Will Our Civil Liberties Survive the Implementation of Article 23?

Albert Chen provides an overview and notes some pitfalls and potholes in the Government's proposals

Introduction

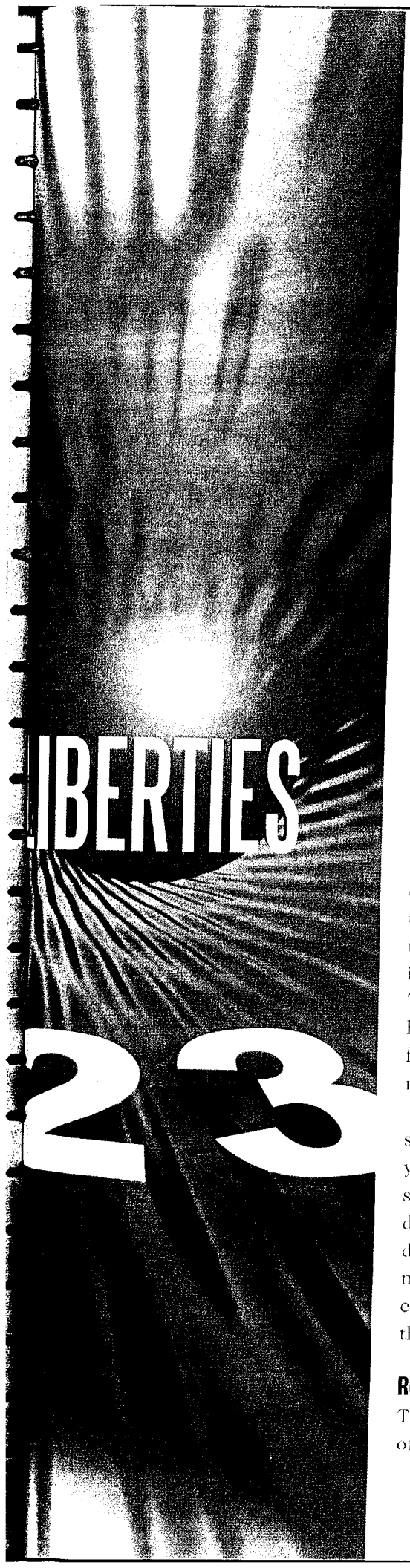
The publication on 24 September 2002 of the Government's Consultation Document (Document) on Proposals to Implement Article 23 of the Basic Law is one of the most important constitutional and legal developments in the Hong Kong Special Administrative Region since it was established more than five years ago. The 3-month consultation exercise and legislative work to follow will be a major test of whether the concept of One Country – Two Systems enshrined in the Basic Law can be implemented in a way that strikes a proper balance between the 'One Country' principle and the 'Two Systems' principle, between which a tension has always existed.

The issues at stake are large, fundamental and controversial. They also attract considerable international attention. Will civil liberties and the Rule of Law continue to thrive in the HKSAR? Or will mainland controls over words, activities and organisations perceived to challenge the regime or otherwise threaten the 'sovereignty, territorial integrity, unity, and national security' of China (in the language of para 1.7 of the Document) be extended to the SAR?

Article 23

Article 23 of the Basic Law (BL 23) requires the HKSAR to 'enact laws on its own to prohibit any act of treason, secession, sedition and subversion against the Central People's Government'. It also deals with issues of state secrets and the activities of foreign political organisations in Hong Kong. Many issues raised by BL 23 are politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

What is interesting about BL 23 is that it does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers the HKSAR – in practice its legislature – to enact laws to define and penalise such



actions. This is an important aspect of HKSAR autonomy under the concept of One Country – Two Systems. It demonstrates respect for existing social, economic and legal systems in Hong Kong at the time of the handover and ensures that mainland laws and practices will not be imposed on Hong Kong.

It has taken the HKSAR Government more than five years to come up with its proposal on the implementation of BL 23. This can perhaps be explained by the fact that immediately after the establishment of the HKSAR Government in 1997, there were many matters for it to handle which had a higher priority than BL 23. After all, nothing has happened in Hong Kong since the handover that comes close to the kind of activities to be proscribed under BL 23. Therefore, there has been no sense of urgency or pressing necessity to legislate. Another possible factor is that the matter is politically sensitive and therefore difficult to deal with, particularly if the mainland laws on matters of treason, subversion, etc are not to be imported wholesale into Hong Kong. The existing relevant Hong Kong law has to be thoroughly reviewed and foreign legislative models have to be researched and compared.

The recently published Consultation Document is the fruit of years of hard work and in-depth study by the HKSAR Government. It deserves to be carefully studied and discussed in detail in a rational manner. I will try to highlight and comment on the salient features of the Document.

Relevant Hong Kong Laws

The Document takes as its point of departure the existing law of Hong Kong as set out in the Crimes Ordinance (Cap 200) (which covers, among other things, treason and sedition), the Societies Ordinance (Cap 151) (which deals with the activities of foreign political bodies in Hong Kong), and the Official Secrets Ordinance (Cap 521). These ordinances are part of Hong Kong's inheritance from the colonial era. It then considers to what extent the existing law needs to be modified in order to fulfill the requirements of BL 23. In doing so, it attempts to take into account international human rights standards as enshrined in art 39 and other provisions of the Basic Law, and to consider also whether there is any room for liberalisation of the existing law. Most importantly, it recognises that, 'the manner in which the state's sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ. Indeed, this has to be the case given the different situations, including the respective legal framework, of the Mainland and the HKSAR. Therefore, the HKSAR has a duty to enact laws to protect national security in accordance with the common law principles as have been practised in Hong Kong, and such laws must comply with the Basic Law provisions protecting fundamental rights and freedoms' (para 1.6 of the Document).

Treason, Secession and Subversion

The offences of treason and sedition are already defined in the existing Crimes Ordinance, but there is no mention of 'secession' and 'subversion'. The Document proposes to amend the law of treason to confine it to situations where the offender collaborates with a foreign state. ➤

'Levying war' against one's own state is the fundamental element of the existing offence of treason. The Document proposes to use this element as the basis for the new offences to be created – secession and subversion. Thus secession and subversion will be defined as 'levying war', using 'force or threat of force' or 'other serious unlawful means' (the means are the same as those defined in the United Nations (Anti-Terrorism Measures) Ordinance (27 of 2002) enacted in July this year) for the purpose respectively of 'withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China' and of 'intimidating the Chinese Government, overthrowing the Chinese Government or dis-establishing the basic system of the state'.

Narrower Definitions

To give due credit to the proposal, note that the definitions of secession and subversion proposed for the HKSAR are much narrower than the corresponding definitions in arts 103 and 105 of the PRC Criminal Code (Code), which do not require acts of violence as an essential element in the offences of secession and subversion. Under Mainland law, an attempt by peaceful means to secure the secession from the PRC of, say, Tibet or to challenge the principle of 'the leadership of the Communist Party' and replace it by a multi-party system would already constitute an offence under ch 1 of part II of the Code, which deals with offences against state security. To establish a political party advocating the secession of any part of China (including Taiwan) or the establishment of a Western-style liberal democracy in China would be to commit a crime under arts 103 and 105, respectively, of the Code.

Non Use of Weapons Might Constitute an 'Act of War'

Although the concept of 'levying war' against the state (which is in the existing law of treason and will, according to the proposal in the Document, be one of the elements of the new crimes of secession and subversion) seems on the face of it to require serious and large-scale violence amounting to war, this is not in fact the case. As pointed out in a footnote to the Document itself (note 17 to ch 2), 'it is not essential that the offenders should be in military array or be armed with military weapons'. For example, if a considerable number of persons assemble together and create a disturbance directed at the release of the prisoners in all the jails, this might already be an act of 'levying war'.

In particular, the reference to 'threat of force' casts the net very wide.

Broadening the Scope of Acts Covered

It is not the case that the Document merely proposes to build the new offences of secession and subversion on the base of the existing law of treason without broadening the base. There is broadening insofar as the existing definition of treason does not refer to the use of 'force or threat of force', nor to 'serious unlawful means'. The inclusion of these two concepts as alternative bases (in addition to 'levying war') for secession and subversion means that the scope of the acts covered by the new offences is broader than the existing scope under the law of treason, not to mention the broadening of the objectives which the acts are aimed at (eg to include secession). In particular, the reference to 'threat of force' casts the net very wide. It is conceivable that a person who is sympathetic to the cause of Taiwanese or Tibetan independence and expresses the view in public that Taiwan may legitimately defend itself against any military attack by the Mainland might be prosecuted and convicted for the proposed offence of secession. Although such a prosecution would be highly unlikely in the present political climate, the same cannot be said if cross-strait relations deteriorate or war becomes imminent.

Non-technical Language is Used

The language used in the Document to express the proposal regarding the new offences is not the technical language used in legal drafting, and it is not completely clear what elements constitute the new offence. It is regrettable that the Document does not include as an appendix a white bill for the purpose of implementing the proposals in the Document. In its absence it is difficult for lawyers to decide whether some of the proposals are worthy of support. This problem is particularly significant with regard to the proposed amendments to the Official Secrets Ordinance and Societies

Ordinance discussed below, but it is also relevant to the proposed crimes of secession and subversion. For example, it is proposed (para 3.6 of the Document) that 'withdrawing a part of the PRC from its sovereignty, or resisting the Central People's Government in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means should be outlawed by the offence of secession'. The actus reus of the proposed offence is unclear. For example, a person in a small-scale demonstration for Taiwanese independence sets fire to a car ('serious damage to property' is one of the 'serious unlawful means' as defined in the Document) while shouting a slogan in support of Taiwanese independence. Would this amount to the offence of secession which, according to the present proposal, attracts a maximum punishment of life imprisonment? What if the person does not damage property but merely shouts a slogan suggesting that Taiwan should strengthen its military so as to defend itself against the mainland?

The same problem regarding the uncertainty of the actus reus exists with regard to the proposal (para 5.5 of the Document) 'to make it an offence of subversion (i) to intimidate the PRC Government, or (ii) to overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means'.

Where are the Safeguards?

The Document in its paragraph on 'serious unlawful means' used in the context of secession (para 3.7) promises that 'adequate and effective safeguards should also be in place to protect the freedoms of demonstration and assembly, etc as guaranteed by the Basic Law, including peaceful assembly or advocacy'. The chapter on subversion again refers to such 'adequate and effective safeguards of guaranteed rights, described in para 3.7' (see note 47 in ch 4). However, nowhere in the Document can we discover what 'safeguards' are to be put 'in place'.

Penalties Are More Severe

The proposed maximum penalties for secession, subversion and the related inchoate and accomplice offences (in Annex 2 of the Document) are the same, namely, life imprisonment. This in fact means that in some cases the same act against national security would be punishable in a more severe manner in the HKSAR than in the mainland itself. For example, both arts 103 and 105 of the Code divide into three categories the punishment for secession and subversion respectively and apply them differentially in accordance with the offender's degree of involvement: (i) imprisonment for 10 or more years (up to life imprisonment); (ii) imprisonment for 3 to 10 years; (iii) imprisonment for less than 3 years.

Sedition and Seditious Publications

We now turn to the law of sedition. Here the Document proposes to liberalise the existing law in the Crimes Ordinance by narrowing the definition of sedition to confine it to situations where there is incitement to commit treason, secession or subversion, or incitement to 'cause violence or public disorder which seriously endangers the stability of the state or the HKSAR'. (para 4.13) It also proposes some reforms of the existing law relating to seditious publications including the production, import, distribution and possession of seditious publications.

Colonial Sedition

The law of sedition in Hong Kong was draconian, as illustrated in 1952 in *The Crown v Fei Yi-ming and Lee Tsung-ying* (1952) 36 HKLR 133. In this case, the publisher and editor of the pro-China newspaper in Hong Kong, *Ta Kung Po*, were prosecuted and convicted for re-publishing an article from the *People's Daily* that accused the colonial government in Hong Kong of 'barbarous, wicked and criminal acts of arresting, killing and persecuting our patriotic fellow-countrymen'. On appeal to the Full Court, it was held, inter alia, that (following *Wallace-Johnson v The King* [1940] AC 231, which held that even if the common law required incitement to violence as an essential element of sedition, this requirement could not be imported into a colonial ordinance on sedition that did not contain such a requirement) incitement to violence was not a necessary element of the offence of sedition. 'If the article when published, would in the natural course of events stir up hatred or contempt against the Government, it is prima facie evidence of a publication with a seditious intention'.

In June 1997 the Legislative Council passed the Crimes (Amendment) (No 2) Ordinance. This ordinance amended the existing law of sedition as contained in s 10 of the Crimes Ordinance by adding as an essential element of the offence the requirement that the offender must ➤

The Practical Necessity of Enacting Legislation Pursuant to Article 23

Dr Priscilla Leung argues that the Hong Kong government should enact local laws pursuant to Article 23 of the Basic Law as soon as practicable to avoid the possibility of the Central Authorities exercising their powers under Articles 18 and 158 of the Basic Law

The recent Consultation Document by the government concerning Article 23 of the Basic Law has given rise to much debate. This article explores the relationship between Article 23 and Annex III of the Basic Law, the applicability of national laws in Hong Kong, and the issue regarding local legislation.

Applicability of Annex III

Paragraph 2 of art 18 of the Basic Law provides that national laws shall not be applied in the Hong Kong SAR except for those listed in Annex III to the Basic Law. Annex III expressly provides that the national laws specified therein shall be applied locally by way of promulgation or legislation by the Hong Kong SAR. Two points emerge:

(i) national laws not listed in Annex III are not applicable in Hong Kong; and

(ii) national laws listed in Annex III must be applied in Hong Kong either by way of promulgation by the Hong Kong government or by way of legislation by the Hong Kong Legislative Council.

Whichever method is used, the applicability in Hong Kong of the national laws listed in Annex III is virtually unqualified and, subject to modification of certain provisions, local legislation must be consistent with those national laws. Nevertheless, there are differences between applicability by way of 'local legislation' and 'direct applicability'. When hearing cases involving national laws listed in Annex III and directly applicable in Hong Kong, the Hong Kong courts may first have to seek an interpretation from the Standing Committee of the National People's Congress (NPCSC). If, however, the relevant national laws are sanctioned by means of legislation by the Hong Kong legislature, those laws will have been adapted as laws of the Hong Kong SAR. In that case, the Hong Kong courts are free to directly interpret those laws and may interpret concepts such as 'damage' and 'riot' in accordance with established common law principles.

For example, according to Annex III, the National Flag Law is applicable in the Hong Kong SAR. The question is whether it is to be implemented by way of direct promulgation or by way of local legislation. From the SAR's point of view, local legislation is undoubtedly the better alternative, because the Hong Kong courts will at least have more room for interpreting such legislation in accordance with common law tradition and local culture, and judicial decisions will be more readily accepted in Hong Kong. Moreover, when hearing cases involving such legislation, the Hong Kong courts are not bound to seek an interpretation from the NPCSC. As far as autonomy is concerned, local legislation is far more desirable than direct promulgation.

have 'the intention of causing violence or creating public disorder or a public disturbance'. This amendment, however, has never been brought into effect, probably because of the Chinese Government's position that any unilateral amendment introduced by the colonial government of Hong Kong's law relating to the matters covered by BL 23 was unacceptable. The 1997 amendment ordinance was based on the Crimes (Amendment) (No 2) Bill 1996 which also contained definitions of new offences of secession and subversion. This part of the Bill did not attract sufficient support in the Legislative Council and was never passed.

Sedition is Narrowed, But Still Too Wide

The proposed definition of sedition in the Document is in fact narrower than both the existing law and that under the Crimes (Amendment) (No 2) Ordinance 1997 and is therefore a welcome development for press freedom and freedom of expression in the HKSAR. However, it should be noted that the proposed liberalisation still falls short of the standards stipulated in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (referred to in para 1.11 of the Document) adopted at an international conference of scholars, judges and lawyers in 1995, which have been emphasised by the Hong Kong Bar Association in its paper on BL 23 published before the release of the Document. As pointed out in that paper (para 13), the Johannesburg Principles provide that expression might be punished as a threat to national security only if the government can demonstrate that:

(i) the expression was intended to

incite imminent violence;

(ii) the expression was very likely to incite such violence; and

(iii) there was direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The proposed definition of sedition in the Document relies heavily on the concept of 'incitement', which is well known to the common law. However, there is a significant gap between the common law understanding of incitement and the Johannesburg Principles as the former does not take into account the 'likelihood' of the acts being incited actually occurring (not to say their imminent occurrence). An inciter 'is one who reaches and seeks to influence the mind of another to the commission of a crime' (per Holmes JA in *Nkosiyana*, quoted in Smith & Hogan, *Criminal Law*, 8th ed 1996, p 273). 'Incitement may be implied as well as express'. It is irrelevant 'whether the incitement is successful in persuading the other to commit, or to attempt to commit the offence or not'.

Possessing Seditious Publications

In view of the breadth of the concept of incitement, particularly when combined with the breadth of proposed offences like secession as discussed above in the context of 'threat of force', the proposal in the Document regarding offences of dealing with and possession of seditious publications is worrying. While it is true that the proposal is not as harsh as the colonial law relating to seditious publications – which has fallen into disuse, it is quite harsh when measured by contemporary standards of reasonableness (not to mention human rights). Inciting people to commit treason, secession or

Implementation of Article 23

Article 23 of the Basic Law expressly provides that the Hong Kong SAR 'shall enact laws on its own' to prohibit acts of treason, secession, etc. Unlike Annex III, Article 23 does not state that the national laws relating to treason, etc shall apply in Hong Kong. In other words, the laws applicable by virtue of Article 23 are to be enacted by the Hong Kong legislature and there is no question of adaptation of the relevant national laws. The laws to be enacted by the Hong Kong legislature must encompass the acts set out in Article 23, but the power of interpretation of such laws must rest with the Hong Kong courts.

Article 23 is a provision that concerns the relationship between the Central Authorities and the Hong Kong SAR. Accordingly, the SAR should positively deal with the implementation of Article 23 by way of local legislation, so as to avoid the need for the Hong Kong courts to seek interpretations from the NPCSC when adjudicating cases involving Article 23. The sooner local legislation is enacted, the larger the scope of the Hong Kong courts' interpretative power over such legislation will be.

Moreover, para 4 of art 18 of the Basic Law provides that, in the event the NPCSC decides to declare a state of war or, by reason of turmoil within the Hong Kong SAR which endangers national unity or security and is beyond the control of the government of the SAR, decides that the SAR is in a state of emergency, then the Central People's Government may issue an order applying the relevant national laws in the SAR. Naturally, no one wants the above scenario to occur. Under the above mentioned paragraph, the initiative to apply the relevant national laws rests with the Central People's Government, not with the SAR, and 'relevant national laws' probably does not refer to the laws set out under Annex III.

Unlike Annex III, para 4 of art 18 basically refers to the laws applicable in situations of war or turmoil (such as the laws on curfew). In theory, such laws should no longer apply once the war or turmoil is over. Annex III, however, sets out laws to be applied as a matter of course - regardless of whether the SAR is in a state of war or turmoil. According to para 3 of art 18, the procedure for adding to or deleting from the list of laws in Annex III is very simple – provided that a national law is one 'relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the [Hong Kong SAR] as specified by [the Basic Law]'. The NPCSC may, after consulting the government of the SAR and the Committee for the Basic Law of the SAR, add that national law to the said list. The Basic Law does not clearly define what matters are 'outside the limits of the autonomy of the [Hong Kong SAR]'.

Whether the addition of laws to and removal of laws from Annex III also has to comply with Article 159 of the Basic Law is debatable. However, the practice since the 1997 Handover suggests that laws may be added to or removed from Annex III as long as para 3 of art 18 is complied with. Therefore, the enactment of local legislation pursuant to Article 23 should be made as soon as possible so as to reduce the possibility of having to seek an interpretation of Article 23 from the NPCSC, or having the Central People's Government adding to Annex III such laws as it considers necessary.

Dr Priscilla Leung
Associate Professor, School of Law
City University of Hong Kong

subversion is one thing; possessing, importing or selling publications 'likely to incite others to commit' (paras 4.17-18 of the Document) these offences is quite another. Given the broad scope of 'incitement', the phrase 'likely to incite others to commit' the relevant offences (unlike 'likely to cause others to commit such offences') casts the net very wide. In particular, why should mere possession of such publications without 'reasonable excuse' be made a crime punishable – according to the Document – by one year's imprisonment and a fine of $50,000? What harm is done to society and to national security by such private possession? Why should it be made a crime at all?

Increased Penalties

Another questionable aspect of the proposals regarding the law of sedition is the proposal to increase the maximum penalties for the relevant offences. Under the existing law, sedition as a first offence is punishable by two years' imprisonment and a fine of $5,000. The Document proposes to increase it to life imprisonment (in the case of incitement to commit treason, secession and subversion) or seven years' imprisonment and an unlimited fine (in the case of incitement to violence or public disorder which seriously endangers the stability of the state or the HKSAR). The punishment for dealing with seditious publications is also proposed to be increased. These proposals are apparently harsher than the mainland law on incitement to secession and subversion (in arts 103 and 105 of the Code) which provides for the punishment of less than five years' imprisonment except where the circumstances are particularly serious.

Official Secrets

BL 23 requires the HKSAR to enact laws, inter alia, to prohibit 'theft of state secrets'. It is well-known that in the mainland, state secrets are often interpreted broadly, and some Hong Kong and overseas journalists and scholars have been prosecuted and convicted for violations of China's state secret laws. In Hong Kong, however, prosecutions for breaches of official secrets are hardly known. The existing Hong Kong law is this regard is contained in the Official Secrets Ordinance (Cap 521), which was enacted in June 1997 and is basically a copy of the relevant British legislation.

The Document now proposes some amendments to this ordinance. One major amendment proposed is to extend the categories of 'protected information' under the ordinance to include 'information relating to relations between the Central Authorities of the PRC and the HKSAR' (para 6.19 of the Document). It is argued that whereas before the handover in 1997, information relating to relations between the Chinese Government and Hong Kong was already protected under the category of 'information relating to international relations', after the handover this category no longer covers such relations; hence the need for the new category. This proposal in itself is not problematic, but it becomes problematic when read in conjunction with another proposed amendment to the Official Secrets Ordinance.

That amendment is allegedly designed to plug a 'loophole' in the existing law whereby a computer 'hacker may openly sell stolen protected information to a publisher who may then openly publish the information for profit' (para 6.22 of the Document), and neither the hacker nor the publisher will be committing any offence under the existing official secrets law. The means that is proposed to 'plug the loophole' is the creation of 'a new offence of making an unauthorised and damaging disclosure of information protected under Part III of the Ordinance that was obtained (directly or indirectly) by unauthorised access to it'. (ibid.)

This proposal is extremely problematic as it fundamentally alters the existing structure and operation of Part III of the Official Secrets Ordinance and creates a new concept of 'unauthorised access' without even attempting to define it. Part III of the Ordinance deals with 'unlawful disclosure' of protected official information. Whether a piece of information is protected (in the sense that unauthorised disclosure thereof is unlawful) depends on the simultaneous application of two tests:

(i) whether the nature of the information falls within any of the four specified categories:
  (a) security and intelligence;
  (b) defence;
  (c) international relations (and the Document now proposes to add the category of 'relations between the Central Authorities and the HKSAR'); and
  (d) the commission of offences and criminal investigations.

(ii) whether the information has come into the defendant's possession by virtue of his position as a public servant or government contractor, or, in the case of s 18 of the Ordinance, whether the information has been disclosed to the defendant by a public servant or government contractor (condition (ii)

is applicable to the first three categories of information mentioned in condition (i)).

Thus under the existing law, although the categories of protected information are broadly and vaguely defined (in condition (i)), the information will not be regarded as protected unless it falls into the hands of public servants or government contractors in the course of their work or it is communicated by such persons to others who then disclose it. Condition (ii) thus plays an important role in limiting the breadth of condition (i). Persons who are not public servants or government contractors are assured under the existing law that unless they knowingly obtain information from public servants or government contractors (or persons entrusted with confidential information by public servants or government contractors (see s 18(2)(c) of the Ordinance)), they will not fall foul of the law even if they publish information falling within the categories in condition (i) above and even if such publication is perceived to be 'damaging' to the interest of Hong Kong or China.

However, the proposed offence of unauthorised disclosure of official information obtained by 'unauthorised access' changes all this. Unless the term 'unauthorised access' is clearly defined to limit it to computer hacking or other prescribed criminal behaviour, the proposal in the Document in this regard will be a severe threat to press freedom and freedom of information in Hong Kong. The beauty of condition (ii) is that unless the source of the relevant information is clearly and directly traced back to a public servant or government contractor, no crime can be established even if the disclosure is 'damaging' (which is vague and difficult to interpret). Taking away the protection of condition (ii) and replacing it with a new and untested concept of 'unauthorised access' is an extremely serious matter.

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Societies and National Security

When the Societies Ordinance was amended by the Provisional Legislative Council in 1997, BL 23 considerations were already taken into account. For example, the 1997 amendment empowers the Government to prohibit the existence of a society on the ground of 'national security', in addition to the existing grounds of 'public safety' and 'public order'. The amendment also provides that political bodies in Hong Kong may not have any connection with foreign or Taiwan political organisations, otherwise the existence of such Hong Kong political bodies may be prohibited.

The Document now proposes further changes to the Societies Ordinance. The proposal is designed to amplify the power of the HKSAR Government to refuse to register (s 5A), cancel the registration of (s 5D) or prohibit the operation of (s 8) a local society on the ground of national security. The proposed amendment provides that where a local 'organisation' (defined in para 7.15 as 'an organised effort by two or more people to achieving a common objective, irrespective of whether there is a formal organisational structure')

(i) has the objective of engaging in treason, secession, subversion or espionage; or
(ii) has committed or is attempting to commit any such offence; or
(iii) is 'affiliated with' an organisation in mainland China which has been proscribed for reasons of national security;

the HKSAR Government may proscribe the local organisation. The policy behind the proposed amendment is to make it clear that it would be unlawful to 'make use of Hong Kong's free and open environment as a base against national security and territorial integrity' (para 3.8 of the Document).

This is one of the most controversial and politically sensitive proposals in the Document and is probably the one which gives the greatest prominence to the 'One Country' principle. The Document states (in para 7.16) that 'to a large extent, on the question of whether such a mainland organisation endangers national security, we should defer to the decision of the Central Authorities'. According to the proposal, a 'proscribed organisation' will attract more severe sanctions than 'unlawful societies' under s 18 of the existing Societies Ordinance. For example, it will be an offence to 'support' its activities (para 7.14 of the Document). Furthermore, organisations which have 'connections' (as defined in para 7.17) with it may be declared 'unlawful societies'.

The Document does not explain ➤

what is meant by 'affiliation', a crucial concept in determining whether a local organisation may be proscribed on the ground of its relationship with a mainland organisation. It is also not clear whether for the purposes of (i) the offence of 'supporting' proscribed organisations, and (ii) rendering unlawful local societies that have 'connections' with proscribed organisations, 'proscribed organisations' refers only to those proscribed in Hong Kong by the Secretary for Security and not to mainland organisations. The better view is that only Hong Kong proscribed organisations are relevant here, and this apparently is also the view of the Solicitor-General (see Robert Allcock, 'Why we need to update our security law', *South China Morning Post*, 2 October 2002, p 14). It is important that these grey areas be removed before one can judge whether the present proposals are acceptable.

Police Powers of Investigation

Finally, the Document proposes to enhance the powers of the police for the purpose of investigating suspected activities relating to BL 23 by giving them the power to enter and search premises without a warrant, and to require banks to disclose financial information in emergency situations. The powers proposed are very wide and do not exist even under the anti-terrorism law enacted in Hong Kong in July. It is doubtful whether the grant of these additional powers in a blanket manner for the purpose of all BL 23 related offences can be justified – particularly in view of the wide powers which the police already have under existing law. For example, under s 50 of the Police Force Ordinance (Cap 232), the police may, in order to carry out an arrest, enter premises without a warrant and conduct a search on the premises. Under s 11(2) of the Official Secrets Ordinance, in cases of 'great emergency' in which immediate action is necessary, a superintendent of police may authorise a police officer to enter and search premises without a warrant. Under s 14 of the Crimes Ordinance, the police may enter and search premises without a warrant to remove and obliterate any seditious publications. Under s 31 of the Societies Ordinance, the police may without a warrant enter premises used by a society as a place of meeting or business (except that if the premises are used for dwelling purpose a warrant is needed). Under s 33 of the same ordinance, where the police suspect that an unlawful society is being operated in any premises, they may without a warrant enter and search the premises and arrest persons there.

Conclusion

Some proposals in the Consultation Document are problematic and cannot be supported in their present form. Some are in desperate need of being clarified by high-quality drafting in the bill for the proposed legislation. Having said that, I also think that the general orientation of the Document deserves to be supported. The successful implementation of the concept of One Country – Two Systems depends on due regard being given to both the 'Two Systems' element and the 'One Country' element. The proposals in the Document have given effect to the 'Two Systems' principle by not importing the relevant mainland laws and standards to Hong Kong, and by creatively designing a legislative model unique to the HKSAR. At the same time, the proposals affirm the importance of the 'One Country' principle by providing for various crimes against the sovereignty, territorial integrity, unity, and security of China and by empowering the HKSAR Government to prohibit activities in the HKSAR by organisations proscribed in the mainland for reasons of national security. Thus the Consultation Document is a concrete demonstration of the principle of One Country – Two Systems at work.

How the proposals, if implemented by law, will affect civil liberties in Hong Kong remains to be seen. However, considerable institutional safeguards to ensure the continued vitality of civil liberties in the HKSAR exist: the elected Legislative Council will ultimately decide the content of the law to be enacted on the basis of the proposals; the vigilant local and international public opinion will continue to actively monitor the Rule of Law and human rights in Hong Kong; and, last but not least, the strong and independent courts of the HKSAR will – though I believe such cases will be rare – be called upon, in the final resort, to interpret and apply the relevant laws in cases litigated before them.

Professor Albert HY Chen
Faculty of Law,
University of Hong Kong;
Member, Committee for
the Hong Kong Basic Law
under the National People's
Congress Standing Committee;
Member, Law Reform
Commission of Hong Kong