

## **Article 23 Roundtable Part II: HK's Place in China's Security Order**

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### **A Legal Basis for Applying Mainland National Security Laws under Article 18 and Annex III?**

*Note: The following ideas are put forward (playing devil's advocate) for discussion and possible rebuttal. They do not imply endorsement of interpreting the HKBL in this way.*

Although the NPC has delegated to the HKSAR (under Article 23) the power to enact on its own legislation on certain national security offences, if the Central Authorities ever became determined to apply mainland national security legislation to the HKSAR it might be possible for them to try and argue that there exists a constitutional basis for taking such action.

Like all national laws applied to the HKSAR, in the absence of a state of war or state of emergency any mainland national security legislation would have to comply with the subject-matter restriction in Article 18(3) which only permits the NPCSC to add national laws to Annex III in respect of the following three categories:

- a) defence;
- b) foreign affairs; and
- c) other matters outside the limits of the autonomy of the Region.

In considering the constitutional basis for the addition of mainland national security laws to Annex III, category c) would seem relevant, and it would be necessary to distinguish between the following types of national security legislation in assessing whether or not there is any possibility that it could be argued they may fall within this category:

- 1) Specific legislation on any offences mentioned in Article 23 (i.e. treason, succession, sedition, subversion, theft of state secrets etc.). Legislation on these offences falls within the region's autonomy, since the power of enactment has been specifically delegated to the HKSAR under Article 23, and so there could not be any constitutional basis for adding specific national legislation on any of these offences to Annex III;
- 2) Specific legislation on other national security offences not mentioned in Article 23. If any further national security offences are identified which are not specifically mentioned in Article 23 (see, for example, the list in Article 15 of the National Security Law) then it could be argued that, since there has been no specific delegation to the HKSAR of legislative powers in respect of these offences, they constitute "matters outside the limits of the autonomy of the Region" and there is a constitutional basis for adding national legislation on such offences to Annex III. A counter argument would be that such offences, although not specifically mentioned in Article 23, fall within the scope of those offences listed in Article 23 and are therefore matters within HK's autonomy;
- 3) General legislation setting out broader principles in relation to the protection of national security. Since national security is not mentioned in Article 23, it could be argued that the power to legislate in respect of such general principles has not been delegated to the HKSAR, and so it might be constitutionally permissible to add this type of national security legislation to Annex III.

Since the PRC National Security Law primarily sets out general principles relating to national security (there is no reference to sedition, while other Article 23 offences are mentioned only in general terms) it could be argued that it might be constitutionally permissible to add the National Security Law to Annex III. That does not, however, suggest it would be either legally or politically desirable for the NPCSC to take such action.

Even if the National Security Law were added to Annex III, under Article 18(2) it would still need to be either promulgated or enacted by Legco before it would become part of the laws of the HKSAR (see the *PRC Law on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks*, which was added to Annex III in 2005 but is still not part of the laws of the HKSAR). Presumably promulgation would be the preferred path since there would no doubt be great difficulties persuading Legco to enact such a law (indeed no national law has been enacted through Legco since the advent of an elected legislature in 1998).

However promulgation would raise serious questions about the jurisdiction of the courts in the constitutional challenges that could be expected to follow, since the National Security Law would not be directly covered by the Article 11(2) requirement that: “No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law”. The issue of whether this is also true of those national laws applied through promulgation, and the jurisdiction of the courts to deal with such matters, remains uncertain (Chan & Lim 2015: 62-63; Leung 2000; 26-27).

Finally, were the National Security Law ever to become part of the laws of the HKSAR, a distinction needs to be drawn between the:

- i) General consequences, which could be expected to be very damaging in terms of confidence in one country, two systems and the local legal system; and
- ii) Direct legal consequences, which would be much more limited, since it is difficult to see the National Security Law on its own creating criminal offences capable of enforcement in the HKSAR.

## **How Far are Hong Kong Chinese Subject to the Personality-Based Jurisdiction of PRC Criminal Law?**

Under Article 7, the PRC Criminal Law exercises wide personality-based jurisdiction over “any citizen of the People’s Republic of China who commits a crime prescribed in this Law outside the territory of the People’s Republic of China”. This includes crimes committed by PRC citizens wholly within the HKSAR if, as has been suggested, the term “territory” in this context refers to the jurisdictional territory of the PRC legal system, rather than the geographical territory of the PRC (Fu 1998: 276; Leung 1999: 57).

When the issue arose in 1998, following the conviction of mainland resident Li Yuhui in a Shantou court for crimes apparently committed entirely in Hong Kong (“the Telford Gardens poisoner” case) it was suggested this personality-based jurisdiction did not apply to those Chinese citizens who are residents of the HKSAR (“Hong Kong Chinese”) in relation to crimes committed entirely within the HKSAR.

According to Fu: “*Since the application of PRC criminal law is limited to the mainland and its residents, ‘PRC citizen’ within the meaning of PRC criminal law means mainland residents only*”.

Leung, then Secretary for Justice, cited the President of the Guangdong Provisional People’s Court as stating: “*According to the Basic Law, the Mainland public security authorities, procuratorates and courts have no judicial jurisdiction over cases which involve crimes committed solely in Hong Kong by Hong Kong residents*”.

An important question worth asking in the light of recent events, and which perhaps others more expert in this area can address, is:

**Is it still correct to interpret the personality-based jurisdiction in Article 7 as not applicable to Hong Kong Chinese?**

**Is it now more accurate to interpret Article 7 as meaning that Hong Kong Chinese physically present on the mainland (whether voluntarily or otherwise) may be subject to prosecution for crimes committed entirely within the HKSAR?**

## **References**

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