

Submissions to the Roundtable

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The following are some comments or submissions to a few selected questions from the "Discussion Agenda"¹:

1. Part I.2.a.ii., The human rights jurisprudence will mitigate the harshness of the Art.23 legislation.

I generally agree with it because 1) with the entrenchment of ICCPR as-applied in Hong Kong by B.L. Art.39, human rights principles can be relied upon as standards of scrutiny of the constitutionality, or at least the "as-applied constitutionality", of the criminal ordinance; 2) Art.23 legislation is a local criminal legislation, though purported to protect some national interests. Thus, the enabling nature of Art.23 of the Basic Law doesn't elevate the "National Security Law" to such status that free from being challenged against human rights jurisprudence; 3) a common law approach of interpreting and enforcing the legislation will probably be secured in the judiciary, therefore, the vagueness and overbreadth of the terms and languages, including those originating from Mainland China laws, can be mitigated to some extent.

On the possibility of an NPSCS interpretation concerning a national security law issue:

1) A free standing and abstract interpretation of Art.23 even after the national security law is enacted is unimaginable, and will not only lead to an amendment of the local legislation to carry out the effect, but also provoke a new round of debates and protests in Hong Kong.

2) Foreseeing or after a constitutional review case of the national security law grounded upon some specific fundamental rights, there might be an impulse for the NPCSC to issue an interpretation, absent a referral from the CFA, of that right provision to give an effect that allow the criminal law passing the scrutiny.

For instance, the freedom of speech clause of the B.L. can be deemed by NPCSC as having an impact upon Central-SAR relationship which would otherwise be grounded by the courts to strike down a sedition conviction. By such an interpretation, some broad understandings of national security concepts can be imported into Hong Kong jurisprudence indirectly.

¹ For the Roundtable discussion only. All the questions and suggestions are welcome.

3) Whether the judicial conditions and rules of test for deciding to make a referral to the NPCSC for interpretation in national security cases would develop are to be observed. In theory, the possibility of an Art.158(3) referral is tiny because most of the Chapter 3 provisions of the B.L. are of the nature that should be seen as within the autonomy of the SAR. However, the judicial conditions and rules can be changed or developed by an NPCSC interpretation or a new CFA precedent.

2. Part II.1. The concerns of central government toward Hong Kong as a source of security threat. I would like to emphasize two points:

1) As a society immersed in the tradition of the freedom of speech and press for so long, Hong Kong has always been a source of the publication, circulation or disclosure of political scandals, whether tested or not, inside Beijing, especially those containing the details of the personal lives and fortunes of those few supreme incumbent and retired leaders, which are definitely of a nature of personal insult in their eyes. From a Mainland perspective, such political scandalous literature have and will always been the targets of prosecution in the name of sedition or state secrets crimes.

On the other hand, the jurisprudence of national security crimes in Mainland are barely developed. Let's take the crime of sedition of subversion(Art.105 of the Criminal Code) as an example. According to Prof. Jia Yu, a prominent scholar in this field, the "act of sedition" of the crime of sedition of subversion means any inciting or provocative expression, printed or oral, with the intention of being accepted or believed by the audience, that encourage, induce, urge or provoke others to conduct the subversion of the regime. Such act of sedition can be in the form of publication, on-line communication, practice of "the evil cult" or disperse of false information during a public health crisis.² However, there's a significant loop hole in such definition: there's no "likelihood" test before the conviction, and the prosecution is usually centered around proving the existence of the "seditious behavior", such as some dispersed utterance on-line. Thus, even if the manner, nature or content of the expression is so ridiculous that nearly impossible to successfully incite any present unlawful act from the audience, the defendant can still be convicted, as long as the court is satisfied with the seditious nature of the expression.

In the case of Chen Pingfu³ in the year of 2012, a senior high school teacher in Lanzhou, Gansu province, who lost his job because the unfortunate close down of the school, blogged a series of articles containing many discontent, criticism and some other "negative words"

² 贾宇主编：《刑法学》，中国政法大学出版社，2009年版，第266页。

³ 参见《甘肃法制报》，2012年9月5日，第002版。

against the local government and the national educational policy as a whole. He was charged of "the sedition of the subversion of the regime". After two court orders of postponement of the trial, the prosecution was withdrawn by the government. This was a typical sedition crime case that the nature of the defendant's expression is basically criticism or outburst of personal emotion. But, in the lack of an objective establishment of the likelihood of the subversive act or the causal connection between the utterance and the act, the power of investigate, arrest and prosecute can be abused easily. Generally speaking, the main risk of the speaker is from the "unwelcome nature" of the speech itself.

2) Under a continuous pressure of maintaining the "stability of society", the governments of all levels in Mainland are sensitive to any sort of social movement, protest and demonstration whatever the theme of such event is. For the past few years, Hong Kong has become a place with high-profile of social confrontation. Therefore, what a Mainland government concerns is the "sample effect" of Hong Kong upon a Mainland region where some general discontent prevails among people or a hot public interest issue, such as environment protection, is escalating within the community.

3. Part II.2. On the argument that the enactment of national security law can help preserve the autonomy in security issues in Hong Kong.

My answers to this argument can be summarized as follow:

1) From a legal point of view, the enactment of Art.23 legislation itself cannot eliminate the chance of listing other national law relating to national security to the Annex 3 of the B.L. by the NPCSC. We know that the laws added to the Annex 3 shall be "confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region". However, the national security laws comprise of many sorts of crimes, regulations and rules. For example, the theft of state secret will probably be seen as a crime that related to defence if the secret is about a sensitive military technology or strategic disposal of the PLA. Above all, the NPCSC has the final say to define the term of "defence", "foreign affairs" or "outside the limits of the autonomy".

However, difficulties that would arise from such "dual legislations" can be foreseen. Such as the conflicts of the national law and the local legislation. In this circumstance, the best way to reconcile the conflict is to enact an amendments legislation in Hong Kong. But the LegCo will have to deal with some technical problems if there're sorts of crimes in the national law that are beyond those provided in Art.23. In sum, whether the Art.23 is the complete "authorization" of national security crimes legislation upon Hong Kong legislature is uncertain.

This is not only a test of the meaning of the term "on its own", but also of the essence of the policy of "one country two systems".

Another question might be that there could be some specific orders or duties provided for the SAR in such national law which are not criminal laws. Then the Hong Kong government needs to carry out such legal duties according to the procedures prescribed in Art.18 sec.2 of the Basic Law.

2) From a political point of view, when the Art.23 legislation is enacted, it's very hard for Beijing to decide to give Hong Kong a system of dual national security legislations. That would fundamentally harm the credibility of Art.23 and the autonomy of the Region.

3) As for the theme of "autonomy of national security issues", or as phrased in the question, "recapture the security territory", I submit that there're three aspects of the enforcement of national security law deserve our special attention. First, whether an unbiased procedure of investigation, prosecution and trial can be maintained by local authorities; Secondly, whether the common law approach toward enforcing the national security crimes can be properly adopted and developed to help decrease the vagueness of the legislation; Finally, whether a strong jurisprudence of human rights can be used to balance the severeness of such laws through the procedure of constitutional review.

4) Whether the completion of Art.23 legislation will minimize the extra-jurisdictional enforcement of Mainland national security law by Mainland agencies is very hard to predict. Against all criterion, these "cross-boundary" enforcements are unlawful, unless there're certain authorizations provided by some bilateral agreements. I assume that an Art.23 legislation can hardly prevent a Mainland agency from unlawfully investigate or arrest someone in Hong Kong when such person's history, status, or deeds "strongly induce" them to do so.

5) To sum up, I believe there can be a short period of appearance of trust-rebuilding between Central Government and the Hong Kong people after the enactment of the Art.23 legislation, but there'll still be various circumstances or incidents which will harm the integrity of the local national security law and then the fragile confidence of the Hong Kong people in Beijing.

4. Some key factors of and my comments upon the National Security Law of 2015:

1) The enactment of the National Security Law of 2015(NSL, “国家安全法”) by the Chinese NPCSC is part of a systematic institutionalization of the national security maintenance which accelerated with great strength since this Administration took office in late 2012. Before the enactment of the statute, a high level party organ," the Central Commission of CCP for National

Security", has been set up in January of 2014 and invested with the supreme and centralized power of deliberation and policy-making in the national security issues. The Commission is referred to in Art.5 of the NSL as "the Centre's national security leading body" and President Xi chairs the Commission.

The unprecedented(except for early 1950s) attention paid to the national security questions by the Central Government and the leadership of CCP can be explained by the current situation in Mainland China. It's widely believed that the incumbent government is under great pressure and predicts the occurrence or high risks of various types of economical, social and even political crisis in the upcoming years. The legislation reflects the determination of the leadership to further consolidate the power and thus to cope with these probable crisis.

2) The concept of "national security" in this national legislation is of a very broad meaning, which includes no less than 11 sub-categories of security issues such as political security(Art.15), territorial security(Art.17), economic security(Art.19&20), nuclear security(Art.31) and even cultural security(Art.23). According to the definition provided in Art.2 of the law, "national security""refers to a situation in which the national regime, sovereignty, unity and territorial integrity, the welfare of the people, the sustained development of the economy and society and other major State interests are not in danger or under internal or external threat, as well as the capacity to ensure a sustained situation of security". It is a definition that nearly covers everything that are within a national government's range of responsibilities in contemporary world. To some extent, the National Security Law, if executed to the completeness, will impose upon all levels of governments and almost all kinds of public authorities in China with a duty that require them to carry out their normal responsibilities as if tackling with a security issue. Therefore, we shall not confuse this "wholesale concept" of national security with those from the criminal law which are much more narrowly defined and understood.

Nevertheless, because of the abstractness of this law, the specific means, orders, regulations, procedures or prohibitions that would be enforced or executed are unknown yet. Considering the established legislative practice in Mainland, we'll see some delegate-legislations with more concrete prescriptions subsequently.

3) There're two provisions in the National Security Law that mention Hong Kong directly. One is Art.11(2) which requires the Chinese nationals among Hong Kong residents, together with all the other Chinese citizens, to safeguard the national sovereignty, unity and territorial integrity. The other one is Art.40(3) which mandates the Hong Kong Special Administrative Region(HKSAR) to "fulfill the responsibility of safeguarding the national security".

Art.11 of the NSL is a general mandate to all the individuals, organs and entities that are within the jurisdiction of Chinese sovereign to carry out their respective duties relating to

national security. Section 2 of this provision refers to the sovereignty, unity and territorial integrity specifically and, against this ground, sets up an obligation in explicit language for all the Chinese citizens, including those reside in Hong Kong, Macau, and Taiwan.

Art.40 sits in Chapter 3 of the legislation. In this chapter, various kinds of state organs are mentioned and imposed with certain duties and tasks in the national security maintenance, and Art.40 is about the duties of all the local governments. Hong Kong SAR is usually taken as a special component of China and its government is usually excluded from the notion of "the local governments of China". Consequently, section 2 of Art.40 begins with the subject of "all local levels' People's Governments", and section 3 begins with "The Hong Kong Special Administrative Region...". Although Hong Kong is not immune from national security duties, the structure of this provision indicates the special legal status of the Region.

There're a few points that I shall make regarding the nature of these two provisions:

First of all, the inclusion of some "Hong Kong referring provisions" doesn't mean there'll be a decision from the NPCSC to add this national legislation into the list of the Annex 3 of the Basic Law(the B.L.). As long as the preservation of a separate legal system of Hong Kong is sustained by Art.18 of the B.L., a national legislation beyond the list is inapplicable and unenforceable in Hong Kong. We must note that as an NPCSC's legislation, the National Security Law is inferior to the Basic Law of Hong Kong, so those two provisions should never be given an effect of circumventing the Art.18 of the B.L. even if some explicit terms are used to indicate the legal responsibilities of the Hong Kong government or the Hong Kong people. Nevertheless, as the central legislative bodies, the National People's Congress and its standing committee have the power to enact such provisions and they are not "invalid law".

Secondly, even in Mainland, the generosity and abstractness of the language in the National Security Law make its implementation dependent upon further promulgation of some inferior orders, regulations or delegated legislations. As some scholars suggested, the National Security Law should be viewed as a ground upon which a systematic cluster of laws of this sort will be enacted and a legal institution for the maintenance of national security will be completed. ⁴Technically speaking, this very piece of legislation is quite a declaration of general policy of national security rather than an "applicable" law. Therefore, it's far from being appropriate to be listed to Annex 3 of the B.L.

Third, the way in which the law prescribes Hong Kong's national security responsibility demonstrates the NPCSC's respect toward the integrity of Hong Kong's legal system. In

⁴ 周叶中、庞远福：《论国家安全法：模式、体系与原则》，《四川师范大学学报（社会科学版）》，2016年第3期。亦可参见康均心、虞文梁：《后<国家安全法>时代的国家安全法律体系建设》，《郑州大学学报（哲学社会科学版）》，2016年第3期。

Art.40(2), the law mandates all the local governments in Mainland to manage the national security work "according to the provisions of laws and regulations", and the "laws and regulations" thereof refer to those from the Mainland legal system. However, when Hong Kong is mentioned in the next section, it's only said that Hong Kong SAR "shall fulfill the responsibility of safeguarding the national security". In a plain reading of this sentence, the source of such "responsibility" is unknown. An explanation of such different disposal in the legislation could be that the NPCSC deliberately leave with the local legislature in Hong Kong the power to further establish and complete its own national security legislation which will on one hand "fulfill the responsibility" as an inseparable region of China and on the other hand better fit the existent legal system in Hong Kong. Thus, it's not the NPCSC's job to specifically indicate the source of responsibility for Hong Kong as she does for the Mainland local governments. In my opinion, such an explanation is in line with the arrangement of local legislation on national security law in Art.23 of the Basic Law.