

New China National Security Law

May 28, 2020

The National People's Congress in China has today adopted a resolution paving the way for a new national security law to apply to Hong Kong.

The law is expected to focus on the prevention and punishment of secession, the subversion of state power, the organization and conduct of terrorist activities and foreign interference in Hong Kong affairs.

The terms of the new law are not yet known. The Standing Committee of the National People's Congress will meet to finalize and adopt the law—possibly in a matter of weeks from now.

On May 27, U.S. Secretary of State Mike Pompeo notified Congress that he is unable to certify that Hong Kong continues to warrant differential treatment under U.S. law. The U.S. Administration and Congress are considering next steps, and additional announcements on this issue are expected in the near future.

We are carefully monitoring developments, and our experts in Hong Kong, London and Washington, D.C. are available to help clients understand next steps and possible impacts.

Hong Kong's Constitutional Balance

Since the restoration of Hong Kong from British rule to Chinese sovereignty in 1997, "One Country, Two Systems" has been a defining characteristic of the governance of the Hong Kong Special Administrative Region ("**Hong Kong**") and its relationship with the People's Republic of China ("**China**"). This reflects the principle of "a high degree of autonomy" for Hong Kong, which is enshrined in the 1984 Sino-British Joint Declaration on the Question of Hong Kong, pursuant to which the "Handover" was implemented. The same principle is referred to and given expression throughout the de facto constitution of Hong Kong, which is known as the "**Basic Law**."

The Basic Law stipulates that the "previous capitalist system and way of life [in Hong Kong] shall remain unchanged for 50 years"—that is, until 2047. It also provides for the continuation of the common law in Hong Kong, as it existed on Handover; the vesting of independent executive, legislative and judicial powers; and protection of basic freedoms, among many other things.

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At the same time, the Basic Law is, by nature, a codification of China's policies on Hong Kong, which is described as an inalienable part of China in Article 1. Consistent with this, the Basic Law reserves responsibility for key national policy areas, including defense and foreign affairs, to the Central People's Government (the "**CPG**") and includes a mechanism (in Article 18) to enable national laws relating to these matters or others outside of the limits of the autonomy of the territory to be applied in Hong Kong. That mechanism works in two stages. First, a national law must be added to Annex III of the Basic Law ("**Annex III**") by the Standing Committee (the "**Standing Committee**") of the National People's Congress (the "**NPC**"), which is the national legislature of China. Thereafter, the law must be applied locally in Hong Kong by way of "promulgation" or local legislation.

Furthermore, the Basic Law requires Hong Kong to take certain positive steps to protect and promote important Chinese strategic interests. As described further below, Article 23 of the Basic Law ("**Article 23**") contains such a requirement and is a focal point of the recent public discourse concerning Chinese national security issues.

Article 23

Article 23 stipulates that Hong Kong, "*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.*"

So far, Hong Kong has not enacted such laws on its own. In an attempt to discharge its constitutional obligation under Article 23, the Hong Kong government initiated a formal effort to enact relevant laws in 2003. The proposed bill was withdrawn following opposition within Hong Kong at that time.

Recently Renewed Demands for Article 23 Legislation

Hong Kong has been experiencing serious challenges since the government introduced a bill—the so-called "extradition law"—in late March 2019. This bill would have amended the Fugitive Offenders Ordinance (Cap. 503) to provide a legal basis for case-by-case extradition of individuals from Hong Kong to jurisdictions where no applicable extradition treaty is in place, including mainland China.

Following mass protests throughout Hong Kong, the proposed legislation was suspended and subsequently withdrawn. At the same time, those opposed to the proposed legislation established a broader set of demands, including a call for the resignation of the Chief Executive of Hong Kong, Carrie Lam Cheng Yuet-ngor.

The protest movement has divided opinion in Hong Kong. Some view it as necessary to preserve the autonomy of Hong Kong and local freedoms, while others question the motives of some protesters and are concerned about fringe elements and speculation that foreign interests are fostering the movement.

Against this backdrop, some voices in mainland China and Hong Kong called again for Article 23 legislation to be put back firmly on the political agenda. This generated attendant speculation about how such legislation would or could be enacted now after the failed attempt in 2003. In particular, the forthcoming Hong Kong Legislative Council

(“Legco”) election in September 2020 is widely expected to make the process and prospects of enacting Article 23 legislation more challenging.

The Proposed Application of a New National Security Law in Hong Kong

The annual session of the NPC in Beijing, which has just drawn to a close, took place later than normal this year given the novel coronavirus pandemic. On May 22, at the start of the session, the CPG announced details of a proposed NPC resolution with the title, “Draft Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security” 《全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定（草案）》 (the proposed “**NPC Resolution**”).

As anticipated, the NPC Resolution was adopted today. The text implores Hong Kong to adopt Article 23 legislation and specifies that Hong Kong must establish and improve institutions and enforcement mechanisms for safeguarding national security. Moreover, Article 6 of the NPC Resolution refers to related legislation to be formulated by the Standing Committee with the aim of “*preventing, stopping, and punishing any act occurring in Hong Kong to split the country, subvert state power, organize and carry out terrorist activities and other conduct which seriously endangers national security, as well as activities of foreign and external forces to interfere in the affairs of Hong Kong.*”

According to mainland Chinese news sources earlier this week, the NPC Resolution was subsequently amended in committee so as to include reference to punishing “activities” in addition to “any act,” per the Article 6 formulation quoted above. Some commentators have concluded that this is designed to expand the scope of conduct that can be punished.

The NPC Resolution also signals other measures to be rolled out in Hong Kong, including national security education, the establishment of national security organs of the CPG in Hong Kong and regular reporting by the Chief Executive to the CPG on Hong Kong’s performance with respect to its duty to safeguard national security.

Next Steps and Impact

The text of the proposed legislation (the “**National Security Law**”) is not publically available or, in all likelihood, settled yet. As a next step, the Standing Committee will need to finalize and approve the legislation. We understand that this could happen as soon as the next Standing Committee session in late June (according to the reported comments earlier this week of Tam Yiu-chung, Hong Kong’s sole delegate to the Standing Committee). If that is the case, the terms of the National Security Law may be published in a matter of weeks from now, with the legislation added to Annex III at or around the same time.

The NPC Resolution states that after being inserted into Annex III, the legislation will be applied in Hong Kong through “promulgation.” In practice, this is understood to mean effected in Hong Kong by way of a legal notice in the Gazette issued by the Chief Executive without the legislation being subjected to any of the usual legislative procedures of Legco.

In a press statement released on May 22, the Chief Executive confirmed that she will fully co-operate with the Standing Committee to complete the legislation as soon as possible.

Many people are exploring what the new legislation may mean for Hong Kong as an international financial center and gateway to China. Earlier this week, the Hong Kong Monetary Authority confirmed that the law would not impact the fundamentals of Hong Kong's monetary or financial system, including the free flow of capital and free convertibility of the Hong Kong Dollar and the Linked Exchange Rate System.

On the other hand, on May 27, U.S. Secretary of State Mike Pompeo notified Congress that he is unable to certify that Hong Kong continues to warrant differential treatment under U.S. law. This action does not officially change Hong Kong's "special status" under U.S. law. Rather, a Presidential Executive Order or an act of Congress would be required to change Hong Kong's status. The Administration and Congress are considering next steps, and additional announcements on this issue are expected in the near future.

More generally, a clearer picture of the way forward will emerge when the text of the National Security Law and further implementation steps are revealed.

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