

Hong Kong Security Law

Introduction

1. This law is a momentous piece of legislation. It alters the relationship between Hong Kong and mainland China. It appears to breach the terms of the Sino-British Declaration, which is a binding international treaty.
2. It creates new offences, some of which are vaguely defined and which carry heavy minimum penalties. It embeds the mainland Chinese security apparatus in the prevention, investigation and prosecution of these offences. It creates a special department in the Hong Kong police with wide powers. It requires special prosecutors to be appointed, headed by a person approved by mainland China. It removes judicial review of domestic decision makers and prevents it in relation to the designated mainland Chinese decision makers in Hong Kong.
3. In so far as the offences are to be tried by Hong Kong courts the judges (at first instance and at each appeal level) must be designated and a designation lasts only a year. A judge may be removed from the list on the basis of statements or acts that are vaguely defined. The threshold before a trial 'shall' be in private is low. There are strict secrecy provisions that appear to apply to all involved, including defence counsel.
4. The law permits the new mainland Chinese security apparatus in Hong Kong to transfer a trial to the mainland Chinese courts on a potentially wide discretionary basis.

The Offences

5. It is right to say that some of the offences cover ground that we would regard as criminal also. It is also right to add that some of the activities prohibited are unlikely to occur regularly (for example some of the activities criminalised by Article 20 (Secession) - although the Hong Kong Bar Association has expressed concerns about this also).
6. The following are the more concerning offence creating provisions:

- (a) Article 22 creates the offence of Subversion. It includes the following:

A person who organises, plans, commits or participates in any of the following acts by force or threat of force or other unlawful means with a view to subverting State power shall be guilty of an offence:

...

(3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body or central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region or;

(4) attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

A person who is a principal offender or a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; a person who actively participates in the offence shall be sentenced to fixed-term imprisonment of not less than three years...

[Article 23 creates liability as a secondary party]

(b) Articles 24 to 27 deal with 'terrorism'. Article 24 includes the following:

'A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:

...

(5) other dangerous activities which seriously jeopardise public health, safety or security.

A person who commits the offence causing serious bodily injury, death or significant loss of public or private property shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; in other circumstances, a person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.

Article 25 includes:

'A person who organises or takes charge of a terrorist organisation shall be guilty of an offence and shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years, and shall be subject to confiscation of property; a person who actively participates in a terrorist organisation shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.....

For the purpose of this Law, a terrorist organisation means an organisation which commits or intends to commit the offence under Article 24 of this Law or participates or assists in the commission of the offence.'

[Articles 26 and 27 contain wide party provisions. Article 28 preserves existing HKSAR terrorism laws.]

(c) Article 29 criminalises assistance to Hong Kongers in widely defined circumstances. It provides in part:

'...a person who requests a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the People's Republic of China, or conspires with a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the People's Republic of China, to commit any of the following acts shall be guilty of an offence:

...

(2) seriously disrupting the formulation and implementation of laws and policies by the Government of the Hong Kong Special Administrative Region or by the Central People's Government, which is likely to cause serious consequences;

(3) rigging or undermining an election in the Hong Kong Special Administrative Region, which is likely to cause serious consequences;

...

(5) provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the Government of the Region, which is likely to cause serious consequences.

A person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years.

The institution, organisation and individual outside the mainland, Hong Kong and Macao of the People's Republic of China...shall be convicted and punished for the same offence.

(d) The Law purports to apply to anybody, wherever they are:

Article 38 provides:

'This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.'

7. The Law asserts both that:

Article 4 (in an apparent reference to the obligations China agreed to in the Sino-British Joint Declaration and its other international obligations):

'...the Rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall be protected in accordance with the law'

Article 5 (in an apparent reference to the 'thin' definition of the rule of law: see *Bingham 'The Rule of Law'* at page 66):

'The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person 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'

8. On any objective view, the offence creating provisions do not comply with these principles. There are at least three objections to them. First, they are vaguely drafted. They do not set out clearly what is criminal conduct and what is not. They are capable of wide interpretation. Secondly, the sentencing provisions are vague. It is not clear what constitutes a 'grave' violation and what does not. The difference from a defendant's point of view is significant. Thirdly, they provide for draconian and mandatory minimum sentences. The sentence levels are disproportionate to the activity criminalised and the narrowness of the discretion will work serious injustice in many cases.

Prevention, investigation and prosecution – the Hong Kong agencies

(a) The Committee for Safeguarding National Security of the Hong Kong Special Administrative Region

9. Hong Kong is required to establish a 'Committee for Safeguarding National Security' which *'shall be under the supervision of and accountable to the Central People's Government'* (Article 12).
10. It is to be chaired by the Chief Executive and include the Chief Secretary, the Financial Secretary, the Justice Secretary, the Secretary for Security, the Commissioner of Police, the head of the department for safeguarding national security of the Hong Kong Police (see below), the Director of Immigration, the Commissioner of Customs and Excise and the Director of the Chief Executive's Office (Article 13).
11. It must have a secretariat headed by a Secretary General appointed by Beijing on the nomination of the Chief Executive (Article 13). It must also have a National Security Advisor designated by Beijing to *'provide advice on matters relating to the duties and functions of the Committee'*. He or she *'shall sit in on meetings of the Committee'* (Article 15).
12. It will have wide duties and functions (see Article 14). These include: *'...advancing the development of the legal system and enforcement mechanisms...for safeguarding national security'* and *'coordinating major work and significant operations for safeguarding national security...'*
13. Finally, it is to be secret and unaccountable. *'No institution, organisation or individual shall interfere with the work of the Committee. Information relating to the work of the Committee shall not be subject to disclosure. Decisions made by the Committee shall not be amenable to judicial review.'* (Article 14).

(b) The Department for Safeguarding National Security of the Hong Kong Police Force

14. By Article 16, the police force is required to establish this department. Its head must be appointed in consultation with the 'Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region' (see below – that is to say, Beijing). He or she must swear this apparently internally inconsistent oath:

'to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, swear allegiance to the Hong Kong Special Administrative Region of the

People's Republic of China, and swear to abide by the law and to observe the obligation of secrecy'

The department 'may recruit' from outside Hong Kong.

15. Its functions will include, intelligence gathering, enforcement and operations for safeguarding national security, investigating offences and '*conducting counter-interference investigation...*' (Article 17). The police powers are set out in Article 43. It bears quoting in full:

Article 43 *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, and may also take the following measures:*

(1) search of premises, vehicles, vessels, aircraft and other relevant places and electronic devices that may contain evidence of an offence;

(2) ordering any person suspected of having committed an offence endangering national security to surrender travel documents, or prohibiting the person concerned from leaving the Region;

(3) freezing of, applying for restraint order, charging order and confiscation order in respect of, and forfeiture of property used or intended to be used for the commission of the offence, proceeds of crime, or other property relating to the commission of the offence;

(4) requiring a person who published information or the relevant service provider to delete the information or provide assistance;

(5) requiring a political organisation of a foreign country or outside the mainland, Hong Kong and Macao of the People's Republic of China, or an agent of authorities or a political organisation of a foreign country or outside the mainland, Hong Kong and Macao of the People's Republic of China, to provide information;

(6) upon approval of the Chief Executive, carrying out interception of communications and conducting covert surveillance on a person who is suspected, on reasonable grounds, of having involved in the commission of an offence endangering national security; and

(7) requiring a person, who is suspected, on reasonable grounds, of having in possession information or material relevant to investigation, to answer questions and furnish such information or produce such material.

The Committee for Safeguarding National Security of the Hong Kong Special Administrative Region shall be responsible for supervising the implementation of the measures stipulated in the first paragraph of this Article by law enforcement authorities including the department for safeguarding national security of the Hong Kong Police Force.

The Chief Executive shall be authorised, 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 the measures under the first paragraph of this Article.

16. A number of points can be made about these powers. First, they are in addition to powers that already exist in Hong Kong and which permit most of these activities with appropriate safeguards. Secondly, they are intrusive powers that ordinarily require either an application to a court before they are exercised or are reviewable by a court afterwards. It is not clear from this law whether and to what extent there will or can be judicial intervention. Thirdly, the covert surveillance power is expressly dependent on political approval. Fourthly, the supervisory body is the Hong Kong Committee referred to above, which is both secret and not susceptible to judicial review.

(c) The Specialised Prosecution Division of the Department of Justice

17. The DOJ is required to set up this division. Its function will be the '*...prosecution of offences endangering national security and other related legal work.*'. All the prosecutors require the consent of the Hong Kong Committee for Safeguarding National Security described above for appointment. The head of the division, like the head of the police department referred to above, must be appointed in consultation with the 'Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region' (see below – that is to say, again, Beijing). He or she must take the same apparently inconsistent oath.

(d) Final provision

18. Article 19 contains the following ominous provision. The Financial Secretary shall: '*...appropriate a special fund to meet the expenditure for safeguarding national security and approve the establishment of relevant posts, which are not subject to any restrictions in the relevant provisions in force in the Region.*'

The Courts

19. The sections on the Courts are extremely concerning. They are plainly and obviously incompatible with basic principles of the rule of law. The Chief Justice of the Court of Final Appeal has issued a statement aimed at trying to allay some concerns. He points out that the judges will come from the existing judiciary appointed on the recommendation of the Judicial Officers Recommendation Commission (which is chaired by the Chief Justice). However, the provisions of the Law are concerning.
20. They include (the principal provision is Article 44):
 - (a) The Chief Executive of Hong Kong designates judges to hear '*cases concerning offence endangering national security.*' She 'may' consult the Hong Kong Committee for Safeguarding National Security and the Chief Justice. It is clear that each level of the court hierarchy up to the Court of Final Appeal will have 'designated judges' who will have the exclusive power to hear cases involving '*offences endangering national security.*' These provisions are a breach of the principles of the separation of powers and the rule of law. The allocation of judicial business is a matter for the courts, not the executive;

(b) The term of office of a designated judge shall be one year. This is a breach of a fundamental principle of the rule of law: judicial independence. Judges should have fixed tenure of sufficient length that their decisions are not influenced by considerations of re-appointment (this has been recognised in English law at least since the Act of Settlement). This and the earlier provision can only be to permit the Hong Kong (and also the mainland Chinese) government to seek to control judicial decision making. This is utterly and completely incompatible with the rule of law;

(c) As if this were not a sufficient 'control' over the judiciary, the Law goes further and provides vague and easily manipulated grounds for removing judges from the designated list. It provides that:

'A designated judge shall be removed from the designated list if he or she makes any statement or behaves in any manner endangering national security during the term of office.'

(d) The control is wider. The Chief Executive also has the binding power to decide which cases fall within these provisions. Article 47 provides:

'The Courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The certificate shall be binding on the courts.'

(e) The Chief Executive of Hong Kong has the power to direct that a case shall be tried without a jury (Article 46). Again, the rule of law requires that decisions such as this in an individual case be taken by a judge not a politician;

(f) *When circumstances arise such as the trial involving State secrets or public order, all or part of the trial shall be closed to the media and the public but the judgment shall be delivered in open court'*. (Article 41). Given that most cases will, by definition, involve public order, one can envisage that this power might be widely used;

(g) Finally, it is not clear that the secrecy provisions are compatible with a fair trial. Article 63 requires judges and prosecuting authorities to: *'...keep confidential State secrets, trade secrets or personal information which they come to know in the process of handling such cases'* and *'a lawyer who serves as defence counsel or legal representative shall keep confidential state secrets, trade secrets or personal information which he or she comes to know in the practice of the law.'*

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

21. This will be established by 'the Central People's Government' and its staff will come from *'relevant national security authorities under the Central People's Government'* (Article 48). It will be funded by Beijing (Article 51). One of its functions will be to *'strengthen working relations and co-operation with...the Hong Kong Garrison of the Chinese People's Liberation*

Army.’ (Article 52). Another will be to *‘establish a mechanism of coordination with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region to oversee and provide guidance on the work of the Hong Kong Special Administrative Region for safeguarding national security’* (Article 53). Neither its acts nor its staff acting under the Law are subject to the jurisdiction of Hong Kong (Article 60).

22. By Article 49 it has significant powers. One is to handle cases under the law. By Articles 55 to 57, it may take over a case and have it prosecuted in mainland China according to mainland Chinese procedural law.

23. Article 55 says that it *‘shall, upon approval by the Central People’s Government of a request made by the Government of the Hong Kong Special Administrative Region or by the office itself, exercise jurisdiction over a case concerning offence endangering national security under this Law, if:*

(1) The case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the Region to exercise jurisdiction over the case;

(2) A serious situation occurs where the Government of the Region is unable to effectively enforce this Law; or

(3) A major and imminent threat to national security has occurred.’

Conclusion

24. This law is a significant development in relations between Hong Kong and mainland China. It contains provisions that are incompatible with the rule of law and, apparently, China’s international commitments. It appears to have been motivated by protests that, although sometimes descended into violence that existing laws could deal with, were seeking greater democratic rights.