Paper No. 12

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Dear Mr. Simon,

Legislation on Article 23 of the Basic Law of the HKSAR

Thank you for your letter of 20 February 2003 providing your comments on the National Security (Legislative Provisions) Bill.

Before turning to the issues raised in your letter, I must stress that that the fundamental rights and freedoms currently protected and enjoyed in the HKSAR, including the freedom of the press and expression, will not in any way be affected by the Bill if enacted, which aims at implementing Article 23 of the Basic Law. We would like to point out that, besides requiring the HKSAR to enact laws to protect national security, the Basic Law, a constitutional document, also guarantees fundamental rights and freedoms. Article 27 of the Basic Law provides that "Hong Kong residents shall have freedom of speech, of the press and of publication..." Article 39 provides that, inter alia, the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force. Any laws that are inconsistent with the human rights guarantees in the Basic Law will be declared invalid by the HKSAR courts.

In formulating the proposals to implement Article 23, it has been one of our guiding principles to comply with the above constitutional obligations (paragraph 1.7 of the Consultation Document). All offences under Article 23 are carefully and tightly formulated and based on the existing laws and common law principles. Mr. David Pannick QC, a renowned specialist on human rights laws, has pointed out in his opinion to the HKSAR Government that the proposals are consistent with fundamental human rights.

The legislative proposals in the National Security (Legislative Provisions) Bill represent a modernization of the existing offences. Many existing offences are substantially narrowed down or repealed.

We now turn to the specific issues you have raised.

Investigation powers

Under the existing laws, the law enforcement agencies in the HKSAR, like their counterparts in other jurisdictions, are vested with emergency entry, search and seizure powers to combat crimes such as those relating to gambling, vice and dangerous goods. In view of the serious nature of Article 23 offences, it is necessary for the Police to be given similar powers to deal with exigent situations. According to the Bill, such powers can only be exercised if strictly defined conditions are satisfied. These conditions are (a) an offence has been committed or is being committed; (b) anything which is likely to contain evidence of substantial value to the investigation is in the premises concerned; and (c) unless immediate action is taken, such evidence would be lost, and the investigation of the offence would be seriously prejudiced as a result (section 18B under Clause 7 of the Bill). In all other cases, a judicial warrant must be obtained.

In order to underline the protection for press freedom, there are special provisions to mandate judicial warrants in all searches involving journalistic materials (Section 18B(5) under Clause 7). This means that the proposed emergency investigation powers are not applicable to journalistic materials, the search of which can only be authorized by a court warrant.

The Police's exercise of emergency is liable to judicial review by our independent courts, and is also subject to an independent avenue of complaint. The proposals are by no measure "significant expansion" of investigative powers, and in particular would not "intimidate" the press in any way.

Independence of the Judiciary

The independence of the Hong Kong Judiciary is acclaimed internationally. Our courts are well cognizant of international human rights standards. All local laws, including legislation to implement Article 23, are adjudicated and interpreted by the courts of the HKSAR. Laws that are inconsistent with the constitutional guarantees of rights and freedoms would be struck down, and any exercise of powers by the executive authorities that are inconsistent with the guaranteed rights is subject to judicial review.

Definition of the offences

The terms and the relevant elements of the offences have been clearly and narrowly defined in the Bill. Many terms that are alleged to be "vague" are terms drawn from the existing statutory provisions and are commonly used in other common law jurisdictions. These terms must be read in the context instead of in isolation. The HKSAR Government has also taken into account public views in ensuring that the Bill is drafted in clear and precise language.

Many of the terms used in the Bill are more narrowly defined than the corresponding ones in most other common law jurisdictions. For example, "public enemy at war" under treason is defined as "the government of a foreign country" or "foreign armed forces" that are at war with the PRC, instead of foreign nationals at common law. Furthermore, "assist public enemy at war" would be an offence only if the assistance is provided with an intent to prejudice the position of the PRC in the war. It should be noted that in some common law jurisdictions such as the UK, the mere offer of "aid and comfort" to a foreign national whose country with which the state is at war would constitute a treason offence.

Under the "One Country, Two Systems" principle, laws that are enacted by the HKSAR legislature can only be interpreted by the local courts, and Article 23 offences would be tried by jury either as a matter of legal requirement or as a result of election by the defendant. The allegation that Government could "construe offences broadly" and "prosecute anyone it wishes to censor" is completely untrue and unfounded.

Specific offences

Subversion and secession

For the proposed offence of subversion, "intimidation" of the Central People's Government is criminalized only when this is achieved by "using force or serious criminal means *that seriously endangers the stability of the PRC*, or by engaging in war." (Section 2A under Clause 4). "Serious criminal means" is further defined in Section 2A(4)(b), to mean acts akin to "terrorist acts". The definition of the offence is by no means "broad" and the mere act of criticizing the government will not be criminalized.

"Serious criminal means" is similarly defined in a tight and narrow manner for the secession offence (Section 2B(4)(b) under Clause 4).

Sedition

Sedition is an existing offence in the HKSAR (sections 9 and 10 of the Crimes Ordinance, Cap 200) and in a number of other developed common law jurisdictions such as the UK (common law), Canada (s. 61 of Ciminal Code), Australia (s. 30C, Crimes Act), and the US (USCS s. 2385). Notwithstanding this, the Bill proposes to repeal the existing sedition offences and substantially narrow the scope of the offence to incite others to commit treason, subversion, secession, or to incite others to engage in violent public disorder that would seriously endanger the stability of the PRC. Inciting others to commit a substantive crime is already an offence at common law, and therefore the scope of criminal law is in no way expanded by the definition of "sedition" in the Bill. Furthermore, the intention to cause the commission of relevant crime must be proved beyond reasonable doubt by the prosecution. Together with the narrow definition of treason, secession, etc, it is difficult to see how a journalistic report on opposition groups could become "sedition" under the Bill.

The offences of seditious publication are already in the statue book of the HKSAR and are not new offences. The Bill instead seeks to repeal the existing offence of possession of seditious publications, substantially narrows down the existing offence of dealing with seditious publications, such that one can be criminalized only if he possesses the intention to incite the offences of treason, subversion or secession by means of the publication (Section 9C under Clause 6), and *at the same time* the publication concerned is likely to cause the commission of such offences. Whether a publication is "likely to" cause the serious offences would be determined by the court (and by the jury if jury trial is opted for by the defendant) rather than by the Government. With such a narrow definition and the defences and procedural safeguards, there is no latitude for any abuse.

Theft of state secrets

The existing Official Secrets Ordinance, which is localized from the corresponding UK Act, already covers any information that relates to the "relations between the Central Authorities and the HKSAR", which is under the category of "international relations". The present formulation in Section 16A(1)(a) under Clause 10 of the Bill was drafted after the extensive public consultation exercise. The coverage is narrowed down and would only cover information that relates to those HKSAR affairs which are within the responsibility of the Central Authorities *under the Basic Law*. Furthermore, disclosure of such information would only be an offence if the disclosure damages "national security". "National security" is limited to mean only "the safeguarding of the territorial integrity and the independence of the PRC"

(Section 12(1)(b) under Clause 8). All unlawful disclosure offences would be tried by the local courts and by a jury if the defendant so elects. It is simply untrue that the proposed offence would "encompass anything the Government wishes to censor".

To constitute an offence of "unlawful disclosure", the prosecution must prove before the court that the accused knew or had reasonable cause to believe that (a) the information disclosed belongs to a protected category defined by the Official Secrets Ordinance, and (b) the disclosure is damaging as defined with respect to the corresponding category; and (c) the information is obtained as a result of unlawful disclosure or illegal access. No one would breach the law unintentionally.

Instead of adopting a "public interest" test which would be confusing, the "damaging" tests provided for in the Official Secrets Ordinance is narrowly defined such that a "damaging" disclosure is by nature contrary to the public interest. The case for a "public interest defence" had in fact been thoroughly debated and rejected by the UK Parliament in formulating the Official Secrets Act in 1989. A public interest defence is not necessary for compliance with international human rights standards, as confirmed in a case in the UK House of Lords in 2002.

Safeguarding human rights

To underline the importance we attach to the compliance with international human rights standards, the Bill explicitly stipulates that the interpretation, application and enforcement of all the relevant provisions to implement Article 23 of the Basic Law must be in compliance with Article 39 of the Basic Law (Clause 7 section 18A, Clause 9 section 12A, and Clause 14 section 2A of the Bill), which enshrines the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international labour conventions as applied to the HKSAR.

There is nothing in the Bill that threatens the freedom of the press. The freedom of expression as guaranteed under the Basic Law shall continue to be protected.

Yours sincerely,

(Johann Wong)
for Secretary for Security

c.c.

Clerk to the Legislative Council
Foreign Correspondents Club
Hong Kong Journalists Association
Private Secretary to Chief Executive
Secretary for Justice (Attn: Mr Robert Allcock)