

October 28, 2020

LAWASIA STATEMENT OF CONCERN ON THE APPLICATION OF THE NATIONAL SECURITY LAW

1. LAWASIA notes with concern the rule of law and human rights issues raised by the content and implementation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law"), that has been in force in Hong Kong since June 2020.
2. LAWASIA understands that the National Security Law, which was passed by China's National People's Congress Standing Committee in accordance with Article 18 of the Basic Law of the Hong Kong Special Administrative Region ("Hong Kong"), contains four categories of offences against the State; secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security. These offences may be punishable with life terms in prison, or graded minimum sentences depending on the severity of the offences. It is also noteworthy that these offences have extra-territorial application to non-permanent Hong Kong residents.
3. LAWASIA is concerned that the broad definitions of these offences, as found in Articles 20, 22, 24 and 29 of the National Security Law, could violate the principle of legal certainty. It is noted that Article 15(1) of the *International Covenant on Civil and Political Rights* ("ICCPR") provides that criminal laws must be sufficiently precise to enable clarity on the types of behaviour that constitute a criminal offence. The wide definition of these offences also raises issues as to whether the National Security Law will meet the test of necessity, proportionality, certainty and non-discrimination, and could have an unintended chilling effect on speech.
4. LAWASIA notes that the offences set out in Article 55 of the National Security Law are brought under the ambit of the Central People's Government of the People's Republic of China insofar as the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region ("the Office") is empowered to exercise jurisdiction over those offences. The Office may exercise jurisdiction over cases specified in Article 55 of the National Security Law including complex cases due to the involvement of a foreign country or external elements making it difficult for Hong Kong to exercise jurisdiction over the case.
5. In this regard, upon approval by the Central People's Government of a request made by Hong Kong or by the Office itself, the Office will exercise jurisdiction in these offences. Further, Article 60 provides that the acts performed in the course of the duty by the Office Hong Kong in accordance with the National Security Law shall not be subject to the jurisdiction of Hong Kong. It is also to be

noted that the cases specified under Article 55 are to be tried under the laws and procedures of the People's Republic of China.

6. LAWASIA notes there might be uncertainties in the applicability of Articles 4, 5 and 45 of the National Security Law, which state respectively that the human rights tenets contained in Hong Kong's Basic Law, the *International Covenant on Economic, Social and Cultural rights* ("ICESCR") and the ICCPR; due process requirements; and the laws of Hong Kong shall apply to the application of the National Security Law. This would presumably include Article 14 of the ICCPR, which mandates that all persons charged with a crime have access to a fair and open trial, qualified legal representation of their choice and the ability to appeal; as well as to have reasonable access to their lawyer and family.
7. LAWASIA also notes that under Article 44, it is the Chief Executive of Hong Kong ("the Chief Executive") who designates a list of existing judges to handle cases under the National Security Law. Before doing so, the Chief Executive may consult the Office and the Chief Justice of the Court of Final Appeal ("the Chief Justice"). However, Article 44 does not specifically provide that the Chief Executive is obliged to consult the Chief Justice, although as a matter of convention this may be done. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.
8. LAWASIA also notes that since the National Security Law was enacted, several people have been arrested or charged under it, including pro-democracy supporters, student activists, the owner of a media company and six activists outside Hong Kong.
9. LAWASIA urges the People's Republic of China and Hong Kong to ensure that all due process requirements, including the principles of fair and open trial; transparency and justice, which encompasses the provision of sufficient and timely information about the legal and administrative processes; legal representation of the accused's choice; reasonable access of the accused to their lawyers and families; timely information of the whereabouts and status of the persons arrested, detained and/or charged; and permitting the presence of the international media at press briefings, are followed in relation to all arrests, detentions, investigations and prosecutions under the National Security Law.

LAWASIA will continue to monitor the situation in Hong Kong and any subsequent proceedings in relation to the aforementioned arrests, including where possible, by deploying an independent LAWASIA observer to review and monitor possible future proceedings. We will also continue to engage with our member associations to advocate for, and to promote the rule of law and access to justice throughout the region.

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