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Writing Sample #1

Title:

Procedural and Constitutional Validity of the National Security Law for Hong Kong

Prompt:

China adopted the National Security Law (NSL) for Hong Kong in June 2020. Many governments and non-governmental organisations around the world have criticised Beijing for imposing its own political and legal values on Hong Kong in violation of the One Country, Two Systems policy. As a law enacted by the Chinese national legislature, how does the NSL measure up against China's own legal and procedural requirements (including the Basic Law of Hong Kong)?

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Context:

Prepared as part of a university law course assessment. The paper evaluates the procedural enactment of the NSL under Chinese legislative law and its consistency with the Basic Law of Hong Kong.

Introduction

The People's Republic of China ("PRC") operates under a unicameral legislative system in which legislative power is exercised by the National People's Congress ("NPC") and its Standing Committee ("NPCSC")¹. The NPC, as the highest organ of state power, is responsible for enacting and amending basic laws governing criminal offences, civil affairs, state institutions, and other fundamental matters². By contrast, the NPCSC primarily supplements and amends laws enacted by the NPC when the NPC is not in session³.

The National Security Law for Hong Kong ("NSL") is a national security law drafted by the NPCSC pursuant to authorisation from the NPC and subsequently adopted through a decision of the NPC. This raises the question of whether the NSL was enacted in accordance with China's own legal and procedural requirements.

Is the NSL enacted in accordance with China's own procedural requirements?

Under the standard legislative process of the NPCSC, a bill may be proposed by the Council Chairperson or other authorised state actors. The bill is then subject to three readings within the NPCSC before being put to a vote. During this process, the NPCSC is required to consult relevant experts and, following deliberation, release the draft bill to the public for comment unless the Chairman's Committee decides otherwise⁴. After revisions are made in response to feedback, the bill is voted on and typically passed by a majority of NPCSC members⁵. Once adopted, the bill is signed by the President and promulgated as law.

In the case of the NSL for Hong Kong, legislative authority was delegated to the NPCSC. The bill underwent only two readings, involved limited consultation, and was not released to the public for comment. It was also enacted without prior public notice.

¹ *Constitution of the People's Republic of China* Article 58

² *Ibid* 62(3)

³ *Ibid* 67(3)

⁴ *Ibid* 36

⁵ *Ibid* 37

Article 67(2) of the PRC Constitution provides that the NPCSC has the power to enact laws except for those that should be enacted by the NPC. Given the significance of national security legislation and the political sensitivity demonstrated by the public response to the 2019 extradition bill, it can be argued that a national security law falls within the category of laws that should be enacted by the NPC rather than delegated to the NPCSC.

Article 30 of the Legislation Law permits the third reading of an NPCSC bill to be omitted where no major disagreements exist, and consensus has been reached. This condition appears difficult to satisfy in the context of the NSL. In light of the widespread opposition to the 2019 extradition bill and the broader implications for the One Country, Two Systems framework, it is implausible that the drafting of the NSL was free from major disagreement or that genuine consensus had been achieved.

Consultation on the NSL was conducted in a limited and confidential manner, involving only pro-Beijing members of the Hong Kong legislature. Neither the Chief Executive nor pro-democracy legislators were meaningfully consulted. The relevant provision of the Legislation Law requires the NPCSC to solicit opinions from various sectors and, where a bill involves highly technical issues requiring feasibility evaluation, to convene expert panel discussions. A national security law applicable to a special administrative region such as Hong Kong is *prima facie* highly technical, making expert consultation necessary. Restricting consultation to a narrow group undermines the purpose of this requirement.

Article 37 of the Legislation Law states that draft bills should be released for public comment unless the Chairman's Committee decides otherwise. The stated justification for withholding the NSL from public consultation was the sensitive nature of its subject matter. However, the decision not to release the bill may also be understood in light of the significant public opposition that could reasonably have been anticipated, particularly given the events of 2019. The refusal to invite public comment, therefore, raises concerns about compliance with the intended transparency of the legislative process.

In summary, the subject matter of the NSL was of such importance that legislative authority should not have been delegated to the NPCSC. The legislative process set out in the Legislation Law was accelerated, key procedural steps were curtailed, and consultation was narrowly conducted. These

factors suggest that the enactment of the NSL departed from established legislative requirements and exceeded the appropriate scope of the NPCSC's authority.

Article 96 permits the NPC to repeal or amend laws enacted by the NPCSC. In this context, repeal would be justified on the basis that the enactment exceeded the NPCSC's delegated authority. A national security law applicable to a special administrative region is of sufficient importance and sensitivity that it should have been enacted directly by the NPC.

Is the NSL enacted in accordance with the Basic Law of Hong Kong?

As a Special Administrative Region, Hong Kong enjoys a high degree of autonomy⁶ and exercises powers comparable to those of a province within the PRC. The Basic Law of Hong Kong ("BL") functions as Hong Kong's constitutional document and is supported by the PRC Constitution. Laws that are inconsistent with the Basic Law are of no effect, including those enacted by the NPC or NPCSC. Hong Kong courts possess the authority to review such inconsistencies and declare invalid laws that contravene the Basic Law⁷.

The Basic Law affirms Hong Kong's authority to manage its own affairs⁸, including external relations, and provides that national laws shall not apply in Hong Kong except for those listed in Annex III. On this basis, the NPCSC lacked the capacity to directly impose a national security law on Hong Kong without first amending Annex III to permit such application. Only after such an amendment could a national law validly be applied to Hong Kong.

Further, Article 11 of the Basic Law provides that, pursuant to Article 31 of the PRC Constitution, the systems and policies practised in Hong Kong are protected. This limits the Central Government's interaction with Hong Kong to the framework established by the Basic Law. Accordingly, any attempt to enact national legislation applicable to Hong Kong must comply with the procedures prescribed by the Basic Law.

⁶ *Basic Law of the Hong Kong* Article 1;12

⁷ *Ng Ka Ling v Director of Immigration*

⁸ *Basic Law of the Hong Kong* Article 13

It is therefore not inherently impermissible for the NPC or NPCSC to enact national legislation applicable to Hong Kong. However, such legislation must follow the procedural and substantive requirements set out in the Basic Law. As enacted, the NSL does not comply with these requirements and is therefore unconstitutional within Hong Kong. Under established principles of constitutional law, Hong Kong courts possess the authority to declare the NSL invalid and of no effect.

Conclusion

The NSL for Hong Kong was improperly enacted under Chinese law. Legislative authority was delegated to the NPCSC despite the importance and sensitivity of the subject matter, and the enactment process departed from the procedural requirements set out in the Legislation Law. As a result, the power to enact the law should have remained with the NPC, and the NSL should be repealed.

The Basic Law, as Hong Kong's supreme law, is supported by the PRC Constitution. Enacting national legislation without adhering to the Basic Law's requirements is therefore unconstitutional under Chinese law. Because the NSL contravenes the Basic Law, it is invalid and without legal effect in Hong Kong. Should China seek to enact national legislation applicable to Hong Kong in the future, it must do so in strict accordance with the procedures established by the Basic Law.