Submission on The Proposals to Implement Article 23 of the Basic Law

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Submission of the
Centre for Comparative and Public Law
Faculty of Law, University of Hong Kong
on
The Proposals to Implement Article 23 of the Basic Law

by
Carole Petersen and Kelley Loper[1]

17 December 2002

Section 1: General Comments

1.1. The Consultation Document provides a useful start to the debate on legislation but is quite vague in places and does not provide the actual statutory language that would be used for certain new offences. It is essential that the government release a White Paper after it considers the comments arising from this consultation exercise. Lawyers and experts in the relevant fields may be able to identify problems in the statutory language which the government would not necessarily have noticed. However, this process will be inadequate if the government does not allow an additional period of consultation on a White Paper.

1.2. If the government is genuinely confident that its proposals will not threaten civil liberties, then it should be confident enough to debate the actual draft bill in the public arena for an additional three to six months. There is no urgency to enact this legislation and it deserves a full and fair consultation.

1.3. We note that government representatives have frequently argued (e.g. in public meetings and articles written for the press) that the public need not be concerned

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by its proposals because similar laws exist in several "free and democratic societies". Actually this is not terribly reassuring. Many democratic countries have archaic laws that are never enforced *because* they are democratic societies and the governments could be voted out if they abused vague laws. We do not have that safeguard and it does not appear that Hong Kong people will be given the right to elect even their local government through universal suffrage in the near future. (Indeed, given that 2007 is now only 4 years away, it is unfortunate that the government has not seen fit to start a process of consultation on that equally important constitutional issue.)

1.4. Given the lack of democratic checks and balances in Hong Kong, we cannot assume that a law that has caused no problems in a "free and democratic society" will not cause problems here. It is entirely possible that the government officials leading Hong Kong in 20 years time will have less respect for civil liberties than our present officials and may seek to use these laws to quash dissent. Thus it is exceedingly important that Hong Kong does not retain or enact laws which would give government officials any greater power or discretion than is necessary under Article 23. Any law implementing Article 23 must be drafted very precisely and cannot leave any room for doubt as to what conduct is being prohibited or as to the scope of governmental powers.

1.5. Any law implementing Article 23 should also *expressly* comply with modern standards of human rights. Hong Kong government officials have frequently stated that the courts of Hong Kong will *interpret* the legislation so as to comply with Article 39 of the Basic Law (which incorporates the International Covenant on Civil and Political Rights (ICCPR)). However, a government should not propose new legislation unless it is certain that the new offences would not violate the ICCPR. Nor should the government seek new powers that could put the courts in the position of having to strike down executive acts as violating the ICCPR -- particularly in the context of national security. It is easy for the Hong Kong government to reassure people that the courts will strike down laws or executive acts that do not comply with the ICCPR. However, the Hong Kong government did not hesitate to go to the Standing Committee of the National People's Congress when it did not like the "final judgment" of the Court of Final Appeal in the right of abode cases and the resulting reinterpretation issued by the Standing Committee dealt a severe blow to the independence of our courts.

1.6. There is also no reason to enact laws that go beyond what is strictly required by

Article 23, as this would only invite undue interference in our civil liberties. Any legislative proposals that go beyond the actual requirements of Article 23 are particularly worrying given the fact that "national security" offences are regularly used in Mainland China to suppress political dissent.

1.7. The lack of certainty of the definitions of several of the offences described in the Consultation Document is extremely worrying and, unless more tightly defined in the final legislation, could be deemed unconstitutional under Articles 28 and 39 of the Basic Law. One of the fundamental principles of the rule of law is that individuals must be able to determine what conduct is prohibited by the law. This principle of certainty was raised in a recent case before the Court of Final Appeal regarding the offence of misconduct in public office. The court unanimously agreed that this particular offence is defined in such a way so as to be sufficiently certain and therefore constitutional. However, Justice Bokhary pointed out that:

> "*the degree of certainty required will depend on the context of the law in question.* In agreeing that the offence of misconduct in public office is sufficiently certain, I am crucially influenced by the fact that it is not the type of offence which criminalizes conduct in such a way as to limit the exercise of a fundamental freedom e.g. free speech. Where any offence of that type is concerned, I think that *an exceptionally high degree of certainty of definition would be required* if, quite apart from any other objection, it is not open to objection as unconstitutional for uncertainty. For in the absence of such a degree of definitional certainty, the whole question of what is left of the fundamental freedom concerned would be thrown into doubt"[2] (emphasis added).

1.8 While no rendition agreement is currently in place between Hong Kong and the mainland, it is important for the government to clarify its intentions as to whether the Article 23 offences are renditionable offences. According to the Solicitor General, the general principle adopted by Hong Kong in the past for extradition treaties is not to include offences of a "political" nature in the list of extraditable offences. However, the government web site indicates that Article 23 offences may not be considered political offences but serious criminal offences. If Article 23 offences are to be renditionable, this will substantially curtail the effectiveness of the safeguards offered by our independent judiciary and the ICCPR. Article 23

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[2] *Shum Kwok Sher v HKSAR*, Hong Kong Court of Final Appeal, (2002) 3 HKC 121-122.

Offences should not be made renditionable.

1.9 The extraterritorial effect of any Article 23 offences should be confined to those Hong Kong Permanent Residents in Hong Kong who are Chinese Nationals. Article 23 offences are offences against the State as a whole. Foreign nationals who are Permanent Residents in Hong Kong owe no allegiance to and receive no direct protection from the Chinese government. For example, if an American citizen encounters difficulties in the Philippines, the United States Embassy, not the Chinese Embassy, would offer him/her assistance and protection.

1.10 Although many of the proposals are modeled on offences already existing on our statute books or in the common law, this should not justify the retention of such offences. The government should use this opportunity to remove obsolete laws and liberalize provisions that unnecessarily restrict basic human rights and which have no place in a modern society.

Section 2: Treason

2.1 The government has proposed to narrow the existing definition of the offence of treason. However, in our view, the proposed definition of treason is still too broad and should be amended.

2.2 The Consultation Document suggests the following definition: levying war [against the state] by joining forces with a foreigner *with the intent to*--

(1) overthrow the PRC government;
(2) compel the PRC government, by force or constraint to change its policies or measures;
(3) put any force or constraint upon the PRC government;
(4) intimidate or overawe the PRC government.

2.3 As the Consultation Document acknowledges (at para 2.7 and note 17), "levying war" is a vague term and could be interpreted to include a riot or insurrection involving a significant number of people for some general public purpose. Given the importance of the concept of "levying war" (not only to the offence of treason but also to the proposed offences of secession and subversion, discussed below), we suggest that "war" should be expressly defined in the legislation and should be limited to international or internal armed conflicts. The legislation should also expressly provide that local disturbances would not constitute "levying war"

unless they amounted to an armed rebellion.

2.4 The offence of treason is punishable by life imprisonment. Thus it is extremely important that the people of Hong Kong have a clear understanding of what constitutes "levying war". Otherwise, there is a danger that the legislation could be used to frighten people from exercising their legitimate right to demonstrate against government policies or actions.

2.5 The second proposed intent – an intent to "compel the PRC government, by force or constraint to change its policies or measures" - is overly broad, extremely vague and should be eliminated. The term "constraint" is particularly vague and requires definition.

2.6 We would also argue that the third alternative intent -- the intent to "put any force or constraint" on the central government should be deleted from the proposed definition of treason. This concept was borrowed from the colonial era, when the "sovereign" was an actual person. There is no explanation in the Consultation Document as to how such a concept would be applied to the central government or why it should be retained.

2.7 Similarly, we suggest that the fourth alternative intent -- the intent to "intimidate or overawe the central government" -- should be deleted from the proposed definition of treason according to the fundamental principle of the rule of law that individuals must be able to determine what conduct is prohibited by the law discussed in paragraph 1.7 above. As worded, how would a person decipher the fourth alternative intent? What does it mean to "overawe" the government of a large and powerful country like China?

2.8 It is also highly likely that the third and fourth alternative intents overlap. At the very minimum, the Hong Kong government should offer examples of the situations in which a person might be found to have committed treason with these intents so that the legislature can really judge whether they are necessary in the definition of treason and whether they are sufficiently clear to comply with the rule of law.

2.9 We strongly urge the government to delete the proposal to codify the common law concept of "misprision of treason". Under this proposal, a person would be guilty of a criminal offence if s/he simply failed to report an act of treason to the police.

It is rare in a common law system to criminalize the mere failure to report upon another person. The government's proposal is especially disturbing in that it suggests that the offence would not be limited to *deliberate* suppression of information. Rather, the proposed offence could also include the mere failure "to take reasonable steps within a reasonable time to inform the Police that another person has committed treason."

2.10 It should also be noted that any acts which constituted actual *assistance* of treason would already be caught under the accomplice offences (proposed at para 2.13 of the Consultation Document). Thus, we would argue that there is no need to codify an offence of misprision of treason.

2.11 The unfairness is heightened by the proposal to make "misprision of treason" punishable by seven years imprisonment – an extremely harsh punishment for someone who simply failed to report on another person within a "reasonable period of time". Rather than codifying this archaic common law offence we would urge the government to use the legislation as an opportunity to abolish the common law offence of misprision of treason.

2.12 If the government is unwilling to abolish the offence, it should (at the very minimum) draft an explicit exemption for legal privilege and other privileged relationships.

Section 3: Subversion

3.1 Although the Consultation Paper addresses subversion in Chapter 5, we discuss it here because many of the points are related to the discussion of treason, in section 2 above.

3.2 The proposed new offence of subversion is an extremely sensitive topic in Hong Kong because of the history of Article 23. The draft version of Article 23 that was published in early 1989 did not contain a reference to subversion. The Chinese government made Article 23 much stricter after June 4 (by adding the language on subversion and the control of political organizations).[3] The final version of

[3] In the draft of the Basic Law that was published in February 1989 Article 23 was shorter and stated simply: "The Hong Kong SAR shall enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets". See Ming K Chan and David J. Clarke (eds.) *The Hong Kong Basic*

Article 23 was a warning to Hong Kong, issued at a time when the Central government was openly angry with Hong Kong people for protesting against the bloodshed in Tiananmen Square. Thus it is not surprising that Hong Kong people view any legislative proposals regarding subversion with skepticism and fear.

3.3 If the government is serious about its promise to comply with the ICCPR in the implementation of Article 23, then it must define the offence of subversion very precisely and narrowly, to ensure that it is not used as a means to suppress peaceful assembly, the right to criticize the national government, or the right to advocate for a change of government in China. These rights have been promised to the people of Hong Kong and must be protected.

3.4 In fact, however, the definition of subversion proposed in the Consultation Document is extremely vague and potentially quite broad. This proposed definition would widen the basis for criminal liability well beyond the existing definition of treason.

3.5 The government has indicated during the consultation process that while treason should cover acts in collaboration with an external enemy, subversion and secession should cover acts from within. As such the *actus reas* for all three offences should be basically the same and confined to the most reprehensible conduct which threatens the very existence of the state.

3.6 The government should therefore confine the definition of subversion to "overthrowing the PRC government by levying war", and limit the definition of "levying war" as discussed in paragraph 2.3

3.7 Moreover, the government has gone well beyond the concept of "levying war" and also added "force or the threat of force" and "serious unlawful means" as alternative means of committing subversion. This is far too wide. The government should remove the proposed reference to the "use of force, threat of force, or other serious unlawful means" from the offence of subversion.

3.8 If the government is unwilling to remove these references, it should, at the minimum, add a clarification that the "threat of force" must be real and imminent

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Law: Blueprint for 'Stability and Prosperity' under Chinese Sovereignty? (Hong Kong University Press 1991) (reproducing the February 1989 draft at 145-161, see especially 149).

in order to constitute the offence of subversion. A mere threat of force, in circumstances where there is no real possibility of the force being applied is too low a threshold for such a serious offence.

3.9 If a person is using "serious unlawful means" then, by definition, the conduct is unlawful and punishable under our existing criminal laws. It should be noted that the "list" of suggested acts (at paragraph 3.7 of the Consultation Document) includes many non-violent acts, such as serious damage to property and "serious disruption of an electronic system" (which could arguably be applied to a mass email campaign calling for the end of one-party dictatorship in China). No justification is offered in the Consultation Paper for punishing these acts as subversion, which would be punishable (under the government's proposal) by *life imprisonment.*

3.10 However, if the government is unwilling to remove the proposed reference to "serious unlawful means", then we suggest that the government confine the list of "serious unlawful means" to acts that would present a clear and present danger to the security of the state.

3.11 The Consultation Document does not make it clear whether the actual statutory language would require a causal connection between the acts (e.g. threat of force) and the consequences. We would argue that such a causal connection should be required. Otherwise the scope of the offence would be far too wide and could include empty and unrealistic threats which could not possibly "intimidate" the PRC government or "disestablish" its current system of government.

3.12 We are also very concerned by the reference to "intimidating" the PRC government. This was discussed above (with reference to the definition of treason at paragraph 2.7) and our comments apply here as well. This concept is hopelessly vague and meaningless and should simply be deleted from the proposed definition of subversion. Similarly, the concept of "disestablishing" the basic system of state is also extremely vague, making it impossible to predict with any certainty what is prohibited.

3.13 Thus the proposed definition of the offence of subversion does not meet the basic requirements of the rule of law (see our comments at paragraph 1.7 above). Moreover, even if the statutory definition is clarified, there is a real danger that the offence of subversion could be used to suppress peaceful demonstrations

against policies or actions of the PRC government. Similarly, the offence could be used to suppress peaceful advocacy for democracy in China or for other changes in the governmental system. This would be completely contrary to the promises made to the Hong Kong people in the Joint Declaration and the Basic Law.

3.14 Although the Consultation Document states that "safeguards" will be included to protect the right to peaceful assembly the details of these measures have not been disclosed. This is an excellent example of why we need an opportunity to comment upon a White Paper, so that these proposed "safeguards" can be carefully evaluated.

3.15 The potential effect of this proposed offence is heightened by the fact that the government has proposed *life imprisonment* as the penalty for "subversion" and also for related *inchoate offences* (such as a mere attempt at subversion or counseling someone to commit subversion). These are extremely harsh penalties and are more severe and rigid than the penalties for similar offences in Mainland China.[4]

3.16 The harsh penalties, combined with the very broad (and vague) definition of this proposed offence could have a "chilling effect" on freedom of expression and assembly in Hong Kong. Given the possibility of a life sentence, if there is any doubt as to whether a public demonstration (or a mass email campaign) might amount to "subversion", people will be understandably reluctant to test the scope of the law. In the summer of 1989, 20% of Hong Kong's population marched in the streets to protest the bloodshed in Tiananmen Square. We must ask whether they would feel safe marching in similar circumstances if the proposed offence of "subversion" were on the books – and whether we want Hong Kong to become a place where people would not feel safe exercising their right to demonstrate in such circumstances?

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[4] See Albert Chen, "Treason, Secession, Subversion and Proscribed Organizations: Comments on the Consultation Document", paper presented at *Preserving Civil Liberties in Hong Kong: the Potential Impact of Proposals to Implement Article 23 of the Basic Law* (conference organised by the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, 23 Nov 2002), 7.

Section 4: Secession

4.1 The definition of secession proposed in the Consultation Document is vague and overly broad. Extreme care should be taken when drafting the final legislation to ensure that the definition is as narrow and precise as possible to avoid abuse and curtailment of fundamental human rights.

4.2 This is especially true since secession does not currently exist as a crime in Hong Kong (unlike treason and sedition) and may even constitute a *right* under international law under certain circumstances. Certainly there is no clear consensus that a right to secession *does not* exist as a form of self-determination. For example, some legal scholars have argued that international law may permit the secession of Tibet from the People's Republic of China.[5] In addition, the Canadian Supreme Court, when considering whether Quebec could, under international law, unilaterally secede from Canada, found that secession in general would be possible under certain circumstances including "possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part".[6]

4.3 Again, as argued above at paragraph 2.3 in relation to the offence of treason and subversion, the definition of "levying war" should not include "a riot or insurrection or disturbance of a local nature" and this should be explicitly stated in the final legislation.

4.4 The crime of secession is considerably broader than the existing crime of treason since it refers to "threat of force" and "serious unlawful means" in addition to

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[5] For example, Hurst Hannum writes: "[t]here are two instances in which secession should be supported by the international community. The first occurs when massive, discriminatory human rights violations, approaching the scale of genocide, are being perpetrated ... secession may be the only option. Such circumstances will probably be uncommon, although the atrocities against, for example, Tibetans in China ... might qualify ... A second possible exception might find a right of secession if reasonable demands for local self-government or minority rights have been arbitrarily rejected by a central government". Hurst Hannum, "The Specter of Secession, Responding to Claims for Ethnic Self-Determination" (March/April 1998) 77 *Foreign Affairs* 13, 16.

[6] *Reference re Secession of Quebec* (1998) 161 DLR 3, 446.

"levying war" as means of committing secession. The *actus reas* of the offence is unclear from the Consultation Document's proposals. As with subversion (see our discussion at paragraphs 3.6-3.9 above), these references exceed the requirements of Article 23 and the government should exclude them from the offence of secession in the final legislation. If a crime of secession must be defined, then its base should be limited to "levying war" and "levying war" should be limited as suggested in paragraph 2.3 above.

4.5 The use of the term "threat of force" in the definition of secession is especially broad and could unjustifiably restrict freedom of expression in Hong Kong. For example, a person who argued that Taiwan is entitled to use military force to defend itself against an attack by the PLA might be caught by this definition.

4.6 The reference to "exercise of sovereignty" in paragraph 3.6 (b) of the Consultation Document is overly broad and should be reworded as: "resisting the CPG in its exercise of *territorial* sovereignty".

4.7 Although, the Consultation Document promises in paragraph 3.7 that "adequate and effective safeguards should also be put in place to protect the freedoms of demonstration and assembly" it does not explain what these safeguards will include. This is but one example of why it is essential for the government to issue a White Paper and allow the public an additional three months to comment upon it -- it is simply impossible to fully evaluate the current proposals until a more detailed description of the "safeguards" is available.

4.8 The proposed maximum penalties for secession are more severe than the counterpart of this offence in mainland China. This is significant because the combination of (1) an overly broad (or vaguely defined offence); and (2) a severe maximum penalty, will very likely have a "chilling effect" on our free press and academic freedoms. People simply will not be willing to test the law if they can be subjected to extreme penalties.

4.9 The government has assured the public during this consultation exercise that the party liability and inchoate offences (e.g. aiding, abetting, attempt or conspiracy) will not be used in such a way to undermine freedom of expression when it comes to articulations of support for the independence of Taiwan or Tibet. However, mere assurances by the current government are in no way binding upon future government officials. The legislation itself must be sufficiently narrow so as to

prevent future governments from using it to suppress legitimate dissent (a real possibility, especially if cross-straits tensions were to increase).

Section 5: Sedition

5.1 The government should proceed cautiously when legislating against acts of sedition and ensure that the offence is defined as narrowly as possible and that adequate safeguards exist for the protection of freedom of expression.

5.2 This is especially true since sedition has been used in some jurisdictions to suppress legitimate dissent and has been abolished – or is seldom relied upon – in many others.[7] Also, in light of Hong Kong's lack of full democratic safeguards, a free, critical press should be nurtured as a key check on Government policy and actions. The offences of sedition and theft of state secrets in particular must be defined according to a minimalist principle that ensures the offences do not exceed the requirements of Article 23.

5.3 The Consultation Document argues in paragraph 4.10 that "the crux lies in striking a balance between proscribing such highly damaging communications and protecting the freedom of expression". Given the sensitive nature of Article 23, and the importance of ensuring press freedoms, any legislation against sedition should err on the side of protecting freedom of expression when attempting to strike such a balance. The government should not merely conform to minimum international human rights standards but should demonstrate that Hong Kong is committed to keeping up with current international trends.

5.4 One such trend is the growing acceptance of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.[8] If a

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[7] In the course of the debate over implementing Article 23, several commentators have reiterated these points and have raised the example of Malaysia's use of sedition laws, as well as citing the UK Law Reform Commission's and the Law Reform Commission of Canada's recommendations to abolish sedition offences in those jurisdictions. See, for example, the Hong Kong section of Amnesty International on behalf of AI's international movement, "Response to Hong Kong SAR Government Consultation Document on Proposals to Implement Article 23 of the Basic Law, Submission to Legco 12 December 2002", footnotes 13 and 14, 8.

[8] According to Frances D'Souza, Convener of the Johannesburg Principles Consultation in 1995, the drafters of the Principles based their conclusions "on international and regional law and standards

sedition offence is necessary at all, the Government should, at the very least, apply a restrictive and progressive approach by ensuring that the final legislation conforms to these Principles.

5.5 The Government should reevaluate its position regarding Principle 6.[9] This Principle provides that expression may be punished as a threat to national security only if it can demonstrate that:

a. the expression is intended to incite imminent violence
b. it is likely to incite such violence; and
c. there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

5.6 Reliance on the notion of "incitement" in the Consultation Document's definition of sedition in paragraph 4.13 is insufficient. The final legislation should explicitly indicate that "incitement" must include an intention to cause imminent unlawful action and that such imminent unlawful action must be likely to occur.

5.7 The definition of sedition, as expressed in the Consultation Document, depends on the definitions of treason, secession and subversion. The vagueness and breadth of these three offences as discussed in earlier sections above, must be rectified to ensure that the sedition offence is sufficiently narrow to prevent abuse.

5.8 The final legislation should include a time limit for bringing prosecutions under a sedition offence. We would suggest six months.

5.9 Even with the inclusion of a mental element of knowledge or reasonable suspicion, the proposed lesser offenses of printing, publishing, selling, offering for sale, distributing, displaying, reproducing, importing or exporting any publication and possessing seditious publications are overly broad, unnecessary

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relating to human rights as well as evolving state practice (as manifested by national court judgements) and agreed that a more progressive standard was needed to promote the fullest possible respect for freedom of expression and to counter government attempts to undermine this key right" (quoted from a handout presented at an International Seminar on Article 23 on 5 December 2002 organized by the Hong Kong Journalists Association).

[9] See Bob Allcock's paper, "Implementing Article 23 of the Basic Law: the Johannesburg Principles" presented at the seminar cited in *Ibid.*

and should be eliminated.

Section 6: Theft of State Secrets

6.1 Any current and new offences falling under this category of "theft of state secrets" should be clearly and narrowly defined. Ambiguity is dangerous to Hong Kong's freedoms because of the potential chilling effect and self-censorship, regardless of the numbers of prosecutions that are actually taken out. This is especially true given fears that a broad mainland interpretation of "state secrets" – which has been used to detain Hong Kong journalists and academics engaged in legitimate reporting and research on the mainland - could be imported into Hong Kong.

6.2 The Government should use this opportunity to review, amend or delete ambiguous, broad provisions in the current Official Secrets Ordinance (Cap. 521) and ensure that definitions of offences covered by this Ordinance and any new offences created under Article 23 comply with provisions on freedom of expression in the Basic Law, Bill of Rights, the ICCPR and the Johannesburg Principles.

6.3 In particular, the categories of protected information relating to international relations are too wide and loosely defined. Although the UK Official Secrets Act 1989 contains similar provisions relating to "international relations" information, they have never been used and tested in court as to their compatibility with the UK Human Rights Act. It is the general view amongst scholars in the UK that such provisions are incompatible with the Human Rights Act.

6.4 The recent House of Lords decision in *Shayler* concerns the prosecution of a former security agent in relation to "security" or "defence" information. It does not justify the retention of the problematic provisions relating to "international relations" information or to the offence of unauthorized disclosure by the media or other third parties. The purported justification for the "international relations" category was that unauthorized leakage of such information might jeopardize the relationship between the State and other countries. However, other democratic countries, such as the United States and Canada, do not have corresponding offences.

6.5 The Consultation Document acknowledges in paragraph 6.13 that "open government and a high degree of transparency of government encourages participation in public affairs and enhances accountability". Transparency is indeed a key element in a modern, democratic society. However, Hong Kong currently has no *legal* right of access to official information. This should be remedied and laws

allowing greater access to official information should be introduced in conjunction with any Article 23 legislation.

6.6 The Consultation Document states in paragraph 6.13 that "in order to safeguard freedom of expression and information, it is important to afford protection only to truly deserving categories of information, and to clearly define the means of protection". However, the proposal to create a new class of protected information relating to relations between the Central Authorities and the HKSAR exceeds the requirements of Article 23 and is unclear for several reasons.

6.7 First, the Consultation Document does not explain what sort of information would be protected under this new category. In other words, would a broad interpretation, which might include economic information, or a narrower interpretation, limited to defense matters, be adopted?

6.8 The meaning of "Central Authorities" has not been defined and could be subject to a dangerously broad interpretation.

6.9 The proposals do not indicate whether such protected information would be defined by content or source. In order to prevent unnecessary restrictions on freedom of expression, the laws should explicitly provide that protected information be defined by content and not by source.

6.10 The proposed new offence of "making an unauthorized and damaging disclosure of information that was obtained directly or indirectly by unauthorized access to such information" widens the scope of the existing offence of unlawful disclosure and could cover non-public servants, such as journalists. If the concern is that hackers may access protected information, then an explicit reference to hackers could be included rather than this broadly worded offence.

6.11 This second proposal should be dropped altogether. If it is not dropped, the legislation should, at the very least, adopt clear public interest and prior publications defenses in order to protect press freedoms. If the information is already in the public domain it should not require protection.

6.12 The proposals do not clarify what constitutes "damaging" disclosure. Damaging disclosure should require proof of a strong likelihood of specified harm or clear and present danger of harm.

6.13 "Unauthorized access" should also be clearly defined and limited.

Section 7 : The Power to Proscribe Organizations

7.1 As the Consultation Document acknowledges, this is one area in which Hong Kong law already complies with Article 23. The Provisional Legislative Council amended the Societies Ordinance in 1997, giving the government the power to prohibit a society if it is a political body that has a connection with a foreign political organization or a political organization of Taiwan. (see paragraph 7.3 of the Consultation Document and Societies Ordinance s 8).

7.2 The government also already has the power to prohibit a local society if it reasonably believes that it is necessary in the interests of national security, public safety, public order, or the rights and freedoms of others. Indeed the government itself appears to acknowledge that existing law fulfills the requirements of Article 23, stating in the Consultation Document that:

> "We believe that the existing provisions of the Societies Ordinance, in particular those governing the definition of 'foreign political organizations' and "connections" are sufficient for the purpose of prohibiting foreign political organizations from taking part in the political process of the HKSAR."

7.3 This raises the question of whether any additional statutory powers are really necessary. It does not appear that they are necessary in order to implement Article 23. Moreover, the Consultation Paper has not demonstrated any real *need* for additional statutory provisions on the control of local organizations. We question why the government would wish to change the existing statutory scheme if it cannot point to any examples in which the Secretary for Security found that the existing laws were inadequate.

7.4 The existing Societies Ordinance defines "society" as "any club, company, partnership or association of persons, whatever the nature of objects, to which the provisions of this Ordinance apply." The government now proposes, in paragraph 7.15 of the Consultation Document, to extend its powers to an "organization", to be defined as "an organized effort by two or more people to achieving [sic] a common objective, *irrespective* of whether there is a formal organizational structure" (emphasis added). This proposed definition is extremely broad and the government

has not offered any specific justifications for adopting it.

7.5 The second worrying aspect of the proposal can be found in the circumstances under which the Secretary for Security may exercise the power to proscribe a local organization. Subparagraphs 7.15 (a) and (b) provide that such power can be exercised if the organization has the objective of committing, has attempted to commit, or actually has committed any act of treason, secession, sedition, subversion or theft of state secrets. However, subparagraph 7.15 (c) proposes that an organization could also be proscribed in Hong Kong if: "the organization is affiliated with a Mainland organization, which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security."

7.6 This proposal could open a "connecting door" between Mainland and Hong Kong concepts of national security that is potentially much wider than that required by Article 23 (which only refers to ties between local and foreign political organizations).

7.7 The Hong Kong government has tried to reassure the public by stating that the Secretary for Security would not only have to be satisfied by the evidence of affiliation but would also have to "reasonably believe that it is necessary in the interests of national security or public safety or public order to ban the affiliated organization, before the power of proscription can be exercised" (Consultation Document, paragraph 7.16). However, this provides little comfort. The Hong Kong government has expressly stated in paragraph 7.16 of the Consultation Document that it will "defer" to the Central Government authorities on the question of whether a mainland organization threatens national security and that "formal notification" by the Central Government that a particular organization has been prohibited in the Mainland on the ground of national security shall be conclusive on that issue. Although the government has stressed that this would not *automatically* mean that the Hong Kong affiliate would also be deemed a threat to national security, it does seem likely that the Secretary for Security would at least take into account the views of the Central Government when deciding whether she has a "reasonable belief" that the affiliated local organization threatens national security. In fact, once this legal door is opened, it is hard to imagine our Secretary for Security defying the Central Government by taking the opposite view regarding a Hong Kong affiliate of a mainland organization that has been banned on national security grounds.

7.8 The dangers of this proposal are heightened by the fact that the government has proposed a curious two-step procedure for any appeals from a decision to proscribe an organization: it is suggested in the Consultation Document, paragraph 7.18, that points of fact should be appealed to an "independent tribunal" and that only points of law may be appealed to a court. The Consultation Document gives no information about how this division would work in practice (many issues on appeal would actually be mixed questions of law and fact) or about the nature of this proposed tribunal. Moreover, the legal community is concerned by the proposal in any event, since administrative tribunals are frequently criticized for being unduly deferential to government decisions.[10]

7.9 The government has sought to reassure lawyers by suggesting that any decision would be subject to judicial review. However, it would be exceedingly difficult for a local organization to establish, in an action for judicial review, that the Secretary for Security's belief that it is necessary to ban a Hong Kong organization in the interests of national security is "unreasonable" (particularly if the law provides that the Central Government's notification that the affiliate organization in China has been banned on national security grounds is conclusive on that issue). There is also the danger that the government would later take the position that the matter was an "act of state" and not subject to judicial review.[11]

7.10 Moreover, as noted in Section 1 above, the Hong Kong courts should not be put in a position of having to strike down laws or executive acts that do not comply with the ICCPR. The government is bound to comply with the ICCPR when drafting new legislation and should take care to ensure that the new laws do not violate it.

7.11 One group that is concerned is Falun Gong, since it is prohibited in China but currently allowed to operate in Hong Kong.[12] The Hong Kong Secretary for

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[10] See Cliff Buddle, "Lawyers attack security tribunal plan", *South China Morning Post,* 27 October 2002.

[11] See Michael Davis, "Who defines national security?", *South China Morning Post,* 22 October 2002.

[12] It should be noted that while Falun Gong is not prohibited in Hong Kong, it is also not popular with certain Hong Kong government officials, who have taken several opportunities to make disparaging remarks about it. While these remarks may have been made only to appease the national government (which no doubt finds the open existence of Falun Gong in Hong Kong extremely irritating), they have raised concerns about freedom of religion and association in Hong Kong. See, e.g., Asia Human Rights Commission, "Hong Kong: Threats against Falun Gong Threaten 'One Country, Two Systems'"

Security has dismissed these concerns, noting that Falun Gong is not prohibited in China on the ground of national security but rather on the ground that it is an "evil cult". However, that distinction does not provide any legal protection since the Chinese government could change the ground under which Falun Gong is proscribed at any time. (There is no independent legislature or court in China to *question* the Central Government if it decides to proscribe Falun Gong in the mainland on the ground of national security).

7.12 Will the Central Government seek to have Falun Gong prohibited in Hong Kong? It probably would not do so in the near future as it would not want to undermine, so quickly, the assurances given by the Secretary for Security during this consultation exercise. However the sword will be hanging over the heads of this and any other organization that is affiliated with a "prohibited" organization in China. For example, a representative of the Catholic Church in Hong Kong has expressed concern that it may be considered to have an affiliation with the underground church in the Mainland.[13]

7.13 There is a real danger that the fear of proscription could have a chilling effect on the rights of these and other organizations, both formal and informal. Given that Article 23 only refers to relationships with foreign political organizations, one would expect the government to have offered some specific justification for these proposals regarding prohibition of local organizations. However, the government does not point to one instance in which the existing laws have proven too weak. Rather, the government insists that it is not really expanding its powers, claiming (on its Myths and Realities webpage) that "the proposed mechanism does not go beyond the scope of the existing power under the Societies Ordinance".[14] If that is really the case then one must ask the rhetorical question -- why did the government go to the trouble of drafting this new language, which it must have known would give rise to enormous controversy? We urge the government to remove doubts and concerns by eliminating this category from its proposals when drafting the actual legislation.

(available at http://www.ahrchk.net/hrsolid/mainfile.php/2001vol11no3/44/).

[13] See Ella Lee, "Article 23 frightening says bishop; Catholic Church head voices anti-subversion law fears and hits back at Beijing's top SAR envoy", *South China Morning Post,* 4 October 2002.

[14] See Hong Kong Government, "Proposals to Implement Article 23 of the Basic Law: Myths and Facts", available on the Hong Kong Government's website at http://www.info.gov.hk/sb/eng/23/leaflet2.htm at page 6 of 7.

Section 8: Investigation Powers

8.1 Article 23 makes no mention of any extraordinary investigation powers and thus the government is not under any specific constitutional duty to include them. Thus, proposals to introduce new extraordinary powers to search premises without warrant or prior judicial authorization must be justified on separate grounds.

8.2 It should also be noted that emergency search powers are already available when calamitous consequences occur or appear imminent. Any expansion of powers to search premises without a warrant is, by definition, an interference with a very fundamental right – the right to privacy and security in one's home. Restrictions on such basic freedoms must be carefully considered and justified. (For example, existing emergency warrantless search powers can be justified in relation to crimes involving drugs and firearms since drugs may be easily disposed of and firearms are inherently dangerous.)

8.3 The government should rely upon the following three principles when considering whether any additional warrantless search powers should be introduced:

(1) warrantless search powers are *prima facie* unreasonable;
(2) the onus is on the government to justify the power by demonstrating empirical necessity for the power (not just speculation);
(3) constitutionally protected domains should be given special protection, including law offices, newspaper offices, and places of worship.

8.4 The Consultation Document itself does not seem to adhere to these principles – e.g. there is no discussion of giving special protection to the press or to law offices. We also note that the justifications provided in the Consultation Document are very weak and do not stand up to rigorous analysis. In particular, the Consultation Document does not provide any empirical evidence of the need for these additional powers. The proposal for extraordinary search powers appears to be based entirely upon speculation. The government simply states that the existing powers "may not always be adequate to cater for the special nature of some offences under Article 23" and then makes a giant leap to conclude that such powers "will be needed".

8.5 In fact, the Hong Kong government has no idea whether such powers will be needed or whether evidence will be lost simply because the police needed to get a warrant

to enter premises. It should be noted that warrants are easily obtainable in Hong Kong, especially with the help of modern technology such as mobile telephones. It should also be noted that the legislature has not granted extraordinary investigation powers in relation to the enforcement of other important laws, such as the Anti-Terrorism Ordinance. This would indicate that the police do not have difficulty obtaining warrants in Hong Kong and do not require extraordinary powers to investigate Article 23 offences. In terms of the likelihood of losing evidence, it is hard to see how investigations of Article 23 offences would present any greater problems than anti-terrorism investigations. Surely terrorism is at least as "special" as the offences proposed in the Consultation Paper (many of which do not involve any threat of violence but are more political in nature).

8.6 The Government's argument that similar search powers exist in other jurisdictions is weakened by a lack of uniform state practice. Moreover, we would argue that it is not appropriate to simply point to another jurisdiction and assume that police powers which exist there can be safely adopted here in Hong Kong. The Consultation Document ignores the fact that that the Hong Kong government is not democratically elected and the fact that Hong Kong is a part of China, a jurisdiction where police and public security officials regularly violate internationally recognized standards of human rights. The people of Hong Kong have no way of knowing what sort of government they will have in 20 years time or what changes may occur with respect to the exercise of police powers. Under these circumstances, the safest thing to do is *not* to give the police extraordinary powers, particularly since they do not appear to be able to demonstrate a real need for them based upon actual cases.

8.7 We recommend that the proposal to create special investigation powers for Article 23 be deleted. The issue of whether such powers are required can always be revisited if the police actually experience difficulties obtaining warrants for investigating these offences and can demonstrate a real need for such powers.

Conclusion

We would be happy to discuss any of these comments with government officials or legislators and look forward to seeing a draft of the legislation.

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