

Rudolf, Moritz

Research Report

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SWP Comment

NO. 56 NOVEMBER 2020

The Hong Kong National Security Law

A Harbinger of China's Emerging International Legal Discourse Power

Moritz Rudolf

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Security Law) highlights the shortcomings of the 1984 Sino-British Joint Declaration and the inherent conflicts of the "one country, two systems" principle. The arrangement has always been full of contradictions and grey areas. With the Security Law, the Chinese leadership has created facts on the ground. The move comes at the expense of civil liberties and accelerates the spread of socialist legal concepts in Hong Kong. But, on this issue, Beijing is not isolated internationally. On the contrary, it is supported by economically dependent states in its assessment of the Security Law as an internal affair. China's ambition to gain international discourse power in legal matters is strategically embedded in the Belt and Road Initiative (BRI). Beijing's course of action in Hong Kong serves as a test balloon in this endeavour. Decision-makers in Germany and Europe are still not sufficiently aware of the problems concerning Chinese legal concepts. More expertise is urgently needed.

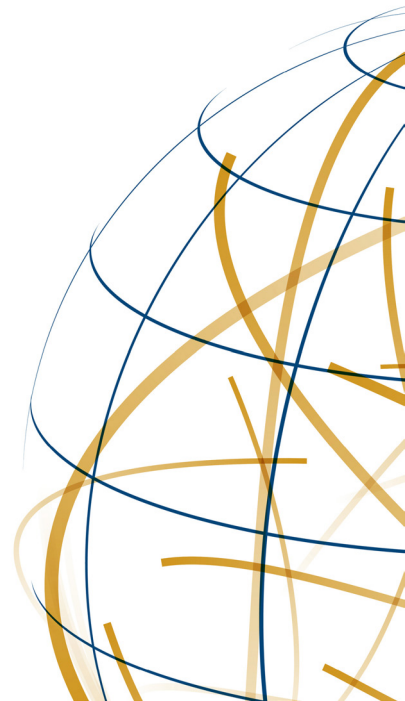
The fact that Western democracies are increasingly isolated in their assessment of the Hong Kong question was recently underlined in the general debate of the 3rd Committee of the United Nations (UN). Speaking on behalf of 39 states (including 20 EU Member States, the USA, the United Kingdom, Japan, but also small states such as Nauru, Palau and Liechtenstein), the German Ambassador expressed concern that several provisions of the Security Law do not comply with China's international legal obligations. This was immediately followed by a statement made by the representative of Pakistan (representing 54 states) stressing that the law was an internal affair of the People's Republic of China (PRC). Just a few

days later, on 13 October 2020, the international community elected China to the UN Human Rights Council for a three-year term.

Content of the Security Law

The Security Law entered into force on 30 June 2020. According to Article 1, its purpose is

- to implement the "one country, two systems" policy;
- to prevent, suppress and punish secession, subversion, terrorism and collusion with foreign powers;
- to maintain prosperity and stability in Hong Kong;



- to protect the rights and interests of Hong Kong residents.

The law creates numerous institutional changes and creates new enforcement mechanisms, such as the “Committee for Safeguarding National Security”. The Committee is under the supervision of and accountable to the central government (Art. 12). The Committee’s decisions are not amenable to judicial review (Art. 14). The central government will appoint a National Security Adviser to sit in on meetings of the Committee (Art. 15). Furthermore, the police force will establish a department for safeguarding national security (which includes personnel from mainland China) with law enforcement capacity (Art. 16). The Hong Kong Department of Justice will also establish a specialised prosecution division (Art. 18).

The law punishes secession (Art. 20 and Art. 21), subversion (Art. 22 and Art. 23), terrorist activities (Art. 24–28) and collusion with a foreign country or with external elements to endanger national security (Art. 29 and Art. 30). Article 38 states that a criminal offence may also be committed outside Hong Kong and by persons who are not permanent residents in Hong Kong. Article 40 gives jurisdiction to Hong Kong. An exception is provided for where (a) the case is complex because of a foreign connection, (b) a serious situation arises and the Hong Kong Government is unable to effectively enforce the law itself, or (c) a major and imminent threat to national security has occurred (Art. 55). In this case, the “Office for Safeguarding National Security of the Central People’s Government”, exercises jurisdiction. The Office’s broad mandate, includes (1) analysing and assessing the national security situation in Hong Kong (as well as submitting proposals on major national security strategies) (2) overseeing, guiding, coordinating with, and providing support to the local security authorities, (3) collecting and analysing intelligence and information, and (4) handling cases concerning offences endangering national security (Art. 49). Following Article 56, criminal proceedings may take place on

the mainland. Chinese criminal procedural law applies. Hong Kong authorities must comply with the measures taken by the Office (Art. 57). The activities of the Office are not subject to the jurisdiction of Hong Kong (Art. 60).

Criticism and Justification

Since it was announced by the National People’s Congress (NPC) on 22 May 2020, the legality of the Security Law has been a bone of contention both inside and outside Hong Kong. The law is being discussed by politicians from around the world, academics, representatives of the Hong Kong government, and party cadres from mainland China. This debate is revealing fundamentally different assessments of the Basic Law of Hong Kong, the 1984 Sino-British Declaration and the “one country, two systems” principle.

One aspect of the security law that is controversial is its formal legality. Following Article 18 of the Basic Law, the Security Law was added to Annex III of the Basic Law, thus becoming part of the Hong Kong legal system. However, Article 23 of the Basic Law explicitly attributes the legislative competence for such a law to the Hong Kong legislature. The Chinese side points out that previous attempts to pass a national security law (in 2003) have failed and that it is, therefore, necessary to fill a regulatory gap to restore public order in Hong Kong. Beijing argues that it is entitled and obliged to do so.

Substantive criticism has pointed out that the offences are vaguely defined and could be used for politically motivated criminal prosecution. The line between exercising individual civil liberties and violating national security is becoming increasingly blurred. The rights codified in the Basic Law, so the criticism goes, are being undermined under the pretext of national security. While the law contains a general guarantee of respect for human rights, some of its other provisions preclude such protection. The law undermines the independence of the judiciary, contrary to the

provisions of the Basic Law. The law also asserts jurisdiction over people who are neither residents of Hong Kong nor ever been there, even if their conduct is perfectly legal where the act is committed. This provision, therefore, even exceeds the provisions of China's Criminal Law and standard international practice.

The Chinese side, however, argues that the law affects merely a tiny fraction of the Hong Kong population, that it creates legal certainty and thus is a prerequisite for prosperity in the region.

Seen from a Chinese perspective and incorporating Beijing's understanding of law as a purely political instrument, this line of argument is quite consistent. In China, the Basic Law is seen as an ordinary law, whereas in Hong Kong it is largely understood as a "mini-constitution". By way of background: The Basic Law was drafted between 1985 and 1990 with the participation of numerous representatives from Hong Kong, and adopted by the NPC in 1990. It entered into force on 1 July 1997. Under Article 158 of the Basic Law, the power to review whether the Security Law is compatible with the Basic Law is vested in the Standing Committee of the NPC. Since it was the NPC which enacted the Security Law in the first place, it is not expected to question the legality of the law.

As regards the allegation that the Security Law undermines the independence of the judiciary, it is also important to look at how the law is applied. So far, the police forces have applied an extensive interpretation of the law. However, only a handful of people have been charged (as of 24 November 2020) under the Security Law (including one motorcyclist who collided with a group of police officers, teen activist and pro-independence advocate Tony Chung, and a delivery driver who allegedly chanted slogans calling for Hong Kong's independence). While the offences are very broadly defined, it is also difficult to prove intent before the court. As long as there are still professional judges in Hong Kong, the main effect of the Hong Kong Security Law will be one of intimidation. It is also not surprising that Beijing

officials are already calling for further "judicial reform" in Hong Kong. In the meantime, the Security Law is sending a strong signal in the spirit of the Chinese idiom "Kill the chicken to scare the monkey (杀鸡儆猴)". Critical voices fall silent for fear of persecution or criminal proceedings within the People's Republic of China.

Shortcomings of the Sino-British Declaration of 1984

The Security Law illuminates weaknesses of the Sino-British Declaration of 1984 (Declaration). The wording of the Declaration is vague, contradictory and leaves room for interpretation, which the PRC is now taking advantage of.

The Declaration is an international treaty between the PRC and the United Kingdom. It governs the "resumption" of Chinese sovereignty over Hong Kong (Article 1) and the "restoration" of Chinese sovereignty by the United Kingdom (Article 2). The negotiations were initiated over concerns stemming from the Hong Kong banking sector in the late 1970s. Financial institutions feared that land lease contracts in the New Territories (at that time a significant part of Hong Kong's revenue) could only be concluded for an increasingly short period. The cut-off date was 27 June 1997, three days before the expiry of the lease that the UK and China had signed in 1898. There were fears of a sharp rise in interest rates and demands for clarity about Hong Kong's future.

The bilateral negotiations were characterised by a strong power asymmetry to the detriment of London. The Chinese side issued an ultimatum for the conclusion of an agreement in autumn 1983. Beijing threatened that, should Britain not meet this ultimatum, it would take unilateral action to reclaim Hong Kong. To reach an agreement at all, the British side showed great willingness to compromise.

Already at an early stage in the process, some legal scholars highlighted the grey areas and contradictions of the declaration, arguing that the implementation of the

treaty ultimately depended on the goodwill of the Chinese leadership. According to paragraph 3 (12), the rights and freedoms granted in the document will be stipulated in a Basic Law. However, the power of interpretation (and the power to add new laws in the form of annexes) of the Basic Law is vested in the Standing Committee of the NPC. This enables the NPC to restrict the freedoms granted in the Declaration on the pretext of national security. The same logic applies to the “high degree of autonomy” granted to Hong Kong under paragraph 3(2). The previous sentence states that Hong Kong is directly under the authority of the central government. Beijing may thus interpret the phrases “high degree of autonomy” or “remain basically unchanged” (referring to the laws in force in Hong Kong) without formal external control mechanisms.

The Security Law turns these concerns into a reality. Beijing argues that with the promulgation of the Basic Law and the return of Hong Kong to China, all obligations of the parties under the Joint Declaration have been fully met. No further monitoring of the implementation of the agreement is therefore required. Since the PRC has sovereignty over Hong Kong, the Security Law is, in Beijing’s view, an internal matter. For the Chinese side, the main purpose of the Declaration was to gain sovereignty over Hong Kong and to put an end to its colonial past.

The British side disagrees and sees Beijing as having a continuing commitment to London until 2047, pointing out that the Security Law undermines the promised high degree of autonomy.

In practice, Britain’s hands are largely tied. No mechanism has been established to monitor China’s long-term compliance with its obligations. A model for this would have been the 1921 Åland Convention. The fact that the PRC was not going to accept the jurisdiction of the International Court of Justice (ICJ) was already clear at the time of the negotiations. The Joint Liaison Group, which originally oversaw the implementation of the Joint Declaration, was dissolved as planned on 1 January 2000. Since July

1997, the UK Government has been preparing regular reports on the implementation of the bilateral agreement. However, these reports are of purely symbolic value and are primarily an expression of “moral obligations” that London has towards the people of Hong Kong.

The British side can certainly be criticised for its short-term and over-optimistic approach towards Hong Kong. Until shortly before the return of the Crown Colony, London had failed to create democratic structures or human rights standards in Hong Kong. The suppression of protests in Tibet (during the 1980s) and the Tiananmen Incident (1989) revealed to London a profound lack of protection of Hong Kong residents. Interestingly, however, it was the Chinese side which asserted a violation of the Declaration when London attempted to build democratic structures in 1992 as part of the Patten proposals.

The PRC Implements Its Interpretation of “One Country, Two Systems”

With the Security Law, Beijing is demonstrating its view of the principle of “one country, two systems”. The inherent conflicts in the arrangement are now coming to light. The “one country, two systems” principle in Hong Kong is, by design, rife with conflicts and contradictions. Western and Chinese interpretations were always different and neither side took the other’s perspective seriously.

The “one country, two systems” formula in Hong Kong is an attempt to insert a system of Common Law into a socialist system. The Common Law system is based on ideas of Western individual liberalism and the separation of powers. According to China’s socialist-Leninist ideology, all power of the state is concentrated in the NPC. There is no clear separation between the legislative, executive and judicial branches. The judiciary is seen as part of the administration. The constitution and the law are instruments for the fulfilment of political, eco-

nomic and social goals. Western ideas such as the intrinsic value of the law, the independence of the judiciary and the central role of the individual are alien to this system. According to the PRC's understanding of the law, rights are given to the individual by the central government. In the Common Law context, on the other hand, individual rights are assumed to be limited by the state through the law.

Due to the asymmetrical power distribution favouring mainland China, the implementation of "one country, two systems" has always, to some extent, depended on Beijing's self-restraint. Conflict over how to interpret the arrangement has been ongoing since 1997. To illustrate, since 1999, through its interpretations of the Basic Law, the NPC, has incrementally narrowed the scope of the independent judiciary. This is because the NPC's interpretations of the Basic Law have a binding effect on the Hong Kong judges. Although, in the past, they have creatively sought to maintain their room for manoeuvre, the Hong Kong judiciary is increasingly internalising socialist values and today unquestioningly accepts the interpretations of the NPC.

Political developments in China and Hong Kong further limit the scope for action. Under Xi Jinping, there are significant efforts to expand state control measures in mainland China (e.g. through the National Security Law, Anti-Terrorism Law, Cybersecurity Law). These monitoring efforts also extend to Hong Kong. The Chinese leadership interpretation of the principle of "one country, two systems" in Hong Kong is increasingly restrictive. A White Paper on "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region" published by the central government in June 2014 states: "One country' is the premise and basis for 'two systems'. 'Two systems' is subordinate to and derived from 'one country'". In the document, the central government also calls for a "patriotic" Hong Kong judiciary that supports the government.

Political sentiment in Hong Kong has become more contentious since 2014.

Triggered by what has been dubbed the "831 decision" of the NPC on the election of the Hong Kong Chief Executive, protesters occupied parts of central Hong Kong for 79 days in late summer 2014 demanding more democracy. The government crackdown on the demonstrators radicalised parts of the movement. When the situation escalated in mid-2019 (over the issue of an extradition agreement with mainland China), it was only a matter of time before Hong Kong's room for manoeuvre would be further restricted. The Security Law put a decisive end to the escalation for the time being.

Incentives for Chinese self-restraint are diminishing. While Hong Kong was of major economic importance to Beijing as a gateway to the West in the 1980s, the Chinese leadership is now trying to integrate Hong Kong into the "Guangdong-Hong Kong-Macao Greater Bay Area" project. Although Hong Kong is likely to remain a key international commercial and capital hub the "one country, two systems" principle is expected to continue in Hong Kong only in the form of "one country, two economic systems".

Fight over International Legal Discourse Power

The conflict has reached a deadlock. The majority of states within the UN support China's legal view that the Security Law constitutes an internal affair of the PRC. The chances of an ICJ advisory opinion or of the dispute being settled by any other international dispute resolution mechanism are slim. The Hong Kong issue has evolved into a conflict over international discourse power. And in this area, the PRC has a strategic advantage (see SWP-Studie 19/2020).

Although many Western democracies are united in their criticism of Beijing, they are finding it difficult to convince other states to publicly express the same position towards China. Those condemning Beijing's actions in Hong Kong include most EU Member States, the UK, the US, Australia, New Zealand, Canada and Japan, as well as sev-

eral small island states, many of which have no diplomatic relations with Beijing. For others, the economic price of publicly criticising China seems too high. Even European democracies (such as Greece, Malta, Romania, the Czech Republic, Hungary and Cyprus) often remain silent.

This isolation was particularly evident during the 44th session of the UN Human Rights Council. On 30 June 2020, the United Kingdom's ambassador to the United Nations in Geneva criticised China's Hong Kong policy on behalf of 27 countries. Shortly afterwards, Cuba spoke on behalf of 52 states in support of the Chinese position.

Hong Kong is an ideal test balloon for Beijing in the struggle for international discourse power over legal issues. The legal situation is at the very least debatable and Beijing has extensive expertise in this area. The Chinese communication strategy is streamlined and follows the guidelines from Beijing. Shortly after the announcement of the Security Law, numerous op-eds by former Hong Kong judges, current members of the judiciary and legal experts appeared, defending the law. In the West, however, Hong Kong is often the subject of emotional debate, possibly because hopes for political change in the PRC and a liberal future for Hong Kong have been dashed.

Western states must perform a balancing act, to avoid being accused of violating international commitments to the PRC on the pretext of maintaining the international rules-based order. This is also because the 1984 Sino-British Declaration has no *erga omnes effect*. Accordingly, it only entitles and obliges the contracting parties.

In response to the suspension or termination of extradition agreements with Hong Kong, as decided by the governments of Australia, Canada, the United Kingdom, Germany, the United States, Finland and Ireland, the PRC has been calling on these countries to comply with international law and the basic rules of international relations. However, many extradition agreements with Hong Kong provide for the possibility of suspension or termination at any time by giving notice. Contrary to Beijing's wording,

such an act thus does not constitute interference in China's internal affairs.

However, additional measures in response to the Security Law cannot simply be based on Article 60 (termination or suspension of the operation of a treaty as a consequence of its breach) or Article 62 (fundamental change of circumstances) of the Vienna Convention on the Law of Treaties. The narrow scope of application of these articles requires a detailed case-by-case examination.

Meanwhile, China uses the well-known narrative that the West still has a colonial mind-set and applies double standards – apparently successfully in many countries.

Strategic Embeddedness within BRI

Legal cooperation programs under the Belt and Road Initiative (BRI) accompany China's efforts to gain international discourse power over legal issues. Beijing systematically engages to convince economically dependent states of its legal positions.

Since July 2018, Beijing has been promoting this process under the umbrella of the Belt and Road Legal Cooperation Forum. Legal cooperation, as "soft connectivity", is intended to complement the desired "hard connectivity" (e.g. the development of cross-border infrastructure networks).

With this often overlooked aspect of the BRI, the PRC aims for the juridification of the initiative in accordance with Chinese interests. Beijing points to different legal traditions and legal concepts around the world and promotes the BRI as a mechanism to give them international validity. China criticises a dominance of Western positions in the international legal discourse, and offers to be the architect of a "more democratic international rules-based order".

The Chinese leadership has been systematically developing legal expertise but not only within China itself; its ambitions also extend to BRI countries.

In addition to standardisation efforts to promote international economic relations,

China intends (with moderate success so far) to establish an international BRI dispute resolution mechanism. Also on the agenda is the establishment of what has been named a “Clean Silk Road”, an initiative which calls for international cooperation on anti-corruption and the fight against “terrorism, separatism and extremism”.

During the Second Belt and Road Forum for International Cooperation in April 2019, the Communist Party’s Central Commission for Discipline Inspection together with the Chinese Ministry of Foreign Affairs and the China Law Society hosted a sub-forum entitled “Building a Clean Silk Road through Consultation and Cooperation for Shared Benefits”. This sub-forum focused on the international fight against corruption, the establishment of a network of extradition treaties and a training program for lawyers from BRI countries.

The “Belt and Road Legal Cooperation Research and Training Programme” launched in autumn 2019 serves to convey and disseminate China’s international law practice, legal concept and the theory of “socialist law with Chinese characteristics”. Existing legal exchange programmes with developing countries are thus embedded in a strategic framework. The programme is aimed at members of the (international) legal departments of the respective foreign and justice ministries. Representatives of 22 states, such as Egypt, Ethiopia, Pakistan, Serbia and Turkey, took part in the first 11-day seminar.

Beijing also awards BRI scholarships aimed at developing a long-term understanding of China’s legal concepts (such as “human rights with Chinese characteristics”, but also focusing on the systems in Hong Kong and Taiwan). The Chinese leadership is explicitly interested in communicating their legal positions and facilitating a greater understanding of them. The recently announced doctrine of “Xi Jinping Thought on the Rule of Law” (习近平法治思想), underscores Beijing’s ambitions to “promote the rule of law in China and foreign countries” and will

further add momentum to China’s strategic engagement.

Options for Action

The developments in Hong Kong are a harbinger of a self-confident China that projects its socialist-Leninist legal concepts internationally and is well prepared to defend them.

China is striving to create a rules-based order in which it sets the guidelines and processes itself. That in itself is not surprising. Leading powers are always striving for legal frameworks that support their political agenda. But China’s idea of a “socialist rule of law with Chinese characteristics” is largely at odds with the European legal tradition. The Hong Kong issue underlines the conflicts between these different views.

Legal certainty when dealing with China only seems possible if Beijing’s core interests are at stake and there are clear incentive structures in place. The scope for interpretation should be kept as narrow as possible. This applies in particular to the current negotiations on the “EU-China Comprehensive Agreement on Investment”. The WTO framework is a positive example of how China can be successfully integrated into the rules-based international order.

Germany and Europe should first develop the necessary awareness of the problem stemming from China’s strategy of exporting its approach to law. An important step in the right direction would be to take the extent of China’s ambitions and strategic embedding seriously. Hong Kong is not an isolated case, but a test balloon. It is conceivable that, in future, Beijing may apply an excessive interpretation of the extraterritorial component of China’s National Security Law or the Chinese Criminal Law and gain support for this from the ranks of a growing number of BRI states. Beijing already has an extensive and ever-growing network of extradition agreements (including Belgium, Bulgaria, Cyprus, Greece, Italy,

Lithuania, Portugal, Romania, Spain and France).

Offers of cooperation with third countries that increasingly share China's positions could help to counteract the prospective marginalisation of Western legal concepts. The German government's Indo-Pacific Guidelines could be a starting point for this.

A sober approach to China is also needed. The European discourse on China is becoming increasingly emotional, especially when it comes to Hong Kong. This is unhelpful and even counterproductive.

The Security Law and its implications also make it clear that there is more rather than less need for dialogue with the PRC on international legal issues. The Chinese side is too strategic to ignore. It is therefore important to understand the Chinese lines of argument. It is doubtful that the German-Chinese dialogue on the rule of law or the EU-China human rights dialogue offer the appropriate venue for this. New stimuli and formats are urgently needed. To ascertain whether the Chinese side is interested in an exchange on legal issues, it would be conceivable, for example, for European states to confidently participate in the Belt and Road Legal Cooperation Forum. Another idea would be to establish a new dialogue format with China, specifically focusing on international law.

China has already acquired sufficient expertise and an impressive understanding of European legal concepts. To understand the rationale behind China's actions and to be able to discuss with the Chinese side on equal footing, it is now necessary for the German Bundestag, the relevant Federal Ministries and European policymakers to all acquire more knowledge on matters of China's position on law and in particular on international law.

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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Moritz Rudolf is Associate in the Asia Division at SWP.