ARTICLES

NATIONAL SECURITY LAW IN HONG KONG: QUO VADIS A STUDY OF ARTICLE 23 OF THE BASIC LAW OF HONG KONG

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I. INTRODUCTION

Since the creation of "British Hong Kong" more than 150 years ago, and especially since the formation of the People's Republic of China (PRC) in 1949, Hong Kong and the PRC have developed two entirely different legal and political cultures. As the termination of the lease over Hong Kong's New Territories drew closer in the 1980s, a treaty was entered into (known as the *Joint Declaration*) between the PRC and the United Kingdom. The *Joint Declaration* set out various grounds for the reunification of the (British) Territory of Hong Kong with Mainland China.[1] This resumption of sovereignty took place on July 1, 1997 when Hong Kong became the Hong Kong Special Administrative Region (HKSAR) of the PRC. Following the signing of the *Joint Declaration*, the *Basic Law*[2] of the HKSAR was drafted

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1. This term is used to denote that part of China comprising the PRC but not Hong Kong and Macao and not including Taiwan.

2. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE P.R.C. (1990) [hereinafter BASIC LAW].

and eventually adopted by the National People's Congress of the PRC (NPC). This *Basic Law* was to act, effectively, as both the new constitution of the HKSAR after its reunification with Mainland China in July 1997 and as one of the key documents setting out a number of the legal and political powers relevant to the interaction of the HKSAR with Mainland China.

Article 23 of the *Basic Law*, which was re-drafted following the Tiananmen Square bloodshed in 1989, sets out the types of national security laws that the HKSAR must have in order to prevent foreign and local entities from seriously attacking the basic political order in Hong Kong or usurping the Central People's Government (CPG) in Beijing.

Article 23 of the *Basic Law* provides as follows,

> The Hong Kong Special Administrative Region 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, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

Article 23 raises a range of interesting issues.[3] This is so because: (a) the HKSAR already has its own national security related laws; (b) the HKSAR has a far less repressive and relatively more democratic political system and culture than Mainland China; and (c) the Standing Committee of the NPC has the power under the *Basic Law* not only to interpret and to amend the *Basic Law* (under Articles 158 & 159), but it can also invalidate, though not amend, laws passed by the HKSAR Legislature in certain circumstances (under Article 17).

The relevance of this article has, regrettably, been amplified by the major terrorist attacks launched against New York City and Washington, D.C. on September 11, 2001 (9/11). The HKSAR government has now signaled its intention to adopt certain measures (likely including legislative measures) to combat terrorism in the aftermath of 9/11.[4]

The main aim of this article is to examine the likely future direction of national security legislation in the HKSAR. The principal factor shaping any new response in Hong Kong in this

3. Hualing Fu, *The National Security Factor: Putting Article 23 of the Basic Law in Perspective*, *in* JUDICIAL INDEPENDENCE AND THE RULE OF LAW IN HONG KONG, (Steve Tsang ed., 2001); H. L. Fu, Richard Cullen & Pinky Choy, *Curbing the Enemies of the State in Hong Kong: What Does Article 23 Require?*, 5 J. OF CHINESE & COMP. L. 45 (2001-02).

4. MEASURES TO COMBAT TERRORISM, LEGISLATIVE COUNCIL DISCUSSION PAPER CB (2) 490/1 - 02(01) (Nov. 30, 2001).

regard is Article 23. Were this Article not in the *Basic Law*, it is likely that the existing laws in the HKSAR regarding national security would simply continue to operate without attracting any great notice - apart, perhaps, for some "fine tuning" in the wake of 9/11. Now, however, the HKSAR has to deal with a mix of Article 23 pressures and concerns arising from 9/11. It is clear that the latter phenomenon has acted as a special catalyst in the ongoing Article 23 debate.

In meeting this aim, this article concentrates on the municipal jurisdictions of pre- and post-unification Hong Kong and Mainland China. Reference is also made to international human rights law in the course of discussing the special relevance of that jurisprudence within the HKSAR.

The article proceeds by discussing the relevant topic areas in the following order: 1) the concept of the rule of law; (2) the various drafts of Article 23 of the *Basic Law*; (3) reaction in Hong Kong to the final draft of that Article in light of political unrest in Mainland China in the late 1980s and political developments in Hong Kong under the last British Governor, Christopher Patten; (4) the compatibility of the *Basic Law* and the *PRC Constitution*;[5] (5) the constitutional validity of the *Basic Law*; (6) the applicability of the *PRC Constitution* in the HKSAR; (7) the relevance of the International Covenant on Civil and Political Rights and the Hong Kong Bill of Rights to Article 23; (8) the approach of the Court of Final Appeal to interpreting the *Basic Law*; (9) the impact of relevant provisions within the criminal law regimes of Mainland China and the HKSAR; and (10) the role of certain NPC deputies and the Basic Law Committee in relation to the interaction between the HKSAR and Mainland China.

II. PRELIMINARY ISSUES

A. THE RULE OF LAW – AN OVERVIEW[6]

1. The Conception of the Rule of Law

Rule of law, as a concept, has developed over a very long period of time. The ancient Greeks considered at length the problem of how to produce virtuous citizens and a virtuous society. There was some theorizing by Plato about the advantages of making the ruler (however titled - Prince, King, Emperor, etc.) subject to law. Given that various ancient Eurasian civilizations

5. P.R.C. CONST. (1982)

6. This section draws on two principal sources: David Clark, *The Many Meanings of the Rule of Law*, *in* LAW CAPITALISM AND POWER IN ASIA 28-44 (Jayasuriya ed., 1999); Carol Jones, *Politics Postponed*, *in* LAW CAPITALISM AND POWER IN ASIA 45-68 (Jayasuriya ed., 1999).

had detailed legal codes, there was potentially plenty of law to which a ruler could be subjected. The more popular and enduring view over many centuries was, however, that the ruler was above the law. If the ruler answered to anyone, then it was to God. Rulers and their functionaries devoted significant energy to explaining that in some way God had appointed them. A variety of this political theory was popular in ancient China as well as in other ancient civilizations. Sometimes early rulers resolved this very basic, "answerability" or "legitimacy" problem by explaining to their subjects that they *were* God.

Although the rule of law concept is not a pure and simple creation of the common law, it was in common law England that the political and economic circumstances came to pass which gave rise to the comparatively rapid development of the theory over a period of around 200 years commencing in the 17th century. In the aftermath of the English Civil War and the final vanquishing of the absolutist, Stuart monarchy, the *Bill of Rights Act* of 1689 was passed. The key rule of law features of this act of Parliament were that kings could no longer suspend or dispense with laws; kings were obliged to acknowledge the privileges of Parliament; and kings could not impose taxation without approval from Parliament. Power shifted decisively, from the monarchy to Parliament. The rule of law concept provided both the justification for this change and the means to lock the change into place. The disastrous loss of the American colonies by George III about a century after the *Bill of Rights Act* was passed provided the pretext for the next significant shift of power from the monarchy to Parliament and the creation of the "figurehead" constitutional monarchy we have today in the United Kingdom.

The rule of law concept is widely regarded as having been encapsulated as a doctrine of the common law by the English lawyer A. V. Dicey in the mid-19th century. Apparently, Dicey drew on the ideas of Professor of Law W.E. Hearn of the University of Melbourne in crafting his formulation.[7] Originally, the concept had been applied principally to mediate the relationship between the monarch and Parliament. Now it was also being applied, in the wake of the massive social, economic, and political changes wrought by the Industrial Revolution, to mediate the relationship between the government and its citizens. Dicey's formulation said that,

- No person is to be punished other than for a breach of a properly established law, the breach of which had to be demonstrated at a hearing before the ordinary courts of the land;

7. Clark, *supra* note 6, at 31.

- No person is above or beyond the law regardless of their rank, and no person are to be exempted from a duty to obey the law which governs citizens of the realm; and
- The general principles of the [UK] Constitution are to be found through judicial decisions determining the rights of private persons in particular cases brought before the courts.[8]

It must be said that this formulation was substantially driven by a concern to protect the rights of citizens of property rather than citizens generally. But the principles lent themselves to general application. Over time, in many jurisdictions, these general rules have been applied for the benefit of ever widening segments of a given population.

2. *Hong Kong and the Rule of Law*

Hong Kong is heir to a strongly established common law legal system, based squarely on the Anglo legal tradition, which stresses observance of the rule of law. Although scholars and others continue to dispute the precise meaning of this term, most are in agreement about the key facets of the concept. In particular, today the rule of law embodies the idea that *all* individuals and components in a given society are subject to law, especially the state, the government, and all their instrumentalities.

Typically, in modern times, the application of the rule of law has occurred within democratic-representative systems of government. Hong Kong, as it happens, is a rather novel, modern exception to this practice. Until 1991 Hong Kong had no significant elements of representative democracy in its governance. However, in Hong Kong the impact of the rule of law pre-dates 1991. In the period since the Second World War the application of this concept has expanded to cover the widest range of Hong Kong residents.

3. *China and the Rule of Law*

The PRC has inherited a quite different legal tradition from that of Hong Kong. Imperial China generally shunned modern legalism as far as possible. As the doomed Manchu (Qing) Dynasty neared its final collapse in the early 20th century, some efforts were made to introduce an up-to-date legal structure, but little came of this reform movement until after the Republic of China was established in 1912. The dominant legal model for China has been the civil law tradition of continental Europe, which traces its roots to Roman law as well as being influenced by the Dutch and the French during their periods of historical

8. *Id.*

ascendancy. The model, moreover, was not imported directly into China from Europe but, rather, through Japan. Modernizing China looked on Japan with a mixture of admiration, awe, and anxiety given the extraordinarily rapid development of the institutions of a modern state that occurred in Japan after the Meiji Restoration in 1868. Japan, in modernizing its legal structure, had looked particularly to the Second Reich of Bismarck's Germany. In 1949 in Mainland China, the legal culture of the Union of Soviet Socialist Republics emerged as yet another influence following the victory of the Chinese Communist Party (CCP) in the Chinese Civil War.

Today, the PRC legal system is undergoing vast change. The common law influence is still quite significant, though principally in commercial law and via legislation from the common law world. The PRC remains, in terms of fundamental political structure, very much a Leninist state. The market-based reforms of the last two decades have resulted in a rapidly waning Marxist influence, but Leninist approaches to governance and social control remain significant. China's four thousand year tradition of authoritarian government remains intact. This tradition and current PRC political practice continue to deny any full and serious application of the Rule of Law doctrine as it is understood in Hong Kong.

The PRC government often speaks of the need to observe the rule of law, especially when noting the appalling excesses of the "rule of man" as epitomized by Chairman Mao Tse-tung's governance during the Cultural Revolution. China still seems, predominantly, to see the rule of law in this negative way. It is this concept that captures the commitment in China to never again subject the nation to the extremes of a rule of man doctrine. The active essence of the rule of law, namely the subjugation of the State to a higher authority, remains at odds with the Leninist theory of the State and much current political practice in China.

B. The Joint Declaration

British control over the New Territories of Hong Kong was based on the ninety-nine year lease in the *Second Convention of Peking*. This lease expired on June 30, 1997. Well before the expiration of this lease, by the late 1970s, Hong Kong investors were beginning to grow uneasy about their long-term tenure in the now strongly developing New Territories. This, in turn, fueled the British government's desire to find a way to reassure both existing and prospective landholders about the prospects for investment in the New Territories beyond 1997. The then gover-

nor of Hong Kong, Sir Murray MacLehose, raised the issue in discussions with Chinese leader Deng Xiaoping in 1979. He received a vague reassurance at that time that investors in Hong Kong should "put their hearts at ease."

By 1982, the Thatcher government in Britain (and Margaret Thatcher, in particular) decided they had to force a clarification of Hong Kong's future with China. The British aim was to somehow secure an agreement that Britain could maintain some sort of administrative management of the territory of Hong Kong *after* 1997. Given the historical attitude of the Chinese towards all the treaties creating Hong Kong, the hopes of success were faint; how could China formally agree to a continuation of a "colonial" arrangement in the face of China's own continuous disavowal of the instruments giving rise to Hong Kong's Britishness?[9] True, the benefits China had enjoyed from Hong Kong's separate status were immense, and not lightly to be thrown away.

The Chinese, however, were ready with their own solution, which required no British administration. In April 1982, Deng gave a comprehensive outline of the PRC's plans for the future of Hong Kong. Hong Kong would return to China and be subject to Chinese sovereignty, but as the HKSAR. It would enjoy much local autonomy. Indeed, it would still be governed by Hong Kong people, would retain its common law legal system, and remain a fully capitalist enclave. Moreover, this politico-economic status for the new HKSAR would be guaranteed for fifty years beyond 1997.[10]

The final outcome of the negotiations between Britain and the PRC over the return of Hong Kong was the Joint Declaration of Great Britain and Northern Ireland and the People's Republic of China on the Question of Hong Kong (Joint Declaration). The Joint Declaration went into force in May 1985 after being signed in Beijing in December 1984. The Joint Declaration is a complex document with three annexes. It laid down the principles that are to govern life in the HKSAR for the fifty years after 1997. It also foreshadowed the drafting of Hong Kong's constitutional document, the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (*Basic Law*).

9. *See generally*, PETER WESLEY-SMITH, UNEQUAL TREATY 1898-1997 CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES 42-63 (1980).

10. William Rich, *Hong Kong: Revolution without Change*, 20 H.K.L.J. 279, 279 (1990).

C. The Basic Law

The *Basic Law* went through three drafts in the late 1980s before being adopted by the PRC Parliament, the National People's Congress (NPC) in April 1990.[11] It came into force on July 1, 1997. The *Basic Law* provides that the HKSAR is to have competence over all matters apart from foreign affairs and defense. The continuation of Hong Kong's legal system is guaranteed in the *Basic Law* (Article 8 of the *Basic Law*).

D. The Court of Final Appeal

The HKSAR ceased, on July 1, 1997, to rely on the Judicial Committee of the Privy Council as its final court of appeal. A new Hong Kong-based Court of Final Appeal (CFA) took its place. The Hong Kong government introduced enabling legislation which provided for a single external judge to be appointed in each case heard by the CFA. A distinguished panel of external judges, including former judges of Australia's High Court and judges from the House of Lords, has been established to form the external panel for the CFA.

E. Human Rights and Freedoms

The *Basic Law* seeks to ensure individual freedoms. It contains wide-ranging guarantees of individual rights.[12] These rights have recently been given real substance in the first major constitutional cases to come before the CFA.[13] It is broadly recognized by most commentators, however, that the lack of a full representative democracy in Hong Kong leaves a fundamental weakness in the underpinnings of these rights. It is around these two related issues, democratization and individual rights, that the greatest controversies arose in the time leading up to the change of sovereignty and afterwards. The role of Article 23 of the *Basic Law* has been intertwined with these controversies.

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11. The *Basic Law* has been subject to a great deal of scrutiny and much academic debate. It (together with much related law) is discussed in detail in: Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (2d ed. 1999).

12. These protections are examined in great detail in Yash Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complimentarities and Conflicts*, 1 J. of Chinese & Comp. L. 30, 34-36 (1995).

13. *See* Ng Ka Ling v. Dir. of Immigration, 1 H.K.L.R.D. 315 (Ct. Final Appeal 1999); Chan Kam Nga v. Dir. of Immigration, 1 H.K.L.R.D. 304 (Ct. Final Appeal 1999); Ng Ka Ling v. Dir. of Immigration (No. 2), 1 HKLRD 577, 577 (Ct. Final Appeal 1999).

III. THE DRAFTING OF ARTICLE 23 OF THE BASIC LAW

A. THE BASIC LAW DRAFTING COMMITTEE

The Chinese government commenced the drafting of the *Basic Law* in 1985 to implement China's basic policies towards Hong Kong. The NPC established the Basic Law Drafting Committee (BLDC) and approved the membership of the BLDC. There were 59 members of the committee, of which 23 were from Hong Kong. Most of the Hong Kong members were prominent businessmen and leading professionals.[14] During the drafting process, four members passed away, and two members resigned. In addition, two members, Martin Lee and Szeto Wah, were suspended from the BLDC on October 31, 1989 because of their strong protests against the bloodshed in Tiananmen Square on June 4, 1989. By the time the drafting process was concluded, the membership of the BLDC was reduced to 51, and the Hong Kong members reduced to 18.

The BLDC was a working committee established under the NPC and was thus responsible to the NPC and its Standing Committee.[15] The Central People's Government (CPG) handpicked all the members, including the members from Hong Kong. The CPG made it clear, that as members from Hong Kong, the Hong Kong drafters were expected to represent a Hong Kong voice in the BLDC and to reflect the interests of a different system. But they were also expected to consider the national interest and the interests of the entire Chinese people. Their loyalty was thus placed under severe tension by the "One Country, Two Systems" doctrine.[16]

The Hong Kong members of the BLDC were responsible for establishing a Basic Law Consultative Committee (BLCC) to reflect the interests and will of the Hong Kong people. But the BLCC, despite its self-claimed independence, was structured and composed in such a way that it was subject to the direct control of the BLDC and, therefore, the indirect control of the CPG. The consultation, if any, was closely monitored and controlled by the CPG, and it came as no surprise that "Hong Kong became deeply suspicious of the PRC authorities' intentions."[17]

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14. Hong Kong members included Mr. Xu Jiatun and Mao Junnian, the Director and Deputy Secretary-General of Xinhua respectively.

15. The Standing Committee of the NPC to the "Executive Parliament" of the PRC. It comprises about 10% of the total of approximately 3000 members of the full NPC.

16. Joseph Cheng, *The Draft Basic Law: Messages for Hong Kong People, in* OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES NO. 5, 9-10 (Hungdah Chiu ed., 1988).

17. *Id.* at 10.

The BLDC was composed of five sub-groups. One sub-group, called the CPG-HKSAR Relations Sub-Group, was given the task of producing a draft to govern the relationship between the CPG and the HKSAR. Article 23 fell within CPG/HKSAR relations. When it was set up this sub-group had eighteen members, with eight members from Hong Kong. The Hong Kong co-convener was Rayson Huang. The other members were Martin Lee, Cha Chi-min, Sanford Yung, Cheng Ching-fun, Maria Tam, Liu Yiu-chu, and Tam Yiu Chung.

B. THE FIRST DRAFT OF ARTICLE 23

The drafting of Article 23 clearly reflects the wider political circumstances in China. After the seventh meeting of the CPG/HKSAR Relations Sub-Group (Sub-Group) on February 18, 1987, it was decided that, for the purpose of preserving China's unity and territorial integrity, the *Basic Law* should require the HKSAR government to enact laws to prohibit activities that could undermine national unity or subvert the CPG.[18] The proposed Article 22 (as it then was known until it later became Article 23) of *Basic Law* provided that,

> The Hong Kong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.[19]

The announcement of the draft of this Article marked the beginning of a long and vigorous debate that is still far from ending. On April 15, 1987, the BLDC held a meeting to discuss provisions that had been drafted, including Article 22.[20] Some members expressed the view that the terms in Article 22 were too broad and too ambiguous and therefore could punish legitimate political dissent. They suggested a qualification, namely that organized and violent means must be used in committing these activities before Article 22 could be invoked. To allay these fears, the Mainland Chinese members of the BLDC argued that Article 22 did not create any new elements within Hong Kong's existing law. It merely endorsed the existing provisions

18. Jianping Chen, *Drafting Sub-group Unanimously Agreed: HKSAR should enact its own laws to prohibit the undermining of the national unity of PRC*, WEN WEI PO, Feb. 19, 1987. *See also*, LI CHANGDAO & GONG XIAOHANG, JI BEN FA TOU SHI [AN ANALYSIS OF THE BASIC LAW] 113 (1990).

19. CONSULTATIVE COMM. FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE P.R.C., THE DRAFT BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE P.R.C. (FOR SOLICITATION OF OPINIONS) – CONSULTATIVE REPORT VOLUME 5 195-202 (Oct. 1988) [hereafter CONSULTATIVE REPORT 5].

20. *Mainland Committee Members said that people who criticized the Central Government in Hong Kong will not be pursued when they go to China*, WEN WEI PO, Apr. 16, 1987.

of the *Crimes Ordinance*.[21] In any case, it was argued that the relevant offenses in the *Crimes Ordinance* had a strong colonial character and would need to be repealed after reunification anyway. A new law would therefore be needed to fill the gap.[22]

On April 28, 1988, the BLDC published the draft *Basic Law* for public consultation. The community response to Article 22 varied. Some regarded it as necessary to ensure the stability and prosperity of Hong Kong. Others rejected it on the grounds that it was not referred to in the *Joint Declaration*; that it was unnecessary because Hong Kong had similar laws; or that it might infringe the rights and freedoms of the Hong Kong people. In particular it was said that subversion was an offense not known to "democratic countries" and therefore, should not be introduced into Hong Kong. Another major concern expressed in the consultation process was the uncertain nature of the terms "undermining national unity."[23] Undermining national unity was a criminal offense unknown to both Chinese and Hong Kong law. Hong Kong's reunification was all about national unity, however, and China was not prepared to soften its position on this issue.

C. THE SECOND DRAFT OF ARTICLE 23

The draft Article 22 was amended after this consultation. The amendments were made on the basis of the principle that, "The wording of [Article 22] may be amended, but its fundamental spirit should not be changed."[24] The amendments were as follows:

1) The clause "subvert the Central People's Government" was replaced by "treason"; and
2) The clause "any act of treason, secession, sedition or theft of state secrets" was inserted to replace "any act designated to undermine national unity."[25]

Article 23, (the previous Article 22), was drafted as follows:

> The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition or theft of state secrets.[26]

There was no explanation offered as to why these particular offenses were included in Article 23, although it was clear that

21. Li & Gong, *supra* note 18, at 113-21.
22. *Id.*
23. CONSULTATIVE REPORT 5, *supra* note 19.
24. CONSULTATIVE COMM. FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE P.R.C., REFERENCE PAPER FOR THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE P.R.C. (Draft) 22-3 (Feb. 1989).
25. *Id.*
26. *Id.*

the amendment took into consideration both the existing Hong Kong and Mainland Chinese laws and China's political concerns. It was a compromise that seemed to satisfy both sides. China was satisfied because both treason and subversion were offenses in its criminal laws, and treason at common law was broad enough to absorb much "subversive" behavior. China's national security was sufficiently protected by these additional three offenses. The compromise was also acceptable to Hong Kong because subversion and undermining national unity were replaced by treason and other offenses, which were defined with some sort of clarity and also had a long history at common law.

Admittedly, there were still serious concerns that the remit of Article 23 was broad and vague. For example, the scope and nature of state secrets were not certain in Chinese law and the definition of secession was even more problematic. But the amendment was generally accepted largely due to the fact the CPG had promised that laws in relation to the Article 23 offenses would be enacted by the future legislature of the HKSAR and not by the NPC. In addition, the common law, instead of Chinese law, would govern the legislation and the interpretation of the offenses.

D. The Third and Final Draft of Article 23

There was a fundamental change in the negotiations over the reunification of Hong Kong and Mainland China in 1989. Having witnessed the reaction from Hong Kong to the tiananmen bloodshed, the CPG was deeply concerned that Hong Kong might be used as a base for the overthrow of CCP rule in Mainland China by domestic and overseas hostile forces. The previous concessions made by the CPG in the negotiations on Article 23 were now regarded as dangerous to China's national interest.

The CPG insisted that further amendments were needed to reflect the new political reality. Enough about "two systems," it was said, more emphasis should be placed on "one country." China proposed to insert two new clauses in Article 23. One was to restore the offense of subversion against the CPG. The other was to insert a clause to prohibit foreign political organizations or bodies from conducting political activities in Hong Kong and to prohibit political organizations or bodies in Hong Kong from establishing ties with foreign political organizations or bodies.

Previously, the BLDC deleted the subversion clause in the original draft because it was satisfied that the offense of treason could also include the offense of subversion. However, due to both the new political situation and especially to the public state-

ments of some Hong Kong organizations calling for the overthrow of the absolute rule of the CCP in China, it was thought necessary to require the HKSAR government to prohibit subversive activities against the CPG specifically.[27]

In justifying the clause on foreign political organizations, the Chinese members of the BLDC argued that the provisions were based on the existing Hong Kong *Societies Ordinance*, which prohibited societies which were branches, or affiliates of political groups outside of Hong Kong, or had established links with those groups.[28] Mainland members of the BLDC explained that these provisions were necessary "to counter the attempt to internationalize Hong Kong in the run-up to, and after, 1997,"[29] and "to make sure Hong Kong remained politically stable and neutral and [that] it [did] not mingle with outside political forces."[30]

The drafters in the CPG/SAR Relations Sub-Group were well informed about China's intentions and were prepared for the possible amendment. The question was not whether the new clauses should be inserted, but how they should be worded. Four possible amendments were framed at the CPG/SAR Relations Sub-Group meeting on December 12, 1989. One was to state expressly that Hong Kong was not allowed to become an anti-Communist base. This proposal was regarded as too political and hostile for Hong Kong to bear. The second stated that Hong Kong was not allowed to interfere with the socialist system and policy in the Mainland. This proposal was regarded as too soft and the meaning of socialist system and policy was also difficult to define. The third option stated that Hong Kong should prohibit subversion against the CPG and the socialist system. The final option involved the adoption of the third option with the words "socialist system" deleted.

The Sub-Group approved the last option, over the reservations of the Hong Kong members who were in the minority. As a local drafter, Maria Tam, said, "It is not a matter of bowing or not bowing to Mainland drafters. We've got only six local members."[31] Local drafters, while clearly disappointed with the insertion, argued that it was the best deal that they could strike in the circumstances. It was not a bad deal, they explained.[32]

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27. *Id. See also* Li & GONG, *supra* note 18, at 120.

28. Chris Yeung, *Clampdown on Groups*, S. CHINA MORNING POST, Dec. 13, 1989.

29. *Id.*

30. *Id.*

31. *Quoted in* Chris Yeung, *Drafters Agree to "Subversive" Clause*, S. CHINA MORNING POST, Dec. 12, 1989.

32. The deal to which they were referring concerned the concurrent amendment of Article 18 of the *Basic Law*. Article 18 of the *Basic Law* was tightened up. After the amendment, Article 18 stated, "In the event that the Standing Committee of the

Rayson Huang, Hong Kong co-convener of the Sub-Group, later said, "We feel if the relevant laws are going to be drafted by our legislature alone [and] the common law system will go unchallenged by the Chinese authorities, then it will be all right."[33] Hong Kong's hopes depended on how its legislature would define the remit of Article 23. Maria Tam was quoted as saying, "I hope that's the least repressive of all the formulas proposed during the meeting. It could be more repressive. It could be more lenient. It all depends on the future SAR legislature."[34]

The amendment was strongly criticized in Hong Kong. Martin Lee thought the new clause was intended to intimidate the people of Hong Kong and would deepen Hong Kong's confidence crisis. Another legislator, Andrew Wong, pointed out that the amendment was unnecessary because the previous version was sufficient to protect the interests of the CPG.[35]

In the eyes of the CPG, however, there were people in Hong Kong seriously contemplating the subversion of the CPG and the socialist system in China. China at that time developed "subversion phobia." As far as the Chinese Government was concerned, the anti-subversion clause had to be inserted in the *Basic Law*. Li Hou, who held the offices of both Deputy Director of the Hong Kong and Macao Affairs Office and Secretary-General of the BLDC, stated that even attempts to expand Hong Kong's freedoms and democratic system to the Mainland were subversive.[36] In addition, some Mainland Chinese drafters argued that subversive activities were prohibited by the criminal law of all countries in the world.[37] Zhou Nan, one Mainland member of the BLDC, who later became the Director of Xinhua's Hong Kong Office, even stated that the insertion of the anti-subversion clause would contribute to the stability and prosperity of Hong Kong and that this should be accepted, or even welcomed, by the

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National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region 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." The Article now included qualifications that, before the CPG might intervene, any turmoil within the HKSAR would have to raise concerns about national unification and safety *and* be beyond the HKSAR's control.

33. Yeung, *supra* note 28.

34. *Id.*

35. S.Y. Wai, *Beijing Move to Outlaw "Subversive" Activities Attacked*, S. CHINA MORNING POST, Oct. 16, 1989.

36. *Li on Central-Hong Kong Relationship and Other Questions*, WEN WEI PO, Nov. 21, 1989.

37. *Criminal Law of All Countries in the World Prohibits Subversion*, WEN WEI PO, Dec. 12, 1989.

Hong Kong people.[38] The CPG again reassured the people of Hong Kong that the amendment would not infringe their rights and freedoms because Article 23 would be put into law (as necessary) and interpreted according to common law principles.[39]

After the final amendment, Article 23 of the draft *Basic Law* read as follows:

> The Hong Kong Special Administrative Region 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, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

The BLDC approved the amendment proposed by the CPG/SAR Relations Sub-group on January 24, 1990, 45 votes to 2 (with 2 absentees and 1 invalid vote). The Article was not changed when the NPC passed the *Basic Law* in 1990. When the *Basic Law* was enacted in 1990, Hong Kong had the following legislation related to Article 23:

Article 23, *Basic Law*	Hong Kong Laws
Treason	*Crimes Ordinance*: treason, treasonable offenses
Sedition	*Crimes Ordinance*
Theft of State Secrets	*Official Secrets Acts* 1911, 1989
Ties with foreign political organizations	*Societies Ordinance*
Subversion	No specific legislation
Secession	No specific legislation

IV. HONG KONG'S RESPONSE TO ARTICLE 23

A. HONG KONG'S REACTION TO THE 1989 BLOODSHED & POLITICAL TRIALS IN MAINLAND CHINA

The 1989 student democratic movement in China and the subsequent political suppression generated unprecedented fear in Hong Kong of the future erosion of civil liberties after the transition. It accelerated and deepened Hong Kong's democratization process. The redrafted Article 23, a direct consequence of the political suppression, presented a direct threat to liberties in

38. Jianping Chen, *Zhou Expressed that Anti-Subversion Clause Enhanced the Prosperity and Stability of Hong Kong*, WEN WEI PO, Dec. 12, 1989.

39. Ho Weici, *Amendment to the Term "Turmoil", Protection for Hong Kong People Increases*, WEN WEI PO, Dec. 12, 1989.

Hong Kong. As the offenses in Article 23 of the *Basic Law* are not defined, there were concerns that after the transition, the Chinese government may impose its own definitions of the offenses in Hong Kong. Many in the Mainland and some in Hong Kong strongly suggested this possibility.

When commentators looked at the criminal law in the PRC for guidance as to how Hong Kong *might* comply with Article 23, they discovered a range of offenses known as Counter-Revolutionary (CR) offenses (recently renamed as national security offenses), which were not defined with any clarity. In interpreting these offenses on the Mainland, the "CR purpose" was normally imputed objectively. It was determined by the nature of the act. Once the act was determined, the subjective aspect of the act (that is, the subjective intention of the "actor") was almost irrelevant. There is little legislative guidance for the Mainland courts in the application of these provisions. The courts are, in fact, able to sweep various forms of harmless political behavior into the CR sedition and subversion categories. There is, in effect, *a priori* justification for penalizing speech against the government. No force or the threat of force is required.[40]

The prosecution and conviction of Xi Yang, a Hong Kong-based journalist, for stealing state secrets in China in 1994, and the prosecution and conviction of Wang Dan and Wei Jingshen for subverting the government in 1996, highlight the vagueness of China's criminal law.[41] These prosecutions caused widespread fear and concern in Hong Kong. The worry was that such political prosecutions might be brought in Hong Kong because Article 23 contained equivalent offenses. Thus, these political trials in the Mainland triggered legislative efforts in Hong Kong to limit the remit of Article 23.

B. The Hong Kong Bill of Rights

The Tiananmen crackdown in 1989 provoked a profound crisis of confidence in Hong Kong.[42] In response, the British government adopted several measures to speed up Hong Kong's democratization process. Two events are especially important. The first was the enactment of the *Hong Kong Bill of Rights Ordinance* (*BORO*) in 1991, which incorporated the *International Covenant on Civil and Political Rights* (*ICCPR*). Section 3(2) of

40. H. L. Fu, *Sedition and Political Dissidence: Towards Legitimate Dissent in China*, 26 H.K.L.J. 210 (1996)

41. *Id.*

42. Alvin Y. So, *The Tiananmen Incident, Patten's Electoral Reforms, and the Roots of Contested Democracy in Hong Kong*, *in* The Challenge of Hong Kong's Reintegration with China 49, 52-3 (Ming Chan ed., 1997).

the *BORO* provides that, "All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed." Hong Kong's Letters Patent (Hong Kong's pre-transition "Constitution") was amended at the same time to prohibit making any law that restricted the rights and freedoms of the people of Hong Kong or was inconsistent with the *ICCPR*.

The incorporation of the *ICCPR* into Hong Kong's domestic law has had a significant impact on the criminal law and has added a "constitutional" dimension to it. *BORO* challenges were frequently raised in criminal litigation and the courts have struck down several legislative provisions for being inconsistent with the *BORO*. At the same time, the government reviewed certain legislative provisions, including controversial provisions in the *Public Order Ordinance* and *Societies Ordinance*, which were likely to be inconsistent with the *BORO*, and proposed their repeal. In doing so, the government was able to satisfy those arguing for the wide application of the *BORO* and, at the same time, preemptively limit the remit of Article 23.

C. Reform of The Legislative Council

The second significant pre-handover event related to the Legislative Council (LegCo) electoral reforms. In 1991, the first popularly elected LegCo members took their seats. They comprised about thirty percent of LegCo. Both the Chinese and British Governments sanctioned the 1991 electoral reforms.

In 1992, Christopher Patten was appointed the last Governor of Hong Kong. Patten soon introduced further political democratization, despite China's strong objections, which eventually fed into the 1995 LegCo election. The 1995 LegCo election was unique in Hong Kong's history. It was the most democratic election ever held in Hong Kong and returned a large group of liberal-oriented legislators (many of them from the Democratic Party). Popularly elected, these legislators had a stronger sense of representation and tended to be highly critical of both the colonial and Chinese governments. They were instrumental in compelling the government to attempt to legislate in relation to Article 23 according to democratic values and international human rights standards.

It is within this context of political development in Hong Kong that the colonial government amended and enacted laws to comply with Article 23 and, at the same time, sought to prevent Article 23 from becoming an instrument for political suppression. These moves were also designed to alleviate widespread fears and to prevent the post-colonial legislature from casting too wide

a net when seeking to control political dissidents in Hong Kong. At the time of transition, certain relevant Hong Kong laws had been amended as part of this process.

D. REUNIFICATION AND THE PROVISIONAL LEGISLATIVE COUNCIL

The democratic expansion within Hong Kong in 1991 was sanctioned, as we have noted, by the *Basic Law*, and agreed to by Mainland China. However, the newly appointed Governor, Christopher Patten, announced in October 1992, not long after his arrival in Hong Kong, that he proposed certain changes to enhance democratization in Hong Kong. The Patten scheme broadly involved the following elements: retaining the existing directly elected members of LegCo, increasing the number of functional constituencies in LegCo, widening their franchise dramatically, lowering the voting age to 18, and using an electoral college scheme for the balance of LegCo members.[43] These proposed changes generated the strongest condemnation by Beijing. Ultimately, Beijing said it would disband any LegCo formed on the basis of the Patten proposals and would replace it, temporarily, with a Provisional Legislative Council (PLC).

The Patten scheme was implemented in time for the 1995 LegCo elections after considerable debate within Hong Kong. True to its promise, the PRC government, on July 1, 1997, installed a new PLC. The PLC had been meeting across the border, in Shenzhen, preparing legislation, including certain amendments to the *BORO*, prior to July 1, 1997. Apart from the *BORO* amendments, the PLC also reversed, after July 1, 1997, certain other amendments introduced by the Patten administration to lessen the impact of some of Hong Kong's more draconian regulatory ordinances. Certain other pre-handover private members' ordinances (dealing mainly with labor relations) were suspended in their operation by the PLC also.[44] Two of the amended laws directly concern Article 23 of the *Basic Law*, namely the *Societies Ordinance* and the *Public Order Ordinance*. The thrust of the PLC changes to these ordinances was to restore the ordinances to the position which applied prior to the Patten amendments. In accord with previous promises, Beijing replaced the PLC with a new LegCo in 1998. The 1998 LegCo essentially restored the partially democratized LegCo prior to the Patten reforms of 1995. A new, proportional representative voting system

43. *The Governor's Speech 1992*, S. CHINA MORNING POST, Oct. 8, 1992 Special Supplement, at VII (Special Supplement).

44. Albert Chen, *Continuity and Change in the Legal System*, *in* THE OTHER HONG KONG REPORT 1998, ch. 3 (Chow & Fan eds., 1999).

was also introduced at this time to replace the previous "first past the post" system for the directly elected LegCo seats.

V. THE CONSTITUTIONAL RELATIONSHIP: MAINLAND CHINA AND HONG KONG

A. THE PRC CONSTITUTION

The political and constitutional system created by the *Constitution of the People's Republic of China* (1982) (*PRC Constitution*) is, in one sense, very clear. The CCP is the holder of ultimate political power.[45] China is a socialist state under the people's democratic dictatorship led by the working class and based upon the alliance of workers and peasants.[46] The state-owned economy "is the leading force in the national economy," and "[t]he state ensures the consolidation and growth of the state economy."[47]

The *PRC Constitution* has been amended three times, in 1988, 1993, and 1999, to respond to the social and economic changes brought about by the introduction of market elements into the economy. But these amendments did little more than provide a breathing space for the private sector of the economy. They did not: (1) alter the fundamentals of the system; (2) diminish the leading role of the CCP; (3) undermine public ownership; or (4) challenge the ultimate goal of eliminating the system of economic exploitation, i.e. the capitalist system.

B. THE BASIC LAW, THE NPC AND THE ESTABLISHMENT OF NEW SPECIAL ADMINISTRATIVE REGIONS

The *Basic Law*, which is the Constitution of the HKSAR, was passed by the NPC to implement China's basic policies regarding Hong Kong as stated in the *Joint Declaration*. Article 5 of the *Basic Law* states, "[T]he socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." Although Article 31 of the *PRC Constitution* authorizes the state to set up special administrative regions when necessary, it is not clear to what extent these regions, including the HKSAR, may deviate from the socialist system.[48] As Professor Ghai has noted, the question is, how broad

45. P.R.C. CONST. pmbl.
46. *Id.* art. 1.
47. *Id.* art. 7.
48. Article 31 of the *PRC Constitution* states that, "[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions.' Article 62(13) further provides

the powers of the NPC are to establish new systems in special administrative regions[49] or whether the Constitution has authorized the NPC to create any system it deems fit.

C. The Validity of the Basic Law and its Compatibility with the PRC Constitution

Given that the *PRC Constitution* provides for (a) the express establishment of the socialist system, (b) the dominant role of Communist vanguard in Chinese society, and (c) the clear superiority of the Chinese Constitution, the constitutional validity of the *Basic Law* may be doubtful (if we take the Constitution seriously as President Jiang Zemin recently urged the nation to do[50]). That is, if one reads the Preamble and Article 1 as prescribing fundamental limits on what governance and economic structures are permitted in the PRC, Article 31 has to be read as subject to the Preamble and Article 1.

The compatibility between the *Basic Law* and the Chinese Constitution was regarded as a particularly contentious point, and it was raised repeatedly during the drafting of the *Basic Law*.[51] Sir William Wade, in his opinion on the draft *Basic Law*, also pointed out this fundamental conflict and recommended amending the *PRC Constitution*.[52] This issue was also thoroughly examined by the BLDC which, after a careful study, proposed four possible solutions, namely: (1) amending the *PRC Constitution* to ensure the validity of the *Basic Law*; (2) expressly limiting the applicability of the *PRC Constitution* in the *Basic Law*; (3) interpreting the *PRC Constitution* to clarify the relationship between the *Basic Law* and the *PRC Constitution* and especially to elucidate which articles of the *PRC Constitution* would not apply in Hong Kong; or (4) establishing a committee to resolve the potential conflict between the *PRC Constitution* and the *Basic Law*.[53]

The Chinese authorities rejected all four proposals. Instead, the NPC adopted a formal Decision declaring that the *Basic Law* is consistent with the Constitution on the same day it passed the

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that the NPC has the power 'to decide on the establishment of special administrative regions and the systems to be instituted there.'

49. Ghai, *supra* note 11, at 56-7.

50. *Jiang: Respect Constitution*, China Daily (Hong Kong Ed.), Feb. 1, 1999.

51. Cheng, *supra* note 16, at 13.

52. "It is thus clear, at least in the eyes of an English lawyer, that the Chinese Constitution and the *Basic Law* will inevitably be in conflict." William Wade, *Opinion on the Draft Hong Kong Basic Law*, *in* Occasional Papers/Reprints Series in Contemporary Asian Studies No. 5, 83 (Hungdah Chiu ed., 1988).

53. Special Group on the Relationship between the Central Government and the SAR, Final Report on the Relationship between the Basic Law and the Constitution (Feb. 10, 1987) at 10-2.

Basic Law.[54] However, the NPC Decision seems not to have set aside doubts about the constitutionality of the *Basic Law*. Scholars continue to argue that the *PRC Constitution* needs to be amended to accommodate the One Country, Two Systems doctrine as it has been applied in Hong Kong.[55]

Article 31 of the PRC Constitution was enacted for the special purpose of reunifying Taiwan, Hong Kong, and Macao. It is not related to the political structure of socialist China. The political-legal system created by the *Basic Law* is fundamentally antagonistic to the political-legal system created by the *PRC Constitution*. Political expediency may have produced a "weakening" of the antagonism between these two systems but this "restructuring" clearly lacks doctrinal support within the *PRC Constitution*. The *PRC Constitution* has been forced to give birth to a deviant political system, which is so different that it has to be kept at a distance. The *Basic Law* is thus both a wedge to separate the two systems and at the same time a bridge to connect the HKSAR and the PRC. Experience in Hong Kong seems to show that two kinds of allegiances may be emerging within the same country. Mainland residents are bound to be loyal to the *PRC Constitution*, while residents in Hong Kong are required to show allegiance to the *Basic Law*. Indeed, different allegiances may even be necessary for the two systems to survive.

D. THE APPLICABILITY OF THE PRC CONSTITUTION IN HONG KONG

Given the contradictions between the *Basic Law* and the *PRC Constitution*, to what extent is the *PRC Constitution* applicable in Hong Kong? The argument that the *PRC Constitution* as a whole applies to Hong Kong must be rejected because the *PRC Constitution* allows only one system. A more popular argument is that the *PRC Constitution* applies partially in Hong Kong.

The thrust of the argument is as follows: The *PRC Constitution* is the highest law in the PRC and it is the only major PRC law that deals with the constitution of the PRC. The *Basic Law* was made pursuant to the *PRC Constitution* and the high degree of autonomy is authorized by the NPC. The *PRC Constitution*, as a general principle, is applicable in Hong Kong. But the appli-

54. Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (3d Sess., 7th Nat'l People's Cong., Apr. 4, 1990).

55. WEN ZHENGBANG, GONGHEGUO XIANFA LICHENG [THE CONSTITUTIONAL HISTORY OF THE PEOPLE'S REPUBLIC OF CHINA] 310-12 (1994); FAN ZHONGXIN, ONE COUNTRY, TWO SYSTEMS AND CHINA IN A CROSS CENTURY ERA 306-07 (1998).

cation is only partial, otherwise the One Country, Two Systems arrangement becomes impossible.[56] The argument for partial application is, of course, not new. In 1988, the Chinese members of the BLDC expressed this conundrum in a similar way, "[The *PRC Constitution*] as a whole is applicable to Hong Kong, but it does not mean that all is applicable."[57]

The difficult question is how to determine which parts of the *PRC Constitution* are applicable to Hong Kong. Wong argues that the *Basic Law* has expressly or impliedly indicated the extent of the applicability of the *PRC Constitution* in Hong Kong by stating that "any provision in the Constitution that is inconsistent with the *Basic Law* is inapplicable, and any provision in the Constitution that does not contravene the *Basic Law* is applicable."[58]

There are several problems with the argument for partial application. First, if the applicability of the *PRC Constitution* is determined by its compatibility with the *Basic Law*, then the *Basic Law* is elevated to a position higher than the *PRC Constitution*. There is no support, whatsoever, for this extreme position. In addition, the whole argument of partial application depends on the premise that the *PRC Constitution* is divisible and can be divided as such. As a matter of principle, one may argue, the *PRC Constitution* is complete and indivisible and does not allow any partition. It either applies or does not apply to the HKSAR. The *PRC Constitution*, as the supreme law of the land, creates a particular political system and is not subject to any qualifications.

Second, even if the *PRC Constitution* is divisible as a matter of principle,[59] there is still the practical difficulty of how to divide the *PRC Constitution*. Which of the 138 Articles in the *PRC Constitution* apply in Hong Kong and according to what standard? As mentioned above, the recommendation that the NPC state clearly and directly specify which Articles of the *PRC Constitution* would apply in the HKSAR was made by the BLDC but

56. James K.T. Wong, *The Applicability of the PRC Constitution to Hong Kong*, H.K. LAW., Mar. 1999, at 22.

57. *Cited in* Ting Wai, *What will the Basic Law Guarantee?-A Study of the Draft Basic Law from a Political and Comparative Approach*, *in* OCCASIONAL PAPERS/ REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES NUMBER 5, 63 (Hungdah Chiu ed., 1988).

58. Wong, *supra* note 56, at 22, 25.

59. Certain Constitutional provisions are said to be so outdated that some scholars have called for the violation of the Constitution for beneficial purposes; therefore those Articles that do not facilitate economic development should not be applied. *See* Xi Zhong, *Reflections on "Benevolent Violation of the Constitution,"* 4 FAXUE PINGLUN [L. REV.] 26 (1998). According to this view, the Constitution is divisible according to whether the provisions are beneficial to national economic development. *Id.*

was rejected by Mainland Chinese authorities. The irony was again very clearly stated by the Chinese members of the BLDC as follows,

> In the Constitution many provisions are not applicable, but if we need to explain every article to see whether it is applicable to Hong Kong or not, there is a technical difficulty. For some articles, half is applicable while the other half is not, or a sentence is applicable while the other one is not.[60]

It has been argued that Articles related to the supremacy of the NPC are applicable in Hong Kong, and the CFA cited Articles 57 and 58 of the *PRC Constitution* in that context in a recent judgment.[61] One might well add other Articles on the powers of the State Council and the State Military Commission, whose powers are recognized in the *Basic Law*, to this list.

But where does this process stop? If Articles 57 and 58 were applicable because the NPC is supreme according to the *PRC Constitution*, then would Hong Kong also be bound to acknowledge and accept the leading position of the CCP, for the CCP also enjoys a supreme status in the *PRC Constitution*? Would Hong Kong residents also have a constitutional duty to popularize Putonghua (Article 19), administer birth control (Article 25), or join the People's Liberation Army (PLA) (Article 55)? The CFA's recognition of the authority of the NPC directly through the *PRC Constitution* is highly selective and arbitrary.

Third, a partial application is not necessary. If the purpose of a partial application is to recognize the authority of central state organs, the purpose can be achieved through the *Basic Law*. The *Basic Law* is a national law passed by the NPC, and the NPC decided, pursuant to an international treaty, to exercise its supreme power through the framework of the *Basic Law*. The constitutional authorities of certain state organs are sufficiently recognized in the *Basic Law* (Articles 13, 14, 17, 18, 158 and 159), subject to the substantive and procedural requirements as provided by the *Basic Law*. The relationship between the *Basic Law* and the *PRC Constitution* is authoritatively stated in the CFA's "clarifying" judgment of early 1999,

> The Court's judgment on 29 January did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to

60. *Cited in* Ting, *supra* note 57, at 63-4.

61. *See* Ng Ka Ling v. Dir. of Immigration, 1 H.K.L.R.D. 315, 324, 338 (Ct. Final App. 1999).

> do any act which is in accordance with the provisions of the *Basic Law* and the procedure therein.[62]

Some have argued that a Hong Kong court, under the CFA decision, has the power to conduct a substantive review of a legislative act of the NPC or its Standing Committee to establish if any such act complies with the manner and form requirements of the *Basic Law*.[63] This view remains contentious. What is now settled, though, is that, as far as Hong Kong courts are concerned, the *Basic Law* forms the only valid "constitutional cord" connecting HKSAR laws with the *PRC Constitution*. There is no constitutional connecting mechanism outside of the *Basic Law*.[64]

VI. THE RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW

A. THE HONG KONG BILL OF RIGHTS

Hong Kong became, through the UK, subject to the *International Covenant on Civil and Political Rights* (*ICCPR*). Hong Kong's *Bill of Rights Ordinance* (*BORO*) is based squarely on the *ICCPR*. More significantly, Article 39 of the *Basic Law* entrenches the *ICCPR*. It provides that,

> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labor conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restriction shall not contravene the provisions of the preceding paragraph of this Article.

The international context of Article 23 is thus quite clear. Laws applying under Article 23 of the *Basic Law* have (and will have) through their very nature, the potential to affect the rights of residents of the HKSAR significantly. In light of the *ICCPR*'s

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62. *See* Ng Ka Ling v. Dir. of Immigration (No. 2), 1 H.K.L.R.D. 577, 577 (Ct. Final App. 1999).

63. ALBERT CHEN, *The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review*, *in* HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION (Chan, Fu & Chai eds., 2000).

64. It is therefore not legally justifiable in law for the Department of Justice to place the PRC Constitution in the Laws of Hong Kong and before all other laws. *See* Margaret Ng, *PRC Constitution Made Part of the Laws of Hong Kong?*, H.K. LAW., Oct. 1998, at 21. In his reply, the Law Draftsman of the Department of Justice pointed out that it is an "editorial" (political may be a better term) decision to include the *PRC Constitution*, and this inclusion "does not mean that the *PRC Constitution* is thereby made part of the laws applicable in the HKSAR." Tony Yen, *The PRC Constitution and Hong Kong Law*, H.K. LAW., Dec. 1998, at 16.

role in Hong Kong's fundamental constituent documents, the impact of Article 23 laws must be considered within the context of international human rights jurisprudence.

The enactment of the *BORO* in Hong Kong incorporated the *ICCPR* into Hong Kong's domestic law. In enacting the ordinance, the government intended the law to be interpreted purposively and according to "the need for uniformity in interpretation of rights recognized in that covenant and other international agreements."[65] In adjudicating early *BORO* cases, Hong Kong courts actively considered foreign cases (especially Canadian *Charter of Rights* cases) and the introduction of international law standards into Hong Kong's jurisprudence. The Silk VP's frequently quoted "entirely new jurisprudential approach" is worth citing at length.

> In my judgment, the glass through which we view the interpretation of the Hong Kong Bill [BORO] is a glass provided by the Covenant. We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give "full recognition and effect" to the statement, which commences that Covenant.[66]

He then went on to state expressly that decisions of the European Human Rights Commission and the United Nations Human Rights Committee would be considered "as of great assistance" and would be given "considerable weight."[67] Professor Ghai's argument resonates with this approach, "The advantage of the Bill of Rights is that it states authoritatively how the *ICCPR* is [to be] applied to Hong Kong, and provides a yardstick to test the validity of other laws."[68]

Since those early cases, however, the courts in Hong Kong (and the Privy Council in London) have signaled that a less activist approach may suit the political and social context of Hong Kong.[69] Many commentators have been worried by this deferential (to the executive government) trend.[70]

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65. RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 180, n. 88 (1997).

66. The Queen v. Sin Yau-ming, 1 H.K.C.L.R. 127, 141 (Ct. App. 1992).

67. *Id.*

68. GHAI, *supra* note 11, at 451.

69. Yash Ghai, *Sentinels of Liberty or Sheep in Woolf's Clothing?: Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459 (1997).

70. *Id. See also*, Andrew Byrnes, Editorial, BILL OF RIGHTS BULL., 4(1), at 1 (1996); Johannes Chan, *Right to freedom of Expression*, BILL OF RIGHTS BULL., 4(1), at 51 (1996). It is still too early to claim that this deference signals a move towards significant subservience. The broader view is that the courts in Hong Kong retain real independence. *See* GHAI, *supra* note 11, at 478-80.

Despite all the controversy in the transitional period over the status of the *BORO* and its compatibility with the *Basic Law*, the *BORO* survived the 1997 transition and became part of the law of the HKSAR. As the *ICCPR* is now firmly "entrenched" in the *Basic Law* of the HKSAR by virtue of Article 39 of the *Basic Law*, the *BORO*, which incorporates the *ICCPR*, is also effectively given a special status by the *Basic Law* in Article 39.

The *ICCPR* will thus have a role in governing the validity of other laws of the HKSAR. The Government has undertaken that future laws of the HKSAR will comply with the *ICCPR*. Speaking at the International Bar Association Conference on the Worldwide Application of the *ICCPR*, the Secretary for Justice, Ms. Elsie Leung, stated that the *ICCPR* is "firmly rooted in Hong Kong's legal system." She said,

> Since reunification, the *ICCPR* has been given a special status in Hong Kong by virtue of Article 39 of the *Basic Law*, which is Hong Kong's new mini-constitution. The first paragraph of Article 39 provides that the provisions of the *ICCPR* as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Special Administrative Region. The second paragraph provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such restrictions shall not contravene the provisions of the (preceding) paragraph.[71]

B. THE ICCPR AND ARTICLE 23

1. *Similarities and Differences*

In discussing the relationship between Article 23 of the *Basic Law* and the *ICCPR*, the Secretary for Justice pledged that,

> The [HK]SAR Government will have full regard to the provisions in the *ICCPR* and the *Basic Law* concerning freedom of speech and freedom of assembly. It will also take into account public opinion. The proposals will be fully debated by the members of the Legislative Council and will need to be acceptable to them.[72]

The remit of Article 23 is potentially wide given the nature and context of the Article. As Ghai argues, it is tempting for the Government to cast a wide net in implementing Article 23 so as to limit protections provided by other articles in the *Basic Law* and the *ICCPR*.[73] To a degree, Article 23 is, on the face of it,

71. Secretary for Justice Elsie Leung, Speech at the International Bar Association Conference on the Worldwide Application of the International Covenant on Civil and Political Rights, *available at* http://www.info.gov.hk/gia/general/199806/13/0612201.htm (June 13, 1998).

72. *Id.*

73. *See* Ghai, *supra* note 11, at 452.

inconsistent with certain rights and freedoms protected by the *Basic Law* and the *ICCPR*. For example, under Article 19(2) of the *ICCPR* and Article 27 of the *Basic Law*, a person has the right to freedom of expression, but Article 23 of the *Basic Law* proscribes sedition. Also, under Article 19(2) of the *ICCPR*, a person has the right "to seek and receive information and ideas of all kinds," but Article 23 of the *Basic Law* proscribes the theft of ill-defined "state secrets." In addition, under Article 22(1) of the *ICCPR*, a person enjoys freedom of association with others, but Article 23 of the *Basic Law* prohibits local political organizations from establishing ties with foreign political organizations. Finally, under Article 17(1) of the *ICCPR*, a person has a right to privacy, but it follows from Article 23 of the *Basic Law* that the security authorities can conduct security vetting and secret surveillance.

These contradictions are more apparent than real, however. It is commonly agreed that the *ICCPR* allows a state to pass laws to punish treason, sedition, or espionage. How such statutory laws are worded and interpreted is crucially important, though. Activities identified in Article 23 are punished or prohibited, to different degrees, in all democratic and non-democratic societies. Indeed, we can find similar provisions in the constitutional documents of other countries. For instance, Article 28 of the *PRC Constitution* prohibits treason and other counter-revolutionary activities, and the Constitution of the United States of America defines and proscribes treason.[74]

2. *Limitations on Rights under the ICCPR and the BORO*

Most political rights are not absolute. They are subject to certain limitations. Under the *ICCPR*, rights and freedoms can be lawfully limited on certain enumerated grounds. Similar limitations and restrictions can be found in other international human rights instruments, such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[75] the *American Convention on Human Rights*,[76] and the *African*

74. U.S. CONST. Art. III, § 3, cl. 1. The clause reads, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.*

75. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

76. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev.1, Corr.2, *reprinted in* 9 I.L.M. 673.

Charter on Human and Peoples' Rights.[77] Article 23 requires and authorizes the HKSAR government to enact laws for its implementation. Whether Article 23 legislation is consistent with the *ICCPR* and the other articles of the *Basic Law* depends on how the activities listed in Article 23 will be defined and the nature of their parameters.

Certain rights are absolute and cannot be subject to limitations under any circumstance under the *ICCPR*. The right to hold opinions is such a right under the *ICCPR*. According to the Human Rights Committee (HRC), the right to hold opinions permits no restriction.[78] In 1983, in *Andre Alphones Mpaka-Nsusu v. Zaire*, the HRC made it clear that an arrest or detention of persons merely because of their political or other views is incompatible with the right to hold opinions.[79] In 1983, in *Rosario Pietraroia*, the HRC held that "in no case" could a person be made subject to sanction solely because of his or her political opinions.[80] There are several other such "absolute rights" in both the *ICCPR* and the *Basic Law*,[81] which apparently cannot be made subject to limitations through the application of Article 23.

But certain rights couched in absolute terms, such as the right to equality, can, it now seems to be accepted, be made subject to reasonable and rational limitations. Ghai states that "[I]t is no longer clear that the 'absolute' rights . . . are really absolute."[82] The court is ready to read into some such rights, implied limitations that do not appear explicitly in the law. As Lord Woolf said, in 1993, in *A.G. v. Lee Kwong-kut* in relation to Article 11 of the *BORO*, rights of general application are *always* subject to implied limitations.[83] This is so because of the need to balance the interests of the individual against those of society.[84] International human rights instruments are inconsistent on this

77. African Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, *reprinted in* 21 I.L.M. 58.

78. Kevin Boyle, *Freedom of Opinion and Freedom of Expression*, *in* THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 314 (Johannes Chan & Yash Ghai eds., 1993).

79. *See* Mpaka-Nsusu v. Zaire, No. 157/1983 (1986), 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 187, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1 (1990).

80. Pietraroia v. Uruguay, Doc. *A/36/40.*

81. *See* GHAI, *supra* note 11, at 443-44.

82. *Id.* at 443 n. 49.

83. *Id. See also* A.G. v. Lee Kwong-kut, 2 H.K.C.L.R. 186, 196 (Privy Council 1993).

84. GHAI, *supra* note 11, at 443-44.

issue. The *Universal Declaration of Human Rights* also contains a general limitation on all rights and freedoms.[85]

It is doubtful whether implied limitations apply to *all* rights and freedoms. To maintain that all rights are subject to limits "would make the precise language of restrictions secondary to judicial determinations of policy."[86] This view is a compelling one. If judicial determinations of policy were to be, ultimately, entirely paramount under rights protection regimes, then the relevant instrument would need to state this supremacy rule explicitly. When we look at the operation of Article 23, it is hard to see how it changes this position in any way. That is, even if one subscribes to the allowance of implied limitations, Article 23, in and of itself, does nothing to bolster the importation of implied limitations into any rights analysis. Put another way, it is difficult to imagine a situation where the exercise of the absolute right to hold opinions could in any way offend Article 23. The right to hold opinions, within the context of Article 23, must be absolute.

Where express limitations of rights are imposed, the scheme and terms differ significantly in the *Basic Law* and the *ICCPR*. The *Basic Law* does not have a general overriding limitation clause to restrict the rights enumerated in Chapter 3, except the uncertain second paragraph in Article 39 which states that, "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article." Arguably, Article 23 itself can be read as a limitation on certain rights and freedoms (under Article 39). It is difficult, by looking at each Article within the *Basic Law* Chapter on Rights and Freedoms, to determine whether a limitation exists, and, if it exists, what the scope is of that limitation.[87]

The *ICCPR* does not have any sort of general overriding limitation Article. The *ICCPR* applies express limitations on the exercise of certain rights, but not on others. Where a limitation is applied, the *ICCPR* is fairly concise in formulating any such limitations. It is clear that, while limitations are permitted, they

85. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1949). Article 29, section 2 states, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id.* art. 29, § 2. While the Universal Declaration of Human Rights is the only international instrument with a general limitation clause, such a general clause is used in the Canadian Charter of Rights, which has been frequently referred to in Hong Kong Courts. *See* GHAI, *supra* note 11, at 412-15.

86. GHAI, *supra*, note 11, at 443 n. 49.

87. *See id.* at 442.

are permitted only to the extent that the express limitations permit. But limitations on rights and freedoms can also be implied where there is no express limitation clause. The drafting committee of the *ICCPR* expressly allowed for such implied limitations in relation to Article 17 rights (the right to privacy, the family, the home and private correspondence), arguing that each state is free to determine how the rights were to be implemented as long as the rights were not vitiated.[88]

Thus far there have been very few cases under the *ICCPR* that are directly relevant to the offenses listed in Article 23 of the *Basic Law*. Those cases that have been decided have often involved blatant violations of human rights. There are also a number of decisions which have come up in the European Court of Human Rights. Many of these have concerned restrictions on rights in a special period of time in a country, and the effect of European Court of Human Rights decision, in Hong Kong, in general, has not been very great.

3. *Importance of the ICCPR in the Context of Rights in HKSAR*

The above discussion is not meant to deny the importance of the *ICCPR* nor to argue that the relevance of the *ICCPR* to questions surrounding the impact of Article 23 is comparatively small. The *ICCPR* is widely recognized as perhaps the key international human rights instrument. It captures and distills in "signed-up" documentary form a wide range of human rights norms in comparatively specific language. Hong Kong, through its domestic constitutional and quasi-constitutional instruments, the *Basic Law* and the *BORO*, has incorporated the *ICCPR* into the municipal law of the HKSAR. Further, Hong Kong is a party to the *ICCPR* internationally through the new sovereign, the PRC (and previously through the old sovereign, the UK). Then there is also the fact that the PRC has now also signed (though not ratified) the *ICCPR*. All of these factors have helped incorporate the *ICCPR* into the constitutional framework of both the HKSAR itself *and* the cross-border framework. Indeed, for the reason just given above, the *ICCPR* is probably far more a part of the local legal framework in Hong Kong than in the case of any other advanced legal jurisdiction.

When we move beyond those institutional aspects, the importance of the *ICCPR* is also evident. Although the case law so far is quite limited, it is clear that something of a global "sea

88. Alexandre Charles Kiss, *Permissible Limitations on Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290, 292 (Henkin ed., 1981).

change" is underway in the interaction of international human rights law with municipal law. The doctrine of national sovereignty and sovereign immunity, which have long "fenced off" this impact on municipal jurisprudence to a very large degree, are now being steadily undermined. Perhaps the best testament to this fact is the experience of Chile's former military ruler, General Pinochet. The House of Lords has said that General, now Senator, Pinochet could be asked to answer charges of committing internationally recognized crimes in municipal courts other than those in Chile. The significant moves to establish a permanent International Criminal Court are another aspect of this major shift in the impact of international law on otherwise "domestic" behavior.

The next point to be made is that international human rights case law seems set to grow. Over time, it looks very likely that cases with real relevance to Hong Kong (in an Article 23 context) will arise for adjudication. As we have noted, the HKSAR is probably more "plugged in" to this species of jurisprudence than most jurisdictions. Therefore the impact of the *ICCPR* could prove to be quite significant in Hong Kong over time.

VII. INTERPRETATION OF THE BASIC LAW BY THE CFA AND THE STANDING COMMITTEE OF THE NPC

A. The General Position

The role of judicial activism in protecting human rights in Hong Kong has recently been powerfully endorsed and rejuvenated by the CFA. In the *Ng Ka Ling case*, the CFA stressed a number of principles that were to apply to constitutional interpretation in the HKSAR. It is clear that the strongly put position of the CFA has been compromised by subsequent initiatives taken by the HKSAR Government to lessen the impact of that judgment. Nevertheless, the pre-eminent status of the *Basic Law* (established in the *Ng Ka Ling* case) as Hong Kong's key governing instrument remains largely intact. In *Ng Ka Ling*, the CFA stated, without qualification, that the *Basic Law* is an entrenched constitutional instrument designed to meet changing needs and circumstances. Secondly, the court stressed the need to adopt a purposive approach when interpreting a constitution such as the *Basic Law*. This was necessary, said the court, because a constitution has to confine itself to general principles with the result that gaps and ambiguities are bound to arise. The courts have the task of carefully establishing the underlying principles and the purposes of the *Basic Law* giving them effect by filling in the gaps and ambiguities through actual adjudication.

The CFA stressed that the HKSAR courts must avoid a literal, narrow, or technical approach when interpreting the *Basic Law*. A generous interpretation must be given to the provisions in Chapter III of the *Basic Law* which guarantee the rights of Hong Kong residents in order that full measure is given to these rights.

A purposive interpretation also means that provisions limiting rights and freedoms should be given a restrictive and narrow interpretation. Another argument favoring a generous and purposive interpretation is that the *Basic Law* needs to be interpreted in favor of Hong Kong's high degree of autonomy (and in accordance with Hong Kong's common law principles). As the *Basic Law* preserves the common law as applied in Hong Kong, legislation and interpretation in relation Article 23 should be kept in line with common law principles.

In *Ng Ka Ling*, the CFA unequivocally applied this purposive interpretive principle. The CFA laid down clear guidelines on the question of referring certain constitutional matters for interpretation to the Standing Committee of the NPC (the Standing Committee) under Article 158 of the *Basic Law*. The Court said that it was for the CFA to decide when such a matter arose in litigation. Specifically, the CFA would refer to the Standing Committee for interpretation,

1. A matter that concerned (a) affairs relating to the responsibility of the CPG or (b) the relationship between the CPG and the HKSAR; *and*
2. When matters (a) and (b) would affect the judgment in a given case.

The CFA said that for an issue to require referral, both conditions 1 and 2 above would have to be satisfied. Moreover, a matter within condition 1 would have to be predominant within the case at hand.

Notwithstanding these comments, it is clear from the first paragraph of Article 158, that the Standing Committee enjoys a unilateral right to interpret the *Basic Law*. That is, the Standing Committee does not have to rely on a referral from the CFA before issuing an interpretation. The CFA in its judgment contains no counter-claim in this regard. It is also clear that the Standing Committee has the power to amend the *Basic Law*, if it complies with the manner and form requirement stated in the *Basic Law*.[89]

The strongly put position of the CFA has been seriously compromised by subsequent initiatives taken by the HKSAR Government to lessen the practical impact of the *Ng Ka Ling*

89. *See* GHAI, *supra* note 11, at 180-81. This is provided that the amendment does not violate China's basic policies towards Hong Kong.

judgment. (The HKSAR Government claimed that the practical impact of the CFA decision was to confer a Hong Kong "right of abode" on several hundred thousand citizens of the PRC who, previously, were not thought to enjoy this right.) In response to the CFA decision in *Ng Ka Ling*, the State Council, upon the request of the HKSAR Government, asked the Standing Committee to interpret Articles 22(4) and 24(2)(3) of the *Basic Law* (using the interpretation power granted to the Standing Committee by Article 158 of the *Basic Law*).

The Standing Committee, after consulting the Basic Law Committee (BLC), gave its interpretation on the relevant articles of the *Basic Law* on June 26, 1999.[90] In its interpretation, the Standing Committee criticized the CFA for failing to refer the issues to the Standing Committee for interpretation and for failing to interpret them in accordance with "legislative intent." The Standing Committee then gave a new interpretation of those articles (which limited their impact in right of abode cases) and stated "courts of the Hong Kong Special Administrative Region. . .shall adhere to this Interpretation."

In *Lau Kong Yung and others v. The Director of Immigration*,[91] the CFA had another opportunity to clarify the power of the Standing Committee to interpret the *Basic Law* and the legal status of such interpretations. In that case, the CFA held that under Article 67(4) of the *PRC Constitution* and Article 158(1) of the *Basic Law*, the Standing Committee has the power to interpret the *Basic Law*. The power, the CFA said, "is in general and unqualified terms" and "is not restricted or qualified in any way by Articles 158(2) and 158(3) [of the *Basic Law*]."[92]

B. Standing Committee Interpretation of Article 23

What are the implications of *Lau Kong Yung* on Article 23 of the *Basic Law*? For example, how far can the Standing Committee go in interpreting "subversion and sedition," before it starts to make criminal law for the HKSAR? What are the limits to the Standing Committee's general power of legislative interpretation of the *Basic Law* under Article 158?

There appear to be at least three limitations on any legislative interpretation of Article 23 by the Standing Committee. First, interpretation must mean what it says, i.e. it is an interpre-

90. The Interpretation by the Standing Committee of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (June 26, 1999).

91. Lau Kong Yung & Others v. Dir. of Immigration, 3 H.K.L.R.D. 778, 799 (C.F.A. 1999).

92. *Id.*

tation and not an amendment. While the difference is artificial and uncertain in the Chinese Mainland law substantially and procedurally, it is crucial to the *Basic Law*. Although the Standing Committee's power to interpret the *Basic Law* may be general and without limit, its power to amend the *Basic Law* is subject to more rigid substantive and procedural conditions.[93]

Second, in its interpretation of Article 22(4) and Article 24(2)(3), the Standing Committee sets limits on its power of interpretation by defining legislative interpretation as seeking the true legislative intent through reviewing legislative history and examining historical documents. If interpretation is to uncover the true legislative intent of a relevant article, the true intention of Article 23, as we have discussed above, is to protect certain specified interests of the CPG according to the principles and rules of common law applying in Hong Kong. One may want to debate what the true legislative intent was, but the power to interpret is not "free-floating."

Finally, from the wording of Article 23 it is clear that the HKSAR is to make laws to implement the Article "on its own." Clearly, how Article 23 is to be implemented belongs to the exclusive jurisdiction of Hong Kong. While the Standing Committee may interpret whether the HKSAR Government has passed laws to implement Article 23, it will be a violation of Article 23 if the Standing Committee actually gives an interpretation as to how the laws implementing Article 23 should be worded. There may even be no legal duty on the part of the HKSAR government to consult the CPG in relation to Article 23.

VIII. THE INTERRELATIONSHIP BETWEEN THE RESPECTIVE CRIMINAL LAW SYSTEMS OF MAINLAND CHINA AND HKSAR

The legislative intent to leave Article 23 offenses to be defined by Hong Kong laws is reflected in the wording of Article 23 of the *Basic Law* and supported by the fundamental structure of the *Basic Law*. The *Basic Law* leaves the making of criminal law within the HKSAR exclusively within the autonomy of Hong Kong. Article 23 requires certain activities within Hong Kong to be criminalized and the criminal law power with regard to Hong Kong is a power of the HKSAR.

93. Hongshi Wen, *Interpretation of Law by the Standing Committee of the National People's Congress*, *in* HONG KONG'S CONSTITUTIONAL DEBATE 183 (Chan, Fu and Ghai eds., 2000).

A. From a Unitary System of Criminal Law to Three Separate Systems of Criminal Law

1. *Three Systems of Criminal Law*

The reunification of Hong Kong altered the unitary nature of criminal law in the PRC. Since the reunification of Hong Kong and Macao with Mainland China, there is no longer a single criminal law system in the PRC. Instead, the PRC now has *three* distinct criminal law systems, in Hong Kong, Mainland China, and Macao. These three criminal law systems are, in effect, equal to, and independent from, each other. There is no supreme court in China with a supervisory jurisdiction to deal with criminal matters from across the entire (post-1997-1999) PRC. Each jurisdiction is free to decide its own criminal jurisdiction and criminal law according to its legal tradition and practical necessity.[94]

2. *The Relevance of the Basic Law*

Annex III of the *Basic Law* lists those Mainland Chinese laws that are to apply in the area of the HKSAR. However the *Criminal Law of the PRC* is *not* listed in that Annex. That Law therefore, does not apply to the HKSAR. It has now effectively become the Mainland Chinese criminal law. Also, the general limitations imposed by the *Basic Law* of Hong Kong and Macao on the application of Mainland laws mean that the criminal law of Mainland China is not meant to apply in these jurisdictions. As a matter of principle, Mainland Chinese criminal law is not part of Hong Kong law in the same way that American criminal law is not part of Hong Kong law. They are both irrelevant to Hong Kong courts. The HKSAR decides what constitutes a crime, how to adjudicate a criminal case (including the final interpretation of its criminal law), and how to punish a criminal.

B. Standing Committee Powers over HKSAR Laws

The high degree of autonomy of Hong Kong's criminal law is, in fact, qualified to a degree. First, all HKSAR legislation must be consistent with the *Basic Law*. The Standing Committee retains extensive powers under Articles 17 and 160 of the *Basic Law* to review and repeal Hong Kong legislation that is deemed to contravene the *Basic Law*. In relation to the possible Article 23 laws to be enacted by LegCo, it is entirely possible that the Standing Committee may review a particular law if, for example, it considers that the definition of an offense, such as subversion,

94. H. L. Fu & Richard Cullen, *Criminal Jurisdictions in Greater China*, 4(3) Asian Lawyer 16 (1999).

in the HKSAR is too liberal to protect the interests of the CPG effectively. There have been strong voices in the Mainland (both official and academic) urging the proposition that subversion should be defined similarly, if not in the same way, across the entire nation so that subverting the CPG in Shanghai is given the same meaning as subverting the CPG in Hong Kong. Given the fundamental differences in the political systems of Mainland China and Hong Kong, future conflicts over such issues are bound to arise. Of course, the veto power of the Standing Committee may not actually need to be used, as the threat of its use may be sufficient to achieve the application of the views of the Standing Committee by the HKSAR government and LegCo.

This concern may prove to be academic given Hong Kong's non-elected, executive-led government. There is no doubt that, under the *Basic Law*, only the executive government in Hong Kong may initiate the process of enacting Article 23 laws. It is clear, politically, that any such Article 23-type bill will have to be consented to by the CPG before it is introduced to LegCo and, therefore, that consultation with the CPG will be necessary before such a bill is tabled at LegCo. In addition, if LegCo amends a bill in such a was as may offend Beijing, the HKSAR government can always withdraw the bill.

C. When Does Mainland Chinese Criminal Law Apply in the HKSAR?

1. Direct Application

Mainland Chinese criminal law may be directly applied in Hong Kong in three ways, two direct and one indirect. Under the first *direct* mechanism, national laws in relation to defense and foreign affairs, as well as other matters outside the limits of the autonomy of Hong Kong, can be applied in Hong Kong. Such national laws must be applied locally (i.e. in and through Hong Kong) through promulgation or by legislation.[95] Laws coming within this category have to be Mainland laws listed in Annex III of the *Basic Law* (pursuant to Article 18). The *Law of the PRC on the National Flag* is an Annex III-type PRC national law that is applicable in Hong Kong and that law requires the HKSAR to pass laws, *inter alia*, to punish acts desecrating the national flag. To satisfy this requirement, Hong Kong has passed the *National Flag and National Emblem Ordinance*. The constitutional validity of local legislation has recently been endorsed by the CFA in *HKSAR v. Ng Kung Sui*.[96] The second *direct*

95. *See* Basic Law, art. 18 (1990).

96. *See HKSAR v. Ng Kung Sui & Another*, 3 HKLRD 907 (Ct. Final Appeal 1999).

mechanism for applying Mainland laws to the HKSAR is via an order of the CPG during a state of emergency (as defined in Article 18).[97]

2. *Indirect Application*

Most controversial of all is the idea that Mainland courts may claim to have jurisdiction (*indirectly*) over (non-Mainland) Hong Kong residents who have behaved in such a way in the HKSAR that it constitutes a significant offense under Mainland criminal law. Given the apparent clarity of the *Basic Law* on this point, one may wonder how it could be that any of these indirect applications of Mainland criminal law could occur.

The key to understanding how this has come about lies in appreciating the existence of a very particular gap that likely exists in the cross-border legal framework between the Mainland and the HKSAR. This gap relates to the extraterritorial effect of Mainland criminal law. The criminal laws of many jurisdictions of the world have an extra-territorial effect, so the extra-territorial reach of Mainland Chinese criminal law is not unusual. Laws purporting to criminalize persons guilty of war crimes outside war zone jurisdictions and laws criminalizing off-shore bribery[98] and child sex[99] are two common examples of extra-territorial laws found within the criminal laws of many developed nations.

The extra-territorial claims made by Mainland Chinese criminal law are, therefore unexceptional in themselves. Unfortunately, although the spirit of the *Basic Law* clearly suggests that Mainland Chinese criminal law should not apply in this (indirect) way in the HKSAR, the *Basic Law* does not have any provisions which clearly negate the extraterritorial reach of the Mainland Chinese criminal law. In two controversial and high profile cases, Mainland Chinese criminal law has been applied to a Hong Kong resident found guilty of crimes on the Mainland (the so called "Big Spender" case) and to a Mainland resident who committed crimes in the HKSAR only (the Telford Gardens case).[100]

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97. BASIC LAW, art. 18 (1990). *See also* earlier discussion on Article 18 above.

98. Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation (Report of the Committee on International Investment and Multinational Enterprises to the OECD Council meeting at Ministerial level - 27 April 1998) *at* http://www.oecd.org/daf/cmis/bribery/bribimpe.htm.

99. Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 398 (1996); Elizabeth Bevilacqua, *Child Sex Tourism and Child Prostitution in Asia: What Can be Done to Protect the Rights of Children Abroad under International Law?*, 5 ILSA J. OF INT'L & COMP. L. 171, 175 (1998).

100. For a detailed discussion of the Big Spender Case, see Richard Cullen & H. L. Fu, *Some Limitations in the Basic Law Exposed*, CHINA PERSP., Mar.-Apr. 1999,

IX. THE ROLE OF THE BASIC LAW COMMITTEE AND NPC DEPUTIES

A. THE BASIC LAW COMMITTEE

Ronald Watts has argued that one of the strains that may lead to the failure of a federation is the absence of "a united framework" which can manage and accommodate regional identity and difference.[101] The *Basic Law*, to a large degree, recognizes and preserves the internal differences, but lacks an institutional structure to generate a positive consensus between Mainland China and Hong Kong. The Basic Law Committee (BLC) is the only institution within the framework of the *Basic Law* bridging the two legal systems on constitutional matters. "[The BLC] is a concession to the 'One Country, Two Systems,' and more specifically, an attempt to marry two different legal [and political] traditions."[102]

The BLC is an advisory committee of the Standing Committee of the NPC. It was established by an NPC Decision adopted on April 4, 1990, the same day the on which the NPC passed the *Basic Law*. The BLC is composed of 12 members, six each from the Mainland and Hong Kong.[103] The Standing Committee appoints them for a term of five years.[104]

The functions of the BLC are provided for in the *Basic Law*.[105] The BLC is limited to giving opinions to the Standing Committee on matters related to Articles 17, 18, 158, and 159 of the *Basic Law*.[106] Under these Articles, the functions of the Standing Committee are as follows, namely, to consult the BLC before it finds any HKSAR law inconsistent with the *Basic Law* (Article 17); to add to, or delete from, the list of national laws in Annex III of the *Basic Law* applicable to HKSAR (Article 18); to interpret the *Basic Law* (Article 158); and to amend the *Basic Law* (Article 159).[107] Given the qualifications of the members in the BLC, the advice it gives will be more political than legal, however.

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at 54. For a detailed discussion of the criminal jurisdiction of Chinese Criminal Law in Hong Kong, *see* Hualing Fu, *One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?*, H.K. LAW., Jan. 1999, at 51, and H.L. Fu, *The Battle of Criminal Jurisdictions*, 28 H.K. L.J. 273 (1998).

101. *See* RONALD L. WATTS, COMPARING FEDERAL SYSTEMS IN THE 1990s 102-03 (1996).

102. GHAI, *supra* note 11, at 196.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

The BLC was set up at the request of Hong Kong members of the BLDC to ensure that, when the Standing Committee makes its decisions, it would consider and respect autonomy and the rule of law as practiced in Hong Kong. Although there have been high expectations that the BLC would become a (quasi) Constitutional Court linking the two different legal systems and traditions, BLC members have been cautious in commenting on the BLC's possible role. Professor Albert Chen, one of the Hong Kong members, has said that the Committee was likely to play a passive and limited role.[108]

The image of the BLC may have been seriously damaged in the recent right of abode debate in the HKSAR. After the CFA delivered its judgment in the right of abode cases, some BLC members from both the Mainland and Hong Kong launched attacks on those decisions in very strong language. One Hong Kong member even went so far as to attack the Chief Justice for his "mistaken" judgment. The legal community in Hong Kong, at least, considered some of the members of the BLC to be too outspoken to perform their function judiciously and fairly. The editors of the *Basic Law & Human Rights Bulletin* have called for "further examination of the role of the Committee, appropriate standards of conduct for its members, and the type of procedures it should adopt."[109] This episode amplified the previously expressed fear that the BLC "could become another instrument for the cooptation of Hong Kong members, and serve to legitimize inroads into autonomy."[110]

B. THE ROLE OF THE NPC DEPUTIES GENERALLY

Within China's socialist state, all powers, according to the *PRC Constitution*, are vested in the NPC, "the supreme legal expression of the will of the ruling class."[111] Article 2 of the Constitution states that, "All powers in the People's Republic of China belong to the people. The National People's Congress and local people's congresses at various levels are the organs through which the people exercise state power."[112] Given the legal importance of the NPC, one might expect that the Hong Kong delegation to the NPC might represent the voice of Hong Kong in the organ of supreme State power and also serve as a bridging insti-

108. *See* China law expert discusses the Basic Law Committee and law in the PRC (interview with Professor Albert Chen), CHINA L. & PRAC. (Nov. 1997), at 40.

109. Editorial, 5 BASIC L. & HUM. R. BUL. (March 1999), at 1, 4.

110. GHAI, *supra* note 11, at 197.

111. Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Barriers to Reform, in* CHINA'S LEGAL REFORM 86 (Lubman ed., 1996).

112. P.R.C. CONST art. 2.

tution between CPG and the HKSAR. However, it has already been shown that it is not possible for the Hong Kong delegation to perform such a role under the current political structure.

From the perspective of deputies to the NPC, the NPC is supreme for three reasons. First, the deputies are "representative" within the meaning of Chinese constitutional law. The NPC is an integral part of the congressional system in China. Deputies to the county people's congress are returned through direct election. Deputies to the provincial people's congresses (including the people's congresses of the autonomous regions and cities under the direct control of the central government) are normally returned through an indirect election in county people's congresses. Finally the NPC deputies are elected indirectly by the people's congresses at the provincial level or by the People's Liberation Army.[113]

Secondly, the deputies to the NPC are composed predominantly of provincial power holders, with each provincial delegation "chaired" by the first CCP secretary of the province. There have been criticisms that the provincial delegations to the NPC are not democratic because of the administrative and political hierarchies within the delegations.[114] But, democratic or not, these delegations have the capacity to represent local interests in Beijing and also have real bargaining power in dealing with other provinces and the central government.

Finally, NPC deputies have certain duties and enjoy certain rights and privileges. Deputies must observe the Constitution,[115] which may be interpreted as loving the country, loving the people, loving socialism, and supporting the CCP.[116] They may not be held legally liable for their speeches or votes at various meetings of the NPC or its Standing Committee,[117] and may not be arrested without the consent of the Presidium of the NPC or, when the NPC is not in session, of its Standing Committee.[118] In addition to the power specified in the Constitution, the deputies have the authority to inspect the work of regional governments when the NPC is not in session. It has become a constitutional convention on the Mainland for the NPC deputies to inspect lo-

113. Electoral Law of the National People's Congress and Local People's Congress of the People's Republic of China (amended 1982), 1 LAWS OF P.R.C. 383 (1979-1982).

114. CAI DINGJIAN, ZHONGGUO RENDA ZHIDU [THE SYSTEM OF PEOPLE'S CONGRESSES IN CHINA] 175 (1996).

115. Organic Law of the National People's Congress of the People's Republic of China, 1 LAWS OF P.R.C. 334 (1979-1983) [hereinafter Organic Law of N.P.C.].

116. CAI, *supra* note 114, at 174.

117. ORGANIC LAW OF N.P.C. art. 43.

118. *Id.* art. 44.

cal works and make (often binding) suggestions and criticisms before each NPC annual plenum.[119]

C. The Role of Hong Kong's Deputies to the NPC

The Hong Kong NPC deputies do not share these empowering features. The Hong Kong deputies of the NPC were a component within the delegation of neighboring Guangdong Province before reunification. On March 14, 1997, the NPC enacted the *Measures for the Election of the HKSAR Deputies to the Ninth Session of the NPC* (*Measures*). According to the *Measures*, Hong Kong shall return 36 Hong Kong NPC deputies, who should be Hong Kong residents and Chinese citizens. There is one NPC deputy for every 220,000 persons in Mainland urban areas. If calculated according to this ratio, Hong Kong should return 29 deputies. However, seven more deputies were allowed from Hong Kong because of its "special status."[120]

The deputies were elected through an electoral committee for the Ninth Session of the NPC. The Electoral Committee was comprised of 424 members.[121] It was composed of Chinese citizens including many drawn from the 400 members of the Selection Committee for the First Government and the First (Provisional) Legislative Council of the HKSAR (Selection Committee).[122] Upon the request of the incumbent NPC deputies and members of the Chinese People's Political Consultative Conference (CPPCC), the Electoral Committee also included members of the PLC and members of the CPPCC who were Hong Kong residents and Chinese citizens, but not otherwise members of the Selection Committee.

The Hong Kong deputies do not enjoy the same privileges and rights as deputies from other parts of China. After the Electoral Committee selected the 36 deputies, serious attempts were made by some of members to the HKSAR NPC delegation to formalize its structure and its relations with the Standing Committee. It was suggested that local legislation should be passed to protect the interests and privileges of the deputies in performing their duties, and that an office or secretariat should be set up in

119. Cai, *supra* note 114, at 388-92.

120. Cao Zhi, *Explanations on the Draft "Measures for the Election of the Hong Kong SAR Deputies to the Ninth National People's Congress"*, 2 Gazette of the Standing Comm. of the Nat'l People's Cong. of the P.R.C. 256 (1997).

121. Linda Choy & May Sin-mi Hon, *Deputies Urge Openness and Accountability*, S. China Morning Post, Dec. 9, 1997.

122. Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region (3d Sess., 7th Nat'l People's Cong., April 4, 1990). *See, further*, discussion at 1.3.3 and 1.3.4.

Hong Kong which should be independent from the branch of the Xinhua News Agency in Hong Kong. Xinhua-Hong Kong had served as the base for Mainland relations with Hong Kong before the transition.[123]

However, the NPC has decided unequivocally that China's congressional system does not apply in Hong Kong. Zheng Yi, Deputy Secretary-General of the Standing Committee, ruled out an independent NPC office in Hong Kong, fearing that it might undermine the authority of the HKSAR government. Mr. Zheng was quoted as saying, "Under the policy of 'one country, two systems,' Hong Kong's affairs would be managed by the HKSAR itself and it is up to the HKSAR legislature to monitor the administration."[124] Xinhua, it was clear, was to serve as the "base" for Hong Kong NPC deputies and, at the same time, restrain any "eager" deputies from interfering in local governance. In his speech addressed to the Hong Kong delegation to the 1998 NPC session, President Jiang sent an unequivocal and very powerful message that Hong Kong NPC deputies represent Hong Kong compatriots in the management of state affairs, but they are not to interfere in HKSAR affairs.[125] This means they are not to discuss HKSAR affairs in Beijing when the NPC is in session.

Towards the end of 1998, the Standing Committee heavy-handedly issued more formal guidelines for the Hong Kong NPC deputies. Without prior consultation, the Standing Committee sent two high-ranking administrators to Hong Kong to announce the rights and privileges enjoyed by, and the limitations placed upon, Hong Kong deputies.

According to the guidelines, the deputies have the following rights in Hong Kong, they may: 1) discuss state affairs, 2) comment on Bills tabled in the NPC when consulted, 3) examine the work of the state organs or units in the Mainland, 4) convey opinions or complaints of Hong Kong residents related to the Mainland to the General Office of the Standing Committee, and 5) provide suggestions, criticisms, and opinions on work related to the Mainland when the NPC is not in session. But any activities relating to the HKSAR government are strictly forbidden. The deputies may not: 1) inspect any work in Hong Kong in their capacity as NPC deputies; 2) accept complaints against the HK-

123. Linda Choy, *Pressure mounts for local NPC office*, S. CHINA MORNING POST, Mar. 3, 1998.

124. Linda Choy, *Local NPC base ruled out*, S. CHINA MORNING POST, Mar. 4, 1998.

125. *Hong Kong NPC Deputies Will Not Interfere with SAR Affairs*, MING PAO, Mar. 10, 1998.

SAR government; or 3) enjoy rights and privileges enjoyed by their counterparts on the Mainland while in Hong Kong.[126]

The deputies are apparently unhappy about these restrictions. Many feel frustrated, that as NPC deputies, they now enjoy fewer rights than before the transition. Also they have complained that they are deputies only when they are in Beijing for the annual plenum. Allen Lee was particularly puzzled when President Jiang congratulated the Hong Kong deputies on their hard work because Lee and fellow deputies had not been allowed to do or say much about Hong Kong.[127] Some deputies continued to advocate their rights to discuss Hong Kong matters in Beijing (such as the right of abode issue) but were asked to keep quiet.[128] The irony facing the Hong Kong deputies is that, on the one hand, they cannot act on, or even discuss Hong Kong matters as deputies. Yet, on the other hand, they have a constitutional duty to represent Hong Kong in the NPC.[129]

Hong Kong NPC deputies do not perform their function in Hong Kong because they are not a part of Hong Kong's political structure.[130] The Vice Chairman of the Legislative Affairs Commission, Qiao Xiaoyang, reiterated Beijing's position in 1999 that "the NPC deputy system is not applicable to Hong Kong" and "the deputies have nothing to do with the HKSAR's political framework."[131] In addition, the status of Hong Kong deputies differs from that of their counterparts on the Mainland. A Ta Kung Pao editorial succinctly summarizes this difference. After

126. Ng Hong-mun, *Hong Kong NPC Deputies have 'a Law' to Follow*, Ming Pao, Dec. 1, 1998.

127. *Lee Peng-fei Complains that He does not know the responsibility as a Hong Kong NPC Deputy*, XIN BAO [H.K. ECON. J.], (Mar. 9, 1999).

128. No Kwai-yan, *'Keep quiet' call to local NPC deputies*, S. CHINA MORNING POST, Mar. 11, 1999. According to the spokesman of the Standing Committee, the NPC should not pursue the right of abode matter further and Hong Kong deputies could only "discuss national affairs." Ma Lik, one of deputies from the Democratic Alliance for Betterment of Hong Kong, who vowed to ask the Standing Committee of the NPC to re-interpret the *Basic Law*, made a U-turn, and was quoted as saying in Beijing that he "will personally support any measure which can resolve the problem." The NPC was afraid of a deterioration of relations between the CPG and the HKSAR if the controversy was not put to an end. No Kwai-yan, *Deputy backs away from NPC plan*, S. CHINA MORNING POST, Feb. 3, 1999.

129. For a discussion of this irony, *see NPC Deputies Face Dilemma on Dual Roles*, H.K. STANDARD, Mar. 17, 1999, and Chris Yeung & No Kwai-yan, *The Ties that Bind our NPC Deputies*, S. CHINA MORNING POST (Hong Kong Ed.), Mar. 16, 1999, at 19.

130. BASIC LAW, art. 21 (1990). Article 21 of the *Basic Law* states that "the Chinese citizens among the residents of the Hong Kong Special Administrative Region shall locally elect deputies of the Region to the National People's Congress to participate in the work of the highest organ of state power." *Id.* However the Hong Kong deputies do not play a direct role in Hong Kong's political establishment. *See Id.*

131. *Id.*

praising the enthusiasm of the deputies, it continues, "People's deputies in the Mainland have official positions and powers, they are widely respected, and they are people doing real things. But Hong Kong NPC deputies cannot do this in the HKSAR, because Hong Kong has 'the other system.'"[132] One may safely conclude that the HKSAR does not have a real voice in the NPC and the NPC does not have a real presence in the HKSAR.

X. CONCLUSION

The aim of this article has been to examine where national security regulation in Hong Kong is headed. The key factor driving consideration of new regulatory measures in this regard is Article 23 of the *Basic Law*. The events of 9/11 have added a certain impetus to the debate. The legislative history of Article 23 shows how major political events, especially the Tiananmen Bloodshed of June 4, 1989, have shaped the Article 23 debate. That event still casts a long shadow over Article 23 and, indeed, the entire *Basic Law*. Certain expectations about the role of Article 23 were developed, on the Mainland especially, after that time. Nevertheless, the clear legislative intent embodied in Article 23 allows the HKSAR government to define the ambit of Article 23 according to common law principles and rules.

The debate over the role of Mainland Chinese criminal law in Hong Kong continues. However, the intent of the *Basic Law* is clear: Mainland criminal law should not apply in Hong Kong other than in clearly specified, exceptional circumstances or where such application is explicitly and directly authorized through the *Basic Law*. Despite this intent, it remains the case that a question mark hangs over the scope for Mainland criminal law (including the provisions of that law punishing Article 23 type crimes) to apply in Hong Kong through the operation of certain, widely recognized, extra-territorial legal principles which are incorporated into Mainland criminal law.

The current state of play in the *Basic Law* interpretation debate has created a zone of significant uncertainty with respect to the operation of the *Basic Law*. What are the limits on the powers of the CFA? What constraints, legal and political, apply to the use of power conferred by the *Basic Law* on the Standing Committee of the NPC? When should matters legitimately in dispute in the CFA also involve interpretation by the Standing Committee? What is the role of the *PRC Constitution* with respect to Hong Kong? Is any sort of mechanism emerging to provide a system for mediating the contradictions between the *PRC*

132. Editorial, *Hong Kong NPC Deputies should Take the Lead in Enforcing 'One Country, Two Systems'*, TA KUNG PAO, Mar. 15, 1999.

Constitution and the *Basic Law*? Which body should (or will) have the final say on defining what is subversion, what is sedition and what is secession? To this list of questions, many more could be added. There are few if any definitive answers to these questions thus far.

Then there is the *ICCPR*. What might its impact be? It is clear that the *ICCPR* is woven into the domestic judicial fabric of the HKSAR to a degree almost unprecedented in any other jurisdiction. It is also clear, more generally, that the impact on municipal legal systems of international human rights norms, often mediated through the *ICCPR*, is growing at a greater pace today than ever before. The influence of the *ICCPR* in Hong Kong generally, and with respect to Article 23 specifically, looks set to increase.

An examination of developments at common law with respect to treason, subversion, sedition, and related offenses reveals that significant changes have occurred in the common law since the 19th century. A clearer distinction has developed between treason in times of war - high treason - and treason during times of peace and also, between these crimes and quasi-treason offenses. Subversion, in and of itself, is not a crime at common law. But subversive activities are criminalized, frequently under one of the categories of treason. In the case of sedition, the principal development has been the crafting of some form of incitement test. The requirement of advocating overthrow of government by force or violence has substantially narrowed the scope of sedition in a number of jurisdictions.[133]

The attempt by the last pre-transition Hong Kong government to legislate on subversion and secession, pursuant to (the then pending) Article 23, failed. So what does the future hold? There is a very sound argument that existing laws in the HKSAR largely satisfy the requirements of Article 23. However, this argument does not, at present, look like it will be acceptable to Beijing. The HKSAR government is under an obligation to deal with Article 23. The desire for a specific legislative response is significant and not just on the Mainland side of the border. The devastating terrorist attacks on New York and Washington on September 11, 2001 have only amplified this urge.

Even so, by any measure it is clear that there is no need for any sort of root and branch re-legislating in these areas. The relationship between the HKSAR and the Mainland PRC has, settled down very well in most respects. In particular, there is no evidence of any threats to the national security of the PRC based

133. *See* Fu, Cullen and Choy, *supra*, note 3.

in Hong Kong. The "enemies of the state" have not developed a base of any sort in the HKSAR.

It seems clear that any legislation that is enacted will need, if it is not to arouse serious concern and resentment, to reflect the local political reality, including the norms arising from the common law tradition and the growing international law jurisprudence in this area. In addition, the HKSAR "experiment" remains in the international spotlight. There is significant potential for the thus far largely successful relationship between the HKSAR and Beijing to be placed under great strain in the course of resolving the national security issues raised by Article 23. If such strains do emerge, they are almost certain to become matters for international discussion.