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14 November 2002

Clerk to Panel on Security
LegCo Secretariat
3/F, Citibank Tower
3 Garden Road
Hong Kong
(Attn. Mrs Sharon Tong)

Dear Mrs Tong,

Proposals to implement Article 23 of the Basic Law

The Consultation Document on the above subject states that one of the Administration's guiding principles is the need to comply with human rights guarantees in the Basic Law and international human rights covenants.

The Department of Justice is satisfied that the proposals put forward fully comply with these guarantees. However, some commentators have suggested that human rights would be eroded if the proposals were implemented.

In view of the importance of this issue, the Department of Justice has sought a second opinion from one of the leading human rights lawyers in the United Kingdom, Mr David Pannick QC. Mr Pannick has argued over 50 cases in the House of Lords and over 20 cases in the European Court of Human Rights. He is the joint general editor, with Lord Lester of Herne Hill QC, of the leading work "Human Rights Law and Practice".

Given that the Article 23 proposals are of great constitutional importance and are arousing widespread public discussion, the Administration has decided that it is appropriate to release Mr Pannick's opinion. A copy is

— therefore enclosed. I would be grateful if you would supply copies of the opinion and this letter to members of the Joint Panel.

I would emphasize that legal advice given to the Administration normally is confidential and, for good reasons, is not released. It might, for example, relate to a particular dispute between parties or its release might prejudice current or subsequent legal proceedings. The decision to release Mr Pannick's opinion in this case is made in the light of the special context in which it was obtained, and should not be regarded as a precedent for the release of legal advice in other contexts.

Yours sincerely,

(Bob Allcock)
Solicitor General

OPINION

Introduction

- 1 I am asked to advise The Department of Justice on whether the legislative proposals to implement Article 23 of the Basic Law of the Hong Kong Special Administrative Region, as set out in the Consultation Document (September 2002), are consistent with the rights to freedom of expression, peaceful assembly, freedom of association and the other rights protected by Articles 27 and 39 of the Basic Law and by the International Covenant on Civil and Political Rights.

- 2 For the reasons set out below, I am satisfied that the contents of the proposals are consistent with human rights law. I emphasise that if and when the enacted provisions are applied, it will be essential to ensure that the application is consistent with fundamental freedoms on the specific facts of the individual case.

Relevant provisions of the Basic Law

- 3 Article 23 of the Basic Law states :

"The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies".

4 Article 27 of the Basic Law states :

"Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike".

5 Article 39 of the Basic Law states :

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

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

The Consultation Document

6 The Government has published a Consultation Document on proposals to implement Article 23 in relation to treason, secession, sedition, subversion, theft of State secrets, foreign political organizations, and ancillary matters.

7 Paragraph 5 of the Summary and paragraph 1.11 of the text of the Consultation Document make clear that a primary aim is to ensure that the substantive provisions adopted to implement Article 23 comply with Article 27 rights and with the international obligations specified in Article 39.

Relevant Principles of Constitutional Law

8 The rights conferred by Articles 27 and 39, and by the ICCPR, are not absolute. They require a balance between the

interests of the individual and other interests, that is the interests of others and the interests of society. It is well established that the application of fundamental rights seeks to give effect to the general principle that courts should seek to strike a

"fair balance ... between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"

: Sporrong and Lonroth v Sweden (1982) 5 EHRR 35, 52 (paragraph 69 of the Judgment of the European Court of Human Rights). In Procurator Fiscal v Brown [2001] 2 WLR 817, 839D-H (Judicial Committee of the Privy Council), Lord Steyn noted :

"The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights".

Last week the Appellate Committee of the House of Lords emphasised, in the context of anti-social behaviour orders, that human rights instruments require a balancing of interests : Clingham v Royal Borough of Kensington and Chelsea (17 October 2002), in particular Lord Steyn at paragraph 18, Lord Hope of Craighead at paragraph 41, and Lord Hutton at paragraph 113. For a recent example of the balancing exercise resulting in substantial restrictions on freedom of expression being held to be lawful, see R v Shayler [2002] 2 WLR 754 (House of Lords) on the disclosure of official secrets by a Crown servant.

9 Whether a fair balance is being struck is very difficult to assess in the abstract. It all depends on the facts of the

particular case if and when the laws are applied under the discretionary powers which the proposals (if enacted) will confer. A court would not decide in the abstract whether one might be able to envisage circumstances in which the content of legislative provisions may allow for unfair application. Indeed, such an objection may be made to virtually any law. See Hakansson v Sweden (1990) 13 EHRR 1, 11-12 (paragraph 46 of the Judgment of the European Court of Human Rights)). Careful consideration will need to be given to any use of the new laws in the particular factual circumstances and context of a specific case.

10 If there is concern about the application to particular facts of the new laws which implement Article 23, then courts will seek to interpret and apply those laws consistently with the basic rights in Articles 27 and 39. That is so in principle, but especially so when the Consultation Document has emphasised the intention to comply with fundamental rights. On this "principle of legality" - that courts will seek to interpret laws so that they are consistent with basic rights - see R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115, 130D-G (Lord Steyn) and 131E-132B (Lord Hoffmann).

11 Applying these principles, it is my opinion that none of the proposals in the Consultation Document offends against fundamental rights. It will, however, be essential to ensure that the powers are used only in a manner which is

proportionate and which complies with fundamental freedoms in the circumstances of the individual case.

Specific Matters

12 My attention has been drawn to specific proposals in the Consultation Document :

- (1) One of the matters covered by Article 23 is the prohibition of foreign political organizations. Paragraph 7.15 of the Consultation Document proposes that power be conferred on the Secretary for Security to proscribe an organization if he or she reasonably believes that this is necessary in the interests of national security or public safety or public order. But this power would be enjoyed only if the organization falls within specified categories, one of which is if it is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities. I can see nothing inherently objectionable in this. That the organization has been proscribed in the Mainland is merely a pre-condition to the exercise of the power. In such a case, as in any other, the Secretary for Security would only enjoy power to act if he or she reasonably believes that this is necessary in the interests of national security or public safety or public order. If the Secretary for Security were to proscribe an organization simply because it had been proscribed in the Mainland, or failed to ask whether

action was necessary, that would plainly be unlawful (assuming the criteria stated in the Consultation Document were to be enacted). Were the Secretary for Security to apply the wrong test, or reach a patently unreasonable conclusion, judicial review would provide a remedy. In R v Shayler [2002] 2 WLR 754, 774C-776C, Lord Bingham of Cornhill (for the Appellate Committee of the House of Lords) emphasised the importance of judicial review as a rigorous procedure where there is an allegation of a breach of fundamental rights. My consideration of the legality of the proposals is on the assumption that either the Secretary for Security will act lawfully, or a court would grant a remedy for unlawful conduct.

- (2) Another of the matters covered by Article 23 is secession. Paragraph 3.6 of the Consultation Document recognises that acts undermining the territorial integrity of a nation by levying war, use of force, threat of force or other serious unlawful means threaten the unity and underlying security of a country. Paragraph 3.7 seeks to define "serious unlawful means", and does so to include

"serious interference or serious disruption of an essential service, facility or system, whether public or private".

The concern is that the definition of "unlawful means" may possibly cover conduct in the Mainland that is protected by fundamental rights, such as strike action

or a peaceful demonstration. If that were so, then the person in Hong Kong who incited such conduct would commit an offence. But that seems to me to be very unlikely :

(a) Paragraph 3.7 of the Consultation Document adds:

"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".

(b) Either this can be made clear in the text of the law, or it would in any event be implicit and would be the approach adopted by a court for the reasons set out in paragraph 10 above. For the avoidance of any doubt, it may well be considered desirable to state generally in the new law that nothing in it is intended to contravene Articles 27 or 39 of the Basic Law, and that restrictions apply only in so far as they are lawful pursuant to those provisions of the Basic Law.

13 Concern has been expressed that Article 23 of the Basic Law might override Articles 27 and 39. I do not see how that conclusion could be reached as a matter of interpretation of the Basic Law. Article 23 imposes a duty on the Hong Kong Special Administrative Region to enact laws relating to specified matters. But Article 23 says nothing about the content of those laws. Nor does it suggest that Hong Kong has power in this context to override the rights conferred

in Chapter III of the Basic Law (in particular Articles 27 and 39). I can see no basis on which the Basic Law could be interpreted to mean that the content of the law enacted to implement Article 23 is not subject to Articles 27 and 39.

Conclusion

14 For these reasons, it is my opinion that none of the provisions set out in the Consultation Document are objectionable as a matter of legal principle. I emphasise that it will be important, if and when enacted provisions are applied, to ensure that the application is consistent with human rights.



DAVID PANNICK QC

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24 October 2002