THE HONG KONG NATIONAL SECURITY LAW:
THE SHIFTED GRUNDNORM OF HONG KONG’S LEGAL ORDER AND ITS IMPLICATIONS

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Theoretical Advancement

Normative and institutional changes

- Application of mainland laws in HK
- Conflicts of Laws and the Interpretation of the NSL
- Increased Presence of Mainland Authorities in HK
- Exceptions to HK’s Criminal Jurisdiction
- Legal language
JUSTIFICATION OF THE NSL LEGISLATION

- **Key Theories**
  - “Theory of authorization”
  - “validity of the PRC Constitution in Hong Kong”

- **Supplemented Basic Law Discourses**
  - “Co-governance on national security matters”
  - “Supreme status of the NPC in China’s constitutional order”
  - “Beijing’s plenary power to govern HK”

Reframe:
- Art 18 of Basic Law
- Art 31 of PRC Const
THEORY OF AUTHORIZATION

- BL 23: a delegation clause

- BL art. 18(4) ‘shall’(‘ying’): HKSAR’s obligation

**Lai Chee Ying Bail case (2021)**

Chapter II “Relationship between the Central Authorities and the HKSAR”

Art 23 of Basic Law

The HKSAR *shall enact laws on its own* to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, ...
Deficiency of the Authorization Theory:
no certain legal procedures to grant or revoke powers

Co-governance theory/‘dual-track legislation’ theory
(双轨立法)

- Central authorities could enact the NSL for HK regardless of whether HK has fulfilled its constitutional duty
- Further removes the constraints imposed on the central authorities by the BL
Basic Law Grounds for the Co-Governance Theory

1. Art. 18 (4): emergence power
   - “In the event that the NPCSC decides to declare a state of war or, by reason of turmoil within the HKSAR which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.”

2. Art. 14 (1)
   - The Central People's Government shall be responsible for the defence of the HKSAR
     - The scope of ‘defence’ and ‘national law’ (BL 18) expanded
Whether and to what extent the NPC/SC will continue to enact NSLs or other laws for HK

Art 31 of PRC Const.

“... The system to be instituted in special administrative regions shall be prescribed by law enacted by the NPC ...”

NSL legislation: “not a one-off power”
CONSTITUTIONAL BASIS OF THE NSL

The validity and application of the PRC Const. in HK

- NPC Decision on NSL Legislation
  - Art 31 of the PRC Const.
  - Arts 62 (2)(14)(16) of the PRC Const.
  - Citizens’ constitutional obligation to maintain territorial integrity and state interest (Arts 51, 52 & 54)

- NPCSC Decision on Qualification of LegCo members
CONCERNS

- Significant development in BL jurisprudence

Implicit amendment of the BL

Relationship between the Const. and BL

Compatibility between the BL and the NSL – or any other national law promulgated for HK outside the BL framework
A NEW ‘CONSTITUTIONAL MOMENT’?

- Reframe Art 18 of the BL and Art 31 of the Const. (legal autonomy)

- Basic Law-based legal order → PRC Constitution-based legal order
THE NSL: ITS CHINESE LAW IMPLICATIONS

Major Areas of Legal Interface

• Application of mainland laws in HK
• Conflicts of Laws and the Interpretation of the NSL
• Increased Presence of Mainland Authorities in HK
• Exceptions to HK’s Criminal Jurisdiction
• Legal language
A. APPLICATION OF MAINLAND LAWS

• Pre-NSL period
  • Implementation of Annex III national laws
  • Implicit application of Non-Annex III national laws

• Post-NSL period
  • Non-Annex III national laws directly applied to HK through Annex III national laws in a non-emergency period
A. APPLICATION OF MAINLAND LAWS

- NSL 55-57: expands the scope of circumstances when non-Annex III laws could be directly applied to HK.

Art 18(2) of BL

Art 18(4) of BL
non-Annex III national laws could only be applied to HK when the NPCSC declares a state of war or emergency and issues an order applying the relevant national laws in HK.

NSL 55: National Security Office exercise jurisdiction over certain national security cases (Art 55 cases)

Arts 56-57: the PRC Criminal Procedure Law and “other related national laws” shall apply to all the procedural matters in Art 55 cases

- Bypass the limits imposed by the BL
whether a national law, listed in Annex III or not, shall prevail if it contravenes the Basic Law and Hong Kong laws

whether the Hong Kong judiciary has the power to review the NPCSC’s legislative act

- **Tong Ying Kit habeas corpus case**
  - Construed the NSL in tandem with rights under HK laws
  - Constitutionality of the NSL confirmed

- **Lai Chee Ying bail case**
A. APPLICATION OF MAINLAND LAWS

- Chinese Elements Applied Implicitly

  - Chinese criminal law provisions on offenses and penalties
  
  - Chinese Law as a reference to clarify key NSL concepts
  
  - Chinese constitutional and administrative laws regarding state organs implicated in the NSL
B. CONFLICTS OF LAWS & THE INTERPRETATION OF THE NSL

- Interpretation of the NSL
  - The power of interpretation
    - NPCSC: final say
    - Lack of procedures
  - Interpretative techniques
    - CFI: Tong Ying Kit Habeas corpus case
      - Adhere to common law approaches
    - CFA: Lai Chee Ying case
THREE LAYERS OF LEGAL CONFLICTS

The Hierarchy and conflict between the NSL and the BL

Hong Kong local laws vs. NSL and IR43
- The NSL
- The Implementation Rules for Article 43 of the NSL
- Criminal procedure laws
- Hong Kong Bill of Rights Ordinance

- A separate legal authority parallel to the existing legal system in HK

Internal conflict among NSL Provisions
C. INCREASED PRESENCE OF MAINLAND AUTHORITIES IN HK

- Legalize interaction between the SAR government and the Liaison office
- Deepens BJ’s reach into HK bureaucracy
- Direct access to daily-policy making process within SAR government
- 'executive-led government' model enhanced
D. EXCEPTION TO HK CRIMINAL JURISDICTION

National Jurisdiction
(NSL 40, 55-57)

Extra-territorial jurisdiction
(NSL 38)
NATIONAL JURISDICTION

(NSL 40, 55-57)

• Diminish the line between the two criminal legal systems in national security regime

• How to guarantee a suspect’s ICCPR rights in Art 55 cases
**EXTRA-TERRITORIAL JURISDICTION**

(NSL 38)

1. **Hong Kong residents who violate the NSL in Hong Kong are detained in the Mainland**
   (“12 Hong Kongers” case)

2. **Mainlanders who violate the NSL in Hong Kong return to the Mainland**

3. **Mainlanders who violate the NSL in the Mainland are detained in the Mainland**

4. **Mainlanders who violate the NSL in Mainland/Hong Kong are detained in Hong Kong**

5. **An NSL crime that involves substantial cross-border elements**

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(Images and charts are not transcribed as they do not contain additional text.)
E. LEGAL LANGUAGE

- The NSL & IR43: Lack of official English versions
- Inconsistencies between English and Chinese versions
- Priority of Chinese in national security law regime

A suspect’s right to select lawyers (*Tong Ying Kit habeas corpus case*)

- Junior Chinese counsels in the legal defense team
- A large pool of senior counsels in the market
CONCLUSION

• Grundnorm transition
  • Transitioning from presupposing the validity of the UK constitutional order to that of the PRC Constitution

• Basic Law: controlling

• Art 31 of PRC Const.: dormant

• HK law insulated from Chinese law
CONCLUSION

• PRC Const.:

“behind the scenes”

“front of stage”

legal source of law in HK

Escalated disobedience: Defiance of the Grundnorm and ‘OCTS’
CONCLUSION

"An undeclared legal reform":

- key arrangements under the BL readjusted
- a wide range of areas of HK’s legal regime reshaped
- Chinese legal elements infiltrated into HK common law
- new central institutions & governance structure reconstructed
- Precedence of Chinese language
- Blurred boundary between jurisdiction & criminal justice systems in Mainland and HK

**Basic Law:** a filter to screen and control national norms and institutions?

**NSL:** a ‘state of exception’ → stabilized ordinary politics?
THANK YOU