興邦定國

2022.05.28

《香港國安法》法律論壇

National Security Law Legal Forum

Thrive with Security

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

《香港國安法》的實施為完善香港特區維護國家主權、統一、領土完整、安全和發展利益的制度踏出歷史性的一步。自2020年實施以來，《香港國安法》已融入成為香港法律體系的一部分，與本地法律和普通法制度互相銜接、兼容和互補，讓特區踏上「由亂轉治、由治及興」的軌道，為「一國兩制」的行穩致遠指明方向。

適逢《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》通過兩周年的重要日子，在中央政府的大力支持下，律政司於2022年5月28日成功舉辦了以「興邦定國」為主題的《香港國安法》法律論壇，作爲慶祝香港回歸祖國25周年的重點活動之一。論壇講辭及討論現彙編成書，讓社會大眾正確理解憲制秩序、國家安全的概念，以及提高國家安全意識和守法意識。

習近平主席在2022年7月1日發表的重要講話中，強調香港必須要全面準確貫徹「一國兩制」方針，並明確指出維護國家主權、安全、發展利益是最高原則。法治是貫徹「一國兩制」方針的重要元素，律政司將繼續全方位內外灌輸正確的法治觀、積極開展和推動國安教育，令社會大眾自覺尊重和維護國家的根本制度。

安全是發展的前提，發展是安全的基礎。律政司將全力以赴，以總體國家安全觀為宗旨下，持續推動完善維護國家安全的法律制度及執行機制，為特區發揮其在「一國兩制」下獨特地位，抓緊國家「十四五」規劃、粵港澳大灣區建設及「一帶一路」倡議所帶來的無限機遇，創造有利條件，積極主動融入國家發展大局。

香港特別行政區律政司司長
林定國SBS SC JP

目錄

33 座談環節（1）:《香港國安法》案例研讀及國際案例比較

主持人

楊艾文
香港大學法律學院 教授

講員

江樂士 GBS SC
香港大學法律學院 榮譽教授

李紹強 SC
清洪資深大律師事務所 資深大律師

目錄

開幕式致辭

林鄭月娥 大紫荊勳賢 GBS JP
中華人民共和國香港特別行政區
時任行政長官

劉光源特派員、王兆兵少將、關清華局長、張舉能法官、梁君彥主席、各位嘉賓、各位同事：

早晨！歡迎大家參與今天由香港特別行政區政府律政司主辦，以「興邦定國」為主題的《香港國安法》法律論壇。

適逢今日是全國人民代表大會通過《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》（簡稱《528決定》）兩周年的重要日子，令法律論壇更具意義。各位中央政府與特區政府的高級官員以及國內外和本地的法律界專家難得聚首一堂，回顧《香港國安法》的案例，探討維護國家安全的前沿議題，以及展望如何進一步完善香港維護國家安全的法律制度及執行機制。

兩年前的今天，全國人大作出《528決定》，授權全國人大常委會制定《香港國安法》。全國人大常委會其後在6月30日通過《香港國安法》，並列入《基本法》附件三，在香港特區公布實施。當天晚上，我以香港特區行政長官身分簽署政府公告，讓《香港國安法》在香港實施，深感責任重大，使命光榮。由於當時香港正經歷了差不多一年的暴力衝擊、社會動亂，國家安全受到威脅，人命財產得不到保障，《香港國安法》的頒布實施無疑是香港的「定海神針」。

《香港國安法》是一部全國性法律，有嚴謹的立法程序和無數內地法律專家的智慧。自全國人大《528決定》通過後，我和幾位同事

有幸參與緊湊的立法工作。藉此機會，我必須再次由衷感謝中央高度重視特區政府的參與，並接納了不少我們提出的意見，讓《香港國安法》能在沿用普通法的香港享有基礎穩固的法律條文，在執行機制上全面到位，在具體落實時高效有力。

我在政府工作超過40年，可以說落實《香港國安法》的效率是前所未見的。《香港國安法》頒布後的10天內已完成了的重點工作包括中央委任國家安全事務顧問及國安委秘書長、警務處國家安全處和律政司專門檢控科分別正式成立、行政長官委任首批《香港國安法》法官、香港特區維護國家安全委員會召開首次會議、中央人民政府駐港維護國家安全公署揭牌成立、有關警務處國家安全處可以採取按《香港國安法》第四十三條七項措施的《實施細則》刊憲生效等。

經過香港特區政府和社會各界人士共同努力，《香港國安法》順利落地實施，香港特區維護國家安全機構依法成立並順利運行，有力懲治了危害國家安全的違法犯罪活動，實現了由亂轉治的重大轉折，保持了大局穩定。

總結這兩年的工作經驗和成效，我最大的感受是，要徹底維護國家安全，我們必須全面領會總體國家安全觀，並全方位把每個觀念落到實處，達致「防範」的目的。這兩年來，我們在中央指導下，完善了特區選舉制度、建立了公職人員宣誓擁護《基本法》和效忠特區的制度、深化政府各部門和公營機構高層的國安意識和政治擔當、都是立竿見影的「防範」工作。

但香港特區在維護國家安全的工作仍屬初階，特區官員必須看到形勢依然嚴峻複雜，《香港國安法》實施仍面對不少挑戰，尤其是外圍政治局勢波動極大，圍堵中國的外部勢力還會不斷冒起，而本地的激進滋事分子，甚至鼓吹恐怖主義的地下組織，仍會蠢蠢欲動。我寄語下屆政府必須進一步提高管治團隊的政治意識、國安意識、大局觀和不畏鬥爭的精神。

祖國永遠是香港特區最堅強的後盾，而經《香港國安法》制定的維護國家安全法律和執行機制充分體現了中央對香港特區、對特區官員的高度信任；我們捍衞的是國家主權、安全和領土完整，維護的是全國人民的福祉，執行的是一部全國性的法律。因此，執行《香港國安法》的所有特區政府官員，必須不負國家、不負人民。最後，我想引述國家主席習近平2016年12月在主持召開中央政治局民主生活會議上的一段話作結，習主席說：「在維護國家核心利益上敢於針鋒相對，不在困難面前低頭，不在挑戰面前退縮，不拿原則做交易，不在任何壓力下吞下損害中華民族根本利益的苦果。」

我預祝今天論壇圓滿成功。多謝大家。

王靈桂

中華人民共和國國務院港澳事務辦公室
副主任

尊敬的林鄭月娥行政長官(時任行政長官)，各位嘉賓、各位朋友：

大家上午好！

很高興受邀參加香港特區政府律政司主辦的第二屆《香港國安法》法律論壇。首先，我謹代表全國政協副主席、國務院港澳辦主任夏寶龍先生對論壇的舉辦表示熱烈祝賀！今年是《香港國安法》實施兩周年，我們齊聚一堂，回顧《香港國安法》制定實施的不平凡歷程，總結經驗，探討問題，思考法治的真諦，我覺得很有必要，也很重要。

《香港國安法》的制定和實施，是「一國兩制」實踐的豐富和完善。香港回歸後，「一國兩制」實踐取得了舉世公認的成功。同時，一個時期，受各種內外複雜因素影響，「反中亂港」活動猖獗，香港局勢一度出現嚴峻局面。中央審時度勢，全國人大根據《憲法》和《基本法》作出決定，授權全國人大常委會制定《香港國安法》，堵住了香港特區維護國家安全的法律漏洞，建立健全了特別行政區維護國家安全的法律制度和執行機制。《香港國安法》頒佈後，特區執法司法機構嚴格執法、公正司法，特區政府和社會各界積極宣傳《國安法》，法治權威得以彰顯，國家安全得到保障，國家安全觀念深入人心。《香港國安法》的制定實施，維護了《憲法》和《基本法》確立的香港特別行政區憲制秩序，為香港局勢實現由亂到治、長期

向好奠定了堅實法治基礎，對堅持和完善「一國兩制」制度體系，維護國家主權、安全、發展利益，維護香港長治久安和長期繁榮穩定，具有重大意義。

制定實施《香港國安法》，根本目的是堵住香港維護國家安全的法律漏洞，有效維護國家安全，保持香港特區的繁榮穩定，保障香港特區居民的合法權益，打擊的是極少數嚴重危害國家安全的行為和活動。《香港國安法》出台以後，一些別有用心的人不斷污蔑、詆毀《國安法》所謂侵犯香港居民的權利和自由，等等。事實勝於雄辯。《香港國安法》實施以來，香港已經告別動盪不安的局面，各種暴力犯罪案件急劇下降，社會逐步安定；特區的管治秩序恢復正常，施政環境得以改善；愛國愛港旗幟高高飄揚，社會正氣充分彰顯；香港法治指數繼續在全球名列前茅；傳媒數量不降反升，新聞的生態更加健康；經濟金融繼續堅挺，外資公司數目持續增長，投資者對香港信心不斷增強。這些都充分說明，《香港國安法》是香港法治的強心劑，是居民權利與自由的守護神，是保持香港繁榮發展的定心丸。

嘉賓們、朋友們，

國家安全是國家生存發展的基本前提，是安邦定國的重要基石，是人民美好生活的最佳保障。習近平主席強調，「實現中華民族偉大復興的中國夢，保證人民安居樂業，國家安全是頭等大事」。2019年的「修例風波」警示我們，沒有國家安全和政權安全，一切都無從談起。在《香港國安法》和新選舉制度的保駕護航下，香港已經實現由亂到治的重大轉折，正在邁進由治及興的新階段。國家安全底線愈牢，「一國兩制」空間越大。我們有理由相信，未來香港多元、包容、開放的特點將更加突出，「背靠祖國、面向世界」的市場化、國際化、法治化的優勢將更加彰顯，香港將以更加蓬勃的姿態融入國家發展大局，再創新的輝煌！

最後，預祝會議圓滿成功！

羅永綱

中央人民政府駐香港特別行政區聯絡辦公室
副主任

尊敬的林鄭月娥行政長官(時任行政長官)，各位嘉賓，女士們、先生們、朋友們：

大家上午好！

很高興參加香港特區政府律政司舉辦的一年一度的《香港國安法》法律論壇。受駱惠寧主任委託，我謹代表中央政府駐港聯絡辦，對論壇的舉辦表示熱烈祝賀！

今天是《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》通過兩周年。論壇選擇這個重要時點，匯聚知名專家學者，圍繞《香港國安法》的立法初心、實施經驗和維護國家安全的前沿議題，進行交流討論，具有很強的學術價值和重要的實踐意義。借此機會，我想與大家分享三點體會。

第一，《香港國安法》推動特區步入「由亂到治」的正軌。習近平總書記在去年12月22日會見赴京述職的林鄭月娥行政長官(時任行政長官)時指出，香港由亂到治的局面不斷鞏固，局勢不斷向好發展。面對「修例風波」造成的香港回歸以來最嚴峻的局勢，中央審時度勢，果斷出手，制定實施《香港國安法》，從根本上堵住了香港維護國家安全制度方面的漏洞，終結了香港維護國家安全「不設防」的歷史，斬斷了內外敵對勢力危害國家安全的「黑手」，有力維

護了《憲法》和《基本法》確定的香港特別行政區憲制秩序。《香港國安法》實施近兩年來，反中亂港分子的囂張氣焰受到沉重打擊，危害國家安全的行為得到有效遏制，香港告別動盪不安的局面，市民生活恢復了往日安寧。據統計，截至今年5月24日，已拘捕涉嫌危害國家安全的犯罪嫌疑人187人，其中以《香港國安法》罪行檢控88人和4家公司，以其他罪行檢控30人和4家公司；8人被定罪判刑，另有80人被收押。當前香港社會大局安全穩定，今年第一季度罪案同比下降6.2%，暴力罪案同比下降10.3%。事實充分證明，《香港國安法》「一法安香江」，特區已步入「由亂到治」的正軌。

第二，《香港國安法》保障特區開啟「良政善治」的新局。習近平總書記強調，「安全是發展的前提，發展是安全的目的」。《香港國安法》出台前，反中亂港勢力在外部敵對勢力支持下策動各種干擾破壞活動，特別是一些反中亂港分子利用選舉漏洞進入立法會等特區管治架構，採取各種手段阻擾特區政府依法有效施政。《香港國安法》頒佈實施後，香港新選舉制度下三場重要選舉圓滿順利舉行，「愛國者治港」原則得到有效落實，特區政權牢牢掌握在愛國愛港人士手中，反中亂港分子被堅決擋在特區管治架構之外。當前，新選舉制度已經落地生根，香港特區的政治秩序恢復正常，社會政治生態日益好轉，行政長官和特區政府的施政權威得到有力維護、施政環境得到有效改善，立法會與特區政府良性互動、高效履職，香港從長期的政治爭拗中解脫出來，特區政府集中精力防控疫情、發展經濟、改善民生，必將成功開啟香港良政善治的新篇章。

第三，《香港國安法》護航特區「一國兩制」行穩致遠。習近平總書記在2022年新年賀詞中充滿深情地說：「祖國一直牽掛著香港、澳門的繁榮穩定，只有和衷共濟、共同努力，『一國兩制』才能行穩致遠。」香港回歸祖國以來，「一國兩制」實踐取得舉世公認的成功，儘管實踐中遇到許多新情況新問題新挑戰，但中央踐行「一國兩制」的初心不會改變。《香港國安法》頒佈實施近兩年來，香港穿越陰霾、走出困境的事實，充分說明「一國兩制」具有制度韌性和強大的生命力，「國安家好」的觀念也日益深入人心，越來

越多的香港市民認識到，「一國」是「兩制」的前提和基礎，只有築牢「一國」的安全底線，「兩制」才有更加充分的活力和空間，廣大香港市民的福祉和利益才能得到切實維護，香港才能譜寫繁榮穩定、長治久安的美好篇章。當前香港社會愛國愛港旗幟高高飄揚，疫情形勢正在好轉，社會發展重回正軌，經濟金融秩序良好，香港市民和國際社會對「一國兩制」信心指數持續回升。相信有《香港國安法》保駕護航，香港充分發揮自身獨特優勢，深度融入國家發展大局，東方之珠必將綻放出更加耀眼的光芒，香港「一國兩制」實踐也必將迎來更加光明的前景。

今年是香港回歸祖國25周年，也是香港由亂到治邁向由治及興的關鍵之年，「穩」始終是香港發展的前提和保障。讓我們一同攜起手來，把對祖國和香港的熱愛，對美好生活的嚮往，變成遵守、擁護、執行《香港國安法》的自覺行動，形成全社會共同落實和捍衛《香港國安法》的良好局面，充分發揮《香港國安法》「守護香江、治亂興邦」的強大威力，為香港的美好未來創造更加安全、安定、安寧的社會環境。

預祝論壇圓滿成功！謝謝大家！

主題演講（一）：
全國人大《528決定》

張勇

中華人民共和國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(時任行政長官)，
尊敬的王靈桂副主任、羅永綱副主任，
各位嘉賓，朋友們：

大家上午好！

感謝香港特區政府律政司的邀請，很高興在《香港國安法》法律論壇上再次同各位進行交流。

記得去年《香港國安法》實施一周年法律論壇的主題是「國安家好」，蘊意著《香港國安法》的制定和實施彌補了香港特區維護國家安全的制度漏洞，扭轉了香港動盪不安的社會局勢，恢復了香港同胞安居樂業的生活環境。今年法律論壇的主題是「興邦定國」，我理解，這是在更高層次上提出建立健全在香港維護國家安全的制度體系，為國家的長治久安，為香港的長期繁榮穩定提供更加全面、更加穩固、更加有效的保障。

兩年前的今天，全國人民代表大會通過了《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》(以下簡稱《國安決定》)。這項重要決定，既是《香港國安法》的立法依據，也是在香港構建維護國家安全制度體系的法律要求，具有重要的憲制意義和豐富內涵。應論壇主辦方的要求，今天，我圍繞《國安決定》與大家分享三點體會。

一、《國安決定》是從國家層面構建在香港維護國家安全的制度體系。《國安決定》是中央針對香港維護國家安全存在的制度缺失和國家安全面臨的現實的嚴峻形勢而作出的重大決策部署，是從國家層面對在香港維護國家安全的制度體系作出的頂層設計。如何理解國家層面，我認為可以有三個角度。

第一，《國安決定》以總體國家安全觀為指導思想。總體國家安全觀是習近平新時代中國特色社會主義思想的重要組成部分，也是我國維護國家安全的行動綱領和科學指南。習近平主席強調，保證國家安全是頭等大事。總體國家安全觀涵蓋了政治、軍事、國土、經濟、文化、社會等諸多安全領域。在總體國家安全觀指導下，我國逐步形成了全面系統的維護國家安全的制度體系。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，在香港維護國家安全本質上是整體國家安全的一個有機組成部分。因此，《國安決定》同樣是以總體國家安全觀作為指導思想，全面貫徹落實總體國家安全觀所確立的各項原則和要求。

第二，《國安決定》是由最高國家權力機關行使《憲法》權力作出的。全國人民代表大會是我國的最高國家權力機關，在整個國家機構體系中居於最高地位，行使著立法權、重大事項決定權等重要國家權力。我國《憲法》第六十二條第十四項規定，全國人民代表大會「決定特別行政區的設立及其制度」，這其中就包括在香港維護國家安全的制度。實際上，在事關香港前途命運的重大問題上，全國人民代表大會一直是最終的決定者，其決定具有最高的法律效力。例如，1985年4月全國人民代表大會作出批准《中英聯合聲明》的決定；同一天，全國人民代表大會還作出成立香港基本法起草委員會的決定；又比如，1990年4月全國人民代表大會在通過香港《基本法》的同時，作出設立香港特別行政區的決定，等等。《國安決定》是香港回歸後全國人民代表大會第一次就香港重大問題作出決定。這項決定對在香港構建維護國家安全的制度體系具有重要的規範作用和指導意義。

第三，《國安決定》授權制定全國性法律，對在香港維護國家安全作出總體的制度性安排。1990年全國人大通過香港《基本法》，將禁止部分危害國家安全行為的立法權授予香港特別行政區，也就是大家熟知的「《基本法》二十三條立法」。但遺憾的是，香港遲遲未能完成立法，而危害國家安全的風險日益凸顯。在這種情況下，全國人大行使《憲法》權力，授權全國人大常委會制定法律，建立健全香港特區維護國家安全的法律制度和執行機制。《國安決定》這項授權與《基本法》二十三條規定並行不悖，其權力來源都是最高國家權力機關。《國安決定》的立法授權是一般性授權，要求全國人大常委會以切實維護國家安全為目的，制定一部全國性法律。正基於此，大家可以看到，《香港國安法》不是一部僅僅規定禁止四類嚴重危害國家安全犯罪的刑事法律，而是一部涵蓋了組織法、實體法和程序法等多方面內容的綜合性、統領性法律。這部法律是從國家層面對在香港維護國家安全作出了總體的制度性安排。在法律位階和效力上，《香港國安法》第六十二條明確規定：「香港特別行政區本地法律規定與本法不一致的，適用本法規定」。

二、《國安決定》是全面系統地構建在香港維護國家安全的制度體系。《香港國安法》的實施，效果顯著，一舉扭轉亂局。因此，大家對《香港國安法》更為關注，對其中許多條款耳熟能詳。但今天，我想與大家一起重溫《國安決定》的內容。作為最高國家權力機關作出的一項重大決定，《國安決定》結構完整、內涵豐富，既有原則要求，也有制度規定，既有中央責任，也有地方義務，其全面性和系統性至少體現在四個方面。

第一，遵循五項基本原則。這包括：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，以及切實保障香港居民合法權益。

第二，闡明國家政策和立場。一是國家堅定不移並全面準確貫徹「一國兩制」、「港人治港」、高度自治方針，維護《憲法》和香港《基本法》確定的憲制秩序；**二是**國家採取必要措施，建立健全香港維護國家安全的法律制度和執行機制，禁止任何危害國家安全的行

為和活動；**三是**堅決反對任何外國和境外勢力以任何方式干預香港事務，並採取必要措施予以反制，防範、制止和懲治外國和境外勢力利用香港進行分裂、顛覆、滲透和破壞活動。

第三，落實中央根本責任。這主要指兩項授權性規定：**一是**授權中央人民政府維護國家安全的有關機關根據需要在香港設立機構，履行職責；**二是**授權全國人大常委會制定全國性法律，在香港公佈實施。

第四，明確香港特區憲制責任。這包括四項內容：**一是**香港特區應當儘早完成《基本法》規定的維護國家安全立法；**二是**香港特區各政權機關，包括行政機關、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和活動；**三是**香港特區應當建立健全維護國家安全的機構和執行機制，強化維護國家安全執法力量，加強維護國家安全執法工作；**四是**行政長官應當就履行維護國家安全職責、開展國家安全教育、依法禁止危害國家安全的行為和活動等情況，定期向中央人民政府提交報告。

三、全面落實《國安決定》，構建維護國家安全的制度體系。《國安決定》作出後，全國人大常委會依據授權，制定了《香港國安法》並公佈實施；中央有關部門和香港特區落實決定的要求，及時設立相關機構並履行職責；香港特區政府和司法機關查辦、檢控和審理了一批危害國家安全的案件；社會各界也開展了形式多樣的維護國家安全的宣教活動。但同時，我們也應清醒地看到，在香港構建維護國家安全的制度體系尚在起步階段，《國安決定》的不少內容還沒形成制度性安排，《香港國安法》的許多條款還有待具體實施，社會上對國家安全形勢和在香港面臨的風險也存在不少模糊認識。今天，我們一起重溫《國安決定》，紀念《香港國安法》實施兩周年，目的就是為了進一步明確努力方向，承擔起責任和義務，共同推進在香港維護國家安全的制度體系建設。

做好這項工作，**首先要立足於國家安全的全局。**維護國家安全是中央事權。在一個國家內，國家安全的標準是統一的。在香港

維護國家安全必須服務於、服從於整體國家安全的需要和要求。這是由中央與地方的憲制關係所決定的，也是由國家安全的極端重要性和複雜性所決定的。**其次要聚焦於《國安決定》和《香港國安法》的有效實施。**兩年前，全國人大及其常委會通過「決定＋立法」方式，從國家層面對在香港維護國家安全作出頂層設計和總體的制度性安排，意義重大而深遠。香港特區履行維護國家安全的憲制責任，在理念、範圍和方式等方面要與時俱進，適應新時期維護國家安全的實際情況，全面熟知和深刻領會《國安決定》和《香港國安法》的要求和規定，通過特別行政區立法、司法、執法等工作確保其全面落地、有效實施。**最後，還要著力於培育維護國家安全的社會政治環境。**「徒法不足以自行」。維護國家安全是一項社會系統工程，法律制度體系只是一個方面。要切實提升社會各界的國家安全意識，使得維護國家安全的觀念深入人心，努力形成有利於法律實施的社會氛圍和政治生態。

各位嘉賓、朋友們！

今年是香港回歸祖國25周年。我們更不能忘記的是，今年也是英國強迫清政府簽訂喪權辱國的《南京條約》、割佔香港島180周年。今年的法律論壇，不僅有現實的紀念意義，還有歷史的警示意義。

「欲安其家，必先安於國」。人類社會的歷史和現實不斷地印證這句話。當前，世界正經歷百年未有之大變局，中華民族正處在向第二個百年奮鬥目標邁進的關鍵時期，香港也處在由亂及治走向由治及興的重要階段。「安不忘危，治不忘亂」。讓我們齊心協力，進一步實施好《香港國安法》，落實好《國安決定》，以更廣闊的視野、更扎實的工作，築牢維護國家安全的制度屏障，守衛好我們共同的美好家園。

謝謝大家！

主題演講 (二)：
由亂轉治—法治精神典範

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

尊敬的林鄭月娥行政長官(時任行政長官)，各位嘉賓，各位朋友：

大家好！

在全國人大作出《建立健全香港維護國家安全法律制度和執行機制決定》兩周年的重要日子，香港特區政府律政司牽頭舉辦論壇，研討交流實施《香港國安法》的成果和體會，意義重大。在此，我謹代表駐港國家安全公署，向與會的各位嘉賓、各位朋友表示誠摯的問候！向一直以來支持《香港國安法》實施和駐港國家安全公署工作的各界人士表示衷心的感謝！

兩年前的今天，面對香港「修例風波」的嚴峻局面，中央以堅忍不拔的政治定力，堅守「一國兩制」初衷，全國人大作出《建立健全香港維護國家安全法律制度和執行機制的決定》，啟動了《香港國安法》的立法進程。在那時，香港不少人有各種疑慮、擔心。現在，兩年過去，香港大亂變大治的事實充分證明，《香港國安法》是香港維護國家安全和長期繁榮穩定的治本之策。

第一，一法兩機制扭轉亂局

《香港國安法》刊憲實施以來，在中央的堅強領導下，特區政府勇於擔當，駐港國安公署和特區國安委兩套機制積極有為，特區

各司法執法管治力量依法履職，有力有效維護了國家安全。反中亂港為首分子落入了法網，社會秩序實現安全穩定，整體輿論生態日趨理性，一批反中亂港組織解散或停運，通識課改革等有效堵塞了國家安全漏洞，社會上一度對《香港國安法》的誤解逐漸消弭，民調顯示對維護國家安全認同程度達到77.5%以上。

《香港國安法》的有效實施，也為各界帶來利好局面。行政主導有效落實，立法機構有序高效運轉，司法執法機關依法辦事，法治尊嚴和權威更加彰顯，傳媒、社團等發展空間更加清朗，青少年成長環境更為健康，市民基本權利和日常生活得到更好保障，營商環境更加優化，投資者更加看好香港。香港去年經濟增速6.4%，比發達經濟體整體增長高出1.4個百分點，重回「紐倫港」世界三大金融中心排位。綜合情況表明，中央運用法治方式解決香港問題的決策是英明正確的。

第二，大亂催生大法，大法促進大治

所謂「颱風過後有漁汛、風雨過後見彩虹」。《香港國安法》應聲落地，是推動香港大亂變大治的里程碑。從國安法的立法時機、立法初衷、立法依據、立法程序、立法內容和法治實踐看，一法兩機制堪稱治國理政的法治範例。**一是一舉堵塞住國家安全無法可依的關鍵漏洞。**香港告別了過去香港維護國家安全長期被動局面，堵住了內外敵對勢力危害國家安全的重大缺口。**二是擊中了「顏色革命」的命門**。《香港國安法》對懲治危害國家安全的四類罪行作出一系列法律規定，對組織和個人的法律責任作出明確規定，有力打擊了反中亂港勢力的囂張氣焰。**三是通篇充滿法治思維、法治智慧、法治擔當。**《香港國安法》賦予司法執法機關必要的權力和職責，對防範、制止、懲治危害國家安全行為所需要的法律手段進行賦權，為依法懲治罪惡提供了充足的法律工具箱。**四是法治手段成為抗擊外來干涉的有力武器。**美西方經常以法治為借口干涉別國內政，但面對《香港國安法》的成功法治實踐，他們沒法雞蛋裡頭挑骨頭。在香港就必須遵守《香港國安法》，這已是不可改變的現實。

第三，中央堅守依法治港贏得最大民心

在香港發生「修例風波」、國家安全遭受前所未有危險的關鍵時刻，中央毅然決然堅持用法治手段兜牢維護國家安全的底線，對於「一國兩制」實踐具有重大意義。「一國兩制」的根本宗旨、根本原則、根本底線都直指維護國家主權、安全、發展利益。沒有了國家安全，或者國家安全被踐踏，「一國兩制」就成了無本之木、無源之水。只有守住了國家安全，才是對「一國兩制」行穩致遠最有力的維護，也是對香港實現長期繁榮穩定的有力支撐。中央堅守「一國兩制」、堅守依法治港的決心和苦心，在全香港起到最大公約數的重要作用，得到最廣泛力量支持，贏得了最大的民心。目前，《香港國安法》「本來就該有、有了就見好、越來會越好」的共識正廣泛形成、逐步鞏固，香港正迎來天朗氣清、惠風和暢的朗朗乾坤。

第四，香港法治底線、法治方向更加清晰、堅定

法治是自由最好的保護神。自由不是決堤的洪水，自治不是無主的為所欲為。自治的前提首先是確保國家主權、安全、發展利益。說到底，「高度自治」的前提就是「高度自覺」，是讓中央「高度放心」，這「三個高度」是一致的、共存的。

香港既是搞資本主義制度，沿用資本主義國家法律體系無可厚非，但是必須清醒認識到，沿用英美法系最終是為了維護中國利益、香港利益，絕不可以因為沿用英美法系而罔顧國家利益，絕不可以罔顧香港回歸中國事實去延續港英時期的價值觀念，甚至聽英美國家頤指氣使。

制度安全是國家安全的核心內涵之一，美英國家如果動了他們制度安全的「芝士」，是不得了的事情。我們要特別記住，維護香港的資本主義制度安全與維護內地的社會主義制度安全都是我們的義務，都是維護國家安全的範疇；「一國兩制」對於香港要維護的既包括「一國」也包括「兩制」，兩者一樣重要，包括不能罔顧中央

的根本關切，搞顛覆中國共產黨領導和中國特色社會主義的事情。妄想通過街頭政治改變內地政制來適應香港，是一種愚蠢的本末倒置，必定玩火自焚。這是香港法治方向、法治底線的根本問題。

第五，不斷提高香港維護國家安全的法治化水平

健全的法治體系是法治之基，有漏洞的法治必定帶來「破窗效應」，影響其他法律效能和法治效果。國家意志得不到貫徹、國家安全得不到保護，是法治最大的漏洞。香港在法治上最大的優勢，應該是既有高度的經貿自由又有清晰的法律邊界，既有充分的言論自由又不會被利用濫用，既有結社集會自由又不會氾濫成災，既有民主人權保障又確保國家安全，既有高度自治權又體現中央全面管治權。世界上沒有絕對的自由，最大的自由，就是法治邊線、國安底線之內的充分自由。就像踢足球，可以腳踢頭頂、合理衝撞，但必須有底線邊線，有裁判邊判，才有足球不一樣的精彩。

今年是香港回歸25周年，也是喪權辱國的《南京條約》簽訂180年，以史為鑒、開創未來，今天的《香港國安法》實施成效意義重大，是對香港恢復行使主權以來最好的紀念，是對珍惜國家主權、安全、發展利益最好的警醒。隨著《香港國安法》實施、「愛國者治港」原則落實和新選制下三場選舉的順利完成，香港穩中向好的態勢正在逐步鞏固，大勢不可逆轉。但綜合來看，香港維護國家安全仍然面臨很多風險隱患。我們必須堅持用法治思維、法治手段、法治程序解決涉及國家安全一切問題。希望特區管治團隊進一步完善維護國家安全的法律體系，在深度落實《香港國安法》各方面不斷開局破題、正本清源，統籌香港的發展與安全。駐港國安公署將全力支持特區管治團隊繼續深入履行維護國家安全憲制責任，同時進一步完善自身依法履職體系，做好隨時依法行使中央管轄權兜牢國家安全底線的充分準備，既要做到有備無患，也期待香港安全無恙，可以備而不用。

各位嘉賓、各位朋友！

大家都知道法治精神是香港的發展之基、穩定之基、民主自由之基，中央堅守依法治港，就是珍惜港人所愛、顧及港人所盼、維護港人所得，中央如此厚愛香港，是香港之福、香港同胞之福，對此我們應該念念不忘、點滴在懷，決不辜負中央對香港最深情的眷顧。

謝謝大家！

主題演講（三）：
由治及興

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

尊敬的林鄭月娥行政長官(時任行政長官)，
各位嘉賓、各位朋友，女士們、先生們：

大家上午好！兩年前的今天，全國人民代表大會通過了《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》，為制定實施《香港國安法》奠定堅實法律基礎。兩年來，《香港國安法》越來越凸顯出治港「良法」的重要作用，為香港持續帶來「善治」成果。今天，我們齊聚一堂，總結實踐經驗、探討法律問題，對繼續貫徹好《香港國安法》具有重要意義。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》是一部固本強基之法，有力推動「一國兩制」重回正軌。維護國家安全是國家頭等大事，也是「一國兩制」核心要求。《香港國安法》對香港特別行政區維護國家安全的法律制度和執行機制作出全面系統規定，構建起在特區防控國家安全風險的制度屏障，為「一國兩制」在香港實踐加固安全根基。《香港國安法》實施以來，香港社會對「一國兩制」認識更趨全面準確，越來越多的香港市民認識到「有國才有家，國安家才安」，愛國愛港正能量不斷激發。隨著「一國」底線愈發牢固，「兩制」獲得更大活力和空間，特區治理效能得到提升，「一國兩制」的生命力和優越性更加彰顯。

第二，《香港國安法》是一部正本清源之法，有力維護香港法治秩序。社會穩定是香港發展的前提。《香港國安法》劍指四類危害國家安全的行為和活動，打擊極少數賣國、禍港、殃民的違法犯罪分子，保護絕大多數香港市民的合法權利和生命財產安全，為香港創造更加安全、穩定、和諧、便利的社會環境。《香港國安法》實施以來，香港重拾法治尊嚴，違法犯罪得到應有懲治，社會安定、市民安全、人心安寧，香港居民的權利和自由不僅「零受損」，而且在安全穩定的環境下獲得更堅實的保障。香港的法治核心價值得到維護，「法治名片」重獲光澤，香港繼續成為市民安居樂業的美好家園。

第三，《香港國安法》是一部匡正祛邪之法，有力遏制外來干涉。香港回歸後，一些外部勢力利用香港「不設防」的漏洞和缺陷，公然插手和干預香港事務，與香港反中亂港勢力勾連合流、沆瀣一氣，為其撐腰打氣、提供保護傘，利用香港從事危害中國國家安全的活動。《香港國安法》實施以來，法治利刃作用彰顯，反中亂港勢力受到沉重打擊，外部干預勢力在香港的「據點」被一個一個地拔除，內外敵對勢力危害國家安全的「黑手」被斬斷。一些西方政客不停地對《香港國安法》「潑髒水」、「扣帽子」。他們跳得越高、反應越大，越證明《香港國安法》切中要害、不可或缺。

第四，《香港國安法》是一部利港利民之法，有力保障香港經濟繁榮發展。香港一直是國際投資者最青睞的營商地之一。香港國安立法後，個別西方國家肆意造謠抹黑香港營商環境，唱衰香港發展前景，甚至炮製所謂「香港商業警告」。但事實早已有力地回擊這些惡意中傷。《香港國安法》實施以來，香港國際金融中心地位十分穩固，今年國際貨幣基金組織再次肯定香港作為主要國際金融中心的地位，香港在最新發佈的「全球金融中心指數」中位列第三。香港繼續被評為全球最自由的經濟體，接受近三成的亞洲直接投資，是亞洲直接投資最大目的地。去年海外和內地駐港公司超 9,000 家，初創企業增至 3,700 多家，創歷史新高。香港仍然是各國投資者興業發家的樂土，「東方之珠」璀璨依舊。

各位嘉賓，各位朋友，

國家安全是定國安邦的重要基石。香港作為中國不可分離的部分，是維護國家安全的重要一環。一些外部反華勢力頻頻打「香港牌」，頑固推行「亂港遏華」圖謀，嚴重威脅中國主權、安全和發展利益。香港面臨的外部安全風險嚴峻，反映出一些國家固守冷戰對抗的陳舊思維，大行單邊霸凌，折射出當今世界和平與發展面臨突出挑戰。當前，新冠疫情延宕反復，烏克蘭危機影響深遠，單邊主義、霸權主義、強權政治逆流橫行，各種傳統安全和非傳統安全威脅層出不窮，建設持久和平、普遍安全的世界仍任重道遠。面對國際和平與安全領域嚴峻挑戰，中國始終堅定走和平發展道路，維護和踐行多邊主義，推動構建人類命運共同體，中國主張：

——堅持開放包容，不搞唯我獨尊。習近平主席說，多樣性是人類文明的魅力所在，更是世界發展的活力和動力之源。世界各國都需要走符合本國國情的發展道路。民主不是哪個國家的專利，而是各國人民的權利，強行移植民主貽害無窮。和平、發展、公平、正義、民主、自由是全人類的共同價值，搞「小圈子」、「小集團」、以意識形態割裂世界，是歷史的倒退，必將被時代拋棄。

——堅持厲行法治，不搞霸凌霸道。習近平主席指出，各國關係和利益只能以制度和規則加以協調，不能誰的拳頭大就聽誰的。踐行國際法治，需恪守普遍公認的國際法則，信守共同商定的國際協定。一些國家對別人大講國際法，對自己則搞例外主義和雙重標準，將國內法凌駕於國際法之上，以「法治」之名侵害他國正當權益，破壞國際和平穩定，完全背棄正義，註定失敗。

——堅持協商合作，不搞衝突對抗。烏克蘭危機再一次證明，人類是不可分割的安全共同體，推行集團對抗、謀求單方面絕對安全，恰恰是絕對不安全。中國在烏克蘭問題上始終秉持公道正義，積極勸和促談。反觀個別大國，兜售武器、升級制裁，不斷拱火澆油。習近平主席在今年博鰲亞洲論壇鄭重提出全球安全倡議，倡導共同、綜合、合作、可持續的安全觀，推動構建均衡、有效、可

持續的安全架構，必將為消弭和平赤字、應對國際安全挑戰提供有力支撐。

各位嘉賓，各位朋友，

遵守聯合國憲章宗旨和原則，尊重各國主權、安全和發展利益，是國與國相處的基本之道。今年是香港回歸祖國 25 周年。香港回歸後，處理香港特區的事務完全是中國內政，任何外部勢力都無權干涉。國際社會各方是「一國兩制」事業受益者，理應恪守尊重國家主權、不干涉內政等國際法基本原則，而不是肆行「雙標」，打著「民主」「法治」幌子，公然干預香港事務；理應尊重事實、認清大勢，而不是顛倒黑白，在涉港問題上興風作浪、造謠生事，極盡誣衊抹黑之能事；理應維護香港繁榮穩定及自身在港利益，而不是霸凌成性，頻繁上演損人不利己的政治表演和「制裁」鬧劇，最終只會作繭自縛、自食其果。

各位嘉賓，各位朋友，

外交公署始終踐行外交護港、外交惠港、外交為民，將繼續為國擔當，與港同行，堅定維護國家主權、安全、發展利益，堅定維護香港繁榮穩定，同一切外部干預勢力做寸土必爭、寸步不讓的決絕鬥爭，共同守護好香港這個美好家園，讓東方之珠再放耀目光彩！

謝謝大家！

座談環節 (1)：《香港國安法》案例研讀及國際案例比較

主持人

楊艾文

香港大學法律學院
教授

講員

江樂士GBS SC

香港大學法律學院
榮譽教授

李紹強SC

清洪資深大律師事務所
資深大律師

楊艾文：各位先生女士，早上好。

很榮幸可以主持第一節座談會。如諸位所知，第一節座談會從比較角度審視《香港國安法》。感謝主辦單位讓我們體會到，就香港而言，放眼於外以反察於內，對理解《香港國安法》有所裨益。在今天的座談會，我們將研究外國案件及外國法律。我相信可從三方面發現裨益所在，因為放眼境外，首先可見的是，其他各國大抵總設有某一形式的國家安全法。第二，我們可見外國司法管轄區的國家安全法都是按當地情況因時制宜而來，不論是北愛爾蘭的所謂「北愛問題」，還是911後的反恐主義亦然。就這樣應運而生，應對當地司法管轄區出現的某些風險及問題。當然，那意味着，隨着該等風險及問題演化轉變，相關法律也得演化轉變。因此，許多國家現正探討訂立新的國家安全法，以修訂或加強現有法律，這並不足為奇。第三方面，研究其他司法管轄區的法律有其助益，因為同樣不足為奇的是，此處所見安全與個人權利自由之間的關係，其他司法管轄區盡皆有之。故此，我們研究法院、行政部門和立法部門，不論哪個也好，研究這些機關如何平衡這關係，如何在權利與安全之間取得平衡，將有莫大裨益。

現在，我以此作引，欣然介紹兩位傑出講者。兩人法律知識極為淵博，尤以這方面的國家安全法律見長，更同是本港的資深大律師。因此，今天我們非常有幸邀得兩人分享真知灼見。其實兩位講者也毋庸正式介紹。他們在香港法律界都極具名氣。第一位講者是資深大律師江樂士先生，他是國際檢察官聯合會的副主席。除此以外，眾所周知，他是前刑事檢控專員。而我亦十分高興地向各位介紹，他是香港大學法律學院榮譽教授。他演講所探討的題目是，國家安全案件的不設陪審團審訊安排及審訊模式。我們第二位講者是資深大律師李紹強先生，同樣在法律界享負盛名，曾在律政司工作逾廿載。因此，兩位講者乃前同事。李先生當然現已私人執業，以處理商業法、反貪法，特別是洗黑錢範疇的案件見稱。我與李先生在這些範疇亦曾多次交流討論。現在，有請江樂士先生發表演講。

江樂士：各位先生女士，早上好。

感謝律政司司長邀請本人參與今天的論壇。我打算就陪審團制度在《香港國安法》審訊中如何運作，跟大家分享一些個人看法，並會與其他屬大陸法系及普通法系的司法管轄區作出比較。

背景描述

2010年，《香港國安法》面世十年前，香港終審法院（上訴委員會）曾作出解釋，引用時任首席法官李國能的話：「香港顯然並無由陪審團審訊的權利」。[1]

雖然《基本法》規定「原在香港實行的陪審團制度的原則予以保留」（第八十六條），但就國家安全案件而言，《香港國安法》確認陪審團審訊未必有利於司法公正。儘管陪審團審訊當然不會被排除在外，但亦有可能出現一些情況，有必要另選他法來達致司法公正而同時無損審訊公平性。因此，當律政司司長基於「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」，發出證書指示被告毋須在有陪審團的情況下受審時，「高等法院原訟法庭應當在沒有陪審團的情況下，並由三名法官組成審判庭」，對相關訴訟進行審理（第四十六條）。

儘管法例明確強調三項因素說明由三名法官進行審訊有理可據，但當中「等理由」一語值得深思，卻鮮有評論。這大抵是一項全面性條文，意即該三項準則並非盡列無遺，可能還有其他情況具充分理據支持審訊不設陪審團。雖然，要設想還可能有哪些情況並非易事；但如比方說律政司司長斷定，陪審員及其親屬會面臨無關人身安全的危險，諸如受勒索或其他各類恐嚇，或預計有人會屢屢企圖干擾證人，這些也許便屬審訊不設陪審團的情況。因此，極

1 *蔣麗莉 訴 律政司司長* (2010) 13 HKCFAR 208。

有可能的是，「其他理由」很可能關乎影響審訊是否完善持正的事宜，然而此類情況很可能極為罕見。

律政司司長證書

律政司司長發出證書後，事情通常便告一段落。律政司司長一旦斷定，舉例來說，陪審員或其家人受到威脅，便有確實風險再無法在設陪審團的情況下進行公平審訊，而唯一實際補救方法，就是由三名法官組成審判庭，在不設陪審團的情況下進行審訊。正如上訴法庭在*唐英傑*一案[2]解釋，律政司司長的該決定屬在《基本法》範圍內作出的檢控決定，而《基本法》訂明律政司「主管刑事檢察工作，不受任何干涉」(第六十三條)。

上訴法庭亦極力強調，設陪審團的審訊並非在原訟法庭秉行公義的唯一途徑，而區域法院及裁判法院的大量刑事案件均由司法人員單獨開庭審理。事實上，有鑑於此，若《香港國安法》的草擬者決定原訟法庭的國家安全審訊亦交由單一法官審理，做法與下級審訊法院本同出一轍，故亦無可厚非。然而，草擬者運用睿智，無疑也為釋除疑慮，決定國家安全案件若非由七名陪審員審理，另一可取方案是以三名法官組成審判庭，理由大概如上訴法庭般，「一人計短，三人計長」。

儘管如此，律政司司長發出證書的決定，一如其他檢控決定，均可受司法覆核。正如上訴法庭亦已解釋，《基本法》第六十三條免受干涉的保障乃針對政治性質的干涉，雖可防止檢控決定受司法干涉，但仍須面對「被指濫用法院程序和可能因決定並非真誠作出而受司法覆核等爭議」。[3]這因此意味着，就發出證書的決定提出司法覆核屬特殊情況，但僅在能證明以下事項的有限情況下，方可提出：決定並非真誠作出；或決定出於不合法的檢控政策；又或決定有違常理。即使司法覆核成功，結果也只會規定律政司司長須重新

2 *香港特別行政區 訴 唐英傑* (CACV 293/2021)。

3 *有關 C（破產人）的事宜* [2006] 4 HKC 582案（上訴法庭法官司徒敬所言）；*有關梁麗芬的事宜* [2018] 1 HKLRD 523案。

考慮發出證書的必要，而非須指示在設陪審團下進行審訊，儘管在該等情況下陪審團審訊當然亦屬可能。

保障人權

務必強調，原訟法庭的國家安全審訊，不論是陪審團審理，還是由三名法官組成審判庭審理，被告所享可獲公平審訊的權利完全相同，理由有二，一是《基本法》，二是《香港國安法》。

首先，憑藉《基本法》（第三十九條），《公民權利和政治權利國際公約》在香港繼續有效，透過香港法例第383章《香港人權法案條例》歸化成本地法例，保護被告人所享的基本刑事司法保障。《基本法》亦規定，某人被合法拘捕後，「享有盡早接受司法機關公正審判的權利，未經司法機關判罪之前均假定無罪」（第八十七條）。

因此，《基本法》已清晰訂明其所維護的保障，《香港國安法》則進而盡力以犯罪嫌疑人的基本權利為此法施行的首要核心。《香港國安法》不僅訂明「維護國家安全應當尊重和保障人權」和應當「保護」《公民權利和政治權利國際公約》的規定（第四條），還規定「應當堅持法治原則」（第五條），並特別提及法律明確性、無罪假定及抗辯權等事項。

故此，簡而言之，香港的刑事司法制度重視人權，一再重申對此的基本保障。我們可以此為背景，參詳其他司法管轄區的國家安全審訊。

遠東

香港一直備受某些國家批評，被指立例讓法院可在若干有限情況下，以三名法官組成審判庭審理案件。有見及此，我們來略談一下，在遠東區內三個前英國殖民地陪審團所扮演的角色，將會有所啟發。

新加坡的法律制度亦以英國普通法法律制度為基礎。然而，不論涉及國家安全還是其他類別的罪行，審訊均由單一法官審理，陪審團審訊早於1969年廢除。新加坡同時保留死刑，另有關當局可為防範罪行而向國家安全犯罪嫌疑人，作出長達兩年的可續期拘留。根據《內部安全法令》(Internal Security Act) 所作的決定，只有為確保程序得以遵行時，方可受司法覆核；而新加坡並非《公民權利和政治權利國際公約》的締約國。

馬來西亞的法律制度主要以英國普通法為基礎，個別法律範疇則受伊斯蘭教法及習慣法等次要法律制度影響。一如新加坡，不論涉及國家安全還是其他類別的罪行，審訊均由單一法官審理，陪審團審訊早於1995年廢除。同時亦訂有條文，可為防範罪行而拘留嫌疑人，並可對被控國家安全罪行者拒予保釋。死刑依然存在，而馬來西亞亦非《公民權利和政治權利國際公約》的締約國。

文萊的法律制度大致沿用英國普通法，亦設有伊斯蘭法院 (Syariah Court) 審理伊斯蘭教法事宜。任何類別的審訊均由單一法官在不設陪審團的情況下審理，而法院可判處死刑。正如新加坡及馬來西亞，文萊亦非《公民權利和政治權利國際公約》的締約國。

因此，耐人尋味的是，對於遠東的三個前英國殖民地，不論罪行類別為何（涉及國家安全與否），一概不設陪審團審訊的做法，英國有些人及其部分國際盟友均隻字不提，卻偏偏樂此不疲獨愛抨擊香港，指其僅在國家安全案件限制被告人獲陪審團審訊的權利。本人若非與人為善的旁觀者，也許已不禁稱之偽善，斷定這都是假裝關注來羞辱中國。事實如何，還是請大家自行定論吧。

不管怎樣，前英國殖民地的情況已談夠了，我們來轉談英國本身。

英國

英國最高法院在*Dennis Hutchings*案認為，雖然被告人具由陪審團審訊的權利，但此權利並非絕對，在特定情況下可受明文法例約束。[4]該法院解釋，若由陪審團審訊會危及刑事司法程序的公正，則獲陪審團審訊的權利「須因有必要確保審訊公正而讓路」。若由單一法官進行審訊，「改變的只是審裁庭的組成」，審訊的公正不受影響。[5]顯然易見，各方須獲公平對待，公平審訊的規定並非純粹取決於被告人的利益，而嚴重刑事罪行非但要徹查，更要妥善審理，這才符合各人利益。

在此背景下，英國早已確立，若然陪審團受賄，就無法有公平審訊。畢竟，英格蘭及威爾斯上訴法院表示，「陪審團如被收買，便無法得出真實的裁決」。[6]因此，英國在2003年制定《刑事司法法令》(Criminal Justice Act)，使審訊可在不設陪審團的情況下進行，前提是法官信納有「實在和即時危險」陪審團會受到干擾，而即使採取步驟消除威脅，干擾仍「相當大程度上」可能會發生，「以致須為司法公正而在不設陪審團的情況下進行審訊」。[7]案中即使並無實質情報預示陪審團會受干擾，只要有證據證明被告人過往曾涉及任何此類活動，又或證明他早前曾試圖干擾證人，便已足夠。

2021年，唐英傑破天荒成為香港首名被告人，因國家安全控罪在三名法官組成的審判庭席前受審；與此同時，80歲前英國士兵丹尼斯・哈欽斯 (Dennis Hutchings) 在北愛爾蘭因遠為嚴重的罪行而在單一法官席前受審，審訊不設陪審團。然而，那些對唐英傑境況大感興趣的國際評論者，大多對哈欽斯案沒加理會。此案源於1974年「北愛問題」期間發生的致命槍擊事件，哈欽斯被控企圖謀殺和引致他人身體受嚴重傷害，在貝爾法斯特刑事法庭 (Belfast

4 *Dennis Hutchings* 的司法覆核申請 [2019] UKSC 26。

5 *R v Twomey* (No2) [2011] EWCA Crim 8, [2011] 1 Cr App R 29.

6 如上文(5)。

7 2003年《刑事司法法令》第46條。

Crown Court) 受審。不過，審訊因哈欽斯心臟病發猝逝而中止，但其經歷富於啟發。

在北愛爾蘭，宗派主義歷史悠久，間或滲入恐怖活動，偶爾有必要免設陪審團，憑藉《2007年司法與安全（北愛爾蘭）法令》(Justice and Security (Northern Ireland) Act 2007)(《北愛爾蘭法令》)仍可作此安排。有此情況時，審訊只由單一法官審理，不像香港般由三名法官審理。這些不設陪審團的法院稱為「狄普樂法院(Diplock Courts)」，以最初倡議者狄普樂勳爵 (Lord Diplock) 的名字命名，專為處理特定罪行而設。這些法院首設於1973年，高峰時每年審理逾300宗不設陪審團的審訊。北愛爾蘭檢察總長若認為存有風險陪審員會受恐嚇，便可發出證書，提出應由單一法官循公訴程序進行審訊，一如哈欽斯案的做法。

2017年，舉例來說，北愛爾蘭檢察總長就不設陪審團的審訊發出22張證書。然而，他只可為恐陪審團審訊可能會妨害秉行司法公正，並懷疑《北愛爾蘭法令》指明的四項準則任何一項已獲符合，方可發出證書要求被告人在不設陪審團下受審。當中三項準則涉及被禁組織（即恐怖分子），而第四項準則指罪行是「在任何程度上（不論直接或間接）由於、關乎或因應某人或某群體對另一人或另一群體懷有宗教敵意或政治敵意而干犯的」。

當時，英國政府解釋，考慮到近期的宗派暴動，而檢控人員未必能證明涉及此等暴力行為的被告人屬某被禁組織，因此上述第四項準則有其必要。北愛爾蘭檢察總長發出證書阻止丹尼斯・哈欽斯由陪審團審訊，其後解釋表示懷疑這名前士兵所面對的罪行，是「關乎或因應臨時愛爾蘭共和軍成員（或疑似成員）對支持北愛爾蘭應留於英國的人懷有政治敵意」而干犯的。

一如唐英傑，哈欽斯不獲准由陪審團審訊，感到不服，便向英國最高法院提出上訴，卻無功而回。[8]正如克爾勳爵 (Lord Kerr)

8 同上，(4)。

解釋，不能假定陪審團審訊是「在刑事過程中秉行公義的唯一途徑」，而陪審團審訊「可能在某些情況下與公平審訊背道而馳」。若有該等情況，唯一方法有把握「確保審訊公平便是單一法官在不設陪審團下進行審訊」。

2015年，在一宗特克斯和凱科斯群島的案件中，樞密院司法委員會審議不設陪審團審訊的問題，休斯勳爵 (Lord Hughes) 表示：「若為司法公正有所必要，可下令由單一法官進行審訊，正如英國亦只在必要時才可下此命令」。[9]在此，值得注意的是，根據《香港國安法》，正正相同的考慮因素在香港亦予適用；並且僅在為司法公正而具充分理據支持下，方可指示由單一法官進行審訊，而即便如此，亦僅在涉及國家安全的案件方可作此指示。

澳大利亞及新西蘭

雖然《澳大利亞憲法》(Australian Constitution) 規定，就任何違反聯邦法律的罪行循公訴程序進行審訊，均須由陪審團審理，[10]但澳大利亞多個組成州份在某些情況下容許由單一法官進行審訊。

在新南威爾士州，自1986年起審訊可不設陪審團，惟須獲被告人同意方可。若檢控官並不同意，而法院認為由法官進行審訊合乎司法公正，便可下此命令。[11]可是，若預期陪審員會遭受重大干擾，並且別無他法緩解有關風險，則審訊可免設陪審團。在維多利亞州，自2009年起也可進行不設陪審團的審訊，惟須獲被告人同意，且法院認為此乃合乎司法公正方可。[12]在西澳大利亞州，自2004年起，僅在經被告人同意且法院認為此乃合乎司法公正的情況下，方可由單一法官審訊取代陪審團審訊。[13]在昆士蘭州，自2008年起，可基於以下理由以單一法官審訊取代陪審團審訊：為司法公

9 *Misick and Others v The Queen* [2015] UKPC 31, [2015] 1 WLR 3215 [53].

10 《澳大利亞聯邦憲法法令》(Commonwealth of Australia Constitution Act) 第80條。

11 《1986年刑事訴訟法令（新南威爾士州）》(Criminal Procedure Act (NSW) 1986) 第132條。

12 《2009年刑事訴訟法令（維多利亞州）》(Criminal Procedure Act (Vic) 2009) 第420(1)條。

13 《2004年刑事訴訟法令（西澳大利亞州）》(Criminal Procedure Act (WA) 2004) 第118D條。

正起見；或案件冗長複雜；或審訊相當可能會不合理地對陪審團構成沉重負擔；或存有風險陪審團會遭受恐嚇；或存有重大風險陪審團的商議會受審前傳媒報道所影響，而被告人無法行使任何否決權。[14]

在新西蘭，干擾陪審團問題向來備受關注，故此仿傚英國模式進行立法。根據《2011年刑事訴訟法令》(Criminal Procedure Act 2011)，如法院有合理理由相信，準陪審員已遭受恐嚇或可能會遭受恐嚇，且惟有下令單一法官在不設陪審團下進行審訊，方可有效避免上述恐嚇帶來的影響，則法院可應控方申請下令被告人在不設陪審團下於單一法官席前受審。[15]除涉及恐嚇的情況外，根據該法令，如審訊相當可能冗長複雜，法官亦可下令其由單一法官而非陪審團審理。[16]

愛爾蘭共和國

剛才研究過北愛爾蘭，現在轉談愛爾蘭共和國，亦會有所啟迪。特別是因為，該國部分關乎國家安全審訊的條文，與香港現行的相關條文極為相似。

在愛爾蘭，《愛爾蘭憲法》(Irish Constitution)(第38.4條)賦予獲陪審團審訊的權利，但該權利並非絕對。該憲法容許愛爾蘭議會(眾議院)在「一般法院不足以確保有效秉行公義和維持公眾安寧及秩序」時設立具廣泛權力的「特別法院」(第38.3條)。1972年，北愛爾蘭爆發「北愛問題」後不久，當局設立特別刑事法院 (Special Criminal Court) 處理恐怖主義相關罪行，臨時愛爾蘭共和軍不免涉及其中。

若案件由特別刑事法院審理，審訊便不設陪審團，被告人在三名法官組成的審判庭席前受審，情況就如香港一樣。案件應否交由

14 2008年經修訂《刑事法典》(Criminal Code) 第614至615E條。

15《2011年刑事訴訟法令》(Criminal Procedure Act, 2011) 第103條。

16 如(15)，第102條。

特別刑事法院審理，則由檢察總長決定，而他亦無須提供選址理由。他的決定屬最終決定不容質疑，或許，以不真誠為由提出質疑則除外，但這幾乎無法予以證明。

隨着1998年達成「耶穌受難日協議」(Good Friday Agreement)，而臨時愛爾蘭共和軍亦作出停火宣言，北愛爾蘭的「北愛問題」正式結束。儘管如此，特別刑事法院自那時起一直運作至今。不僅這樣，其職權範圍還有所擴大，現時不單處理威脅國家安全的案件，還會處理因陪審員面臨恐嚇而危及司法公正的案件。時至今日，特別刑事法院也用作審理涉及嚴重及有組織罪行的案件，這樣當然遠遠超乎香港可允許的範圍。

舉例來說，2013年，利默里克市的幫派頭目約翰・鄧登 (John Dundon)，因誤認欖球員沙恩・蓋根 (Shane Geoghegan) 為仇敵而謀殺對方，經特別刑事法院裁定罪名成立，判處終身監禁。同樣，1999年毒品集團成員因謀殺調查記者薇若妮卡・格琳 (Veronica Guerin) 而在特別刑事法院受審。在香港，此類案件必須由陪審團審理，而原訟法庭的陪審團審訊可受的限制少之又少，且僅見於國家安全案件。

對於香港採用三名法官組成審判庭審理國家安全案件，有些西方國家喋喋不休大有意見，卻絕口不提愛爾蘭在一般刑事案件中也採用相同做法，依我看來這是匪夷所思，再者，如此雙重標準令人咋舌。

歐洲及歐洲人權法院

歐洲大陸有不同的審訊模式，我們可重點談談希臘。希臘是首個國家發展陪審團審訊，形式獨特，一直沿用至今。憑藉《希臘憲法》(Greek Constitution) 及《刑事訴訟程序法典》(Code of Criminal Procedure)，三名專業法官與四名非專業法官組成「混合法庭」審理重刑罪，裁斷事實及釐定合適刑罰。然而，包括恐怖主義在內的

嚴重重刑罪，卻並非由「混合法庭」審理，而是由上訴法院三名法官一審審理，再由上訴法院五名法官二審審理，做法符合規定。

在2003年，舉例來說，極左城市游擊隊「11月17日革命組織」(Revolutionary Organization November 17) 的成員在希臘上訴法院受審，原因是恐怖主義及有組織罪行這些重刑罪，乃屬上訴法院而非「混合法庭」的司法管轄範圍。所以，一如愛爾蘭共和國，希臘不僅在國家安全案件，就連嚴重刑事案件中，審訊均可免設陪審團。這樣，以香港來說，已遠遠超乎可容許的範圍。然而，不見得有人對此尤其不悅，就連那些為了香港的安排大動肝火的人亦然。大概是因為，歐洲法學界毫不介意審訊不經陪審團審理。

《歐洲人權公約》保障被告人獲得公平審訊的權利（第6條），然而歐洲人權法院指出，各國享有相當大自由選擇採用何種方式，以確保此權利得以保障。[17]該法院亦解釋，雖然《歐洲人權公約》第6條訂有公平審訊的權利，但該條文「並無指明陪審團審訊是裁定刑事控罪時確保審訊公平的元素之一」。[18]換言之，該法院已表明，「《公約》第6.1條並無賦予在陪審團席前受審的權利」。[19]因此，這即是說，有人提出上訴時，法院的職能僅限於考慮審訊所採用的制度，是否有助達致符合《歐洲人權公約》的結果，而法院在裁定公平問題上，焦點並非審訊模式本身。

總結

以任何準則而言，唐英傑的審訊為本地法學界開創先河。一方面，該案確立了一點，就是：檢控獨立雖受憲法保障，惟律政司發出證書的決定一旦涉及惡意，則可受司法覆核。另一方面，該案顯示司法制度既能通時達變，同時仍能堅守公平審訊權這最為基本的刑事司法原則。

---

17 *Taxquet v Belgium* (2012)。

18 *X & Y v Ireland* (1980)。

19 *Twomey, Cameron and Guthrie v United Kingdom*, 67318/09 及 22226/12號。

因此，總括而言，唐英傑案的審訊帶來正面的經驗，法治成為大贏家。嚴重的國家安全罪行得以成功審理，準陪審員獲保護免受傷害，經驗豐富的法官組成審判庭，確保被告人在整個法律程序中均獲公平對待。有些人曾揚言，在不設陪審團下循公訴程序進行審訊將會後果堪虞，他們便大錯特錯了；這次的經驗反而豐富了法律制度的內涵。

正如我們所見，對於國家安全案件的陪審團審訊，可施加的限制不多，也絕非必然之事。這些限制均考量有度，既合理且有理可據，遠較許多其他司法管轄區所設的保守。儘管如此，它們倒引來外國極大關注，當中總不乏懷有敵意，卻顯然偽善者。這些投以關注的國家，往往本身對陪審團審訊諸多設限，限制之多遠較香港可容許的，有過之而無不及。實在難免令人想起，諺語有云：「己身不正，勿以正人」。

事實上，《香港國安法》不但拯救香港免其毀於一旦，還為案件審訊提供了務實可行、公平為上的法律機制。

謝謝各位。

楊艾文：非常感謝江樂士先生，為我們剖析這方面的法律，內容非常廣泛實用。陪審團審訊有這麼多例外情況，實在令人眼界大開。補充一點，在加拿大，上級法院的審訊可由單一法官審理，但任由被告人選擇，這類審訊其實相當普遍，特別是涉及商業罪案時，皆因大家都不想陪審團要翻閱數以百計的證據文件冊。江樂士先生，你還提到干擾陪審團問題。有一點並未提及，亦大概是這方面有待改革的另一原因，就是在香港，陪審團一旦裁定某人無罪，案件便無從上訴，即使陪審團曾被干擾亦然。不公平無罪裁定的問題，由此而生。因應這個情況，香港法律改革委員會於2012年建議也許應容許就錯誤的無罪裁定引入上訴機制。所以，我認為這也是你所提出的部分關注。現在讓我們展開第二場演講。李先生將會

談到《實施細則》，當中詳述各項警權，以下會特別集中說明要求提交權或要求提交文件的權力，有關討論相當可貴，因根據《香港國安法》所訂的警權向來鮮有關注。有請李先生。

李紹強：謝謝，楊教授。律政司司長，尊敬的嘉賓，各位先生女士，很榮幸獲邀出席這個重要法律論壇發表演講，講述根據《香港國安法》制定《實施細則》附表7的概況。

I 引言

《香港國安法》（全稱《中華人民共和國香港特別行政區維護國家安全法》）由全國人大常委會制定，透過《基本法》在香港特別行政區落實以保障國家安全，並於2020年6月30日晚上11時開始實施。

《實施細則》（全稱《中華人民共和國香港特別行政區維護國家安全法第四十三條實施細則》，文件A406A」）乃根據《香港國安法》第四十三條制定，旨*在加強和規管對危害國家安全犯罪的調查*。《實施細則》於2020年7月7日開始實施。本人以下會審視《實施細則》附表7，包括其與香港特別行政區市民合法權利的相互關係。

I.1 保障國家安全，實現真正普世價值，達致繁榮進步

為何各國有需要保障國家安全？有何背景使然？國家安全是社會秩序的基礎，從中得以實現人民真正的自由及權利，得以踐行法治，並據此追求繁榮進步。所有國家均須適切保護國家安全。整個背景可涉及以下方面：

1) 各國面臨的存在性威脅不盡相同，這些威脅可來自氣候變化、極端主義或歷史事件等。因此，各國有需要採用不同模式的國家安全法及措施，以切合自身特定的國家安全需要及目標。

2) 近數世紀以來，隨着歷史的演進，各國可分為兩大類別，即「已發展或支配性國家」及「發展中或受支配國家」。*對受支配國家來說，適當的國家安全目標是與支配力量互動，逐漸將之消減，以成就真正的普世價值。*

3) 西方自由主義，是無關道德／道德中性／道德模稜性的*支配力量*，[1]*由無關道德而具矛盾性的個人欲求所驅動*。[2]說其無關道德，意指欲求引致的後果，既可合乎道德，亦可不乎道德。這*無關道德*的自由主義，數個世紀以來在世界各地帶來不少*矛盾*結果：正面來說當然包括法治、財富及進步，但負面來看，則是無休止的戰爭、不平等、社會分化、支配統治和不誠實行為。諸如「自由」、「民主」及「人權」的「核心自由主義價值」，舉凡是*以欲求為本*[3]的，*本質上均屬無關道德而具矛盾性*。這些價值，尚未成為真正普世價值，但仍具有他日成普世的潛力。

4) 在自由主義價值中，普通法在某程度上屬例外，因其乃基於責任而促進自由／權利。這種*自由和權利的責任邏輯*，可見於以下數例：

(a) *行動自由的產生，乃僅**當各人***（***各***駕駛人和道路使用者）***恪守責任***，*遵從*平等適用於各人的*交通標誌和規例*，方能實現。人人履行此等責任，方能形成*交通秩序*。*只要交通有其秩序*，人人皆可合理預計，例如約於30分鐘內能在相對安全的道路情況下，從地點A到達地點B。這就是本人及其他道路使用者的*行動自由*。行動自由並非來自人人堅持一己「自由」駕駛的欲求（欲求常被錯誤標

1 見如：安東尼・阿巴拉斯特的《西方自由主義的興衰》即 *The Rise and Decline of Western Liberalism*, Anthony Arblaster, Basil Blackwell (1984)。

2 見如：霍布斯的《巨靈論》即 *Leviathan*, Thomas Hobbes, Penguin Books (2017)，以及《西方自由主義的興衰》*（同上）*。

3 *例如：「自由」是不受約束而無關道德的欲求；「民主」是指一種制度，將個人無關道德的欲求匯聚成「集體欲求」，迎合此無關道德的社會欲求；而「人權」則指經神聖化的個人無關道德之欲求。*

籤為「與生俱來的權利」)。[4]如此堅持，結果只會交通意外頻生，處處擠塞，釀成混亂，而非產生行動自由。

(b) 言論自由的產生，乃僅***當各人恪守責任***，不誹謗他人、不傷害他人、不在會議等過程中造成混亂，方能實現。這些責任的存在，意味所謂「冒犯權」[5]可動輒抹殺言論自由，而非構成言論自由的一部分。

(c) 在*Donoghue v Stevenson*一案，[6] Donoghue太太提告Stevenson先生，指他製酒時疏忽，以致一瓶啤酒受蝸牛腐體污染，她飲用後病倒。依McBride教授和Bagshaw教授的看法，法院准予Donoghue提告Stevenson，並非因為Stevenson侵犯其「保持人身健全」(bodily integrity) 的「權利」，而是因為「她有權獲*他謹慎確保瓶內薑啤可供她安全飲用*」—— 即是說，Stevenson實質上*對她負有責任*，須確保該瓶啤酒適宜飲用。[7]

(d) 人與人之間的互動，有賴這種「自由／權利的責任邏輯」來維繫：*任何人得享自由或權利，皆因所有人履行相應情境責任，並藉履行此等責任來維持秩序*。亦即是說，個人自由或權利並非「獨立存在」，而是依存在由責任維持的秩序之上，而此等秩序一視同仁，人人適用。

---

4 許多自由主義者誤把霍布斯「*不受外界妨礙的欲求*」解讀為自由的定義。見《巨靈論》(Leviathan) 如第129頁所述：「自由 (liberty, or freedom)，確當來說意指並無反對（反對，我是指意願受外界妨礙）……」但這種由欲求驅使的「自由」會造成戰事和混亂，必須妥為管控，霍布斯認為須受專制君主管控。這種專制管控當然已不再可行了。

5 萊斯特御用大律師 (Lester K.C.) 錯誤地對此認可，見其著作《為五個理念而奮鬥》(*Five Ideas to Fight For*)，Oneworld Publications出版，2017年，第130頁。

6 [1932] A. C. 562，第580頁。

7 Donoghue太太鄰近製酒者，接近得足以視她為後者的「鄰近者」(neighbour)，其接近程度使Stevenson對她負有謹慎責任。見《侵權法》(*Tort Law*), 2012, Edinburgh Gate, England: Pearson Education Limited，第4頁。作者進一步闡釋：「*……我們具有『權利可……』（保持人身健全，得享言論自由、名譽、財產，可作貿易，得以投票，免受歧視等等），是因為侵權法發揮作用賦予我們特定權利，使他人不得以若干方式行事*。正正因為我們具有該等權利，方可表明有權保持人身健全，得享言論自由、名譽等等。」也就是說，我們有權保持人身健全等，因為他人有相應責任不得以若干方式行事。

5) 從上述「自由／權利的責任邏輯」可見，各項適切推動責任或適切限制欲求的法律及其他措施，非但不會減損個人自由，反而有利於促進自由及權利。

6) 為使自由、民主及人權成為真正的普世價值，這些*以欲求為本*的觀念*必須改以責任為本，法治為這轉化過程，提供強而有力的理性平台*。責任可在許多層面產生。東西方的智者都不斷提醒，*我們*的核心責任是實現「*共生互存／互存性*」(mutuality)，即*尊重彼此，平等相待*，[8]*視彼此為目的而非手段*，[9]*並為彼此犧牲*。[10]這種核心的共生互存責任，源於人類生存的基本狀態（或真正的「自然狀態」），即：*我們因他人而活；我們須為他人而活*。若如此踐行，這核心的共生互存道德責任，便堪成為真正普世人類價值的*源頭*，[11]而真正的自由和權利亦涵蓋於此。

7) 就發展中國家而言，但凡處於受支配的地位，自由和權利便無法盡展，因為大部分資源都得轉用來消減支配力量。在這股支配力量當中，難以將自由和權利從不能持續的欲求驅動模式，轉化為可自行持續的責任驅動模式。發達國家和發展中國家應該攜手解決有關支配和實現真正普世價值的種種歷史問題，方為適時可取的做法。

國家安全保護不足，不單會釀成混亂，損害法治及人民的自由和權利，還會危害經濟環境，擾亂國際貿易，削弱外商對香港特別行政區的興趣。只有通過適切保護國家安全，始能延續香港特別行政區的法治，繼而讓市民可以真正持續享有自由和權利。

---

8 例如《認真對待權利》(*Taking Rights Seriously*)，羅納德·德沃金 (Ronald Dworkin)，哈佛大學出版社，1977年，第180-3、272-8頁。他區分了「獲平等待遇的權利」與「獲平等相待的權利」，並認為後者是基本權利，而前者是衍生權利（第227頁）。

9 見康德 (Kant)《道德形而上學的奠基》(*Groundwork for the Metaphysics of Morals*)，第45頁，「現在我說的是，人類，一般來說，每個理性的存在者，本身乃作為目的而存在，並非純粹淪為任人隨意差遣的手段.....」

10 見*佛教*、*儒家*、*耶穌*、*聖彼得*、先知*穆罕默德*的道德教義，以及*陀思妥耶夫斯基 (Dostoyevsky)的著作*。

11 核心道德責任規範適切約束欲求，文明由此而生。若欲求凌駕責任，則文明危機隱現。

I.2 《香港國安法》和《實施細則》須於《基本法》所訂的普通法環境下應用

《香港國安法》載有66條，分為六章。此法開宗明義在第四條重申香港特別行政區維護國家安全應當尊重和保障人權，並在第五條重申應當堅持法治原則：

> 第四條規定：「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。」
>
> 第五條規定：「防範、制止和懲治危害國家安全犯罪，應當堅持法治原則。法律規定為犯罪行為的，依照法律定罪處刑；法律沒有規定為犯罪行為的，不得定罪處刑。
>
> 任何人*未經司法機關判罪之前均假定無罪*。保障犯罪嫌疑人、被告人和其他訴訟參與人依法享有的辯護權和其他訴訟權利。任何人已經司法程序被最終確定有罪或者宣告無罪的，不得就同一行為再予審判或者懲罰。」

《香港國安法》在第三章闡述措施，其中包括四類罪行：*分裂國家罪*、*顛覆國家政權罪*、*恐怖活動罪及勾結外國或者境外勢力危害國家安全罪*。這些罪行範圍具體，定義精細，每項罪行均須以有力證據加以證明。公正有效的偵查權力，可確保隨後展開的檢控迅速公正。

II 制定《實施細則》加強以公正有效方式調查危害國家安全罪行

《香港國安法》第四十三條規定：「香港特別行政區政府警務處維護國家安全部門辦理危害國家安全犯罪案件時，*可以採取*香港特別行政區*現行法律*准予警方等執法部門在調查嚴重犯罪案件時採取的*各種措施* ……」。第四十三條列出現時沿用的七個調查範疇的措施，以及進一步授權香港特別行政區行政長官會同香港特別行政區維護國家安全委員會，為採取這些措施調查危害國家安全犯罪制定相關實施細則。

《實施細則》大致上以調查貪污或有組織罪行等相關現行措施作為藍本。這些現行調查措施沿用已久，並因應實踐所需而不斷加以完善。由此修改成《實施細則》，可承襲相關措施在法律和實踐方面的經驗，用於調查國家安全犯罪之中。

《實施細則》載有四項規則和七個附表。規則2指明有關各方可根據各個附表行使的權力。規則3指明，只有《香港國安法》第四十四條所指定的法官方可根據這些規則處理申請。該七個附表列舉如下：

附表1： 關於為搜證而搜查有關地方的細則

附表2： 關於限制受調查的人離開香港的細則

附表3： 關於凍結、限制、沒收及充公財產的細則

附表4： 關於移除危害國家安全的訊息及要求協助的細則

附表5： 關於向外國及台灣政治性組織及其代理人要求因涉港活動提供資料的細則

附表6： 關於進行截取及秘密監察的授權申請的細則

附表7： 關於要求提供資料和提交物料的細則

警方現時獲《警隊條例》(香港法例第232章)等法例授權，如有合理理由懷疑，某些資料或物料可能與警方的刑事調查有關，便可拘捕和搜查嫌疑人、向其提問和檢取物料。[12]附表7訂明各項事宜，當中包括通過申請法庭命令來加強這些權力，若果相關內容相當可能與證明嫌疑人／被告人有罪(或可以顯示其無罪)，以及與追索這些犯罪得益有關，法庭可頒令強制相關人等回答問題、提供資料或提交物料。第6條訂定如何作出適用於附表7的法院規則。

究竟，根據附表7作出的*法院命令*，能否有效加強對危害國家安全犯罪的調查，並公正地保護受影響公民的合法權利呢？歐洲人權法院的一項裁決提出，搜查令在某些情況下可能較為嚴厲，而由法院作出的提交令，允許其對有關情況作小心監察，因此可給予受影響公民更大的保護。*Nagla v Latvia*(申請編號73469/10)案便是一例。有關案情及主要爭議點如下：

(1) 申請人*Nagla*任職國家電視台，負責製作和主持每週調查新聞節目。2010年2月，一名匿名消息人士聯絡她，透露國家稅務局所設的數據庫存在嚴重缺陷。她向國家稅務局通報可能發生了保安事故，其後在節目廣播期間公布數據泄漏事件。

(2) 一週後，該名自稱「Neo」的消息人士開始用Twitter發布多個公共機構國家官員的薪酬資料，此舉一直持續到2010年4月中。

(3) 國家稅務局提起刑事法律程序，調查警員於2010年2月與身為證人的申請人會面。她拒絕透露消息人士的身分。2010年5月，調查機關確立一名稱為*I.P.*的人曾使用連接數據庫的IP位址，多次致電至申請人的電話號碼。*I.P.*因涉及此等刑事法律程序而被拘捕。

---

12 關於警務人員合理地相信會被控罪行或合理地懷疑犯了罪行的人，第50條為「涉嫌人士的逮捕、扣留與保釋以及涉嫌財產的檢取」，訂定條文。第53條賦權任何警務人員執行手令。第54條賦權任何警務人員為作出搜查而截停及扣留任何行動可疑的人或任何警務人員合理地懷疑已經或即將或意圖犯任何罪行的人，而第63條則禁止任何人「意圖妨礙或拖延達到公正的目的而提供虛假資料，以蓄意誤導或企圖誤導警務人員.....」

(4) 同日，搜查令經調查人員備妥和檢控官授權後，警方搜查申請人住所，檢取一部手提電腦、一部外置硬碟機、一張記憶卡及四個閃存盤。申請人依據《歐洲人權公約》第10條[13]提出申訴，指其住所被搜查，等同強制她須披露能辨識新聞來源的資料。(§§5-30)

歐洲人權法院認為，案中對申請人發表意見之自由的干預，乃依法規定並為合法目的而作出。「*..... 法院可以接納，這種干預旨在防止混亂或防止犯罪，同時旨在保護他人的權利，兩者均屬合法目的。*」(§92) 餘下的爭議點是，這種限制是否超乎民主社會所必需。(§91-92) 本案所發出的*並非披露令而是措辭含糊的搜查令*。歐洲人權法院指出，搜查令是較為嚴厲的措施，法庭須對任何限制新聞消息來源保密原則的做法嚴加監察(§95)，可是法官的理據欠妥。(§99-101) 申請人的權利受到侵犯，她獲判予10,000歐元的損害賠償。

III 評估附表7所訂程序是否公正有效的三類準則

按《基本法》第八條所訂明，附表7在香港特區的普通法框架下施行。[14]到底附表7所訂的程序，能否有效加強對危害國家安全犯罪的調查，以及公正地維護公民的合法權利呢？我們將通過三類準則審視附表7：

準則A：*附表7所訂的法庭命令*，是否能公正有效地推進刑事調查：

1) 法庭命令的申請程序是否嚴格？

2) 所須符合的條件是否嚴格？

---

13 「1. 人人享有表達自由的權利 …… 2. 行使上述各項自由，因為同時負有義務和責任，必須接受法律所規定的和民主社會所必需的程式、條件、限制或者是懲罰的約束。這些約束是基於對國家安全、領土完整或者公共安全的利益，為了防止混亂或者犯罪，保護健康或者道德，為了保護他人的名譽或者權利，為了防止秘密收到的情報的洩漏，或者為了維護司法官員的權威與公正的因素的考慮。」

14 《基本法》第八條規定：「香港原有法律，即普通法、衡平法、條例、附屬立法和習慣法，除同本法相抵觸或經香港特別行政區的立法機關作出修改者外，予以保留。」

3) 命令的執行是否相當可能有實際成效？

4) 受影響方可否反對？

準則B：*附表7所訂的程序*，能否保護受影響各方的以下權利：

1) 法律專業保密權[15]？

2) *免使自己入罪的特權*？

3) 新聞材料？[16]

準則C：此準則評估*附表7所訂的程序*是否加強（而非妨礙）*刑事審訊的以下基本原則*：

1) 控方負有舉證責任（無罪推定）；

2) 必須在毫無合理疑點下證明有罪；

3) *相關性*是決定可否接納證據的首要標準；及

4) 被告人獲得公平審訊和享有上訴權。

這些刑事審訊的「黃金原則」，不應因民事訴訟程序或民事案例原則而變得複雜或受到妨礙，否則一方面可能令控方難以援引相關證據，另一方面減損被告人獲得公平審訊或尋求上訴的權利。檢控官應忠誠地確保被告人獲得公平審訊，力求從中確立證據使法庭信納。只有在優質刑事訴訟程序下達至定罪，方可促進社會的自由、公正、穩定和繁榮。

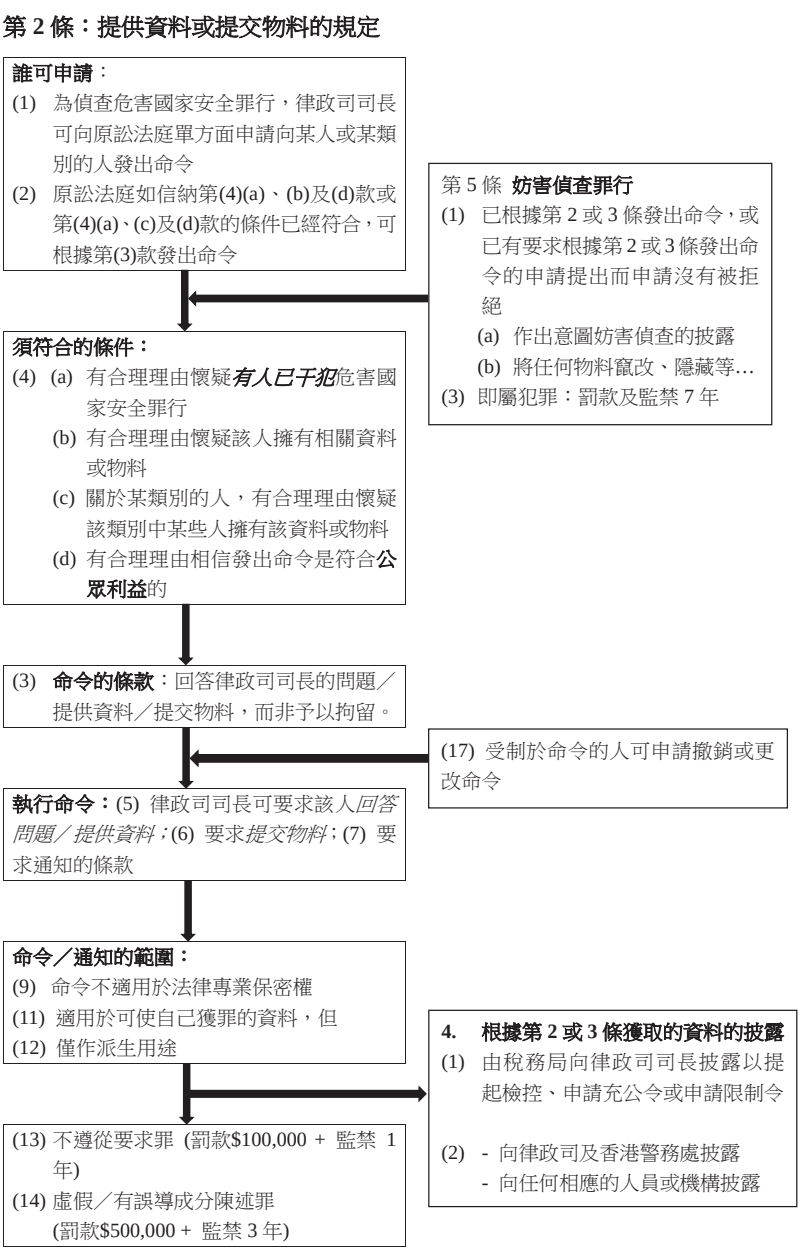
附表7第2及3條所訂的程序大致相類，主要區別在於三方面。有別於第2條，第3條：(a) 也適用於對犯罪得益的調查；(b) 可涵蓋香港境外的物料；及(c) 豁除免使自己入罪的特權。我們將審視第2條所訂的通用程序，並重點指出與第3條不同之處。

---

15 法律專業保密權，是對律師與當事人之間關乎法律意見或有關訴訟（不論正在進行還是預期進行者）之事宜所真誠地作出的通訊，予以保密。這項特權賦予獲免強制披露該等通訊的權利。見案例*Citic Pacific Limited v Secretary for Justice* [2012] 2 HKLRD 701。

16 香港法例第1章《釋義及通則條例》第XII部。

IV 評估附表7第2條：「提供資料或提交物料的規定」[17]



17 第2條相類於香港法例第455章《有組織及嚴重罪行條例》第3條（「提供資料或提交物料的規定」）及香港法例第201章《防止賄賂條例》第14條（「獲得資料的權力」）。

A.1) 法庭命令的申請程序是否嚴格？

根據第2條，只有律政司司長可提出申請。這意味著任何申請均須由律政司的相關律師予以考慮。申請程序看來相當嚴格：

「(1) 為偵查*危害國家安全罪行*，律政司司長可向原訟法庭提出單方面申請，就*某人或某類別的人*根據第(2)款發出命令。」

A.2) 所須符合的條件是否嚴格？

第(2)及(4)款訂定發出法庭命令所須符合的條件。有關條件看來相當詳細及嚴格：

「(2) 原訟法庭如信納*第(4)(a)、(b)及(d)款或第(4)(a)、(c)及(d)款*的條件已經符合，*可*應如此單方面提出的申請，*就*與申請*有關的人*或與申請*有關的類別的人*，發出符合第(3)款規定的命令。

…

(4) 第(2)款提述的條件是 —

(a) *有合理理由懷疑*有人*已干犯*該正在偵查中的*危害國家安全罪行*；

(b) 如該申請是*關於某人*的——*有合理理由懷疑*該人*擁有資料或管有物料，而該等資料或物料相當可能*與偵查有關；

(c) 如該申請是*關於某類別的人*的—

(i) 有合理理由懷疑*該類別中某些或全部人*擁有該等資料或管有該等物料；及

(ii) 不論是因偵查需迫切進行、偵查需保密或擁有有關資料或物料的人的身分是難於辨別的，如規定

該申請須是就某一人而作出的，即不能有效地對該危害國家安全罪行進行偵查；

(d) 經考慮—

(i) 該偵查中的危害國家安全罪行的*嚴重性*；

(ii) *若不根據第(2)款發出命令，能否有效地偵查*該危害國家安全罪行；

(iii) 披露資料或取得物料後*對偵查可能帶來的利益*；及

(iv) *該人或該等人士所可能獲得或持有的資料或物料，是在何種情況下獲得或持有的*（包括考慮對該等資料或物料的保密責任，以及與該等資料或物料所關乎的人的任何家族關係），

有合理理由相信就該人或該等人士*根據第(2)款發出命令，是符合公眾利益的*。」

A.3) 命令的執行是否相當可能有實際成效？

該條文授權法官發出涵蓋範圍較廣的命令，而範圍寬廣的命令表面上相當可能令偵查具有成效。第(3)款訂定：

「根據第(2)款發出的命令須 —

…

(c) ***授權律政司司長向命令所針對的人或類別的人***提出要求，***要求***該人或該類別的人作出以下一項或兩項作為—

(i) 就獲授權人員合理地覺得是與偵查有關的任何事情*回答問題或提供資料*；

(ii) *提交任何*律政司司長*合理地覺得*是與關乎偵查的事情有關的*任何物料或某種類的物料*；及

(d) 載有原訟法庭認為符合公眾利益而宜於加上的其他條款（如有的話），但本段不得解釋為授權法庭未得任何人的同意而命令將該人拘留。」

鑑於實際情況千變萬化，即使命令的範圍寬廣，仍有途徑質疑法庭命令是否適用。而法庭命令和通知，受到不遵從命令和妨害偵查的罪行作為支持。現階段判斷這些法庭命令的實際成效乃言之尚早。

A.4) 受影響方可否反對？

第2(17)款賦權予受影響方可在多方參與的階段向法庭申請撤銷或更改命令：「撤銷或更改根據本條發出的命令的申請，可*由*根據該項命令*被施加要求的人*提出。」

第3(7)款同樣規定：「要求撤銷或更改根據第(2)或(6)款發出的命令的申請，可由受制於該命令的人提出。」在*J 訴 警務處處長*一案中[18]，律政司司長代表警務處處長，根據第3條取得針對X等的單方面提交令。X等基於各項理由尋求更改該等命令。李運騰法官的裁決如下：

「駁回X等的申請，理由如下：

(1) 原則上，當法院已在單方面階段作出了相關裁決，則一般不應基於附表7第3(4)(c)(i)及(d)(i)條下的相關性或效用，受理該等要求撤銷或更改提交令的申請或請求，因為此舉有可能危

18 [2021] 5 HKLRD 708.

及調查的完整和有效性，違背了法定意圖。基於維護國家安全是重中之重，在附表7第3(4)條的所有法定準則獲得符合的情況下，法院不作出提交令的酌情決定權乃受到限制，而拒絕頒發該命令的理由必須十分有力 (*R (Bright) v Central Criminal Court* [2001] 1 WLR 662、*P 訴 廉政專員* (2007) 10 HKCFAR 293、*香港特別行政區 訴 黎智英* (2021) 24 HKCFAR 33等案件適用)。(見第20、22-24、26段)

(2) 儘管有上述的結論，但法庭為了履行其在防止濫用和壓迫方面的最終保障職能，在面對撤銷或更改申請時，法庭可以重新根據附表7第3(4)(d)條予以權衡。在聽候該申請的裁決作出時，較佳做法是在當事各方的代表在場下，密封具爭議的文件，正如當事各方在本案中所作的。(見第28段)[19]

(3) 在重新評估附表7第3(4)(d)條的規定及考慮相關的誓章證據後，公眾利益的平衡明顯傾向須予提交，而X等要求遮蓋部分資料的申請並無理據支持：(見第28-29、37段)

(i) X等有可能違反其對捐贈／補助收受人的保密「保證」，但這一事實並不足以使其得免遵守有關規定；(見第30段)

(ii) 提交令的性質，正是關乎調查機構可向擁有人以外的人士尋求資料而無需經他們同意；(見第31段)

(iii) 保密方面的衡平法責任，並不延伸至禁止向與調查事項相關的調查／監管機構披露資料(*Re A Company's Application* [1989] Ch 477一案適用)；(見第32段)

(iv) 法庭一致性地認為，偵查和檢控嚴重罪行的公眾利益高於疑犯的隱私權(*香港特別行政區 訴 陳裘大* [2006] 1

19 附表7第3(4)(d)條訂定，「經考慮—(i) 取得物料後對偵查可能帶來的利益；及(ii) 管有或控制物料的人在何種情況下持有或控制（視屬何情況而定）該物料，有合理理由相信將該物料交予獲授權人員或讓他們取覽，是符合公眾利益的。」

HKLRD 400、*香港特別行政區 訴 黃國雄* [2007] 2 HKLRD 621、*P 訴 廉政專員* (2007) 10 HKCFAR 293、*Next Digital Ltd v Commissioner of Police* [2021] 5 HKC 411等案適用）；（見第33段）

(v) 由於調查的目的，是為了查驗資金的流向和付款的合法性，因此所涉及的個人資料顯然相關；（見第34段）……」

B. 1) 法律專業保密權是否受保護？

法律專業保密權受第(9)款保護：

「(9) *任何人不得根據本條被要求提供或提交任何與享有法律專業保密權的品目有關的資料或物料，但律師（包括大律師）則可被要求提供其客戶的姓名、名稱及地址。*」

李運騰法官在 *A 訴 警務處處長*一案中[20]的裁決，施行了對法律專業保密權的保護（申請依據第3條提出，但該案亦適用於本條文）：

「(1) 經檢視供考慮的項目19-22後，本庭裁定涉案經遮蓋的WhatsApp交談內容及A與B的內部電郵*全部都與一名僱員向其法律部門尋求法律意見有關。即使從最有利於控方的角度來看，亦無表面證據證明這些項目構成任何欺詐或刑事罪行的一部分*。此結論是在沒有依賴事件任何受爭議版本的情況下得出，亦無須取決於所審理爭議點的任何裁定。本庭接納A與B就該等項目提出法律專業保密權的申索……（見第9、12-14段）」

20 [2021] 3 HKLRD 300.

B. 2) 免使自己入罪的特權是否受到保護？

此特權受到一定程度的保護。第(11)款要求提供可能傾向於使本身獲罪的資料，以進行有效偵查。但第(12)款藉禁止「直接使用」獲取的資料（證明虛假資料或對可信程度提出質疑者除外）以平衡保護需要，但顯然允許調查人員對有關資料作派生使用：

「(11) 任何人不得以會有下述情況為理由，而不遵從根據本條提出的要求提供資料或提交物料 —

(a) 提供資料或提交物料會傾向於使該人獲罪；或

(b) 提供資料或提交物料會違反法規或其他規定所施加的保密責任或對披露資料或物料的其他限制。

(12) 因遵從憑藉本條施加的要求而作的陳述，不得在針對作出該陳述的人的刑事法律程序中用於針對該人，但在以下情況則除外 ——

(a) 在根據第(14)款或《刑事罪行條例》（第200章）第36條提起的法律程序中作為證據；或

(b) 在有關任何罪行、且該人作出與該陳述不相符的證供的法律程序中，用以對其可信程度提出質疑。」

*在香港特別行政區 訴 李明治及另一人案*中[21]，其中一個爭議點是，根據（當時的）《公司條例》第145(1)條進行研訊期間，第145(3A)條是否撤銷免使自己入罪的特權，並以「禁止直接使用」的規定取而代之。第145(3A)條載於判案書第58段：

「(3A) 任何人不得以答案可能會導致其入罪為理由而免回答審查員根據本條向其提出的問題，但如該人在回答該問題前聲稱答案可能會導致其入罪，則在刑事法律程序中（〔與本案無關〕

21 (2001) 4 HKCFA133.

的法律程序除外），該問題及答案均不得接納為針對該人的證據。」

終審法院總結如下：

「69. …… 因此，表面看來（除普通法下或依據《人權法案》有任何獨立的派生使用豁免外），第145(3A)條撤銷該項特權，然後只禁止直接使用，因此按照推論，該條文准許派生使用在審查期間提出的問題及取得的答案。
……

132. 據此，在本案中，並無理據辯稱《人權法案》第10及11(1)條規定法庭須推斷出對兩名答辯人有利的派生使用豁免。」

B. 3) 新聞材料是否受到保護？

附表7並無直接涵蓋新聞材料。但李運騰法官在*A 訴 警務處處長*[22]一案中，提出附帶意見，認為《香港國安法》第四條在附表7所述的情況下間接保護新聞材料，並作出裁決如下：

「新聞材料 (2) *對於新聞材料應予以寬鬆釋義，因為保護新聞材料免被檢取和曝光與新聞自由密切相關，而新聞自由是一項基本權利。雖然新聞材料必須盡可能受到保護，免被檢取或公開曝光，但這並非絕對的。新聞材料的顯著特點包括：(i) 新聞材料與發表自由密切相關，因此在各法例條文中享有特殊地位；(ii) 然而，材料本身的性質，不能單憑其由新聞工作者管有此事實，或所發布的形式來決定；(iii) 製作和獲取涉案材料的目的，以及傳送者的意圖（如適用）才是決定因素；及 (iv) 為發布目的而擬備的演辭／文章如旨在引發公眾辯論和關注其他公眾利益事宜亦屬新聞材料。話雖如此，若涉案材料是為犯罪目的而製作、獲取或接收，便不符合歸類為新聞材料。……*

22 [2021] 3 HKLRD 300.

(3) *本庭出於必要並經當事各方同意後，打開了密封材料，檢視了此類目下的項目。即使如A與B所主張對之從寬詮釋，這些項目都不能歸類為《釋義及通則條例》第XII部所指的新聞材料（香港特別行政區 訴 黃祖成 [2019] 4 HKC 401案適用）。（見第29、34段）*

《釋義及通則條例》第XII部是否適用

(4) *（附帶意見）《釋義及通則條例》第XII部不直接適用於《實施細則》附表7：（見第36段）*

(i)《釋義及通則條例》第85條涉及任何「條例」在進入處所、搜查處所和檢取材料方面的權力。(i) 然而，《香港國安法》及《實施細則》並非《釋義及通則條例》第3條所界定的「條例」。《釋義及通則條例》的條文是否適用，乃視乎該條例或其他現行條例的內容是否出現任何「相反用意」而定，而案中並無出現相反用意致使法庭將「條例」一詞解釋為包括《香港國安法》及《實施細則》在內（唐英傑 訴 香港特別行政區 [2020] 4 HKLRD 382一案已予考慮）。（見第36(1)段）

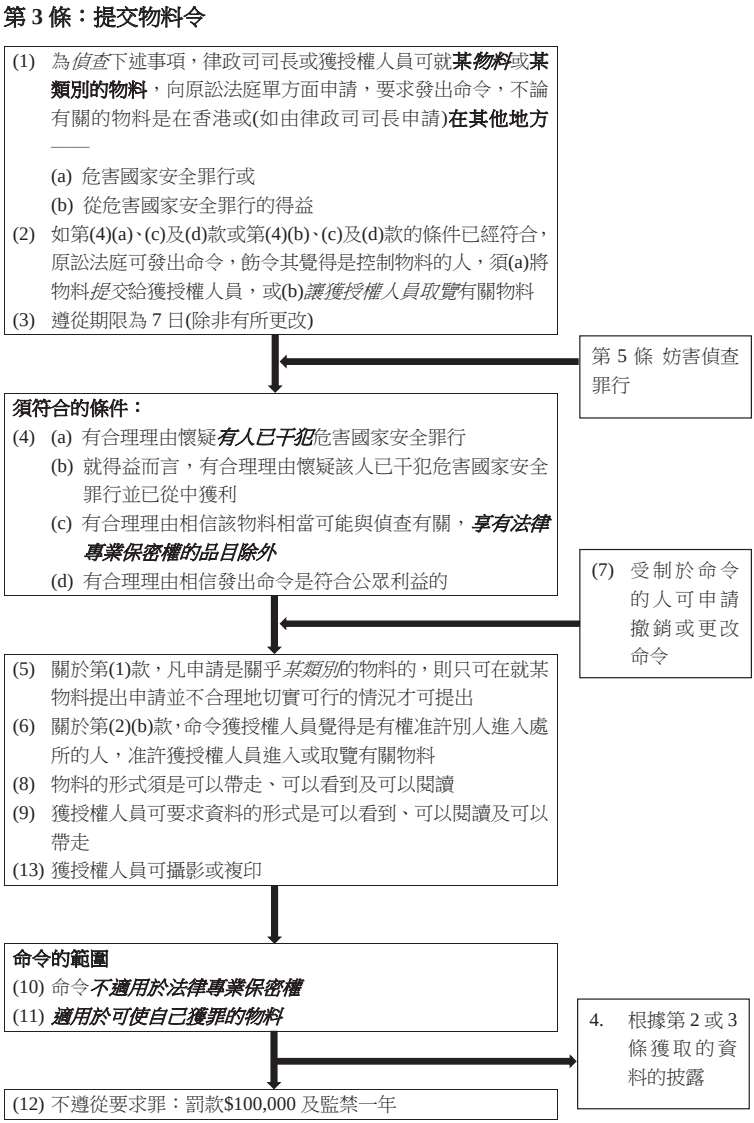
(ii)《釋義及通則條例》第84及85條僅適用於任何條例中授予「進入」、「搜查」及「檢取」權力的條文。另一方面，提交令並不涉及任何上述者（有別於蘇永強 訴 星島有限公司 [2005] 2 HKLRD 11一案）。（見第36(2)、37-38段）

發出提交令時新聞材料是否相關考慮因素

(5) *（附帶意見）《實施細則》附表7第3(2)條的措辭明確指出，法庭獲賦權可在信納第4款所載全部條件均已符合時發出命令批予提交令，但此舉並非必要。此外，法庭有權考慮所索取的材料可能涵蓋新聞材料。雖然附表7沒有明文提述新聞材料，但《香港國安法》第四條規定香港特別行政區法院在維護國家安全時應當尊重和保障人權，包括言論和新聞自由，而附表7乃根據《香港國安法》第四十三條制定。為使附表7所訂定的司法保障具有意義及成效，並使《香港國安法》第四條得以全面落實，法庭必須有權考慮根據提交令索取的材料是否可能包括*

新聞材料。這從《香港國安法》及《實施細則》的措辭中清晰可見。……」

V 評估附表7第3條：提交物料令[23]



23 參照香港法例第405章《販毒（追討得益）條例》第20條（提交物料令）；香港法例第455章《有組織及嚴重罪行條例》第4條（提交物料令）；及香港法例第201章《防止賄賂條例》第13A條（提交物料及提供協助令）。

A.1) 法庭命令的申請程序是否嚴格？

第2條與第3條有三大區別。第3條處理就偵查危害國家安全罪行，或偵查*從危害國家安全罪行的得益*所作的提交令申請。如欲取得涵蓋*域外材料*的法庭命令，*必須由律政司司長*提出申請：

「(1) 為偵查下述事項，律政司司長或獲授權人員可就某物料或某類別的物料，向原訟法庭提出單方面申請，要求根據第(2)款發出命令，不論有關的物料是*在香港或(如申請是由律政司司長提出的)在其他地方* ——

(a) *危害國家安全罪行*；或

(b) 已干犯或被懷疑已干犯危害國家安全罪行的人*從危害國家安全罪行的得益*。」

B.2) 免使自己入罪的特權是否受第3條保護？

此特權不適用於根據第3條發出的提交令所規定提交的物料。第(11)款規定提供物料(即使屬可使自己入罪者)，使偵查得以有效進行：

「(11) *任何人不得以若提交物料會出現下述情況為理由，而不提交與根據第(2)款發出的命令有關的物料* ——

(a) 提供資料或提交物料會傾向於使該人獲罪；或

(b) 提供資料或提交物料會違反法規或其他規定所施加的保密責任或對披露資料或物料的其他限制。」

VI 限制資料的使用

附表7第4條限制根據第2或3條所獲資料的披露，特別是限制披露屬根據《稅務條例》(第112章)須受保密責任規限的所獲資料，並進一步規定：

「(2) 除第(1)款另有規定外，任何人根據或憑藉本附表第2或3條獲取的資料，可由任何獲授權人員向下列人員或機構披露 ——

(a) 律政司及香港警務處；及

(b) 如律政司司長覺得資料相當可能有助於任何相應的人員或機構履行職能 —— 該人員或機構。」

第(4)款界定「相應的人員或機構 (corresponding person or body)」為「律政司司長認為根據香港以外地方的法律，具有相當於第(2)(a)款所述機構的任何職能的人員或機構」。

在*J 訴 警務處處長*一案中，[24]律政司司長代表警務處處長，根據第3條獲取針對X等的單方面提交令。X等基於各項理由（包括該資料具有公開披露的風險），尋求更改該等命令。李運騰法官根據裁決第(vi)項駁回該項理由：

「至於擔心個人資料一旦提交予警方便會公諸於世，屬於毫無根據。相反，附表7第4條有條文規限警方發布根據第2及3條獲取的資料（有別於*Junior Police Officers' Association of Hong Kong Police Force v Electoral Affairs Commission* (No 2) [2020] 3 HKLRD 39一案）；（見第35段）。」

VII 罪行

第2條第(13)及(14)款和第3條第(12)款，將不遵從或具欺詐成分的遵從訂為罪行。第5條另訂一項「妨害偵查」罪行。根據一般原則，*只有受有關法庭命令針對的一方才須負刑事法律責任，而香港特別行政區的刑事司法管轄權奉行屬地原則*。以第3條為例，第3(2)款指明有關法庭命令針對的對象。該款規定：

24 [2021] 5 HKLRD 708.

「除第(5)款另有規定外，法庭接獲該項申請後，如信納已經符合第(4)(a)、(c)及(d)款或第(4)(b)、(c)及(d)款的條件，可發出命令，飭令*其覺得是管有或控制與申請有關的物料的人*，須在命令內所指明的期限內——

(a) 將物料提交給獲授權人員由該人員帶走；或

(b) 讓獲授權人員取覽該物料。」

第3(12)條訂定有關罪行，容許被告人提出「合理辯解」作為免責辯護：「任何人無合理辯解而不遵從根據第(2)款發出的命令，即屬犯罪，一經循公訴程序定罪，可處罰款$100,000及監禁1年。」

第5條訂定「妨害偵查」罪，適用於第2及3條。犯罪者一經循公訴程序定罪，可處罰款及監禁7年。鑑於罪行範圍，任何已干犯指明行為的人，即使並非受有關法庭命令所針對者，仍須負刑事法律責任。香港特別行政區的刑事司法管轄權仍奉行屬地原則，被告人亦獲容許提出「合法權限」或「合理辯解」作為免責辯護：

「(1) 凡法庭已根據本附表第2或3條發出命令，或已有要求根據本附表第2或3條發出命令的申請提出而申請沒有被拒絕，則任何人如知道或懷疑已發出或已申請的命令所關乎的偵查正在進行，而——

(a) 並無合法權限或合理辯解而作出意圖妨害偵查的任何披露，或作出任何披露而罔顧該披露是否會妨害偵查；或

(b) 將任何物料竄改、隱藏、毀滅或以其他方式處置，或導致或准許此等情況發生，而且——

(i) 知道或懷疑該物料相當可能是與該宗偵查有關的；及

(ii) 意圖向進行該宗偵查的人隱藏該物料所披露的事實，

即屬犯罪。

(2) 凡有人因第(1)款所指明的偵查的關係而被捕，則該款對逮捕後就該宗偵查所作的披露並不適用。」

VIII 準則C：維持刑事審訊公正有效

此準則評估*附表7*是否加強（而非妨礙）刑事審訊的「黃金原則」。這些原則不應因民事訴訟程序或民事案例原則而變得複雜或受到妨礙。正如上訴法庭在*Yeung Chun Pong and Others v Secretary for Justice*[25]一案中強調：

「63. 確保控罪一經呈堂必獲審理，顯然符合公眾利益。審訊制度內設一系列保障措施，確保被告得到公正、恰當迅速的裁決。若某情況不獲上述保障所涵蓋，立法機關亦設訂明的上訴機制。該機制並沒將非正審上訴或附帶質疑預計在內。箇中理由充分，皆因實際而言，大部分審訊經常受到中斷，會不利於有效作出決定，亦對整個制度造成干擾。有時，某一審訊會因司法覆核申請 —— 甚或單一案件中重複提出各項申請 —— 而受干擾或延誤，如此延誤可能會影響證人或影響其出庭，致令*妥為提起的檢控*陷於失控。這類干擾可如本案般更形嚴重。本案過程始末：申請人提出單方面許可申請；法庭在無聽取控方即答辯人的陳詞下批准申請；律政司繼而申請撤銷許可，卻被駁回；律政司因申請被駁回而提出上訴，有關上訴可上達終審法院；若法院對許可不作干預，司法覆核便會展開，不論裁決如何，新一輪上訴又可隨之而起；凡此種種沒完沒了，審訊的聆訊日期一再取消。結果，這樣無理申請擱置法律程序和提出附帶質疑，本身便有濫用法院程序之虞。」

25 [2008] 3 HKLRD 1.

這類可疑的附帶質疑，也許可見於高院雜項案件2020年第1217號（2021年6月10日內庭聆訊）*Next Digital Limited v Commissioner of Police*案（該案附帶質疑搜查令是否有效）。刑事審訊中的「案中案程序」，採用刑事案標準，往往是解決附帶爭端的有力手段。在刑事法律程序中不當應用民事原則或標準，若辯方為之，可能會窒礙妥為提起的檢控；若控方為之，則可能剝奪被告人獲公平審訊或尋求上訴的基本權利。

楊艾文：非常感謝李先生，剛才就國家安全及附表7作出內容廣泛而深入的講解。我認為當中帶出一個重要觀點，《實施細則》既屬全國性法律，而又應用於普通法制度。至於《實施細則》的法律地位，我認為還可以有空間提出一個要點，因為依我看來，《實施細則》似乎存在某種固有張力，看看你所提觀點的要旨，所審視的《實施細則》內容，可知大體上都以香港的法律及法學理論為基礎。毫無疑問，不論草擬者是誰，他們大抵熟知香港法律。但與此同時，正如你所強調，這是一部全國性法律。或許，有人從普通法制度的角度來看，可能會認為《實施細則》看起來像附屬法例，《香港國安法》則為主體法例，而《香港國安法》第四十三條看起來就像賦權條文。我想聽聽你的想法。我的初步看法是，以上的理解大概是錯的，《實施細則》並非香港的附屬法例，而是如你所說，乃全國性法律。因此，我們現有適用於附屬法例的一般細則，以及附屬法例與主體法例之間的關係，很大可能並不適用。Robert (李紹強先生)，未知你對此有何看法。

李紹強：謝謝。這是一個難題。《實施細則》乃根據《香港國安法》第四十三條制定。《香港國安法》必然是全國性法律。因此，你可主張說，舉凡根據其條文所制定的任何內容，均具此全國性法律的特質。或者，我初步認為這看法較為可取。當你說其性質屬全國性法律，即指其全國適用，但我不太肯定是否如此。也許，這有待法院或大智之人，日後給予啟迪。就《實施細則》性質為何，我傾向更為謹慎待之。

楊艾文：我認為言之有理。

接下來，Grenville (江樂士先生)，我想問一下多數裁決。當然，尚未知道，根據《香港國安法》由三名法官組成的審判庭，實際上能否以多數票的方式進行裁定，因為《香港國安法》中沒有明言。我們知道，陪審團審訊時，可至少以 5比2作出多數裁決。若以數學運算，即約佔陪審團的71%。現在，假設由三名法官組成的審判庭可作出多數裁決，2比1，即67%。在《香港國安法》案件中，可以接受2比1的多數裁決嗎？愛爾蘭情況怎樣？他們同樣也設由三名法官組成的審判庭，未知其經驗如何？

江樂士：當然，在許多普通法司法管轄區，「多數裁決」多年來早獲公認。此原則一經接納，我認為，準確細算百分比，最終來說，未必太有幫助。然而，要驗證合法與否，方法之一也許是借鏡上訴法庭。我的意思是，例如，上訴法庭在謀殺案中，可作2比1的多數裁決維持定罪，不見得有人說裁決哪兒不恰當。終審法院甚至曾作3比2的裁決判案。我沒記錯的話，在2011年的剛果案中，法院以3比2作出多數裁決，將事宜提交全國人民代表大會釋法。事實上，3比2，我不太擅長計算百分比，相信是55、56之類，怎樣也罷。這樣看事情，未必有所幫助。在美國，2015年關於同性婚姻一案，我指的是，該案所予的批准，引來美國社會秩序的巨變，有關批准就出自5比4的多數裁決。所以，只是些微過半數，卻不影響最終合法性或判決本身的地位，而判決更即時生效。我對愛爾蘭的情況做了些研究，當地人員告訴我，他們可作出2比1的裁決，但這從未對外公布。

楊艾文：這從未發生過。

江樂士：或許有發生過，但從未對外公布。

楊艾文：明白。

江樂士：他們頒下附有理由的判決，但無指出是一致判決還是多數判決。頒下的就只有一個判決，一個由法院頒下的裁決，而公眾永不知道這是多數裁決還是一致裁決。

楊艾文：噢，非常有趣。你所舉出的一些上訴法院例子，我想知道當中的區別是否基於他們決定的是法律問題，而在香港由三名法官組成的審判庭兼而決定事實問題，那麼，事實裁斷又是否需要比率較高的多數共識。我不知道。但我認為愛爾蘭的例子是重要的。

江樂士：但當然，對被告人來說，重要的是他最終被裁定有罪還是無罪，而不論這純粹是法律問題還是事實問題，都不會真正影響這一點，對嗎？

楊艾文：不會的。好，Grenville，我想問你的第二個問題與法律改革有關，因為我認為，你演講中的闡述非常實用而有力，指出許多司法管轄區，特別是普通法司法管轄區，現在均准予國家安全範疇以外的案件，由單一法官審理。而這是否香港該予考慮的法律改革呢？你會如何設定適用範圍？會否只為特定嚴重罪行而設？會否只任由被告人選擇？你對此有何想法？

江樂士：當然，在原訟法庭審訊限制陪審團角色，永遠備受爭議。過往不時有人討論，應由單一法官審理複雜的商業案件，但始終沒有落實。現時的看法是，除非有絕對必要審訊免設陪審團，且無其他替代方案，否則便應沿用陪審團審訊。當然，要解決這個問題，法院現時首重的是，律師盡量做到簡化易明，法官總結時盡量淺白，務使一般陪審員能理解爭議事項。不過，我認為大概可公道地說，某些司法管轄區，例如因涉及陪審團受干擾、審前傳媒報道或案件極其複雜等問題，而限制陪審團審訊權，但其實是帶點勉為其難的，且純粹基於其特定司法管轄區的看法，認為此乃為司法公正真正必要。我認為總的來說，香港在我所指的商業罪案中，並未達此地步。香港至今來說都是另用他法，即使過往也許有三合會及其他壞分子試圖干擾陪審團的日子亦然。向來的看法都

認為，此非嚴重問題，若確有這些情況，警方自有能力處理。事實上，若在審訊過程中出現以上問題，法官也有能力處理。因此，我的看法是除非為了司法公正有迫切需要去改變香港現行制度，否則我們應該沿用目前的做法。即使日後出現嚴重問題，一如其他司法管轄區所發生者，屆時定可重新審視此議題。

楊艾文：當然，毫無疑問，我們會從單一法官審理《香港國安法》案件的審訊汲取經驗，看看實踐上運作如何。很可能是三位法官太多，或者也許單一法官，成效更大。總之隨你配置。若然是《香港國安法》以外範圍，當然會涉及的問題是，誰來決定，是向法庭提出申請，還是交由刑事檢控專員。

江樂士：我認為這不會來自某一方。我的意思是，相信檢控人員會告知法庭，說我們在案中有確鑿證據證明有人屢屢企圖干擾陪審團，而我們邀請法庭命令審訊不設陪審團。同樣地，被告人可能在庭上說，真的覺得不能在此獲得公平審訊，皆因有大量審前傳媒報道，這會損害其獲得公平審訊的權利。因此，這可來自任何一方。然而，若任何一方能夠確立其理據，那便有不設陪審團進行審訊的基礎。但正如我所說，可幸香港還未至此境況，亦希望永遠不會。

楊艾文：好的，謝謝你，Grenville。李先生，我有幾個問題問你。你在演講接近末段提到《實施細則》附表7有一項條文容許律政司司長提出申請要求提交海外物料（即香港境外的物料），相當有趣。就此，我想知道，若有人不遵從，如海外紀錄保管人，他們是否可被定罪。因為，我留意到你說，管有文件的人若不遵從規定，便可能觸犯刑事罪行。法律的域外效力如此延伸，似乎非同一般。你對於《實施細則》在這方面的立場有何看法？

李紹強：附表7第3條訂定律政司司長可就海外物料提出申請，但以我理解，該命令乃針對在香港的人而非海外保管人。因此，正如我所強調，命令所針對的人可因不遵從命令而有罪，其他人則不會。我初步的看法是無須憂慮，我不認為海外保管人應該

為此憂慮，擔心會被香港法庭起訴。但我相信這方面的壓力對在香港一方是實在的，法庭命令所針對的香港人，須努力、真誠努力嘗試取得命令條款範圍所指的一切。

楊艾文：從那個意義上來看，你意思是說，該權力似乎與香港法例第201章《防止賄賂條例》所訂的相類權力一致，均須某程度上對在香港的人採取屬地管轄。

李紹強：是的。我同意你的看法。依我對附表7的理解，我認為其為刑事司法管轄權，是屬地管轄權。

楊艾文：是的。我再次提及《防止賄賂條例》所訂的此項權力。我們有終審法院案件*P 訴 廉政專員*一案。我相信大多數刑事法律執業者都熟悉此案，當中處理此項要求提交物料的權力。在終審法院的判決中，此權力基本上理解為提交文件的例外情況。若有關權力過於具壓迫性，則會構成可能合法地不予遵從的理由。當然，現時《實施細則》沒有明確列出這例外情況。你是否認為這例外情況同樣予以適用呢？

李紹強：就《防止賄賂條例》第14條而言，*P 訴 廉政專員*案是一項重要、非常重要的決定，因為該案審視了該條文並加以應用。《防止賄賂條例》第14條與《實施細則》第3條分別頗大。因此，該項決定，我會說，也許與本案關連甚微。據我理解，終審法院在該案表示，法定條件一經符合，法庭便無甚酌情權拒絕作出命令。只有當法官認為該權力具壓迫性，方可拒絕作出有關命令。因此，壓迫性的概念源於這個背景。相對而言，附表7第3條訂明了，你可稱之為「合法權限或合理辯解」的免責辯護。因此，依我看來，任何人根據第3條被控以不遵從命令的罪行，均可選擇以此作為免責辯護。也許「壓迫性」測試並非適當的測試，適當的測試是究竟被告人能否提出合法權限或合理辯解，而舉證標準非常低，僅須負援引證據性的舉證責任而已。這就是不同之處。

楊艾文：感謝你澄清這一點。這是相當複雜的範疇，對嗎？

李紹強：對。

楊艾文：我們尚餘些少時間，何不看看講者們對《香港國安法》比較法這個主題有甚麼結語嗎？有任何結語想說嗎？這些比較案例有多實用呢？

江樂士：我認為，只要開始研究其他司法管轄區的法學理論，尤其是其法例，就會馬上發現香港的法例並非獨一無二，其實可供實用詮釋。正如我發言時說，這對釋除部分人所懷的疑慮，有莫大幫助。我們在香港面對的這類問題，別的地方也曾遇過，而這些問題，其他普通法司法管轄區亦採取跟我們相類的方法來解決。因此，我認為更廣泛了解全球形勢，確實非常有用。

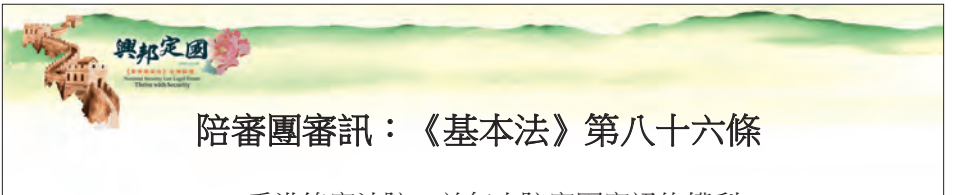
楊艾文：Robert。

李紹強：從比較角度來看，《香港國安法》本身非常強調應當堅守人權及法治等原則。並且《實施細則》中的附表，基本上是依據現有調查措施為藍本。因此，我認為可能性是，我們的法哲學取向很大程度上與普通法制度看齊。個人來說，我並不擔心這部法律會為社會製造真正不便或諸如此類的問題。

楊艾文：好的。謝謝。當然，我們在香港制定的這部法律亦非常有助於全球就國家安全法展開更廣泛的對話。至此，我首先要感謝兩位非常透徹及非常有用的講解及問答。各位先生女士，請向兩位講者鼓掌致意。

《香港國安法》案例研讀及國際案例比較

江樂士 GBS SC
香港大學法律學院榮譽教授



陪審團審訊：《基本法》第八十六條

- 香港終審法院：並無由陪審團審訊的權利
- 陪審團審訊：可在《香港國安法》審訊中進行
- 由三名法官進行審訊：有利於司法公正
- 原訟法庭：不設陪審團審訊的範圍
- 律政司司長證書：觸發機制

由三名法官組成審判庭進行審訊：《香港國安法》第四十六條

- 律政司司長證書：檢控決定
- 《基本法》第六十三條：律政司檢控獨立
- 律政司司長的決定：司法覆核
- 香港的審訊：多由單一法官審理
- 陪審團審訊及法官審訊：同樣公正
- 一人計短，三人計長

人權保障

- 刑事司法 /《香港國安法》：重視人權
- 《香港國安法》第四及五條：內設保障確保公平審訊
- 《基本法》第三十九條：《公民權利和政治權利國際公約》適用於審訊
- 保障：法律明確性、無罪假定、聘用律師的權利
- 嫌疑人：審訊時權利始終相同

遠東的審訊

- 新加坡、馬來西亞、文萊：前英國殖民地
- 審訊：廢除陪審團審訊：由單一法官審理
- 《公民權利和政治權利國際公約》並不適用
- 允許為防範罪行而作出拘留
- 死刑：仍然合法
- 雙重標準

英國

- 最高法院：陪審團審訊的限制
- 首要驗證：審訊公正
- 單一法官進行審訊：並非不公正
- 審訊的威脅：干擾陪審員
- 北愛爾蘭：狄普樂法院
- 樞密院：單一法官審訊及司法公正

澳大利亞及新西蘭

- 《澳大利亞憲法》：由陪審團進行審訊
- 澳大利亞各州份：陪審團審訊的限制
- 單一法官審訊：應用司法公正驗證
- 冗長、複雜或構成沉重負擔的審訊
- 新西蘭： 恐怕陪審團受干擾
- 《2011年(新西蘭)刑事訴訟法令》：單一法官審訊

愛爾蘭共和國

- 陪審團審訊：權利並非絕對
- 特別法院：確保司法公正
- 特別刑事法院 ：恐怖主義
- 檢察總長：決定最終審訊模式
- 特別刑事法院 ：由三名法官組成審判庭進行審訊
- 特別刑事法院 ：威脅、有組織及嚴重罪行的審訊

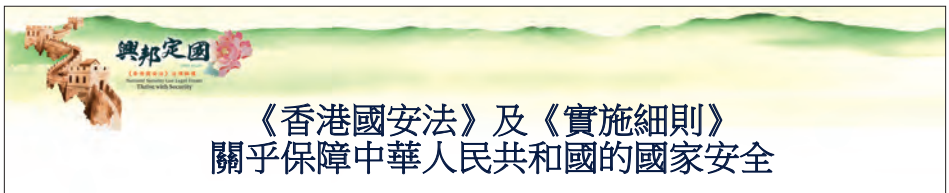
歐洲及歐洲人權法院

- 希臘：由「混合法庭」進行審訊
- 上訴法庭：進行審訊
- 法官審訊：國家安全及嚴重罪行
- 《歐洲人權公約》(法院)：以不同方式確保審訊公平
- 《歐洲人權公約》(法院)：沒有在陪審團席前受審的權利

總結

根據《香港國安法》制定《實施細則》附表7的概況

李紹強 資深大律師
清洪資深大律師事務所



《香港國安法》及《實施細則》關乎保障中華人民共和國的國家安全

- *《香港國安法》*由中華人民共和國全國人大常委會於2020年6月30日制定，透過《基本法》在香港特區落實以保障國家安全。
- *《實施細則》*乃根據《香港國安法》第四十三條制定，*旨在加強和規管對危害國家安全犯罪的調查，載有7個附表*。
- 此次演講將審視*《實施細則》附表*7是否公正有效 — 附表7以「*關於要求提供資料和提交物料的細則*」為題。
- *此附表能否在有效性與公正性之間取得適當平衡?*

然而，為何各國都需要保障國家安全？有何景況使然？

國家安全是社會秩序的基礎，從秩序中方可以實現人民真正的自由及權利、法治，以及繁榮和進步。
所有國家均須適切保護國家安全：
1)應對歷史形成的存在性威脅：各國面臨的存在性威脅不盡相同，這些威脅可來自氣候變化、極端主義或者歷史事件等。因此，各國有需要採用不同模式的國家安全法及措施，以切合自身特定的國家安全需要及目標。
2)消除外來支配性力量，以實踐真正的普世價值：近數世紀以來，隨着歷史的演進，各國可分為兩大類別，即「*已發展或支配性國家*」及「*發展中或受支配國家*」。*受支配國家的適當國家安全目標是與支配力量互動，逐漸將之消減，以成就真正的普世價值。*

3) 自由主義是由欲求推動、道德中性、模稜兩可的支配力量：西方自由主義是*支配力量*，由無關道德而具矛盾性的*個人欲求*所驅動。

- **自由主義支配下，成就與戰火交織：**這無關道德的自由主義，數個世紀以來在世界各地帶來不少矛盾結果：*固然包括法治、財富及進步，但亦有無休止的戰爭、不平等、社會分化、支配統治和不誠實行為。*
- **由欲求推動的自由、民主、人權價值，不能成為真正的普世價值：**諸如「自由」、「民主」及「人權」的「核心自由價值」，舉凡是以欲求為本的，本質上均屬無關道德而具矛盾性，*尚未成為真正普世價值*，但仍具他日成普世的潛力。

要成為真正的普世價值，自由須改由責任、而非欲求產生

普通法有某程度的特殊性，即它乃***基於責任而促進權利***：

a)行動自由，從各人盡責產生的交通秩序中產生：*各人行動自由的產生，乃僅**當各人**（駕駛人和道路使用者）**恪守責任***，*遵從*平等適用於各人的*交通標誌和規例*，*方能實現*。人人履行此等責任，方能形成交通秩序。

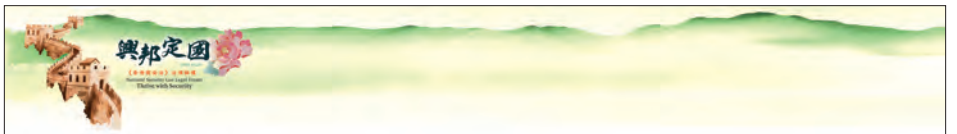
▪人人皆可合理預計，例如約於30分鐘內能在相對安全的道路情況下，從地點A到達地點B。這就是本人及其他道路使用者的*行動自由*。

▪行動自由並非來自人人堅持一己「自由」駕駛的*欲求*（欲求常另被標籤為「與生俱來的權利」）。如此堅持，結果只會交通意外頻生，處處擠塞，釀成混亂，而非產生行動自由。

b) 個人言論自由，由各人盡相應責任構成：*言論自由*的產生，乃僅**當各人恪守責任**，不誹謗他人、不傷害他人、不在會議等過程中造成混亂，方能實現。

c) 個人健康權，由各人盡相應責任構成：在*Donoghue v Stevenson*一案中，Donoghue太太提告Stevenson先生，指他製酒時疏忽，以致一瓶啤酒受蝸牛腐體污染，她飲用後病倒。依McBride教授和Bagshaw教授的看法，法院批准Donoghue提告Stevenson，**並非**因為Stevenson侵犯了她「保持人身健全」(bodily integrity) 的「權利」，而是因為Stevenson實質上*對她負有責任*，須確保該瓶啤酒適宜飲用。

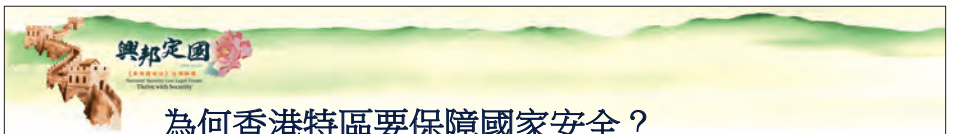
- 即是說：任何人得享自由(或權利)，皆因所有人履行相應情境責任，並藉此來維持相關秩序。
- *各項適切推動責任或適切限制欲求之法律及其他措施，非但不會減損個人自由，反而有利於促進自由。*



4) 由責任推動的自由、民主、人權，方可成為真正的普世價值：要令到自由、民主及人權成為真正的普世價值，這些觀念須*以責任為本*而非*以欲求為本*。

- **核心的*互存性*責任，是普世價值的源頭：**責任可在許多層面產生。東西方的智者都曾作出提醒，*我們的核心責任*，是實現***共生互存*：***尊重他人，平等相待，視他人為目的而非手段，並為彼此犧牲。***

- 若如此踐行，這*核心責任*便堪成為*真正普世人類價值**之源頭***。



為何香港特區要保障國家安全？

- 如上闡述，國家安全是社會秩序的*基礎*，從中得以實現香港特區市民的自由及權利，得以踐行法治，並據此追求繁榮進步。
- 只有通過適切保護國家安全，始能延續香港特區的法治，繼而讓市民可真正持續享有自由和權利。
- 國家安全保護不足，不單會釀成混亂，損害法治及人民的自由和權利，還會危害經濟環境，擾亂國際貿易，削弱外商對香港特區的興趣。

透過《香港國安法》保護國家安全

《香港國安法》第三章闡述一些措施，其中包括四類罪行：*分裂國家罪*、*顛覆國家政權罪*、*恐怖活動罪及勾結外國或者境外勢力危害國家安全罪*。

- 這些罪行範圍具體，定義精細，每項罪行均須以有力證據加以證明。
- 公正有效的調查權力，可確保隨後展開的檢控迅速公正。

《實施細則》旨在強化對危害國家安全犯罪的調查

- *《實施細則》*載有四項規則和七個附表。規則2指明有關各方可根據各個附表行使的權力。規則3指明，只有《香港國安法》第四十四條所指定的法官方可根據這些規則處理申請。
- *《實施細則》*乃加強以公正有效方式調查的重要手段。

令致《實施細則》公正有效的兩個特點：

1) 以現行條文為藍本：《*實施細則*》*大致上以*調查貪污或有組織罪行等相關現行措施*作為藍本*。

- 這些現行調查措施沿用已久，並因應實踐所需而不斷加以完善。
- 由此修改成《*實施細則*》用於調查國家安全犯罪，承襲相關措施在法律和實踐方面的經驗。

2) 在普通法環境中行使：《實施細則》須於《基本法》所訂定的普通法環境下應用

- 《實施細則》源於全國性法律，而按下述條文規定在普通法環境下適用
  - 《香港國安法》的第四及第五條
  - 《基本法》第八條
- 《香港國安法》第四條規定：「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.....基本法.....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》第五條規定：「防範、制止和懲治危害國家安全犯罪，應當堅持*法治*原則...
- 任何人*未經司法機關判罪之前均假定無罪*。
- 保障犯罪嫌疑人、被告人和其他訴訟參與人依法享有的*辯護權*和其他訴訟權利...
- *任何人已經司法程序被最終確定有罪或者宣告無罪的，不得就同一行為再予審判或者懲罰*。」
- **《基本法》第八條**規定：「香港原有法律，即普通法、衡平法、條例、附屬立法和習慣法...予以保留。」

以法庭命令規管調查權力一般較為可取

- *附表7訂定程序，由法庭頒布命令以規管對危害國家安全罪行的偵查*。
- *在 Nagla v Latvia* 一案中：歐洲人權法院認為，法庭命令一般是規管刑事調查的較為適切的手段：

(1) 申請人 *Nagla* 任職國家電視台，負責製作和主持每週調查新聞節目。2010年2月，一名匿名消息人士聯絡她，透露國家稅務局所設的數據庫存在嚴重缺陷。

(2) 一週後，該名自稱「Neo」的消息人士開始用 Twitter 發布多個公共機構國家官員的薪酬資料。調查警員於2010年2月與身為證人的申請人會面。她拒絕透露消息人士的身分。

(1) 2010年5月，調查機關拘捕一名稱為「*I.P.*」的嫌疑人。搜查令經調查人員*備妥*和*檢控官*授權後，警方搜查申請人住所，檢取一部手提電腦及其他物品。

(2) 申請人提出申訴，指其住所被搜查，等同強制她須披露能辨識新聞來源的資料。（§§5-30）她依據《歐洲人權公約》第10條提出申訴，而該條文規定：

- 「1. 人人享有表達自由的權利……
- 2. 行使上述各項自由，因為同時負有義務和責任，必須接受法律所規定的和民主社會所必需的程式、條件、限制或者是懲罰的約束。這些約束是基於對國家安全、領土完整或者公共安全的利益，為了防止混亂或者犯罪，保護健康或者道德，為了保護他人的名譽或者權利，為了防止秘密收到的情報的洩漏，或者為了維護司法官員的權威與公正的因素的考慮。」

(3) 歐洲人權法院認為，案中對申請人發表意見之自由的干預，乃依法規定並為合法目的而作出。「.....*法院可以接納，這種干預旨在防止混亂或犯罪，同時旨在保護他人的權利，兩者均屬合法目的*。」（§92）

(4) 歐洲人權法院指出，所發出的*並非披露令而是措辭含糊的搜查令*。搜查令是較為嚴厲的措施，法庭須對任何新聞消息來源保密原則的問題嚴加監察（§95），可是法官理據欠妥，申請人因而獲判給賠償。

三類評價標準：評估附表7所訂程序是否公正有效的三類準則

- **準則 A** ：*附表7所訂的法庭命令*是否能公正有效地推進刑事調查：
  1) 法庭命令的範圍是否有效？申請程序是否嚴格？
  2) 所須符合的條件是否嚴格？
  3) 命令的執行是否相當可能有*實際*成效？
  4) 受影響方可否反對？

準則 B：*附表7*能否保護受影響各方的權利：

▪附表7能否保護受影響各方的以下權利：

1) 法律專業保密權#？
2) *免使自己入罪的特權*？
3) 新聞材料?

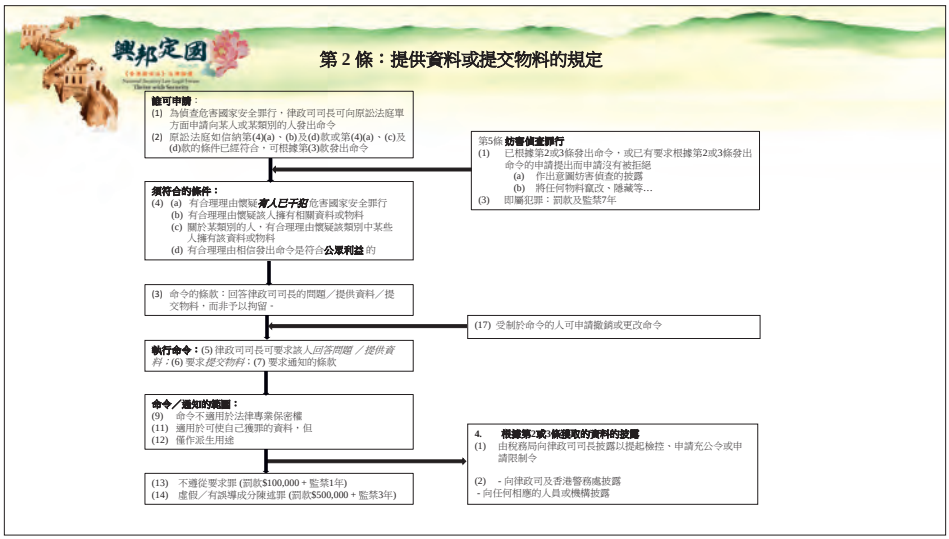
#法律專業保密權，是對律師與當事人之間關乎法律意見或有關訴訟(不論正在進行還是預期進行者)之事宜所真誠地作出的通訊，予以保密。這項特權賦予獲免強制披露該等通訊的權利。見案例如 *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701。

準則 C：維持刑事審訊公正有效

▪此準則評估*附表7所訂的程序*是否加強（而非妨礙）*刑事審訊的基本規則*，即：

1) 控方負有舉證責任；
2) 必須在毫無合理疑點下證明；
3) *相關性*是決定可否接納證據的首要標準；及
4) 被告人獲得公平審訊和享有上訴權。

•在刑事法律程序中不當應用民事原則或標準，若辯方為之，可能會窒礙妥為提起的檢控；若控方為之，則可能剝奪被告人獲公平審訊或尋求上訴的基本權利。



評估附表7第2條：「提供資料或提交物料的規定」

- **受影響方可否反對？**
- 在 *J 訴 警務處處長* 一案中([2021] 5 HKLRD 708)，律政司司長代表警務處處長，根據第3條獲取針對X等的單方面提交令。X等基於各項理由，尋求更改該等命令。法官基於第4條駁回X等的反對申請(見下文)
- **法律專業保密權是否受保護？**
- 李運騰法官在 *A 訴 警務處處長* 一案中([2021] 3 HKLRD 300)的裁決，施行了對法律專業保密權的保護（申請依據第3條提出，但有關原則必然同樣適用於第2條）。他裁定：「涉案經遮蓋的 WhatsApp 交談內容及 A 與 B 的內部電郵*全部都與一名僱員向其法律部門尋求法律意見有關。即使從最有利於控方的角度來看，亦無表面證據證明這些項目構成任何欺詐或刑事罪行的一部分…*」

- **免使自己入罪的特權是否受保護？**
- 在 *香港特別行政區 訴 李明治及另一人案*中((2001) 4 HKCFA 133) ，其中一個爭議點是，根據（當時的）《公司條例》第145(1)條進行研訊，第145(3A)條是否撤銷*免使自己入罪的特權*。終審法院詮釋該等條文（相類於第2(11)條及第2(12)條），裁定該特權被撤銷，但由「禁止直接使用」的規定取而代之；換言之，接受研訊的人必須提供答案，即使答案可能會導致其入罪亦然，然而該等答案不得在審訊中用作指證該人。
- **新聞材料是否受到保護？**
- 新聞材料不受附表7直接涵蓋。在 *A 訴 警務處處長* 一案中 ([2021] 3 HKLRD 300)，李運騰法官認為，香港法例第1章所予新聞材料的保障，並不適用於附表7的情況，但《香港國安法》第四條可能另予間接保障。

第3條：提交物料令

(1) 為*偵查*下述事項，律政司司長或獲授權人員可就**某*他所*或**某類別的物料**，向原訟法庭單方面申請，要求發出命令，不論有關的物料是在香港或(如由律政司司長申請)**在其他地方**——
(a) 危害國家安全罪行或
(b) 從危害國家安全罪行的得益
(2) 如第(4)(a)、(c)及(d)款或第(4)(b)、(c)及(d)款的條件已經符合，原訟法庭可發出命令，飭令其覺得是控制物料的人，須(a)將物料*歷交*給獲授權人員，或(b)*讓獲授權人員取覽*有關物料
(3) 遵從期限為7日(除非有所更改)

← 第5條 妨害偵查罪行

須符合的條件：
(4)(a) 有合理理由懷疑***有人已干犯***危害國家安全罪行
(b) 就得益而言，有合理理由懷疑該人已干犯危害國家安全罪行並已從中獲利
(c) 有合理理由相信該物料相當可能與偵查有關，***事有法律專業保密權的品目除外***
(d) 有合理理由相信發出命令是符合公眾利益的

← (7) 受制於命令的人可申請撤銷或更改命令

(5) 關於第(1)款，凡申請是關乎*某類別*的物料的，則只可在就某物料提出申請並不合理地切實可行的情況才可提出
(6) 關於第(2)(b)款，命令獲授權人員覺得是有權准許別人進入處所的人，准許獲授權人員進入或取覽有關物料
(8) 物料的形式須是可以帶走，可以看到及可以閱讀
(9) 獲授權人員可要求資料的形式是可以看到、可以閱讀及可以帶走
(13) 獲授權人員可攝影或複印

命令的範圍
(10) 命令***不適用於法律專業保密權***
(11) ***適用於可歸自己提供的資料***

→ 4. 根據第2或3條獲取的資料的披露

(12) 不遵從要求罪：罰款$100,000及監禁一年

附表7第3條：提交物料令 — 與第2條有三大區別

- 附表7第3條處理就偵查*危害國家安全罪行*所作的提交令申請。
- 第2及3條所訂的程序大致相類。主要區別在於三方面，涉及兩項條文下法庭命令之目的及範圍。
- 有別於第2條，第3條的提交令
  a) 也適用於對*犯罪得益*的調查，
  b) 可涵蓋香港境外的物料(如欲取得*海外物料*，必須由*律政司司長*提出申請)，及
  c) 豁除免使自己入罪的特權。

披露資料的限制

- 附表7第4條限制根據第2或3條所獲資料的披露。
- 在 *J 訴 警務處處長* 一案中，X等基於各項理由（包括該資料具有公開披露的風險)，尋求更改該等命令，但被李運騰法官駁回：
- 「*至於擔心個人資料一旦提交予警方便會公諸於世，屬於毫無根據。相反，附表 7 第 4 條有條文規限警方發布根據第 2 及 3 條獲取的資料…*」

第 2 及 3 條所訂定的不遵從命令罪行

- 根據一般原則：
- *只有受有關法庭命令針對的一方才須負刑事法律責任，而*
- *香港特別行政區的刑事司法管轄權奉行屬地原則。*

- *識別出命令針對的對象：*第3(2)條規定：「除第(5)款另有規定外，法庭 ……**可發出命令，飭令其覺得是管有或控制與申請有關的物料的人，**須在命令內所指明的期限內 ———
  a) 將物料提交給獲授權人員由該人員帶走；或
  b) 讓獲授權人員取覽該物料。」
- *應用在罪行上*：第3(12)條訂定「任何人**無合理辯解**而不遵從根據第(2)款發出的命令，即屬犯罪，一經循公訴程序定罪，可處罰款$100,000及監禁1年。」

第5條：妨害偵查罪行

- ***鑑於第5條的罪行範圍，任何已干犯指明行為的人，須負刑事法律責任，但香港特別行政區的刑事司法管轄權仍奉行屬地原則。***

第5條規定「(1)凡法庭已根據本附表第2或3條發出命令，或已有要求根據本附表第2或3條發出命令的申請提出而申請沒有被拒絕，則任何人如知道或懷疑已發出或已申請的命令所關乎的偵查正在進行，而 ———

a) 並無合法權限或合理辯解而**作出意圖妨害偵查的任何披露**，或作出任何披露而罔顧該披露是否會妨害偵查；或

b) 將任何物料竄改、隱藏、毀滅或以其他方式處置…

即屬犯罪。」

被定罪的人可處罰款及監禁7年。

主題演講（四）：
《香港國安法》的展望

鄧中華

中華人民共和國國務院港澳事務辦公室
原副主任

全國港澳研究會
會長

尊敬的林鄭月娥行政長官(時任行政長官)，各位嘉賓、各位朋友：

大家上午好！

很高興再次受邀參加由香港特區政府律政司主辦的「《香港國安法》法律論壇」。本屆論壇於香港回歸祖國25周年之際召開，圍繞進一步全面準確貫徹「一國兩制」方針，維護國家主權、安全和發展利益，展開充分交流，具有重大意義和深遠影響。首先，我代表全國政協副主席、國務院港澳事務辦公室主任夏寶龍，代表全國港澳研究會，對本屆論壇的舉辦表示祝賀。

去年7月，我曾應邀參加第一屆「《香港國安法》法律論壇」，當時論壇的主題為「國安家好」。一年過去了，本屆論壇的主題定為「興邦定國」，從「安」到「興」這一變化，正是香港由亂到治、由治及興的真實寫照，再次彰顯了《香港國安法》維護國家安全、保障香港繁榮穩定的強大威力。下面，我就全面準確貫徹《香港國安法》，推動維護國家安全法律體系新發展，分享幾點想法，與大家交流。

一、《香港國安法》是彰顯善治之法，曾受黑雲籠罩的香港市民最懂得它的意義。

兩年來，《香港國安法》充分發揮止暴制亂的功能，彰顯人權保障價值，守護社會安寧穩定，凝聚起「求穩定、謀發展」的強大民意，「一法安香江」的圖景業已呈現。

第一，《香港國安法》是彰顯善治的止暴制亂之法。兩年來，《香港國安法》充分發揮止暴懲惡的功能，有力打擊了黎智英、戴耀廷、黃之鋒等反中亂港分子，有效遏制了「黑暴」「攬炒」等反中亂港活動。截至今年3月，共有175人因涉嫌危害國家安全被拘捕，8人被定罪。香港司法機構共處理85宗與《香港國安法》相關案件，64宗已經結案。這個數字背後，《香港國安法》的各項規定，包括涉及保釋、指定法官、陪審團的規定，在具體的案件中得到準確的理解和適用。香港普通法和原有法律制度繼續運行良好，法治和司法獨立堅如磐石，唱衰香港法治已死的各種言論不攻自破。

第二，《香港國安法》是彰顯善治的人權保障之法。《香港國安法》秉持「懲治極少數、保護大多數」的立法精神，充分考慮香港特區的實際和普通法的特點，突出強調尊重和保障人權，堅持法治原則，依法保護香港特別行政區居民享有的各項權利和自由，對被告人和犯罪嫌疑人享有的訴訟權利和程序作出明確規定。特別行政區執法、司法機關在處理國安案件時，嚴格落實上述規定，依法懲治極少數危害國家安全的違法犯罪分子，廣大市民依法享有的言論、新聞等各項自由非但未有減損，反而因「黑暴」分子受到懲處而得到更加充分的保障，傳媒生態持續改善，本地和海外媒體的數量增加，香港社會依法監督政府效能更加彰顯。

第三，《香港國安法》是彰顯善治的安寧守護之法。《香港國安法》營造了香港市民維護國家安全的總基調，開啟了香港正本清源的新進程，促進了社會政治生態的好風尚，激發了市民愛國愛港的正能量，讓市民和國際投資者安心、放心、增信心。社會安定、市民安全、人心安寧，經濟持續發展的良好社會環境重臨香港。《香

港國安法》實施以來，香港繼續保持國際金融中心地位，營商環境持續改善，2021年香港外資企業達9,049間，創歷史新高。有了《香港國安法》的護佑，香港繼續成為全球金融投資的寶地、人才聚集的高地、興業發家的福地。

二、進一步築牢系統、完整、管用的香港維護國家安全法律制度和執行機制，激發《香港國安法》「保駕護航」的強大威力。

不斷建立健全維護國家安全的法律制度和執行機制，是香港特區的憲制責任，也是防範化解國家安全風險、維護國家安全的必要之舉。香港特區在不斷健全維護國家安全制度體系過程中，應始終堅持問題意識，以落實《香港國安法》的精神為導向，注重與《香港國安法》實施以來所取得的司法成效相銜接。

第一，不斷建立健全維護國家安全的法律制度和執行機制是香港特區的憲制責任。香港特區負有維護國家安全的憲制責任。香港《基本法》第二十三條清晰規定了特區應自行立法禁止七類危害國家安全的行為。全國人大《528決定》第三條和《香港國安法》第七條均規定，香港特區應當儘早完成《基本法》規定的維護國家安全立法，完善相關法律。全國人大通過決定授權並由全國人大常委會制定《香港國安法》，目的就是完善香港特區同《憲法》和《基本法》實施相關的制度和機制，是在《基本法》有關規定基礎上對香港特區維護國家安全的制度體系作出的必要充實和完善。《香港國安法》的制定實施與《基本法》第二十三條的規定並行不悖，不取代也不排斥香港特區根據該條規定繼續履行有關維護國家安全立法的憲制責任。香港特區應當積極履行維護國家安全的職責，儘早完成《基本法》第二十三條本地立法，逐步構建起系統、完整、管用的維護國家安全法律制度和執行機制，堵住維護國家安全的法律缺口。

第二，不斷建立健全維護國家安全的法律制度和執行機制，是防範化解國家安全風險、維護國家安全的必要之舉。制度優勢是一個國家最大的優勢。制定實施《香港國安法》，開創了依法治港、運用《憲法》和《基本法》賦予的權力進行國家治理的新範式。但《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，而是重點懲治四類嚴重危害國家安全的犯罪行為，香港特區本地法律同樣是維護國家安全的重要依據。《香港國安法》的立法意圖是通過與香港特區本地法律互補適用，共同維護國家安全。為此，《香港國安法》明確規定，香港特區根據該法和特區本地法律的有關規定，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》實施以來，維護國家安全的法律制度和執行機制得以完善，本地法律防範、制止和懲治危害國家安全的有關規定得到適用，特區維護國家安全的能力與水平明顯提升，一批反中亂港分子的囂張氣焰受到沉重打擊。但同時，也應當看到，特區在維護國家安全方面依然存在風險隱患與制度短板。例如，一些「港獨」團伙還在地下活動，部分激進「港獨」組織在海外高調宣佈重新運作，網路危害國家安全的行為時有發生，外部勢力試探特區法律底線的干預行為依然存在。惟有不斷加固維護國家安全的法律「底板」，構建系統完備、科學規範、運行有效的國家安全制度和執行機制，才能切實提高特區抵禦國家安全風險的能力。

第三，深入實施《香港國安法》，建立健全香港特區維護國家安全的法律制度和執行機制。我們很高興地看到，兩年來，特區維護國家安全執行機制穩固搭建，順暢運行，執法部門嚴格執法、司法機構公正司法，《香港國安法》的法治效能與社會效果不斷彰顯。同時，全面準確實施《香港國安法》仍有很長的路要走，有賴於香港特區進一步落實維護國家安全的憲制責任，鞏固與發展維護國家安全的法律制度機制；有賴於香港特區執法、司法機關繼續嚴正執法、公正司法，發揮維護國家安全法律的制度效能；也有賴於香港社會整體不斷深化國家安全意識，形成維護國家安全的強大合力。在未來落實《基本法》第二十三條立法時，也要注意做好本地立法與《香港國安法》的銜接，以落實《香港國安法》立法精神為導向，確保本地法律不越位、不抵觸、不稀釋，讓《香港國安法》實施以來取得的各項成效不斷強化、繼續深化、更加優化。

三、不斷夯實香港維護國家安全法律制度的社會基礎，營造風清氣朗、祥和安全的社會氛圍。

習近平主席指出，國家安全一切為了人民，必須堅持以人民安全為宗旨的新時代國家安全根本立場。做好國家安全工作必須緊緊依靠人民，只有全社會共同努力，才能匯聚起維護國家安全的強大力量。為進一步夯實維護國家安全的社會基礎，《香港國安法》要求，香港特區採取必要措施，加強學校、社會團體、媒體、網路等涉及國家安全事宜的監督，開展國家安全教育，提高香港特區居民的國家安全意識和守法意識。

《香港國安法》實施以來，特區政府積極履行維護國家安全主體責任，推動教育、傳媒、司法等領域撥亂反正，17萬公務員完成宣誓，《香港國安法》成為應考政府職位的必考內容；國家安全教育課程框架陸續公佈，中小學升掛國旗、奏唱國歌；「全民國家安全教育日」等系列活動如火如荼，電影、圖書、傳媒、工會、社團等各領域維護國家安全制度建設也在不斷推進，香港社會對「國家安全」的認同不斷提升，對「一國兩制」信心持續增強。

同時需要看到的是，當前香港特區維護國家安全的社會基礎尚未完全築牢，少數暴恐組織轉入地下積極運作，一些反中亂港分子通過文學、藝術等領域持續進行「軟對抗」。為此，香港特區應繼續根據《香港國安法》和相關法律的要求，針對香港社會出現的危害國家安全風險，築牢公職人員國家安全意識防線，加強青少年愛國主義和國家安全、《基本法》、國安法教育，營造維護國家安全良好氛圍，為維護國家安全各項制度的建立與有效落實提供堅實的社會基礎。

各位嘉賓，各位朋友！

今年是香港回歸祖國25周年。這25年來香港所走過的歷程，是融入中華民族偉大復興的壯闊歷程，是不斷塑造現代風貌和開放形象的成長歷程，是不斷完善創造性制度和體制的探索歷程。不論是《香港國安法》的頒佈實施，還是選舉制度的修改完善，歸根結底都是為了保障「一國兩制」行穩致遠，都是為了保障香港長期繁

榮穩定。當前，香港已經實現了由亂到治的重大轉折，正邁向由治及興的歷史新階段。事實已經證明並將繼續證明，「國家安全」的底線愈牢，「一國兩制」的空間愈大！惟有推動維護國家安全法律體系不斷取得新發展，惟有香港市民形成遵守、執行、捍衛《香港國安法》的行動自覺，方能確保香港穩定繁榮，實現香港走向更加安全、美好、璀璨的未來！

最後，祝論壇圓滿成功！

鄭若驊 大紫荊勳賢 GBS SC JP

中華人民共和國香港特別行政區政府
時任律政司司長

各位嘉賓、各位朋友：

非常高興今天可以與大家一同在全國人大通過《528決定》(《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》) 兩周年這個重要日子就《香港國安法》及香港特區進一步建立健全維護國家安全法律制度的路向作出展望。

《香港國安法》實施後，我們很清楚見到社會已經由亂轉治，現正步向由治及興。「興邦自古賢人志，定國豐年家業盛」，所以我們以「興邦定國」為主題舉辦今次的法律論壇。除了各位在現場參加外，在線上亦有超過2,000人一同參與。「安全是發展的前提，發展是安全的保障」。今天論壇的主題—「興邦定國」，就突顯出國家安全是推動國家繁榮富強，保障人民美好生活，維繫社會和諧穩定，實現「國安家好」、「興邦定國」的重要基石。

有些人問，現在立了《香港國安法》，又有《刑事罪行條例》等本地現行法律，將來再完成《基本法》第二十三條本地立法後，香港特區在維護國家安全的工作是否已完成了？

我認為思考這條問題，首先要對「國家安全」這個概念有正確的理解；要清楚知道香港特區是須要全面落實《528決定》及《香港國安法》所規定的憲制責任及義務；要明白香港特區維護國家安全的法律制度是由《528決定》、《香港國安法》和香港本地法律共同構

建；亦要認識其他國家如何立法處理及應對非傳統性的國家安全風險，之後我們就會體會到香港特區有持續完善維護國家安全法律制度體系的責任。

首先，在一國之內，國家安全的概念是統一的，而《香港國安法》關於「國家安全」的定義亦是與2015年《中華人民共和國國家安全法》一致的。根據《國家安全法》，國家安全是指國家政權、主權、統一和領土完整、人民福祉、經濟社會可持續發展和國家其他重大利益相對處於沒有危險和不受內外威脅的狀態，以及保障持續安全狀態的能力[1]。

隨着時代及社會的演變，經濟科技的發展，加上在國際形勢日益複雜的環境下，國家安全早已不再局限於國土安全、軍事安全等傳統安全領域。

習近平主席於2014年提出了總體國家安全觀。總體國家安全觀中的「總體」兩字，所強調的是必須從大局、整體、全面的角度理解和應對這些多變、多樣化，而且常常互相關聯的安全風險。這個概念內涵豐富，既包含傳統安全領域，亦包含非傳統安全領域，例如經濟安全、網絡安全、文化安全等。要全面準確理解這個概念，我建議大家讀一讀上個月出版，由中央國家安全委員會辦公室等機關編寫的《總體國家安全觀學習綱要》。

國安決定和《香港國安法》對香港特區維護國家安全的憲制責任和制度設置作出明確規定，是全面構建特區維護國家安全制度體系的總設計圖。

特區政府有主體責任積極履行《528決定》和《香港國安法》的規定，從多方面着手切實推進維護國家安全的具體工作，例如：完善選舉制度；落實區議員、公務員等公職人員宣誓或作出聲明擁護《基本法》、效忠香港特區；修訂本地法律，確保在各方面更有效防範、制止危害國家安全的行為和活動，包括修訂《電影檢查條例》以

1 《中華人民共和國國家安全法》第二條。

加強防範不利於國家安全的影片上映、修訂《社會工作者註冊條例》令被裁定犯危害國家安全罪行的人不得擔任社會工作者；於公務員招聘考試中引入關於《香港國安法》的題目；以及繼續深入開展國家安全教育，提高社會各界、市民大眾的國家安全意識和守法意識。

律政司亦會繼續致力推動國家安全教育的工作和加強法治意識。在座各位今天入場的時候都收到一本《香港國安法》法律論壇《國安家好》匯編，該匯編收錄了律政司去年舉辦的法律論壇的內容及各講者的演辭。另外，大家亦應該同時收到一本由國際關係學院・國家安全法治研究基地編著的《我們的國家，我們的安全》的繪本，該繪本用深入淺出的方式講解國家安全，很適合兒童閱讀。

第三，我們看看《香港國安法》的實施如何鞏固香港特區維護國家安全的法律制度。《香港國安法》是一部全國性法律，在頒布實施後已融入成為香港法律體系的一部分，與香港本地法律和普通法制度的關係是互相銜接、兼容和互補。

例如，《香港國安法》中有不少條文提到「危害國家安全犯罪」。危害國家安全犯罪這個概念，除了包含《香港國安法》訂立的四類罪行之外，亦包含其他香港現行法律的危害國家安全罪行，例如《刑事罪行條例》所訂的發布煽動刊物罪行。終審法院上訴委員會在去年*伍巧怡案*[2]中已清楚說明，當《香港國安法》下提述「危害國家安全犯罪」的語句沒有特別作出區分，則應詮釋為不予區別地指所有《香港國安法》訂立的罪行，以及在香港現行法律下屬相同性質的罪行。因此，《香港國安法》中多數的規定，例如第四十二條第二款有關保釋、第四十三條有關調查權力、第四十四條有關指定法官等規定，均適用於《香港國安法》及香港現行法律下的危害國家安全罪行。

在保釋方面，終審法院在*黎智英*[3]案中指出根據本港法律，法庭批准保釋與否屬於「法庭運用其判斷或評估而作出的司法工作，而非舉證責任的應用」，顯示了《香港國安法》就危害國家安全案件加

2 *香港特別行政區 訴 伍巧怡* [2021] HKCFA 42，判辭第27-31段。

3 *香港特別行政區 訴 黎智英* [2021] HKCFA 3，判辭第68段。

入嚴格的保釋門檻，而並沒有否定「無罪假定」原則。相比之下，在某些司法管轄區，行政機關獲賦權在無需提出檢控的情況下進行長時間的拘留，以防止危害國家安全的行為。例如新加坡的《內部安全令》賦予總統行政權力，可基於國家安全，在不經審判的情況下對疑犯進行最高兩年（甚至可延長）的拘留，這同時亦完全排除了保釋的可能，而在此令下所作的相關決定一般不可以被司法覆核。

剛才提到《刑事罪行條例》下的煽動罪，我留意到有些人對這項罪行存有一些誤解，例如誤以為條文的用字是過於「模糊」。首先我們要看看在普通法下的一個原則。終審法院在2007年的*毛玉萍*案[4]指出，普通法制度讓法官透過司法裁決因時制宜，以應付新情況和條件。這解釋為何法律無法達到絕對確定性，也說明為何法律的表述本身總會帶有某程度的靈活性。

法庭在近期的*譚得志*案[5]便將上述原則應用到煽動罪中的一些概念性的字句，例如「敵意」、「藐視」、「憎恨」等。因此，法庭認為有關罪行符合「依法規定」原則。法庭亦裁定該罪行符合《基本法》和《香港人權法案》有關保障人權的條文，認為在維護國家安全和保障言論、集會、遊行等自由之間作出相稱而合理的平衡。*譚得志*案的被告人已經提出上訴，我相信有關的法律爭議會在上訴階段得到進一步釐清，從而豐富維護國家安全法律的內涵。

此外，在*唐英傑*案[6]中，原訟法庭解釋《香港國安法》煽動分裂國家罪的罪行元素時，就如何構成「煽動」的犯罪行為及意圖，便引用了普通法案例就「煽惑」確立的相關法律原則。

上述的例子證明在「一國兩制」方針下，香港特區繼續實行普通法制度。香港法院在審理危害國家安全犯罪案件過程中應用了一些普通法概念，充分體現《香港國安法》條文的詮釋與普通法有機結合。

---

4 *毛玉萍 訴 香港特別行政區* (2007) 10 HKCFAR 386，判辭第62段。該案涉及對普通法下串謀詐騙罪罪行元素的爭議。

5 *香港特別行政區 訴 譚得志* [2022] HKDC 208，判辭第54-58段。

6 *香港特別行政區 訴 唐英傑* [2021] HKCFI 2200，判辭第16-34段。

接着，我希望與大家分享其他國家如何應對及處理一些非傳統國家安全風險。近年，不少外國國家例如英國、美國、澳大利亞等也在非傳統安全領域制訂和加強維護自身國家安全的法律。

例如，經濟安全方面，在今年1月，為應對一班反對加拿大政府實施的新冠疫苗強制接種政策，而堵塞加拿大與美國的多個陸路邊境的「自由車隊」貨車司機示威者，加拿大政府首次動用《緊急狀態法》[7]，禁止部分集會，加強警方執法權力，並制定措施凍結涉嫌資助示威者的資金，以解決「自由車隊」示威對美、加兩國的跨境經貿活動的嚴重影響。

眾籌活動是另一個與經濟安全風險相關的例子。例如，一些不法分子以眾籌方式募集資金，表面上聲稱所籌集的資金會用於慈善、資助訴訟等看似正當的用途，但可能實質卻是用作策劃和進行危害國家安全的違法行為。其實，在香港這類已有法律援助制度的司法管轄區，這些聲稱要眾籌來「打官司」的活動根本毫無必要，而特區政府亦會就立法規管眾籌展開研究。

現今社會科技日新月異，隨之帶來的是網絡安全方面的威脅。網絡安全是一個全球性的挑戰，例如，聯合國正就制定《打擊網絡犯罪公約》進行談判；亞洲—非洲法律協商組織亦有就網絡安全的國際法事項進行探討。維護網絡主權及數據主權是備受關注的議題。

在維護網絡安全方面，國際上亦出現了一些新做法。例如，歐盟委員會正在推展《數位服務法案》。法案將要求大型科技企業，包括社交媒體企業，有效管控系統風險及監管網上平台上的違法內容，並加強對其規範，例如要求企業每年接受獨立組織的審核[8]；進行系統性風險評估，密切監察是否有傳播非法內容，及透過故意操

7 Emergencies Act

8 歐盟委員會《數位服務法案》(Digital Services Act) 第28條。

縱平台而影響公眾安全等[9]。值得留意的是，違反該法規定的企業，最高可被處其年收入或營業額百分之六的罰款[10]。

非傳統安全威脅和傳統安全威脅亦出現相互交織的情況。其中與網絡安全相關的是透過互聯網散播假新聞。在最嚴重的情況，假新聞甚至可以被用作為顛覆政權或製造社會不穩的武器，危害政治安全。例如，2021年1月，數千名示威者受到美國總統選舉出現廣泛舞弊等虛假信息的煽動，硬闖和佔領美國國會山莊，意圖推翻總統選舉結果，繼而發展成造成人命傷亡的暴亂，美國司法部已經以共謀暴亂罪起訴了大批暴徒。

在應對假新聞方面，新加坡政府也在2019年推出《防止網絡假信息和網絡操縱法令》，禁止透過網絡傳播可能對公眾利益構成威脅的虛假事實陳述[11]，並訂明一系列規管措施打擊虛假資訊，包括指令傳播虛假信息的人士標註更正或停止發放虛假信息[12]；指令網絡供應商或平台禁止終端用戶閱覽相關虛假信息等[13]。

總體國家安全觀既重視內部安全，也重視外部安全。現時國際形勢有不穩定因素，地緣政治日益複雜，出現單邊主義抬頭的情況。主權平等及不干涉內政是國際關係基本準則和國際法基本原則，亦體現於《聯合國憲章》。聯合國大會於1970年一致通過的《友好關係宣言》也明確指出主權平等的要素尤其包括國家之政治獨立不得侵犯。因此，採取必要的法律措施對外國和境外勢力干預內政的行為予以反制實屬合情合理。

---

9 歐盟委員會《數位服務法案》(Digital Services Act) 第26條。

10 歐盟委員會《數位服務法案》(Digital Services Act) 第59條。

11 新加坡《防止網絡假信息和網絡操縱法令》(Protection from Online Falsehoods and Manipulation Act 2019) 第7條。

12 新加坡《防止網絡假信息和網絡操縱法令》(Protection from Online Falsehoods and Manipulation Act 2019) 第11-12條。

13 新加坡《防止網絡假信息和網絡操縱法令》(Protection from Online Falsehoods and Manipulation Act 2019) 第16, 22, 33, 34條。

在這方面，不少國家已經或將會訂立禁止涉及外國干預的犯罪行為的法例。例如，澳洲早於2018年已制訂外國干預罪[14]；新加坡的《2021年防止外來干預（對應措施）法令》[15]亦訂立了針對以電子通訊進行境外干預的相關罪行；而英國最近向國會提交的《國家安全法案》亦建議引入外國干預罪行。

各位，《528決定》明確指出維護國家主權、統一和領土完整是香港特區的憲制責任，而香港特區應當盡早完成《基本法》第二十三條規定的維護國家安全立法。《香港國安法》第七條亦訂明香港特區應當完善維護國家安全的相關法律。

然而，《基本法》第二十三條只涵蓋七類危害國家安全的行為和活動，遠不能涵蓋國家安全立法的全部內容。正所謂「安而不忘危，存而不忘亡，治而不忘亂」，在總體國家安全觀下，國家安全風險範圍廣闊，亦會隨着環境、局勢不斷演化、改變。因此，回到我剛才所提及的問題，顯然易見的正確答案是香港特區有責任持續穩步完善維護國家安全的法律體系，達到持續有效防範、制止和懲治危害國家安全的行為和活動，包括非傳統安全領域出現的新型風險。

各位嘉賓，各位朋友，發展和安全有如「鳥之兩翼、車之雙輪」。安全是發展的條件，發展是安全的基礎，兩者相輔相成。任何國際商貿投資活動只會在一個社會情況穩定，以法治為基石並為該等活動提供充足法律保障的地方，有效進行。

只有牢牢守住安全發展這條底線，才得以構建國內國際雙循環相互促進的新發展格局，讓香港特區抓緊國家《十四五規劃綱要》及粵港澳大灣區建設的無限機遇，以「興邦定國」為目標，與國家譜寫「一國兩制」新篇章。謝謝！

---

14 澳洲《2018年國家安全立法修正案（間諜活動及外國干預）法》(National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018)及《1995年刑事法典》(Criminal Code Act 1995) 第92.2-92.4條。

15 新加坡《2021年防止外來干預(對應措施)法令》(Foreign Interference (Countermeasures) Act 2021)第17-19條。

座談環節 (2)：
維護國家安全的前沿議題

主持人

陳德霖GBS

香港金融管理局
前任總裁

講員

許正宇GBS JP

中華人民共和國香港特別行政區政府
財經事務及庫務局局長

劉賜蕙PDSM

中華人民共和國香港特別行政區政府
警務處副處長(國家安全)

高禮文

香港大學法律學院
客座教授

陳德霖：戰爭自有人類以來就開始發生，未曾停過！要避免戰爭和戰爭帶來的傷害，為了保障國家安全和領土完整，最根本的辦法是先自強以求自保。但經過自二戰後差不多70年的供應鏈和貿易全球化，現代的戰爭不再一定是以武裝或軍事衝突的形式出現。這一節的討論是探討在非軍事領域的國家安全，也就是無硝煙和殺敵於無形的戰爭！

非軍事領域的國家安全可以有很多不同範疇，今天我想集中討論三項主要「戰線」：金融，網絡和信息，思想和意識形態。為了方便了解這三個戰線對國家安全的重要性，容許我做一個簡單的比喻：你面對一個精通武術，兵器精良的敵人，有什麼方法能兵不刃血，不需使用武力，就能擊倒對方呢？

方法一就是針對對手的心臟，令到他不能順利輸送血液去全身。金融系統的功能是輸送資金支撐社會所有經濟活動，就好像心臟輸送血液支援身體所有器官，如果能夠破壞對方的金融系統或國際收支渠道，那麼敵人就很有可能因為缺乏血液而不戰而敗！

方法二是破壞對方的感官能力，如視覺，聽覺，嗅覺，和神經傳遞系統，令到對手變成盲、聾、啞和沒有反應能力，只能捱打！在互聯網的數字新世界裡，能否防止對方攻擊和癱瘓己方的通訊系統和重要基建設施很可能是成或敗的關鍵。

方法三是針對對手的大腦，影響對手的意識形態，令對手思想紊亂，敵我不分和人格分裂。大腦不能正常運作，又何來有能力抵抗外敵呢？自前蘇聯解體以來，以意識形態滲透而造成內部矛盾和分裂的例子已經經常出現！

在現實世界中，金融、資訊和文化都會成為無硝煙但殺人於無形的主戰場。今天很高興能夠邀請了三位重量級的講者嘉賓，分享他們對這三個範疇的看法！第一位講者是香港特別行政區政府財經事務及庫務局局長許正宇先生，他會談論金融領域的國家安全。第二位講者是香港特別行政區政府警務處副處長（國家安全）劉賜蕙

女士，她會介紹一下資訊方面的國家安全。第三位講者是香港大學法律學院的客座教授高禮文先生，他會討論文化領域的國家安全。以下時間我會先請嘉賓講者每人作 15 分鐘的發言，然後作 20 分鐘的小組討論。

許正宇：大家好！很高興今天有機會出席題為「興邦定國」的《香港國安法》法律論壇，亦感謝剛才主持人（陳德霖先生）的引言。

今天我希望以「金融如治水：維護國家金融安全的策略舉措」為題，與大家分享有關經濟及金融安全的一些思考及政府在這方面的工作重點。如我的題目所述，金融系統有如水利工程，這範疇也是國家在世界的聞名成就，其有效運作為社會及經濟發展帶來資本「活水」，亦讓各行各業得到持續增長的養分及活力，有不可取代的「興邦定國」之效。自古以來不同文明及國家都要做好水利工程，既要讓水源充足潤澤土地，亦要防範洪水暴發造成破壞傷亡。金融系統作為國家軟性及無形的基礎建設，與水利工程有相同的戰略考慮，既要達至資金融通利便民生及促進企業發展，亦要防範各式各樣的金融風險，以免其負面影響傳導至實體經濟。

香港是國家的國際金融中心，自回歸以來我們一直充分發揮「一國兩制」的制度優勢，成為國家融通中外資本的戰略通道與平台。目前在香港上市的內地企業超過1,300家，市值達29萬億港元以上，佔我們股票市場市值約百分之七十七。從此數字大家可以看到香港服務國家金融需求的獨有功能。另一方面，投資內地具發展潛力企業的黃金機會吸引了環球金融機構及投資者駐紮香港，我們的股票現貨交易量有超過四成來自海外投資者，在我們管理的超過34萬億港元資產中，亦有超過六成源自非香港海外投資者。此外，就市場近期關注的「中概股」回流上市而言，香港高效的集資平台可以充分滿足這方面的需求，確保內地企業可以在不受地緣政治影響下繼續於國際市場上融資及定價。截至今年4月，已有21家中概股發行人透過第二上市或雙重主要上市回流香港，其總市值佔所有

於美國上市的中概股超過七成。可以說，香港是國家經濟及金融層面上通向國際市場的一個主要對外河口，也是中外資本交融互動，富有特色的海水與淡水交匯之地。

世界正處於百年未有之大變局中，地緣政治情況出現激烈變化，海水與淡水交匯之地的原有「生態平衡」亦可能因外來因素受到影響。具體而言，我們必須要以「底線思維」審視金融安全風險，思考是否會有外部勢力惡意污染我們的水源、破壞我們原有的「防洪牆」或施計阻隔資本「活水」流入我們的經濟體。在這方面我們會不斷加強及深化應對策略，以積極的防禦措施，堅守不發生系統性金融風險事件的底線。

當中第一個策略是「嚴密監察 穩慎防控」，加強我們識別及應對金融安全風險的雷達及能力。我在政府內部定期主持「金融穩定委員會」，聯同銀行、證券及期貨和保險監管機構，審視國際金融市場的各類風險事件，以期及早制訂應對預案。我們的重點是確保香港市場時刻維持穩健的根基及應變的韌性，在交易、結算及支付等重要環節不出現問題或任何系統性風險。政府聯同監管機構對市場會時刻作出嚴密監察，留意沽空及淡倉水平、衍生工具持倉量、及金融機構財務狀況等關鍵指標，堅守香港的金融穩定。事實上，香港多年來不斷加固我們的金融安全「防洪牆」，財政儲備超過9,500億港元，外匯儲備則超過3.7萬億港元，是貨幣基礎的1.8倍。無論面對經濟或宏觀金融的各種情況，包括維護聯繫匯率的穩定及有效運作，我們都有充足的資源及空間作應對。

第二個策略是「積極審視 完善法規」。金融系統與水利工程一樣，結構複雜而且各項細節環環緊扣，我們必須不斷審視當中是否存在弱點，以免在「防洪」的關鍵時候出現「決堤」。在金融領域這體現於完善法規的重要性，須防範不法分子利用任何弱點危害國家金融安全。我帶領的財經事務及庫務局（財庫局）在這方面會不斷落實具體工作。其中，稅務局在去年9月已因應《香港國安法》實施，修訂適用於慈善機構的稅務指南。如任何團體支持、推廣或從事不利於國家安全的活動，稅務局將不再認定其為慈善團體，並會撤

銷根據《稅務條例》第88條給予的豁免繳稅資格。修訂後的指南適用於新申請及已獲確認資格的所有慈善團體，稅務局會進行定期覆檢，如發現有團體已根本性地改變慈善宗旨，將撤銷其所享受的相關資格。

此外，我早前亦公布財庫局將在今年諮詢公眾，考慮專門制定適用法例以規管眾籌活動。當中需要重點防範及打擊的是以眾籌方式募集資金，策劃危害國家安全活動的違法行為。我們有需要制定適當的規管制度，杜絕任何人或組織直接或間接以眾籌手段為危害國家安全活動籌集資金，亦須切斷逃亡海外不法分子在香港的眾籌資金鏈。諮詢將涵蓋幾個重點範疇，包括眾籌平台是否須獲得牌照或進行登記、資金募集者是否須作出披露、及如何建立一套匯報制度以供舉報危害國家安全的可疑交易等。

各位嘉賓朋友，我在剛才的分享中多次提到，香港金融市場是富有特色的海水與淡水交匯之地，具有促進中外資本交融互動的獨有功能。事實上，「鹹淡水交界」既有來自陸地的豐富養分，又較海洋相對安全，因此是理想的棲息地。放在香港作為國家的國際金融中心這角度來看，我們背靠祖國，享有經濟及金融發展上的無限機遇，對外我們也是聯通國際的高度開放市場。在《香港國安法》發揮其定海神針的作用後，財庫局會進一步落實今天提到維護國家金融安全的各種策略舉措。在這些措施的保駕護航下，我們在落實國家「十四五規劃」下給予香港的各種金融新機會時將真正無後顧之憂。本地、內地和國際金融機構及投資者都可以在社會及政治安全得到保障的前提下，利用香港作為平台開拓更多金融業務機會。

我的分享到此，期待稍後的討論環節。謝謝。

陳德霖：很多謝許局長的分享，我很喜歡他的比喻，以「水」作比喻可能較為貼切，水為財，一定要治理好水，無水不行。無論現代、古代戰爭都需要錢，沒有硝煙的戰爭裡，錢方面可能也很

重要，不過未必一定是軍餉方面，稍後我還有一些問題要與許局長跟進。下一位講者是 Edwina (劉賜蕙女士)。

劉賜蕙：陳德霖先生、許正宇局長、高禮文教授、各位，大家好！

我很榮幸參加本年度的《香港國安法》法律論壇。今年的論壇主題是「興邦定國」，要做好這個目標，我們須要一個安全穩定的社會環境及發展空間，讓社會各界得以各展所長，為國家、為特區作出貢獻。同時，大家亦可共享社會平穩、持續發展所帶來的「紅利」。國家安全是「興邦定國」的必要條件，亦是先決的條件。

國家安全體現在眾多領域，除了剛才許局長和稍後高教授會談及的經濟安全和文化安全外，網絡安全亦是很重要的一環，是我們國家安全十六項重點領域之一[1]。國家主席習近平亦提出「沒有網絡安全，就沒有國家安全」。現今的國際形勢複雜多變，香港作為中國主要城市，開放型國際大都會，資訊發達，我們的網絡空間極可能成為國際地緣政治角力的其中一個「主戰場」。香港須要打好網絡安全的「保衛戰」，正所謂「一榮俱榮，一損俱損」，我們沒有「躺平」的空間，須要有危機意識，不斷作出提升，才可以做到「知彼知己，百戰不殆」。

今日我會聚焦分享香港在網絡安全方面的形勢、風險點、局限，及嘗試作出一些優化建議。

香港網絡安全形勢

首先是網絡安全形勢。多年來，香港一直是世界最安全的國際大都會之一，亦是亞洲領先數碼及智慧城市，罪案率維持在極低水平，但我們關注到科技罪案及網絡保安事故在近年急升，加上未有總體牽頭部門統籌網安的工作，相關的法規亦存在優化空間，以及

1 國家安全涵蓋16個重點領域，當中包括：政治安全、國土安全、軍事安全、經濟安全、文化安全、社會安全、科技安全、網絡安全、生態安全、資源安全、核安全、海外利益安全、生物安全、太空安全、深海安全及極地安全。

互聯網產業和基礎設施亦面對升級換代等的挑戰。整體上，香港的網絡安全形勢，可能未必能跟上我們的國際地位及發展定位，所以我們一定要「落功夫」去鞏固提升。

風險點

接著我會分享兩個值得關注的網絡安全「風險點」：

（一） 網絡犯罪

第一是網絡犯罪所衍生的風險。近十年，香港的科技罪案上升4倍，至去年的1萬6千多宗[2]；網絡保安事故亦由千多宗上升近6倍，至去年的7千多宗[3]。一定程度上，揭示了香港的網絡安全風險隱患。雖然，目前的科技罪案及網絡保安事故主要涉及泄密、入侵、勒索等治安及經濟犯罪行為，但我們必須嚴防違法分子利用網絡犯罪手段，發動危害國安的敵對行動。

（二） 網絡攻擊及利用網絡進行危害國家安全活動

第二個「風險點」是網絡攻擊及利用網絡進行危害國家安全活動。香港的重要基礎設施，例如發電廠、醫療系統、銀行、公共運輸及通訊設施是我們社會運作的筋骨命脈，一旦它們的網絡系統遭到攻擊，可以導致社會運作癱瘓、緊急服務停頓的嚴重影響，後果極之堪虞。

而香港的公私營機構系統一般發展比較早，部分系統用了較早期的設計框架，系統更新亦多數在現有基礎上做鞏固提升，軟硬件的升級換代，面對追趕科技的挑戰，存在被入侵及資料外洩的風險。

---

2 科技罪案由2012年的3,015宗上升至2021年的16,159宗，10年間上升4.4倍。

3 網絡保安事故由2012年的1,189宗上升至2021年的7,725宗，10年間上升5.5倍。

另外，不法份子亦利用網絡去煽動暴力及作出大規模的非法動員。在2019年「黑暴」期間，就有人利用不同網絡平台，包括「電報」群組，公然號召群眾在全港發動暴亂。今年初，加拿大亦有大規模網上動員民眾，參加暴力示威，抗議防疫措施，導致當地城市陷入癱瘓。同時，互聯網亦被用作散播煽動性的違法訊息及「假新聞」。影響惡劣的例子有「黑暴」時所謂「831太子站死人」的虛假資訊，短時間內在網上快速流傳，矇蔽市民，煽動仇恨，禍害極深。另一方面，我們亦關注到有非法分子在網上進行「思想滲透」，荼毒大眾，甚至是幼童，例如以幼童及家長為目標的煽動性兒童網上讀本「羊書」系列。另外，亦有人透過網上「眾籌」「吸金」，目的是為了資助危害國安的活動。

局限

香港在應對這些網絡安全風險，面臨一定局限，當中較突出的有三個方面：

（一） 缺乏整體負責部門及統籌機制

第一是香港仍未有一個整體負責的部門及統籌機制。現時不同的政府部門及機構[4]在網絡安全上，分別肩負著不同的角色，大家雖然各司其職，各盡所能，但工作上難免各有優次。有別於內地[5]、美國[6]及新加坡[7]等地的做法，香港暫時沒有一個總體專責部門及機制去牽頭領導、監督協調各項網安工作。各個部門及機構在推行各自工作的時候，可能出現步調不一、難以產生協同效應等情況。整體上，不利於推行具前瞻性及突破性的進展，執行起來難免步履維艱。

---

4 包括保安局、警務處網絡安全及科技罪案調查科、香港電腦保安事故協調中心、政府資訊科技總監辦公室、政府電腦保安事故協調中心、通訊事務管理局、互聯網基建聯絡小組及香港金融管理局等。

5 中央網絡安全和信息化委員會辦公室。

6 美國網絡安全和基礎設施安全局（Cybersecurity and Infrastructure Security Agency）。

7 新加坡網絡安全局（Cyber Security Agency of Singapore）。

（二） 地緣政治

第二方面的局限，是地緣政治所帶來的。香港人常用的社交媒體[8]，大部份是外國公司，他們的數據庫都在海外。這些公司的香港分部慣常拒絕本地執法單位的調查請求，阻礙了調查進度[9]。另外，亦有人從海外透過社交平台及通訊軟件[10]散播虛假及煽動性的訊息，向本地網民滲透違法、極端思想，對國家安全構成威脅。而由於這些人身處海外，我們在打擊上，會遇到一定的挑戰。

（三） 法規

第三方面的局限，是法規有待完善。現時，香港未有法規去界定及規管重要基礎設施的營運者；沒有規定網絡供應商就用戶的網絡言行作出監控，亦沒有要求他們保存用戶的網路足跡，或者就違法行為作出通報；另外，亦沒有規管流動網絡供應商[11]就著用戶身份做查核及紀錄[12]，這些都令我們未能有效率地移除網絡安全風險及應對突發事故。

優化建議

所謂「鑒往而知來」，為了提升香港的網安風險抵禦能力，及突破剛剛提及的局限，我嘗試提出以下三項優化建議：

（一） 構建全方位戰略性的網絡安全治理體系

香港可以參考內地及海外的例子，設立或者指定一個整體負責網絡安全的部門及統籌機制，專責領導、協調、監管及推動各個相

8 例如Facebook及Instagram。

9 執法部門須要透過「相互法律協助」(MLA) 形式向海外國家、地區作出申請。

10 例如Facebook及Telegram。

11 4G 及5G網絡。

12 舉例：流動網絡供應商會將一組「流動網際網絡協定地址」（Mobile IP Address）於同一時段內，分配予多個登記用戶使用；即使警方發現該Mobile IP Address涉於網上進行犯罪活動，流動網絡供應商亦未必能根據該Mobile IP Address確定實際涉案用戶的身份。

關政府部門和持份者的協作，擔起牽頭角色，全盤推動策略制定、清晰分配各單位的權責，以及統籌網安工作，例如演練測試、優化系統，及制定行動預案等。在這個整體負責部門的督導下，各個相關部門亦應制訂清晰的發牌、巡查及調查等監管機制，確保主要持分者[13]遵守網安要求。

（二） 加強各持份者的協作

內地及歐美等地都已經有法規監管重要基礎設施的營運者，香港亦應該從速訂立類似的法規，確保營運者做好他們維護網絡安全的責任。除了用法規這種「剛性」手段進行規管，政府亦可以考慮提供政策便利、資助及培訓等比較「軟性」的誘因，鼓勵持份者投放更多資源，升級軟硬件配套，及擴大網絡流量監控能力，全面提升網絡安全的防禦能力。

另外，我們亦要建立良好的網絡安全文化。面向不同層面的受眾，例如網絡供應商及用戶，政府有必要推動具有針對性的網安文化宣傳教育工作，特別是對營運業界（例如前線系統技術員），及一些較易受煽動的網絡群眾（例如青少年網民）。我們可以從各個持分者的切身關注點出發，配合實際情境例子，度身訂造切合各人的網安知識套件，做到「入心入腦」的最佳效果。

同步，政府亦應該善用科技手段，辨識及偵查危害網絡安全的「苗頭」，主動打擊失實及煽動性的訊息，包括對網上訊息進行實時監察，適時駁斥及澄清，並且依法作出移除。務求做到「早發現、早介入、早處理」，有效阻截劣質及違法訊息在網上蔓延，建立、鞏固良好的網絡安全文化。

（三） 完善法規

國家已經就《網絡安全法》、《數據安全法》、《個人信息保護法》、《關鍵訊息基礎設施安全保護條例》等針對網安的法規作出了

13 平台服務商、主機服務商、網絡服務商等。

立法，亦推出了《網絡安全審查辦法》及《雲計算服務安全評估辦法》等規章。而在國際方面，歐美等地亦陸續實施了類似法規（例如歐盟的《通用數據保障條例》[14]；美國的《雲端法》[15]和《加強美國網絡安全法》[16]；以及澳洲的《網絡安全法》[17]）。這些內地及海外例子，為香港提供了重要參考及示範作用。

在這方面，我知道特區政府正積極推展整體國家安全，及特別針對網絡安全的法規制定、優化工作，包括《網絡安全法》、《基本法》第二十三條的立法工作，以及《香港國安法》第四十三條《實施細則》附表4的優化工作。我們警隊會全力支持配合政府在這方面的工作。

總結

總括而言，網絡安全跟我們所有人息息相關，維護網絡安全，人人有責。要達致論壇主題所講的「興邦定國」，在網絡安全的領域，除了我們政府、執法者的力量，更加須要所有人一起，法律界、學術界、各個不同持分者，以及廣大市民，大家「捲起衣袖」，在各自範疇共同努力，多管齊下，出謀獻策。

我們眾志成城，香港一定會「打贏」網絡安全的「保衛戰」，在維護國家安全的道路上，行穩行好，致遠圖強。正所謂:

「路阻且長，行則必至；
興邦定國，就在當下。」

我的分享到這裡，多謝大家。

---

14 歐盟於2018年實施《通用數據保障條例》(GDPR - General Data Protection Regulation)，規定數據在一定情況下不得向歐盟以外的國家或地區轉移，持分者的業務流程亦須確保資料保護。

15 美國於2018年實施《雲端法》（CLOUD Act），無論資料儲存地在美國境內或境外，執法機構均可對通訊服務提供業者強制執行，請求通訊紀錄的保存或揭露。

16 美國於2022年實施《加強美國網絡安全法》(Strengthening American Cybersecurity Act)，加強公共和私營機構的網絡安全，推進各機構處理網絡事務現代化水平，升級政府的雲技術應用，持分者須在特定時限內向政府報告漏洞。

17 澳洲於2022年實施《網絡安全法》（Online Safety Act），授權政府可命令服務供應商刪除社交媒體網站上的違法內容，政府可申請封鎖對公共安全構成威脅的供應商和社交媒體。

陳德霖：多謝Edwina的分享，剛才她的分享帶出了很多問題。我想提出一點 - 很多人都有一些誤解。大家都知道網絡安全很重要，就好像人的神經系統、訊息系統，但是他們傾向以為這是一個科技上的技術問題，只要你付錢給一些專家，他們就可以做得好一些，把它處理好。剛才Edwina已明確指出這是一個深遠重大的問題，包括政策、體制和資源，以及很重要，是要由上至下大力的推動。剛才你提及的協調機制，不可以只由警務處或者金管局一個部門負責推行，一定要在最高層面有一個協調、決定，還要排除萬難。因為我曾在政府工作，我知道協調部門是十分困難的，尤其是一些成功的部門。我不是說笑，愈成功的部門愈難協調，因為他們會覺得我做得那麼好，你還要找人在我之上架一層，阻礙我的發展，又要我這樣那樣，所以稍後我們可以再談談這些問題。Richard (高禮文教授)，你將會談到關於文化領域的國家安全。有請Richard。

高禮文：各位嘉賓、各位朋友，下午好。

感謝陳先生的介紹，也感謝律政司邀請我來今次的論壇演講。

將近一年前，我於律政司舉辦的《香港國安法》法律論壇指出，在一個理想的世界，不需要國家安全法。可是，我們並非活於這樣的世界。2019年中，動亂伊始，連天蔓延香港各處，便確證這一點，隨後所見亦一再印證此言非虛。

今天我會探討一下藝術文化與國家安全的關係。這是充滿挑戰的一環。藝術文化之事，猶可淪為擾亂和顛覆既定政治秩序的手段。然而，我們還是欲見藝術文化蓬勃發展，尤其在香港，歷約廿載積極籌備，具備卓越世界級水平、集多用途場地於一身的西九文化區，現在終於逐步落成啟用。

今天，我的時間分配如下：

- 首先談談一個藝術與政治結合的著名例子所帶來的影響；
- 概論藝術文化表達的重要性質；
- 考慮一些基礎背景事宜；
- 審視現今個人激進化往往如何展開；及
- 討論如何最妥善應對藝術或文化項目中可能形成的國家安全風險。

蘭妮・萊芬斯坦一例

所提論點

蘭妮・萊芬斯坦是位極具天賦的德國導演，生於1902年，卒於2003年，享年101歲。她最聞名於世的 —— 實際上臭名昭著的 —— 是其攝於20世紀30年代記錄納粹政權如何在德國崛起和統治之作。最令人不齒的，是她執導攝於1934年紐倫堡納粹大會的震撼影片，名為《意志的勝利》(Triumph of the Will)。萊芬斯坦親自操刀的另一力作，還有納粹時期所拍的1936年柏林奧運，當中採用的嶄新技術，至今依然沿用。

長遠影響

萊芬斯坦藝術技巧超卓引人矚目，就連福特汽車公司創辦人亨利・福特亦於臨戰前1938年在美國底特律盛情接待過她。戰後，這股攝人的藝術魅力仍然迷倒多名頂尖搖滾樂手，包括約1974年的這位相中人。

萊芬斯坦的作品提供絕佳印證，展示藝術作品能：

- 如何力塑政治觀念；

- 兼使極端政治意識形態更為人接受；
- 同時仍保持藝術水準非凡。

藝術文化表達：主要框架

藝術表達的一個定義是：*有意識地運用想像力來創造旨在發人深省或令人欣賞的美麗或迷人事物。*

這與文化表達有明顯重疊。文化表達據指涵蓋那些源自*個人、團體和社會發揮創意而具文化內涵的表達。*

任何人運用藝術或文化展現自我都在表達觀點。不論觀點屬於傳統，還是大受爭議，目的通常在於說服別人，或至少引起別人注意。若然涉及政治內容，則可能旨在激起辯論，確認現狀價值，敦促改革 —— 而在極端情況下，甚至驅使他人破壞穩定，從而顛覆現有憲制或社會秩序。

這些定義相當抽象，要將之實體呈現，方法之一是回溯蘭妮·萊芬斯坦此例。萊芬斯坦的電影傑作本身極富創意，從她堅確的視野來看，作品的藝術特質值得深思細味。她的作品亦大力強調某種篤定的德國文化身分，這對其他受誅的特定身分而言，倒卻嚴重顛覆了後者的地位和認受度。

戰後的20世紀50年代，英國首次引入商營電視，當時新成立的商營電視台一律絕對禁播政治及宗教的付費廣告。人們認識到，電視視頻影像具有其他媒體無可比擬的說服力，這是根本的政治現實。數十年後，此項施以基本內容控制的法律受到質疑，英國上議院於2008年一致裁定上述理據依然正確 —— 政府的民主體制必須受到保護，使其基本秩序免受電視上黨派和煽動性政治活動帶來的風險所危及。[1]

---

1 *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL,15.

情況依然不變，採用視頻形式來表達文化或藝術，由此而生的潛在傷害仍屬最大。

關鍵脈絡

我們需要注意，若干較廣泛的適用層面會涉及國家安全的關注。這些因素部分可能會直接加劇國家安全風險，其他則可能指向一些特殊的不明朗因素。我想各舉一關鍵例子略談一下。

約翰・米爾斯海默教授是美國的知名國際關係學者。在芸芸著名美國評論員中，他是其中一人指美國正與中國步入新冷戰 —— 並指這是好事。其他評論員卻指這是一場嚴峻的貿易科技戰而非冷戰。

姑勿論真實情況如何，毋庸置疑的是，美國現正進行全面計劃，毫不掩飾地利用政治、經濟、媒體和軍事手段來遏制中國崛起。該國自2017年起大張旗鼓推進此項艱巨任務，投放力度有增無減，自總統拜登2021年執政至今從沒鬆懈。

自2019年6月起席捲全港歷時多月的動亂，就在此極其關鍵的不利環境下展開。在這場極具破壞力的政治動亂中，美國推波助瀾、助長事態發展，角色至關重要。

此地緣政治背景於2019年非常重要，在今天可能更形重要。正如前終審法院法官烈顯倫去年所指，有人試圖以該場動亂推翻香港特區政府。從任何角度來看，美國因地緣政治引發的嫉妒、焦慮、沮喪和好鬥情緒正在持續升級。

接著，我們來審視「易受影響的程度」。世人常常引述亞里士多德兩千年多前所說的話 —— *讓我帶孩子到七歲，回你身邊時他已長大成人*。在成長階段甚至求學時期，兒童及青少年正在摸索如何立身處世，特別傾向易受他人影響：他們會不斷探求新的說明、解讀及印證。2019年的經歷，給我們上了重要一課，許多年輕港

人受到種種歪曲事實、危言聳聽的言論唆擺左右 —— 年輕人天性好奇，燥動不安，情況因而更甚。

激進化的過程

2008年巴黎「阿斯彭文化對話」活動上發表的主題演講，論述文化與安全之間的關係經已如何改變，令人信服。該論文重點述說伊斯蘭裔年輕一輩的激進化情況。然而，講者阿澤姆・易卜拉欣教授恰切指出，其條分縷析的論述亦適用於與任何意識形態相關的激進化過程。[2]

那麼，激進思想一般如何散播？該論文發表時，易卜拉欣教授已清楚知道，境外影響加劇本土的刺激因素，就此具根本重要性，而現代科技早已起變革作用，提供便利讓人可隨時接觸到此等影響。

易卜拉欣歸納分類，表示激進化的過程通常分為四個階段：

1：基於既定理解形成個人道德義憤（這種理解有其軸心，例如穆斯林受難故事 —— 或因政治權利遭剝奪而感到不忿）；

2：其後接觸一些解讀，便將此不忿情緒放諸更廣泛的煽動性背景中使之加劇；

3：任何隨後的個人負面經歷現在均可加深這份憤恨；

4：該人便遠比從前更願意參與暴力激進運動。

易卜拉欣教授總結指，這激進化過程的展開，基本上取決於個人對現實的詮釋。這種對世界觀的詮釋，主要由個人的核心思想及信念塑造出來。科技能擴大激進思想的影響（其中以社交媒體形式尤甚），這股威力無遠弗屆，今時今日較之2008年，更是有過之而

2 易卜拉欣・阿澤姆，「文化與安全之間的關係經已改變」(The Relationship Between Culture and Security Has Changed)，哈佛大學貝爾福中心，2008年11月13日，可參閱：https://www.belfercenter.org/publication/relationship-between-culture-and-security-has-changed

無不及。大眾傳播模式之廣，成本之低，前所未見。而且，更可隨時轉為隱密模式。

如何應對

絕大多數情況下，藝術創作及文化創作皆涉及，*有意識地運用想像力來創造旨在發人深省或令人欣賞的美麗或迷人事物*。然而，這些創作亦可用來宣揚激進跋扈的思想，助長暴力極端主義。

那麼，我們如何能公平穩健地確保，在維護國家安全之餘亦讓藝術蓬勃發展呢？這是核心的挑戰 —— 絕非輕鬆自在、輕而易舉就能解決。我們需要覓得平衡。極端的情況可能清晰不過。然而，恰切取得箇中平衡，必然是持續不斷的過程；從中我們汲取經驗，完善和調整現有規範，用以區分出具顯著危險的文化創作或藝術創作。與此同時，溫斯頓・邱吉爾曾經忠告，若試圖全面掌控以防患於未然，因而過度立法，則當心受其囿限，適得其反。如他所說：「*法律若規條萬千，便會殆失尊敬*。」

即便如此，審視創意產物時，還是有些基本初步驗證可循，建議如下：

- 誰是目標受眾？特別是，受眾有多年輕？
- 創作背後主要動機為何？
- 創作的根源及資金方面，有否任何明顯證據表面看來須予關注？
- 該創作是否符合「忠誠反對派」的驗證 —— 亦即是說，儘管該創作可能屬政治批判，但是否顯而易見，該作品及其創作者致力維護基本社會秩序？

背景亦是至關重要。誠如前述，美國現正進行全面計劃，盡量拉攏盟友，明目張膽地利用昭然若揭的政治、經濟、軍事手段——乃至媒體手段，遏制中國崛起。情況勢必持續多年，甚或會更趨激烈。總體來說，在香港製造嚴重動亂，顯然有利於實行這項美國為首的遏華大計。

一般來說，我們需要決定的是，在剛才提述的背景下，某項藝術創作或文化創作，是否顯然支持真正容忍和助長無法無天的局面。正如著名的拉丁美洲革命家西蒙・玻利瓦爾約二百年前所說：*「無政府狀態是自由的最大敵人」*。

陳德霖：謝謝 Richard 的演講，內容精彩，引人入勝。我這裏有些問題，稍後向你提問。現在我們還有點時間進行座談會討論。第一個問題，我想問一下Chris。剛才你提到金融體系的重要性和很多防禦工作，防水、治水，各方面的工作都很好。不過近期大家都非常留意烏克蘭衝突的情況，大家亦留意到我們以前一般說在金融體系裡一個很重的武器，稱為金融核彈，即是「financial nuclear bomb」，已經在運用中，去應付對付俄羅斯，包括凍結它的中央銀行資產和一些商業銀行資產，以及一些個人資產。還有最厲害就是在 SWIFT (環球銀行金融電信協會) 體系裡將部份俄羅斯銀行剔出來，令到它在國際支付方面有困難。我有很多朋友碰面時都問這個問題，其實香港是一個國際金融中心，很多國際的交易支付，所有這些公司或者金融機構都和海外有很多結算活動，如果中美關係繼續惡化，我們會否需要擔心?

許正宇：其實剛才幾位講者包括Edwina和Richard，他們都在不同角度提到了國家安全和在社會不同層面之間的關係，剛才Norman (陳德霖先生)你說的是關於具體金融方面。最近這些局勢的變化，大家都看到。但去看整件事或者香港的本質，其實一直以來，我們都是一個全球化的得益者和倡導者。那麼我們這個自由或者全球化的核心是什麼呢？就是要有一些自由流通的資本、自由

流通的人、自由流通的服務和產品。為什麼我要先說這些呢？因為這正正是你剛才所說的，金融的武器化所造成的影響，將我們過去一直以來全球化得來的好處，或者自由流動的好處削弱和影響。從這個角度看，我覺得不單止香港本身，其實很多和我們一樣，一些小的經濟體或者自由經濟體，如果過去在這個全球化和一個自由流動的資本，個人也好，又或者機構投資者也好，都應該作出譴責，因為從一個比較宏觀的社會文明，或者經濟發展角度，一定是有害無利，以及令到我們整個資源配置會愈來愈差。所以在這個問題核心之下，我們要如何應對呢？

其實 Edwina 的分享給了我很多啟發，她說到在網絡安全方面，我們需要強化一個頂層建築，又或者是部門與部門之間的協調，正是這個原因，我們政府內部，可能 Norman 也清楚，我們有一個「金融穩定委員會」，就是跨界別從銀行、證券期貨和一個保險的角度去看究竟我們在平時的系統操作也好，市場營運也好，有甚麼風險點或者風險位我們需要去維護或者加強。所以我覺得重點不是擔心與否的問題，反而是我們的心態要持續謹慎去看整個變化。因為回看剛才幾位講者，我覺得雖然大家是在不同領域的關於國家安全的討論，但有一個核心，也不只是香港獨有，就是國家安全的維繫其實「is always a work in progress」。因為社會變、市場變，人也會變，所以為什麼我們要方方面面不斷去優化、潤色和提升剛才提到的「防洪牆」，或者更加廣義的一個防控，或者一個防禦的能力。在這方面，作為一個有責任的政府，一定會自動去做。所以在這方面我們會繼續沿用剛才所說的策略，穩妥監察，同一時間利用我們已有的空間和資源保持我們金融中心的地位，這一方面我們是有信心的。

陳德霖：即是說我們做好自己，保障好自己各方面，就不需要太擔心外部的制裁，是否這個意思呢？

許正宇：是。

陳德霖：謝謝。

陳德霖：這個問題想問 Edwina。剛才你做了很多分析，有些我認為是很好的建議，不過這是一個大工程，不是一個部門可以推動的，希望特區政府高層很快會加把勁。剛才你提到一點就是網絡安全要做好，另外亦提到有人利用假消息、假新聞，抹黑式的散播一些謠言，目的很清楚是想挑撥，散播一些仇恨，或者是令到市民想推翻政權，破壞社會秩序。在對付假新聞方面，剛才司長提到有些地方，包括我們的鄰居新加坡，2019年也有一些應對措施，那麼我們香港要如何應付呢？這是否有一個比較急、比較高的優先次序呢？

劉賜蕙：多謝Norman。是的，假新聞、假消息對社會的遺害真的很大。這些虛假消息傳播很快，我想我們在座每人每日可能都收到這些WhatsApp、WeChat訊息不下數百個。在這資訊氾濫的期間，每日都到收很多資訊。這些資訊很短，或者有些是圖像。但圖像帶出的訊息實在亦深入我們每個人心裡，亦沒有可能這些資訊全部都有一些數字上的來源，所以很多時看了就會潛移默化影響了你。我們看到很多這樣的假消息很快地散播，如果一些有心人，或者一些心懷不軌的人利用這種方式傳播這些消息，實在是對我們在國家安全方面影響很大。

一些活生生的例子就如剛才提到的「831太子站死人」，大家都聽很多了。最初是死了一個人，後來死了一班人，再後來死了很多人，接著全被推到海裡，隨後不同部門就一起密謀將這些屍體處理。大家記得在很長時間裡，我想超過一年的時間，在太子站有一個祭壇，每逢31日，如果那個月份沒有31日，就會在30日，很多人去獻花，你可以看到對整個社會影響有多大。第二個例子就是，那時有一位女示威者眼睛受傷，之後有一個手勢，就是一個大家都很熟悉的手勢，這個手勢看上去好像沒什麼，只是大家玩一玩，傳一傳，但是如果大家記得，它的影響是甚麼呢？就是最終有大批示威者去了我們的國際機場示威，令到我們整個機場癱瘓了好一段日子。你們可以看到這樣的一個訊息，影響實在很大。

但在網絡上我們也不是完全沒有辦法的，我們現在是有法例對付一些網上違法行為，例如一些煽動暴力的破壞、非法「起底」，和危害國家安全的一些訊息、貼文，我們都有法例可以處理的。如果有一些危害維護國家安全的貼文，我們可以用《國安法》第四十三條將它禁制，這個我們一直在做。事實上，剛才司長亦提到在外國很多國家已經針對這些假新聞、假消息進行立法，因為禍害實在太大。新加坡、法國、甚至是歐盟，他們都有一些規條規管假新聞。正如我們剛才提到，香港政府現正積極研究將假新聞立例管制。

法例當然重要，但教育亦非常重要。我相信社會不同年齡層的人士都應該：第一，認知有假消息、假新聞這件事。不要收到任何訊息都第一時間相信，因為不單在危害國家安全的情況，就是在最近這個疫情期間，如果大家記得，當時我們正商討究竟會否進行全民檢測。有一天有個訊息說立法會剛剛於早上落實了將會做全民檢測，之後人們就蜂擁至超市，把所有貨品掃光，實在對整個社會影響很大。所以教育是很重要的，大家要知道是有假消息、假新聞這件事。收到訊息之後，如果這個消息對他來說是重要的，應該嘗試去看看它是否真確，去查找一下孰真孰假。如果個人或者一個組織、一間公司，甚至政府，是受到假消息的影響，應該第一時間出來澄清，以正視聽，減低它的壞影響。

陳德霖：謝謝你，Edwina。最後一個問題，我來問Richard。有一點對任何政府來說，不單止香港政府而已，似乎都說易行難。那就是一方面既要保護文化藝術的表達自由，另一方面也得維護國家安全，任何政府都正尋求從中取得適當平衡。那麼，香港如何才最能達此平衡呢，你對此有何忠告嗎？比如說，依你建議，我們應考慮何種制度安排，是否需要頒布一套新的法律法規，以及如何幫助各國處理這類問題？

高禮文：好的。這是一個好問題。從我的演講可知，雖然身為律師，我卻不太主張引入更多法律，因為往往會後果叢生，招來更多弊端。但我認為，Edwina 的回應確實道出了許多我想作出的建

議。我認為我們該積極推展工作，但應按實際經驗而謹慎行事。因此，我們應該借鏡於外，參考別國做法，從而迅速行動，敏捷應對。我當然並沒找到解決這問題的完美答案，但也許我可說說幾件軼事，最後來評論一下澳大利亞的法規。這並不完全關乎法規，而是關乎管控國家安全風險。這確實表明，它在這些情況下都能奏效。

首先，越戰期間在美國，採訪報道涉獵甚廣，而且都是負面為主。而在伊拉克戰爭，卻無此情況。美國國防部想出了該怎麼做，而且坦白說，這是許多司法管轄區沿用的做法。日本尤其以此聞名。若想阻止壞消息甚或假新聞散播，就得限制資訊的取覽。因此伊拉克戰爭期間，所有記者都必須與美國軍方隨行方獲准採訪，否則便無法得知戰況。所以，當時的報道反映這一實況。有趣的是，我在西方主流新聞媒體上看到評論，尤其是在美國，控訴俄羅斯如何安排記者隨軍採訪。好吧，這可是從美國學來的。

另一個例子頗為不同，但也涉及非常暴力的情況，剛才也聽到提述，就是關於北愛爾蘭的事。因此，在江樂士教授提到所謂的「北愛問題」時期，英方下了決定，不容許電台電視廣播愛爾蘭共和軍成員和聯合派陣營中對敵者的聲音，只可安排他人配音。我並非指我們該這樣做。然而，要更好地理解箇中影響，可想像一下假如電台電視不得播出黃之鋒的音容，只能找人讀出他說的話，那麼他的說話並未被阻止，但影響卻減低了。

最後讓我們看看澳大利亞，那裡有一條法律它基本上涵蓋各類刊物(第9A條)，規定一般而言，檢查員可查看涉及恐怖主義議題的物品，關乎恐怖活動的物品，接著閱覽報告內容，看它是否只屬於討論、娛樂或諷刺所以能獲批准。如這些驗證一概未能通過，則政府實際上可以說不得發布。他們確曾這樣做，但僅此一次，因為澳大利亞的媒體大多明白該對哪些事情敬而遠之。舉凡相當可能煽撥和增添恐怖主義或暴力的報道，媒體都應避之則吉。

陳德霖：謝謝 Richard。請大家和我一起多謝我們的嘉賓和講者，謝謝。

興邦定國

《香港國安法》法律論壇

National Security Law Legal Forum

Thrive with Security

金融如治水：
維護國家金融安全的策略舉措

香港特區政府財經事務及庫務局局長許正宇

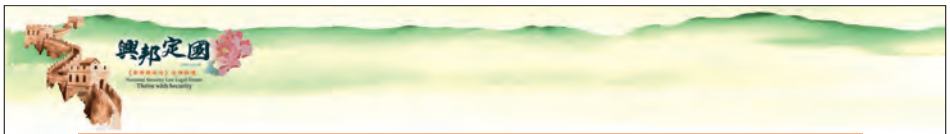
1

興邦定國

金融如治水：金融系統有如水利工程，其有效運作為社會及經濟發展帶來資本「活水」，亦讓各行各業得到持續增長的養份及活力，有不可取代的「興邦定國」之效

要讓水源充足 潤澤土地	水利工程	防範洪水暴發 做成破壞傷亡
資金融通利便民生 及促進企業發展	金融系統	防範金融風險及 其負面影響傳導 實體經濟

2



香港是國家經濟及金融層面上通向國際市場的一個主要對外河口，
也是中外資本交融互動，富有特色的海水與淡水交匯之地

香港服務國家金融需求的
獨有功能

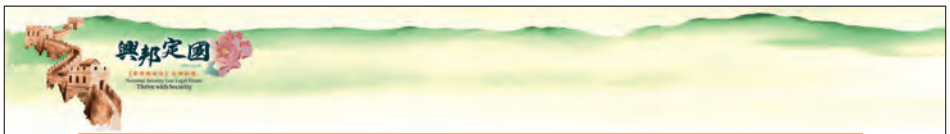
投資內地企業的黃金機會吸
引了環球金融機構駐紮香港

在港上市內地企業超過1,300家，
市值達29萬億港元以上，佔我們
股票市場市值約77%

1. 股票現貨交易量超過四成來自海外投資者，管理超過34萬億港元資產超過六成源自非香港海外投資者

2. 21家中概股發行人已回流香港，其總市值佔所有於美國上市的中概股超過七成

3



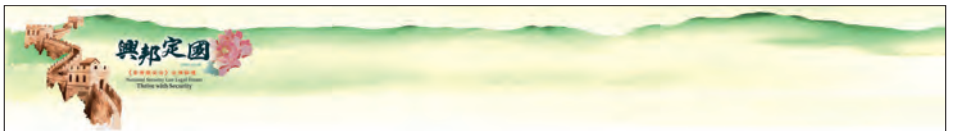
世界正處於百年未有之大變局中，地緣政治情況出現激烈變化，
海水與淡水交匯之地的原有「生態平衡」亦可能因外來因素受到影響，我們要思考：

是否會有外部勢力……

1. 惡意污染我們的水源？
2. 破壞我們原有的「防洪牆」？
3. 施計阻隔資本「活水」流入我們的經濟體？

我們必須要以「底線思維」不斷加強及深化應對策略，以積極的防禦措施，
堅守不發生系統性金融風險事件的底線

4



第一個策略是「嚴密監察　穩慎防控」，加強我們識別及應對金融安全風險的雷達及能力

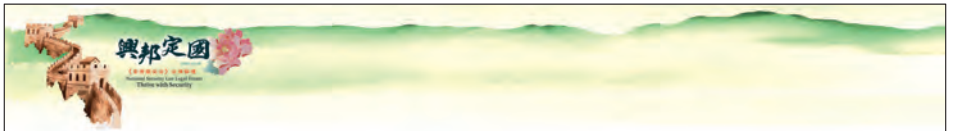
財經事務及庫務局局長主持「金融穩定委員會」

1. 審視國際金融市場的各類風險事件，以期及早制定應對預案
2. 作出嚴密監察，留意沽空及淡倉水平、衍生工具持倉量、及金融機構財務狀況等關鍵指標

不斷加固金融安全「防洪牆」

1. 財政儲備超過9,500億港元，外匯儲備超過3.7萬億港元（貨幣基礎1.8倍）
2. 無論面對經濟或宏觀金融的各種情況，包括維護聯繫匯率的穩定及有效運作，我們都有充足的資源及空間作應對

5



第二個策略是「積極審視　完善法規」，以免在「防洪」的關鍵時候出現「決堤」，防範不法分子利用任何弱點危害國家金融安全

稅務局已修訂適用於慈善機構的稅務指南

1. 如任何團體支持、推廣或從事不利國家安全活動，稅務局將不再認定其為慈善團體，撤銷豁免繳稅資格
2. 修訂後的指南適用於新申請及已獲確認資格的所有慈善團體

諮詢公眾制定適用法例以規管眾籌活動

1. 防範及打擊以眾籌方式募集資金，策劃危害國家安全活動的違法行為
2. 將涵蓋眾籌平台是否須獲得牌照或進行登記、資金募集者是否須作出披露、及如何建立一套匯報制度以供舉報危害國家安全的可疑交易等

6

興邦定國

總結：香港金融市場是富有特色的海水與淡水交匯之地，具有促進中外資本交融互動的獨有功能

1. 「鹹淡水交界」既有來自陸地的豐富養份，又較海洋相對安全，因此是理想的棲息地
2. 放在香港作為國家的國際金融中心這角度來看，我們背靠祖國享有經濟及金融發展上的無限機遇，對外我們也是聯通國際的高度開外市場
3. 在《香港國安法》發揮其定海神針的作用後，財庫局會進一步落實今天提到維護國家金融安全的各種策略舉措。在這些措施的保駕護航下，我們在落實國家「十四五規劃」下給予香港的各種金融新機會時將無後顧之憂
4. 本地、內地和國際金融機構及投資者都可以在社會及政治安全得到保障的前提下，利用香港作為平台開拓更多金融業務機會

7

興邦定國

謝謝！

8

興邦定國

《香港國安法》法律論壇

National Security Law Legal Forum

Thrive with Security

維護國家安全的前沿議題 – 網絡安全
Frontier Issues in Safeguarding National Security – Cyber Security

劉賜蕙

Edwina LAU

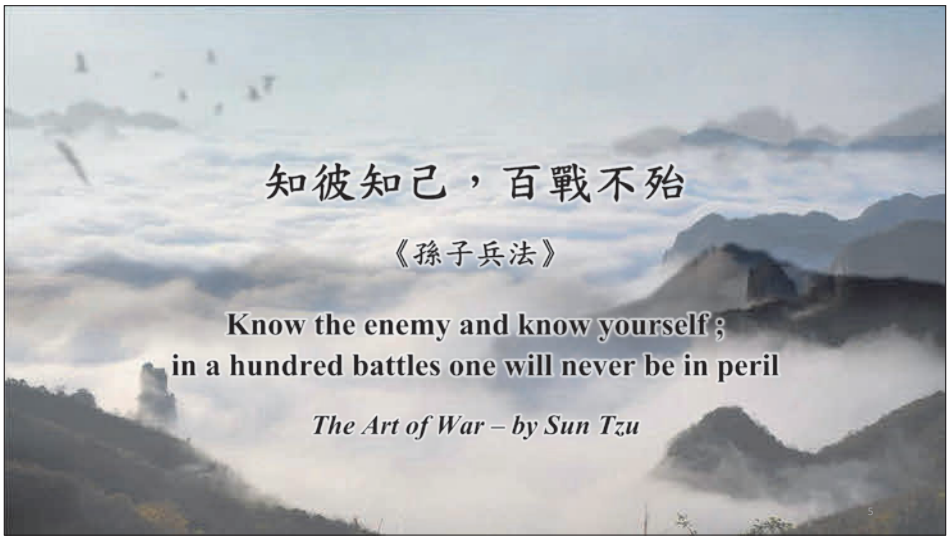
警務處副處長（國家安全）

Deputy Commissioner of Police (National Security)

1


興邦定國
網絡安全 – 國家安全16項重點領域之一
Cyber security as one of the 16 major areas of national security
政治安全 Political Security
國土安全 Homeland Security
軍事安全 Military Security
經濟安全 Economic Security
文化安全 Cultural Security
社會安全 Public Security
科技安全
網絡安全 Cyber Security
生態安全 Ecological Security
資源安全 Resource Security
核安全 Nuclear Security
海外利益安全 Overseas Interests Security
生物安全 Biosecurity
太空安全 Outer Space Security
深海安全 Deep Sea Security
極地安全 Polar Security
3

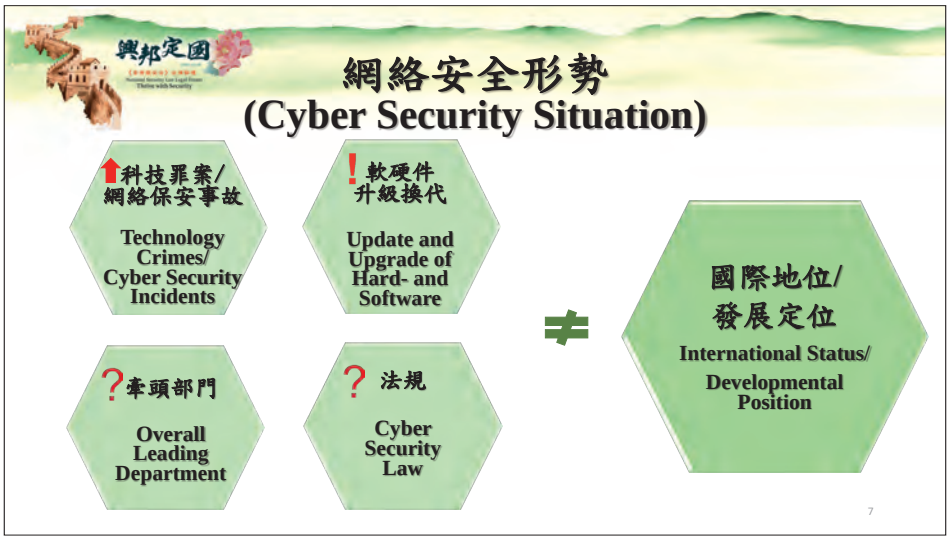

興邦定國
香港網絡空間可能成為
國際地緣政治角力的其中
一個主戰場
Hong Kong's cyber space possibly as battlefield of geopolitics
中國
主要城市
China's Major City
地緣政治
Geopolitics
開放型
國際大都會
World's Metropolitan
資訊發達
Advancement in Information and Technology
4



興邦定國

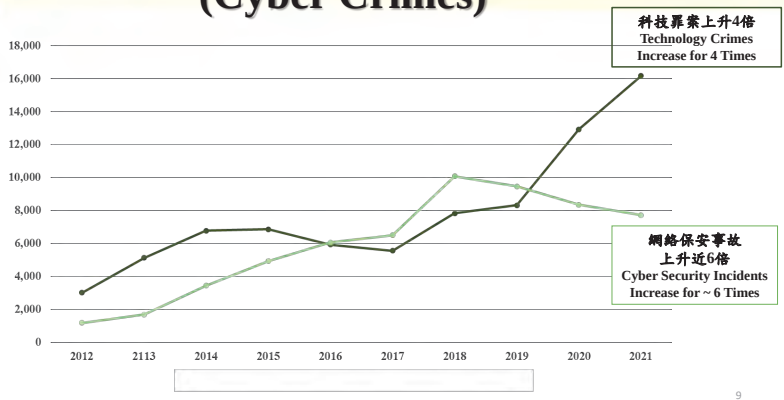
討論重點 (Contents)

- 網絡安全形勢 (Cyber Security Situation)
- 風險點 (Risks)
- 局限 (Limitations)
- 優化建議 (Way Forward)


興邦定國
網絡安全形勢
(Cyber Security Situation)
科技罪案/
網絡保安事故
Technology Crimes/ Cyber Security Incidents
軟硬件
升級換代
Update and Upgrade of Hard- and Software
≠
國際地位/
發展定位
International Status/ Developmental Position
牽頭部門
Overall Leading Department
法規
Cyber Security Law
7


興邦定國
風險點 (Risks)
網絡犯罪
Cyber Crimes
網絡攻擊 &
危害國安活動
Cyber Attacks & Activities Threatening National Security
8

網絡犯罪
(Cyber Crimes)



9

網絡攻擊及利用網絡
進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

重要基礎設施
Critical Infrastructures

10

興邦定國

網絡攻擊及利用網絡進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

煽動暴力
Inciting Violence

非法群眾動員
Illegal Mobilization

假新聞
Fake News

11

興邦定國

網絡攻擊及利用網絡進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

思想滲透
Brainwashing

「眾籌」
Crowdfunding

12

局限 (Limitations)

- 缺乏整體負責部門及統籌機制
  Lack of Overall Leading Department & Overseeing Mechanism
- 地緣政治
  Geopolitics
- 法規
  Law & Regulation

13

缺乏整體負責部門及統籌機制
(Lack of Overall Leading Department and Coordination Mechanism)

- 保安局
  SB
- 警務處
  HKP
- 資訊科技總監辦公室
  OGCIO
- 互聯網基建聯絡小組
  IILG
- 香港電腦保安事故協調中心
  HKCERT
- 金管局
  HKMA
- 通訊事務管理局
  OFCA
- 政府電腦保安事故協調中心
  GovCERT

14

興邦定國

地緣政治 (Geopolitics)

境外伺服器
Overseas Servers

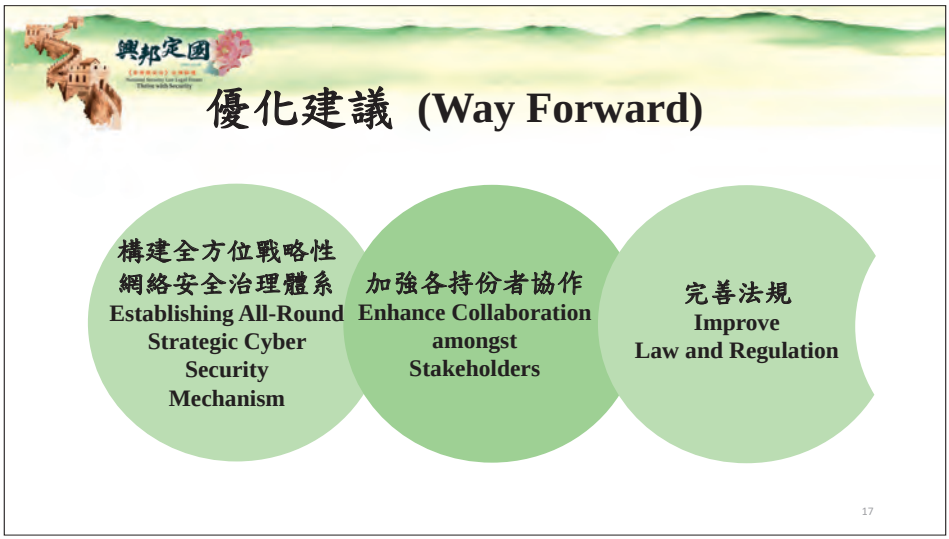
15

興邦定國

法規
(Law and Regulation)

- 重要基礎設施營運者
  Critical Infrastructure Operators
- 網絡供應商
  Internet Service Providers
- 流動網絡供應商
  Mobile Network Providers

16


興邦定國
優化建議 (Way Forward)
構建全方位戰略性網絡安全治理體系
Establishing All-Round Strategic Cyber Security Mechanism
加強各持份者協作
Enhance Collaboration amongst Stakeholders
完善法規
Improve Law and Regulation
17


興邦定國
構建全方位戰略性網絡安全治理體系
(Establishing All-Round Strategic Cyber Security Mechanism)
領導
Leadership
協調
Coordination
監管
Supervision
推動
Motivation
策略制定
Strategies Formulation
權責分配
Division of Responsibilities
工作統籌
Coordination
18

加強各持份者協作
(Enhancing Collaboration amongst Stakeholders)

剛柔並重，規管及鼓勵提升防禦能力

Enhancing Cyber Security Capability by Regulation and Incentives

建立良好網絡安全文化

Building Up Positive Cyber Security Culture

打擊失實或煽動性訊息

Targeting False or Seditious Online Messages

19

完善法規
(Improving Legal Framework)

《網絡安全法》

Cyber Security Law

《基本法》第二十三條

Basic Law Article 23

《國安法》第四十三條《實施細則》附表4

Schedule 4 under The Implementation Rules, Art. 43 of the NSL

20

興邦定國

21

路阻且長，行則必至

《荀子·修身》

興邦定國，就在當下

Long and difficult as the journey may be,
sustained actions will take us to our destination

Self-Cultivation - by Xunzi

Thrive with security, today and beyond

22

興邦定國

《香港國安法》法律論壇

National Security Law Legal Forum

Thrive with Security

前沿議題 -- 文化安全

高禮文教授
香港大學法律學院

興邦定國

前沿議題：文化安全

引言

文化與藝術如何連繫政治及安全：

蘭妮・萊芬斯坦一例

前沿議題：文化安全

引言

蘭妮・萊芬斯坦一例

所提論點…

長遠影響…

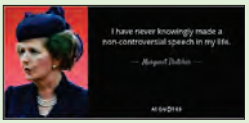
前沿議題：文化安全

文化表達

- 藝術作品
- 音樂
- 書面用語
- 視頻表達

觀點: 具說服力 – 具爭議性

- 個人 / 文化
- 政治
- 敵對 / 破壞穩定 / 顛覆

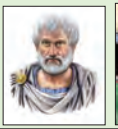


興邦定國

前沿議題：文化安全

關鍵脈絡

重要的地緣政治情況



教育傳播

亞里士多德：*讓我帶孩子到七歲…*

興邦定國

前沿議題：文化安全

激進化的過程

文化及批判信念

境外影響

科技的角色

前沿議題：文化安全

激進化的階段

感到不公義 – 道德義憤

接觸激進解讀
確立義憤

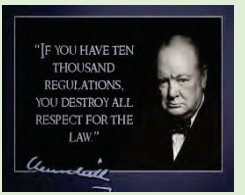
加入激進網絡

前沿議題: 文化安全

如何應對
理解優次

教育
文化傳播

法律解決方案（與局限）



前沿議題：文化安全

如何應對 – 平衡規範

基本初步驗證：

- 誰是目標受眾？受眾有多年輕？
- 創作背後主要動機為何？
- 創作的根源及資金方面，有否任何明顯證據表面看來須予關注？
- 該創作是否符合「忠誠反對派」的驗證：是否顯而易見，該作品及其創作者致力維護基本社會秩序？

前沿議題: 文化安全

如何應對

平衡規範

持續不斷的過程 -

汲取經驗

時代轉變

脈絡轉變


興邦定國
前沿議題：文化安全
謝謝

座談環節 (3)：
完善香港特區的維護國家安全法律

主持人

朱國斌

香港城市大學法律學院
教授

講員

林來梵

清華大學法學院
教授

鄧炳強 GBS PDSM JP

中華人民共和國香港特別行政區政府
保安局局長

Chin Leng LIM

香港中文大學法律學院
卓敏法律學教授

朱國斌：各位先生女士，下午好！

我非常榮幸獲邀主持這最後一節座談會。自遵從全國人民代表大會（全國人大）的《528決定》、全國人民代表大會常務委員會（全國人大常委會）所訂《香港國安法》和《基本法》以來，香港社會秩序已見恢復正常。法治得以延續。今天5月28日紀念全國人大的這個決定，極具意義，同時讓大家進一步探討，如何完善香港特區在維護國家安全方面的法律框架。這個環節會集中討論如何完善香港特區有關維護國家安全的法律框架，包括《基本法》第二十三條的立法工作，以及其他相關法律的立法工作。我們一共有三位講者，兩位是知名法律學者，一位是來自特區政府的關鍵人物，在國家安全立法及執法方面扮演重要角色。他們分別是：清華大學法學院的林來梵教授、代表特區政府的鄧炳強先生，以及香港中文大學的Professor Lim (Chin Leng Lim教授)。我先邀請三位講者就中心主題分享一下意見和想法。現在，為省時起見，請每位講者的演講以15分鐘為限。第一位講者是來自清華大學法學院的林來梵教授。

林教授曾留學日本獲得博士學位，也曾在香港城市大學工作多年，後來加入了浙江大學法學院，還有清華大學法學院。目前除了擔任教授外，林教授還兼任中國法學會憲法學會副會長、中國法學會香港基本法澳門基本法研究會副會長。林教授將會就《基本法》第二十三條和《香港國安法》的關係發表意見。我們有請林教授。

林來梵：各位嘉賓、各位同仁、女士們、先生們，下午好。很高興參加這個論壇，今天要跟大家分享的題目是香港特區「二十三條立法」與《香港國安法》的關係。

香港自回歸以來，長期存在有關國家安全立法的需求、紛爭與博弈。尤其是大約近十年以來，內外形勢與現實環境不斷變化，香港特區的國家安全風險也不斷增加，成為困擾特區管治的一個重大問題。

在此情形之下，全國人大授權全國人大常委會制定了《香港國安法》，這在很大程度上填補了香港特區國家安全立法的漏洞，但從嚴格意義上說，特區國家安全立法體系還沒有最終完結，作為特區政府憲制責任的《基本法》第二十三條立法也有待於完成。

當下，第二十三條立法有望「破冰」。在此之際，我們首先需要釐清一個問題——同樣作為在香港實施的國家安全立法，香港本地的二十三條立法，與全國人大常委會制定的《香港國安法》之間，在法律意義的層面上存在著什麼樣的關係？應該說，這是今後進一步完善香港特區國家安全法律體系進程中首先應該辨明的一個基本問題。

對此，我個人認為，這一問題可以從二者之間的法理關係、內容銜接和功能互動三個方面，層層遞進地加以把握。

一、二十三條立法與《香港國安法》的法理關係

關於這個法理關係，又可以從兩點來看。

第一點，二十三條立法與《香港國安法》的法理關係，首先體現在它們的立法權的歸屬上。

在這個問題上，香港法律界部分人士堅持一種「分權論」的觀點，認為《基本法》第二十三條既然已經作出了明確授權，中央即不應該再就這一問題自行立法。但這一觀點被認為是不符合《基本法》立法原意的。我同意內地學界的主流意見，認為：特區所享有的二十三條立法的立法權，是中央授予的一項權力，與香港特區所享有的「高度自治權」一樣，其最終都歸屬於中央；如果香港特區長期未能履行自身憲制責任，那麼，中央作為國家主權者、高度自治權的授權者和監督者，可以直接代為履行。《香港國安法》就是在這種情況下制定的。

第二點，兩部法律在法理關係上還體現在二者的法律位階和立法依據上。在法律位階上，二十三條立法應當屬於《香港國安法》

的下位法。這主要是由二者作為立法主體的不同地位所決定的：《香港國安法》是全國人大常委會經全國人大授權制定的全國性法律，而香港特區的二十三條立法則將是特區立法會以條例形式制定的本地立法。

不僅如此，《香港國安法》也可以被認為是特區二十三條立法的立法依據之一。應該說，在《香港國安法》頒佈之前，或者說全國人大的《528決定》作出之前，香港本地二十三條立法的立法依據主要是《基本法》第二十三條；而在《香港國安法》生效之後，情況則發生了變化：除了《基本法》第二十三條之外，《528決定》（尤其是其第三條）、《香港國安法》（尤其是其第七條），可以說都構成了香港特區履行二十三條立法職責的法律依據。

二、第二十三條立法與《香港國安法》的內容銜接

二十三條立法與《香港國安法》在調整對象上的同一性，意味著未來的二十三條立法與《香港國安法》在具體內容上必然存在著緊密的聯繫；而《香港國安法》作為二十三條立法的立法依據和上位法，則進一步意味著二十三條立法與《香港國安法》之間在內容上存在一種銜接關係。這也可以從兩點來加以把握：

第一點，《香港國安法》已經在必要的意義和程度上，拓寬並深化了《基本法》第二十三條對國家安全秩序的保護範圍，為二十三條立法提供了一種框架。在這裡可以舉兩個例子來說明。

一個是關於顛覆罪。《基本法》第二十三條僅保護中央人民政府不受顛覆，並且在這裡「中央人民政府」的概念也比較模糊。內地有學者通過將該表述與香港《刑事罪行條例》中的相關規定進行比較，認為在《香港國安法》制定以前受香港法律保護的不被顛覆的對象只有兩個，一是國家的基本制度，二是全國人大及其常委會。而《香港國安法》對此則進行了拓寬，將受保護的對象擴展為「國家政權」，其中不僅包括基本制度，也包括所有的公權機關；不僅包

括中央機關，也包括香港特區機關；不僅包括立法機關，也包括行政機關和司法機關等。

另一個例子是恐怖活動罪。作為二十一世紀才開始冒現的一種新型的危害國家安全犯罪，恐怖活動罪沒有被當年制定的香港《基本法》第二十三條所羅列；這就使得《香港國安法》有必要根據新時期維護國家安全的實際需要，將其列入懲治範圍之中。

第二點，未來的二十三條立法可以對《香港國安法》的內容作出更進一步的處理。究竟該如何處理呢？這又可以從兩個方面進行展開。

第一方面，對《香港國安法》中已有的內容，二十三條立法應當如何處理？

關於這個問題，應該可以這樣處理，即：《香港國安法》中已有的規定，如果有必要，香港本地的二十三條立法仍然可以作出相應的、合適的規定。比如，《香港國安法》中的一些條款或法律用語，在香港特區的具體適用中可能存在理解上的困難，對於這部分內容，二十三條立法就可將其具體化、精細化。但前面說了，香港本地的二十三條立法是《香港國安法》的下位法，為此，上述規定應該遵循《香港國安法》的相關規定和精神，不得違背《香港國安法》。

舉個例子來進行說明。《香港國安法》中有「國家秘密」這個用語，在香港一般採用「國家機密」的表述，在《基本法》第二十三條中也同樣採納了「國家機密」的表述。它們似乎說的都是一個意思。但其實，在當今內地的立法文本中，「秘密」和「機密」並不能劃上等號。根據《保守國家秘密法》的規定，「國家秘密」內部又細分為絕密、機密和秘密三類，也就是說「機密」的指代範圍是窄於「國家秘密」的。但《香港國安法》未能在條文中對「國家秘密」的具體含義作出清楚的界定，因此就需要進一步的細化說明。類似這樣的事項，就是未來的二十三條立法可以承擔的任務。

第二方面，是對《香港國安法》中沒有規定、或沒有完全規定，但是列於《基本法》第二十三條中的危害國安事項，二十三條立法又該如何處理？應當認為，二十三條立法對此可以作出必要的補充規定。也就是說，除了對已有內容的細化，二十三條立法與《香港國安法》在內容上的銜接，還體現在可以對《香港國安法》未規定、或規定不完全的內容進行補充。應當看到，《基本法》第二十三條所列舉的危害國家安全行為，並未被《香港國安法》完全涵蓋，其中仍有部分規定沒有實現立法化，而這也應當是二十三條立法在具體內容規定上需要實現的目標。

比如，有關間諜罪，《香港國安法》就沒有作出全面涵攝的規定；目前據以懲治間諜行為的《官方機密條例》，也已經多年未修改，無法滿足現實的需要。為此，對有關間諜罪規定的補充，可能是當下對二十三條立法需求最為突出的一個領域。

三、二十三條立法與《香港國安法》的功能互動

這同樣可以從兩點進行把握：

第一點，實現兩部法律在執法與司法程序上的協調統一。大家都知道，《香港國安法》與內地的《國家安全法》和澳門的《澳門國安法》相比有著自身的獨特之處，它是一部兼具實體規範、程序規範和組織規範在內的綜合性法律，其中就包括了執法與司法程序機制的建立。特別是其中除了規定由香港特區行使管轄權的一般案件之外，還規定了應由駐港國安公署管轄的特殊案件，這些案件主要是特區自身無法有效管轄和執行或是具有重大威脅。但如何甄別、如何認定這些案件，則是一個重大問題。為此，這套機制的運行，需要兩部立法在執法與司法程序上進行協調與互動。

兩部立法功能互動的第二點，是體現在通過兩部法律的有機結合，實現中央全面管治權和特區高度自治權在維護國家安全方面的有序互動。這是一個比較宏大的話題。對此，目前可以認為：應當充分相信在經歷了選制改革之後產生的香港特區管治者，能夠有

效處理好特區內部的國安事務，從而在一般情形下應當充分尊重和發揮特區的高度自治；而在出現特區自身無法有效應對的極端情形時，可由中央直接出場。至於在具體的制度機制層面上如何真正實現二者的有序互動，這還需要特區各界同仁的共同努力。

總之，當務之急是制定出一部完備齊全、切實可行的第二十三條立法。

以上淺見，卑之無甚高論，懇請批評指正。

朱國斌: 謝謝林教授。現在，有請保安局局長鄧炳強先生發言。我相信大家對他已相當認識。鄧先生加入香港警隊時擔任督察，先後晉升爲警務處高級助理處長、行動處處長、警務處副處長和警務處處長。去年6月25日，鄧先生出任保安局局長。有請鄧先生。

鄧炳強：財政司司長陳茂波先生、律政司司長鄭若驊女士（時任律政司司長）、各位朋友：

大家好，今天我很高興能夠獲邀出席由律政司主辦的《香港國安法》法律論壇，與席上各位嘉賓就特區維護國家安全的工作進行交流。

雖然《香港國安法》的制定和實施使香港特區「由亂變治」，但特區政府仍有需要繼續履行完善相關維護國家安全法律，包括就《基本法》第二十三條進行本地立法，盡早完成《基本法》規定的維護國家安全立法的責任。我亦想藉此機會，和大家分享特區政府就《基本法》第二十三條立法的一些觀點。

就《基本法》第二十三條進行本地立法和完善相關維護國家安全法律是香港特區的憲制責任。2020年5月28日通過的《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》第三條及《香港國安法》第七條亦分別要求香港特區盡早完成《基本法》規定的維護國家安全立法的工作。事實上，每個國家都會制定維護國家安全的法律，這既是主權國家的固有權利，也是國際慣例。中央授權特區自行制定維護國家安全法律，體現了「一國兩制」的方針和國家對特區的信任。

《基本法》第二十三條立法除了是香港特區的憲制責任外，亦有其實際需要，以應付香港特區過去和將來可能面對的國家安全風險。

隨着國家的整體發展，不少西方國家視中國為威脅，甚至採取全面敵對態度。由於香港在「一國兩制」下有獨特環境和生活模式，容易被外部勢力惡意滲透，試圖分裂及顛覆國家，並孕育和鼓吹「港獨」思想，致令國家安全風險越見加劇。自2003年未能完成《基本法》第二十三條立法工作至今，香港特區的國家安全風險起了急劇的變化，期間出現了2014年的「非法佔中」、2016年的旺角暴動、和鼓吹「港獨」的香港民族黨成立等嚴重損害公共秩序和危害國家安全的行為。過去20多年出現多次的社會亂象，在2019年起持續十多個月的大規模暴亂期間更加達至極點，出現嚴重損害法治、公共秩序和危害國家安全的行為，包括：

（一）「港獨」、「自決」活動冒起；有人利用媒體、文化藝術等「軟對抗」方式，宣揚反中央和反特區政府訊息；並以新聞工作做包裝，涉嫌串謀勾結境外勢力，煽動對中央和特區政權機關的憎恨；

（二） 全港性大規模暴亂，大範圍損毀公共設施；亦有境外組織成員於暴亂期間公開為暴徒籌款或籌集裝備；

（三） 藉發表抹黑指控的言論、文字或刊物煽動群眾，美化暴力，削弱市民的法治觀念和守法意識；

（四） 本土恐怖主義滋長並轉趨行動化，包括「孤狼式」襲擊及以小組形式組織、策劃和實施的本土恐怖主義活動；

（五） 有境外勢力透過長期在香港全方位滲透，扶植本地組織或個人為其代理人，並透過代理人從事危害國家安全的活動，包括企圖影響選舉結果，以顛覆國家的政權。

《香港國安法》實施以來，社會秩序重回正軌，但畢竟《香港國安法》只是針對當時最嚴重和最迫切的四類危害國家安全的行為和活動，《基本法》第二十三條規定應當予以立法禁止的七類行為中，《香港國安法》只涵蓋了其中兩類，即「分裂國家」和「顛覆中央人民政府」，而未有完全應對剛才提到的國家安全風險。而現行本地法例（例如《刑事罪行條例》、《官方機密條例》以及《社團條例》）亦只涵蓋部分相關的行為。舉例而言：

（一）《刑事罪行條例》涵蓋了有關「叛逆」的罪行，以及煽動危害國家安全、離叛及仇恨的罪行。但我們需要審視有關罪行是否足以應對過去香港所面對的國家安全風險，以及如何完善，和更好地維護國家安全；

（二） 在《官方機密條例》中，所禁止的「間諜活動」定義較為狹隘，主要只涵蓋「接近禁地」、「製作對敵人有用的資料」，以及「取得、收集、記錄或發表對敵人有用的官方機密資料」等，不足以應對現今複雜的間諜行為和相關風險；

（三） 至於《官方機密條例》中的「非法披露受保護資料」罪，其涵蓋的資料類別亦只有防務資料和關乎國際關係的資料是屬國家秘密，而法例亦未就「國家秘密」一詞作出定義；

（四）《社團條例》中就「外國／台灣政治性組織」及「政治性團體」作出的定義相對狹窄；《社團條例》下有關禁止社團運作機制，亦只適用於根據《社團條例》已註冊、須註冊或獲豁免註冊的社團。

此外，犯罪分子的活動更越趨「地下化」及「隱蔽化」，亦有危害國家及香港特區安全的分子潛逃海外、肆無忌憚勾結外國勢力，繼續從事危害國家安全的行為和活動，例如要求外國實施所謂制

裁，以及成立所謂「智庫」，宣揚危害國家安全的訊息等。我們有實際需要就《基本法》二十三條立法，進一步完善維護國家安全的法律，以應對有關風險和威脅。

就此，特區政府一直進行《基本法》第二十三條立法的相關工作。雖然特區政府曾於2003年就《基本法》第二十三條立法向立法會提交草案，但由於特區的國家安全風險自2003年有相當大的改變，因此，我們正針對過去發生的事情，研究特區的過去、現在、以至未來的安全風險；我們亦正檢視《香港國安法》的實施經驗和相關的法庭裁決及現行法律的不足，務求制定有效和務實的方案和條文，以應對有關風險。就此，我們亦會參考其他相關的全國性法律及其他司法管轄區的同類法律，一些有涵蓋類似罪行範圍的法律的國家，包括英國、美國、澳洲、加拿大、新西蘭、新加坡等，均在我們參考之列。

上述制定《基本法》第二十三條立法建議的工作絕不輕易，性質複雜。加上國際形勢的急劇變化，增加我們的工作難度。而鑑於有關立法對維護國家安全的重要性，立法建議亦必須在執行方面切實可行，所以我們必須小心處理，不容有失。

除了確保《基本法》第二十三條立法建議能有效維護國家安全外，有關立法獲得香港特區市民的支持，亦非常重要。

我們會積極向市民以及持份者解釋香港特區進行《基本法》第二十三條立法的憲制責任，以及各項立法建議的內容及其考慮因素，並以開放的態度，聆聽市民以及持份者的意見。

我們預料有人會利用機會，試圖誣蔑特區政府借《基本法》第二十三條立法，打壓人權和自由。我希望借此機會強調，《香港國安法》第四條指出香港特區維護國家安全同時亦應當尊重和保障人權，依法保護香港居民根據《基本法》、《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》規定所享有的包括言論、新聞、出版的自由，結社、集會、遊行、示威的自由。因此，

在維護國家安全的同時，市民繼續依法享有《基本法》所保障的權利和自由。

然而，這些權利和自由並非絕對，而是可以為達致保障國家安全、公共秩序或他人的權利和自由等情況下，根據法律作出規限。上述兩部國際公約就有條文容許基於維護國家安全等理由，以法律對權利和自由予以限制。

我亦希望強調，《香港國安法》第五條除規定防範、制止和懲治危害國家安全犯罪之外，亦規定無罪推定、一事不再審、以及犯罪嫌疑人、被告人和其他訴訟參與人依法享有辯護權和其他訴訟權利等法治的原則。

在推廣《基本法》第二十三條立法的時候，我們亦會特別注意資訊的發放，讓有關資料可以迅速而準確地提供予公眾。除傳統的公眾諮詢渠道外，我們亦會善用不同的平台(包括網上平台)發放有關資訊，並向不同持份者進行解說。

儘管如此，我們不排除仍然會有心懷不軌的人伺機透過惡意、甚至虛假訊息抹黑立法工作。我們亦不排除外部勢力以及其代理人會罔顧事實，無視他們國家亦有類似法律，並持雙重標準，刻意抹黑立法建議指我們打壓人權自由。此外，想危害國家安全的人亦必定會繼續利用「軟對抗」手段，「妖魔化」立法建議以誤導市民。

意圖危害國家安全的人亦會借助互聯網及社交通訊軟件，將惡意抹黑和誤導的訊息廣泛流傳，因此我們必須迅速採取行動，否則若市民未能清楚了解立法建議，便會不知就裏被誤導。早前，就曾經有一間已經停止運作的網媒故意就我在記者會有關《基本法》二十三條立法的發言作誤導性報道，這絕對不是第一次，亦相信不會是最後一次，但我一定會揭穿他們的真面目，將真相還原給大家。

就此，我們會加強宣傳和解說的工作，包括：

（一） 針對此等抹黑的言論，主動而迅速地作出澄清；

（二） 着力解說立法的重要性，包括：立法可以令國家安全得以維護，香港經濟得以長足發展；危害國家安全的罪行得以防範，市民免受嚴重危害社會整體安全的暴力襲擊及脅迫；市民的生命和財產得到保障；煽動仇恨、暴力和不守法的歪風得以遏止，法治得以彰顯等。

保安局一直聯同律政司及相關執法部門致力推展《基本法》第二十三條立法的工作。但由於新一波疫情關係，特區政府，包括保安局及律政司，自今年初把盡快穩定疫情作為壓倒一切的任務，因此對立法工作有所影響。

雖然如此，我們會繼續迎難而上，做好相關工作，以確保香港和國家的安全。多謝大家！

朱國斌：謝謝鄧先生。第三位講者是香港中文大學法律學院的Professor Lim。Professor Lim曾任香港大學的法律教授，現在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。2021年，他成為國際法研究院的準會員。他曾就國際私法及國際公法的事宜及糾紛代表多個政府及私人客戶，並為他們提供法律意見。Professor Lim將會從國際法及比較法的角度發言和討論第二十三條之立法工作。

Chin Leng Lim: 非常感謝律政司司長這次邀請，讓我有機會發表意見，談談一些香港未來無疑會廣為討論的事情。律政司司長、各位觀眾及同台講者、各位先生女士，大會邀請我在首15分鐘演講時間內，談及一些普通法的比較例子，而不贅述以往談過的內容。因此，舉例說，我們去年已充實地討論分裂國家罪和顛覆國家政權罪，今天便盡量不會重複。我知道現在時候不早了，我會盡量直

截了當。我會依次談論：叛國、煽動叛亂、竊取國家秘密、規管外國政治性組織，以及外國干預。

首先，我想談及《香港國安法》第三十八條，因該條文一直大受議論。自去年論壇以來，北京及香港特區均曾發表聲明，回應有批評指該條文有時在外國看來是域外司法管轄權的不合理延伸。讓我這樣解說吧。若有人在瑞士拔槍射擊某個身處意大利的人，子彈從瑞士飛向意大利再擊中身處意大利的那人。意大利那人離世，意大利聲稱對瑞士那人具司法管轄權。首先，這樣是域外管轄嗎？事實上，該行為發生在意大利境內。

再另舉一例。有人串謀，假設有人在瑞士串謀導致意大利境內發生一宗極為暴力的事件。這又是否在意大利境外串謀犯事呢？不是。這是否域外罪行呢？普通法說「不是」。長久以來，普通法向來都說「不是」，而香港也有相關案例。但如果說，現在談及的是延伸司法管轄權，涵蓋境外的國民完全身處境外時所作的行為，世界上沒有一個國家會說這是錯的。它們也許不便承認，但它們無法說這是錯的。我給大家舉個例子，譬如土耳其國民在瑞典遊行支持一個被土耳其視為恐怖分子的組織。土耳其提出反對，瑞典不會說：「你無權將所屬國民在境外的行為納入刑責範圍」。瑞典會說：「我們此處享有言論自由及集會自由」。我想提出的是，第三十八條說明，我們的司法管轄權會延伸涵蓋境外的外國人，而他們並非香港特區的永久性居民。其後，這備受爭議，於是我們得回應說，依據「保護原則」，該條文具充分理據支持。但這樣討論頗為抽象。我們可想像到，大多數此類案件總有某種聯繫，要麼領土聯繫，要麼國民身份的聯繫。

舉例來說，有些國家設法將其公民在境外所作的行為，性虐待兒童的行為，納入刑責範圍。現時，國際有所共識和協議，各國應獲准這樣做。但有些時候，各國意見不一，對於某種形式的行為應否刑事化，看法互相矛盾。舉上述性剝削兒童為例，我們可否說，不得對此宣稱域外司法管轄權？可否說，如前所述，不得宣稱屬地司法管轄權？例如，在犯事前，該名公民在所屬國家境內

策劃行動。我們可否說，不得對所屬國民宣稱域外司法管轄權？稍後演講末段，我總結看法時，會盡量簡短，我想談談最近的澳大利亞法例和英國的法案。我想表達的觀點是，外國干預法從定義上便觸及國外行為，我們稍後會看看。

首先是關於叛國。我剛才聽到台上講者提到一些事情可能有待梳理。其中一項可能有待梳理的是叛國罪。《刑事罪行條例》第2條載有叛逆罪；而《刑事罪行條例》第2條，啟發源自英國多項《叛國法令》，當中一項更是中世紀的法令。現時，我們的法例依然提述「女皇陛下」。我們的法例說，倘試圖向國會或任何英國屬土的立法機關作出恐嚇或威嚇，即屬叛逆。但當然，《釋義及通則條例》說，我們應當從文意去理解。若事情涉及中央人民政府的司法管轄權，或中央人民政府與香港特區的關係，便以某方式理解。若只涉及香港特區的事情，則以另一方式理解。我這樣解說吧。假設有些人衝擊立法機關，譬如香港立法會。我們可否說，此條例提述的只是內地立法機關？現在，若說這亦包括香港的立法機關，我又問另一問題。那麼，衝擊澳門立法機關的行為，是否也納入刑責範圍？所以，這些方面可能都有待思量，看看怎能排除此類含糊之處。

更有趣的是，英國有一份政策交流報告名為《資敵》(Aiding the Enemy)，大家也非常熟悉。報告由多人撰寫，包括牛津大學的李察・埃金斯 (Richard Ekins) 教授，以及英國外交事務委員會 (Foreign Affairs Committee) 現任主席。報告建議擴闊叛國罪，涵蓋背叛自己的國家。對我們而言，叛國只是指圖謀殺死英王，向其發動戰爭，依附英王的敵人，向（任何英國屬土的）立法機關作出威嚇。

現在，我來談談煽動意圖，基於最近香港法庭上有這樣一事。案中資深大律師站起來，向法官陳詞。而這位法官，正是今天較早前，論及法律專業保密權決定時提到的那位。我當時相當留神細聽律政司司長的演講。案中，資深大律師站起來說：「除非存在煽動暴力的特定意圖，否則無法確立煽動意圖。」法官從詮釋角度立論，拒予認同，我認為相當正確。假設資深大律師主張，譬如在

普通法、英國的普通法下，若沒有煽動他人使用暴力，煽動叛亂便不成立。若然資深大律師有此論調，英格蘭及威爾斯法律委員會 (Law Commission of England and Wales) 早就提出異議。煽動叛亂可在沒有煽動他人使用暴力的情況下確立。若煽動他人擾亂公共秩序或引起騷亂，亦屬煽動叛亂。我意思是，在普通法下，煽動叛亂的定義也涵蓋呼籲他人非法集結，有關定義為英格蘭及威爾斯法律委員會所採納，依據的是加拿大最高法院案件*Boucher v the King*（*Boucher*案）。這一點經常被誤解，因大量學術文獻，甚至連維基百科均表示，根據*Boucher*案，被告人必須具有意圖、煽動他人使用暴力的特定意圖。可是，曾透徹分析*Boucher*案的英格蘭及威爾斯法律委員會，看法卻絕非如此。

現在，就讓我談談竊取國家秘密，因為剛才也曾提及。今早也述及*Nagla v Latvia*一案，而我們也聽過和談及何謂國家秘密。現在於《香港國安法》下，據我了解，何者屬或不屬（國家）秘密是可予認定的。這由行政長官來認定。就此，需要稍為謹慎。有一個比較法上的普通法案例，案中法官裁定，文件的簽署人選不當。那麼，假設文件由正確的人簽署認定某事屬（國家）秘密，事情就此了結嗎？應該是吧。正式來說，答案為「是」。但有比較法案例則這樣表述。那我們說，只是假設而已，香港行政長官想認定太陽從東邊升起的事實屬秘密。那麼就會遇到，歸類何謂秘密是有所限制的。在*Public Prosecutor v Bridges Christopher*一案中，新加坡法院認為，凡某事已存在於公共領域，便不屬秘密。這很大程度取決於如何理解我們的法律，因為就現行法律而言，竊取國家秘密涉及現任或前任的公務人員或政府承辦商，就「任何官方機密」所作的通訊。

現在談談規管外國政治性組織，最近有一宗英國最高法院的案例。案中有些示威者手持標語聲援庫爾德工人黨 (Kurdistan Workers' Party)。庫爾德工人黨在英國是被禁組織。英國最高法院席前待決的問題之一是：被告人是否須認識庫爾德工人黨是何組織？是否須知悉庫爾德工人黨是被禁組織？英國最高法院說「不」。法院從釋義角度指出：你只須知道自己當時手持標語便可。

最後談談外國干預，因我認為許多關注都與此相關。開首時我已提及外國干預，因這觸及域外法權的問題。反外國干預的法例，各地已比比皆是。某些地方關注的是敵意信息宣傳。我們聽過在其他地方，例如澳大利亞及現時的英國，均出現敵意信息宣傳，關注點是外國遊說。這正是耐人尋味之處。據我理解，澳大利亞將罔顧後果而影響政治程序或政府程序的行為，凡涉及欺騙手段等情況者，均訂為刑事罪行。我為何提出這點呢？但願今天我並非藉一己看法罔顧後果而影響你們吧。除此之外，澳大利亞法例也涵蓋行為完全或局部在澳大利亞所犯的情況。回想開首所舉的例子，有人越境射擊，或有人境外串謀在另一地方犯暴力行為，只要局部發生在澳大利亞，又或罪行是（澳大利亞）國民或居民所犯便可，犯案者甚至不必是國民。

此時來到最富戲劇性一例，即英國的《國家安全法案》。我上次查看時，大約是數周前，法案已首讀通過並即將進行二讀。當中第 3 條有這樣的構思：即使不知悉自己正協助外國情報組織，不知悉是哪國的甚麼外國情報組織，仍可觸犯英國罪行；如屬英國國民，甚或不屬英國國民但在英國駐外大使館工作，則可在英國境外犯此罪行。現在看來，這與澳大利亞該例頗為相似。收結前，我只有此一問：根據英國的《國家安全法案》，何謂英國國民呢？

英國國民（海外）護照持有人亦包括其中。

非常感謝。

朱國斌：謝謝Professor Lim。我們的時間表相當緊迫，我只能向每位講者提出一條問題。首先，我想問林教授。林教授，你能不能從這個法律規範的角度講一講，二十三條立法和《香港國安法》在立法原則和立法技術上的協調統一有哪些需要我們關注的地方。謝謝。

林來梵：首先，在立法原則上，兩部立法共性大於個性。全國人大《528決定》草案的說明中，明確提出了五條基本原則，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、和切實保障香港居民的合法權益。這五條基本原則對《香港國安法》和二十三條立法來說都是適用的。

其次，在立法技術上，兩部立法則是個性大於共性。這主要是由兩地分屬不同法系的大前提所決定的。在具體的法律規範中，兩地所採取的文字表述和條文結構等都有明顯的區別，例如我在發言中援引的「國家秘密」表述就是這樣。除此之外，兩地關於法定刑的規定也有不同。在香港特區，立法中存在司法中心主義的傾向，立法者一般只規定最高刑期而不規定最低刑期；而在《香港國安法》中，立法中心主義的特點，使得立法者對最低刑期和最高刑期都作出明確規定，並且還會根據情節嚴重與否劃分不同的檔次。

這種立法技術的差異，在實踐中也可能會引發一定的分歧。例如在前不久的「呂世瑜案」中，主審法官通過採用香港傳統的「認罪扣減三分之一刑期 」的慣例，將犯罪人的最終刑期降低至《香港國安法》規定的最低刑期以下，就引發了一定的爭議。我想這一區別是未來二十三條立法者在立法過程中需要注意的。

朱國斌：謝謝林教授。下一個問題是給鄧局長的。你剛才的演講中提到香港現行的法律，《香港國安法》、《刑事罪行條例》、《官方機密條例》、《社團條例》，已大概涵蓋了二十三條的七個禁止的內容，儘管只是部分的涵蓋。那麼你能否給我們分享一下，為何我們仍然需要就二十三條立法?以及預期有關法律將會涵蓋哪些新的內容、新的範圍?

鄧炳強：謝謝朱教授，其實就《基本法》第二十三條所禁止的七項罪類，剛才我提過有兩項，即分裂國家及顛覆國家政權罪，《香港國安法》已涵蓋了。一些罪行雖然《刑事罪行條例》、《官方機密條例》和《社團條例》已經部分涵蓋，但是為了 [確保為《基本法》第二十三條訂立的] 法例是能應對目前和將來的國家安全的挑戰，

我想我們有需要探討以下幾方面的問題：第一，就着某些概念，我們要賦予更加清晰的定義或賦予其定義。正如剛才清華大學林教授也提及，就「國家秘密」目前還沒有一個定義；又例如「國家安全」一詞，目前在《社團條例》裏面有有關的定義，也是需要重新審視，去套用到《基本法》第二十三條立法的不同部分。此外，我們也要就目前的一些法律進行適應化，移去那些殖民相關的字眼。正如剛才中文大學Professor Lim 也提到，例如「女皇陛下」、「聯合王國」，這些詞彙也要移除。

第二方面，我們也要審視一些罪行的範圍，以應對目前和將來的風險，例如在《刑事罪行條例》下，目前叛國罪主要是涵蓋一些跟戰爭相關的行為，但是我們有需要去看看其他一些涉及境外的因素，對國家主權、統一和領土完整，或者對香港社會整體安全可能構成嚴重威脅的行為，例如勾結外國勢力，破壞基礎設施的行為等等。

第三方面，我們要審視現有的法律是否已經過時，例如在《官方機密條例》下，諜報活動只是涵蓋了接近禁地、製作對敵人有用的資料等等，我們可能需要去擴闊涵蓋的範圍，以包括一些其他先進的通訊設施，或者現代的一些間諜活動。

最後，我們要審視在實際執法經驗當中所反映出來目前法例的不足。例如在《社團條例》下，「政治性團體」的定義只涵蓋了政黨，或者那些主要功能是為參加選舉的候選人宣傳或作準備的組織，但不包括一些為了追求其他政治目的的組織。另外《社團條例》也不涉及一些非社團的組織，例如公司、合作社，或者是職工會等等，這些都是我們在《基本法》第二十三條立法當中需要去探討的。

朱國斌：謝謝。 Professor Lim，我想請你澄清一點。你剛才提到，國家規管本身國民的境外行為並不受爭議。但我們看到社會上確有爭議。你能對此加以闡明嗎？謝謝。

Chin Leng Lim: 爭議並不在於國家宣稱有權規管境外國民，矛盾是在其他方面。倘若是關乎本身的國民，如某國國民在某地虐待兒童，大家不會異議。對於國家可規管本身的境外國民，通常雙方都不爭議，國家是可規管國民的境外行為。例如不能說，事情並非在國土所作出的，便不觸犯叛國罪。任何國家都不會同意。

朱國斌：謝謝。時間已到，我們要結束這節座談會了。我首先想感謝三位講者的分享，也感謝在場和線上的觀眾。最後，我衷心感謝律政司邀請我主持這節座談會。謝謝。

香港特區二十三條立法與《香港國安法》的關係
The Relation Between Hong Kong Legislation of Art.23 and HKNSL

林來梵
Lin Laifan
清華大學法學院教授
Professor, School of Law of Tsinghua University

- 法理關係 → 內容銜接 → 功能互動
- Legal Relation → Cohesion in Contents → Interaction in Function

一、法理關係
Legal Relation

- （一）國安立法權的歸屬：
  1. 中央授權，最終歸屬於中央；
  2. 中央可以直接代為履行。

- The attribution of the legislative power in national security:
  1. The power was authorised to the SAR by Central Authorities, and ultimately attributed to Central Authorities;
  2. The Central Authorities may exercise the power directly.

- （二）《香港國安法》是二十三條本地立法的上位法和立法依據之一。

- HKNSL is the legal basis and superior law of the local legislation of Art.23.

二、內容銜接
Cohesion in Contents

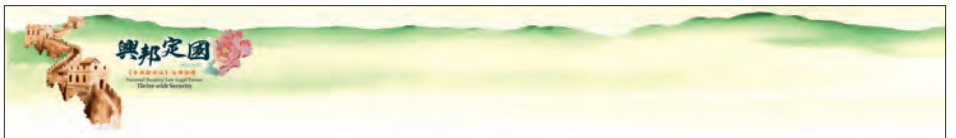
- （一）《香港國安法》在必要的意義和程度上拓寬並深化了《基本法》第二十三條對國家安全秩序的保護範圍。

- The HKNSL, to the extent necessary, broadens the protection of national security under Art.23 of the Basic Law.

1. 顛覆罪（Subversion）

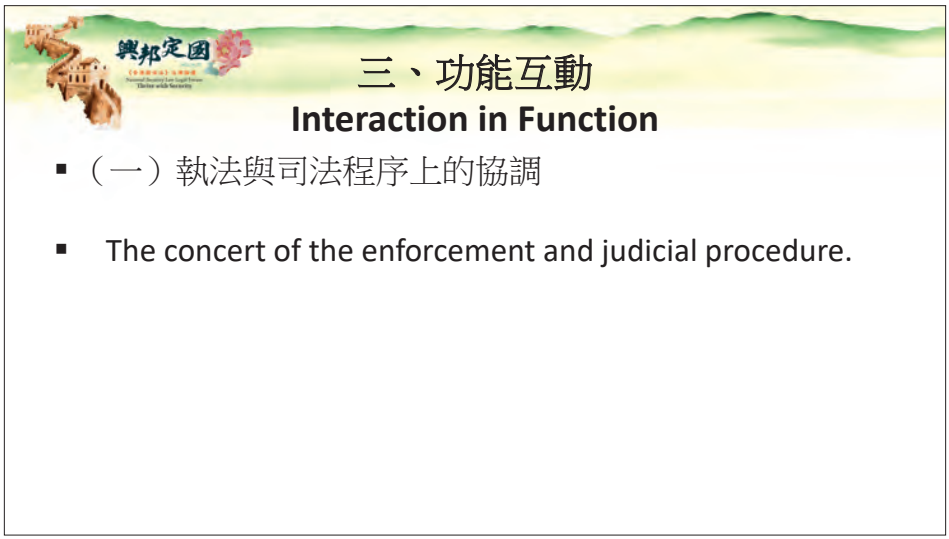
   「中央人民政府」→「國家政權」
   'Central People's Government' → 'State power'

2. 恐怖活動罪（Terrorism）



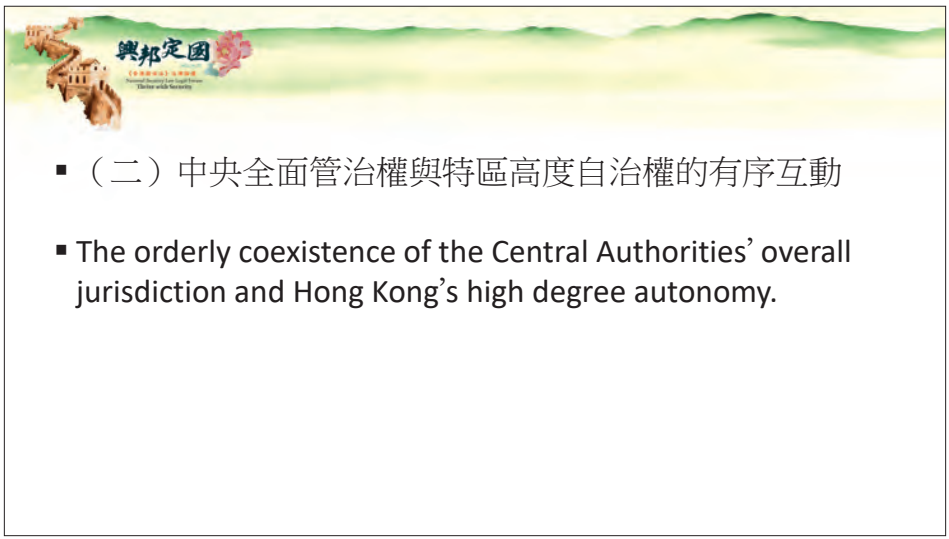
- （二）二十三條立法對《香港國安法》內容作出更進一步的處理。
- Local legislation of Art.23 shall improve the content of HKNSL.

- 1. 對《香港國安法》中存在理解困難的內容進行精細化、具體化
  Specifying the content of HKNSL which is difficult to understand.
  如：「國家秘密」的含義
  The definition of 'State secrets'
- 2. 對《香港國安法》未完備規定內容的補充
  Supplying the content which HKNSL has not completely provided.
  間諜罪（Espionage）



三、功能互動
Interaction in Function

- （一）執法與司法程序上的協調
- The concert of the enforcement and judicial procedure.



- （二）中央全面管治權與特區高度自治權的有序互動
- The orderly coexistence of the Central Authorities' overall jurisdiction and Hong Kong's high degree autonomy.

閉幕式致辭

陳茂波 大紫荊勳賢 GBS MH JP
中華人民共和國香港特別行政區政府
財政司司長

鄭若驊司長(時任律政司司長)、各位嘉賓、各位朋友：

大家好！首先，我感謝律政司同事這三天來籌辦多個論壇的辛勞，亦很感謝全國人大、國務院港澳辦和中央各駐港機構代表的支持，以及各位線上線下講者、嘉賓和朋友們的積極參與，讓論壇取得圓滿成功，加深了社會各界對《香港國安法》的全面認識。

「一國兩制」是香港成功發展的基石，國家《憲法》是「一國兩制」制度的依據。《憲法》授權《基本法》將國家對香港的各項方針、政策作出規定，《基本法》是香港法律的依據。《香港國安法》的訂立是從安全方面為「一國兩制」的踐行設置制度上的保障。以上的法律安排建構了讓香港可以持續穩定、繼續繁榮發展的堅實基礎。

就香港特區的經濟、財政、金融、貿易，以至工商業，《基本法》都提供了明確和清晰的政策規定和保障，包括：實行自由貿易政策、保持自由港、維持單獨的關稅區；保持港元和香港國際金融中心地位；實行財政和稅收政策獨立、保障人員、資金和資訊的自由流動，以及保障個人和投資者的財產等；又繼續奉行普通法制度，法院繼續享有獨立的司法權並加上終審權。可以說，《基本法》中的每一章、每一條，都是在國家《憲法》賦權下訂定的莊嚴規定和承諾，讓我們對香港的發展有無比信心。

在這制度安排下，香港一方面能在「一國」之內實行資本主義制度、接通國際；另一方面，又可以受惠於實行中國特色社會主義的內地騰飛發展帶來的機遇。「一國兩制」的靈活安排，讓香港發展欣欣向榮，成為國際的金融、航運和貿易中心，以及亞太區的國際法律及解決爭議服務中心。時至今天，香港在國家的整個發展大局中，仍然發揮着難以替代的獨特角色和功能。

不過，即使制度的設計再好，我們亦需要為其裝上「保護罩」、「防撞欄」，以抵禦各種各樣可能出現的干擾和破壞，讓特區政府能聚焦發展、切實改善民生，並不斷提升施政效能。兩年前開始實施的《香港國安法》，就是為香港踐行「一國兩制」提供重要和堅實的保障。

事實上，多項數據已清楚說明，《香港國安法》實施後，有效維護和鞏固了香港國際金融中心的地位。《香港國安法》實施至今，本港的新股集資額超過6,500億港元，較實施前的同一時期增加超過三成；港股平均每日成交額超過1,500億港元，較《香港國安法》實施前的12個月高出近六成。我們的資產及財富管理業務總值於2020年底達到34.9萬億港元，較《香港國安法》實施前增加了兩成。本港銀行最近的存款總額，達到15.3萬億港元，亦較《香港國安法》實施前增加逾百分之十一。可以說，《香港國安法》的實施，全面保障了香港社會的整體穩定，讓香港經濟即使在受到新冠疫情嚴峻打擊下，仍能展現出無比的韌力、不斷發展。

除了落實《香港國安法》外，去年香港亦完善了選舉制度以落實「愛國者治港」這根本原則，並已先後順利完成了三場重要的選舉，包括最近的行政長官選舉，順利選出本港第六任行政長官。新一屆政府將在今年7月1日接任，在中央的堅實支持、立法會以及全社會同心合力下，新政府定可全力推動經濟發展、改善市民生活，開啓良政善治新篇章。

然而，我們對複雜多變的國際政經大環境，不能掉以輕心。過去數年，以美國為首的西方國家不斷從多方面嘗試遏制我國發展，

手段橫蠻無理，且有變本加厲之勢。最近的俄烏衝突讓人清楚看見美國如何把美元和一些國際金融系統武器化，並且聯同其盟友、對別國進行所謂的制裁和經濟封鎖，赤裸地扭曲和干擾了國際金融市場的運作，影響嚴重。

香港作為全開放的國際金融中心，對於這些風險，我們必須清醒認識、高度警惕，做好不同的準備和預案。我們必須全力維護香港的金融安全，因為這也涉及到國家的安全。無論是從香港社會的繁榮穩定出發，抑或是捍衞國家的利益、貢獻國家發展的角度，我們都須清楚認知到：「國家安全是經濟發展的前提，經濟發展是國家安全的保障」這個根本道理。「高水平安全」和「高質量發展」，兩者必須統籌兼顧，兩者亦相互促進。

為此，我們需要牢固兩點認識。第一，是以「總體國家安全觀」來看香港的發展，以「底線思維」做好各種風險防禦的準備和預案。第二，是建立全方位發展意識，以多元、平衡的方式推動經濟發展，既提升經濟的彈性和韌力，以應對日益複雜的外圍環境，同時亦確保更廣泛地讓民眾更好的分享到經濟發展的成果，為社會的長治久安打下更穩固基礎。

就着金融體系的不同環節，我們已建立了全方位的風險管理及預警機制。一方面推動銀行、證券、保險、資產管理等行業繼續有序發展，同時亦有效監察風險，尤其是跨市場風險，填補因市場分業監管可能導致的漏洞。我們一直聯同金融監管機構保持高度警惕，並備有各種可能情景的應對預案。而日常則通過「全天候、跨市場、聯動式」的監測系統，對整個金融系統進行「實時監察、實時預警」，並按需要適時作出果斷應對，及早將隱患解決在萌芽之時；期間並對相關業界進行定期及不定期的實地審查以及壓力測試，確保每個環節保持戒備，足以應對隨時可能出現的風險。

面對西方國家金融武器化的威脅，我們還要加緊推動本港金融體系全方位朝多元化和可持續方向發展。而作為國家的離岸國際金融中心，我們會繼續發揮好作為國家金融發展改革的「試驗田」和

「防火牆」的角色，助力國家金融邁向更高水平對外開放，同時以審慎穩妥的方式推動人民幣國際化進程。

過去數年，我們實施了一系列上市制度改革。例如，為配合新興及創新產業公司的集資需要，港交所已於2018年4月實施新上市制度，容許同股不同權架構的新興及創新企業和未有收入或盈利的生物科技公司來港上市，並透過設立便利管道，容許合資格的此類公司在香港作第二上市。截至今年4月底，共有74間公司循新制度上市，首次公開招股集資額累計超過5,800億元，佔同期本港IPO集資總額超過百分之四十四。香港亦成為亞洲最大、全球第二大的生物科技融資中心。

今年1月，港交所推出特殊目的收購公司（SPAC）上市制度，為有意在港上市集資的公司，提供另一條途徑。我們同時繼續優化第二上市制度，容許非創新產業的大中華公司在港第二上市，並給予雙重主要上市的發行人更大靈活性，進一步吸納優質「中概股」在港上市。

事實上，截至今年4月，已有21家「中概股」發行人透過第二上市或雙重主要上市回流本港，以市值計，它們合共佔所有在美國上市的「中概股」的總市值超過七成。在美國金融市場日漸泛政治化的環境下，香港繼續優化自身的上市制度，可為全球金融市場提供更多元的選擇；此舉並可增加我們市場的競爭力、流動性和投資產品。我們正努力把更多這些股份納入跟內地市場互聯互通的範圍，除了可為內地投資者提供更多的優質投資選擇外，也可引導龐大的內地資金，支持實體經濟的發展，實屬一舉多得。

隨着我國經濟不斷發展，無論是企業、金融或其他機構，在境外使用和持有人民幣，以及以人民幣進行交易或投資的需求將會日益增加，而香港作為離岸人民幣業務樞紐的角色，將發揮更關鍵的作用。我們會循多個方向推動香港離岸人民幣市場發展，包括：(一)爭取完善和擴大各項互聯互通安排，為離岸和在岸市場之間的人民幣資金提供有效的雙向流通管道，提高離岸人民幣流動性。昨

天宣布的ETF互聯互通，正是朝着這方向，再邁出一大步的進展；(二)推動離岸市場人民幣產品的發展，包括更多元化的人民幣債券產品發行和債券交易，以及更多以人民幣計價的理財產品；(三)提升發行及交易人民幣證券的需求，為上市公司及投資者提供更多人民幣投融資選項，包括容許「港股通」南向交易的股票以人民幣計價；(四)把握大灣區先行先試的契機，擴大粵港澳大灣區內人民幣跨境使用的規模和範圍，推出更多樣化和便利化的人民幣產品和服務，有序推動區內金融產品跨境交易。去年10月宣布的「粵港澳大灣區理財通」是這方面進展的里程碑，我們會繼續推動擴展其涵蓋的範圍和內容。此外，我們亦正研究雙貨幣電子錢包，推動數字人民幣和數字港元在區內更便利和廣泛的使用。

穩步推進這些工作，不但有助鞏固香港作為資金進出內地重要橋樑的角色，以及進一步助力人民幣穩慎國際化的進程；長遠而言，更是應對所謂制裁、確保金融安全的重要一步。

至於西方社會單邊主義、保護主義抬頭，以至各方面可能出現的經濟打壓，我們需要以「內、外」兩路並進應對。前者，是要加快融入國家發展大局，特別是用好國家在「十四五規劃」及粵港澳大灣區建設中給香港的定位和各項支持，加強與區內各兄弟城市的協同發展、互惠合作，讓整個大灣區城市群的經濟取得「質」和「量」的整體提升，實現更高質量發展，達致更高水平的對外開放。

在國家「十四五規劃」下，科技發展、自主創新獲賦予核心地位，香港必須善用自身的科研優勢，跟大灣區的兄弟城市通力合作，共同努力把整個灣區發展成為國際級的創新科技中心，助力國家實現科技自立自強。

落馬洲河套地區港深創新及科技園和新田科技城，將聯同深圳科創園區組成合共佔地約540公頃的深港科創合作區，成為推動大灣區國際科技創新中心建設的重要引擎。

推動研發方面，2018/19年度《財政預算案》撥款100億元成立的「InnoHK創新香港研發平台」，至今已成功吸引海內外30多所頂尖大學和科研機構與本地的大學和科研機構合作，在科學園設立了28間研發實驗室。而我在今年《預算案》亦為香港生命健康科研發展預留了100億元，包括在港深創新及科技園設立InnoLife生命健康創新科研中心。

「對外」方面，我們要加強與豐富不同的境外聯繫，積極跟更多不同的經貿夥伴建立更深厚、互惠互利的關係，力拓美歐市場以外的多元發展。近月，特區政府亦正積極爭取加入覆蓋全球約三成人口、佔全球經濟約三成GDP的《區域經濟全面夥伴關係協定》（RCEP）。

與此同時，我們亦會大力推動香港跟主要的貿易投資夥伴，以及具有雙邊貿易和投資增長潛力的新興經濟體，簽訂「全面性避免雙重課稅協定」（CDTA），從而建立一個更全面的稅務協定網絡，吸引更多海內外投資者在香港投資，以及便利本港公司到海外投資。截至今年1月，香港已與45個稅務管轄區簽訂全面性協定，並正與14個稅務管轄區進行磋商。

今年是香港回歸祖國25周年，標誌着香港發展的歷史新起點。實施《香港國安法》、完善選舉制度，全面準確貫徹落實「一國兩制」，讓香港能行穩致遠，重回聚焦發展的軌道，開啓一個良政善治的新里程、新發展階段。我深信，只要全社會上下一心，守好國家安全的底線，同心合力謀發展，在國家的堅實支持下，香港將會迎來更亮麗發展的明天！

再次多謝大家出席今天的論壇，祝大家身體健康，事業宏達！

Legal Forum

Thrive with Security

Proceedings

Foreword

The implementation of the National Security Law is a historical step forward in refining the HKSAR's framework for safeguarding national sovereignty, unity, territorial integrity, security and development interests. Since its implementation in 2020, the National Security Law has been integrated into Hong Kong's legal system. It is convergent and compatible with, and complementary to, HKSAR's local laws and the common law system. This has set the HKSAR on track "from chaos to order, and from order to prosperity", and charted a clear direction for the steadfast and successful implementation of "One Country, Two Systems".

On the momentous occasion to commemorate the second anniversary of the 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, the Department of Justice, with the strong support of the Central People's Government, successfully organised the "National Security Law Legal Forum - Thrive with Security" on 28 May 2022 as one of the key events for celebration of the 25th anniversary of Hong Kong's reunification with the Motherland. The proceedings of the Legal Forum, which comprise both speeches and discussions, are now published to provide the general public with the proper understanding of the constitutional order and concepts on national security, and to raise their awareness of national security and of the obligation to abide by the law.

In President Xi's important speech delivered on 1 July 2022, he emphasised that Hong Kong must fully and faithfully implement "One Country, Two Systems" and made it clear that its highest principle is to safeguard national sovereignty, security and development interests. The rule of law is an essential element in implementing "One Country, Two Systems". The Department of Justice will continue its full spectrum of initiatives to inculcate the proper concept on the rule of law both inside

and outside of the HKSAR, and proactively develop and promote national security education, thereby cultivating an environment in which the general public willingly respect and uphold the country's fundamental system.

Security is the prerequisite for development, whilst development is the foundation for security. Taking the holistic view of national security as tenet, the Department of Justice will do its utmost to continuously take forward the refinement of the legal system and enforcement mechanisms for safeguarding national security, thereby creating favourable conditions for the HKSAR to leverage its unique status under "One Country, Two Systems" and to seize the boundless opportunities brought forth by the National 14th Five-Year Plan, the development of the Guangdong-Hong Kong-Macao Greater Bay Area and the Belt and Road Initiative, so as to proactively integrate ourselves into the overall development of the country.

Mr Paul T K Lam SBS SC JP
Secretary for Justice
Hong Kong Special Administrative Region

CONTENTS

CONTENTS

WELCOME REMARKS

LAM CHENG Yuet-ngor Carrie GBM GBS JP

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

Commissioner Liu Guangyuan, Major General Wang Zhaobing, Director Guan Qinghua, Chief Justice Andrew Cheung Kui-nung, President Andrew Leung Kwan-yuen, distinguished guests and colleagues,

Good morning! Welcome to this National Security Law Legal Forum themed "Thrive with Security" hosted by the Department of Justice of the HKSAR Government.

Today marks the second anniversary of the adoption of the Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security (528 Decision) by the National People's Congress. This important date makes this Legal Forum more meaningful. Senior officials of the Central People's Government and of the HKSAR Government, as well as a host of elites in the legal profession at home and abroad, are gathered together to review cases of the National Security Law, explore frontier issues on national security, and look ahead the further refinement of the legal framework and enforcement mechanism for safeguarding national security in the HKSAR.

The National People's Congress made the 528 Decision and authorised the Standing Committee of the National People's Congress to formulate the National Security Law on this day two years ago. After

that, the National People's Congress passed the National Security Law on 30 June, which was listed in Annex III to the Basic Law and applied in the HKSAR by way of promulgation. On that night, I signed the Gazette Notice in the capacity of the Chief Executive of the HKSAR, such that the National Security Law was implemented in Hong Kong. It is indeed a significant and honourable responsibility. At that time, there had been violent clashes and social unrest in Hong Kong for almost a year. National security was threatened, and people's life and property were not protected. In light of the above, the promulgation and implementation of the National Security Law are undeniably the lynchpins of stability for Hong Kong.

The National Security Law is a national law. It was made under a stringent legislative process and with the wisdom of many Mainland legal experts. After the National People's Congress made the 528 Decision, several colleagues of mine and I had the honour of participating in the intense legislative work. I would like to take this opportunity to express my sincere gratitude to the Central People's Government, who attached great importance to the participation of the HKSAR Government and adopted many of our views. These ensure the implementation of the National Security Law in Hong Kong, where the common law system is adopted, through the effective and powerful application of its fundamental provisions.

I have worked for the Government for over 40 years. The efficiency of the implementation of the National Security Law is unprecedented. Some of the major tasks were accomplished within the first 10 days of the promulgation of the National Security Law. These include the appointment of the National Security Adviser and Secretary-General of the Committee for Safeguarding National Security of the HKSAR by the Central People's Government, the formal establishment of the National Security Department of the Police Force and the National Security Prosecutions Division of the Department of Justice, the appointment of the first batch of designated judges under the National Security Law by

the Chief Executive, the convening of the first meeting of the Committee for Safeguarding National Security of the HKSAR, the establishment of the Office for Safeguarding National Security of the Central People's Government in the HKSAR, and the gazettal and implementation of the "Implementation Rules" for the National Security Department of the Police Force to use or to carry out the seven types of measures in Article 43 of the National Security Law.

With the concerted efforts of the HKSAR and all sectors of the community, the National Security Law has been successfully implemented. Institutions for safeguarding national security in the HKSAR have been established in accordance with the law and operating smoothly. Illegal criminal activities endangering national security have been cracked down on. Further, the law has facilitated the transition from chaos to order and maintained stability of Hong Kong.

Concluding the work and experiences over the past two years, my greatest feeling is that in order to safeguard national security to the utmost, we must thoroughly understand the holistic view of national security and implement every part of it to achieve the goal of "prevention". Over the past two years, under the leadership of the Central People's Government, we have improved the electoral system of the HKSAR, established a system under which public officers should take an oath to uphold the Basic Law and swear allegiance to the HKSAR, and reinforced the sense of national security awareness and political commitment of the senior officials of the governmental departments and public bodies. These measures delivered immediate results in achieving the goal of "prevention".

However, the work of the HKSAR in safeguarding national security remains at preliminary stages. Officials of the HKSAR Government should recognise that the situation remains challenging and complex. There are still many challenges in the implementation of the National Security Law, including the turbulent external political climates, as well as the rising external forces attempting to contain China. Radical local

groups and underground organisations which advocate terrorism are lurking around. I call on the next term of government to further enhance the administration team's political awareness and sense of national security, think about the big picture and embrace a "dare-to-fight" spirit.

Our Motherland will always be the HKSAR's strongest backing. The establishment of the law and enforcement mechanism for safeguarding national security under the National Security Law is a manifestation of the Central People's Government's high degree of trust in the HKSAR and its officials. We are safeguarding national sovereignty, security and territorial integrity; protecting the well-being of the citizens of the country; and enforcing a national law. Therefore, all HKSAR officials who are enforcing the National Security Law should not disappoint the country and citizens. Lastly, I would like to conclude by quoting the words given by President Xi Jinping when he hosted the Democratic Life Meeting of the Political Bureau of the Communist Party of China Central Committee in December 2016. President Xi said "we should go head to head when safeguarding the core interests of the country, be courageous enough to meet challenges, never yield to any difficulties, never trade principles for benefits, and never swallow bitter fruits that undermine the fundamental interests of the Chinese nation under any pressure".

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

WANG Linggui

Deputy Director,
Hong Kong and Macao Affairs Office of
the State Council of the People's Republic of China

The Honourable Ms Carrie Lam Cheng Yuet-ngor (then Chief Executive), distinguished guests and dear friends,

Good morning, everyone!

I am delighted to be invited to participate in the 2nd National Security Law Legal Forum hosted by the Department of Justice of the HKSAR Government. First of all, on behalf of Mr Xia Baolong, Vice-Chairman of the National Committee of the Chinese People's Political Consultative Conference and the Director of the Hong Kong and Macao Affairs Office of the State Council, I extend our warm congratulations to the forum! This year being the second anniversary of the implementation of the National Security Law, we gather to review the eventual history leading to the formulation and implementation of the National Security Law, sum up our experiences, discuss the issues, and reflect on the true meaning of the rule of law. I believe this is necessary and important.

The formulation and implementation of the National Security Law is the enrichment and improvement of the practice of "One Country, Two Systems". After Hong Kong's reunification with the Motherland, the practice of "One Country, Two Systems" has achieved universally recognised success. At the same time, under the influence of various internal and external complex factors, anti-China disruptors' activities were rampant, and the community in Hong Kong was once traumatised.

The Central Authorities evaluated the situation and the National People's Congress (NPC) made a decision in accordance with the Constitution and the Basic Law to authorise the NPC Standing Committee (NPCSC) to formulate the National Security Law, plugging the legal loopholes in the legal system and the enforcement mechanisms of the HKSAR in safeguarding national security. Since the promulgation of the National Security Law, the law enforcement agencies and the Judiciary of the SAR have strictly enforced the law and impartially administered justice. The HKSAR Government and all sectors of the community have actively promoted the National Security Law. The authority of the rule of law is manifested. The national security is guaranteed. The concept of national security is now deeply rooted in people's minds. The formulation and implementation of the National Security Law have maintained the constitutional order of the HKSAR established by the Constitution and the Basic Law, and have laid a solid legal foundation for the transition from chaos to order and from order to prosperity. It is significant to uphold and enhance the institutional system of "One Country, Two Systems", safeguard national sovereignty, security, and development interests, and maintain Hong Kong's long-term stability, prosperity and stability.

The fundamental purpose of enacting and implementing the National Security Law is to plug the legal loopholes in Hong Kong's maintenance of national security, effectively safeguard national security, maintain the prosperity and stability of the HKSAR, protect the legitimate rights and interests of residents of the HKSAR, and combat a small minority of acts and activities endangering national security. Since the promulgation of the National Security Law, some people with ulterior motives have continued to query and even smear the National Security Law that it would undermine the rights and freedoms of Hong Kong residents and so on. Yet, facts speak louder than words. Since the implementation of the National Security Law, Hong Kong has bid farewell to the turbulent situation. The numbers of various violent crime cases have dropped sharply, and stability has been gradually restored in society. The order

of the HKSAR Government's governance has returned to normal, with improved environment in governance. The flag of patriotism and love for Hong Kong is flying high, and the social integrity is fully demonstrated. Hong Kong's Rule of Law Index maintains its ranking among the best in the world, with more media outlets and a healthier media environment. The economy and finance has continued to take hold. The number of foreign companies has continued to increase. Investors have more confidence in Hong Kong. All these fully demonstrate that the National Security Law is a booster for the rule of law in Hong Kong, a guardian of the rights and freedoms of residents, and a reassurance for the prosperity and development of Hong Kong.

Distinguished guests and dear friends,

National security is the prerequisite for the survival and development of a country, an essential cornerstone for peace and stability of the country, and the best guarantee for a better life for the people. President Xi Jinping has emphasised that "National Security is of the top priority to realise the Chinese dream of the great rejuvenation of the Chinese nation, to ensure that the people live and work in contentment". The disturbances arising from the "legislative amendment turmoil" in 2019 was a good lesson that without national security and political security, all will be in vain. With the National Security Law and the new electoral system, Hong Kong has achieved a significant transition from chaos to order and from order to prosperity. The stronger the foundation of national security, the greater the room for "One Country, Two Systems". We have every reason to believe that in the future, Hong Kong's advantages of diversity, inclusiveness and openness will be more prominent. Its edge of being a highly market-oriented and international economy underpinned by the rule of law, which has leveraged the support of the country while engaging the world at large, will be more eminent. Hong Kong will integrate into the national development in a more thriving position to create new glory!

Lastly, may I wish this forum every success!

LUO Yonggang

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

The Honourable Ms Carrie Lam Cheng Yuet-ngor (then Chief Executive), distinguished guests, ladies and gentlemen, dear friends,

Good morning, everyone!

It's my great pleasure to participate in the annual National Security Law Legal Forum hosted by the Department of Justice of the HKSAR Government. As entrusted by Director Luo Huining, I would like to extend my warm congratulations to this forum on behalf of the Liaison Office of the Central People's Government in Hong Kong.

Today marks the second anniversary of the adoption of the 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. This forum is held at a momentous time. Gathering leading experts and scholars for exchanges and discussions on the objectives of the enactment and implementation of the National Security Law and the frontier issues of safeguarding national security, this forum offers strong academic values and important practical significance. I would like to take this opportunity to share with you my three observations.

First, the National Security Law facilitates the transition of the HKSAR from chaos to order. In his meeting with the Chief Executive

Carrie Lam Cheng Yuet-ngor (then Chief Executive) during her duty visit to Beijing on 22 December last year, President Xi Jinping pointed out that the transition of Hong Kong from chaos to order was being reinforced and the situation would continue to improve. Faced with the gravest situation arising from the "legislative amendment turmoil" since Hong Kong's reunification with the Motherland, the Central Authorities evaluated the situation and resolutely decided to implement the National Security Law. This has fundamentally plugged the loopholes in the national security system in Hong Kong, put an end to Hong Kong's long history of "security vacuum" in safeguarding national security, removed the "evil hands" of internal and external hostile forces that endanger national security and effectively safeguarded the constitutional order of the HKSAR established under the Constitution and the Basic Law. Over the past two years since the implementation of the National Security Law, the aggressiveness and arrogance of anti-China Hong Kong disruptors have been given a heavy blow. Acts that endanger national security have been effectively curbed. Hong Kong has put an end to its turbulent situation. People have resumed their peaceful lives. Statistics show that as of 24 May this year, 187 criminal suspects who were suspected of endangering national security were arrested. Among them, 88 persons and 4 companies were prosecuted for the offences under the National Security Law, while 30 persons and 4 companies were prosecuted for other offences. 8 persons were convicted and 80 persons have been detained. The general social stability of Hong Kong has been maintained now. The crimes rate dropped by 6.2 percent year-on-year and the violent crimes rate dropped by 10.3 percent year-on-year in the first quarter of this year. The facts have fully proved that the National Security Law has restored peace to Hong Kong. The HKSAR has got back on the right track from chaos to order.

Second, the National Security Law ensures the opening of a new chapter on good administration and governance of the HKSAR. General Secretary Xi Jinping emphasised that "security is the prerequisite for development, whilst development is the guarantee of

security." Before the enactment of the National Security Law, forces of anti-China Hong Kong disruptors, with the support of the external hostile forces, initiated various disruptive activities. In particular, some anti-China Hong Kong disruptors took advantage of the loopholes in election to join the governance of the HKSAR such as the Legislative Council and to take different measures to obstruct the HKSAR Government's effective governance in accordance with the law. After the enactment of the National Security Law, three important elections were successfully held under the improved electoral system. The principle of "patriots administering Hong Kong" has been effectively implemented. The governance power remains firmly in the hands of the patriots. Anti-China Hong Kong disruptors have been firmly kept outside the governance of the HKSAR. Now the improved electoral system has taken root. The political order of the HKSAR has returned to normal with the improvement of the socio-political situation. The governance authority of the Chief Executive and the HKSAR has been strongly safeguarded and the environment for governance has also been effectively improved. A positive interaction between the Legislative Council and the HKSAR Government is manifested, and both of which discharge their respective functions in a highly efficient way. Hong Kong is now free from long-term political disputes. The HKSAR Government can focus on the pandemic prevention and control, developing the economy and improving people's livelihood. Hong Kong will open a new chapter on good administration and governance.

Third, the National Security Law escorts the steadfast and successful implementation of "One Country, Two Systems" in the HKSAR. In his 2022 New Year address, General Secretary Xi Jinping heartily remarked, "The Motherland has always been concerned with the prosperity and stability of Hong Kong and Macao. The steadfast and successful implementation of "One Country, Two Systems" could only be ensured with unity and concerted efforts." Since Hong Kong's reunification with the Motherland, the success of "One Country, Two Systems" has received recognition throughout the world. Despite many

new situations, problems and challenges encountered in practice, the Central Authorities will not change its original intention of "One Country, Two Systems". Over the past two years since the implementation of the National Security Law, the fact that Hong Kong has gone through hard times speaks volumes about the institutional resilience and strong vitality of "One Country, Two Systems". The concept of "security brings prosperity" has been gradually ingrained in everyone. More and more Hong Kong citizens have realised that "One Country" is the prerequisite and foundation of "Two Systems". Only by building a solid security foundation of "One Country" can the "Two Systems" enjoy greater vitality and space, the well-being and interests of Hong Kong residents be effectively safeguarded, and the prosperity, stability and lasting peace of Hong Kong be ensured. At present, the flag of patriotism and love for Hong Kong has been flying high. The situation of the pandemic is improving. The social development has got back on the right track. The economy and finance are in good order. The level of confidence in "One Country, Two Systems" among Hong Kong citizens and international community continues to rise. With the protection of the National Security Law, Hong Kong will be able to give full play to its unique strengths and proactively integrate itself into the national development. The Pearl of the East will be shining more brightly, and the practice of "One Country, Two Systems" in Hong Kong will embrace brighter future.

This year marks the 25th anniversary of Hong Kong's reunification with the Motherland, and it is also a crucial year for Hong Kong to advance from chaos to order, and gradually towards governance and prosperity. "Stability" has always been the prerequisite and guarantee for Hong Kong's development. Let us join hands together to turn our love for the Motherland and Hong Kong and our aspiration for a better life into conscious actions to abide by, uphold, and enforce the National Security Law. This would result in the good situation where the whole society will work together to implement and defend the National Security Law. The formidable power of the National Security Law that protects Hong Kong and enables Hong Kong to thrive with security could be fully utilised. A

safer, more stable and tranquil social environment will be created for the bright future of Hong Kong.

May I wish this forum every success! Thank you!

KEYNOTE SPEECH (I): NATIONAL PEOPLE'S CONGRESS'S 528 DECISION

ZHANG Yong

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

The Honourable Chief Executive Carrie Lam Cheng Yuet-ngor (then Chief Executive),
The Honourable Deputy Director Wang Linggui, and Deputy Director Luo Yonggang,
Distinguished guests, dear friends,

Good morning, everyone!

Thanks for the invitation from the Department of Justice of the HKSAR Government. It is a great pleasure to exchange views with you all again at the National Security Law Legal Forum.

As I remember, the theme of last year's Legal Forum for the first anniversary of the implementation of the National Security Law was "Security Brings Prosperity". That signifies what the enactment and implementation of the National Security Law has achieved by plugging the HKSAR's institutional loopholes in safeguarding national security, turning around the social turmoil in Hong Kong, and restoring joy and peace to the lives of our Hong Kong compatriots. This year, the theme of the Legal Forum is "Thrive with Security". To my understanding, this is to suggest at a higher level that the establishment and improvement of the institutional system for the HKSAR to safeguard national security has provided more robust, comprehensive and effective protection for the

country's enduring peace and security, and for Hong Kong's long-term prosperity and stability.

Two years ago today, the National People's Congress (NPC) adopted the Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security (National Security Decision). As both the legislative basis for the National Security Law and the legal requirement for building an institutional system for safeguarding national security in Hong Kong, this important Decision carries vital constitutional significance and an abundance of content. So today, upon request of the Forum organiser, I would like to share with you my three observations on the National Security Decision.

I. The National Security Decision is an institutional system built at the State level for safeguarding national security in Hong Kong. The National Security Decision is the major decision and arrangement made by the Central Authorities to address Hong Kong's existing systemic deficiencies in safeguarding national security and the grave situation facing national security in reality. It is a top-level design of the institutional system for safeguarding national security in Hong Kong at the State level. In my view, there can be three perspectives to understand at the State level.

First, the National Security Decision takes the holistic view of national security as the guiding ideology. The holistic view of national security is an integral part of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era. It is also the action agenda and scientific guidance on safeguarding national security of our country. President Xi Jinping emphasised that ensuring national security is a matter of top priority. The holistic view of national security covers security areas such as political, military, homeland, economic, cultural and public security. Guided by the holistic view of national security, our country has gradually established a comprehensive and systematic institutional system for safeguarding national security. The HKSAR is a local administrative region directly under the Central People's

Government. Safeguarding national security in Hong Kong is essentially an organic component of national security for the country as a whole. Therefore, the National Security Decision similarly takes the holistic view of national security as its guiding ideology in fully implementing the various principles and requirements established by this approach.

Second, the National Security Decision is made by the highest organ of State power by exercising its powers under the Constitution. The NPC, the highest organ of State power in our country, occupies the supreme position in the entire system of State institutions, and exercises key State powers such as the legislative power and the power to decide on major issues. Article 62(14) of the Constitution of our country provides that the NPC "decid[es] on the establishment of special administrative regions and the systems to be instituted there", which include the system for safeguarding national security in Hong Kong. In practice, the NPC has always been the final decision maker on major issues concerning the fate and future of Hong Kong, and its decisions have supreme legal force. Examples of such decisions made by the NPC include: its decision to ratify the Sino-British Joint Declaration in April 1985; its decision to establish the Drafting Committee for the Basic Law of the HKSAR on the same day; and also its decision to establish the HKSAR when adopting the Basic Law of the HKSAR in April 1990. The National Security Decision is the first decision made by the NPC on a major issue concerning Hong Kong since the city's reunification with the Motherland. This decision has important normative and guiding implications for the establishment of an institutional system for safeguarding national security in Hong Kong.

Third, the National Security Decision mandated the enactment of a national law providing holistic institutional arrangements for safeguarding national security in Hong Kong. In 1990, the NPC adopted the Basic Law of the HKSAR and vested the HKSAR with the legislative power to prohibit certain acts that endanger national security. This is "legislating on Article 23 of the Basic Law", as we are all familiar

with. But regrettably, the legislative work for this is long overdue in Hong Kong whilst the risks of endangering national security have become increasingly notable. Under such circumstances, the NPC exercised its power under the Constitution to mandate the Standing Committee of the National People's Congress (NPCSC) to formulate laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security. This mandate of the National Security Decision operates in tandem and harmony with Article 23 of the Basic Law, both of which derive their powers from the highest organ of State power. The legislative mandate of the National Security Decision is a general one, requiring the NPCSC to enact a national law for the purpose of effectively safeguarding national security. Precisely on this basis, we can all see that the National Security Law is not merely a criminal law that prohibits the four types of offences which seriously endanger national security. Rather, it is a comprehensive and overarching piece of legislation that covers various aspects such as organisational law, substantive law and procedural law. This Law provides holistic institutional arrangements for safeguarding national security in Hong Kong at the State level. In terms of legal hierarchy and effect, Article 62 of the National Security Law clearly provides that "this Law shall prevail where provisions of the local laws of the [HKSAR] are inconsistent with this Law".

II. The National Security Decision serves to comprehensively and systematically build an institutional system for safeguarding national security in Hong Kong. The implementation of the National Security Law has achieved remarkable results and turned the tide of chaos at one stroke. Therefore, there has been increased interest in the National Security Law and we are well versed with many of its provisions. Today, however, I would like to take you through the contents of the National Security Decision for a refresher. As a major decision made by the highest organ of State power, the National Security Decision is comprehensive in structure and rich in content. It contains both principle requirements and institutional provisions; both the responsibilities of the

Central Authorities and the duties of the local region. Its comprehensive and systematic nature is manifested in at least four aspects.

First, it follows the five basic principles. These include 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.

Second, it makes clear the State policy and positions. (1) The country unswervingly, fully and faithfully implements the principles of "One Country, Two Systems", "Hong Kong people administering Hong Kong" and a high degree of autonomy, and upholds the Constitution and the constitutional order established by the Basic Law of the HKSAR; **(2)** The country takes necessary measures to establish and improve the legal system and enforcement mechanisms for Hong Kong to safeguard national security and forbid any acts and activities endangering national security; **(3)** The country resolutely opposes interference in the Hong Kong's affairs by any foreign countries or external forces in any form, and will take necessary countermeasures to prevent, stop and punish activities of secession, subversion, infiltration and sabotage carried out by foreign or external forces in Hong Kong.

Third, it firmly implements the overarching responsibilities of the Central Authorities. This mainly refers to two enabling provisions. **(1)** When needed, relevant national security organs of the Central People's Government are authorised to set up agencies in Hong Kong to fulfil their duties; **(2)** The NPCSC is entrusted to formulate national laws to be promulgated and implemented in Hong Kong.

Fourth, it specifies the constitutional responsibilities of the HKSAR. This includes four aspects. **(1)** The HKSAR shall complete the legislation for safeguarding national security as stipulated in the Basic Law as early as possible. **(2)** All bodies of power of the HKSAR,

including administrative, legislative and judicial organs, must effectively prevent, suppress and punish any acts and activities endangering national security. **(3)** The HKSAR must establish and improve the institutions and enforcement mechanisms for safeguarding national security, strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security. **(4)** The Chief Executive must regularly report to the Central People's Government on the performance of the duty to safeguard national security, carry out national security education, and to forbid acts and activities endangering national security in accordance with the law, etc.

III. With the full implementation of the National Security Decision, an institutional system has been established to safeguard national security. After the National Security Decision was made, the NPCSC enacted in accordance with the mandate the National Security Law which was applied by way of promulgation. The relevant departments of the Central Authorities and the HKSAR have fully implemented the requirements of the Decision and timely set up relevant institutions to fulfil their duties. The HKSAR Government and the judicial authorities have investigated, prosecuted and tried a batch of cases concerning offences endangering national security. Diverse publicity and educational activities on safeguarding national security have also been launched across the community. Yet, at the same time, we should remain conscious of the fact that the institutional system for safeguarding national security is still fledgling. Quite some parts of the National Security Decision have yet to be institutionalised. Many provisions of the National Security Law are still pending concrete implementation. The community still has quite some vague understanding of the national security situation and the risks facing Hong Kong. So today, we join together to refresh ourselves on the National Security Decision and commemorate the second anniversary of the implementation of the National Security Law. The purpose is to further specify the course for our efforts, undertake our responsibilities and duties, and jointly spearhead the establishment of the institutional system for safeguarding national security in Hong Kong.

To do this well, **we must first position ourselves in the overall context of national security.** Safeguarding national security is within the purview of the Central Authorities. Within the same country, the standard of national security is uniform. The efforts to safeguard national security in Hong Kong must serve and be subservient to the needs and requirements of national security in the country as a whole. This is determined by the constitutional relationship between the Central Authorities and local regions; and also by the paramount importance and complexity of national security. **We must then focus on the effective implementation of the National Security Decision and the National Security Law.** Two years ago, the NPC and the NPCSC adopted a "Decision and Legislation" approach and made the top-level design and holistic institutional arrangements at the State level for safeguarding national security in Hong Kong. This is of major and profound significance. In fulfilling its constitutional duty to safeguard national security, the HKSAR must keep abreast with the times in terms of concept, scope, approach and so on; adapt to the actual circumstances of safeguarding national security in the new era; gain full knowledge and deep understanding of the requirements and provisions of the National Security Decision and the National Security Law; and ensure their full realisation and effective implementation through legislative, judicial and law enforcement work by the HKSAR. **Finally, we must also make efforts to cultivate a socio-political environment for safeguarding national security.** "Laws alone cannot carry themselves into practice". Safeguarding national security is a social system project in which the legal system is just one facet. We must effectively raise the awareness of safeguarding national security among all walks of life for this concept to take root in everyone. By doing so, we endeavour to create a social atmosphere and political ecology conducive to the implementation of laws.

Distinguished guests, dear friends!

This year marks the 25th anniversary of Hong Kong's reunification with the Motherland. We must never forget that this is also the 180th anniversary of the humiliating Treaty of Nanking, which Britain forced upon the Qing government for the cession of Hong Kong Island. This year's Legal Forum serves not only as a commemoration in reality, but also an admonishment in history.

"For there to be a safe home, there must first be a safe country." The history and the reality of human society have constantly attested to this saying. At present, the world is undergoing profound changes unseen in a century while the Chinese nation is in a crucial phase of striding towards the second centenary goal. Meanwhile, Hong Kong is also at a momentous stage moving from chaos to order and towards greater prosperity. "Forget not peril in peacetime, and chaos when in order". Let us work together to further implement the National Security Law and put well into practice the National Security Decision. With a broader vision and more solid work, we will build a robust institutional barrier for safeguarding national security, and guard well our common wonderful homeland.

Thank you!

KEYNOTE SPEECH (II): FROM CHAOS TO ORDER – NATIONAL SECURITY LAW AS THE MODEL EXAMPLE OF THE RULE OF LAW

ZHENG Yanxiong

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

The Honorable Ms Carrie Lam Cheng Yuet-ngor (then Chief Executive), distinguished guests, dear friends,

Good morning, everyone!

On this important day marking the 2nd anniversary of the Decision of the National People's Congress (NPC) on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security, it takes on profound significance for the Department of Justice of the HKSAR Government to take the initiative to host this forum to discuss and exchange views on the achievements and experiences in implementing the National Security Law. On behalf of the Office for Safeguarding National Security of the Central People's Government in the HKSAR, I hereby extend my sincere greetings to the distinguished guests and dear friends here! My heartfelt gratitude also goes to everyone from all walks of life who have always supported the implementation of the National Security Law and the work of our Office.

On this day two years ago, faced with the dire situation of the "legislative amendment turmoil", the Central Authorities with their unswerving political resolve stood firm on the original intention of "One Country, Two Systems" where the NPC kicked started the legislative process of the National Security Law upon its adoption of the Decision

on Establishing and Improving the Legal System and Enforcement Mechanism for Safeguarding National Security in the HKSAR. Back then, all kinds of doubts and misgivings prevailed in Hong Kong. Now with the passage of two years, Hong Kong has turned from chaos to order. This fact amply demonstrates that the National Security Law is the fundamental solution for Hong Kong to safeguard national security and its long-term prosperity and stability.

First, the chaotic situation reverted by "One Law, Two Mechanisms"

Since the gazettal and implementation of the National Security Law, under the robust leadership of the Central Authorities, the HKSAR Government has embraced its responsibilities with courage while the two mechanisms of 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 have been proactive and productive in their operation. The judiciary, law enforcement and executive authorities of the HKSAR have performed their duties and functions in accordance with the law. This has provided a powerful and effective safeguard for national security. With the leaders of the anti-China disruptions in Hong Kong brought to justice, social order has attained security and stability. The overall ecology of public opinion has grown increasingly rational. A number of anti-China, destabilising organisations have been disbanded or ceased operation. Those efforts together with the reform of the Liberal Studies subject and so on have effectively plugged the loopholes in national security. The previous misunderstandings in the community about the National Security Law are gradually dispelled. According to opinion polls, the level of recognition for safeguarding national security has reached above 77.5%.

The effective implementation of the National Security Law has also opened up a favourable prospect for all sectors. We have seen the executive-led approach effectively put in place, the legislature operating in an orderly and highly-effective manner, and the judiciary and law enforcement authorities acting in accordance with the law. Such

initiatives have achieved: greater prominence of dignity and authority in the rule of law; a fresher and brighter space for the development of media, societies and the like; a healthier environment for youth growth; better protection for the fundamental rights of the public and their daily lives; a more optimised business environment; and more optimism among investors over Hong Kong. Last year, the city's economy grew at 6.4%, outpacing the overall growth of developed economies by 1.4% and making its way back to the "Nylonkong" ranking among the world's top three financial centres. The overall picture illustrates that the Central Authorities' decision to resolve the problems in Hong Kong by a rule-of-law approach is a wise and correct one.

Second, major chaos prompted great law which in turn promotes good order

As the saying goes, "after the typhoon comes the fishing season; and after the storm comes the rainbow." The timely advent of the National Security Law is a milestone for Hong Kong's transition from chaos to order. As evident from the legislative timing, legislative intent, legislative backing, legislative procedures and legislative content of the National Security Law, as well as its rule-of-law practice, the "One Law, Two Mechanisms" approach provides a model example for the rule of law in national governance. **First, the National Security Law has at one stroke plugged the key loophole in the lack of legal basis for national security.** Hong Kong has left behind its long history of passivity in safeguarding national security and closed the major gap of internal and external hostile forces endangering national security. **Second, it has struck at the very heart of "colour revolution".** The National Security Law introduced a set of legal provisions to punish the four types of offences endangering national security, and clearly stipulates the respective liabilities for organisations and individuals. This has significantly dampened the arrogance of the anti-China destabilising forces in Hong Kong. **Third, the whole piece of legislation is interwoven with rule of law thinking, wisdom and commitment.** The National Security Law vests the judiciary and law enforcement authorities with the necessary powers and duties,

empowering them with the legal means required to prevent, suppress and punish acts endangering national security, and providing an ample legal toolbox to punish crimes in accordance with the law. **Fourth, the rule of law has become a potent weapon against external interference.** The western countries such as the United States often interfere with the internal affairs of other countries on the pretext of the rule of law. But the successful practice of the rule of law under the National Security Law has left them no room for nitpicking. Compliance with the National Security Law in Hong Kong is an immutable reality.

Third, the Central Authorities' firm adherence to law-based governance of Hong Kong has won them the most favour from the people

At the critical moment when national security was thrown into unprecedented peril by the "legislative amendment turmoil" in Hong Kong, the Central Authorities remained resolute in their determination to uphold a bottom line for safeguarding national security by means of the rule of law, which is of prime significance to the practice of "One Country, Two Systems". The fundamental objective, principle and bottom line of "One Country, Two Systems" all point directly to the safeguard of national sovereignty, security and development interests. Without national security, or if national security is trampled on, "One Country, Two Systems" would be rendered a rootless tree and a strip of sourceless water. Only by guarding national security can we provide the strongest safeguard for the steadfast and successful implementation of "One Country, Two Systems", as well as the strong support for the long-term prosperity and stability of Hong Kong. The Central Authorities have achieved the pivotal effect of "largest common denominator" in Hong Kong by their resolve and assiduity in firmly adhering to "One Country, Two Systems" and to the law-based governance of Hong Kong. This has empowered them with the widest support and won them the most favour from the people. At present, there is a widely-built and gradually strengthening consensus that the National Security Law is "what should have been in place, and what brings benefits and an ever brighter future". It is now time for Hong Kong to embrace the clarity and bliss of sunny days with a fresh caressing breeze.

Fourth, more clarity and firmness to the bottom line and direction of the rule of law in Hong Kong

The rule of law is the best protector of freedom. Freedom is not an overflowing flood; and autonomy does not mean being free to do whatever you want without any oversight. Ensuring national sovereignty, security and development interests is the prerequisite to autonomy. After all, a "high degree of autonomy" is premised on a "high degree of conscientiousness" and on a "high degree of reassurance" for the Central Authorities. These "three high degrees" are consistent and mutually inclusive.

As Hong Kong practises the capitalist system, it gives no cause for criticism to follow the legal system of capitalist countries. However, there must be a clear awareness that the adoption of the Anglo-American legal system ultimately serves to safeguard the interests of both China and Hong Kong. We must not disregard the interests of the State for the sake of adopting such a system. Nor must we disregard the fact of Hong Kong's reunification with the Motherland to perpetuate the values of the British Hong Kong era or even listen to the imperious dictates of the Anglo-American countries.

Regime security is one of the core essentials of national security. It would be a big deal for the Anglo-American countries if anyone moves the "cheese" of their regime security. We must bear in mind in particular that it is our obligation to safeguard the security of both Hong Kong's capitalist system and the Mainland's socialist system, both of which fall within the scope of safeguarding national security. Under "One Country, Two Systems", Hong Kong must protect the equally important elements of "One Country" and "Two Systems", and must refrain from disregarding the fundamental concerns of the Central Authorities and from subverting the leadership of the Communist Party of China or socialism with Chinese characteristics. It is foolish of anyone to put the cart before the horse by harbouring the vain hope of altering the Mainland's political system through street politics to suit Hong Kong, in which case the person is bound to get burnt by playing with the fire. This

is a fundamental matter concerning the direction and bottom line for the rule of law in Hong Kong.

Fifth, continuous rise in rule-of-law level for safeguarding national security in Hong Kong

A robust rule-of-law system is the foundation for rule of law. A flawed rule of law will certainly bring about the "broken window effect", undermining the efficacy of other laws and the effectiveness of rule of law. It is the biggest loophole in rule of law that the will of a State is not carried through and national security remains unprotected. Hong Kong's greatest edge in rule of law certainly lies in: its high degree of economic and trade freedom with clear legal boundaries; its freedom of speech which is ample yet free from abuse or exploitation; its freedoms of association and assembly which do not go overboard; the presence of both protection for democratic human rights and assurance of national security; and its high degree of autonomy while in manifestation of the Central Authorities' overall jurisdiction. There is no absolute freedom in the world. The greatest one is the exercise of freedom within the boundaries of rule of law and the baselines of national security. This is like the game of soccer. You may either kick or headbutt the ball. You are allowed to make a fair charge. Yet there must be boundaries and baselines as well as referees. Only then can we have the extraordinary thrill of soccer playing.

This year marks the 25th anniversary of Hong Kong's reunification, as well as the 180th anniversary of the humiliating Treaty of Nanking. Let us draw lessons from history to create our future. Immense significance is attached to the achievements of implementing the National Security Law today. This serves as both the best commemoration for the resumption of the exercise of sovereignty over Hong Kong and the best admonition for cherishing our national sovereignty, security and development interests. With the implementation of the National Security Law, the adoption of the "patriots administering Hong Kong" principle, and the smooth completion of the three elections under the new electoral system, Hong Kong has been on a steady upswing gradually gaining

solid momentum, and this general trend is irreversible. Nevertheless, all things taken together, Hong Kong still faces numerous risks and lurking dangers in safeguarding national security. We must resolutely apply the rule-of-law mentality, approach and procedures in addressing all issues relating to national security. We hope that the HKSAR's governing team will strive to: further improve the legal system for safeguarding national security; constantly unravel situations and resolve problems at root by taking the implementation of the National Security Law to a deeper level in all aspects; and coordinate efforts for the development and security of Hong Kong. The Office for Safeguarding National Security of the Central People's Government in the HKSAR will fully support the HKSAR's governing team in their further discharge of the constitutional duty to safeguard national security and further improvement of their own mechanisms for performing the duties and functions in accordance with the law. We will get fully prepared for the ready exercise of the jurisdiction of the Central Authorities in accordance with the law to fasten a firm bottom line for national security. While preparedness averts peril, we do hope that Hong Kong will stay safe and sound so that the precautions in place can all remain unused.

Distinguished guests, dear friends!

As we all know, the rule-of-law spirit is the cornerstone of development, stability, democracy and freedom in Hong Kong. The Central Authorities' firm adherence to law-based governance of Hong Kong shows that they cherish what Hong Kong people love, care what Hong Kong people long for and safeguard what Hong Kong people achieve. With such generous love from the Central Authorities, Hong Kong is truly blessed and so are the Hong Kong compatriots. We should keep this close to heart and always on our mind. Never should we become unworthy of the deepest affection from the Central Authorities for Hong Kong.

Thank you very much!

KEYNOTE SPEECH (III): TOWARDS GOVERNANCE AND PROSPERITY

LIU Guangyuan

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

The Honourable Ms Carrie Lam Cheng Yuet-ngor (then Chief Executive), distinguished guests, dear friends, ladies and gentlemen,

Good morning, everyone! On this day two years ago, the National People's Congress adopted the Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security, laying a solid legal basis for the formulation and implementation of the National Security Law. Over the past two years, the National Security Law has increasingly accentuated the crucial role of "good law" in administering Hong Kong, and has consistently brought the fruit of "good governance" to the city. Today, we get together to sum up practical experience and explore legal issues. This is of great significance to our continued implementation of the National Security Law. Next, I would like to share a few of my views on the National Security Law.

First, the National Security Law is a law for a reinforced foundation by providing strong impetus to get "One Country, Two Systems" back on track. Safeguarding national security is a matter of top priority for a State as well as a core requirement of "One Country, Two Systems". The National Security Law sets out comprehensive and systematic provisions on the legal system and enforcement mechanisms for the HKSAR to safeguard national security, and has built an institutional shield for the prevention and suppression of national security risks in the HKSAR,

thereby reinforcing a security foundation for the implementation of "One Country, Two Systems" in Hong Kong. Since the implementation of the National Security Law, the Hong Kong community has gained a more comprehensive and accurate understanding of "One Country, Two Systems". More and more Hong Kong people have come to realise that "Without a country, there is no family; safe homes only come with national security." This keeps fuelling the positive energy of loving our Motherland and Hong Kong. A firmer bottom line of "One Country" brings greater vibrancy and room for "Two Systems", and enhances the effectiveness of the HKSAR's governance, revealing even more the vitality and superiority of "One Country, Two Systems".

Secondly, the National Security Law is a law to resolve problems at root by resolutely safeguarding the legal order of Hong Kong. Social stability is a prerequisite for the development of Hong Kong. The National Security Law targets the four types of acts and activities endangering national security. It serves to crack down on the very few criminals who are traitors of the country and scourges to Hong Kong and its people, to protect the legitimate rights as well as the life and property safety of the vast majority of Hong Kong residents, and to create a safer, more stable, harmonious and facilitating social environment for Hong Kong. Since the implementation of the National Security Law, Hong Kong has regained the dignity of the rule of law by having those law-breakers duly punished, and restored social stability, public safety and tranquillity whilst the rights and freedoms enjoyed by Hong Kong residents have not only remained unimpaired but also become more firmly protected in a secure and stable environment. With the core values of the rule of law safeguarded, the "rule of law card" resumes its shine, and Hong Kong continues to be a wonderful home base for a peaceful life and a happy career.

Thirdly, the National Security Law is a law of redress against evil, which has staunchly curbed external interference. After Hong Kong's reunification, some external forces staged brazen acts of intervention

and interference in Hong Kong's affairs by exploiting Hong Kong's loopholes and deficiencies of "security vacuum". In collusion with the anti-China disrupters in Hong Kong, these forces of the same ilk backed and cheered on and provided a protective umbrella for the disrupters, and utilised Hong Kong to carry out activities endangering national security. Since the implementation of the National Security Law, the rule of law has played a prominent role as a sharp blade and dealt heavy blows to the anti-China, destabilising forces in Hong Kong. The "strongholds" established by external interfering forces in Hong Kong have been uprooted one by one, and the "evil claws" of internal and external hostile forces endangering national security have been severed. Some Western politicians have incessantly "splashed filth" and "slung labels" at the National Security Law. The higher they pounce and the more they react, the more evident that the National Security Law is indispensable as it has hit the nail on the head.

Fourthly, the National Security Law is a law that benefits Hong Kong and its residents, and a strong safeguard for Hong Kong's economic prosperity and development. Hong Kong has always been one of the most favoured locations to do business for international investors. Following the enactment of the National Security Law, individual Western countries have engaged in wanton rumour-mongering to smear Hong Kong's business environment, bad-mouthed Hong Kong's development outlook and even concocted the so-called "Hong Kong Business Advisory". But the facts have already strongly rebutted such malicious vilifications. Since the implementation of the National Security Law, Hong Kong's position as an international financial centre has remained firmly anchored. This year, the International Monetary Fund has reaffirmed Hong Kong's status as a major international financial hub. Hong Kong has ranked third in the latest edition of Global Financial Centres Index. The city has continued to be rated as the world's freest economy and receives nearly 30% of direct investment into Asia, making it the top destination for such investment. Last year, Hong Kong saw record highs of over 9,000 overseas and Mainland businesses running here, and of start-ups risen to over 3,700.

Hong Kong remains a paradise for global investors to thrive and prosper. The "Pearl of the Orient" is shining brightly as ever.

Distinguished guests, dear friends,

National security is an essential cornerstone for peace and stability of the country. As an inalienable part of China, Hong Kong plays an important role in safeguarding national security. Some external anti-China forces have frequently played the "Hong Kong card" with tenacious attempts to "destabilise Hong Kong to contain China", seriously threatening our national sovereignty, security and development interests. The grave external security risks faced by Hong Kong reveal certain countries' cling to the stale mind-set of Cold War rivalry and their rampant practice of unilateral bullying, thereby reflecting the salient challenges to global peace and development today. Currently amidst the recurring waves of COVID-19, the far-reaching Ukraine crisis as well as the prevailing headwinds of unilateralism, hegemony and power politics, we encounter an infinite array of traditional and non-traditional security threats. Our important mission to build a world with lasting peace and universal security still has a long way ahead. Faced with the acute challenges in respect of international peace and security, China has always been committed to the path of peaceful development, to upholding and practising multilateralism, and to promoting the building of a human community with a shared future. China advocates to:

--Uphold openness and inclusiveness instead of seeking supremacy. As remarked by President Xi Jinping, diversity is what makes human civilization fascinating, and even more so, what gives vitality and momentum to global development. Countries all over the world need to follow development paths that suit their respective national conditions. Democracy is not the exclusive right of any individual country, but a right for the people of every country. Forcible transplantation of democracy brings endless harms. Peace, development, equality, justice, democracy and liberty are the common values of humanity. To form exclusive blocs

and cliques, and to fragment the world with ideologies is a historical retrogression that is bound to be discarded by the times.

--Resolve to uphold the rule of law, and refrain from bullying and hegemony. According to President Xi Jinping, relations among countries and coordination of their interests must only be based on rules and institutions; they must not be lorded over by those who wave a strong fist at others. The practice of international rule of law requires adherence to universally recognised norms of international law and honouring the mutually negotiated international agreements. Certain countries, while preaching international law to others, have practised exceptionalism and double standards on their own. They have prioritised domestic law above international law, and used the "rule of law" as a pretext to infringe on other countries' legitimate rights and interests or undermine world peace and stability. This is an utter betrayal of justice and is doomed to fail.

--Stay committed to consultation and cooperation rather than conflict and confrontation. The crisis of Ukraine has once again demonstrated that humanity is an indivisible security community. The very practice of bloc confrontation and quest for absolute unilateral security by themselves cause absolute insecurity. On the Ukraine issue, China has all along upheld fairness and justice by proactively advising peace and encouraging talks. By contrast, individual major powers keep peddling weapons, escalating sanctions, and pouring oil on the fire. At the Boao Forum for Asia Annual Conference this year, President Xi Jinping solemnly proposed a Global Security Initiative and advocated the vision of common, comprehensive, cooperative and sustainable security, and promoted the construction of a balanced, effective and sustainable security architecture. This will certainly provide a strong support for eliminating the "peace deficit" and meeting international security challenges.

Distinguished guests, dear friends,

The fundamental way to develop State-to-State relations is to observe the purposes and principles of the Charter of the United Nations

and to respect the sovereignty, security and development interests of all countries. This year marks the 25th anniversary of Hong Kong's reunification with the Motherland. After the reunification, the handling of the HKSAR's affairs is entirely a matter of China's internal affairs in which no external force has the right to interfere. As beneficiaries of the "One Country, Two Systems", members of the international community should have adhered to such basic international law principles as respect for national sovereignty and non-interference in internal affairs, rather than wilfully applying "double standards" and blatantly meddling in Hong Kong affairs under the guise of "democracy" and "rule of law". They should have respected the facts and identified the major trends rather than confounding black and white, and going to extreme lengths to smear and slander by stirring up havoc and creating rumours over Hong Kong-related issues. And they should have safeguarded the prosperity and stability of Hong Kong as well as their own interests here in this city, rather than habitually bullying others and frequently staging political shows and "sanction" farces to the detriment of others without benefiting themselves. The doers of such evil deeds would only end up hoisting themselves with their own petard and tasting their own medicine.

Distinguished guests, dear friends,

The Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR will always remain committed to protecting Hong Kong, benefitting Hong Kong and working for the people through diplomacy. We will continue to serve the nation and strive together with Hong Kong in our efforts to: steadfastly uphold national sovereignty, security and development interests; unswervingly maintain the prosperity and stability of Hong Kong; and remain resolute in our unflinching and unyielding fight against all external interfering forces. Together, we will safeguard Hong Kong as a wonderful homeland and ensure that the Pearl of the Orient will glow with renewed glamour!

Thank you very much!

PANEL SESSION (1): COMPARATIVE STUDY OF CASES UNDER THE NATIONAL SECURITY LAW AND NATIONAL SECURITY CASES IN FOREIGN JURISDICTIONS

MODERATOR

YOUNG Ngai-man Simon

Professor,
Faculty of Law of The University of Hong Kong

PANELLISTS

Ian Grenville CROSS GBS SC

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

LEE Shiu-keung Robert SC

Senior Counsel,
Cheng Huan SC's Chambers

Young Ngai-man Simon: Good morning, ladies and gentlemen.

It's a great honour for me to be chairing the first panel. As you all know, the first panel concerns the National Security Law from a comparative perspective. And to the credit of the organisers, this tells us that there is value in looking beyond Hong Kong to understand the National Security Law within Hong Kong. In today's panel, we will be looking at both foreign cases and foreign law. I think that value can be seen in three respects, because when one looks sort of beyond the border, one would see firstly that probably all other countries have national security law in one form or another. Secondly, we would see that national security law of the foreign jurisdiction is developed in response to the local circumstances, whether it be the so called "Troubles" of Northern Ireland or anti-terrorism after September 11th. It is responsive to the particular risks and issues that arise in a local jurisdiction, and that, of course, means that those risks and problems evolve and they change, and hence the laws also have to evolve and change. And that's why it's no surprise now that many countries are at present looking at new national security laws that amend or enhance existing laws. And the third respect of why it is useful to look at the laws of other jurisdictions is that, again, it would come as no surprise that this tension between security and individual rights and freedoms is a tension that exists in all other jurisdictions. So there is great value in looking at how, whether it's the courts or the executive branch or the legislative branch, in seeing how these organs have balanced this tension and struck a balance between rights and security.

Now, with this introduction, I'm very pleased to introduce our two distinguished speakers who are extremely learned in the law and particularly in this area of national security. Both of them are Senior Counsel in Hong Kong. So we're very fortunate to have their contribution today. In fact, both speakers need no real introduction. They are very well known to the legal community in Hong Kong. Our first speaker, Mr Grenville Cross, Senior Counsel, is a Vice-Chairman of the International

Association of Prosecutors. Also, we all know a former Director of Public Prosecutions, and I'm very pleased to also say that he's an Honorary Professor in our Faculty of Law at The University of Hong Kong. And in his presentation, he will be looking at the topic of non-jury trials or mode of trial for national security cases. Our second speaker is Mr Robert Lee, Senior Counsel, again, really well known to our legal community, more than 20 years of experience at the Department of Justice. So there are two speakers, former colleagues, but he has of course been at the private bar and is very well known for his cases in commercial law, corruption law, and particularly in the area of money laundering. I've had many discussions with Mr Lee in these areas. So at this point, I'm going to call upon Mr Cross to give his presentation.

Ian Grenville Cross: Good morning, ladies and gentlemen.

I am grateful to the Secretary for Justice for inviting me to participate in today's forum, and I propose to share with you my thoughts on how the jury system operates in National Security Law trials, and to make some comparisons with other jurisdictions, both civil and common law in nature.

Setting the scene

In 2010, ten years before the advent of the National Security Law for Hong Kong (NSL), the Hong Kong Court of Final Appeal (Appeal Committee) explained that, in the words of Chief Justice Andrew Li Kwok-nang, "it is clear that there is no right to trial by jury in Hong Kong".[1]

Although the Basic Law provides that "the principle of trial by jury previously practiced in Hong Kong shall be maintained" (Article 86), the

1 *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208.

NSL recognises that, insofar as national security cases are concerned, a jury trial may not be in the interests of justice. Although a jury trial is certainly not excluded, circumstances can arise where an alternative means of achieving justice is necessary, and it does not impinge upon the fairness of the trial. Where, therefore, the Secretary for Justice issues a certificate directing that the accused 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", the case shall be tried in "the Court of First Instance without a jury by a panel of three judges" (Article 46).

Although three factors are specifically highlighted as justifying a three-judge trial, the phrase "among others" is noteworthy, and has attracted little, if any, comment. It is, presumably, a catch-all provision, and it suggests that the three criteria are not exhaustive, and that there may be other circumstances that justify a non-jury trial. Although it is not easy to envisage what they might be, they could perhaps arise if, for example, the Secretary for Justice concludes that jurors and their relations will face dangers unrelated to their physical safety, such as blackmail or other types of intimidation, or where attempts to interfere with witnesses are anticipated. In all likelihood, therefore, the "other grounds" are likely to concern matters that affect the integrity of the trial, although they will likely be very rare.

Secretary for Justice's certificate

After the Secretary for Justice has issued the certificate, that is normally the end of the matter. Once the Secretary concludes, for example, that the jurors or their family members are under threat, there is a real risk that a fair trial by jury is no longer possible, and the only realistic remedy is a non-jury trial by a three-judge panel. As the Court of Appeal has explained in *Tong Ying-kit*'s case[2], the Secretary's decision is a prosecutorial decision within the ambit of the Basic Law,

2 *HKSAR v Tong Ying Kit* (CACV 293/2021).

which stipulates that the Department of Justice "shall control criminal prosecutions, free from any interference" (Article 63).

The Court of Appeal was also at pains to emphasise that the jury trial is not the only means of achieving justice in the Court of First Instance, and that the bulk of criminal cases are tried by judicial officers sitting alone in the District Court and the Magistrates' Courts. Indeed, in light of that, it would have been perfectly consistent with the practice in the lower trial courts for the drafters of the NSL to have decided that national security trials in the Court of First Instance would also be tried by a single judge, and nobody could seriously have complained. However, in their wisdom, and undoubtedly to allay concerns, the drafters decided that if a national security case was not going to be tried by seven jurors then a three-judge panel was the preferred alternative, presumably reasoning that, as with the Court of Appeal, "three heads are better than one".

Be that as it may, the Secretary's decision to issue a certificate is, like other prosecutorial decisions, amenable to judicial review. As the Court of Appeal has explained, the Basic Law's Article 63 protection against interference is directed at interference of a political nature, and, although judicial interference with a prosecution decision is precluded, this is subject to "issues of abuse of the court's process, and, possibly, judicial review of decisions taken in bad faith".[3] What this means, therefore, is that, although the judicial review of a decision to issue a certificate is exceptional, it is nonetheless only possible in limited circumstances, as where it can be shown it was taken in bad faith, or it resulted from an unlawful prosecution policy, or was otherwise perverse. Even if a judicial review succeeded, its only consequence would be to require the Secretary to re-consider the need to issue a certificate, and not to direct that there be a jury trial, although a jury trial in those circumstances might certainly be a possibility.

---

3 *Re C (A Bankrupt)* [2006] 4 HKC 582 (*per* Stock JA); *Re Leung Wai-fun* [2018] 1 HKLRD 523.

Human rights protections

It is important to stress that, irrespective, of whether a national security trial in the Court of First Instance is tried by a jury or a three-judge panel, the accused enjoys exactly the same rights to a fair trial, for two main reasons, one in the Basic Law, the other in the NSL.

By virtue, firstly, of the Basic Law (Article 39), the International Covenant on Civil and Political Rights (ICCPR) remains in force in Hong Kong, and this, domesticated as it has been through the Hong Kong Bill of Rights Ordinance (Cap. 383), protects the fundamental criminal justice guarantees to which an accused person is entitled. It also stipulates that somebody who has been lawfully arrested "shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs" (Article 87).

Although, therefore, the Basic Law is very clear in terms of the protections it upholds, the NSL, secondly, goes out of its way to place the fundamental rights of criminal suspects at the front and centre of its operation. It not only stipulates that "human rights shall be respected and protected in safeguarding national security" and that the ICCPR's provisions "shall be protected" (Article 4), but requires that "the principle of the rule of law shall be adhered to" (Article 5), with such things as legal certainty, the presumption of innocence and the right of defence being singled out for especial mention.

Quite simply, therefore, Hong Kong's criminal justice system is human rights heavy, with fundamental protections being repeatedly stated, and this provides a context for the consideration of national security trials in other jurisdictions.

The Far East

As Hong Kong has been criticised by some countries for making provision for trials by a three-judge panel in certain limited

circumstances, it is instructive to briefly consider what role juries have to play in three former British colonies in this part of the world.

In Singapore, the legal system is also based on the common law legal system of England. Trials, however, whether involving national security or other types of crime, are conducted by a single judge, with trial by jury having been abolished in 1969. The country also retains the death penalty, and the authorities can deploy preventive detention of up to two years, which may be renewed, for suspects in cases involving the country's security. Judicial review of decisions taken under the Internal Security Act are only possible to ensure procedural compliance, and Singapore is not a party to the ICCPR.

In Malaysia, the legal system is predominantly based on the English common law, although there are also secondary legal systems affecting particular legal areas, such as Islamic Law and Customary Law. As in Singapore, trials, whether involving national security or other types of crime, are conducted by a single judge, with trial by jury having been abolished in 1995. Provision is also made for the preventive detention of suspects and for the denial of bail to those charged with national security offences. The death penalty still exists, and the country is not a party to the ICCPR.

In Brunei Darussalam, the legal system is based largely on the English common law, and there is also a Syariah court that deals with Islamic Law. Trials, of whatever type, are conducted by single judges without juries, and the courts can impose the death penalty. As with Singapore and Malaysia, the country is not a party to the ICCPR.

It is, therefore, intriguing to note that, although some people in the United Kingdom, together with some of its global partners, are only too happy to single out Hong Kong for criticism, for having limited the right to trial by jury in national security cases only, they have nothing to say about three former British colonies in the Far East, which do not have jury trials for any type of offence, whether involving national security

or otherwise. Were I not the charitable observer I am, I might have been tempted to describe this as hypocritical, and to conclude that their concerns have been fabricated in order to embarrass China, but please do draw your own conclusions.

Enough, however, of former British colonies, and let us now turn to the United Kingdom itself.

The United Kingdom

In the UK, the Supreme Court has taken the view, in the *Dennis Hutchings* case, that, although there is a right to a jury trial, it is not absolute, and it may be constrained in particular circumstances by express legislation.[4] It explained that if a trial by jury would place the fairness of the criminal justice process at risk, the right to a jury trial "must yield to the imperative of ensuring that the trial is fair". If there is a trial by a single judge, "all that has changed is the constitution of the tribunal", and the fairness of the trial is unaffected.[5] Quite clearly, there has to be fairness to all sides, and the requirements of a fair trial are not determined by the defendant's interests exclusively, and it is in everybody's interests that serious criminal offences are not only thoroughly investigated but also properly tried.

Against this background, it has been recognised by the UK that there cannot be a fair trial if the jury is corrupted. After all, said the Court of Appeal of England and Wales, "verdicts by a jury which has been nobbled cannot represent true verdicts".[6] In 2003, therefore, the UK enacted the Criminal Justice Act, which enables a trial to be conducted without a jury if the judge is satisfied that a "real and present danger" exists of jury tampering occurring, and that, even after steps are taken to neutralise the threat, the likelihood of it occurring would be "so substantial as to

4 *In an Application by Dennis Hutchings for Judicial Review* [2019] UKSC 26.

5 *R v Twomey* (No2) [2011] EWCA Crim 8, [2011] 1 Cr App R 29.

6 As (5), above.

make it necessary in the interests of justice for the trial to be conducted without a jury".[7] Even in the absence of concrete intelligence that jury tampering is contemplated in a particular case, evidence that a defendant has previously been involved in any such activity would suffice, as also would evidence that he had tried on an earlier occasion to interfere with a witness.

In 2021, at the same time as Tong Ying-kit was making history by becoming the first defendant to be tried on national security charges in Hong Kong by a three-judge panel, a former British soldier, Dennis Hutchings, aged 80, was facing trial for far graver offences by a single judge in a non-jury trial in Northern Ireland, although this was largely ignored by those international commentators who took such great interest in Tong's situation. He was accused, at Belfast Crown Court, of attempted murder and causing grievous bodily harm, arising out of a fatal shooting during the "Troubles" in Northern Ireland, in 1974. However, he died suddenly of a heart attack, and the trial was aborted, but his experience is illuminating.

In Northern Ireland, there is a long history of sectarianism that has sometimes spilled over into terrorist activity, and it is sometimes necessary to dispense with juries, and this is still possible under the Justice and Security (Northern Ireland) Act 2007 (the Act). When this happens, the trials are conducted by one judge only, and not by three as in Hong Kong. These non-jury courts are known as "Diplock courts", after Lord Diplock, the judge who first recommended them, and they handle particular offences. They were first introduced in 1973, and, at their peak, over 300 trials a year were being held without a jury. The Director of Public Prosecutions for Northern Ireland (DPP) can, if he considers there is a risk of jurors being intimidated, certify that a trial on indictment should be tried by a single judge, as he did with Hutchings.

7 Criminal Justice Act, 2003, Section 46.

In 2017, for example, the DPP issued 22 certificates for a non-jury trial. The DPP, however, can only issue a certificate requiring a defendant to be tried without a jury if he fears the administration of justice might be impaired by a jury trial and he suspects that one of four criteria specified in the Act is met. Three of these conditions involve proscribed organisations, meaning terrorists, while the fourth is that the offence was "committed to any extent (whether directly or indirectly) as a result of, or in connection with or in response to religious or political hostility of one person or group of persons towards another".

At the time, the British government explained that the fourth condition was needed having regard to recent sectarian rioting, and prosecutors might not be able to prove that a defendant involved in such violence belonged to a proscribed organisation. After the DPP had issued a certificate preventing Dennis Hutchings from being tried by a jury, he explained his suspicion that the offences the former soldier was facing had been committed "in connection with or in response to the political hostility of members (or suspected members) of the Provisional IRA towards those who believe Northern Ireland should remain a part of the United Kingdom".

Like Tong Ying-kit, Hutchings was aggrieved by being denied a jury trial, but, when he appealed to the UK Supreme Court, he also got nowhere.[8] As Lord Kerr explained, it was not to be assumed that trial by jury was "the unique means of achieving justice in the criminal process", and that a jury trial "can in certain circumstances be antithetical to a fair trial". When those circumstances arose, the only assured means of "ensuring that the trial is fair is that it is conducted by a judge sitting without a jury".

In 2015, when the Judicial Committee of the Privy Council considered the issue of non-jury trials, in a case arising from the Turks and Caicos Islands, Lord Hughes said "An order for trial by judge alone

8 Ibid (4).

can be made where the interests of justice require it, just as in England it can only be made where it is necessary".[9] It should be noted here that precisely the same considerations apply in Hong Kong under the National Security Law, and a trial by judge alone can only be directed where this is justifiable in the interests of justice, and even then only in cases where national security is involved.

Australia and New Zealand

Although the Australian Constitution provides for the trial on indictment of any offence against any law of the Commonwealth to be by jury,[10] a trial by judge alone is permissible in some circumstances in various of the country's constituent States.

In New South Wales, a trial without a jury has been possible since 1986, but only if the accused person agrees. If the prosecutor disagrees, a trial by judge can be ordered if deemed in the interests of justice.[11] If, however, substantial interference with jurors is anticipated, and the risk cannot be mitigated by other means, a jury trial may be dispensed with. In Victoria, since 2009, a trial without a jury is also possible, provided the accused person agrees and the court considers it is in the interests of justice.[12] In Western Australia, since 2004, a jury trial can only be replaced with a trial by a judge alone if the accused person consents, and it is considered to be in the interests of justice.[13] In Queensland, since 2008, a trial by judge alone, in lieu of a jury trial, has been possible if it is in the interests of justice, or because of the case's length and complexity, or because the trial is likely to be unreasonably burdensome for a jury, or because of the risk of jury intimidation, or because a significant risk

9 *Misick and Others v The Queen* [2015] UKPC 31, [2015] 1 WLR 3215 [53].

10 Commonwealth of Australia Constitution Act, Section 80.

11 Criminal Procedure Act (NSW) 1986, Section 132.

12 Criminal Procedure Act (Vic) 2009, Section 420 (1).

13 Criminal Procedure Act (WA) 2004, Section 118D.

exists of pre-trial publicity affecting the jury's deliberations, and the accused person cannot exercise any veto power.[14]

In New Zealand, there have been concerns over jury tampering, and this has resulted in legislation that mirrors the United Kingdom's. The Criminal Procedure Act 2011 enables the court, upon the prosecutor's application, to order that a defendant be tried by a judge alone without a jury if there are reasonable grounds for believing that that intimidation of potential jurors has occurred or may occur, and that the effects of that intimidation can only be effectively avoided by so ordering.[15] Intimidation apart, the Act also enables a judge to order that a trial be conducted by a single judge rather than a jury if it is likely to be lengthy and complicated.[16]

Republic of Ireland

At this point, having already examined Northern Ireland, it is instructive to turn to the Republic of Ireland, not least because some of its provisions in relation to the conduct of national security trials are strikingly similar to those now operating in Hong Kong.

In Ireland, the right to trial by jury is granted by the Irish Constitution (Article 38.4), although it is not absolute. The Constitution allows the Parliament (Dail) to establish "special courts" with wide powers when the "ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order" (Article 38.3). In 1972, shortly after what were known as "the Troubles" erupted in Northern Ireland, the Special Criminal Court (SCC) was created, to handle terrorism-related crimes, invariably involving the Provisional Irish Republican Army (the Provos).

---

14 Criminal Code, as amended in 2008, Sections 614 to 615E.

15 Criminal Procedure Act, 2011, Section 103.

16 As (15), Section 102.

If a case is tried by the SCC, there is no jury, and the defendant, as in Hong Kong, is tried by a three-judge panel. It is up to the Director of Public Prosecutions to decide if a case should be tried by the SCC, and he is not required to provide reasons for selecting this venue. His decision is final, and cannot be challenged, save, perhaps, on the ground of bad faith, which is virtually impossible to show.

Even though "the Troubles" in Northern Ireland formally concluded with the "Good Friday Agreement" of 1998, and the declaration of a ceasefire by the Provos, the SCC has remained in operation ever since. Not only that, its remit has been expanded, and it now handles not only cases that threaten State security, but also those that endanger the administration of justice, as where jurors face intimidation. The SCC is also used nowadays to try cases involving serious and organised crime, which, of course, is way beyond anything that is possible in Hong Kong.

By way of example, in 2013, a gang leader from Limerick, John Dundon, was convicted by the SCC of the murder of a rugby player, Shane Geoghegan, whom he had mistakenly identified as a rival, and he was sentenced to life imprisonment. Again, after the murder of an investigative journalist, Veronica Guerin, in 1999, the members of a narcotics gang were tried for her murder in the SCC. Cases of this sort must be tried by a jury in Hong Kong, where restrictions on jury trials in the Court of First Instance are strictly limited, and can only occur in national security cases.

It is, I suggest, extraordinary that the Western countries that have so much to say about the use of three-judge panels in national security cases in Hong Kong, have nothing to say about the use of three-judge panels in general crime cases in Ireland, and, again, the double-standards are startling.

Europe & European Court of Human Rights

Although various trial models exist in continental Europe, Greece's may be highlighted. It was the first country to develop the jury trial, and it still retains it in a distinctive form. By virtue of the Greek Constitution and the Code of Criminal Procedure, felonies are tried by a "mixed court" that consists of three professional judges and four lay judges, who determine the facts and the appropriate penalty. However, some serious felonies, including terrorism, are not tried by a "mixed court", but by the judges of the three-judge Court of Appeal, at first instance, and by the 5-judge Court of Appeal, at second instance, and this approach has passed muster.

In 2003, for example, members of the "Revolutionary Organisation November 17", a far-left urban guerrilla grouping, were judged by the Greek Court of Appeal, the reason being that the felonies of terrorism and organised crime fall within the jurisdiction of the Court of Appeal, and not the "mixed court". As in the Republic of Ireland, therefore, the jury trial can be dispensed with in not only in national security cases but also in serious crime cases, and this, therefore, goes way beyond anything that is permissible in Hong Kong. Nobody, and certainly not those who whip themselves up into a frenzy over Hong Kong's arrangements, appears to have got particularly upset by this, presumably because European jurisprudence has no problems with the denial of jury trials.

Although the European Convention on Human Rights (ECHR) guarantees the right to a fair trial (Article 6), the European Court of Human Rights has indicated that a State enjoys considerable freedom in choosing the means of ensuring this.[17] The Court has also explained that, while Article 6 of the ECHR provides the right to a fair trial, it "does not specify trial by jury as one of the elements of a fair trial hearing in the determination of a criminal charge".[18] In other words, the Court has

17 *Taxquet v Belgium*, 2012.

18 *X & Y v Ireland*, 1980.

made clear that "there is no right under Article 6.1 of the Convention to be tried before a jury".[19] What this means, therefore, is that, when there is an appeal, the Court's function is confined to a consideration of whether the system adopted at the trial has contributed to an outcome that is compatible with the ECHR, and in determining fairness its focus is not on the mode of trial itself.

Conclusion

By any yardstick, Tong Ying-kit's trial was a groundbreaker for local jurisprudence. On the one hand, it established that, while prosecutorial independence is constitutionally protected, the issuing of a certificate is nonetheless judicially reviewable if there is any mala fides. On the other, it showed that the judicial system is capable of adapting itself to new situations, while still upholding the most basic principle of criminal justice, the right to a fair trial.

All in all, therefore, Tong's trial was a positive experience, with the rule of law being the big winner. Whereas serious national security offences were successfully tried, potential jurors were protected from possible harm, and a panel of experienced judges ensured that the accused person was fairly treated throughout the proceedings. Those who predicted disaster if trials on indictment were not tried by juries could not have been more wrong, and the legal system has been enriched by the experience.

As we have seen, the restrictions that can be placed on jury trials in national security cases are limited, and are by no means automatic. They are measured, reasonable and justifiable, and far more conservative than those available in many other jurisdictions. Despite this, the restrictions have attracted huge foreign interest, invariably hostile, but manifestly hypocritical. It has often emanated from countries that place far more limitations on the availability of trial by jury than is possible in Hong

19 *Twomey, Cameron and Guthrie v United Kingdom*, Nos 67318/09 and 22226/12.

Kong, and they inevitably bring to mind the proverb that “those who live in glass houses should not throw stones”.

In reality, the National Security Law has not only saved Hong Kong from ruin, but also provided legal mechanisms for the trying of cases that are practical, realistic and, above all, fair.

Thank you.

Young Ngai-man Simon: Thank you very much, Mr Cross, for the very extensive and useful survey of the law in this area. I think it’s rather eye-opening that there are so many examples of exceptions to jury trial. And just to add to your survey, the situation in Canada is that you can have a judge alone trial in the superior court, although with the election of the defendant; they are actually rather common, particularly when it comes to commercial crime, because you don’t really want the jury to be going through hundreds of bundles of evidence. You also mentioned, Mr Cross, the issue of jury tampering. One thing you did not mention and probably another reason why we might want to think about reform in this area, is that in Hong Kong, if a jury acquits someone, it’s not possible to appeal that, even if there has been jury tampering. So that gives rise to the problem of unjust acquittals. And it’s because of that, in 2012 that the Hong Kong Law Reform Commission recommended that maybe we should allow for some appeal mechanism for wrongful acquittals. So I think that’s also part of the concerns that you’ve raised. Great. Let us move on to our second presentation. Mr Lee will be talking about the Implementation Rules, which sets out a wide array of police powers. And he will be focusing particularly on the power of production or producing documents. This is quite a valuable discussion because there hasn’t been that much attention paid to these police powers under the NSL. Mr Lee, please.

Lee Shiu-keung Robert: Thank you, Professor Young. Secretary for Justice, honourable guests, ladies and gentlemen, it is my great honour to have been invited to speak in this important legal forum. The topic I'm asked to speak about is an overview of Schedule 7 of the Implementation Rules made under the National Security Law.

I Introduction

The "*National Security Law*" (its full title reads: "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region", the "NSL") was enacted by the NPCSC and introduced into the HKSAR via the Basic Law to protect national security. It commenced operation at 11 p.m. on 30 June 2020.

The "*Implementation Rules*" (its full title reads: "The Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region", Instrument A406A) was made pursuant to Article 43 of the NSL *to enhance and regulate the investigation of offences endangering national security.* They commenced operation on 7 July 2020. This presentation examines Schedule 7 of these Rules, including its interactions with the legitimate rights of the people in the HKSAR.

I.1 Protect National Security to realise true universal values and to achieve prosperity and progress

Why do countries need to protect their national security? And in what context? National security is the foundation of social order within which true freedoms and rights of the people can be realised, the rule of law can operate, and upon which prosperity and progress can be pursued. The national security of all countries requires optimal protection. The full context may involve these aspects:

1) Different countries face different existential threats, which can arise from, e.g., climate changes, or extremism, or historical events.

They would therefore need to deploy different modes of national security law and measures to meet their specific national security needs and goals.

2) Recent centuries of historical development have divided countries into two main classes, i.e., the "developed or dominating countries", and the "developing or dominated countries". *For the dominated countries, their proper national security goal is to interact with, and dissipate the dominating force in order to achieve true universal values.*

3) Western liberalism is an amoral *dominating* force.[1] It is *driven by amoral and ambivalent individual desires*.[2] This amorality means that desires can generate both moral or immoral consequences. This *amoral* liberalism has generated centuries of *ambivalent* results world-wide: surely the rule of law, wealth, and progress on the positive side, but also unending wars, inequalities, social divisions, domination, and dishonesty on the downside. "Core liberal values" such as "freedom", "democracy" and "human rights", insofar as they are *desire-based* [3] *are inherently amoral and ambivalent.* They are not *yet* true universal values, though they remain promising candidates.

4) Among the liberal values, the common law is somehow exceptional in that it promotes freedom/right on the basis of duty. A few examples may reveal this *duty-logic of freedoms and rights*:

(a) *Freedom of movement only arises* ***when everyone*** *(****every*** driver and road user) ***abides by his/her duties*** *to obey traffic*

---

1 See, e.g., *The Rise and Decline of Western Liberalism*, Anthony Arblaster, Basil Blackwell, 1984.

2 See, e.g., *Leviathan*, Thomas Hobbes, Penguin Books, 2017, and *The Rise and Decline of Western Liberalism, ditto.*

3 *E.g., "freedom" as unrestrained amoral desires; "democracy" as institution purported to aggregate individual amoral desires into "collective desires" and to serve that amoral social desire, and "human rights" as individual amoral desires sanctified.*

signs and regulations which apply equally to all. When these duties are fulfilled, a *traffic order exists. As long as a traffic order exists*, everyone can reasonably expect that he or she can move from location A to location B, in say about 30 minutes and in relative road safety. That is my, and other road users' *freedom of movement*. Freedom of movement does not arise from everyone insisting on his/ her *desire* (often mislabelled as "inborn right") to drive "freely".[4] That will result in traffic accidents and congestions everywhere, in chaos not freedom of movement.

(b) Freedom of speech arises only **when everyone abides by his/her duties** of not to defame others, not to injure others, not to cause chaos in conference proceedings, etc. These duties suggest that the so-called "right to offend"[5] can easily negate freedom of speech, rather than forming part of it.

(c) In *Donoghue v Stevenson*,[6] Mrs Donoghue sued Mr Stevenson for having negligently manufactured a bottle of beer contaminated by a decomposed snail. She consumed the beer and fell ill. Professors McBride and Bagshaw take the view that the Court permitted Donoghue to sue Stevenson NOT because he violated her "right" to "bodily integrity", but because "she had a right *that he take care that the ginger beer in her bottle was safe to drink*" – that is, in truth, Stevenson had a duty towards her to ensure that the beer was fit for consumption.[7]

---

4 Many liberals misconceive Hobbes's "*absence of external impediments to desires*" as the definition for freedom. See Leviathan at, e.g., p. 129: "Liberty, or freedom, signifieth properly the absence of opposition (by opposition, I mean external impediments of motion) …" But this kind of desire-driven "freedom" creates war and chaos, and must be brought under proper control, and in Hobbes' view, under the control of an absolute Monarch. Such absolute control is of course no longer tenable.

5 Wrongly endorsed by Lester K.C. in his "Five Ideas to Fight For", Oneworld publications, 2017, p.130.

6 [1932] A. C. 562, at p.580.

7 Mrs Donoghue was proximate enough to be regarded as the "neighbour" of the manufacturer, which proximity imposed a duty of care on him towards her. See *Tort Law*, 2012, Edinburgh Gate, England:

(d) Human interactions are sustained by this "duty logic of freedoms/rights": *Anyone's freedom, or right, is constituted by everyone fulfilling their corresponding situational duties, and the orders sustained by such duties.* That is, individual freedoms, or rights, are not "free-standing", but depend on duty-sustained orders which apply equally to all.

5) It follows from the above "duty logic of freedoms/ rights": legal and other measures which optimally promote duty, or optimally restrain desires, do not diminish individual freedoms, but are conducive to our freedoms, and rights.

6) For freedom, democracy, and human rights to become true universal values, they have to be transformed from *desire-based, to duty-based, and the rule of law provides a cogent, rational platform for this transformation to occur.* Duty can occur at many levels. Great minds in both the East and in the West have constantly reminded us that, *our* core duty is to achieve "*mutuality*", i.e., *to respect each other as equals,*[8] *to treat each other as ends not means,*[9] *and to sacrifice for each other.*[10] This core mutuality duty follows from this fundamental condition of human existence (or the true "state of nature"): *we live because of others; we must live for*

Pearson Education Limited, p. 4. The authors further explained: "*…our 'rights to…' (bodily integrity, freedom of speech, reputation, property, trade, vote, freedom from discrimination, and so on) exist because tort law does what it does in giving us particular rights against other people that they not act in particular ways*. It is because we have those rights that we can say we have rights to bodily integrity, freedom of speech, reputation, and so on." That is, we have rights to bodily integrity etc. because other people have the corresponding duty not to act in particular ways.

8 See, e.g., *Taking Rights Seriously*, Ronald Dworkin, Harvard University Press, 1977, pp.180-3, 272-8. He makes a distinction between "the right to equal treatment", and "the right to treatment as an equal", and holds that the latter right is fundamental, and the former derivative (p. 227).

9 See Kant, *Groundwork for the Metaphysics of Morals*, p. 45, "Now I say that the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will…"

10 See moral teachings in *Buddhism, Confucianism*, and the moral teachings of *Jesus, St Peter*, the prophet *Muhammad, and the writings of Dostoyevsky*.

others. In so doing, this core moral mutuality duty qualifies as *the source of* true universal human value,[11] including true freedoms and rights.

7) For developing countries, as long as they are in a dominated status, freedoms and rights cannot be maximised as much of these resources would have to be diverted to dissipating the dominating force. Within that dominating force it would be difficult to transform freedoms and rights from the unsustainable desire – driven mode to the self – sustaining, duty – driven mode. It is desirable and timely that both the developed and the developing countries should come together to resolve these historical problems of domination and of achieving true universal values.

Under-protection of national security creates disorder, harms the rule of law and the freedoms and rights of the people. It also hurts the economic environment, disrupts international trade, and diminishes foreign business interests in the HKSAR. Only through optimal protection of national security can the rule of law, and with it, true enjoyment of freedoms and rights in the HKSAR be sustained.

I.2 The NSL and the Implementation Rules are to be applied in a common law context as provided by the Basic Law

The NSL contains 66 articles divided into six chapters. It begins by reiterating in Article 4 that human rights shall be respected and protected in safeguarding national security in the HKSAR, and, in Article 5, that the principle of the rule of law shall be adhere to:

Article 4 provides: "Human 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*

11 When the norm of core moral duty optimally restrains desires, civilization arises. When desires override duties, a civilization crisis looms.

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*."

Article 5 provides: "The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law.

A person is *presumed innocent until convicted by a judicial body.* The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."

The NSL sets out, among other measures, four types of offences in its Chapter III. They are, *Secession; Subversion; Terrorist Activities*, and *Collusion with a Foreign Country or with External Elements to Endanger National Security.* These offences are specific in their scopes and meticulously defined. Each requires cogent evidence to prove. Fair and effective powers of investigation can ensure that the subsequent prosecutions are speedy and fair.

II The Implementation Rules were made to enhance the fair and effective investigation of offences endangering national security

Article 43 of the NSL provides: "When handling cases concerning offence endangering national security, the department for safeguarding national security of the Police Force of the Hong Kong Special Administrative Region *may take measures* that law enforcement authorities, including the Hong Kong Police Force, are allowed to apply *under the laws in force* in the Hong Kong Special Administrative Region in investigating serious crimes…" Article 43 lists seven areas of investigative measures currently in use, and further authorises the Chief Executive, in conjunction with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, to make relevant implementation rules for the purpose of applying these measures to the investigation of offences endangering national security.

The Implementation Rules are largely modelled on current investigative measures relating to, e.g., corruption offences or organised crimes. These current investigative measures have been in use for a long time, and have been improved upon as required by practice. By adapting these existing measures as the Implementation Rules, these Rules may inherit their legal and practical experience in the investigation of national security offences.

The Implementation Rules contain four rules and seven schedules. Rule 2 specifies the parties who may exercise the powers under each schedule. Rule 3 specifies that only judges designated under Article 44 of the NSL may handle applications under these Rules. The seven schedules are as follows:

Schedule 1: Rules Relating to Search of Places for Evidence.

Schedule 2: Rules Relating to Restriction on Persons under Investigation from Leaving Hong Kong.

Schedule 3: Rules Relating to Freezing, Restraint, Confiscation and Forfeiture of Property.

Schedule 4: Rules on Removing Messages Endangering National Security and on Requiring Assistance.

Schedule 5: Rules on Requiring Foreign and Taiwan Political Organizations and Agents to Provide Information by Reason of Activities Concerning Hong Kong.

Schedule 6: Rules on Application for Authorization to Conduct Interception and Covert Surveillance.

Schedule 7: Rules Relating to Requirement to Furnish Information and Produce Materials.

The police are currently empowered by, e.g., the Police Force Ordinance (Cap. 232), to apprehend and search suspects, to ask persons questions and to seize material if there are reasonable grounds to suspect that the information or material may be relevant to their criminal investigations.[12] Schedule 7, among others, enhances these powers through the application of court orders which would compel relevant persons to answer questions, provide information or produce material which are likely to be relevant for proving the guilt (or, for that matter, showing the innocence) of the suspect/defendant, and for pursuing their proceeds of these crimes. Section 6 provides for the making of rules of court applicable to Schedule 7.

12 Section 50 provides for "Arrest, detention and bail of suspected persons and seizure of suspected property" in respect of person whom a police officer reasonably believes will be charged with or whom he reasonably suspects of being guilty of. Section 53 empowers any police officer to execute warrants. Section 54 empowers any police officer to stop, and detain any person for the purpose of search who acts in a suspicious manner, or whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence and Section 63 prohibits anyone from "giving of false information with intent to defeat or delay the ends of justice, wilfully misleads or attempts to mislead any such officer..."

Can *court orders* made under Schedule 7 effectively enhance the investigation of offences endangering national security, and fairly protect the legitimate rights of the affected citizens? A decision of the European Court of Human Rights (ECtHR) suggests that in some cases a search warrant can be drastic and that a court production order allows careful scrutiny by the court and may therefore give greater protection to affected citizens. *Nagla v Latvia* (Application no. 73469/10) provides an example. The facts and key issues are as follows:

(1) The applicant *Nagla* worked for the national television broadcaster where she produced and hosted a weekly investigative news programme. In February 2010, she was contacted by an anonymous source who revealed that there were serious flaws in a database maintained by the State Revenue Service (VID). She informed the VID of possible security breach and then publicly announced the data leak during a broadcast of her programme.

(2) A week later her source, identifying himself as "Neo" began to use Twitter to publish information concerning the salaries of State officials in various public institutions, and continued to do so until mid-April 2010.

(3) The VID initiated criminal proceedings and in February 2010 the investigating police interviewed the applicant as a witness. She declined to disclose the identity of her source. In May 2010, the investigating authorities established that a person *I.P.*, who had used an IP address connected to the database and had made several calls to the applicant's phone number. *I.P.* was arrested in connection with the criminal proceedings.

(4) The same day the applicant's home was searched, and a laptop, an external hard drive, a memory card and four flash drives were seized after a search warrant was drawn up by the investigator and authorised by a public prosecutor. The applicant relied on Article

10[13] of the European Convention on Human Rights, and complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified. (§§5-30)

The ECtHR is of the view that the interference to the applicant's freedom of expression is prescribed by law and with a legitimate aim. "*…the Court could accept that the interference was intended to prevent disorder or crime and to protect the rights of others, both of which are legitimate aims.*" (§92) The remaining issue is whether such a restriction is no more than necessary in a democratic society. (§§91-92) In the present case, *a search warrant in vague terms rather than a disclosure order was issued*. The ECtHR notes that a search warrant is a more drastic measure, and that limitations on the confidential sources call for the most careful scrutiny by the court, (§95) but the judge's reasoning was defective. (§99-101) The right of the applicant was infringed and she was awarded €10,000 in damages.

III Three types of criteria for assessing the effectiveness and fairness of Schedule 7 procedures

Schedule 7 operates in the common law context of the HKSAR, as enshrined in Article 8 of the Basic law.[14] Are its procedures able to effectively enhance the investigation of offences endangering national security, and fairly preserve the legitimate rights of citizens? We shall examine Schedule 7 by three types of criteria:

---

13 "1. Everyone has the right to freedom of expression…. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

14 Article 8 of the Basic Law provides: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Criterion A: Whether *Schedule 7 court orders* are effective and fair in advancing criminal investigations:

1) Are the application procedures for the court order stringent?
2) Are the conditions to be fulfilled stringent?
3) Is the implementation of the order likely to be effective in practice?
4) Can the affected party object?

Criterion B: Whether *Schedule 7 procedures* protect the rights of the affected parties in respect of

1) legal professional privilege (LPP)[15]?
2) *the privilege against self-incrimination?*
3) journalistic material?[16]

Criterion C: This criterion assesses whether *Schedule 7 procedures* enhance, rather than impede, the *fundamental principles of criminal trials, as follows*:

1) the prosecution bears the burden of proof (presumption of innocence);
2) proof of guilt must be beyond reasonable doubt;
3) *relevance* as the paramount criterion for admissibility of evidence, and
4) fair trial and the right of the defendant to appeal.

---

15 LPP protects the confidentiality of *bona fide* communications between lawyer and client concerning matters of legal advice or in reference to litigation, be it on-going or in contemplation. The privilege conveys the right to resist the compulsory disclosure of those communications. See, e.g., *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701.

16 Pt. XII of the Interpretation and General Clauses Ordinance (IGCO), Cap. 1.

These “Golden principles” of criminal trial should not be complicated or impeded by civil procedures or civil case law principles, which may make it difficult for the prosecution to adduce relevant evidence on the one hand, and derogate the rights of defendants to a fair trial or to pursuit appeals, on the other. A public prosecutor should seek to derive satisfaction from having faithfully ensured a fair trial for the defendant. Only convictions achieved under high quality criminal procedures would advance the freedom, fairness, stability, and prosperity of the community.

The bulk of the procedures under sections 2 and 3 of Schedule 7 are similar. Major differences lie in three areas. In contrast to section 2, section 3(a) also applies to the investigation of proceeds of crime, (b) may cover material outside Hong Kong, and (c) excludes the privilege against self-incrimination. We shall examine the common procedures under section 2, and highlight their differences under section 3.

IV Assessing Section 2 of Schedule 7: "Requirement to furnish information or produce material"[17]

Section 2: Requirement to furnish information or produce material

Key: OENS= *offence endangering national security*; RGS = *reasonable grounds for suspecting; RGB= reasonable grounds for believing*

Who may apply:

(1) The SJ may, for investigation into an OENS, apply *ex parte* to the CFI for an order re a particular person, or persons of a particular description

(2) CFI may, if conditions in (4)(a), (b) & (d) or (4)(a), (c) & (d) are fulfilled, make the order under (3)

s.5 **Offence of prejudicing investigation**

(1) an order under s. 2 or 3 has been made, or has been applied for and has not been refused,

(a) makes disclosure intending to prejudice investigation

(b) falsifies, conceals etc. any material…

(3) commit an offence: a fine & 7 years imprisonment

Conditions to be fulfilled:

(4) (a) RGS the OENS ***has been committed***

(b) RGS the particular person has relevant info or material

(c) Re persons of a particular description, RGS some has it

(d) RGB it is in the **public interest** to make the order

(3) **Terms of the order**: To answer SJ's questions/ furnish information/ produce material, but not to detain.

(17) Person subject of an order may apply to discharge or vary order

Implementing the Order: (5) SJ may require the person to *answer question/ furnish info*; (6) to require *production of material*; (7) Terms of the notice of requirement

Scope of order / notice:

(9) Order does not apply to LPP

(11) Apply to self-incriminating info, but

(12) for derivative use only

4. Disclosure of information obtained under s. 2 or 3

(1) From IRD to SJ for prosecution, applying for confiscation or restraint order

(2) - to DOJ & HKPF

- to any corresponding person or body

(13) Offence of non-compliance ($100,000 + 1 year)

(14) Offence of false/ misleading statement ($500,000 + 3 years)

17 Section 2 is analogous to section 3 ("Requirement to furnish information or produce material") of the Organized and Serious Crimes Ordinance (OSCO), Cap. 455, and to section 14 ("Power to obtain information") of the Prevention of Bribery Ordinance (POBO), Cap. 201.

A.1) Are the application procedures for the court order stringent?

Only the Secretary for Justice may make an application under section 2. It implies that any application has to be considered by relevant counsel in the Department of Justice. The application procedures appear to be reasonably stringent:

> "(1) The Secretary for Justice may, for the purpose of an investigation into *an offence endangering national security*, make an *ex parte* application to the Court of First Instance for an order under subsection (2) in relation to *a particular person or to persons of a particular description*."

A.2) Are the conditions to be fulfilled stringent?

Subsections (2) and (4) provide for the conditions to be fulfilled for granting the court order. They appear to be reasonably detailed and stringent:

> "(2) The Court of First Instance may, if on such an application it is satisfied that the conditions in *subsection (4)(a), (b)* and *(d)* or *subsection (4)(a), (c) and (d)* are fulfilled, make an order complying with subsection (3) *in respect of the particular person, or persons of the particular description*, to whom the application relates.
>
> …
>
> (4) The conditions referred to in subsection (2) are —
>
> (a) that there are *reasonable grounds for suspecting* that the *offence endangering national security* under investigation *has been committed*;
>
> (b) where the application *relates to a particular person* — that *there are reasonable grounds for suspecting* that the

person *has information, or is in possession of material, likely to be relevant* to the investigation;

(c) where the application relates to *persons of a particular description*, that —

(i) there are reasonable grounds for suspecting that *some or all persons of that description* have such information or are in possession of such material; and

(ii) the offence endangering national security could not effectively be investigated if the application was required to relate to a particular person, whether because of the urgency of the investigation, the need to keep the investigation confidential or the difficulty in identifying a particular person who has relevant information or material;

(d) that there are reasonable grounds for believing that *it is in the public interest that an order under subsection (2) should be made* in respect of that person or those persons, having regard to —

(i) the *seriousness* of the offence endangering national security under investigation;

(ii) whether or not the offence endangering national security *could be effectively investigated if an order under subsection (2) is not made;*

(iii) the *benefit likely to accrue to the investigation* if the information is disclosed or the material obtained; and

(iv) the *circumstances under which the person or persons may have acquired, or may hold, the information or material* (including any obligation of confidentiality in respect of the information or material and any family relationship with a person to whom the information or material relates)."

A.3) Is the implementation of the order likely to be effective in practice?

The section empowers the judge to make orders of fairly wide scope, and wide-scope orders are prima facie likely to make the investigation effective. Subsection (3) provides:

"An order under subsection (2) must —

…

(c) ***authorize the Secretary for Justice to require*** the person or persons ***in respect of whom the order is made*** to do either or both of the following —

(i) to *answer questions or furnish information* with respect to any matter that reasonably appears to an authorized officer to be relevant to the investigation;

(ii) *to produce any material that reasonably appears* to the Secretary for Justice to relate to any matter relevant to the investigation, or *any material of a class* that reasonably appears to the Secretary for Justice so to relate; and

(d) contain such other terms (if any) as the Court of First Instance considers appropriate in the public interest, but nothing in this paragraph is to be construed as authorizing the court to order

the detention of any person in custody without that person's consent."

Given that circumstances are infinitely variable, there are ways to dispute the applicability of court orders even of wide scope. The court order and the notice are backed up by offences of non-compliance and of prejudicing investigation. It may be a bit early to judge the practical effectiveness of these court orders.

A.4) Can the affected party object?

Subsection 2(17) confers a right to the affected party to apply, at the inter-parte stage, to the court to discharge or vary the order: "An application for the discharge or variation of an order made under this section may be made *by any person on whom a requirement is imposed* under the order."

Subsection 3(7) similarly provides that, "An application for the discharge or variation of an order made under subsection (2) or (6) may be made by any person who is subject to the order." In *J v Commissioner of Police*[18], the Secretary for Justice, on behalf of the Commissioner of Police, had obtained *ex parte* production orders under section 3 against X. X sought to vary those orders on various grounds. Alex Lee J ruled as follows:

"Held, dismissing Xs' application, that:

(1) As a matter of principle, the court generally should not entertain an application or invitation to discharge or vary production orders on the ground of relevance or utility under s.3(4)(c)(i) and (d)(i) of Sch.7, when there had already been a decision by the court on those at the *ex parte* stage. To do so may run the risk of compromising the integrity and

18 [2021] 5 HKLRD 708.

effectiveness of the investigation, which was contrary to the statutory intent. Where all the statutory criteria contained in s.3(4) of Sch.7 were satisfied, the discretion of the Court not to order a production order was restricted, bearing in mind the utmost importance of national security, and the justification for refusal had to be strong (*R (Bright) v Central Criminal Court* [2001] 1 WLR 662, *P v Commissioner of ICAC* (2007) 10 HKCFAR 293, *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 applied). (See paras.20, 22–24, 26.)

(2) Notwithstanding the above conclusion, in fulfilment of the court's role as the final safeguard against abuse and oppression, it was permissible for the court to re-conduct the balancing exercise under s.3(4)(d) of Sch.7 when facing an application for discharge or variation. Pending resolution of the application, a good practice was to have the documents in dispute sealed in the presence of the parties' representatives, as the parties did in the present case. (See para.28.)[19]

(3) Having re-assessed the requirement of s.3(4)(d) of Sch.7, taking into account the relevant affirmation evidence, the balance of public interest clearly tilted in favour of production and X's application for redaction had no merit: (See paras.28–29, 37.)

(i) The fact that Xs might breach their "assurance" of confidentiality given to the donations/subsidies recipients in itself was not sufficient to excuse them from compliance; (See para.30.)

19 S.3(4)(d) of Sch.7 provides, "that there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given, having regard to—(i) the benefit likely to accrue to the investigation if the material is obtained; and (ii) the circumstances under which the person in possession or control of the material holds or controls it, as the case may be."

(ii) The very nature of a production order would involve the investigating authority seeking information from the parties other than their owners and without their consent; (See para.31.)

(iii) The equitable duty of confidence did not extend to bar the disclosure to investigatory/regulatory authorities of the investigation matters (*Re A Company's Application* [1989] Ch 477 applied); (See para.32.)

(iv) The courts had consistently held that the public interests in having serious crimes detected and prosecuted outweighed a suspect's right to privacy (*HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, *HKSAR v Wong Kwok Hung* [2007] 2 HKLRD 621, *P v Commissioner of ICAC* (2007) 10 HKCFAR 293, *Next Digital Ltd v Commissioner of Police* [2021] 5 HKC 411 applied); (See para.33.)

(v) As the purpose of the investigation was to examine the fund flow and the legitimacy of payments, the personal data in question were plainly relevant; (See para.34.) …"

B. 1) Is LPP protected?

LPP is protected under subsection (9):

"(9) *A person must not under this section be required to furnish any information or produce any material relating to items subject to legal professional privilege, except that a lawyer may be required to furnish the name and address of the lawyer's client."*

Alex Lee J. in *A v Commissioner of Police*[20] gave effect to LPP protection (again in respect of a section 3 application, but the case is also relevant to this section) in this holding:

> "(1) Having inspected items 19–22 under consideration, the Court found that the redacted WhatsApp exchanges in question and the internal emails of A and B *were all about an employee seeking legal advice from their legal department. There was not a prima facie case that the items came in existence as part of any fraud or crime, even if viewed in the light most favourable to the prosecution*. This conclusion was reached without depending on any disputed versions of events and it did not require any judgment to be reached in relation to the issues to be tried. The Court upheld A and B's claim of LPP as regards those items ... (See paras. 9, 12–14)"

B. 2) Is the privilege against self-incrimination protected?

This privilege is protected to an extent. Subsection (11) requires information which may tend to self-incriminate to be furnished to enable effective investigation. But subsection (12) balances the need for protection, by prohibiting "direct use" of the obtained information (save for proving false information or for impeaching credibility), but apparently permitting the investigator to make derivative use of it:

> "(11) A person is not excused from furnishing information or producing any material required under this section on the ground that to do so —
>
> (a) might tend to incriminate the person; or
>
> (b) would breach an obligation as to secrecy or another restriction on the disclosure of information or material imposed by statute or otherwise.

20 [2021] 3 HKLRD 300.

(12) A statement by a person in response to a requirement imposed by virtue of this section may not be used against the person in criminal proceedings against the person except as follows —

(a) in evidence in proceedings under subsection (14) or section 36 of the Crimes Ordinance (Cap. 200); or

(b) for the purpose of impeaching the person's credibility in proceedings in respect of any offence where in giving evidence the person makes a statement inconsistent with it."

In *HKSAR v Lee Ming Tee and Another*[21], one of the issues was whether during an inquiry under section 145(1) of the (then) Companies Ordinance, section 145(3A) abrogates the privilege against self-incrimination and replaces it with a "direct use prohibition". Section 145(3A) is set out in para. 58 of that judgment:

"(3A) A person is not excused from answering a question put to him under this section by an inspector on the ground that the answer might tend to incriminate him but, where such person claims, before answering the question, that the answer might tend to incriminate him, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings [which are not material]."

The CFA concluded:

"69…. Therefore, on its face (and subject to there being any free-standing derivative use immunity at common law or pursuant to the Bill of Rights), s 145(3A) abrogates the privilege and then forbids only direct use, inferentially permitting derivative use of the questions and answers obtained in the course of an inspection.

…

21 (2001) 4 HKCFA133.

132. There is accordingly no basis for contending, in the present case, that Articles 10 and 11(1) of the Bill of Rights require the court to deduce a derivative use immunity in favour of the respondents."

B. 3) Whether journalistic material is protected?

Journalistic material (JM) is not directly covered by Schedule 7. But Alex Lee J in *A v Commissioner of Police*[22] ([2021] 3 HKLRD 300) made this ruling, taking the obiter view that Article 4 of the NSL provides, indirectly, protection to JM in the context of Schedule 7:

"JM

(2) *A generous interpretation should be given to JM, because protection of journalistic material from seizure and exposure was closely connected with freedom of the press which was a fundamental right. Whilst JM must be given the greatest possible protection from seizure or public exposure, it was not absolute. The salient features of JM included: (i) the reason for JM enjoying a special status in various statutory provisions was its close connection with the freedom of expression; (ii) however, the mere fact that the material was in possession of a journalist was not determinative of its nature, nor was the form in which the material was published; (iii) the determining factor was the purpose of the creation and acquisition of the material in question and the intention of the conveyor (if applicable); and (iv) a speech/ article prepared for the purpose of publication would be JM if it was directed to informing public debate and on other matters of public interest. That said, if the material in question was created, acquired or received for the purpose of a crime, then it would not be qualified as JM* …

22 [2021] 3 HKLRD 300.

(3) *As a matter of necessity and with the consent of the parties, the Court opened the Sealed Materials and inspected the items under this head. Even if one were to adopt a liberal interpretation as contended by A and B, none of the items could be categorised as JM in the sense of Pt. XII of the IGCO (HKSAR v Wong Cho Shing [2019] 4 HKC 401 applied). (See paras. 29, 34.)*

Applicability of Pt. XII of IGCO

(4) *(Obiter) Pt. XII of the IGCO has no direct application to Sch.7 of the IR: (See para.36.)*

(i) Section 85 of the IGCO concerns the power to enter, search, and seize materials in any "Ordinance". (i) However, the NSL and the IR are not "Ordinance" as defined in s.3 of the IGCO. Whilst the application of the provisions of the IGCO is subject to any "contrary intention" appearing either from that Ordinance or any other Ordinance in force, there is no contrary intention which would lead the court to construe the word "Ordinance" to include the NSL and the IR (Tong Ying Kit v HKSAR [2020] 4 HKLRD 382 *considered). (See para.36 (1).)*

(ii) Sections 84 and 85 of the IGCO apply to provisions in any Ordinance granting power to "enter", "search" and "seize" only. Production orders, on the other hand, do not involve any of those (So Wing Keung v Sing Tao Ltd [2005] 2 HKLRD 11 *distinguished). (See para.36 (2), 37–38.)*

Whether JM relevant consideration when making production order

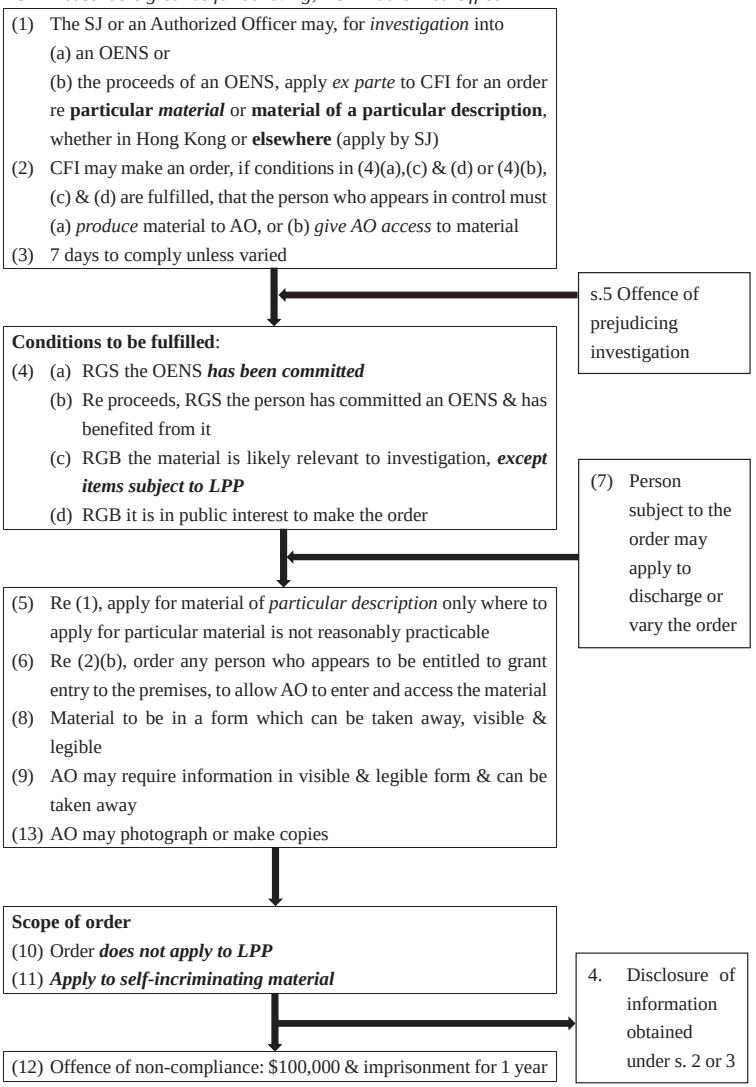
(5) *(Obiter) By the clear language of s.3(2) of Sch.7 of the IR, the court is empowered but not bound to make an order granting*

a production order when the court is satisfied that all the conditions set out in s.4 are met. Furthermore, the court is entitled to take into account that the material sought might cover JM. Although Sch.7 makes no express reference to JM, art.4 of the NSL requires the courts to respect and protect human rights, including the freedoms of speech and of the press, in safeguarding the national security in the HKSAR and Sch.7 is made under art.43 of the NSL. In order that the judicial safeguard provided for in Sch.7 could be meaningful and effective and that art.4 of the NSL could be given its full effect, the court must be entitled to take into account whether the material sought under a production order might include JM. This is plain from the language of the NSL and the IR. …"

V Assessing Section 3 of Schedule 7: Order to make material available[23]

Section 3: Order to make material available

Key: OENS= *offence endangering national security*; RGS = *reasonable grounds for suspecting; RGB= reasonable grounds for believing; AO= Authorized Officer*



23 C.f., section 20 (Order to make material available) of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405; section 4 (Order to make material available) of the OSCO, Cap. 455; and section 13A (Order to make material available and to render assistance) of the POBO, Cap. 201.

A.1) Are the application procedures for the court order stringent?

There are three main differences between section 2 and section 3. Section 3 deals with the application for production orders for the investigation into an offence endangering national security, or the *proceeds of an offence endangering national security.* If it is intended to obtain court orders which cover *extraterritorial material,* the application must be made by the *Secretary for Justice*:

> "(1) The Secretary for Justice or an authorized officer may, for the purpose of an investigation into —
>
> (a) *an offence endangering national security*; or
>
> (b) the *proceeds of an offence endangering national security* of any person who has committed or is suspected of having committed an offence endangering national security,
>
> make an *ex parte* application to the Court of First Instance for an order under subsection (2) in relation to particular material or to material of a particular description, *whether in Hong Kong or, in the case of an application by the Secretary for Justice, elsewhere."*

B. 2) Is the privilege against self-incrimination protected under section 3?

This privilege does not apply to the production of material under a production order made under section 3. Subsection (11) requires material, even if it may self–incriminate, to be furnished to enable effective investigation:

> "(11) *A person is not excused from producing any material in relation to which an order under subsection (2) is made on the ground that to do so —*
>
> (a) *might tend to incriminate the person; or*

(b) *would breach an obligation as to secrecy or another restriction on the disclosure of information or material imposed by statute or otherwise."*

VI Restrictions on use of information

Section 4 of Schedule 7 restricts the disclosure of information obtained under section 2 or 3. In particular, it restricts the disclosure of obtained information which is subject to an obligation of secrecy under the Inland Revenue Ordinance (Cap. 112), and further provides:

"(2) Subject to subsection (1), information obtained by any person under or by virtue of section 2 or 3 of this Schedule may be disclosed by any authorized officer —

(a) to the Department of Justice and the Hong Kong Police Force; and

(b) where the information appears to the Secretary for Justice to be likely to assist any corresponding person or body to discharge its functions — to that person or body.

Subsection (4) defines "corresponding person or body (相應的人員或機構)" as meaning "any person who or body which, in the opinion of the Secretary for Justice, has under the law of a place outside Hong Kong functions corresponding to any of the functions of anybody mentioned in subsection (2)(a)."

In *J v Commissioner of Police*,[24] the Secretary for Justice, on behalf of the Commissioner of Police, had obtained *ex parte* production orders under section 3 against X. X sought to vary those orders on various grounds, including the risk that the information would be disclosed to the public. Alex Lee J ruled against that ground under holding (vi):

24 [2021] 5 HKLRD 708.

"There was no basis to worry that the personal data in question, once produced to the police, would be made available to the public. To the contrary, s.4 of Sch.7 contained provisions which restricted dissemination of information obtained by the police under ss.2 and 3 (*Junior Police Officers' Association of Hong Kong Police Force v Electoral Affairs Commission* (No 2) [2020] 3 HKLRD 39 distinguished); (See para.35.)"

VII Offences

Subsections (13) and (14) of section 2, and subsection (12) of section 3 create offences against non or fraudulent compliance. Section 5 creates a further offence of "prejudicing investigation". As a matter of general principles, *only a party who is the subject of the court order can be held criminally liable, and that the criminal jurisdiction of the HKSAR is territorial.* Take section 3 as an example, the person who is the subject of the court order is specified in subsection 3 (2), which provides:

"Subject to subsection (5), the court may, if on such an application it is satisfied that the conditions in subsection (4)(a), (c) and (d) or subsection (4)(b), (c) and (d) are fulfilled, make an order that *the person who appears to the court to be in possession or control of the material to which the application relates* must —…

(a) produce the material to an authorized officer for the officer to take away; or

(b) give an authorized officer access to it,

within such period as the order may specify."

Section 3 (12) provides for the offence, which permits the defendant to raise the defence of "reasonable excuse": "Any person who without reasonable excuse fails to comply with an order made under subsection (2)

commits an offence and is liable on conviction on indictment to a fine of $100,000 and to imprisonment for 1 year."

Section 5 creates an offence of "prejudicing investigation" which applies to both sections 2 and 3. The offender is liable on conviction on indictment to a fine and to imprisonment for 7 years. Given the scope of the offence, anyone who has committed the specified act can be held criminally liable, even if he/she is not the subject of the court order. The criminal jurisdiction of the HKSAR is still territorial. It also permits the defendant to raise the defences of "lawful authority" or "reasonable excuse":

"(1) Where an order under section 2 or 3 of this Schedule has been made or has been applied for and has not been refused, a person who, knowing or suspecting that the investigation in relation to which the order has been made or applied for is taking place —

(a) without lawful authority or reasonable excuse makes any disclosure intending to prejudice the investigation or makes any disclosure being reckless as to whether the disclosure will prejudice the investigation; or

(b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of any material —

(i) knowing or suspecting that the material is likely to be relevant to the investigation; and

(ii) intending to conceal the facts disclosed by the material from persons carrying out the investigation, commits an offence."

(2) Where a person has been arrested in connection with an investigation specified in subsection (1), that subsection

does not apply as regards any disclosure in respect of the investigation made after such arrest."

VIII Criterion C: Preserving the fairness and efficacy of criminal trials

This criterion assesses whether *Schedule 7* enhances, rather than impedes, the "Golden principles" of criminal trial. These principles should not be complicated or impeded by civil procedures or civil case law principles. As the Court of Appeal in *Yeung Chun Pong and Others v Secretary for Justice*[25] has emphasised:

> "63. There is a clear public interest in ensuring that charges, once before a court, must be tried. There is built into the system a host of safeguards to secure for an accused a fair, and an appropriately speedy, determination. If those safeguards are not afforded in a particular instance, there is provided by the legislature a prescribed appeal mechanism. That mechanism does not envisage interlocutory appeals or collateral challenges. That is for very good reason, namely, that in practice most trials would constantly be interrupted to the disadvantage of effective decision-making and the disruption of the system as a whole. Sometimes disruption to and delay of a particular trial caused by a judicial review application – or even by repeated applications in the one case – may derail *a prosecution properly brought* by the effect of that delay upon witnesses or their availability. This disruption may find aggravated form as in the present case, where there is an *ex parte* application made for leave; leave is granted without hearing the prosecutor respondent; an application is then made to set aside leave; that is refused; there is an appeal from that refusal, an appeal that may find its way to the Court of Final Appeal and, if the leave is not disturbed, there is a judicial review and renewed appeals from whatever decision emerges therefrom; and whilst all this is going on, hearing dates

25 [2008] 3 HKLRD 1.

for trial are repeatedly vacated. The outcome is that unwarranted applications to stay proceedings combined with collateral challenges themselves run the risk of abusing the court's process."

One such dubious collateral challenge (to the validity of a search warrant) may perhaps be found in *Next Digital Limited v Commissioner of Police*, HCMP 1217/2020 (Chambers hearing dated 10 June 2021). The device of "voire dire" in criminal trials, which applies the criminal standard, is often a cogent means for resolving collateral disputes. Improper application of civil principles or standards in criminal proceedings by the defence may thwart a prosecution properly brought, and, if improperly applied by the prosecution, may deny a defendant of his fundamental rights to a fair trial, or to pursuit appeals.

Young Ngai-man Simon: Thank you very much, Mr Lee, for that wide ranging and in-depth presentation on national security and Schedule 7. I thought an important point that you made in your presentation was that the Implementation Rules, while being national law, are applied in a common law system. And I thought there was room to highlight an important point about the status of the Implementation Rules, because I see a kind of inherent tension with the Implementation Rules in that when you look at the substance in the point you made, as you look at the content of those Implementation Rules, they are very much based on Hong Kong laws and jurisprudence. And no doubt whoever drafted them probably was well aware of the Hong Kong law. But at the same time, they are national law, as you highlight. And it might be that someone looking at this from the common law system may think that the Implementation Rules look like subsidiary legislation and that the NSL is the primary legislation, and that Article 43 of the NSL looks like the empowering provision. I'd be interested to see what you think. My own preliminary view is that that's probably the wrong way of thinking about it, that the Implementation Rules are not Hong Kong subsidiary legislation, but national law, as you say. And so the ordinary rules that we

have that apply to subsidiary legislation and the relationship of subsidiary legislation to the primary legislation probably wouldn't apply. I don't know if you'd give any thought to that, Robert (Mr Lee Shiu-keung Robert).

Lee Shiu-keung Robert: Thank you. That's a difficult question. The Implementation Rules were made pursuant to Article 43 of the National Security Law. National Security Law is definitely a national law. So you may argue that anything made pursuant to its provisions also acquire that quality, i.e. a national law. Or I would preliminarily prefer this view. When you say it is in the nature of national law, it applies to the whole nation, and I'm not too sure that is the case. And perhaps the court or somebody wiser than us can enlighten us later. I would tend to be more prudent on its nature.

Young Ngai-man Simon: I think that you made a good point about that.

Now, Grenville (Mr Ian Grenville Cross), I'd like to ask you about majority verdicts. Of course, we don't know whether the three-judge panel under the NSL can actually decide by majority because it's not spelled out in the NSL. We know that when we have jury trials, we can have majority verdicts as much as 5 to 2. And if you work out the math, that represents approximately 71% of the jury. Now, assuming that you can have majority verdicts with the three-judge panel, 2 to 1, that's 67%. Is it acceptable to have a 2 to 1 majority verdict in a NSL case? And what about Ireland? What is their experience where they do have the same kind of configuration of the three-judge panel?

Ian Grenville Cross: Of course, it's been accepted for many years in many common law jurisdictions that you can have majority verdicts. And once the principle has been accepted, I don't think it's necessarily too helpful to break down the exact percentage at the end of the day. But perhaps a way of testing its legitimacy is by looking at the Court of Appeal itself. I mean, the Court of Appeal, for example, in a murder case,

can decide to uphold the conviction by a majority of 2 to 1 and no one suggests that's an improper verdict in any way. The Court of Final Appeal has even decided cases on the basis of 3 to 2. If I remember rightly in the Congo case back in 2011, there was a 3 to 2 majority to refer the matter for interpretation to the National People's Congress. And the fact it was 3 to 2, which I'm not very good at percentages, but it must be something like 55, 56 to whatever. It's not a necessarily helpful way of looking at it. In the United States, the case in 2015 where concerning homosexual marriage, I mean, that was approved, by a huge change in the social order in America that was approved by a majority of 5 to 4. So a very tiny majority. But that didn't affect the ultimate legitimacy or the status of the judgment itself, which immediately took effect. I did some studies of the situation in Ireland, and I'm told by people on the ground that they can return verdicts of 2 to 1. But this is never announced.

Young Ngai-man Simon: It's never happened.

Ian Grenville Cross: Well, it may have happened, but it's never announced.

Young Ngai-man Simon: I see.

Ian Grenville Cross: And they delivered a reasoned judgment. But the judgment doesn't indicate if it's unanimous or by majority. There's only one judgment delivered, one verdict delivered by the court. And the general public will never know whether it was a majority or unanimous verdict.

Young Ngai-man Simon: Oh, very interesting. I was wondering whether the distinction that the examples you've given of the appeal courts might be distinguished on the basis that they're deciding questions of law, whereas here the three-judge panel also decides questions of fact, whether the fact finding requires a higher degree of majority consensus. I don't know. But I think the Irish example is important.

Ian Grenville Cross: But of course, what matters to the accused person is whether he's ultimately adjudged to be guilty or innocent, and whether it's purely a legal issue or a factual issue doesn't really affect that, does it?

Young Ngai-man Simon: No. Good. A second question I'd like to ask you, Grenville, relates to law reform, because I think as your presentation has very helpfully and powerfully illustrated, there are many jurisdictions in particular common law jurisdictions that now allow for judge alone trials beyond the national security context. Is that a law reform that maybe we should be thinking about here? And how would you set the parameters? Would it be just for specific serious crimes? Would it be at the election of the defendant only? What are your thoughts on that?

Ian Grenville Cross: Of course, it is always a controversial issue to limit the role of juries in Court of First Instance trials. In the past, there have from time to time been discussions about having single judge trials for complicated commercial cases. But those have never really got off the ground. The view being taken is that unless it's absolutely essential and alternatives can't be pursued to getting rid of jury trials, then you should stick with the jury trials. Of course, the way they've got round it is that courts now prioritise the counsel making things as simple, as understandable as possible, and the judges make their summing up as plain as possible so that the ordinary jurors can understand the issues. But I think it's probably fair to say that in those jurisdictions which have limited the right to jury trials in, for example, cases where there are problems of jury tampering or pre-trial publicity or cases of huge complexity, they have done it with some reluctance and only because they took the view in their particular jurisdictions that this was really essential in the interest of justice. I don't believe we've achieved that position here in Hong Kong. By and large, as I say, in commercial crime cases, an alternative means has been adopted, even in the days where there were perhaps cases where the triad and other unsavoury elements

were trying to tamper with juries. The view was always taken that this wasn't a serious problem, that if cases did arise, then the police should have the ability to handle the situation. And indeed, so do the judges, if the problems arise during the course of a trial. So my view would be that unless there is a pressing need in the interest of justice to change the system here in Hong Kong, then we should stick with what we have at the moment. If serious problems were to arise, as have happened in other jurisdictions, then certainly the issue could be looked at again.

Young Ngai-man Simon: Of course, no doubt we will learn from our experiences with having a judge alone trial in NSL cases to see how that works in practice. It may well be three judges may be too much, or maybe a single judge may be more effective. Your configuration. If you're going beyond the NSL and then there's of course question of who decides whether it's an application to the court or it's the Director of Public Prosecutions.

Ian Grenville Cross: It would not come from a party, I think. I mean, presumably the prosecutor would tell the court that we have convincing evidence in this case that attempts have been made to interfere with the jury. And we invite the court to order a non-jury trial. And likewise, the defendant might come before the court and say, well, I seriously feel I can't get a fair trial here because there's been massive pre-trial publicity and that would prejudice my right to a fair trial. So it could come from either side. But if either side could make out its case, then that would be a basis for having a non-jury trial. But as I say, fortunately, we haven't arrived at that situation in Hong Kong, so hopefully we never will.

Young Ngai-man Simon: All right, thank you, Grenville. Mr Lee, I have a couple of questions for you. In your presentation near the end, you referred to a provision in the Implementation Rules, Schedule 7 that allows the Secretary for Justice to apply for the production of overseas materials, i.e. materials outside Hong Kong, which is rather interesting. I'm wondering whether if someone doesn't comply, for example, the

custodian of the records overseas, whether they might be liable to conviction. Because, I noticed you said that people who have possession of the documents, if they don't comply, they could be committing a criminal offence. It would seem a rather extraordinary reach of extra-territoriality of the laws. What is your view of the position under the Implementation Rules?

Lee Shiu-keung Robert: Section 3 of Schedule 7 provides for the Secretary for Justice to apply for the production of overseas materials. But the order, as I read it, is directed not at the overseas custodian, it's directed at someone in Hong Kong. So as I've emphasised, the person who is subject to the order can be guilty of non-compliance, but not someone else. My preliminary view is I have no worries. I don't think the overseas custodian should have any worry about being charged by Hong Kong court. But the pressure, I would imagine, is forceful on the Hong Kong party, the Hong Kong person who is the subject of the court order, he or she will have to make great effort, genuine effort to try to obtain everything which is within the terms of the order.

Young Ngai-man Simon: And in that sense, it seems what you're saying is that power would be consistent with the similar power under the Prevention of Bribery Ordinance (Cap. 201) (POBO), which would have to be, to some extent, territorially directed at someone in Hong Kong.

Lee Shiu-keung Robert: Yes. I think I agree with you. I think my reading of Schedule 7 is a criminal jurisdiction, it's territorial.

Young Ngai-man Simon: Yes. And again, I mentioned this power under the POBO. We have a case from the Court of Final Appeal named *P v the Commissioner of ICAC*. I think most criminal practitioners are familiar with this case that dealt with this production power and in the Court's judgment, it essentially read in an exception to the production of documents. If it was too oppressive, then that would be a ground for possible legitimate non-compliance. Now, of course, in the

Implementation Rules, that exception is not explicitly spelled out. Is it your view that exception would also apply?

Lee Shiu-keung Robert: *P v the Commissioner of ICAC* is an important, very important decision as far as section 14 of the POBO is concerned because it examines and applies that section. Section 14 of the POBO differs quite a lot from our section 3 in the Implementation Rules. So that decision, I would say, may have some marginal relevance to the present case. As I understand it, the Court of Final Appeal there was saying that once the statutory conditions are satisfied, the Court has little discretion not to make the order. It can refuse to make the order if it is oppressive in the judge's view. So the oppressive concept comes in that context. Whereas in section 3 of Schedule 7, it expressly provides for, you may call it a defence of lawful authority or reasonable excuse. So in my view, it is open to anyone charged with an offence of non-compliance under section 3 to raise this defence. Perhaps the oppressive test is not the right test, the right test is to ask whether the defendant can raise either lawful authority or reasonable excuse on a very low standard, which is the evidential burden only. So that's the difference.

Young Ngai-man Simon: Thank you for clarifying that. It's a rather complex area, isn't it?

Lee Shiu-keung Robert: Yes.

Young Ngai-man Simon: We've got a little bit of time left. Why don't we see if our panellists have any final words on this topic of comparative law in the NSL? Any final words you might want to mention? How useful are these comparative cases?

Ian Grenville Cross: I think once one starts studying the jurisprudence in other jurisdictions, and indeed the legislation, one immediately sees how Hong Kong's legislation is not unique and indeed can be usefully interpreted. And it goes a great way, as I said in my remarks, towards allaying the concerns that some people have

felt. The type of problems that we've faced here in Hong Kong have been encountered elsewhere, and other common law jurisdictions have adopted a similar approach to us in seeking to resolve them. And so by understanding the broader global situation, I think this is very helpful indeed.

Young Ngai-man Simon: Robert.

Lee Shiu-keung Robert: From a comparative perspective, there is heavy emphasis in the NSL itself that the human rights and rule of law shall be adhered to, etc. And the Schedules to the Implementation Rules are basically based on a model on the existing investigative measures. So I would think that the likelihood is that our jurisprudence would be very much on par with the common law system. Personally, I don't have any worry about this law creating really inconvenience or things of that sort to the community.

Young Ngai-man Simon: Great. Thank you. And of course, the law that we created in Hong Kong could well contribute to this broader global dialogue on national security laws. On that note, I want to first thank you both for your very thorough and very helpful presentations and for the questions and answers. Ladies and gentlemen, can you please show your appreciation for our two speakers?

興邦定國

National Security Law Legal Forum
Thrive with Security

Comparative Study of Cases under the National Security Law and National Security Cases in Foreign Jurisdictions

Ian Grenville CROSS GBS SC
Honorary Professor
Faculty of Law of The University of Hong Kong

興邦定國

Trial by Jury: Basic Law Art 86

- HKCFA: No right to trial by jury
- Jury trial: Possible in NSL trials
- 3-judge trials: Interests of justice
- CFI: Extent of non jury trials
- SJ's certificate: Triggering mechanism

Trial by Three-Judge Panel: NSL Art 46

- SJ's certificate: Prosecutorial decision
- BL Art 63: DoJ independent prosecutions
- SJ's decision: Judicial review
- HK trials: Most by single judge
- Jury & Judge trials: Equal fairness
- Three heads: Better than one

Human Rights Protections

- Criminal justice/NSL: Human rights heavy
- NSL Arts 4 & 5: Inbuilt fair trial protections
- BL Art 39: ICCPR applicable to trials
- Protections: Legal certainty, presumption of innocence, access to counsel
- Suspect: Rights always same at trial

Trials in the Far East

- Singapore, Malaysia, Brunei: Former British colonies
- Trials: Juries abolished: Single judge
- ICCPR not applicable
- Preventive detention permissible
- Capital punishment: Still lawful
- Double standards

United Kingdom

- Supreme Court: Limits on jury trials
- Paramount test: Fairness of trial
- Single judge trial: Not unfair
- Trial threat: Interference with jurors
- Northern Ireland: Diplock Courts
- Privy Council: Single judge trial & justice

Australia and New Zealand

- Australian Constitution: Trial by jury
- Australian States: Limitations on jury trial
- Singe judge trials: Justice test applied
- Long, complex or burdensome trials
- New Zealand: Jury tampering fears
- CPA (NZ) 2011: Single judge trials

Republic of Ireland

- Jury trial: Not absolute right
- Special courts: Ensuring justice
- Special Criminal Court: Terrorism
- DPP: Decision on trial mode final
- SCC: Trial by three-judge panel
- SCC: Threats, organized & serious crime trials

Europe & ECHR

- Greece: Trial by ‘mixed court’
- Appeal courts: Conducting trials
- Judge trials: National security & serious crime
- ECHR (Court): Fair trial by different means
- ECHR (Court): No right to jury trial

Conclusion

An Overview of Schedule 7 of the Implementation Rules Made under the National Security Law

Lee Shiu-keung Robert SC
Senior Counsel
Cheng Huan SC's Chambers

The NSL and the Implementation Rules are about protecting the national security of the PRC

- The *National Security Law* was enacted by the NPCSC of the People's Republic of China on 30 June 2020, and introduced into the HKSAR via the Basic Law to protect national security.
- The *Implementation Rules* were made pursuant to Article 43 of the NSL *to enhance the investigation of offences endangering national security. It contains 7 schedules.*
- This presentation examines the effectiveness and fairness of Schedule 7 of the *Implementation Rules* — Schedule 7 is entitled "*Rules Relating to Requirement to Furnish Information and Produce Materials*"
- *Does this schedule strike the right balance between effectiveness and fairness?*

興邦定國

But why do countries need to protect their national security? And in what context? [為何各國都需要保護國家安全？]

National security is the foundation of social order upon which true freedoms and rights of the people, the rule of law, and prosperity and progress can be realised.
The national security of all countries requires optimal protection:
1)Different countries face different existential threats, which can arise from, e.g., climate changes, or extremism, or historical events. They would therefore need to deploy different modes of national security law and measures to meet their specific national security needs and goals. **[應對歷史形成的存在性威脅]**
2)Recent centuries of historical development have divided countries into two main classes, i.e., the "*developed, or dominating countries*", and the "*developing*, or *dominated countries*". The proper national security goal of the dominated countries is *to interact and dissipate the dominating force in order to achieve true universal values*.
[消除外來支配性力量，以實踐真正的普世價值]

興邦定國

3) Western liberalism is a *dominating force*, driven by amoral, ambivalent *individual desires* [自由主義是由欲求推動、道德中性、模稜兩可的支配力量]

- This amoral liberalism has generated centuries of ambivalent results world-wide: *surely the rule of law, wealth and progress, but also unending wars, inequalities, social divisions, domination, and dishonesty*. **[自由主義支配下，成就與戰火交織]**
- "Core liberal values" such as "freedom", "democracy" and "human rights", insofar as they are desire-based, are inherently amoral and ambivalent, and *not yet true universal values*, though they remain promising candidates. **[由欲求推動的自由、民主、人權價值,不能成為真正的普世價值]**

True freedom, as a "universal value", is based on duty, not on desire
[要成為真正的普世價值，自由須改由責任、而非欲求產生]

The common law is somehow exceptional in that ***it promotes rights on the basis of duty:***

a)Freedom of movement for everyone only arises ***when everyone (***drivers and road users) ***abides by his/her duties*** *to obey traffic signs and regulations* which apply equally to all. When these duties are fulfilled, a traffic order exists. **[行動自由,從各人盡責產生的交通秩序中產生]**

▪Everyone can reasonably expect that he or she can move from location A to location B, in say about 30 minutes and in relative road safety. That is my, and other road users' *freedom of movement*.

▪Freedom of movement does not arise from everyone insisting on his/ her *desire* (often re-labelled as "inborn right") to drive "freely". That will result in traffic accidents and congestions everywhere, in chaos not freedom of movement.

b) Freedom of speech arises only **when everyone abides by his/her duties** of not to defame others, not to injure others, not to cause chaos in conference proceedings, etc. **[個人言論自由，由各人盡相應責任構成]**

c) In *Donoghue v Stevenson*, Mrs Donoghue sued Mr Stevenson for having negligently manufactured a bottle of beer contaminated by a decomposed snail. She consumed it and fell ill. Professors McBride and Bagshaw take the view that the Court permitted Donoghue to sue Stevenson NOT because he violated her "right" to "bodily integrity", but because, in effect, Stevenson had *a duty towards her* to ensure the beer was fit for consumption. **[個人健康權,由各人盡相應責任構成]**

- That is: Anyone's freedom (or right) is constituted by everyone fulfilling their corresponding duties, and the orders sustained.
- *Legal and other measures which optimally promote duty, or optimally restrain desires, do not diminish individual freedom, but are conducive to freedom.*

4) Freedom, democracy, and human rights, to be true universal value, should be *duty-based*, not *desire-based*. [由責任推動的自由、民主、人權，方可成為真正的普世價值]

- Duty can occur at many levels. Great minds in both the East and the West have reminded us that, *our core duty is to achieve* ***mutuality***: to *respect others as equals, to treat others as ends not means, and to sacrifice for each other*. **[核心的互存性責任, 是普世價值的源頭]**

- In so doing, this *core duty* qualifies as *the* ***source*** *of true universal human value*s.

Why protect National Security in the HKSAR ?

- As explained above, national security is the *foundation* of social order within which the freedoms and rights of the people in the HKSAR can be realised, the rule of law can operate, and upon which prosperity and progress can be pursued.
- Only through optimal protection of national security can the rule of law, and with it, true enjoyment of freedoms and rights in the HKSAR be sustained.
- Under-protection of national security creates disorder, harms the rule of law and the freedoms and rights of the people. It also hurts the economic environment, disrupts international trade, and diminishes foreign business interests in the HKSAR.

Protect National Security via The NSL

The NSL, among other measures, sets out four types of offences in its Chapter III. They are, *Secession; Subversion; Terrorist Activities,* and *Collusion with a Foreign Country or with External Elements to Endanger National Security.*

- These offences are specific in their scopes and meticulously defined. Each requires cogent evidence to prove.
- Fair and effective powers of investigation can ensure that the subsequent prosecutions of national security offences are speedy and fair.

The Implementation Rules are to enhance investigation of offences endangering national security

- The *Implementation Rules* contain four rules and *seven schedules*. Rule 2 specifies the parties who may exercise the powers under each schedule. Rule 3 specifies that only judges designated under Article 44 of the NSL may handle applications under these Rules.
- The *Implementation Rules* are important means to enhance effective and fair investigations.

Two features conducive to the effectiveness and fairness of the Implementation Rules: [實施細則的兩個特點]

1) The *Implementation Rules are largely based upon* current investigative measures relating to, e.g., corruption offences or organised crimes. [以現行條文為藍本]

- These current investigative measures have been in use for a long time, and have been improved upon as required by practice.
- By adapting these existing measures as the *Implementation Rules* for the investigation of national security offences, these Rules inherit their legal and practical experience.

2) The Implementation Rules are to be applied in a common law context as provided by the Basic Law [在普通法環境中行使]

- While the Implementation Rules have their origin in a national law, they are to be applied in the common law context, as required by
  - Articles 4 and 5 of the NSL
  - Article 8 of the Basic Law
- Article 4 of the NSL provides: "Human 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 … *shall be protected in accordance with the law.*"

- Article 5 of the NSL provides: "The principle of *the rule of law* shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security…
- A person is *presumed innocent until convicted by a judicial body*.
- The *right to defend himself or herself* and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected…
- *No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings*."
- **Article 8 of the Basic Law** provides: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained…"

Court orders to regulate investigations – generally more preferable [以法庭命令規管調查權力是較可取做法]

- *Schedule 7 provides for the making of court orders to regulate investigation into offences endangering national security.*
- *In Nagla v Latvia* : the ECtHR takes the view that court orders are generally a more cogent means for regulating criminal investigations:

(1) The applicant *Nagla* worked for the national television broadcaster where she produced and hosted a weekly investigative news programme. In February 2010, she was contacted by an anonymous source who revealed that there were serious flaws in a database maintained by the State Revenue Service ("VID").

(2) A week later her source, identifying himself as "Neo" began to use Twitter to publish information concerning the salaries of State officials in various public institutions. In February 2010 the investigating police interviewed the applicant as a witness. She declined to disclose the identity of her source.

(1) In May 2010, the investigating authorities arrested a suspect called "*I.P.*" The applicant's home was searched, and a laptop and other items were seized after a search warrant was drawn up by the investigator and authorized by a *public prosecutor*.
(2) The applicant complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified. (§§5-30) She relied on Article 10 of the ECHR, which provides:

- "1. Everyone has the right to freedom of expression….
- 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

(3) The ECtHR is of the view that the interference to the applicant's freedom of expression is prescribed by law and with a legitimate aim. "*…the Court could accept that the interference was intended to prevent disorder or crime and to protect the rights of others, both of which are legitimate aims.*" (§92)
(4) The ECtHR notes that a search warrant *in vague terms rather than a disclosure order was issued*. A search warrant is a more drastic measure, and that questions of confidential sources call for the most careful scrutiny by the Court, (§95) but its reasoning was defective, and compensation was awarded to the applicant.

Three types of criteria to assess the effectiveness and fairness of Schedule 7 procedures [三類評價標準]

- **Criterion A**: Whether *Schedule 7 court orders* are effective and fair in advancing criminal investigations:
  1) Is the scope of the court order effective and the application procedure stringent?
  2) Are the conditions to be fulfilled stringent?
  3) Is the implementation of the order likely to be effective *in practice*?
  4) Can the affected party object?

Criterion B: Whether *Schedule 7* protects the rights of the affected parties

▪Whether Schedule 7 protects the rights of the affected parties in respect of

1) Legal professional privilege (LPP)# ?
2) The privilege against self-incrimination?
3) Journalistic material?

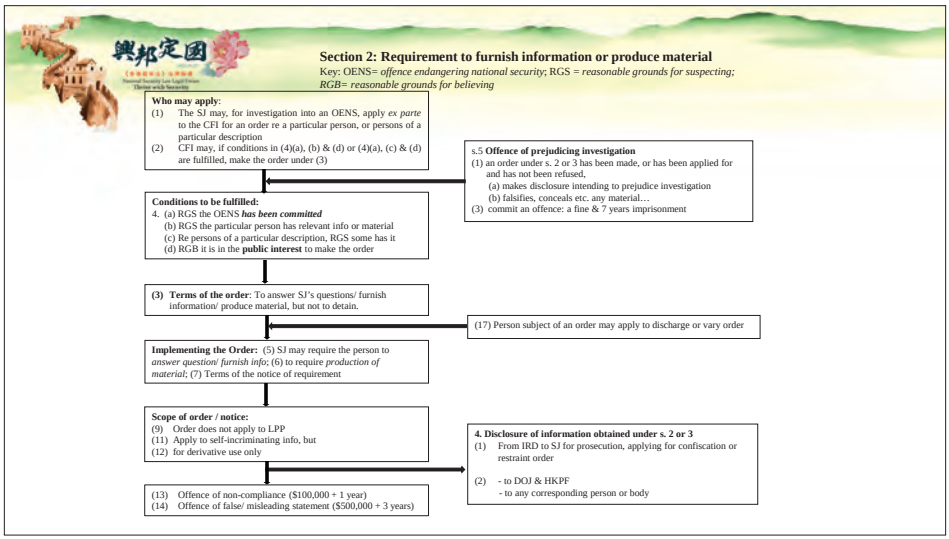
LPP protects the confidentiality of *bona fide* communications between lawyer and client concerning matters of legal advice or in reference to litigation, be it on-going or in contemplation. The privilege conveys the right to resist the compulsory disclosure of those communications. See, e.g., *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701.

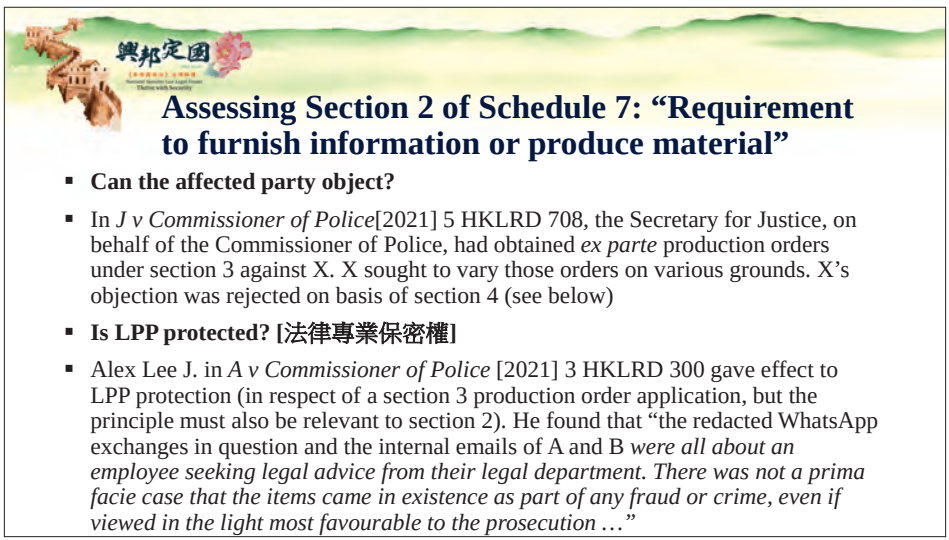
Criterion C: Preserving the fairness and efficacy of criminal trials

▪This criterion assesses whether *Schedule 7 procedures* enhance, rather than impede, the *fundamental rules of criminal trials*, namely:

1) The prosecution bears the burden of proof;
2) Proof must be beyond reasonable doubt;
3) *Relevance* as the paramount criterion for admissibility of evidence, and
4) Fair trial and the right of the defendant to appeal.

•Improper application of civil principles or standards in criminal proceedings by the defence may thwart a prosecution properly brought, and, if improperly applied by the prosecution, may deny a defendant of his fundamental rights to a fair trial, or to pursuit appeals.





Assessing Section 2 of Schedule 7: "Requirement to furnish information or produce material"

- **Can the affected party object?**
- In *J v Commissioner of Police*[2021] 5 HKLRD 708, the Secretary for Justice, on behalf of the Commissioner of Police, had obtained *ex parte* production orders under section 3 against X. X sought to vary those orders on various grounds. X's objection was rejected on basis of section 4 (see below)
- **Is LPP protected? [法律專業保密權]**
- Alex Lee J. in *A v Commissioner of Police* [2021] 3 HKLRD 300 gave effect to LPP protection (in respect of a section 3 production order application, but the principle must also be relevant to section 2). He found that "the redacted WhatsApp exchanges in question and the internal emails of A and B *were all about an employee seeking legal advice from their legal department. There was not a prima facie case that the items came in existence as part of any fraud or crime, even if viewed in the light most favourable to the prosecution …*"

- **Is the privilege against self-incrimination protected? [不自我入罪特權]**
- In *HKSAR v Lee Ming Tee and Another* (2001) 4 HKCFA 133, one of the issues was whether, for inquiry under section 145(1) of the (then) Companies Ordinance, section 145(3A) has abrogated *the privilege against self-incrimination*. The CFA construed the provisions (similar to sections 2(11) and 2(12)) and held that the privilege was abrogated but replaced by a "direct use prohibition", i.e. the person subject to the inquiry must give answers even if they may be self-incriminating, but which answers cannot be used in evidence against him.
- **Is journalistic material protected? [新聞材料]**
- It's not directly covered by Schedule 7. In *A v Commissioner of Police* ([2021] 3 HKLRD 300), Alex Lee J took the view that the protection of journalistic material ("JM") afforded by Cap. 1 does not apply in the context of Schedule 7, but that Article 4 of the NSL may afford alternative, indirect protection.

Section 3: Order to make material available

Key: OENS= *offence endangering national security*; RGS = *reasonable grounds for suspecting; RGB= reasonable grounds for believing; AO= Authorized Officer*

(1) The SJ or an Authorized Officer may, for *investigation* into
(a) an OENS or
(b) the proceeds of an OENS, apply *ex parte* to CFI for an order re **particular *material*** or **material of a particular description**, whether in Hong Kong or **elsewhere** (apply by SJ)
(2) CFI may make an order, if conditions in (4)(a),(c) & (d) or (4)(b), (c) & (d) are fulfilled, that the person who appears in control must (a) *produce* material to AO, or (b) *give AO access* to material
(3) 7 days to comply unless varied

→ s.5 Offence of prejudicing investigation

Conditions to be fulfilled:
(4) (a) RGS the OENS ***has been committed***
(b) Re proceeds, RGS the person has committed an OENS & has benefited from it
(c) RGB the material is likely relevant to investigation, ***except items subject to LPP***
(d) RGB it is in public interest to make the order

→ (7) Person subject to the order may apply to discharge or vary the order

(5) Re (1), apply for material of *particular description* only where to apply for particular material is not reasonably practicable
(6) Re (2)(b), order any person who appears to be entitled to grant entry to the premises, to allow AO to enter and access the material
(8) Material to be in a form which can be taken away, visible & legible
(9) AO may require information in visible & legible form & can be taken away
(13) AO may photograph or make copies

Scope of order
(10) Order ***does not apply to LPP***
(11) ***Apply to self-incriminating material***

→ 4. Disclosure of information obtained under s. 2 or 3

(12) Offence of non-compliance: $100,000 & imprisonment for 1 year

Section 3 of Schedule 7: Order to make material available – differs from section 2 in three main aspects

- Section 3 of Schedule 7 deals with the application for production orders for the investigation into *an offence endangering national security.*
- The bulk of the procedures under sections 2 and 3 are similar. Major differences lie in three areas, in the purpose and scope of the court orders under the two sections.
- In contrast to section 2, a section 3 production order
  a) Also applies to the investigation of *proceeds of crime*,
  b) May cover material outside Hong Kong (if it is intended to obtain *overseas material*, the application must be made by the *Secretary for Justice)*, and
  c) Excludes the privilege against self-incrimination.

Restrictions on use of information [披露資料的限制]

- Section 4 of Schedule 7 restricts disclosure of information obtained under section 2 or 3.
- *In J v Commissioner of Police*, X sought to vary those orders on various grounds, including the risk that the information would be disclosed to the public. This was rejected by Alex Lee J:
- "*There was no basis to worry that the personal data in question, once produced to the police, would be made available to the public. To the contrary, s.4 of Sch.7 contained provisions which restricted dissemination of information obtained by the police under ss.2 and 3…*"

Offence of non-compliance under sections 2 and 3 [不遵從命令的罪行]

- As a matter of general principles:
- *Only a party who is the subject of the court order can be held criminally liable, and*
- *The criminal jurisdiction of the HKSAR is territorial.*

- *Identify the subject of the order*: Section 3(2) provides, "Subject to subsection (5), the court **may**, … **make an order that the person who appears to the court to be in possession or control of the material to which the application relates** must – …
  a) produce the material to an authorized officer for the officer to take away; or
  b) give an authorized officer access to it,

  within such period as the order may specify."
- *Apply the offence*: Section 3(12) provides, " Any person who **without reasonable excuse** fails to comply with an order made under subsection (2) commits an offence and is liable on conviction on indictment to a fine of $100,000 and to imprisonment for 1 year."

Section 5: Offence of prejudicing investigation [妨害偵查的罪行]

- ***Given the scope of the offence under section 5, anyone who has committed the specified act can be held criminally liable, but that the criminal jurisdiction of the HKSAR is still territorial.***

Section 5 provides "(1) Where an order under section 2 or 3 of this Schedule has been made or has been applied for and has not been refused, a person who, knowing or suspecting that the investigation in relation to which the order has been made or applied for is taking place –

a) without lawful authority or reasonable excuse makes any disclosure intending to prejudice the investigation or makes any disclosure being reckless as to whether the disclosure will prejudice the investigation; or

b) falsifies, conceals, destroys or otherwise disposes of … any material …

commits an offence. …"

Convicted persons are liable to a fine and 7 years imprisonment.

KEYNOTE SPEECH (IV): LOOKING AHEAD FOR THE NATIONAL SECURITY LAW

DENG Zhonghua

Former Deputy Director,
Hong Kong and Macao Affairs Office of
the State Council of the People's Republic of China

President,
Chinese Association of Hong Kong and
Macao Studies

The Honourable Ms Carrie Lam Cheng Yuet-ngor (then Chief Executive), distinguished guests and dear friends,

Good morning, everyone!

It is my great pleasure to be invited once again to participate in the National Security Law Legal Forum hosted by the Department of Justice of the HKSAR Government. Held on the 25th anniversary of Hong Kong's reunification with the Motherland, this year's forum is of great significance and has far-reaching impact as it encourages exchanges about furthering full and faithful implementation of the principle of "One Country, Two Systems" and safeguarding national sovereignty, security and development interests. First of all, on behalf of Mr Xia Baolong, Vice-Chairman of the National Committee of the Chinese People's Political Consultative Conference and the Director of the Hong Kong and Macao Affairs Office of the State Council, and on behalf of the Chinese Association of Hong Kong and Macao Studies, I would like to extend our congratulations to this year's forum.

I participated in the first National Security Law Legal Forum held in July last year with the theme of "Security Brings Prosperity". One year has passed since then, the theme of this year's forum is "Thrive with Security". The change in the themes of the first and second forums from "Security" to "Thrive" fully reflects how Hong Kong has transited from

chaos to order, and from order to prosperity with the implementation of the National Security Law, which demonstrates its effectiveness in safeguarding national security and maintaining Hong Kong's stability and prosperity. Next, I would like to share a few of my views on the full and faithful implementation of the National Security Law and promoting the development of the legal system for safeguarding national security.

1. The National Security Law is a law that manifests good governance. Its significance is best understood by Hong Kong citizens who were affected by the chaos.

Over the past two years, the National Security Law has played an important role in stopping violence and curbing disorder, manifesting the value of human rights protection, safeguarding peace and stability in the society and constituting a strong public consensus for the pursuit of stability and development. This single law has restored peace in Hong Kong.

First, the National Security Law is a law that manifests good governance by stopping violence and curbing disorder. In the past two years, the National Security Law has fully fulfilled its function of stopping violence and punishing evilness. It has effectively cracked down on anti-China Hong Kong disruptors like Lai Chee-ying, Tai Yiu-ting and Wong Chi-fung, and curbed anti-China Hong Kong disruptive activities such as "violent riots" and "mutual destruction". As of March 2022, a total of 175 persons were arrested for endangering national security, with 8 of them being convicted. The Hong Kong judiciary has handled 85 cases relating to the National Security Law, with 64 cases having been closed already. Different provisions under the National Security Law, including those relating to bail, designated judges and the jury, have been accurately explained and applied in these particular cases. The common law system and the original legal system in Hong Kong continue to work properly. The rule of law and judicial independence are as robust as ever. Allegations that "Hong Kong's rule of law is dead" have been proven wrong.

Second, the National Security Law is a law that manifests good governance by protecting human rights. The National Security Law upholds the legislative spirit of "targeting a very small minority for protecting the vast majority". Its enactment has taken into account the actual and the common law features of the HKSAR. The law emphasises on respecting and protecting human rights and adhering to the principles of the rule of law. It protects the rights and freedoms of the residents of the HKSAR and has clear provisions on the litigation rights enjoyed by criminal suspects and defendants and the procedures in handling their cases. The HKSAR law enforcement agencies and the judiciary have strictly followed the aforesaid provisions in handling national security law cases to punish in accordance with the law the extremely small minority of criminals who endanger national security. The freedoms lawfully enjoyed by the wider community including the freedom of speech and the freedom of the press are better protected with the offenders related to the "violent riots" punished. The media environment has been improved continuously. The number of local and overseas media has increased. The Hong Kong society can more effectively monitor the government in accordance with the law.

Third, the National Security Law is a law that manifests good governance by safeguarding peace and stability. The National Security Law has created an overall keynote among Hong Kong citizens to safeguard national security. It has opened up a new era for Hong Kong to resolve problems at root, promoted a good atmosphere for the social and political environment and aroused the citizens' patriotism and love for Hong Kong, thereby reassuring citizens' and international investors' faith and enhancing their confidence in Hong Kong. A good social environment with stability, public safety, tranquility, as well as sustainable economic development has resumed in Hong Kong. Since the implementation of the National Security Law, Hong Kong has continued to maintain its status as an international financial centre and the business environment has kept improving. In 2021, the number of foreign companies in Hong Kong reached the historical high of 9,049. With the

protection offered by the National Security Law, Hong Kong continues to be an attractive place for global investment, talents and entrepreneurship.

2. The further consolidation of the systematic, comprehensive and effective legal system and enforcement mechanisms in safeguarding national security in Hong Kong is necessary to allow the National Security Law to offer effective protection to Hong Kong.

It is the constitutional responsibility of the HKSAR to continue to establish and improve the legal system and enforcement mechanisms for safeguarding national security. It is also a necessary measure to guard against and remove national security risks and protect national security. In the process of doing so, the HKSAR should have an awareness of problems, be guided by the spirit of the National Security Law and focus on aligning with the judicial outcomes that the National Security Law has achieved since its implementation.

First, continuing to establish and improve the legal system and enforcement mechanisms for safeguarding national security is a constitutional responsibility of the HKSAR. The HKSAR has the constitutional duty to safeguard national security. Article 23 of the Basic Law clearly stipulates that the region should enact laws on its own to prohibit 7 types of acts endangering national security. Section 3 of the National People's Congress's "528 Decision" and section 7 of the National Security Law also provide that the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and shall refine relevant laws. The National People's Congress adopted the Decision and authorized the National People's Congress Standing Committee to formulate the National Security Law with the aims to improve the relevant system and mechanisms in the HKSAR in implementing the Constitution and the Basic Law. It makes necessary improvements and supplements to the HKSAR's system for safeguarding national security based on the relevant provisions in the Basic Law. The implementation of the National Security Law is not inconsistent with Article 23 of the Basic Law. It does not replace nor exclude the HKSAR's

constitutional responsibility to enact laws on safeguarding national security in accordance with Article 23. The HKSAR shall actively fulfil its duty in safeguarding national security and complete the relevant local legislation in accordance with Article 23 of the Basic Law. It should progressively establish a systematic, comprehensive and effective legal system and enforcement mechanisms in safeguarding national security to plug any legal loopholes.

Second, continuing to establish and improve the legal system and enforcement mechanisms for safeguarding national security is a necessary measure to prevent and remove national security risks and safeguard national security. Institutional strength is the most important strength for a country. The implementation of the National Security Law creates a new paradigm in the way of governing Hong Kong in accordance with the law and also using the powers granted under the Constitution and the Basic Law for national governance. However, the National Security Law does not cover every aspect and detail on safeguarding national security in Hong Kong. It focuses on punishing four types of criminal acts that seriously endanger national security. Local laws in the HKSAR form an equally important basis for safeguarding national security. The legislative intent of the National Security Law is to complement the local laws of the HKSAR for safeguarding national security. As such, the National Security Law expressly provides that the HKSAR shall prevent, suppress and impose punishment for acts and activities endangering national security in accordance with the National Security Law and other relevant laws of the HKSAR.

Since the implementation of the National Security Law, the legal system and enforcement mechanisms for safeguarding national security have been improved. The relevant local laws on preventing, suppressing and punishing acts or activities endangering national security have been applied appropriately. There is a significant enhancement in the HKSAR's ability and standard in safeguarding national security, dealing a heavy blow to the anti-China Hong Kong disruptors. Yet, it should

be noted at the same time that there are still potential risks and system deficiencies in the HKSAR's system for safeguarding national security. For instance, some groups advocating for "Hong Kong independence" are still operating underground; some radical "Hong Kong independence" groups have announced their re-operation overseas in a high-profile manner; cyber activities endangering national security occur from time to time; and external forces continue to intervene and test the bottom line of the laws of the HKSAR. The HKSAR's capability to deal with national security risks should be strengthened by constantly reinforcing the legal basis of safeguarding national security and establishing a comprehensive, scientific and effective system and enforcement mechanisms to safeguard national security.

Third, to further implement the National Security Law, and to establish a sound legal system and enforcement mechanisms for the HKSAR to safeguard national security. In these two years, we are pleased to see that the HKSAR has securely established enforcement mechanisms for safeguarding national security which have been operating smoothly. With the effective law enforcement by the law enforcement agencies and impartial administration of justice by the judiciary, the positive impacts of the National Security Law on the rule of law and the society are continuously manifested. Meanwhile, there is still a long way to go for the full and faithful implementation of the National Security Law, which depends on the HKSAR to further fulfil its constitutional responsibility to safeguard national security and to reinforce and develop the legal system and mechanisms for safeguarding national security; the law enforcement agencies and the judiciary of the HKSAR to continue to strictly enforce the law and administer justice impartially to ensure the effectiveness of the legal system for safeguarding national security; and the entire Hong Kong society to continue to deepen their awareness about safeguarding national security, so as to form a strong joint force in safeguarding national security. It is also important to ensure compatibility between the National Security Law and the local legislation when enacting the relevant laws in accordance with Article 23 of the Basic Law

in future. The enactment should be guided by the legislative spirit of the National Security Law and should ensure that local legislation do not overstep, contradict nor diminish the National Security Law, such that the outcomes achieved since the implementation of the National Security Law would be continuously strengthened, deepened and optimized.

3. Continue to reinforce the social foundation of Hong Kong's legal system for safeguarding national security, and create a just, peaceful and safe social atmosphere.

As pointed out by President Xi Jinping, everything done for national security is for the sake of the people, and the fundamental stance of taking the people's security as the ultimate goal must be upheld in this new era of national security. The mission to safeguard national security relies on the people. Strong capability to safeguard national security could only be built through the joint efforts of the whole society. To further reinforce the social foundation for safeguarding national security, the National Security Law stipulates that the HKSAR shall take necessary measures to strengthen the supervision over matters concerning national security including those relating to schools, social organisations, the media and the internet, and to promote national security education to raise the awareness of Hong Kong residents of national security and of the obligation to abide by the law.

Since the implementation of the National Security Law, the HKSAR government has actively fulfilled its primary responsibility under the National Security Law by bringing back order in sectors like education, the media and the judiciary. 170,000 civil servants have taken oath. The National Security Law has become a compulsory exam topic for recruitment of government positions. The curriculum framework of national security education has been announced progressively. There are flag-raising ceremonies and playing and singing of the national anthem at primary and secondary schools. Activities like the "National Security Education Day" and the establishment of the system for safeguarding national security in different areas like films, books, the media, trade

unions and societies are in full swing. The Hong Kong society's recognition of national security and confidence in "One Country, Two Systems" are increasing continuously.

At the same time, it must be seen that the HKSAR's social foundation for safeguarding national security has not yet been fully consolidated. Some terrorist groups have gone underground in their operations while some anti-China Hong Kong disruptors continue their "soft resistance" via literature, arts and other fields. Hence, the HKSAR should, in accordance with the requirements under the National Security Law and relevant laws and in view of the emergence of national security risks in the Hong Kong society, continue to enhance the awareness of public officials in safeguarding national security, and to strengthen the promotion of patriotism and education on national security, the Basic Law and the National Security Law among the youth. This could create a good atmosphere for safeguarding national security, thereby offering a solid social foundation for the establishment and effective implementation of various systems for safeguarding national security.

Distinguished guests and dear friends!

This year is the 25th anniversary of Hong Kong's reunification with the Motherland. The journey of Hong Kong in these 25 years is a remarkable journey towards the great rejuvenation of the Chinese nation. It is a developmental journey of continuous creation of modern features and open images. It is an explorative journey of constant improvement of creative institutions and systems. Both the implementation of the National Security Law and the improvement of the electoral system are to ensure the steadfast and successful implementation of "One Country, Two Systems" and to maintain the prosperity and stability of Hong Kong in the long run. Currently, Hong Kong has already made a significant transition from chaos to order, and has progressed from order towards a new historic stage of prosperity. It has already been proven and will continue to be proved that the stronger the bottom line of national security, the greater the room for "One Country, Two Systems". Only by

the constant development of the legal system for safeguarding national security and by nurturing Hong Kong citizens' self-awareness to abide, enforce and defend the National Security Law could Hong Kong's stability and prosperity be ensured, bringing a safer, better and brighter future for Hong Kong!

Finally, I wish this forum a great success! Thank you.

CHENG Yeuk-wah Teresa GBM GBS SC JP

Then Secretary for Justice,
The Government of
the Hong Kong Special Administrative Region of
the People's Republic of China

Distinguished guests, ladies and gentlemen,

I am most delighted to be able to join you today on this important occasion - the second anniversary of the adoption of the 528 Decision by the National People's Congress (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) - to present our outlook on the National Security Law and the way forward for further establishing and improving the legal system for the HKSAR to safeguard national security.

Upon the implementation of the National Security Law, we have seen very clearly that our society has moved from chaos to order, and is now moving from order to prosperity. "Since ever the wise has aspired for our nation to thrive, families and trades flourish when our country prospers with security." That is why we host this Legal Forum under the theme of "Thrive with Security". In addition to your presence here, this Forum is also jointly attended by over 2,000 people online. "Security is the prerequisite for development, whilst development is a guarantee for security." The theme of today's forum - "Thrive with Security" - highlights the importance of national security as the cornerstone for promoting national prosperity and strength, assuring a good life for the

people, maintaining social harmony and stability, and realising "Security Brings Prosperity" and "Thrive with Security".

Some people asked whether, with the implementation of the National Security Law, the presence of existing local laws such as the Crimes Ordinance and the future completion of local legislation implementing Article 23 of the Basic Law, the HKSAR's work in safeguarding national security would be considered accomplished.

I believe that when pondering this question, first of all, we must have a correct understanding of the concept of "national security"; we must be well aware that the HKSAR has to fully discharge the constitutional duty and obligation as stipulated in the 528 Decision and the National Security Law; we must understand that the HKSAR's legal system for safeguarding national security is jointly established by the 528 Decision, the National Security Law and the local laws of Hong Kong; and we must also find out how other countries legislate to deal with and respond to non-traditional security risks. Then, we will appreciate the HKSAR's responsibility for sustained improvement of the legal system for safeguarding national security.

First, the concept of national security is unified within a State, and the definition of "national security" in the National Security Law of Hong Kong is consistent with the National Security Law of the People's Republic of China 2015 ("PRC National Security Law"). According to the PRC National Security Law, national security refers to the status whereby the State's political regime, sovereignty, unity and territorial integrity, the welfare of its people, its sustainable economic and social development, and other material national interests are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security[1].

1 Article 2 of the PRC National Security Law.

With epochal and social evolutions, economic and technological developments, and the increasingly complex international situations, national security is no longer confined to traditional security areas such as homeland security and military security.

President Xi Jinping put forward the holistic view of national security in 2014. The word "holistic" in the term accentuates the need to understand and address these changeable, diverse and often interconnected security risks from a macro, overall and comprehensive perspective. This is a comprehensive concept covering both the traditional security areas and the non-traditional ones such as economic security, cyber security and cultural security. To fully and accurately understand this concept, I suggest that you may read the *Study Outline on Holistic View of National Security* published last month and compiled by the Office of the Central National Security Commission and other authorities.

The decision on national security and the National Security Law provide clear stipulations on the HKSAR's constitutional duty and institutional setup for safeguarding national security, and form the master plan for establishing a comprehensive institutional system for the HKSAR to safeguard national security.

The HKSAR Government has primary responsibilities to proactively implement the stipulations of the 528 Decision and the National Security Law, and has been working on various fronts to take forward the specific work on safeguarding national security, for example: improving the electoral system; implementing the requirements for public officers such as district councilors and civil servants to take the oath or make the statement to uphold the Basic Law and pledge allegiance to the HKSAR; revising local laws to ensure more effective prevention and suppression of acts and activities endangering national security in all aspects, including amending the Film Censorship Ordinance to strengthen the prevention of exhibition of films which would be contrary to the interests of national security, and amending the Social Workers Registration Ordinance to

prohibit a person convicted of any offence endangering national security from being a registered social worker; introducing questions about the National Security Law in the civil service recruitment examination; and continuing to promote in-depth national security education to all walks of life and the general public in order to raise their awareness of national security and the obligation to abide by the law.

The Department of Justice has also been committed to promoting national security education and strengthening the proper understanding of the rule of law among the general public. When you entered the venue today, you all received a copy of the National Security Law Legal Forum (Security Brings Prosperity) Proceedings comprising the content of the legal forum organised by the Department of Justice last year and the speeches of the speakers. You should also receive a picture book entitled "Our Country, Our Security" compiled by the National Security Rule of Law Research Base of the University of International Relations. The picture book explains the concept of national security in simple language, which is very suitable for children to read.

Third, let us look at how the implementation of the National Security Law consolidates the legal system for the HKSAR to safeguard national security. The National Security Law, as a national law, has been integrated into Hong Kong's legal system since its promulgation and implementation. It is convergent and compatible with, and complementary to, Hong Kong's local laws and the common law system.

For example, the National Security Law contains various provisions which refer to "offence(s) endangering national security". The concept of offences endangering national security, in addition to the four types of offences stipulated under the National Security Law, also includes offences endangering national security under other existing laws of the HKSAR, such as the offence of publishing seditious publication(s) under the Crimes Ordinance. In the case of *Ng Hau Yi Sidney*[2], the

2 *HKSAR v Ng Hau Yi Sidney* [2021] HKCFA 42, at paras. 27-31.

Appeal Committee of the Court of Final Appeal stated clearly that where the National Security Law refers to "offence(s) endangering national security" without distinguishing between those offences which it creates and other offences of that nature, such phrase should be construed as referring to all offences under the National Security Law and offences of that nature under existing Hong Kong laws without distinction. Therefore, most of the requirements under the National Security Law, such as the requirements on bail under Article 42(2), the investigative powers under Article 43, and the requirements on designated judges under Article 44, are applicable to all offences endangering national security under the National Security Law and other existing Hong Kong laws.

In respect of bail, the Court of Final Appeal pointed out in the *Lai Chee Ying* case[3] that, in accordance with the Hong Kong laws, the court's decision as to whether or not to grant bail is a "juridical exercise carried out by the court [as] an exercise in judgment or evaluation, not the application of a burden of proof". This indicates that while the National Security Law has put in place a stringent threshold for the grant of bail for cases concerning offence endangering national security, this does not violate the principle of "presumption of innocence". In contrast, in some jurisdictions, the executive authorities are vested with powers to impose detentions for long periods without charge in order to prevent acts endangering national security. For instance, the Internal Security Act of Singapore creates substantial executive powers for the President to authorise detention without charge for a period of up to two years (which is even renewable) on grounds of national security. This rules out bail completely, and judicial review of such decisions taken under the Act is generally precluded.

Just now I mentioned the sedition offence under the Crimes Ordinance, I note that some people seem to have some misunderstandings about this offence, such as the misunderstanding that the wording of the provision is too "vague". First, we have to take a look at a common law

3 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, at para. 68.

principle. As the Court of Final Appeal stated in the *Mo Yuk Ping* case[4] in 2007, in a common law system, the common law allows incremental judicial lawmaking by the judges to mould the law to meet new circumstances and conditions. That is one reason why absolute certainty is unattainable and why some degree of flexibility is inherent in the formulation of laws.

In the recent case of *Tam Tak Chi*[5], the court applied the above principles in construing some conceptual phrases in the sedition offence, such as "enmity", "contempt", "hatred", etc. As such, the court held that the relevant offence satisfied the "prescribed by law" requirement. The court also held that the offence complied with the relevant provisions of the Basic Law and the Hong Kong Bill of Rights on the protection of human rights, and considered that a proportionate and reasonable balance was struck between safeguarding national security and safeguarding the freedoms of speech, assembly, procession, etc. The defendant in the *Tam Tak Chi* case has filed an appeal, I believe that the relevant legal issues will be further clarified at the appeal stage, thereby enriching the contents of the law on safeguarding national security.

In addition, in the *Tong Ying Kit* case[6], the Court of First Instance, in explaining the elements of the offence of incitement to secession under the National Security Law, applied the relevant legal principles established under common law as to what constituted the *actus reus* and *mens rea* of "incitement".

The above examples demonstrate that under the "One Country, Two Systems" principle, the HKSAR continues to practise the common law system. The application of common law concepts by the Hong Kong courts in the process of adjudicating cases concerning offence

---

4 *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386, at para. 62. This case involves disputes concerning the elements of the common law offence of conspiracy to defraud.

5 *HKSAR v Tam Tak Chi* [2022] HKDC 208, at paras. 54-58.

6 *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, at paras. 16-34.

endangering national security fully reflects the organic integration of the construction of the provisions of the National Security Law with the common law.

Next, I wish to share with you how other countries respond to and deal with non-traditional security risks. In recent years, many foreign countries, such as the United Kingdom, the United States and Australia, have also formulated and reinforced their own laws on safeguarding national security in non-traditional security areas.

Taking economic security as an example. In January this year, in response to the Freedom Convoy of truck drivers who blocked various land borders between Canada and the United States in opposition to the Canadian government's COVID-19 vaccine mandates, the Canadian government for the first time invoked the Emergencies Act[7] to ban certain rallies, strengthen police enforcement powers and formulate measures to freeze funds suspected of financing the protestors, in order to address the serious impact of the Freedom Convoy demonstrations on cross-border economic and trade activities between the United States and Canada.

Crowdfunding activities are another example relevant to economic security risks. For instance, some criminals may raise funds through crowdfunding, claiming that the funds raised would be used towards seemingly legitimate purposes such as supporting charity and funding litigations, but instead the funds are actually used to support the planning and commission of illegal acts that endanger national security. In fact, in jurisdictions where legal aid systems are in place, such as Hong Kong, such crowdfunding activities purporting to fund litigation are totally unnecessary. The HKSAR Government will also conduct further study on the formulation of legislation for regulating crowdfunding.

The rapid advancement of technology in modern society comes with threats in cyber security. Cyber security is a global challenge.

---

7 Emergencies Act (緊急狀態法)

For instance, the United Nations has been holding negotiations on establishing the "Convention on Cybercrime". The Asian-African Legal Consultative Organisation has also been exploring matters relating to the international law on cyber security. The protection of cyber sovereignty and data sovereignty has been a topic of serious concern.

In respect of the protection of cyber security, new international practices have been emerging. For instance, the European Commission has proposed the "Digital Services Act". The Act will require large technology corporations, including social medial corporations, to effectively manage systemic risks and regulate illegal content on online platforms, and strengthen the regulation of such corporations. For example, the Act will require corporations to be subject to annual audits by an independent organisation[8]; conduct systemic risk assessment to closely monitor whether illegal content is being disseminated through their services, and whether the platform is intentionally manipulated with an effect on public security[9]. It is noteworthy that any corporation which violates the relevant requirements under the Act can be sanctioned by a fine of up to 6% of its annual income or turnover[10].

There is also an interplay of non-traditional and traditional security threats. Those relating to cybersecurity include the dissemination of fake news via the Internet. In the gravest circumstances, fake news can even be used as a weapon to subvert State power or create social instability, endangering political security. For example, in January 2021, incited by false information such as widespread rigging in the US presidential election, thousands of protestors stormed and occupied the US Capitol in an attempt to quash the presidential election results, which then grew into a riot causing loss of life and injuries. The US Department of Justice had brought charges of sedition conspiracy against numerous rioters.

---

8 European Commission's Digital Services Act, section 28.

9 European Commission's Digital Services Act, section 26.

10 European Commission's Digital Services Act, section 59.

In terms of tackling fake news, the Singapore government also introduced the Protection from Online Falsehoods and Manipulation Act in 2019 to prohibit the transmission of false statements of fact that may be prejudicial to public interest through the internet[11], and prescribed a series of regulatory measures to combat false information, including directing a person who communicated false information to make a correction statement or to stop communicating the false information[12]; and directing an internet access service provider or intermediary to disable access by end-users to the relevant false information, etc.[13].

The holistic view of national security attaches importance to both internal and external security. The current international situation is characterised by uncertainties, increasingly complex geopolitics and the rise of unilateralism. Sovereign equality and non-interference in one another's internal affairs are the basic norms of international relations and fundamental principles of international law, and are enshrined in the Charter of the United Nations. The Declaration on Friendly Relations, which was unanimously adopted by the United Nations General Assembly in 1970, also clearly states that the elements of sovereign equality includes, in particular, the inviolability of a State's political independence. It is therefore legitimate and reasonable to take the necessary legal measures to counteract the interference in our internal affairs by any foreign countries and external elements.

In this regard, many countries have already enacted or will enact legislation outlawing foreign interference acts. For example, Australia enacted offences related to foreign interference offence as early as 2018[14]; the Foreign Interference (Countermeasures) Act 2021 of Singapore provides for offences targeting foreign interference by electronic

---

11 Singapore's Protection from Online Falsehoods and Manipulation Act 2019, section 7.

12 Singapore's Protection from Online Falsehoods and Manipulation Act 2019, sections 11-12.

13 Singapore's Protection from Online Falsehoods and Manipulation Act 2019, sections 16, 22, 33, 34.

14 Australia's National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018; and Criminal Code Act 1995, sections 92.2-92.4.

communications activity[15]; the National Security Bill recently submitted by the UK Government to the Parliament also proposes that foreign interference offences should be introduced.

Ladies and gentlemen, the 528 Decision clearly states that it is the constitutional duty of the HKSAR to safeguard national sovereignty, unity and territorial integrity, and that the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in Article 23 of the Basic Law. Article 7 of the National Security Law also stipulates that the HKSAR shall refine relevant laws on safeguarding national security.

However, Article 23 of the Basic Law only covers seven types of acts and activities endangering national security, which is far from covering the full scope of national security legislation. As the saying goes, "Be mindful of peril in peacetime, of demise while in existence, and of chaos at times of order." Under the holistic view of national security, the scope of national security risks is vast, ever evolving and changing with the surrounding circumstances and situations. Therefore, let me return to the question I mentioned just now. The obvious and correct answer is that the HKSAR has the responsibility for the sustained and steady improvement of its legal system for safeguarding national security, so as to remain effective in preventing, suppressing and punishing acts and activities endangering national security, including the emergence of new risks in non-traditional security areas.

Distinguished guests, ladies and gentlemen, development and security are like "the two wings of a bird, and the two wheels of a cart". Security is the condition for development, whilst development is the foundation for security, both complementing each other. Any international trade and investment activities can only run effectively in a place with social stability where the rule of law as the cornerstone provides adequate legal protection for such activities.

---

15 Singapore's Foreign Interference (Countermeasures) Act 2021, sections 17-19.

Only by firmly guarding this baseline of secure development can we build a new development paradigm with dual circulations, in which the domestic and international markets will be mutually conducive. By doing so, the HKSAR will be able to seize the unlimited opportunities offered by the National 14th Five-Year Plan and the construction of the Guangdong-Hong Kong-Macao Greater Bay Area, and join our country in writing a new chapter for "One Country, Two Systems" towards the goal to "Thrive with Security". Thank you!

PANEL SESSION (2): FRONTIER ISSUES IN SAFEGUARDING NATIONAL SECURITY

MODERATOR

CHAN Tak-lam Norman GBS

Former Chief Executive,
Hong Kong Monetary Authority

PANELLISTS

HUI Ching-yu Christopher GBS JP

Secretary for Financial Services and the Treasury,
The Government of
the Hong Kong Special Administrative Region of
the People's Republic of China

LAU Chi-wai Edwina PDSM

Deputy Commissioner of Police (National Security),
The Government of
the Hong Kong Special Administrative Region of
the People's Republic of China

Richard CULLEN

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

Chan Tak-lam Norman: Ever since the existence of mankind, wars have been fought and never ceased at all! To avert wars and the harm so caused, as well as to safeguard national security and territorial integrity, the most fundamental way is to strengthen ourselves for the sake of self-protection. Yet after globalisation of supply chains and trade for almost seven decades since World War II, warfare nowadays no longer necessarily takes the form of armed or military conflicts. The discussion in this session explores national security in non-military areas, namely the smokeless wars that kill enemies without a trace!

National security in non-military areas may cover many different aspects. Today, I would like to focus on three major "battle fronts": finance; cyberspace and information; ideas and ideology. To help you understand the importance of these three fronts to national security, let me draw a simple analogy. You are facing an enemy who is a proficient martial artist well-armed with the finest weapon. How could you beat him hands down without bloodshed or recourse to force?

The first tactic is to target the opponent's heart to block the free flow of blood throughout the body. The financial system functions by transferring funds to support all economic activities in society, akin to the heart pumping blood to sustain all organs of the body. If you could break the enemy's financial system or international payment channels, there is good chance that he would lose for want of blood even without fighting!

The second tactic is to impair the opponent's such sensory faculties as sight, hearing, and smell plus neurotransmission system, rendering him blind, deaf, dumb, unresponsive and merely able to take a beating! In the digital new world of the Internet, success probably pivots on your ability to prevent the opponent from attacking or paralysing your communications system and key infrastructure.

The third tactic is to aim for the opponent's brain and interfere with his ideology, leaving his mind in disarray, unable to discern self

from enemy and with a split personality. How could one resist external enemies if his brain is not functioning properly? Since the dissolution of the former Soviet Union, there have been frequent instances of internal conflicts and divisions caused by ideological infiltration!

In reality, finance, information and culture can all become major battlefields for these smokeless yet insidious, lethal wars. Today, we are most delighted to have invited three heavyweight guest speakers to share with us their views on these three areas! The first speaker is Mr Hui Ching-yu Christopher, the Secretary for Financial Services and the Treasury of the HKSAR Government, who will talk about national security in the financial sector. The second speaker is Ms Lau Chi-wai Edwina, Deputy Commissioner of Police (National Security) of the HKSAR Government, who will present on national security in the information aspect. The third speaker is Professor Richard Cullen, Visiting Professor of the Faculty of Law of The University of Hong Kong, who will discuss national security in the cultural discipline. In the following, I will invite our guest speakers to start by presenting 15 minutes each, to be followed by a 20-minute panel discussion.

Hui Ching-yu Christopher: Good afternoon, everyone! I am very pleased to have this opportunity to participate in the National Security Law Legal Forum themed “Thrive with Security”. I would also like to thank the panel moderator (Mr Chan Tak-lam Norman) for his introduction.

Today, under the topic “Finance resembling water governance: strategic initiatives for safeguarding national financial security”, I would like to share with you some thoughts on economic security and financial security as well as the focus of the Hong Kong SAR Government’s work in this regard. As my topic suggests, the financial system resembles hydraulic engineering, an area in which our country is globally renowned for its achievements. Its effective operation brings in capital, the “live

water", for social and economic development; as well as the nutrients and vitality for sustainable growth of various trades and industries. It produces an irreplaceable effect in helping our country "thrive with security". Since ancient times, civilisations and countries have had to develop effective hydraulic projects, both to keep the land nourished with abundant water and to prevent floods from causing damage and casualties. As the soft and intangible infrastructure of the State, the financial system has the same strategic considerations as hydraulic engineering in that it must not only facilitate people's livelihood and promote enterprise development through financial intermediation, but also prevent various financial risks from adversely spilling over into the real economy.

As an international financial hub of the country, Hong Kong since the reunification has always given full play to the institutional strength of "One Country, Two Systems", serving as a strategic conduit and platform for our country's integration of Chinese and foreign capital. At present, there are over 1,300 Mainland enterprises listed in Hong Kong, with the market capitalisation of over HK$29 trillion representing approximately 77% of our stock market value. From these figures, we can see Hong Kong's unique role in serving the financial needs of our country. On another front, the golden opportunity of investing in promising Mainland enterprises has attracted global financial institutions and investors to Hong Kong. Over 40% of our spot trading volume comes from overseas investors, and more than 60% of the over HK$34 trillion assets under our management originate from non-Hong Kong investors abroad. Moreover, as regards the return of "China Concept Stock" (CCS) for listing, which has drawn market attention recently, Hong Kong's highly effective capital raising platforms can adequately meet such demand, and ensure the continued financing and pricing of Mainland enterprises in the international market free from geopolitical influence. As of April this year, 21 CCS issuers have returned to Hong Kong through either secondary listing or dual primary listings, which account for over 70% of all US-listed CCS in terms of total market capitalisation. We can say

that Hong Kong is a major external estuary to international markets for our country's economy and finance; as well as a distinctive confluence of marine and fresh water where Chinese and foreign capital converges and interacts.

With the world amidst profound changes unseen in a century, the geopolitical situation has undergone drastic changes while the original "ecological equilibrium" at the confluence of marine and fresh water may also be affected by external factors. Specifically, we must adopt the "bottom-line mentality" in examining the financial security risks and ponder whether external forces would maliciously contaminate our water sources, sabotage our existing "flood walls" or scheme to impede inflow of the capital "live water" into our economy. In this regard, we will continue to strengthen and deepen our response strategies and hold firm to the bottom line of no incidents involving systemic financial risks by taking proactive pre-emptive measures.

The first of these strategies is "Strict Surveillance with Prudence in Prevention and Control". This serves to enhance our radar and capability for identifying and responding to financial security risks. I regularly chair the "Financial Stability Committee" within the Government, working with regulatory bodies in banking, securities and futures as well as insurance to examine various risk events in the international financial market, with a view to early formulation of planned countermeasures. Our focus is to ensure that the Hong Kong market always remains robust in foundation and resilient to changes without any problems or systemic risks in key areas such as trading, clearance and payments. The Government, together with the regulatory bodies, will strictly monitor the markets at all times by keeping in view key indicators such as levels of short selling and short positions, derivative positions, and financial status of financial institutions, so as to firmly sustain Hong Kong's financial stability. In fact, Hong Kong has been fortifying our "flood walls" of financial security over the years, with a fiscal reserve of over HK$950 billion and a foreign currency reserve exceeding HK$3.7 trillion,

equivalent to 1.8 times the monetary base. We have ample resources and room for response in the eventuality of any economic or macro-financial situations, such as for maintaining the stability and effective operation of the linked exchange rate system.

The second strategy is "Proactive Review and Statutory Improvement". The financial system resembles hydraulic engineering in its complex structure and intertwined details, where we must conduct ongoing reviews for possible weaknesses lest there be a "levee breach" at the critical time of "flood prevention". In the financial discipline, this reflects the importance of statutory improvement where we must guard against the use of any weaknesses by lawbreakers to endanger national financial security. The Financial Services and the Treasury Bureau (FSTB) under my leadership will make continuous efforts to implement specific work in this regard. In particular, the Inland Revenue Department (IRD) revised the tax guide applicable to charitable institutions last September in view of the implementation of the National Security Law. Where any organisation supports, promotes or engages in activities which are contrary to the interests of national security, the IRD will no longer recognise it as a charity and will revoke the tax exemption status accorded by section 88 of the Inland Revenue Ordinance (Cap. 112). The revised guide applies to all charities, both new applicants and those already recognised. The IRD will carry out regular reviews, and revoke such status enjoyed by any organisation found to have fundamentally changed its charitable objects.

Furthermore, as I have earlier announced, the FSTB will hold public consultations this year on considering the formulation of appropriate and dedicated legislation for regulating crowdfunding activities. In particular, we need to focus on preventing and combating unlawful acts of raising funds through crowdfunding for planning activities that endanger national security. We need to establish an appropriate regulatory system for stamping out attempts by individuals or organisations to raise funds directly or indirectly through crowdfunding in respect of activities that

endanger national security, and for breaking the crowdfunding capital chains in Hong Kong of those lawbreakers who have fled abroad. The consultations will cover several major areas, including: whether it is required to obtain a licence or registration for crowdfunding platforms; whether the fundraisers are required to make disclosure; and how to establish a reporting system to report suspicious transactions that endanger national security, etc..

Distinguished guests, dear friends. As repeated in my sharing just now, Hong Kong's financial market is a distinctive confluence of marine and fresh water, which serves the unique function to facilitate the convergence and interaction of Chinese and foreign capital. Indeed, "the brackish mix" is an ideal habitat with both its rich nutrients from the land and better safety compared to the ocean. In the context of Hong Kong as our country's international financial hub, we enjoy unlimited opportunities for economic and financial development with the Motherland at our back; while externally we are also a highly open market with global connectivity. As the National Security Law plays its role of the lynchpin for stability, FSTB will further implement the various strategic initiatives mentioned today to safeguard national financial security. With the escort and protection by these initiatives, we can be truly free from worries in bringing to fruition all the new financial opportunities offered to Hong Kong under the National 14th Five-Year Plan. Premised on guaranteed social security and political security, financial institutions and investors – local, Mainland and international alike – can utilise Hong Kong as a platform to explore more opportunities in finance and business.

This concludes my sharing and I'm looking forward to the discussion session. Thank you.

Chan Tak-lam Norman: Thanks so much for Secretary Hui's sharing. I like his analogy very much. The metaphor of "water" is perhaps

quite apt. “Water” is wealth, which we must manage well and cannot do without. Be it in ancient times or modern days, war needs money. When it comes to wars without gun smoke, money probably matters too, but not necessarily for military rates. I will have some follow-up questions for Secretary Hui later. Our next speaker is Edwina (Ms Lau Chi-wai Edwina).

Lau Chi-wai Edwina: Mr Chan Tak-lam Norman, Secretary Hui Ching-yu Christopher, Professor Cullen, ladies and gentlemen. Good afternoon, everyone!

I’m most honoured to join this year’s National Security Law Legal Forum. The theme of this year’s Forum is “Thrive with Security”. To achieve this goal, we must have a safe and stable social environment and room for development so that people from all walks of life can realise their potential and contribute to our country and the HKSAR. And we can share the “bonus” brought by social stability and sustainable development. National security is the prerequisite and cornerstone for our nation to “thrive with security”.

National security is embodied in many different areas. In addition to economic security as mentioned by Secretary Hui just now, and cultural security which Professor Cullen will talk about afterwards, cyber security plays a very important role among the 16 major areas of national security[1] as well. As per President Xi Jinping, “Without cyber security, there is no national security.” In today’s complex and volatile international landscape, Hong Kong, as a major city of the PRC and an open cosmopolitan with advancement in information and technology, is likely to see its cyberspace become one of the “key battlefields” in the international geopolitical tussle. Hong Kong must fight a good “defence war” on cyber security. We all succeed or fail as one, as the saying goes.

---

1 National security covers 16 major areas, including political security, homeland security, military security, economic security, cultural security, public security, science and technology security, cyber security, ecological security, resource security, nuclear security, overseas interests security, biosecurity, outer space security, deep sea security, and polar security.

So there is no room for us to "lie flat". It takes us both crisis awareness and unrelenting advancement to achieve this – "Know the enemy and know yourself; in a hundred battles you will never be in peril".

Today, I will focus my sharing on the cyber security situation, risks and limitations in Hong Kong, and endeavour to make certain suggestions on the way forward.

Hong Kong's cyber security situation

First of all, the cyber security situation. Over the years, Hong Kong has been one of the safest metropolises in the world as well as Asia's leading digital and smart city, where its crime rate has remained very low. Nevertheless, we are mindful of the following: the surge of technology crimes and cyber security incidents in recent years; the lack of an overall leading department to coordinate cyber security efforts; the room for enhancement of relevant laws and regulations; and the challenges such as updates and upgrades faced by the Internet industry and its infrastructures. On the whole, Hong Kong's cyber security landscape is perhaps unable to keep up with our international status and developmental position. We therefore must devote efforts in reinforcing and enhancing our cyber security.

Risks

Next, I'm going to share with you two noteworthy risks in cyber security:

(1) Cyber crimes

The first one concerns risks arising from cyber crimes. In the past decade, technology crimes quadrupled in Hong Kong to over 16,000 last year[2], while cyber security incidents also rose nearly six-fold from

2 Technology crimes rose from 3,015 in 2012 to 16,159 in 2021, with a 4.4-fold increase in 10 years.

over 1,000 to over 7,000 last year[3]. To a certain extent, this reveals the potential risk of our cyber security. Though currently cyber crimes and cyber security incidents mainly involve law-and-order and economic offences such as leakage of secrets, hacking and blackmailing, we must stay on vigilant guard against the use of cyber-crime tactics by lawbreakers to launch hostile actions endangering national security.

(2) Cyber attacks and using internet for activities endangering national security

The second risk refers to cyber attacks and using internet for activities endangering national security. Hong Kong's critical infrastructures (such as power plants, healthcare system, banks, public transport and communications facilities) are the very backbone and lifeblood by which our society operates. Any attack on their network systems could gravely impact on our society by paralysing its operations and halting emergency services, and the consequences would be highly disastrous.

The systems of public and private organisations in Hong Kong trace their developments back to earlier times. Some of these systems are using earlier design frameworks. System updates are mostly done by reinforcing and enhancing existing infrastructures. In updating and upgrading our hardware and software, we face the challenge of keeping up with technology and the risk of hacking or information leak.

Besides, criminals use the cyberspace for inciting violence and massive illegal mobilisation. During the 2019 riots, various online platforms including Telegram groups were used in blatant calls on the masses to riot across Hong Kong. Early this year, Canada also saw a large-scale online mobilisation of the population in violent protests against anti-epidemic measures, which brought local cities to a standstill.

---

3 Cyber security incidents rose from 1,189 in 2012 to 7,725 in 2021, with a 5.5-fold increase in 10 years.

Meanwhile, the Internet has also been used for disseminating seditious, illegal messages and "fake news". One egregious example is the false information on the so-called "831 Prince Edward Station Fatalities" during the riot period. By going viral fast online in a short time, the information deluded the public, incited hatred and wreaked tremendous havoc. Another concern of ours is that some criminals have engaged in "brainwashing" online to mentally poison the general public and even young children. One such example is the seditious e-books for children, the "Sheep Village" series, which target young children and their parents. There have also been cases of people "siphoning off money" through "crowdfunding" online for the purpose of funding activities endangering national security.

Limitations

In addressing these cyber security risks, Hong Kong is facing certain limitations, the more salient of which are in three areas:

(1) Lack of overall leading department and overseeing mechanism

First, Hong Kong has yet any overall leading department and overseeing mechanism. Currently, different government departments and organisations[4] have different roles to play in cyber security; while they each perform respective functions to the best of their abilities, they inevitably have their own priorities at work. Unlike the practices in places such as the Mainland[5], the US[6] and Singapore[7], Hong Kong so far does not have any overall dedicated department and mechanism to spearhead and oversee the coordination of cyber security work. In implementing

4 Including Security Bureau, Cyber Security and Technology Crime Bureau of Police Force, Hong Kong Computer Emergency Response Team Coordination Centre, Office of the Government Chief Information Officer, Government Computer Emergency Response Team Hong Kong, Office of the Communications Authority, Internet Infrastructure Liaison Group, Hong Kong Monetary Authority and so on.

5 Office of the Central Cyberspace Affairs Commission.

6 Cybersecurity and Infrastructure Security Agency of the US.

7 Cyber Security Agency of Singapore.

their respective initiatives, various departments and organisations may move out of step with one another, rendering it difficult to achieve synergy and so on. On the whole, this militates against forward-looking and ground-breaking progress, and inevitably makes implementation unwieldy.

(2) Geopolitics

The second area of limitations is brought by geopolitics. Most of the social media[8] commonly used by Hong Kong people are operated by foreign companies, the databases of which are located overseas. The Hong Kong branches of these companies habitually refuse requests for investigation by local law enforcement agencies, thereby hindering the investigation progress[9]. There are also people who have spread false and seditious messages from overseas through social networking platforms and communications software[10], brainwashing local netizens with illegal and extremist ideas and posing a threat to our national security. As these people are located abroad, we have encountered certain challenges in combatting them.

(3) Laws and Regulations

The third area of limitations is the room for improvement in our laws and regulations. At present, there is no statute to define and regulate critical infrastructure operators in Hong Kong. Nor is there any requirement for internet service providers to monitor users' speech and conduct online, keep track of their cyber footprints or report any violations of the law. Besides, mobile network service providers[11] are not subject to an regulation with respect to verification and recording of user identity[12]. All these

8 For example, Facebook and Instagram.

9 Law enforcement agencies must apply to overseas countries or regions by way of "mutual legal assistance" (MLA).

10 For example, Facebook and Telegram.

11 4G and 5G networks.

12 For example, a mobile network provider allocates a set of Mobile IP Address to multiple registered

have prevented us from removing cyber security risks and responding to emergencies in an effective manner.

Way Forward

"Learn from the past to understand the future", as the saying goes. In order to enhance our capability to guard against cyber security risks and to break through the limitations as mentioned just now, I seek to make the following three suggestions on the way forward for enhancement:

(1) Establishing all-round strategic cyber security mechanism

Hong Kong can draw reference from the Mainland and overseas in establishing or designating an overall leading department with an overseeing mechanism, which is specifically tasked to lead, coordinate, supervise and motivate collaboration among different government departments and stakeholders. It will play a leadership role to provide a holistic steer for strategies formulation, clear division of responsibilities among departments and coordination of cyber security work, such as drills and tests, system enhancement and formulation of operational plans. Under the steer of the overall leading department, the relevant departments should also put in place clear regulatory mechanisms for licensing, inspection, investigation and so on to ensure compliance of cyber security requirements by major stakeholders[13].

users for their use in the same period of time. Even if the police find that the said Mobile IP Address is involved in cybercrime activities, the mobile network provider may not be able to ascertain the identity of the actual user engaged in the crime based on the Mobile IP Address.

13 Platform service providers, hosting service providers, network service providers and so on.

(2) Enhancing collaboration among stakeholders

Places such as the Mainland, Europe and the US already have laws and regulations in place to regulate critical infrastructure operators. Hong Kong should also enact similar statutes as soon as possible to ensure that the operators fulfil their responsibilities of maintaining cyber security. Apart from regulating by such "hard" measures as laws and regulations, the Government may also consider providing relatively "soft" incentives such as policy facilitation, subsidies and training. By doing so stakeholders can be encouraged to invest more resources in upgrading their software and hardware ancillary facilities and expand their network traffic surveillance capacity for the comprehensive enhancement of our cyber security capability.

Besides, we need to build up a positive cyber security culture. Facing an audience of different tiers (network suppliers and users for instance), it is necessary for the Government to promote targeted publicity and education on cyber security culture, particularly for the operation industry (e.g. frontline system technicians) and those cyber groups who are more prone to incitement (such as young netizens). We can start with the concerns pertinent to various stakeholders, and match them with real-life contextual examples to individually tailor cyber security knowledge kits for having the ideas optimally "ingrained in minds and hearts".

In parallel, the Government should also make good use of technology in order to identify and detect any signs of harm to cyber security, and take the initiative to combat false and seditious messages, including real-time surveillance of online messages and their timely rebuttal, clarification and removal in accordance with the law. We strive to achieve "early detection, early intervention and early handling". This will effectively stem the spread of objectionable and illegal messages online to build and reinforce a positive cyber security culture.

(3) Improving laws and regulations

Our country has enacted statutes against cyber security such as the Cybersecurity Law, the Data Security Law, the Personal Information Protection Law, and the Regulation on Protecting the Security of Critical Information Infrastructure. It has also introduced regulations such as the Measures for Cybersecurity Review and the Assessment Method for Security Capability of Cloud Computing Service. Internationally, similar statutes have successively come into force in places like Europe and the US (e.g. European Union's General Data Protection Regulation[14], the US's CLOUD Act[15] and Strengthening American Cybersecurity Act[16]; Australia's Online Safety Act[17]). These examples from the Mainland and overseas provide important references and models for Hong Kong.

In this aspect, I am aware that the HKSAR Government has been proactively taking forward the enactment and enhancement of laws and regulations on national security in general and specifically on cyber security, including legislative work related to Cyber Security Law and Article 23 of the Basic Law, as well as enhancement of Schedule 4 to the Implementation Rules of Article 43 of the National Security Law. We in the Police Force will fully support the work of the Government in this area.

---

14 In 2018, the European Union implemented the GDPR - General Data Protection Regulation, which stipulates that data shall not be transferred to countries or regions outside the European Union under certain circumstances and that the business processes of stakeholders shall also ensure data protection.

15 The US implemented the CLOUD Act in 2018, which allows law enforcement agencies to enforce against communications service providers to request the retention or disclosure of communications records, regardless of whether the data is stored within or outside the US.

16 The US implemented the Strengthening American Cybersecurity Act in 2022 to strengthen cybersecurity in the public and private sectors, advance the modernisation of cyber processing across agencies, upgrade the government's application of cloud technology, and require stakeholders to report loopholes to the government within a specific timeframe.

17 Australia implemented the Online Safety Act in 2022, which empowers the government to order service providers to remove illegal content from social media websites, and the government can apply to block providers and social media that pose a threat to public safety.

Conclusion

In conclusion, cyber security is closely related to all of us, and everyone has the responsibility to safeguard cyber security. To "thrive with security" as the theme of the Forum suggests, in the area of cyber security, we need not only the strength of the Government and law enforcers, but even more so the collaboration of everybody including the legal profession, academia, various stakeholders and the general public. All of us should "roll up our sleeves" to make concerted efforts in our own domains by offering solutions and contributions along a multi-pronged approach.

With our collective resolve, Hong Kong will definitely "win" the "defence war" on cyber security, and keep a steady headway far and strong on the path of safeguarding national security. As we say,

"Long and difficult as the journey may be,
sustained actions will take us to our destination
Thrive with security, today and beyond."

My sharing ends here. Thank you very much.

Chan Tak-lam Norman: Thanks for Edwina's sharing. Just now her presentation has brought up many issues. One point I would like to make is that many people usually have some misunderstandings. We all know that cyber security is very important, just like the human nervous system and information system. However, people tend to think that it is an IT technical issue which could be done better and duly addressed by simply paying some experts to do so. Just now Edwina has clearly pointed out that this is a far-reaching and critical issue covering policies, systems and resources, which very importantly should be given a vigorous push all the way top down. The coordination mechanism you mentioned just now cannot simply be introduced by a single department like the Police

Force or Hong Kong Monetary Authority. There must be a co-ordination and decision at the highest level, and against all odds as well. As I used to work in the Government, I know that it is very difficult to co-ordinate departments, especially those successful ones. I'm not joking; the more successful the department, the more difficult it is to coordinate. This is because they'd think: I'm performing so well but still you want to create a layer of people above me to hinder my development and ask me to do this and that. So we can talk about these issues later. Richard (Professor Richard Cullen), you talk about national security and the cultural aspect. Richard, please.

Richard Cullen: Good afternoon distinguished guests and friends.

Thank you, Mr Chan, for the introduction. And thank you to the Department of Justice for asking me to speak at this forum.

When I spoke at the NSL Legal Forum organised by the Department of Justice almost a year ago I observed that in an ideal world, there would be no need for national security laws. We do not, however live in such a world. The extended insurrection that commenced in Hong Kong in mid-2019 confirmed this and we have seen further verification since.

Today, I will address the relationship between art and culture and national security. It is a challenging area. What is artistic or cultural can still provide a means to disrupt and subvert a given political order. Yet we want art and culture to flourish, especially in Hong Kong, where the remarkable, world-class, West Kowloon Cultural District is now taking on its final, multi-venue shape after some 20 years of intense preparation.

Today, I will use my time:

- To look, first, at the impact of a famous case where art and politics met;

- To discuss, briefly, the essential nature of artistic and cultural expression;

- To consider some primary contextual matters;

- To review how individual radicalisation can often unfold today; and

- To discuss how we can best respond to national security risks that may crystalise within artistic or cultural presentations.

THE CASE OF LENI REIFENSTAHL

Arguments Made

Leni Riefenstahl was an extraordinarily gifted German film-maker. She was born in 1902 and died in 2003, aged 101. She was most famous – indeed infamous – for the work she did documenting the rise and rule of the Nazi Regime in Germany in the 1930s. Most notorious was her rivetting film of a huge Nazi Rally in Nuremberg in 1934, called "Triumph of the Will". Riefenstahl was also in charge of the superbly filmed, 1936 Berlin Olympics, during the Nazi era, employing new techniques still used today.

The Long Shadow

Such was the draw of her exceptional artistic skill that Henry Ford, the creator of the Ford Motor Company greeted her warmly just before the war, in Detroit in the USA, in 1938. After the war, that same magnetic artistic appeal charmed a number of leading Rock Music personalities, including one seen in this picture from around 1974.

Riefenstahl's work provides an exceptional demonstration of how an artistic production can:

- Powerfully shape political perceptions;

- And amplify the acceptance of an extreme political ideology;
- While still maintaining compelling artistic standards.

ARTISTIC-CULTURAL EXPRESSION: A PRIMARY FRAMEWORK

One definition says that artistic expression is: *the conscious use of the imagination in the production of objects intended to be contemplated or appreciated as beautiful or engaging.*

There is a clear overlap with cultural expression which is said to comprise those expressions *that result from the creativity of individuals, groups and societies that have cultural content.*

Anyone making artistic or cultural statements is expressing a point of view. Whether this is a conventional view – or far more controversial – the aim is usually to persuade or at least to arouse attention. Where there is political content, it may be designed to stimulate debate, confirm the value of the status quo, urge reform – and in extreme cases, drive destabilisation to subvert an existing constitutional or social order.

One way to give solid form to these rather abstract definitions is to return to the case of Leni Riefenstahl. Her remarkable filmic work was, individually, highly creative and was meant to be contemplated for its artistic qualities, in her firm view. Her work also powerfully emphasised a particular, adamant German cultural identity, which, in turn, gravely subverted the standing and acceptance of other specific denounced identities.

When commercial television was first introduced into the UK, after the war, in the 1950s, all paid political and religious advertising on the new commercial television stations was absolutely prohibited. It was recognised as a fundamental political reality that video images on television possessed a power to persuade unequalled using any other medium. When the law applying this basic, content control was

challenged many decades later, the House of Lords in the UK found, unanimously, in 2008, that this reasoning was still correct – the democratic institutions of government had to be protected from the risks to basic order which could arise from partisan, inflammatory politicking on television[1].

It remains the case that the potential for harm to arise from within cultural or artistic articulation is greatest where video forms of expression are used.

CRUCIAL CONTEXTS

We need to pay attention to certain wider aspects which apply, within which national security concerns arise. Some of these factors may directly amplify national security risks and others may point to special vulnerabilities. I want to speak briefly about a key example of each.

Professor John Mearsheimer is a leading US, International Relations academic. He is one of a number of prominent American commentators who say that the US is now engaged in a New Cold War with China – and this is a good thing. Other commentators argue there is a severe Trade and Technology War but not a Cold War.

Whatever the true position may be, what is beyond doubt, is that US is now engaged in a comprehensive project, using unconcealed, political, economic, media and military means to contain the rise of China. The massive effort put into this grim venture has intensified since 2017, with no let-up since President Biden took power in 2021.

The multi-month insurrection which engulfed Hong Kong from June, 2019 unfolded within this crucially adverse environment. The US role in assisting and maintaining that immensely destructive political upheaval was fundamentally significant.

---

1 *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL, 15.

This geopolitical context mattered greatly in 2019. It very likely matters even more today. As the former CFA Judge, Henry Litton noted a year ago, an attempt was made, with that insurrection, to overthrow the HKSAR Government. By any measure, geopolitical envy, anxiety, frustration and truculence levels continue to intensify in the US.

Next, let us consider susceptibility. Aristotle is commonly quoted as having said, well over 2,000 years ago: *Give me the child until seven and I will give you the man.* During these formative years and indeed during school years, children and teenagers are particularly disposed towards being readily influenced as they work-out what their place is, within the world: they are continually exploring for fresh clarification, explanation and vindication. A primary lesson to be taken from 2019 is that many younger Hong Kong residents were swayed by distorted and dangerous narratives – the more so because they were naturally restless and curious.

THE PROCESS OF RADICALISATION

The keynote address presented, in Paris, in 2008, at the Aspen Cultural Dialogue Event argued persuasively how the relationship between culture and security had changed. The emphasis in this paper was on the radicalisation of younger people of Islamic origin. However, the presenter, Professor Azeem Ibrahim, aptly noted that his structured argument applied to radicalisation associated with any ideology[2].

So how are radical beliefs typically disseminated? When this paper was presented, it was already clear to Professor Ibrahim that offshore influences had become fundamentally important in augmenting local stimuli and modern technology had had a transformative effect in providing ready access to such influences.

2 Ibrahim, Azeem, "The Relationship Between Culture and Security Has Changed", *Belfer Center, Harvard University*, November 13, 2008, available at: https://www.belfercenter.org/publication/relationship-between-culture-and-security-has-changed.

The typology Ibrahim provided said that radicalisation normally happened in four stages:

1: A sense of individual moral outrage based on a given understanding (for example pivoting on stories of Muslim suffering – or an indignant perception of denied political rights) develops;

2: Explanations are then accessed which intensify this indignation by placing it within a wider, inflammatory context;

3: Any subsequent adverse personal experiences can now feed into this sense of resentment;

4: The individual is then far more ready to join a violent radical movement.

Professor Ibrahim concluded that the unfolding of this process depends, fundamentally, on an individual's interpretation of reality. It is their core ideas and beliefs that most shape this interpretation of how the world appears. The power of technology (especially in the form of social media) to amplify radical influencing is even more profound today compared to 2008. The modes of mass communication have never been more extensive and low-cost. And they can be readily rendered clandestine.

RESPONSES

Artistic and cultural creations, in the vast majority of cases, involve *the conscious use of the imagination in the production of objects intended to be contemplated or appreciated as beautiful or deeply engaging.* Such creations can also, though, be used to propagate radical, domineering ideas which can fuel violent extremism.

So, how can we fairly, yet robustly, ensure that the arts can flourish whilst safeguarding national security? This is a central challenge - and

there are no stress-free or easy answers. We need to find a balance. Extreme cases may be clear enough. But aptly striking this balance is bound to be an ongoing process where we learn from experience and refine and adapt the norms we use to separate out the measurably dangerous cultural or artistic creations. Meanwhile, Winston Churchill has reminded us to be mindful of the limitations of using excessive legal drafting to try and control every eventuality: *If you have 10,000 regulations, he said, you destroy all respect for the law.*

Still, some basic initial tests suggest themselves, when reviewing creative output:

- Who is the target audience and, in particular, how young is that audience?

- What is the dominant motivation behind the creation?

- Is there any measurable evidence about the origins and funding of a creation that gives prima facie cause for concern?

- Does the creation satisfy a "Loyal Opposition" test: that is, though it may be politically critical – is it plain that the work and its creator maintain a clear commitment to preserving fundamental social order?

Context is also of vital importance. As noted earlier, the US is now engaged in a comprehensive project, drawing in as many allies as it can, using brazenly conspicuous, political, economic, military – and media - means to contain the rise of China. These circumstances look set to endure for some years and they may well become more intense. Creating serious disorder in Hong Kong, on balance, plainly benefits the prosecution of this colossal, US-led, Sino-obstruction project.

Generally, we need to decide if an artistic or cultural creation evidently supports a real tolerance and fostering of lawlessness – within

the context just noted. As the famed Latin American revolutionary, Simon Bolivar said around 200 years ago: *Anarchy is the worst enemy of freedom*.

Chan Tak-lam Norman: Thank you, Richard, for a fantastic, fascinating presentation. I do have some questions for you later on. Now we have some time left for panel discussion. My first question is for Chris. Just now you mentioned the importance of the financial system and the many pre-emptive measures, such as flood prevention and water governance, which are working well in all aspects. But recently, we have been paying close attention to the armed conflicts in Ukraine. We are aware that what we have generally called a heavyweight weapon in the financial system, namely the "financial nuclear bomb", is already in use to tackle Russia. This includes the freezing of its central bank assets, some commercial bank assets and some personal assets. The most powerful of all is the exclusion of some Russian banks from the SWIFT (Society for Worldwide Interbank Financial Telecommunication) system, which has made it difficult for them to make international payments. Many friends of mine would ask this question when we meet. Indeed, Hong Kong as an international financial hub has many international transactions and payments to make. All these companies or financial institutions have a lot of clearance activities with overseas. If the Sino-US relations continue to deteriorate, do we have to worry?

Hui Ching-yu Christopher: In fact, several speakers, including Edwina and Richard, have just talked about the relationship between national security and various aspects of society from different perspectives. What you said just now, Norman, was about the financial aspect in particular. We can all see the recent changes in the situation. But if we look at the whole matter or the nature of Hong Kong, we have indeed always been a beneficiary and advocate of globalisation. So what is the core of such freedom or globalisation? It is the free movement of

capital, of people, of services and products. Why do I start with all these? Because this is exactly what you've said just now, that the impact from weaponisation of finance has undermined and affected the benefits of globalisation, or the benefits of free movement, that we have been able to achieve in the past. From this perspective, I think that this is not only the case in Hong Kong itself, but also in many small or free economies like ours. Individuals or institutional investors who have engaged in globalisation and the free movement of capital in the past should voice their condemnation. It is because from a more macroscopic perspective of social civilisation or economic development, this will definitely do all harm but no good, and will lead to the deterioration of our overall resource allocation. Therefore, at the crux of this problem, what should we do in response?

In fact, Edwina's presentation gave me a lot of insight when she said that in terms of cyber security, we need to strengthen a top-level structure, or inter-departmental coordination, and it is for this reason that we have within the Government, as Norman probably knows, a "Financial Stability Board". This is the cross-sectoral body that takes the perspectives of banking, securities and futures as well as insurance to identify the risk points or risk areas that need our safeguarding or enhancement efforts, whether in our usual system operations or market operations. So I think the focus is not on whether we are worried or not, but rather on the need for our mindset to keep a careful watch on the overall changes. Having watched the speakers earlier, I feel that although we are discussing national security in different areas, there is one core point, which is not unique to Hong Kong, namely that the maintenance of national security in fact "is always a work in progress". This is because society changes, the market changes and people change. That is the reason why we have to constantly optimise, refine and enhance in all aspects the "flood walls" mentioned earlier, or the prevention and control in a broader sense, or the defence capability. In this regard, as a responsible government, we will certainly do so of our own accord. Therefore, we will continue to follow the strategies mentioned just now in

this regard by duly monitoring the situation and at the same time making use of the available space and resources to maintain our position as a financial centre. We are confident in this regard.

Chan Tak-lam Norman: That is to say, if we do well on our part and protect ourselves in all aspects, we do not need to worry too much about external sanctions. Is this what you mean?

Hui Ching-yu Christopher: Yes.

Chan Tak-lam Norman: Thank you.

Chan Tak-lam Norman: This question is for Edwina. You have made a lot of analyses just now, some of which I think are very good suggestions. But this is a big project that cannot be taken forward by a single department. I hope that the senior management of the HKSAR Government will soon step up their efforts. Just now you've mentioned that cyber security needs proper implementation. Besides, you've also mentioned that some people have engaged in smear-mongering by spreading rumours using false information and fake news, with the clear purpose of instigating and spreading hatred, or inciting the public to overthrow the political regime and disrupting social order. In terms of tackling fake news, the Secretary mentioned just now that our neighbour Singapore, among others, introduced some coping measures in 2019. What are we going to do in Hong Kong to deal with this? Does this have a more pressing, higher priority?

Lau Chi-wai Edwina: Thank you Norman. Yes, fake news and false information are indeed very harmful to society. Such false information is spreading fast and I think each of us here probably receives hundreds of these WhatsApp and WeChat messages every day. In this age of information overload, we receive a lot of information every day. Such information comes in very short bursts, or some in images. But the messages conveyed by these images do reach deep into the minds of us all. Nor is it possible for all such information to have numerical sources.

So very often you are subliminally influenced by what you read. We see a lot of such false information spreading very quickly. If some people with ulterior motives or evil intentions circulate such information in this manner, the impact on our national security would be very tremendous.

There are vivid examples of this, such as the "831 Prince Edward Station Fatalities", which we have heard a lot about. It started with the allegation of one single death, then a bunch of deaths, and then many deaths. It was then said that they were all pushed into the sea, and that subsequently various departments conspired together to dispose of these corpses. You may all remember that for a very long time, for over a year I think, there was an altar at the Prince Edward Station where on every 31st, or 30th if no 31st in the month, many people would visit to pay floral tributes. You can see how great the impact was on the whole community. The second example is that a female protester was injured in the eye and afterwards a gesture came about, one that is very familiar to all of us. This gesture may seem nothing much on its face; just something everyone made fun of and circulated. But if you recall, what was the impact? Eventually, a mass of protesters staged a demonstration at our international airport, the whole of which was thereby paralysed for quite some time. As you can see, the impact of such a message was really great.

Having said that, we are not completely without solutions over the Internet. We now do have laws to tackle cyber offences, such as incitement to violence and damages, unlawful "doxxing", and messages and posts that endanger national security. We have statutes to address these. If there are posts that endanger the safeguarding of national security, we can take disabling actions by invoking Article 43 of the National Security Law, which we have been doing all along. As a matter of fact, the Secretary has also mentioned just now that many foreign countries have already enacted legislation against such fake news and false information as they are really too detrimental. In Singapore, France and even the European Union, they all have some regulations governing

fake news. As we have just mentioned, the HKSAR Government is proactively exploring the enactment of legislation to regulate fake news.

While legislation is certainly important, education is also of great significance. I believe that people of all ages in society should, first of all, acknowledge the existence of false information and fake news. Don't trust any message instantly upon receipt. This is not just true about situations that endanger national security, but also during the recent epidemic, as you may recall, when we were discussing whether universal testing would be conducted. One day, a message came about saying that the Legislative Council in the morning had just endorsed the conduct of universal testing, after which people flocked to supermarkets and stripped them bare of any goods. It really impacted heavily on society as a whole. Therefore, education is very important. People should know that there are false information and fake news. When one receives a message, if it matters to him, he should try to verify it and discern the truth from falsehood. If an individual, an organisation, a company or even the Government is affected by fake news, they should step forward at the first opportunity to clarify and set the record straight so as to minimise its adverse effects.

Chan Tak-lam Norman: Thank you, Edwina. Last question for Richard. It would seem easier said than done for any government, not just the HKSAR Government, any government seeking to strike the right balance between protecting the freedom in cultural and artistic expressions on the one hand, and safeguarding national security on the other. So any advice from you on how best to achieve this balance in Hong Kong, for example, what kind of institutional arrangements you recommend that we should consider and whether we need to promulgate a new set of laws and rules and regulations, and how to help the countries deal with this kind of issues?

Richard Cullen: Okay. A good question. As you can tell from my presentation, although I'm a lawyer, I'm very hesitant in encouraging more laws because they often cause more trouble as a result of the

consequences that flow from them. But I think, Edwina's response really covers a lot of what I would recommend. I think we should proceed actively but carefully based on real experience, and so we should move quickly in a responsive way, paying attention to what other countries have done. I certainly didn't find any perfect answers to this problem, but perhaps I can just relate a couple of anecdotes and I'll end up with a comment about some Australian regulation. This is not strictly about regulation, but it is about controlling national security risks. And it does demonstrate that what can work in certain cases.

Firstly, in America during the Vietnam War, reporting was amazingly wide and it became mostly negative. This didn't happen in the Iraq war. There, the Pentagon figured out what to do. Moreover, this approach is used, frankly, in a lot of jurisdictions. Japan is particularly well known for this. You restrict access to information if you want to stop bad news from getting around and possibly fake news as well. Thus, in order to report in the Iraq war, all reporters had to be embedded with the American military, otherwise they wouldn't get access to what was going on. And so you had a coverage that reflected this. Interestingly, I see comments in the mainstream Western press, not least in the US, complaining about how Russia is embedding reporters with their military. Well, they learnt this from the US.

The other example is quite different, but also involves a very violent situation and something which we've heard about earlier related to Northern Ireland. So during "the Troubles" as they were called, as Grenville Cross referred to them, the British took a decision that the members of the IRA and their opponents in the Loyalist camp were not allowed to have their voices broadcast on radio or television – only a replacement voice could speak their words. I'm not suggesting this is something that we should do. But to better understand the impact of this, consider if Joshua Wong was unable to be broadcast on radio or television and you had to have somebody just read what he said. The words are not stopped but the impact is reduced.

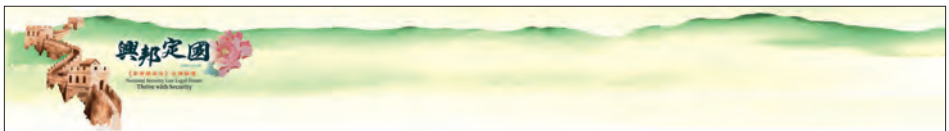
And then let's consider Australia. There is law there, now, that basically covers publications of all sorts and there's a provision in it (section 9A), which says that basically the censor can look at a matter that involves a terrorist issue, something to do with terrorist activity – and then look at a report and see whether it can be allowed because it is no more than discussion, entertainment or satire. If it fails those tests, then the government can actually say *do not publish*. And they've done it. But they've only done it once because mostly the media in Australia understand what they should stay away from. They should stay away from reporting that which is likely to inflame and create more terrorism or more violence.

Chan Tak-lam Norman: Thank you, Richard. Please join me in thanking our guests and speakers. Thank you.

Finance Resembling Water Governance: Strategic Initiatives for Safeguarding National Financial Security

Hui Ching-yu Christopher
Secretary for Financial Services and the Treasury
Government of the HKSAR

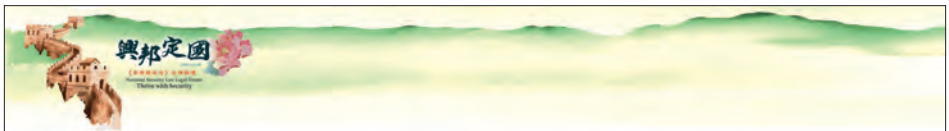
1



Finance resembling water governance: The financial system resembles hydraulic engineering. Its effective operation brings in capital, the "live water", for social and economic development; as well as the nutrients and vitality for sustainable growth of various trades and industries. It produces an irreplaceable effect in helping our country "thrive with security".

Keeping the land nourished with abundant water	**Hydraulic Projects**	Preventing floods from causing damage and casualties
Facilitating people's livelihood and promoting enterprise development through financial intermediation	**Financial System**	Preventing financial risks from adversely spilling over into the real economy

2



Hong Kong is a major external estuary to international markets for our country's economy and finance; as well as a distinctive confluence of marine and fresh water where Chinese and foreign capital converges and interacts.

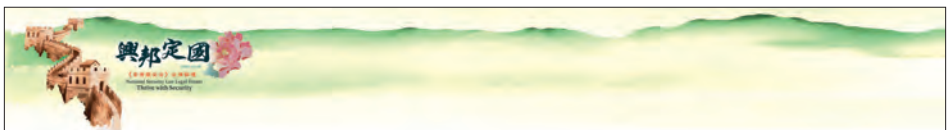
Hong Kong's unique role in serving the financial needs of the country

There are over 1,300 Mainland enterprises listed in Hong Kong, with the market capitalisation of over HK$29 trillion representing approximately 77% of our stock market value.

The golden opportunity of investing in Mainland enterprises has attracted global financial institutions to Hong Kong

1. Over 40% of the spot trading volume comes from overseas investors, and more than 60% of the over HK$34 trillion assets under our management originate from non-Hong Kong investors abroad.
2. 21 CCS issuers have returned to Hong Kong, which accounts for over 70% of all US-listed CCS in terms of total market capitalisation.

3



With the world amidst profound changes unseen in a century, the geopolitical situation has undergone drastic changes while the original "ecological equilibrium" at the confluence of marine and fresh water may also be affected by external factors. We must ponder:

Whether external forces would…

1. maliciously contaminate our water sources?
2. sabotage our existing "flood walls"?
3. scheme to impede inflow of the capital "live water" into our economy?

We must adopt the "bottom-line mentality" to continue to strengthen and deepen our response strategies and hold firm to the bottom line of no incidents involving systemic financial risks by taking proactive pre-emptive measures.

4

興邦定國

The first strategy is "Strict Surveillance with Prudence in Prevention and Control", which serves to enhance our radar and capability for identifying and responding to financial security risks.

The Secretary for Financial Services and the Treasury chairs the "Financial Stability Committee"

1. Examining various risk events in the international financial market, with a view to early formulation of planned countermeasures
2. Strictly monitoring the markets by keeping in view key indicators such as levels of short selling and short positions, derivative positions, and financial status of financial institutions

Hong Kong has been fortifying the "flood walls" of financial security

1. Fiscal reserve of over HK$950 billion and foreign currency reserve exceeding HK$3.7 trillion (1.8 times the monetary base)
2. We have ample resources and room for response in the eventuality of any economic or macro-financial situations, such as for maintaining the stability and effective operation of the linked exchange rate system

5

興邦定國

The second strategy is "Proactive Review and Statutory Improvement", lest there be a "levee breach" at the critical time of "flood prevention" and we must guard against the use of any weaknesses by lawbreakers to endanger national financial security.

The Inland Revenue Department revised the tax guide applicable to charitable institutions

1. Where any organisation supports, promotes or engages in activities which are contrary to the interests of national security, the Inland Revenue Department will no longer recognise it as a charity and will revoke the tax exemption status
2. The revised guide applies to all charities, both new applicants and those already recognised

Public consultations for the formulation of appropriate and dedicated legislation for regulating crowdfunding activities

1. Preventing and combating unlawful acts of raising funds through crowdfunding for planning activities that endanger national security
2. Covering areas including whether it is required to obtain a licence or registration for crowdfunding platforms; whether the fundraisers are required to make disclosure; and how to establish a reporting system to report suspicious transactions that endanger national security

6

Conclusion: Hong Kong's financial market is a distinctive confluence of marine and fresh water, which serves the unique function to facilitate the convergence and interaction of Chinese and foreign capital.

1. **"The brackish mix" is an ideal habitat with both its rich nutrients from the land and better safety compared to the ocean.**

2. **In the context of Hong Kong as our country's international financial hub, we enjoy unlimited opportunities for economic and financial development with the Motherland at our back; while externally we are also a highly open market with global connectivity.**

3. **As the National Security Law plays its role of the lynchpin for stability, the FSTB will further implement the various strategic initiatives mentioned today to safeguard national financial security. With the escort and protection by these initiatives, we can be truly free from worries in bringing to fruition all the new financial opportunities offered to Hong Kong under the National 14th Five-Year Plan.**

4. **Premised on guaranteed social security and political security, financial institutions and investors – local, Mainland and international alike - can utilise Hong Kong as a platform to explore more opportunities in finance and business.**

7

Thank you!

8

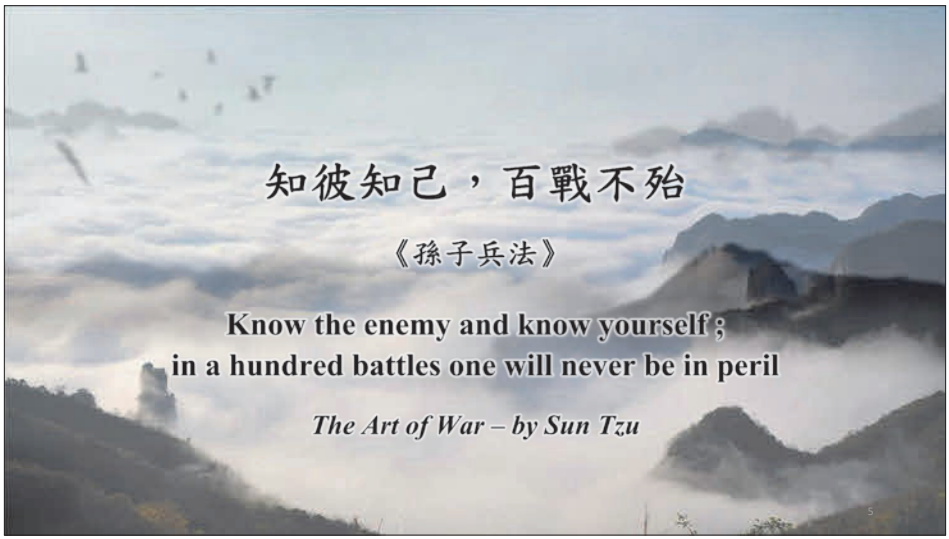
維護國家安全的前沿議題 – 網絡安全
Frontier Issues in Safeguarding National Security – Cyber Security

劉賜蕙
Edwina LAU
警務處副處長（國家安全）
Deputy Commissioner of Police (National Security)

1


興邦定國
網絡安全 – 國家安全16項重點領域之一
Cyber security as one of the 16 major areas of national security
政治安全 Political Security
國土安全 Homeland Security
軍事安全 Military Security
經濟安全 Economic Security
文化安全 Cultural Security
社會安全 Public Security
科技安全
網絡安全 Cyber Security
生態安全 Ecological Security
資源安全 Resource Security
核安全 Nuclear Security
海外利益安全 Overseas Interests Security
生物安全 Biosecurity
太空安全 Outer Space Security
深海安全 Deep Sea Security
極地安全 Polar Security
3

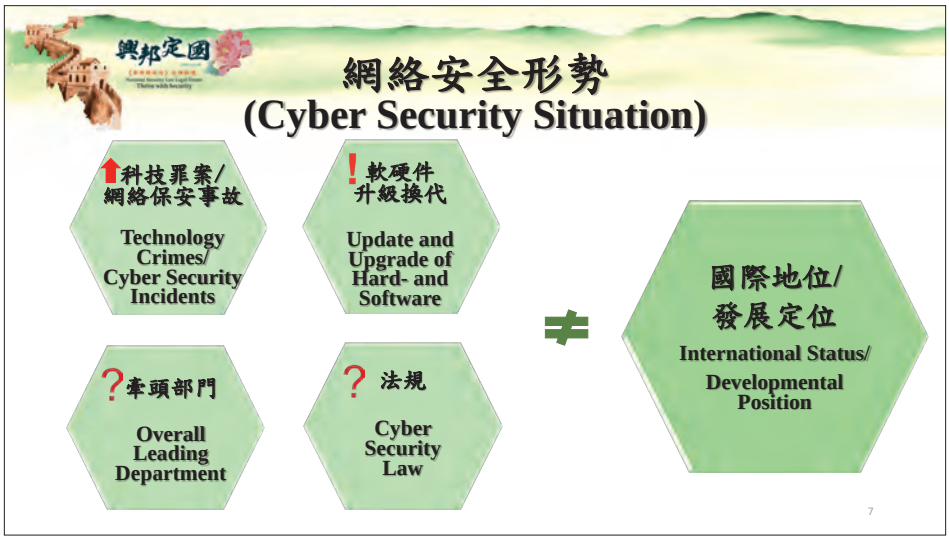

興邦定國
香港網絡空間可能成為
國際地緣政治角力的其中
一個主戰場
Hong Kong's cyber space possibly as battlefield of geopolitics
中國
主要城市
China's Major City
地緣政治
Geopolitics
開放型
國際大都會
World's Metropolitan
資訊發達
Advancement in Information and Technology
4



興邦定國

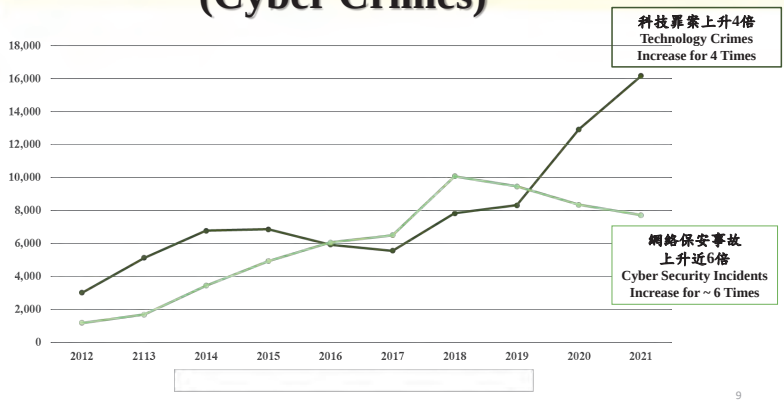
討論重點 (Contents)

- 網絡安全形勢 (Cyber Security Situation)
- 風險點 (Risks)
- 局限 (Limitations)
- 優化建議 (Way Forward)


興邦定國
網絡安全形勢
(Cyber Security Situation)
科技罪案/
網絡保安事故
Technology Crimes/ Cyber Security Incidents
軟硬件
升級換代
Update and Upgrade of Hard- and Software
≠
國際地位/
發展定位
International Status/ Developmental Position
牽頭部門
Overall Leading Department
法規
Cyber Security Law
7


興邦定國
風險點 (Risks)
網絡犯罪
Cyber Crimes
網絡攻擊 &
危害國安活動
Cyber Attacks & Activities Threatening National Security
8

網絡犯罪
(Cyber Crimes)



9

網絡攻擊及利用網絡
進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

重要基礎設施
Critical Infrastructures

10

興邦定國

網絡攻擊及利用網絡進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

煽動暴力
Inciting Violence

非法群眾動員
Illegal Mobilization

假新聞
Fake News

11

興邦定國

網絡攻擊及利用網絡進行危害國家安全活動
(Cyber Attacks and Using Internet for Activities Endangering National Security)

思想滲透
Brainwashing

「眾籌」
Crowdfunding

12

局限 (Limitations)

缺乏整體負責部門及統籌機制
Lack of Overall Leading Department & Overseeing Mechanism

地緣政治
Geopolitics

法規
Law & Regulation

13

缺乏整體負責部門及統籌機制
(Lack of Overall Leading Department and Coordination Mechanism)

保安局
SB

警務處
HKP

資訊科技總監辦公室
OGCIO

互聯網基建聯絡小組
IILG

香港電腦保安事故協調中心
HKCERT

金管局
HKMA

通訊事務管理局
OFCA

政府電腦保安事故協調中心
GovCERT

14

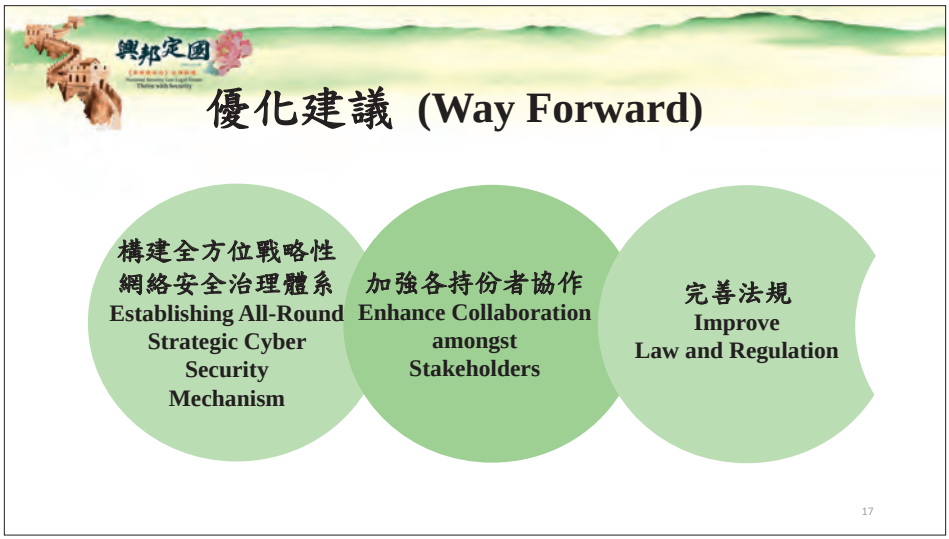
地緣政治 (Geopolitics)

境外伺服器
Overseas Servers

15

法規
(Law and Regulation)

16


興邦定國
優化建議 (Way Forward)
構建全方位戰略性網絡安全治理體系
Establishing All-Round Strategic Cyber Security Mechanism
加強各持份者協作
Enhance Collaboration amongst Stakeholders
完善法規
Improve Law and Regulation
17


興邦定國
構建全方位戰略性網絡安全治理體系
(Establishing All-Round Strategic Cyber Security Mechanism)
領導
Leadership
協調
Coordination
監管
Supervision
推動
Motivation
策略制定
Strategies Formulation
權責分配
Division of Responsibilities
工作統籌
Coordination
18

加強各持份者協作
(Enhancing Collaboration amongst Stakeholders)

剛柔並重，規管及鼓勵提升防禦能力

Enhancing Cyber Security Capability by Regulation and Incentives

建立良好網絡安全文化

Building Up Positive Cyber Security Culture

打擊失實或煽動性訊息

Targeting False or Seditious Online Messages

19

完善法規
(Improving Legal Framework)

《網絡安全法》

Cyber Security Law

《基本法》第二十三條

Basic Law Article 23

《國安法》第四十三條《實施細則》附表4

Schedule 4 under The Implementation Rules, Art. 43 of the NSL

20

興邦定國

21

路阻且長，行則必至

《荀子·修身》

興邦定國，就在當下

Long and difficult as the journey may be,
sustained actions will take us to our destination

Self-Cultivation - by Xunzi

Thrive with security, today and beyond

22

興邦定國

National Security Law Legal Forum
Thrive with Security

Frontier Issues – Cultural Security

Richard Cullen
Faculty of Law, The University of Hong Kong

興邦定國

Frontier Issues: Cultural Security

INTRODUCTION

How Art & Culture

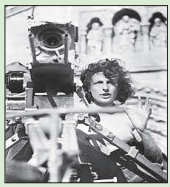
are linked to

Politics & Security:

The Case of Leni Riefenstahl

Frontier Issues: Cultural Security

INTRODUCTION



The Case of Leni Riefenstahl

Arguments made…

The Long Shadow…

Frontier Issues: Cultural Security

Cultural Expression

- **Artistic work**
- **Music**
- **Written word**
- **Video expression**

Viewpoints: Persuasive – Controversial

- **Personal / Cultural**
- **Political**
- **Hostile / Destabilising / Subverting**

Frontier Issues: Cultural Security

Crucial Contexts

Pivotal Geopolitical Circumstance

Educational communication

Aristotle: ***Give me the child until seven…***

Frontier Issues: Cultural Security

Process of Radicalisation

Culture and critical beliefs

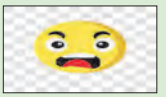
Offshore influences

Role of Technology

Frontier Issues: Cultural Security

Radicalisation Steps

Injustice perceived – Moral outrage



Radical explanations accessed
Outrage confirmed

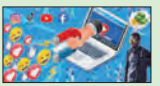
Joining a radical net work

Frontier Issues: Cultural Security

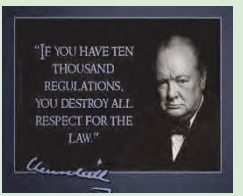
RESPONSES

Understanding Priorities

Education
Cultural communications



Legal Solutions
(& Limitations)



Frontier Issues: Cultural Security

RESPONSES - Balancing Norms

Some Basic Initial Tests:

- Who is the target audience and how young is that audience?
- What is the dominant motivation behind the creation?
- Is there any measurable evidence about the origins and funding of a creation that gives prima facie cause for concern?
- Does the creation satisfy a 'Loyal Opposition' test: is it plain that the work and its creator maintain a commitment to preserving fundamental social order?

Frontier Issues: Cultural Security

RESPONSES

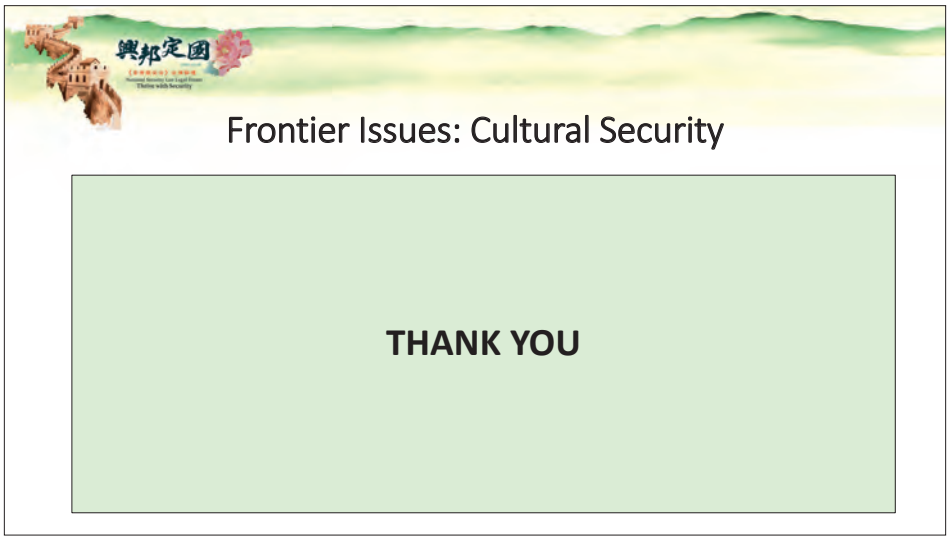
Balancing Norms

Ongoing process -

Learn from experience

Changing Times

Changing Context(s)


興邦定國
Frontier Issues: Cultural Security
THANK YOU

PANEL SESSION (3): REFINING THE LEGAL FRAMEWORK OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION ON SAFEGUARDING NATIONAL SECURITY

MODERATOR

ZHU Guobin

Professor,
School of Law of City University of Hong Kong

PANELLISTS

LIN Laifan

Professor,
School of Law of Tsinghua University

TANG Ping-keung GBS PDSM JP

Secretary for Security,
The Government of
the Hong Kong Special Administrative Region of
the People's Republic of China

Chin Leng LIM

Choh-Ming Li Professor of Law,
Faculty of Law of
The Chinese University of Hong Kong

Zhu Guobin: Good afternoon, ladies and gentlemen!

I'm so honoured to be invited to chair this last session. In compliance with the Decision of May 28th by the National People's Congress, the National Security Law by the Standing Committee of the National People's Congress, and the Basic Law, social order has been seen restored in Hong Kong. The rule of law continues to be maintained. Today, May 28th, is a very meaningful moment to commemorate this Decision by the National People's Congress and also to further discuss and explore the improvement of legal framework of the Hong Kong Special Administrative Region (HKSAR) on safeguarding national security. This panel session will focus on discussing how to refine the legal framework of the HKSAR on safeguarding national security, including the legislative work for Article 23 of the Basic Law and other relevant laws. We have a panel of three – two distinguished legal scholars and one key player from the HKSAR Government, who plays an important role in respect of national security law-making and law enforcement. They are Professor Lin Laifan from Tsinghua University, Mr Chris Tang from the HKSAR Government and Professor Chin Leng Lim from The Chinese University of Hong Kong. Let me invite them to share with us their ideas and thoughts on the central theme. Now, to save some time, I would be most grateful if each presentation can be limited within 15 minutes. The first speaker is Professor Lin Laifan from the Law School of Tsinghua University.

Professor Lin studied in Japan and obtained his doctorate degree there. He also worked in the City University of Hong Kong for many years. Later, he joined the School of Law of Zhejiang University and the School of Law of Tsinghua University. In addition to being a professor, Professor Lin is the vice-chairman of the Association of Constitutional Law of China Law Society and the vice-chairman of the Hong Kong Basic Law and Macau Basic Law Research Association of China Law Society respectively. Professor Lin will speak on the relationship between

Article 23 of the Basic Law and the National Security Law. Professor Lin, please.

Lin Laifan: Good afternoon, distinguished guests, dear colleagues, ladies and gentlemen. It is my pleasure to participate in this Forum. Today, I would like to share with you the topic about the relation between "Legislating for Article 23" in the HKSAR and the National Security Law.

Since the reunification of Hong Kong with the Motherland, there have been long standing demands, disputes and tussles over legislation on national security. In particular, over the past decade or so, internal and external situations, as well as the realities have been changing constantly, while the national security risks in the HKSAR have also been on the rise, posing a major problem to the governance of the HKSAR.

In these circumstances, the National People's Congress (NPC) authorised the Standing Committee of the National People's Congress (NPCSC) to enact the National Security Law which, to a large extent, has plugged the loopholes in national security legislation of the HKSAR. Nevertheless, strictly speaking, the legislative system for national security in the HKSAR has yet to finally completed, and the enactment of legislation for Article 23 of the Basic Law, which is the constitutional duty of the HKSAR Government, is still pending completion.

At present, there are prospects of "breaking the deadlock" over legislation on Article 23. At this juncture, we first need to clarify one question — what is the relation, from a legal perspective, between Hong Kong's local legislation on Article 23 and the National Security Law enacted by the NPCSC, noting that both of them are national security laws implemented in Hong Kong? Presumably, this is the first fundamental issue that should be identified in the process of further improving the HKSAR's legal system for national security from now on.

In this regard, I personally view that the said question can be grasped in a progressive manner from three aspects, i.e. the relation in jurisprudence, cohesion in contents, and interaction in function between the two laws.

1. Legal relation between the legislation on Article 23 and the National Security Law

This legal relation can be further viewed from two points.

First, the legal relation between the legislation on Article 23 and the National Security Law is demonstrated by the attribution of their legislative powers.

On this subject, some members of the Hong Kong legal profession have clung to the view of "separation of powers", thinking that given the express mandate under Article 23 of the Basic Law, the Central Authorities should not have legislated on this issue on their own. However, this view is considered to be inconsistent with the legislative intent of the Basic Law. I agree with the mainstream view of the Mainland academia that: the legislative power for legislating on Article 23 enjoyed by the HKSAR is a power conferred by the Central Authorities, which, like the "high degree of autonomy" enjoyed by the HKSAR, is ultimately attributed to the Central Authorities. If the HKSAR has long fallen short of fulfiling its constitutional duty, then the Central Authorities, being the State sovereign and the authoriser cum supervisor of the high degree of autonomy, may take over to exercise the power directly. The National Security Law was formulated in this context.

Second, the legal relation between the two laws is also demonstrated by their legal hierarchy and legislative basis. As regards legal hierarchy, the legislation on Article 23 should be subordinate to the National Security Law and this is mainly determined by their different status as legislative bodies: the National Security Law is a national law enacted by the NPCSC with the authorisation of the NPC, while the HKSAR's

legislation on Article 23 is local legislation to be enacted by the HKSAR's Legislative Council by way of an ordinance.

In addition, the National Security Law can also be regarded as one of the legislative bases for legislation on Article 23 in the HKSAR. It should be said that prior to the promulgation of the National Security Law or the NPC's 528 Decision, Article 23 of the Basic Law served as the major legislative basis for the enactment of local legislation on Article 23 in Hong Kong. After the National Security Law came into effect, the situation has changed. In addition to Article 23 of the Basic Law, the 528 Decision (in particular Article 3) and the National Security Law (in particular Article 7) can be said to constitute the legal bases for the HKSAR to fulfil its legislative duty under Article 23.

2. Cohesion in contents between the legislation on Article 23 and the National Security Law

The commonality between the legislation on Article 23 and the National Security Law on the subject to be regulated suggests that there must be a close link in specific contents between the future legislation on Article 23 and the National Security Law. The fact of the National Security Law being the legislative basis of and the superior law to the legislation on Article 23 further suggests that there is cohesion in contents between these two pieces of legislation. This can also be grasped from two points:

The first point, the National Security Law has, to the extent necessary, broadened the protection of national security under Article 23 of the Basic Law, and provided a framework for legislation on Article 23. Here are two examples for illustration.

One example is about subversion. Article 23 of the Basic Law only protects the Central People's Government from subversion, and the concept of "Central People's Government" is relatively ambiguous. Some Mainland scholars have compared that expression with the relevant

provisions in the Crimes Ordinance of Hong Kong, and considered that before the enactment of the National Security Law, there used to be only two subjects which are protected by Hong Kong laws from subversion. The first one is the basic system of the State, and the second one is the NPC and its Standing Committee. The National Security Law has broadened the protection by extending the subject of protection to "State power" covering not only the basic system but also all public authorities; not only the Central Authorities but also the HKSAR authorities; not only the legislature, but also the executive authorities, judiciary, etc.

Another example is terrorism. As a new type of crime endangering national security that only emerged since the 21st century, terrorism is not listed in the then-enacted Article 23 of the Basic Law of Hong Kong. This makes it necessary for the National Security Law to include it in the scope of punishment for safeguarding national security according to the practical needs in the new era.

The second point is that the future legislation on Article 23 can take the contents of the National Security Law further. How should it be done? It can be approached from two aspects.

First, how should the legislation on Article 23 deal with the existing contents of the National Security Law?

This may be handled in the following way, namely: for matters already provided for in the National Security Law, Hong Kong's local legislation on Article 23 may, if necessary, make corresponding and appropriate provisions. For instance, certain provisions or legal terms in the National Security Law may be difficult to understand in the actual application in the HKSAR. As such, the legislation on Article 23 can specify and refine such contents. Nevertheless, as mentioned earlier, given that Hong Kong's local legislation on Article 23 is subordinate to the National Security Law, the said provisions in the legislation on Article 23 should follow the corresponding provisions and spirit of the National Security Law, which must not be contravened.

Let me explain by an example. For the term "State secrets", the Chinese term "國家秘密" is used in the National Security Law, whereas in Hong Kong, the Chinese expression "國家機密" is generally used, and Article 23 of the Basic Law also uses the Chinese expression "國家機密". It seems that they refer to the same thing but in fact, in the current mainland legislative texts, "秘密" is not equivalent to "機密". According to the provisions of the Law of the People's Republic of China on Guarding State Secrets, "國家秘密" (State secrets) are subdivided into three categories: 絕密 (top secret), 機密 (secret) and 秘密 (confidential). This means that the scope covered by 機密 (secret) is narrower than that of 國家秘密 (State secrets). However, the National Security Law does not define the specific meaning of "State secrets" clearly in its provisions. Therefore, further refined elaboration is necessary. The future legislation on Article 23 can be entrusted with a mission to deal with similar matters.

Second, how should the legislation on Article 23 deal with those matters endangering national security which are listed in Article 23 of the Basic Law but not provided for or not fully provided for in the National Security Law? It should be recognised that the legislation on Article 23 can make necessary supplementary provisions in this regard. That is to say, in addition to the refinement of the existing contents, the cohesion in contents between the legislation on Article 23 and the National Security Law is also demonstrated by the supplementation of contents that are not provided for or not fully provided for in the National Security Law. It should be noted that the acts endangering national security listed in Article 23 of the Basic Law are not fully covered by the National Security Law, and there are still some provisions that have not been legislated. This should be the goal to be achieved by the legislation on Article 23 in relation to specific contents of the provisions.

For example, regarding the offence of espionage, the National Security Law does not provide for comprehensive coverage. The Official Secrets Ordinance, whereby espionage is currently punished, has not

been revised for years and cannot meet the current needs. Accordingly, one area where the necessity for legislation under Article 23 is probably most prominent is the addition of provisions on espionage.

3. The interaction in function between the legislation on Article 23 and the National Security Law

This can be likewise understood from two points:

The first point is to achieve the concert of the two laws in enforcement and judicial procedure. As we all know, the National Security Law of Hong Kong has its own uniqueness compared with the National Security Law of the Mainland and that of Macao. It is a comprehensive law with substantive norms, procedural norms and organisational norms including *inter alia* the establishment of mechanism for enforcement and judicial procedure. In particular, in addition to general cases over which the HKSAR shall exercise jurisdiction, it also provides for exceptional cases over which the Office for Safeguarding National Security of the Central People's Government in the HKSAR shall exercise jurisdiction. These are mainly cases where the HKSAR itself cannot effectively exercise jurisdiction, enforce this Law, or a major threat has occurred. However, a major issue is how to discern and identify these cases. To this end, the operation of such mechanism requires the concert and interaction of the two laws in terms of enforcement and judicial procedure.

The second point on interaction in function is manifested by the realisation of orderly coexistence of the Central Authorities' overall jurisdiction and HKSAR's high degree of autonomy in the context of safeguarding national security through the organic integration of the two laws. This is a rather macro topic. In this regard, the following view is now warranted. Those coming into governance of the HKSAR after the electoral reform can be fully trusted for their ability to effectively handle national security matters which are within the HKSAR's purview. As such, under normal circumstances, the high degree of autonomy of the

HKSAR should be fully respected and brought into play. In the event of extreme circumstances where the HKSAR is unable to cope effectively on its own, the Central Authorities can take action directly. As to how to realise the orderly coexistence of the two laws at the level of specific institutional mechanism, this requires the joint efforts of people from all walks of life in the HKSAR.

All in all, the immediate priority is to formulate a comprehensive and practicable piece of legislation on Article 23.

The above are my humble opinions. Your comments and feedback are most welcome. Thank you.

Zhu Guobin: Thank you, Professor Lin. Now, I invite Mr Tang, Secretary for Security to speak first. I'm sure that you know him quite well. Mr Tang joined the Hong Kong Police Force as the Inspector of Police, then successively promoted to Senior Assistant Commissioner, Director of Operations, Deputy Commissioner of Police and the Commissioner of Police. He has become the Secretary for Security on 25th June last year. Mr Tang, please.

Tang Ping-keung: Financial Secretary, Mr Paul Chan Mo-po, Secretary for Justice, Ms. Teresa Cheng Yeuk-wah (then Secretary for Justice), dear friends,

Today, I am delighted to be invited to attend the National Security Law Legal Forum hosted by the Department of Justice and exchange views with the distinguished guests in respect of the HKSAR's work on safeguarding national security.

Although the enactment and implementation of the National Security Law has turned the HKSAR "from chaos to order", it is still necessary for the HKSAR Government to continue to fulfil its duty to improve the

relevant laws for safeguarding national security, including enacting local legislation on Article 23 of the Basic Law, so as to complete legislation on national security as stipulated in the Basic Law as early as possible. I would also like to take this opportunity to share with you some views of the HKSAR Government on legislating for Article 23 of the Basic Law.

Enacting local legislation on Article 23 of the Basic Law and refining laws relevant to safeguarding national security are the constitutional responsibilities of the HKSAR. Article 3 of the "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" adopted on May 28, 2020 and Article 7 of the National Security Law respectively require the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law. In fact, every State will enact laws on safeguarding national security. This is an inherent right of every sovereign State, and also an international practice. The authorisation by the Central Authorities for the HKSAR to enact laws on its own for safeguarding national security has embodied the principle of "one country, two systems", and the State's confidence in the HKSAR.

Apart from being the constitutional duty of the HKSAR, there are also practical needs to legislate on Article 23 of the Basic Law to cope with past and possible future national security risks faced by the HKSAR.

Following the overall development of the State, many western countries regard China as a threat, and even take a completely hostile position against it. Given Hong Kong's unique environment and lifestyle under the principle of "one country, two systems", it is easy for external elements to infiltrate with malicious intention, and attempt to commit secession and subvert the State power, as well as to promote and advocate "Hong Kong independence", thus intensifying national security risks. Since the failure of the HKSAR to complete the enactment of legislation on Article 23 of the Basic Law in 2003, there have been drastic changes

in the national security risks of the HKSAR. Hong Kong experienced acts seriously undermining public order and endangering national security, such as the illegal Occupy Central movement in 2014, the Mong Kok riot in 2016, and the establishment of the Hong Kong National Party which advocated "Hong Kong independence". The multiple social chaos over the past two decades or so reached a climax in the large-scale riots since 2019, with the emergence of acts which seriously undermined the rule of law and public order and endangered national security, including:

(1) The rise of activities of "Hong Kong independence" and "self-determination". Some leveraged on "soft resistance" means through the media, arts and culture, etc. to disseminate messages of opposing the Central Authorities and the HKSAR Government; and allegedly conspired to collude with external elements to incite hatred against the Central Authorities and the body of power of the HKSAR under the guise of journalism;

(2) Territory-wide large-scale riots, with damage of public facilities in a wide area. Also, some members of external organisations openly raised funds for or donated equipment to the rioters during the riots;

(3) Delivery of speeches, words or publications which contain slandering accusations, with a view to inciting the public, glorifying violence, and weakening the concepts of rule of law and law-abiding awareness of the public;

(4) Local terrorism, which is growing and increasingly materialised into actions. It includes "lone-wolf" attacks and organising, planning and committing local terrorism activities in small groups;

(5) External elements, through long-term infiltration on all fronts, have been grooming local organisations or individuals as agents in Hong Kong, and taking part in activities endangering national security through the agents, including attempting to influence election results with a view to subverting the State power.

Since the implementation of the National Security Law, the social order has been restored. That said, the National Security Law only targets the four most serious and pressing categories of acts and activities endangering national security at the time. Among the seven types of acts which the HKSAR shall enact laws to prohibit as prescribed in Article 23 of the Basic Law, only two (i.e. secession and subversion) are covered by the National Security Law. Existing local legislations (such as the Crimes Ordinance, Official Secrets Ordinance and Societies Ordinance) also only cover part of the relevant acts. For example:

(1) The Crimes Ordinance covers offences relating to "treason", as well as offences of incitement to endanger national security, disaffection and hatred. Nevertheless, we need to review whether the relevant offences are adequate to deal with the national security risks previously faced by Hong Kong, and how to improve and better safeguard national security;

(2) The "espionage" prohibited under the Official Secrets Ordinance has a relatively narrow definition, which mainly covers "approaching a prohibited place", "making information useful to an enemy", and "obtaining, collecting, recording or publishing official secret information useful to an enemy", and so on. This is inadequate to deal with the complex acts of espionage and the related risks nowadays;

(3) As for the offence of "unlawful disclosure of protected information" under the Official Secrets Ordinance, only defence information and information related to international relations are classified as State secrets, and the legislation has not defined the term "State secrets";

(4) The definitions of "foreign political organization/political organization of Taiwan" and "political body" in the Societies Ordinance are relatively narrow; the mechanism for prohibiting the operation of a society under the Societies Ordinance applies only to a society that has been registered, required to be registered or exempted from registration under the Societies Ordinance.

Besides, activities of the criminals have gone increasingly "underground" and become increasingly "clandestine". There are also elements endangering the security of both the State and the HKSAR who have absconded overseas, wantonly colluded with external elements and continued to engage in acts and activities endangering national security, such as demanding foreign countries to impose the so-called sanctions, and set up the so-called "think tanks" to disseminate messages that endanger national security. There is a practical need to legislate on Article 23 of the Basic Law to further refine the laws on safeguarding national security so as to cope with the risks and threats concerned.

To this end, the HKSAR Government has been taking forward relevant work in respect of the enactment of legislation on Article 23 of the Basic Law. Although the HKSAR Government has introduced a bill to legislate on Article 23 of the Basic Law to the Legislative Council in 2003, given the substantial change in national security risks of the HKSAR since 2003, we are studying past, present and future security risks of the HKSAR, taking into account what had happened in the past. We are also reviewing the implementation experience of the National Security Law, the relevant court verdicts and the deficiencies of the existing laws, with a view to drawing up effective and pragmatic options and provisions to cope with the risk concerned. In this regard, we will also examine relevant national laws and laws of similar nature in other jurisdictions. Countries with laws covering similar offences, including the United Kingdom, the United States, Australia, Canada, New Zealand and Singapore, etc., are among those to which we would make reference.

The said, the work of formulating the legislative proposals for Article 23 of the Basic Law is by no means easy, and is complex in nature. The drastic changes in the international situation have made our work more difficult. Given the importance of the relevant legislation in safeguarding national security, the legislative proposals must be practicable in terms of implementation, and we must handle with care and avoid mistakes.

In addition to ensuring that the legislative proposals for Article 23 of the Basic Law can effectively safeguard national security, it is also very important for the relevant legislation to gain support from members of the public of the HKSAR.

We will proactively explain to the public and stakeholders the constitutional responsibility of the HKSAR to enact legislation on Article 23 of the Basic Law, as well as the content of various legislative proposals and the considerations involved. We will also listen to the views of the public and stakeholders with an open mind.

We expect that some people may exploit the opportunity to smear the HKSAR Government for suppressing human rights and freedoms through legislating on Article 23 of the Basic Law. I would like to take this opportunity to emphasise that Article 4 of the National Security Law stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR; the rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which HKSAR residents enjoy under the Basic Law of the HKSAR 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. Therefore, while safeguarding national security, members of the public continue to enjoy the rights and freedoms guaranteed by the Basic Law in accordance with the law.

However, these rights and freedoms are not absolute and may be subject to restrictions as prescribed by law which are, amongst others, in the interests of national security, public order (*ordre public*) and the protection of the rights and freedoms of others. The two above-mentioned international covenants have provisions that allow for restriction of rights and freedoms by law for reasons such as safeguarding national security.

I would also like to emphasise that in addition to preventing, suppressing and imposing punishment for offences endangering national security, Article 5 of the National Security Law also provides for principles of the rule of law, such as the presumption of innocence, the prohibition of double jeopardy, and the right to defend oneself and other rights in judicial proceedings that a criminal suspect, defendant and other parties in judicial proceedings are entitled to under the law.

In promoting legislation for Article 23 of the Basic Law, we will also pay special attention to the dissemination of information, so that relevant information can be provided to the public quickly and accurately. In addition to the traditional public consultation channels, we will make good use of various platforms (including online platforms) to disseminate the relevant information and provide explanations to different stakeholders.

Notwithstanding the above, we do not rule out that there may still be people with ulterior motives smearing the legislative work with malicious or even fake information when opportunities arise. Nor do we rule out that external forces and their agents may defy the facts in disregard of the existence of similar laws in their own countries and hold double standards to deliberately smear the legislative proposals, accusing us of suppressing human rights and freedoms. In addition, those who want to endanger national security will certainly continue to use "soft resistance" means to "demonise" our legislative proposals so as to mislead the public.

Those who intend to endanger national security will also make use of the internet and social communication software to widely disseminate information which is maliciously slanderous and misleading. We must therefore act quickly, otherwise the public would be unclear about the legislative proposals and would be misled unwittingly. Earlier on, an online media which has ceased operation deliberately made a misleading report on my speech at a press conference on legislating for Article 23 of the Basic Law. This was certainly not the first time, and I believe that

it would not be the last. But I will definitely reveal their true colours and uncover the truth to everyone.

In this regard, we will strengthen our publicity and explanation work, including:

(1) Clarify such slanderous remarks proactively and promptly;

(2) Strive to explain the importance of such legislation, including: that the legislation can ensure protection for national security and the long-term development of Hong Kong's economy; preventing offences endangering national security, while protecting citizens from violent attacks and coercion that seriously endanger the overall security of our society; safeguarding the lives and property of citizens; curbing the unhealthy trend of incitement to hatred, violence and lawlessness, while upholding the rule of law; and so on.

The Security Bureau has been working in collaboration with the Department of Justice and relevant law enforcement agencies in taking forward the legislative work on Article 23 of the Basic Law. However, in view of the new wave of the epidemic, the HKSAR Government, including the Security Bureau and the Department of Justice, has made the early stabilisation of the epidemic its overriding mission since early this year. This has therefore affected the legislative work.

Nevertheless, we will continue to proactively embrace the challenges and handle the relevant work proficiently, so as to ensure the security of Hong Kong and our country. Thank you very much!

Zhu Guobin: Thank you, Mr Tang. The third speaker is Professor Lim, from the Faculty of Law of The Chinese University of Hong Kong. Professor Lim was once a Professor of Law at The University of Hong Kong, and he is also a Visiting Professor at King's College London,

and Honorary Senior Fellow of the British Institute of International and Comparative Law. In 2021, he became an elected member of the Institut de Droit International. He has advised and represented a range of government and private clients in public and private international law matters and disputes. Professor Lim is going to speak on and discuss the legislative exercise for Article 23 from the international law and comparative law perspectives.

Chin Leng Lim: Madam Secretary (then Secretary for Justice, Ms Teresa Cheng Yeuk Wah), thank you very much for this very kind invitation. It gives me the opportunity to comment on matters which no doubt many people will be discussing here in Hong Kong in the future. Madam Secretary, very distinguished members of the audience and fellow panellists, ladies and gentlemen, I am asked to speak on certain common law comparisons that we can draw within the first 15 minutes, and I've been asked to not dwell on things we've discussed before. So last year there was a very substantive discussion of secession and subversion, for example, and I will try not to repeat what has been said today. I know it's late in the day. I'll try to be direct. I will speak to treason, sedition, theft of State secrets, the regulation of foreign political organisations and foreign interference in that order.

First, I would like to say something about Article 38 of the National Security Law, because there has been so much discussion. Since last year's conference, statements have been issued both from Beijing and from the HKSAR in relation to criticism of what is sometimes seen outside Hong Kong as an unreasonable extension of extraterritorial jurisdiction. Let me put it to you this way. If a person in Switzerland were to pull out a gun and shoot someone in Italy, and the bullet travels from Switzerland to Italy, strikes the person in Italy, the person in Italy dies and Italy claims jurisdiction over the person in Switzerland. Is that in the first place extraterritorial? In fact, the act was committed in Italy.

Take another example. There is a conspiracy, say a conspiracy in Switzerland, to cause a very violent event in Italy. Is that a conspiracy

to commit an act outside Italy? No. Is it an extraterritorial offence? The common law says “no”. The common law has said “no” for a long time and there is Hong Kong case law on this matter. But let us say we are talking about extending jurisdictional reach to nationals abroad for acts that are committed entirely abroad. No country in the world would say that is wrong. They may not be able to admit that, but they can’t say that it is wrong. I will give you an example. Say Turkish nationals in Sweden march in support of an organisation which Turkey considers to be a terrorist body. When Turkey objects, Sweden doesn’t say you don’t have the right to criminalise the conduct of your own nationals abroad. What Sweden says is here we have the freedom of speech and we have the freedom of assembly. What I’m trying to suggest is this. Article 38 says that we will extend our jurisdiction to foreigners abroad, persons who are not permanent residents of this region. Then there has been controversy, and then we have had to respond to say it is justified on the basis of something called the protective principle. But that is quite an abstract discussion. In most of the cases we can imagine, there will be a link, either a territorial link or a national link.

Take, for example, the case of countries which seek to criminalise the conduct of their citizens when abroad, when those citizens commit sexual abuses against children. Now, there is consensus, there is agreement internationally that countries should be allowed to do that. But sometimes countries don’t agree, and there is conflict between them as to whether a certain form of conduct should be criminalised. Can we say using this example of the sexual exploitation of children that there cannot be an assertion of extraterritorial jurisdiction? Can we say that there cannot be an assertion of territorial jurisdiction, as I’ve just described to you? For example, before committing the act, the citizen plans it in his own country. Can we say that we cannot assert extraterritorial jurisdiction in relation to one’s own nationals? When I get to the end of this talk and I will make it as short as possible, I would like to come to recent Australian legislation and a United Kingdom Bill. The point I’m trying to make is

that foreign interference laws by definition reach foreign conduct and we will take a look at that.

But coming, first, to treason, I was listening to my fellow panellist who mentioned earlier that some things might need tidying up. One of the things that might need tidying up is treason. It is contained in section 2 of the Crimes Ordinance, and section 2 of the Crimes Ordinance is inspired by the English Treason Acts, one of which is a medieval act. Now, our legislation still refers to "Her Majesty". Our legislation says that if you seek to intimidate or overawe Parliament or the legislature of any British territory, then that is treason. But the Interpretation and General Clauses Ordinance, of course, says we have to read that in context. If the matter involves the jurisdiction of the Central People's Government (CPG) or the relationship between the CPG and the HKSAR, then we read it in a certain way. If it only involves a HKSAR matter, then we read it in another. Let me put it to you this way. Let us say some people storm a legislature. Say a legislature in Hong Kong. Can we say that this Ordinance only refers to a legislature on the Mainland? Now, if we say it also includes a legislature in Hong Kong, then let me ask a further question. Does it criminalise storming the Macau legislature? So those aspects may need some thought on our part to preclude these kinds of ambiguity.

More interestingly, there is a Policy Exchange report in the United Kingdom called "Aiding the Enemy", and it is very well known. It is written by, amongst others, Professor Richard Ekins at Oxford and the current chair of the Foreign Affairs Committee in the United Kingdom. It recommends an expansion of the crime of treason to betraying one's country. For us, treason only means compassing the death of the King, levying war, adhering to the King's enemies, and overawing the legislature.

Let me turn now to seditious intention, because something happened recently in court in Hong Kong. Senior Counsel got up and said to the judge, and it's the same judge referred to earlier today in respect of a

decision on legal professional privilege as I was listening quite carefully to the Secretary for Justice's speech. Senior Counsel got up and said, "Well, we can't establish a seditious intention unless there is a specific intention to incite violence." The judge disagreed, quite rightly, I think, on a point of construction. But let us say Senior Counsel was suggesting that at common law, the English common law, for example, you cannot have sedition if there is no incitement to violence. If that is the proposition by Senior Counsel, then the Law Commission of England and Wales has long disagreed with that view. You can have sedition without an incitement to violence. You can have sedition if there is an incitement to public disorder or disturbance. I mean, that at common law, urging others to assemble unlawfully would be covered under the definition of sedition, which was adopted by the Law Commission of England and Wales, and which was based on a Canadian Supreme Court case called *Boucher v the King* (*Boucher*). This is a point that often is misunderstood because there is abundant academic literature, and even Wikipedia will say to you under *Boucher*, you need an intention, specific intention to incite violence. That is not even the view of the Law Commission of England and Wales, which analysed *Boucher* to a very great extent.

Let me now say something about the theft of State secrets, because that has just been mentioned. There was also mention this morning about a case called *Nagla v Latvia* and we have heard and talked about what a State secret is. Now under the National Security Law, as far as I understand it, what is or is not a secret can be certified. It is certified by the Chief Executive. One needs to be a little bit careful. There is a comparative common law example where the judge decided that the wrong person signed the piece of paper. So let's assume the right person signs the piece of paper certifying that something is a secret. Is that the end of the matter? Should be. Formally, the answer is "yes". But there is comparative case law that puts it this way. Let us say, just hypothetically, that the Chief Executive of Hong Kong seeks to certify that the fact that the sun rises in the east is a secret. There you run into the limitations of classifying something as a secret. There is a case called *Bridges*

Christopher, Public Prosecutor v Bridges Christopher, in which the Singapore courts considered that if something is already in the public domain, then it cannot be a secret. Much depends upon how you would read our legislation, because as far as our current legislation is concerned, theft of State secrets involves the communication by an existing or former public servant or government contractor of "any official secret".

Turning to the regulation of foreign political organisations, there is a very recent case, a United Kingdom (UK) Supreme Court case. Some people were carrying placards demonstrating in support of the Kurdistan Workers' Party. The Kurdistan Workers' Party in England is a prohibited organisation. One of the questions before the UK Supreme Court was this: Did they have to know what the Kurdistan Workers' Party was? Did they have to know that the Kurdistan Workers' Party is a proscribed organisation? The UK Supreme Court had said "no". On a point of construction, they said all you had to know was that you were carrying a placard.

I come finally to foreign interference, because I think that is where a lot of the attention has been and I mentioned it at the outset because it touches on extra-territoriality. There has been a slew of foreign non-interference legislation. In some places, the concern is with hostile information campaigns. We've heard something about hostile information campaigns in other places such as in Australia and currently in the United Kingdom. The concern is with foreign lobbying. Here is where it gets interesting. Australia would criminalise, the way I read it, recklessly influencing political or governmental processes, provided there is, for example, deception. How do I make this point? I hope that I haven't been recklessly influencing you with my views today. Moreover, the Australian legislation reaches to conduct wholly or partly committed in Australia. Think of the example I gave at the outset where a person fires a shot across a border or conspires abroad to commit a violent act in another place as long as it occurs partly in Australia, or if it is committed by a

national, or if it is committed by a resident, you don't even have to be a national.

Now, here's the most dramatic example, the National Security Bill of the United Kingdom. Last time I looked, maybe about a couple of weeks ago, it had passed its first reading and was on its way to its second reading. It has, in clause 3, this idea that even if you don't know that you are assisting a foreign intelligence service, even if you don't know what foreign intelligence service it is of whichever country, you can still commit a United Kingdom offence and you can commit it outside the United Kingdom if you're a national or even if you're not a national, if you work for a British embassy abroad. Now that seems fairly similar to the Australian example. Before I end, I will just ask this question, what is a British national according to the United Kingdom's National Security Bill?

It includes holders of British National (Overseas) passports.

Thank you very much.

Zhu Guobin: Thank you, Professor Lim. Our schedule is pretty tight, and I can only have one question for each of the speakers. First, I'd like to invite Professor Lin. Professor Lin, can you tell us, from the perspective of the legal norms, what are the areas that need our attention regarding the concert of the legislation on Article 23 and the National Security Law in terms of legislative principles and legislative technicalities? Thank you.

Lin Laifan: First of all, as regards legislative principles, the two pieces of laws show more commonality than individuality. In the Explanation on the Draft May 28 Decision of the National People's Congress, five basic principles are specified, 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. These five basic principles are applicable to both the National Security Law and the legislation on Article 23.

Secondly, as regards legislative technicalities, the two pieces of laws then show more individuality than commonality. It is mainly due to the premise that the two places are under different legal systems. In respect of the specific legal norms, there are obvious differences in lexical expression and structure between the provisions adopted in the two places, such as the expression "State secrets" which I quoted in my speech. In addition, the two places have different provisions on prescribed punishment. In the HKSAR, there is a tendency towards judicial centrism in legislation with legislators generally stipulating only maximum rather than minimum sentences. Whereas in the National Security Law, the feature of legislative centrism has resulted in the legislators specifying both the minimum and maximum sentences which are further divided into different levels according to the seriousness of offence circumstances.

Such differences in legislative technicalities may also lead to divergence in practice to a certain extent. For example, in the case of *Lui Sai Yu* not long ago, the judge adopted Hong Kong's customary "one-third discount for guilty plea", reducing the final sentence on the offender to one below the minimum sentence stipulated in the National Security Law. This has sparked quite a controversy. I think such discrepancy is something that the lawmakers of the future legislation on Article 23 need to pay heed to in the legislation process.

Zhu Guobin: Thank you, Professor Lin. The next question is for Mr Tang, Secretary for Security. You mentioned in your speech just now that the current laws of Hong Kong, namely the National Security Law, the Crimes Ordinance, the Official Secrets Ordinance, and the Societies Ordinance have roughly covered the seven types of prohibited acts

stipulated in the Article 23, though it is only partial covering. So, can you share with us why we still need to enact legislation on Article 23? Further, what new contents, new areas are expected to be covered by the relevant law?

Tang Ping-keung: Thank you, Professor Zhu. Actually, for the seven types of acts prohibited by Article 23 of the Basic Law, I mentioned two of them just now, namely secession and subversion, which are already covered by the National Security Law. Although some criminal acts have been partly covered by the Crimes Ordinance, the Official Secrets Ordinance and the Societies Ordinance, in order to ensure that the legislation [on Article 23 of the Basic Law] can enable us to address the current and future challenges concerning national security, I think that we need to explore the issues in the following areas. First, in respect of certain concepts, we must provide for clearer definitions or define them. As Professor Lin of Tsinghua University mentioned earlier, currently there is no definition for the term "State secrets". Another example is the term "national security": the current definition for which under the Societies Ordinance needs to be reviewed for application to different parts of the legislation on Article 23 of the Basic Law. Besides, we need to adapt some of the existing laws to remove the colonial references. As Professor Lim of the Chinese University just mentioned, terms like "Her Majesty" and "United Kingdom" should also be removed.

Second, we must also review the scope of certain offences to address current and future risks. For example, under the Crimes Ordinance, the existing offence of treason mainly covers acts relating to war. However, we need to consider other factors involving external elements that may severely threaten our national sovereignty, unity and territorial integrity, or the overall security of Hong Kong society, such as acts of sabotage of infrastructure in collusion with external elements, and so on.

Third, we must review whether the existing laws are outdated. For example, under the Official Secrets Ordinance, spying only covers approaching a prohibited place, making information that is useful to

an enemy, etc. We may need to expand the coverage to include some other advanced communication facilities or other contemporary spying activities.

Finally, we have to review the deficiencies of the existing laws as reflected in our experience of actual law enforcement. For example, under the Societies Ordinance, the definition of "political body" only covers political parties, or organisations whose principal function is to promote or prepare candidates for elections, but not the organisations that pursue other political ends. In addition, the Societies Ordinance does not cover organisations that are not societies, such as companies, co-operative societies or trade unions, etc. These are areas that we need to examine in the legislation on Article 23 of the Basic Law.

Zhu Guobin: Thank you. Professor Lim, I want to seek your clarification with one point. You say it is not a controversial issue when you regulate your own nationals' conduct abroad, but we have seen genuine controversies. So could you clarify that point further, please?

Chin Leng Lim: It is not concerned with the claim that you have a right to regulate your nationals abroad that they dispute. The conflict lies elsewhere. If it had to do with your nationals and their nationals going somewhere and abusing children, there would be no disagreement. There usually is no disagreement on either side that you can regulate the conduct of your nationals abroad. For example, you can't say I can't commit treason because I didn't do it at home. No country would agree with you.

Zhu Guobin: Thank you. And time is already up. We have to conclude this session. First, I want to thank three speakers for sharing and thank the audience here, in person and online. Finally, I sincerely thank the Department of Justice for inviting me to chair this session. Thank you very much.

香港特區二十三條立法與《香港國安法》的關係
The Relation Between Hong Kong Legislation of Art.23 and HKNSL

林來梵
Lin Laifan
清華大學法學院教授
Professor, School of Law of Tsinghua University

- 法理關係 → 內容銜接 → 功能互動
- Legal Relation → Cohesion in Contents → Interaction in Function

一、法理關係
Legal Relation

- （一）國安立法權的歸屬：
  1. 中央授權，最終歸屬於中央；
  2. 中央可以直接代為履行。

- The attribution of the legislative power in national security:
  1. The power was authorised to the SAR by Central Authorities, and ultimately attributed to Central Authorities;
  2. The Central Authorities may exercise the power directly.

- （二）《香港國安法》是二十三條本地立法的上位法和立法依據之一。

- HKNSL is the legal basis and superior law of the local legislation of Art.23.

二、內容銜接
Cohesion in Contents

- （一）《香港國安法》在必要的意義和程度上拓寬並深化了《基本法》第二十三條對國家安全秩序的保護範圍。
- The HKNSL, to the extent necessary, broadens the protection of national security under Art.23 of the Basic Law.

1. 顛覆罪（Subversion）

   「中央人民政府」→「國家政權」
   'Central People's Government' → 'State power'

2. 恐怖活動罪（Terrorism）

- （二）二十三條立法對《香港國安法》內容作出更進一步的處理。
- Local legislation of Art.23 shall improve the content of HKNSL.

- 1. 對《香港國安法》中存在理解困難的內容進行精細化、具體化
  Specifying the content of HKNSL which is difficult to understand.
  如：「國家秘密」的含義
  The definition of 'State secrets'
- 2. 對《香港國安法》未完備規定內容的補充
  Supplying the content which HKNSL has not completely provided.
  間諜罪（Espionage）

三、功能互動
Interaction in Function

- （一）執法與司法程序上的協調
- The concert of the enforcement and judicial procedure.

- （二）中央全面管治權與特區高度自治權的有序互動
- The orderly coexistence of the Central Authorities' overall jurisdiction and Hong Kong's high degree autonomy.

CLOSING REMARKS

CHAN Mo-po Paul GBM GBS MH JP

Financial Secretary,
The Government of
the Hong Kong Special Administrative Region of
the People's Republic of China

Ms Teresa Cheng Yeuk-wah (then Secretary for Justice), distinguished guests, ladies and gentlemen,

Good afternoon! First of all, I thank colleagues from the Department of Justice for organising the conferences in the past three days. I also thank the National People's Congress, the Hong Kong and Macao Affairs Office of the State Council and various Offices of the Central People's Government in the Hong Kong Special Administrative Region (HKSAR) for their support, and speakers joining online or in person, distinguished guests and friends for their participation, in making this forum a success. It has helped different sectors of the community to deepen their comprehensive understanding on the National Security Law (NSL).

"One Country, Two Systems" lays the foundation for Hong Kong's success, and the Constitution forms the basis of "One Country, Two Systems". As authorised by the Constitution, the Basic Law, the foundation of Hong Kong's legal system, provides for various national directives and policies in respect of Hong Kong. The enactment of NSL serves as an institutional safeguard for implementing "One Country, Two Systems". The above legal arrangements lay a solid foundation for Hong Kong's prosperity and stability.

The Basic Law provides clear and express policy stipulation and protection for Hong Kong's economy, finance, trade, as well as industry

and commerce. These include the arrangements for Hong Kong to adopt a free trade policy, and to continue to be a free port and a separate customs territory; to maintain the status of the Hong Kong dollar and Hong Kong's status as an international financial centre; to have independent public finance and tax system; to safeguard the free flow of people, capital, goods and information; to safeguard the property of individuals and investors; and to continue to implement the common law system, with courts that continue to exercise independent judicial power including the power of final adjudication. It is fair to say that each and every chapter and article of the Basic Law is solemn provision and promise made as empowered by the Constitution, which together have enabled us to have full confidence in Hong Kong's development.

Under this arrangement, Hong Kong can not only implement the capitalist system within "One Country" and connect with the world, but can also benefit from the opportunities brought about by the rapid development of the Mainland, which implements socialism with Chinese characteristics. The flexible arrangement of "One Country, Two Systems" is Hong Kong's core competitive edge, enabling Hong Kong to prosper and develop into an international financial, shipping and trade centre, as well as a centre for international legal and dispute resolution services in the Asia-Pacific region. Today, Hong Kong still plays an irreplaceable and unique role in our country's development.

However, no matter how well-designed our system is, we need to install a "protective shield" and "safety fence" to protect it from possible interferences and damage that may emerge, such that the HKSAR Government can focus on enhancing people's livelihood and continuously strengthen its governance capability. The implementation of NSL two years ago is essential for safeguarding the implementation of "One Country, Two Systems" in Hong Kong.

In fact, statistics have clearly shown that the implementation of NSL has effectively protected and reinforced Hong Kong's position as an international financial centre. Since the implementation of NSL, the

amount of funds raised through initial public offerings in Hong Kong has exceeded HK$650 billion, an increase of over 30% compared with the preceding period of the same duration. The average daily turnover of Hong Kong stocks surpassed HK$150 billion, which is about 60% higher than that in the 12 months before the implementation. Assets under management by our asset and wealth management industry amounted to around HK$34.9 trillion as at the end of 2020, registering a growth of 20% over the amount before NSL was implemented. The total deposits in Hong Kong's banking system reached HK$15.3 trillion recently, an increase of over 11% compared with that prior to the implementation of NSL. It is fair to say that the implementation of NSL has fully protected Hong Kong's overall stability, and Hong Kong's economy has demonstrated resilience and continued to develop despite severe challenges brought by the COVID-19 pandemic.

Apart from implementing NSL, Hong Kong has also improved its electoral system to ensure the adoption of the fundamental principle of "patriots administering Hong Kong", and has completed three important elections smoothly, including the recent Chief Executive election, whereby the sixth Chief Executive was smoothly elected. The sixth-term HKSAR Government will begin its term on 1 July, and will surely promote economic development at full steam and improve people's livelihood with the support of the Central Authorities, Legislative Council and the community as a whole, and start a new chapter for good governance in Hong Kong.

However, we must not lose sight of the complex and ever-changing political-economic environment. In the past few years, some western countries, with the United States taking the lead, have tried to suppress our country's development with arbitrary and unreasonable means. The recent Russia-Ukraine conflict has made it clear how the United States and its allies have weaponised the United States dollar and the international financial systems, imposing sanctions and economic blockades against other countries, blatantly distorting and interfering

with the operation of the global financial markets, and causing serious consequences.

Hong Kong, as a fully open international financial centre, must be vigilant in face of these risks and be prepared for all sorts of situations. We must strive to maintain Hong Kong's financial security, which is also related to national security. We must clearly acknowledge the fundamental principle that "National security is the prerequisite for economic development, while economic development could provide protection for national security", whether it is from the perspective of maintaining Hong Kong's prosperity and stability, defending national interests, or contributing to our country's development. We must maintain a "high level of security" while pursuing "high-quality development", both of which are mutually reinforcing, and for which a right balance should be struck.

As such, we have to strengthen two points of understanding. First, we have to look at the development of Hong Kong from the holistic view of national security, and prepare for the worst and make contingency plans. Second, we have to bear in mind the concept of comprehensive development, which promotes economic development in a diversified and balanced approach, with a view to enhancing the flexibility and resilience of our economy in front of the complicated external environment; while ensuring that members of the community could better share the fruits of economic development, thus paving a more solid foundation for long-term social stability.

In relation to different sectors of our financial system, we have established an all-rounded risk management and alert mechanism. On the one hand, we seek to promote the orderly development of industries such as banking, securities, insurance and asset management, and on the other effectively monitor risks, especially cross-sectoral ones, in order to plug the possible loopholes where different segments of the market are overseen by the respective regulators. Together with the financial regulators, we have remained vigilant and prepared contingency plans

for different types of possible scenarios that may arise. We have adopted "cross-market, well-coordinated, and cross-time zone" monitoring of all sectors of the financial market, which provides real-time monitoring and alerts. We will act decisively when necessary and nip problems in the bud, and conduct on-site checks and pressure tests on relevant industries at both regular and irregular intervals to ensure that every sector is vigilant and prepared for possible risks.

In face of western countries' weaponisation of finance, we must speed up the development of a diversified and sustainable economic and financial system for Hong Kong. As the offshore international financial centre of our country, we strive to become our country's "testing ground" and "firewall" for the national financial development reform, and support our country in opening up its financial system to the world, while helping to promote the internationalisation of Renminbi (RMB) in a prudent manner.

Over the past few years, we have implemented a series of listing reforms. For instance, the Hong Kong Exchanges and Clearing Limited launched a new listing regime in April 2018 to allow emerging and innovative enterprises with weighted voting rights structures as well as pre-revenue or pre-profit biotechnology companies to list in Hong Kong, and establish a concessionary route for relevant qualifying issuers to seek secondary listing in Hong Kong. As at the end of April 2022, a total of 74 companies had been listed through the new regime with more than $580 billion raised, representing over 44% of the total fund raised through initial public offerings in the same period. Hong Kong has also become Asia's largest and the world's second-largest fundraising hub for biotechnology.

In January this year, the Hong Kong Exchanges and Clearing Limited introduced a new listing regime for Special Purpose Acquisition Companies (SPAC) to provide an alternative listing avenue for companies intending to raise funds in Hong Kong. We are also enhancing our secondary listing regime to allow Greater China companies which are

not from innovative sectors to seek secondary listing in Hong Kong, and offer greater flexibility to issuers seeking dual primary listings, hence further attracting high-quality "China Concept Stocks" to list in Hong Kong.

In fact, as of April this year, 21 "China Concept Stocks" issuers have returned to Hong Kong through secondary listing or dual primary listing, the total market capitalisation of which accounted for over 70% of all "China Concept Stocks" listed in the United States. With increasingly politicised financial markets in the United States, Hong Kong can offer more choices for the global financial market by enhancing its listing regime. This can also increase our market competitiveness, market liquidity and choices of investment products. We are working on enhancing the connectivity of the stocks with Mainland's capital markets, thus providing more high-quality choices to Mainland investors and attracting large amounts of funds from the Mainland to support the real economy, and bringing multiple benefits.

As our country's economy continues to develop, there has been an increase in the use and holding of RMB outside the Mainland by enterprises as well as financial or other institutions. The demand for RMB for use in transactions or investments would also increase over time. The role of Hong Kong as the leading offshore RMB business hub will become more significant. We shall promote the continued development of the offshore RMB market in Hong Kong through various channels, including: (1) striving to improve and widen mutual access between the financial markets of Hong Kong and the Mainland to provide effective channels for two-way flow of offshore and onshore RMB funds, thus strengthening the liquidity of offshore RMB. The ETF Connect announced yesterday marks a milestone and a great step forward to this direction; (2) promoting the development of offshore RMB products, including the issuance of more diversified RMB bond products and facilitating their transactions, as well as offering more RMB-denominated financial products; (3) enhancing the demand for issuance

and trading of RMB securities and providing more RMB investment and financing options for listed companies and investors, including enabling stocks traded via the Southbound daily quota to be RMB-denominated; (4) seizing opportunities brought by pilots in the Guangdong-Hong Kong-Macao Greater Bay Area (GBA) and expanding the scale and scope of the cross-boundary use of RMB in GBA, as well as introducing more diversified and facilitating RMB products and services, thereby gradually promoting cross-boundary transactions of financial products within GBA. The Cross-boundary Wealth Management Connect Scheme in the Guangdong-Hong Kong-Macao Greater Bay Area introduced in October last year is a milestone to this end, and we shall continue to expand its coverage and substance. In addition, we are exploring the use of dual-currency e-wallets to promote the use of digital RMB and digital Hong Kong Dollar.

Pursuing these objectives in a steady manner would not only reinforce Hong Kong's role as a bridge with the Mainland in respect of fund flow, but would also further promote the internationalisation of RMB. In the long run, this is also an important step to respond to the so-called "sanctions" and ensure financial security.

As to the rise of unilateralism and protectionism in some western countries in recent years, as well as economic oppression that may arise from various sources, we must pursue both "internal" and "external" routes in response. Internally, we must integrate into national development, in particular leveraging on the strategic position of Hong Kong and various support measures under the National 14th Five-Year Plan and development of GBA. This would in turn strengthen the cooperation and coordinated development of our bother cities in GBA, so that the quality and volume of economic development of the cluster of cities in the entire GBA would be enhanced, and a higher level of opening up would be achieved.

Technological development and independent innovation lie at the heart of the National 14th Five-Year Plan. Hong Kong must leverage on its

advantages in technological development and cooperate with its brother cities in GBA and develop the whole GBA into a world-class international innovation and technology (I&T) hub, thus contributing to our country's greater technological self-reliance.

The Hong Kong-Shenzhen Innovation and Technology Park in the Lok Ma Chau Loop and San Tin Technopole, together with the Shenzhen I&T Zone, will form the Shenzhen-Hong Kong I&T Co-operation Zone with an area of approximately 540 hectares. It will become a locomotive for the development of an international I&T hub in GBA.

On the promotion of innovation, the InnoHK Research Clusters was established with a funding of HK$10 billion allocated by the 2018/19 Budget. Since its establishment, it has admitted over 30 top-notch universities and research institutions to collaborate with local universities and research institutions, and has set up 28 research laboratories at the Hong Kong Science Park. HK$10 billion has been earmarked in this year's Budget to set up the InnoLife Healthtech Hub in the Hong Kong-Shenzhen Innovation and Technology Park.

Externally, we must strengthen our connections and build deeper and more mutually beneficial relationships with our economic and trading partners, and diversify into markets outside of the United States and Europe. Recently, the HKSAR Government has been actively seeking to join the Regional Comprehensive Economic Partnership, which covers about one-third of the world's population and around 30% of the global GDP.

At the same time, we shall actively promote the signing of the Comprehensive Double Taxation Agreements (CDTA) in order to establish a comprehensive network of CDTAs with major trading and investment partners, as well as emerging economies with potential for growth in bilateral trade and investment. CDTA provides an incentive for overseas companies to do business in Hong Kong and for Hong Kong companies to do business overseas. As at January 2022, Hong Kong has

signed CDTAs with 45 reportable jurisdictions and is in negotiation with 14 reportable jurisdictions.

This year marks the 25th anniversary of Hong Kong's return to the Motherland and a historic new starting point for Hong Kong's development. By implementing NSL, improving the electoral system, and fully and accurately implementing "One Country, Two Systems", Hong Kong can stand firm and steadfast, and get back on track and focus on development. A new chapter of good governance and development will be opened. I firmly believe that with the staunch support of our country, where the whole community could stay united to safeguard national security and strive for development in one heart, we can build a bright future for Hong Kong!

Thank you again for attending today's forum. I wish you all good health and success!

www.doj.gov.hk

中華人民共和國香港特別行政區
Hong Kong Special Administrative Region
of the People's Republic of China
25th 周年紀念 ANNIVERSARY

香港特別行政區政府新聞處設計
政府物流服務署印

Designed by the Information Services Department
Printed by the Government Logistics Department
Hong Kong Special Administrative Region Government