

## *CLM Quick Take*

### **Hong Kong's National Security Law: An Assessment**

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The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the "NSL" or the "Law")<sup>1</sup> was passed by the National People's Congress Standing Committee on June 30, 2020, promulgated on the same day, and made effective immediately upon being made public. Although mainland Chinese law is not generally part of Hong Kong's domestic law, it can become so if made part of Annex III to the Basic Law of the Hong Kong Special Administrative Region, and this was done with the NSL. This essay will highlight its main points and discuss controversial areas.

The Law performs essentially two functions: first, it defines substantive offenses (such as subversion, terrorism, and the like) and prescribes penalties for them, and second, it sets up institutions and procedures for its own enforcement. Because the second function is so important—it is the institutions that will determine what the words of the substantive offenses mean in practice—this essay will spend more time on that than on the first. But it makes sense to look at the substantive offenses—their definitions and sanctions—before considering the procedures for their implementation.

#### **Substantive Offenses**

The substantive offenses fall under the general headings of secession,<sup>2</sup> subversion,<sup>3</sup> terrorism,<sup>4</sup> and collusion with foreign forces.<sup>5</sup> The Law also criminalizes acts that amount to incitement or advocacy of, or support for, the first three.

There is no requirement of force or the threat of force in the case of secession. While "altering the legal status" of Hong Kong is prohibited only if done "illegally"—leaving open the theoretical possibility that peaceful advocacy of Hong Kong independence through revision of Chinese domestic law would not be unlawful—"separating" Hong Kong is prohibited outright, meaning that any kind of advocacy of separation is also unlawful. In any case, as shall be discussed below, none of the relevant enforcement institutions are likely to engage in this kind of fine parsing of the text.

The penalties for secession-related offenses range from up to three years for minor offenders to life imprisonment for grave offenders. The maximum penalty for incitement to secession is ten years.

Subversion includes not just unlawful attempts to overthrow the governments of China or Hong Kong, but also the potentially much lesser offenses of "seriously interfering in, disrupting, or undermining the performance of duties and functions . . . by . . . the body of power of the Hong Kong Special Administrative Region; or attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions." The penalties

are the same as for secession.

The NSL's section on terrorism criminalizes a number of acts if committed with the intent of causing harm to society and thereby coercing the government or intimidating the public in order to pursue a political agenda. The acts include serious violence against persons as well as a catch-all category of "other dangerous activities that seriously jeopardize public health, safety, or security." As with secession and subversion, the penalties range from up to three years for minor offenses to life imprisonment for serious offenders, with a maximum penalty of ten years for advocacy or incitement. Interestingly, there is no provision for the death penalty even where the activity results in death, so it seems that the mainland authorities are respecting Hong Kong's 1993 abolition of capital punishment.

Perhaps most worrisome for those in Hong Kong with any relationships outside of Hong Kong is the section on collusion with foreign or external (*jingwai* 境外; a technical term that includes Hong Kong, Macau, and Taiwan, because China cannot permit them to be called "foreign") forces. A person who requests any foreign or external person or entity to commit, or receives support in committing, any of the following acts (among others) resulting in serious consequences<sup>6</sup> commits a crime under the NSL: (1) rigging or undermining an election, (2) imposing sanctions or "engaging in other hostile activities" against the Hong Kong Special Administrative Region or the People's Republic of China, or (3) "provoking by unlawful means" hatred among Hong Kong residents towards the governments of China or Hong Kong.

Clearly this kind of language, as with many other key terms in the Law, is open to very broad interpretation, which makes the procedural part of the NSL (discussed below) all the more important. Does writing an op-ed in the *New York Times* criticizing the government constitute provoking hatred? The qualifier "by unlawful means" is not especially comforting; such language is routinely found in Chinese criminal laws and is rarely dwelt on as an important part of the offense.<sup>7</sup>

### **Applicability of the ICCPR**

The NSL states that Hong Kong "should protect" rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. It is hard to see, however, how this general provision can overcome the specific contrary provisions in the rest of the Law. As shown above, peaceful advocacy alone, protected under the ICCPR, can constitute a crime under the NSL. Moreover, the ICCPR provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody." But Article 42 of the NSL stipulates precisely such a general rule: the default rule is that no bail shall be granted; the exception is when the defendant can show that they will not "continue to commit acts endangering national security". Needless to say, this provision, which assumes that the defendant has already committed acts endangering national security, also contradicts the presumption of innocence required under Article 14 of the ICCPR and indeed under Article 5 of the NSL itself. Thus, it is clear that the ICCPR, whatever its effect in other areas of Hong Kong law, does not pre-empt or invalidate contrary provisions in the NSL. The NSL takes precedence.

### **Institutions and Procedure**

#### *Overview*

The NSL essentially (although not explicitly) establishes two parallel tracks and sets of institutions for implementing and enforcing the Law. One track (Track I) operates within the

Hong Kong government and uses almost exclusively Hong Kong government personnel and institutions, but the mainland authorities exercise control over key personnel. The second track (Track II) directly uses mainland Chinese personnel and institutions. Both tracks have the power to undertake investigations, prosecutions, and adjudications of offenses charged under the Law. Track II, however, is special in that its personnel operate in Hong Kong but are immune from Hong Kong law. Jurisdiction over national security cases is in the hands of Track I institutions by default,<sup>8</sup> but can be asserted by the Office for Safeguarding National Security, a Track II institution discussed below, at any time at its unreviewable discretion, and such an assertion deprives Track I institutions of their jurisdiction.

### *Track I: Hong Kong Institutions*

#### National Security Committee

Article 12 of the NSL calls for the establishment of a Committee for Safeguarding National Security (the “National Security Committee” or the “Committee”). The Law states that it is under the supervision of and accountable to the Central People’s Government (the “CPG”), i.e., the State Council and the Premier. It is not quite clear, however, what this accountability might mean in practice, since the membership is prescribed by law: the Chief Secretary for Administration, the Financial Secretary, the Secretary for Justice, the Secretary for Security, the Commissioner of Police, the head of the department for safeguarding national security of the Hong Kong Police Force established under Article 16 of this Law (the “Nat Sec Head”), the Director of Immigration, the Commissioner of Customs and Excise, and the Director of the Chief Executive’s Office.<sup>9</sup> These are not all of equal rank. The Nat Sec Head, for example, is under the Commissioner of Police, who is under the Secretary for Security, who is under the Chief Secretary for Administration. The Committee is to be chaired by the Chief Executive.

The Committee seems to be largely a general policy-making body, with few direct powers to do anything. And as all of its members have other jobs, it cannot be constantly meeting. Thus, the Law sets up a secretariat headed by a Secretary-General (“SG”). This body presumably will do much of the real work. And here is where we first see what we will see a great deal of this in this Law: the hand of Beijing not just in Track II, but also in Track I personnel appointments. Although the SG is nominated by the Chief Executive, they must be appointed by the CPG. Moreover, the Chinese government has previously interpreted this appointment power (which it has over the Chief Executive) as meaning the plenary power to decide who fills the office, not simply a power to confirm.

Article 15 states that the Committee shall have a national security advisor appointed by the CPG, and that the advisor shall attend all Committee meetings. This advisor has already been named: it is Luo Huining, already the director of the central government’s liaison office in Hong Kong.<sup>10</sup> The appointment of Luo confirms predictions that the position of advisor will be a key one with great influence over the work of the Committee.

Article 14 states that the Committee shall work in secret, and that its decisions are unreviewable by a court.

#### Investigation

Article 16 of the Law sets up a subsection of the police force dedicated to national security cases (the “National Security Division”). The head of this division (defined above as the Nat Sec Head) shall be appointed by the Chief Executive, but only after written consultation with the Office for

Safeguarding National Security, a Track II body provided for in Article 48 (discussed below).

Note how deep into the bureaucracy the Chinese government's power over personnel reaches. The Nat Sec Head is formally under the Police Commissioner, who is under the Secretary for Security, who is under the Chief Secretary for Administration.

In addition, the Law states that the National Security Division can hire staff from outside of Hong Kong. This undoubtedly means staff from mainland China. Those staff will, like other members of the Division, have law enforcement powers.

### Prosecution

As with investigation, national security cases cannot be left to the ordinary organs of prosecution. Instead, the Department of Justice must set up a special division for prosecuting national security cases (the "National Security Prosecution Division" or "NSPD"). All prosecutors working in the NSPD must be approved by the National Security Committee, and the head of the NSPD must, like the Nat Sec Head in the police, be appointed by the Chief Executive, but only after written consultation with the Office for Safeguarding National Security, a Track II body discussed below.

### Adjudication

As with investigation and prosecution, the adjudication of national security cases under the Law is handled by special institutions. The Chief Executive is to designate judges to hear national security cases from among deputy judges, recorders, magistrates, the judges of the District Court, the judges of the Court of First Instance, judges of the Court of Appeal of the High Court, and judges of the Court of Final Appeal. Such judges shall have a one-year term.<sup>11</sup>

In general, national security cases shall be heard in magistrates' courts, the District Court, the High Court, and the Court of Final Appeal, but that default rule can be changed when a case is moved into Track II by the Office for Safeguarding National Security. If the Secretary of Justice so decides, a case that would ordinarily be tried before a jury shall instead be tried before a three-judge panel.<sup>12</sup>

### *Track II: Mainland Institutions*

A key part of the NSL lies in its establishment within the territory of Hong Kong of a special Office for Safeguarding National Security (the "National Security Office" or the "Office"). The Office is a Track II institution: a mainland body like (for example) the Liaison Office, staffed by mainland officials appointed by mainland authorities. It has a number of functions, including, critically, the power to "handle" national security cases.<sup>13</sup> It can take jurisdiction over any case with the approval of the CPG, which would no doubt be granted when requested. It can then send people back to China for prosecution, trial, and sentencing in mainland institutions according to the Chinese Criminal Procedure Law.<sup>14</sup> The Supreme People's Procuratorate will select the procuratorate that will prosecute, and the Supreme People's Court will select the court that is to hear the case. In other words, mainland Chinese authorities can, on their own, decide that a suspect shall be brought from Hong Kong to the mainland, and that their case will be processed entirely by mainland authorities using mainland procedures.

The powers of the Office and its personnel are quite remarkable. First, Article 57 states that with respect to measures undertaken according to law (this is not a meaningful qualifier) by the Office, relevant organs, organizations, and individuals must obey. Whatever the Office says, you must

do. Second, Article 60 grants them immunity from Hong Kong law:

The acts performed in the course of duty by the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region and its staff in accordance with this Law shall not be subject to the jurisdiction of the Hong Kong Special Administrative Region.

In the course of performing duty, a holder of an identification document or a document of certification issued by the Office and the articles including vehicles used by the holder shall not be subject to inspection, search or detention by law enforcement officers of the Region.

Not only are they untouchable under Hong Kong law, but it would seem *they are untouchable under mainland law as well*. Suppose one such officer commits a deliberate and unjustified homicide “in the course of duty.” He is not liable under Hong Kong law by virtue of Article 60. And he is not liable under the PRC's Criminal Law either: as discussed above, the only PRC laws applicable in Hong Kong are those listed in Annex III to the Basic Law, and the Criminal Law is not listed there. Thus, it seems that officials of the National Security Office can move around Hong Kong in a kind of lawless bubble.

### *Summary*

The existence of a special set of institutions for handling national security cases—particularly the Track II institution of the National Security Office—renders somewhat superfluous the analysis of the substantive crimes and the language used to define them. In an open letter to Boris Johnson defending the NSL (somewhat remarkably, since its text was not public and was probably not even close to final at the time of his letter), Grenville Cross, the former Director of Public Prosecutions in Hong Kong, assured Johnson that “the only people with anything to fear are those who threaten national security.”<sup>15</sup> The statement would have been accurate had it said, “The only people with anything to fear are those who, *in the opinion of the PRC authorities and their agents in Hong Kong*, threaten national security.”

For a trained lawyer to ignore this critical procedural element borders on the disingenuous. There is extensive precedent in support of the view that the language of criminal statutes does not meaningfully constrain prosecutions by PRC authorities. Gui Minhai, a bookseller in Hong Kong of Swedish citizenship who published materials on the personal lives of senior Chinese Communist Party leaders, was kidnapped in Thailand and taken to mainland China, where the authorities initially accused him of involvement in a traffic accident before moving to “illegal business operations” and then finally settling on “illegally providing intelligence overseas.”<sup>16</sup> Pu Zhiqiang, an activist lawyer, was convicted of “picking quarrels” for three Weibo posts criticizing government officials and a pro-government author.<sup>17</sup> Zhang Jialong was indicted in November 2019 on charges of “picking quarrels” because he had retweeted or liked some Weibo posts supporting the Hong Kong protests. The indictment alleged that he had “repeatedly used the platform to post and retweet a great amount of false information that defamed the image of the [Chinese Communist] Party, the state, and the government.”<sup>18</sup> But this allegation simply does not make out the crime of “picking quarrels” as it is defined in the Criminal Law.<sup>19</sup> Cross's bland reassurance is based on a false premise: that “threatening national security” is a concept that is objectively and neutrally defined, and that it cannot be stretched to cover (for example) speech that is simply critical of the authorities.

### **Jurisdiction**

The Law's provisions on its scope have drawn a great deal of attention. It provides for three bases of jurisdiction. First, the Law applies to acts defined as crimes under the Law when any part of the act or its effect occurs in Hong Kong. Second, it applies to any act defined as a crime under the Law committed anywhere by a Hong Kong permanent resident or an entity established in Hong Kong. Finally, Article 38 states that it applies to any act defined as crime under the Law committed "against Hong Kong" from outside Hong Kong by any person, regardless of citizenship or residency. Thus, the law is asserting extraterritorial jurisdiction over every person on the planet.

The planetary reach of Article 38, unconstrained by citizenship, residency, or geography, is highly troubling. It is true that unlike the other provisions on jurisdiction, it contains language that is limiting at least in a strict grammatical sense: "against Hong Kong." The other jurisdictional provisions do not contain this apparent qualifier. Yet since the NSL is a criminal law concerned with offenses against the state, it is hard to see how there could be any offenses *not* "against Hong Kong."

Remarkably, this provision gives the Law a broader reach even than mainland criminal law. Under the Criminal Law of the PRC, a foreigner is not liable for an act that is a crime under the law unless (a) the act is punishable by a minimum of three years' imprisonment, and (b) the act is a crime in the jurisdiction where it is committed. The NSL has no such limitation. Suppose a US newspaper columnist advocates Tibetan independence in their column. They are not liable under mainland criminal law. But they are liable under the NSL.

This provision also raises another issue. Suppose the newspaper columnist travels not to Hong Kong but to Beijing. Although they may have committed no crime under PRC criminal law, they have under the NSL. What if the Hong Kong authorities ask the mainland authorities to detain the columnist and send them down to Hong Kong for prosecution? Will the mainland authorities turn them down?

As far-fetched and unusual as this assertion of planetary jurisdiction might seem, it is worth noting that although it has been attracting unfavorable comment since the Law was promulgated on June 30, to the best of my knowledge no Hong Kong or PRC government official has come forth to assure the world that this understanding of the Law is incorrect. As the mainland's Criminal Law shows, Chinese legislative drafters know how to refrain from asserting extraterritorial effect, and how to do so conditionally, when they wish to. It seems clear by now that Article 38 means exactly what it says.

An important practical question is that of the degree to which the extraterritorial threat of Article 38 is genuine. Given that any critical commentary by anyone, anywhere could be viewed by the Hong Kong or PRC authorities as a violation of the NSL, do people outside of Hong Kong or China have serious cause for concern?

I believe that critics of the Chinese or Hong Kong governments residing abroad are not in significantly greater danger than they were before the NSL came into effect *provided they stay out of Hong Kong and mainland China*—in the latter case, because of the possibility that mainland authorities could detain someone wanted by the Hong Kong authorities and in effect extradite them to Hong Kong.

It is unlikely that anyone residing in a country with an independent judiciary that is not subject to pressure from Chinese authorities would be extradited. Extradition treaties typically provide an

exception for political offenses and acts that are not a crime in the country from which extradition is sought,<sup>20</sup> and the authorities would have to be politically willing to start proceedings. And some jurisdictions with such treaties with Hong Kong have already suspended them,<sup>21</sup> with further suspensions or cancellations likely to follow.<sup>22</sup> Nevertheless, as the examples of Huseyin Celil,<sup>23</sup> Gui Minhai,<sup>24</sup> and Wang Bingzhang<sup>25</sup> show, those who may be wanted by Hong Kong or PRC authorities should stay out of countries whose governments are willing to cooperate with PRC authorities, regardless of whether or not an extradition treaty exists.

### About the Contributor



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### Notes

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<sup>1</sup> 中华人民共和国香港特别行政区维护国家安全法, promulgated and effective June 30, 2020, available at <https://perma.cc/FKD2-JCNR>; semi-official English version available at <https://perma.cc/YW3H-9LGD>.

<sup>2</sup> NSL, Articles 20, 21.

<sup>3</sup> NSL, Articles 22, 23.

<sup>4</sup> NSL, Articles 24-28.

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<sup>5</sup> NSL, Articles 29, 30.

<sup>6</sup> The requirement of “serious consequences” is a general feature of Chinese criminal law and simply shows, as do other features, the NSL’s genealogy.

<sup>7</sup> In the case of Peter Humphrey and Yu Yingzeng, for example, convicted for “unlawful obtaining of citizens’ personal information,” the judgment spent no time showing that the “unlawfulness” element of the offense was satisfied. See Donald Clarke, “Don’t Ask, Don’t Sell: The Criminalization of Business Intelligence in China and the Case of Peter Humphrey,” *UCLA Pacific Basin Law Journal* 33, no. 2 (2016): 109-153.

<sup>8</sup> NSL, Article 40.

<sup>9</sup> To understand where all these fit within Hong Kong’s administrative structure, see the organizational chart at <https://bit.ly/hkorgchart>.

<sup>10</sup> Chen Qingqing, “Liaison Office Director Luo Huining Appointed National Security Advisor to HK,” *Global Times*, July 3, 2020, <https://perma.cc/47FM-GSFL>.

<sup>11</sup> NSL, Article 44.

<sup>12</sup> NSL, Article 46.

<sup>13</sup> NSL, Article 49(4).

<sup>14</sup> NSL, Article 57.

<sup>15</sup> Grenville Cross, “Open Letter to the Prime Minister of the United Kingdom,” *China Daily (Hong Kong)*, June 16, 2020, <https://perma.cc/2LAA-DM7V>.

<sup>16</sup> “Gui Minhai: Hong Kong Bookseller Gets 10 Years Jail,” *BBC News*, Feb. 25, 2020, <https://perma.cc/X6GF-YB9Y>.

<sup>17</sup> Katie Hunt, “Chinese Human Rights Lawyer Pu Zhiqiang Gets Suspended Sentence,” *CNN*, Dec. 22, 2015, <https://perma.cc/3FUD-4RVD>. On the government’s use of “picking quarrels” against political targets, see Ryan Kilpatrick, “How ‘Picking Quarrels’ Became Beijing’s Go-To Weapon in Anti-Dissident Lawfare,” *Hong Kong Free Press*, Dec. 22, 2015, <https://perma.cc/F23J-DZYM>.

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<sup>18</sup> “Zhang Jialong,” China Human Rights Defenders, June 16, 2020, <https://perma.cc/6L8S-CXFM>.

<sup>19</sup> Article 293 of China’s Criminal Law specifies four activities that constitute "picking quarrels":

1. Willfully attacking another person where the circumstances are serious;
2. Chasing, intercepting, or cursing another person where the circumstances are serious;
3. Forcibly taking away, demanding, or willfully damaging or seizing public or private property, where the circumstances are serious;
4. Creating a disturbance in a public place, causing serious disorder.

<sup>20</sup> See, for example, the US-Hong Kong extradition treaty, described in Senate Executive Report 105-2, 105<sup>th</sup> Congress, 1<sup>st</sup> Session, Aug. 19, 1997, <https://perma.cc/L77P-S97T>.

<sup>21</sup> David Ljunggren, “Canada Suspends Its Extradition Treaty with Hong Kong, Eyes Immigration Boost,” Reuters, July 3, 2020, <https://reut.rs/2ZZUHG0> (Canada); “National Security Law: Australia Suspends Hong Kong Extradition Treaty.” BBC News, July 9, 2020, <https://perma.cc/KQ5H-83VB> (Australia).

<sup>22</sup> Sarah Zheng, “International Call to Halt Extradition Treaties with Hong Kong After China Imposes Tough National Security Law,” South China Morning Post, July 6, 2020, <https://perma.cc/3FLT-S39T>.

<sup>23</sup> “Huseyin Celil,” Amnesty International, n.d., <https://perma.cc/9JN8-RNXB>.

<sup>24</sup> Simon Denyer, “The Saga of Hong Kong’s Abducted Booksellers Takes a Darker Turn,” Washington Post, June 17, 2016, <https://perma.cc/4VC4-DT3H>; Anna Fifield, “Swedish Bookseller Gui Minhai Sold Critical Titles About Xi Jinping. China Jailed Him for 10 Years.” Washington Post, Feb. 25, 2020, <https://perma.cc/GR8M-6QWR>.

<sup>25</sup> “Wang Bingzhang: Political Dissident Still Imprisoned by China,” Inside These Walls (Canadian Broadcasting Corporation), Aug. 6, 2017, <https://perma.cc/L7AE-HT4P>.