

Attached please find the Committee to Protect Journalists' submission to the Security Bureau on the proposed legislation under Article 23 of the Basic Law. The full text is also available at: www.cpj.org. A press release is below.

We hope the Legislative Council will take our views into consideration when debating this legislation.

<<hk-article 23 submission. 12. 3. doc>> <<hk-article 23 letter to ip. 12. 5. doc>>

NEWS FROM THE COMMITTEE TO PROTECT JOURNALISTS

FOR IMMEDIATE RELEASE:

PROPOSED ANTI-SUBVERSION LEGISLATION THREATENS FREEDOM OF EXPRESSION IN HONG KONG

December 9, 2002, New York-The Committee to Protect Journalists (CPJ) today submitted a response to the Hong Kong Security Bureau's proposed anti-subversion legislation. In the submission, CPJ said the legislation presents a grave threat to freedom of expression in Hong Kong.

"The Hong Kong media have a well-deserved reputation in the region for their lively and aggressive reporting," said CPJ executive director Ann Cooper. "If enacted, this legislation will send a clear message to Hong Kong journalists that coverage of sensitive issues, especially Chinese politics, will no longer be encouraged or even tolerated."

Under Article 23 of Hong Kong's Basic Law, the territory's constitution, Hong Kong is required to enact "on its own" legislation covering subversion, sedition, secession, and theft of state secrets. (The Basic Law came into

effect upon Hong Kong's return to Chinese sovereignty on July 1, 1997.) On September 24, 2002, the Security Bureau released a Consultation Document on the proposed legislation and called for public comment during a three-month public consultation period, which ends on December 24, 2002. The precise statutory language of the final legislation is not included in the document.

CPJ believes that the proposed legislation exceeds the requirements of Article 23 and should not be enacted. The language of the Consultation Document is unacceptably vague, making it impossible for the public-including legal experts and journalists-to make informed comments on the final legislation. In the submission, CPJ urges the Security Bureau to issue the proposed text of the legislation in the form of a White Bill, or a draft of the law, and to give adequate time for public comment.

With this legislation, "the shadow of the more restrictive practices of the People's Republic of China appears to be looming," said CPJ in the submission. "We seek concrete assurance that the normal practices followed by journalists working in free societies will continue to be protected in Hong Kong."

China, the world's leading jailer of journalists, currently holds 36 journalists in prison. Most imprisoned Chinese journalists are held on subversion or state secrets charges.

Please see www.cpj.org for a copy of CPJ's submission to the secretary of the Hong Kong Security Bureau.

CPJ is a New York-based, independent, nonprofit organization that works to safeguard press freedom around the world. For more information about press freedom conditions in Hong Kong and China, visit www.cpj.org.

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CPJ Contact:

Sophie Beach

Tel: 212.465.1004 ext. 117; sbeach@cpj.org

Committee to Protect Journalists

330 Seventh Avenue, 12th floor

New York, NY 10001

Tel: 212-465-1004

Fax: 212-465-9568

E-mail: asia@cpj.org

Web: www.cpj.org



COMMITTEE TO PROTECT JOURNALISTS

330 Seventh Avenue, New York, NY 10001 USA Phone: (212) 465-1004 Fax: (212) 465-9568 Web: www.cpj.org E-Mail: info@cpj.org

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THE FREEDOM FORUM

FIRST AMENDMENT CENTER

Paul C. Tash

ST. PETERSBURG TIMES

December 9, 2002

Regina Ip Lau Suk-ye
Secretary of Security
Security Bureau
Central Government Offices
Lower Albert Road
Central, Hong Kong

Via facsimile: 852-2521-2848

Dear Secretary Ip:

The Committee to Protect Journalists (CPJ), an independent, nonprofit organization dedicated to the defense of press freedom worldwide, is submitting the attached memorandum in response to the Consultation Document on proposals to implement Article 23 of the Basic Law. In CPJ's view, the legislation as proposed presents a grave threat to freedom of expression in Hong Kong.

CPJ believes that the proposed legislation exceeds the requirements of Article 23 and should not be enacted. Proposed statutes covering subversion, sedition, secession, and theft of state secrets are out of place in a modern world. In particular, we are concerned by the statutes covering subversion and theft of state secrets. Authorities in the People's Republic of China routinely use similar statutes to imprison journalists for their work. China currently holds 36 journalists in prison, the majority of whom were charged with subversion.

CPJ also has general concerns about the manner and haste with which this vitally important legislation is being prepared. The language of the Consultation Document is unacceptably vague, making it impossible for the public - including legal experts and journalists - to make informed comments on the final legislation. For that reason, CPJ strongly supports calls from journalists, legislators, lawyers, and others in Hong Kong for the release of a White Bill, with adequate time for the public to respond.

Please see the attached submission for CPJ's detailed critique of the proposed legislation. We urge you to proceed with extreme caution and to carefully consider the responses from CPJ and other press freedom and human rights organizations, Hong Kong residents, and the international community at large before enacting any legislation under Article 23. Failure to do so risks sacrificing Hong Kong's reputation as a regional leader committed to press freedom and human rights.

We appreciate the opportunity to offer our comments on this important matter. We await your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Cooper". The signature is fluid and cursive, with the first name "Ann" and the last name "Cooper" clearly distinguishable.

Ann Cooper
Executive Director

CC:

President Jiang Zemin, People's Republic of China

Premier Zhu Rongji, PRC

Chief Executive Tung Chee Hwa, Hong Kong Special Administrative Region

Secretary Elsie Leung Oi-sie, Department of Justice, HKSAR

Robert Allcock, Solicitor General, Department of Justice, HKSAR

HKSAR Legislative Council

Foreign Correspondents Club-Hong Kong

Hong Kong Journalists Association

Human Rights in China

COMMITTEE TO PROTECT JOURNALISTS

330 Seventh Avenue, New York, NY 10001 USA Phone: (212) 465-1004 Fax: (212) 465-9568 Web: www.cpj.org E-Mail: info@cpj.org

December 9, 2002

Comments on the Hong Kong Special Administrative Region Government's Consultation Document on proposals to implement Article 23 of the Basic Law

Submitted to the Security Bureau by the Committee to Protect Journalists*

The Committee to Protect Journalists (CPJ) submits this memorandum in response to the Consultation Document dated September 24, 2002 released by the Security Bureau in connection with legislation proposed to implement Article 23 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR). CPJ is a non-profit, non-partisan organization of journalists dedicated to the defense of press freedom worldwide. CPJ works in every region of the world to defend journalists against physical attack, imprisonment, censorship and other threats to free expression. CPJ is firmly committed to the principle, recognized in international law, that free expression is the foundation of a free society. CPJ firmly believes that no journalist should ever be criminally punished because of the content of an article or broadcast. Freedom itself is imprisoned when a journalist goes to jail.

CPJ believes that the legislation as proposed in the Consultation Document exceeds the requirements of Article 23. If implemented, such legislation is likely to

unduly restrict Hong Kong citizens' right to freedom of expression. In particular, CPJ has the following concerns:

- We support the calls from lawyers, journalists, legislators and others in Hong Kong for the release of a “White Bill” containing the precise wording of the legislation before submission of a “Blue Bill” to the Legislative Council. The fact that no actual legislative text has been made available for comment makes it difficult, at best, for the public to adequately understand and comment on the proposal. The saying that “the devil is in the details” applies here - there are numerous aspects of the proposed legislation that may be more or less troubling for the press depending on exactly what the legislation says.
- It appears from the Consultation Document that the investigative powers of law enforcement will be significantly expanded. There is no justification for such expansion. These powers could easily be used to intimidate the press.
- The Consultation Document provides insufficient assurances about the powers of the independent judiciary to restrict abuses in the enforcement of the proposed statute.
- Perhaps most troubling of all, the Consultation Document calls for the creation of a subversion statute and expansion of the statutes covering theft of state secrets. Statutes on subversion and theft of state secrets are routinely used by the government of the People's Republic of China (PRC) to jail journalists.

In sum, CPJ believes that the proposed legislation poses serious risks to freedom of expression in Hong Kong. The shadow of the more restrictive practices of the PRC appears to be looming across the water. We seek concrete assurance that the normal practices followed by journalists working in free societies will continue to be protected in Hong Kong.

1. The Vagueness of the Consultation Document

CPJ regards the Consultation Document as unacceptably vague. The Consultation Document discusses the overall approach that the Security Bureau has taken in determining how to implement Article 23, and summarizes what the implementing

legislation is intended to do. The Consultation Document does not, however, provide any actual proposed statutory language. The exact phrasing of laws can have a substantial impact on how those laws are interpreted and enforced. Minor changes to the language can have a sweeping impact on the meaning of laws. The public therefore should have access to the actual text of the proposed law in the form of a White Bill.

The Consultation Document suggests that each of the proposed major offenses under the new statute (treason, subversion, secession and sedition) is to be limited to acts that somehow involve violence. The definitions of the various terms, however, are so vague that it is difficult to determine what that will mean. For example, the proposed new offense of secession is to be defined as acts intended to “resist the CPG [Central People’s Government] in its exercise of sovereignty over a part of China” by “serious unlawful means” (p. 17). The term “serious unlawful means” is subject to broad interpretation. The Consultation Document offers three definitions of serious unlawful means. The first two definitions offered by the Consultation Document involve injury to persons or property (p. 17). But the definition goes on to include “serious risk to the health or safety of the public or a section of the public” (p. 18). CPJ anticipates that news reports covering the banned spiritual group Falun Gong, pro-independence activities in Taiwan and the Tibet and Xinjiang autonomous regions, or the pro-democracy movement (to cite just a few examples) could be construed by the Chinese authorities as inimical to the health or safety of the public and could be prohibited or curtailed on that basis. Whether or not the statutory language will permit prosecution on the basis of such arguments cannot be discerned from the Consultation Document.

Similarly, the Consultation Document states that the offense of sedition will include speech that “incite[s] others to . . . public disorder which seriously endangers the stability of the state or the HKSAR” (p.25). The nature of the public disorder that would be required to give rise to liability under the proposed legislation is unclear. “Public disorder” is a vague term that can be interpreted quite broadly if the authorities are so inclined. For example, a political demonstration that blocks a major traffic artery could be viewed as public disorder and subject the organizers to criminal liability.

Furthermore, in a revision to the existing law covering theft of state secrets, the Consultation Document proposes a new class of protected information: “relations between the Central Authorities of the People’s Republic of China and the HKSAR.” The document fails, however, to clearly spell out what information will be covered under this statute or to give a precise definition of “relations” between the two governments.

2. Concerns About Investigative Powers and Jurisdiction

We are also concerned about the powers to be granted to the authorities to enforce the proposed laws and the potential lack of judicial oversight. The Consultation Document states that emergency entry, search and seizure powers should be granted to the police to investigate offenses in violation of Article 23 (p. 49). In addition, the Consultation Document contemplates special financial investigation powers under which banks and other financial institutions would be obliged to reveal information to the police.

These powers have no apparent justification. The Consultation Document does not state any reason why evidence of Article 23 crimes would be more fleeting or more easily destructible, and therefore support greater police power, than evidence of other crimes. Similarly, the Consultation Document fails to explain why evidence of illicit

financial backing should be easier to obtain in the case of Article 23 offenses than of other crimes. Without justification for their existence, such powers simply provide the police with a tool that easily could be used to harass journalists.

CPJ is also concerned that the Consultation Document proposes to “claim jurisdiction over an offense” where “the act is committed by a HKSAR permanent resident overseas” (p. xii). According to this stipulation, journalists who are Hong Kong residents could be charged in Hong Kong for reports published outside of the territory. This provision represents an unwarranted extension of Hong Kong’s power to chill speech on sensitive issues not only within its territory but around the world.

An overarching issue that the Consultation Document fails to address at all is the jurisdiction of the courts. The Solicitor General and the Secretary for Security both have argued that the proposed Article 23 laws will not be problematic because they will be interpreted by Hong Kong’s independent judiciary. It is not clear, however, that the courts will have the requisite jurisdiction in all instances. For example, the Basic Law provides that Hong Kong’s courts “have no jurisdiction over acts of state such as defence and foreign affairs” (Basic Law, Article 19). Cases in which persons are accused of treason or other crimes undermining the government implicate the national defense and may therefore be considered to be outside of the jurisdiction of the Hong Kong courts. If the court of last resort in these cases is to be in Beijing, CPJ has serious reservations about whether journalists can expect a fair and impartial hearing. Courts in the PRC have shown little regard for due process rights and freedom of expression, particularly in politically sensitive cases. Where adequate judicial oversight is in question, the potential for abuse is ever present.

3. Concerns About Individual Offenses

a. Subversion

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 (CPJ, Attacks on the Press in 2001, pp. 271, 567; also available at www.cpj.org/attacks01/asia01/china.html). 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 (Id.). If Hong Kong is to maintain its tradition of free expression and protection of basic rights, a subversion statute has no place in its laws.

Hong Kong's criminal code currently contains no subversion statute. None is needed. The existing laws of Hong Kong are sufficient to criminalize subversive activities to the extent that such prohibitions are justified. Offenses that are covered by the proposed law are also covered by the existing and proposed offenses of treason. Specifically, the provisions of the Crimes Ordinance outlawing treason cover subversive acts aimed at forcibly overthrowing the government (Hong Kong Bar Association, "Hong Kong Bar Association's View on Legislation Under Article 23 of the Basic Law," 15-16 (2002), at <http://www.hkba.org/whatsnew/index.html>). Nonetheless, the Consultation Document proposes a new statute making it an offense to "intimidate the People's Republic of China or to overthrow the People's Republic of China . . . by levying war, use of force, threat of force, or other serious unlawful means" (p. 30). The

Consultation Document identifies no concerns that are legitimately addressed by the creation of a separate subversion statute.

In the few common-law countries that have anti-subversion statutes, such as Australia and Canada, subversion is narrowly defined and limited to actions that are aimed at overthrowing the government by force (Hong Kong Bar Association, “Hong Kong Bar Association’s View on Legislation Under Article 23 of the Basic Law,” 14-15 (2002), *at* <http://www.hkba.org/whatsnew/index.html>). The proposed Article 23 legislation, however, reaches significantly beyond the use of force to encompass actions taken “to intimidate” the government by “serious unlawful means” (p. 30). The broad scope of this offense could easily be used to punish journalists engaged in criticism of the government.

Furthermore, in the proposed legislation, limitations based on use of force may well have little effect if the experience of journalists in the People’s Republic of China is any guide. Under Chinese law, it is a defense to a charge of subversion that “the circumstances are obviously minor [or] the harm done is not serious.” Nonetheless, journalists whose only offense is to write about sensitive topics like political reform or social unrest are regularly convicted of subversion even though their writings do not remotely encourage the use of force. For example, Huang Qi, who published a website that contained reports about official corruption, the 1989 pro-democracy movement, and the banned spiritual group Falun Gong, was convicted of subversion after a secret trial in August 2001 and still awaits sentencing.

b. Secession

Secession, like subversion, is not a common law offense. Countries that address secession in their laws treat secession as a variety of treason (e.g., French Penal Code,

Title I, Book IV; German Penal Code, §§ 81, 92). Nonetheless, the Consultation Document proposes a new offense of secession, which would prohibit “withdrawing part of the People’s Republic of China from its sovereignty or resisting the CPG in its exercise of sovereignty over a part of China by levying war, use of force, threat of force or other serious unlawful means.” Hong Kong law on treason is sufficiently broad to address such activities, and a new provision criminalizing such acts is unnecessary. The only likely effect of the enactment of a separate statute prohibiting secessionist activities is to chill public discussion of the status of Taiwan and independence movements in the Tibet and Xinjiang autonomous regions. Open discussion of such issues should be accepted and encouraged in a free society like Hong Kong’s.

c. Sedition

Sedition laws provide special protections to high government officials against criticism by the press and public. Such laws are derived from the archaic concept of the divine right of the monarch. Sedition laws are outmoded in modern society.

The current crime of sedition, proscribed in Section 10 of the Crimes Ordinance, is summarized in the Consultation Document as “involv[ing] incitement to actions, armed or otherwise, against lawful authority” (p. 25). The Consultation Document proposes that a new crime be created consisting of incitement to the substantive offenses of treason, secession or subversion or to violence or public disorder that seriously endangers the stability of the state (p. 25).

CPJ believes that no sedition statute is appropriate. If a sedition statute must be executed, however, it should be as narrow as possible. The key flaw in the proposed sedition law is the failure to explain what constitutes incitement. The Consultation Document indicates that the mere expression or reporting of views will not be

criminalized unless it incites violence. But what constitutes incitement is still subject to broad interpretation and therefore, to abuse. Bob Allcock, Hong Kong's Solicitor-General, has explained that a "person only incites another to do something if he encourages or otherwise pressures that other person to do it, and intends that the other should do it." (Bob Allcock, "No Change to Freedom of Speech," *South China Morning Post*, Sept. 30, 2002). There is no indication in the Consultation Document, however, that this or any other standard defining incitement is to be written into the proposed law.

In order to be consistent with international standards, the proposed law should define incitement as a call to action that is imminent and directly related to the incitement. While freedom of expression protected under international law is not absolute, sedition laws are contrary to Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹. Although such expression can be regulated, pure expression of opinion should not be criminalized. Accordingly, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information (U.N. Doc. E/CN.4/1996/39) provide that for expression to be labeled an offense the government must show that: (1) the expression was intended to incite violence; (2) the expression was likely to incite such violence; and (3) there was direct and immediate connection between the expression and the likelihood that violence would occur. Similarly, common law jurisdictions, such as Canada and the United States, have adopted the standard that incitement to violence alone is insufficient to subject the actor to punishment. In the United States, for example, speech can only be criminally punished on grounds of incitement if the speech is intended

¹ The ICCPR is applied to Hong Kong through Article 39 of the Basic Law

to incite imminent lawless action and is likely to produce such action (Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 1829 (1969)). In Canada, violence incited by the speaker must be intended to disturb constitutional authority (Hong Kong Bar Association, “Hong Kong Bar Association’s View on Legislation Under Article 23 of the Basic Law,” 15-16 (2002), at <http://www.hkba.org/whatsnew/index.html>, citing Boucher v. R. (1951) 2 D.L.R. 369). Unfortunately, the Hong Kong government to date has specifically declined to adopt such a standard (Bob Allcock, “No Change to Freedom of Speech,” South China Morning Post, Sept. 30, 2002).

Moreover, the proposed sedition law, under the guise of narrowing the range of offenses, would make it a crime to print, publish, sell, distribute, display, import or export a publication that one knows or has “reasonable grounds to suspect” is seditious.

Although the Consultation Document recognizes that the targeting of publications is “a direct restriction of freedom of expression, and should therefore be narrowly defined” (p. 26), the proposals addressing seditious publications are not at all narrow or unambiguous. There is no attempt to describe what would constitute “reasonable grounds to suspect” that a publication is seditious. In the absence of guidance from the law, a prudent person would simply abstain from dealing with any controversial publication lest it be determined at some later date to be seditious. Such a course would naturally chill free speech because publications engaged in true independent journalism would find it difficult to function in the market.

d. Theft of State Secrets

The Consultation Document proposes to expand the already overbroad and ambiguous Official Secrets Ordinance to add a broad and ambiguous new category of

protected information, that “relating to relations between the central authorities of the PRC and the HKSAR.” CPJ fears that this additional offense may restrict journalists’ ability to report freely on relations between the two governments.

The PRC government routinely uses charges of “revealing state secrets” against journalists for reports that are based on information that is publicly available. Because what constitutes “state secrets” is not clearly defined under Chinese law, journalists can be arrested without being aware that their reporting touched on prohibited information. For example, in 2002, journalist Jiang Weiping was sentenced to eight years in prison on charges of “revealing state secrets” for his reporting on local corruption cases (CPJ “Prominent Journalists Call for Release of Chinese Reporter” Feb. 14, 2002 *at* <http://www.cpj.org/news/2002/China14feb02na.html>). In 2000, Rebiya Kadeer, a businesswoman from Xinjiang, was sentenced to eight years in prison on state secrets charges after she mailed copies of publicly available newspapers to her husband in the United States (Amnesty International “Special Focus Cases: Rebiya Kadeer” *at* <http://www.amnestyusa.org/action/special/kadeer.html>).

The Consultation Document does not clearly delineate the scope of prohibited information concerning relations between the PRC and the HKSAR governments. Journalists in Hong Kong, like their counterparts in China, may therefore be subject to prosecution for their legitimate reporting on political issues. These issues are of vital public importance to residents of the HKSAR who have been promised that their political freedoms will remain intact. Hong Kong must not enact legislation that threatens to make reporting on these issues a criminal offense.

Conclusion

For the foregoing reasons, CPJ believes that the proposed Article 23 legislation poses a serious risk to freedom of speech in Hong Kong. The legislation, as proposed in the Consultation Document, exceeds the requirements of the Basic Law and should not be enacted. Any legislation enacted under Article 23 must include adequate safeguards to guarantee the rights to freedom of speech and of the press and must incorporate the comments of an informed public. CPJ calls for the following specific steps:

- We urge the Security Bureau to issue the proposed text of the legislation in full in the form of a White Bill, with adequate time for public comment.
- We urge strict limitations on any new investigative powers under the law, and we urge that the legislation clearly provide for forceful and independent judicial review.
- We call for the elimination of the proposed legislation on subversion and sedition. At the very least, we call for the inclusion of clear statutory language providing that any definitions of subversion, sedition and secession should be strictly limited to conduct that directly and imminently incites violence. These limitations should make clear that the ordinary activities of working journalists and others who publish journalistic writing, including the expression of opinions that run counter to government policy, are not subject to criminal punishment.
- We call for the elimination of the provision to consider information regarding relations between the PRC and the HKSAR under a special category of protected information covered by the theft of state secrets statute. We urge strict statutory definitions of all offenses under laws governing theft of state secrets.

CPJ will join with other Hong Kong-based and international organizations in continuing to monitor the proposed legislation and the threat it poses to freedom of expression in Hong Kong.

*CPJ thanks the law firm Debevoise & Plimpton for its assistance.