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Hong Kong Security Law 2020: Between State Sovereignty and Breach of Treaty

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Article	Abstract
<p>Keywords: Binding Force; Hong Kong Security Law; International Agreement; Sovereignty; The Sino-British Joint Declaration.</p> <p>Article History Received: Nov 10, 2021; Reviewed: Jun 26, 2022; Accepted: Jul 14, 2022; Published: Jul 31, 2022.</p> <p>DOI: 10.28946/slrev.Vol6.Iss2.1516.pp350-366</p>	<p>In 1984 the People's Republic of China (PRC) and the United Kingdom (UK) signed an international agreement to hand over Hong Kong to the PRC on the condition that it be granted a high level of autonomy, except in the field of defence and cooperation with foreign powers. In 2020, PRC Government issued the 2020 Hong Kong Security Law, which contains restrictions on political rights for the people of Hong Kong. This provision will automatically lead to discourse in international law, whether the HKSL 2020 is a manifestation of the implementation of PRC's legal sovereignty or violates the Sino-British Joint Declaration 1984 as a treaty which contains requirements for the transfer of Hong Kong. This article is intended to examine these problems using a normative, historical and conceptual approach. As a result, even though PRC has sovereignty to implement its national law in the territory, the authority must be placed within the limits of compliance with international law. Non-compliance with international treaties will lead to consequences of internationally wrongful acts as a breach of the treaty.</p>

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INTRODUCTION

After 156 years in power, through an arduous negotiation process, in 1997, Britain finally handed over Hong Kong's sovereignty to the People's Republic of China under certain conditions as stated in the Sino-British Joint Declaration on The Question of Hong Kong 1984. It can be seen in the figure 1 that the Declaration contains granting of a high degree of autonomy¹ to the Hong Kong Government to administer its region under the democratic system previously introduced by Britain, during the 50 years post-1997, except in the field of defence and cooper-

¹ "The Shino-British Joint Declaration" (1984).

ation with foreign powers. This makes Hong Kong different from other parts of China (figure 1).

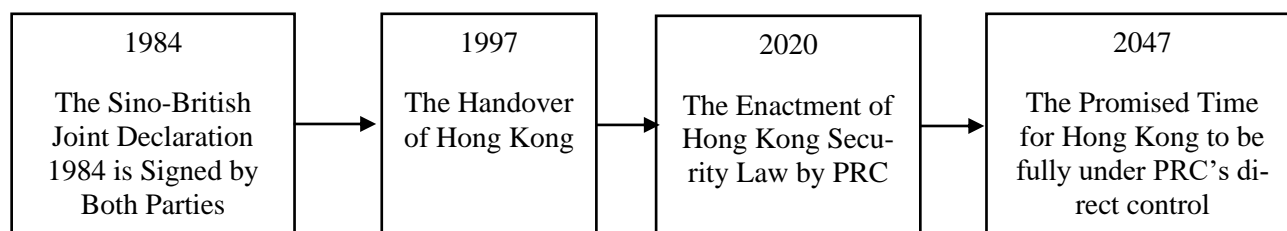


Figure 1: *Hong Kong Status from 1984 to 2047*

On 30 June 2020, the PRC Government enacted the National Security Law of Hong Kong, which contained the PRC's authority to take all necessary actions to overcome conditions that jeopardised China's national security; in this case, Hong Kong, as a unique autonomous region, was included. This decision drew protests both internally among Hong Kong citizens and from the international community, who were concerned that this legislation could be seen as a manifestation of the breach of the treaty on the Sino-British Joint Declaration 1984 Subparagraph 2 of paragraph 4, which stated:

“The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.”

This provision, later on, became the basis for Hong Kong's privileges in the PRC hierarchy of state administration. This provision is deemed to injure the privileges of Hong Kong citizens. Criminal provisions are considered unfair for citizens who try to defend themselves from physically repressive actions by the police because they are categorised as acts of terrorism and are threatened with life imprisonment by the PRC Government. The British government also argued that what the PRC was doing was a violation of the International Covenant on Civil and Political Rights, signed by the UK and PRC even before the 1984 Sino-British Joint Declaration was made.

The issuance of this law caused an intersection between, on the one hand, the existence of state sovereignty to regulate its territory as guaranteed by international law and, on the other hand, the PRC's obligation to comply with the agreements agreed upon in the Sino-British Joint Declaration 1984. Deliberate failure to implement the agreement will indirectly bring global consequences; namely, the international community had doubts about the certainty of the PRC in complying with international agreements made with other countries. Meanwhile, the juridical consequence is that such action can lead to legal consequences in the form of a breach of the treaty, which will give Britain the right to file a claim or object to the violation. This article will examine how this conflict occurs and what the consequences of this conflict are. The theory of state sovereignty and The Vienna Convention on the Law of Treaties 1969 (VCLT 1969) as a codification of international treaty law are used as analytical tools to study legal problems arising from these legal events.

RESEARCH METHODS

The type of legal research used for this research is doctrinal research or normative research. This legal research is normative in nature, basically an activity that will examine aspects (to solve problems that are internal to positive law with studies based on norms and literature studies)². Also, this research uses statute, historical and conceptual approaches. The statute approach is conducted by researching the British Joint Declaration 1984 as a norm that became the basis for Hong Kong's privilege as an entity protected by international law. The agreement is also used as a benchmark to determine if Hong Kong's security law enacted by the PRC government has violated the requirements in articles 26 and 27 of the VCLT 1969. It is also used to determine if the RRC government's action constitutes a breach of the treaty according to international law on international agreements, especially VCLT 1969.

The historical approach is carried out by examining and tracing something based on a historical framework from time to time relating to the chosen legal issue³. This historical approach is essential to understand the origin of Hong Kong's privileges as an entity within the PRC's constitutional system and why these privileges are important to be given and maintained until the deadline promised, namely in 2047.

The third approach is the conceptual approach. In this research, the author will examine through theories, doctrines, international customary law and expert opinions to solve the main legal problems that are being explored; for example, the concept of breach of treaty, state responsibility, independence and sovereignty. The concept of the breach of a treaty is used to examine the actions of the PRC Government, which are deemed inconsistent with the Sino-British Joint Declaration 1984. The concept of state responsibility is used to examine the obligations of the PRC Government to protect the human rights of Hong Kong citizens because the PRC Government is part of the international community and human rights is a value held by the international community universally or what is known as *Jus Cogens*. The concept of independence is vital to use to examine the range of privileges of Hong Kong in the PRC constitutional system as stipulated in the Sino-British Joint Declaration 1984 and indications of its contradiction with the Hong Kong Security Law. Meanwhile, the concept of sovereignty is used to study the authority of China as the parent country of Hong Kong and its rights and obligations even though Hong Kong is a unique autonomous region.

ANALYSIS AND DISCUSSION

Relations Between State's Sovereignty and International Law

The principle of sovereignty is often interpreted as the right and authority of the state to do whatever it wants as long as it is carried out within the boundaries of the state's territory. The principle has increasingly gained a place for states since the creation of the Westphalia 1648 agreement, which reinforces the view that state sovereignty is the primary basis for conducting international relations and applying international law.

According to W. Michael Reisman, the principle of state sovereignty is rooted in the absolute sovereignty of the King over his territory in the heyday of the monarchy, so the concept of

² Khudzaifah Dimiyati, *Metodologi Penelitian Hukum (Buku Pegangan Kuliah)* (Surakarta: Sekolah Pascasarjana Program Magister Ilmu Hukum Universitas Muhammadiyah, 2004).

³ Peter Mahmud Marzuki, "Penelitian Hukum, Kencana Prenadamedia Grup," Edisi Revi (Jakarta, 2013), 166.

sovereignty is often attached to a monarch who is in power and has legitimacy over the area under his control.⁴ Jack Goldsmith added that the concept of state sovereignty is essential to provide legitimacy for the state to build a sense of its national identity while subjecting itself to international law.⁵ The awareness that general norms, including international law, still limit the implementation of state sovereignty is a legacy from history when kings with absolute power are still limited by a set of norms that society in general, such as those in Christianity. This awareness reinforces the understanding that state sovereignty must be placed in a legal framework and not seen as a mere right to state autonomy. The intersection between state sovereignty and international law in the UN Charter is mixed in a norm that the UN Charter serves as an instrument that limits the sovereignty of its member states. However, submission to this instrument is seen as a state affirmation of its sovereignty.⁶ This awareness reinforces the understanding that state sovereignty must be placed in a legal framework and is not seen as a mere right to state autonomy.⁷ The intersection between state sovereignty and international law in the UN Charter is mixed in a norm that the UN Charter serves as an instrument that limits the sovereignty of its member states. However, submission to this instrument is seen as a state affirmation of its sovereignty.⁸

State sovereignty manifests itself in the form of the state's ability to exercise control over territory, people, actions and resources within its power and authority. This control is exercised through a set of institutions that exercise power and authority of the state, and the law is used to implement these powers and authorities and gain legitimacy. In countries that adhere to the principle of the rule of law, the law even determines the validity and legitimacy of the implementation of state sovereignty from every state institution, including the highest authority in the country. Basic rules regarding how power and authority are exercised are usually contained in the constitution. In this constitution, the state usually determines how the state balances the implementation of state sovereignty with the implementation of state obligations born from international law. It may be that the state tends to prioritise the implementation of state sovereignty compared to the implementation of international obligations, but it can also be vice versa.

Through the Preamble and Article 2 of its Constitution, the PRC emphasises that:

“(1) All power in the People's Republic of China belongs to the people. (2) The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels. (3) The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways under the law.”

However, legal events often are not as simple as the formulation in the constitution. The Sino-British Joint Declaration on The Question of Hong Kong 1984, which became the rule for transferring Hong Kong territory to the PRC, became the basis for applying a different legal system for the Mainland China territory from the Hong Kong territory. Through this agreement,

⁴ W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *The American Journal of International Law* 85, no. 4 (1990): 866–76.

⁵ Jack Goldsmith, "Sovereignty, International Relations and International Law," *Stanford Law Review* 52, no. 4 (2000): 959.

⁶ Hans Kelsen, "Sovereignty and International Law," *The Georgetown Law Journal* 48, no. 4 (1960): 627.

⁷ Samantha Besson, "Sovereignty, International Law and Democracy," *The European Journal of International Law* 22, no. 2 (2011): 373–74.

⁸ Winston P Nagan and Craig Hammer, "The Changing Character of Sovereignty in International Law and International Relations," *Columbia Journal of Transnational Law* 43, no. 1 (2004): 154.

the Chinese government stated that it was willing to reduce its sovereignty over the Hong Kong territory, except in the field of defence and foreign relations during the 50-year transition period. This concept is known as "One Country Two Systems", where China promises to give Hong Kong autonomy to take care of its internal affairs except for two things that have been agreed to be submitted to Beijing. The issuance of the 2020 Hong Kong Security Law, which contains restrictions on political freedom for Hong Kong citizens, will undoubtedly raise problems about whether this law is a manifestation of the implementation of the PRC's legal sovereignty to regulate people and actions within its sovereign territory, or whether it is a violation of the international agreement that the PRC Government has made with the British government regarding the transition of power from Britain to China which is contained in the Sino-British Joint Declaration on The Question of Hong Kong 1984.

The Concept of Breach of Treaty

In its regulation regarding breach of treaty, the 1969 VCLT included it in article 60, which Oliver Dörr considered one of the articles with the most complicated provisions in the convention.⁹ Article 60 paragraph (1) regulates the material violation of the agreement on a bilateral agreement that other parties can use as a basis for postponing or stopping the agreement's implementation, either partially or entirely. Meanwhile, paragraph (2) of the same article regulates material violations of multilateral agreements. In paragraph (3) of the same article, the criteria for a material violation of a treaty can be in the form of rejection of an agreement that is not subject to sanctions in the convention and violation of the provisions which are meaningful towards the achievement of the object or the purpose for which the treaty was formed.

Arrangements regarding material breaches of covenants raise questions among practising international lawyers about what differentiates material and non-material offences. In his view of this matter, Lord McNair stated that only violations that are important, and/or crucial, and/or violations of the material of the agreement, and not just arbitrary violations. In his book, he wrote:

The question is controversial. Some writers maintain that it is only the breach of an 'essential' or 'important' or material term of the treaty that entitles the other party to denounce the whole treaty; others hold that the breach of any term justifies the other party in denouncing the whole treaty because it is impossible to say whether or not that term induced him to conclude the treaty although he accepted the rest of the treaty with reluctance. In our submission, the balance of common sense, practical convenience, and judicial authority supports the former of those two contrasting views.¹⁰

Another thing that is deemed to require further explanation is article 60, paragraph (3) point b, which states that the violation of the provisions is meaningful towards the achievement of the object or the purpose for which the agreement was formed. In this provision, the definitive definition in the context of the convention of what is meant by objects and objectives is of concern.¹¹ Bruno Simma then gave the criteria that the objects and objectives referred to in these provisions could be interpreted as stated in paragraph (3) point b, namely that violations

⁹ Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on The Law of Treaties : A Commentary* (Berlin: Springer, 2012).

¹⁰ Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1986).

¹¹ Isabelle Buffard and Karl Zemanek, "The 'Object and Purpose' of the Treaty : An Enigma," *Austrian Review of International & European Law* 3 (1998): 311.

of meaningful provisions against the achievement of the object and the purpose for which the agreement was formed could be interpreted as a material violation of the agreement.¹² The International Law Commission (ILC) also gave the same opinion as Simma in the text of part of article 57 paragraph (3) point b, which later became article 60 paragraph (3) point b of the 1969 Vienna Convention.¹³ Paul F. Kirgis agrees with the opinions previously mentioned, but he adds an opinion based on his logic that even though a violation fulfils the elements mentioned in article 60 paragraph (3) point b, it remains to be seen how severe the violation is due to the violation. Small ones cannot be categorised as material violations of the agreement.¹⁴

In the commentary section of the ILC draft published in the Yearbook of International Law Commission Vol. 2 issued in 1966, violations of bilateral agreements can give another party to the agreement concerned the right to postpone the implementation of the agreement or even retaliate against it on a non-coercive basis concerning the rights of the violating state guaranteed in the agreement.¹⁵ In its relation to multilateral treaties, the same paper argues the extent to which actions can be taken by the state if a multilateral treaty has been violated and what conditions must be met if a country intends to take action in response to the violation of the agreement.¹⁶

The Binding Force of the Sino-British Joint Declaration 1984

In his explanation of the binding force of international agreements, William G. Rice stated that the binding power of an agreement is needed to bridge the parties to the agreement, who may have different views based on the influence of the thoughts of the constitution they adhere to.¹⁷ In practice, many international lawyers have tried to differentiate between the concept of binding force and enforceability, which in Indonesian can be referred to as law enforcement. The benchmark of enforceability is when a party in an agreement carries out the provisions of an agreement with full force, while the binding force is when the state party carries out the provisions with a complete sense of responsibility and volunteerism. In responding to this view, F. Blaine Sloan stated that such a view is ambiguous and misleading because, in reality, the two concepts are two inseparable sides of a coin.¹⁸ Sloan's opinion is supported by Oona A. Hathaway's view, which states that the international community must not forget the basic concept of international treaties, which are essentially voluntary.¹⁹ In essence, the division of international treaties varies, even based on the binding strength of an agreement itself, with a general dichotomy that only allows an agreement to be classified into two types: hard Law and soft Law. In the same agreement, it can find several provisions categorised as hard law and soft law in other

¹² Bruno Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General Inter-National Law," *Austrian Journal of Public and International Law* 20, no. 5 (1970): 83.

¹³ Yearbook of International Law Commission, 1966, vol II, p. 255.

¹⁴ Paul F. Kirgis, "Some Lingering Questions about Article 60 of the Vienna Convention of the Law of Treaties," *Cornell International Law Journal* 22, no. 3 (1989): 552.

¹⁵ Paul F. Kirgis.

¹⁶ Paul F. Kirgis.

¹⁷ William G. Rice and Jaro Mayda, "Some Thoughts on the Binding Force of International Treaties," *Wisconsin Law Review* 1, no. 2 (1956): 187.

¹⁸ F. Blaine Sloan, "The Binding Force of A 'Recommendation' of The General Assembly of The United Nations," *British Yearbook of International Law* 25 (1948): 2.

¹⁹ Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law," *The University of Chicago Law Review* 72, no. 2 (2005): 492.

sections. An agreement is possible to be hard law even though it is made in hard law form.²⁰ Such inconsistencies are understandable because of the inherent ambiguity of categorisation in how the experts study an agreement generally based on its respective form and substance.

Most forms of an instrument in an international agreement provide only a general indication of the nature of its content. The fact that provisions that are recommended (soft law) are included in a binding instrument (hard law) will not affect their substantive status as soft law. Thus, to understand the binding power of an international agreement, whether soft Law or hard Law, the provisions must be looked at one by one by taking into account their original meaning in the context of the object and purpose of the agreement.²¹

The process of making treaties, especially multilateral agreements, as stipulated in the VCLT 1969, is intended to guarantee legal certainty, but countries also often find that not all provisions in the agreement are necessary or follow their interests. This happens because, in general, international agreements are reciprocal in terms of the rights and obligations they result in, which give birth to the rule of law, both declarative and expositive. On the other hand, countries and other international legal subjects that have the authority to enter into international treaties, from time to time, tend to prefer less binding international treaty provisions.

The UN General Assembly, on several occasions, has used its declaratory powers to issue regulations in the form of declarations which are not binding by consensus. A concrete example of this explanation is the UNSC Resolution 2504 regarding the extended cross-border delivery mechanism for humanitarian aid to Syria. The general understanding is that these texts serve as authoritative expositions of law, even if the instrument does not establish formal legal rights and obligations for the state. In some cases, declarations adopted by the General Assembly form the basis for subsequent adoption of the treaty. The most famous example is the Universal Declaration of Human Rights of 1948, which largely served as the basis of the two Covenants on Human Rights.

Elements of the Breach of the Treaty on the Sino-British Joint Declaration 1984 in the Hong Kong Security Law 2020

Since it was introduced and took effect on 30 June 2020, the Hong Kong Security Law 2020 has caused fear to the people of Hong Kong because they consider that for a law with heavy sanctions, the Hong Kong Security Law 2020 is too general in providing the scope of the elements of the violation it intended.²² This law was formed to prevent, suppress and impose sanctions for actions in the form of efforts to carry out the succession of PRC power over Hong Kong (secession), subversion (overthrow of the legal government), involvement in acts and activities of terrorist organisations, collusion with foreign powers or with elements coming from outside that endanger national security concerning Hong Kong SAR.²³ This fear caused libraries in Hong Kong to withdraw all the books the pro-democracy camp wrote as a pre-emptive

²⁰ Arnold N. Pronto, "Understanding the Hard/Soft Distinction in International Law," *Vanderbilt Journal of Transnational Law* 48, no. 4 (2015): 950.

²¹ Pronto.

²² "Hong Kong's National Security Law: 10 Thing You Need To Know," Amnesty International, 2020, <https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know/>.

²³ "Hong Kong's National Security Law : 10 Thing You Need To Know."

measure to prevent them from getting caught in the new law for unwittingly circulating books that endanger Beijing's interests in Hong Kong.²⁴

This law stipulates that the Hong Kong region's executive, legislative and judicial authorities must effectively suppress and impose penalties for all acts and activities that jeopardise national security concerning these laws and other relevant legal provisions, even when restrictions are placed on their implementation with the guarantee of human rights.²⁵

Under article 4, human rights are respected and protected in maintaining national security in the Hong Kong Security Law 2020 as how it is stated:

“Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, the press, publication, association, assembly, procession and demonstration, which the residents of the region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected under the law.”

Rights and freedoms, including freedom of speech, press, publication, association, assembly, processions and demonstrations, are enjoyed by residents of the territory under the Basic Law and provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, Cultural and Cultural Rights which are applied in Hong Kong. However, there is still a clause that implementing the above freedoms must comply with the applicable legal rules.

Another measure in the Hong Kong Security Law that carries a severe penalty is secession attempts. In article 20, there are provisions on threats against attempts to secede through actions: (1) to separate Hong Kong SAR or other parts of PRC from PRC; (2) unlawfully modify the legal status of Hong Kong SAR or other parts of China; or (3) hand over Hong Kong SAR or other parts of China to a foreign country.

A person who is the main perpetrator or a person who has committed a serious criminal offence is punishable by life imprisonment or imprisonment of not less than ten years; a person who actively participates in said crime will be sentenced to imprisonment of not less than three years but not more than ten years; and other participants will be sentenced to fixed-term imprisonment of not more than three years, detention or short-term restriction.

The norm contained in the Hong Kong Security Law 2020, compared to the draft article 23 of the Hong Kong Basic Law, is not much different. The Hong Kong Security Law 2020 contains many agendas which, on previous occasions, were introduced to the public as a draft amendment to article 23 of the Basic Law and then withdrawn from the discourse of ratification.

The first analysis in the Hong Kong Security Law 2020 about whether there is an element of breach of the treaty on the Sino-British Joint Declaration 1984 can be seen in article 65 of the law, which states: “The power of interpretation of this law shall be vested in the Standing Committee from the National the People's Congress”. It is contrary to annex III paragraph 4 of the Sino-British Joint Declaration 1984, which states, “The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the

²⁴ “Hong Kong Libraries See Pro-Democracy Books Removed after National Security Law Introduced,” ABC News, 2020, <https://www.abc.net.au/news/2020-07-06/hong-kong-libraries-see-pro-democracy-books-removed/12424900>.

²⁵ “Hong Kong’s National Security Law : 10 Thing You Need To Know.”

Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal". Furthermore, in this case, if the National Security Law 2020 is upheld and a case is alleged to be a violation of the authority to interpret its provisions in the hands of the Beijing authorities, then Beijing will indirectly intervene in upholding the justice system in Hong Kong. This contradicts paragraph 4, subparagraph 2 of the opening section of the Sino-British Joint Declaration 1984, which states that Hong Kong will enjoy a high level of autonomy except in the field of defence and cooperation with foreign powers. Of course, the enforcement of justice by the Hong Kong Court does not belong to either. Furthermore, regarding a court that is free from intervention, The Sino-British Joint Declaration 1984 promised it in annexe III paragraph 2. Similarly, according to Susan L., London becomes the authority of the Court, which is domiciled in Hong Kong²⁶ by continuing to apply the common law system which is strengthened with the legitimacy stipulated in article 8 of the Basic Law.²⁷

Likewise, in the second analysis about the purpose of establishing the law and the obligations imposed by the law on the Hong Kong authorities to suppress and enforce sanctions, it is contrary to paragraph 4 subparagraph 2 of the Sino-British Joint Declaration 1984, which states that Hong Kong will enjoy a high level of autonomy except in the field of defence and cooperation with foreign powers. Of course, the formation and imposition of sanctions, especially for violating the provisions of the law established by Beijing, are not included in both. Furthermore, based on annexe II paragraph 2, the National People's Congress is only entitled to obtain a report as a form of registration of the provisions established by the Hong Kong legislative body and not make laws imposed on Hong Kong.

Third, about human rights, although human rights must still be upheld in upholding the 2020 Hong Kong Security Law, under the ICCPR and ICESCR regulations, it turns out that the same concept has also been proposed in the draft article 23 of the Basic Law. Yash Gai believes that the rights stated in the draft are not adequately represented.²⁸ About the Hong Kong Security Law 2020, it can be seen that this provision regarding human rights is contradictory if it is examined more deeply with other provisions in the same legislation, especially regarding secession and subversion.

The fourth analysis relates to the secession or separatist effort on the integration of the PRC, which was previously also contained in the draft article 23 of the Basic Law. Carole Petersen and Kelley Loper argue that this type of crime cannot be carried out in general in society.²⁹

With such a general arrangement, since it is still in the form of a draft amendment to article 23, many experts worry that this will also impact peaceful resistance actions commonly carried out through demonstrations, including voice support for the independence of Taiwan, Tibet and

²⁶ Susan L. Karamanian, "Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong," *Texas International Law Journal* 20, no. 1 (1985): 172.

²⁷ Ann Black and Gary Bill, *Law and Legal Institutions in Asia* (Cambridge: Cambridge University Press, 2011).

²⁸ Yash Gai, "The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administrative Region: Complimentaries and Conflicts," *Journal of Chinese and Comparative Law* 1, no. 1 (1995): 30.

²⁹ Ngok Ma, "Civil Society in Self-Defense : The Struggle against National Security Legislation in Hong Kong," *Journal of Contemporary China* 14, no. 14 (2005): 466.

Xinjiang.³⁰ If this is the case, then the provisions in the preamble paragraph 3 subparagraph five guarantee the freedom and freedom of speech for the people of Hong Kong.

The fifth analysis concerns subversive actions, including the destruction of public facilities used by the Hong Kong SAR authorities and attempts to intervene and overthrow government agencies within Hong Kong SAR. For the first provision, based on the facts in the main field, the demonstrations that took place throughout 2019, there was much damage to public facilities, including painting the Hong Kong SAR emblem with black paint³¹ and the raising of the British flag “Union Jack”, singing the British national anthem “God Save the Queen”,³² along with the flag of the Crown Colony of Hong Kong³³ However, it is necessary to realise together that the destruction of these facilities was preceded by acts of violence carried out by police officers who incidentally are indirectly responsible to Beijing through the Hong Kong SAR authorities.³⁴ It would be very unfair if the demonstrators were threatened with severe punishments without considering the basis of their actions. This manifests the human instinct to survive when faced with something that endangers their lives. For the second provision, there is no mention of allowing peaceful means to intervene in the Hong Kong SAR government’s steps as a manifestation of the application of democracy in Hong Kong. In line with paragraph 3, subparagraph 5 of the opening section of the Sino-British Joint Declaration 1984, the freedom of Hong Kong citizens was allowed to exist for 50 years post-1997. Thus, expressing opinions in public to provide criticism and suggestions or even demand the dissolution of an agenda or a body formed by the Hong Kong SAR authorities is something legal as promised by the Sino-British Joint Declaration 1984.

Furthermore, in his book, Jian Zhou quotes Ci Hai’s view on the definition of Military in 1991: “All issues directly related to war or armed forces are collectively called Military, mainly including national defence construction and army building, war preparation and implementation.”³⁵ With this understanding, it is clear that the defence affairs addressed in the Sino-British Joint Declaration 1984 in Paragraph 4, subparagraph two refers to the situation where war threatens Hong Kong with foreign powers. As such, only the army, the navy and the air force are under the direct instruction of Beijing. Meanwhile, the Hong Kong Police still should have been under the arrangement of Hong Kong authority since it has been widely known that police are assigned to local security instead of defence affairs.

Sixth, regarding acts of terrorism, according to HL Fu and Richard Cullen in their review of the provisions of terrorism in the draft article 23 of the Basic Law in 2002, the filing’s efforts to regulate acts of terrorism in Hong Kong are based on Beijing’s concerns since the ter-

³⁰ Ma.

³¹ “Protester Who Defaced Hong Kong City Emblem Is Still Angry,” *The Strait Times*, 2019, <https://www.straitstimes.com/asia/east-asia/protester-who-defaced-hong-kong-city-emblem-is-still-angry>.

³² “Hong Kong: Protesterssing God Save the Queen as Violence Erupts at Anti-China Demonstrations Again,” *Independent*, 2019, <https://www.independent.co.uk/news/world/asia/hong-kong-protests-violence-china-carriellam-god-save-queen-union-jack-a9106611.html>.

³³ “In Hong Kong, Colonial Flag Still a Symbol of Prized Values,” *AP News*, 2019, <https://apnews.com/article/8a24161212c140ebaf9eac02049a978a>.

³⁴ “Hong Kong Got Trapped in a Cycle of Violence,” *BBC News*, 2019, <https://www.bbc.com/news/av/world-asia-china-49369052>.

³⁵ Jian Zhou, *Fundamentals of Military Law* (Shanghai: Springer, 2019).

rorist attacks experienced by the United States on 11 September 2001.³⁶ As in the subversive provisions in the same regulation, regulations regarding acts of terrorism are not specifically designed and are still very general so that in certain circumstances, it can ensnare a person or group with these elements, even though not really acts of terrorism, like the destruction of public facilities to defend oneself from aggressive acts of the police.

Seventh, regarding collusion with foreign powers, there are vague provisions regarding funding from foreign organisations relating to Hong Kong people's efforts to obstruct the formation of regulations by Beijing and the Hong Kong SAR authorities. This could ensnare the assistance to be channelled by community organisations such as church affiliations when Hong Kong was hit by prolonged difficult times such as the demonstrations in 2019, which caused the people's economy to disrupt.³⁷

Finally, regarding the police duties regulated by the Hong Kong Security Law 2020, it is contrary to the Sino-British Joint Declaration 1984, which guarantees the application of a high level of autonomy in Hong Kong, except in the field of defence and relations with foreign powers as contained in paragraph 4 subparagraph 2. As is generally known in the international community, the police serve as an institution that controls public security.³⁸ The Sino-British Joint Declaration 1984 authorised the Hong Kong SAR authorities to maintain the security of the general public as stated in paragraph 4 subparagraph 11. Thus, in terms of security over Hong Kong territory, Beijing is not allowed to intervene, including giving authority and an obligation to the police authority, which is obliged to maintain the security of the public because this authority is not included in defence and relations with foreign powers which are two of the powers that belong to Beijing based on The Sino British Joint Declaration 1984.

With this explanation, the writer agrees with Eliza W. Y. Lee, who argues that the making of Basic Laws is incompatible because it does not pay attention to Hong Kong's political, economic and social climate, which has been moving dynamically since its design in the 1980s.³⁹ Following Simma's understanding of the object and purpose of international treaties, if indeed China intends to show good faith to the Sino-British Joint Declaration 1984, especially in the provisions of the opening section of paragraph 4 subparagraph 12 regarding the establishment of a Basic Law to regulate Hong Kong, then China should make efforts to form a new Basic Law or amend the existing Basic Law so that it is in line with the dynamic environment of Hong Kong society in living a democratic life as a pillar of support for their lifestyle. This is important to do considering that these amendments go hand in hand with the main objective of the establishment of the Sino-British Joint Declaration 1984 at the same reference section and also annexe I paragraph 1, which promises a lifestyle for a society that had not changed in the years post-1997 when Hong Kong was returned to the sovereignty of the PRC. Since being

³⁶ H. L. Fiu and Richard Cullen, "National Security Law in Hong Kong : Quo Vadis a Study of Article 23 of the Basic Law of Hong Kong," *Pacific Basin Law Journal* 19, no. 2 (2002): 186.

³⁷ "5 Charts Show How to Protest in Hong Kong Have Affected The City's Economy and Stock Market," CNBC News, 2019, <https://www.cnbc.com/2019/12/26/hong-kong-protests-impact-on-economy-stock-market-in-five-charts.html> .

³⁸ International Committee of the Red Cross, "To Serve and to Protect : Human Rights and Humanitarian Law for Police and Security Forces" (2013).

³⁹ Eliza W. Y. Lee, "Governing Post-Colonial Hong Kong : Institutional Incongruity, Governance, and Authoritarianism," *Asian Survey* XXXIX, no. 6 (1999): 941.

passed on 30 June 2020, on 2 December 2020, Joshua Wong, Ivan Lam and Agnes Chow have been found guilty of their involvement in demonstrations based on the Hong Kong extradition note. Each was imprisoned for 13, 10 and seven months, respectively.⁴⁰

The Arrangement of Article 27 VCLT 1969

Based on the opinion expressed by Dörr in his commentary on article 27 of the 1969 Vienna Convention, he stated that this article obliges a party to an international agreement to implement an international agreement that it has made, regardless of the legal situation within the country.⁴¹

Given that the meaning of internal law is not explained in article 2 of the same convention, Mark E. Villiger also, in his commentary, stated that logically the convention provides a broader spectrum of internal law coverage, which includes all written and unwritten laws. Including laws, decrees, orders and decisions within the scope of the law of a country, regardless of what state institution issued them, both the executive, legislative and judiciary.⁴² According to David Thór Björgvinson, article 27 of the convention, as well as other international law, does not impose specific obligations regarding how the objectives of an international treaty are to be achieved by the application of national law.⁴³ Anneliese Quast Mertch added that in this context, if the state fails to fulfil the main objective of forming an international agreement in its integration into national law, then the concept of state responsibility is born, which is important to ensure the effectiveness of the enactment of international law.⁴⁴ Valerie Selvie Sinaga argues that article 27 is made with the premise that a country cannot agree to an international treaty that is contrary to its national law so that it can be said that the contradictory conditions between national law and international treaties have been resolved before an international agreement binds the parties.⁴⁵

In article 27, it is stated that the application of the article does not preclude article 46, which talks about the provisions of national law regarding the ability to enter into international agreements. National law cannot be used as an excuse to say that international treaties cannot be implemented because they are contrary to national law unless it has been proven objectively to other countries. Sinaga argues that article 46 is an effort to reaffirm the provisions of article 27.⁴⁶ Likewise, Fidelia quoted Dokhala's opinion that this provision was logical because it was appropriate for a country's internal problems not to be used as an excuse for implementing an

⁴⁰ "Hong Kong Activists Joshua Wong Jailed for 13 and a Half Months over Protest," *The Guardian*, 2020, <https://www.theguardian.com/world/2020/dec/02/hong-kong-activist-joshua-wong-jailed-over-protest-police-hq>.

⁴¹ Dörr and Schmalenbach, *Vienna Convention on The Law of Treaties : A Commentary*.

⁴² Mark. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, Leiden, 2009).

⁴³ David Thór Björgvinson, *The Interaction of International Law and Domestic Law* (Cheltenham: Edward Elgar Publishing Limited, Cheltenham, 2015).

⁴⁴ Anneliese Quast Mertch, *Provisionally Applied Treaties: The Binding Force and Legal Nature, Leiden* (Leiden: Koninklijke Brill NV, Leiden, n.d.).

⁴⁵ Valerie Selvie Sinaga, *Hukum Perjanjian Internasional: Diskursus Tentang Konvensi Wina 1969* (Jakarta: Penerbit Universitas Katolik Atma Jaya, 2019).

⁴⁶ Sinaga.

international agreement because it would only harm partner countries.⁴⁷ In practising this provision, several countries reinforce this provision through their legal instruments, such as Russia, which stipulates in its constitution in article 15 paragraph (4) of the 1993 Constitution which states that it recognises that the principles and norms are generally understood in the world of international law and treaties. International Law of the Russian Federation is an integral part of the legal system of the Russian Federation.⁴⁸ There is no official name for the relationship between international and national Law in Russia. However, B. L. Zimnenko, in his book, argues that the term "interaction" is more appropriate to use than the term "correlation". The term correlation is closely related to the international legal system and national monism and dualism, which tend to be static. In contrast, Zimnenko quoted V. G. Butkevich's opinion that interaction includes all efforts to harmonise international Law and National Law and vice versa. This effort does not emphasise what material is to be matched but rather the procedures it takes to achieve that result. Thus, the harmonisation effort is not a correlation but an attempt to deliberately interact with national and international law.⁴⁹

Concerning the Sino-British Joint Declaration 1984 and Hong Kong Security Law 2020, the Chinese Ambassador to the UK stated that the British statements regarding the 2020 Hong Kong Security Law were an effort to show that China considered an act of trampling on basic norms from the concept of international relations because Hong Kong is no longer a British colony and Hong Kong was handed over in 1997 so that the integration that occurs between Hong Kong and China causes all British statements regarding Hong Kong to be an attempt to interfere in China's domestic affairs.⁵⁰ Thus, although there has been no official statement regarding the reluctance or inability of the Beijing authorities regarding Hong Kong to implement the Sino-British Joint Declaration 1984 concerning the Hong Kong Security Law 2020 if James W. Garner's opinion⁵¹ is applied to analyse this legal incident, then the PRC has been proven to have been in breach of the treaty on the Sino-British Joint Declaration 1984 by ratifying the Hong Kong Security Law 2020, which violates article 27 of the 1969 Vienna Convention. Furthermore. The statement of the Chinese Ambassador to Britain seems to negate that Britain and China are bound by the Sino-British Joint Declaration 1984, which promised autonomy for Hong Kong for 50 years post-1997. Moreover, considering that Britain is a party to the Sino-British Joint Declaration 1984 and China, the people of Hong Kong consider Britain a moral obligation to Hong Kong.⁵² The UK is logically also entitled to comment on China's actions against Hong Kong based on the *pacta sunt servanda* principle contained in article 26 of the

⁴⁷ Fidelia, Syahmin A.K., and Dedeng Zamawi, "Analisi Vienna Convention 1969 Mengenai Ketentuan, Pembatalan, Pengakhiran Dan Penundaan Atas Suatu Perjanjian Internasional," *Jurnal Ilmiah Penegakan Hukum* 6, no. 2 (2019): 112.

⁴⁸ William Elliott Butler, *Russian Public Law: The Foundations of a Rule-of-Law State: Legislation and Documents* (London: Wildy, Simmonds & Hill Publishing, 2009).

⁴⁹ B. L. Zimnenko, *International Law and Russian Legal System* (Utrecht: Eleven International Publishing, 2007).

⁵⁰ "China Ambassador to the UK: 'Hong Kong Is No Longer under Colonial Rule,'" Sky News, 2020, <https://www.youtube.com/watch?v=JQR28gJxJIQ>.

⁵¹ James W. Garner, "The International Binding Force of Unilateral Oral Declarations," *The American Journal of International La* 27, no. 3 (1933): 494.

⁵² "How 156 Years of British Rule Shaped Hong Kong," Vox, 156AD, https://www.youtube.com/watch?v=StW7oGSR_Mg.

1969 Vienna Convention that states that are bound to a certain agreement are obliged to carry out the provisions of the agreement in the spirit of good faith.

After one year of its implementation, Johannes Chan believes that the Hong Kong Security Law has drastically changed the legal landscape in Hong Kong. People in Hong Kong have been parted into pros and cons. Those who support the Hong Kong Security Law argue that it has effectively restored social order and security in Hong Kong. However, for those who do not agree, the Hong Kong Security Law had robbed them of the freedoms that had been promised when Hong Kong was handed over in 1997. The freedom of Hong Kong citizens has become their unique identity and differentiates them from Chinese citizens living across the border.⁵³ The enactment of the Hong Kong Security Law makes the Hong Kong people continue to react because they feel that these legal regulations violate the concept of the rule of Law that China, as part of the international community, should obey.⁵⁴ Thus, the implementation of the Hong Kong Security Law is actually counter-productive to the purpose of its implementation. The instrument that was made to ensure the security of Hong Kong, due to its implementation and regulation, which violated the Sino-British Joint Declaration 1984 as a binding legal instrument and made by the parties voluntarily, became a source of chaos and social instability in Hong Kong.

CONCLUSION

By implementing the Hong Kong Security Law 2020, the PRC Government has fulfilled the element of the breach of the treaty on the Sino-British Joint Declaration 1984. The Hong Kong Security Law 2020 has many provisions with serious penalties, even in the form of life imprisonment for serious acts regulated by the stipulation of criminal elements so general that it has the potential to hinder the purpose of establishing the Sino-British Joint Declaration 1984, namely to provide a high level of autonomy during the post-Hong Kong handover. Although Hong Kong is a territory of China, and logically China has the right to exercise its sovereignty over Hong Kong, by signing the Sino-British Joint Declaration 1984, China has submitted to an agreement that limits its sovereignty over Hong Kong except for defence and cooperation with foreign powers during the promised time. Failure to fulfil this agreement will only lead to the blurring of the concept of the rule of law, which will cause endless chaos and take many victims as a result of the dissatisfaction of the Hong Kong people with the implementation of the Hong Kong Security Law 2020.

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⁵³ Johannes Chan, “National Security Law 2020 in Hong Kong : One Year On,” *Academia Sinica Law Journal* 30 (2022): 25.

⁵⁴ Jie Zhu, *Critique of Hong Kong Nativism* (Wuhan: Springer, 2019).

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