LC Paper No. CB(2)481/02-03(13)

Summary of Statement of Dr. David Bodoff, Hong Kong University of Science and Technology, in regard to Legislation Under Article 23
October 28, 2002

Thank you for the opportunity to share my views of the HKSAR's Consultation Paper on the proposed legislation under Article 23. In my opinion, it is important that the legislature improve the final legislation in three ways.

First, regarding the grounds for banning political organizations (item 7.16 in the Consultation Paper), the consultation paper provides that a group should be banned in Hong Kong if the mainland authorities ban the group on grounds of national security. In response to publicly voiced concerns, later statements from government officials have sought to allay fears by suggesting that the banning of a group on the mainland would not automatically result in the group's being banned in Hong Kong, but that it would instead only serve as a trigger to initiate an investigation here in Hong Kong. In my view it will be an unnecessary mistake to give any special consideration to input from the mainland authorities. When the HKSAR government gets any credible information that a group really does threaten the national security, then the HKSAR government is capable of investigating that group to determine if they are indeed planning to use violence or other serious unlawful means to overthrow the mainland. If one source of evidence originates with the mainland authorities, then that evidence can be considered. But in light of "two systems" and in light of the historical fact that the mainland has often invoked national security to ban or imprison individuals or groups that have not been found guilty of plotting an actual rebellion, it is important that the proposed legislation should give to the Hong Kong courts the power to determine whether a Hong Kong group threatens national security. To avoid confusion, the proposed legislation should not give any special status to information that arrives from mainland authorities, especially since no special status is necessary.

Second, there remains an unacceptable amount of ambiguity in the consultation document and in recent "clarifications" on the meaning of secession. Fundamental questions remain regarding the precise limits that will be imposed on otherwise free speech. The Secretary for Justice recently contrasted "merely mentioning Taiwanese independence" as opposed to "calling for indirect or direct use of force", but there is a very great area between these two, and the government has not described the criteria that distinguish the legal from the illegal. Explication of these criteria is a bare minimum before legislation can even be properly debated, much less passed.

Third, it is my impression that we cannot simply rest assured that in enforcing the new legislation, the executive branch of the HKSAR will ultimately exercise the kind of reasoned legal judgment that has characterized the Hong Kong *judicial* system and that has distinguished Hong Kong's rule of law from the mainland's rule of law in the last 50 years. In fact, there is mounting evidence that on matters of national security, the executive branch is eager to extend the judgments of the mainland to the HKSAR, rather than to rely on the HKSAR courts. Even more ominously, there is growing evidence that members of the executive branch, holding Hong Kong residents in contempt, intend to simply ignore the reasoned and detailed point-by-point analysis of, for example, the HK Bar Association, constitutional scholar M. Davis, and others. Instead, during this consultation process we have been treated to coarse slogans such

as Secretary Ip's "rule of law", Mr Qian's "only criminals have something to fear", and Secretary Leung's gratuitous criticism, in advance, of even *legal* utterances that are distasteful to Beijing ("If someone in Hong simply raises the idea of independence for Taiwan...the SAR government will condemn their acts."). The government's apparent eagerness to be seen as standing with Beijing in criticizing even legal utterances, belies a disposition that is prejudicial. As a result, it is all the more important that this legislation not rest assured in the good faith of officials from the executive branch, present or future, but that it rather includes as many as possible obstacles to abuse. In the case of banned groups, this means making it clear that Hong Kong courts are the only ones who determine whether a group is plotting armed rebellion; in the case of secession, it means making clear what criteria determine whether an act or utterance is secessionist.

It is my opinion that the details and the tenor of this legislation will shape the political environment of Hong Kong in the coming years, and may have significant effect on whether Hong Kong retains its special status as a part of China where there is not just rule of law, but where the rule of law is not used as a weapon by individuals who seek power. It is eminently possible to pass legislation that protects the mainland government from real rebellion, without unnecessarily relinquishing the objectiveness and predictability of Hong Kong's rule of law. I urge you to heed the advice of local legal professionals, and to take the necessary time to draft legislation that protects the central government while maintaining the unique strengths of our system.

Full Statement of Dr. David Bodoff, Hong Kong University of Science and Technology, in regard to Legislation Under Article 23
October 28, 2002

Honorable members of our Hong Kong Legislative Council:
Thank you for the opportunity to address you with my 3 thoughts on the question -- on the details, really -- of article 23. For what it's worth, I want to tell you that my thoughts and opinions are heartfelt. Hong Kong has been hospitable to me since I first applied to live and work here. You are in an important moment in your recent political history, and I feel it is my duty and privilege to express my views. I sincerely thank you for your attention, and to the extent you hear similar views from others, I beg you to consider our voice.

I would like to make three points. These points regard

1) the provision to ban groups that are banned in the mainland on grounds of national security. I will tell you that this provision is mad.
2) The terrible ambiguity and lack of fundamental analysis regarding the proposed secession offense
3) The frightening disposition of the HK government's executive branch, with the result that your legislation must protect against its abuse

I would like to emphasize that as an American living in Hong Kong, I absolutely will not get on a soapbox and preach to you about American ideals of individual freedom. I am quite aware of the different challenges facing China, and it is not my intention today to challenge the Chinese government or to argue against these anti-subversion laws in principle. Rather, I think the consultation document -- and indeed the public discussion -- has shown a few specific and, in my opinion, terrible aspects. It is my intention to help you make a law that benefits both the mainland and Hong Kong.

I. Regarding Ban on Organizations

My first point regards the proposed provision -- item 7.16 in the consultation document -- whereby a group that is banned on the mainland on grounds of national security, will also be banned (or maybe be banned, or have triggered a review of its legality, etc.) in Hong Kong.

Hong Kong's Solicitor General, Mr. Robert Allcock, appearing on Frank Ching's television show "Newsline", repeatedly stressed that all the proposed laws, including the provision to ban certain organizations, are limited to individual acts or groups who plot to violently overthrow the government. In response to every concern that was raied, Mr. Allcock's reply was to say "but only if they plot violence". And this hardly seems objectionable. Except that it's a deceitful lie. The law does include such strict conditions regarding violence before a group is banned, but then the law adds one extra provision, which reads, "or if Bejing says so". This extra clause makes irrelevant all the other specific conditions.

Now what's so bad about that? Presumably, Beijing also only bans groups on grounds of national security if *they* have found that the group was plotting a violent overthrow of the government, right? The consultation document, with cynical and utter contempt

for its readers, adopts this view, as it explains that mainland authorities are simply in a better position than SAR authorities to know that a group poses a threat to national security. As if to say, the reason why millions of people have been sent to prison, labor, or re-education camps in the mainland over the last 50 years, is because the superlative investigative capabilities on the mainland found that each of those millions of people were actually plotting a violent overthrow of the Chinese government. This suggestion is farcical, and obscene with respect to the memories of those people.

With all due respect to Mr. Allcock, no matter how many times he repeats the expression "violent overthrow", that is not the only circumstance in which the mainland bans a group.

As I have already said, I am not here to preach to you about American principles of individual rights. I am quite aware of the different challenges faced by our two countries, and with the Chinese concern with order. But whatever the justification, the simple fact is that the mainland authorities routinely ban, imprison, and re-educate not only those who were discovered to be plotting a violent overthrow of the government. (Many such groups or individuals, such as Falun Gong practitioners, are imprisoned on grounds other than national security, e.g. public order. But I hope no one will dare to suggest that the mainland would not ban such a group on grounds of national security if that were the only mechanism available to them. I therefore consider in my analysis all those people whose innocent lives were ruined to protect the party or a party official, even if the technical rule was not always on grounds of national security.) In fact, I am not aware of a single, solitary case in all the last 50 years in which such a plot was uncovered. Rather, the mainland routinely bans any group or any one who poses a potential -- even a future -- threat to the party's power. This is a fact of history and a fact of life in China. In my comments today, this is not even meant as a criticism of the mainland government. In their view, the party's power is perhaps the only thing that stands between order and chaos, and in that way their actions may be tragic for the lives of individuals but necessary for the greater good. My point is that you, our HKSAR legislators, dare not pretend, and dare not allow our executive branch to pretend, that the mainland and the HKSAR share the same view of national security, that both the Central government and the HKSAR government would only ever consider prosecuting groups or individuals who were discovered to have actually plotted a violent overthrows of government, and you dare not pretend that the provision to allow Beijing to ban a group in Hong Kong is simply a matter of sharing the workload or taking advantage of their superior investigative abilities. The simple fact is that the mainland authorities ban groups and imprison individuals on a basis that extends far beyond the case of a group found to be plotting a violent overthrow. That is a fact. To include a clause which bans groups on the grounds that Beijing says so, represent the total collapse of what is different between the mainland the HKSAR. It is the end of HK as I knew it. The reason why I choose to live, love and work in the HKSAR with my family, and not to do so in e.g. Shanghai, is because here in Hong Kong, I really know when I am within the law and when I would run afoul of it. I really know that I have no plans to violently overthrow the government of China and announce myself King, so I do not live in fear of the law. But in the mainland, I cannot ever be sure that someone in power might not feel threatened by my views or my utterances or my actions. I myself cannot live in a place where my

fate depends solely on whether someone *feels* threatened by me. If Hong Kong becomes also such a place, I will no longer enjoy my life here.

Your job is to protect Chinese national security. You can do that by passing laws that really do protect national security. Surely you are obliged to make it illegal to plot a violent overthrow of government. But you do not have the obligation to adopt the mainland's tradition of banning groups and ruining the lives of people who make nervous someone in power. By including the clause "or if Beijing says so", you are not adding real protection to the mainland's security, you are just importing the mainland system of equating the feelings of a person in power with the national security.

In recent days, as others have publicly raised concerns about this provision, the government has sought to allay fears. The government now claims -- in direct contradiction to the words of the consultation document -- that the mainland authorities' ban of a group will merely "trigger" an investigation by the HKSAR regarding any danger the group poses to national security. This is just dumb. It is not necessary to specifically list this automatic trigger. The HKSAR is obligated to investigate when it has reason to suspect that a group threatens national security. If the central government says that a group poses such a threat, and if a cursory review shows there may be truth in that, i.e. that the group may be plotting a violent overthrow of the mainland, then the HKSAR is bound to investigate. A special clause that introduces an automatic "trigger" is totally superfluous, and can only lead to misunderstanding and abuse regarding the HKSAR's autonomy to pursue its own investigation in accordance with its own finite and rational criteria for determining whether a group is actually plotting a violent overthrow of the mainland.

In a related attempt to allay fears, Mr. Allcock announced that the law will require that the HKSAR Secretary for Security must "reasonably believe" that the banned group represents a threat to national security. Professor Michael Davis of Chinese University cogently argued (in SCMP, October 22, 2002, p. 16) against this sort of subjective approach which depends on the inner thoughts and feelings of a single (appointed) Secretary. You must let the HKSAR courts decide whether a group threatens national security, in accordance with the court's very competent and rational views. YOU MUST NOT IMPORT INTO THE HKSAR THE MAINLAND TRADITION OF ALLOWING A POWERFUL PARTY MEMBER TO RUIN THE LIVES OF ANYONE WHO POSES A REAL OR IMAGINED POTENTIAL THREAT TO HIS/HER POWER. THAT PROVISION WILL MARK THE END OF HONG KONG AS WE KNEW IT.

As a final final point on this issue, I note that my comments have been limited to the question of banned organizations. I can only wonder -- and fear -- whether the law may also outlaw other acts or speech that is banned on the mainland on grounds of national security.

II. Ambiguous Secession

The second issue I would like to raise, concerns the secession offense. More specifically, it concerns an opinion piece by Secretary for Justice Elise Leung,

supposedly written to allay fears. The article was frightening, as it showed the total lack of any careful analysis on any of the pertinent details. My main point in this regard is that a white paper is evidently necessary.

Here is an excerpt from her reassuring words: "The mere uttering of words and comments without action would not constitute an offence of secession. If someone in Hong Kong simply raises the idea of independence for Taiwan without calling for direct or indirect use of force, violence, or the committing of serious unlawful acts, the SAR will condemn their acts, but the act will not be dealt with under the criminal law if it does not constitute an offence of secession."

The internal contradictions, ambiguities, and errors in this single "clarifying" statement are legion, and beg for a white paper.

The first muddled point regards the very definition of the offense. The first sentence quoted above says that actions may be prohibited, but words are not. The very next sentence flatly contradicts in two ways, first, by readily saying that some words are in fact offenses if they call for action, and second, by the repeated use of the words "act" to refer to the utterance of words ("...will condemn their act, but the act will not....")! Regarding the second, we might say that Mrs. Leung didn't really intend to say "act", but only intended to say "utterance". But this error is quite extraordinary. In the only two sentences given to us by the Secretary to clarify the difference between words and acts, she accidentally interchanges the two?!

With regard to the first contradiction, I assume that we should simply ignore the first sentence, which indicates that speech is never proscribed, in favor of the latter sentence that it may be. But this just brings us to a second muddle. The Secretary distinguishes between merely mentioning Taiwanese independence, which would le allowed, on the one hand, and calling for armed rebellion, on the other hand. Fair enough, but the comparison obfuscates rather than clarifies the issue. There are two very different dimensions, which the Secretary blurs together. The first issue regards the disposition of the speaker/analyst/writer/reporter. Is the speaker merely mentioning that something exists, or is he/she criticizing it, or advocating it (etc.)? The second dimension is, what is the thing being mentioned or criticized or advocated? Is it armed resistance, passive resistance, statements of allegiance, opinions of law, etc etc.

The Secretary muddles these two dimensions by contrasting a mere mention as opposed to advocating violence. Taking the first extreme, the example of "merely mentioning Taiwanese independence" is unhelpful. The only way to "merely mention" it, with no disposition, is to say the two words "Taiwan independence". I think we can all safely assume that is not illegal to say the two words "Taiwanese Independence". The questions arise as soon as the speaker utters a full sentence -- what *about* Taiwanese independence? You like it? You report that others like it? After the speaker's disposition or neutrality is made explicit, that's when the questions arise, and the Secretary has done nothing to answer those questions. Does the legality of an utterance depends in part on the speaker's disposition? We simply do not know the answer to this most basic question.

Jumping from there to the other extreme, the Secretary gives an example of a leader calling for armed rebellion. This contrast is not helpful. We don't know whether that is illegal because now the speaker is advocating, or because now the topic is armed violence, or only both together. Here are the appropriate follow-up questions to the Secretary's contrast of "merely mentioning" versus "calling for armed rebellion": Madame Secretary, is the key difference that the in the second case the speaker was advocating ("calling for") rather than mentioning, or is the difference that in the second case the thing mentioned includes violence? or only both these together? Suppose I *advocate* independence, but through non-violent means? Suppose I report on plans to *arm* or fight, without advocating it? The media, and you, the legislators, and the rest of us, must get answers to these most basic questions. The Secretary's clarification merely indicates that she lacks either the motivation or ability to analyse the problem and craft a law that we can all understand.

This brings me to the third muddle, still in that very same comment by the Secretary. She says that an utterance will be considered as secession only if it involves "calling for direct or indirect use of force...". This is an impenetrable phrase, and can only indicate an error or conscious deception. Presumably, the Secretary didn't mean to speak of "direct or indirect...force", but instead meant to say that it would be a crime to "directly or indirectly call for use of force". But that phrase would just clarify for the media the reasons for great concern -- all kinds of utterances can be considered as "indirect" calls, as that is nowhere defined. So, either through an analytical or attention deficit, or in order to avoid using the intended phrase "direct or indirect calls", the Secretary instead says the law will only proscribe (clear) calls for "direct or indirect violence". That meaningless phrase can only be totally dismissed as evasive and unhelpful, and not what the Secretary -- or the proposed law -- really means.

Finally, I would like to just toss off a few scenarios and ask if you, the legislators, have any idea what criteria would be used to decide if they are legal or illegal under the law. If at this late stage you cannot say you have any idea, then I think it is your duty to demand a white paper, or to otherwise get clarifications. Note that my point is not that the law should include, or even that you need to have thought about, in advance, every hypothetical situation. My point is that the legislators and the public must at least understand what *criteria* the law would use to decide these cases. At this point, I dare say that you really don't know. Here, then, is my list of scenarios:

(1) I write that I wish the mainland government would themselves agree to Taiwanese independence and begin trade and diplomatic relations with Taiwan (note what I *advocate* here is not an act by Taiwan, but a change of thinking in the mainland government)
(2) I write that in my opinion, the mainland economy would benefit if they recognized an independent Taiwan
(3) I write that in my opinion, by international law, Taiwan already is in fact independent
(4) I report that an expert (not me) said that in his opinion, by international law, Taiwan already is in fact independent
(5) I report that a group of pro-independence supporters meet every Tuesday at address xyz at 17:45

The Secretary's contrast of "merely mentioning" versus "calling for direct or indirect violence" does not clarify what criteria would be used for judging these cases

III. Rule of Law as Weapon of Choice

Such ambiguities bring me to my third, final, and most compelling issue. The people of Hong Kong deserve to rest assured that their own government is there to protect them. In this special case, the government of the HKSAR must also protect the mainland government. Can the people of Hong Kong rest assured that their government will protect their freedoms and safety in every case and in every respect, except where they participate in or foment an armed rebellion against Beijing? Since the new law will entail so many ambiguities and new test cases, can we rest assured that in all those ambiguous cases, the government will soberly weigh the individual's rights, and limit those rights only in the presence of evidence of an armed rebellion? Hardly. In fact, we need not look any further than the same text I quoted above from Secretary Leung. She says: "If someone in Hong Kong simply raises the idea of independence for Taiwan, without calling for direct or indirect use of force,.... The SAR government will condemn their acts". Imagine that. Our government considers that its place is to condemn legal "acts" (i.e. words). Now, why would a government condemn its citizens' legal acts? Is such criticism designed to further the interests of the Hong Kong people? No, there is no benefit to the people of Hong Kong from such criticism. What, then, is the purpose of such criticism? Clearly, its purpose is to show the mainland authorities that the HKSAR government is really on their side, and not on the side of that splittist HK citizen.

We are told to rest assured, and to leave our life and freedom in the hands of a Secretary for Justice who admits, in advance, that she condemns legal expressions that she thinks Beijing wouldn't like! What will this person do with the gigantic areas of discretion, interpretation, and jurisdictional questions that will arise from imperfect legislation?

If our secretary of justice readily admits she will condemn legal acts, how can we expect her to act in all ambiguous or borderline cases? Can we expect her to soberly weigh our rights against the subversion laws? Obviously not. *A Secretary who condemns legal expressions will certainly tend to prosecute borderline ones, with prejudice.* A person who condemns citizens' *legal* expressions, is a person who is chomping at the bit to prosecute. Our HK Secretary of Justice views her role as courting Beijing's approval against trouble-making Hong Kong-ers. In my view, alarm bells should be ringing very loudly in your ears.

Yesterday's comments by Qien Qichen's are in the same vein. As quoted in October 26 South China Morning Post, his penetrating analysis was to say, "Why do you object to the proposed legislation, do you have something to fear?" This is classic mainland rule-of-law by intimidation, power, and fear, and our own government is introducing these ways to Hong Kong. First, in direct answer to Mr Qian's stupid rhetoric, I say, yes of course, one reason why I object to some of the proposed details is that I am afraid that I, or someone I know, or someone I don't know, a resident of Hong Kong, may someday say or do something that I think *should* be legal, which might be illegal under the proposed legislation (or worse, might be left ambiguous

under the legislation and later interpreted as illegal by our zealous Secretary for Justice or by mainland authorities). So yes, of course, that's the point, when we say we fear some details of the proposed legislation, we are saying we have something to fear -- the legislation. So much for the analytical mind of Qian Qichen. His very typical attitude -- I recently saw it described as the mainland authorities' strange combination of arrogance and insecurity -- and the rule of law by intimidation, must be strenuously guarded against, if Hong Kong is to remain Hong Kong. It is a historical fact that fear of authority has been a mainstay of the last 50 years of mainland politics and justice. It is at the core of why Hong Kong is still a much less risky place to do business than the mainland is. Yet our government invites this style of governance with the current proposed legislation, because the legislation includes subjective and undefined criteria, a reliance on mainland advice, and local leaders who take sides, in advance, in favor of Beijing, even in cases that are *within* the law. You must not pass legislation that lends itself to such abuse. The legislative council must stand against this kind of law and this kind of rule by intimidation, by passing legislation that is more carefully defined, that pays attention to the kinds of details and analysis provided in the bar association's Position Paper (CB(2)2640/01-02(01)), that does not depend on secret and personal power in the mainland's party, or on the subjective feelings of a single appointed secretary in Hong Kong.

Another official, Secretary for Security Regina Ip gave an equally breathtaking glimpse of the government's bullying and utter contempt for its citizens. As you all know, she recently explained that there is no need to share details of this proposed legislation in a white paper because taxi drivers and fish-ball sellers wouldn't understand, anyway. Mrs. Ip clearly thinks she's much smarter than we all are. Then one wonders at the breathtaking stupidity of another remark she made on a recent radio talk show, that there is nothing to fear because Hong Kong has the rule of law. This is literally the stupidest thing I ever heard. We are debating the details of a proposed law, and Mrs' Ip's comment is that there's nothing to fear because we have law? That doesn't make the slightest bit of sense.

Throughout this process, our executive branch consistently gives the impression that they view themselves as enforcers, or, to use a more pejorative term, as capos. They simply ignore the reasoned opinions *and questions* of analysts, legislators, the bar association, and others, choosing instead to resort to empty slogans such as Mrs. Ip's "rule of law", intimidation such as Mr. Qian's "something to fear", and prejudice such as Mrs. Leung's "condemnation" of legal utterances. Much more important than the detailed substantive issues, important as those are, is the question of our faith in our government. How do they view their role? As our protectors, moderated by honest efforts to protect the mainland from a Hong-Kong based takeover? Or do they view themselves as career politicians in the mainland political system of power, arrogance, insecurity, and intimidation? These are the very least appealing aspects of life on the mainland, yet our leaders seem eager to import them here.

It is my opinion that the legislative council can and must do its job by passing laws that protect the mainland from subversion, without introducing into Hong Kong the processes that exist on the mainland, which turn the rule of law into a weapon of power. There is no need to ban organizations on the grounds that they are threateningly popular. There is great need to define for us what views will be considered as secessionist, and not to leave this in the mind of one Secretary's

"reasonable belief". You must pass legislation that has every conceivable built-in protection against efforts to use the rule of law as a weapon for those in power against our own citizens, *as is routine on the mainland*, and as is apparently welcomed by some of our current leaders. No possible benefit will come to Hong Kong or the mainland from your acquiescence on these points. I urge you to do your jobs. The shape of these laws will define the shape of Hong Kong's political environment for the foreseeable future. I urge you to do your jobs by honestly protecting the mainland against a violent overthrows emanating from Hong Kong, but to do so without casting a net of fear across Hong Kong.