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Abstract

Liao Zhengzhi, the late director of the Office of Hong Kong and Macau
Affairs, once said that, on the resumption of Hong Kong’s sovereignty,
Hong Kong needed only to change the flag and British governor after the
Handover. While the press was full of doomsday prophecies about Hong
Kong’s future, there was another camp of ‘super-paradox’ theorists who
genuinely believed that Hong Kong’s status quo would not changed after
the Handover, for an authoritarian one party-dominated PRC could
absorb a free-flowing Hong Kong without changing the nature of an
open society. Contrary to doomsday prophets and ‘super-paradox’
theorists, this paper argues that, on the one hand, the doomsday prophecy
was groundless, but on the other hand, important institutional changes
did take place even though barely noticed. It is argued, by using the
example of the legislation of Article 23, that a gradual approach has been
adopted by the CCP to change the fundamentals of Hong Kong’s polity,
a strategy that I call ‘Leninist integration’.

Introduction

Hong Kong had been a British colony for 155 years before the
People’s Republic of China (PRC) resumed its sovereignty over Hong
Kong on 1 July 1997.

Since then, more than eight years have passed and Hong Kong has
experienced momentous changes. In particular, the marching of half a
million people protesting against the legislation of the Article 23 of the
Basic Law on 1 July 2003 marked the turning point in the post-Handover
Hong Kong political development, which subsequently led to the
resignation of the Chief Executive (CE) Tung Chee-hwa. A 'super-paradox' theory, however, circulated after the Handover, which basically argued that despite the sovereignty retrocession, nothing in Hong Kong had changed and a free Hong Kong remained the same and Beijing was content to leave Hong Kong alone. ¹ Nothing, however, was further from the truth. In fact, the 'super-paradox' theorists were too impatient and if only they could wait two or three years, they could have seen that the 'paradox' had dissolved and Beijing's grip on Hong Kong has been tightening as time goes by. The introduction of the "accountability" system concentrated the power on the Chief Executive, abolishing the Chief Secretary as the head of the civil service and making the post constitutionally redundant.

In April 2004, Beijing's second interpretation of the Basic Law on Hong Kong's political development intensified the trend. Beijing adopts an incremental approach of what I call "Leninist integration", by which an authoritarian PRC could severely restrict the pace of democratization and the civil liberties of Hong Kongers. In this paper, I would argue that the legislation of the Article 23 in Hong Kong was, in fact, one of the measures through which Beijing implements the tactics of "Leninist integration" and was the most dramatic step to change the nature of Hong Kong as a free society by making use of the UK's law abiding tradition. At the same time, I would also use the case to illustrate the post-Handover political development in Hong Kong in general.

The paper also attempts to analyze the origin of Article 23 in the Basic Law and the viewpoints of different social and political groups pertinent to the issue. Why are Hong Kong people so worried about such legislation? What are the social and political forces that lend support to the pro and con camps? What are the deep-seated reasons that characterize such heated debates? The paper further examines the impact that would be felt on Hong Kong SAR as an international city and the consequences if the Article is enacted.

The Origin of Article 23

Hong Kong people were presented with the Hobsonian choice in the matter of sovereignty change in 1997. The PRC refused to allow Hong Kong to be involved in the negotiation with the British government. In order to restore the confidence of local people and to honour its pledge
not to meddle with the internal affairs of Hong Kong after the Handover, the PRC drafted the territory’s mini-constitution—the Basic Law, supposedly to embody the principle of ‘one country, two systems’ which gives a high degree of autonomy to Hong Kong. The drafting of the Basic Law lasted for five years and it was completed in 1990. The Law was promulgated by the National People’s Congress (NPC) in April 1990 to be effective after 1 July 1997. Among all the provisions in the Basic Law, however, none is more controversial than Article 23. Despite Donald Tsang, the new CE, having promised not to reintroduce legislation in his remaining two-year term, even today, the society at large is still divided over the content or substance of the Article, the pace of legislation or even the necessity of legislating such a law.

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

The Article had undergone several formulations before it took the final shape. The June 4 massacre was the single most important event impacting upon the drafting. The present form was introduced only in the aftermath of the June 4 crackdown. As is well recorded, the issue of Hong Kong sovereignty emerged in the late 1970s. From 1981 to 1983 the British government and China negotiated an agreement supposedly to the satisfaction of three sides. The Sino-British Joint Declaration was signed in 1984 and in 1985, the PRC set up a Basic Law Drafting Committee (BLDC) to draft the Basic Law and along the Drafting Committee, a Basic Law Consultative Committee (BLCC), composed of 150 members, was set up to solicit ideas or opinion from Hong Kong general public.

The 1980s was the most liberal era in China since the founding of the PRC. Having discarded the shackles of Maoist dogma, Deng Xiaoping became the de facto supreme Party/state leader and launched the four modernization programs in the Third Plenum of the Eleventh Chinese Communist Party (CCP) Congress in late 1978. His reform and open door policies heralded a new epoch in China’s development. He was assisted
by the two reform-minded senior party leaders-Hu Yaobang and Zhao Ziyang. Deng also adopted a pragmatic posture in foreign policy. The astute and peaceful diplomatic solving of the sovereignty issue of Hong Kong manifested a spirit of realism pervading the Basic Law.

Incidentally, China's intention of drafting a 'good' mini-constitution for Hong Kong was evident from the start. For all its authoritarian twists, the BLDC incorporated two most outspoken and articulate democrats from Hong Kong, namely Martin Lee Chu-ming, a widely-held as the father of democracy and Szeto Wah, a trade unionist. China nominated two-thirds of the members. One-third of its members came from Hong Kong and most of them were political conservatives or pro-Beijing establishment figures. A majority, therefore, was guaranteed for the China status quo.

After three years of drafting, the BLDC published the first draft of Basic Law for consultation in April 1988. The then subversion Article 22 read as follows, “The Hong Kong SAR government shall prohibit by law any act designed to undermine national unity or subvert the central people’s government.” In retrospect, though ambiguous, the provision was certainly much less harsh than the later versions. However, upon being released, the article was heavily criticized by the legal community and liberal-minded legislators. Most criticism stressed that the wording was too vague and covered a variety of activities that were guaranteed by the Sino-British Joint Declaration but would be considered illegal under the Law. The criticism led to a totally reworded new Article 23 in the second draft of the Basic Law in February 1989. In the new draft, the Article said that Hong Kong SAR “shall enact laws on its own to prohibit any act of treason, secession, sedition or theft of state secrets”. The offences were more precise and, in general, it was agreed that the notation was consistent with Hong Kong common law tradition and, moreover, it has the important words “on its own” which allows the Hong Kong SAR to enact the law by itself after 1997 and seems to respect the autonomy of Hong Kong.

However, the events of June 4 1989 changed all these. The death of former CCP general secretary Hu Yaobang on 15 April triggered the largest social movement in several decades in the PRC. The pioneers were the university students but the movement was participated in by all walks of life. For two months, thousands of people staged protests and demanded inflation be curbed, a clean government, elimination of
princelings', and political reform. Deng Xiaoping responded with brutal force. The armored cars and tanks rolled on the Chang An Avenue and the demonstrations were crushed. The clock stopped clicking in Beijing and the work of both BLDC and BLCC were suspended indefinitely.

In the months of April and May 1989, when the pro-democracy movement was at its height, Hong Kong people manifested unfailing efforts in their support for the movement. In May, twice there were more than one million people flooding on to the streets to show support for the students and protest against the declaration of martial law in Beijing by Li Peng, then Chinese premier. Unfortunately, the support went afoul. After the massacre, more than three hundred thousand people assembled in the Happy Valley horse race course to mourn the thousands of victims suppressed by the People’s Liberation Army (PLA). Moreover, hundreds of pro-democracy activists such as Chai Ling, Lee Lu, Feng Cunde, Zhang Boli and Wuer Kaixi and including famous intellectuals Yin Jiaqi, Chen Yizi, Wan Runnan, Chen Yi and Su Xiaokan in the movement escaped to Western countries through clandestine channels in Hong Kong organized by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China and Hong Kong underground societies.

Hong Kong was publicly accused by Li Hou, then vice director of the Office of Hong Kong and Macau Affairs, as being the biggest subversive base against the PRC government. The relations between Hong Kong and Beijing became extremely tense. After the resumption of work, BLDC reviewed the Basic Law provisions and Article 23 took its present form as events unfolded. The wording of subversion against the central government was inserted in the aftermath of the June 4 events, which was in response to the subversive role of Hong Kong in the events. The final version of the Basic Law was promulgated in April 1990.

Events Triggering the Legislation of the Article

In the first term (1997-2002) of Tung Chee-hwa, Beijing adopted a relatively non-interventionist posture towards Hong Kong, except the NPC interpretation on the right of abode of the mainland-born children of Hong Kong residents in 1999. “Public Order ordinance” and “Societies ordinance” were passed after the Handover to deal with issues of social order, demonstrations and relations between local political groups and
foreign political organizations, but not other more sensitive political measures. However, there had been several incidents since the Handover that put Hong Kong SAR government in an embarrassing position because there is a lack of ordinances to deal with sensitive political issues in Hong Kong in particular regarding national territorial integrity and government confidential documents. Although the issues were resolved by political/administrative measures permanent damage has been done for Hong Kong and the image of rule of law was tarnished. More importantly, Beijing was determined that such embarrassments would not happen again and its move to push the Hong Kong SAR government to legislate Article 23 was as urgent as ever when Tung’s first term was approaching its end. The following incidents certainly forced the Tung administration as well as Beijing to rethink the pace of the legislation of the Article:

a) Cheng An-kuo Incident

Cheng An-kuo was nominally the general manger of the Chung Hwa Travel Service but he was then, in fact, the de facto highest official of Taiwan in Hong Kong. In July 1999, Lee Teng-hui, then Taiwan president, talking to a German weekly journalist, proposed a “two state” theory regarding international status of Taiwan, in which he rejected the claims by the PRC that Taiwan is a local government while Beijing is the central government; instead two political entities are of equal status. Taiwan and the PRC are in a state-to-state relationship.

As expected, the theory was strongly attacked by the Beijing media. On 17 July 1999, Cheng An-kuo was invited to talk in a radio program of RTHK, government-sponsored radio, called Hong Kong Letter, in which he defended the “two states” theory. The ‘letter’ engendered a strong reaction from the local pro-CCP groups. Ma Lik, a NPC deputy and now chairman of the Democratic Alliance for the Betterment of Hong Kong (DAB), attacked Cheng’s speech on the radio as disseminating the idea of Taiwanese independence, which has secession intention and impact. He urged the Hong Kong government to draft Article 23 legislation as early as possible. On 19 August 1999, then vice premier Qian Qichen stepped in and stated publicly that Hong Kong should not promote the ‘two states’ idea as it contravenes Beijing’s seven principles which have governed the Hong Kong- Taiwan relationships
since 1997. For the existing laws in Hong Kong simply cannot handle the issues.

b) Lu Hsin-lien Incident

Chen Shui-bian and Annette Lu Hsin-Lien were first elected Taiwan's president and vice-president in March 2000. After the elections, the Hong Kong Cable TV interviewed Lu on 29 March 2000 and the next day it was broadcast for two days. In the interview, Annette Lu reiterated the official position of the Democratic Progressive Party, which was that Taiwan should have independence and the Taiwanese people did not want to reunify with the Mainland.

Once again, Beijing reacted angrily and the People's Daily published several articles condemning the views of Annette Lu. Locally, Wang Fengchao, deputy director of Central Government Liaison Office, delivered a speech entitled “The principle of one China and the Taiwan issue” at a seminar organized by the Hong Kong Journalist Association on 12 April 2000, with the senior management personnel of the mass media as his audience.

At the outset, Wang excluded information about Taiwan reunification from normal news items. He argued that the reunification with Taiwan is an utterly important issue for the country and, therefore, it is the responsibilities of Hong Kong reporters “to uphold integrity and sovereignty of the country and not to advocate the ‘two states’ theory. This, according to his logic, has nothing to do with normal press freedom.” Wang hinted that the Article 23 on treason and subversion should be enacted as quickly as possible.

In fact, there was a related incident concerning Annette Lu and RTHK. So Wing-hong is a famous Hong Kong singer and he was found taking drugs in a Taiwan karaoki and arrested. After the trial he was sentenced to twelve days of rehabilitation. He was found to have good behavior and was released two days early. So far, everything was fine. However, during his stay in the rehabilitation centre, Annette Lu came to visit the center and they held a party in which So was joyously singing with Lu. This created a headline in Hong Kong as Lu was a political figure. After So came back to Hong Kong, Che Suk-mui, a DJ in the RTHK, wanted to arrange a dialogue between Lu and So on the radio. The news immediately became a bomb shell in Hong Kong. The old
problem arose; should a government-sponsored radio interview (or let her have a chance to talk) Annette Lu, who is the number two pro-Taiwan independence figure? Should RTHK become a propaganda machine of the government which is in conflict with the role long played by the station? Henry Tang Ying-yen, then secretary responsible for broadcasting policy, intervened and the dialogue was dead.8

c) Li Xiaomin Incident

Li Xiaomin is a Mainland Chinese scholar who has a Princeton Ph D in sociology and is a naturalized American. He was teaching at the City University of Hong Kong when he was arrested by the security forces in Shenzhen on 25 February 2001. He was sent to Beijing for trial and found guilty of theft the of PRC government classified documents. Furthermore, he was alleged to have been spying for Taiwan. The PRC court sentenced him to ten years of imprisonment but later deported him to the USA because of American government intervention. The tricky point was that, after several months, he was able to come back to Hong Kong and resume his teaching duty at the City University.

Li's return to Hong Kong successfully aroused bitter debates among pro-one-country and pro-two-systems camps in Hong Kong. The bone of contention was about the extent of territorial jurisdiction of the Mainland China court verdict. The pro-two-systems camp claimed it is legitimate for him to come back because Hong Kong practiced 'one country, two systems' and Hong Kong's legal system is different from that of the PRC; therefore, the mainland's legal jurisdiction did not cover Hong Kong. However, the pro-one-country camp argued that Li should have been barred, because the legal jurisdiction of the Mainland court decision should be extended to Hong Kong since Hong Kong is a part of the PRC. When Li was sentenced to imprisonment and later, deported out of 'Chinese territories', what does 'Chinese territories' mean? Does it mean 'legal territories' by which Hong Kong has a distinctive system or does it mean 'geographical territories' in which Hong Kong is a part of the PRC. If it is the former, Li evidently could come back because his verdict by Mainland court became invalid, and his conviction certainly would affect his return but if it is the latter, he would be sent into prison once he set foot in Hong Kong.
On the surface, it seems that the pro-two-systems camp triumphed and Beijing seems to have adopted a lenient approach in Li’s case. However, without the backing of the US government, Li’s entry to Hong Kong was doubtful. The incident evidently involved international relationships, in particular Sino-American relation. The collision between a Chinese jet fighter and an American surveillance plane over South China Sea in April 2001, which led to the death of a Chinese pilot and the detention of twenty four US crew members and the plane in the PRC, produced a cold war between the PRC and USA. The crisis was solved only by strenuous diplomatic efforts on both sides. Then Sino-American relationships began to warm up. It was at this time that the spy case of Li Xiaomin occurred and it must be born in mind that Li is an American citizen and his return was accompanied by a US Consular officer at the airport. Li was detained for six hours in the airport. It was most likely that, during the six hours, Beijing was consulted whether to allow Li back to Hong Kong. ‘One country’ always predominates over ‘two systems’. Ma Lik once again raised in the mass media the issue of legislating Article 23.

d) Falun Gong Incident

Among these incidents, the Falun Gong movement in Hong Kong was perhaps the most sensitive and complicated issue and caused embarrassment both for Hong Kong SAR government and Beijing. Falun Gong was outlawed by the NPC after thousands of its followers encircled Zhongnanhai, the nerve center of the CCP power, in 1999. Since then, the Falun Gong movement has been brutally suppressed in China and thousands of believers were jailed, as the CCP perceived the movement as a threat to the regime. In Hong Kong, Falun Gong was registered as a social organization under the Society Ordinance in 1996 and their breathing practice was conducted publicly and peacefully. Even after its banning in Mainland, their activities were all within the confines of Hong Kong laws and it would be illegitimate to outlaw the movement. As an international city, Hong Kong is being closely watched by international mass media. Even though Tung Chee-hwa gradually moved from a neutral position to a position that pronounced that ‘Falun Gong is more or less an evil cult’ and then to a standpoint that firmly declared Falun Gong is an evil cult in a span of two years from 2000 to
2002, the Hong Kong SAR government could do nothing about it. That could explain why the Beijing government was so pushy in urging Hong Kong government to legislate Article 23.

The Views of Beijing

Since the inception of the second term of Tung Chee-hwa’s administration in July 2002, the pressure on the HKSAR government to enact the security laws had been mounting. There is no doubt that Beijing wanted the SAR government to legislate as quickly as possible, as the Central government cannot enact the law for the HK SAR. Their reason is simple: because it is stated in the Basic Law that the SAR government should enact locally laws regarding subversion, secession, and sedition. It is against the constitution if the SAR government does not. More importantly, the first term of Tung (1997-2002) had gone and the Taiwan political scene was dominated by pro-independence figures. Li Teng-hui’s pro-independence stand had become increasingly explicit. In 2000 Chen Shui-bian was elected as Taiwan’s president.

On the tenth anniversary of the promulgation of the Basic Law in 2000, Qian Xiaoyan, then vice-chairman of the Legislative Affairs Committee of the NPC, reiterated that the enactment of the article was important because it involved sovereignty and the unification of the nation. He was certainly referring to Taiwan when he mentioned the issue of unification. In a meeting between Qiao and Elsie Leung, Secretary of Justice, in Beijing, Qiao emphatically said that “Under the Basic Law, the SAR has a duty and responsibility to enact the law....it has to do it as soon as possible.” On the same day, in a meeting with Elsie Leung, the then NPC chairman Li Peng publicly pushed Hong Kong for quickened legislation. Elsie Leung repeated what Li had told her that the SAR has an obligation to enact the law, though Li had not put any pressure on her to speed up the process. Later in an interview with Hong Kong television broadcasting station TVB, Qian Qichen, the vice premier, explicitly pointed out that the Falun Gong should be outlawed in Hong Kong if it maintained ties with foreign groups after the enactment of the anti-subversion law.

In Hong Kong, before her resignation in April 2001, Anson Chan, Chief Secretary for Administration, obviously did not think that the legislation was urgent. In fact, she stated that the legislation of the Article
23 was of such a sensitive nature that the government should consult widely before it made any decision. She argued that nothing can challenge the Basic Law and we should respect all articles in the Basic Law including freedom of speech, press and etc, but we should not rush to a decision. Elsie Leung said that the government would not make this law rashly and it would consult wide sectors of society before the enactment. To put down people’s worries, she added that by allowing the enactment of this article locally, the Central government, in fact, understood that the degree of human rights and freedom in Hong Kong and mainland China were different.

Moreover, to further allay the fear of Hong Kongers, she pointed out that according to Article 39 of the Basic Law, the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong remained in force and therefore the rights of and freedom enjoyed by Hong Kongers would not be restricted. She also pledged that she would stand up to Beijing if it wants Hong Kong to pass laws on sedition and subversion which would breach international safeguards on human rights. She assured Hong Kong people that “The purpose of the legislation is not to target any particular group.... I don’t think there is actually a threat. I believe the law is there in case there is a need to use it.”12 Furthermore, she added that if everyone is sincere in doing it, it needed only a few years to complete the enactment, as most of the clauses would be based on the existing ordinances. Lau Siu-kai, the chief advisor for Central Policy Unit, even went to predict that the legislation could be completed within two or three years.13 However, according to Zhang Xin, a noted Chinese legal specialist based in the Chinese University of Hong Kong, the gap between Hong Kong’s conception of sedition and subversion and China’s is so great that, it is difficult not to carry “Chinese characteristics” if the Article were enacted.14

The Consultative Process

Finally, the Hong Kong SAR government published the consultation document (hereafter the Document) on proposals to implement Article 23 of the Basic Law on 24 September 2002; the consultation period would last for three months, with the aim of passing the Bill in July 2003. The Document stated that the HKSAR government “has both practical and legal obligations to implement Article 23....The intent... is to prohibit by
law acts that would undermine the sovereignty, territorial integrity, unity and national security of our country. In arguing for the introduction of the proposal, Regina Ip said that “There are few people [in Hong Kong] who are imbued with the concept of protecting one’s country....Security lies at the heart of our well-being. It is the cornerstone of the smooth running of our society.” The Document covers seven areas of offences, including treason, secession, sedition, subversion, theft of state secrets, foreign political organizations and the police investigative powers. In fact, among the proposed offences, some were already dealt with under Hong Kong existing legislations. Part 1 and 11 of the Crimes Ordinance deal with treason and sedition respectively. The Official Secrets Ordinance deals with spying and unlawful disclosure of the official confidential information. The Societies Ordinance regulates, inter alia, the activities of organizations and their ties with foreign political organizations.

In the course of consultation, both the publicity style of senior officials and the substances of the Document were heavily criticized by society at large and the legal community in particular. Regina Ip Lau Suk-yee, the Security Secretary, who was responsible for marketing the Document, was perceived to be too arrogant and pushy and very often discussion was impossible when she was present. After 1 July, she resigned the post of the Security secretary. At the end of the consultation period, 100,909 submissions were received by the government of which 97,097 were local. Without analyzing the submissions properly, the government submitted the National Security Bill (Legal form of Article 23) to the Legislative Council (LegCo) for the first reading on 26 February 2003.

Despite the concessions by the government, such as the relaxation of the proscription mechanism and “a careful effort to strike a balance between protecting national security and safeguarding fundamental rights and freedoms”, the Security Bill still suffered a number of drawbacks. According to the Article 23 Concern Group, whose membership consisted of Audrey Eu, Alan Leong, Ronny Tong, Margaret Ng, all LegCo members and lawyers and other legal professionals, the Bill contained a number of major problems: 1) The proscription mechanism goes beyond the requirements in Article 23, and it threatens freedom of association and expression as well as the right to open justice and legal representation; 2) The Bill threatens the freedom of information and the free press
because there is no public interest or prior publication defence; 3) The offence of sedition endangers freedom of speech because it is defined as indictment to commit treason, subversion and succession, and incitement can be committed by mere speech without any unlawful act; 4) The wording in many parts of the Bill is too vague; 5) Apart from treason, all Article 23 offences apply to all Hong Kong permanent residents wherever their nationality and whatever they live and for what they do in or outside Hong Kong; 6) It abolishes important safeguards in the existing law that prosecution of treason should be within 3 years and sedition within 6 months; 7) There is no reason to give the chief superintendent the power to approve police break in, search and seizure of property, which is given now by the court, etc.  

As is well known, the CCP both represents and governs the country in the PRC. The four cardinal principles are enshrined in the PRC constitution, the most important of which is the rule of the CCP. The Party monopolizes political power, allowing no organized opposition, not to mention popular elections in rotating the government. Any criticism of the government and the CCP even verbally could be construed as having seditious intention to overthrow the state. This practically makes the CCP immune from criticism and thus, freedom of speech is practically ruled out from daily life and any activities on the part of citizens who are perceived to be threat to the CCP Party/state could be liable for prosecution under these provisions. Under the PRC’s criminal law, it is difficult to distinguish between sedition and exercising genuine rights/freedom of speech. Hong Kong public feared that by interpreting the seditious offences to such an extent, the CCP could potentially eliminate the fundamental rights pledged to HK citizens in the Basic Law.

As observed from Hong Kong, there were cases showing the arbitrary application of criminal laws involving security issues in China. One notable example is the case of Wang Dang, the number one hunted student leader in the aftermath of June 4 events and now studying in Harvard University. He was hunted down by the security forces and imprisoned for four years. After his release, Wang stayed at home and wrote articles in overseas publication criticizing the CCP. In 1996, he was arrested again and charged with subversion and seditious offences. Wang had written about thirty articles and had maintained contact with overseas political organizations through emails, although Wang did not have any overt activities at all, he was, however, still charged with
subversion and sedition under the Chinese Criminal Laws. He was subsequently sentenced to ten years of imprisonment. In April 1998, Wang was released on medical parole and exiled to the USA; and this was possible mainly due to the diplomatic pressure of the US government, in particular after the visit of President Bill Clinton to China. For Hong Kong people, Wang Dang’s case was only one of the many that totally ignored human rights in the PRC. The legislation of the Article 23 aroused the worries that the arbitrary use of the criminal laws and procedures could be transplanted to Hong Kong and would lead to subsequent loss of citizen rights enjoyed before the Handover.

The Standpoints of Different Political/Social Groups

The Democratic Party

Once the most influential political party in Hong Kong, The Democratic Party (DP) did not oppose the legislation itself but argued that sufficient preparation should be made before legislation and that the provisions should not run in counter to the International Covenant for Political and Social Rights. Legislator Cheung Man-kwong suggested that the best option was not to legislate the Article as Hong Kong already has similar laws in dealing with treason, public order and internal turmoil. Furthermore, Martin Lee, then chairman of the DP, argued that since the promulgation of the Basic Law, the political situation has been stable, the transition and the Handover has been smooth, and there are no political groups which oppose unification and national territorial integrity, therefore it is unnecessary to legislate the anti-subversion law, a move that would certainly divide Hong Kong society. He further argued that the DP fully supports ‘one China’ policy and the reunification of Taiwan. The Falun Gong members have been peaceful demonstrators in Hong Kong. He urged the Hong Kong SAR government to explain the situation to the leaders in Beijing who may not have a full grasp of the information on Hong Kong. Anthony Cheung Bing-leung, a former deputy chairman of the Party and new chairman of SynergNet, a think tank, asserted that there was no urgency to bring in the law and “that any move to legislate in the near future is bound to cause uncertainty in mainland-Hong Kong relations.”
Democratic Alliance for Betterment of Hong Kong (DAB) and Liberal Party

The DAB was established in 1992 and Liberal Party in 1993. Widely perceived as the 'indigenous CCP', the DAB scored the biggest electoral victory in the LegCo election in September 2004 and is now the biggest political group in the LegCo, occupying 13 seats. Liberal Party is the second biggest party in the LegCo, having 12 seats. Together, these two parties have a firm grip on the majority votes of the LegCo. Because of that, Tsang Yok-sing and James Tien Pei-chun, chairmen of both parties were invited to join the Exco by Tung Chee-hwa in 2002, when the accountability system was introduced. It goes without saying that the two parties have been staunch supporters of all government polices, in particular on the legislation of Article of 23. After the 1 July mass demonstrations, the DAB insisted that the Bill should go ahead as scheduled to be enacted on 9 July 2003, but the Liberal Party wavered and finally James Tien resigned from the ExCo, meaning that the government would not obtain sufficient votes in the LegCo and consequently forcing Tung Chee-hwa to delay the legislation.

The Bar Association

Alan Leung Ka-kit, legislator and then chairman of the Bar Association, even hinted at the possibility of a constitutional crisis, if such legislation were forced through. Similar to Martin Lee, Leung reiterated that the existing legislation could provide a set of legal code that could deal with activities covered by the Document. On the other hand, he argued that under the existing ordinances, the concept of secession and subversion against the central government is ambiguous at best. The legislation borrows the concepts from Mainland China which belongs to another legal system, thereby threatening the common law notion of freedom and rights in Hong Kong. The Article, furthermore, violates the provisions of the International Covenant of Political and Social rights. In future, it is likely that such legislation would be declared unconstitutional in the court because the presumed ordinance would be against the international covenant of social and political rights which is contained in the Basic Law.
In July 2002, the Bar Association published a report, outlining its recommendations regarding the drafting of Article 23. Among the main recommendations were the following. First, New legislation must conform to International Covenant on Civil and Political Rights and other relevant Basic Law provisions; Second, pure expression of opinion should not be criminalized; Third, the Secretary of Justice’s consent must be obtained for prosecutions under Article 23; Fourth, on sedition, an intention to incite violence or create public disorder against the ‘constituted’ authority has to be shown; Fifth, on treason, no objection to amending the Crimes Ordinances to reflect the sovereignty change, but only action involving or likely to lead to violence to be liable to prosecution; Sixth, regarding the theft of state secrets, review Official Secrets Ordinance to keep it in line with Johannesburg Principles on Restriction on Freedom of Information; Seventh, on secession, in fact, actual secessionist activity is covered under other laws, so there is no need for the new legislation. 28

Article 23 Concern Group

This group rose to prominence during the consultation process and consisted mostly senior counsels including Denis Chang, Audrey Eu, Alan Leong, Ronny Tony and legislator Margaret Ng. The group had established a website devoted to the discussion of the proposed legislation. On the proposed legislation, the group submitted more than a hundred revisions. After the SAR government submitted the legislation as the Blue Bill, the group published a booklet summarizing their criticism. 29 The group certainly had wide spread influence on Hong Kong public, as they were all legal experts with high credibility.

Other Social/Religious Groups

Michael Davis, a human rights and constitutional law specialist, was concerned that “there have been intense meeting (between Hong Kong officials and mainland officials) in which mainland officials are interfering with enactment of this legislation...perhaps we are consulting too much on the content of this.” 30 Johannes Chan Man-mun, Hong Kong University law dean, argued that the existing laws to handle national security issues were enough. 31 He also argued that since Elsie
Leung had said that the legislation would mostly be based on existing legislations, therefore, it was necessary to publish all the relevant information in order to alleviate the uncertainties of the people.\textsuperscript{32}

The Hong Kong Human Rights Monitor group led by Mr Law Yuk-kai, in fact, sternly opposed such enactment. Law argued that the incumbent legislation already provided sufficient basis for violent activities against the Hong Kong SAR government. For instance, the Crime Ordinances could prosecute those who instigate such activities against the government. For the theft of state secrets, he argued that the Official Secrets Ordinances again was capable of dealing with the theft of official secrets. Most importantly, the legislation practically abrogated the provisions of freedom of speech and assembly which are guaranteed by the Basic Law; Article 27 would be meaningless.\textsuperscript{33} ARCH

Archbishop Joseph Zen Ze-Kiun was totally against the legislation. He called on Catholics to join the 1 July demonstration (2003) to express their dissatisfaction over the proposed legislation. He strongly urged the government to defer the legislation and he believed that if the government could accept to defer the legislation, the size of demonstration would be reduced by half.\textsuperscript{34} However, Elsie Tu, the colonial fighter before the Handover, argued that Bishop Zen’s accusations were “groundless” and based his judgments on the experiences of the days of the Cultural Revolution. She believed that national security bill was necessary in Hong Kong, as part of China, and the proposed bill, in fact, was more liberal than the security law of Western democracies.\textsuperscript{35}

\textit{Foreign Governments, Consulates and Press}

Besides the public and the local press, foreign governments, Hong Kong-based consul generals, and the foreign press had also expressed concern over the issues relating to the legislation of the Article. Most of them were worried that the freedom of speech, expression and the free flow of information would be impacted by the implementation of the Article 23. Subsequently, Hong Kong would become less attractive to the international community, and its status as an international commercial and financial center would also be affected. The US and UK consulates in Hong Kong,\textsuperscript{36} the British Chamber of Commerce,\textsuperscript{37} and some foreign banks also articulated the similar worries.\textsuperscript{38} The European Union issued a statement, expressing the same worries and the European Parliament
debated the issue in mid-December 2002. On 30 June 2003, Bill Rammell, the British Foreign Office minister for Hong Kong, warned of the proscription of organizations which "blur the line between two autonomous legal systems by introducing into Hong Kong legislation linkages to mainland law." The editorial of *New York Times* stated that "Freedom of speech could be threatened by a law that would ban seditious publications...undermine the territory's ability to survive as a vibrant financial center that thrives on a free flow of information", and that "...the violation of Hong Kong’s autonomy would devalue Beijing's credibility in seeking a peaceful reconciliation with Taiwan."39

Li Kwok Po, a local banker and legislator for the banking sector, reflected the sentiments of the banking industry. "Banking in Hong Kong would be affected if press freedom is restrained...if the media cannot fully and fearlessly reflect news and views truthfully, the information is useless--press freedom is what gives us a comparative advantage over Singapore".41

Erosion of the high autonomy of Hong Kong was another worry for the Western industrialized countries. According to the Article 2 of the Basic Law, the HKSAR enjoys a high degree of autonomy, however, the British Consulate General of Hong Kong42, the *Asian Wall Street Journal*43 and the Bar Association in England and Wales44 all showed concern about the proposed provisions about banning organizations in Hong Kong affiliated with Mainland organizations which are proscribed in the Mainland on national security grounds. A press release by the British Consulate-General in Hong Kong on 18 November 2002 said, "It is important that the integrity and independence of Hong Kong's legal system, key factors in Hong Kong's success are not compromised by the proposed legislation".45

The lack of transparency, the hasty legislation schedule and the refusal to publish the White Bill were other criticisms by the international community. The US State Department had urged the SAR government to release the exact draft of the proposed legislation of Article 23 for public consultation. Philip Reeker, deputy spokesman of the US State Department, said that, "We believe there should be an opportunity for the fullest possible consultation on the draft legislation...".46 In the press release of the British Consulate-General of Hong Kong, it also stated that the British government would closely follow the issues on the legislation of Article 2347. Moreover, Li Kwok Po said "More than 10 foreign
banks, especially banks from US, UK, Germany and France, told me they hoped the Hong Kong Government would publish a white [bill] first.48

The extra-territorial effect of certain provisions in the proposed legislation intensified the debate. The New Zealand government expressed great concern over this issue. Phil Goff, the minister of foreign affairs and trade, questioned the impact that the proposed anti-subversion laws may have on foreign nationals living in Hong Kong. He said “New Zealand will follow with interest how that proceeds and how that may impact upon a New Zealander who, for example, may make a comment in New Zealand that could come within this category.”49 The US State Department50, the British Consulate-General in Hong Kong51 and the New York Times52 also expressed the same view.

Dr. Frances D’Souza, a human rights expert, who helped to draft the Johannesburg Principle53 in 1995, urged the SAR government to adopt a strict definition of national security and ensure non-violent advocacy and even insults to the government not be curtailed. On the issue of “subversion”, she said that “The crime of subversion is new to the world. I don’t know of any modern jurisprudence which would carry such severe penalties for citizen who may unknowingly commit it.”54 She thought that the anti-subversion legislation under Article 23 would be a major blow to freedom and democratic development in Hong Kong.

Last but not least, the proposed legislation had attracted public attention in other countries. A group of US citizens had written a public letter to the US president, urging him to follow closely the issues about Article 23, and make sure that the human rights in Hong Kong would not be compromised.55 Another group of foreign and local scholars had written a public letter to the President of the PRC as well, asking him to stop the legislation of Article 23 in Hong Kong.56 The Asian Wall Street Journal published an article titled “Broken Promise in Hong Kong”, in which the writer argued Beijing was only concerned with the laws about national security such as “treason” and “subversion”; however, Tung Chee-hwa’s government “went on extra mile”57, trying to suppress the freedom of press and expression as well.

The Escalation of the Debate

The Document was heavily criticized by the legal community and social groups. Brushing aside opposition voices, the government gazetted
the National Security Bill on 11 February 2003 and submitted the proposed legislation to the LegCo for first and second reading. The public demanded a White Bill (full draft of the legislation) be published for more thorough consultation. The Article 23 Concern Group suggested more than one hundred amendments to the Bill on 13 June 2003. On 14 June 2003, when nearly all the legislators of pan-democratic camp attended a forum on the Article 23, held in the Hong Kong University, the pro-Beijing legislators passed the original Bill without amendment and the government made ready to be submitted to the LegCo on 9 July 2003 for the final enactment. The move angered the public and the mood of confrontation intensified.

As soon as the SAR government published the Document a powerful political group was formed, named Civil Human Rights Front (CHRF), comprising forty plus social and political groups concerning different religious, labour, cultural, glass root issues. The CHRF specially set up a Article 23 working committee to deal with issues arising from the legislation of the Article 23. The CHRF organized a 60,000 people demonstration opposing Article 23 legislation on 15 December 2002 at the end of the three-month consultation period. Moreover, it organized a candle night, participated by 1,500 people, when the National Security Bill went to LegCo for first reading on 25 Feb. 2003. Finally, the CHRF became the most powerful group that organized the world-stunning half million July 1st mass peaceful demonstration against the SAR government.

A group of local scholars reanalyzed the submissions to the government at the end of the 3-month period. They found a total of 369,374 individuals had expressed their opinion on the Document and of these 34.6% supported the proposed legislation content, while 62.6% opposed. For those who opposed, the most often-cited reason was that it would hurt human rights and freedom and followed by that reason that it would damage one country, two systems and so on. Beginning in early 2003, the political atmosphere began to be more tense and society increasingly polarized. Different groups galvanized forces for support.

As the sixth anniversary of the establishment of the Hong Kong SAR approached, the democratic camp agreed to stage a mass rally to oppose the Bill, although people thought that the chance for the government to back-down was slim. Throughout June 2003, people had been using internet to urge others to participate in the demonstrations on 1 July. The
mass media also played a role but none was more active in mobilizing than the *Apple Daily*, which practically abandoned the language of neutrality and urged people to take part in the demonstration on 1 July 2003.

In the end, more than half a million people turned up on the streets on 1 July 2003 to protest against the legislation. The number of demonstrators exceeded the wildest expectations of the organizers. Some even estimated the people were more than a million. Certainly, this was the biggest rally in Hong Kong since 1989. More embarrassingly for the SAR government was that Wen Jiabao, the Chinese premier, was in Hong Kong to celebrate the sixth anniversary of the establishment of Hong Kong SAR. He departed for Shenzhen in the morning on 1 July. It was reported that he watched the drama unfolded and was surprised to find so many people turned up to oppose the SAR government.61

In the wake of the massive protest, Tung held a crisis meeting with his cabinet the next day and decided to go ahead as planned to submit the National Security Bill to the LegCo on 9 July 2003, while promising to amend three of the most controversial areas including the removal of proscription mechanism, the addition of public interest defence, and to withdraw the police power in investigative entry without judicial warrant on 5 July 2003. However, despite the insistence of the government, the lawmakers began to waver as public pressure was mounting. Dr Lo Wing-lok, representing the medical sector, said that he was waiting for the results of a questionnaire which he sent to all 10,000 doctors in the territories, and said, “I will vote according to the majority view of respondents. I will also take into consideration the very loud voice in yesterday’s march.” James Tien Pei-chun, the Liberal Party chief which had been the government’s staunch supporter, now said that the Party’s eight LegCo members vote would depend on how the government responded to the public demand.62 Moreover, activists warned that they would besiege the LegCo building if its plan of enactment were unchanged and even warned that there might be clashes between the supporters of the government and the opponents on 9 July outside the LegCo chamber in central.

Dramatically, coming back from Beijing, James Tien claimed that, after consultation with senior officials there, he was told that Beijing had no timetable for the National Security Bill. Tien then publicly on 4 July asked Tung to defer the legislation. Tung’s government responded by
proposing to make three amendments on the Bill as above. Apparently, Tien was not satisfied with the move and he declared he would resign from the ExCo on 6 July. The ‘ruling coalition’ formed in July 2002 immediately crumbled and the SAR government became a minority without the support of the Liberal Party in the LegCo. Tung was forced to declare the deferment of the final reading of the Bill.

The Civil Human Rights Front organized two more mass rallies in the Central on 9 July and 13 July, attended by thousands of people. Gradually, the slogans of the rallies shifted to ask the government to introduce direct elections both on the Chief Executive in 2007 and all LegCo members in 2008. The momentum towards universal democratization was so great that the SAR government was not able to resist it and subsequently led to the intervention of Beijing on Hong Kong’s internal affairs by re-interpretating the Basic Law on the relevant provisions \(^{63}\) in April 2004.

On 16 July 2003, Regina Ip, Secretary of Security, resigned from her post for personal reasons, but apparently for her failure in her bid to implement article 23. On the same day, Anthony Leung Kam-chung, the Financial Secretary, tendered his resignation letter for an alleged conflict of interest. The fiasco of the Bill caused Tung’s popularity rating to dip to its lowest point since 1997. In a survey conducted by Hong Kong University between 14-16 July, 63% of the respondents were against his performance and 72% were against him to be the CE. \(^{64}\) In retrospect, 1 July 2003 mass demonstration was the turning point for Hong Kong as well as for Tung. It marked the beginning of the end of an era of relatively non-interference policy by Beijing and practically the end of Tung’s political career. Tung resigned from the CE post in March 2005. The political struggles between the SAR government and pan-democratic camp and other NGOs in the legislation process of Article 23 engendered a “new breed of heroes” as the SCMP titled one of its reports. \(^{65}\)

**Conclusion**

The political struggles between the pro-one-country camp and the pro-two systems camp on the legislation of Article 23 crystalized the conflicts arising from the integration of two regions with two entirely different legal traditions, political histories, cultural dimensions and mass
psychological experiences. For several decades, Hong Kong was kept from the political turmoil and intrigues of Chinese mainland. Having escaped from mainland, Hong Kong people could do what they wanted in daily life under the British rule. Hong Kong had an independent judiciary and the colonial rule was benign. Political participation was not the goal of daily life until the advent of the 1997 issue. Hong Kong was a capitalist paradise where there was no bar on the way to success if one works hard enough.

Since the 1980s, democratization has become one of the most important goals that the community strives for. In the 1990s, because of Governor Chris Pattern's political reform (1992-1997), the era of party politics dawned. The tragedy is that the pace of regression has been forced upon by a centralized power center in Beijing. The legislation of Article 23 displays the tactics of ‘Leninist integration’ by the CCP. The super-paradox theorists were too naïve politically. They were well-intentioned people, having hopes in the PRC government. As one of the advocates Elsie Tu said, “Since the [Cultural Revolution] when a quiet and peaceful revolution has made China one of the most enlightened governments in the world.” They were oblivious to the changes after the Handover. For example, in 1998, the introduction of the mother-tongue as the medium of instruction in the secondary schools aroused strong social resistance, which was against the tradition of leaving the secondary schools to choose their own medium of instruction. No sooner did the policy begin to be implemented, than the SAR government had to back down. In 1999, the abolition of the two municipal councils further centralized political power in the executive branch. The 1999 reinterpretation by the NPC deprived the jurisdiction power of the Court of Final Appeal, putting the NPC as the final arbitrator in legal litigation and able to intervene as it wished. Finally, the introduction of the principal official accountability system in 2002, enhanced the CE’s power enormously. Contrary to what the super-paradox theories wished to see, the post-Handover has seen the incremental absorption of HK into the PRC of Leninist leanings. For many people, the vivid imagery of the tanks crushing tents of students and the statue of liberty in (the Tiannamen Square) still lingers. Despite the achievements of the legal system in the past two decades, China’s concept of rule of law is still alien to the common law tradition. A legal scholar has noticed that “law in China remains dependent on the regime’s
policy goals. Particularly where political prerogatives are at stake, legal requirements appear to pose little restraint on state power.

The legislation of Article 23 certainly would change the nature of Hong Kong legal system. Fortunately, Tung totally failed and on 5 September 2003, he withdrew the Bill and without committing to a time table. In September 2004, after the LegCo elections on 10 September, Tung once again declared he had no intention of submitting the Bill to the LegCo and no timetable was scheduled. Tung has had to pay a heavy political price in sixteen months. The democrats seem to have won a big battle over Article 23, but without realizing that they have lost the war on “double universal elections” for 2007-08.

Notes
2 About the details of the Sino-British negotiations, see Robert Cottrel (1993), The End of Hong Kong. London: John Murray. For the decision-making process of the Chinese government and the negotiation from the Chinese perspective, see Wong Man-fong (1997). The Decision-making Process and the Implementation of the ‘one country, two systems’, Hong Kong: East and West Centre, Baptist University. For a Hong Kong insider perspective, see Chung Sze-yuen (2001). Hong Kong’s Journey to Reunification- Memoirs of Sir Sze-yuen Chung. Hong Kong: The Chinese University of Hong Kong.
4 For the insider story of the June 4 crackdown, see Andrew Nathan and Perry Link, eds. (2001). The Tiananmen Papers- the Chinese Leadership’s Decision to Use Force Against Their Own People-in Their Own Words, New York: Public Affairs. About the decision-making process of the crackdown, see Zhao Ziyang’s recollection, in Open. February 2005, pp.20-24.
5 The strange co-operation between secret societies and anti-government groups perhaps could date back to the Han dynasty in China more than two thousand years ago. The code-name operation ‘Yellow Bird’ to rescue democratic activists in the aftermath of June 4 remains a mystery till present.
6 The gist of the Qian’s seven principles is that non-governmental exchanges between Hong Kong and Taiwan could be preserved after the Handover. However, all governmental exchanges between the two places must be approved by Beijing. The Taiwan representative in Hong Kong must adhere to ‘one China’ policy, both in words and deed. As a government-sponsored broadcasting station, RTHK should not disseminate separatist views on the question of national unification. The official argument behind this is that freedom of speech and press has pre-conditions, as everywhere in the world.
7 South China Morning Post, 13 April 2000.
This is certainly an overt intervention in Hong Kong’s internal affairs by Beijing. It is important to see that the non-interventionism practiced by Beijing after the Handover is not that it cannot but rather it does not want to. When it sees that important issues are at stake, it chooses to intervene, such as the drafting of Article 23. See Apple Daily. 'It is not necessary to quicken the process of legislation for Article 23’, 28 February 2002.

South China Morning Post, 26 June 2002.

South China Morning Post, 12 July 2002.

Ming Pao, 15 July 2002.


Ibid, pp.7-51.

Being interviewed in 2005, Regina Ip did not think that her resignation was caused by the fiasco of Article 23. She was thinking of leaving the government in 2002. As principal official, her job was to persuade the public to accept the legislation and she did not think the time schedule was tight. See Interview with Regina Ip, in *Economic Journal Monthly*, September 2005, pp.39-40.


Articles 63, 90, 92 and Security Law, Article 23.


Tsang has already resigned the post of DAB chairman in early 2005. The DAB is now headed by Ma Lik. James Tien has resigned the ExCo post in the aftermath of 1 July demonstrations but he is still the head of Liberal Party.

Ming Pao, 7 April 2002.


South China Morning Post, Do not interfere in sedition law, jurists tell Beijing, 13 July 2002.

South China Morning Post, 13 July 2002.

Ming Pao, 15 July 2002.


South China Morning Post, 4 May 2003; Apple Daily, 20 June 2003.

South China Morning Post, 6 May, 2003.

Apple Daily, 26 September 2002.


South China Morning Post, 3 December 2002.


Apple Daily, 26 September 2002.

Ming Pao, 28 December 2002.


Quoted from May Sin-mi Hon and Ambrose Leung, South China Morning Post, 23 November 2002.


South China Morning Post, 3 December 2002.

Cliff Buddle, South China Morning Post, 18 November 2002.

May Sin-mi Hon and Ambrose Leung, South China Morning Post, 23 November 2002.


The principles were developed by 37 international experts in South Africa.

Ravina Shama dasani, South China Morning Post, 5 December 2002.

Apple Daily, 30 November 2002.


Apple Daily, 26 September 2002.

www.margaretng.com/article%2023%20text.


Ming Pao, 2 July 2003.

South China Morning Post, 3 July 2003.

The second NPC reinterpretation took place on 26 April 2004, which forbids Hong Kong to have universal elections on the CE and all LegCo members in 2007 and 2008.


South China Morning Post, 6 May 2003.


Ming Pao, 14 September 2004.
It was said that the Hu-Wen leadership was extremely dissatisfied with Tung. In one of the Standing Politburo Committee meetings, after the 1 July demonstrations, Tung was criticized as “out of touch with public opinion” and “he did not do his job well” etc. See Chung Hoi-yan, “Hu-Wen and the crisis of the legislation of the Article 23” in *Economic Journal*, 24, 26, 27 August 2003.
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<tr>
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<td>Wong Yiu-chung</td>
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