LEGISLATING RIGHTS: BASIC LAW ARTICLE 23, NATIONAL SECURITY, AND HUMAN RIGHTS IN HONG KONG

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> The HK SAR shall enact laws on its own to prohibit 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.
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> Article 23 of the Basic Law of the Hong Kong Special Administrative Region

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I. INTRODUCTION

September 5, 2003 may someday be recognized as one of the key dates in Hong Kong history. On that day, Chief Executive Tung Chee-Hwa announced that he was withdrawing the government's proposals to amend Hong Kong's national security law. The announcement came roughly one year after the proposals were first introduced, and only two months after the largest public protests in Hong Kong since 1989, when the people of Hong Kong took to the streets in support of the pro-democracy movement in Tiananmen Square in Beijing.

On July 1, 2003, an estimated 500,000 people marched through the streets of Hong Kong in order to voice their disapproval for the government's proposed Article 23 legislation, which was due to be passed within a matter of weeks. It was a rare and thrilling example of the people of Hong Kong making their voices heard, such that the

government and pro-Beijing political parties could ill afford to ignore them. Although the Chief Executive admitted that he was shaken by the protests, Tung did not immediately give up on his legislative proposals. Instead he delayed, hoping to find a politically tenable way forward. Not until the two largest pro-Beijing political parties announced that they would withdraw their support for the legislation if it came to a vote in the Legislative Council ("LegCo") did the Chief Executive finally yield. His September 2003 retreat on Article 23 does not mean that the issue is dead, however. The government might revive its proposals at a later time if it feels that the political winds have changed sufficiently to allow for a second try.

This paper describes in detail the government's initial proposals on Article 23, outlining their flaws from a human rights perspective. It also documents the changes that the government made when it issued its draft bill on February 25, 2003. Although significant changes were made following the consultation process, key suggestions for improvements to the consultation document proposals were ignored, and therefore the government's proposed draft law remained deeply flawed. In addition to analyzing the content of the Hong Kong government's proposals, this paper describes the process by which the government attempted to advance them. Instead of moving forward through negotiation and consensus, the government instead issued its consultation document without prior discussion with any of Hong Kong's leading pro-democracy politicians, and refused, despite repeated calls that it do so, to release a draft bill embodying its consultation document proposals. Its approach to public consultation during the three-month consultation period following the issuance of the consultation document was often defensive and combative, and government officials regularly derided critics of the government's position rather than engaging in substantive debate.

A. Background: the Creation of Article 23

In September 2002, the Hong Kong Special Administrative Region ("SAR") government released a consultation document outlining its proposals to implement Article 23 of the Basic Law.[1] After a three-month consultation period that ended in late December, the

[1] Basic Law Article 23

government released draft legislation on February 25, 2003. Perhaps the single most controversial provision of the Basic Law, Article 23 has had a troubled history since its inception. Under the 1984 Joint Agreement between Great Britain and China, the basic governmental structure of Hong Kong would be spelled out in a Basic Law, a sort of quasi-constitution for Hong Kong.[2] Drafting of the Basic Law by the newly formed Basic Law Drafting Committee ("BLDC") began in 1986. The BLDC, composed of thirty-six representatives from the mainland and twenty-three from Hong Kong, was generally acknowledged to be a conservative group.[3] The mainland Chinese members of the committee consisted largely of government officials, with some academics also on the list. The Hong Kong group was a bit more diverse, but "there was a clear dominance of business people, including the most wealthy and influential of them."[4]

Working under the close scrutiny of the Beijing government, the BLDC produced its first draft of the Basic Law in April 1988.[5] Although the first draft did contain strong rights protections, it also contained a draft Article 23 (Article 22 in the original draft), which stated that the government would "prohibit by law any act designed to undermine national unity or subvert the Central People's Government."[6] Under the process laid out by the BLDC, the issuance of the draft was followed by a solicitation of public commentary. This commentary resulted in a second draft, issued in February 1989. While the text of Article 23 was improved, it was still problematic from a human rights perspective: the word "subvert" had been removed, but Article 23 still called for the Hong Kong government to "enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets."[7]

Further solicitation of public opinion followed, but the drafting process was interrupted by the 1989 Tiananmen Square protests and the subsequent military crackdown ending them. In the wake of the

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[2] Joint Declaration, Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong, Annex 1.

[3] MING K. CHAN & DAVID J. CLARK, THE HONG KONG BASIC LAW: BLUEPRINT FOR 'STABILITY AND PROSPERITY' UNDER CHINESE SOVEREIGNTY? 6 (M. E. Sharpe, 1991).

[4] YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 57 (Hong Kong University Press, 2nd ed., 1998).

[5] CHAN & CLARK, *supra* note 3, at 4.

[6] HONG KONG HUMAN RIGHTS MONITOR [hereinafter HKHRM], *A Ticking Time Bomb?: Article 23, Security Law, and Human Rights in Hong Kong*, August 17, 2001, at 6.

[7] *See id.*

crackdown, recommendations to further liberalize or even remove Article 23 from the Basic Law were ignored, and the BLDC instead chose to take a conservative turn on Article 23 by reinserting subversion and otherwise broadening its scope.[8] The third draft of the Basic Law was enacted by the National People's Congress in Beijing on April 4, 1990; its creation was met with a mixture of anger and indifference in Hong Kong.[9]

Since Article 23 became a reality, repeated attempts have been made to limit its effect on the post-handover SAR government's drafting and implementation of Article 23 legislation. These attempts have borne little fruit: the dissenting voices of civil society were largely ignored in the drafting of the September 2002 government consultation document (the so-called "blue paper").[10] Despite the flaws of Article 23 and the questionable motives behind its creation, nonetheless the SAR government could have used Article 23 as an opportunity to improve the security law of Hong Kong. Instead, the government proposed a broadening of existing laws, while further empowering both the local government and the national government in Beijing to infringe on the rights of the people of Hong Kong.

The key components of the proposed revisions include creating new criminal offenses of subversion and secession; extending the definition of "state secrets" to include all communications between the SAR government and the central government in Beijing; and adding provisions that allow Beijing to play a role in the enforcement of security law in the SAR.

B. The Government's Proposals: Why Legislate at All?

From a public security point of view, the SAR government's decision to act in September 2002 was difficult to explain. Both during the reversion to Chinese sovereignty and during the five years since the 1997 handover, Hong Kong experienced no major security threats, internal or external. If fears over security post-September 11 were a

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[8] *See id.*, at 7.

[9] CHAN & CLARK, *supra* note 3, at 29.

[10] Security Bureau, HKSAR, Proposal to Implement Article 23 of the Basic Law: Consultation Document, September 2002 [hereinafter Consultation Document] *available at* http://www.basiclaw23.gov.hk/english/download/reporte.pdf. The consultation was referred to as the "blue paper" merely because, like many SAR government consultation documents, it was indeed printed on blue paper.

concern, then the government could have looked to existing anti-terrorism and basic criminal law rather than new laws covering treason, sedition, and subversion.[11]

The government's stated rationale for moving to revise the SAR's security law was simply that all jurisdictions must have laws on national security, and that Hong Kong is no exception. Further, the government argued, Article 23's constitutional authority *requires* that the government create new laws on national security.[12] This argument neglects the fact that Hong Kong already has legislation covering all of the areas mentioned in Article 23. There is no legal vacuum in Hong Kong's national security law in the way that the government suggested. Rather than reading Article 23 as requiring new laws, the government could have taken the position that Article 23 merely requires that Hong Kong have laws that cover the various acts listed, and if existing law is adequate, then there is no need to legislate. Also, Article 23 does not set any explicit timetable for the presentation of legislation; the government could have chosen to continue to do nothing, given that existing laws have not proven inadequate in ensuring national security since the handover.[13]

Yet the SAR government decided, in the absence of any demonstrated need, to move forward in enacting new national security laws. Its considerations may have been more heavily influenced by political expediency than legal concerns: by waiting several years after the handover, the government avoided the increased international scrutiny which would have accompanied any such proposals in the wake of the 1997 transition. The government's decision to advance their proposals in September 2002 may also have been related to the upcoming District Council elections in November 2003, and Legislative Council elections in November 2004. By moving to enact its proposals before elections, the government may have sought to avoid turning

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[11] *See* United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, which was passed in August 2002.

[12] *See* Regina Ip, *Hong Kong Needs National Security Laws*, ASIAN WALL ST. J., September 30, 2002, at A11. A similar argument is laid out in the Consultation Document, paragraphs 1.4-1.6. at 2-4.

[13] Even if one insists on an extremely literalist reading of Article 23, one in which the words "shall enact" *require* new legislation, the government could have merely pushed for the passage of a bill that stated that all of the Article 23 offenses would be covered by existing law. Alternatively, the government could have proposed amendments to existing law to strengthen the human rights protections as suggested at various points in this article. In other words, a push for new legislation is not inconsistent with a move to increase the human rights protections of Hong Kong law.

Article 23 legislation into an election issue. If, as the government had hoped, LegCo had passed the legislation by mid-2003, the new laws would have been several months old by the time the 2003 elections came around, and over a year old by the time of the 2004 LegCo elections.

Given the nature of the closed-door consultations between Beijing and the SAR government, it is impossible to know if central government interests pushed for action on Article 23, despite the clear provision in the Basic Law that Hong Kong would enact any such legislation "on its own." The SAR government has made no secret of the fact that it has repeatedly consulted with the Beijing government on its Article 23 proposals, and the SAR government did so before seeking the input of its own legislators and citizens. There are scattered reports that the central government agreed that while Article 23 legislation should not be moved forward in the immediate aftermath of reunification, the wait had been long enough. In Beijing's view, according to these sources, by late 2002, it was time to move.[14]

There has been no suggestion by any party that either the SAR government's decision to legislate, or Beijing's pressure on the local government to act (if any such pressure existed), came about as a result of perceived threats from specific groups. Instead, some have theorized that there was a desire to deal with and finally conclude the potentially explosive issue. Once the legislation was passed, concerns over the potential negative impact of Article 23 on relations between Hong Kong and the Mainland could be put to rest.[15]

Beyond timing, it seems unlikely that the central government in Beijing was entirely agnostic about the content of Article 23 legislation. Given that many of the legislative items suggested by SAR government in its consultation paper could be used against persons or entities perceived as Beijing's foes in Hong Kong, including the spiritual group Falun Gong, it is very possible that the concerns of the central government influenced more than just the timetable of Article 23 legislation. Furthermore, the SAR government's proposals include an active role for Beijing in the operation of security law in Hong Kong. It seems unlikely that the SAR government would of its own accord bring

[14] Chris Yeung, *Can Tung Get it Right on Article 23?*, SOUTH CHINA MORNING POST, September 23, 2003.

[15] Chris Yeung, *Urgency Appears to Be the Watchword: Where Once There Seemed No Rush, Leaders Now Talk of "Top Priority"*, SOUTH CHINA MORNING POST, September 25, 2002.

the central government into the picture.[16] Despite these conjectures, the extent of Beijing's influence over the substantive content of the proposals remains unknown. Indeed, under the legislation as initially proposed, such information might well have been protected as a state secret.

The SAR government's decision to legislate in the absence of any timetable compelling them to do so came after five years of slow and steady erosion of Hong Kong's rights protections framework. Before the handover, the central government announced that it would repeal significant reforms to Hong Kong's colonial laws governing free association and assembly. It also announced its intention to remove Hong Kong's Bill of Rights Ordinance Cap. 383 ("BORO"), passed in 1994, from its prominent position in Hong Kong law. During the 1997 handover, the government replaced the elected LegCo, the first in Hong Kong's history to be elected by universal suffrage, with its own appointed Provisional Legislative Council, and then moved to amend Hong Kong's election laws so as to drastically reduce the number of popularly elected seats in LegCo. The new electoral system virtually guaranteed that Hong Kong's pro-democracy parties would remain in the minority in LegCo despite broad public support. In 1999, the government dealt a serious blow to the autonomy of Hong Kong's court system when it sought a reinterpretation from Beijing of the high court's ruling in the infamous right of abode case.

As a result of these and other actions taken by the SAR and Beijing governments, confidence in the government's willingness to take seriously its constitutional obligation to protect the rights of the residents of Hong Kong was and remains very much in doubt.[17] Sadly, the proposals laid out in the government blue paper and the subsequent draft law were very much in line with previous action taken by the Hong Kong government in the area of human rights protection. Article 23 has been a cause of concern since its inception, and the government's proposals brought closer to reality the fears expressed by several commentators over a continued weakening of Hong Kong's rights protection framework.

The draft law, issued on February 25 2003, contained several significant departures from the consultation document. It is impossible

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[16] *See* Section F below on the proscription of political organizations.

[17] Under Basic Law Article 4, the Hong Kong government has the duty to "safeguard... the rights and freedoms of the residents and other persons in the Region..."

to know whether the SAR government intentionally left room in the consultation document for changes to be made in the issuance of the draft law, so as to anticipate the need to appear accommodating of public opinion, or if they were genuinely influenced by public pressure after the release of the consultation. Certainly some changes to the consultation document proposals had to be made or the process would have been seen as completely lacking legitimacy. Given the lack of logical consistency in the government's choices on what to change, however, many have concluded that the government was intent upon keeping certain elements of the law, no matter how flawed.[18] Regardless, significant flaws in the draft law remained, all of which were pointed out by several commentators during the consultation period.

II. THE CONSULTATION DOCUMENT PROPOSALS AND THE DRAFT LAW

A. Treason

The government's initial proposal on treason was novel: it suggested splitting the offense of treason into two parallel offenses. Treason would cover only acts committed in concert with a foreigner, while subversion would cover acts committed purely by domestic actors.[19] While the proposal seemed innocuous on its face, the two offenses outlined by the government were together potentially much broader than the one offense of treason currently in place.[20] This section addresses the proposed new offense of treason; subversion is dealt with below.

The government's consultation document proposal on treason was a bit schizophrenic. Although the government rightly called for the elimination of the most antiquated language in the statute, it did not propose the removal of other equally out-of-date language that could

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[18] E-mail correspondence with Hong Kong academic.

[19] The government rightly moved to define the key term of "foreigner" in relation to the proposed offense. The government's proposed definition for foreigner is "armed forces which are under the direction and control of a foreign government or which are not based in the PRC." This definition of what constitutes a connection to a foreign "armed forces" is narrower than one which would include, explicitly or implicitly, such entities as businesses that have entered into a commercial relationship with a foreign military. *See* Consultation Document, *supra* note 10, paragraph 2.9 at 10.

[20] Crimes Ordinance Cap. 200, s. 2

be used to crack down on free speech and association. The SAR law on treason is inherited from the British colonial government, and the language of the law is largely drawn from the Treason Felony Act of 1848, which defines treason as an affront to the Queen and thus the State. Under the Act, treason is defined as follows:

> To levy war against Her Majesty within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament.[21]

This language is typical of the original concept of treason, which entailed a violation of personal allegiance to the State. The modern concept of treason has moved away from a concept of allegiance and toward one of armed resistance. In the words of the British Law Commission, "the modern concept... regards treason as 'armed resistance made on political grounds to the public order of the realm.'"[22]

Because the incoming SAR government rejected the pre-handover amendments to the Crimes Ordinance, current Hong Kong law still outlaws attacks on the bodily person of the Queen. Such provisions are no longer useful, and the government was right to call for their removal from the law. However, other language which implies an attack on an individual person or a violation of the duty of loyalty to the State was retained in the consultation document proposals.

Under the government's consultation document proposals, attempts to "constrain" the government in order to change its policies, or to "intimidate" or "overawe" the government were still considered treason. In a separate provision in the Crimes Ordinance, the government advocated retaining a law which forbids individuals from "instigat[ing] any foreigner with force to invade the United Kingdom or any British territory."[23] Although there is some ambiguity in this

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[21] Treason Felony Act, 1848 (Eng.). This language is itself drawn from the prior British law on treason, including the common law and the first Treason Act of 1351.

[22] MICHAEL SUPPERSTONE, BROWNLIE'S LAW OF PUBLIC ORDER AND NATIONAL SECURITY, 230 (London, Butterworths, 1981) *citing to* LAW COMMISSION WORKING PAPER NO. 72, paragraph 14.

[23] Crimes Ordinance, Cap. 200, s. 2(1)(d).

language, the government consultation paper made it clear that instigation under Section 2(1)(d) of the Crimes Ordinance need not be forceful. In common parlance, "instigate" has no association with violent acts, and is defined rather as urging or provoking another to act. As such, the provision is somewhat similar to the offense of sedition as outlined by the government, with the added element of foreign involvement. There was therefore a risk that the offense, like the other provisions relating to treason, could have been stretched to cover peaceful public protest or other criticism of the government.[24]

Also problematic was the government's preservation in its consultation document of the somewhat archaic term "levying war." Under the government's proposed definition, levying war included not only armed attack against the government, but also "a riot or insurrection involving a considerable number of people for some general public purpose."[25] Such a definition could cover public demonstrations which get out of hand, whereas treason statutes should cover only violent action aimed at overthrowing the state. Damage to public property during public protest is extremely rare in Hong Kong, but such incidents, if and when they do occur, should be covered by the relevant criminal statutes relating to vandalism, destruction of property, public disorder, and the like, rather than by treason, which is one of the most serious crimes contemplated by the criminal law.

Rather than using centuries-old language that could potentially be manipulated to cover peaceful protest and dissent from official policy, the government could have instead further modernized the crime of treason in Hong Kong by expunging all of these terms from the law, and by creating a law of treason that covers only attempts to overthrow the government by force.[26] Its decision not to do so is indicative of its general approach to Article 23 legislation: rather than looking at existing law holistically to see how it might be revised in order to fully update the law and fix any possible ambiguities or flaws,

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[24] This is especially so given that there is no requirement that the act of instigation actually lead to an attack on Hong Kong or another part of Chinese territory. The consultation document also called for the specific criminalization of "non-violent threats." *See* Consultation Document, *supra* note 10, paragraph 2.12 at 11.

[25] Consultation Document, *supra* note 10, paragraph 2.7 at 9.

[26] The removal of the pre-modern terms like constraint, intimidate, and overawe is especially necessary given the paucity of treason cases. Treason cases are virtually unknown in twentieth century Britain, and cases are few and far between in other common law jurisdictions. If the courts were called upon to interpret any of the terms in question, they might have little precedent to aid them in rejecting a broad interpretation of the terms.

the government instead took a very targeted and piecemeal approach. Specific provisions were inserted or expurgated, sometimes to clean up the language of the law, but often resulting in broadening the scope of the government power, with no explanation given as to why greater authority was needed in the absence of any tangible threats to public security.

If the SAR government had opted to expunge the outdated language from the statute, it would be following the recommendation of the British Law Commission, which made similar recommendations for the revision of British law on treason in its 1977 working paper on treason, sedition, and related offenses. After deliberating over the necessity of the offense of treason at all in the peacetime context, the Law Commission concluded that, while a narrowly tailored offense "aimed at the overthrow, or supplanting, by force, (of the) constitutional government" should be retained, nevertheless the language of the statute should be reworded:

> [i]t is because of the extent of the present offenses of treason in peacetime and because of the difficult language in which they are cast that it is in our view necessary at least to restate the offences in simple language.[27]

Although the SAR government maintained that its proposals were in accordance with international standards, the UN Human Rights Committee ("UNHRC") has previously called on the Hong Kong government to clean up the language of both its statutes on treason and sedition. In its Concluding Observations, the UNHRC noted that "the [current] offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under Article 19 of the Covenant."[28] By refusing to update the language of the law on treason, the SAR government came close to a violation of international standards as articulated by the UNHRC. The government has also failed to live up to the standards

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[27] LAW COMMISSION, WORKING PAPER NO. 72, CODIFICATION OF THE CRIMINAL LAW: TREASON, SEDITION AND ALLIED OFFENCES, London, May 1977, paragraph 57.
[28] HKHRM, *supra* note 6, at 9.

articulated in the Johannesburg Principles, which call for the elimination of ambiguity in the law.[29]

The Force Requirement

Treason has also traditionally been thought of as a crime that is only committed through the use of force. As the British Law Commission has pointed out, "[i]t is difficult... to postulate a conspiracy illegally to overthrow or supplant constitutional government, without the use of force."[30] The SAR government took a different view, arguing that certain activity, while aimed at the overthrow of the government, may not involve the use of force:

> [i]n so far as a non-violent attack (e.g. electronic sabotage) is part of the larger planned operation by which foreign forces levy war or invade the territory of the state, it would be caught by the offences proposed (in the consultation document).[31]

If the goal of the government was to capture acts like electronic sabotage that are committed in conjunction with an armed attack on Hong Kong, then it should have tightened the language of the proposed laws so as eliminate over-inclusiveness. As mentioned above, simple acts of vandalism or destruction of property cannot generally be considered acts of treason, and the use of the word "incitement" was potentially both over-inclusive and duplicative, given the government's proposals on sedition.

In addition to being vague and over-inclusive, the proposal on treason was also duplicative. Under the government's original proposal, Section 2(1)(e) of the Crimes Ordinance, which forbids anyone from "assist[ing] by any means whatever any public enemy at war with Her Majesty,"[32] was retained at the same time that the common law offenses of aiding and abetting, counseling, and procuring treason were to be

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[29] *See* in particular Principle 1.1(a), which calls for national security laws to be "accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful."

[30] LAW COMMISSION, WORKING PAPER NO. 72, *supra* note 27, paragraph 61.

[31] Consultation Document, *supra* note 10, paragraph 2.12 at 11.

[32] Crimes Ordinance Cap. 200, s. 2(1)(e).

codified by law.[33] There is little substantive difference between the two provisions. As the Hong Kong Bar Association has pointed out, such duplication is "simply creating an offence for the sake of creating an offence."[34]

The government also proposed codifying the offense of misprision of treason, which is essentially the offense of failure to disclose the commission of the act of treason by another within a reasonable time. Although it may be unnecessary for the government to take this action given the paucity of such cases,[35] codifying the offense does not itself violate international norms. While the UK and Canada have left the offense in the common law rather than committing it to statute, the US, has codified the offense.[36] The move to codify the ancillary offense was troubling primarily in the context of the overly broad proposal for the offense of treason itself.

The proposal also created problems specific to the Hong Kong context: many Hong Kong Chinese fled the mainland in order to escape from the severe political repression of the first decades of the Communist regime. The proposal to codify the offense of misprision of treason was an uncomfortable reminder to many in Hong Kong of the Cultural Revolution, in which children were called upon to inform on their parents' political and ideological crimes and friend was turned against friend. Many saw the proposal on misprision of treason as instituting a requirement of informing on friends and loved ones for political dissention, a requirement that was especially problematic given the uncertain environment of legal protections in Hong Kong.

The Draft Law

Although the draft law provision on treason was an improvement over the initial consultation document proposal, significant flaws which had been pointed out during the consultation period remained. The draft provision on treason retained some of the archaic language of the existing law, including prohibitions on "compel[ling] the Central People's Government to change its policies

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[33] Consultation Document, *supra* note 10, paragraph 2.13, at 11.

[34] HONG KONG BAR ASSOCIATION, *Hong Kong Bar Association's View on Legislation under Article 23 of the Basic Law*, December 2002, paragraph 25 at 7, *available at* http://www.hkba.org/whatsnew/press-release/20020722.doc.

[35] The last case of misprision of treason in the UK was R. v. Thistlewood, 33 State Tr. 681 (1820).

[36] 18 U.S.C. § 2382.

or measures" and "intimidate[ing] the Central People's Government." The refusal to update the language was somewhat puzzling in that the government implicitly acknowledged the ambiguity in the language, but noted that the courts would read the terms "in accordance with common law precedents and principles."[37] Although it would have likely been more straightforward for the government to update the language of the statute in its proposed draft law, the failure to do so was likely not a major flaw, given the settled nature of the law of treason in common law jurisdictions and the government's signal that it assumed that it would be bound by prior common law precedents.

While the government refused to update the language of the statute, it did make other important improvements to the treason provision in the draft law. Crucially, the government took a step closer to embracing a force requirement for the treason offense by expunging the term "levying war" from the statute. In the draft law, the government limited the application of the treason provision to situations in which an individual either instigates a foreign force to invade China or situations of an actual "state of war."[38] This language is much less susceptible to manipulation than the language of either the existing statute or the proposals of the consultation document.

Perhaps the most significant change made to the treason provision was that the government abandoned its proposal to codify the offense of misprision of treason, instead eliminating it from the draft law. This shift is attributed to the desire by the government to "ease public concerns" over potential legal obligations to report on friends, coworkers, and family members.[39] Finally, the application of the law was limited to Chinese nationals, as opposed to "all those who enjoy protection by the state" as called for in the consultation document. This narrowing of the coverage of the offense was in response to criticisms by several parties, all of whom argued that the crime of treason implied a violation of a duty of allegiance to the state, which could only be violated by those who owed such a duty.[40]

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[37] Security Bureau, HKSAR, National Security (Legislative Provisions) Bill: Explanatory Notes, [hereinafter Explanatory Notes] February 2003, at 5.

[38] A "state of war" is defined as either "open armed conflict" or a situation in which "war has been publicly declared."

[39] Explanatory Notes, *supra* note 37, at 5.

[40] *See, e.g.*, HKHRM, *Repressive Society in the Making: Response to Government Consultation Document Proposals to Implement Article 23 of the Basic Law*, 15 November 2002, paragraphs 42-46.

B. Secession

In the section of the consultation document on secession, the government pointed out that "[t]he actual development of the law on secession of individual countries is determined to a large extent by the history and special circumstances of the country in question."[41] After laying down this principle, the government goes on to state that

> [w]here there are, within a particular country, distinct, discontented communities associated with a geographical territory in respect of which they intend to establish new independent states, the country in question has a pressing need to formulate clear policies and laws on secessionist attempts. The need for specific legislation to proscribe secessionist attempts or acts is particularly acute where such actions have become violent or could result in the fragmentation of a country, or threaten its unity or peace.[42]

In essence, the government was laying down a rough test for whether a law on secession is necessary: if there is an active secessionist movement, then there is a need for legislation prohibiting secessionist activity. Presumably, if there is no such movement, then there is no need for legislation.

While there are, to use the phraseology of the government report, "distinct, discontented communities"[43] in Tibet, Xinjiang, and even, to a lesser extent, Inner Mongolia, there is no secessionist movement in Hong Kong. No political party or other group has advocated independence for Hong Kong in the years since the resumption of Chinese sovereignty, and there have been no violent acts by any party in support of an independent Hong Kong. It stands to reason, then, that under the government's own test, it is unnecessary to legislate on secession in Hong Kong.

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[41] Consultation Document, *supra* note 10, paragraph 3.4 at 16.
[42] *See id.*
[43] *See id.*, at paragraph 3.4 at 16.

Even looking at Hong Kong's status vis-à-vis other parts of China, there remains no need to legislate on secession. Beijing's fears to the contrary, Hong Kong has not historically been used as a base for secessionist movements inside China. However, it has long been a place where important and sensitive issues regarding China's present and future are discussed and debated. It is this tradition which was put at risk with the proposal to create a secession offense.

The government's consultation document proposal on secession, which could have been stretched to cover open discussion of independence for Taiwan or Tibet, did little to allay fears of intervention by the central government. Under the SAR government's proposal, an individual committed the offense by either levying war, the use or threat of force, or by "other serious unlawful means."[44] As with treason, it is difficult to imagine a serious secessionist threat that did not engage in the use of force, and thus the expanded definition including serious unlawful means seemed unnecessary. The government recognized the risk inherent in the use of such language, and in order to "avoid casting the net too wide and including minor offenses" within the definition of the offense, proposed a definition of "criminal actions" which would include only specifically-defined serious unlawful means, including "serious violence against a person" and "serious damage to property."[45] But this additional definition remains over-inclusive: property damage, for example, can occur under any number of circumstances. In and of itself, even serious damage to property is not an indicator of activity that is threatening to national security. As one prominent commentator pointed out, "the list is not a list of criminal offences but of the results, intended or unintended, of criminal action."[46]

The risk, therefore, was that certain action, which may or may not be illegal, could rise to the level of secession. Protests in favor of

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[44] *See id.*, at paragraph 3.5 at 17.

[45] *See id.*, at paragraph 3.7 at 17. The six listed "criminal actions" in the consultation document, which were taken directly from United Nations (Anti-Terrorism Measures) Ordinance Cap. 575, s. 2, are:

(a). serious violence against a person;
(b). serious damage to property;
(c). endangering of a person's life, other than that of the person committing the action;
(d). creation of a serious risk to the health or safety of the public or a section of the public;
(e). serious interference or serious disruption of an essential service, facility or system, whether public or private.

[46] Margaret Ng, *Draconian Measures Threaten HK Freedoms*, SOUTH CHINA MORNING POST, October 9, 2002.

human rights in Tibet, for example, though legally conducted, could cause a serious disruption to public transportation, which is unquestionably an "essential service," and thus would come within the ambit of the consultation document proposal. Although such incidents are rare in the Hong Kong context, public protests can sometimes cause damage to public property. Such incidents may be a violation of the law, but cannot reasonably considered secessionist activity. Nonetheless, the consultation document proposals covered such an occurrence.

The Draft Law

Given the potential of a provision on secession to be applied to free speech on issues related to the political status of Taiwan, Tibet, and Xinjiang, the government was under significant pressure to draft its anti-secession law with care. In line with criticisms received, there were some significant improvements in the draft law as compared with the consultation document. Secession was defined only as "withdraw[ing] any part of the People's Republic of China from its sovereignty" and did not include the more manipulable definition of "resisting the Central People's Government ("CPG") in its exercise of sovereignty over a part of China."[47] Further, the offense could not be committed through the mere "threat of force," as called for in the consultation document. As with the draft provision on treason, the draft law on secession did not refer to "levying war" but rather to a more narrowly defined "engaging in war."[48] The government also strengthened the language of the statute in terms of the effect of the prohibited action: in order to come under the statute, the action had to "seriously endanger the territorial integrity of the PRC." This formulation is stronger than the construction found in the consultation document, which refers to acts "undermining the territorial integrity of the PRC."[49] Although such language is manipulated in the Mainland Chinese context on a regular basis to include acts of a rather mundane nature, including the exercise of basic rights, the tightening of the language in the draft law was nonetheless a welcome improvement.

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[47] Consultation Document, *supra* note 10, paragraph 3.6 at 17.
[48] The term is defined exactly as in the provision on treason.
[49] Consultation Document, *supra* note 10, paragraph 3.6 at 17.

Despite these improvements, the most significant flaw of the draft law remained: the use of "serious criminal means" as defined in the consultation document could have triggered the activation of the statute. Under the draft law, the possibility remained that public demonstrations that lead to public violence or destruction of property would be pulled into the ambit of the statute, especially if the demonstration was in protest of Beijing's policy toward Taiwan or Tibet.

C. *Sedition*

The Crime of Sedition

As the SAR government itself pointed out, many commentators have questioned the need for any provision on sedition in modern national security law.[50] When the outgoing British colonial government moved to amend Hong Kong's security laws before the return to Chinese sovereignty, LegCo member Emily Lau tabled a proposal to eliminate the crime altogether.[51] Although the proposal received significant support from other legislators, it and all other proposals to amend Hong Kong's law on sedition failed to win a majority, and the law remained unchanged as Hong Kong returned to Chinese sovereignty.

As with treason, the offense of sedition in Hong Kong law is archaic in that the text of the law fails to reflect a narrower definition to comport with the stability of most modern nation states and increased respect for the individual's right of political expression. Under the current statute, it is an offense to "excite disaffection against the Central People's Government," "raise discontent or disaffection among Chinese nationals," or to promote feelings of ill-will or enmity between different classes" in the SAR.[52] Such language could easily be stretched to cover normal political activity, even with the retention of various protections found in Section 2 of the Crimes Ordinance.[53]

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[50] *See id.*, at paragraph 4.9 at 23.
[51] HKHRM, *supra* note 6, p. 13.
[52] Crimes Ordinance Cap. 200, s. 9.
[53] *See id.*, s. 2. Those protections extend to any speech that intends to influence policy or that "points out errors or defects in the government or constitution of the HKSAR." Nonetheless, problems remain: speech that advocated civil disobedience, for example, could be punished under a sedition statute.

Removing this language from the existing statute would be a major improvement.[54] In its relevant provision on incitement, US law refers directly and unambiguously to "overthrowing or destroying the government."[55] Canadian law takes a similar tack: it places primary emphasis on "the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada."[56] Perhaps most instructive, the UK has declined to codify the offense of sedition at all. In the view of the British Law Commission, "there is likely to be a sufficient range of other offences covering [seditious] conduct," and therefore "there is no need for an offense of sedition in the criminal code."[57]

In addition to concerns over the language of the existing statute, there were also flaws in the government's approach to the conceptualization of the offense itself in the consultation document. First, the government acknowledged the narrowing of the offense that has taken place in several common law jurisdictions:

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[54] As mentioned above, the government has already been admonished by the UN Human Rights Committee to narrow the language of its statute on sedition. HKHRM *supra* note 6, at 9.

[55] 18 U.S.C § 2385. It is worth noting that US law avoids the use of the word "sedition" to cover such activity, instead using the phrase "advocating overthrow of Government" to describe the offense. The relevant part of the
§ 2385 reads as follows:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
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> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
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> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

[56] Criminal Code, R.S.C. ch. C-46, § 59(4)(b) (1985) (Can.).

[57] LAW COMMISSION, WORKING PAPER NO. 72, *supra* note 27, paragraph 78.

> [i]t has been clearly established that the common law offence is committed only if the person with the seditious objective intends to achieve that objective by causing violence or creating public disorder or public disturbance.[58]

This is a rather garbled and less than full expression of the central principle regarding incitement enunciated in American law in *Brandenburg v. Ohio*:

> [c]onstitutional guarantees of free speech and free press do not permit a State to forbid advocacy of the use of force... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[59]

The *Brandenburg* test, then, is a two-part test, for both intent and for actual likelihood that the speech will produce the called-for action. The additional requirement that the speech be actually likely to lead to lawless action further ensures that free speech will be protected: harmless words spoken in a frivolous context are unlikely to lead to successful prosecution under the *Brandenburg* standard.

The leading Commonwealth case, *Boucher v. R.*, unlike *Brandenburg*, deals specifically with sedition. It holds that in order for an action to be held seditious, "there must be an intention to incite violence or resistance or defiance for the purpose of disturbing constituted authority."[60] Although less protective than the *Brandenburg* test, the Boucher case still presents a high bar for prosecution for sedition.

The government notes that, contrary to the development of the law in other jurisdictions, no such narrowing of the law has taken place in Hong Kong:

> [t]hat element of the common law offence is not set out in the Crimes Ordinance and, according to a Hong Kong case decided in 1952, such legislation is not to be

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[58] Consultation Document, *supra* note 10, paragraph 4.8 at 23.
[59] 395 U.S. 444, 447 (1969).
[60] Boucher v. R, 2 D.L.R. 369 (1951).

> construed according to the common law but on its own terms.[61]

Given this gap in the law, the government would have done well to add an intent requirement into its reform proposal. The government indirectly explained this omission by pointing to the obligation of the courts of Hong Kong to look to the free speech protections found in the Basic Law and in Article 19 of the International Covenant on Civil and Political Rights ("ICCPR").[62] But the ICCPR calls on the state to incorporate the rights protections found in the Covenant into existing *law*, and in the absence of any such protection in either case law or statutory law, the SAR government should have considered such an approach.[63]

A move to incorporate the common law protections would not be without precedent. The South African Constitution, for example, explicitly denies protection to expression that is "incitement [to] imminent violence," which might be read as a nod to the imminence requirement of *Brandenburg*, and expression that is "propaganda for war."[64] Although neither clause has yet been interpreted by the courts, the reference to war might be read as a requirement that the speech must be directed toward a "constituted authority," as per *Boucher*.

The Crime of Seditious Publication

As with the crime of sedition, the proposed crime of seditious publication also failed to conform to the *Brandenburg* standard. Under the government's initial proposal, an individual was guilty of seditious publication if she or he published an item that he either "know[s] or has reasonable grounds to know" is "likely to incite others to commit the

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[61] Consultation Document, *supra* note 10, paragraph 4.8 at 23.

[62] Interestingly, the government does not point to the Bill of Rights Ordinance, which embedded into Hong Kong law the provisions of ICCPR Article 19. In fact, the Bill of Rights Ordinance is not mentioned at all in the government document, which may be an indicator of the government's view of the place of that particular law in the body of Hong Kong law.

[63] The relevant provision of the ICCPR is very clear:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. ICCPR Article 2(2).

[64] Constitution of the Republic of South Africa, Section 16(2).

offence of treason, secession, or subversion."[65] At first glance, this construction seems to contain both the intent test and the actual likelihood test of *Brandenburg*. But "knowing or having reasonable grounds to suspect" is not the same as actual intent. Under the government's proposed language, all publishers, including newspapers, magazines, and book publishers, were at risk for the crime of seditious publication even in the clear absence of intent to do anything beyond inform public debate.

The government rightfully called for a defense of reasonable excuse, but did not spell out the content of its proposal. Also, creating a law that will potentially criminalize regular news reporting and academic inquiry but for a "reasonable excuse" is likely to have a significant chilling effect, as publishers and editors would wonder whether their reporting will fall into the "reasonable excuse" category, or if they would face criminal prosecution once their publication hit the booksellers' shelves.

The concern over self-censorship was especially strong given that all of the flaws of the proposed offenses of treason, secession, and subversion were built into the offense of seditious publication. A publication which supported the right of Falun Gong protestors to make their case to the people of Hong Kong or that stirred Falun Gong followers to engage in organized protest might have been illegal, given that peaceful protest that resulted in the destruction of property could fall under the law against treason as defined in the government consultation document. By many accounts, press freedom in Hong Kong has suffered greatly since the handover,[66] and the government's consultation document proposals on seditious publication did little to counter that trend.

The Draft Law

Given the close connection of anti-sedition provisions to protected free speech and freedom of the press, concern over the government's draft law proposals in this area ran high. Regrettably, the government refused to write an intent requirement into the draft law,

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[65] Consultation Document, *supra* note 10, paragraph 4.17 at 26

[66] One recent example is the decision of the Hong Kong-based magazine *China Law & Practice* not to publish an article on Chinese criminal law by prominent expert Jerome Cohen. *See Self-Censorship Exposed*, ASIAN WALL. ST. J., October 24, 2002.

adhering to its position that the courts would read a requirement into the law, in accordance with common law precedent.[67] The government ignored all requests to adapt the law to the even more protective *Brandenburg* standard, which requires both intent and an actual likelihood that the action will incite violence.[68]

Nonetheless, important improvements were made: under the draft law, the offense was triggered only when the individual incites others to treason, subversion, secession, or "violent public disorder that would seriously endanger the stability of the People's Republic of China."[69] This language, which was cited in the consultation document, compares favorably with the language of the existing law, which prohibits action which "excite[s] disaffection," "raise[s] discontent," or "promote[s] feelings of ill-will."[70]

Crucially, in the face of strong public criticism, the government abandoned its proposal to codify the offense of possession of seditious material. Though it initially claimed that its provision was narrowly drawn and excluded individuals who did not know or did not have reason to know that the material that they possessed was seditious, nonetheless, fears over individuals being arrested for the contents of their bookshelves could not be overcome by the government. This provision was especially chilling in light of the government's proposal to expand the police power to conduct warrantless searches in certain emergency situations; the scenarios imaginable under the two provisions were unsettling to the public, and the government dropped the possession offense in the draft bill.

Unfortunately, the government did not go as far in narrowing the offense of seditious publication, which, as the government acknowledged, is especially potentially damaging to free expression. Although the government did strengthen its initial proposal by including an intent requirement for the offense of seditious publication,[71] the proposal still raised fears of a potential chilling effect for the media in Hong Kong. While it is true that the changes to the statute did

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[67] *See, e.g.*, *Boucher*, *supra* note 60.

[68] 395 U.S. 444 (1969).

[69] Security Bureau, HKSAR, National Security (Legislative Provisions) Bill, [hereinafter National Security Bill] cl. 6 at C143.

[70] Crimes Ordinance Cap. 200, s. 9(1)(d)-(e)

[71] The initial proposal in the consultation document called for prosecution of publishers when the publisher either "knew or had reason to know" that the publication was seditious. *See* Consultation Document, *supra* note 10, paragraph 4.17 at 26.

represent an improvement over the existing inherited British colonial statute, nonetheless, the circumstances of post-handover Hong Kong are such that only an extreme narrowing of the statute or its complete elimination would be enough to counter the post-1997 trend toward increasing self-censorship.

D. Subversion

Perhaps the weakest part of the government consultation document was the section on subversion. In an attempt to draw a parallel between its own proposal to create an offense of subversion and the law of other countries, the government cited examples from Canada, Australia, and Germany. But none of these countries have enacted a subversion law.

Although it admitted that "there are not many examples of offences termed 'subversion' in common law jurisdictions," the government nonetheless claimed that "the concept is by no means alien."[72] Yet it failed to cite a single example of an offense of subversion in a common law system. Strangely, the government made reference to British law, despite the fact that there is no offense of subversion in the UK. In claiming the connection, the government referenced the British Security Service Act 1989. The reference to the Act is somewhat disingenuous, as the word "subversion" is not mentioned at all in the Act itself. As the name of the Act suggests, the Security Service Act is concerned with the creation of a security service, and does not discuss criminal offenses.

The government instead turned to the website of MI5, the British security agency, which was created by the Security Service Act. Under its section on "threats," MI5 lists subversion as one of the activities that it addresses. But the pronouncements of MI5 have nothing to do with British criminal law, and it is unclear why the Hong Kong government referred to MI5 in its proposals.[73]

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[72] Consultation Document, *supra* note 10, paragraph 5.3 at 29.

[73] Ironically, the assessment of the MI5 is that "the threat from subversive organizations... is now insignificant." Presumably the threat is no greater in Hong Kong. The MI5 assessment was posted at http://www.mi5.gov.uk/th5.htm (on file with the author), but has since been taken down. Ironically, the new language is even clearer in its statement that "subversion" is not a subject of investigation by MI5:

> Since the late 1980s, particularly following the end of the Cold War and the collapse of Soviet communism, the threat from subversion diminished and is now negligible. We do not currently investigate subversion.

The government made a further reference to Canadian law, but the law that it cites does not discuss subversion as a criminal offense. Rather, the law, the Canadian Access to Information Act, allows for the denial of access to government information on the grounds that the information requested would have a negative effect on government efforts to counter "subversive or hostile activities."[74]

In addition to providing no comparative basis for the law, the government also failed to narrowly define the offense. Subversion included "intimidation" of the central government, a word that could well be abused to cover the exercise of basic rights. As with secession, the offense was committed by levying war, the use or threat of force, or by "other serious unlawful means," which means that the same flaws regarding "other serious unlawful means" discussed above would also apply to subversion.

The Draft Law

The changes to the subversion statute ran parallel to the changes made to the secession provision. As with secession, the provision on subversion was only activated when the action in question "seriously endangers the stability of the PRC"[75] or in cases of armed warfare. Despite this significant limitation, concerns over the "serious criminal means" trigger, which was retained in the draft subversion statute, remained. The archaic prohibition against "intimidat[ing] the CPG" was also retained, but the activation of the statute due to the "threat of force," proposed in the consultation document, was removed.

E. Theft of State Secrets

Since its inception, the Hong Kong Official Secrets Ordinance Cap. 521 ("OSO"), derived from the UK Official Secrets Act ("OSA"),

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See http://www.mi5.gov.uk/history/history_8.htm.

[74] The relevant provision is Article 15 of the Access to Information Act R.S.C. c. A-1, s. 15(1) (1985) (Can.), which reads as follows:

> 15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defense of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities...

[75] National Security Bill, *supra* note 69, cl. 4 at C135.

has been the subject of much criticism: several groups have called for substantial amendments so as to bring it in line with international standards.[76] In fact, the UK OSA may have to be narrowed in order to conform to Britain's new human rights commitments as part of the European Union:

> [i]n light of the Human Rights Act 1998 and the new Freedom of Information Act 2000, which will come into force fully by 2005, some of the basic principles by which courts have upheld official secrecy require re-evaluation. It is now becoming increasingly difficult to justify the harshness of the offenses under the Official Secrets Act.[77]

In the consultation document, the SAR government ignored all calls for reform of the OSO. Instead, the government moved to dramatically broaden the scope of protected information.

Existing law: The Official Secrets Ordinance and International Standards

The core provisions in the OSO relating to state secrets and disclosure thereof, specifically sections 13-18, depart even further from the guidelines of the Johannesburg Principles. Principle 15 states: "No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure." Principle 16 makes the public interest test more explicit for government employees, stating that "no person may be subjected to any detriment on national security grounds for disclosing information that he or she

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[76] For more on criticism of the UK OSA, *see* Lawrence Lustgarten, *Freedom of Expression, Dissent, and National Security in the United Kingdom, in* SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (Coliver, ed., Martinus Nijhoff Publishers, the Hague 1999)

[77] EDWIN SHORTS & CLAIRE DE THAN, HUMAN RIGHTS LAW IN THE UK 333 (Sweet and Maxwell 2001).

[78] The following subsection is drawn from the author's previous work on Article 23, HKHRM, *supra* note 6.

learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure."

Under the OSO, different guidelines are laid out for three different groups of persons who may come to possess information related to national security. None of the approaches for these three groups is in accordance with Principles 15 and 16. The first group of persons is "member(s) or the security and intelligence services" or persons who have been notified that they are subject to intelligence services strictures. These persons are guilty of an offence if they "without lawful authority... disclose any information, document or other article relating to security or intelligence that is or has been in (his or her) possession by virtue of (his or her) (professional) position."[79] There is no provision for exemption from punishment if the information disclosed is in the public interest, and no requirement that any actual harm was caused by the disclosure: disclosures by personnel in this category are considered *de facto* damaging and therefore illegal.

The standards are slightly different for the second group of persons specified in the OSO, public servants and contractors. For them the bar is set a bit higher: a disclosure must actually be "damaging" in order to contravene the OSO.[80] As with Section 13, Section 14 provides for no exception for disclosures whose public benefit outweighs any harm to national security. On the other hand, the requirement that a disclosure be "damaging" seems to bring Section 14 closer in line with Johannesburg Principle 15's requirement that of actual harm. Section 14 classifies a disclosure as damaging if:

> (a) the disclosure causes damage to the work of, or any part of, the security or intelligence services;
> (b) the information, document or article in question is of such a nature that its unauthorized disclosure would be likely to cause such damage; or
> (c) the information, document or article in question falls within a class or description of information, documents or articles

[79] Official Secrets Ordinance, Cap. 521, s. 13(1).

[80] *See id.*, s. 14(1) "A person who is or has been a public servant or government contractor commits an offence if without lawful authority he makes a damaging disclosure of any information, document or other article reelating to security or intelligence that is or has been in his possession by virtue of his position."

> the unauthorized disclosure of which would be likely to have that effect.[81]

Although Subsections (b) and (c) could be legitimately used to punish those public servants who disclose sensitive information on, for example, new weapons technology to an enemy state, the subsections would be less likely abused if the law gave concrete examples of exactly which types of documents are and are not of a damaging "nature." Subsection (a) is also vulnerable to abuse through overly-broad interpretation and application. If, for example, a public employee exposed a pattern of racial or sex discrimination inside a state security organ, the government might seek to prosecute her or him on the argument that the disclosure damaged the prestige of the organization, thus making it more difficult for the organization to influence events or recruit new personnel.[82] Though hardly a disclosure that most would consider damaging to the national security interest, such action might fall prey to prosecution on national security grounds under an overly-expansive reading of subsection (a).[83]

The third group of persons specified are those who come into possession of information or documents of a sensitive nature. Section 18 prohibits the disclosure of information that the individual who comes into possession of information "know[s], or [has] reasonable cause to believe" is protected under the OSO.[84] Although the OSO does not specify any particular group in the text of the law, Section 18 presumably would be used primarily against journalists, nongovernmental organizations, and academics. As such, it is the provision most in need of a previous publication exception. An exemption from prosecution for public policy is also necessary in this

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[81] Official Secrets Ordinance Cap. 521, s. 14

[82] In her discussion of the Johannesburg Principles, Sandra Coliver, one of the drafters of the Principles, cites the Spycatcher case, in which the British government sought to stop the publication in Britain of the memoirs of a retired member of MI-5 which did not reflect favorably on the organization. The European Court ruled against the British government even though it agreed that the book would likely have a negative effect on the reputation and recruitment activities of MI-5. *See* Sandra Coliver, *Commentary to: the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,* 20.1 HUM. RTS. Q. 22-3 (1998).

[83] Such an action would also violate Johannesburg Principle 2, which requires that a legitimate national security interest be involved in any restriction of rights, and lists as examples of such legitimate interests the protection of a country's existence or "territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force," whether that threat is external or internal. Such goals as the protection of a government from "embarrassment or exposure of wrongdoing" or the "entrenchment of a particular ideology" are not legitimate.

[84] Official Secrets Ordinance Cap 521, s. 18(1).

section. In order to be actionable under Section 18(3), disclosures must be "damaging" along the lines of Section 14; the same shortcomings with the law as stated above regarding Section 14 also applies here.

In addition to the disclosures described above, the OSO also places restrictions on disclosures related to defense (Section 15), international relations (Section 16) and criminal offences and investigations (Section 17). "Damaging" disclosures are defined somewhat differently for each of the different categories, but all fall short of the actual harm standard recommended by Johannesburg Principle 15. Generally speaking, disclosures are considered damaging under these sections if the disclosure "endangers the interests of the Central People's Government or Hong Kong" or is likely to have such an effect.[85] These provisions should also be amended to include the proper exceptions, including the public interest and prior publication exceptions. Doing so would also bring these sections in line with Principle 12, which calls for narrow designations of security exceptions, rather than blanket categorical exemptions.

In a sense, the government's defense of its proposals rings true: according to the government, nothing in the consultation document represented a radical expansion of the law, and much of what it proposed was in line with existing provisions of the OSO. In an address to the Newspaper Society of Hong Kong, Secretary for Justice Elsie Leung bluntly noted that "the knife has always been above your heads, although no one had (sic) bothered to take a close look at it."[86] Ms. Leung was referring to Section 18 of the OSO, which prohibits the disclosure by any party of information protected by the OSO without "lawful authority." Section 18 is indeed at the heart of the OSO, and should have been stricken from the books by the SAR government in its review of national security law. Section 18, on its face, would make Hong Kong security information nearly unpublishable, as journalists would have to question whether the information given to them by government officials was given with "lawful authority"; many leaks are, by their very nature, furtive and undertaken without any official permission.

Although the government has repeatedly claimed that the OSO would not have any impact on the freedom of the press in Hong Kong,

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[85] *See id.*, s. 15(2).

[86] Ng Kang-chung, *Majority Believes Government Meddles with Media: Survey*, SOUTH CHINA MORNING POST, October 22, 2002.

the growing problem of self-censorship in Hong Kong suggests otherwise. Leaks are a normal part of journalistic practice, and journalists should not be placed in legal jeopardy for making use of them. As a prominent American journalist pointed out, "[without] the use of 'secrets'... there could be no adequate diplomatic, military and political reporting of the kind our people take for granted... and there could be no mature system of communication between the Government and the people."[87]

Journalists are not given blanket protection from prosecution under the Johannesburg Principles, however. Instead, under the Johannesburg Principles, the standard for punishing disclosures is much higher:

> [n]o person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from the disclosure.[88]

This standard is in line with the laws of the United States, Austria, Germany, the Netherlands, and Sweden, among others. In all of these countries, "journalists and editors are not subject to prosecution for publishing official secrets, unless the disclosure risked severe damage to national defense or international relations."[89] In defining a legitimate national security interest, the Principles make clear that national security is usually directly related to the nation's ability to respond to the use or threat of force. National security cannot be applied to situations in which a government seeks to protect itself from "embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology."[90] The vague language of the OSO does not conform to the requirements of the Johannesburg Principles.

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[87] Max Frankel, affidavit filed on behalf of the New York Times in the Pentagon Papers case, New York Times v. United States, 403 U.S. 713 (1971), *reproduced in* STEPHEN DYCUS, NATIONAL SECURITY LAW 1019 (Aspen) (1990).

[88] Johannesburg Principle 15, General Rule on Disclosure of Secret Information.

[89] *See* SECRECY AND LIBERTY (Coliver, ed.), *supra* note 76, at 63-4.

[90] Johannesburg Principle 2.

Further Expansion: the Government's Consultation Document Proposals

Despite the serious flaws of the existing law, the government proposed further expansion of the category of protected information under the OSO. As with its proposal to extend the government's ability to conduct searches without warrants, the government's proposal to extend protection to information beyond state secrets is not required by Article 23. The government seemed to indirectly acknowledge as much when it stated that "Article 23 should not be interpreted as implying that information other than state secrets needs no protection."[91] While it is true that Article 23 does not designate "state secrets" as the only category of information in need of protection, it also does not call for protection of other categories of information. It is simply silent and confers no authority to the SAR on the issue. Proposals to protect other categories of information should therefore have been postponed until Article 23 was dealt with.

In its consultation document, the government urged the creation of a new category of protected information: "relations between the Central Authorities... and the HKSAR."[92] This category of information was intended to be exceedingly broad: it would seem to cover all information and communication that flows between Beijing and Hong Kong and that relates to the governance of Hong Kong. The government did not qualify the category in any way, to include, for example, only information that is related to national security that concerns both Hong Kong and Beijing, but rather proposed extending blanket coverage.[93] Extending protected status to such information would seem to be almost without precedent: there is no specific protection for communications between the United States federal government and state governments, for example. In addition, there was no standard offered for how damaging the disclosure had to be in order to trigger prosecution under the proposed law. This made a full analysis of this aspect of the government's proposals impossible.

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[91] Consultation Document, *supra* note 10, paragraph 6.14 at 35.

[92] *See id.*, at paragraph 6.19 at 36.

[93] As such, the proposal runs afoul of several provisions of the Johannesburg Principles, including, most crucially, Principle 12, which states that "A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest."

The government offered little justification for its proposal to extend protected status to this category of information. It merely pointed out that, before the handover, such information was protected under the category of "international relations" and that that category no longer applied. But the relationship between Beijing and Hong Kong has changed, and that it is appropriate that the right of the people of Hong Kong to know about dealings between Hong Kong and Beijing should change, and expand, with it.

The potential of this new category to stifle normal research and journalistic activity is breathtakingly vast given that, under Section 18 of the OSO, as mentioned above, any disclosure of protected material is a punishable offense if the individual knows or has reason to know that the material is protected under the OSO. The effect of this provision is to make the journalist or researcher (or his or her editors or publishers) stop and question whether the information relates to Hong Kong-Beijing affairs and whether it was disclosed to him "with authorization."[94] Such questioning can only lead to an intensification of the trend of self-censorship. As one commentator puts it:

> [t]he Official Secrets Ordinance is perhaps of particular interest to the media, because their business is disclosure. They have two key considerations: one is the source of information, the other is whether a disclosure is 'damaging.'... In relation to (the) information source, they are, in a legal phrase, 'put on enquiry' to ascertain the legality of their source... The media should study the ordinance with care.[95]

In addition to adding a new category of protected information, the consultation document also recommended that disclosure of protected information obtained through "unauthorized access" also be criminalized under the OSO. The government viewed its proposal as closing a "loophole" in the law, in that, in the government's view, the

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[94] This may be especially difficult to discern, given the relatively common practice of government officials intentionally "leaking" material in order to send a message to political enemies. Some speculated that the famously tight-lipped Bush administration was engaging in such a practice in the months leading up to the second Gulf War. By leaking its invasion plans to the press, the administration was allegedly making clear its resolve to use force if necessary, as well as indicating to the Iraqi leadership that it would face a military onslaught that it would not be able to repel.

[95] Peter Lo, *Article 23 – What the Blue Bill Says*, HONG KONG LAWYER, March 2003.

current OSO covers only disclosures made by government officials who obtain information in the course of their employment. Such disclosures would be covered by the OSO only if they were "damaging," as per Section 18 of the existing OSO.

While it may be desirable to punish those who obtain secret information through illegal means, the compounding effect of Section 18 means that journalists and researchers must once again inquire after their source or risk prosecution. The chilling effect of this provision will likely be great. In further expanding the reach of the OSO in this manner, the government takes another step toward making Hong Kong leak-proof. Secretary for Justice Elsie Leung may have been right to observe that the sword of Damocles has been hanging over the heads of Hong Kong's journalists and publishers since the inception of the OSO in 1989,[96] but the sharpening of the sword through the expansion of the sweep of the OSO is hardly cause for comfort.

Finally, the government proposed amending the OSO to ensure that former government employees are covered by Section 18(2), and that agents and government informants, including those who are not paid by the government, are covered by the OSO. While at first reading, this may indeed seem like a mere technical correction, in fact the issue is not as simple as the government suggests. The sections of the OSO which prohibit disclosure of sensitive material are based on the duty owed by government officials to their employer:

> The basis for the various criminal offences in Part III of the Official Secrets Ordinance is the duty of confidence arising from past or present employment. If there is, or was, no employment relationship, then there is, or was, no duty of confidence.[97]

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[96] *Hong Kong's Dangerous Attitude*, ASIAN WALL. ST. J., October 30, 2002. The *Journal* commented that Ms. Leung's words, apparently intended to assuage the fears of Hong Kong's journalists, had the opposite effect:

> Speaking to the Newspaper Society, Elsie Leung sought to calm journalists' fears that changes in the Official Secrets Ordinance will mean a sword of Damocles hanging over their heads by explaining that in fact this sword has in fact been hanging over their heads for some time. Ms. Leung effectively put journalists on notice that she will not hesitate to use this law, which was falling into desuetude before the current move to update it.

[97] HONG KONG BAR ASSOCIATION, *Response to the Consultation Document on the Proposals to Implement Article 23 of the Basic Law*, December 2002, paragraph 142 at 29.

Under this view of the government's proposal, the extension of criminal liability to former government officials was inappropriate. It may also have been unnecessary: some commentators have pointed out that a common law remedy for third party disclosures already exists.[98]

The government has been criticized for downplaying its proposed changes to the OSO as merely the closing of "loopholes." Instead, it was attempting to seal up the cracks of the deeply flawed and overly sweeping OSO through which information might flow without fear of punishment.

The Draft Law

Although the government's proposed provisions on the theft of state secrets were some of the most highly criticized, few changes were made to the proposals in the draft law. The newly-created category of protected information, that of information on the relations between the SAR government and the Central Authorities, remained intact, although it was narrowed by the added proviso that only those functions which are "within the responsibility of the Central Authorities under the Basic Law"[99] were covered. Under this narrower provision, economic and commercial information was presumably not included, and a government official could not have been charged with leaking state secrets if she or he passed such information on to a journalist or academic researcher.[100] But broad swaths of information were still protected under the draft law provision, including any information related to Article 23 legislation. Additional areas that would have been covered by the provisions includes communication between Hong Kong and Beijing on interpretation of any aspect of the Basic Law, appointment of the Chief Executive under Article 15 of the Basic Law, and all communications relating to international relations and military affairs.

While this narrowing of the new category of protected information was a slight improvement, the government never explained why it moved to create this category in the first place. Their refusal to

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[98] *See id.*, at paragraphs 144-6 at 29-30.

[99] National Security Bill, *supra* note 69, cl. 10 at C149.

[100] This change may be in response to criticism from the Democratic Party, among others, that a leak of information regarding a communication between the central government and the local government on whether to sell valuable government land in Central might lead to prosecution under the OSO, despite the absence of any real harm to national security.

do so was consistent with their approach to issuing the draft legislation for consideration by LegCo. Some changes urged by various parties were adopted and incorporated into the draft legislation, but where no change was made, the government has refused to answer its critics and explain why. It did not rebut the significant legal arguments made by those opposing its policies. The legitimacy of its position would be enhanced if it did so.

The ability of the government to punish leaks under this provision was further limited by the requirement, present in both the existing law and in the consultation document, that a disclosure be "damaging" in order to be covered by the statute. For the purposes of the newly-created category of protected information, a "damaging" disclosure was defined as one that "endangers national security."[101] This standard is higher than that of the other existing provisions, which generally require that a damaging disclosure as one that "endangers the interests" of the government. While this language is preferable to that used in other parts of the OSO, it does not rise to the level of the Johannesburg Principles, which require both that a disclosure "actually harms... a legitimate national security interest," rather than "endangering," or putting at risk, such an interest, and that the disclosure fails a balancing test in which the public interest benefit from the disclosure is weighed against the harm done by the disclosure.[102]

In addition to enunciating the standard for a damaging disclosure, the government also changed its wording on its proposed new offense: instead of punishing disclosures made through "unauthorized access," the government would punish disclosures which come about through "illegal access," which was defined as information obtained through the violation of various criminal statutes, including those forbidding theft, robbery, and burglary.[103] While this was an improvement over the more malleable language of the consultation document, nonetheless, it did not address the problem that journalists face when dealing with material passed on to them by confidential sources: unless they could concretely verify the legality of the flow of the information, they would be hesitant to use it. And, given the stiff

[101] National Security Bill, *supra* note 69, cl. 10 at C149.
[102] Johannesburg Principle 15, General Rule on Disclosure of Secret Information.
[103] National Security Bill, *supra* note 69, c. 11 at C151.

penalties meted out under the OSO[104], they would likely err on the side of self-censorship.

F. Political Organizations

Under international standards, social groups may form at any place and at any time for virtually any peaceful purpose.[105] It is appropriate under international standards to require those nongovernmental groups ("NGOs") that wish to obtain legal status or privileges such as charitable tax exemption to *notify* the government of their establishment, but it is generally not considered acceptable to force NGOs to *register* with the government, such that their successful formation is conditioned on government approval.

For most of its history, Hong Kong had a registration system for nongovernmental groups. This changed in 1992, when the government amended the Societies Ordinance Cap. 151 s. 5-5A so that all that was required from newly formed groups was that they notify the government of their formation.[106] Despite the enormous success of the new system, the incoming government returned to the compulsory registration system.[107] After the return to Chinese sovereignty in 1997, new societies were dependent upon the approval of the SAR government in order to open their doors.

With its new proposals as outlined in the consultation document, the government sought to broaden its authority still further over NGO activity in Hong Kong. Under the government's proposals, the Secretary for Security could ban an organization if it has as one of its objectives or has previously committed any act of treason, secession, sedition, subversion, or theft of state secrets.[108] Thus, the flaws of all of

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[104] Official Secrets Ordinance Cap. 521, s. 25 states: (1) A person who commits an offence under any provision of this Part other than section 22(1), (4) or (5) shall be liable-
(a) on conviction on indictment to a fine of $500000 and to imprisonment for 2 years; (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

[105] With the exception of advocating the violent overthrow of the government or engaging in other illegal activity, almost any peaceful purpose is permitted.

[106] HKHRM, *supra* note 6, p. 15.

[107] The change in Hong Kong's civil society after the outgoing British colonial administration scrapped the registration system was dramatic: according to one local group, "The NGO community expanded rapidly (after 1992)... The period after Tiananmen brought a huge shift in Hong Kong's political culture. Historic quiescence gave way to an explosion of activism." HKHRM, *Tightening the Leash*, June 1997 at 10.

[108] Consultation Document, *supra* note 10, paragraph 7.15. at 44-45.

the proposed laws described above were built into the provisions on registration of political organizations.

Troublingly, the SAR government also sought to shift a significant measure of authority over social and political groups in Hong Kong to Beijing. Under the government's proposal, the central government in Beijing would have been empowered to notify the HKSAR government that a particular group was a threat to national security, and the local government would then take action against the local representatives or branch organizations of the group, or of any other entity "affiliated" with the proscribed mainland organization.

The proposals in the consultation document significantly expanded the types of groups subject to the powers of the Secretary for Security on national security grounds. While the Secretary for Security is already empowered to ban groups under the revised Societies Ordinance that reimposed compulsory registration, the law applies only to groups that seek to register as "societies."[109] By contrast, the consultation document used the term "organization," which it defines much more broadly to include "an organized effort by two or more people to achieving [sic] a common objective, irrespective of whether there is a formal organizational structure."[110]

Furthermore, in a proposal of breathtaking scope, the SAR proposed that it have the power to proscribe not only groups "affiliated" with outlawed mainland organizations, but also local bodies that have a "connection" to banned mainland groups. Under the government's consultation document proposal, a connection could consist of a financial link, affiliation, "determination" of one group's policy by another group, or "direction, dictation, control or participation in the association's decision making process by a proscribed organization, or *vice versa*."[111]

The flaws of the government's proposals were many: first, by proscribing groups "affiliated" to those banned by Beijing, the SAR government in many cases would have been following in the footsteps of Beijing in punishing groups for the exercise of their basic right of association. The same holds true for groups that have a more informal "connection" to groups on the mainland. If Beijing proscribed a group

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[109] Societies Ordinance Cap. 151, s. 8(1). Many NGOs in Hong Kong are in fact registered as companies.

[110] Consultation Document, *supra* note 10, paragraph 7.15 at 44-45.

[111] *See id.*, at paragraph 7.17 at 45.

merely because that group opposes official government policy, then Hong Kong would possibly be required to compound the mistake by outlawing the affiliated organization in Hong Kong. Subjecting organizations in Hong Kong to penalties for associating with peaceful mainland groups would only have served to validate the action of the central government in Beijing.

Furthermore, under the language of the consultation document, the "connection" between a banned mainland group and a Hong Kong group did not have to be very significant in order to qualify for investigation and eventual proscription. Given that a connection could have consisted of mere "participation" in the decision making process of one group by another group, if a Hong Kong group sent one of its members to attend the meetings of a mainland entity that was later banned, the Hong Kong group would then have been at risk of proscription if the Secretary for Security determined that its activity constituted a risk to public safety or public order in Hong Kong.

Much of the criticism of this proposal focused on the question of the right of the spiritual group Falun Gong to continue to operate in Hong Kong, given the severe persecution of the group on the mainland.[112] Although the Secretary for Security has claimed that Falun Gong would not be banned under current conditions, her comments were somewhat disingenuous given the intensity of Beijing's campaign against the group.

Falun Gong's own statements on Article 23 legislation naturally focused heavily on the provisions relating to the proscription mechanism. The spiritual group referred to the government's proposals as a system in which "mainland China makes the judgment and Hong Kong duteously (sic) follows."[113] The group also pointed out that, beyond outright proscription, a group may suffer in other ways from a notice of proscription from Beijing to the Hong Kong government. Under the consultation document proposals, a mere notice from Beijing empowered the Hong Kong authorities to investigate a group's finances, its mode of operation, perhaps also its membership list – anything that would be useful, in the view of the government, in terms

[112] For more on the crackdown on the Falun Gong on the mainland, see HUMAN RIGHTS WATCH, *Dangerous Meditation: China's Campaign Against Falun Gong*, January 2002.

[113] HONG KONG FALUN GONG PRACTITIONERS, *Hong Kong Practitioners' Statement Regarding Article 23 of the Basic Law: Defending Freedom Creates Genuine Peace and Harmony*, October 1, 2002 *available at* http://www.clearwisdom.net/emh/articles/2002/10/5/27242.html.

of establishing the group's threat to public order and the existence of a connection to a proscribed mainland group.[114] This investigation could have taken place despite the fact that the group had broken no law in Hong Kong.[115]

The members of Falun Gong in Hong Kong also raised a concern that they might well be more acutely aware of: the prospect of becoming a social pariah as a result of a government investigation into whether or not a group should be proscribed. In its response to the government's draft law proposals, the group stated that:

> ...when a law-abiding local group is being openly investigated in connection to "national security" under the proscription mechanism, members of the public would naturally refrain from associating with the group out of fear. Even if the group is eventually cleared and proscription is not necessary, the freedom of association is already destroyed... In fact this could be used to restrict the growth of any dissident groups by alienating them from the community.[116]

In other words, the investigation process itself is potentially damaging, even when groups are in the end allowed to continue to function. In the uncertain legal and social atmosphere of post-Article 23 legislation Hong Kong, fringe groups like Falun Gong might well face a decline in donations, greater difficulties in recruiting members, and difficulty in finding fora in which to publish or broadcast their views.

Falun Gong was not the only group that would be placed in an extremely difficult position if the government's proposal had become law. Religious groups that maintained connections with underground Christian house churches, for example, would likely fall under the ambit of the law, as would human rights groups that maintained a connection with banned political action groups or victims' groups on the mainland. Under such a law, these groups would be faced with a Hobson's

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[114] HONG KONG FALUN GONG PRACTITIONERS, *Hong Kong Falun Gong Practitioners Protest the Extension of Jiang Regime's Persecution to Hong Kong and Demand Stopping the Evil Law From Harming Hong Kong,* February 18, 2003 *available at* http://www.clearwisdom.net/emh/articles/2003/2/18/32284.html

[115] *See id.*

[116] *See id.*

choice: either sever ties with activists on the mainland or risk the loss of registration in Hong Kong.

There are few entities less well equipped than the Beijing government to handle the task of judging whether a group should be proscribed on the grounds of national security. While social group activity in China has increased dramatically over the past two decades, all NGO activities take place only with government permission and with strict government oversight. Relevant laws on NGO formation reflect Beijing's view that the nongovernment sector should be under the oversight and control of the government, and that the role of social groups is to serve the state.[117] Allowing Beijing a role in deciding which nongovernment groups are a threat would represent a serious threat to freedom of association in Hong Kong.

The government claimed that the censure of groups named by Beijing would not be automatic. Rather, the local government would act as a check on Beijing:

> [t]he Secretary for Security must then be satisfied by evidence of the said affiliation, and must 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.[118]

It is difficult to see the proposed review by the Secretary for Security as a significant check against abuse of power. The Hong Kong government has never publicly disagreed with Beijing on any major issue during the seven years since the handover. The Chief Executive, toeing Beijing's line, has publicly denounced Falun Gong as an "evil cult"; the SAR's immigration service has denied entry to Falun Gong protestors during important international meetings; and the police have kept all protestors away from international meetings attended by top leaders from Beijing. In addition, the SAR government has refused to criticize the politically-motivated detention of Hong Kong-based academics by mainland security agents, and some prominent Chinese dissidents in exile have been kept out of Hong Kong. Under these

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[117] *See* HUMAN RIGHTS IN CHINA, *China: Social Groups Seek Independence in Regulatory Cage*, September 1997.

[118] Consultation Document, *supra* note 10, paragraph 7.16 at 45.

circumstances, the proposal that the Secretary for Security would serve as an effective check on the misuse of the proposed process was met with considerable skepticism.

The government, perhaps sensing that the public would likely have little faith in the SAR government's willingness to stand up to Beijing, also proposed an appeal mechanism. Under the proposed appeal mechanism, questions of fact were to be heard by an independent tribunal, while questions of law would go to the courts of Hong Kong. Because no information was given about the makeup of the independent tribunal, it was difficult to say how effective this mechanism would have been in practice. Such a tribunal would have faced the prospect of contradicting both the central government in Beijing and the SAR government, putting it under enormous political pressure. As for appeal to the courts, they too would have been under severe political strain if called upon to reverse the decision of both Beijing and the SAR government, particularly on a matter allegedly relating to national security.

The Draft Law

Of all of the government's proposals, this section was the most heavily revised in the transition from consultation document to draft bill. While the proposals outlined in the draft bill represented a significant improvement over the consultation document proposals, they fell far short of addressing the serious concerns expressed by a wide range of commentators during the consultation period. The government's proposed law still placed the right of free association in Hong Kong in jeopardy, and still needlessly provided for a direct role for Beijing in the operation of security law in Hong Kong.

Under the initial consultation document proposal, Hong Kong organizations could be proscribed if they had a "connection" with a banned mainland group. In response to the strong criticism received over its proposals, the government limited "connection" to those Hong Kong organizations that are "subordinate" to a proscribed mainland group.[119] In other words, whereas in the initial proposal, the influence

[119] The government seems to have particularly backed away from the word "connection": In its Explanatory Notes on the Bill, the government remarks that, contrary to the language of the consultation document, an "ordinary connection does not amount to 'subordination.'" Explanatory Notes at 11.

could flow either way, under the language of the draft bill, the influence must flow from the mainland group to the Hong Kong entity in order for the provision to apply. While the government denies that the change was made with any particular group in mind, the change would make it more difficult (though not impossible) to prosecute either Falun Gong or the Roman Catholic Church in Hong Kong, given that neither group is subordinate to its sister groups in the mainland.

This limitation on the scope of the law, while helpful, fails to respond to the basic dilemma: given that Beijing regularly abuses national security law in order to ban groups critical of the government, how can the SAR government punish an affiliated Hong Kong group for exercising its basic right to freely associate? Does not doing so indicate tacit approval of Beijing's misuse of its own national security law?

The government responded with its claim that "a local organization that is subordinate to a prohibited mainland organization will not be automatically proscribed."[120] The government pointed to additional "safeguards" in the law which it claimed would prevent wrongful proscription. Of the handful of safeguard provisions, two deserve close attention: first, in addition to being "subordinated" to a banned mainland group, the organization must be such that, in the view of the Secretary for Security, "(its) proscription is necessary in the interests of national security and is proportionate for such purpose."[121] But in order for this provision to apply, the Secretary for Security must not only contradict the wishes of Beijing, she or he must also directly contradict the judgment of the authorities in Beijing on the applicability of national security law to the group in question. It seems unlikely that any senior Hong Kong government official would be willing to do this.

The government also pointed to a so-called "panic provision" inserted into the draft bill, which explicitly states that "[t]he provisions of this Ordinance are to be interpreted, applied and enforced in a manner that is consistent with Article 39 of the Basic Law."[122] While

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[120] Explanatory Notes, *supra* note 37, at 11. This language also raises the specter of selective enforcement: if "subordination" is not enough to trigger the proscription process, how will the government decide which groups to prosecute? How will it guarantee that no political or other extraneous factors will be taken into account?

[121] National Security Bill, *supra* note 69, cl. 15 at C155. The consultation document also contained similar language.

[122] *See id.*, at cl. 14 at C155. Article 39 reads as follows:

> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour

this additional language was a welcome addition, the level of safety that it would have provided is unclear. Senior central government officials have openly expressed their view that the ICCPR applies only "narrowly" to Hong Kong, and that the ICCPR cannot be directly applied to Hong Kong.[123] It is difficult to reconcile this view with the text of Article 39, which explicitly approves of the continued implementation of ICCPR in the SAR. At the very least, the debate over the level of applicability of the ICCPR to Hong Kong raises concern over the level of protection that this newly-added panic provision would have provided to the people of Hong Kong in the exercise of their associational rights.

Given these flaws with the draft bill, it is troubling that the government proposed to allow for the prosecution of officeholders of a proscribed organization. The government did offer a safety mechanism: it was a defense that the officer "did not know and had no reason to believe" that the organization had been proscribed.[124] This provision in essence reinforces the proscription mechanism: it discourages individuals from making a statement against the wrongful proscription of a Hong Kong organization by threatening individuals who refuse to quit their posts with either a fine or three years' imprisonment. In the context of a well-drawn ordinance prohibiting the operation of organizations that truly threaten national security, such provisions are less problematic; in the context of these proposals, the provision could become a latent threat against associational rights.

As with several other provisions of the draft bill, the imperfect nature of the government's proposed amendments to the Societies Ordinance created serious concerns over a significant chilling effect, both in terms of the willingness of the people of Hong Kong to support groups that criticize the government, and in terms of SAR organizations' willingness to maintain affiliations with mainland groups that have come into political controversy. If the law had passed

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conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

[123] *See generally* Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 366 (1997).

[124] National Security Bill, *supra* note 69, cl. 15 at C155.

unchanged, Hong Kong organizations might have been tempted to sever any ties with parent or sister organization on the mainland at the first whiff of trouble rather than risking both the proscription of the group and the prosecution of individual members.

G. *Investigation Powers*

In addition to significantly increasing the scope of national security laws, the government also called for strengthening the procedural powers of the police. Such changes to the procedural law are in no way mandated by Article 23 of the Basic Law. The government nonetheless saw the changes as a necessary complement to the substantive legal changes proposed:

> The very essence of Article 23 is to protect the sovereignty, territorial integrity, unity and security of the state, and hence the fundamental interests of our country. It is therefore important that sufficient powers be provided for investigation into the offenses proposed.[125]

Whether or not the police need enhanced investigative powers is a matter of heated debate. Regardless, the expansion of such powers is simply not called for by Article 23, and any significant changes should have been deferred until the debate over Article 23 legislation is completed.

Regardless of when LegCo examines the government's proposals on criminal procedure, it will find that the proposals are unnecessary as a means for furthering the security of the people of Hong Kong. Instead, the government's proposals only weakened the safeguards against administrative violations of the privacy rights of the people of Hong Kong.

The most controversial of the government's proposals was to allow the police to execute a search without a warrant in situations in which a "sufficiently senior police officer... reasonably believes that" an offense has been committed and that evidence of that crime will be destroyed unless the police act immediately.[126] But, as several

[125] Consultation Document, *supra* note 10, Chapter 8 Introduction, at 48.
[126] *See id.*, at paragraph 8.5, at 49.

commentators have pointed out, the police already have significant power to carry out searches without a warrant. A long list of exceptions to the general rule that warrants must be executed in order to conduct a search already exists:

> Under Section 50 of the Police Force Ordinance, the police may in order to carry out an arrest enter premises without a warrant and conduct a search on the premises. Under Section 11(2) of the Official Secrets Ordinance, in cases of "great emergency" in which immediate action is necessary, a superintendent of police may authorize a police officer to enter and search premises without a warrant. Under section 14 of the Societies Ordinance, the police may enter and search premises without a warrant to remove and obliterate any seditious publications.[127]

In light of this long list of exceptions, the government would need to offer a very compelling rationale for further expanding the police power to conduct searches without a warrant. Further, as the Bar Association pointed out, a decision on whether or not to expand the government's powers of search and seizure must stem from a recognition of the right to privacy that an individual has in his or her own home, and her concurrent right to be protect from arbitrary searches.[128] In light of these concerns, the government's burden of justification was very high. And yet it offered no such compelling justification: it gave no evidence that criminal investigations had been hindered in the past, nor did it suggest any provisions to protect against the misuse of this power by the police. Its discussion in the consultation document is surprisingly brief, running only four pages, and makes no mention of any of the Basic Law rights involved. It therefore cannot be said that the government met its burden to show that an expansion of police powers was indeed necessary.

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[127] Albert H. Y. Chen, *Will Civil Liberties in Hong Kong Survive the Implementation of Article 23?*, HONG KONG LAWYER, November 2002, *available at* http://www.hk-lawyer.com/2002-11/Default.htm.

[128] HONG KONG BAR ASSOCIATION, *Hong Kong Bar Association's Response to the Consultation Document on the Proposals to Implement Article 23 of the Basic Law,* Dec. 9, 2002, at paragraph 197 at 40, *available at* http://www.hkba.org/whatsnew/press-release/20021209-art23.doc.

In addition to the proposed expansion of the government's physical search power, the government also proposed expanding its power to compel financial information from financial institutions. Specifically, the government proposed that, for certain Article 23 offenses, the government should be empowered to "require a bank or deposit-taking company to disclose to him information relevant to the investigation where there is reasonable suspicion that the relevant offence has been committed or is being committed."[129] This particular proposal was strongly opposed by the business sector, and raised the specter of improper governmental interference into one of Hong Kong's strongest sectors: that of banking and finance. As with the proposed expansions of the warrantless search power, the government's proposal offered no extended discussion of the issue, and little justification for the expansion beyond the need to deal with national security crimes. It made no attempt to balance the expansion of the investigatory power against the right to privacy.

The Draft Law

With one important exception, the proposals advanced by the government in the area of investigative powers in the draft law remained unchanged from those in the consultation document. Although the government rightly dropped its proposal to expand its investigatory powers vis-à-vis financial institutions, its proposals on warrantless searches remained largely unchanged. The draft bill allowed for warrantless searches in cases of alleged treason, subversion, secession, sedition, and handling of seditious publications, in situations in which the police believe that evidence of "substantial value" is on the premises, and "unless immediate action is taken, such evidence would be lost and the investigation of the offence would be seriously prejudiced as a result."[130] In a slight improvement over the consultation document, the draft law required that such searches be authorized by a police officer at or above the rank of chief superintendent.[131]

Despite repeated calls to do so, the government failed to offer any detailed rationale for its decision to expand its powers of search

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[129] Consultation Document, *supra* note 10, paragraph 8.6 at 49-50.

[130] National Security Bill, *supra* note 69, cl. 7 at 143.

[131] The consultation document called for authorization by a "sufficiently senior police officer," and gave the rank of superintendent as an illustrative example. *See supra* note 125.

and seizure, and failed to engage in any discussion of its proposals in light of the privacy rights protections of the Basic Law. This unwillingness to engage in an expanded discussion was representative of the government's approach, and did little to assuage public fears over potential misuse of the search power by the police.

III. THE CONSULTATION PROCESS: HALF-HEARTED DEMOCRACY?

The consultation period lasted three months, from September 24 to December 24, 2002. Given the timing of the consultation period, some members of the pro-democracy camp in Hong Kong jokingly referred to the draft legislation, which was initially expected very soon after the end of the consultation period, as the government's "Christmas present" to Hong Kong. The three-month consultation period saw a massive outpouring of commentary, protest, and advocacy from a wide range of civil society groups, business associations, political parties, and concerned individuals. The government received over 100,000 submissions of various levels of detail and length, a telling sign of public concern over the issue and of the extent of political organization and mobilization by both sides of the issue.[132]

A. Fuller Consultation: Calls for a White Bill

Almost from the moment the consultation document was released, calls were made for the government to release a so-called "white bill," a draft of the government's proposed legislation for public inspection and commentary. Proponents of the issuance of a white bill argued that it was difficult to make a full determination of the problems of a legislative plan on the basis of a policy paper: the text of the law is naturally key to determining the degree of rights protection that it offers. Despite the reasonableness of the request and the fact that the SAR government had offered white bills on a number of other, much less significant legislative matters, the government refused to issue a

[132] LEGISLATIVE COUNCIL, *S for S speaks in LegCo*, LC Paper No. CB(2)1171/02-03(01) at 1, *available at* http://www.legco.gov.hk/yr02-03/english/panels/ajls/papers/ajlsse0215cb2-1171-1e-scan.pdf.

white bill. Its failure to do so likely added to the public fear and uncertainty over the government's proposals.[133]

The issuance of a white bill would have given those critical of the government's proposals a chance not only to offer a more detailed critique of the government position, but also to offer specific alternative language during the consultation period, for which they could attempt to win public support.

B. The Debate over the Consultation Document

While critics of the government proposal were outspoken and detailed in their criticism, those outside the administration who supported the proposals were more reserved in their support. This is not to suggest that the pro-government forces have not been mobilized by this issue: to the contrary, the pro-government groups have been very successful in showing their strength through submissions to the government, public rallies, and the like.[134] However, there was some reluctance on the part of the pro-Beijing political parties, including the Democratic Alliance for the Betterment of Hong Kong ("DAB") and the Liberal Party, to be too vocal on Article 23 during the consultation period. This relative quiet may have been due to a reluctance to be seen as too supportive of government proposals for fear of appearing either anti-democratic or overly willing to do the Chief Executive's bidding in the eyes of the public. The pro-Beijing DAB, for example, released a very short, not particularly detailed statement, despite its prominent position in Hong Kong politics. In its statement, the DAB supported the Hong Kong government, but did not do so in the most explicit or blanket terms:

> The Democratic Alliance for Betterment of Hong Kong (DAB) welcomes the government's release of its proposal to implement Article 23 of the Basic Law for public consultation. The enactment of Article 23 is a right vested in the Hong Kong Special Administrative Region (HKSAR) by the Central People's Government

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[133] HKHRM, *Repressive Society in the Making: Response to Government Consultation Document Proposals to Implement Article 23 of the Basic Law*, 15 November 2002, paragraph 14.

[134] In the words of one prominent Hong Kong-based academic, "The entire pro-China camp has been mobilized in support [of] this legislation." Correspondence with Mike C. Davis, Professor of Law, City University of Hong Kong (April 16, 2003).

> and it is our duty to make sure that our constitutional and legislative obligations to safeguard our nation's security are fulfilled.[135]

Thus, the DAB distanced itself from the views of many in the pro-democracy camp that there was no need to legislate at all on Article 23. At the same time, although it did voice its support for certain specific government proposals, it offered no blanket statement of praise for the government's proposals One of the specific proposals which the DAB publicly supported the government was the proposal to protect information relating to "relations between the Central Authorities... and the HKSAR." It did, however, qualify its support with a suggestion that the classification be carefully designed so as to limit the potential for misuse.

In addition, the DAB disagreed with the government on particular points. On the proscription of political groups, the DAB expressed "reservations" over the government's proposals:[136]

> Whether SAR based organizations have affiliations with those based the mainland may not necessarily be a criterion for proscription. Rather, the SAR government's basic consideration for proscription should be whether the SAR based organizations have engaged in any act of treason, secession, sedition, subversion, espionage or other activities endangering national security instead of whether the these organizations have affiliations and connections with proscribed mainland organizations. Therefore, we suggest that the government evaluate and reconsider the necessity of abovementioned criterion for proscribing organizations in the SAR.[137]

Their written statements have been matched by a muted tone in LegCo and a low profile in other public fora; both the DAB and the Liberal Party refused to represent the pro-legislation side in a public debate

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[135] DEMOCRATIC ALLIANCE FOR THE BETTERMENT OF HONG KONG, *DAB Responds to the Government Proposals of Implementing Article 23 of the Basic Law, January 2003*, paragraph 1, *available at* http://www.dabhk.com/bulletin/jan_03a.htm.

[136] *See id.*, at paragraph 5.

[137] *See id.*

sponsored by the Foreign Correspondence Club of Hong Kong during the consultation period.[138] Before the July 1 demonstrations, which gave all parties a better sense of the potential political costs of being seen as supportive of the Chief Executive's proposals, the DAB worked closely with the Chief Executive to get keep the process moving forward, despite the small reservations that it expressed about the proposals during the consultation period. After the draft bill was released in mid-February, the DAB did not push publicly for the changes it advocated during the consultation period, and, before the July 1 demonstrations caused a radical shift in the political environment, it worked closely with the administration on getting the bill through LegCo in time for the government's July 2003 deadline.[139]

Regardless of the motivations of those in favor of the government proposals for staying relatively quiet, vocal support of the government seemed less necessary in that the government was actively promoting Article 23 legislation in the debate over the proposals. Rather than taking a neutral position on the proposals and encouraging open and critical commentary on the consultation document, government officials waged an open and sharp battle for public opinion, often attacking its critics and repeatedly claiming that those who voiced concerns over the consultation document "didn't fully understand" the government's position. The two main spokespeople for the government were Regina Ip, Secretary for Security, and Bob Allcock, the Solicitor General.

This failure of the government to engage its critics in rational debate was perhaps one of the most regrettable flaws of the Article 23 legislative process. According to one of the most prominent critics of the government's proposals, those in the pro-democracy camp stood willing at the beginning of the process to work with the government to find the most rights-protective solution to Article 23 legislation for the people of Hong Kong. In a meeting with Secretary for Security Regina Ip in the lead-up to the release of the consultation document, Legco member Margaret Ng offered a promise of cooperation to the SAR government: "We warned her, do not repeat past tactics, do not attack

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[138] Correspondence with Mike C. Davis, Professor of Law, City University of Hong Kong (April 14, 2003).

[139] Klaudia Lee, Pro-democracy Camp Cries Foul over Article 23 Hearing, SOUTH CHINA MORNING POST, April 13, 2003; Ambrose Leung, Article 23 'Must Be Made Law by July': The Security Chief Puts the Pressure on as Lawmakers Block a Motion Calling for More Public Consultation, SOUTH CHINA MORNING POST, March 26, 2003.

your critics. If you listen to reason, we will speak softly. But if you attack, I will fight you every step of the way."[140]

Despite this offer of cooperation, the government went on the offensive very early in the consultation process: within days of the release of the consultation document, the Secretary for Security, not known for her moderate tone, had made inflammatory comments in response to issues raised by critics of the government.[141] Despite mounting criticism of her rhetoric and the government's proposals more generally, the government chose not to engage its critics during the consultation period, relying instead on a vigorous and sustained defense of the views enunciated in the consultation document.

Anxious to win support, especially from those beyond the core pro-democracy groups, for its proposals, the government engaged in more than sharp rhetoric. In the case of the banking sector, it went around the banking sector's LegCo member, David Li, and began to seek information from individual bankers as to whether they had indeed expressed the concerns about Article 23 legislation that Mr. Li had articulated. It was difficult to see this move in a positive light. Li himself, a longtime member of the banking community and current chairman and chief executive of the Bank of East Asia, was particularly disturbed:

> [t]his Regina Ip, she called bankers and asked them if they really said such and such to me. I'm very dissatisfied, very, very dissatisfied. Because it was as if she thought I was lying, and I wasn't truly reflecting my industry. This is not very professional... If bankers say something to me, naturally I have to reflect those views. If she then goes and asks them whether they really said something like that to me, doesn't that mean the government, or she personally, thought I was lying?[142]

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[140] Margaret Ng, Speech at Harvard University Yenching Center (February 2003).

[141] Responding to calls for the publication of a so-called "white bill," Ip derisively dismissed the notion that such a move would help the public better understand the government's proposals: "Are you seriously telling me that taxi drivers, restaurant waiters and workers at McDonald's will want to discuss these proposals with me? A draft bill is for the experts." Statement by Secretary for Security Regina Ip, (September 26, 2002). *See also* Frank Ching, *Government Insists Consultation on Article 23 Legislation is Genuine*, SOUTH CHINA MORNING POST, 12 November 2002.

[142] Remarks of David Li Kwok-Po (February 11, 2003). *See generally* http://www.article23.org.hk/english/main.htm.

It appears that this type of background checking was limited to the banking sector: no other member of LegCo has reported similar outreach by the government to their constituents. Nonetheless, despite the limited scope, the actions of the government are quite troubling. Although the government claimed that it was merely "consulting" with individuals of the banking sector, many saw the phone calls as potentially intimidating, particularly given the extensive interest that many Hong Kong banks have on the mainland. Democratic Party LegCo member James To expressed concern that the Secretary for Security's actions might be seen by some as a threat: "Some middle-ranking executives in the banking industry have expressed worries to me that they dare not criticize the proposal openly because it may affect the banks' development on the mainland," To remarked. "If Mrs. Ip approached the bankers directly, it may amount to a threat."[143]

Finally, given the proposal for Beijing to be given a role in the execution of national security law in Hong Kong, the government felt compelled to defend the mainland's human rights record, especially in the area in which Beijing was to be an active participant, the proscription of political groups. While it would not be realistic to expect the Hong Kong government to be candid about Beijing's record in this area, it nonetheless could have chosen to remain silent on the issue. Instead, it chose to make statements supporting Beijing. In November 2002, in response to concerns over the political use of Article 23 legislation by Beijing, the Secretary for Security attempted to allay fears by informing the public that "the mainland has assured us that no one gets prosecuted in China for political crimes."[144] Ip also defended the mainland government's handling of Falun Gong:

> Chinese leaders place a great deal of importance on the rule of law. In 1999 when they banned the Falun Gong they were fully in compliance with the criminal law, and that was affirmed by the Standing Committee of the

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[143] Hon, May Sin-mi and Ravina Shamdasani, *Regina Ip Thought I Was Lying: Banker David Li Is Outraged That the Security Chief Checked Him Out on Finance Bosses' Fears about the Security Law*, SOUTH CHINA MORNING POST, February 12, 2003.

[144] Statement by Secretary for Security Regina Ip, to LegCo, (November 7, 2002). *See* Martin Regg Cohn, *Hong Kong Feels Chill From China*, TORONTO STAR, 14 December 2002.

> National People's Congress and the Higher People's Courts. It wasn't as if they just did what they liked.[145]

Such statements are problematic: they can create the perception that the Hong Kong government is either out of touch with events on the mainland, or willing to make knowingly false statements in support of a political goal. Neither possibility would be particularly comforting to the people of Hong Kong. Statements like these also present problems for those attempting to engage the government in debate over its proposals: if the government is unwilling to acknowledge uncomfortable facts that call its policy decisions into question, how can those opposed move forward the debate on those proposals?

C. Mainland Chinese Law: an Inaccurate Comparison?

One possible rhetorical mistake made by the pro-democracy camp was to regularly imply that the government was moving toward the mainland model of national security law, which justifies open repression of political dissent. The comparison was made by a number of commentators throughout the consultation process. To cite one example, the New York-based Committee to Protect Journalists repeatedly described the operation of national security law in mainland China, implying that Hong Kong was moving toward that model:

> The offense of subversion is the tool most often used against journalists in the People's Republic of China to muzzle investigative journalism or critical opinions. Reporters who have written about labor abuses, corruption scandals, rural unrest, and possibilities for political and social reform have been convicted on charges of subversion and sentenced to long prison terms. Primarily through the use of the subversion law, China has become the world's leading jailer of journalists. Eight of the nine journalists imprisoned for their work over the past two years were charged with subversion. If Hong Kong is to maintain its tradition of

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[145] Statement by Secretary for Security Regina Ip, (February 6, 2003). *See generally* http://www.article23.org.hk/english/main.htm.

> free expression and protection of basic rights, a subversion statute has no place in its laws.[146]

By making this comparison, critics of Article 23 legislation may have given the government an easy out. By simply pointing out that comparisons with mainland national security law were exaggerated, the government could avoid to some extent the need to respond more substantively to criticisms of their proposals. This refutation became a lead point, a key reassuring defense offered by the government. The exaggeration of the threat may have served in the minds of some to minimize the real and significant threat posed by the government's draft bill.

Although the government's Article 23 legislative proposals remain seriously flawed, it is almost impossible to imagine that Hong Kong would revert to an open abuse of national security laws similar to the mainland Chinese context. The claim of the critics was a much more limited one: the argument was not that there would be a convergence of laws in the two jurisdictions, but rather that (1) mainland China, in a position to influence the SAR government on Article 23 legislation, has a view of the role of national security law which ignores the fundamental right of political freedom, and that (2) without proper drafting and safeguards, Hong Kong law could be used by the government to restrict free expression and the exercise of other basic rights. Nonetheless, the subtlety of this argument was sometimes lost through occasional inarticulate expression and constant repetition by the pro-democracy camps.

D. Results of the Consultation Process

The consultation period came to a close on December 24, 2002. Once all the submissions were accepted, the government set about analyzing the responses received. Given that it had over 100,000 responses of various types to deal with, the government's goal of classifying the results and publishing its findings was no small task. Because the government was acting as the sole analyst of this large body of submissions, it was crucial that the submissions be reviewed

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[146] COMMITTEE TO PROTECT JOURNALISTS, *Comments on the Hong Kong Special Administrative Region Government's Consultation Document on Proposals to Implement Article 23 of the Basic Law*, December 9, 2002, *available at* http://www.cpj.org/news/2002/HongKongLegalSub09dec02.html.

with the utmost care so that the public could have confidence both in the results of the survey and in the government's ability to review the results of the consultation with objectivity. When the government published the results of its work on January 28, 2003, its analysis was largely considered a disappointment: there were several glaring errors in terms of classification of submissions, and other choices about how to correlate the information seems to have been made with a view toward creating the impression that a vast majority of commentators supported the government's proposals.

All submissions were sorted into four basic categories: submissions from organizations, submissions from individuals, submissions in the form of standard letters, and signature forms or petitions. In addition, domestic submissions were separated out from those from abroad. Each of the submissions in these four categories were then classified according to the opinion expressed as either "supportive of legislation to implement Article 23," "opposed to introducing legislation to implement Article 23," or not capable of classification in either category. According to the government's tabulation, domestic submissions in support of the government position outnumbered those opposed in all of the categories save for signature forms.[147]

But the government's categorization was misleading: instead of classifying submissions as either in favor of or opposed to the government's proposals, the government classified the proposals on the basis of whether or not the party was in favor of or opposed to *introducing* any such legislation. Thus, unless a party indicated a position against any legislation whatsoever, then that party might not be classified as "opposed," regardless of the views that party expressed on the government's specific proposals. It appeared that the government classified as unclear many of the submissions that did not make an explicit statement against any Article 23 legislation but were nonetheless highly critical of the government's proposals.

A number of organizations were surprised to find that their submissions had been classified as neither opposed nor in favor, and

[147] Security Bureau, HKSAR, Foreword to Compendium of Submissions, Annex A. *available at* http://www.basiclaw23.gov.hk/english/download/forward-e.pdf. Submissions from outside Hong Kong were overwhelmingly opposed in all four categories; in two of the four categories, the government received no submissions in favor of its proposals. *See also* Compendium of Submissions, Foreword, Annex C, *available at* http://www.basiclaw23.gov.hk/english/download/forward-e.pdf (last accessed Feb. 21, 2004).

their members were outraged over the misclassification. Despite its highly critical take on the consultation document, the Bar Association submission was classified as unclear, as were the submissions by the Hong Kong Journalists Association, International P.E.N, and Human Rights in China.[148] Somewhat comically, given Falun Gong's outspokenness on the issue of Article 23, the submission of the European Falun Dafa Association was also read as unclear.[149] Even the Article 23 Concern Group, an umbrella group set up by a consortium of civil society groups opposed to the government's proposals, found its submission classified as "unclear."

While there is no evidence that the classification was intentionally manipulated to create an appearance of majority support for the government's position, nonetheless the government's system of classification significantly undercut its own credibility and further alienated the civil society groups whose views were misrepresented as a result. Many of those groups who were misclassified reacted with anger and disgust. The Article 23 Concern Group, for example, voiced outrage over being classified as neutral:

> The Article 23 Concern Group is dismayed that the Security Bureau's consultation process on legislation is a sham. We say this because of the way views have been categorized. Our comments on the government's proposals were clear and unambiguous. We object to many aspects of the proposals. Yet, our views were taken to be "unclear."[150]

The Hong Kong Journalists Association also used strong language to voice its displeasure with the government's misclassification of its views:

> In our submission, our association clearly stated that we see no pressing need to enact legislation to prohibit actions that endanger state security. We are extremely

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[148] Security Bureau, HKSAR, Compendium of Submissions, Annex C, at 25-6, *available at* http://www.basiclaw23.gov.hk/english/download/index1.pdf.

[149] *See id.*, at p. 25.

[150] Press Statement from Article 23 Concern Group, (January 23, 2003) *available at* http://www.article23.org.hk/english/newsupdate/jan03/0129Concern%20Group%20Statement%20Eng.doc

> disappointed that so clear a submission has been misrepresented and categorized as "unclear" in the compendium of public submissions.[151]

Other groups which voiced their views to the Security Bureau in public fora rather than submitting their views directly to the office of the Secretary for Security were not counted at all, including those groups which testified before LegCo at a forum on security matters. Groups shut out in this manner included Amnesty International Hong Kong, one of Hong Kong's oldest human rights groups, among others.

Given the problems with the classification of the results of the consultation period, the government perhaps should have been hesitant about claiming a public mandate for its proposals. Yet it did exactly that. According the Chief Executive Tung Chee-Hwa, the results of the consultation process were clear: "we know that the majority of the public agree that we have a responsibility to safeguard our national security. They also realize the need to legislate under Article 23 of the Basic Law."[152]

Regardless of the method of tabulation of the consultation results, it is difficult to come to a conclusion on exactly what role public opinion should play in the crafting of Article 23 legislation. Both sides of the debate attempted to use public opinion to their advantage, and both attempted to claim the mantle of spokesperson for the people of Hong Kong. But decisions on rights protection are not made by majority vote, nor should they be. At the same time, no one would suggest that public opinion should play no role in the process. In claiming democratic legitimacy for its proposals, the government was suggesting that the majority of the people of Hong Kong believe that the government got it right: that it did not unduly risk civil liberties in its drive to legislate on Article 23. The flaws in the process suggest that this claim of public legitimacy is unfounded, or at the very least yet to be substantiated.

The issue is complicated by the lack of a full democratic mechanism in Hong Kong through which voters could voice their

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[151] Letter from Hong Kong Journalists Association to Secretary for Security, (February 7, 2003) (on file with author)

152 Chief Executive Tung Chee-Hwa, Speech of Hong Kong SAR Chief Executive, CE Sets Out Legislative Directions on Basic Law Article 23 (January 28, 2003) available at http://www.info.gov.hk/gia/general/200301/28/0128149.htm.

opinion on the government's proposals: the Chief Executive is appointed, and many of the LegCo representatives who support the government's proposals, as well as a handful of those opposed, are elected by functional constituencies which are more insulated from the pressure of public opinion. In other words, although the July 1 demonstrations showed that public opinion and pressure does influence the Chief Executive and members of LegCo, nonetheless, both the Chief Executive and those LegCo members elected by functional constituencies have a greater degree of insulation from public opinion. This flaw can only be rectified by a major overhaul of Hong Kong's electoral system, and no such overhaul seems forthcoming.

Despite the significant problems with the government's analysis, the results of the consultation period do point to the success of the pro-government forces in amassing support for the government's proposals. The pro-government groups had an advantage over those in the pro-democracy camps, as they could draw more extensively from the Hong Kong business community, including individual companies and trade groups. While it has been considered somewhat risky for businesses to be too outspoken on rights issues in Hong Kong, especially if they have interests in the mainland, there is obviously no such risk associated with supporting the government line. Thus those that were listed as largely supporting the government's proposals included the Hong Kong Exporters' Association, the Chinese Manufactures' Association of Hong Kong, the Hong Kong Shippers' Council, and Hong Kong Chamber of Commerce.[153] Individual private companies also got in on the act, submitting individual statements in favor of the government's proposals as the trade associations they were affiliated with also made submissions on behalf of the group. The Pong Tak Realty Company, for example, made a submission at the same time the Real Estate Developers Association of Hong Kong did.[154]

Support for the government's position was by no means limited to corporate entities, however. A number of pro-Beijing trade unions and associations also supported the government's proposals. The sheer number of submissions from such groups suggest a highly coordinated and highly successful organizing effort on the part of those in favor of the government's proposals. One very successful tactic used by the pro-Beijing groups was to have each sub-organ of a particular organ

[153] Security Bureau, HKSAR, Compendium of Submissions, Annex C, *supra* note 147, at 1.
[154] *See id.*

make a submission in favor of the government's proposals. For example, the Hong Kong Association of Trade Unions made one submission, while the New Territories Southern Section Services Bureau of the Hong Kong Association of Trade Unions made another, and the Shiweijiao Village residence group of the New Territories Southern Section Services Bureau of the Hong Kong Association of Trade Unions made still another.[155] The Youth Volunteer Group of the same New Territories Southern Section Services Bureau also made a submission in favor of the government's proposals, as did the Elderly Vigorous Friendship Association.[156] All in all, twenty groups associated with the Hong Kong Association of Trade Unions made submissions in support of the government, as did thirty-nine subdivisions of the Association of Industry and Commerce.[157] Each of these were tabulated in the government's consultation survey as an unique submission. The pro-democracy groups also engaged in multiple submissions but to a much more limited extent: the Democratic Party submitted a brief against the government's proposals, as did the Kowloon Eastern Branch of the Democratic Party and the New Territories Eastern Branch of the Democratic Party.[158] But even allowing for the misclassification of a number of groups as "neutral," the pro-democracy forces were simply not able to mobilize the same number of groups and subgroups in support of their position. Their support came instead from interested individuals, as indicated by their success in collecting signatures.

IV. CONCLUSION

In moving to rewrite national security laws in Hong Kong, the SAR government proposed laws that increase the power of the government to investigate private individuals, to dissolve social groups that have done nothing illegal in Hong Kong, and potentially to limit speech critical of the government. Despite the protections of the one-country, two-systems framework, the government wanted to allow Beijing an active role in the determination of security threats in Hong Kong, despite Beijing's record of abuse of security laws on the

[155] *See id.*, at 9.
[156] *See id.*
[157] *See id.*, at 2-3.
[158] *See id.*, at 23-24.

mainland and its intolerance for political activity outside of Communist Party control.

With a precious few exceptions, the government's draft bill ignored suggestions made by a wide spectrum of social groups both in Hong Kong and in the international community over the past several years, well before the government even issued its initial September 2002 Consultation Document.[159] This decision does not bode well for civil society in Hong Kong. Although the massive public protests of July 1 2003 forced the government to table its proposals for the time being, it is unclear whether the government will take a more consultative and cooperative approach to Article 23 legislation in the future, should it decide again to attempt to revise Hong Kong's national security laws.

After the release of the consultation document and the draft bill, a number of social groups, media organizations, and members of LegCo criticized the government's proposals as being insufficiently protective of the rights of the people of Hong Kong. Rather than taking these suggestions seriously and engaging in an extensive reworking of its proposals, the government has instead derided the criticisms of the flaws found in the consultation document and the draft bill as so many "doomsday scenarios." The government maintained this position until public protests forced Tung to back down. Yet the risks posed by the deep and central flaws in the draft bill posed a significant threat to Hong Kong's vibrant media sector, its dynamic NGO community, and even its business sector.

Ever since Hong Kong's reversion to Chinese sovereignty in June 1997, the system of rights protection in the SAR has been in flux. Although a historic change like the one that took place in Hong Kong seven years ago is bound to bring about some uncertainty as the new system takes hold, the Beijing government and the government of the Hong Kong SAR have made the situation worse by moving repeatedly to weaken basic rights protections in the law and to repeal last-minute improvements to the law made under the outgoing British colonial administration. Some observers had hoped that the trend of ever-weaker rights protection that has persisted since 1997 would end with the introduction of Article 23 legislation. With the issuance of the

[159] Groups that were vocal on Article 23 well before September 2002 included the Hong Kong Human Rights Monitor, the Hong Kong Bar Association, and several of Hong Kong's political parties, among others.

consultation document in September and the draft bill in February, the government showed no inclination to reverse this trend.

In many instances where serious questions were raised over the draft bill, the government pointed to the protections of the Basic Law and the courts of Hong Kong. Although these protections are important, they are not meant to allow for substandard legislation, on the theory that the courts will "fix" what needs to be clarified when they interpret the law. Like many constitutions, Hong Kong's Basic Law is, among other things, an aspirational document. Filled with the sweeping statements and broad rights guarantees common to such documents, it embodies the hope of a citizenry to live free from fear, protected by their central legal document from encroachment on their rights.

But it is important to note that, while the typical model of constitutional adjudication is one of top-down interpretation, in fact influence also flows in the opposite direction: laws that are pushed up to a high court come armed with the imprimatur of the legislature and the executive government, and may already have been approved by one or more courts below. In the case of Article 23 legislation, any new law would also be making its way to the high court with the vocal support of the Chief Executive and the implicit blessing of Beijing. In light of this, a high court may well find itself reviewing a question of law by looking for a way to make the constitutional protections fit with the law, instead of vice-versa.[160] Instead of pointing to the courts, therefore, as a final safeguard, the government needs to draft any new Article 23 legislation as tightly as possible, so as to meet its own obligation to protect the rights of the people of Hong Kong.

The government's proposals have been shelved, at least for now, with no indication of when the government might move to revive its proposals. In the wake of the November 2003 elections, in which the pro-Beijing DAB was dealt a serious blow, political parties have learned that Article 23 has become a potent political issue, and that

[160] On this front, however, the government needs to be very careful: there are some indications that the judiciary, still smarting from the right of abode fiasco, is not happy with the government's Article 23 proposals. In a widely reported remark assumed by most observers to be a direct reference to Article 23, Chief Justice Andrew Li called on the people of Hong Kong to exercise "vigilance – not only in relation to the enforcement and interpretation of laws, but also in relation to the formulation and enactment of new laws." Robin Fitzsimmons, *Bar Stands Up to the Might of China*, LONDON TIMES, March 4, 2003.

supporting the government's proposals can carry a heavy price.[161] The government needs to learn from the lessons of the July 2003 protests: that basic rights protections do matter to the people of Hong Kong, and that its proposals must reflect a commitment to strengthening legal protections rather than weakening them. In taking a new and invigorated approach to Article 23, the government would be making a larger policy statement, one that goes beyond the technical legal matters of Article 23 amendments: it would be signaling, finally, its commitment to vigorous rights protection and rule of law in Hong Kong.

[161] *See* NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *The Promise of Democratization in Hong Kong: the Impact of July's Protest Demonstrations on the November 23 District Council Elections,* NDI Hong Kong Report #8, November 17, 2003.