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WILL CIVIL LIBERTIES IN HONG KONG SURVIVE THE IMPLEMENTATION OF ARTICLE 23?

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THE publication on 24 September 2002 of the Government's Consultation Document ("the Document") on *Proposals to Implement Article 23 of the Basic Law* is one of the most important constitutional and legal developments in the Hong Kong Special Administrative Region (SAR) since it was established more than five years ago. The 3-month consultation exercise on this Document and the legislative work that will follow will be a major test of whether the concept of "one country, two systems" as enshrined in the Basic Law can be implemented in such a way that a proper balance is struck between the "one country" principle and the "two systems" principle, between which a tension has always existed. The issues at stake are large, fundamental and controversial ones. They have also attracted considerable international attention. Will civil liberties and the Rule of Law continue to thrive in the HKSAR? Or will the mainland controls over words, activities and organizations that are perceived to challenge the regime or otherwise threaten the "sovereignty, territorial integrity, unity, and national security" of China (in the language of para. 1.7 of the Document) be

extended to the SAR? These are the most basic questions raised by the Document.

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

What is interesting about BL 23 is that it does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers the HKSAR --- in practice its legislature --- to enact laws to define and penalize such actions. This is an important aspect of the autonomy of the HKSAR under the concept of "one country, two systems," which demonstrates respect for the existing social, economic and legal systems in Hong Kong at the time of the handover and ensures that mainland laws and practices will not be imposed on Hong Kong.

It has taken the HKSAR Government more than five years to come up with its proposal on the implementation of BL 23. This can perhaps be explained by the fact that immediately after the establishment of the HKSAR Government in 1997, there

were many matters for it to handle which had a higher priority than BL 23. After all, nothing has happened in Hong Kong since the handover that comes close to the kind of activities to be proscribed under BL 23. Legislation under BL 23 therefore has no sense of urgency or pressing necessity. Another possible factor is that the matter is politically sensitive and therefore very difficult to deal with, particularly if the mainland laws on matters of treason, subversion, etc. are not to be imported wholesale into Hong Kong. The existing Hong Kong law that is relevant to these matters has to be thoroughly reviewed, and foreign legislative models have to be researched into by way of comparison.

The Consultation Document recently published is therefore the fruit of years of hard work and in-depth study of the matter on the part of the HKSAR Government. It deserves to be carefully studied with an open mind, and discussed in detail in a rational manner. In the following, I will try to highlight the salient features of the Document and to comment on them.

The Document takes as its point of departure the existing law of Hong Kong as set out in the Crimes Ordinance (which covers, among other things, treason and sedition), the Societies Ordinance (which deals with the issue of the activities of foreign political bodies in Hong Kong), and the Official Secrets Ordinance --- these ordinances are part of Hong Kong's inheritance from the colonial era. It then considers to what extent the

existing law needs to be modified in order to fulfill the requirements of BL 23. In doing so, it attempts to take into account international human rights standards as enshrined in article 39 and other provisions of the Basic Law, and to consider also whether there is any room for a liberalization of the existing law. Most important of all, it recognizes that "the manner in which the state's sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ. Indeed, this has to be the case given the different situations, including the respective legal framework, of the Mainland and the HKSAR. Therefore, the HKSAR has a duty to enact laws to protect national security in accordance with the common law principles as have been practised in Hong Kong, and such laws must comply with the Basic Law provisions protecting fundamental rights and freedoms." (para. 1.6 of the Document)

Treason, secession and subversion

The offences of treason and sedition are already defined in the existing Crimes Ordinance, but there is no mention of "secession" and "subversion." The Document proposes to amend the law of treason so as to confine it to situations where the offender collaborates with a foreign state. "Levying war" against one's own state is the fundamental element of the existing offence of treason. The Document proposes to use this element as the basis for the new offences to be created --- secession and subversion. Thus secession and subversion will be defined as "levying war", using "force or threat

of force" or "other serious unlawful means" (the means are the same as those defined in the United Nations (Anti-Terrorism Measures) Ordinance enacted in July this year) for the purpose respectively of "withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China" and of "intimidating the Chinese Government, overthrowing the Chinese Government or disestablishing the basic system of the state."

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

Secondly, although the concept of "levying war" against the state (which is in the

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

Thirdly, it is not the case that the Document merely proposes to build the new offences of secession and subversion on the base of the existing law of treason without broadening the base. There is broadening insofar as the existing definition of treason does not refer to the use of “force or threat of force,” nor to “serious unlawful means.” The inclusion of these two concepts as alternative bases (in addition to “levying war”) for secession and subversion means that the scope of the acts covered by the new offences is broader than the existing scope under the law of treason, not to mention the broadening of the objectives which the acts are aimed at (e.g. to include secession). In particular, the reference to “threat of force” would seem to cast the net very wide. It is conceivable that a person who is sympathetic to the cause of Taiwanese (or, for that matter, Tibetan) independence and expresses the view in public that Taiwan may

legitimately defend itself against any military attack launched in the mainland may be prosecuted and convicted for the proposed offence of secession. Although such a prosecution would be highly unlikely in the present political climate, the same cannot be said if and when cross-strait relations further deteriorate and war becomes imminent.

Fourthly, the language used in the Document to express the proposal regarding the new offences is not the technical language used in legal drafting, and it is not completely clear what are the elements of the new offence. It is regrettable that the Document does not include as an appendix a white bill for the purpose of implementing the proposals in the Document, in the absence of which it is difficult for lawyers to decide whether some of the proposals are worthy of support. This problem is particularly significant with regard to the proposed amendments of the Official Secrets Ordinance and Societies Ordinance discussed below, but it is also relevant to the proposed crimes of secession and subversion. For example, it is proposed (para. 3.6 of the Document) that "withdrawing a part of the PRC from its sovereignty, or resisting the Central People's Government in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means should be outlawed by the offence of secession." It is not clear what is the actus reus of the proposed offence. For example, a person in a small-scale demonstration for Taiwanese independence sets fire to a car ("serious damage to property" is one of the "serious

unlawful means" as defined in the Document) while shouting a slogan in support of Taiwanese independence. Would this amount to the offence of secession which, according to the present proposal, attracts a maximum punishment of life imprisonment? What if the person does not damage property but merely shouts a slogan suggesting that Taiwan should strengthen its military so as to defend itself against the mainland? The same problem regarding the uncertainty of the actus reus exists with regard to the proposal (para. 5.5 of the Document) "to make it an offence of subversion (a) to intimidate the PRC Government, or (b) to overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means."

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

Finally, the proposed maximum penalties for secession, subversion and the related inchoate and accomplice offences (in Annex 2 of the Document) are the same, namely,

life imprisonment. This in fact means that in some cases the same act against national security would be punishable in a more severe manner in the HKSAR than in the mainland itself. For example, both articles 103 and 105 of the Chinese Criminal Code divide into three categories the punishment for secession and subversion respectively and apply them differentially in accordance with the offender's degree of involvement: (a) imprisonment for 10 or more years (up to life imprisonment); (b) imprisonment for 3 to 10 years; (c) imprisonment for less than 3 years.

Sedition and seditious publications

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

The law of sedition in Hong Kong was draconian, as illustrated in 1952 in *The Crown v Fei Yi-ming and Lee Tsung-ying* [1952] 36 HKLR 133. In this case, the publisher and editor of the pro-China newspaper in Hong Kong, *Ta Kung Po*, were prosecuted and convicted for re-publishing an article from the *People's Daily* that

accused the colonial government in Hong Kong of "barbarous, wicked and criminal acts of arresting, killing and persecuting our patriotic fellow-countrymen." On the appeal to the Full Court, it was held, inter alia, that (following *Wallace-Johnson v The King* [1940] AC 231, which held that even if the common law required incitement to violence as an essential element of sedition, this requirement could not be imported into a colonial ordinance on sedition that did not contain such a requirement) incitement to violence was not a necessary element of the offence of sedition. "If the article when published, would in the natural course of events stir up hatred or contempt against the Government, it is prima facie evidence of a publication with a seditious intention."

In June 1997, the Legislative Council passed the Crimes (Amendment) (No. 2) Ordinance. This ordinance amended the existing law of sedition as contained in section 10 of the Crimes Ordinance by adding as an essential element of the offence the requirement that the offender must have "the intention of causing violence or creating public disorder or a public disturbance." This amendment, however, has never been brought into effect, probably because of the Chinese Government's position that any unilateral amendment introduced by the colonial government of Hong Kong's law relating to the matters covered by BL 23 was unacceptable. The 1997 amendment ordinance was based on the Crimes (Amendment) (No. 2) Bill 1996 which also contained definitions of new offences of secession and subversion. This part of the Bill

did not attract sufficient support in the Legislative Council and was never passed.

The proposed definition of sedition in the Document is in fact narrower than both the existing law and that under the Crimes (Amendment) (No. 2) Ordinance 1997 and is therefore a welcome development for press freedom and freedom of expression in the HKSAR. However, it should be noted that the proposed liberalization still falls short of the standards stipulated in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (referred to in para. 1.11 of the Document) adopted at an international conference of scholars, judges and lawyers in 1995, which have been emphasized by the Hong Kong Bar Association in its paper on BL 23 published before the release of the Document. As pointed out in that paper (para. 13), "the Johannesburg Principles provide that expression might be punished as a threat to national security only if the government can demonstrate that (1) the expression was intended to incite imminent violence, (2) the expression was very likely to incite such violence, and (3) there was direct and immediate connection between the expression and the likelihood or occurrence of such violence."

The proposed definition of sedition in the Document relies heavily on the concept of "incitement," which is well-known to the common law. However, there is a significant gap between the common law understanding of incitement and the Johannesburg Principles as mentioned above, as the former does not take into account

the *likelihood* of the acts being incited actually occurring (not to say their imminent occurrence). An inciter "is one who reaches and seeks to influence the mind of another to the commission of a crime" (per Holmes JA in *Nkosiyana*, quoted in Smith & Hogan, *Criminal Law*, 8th ed. 1996, p. 273). "Incitement may be implied as well as express." (ibid.) It is irrelevant "whether the incitement is successful in persuading the other to commit, or to attempt to commit the offence or not." (ibid.)

In view of the breadth of the concept of incitement, particularly when combined with the breadth of proposed offences like secession as discusssed above in the context of "threat of force", the proposal in the Document regarding offences of dealing with and possession of seditious publications is worrying. While it is true that the proposal is not as harsh as the colonial law relating to seditious publications --- which has fallen into disuse, it is quite harsh when measured by contemporary standards of reasonableness (not to mention human rights). Inciting people to commit treason, secession or subversion is one thing; possessing, importing or selling publications "likely to incite others to commit" (parap. 4.17-18 of the Document) these offences is a different matter. Given the broad scope of "incitement", the phrase "likely to *incite* others to commit" the relevant offences (unlike "likely to *cause* others to commit such offences) casts the net very wide. In particular, why should mere possession of such publications without "reasonable excuse" be made a crime punishable --- according to

the Document --- by one year's imprisonment and a fine of $50,000? What harm is done to society and to national security by such private possession? Why should it be made a crime at all?

Another questionable aspect of the proposals regarding the law of sedition is the proposal to increase the maximum penalties for the relevant offences. Under the existing law, sedition as a first offence is punishable by two years' imprisonment and a fine of $5000. The Document proposes to increase it to life imprisonment (in the case of incitement to commit treason, secession and subversion) or seven years' imprisonment and an unlimited fine (in the case of incitement to violence or public disorder which seriously endangers the stability of the state or the HKSAR). The punishment for dealing with seditious publications is also proposed to be increased. These proposals are apparently harsher than the mainland law on incitement to secession and subversion (in articles 103 and 105 of the Criminal Code) which provides for the punishment of less than five years' imprisonment except where the circumstances are particularly serious.

Official secrets

BL 23 requires the HKSAR to enact laws, inter alia, to prohibit "theft of state secrets." It is well-known that in the mainland, state secrets are often interpreted broadly, and some Hong Kong and overseas journalists and scholars have been

prosecuted and convicted for violations of China's state secret laws. In Hong Kong, however, prosecutions for breaches of official secrets are hardly known. The existing Hong Kong law is this regard is contained in the Official Secrets Ordinance, which was enacted in June 1997 and is basically a copy of the relevant British legislation.

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

That amendment is allegedly designed to plug a "loophole" in the existing law whereby a computer "hacker may openly sell stolen protected information to a publisher who may then openly publish the information for profit" (para. 6.22 of the Document), and neither the hacker nor the publisher will be committing any offence under the existing official secrets law. The means that is proposed to "plug the

loophole" is the creation of "a new offence of making an unauthorized and damaging disclosure of information protected under Part III of the Ordinance that was obtained (directly or indirectly) by unauthorized access to it." (ibid.)

This proposal is extremely problematic as it in effect fundamentally alters the existing structure and operation of Part III of the Official Secrets Ordinance, and creates a new concept of "unauthorized access" without even attempting to provide a brief definition of it. Part III of the ordinance deals with "unlawful disclosure" of protected official information. Whether a piece of information is protected (in the sense that unauthorized disclosure thereof is unlawful) depends on the simultaneous application of two tests: (a) whether the nature of the information falls within any of the four specified categories --- (1) security and intelligence, (2) defence, (3) international relations (and the Document now proposes to add the category of "relations between the Central Authorities and the HKSAR"), and (4) the commission of offences and criminal investigations; (b) whether the information has come into the defendant's possession by virtue of his position as a public servant or government contractor, or, in the case of section 18 of the ordinance, whether the information has been disclosed to the defendant by a public servant or government contractor (this condition (b) is applicable to the first three categories of information mentioned in condition (a)).

Thus under the existing law, although the categories of protected information are

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

However, the proposed offence of unauthorized disclosure of official information obtained by “unauthorized access” changes all these. Unless the term “unauthorized access” is clearly defined to limit it to computer hacking or other prescribed criminal behaviour, the proposal in the Document in this regard will be a severe threat to press freedom and freedom of information in Hong Kong. The beauty of condition (b) above is that unless the source of the information the disclosure of which is alleged to be unlawful is clearly and directly traced back to a public servant or government contractor, no crime can be established even if the disclosure is “damaging” (which is

vague and difficult to interpret). Taking away the protection of condition (b) and replacing it with a new and untested concept of “unauthorized access” is an extremely serious matter.

Societies and national security

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

The Document now proposes further changes to the Societies Ordinance. The proposal is designed to amplify the power which the HKSAR Government has of refusing to register (section 5A), cancelling the registration of (section 5D) or prohibiting the operation of (section 8) a local society on the ground of national security. The proposed amendment provides that where a local “organization” (defined in para. 7.15 as “an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure”) (a) has the objective of engaging in treason, secession, subversion or espionage, or (b) has committed or is

attempting to commit any such offence, or (c) is "affiliated with" an organization in mainland China which has been proscribed for reasons of national security, the HKSAR Government may proscribe the local organization. The policy behind the proposed amendment is to make it clear that it would be unlawful to "make use of Hong Kong's free and open environment as a base against national security and territorial integrity." (para. 3.8 of the Document)

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

The Document does not explain what is meant by "affiliation", a crucial concept in determining whether a local organization may be proscribed on the ground of its relationship with a mainland organization. It is also not clear whether for the purposes

of (a) the offence of “supporting” proscribed organizations, and (b) rendering unlawful local societies that have “connections” with proscribed organizations, “proscribed organizations” refers only to those proscribed in Hong Kong by the Secretary of Security and not to mainland organizations. The better view is that only Hong Kong proscribed organizations are relevant here, and this apparently is also the view of the Solicitor-General (see Robert Allcock, “Why we need to update our security law,” *South China Morning Post*, 2 October 2002, p.14). It is important that these grey areas be removed before one can judge whether the present proposals are acceptable.

Powers of investigation

Finally, the Document proposes to enhance the powers of the police for the purpose of investigating suspected activities relating to BL 23, such as the power to enter and search premises without a warrant, and the power to require banks to disclose financial information in emergency situations. The powers proposed are very wide and do not exist even under the anti-terrorism law enacted in Hong Kong in July. It is doubtful whether the grant of these additional powers in a blanket manner for the purpose of all BL 23 related offences can be justified, particularly in view of the wide powers which the police already have under existing law. For example, under 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 Crimes Ordinance, the police may enter and search premises without a warrant to remove and obliterate any seditious publications. Under section 31 of the Societies Ordinance, the police may without a warrant enter premises used by a society as a place of meeting or business (except that if the premises are used for dwelling purpose a warrant is needed). Under section 33 of the same ordinance, where the police suspect that an unlawful society is being operated in any premises, they may without a warrant enter and search the premises and arrest persons there.

Conclusion

In the light of the above, it may be seen that some of the proposals in the Consultation Document are problematic and cannot be supported in their present form. Some are in desperate need of being clarified by high-quality drafting in the bill for the proposed legislation. Having said that, I also think that the general orientation of the Document deserves to be supported. The successful implementation of the concept of “one country, two systems” depends on due regard being given to both the “two systems” element and the “one country” element. The proposals in the Document have given effect to the “two systems” principle by not importing the relevant mainland laws

and standards to Hong Kong, and by creatively designing a legislative model unique to the HKSAR. At the same time, the proposals affirm the importance of the "one country" principle by providing for various crimes against the sovereignty, territorial integrity, unity, and security of the Chinese state, and by empowering the HKSAR Government to prohibit the activities in the HKSAR of organizations proscribed in the mainland for reasons of national security. Thus the Consultation Document is a concrete demonstration of the principle of "one country, two systems" at work. How the proposals, if implemented by law, will affect civil liberties in Hong Kong remains to be seen. However, there exist considerable institutional safeguards that can ensure the continued vitality of civil liberties in the HKSAR: the elected Legislative Council that will ultimately decide the content of the law to be enacted on the basis of the proposals; the vigilant local and international public opinion which will continue to monitor actively the Rule of Law and human rights in Hong Kong; and, last but not least, the strong and independent courts of the HKSAR which will --- though I believe such cases will be rare --- be called upon, in the final resort, to interpret and apply the relevant laws in cases litigated before them.

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