

Legco Submission Re Article 23

By Michael C. Davis

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In watching the media frenzy over the recent release of the Government Consultation Document on its "Proposal to implement Article 23 of the Basic Law" one is surprised by the rather tepid initial public response. Only a few local civic groups were able to mobilize but largely without the benefit of the text. Commentators were confounded in their response by the timing of the release of the report, largely guaranteeing the Government an opportunity to get its case across first in the press.

The most obvious reason for this circumstance has been the Government's actions to keep its intentions secret until it has largely solidified its position. The report offers really nothing in the alternative, being largely an indication of the Government's position, seemingly chiseled in stone. This suspicion about this consultation exercise is enhanced by the Government's claims that it has already consulted with the Chinese Government and has defended its proposals vigorously. This giving of preference to the Beijing consultation over local consultation is surprising, given the Basic Law proviso that Hong Kong enact Article 23 legislation "on its own."

The Government's claims that this proposal offers no threat to human rights. To the contrary, the report offers considerable cause for concern. The report cites numerous foreign examples

but in every case these are examples of legislation in jurisdictions with a strong democratic check on official action, where the final right of interpretation and review is left to courts that are independent and final. Hong Kong is not yet a democracy and it is not really clear what the scope of jurisdiction of the local courts are in this matter. Is national security a matter beyond the local courts under Article 19 of the Basic Law or is it a matter that must be referred to the NPC under Article 158. In this regard judges may not be able to save us even if the law were reasonably adequate.

And there are many areas where the proposals leave considerable doubt as to their adequacy. Some of these have been highlighted in public debate. When it comes to banning local groups affiliated with Chinese mainland groups (eg. the Fa Lun Gong), we are told that the mainland government has never issued an order banning mainland groups on national security grounds. But the mainland government has suppressed numerous groups, for example a nascent Democratic Party. Even the Fa Lun Gong, while ostensibly banned as a cult, has frequently been accused of conspiring with foreign groups hostile to the Chinese government. Certainly the mainland government may not need to issue a banning order based on national security when all members of the group are individually arrested and charged with such crimes. How will the Secretary for Security deal with this situation, especially when confronted with a chorus of local pro-China protest over the presence of such groups in Hong Kong. What if the Chinese Government takes the extra step of banning, in light of the legislation in Hong Kong? What will be the constraints on the Secretary for Security in the face of such pressure. Will she be able to point to a law that firmly protects civil liberties in defending her choice not to take action. Or will she have a degree of discretion unacceptable in a free democratic society.

Concern has also been expressed about the police investigative powers proposed in the report. The need for a warrant is to be dispensed with. What kind of investigative activities are to be anticipated in the legislation? Will this include wiretapping? Are the police to be free to range across the gambit of police investigative activities without the benefit of judicial scrutiny? The report likens this to the warrant exception for cases where criminals are caught in the act. But is this the same thing? Surely when someone is conspiring in a way that represents a real threat to the government the police will have time to stop at the courthouse to seek a warrant. Here, as the report acknowledges, we are talking about the kinds of investigative activities where threats to civil liberties are at their greatest. Excessive investigations over national security are the foundations of a police state.

The government is fond of arguing that we are proposing this legislation now because there are no current threats and it is the right time to prepare for potential risk ahead. But this is also a time, when we are at the drafting table, that we should work tirelessly to prepare for potential risk to civil liberties ahead. Bear in mind that a lot of the political activities that occurred here in 1989, if repeated, potentially run afoul of this proposed legislation. And the potential for China to have future political disruptions are certainly real. In 1989 the local police were there smiling while peaceful demonstrators marched toward Happy Valley. Under this legislation what might the police be doing the next time around? Will the government have legislation that strictly limits the resort to national security?

There are other problems that have received less public attention. Under the sedition proposals there is more substantial reliance on the notion of "incitement." In press comments the Secretary for Security responded to inquiries that the risk to speakers depended on their intentions. But should intentions be enough. Using exactly the same word, "incitement," the

US Supreme Court has held that for incitement there must be an intention to cause imminent unlawful action and such imminent unlawful action must be likely to occur. Every society has disgruntled activist that may advocate revolution or rebellion. As long as they pose no real threat the society is probably better off to hear about their anxieties. If these anxieties stem from legitimate concerns such protection of their right to speak may enable us to address these concerns.

The provisions on secession have caused concern. While secession seems to require some degree of open rebellion the associated inchoate crime, also advocated in the report, would appear to only require aiding or abetting, attempt or conspiracy. With Taiwan featuring so prominently in Hong Kong politics, when will the innocent supporter of Taiwan's independence cause be deemed to have crossed the line? What about the reporter that covers these events? The government disparages this concern today. But what about future times when the Taiwan issue is more sensitive? Will the innocent supporter, the journalist, the academic all be rounded up? Bear in mind that national security laws are most of concern when times are bad. At such time will a more proactive government face acceptable limits or will Hong Kong's human rights be out the window. At such time there will surely be pro-Beijing figures calling for decisive action. A government committed to civil liberties will surely be better off if it can defend its decision not to arrest.

This raises another issue largely neglected. It seems the treason laws and all the others are to be extended to all Hong Kong permanent residents wherever they are. Many Hong Kong residents are foreign nationals. In the event of future war or conflict between their country and China will they have any way to effectively disengage from this obligation toward China? After World War II a Japanese American who had spent the war in Japan was later found

guilty of treason and executed. If he had stayed in America he would have been interned. Given the prevalence of foreign nationals in Hong Kong does it make sense to set up this "catch 22" situation? The sedition proposal also calls for world-wide application to Hong Kong permanent residents. In both cases the inchoate crime expands this potential risk.

Given the nature of the current PRC government, the subversion law is also of great concern. When does advocacy for democratic reform cross the line? When does one "intimidate the PRCG" "by serious unlawful means?" Recall that Hong Kong was said to be a "base of subversion" in 1989.

Regarding secrecy law, the mainland government has long taken a practice that renders all citizens accountable for state secrets, often prosecuting those who have spoken to the foreign press. The existing Hong Kong law places emphasis on official "disclosure" of documents that are to be kept secret. Though it also reaches those who come into possession of the unauthorized documents this reach has been controversial, highlighted in the Spycatcher Case and the American Pentagon Papers Case. The US position was effectively to put the burden on officials to keep the documents away from the media, rather than restrain the media from publishing them. The Government's proposal clearly leans toward expanding the net to center attention more on the recipients. With the past experience of Hong Kong reporters who have been prosecuted on the mainland for disclosing official financial documents this is surely a sensitive area in Hong Kong.

Overall, the government should appreciate the sensitivity of its dramatic move into the national security area. The more passive approach of existing legislation or its rights-oriented reform would clearly have been the preferred course. But now that it has resurrected this

issue there should be a proactive effort to emphasize rights protection in this community that has never been a security threat to the Chinese mainland. The Government cites Article 19 of the International Covenant on Civil and Political Rights to legitimate its proposal. What that covenant really seeks to emphasize is the protection of civil liberties, not the empowerment of police in the national security area. Yes, we do have to prepare for future eventualities, but those eventualities are more the risk to civil liberties than they are the risk to national security. At the end of the day a government truly committed to civil liberties we be better off with laws that permit it to keep that commitment.