



Roundtable Series on National Security Law (V)

Hong Kong's National Security Law: Procedural and Sentencing Implications

25 February 2021
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Hong Kong's National Security Law (NSL), which was enacted on 30 June 2020, has attracted worldwide attention. To discuss various issues related to the NSL, the Public Law and Human Rights Forum (CPLR) at the School of Law, City University of Hong Kong (CityU) has hosted a Roundtable Series, consisting of five events so far. The two symposiums in Chinese were entitled "Online Symposium on 'National Security Legislation of the HKSAR'" (June 2020) and "Online Symposium on Theory and Practice of National Security Law" (September 2020). The two webinars in English were entitled "Hong Kong's National Security Law: Implications for Companies and their Human Rights Responsibilities" (July 2020) and "Hong Kong in the Post-National Security Law Era: Some Reflections from International Law and Relations Perspectives" (October 2020).

On 25 February 2021, the CPLR hosted the fifth component of the Roundtable Series, with a webinar aiming to clarify the NSL's implications for criminal practice. This webinar attracted over 60 participants. The NSL possesses far-reaching implications for criminal law practice in Hong Kong, with several features of the new law (e.g. the preclusion of judicial review over supervisory decisions, the power to dispense with jury trials, the ability for the central government to assert jurisdiction and move a defendant to mainland China for trial) rarely or never before seen in Hong Kong's common law legal system. The roundtable on 25 February featured five distinguished panellists: **Vivienne BATH**, Professor of Chinese and International Business Law, The University of Sydney Law School; **Michael C. DAVIS**, Global Fellow, Wilson Center; **Denis EDWARDS**, Barrister and Mediator, Normanton Chambers, London; **Paul HARRIS SC**, Barrister, Denis Chang's Chambers, and Chairman of the Hong Kong Bar Association; and **Simon YOUNG**, Barrister, Parkside Chambers, and Professor of Law and Associate Dean (Research), Faculty of Law, The University of Hong Kong. The webinar was moderated by **Daniel PASCOE**, Associate Professor, School of Law, City University of Hong Kong.

Given that the NSL is relatively new, all five panellists stressed that there are many unknowns and uncertainties about the law. **Prof. Simon Young** believed that the NSL's indictable offences could be tried

at all three levels of adjudication (the Magistrates' Courts, the District Court and the Court of First Instance of the Hong Court), subject to the usual prosecution criteria for choice of trial venue (i.e. the likely sentence upon conviction and the complexity of the case). Judges with foreign passports have been already designated to hear NSL bail matters reaching the Court of First Instance, however, whether they will be appointed to hear trials is still an open question.

Prof. Michael C. Davis noted that ECHR precedents have been cited in the *Jimmy Lai* and the *Tong Ying-Kit* cases, meaning that the Hong Kong courts will still apply existing legal norms under the new NSL regime. Nevertheless, the NSL will prevail over local laws if there remain inconsistencies. He and **Mr. Denis Edwards** were worried about 'forum shopping' on the part of the prosecution, given the wide discretion to choose the venue for trial and the Chief Executive's power to designate a panel of NSL magistrates and judges.

Mr. Paul Harris SC stated that the Court of First Instance has confirmed that the Hong Kong courts will apply a common law approach to the interpretation of the NSL, including for bail decisions. However, it is unusual for common law systems to exclude jury trials. Jury trials are a hallmark of common law systems, and increasingly, civil law countries utilise jury trials when it comes to the most serious offences. **Prof. Vivienne Bath** claimed that closed-door hearings are common in China for state security cases. Given that juries might refuse to convict defendants, the Secretary for Justice might refuse to have hold jury trials at all. She added that, seeing that the NPCSC evidently drafted parts of the NSL to replicate Chinese criminal provisions, it would be appropriate to look at mainland Chinese interpretations to better understand the NSL.

Finally, in the panellists' views, the answer to the pressing question "which types of cases might result in the assertion of jurisdiction by mainland courts" remains unclear. The language used in the NSL is abstract and involves a degree of flexibility. The assertion of jurisdiction by mainland courts also depends on clarifications to the way that defendants, witnesses and evidence can be physically transferred from Hong Kong to mainland China.

On behalf of the CPLR, **Dr. Daniel Pascoe** thanked all invited panelists for participating in the webinar.



First row from left: Prof. Vivienne Bath; Prof. Michael C. Davis; Mr. Denis Edwards
Second row from left: Mr. Paul Harris SC; Prof. Simon Young; Dr. Daniel Pascoe