

## CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN THE UK, CANADA AND HONG KONG

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### ABSTRACT

In any jurisdiction, national security legislation is not developed or enacted in a vacuum and, as such, interdisciplinary analyses of this legislation is both necessary and useful. This paper establishes that the UK, Canada and Hong Kong's counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, which includes, for instance, their respective legal systems; the relative stability of their governmental and political institutions; their respective mechanisms for parliamentary scrutiny and oversight; and their individual experiences with terrorism. It analyses contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central movement in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or will be) enacted in the aftermath of these events. It concludes that terrorism can be best dealt with through existing criminal law, rather than national security legislation that is often hastily enacted, lacking in oversight, and overly politicized.

**Key Words:** National Security, International Terrorism, Human Rights and Civil Liberties, Contemporary Global Security

### INTRODUCTION

In any jurisdiction, national security legislation is not developed or enacted in a vacuum and, as such, interdisciplinary analyses of this legislation is both necessary and useful. This paper establishes that the UK, Canada and Hong Kong's counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, which includes, for instance, their respective legal systems; the relative stability of their governmental and political institutions; their respective mechanisms for parliamentary scrutiny and oversight; and their individual experiences with terrorism. It analyses contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central protests in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or could be) enacted in the aftermath of these events. In particular, it focuses on new anti-terrorism specific legislation in Canada and the United Kingdom and the lack of such legislation in Hong Kong, where the criminal law is the primary mode of criminalizing offences pertaining to national security. It concludes that terrorism can, and should be, dealt with through existing criminal law, rather than national security legislation that is often hastily enacted, lacking in oversight, and overly politicized. This national security legislation is often politically motivated and carries human rights implications that may take decades to be rectified through the courts. It is further noted that these human rights implications are exacerbated in Canada, where no specific parliamentary mechanism for oversight and review of national security policies exists. Recommendations to rectifying this problem are suggested in the paper's conclusion.

### CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN CANADA

On October 22<sup>nd</sup>, 2014, Canada suffered the most significant domestic terrorist attack in its history when Michael Zehaf-Bibeau shot and killed an unarmed soldier stationed at a War Memorial. He was subsequently killed after having entered the Canadian Parliament buildings

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in Ottawa, where heads of each of Canada's political parties, including the Prime Minister, were holding their usual caucus meetings.<sup>2</sup> The events took place only days after another man who had apparently taken to radical Islam, Martin Rouleau, drove his car into two Canadian forces personnel.<sup>3</sup> The attacks prompted immediate political condemnation and the introduction of two new pieces of legislation, including Bill C-44<sup>4</sup> on October 27<sup>th</sup> and, more recently, Bill C-51,<sup>5</sup> despite the fact that Canada already has the Anti-Terrorism Act<sup>6</sup> and several criminal law provisions aimed at combating terrorism. While Bill C-44 had been in the works before the October 23 attacks, Bill C-51 can be seen as a direct response to those attacks and has attracted a significant amount of attention and concern from civil liberties groups, parliamentarians and academics.<sup>7</sup> This section will detail and analyse the content of these new pieces of legislation, noting that the civil right(s) concerns they arouse are particularly exacerbated because of a significant shortcoming of Canada's political structure: its glaring lack of mechanisms for parliamentary oversight and accountability of counter-terrorism legislation and practices. Moreover, it will note a disturbing trend that is common to both Canada and the UK, that is, legislative responses in the aftermath of terrorist attacks despite several existing anti-terrorism mechanisms and numerous provisions pertaining to terrorism under the normal criminal law. This will prove particularly useful for comparative purposes when focus turns to Hong Kong, a jurisdiction that has resisted pressures to enact specific anti-terrorism legislation.

In an official press release on the day Bill C-44 was tabled, the Conservative government reminded Canadians that the threat of terrorism "continues to be apparent both abroad and at home" and specifically mentioned the ongoing threat posed by the "Islamic State in Iraq and the Levant (ISIL) against Canada".<sup>8</sup> The Bill, which has currently passed through the House of Commons and has had its first reading in the Senate, will make a number of amendments to the *CSIS Act*,<sup>9</sup> including: a) confirming CSIS' authority to conduct investigations outside of Canada; b) providing protections for the identity of CSIS human sources from disclosure; c) providing protection for the identity of CSIS employees who may engage in covert activities in the future; and d) giving the Federal Court authority to issue warrants for CSIS to investigate threats to national security outside of Canada.<sup>10</sup> While the Bill will undoubtedly pass into law given the current Conservative government majority in the House of Commons, several academics and Parliamentarians have raised concerns pertaining to the Bill's political purpose and human rights implications.<sup>11</sup> Perhaps the most significant concern with the Bill is that it would extend a "blanket" protection to CSIS human sources, despite the fact that the Canadian courts have consistently ruled that this protection is best

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<sup>2</sup> Ian Macleod, 'Anti-terrorism bill built around an attack that still raises questions' *Ottawa Citizen* (28 January 2015).

<sup>3</sup> Allan Woods, 'Canadian soldiers run down in possible Quebec terror attack' *Toronto Star* (20 October 2014).

<sup>4</sup> Protection of Canada from Terrorists Act, C-44.

<sup>5</sup> Anti-terrorism Act, 2015, C-51: Tabled for first reading on 30 January, 2015.

<sup>6</sup> Anti-terrorism Act, S.C. 2001, c. 41.

<sup>7</sup> John Barber, 'Canada's new anti-terror legislation prompts civil liberties fears' *The Guardian* (30 January 2015).

<sup>8</sup> Government of Canada, 'The Government of Canada Introduces Protection of Canada from Terrorists Act' (27 October 2014) <[http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=897129&crtr.tp1D=1&\\_ga=1.54539176.2078202319.1410971187](http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=897129&crtr.tp1D=1&_ga=1.54539176.2078202319.1410971187)> accessed 15 December 2015.

<sup>9</sup> Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23.

<sup>10</sup> For more information on the Bill, see legislative summary and other materials, see: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C44&Parl=41&Ses=2&billId=6729100&View=8>> accessed 16 December 2015.

<sup>11</sup> Kent Roach, 'The problems with the new CSIS human source privilege in Bill C-4' (2014) 61(4) *Criminal Law Quarterly* 451; Mr. Randall Garrison (NDP) argued in regards to the blanket protection of human sources: "Even the bill itself acknowledges that this could be a problem when it comes to using CSIS information as the basis for criminal charges. Our criminal justice system, quite rightly, does not look favourably on anonymous testimony or evidence whose validity cannot be challenged in court". House of Commons Debates (18 November 2014) 1110.

extended on a case-by-case basis.<sup>12</sup> Challenging material gleaned from these sources in criminal proceedings while maintaining due process rights would prove difficult and, as will be discussed further below, providing CSIS with further powers is additionally problematic because Canada lacks any meaningful mechanisms for parliamentary review and oversight of counter-terrorism activities.

Bill C-51 is perhaps the more problematic of the two pieces of legislation, given its omnibus nature.<sup>13</sup> Upon unveiling the new package of measures, Prime Minister Stephen Harper reiterated that, “The world is a dangerous place and, as most brutally demonstrated by last October’s attacks in Ottawa and Saint-Jean-sur-Richelieu, Canada is not immune to the threat of terrorism”.<sup>14</sup> The Bill proposes a number of new measures, including: a) the enactment of a Security of Canada Information Sharing Act, which will allow Canadian government institutions to disclose a wide range of information to agencies such as CSIS or the RCMP; b) the enactment of a Secure Air Travel Act, which will establish a ministerial procedure for the listing of terrorist suspects; c) amendments to the Criminal Code which will re-instate “recognizance” measures instituted after 9/11 that had previously expired under a sunset clause; d) amendments to the criminal code providing for offences of advocating or promoting the commission of terrorism offences “in general”; e) amendments to the CSIS Act giving CSIS additional powers within and outside Canada; and f) amendments to the Immigration and Refugee Protection Act that would further allow Ministers to claim non-disclosure of security sensitive information.<sup>15</sup> The human rights implications of the bill have immediately raised concerns.<sup>16</sup> The most problematic aspect of the Bill pertains to its exceptionally vague definition of “threats to the security of Canada”, which could result in the criminalisation of legitimate and peaceful political protest. The aforementioned recognizance measures, which would allow for detention on suspicion, were a product of the 2001 Anti-Terrorism Act that were never used prior to their expiry in 2007. The changes to the Immigration and Refugee Protection Act, would further complicate an accused’s ability to see the case against them in security certificate proceedings.<sup>17</sup> The potential human rights implications of these proposed changes, along with those that would give additional powers to CSIS, are again further exacerbated by the fact that Canada’s political structure glaringly lacks any mechanisms for parliamentary review and oversight of counter-terrorism activities.

Understanding Canada’s lack of parliamentary review and oversight mechanisms for counter-terrorism activities requires some historical context. In the aftermath of 9/11 and the enactment of the 2001 Anti-Terrorism Act, several reports mandated by that act led to Parliament proposing a specific National Security Committee of Parliamentarians through Bill C-81.<sup>18</sup> Unfortunately, on November 30<sup>th</sup>, 2005, Parliament was dissolved and Bill C-81 died on the Order Paper before becoming legislation. Future reiterations of the Bill died as a result

<sup>12</sup> R. v. Hape [2007] 2 SCR 292; Canadian Security Intelligence Service Act (Re) (F.C.) [2008] 4 FCR 320.

<sup>13</sup> The Bill will enact two new pieces of legislation, the Security of Canada Information Sharing Act and the Secure Air Travel Act, and will amend the Criminal Code, the CSIS Act, the Immigration and Refugee and Protection Act and several other acts.

<sup>14</sup> Government of Canada, ‘PM Announces Anti-Terrorism Measures to Protect Canadians’ (30 January 2015) <<http://news.gc.ca/web/article-en.do?nid=927199>> accessed 15 December 2015.

<sup>15</sup> For more information on the Bill, see legislative summary and other materials, see: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C51&Parl=41&Ses=2&billId=6842344&View=8>> accessed 16 December 2015

<sup>16</sup> Elizabeth May, leader of the Green Party, queried: “Is Stephen Harper using the imagined fear of widespread security threats to score political points before the next election?” see: ‘Elizabeth May issues statement: Anti-Terrorism Act must be rejected’ (*Green Party Website*, 2 February 2015) <<https://www.greenparty.ca/fr/node/25166>> accessed 3 February 2015; *Globe and Mail*, ‘Parliament must reject Harper’s secret policeman bill’ (1 February 2015).

<sup>17</sup> Canadian Courts have already found that security certificate proceedings under immigration law, in which the accused only receives information through a vetted “special advocate” that can no longer communicate with them once they have seen national security sensitive information, infringe various human rights including the right to a fair trial, see: *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Almrei (Re)* [2011] 1 FCR 163; *Canada v. Almalki* [2011] FCA 199.

<sup>18</sup> Bill C-81, An Act to Establish the National Security Committee of Parliamentarians, November 24, 2005.

of the minority government instability that characterized Canadian politics for most of the 2000s. This was despite the fact that two separate, independent judicial inquiries into human rights abuses by both CSIS and the RCMP strongly recommended that such a committee be created as a matter of urgency.<sup>19</sup> In 2009, a Standing Committee on Public Safety and National Security argued that it was “regrettable that the government has not yet established the independent national security review framework recommended by Justice O’Connor” and noted that this framework was “essential to prevent further human rights violations”.<sup>20</sup> Regrettably, although two bills nearly identical to Bill C-81 (Bills S-220 and C-551) were introduced into Parliament in 2013 and 2014, both lack the support of the Conservative government and, subsequently, neither have made any consequential progression through the parliamentary process.<sup>21</sup> As such, contemporary developments in the realm of Canadian national security analyzed here clearly suggest that the Conservative government is more interested in enacting new and sprawling legislation for political purposes (even though this legislation may carry severe human rights implications) than it is in addressing a fundamental deficiency of its political structure and national security framework. This is despite the fact that numerous provisions of existing criminal law covering terrorist offences exist and offer procedural safeguards to prevent the inevitable human rights abuses that require parliamentary oversight and accountability. As will now be illustrated in analysis of the United Kingdom, this troubling reliance on measures outside of the ordinary criminal law to combat terrorism is not a phenomenon specific to Canada.

## CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN THE UNITED KINGDOM

The United Kingdom is crucially different from Canada in that it has had extensive experiences of terrorism, resulting in scores of anti-terrorism legislation and a variety of mechanisms for oversight and review of counter-terrorism practices, including parliamentary committees (such as the Joint Committee on Human Rights and the Home Affairs Committee) and a dedicated independent reviewer of terrorism legislation. Nonetheless, despite the wealth of this existing legislation and a multitude of criminal law provisions pertaining to terrorism, the United Kingdom is not immune to the phenomenon of enacting legislation in the aftermath of horrific events. The January 7<sup>th</sup> attacks at the Paris satirical magazine Charlie Hebdo drew immediate global media attention and political condemnation, sparking several debates pertaining to the rights to free speech and expression.<sup>22</sup> Although the recently passed UK Counter-Terrorism and Security Act (CTSA)<sup>23</sup> was introduced before the Paris attacks,<sup>24</sup> it was subject to a semi-fast-track procedure that saw it progress from Report stage in the House to full Royal Assent in just over a month. This has raised concerns that proper pre-legislative scrutiny of the Act was rushed, which is particularly disconcerting given the omnibus nature of the Act and its human rights implications.<sup>25</sup> The CTSA makes provision for a number of new controversial anti-terrorism powers, including: a) temporary exclusion orders (TEOs) through which British

<sup>19</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (Ottawa: 2006); The Honourable Frank Iacobucci QC LLD, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: 2008).

<sup>20</sup> Standing Committee on Public Safety and National Security, *Review of the Findings and Recommendations Arising from the Iacobucci and O’Connor Inquiries* (Ottawa: Standing Committee on Public Safety and National Security, June 2009).

<sup>21</sup> For information on both bills, see: <http://openparliament.ca/bills/41-2/S-220/>; <http://openparliament.ca/bills/41-2/C-551/>

<sup>22</sup> John Irish and Alexandra Sage, ‘Police hunt three Frenchmen after 12 killed in Paris attack’ (*Reuters*, 7 January 2015) <<http://www.reuters.com/article/2015/01/07/us-france-shooting-idUSKBN0KG0Y120150107>> accessed 7 February 2015

<sup>23</sup> Counter-Terrorism and Security Act, 2015, No. 217: The CTSA received Royal Assent on 12 February 2015.

<sup>24</sup> The Act’s first reading was in the House of Commons on 26 November 2014.

<sup>25</sup> Karma Nabulsi, ‘Theresa May’s Prevent bill is extremism in the name of security’ *The Guardian* (4 February 2015); Frances Webber, ‘Farewell Magna Carta: the Counter-Terrorism and Security Bill’ (*Open Democracy*, 19 January 2015) <<https://www.opendemocracy.net/ourkingdom/frances-webber/farewell-magna-carta-counterterrorism-and-security-bill>> accessed 5 February 2015.

citizens suspected of involvement in terrorist-related activity abroad can be barred from returning to the UK; b) travel bans, through which a police or immigration officer can seize a person's passport to prevent them from leaving the country if they reasonably suspect that the person intends to leave in connection with terrorism-related activity; c) increased sanctions for airline carriers, whereby they will be required to supply advanced passenger and crew information and refuse boarding to anyone on a government list; and d) compulsions for education providers to enact the government's PREVENT strategy, which had previously been voluntary, in order to counter terrorism by targeting radical extremist ideology. According to Home Secretary Theresa May, "This important legislation will disrupt the ability of people to travel abroad to fight and then return, enhance our ability to monitor and control the actions of those who pose a threat, and combat the underlying ideology that feeds, supports and sanctions terrorism".<sup>26</sup>

As is currently the case in Canada, David Cameron knows that he and his party will shortly be campaigning for election.<sup>27</sup> As we have seen on many occasions since 9/11 in both the UK and Canada, new terrorism legislation is most politically tenable in the direct aftermath of high-profile attacks and, in particular, in election years, when few political leaders are willing to oppose the legislation and risk being branded "soft" on terrorism. It is in this political climate that legislation with severe implications for human rights is often used as a political tool, with disregard for its true implications and less time for consideration of these implications, despite the fact that existing legislation, or the ordinary criminal law pertaining to anti-terrorism, is already on the statute books. It is worth noting that this process also occurred in the UK after 9/11, when the *Anti-Terrorism, Crime and Security Act 2001*,<sup>28</sup> a sprawling, complex and enormously problematic legislation, achieved Royal Assent within two months of those attacks. A similar process occurred after the landmark decision of *A. v. Secretary of State for the Home Department*,<sup>29</sup> a case in which several provisions under the ATCSA 2001 were found to be incompatible with human rights. The Prevention of Terrorism Act 2005,<sup>30</sup> enacted at least in part as a result of the decision in that case, "was passed in 17 days amidst much controversy".<sup>31</sup>

To be fair, the legislative response in the aftermath of the 7 July 2005 bombings in London, in the form of the *Terrorism Act 2006*,<sup>32</sup> was much more carefully considered. It is worth noting that the legislation came into force on March 30<sup>th</sup>, 2006, nearly nine months after the attacks occurred. Lord Carlile, the government's former independent reviewer of terrorism legislation opined that the bombings "rightly and inevitably catalyzed an earlier examination of potential additional legislation than had been envisaged at the time of the enactment of the Prevention of Terrorism Act 2005".<sup>33</sup> He seemed encouraged by the fact that there was a full public debate on the possible changes that might be made to the law.<sup>34</sup> Nonetheless, it has too often been the case (both in the UK and Canada) that swiftly-enacted anti-terrorism legislation in the aftermath of a serious attack is considered more for its political utility than it is for its human rights implications. As aforementioned, this issue is less exacerbated in the UK, where the JCHR and Independent Reviewer are mandated to release regular reports pertaining to several counter-terrorism provisions. Nonetheless, we have seen that it is the UK courts and

<sup>26</sup> Alexis Flynn, 'Tougher Antiterror Law to Take Effect in UK' *The Wall Street Journal* (12 February 2015).

<sup>27</sup> The Canadian federal election is tentatively scheduled for October 2015 and the UK election is scheduled for the 7<sup>th</sup> of May, 2015.

<sup>28</sup> *Anti-Terrorism, Crime and Security Act 2001* c. 24.

<sup>29</sup> *A v. Secretary of State for the Home Department* [2004] UKHL 56.

<sup>30</sup> *Prevention of Terrorism Act 2005* c.2

<sup>31</sup> Ed Bates, 'Anti-terrorism control orders: liberty and security still in the balance' (2009) 29 *Legal Studies* 99.

<sup>32</sup> *Terrorism Act 2006*, c.11

<sup>33</sup> Lord Carlile, *Proposals by Her Majesty's Government for changes to the laws against terrorism* (Home Office 2005) para.

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<sup>34</sup> *ibid*, para. 7.

those accused of terrorist offences (with inevitable additional effect on Muslim populations) who have to bear the human rights burdens of this kind of policy-making. For instance, controversial “detention without trial” provisions that were enacted by the 2001 ATCSA and reincarnated into “control orders” by the 2005 PTA were found to be inconsistent with fair trial rights by the European Court of Human Rights<sup>35</sup> and the U.K. Supreme Court.<sup>36</sup> As a result of the UK’s legal structure, the Court was only able to issue a declaration of incompatibility rather than strike down the law. The Government has since done away with control orders and enacted Terrorism Prevention and Investigation Measures,<sup>37</sup> but this process took more than a decade from the time of their original enactment and some of the main concerns with the measures still remain.<sup>38</sup>

It is within this context that concerns with the newly enacted Counter-Terrorism and Security Act must be situated. It has been noted that provisions allowing the UK to stop a citizen’s re-entry into the country have been criticized by civil rights groups as a violation of international law.<sup>39</sup> Commentators have expressed concern over what impact the Act’s compulsion to implement the PREVENT strategy might have on the UK’s schools and universities.<sup>40</sup> If the years since 9/11 and the above analyses of legislation passed in the aftermath of those attacks has illuminated anything, it is that it might take decades for the human rights implications of this legislation to fully play themselves out in the courts, without the necessary promise that either the courts or the UK’s parliamentary oversight mechanisms will be able to rectify them in a truly meaningful or satisfactory way. The disturbing trend of anti-terrorism legislation being hastily enacted (in both the UK and Canada) for political purposes, despite real human rights concerns and several provisions under existing and ordinary criminal law to combat terrorism, needs to be noted and argued against. As such, it is not surprising to see open letters written by coalitions of interested parties (such as the UK Green Party, the Islamic Human Rights Commission, Rights Watch UK, and the NUS National Executive Council) arguing that, “Ordinary criminal law remains adequate to protect the public from violence; terrorist attacks have resulted from inadequately using intelligence and available powers, not from inadequate powers”.<sup>41</sup> As will now be illustrated in analyses pertaining to Hong Kong, reliance on the ordinary criminal law rather than specific anti-terrorism legislation is a viable way forward.

## CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN HONG KONG

As was the case in the above analyses of Canada and the United Kingdom, some information about Hong Kong’s legal and political structures and cultures is necessary in order to understand its national security framework. Any analysis of any kind of laws in Hong Kong

<sup>35</sup> *A v. United Kingdom*, App No 3455/05 [2009] ECHR 301.

<sup>36</sup> *Secretary of State for the Home Department v AF* [2009] UKHL 28.

<sup>37</sup> Terrorism Prevention and Investigation Measures Act 2011 c. 23: although many argue that the restrictions in these measures are less drastic than those that were present in control orders, TPIMs still raise the main human rights issue (an inability for the accused to know the case against them in closed material proceedings) that was the subject of concern for the European Court and the U.K. Supreme Court. For further commentary, see: Clive Walker and Alexander Horne, A., ‘The Terrorism Prevention and Investigation Measures Act 2011’ [2012] CLR 421.

<sup>38</sup> For a discussion of the continuing human rights implications of ‘Closed Material Proceedings’, including those used under TPIMs and the Justice and Security Act 2013, see: Greg Martin and Rebecca Scott Bray, ‘Discolouring democracy?’ (2013) 40 *Journal of Law & Society* 624, 634; John Jackson, ‘Justice, security and the right to a fair trial’ [2013] *Public Law* 720; John Ip, ‘Al Rawi, Tariq and the future of closed material procedures and Special Advocates’ (2012) 75 *Modern Law Review* 606, 617.

<sup>39</sup> Taylor Brailey, ‘UK enacts strict anti-terror legislation’ (*The Jurist*, 13 February 2015) <<http://jurist.org/paperchase/2015/02/uk-enacts-strict-anti-terror-legislation.php>> accessed 13 February 2015.

<sup>40</sup> Karma Nabulsi, ‘Theresa May’s Prevent bill is extremism in the name of security’ *The Guardian* (4 February 2015).

<sup>41</sup> Editorials and Letters, ‘Groundless anti-terror laws must go’ *The Guardian* (5 February 2015) <<http://www.theguardian.com/politics/2015/feb/05/groundless-antiterror-laws-must-go>> accessed 8 February 2015.

begins with the Basic Law,<sup>42</sup> the constitutional agreement through which Hong Kong was handed over by the United Kingdom and reunified with China, becoming a Special Administrative Region. The Basic Law is a complex document with a complicated history, a microcosm in and of itself of the complicated relations between Hong Kong and China, as has been evidenced by this past year's Occupy Central protests. These protests warrant brief discussion here because of concerning suggestions made by Chinese officials during (and after) them pertaining to Article 23 of the Basic Law, the national security provision.<sup>43</sup> Nearly 1.2 million people participated in last year's protests pertaining to universal suffrage before they were eventually cleared by court injunction in December.<sup>44</sup> The protests were a response to an August 31<sup>st</sup>, 2014 decision of the Standing Committee of the National People's Congress (NPCSC) that effectively held that candidates for the Hong Kong Chief Executive election would be determined by a selection process largely controlled by Beijing's interests.<sup>45</sup> As the protests gained international media attention and tensions grew higher, concerns grew over the possibility of a forceful response from Beijing that could possibly mirror the 1989 Tiananmen Square massacre.<sup>46</sup>

It is against this backdrop that Article 23 of the Basic Law was contentiously drafted and has been cautiously treated ever since. The Article provides: "The Hong Kong Special Administrative Region shall enact laws on its own to prevent any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies".<sup>47</sup> Gittings notes that, "More than virtually any other provision, Article 23 was widely seen as a threat to Hong Kong's separate system... Instead, the wording of Article 23 was rephrased in more specific language to refer to offences which, in most cases, were already covered by existing laws in Hong Kong".<sup>48</sup> To date, the Hong Kong government has not successfully enacted national security legislation to give effect to Article 23 of the Basic Law. Its last attempt was in 2003, when the introduction of the National Security (Legislative Provisions) Bill<sup>49</sup> sparked intense public opposition and a 500,000 person strong street protest. Understanding the past (and present) public opposition to the Bill again requires political and cultural context. Gittings notes that Article 23 has been "firmly associated" with the events at Tiananmen Square since its inception, noting that, "That linkage came back to haunt the Hong Kong SAR government 14 years later when intense public opposition forced it to abandon proposed legislation that sought to implement the provisions of Article 23".<sup>50</sup>

<sup>42</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997.

<sup>43</sup> Kenneth Lau, 'Outrage over NPC deputy's call to apply mainland security law' *The Standard* (21 January 2015).

<sup>44</sup> '1.2 million people took part in Occupy protests, poll shows' (*Hong Kong Economic Journal*, 19 December 2015) <<http://www.ejinsight.com/20141229-1-2-million-people-took-part-in-occupy-protests-poll-shows/>> accessed 30 January 2015.

<sup>45</sup> For a comprehensive compilation of news and events pertaining to the movement, see the South China Morning Post's dedicated OCM website at : <http://www.scmp.com/topics/occupy-central>.

<sup>46</sup> The massacre occurred on 4 June 1989 after student-led popular protests had spread throughout China and, most specifically, in Beijing. Chinese authorities declared martial law, leading to unprecedented military action and death tolls that have ranged from 300 to the thousands (though never officially confirmed. For more information, see: Noah Rayman, '5 Things You Should Know About the Tiananmen Square Massacre' *Time Magazine* (4 June 2014) <<http://time.com/2822290/tiananmen-square-massacre-anniversary/>> accessed 29 January 2014.

<sup>47</sup> Basic Law, Article 23.

<sup>48</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 26.

<sup>49</sup> 2003, c127.

<sup>50</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 27.

As a result, Hong Kong has dealt with national security related offences exclusively through its criminal law.<sup>51</sup> While some academic commentators argue that Hong Kong has a constitutional duty to implement Article 23,<sup>52</sup> others argue that “the principle of minimum legislation” needs to be the guiding principle of any legislation enacted to implement the article.<sup>53</sup> To date, the latter has obviously been preferred, and the Hong Kong government has seen no political advantage to attempting to re-introduce the measures that were so publicly opposed in 2003. This is in stark contrast to the process that has been observed and described in relation to Canada and the United Kingdom. Granted, unlike both of those jurisdictions, Hong Kong has never suffered a terrorist attack, and the political advantage that “being tough on terrorism” affords in Canada and the UK does not extend here. Nonetheless, it is remarkable how different the discourse pertaining to the need for strict-anti terrorism legislation is in the jurisdictions. Even in the heat (and the aftermath) of the Occupy Central protests, when some Chinese officials were calling for the imposition of Chinese national security law, discussion has centred around how the criminal law of Hong Kong is already sufficient to address national security concerns.<sup>54</sup> The Hong Kong experience illustrates how much previous political and cultural history can impact upon the development of national security legislation. Moreover, when contrasted with Canada and the United Kingdom, it also illustrates the weight of significant events (such as domestic terrorist attacks) and the political advantages of being seen to act in the aftermath of those events.

## CONCLUSION

As this paper has illustrated, national security legislation is not developed or enacted in a vacuum. Interdisciplinary analyses of this legislation are thus useful because they help to illuminate the political, legal, historical and cultural contexts through which the legislation is debated, enacted, implemented and amended. This paper has argued that the UK, Canada and Hong Kong’s counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, including their: respective legal systems; the relative stability of government and political institutions; mechanisms for parliamentary scrutiny and oversight; and experiences with terrorism. It has used contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central movement in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or will be) enacted in the aftermath of these events. In particular, it focused on new anti-terrorism specific legislation in Canada and the United Kingdom and the lack of such legislation in Hong Kong, where the criminal law is the primary mode of criminalizing offences pertaining to national security. Although it is accepted that Hong Kong has not had the same experience with terrorism that Canada or the UK has had, it is still argued that terrorism can and should be dealt with through existing criminal law, rather than through national security legislation that is often hastily enacted, lacking in oversight, and overly politicized. As analyses of Canada and the UK have shown, this national security legislation is often politically motivated and carries human rights implications that may take decades to be rectified through the courts. These human rights implications are exacerbated in Canada, where no specific parliamentary mechanism for oversight and review of national security policies exists. It is thus recommended that, as a matter of urgency, the Conservative government (particularly if Bills C-44 and C-51 are going

<sup>51</sup> More specifically, through provisions in the Crimes Ordinance (Cap. 200), Official Secrets Ordinances (Cap. 521) and Societies Ordinance (Cap. 151). For more information, see: Department of Justice, ‘Collection of existing statutory provisions relevant to the National Security (Legislative Provisions) Bill (February 2003) LC Paper No. CB(2)1215/02-03.

<sup>52</sup> Bob Hu, ‘The Future of Article 23’ (2012) 41 Hong Kong Law Journal 115.

<sup>53</sup> Benny Tai, ‘The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law’ (2002) 32 Hong Kong Law Journal 579.

<sup>54</sup> Cliff Buddle, ‘Hong Kong’s Article 23 obligations are already in our legal armoury’ *South China Morning Post* (29 January 2015); Stuart Lau, ‘Calls for Hong Kong national security law shot down by legal expert Albert Chen’ *South China Morning Post* (20 January 2015).

to pass) needs to support either Bill S-220 or Bill C-551 and give Canada the parliamentary committee that it has sorely needed for more than a decade.