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**Published in:**

Chinese Journal of Comparative Law

Online published: 03/03/2022

**Document Version:**

Post-print, also known as Accepted Author Manuscript, Peer-reviewed or Author Final version

**Publication record in CityU Scholars:**

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**Published version (DOI):**

[10.1093/cjcl/cxac011](https://doi.org/10.1093/cjcl/cxac011)

**Publication details:**

Pascoe, D. (2022). Hong Kong's National Security Law: A Socialist Legal Transplant? *Chinese Journal of Comparative Law*, Article cxac011. Advance online publication. <https://doi.org/10.1093/cjcl/cxac011>

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<https://doi.org/10.1093/cjcl/cxac011> is available online at:

<https://academic.oup.com/cjcl/article/10/1/28/6541961>.

# Hong Kong's National Security Law: A Socialist Legal Transplant?

Daniel Pascoe\*

Chinese Journal of Comparative Law, Forthcoming 2022

## Abstract

*The recently enacted Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('NSL') is unique in global perspective: it was both drafted by and adopted from a jurisdiction espousing an entirely different type of legal system. In this paper, I consider the NSL as a potential socialist legal transplant from the People's Republic of China to its Special Administrative Region of Hong Kong upon its promulgation in June 2020. I consider why, in the criminal law context, the NSL bears certain socialist characteristics and may even be classified as a socialist law. I also consider whether the NSL might be the world's first ever socialist criminal law transplant into a common law jurisdiction, and discuss what this might mean for legal interpretation and comparative law scholarship more generally. While existing comparative law scholarship on legal transplants has focused, where relevant, on transplants into states espousing socialist legal systems or between such systems, rarely have scholars encountered and analysed laws making their way across legal boundaries in the other direction. This article uses the example of the NSL, enacted by the Standing Committee of the National People's Congress in Beijing and applied to Hong Kong's common law legal system, to begin to fill the gap.*

## I. Introduction

As the Hong Kong and Beijing governments are at pains to point out, many states throughout the world have enacted national security laws, either through constitutional provisions, separate pieces of legislation or through additional crimes added to the penal code.<sup>1</sup> Yet the recently enacted Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('NSL' or 'National Security Law') is unique in global perspective: it was both drafted by and adopted from a jurisdiction espousing an entirely different type of legal system. In this paper, I consider the NSL as a potential *socialist legal transplant* from the People's Republic of China ('PRC') to Hong Kong upon its promulgation on 30<sup>th</sup> June 2020. I consider why, in the criminal law context, the NSL bears certain socialist characteristics and may even be classified as a socialist law. I also consider whether the NSL might be the world's first ever socialist criminal law transplant into a common law jurisdiction, and discuss what this might mean for legal interpretation and comparative law scholarship more generally. While existing comparative law scholarship on legal transplants has focused, where relevant, on transplants *into* states espousing socialist legal systems or *between* such systems,<sup>2</sup> rarely have scholars encountered and analysed laws making their way across legal boundaries in the other direction. This article uses the example of Hong Kong's National Security Law, enacted by the Standing Committee of the National People's Congress ('NPCSC' or 'Standing Committee') in Beijing, to begin to fill the gap.

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The author would like to thank Surya Deva, Tianxiang He, Thomas Kellogg, Tobias Smith, Simon Young and Antonios Kouroutakis for their advice during the preparation of the manuscript, and Ha Kyung Moon, Benjamin Chong, Jasmine Ho, and Florence Yiu for their research assistance.

<sup>1</sup> Permanent Mission of the People's Republic of China, 'No.GJ/64/2020' (*Office of the High Commissioner for Human Rights*, 30 October 2020) 5 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35721>> accessed 23 January 2022; Kent Roach, 'Echoes that Build to a Cacophony: Hong Kong's Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies' (*SSRN*, 7 February 2021) 2 <<https://ssrn.com/abstract=3763099>> accessed 30 May 2021.

<sup>2</sup> For example, Matthew S Erie and Ha Hai Do, 'Law and Development Minus Legal Transplants: The Example of China in Vietnam' (2021) 43 *AJLS* 1; Pip Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff 2007); Rafal Mańko, 'Survival of the Socialist Legal Tradition: A Polish Perspective' (2013) 4 *Comp L Rev* 1; Jaakko Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' (2018) 6 *J Chin Comp L* 129.

## II. Socialist Legal Systems and their Criminal Laws

The People's Republic of China formally remains a socialist state.<sup>3</sup> But just as many commentators debate the practical reality of 'Socialism with Chinese Characteristics' in the modern Chinese polity,<sup>4</sup> there is also a protracted scholarly debate over whether the PRC's legal system is still classifiable as socialist, or should instead be described as civil law, a mixed regime or even as a separate 'East Asian' system.<sup>5</sup> Socialist legal systems are one of the four main legal 'families' traditionally identified by comparative law scholarship (alongside common law systems with English origins, civil law systems with Roman Law origins and religious law systems).<sup>6</sup> Socialist legal systems were implemented in countries that underwent communist revolutions during the twentieth century, such as throughout mainland China after 1949, in Cuba after 1959 and throughout Vietnam after the reunification of North and South in 1975. Their common ancestry is traceable to the legal system of the Soviet Union, the world's first revolutionary socialist state in 1917.<sup>7</sup>

Historically, the common organising themes of socialist law were class struggle and revolution, with law an instrumental tool to implement communist party social and economic policy and to move society closer to a dictatorship of the proletariat, where in theory, law would wither away entirely.<sup>8</sup> However, following the collapse of the Soviet Union in the late 1980s and early 1990s, some scholars

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<sup>3</sup> Constitution of the PRC 1982, Preamble, Art 1.

<sup>4</sup> For example, Michael A Peters, 'The Chinese Dream: Xi Jinping thought on Socialism with Chinese characteristics for a new era' (2017) 49 *Educational Philosophy and Theory* 1299, 1299-303; Peter de Cruz, *Comparative Law in a Changing World* (3<sup>rd</sup> edn, Routledge-Cavendish 2007) 211.

<sup>5</sup> Zhang Zhong-qiu, 'From Chinese Legal Genealogy to East Asian Law – Legal Tradition of East Asia and Its Change and Trend' (2007) 1 *Journal of Nanjing University (Philosophy, Humanities and Social Sciences)* 118; Jianfu Chen, *Chinese Law: Context and Transformation* (2<sup>nd</sup> edn, Martinus Nijhoff Publishers 2015).

<sup>6</sup> Erika S Fairchild and Harry R Dammer, *Comparative Criminal Justice Systems* (2<sup>nd</sup> edn, Wadsworth/Thomson Learning 2000) 43; William Hurst, *Ruling Before the Law: The Politics of Legal Regimes in China and Indonesia* (CUP 2018) 14-5. The literature on legal families tends to neglect mixed and customary law classifications (Mathias Siems, *Comparative Law* (CUP 2014) 85-9). See H Patrick Glenn, *Legal Traditions of the World* (5<sup>th</sup> edn, OUP 2014) for a robust critique of the entire legal family approach.

<sup>7</sup> John N Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (University of Chicago Press 1969); Hurst (n 6) 15.

<sup>8</sup> Hazard (n 7) 524-6; Hurst (n 6) 16; de Cruz (n 4) 186-7; Vladimir Gsovski, 'The Soviet Concept of Law' (1938) 7 *Fordham L Rev* 1, 3, 12.

asserted that, as a distinct category of legal system or legal family, ‘socialist law is dead and buried’.<sup>9</sup> Others argue that ‘many of the values of socialist law remain embedded in positive law and legal theory’, both in avowed socialist countries such as Vietnam and the PRC, and in former socialist countries such as Russia and several Eastern European states.<sup>10</sup> As Partlett recently argued, ‘socialist legacy is fundamental to understanding law and legal institutions in Vietnam and China’.<sup>11</sup>

In the Chinese context, market-based reforms since the reopening of the country to the outside world in the late 1970s call into question whether the PRC is still a ‘socialist’ state in the original sense of the word, referring to public ownership over the means of production. In the Chinese legal sphere, too, there has been a concerted move away from revolutionary morality, class struggle and the diminution of private property, replaced by a private law regime that increasingly draws from European civil codes and Anglo-American common law.<sup>12</sup> Yet ‘socialist’ ideology, at least as a proxy for authoritarian one-party governance, remains in fashion within Chinese legal thought.<sup>13</sup> In May 2018, the PRC’s Central Government announced the intention to incorporate the Party’s ‘socialist core values’ into all legislation over the next five to ten years, alongside elevating accountability based on socialist values to become ‘the core’ of the legislative system.<sup>14</sup> Indeed, the PRC’s 1982 Constitution, amended several times since its original promulgation, still asserts the importance of upholding the ‘socialist legal system’ (art 5). It may be true that the PRC legal system, in private law areas, increasingly resembles a civil law system. But in

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<sup>9</sup> Husa (n 2) 147; Inga Markovits, ‘The Death of Socialist Law?’ (2007) 3 *Annual Review of Law and Social Science* 233, 234; Stephen C Thaman, ‘Marxist and Soviet Law’ in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 324.

<sup>10</sup> William E Butler, ‘Socialist Law’ in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2009); William Partlett and Eric C Ip, ‘Is Socialist Law Really Dead?’ (2016) 48 *JILP* 463, 474-5, 510; William Partlett, ‘Socialist Law in Socialist East Asia’ in Fu Hualing and others (eds), *Socialist Law in Socialist East Asia* (CUP 2018) 13, 18; Glenn (n 6) 348.

<sup>11</sup> Partlett (n 10) 19.

<sup>12</sup> Chen Lei, ‘The Historical Development of the Civil Law Tradition in China: A Private Law Perspective’ (2010) 78 *Tijdschrift voor Rechtsgeschiedenis* 159, 160-1; Erie and Do (n 2) 9; Hurst (n 6) 64-8.

<sup>13</sup> Glenn Tiffert, ‘Socialist Rule of law With Chinese Characteristics’ in Fu Hualing and others (eds), *Socialist Law in Socialist East Asia* (CUP 2018) 77.

<sup>14</sup> Susan Trevaskes, ‘Socialist Law’ in Christine Sorace, Ivan Franceschini and Nicholas Loubere (eds), *Afterlives of Chinese Communism: Political Concepts from Mao to Xi* (ANU Press 2019) 255.

the public law domain, including in criminal law and criminal justice, strong socialist characteristics remain.<sup>15</sup>

There is already an extensive literary debate over the classification of the PRC's entire legal system,<sup>16</sup> which I will not revisit in detail here. Instead, this research is more concerned with the institutional framework and offences created by a particular piece of legislation enacted in one of the PRC's Special Administrative Regions, namely the National Security Law as applied to Hong Kong.<sup>17</sup> Having been drafted and promulgated by the Standing Committee of the National People's Congress in Beijing, the NSL's geographical origins are as a (mainland) Chinese law. But merely because it is a mainland Chinese law drafted by a mainland Chinese political body, it does not necessarily follow that it is a 'socialist' law and therefore a socialist legal transplant into Hong Kong. To determine this definitively, it is first necessary to identify some key characteristics of socialist legality, especially in the criminal law sphere.

What defines a socialist legal system? Much of the traditional socialist typology stems from the way that private laws are diminished in status or abolished entirely, given the economic focus on state ownership of the means of production. Certainly, *this* type of legal architecture disappeared from much of the world in the late 1980s as avowedly socialist states partially or fully adopted market-based economies. However, socialist *public* law (prescriptive of the relationship between the state and its citizens) arguably persists in the post-Cold War era.<sup>18</sup> In the five remaining states with Marxist-Leninist revolutionary origins (Vietnam, Cuba, Laos, North Korea and China), public law retains the primary function to 'express, in a positive, normative form, current [Communist] Party policy'.<sup>19</sup> For the regime, socialist public law

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<sup>15</sup> Erie and Do (n 2) 89.

<sup>16</sup> Relatively recent works on this topic include the following: Albert Chen, 'Socialist Law, Civil Law, Common Law and the Classification of Contemporary Chinese Law' in Albert Chen (eds), *The Changing Legal Orders in Hong Kong and Mainland China: Essays on "One Country, Two Systems"* (City University of Hong Kong Press 2021); Zhang (n 5); Chen (n 5); Bo Yin and Peter Duff, 'Criminal Procedure in Contemporary China: Socialist, Civilian or Traditional' (2010) 59 *Int'l & Comp LQ* 1099, and Lukas Frederik Müller, 'The Taxonomy of Legal Systems under Effect of Globalization: Classification of China and the United States' (2016) 16 *Global Jurist* 51.

<sup>17</sup> There are separate National Security Laws for the Chinese mainland (enacted in 2015) and for the Macau Special Administrative Region (enacted in 2009).

<sup>18</sup> Glenn (n 6) 348.

<sup>19</sup> Perry Keller, 'Sources of Order in Chinese Law' (1994) 42 *Am J Comp L* 711, 721.

serves to defend the citizenry, who are aligned with the state, from the predations of counterrevolution.<sup>20</sup> Socialist jurisdictions increasingly achieve this by employing what comparative constitutional law scholars label as ‘rule by law’: using legal institutions and governance according to law as cover to realise and justify autocratic interests.<sup>21</sup> Importantly, socialist public law has retained its instrumental function even if private law in the remaining socialist countries has moved closer to a ‘rule of law’ ideal,<sup>22</sup> whereby law and legal institutions serve as means of justly resolving disputes between private parties and between private actors and the government.

Yet public laws and institutions co-opted as political instruments are hardly unique to the socialist tradition, and do not alone distinguish Marxist-Leninist legal systems from those of other authoritarian regimes such as absolute monarchies, and fascist, military or theocratic dictatorships.<sup>23</sup> Beyond being instrumental commands from party to citizen, is there anything more distinctively ‘socialist’ about the public laws found in the Soviet Union, and in modern-day Marxist-Leninist regimes? As I observe below, it is in the criminal justice field that several of the more unique characteristics of socialist public law manifest, as distinct from other forms of authoritarian legality.

Comparative law scholarship from the past 50 years has identified several consistent themes relevant to the analysis of socialist criminal laws and criminal justice systems.<sup>24</sup> In summary, the four themes in

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<sup>20</sup> Erik Luna, ‘Cuban Criminal Justice and the Ideal of Good Governance’ (2004) 14 *Transnat'l L & Contemp Probs* 529, 535-7, 642; Vai Io Lo, *Law and Society in China* (Edward Elgar Publishing 2020) 110-2.

<sup>21</sup> Bui Ngoc Son, ‘The Law of China and Vietnam in Comparative Law’ (2017) 41 *Fordham Int'l LJ* 135, 139; Hurst (n 6) 9; Ignazio Castellucci, ‘Rule of Law with Chinese Characteristics’ (2007) 13 *Ann Surv Int'l & Comp L* 35, 90-1; Michael C Davis ‘The Clash of Legal Cultures: Hong Kong Efforts to Maintain the Liberal Rule of Law vs. Beijing’s Hardline Authoritarian Legality’ in Weitseng Chen and Hualing Fu (eds), *Authoritarian Legality in Asia: Formation, Development and Transition* (CUP 2019) 169.

<sup>22</sup> Bui (n 21) 172-3; Erie and Do (n 2) 8-9; Hurst (n 6) 66.

<sup>23</sup> Peter H Solomon, ‘Law and Courts in Authoritarian States’ in James D Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (2<sup>nd</sup> edn, Elsevier 2015) 427-8; Hurst (n 6) 18; Volkmar Gessner, Armin Hoeland and Csaba Varga (eds), *European Legal Cultures* (Dartmouth 1996) 169-70.

<sup>24</sup> For example: Hazard (n 7); Stanislaw Pomorski, ‘Communists and Their Criminal Law: Reflections on Igor Andrejew's “Outline of the Criminal Law of Socialist States”’ (1981) 7 *Review of Socialist Law* 7; Luna (n 20); Markovits (n 9); Nicholson (n 2); Pip Nicholson, ‘Comparative law and legal transplants between socialist states: an historical perspective’ in Timothy Lindsey (ed), *Law Reform in Developing and Transitional States* (Taylor & Francis 2007); Yin and Duff (n 16); Glenn (n 6); Partlett and Ip (n 10); Ekaterina Mishina, ‘The Re-birth of Soviet Criminal Law in Post-Soviet Russia’ (2017) 5 *Russian Law Journal* 57; Partlett (n 10); de Cruz (n 4); Tom Ginsburg, ‘Administrative Law and the Judicial Control of Agents in Authoritarian Regimes’ in Tom Ginsburg and Tamir Mustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008); Solomon (n 23); John Quigley, ‘Socialist Law and the Civil Law Tradition’ (1989) 37 *Am J Comp L* 781; Mary Ann Glendon,



this literature concern the definition and function of criminal offences, centralised political supervision over the administration of justice, the role and makeup of the courts, and types of punishments for transgressors. When considered together, they account for the unique character of socialist criminal law and criminal justice, as opposed to other forms of authoritarian penalty.

1. **OFFENCES:** socialist criminal law regimes possess vaguely defined, codified offences against the state, such as ‘counterrevolutionary activity’.<sup>25</sup> Such political offences are interpreted and enforced with ‘a proclivity for restraint of expression’, given the ruling party’s fears over the future of the revolutionary regime.<sup>26</sup> Criminal offences collectively function to separate out society’s ideological friends and enemies and to socially engineer a new citizenry through positive and negative commands – transformative, pseudo-religious, goals given much greater emphasis under socialist legal regimes than in right-wing dictatorships.
2. **POLITICAL SUPERVISION:** socialist legal systems feature centralised political supervisory bodies (most notably, but not exclusively, the procuracy) keeping watch over the entire system of administrative and judicial decision-making. Each supervisory body is tasked with ensuring the furtherance of revolutionary aims. It is the procuracy’s role, rather than private litigants’, to review the legality of executive actions. The procuracy also functions as a public prosecutor, despite being formally separate from the executive branch. Similarly, it is the legislature’s role, rather than that of the courts, to definitively interpret the meaning of legislation. And importantly, centralised political supervision is found in few, if any, non-socialist authoritarian legal systems;<sup>27</sup>

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Michael Wallace Gordon, and Christopher Osakwe, *Comparative Legal Traditions* (West Publishing Co 1985); Gessner, Hoeland and Varga (n 23); Stephen Weiner, ‘Socialist Legality on Trial’ (1968) 17 *Probs Communism* 11.

<sup>25</sup> Moving from the Statute on Punishment for Counterrevolutionary Activity (20 February 1951) to the first codified Chinese Criminal Law of 1979 to the second codification in 1997, ‘counterrevolutionary activity’ was refashioned into offences committed by breaching ‘national security’ (Partlett and Ip (n 10) 491-2; Glenn (n 6) 353; Thaman (n 9) 318).

<sup>26</sup> See Hazard (n 7) 479.

<sup>27</sup> Ginsburg (n 24) 62.

3. COURTS: Socialist courts are primarily instruments of state policy, rather than institutions to resolve legal disputes. Socialist criminal courts feature panels of judges and lay assessors eligible for re-election after a term of office, with at least one major criterion for election and re-election being revolutionary ideology. Courts possess an educative function toward the public over the role of law in achieving socialist morality. In criminal cases, this extends to judicial punishment's role in denunciation, meaning the moral education of the public;
  
4. PUNISHMENTS: in socialist legal systems, criminal punishments are imposed through both judicial *and* administrative procedures, the former being used for more severe violations whereas the latter are used for 'general' or 'ordinary' transgressions. This bifurcated arrangement is, again, rarely seen in authoritarian systems of other stripes.<sup>28</sup> As for specific types of punishments, socialist criminal justice regimes employ the frequent and punitive use of imprisonment, exile, re-education through labour and the death penalty, which contrast with the rehabilitative and non-custodial ideals often set out in the written law itself or in policy statements. Punishments for crimes against the state are, in practice, more severe than for ordinary crimes.

During the remainder of this article, I consider the NSL through this four-part framework. Is the NSL a socialist criminal law, a more broadly authoritarian criminal law, or does it espouse a different character altogether? As Part III makes clear, there seems little doubt that the NSL serves as a legal transplant from mainland China to Hong Kong. But *what type* of legal transplant it is will have an active bearing on scholarly analysis of its provisions, its place within the Hong Kong legal system, and the future study of the PRC's legal system in a global context.

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<sup>28</sup> *ibid* 58.

### III. Legal Transplants

What is a legal transplant? For Gillespie, a prominent scholar of Vietnamese law, legal transplants are:

generally understood as the movement of laws and institutional structures *across geopolitical, cultural or religious borders*. They can be imposed or voluntary, *encompass entire legal systems or single legal principles* and integrate similar or different cultures.<sup>29</sup>

As to how transplants occur, laws and institutional structures can be borrowed (connoting a search for best practice abroad), unintentionally ‘diffused’ into the recipient jurisdiction over time, or else coerced through hard or soft power, such as via colonialism, trade agreements or the Washington Consensus tying reforms in law and governance to loans from international financial institutions.<sup>30</sup>

For transplants involving socialist legal systems, there are precedents for criminal law transplants *between* such systems, particularly from older to younger revolutionary socialist states seeking to build the latter’s capacity. Among the prominent examples are criminal law offences and institutions transferred from: the Soviet Union to Eastern European states after World War Two; the Soviet Union to the PRC, Vietnam, and Mongolia during the mid-twentieth century, the PRC to North Vietnam for several years after 1954, and Vietnam to post-Khmer Rouge Cambodia in the 1980s.<sup>31</sup> There were also numerous transplants throughout the 20th century flowing *to* socialist legal systems from Western civil law and common law legal systems, often under the paternalistic guise of ‘modernisation’ or ‘law and development’ in private law fields.<sup>32</sup> A prevailing assumption in the academic literature on legal transplants is that these are more common, and more likely to work as intended when moving from jurisdictions sharing the same

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<sup>29</sup> John Gillespie, ‘Developing a Decentred Analysis of Legal Transfers’ in Pip Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff 2008) 27, emphasis added.

<sup>30</sup> Siems (n 6) 191-5; Benjamin Brake and Peter J Katzenstein, ‘The Transnational Spread of American Law: Legalization as Soft Power’ (Hauser Globalization Colloquium, New York, June 2010) 4, 12, 25-6; John Gillespie, ‘Towards a Discursive Analysis of Legal Transfers into Developing East Asia’ (2008) 40 *NYU J Int’l L & Pol* 657, 668.

<sup>31</sup> Zhang (n 5); Nicholson (n 2) 235; William E Butler, *Yearbook on Socialist Legal Systems, 1989* (University College 1989) 45; John Gillespie, ‘Changing Concepts of Socialist Law in Vietnam’ in John Gillespie and Pip Nicholson (eds), *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press 2005) 51; Teilee Kuong, ‘Legal Assistance to Cambodia – A Grand project Facing Coordination Challenges’ (2008) 9 *KLRI Journal of Law and Legislation* 102, 108; Erie and Do (n 2) 10; Hurst (n 6) 60-1.

<sup>32</sup> Glenn (n 6) 346; Erie and Do (n 2) 2; Nicholson (n 2) 234.

legal ‘family’.<sup>33</sup> Civil law to socialist law criminal justice transplants (or vice-versa) may be more likely to succeed in comparison with other combinations of systems, given socialist law’s continuation of civil law traditions, some of which are relevant to criminal investigation and trial:

the inquisitorial style of trial, codes and the passing of legislation/regulations as the basic style of law making, division of law into its civil (private) law categories, and the method of investigation of crime (written documentation compiled by a law-trained investigator) ... [in these ways] socialist legal systems have utilised civil law institutions, methodology and organisation[.]<sup>34</sup>

What remains highly unusual in the current context is that the NSL was drafted in a formally socialist legal system (and, in the public law sphere, a functionally socialist system as well) and now operates in a predominantly common law system of British heritage. When considered in the abstract, the role of law and legal institutions is markedly distinct across these two families, threatening the adaptability of simple ‘cut and paste’ socialist-to-common law transplantations. Based on its content, will the NSL encounter such problems in its implementation, or was it cleverly formulated by the NPCSC with Hong Kong’s common law traditions in mind?<sup>35</sup> The following part, Part IV, considers the NSL’s provisions in detail, concluding that the new law is indeed socialist, when measured against the four identified characteristics of criminal law and its administration in legal systems with Marxist-Leninist origins.

## **IV. The NSL as a Socialist Legal Transplant**

### **A. Why is the NSL a Socialist Law?**

Based on the characteristics of socialist criminal laws and criminal justice systems set out in Part II, there are several interconnected reasons why the NSL bears close resemblance to a socialist law: its offence scheme, its transformational function in Hong Kong society, the supervisory institutions it empowers, and its regulation of judges and juries. The first point of resemblance comes from the set of four vaguely

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<sup>33</sup> Brake and Katzenstein (n 30) 12; Siems (n 6) 199; Nicholson (n 2) 234-6.

<sup>34</sup> de Cruz (n 4) 187. See also Mirjan R Damaška and Susan Fisher, *The faces of justice and state authority: a comparative approach to the legal process* (Yale University Press 1991) 194-5.

<sup>35</sup> Simon Young, ‘Introductory Note to the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region’ (2020) 60(1) Intl L Materials 1, 2; Cora Chan, ‘Can Hong Kong Remain a Liberal Enclave within China? Analysis of the Hong Kong National Security Law’ [2021] PL 271, 285.

drafted crimes that the law provides for ('secession', 'subversion', 'terrorism' and 'collusion with foreign forces' – ch 3 parts 1-4). Commentators who have previously discussed these provisions believe that the definitional ambiguity is deliberate, to encourage self-censorship and self-regulation of behaviour,<sup>36</sup> reflecting the transformative and preventive aims of the new law. Such is the width of the legal provisions in question that three of the four crimes (secession, subversion and collusion) may be, in theory, committed by principal offenders merely through non-violent written or oral expression,<sup>37</sup> although which forms of expression, and in which contexts, must be closely assessed on a case-by-case basis. The Hong Kong courts will not have an easy job in doing so.

To provide but four striking examples of ambiguity, for secession (art 20-21), what is a 'grave' or 'serious' or 'minor' offence of this nature? For terrorism (art 24), what are 'other dangerous activities which seriously jeopardize ... security'?<sup>38</sup> For collusion (art 29), what is provoking by unlawful means 'hatred' among Hong Kong residents towards the central government or Hong Kong government, which is likely to cause 'serious consequences'? For subversion (art 22), what is 'seriously interfering in [or] disrupting' the performance of government functions? The apparently deliberate drafting ambiguity within the NSL further extends to the aggravating factors that may take the prosecution out of the hands of Hong Kong's Police Force and Department of Justice, and have the suspect tried in the mainland courts (art 55-56), which is one of the provisions that has attracted the most local concern.<sup>39</sup> The three stated criteria are that the case be 'complex due to the involvement of a foreign country or external elements', or involve a 'serious situation' or a 'major and imminent threat to national security' (art 55). It is difficult to predict in

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<sup>36</sup> Michael Bristow, 'Hong Kong security law: Why students abroad fear it' (*BBC News*, 9 November 2020) <<https://www.bbc.com/news/world-asia-china-54718434>> accessed 31 January 2022; Hadas Gold, 'Hong Kong's security law could have a chilling effect on press freedom' (*CNN*, 3 July 2020) <<https://edition.cnn.com/2020/07/03/media/hong-kong-media-freedom-national-security/index.html>> accessed 31 January 2022.

<sup>37</sup> Carole J Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong' (2020) 50 *Hong Kong LJ* 633, 651-2. Advocating for and inciting may also be committed by speech or by writing for each of the four offences, thereby making the protagonist liable as a secondary party.

<sup>38</sup> The judgment in the case of the first person convicted for an NSL crime, Tong Ying Kit, failed to clarify these ambiguities relating to the new crimes of secession and terrorism (*HKSAR v Tong Ying Kit* [2021] HKCFI 2200).

<sup>39</sup> Lydia Wong and Thomas Kellogg, 'Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis' (*Georgetown Law School*, February 2021) 17 <<https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf>> accessed 30 May 2021.

advance what kinds of circumstances will precipitate the exercise of jurisdiction by mainland authorities,<sup>40</sup> unlike conventional criteria for extradition to a foreign jurisdiction, which are usually demonstrably clear, including in previous agreements concluded by Hong Kong and by mainland China.<sup>41</sup>

In the socialist criminal law context, Pomorski<sup>42</sup> describes the deliberately vague drafting of political offences as allowing for ‘discretionary justice’. Vaguely defined offences offer a useful means of criminalising changing patterns of dissent over time, according to evolving party policy, without changing the written law itself.<sup>43</sup> In the NSL context, it is significant that each of secession, subversion and collusion are drawn in part from the associated broadly worded security crimes in the PRC’s own penal code, the 1997 Criminal Law of the People’s Republic of China.<sup>44</sup> And in turn, the PRC’s state

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<sup>40</sup> Changhao Wei, Taige Hu and Haoran Zhang, ‘Legislation Summary: Hong Kong National Security Law’ (*NPC Observer*, 30 June 2020) <<https://npcobserver.com/2020/06/30/legislation-summary-hong-kong-national-security-law>> accessed 30 May 2021; Public Law and Human Rights Forum, ‘Hong Kong’s National Security Law: Procedural and Sentencing Implications’ (*City University of Hong Kong*, 25 February 2021) <[https://www.cityu.edu.hk/slwlw/lib/doc/cplr/NSL\\_Eng.pdf](https://www.cityu.edu.hk/slwlw/lib/doc/cplr/NSL_Eng.pdf)> accessed 14 September 2021.

Fu Hualing, ‘National Security’ in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (3<sup>rd</sup> ed, Sweet and Maxwell 2021) [6.055] argues that this provision ‘is likely to be limited to what is perceived to be a near-emergency scenario such as Hong Kong witnessed during the high days of the protest in the latter half of 2019’.

<sup>41</sup> Nectar Gan, ‘How the national security law is bringing China’s authoritarian legal system to Hong Kong’ (*CNN*, 3 July 2020) <<https://edition.cnn.com/2020/07/02/asia/hk-china-national-security-law-intl-hnk/index.html>> accessed 31 January 2022.

<sup>42</sup> Stanislaw Pomorski, ‘Review: Communists and their Criminal Law Revisited’ (1989) 14 *Law & Social Inquiry* 581, 587.

<sup>43</sup> This is distinct from the ‘constructive ambiguity’ often present in negotiated international treaties and UN resolutions, enabling parties with divergent interests to come to a broad agreement, allowing for a flexible application in changing circumstances: Michael Byers, ‘Still agreeing to disagree: international security and constructive ambiguity’ (2021) 8(1) *Journal on the Use of Force and International Law* 91, 93-5. By contrast, domestic criminal laws, with their immediate and enforceable impact on the life and liberty of individuals, must be more tightly drafted if they are to accord with the ‘thin’ conception of the rule of law. Citizens must have a reasonable opportunity to know, in advance, what type of conduct would contravene the law and would be prosecuted and punished.

<sup>44</sup> Albert Chen, ‘Chapter 3 offences in the NSL’ (*YouTube*, July 2020) <<https://www.youtube.com/watch?v=NsgP0hekyJY>> accessed 30 May 2021; Permanent Mission of the People’s Republic of China (n 1) 5. See Criminal Law 1997 (PRC) art 103 (secession), 105 (subversion), 111 (state secrets), 120 (terrorism). Chen (*ibid*) observes that, in its adoption of similar wording for these offences, Hong Kong’s NSL bears a much closer textual resemblance to the Criminal Law 1997 (PRC) (estimating a 60 percent similarity) than does the Macau National Security Law of 2009.

security crimes evolved directly from a counterrevolutionary model.<sup>45</sup> Although the precise wording and the surrounding context has changed along the way, several of the NSL's offences thus bear a direct genealogical lineage to the criminal law's instrumental role in maintaining revolutionary socialism in China, both before and after the first codified penal code in 1979.

Admittedly, all legal traditions, including those of non-socialist states, deal with the problem of indeterminacy.<sup>46</sup> For example, in separate comparative analyses, Roach found that national security laws in western common law jurisdictions usually defined terrorism broadly.<sup>47</sup> However, they did not tend to leave national security offences comparable to the NSL's secession and subversion with deliberately wide definitions that make no reference to violent actions or threats.<sup>48</sup> Indeterminacy is a much more vital tool in what Damaška and Fisher call 'the activist state'.<sup>49</sup> Here, vaguely worded criminal offences are useful, flexible tools to help the state fulfil its primary role in reshaping public behaviour and beliefs, rather than in restraining power or adjudicating in disputes.

The second point of convergence with Socialist laws is the way that, early on, the NSL exhorts 'executive authorities, legislature and judiciary' to 'effectively prevent, suppress and impose punishment for any act or activity endangering national security', and for 'law enforcement and judicial authorities' to 'fully enforce this Law' (art 3, 8). Ensuring national security is thus a whole-of-government task under

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<sup>45</sup> See n 25; Fu Hualing, 'Counter-Revolutionaries, Subversives, and Terrorists: China's Evolving National Security Law' in Fu Hualing, Carole J Petersen and Simon NM Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (HKU Press 2005) 65-6, 89.

<sup>46</sup> Thaman (n 9) 317.

<sup>47</sup> Roach (n 1) 4-5, 13; Kent Roach, 'The Criminal Law and its Less Restrained Alternatives' in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (CUP 2012) 98-103. See also Permanent Mission of the People's Republic of China (n 1) 5-6.

Roach (ibid) provides the following examples, noting that Security Council Resolution 1373, passed in the aftermath of the September 11<sup>th</sup>, 2001, attacks in the United States, did not provide a concrete definition of terrorism: Terrorism Act 2000 (UK) s 1; Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 (South Africa) s 1; Patriot Act 2001 (USA) s 411, 802, 808; Criminal Code (Canada) s 83.01. Nevertheless, several of these anti-terror laws contain exceptions to their broad definitions, allowing for peaceful displays of dissent against government policies.

<sup>48</sup> Unlike secession and subversion in the NSL, the crimes of insurrection or treason in the UK and Canada and the USA can only be committed through violent means or violent threats (Treason Felony Act 1848 (UK) s 3; Criminal Code (Canada) s 46(2), 51; 18 USC § 2383 (USA)).

<sup>49</sup> Damaška and Fisher (n 34) 80-4, 198-9. See also n 43 on indeterminacy and the rule of law.

the NSL. This is, again, not unusual among non-socialist nations with national security laws.<sup>50</sup> However, the NSL's additional wording in articles 3, 8 and 9-10 (on national security communication and education) is strongly reminiscent of the use of law as an ideological, social-engineering tool and the repurposing of the judiciary in socialist systems to achieve Party aims, rather than to do justice in individual cases.<sup>51</sup> While there is no explicit reference to the denunciatory functions of court decisions and punishments in the new law, the NSL does contain provisions mandating public instruction on national security matters, including placing a duty on the Hong Kong government to 'strengthen public communication, guidance, supervision and regulation' over national security (art 9) and to educate the public on 'the obligation to abide by the law' (art 10). Hong Kong's first 'National Security Education Day', aiming at 'raising Hong Kong residents' awareness on national security; creating a positive atmosphere of national security' took place on 15<sup>th</sup> April 2021.<sup>52</sup> There are no comparable provisions within western, common law, national security legislation to mandate patriotic public education on national security matters, adopting a whole-of-society approach.<sup>53</sup>

Third is the Soviet-derived concept of centralised political supervision over the administration of justice. Here we move to the institutional argument linking the NSL with socialist legal systems. According to Partlett,<sup>54</sup> 'the supervisory tradition of the political review of legality remains important' in the modern PRC legal system. In the Hong Kong context, the ability of the NPCSC to exercise 'comprehensive jurisdiction' over the interpretation of Hong Kong's Basic Law (BL art 158), for Davis, 'bears direct relation to practice in the mainland legal system regarding the NPC Standing Committee's

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<sup>50</sup> Roach (n 1) 8-9. Examples from common law jurisdictions include the US Department of Homeland Security; the Australian (departmental) Secretaries Committee on National Security and the UK's Joint Committee on the National Security Strategy.

<sup>51</sup> Roach (n 1) 16; Gessner, Hoeland and Varga (n 23) 189-90. The NSL's societally transformative aims also preclude it being analysed through the lens of emergency laws, as Roach (n 1 at 22) suggests. Although the NSL came into being through an unusual legislative process following extraordinary domestic events, its provisions are not time-limited, and none of them (with the possible exception of art 55-9) apply solely within a temporary, declared, state of exception. See further n 40, n 127, and Antonios Kouroutakis, 'The Virtues of Sunset Clauses in Relation to Constitutional Authority' (2020) 41(1) *Statute L Rev* 16, 22-4. Pursuant to article 18(4) of the Basic Law, the NPCSC retains the power to apply PRC national laws to Hong Kong following a declared state of emergency.

<sup>52</sup> The Government of the Hong Kong Special Administrative Region, 'National Security Education Day 2021 to be held on April 15' (*Press Releases*, 2021) <<https://www.info.gov.hk/gia/general/202104/13/P2021041300307.htm>> accessed 30 May 2021.

<sup>53</sup> Roach (n 1) 6-7, 16.

<sup>54</sup> Partlett (n 10) 68.



powers to supervise the enforcement of the constitution and the Supreme People's Court.'<sup>55</sup> Historically, the NPCSC's power of statutory interpretation was inherited from the Soviet Union's Presidium. In justification of its interpretative command over legislation, the Presidium of the Supreme Soviet had a 'democratic legitimacy that the judiciary does not' and possessed 'legislative expertise that the judiciary, which is empowered only to apply the law to specific cases, [did] not'.<sup>56</sup>

Returning to the NSL, the law specifically extends to the Standing Committee of the PRC legislature the same power of interpretation (NSL art 65). The NPCSC in Beijing may definitively interpret the meaning of words and phrases in the NSL, thereby periodically supervising the Hong Kong courts' adjudication. According with the preeminent theory of socialist legality, it is the Communist Party that retains the unassailable power over the content and interpretation of law, rather than the courts,<sup>57</sup> in this case Hong Kong's common law courts.

The NPCSC's interpretative role is not the sole method of centralised political supervision described in the NSL. The law establishes two separate executive agencies for this purpose. The Committee for Safeguarding National Security is a domestic executive government body set up to play a close supervisory role over law enforcement and prosecution in national security cases, advised by a mainland-appointed National Security Adviser (art 12-15). The NSL precludes judicial review of executive actions by the Hong Kong-based Committee (art 14), and judicial review may have also been effectively foreclosed for the subordinate implementation regulations, covering investigative practices and preventative measures.<sup>58</sup> The Office for Safeguarding National Security is a mainland law enforcement agency which now operates in Hong Kong pursuant to article 48 of the NSL, but yet falls outside the purview of Hong Kong's domestic legal jurisdiction (art 60). According to article 49, its functions include 'providing opinions and making proposals on major strategies and important policies for safeguarding national security' to Hong Kong's executive agencies; 'overseeing, guiding, coordinating with, and providing support to the [Hong Kong Special Administrative] Region in the performance of its duties for

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<sup>55</sup> Davis (n 21) 182.

<sup>56</sup> Thomas E Kellogg, 'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China' (*SSRN*, 2008) 7 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169298](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169298)> accessed 19 September 2021.

<sup>57</sup> Weiner (n 24) 12; Gsovski (n 8) 3, 31, 42-3; Glenn (n 6) 348.

<sup>58</sup> Michael C Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Columbia University Press 2020) 83.

safeguarding national security’,<sup>59</sup> and initiating its own national security cases, for trial in mainland China, in the exceptional circumstances outlined in article 55. As Davis observes,<sup>60</sup> supervision by these two executive bodies, plus the NPCSC, is one of the law’s most noticeable features:

the [NSL] is profoundly distrustful of Hong Kong’s institutions and puts Beijing officials on the ground locally to oversee or override nearly all local mechanisms of constraint. There is mainland oversight or direct supervision in one form or another over executive officials, the police, prosecutorial authorities, and the courts.

For the NSL’s legal taxonomy, what is important is not the jurisdictional *source* of supervision (here, from both a mainland Chinese institution and mainland-sanctioned authorities based in Hong Kong), but rather the fact that centralised, political, supervision over the administration of justice exists at all. In modern common law and civil law criminal justice systems, law enforcement authorities, prosecutors, and judges are usually free to carry out their respective functions without close political oversight. In socialist legal systems, each of these institutions’ work is closely supervised by the legislature, the procuracy, and other party-affiliated administrative agencies, to ensure the furtherance of revolutionary aims.<sup>61</sup> Taken together, the NPCSC, the Committee for Safeguarding National Security and the Office for Safeguarding National Security may exercise their supervisory powers to ensure that the NSL is interpreted and enforced in accordance with the Central Government’s political agenda.

The fourth and final similarity with socialist legal systems involves judicial decision-making under the new law. Although jury trials remain formally permitted for NSL offences tried on indictment, it is likely that Hong Kong’s Secretary for Justice will dispense with juries to hear the most serious security cases tried in the Court of First Instance, given her wide discretion to do so under the new law (art 46).<sup>62</sup> All or a majority of all NSL trials in the Court of First Instance will likely be tried before a bench of three

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<sup>59</sup> See also NSL article 53, which establishes a direct supervisory relationship: ‘The Office for Safeguarding National Security of the Central People’s Government in the Hong Kong Special Administrative Region shall establish a mechanism of coordination with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region to oversee and provide guidance on the work of the Hong Kong Special Administrative Region for safeguarding national security.’

<sup>60</sup> Davis (n 58) 80. See also Fu (n 40) [6.045].

<sup>61</sup> Partlett and Ip (n 10) 482-502; Nicholson (n 2) 170; Glendon, Gordon and Osakwe (n 24) 683-4; Partlett (n 10) 68-9.

<sup>62</sup> Public Law and Human Rights Forum (n 40). This has already occurred in the case of Tong Ying-Kit, the first ever trial for NSL offences (*Tong Ying Kit* (n 38) [4], [7]).

judges only, adding to the single justices who try District Court cases, and the magistrates who try summary offences in their namesake courts.<sup>63</sup> Although socialist criminal courts often featured lay assessors assisting a judge to determine liability,<sup>64</sup> in no socialist legal system was there a bifurcation of responsibilities between judge and jury.

Which judicial officers will be adjudicating national security cases in Hong Kong? Pursuant to the NSL, the Chief Executive of Hong Kong has the power to select a pool of magistrates, District Court, High Court and Court of Final Appeal judges to adjudicate in national security matters, covering the preliminary, trial and appeal phases (art 44). She may consult both the Committee for Safeguarding National Security and the Chief Justice of the Court of Final Appeal in doing so (art 44). As with the characterisation of socialist criminal courts in Part II, the terms of appointment for these judicial officers are short (one year only), and magistrates and judges ‘shall’ (i.e. must) be removed from the pool or not appointed or reappointed if their statements or behaviours are seen by the Chief Executive to endanger national security (art 44).<sup>65</sup> Presumably, given Hong Kong judges’ usual reticence to speak publicly on legal and political issues, such assessments will be based on a continuous monitoring of the content of security law and other judgments, and whether they meet the Hong Kong and Central Governments’ expectations.<sup>66</sup>

Thus, the ability to select and dismiss magistrates and judges appears to jeopardise judicial independence by prioritising the realisation of the NSL’s political objectives over just dispute resolution,<sup>67</sup> in much the same way that substantive socialist law acts as an instrument of party power rather than as a means of achieving justice between litigants.<sup>68</sup> Even if Hong Kong judicial officers refuse, in their

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<sup>63</sup> Hong Kong’s criminal court structure consists of three trial courts: the Magistrates’ Courts housed in seven locations, the District Court in Wanchai, and the Court of First Instance of the High Court in Admiralty. Only trials in the Court of First Instance, for the most serious crimes tried on indictment (e.g. murder, manslaughter, rape), are held with a jury. Subject to mandatory minimum sentencing stipulations, NSL crimes may be tried in any of the three trial courts (NSL art 44-5).

<sup>64</sup> Nicholson (n 24) 146; Hazard (n 7) 91-2, 104

<sup>65</sup> On direct similarities with the Soviet model in terms of judicial selection and removal, see Nicholson (n 2) 166.

<sup>66</sup> Davis (n 58) 85.

<sup>67</sup> Roach (n 1) 20.

<sup>68</sup> Note that the argument here does not preclude special panels of judges (and lawyers) vetted through security clearances to hear national security cases, as in several common law and civil law jurisdictions (see Permanent Mission of the People’s Republic of China (n 1) 3 and Roach (n 1) 7-8), but rather reflects the NSL’s short terms for judicial appointments and the mandatory criteria for removal.

decision-making and reasoning, to be swayed by the implicit threat of removal from the panel, over time the Chief Executive will develop a picture of which judges are most and least likely to rule against the government. This is a marked contrast with the existing system, whereby appointment, promotion and demotion of judges in Hong Kong is, to a large extent, determined by the judiciary themselves.<sup>69</sup> Judges have been, to date, effectively insulated from political pressures originating within the executive branch as they adjudicate on criminal cases. This has the potential to change under the NSL.

## B. Why Might the NSL NOT be a Socialist Law?

In this section I consider the opposing proposition that the NSL might *not* be so easily classifiable as a socialist law. Again, I bear in mind the four main characteristics of socialist criminal laws and criminal justice regimes described in Part II, and the more general function of socialist public law: to act as an instrument to fulfil party policy. There are at least three reasons why political figures and academic commentators might make this opposing argument: the NSL's repeated reference to human rights and freedoms (appearing in seven of the law's articles),<sup>70</sup> the law's stated punishments, and the role of the courts in applying the NSL.

The first two of these arguments are unconvincing and are capable of rebuttal. First, human rights. Historically, neither Confucian thought nor Soviet law prioritised individual rights over collective interests.<sup>71</sup> However, unlike their far-right totalitarian equivalents in the 20<sup>th</sup> century, the socialist constitutions of Eastern Europe did contain some references to rights and liberties.<sup>72</sup> The current Asian socialist states (PRC, Vietnam, North Korea, Laos) have ratified 32 human rights treaties or protocols between them, and some protections for human rights appear on paper within the PRC's own national security law and state constitution.<sup>73</sup> Nevertheless, individual rights limiting state action are still largely

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<sup>69</sup> Simon Young, 'Criminal Justice in Hong Kong Under the National Security Law' (*YouTube*, 4 December 2020) <<https://www.youtube.com/watch?v=OHaPZBAxTgY>> accessed 21 September 2021; Henry Litton, 'Ignorance or malice on new security laws for Hong Kong?' (*Pearls & Irritations*, 27 July 2020) <<https://johnmenadue.com/how-long-can-hong-kong-last>> accessed 30 May 2021.

<sup>70</sup> Articles 1, 2, 4, 5 (general principles), 50, 60 (Office for Safeguarding National Security), 58 (exercise of jurisdiction by mainland authorities).

<sup>71</sup> George C Guins, *Soviet Law and Soviet Society* (Martinus Nijhoff 1954) 6, 23; Christine Sypnowich, *The Concept of Socialist Law* (OUP 1990) 87-92; Glenn (n 6) 353; Quigley (n 24) 793.

<sup>72</sup> Sypnowich (n 71) 90; Solomon (n 23) 429.

<sup>73</sup> National Security Law of the People's Republic of China 2015, art 7, 83 (generic references to rights and freedoms); Constitution of the PRC 1982, ch 2 (specific entitlements and liberties).

unknown to Asian socialism.<sup>74</sup> This makes the pronouncement that the NSL will be interpreted consistently with the ICCPR and ICESCR noteworthy (art 4). The law provides for presumptive judicial respect for the freedoms of speech, the press, assembly and demonstration, the presumption of innocence, the rights to counsel and fair trial and the prohibition on double jeopardy (art 4-5, 58), several of which were explicitly mentioned by the Court of First Instance in *Tong Ying Kit*, the first trial to take place under the NSL.<sup>75</sup> Taken at face value then, the NSL shares some features with western constitutionalism, with judicially enforceable guarantees seemingly restraining excessive state power.

However, it remains too early to determine whether the human rights provisions in the NSL will have any practical moderating effect on state power. On one view, the human rights provisions in the NSL were only added as ‘window dressing’ to pre-empt international criticism.<sup>76</sup> The superior status of the NSL vis-a-vis pre-existing human rights laws, and the ability for the NPCSC to issue authoritative interpretations of NSL provisions will limit the Hong Kong courts’ ability to interpret the new law restrictively.<sup>77</sup> As mentioned, several Eastern European socialist constitutions also contained references to rights and freedoms. Regarding the Russian Constitution of 1918 and subsequent Soviet Constitutions of 1924, 1936 and 1977, Sypnowich<sup>78</sup> stated that the validity of:

political rights [such] as freedom of conscience and expression ... is undermined by the express qualification at the beginning of the declaration that the protection of all rights is subject to conformity with the interests of Soviet society and the state.

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<sup>74</sup> Bui (n 21) 181-2.

<sup>75</sup> *Tong Ying Kit* (n 38) [7].

<sup>76</sup> Wong and Kellogg (n 39) 26; ‘Academic Freedom in Hong Kong: the Potential Impact of the New National Security Law’ (*HKU Legal Scholarship Blog*, 15 August 2020) <<http://researchblog.law.hku.hk/2020/10/hku-laws-national-security-law-webinar.html>> accessed 30 May 2021; Human Rights in China, ‘Too Soon to Concede the Future: The Implementation of the National Security Law for Hong Kong’ (*FIDH*, 16 October 2020) <[https://www.fidh.org/IMG/pdf/hric\\_white\\_paper\\_on\\_nsl.pdf](https://www.fidh.org/IMG/pdf/hric_white_paper_on_nsl.pdf)> accessed 30 May 2021.

<sup>77</sup> Petersen (n 37) 650; Simon Young, ‘Hong Kong’s Highest Court Reviews the National Security Law—Carefully’ (*Law Fare*, 4 March 2021) <<https://www.lawfareblog.com/hong-kongs-highest-court-reviews-national-security-law-carefully>> accessed 30 May 2021; Surya Deva, ‘Putting Byrnes and Hong Kong in a Time Machine: Human Rights in 2021 under the Shadow of Beijing’s National Security Law’ (2021) 27 *Australian Journal of Human Rights* (forthcoming).

<sup>78</sup> Sypnowich (n 71) 90. See also Solomon (n 23) 429.

So it is with the NSL, whose provisions, on one interpretation equivalent in status to the Basic Law,<sup>79</sup> prevail ‘where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this law’ (art 62). This will include the rights set out in the Bill of Rights Ordinance Cap. 383 (implementing the ICCPR), the rights enjoyed by Hong Kong residents at common law, and arguably, even the human rights contained in the Basic Law itself (in Chapter 3).<sup>80</sup> Although the courts will try to interpret NSL provisions in accordance with Hong Kong’s prevailing human rights laws ‘as far as [is] possible’,<sup>81</sup> if a direct conflict were to arise, the NSL’s stated crimes, penalties and extension of mainland jurisdiction are likely to hold sway over human rights standards.<sup>82</sup>

On punishments, critics of the socialist transplant thesis may argue that the NSL does not impose administrative punishment, re-education through labour, or the death penalty – in contrast to criminal laws featuring political offences in the socialist tradition. The NSL does impose relatively harsh mandatory minimum punishments (art 20-27, 29) which are unusual to Hong Kong’s pre-existing discretionary sentencing scheme, but these are far from unique when considered in the common law’s historical context.<sup>83</sup> Nevertheless, considering punishment in a broader functional sense,<sup>84</sup> the NSL’s explicit provisions on the deportation of non-residents, even without a criminal conviction (art 34), the mandatory revocation of business or organisation licences (art 31), permanent political disqualification (art 35) and most importantly on exporting cases to mainland China for trial (art 55-56) strongly resemble internal or external *exile* as a potentially ‘capital’ (i.e. terminal) punishment that was administered throughout the

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<sup>79</sup> Fu (n 40) [6.011].

<sup>80</sup> Deva (n 77); Young (n 77). Compare Fu (n 40) [6.014]: ‘A better view is that the NSL is an ordinary piece of NPCSC legislation, subordinate in status and legal effect to the Basic Law’.

<sup>81</sup> *HKSAR v Lai Chee Ying* [2021] HKCFA 3, [42]; Young (n 77).

<sup>82</sup> Petersen (n 37) 650; Deva (n 77). Arguably, this has already occurred with the Hong Kong Court of Final Appeal’s interpretation of the NSL’s bail provision in art 42 (Johannes Chan, ‘Judicial Responses to the National Security Law: *HKSAR v Lai Chee Ying*’ (*SSRN*, 10 May 2021) 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3842790](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842790)> accessed 17 September 2021).

<sup>83</sup> Grenville Cross and Jack Chan, ‘Chapter 5: Sentences and Orders on Conviction’ in Kemal Bokhary and Simon Young (eds), *Archbold Hong Kong 2021* (Sweet & Maxwell 2020). The NSL’s mandatory minimum sentences do resemble one aspect of the socialist criminal law tradition – in practice, they serve to impose harsher punishments for political crimes as compared with the vast majority of ordinary crimes.

<sup>84</sup> On functional approaches to comparative criminal law and punishment, see for example, Albin Eser, *Comparative Criminal Law* (Hart 2017); Kai Ambos, ‘The Current State and Future of Comparative Criminal Law - A German Perspective’ (2020) 24 *UCLA J Int’l L Foreign Aff* 9, 25-9; Daniel Pascoe and Michelle Miao, ‘Victim-Perpetrator Reconciliation Agreements in Murder Cases: What Can Muslim-Majority Jurisdictions and the PRC Learn from Each Other?’ (2017) 66 *ICLQ* 963.

20<sup>th</sup> century in socialist states.<sup>85</sup> While lifetime exile and the death penalty removed counterrevolutionaries from socialist societies for good, several of the NSL's listed punishments share the same goal of permanent physical, political and commercial exclusion of ideological 'enemies' from the community, albeit through more humane means.

As a uniquely defining characteristic of socialist criminal law regimes,<sup>86</sup> administrative punishment also possesses a functional equivalent within the NSL. More than one commentator has suggested, within the NSL's institutional framework, that the process itself *is* punishment.<sup>87</sup> Investigation, arrest, indictment and trial, regardless of ultimate guilt or innocence, are designed in the short-term to publicly shame suspects, to intimidate political activists into silence and to warn the wider public of the dangers of challenging governmental authority, whether emanating from Hong Kong or Beijing. The mere suspicion of contravening the NSL can be enough to justify the deportation of non-permanent residents, without judicial involvement (art 34). Commenting on the consolidation, timing and length of bail proceedings within one of the NSL's first cases, a serving Hong Kong magistrate anonymously observed that the 'bail hearings [of 47 subversion defendants] were reminiscent of "show trials" used by China and other autocracies to publicly humiliate and ultimately break political opponents'.<sup>88</sup> The reverse onus imposed by the NSL, whereby judges granting bail must satisfy themselves that defendants 'will not continue to commit acts endangering national security' (art 42) clearly facilitates process as punishment. Charging suspects with national security violations is likely to result in detention on remand, regardless of the defendants' guilt or innocence at subsequent trial.<sup>89</sup> The detention without bail of 36 of the 47

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<sup>85</sup> Thaman (n 9) 313, 315; Hazard (n 7) 444-5; Gessner, Hoeland and Varga (n 23) 192.

<sup>86</sup> Ginsburg (n 24) 58.

<sup>87</sup> 'Roundtable "One Country, Two Systems" after the National Security Law Reflections' (*HKU Legal Scholarship Blog*, 26 September 2020) <[https://youtu.be/ZGRu\\_FFEx6c](https://youtu.be/ZGRu_FFEx6c)> accessed 30 May 2021; 'SPECIAL REPORT: Hong Kong activists retreat as China-style justice comes to their city' (*Reuters*, 21 April 2021) <<https://www.reuters.com/world/asia-pacific/special-report-hong-kong-activists-retreat-china-style-justice-comes-their-city-2021-04-21/>> accessed 31 January 2022; Schona Jolly, 'Reply' (*Twitter*, 4 March 2021) <<https://twitter.com/WomaninHavana/status/1367446101851308043?s=20>> accessed 30 May 2021.

<sup>88</sup> *Reuters* (n 87). Robert C Tucker and Stephen F Cohen, *The Great Purge Trial* (Grosset & Dunlap 1965) define a 'show trial' as the following (at ix): 'court proceedings become literally a dramatic performance in which not only the judge and the prosecutor but also the defendant or defendants play prearranged parts as actors do on the stage.'

<sup>89</sup> Chan (n 82) 7-10. Fu (n 40) [6.063] takes a more pragmatic approach to the NSL bail provision. Regardless of the provision's precise wording and its judicial interpretation:

suspects prior to the NSL's first subversion trial pursuant to the NSL's tightened bail criteria<sup>90</sup> is a cogent demonstration. Four of the 11 defendants who received bail only did so because the prosecution dropped their objections in court.<sup>91</sup>

As for the courts, whether in relation to the NSL or any other set of criminal laws, the courts' role in Hong Kong is still primarily to ascertain truth and to do justice between the parties, rather than to morally educate the public and to repress 'socially dangerous' people, as in socialist legal systems.<sup>92</sup> Indeed, even as NSL cases begin to be tried, the judiciary remains the most publicly respected of Hong Kong's government institutions.<sup>93</sup> The fact that, pursuant to article 158, the NPCSC has issued five binding interpretations of Basic Law provisions to date, two of these on its own initiative, does not appear to have altered public views on the esteem or functions of the Hong Kong judiciary.

Overall, the NSL's provisions on the jury and judiciary (art 44-47) remain the easiest to refute as socialist. Hopes remain high among commentators that the Hong Kong judiciary can rise to the challenge professionally, and remain locally and internationally respected as impartial arbiters of justice, while giving meaning to the NSL's procedural and substantive provisions using common law methods of interpretation.<sup>94</sup> Although the NSL's adjudicative panel criteria seemingly demand that 'judges inspire loyalty to state causes', Hong Kong is unlikely to see its executive government 'giving specific instructions as to how particular cases ought to be decided', as in outright Communist regimes operating

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the practical effect in most cases will be to deny bail because NSL offences by definition are serious crimes with heavy penalties and in any case the prosecution can always argue that they are infected with a radical ideology and so [are] at risk of reoffending.

At the time of writing, of the 88 adult arrestees who have been charged with an NSL offence, 63 were denied court bail, although this number also includes a small number of defendants who were already in custody for other offences (Lydia Wong and Thomas Kellogg, 'Individuals Arrested under the Hong Kong National Security Law or by the National Security Department' (*ChinaFile*, 19 January 2022) <<https://www.chinafile.com/individuals-arrested-under-hong-kong-national-security-law-or-national-security-department>> accessed 20 January 2022).

<sup>90</sup> *Reuters* (n 87).

<sup>91</sup> 'National security law forces democracy movement onto the back foot' *The Standard* (Hong Kong, 21 April 2021).

<sup>92</sup> Thaman (n 9) 305.

<sup>93</sup> Mary Hui, 'Beijing is breaching Hong Kong's final line of defense: its judiciary' (*Quartz*, 29 December 2020) <<https://qz.com/1944464/hong-kongs-judges-are-its-final-line-of-defense-from-beijing/>> accessed 19 September 2021.

<sup>94</sup> Roach (n 1) 19; Hui (n 93); Davis (n 58) 86.



under a ‘telephone justice’ model.<sup>95</sup> Although the Chief Executive will retain the power to appoint to and remove judges from the NSL panel, these appointments must always come from the pre-existing pool of Hong Kong judges already elevated to the bench by the Chief Executive following substantial input from the legal profession and the judiciary itself.<sup>96</sup> Moreover, from the vetted pool of NSL judges, the judiciary itself is still the institution that allocates judges to hear individual cases.<sup>97</sup> As I have suggested above, although at the time of writing this is a mere expectation, Hong Kong’s judicial officers are not likely to let the explicit threats of removal from the NSL panel sway their decision-making.

### C. A Unique Socialist Criminal Law Transplant?

The most important quasi-empirical observation from this research is that the NSL is likely to be the first example in history, of what is, on balance, a socialist criminal law being transplanted into an existing common law system. Here I do not claim to have assessed on a systematic basis every single legal transplant since the Bolshevik Revolution, but the existing academic literature on constitutional, legislative and institutional transplants in criminal law remains entirely devoid of such examples. Historical data on socialist revolutions supports this observation. It is notable that only two of the 28 countries which adopted Marxist-Leninist systems of government during the twentieth century had previously been British colonies: the People’s Democratic Republic of Yemen (also known as South Yemen, formerly the British colony of Aden) from 1967-90, and the Caribbean island nation of Grenada, where a People’s Revolutionary Government ruled from 1979-83.<sup>98</sup> In South Yemen, socialist legal precepts adapted a mixed legal system previously based on customary law, common law, and Islamic

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<sup>95</sup> Richard Thornburgh, ‘The Soviet Union and the Rule of Law’ (1990) 69 *Foreign Affairs* 13, 24; Damaška and Fisher (n 34) 173; Litton (n 69).

<sup>96</sup> Permanent Mission of the People’s Republic of China (n 1) 3. See *Judicial Officers Recommendation Commission Ordinance*, Cap. 92.

<sup>97</sup> Roach (n 1) 19, 22. Roach, however, cautions that the executive may still influence the results of NSL cases ‘by not designating many judges’. Eighteen months after the law was first promulgated, it is still unclear how many magistrates and judges have been appointed to the NSL panel.

<sup>98</sup> To these two states it is possible to add Guyana, labelled a socialist legal system by comparative law scholar de Cruz ((n 4) 187). However, under the leadership of former Prime Minister LFS Burnham (1964-1980), the existing common law system, inherited from Guyana’s British colonisers, remained in areas such as criminal law (John N Hazard, ‘Guyana’s Alternative to Socialist and Capitalist Legal Models’ (1968) 16 *Am J Comp L* 507, 507, 512). To Guyana, Glendon, Gordon and Osakwe (n 24 at 714) also add Tanzania, although most other comparative literature does not include Julius Nyerere-led Tanganyika/Tanzania (1961-85) in a list of nations with socialist legal systems. See n 100 for a full list.

law,<sup>99</sup> whereas in Grenada the common law legal architecture did not change greatly with the new socialist government, which only lasted four and a half years before being itself overthrown.<sup>100</sup> As Quigley<sup>101</sup> stated towards the end of the Cold War, ‘no common law country has established a fully socialist order.’ There are also no known examples of a socialist *criminal* law being transplanted in its entirety into a common law system.

The closest thing to a socialist legal transplant into a common law legal system witnessed during the twentieth century, albeit not in the criminal law field, was the 1976 addition of ‘Fundamental Duties’ to add to the ‘Fundamental Rights’ already existent within the Constitution of India. The 42<sup>nd</sup> amendment to the Indian Constitution, inserting a new article 51A, appropriated the concept of Fundamental Duties from the Soviet Union’s 1936 Constitution (art 130-133), although duties to the community balancing rights of the individual are also present within article 29(1) of the Universal Declaration of Human Rights, adopted in 1948.<sup>102</sup> As far as the literature reveals, no other constitution of a common law country has been influenced by legal precepts from Marxist-Leninist regimes.<sup>103</sup>

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<sup>99</sup> Manfred W Wenner, ‘Yemen’ (*Encyclopædia Britannica*, 2021) <<https://www.britannica.com/place/Yemen>> accessed 30 May 2021.

<sup>100</sup> Quigley (n 24) 804-5. See ‘Declaration of the Grenada Revolution’ (*The Grenada Revolution Online*) <<https://www.thegrenadarevolutiononline.com/declaration.html>> accessed 30 May 2021: People’s Laws numbers 5 and 6.

The sole remaining Marxist-Leninist (or ‘Market Leninist’) states are the PRC, Cuba, Laos, Vietnam and North Korea. Excluding internationally unrecognised states and prior iterations of the current five, previous Marxist-Leninist governments ruled in Afghanistan, Albania, Angola, Belarus, Benin, Bulgaria, Cambodia, Congo (Republic), Czechoslovakia, Ethiopia, East Germany, Grenada, Hungary, Mongolia, Mozambique, Poland, Romania, Soviet Union, Somalia, Tuva, Ukraine, South Yemen, Yugoslavia.

Butler (n 10) lists the following nations as having socialist legal systems at some stage during the 20<sup>th</sup> century: Afghanistan, Albania, Bulgaria, China, Cuba, Czechoslovakia, East Germany, Ethiopia, Hungary, Mongolia, North Korea, Poland, Romania, Somalia, Soviet Union, Vietnam, Yemen, Yugoslavia, ‘and other developing economies’. de Cruz ((n 4) 187) adds Angola, Cambodia, Guinea, Guyana, Laos, Libya, and Mozambique.

<sup>101</sup> Quigley (n 24) 804.

<sup>102</sup> Ravideep Badyal, ‘Concept of Duty Vis-A-Vis Modern State With Special Reference to Fundamental Duties Under Indian And USSR Constitution’ (2018) 9 *The Lex-Warrior: Online Law Journal* 147; Department of Justice, ‘Constitution Day and Fundamental Duties’ (*Department of Justice, Government of India*, 2020) <<https://doj.gov.in/sites/default/files/Constitution%20Day.pdf>> accessed 31 January 2022.

<sup>103</sup> Common law states whose constitutions contain reference to the words ‘socialism’ or ‘socialist’, albeit outside of the Marxist-Leninist context, include the following at the time of writing: Bangladesh; Guyana; Sri Lanka; Tanzania. Formerly, the list also included: Burma; Ghana; Sierra Leone, and Zambia.

Legal evolutionary theory supposes that developing countries will adopt the most efficient aspects of developed nation legal systems,<sup>104</sup> which may explain many of the common law to socialist law movement of legal ideas and institutions over the course of the 20<sup>th</sup> century. But, as far as the available literature suggests, never has the world seen a criminal law move the opposite way, until now. The NSL's status as a 'socialist legal transplant' is a reflection of Hong Kong's unique constitutional status as a common law 'enclave' within a larger national entity, featuring a different type of legal system. It is also a symptom of the rising economic and strategic power of the PRC. Although the interaction of the legal families on display here is unusual in comparative perspective, in the broader historical context, the inter-systemic legal controversies surrounding the NSL may merely be a symptom of decolonisation (or, for some, recolonisation).<sup>105</sup> As Siems<sup>106</sup> has observed:

most of the former colonies today have a mixture of involuntary and voluntary transplants from the West, plus further transplants from neighbouring countries, and indigenous forms of law and order.

The English common law legal system, (PRC) national laws promulgated in Hong Kong by way of Basic Law Annex III, and the Chinese customary law recognised in the Basic Law, in that order, neatly satisfy Siems' definition above.<sup>107</sup> Even if it is not a national border, for the purposes of legal transplants, the Hong Kong–Mainland China border is a 'geopolitical' one. Previous scholarship has recognised this frontier as a potential site of legal transplants.<sup>108</sup> The Basic Law itself was a mainland Chinese legal transplant into Hong Kong's pre-existing common law system, but its drafting history (featuring substantial input from Hong Kong committee members) and its substantive provisions (honouring the

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<sup>104</sup> Gillespie (n 30) 666-9; Laura K Donohue, 'Transplantation' in Victor V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (CUP 2012) 74.

<sup>105</sup> See Gary Chi-hung Luk, 'Straddling the Handover: Colonialism and Decolonization in British and PRC Hong Kong' in Gary Chi-hung Luk (ed), *From a British to a Chinese Colony? Hong Kong Before and After the 1997 Handover* (Institute of East Asian Studies, University of California 2017); Law Wing Sang, *Collaborative Colonial Power: The Making of the Hong Kong Chinese* (Hong Kong University Press 2009) 173.

<sup>106</sup> Siems (n 6) 111.

<sup>107</sup> See Basic Law, art 8, 84, annex III.

<sup>108</sup> Chen Lei, 'Contextualizing Legal Transplant: China and Hong Kong' in Pier Giuseppe Monateri (eds), *Methods of Comparative Law* (Edward Elgar Publishing 2012); Shen Zhongling, 'Legal Transplant and Comparative Law' (1999) 51 RIDC 853.

Sino-British Joint Declaration) preclude it being classified as a ‘socialist’ law in toto.<sup>109</sup> Other than the NPCSC’s supervisory jurisdiction over Hong Kong courts’ interpretation of its provisions (art 158), the Basic Law bears few of the paradigmatic features of socialist legality.<sup>110</sup>

Of course, the NSL is not the first national law to be introduced into Hong Kong via Annex III to the Basic Law. It is thus not the first PRC legal transplant into Hong Kong, and not even the first mainland *criminal law* transplant. The National Anthem Law (adopted in 2017), the National Flag and Emblem Laws (adopted in 1997) are also PRC laws annexed to the Basic Law, for which Ordinances were later drafted that create criminal offences in Hong Kong domestic law.<sup>111</sup> Are these criminal laws precursors to the NSL as socialist legal transplants? According to Gillespie’s definition reproduced above,<sup>112</sup> there is no doubt that they satisfy the definition of cross-border, inter-systemic transplants. However, there are several key distinctions precluding their taxonomy as *socialist* legal transplants.

As originally enacted and applied to Hong Kong, the Law of the PRC on the National Emblem and the Law of the PRC on the National Flag each contain a single criminal offence, defining quite clearly what conduct is criminalised in relation to the national emblem and flag: ‘publicly and wilfully burning, mutilating, scrawling on, defiling, or trampling upon it’.<sup>113</sup> These are not the broadly worded political offences that proved so successful in neutering changing patterns of political dissent in the post-1979 PRC, the Soviet Union, or in modern day Vietnam or North Korea. The National Anthem Law bears closer typological similarity with the NSL, due to its reference to ‘socialist core values’, the law’s role in public

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<sup>109</sup> Chan (n 35) 273-4; Petersen (n 37) 641-2. See also Fu Hualing and Richard Cullen, ‘National Security’ in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2<sup>nd</sup> ed 2015) 198, on article 23 of the Basic Law first creating the conditions for a mainland Chinese legal transplant of security offences into Hong Kong.

<sup>110</sup> Chan (n 35) 273; Ann D Jordan, ‘Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region’ (1997) 30 *Cornell International Law Journal* 335, 350; Peter Wesley-Smith, ‘Law in Hong Kong and China: The Meshing of Systems’ (1996) 547 *The Annals of the American Academy of Political & Social Science* 104, 105, 111-5.

<sup>111</sup> See National Anthem Ordinance (Hong Kong), s 6-7; National Flag and Emblem Ordinance (Hong Kong), s 6-7.

<sup>112</sup> Gillespie (n 29) 27.

<sup>113</sup> Law of the PRC on the National Flag 1990, art 19; Law of the PRC on the National Emblem 1991, art 13, appendix III.

education, and its slightly vaguer criminal offence which includes ‘insulting’ the National Anthem.<sup>114</sup> However, on the whole, it is an unconvincing example of a socialist criminal law transplant, because it does not attempt to alter the broader institutional architecture processing criminal offences through Hong Kong’s common law justice system. It contains no reference to centralised political supervision over the administration of justice, and moreover contains no novel punishments in the socialist style, particularly administrative sanctions. Instead, the NSL is the clearest example yet of a socialist legal transplant into Hong Kong, whether in criminal law or in any other field. And, as I have argued above, it may well be the first example in history of a socialist criminal law transplanted into a common law system.

## V. Implications for Implementation and Further Research

That the NSL bears many of the key characteristics of socialist criminal laws, and that it is likely the first such criminal law to be transplanted into a common law system, result in several important implications for both criminal practice and for further scholarship in comparative law. In this section I outline the seismic implications that the NSL has brought to practice and scholarship.

On the practical implementation and interpretation of the NSL in Hong Kong, the first and most obvious implication (and I am not the first person to note this)<sup>115</sup> is that of *uncertainty*. Many legal transplants across legal families are ill-suited for the societies which newly host them, and may not work in the manner intended after they face public and institutional resistance.<sup>116</sup> An ill-suited legal transplant may either challenge the existing legal order that surrounds it, or else its effect may be muted by the pre-existing context.<sup>117</sup> As alluded to above, Hong Kong’s executive and judicial institutions do not possess any comparative precedents from common law jurisdictions to turn to in order to interpret and enforce a

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<sup>114</sup> National Anthem Law of the PRC 2017, art 1, 5, 11, 12. Tianxiang He, ‘Copyright, Freedom of Speech, and the Insult to the National Anthem’ (2021) 51 Hong Kong LJ 53, 56-8.

<sup>115</sup> See variously Simon Young, ‘The National Security Law’s Challenges to Criminal Justice in Hong Kong’ (*U.S.-Asia Law Institute*, 14 January 2021) <<https://usali.org/usali-perspectives-blog/the-national-security-laws-challenges-to-criminal-justice-in-hong-kong>> accessed 30 May 2021; Johannes Chan, ‘National Security Law 2020 in Hong Kong: One Year On’ (2022) 30 *Academia Sinica Law Journal* (forthcoming); Susan V Lawrence and Michael F Martin, ‘China’s National Security Law for Hong Kong: Issues for Congress’ (Congressional Research Service 2020) 20; Wong and Kellogg (n 39) 17.

<sup>116</sup> Siems (n 6) 198; Nicholson (n 2) 234-6.

<sup>117</sup> Siems (n 6) 198; Gillespie (n 29) 31. The PRC’s Central Government will hope for the former. For example, see Chen Qingqing and Wang Wenwen, ‘Jimmy Lai denied bail in “landmark ruling signalling HK common law system adapting to national security law”’ *Global Times* (China, 9 February 2021). See also n 127.

socialist criminal law transplant. Nor does the previous implementation of the national emblem, flag and anthem laws provide useful guidance, for much the same reason. To understand and interpret the NSL, Hong Kong's courts may even have to turn to mainland Chinese legal doctrine.<sup>118</sup> Furthermore, if the courts' interpretation does not accord with the Central Government's in a key case, the inherent uncertainty in adapting a transplant from another legal family will be exacerbated by the NPCSC's power to issue official interpretations of the NSL's provisions.<sup>119</sup> The main reason why the National Security Law has provoked such anxiety among certain segments of the Hong Kong public is the prevailing uncertainty over its interpretation and enforcement, questions that Hong Kong's executive authorities seem reluctant or unable to resolve before a substantial body of caselaw and prosecutorial practice develops.

Be that as it may, the comparative law literature also makes clear that all legal transplants are adapted, either overtly or through latent processes, to fit the local situation. Öricü<sup>120</sup> argues that, rather than the compatibility of the original legal provisions or institutions on paper, the “tuning” that takes place *after transposition by the appropriate actors of the recipient* is the key to success’ (emphasis added). Successful legal transplants across legal ‘families’ are certainly possible,<sup>121</sup> in criminal law most famously the adoption of jury trials by inquisitorial, civil law jurisdictions.<sup>122</sup> From a comparative law perspective, it will be particularly interesting to see how the Hong Kong courts interpret the provisions of the NSL that replicate parts of the Chinese Criminal Law 1997 (secession, subversion and collusion), in comparison with their mainland judicial counterparts,<sup>123</sup> and whether mainland interpretations of these crimes are adopted as extrinsic materials to help pin down their meaning in Hong Kong.<sup>124</sup> Alternatively, Hong

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<sup>118</sup> Chen (n 47); Public Law and Human Rights Forum (n 40). Contrast Fu (n 40) [6.060]. The Hong Kong courts have held that there are no limits to the extrinsic materials that may be relied upon in interpreting the NSL, including policy documents from mainland institutions such as the NPC or NPCSC (*Lai Chee Ying* (n 88) [11]).

<sup>119</sup> Young (n 115); Chan (n 115).

<sup>120</sup> Esin Öricü, ‘Law as Transposition’ (2002) 51 ICLQ 205, 207.

<sup>121</sup> Gillespie (n 29) 32, 34.

<sup>122</sup> Valerie P Hans, ‘Trial by Jury: Story of a Legal Transplant’ (2017) 51(3) LSR 471; Valerie P Hans, ‘Jury Systems Around the World’ (2008) 4 Annual Review of Law and Social Science 275.

<sup>123</sup> See n 44.

<sup>124</sup> See n 118.

Kong's courts may interpret the terms of the relevant offences more strictly than mainland courts, bearing in mind the human rights guarantees that the NSL provides throughout its text.<sup>125</sup>

To some degree, the extent of divergence will depend on the restraint shown by the NPCSC in issuing remedial interpretations. As for the other novel institutional procedures introduced by the NSL, following Örucü's observations described above, the smooth integration of the NSL into Hong Kong's existing criminal justice scheme will also depend on restraint by locally based actors afforded substantial discretion by the new law.<sup>126</sup> This includes restraint by the mainland-appointed National Security Adviser in upending domestic security operations; restraint by Department of Justice prosecutors in pursuing NSL charges for only those security incidents that cannot be dealt using the pre-existing offence scheme;<sup>127</sup> restraint on the part of the Office for Safeguarding National Security in asserting mainland jurisdiction over suspects in even the most severe cases; restraint by the Secretary for Justice in dispensing with juries in all but the most exceptional circumstances, and restraint on the part of the Chief Executive in removing magistrates and judges from the NSL adjudicatory panel. With such wide discretion afforded to Hong Kong-based executive actors, the good news in terms of transplantation is that the NSL offers a choice. Its implementation within the existing criminal justice system can be as seamless or as fraught as Hong Kong's executive decision-makers choose to make it.

Further refinement of and addition to the NSL's legal provisions remains likely. Implementation regulations for the NSL have already been passed in Hong Kong, which are substantially longer than the law itself. There is also a continued obligation on the Hong Kong legislature to enact its own security legislation pursuant to article 23 of the Basic Law, which was reiterated in the NPC's decision to promulgate a security law for Hong Kong (art 3) and in the NSL itself (art 7). At the time of writing, it is still unclear when the Legislative Council will act.<sup>128</sup> When it does, will this prove a belated opportunity to better adapt the NSL's provisions to their new common law context, pursuant to the Basic Law's

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<sup>125</sup> Human Rights in China (n 76); Roach (n 1) 21; Fu (n 40) [6.059]-[6.061].

<sup>126</sup> Petersen (n 37) 656.

<sup>127</sup> As Wong and Kellogg ((n 39) 41) and Young (n 115) have noted, the NSL's promulgation has also emboldened police and prosecutors in Hong Kong to utilise 'ordinary' criminal provisions, such as public order offences and the colonial-era sedition law, to pursue political activists who are threats to the governmental order. That the NSL has begun to reshape Hong Kong's criminal justice system in areas beyond those directly covered by its textual provisions provides further evidence for the law's ideologically transformative aims.

<sup>128</sup> Christy Leung, 'Hong Kong national security law: time is "ripe" for Article 23 with focus on combating "state-level spying", minister says' *South China Morning Post* (Hong Kong, 23 September 2021).

original plan?<sup>129</sup> Or, as appears more probable, will the article 23 enactment only cover the security offences not created by the NSL?<sup>130</sup>

Rather than expecting the NSL to become an incongruous, awkward add-on to Hong Kong's existing criminal law scheme given its separate origins as a mainland enactment, the promulgation of the NSL instead likely symbolises the beginning of a move towards a mixed, tripartite (socialist, civil law and common law) system in Hong Kong in the long-term future. To be sure, this prediction has been made previously by several scholars,<sup>131</sup> but it is only now that the path appears irreversible. Irrespective of its impact on Hong Kong's distinct social identity and future economic prosperity, for comparative law scholars, this development would be highly intriguing. No other jurisdiction presently espouses this kind of legal family interface, although there are of course many states with mixed civil law/common law legal systems.<sup>132</sup>

The second key implication for further research in comparative law, as foreshadowed by the NSL's promulgation, will be future Chinese legal transplants into non-socialist legal systems. Given China's rising geopolitical, economic and cultural power, it seems likely that legal ideas will migrate from China to countries with western-derived legal systems (including to Anglo-American common law and European civil law systems), some through the established methods of legal transplantation – hard power, soft power, 'nudging', borrowing, an emerging regional or global 'best practice' consensus, and so on.<sup>133</sup> To provide just one example, there have long been legislative proposals for a (consensual) criminal law transplant from China to ardently non-socialist Indonesia, with the option for sentencing judges to pass a 10-year suspended death sentence.<sup>134</sup> As this process of legal diffusion gathers pace across the world, quite literally

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<sup>129</sup> Petersen (n 37) 643-5; 'Book Talk: China's National Security Endangering Hong Kong's Rule of Law?' (*HKU Legal Scholarship Blog*, 28 September 2020) <<https://youtu.be/N0KfwKVuftE>> accessed 30 May 2021.

<sup>130</sup> The Legislative Council will additionally have to enact or amend legislation covering five types of crimes not covered by the NSL: treason, sedition, stealing state secrets, foreign political organisations acting in Hong Kong, local political organisations establishing ties with foreign political organisations. Existing ordinances conflicting with the NSL will also have to be amended. See further Lawrence and Martin (n 115) 25-6.

<sup>131</sup> For example, Jordan (n 110) 397; Zhang (n 5); Castellucci (n 21) 81-2.

<sup>132</sup> Some of the more well-known are Cyprus, Philippines, Scotland, and South Africa.

<sup>133</sup> Erie and Do (n 2) 7; Siems (n 6) 191-5, 202-11. The same may also apply to legal transplants from Vietnam – see Christie S Warren, 'Toolkit or Tinderbox? When Legal Systems Interface Conflict' (2020) 53 *Cornell Int'l LJ* 297, 310 n 76.

<sup>134</sup> Tobias Smith and Daniel Pascoe, 'Suspended Execution Beyond China's Borders' (2021) *Asian JLS* <<https://doi.org/10.1017/als.2021.19>> accessed 19 January 2022.



through the Belt and Road initiative,<sup>135</sup> scholars will have to develop new theoretical models explaining why and how Chinese legal doctrines are transplanted into non-Chinese jurisdictions, including subsequent adaptations within the host societies. The established western theories, focusing on colonialism, neoliberalism, and legal evolution may not provide convincing explanations.

A third question for further research arising from an analysis of the NSL is whether it is possible to denote an *individual law* as socialist, when the surrounding legal system can no longer be described as socialist? The comparative law taxonomy of legal families (common law, civil law, socialist law, religious law, and so on) was traditionally applied to entire national legal systems.<sup>136</sup> Yet, the large amount of previous scholarship which juxtaposes individual fields of law (e.g. transplanted family law, criminal law, or commercial law) within the broader legal architecture of a different family<sup>137</sup> points to the same possibility for individual statutory promulgations or constitutional provisions. While legal transplants soon adapt, and are adapted by, their new setting,<sup>138</sup> at least on paper, context-free categorisation at the moment of reception remains possible. In that case, which of China's other current legislation, predominantly in the public law field, still manifests strong socialist characteristics and are therefore the next candidates to become 'socialist legal transplants' along the Belt and Road or elsewhere?

Several commentators have observed that the provisions of Hong Kong's NSL are even more sweeping in some areas (namely extraterritoriality and the definition of terrorism) than the equivalents found within the National Security Law of the PRC 2015.<sup>139</sup> Might it be Hong Kong's NSL itself, then,

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<sup>135</sup> The Belt and Road Initiative provides the PRC an unrivalled opportunity to promote its governance models and legal precepts to developing world legal systems. See Erie and Do ((n 2) 10, 22) and Surya Deva, 'With coronavirus crisis, China sees a chance to export its model of governance' *The South China Morning Post* (Hong Kong, 29 March 2020).

<sup>136</sup> With certain sub-national exceptions within federal polities, such as Louisiana (US), Quebec (Canada), the northern states of Nigeria, Scotland (UK), Puerto Rico (US) and Goa (India).

<sup>137</sup> For example, Siems (n 6) 90-1; Erie and Do (n 2) 9; Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 216; Jacques du Plessis, 'Comparative Law and the Study of Mixed Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 478, 488. This type of work focuses on the fortunes of legal systems vertically divided by different fields of law, rather than truly 'mixed' jurisdictions sharing fundamental characteristics of more than one family (e.g. civil law and common law).

<sup>138</sup> du Plessis (n 157) 488; Öricü (n 120) 207.

<sup>139</sup> Roach (n 1) 16; Emily Feng, '5 Takeaways From China's Hong Kong National Security Law' (*National Public Radio*, 1 July 2020) <<https://www.npr.org/2020/07/01/885900989/5-takeaways-from-chinas-hong-kong-national-security-law>> accessed 31 January 2022.

that is China's next socialist law candidate for transplantation abroad? Despite the torrent of negative Western press that the law has received since its promulgation in June 2020,<sup>140</sup> authoritarian and semi-authoritarian governments in nearby jurisdictions, including common law jurisdictions,<sup>141</sup> may well look to the NSL's claimed role in pacifying Hong Kong's streets<sup>142</sup> and decide that they, too, require an overhaul of their national security laws, incorporating broadly defined political offences, political supervision over the administration of justice in security cases, tighter regulation of the judiciary, and exiling punishments, among other features. Following the NSL's promulgation in Hong Kong, such governments may no longer be held back by the symbolic and interpretative difficulties in transplanting into the local context a criminal law first developed within a formally socialist legal system.

## VI. Conclusion

Due to a combination of its vaguely drafted political offences, its ideologically transformative function, its novel punishments and, especially, its imposition of centralised political supervision over the administration of justice, I have argued that the NSL bears closer resemblance to a socialist criminal law than it does to the criminal law of any other legal family. Critics of the socialist transplant thesis may argue that the law contains too many references to human rights protections and punishments that are too mild to be truly categorizable alongside historical Soviet and PRC penal laws. Yet, the NSL's close comparison with socialist law is inescapable, at least when assessed on the basis of its written provisions alone, before it is widely applied in the trial and punishment of security offence suspects. The human rights guarantees within the NSL appear legally porous enough to make little difference to the state's

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<sup>140</sup> A small selection includes the following articles from major news outlets: Grace Tsoi and Lam Cho Wai, 'Hong Kong security law: What is it and is it worrying?' (*BBC News*, 30 June 2020) <<https://www.bbc.com/news/world-asia-china-52765838>>; Javier C Hernández, 'Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained' *New York Times* (Beijing, 30 June 2020); Clifford Coonan, 'Beijing's security law threatens Hong Kong's financial hub status' (*Deutsche Welle*, 1 July 2020) <<https://www.dw.com/en/beijings-security-law-threatens-hong-kongs-financial-hub-status/a-54015199>> accessed 31 January 2022.

<sup>141</sup> Several examples from the Asian continent are the following common law or mixed common law-Islamic law jurisdictions: Bangladesh; Brunei; Malaysia; Myanmar; Pakistan; Singapore. At the time of writing, each are presently classified by NGO Freedom House as 'not free' or 'partly free', combining scores on political rights and civil liberties ('Countries and Territories' (*Freedom House*, 2021) <<https://freedomhouse.org/countries/freedom-world/scores>> accessed 21 September 2021).

<sup>142</sup> Helen Davidson, "'Remarkably effective": Carrie lam praises Hong Kong national security law' (*The Guardian*, 25 November 2020) <<https://www.theguardian.com/world/2020/nov/25/remarkably-effective-carrie-lam-praises-hong-kong-national-security-law-in-annual-address>> accessed 31 January 2022.

security operations, whereas many of the NSL's punishments play a similar functional role to socialist criminal law sanctions, and are thus worthy of analysis in the comparative law tradition.<sup>143</sup> The one area where defenders of the NSL are on more solid ground relates to the law's purported effect on the Hong Kong judiciary. Here I acknowledge that the Chief Executive's power to vet magistrates and judges to hear national security cases is less 'socialist' than it first appears. Yet when considering the four identifiable features of socialist criminal law regimes as a whole, the NSL is not out of place.

Many observers have already asserted that the NSL's promulgation forms an 'unprecedented' intrusion into Hong Kong's legal system by the Central Government in Beijing, whether for future good or for ill.<sup>144</sup> What has largely been missing from the public and scholarly debate over the NSL, thus far, has been a sense of its comparative importance within the global taxonomy of legal families. Not only is the NSL an unprecedented development in mainland China's relations with its Special Administrative Region of Hong Kong, but it is also unprecedented as a criminal law transplant on a worldwide scale. From a comparative law perspective, the NSL serves as an urgent reminder to better understand the potential for Chinese legal transplants, particularly in public law areas, into jurisdictions with no previous socialist underpinnings.<sup>145</sup> Theorising on legal transplantation must keep pace with realities of geopolitics.

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<sup>143</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3<sup>rd</sup> edn, OUP 1998) 10.

<sup>144</sup> For example, Chan (n 35) 274; Kelly Ho, 'Top Hong Kong barristers say "unprecedented" security law draft has 'worrying and problematic features' (*Hong Kong Free Press*, 26 May 2020) <<https://hongkongfp.com/2020/05/26/top-hong-kong-barristers-say-unprecedented-security-law-draft-has-worrying-and-problematic-features/>>; Amnesty International, 'National Security Laws and Pandemic: A Destructive Combination for Human Rights in Hong Kong' (*Amnesty International*, 7 April 2020) <<https://www.amnesty.org.hk/en/national-security-laws-and-pandemic-a-destructive-combination-for-human-rights-in-hong-kong/>> accessed 30 May 2021.

<sup>145</sup> See also n 133 on the potential for Vietnamese legal transplants.