



中华人民共和国常驻联合国日内瓦办事处和瑞士其他国际组织代表团

**PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA**

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The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human rights and with reference to the latter's communication [UA CHN 10/2021] dated 24 September, has the honour to transmit herewith the reply of the Chinese Government.

The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 22 December 2021



Office of the High Commissioner for Human Rights  
**GENEVA**

联合国人权理事会和平集会和结社自由问题特别报告员、任意拘留问题工作组、言论自由问题特别报告员、“人权卫士”问题特别报告员、在反恐中促进和保护人权问题特别报告员 2021 年 9 月 24 日联合来函【UA CHN 10/2021】收悉，中国政府对来函答复如下：

**对联合国人权理事会特别机制  
联合紧急呼吁函(CHN 10/2021)的回应**

**(A) 保障基本自由和权利**

1. 在制定《中华人民共和国香港特别行政区维护国家安全法》(《香港国安法》)的过程中，已全面考虑《公民权利和政治权利国际公约》和《经济、社会及文化权利的国际公约》的相关内容，并强调维护国家安全时亦须遵守各项人权保障原则。
2. 《香港国安法》第四条订明，香港特别行政区(香港特区)维护国家安全应当尊重和保障人权，依法保护香港特区居民根据《中华人民共和国香港特别行政区基本法》(《基本法》)和《公民权利和政治权利国际公约》及《经济、社会与文化权利的国际公约》适用于香港的有关规定享有的权利和自由，包括言论、新闻、出版、结社、集会、游行及示威的自由。
3. 《香港国安法》第五条明确订明执法机关就危害国家安全犯罪采取执法行动时，必须坚持法治原则。该条文订明防范、制止和惩治危害国家安全犯罪，应当坚持法治原则。如某人的行为构成法律规定的犯罪行为，依照法律定罪处刑；如某行为不构成法律规定的犯罪行为，不得定罪处刑。此外，任何人未经司法机关判罪之前均假定无罪。犯罪嫌疑人、被告人和其他诉讼参与人依法享有的辩护权和其他诉讼权利得到保障。任何人已经司法程序被最终确定有罪或者宣告无罪的，不得就同一行为再予审判或者惩罚。

4. 值得注意的是，在 2019 年 6 月至 2020 年年初期间，香港特区法纪和秩序恶化，经常发生大规模暴乱、纵火、袭击执法人员和与示威者持不同意见的人士，以及破坏与示威者政治立场不同的商户的事件，许多市民不能享有应有的权利和自由。制定《香港国安法》是为了让香港居民重新享有于上述期间不能享有的权利和自由。

## **(B) 自由并非绝对**

5. **《基本法》第四十二条**订明，香港居民和在香港的其他人有遵守香港特区实行的法律的义务。

6. **《香港国安法》第六条第一款**订明维护国家主权、统一和领土完整是包括香港同胞在内的全中国人民的共同义务。**第六条第二款**进一步订明在香港特区的任何机构、组织和个人都应当遵守《香港国安法》和香港特区有关维护国家安全的其他法律。

7. **《基本法》第一条**订明，香港特区是中华人民共和国不可分离的部分。根据**《基本法》第十二条**，香港特区是中华人民共和国的一个享有高度自治权的地方行政区域，直辖于中央人民政府。根据**《香港国安法》第二条**，关于香港特区法律地位的《基本法》第一条和第十二条规定是《基本法》的根本性条款。香港特区任何机构、组织和个人行使权利和自由，不得违背《基本法》第一条和第十二条的规定。

8. 香港特区政府尊重发表和结社的自由。然而，**发表的自由和结社的自由并非绝对**。《公民权利和政治权利国际公约》和《经济、社会与文化权利的国际公约》均容许以法律和维护国家安全的必要对非绝对的人权予以限制。为维护国家安全或公共安全、公共秩序及他人权利和自由，可循法律形式(包括《香港国安法》)对这些权利的行使施加合理和必要的限制，此乃各国普遍做法，也为《公民权利和政治权利国际公约》和《经济、社会与文化权利的国际公约》所允许。

9. 《香港人权法案》第十六条的表述与《公民权利和政治权利国际公约》第十九条相同，而《香港人权法案》第十八条的表述则与《公民权利和政治权利国际公约》第二十二條相同。两者皆订明为了保障国家安全或公共秩序所必要者，可分别对发表的自由和结社的自由以法律规定予以限制。

10. 执法部门根据《中华人民共和国香港特别行政区维护国家安全法第四十三条实施细则》(《实施细则》)作出的决定和采取的行动可予以司法复核，法庭会根据相称性分析(即如涉及基本权利，对该等基本权利所施加的限制是否属相称的限制)审视有关个案。

11. 在 *希慎兴业有限公司 诉 城市规划委员会* (2016) 19 HKCFAR 372 一案中，终审法院认为相称性分析涉及四个步骤：

(a) 限制必须是为了追求达致某合法目的；

(b) 限制必须与该合法目的有合理关连；

(c) 限制没有超越为达致该合法目的所需的程度；以及

(d) 该项措施所达致的社会利益，与对有关个别人士受宪法保护的权利的影响之间，须取得合理平衡；特别须审视追求该社会利益会否导致有关个人面对无法接受地严苛的负担。

12. 根据《实施细则》对香港市民支援爱国民主运动联合会(支联会)和邹幸彤采取执法行动是对于发表和结社的自由的权利施加的必要和相称限制。

13. 总括而言，发表的自由和结社的自由并非绝对，可予以限制，以避免与国家安全、公共利益及他人权益相悖。基于自身政治动机的人，漠视上述一贯以来公认的法律原则，明显是采取双重标准。

### (C) 《香港国安法》条文定义清晰

14. 《香港国安法》清楚列出所规定的四类危害国家安全的罪行，即分裂国家、颠覆国家政权、恐怖活动、以及勾结外国或者境外势力危害国家安全。这些罪行在《香港国安法》中定义清晰，亦与其他司法管辖区的国家安全法所订罪行相似。构成有关罪行的元素、刑罚、减刑因素和犯罪的其他后果已于《香港国安法》第三章清楚订明。控方有责任在毫无合理疑点下证明被告人有相关的犯罪行为 and 犯罪意图，被告人才可被法庭定罪。没有人会在无意中违反《香港国安法》。

## **(D)    执法行动**

15. 危害国家安全的行为和活动可造成非常严重的后果，必须采取措施以防范和制止有关行为和活动。

16. 所有香港执法部门的执法行动，均是根据证据、严格依照法律，以及按有关的人士或单位的行为而采取的，与其政治立场、背景或职业无关。

17. 由于对支联会和邹幸彤采取执法行动的法律程序尚在进行，基于回避待决案件(sub judice)的法律原则，任何人均不宜评论有关案件。下文提述邹幸彤和支联会的案件，只为点出采取该等执法行动所依据的相关法律条文。

### 就「煽动他人颠覆国家政权」罪作出拘捕

18. 支联会及三名相关人士，包括支联会副主席邹幸彤，于2021年9月9日被控《香港国安法》第二十二和二十三条下的「煽动他人颠覆国家政权」罪。

19. 根据《香港国安法》第二十二和二十三条，任何人组织、策划、实施或者参与实施以下以武力、威胁使用武力或者其他非法手段旨在颠覆国家政权行为之一的，即属犯罪：

- (1) 推翻、破坏中华人民共和国宪法所确立的中华人民共和国根本制度；
- (2) 推翻中华人民共和国中央政权机关或者香港特区政权机关；
- (3) 严重干扰、阻挠、破坏中华人民共和国中央政权机关或者香港特区政权机关依法履行职能；
- (4) 攻击、破坏香港特区政权机关履职场所及其设施，致使其无法正常履行职能。

20. 《香港国安法》第二十三和二十四条也订明，任何人煽动、协助、教唆、以金钱或者其他财物资助他人实施《香港国安法》第二十二和二十三条规定的犯罪的，即属犯罪。

21. 事实上，《香港国安法》所订明的四类罪行，与外地司法管辖区的**国家安全法律所规管的罪行相近**。举例而言，英国《1848年叛国重罪法》、加拿大《刑事罪行法典》，以及《美国法典》第18篇第115章 - 叛国、煽动叛乱和颠覆活动也订有颠覆国家政权罪。

就「没有遵从通知规定提供资料」罪作出拘捕

22. 2021年9月9日，邹幸彤等人因没有遵从通知规定提供资料，违反《实施细则》附表5第3条而被拘捕。

23. 根据《香港国安法》**第三条第二款**，香港特区负有维护国家安全的宪制责任。为了及时而有效地防范和制止危害国家安全的行为和活动，《香港国安法》**第四十三条**列明执法部门在办理危害国家安全犯罪案件时获授予的权力，包括根据与《实施细则》附表5一并解读的第四十三条第五款，要求有关人士提供资料，借以防止及侦查危害国家安全罪行的权力。

24. 根据《实施细则》**附表5第3(1)条**，警务处处长如合理地相信发出有关规定是防止及侦查危害国家安全罪行所需要的，则可在保安局局长批准下，不时借向某外国代理人或台湾代理人(定义见《实施细则》附表5第1条)送达书面通知，规定该代理人向警务处处长提供该条文下所列明的资料。

25. 值得强调的是，警方根据《实施细则》附表5第3(1)条发出该等通知，**并不必定代表指控获发通知的人犯了过失或犯罪**：该等通知纯粹要求获发通知的人提供通知上列明的资料。只有在不遵从通知的规定而又未能向法庭提供合理解释的情况下，获发该等通知的人才会受到法律制裁。

26. 《实施细则》附表5的条文**符合国际人权标准**。对于联合紧急呼吁函中问题2暗示有关条文会「侵害发表的自由的权利」，香港特区政府反驳这番不实言论。

27. 根据国际法中主权平等和不干涉原则，没有国家有权以任何理由直接或间接干涉任何其他国家之内政。因此，每个国家都有权采取措施保障自身不受外国干涉。国家制定法律，要求任何外国政治性组织或外国代理人向当局登记，或提供他们在所在国家的活动资料，并不罕见。指

该等立法不相称地侵扰基本权利和自由，这种说法实在令人感到诧异，是不重视甚至无视国际间于这方面的做法。

28. 联合紧急呼吁函提到，「[以下为原文的中译本]《中华人民共和国香港特别行政区维护国家安全法第四十三条实施细则》<sup>1</sup>的适用范围……订明若干针对被指称为『外国代理人』的严苛措施，例如：搜查处所及电子设备、没收旅游证件、冻结财产、要求提供资料或物料，以及进行秘密监察等」。我们必须指出，这并不是对《实施细则》的正确理解。《实施细则》附表 5 载列规管外国(及台湾)政治性组织及代理人的具体细则，而《实施细则》其他附表则订明一般办理危害国家安全犯罪案件时的执法权力。考虑到该附表针对的问题性质特殊，该附表下的细则只订明如认为有关资料是防止及侦查危害国家安全罪行所需要的，则可规定外国(及台湾)政治性组织及代理人须因涉港活动提供该等资料。此外，《实施细则》详细列出警方须遵守的严格程序要求，包括申请授权采取调查措施时必须符合的条件。

#### 基于国家安全理由作出羁押

29. 《香港国安法》第四十二条第二款订明，「对犯罪嫌疑人、被告人，除非法官有充足理由相信其不会继续实施危害国家安全行为的，不得准予保释」。

30. 终审法院在**香港特区 诉 黎智英** [2021] HKCFA 3 一案中裁定，第四十二条第二款对香港特区规管批准及拒绝保释的规则和原则，衍生了一个特别例外情况，**为保释申请加入了严格的门槛要求**。引用第四十二条第二款的准则时，法庭必须先决定有没有「充足理由相信犯罪嫌疑人或被告人不会继续实施危害国家安全行为」。如法庭考虑过所有相关资料，认为没有充足理由相信被告人不会继续实施危害国家安全行为，自当拒绝其保释申请。另一方面，经考虑过所有相关资料后，如法庭认为有充足理由时，应继而考虑《刑事诉讼程序条例》(第 221 章)第 1A 部中所有与批准或拒绝保释相关的事宜，并引用有利于保释的假定。

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<sup>1</sup> 英文原文中提述的“《香港国安法》的实施法律的第 43 条”并不准确，此文假定有关提述指的是《实施细则》，而不是《香港国安法》第四十三条。

31. 终审法院认为，《香港国安法》主要目的的重点是要维护国家安全，防范和制止危害国家安全的行为，这是非常清楚的。这也是为何法律引入变更，其中包括第四十二条第二款所列的例外情况，对涉及危害国家安全的罪行引入更严格的可准保释的条件。

32. 另一方面，《香港国安法》第四条和第五条明文规定，人权、自由和法治价值在引用《香港国安法》时须予以保护及坚持，终审法院裁定第四十二条第二款也必须以这些条文作为文理基础来予以诠释及应用。在尽可能情况下，**第四十二条第二款须获赋予符合人权、自由和法治价值的意义和效力**。根据第四条、第五条、第四十一条和第四十二条的规定，《刑事诉讼程序条例》(第 221 章)中有关申请保释的程序规定，同样适用于危害国家安全犯罪案件的保释问题，惟须受第四十二条第二款衍生的特别例外情况规限。

#### 搜查支联会处所

33. 警方于 2021 年 9 月 9 日持裁判官根据《实施细则》附表 1 所发出的手令，在支联会分别位于旺角和葵涌的总部和仓库进行搜证，检获一批怀疑与一宗刑事案件有关的文件、电脑及宣传物品。

34. 上述搜查是根据《实施细则》附表 1 第 2 条的规定进行。该条文订明，为侦查危害国家安全罪行，警务人员可借经宣誓而作的告发，向裁判官提出申请，要求裁判官就该项告发所指明的地方根据该条发出手令。因此，司法上已保障市民的私隐不受无理或非法侵扰。只有在取得手令并非合理地切实可行，而且有合理理由相信有关证据是为侦查危害国家安全罪行、获取和保存证据，又或保护任何人的人身安全所必需的情况下，方可在无手令的情况下进行搜查。

#### 冻结支联会财产

35. 根据《香港国安法》下《实施细则》附表 3 的规定，保安局局长考虑警务处国家安全处所提供的资料后，于 2021 年 9 月 29 日向支联会发出冻结财产的书面通知。保安局局长有合理理由相信有关财产属《实施细则》附表 3 所指的「罪行相关财产」。



36. 根据《实施细则》附表 3 第 3(1)条，保安局局长如有合理理由怀疑某人所持有的任何财产是罪行相关财产，可借指明该财产的书面通知，指示除根据保安局局长批予的特许的授权外，任何人不得直接或间接处理该财产。任何人如拟处理或协助处理已冻结的财产，可向保安局局长申请特许。有关申请会否获批，视乎整体案情下其合理程度而定。

37. 必须强调，资金或其他形式的协助于促使危害国家安全罪行方面占有重要角色。冻结财产制度有着维护国家安全的重要目的，包括防止涉案财产被转移或耗散，而影响将来可能发出的没收令或充公令；防范涉案财产被用作资助或协助干犯危害国家安全罪行；以及防止以任何可能不利于正在进行与危害国家安全罪行有关的侦查或程序的方式处理财产。

38. 原讼法庭于 2021 年 9 月 17 日就 **黎智英诉保安局局长** [2021] HKCFI 2804 一案颁布判决，表示法庭考虑了《实施细则》附表 3 订定的冻结制度，认为制度下设有特许，已在防范、制止和惩治危害国家安全罪行与保障财产权之间取得平衡。

## **(E) 案件裁决**

39. 就如何根据《香港国安法》第四十二条第二款处理被控危害国家安全罪行的人的保释申请，终审法院已在 **香港特区诉黎智英** [2021] HKCFA 3 一案中订下相关原则(见上文第 29 至 32 段)。其中，终审法院确认，《香港国安法》反映了在国际间广为采用的原则，例如无罪推定原则及保障各方享有公平审讯的权利。所有法律程序均遵循适当程序进行。

40. 现时已订明多项实质的保障，确保公平审讯及不受任意逮捕或拘留的权利。《基本法》第二十五条订明，香港居民在法律面前一律平等。

《基本法》第二十八条亦保证香港居民的人身自由不受侵犯，以及香港居民不受任意或非法逮捕、拘留、监禁。《香港国安法》第三条第三款订明，香港特区行政机关、立法机关、司法机关应当依据《香港国安法》和其他有关法律规定有效防范、制止和惩治危害国家安全的行为和活动。《香港国安法》第四条清楚指出，香港特区维护国家安全应当尊重和保障人权以及香港特区法律下的基本自由。《香港国安法》第三章亦

清楚列出构成四类危害国家安全罪行的元素，包括犯罪行为及犯罪意图，以及这些罪行的刑罚。

41. 就**程序上的保障措施**而言，首先，律政司的检控人员必定按照《香港国安法》和本地法律处理危害国家安全犯罪案件。**《基本法》第六十三条**明确指出律政司主管刑事检察工作，不受任何干涉。**所有检控决定是基于可接纳证据和适用法律**，案件不会因涉案人士的职业、政治理念或背景而在处理上有所不同。律政司在有充分可被法院接纳的证据，令案件有合理机会达致定罪，并符合公众利益的情况下，才会提出起诉。律政司一直以专业公正的态度履行宪制职责。

42. 第二，**《基本法》第三十五条**保证，香港居民有权得到秘密法律咨询、向法院提起诉讼、选择律师及时保护自己的合法权益或在法庭上为其代理和获得司法补救。

43. 第三，**法官**在处理涉及《香港国安法》的案件时，一如其他案件，**都是独立公正地履行司法职责**，不受任何干涉。正如《基本法》第二条、第十九条及第八十五条所订明，香港特区法院可行使独立的司法权和终审权，不受任何干涉。《基本法》第九十二条亦清楚订明香港特区的法官和其他司法人员，应根据其本人的司法和专业才能选用。**在任命过程中，并没有政治审查**。法官的宪制职责是在行使其司法权力时，以法律为依据，别无其他考虑。即使法官裁决的是由政治争议所引发或涉及政治争议的案件，这项职责也不会有所改变。法院颁布的判词阐明了法官裁决的理据，显示**刑事司法制度的妥善运作**仍然符合《香港国安法》第四条及第五条所要求的人权保障和法治原则。

44. 关于邹幸彤及其他人被控「没有遵从通知规定提供资料」罪，署理总裁判官经考虑《香港国安法》第四十二条的规定和香港特区本地法律的其他条文后，批准部分被告人保释。任何说法指司法机构并非独立行事，完全没有丝毫证据支持。

45. 《刑事诉讼程序条例》(第 221 章)第 9P 条订明对报导保释法律程序的限制。限制报导保释法律程序和其他审讯前的程序，在世界各地的司法管辖区均屡见不鲜，目的是避免案件在审讯前过度引起负面报道，以致可能妨害日后进行公平审讯，并同时确保司法公正。无论如何，即使有报导限制，**保释申请会在法庭公开聆讯**，公众人士可出席聆讯旁听有关程序。

46. 香港特区政府一直致力维护自由和人权，并视之为首要工作。除了奉行法治，极其独立的司法机构、廉洁的政府、公平的营商环境、开放、多元和包容的社会，以及自由和人权皆是香港珍而重之的核心价值。

## **(F) 羈留状况**

47. 惩教署致力确保羈管环境稳妥、安全、人道、合适和健康。惩教署亦会以一视同仁的原则管理所有在囚人士，不会因其背景而有所改变。

48. 惩教署根据法律，为在囚人士提供**基本生活所需、合理生活环境及足够羈管照顾**，并以公平、合法和合理原则，让在囚人士获得合适和平等的待遇。

49. 此外，惩教署亦会协助和指导在囚人士解决因入狱而引起的个人问题及困难，并会在院所内组织活动，协助他们更生，及让他们作好准备，于获释后顺利重返社会。

50. 现时，所有**惩教院所均设有医院**，由合资格医护人员当值，并在与卫生署派驻医生的协作下，提供 24 小时的基本医疗服务。如在囚人士需要进一步检查和治疗，他们会获转介予到诊专科医疗人员或至公立医院接受跟进。另外，惩教署为在囚人士提供心理辅导，以改善他们的心理健康和纠正犯罪行为。

51. 如在囚人士对在囚期间的待遇有所不满，可**透过多个渠道作出申诉**。署内方面，在囚人士可以向院所管方、到院所巡视的惩教署总部首长级人员，或惩教署投诉调查组提出投诉。署外方面，在囚人士可以书面方式向立法会议员、申诉专员、法定机构、其他执法部门或政府政策局等投诉。此外，他们亦可选择直接向突擊巡视院所的巡狱太平绅士求助或投诉。

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**Response to a Joint Urgent Appeal from  
the UN Human Rights Council Special Procedures  
(CHN 10/2021)**

**(A) Protection of fundamental freedoms and rights**

1. During the adoption of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Hong Kong National Security Law), the relevant contents of the **International Covenant on Civil and Political Rights (ICCPR)** and the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** were fully taken into consideration in the legislative process, with an emphasis placed on the fact that principles of human rights protection must be observed when safeguarding national security.

2. **Article 4 of the Hong Kong National Security Law** provides that human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region (HKSAR). The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) and the provisions of the ICCPR and the ICESCR as applied to Hong Kong, shall be protected in accordance with the law.

3. **Article 5 of the Hong Kong National Security Law** affirms adherence to the principle of the rule of law while enforcing the law against offences endangering national security. It states that the principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law. Furthermore, a person is presumed innocent until convicted by a judicial body. The right to defend himself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to

under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings.

4. It should be noted that the Hong Kong National Security Law was enacted to restore the enjoyment of rights and freedoms which many people in the HKSAR had been unable to enjoy during the period between June 2019 and early 2020, where there was a degeneration of law and order in the HKSAR, with prevalence of mass-scale riots, arson, and assaults against law enforcement officers and people who held different opinions with protestors, and vandalism targeting business entities which did not share the same political stance as the protestors.

**(B) Freedoms not absolute**

5. As stated in **Article 42 of the Basic Law**, Hong Kong residents and other persons in Hong Kong have the obligation to abide by the law in force in the HKSAR.

6. **Article 6(1) of the Hong Kong National Security Law** states that it is the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of the People's Republic of China. **Article 6(2)** further states that any institution, organisation or individual in the HKSAR shall abide by the Hong Kong National Security Law and the laws of the HKSAR in relation to the safeguarding of national security.

7. **Article 1 of the Basic Law** states that the HKSAR is an inalienable part of the People's Republic of China. **Article 12 of the Basic Law** provides that the HKSAR shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government. **Article 2 of the Hong Kong National Security Law** provides that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. No institution, organisation or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms.

8. The Government of the HKSAR respects freedoms of expression and of association. **Freedoms of expression and of association are, however, not absolute.** The ICCPR and ICESCR both permit restrictions on non-absolute human rights if they are prescribed by law and necessary for the protection of national security. In order to protect national security or public safety, public order (*ordre public*) and the rights and freedoms of others, reasonable and necessary restrictions may be imposed on the exercise of such rights in the form of laws (including the Hong Kong National Security Law). This is common practice in all countries and is also allowed under the ICCPR and ICESCR.

9. The wording of Article 16 of the Hong Kong Bill of Rights is the same as Article 19 of the ICCPR, whereas the wording of Article 18 of the former is the same as Article 22 of the latter. They stipulate respectively that the freedom of expression and freedom of association may be subject to restrictions provided by law and are necessary for the protection of national security or of public order (*ordre public*).

10. Where the decisions and actions of law enforcement agencies under the Implementation Rules for Article 43 of the Hong Kong National Security Law (Implementation Rules) are amenable to judicial review, they will be examined by the court on the basis of the proportionality analysis (i.e., whether they are proportionate restrictions on the fundamental rights if such rights are engaged).

11. In the Court of Final Appeal case of *Hysan Development Co Ltd and Town Planning Board* (2016) 19 HKCFAR 372, it was held that **the proportionality analysis involves a four-step approach:**

- (a) the restriction must pursue a legitimate aim;
- (b) the restriction must be rationally connected to that legitimate aim;
- (c) the restriction must be no more than is necessary to accomplish that legitimate aim; and
- (d) a reasonable balance has to be struck between the societal benefits of the encroachment and the inroads made into the constitutionally guaranteed rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

12. The law enforcement actions against the Hong Kong Alliance in Support of Patriotic Democratic Movements of China (the Alliance) and CHOW Hang-tung (Chow) under the Implementation Rules are necessary and proportionate restrictions on the rights to freedom of expression and of association.

13. In brief, the freedom of expression and freedom of association are not absolute and may be restricted to avoid conflict with national security, public interests and the rights and interests of others. Those who choose to turn a blind eye to such well-established legal principle out of their own political motives are clearly adopting double standard.

**(C) Provisions under the Hong Kong National Security Law are clearly defined**

14. The Hong Kong National Security Law has **clearly stipulated four categories of offences** that endanger national security, namely secession, subversion of state power, terrorist activities, and collusion with a foreign country or with external elements to endanger national security. Such offences are clearly defined in the Hong Kong National Security Law and are similar to those in the national security laws of other jurisdictions. The elements, penalties, mitigation factors and other consequences of the offences are clearly prescribed in Chapter III of the Hong Kong National Security Law. The prosecution has the burden to prove beyond reasonable doubt that the defendant had the *actus reus* and *mens rea* of the offence before the defendant may be convicted by the court. No one would inadvertently violate the Hong Kong National Security Law.

**(D) Enforcement actions**

15. Acts and activities that endanger national security can have very serious consequences. Action must be taken to prevent and suppress such acts and activities.

16. All law enforcement actions taken by Hong Kong law enforcement agencies are based on evidence, strictly according to the law, for the acts of the persons or entities concerned, and have nothing to do with their political stance, background or occupation.

**17. As the legal proceedings of the law enforcement actions against the Alliance and Chow are still ongoing, it is inappropriate for any person to comment on such cases as it is a matter of sub-judice.** Reference to the cases against Chow and the Alliance below is only for highlighting the relevant legal provisions for the enforcement actions concerned.

Arrest under “Incitement to Subversion”

18. The Alliance and three related individuals, Chow included (as the Vice-chairperson of the Alliance), were charged on 9 September 2021 with the offence of “incitement to subversion” under Articles 22 and 23 of the Hong Kong National Security Law.

19. According to **Article 22 of the Hong Kong National Security Law**, a person who organises, plans, commits or participates in any of the following acts by force or threat of force or other unlawful means with a view to subverting the State power shall be guilty of an offence:

- (1) overthrowing or undermining the basic system of the People’s Republic of China established by the Constitution of the People’s Republic of China;
- (2) overthrowing the body of central power of the People’s Republic of China or the body of power of the HKSAR;
- (3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People’s Republic of China or the body of power of the HKSAR; or
- (4) attacking or damaging the premises and facilities used by the body of power of the HKSAR to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

20. **Article 23 of the Hong Kong National Security Law** also stipulates that a person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of the offence under Article 22 of the Hong Kong National Security Law shall be guilty of an offence.



21. The four types of offences set out under the Hong Kong National Security Law are in fact **similar to those in the national security laws of foreign jurisdictions**. For example, the offence of subversion can also be found in the United Kingdom's Treason Felony Act 1848, the Criminal Code of Canada, and Title 18 U.S. Code Ch. 115 Treason, Sedition, and Subversive Activities.

Arrest under "Failure to Comply with Notice to Provide Information"

22. On 9 September 2021, Chow, among others, was arrested for failing to comply with the Notice to provide information in contravention of section 3 of Schedule 5 to the Implementation Rules.

23. According to **Article 3(2) of the Hong Kong National Security Law**, the HKSAR has the constitutional duty to safeguard national security. In order to timely and effectively prevent and suppress any act or activity endangering national security, **Article 43 of the Hong Kong National Security Law** sets out the powers conferred on the law enforcement authorities when handling cases concerning offence endangering national security, including the power to request for information for the prevention and investigation of an offence endangering national security under Article 43(5) read together with Schedule 5 to the Implementation Rules.

24. Under **section 3(1) of Schedule 5 to the Implementation Rules**, if the Commissioner of Police reasonably believes that it is necessary to issue the requirement for the prevention and investigation of an offence endangering national security, the Commissioner may from time to time, with the approval of the Secretary for Security, by written notice served on a foreign agent or Taiwan agent (as defined in section 1 of Schedule 5 to the Implementation Rules), require the agent to provide the Commissioner with the information specified thereunder.

25. It bears emphasis that the issuance of a Notice pursuant to section 3(1) of Schedule 5 to the Implementation Rules **does not necessarily connote allegations of wrongdoing or the commission of any offence** by the recipient as such: it simply requires that recipient to furnish the information requested in the Notice. It is only when the recipient fails to comply with the Notice with no valid explanation provided to the court would legal sanctions be imposed.

26. The provisions under Schedule 5 to the Implementation Rules are **in compliance with the international human rights standard**. The HKSAR Government refutes the misrepresentation as seemingly suggested in question 2 of the Joint Urgent Appeal that such provisions would “infringe on the right to freedom of expression”.

27. By virtue of the principles of sovereign equality and non-interference in international law, no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other State. Thus, each State is entitled to introduce measures to protect itself against foreign interference, and it is not uncommon for countries to enact legislation requiring any foreign political organisations or foreign agents to register with the authorities, or to provide information concerning their activities in the relevant host countries. Any suggestion that such legislation constitutes a disproportionate interference with any fundamental rights and freedoms is astonishing and pays little or no regard to international practices in this area.

28. In the Joint Urgent Appeal, it was mentioned that “*the application of article 43 of the Implementation Law of the National Security Law<sup>2</sup>... provides for a number of incisive measures against alleged ‘foreign agents’, such as: searching premises and electronic devices, confiscating travel documents, freezing property, requiring information or material, as well as conducting covert surveillance, inter alia*”. We must point out that this is not an accurate understanding of Implementation Rules. The specific rules regulating foreign (and Taiwan) political organisations and agents are contained in Schedule 5 to the Implementation Rules (whereas other Schedules to the Implementation Rules provide for law enforcement powers in handling cases concerning offences endangering national security generally). Such rules, taking into account the special nature of the issue which the Schedule seeks to address, only provide for the requirement for foreign (and Taiwan) political organisations and agents to provide information by reason of activities concerning Hong Kong should such information be necessary for the prevention and investigation of an offence endangering national security. Moreover, the Implementation Rules have set out in detail the stringent procedural requirements for the Police to follow, including the conditions that must be met when they seek authorisation to take investigative measures.

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<sup>2</sup> The reference to “article 43 of the Implementation Law of the National Security Law” is not accurate. It is presumed that the statement intends to refer to the Implementation Rules rather than Article 43 of the Hong Kong National Security Law.

### Detention on national security ground

29. **Article 42(2) of the Hong Kong National Security Law** states that “no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security”.

30. As held by the Court of Final Appeal in *HKSAR v Lai Chee-ying* [2021] HKCFA 3, Article 42(2) creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and **imports a stringent threshold requirement for bail applications**. In applying the test under Article 42(2), the court must first decide whether it “has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security”. If, having taken into account all relevant material, the court concludes that it does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused. If, on the other hand, the court concludes that taking all relevant material into account, it does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail under Part IA of the Criminal Procedure Ordinance (Cap. 221) applying the presumption in favour of bail.

31. The Court of Final Appeal takes the view that the cardinal importance of the primary purpose of the Hong Kong National Security Law, namely to safeguard national security and to prevent and suppress acts endangering national security, is clear. That is why changes, including the Article 42(2) exception applying more stringent conditions to the grant of bail in relation to offences endangering national security, have been introduced.

32. On the other hand, the Court of Final Appeal has held that Article 4 and Article 5 of the Hong Kong National Security Law, which expressly stipulate that human rights and freedoms and rule of law values are to be protected and adhered to in applying the Hong Kong National Security Law, provide the context in which Article 42(2) must be construed and applied. As far as possible, **Article 42(2) is to be given a meaning and effect compatible with human rights and freedoms and rule of law values**. By virtue of Articles 4, 5, 41 and 42, the procedural rules under the Criminal Procedural Ordinance (Cap. 221) relating to applications for bail are also applicable to questions regarding bail in cases involving offences

endangering national security, but subject to the specific exception created by Article 42(2).

#### Search of the Alliance's Premises

33. The Police conducted on 9 September 2021 searches at the headquarters and a warehouse of the Alliance respectively located in Mong Kok and Kwai Chung with a warrant issued by a magistrate under Schedule 1 to the Implementation Rules. Documents, computers and promotion materials were seized in suspected connection with a criminal case.

34. The above searches were conducted pursuant to **section 2 of Schedule 1 to the Implementation Rules** which provides that a police officer may, for investigation of an offence endangering national security, apply to a magistrate by information on oath for a warrant under such section in relation to the place specified in the information. There is thus judicial safeguard against any arbitrary or unlawful interference with privacy. A warrantless search may be conducted only if it would not be reasonably practicable to obtain a warrant, and if there is reasonable ground for believing that the evidence is necessary for investigation of an offence endangering national security; procurement and preservation of evidence; or protection of the safety of any person.

#### Freezing of the Alliance's Property

35. Pursuant to Schedule 3 to the Implementation Rules under the Hong Kong National Security Law, the Secretary for Security, having considered the information provided by the National Security Department of the Police, issued a notice in writing to the Alliance on freezing its property on 29 September 2021. The Secretary for Security had reasonable grounds to believe that the relevant property is “offence related property” as defined under Schedule 3 to the Implementation Rules.

36. According to **section 3(1) of Schedule 3 to the Implementation Rules**, where the Secretary for Security has reasonable grounds to suspect that any property held by any person is offence related property, the Secretary may, by notice in writing specifying the property, direct that a person must not, directly or indirectly, deal with the property except under the authority of a licence granted by the Secretary. Any person who plans to deal with or assist in dealing with property that has been frozen may make an application

to the Secretary for Security for a licence. Whether the relevant application will be approved would depend on the reasonableness of the application, taking into account the overall circumstances of the case.

37. It should be emphasised that financial and other kinds of assistance play an important role in facilitating the commission of offences endangering national security. The property freezing regime serves the important purposes of safeguarding national security – including preventing relevant property from being transferred or dissipated, thus affecting any confiscation order or the forfeiture order to be made in future; or preventing the use of the property in financing or assisting the commission of any offence endangering national security; and preventing any dealing of property in a manner which may prejudice on-going investigation or proceedings concerning offences endangering national security.

38. In the judgment of *Lai Chee Ying v Secretary for Security* [2021] HKCFI 2804 handed down on 17 September 2021, the Court of First Instance considered the freezing regime under Schedule 3 to the Implementation Rules and observed that the existence of the licence exception provides a balance between the purposes of the preventing, suppressing and punishing offences endangering national security, and the protection of property right.

#### **(E) Adjudication of Cases**

39. On how to handle applications for bail by persons charged with offences endangering national security in accordance with Article 42(2) of the Hong Kong National Security Law, the Court of Final Appeal has already laid down the relevant principles in *HKSAR v Lai Chee-ying* [2021] HKCFA 3 which are highlighted in paragraphs 29 – 32 above. In particular, the Court of Final Appeal has acknowledged that the Hong Kong National Security Law reflects internationally practiced principles such as presumption of innocence and protection of parties' rights to fair trial. **Due process is observed** in all proceedings.

40. The rights to fair trial and to be free from any arbitrary arrest or detention are enshrined under **various substantive safeguards**. **Article 25 of the Basic Law** states that all Hong Kong residents shall be equal before the law. **Article 28 of the Basic Law** also guarantees that the freedom of

the person of Hong Kong residents shall be inviolable and that no Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. **Article 3(3) of the Hong Kong National Security Law** stipulates that the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the Hong Kong National Security Law and other relevant laws. **Article 4 of the Hong Kong National Security Law** makes it plain that human rights and fundamental freedoms under the laws of the HKSAR are to be respected and protected while safeguarding national security in the HKSAR. The elements of each of the four types of offences endangering national security under the Hong Kong National Security Law encompassing the *actus reus* and *mens rea*, as well as the penalties of these offences, are also clearly set out in **Chapter III** therein.

41. So far as **procedural safeguards** are concerned, firstly, the Department of Justice (DoJ)'s prosecutors must act in accordance with the Hong Kong National Security Law and local law in handling cases concerning offences endangering national security. **Article 63 of the Basic Law** expressly guarantees that all prosecutions are controlled by the DoJ, free from any interference. **All prosecutorial decisions are based on admissible evidence and applicable laws.** Cases will never be handled any differently owing to the occupation, political belief or background of the persons involved. Prosecutions would be instituted only if there is sufficient admissible evidence to support a reasonable prospect of conviction and if it is in the public interest to do so. The DoJ has been carrying out this constitutional duty in a professional and fair manner.

42. Secondly, **Article 35 of the Basic Law** guarantees that Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

43. Thirdly, when adjudicating cases under the Hong Kong National Security Law, as in any other cases, **judges remain independent** and impartial in performing their judicial duties, free from any interference. That the courts of the HKSAR can exercise independent judicial power, including that of final adjudication free from any interference, has been enshrined under the Basic Law as set out in Articles 2, 19 and 85. Article 92 of the Basic Law also clearly stipulates that judges and other members of

the judiciary of the HKSAR shall be chosen on the basis of their judicial and professional qualities. **No political vetting is in the appointment process.** The constitutional duty of judges, in the exercise of their judicial power, is to apply the law and nothing else. Such duty does not change when judges decide cases arising from or involving political controversies. The issue of judgments setting out the reasons by which judges arrived at their decisions also demonstrates that **due administration of criminal justice system** remains in compliance with human rights protection and principles of the rule of law as required by Articles 4 and 5 of the Hong Kong National Security Law.

44. In respect of the charge of “Failure to Comply with Notice to Provide Information” against Chow and others, the Acting Chief Magistrate, after considering the requirement of Article 42 of the Hong Kong National Security Law and other provisions of the local law of the HKSAR, granted bail to some of the defendants. Any suggestion that the judiciary does not act independently is not supported by any shred of evidence.

45. Section 9P of the Criminal Procedure Ordinance (Cap. 221) provide for restrictions on the reporting of bail proceedings. Reporting restrictions in relation to bail proceedings and other pre-trial proceedings are very common in jurisdictions around the world, the purpose of which is to avoid excessive adverse pre-trial publicity which may prejudice the fairness of the eventual trial, and to ensure the due administration of justice. In any event, notwithstanding the reporting restrictions, **bail applications are heard in open court** and members of the public can attend the hearing and observe the proceedings.

46. Freedoms and human rights have continued to be jealously guarded and remained a top priority of the HKSAR Government. Along with the rule of law, a fiercely independent judiciary, a clean government, a level playing field for business, openness, diversity and inclusiveness, freedoms and human rights constitute Hong Kong’s much cherished core values.

#### **(F) Conditions of Detention**

47. The Correctional Services Department (CSD) is committed to ensuring a secure, safe, humane, decent and healthy custodial environment. CSD also

upholds the principle of equality in managing all persons in custody (PICs), regardless of their background.

48. CSD provides PICs with **basic necessities, a reasonable living environment and sufficient custodial care** in accordance with the law. It also ensures that they receive proper and fair treatment according to fair, lawful and reasonable principles.

49. In addition, CSD provides assistance and guidance to help PICs solve their personal problems and cope with difficulties arising from detention. CSD also organises programmes to help rehabilitate PICs and to prepare them for release.

50. Currently, all institutions have **on-premises hospitals** that are staffed by qualified healthcare personnel. In collaboration with the Medical Officers from the Department of Health, round-the-clock basic health care services are provided in all institutions. PICs who need further examinations and treatments are referred to visiting medical specialists or public hospitals for follow up. Furthermore, psychological programmes are provided for PICs to improve their psychological well-being and help change their offending behaviour.

51. Any PICs who feel aggrieved by any treatment received during imprisonment can lodge their **complaints through various channels**. Internal channels include complaining to the institutional management, directorate officers of the CSD Headquarters during their inspections of the correctional institutions or the Complaints Investigation Unit of the CSD. As for external channels, PICs may write to members of the Legislative Council, The Ombudsman, statutory bodies, other law enforcement agencies or government bureaux, etc. to lodge their complaints. Besides, they may seek assistance from or lodge their complaints to the visiting Justices of the Peace during the latter's surprise inspections of their institutions.

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