National security law: five differences between Hong Kong’s new legislation and 2003’s shelved Article 23 bill

While critics of new legislation are still in shock, analysts say that, in some ways, the city has been down this road before. The Post explores differences in wordings, processes and the context behind version of the law 17 years ago that sparked massive protest.

Topic | Hong Kong national security law (NSL)
As Hong Kong comes to grips with the sweeping national security law tailor-made by Beijing, it may appear as if the legislation was drawn from scratch. But there are parallels with another home-made version, crafted in the city almost two decades ago.

In 2003, an unpopular bill that regulated seven acts was pushed forward by the local government, but it was shelved after more than 500,000 people took to the streets on July 1, the handover anniversary marking Hong Kong’s return to Chinese rule. It was the largest postcolonial protest the city had seen.

Seventeen years later, Beijing chose the eve of the anniversary of the handover – at 11pm on June 30 – to impose the new law, described by mainland Chinese officials as “a birthday gift” to safeguard the city’s “one country, two systems” governing principle. However, critics have called it “the end of Hong Kong as people know it”.

The first week into the enforcement of the much-stiffer-than-expected law saw localist parties disbanding, activists fleeing abroad and 10 protesters arrested for allegedly displaying pro-independence slogans in a July 1 march that was banned by police.

Fear and anxiety continue to pervade across swathes of society as new regulations kicked in after the Committee for Safeguarding National Security, in the first meeting on Tuesday, detailed new powers – as derived from the newly minted law – to local police to raid premises without a court warrant and demand information from political groups operating outside the city.

Hong Kong national security law full text:
In many ways, veteran analysts said they felt Hong Kong had been down this road before. These and many other sweeping powers under the new law were debated thoroughly in the legislative exercise of the now-withdrawn bill back in 2003, during which the local government made numerous concessions to fulfil demands by various sectors on safeguarding civil liberties.

Now, analysts and legal experts feared that the new law, which defines criminal offences in broad and expansive language, would make it difficult for people to ascertain exactly what conduct was prohibited. But others believed that Beijing had no choice but to impose sweeping constraints on citizens’ liberties in view of escalating pro-independence forces and foreign interference in recent years, arguing that at stake was the very idea, no less, of the “one country, two systems” policy that Hong Kong was premised upon.

The Post reviewed the major differences between the proposed law in 2003 by the local city government and the current bespoke law by Beijing, and asked experts what prompted the changes.
The 2003 bill went through public consultation and Legco scrutiny, but the new law did not.

In contrast with the newly enacted law, which was drafted behind closed doors in the country’s top legislature, with little input from Hong Kong officials or residents, the local government in 2002 went through a lengthy consultation exercise to fulfil its constitutional responsibility to safeguard national security, as stipulated in Article 23 of the Basic Law, the city’s mini-constitution.

Officials released a consultation document in September that year and followed that up with a three-month public exercise and a massive publicity campaign. The government received more signatures from locals against the proposals.

How different are Hong Kong, Macau’s national security laws?

8 Jul 2020
Seven weeks after the close of the consultation period, the government published the bill, which regulated seven acts: treason, secession, sedition, subversion of the central government, theft of state secrets, the prohibition of foreign political organisations or bodies from conducting political activities in the city, and the prohibition of political organisations or bodies of the special administrative region from establishing ties with foreign political organisations or bodies.

It then introduced this to the Legislative Council for a four-month scrutiny by the bills committee.

Following the mass protest on July 1, 2003, the government offered several concessions to further amend the bill, yet later decided to shelve it as the pro-business Liberal Party, which held eight votes, decided not to support the proposals.

Among the activists who opposed the Article 23 legislation was Ronny Tong Ka-wah, who co-founded a concern group with other pro-democracy barristers. Tong is now an adviser to the cabinet of Chief Executive Carrie Lam Cheng Yuet-ngor.

Ronny Tong shakes hands with Chief Executive Carrie Lam in 2017. Photo: Felix Wong
He said Legco’s scrutiny in 2003 was crucial in pressuring the government to clarify concerns on how the bill might undermine civil liberties, but a similar approach could not be undertaken with the new law without rendering the process ineffective. The reason he gave? The opposition camp’s tactics in recent years to paralyse or stall legislative proceedings.

“Beijing had no choice but to impose it directly in Hong Kong to avoid unnecessary chaos,” he said.

Police search powers without a court warrant was removed in the 2003 bill, but revived in the new law.

One of the major concessions made by then chief executive Tung Chee-hwa following the July 1 march in 2003 was to delete a provision that conferred on police the powers to search without a court warrant in emergency investigations.

But such power was revived in the new law, with authorities announcing the new implementation rules on Tuesday allowing senior police officers to enter any premises and hunt for evidence without a warrant “under exceptional circumstances”.

Simon Young, associate law dean at HKU. Photo: Edward Wong
Simon Young Ngai-man, associate law dean at the University of Hong Kong, had warned that any warrantless entry or search and seizure power of police lacked legitimacy in Hong Kong’s civil society and could be in breach of fundamental rights guaranteed in the city’s mini-constitution.

Article 29 of the Basic Law provides that the “homes and other premises of Hong Kong residents shall be inviolable” and “arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited”.

He believed a warrant-based procedure has been crucial in preventing abuse of the arresting authority, as warrants set standards by which to measure the lawfulness of the search and notify the affected people of the parameters.

But Lau Siu-kai, vice-president of the Chinese Association of Hong Kong and Macau Studies, a semi-official think tank, believed the new sweeping powers were in line with global practice for authorities to cope with increasingly complex national security cases.

“If intelligence suggests that relevant evidence would be destroyed or suspects fled abroad in a short time, it’d be necessary for officers to be granted more powers for swift actions,” he said.

Lau believed that the rights of ordinary citizens would not be undermined as authorities would conduct warrantless searches on “a very limited number of people” only, in emergency situations.

“Serious criminal means” are necessary to constitute secession in the 2003 proposals, but not any more.

Secession and subversion are the only two offences that are identical in the shelved bill and the sweeping new law, both punishable by up to life imprisonment.

Following the public consultation exercise, local authorities in 2003 removed the reference to “threat of force” in both offences, making secession an offence only if a person used “force or serious criminal means” that seriously endangered the territorial integrity of China. Local officials had given the assurance that public advocacy would probably be counted only as part of preparatory steps taken towards bringing about an actual withdrawal of sovereignty.
But under Article 20 of the newly enacted law, secession covers acts to separate the city from China “whether by force or threat of force”.

Tong, the executive councillor, believed the expansive scope reflected that Beijing aimed to target the increasingly common “organisational behaviours” that might threaten national security.

“The mobilising people to take part in non-violent acts to separate Hong Kong from China could trigger more substantial, immediate threats to the nation than mobilising people to be involved in street violence,” he said.

*The UN Human Rights Committee has frequently reminded governments that ‘national security’ is not synonymous with the*
Young argued the change could be related to the enactments of the Anti-Secession Law of 2005 that targeted Taiwanese separatists hoping to achieve their goals by any means, and the National Security Law of the People’s Republic of China of 2015, which was broadly related to “national security” as not only the state’s “political regime, sovereignty, unity and territorial integrity” but also “the welfare of its people, its sustainable economic and social development”.

Under Article 20 of the new law, secession covers acts that separate Hong Kong or any other part of China from the People’s Republic, unlawfully changing the status of Hong Kong or any other part of China, or turning over Hong Kong or any other part of China to foreign rule.

Carole Petersen, a law professor at the University of Hawaii’s William S. Richardson School of Law, worried that the vaguely defined criminal offences under the new law made it difficult for the public to ascertain exactly what conduct was now prohibited.

The legal expert, who has researched extensively on the 2003 debate and now teaches international law, told the Post: “The UN Human Rights Committee has frequently reminded governments that ‘national security’ is not synonymous with the security of a particular political party or a particular government.”

The Johannesburg Principles, considered one of the international standards, states that a government should seek to prohibit expression only when it can demonstrate that the expression is intended to “incite imminent violence” and is likely to do so.
Treason in the 2003 bill mainly regulated Chinese nationals, but crimes under the new law are not bound by nationality or the place of an offence.

Seventeen years ago, when local officials set up the scope of offences, they proposed to limit crimes of subversion and secession to Hong Kong permanent residents, and narrowed the application of the new treason offence to Chinese nationals regardless of where the crime was committed. Such change was heavily lobbied for by foreign governments and international companies, which employ a large number of foreign nationals in the financial hub, according to consultation documents.

However, Article 38 of the new law states that it covers anyone in Hong Kong regardless of nationality or residency status, and also applies to offences committed “from outside the region by a person who is not a permanent resident”, suggesting that foreigners could also be prosecuted upon entering Hong Kong or mainland China.

The boundless reach of the rules has triggered an outcry in the international community, despite Carrie Lam on Tuesday dismissing fears of the law’s impact on Hong Kong, saying “this is not doom and gloom”.

Protests weren’t sustainable, but national security law may not stop them: analyst
Countries including the United States and Australia have established extraterritorial jurisdiction over acts of terrorism, while Britain last year passed the Counter-terrorism and Border Security Bill, which extends extraterritorial jurisdiction over some terrorist offences.

China’s State Security Law punishes individuals and organisations outside its territory who commit acts endangering state security, according to Article 4.

The new power Beijing granted itself in the Hong Kong law is even wider than the Criminal Law of the People’s Republic of China, in which Article 8 covers foreigners outside China’s territory only if the committed crime carries a minimum sentence of no less than a three-year fixed term of imprisonment, and the crime is also punishable “according to the law of the place where it was committed”.

Lau Siu-kai, vice-president of the Chinese Association of Hong Kong and Macau Studies. Photo: Xiaomei Chen

Lau from the central government’s top think tank in the city believed the new law’s widened scope, as compared with that in the 2003 bill, as well as the national criminal law, reflected Beijing’s determination to curb foreign forces that use Hong Kong as a base for subversion against the mainland or to damage its stability.
He admitted that huge obstacles existed in enforcing the law on foreign nationals outside China, but the deterrent effect alone would aid crime prevention.

“Its threats of detention and penalties are enough to prompt self-regulation in foreigners who used to meddle with China’s affairs,” he said. Offenders of serious crimes under the new law could face imprisonment for life.

**Hong Kong courts came first in the 2003 bill, but the new law empowers Beijing to exercise jurisdiction over specific cases.**

Back in 2003, local authorities did not seek to extend jurisdiction to mainland Chinese courts. Controversies about adjudicating cases mainly surrounded how the city’s Court of First Instance should handle appeals if anyone was aggrieved by the authorities’ new power to proscribe an organisation on the grounds of a threat to national security.

But the new national security law states that the Supreme People’s Court can name “relevant courts” for trials if Hong Kong has “realistic difficulties” due to the involvement of foreign forces, where it has no effective means to enforce the law amid the seriousness of the situation, and where China is faced with grave realistic threats. Its Article 65 also states that the power to interpret the national security law lies with the National People’s Congress Standing Committee (NPCSC).

Basic Law Committee member Priscilla Leung Mei-fun, also a barrister, said the change reflected the improvement of mainland China’s judicial system, which allowed suspects to be defended and stand trial fairly.

She believed that Beijing would still leave most of the judicial duties to local authorities, while Chinese legal experts might be invited to give evidence in local courts in specific cases.

Petersen, the law professor specialising in international laws, said that as there was no language requiring local courts to send a question to the standing committee over any dispute regarding interpretation, Hong Kong courts would probably do their best to interpret any vague statutory language in a manner that complied with international standards.

“If there are two possible interpretations of statutory language, then I would argue that the interpretation that complies with the International Covenant on Civil and Political Rights and the Basic Law should prevail,” she said.

**Rebel City: Hong Kong’s Year of Water and Fire** is a new book of essays that chronicles the political confrontation that has gripped the city since June 2019. Edited by the South China Morning Post’s Zuraidah Ibrahim and Jeffie Lam, the book draws on work from the Post’s newsrooms across Hong Kong, Beijing, Washington and Singapore, with unmatched insights into all sides of the conflict. [Buy directly from SCMP today](https://www.scmp.com/print/news/hong-kong/politics/article/3092396/national-security-law-five-differences-between-hong-kongs) for HKD$198. **Rebel City: Hong Kong’s Year of Water and Fire** is also available at major bookshops worldwide and online through [Amazon](https://www.amazon.com), [Kobo](https://www.kobo.com), [Google Books](https://play.google.com/store), and [eBooks.com](https://www.ebooks.com).

Links
[23] https://play.google.com/store/books/details/Lam_Jee_Rebel_City_Hong_Kong_s_Year_Of_Water_An?id=nR_kDwAAQBAJ