



# **Hong Kong's National Security Law, Article 23 Legislation and Human Rights Defence**

**A Workshop Report**

## Introduction

SOAS China Institute and Georgetown Center for Asian Law jointly hosted a closed door workshop on Hong Kong's National Security Law and its legislative consultation regarding Article 23 of the Basic Law in early February 2024 at SOAS University of London. The workshop was held to examine and debate the significance and implications of the Hong Kong government's recent announcement of consultation on the "Safeguarding National Security Ordinance" as a fulfilment of the constitutional requirement of Article 23 of the Basic Law of Hong Kong.

This report is a summary of the issues discussed at the workshop. The event was held under the Chatham House Rule, and contributions have been anonymised. The workshop was intended to be an opportunity for nearly 40 scholars, legal practitioners, journalists, human rights defenders, and NGOs to deepen their understanding of the background of Article 23 legislation, study the consultation document in light of international human rights principles and comparative best practices, and discuss appropriate response to the legislative consultation and the broader implications on Hong Kong society. Views reported here were not necessarily shared by all participants. They do not represent the views of the two institutions co-hosting this event.

## **Hong Kong's 2020 National Security Law (NSL) and the "One Country, Two Systems" Framework**

The workshop begins with a recollection of the implementation of the NSL, which China imposed on Hong Kong in 2020, with reference to the global trend of illiberalism. Speakers commented that the experiences of Hong Kong in the previous three years can serve as a snapshot of how a liberal order could fall under authoritarian regimes. In other words, Hong Kong today has become a prototype for autocracies worldwide for autocratic friends to reference. As an authoritarian regime, China sees the liberal values and institutions of the Chinese people in Hong Kong, who had been demanding liberal reforms through mass mobilisations, as existential threats to the survival of the regime. Thus, the promulgation of the NSL reveals the regime's desire to make everything related to "national security" to warrant complete control in Hong Kong. Eventually, China will transplant the concept of a "holistic view of national security" into Hong Kong society.

Speakers also suggested that the historical background of Hong Kong's "one country, two systems" shall not be overlooked. On the one hand, the Basic Law could be considered a liberal document because, in the early 1980s, the Chinese Communist Party under Deng Xiaoping's leadership took a relaxed approach to governing China. On the other hand, Hong Kong's "One Country, Two Systems", as some social scientists and legal historians argued, was modelled after the Seventeen Point Agreement, which was accepted as a treaty with Tibet after 1949 but later failed. China's logic of pragmatism, rather than a belief in liberalism, could be evident after the Tiananmen crackdown in 1989; the draft of the Basic Law was tightened as the Chinese Communist Party's trust in Hongkongers declined.

They also reminded the workshop participants that the significant flaws of the Basic Law of Hong Kong, as a mini-constitutional document under the "One Country, Two Systems" framework, shall be evaluated. One major flaw refers to the power of Basic Law interpretation ultimately entitled to the Standing Committee of the National People's Congress of China rather than the local court in Hong Kong. Sharing none of any liberal values, the Chinese authorities had been using their interpretation

power to intervene in judicial independence and the legal system in Hong Kong, where most of the population placed the rule of law as the top value in the city. Another major flaw of the Basic Law concerns democratisation. Ever since the handover, China has been foot-dragging over democratic reforms in Hong Kong, ranging from the interpretation of the Basic Law in 2004 that requires Hong Kong to seek permission from the central authorities before changing the method of selecting its government and legislature to the rejection of universal suffrage unless a screening committee was installed for the Chinese government to filter out candidates they dislike.

Workshop participants paid massive attention to the state of judicial independence in Hong Kong. It is recognised that the independent courts have been vulnerable to the executive powers, both from the Hong Kong and Chinese authorities, since the beginning of the handover in 1997. In particular, the right of abode saga in 1999 marked the start of the erosion of the rule of law in Hong Kong, as Beijing overruled the Court of Final Appeal's decision by interpreting the Basic Law. Such erosion of the rule of law could be attributed to the fact that the Chinese authorities were displeased by the Hong Kong court's view that it had jurisdiction to review acts of the Chinese authorities. Yet, it could also be attributed to the Hong Kong government, which acted *ultra vires* by bypassing the Court of Final Appeal to seek Beijing's interpretation of the Basic Law. While it appeared that much more could have been done to stop the executive governments of Hong Kong and China from abusing their powers in the right of abode case, workshop participants also appreciated that the legal profession and civil society had not always selected their best possible strategies to resist.

The introduction of the 2020 NSL was a direct attack on judicial independence and effectively an amendment to the Basic Law, where the provisions of the NSL are not subject to judicial review in Hong Kong and can technically override all local laws. The NSL implementation also showed that the Chinese authorities do not trust local judges. Thus, they need to wield control over the judiciary by introducing a system of NSL-designated judges. Worse still, under the NSL, the Committee for Safeguarding National Security and the Office of Safeguarding National Security are not subject to the local courts' jurisdiction. Regarding criminal procedure, due process rights

become highly restricted, and criminal suspects can be extradited to China for trial following the NSL. Liberal institutional pillars in Hong Kong, such as partially democratic elections, civil society organisations and the education system, are either cracked down or reshuffled to promote “patriotism” among the next generation and the whole population of Hong Kong.

Speakers highlighted the fact that, even though Hong Kong’s Basic Law provides a constitutional obligation for the government to apply the International Covenant on Civil and Political Rights (under Article 39), the critical issues around freedoms of speech, association, peaceful assembly, are all remaining the same before and after the implementation of the NSL. Such a lack of protection for those rights in Hong Kong has been present even before the NSL was introduced; the NSL, alongside the latest legislative attempt of Article 23 of the Basic Law, is speeding up autocratisation. That said, it is essential to acknowledge the contributions of the international human rights expert mechanisms, the United Nations’s human rights treaty body reviews and special procedures in keeping the human rights violations in Hong Kong alive in the international community. These expert mechanisms have a remarkable level of engagement in the Hong Kong question, ranging from the UN Committee Against Torture’s opinion on the risks of the rule of law in Hong Kong in 2015 to the UN Human Rights Committee’s latest recommendations on repealing the NSL. The intervention of UN special rapporteurs on Hong Kong’s domestic legislative proposal, such as the crowdfunding law, demonstrates how niche and rigorous analysis can have broad ripple effects when Hong Kong civil society cannot voice its concerns.

## The Article 23 Legislative Consultation

### *Major Observations*

In the second session of the workshop, speakers and participants highlighted several significant observations of the Hong Kong government's consultation document (the Document) on Article 23 legislation:

*Extended enforcement measures without judicial scrutiny:* The document proposed the extraterritorial application of the proposed legislation, as well as enforcement mechanisms like upholding presumption against bail, an extension of detention period without charge, delaying or denial of suspect's access to a lawyer, revocation of passports of suspects absconding overseas and elimination of judicial procedures to speed up the trial process. It is suggested that the presumption of bail be restored to the local Article 23 legislation and a mandatory bail-granting provision be provided when pre-trial detention disproportionate to the likely offence sentence would happen. Furthermore, judicial scrutiny shall be required to extend police powers rather than merely relying on executive decrees.

*Inconsistency between the offences and human rights protections:* The Document proposes to tighten up existing law and introduce new offences in five areas: (1) treason, (2) insurrection, incitement to mutiny and disaffection, and acts with seditious intention, (3) theft of state secrets and espionage, (4) sabotage endangering national security and (5) external interference and organisations engaging in activities endangering national security. However, expanding the scope of offences is not aimed at improving compliance with human rights principles but at further extending the application of the law in non-violent acts that are not considered to endanger national security from a liberal point of view. While the Document repeatedly stresses that safeguarding national security is fundamentally consistent with the respect and protection of human rights, speakers argued that such a notion is conceptually wrong as under both international human rights law and constitutional jurisprudence, a legitimate aim (safeguarding national security) is never sufficient to justify restrictions of rights. The principles of legality, which require

laws to be narrowly and precisely defined and enforced, and the principle of proportionality must be considered.

*Extensive references to foreign legislation:* the Document appears to justify the legislation about similar offences and legal rules in other common law jurisdictions, such as the US, the UK, Canada and Singapore. However, speakers commented that such comparisons are selective and drawn out of context. On the one hand, the Document does not follow the UK's practice of repealing sedition law but extends the scope of such offence. On the other hand, the Document ignores extensive safeguards of national security laws overseas, such as narrowly defined official secrets and judicial authorisation of extending detention, independent periodic review of enforcement, and wider social-political scrutiny by free media, democratic elections and independent judiciary.

*Wholesale adoption of Mainland China's concept of national security and state secrets:* *The Document adopts Mainland China's concept that covers 20 traditional and non-traditional areas of security. Such a broad definition would make the intent to endanger national security more fluid and make it difficult for a defendant to challenge whether their conduct has endangered national security. The speaker suggested that there should be a requirement that the act concerned must cause actual harm to national security or pose a significant risk of damage to national security. Also, procedural safeguards should be available to warrant defendants' fair hearings, adequate opportunity for defendants to challenge prosecution evidence, and the right to access lawyers of choice.*

*Unrealistic consultation period:* speakers noted that there are many "devils in the details" of the Document, such as the broad definition of "state secrets", "espionage", "external interference", and a new offence of doing an act related to a computer or electronic system that endangers national security. Also, the Document proposed many interactions with existing law, such as the Societies Ordinance, to extend the surveillance over lawful entities by the police. The short consultation period is thus unrealistic to let stakeholders genuinely review the Document and provide opinions essential to improve the substance of the legislative proposal.

*Implications for the digital space:* speakers forecasted that the new Article 23 legislation would worsen the situation in at least three ways. Firstly, the proposed offence of “misprision of treason” would risk whether OSPs are bound by the requirement to report to the authorities. Secondly, it is uncertain whether OSPs or ISPs would be required to remove confidential information online that was considered prejudicial to the interests of the Hong Kong and Chinese authorities under the proposed offence of “unlawful disclosure of information that appears to be confidential”. Thirdly, the extraterritorial application of the new legislation would impact Hongkongers working in foreign or multinational OSPs and ISPs inside or outside Hong Kong, following the possible application of the offences above. One must also note that, as highlighted by speakers, many OSPs have always received data requests from the Hong Kong authorities under the NSL. Those small, local OSPs may not have adequate legal resources to deal with the law enforcement’s request and thus often comply immediately. The active duty to hand over information to the authorities would create an atmosphere of mutual surveillance that discourages signs of solidarity among Hongkongers.

#### *Implications for Hong Kong’s Path of Autocratisation*

Speakers also argued that the current and new national security legislations would further impact Hong Kong society and the next generation of Hongkongers. These developments would only reinforce the city’s path of autocratisation. The national security education required by the NSL not only assimilates Hong Kong’s distinct cultural and social identity into the state-driven Chinese identity but also poses threats to the rights of children, particularly the right to education. The post-NSL education reforms like abolishing Liberal Studies and imposing mandatory trips to mainland China, combined with various forms of censorship, have weakened the education system as a site of shaping collective but pluralistic identities and respect for different cultural identities. Centring national security in the education system, including the “de-radicalisation” program in juvenile custody, would only propagate the curriculum. Eventually, the ideology of the Chinese Communist Party would be institutionalised.

It is also foreseeable that Hong Kong's path of autocratisation would be more comprehensive after the passage of Article 23 legislation. On the one hand, the authorities will continue to attack or weaken existing institutions still embedded with a certain degree of liberal values by ideological re-engineering, such as the transplantation of China's holistic view on national security into all facets of Hong Kong. On the other hand, the governments of Hong Kong and China are aggressively defensive about building a virtual firewall in Hong Kong to cut its external ties and isolate it from the global community. This will be done by criminalising information dissemination and access via external sources as "disinformation" or "espionage" and prohibiting information flow from within by the offences of "external interference" and "theft of state secrets". In short, the right to access information in Hong Kong will be further restricted, and a new virtual firewall could effectively block liberal norms and ideas which are threats to the existence of the Chinese regime.

### *Fear and Censorship in Hong Kong Society*

Speakers suspected the rationale of such an overbroad legislation proposal was to induce fear or uncertainty to effectively maximise government control over society and the digital space, despite the fact that digital space in Hong Kong remains more open than that in mainland China. Participants also expressed worries that the offence of external inferences would block human rights monitoring and advocacy work, and the whole legislation would eventually turn the population in Hong Kong into collective surveillance and even victims of "hostage diplomacy". Such mutual surveillance could happen in schools, workplaces and even families. Regarding looking forward, participants expressed the need to develop more in-depth research on how law enforcement and public prosecution behave under the national security regime since most of the population in Hong Kong encounters the police more often than the court in daily life. Besides, it is essential to observe and study how different safeguards of the rule of law, including the legal aid regime, jury system, and other administrative bodies, would be further developed into instruments of censorship after the passage of the Article 23 legislation.

## Reflections of Stakeholders

At the third session of the workshop, academics specialised in contentious politics, civil society, academic freedom, international relations, and diasporic activism. They provided their insights into the future of the Hong Kong community in response to Article 23 legislation. Then, participants were invited to share their reflections and suggestions for the next step.

### *The Global Context*

One academic presenter highlighted that, as many scholars in contentious politics and social movements indicated, non-violent civil disobedience has become less effective in bringing political change worldwide in the past decade following democratic backsliding and autocratic advances. In particular, transnational activism, which refers to the strategy of shifting the cost of activism from local consumption to transnational mobilisation, has met with different forms of autocratic repression, such as Russia's "fortress strategy" that isolates local activists and political prisoners from their supporters outside the border, and the use of extraterritorial reach of various legal instruments to cut off transnational activism.

Of paramount importance is to distinguish "transnational repression" (TNR) and "repression of transnational activism" (RTA), as they are targeting different exile groups and individuals strategically. TNR mainly focuses on eliminating "voice after exit" in host countries, say the diaspora, while RTA specifically targets connections between activists at home and abroad.

In the context of Hong Kong, which is undergoing democratic backsliding, it is essential to pay attention to China's "autocratic advances", which refers to the playbook of autocratic rule shared by many authoritarian regimes today. China's export of surveillance technology aids to countries evading from economic sanctions like Russia, as well as increasing its fiscal capacity from international trade under economic globalisation, have strengthened the capacity of the Chinese state to crack down on the opposition and transnational activism. Combined with the rise of

populism in Western democracies in light of the massive creation of refugees and asylum-seekers escaping from autocratic rules, the future trajectory of Hong Kong appears to be pessimistic. That said, it is still essential to promote narrative justice for the Hong Kong community to preserve their stories, memories and histories, which can be discovered by people in Hong Kong when the appropriate time comes.

### *Threats to Academic Freedom*

Workshop participants also raised concerns about academic freedom in the UK following the expanded autocratic rules from China and Hong Kong. The new Article 23 legislation would further incapacitate scholars in China and Hong Kong studies to carry out good quality academic research due to the risk of criminal liability under the labels of “external forces”, “foreign interference”, “state secrets”, and “espionage”. Even before the Article 23 legislative consultation, academics in the UK had already expressed concerns about self-censorship in teaching and research, developing academic exchange as well as forming research partnerships with universities and scholars based in Hong Kong, alongside stigmatisation of being insufficiently or exceedingly critical of China and Hong Kong in the public sphere. Academic institutions in the UK would also worry about their choice of speakers in academic and public-facing events in light of their heavy reliance on international student recruitment, especially from China, as the primary source of income. Last, the sense of fear and self-censorship would be enhanced by the bona fide institutional guidelines in teaching and research in response to Hong Kong’s national security laws. There is also a reflection by scholar participants on how overseas academics should position themselves when engaging in research about Hong Kong. It appears inevitable that behaviours will be adjusted to secure safe working relationships with Hong Kong-based scholars under the new legal environment. Yet, it is also an exercise of self-censorship. However, it is debatable whether standing at the moral high ground to be an intellectual critique could help get into the territory for greater access to information and maintaining connections. One participant highlighted that such debate is familiar within the scholarship of China studies, such as the German debate on sinologists working in China, and this could be further studied as a reference point.

### *The Hong Kong Community on Ground*

Workshop participants raised an essential observation that it is not helpful to consider “Hong Kong is dead”. Instead, keeping Hong Kong “alive” at local, regional and international levels is paramount. However, some workshop participants also recognise that Hongkongers who stay behind and those who migrate abroad might follow divergent paths. It appears that Hong Kong immigrants are relatively better educated and much better off than those who remain in Hong Kong and must adapt to life under fear. Tensions between the local and immigrant Hong Kong communities over interpretations of events happening inside Hong Kong would continue to emerge. That said, the immigrant communities should find ways to deliver and maintain a sense of hope receptive to the local community.

### *The Hong Kong Immigrant Community*

Workshop participants identified several observations and tensions among the Hong Kong immigrant communities (not only in the UK but worldwide) regarding their coping mechanisms and strategies of public engagement in response to the developments in Hong Kong. One identified tension is whether the communities shall further “exceptionalism “ or internationalise the case of Hong Kong before the global community, especially when authoritarianism and democratic backsliding continue to flourish worldwide. It would be academically and practically helpful to frame the Hong Kong question in the broader context of China’s development and expansion of its governance at regional and global levels today.

Another observation is the threat of surveillance by collaborators of the autocratic governments in the hosting countries. The use of the NSL today, combined with the bounty warrants against overseas Hong Kong activists, has provided economic incentives to create an atmosphere of intimidation and surveillance overseas. The Article 23 legislation would further expand the spying narratives abroad and intensify the question of trust among Hong Kong immigrant communities. The growing rivalry within the immigrant communities and between activist groups shall also be noticed.

More genuine dialogues and closed-door intellectual conversations would be a way of creating a level of trust.

At the end of the workshop, participants shared their views on the tension of developing optimism amid the pessimistic reality in light of the analysis of the impacts of the Hong Kong government's national security legislation and its extraterritorial reach. Undoubtedly, the Article 23 legislation is an anxiety-inducing event that would impact both local and immigrant Hong Kong communities in their everyday life, in addition to the fact that many individuals inside Hong Kong or from the Hong Kong immigrant community are still dealing with stress and their traumatic experiences from the events in Hong Kong in the previous years. It is suggested that the Hong Kong immigrant communities aim to develop symbols of hope in international or transnational domains.

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