

Unpacking Hong Kong's National Security Law

(1) PRACTICAL ISSUES (2) A HIGH-LEVEL COMPARATIVE ANALYSIS WITH NATIONAL SECURITY LAW IN THE US AND THE UK

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Key questions in practice

1. How much of this law is new? How does it compare to the position in the UK and the US?
2. How do the investigative and trial processes under the HK NSL compare to processes in other countries? How will investigative processes change compared to pre-July 1, 2020?
3. Are investigations subject to confidentiality obligations? (cf. s.378, SFO)
4. How likely is it that cases will be investigated and prosecuted under Article 55?
5. Are the substantive offences similar to those in other jurisdictions?
6. Do organizations have an active obligation to monitor staff, clients and counterparties for potential breaches?
7. Can corporates be liable? Can corporates be vicariously liable for offences committed by their representatives? When may directors be liable?
8. Is proof of mens rea required?
9. What is the respective status of legal professional privilege and privilege against self-incrimination under the HK NSL?
10. Article 29: How should requests for information by foreign regulators and obligations under foreign law to comply with their sanctions programs be dealt with?
11. What is a State secret?

NSL Overview

NEW CENTRAL AND HK GOVERNMENT BODIES AND INITIATIVES

NPC Standing Committee added HK NSL to Annex III of HK Basic Law; HKSAR government applied locally through promulgation on June 30, 2020.



Article 48 of the NSL provides for the establishment of the Office for Safeguarding National Security of the Central People's Government in the HKSAR ("Central Government Office"), responsible for:

- "analysing and assessing developments . . . and providing opinions and making proposals on [strategies and policies]" regarding national security;
- "overseeing, guiding, coordinating with, and providing support to the Region in the performance of its duties for safeguarding national security";
- "collecting and analysing intelligence and information concerning national security"; and
- "handling cases concerning offence endangering national security in accordance with the law [presumably under Article 55]" (Article 49).



HKSAR government shall establish National Security Committee:

- Committee is under supervision of and accountable to the Central People's Government (Article 12).
- Chief Executive serves as chairperson, with other members from HK government (Article 13).
- "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).
- Central People's Government shall designate a National Security Adviser (Article 15).



HK Police Force shall establish a national security department:

- Department Head appointed by Chief Executive after seeking the opinion of the Central Government Office (Article 16).

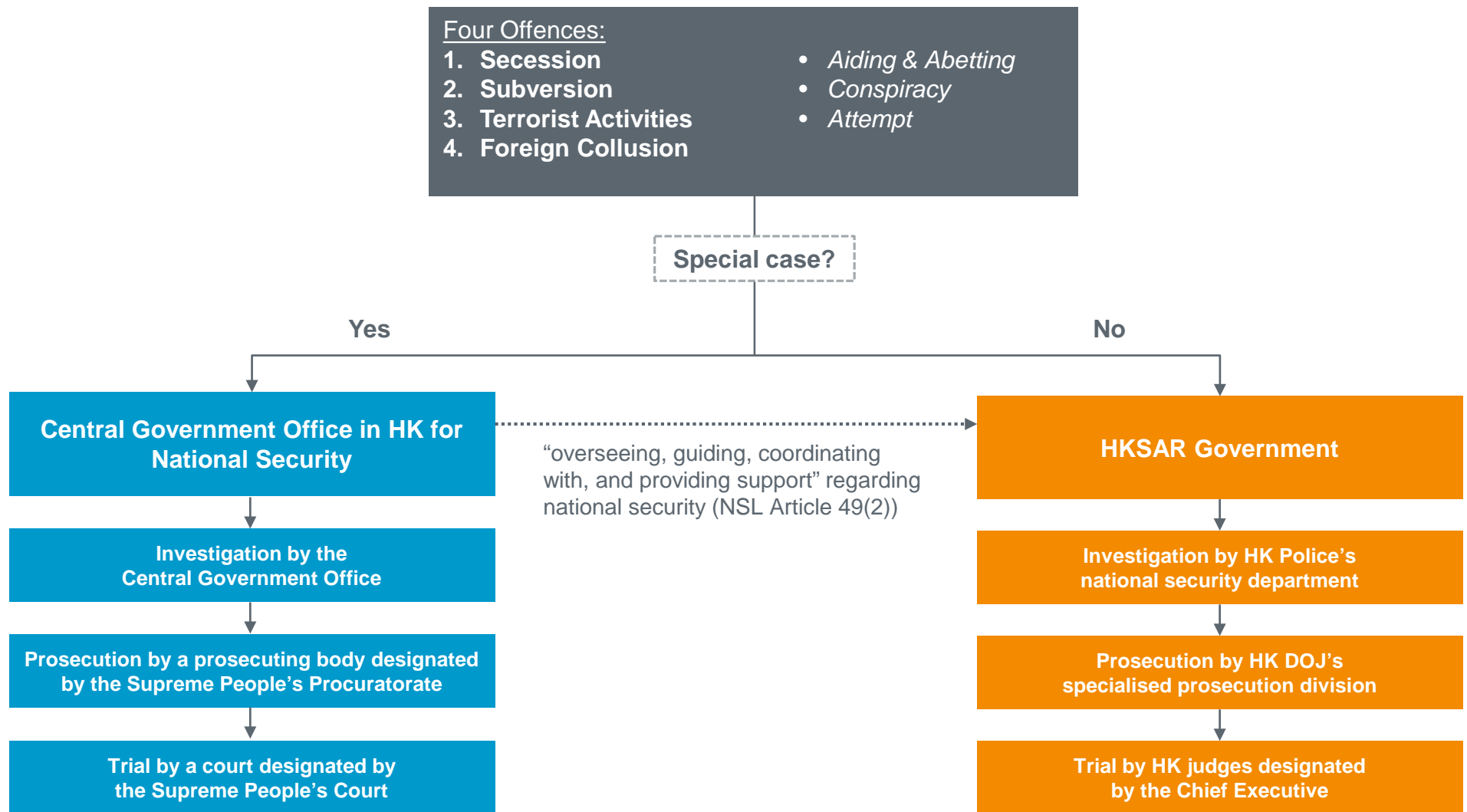


HK DOJ shall establish a specialised prosecution division:

- Division Head appointed by Chief Executive after seeking the opinion of the Central Government Office (Article 18).

NSL Overview

OFFENSES AND ENFORCEMENT



Four Offences:

1. Secession
2. Subversion
3. Terrorist Activities
4. Foreign Collusion

- *Aiding & Abetting*
- *Conspiracy*
- *Attempt*

- Mens rea requirement for criminal liability
 - Kulemesin -v- HKSAR, cited in HKSAR -v- Choi Wai Lun [2018] HKCFA, para 18.
 - “All four offences [in the HK NSL] require criminal intent, and Prosecution must prove criminal intent for the defendant to be convicted” – *Secretary of Justice Teresa Cheng in her speech to the LegCo on July 7, 2020*
 - Compare with P.R.C. Criminal Law provisions regarding mens rea
- Corporate liability
- Directors’ liability

Substantive Offences in Foreign Jurisdictions

COMPARATIVE ANALYSIS WITH THE US AND THE UK

- Secession
 - Secession is not criminalized in the US or the UK.
- Subversion
 - “Rebellion or insurrection”, “seditious conspiracy” and “advocating overthrow of government” are criminalized under Title 18 of the US Code, sections 2383-2385.
 - Section 2 of the UK Security Service Act 1989 defines the functions of the UK Security Service in relation to actions ‘intended to overthrow or undermine parliamentary democracy’.
- Terrorist Activities
 - Both the US and the UK have very extensive and comprehensive anti-terrorism laws.
- Foreign Collusion
 - Title 18 of the US Code, section 2381, on “state secrets; and war or use of force” contain some overlap with the HK offence.
 - Both the US and the UK also criminalize certain acts of foreign collusion in the context of elections.

Procedural Requirements

JURISDICTION AND INVESTIGATIONS

Article 55 Cases

Non-Article 55 Cases

Jurisdiction

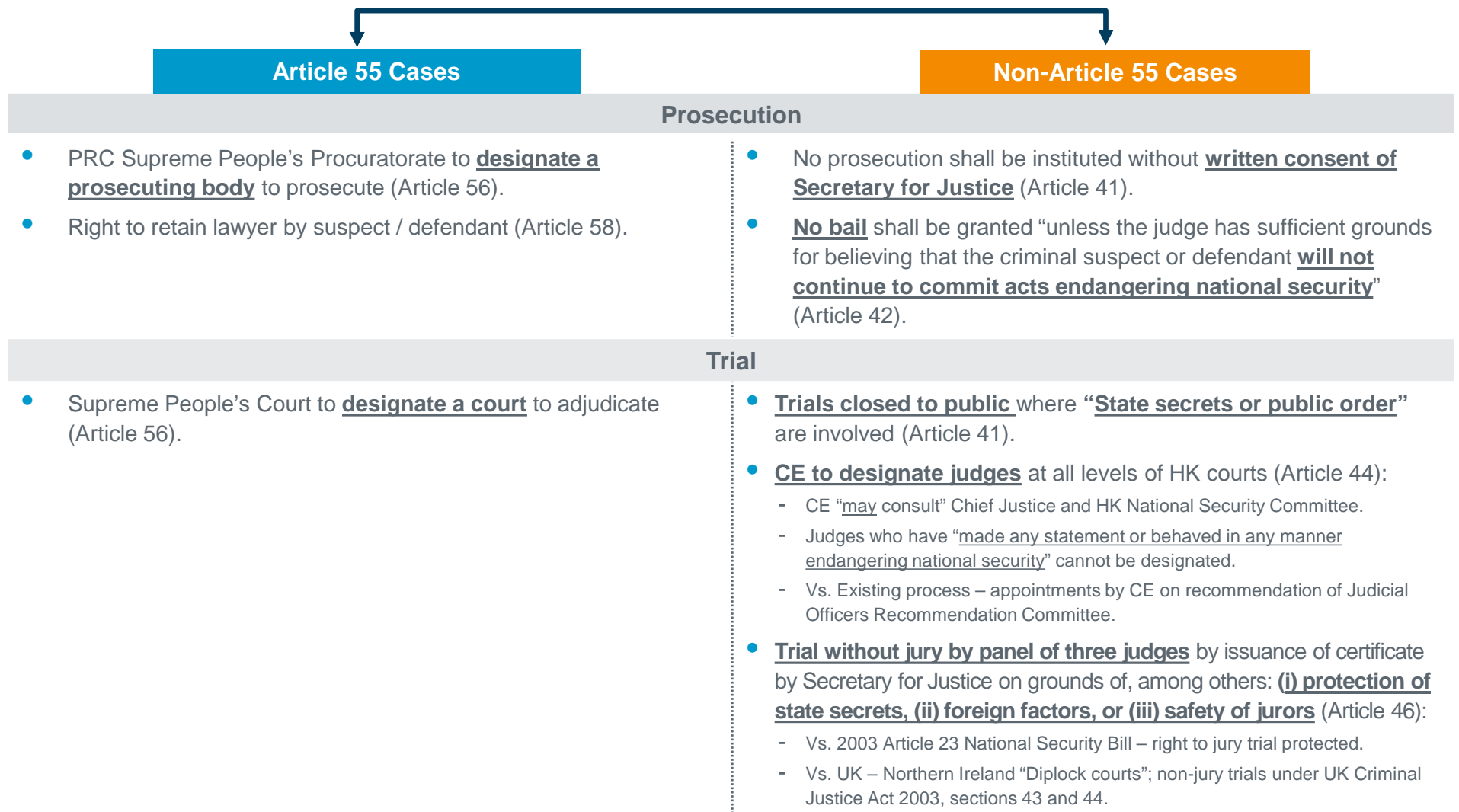
- **Central Government Office** may exercise jurisdiction over cases upon request by Office itself / HK government if (**Article 55**):
 - (1) “case is complex” due to involvement of “foreign country or external elements”;
 - (2) HK government “unable to effectively enforce”; or
 - (3) “a major and imminent threat to national security” occurred.
- **PRC Criminal Procedure Law** to apply (Article 57).
- **HK** has jurisdiction over non-Article 55 cases (Article 40).
- **HK criminal procedures** to apply (Article 41).

Investigation

- **Central Government Office** to initiate investigations (Article 56).
- **Legal documents issued by PRC authorities** on “decision to take mandatory and investigation measures” **have legal force in HK** (Article 57).
- “**Acts performed in the course of duty**” by the Central Government Office and its staff **not subject to HK jurisdiction** (Article 60).
- Holders of identification issued by the PRC Office **not subject to “inspection, search or detention”** by HK law enforcement officers.
- **HK Police National Security Dept.** to handle non-Article 55 cases.
- Investigative powers (Article 43 & Implementation Rules):
 - (1) “search of premises, vehicles...and electronic devices that may contain evidence”;
 - (2) “ordering any person suspected of having committed an offence... to surrender travel documents”;
 - (3) freezing, restraint, confiscation and forfeiture of “property used or intended to be used for the commission of an offence”;
 - (4) requiring person who “published information or the relevant service provider to delete the information or provide assistance”;
 - (5) requiring foreign “political organisation”, its agents, or agents of foreign “authorities” to provide information;
 - (6) with CE’s approval, “carrying out interception of communications and conducting covert surveillance on” persons suspected “on reasonable grounds”; and
 - (7) requiring person suspected “on reasonable grounds” to have relevant information to answer questions and furnish information.

Procedural Requirements: When will Article 55 apply?

PROSECUTION AND TRIALS



Obligations under the NSL

REPORTING OBLIGATION

Section 5(1), Schedule 3, Implementation Rules for Article 43, HK NSL

“Where a person knows or suspects that any property is offence related property, then the person must disclose to a police officer the information or other matter –

- a. On which the knowledge or suspicion is based; and
- b. As soon as is reasonably practicable after the information or other matter comes to the person’s attention.”

Section 1, Schedule 3 - Definition of “offence-related property”

“a. the property of a person –

- i. who commits, or attempts to commit, an offence endangering national security; or
 - ii. who participates in or facilitates the commission of an offence endangering national security; or
- b. any property that is intended to be used or was used to finance or otherwise assist the commission of an offence endangering property used or intended to be used for the commission of an offence endangering national security”

NSL Safeguards

STATUS OF LEGAL PRIVILEGES

- Legal Professional Privilege
 - Operating Principles and Guidelines
 - Part D5. Protection of Legal Professional Privilege information (paragraphs 23-25)
 - See also paragraphs 5, 11, 15, 26 and 33
 - Implementation Rules for Article 43
 - Schedule 6
 - Part 2, Division 3, Section 13(3)
 - Part 4, Division 1, Section 23(b)(ix) and Division 2, Section 24(b)(x)
 - Part 6, Section 27(3)
 - Schedule 7
 - Section 2(9)
 - Section 3, Subsections (4)(c)(ii) and (10)(a)
- Self-incrimination
 - Implementation Rules for Article 43
 - Schedule 7, sections 2(11)(a) and 3(11)(a)

Substantive Offences

FOREIGN COLLUSION

Article 29 –

- “A person who steals, spies, obtains with payment, or unlawfully provides **State secrets** or intelligence concerning national security for a [Foreign Party]”.
- “A person who **requests**...or **conspires with**...or directly or indirectly **receives instructions**, control, funding or other kinds of support from a [Foreign Party] to commit”:
 - “(1) waging war...or using or threatening to use force”;
 - “(2) seriously disrupting the formulation and implementation of laws”;
 - “(3) rigging or undermining an election in [Hong Kong]”;
 - “(4) imposing sanctions or blockade, or engaging in other hostile activities against [Hong Kong] or the [PRC]”; or
 - “(5) provoking by unlawful means hatred among Hong Kong residents” towards the Central or Hong Kong governments.
- The Foreign Party—“an institution, organization or individual outside the Mainland, Hong Kong and Macao”—also “shall be convicted and punished for the same offense”.

Hypotheticals:

- A US company responding to a U.S. subpoena requiring production of information and documents held by its subsidiary in Hong Kong relating to its interaction with a Chinese corporate client?
- A U.S. regulator requiring written confirmation (a legal opinion) that the HK NSL will not act as a blocking statute in providing information from Hong Kong as a condition of registration of a Hong Kong applicant for registration.
- The Hong Kong branch of a U.S. or European bank complying with U.S. sanctions against a HKSAR official?

Substantive Offences

FOREIGN COLLUSION – INTERPLAY BETWEEN U.S. SANCTIONS COMPLIANCE AND ART. 29(4)

“A person who requests...from a [Foreign Party] to commit” or conspires with...or directly or indirectly receives instructions, control, funding or other kinds of support from a [Foreign Party] to commit”:

- **“(4) imposing sanctions or blockade, or engaging in other hostile activities against [Hong Kong] or the [PRC]”;...**
 - “receives instructions”
 - “to commit”
 - “imposing sanctions or blockade”
 - “or engaging in other hostile activities”
 - “against [Hong Kong] or the [PRC]”

 - Article published by HKU scholars on July 31, 2020 <http://researchblog.law.hku.hk/2020/07/liability-for-imposing-sanctions-under.html>
 - Are financial institutions capable of “imposing” sanctions or blockade? Answer: “no: only State actors”.

 - HKMA Circular of 8 August 2020:
 - HK law only requires compliance with U.N. sanctions
 - absence of reference to Art. 29(4)
 - “Balancing legal, business and commercial risks”
 - apply treat customers fairly principles

 - A person shall not be guilty of the offense [under Article 29] unless he or she “has the intention to endanger national security” -- *statement by Deputy Director Zhang Xiaoming of Hong Kong Macau Affairs Office of the State Council during the press conference on 1 July 2020 upon promulgation of the NSL.*

 - Purposive interpretation?

 - Principle against doubtful penalisation
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