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The National Security Law's Challenges to Criminal Justice in Hong Kong

Hong Kong can meet the challenges, if given space to do so

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To understand the potential impact of Hong Kong's new National Security Law, we must be clear about what preceded it. For most of the British colonial period, criminal justice in Hong Kong was rather brutish and harsh. A recent book by historians May Holdsworth and Christopher Munn, *Crime, Justice and Punishment in Colonial Hong Kong*, gives a detailed account of this rich history. The Hong Kong Bill of Rights Ordinance (BORO) of 1991 introduced a due process model in which the fairness of trial became its central feature. The BORO domesticated the international fair trial norms embodied in the International Covenant on Civil and Political Rights. Hong Kong thus joined a community of nations that mutually exchanged and contributed to human rights jurisprudence. This trend was reinforced after July 1, 1997, when China resumed sovereignty.

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China maintained the constitutional status of the BORO and conferred additional rights and freedoms. Courts adopted a strong approach to constitutional review, striking down or remedially interpreting unconstitutional legislation. For the most part, our courts approached these instruments with a large measure of common sense. They have applied a sophisticated four-part test of proportionality to ensure social interests are carefully balanced with individual rights in a contextualized manner. Moreover, Hong Kong has remained connected to the global common law community through its system of appointing distinguished senior judges from leading common law countries to serve as non-permanent Hong Kong judges on the Court of Final Appeal (CFA). More than 95 percent of CFA cases are decided with a sitting foreign judge, and the CFA's criminal law jurisprudence has maintained and extended basic common law principles, which are mostly protective of defendants' interests.

Unlike other places, however, Hong Kong has been unable to bring about comprehensive reforms of criminal offences, procedures and rules of evidence due to political dysfunction in its law-making process. This has been both positive and negative in that we have avoided "get tough on crime" politics but lacked constructive reforms of the criminal law. In many ways we are stuck in a time warp of the British criminal justice system of the 1970s. Thus the enactment of the NSL without any genuine public consultation or debate, in less than five weeks from its public announcement, was received with both shock and awe in the community. The NSL

was shocking in that it defied all the conventions and principles of law-making in Hong Kong, but awesome in that the authorities managed to enact such a comprehensive and controversial piece of legislation in such short time and still have it regarded as law (some might say out of fear) in the community. Whether it will be regarded as a good law awaits to be seen. This will depend on how Hong Kong deals with the distinct challenges it presents to criminal justice and, perhaps more importantly, whether Hong Kong will be left to tackle these challenges on its own.

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Five distinct challenges can be identified. The first is the challenge of interpretation. Unlike existing criminal law legislation, which our courts can interpret with finality, the power of final interpretation of the NSL lies with the Standing Committee of the National People's Congress. As a national law, it has superiority over local laws, and these qualities make the NSL akin to the Basic Law. The first judgment on the NSL (*Tong Ying Kit v HKSAR* [2020] HKCFI 2133) reassures us that courts will interpret the new law according to common law principles, taking into account human rights norms. However, only judges designated by Hong Kong's chief executive can hear NSL cases, so the integrity of this designation scheme must be upheld and kept in check. We can only hope the Standing Committee will exercise restraint in interpreting the NSL as it generally has with Basic Law interpretations, ideally acting only on requests made by the CFA.

Secondly, there will be challenges to ensuring a fair trial as the NSL allows departures from the principle of open justice, the presumption of bail, the principle of trial by jury, and evidential proof. I am confident, however, that our courts will be able to balance the relevant considerations and reach results not too different from those in other common law jurisdictions when addressing similar issues. Indeed, sooner than expected the CFA will examine the NSL's bail provision (Article 42) in February 2021 after granting the prosecution leave to appeal the bail decision for Jimmy Lai Chee Ying, the founder of Apply Daily.

The third and fourth challenges are novel and will present difficulties for our courts. The NSL imposes a system of tiered mandatory minimum penalties which can result in sentences of between 10 years and life imprisonment for "principal" offenders. Our courts have held that grossly disproportionate sentences may violate the right to be free from arbitrary imprisonment (see *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415). But the safety valves in the NSL, which permit reduced penalties under limited conditions, may well save the law if judges are allowed sufficient discretion to ensure that justice can be done. Another challenge arises from the new warrantless police powers and the chief executive's power to authorize surveillance and interception. A major issue will be how these powers reconcile with existing Hong Kong constitutional principles of legal certainty and requiring prior judicial authorization when reasonably practicable.

Finally, there is the challenge of jurisdiction in two different senses. First the extraordinary breadth of extraterritorial jurisdiction cast by the law is exceptional for Hong Kong offences. But with the recent suspension of nine extradition

and ten mutual legal assistance treaties, there might not be many extraterritorial cases in the near future. Second, the new Mainland office established in Hong Kong by the NSL can assume jurisdiction over a case and effectively have the person transferred to and tried on the Mainland. Although the criteria for intervention contemplate instances where the Hong Kong authorities are unable to act or the imminent risk is great, the Mainland office will need to exercise restraint to be consistent with the "One Country, Two Systems" model under which Hong Kong was returned to Chinese rule.

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