of the Hong Kong National Security Law specifies it into four types of acts, namely:

(1) overthrowing or undermining the basic system of the People's Republic of China established by the Constitution of the People's Republic of China;
(2) overthrowing the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region;
(3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; or
(4) attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

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Again, when compared with the relevant provisions of the PRC Criminal Law, the Hong Kong National Security Law's provisions on offences endangering national security are more clear and specific

The offence of treason:

Article 102 of the PRC Criminal Law: "Whoever colludes with a foreign State to endanger the sovereignty, territorial integrity and security of the People's Republic of China"

Article 29 of the Hong Kong National Security Law: "A person who steals, spies, obtains with payment, or unlawfully provides State secrets or intelligence concerning national security for a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China; a person who requests a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, or conspires with a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organisation or individual outside the mainland, Hong Kong, and Macao of the People's Republic of China, to commit any of the following acts, shall be guilty of the offence:

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Again, when compared with the relevant provisions of the PRC Criminal Law, the Hong Kong National Security Law's provisions on offences endangering national security are more clear and specific

1) waging a war against the People's Republic of China, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the People's Republic of China;
2) seriously disrupting the formulation and implementation of laws or policies by the Government of the Hong Kong Special Administrative Region or by the Central People's Government, which is likely to cause serious consequences;
3) rigging or undermining an election in the Hong Kong Special Administrative Region, which is likely to cause serious consequences;
4) imposing sanctions or blockade, or engaging in other hostile activities against the Hong Kong Special Administrative Region or the People's Republic of China; or
5) provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the Government of the Region, which is likely to cause serious consequences. "

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Last, both laws impose severe penalties on acts endangering national security

The penalty for offences endangering national security under the PRC Criminal Law has the following characteristics. It includes penalty for the earliest stage of crime perpetration, with separate conviction and sentence for an act of organising and planning that has yet to be carried out. It covers the widest scope of punishment, with separate conviction and sentence for an act of inciting (abetting) and aiding (providing financial support) peripheral to the crime perpetrated. It imposes the most severe sentences, where 8 of the 12 offences are punishable by death penalty while all of them punishable by confiscation of property.

The Hong Kong National Security Law: The principal offenders who commit the offence of secession can be punishable of maximum penalty of life imprisonment. In addition to that, it is also stipulated that those who incite, aid, abet, provide pecuniary or other financial assistance or property for the commission by other persons of the offence of secession shall be guilty of an offence (Article 21). Likewise, in addition to life imprisonment or fixed-term imprisonment of 10 years or more for the principal offenders subverting the State power, Article 23 also provides that a person who incites, aids, abets, provides pecuniary or other financial assistance or property for the commission by other persons of this offence shall be guilty of an offence and is punishable by criminal law.

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Thank you!
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Panel II:

A Focused Study Of The Hong Kong National Security Law Provisions – Procedural Law Aspect

Moderator

LEUNG, Mei-fun Priscilla, SBS, JP

Member,
Committee for the Basic Law of
the Hong Kong Special Administrative Region
under the Standing Committee of
the National People's Congress

Panellists

LEI, Jianbin

Director,
Office for Constitution of the Legislative Affairs
Commission of the Standing Committee of
the National People's Congress

YANG, Mei-kei Maggie

Director of Public Prosecutions,
Department of Justice of the Hong Kong
Special Administrative Region of the People's
Republic of China

XIONG, Qiuhong

Professor and Dean of
Procedural Law Research Institute,
China University of Political Science and Law

Leung Mei-fun Priscilla: Secretary, distinguished guests. Today, I am most honoured to be a panel moderator in this Forum of great significance. This panel will look into the procedural matters for the implementation of the National Security Law in Hong Kong.

First of all, why is there "One Country, Two Systems"? In fact, "One Country, Two Systems" is all about peace. It is a great project for the peaceful resolution of major historical issues, and the Basic Law is a constitutional manifestation to implement "One Country, Two Systems". Hong Kong has a gilded reputation built upon rule of law, which is also the cornerstone of our social stability and prosperity. Our State has waited for Hong Kong for 23 years, with an earnest hope that Hong Kong can legislate on its own for national security under "One Country, Two Systems". But for various reasons, Hong Kong has yet to accomplish the constitutional duty to enact Article 23 legislation by 2020. As early as 1999, 2003 and 2015, I personally made a forecast on this issue that any change to the international situation or any social instability in Hong Kong might compel our State to directly enact laws on national security for Hong Kong. Eventually with the eruption of social turmoil in Hong Kong in 2019, our State enacted the National Security Law for Hong Kong from the historical perspective in a bid to halt chaos through legislation. I think everyone can see that if there were no National Security Law, the safety of lives and property of the general public in Hong Kong would remain unprotected. Once my office was hit with three petrol bombs in a single day even when someone was therein. So, over the year, I believe everyone can witness that the National Security Law has given us an assurance that people's lives and property are protected.

In this panel today, we will talk about the procedural aspects of the National Security Law, particularly in relation to the courts and law enforcement, which are matters of keen interest to us all. Just now,

Deputy Director ZHANG Yong mentioned that the National Security Law is in effect a combination of a special national law, and tailor-made for the special conditions of HKSAR. Therefore, although the National Security Law is a national law, notably for most cases, all cases concerning the national security law, except for the extremely serious or exceptional circumstances specified in Article 55, shall be heard before the judiciary authorities of Hong Kong, and Hong Kong courts will handle the cases in accordance with the common law. This fully demonstrates the characteristics of cases relating to national security law being heard in Hong Kong under "One Country, Two Systems". Just now, various guests and speakers also mentioned that our common law attaches particular importance to procedural fairness. Indeed, such principles as "presumption of innocence" and "benefit of doubt to the defendant" are fully reflected in our court proceedings. Law enforcement and trial are most crucial to the effective implementation of the National Security Law. So, we have invited three highly distinguished and experienced speakers to this panel.

Our first panelist is Director LEI Jianbin. He will talk about the matter of keen interest to us under Article 55 of the National Security Law, namely under what circumstances (only the very exceptional ones) the national security cases might not be handled by Hong Kong courts. Director LEI is the Director of the Office for Constitution of the Legislative Affairs Commission of the Standing Committee of the National People's Congress. He took part in various amendments to the Criminal Law and the Criminal Procedure Law of the People's Republic of China. He has a very in-depth understanding of the implementation of the Criminal Law and the Criminal Procedure Law of the People's Republic of China, the Constitution of our State, and the Hong Kong Basic Law, particularly the applicability of the National Security Law.

Now, let's turn the floor over to Director LEI Jianbin with a round of applause.

■ ■ ■ ■ ■

Lei Jianbin: Thanks to our moderator. Thanks to our distinguished guests and audience for your patience and attention.

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) is a milestone piece of legislation for the cause of "One Country, Two Systems". Like many others, I was keenly interested in the introduction of the National Security Law and carefully studied it upon its promulgation. It's both my pleasure and honour to share with you some of my personal views. I would like to focus on the understanding of the provisions under Article 55 of the National Security Law on cases under the jurisdiction of the Central Authorities.

Article 55 is a very important provision of the National Security Law. One of the reasons is that this article together with Article 40 jointly clarify the jurisdiction over cases concerning offences endangering national security as provided for in the National Security Law. As we all know, the National Security Law is comprehensive in content, containing a considerable portion of criminal substantive and procedural rules. Case jurisdiction is important as a fundamental system for criminal procedural law.

Another reason for its importance is that this article provides for the jurisdiction of the Central Authorities over cases concerning offences endangering national security under the National Security Law, and naturally in Hong Kong, the jurisdiction of the Central Authorities over cases is of concern to all parties.

The content of Article 55 can be briefly summarised in three points. **First, it establishes a conduit of jurisdiction for the Central Authorities,** in that the Central Authorities shall, under specified circumstances, exercise jurisdiction over cases concerning offences endangering national security as stipulated in the National Security Law. **Second, it clarifies the specified circumstances under which the Central Authorities shall exercise jurisdiction over those cases.** These are the circumstances set out in sub-paragraphs (1), (2) and (3) of this Article, under which the Central Authorities shall exercise jurisdiction over the cases. **Third, it clarifies the specific procedures for cases under the jurisdiction of the Central Authorities,** covering matters such as by whose request, with whose approval, and by whom the jurisdiction is exercised.

Before further discussing the content of Article 55, I would like to express my personal views on a few premises. The reason is that these premises will help us fully and accurately understand the intent behind the design of the Article 55 regime in relation to the important matter concerning the Central Authorities' jurisdiction over cases.

The first one is the relationship between the Central Authorities and the HKSAR. The relationship between the Central Authorities and the HKSAR originates from the Constitution and the Hong Kong Basic Law, which was enacted in accordance with the Constitution. Together, the Constitution and the Hong Kong Basic Law form the constitutional basis of Hong Kong Special Administrative Region. According to the Constitution and the Hong Kong Basic Law, Hong Kong Special Administrative Region is a local administrative region directly under the Central People's Government (Articles 30 and 31 of the Constitution and Article 12 of the Basic Law). Our country is a unitary state. As a local administrative region, Hong Kong Special Administrative Region exercises a high degree of autonomy in accordance with the law, but this autonomy fundamentally emanates from the authorisation of the Central

Authorities (Article 2 of the Basic Law). This is the legal basis for the entire national security law, which includes Article 55 of the National Security Law. **Therefore, the Central Authorities' overall jurisdiction should be manifested in its jurisdiction over cases.**

The second one is about the responsibility of the Central Authorities and that of the HKSAR in safeguarding national security. National security matters are by nature within the purview of the Central Authorities. This is so determined by the very nature and characteristics of such matters, as is the case in all countries around the world where effective governance is achieved. At the same time, the effective safeguard of national security requires both the Central Authorities and the HKSAR to duly fulfil their corresponding responsibilities. The Central Authorities, as the sovereign, have an overarching responsibility for national security; the HKSAR, as a local region, has a duty to guard the territory under its jurisdiction and the corresponding constitutional responsibility to safeguard national security. In this regard, Article 3 of the National Security Law provides clearly for this. As I understand it, the term "overarching responsibility" means the broadest and ultimate responsibility. **Therefore, the different responsibilities between the Central Authorities and the HKSAR must be manifested in the jurisdiction over cases.**

The third one is on adherence to the "One Country, Two Systems" principle. Hong Kong is a local administrative region of the People's Republic of China, which enjoys a high degree of autonomy. The implementation of "One Country, Two Systems" and the establishment of the HKSAR are the principles laid down by the State upon resuming the exercise of its sovereignty over Hong Kong. These are guaranteed by the Constitution and the Hong Kong Basic Law, which was enacted in accordance with the Constitution. In this connection, the National Security Law makes it clear from the outset in Article 1 that part of its

legislative intent is to ensure the resolute, full and faithful implementation of the policy of "One Country, Two Systems" under which the people of Hong Kong administer Hong Kong with a high degree of autonomy. This fully demonstrates the confidence the Central Authorities have in the HKSAR. **Therefore, the above legislative intent must be embodied in the jurisdiction of cases.**

The fourth point concerns the specificity of crimes endangering national security. Crimes endangering national security are characterised as follows. First, serious dangers are posed, which is why all countries devote the utmost attention to them by casting a tight legal net and imposing stiff sanctions. Second, it is a matter of national security and survival. We must guard against the occurrence of such dangers and to stop them in a timely manner, rather than awaiting the actual outcome of serious harm before taking action. Third, they often involve state secrets and national interests, manifest a high degree of concealment, and may feature factors such as unlawful interference by and collusion between foreign countries or external forces. It requires specialised personnel, specialised information and specialised procedures to deal with them, and in many cases the State must mobilise ample resources to do so effectively. Given the above characteristics of crimes against national security, there is no room for error in preventing and combating such crimes, and laws on safeguarding national security must be effectively implemented and, where necessary, the State must take action. **This must also be reflected in the jurisdiction of cases.**

Up next, based on my views on the four matters above, I would like to take a deeper dive into the understanding of Article 55 of the National Security Law. I've made a gist of Article 55 earlier, which: establishes a conduit; clarifies the circumstances of jurisdiction; and clarifies the procedures of jurisdiction.

First, the most direct legal effect of Article 55 is that it establishes a conduit for the Central Authorities to exercise direct jurisdiction over cases. With this conduit, there are then two routes of jurisdiction, one for the HKSAR and one for the Central Authorities, in respect of cases that endanger national security under the National Security Law. The direct exercise of jurisdiction by the Central Authorities is an important institutional arrangement. That said, as mentioned earlier, there is a solid legal basis for the Central Authorities to exercise jurisdiction over specified cases, whether in terms of the relationship between the Central Authorities and the HKSAR, or by nature of national security as a matter within the purview of the Central Authorities. This is an important manifestation of the Central Authorities' exercise of overall jurisdiction over the HKSAR, and is also conducive to supporting and monitoring the HKSAR's own effective performance of its constitutional duty to safeguard national security. Meanwhile, the specificity of crimes against national security, and circumstances such as the hindrance since the reunification to Hong Kong's practice of safeguarding national security and to the HKSAR's discharge of its legislative duty under Article 23 of the Basic Law, as well as the chaos since the legislative amendment turmoil, have all fully demonstrated that only when the Central Authorities exercise jurisdiction under specified circumstances can national security be effectively safeguarded. The fact that the Central Authorities retain the possibility to intervene when necessary is a fundamental guarantee that "One Country, Two Systems" will not lose shape and remain unchanged. The purpose of "walking on two legs" is to ensure the enduring success of "One Country, Two Systems" and the prosperity and stability of Hong Kong in the long run. Simply put, the Central Authorities are legally obliged, duty-bound and compelled to exercise jurisdiction.

Second, cases under the jurisdiction of the Central Authorities include three specified circumstances. According to Article 55, cases under the jurisdiction of the Central Authorities shall be restricted to three circumstances. First, 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. This refers to situations where the exercise of jurisdiction by the HKSAR is seriously impeded by external factors. It is factually proven that more often than not there are "evil hands", who could not stand idle, behind those cases endangering national security in Hong Kong. Even so, I personally understand that unless a case poses so much an obstacle as to render the HKSAR unable to exercise its jurisdiction, the case will in principle remain under the jurisdiction of the HKSAR pursuant to Article 40 of the National Security Law. Second, a serious situation occurs where the Government of the HKSAR is unable to effectively enforce this Law. This refers to the situation where the HKSAR Government fails to effectively enforce the National Security Law on its own due to serious obstacles from within the HKSAR, and the Central Authorities must exercise direct jurisdiction to ensure effective law enforcement. Third, a major and imminent threat to national security has occurred. This refers to a situation where there is a serious and imminent danger to national security and where such danger is so imminent that immediate measures must be taken by the Central Authorities to prevent its occurrence.

The three circumstances specified in Article 55 of the National Security Law fully demonstrate that the Central Authorities' jurisdiction over cases is based on their overarching responsibility to safeguard national security. The Central Authorities' jurisdiction over cases provides firm support, strong protection and, of course, strict supervision to the HKSAR.

Third, there are clear procedural requirements for cases under the jurisdiction of the Central Authorities. According to Article 55, if there are any of the three circumstances specified by the Law that require the exercise of jurisdiction by the Central Authorities, the Office for Safeguarding National Security of the Central People's Government in the HKSAR cannot decide on its own to institute a case under its jurisdiction but must go through a strict approval procedure. First, the HKSAR Government or the Office for Safeguarding National Security of the Central People's Government in the HKSAR must make a request, which is then subject to the approval by the Central People's Government, and only upon the approval by the Central People's Government can the Office for Safeguarding National Security of the Central People's Government in the HKSAR exercise jurisdiction over a case. This strict procedural requirement further demonstrates the Central Authorities' sincerity in ensuring the resolute, full and faithful implementation of the policy of "One Country, Two Systems".

In retrospect, the legislative amendment turmoil and the ensuing chaos in Hong Kong were very worrying and distressing. I think those who are genuinely concerned about the prosperity and stability of Hong Kong and hope for the enduring success of "One Country, Two Systems" should share my feelings. In a flash, it has been one year since the implementation of the National Security Law, and its effectiveness is evident to all. The further effective implementation of the National Security Law depends on the concerted efforts of all parties. I hope that my humble opinions above will be useful to everyone's understanding of the law.

Lastly, may this Forum's wish of "Security Brings Prosperity" be realised. May Hong Kong, the Pearl of the Orient, regain its beauty and peace with the "escort" of the National Security Law.

Leung Mei-fun Priscilla: Thank you very much, Director LEI Jianbin, for your detailed explanation about the division of jurisdiction under Article 55 of the National Security Law, which is a matter of keen interest to everyone. Our second panelist is Director YANG Mei-kei Maggie. Ms. Maggie YANG is the Director of Public Prosecutions of the Department of Justice (DoJ). She joined the DoJ in 1994. She specialises in the prosecution of cybercrime and white-collar crime, and has extensive experience in criminal prosecution. In respect of a spectrum of recent cases, particularly those on bail or the jury matters, Ms. YANG will explain in detail the relevant issues on the enforcement and application of Articles 42 and 46 of the National Security Law. Let's welcome Ms. YANG.

Yang Mei-kei Maggie: Distinguished guests, Secretary and dear colleagues, today I am going to talk about the applicable laws and procedures for cases concerning offences endangering national security over which the HKSAR exercises jurisdiction. They are mainly related to the provisions in Chapter IV of the National Security Law.

"Cases concerning offences endangering national security" under the jurisdiction of the HKSAR

First of all, I will explain what cases fall within "cases concerning offences endangering national security" over which the HKSAR exercises jurisdiction. Here are four examples.

The first category is offences endangering national security as stipulated under the National Security Law, namely secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security. Except under the

circumstances specified in Article 55 of the National Security Law, the HKSAR shall have jurisdiction over them[1].

The second category is offences as stipulated under the Implementation Rules for Article 43 of the National Security Law. The Implementation Rules provide for measures that may be taken by law enforcement authorities when dealing with cases concerning offences of endangering national security and create offences for non-compliance of requirement or prejudice to investigation.[2]

The third category is other offences endangering national security under the local laws of Hong Kong, such as treason and sedition under the Crimes Ordinance, and offences under the Official Secrets Ordinance.

The fourth category is offences endangering national security prescribed in the legislation to be enacted by the HKSAR under Article 23 of the Basic Law. Article 7 of the National Security Law provides that the HKSAR shall complete, as early as possible, the relevant legislation and shall refine the relevant laws.

What are the laws applicable to cases concerning offences endangering national security over which the HKSAR exercises jurisdiction?

I will now move on to the question of laws applicable to cases concerning offences endangering national security over which the HKSAR exercises jurisdiction. Under Article 41(1) of the National Security Law, the National Security Law and the laws of Hong Kong shall apply to procedural matters, including those related to criminal

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1 Article 40 of the National Security Law provides that the HKSAR shall have jurisdiction over cases concerning offences under this Law, except under the circumstances specified in Article 55 of this Law.

2 For example, section 3(8) of Schedule 3 to the Implementation Rules for Article 43 of the National Security Law (on handling without lawful authority any property related to an offence endangering national security frozen by the Secretary for Security).

investigation, prosecution, trial, in respect of cases concerning offence endangering national security over which the HKSAR exercises jurisdiction. Article 45 further provides that, unless otherwise provided by the National Security Law, courts at all levels shall handle proceedings in relation to the prosecution for such offences in accordance with the laws of the HKSAR. Article 62 also provides that the National Security Law shall prevail where provisions of the local laws of Hong Kong are inconsistent with the National Security Law.

Therefore, unless otherwise provided by the National Security Law, the provisions of the laws of Hong Kong relating to criminal justice, such as the Criminal Procedure Ordinance, the Magistrates Ordinance and the High Court Ordinance, shall continue to apply to cases under the jurisdiction of the HKSAR.

Safeguarding national security while protecting human rights and upholding the rule of law

Safeguarding national security is fundamentally consistent with respecting and protecting human rights. The effective prevention, suppression and punishment of unlawful acts that endanger national security is precisely to better protect the safety of Hong Kong residents' lives and property and to better protect fundamental rights and freedoms[3]. Therefore, Article 4 of the National Security Law provides that human rights shall be respected and protected in safeguarding national security in the HKSAR, and that the rights and freedoms, which the residents of the HKSAR enjoy under the Basic Law and the provisions of the

3 Explanation on "The Draft Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security" (WANG Chen, Vice Chairman of the Standing Committee of the National People's Congress, 22 May 2020).

International Covenants on Human Rights[4] as applied to Hong Kong, shall be protected in accordance with the law.

Article 5 of the National Security Law also stipulates the principles of the rule of law for preventing, suppressing and imposing punishment for offences endangering national security, including the principles of conviction and punishment of crimes as prescribed by law, presumption of innocence, protection of parties' rights in litigation and protection against double jeopardy. Article 39 also reflects the principle of non-retrospectivity of criminal offences. All these are in line with the provisions of the Basic Law and the Hong Kong Bill of Rights[5].

Of course, most rights and freedoms are not absolute, but can be subject to restrictions necessitated by law and for legitimate purposes such as the safeguarding of national security and public order. In striking a balance between safeguarding national security and protecting the rights and freedoms of individuals, regard must be given to the provision of Article 2 of the National Security Law that: the provisions of Articles 1 and 12 of the Basic Law are fundamental provisions, and that no institution, organisation or individual shall contravene these two provisions in exercising their rights and freedoms. In fact, as early as 1999, in a case of desecrating the national and regional flags, the Court of Final Appeal already pointed out that the implementation of the principle of "One Country, Two Systems" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity, and that restrictions can be imposed on certain rights for these purposes[6].

4 Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

5 Articles 10 and 11 of the Hong Kong Bill of Rights.

6 *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, page 461D-E.

The Court of Final Appeal stated early this year in *Lai Chee Ying* that save insofar as the National Security Law constitutes a specific exception thereto, not only the human rights and rule of law principles but also the generally applicable HKSAR rules have continued to apply in National Security Law cases. This specific exception is intended to operate in tandem with constitutional rights and freedoms and other applicable statutory norms as part of a coherent whole[7].

Procedures specifically required under National Security Law

Handling of cases concerning offences endangering national security by "designated judges"

Next, I will discuss several specific procedural requirements of the National Security Law. First, the judges responsible for handling cases concerning offences endangering national security must be among those designated by the Chief Executive of the HKSAR from the judges of the courts at all levels in accordance with Article 44 of the National Security Law. The Chief Executive may consult the Committee for Safeguarding National Security of the HKSAR and the Chief Justice of the Court of Final Appeal before making such designation.

The then Chief Justice of the Court of Final Appeal, Mr. Justice Geoffrey MA, explained last year that the listing and handling of cases, and the assignment of which designated judge to handle a case will be determined by the court leader of the relevant level of court. These are matters within the sole responsibility of the Judiciary.[8]

The Court of First Instance also emphasised in *Tong Ying Kit (No. 1)* that the Chief Executive does not assign or nominate any particular

7 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraph 42.

8 https://www.info.gov.hk/gia/general/202007/02/P2020070200414.htm?fontSize=1

judge to hear a particular case. Judges are duty-bound by the Judicial Oath to discharge their functions in accordance with the law, and will not allow the Chief Executive or the Government to interfere in matters relevant to the judges' adjudicative function by virtue of the Chief Executive's power to designate judges. A reasonable, fair-minded and well-informed observer would not think that a judge handling a case is no longer independent merely for being a judge designated by the Chief Executive.[9]

Procedure for a defendant to apply for bail

Next, I will discuss the bail provision under Article 42(2) of the National Security Law, which reads *"No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."* The Criminal Procedure Ordinance, on the other hand, contains a "presumption in favour of bail".

The Court of Final Appeal held in *Lai Chee Ying* that Article 42 of the National Security Law needs to be interpreted in the light of the context and purpose of the National Security Law.[10] Besides having regard to the legislative intent set out in Article 1, Article 42 should also be interpreted in a manner that is compatible, as far possible, with the provisions of Articles 4 and 5 on human rights protection and adherence to the rule of law principles.[11]

Since Article 62 of the National Security Law provides that the National Security Law shall prevail where provisions of the local laws

9 *Tong Ying Kit v HKSAR* [2020] HKCFI 2133, paragraphs 54-60 and 64.

10 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraph 8.

11 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraph 42.

of Hong Kong are inconsistent with the National Security Law, Article 42 carves out a specific exception to the "presumption in favour of bail" of the local laws. That said, the general provisions on human rights, freedoms, the rule of law and bail have otherwise continued to apply in cases concerning offences endangering national security[12].

Accordingly, the Court of Final Appeal held that the judge must first decide whether he or she has "sufficient grounds for believing that the defendant will not continue to commit acts endangering national security". By the defendant "will not continue to commit acts endangering national security", it should be construed as not continuing to commit acts of a nature capable of constituting an offence which endangers national security, and this is in line with the presumption of innocence[13]. The judge should take into account all relevant factors. If the judge concludes that he or she does not have sufficient grounds for believing that the defendant will not continue to commit acts endangering national security, bail should be refused.[14]

If the judge concludes that he or she does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the "presumption in favour of bail". This includes consideration of whether there are substantial grounds for believing that the defendant would fail to surrender to custody, commit an offence while on bail, interfere with a witness or pervert the course of public justice.[15]

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12 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraph 42.

13 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraphs 53(c)(ii) and 70(d)(ii).

14 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraphs 53(b) and 70(d) & (e).

15 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, paragraph 70(f).

Trial of national security cases in the Court of First Instance by a jury or a panel of three judges

Article 46 of the National Security Law provides that in criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice (SJ) may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the SJ has issued the certificate, the case shall be tried by a panel of three judges.

Recently in TONG Ying-kit's application for judicial review of the SJ's decision to issue a certificate pursuant to Article 46 of the National Security Law, the Court of Appeal held that Article 46 of the National Security Law should be examined in the light of the general context and purpose of the National Security Law as a whole, and be read together with Articles 4 and 5, as well as the relevant provisions of the Basic Law and the Hong Kong Bill of Rights, ensuring the service of the primary purpose to prevent and suppress acts which endanger national security, the prosecution's interest in maintaining the fairness of the trial and the defendant's right to a fair trial.

The Court of Appeal stated that jury trial is neither the only means of achieving fairness in the criminal process, nor an indispensable element of a fair trial required by the Basic Law and the Hong Kong Bill of Rights. When there is a real risk that the goal of a fair trial by jury will be put in peril, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by Article 46 of the National Security Law[16].

16 *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912, paragraphs 37-43.

By reference to the Court of Final Appeal's judgment in *Chiang Lily* in 2010, which relates to the choice of trial venue by the Department of Justice, the Court also held that the SJ's decision made under Article 46 of the National Security Law was a prosecutorial decision of the Department of Justice as stipulated in Article 63 of the Basic Law, and that, coupled with the direction for timely disposal of cases under Article 42(1) of the National Security Law, such decision was not open to challenge on ordinary judicial review grounds.[17] The application for judicial review was ultimately dismissed.

This concludes my presentation. Thank you all!

■ ■ ■ ■ ■

Leung Mei-fun Priscilla: Thank you so much, Ms. YANG, for citing so many cases, including the recent notable ones, in illustration of the prosecution in courts under the National Security Law, especially the procedural matters which are of particular concern to us. Next, we have another expert, Professor XIONG Qiuhong. Professor XIONG Qiuhong is Dean of the Procedural Law Research Institute of China University of Political Science and Law. She is also a member of the Council of the China Society for Human Rights Studies who participated in China-US and China-EU Human Rights Dialogues. Professor XIONG will further explain to us how the relevant jurisdiction will operate in the event of the circumstances specified in Article 55 of the National Security Law. Articles 56, 57 and 58 are relevant in this regard. So, let's welcome Professor XIONG for discussion on the relevant provisions.

17 *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912, paragraphs 55-71. It is only amenable to judicial review on the limited grounds of dishonesty, bad faith and other exceptional circumstances.

Xiong Qiuhong: The National Security Law puts in place a dual-track mechanism on jurisdiction and litigation for cases concerning offences endangering national security, which forms two closed loops as a whole. Currently, the litigation mechanism for cases under the jurisdiction of the Hong Kong Special Administrative Region (HKSAR) has been in operation, but the litigation mechanism for cases under the jurisdiction of the Central Authorities has not yet been activated. The National Security Law makes provisions in principle for the applicable laws and procedures in cases under the jurisdiction of the Central Authorities. The main content therein, in my personal view, can be interpreted as follows.

I. Applicable laws for cases under the jurisdiction of the Central Authorities

Chapter III of the National Security Law provides for "offences and penalties", which specifically include the provisions of offences and penalties for secession, subversion, terrorist activities, and collusion with a foreign country or with external elements to endanger national security. On this ground, the National Security Law shall apply to conviction of and penalties for cases under the jurisdiction of the Central Authorities, namely substantive law matters.

As regards the criminal procedural matters for cases under the jurisdiction of the Central Authorities, Article 57 of the National Security Law stipulates that the Criminal Procedure Law of the People's Republic of China (hereinafter "Criminal Procedure Law" in brief) and other related laws shall apply. Other related laws here refer to such laws as the Law on Lawyers and the Prison Law. The Law on Lawyers involves the provisions on practices, rights and obligations of Lawyers, whereas the Prison Law provides for the execution of criminal punishments, prison administration and education and reform of prisoners, etc.

II. Mechanism on division of responsibilities for cases under the jurisdiction of the Central Authorities

Under Article 56 of the National Security Law, the Office for Safeguarding National Security of the Central People's Government in the HKSAR shall initiate investigation into the case, the Supreme People's Procuratorate shall designate a prosecuting body to prosecute it, and the Supreme People's Court shall designate a court to adjudicate it. The above provisions can be explained by the following three points.

First, the article stipulates that the three powers of criminal investigation, prosecution and adjudication under the jurisdiction of the Central Authorities shall be exercised by different authorities. This manifests the principle of division of responsibilities and mutual checking among the three organs, namely the Office for Safeguarding National Security of the Central People's Government in the HKSAR, the Procuratorate and the Court.

Second, since these are cases under the jurisdiction of the Central Authorities, the relevant law enforcement and judicial powers should be exercised by law enforcement and judicial authorities at the central level respectively. This is an explanation from the jurisprudential perspective. The Office for Safeguarding National Security of the Central People's Government in the HKSAR established by the Central People's Government is a law enforcement organ of the Central Authorities, whereas the Supreme People's Procuratorate and the Supreme People's Court are both judicial organs of the Central Authorities.

Third, for cases under the jurisdiction of the Central Authorities, with the principle of two-instance final adjudication, a defendant is entitled to an absolute right to appeal. For implementing the system of two-instance final adjudication, Article 56 of the National Security

Law stipulates that the Supreme People's Procuratorate shall designate a prosecuting body to prosecute, and the Supreme People's Court shall designate a court to adjudicate. For example, the Supreme People's Court may designate the Shenzhen Intermediate People's Court as the court of first instance and the Higher People's Court of Guangdong Province as the court of second instance.

III. Workflow for cases under the jurisdiction of the Central Authorities

Under Articles 56, 57 and 58 of the National Security Law, the workflow for cases under the jurisdiction of the Central Authorities is broadly outlined as follows:

1. Filing a case for criminal investigation. The filing of a case is an independent procedure that must be formally approved by the Central People's Government before the Office for Safeguarding National Security of the Central People's Government in the HKSAR can commence relevant investigation activities in respect of the case. Examples of these activities include taking such mandatory measures as detention and arrest to restrict the personal liberty of criminal suspects; and taking such investigation measures as interrogation of the criminal suspect, questioning of the witnesses, inquest and examination, search, seal-up, seizure, inquiry and freeze to collect evidence. In taking the above measures, the Office for Safeguarding National Security of the Central People's Government in the HKSAR shall form the corresponding legal instruments, such as detention warrant, arrest warrant and search warrant. Article 57 of the National Security Law provides that these legal instruments shall have legal force in the HKSAR.

2. Examination and prosecution. If the Supreme People's Court designates the People's Procuratorate of Shenzhen Municipality and the

People's Procuratorate of Guangdong Province to exercise procuratorial power, then upon completion of investigation by the Office for Safeguarding National Security of the Central People's Government in the HKSAR, the case will be transferred to the People's Procuratorate of Shenzhen Municipality for examination and prosecution. In the course of examination, the People's Procuratorate of Shenzhen Municipality shall interrogate the criminal suspect, hear the opinions of his/her defence counsel, the victims and their agents ad litem. Upon examination, if the facts are considered unclear or the evidence insufficient, the case can be returned to the Office for Safeguarding National Security of the Central People's Government in the HKSAR for supplementary investigation. If the facts of the crime are considered clear with concrete and sufficient evidence, then the case shall be brought before the Shenzhen Intermediate People's Court for initiation of a public prosecution.

3. Trial. If the Supreme People's Court designates the Shenzhen Intermediate People's Court and the Higher People's Court of Guangdong Province to exercise judicial power, then the public prosecution of the case initiated by the People's Procuratorate of Shenzhen Municipality will be tried at first instance by the Shenzhen Intermediate People's Court. If the defendant refuses to accept the first-instance decision, he/she may appeal to the Higher People's Court of Guangdong Province for trial at second instance. If the defendant remains dissatisfied with the judgment of second instance, he/she may apply for a retrial by the Supreme People's Court.

4. Execution of penalty. If the defendant is found guilty, the penalty will be executed by the law enforcement and judicial authorities of the Central Authorities.

IV. Protection of rights of a criminal suspect or defendant in cases under the jurisdiction of the Central Authorities

The Criminal Procedure Law and other relevant laws give full protection to the rights of a criminal suspect or defendant, which mainly include:

1. The law enforcement and judicial authorities of the Central Authorities in handling a case must inform a criminal suspect or defendant of his/her litigation rights at every stage of the proceedings, such as the right to retain a lawyer for defence, the right to appeal and the right to lodge a claim.

2. A criminal suspect has the right to retain a lawyer from the outset of the investigation activities. Article 58 of the National Security Law stipulates that a criminal suspect shall have the right to retain a lawyer to represent him or her from the day he or she first receives inquiry made by the Office for Safeguarding National Security of the Central People's Government in the HKSAR or from the day a mandatory measure is taken against him or her.

3. Sufficient legal assistance is provided to a criminal suspect or defendant. All criminal suspects or defendants shall have access to on-duty lawyers for assistance; when a case enters the trial stage, if the defendant does not retain a lawyer, the court will notify a legal aid agency to assign a lawyer to defend him/her.

4. A defence lawyer is entitled to a range of litigation rights, such as the right to have meetings and correspondence with criminal suspects or defendants who are under detention, the right to investigate and collect evidence, the right to examine the prosecution evidence and the right to apply for changes to compulsory measures.

5. A defendant has the right to a fair trial. This covers, *inter alia*, the independent exercise of powers in accordance with the law by the judicial authorities, equality before the law, application with the judicial authorities for collection and obtaining of evidence, and application for exclusion of illegal evidence.

The Criminal Procedure Law was promulgated in 1979 and has been amended thrice - in 1996, 2012 and 2018 – and the standard of human rights protection has continued to rise. The Chinese Government signed the International Covenant on Civil and Political Rights (ICCPR) in 1998. It has since released the Human Rights Action Plan of China for three times (2009-2010, 2012-2015, 2016-2020), which, *inter alia*, protects the rights of detainees and the right of defendants to a fair trial. The provisions of the Criminal Procedure Law and other relevant laws on the protection of the rights of criminal suspects or defendants are generally in line with the relevant requirements of the ICCPR.

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Leung Mei-fun Priscilla: Thank you very much, Professor XIONG, for your detailed explanation on the various procedural aspects when exercising the Mainland jurisdiction under Article 55 of the National Security Law. Our three panelists have already explained in great length about the circumstances under the National Security Law. Next, I would like to sum up briefly the remarks made by each of them.

First, we have learnt from Director LEI Jianbin that our State's enactment of the National Security Law and its formulation of Article 55 have reflected its trust in and love for Hong Kong in every way. Article 55 states that it is only under rare circumstances, such as where the case is complex due to the involvement of a foreign country or external

elements, or even when the relevant investigation or law enforcement is obstructed, that Article 55 may be invoked.

Indeed, in enacting the National Security Law, China did not directly apply the National Security Law of the People's Republic of China to Hong Kong via Annex III of the Basic Law. This has already manifested the major feature of "One Country, Two Systems", in that most of the procedural provisions within this national law indeed adopt the court procedures of Hong Kong in accordance with the common law. Moreover, Ms. YANG also reiterated that Articles 4 and 5 of the National Security Law are based on the legal principles of Hong Kong as well as the common law and the Bill of Rights. We can see this from our speakers, especially Professor XIONG, who was involved in China-US and China-EU Human Rights Dialogues. Therefore, when enacting the National Security Law, our State's experts and policymakers, I believe, had fully considered how to protect human rights while safeguarding national security. Articles 4 and 5 of the enacted Law highlights the "presumption of innocence", which is a legal principle highly emphasized at the common law.

The National Security Law also fully reflects the trust placed in the Hong Kong Judiciary. This degree of trust is shown in the recent notable cases as referred to by Ms. YANG. Those cases, which are actually still ongoing, involve the issues of bail, jury and the issue as to whether the DoJ should apply for a judicial review of the court's decision on the levels of jurisdiction. All these fully reflect the common law features of Hong Kong, in that the procedural justice is fully protected throughout the court proceedings of a case in Hong Kong before an important precedent is finally set. This is a full manifestation of the common law spirit.

Certainly, our panelists, in particular Director LEI, just mentioned one thing – when there is no other way out, is our State supposed to

leave Hong Kong to its fate? This is impossible. For example, without the National Security Law, under our existing laws there is simply no way to deal with the paralysis of the legislature when someone can take advantage of the legal loopholes, or the occurrence of terrorist attacks. Of course, according to the Constitution and the Basic Law, this certainly goes against the legislative intent of the Basic Law, but unclear legislation has led to long delays in many matters. Now with the National Security Law in place, many issues have been clarified. These include, I believe everyone is clear now, things such as calling on others to impose sanctions our own place, our State and Hong Kong, or paralysing the legislature, and so on. This has become very clear.

However, Ms. YANG also referred to Article 7 of the National Security Law that Hong Kong has a duty to legislate on its own local laws under Article 23 of the Basic Law as soon as possible. Like what Deputy Director ZHANG Yong has just said, the scope of legislation includes but not limited to the parts already covered by the National Security Law, which has been enacted for Hong Kong. That means within the scope of our study, we should proactively work harder to address the possible recurrence of various situations in Hong Kong recently and cherish the opportunity to enact legislation on our own. I think this is a duty entrusted to the HKSAR by our State, as well as a manifestation of a high degree of trust. I myself have also taken part in some of the discussions. Indeed, it's easy for the State to do this part, why not do so? It is to give Hong Kong a chance to do it, and to do it in better harmony with Hong Kong's political and legal culture.

It is understandable that anxiety stems from the lack of understanding. We all understand it. Professor XIONG has just said that those familiar with the legal system and the Criminal Procedure Law should know very well that the current judicial system in China is very stringent and highly transparent. Over the past two decades, I had a

part in the training of judicial officers in China. As a matter of fact, their judicial officers are under considerable pressure in their work. As mentioned just now, if, in the rare event that Hong Kong is unable to deal with a situation, then the State will have to deal with it. As to the exercise of jurisdiction, Professor XIONG mentioned that there are strict procedures for filing a case, and the Office for Safeguarding National Security of the Central People's Government in the HKSAR can only undertake detention, investigation, and detective work upon the formal approval by the Central Government. And once the persons are subject to the jurisdiction of the State, each and every of their rights in the legal proceedings, namely the right to appeal, right to retrial, right to defence, right to complaint as well as right to legal aid, are fully protected.

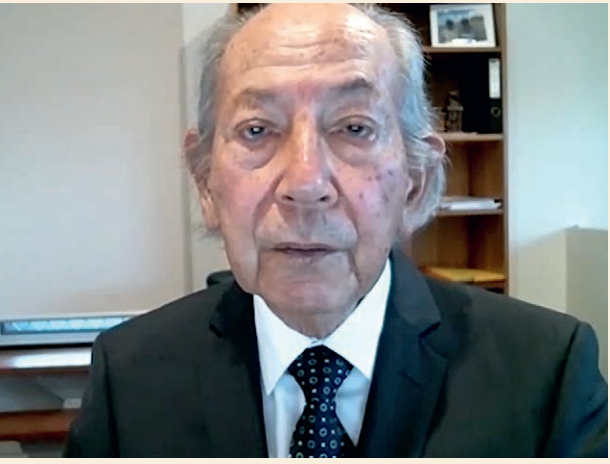
I see why Professor XIONG said so, as legal aid is actively promoted in the Mainland. On this, Professor XIONG participated in China-US and China-EU Human Rights Dialogues. Indeed, the Mainland legislation on criminal procedures, particularly those on national security and leaking State secrets, are very comprehensive with regard to all aspects. I hope everyone has a further understanding, and we will ensure a fair and impartial trial in all aspects. I stress once again that our State has fully considered the features of the HKSAR in the promulgation of the National Security Law, so that the parts on bail and the jury are still retained for application, and provided with clear procedures and principles in their application.

In my view, the passage of a new law aims at deterrence of similar crimes. Say, I don't wish to see another day when my office would be hit by so many petrol bombs where people just hurled them inside at will regardless of the civilians and volunteer workers therein. I hope that such things will not happen again in Hong Kong society, which loves peace and the rule of law. I don't wish the same thing to happen again. But at the same time, a law needs to be enforced to achieve its effect.

In this regard, I show my great respect to our colleagues in the DoJ as well as the judges in our courts. I understand that judges are under great pressure, and so are colleagues in the DoJ, because nowadays threats of violence upon our law enforcement officers and judicial officers are used, and there are many such cases. It is only by saying a definite "NO" to violence that the National Security Law in Hong Kong can truly see itself become the law to be observed where the law must be observed and strictly enforced, and lawbreakers must be dealt with. Looking ahead, I believe the legislative, judicial and the executive authorities will need to fully cooperate with one another in order to do a good job and return a society of peace, rule of law and civilisation to the Hong Kong people.

Today, I'm greatly honoured to moderate this panel. I look forward to our further exchange on other occasions if anything is unclear to you. Thank you very much.

Keynote Speeches



CHENG, Yeuk-wah Teresa, GBM, GBS, SC, JP

Secretary for Justice,
Hong Kong Special Administrative Region of
the People's Republic of China

The Honorable Vice-Chairperson Leung (Leung Chun-ying, Vice-Chairperson of the National Committee of the Chinese People's Political Consultative Conference), distinguished guests, dear friends,

Good afternoon. "Security Brings Prosperity" is the theme for the Legal Forum today. National security is a matter of top priority for any state. It is a basic prerequisite for the survival and development of a state. National security takes people's safety as tenet, protects the fundamental interests of every national, and is an essential condition for social prosperity and stability, and for peace of mind both at work and home. Therefore, "security" of our State brings "prosperity" to our home. National security precedes a good homeland.

The State takes a firm position to safeguard national sovereignty, security and development interests, uphold the full implementation of "One Country, Two Systems", maintain the long-term prosperity and stability of Hong Kong and protect the lawful rights and interests of Hong Kong residents. The Central Authorities adopted the "Decision + Legislation" approach for enacting the National Security Law, which was added to Annex III to the Basic Law and promulgated

for implementation in the HKSAR by the Chief Executive on 30 June last year.

Over the past year, the National Security Law has effectively curbed acts and activities that posed a serious threat to our national security. The effectiveness of the National Security Law in safeguarding national security is evident to all, enabling Hong Kong to find a way out of the impasse since mid-2019 and restore order from chaos.

Next, I will analyze five points in relation to the proper understanding of the National Security Law.

First, the National Security Law demonstrates the confidence the Central Authorities have in the HKSAR. It is stated in the General Principles of the National Security Law that the Central Government has an overarching responsibility for national security affairs relating to the HKSAR and it is the duty of the HKSAR under the Constitution to safeguard national security. Early this year, the Court of Final Appeal made clear in the *Lai Chee Ying* case that the National Security Law was promulgated on the footing that safeguarding national security is a matter outside the limits of the HKSAR's autonomy and within the purview of the Central Authorities, the Central Government having an overarching responsibility for national security affairs relating to the HKSAR.[1]

Article 40 of the National Security Law explains that, with the exception of the three types of circumstances specified in Article 55, the HKSAR shall have jurisdiction over all other cases, namely the vast majority of cases. In exercising jurisdiction, the HKSAR shall undertake matters as criminal investigation, prosecution, trial, and execution of

1 *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (FACC 1/2021), paragraph 32 of the judgment.

penalty in accordance with the National Security Law and the laws of the HKSAR.

In all states, be they unitary or federal, 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 plays only a supporting and facilitating role. Therefore, it is indeed a ground-breaking arrangement that the HKSAR can exercise jurisdiction over the vast majority of cases involving the National Security Law. Such an arrangement has demonstrated the Central Government's confidence and trust in the HKSAR in implementing its own constitutional duty to safeguard national security, and truly reflected the spirit of "One Country, Two Systems".

Second, the National Security Law is compatible with, and complementary to the laws of the HKSAR. One of the five working principles in formulating the National Security Law as referred to by the Legislative Affairs Commission of the Standing Committee of the National People's Congress (NPCSC) in the explanation on the Draft National Security Law is to address the compatibility and complementarity between the National Security Law and the relevant national laws and laws of the HKSAR taking into account the differences between Mainland China and the HKSAR.

This legislative intent is fully embodied in the design and provisions of the National Security Law. While the National Security Law is a national law enacted by the NPCSC, in formulating the Law, the NPCSC has taken into account the differences between the legal systems of Mainland China and the HKSAR under "One Country, Two Systems" in order to ensure the effective implementation of the legal framework for safeguarding national security in the HKSAR. Article 41 of the National Security Law provides that the National Security Law and the

laws of the HKSAR shall apply to cases concerning offence endangering national security over which the HKSAR exercises jurisdiction.

On the other hand, the National Security Law has the objective to safeguard and protect the security and development interests of the State as a whole and of all its people, and to resolve the legal loopholes, system deficiencies, and shortcomings of the HKSAR in respect of safeguarding national security. As such, under Article 62, the National Security Law shall prevail where provisions of the local laws of the HKSAR are inconsistent with this Law.

The provisions of the National Security Law reflect the fundamental importance of safeguarding national security, as exemplified by the provisions relating to bail. The Court of Final Appeal held in *Lai Chee Ying* that Article 42(2) creates a specific exception to the general rule of "presumption in favour of bail" and imports a more stringent threshold requirement for bail applications. When dealing with bail applications, the judge must first decide whether he or she "has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security". If the judge concludes that he or she does not have sufficient grounds for believing that the person will not continue to commit acts endangering national security, bail must be refused[2].

Another example is that the National Security Law has a special mechanism to ensure fair trial of cases endangering national security. Article 46 of the National Security Law provides that the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State

2 *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (FACC 1/2021), paragraphs 53(b), 70(b), (d) and (e) of the judgment.

secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. The Court of Appeal stated in the *Tong Ying Kit* case that jury trial should not be assumed to be the only means of achieving fairness in the criminal process. Under the circumstances where there is a real risk that the goal of a fair trial by jury will be put in peril, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges. Such a mode of trial serves the prosecution's interest in maintaining a fair trial and safeguards the accused's right to a fair trial[3].

Third, the National Security Law respects and protects human rights, and upholds the rule of law. Article 4 of the National Security Law provides that human rights shall be respected and protected in safeguarding national security in the HKSAR, and the rights and freedoms which the residents of the HKSAR enjoy under the Basic Law and the provisions of the international covenants on human rights as applied to Hong Kong shall be protected in accordance with the law. Article 5 provides that the principles of the rule of law, including the principles of conviction and punishment of crimes as prescribed by law, presumption of innocence, protection of parties' rights in judicial proceedings and protection against double jeopardy, shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security, whereas Article 39 states the principle of non-retrospectivity of criminal offences under the National Security Law.

Of course, most rights and freedoms are not absolute, but can be subject to restrictions imposed in accordance with the law and for legitimate purposes such as the safeguarding of national security and public order. In this regard, Article 2 of the National Security Law

3 *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912 (CACV 293/2021), paragraphs 43-44 of the judgment.

emphasises that Articles 1 and 12 of the Basic Law are fundamental provisions and "[n]o institution, organisation or individual in the Region shall contravene these provisions in exercising their rights and freedoms". This precisely is to strike a balance between the rights and freedoms of individuals and the safeguarding of national security. As mentioned by the Court of Final Appeal in *Lai Chee Ying*, the National People's Congress and the NPCSC had taken into account and balanced human rights considerations when drafting the National Security Law, in that while safeguarding national security, it is also necessary to emphasise the protection of and respect for human rights and uphold the value of the rule of law. These provisions are crucial to the construction of the National Security Law as a coherent whole[4].

For example, freedoms of speech and of the press are protected under the Basic Law and the Hong Kong Bill of Rights. However, Article 16 of the Hong Kong Bill of Rights provides that the exercise of these rights carries with it "special duties and responsibilities" and may be subject to such restrictions as are provided by law and are necessary for the protection of national security or of public order (ordre public), or of public health or morals, or for respect of the rights or reputations of others. Journalists, like everyone else, have the obligation to abide by all laws, including criminal law. The concept of "responsible journalism" is well-established in jurisprudence on human rights. Journalists are entitled to the protection of the right to freedoms of expression and of the press only if they act in good faith in order to provide accurate and reliable information in accordance with the tenets of "responsible journalism"[5]. Likewise, publishers and editors of newspapers are obliged to observe the special duties and responsibilities in journalistic activities.

4 *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (FACC 1/2021), paragraph 42 of the judgment.

5 See for example *Pentikäinen v Finland* (2017) 65 EHRR 21, paragraph 90 of the judgment.

Fourth, the extraterritorial application of the National Security Law aligns with the principles of international law and international practice. Criminal offences that are subject to the National Security Law endanger national sovereignty, unity, territorial integrity and development interests, which by nature are different from general criminal offences. Where the relevant criminal acts threaten our national security, the State cannot turn a blind eye to them, and must prevent, suppress and punish them, regardless of whether they are committed within the HKSAR or in foreign jurisdictions, or whether the offenders are Hong Kong residents or not. The National Security Law therefore has to provide for extraterritorial application.

Such extraterritorial application of the National Security Law is in line with the international law principle of "protective jurisdiction". Under the principle of "protective jurisdiction", if anyone commits 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 jurisdiction. Extraterritorial application is also a common feature of national security laws in many states, such as: Section 5 of the German Criminal Code, which covers extraterritorial conducts in respect of the offence of treason[6] ; and the Logan Act of the United States, which targets collusive activities with a foreign country or external elements[7].

6 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)"* (English Translation)

7 See Logan Act, 1 Stat. 613, 18 U.S.C. §953. 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"*.

The principle of "protective jurisdiction" is also commonly followed in international conventions against terrorism[8].

Fifth, Chapter III of the National Security Law clearly sets out the various specific criminal acts and elements that constitute the four types of offences. For example, for the offence of "collusion with a foreign country or with external elements to endanger national security" under Article 29, "collusion" is merely the heading of the provision, while the specific criminal acts are clearly set out in the provision.

The creation of the offence of "collusion" is in line with the principles of international law. Sovereign equality and non-interference in internal affairs are basic norms of international relations and fundamental principles of international law. The purpose of creating this offence is to safeguard the sovereign independence of the State from interference by external forces. The legitimacy of this is plain enough. The offence neither targets nor affects the normal contacts, such as academic exchanges and business transactions, between organisations or individuals in Hong Kong and foreign places. Nevertheless, no organisation or individual in Hong Kong should be complicit with foreign countries in imposing sanctions or other hostile acts against China or Hong Kong.

Similar offences are common elsewhere. For example, the Logan Act of the United States, which targets collusive activities with foreign countries and external elements, makes it a criminal offence for any 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

8 For example, the International Convention against the Taking of Hostages (1979), the International Convention for the Suppression of Terrorist Bombings (1997), and the International Convention on the Suppression of the Financing of Terrorism (1999).

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. The Australian Criminal Code contains offences involving foreign interference, funding or being funded by foreign intelligence agency for endangering national security.

I hope that the above five points can deepen your proper knowledge and understanding of the National Security Law. I would like to express my sincere thanks to all the speakers and experts for making time to attend this Forum in person or online, and for sharing with us their insights and valuable opinions on the National Security Law. My gratitude particularly goes to the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region, the Office for Safeguarding National Security of the Central People's Government in the HKSAR, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the HKSAR and the Hong Kong Garrison of the Chinese People's Liberation Army for their support for and assistance to the event today. Also, my special thanks owe to Asian Academy of International Law and my colleagues in the Department of Justice for their hard work and concerted efforts in making this Forum possible.

Lastly, I hope that, by your participation in the Forum today, you have come to better appreciate the remarkable contributions of the National Security Law to our national security and to the prosperity of the people in Hong Kong. My colleagues in the Department of Justice and I will remain committed as ever to safeguarding national security towards the goal of "Security Brings Prosperity".

Thank you.

TANG, Ping-keung, PDSM, JP

Secretary for Security,
Hong Kong Special Administrative Region of
the People's Republic of China

The Honorable Vice-Chairperson LEUNG (Vice-Chairperson of the National Committee of the Chinese People's Political Consultative Conference Mr. LEUNG Chun-ying),
Secretary for Justice Ms. Teresa CHENG Yeuk-wah,
Dear friends,

Good day to you all! I am very delighted to be invited to the National Security Law Legal Forum organised by the Department of Justice today. The keynote speeches and the panels in the morning, as well as the address by the Secretary for Justice just now, covers in-depth discussions on the National Security Law mainly from the legal perspective. I would like to take this opportunity to share with you the experience of the Security Bureau alongside the disciplined services in safeguarding national security, the effectiveness of the implementation of the National Security Law, as well as challenges faced by Hong Kong in safeguarding national security, from the perspective of the enforcement of the National Security Law.

I believe no one will forget the serious violence that ravaged the city for over a year since June 2019. The rioters rampantly vandalised shops, railways and other public facilities, set fires, stormed and trashed

the Legislative Council, and wilfully assaulted people holding different views. There was very serious interference by external forces, where some people begged foreign countries for sanctions against the Central People's Government and the HKSAR Government, and some even plotted subversion against State power, posing an unprecedented national security threat to Hong Kong.

The aforesaid serious violence involves three key elements related to national security, namely: the intervention and sabotage by foreign forces; the brazenness of "Hong Kong independence"; and the magnitude of violence and destruction. I will now analyse these elements one by one.

First, foreign forces, out of their own political interests, have promoted and supported the violence of Hong Kong rioters through various means, such as by providing funds and supplies to their "agents" in Hong Kong. An organisation linked to a foreign government openly admitted at its own congressional committee that funds were deployed to assist Hong Kong rioters in hiding identities on the internet to evade investigation. There were also organisations outside Hong Kong that openly raised funds, resources and equipment - including helmets, respirators and filters - for the rioters during the serious violence. I believe we all noticed that the rioters were highly organised during their rampage, and that after each riot they would lavishly leave behind numerous supplies. This indicates their abundant supply of funds and resources.

The second element is the brazenness of "Hong Kong independence". About a decade ago, anti-State "nativism" and activities suggestive of "self-determination" and "Hong Kong independence" arose. Then came the "anti-national education campaign" in 2012, the unlawful "Occupy Central" in 2014, the Mongkok riot in 2016, and the prohibition

of the Hong Kong National Party in 2018 for its advocacy of "Hong Kong independence", etc. Then followed the serious violence in 2019, where advocates of "Hong Kong independence" waved "Hong Kong independence" flags, displayed "Hong Kong independence" placards and chanted "Hong Kong independence" slogans, in their blatant challenge to the Central Authorities and the HKSAR Government.

Third, the magnitude of violence and destruction during the serious violence was unprecedented. Over 5,000 petrol bombs were hurled by the rioters and over 10,000 were seized by the Police. In one of the incidents, some 3,900 petrol bombs were seized. In addition, about 22,000 square metres of paving blocks were removed during the serious violence. How large an area can these blocks cover? Sufficient for the area of two Hong Kong Stadiums. The length of the railing removed was about 60 kilometres, which is more than the distance from Shek O to the Chek Lap Kok Airport. A person tragically died after being hit by bricks hurled by rioters, while another was severely burnt when doused with flammable substance and set ablaze. The serious violence drastically eroded the law-abiding awareness of Hong Kong people, especially the youth. Some people purposely preached the fallacious mindset that one may even break the law for doing whatever he or she deems right. Many young people were thus thrust into the abyss of crime and ended up in jail with criminal record.

The promulgation of the National Security Law on 30 June last year achieved instant results and deterrence effect. This hence has turned Hong Kong from chaos to order, restoring people's lives to normal, and enabling our economy and livelihoods to start afresh. From the perspective of establishing a legal system to safeguard national security, the effects of the National Security Law are mainly manifested in two areas. First, since its return to the Motherland, Hong Kong had not been able to legislate for Article 23 of the Basic Law, thus leaving a loophole

in the laws on safeguarding national security. The National Security Law has plugged this loophole by clearly stipulating four categories of offences endangering national security. In particular, the provisions against the offence of "collusion with a foreign country or with external elements to endanger national security" help prevent collusion of external elements with advocates of "Hong Kong independence", and reduce the risk of external interference. The provisions against the offence of "subversion" help reduce the risk of any person staging a "colour revolution" in an attempt to seize power. The provisions against the offence of "secession" helps stem secessive efforts made by advocates of "Hong Kong independence".

Moreover, the National Security Law has fortified the legal framework against terrorist activities under existing law. It stipulates that a person who organises, plans, commits, participates in or threatens to commit terrorist activities causing grave harm to society with a view to coercing the Central People's Government, the HKSAR Government or an international organisation or intimidating the public in order to pursue political agenda, shall be guilty of an offence, thus providing law enforcement agencies with the law for handling terrorist activities endangering national security.

On law enforcement, the Police have arrested over 110 people since the implementation of the National Security Law. Although this is only a small number as compared to the over 10,000 arrests made during the serious violence, the law enforcement actions have successfully cracked down on most of the criminal activities severely endangering national security. Those arrested include the syndicate suspected of conspiracy to commit subversion through the so-called "35-plus" primary election, as well as those suspected of conspiracy to collude with external elements to endanger national security under the guise of journalism.

With the National Security Law exerting potent deterrence, that those previously involved in collusion or alliance with external forces have withdrawn, while some disbanded their organisations and others absconded, thereby substantially reducing the national security risk.

However, we must not let down our guard. We still have to face many challenges in safeguarding national security. In respect of law and order, the overall law-abiding awareness of the community, especially among young people, is still weak. Although the overall crime figures have dropped recently, the serious violence has greatly weakened Hong Kong people's law-abiding awareness. What is even more worrying is that Hong Kong has seen a "rising trend of juvenile delinquency" in recent years. The number of juvenile arrests grew by more than 40% in 2020 compared to 2018. Recent crimes involving juveniles are very serious, including vigilante abuse of secondary students by other youths with slaps, punches and kicks, as well as youth gang crimes such as robbing goldsmiths, drug trafficking and criminal damage. These happenings are indeed distressing.

Moreover, although the implementation of the National Security Law has curbed the rampant and unlawful acts of serious violence and "Hong Kong independence", advocates of "Hong Kong independence" have not wholly given up and are still desperate to continue their advocacy and infiltration through various means of "soft resistance", such as by media, arts and culture, and publications, to indoctrinate the "Hong Kong independence" ideology. There are still street booths set up by organisations advocating "Hong Kong independence" in different places every now and then. There is also a university student union which still referred to the rioters as "martyr" in their pledge and manifesto for cabinet election, proclaiming their fight against the political regime. Some advocates of "Hong Kong independence" seek to circumvent investigations with constant facelifts, setting up new organisations

and recruiting new members. Some people glorified rioters under the guise of screening of documentaries, while in reality using culture to disseminate ideas of violence and "Hong Kong independence". There are also bookstores which, alongside their sale of educational and children's books, are selling books, photo albums, novels and autobiographies, etc. that propagated resistance, thereby resulting in harmful effects on the youth. We must therefore remain vigilant and call upon Hong Kong people to stay away from activities hijacked by "Hong Kong independence" so as not to be exploited as a protective cover for "Hong Kong independence".

Another challenge is the lurking of local terrorism. Ever since the serious violence, there have been over 20 cases involving explosives, firearms or ammunition. The explosives seized are those commonly used in terrorist attacks overseas. In April this year, the court imposed an imprisonment of 12 years on the defendant in an explosive-related case. In another case, the Police seized two homemade bombs weighing approximately 10 kilograms in total, which, if detonated, could have blasted all buildings within a radius of 100 metres. There was also another case involving the seizure of a semi-automatic rifle. The same type of rifle was used to open fire on the crowd attending a concert in Las Vegas of the US, killing more than 50 people. In a recent case at the end of this June, the Police cracked down on a case of suspected possession of explosives and imitation firearms. The arrestees claimed on social media about killing various political celebrities and causing bloodshed in police stations. All these indicate the lurking risk of local terrorism in Hong Kong. The perpetrators have the ability and knowledge to put local terrorism into practice by orchestrating terrorist attacks. We must remain on guard against self-radicalised individuals who may appear normal but could suddenly turn into "lone wolves" and commit terrorist acts, causing heavy casualties. Just this 1 July, someone suddenly

stabbed a police officer on duty with a sharp knife before committing suicide. Preliminary investigation shows that the attack was precisely one of such so-called "lone-wolf local terrorist attacks". However, there are still people who continue to mislead and "poison" the public by their attempts to glorify and heroise these acts, and even shift the blame onto the Police. This we must solemnly condemn.

To tackle these risks, apart from strict law enforcement, we will also strengthen our intelligence analysis to nip crimes in the bud. Through publicity and education, we will re-establish law-aiding awareness and raise the vigilance of the public by illustrating the common criminal tactics of perpetrators. In this regard, the Government, the Security Bureau and its disciplined forces, alongside various sectors of the community, must strive together to rebuild correct values and law-abiding awareness.

This past year is the inaugural year of the National Security Law. Despite the above potential risks which we need to continue to address, the deterrence of the National Security Law has been in full effect, and its success in maintaining Hong Kong's security and stability is evident to all. That said, I would like to emphasise that the National Security Law is a novel law. In the course of its enforcement, it is necessary to iron out implementation details in various aspects of the Law. In this regard, the Security Bureau and the National Security Department of the Hong Kong Police Force have received full support and assistance from the Department of Justice, providing ample professional advice on the legal basis of the law enforcement measures required in investigations, the interpretation of the relevant offence provisions, the sufficiency of the relevant evidence, as well as the legal arguments to be raised by the prosecution when law enforcement or prosecution work is subject to legal challenges. In handling the above matters, colleagues of the Department of Justice have researched extensively and communicated

closely with the Security Bureau and fellow case officers of the National Security Department. These efforts have made it possible for the legal and judicial procedures to proceed most appropriately, and for law enforcement operations to be conducted smoothly and effectively. I am very grateful for this.

We are now second year into the implementation of the National Security Law. As law enforcement and publicity work proceed in tandem, and the courts begin to try and adjudicate cases of offences endangering national security, the awareness for national security among the public and all sectors of the community will grow further. The Security Bureau will remain committed as ever to leading the disciplined forces in unswervingly discharging the responsibility to safeguard national sovereignty, security and development interests. We will do our utmost to safeguard national security. The Security Bureau and its law enforcement authorities will continue to work closely with the Department of Justice to enforce the National Security Law conscientiously, without fear or favour, and make further contributions towards the goal of "Security Brings Prosperity".

Thank you!

LITTON, Henry Denis, GBM, JP

Former Permanent Judge of the Court of Final Appeal, Hong Kong Special Administrative Region of the People's Republic of China

Thank you, Secretary for Justice, for inviting me to take part in this forum. Such small contribution as I can make to your deliberations come from long years in the law, in the course of which I have learnt at least one thing: Honour the wisdom of the common man. Therein lies the essence of the common law. A subsidiary lesson perhaps is this: History casts a long shadow.

In 1815 China under the rule of the Emperor Jiaqing was at peace, but Britain, in the course of acquiring a great empire, was at war.

When, after the battle of Waterloo in June 1815, the Duke of Wellington, commander of British forces, was asked how he saw the outcome, his laconic reply was: "It was a close-run thing".

His foot soldiers, formed in squares, withstood the repeated onslaught of Napoleon's fearsome cavalry. Not a single square broke rank. Discipline ultimately prevailed.

Transposing the scene from the heights of Waterloo in June 1815 to the streets of Hong Kong in November/December 2019, what do we see? The Hong Kong Police in serried ranks protecting property, safe-guarding lives, staying calm and restrained, withstanding onslaughts by

assailants wearing protective gear, weapons-grade gas-masks, wielding sharpened iron rods, throwing petrol bombs. And they did this month after month.

I put myself in the place of the ordinary policeman. He had been doing this for more than 6 months. His name has been posted on social media; doxxing involved not only himself but also his children; they are bullied at school; the quarters where he lived have been fire-bombed; his wife is seriously frightened; and his mother-in-law says to him repeatedly: "Why do you protect other peoples' property and not your own home, your own family?"

When ordered to make an arrest he is required to exercise "reasonable force", whatever that means. The thug he is arresting knows no reason, no restraint. An arrest risks serious injury to himself; some of his colleagues have been injured and hospitalized. The thug carries no ID card. He will not disclose his name, will not cooperate in having his photo or finger-print taken. He will not accept police bail. He cannot be charged. So, after 48 hours he is released unconditionally, to repeat the same outrage the next weekend.

How close was Hong Kong to total collapse? This, we ordinary citizens, will never know. This is something the government, for obvious reasons, will never disclose. But, as an observer looking from the outside, I would say: "It was a close-run thing".

All it took was for one police unit to break ranks, to say: "We've had enough". The whole force would have collapsed. But discipline held; and for that the community should be forever grateful.

This, as I see it, is the true scenario against which the National Security Law should be viewed. The rest is creative fiction crafted to put the Hong Kong government in the worse possible light.

What Hong Kong faced was an insurgency, the overthrow of the government, nothing less.

The insurgents made the classic mistake of the cowardly, of the school-yard bully. They took the government's low-key response, its restraint, as signs of weakness. So, for a few months, their leaders strutted on the stage as if they owned the whole show. They attracted the label of "freedom fighters" and got themselves onto the cover of Time magazine. They took no responsibility for the misery they caused to millions of their fellow citizens, and the billions of dollars of damage they inflicted, to be paid for by Hong Kong tax-payers.

What happened on Sunday 18 August 2019 is a good example. The police had raised no objection to a mass gathering in Victoria Park, provided the organizers arranged for 200 marshals to control the crowd; but the police objected to a procession to Central and a further mass gathering there. In open defiance of the law the leaders raised a huge banner and led a procession down the highways to Central, vaunting their impunity from the law. So filled were they with their own sense of triumph that they forgot the inherent strength of the law; that the law has long arms.

In retrospect, it can be seen that the seeds of insurgency were laid many years before. As Professor Cullen recently explained, much of the world had been dominated by the notion of Western ascendancy for some 200 years. China's decline in the late Qing Dynasty had been accelerated by Western belligerency.

But, after WW2, the balance began to shift. The USA, for all its awesome fire-power, met stale-mate in Korea, defeat in Vietnam and expulsion in Cuba.

Then came the astonishing rise of China after the end of the Cultural Revolution in the early 1980s. The tectonic plates began to shift, but there was no change in Western thinking: it clung tenaciously to the notion of Western ascendancy. One aspect of this, as Professor Cullen puts it, is "turbulent pushback from an unnerved Western media"; this "pushback" reflects the stance of the Western powers clinging to its assumed ascendancy.

With the break-up of the Soviet Union in the early 1990s, China was seen, more and more, as posing a threat to the dominance of the West. How to counteract that? Destabilize Hong Kong was one answer.

The thinking seems to run along these lines: China stands today as a strong homogenous nation-state; but it wasn't that long ago that China was splintered into separate fiefdoms dominated by warlords. Well, maybe, its territorial integrity could be broken up again.

If the stirrings of industrial action in the late 1980s, in a lousy little shipyard in Gdansk – a small port on the Baltic Sea – could lead to the eventual breakup of the Soviet Empire, why wouldn't the seeds of insurgency, sown in Hong Kong, do the same thing to China's territorial integrity?

The signs of such a movement are everywhere to be seen.

We need to look no further than at how the controversy surrounding the National Security Law arose.

As everyone knows, the Basic Law (Article 23) required the Hong Kong SAR, on its own, to enact laws to prohibit treason, secession, subversion etc. The laws in the statute books, inherited from colonial times, scattered over 3 Ordinances, were plainly unfit for that purpose.

So, 5 years after reunification, the government issued a consultation paper on proposals to implement Article 23. It made out a strong case. This is what it said:

"All countries round the world .....have express provisions on their statute books to prevent and punish crimes which endanger the sovereignty, territorial integrity and security of the state. Therefore, while nationals of a state enjoy the privilege of protection provided by it on the one hand, the individual citizens have a reciprocal obligation to protect the state by not committing criminal acts which threaten the existence of the state, and to support legislation which prohibits such acts on the other hand."

The proposals took into account the whole range of constitutional guarantees of personal freedoms: speech, expression, the press; and freedom from arbitrary arrest, sanctity of the home, etc.

All thinking persons would have realized that to implement Article 23 was an absolute necessity. The Central Government had entrusted this to the Hong Kong SAR; it was a considerable responsibility.

What was needed was not a *regional* security law; it was a *national* security law, affecting not only security within the region, but nationally. To emphasize Hong Kong's high degree of autonomy, this law was to be enacted by the SAR "on its own".

When the National Security (Legislative Provisions) Bill was introduced in LegCo in February 2003 one would have thought that all community leaders would have given it their support. If there were flaws in its details these could be ironed out in Committee.

There was no rational basis for a total rejection of the Bill. There was only one possible alternative to the enactment of the law by the local legislature: its promulgation by the Central Government.

But misinformation got to work in the social media. People's passions were aroused. Dark forces were at play to defeat the Bill. It failed to pass.

Fast-forward to early 2019, the controversy surrounding another piece of legislation, the "Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill".

The international community was much concerned at that time about cross-country crimes, money-laundering and terrorist financing. To align Hong Kong with other developed economies, it was necessary to upgrade the existing Ordinance: hence the amending statute.

A scare campaign was mounted through social media. The Bill was portrayed as allowing Mainland agents to grab people off the streets of Hong Kong and bring them for trial across the border.

Trouble in the streets erupted, turning into the most damaging unrest Hong Kong has ever seen.

This is what Mr C H Tung (former Chief Executive) said in May 2019:

"As Hong Kong had failed to enact its own security legislation for over 20 years, it had become an easy target for hostile foreign opportunists to disrupt public order, using Hong Kong in effect as a proxy for a wider power conflict".

On Wednesday 12 June 2019, an organized group of rioters outside the fenced perimeter, fighting to get into the LegCo building, forced the suspension of the second reading of the Bill.

Three days later the government announced the withdrawal of the Bill.

The speech made by the Chief Executive was calculated to calm nerves and dampen passions. It was a model of restraint and humility. She said:

"I want to stress that the original purposes of the exercise stem from my and my team's passion for Hong Kong and our empathy for Hong Kong people. I feel deep sorrow and regret that the deficiencies in our work and various other factors have stirred up substantial controversies and dispute in society following the relatively calm periods of the past two years, disappointing many people. We will adopt the most sincere and humble attitude to accept criticisms and make improvements so that we can continue to connect with the people of Hong Kong".

That, surely, would have satisfied demands of the protesters. Their aim had been achieved; the withdrawal of the Bill.

But not at all, showing beyond all doubt that the movement had much darker roots.

Monday 1 July was a public holiday, to celebrate Hong Kong's reunification with the Mainland. On that day an organised group broke into the LegCo building and trashed the Legislative Council chamber. The Chinese national emblem was defaced; the Hong Kong colonial flag was raised. The rioters had declared war on the government, on the existing constitutional order.

It was also a war on democracy, just as it was in 1933 when Hitler's thugs burned the Reichstag. This was the moment for the veteran leaders of the democratic movement, and the "pro-dem" members of LegCo, to distance themselves from the movement, to condemn the acts of violence and desecration. No one did, thereby allying themselves inextricably with the violent segment of the movement.

Fast forward again to 11-12 July 2020, soon after the enactment of the National Security Law. Various agitators had got together to mount what they called "primary elections" to find the best candidates for the LegCo elections due to take place later that year. They have since been arrested on suspicion of subversion under the new law.

In a report to Parliament this month the British Foreign Secretary Dominic Raab said that the National Security Law was being used "to stifle political opposition".

It seems, sadly, that the Foreign Secretary had not been told the full facts; or is it possible that someone of that standing would knowingly distort the truth?

Most of the truth of that story is on public record. The "primaries" were simply a small part of a larger plot calculated to bring down the government. This was described as "10-steps to mutual destruction", which had been outlined in Apple Daily in late April 2020. The label attached to this plot is "Laam Chau" meaning "We Burn, You Burn", an expression taken from a popular TV series. It was, on its face, a last desperate attempt by the insurgents to bring down the government.

The full facts have not been revealed. Investigations are still going on. The case has not yet come on for trial.

What, for instance, was put to the voters to induce them to come out and vote in the "primaries"? Probably different things were said to different constituents, and there may be questions as to the truthfulness of what was said. According to the police, the voters were paid substantial sums to take part in the process. Arising from this HK$1.6 million have been frozen. The significance of this will need to be explored.

Under such circumstances, how could it possibly be right for the British Foreign Secretary to assert that the National Security Law is being used "to stifle dissent"?

As things stand today, there is a Bill in the British Parliament entitled "Police, Crime, Sentencing and Courts Bill 2021". It is meeting with considerable opposite from ordinary citizens, who have launched street protests. This is what the policy paper says:

"Protests are an important part of our vibrant and tolerant democracy. Under human rights law, we all have the right to gather and express our views. But these rights are not absolute rights. That fact raises important questions for the police and wider society to consider about how much disruption is tolerable, and how to deal with protesters who break the law. A fair balance should be struck between individual rights and the general interests of the community ....."

Section 59 of the Bill, for instance, abolishes the common law offence of public nuisance and replaces it with a statutory offence of very wide scope, attracting 10 years imprisonment on indictment.

Would it be right for, say, the Hong Kong Chief Secretary to comment on this provision, or on how the "fair balance" should be struck in the UK? Obviously not. So how is the reciprocal position justified?

What is more, the National Security Law deals with something more fundamental than the so-called "fair balance". It arms the Hong Kong government, for the first time since reunification, with effective legislation to deal with an insurgency.

The law starts with statements of general principles where the lawful rights and interests of Hong Kong residents are fully protected. The common law principles governing criminal trials are safe-guarded

including, for instance, the presumption of innocence, the exclusion of prejudicial evidence, etc.

If one looks at, for instance, the US Patriot Act 2001, the contrast with Hong Kong's National Security Law is stark.

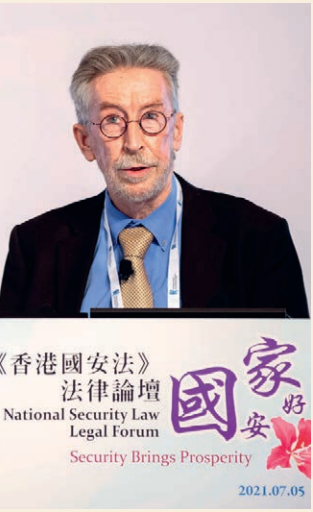
It is an Act to deter and punish terrorist acts in the USA and around the world. It is extremely difficult to judge from the text of the law its overall effect. It is not only an enabling Act but also an amending Act, amending many other enactments; unless one is familiar with those other enactments it is not possible to make sense of the Act.

But its introduction paragraph is startling. It says:

"Any provision of this Act .....as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability in which event such provision shall be deemed severable from this Act ....".

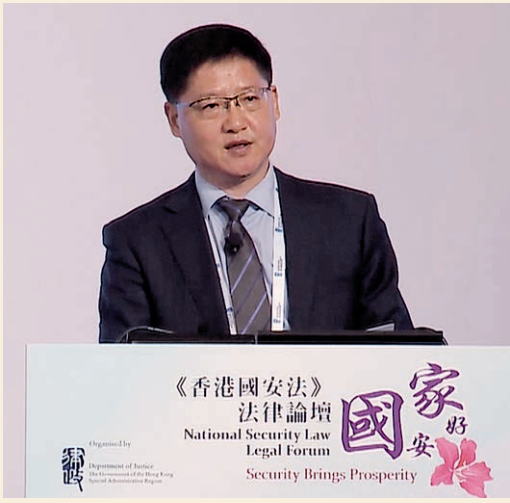
No mention of the presumption of innocence. No safe-guard for the rights of the defendant.

The repeated accusations made by Western leaders and media of Beijing's so-called stifling of freedoms in Hong Kong through use of the National Security Law is so far from reality that the conclusion is inevitable: as Mr C H Tung said, Hong Kong is being used as a proxy for a wider power conflict.



Panel III:

A Comparative Study Of National Security Laws



Moderator

ZHU, Guobin

Professor,
School of Law of the City University of Hong Kong

Panellists

CULLEN, Richard

Visiting Professor,
Faculty of Law of The University of Hong Kong

LIM, Chin Leng

Choh-Ming Li Professor of Law,
Faculty of Law of
The Chinese University of Hong Kong

ZHAO, Yun

Representative,
Regional Office for Asia and the Pacific of
Hague Conference on Private International Law

Zhu Guobin: Distinguished guests, dear colleagues, ladies and gentlemen, good afternoon!

The passage and implementation of the Hong Kong National Security Law (National Security Law) was an unexpected move to many people, but it was still a logical development. The National Security Law has quickly achieved the goal of stabilizing society, restoring order, and rebuilding confidence. The central government directly exercised the legislative power to safeguard national security of the Hong Kong Special Administrative Region (HKSAR), which was constitutional and lawful. The aims of the central government are to prevent and punish acts that endanger national security, while urging the HKSAR Government to fulfill its constitutional obligation to safeguard national security.

The passage of the Law and its implementation in the HKSAR will undoubtedly bring about political, legal, social, theoretical, practical and many other far-reaching influences on Hong Kong, and the influence will be institutional, long-term and far-reaching, and its extent will even exceed people's expectations. As far as its impact on Hong Kong's legal system is concerned, it will be reflected in the constitutional order, human rights protection, criminal law, criminal procedure and the judicial system. In view of the fact that the National Security Law has only been implemented for one year, many problems, questions and difficulties have not been fully revealed. This means that it is most necessary to continue to observe how the new law operates, and to carry out full and in-depth discussions and research.

Following the discussions on the "substantial law" aspect and "procedural law" aspect of the National Security Law in the previous two sections of this Legal Forum this morning, we now enter the third section: "Comparative Study of National Security Law".

It is the fact that most countries and regions in the world have enacted their own laws to safeguard national territorial integrity and sovereignty. National security involves the fundamental interests of a given country or region. In view of the differences between political systems and legal systems, the legal provisions governing national security understandably vary between one jurisdiction and another. However, there must be some common values, principles, systems, and even legislative techniques and experiences which apply. This is the subject of our discussion.

For this reason, this Forum is honored to have invited three leading scholars to share their research outcome and observations with us. They are: Professor Richard CULLEN from the Faculty of Law of the University of Hong Kong, Professor Chin Leng LIM from the Faculty of Law of Chinese University of Hong Kong, and Professor Yun ZHAO from the Faculty of Law of the University of Hong Kong who also serves as the representative of the Regional Office for Asia and the Pacific of the Hague Conference on Private International Law. I am Guobin ZHU, Professor of Law at the School of Law, City University of Hong Kong, and a Titular Member of the International Academy of Comparative Law.

Professor Richard CULLEN is a Visiting Professor at the Faculty of Law of the University of Hong Kong. He once taught at Monash University, Australia, and City University of Hong Kong. He has been a Visiting Scholar at Universities in Austria, Belgium, Canada, China, England, Japan and Switzerland, and has made presentations at seminars and conferences in various countries and regions. He has written and co-written several books and more than 200 articles, notes and commentaries. Today, Professor CULLEN will speak on National Security Law: Comparing Australia and Singapore.

Professor Chin Leng LIM, now a Professor at the Faculty of Law of Chinese University of Hong Kong, is also a Visiting Professor at King's College London and an Honorary Senior Fellow of the British Institute of International and Comparative Law. Among many publications, I want to specially highlight that he has co-edited *Law of the Hong Kong Constitution.* Professor LIM will speak on National Security Law: Anglo-American Comparisons.

Professor Yun ZHAO, Henry Cheng Professor in International Law and Head of Department of Law at The University of Hong Kong, is also a Visiting Professor at various distinguished Chinese universities. Professor ZHAO is currently a Standing Council Member of the Chinese Society of International Law, a founding Council Member of the Hong Kong Internet Forum, a Member of the International Institute of Space Law in Paris, a Member of the Asia Pacific Law Association and the Beijing International Law Society. Professor ZHAO is going to speak on the National Security Law from an international law perspective, with special reference to the European continental practice.

From the outlines of the presentations prepared by the panellists, we see that a wide range of the topics and issues will be specially covered and discussed with reference to Hong Kong law and practice. They are: constitutional order and national security law, role of the state, legal regime of national security law, law enforcement entities and mechanisms, extradition and political offences, extraterritorial application of law, individual rights under national security law, tension between the protection of public interests and that of individual rights and liberties, and the role of the courts.

Now we invite the panellists to start their presentations. The sequence is Professor CULLEN, Professor LIM and Professor ZHAO. Please.

Richard Cullen: Good afternoon distinguished guests and friends.

Thank you, Professor Zhu, for the introduction. And thank you to the Department of Justice for asking me to speak at this forum.

In an ideal world, there would be no need for National Security Laws. We live in a wonderful world – but it is far from ideal. We received a stunning reminder of this certainty in Hong Kong in 2019. The insurrection, which grew out of a series of major protest marches, had established traction by early June in that year and it grimly continued for many subsequent months.

In the normal, real world, National Security Laws have been applied in various forms for centuries. The Treason Act, for example, codified the Common Law offence of treason in England in 1351 during the reign of the Plantagenet King, Edward III.

National Security Laws have grown significantly more detailed and complex over time. Context matters. After the 911 attacks in 2001 in America, there was a major lift in National Security legislating around the world – led by the US (though, until last year, there was no such lift in Hong Kong).

Consequently, the scope of the matters to be discussed today is wide. Accordingly, I plan to use my time:

- To summarize key aspects of the Australian National Security Framework;
- To discuss, briefly, the National Security Framework in Singapore; and

- To consider two relevant case studies illustrating the impact of these National Security regimes.

KEY ASPECTS OF AUSTRALIAN NATIONAL SECURITY FRAMEWORK

The "Five Eyes" Security Alliance – history and significance

The Five Eyes security alliance was originally Two Eyes – the UK and the US. Their code-breakers had established a most useful working relationship during World War 2, in accordance with the Atlantic Charter agreed in 1941, shortly before the US entered the war. In March 1946, a secret treaty was agreed between the UK and US, in effect creating the "Two Eyes" which linked the work of the US National Security Agency (NSA) and the UK Government Communications Headquarters (GCHQ).

Canada joined this arrangement in 1948. Australia and New Zealand joined in 1956. Certain other countries ceased formal involvement and the Five Eyes alliance, as we know it today, was confirmed, consisting of the five leading English speaking allies from World War 2. The Five Eyes alliance has served an important role for its members in providing an enhanced, joint security framework.

In 2013, leaked documents provided by Edward Snowden (who once worked for the NSA) revealed that alliance members did not just spy in foreign parts but spied on one another's citizens and then shared collected information with each other. This provided a way around domestic National Security Law restrictions which applied to spying on citizens. The alliance also help orchestrate, through security service collaboration, covert political intervention in foreign countries, which

included the overthrow of governments in Iran in 1953 and Chile in 1973.

The Extensive Australian Legal Framework

The Australian Government Website provides a summary of both the primary National Security Laws which apply and the varied National Security Agencies, which operate under those laws. These are Federal Laws, some of which are laws of general application, which contain important National Security provisions. There are additional relevant laws which apply at the State level. This Federal summary just lists the most prominent, established National Security Laws – it is not comprehensive.

Briefly the most significant Federal Acts are:

- Defence Act 1903
- Crimes Act 1914
- Charter of the United Nations Act 1945
- Australian Security Intelligence Organization (ASIO) Act 1979
- Telecommunications (Interception and Access) Act 1979
- Crimes (Hostages) Act 1989
- Crimes (Aviation) Act 1991
- Crimes (Ships and Fixed Platforms) Act 1992
- Criminal Code Act 1995
- Aviation Transport Security Act 2004
- National Security Information (Criminal and Civil Proceedings) Act 2004
- Surveillance Devices Act 2004
- National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 *(Foreign Interference Act)*

The Security Agencies operating in Australia include specialized agencies and other institutions which incorporate security protection responsibilities. The key security agencies are:

- The Australian Security Intelligence Organization (ASIO) – with primary domestic security responsibilities.
- The Australian Security Intelligence Service (ASIS) – with primary offshore security responsibilities.
- The Australian Federal Police
- The Australian Border Force
- The Australian Criminal Intelligence Commission
- The Australian Transaction Reports and Analysis Centre (AUSTRAC)

Significant enhancement in terms of funding and power is on the way arising out of a recent major review of the National Security System (see below). Australia has at least 13 major National Security Laws (including sweeping revisions and updates in the *Foreign Interference Act* passed in 2018) and six key agencies involved in applying these laws. Remember, too, that these are Federal laws and institutions. They are backed up by certain security-related State laws and institutions.

The laws listed above cover the widest range of security concerns, including:

- Treason, Treachery, Sabotage; Piracy; Espionage, Terrorism, Terrorist Financing; Hostage Taking; Interference with Ships or Aviation; Foreign Interference in Domestic Politics in Australia; and Foreign Incursions into Australia.

Procedural matters dealt with include:

- No Bail or Stricter Bail requirements for those charged with Terrorism offences; together with Enhanced Control, Surveillance; and Search and Information Gathering Powers.

The Criminal Code Act of 1995 also has extra-territorial scope, making it an offence to cause serious harm to an Australian outside of Australia, recklessly or intentionally.

Evelyn Douek, a rising Australian legal academic recently argued that under the new *Foreign Interference Act* passed in 2018, *"it is illegal for a person to knowingly engage in covert conduct or deception on behalf of a [very widely defined] foreign principal with the intention of influencing an Australian political process, exercise of a vote or prejudicing national security."* The maximum penalty is 20 years imprisonment if the conduct is intentional and 15 years if arises from reckless conduct. Other provisions criminalize influencing a target in relation to any political process. Douek says that the reach of these provisions may be vast.

The Recent Major Review of the National Security System

The Comprehensive Review of the Legal Framework of the National Intelligence Community (the "Richardson Review") was conducted by a former Head of ASIO, Dennis Richardson. The review notes that since the 911 attacks over 120 Acts had been introduced to the Federal Parliament concerning the national intelligence community resulting in one of the most complex National Security regimes in the world.

The Richardson Review runs to over 1,300 pages and contains 204 recommendations. Richardson believes that it will cost an additional A$100 million to complete his advised overhaul of National Security Laws (this is on top of the revisions introduced in 2018 in the new *Foreign Interference Act*). Just conducting the review itself cost A$18 million.

National Security Role of the States

Under the Australian Constitution – and its operating Federal System - the six States and the two Territories are responsible for creating and applying their own general Criminal Law. There is no general Federal Criminal Law as there is, for example, within the Canadian Federal System. Accordingly, much behaviour which may amount to a criminal breach of Federal National Security Laws, may also place a person in serious breach of a State or Territory, Criminal Law regime. State and Territory Police Forces also may often act as a first-responder to a National Security breach.

Each of the States and Territories maintains their own specialized coordination bodies to combat National Security threats within their respective jurisdictions. They oversee local level: counter-terrorism surveillance and operations; infrastructure recovery services; controlled supply of dangerous goods; bio-hazard protection-planning; and emergency health and welfare services, for example.

The States and Territories are instructed to coordinate and cooperate with any national response to a National Security threat.

The New Zealand view

New Zealand maintains its own National Security regime, of course, though it is less elaborate than that applying Australia.

Canberra, encouraged by Washington, appears increasingly attracted by the potential benefits of using the Five Eyes alliance to apply a level of synchronized geopolitical pressure. That is, Canberra and Washington have perceived how the Five Eyes *security-protection platform* could be developed to launch some level of recurrent,

coordinated Five Eyes *political response* on certain contentious issues concerning China, above all.

New Zealand differs from Australia on this issue. The New Zealand Prime Minister and Foreign Minister say they value the membership of Five Eyes as a security alliance. But New Zealand disagrees about using this *security alliance* to apply *political pressure* to China by issuing joint geopolitical claims. They argue, cogently, that any group political pressuring should be done outside of this alliance, which is expressly concerned with security protection.

Energetically unsympathetic reporting directed at this New Zealand response by outlets such as the Voice of America, CNN and the Australian version of the programme "Sixty Minutes", strongly suggest that significant push-back against this stance is being applied to New Zealand by Canberra and Washington.

KEY ASPECTS OF NATIONAL SECURITY FRAMEWORK IN SINGAPORE

Singapore, repeatedly and understandably, has been cited as one prime, alternative destination for those currently considering relocation from Hong Kong. Kishore Mahbubani says that a key test of societal accomplishment, especially in East Asia, pivots on taking the measure of economic success and reviewing how widely shared it is within a given society. Mahbubani argues lucidly, using this yardstick, that Singapore has created the world's most successful society.

Although one can debate that "world's most successful" award, it is clear that Singapore's accomplishments are remarkably positive. What, though, lies at the core of what makes Singapore such an attractive re-location destination?

Above all, Singapore offers enduring stability and an exceptional level of personal security for residents, businesses and visitors, across the public domain - combined with an ethos of hard working, widely shared prosperity. Singapore has assiduously maintained a core freedom from fear principle within its rule of law regime. This is the precept which was so gravely damaged in Hong Kong in 2019.

A pivotal part of the scheme that underpins this effective rule of law regime is Singapore's national security framework. Around 20 separate laws help safeguard national security, the most important being the Internal Security Act (ISA). According to the International Commission of Jurists, the ISA creates substantial executive powers which permit the President of Singapore, on national security grounds, to prohibit certain publications and to proclaim certain zones as "security areas" (where very wide-ranging regulations may be applied), for example.

The President is also able, under the ISA, to order renewable detention without trial for up to two years, in certain cases. This rules out bail completely, of course. Judicial review of such decisions taken under the ISA is only allowed to ensure procedural compliance. In very serious national security cases the death penalty may apply.

Meanwhile, the media is rather more tightly regulated in Singapore than in Hong Kong. According to the Reuters Institute, the print and broadcast media are largely run by two major corporations which are associated with the governing party. Each of the two also maintains a dominant online presence. Freedom House says that the media in Singapore must take significant care to avoid speech which is "seditious, defamatory or injurious to religious sensitivities."

In 2019, Singapore introduced a robust anti-fake news law to counter falsehoods (especially online) aimed at "exploiting" the city's

"fault lines". This was, according to human rights critics, a disaster for freedom of speech.

In a recent report, Transparency International ranked Singapore within the top 2% of least corrupt jurisdictions. At about the same time, the US-based, World Justice Report ranked Singapore within the top 11% (globally) for rule of law compliance. Reporters without Borders, however, recently placed Singapore in the lowest 16% of jurisdictions for press freedom. Comparable figures for the HKSAR were: within the top 8% for freedom from corruption; the top 13% for rule of law compliance; and the top 40% for press freedom.

Malaysia

Two primary laws dealing with National Security – and especially Terrorism – in Malaysia are:

- The Security Offences (Special Measures) Act 2012 (SOSMA); and
- The Prevention of Terrorism Act 2015.

The first of these (SOSMA) replaced the Internal Security Act 1960 (ISA-M). The ISA-M (like its namesake in Singapore) dates from the period of British colonial rule.

Human Rights advocates in Malaysia have steadily argued for the repeal of anti-terrorism laws. There is no sign of the Government being persuaded. Strong, specialist counter-arguments stressing how these laws have been crucial in protecting Malaysia's National Security have also been advanced.

CASE STUDIES

Australia

This Australian case study relates to the recent interaction between Australia's extensive National Security regime and its university sector, including a number of Australia's leading universities. Context is important in understanding how this matter has unfolded.

It is widely recognized that Canberra's relationship with Beijing is more strained now than at any time since 1989 - following the clearing of Tiananmen Square in early June of that year. "Peak Sinophobia in Australia?" is the enquiring title of a recent, spirited overview of the current Sino-Australian relationship. The article, written by Scott Burchill from Deakin University in Australia, was published in an online public policy journal, *Pearls and Irritations*, in April, 2021.

Burchill begins by arguing that *"Sinophobia in Australia, promoted over recent years by naïve MPs, opportunistic academics and jejune journalists, has now entered its neo-McCarthyist phase."* The following text in the article confirms the aptness of the title and sets down chapter and verse supporting the opening claim.

A number of past, high-ranking politicians from the centre-left of Australian politics, including former Prime Minister, Paul Keating and former Foreign Minister, Gareth Evans, have expressed serious concerns about the inordinate influence the security services in Australia now exert over Canberra's decision-making with respect to China. The close linkage between these Australian agencies and consistently hawkish, primary US security bureaus has sharpened these expressed anxieties.

A report in the *Sydney Morning Herald* in March, 2021, explained how leading Australian universities had "ramped up [their interaction

with ASIO] dramatically" over the previous three years due to a perceived escalating level of interference by China and other foreign governments. ASIO confirmed, in the same report, that it had had 60 engagements with leading Australian Universities in 2020. A number of universities, including UNSW, called for still more involvement of - and help from - the security agencies. New stringent guidelines for offshore interaction – especially with China – now apply.

This is extraordinary. Moreover, it is difficult to find anyone raising concerns in mainstream media outlets about the impact on academic freedom of this embrace, by tertiary institutions, of spy-based advice and influence.

Burchill goes on to note how a number of leading Australian universities feel such a need to badge themselves as wholly patriotic that they are paying handsomely for private risk assessment by a consultancy led by a former journalist who claims to be an expert on the operations of the Communist Party of China. This suggests that these universities consider that their own academic staff cannot be trusted to observe the new guidelines. Burchill continues, "It is not clear whether [this appointment] is designed to appease Canberra's increasingly unhinged Sinophobia or to pre-empt and hopefully ward off further government erosions of academic independence."

Angela Lehman, is Head of Research at the Lygon Group, a specialist international education organization based in Melbourne. Her comparative experience helps provide at least one direct measure of some of the impact of the much enhanced interaction between Australia's security agencies and its universities.

She explains in an article also published in the online public policy journal, *Pearls and Irritations*, in June, 2021, that she lived and researched

in China for 10 years and held a position as an Assistant Professor at Xiamen University for several years. Now back in Australia, she argues, in this article, that, "Navigating the surveillance mechanisms and culture at a Chinese University is far simpler than navigating the ideological surveillance currently underway in Australia." Adding that, "Here in our freedom-loving, free-speaking liberal democracy I find myself *more* aware that I am self-censoring what I can and I can't say about China than any experience of surveillance I had while in that country."

Lehman also comments that Chinese students in China, no less than students in Australia but within their own shared experience, thought about "the bigger picture" and "wanted to understand their place in the world".

Burchill, meanwhile, acutely notes that, *"Not all foreign interference concerns the [Australian] Government. Much higher levels of intellectual collaboration exist between Australia, and the United States, the United Kingdom and Israel, to cite only three examples. All three almost certainly conduct more espionage [in Australia] than China does, but ASIO remains relaxed and comfortable about their interference in Australian domestic affairs."*

Very recently, an article in The Guardian, by Jeff Sparrow, revealed the extent of extended close engagement, in the 1970s, between certain US diplomats in Canberra and Bob Hawke, a then primary leader of the Australian labour movement and later a Prime Minister of Australia. This involvement - and that of other leading Australian Labor Party figures - is made clear in (what where) secret US embassy cables. Sparrow notes how the new *Foreign Interference Act* from 2018 would, "on paper at least, criminalize the kind of meddling in which the Americans have gleefully engaged for decades."

Singapore

We saw earlier how the President of Singapore (advised by the Government) is able, under the ISA, to order renewable detention without trial for up to two years, in certain circumstances. This is not a power that is frequently exercised. Neither, however, is it a dormant power.

A Singaporean citizen, Dickson Yeo, was detained in the US in 2020 for acting as an illegal agent of a foreign power (China) - a charge to which pled guilty. After serving a 14 month sentence in America he was deported to Singapore in December, 2020. On his return he was arrested by the Singapore Internal Security Department (ISD). He was subsequently detained for two years under the ISA in January, 2021. The ISD said he had worked as a paid agent of a foreign state (China) in Singapore. The ISD explained that their investigations were ongoing and Yeo's extended detention under the ISA was necessary to discover the full extent of his improper activities.

CONCLUSION

Based on the broad review above of:

- The Australian and Singaporean National Security regimes; combined with
- Two indicative case studies;

I would now like to offer some closing observations.

First Observation: all jurisdictions have a right and a responsibility to protect their National Security.

Second Observation: Road Traffic Laws were uncommonly simple 50 years ago. Today they are far more extensive, detailed and complex. Legislating to protect National Security exhibits a similar pattern.

There is a tension, in both cases, between protecting the public interest and protecting individual interests. This tension is particularly acute with National Security Laws as the punishments for breach can be remarkably severe.

Third Observation: Singapore has established what is by any measure, a forceful and effective National Security regime, which is widely accepted within Singapore. It plainly helps underpin stability and prosperity. Many in Hong Kong stress how, today, Singapore looks to be an attractive relocation destination in view of the application of the new National Security Law in the HKSAR. This is intriguing, given the long-term, clear, very tight and successful National Security controls employed in Singapore, which are significantly more stringent than those now operating in Hong Kong, since June 30, 2020, under the new National Security Law.

Fourth Observation: Comprehensive National Security controls are being significantly enhanced – at significant dollar-cost - within Australia driven above all by a forceful narrative, especially evident since 2018, stressing the Sino-threat to Australia's National Security. The impact of these controls is growing, not least within the Tertiary Education sector.

Finally: This review suggests, I believe, certain principles which can be used to guide how a National Security regime should be employed. Where rigorous powers are conferred on government under any National Security Law:

- Those powers should be applied firmly – when required – but not impulsively;

- They should be applied dispassionately without fear or favour;
- They should be applied without being coloured by any current, disproportionate political fervor; and
- They should be consistently used in a circumspect manner.

Thank you.

■ ■ ■ ■ ■

Lim Chin Leng: Madam Secretary, thank you very much for this invitation, very distinguished members of the audience, friends, ladies and gentlemen. When I received the invitation, it was very much to my delight to be invited to speak on comparative law to a general audience. I've actually never done it before in my life. I only know of two types of people who talk about comparative law: Practising lawyers, why, because it is profitable, and academics. Academics talk about comparative law. I have the privilege of being involved with a journal, which for the last 125 years has been investigating how we compare laws. I know it is 4:00 PM and I only have 15 minutes after Richard. I'm very grateful to Richard for that because, as you can see, I have a very small paper. So I won't give you a mini lecture on how we compare laws. I think what we are interested in is what happens when we compare the National Security Law with its Anglo-American counterparts.

The moderator, Professor Chu, thank you very much for that very kind and undeserved introduction, had asked me to say something about extraterritoriality. I think it is because many people who talk about the National Security Law outside Hong Kong are very concerned about the extraterritoriality clauses in the national security law. We have heard earlier today about Articles 37 and 38. So let me begin by saying something about that. I will then say something about the history of

Anglo-American national security laws. Then I will make one point - that is how notable, how unusual, actually, when you compare the National Security Law with its Anglo-American counterparts, and what happens when you actually make the comparison.

In terms of extraterritoriality, the most famous English case had involved a person called William Joyce, who was broadcasting from Germany in order to demoralize the British public during the Second World War. Words to the effect: People of the United Kingdom, you are kaput. Now, they caught him after the Second World War, and they tried him after the Second World War. Lord Jowitt, who then was Lord Chancellor said that it is not a question of where he had broadcasted these messages from. He was broadcasting from Germany, but rather who he is. He is a British national. Even though he probably obtained a British passport by fraud, he is still a British national, and therefore has the right to claim the protection of the crown, and so they hanged him. The way I described it in a journal, the Law Quarterly Review, was by saying that it was not a question of where treason can be committed, but by whom, and if it is a national by and large that is uncontroversial.

The Terrorism Act of 2000 in the United Kingdom extends to both nationals as well as to residents for bombing, for example, for terrorist financing, and they amended it to extend it to such things as engagement in terrorist training abroad. So you have your own nationals go abroad, to train to do some very undesirable, anti-social things in the United Kingdom or against British embassies abroad.

Now, on this point of extraterritoriality, the imagination of Anglo-American law, how Anglo-American lawyers imagine themselves is quite different from how we might see things from Hong Kong or from China. The idea in Anglo-American law is that there is a strong presumption against any extraterritorial laws. So if we were to take the jurisprudence

of the United States Supreme Court between 1983 and 2021, for example, we find that in 1983, Justice Souter, in a case called *Hartford Fire*, said in the context of American anti-trust or competition laws that if you can obey American law wherever you are, and it is not unlawful for you to obey American law wherever you are, then you should obey American law wherever you are. Now that was a high point in 1983. By the time we got to a case called *Empagran* in 2004, the same Supreme Court decided to pull back from that position. Most commentators say because, by that time, half the world had already adopted American law, so you didn't need to take this approach, telling them to obey American law, to comply with the Sherman Act of the United States because competition law was to be found all over the world: lawyers in Sicily, lawyers in Seoul, in Tokyo, lawyers in Hong Kong talk about competition law today. That is American law.

By the time we got to 2013 in relation to something called the Alien Tort Statute or the Alien Tort Claims Act, allowing people to bring human rights lawsuits against Royal Dutch Petroleum, for example, in a case called *Kiobel*, we finally see the tide of American jurisdiction going out because, in *Kiobel*, the United States Supreme Court basically applying another judgment called *Morrison* from 2010, said that it was not going to assert jurisdiction unless a particular matter touches and concerns the United States with sufficient force.

So if you are standing from over there, looking at the world from the viewpoint of Anglo-American law in this context, from the viewpoint of American jurisprudence, you have this idea that people shouldn't extend their laws abroad. So when you look at something like the national security law, it looks odd because it has these extraterritoriality clauses, but that is only the impression we get from within Anglo-American law. Yet we feel American law in Hong Kong. We have felt it in Hong Kong and in China in recent months and in recent years.

The Executive Order of July 14th, 2020, was made because a particular statute exists, called the International Emergency Economic Powers Act. Now when we trace the history of the International Emergency Economic Powers Act, we find that it came from trading with the enemy legislation. So the sanctions we talk about today, American sanctions imposed on Hong Kong, come from an extraterritorial national security law. We don't usually think of sanctions as national security law, so it is not unusual, and we feel it acutely.

As for the history of Anglo-American national security law, the United States Constitution has a very famous treason clause stating that you will need two witnesses or a confession in open court to be convicted of treason. Early treason cases involved even a prosecution against a former Vice President of the United States, Aaron Burr, who was Vice President to Thomas Jefferson. Later Second World War cases involved giving aid and comfort to the enemy. There was a case in 1947 called *Haupt* where a father was sheltering his son.

In more modern times, a famous case was the *United States v Rahman*. *Rahman* was a case that was related to the World Trade Center bombings. It was a 1999 case, and the persons, in that case, were prosecuted for seditious conspiracy. Now what was interesting about *Rahman* was that it cited another famous case called *Dennis*, which was a 1951 case. Why were the people in *Dennis* being prosecuted? They were being prosecuted for what they planned to teach. They planned to teach Marx, they planned to teach Lenin, and so on.

Now you might have thought in the United States of America, even in 1951, that there was such a thing as freedom of expression, and the United States Supreme Court said, yes, they are free to discuss Marx. They are free to discuss Lenin or Engels or Stalin or whatever they might wish to discuss, but they crossed the line when it became advocacy to

overthrow the government. In that case, in *Dennis*, the United States Supreme Court also threw away something called the clear and present danger test. There is no need for a clear and present danger. I mention this not as criticism. I mention this because there is a certain misimpression that in the national security context, pride of place is given to the protection of rights. But usually when you find yourself in a national security context, it is not. Rights don't usually matter very much in a national security context, unfortunately.

In *Dennis*, they were imprisoned for many, many years. In *Rahman* itself, in 1999, they were imprisoned for many years. The evidence used for prosecution of the seditious conspiracy included speeches and writings. Again, you might think, well, people have the right to express themselves, to speak, or to write. The Supreme Court said, yes, but we can still use what they write and what they say to prosecute them. We can still use it as evidence.

In the United Kingdom in 2001, there was the Anti-Terrorism, Crime and Security Act, sections 21 to 23, which have now been repealed. But for those few years, we saw that people could be deprived indefinitely of their liberty, without trial, on mere suspicion, on the basis of a certificate issued by the Secretary of State, which was not reviewable before the courts, and we had that. The history of preventive detention in the United Kingdom is long and it is tawdry. It was used in relation to Northern Ireland. The *United Kingdom v Ireland* was a famous case. And across the Commonwealth. I think Richard has spoken about that. We see the legacy of prevention, indefinite detention without trial.

I'll try and wrap up quite quickly so that my dear friend, Zhao Yun, will have 20 minutes. In the United Kingdom today, there are people who say that the Treason Acts are insufficient. The original Treason Act of 1351 is almost 700 years old. If we take a look at *Archbold* or

Blackstone's Criminal Practice, both of those very authoritative works will say that prosecution for treason is hardly to be expected. But there are people today who are suggesting, in very influential places, that the Treason Acts should be reformed and that there should be a crime of betraying one's country and helping one's enemies.

To conclude, when we compare laws, what are we doing? Are we even comparing the same thing? Are we comparing like with like? When people outside Hong Kong look at the National Security Law here, they say: "Oh, look at the provisions on extraterritoriality". Usually, they zero in on Article 55, that is the provision that we have heard mentioned this morning. When does the jurisdiction of the Hong Kong courts run out? In only three highly exceptional situations. For example, if the government is unable to enforce the National Security Law. Now it must take a very extreme situation. Or where there is a major imminent threat to national security. That is a very extreme situation. Or where there is a foreign country or external power that is involved. These are all highly exceptional situations, but the most interesting question is why? Why do we have Article 55? Because Hong Kong is a region of a country - that is the simple explanation. There is no comparison to be drawn. It offers an inappropriate comparator.

An appropriate comparison is this: Article 4 preserves our fundamental liberties. It preserves our fundamental liberties by reference to the Basic Law. It preserves our fundamental liberties by reference to the provisions of the International Covenant on Civil and Political Rights, as applied to Hong Kong under law. When we compare that with what happens, whenever there is a national security situation in the history of Anglo-American law, we find a very stark comparison. That is my only point about comparative law. Thank you very much.

■ ■ ■ ■ ■

Zhao Yun : Thank you, Chair. Good afternoon, ladies and gentlemen, it is a great honour for me to be invited to speak on this occasion.

National security law establishes the way that a state handles threats to its government, its values, and its very existence. The focus of the concept of national security is on state values, which are protected against armed attacks from outside, armed rebellions from within, subversion, and economic constraints. Comparative studies have been able to characterize legal similarities apparent across legal systems. Thus I hope this session will be able to help to put our National Security Law against international background. In a way, national security law is no more so national, in view of the standardization of vital state and national values, and mechanisms and organizations responsible for security at both national and international levels. My learned colleagues have made excellent presentations on the situation in several jurisdictions. In this presentation, I will briefly give an overview of the European Continental situation and discuss certain issues from the perspective of international law, including extradition and extraterritorial application of the law.

National security has been a major issue since World War II in Europe. Almost all European continental countries have made legislation for this purpose, which has formed the so-called National Security Legal System with European Characteristics. Different from the comprehensive legislation model in other jurisdictions, the European continental countries do not generally make a comprehensive law on national security, but include relevant provisions in separate national laws, in particular criminal law.

The European continental countries have been continuously improving the legal system for the protection of national security. Two major features could be discerned. First, they emphasize the importance

of maintaining constitutional order. The priority is on the maintenance of the basic political system and core values based on the Constitution. Second, they rely on the support of powerful enforcement authorities, though such enforcement mechanisms differ depending on their historical and traditional background. For example, France emphasizes its work on terrorism and thus takes measures on cracking down terrorism and other NS-related crimes, while Germany focuses more on extremism due to Nazi in history and thus more frequently take preventive measures. When it comes to guiding ideology, France focuses more on a comprehensive concept of national security, including political and social security, with Germany more on traditional political security.

Now, I take Germany as an example to elaborate the national security regime. I must admit this is very brief and preliminary examination of relevant provisions in this European continental country.

German Criminal Code provides for the offence of high treason against the Federation, against the land, with or without force, *"to incorporate the territory...of the [land] in whole or in part into another Land or to separate a part of one of the [land] from it."* The Code further provides for the offence of preparation of high treasonous undertaking.

On the extraterritorial effects, the Code specifically provides that they apply to acts committed abroad: *"Regardless of which law is applicable at the place where the offence was committed, German criminal law applies to the offences committed abroad, including high treason."*

Similar arrangements have been made to other offences. The Code provides for the offence of preparing serious violent offences endangering the state. The Code applies if the preparations are made abroad.

The Code provides for another offence of treason: espionage, revealing state secrets, treasonous espionage and spying out state secrets,

divulging state secrets, treasonous activities as agent, working as agent for intelligent service.

The Code further provides for the offences of sabotage against means of defence, intelligence activities endangering national security, images endangering national security. Regardless of which law is applicable at the place where the offence was committed, German criminal law applies to such offences committed abroad.

When it comes to various rights of the accused, the Criminal Code allows exclusion of defence counsel's participation in cases involving dangers to national security. The Court Constitution Act provides for the right to exclude the public from hearing if there is possibility of endangerment of state security, the public order or public morals. If a person is urgently suspected of a crime, and there is a reason for detention (such as the danger of absconding), the prerequisites for pre-trial detention are met.

Now I move to specific issues from the perspective of international law. First, Open Trial.

Article 14 of the ICCPR provides that "the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires." The National Security Law is compatible with the ICCPR that it presumes a trial in open court but allows closure if issue(s) of public order/state secrets arises and it provides publication of judgment in any event.

Now we move to the second issue: Extradition.

Several countries suspended their extradition treaties with Hong Kong after the implementation of the National Security Law. It should be noted that Hong Kong's existing legal protection with regard to extradition remains valid (including the application of the ICCPR and ICESCR); furthermore, extradition requests are restricted by the judicial processes of different requested jurisdictions; and thirdly, extradition requests involving offences under the National Security Law may be rejected on the grounds of political offence exception.

It is a well-established principle in international law that political offences are exempted from extradition. This is also the case in Hong Kong. For both agreements which are still in force and those which were suspended, there is a common or similar clause providing that "a person shall not be surrendered if the Requested Party has substantial grounds for believing that the offence of which the person is accused or was convicted is an offence of a political character."

Now we move to the last issue: Extraterritorial application

Part 6 of Chapter III of the National Security Law includes three articles that provides for possible extraterritorial effect of the Law. The territoriality of criminal law is fundamental and is an essential attribute of state sovereignty. That is, a state has jurisdiction over all persons and things within its territory. Extraterritorial criminal jurisdiction is however, not forbidden in international law.

The jurisdictional principles provide the bases for applying criminal legislation to crimes committed abroad, including the territorial principle, the nationality principle, the protective principle, and the universality principle. In a way, it shows that the exercise of extraterritorial jurisdiction requires a sufficiently close connection between the offence and the legislating state.

Article 36 is not controversial since it clearly follows the territorial principle in view of the close connection between the crime and the state, including the situation with only the consequences of a crime in the territory of Hong Kong, even though the crime may have been committed in a foreign state. For offences committed on board a vessel or aircraft registered in Hong Kong, this is also well recognized as quasi-territorial jurisdiction and natural extension of the territory of the state.

A state may apply its laws to its nationals even when they are abroad. This nationality principle has been well accepted internationally, though the exercise of such jurisdiction shall not infringe on the territorial sovereignty of another state. Article 37 is exactly the application of this principle. Hong Kong permanent residents, even of non-Chinese nationality, enjoy a wide range of legal rights under the laws of Hong Kong. Thus there is solid grounds to exercise the jurisdiction under this article.

The extraterritorial jurisdiction under Article 38 is the most controversial provision, which applies to offences committed against Hong Kong from outside Hong Kong by a person who is not a Hong Kong permanent resident. The arrangement is in accordance with the protective principle. It is well-settled that a state may apply its law to the conduct of a foreigner committed outside its territory that endangers national security. National security has always been the primary state interest covered by the protective principle. The exercise of extraterritorial jurisdiction is within the scope of state sovereignty. A state is in a position to judge what endangers and how to protect its own security. However, the difficulty lies in the lack of clarity and consensus with regard to the application of the protective principle: such as the range of state interests to be protected? The types of crimes to be punished? Etc. Normally we would expect only state interests that are

essential or vital to the state and such crimes include espionage, acts of terrorism, murder of governmental officials, etc.

A state should carry out the protection of national security in a manner that is consistent with international legal obligations. Article 4 of the National Security Law makes it clear that human rights shall be respected and protected in safeguarding national security in Hong Kong. The ICCPR and the ICESCR shall continue to apply.

To conclude, all countries have some kind of national security law or concerns over national security. Thus this is not something new. Major problems lie in its enforcement. For example, "the protective principle" is recognized in international law, however, how to interpret and apply the criteria of the terms such as "significant interests" and "necessity". In general, legal protections with regard to extradition or extraterritorial application are in place, including the continued application of the ICCPR, and the protection of human rights. Thus, more important for us now is to look into its implementation, not simply the law per se.

We are still in the early stage of its implementation. We do not yet have a full picture of how the National Security Law will be interpreted and applied by the courts. I hope the comparative studies of National Security Law in other jurisdictions may help the implementation of the law.

■ ■ ■ ■ ■

Zhu Guobin: According to the Programme, we'll have 15 minutes for panel discussion. While I listened to you, I prepared a few questions for you. Start with Richard first. Singapore is quite similar to Hong Kong in size and also in ecosystem. Singapore experience should be relevant to us. But how and what we can learn from Singapore.

Richard Cullen: I think well, I agree with you about the similarity, so let's start there. That's the easy part. Each jurisdiction had over 150 years of experience of being run by the British with the British common law system and so on. They are of similar size, similar economic functions. And in both cases, there's a majority Chinese population. The Singapore experience, I think when we move beyond that, what is significant to me is that the use of the national security regime is much more settled. We've had it now for one year, the new national security law. We had the old British laws, which are still on the books, but frankly, quite outdated in the modern circumstances. Singapore is kept right up to date with its lawmaking, as I understand it, witness the new law regulating online content. But I think in terms of the thrust of the national security law, the law appears to be well accepted, perhaps not by people like Mr Yeo, who's just been put in jail for two years and may have to stay there for two years and two years and two years. But for most people, it's seen as part of the system that underpins the stability and prosperity. So it's relatively well accepted. And I think I'm no expert in the operation. My reading is general, but I think the reasons that this may be so that the law is used in a principled way. It can be very harsh, but it's not used in an impulsive way, and it's used in cases where the government sees if something in the bud or they can control something. But it has limited impact on the overall population in terms of adverse impact. But people mostly see if they think about the positive impact of being part of maintaining the stability. So we come to Hong Kong, the test is going to be over the next five years, I think, just see how the national security law works out here. So far, despite all of the wild and somewhat alarming statements from the likes of Dominic Raab and others who think like him, it seems to me to be working very well. It's clearly done far more good than harm. It's not cost-free. There are restrictions on what we can and cannot do compared to over a year ago. But it's working in the way that it's meant to. But as I say, it's going to take time. I think the point

made by Grenville Cross earlier is very important too, that we're going to have to wait and see how the courts deal with it and apply it, so that we've got more certainty coming from the experience. And in that sense, I think if we can reach the point where Singapore is that I don't think Hong Kong quite like Singapore, but if we can reach that point over the next five years, that will be a good benchmark.

Zhu Guobin: Thank you. Let's talk more about America. Americans, for example, have adopted quite a number of national security acts. Can you summarise the rationale that supports the practice that America made its laws extraterritorial? Please talk about the Courts as well.

Lim Chin Leng: We have to leave the courts out of it and it really depends upon the particular, it depends on who is in the White House. If we take the Bush administration, for example, what did the Bush administration do? It labeled certain persons as unlawful combatants. This is very deliberate. So all you guys are unlawful combatants. That means three things. First, we don't think the Geneva Conventions which protect combatants during wartime - we don't think that's part of the law of the United States. Those are treaties for us in Hong Kong. It may also be the International Covenant on Civil and Political Rights. We say the provisions as they have applied continue to apply. We are doing the opposite. For the Bush administration, these treaties, which ordinarily would apply, they are not part of United States law. That's the first move. The second move was to say that even if they did apply as American law, these guys will not be protected because they are not really combatants. They are unlawful combatants, though they don't even have combatants' rights. And then they made the third move. Okay, so if international humanitarian law doesn't protect them, even though they are combatants, or you call them combatants but unlawful or illegal combatants, then do they have any other human rights at all?

No, because they are combatants. So it is unusual to apply international human rights law where international humanitarian law, which applies in wartime, should apply instead. Now, if you followed all those convoluted moves, all those somersaults, you will see that what the Bush administration was trying to do was to get out of having to accord any rights to anyone suspected of having any links with al-Qaeda. All these guys were operating abroad, all of them. The example came to a head in a case called *Hamdan*; there was another case called *Hamdi*, *Hamdi* and *Hamdan*. In *Hamdan*, the US Supreme Court basically said, carry on, you can detain, you can deprive them of liberty without any ordinary trial. The rest, we all know − where they were detained and so on and so forth. I wouldn't use the United States as guidance. I really wouldn't. I really do prefer the national security law here. Thank you very much.

Zhu Guobin: Thank you. You correctly, of course, precisely mentioned what kind of role an American court has played in maintaining national security.

Lim Chin Leng: What kind of role?

Zhu Guobin: What kind of role? Active, proactive, conservative?

Lim Chin Leng: Well, as I mentioned in the case of *Dennis*, there was an earlier case that said "Okay, you can deprive people of their rights in a national security context", what we call a national security context. If there is a clear and present danger to the United States. And *Dennis* in 1951, dealing with a bunch of people who wanted to teach Karl Marx, said, no, no, there's no need for that. It's a very uncomfortable piece of the history in American jurisprudence, but it is still there. And in *Dennis*, they said, well, you all can discuss Marx, but we say that you have crossed the line. And in planning, not even teaching, planning to teach, you have crossed the line into advocacy of the overthrow of the

US government. In *Rahman*, if I have the liberty to say something or to write something, what does it mean to say that I have that liberty? But you can use what I write and what I say and say to me, "You have committed seditious conspiracy". So what does that freedom mean? So, no, I don't think we should look for examples there.

Zhu Guobin: Thank you. And one of the many concerns over the national security law is the protection of human rights and individual rights and liberties. For example, political offence is related to it. Now, I would like to ask Professor ZHAO to clarify the point or definition of political offence, whether a suspect of political offence should be extradited to or from Hong Kong. Thank you.

Zhao Yun: Thank You. Yes, I think political offence is quite an important issue. Internationally, I refer to the international law, non-extradition of a political offence is well-established. So it's clear that there will be no extradition of political offences. But the problem lies in understanding or interpretation of "political offence". How do we understand? How do we interpret? At the moment, at an international level, political offence can be divided into pure political offence and relative political offence. Pure political offence is in a way, I think, of non-violent nature. If not for its political considerations, it would not constitute a crime. But when it comes to relative political offence, it always involves one or more common crimes with political consideration. So this is one major issue that we have to look into, the relationship between the common crime and the political factor, political consideration. How close are the common crime and the political consideration? Well, at the moment, we do not have a clear definition for the political offence, relative political offence. But internationally, the trend is quite clear that public opinions or the scholars have reached some kind of consensus regarding the political events or the political offence exception. That means the international society is increasingly intolerant of violent crime or violent

terrorism. And increasingly we can find out that the international society will exclude violent conduct from the benefits of the exception.

Zhu Guobin: Thank you. And we still have a minute. I have the last question to all three panelists. Probably you can offer your opinion as legal professionals in Hong Kong, I would like to ask about balancing, balancing between the interests, public interest and the individual rights and freedom. So you are free to speak. Yeah, it's a very important issue, but I'm also very concerned.

Richard Cullen: The balancing we're going to have to keep working on that, we're going to have to pay constant attention to it on both sides, protecting national security and individual rights. I think we'll have to learn to live with a loss of a certain amount of scope to do, just what we want to do, whenever we want to do it. There's no question about that. But I think a very good thing is that we now know where we stand. We certainly know where the really in fact red lines are. And these are doing things which endanger national security and trying to cause alarm and spread alarm and actively doing this sort of thing and disguising it, or to use the current word that's used a bit beautifying that sort of behaviour ought to be recognized for just doing that. But there are going to be tensions around the borderlines. I don't think there's any doubt about that. And I think the other thing that's going to happen is we'll have to be able to look at behaviour that may be inflammatory, but it doesn't have much impact because of who is coming from or because it's just an individual saying something very silly. We're going to learn to feel our way with these sorts of things. But I think more seriously, looking at the, you know, many people would say the balance of rights and the state's rights in Singapore are too tilted, too heavily in favor of the state. But we can learn from the way that they've gone about working out how to maintain that balance. We may not want to follow it, but at least they've

got a clear idea of what the position should be. And they clearly convince people that this is in the interest of all Singaporeans.

Lim Chin Leng: I think there hasn't been a shortage of people who have spoken for the judges without the judges having really spoken. People who say "Oh, look at the National Security Law, the judges cannot do their job". Lord Reid issued a statement very quickly and gave us heart. He said let us wait and see. Lord Neuberger said, there is enough oxygen for me to sing, and he had said that in an incredible debate with Lord Faulkner, which I would recommend to everybody. It was an Inner Temple event, and it was very informative. We have also all seen what Jonathan Sumption has written in the press. I was asked this question, speaking to the Statute Law Society two weeks ago − "What are you going to say about Lady Hale?" And all I said was it is a matter for the individual judge to decide. So let us let them decide. Let us not preempt them. Let us see how they do it.

Zhu Guobin: Thank you.

Zhao Yun: Well, I think balancing public interest and individual rights can be a very difficult process, and of course, this happens not only in the national security law field, but also in many other fields. When we look at the protection of public interest, actually as a concept, public interest is changing over time. So we will need to look into the specific social circumstances to define the concept of public interest. Individual rights, again, are also quite important. But if we look at our ICCPR or some human rights documents, it has already mentioned that there is a possibility of derogation from these rights in time of emergency, such as endangering national security. So when it comes to the balancing exercise, I think it's rather important to take a two-step exercise. The first step is to look at the necessity, whether we really need to take such measures. Second, the measures that were taken should be

proportionate to the purpose they seek to achieve. So proportionality test is rather important as a second step to balance public interest and individual rights.

Zhu Guobin: Thank you. I think since we are supposed to be the expert of comparative law, just to what extent are these foreign experiences, foreign systems really relevant to Hong Kong?

Richard Cullen: Why don't you go first?

Lim Chin Leng: I would have thought that by now everyone would have wanted me to shut up. I think what we have found is that sentiments are heightened in national security situations, but what we have seen abroad is that even when legislation curtails rights in the UK context in relation to the Anti-Terrorism, Crime and Security Act, which I mentioned earlier, the United Kingdom entered a derogation under the European Convention on Human Rights and Fundamental Freedoms that triggered sections 1 and 2 of the Human Rights Act, in the United Kingdom, disapplying the Human Rights Act. They have ended a derogation also under the International Covenant on Civil and Political Rights. All of those things were done with popular support. The people who spoke against the Anti-Terrorism Crime and Security Act were a minority. Those situations, if I may say so, mark out the difference. We don't have that kind of broad public support, that heightened sense of security when these sorts of legislation, which you wouldn't have thought acceptable ordinarily in the United States or in the United Kingdom, were simply accepted. The conditions matter.

Richard Cullen: Well, comparative laws, I think they are worth. It's important to look at things comparatively, particularly legally and at two levels, I would say. One is what I would call the basic political or geopolitical level. I think more geopolitical. So today, with various

persons in the US say we're in the middle of a new Cold War or statements of that sort, then it's important to push back against all of this finger jabbing and waving and prior sermons that we get from Washington to point to how they deal with the same things in their own laws. We've just seen that today. That's very important. And then add more technical level. We can learn to legislate far better by looking at laws from offshore, but we need to take into account the local context offshore and the local context here.

Zhu Guobin: I'm asked to conclude. I want to thank the panellists again for their informative presentations, meaningful and highly relevant comparison, and insightful comments and observations. I also want to thank the audience for having followed the presentations. Taking this opportunity, I would like to make a few remarks to conclude:

First, the National Security Law has been promulgated for one year, and the implementation of the Law shall be our focus in the future. In order to consolidate the positive social effects brought about by the National Security Law, the SAR government led by the Chief Executive should lead the implementation of the Law and improve the relevant systems.

Second, Article 23 of the Basic Law and the Hong Kong National Security Law provide a macro framework for legally solving national security issues. The HKSAR Government needs to continue to complete unfinished national security legislation tasks and fulfill its constitutional responsibilities. This can be through the re-introduction of Article 23 legislation, or respective amendments to existing Hong Kong laws, including: the Crimes Ordinance, the Societies Ordinance, the Official Secrets Ordinance, the Public Order Ordinance, and the Criminal Procedure Ordinance.

Third, in the process of law enforcement, we should fully consider the value of human rights protection and follow the basic standards and rules recognized by the international community to achieve a reasonable balance between national security interests and the protection of individual rights.

Fourth, we should study the experiences and lessons of other countries and regions, and improve the legal system governing national security aspects.

Fifth, the issues that need to be studied further include:

A. the possible impact and influence of the National Security Law on the current constitutional system and human rights law, and this includes:

   (a) Theories about the relationship between the Basic Law and the National Security Law;

   (b) How to implement Article 23 of the Basic Law as soon as possible;

   (c) Striking a proper balance between rights protection and national security interest; and

   (d) How does the National Security Law truly integrate into Hong Kong's constitutional and legal system.

B. the impact and influence of the National Security Law on Hong Kong's judicial system and principles, and this includes:

   (a) Appointment of national security judges and judicial independence;

   (b) The Committee for Safeguarding National Security not being subject to judicial review;

(c) The Office for Safeguarding National Security operating outside the jurisdiction of the HKSAR;

(d) The exclusive power of interpretation vested in the Standing Committee of the National People's Congress.

C. the coordination between the national security criminal law system and Hong Kong criminal law system, and this includes:

(a) The integration of crimes under the National Security Law and local ordinances;

(b) The influence of mainland criminal law and criminal law theory on Hong Kong.

D. the impact of the National Security Law on the current criminal justice and litigation procedures in Hong Kong, and this includes:

(a) The implementation of specific criminal procedures stipulated by the National Security Law in Hong Kong, related to: bail, open trials, jury trials, and the determination of state secrets;

(b) Application of relevant criminal procedures after the activation of "mainland jurisdiction", including: the designated judicial authorities, the right of defense of criminal suspects and defendants, and the obligation to testify.

We should plan ahead, and under the premise of the Basic Law of Hong Kong, adopt a proactive and enterprising attitude. We should carry out theoretical explorations, and propose practical strategies to

ensure the stability of Hong Kong and the long-term development of "One Country, Two Systems".

Thank you.

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COMPARATIVE NATIONAL SECURITY LAW: AUSTRALIA & SINGAPORE

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THE UNIVERSITY OF HONG KONG

COMPARATIVE NATIONAL SECURITY LAW: AUSTRALIA & SINGAPORE

INTRODUCTION

- Key aspects of the Australian National Security Framework
- Review of the National Security Framework in Singapore
- Case Studies illustrating the impact of these National Security Regimes

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- "Five Eyes" – History and Significance
- The Legal Framework
- The recent HK$100 million Review of the National Security System
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CASE STUDIES

Australia:

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Impact in the Classroom

Singapore:

Detention under the Internal Security Act

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COMPARATIVE NATIONAL SECURITY LAW: AUSTRALIA & SINGAPORE

CONCLUSION

- **All jurisdictions have a Right and Responsibility to protect National Security.**
- **Road Traffic Laws were uncommonly simple 50 years ago. Today far more extensive, detailed and complex. Legislating to protect National Security exhibits a similar pattern.**
- **There is a tension, in both cases, between protecting the public interest and protecting individual interests.**
- **This tension is particularly acute with National Security Laws as the punishments for breach can be remarkably severe.**

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National Security Law from an International Law Perspective with reference to European Continental Practice

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Hague Conference on Private International Law

Introduction

- National Security Law establishes the way that a state handles threats to its government, its value, and its very existence.
- Comparative studies have been able to characterize legal similarities apparent across legal systems.
- In a way, national security law is no more so national, in view of the standardization of vital state and national values, and mechanisms and organizations responsible for security at both national and international levels.
- I will give an overview of the situation in European Continental area and discuss relevant issues from the perspective of international law.
  - ❑ Extraterritorial application of the law
  - ❑ Extradition

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National Security in European Continent and Major Features

- National security has been a major issue since World War II in Europe. Different from the comprehensive legislation model, the European continental countries do not generally make a comprehensive law on national security, but include relevant provisions in separate national laws, in particular criminal laws.
- Emphasizing the importance of maintaining constitutional order
  - ❑ The priority is on the maintenance of the basic political system and core values based on the Constitution
- Relying on the support of powerful enforcement entities (varies depending on their historical, traditional background, etc.) Differing on work focus, working methods and guiding ideology.

German Criminal Code: Offences

- Offence of high treason against the Federation, against the land, with or without force; and the offence of preparation of high treasonous undertaking.
  - ❑ Extraterritorial effect: apply to acts committed abroad, "regardless of which law is applicable at the place where the offence was committed"
- Offence of preparing serious violent offences endangering the State (with preparations made abroad); offence of treason (espionage, revealing State secrets, etc.); offences of sabotage against means of defence, intelligence activities endangering national security, images endangering national security.

German Criminal Code

- Rights of the accused: allowing exclusion of defence counsel's participation in cases involving dangers to national security.
- The Court Constitutional Act provides for the right to exclude the public from hearing if there is possibility of endangerment of State security, the public order or public morals.
- If a person is urgently suspected of a crime, and there is a reason for detention (e.g. the danger of absconding), the prerequisites for pre-trial detention are met.

Open Trial

- ICCPR (Art. 14): the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, but any judgment rendered in a criminal case or in a lawsuit at law shall be made public except where the interest of juvenile persons otherwise requires.
- The NSL is compatible with the Protocol that
  - ❑ (a) it presumes a trial in open court but allows closure if issue(s) of public order/ State secrets arises and
  - ❑ (b) it provides publication of judgment in any event

Extradition

- Hong Kong's existing legal protection with regard to extradition remains valid (including the ICCPR and ICESCR);
- Extradition requests are restricted by the judicial processes of different requested jurisdictions;
- Extradition requests involving offences under the NSL may be rejected on the grounds of political offence exception.

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Extraterritorial application: Territoriality and Nationality

- The territoriality of criminal law is fundamental, which is an essential attribute of State sovereignty.
- Extraterritorial criminal jurisdiction is not forbidden in international law, though requiring a sufficiently close connection between the offence and the legislating State.
- A State may apply its laws to its nationals even whilst they are abroad, though the exercise of such nationality principle shall not infringe on the territorial sovereignty of another State.

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Extraterritorial Application: Protective

- Most controversial provision on offences committed against HK from outside HK by a person who is not a HK permanent resident!
- Protective principle: well established that a State may apply its law to the conduct of a foreigner committed outside its territory that endangers national security.
- Normally only State interests that are essential or vital to the State and such crimes include espionage, acts of terrorism, murder of governmental officials, etc.
- A State should carry out the protection of national security in a manner that is consistent with international legal obligations: NSL Article 4 provides that human rights shall be respected and protected; the ICCPR and ICESCR continue to apply.

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Conclusion

- All countries have some kind of national security laws or concerns over national security. Major problems may lie in its implementation.
- Thus, more important for us now is to look into practical implementation in the future.
- Comparative studies hopefully will be helpful in this regard.

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Closing Remarks

LEE, Ka-chiu John, SBS, PDSM, JP

Chief Secretary for Administration,
Hong Kong Special Administrative Region of
the People's Republic of China

The Honorable Vice-Chairperson LEUNG Chun-ying (Vice-Chairperson of the National Committee of the Chinese People's Political Consultative Conference),
Deputy Commissioner FANG Jianming (Deputy Commissioner of the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region),
Standing Committee Member TAM Yiu-Chung (Member of the Standing Committee of the National People's Congress),
Vice-Chairperson Maria TAM Wai-chu (Vice-Chairperson of the Hong Kong Special Administrative Region Basic Law Committee of the Standing Committee of the National People's Congress),
Secretary for Justice Teresa CHENG Yeuk-wah (Secretary for Justice),
Distinguished guests, dear colleagues and friends,

The National Security Law has been implemented for one year. The National Security Law Legal Forum organised by the Department of Justice today is an excellent opportunity to review and look ahead regarding the development of the National Security Law and that of Hong Kong. First, I would like to thank all of you for participating in today's Forum. I would also like to express my sincere gratitude to the

Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region and the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region for their full support.

The implementation of the National Security Law has three important aspects, namely preventing, suppressing and imposing punishment for any act or activity endangering national security. In the morning and afternoon sessions of today's Forum, speakers from the Mainland, overseas and Hong Kong discussed in depth the implementation of the National Security Law from the legal and law enforcement perspectives. I would like to thank all of you for your insights, the sharing of which has been most enlightening for us all.

The implementation of the National Security Law delivered immediate results in turning around the chaos of the past where there was wanton advocacy of "Hong Kong independence" and serious violence in society. The community has seen a significant reduction in acts that disrupt public order and social peace, as well as a return to social stability. This is testimony to how law enforcement can achieve suppressive and punitive effects. Nevertheless, a "lone-wolf terrorist attack" occurred on the night of 1 July where a knifeman, in a murderous attempt, attacked and seriously injured a police officer on the street. The heinous incident has raised widespread concern in society. This case also shows that although the threat to national security has been contained, the risks remain. I notice that some people have gone so far as to advocate and back this kind of "lone-wolf terrorist attack", spreading hatred, and even seeking to glorify or "heroise" these violent acts of murderous intent. This has undoubtedly fuelled and encouraged such extremist acts, threatening the security and order in Hong Kong. That is why we must work together to stop domestic terrorism breeding in Hong Kong.

To eradicate the threat to national security in the Hong Kong Special Administrative Region (HKSAR), we must stay vigilant and be pre-emptive to effectively prevent acts and activities endangering national security. This is not the work of one or two departments, nor is it the work of the Government alone, but is the shared responsibility of the entire HKSAR. In this regard, Article 3 of the National Security Law stipulates that the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the National Security Law and other relevant laws. Article 6 also provides that it is the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of the People's Republic of China.

Over the past year, the entire government team has been working on various fronts to integrate the concept of safeguarding national security into the work of the HKSAR Government. For example, in the area of public officers management, the Government has required all government officials and civil servants to take an oath or make a declaration in accordance with the law that they will uphold the Basic Law, bear allegiance to the HKSAR and be responsible to the HKSAR Government. Moreover, the HKSAR Government has also amended the relevant legislation to include a requirement for all District Council members to swear to uphold the Basic Law and pledge allegiance to the HKSAR in accordance with the law. The Government will also gradually define officers of certain suitable statutory bodies as "public officers" and require them to take an oath or confirm in writing to uphold the Basic Law and pledge allegiance to the HKSAR in accordance with the law. We are also stepping up training for civil servants on the National Security Law, helping them gain a comprehensive understanding of the National Security Law and enhance their awareness of national security.

As for schools, the Education Bureau in February this year issued circulars to schools across the territory to provide guidelines on school administration and education in respect of safeguarding national security, as well as promulgated the mode of implementation and learning and teaching resources for national security education in the school curriculum, with a view to facilitating schools to put in place measures to enhance students' awareness of their national identity and develop their sense of belonging to the country. In addition, the Government made amendments to the guidelines for censors under the Film Censorship Ordinance following the National Security Law's implementation. If a film may endanger national security or the safeguarding of national security, the censor should form the opinion that the film is not suitable for exhibition. The Home Affairs Department has also assisted in organising community involvement activities to explain the National Security Law to all sectors of the community. All policy bureaux and departments will continue their efforts in taking forward the relevant work to ensure that all aspects of policymaking meet the requirements of the National Security Law for the executive authorities of the HKSAR Government, with a view to effectively preventing, suppressing and imposing punishment for any act or activity endangering national security.

The cultivation of national security and law-abiding awareness in the community as a whole must be extended beyond the Government to promote public participation in safeguarding national security together. In addition to the above training and education efforts targeted at the HKSAR Government, the civil service and schools, the Government has also brought national security and law-abiding awareness to all sectors of the community through various mechanisms and programmes.

For example, as a national law listed in Annex III to the Basic Law, the National Security Law is closely associated with the Constitution

and the Basic Law, and is an important subject that the Hong Kong public must understand. Hence, the Government will make good use of the platform provided by the Basic Law Promotion Steering Committee to co-ordinate and formulate promotional strategies and plans on the Constitution, the Basic Law and the National Security Law. Besides, various government departments and organisations also endeavour to promote the concept of safeguarding national security through a range of activities, which include the activities of National Security Education Day held by the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, the launch of a virtual exhibition for the first anniversary of the promulgation of the National Security Law last week by the Security Bureau, and the meaningful Legal Forum organised by the Department of Justice today. All these were multi-faceted initiatives to introduce the concept of national security and the National Security Law to the Hong Kong public. In the days ahead, all policy bureaux and departments will continue to take forward the relevant work.

With the concerted efforts of the Hong Kong community in implementing the National Security Law, we can certainly build an awareness of national security across different sectors, so that the "One Country, Two Systems" policy, which has always underpinned the HKSAR's success, can be steadfastly and successfully implemented. "One Country, Two Systems" policy is the best institutional arrangement to maintain Hong Kong's long-term stability and prosperity. For a rather long period of time previously, Hong Kong suffered from unprecedented devastation and harm caused by the rampant acts by those advocating "Hong Kong independence", as well as the interference and sabotage by external forces, rendering Hong Kong a gaping hole in national security.

The purpose of enacting, implementing and enforcing the National Security Law is to combat forces that endanger national security, so that

the HKSAR can refocus on the fundamentals of the "One Country, Two Systems" policy.

I must emphasise that while the National Security Law safeguards national security, the legitimate freedoms and rights that people have always enjoyed in the HKSAR are fully protected. These include criticising the HKSAR Government, as well as engaging as usual in international, and academic exchanges, and conducting businesses freely. Article 4 of the National Security Law clearly states that *"[h]uman rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law."*

The implementation of the National Security Law has produced potent and effective deterrence, and rapidly restored security and stability in Hong Kong; the achievements are evident to all. The National Security Law also enables the Hong Kong economy to start afresh. As compared to the end of 2019, the daily turnover of the securities market rose by about 140 per cent; the total market capitalisation grew by around 40 per cent; and the number of start-ups also increased by around 6 per cent. Moreover, Hong Kong is ranked as the third most preferred seat for arbitration. Social stability is also conducive to Hong Kong seizing the opportunities brought about by the 14th Five-Year Plan. The 14th Five-Year Plan makes plain its support for Hong Kong's better integration into the country's overall development, including the development of the Guangdong-Hong Kong-Macao Greater Bay Area, which is among the

country's most open and economically vibrant regions, and has a huge market of a total population ten times that of Hong Kong with a gross domestic product of US$1.7 trillion.

National security and political security are inseparable. To achieve genuine national security, governance must be firmly held in the hands of patriots. With the approval of the amended Annex I and Annex II to the Basic Law by the Standing Committee of the National People's Congress on 30 March this year, the local laws for improving the electoral system of the HKSAR were passed by the Legislative Council in May.

The improved electoral system will help the Legislative Council restore its constitutional function as a platform for rational interaction between the executive authorities and the legislature, which will clearly enhance governance. The Government is now committed in full swing to the preparations for the coming three elections. The two major measures taken by the Central Authorities over the past year have stabilised the overall situation in Hong Kong and laid an important and solid foundation for the full and faithful implementation of the policy of "One Country, Two Systems", under which the people of Hong Kong administer Hong Kong with a high degree of autonomy.

I strongly trust that with the implementation of the National Security Law, the improved electoral system and the realisation of "patriots administering Hong Kong", Hong Kong will unveil a new chapter of constructive and effective governance. All we need is to join hands and stand united in upholding the full and faithful implementation of the policy of "One Country, Two Systems". With the full support of our country, security brings prosperity. The policy of "One Country, Two Systems" will certainly be implemented smoothly and continuously. And for sure, so will Hong Kong thrive with long-term prosperity and stability.

Finally, I would like to express my special thanks to all the colleagues of the Department of Justice for their tremendous preparations in making this Forum a great success today. I once again thank all the expert speakers for their valuable sharing. Thank you.

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