

# Update on Hong Kong National Security Law: first judgment addressing constitutional matters delivered

26 August 2020

On 21 August 2020, in *Tong Ying Kit v HKSAR* [2020] HKCFI 2133 (the "Judgment"), the Hong Kong Court of First Instance handed down its first judgment addressing important constitutional matters arising under the Law of the People's Republic of China on Safeguarding National Security (the "NSL"). This case is the first opportunity for a Hong Kong court<sup>1</sup> to assess provisions under the NSL, in particular, a constitutional challenge to the detention provisions under Article 42 of the NSL, and offers insights into how the Hong Kong courts may analyse other provisions of the NSL in the future.

Tong Ying Kit faces charges of various offences including inciting secession and engaging in terrorism under the NSL. This application concerned his writ of habeas corpus challenge to a decision of the Chief Magistrate to deny him bail. Tong Ying Kit argues that he has been unlawfully denied bail on the basis of what he describes as an unconstitutional "no bail" provision in Article 42(2) of the NSL. He also sought to challenge the constitutionality of Articles 20, 21, 24 and 44 of the NSL.

The Judges swiftly dismissed the habeas corpus application. According to the Judges, the application should have been brought as an application for review of a refusal of bail under s.9J of the Criminal Procedure Ordinance (the "CPO"). Further, the Chief Magistrate who originally denied bail was not acting outside his lawful authority (the key tenet of a habeas corpus application).

However, the Court helpfully took the opportunity to address the constitutional challenges raised by Tong Ying Kit notwithstanding their decision to dismiss the application on essentially procedural grounds.

Crucially, the Judgment of Anderson Chow J and Alex Lee J has brought welcome clarity in respect of how the NSL is likely to be interpreted and implemented by the Hong Kong Courts. Most importantly, that Hong Kong courts will apply common law principles to the text of the NSL.

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<sup>1</sup> **Article 40** of the NSL states that the HKSAR shall have jurisdiction over cases concerning offences under the NSL except under the circumstances specified in **Article 55** (namely: (1) where the case is complex due to involvement of a foreign country or external elements making it difficult for the HKSAR to exercise jurisdiction; (2) a serious situation occurs where the HKSAR Government is unable to effectively enforce the NSL; or (3) a major and imminent threat to national security has occurred).

We summarize the key points below.

## Common Law interpretation

In our [client alert on 13 July 2020](#), we highlighted the apparent uncertainty as to whether the Hong Kong courts would apply a common law approach to interpretation of the NSL or whether the civil law approach would be favoured. This has been an area of concern for many organisations operating within Hong Kong who have long bestowed the virtues of Hong Kong's common law legal system.

In the Judges' comments in paragraph 49 of the Judgment the position appears to be clear (at least at first instance).

The Judges have confirmed unequivocally that the Hong Kong court should apply the **common law approach to interpretation of the NSL**, consistent with the approach which is applied in respect of the Basic Law. In reaching this view, the Judges commented:

*"...we consider that, as far as Hong Kong courts are concerned, we should continue to adopt the common law approach in the construction of the National Security Law. As authoritatively held by the Court of Final Appeal, the Basic Law, which is also a national law enacted by the NPC under the civil law system, should be construed using the common law approach [...]. If the Basic Law, which is right at the interface of "one country, two systems", is to be construed using the common law approach (a proposition that we are duty-bound to accept), we can see no valid basis to adopt any other approach in the construction of the National Security Law".*

In adopting this approach, the Judges analysed the relevant articles of the NSL in the context of other NSL articles and laws already in force under Hong Kong's local laws.

## Inconsistencies between Basic Law and NSL

We await the Hong Kong court's view as to the appropriate approach for addressing inconsistencies between the Basic Law and the NSL – because on the basis of the specific issues before the court in this case, the Judges considered that the Basic Law and NSL were sufficiently well aligned and therefore the question did not arise.

The Judges did however take the opportunity to posit the question of whether, for the purposes of Article 62 of the NSL, the Basic Law is properly a "*local law*", given it is a law which itself was promulgated by the NPC:

*"The question of the relative status of the Basic Law and the National Security Law, and how any inconsistency between the two which cannot be resolved by applying ordinary techniques of statutory interpretation should be dealt with by the court, is a question of fundamental importance. In this respect, although Article 62 states that "[t]his law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law", the answer to the question of whether the reference to "local laws" included the Basic Law was, understandably, left open by Mr Yu on the basis this question did not arise for*

*determination in the present case."*

This question may arise for proper judicial treatment at Tong Ying Kit's trial, if not before.

## **Fundamental rights**

As part of their analysis, the Judges held that: *"Article 42 ought, in our view, to be construed and applied, so far as reasonably possible, in a manner which is consistent with the protection of fundamental rights, including the right to liberty of the person under Article 28 of the Basic Law and Article 5 of the Hong Kong Bill of Rights"*.

Encouragingly, they noted further that:

- the presumption of innocence along with other fundamental rights enshrined in the Basic Law and the International Covenant on Civil and Political Rights as applied in Hong Kong through the Bill of Rights Ordinance, are expressly recognized in the NSL;
- the "...well-established approach of the court is to give a generous interpretation to the constitutional guarantee of rights, and a narrow interpretation to statutory provisions which impair liberty or restrict fundamental rights"; and
- the Court is under a duty to protect the fundamental rights accorded by the Basic Law and the Hong Kong Bill of Rights.

## **Mandatory terms of imprisonment vs exercise of independent judicial powers**

Tong Ying Kit argued that the creation of minimum terms of imprisonment in the NSL neutralizes the exercise of the independent judicial power of the HKSAR. The judges rejected this argument, noting that mandatory fixed punishments and ranges of sentences are already permissible under Hong Kong law and it is clear that Articles 20, 21 and 24 only prescribe ranges of sentences. They stated:

*"As a matter of principle, it is not objectionable for the legislature to prescribe a fixed punishment (eg life imprisonment in the case of murder in the HKSAR), or a range of sentences (including a maximum and minimum sentence) for any particular offence, leaving it to the judge to determine the appropriate sentence on the facts of any given case"*.

As such, they did not consider that Articles 20, 21 and 24 *"impermissibly interfere with the exercise of judicial powers in the HKSAR in relation to the sentencing of persons charged with and convicted of offences under those articles"*.

## **Independence of Chief Magistrate**

The Judges rejected Tong Ying Kit's argument that the Chief Magistrate is not "independent" merely because he is one of the designated judges appointed by the Chief Executive to handle cases concerning offences endangering national security under Article 44.

Noting that Judges are ordinarily appointed by the Chief Executive (albeit on the recommendation of the Judicial Officers Recommendation Commission), they stated: *"There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the National Security Law, the Chief Executive or the Government is in a position "to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists", or that the liberty of any member of the Judiciary in Hong Kong "in adjudicating individual disputes and in upholding the law and values of the constitution" is, or will be, interfered with by the Chief Executive exercising her power under Article 44"*.

They held that the effect of Article 44 is simply that a number of judges at different levels of the courts in Hong Kong are designated by the Chief Executive to handle cases concerning offences endangering national security, but the actual assignment of a judge to hear any particular case remains the sole responsibility of the Judiciary. Moreover: *"Judges are duty-bound by the Judicial Oath to discharge their functions strictly in accordance with the law, and to be completely free of any interference from, or influence by, the Government"*.

## Inaccessible law

Finally, the Judges rejected Tong Ying Kit's argument that the NSL is inaccessible because it is only (formally) rendered in the Chinese language. They noted that it is not the only law in Hong Kong that is rendered formally in Chinese only and in any event, whilst English is an official language in Hong Kong, Article 9 of the Basic Law, merely states that in addition to the Chinese language, English "may also be used as an official language" (and of course, in the event of discrepancy between the Chinese and English language versions of the Basic Law, the Chinese version prevails).

## Conclusion

These determinations are only the beginning of the legal challenges that the NSL may face in Hong Kong courts, both in this and future cases. It remains to be seen how the Hong Kong Courts of Appeal and Final Appeal and the NPC might view the analysis and conclusions of the Court of First Instance if given the opportunity. Moreover, questions of the constitutionality of the NSL and how it interacts with the Basic Law will no doubt be examined further and more extensively in October at Tong Ying Kit's trial.

For now, this case provides early insights into how the Hong Kong Judiciary will continue to use and adopt common law principles to address constitutional challenges regarding the NSL and a fascinating forensic interpretive analysis by the learned Judges.

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