

## The Unfolding Shape of the New National Security Law for Hong Kong

June 23, 2020

Following the decision taken by China's National People's Congress to adopt a new national security law (the "**Security Law**") for the Hong Kong Special Administrative Region ("**Hong Kong**") on May 28, the Standing Committee of the National People's Congress (the "**Standing Committee**") met recently for the first time to consider the terms of the new legislation.

There had been speculation that the draft Security Law would be published at the conclusion of the Standing Committee session on June 20 to allow for a brief period of consultation on the proposed legislation. That publication did not occur and latest reports in Hong Kong suggest that the Security Law will be passed by the Standing Committee on June 30 and only then will the law be published.

In the meantime, the Xinhua News Agency, a China state-run media outlet, released a statement on June 20 from a working group of the Standing Committee (the "**Statement**") with some detailed information about the Security Law. We summarise below certain key points which are mentioned or confirmed in the Statement.\*

### Preserving National Security

- The legislation is detailed, with six chapters and 66 articles. It is characterized as a "*comprehensive law with substantive, procedural, and organizational legal content.*"
- The Central People's Government of the People's Republic of China ("**CPG**") has fundamental responsibility for matters of national security, as well as constitutional responsibility for Hong Kong.
- The administrative, legislative and judicial organs of Hong Kong are required to prevent, stop and punish conduct endangering national security in accordance with relevant legal stipulations.
- Hong Kong shall employ "necessary" measures to strengthen the oversight and management of schools, social organizations and other matters related to national security.

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## Constitutional protections

- One of the six chapters of the Security Law is directed to the topic of ensuring that the rule of law is preserved in the pursuit of national security.
- Specifically, the freedoms of speech, the press and publication, association, assembly and demonstration are referred to, as are the Hong Kong Basic Law (Hong Kong's mini-constitution) and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as applied to Hong Kong.

## National Security Governance and Enforcement Structures

- Hong Kong will establish a National Security Preservation Commission (the “**Commission**”), which will have major responsibility for preserving national security in Hong Kong, but will be accountable to, and subject to oversight from, the CPG.
- The Commission will be chaired by the leader of the Hong Kong government (the “**Chief Executive**”) and other members will include various identified Hong Kong public officials. The Commission will function through a secretariat led by a Secretary General who will be nominated by the Chief Executive, but appointed by the CPG. Among other things, the Commission will promote the establishment of legal and enforcement mechanisms for preserving national security.
- In addition, the Hong Kong government will establish a department for preserving national security, as will the Department of Justice (for policing and prosecuting crimes endangering national security).
- The CPG will establish an Office for the Preservation of National Security in Hong Kong (the “**CPG Office**”) “*to lawfully perform duties for the preservation of national security and exercise relevant powers*”. Part of the remit of the CPG Office will be to “*put forward comments and recommendations on major strategies and important policies for the preservation of national security; oversee, guide, coordinate and support [Hong Kong's] performance of its duties to preserve national security; collect and analyse national security intelligence information; and handle crimes endangering national security in accordance with the law.*”
- CPG Office personnel will abide by both national and Hong Kong local laws.

## Crimes

- Four types of criminal conduct are identified. They are described as, “*the crime of state separatism, the crime of subverting state power, the crime of terrorist activities and the crime of colluding with foreign or overseas forces to endanger national security.*” No additional insights about these crimes are provided – the Statement says that relevant provisions of the legislation will clearly set out the specific constituent elements of the criminal conduct and the corresponding criminal responsibility.

## Enforcement and Jurisdiction

- Except in “specified circumstances”, Hong Kong is to exercise jurisdiction over national security cases.
- For cases falling within Hong Kong's jurisdiction, both the Security Law and Hong Kong local law shall apply to procedural matters related to the opening of cases, investigations, prosecutions and the enforcement of penalties. Further, such cases

will be subject to Hong Kong's public prosecutions regime, but they will be tried by a special pool of judges nominated by the Chief Executive from among the individuals who currently serve as, or are former, magistrates and judges in Hong Kong.

- In “specified circumstances”, the CPG Office and “relevant State organs” will exercise jurisdiction in relation to national security cases - anticipated to involve “*an extremely small set of crimes*”. Preserving jurisdiction over these crimes is described as being, “*an important manifestation of the CPG’s comprehensive power of governance, conducive to supporting and strengthening enforcement and judicial work in Hong Kong to preserve national security, and conducive to avoiding the occurrence of state of emergency situations, as provided for in Article 18, paragraph 4 of the Hong Kong Basic Law.*” Article 18, paragraph 4 of the Basic Law refers to a state of war or state of emergency by reason of “turmoil” within Hong Kong which endangers national unity or security and is beyond the control of the Hong Kong government.
- In the case of any inconsistency, the Security Law shall prevail over Hong Kong (local) law. The Security Law is also subject to interpretation by the Standing Committee.

While the Statement takes us several steps closer to an understanding of the overall shape of the Security Law and confirms many of the features of the legislation that have been rumored for some weeks now, it reveals very little of substance about some core aspects of the law, such as the true scope of the four types of criminal conduct. It also raises questions about other matters of significance, such as the extent of the powers the CPG can and will exercise in practice through the auspices of the CPG Office, as well as the types of cases that may be caught by the “specified circumstances” carve-out and, as such, would be subject to CPG jurisdiction (and how such jurisdiction would be exercised in practice).

Some clarity on these and other matters may arrive as and when the text of the Security Law is published, possibly in a matter of days from now when the legislation is passed by the Standing Committee. However, it is more likely that a complete picture will emerge only once the new regime takes effect and the various enforcement mechanisms are operational.

It is understood that the Standing Committee will meet again from June 28 to 30. Based on the latest reports, we expect the Security Law to be back on the agenda for that session, at which time it may well be adopted.

Meanwhile, in terms of the international reaction, the Trump Administration recently indicated that it is awaiting additional information about the Security Law and shall be closely monitoring the Legislative Council elections in Hong Kong scheduled for September to determine any executive action. The Administration and other U.S. officials have referred to a number of possible responses, but no specific proposals have been announced at this time.

*\*The authors wish to acknowledge use of an English translation of the Xinhua News Agency-released Statement published by China Law Translate and available on [www.chinalawtranslate.com](http://www.chinalawtranslate.com).*