

**ROUNDTABLE DISCUSSION****ARTICLE 23 LEGISLATION: CONCERNS AND IMPERATIVES 13 YEARS ON****WRITTEN PROCEEDINGS**

**30 August 2016, 1.00-7.00 pm, 11/F, Cheng Yu Tung Tower (closed-door event)**

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**INTRODUCTION**

Article 23 of the Hong Kong Basic Law requires Hong Kong to “enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

Enacting legislation to implement this provision has been one of the most controversial constitutional law issues in Hong Kong. Part of the controversy fits with the global challenge of balancing security and rights. Yet part of it is unique to Hong Kong: its lack of democratic governance, the weak institutional protection of autonomy and rights in the territory against erosion thereof from China – a one-party dictatorship with a bleak record of using security laws to clamp down on legitimate dissent, the huge power imbalance between China and Hong Kong, and distrust between the general public and the Chinese and Hong Kong governments. No other issue better illustrates the intricate relationship between national security, democracy, human rights protection, separation of powers, civil society and autonomy in Hong Kong than the attempts to enact Article 23 legislation in Hong Kong. How that issue will be resolved will have far-reaching ramifications on the freedoms and principles of legality that constitute the identity of Hong Kong society, as well as its constitutional relationship with China.

The Hong Kong Government’s attempt to introduce such legislation in 2003 led to a demonstration of half a million people, forcing the Government to offer major concessions and ultimately, to shelf the bill. Since then, there has been no further attempt to introduce Article 23 legislation. However, given the obligation in the Basic Law, the issue will no doubt be re-opened in the not too distant future. In the past year, in light of social movements in Hong Kong that China deem secessionist, there have been renewed calls from pro-China figures for the enactment of Article 23 legislation. This roundtable aims to update the discourse on the subject of Article 23 in light of relevant developments in Hong Kong, China and worldwide in the last 13 years that may impact upon the forces for and against introducing security legislation in Hong Kong and the form that such legislation should take. These developments include: the increase of Chinese interference in Hong Kong’s affairs, the lack of significant progress on democratization in Hong Kong, the occurrence of a large-scale civil disobedience movement and other incidents that are seen to threaten public order and the rule of law in Hong Kong, the rise of localist forces and Beijing’s perception of these

developments, the increase in media self-censorship in Hong Kong, suspected attempts by the Mainland authorities to enforce Mainland security law in Hong Kong, the passing of Article 23 legislation in Macau, the high-profile suppression of political dissent in the Mainland, the proliferation of international terrorism, the accumulation of experience by Western democracies on the enactment and implementation of post-911 security measures, internal instability in China and developments in China's national security policy.

The aim of the roundtable discussion is a modest one of identifying what the stakes of enacting *and* not enacting Article 23 legislation are, respectively, in light of developments in the past decade, assuming that legislation along the lines of the Revised Bill with Committee Stage Amendments that stood as at 10 July 2003 is reintroduced. By throwing into relief what exactly falls into the two sides of the balance on the enactment of security legislation in Hong Kong, the discussion will inform law-makers and the public on how that balance should be struck when the issue arises for deliberation again.

The format of the roundtable will entail brief presentations on the issues in national security law in global and Chinese perspectives. The discussion which will follow will comprise two main sessions. The first seeks to identify the new and remaining concerns in relation to Article 23 legislation, given the global, national and local developments in the past decade. The second session focuses on the other side of the balance: the issues triggered by lack of Article 23 legislation and the implications and concerns that arise if its enactment is put on halt indefinitely.

#### ROUNDTABLE PARTICIPANTS

Ms Amy Barrow, The Chinese University of Hong Kong  
Ms Cora Chan, The University of Hong Kong  
Professor Albert Chen, The University of Hong Kong  
Mr Eric Cheung, The University of Hong Kong  
Ms Surabhi Chopra, The Chinese University of Hong Kong  
Professor Michael Davis, Centre for Comparative and Public Law, The University of Hong Kong  
Professor Fiona de Londras, University of Birmingham  
Professor Fu Hualing, The University of Hong Kong  
Mr Danny Gittings, HKU School of Professional and Continuing Education  
Dr Denis Halis, University of Macau  
Dr Eric Ip, University of Hong Kong  
Dr Huang Mingtao, Wuhan University  
Dr Margaret Ng, Sir Oswald Cheung's Chambers, Hong Kong  
Mr Malik Imtiaz Sarwar, Malik Imtiaz Sarwar Advocates & Solicitors, Malaysia  
Ms Puja Kapai, The University of Hong Kong  
Professor Lin Feng, City University of Hong Kong  
Dr Lo Pui Yin, Gilt Chambers, Hong Kong  
Professor Carole Petersen, University of Hawaii  
Mr Benny Tai, The University of Hong Kong  
Ms Doreen Weisenhaus, The University of Hong Kong  
Professor Simon Young, The University of Hong Kong

**RUNDOWN**

1.00-1.15	Opening remarks and introduction
1.15-1.30	Professor Fiona de Londras – Security, Liberty, and the Seductive Power of “Balance”
1.30-1.45	Mr Malik Imtiaz Sarwar – The Role of Courts in Balancing Rights and Security: the Malaysian Experience
1.45-4.00	Discussion Part I
4.00-4.15	Coffee break
4.15-6.30	Discussion Part II
6.30-7.00	Conclusion

**ABBREVIATIONS**

2003 Revised Bill	National Security (Legislative Provisions) Bill 2003 and Committee Stage Amendments as at 10 July 2003
A23	Article 23
BL	Hong Kong Basic Law
Chan	Cora Chan
CE	Chief Executive
CFA	Court of Final Appeal
Chen	Albert Chen
Cheung	Eric Cheung
Chopra	Surabhi Chopra
Davis	Michael Davis
de Londras	Fiona de Londras
Fu	Hualing Fu
Gittings	Danny Gittings
Halis	Denis Halis
Huang	Mingtao Huang
ICCPR	International Covenant on Civil and Political Rights
Ip	Eric Ip
Kapai	Puja Kapai
LegCo	Legislative Council
Lin	Lin Feng
Lo	Pui Yin Lo
Ng	Margaret Ng
NPCSC	Standing Committee of the National People’s Congress
Petersen	Carole Petersen
Tai	Benny Tai
Weisenhaus	Doreen Weisenhaus
Young	Simon Young

**13:15 – 13:30: PROFESSOR FIONA DE LONDRAS**  
**SECURITY, LIBERTY, AND THE SEDUCTIVE POWER OF “BALANCE”**

1. This presentation focuses on the idea of balance, which is ubiquitous across multiple jurisdictions. “Balance” as an idea is a dominant concept used to hide or elide some difficulties around the two things that balance is supposed to be balancing, *viz.* security and liberty.
2. Three claims will be made in this presentation:
  - a. Security is an indefinable concept.
  - b. As against security, liberty has been determined to be contingent on the former, i.e. it may be forfeited where security claims are made.
  - c. Balance only pretends to be objectively determinable.
3. There are at least five ways in which security may be defined:
  - a. As a lack of or resilience to violence experienced interpersonally
  - b. As a lack of or resilience to viable threats to the state
  - c. As a lack of or resilience to challenges to the established order, e.g. rebellion, sedition
  - d. As a lack of or resilience to transnational disruption
  - e. As something to which an undefined “we” have a right
4. The reality is that “security” is a concept in the eyes of the beholder. Its definition is a gift of the prevailing order. Those asserting insecurity are those holding monopolies on the relevant information. More often than not, claims of “security” are mere assertions and not justifiable.
5. The language of “security” is rhetorically compelling. It is a common good we accept as requiring special treatment in legal regimes. There is also a growing tendency of a human right to security, which buttresses the security claim.
6. In rhetorical terms, all claims to liberty are subordinate to claims to security. This is the way many legal regimes construct the relation of security to liberty. The ICCPR is such an example; within international human rights law, there is a capacity for states to derogate from human rights.
7. There is the “conceit of trade-off” – an idea that liberty can and must be traded off for security gains. This is one of the most powerful constructions of liberty being subordinate to security (even at times without clear justification).
8. Liberty is subject to forfeiture: not only can an individual forfeit liberty due to bad behaviour, but all of us forfeit our rights on the claim of insecurity.
9. We must trust the state to engage those security claims in good faith, but trust is a commodity in short supply.
10. There are two possible roles for the idea of balance:
  - a. Considered to be the necessary language of political justification
  - b. In the legal structure of proportionality analysis

**13:30 – 13:45: MALIK IMTIAZ SARWAR**

**THE ROLE OF COURTS IN BALANCING RIGHTS AND SECURITY: THE MALAYSIAN  
EXPERIENCE**

1. The lesson to be learnt from the Malaysian experience is that things can go very wrong in practice.
2. As a matter of background, Malaysia is a former British colony, and the Federal Constitution serves as the supreme law of the country. Fundamental liberties are protected by the Federal Constitution.
3. Despite these constitutional protections, in practice, Malaysia fails to protect such fundamental rights in many aspects. For example, the power to prosecute is exclusively vested in the Attorney General, and the Prime Minister of Malaysia has not prosecuted despite corruption claims.
4. Moreover, since an amendment to Art 121(1) of the Federal Constitution was enacted in 1988, there has been a steady erosion of the rule of law in Malaysia.
5. There are various pieces of security legislation in Malaysia. However, the clauses in these Acts are largely undefined, and such legislation has been used to prosecute even minor acts of dissent in Malaysia. For example, a person accusing a government official of being “an idiot” was prosecuted under security legislation.
6. There is an urgent need for checks and balances in Malaysia, but the government has increasingly arrogated to itself power since the constitutional crisis of 1988.
7. The concern for Hong Kong in enacting A23 is how to insulate the judiciary such that it remains independent.

**13:45 – 14:00: Q&A**

**Chen:** *What kind of actions or prosecutions has the government taken in recent years in Malaysia? Has there been any increasing use of security or related laws?*

**Malik Imtiaz Sarwar:** Security laws have been used actively to quash dissent. For example, the Special Measures Act was originally intended for terrorism, and now it has been used to deal with individuals lodging reports against the Prime Minister. The Sedition Act has also been used to charge more than 80 individuals on a selective basis.

**Davis:** *Regarding your scepticism of the notion of balance, is there a decent argument to be made that more liberty actually provides for more security?*

**de Londras:** Yes. In some cases, enhancement of everyday rights reduces dissatisfaction in society, including crimes against the state.

**Weisenhaus:** *Regarding the media...how are courts in Malaysia responding to dissent via media platforms?*

**Malik Imtiaz Sarwar:** Any media against government would likely be suspended, e.g. “The Edge” magazine was suspended as it reported on a potential corruption case linked to the Prime Minister.

**Chopra:** *Argument for thick conception of security: how do you feel about this, would you argue for an expansion of vocabulary in talking about security?*

**de Londras:** On one hand this is attractive, as I can see an instrumental value to “security”; but on the other hand, I still have discomfort with that. In order for that approach to really be successful, we need a state that always acts in good faith and not in a panicked way.

**Petersen:** *It seems that NGOs currently function well in Malaysia, whereas there has been a massive crackdown on NGOs in Mainland China. Why do you think this is the case?*

**Malik Imtiaz Sarwar:** The NGOs in Malaysia are allowed to exist as they are used by the government to pay lip service to there being some sort of human rights protection in Malaysia.

**Young:** *You mentioned that liberty is subject to forfeiture, but is this an appropriate way of putting it? Forfeiture seems to suggest that a certain right is lost and has been taken away by the state. Derogation under human rights regimes, on the other hand, seems to be temporary...perhaps the better word to be used here is “suspension”? The restriction of rights appears to merely be a “restriction”, and does not amount to “forfeiture”. Moreover, how much of your scepticism of balancing is driven by dissatisfaction with case law? Perhaps it is not the idea of balancing that is the problem, but the way the courts have approached it?*

**de Londras:** The term “forfeiture” builds on jurisprudential work on the topic, hence I have used the same language in this context. The concept of forfeiture is not so technical; it just means that a right is not exercisable although it continues to exist. My scepticism of balancing is not driven by dissatisfaction with case law, but rather it is the concept itself. I have been impressed by the way courts have dealt with the issue.

**14:10 – 15:30: DISCUSSION – PART I(1)****CONCERNS WITH ARTICLE 23 LEGISLATION: PAST, PRESENT AND FUTURE**

*Moderators: Young and Chan.*

Young first set the focus of the open discussion by raising the question: How could society have changed if the 2003 Revised Bill had been enacted in Hong Kong?

Before analyzing the five recent events in Hong Kong to test whether any of these events would have triggered the 2003 Revised Bill had it been enacted, Young called upon Halis to first examine the background of A23 legislation in Macau.

**a. The Macau Experience**

According to Halis, in 2009, the national security law was enacted in Macau to comply with its constitutional duty under A23 of the Basic Law of Macau (which is identical to that of the BL). In the legislative process back then, the discussion was very frank. At that time, there were not many people criticizing the government. A variety of points came into place because of comparative law (exclusively from civil law jurisdictions).

Since the enactment of the national security law, no prosecution has been brought. This is a good sign and shows that, on the face, no undue restriction on fundamental rights has been taking place.

However, there exists several problems in Macau, which have triggered Halis' concern, including:

- (1) There have been cases in which academics, journalists, politicians and social activists have been denied entry into Macau without strong justifications, but rather with “circular” and generic references to the law of internal security or to the practice of other countries. They were usually Chinese nationals or Hong Kong residents;
- (2) Temporary police detentions of peaceful activists during the visit of a top Chinese official (Mr Wu Bangguo);
- (3) Dismissal of two professors, and the reasons for that, many argue, have been their activism or mere performance of their profession related to political science and the critique of certain aspects of society and the government.
- (4) Prohibition of activists from conducting a public survey (or informal referendum) in the streets to investigate the level of trust of the Macau population in the Chief Executive. The activists were also temporarily detained. Subsequently, charges were either not brought or were dropped, with the exception of those against Mr Jason Chao, the leader of the most critical political association in Macau;
- (5) There have been cases in which the government created obstacles for peaceful protests by way of imposing time and venue restrictions in some demonstrations. At least once, a governmental organ has decided to renovate and thus close a public square where a demonstration was to take place. The CFA of Macau has upheld cases related to the right to peaceful demonstration. All these episodes unfortunately lead to increased self-censorship and some concern over what the limits of expression and activism may be. This shows the chilling effect of the government's tactics.

With an urge by the government to have A23 legislation enacted in society, he pointed out that the A23 legislation is part of the criminal law and therefore should be used as a last resort and never to punish legitimate dissent. Although the government claims that it strives

to defend the right to protest and that it is not creating tension, Halis remarked that there is fear that the government can use vague application of the existing law to suppress dissenting views and the law's punishment can be very severe. Although the government reiterated that the national security law is not to target and punish journalists, professors, and normal peaceful activism, there is always the potential to categorize and include necessary and beneficial forms of political dissent under a law that contains open texture terms. This is not conducive to maintaining public trust and public participation in the discussion of public affairs.

From a social theory perspective, he also argued that the government should not define the acts of those activists as crime. The goal of criminal law is to punish criminals. In sociological terms, crime means those acts that depart from publicly acceptable behaviour, and does not and should not include lawful expression of dissenting views, which should be seen as a normal and desirable practice that may benefit society as a whole, including the government. Dissenting views can benefit the government and lead to innovation and guarantee diversity of thoughts and a pool of opinions and views conducive to well-grounded decisions. The existence of a fundamental freedom to dissent is at the core of all political freedoms, which only make sense when people can voice out their views and peacefully act against the views of a majority or of the government. The exercise of freedom only makes sense when nobody is being censored for holding a dissenting position. In this respect, China must be strong and resist following foreign models in which governments have adopted an agenda of security rather than one of development and social justice. The safeguard and promotion of legitimate dissent in both Macau and Hong Kong is at the core of the right balance between them and the Mainland and this can reinforce their ties, respecting and reinforcing "One Country Two Systems". This means that any national security law must not be a tool to tackle legitimate dissent (that without violence but which nonetheless may carry some degree of inconvenience to some as any disagreeing voice or demonstration may do). The context represents an opportunity for the Chinese government to demonstrate its commitment to the comprehensive development and autonomy of the two regions while seriously caring for its security and territorial unity.

Petersen posed a question to Halis as to the legal basis under the ordinary internal security law for the acts mentioned by him (e.g. detaining dissidents during the visit of Chinese officials), since Halis said that there is no prosecution under the A23 legislation in Macau.

In response, Halis said that some may argue that democracy in Macau is far from what some Macau people want. But the good side is that the government does not attempt to use the most potent weapon (the national security law) but to use ordinary legislation to target the dissidents. In all the situations he mentioned above, according to Macau law, he believed that they would not be punished eventually. In fact, those kinds of dissenting behavior would not fall within the scope of the A23 Macau legislation unless one inappropriately stretches the words in the law to include behaviour that should not be punished by criminal law or any other law for that matter. Above all, there must be certainty that the national security law is not to punish teachers, not to sanction debate and to avoid protests. The national security law is fine as it is not to suppress dissent, and it should not be in any form or way. This is so as the CE of Macau has also guaranteed to the public that the A23 legislation is not to suppress dissent.

In response to Halis's comments, Kapai counter-argued that Halis's focus might have been misplaced. Instead, she suggested that the focus should not be that the Macau government is

not using the strongest tool (i.e. A23 legislation) to crack down on dissidents, because the government does not have to do so in the first place. In short, the government should not use ordinary law, let alone A23 legislation, to suppress any freedom entitled by the dissidents.

**b. Whether Recent Events would have fallen within the scope of the 2003 Revised Bill if it had been Enacted**

Young asked Lo for his legal analysis as to what would have happened if A23 legislation had been enacted. Views have been expressed in detail in Lo's written submissions, covering the activities of Tai and student leaders in the Occupy Movement in 2014, the Mong Kok Incident in 2016, independence advocacy and other recent events/activities.

Lo pointed out that it is a difficult task because one has to look at the entire movement/event in different phrases. Each specific act may require a possible criminal enquiry.

He was of the view that there is no *prima facie* case for Tai being convicted of inciting subversion by simply asking people to sit and occupy the road in an unauthorized way to show their opposition to the NPCSC Decision (para. 2(i) of Lo's Written Submissions (Set 2)).

This is because, in order to satisfy the (c) limb of intimidation of the Central People's Government under the subversion offence, what has to be proved is that Tai has "use[d] force or serious criminal means that seriously endangers the stability of the People's Republic of China" ("PRC"). Even though occupation of the main roads may constitute serious criminal means (by seriously interfering or disrupting the essential service, facility or system in Hong Kong), it is questionable whether it endangers the stability of Hong Kong (or PRC) since the stock market in Hong Kong still functioned during the Occupy Movement. Although some serious means might have been involved in the movement, economic stability of PRC was not seriously endangered.

As to the offence of sedition (which is connected with the offence of incitement of subversion), Lo was of the view that Tai is likely to come under the prescribed act defences under section 9D of the 2003 Revised Bill, namely (a) to show that the Central Authorities had been mistaken in its measures, *or* (b) to point out errors or defects in the government or constitution of the HKSAR with a view to remedying of such errors or defects. Limb (c) (i.e. acts to persuade members of the public in the HKSAR to attempt to procure, by lawful means, the alteration of any matter provided for in the laws of the PRC or of the HKSAR) is not applicable since Tai had all along been advocating for the use of "unlawful means". The legal analysis of what had been done by other leaders in the Occupy Movement has been stated in Lo's written submissions.

However, Chen argued that Tai need not rely on the defence under section 9D of the 2003 Revised Bill at all. Section 9D is not relevant if Tai does not *prima facie* fall within the offence under section 9A. The newly defined offence of sedition under section 9A (if enacted) would have been much narrower than the existing section 9 of the Crimes Ordinance. He observed that the acts under subsection (a)-(e) in the Malaysian legislation are identical to the five acts in Hong Kong under section 9(1)(a)-(e) of the Crimes Ordinance currently in force.

To this, Tai responded that his act might fall within section 9A(1)(b) of the 2003 Revised Bill, that is to endanger the stability of PRC, as People's Daily described the Occupy Movement as a kind of "Colour Revolution".

Chen said it is very unlikely that Tai would commit any offence of sedition under section 9A(1)(b) as sedition has been defined as “inciting others to engage in violent public order that would seriously endanger the stability of PRC”. He adopted the words of Mrs. Regina Ip in 2003 that endangering the stability of PRC is different from endangering the stability of Hong Kong. One would only be caught under the section if he has endangered the stability of the *entire* PRC.

Lo added an observation in addition to his remarks made in the written submissions: Had the 2003 Revised Bill been enacted, he opined that, if reference is drawn to the 2014 White Paper, the stability of the PRC may be understood as including “sovereignty security and development interest”.

From Cheung’s observation, the political situation has changed vastly from 2003 in that Mainland officials are becoming more vocal in commenting on Hong Kong law and Hong Kong affairs. If the A23 legislation had been enacted, mainland officials would now have commented on how recent events may fall within the A23 provisions and how the government should enforce them. This would pose great pressure on the Hong Kong Government, similar to what happened in the recent election controversy, where the mainland officials are seen to be pressurizing the Hong Kong Government into declaring the nomination of certain candidates to be invalid.

Cheung also added an issue in relation to section 161 of the Crimes Ordinance (i.e. the crime of accessing a computer with criminal or dishonest intent). He posited that this section is very widely drafted with potentially wide coverage in application by the courts. Under this section, one does not need to hack into someone else’s computer in order to attract liability. One can be accused if one just uses one’s own mobile phone or computer with the intent to commit an offence. The consequence could be tremendous if it were used together with A23, as anyone using Facebook or mobile phone may arguably fall within the scope of section 161. This can trigger police’s investigation and seizure of one’s computer and the police can look at what one has in the computer. This is damaging and detrimental to one’s privacy when the police can legitimately exercise this draconian power under the law.

### **c. Potential Concerns about Human Rights Curtailment under the National Security / Terrorism Law (from the UK Perspective)**

de Londras, drawing on the perspective from the UK, highlighted the differences between prosecution under ordinary law and that under national security or terrorism law. It is noted that the UK Terrorism Act 2006 already contains both inchoate offences and full offences. There are implications in the reclassification of offences in terms of the scale of punishment, procedural implications (by reversing the burden of proof) and changing the nature of defence. The state can, in one of the offences, establish criminal liability when it finds that an item in connection to terrorism is in proximity to a particular person. For the defence, the accused bears the burden to establish the reason why that item is close to him and that he is not connected with terrorism. This shows that the burden that has to be discharged by the prosecution and the defence is completely unequal.

Apart from the chilling effects mentioned by other speakers, another implication is that these kinds of laws justify early intervention, which underpins the preventative line in criminal justice. For example, in the UK, possession of certain items is an offence. Material support becomes a serious offence. This allows the state to intervene much earlier than what ordinary

criminal law allows. Before the point of establishing an inchoate offence, some early acts could already become a serious criminal offence under the Terrorism Act 2006 even though they would not meet the “attempt” threshold. This worrying trend can create a situation of slippery slope, which provides the government with the pretext to intervene much earlier than ordinary criminal law.

Another controversial issue in the UK is that a set of legal obligations have built up for people to report when something might be happening or somebody might be “vulnerable to radicalization”. For example, she has to make a report if she encounters a student expressing his view about whether the UK should engage in military activities in Syria because it is a kind of Islamophobic activity and the duty to report is to prevent radicalization. The chilling effect goes beyond forbidding someone to engage in certain activities. This would further undermine the possibility of discussion so that the government can prevent extremism in the first place. She pointed out that it is interesting to examine why the government would criminalize certain acts under some categories and the respective implications, as all subsequent developments can happen to undermine and encroach the democratic space.

Agreeing with de Londras, Young also mentioned that Lord Pannick QC has criticized the reporting mechanism as a bad idea that would undermine the freedom of expression. Young also raised his concern about early intervention, recalling that the Hong Kong government in 2003 has proposed a proscription mechanism to blacklist certain organizations.

de Londras agreed with Young, arguing that it is ineffective to proscribe organizations. Worse still, this would also lead to weak societal cohesion where people of similar views cannot associate with each other. The situation is aggravated in the UK where social cohesion is already very low in the community.

Young agreed, commenting that it is good that the national security law in Macau does not include the proscription provision.

#### **d. The Importance of Trust Building in dealing with A23 Legislation in Hong Kong**

In relation to the A23 legislation experience in Hong Kong, Ng raised two points. First, she was of the view that the A23 saga is a matter of trust. There is no doubt that bad drafting would upset people. But even if there was perfect drafting, it is still problematic if the law would be applied in such a way to intimidate and chill dissidents by expansive investigation powers, such as searching or seizing without warrant.

Second, she opined that if A23 legislation had been passed, it is probable that the umbrella movement would not have happened in Hong Kong. She invited the participants to consider all those inchoate offences that can be committed by simply an “attempt, conspiracy and incitement”. A23 legislation contains inchoate offences which seek to intervene in an early stage before certain acts threatening national security have actually been committed.

Looking at what the students have done in the Occupy Movement, Ng pointed out that they would be accused of subversion and intimidating the Central People’s Government by threatening and occupying Admiralty with serious unlawful means and obstructing the traffic. Also, she posited that Tai may arguably also fall within the crime of secession. By definition, if one commits secession, he is using force in a serious means to endanger territorial integrity. Therefore, in 2014, Tai was arguably trying to incite others to do it in the Occupy Movement. This has already constituted an attempt.

Ng suggested another event of secession – one that is related to the recent LegCo election. In 2003, the then Secretary for Security Mrs. Regina Ip assured the general public that a speech supporting independence of Hong Kong or Taiwan is not a crime. However, today, mere discussion about Hong Kong independence would deprive one's political right to stand for election. Pro-independence expression in schools has also attracted a lot of controversy.

It is therefore important to note that A23 legislation is about the trust in the application of the law. This is so even though there is a perfect drafting. The worrying culture still exists so long as there is no change in the human rights record of China, which has the tendency of using national security laws to crack down on dissidents.

At this juncture, she also drew attention to Lord Pannick QC's opinion on the legislative proposal that the terms of the 2003 Revised Bill are consistent with the human rights law. Lord Pannick QC at the same time pointed out that, despite this, the government must ensure that it would comply with the international human right standards when applying the law. She reiterated that it is not the law that is passed alone that matters. Given that this is a draconian law, it is more about how prosecution is handled in recent years.

Young agreed with Ng, pointing out that this is about the power of the government and prosecution. Under the existing legislative provisions, police powers in Hong Kong are very broad. For instance, under sections 13 and 14 of Crimes Ordinance, any police or public officer may enter any premise or place or stop any vehicle in order to remove any seditious publications. With such a draconian law that allows the police or public officers to enter any place without warrant, if there is trust in society, the government would not enforce such powers. When the trust breaks down, it could be used one day. In the 2003 Revised Bill, the government suggested repealing these powers, but recommended another power to search without warrant. Young is critical of this and fortunately, the government has made a concession to remove that.

(On this issue, it was clarified by Ng later that the new investigatory power of search without warrant is actually under section 18B of the 2003 Revised Bill but not under existing law (i.e. section 14 of the Crimes Ordinance). She pointed out that the former CE Mr. Tung wanted to pass the Bill containing the new section 18B power on 9 July 2003 but this power was finally removed on 5 July 2003 as a concession to the massive protest on 1 July 2003.)

#### **e. Lack of Trust in Police Enforcement and the Central People's Government**

Elaborating on the lack of trust as put forward by Ng, Lin suggested that there are three types of trust:

- (1) Mutual trust between Hong Kong and Mainland China. Today, there is little, if not worsening, trust between them.
- (2) Trust in the enforcement of the law which falls within the executive authority (such as whether the police would enforce the law properly or abuse its powers in enforcement).
- (3) Trust in the judiciary. As the judiciary is the last gatekeeper, Hong Kong should still have great trust and confidence in the local judiciary. Even though people do not have trust in the police and the Department of Justice may bring the case to the court, the court would do the proper balancing. With the Bill of Rights Ordinance and Chapter 3 of the BL guaranteeing one's fundamental rights, courts can do a good job in safeguarding the human rights of people in Hong Kong.

In response to his suggestions, Weisenhaus believed that the Hong Kong CFA would uphold human rights, but she stressed that harm can be done and trust can be destroyed before any promulgation of judicial decisions.

Although Tai believed that he would have a fair trial and he would not be convicted under the 2003 Revised Bill, he was of the view that he would still be prosecuted in 2014. The prosecution may cause damage to him and this would have a negative impact on him. It is also doubtful as to whether he can still teach at the university (though he has confidence in the independence of the university). This shows that the public has to worry not just about the court but also about the prosecution process.

On this issue, Chopra brought in a comparative law approach to examine the national security law in Hong Kong. She pinpointed that India for decades has had a very strong terrorism law containing expansive criminal offences that give a lot of discretion to the executive branch. Many activists have been detained and arrested without charges being pressed. But she noticed that only a tiny fraction of them would eventually be convicted. So the law operates as a *de facto* detention law. The law is used for investigation and arrest.

Against this background, she posited that the appropriate question is not whether the substantive offences in the revised Bill can be made out in the list of events. Instead, the proper questions would be:

- (1) could someone be creditably arrested, investigated, prosecuted for the inchoate offence(s); and
- (2) could someone be creditably accused (given that accusation itself is already very damaging).

She suggested that Tai might be convicted under sections 9 and 9A if the sections were applied expansively.

She also suggested that the executive is faced with a restraint which depends on the politics of absurdity and embarrassment. The test is: if the government did X, would it look so absurd that the public would laugh at it? The only item listed on the Discussion Agenda that would meet this criterion is the broadcast of the film “10 Years”. (see 1(a)(v) of the Discussion Agenda).

Davis agreed, pointing out that the government has other tools to curb dissidents by intimidating them. A23 legislation is a way by which China is taking over national security in Hong Kong. There is a political culture of intimidation, which can be illustrated in the patriotic education saga. Also, recently, Junius Ho suggested that the government should complain to the judiciary in relation to the lenient sentence given to Joshua Wong.

Huang was also aware that the investigation process can be used by the government to intimidate dissidents. When the government does not charge a person, the courts need not go through the balancing exercise. One can see that the situation in Mainland China is that there were quite a few investigations of the sedition crime, and the police just asked the “accused” to cooperate with them. The police eventually dropped the charge and the case did not go to the court. So it is difficult for one to collect the materials or jurisprudence of the sedition crime in China because there is hardly any formal record about the case. The tactic of the

government is just to scare or intimidate those dissidents and make them feel afraid of expressing their opinion at liberty.

Ng drew attention to an alarming paper by Fu (item 16, p.321 of the bundle) which deals with the responses towards terrorism in China. The paper argued at p. 351 that separatist movements in China may not only be driven exclusively by intrinsically nationalistic inclination but also by political and economic frustration. Ng stressed that when there is suppression of speech, political frustration would increase. When such political frustration accumulates, people would have no choice but to resort to violence as they cannot express themselves. This tendency can be manifested in Hong Kong. Although the government assured the public on how safe the 2003 Revised Bill was (as it only targeted against violence threatening national security), it would force people to resort to violence sooner or later as a result of suppression of free speech. Then the government would put forward justifications to legitimize its action. So it becomes a self-fulfilling policy. It is wrong to claim that the national security bill should be accepted because it has set the parameters of certain legal or illegal behavior.

#### **f. Conclusion**

There is no consensus on the timing for enacting A23 legislation, and many expressed scepticism as to whether the legislature should do it at all in the foreseeable future considering the political climate in the legislature and in Hong Kong in general. Young finally concluded that, for A23 legislation, there exist not just fear and concerns about what is in the law (the so-called “hard threats”), but also the “soft threats” in terms of police power and changes in the political climate that might come after the enactment of A23 legislation. What matters is not just the drafting and wording of the legislation. What matters more and should concern us more is the political culture.

**15:45 – 17:00: DISCUSSION – PART I(2)****CAN THE CONCERNS AGAINST ARTICLE 23 LEGISLATION BE MITIGATED? WHAT IS THE RELATIONSHIP BETWEEN HUMAN RIGHTS PROTECTION, DEMOCRACY, SEPARATION OF POWERS, AND “ONE COUNTRY TWO SYSTEMS”?**

*Moderators: Chan and Petersen*

**a. Structure**

At the outset, Petersen suggested a structure for the discussion. The theme of the section is how we mitigate concerns if the legislative process were started again to implement A23. There are three headings the discussion should fall into, which are:-

1. the drafting techniques linking the legislation to international human rights standards, in particular, the ICCPR;
2. the idea of a package of proposals that do not just implement A23 but also strengthen the existing institutions of autonomy and perhaps even creates new institutions, e.g. a human rights commission; and
3. the possibility of implementing both A23 and universal suffrage together.

**b. Drafting techniques**

Gittings agreed that it was a good idea for the “Pannick clause” to refer to the ICCPR rather than Article 39 of the BL to escape the interpretation of the NPCSC, but he suggested that even so the NPCSC could still pass interpretations through the BL to make an impact if it insists. He referred to the *Congo* case in which the NPCSC held that the BL modifies the common law and he was of the view that NPCSC might in future pass an interpretation to the effect that the BL modifies the ICCPR. Although Gittings agreed with Petersen that the NPCSC has no power to interpret ordinary legislation, Gittings argued that the BL prevails over everything else, so the interpretation could affect local legislation as well.

Ng suggested that the Government would not consider putting a reference to the ICCPR in the legislation at all as her experience showed that the Government had been reluctant to refer to international documents in legislation (citing, for example, the Government’s reluctance to include references to the Convention Against Torture in the local Immigration Ordinance).

Lin argued that from a legal perspective, there is no significance to the legislation referring to the ICCPR, because the ICCPR is already part of Hong Kong law and an express reference in the legislation would make no difference. Huang agreed with Lin on this point. Huang also expressed the view that although the NPCSC cannot interpret local legislation as suggested by Petersen, it is undetermined whether it can or will interpret articles in Chapter III of the BL, e.g. freedom of expression. He argued that if the freedom of expression is viewed in such a way that is relevant to national security issues or state secrets, then for those purposes it is not entirely within the autonomy of the region and the NPCSC can issue an interpretation. Petersen responded that she agreed that the NPCSC can interpret any article in the BL itself, but reiterated that the NPCSC has no power to interpret local legislation. Thus, if the local legislation expressly states that this law must be interpreted in a manner consistent with the ICCPR, then the NPCSC cannot interfere by issuing a contrary interpretation of the local ordinance. Davis, however, argued that the NPCSC may interpret Article 39 to the effect that national security legislation should be construed in the prescribed manner, which takes priority over local legislation. Petersen argued that the national security legislation should be linked directly to the ICCPR rather than to Article 39. Davis asked whether the Chinese authority can strike out a piece of national security legislation on the ground that it is too

liberal. Petersen responded that this power falls under Article 160 of the BL (which only applies to the law previously in force before the handover) or Article 17 (which allows the NPCSC to “invalidate” a local law but not amend it). Davis asked whether the NPCSC’s power of interpretation can be used to this effect given the track record of it saying to Hong Kong “you’ve gone too far” and the liberal meaning given to the power of “interpretation” under Chinese law. Ng said that the NPCSC can always find a way of interpreting the BL to curtail our rights.

Gittings added that an NPCSC interpretation could modify the common law (referring to the *Congo* case) and may modify the ICCPR as well.

Chopra said that linking A23 legislation to ICCPR is attractive. She said that if the NPCSC spontaneously interprets A23, it will be very politically controversial; however, if there is litigation that goes to the CFA, it may potentially trigger the CFA’s obligation to make a reference to the NPCSC under Article 158. That will be a gateway for the NPCSC to pass an interpretation legitimately. Chan replied that there is possibility for the CFA to seek reference if the CFA were to interpret Articles 23 and 39 and if there is a conflict between the two articles.

Lo suggested a scenario in which someone is very frustrated about the lack of A23 legislation in Hong Kong and takes the case of this omission to court; when it goes to CFA, it could present an opportunity for the CFA to seek judicial reference from the NPCSC, which may prescribe a timetable for legislation.

Chan commented that it is an important issue how an NPCSC interpretation of the BL could find itself into Hong Kong.

Halis said that in 2009, Macau enacted A23 legislation. He argued that it is unlikely that the same BL provision can lead to different local laws. The Chinese Government will not accept this. The framework will be the Macau legislation and it is impossible for Hong Kong to pass anything less stringent, although necessary adjustments are needed since Hong Kong runs a common law system.

### **c. Piecemeal approach**

Gittings commented that the piecemeal approach suggested by Tai was an interesting idea but a strange approach. One could argue the amendments to Societies Ordinance and the amendments to Official Secrets Ordinance have already complied with the requirements of A23 in relation to those two areas. However, when it comes to the core of A23, which are the offences of treason, subversion, sedition and secession, if we propose to split those as Tai proposed and start with treason, then the CPG will argue that we start with subversion and secession first because they are not explicitly covered by the current law. However, Gittings expressed reservation about this approach.

Tai clarified that his proposal was put forward years ago, long before the Umbrella Movement and he said he would not raise the same kind of proposal now due to changes in reality.

Lin said that the piecemeal approach is possible, because it means issues will be dealt with one by one. As Young mentioned in his paper, there is almost consensus on some issues and we can move on to implement them. This also shows our good will towards building mutual

trust. Also, Lin made the point that Hong Kong people should look at A23 legislation positively - it can be a useful law to implement measures to safeguard our rights and liberty because we are the one to draft it - rather than with a passive attitude - waiting for something bad to happen. However, Ng argued that there was not anything even close to an agreement on the last Bill. Also, she commented that the law drafting in Appendix I of the Bill was very bad, although the drafters of some of these provisions meant well. Ng referred to the conference in HKU on 14-15 June 2003, at which there was a paper from the English Bar. It analysed in detail what was wrong with the drafting of the crimes of treason, subversion, secession, noting that our Crimes Ordinance was very out of date. For example, the treason offence protected the sovereign as a person. Ng suggested that we start afresh.

De Londras added that there is a tradition of civil society taking the initiative to write another law, one that would satisfy the obligation of A23. The advantage of doing it is not that the Government must implement the civil society's proposal but that the Government must justify any departures from the proposal. Although there is no guarantee that this would work, it will change the momentum of discussion.

#### **d. Implementing both A23 and universal suffrage together**

Tai argued that it is not feasible to first enact legislation to implement A23 and then shelve it from taking effect until the implementation of universal suffrage because the best time for this has already passed and because distrust against the Government is prevalent after the Umbrella Movement. If China insists on the implementation of A23, Tai suggested that perhaps something bigger than the Umbrella Movement might happen.

Davis said it would be important to discuss how to close the trust gap in Hong Kong. It seems compelling that we can pass A23 legislation for universal suffrage but as Tai suggested people would fill the streets to attempt to stop it. There are many steps to go before we come anywhere close to the solution. It is the reason why only a more democratic government in Hong Kong might be to change something.

Kapai responded to Davis that the attraction of Petersen's proposal is that people will only talk to you if you have something they want. As much as A23 talk will get people onto streets, universal suffrage talk will get them off. In the exercise of trust building, one must show genuineness and sincerity by trying to offer something meaningful. Yet, Kapai felt that it would be a huge gamble because there is always give and take, and we must ask ourselves: what are we prepared to give up in exchange for what we want to be given? We do not even seem to have contours of how much we are prepared to compromise on either universal suffrage or A23. At this point, people really want an ideal law on both respects and how do we convince the public to move further on this?

Lin argued that there is no necessity to link universal suffrage with A23 legislation from a legal perspective, because it would be easier to deal with issues one by one than altogether. Weisenhaus agreed with Davis that we have to rebuild trust to bring the project forward. However, she doubted whether the distrust is fixable. She raised the example of the digital copyright bill, which is widely known as A23 legislation on the internet. The Government made concessions and improvements, but people still do not trust the Government. Also, in the 2003 Bill, the Government made improvements on the definition of sedition, but the media has no trust in this issue and focused on theft of state secrets, which directly affects its ability to do its job. If the A23 legislation were to be passed, it would be the first major

enactment against the media in over 20 years. There is no trust that the Government will protect Hong Kong's interest vis-a-vis the Mainland authority.

Davis argued that it seems that the source of the independence movement now emerging in Hong Kong is the Chinese Central Government, which seems to be the biggest threat to national security in Hong Kong. The HKSAR Government's policies and its inability to resist the Chinese Government are what have triggered public resistance against the Chinese Government. In this vein, passing laws to stop resistance can be counterproductive. The Central Government should note that interfering in Hong Kong's affairs has caused most of the problems it now faces here. The HKSAR Government should examine what is the appropriate level of interference under "One Country, Two Systems" and advise the Central Government that over-interference will trigger more resistance. Davis believed that the independence movement will disappear if there is genuine universal suffrage. Fu responded that although it seems that the Central Government is part of the problem, there is nothing much we can do here in Hong Kong.

Ng said that few people in this room believe that it is the right time to legislate on A23, and, in the meantime, we have suggested that we have to rebuild trust. One area in which trust must be built is the prosecution department. The Secretary for Justice and the prosecution department have eroded the confidence of Hong Kong people. If people believe the prosecution department will serve the Central Government, then no law can give people confidence. Ng suggested that to rebuild trust, we can start with a Secretary for Justice who is more independent and more prepared to protect Hong Kong people's human rights under the law, and stand up for the rule of law. The neutrality of the police is the next important thing. These are more immediate concerns than the independence of the courts. Even the Bar has become more circumspect in defending the rights of the public: they only advocate obedience to the courts but Ng regards that as not enough. The public has the right to question the court's' decisions - if the Bar only advocates obedience then people would not trust the rule of law. The Bar now has become more conservative than in 2003 and they are now going out of their way to show that they are not political.

Ip raised the question whether it is even politically feasible to enact A23 legislation in contemporary politically polarised Hong Kong. Since the event as big as the Umbrella Movement did not necessitate the legislation, why would Beijing even want to push forward the national security law now, given that even a bill to amend Medical Council Reform Ordinance cannot be passed?

Gittings said that Ip's point is important, as we cannot ignore the scenes of the LegCo today if we want to pass the A23 legislation. Also, from the Central Government's perspective, it may not be beneficial for them to pass the bill because it would not achieve what they want, such as banning pro-independence groups in Hong Kong or Falungong, unless the Central Government can have its own version passed but that seems impossible in Hong Kong.

Petersen agreed that in the current LegCo it would be impossible to pass A23 legislation, but no one can predict whether the LegCo that is in session after the elections on 4 September 2016 may pass it.

De Londras said that when we say we trust the state, it usually means we trust the state to operate in a way consistent with the rule of law. However, the rule of law is not determinable and ever changing as societal concepts change. For example, what people expect of the state

in Turkey now is very different from 20 years ago because of the change in the education system. We have to think about what the expectations of Hong Kong people are towards state institutions.

**e. Academic group to draft the bill**

Petersen agreed with De Londras's suggestion that a group of academics might try to draft a model bill, which would be consistent with strict constitutional requirements and the ICCPR, including strong procedural protections. The group of academics would not take the initiative to introduce such a bill but could have it ready as an alternative. Then, if the Government issues a consultation paper, the government proposal will not be the only version and we can ask the Government to justify any departures.

Ng responded that although the university is an important institution, if you draft a liberal law then the government will ignore you; if you draft a law that truly protects national security and curtails human rights then the public will question why HKU is pushing the A23 legislation upon us. Inevitably all good intentions will turn to ash. Ng suggested that we should preserve our power.

Petersen said that she was not suggesting HKU but perhaps a small group of academics, and her main goal would be to have an alternative out there somewhere reflecting academic views.

**f. Using Law Reform Committee to legislate**

Davis agreed with Petersen's comments in her paper about using the Law Reform Commission to legislate. Legislation should guarantee Hong Kong people's rights around the issue of security in a way that is consistent with the Johannesburg Principles. However, apparently the Government is not interested in utilising A23 Bill as a liberal project but a constraining measure instead. Thus social activists will not be given the luxury to nicely work out things because there is huge gap between the bottom lines of the two sides.

Lin, speaking only for his own views, commented that it was unlikely that the A23 project would be initiated by the Law Reform Commission because it is very controversial and political.

**g. Courts and other institutions**

De Londras said that courts are one of the institutions that can mitigate the harms of the A23 legislation. Courts are generally doing a good job, but they rely on a number of things: a vibrant culture of legal professionalism, in that legal professionals see themselves as having a role to maintain the rule of law, e.g. in the jury-free courts in Northern Ireland and special advocates in the UK; judicial independence; and the availability of cases, which would unlikely to accumulate shortly. Even the best court in the world cannot effectively mitigate the harm. De Londras suggested that, in addition to national human rights institutions, the system of independent reviewers (eg in Australia and the UK of anti-terrorism legislations) can be established. Although these institutions may not have direct impact, they can urge the state to justify how the powers are being used - even more effectively than the national human rights institutions can.

**h. Are these institutions trustworthy?**

Chan raised the question of how, institutionally (courts, police and prosecution), the Mainland's expansive understandings of national security would be able to find their way into Hong Kong. Johannes Chan raised a potential issue (through email): how far would

a prosecution under A23 legislation be a matter entirely for Hong Kong, given that it might be considered a matter of defense and hence fall outside of Hong Kong's jurisdiction? Cora Chan suggested that the court might need to obtain a certificate of facts of state on certain matters of national security.

Gittings argued that there is no legal basis to suggest prosecution decision will not be the within Hong Kong's autonomy. The BL guarantees that prosecution be free from any interference, even inside Hong Kong.

Chan raised the question of whether, even if formally and procedurally prosecution is within the autonomy of Hong Kong, the integrity of this autonomy would be undermined because substantive issues (such as whether someone is subversive or is a terrorist) might be considered as within the knowledge of Mainland authorities. They might issue a certificate, which, even if not binding on Hong Kong institutions, might be highly persuasive.

Lo said that in Macau's state secret legislation, under theft of state secret, there is a certification provision for a particular piece of information to be certified as a state secret from the executive, which is a carbon copy of the arrangement in Mainland China. Chan commented that even if the legislation would not change the function of existing institutions, arrangements like this will be the connecting door to Mainland concepts of national security.

Fu argued that Hong Kong should establish its own organs on national security. Otherwise, the Mainland authorities will see a gap and fill the gap with its own branches. In every country there are political agencies doing monitoring work. The question is how to make them accountable.

**i. Uncertainty clouding the post-2047 constitutional arrangements**

Petersen said that we are now much closer to 2047 than in 2003. There are two extreme views as to what will happen in 2047: one is pro-independence and the other is the fear that 2047 will be the point of full integration of Hong Kong within China.

Tai said that some LegCo candidates, who have a good chance of being elected in the coming Sunday, will at least promote a self-determination process in determining the future of Hong Kong. They may start electronic, although unofficial, voting on this matter. Tai asked whether voting on Hong Kong's future would be considered as challenging China's sovereignty. This may trigger the Government to launch the A23 legislative process as soon as possible. If the 2003 version of the legislation would not prohibit such activity, then we may have a much harsher version in the end.

Lo joked that the organisers would have difficulty opening a bank account.

Kapai argued that if we want a depoliticised discussion of A23 legislation, then we should have it now because we do not have a particular incident in mind which may trigger differentiation of people's views. Kapai questioned what would be the advantage of waiting for something to happen. In order to draft, we need time and space rather than something hanging over our heads.

Ip said that the political fragmentation and polarisation will only increase from now until 2047. It will be aggravated by Hong Kong's quasi-presidential system combined with proportional representation. These two developments will bar any major changes to Hong

Kong's political system, including the introduction of universal suffrage and the introduction of national security legislation.

Gittings said there is no direct linkage between A23 and 2047. Because A23 is not in the Joint Declaration, it should be equally possible to change provisions in A23 before or after 2047. Petersen responded that the activities that are very likely to occur in relation to 2047 may trigger a faster decision to push for the enactment of A23 legislation and make it harsher than the revised 2003 bill.

Chan said that if we see the independence of the judiciary and the common law system as prerequisites to safeguarding liberties when we have A23 legislation, then what happens after 2047? If we may no longer have a common law legal system, then we should not introduce A23 legislation at any cost.

**17:00 – 18:15: DISCUSSION – PART II**  
**THE PLACE OF HONG KONG IN CHINA’S SECURITY ORDER**

*Moderators: Fu and Chan.*

Fu introduced the topic by pointing out that much has changed in the political climate of both China and Hong Kong since the failed attempt to pass A23 in 2003. First, China’s governing model has been moving quickly from “stability maintenance” to “national security”. Institutions and policies are now highly politicized. The Chinese government has consolidated a tremendous amount of political power. There have also been numerous events representing a “crackdown” on civil society, such as the recent mass detention of Chinese lawyers. In spite of the politicized nature of these harsh measures, the Chinese government has always found a way to legitimize or legalize its actions. For example, the Chinese government is confident that it has both strong moral and legal grounds to support its actions relating to the Causeway Bay Books Lee Bo incident.

Second, Hong Kong has experienced many major political events since 2003, such as the National Education controversy, the Occupy Central movement and the rise of localism and independence advocates. These political conflicts are occurring more and more often. Fu categorizes two types of national security risks in Hong Kong: domestic ones and ones coming from China. Examples of domestic risks are Occupy Central initiator Tai and localist movements, whereas an example for the latter category would be NGOs that used to operate in China. Given the Chinese government’s crackdown on civil society, Fu believes that many NGOs, both local and international, will not survive in Beijing. These NGOs will then move to Hong Kong, bringing along with them national security issues to Hong Kong because of Beijing’s strict scrutiny of these NGOs. Hong Kong will be the center of resistance. Following calls for independence from within Tibet, Xinjiang and Taiwan, Hong Kong, especially its younger generation, is now following suit. Fu envisages a difficult future for Hong Kong.

Fu believes that the enactment of A23 will not stop Hong Kong’s radicalization trajectory, partly because the legislation will not be effective in resolving local politics, and partly because the legislation is very unlikely to be enforced. Fu also believes that NPCSC interpretations of A23 will not be issued as it is a matter of local legislation, and that extradition from Hong Kong to China appears to have no legal basis. Fu therefore proposes to explore other options in the absence of A23. Meanwhile, Fu foresees extra-jurisdictionally enforcement incidents such as Lee Bo will continue to happen in the near future.

**Ng:** In the document prepared by the LegCo Research and Library Services Division in 2001, entitled “Research Study on the Agreement between Hong Kong and the Mainland concerning Surrender of Fugitive Offenders”, there were discussions of the “Big Spender” case that brought into question the issue of criminal law jurisdiction between Hong Kong and China, and the meaning of Article 7 of Chinese Criminal Code. It used to be my understanding that those who did everything consistent with Hong Kong law, would not be prosecuted by the Chinese government. For example, even if a person sells Chinese forbidden books in Hong Kong in breach of the Chinese Criminal Code, China has no jurisdiction over that person. But recent events suggest that it seems to be a different case now: if that person physically goes back to China, that person will be prosecuted by the Chinese authorities. Further clarifications are needed.

**Gittings:** In determining the reach of the Chinese Criminal Code, there used to be a distinction between Hong Kong Chinese and other Chinese. Does this distinction still exist?

**Fu:** Yes and no. It depends on the impact of the act, and its relevant impact on China. So it is more consequence-based. Even though a company is based in Hong Kong, if its books are sold to China or if the selling of such books impacts China, there may be problems.

**Petersen:** But there has to be a distinction between books sold in Hong Kong, which happen to make their way into China, and books that are actually sold into China right?

**Fu:** Yes.

**Petersen:** Is no one in the Chinese government exploring options other than the current draconian measures? The heavy-handedness of the Chinese government is strengthening the pro-independence discourse. Has the Chinese government ever considered changing its governing directions (e.g. taking a softer stance towards Hong Kong)? I am sure there must be officials within the government who possess the ability and comparative perspective to explore such possibilities.

**Fu:** China is a top-down bureaucratic society: if there are orders from the top, it will be very difficult for the ones at the bottom to say otherwise. There are also numerous administrative agencies within the governmental structure. Once the tone is set, it is as though people are on a big ship, making it very hard to change the course.

**Young:** About the issue of extraterritorial jurisdiction, I would like to point out that Hong Kong's status is an anomaly. If a Chinese national in Canada commits an offense under Chinese national law and then returns to China, that person will be prosecuted and China will be legitimately exercising its extraterritorial jurisdiction. But the same would not happen if the person committing the offense is a Hong Kong Chinese national. Why are Hong Kong Chinese nationals different? Because the Sino-British Joint Declaration and BL says so. In a way, Hong Kong is privileged for enjoying a completely segregated system.

I would like to talk about the vulnerability of Hong Kong institutions. Our institutions are not grounded in democracy or democratic values; our institutions are about individuals. Although we say there is "rule of law", Hong Kong is in fact "ruled by persons". The CE exercises great power over our institutions. For example, the CE appoints judicial members. Much of the institutional abilities depend on the self-restraint of individuals, including the CE, the Secretary for Justice and the Secretary for Security. It is not just about an independent review mechanism; it is also about who exercises these powers. Members of the public are powerless as to who these people are. Rather, it is about the grace of the Chinese government, hoping Beijing appoints the "right" people. If there is a right team, A23 can likely be passed. Is there a way to convince the Chinese government to select the right person?

**Fu:** If China was to influence Hong Kong judges, I would not be surprised to see Hong Kong judges actually intimidated before handing down a judgment. There is a lack of support for the judiciary. Referring to Tai's argument in support of civil disobedience: how long can office-holders be sure that they are holding their positions? Without the necessary democratic support, our rule-of-law is hanging in the air and will collapse sooner or later.

**Lin:** I would like to present a more optimistic view. We always compare Hong Kong with other democratic rule-of-law countries. I do not think this is the right approach. I believe we should make the best out of the existing system. We should accept the fact that Beijing is in control of our system, acknowledge our institutional limits, but make the most out of what we have now. In other words, we should play the game by its rules. It is impractical to wait until the perfect scenario exists.

About the extradition issue, I would like to ask, what if a Hong Kong Chinese national commits a crime in Macau? For example, what if he desecrated a national flag there? Comparatively, on the assumption that the US Supreme Court ruled that American flags could not be desecrated (which has never happened), would US citizens burning flags elsewhere be prosecuted?

**Petersen:** The presumption in the United States is that legislation will not have extraterritorial effect unless specified in the law itself or the court finds that a legislative intent to have extraterritorially effect is implicit in the law.

**Ng:** In *HKSAR v Wong Tak Keung* (2015) 18 HKCFAR 62, it was also ruled that Hong Kong criminal jurisdiction is territorial, unless for more serious crime.

**Davis:** For antitrust or drug trafficking conspiracy cases, the general rule is impact territoriality.

**Ng:** On the issue of vulnerability of our institutions, I would like to add that lack of support not only means lack of democracy, but it also means the lack of strong traditions and legal culture in safeguarding liberty/human rights. My observations suggest that Hong Kong courts will likely depart from common law human rights jurisprudence in the near future. Authoritarianism is taken for granted in Hong Kong. Much of human rights adjudication in Hong Kong depends solely on the judge's own moral strength instead of the entire legal culture. Judges are isolated.

**Petersen:** I disagree with Margaret. I remain confident in and optimistic about the future of Hong Kong courts, especially the higher courts. Hong Kong jurisprudence is still very protective of human rights, especially judgments of the upper level courts. I do, however, agree that it is correct to ask what is underneath our institutions. I am not entirely sure about the decisions of lower courts. I do have reservations about some magistrates' decisions and new judicial appointments. In light of recent events, I believe we should talk about the ICAC as well, which is an institution we have not mentioned today.

**Ng:** The CFA tries its best to maintain international connection and professionalism. But not every litigant can go to the CFA, and we cannot just wait until the CFA asserts our rights.

On the issue of extraterritorial jurisdiction, I would just like to briefly add a point on a Hong Kong Chinese nationals' privileged status as compared to the status of an ordinary Chinese national. This privilege, enjoyed by us, is in fact the fruits of our bargain. Without this bargain, the trust and confidence Hong Kong people reposed on China back then would be completely different. I am very concerned about the muted responses from the Government and people who acquiesced with the unconstitutional measure (of extra-terrestrial prosecution), while this issue was thoroughly discussed in 2001. It is as if people simply lost memory of it.

**Tai:** Putting forward three hypothetical questions: first, assuming the Chinese authorities allow me to enter into China, will I be prosecuted if I go back to China? Second, if I advocate for an unofficial referendum in Hong Kong about Hong Kong's future, will I be prosecuted if I go back to China? Third, if I advocate that every province in China should have the right to self-determination, forming a federal China, will I be prosecuted if I go back to China?

**Chopra:** About the role of the judiciary. The point of national security law is to provide the executive branch with as much discretion as possible. Many of the issues posed to courts depend heavily on the legal drafting of the law, which are already limited by the legislature. I suggest the correct approach is to build in judicial scrutiny in earlier stages of the process instead of just relying on judicial review. I however see a trend that the judiciary veers towards a pro-security view when national security is concerned.

I would like to ask: I see popular constitutionalism becoming a trend in Hong Kong and China in recent years. Are the two phenomena interlinked?

**Davis:** I doubt whether judges are in fact siding with national security. Judges scrutinize security measures for being potentially too heavy-handed (e.g. nullifying the legal instruments) and always side with human rights (e.g. not sentencing Joshua Wong to imprisonment).

Regarding Fu's comment on China's policy being rigid, is it really that impossible for the Chinese or Hong Kong government to see that current oppressive policies will eventually provoke more radicalization? Is there any room at all on the Chinese side to re-examine their policy towards Hong Kong?

**Gittings:** Regarding the legal position of Hong Kong Chinese and their illegal actions in China. A23 will not provide the Chinese authorities with legal tools for detaining people such as Lee Bo. A23 is just irrelevant in these cases.

**Chan:** We should also explore the possibilities of setting up our own intelligence agency in Hong Kong.

**Kapai:** It should be obvious that the Chinese authorities should have realized that their approach is not working. There is a steady trajectory of what is about to come. The current state of affairs is sort of like game theory, and different camps are setting expectations. There seems to be no room for concessions.

**Albert:** In response to Benny's hypothetical questions, I doubt whether mainland criminal law can be applied to Chinese citizens in Hong Kong vis-à-vis Chinese citizens in Canada.

In China, if the offence passes the threshold of severity (3 years of imprisonment), the person can be prosecuted although the offences are committed extra-terrestrially. For even more severe crimes, extradition is possible. Arguably, Hong Kong people will be subject to the same treatment. The question about the reach of the Chinese Criminal Code depends on legal interpretation: whether Hong Kong is outside Chinese territory, or that there will be an anomaly that Chinese nationals in Hong Kong will not be subjected to Chinese Criminal Code.

**Petersen:** But BL Art. 18 says national laws will not apply in Hong Kong.

**Albert:** It only means that the Hong Kong courts will not apply national laws of China. It only governs the regime in Hong Kong and cannot affect the competence of the Chinese government.

**Halis:** There were two Hong Kong residents, staying in Macau, searched for by the Chinese authorities. The police of Macau, endorsed by the Chief Prosecutor, eventually ordered the two Hong Kong residents to be delivered back to China. There were cases, later censored by the Macau's CFA, in which the police simply handed in suspects to the Mainland even in the absence of specific regulations but on the approval of representatives of Macau's Public Prosecution's Office.

**Huang:** On the issue of criminal jurisdiction in China, there is a difference in jurisdiction over land and jurisdiction over person. The Chinese Criminal Code's extra-jurisdictional effect only affects Chinese nationals that exclude Hong Kong residents. The identity of the offenders matters because BL Art. 18 excludes Hong Kong residents from the enforcement of Mainland law.

**Fu:** It is unsure whether CPG is considering being more open or reviewing its policies on Hong Kong because China's political climates go in cycles. It should be remembered that China has a twenty-year cycle.

**18:15 – 19:00 CONCLUSIONS**

1. There is no consensus on whether there is a need to implement A23. At present, it also seems unlikely that should such a bill be proposed, it could be passed due to the legislative climate in Hong Kong today.
2. There remains a big issue of “trust” between the Central People’s Government and the people of Hong Kong.
3. Any new proposal for the enactment of A23 should also address how minors are dealt with should they be found in violation of national security laws.
4. Some participants emphasized that PRC national security laws should not apply directly in Hong Kong.