

10 things to know about Hong Kong's national security law - new crimes, procedures and agencies

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On June 30, China's top legislature enacted Hong Kong's national security law. Its text was revealed to the public late at night – only in Chinese.

First announced in May, the unprecedented criminal legislation was drafted in Beijing, rapidly tabled behind closed doors, and bypassed any local legislative oversight.

The city's Secretary for Justice admitted the law would not be compatible with the city's common law tradition, while critics argued it spelt the end of the One Country, Two Systems framework.

Over the past month, the spectre of the law led the US to impose sanctions and trade restrictions on Hong Kong. The UK pledged to extend privileges to the city's "British National (Overseas)" passport holders, while Taiwan established a special office for humanitarian assistance.

As Tuesday 30 neared, several Hong Kong opposition groups disbanded, activists fled overseas, and ordinary citizens scrubbed their social media accounts.

Beijing has cited the need to plug a "loophole" whereby Hong Kong served as a base for endangering China's national security, claiming laws to criminalise sedition, foreign interference and terrorism was necessary to prevent the city's way of life. Pro-establishment figures have nevertheless likened the law to a "second handover".

TEN KEY POINTS

1. Broad offences

The national security law creates four offences, namely secession, subversion, terrorism and collusion with foreign forces to endanger national security. Each offence is widely-defined.

- **Secession** is defined in **Article 20** as *“to participate, plan or implement... acts of secession... whether or not force or the threat of force is used.”*

Acts of secession refer to the secession of Hong Kong or any other part of China from the People’s Republic, unlawfully changing the status of Hong Kong or any other part of China, or turning over Hong Kong or any other part of China to foreign rule. Read literally, the article may prohibit the advocacy of independence or self-determination for Hong Kong.

- **Subversion**, meanwhile, is defined in **Article 22** as *“to participate, plan or implement... acts of subversion of the state, whether by force or other unlawful means.”*

Acts of subversion refer to overthrowing or damaging either the *“fundamental system”* of the People’s Republic of China under its constitution, or the state organs of China or Hong Kong. These acts also refer to *“serious interference, obstruction or damage”* to the lawful exercise of powers by the state organs of China or Hong Kong, or attacking or damaging the venues and facilities by which Hong Kong’s organs exercise their functions.

The latter clause may have been inspired by the storming of the Legislative Council or the defacement of the Chinese emblem by protesters last July.

- **Terrorism** is defined in **Article 24** as *“to participate, plan, implement or participate in implementing acts that cause or intend to cause serious societal harm – with the aim of threatening the Chinese or Hong Kong governments, an international organisation or the public.”*

The acts in question include: Serious personal violence; using explosives, arson or poison, radioactive materials or diseases; destroying transportation and power facilities (among others); serious interference or destruction to infrastructure; or serious harm to public health and safety using other dangerous means.

The anti-extradition bill protests last year saw some of the acts mentioned above. While local and national officials have increasingly described protest violence as *“terrorism”*, no charges under the existent United Nations (Anti-Terrorism Measures) Ordinance have been imposed so far.

- **Collusion with foreign forces** is initially defined in **Article 29** as *“to steal, spy, bribe or unlawfully provide state secrets or intelligence related to national security on behalf of foreign institutions, organisations or agents.”*

A second definition of collusion is to request foreign institutions, organisations or agents to implement, conspire or support a number of acts: threatening war or force against China; enacting laws and policies that cause serious obstruction or serious consequences to Hong Kong or China; manipulating or damaging elections; sanctions, blockades or other hostile activities; and using unlawful means to cause hatred among Hongkongers towards the Hong Kong or Chinese government.

Many Hongkongers have lobbied foreign governments to sanction local and mainland officials over the past year – notably for the US’s Hong Kong Human Rights and Democracy Act, enacted in December. In January, Chief Executive Carrie Lam said she felt there was *“something at work”* behind the West’s interest in the Hong Kong protests though said she did not have conclusive evidence.

To incite, assist, procure or provide financial or property aid to the four aforementioned offences all amount to a violation – perhaps placing donors to opposition political groups at risk.

2. Minimum sentences

For the four offences, “*serious*” cases will generally attract penalties of at least 10 years and up to life imprisonment. Regular cases will attract penalties of a minimum of three years behind bars and a maximum of 10 years.

Pursuant to **Articles 31 and 35**, convicted legislators, district councillors, civil servants, judges and other officials can be disqualified from their posts. Monetary penalties and license-revocation are also stipulated in relation to convicted companies or organisations.

There is discretion to reduce sentences for offenders who voluntarily cease or prevent offences, surrender to authorities, or reveal offences committed by others, pursuant to **Article 33**.

3. Overriding Hong Kong law

Article 62 provides that the security law overrides local Hong Kong law if there are inconsistencies. One major inconsistency is **Article 42**, which states that bail shall not be granted to suspects, “*unless the judge has convincing reasons to believe he/she will not continue acts that endanger national security.*” Hong Kong’s Criminal Procedure Ordinance legislates a presumption in favour of bail as part of the common law presumption of innocence.

The power to interpret the national security law lies with the Standing Committee of the National People’s Congress, according to **Article 65**.

In contrast to Article 158 of the Basic Law – which states that Hong Kong’s mini-constitution can be interpreted by its own courts – there is no clause authorising local courts to interpret the national security law.

Whether courts can apply the new law in a manner consistent with human rights safeguards in Basic Law is therefore doubtful. Safeguards in the Bill of Rights Ordinance are referred to in **Article 4**, but the ordinance is local legislation.

The right to legal representation is legislated in **Article 58**, as is the right to a trial “*as early as possible.*”

There is no provision stating that the law is retrospective, as was widely feared. **Article 39** states that offences and sentences will apply to acts after the law takes effect.

4. Secrecy and closed trials?

In general, **Article 63** requires law enforcement, judges and other personnel – including defence lawyers – must not disclose “*state secrets*”.

Trials may be closed to the public for reasons such as maintaining state secrets and public order, pursuant to **Article 41**.

While jury trials are permitted, **Article 46** allows the Secretary for Justice to convene a panel of three judges for trial instead on grounds related to state secrets or external/diplomatic factors. However, whether or not a trial involves state secrets is decided by the Chief Executive, not the court, pursuant to **Article 47**.

5. Chinese organs and agents

Article 48 mandates that the Chinese government will establish a National Security Office (NSO) in Hong Kong, whose duties notably include the collection and analysis of national security intelligence and the “*processing*” of national security cases.

According to **Articles 60 and 61**, agents of the NSO are not bound by Hong Kong’s legal jurisdiction while they are performing their duties. In fact, departments of the Hong Kong government are required to cooperate and prevent any obstruction of their work.

The NSO is authorised to “*take necessary measures*” to strengthen “*management of and services to*” NGOs and the media, pursuant to **Article 54**.

6. Jurisdiction, extradition and extraterritoriality

There is no literal reference to extradition to China in the national security law. Hong Kong is given the power to prosecute offences in its own courts as per **Article 40**.

However, **Article 55** stipulates three exceptions: Where Hong Kong has “*realistic difficulties*” due to the involvement of foreign forces, where it has no effective means to enforce the law due to the seriousness of the situation, and where China is faced with grave realistic threats.

Under these three exceptions, China’s Supreme People’s Procuratorate can name “*relevant procuratorates*” to conduct prosecutions, while the Supreme People’s Court can name “*relevant courts*” for trial.

This process would take place under mainland Chinese criminal law, pursuant to **Article 56**. The spectre of extradition may therefore have been implied.

Another notable jurisdictional issue arises from Article 38, which states that non-Hong Kong residents can be prosecuted for their acts outside of Hong Kong.

* Read literally, critics of China – including Hong Kong’s large diaspora – may face legal risks if they enter or return to the city.

7. New police powers

Under **Article 16**, a new National Security Department will be created within the Hong Kong Police Force, which must keep its operations secret.

In addition to existing police powers, **Article 43** grants national security police officers a range of broad powers, including: Search powers, restricting overseas travel, freezing and confiscation of property, requiring services providers to delete information and provide assistance, requiring foreign political organisations to provide information, secret surveillance and interception of telecommunications, and requiring people implicated in cases to answer questions or provide information.

* Some of these powers may be inconsistent with the common law right to silence, but as previously mentioned, the national security law overrides local legislation.

8. Hand-picked judges

Article 44 empowers the Chief Executive to pick judges and magistrates from all levels of Hong

Kong's courts to deal with national security cases for a term of one year. The views of the Chief Justice may be considered.

However, judges who have "*made statements or engaged in behaviour endangering national security*" may not be picked.

* It is unclear whether the anonymous judges who have spoken to Reuters in previous months with regards to the extradition bill and the national security law may fall foul of this rule.

There is no reference to prohibiting foreign judges from hearing cases, as was once suggested.

9. Other new organs

A new National Security Commission will be set up and chaired by the Chief Executive, while an advisor from the Chinese government will be delegated to it. Its budget will not be subject to Legislative Council supervision.

Furthermore, in keeping with **Article 14**, the Commission's decisions cannot be challenged by judicial review.

The Department of Justice will also set up a division to handle national security cases, which must keep its operations secret. The Chief Executive is required to submit annual reports on national security to the Chinese government.

10. National security education

According to **Articles 9 and 10**, the Hong Kong government is required to promote national security education through schools, social groups, the media and the internet.

* With a number of public school teachers already having been disciplined, suspended or dismissed due to their perceived support for last year's protests, government control over school curriculum can be expected to intensify.

LAW IN FULL

<https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law/>

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P.S.

<https://hongkongfp.com/2020/07/01/explainer-10-things-to-know-about-hong-kongs-national-security-law-new-crimes-procedures-and-agencies/>