Submission No.150

The Association of the Bar of the City of New York

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April 25, 2003

The Clerk of the Bills Committee
National Security (Legislative Provisions) Bill
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Sir:

I am writing on behalf of The Association of the Bar of the City of New York (the "Association") to express our concerns regarding certain provisions of the proposed National Security (Legislative Provisions) Bill (the "Bill").

At the outset, let me state that we can appreciate your Government's efforts to accommodate national security concerns with the preservation of fundamental human rights, challenges with which we in the United States have had to struggle for more than 200 years, often with questionable results, from the Alien and Sedition Acts of 1798 to the USA PATRIOT Act of 2001. We further appreciate the effort by the Hong Kong government to publish the Consultation Document for public comment and its responsiveness to recommendations and suggestions not only from the Hong Kong community but from organizations in other common law jurisdictions.

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The Association is an independent, non-governmental organization with a membership of more than 22,000 lawyers, judges, prosecutors, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. Founded in 1870 to combat corruption in the judiciary, the Association has a long history of dedication to human rights, notably through its Committee on International Human Rights, which investigates and reports on human rights conditions around the world.

The Association has also had a long and ongoing interest in supporting Hong Kong as a democratic society with checks and balances among its three branches of government, with particular interest in the maintenance of a qualified and independent judiciary, the protection of fundamental human rights, and the adherence to the Rule of Law in the common law tradition.

This interest is not only one of principle but of self-interest. For many years, numerous New York law firms and hundreds of our members have been working as lawyers in their Hong Kong regional offices, and many are permanent residents. We believe they contribute significantly to the economic, commercial, and financial life of Hong Kong. In addition, many hundreds of our clients have regional headquarters in Hong Kong or do extensive business in Hong Kong and often seek our advice regarding the benefits of locating in, relocating from, or doing business in Hong Kong. Over the years, we have been enthusiastic supporters of Hong Kong as a place to do business and to live due to its open and free society, its independent and highly qualified judiciary, its free press, its active lawyers' associations, its conditions of transparency, its absence of corruption and its adherence to the Rule of Law and common law principles that protect civil, political and commercial rights.

Prior to and following the return of sovereignty to the People's Republic of China on July 1, 1997, we, together with the Joseph R. Crowley Program in International Human Rights at Fordham Law School, have carefully followed legal and political developments in Hong Kong through missions, reports and symposia.[1] Through the Joint Declaration, the United Kingdom and the People's Republic of China entered into a solemn compact: the return of sovereignty to China in exchange for continued maintenance of Hong Kong's political, social, economic, and legal institutions enjoyed by Hong Kong accompanied by a high degree of autonomy. Observing this compact is incumbent on both parties. Inherent in the Basic Law that implemented China's obligations under the Joint Declaration is the commitment by China and the Hong Kong Special Administrative Region Government ("H.K.S.A.R.G.") that the fundamental rights of free speech, free press, freedom of assembly, freedom of association and freedom of religion, as well as due process, would not only continue but flourish. The benefits of such freedom would accrue not only to the people of Hong Kong but to the people of China who would be exposed to a new diversity of views. It is therefore incumbent on all interested parties, China, Hong Kong and the United Kingdom, to maintain these basic principles in action as well

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1 "Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry: The Association of the Bar of the City of New York: The Committee on International Human Rights," 51 Record of The Association of The Bar of The City of New York 357-90 (1996).

Symposium on Right of Abode Decision of Court of Final Appeals, May 25, 1999, Great Hall of the Association of the Bar of the City of New York sponsored by the Asian Affairs Committee.

"One Country, Two Legal Systems?, " 23 Fordham Int'l L.J. 1 (Nov. 1999).

"One Country, Two Legal Systems? The Rule of Law, Democracy, and the Protection of Fundamental Human Rights in Post-Handover Hong Kong," 55 Record of the Association of the Bar of the City of New York 32-388 (2000).

as words. We have been gratified that Hong Kong and the People's Republic of China generally have fulfilled their obligations under both the Joint Declaration and the Basic Law. However, the Association is particularly concerned with the Bill published by the H.K.S.A.R.G. on February 13, 2003, and currently being considered by the Legislative Council.

With the introduction of the Bill intended to implement Article 23 of the Basic Law, Hong Kong faces the most significant challenge to its democratic principles so far, unless certain of its provisions are more clearly defined or eliminated.

Over the years, most of the statutes adopted by the United States dealing domestically with national security issues, such as the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the Espionage Act of 1917, the Smith Act of 1940, the War Relocation Authority of 1942, the McCarran Act of 1950, and the anti-terrorist legislation (the "USA PATRIOT" Act of 2001) adopted after the September 11, 2001 terrorist attack, have occurred during times of perceived national crises with little deliberation or concern for civil rights. With the passage of time, our nation has generally repudiated such legislation as needlessly tipping the balance in favor of security over liberty in a manner inconsistent with both our own tradition and with international law. We respectfully suggest that today the threat to Hong Kong or China's security through Hong Kong is remote. It is all the more disconcerting, therefore, that the Bill reflects the type of overreaction that we associate with flawed measures that we have taken during times of crisis. We would therefore urge our friends in Hong Kong to approach this area with caution and careful deliberation to avoid adverse impact on fundamental civil and political rights of Hong Kong citizens.

As currently crafted, the proposed ordinances undermine civil liberties more than is necessary to achieve the stated purposes of the Bill. Moreover, neither in the Consultation Document nor in any of the government's publications or statements which we have reviewed has there been any reference to the real or potential security risks that would justify the broad legislative restrictions contained in the proposed legislation.[2] We would hope that the Legislative Council, as a deliberative body, would address these issues in a meaningful manner. It would be a major setback to Hong Kong's status as a free and open society, with its own democratic institutions, if it did not adopt a more measured or restrained approach in implementing Article 23 of the Basic Law.

Although Article 23 requires the adoption of legislation covering the activities enumerated therein, there is no date fixed for the adoption of such legislation. We respectfully suggest that it would be more appropriate to defer such legislation until rules and regulations have been promulgated permitting universal suffrage and the election of a Chief Executive and a representative Legislative Council as required by the Basic Law. A balanced approach would be for the government to move forward with a Consultation Document on its program for universal suffrage followed by a proposed suffrage Bill to be considered at the same time as the national security Bill. It is not too late. This parallel approach would allay concerns regarding Hong Kong's commitment to implementing all of its obligations under the Basic Law and the International Covenant on Civil and Political Rights (the "ICCPR") and the strengthening of its democratic institutions.

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[2] The only justification we have found is a March 27, 2003 press release, in which a "government spokesman" stated that the power of proscription "was necessary to deal with organized crimes threatening national security."

One further reason to defer action on the Bill is the SARS epidemic which has understandably diverted public attention from the Bill and discouraged the comprehensive dialogue which is required to give final passage of any Bill full credibility.

Short of that, the Legislative Council should carefully consider those legitimate national security concerns that are real and immediate, and draft legislation carefully calibrated to address those concerns with deference to the protection of fundamental human rights.

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The annexed Legal Analysis of the Bill, prepared by the Association's Committee on International Human Rights in cooperation with the Joseph R. Crowley Program in International Human Rights at Fordham Law School in New York City sets forth our views on the sections of the proposed Bill that we believe will undermine democratic institutions in Hong Kong. In presenting our views, we rely on our more than 200 years of experience as a constitutional democracy during which we have dealt - sometimes unsuccessfully - with treason, sedition, publication of state secrets, prohibiting membership in certain organizations, and national security measures. We trust that our response will be relevant to your deliberations. In this regard, we note that the H.K.S.A.R.G. has itself deemed the experience of such common law jurisdictions as the United Kingdom, Canada, and the United States relevant.

We are not commenting on whether the proposed legislation complies with the ICCPR or the Johannesburg Principles, as these issues have been adequately addressed by other organizations. Nor is our analysis exhaustive, rather it reflects our principal concerns.

Finally, as noted earlier, the concerns we have expressed are not academic, but reflect matters that have an immediate impact on Hong Kong's economic prospects. Foreign

investors with whom our members work as legal advisors - both those investors with a long history in Hong Kong and those just now entering the Asian markets - are unsettled by the implications of the Bill, both for the security of business information and data maintained in Hong Kong, which is of critical importance for their businesses and, more generally, for the relative attractiveness of Hong Kong as a regional business and financial center in a free and open environment.

If it is decided to proceed with the proposed legislation, we respectfully suggest that the various ordinances be reviewed in their entirety to ensure compliance and consistency with the rights granted to Hong Kong residents under the Basic Law.

Very truly yours,

E. Leo Milonas, President

cc: Honorable Ip Kwok-him, Chairman
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National Security (Legislative Provisions) Bill
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Committee on International Human Rights
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LEGAL ANALYSIS OF CERTAIN PROVISIONS OF THE NATIONAL SECURITY (LEGISLATIVE PROVISION) BILL PENDING BEFORE THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

This Legal Analysis accompanies the letter from the President of The Association of the Bar of the City of New York, Honorable E. Leo Milonas, and relates to the following provisions of the Bill:

(i) Section "8A. Proscription of organizations endangering national security" and related Sections amending The Societies Ordinance;

(ii) Section "2A. Subversion" and related Sections amending The Crimes Ordinance;

(iii) Section "9A. Sedition" and related Sections amending The Crimes Ordinance;

(iv) Section "16A. Information related to Hong Kong Affairs within the responsibility of the Central Authorities amending the Official Secrets Act"; and

(v) Section "2. Treason" amending the Crimes Ordinance.

As a general comment on the proposed Bill, while we have confidence in the commitment of the present Hong Kong government to the protection of fundamental human

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* We note with appreciation the review of this report by the Committee on Asian Affairs of The Association of the Bar of the City of New York.

rights in the common law tradition, the broad and vague language of the proposed Bill may allow future governments without such commitments, or which may be subject to increased pressure from the Central Government, to undermine these rights. Thus, the Bill should be carefully drafted with precise terms and definitions known to the law not only for the present government but for future governments in a manner that will ensure continued protection of these rights.

Legislation criminalizing behavior should be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful. Mr. Bob Allcock, Solicitor General of the Hong Kong Special Administrative Region Government (H.K.S.A.R.G.), has publicly stated that "there is [no] excuse for loose drafting in our new laws. We cannot justify over broad provisions by saying that they will be enforced selectively, or that the courts will throw out inappropriate cases. We must, and will, ensure that the laws are drafted as tightly as possible. No one wants to turn harmless acts of protest into serious crimes against the state. Hong Kong's reputation as a free and tolerant society must not be undermined."[1]

Notwithstanding Mr. Allcock's commendable aspirations, we do have serious concerns with certain provisions of the Bill that do not meet these standards.

SECTION "8A. PROSCRIPTION OF ORGANIZATIONS ENDANGERING NATIONAL SECURITY" AND RELATED SECTIONS AMENDING THE SOCIETIES ORDINANCE

a. Drafting Concerns

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[1] See "Letter to Hong Kong: Implementing Article 23 of the Basic Law" by the Solicitor General, Mr. Bob Allcock, broadcast by Radio Television Hong Kong on December 15, 2002 and reprinted on the H.K.S.A.R.G. website on December 15, 2002.

The power granted to the Secretary for Security in Subsection (1) of Section 8A to proscribe any local organization in the interests of "national security" is unduly broad. Given that the term "national security" is defined in Section 12(i)(b) of the proposed amendment to the Official Secrets Act ("national security means the safeguarding of the territorial integrity and the independence of the People's Republic of China"), at the very least a similar definition should be added to constrain the scope of the Secretary's power more clearly.

An even more significant but related problem with Section 8A is Subsection (2)(c), which grants the Secretary for Security the power to proscribe any local organization "which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities under the laws of the People's Republic of China." Based on certification of such decree by the Central Government, the Secretary for Security may proceed against the local organization if he "reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose." Here the lack of a clear definition of "national security" leaves the Secretary for Security with little to rely on other than the mainland determination of that term. Indeed, action by the mainland authorities would have the effect of creating a strong presumption that the Secretary would proscribe any Hong Kong counterpart of an organization banned by open decree in China.

We can appreciate that Hong Kong, as part of China, does not wish to harbor local organizations that are controlled by mainland groups that in fact, pose a threat to China's national security. However, such proscription must be determined in accordance with the Rule of Law

and respectful of fundamental human rights guaranteed by the Basic Law, including freedom of association. How this can be accomplished is a challenge for Hong Kong's legal system, which generally has clear definitions of criminal activities, judicial procedures that provide due process to organizations and individuals, trial by jury, right to counsel, transparency, and the right of appeal. Given that China has none of these protections - particularly in matters touching upon national security - Hong Kong should not accept China's certification as the basis for proceeding against a local organization. It is evident that many peaceful local organizations that could be proscribed in China as endangering national security would not be so characterized in Hong Kong. Subsection (2)(c) places the presumption of illegality on the local organization.

The Government's claim in its Explanatory Notes that "A local organization that is subordinate to a prohibited mainland organization will not be automatically proscribed" is true but perhaps misleading or unrealistic. First, while Subsections (1) and (2)(c) give the Secretary for Security authority to proscribe any "subordinate" local organization he reasonably believes is a "national security" threat based on a certificate prohibiting the operation of a mainland organization, it is unlikely that the Secretary for Security, in the face of such a certificate, would make a de novo determination that the local organization is in fact not a national security risk. In practice, Subsections (1) and (2)(c) leave the "subordination" of the local organization. as the only issue remaining for the Secretary for Security to determine. Thus, local organizations that would not be deemed a national security risk according to Hong Kong standards, would be virtually automatically criminalized without an open hearing with procedural safeguards to challenge the organization's alleged threat to "national security." This is a most egregious breach of Hong Kong's autonomy as guaranteed in the Basic Law.

In addition, we are not confident that the Hong Kong judiciary will be permitted to serve as a check against proscriptions that could be held to violate the Basic Law. Under Article 158 of the Basic Law, the Court of Final Appeal must request that the Standing Committee of the National People's Congress provide an interpretation of provisions of the Basic Law "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region ..." The most natural reading of Article 158 would require the Court of Final Appeal to determine whether a specific Basic Law provision itself dealt with affairs "that are the responsibility of the Central People's Government." It could be argued, however, that even a provision of the Basic Law safeguarding a fundamental right within Hong Kong, such as those set out in Article 39, would concern the Central People's Authorities when applied to matters that implicated national security. Were this interpretation accepted, either by the Court of Final Appeal or, more likely, by the Standing Committee, the effect would be to oust the Hong Kong judiciary from independently considering a claim that a proscription by the Secretary for Security was inconsistent with the Basic Law. Such a development would be a further blow to Hong Kong's autonomy and to the independence of its judiciary.

In view of these serious infirmities in the Bill, we strongly urge that clause (c) of Subsection (2) be eliminated.

If retained, we suggest that the Secretary for Security be required to make a determination that the local organization is both a national security risk by virtue of its activities in Hong Kong and subordinate to the mainland organizations through an open administrative proceeding before proscription. The evidence required to sustain the proscription of a local

organization should be provided in Subsection (3)(a)(iii)(A) of Section 8D by adding the words "notwithstanding the receipt of the certificate referred to in Subsection 3 of Section 8A." Any proscription should first be reviewed and confirmed by the Secretary for Justice as being in compliance with the Basic Law and the ICCPR. Moreover, in order to avoid damaging judgment before trial, no local organization should be proscribed until proper administrative and judicial proceedings have been completed.

Subsection (2)(c) clearly violates the independence and autonomy of the Hong Kong government which is empowered to implement Article 23 "on its own." It also precludes the H.K.S.A.R.G. from making its own determination, in accordance with published rules and procedures, whether to proscribe a local organization that in no way falls within the activities listed in subsections (2)(a) and (b) of Section 8A. As such, it amounts to a method of circumventing the procedural protection that all local organizations enjoy. Given China's lack of published rules and regulations for making such a determination, its general lack of "transparency," and its history of outlawing "counter revolutionary" organizations, such a provision is tantamount to surrendering Hong Kong's autonomy to the Central Government. Not only is such proscription a violation of basic fundamental human rights in Hong Kong, it is also a means of outlawing all types of human rights, religious, trade union, and non-government organizations deemed to be a danger to China's "national security."

The proscription proposals raise other concerns as well. The penalties for membership in proscribed organizations are unreasonable and excessive.

In addition, because the Bill fails to require any overt act that undermines national security, journalists, academics, even an interested member of society would be violating the

statute by mere attendance at a meeting. Also alarming are the provisions for closed court proceedings and the exclusion of defendant's chosen counsel, which violate relevant provisions of the Basic Law and the ICCPR.

Little consolation can be taken from the Consultation Document's statement that the Central Government is in the best position to determine which organizations are a threat to national security.

The significant political influence of the Chinese Communist Party on any administrative, prosecutorial, or judicial determination in the areas of national security or subversion, the absence of any published procedures for such determination, and the lack of transparency of Central Government proceedings undermine any confidence Hong Kong's government and its people could have in being able to enforce such determinations locally. Proscription by proxy - particularly in this area - violates the fundamental human rights guaranteed in the Basic Law and constitutes a flagrant breach of the "one country-two system" mandate.

This provision is not only in direct violation of China and Hong Kong's covenant to maintain Hong Kong's legal and political system, but is completely gratuitous since it is not even one of the activities required to be covered in Article 23.

b. Relevant U.S. Experience

The Supreme Court of the United States has recognized that the First Amendment to our Constitution embodies an implicit yet fundamental right of association. As Justice John Marshall Harlan declared, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has

more than once recognized by remarking upon the close nexus between freedom of speech and assembly..... [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama,* 357 U.S. 449, 460 (1958).

In part for this reason, the technique used against ostensibly subversive organizations within the United States historically has not been proscription of the group, but rather the imposition of criminal liability on individuals for membership in groups that met certain general definitions in a particular case. During the past century this approach was employed widely during the "red scares" that sprang from the fear of Communist subversion that spread during and after the two world wars. Two Federal statutes were especially notorious in this regard. One was the Smith Act of 1940, which among other things, made it illegal "to organize any society, group, or assembly of persons who teach advocate, or encourage the overthrow or destruction of the United States by force or violence." The other was the McCarran Act of 1950, which permitted an otherwise legal alien to be deported who was a member of the Communist Party even if the person was not aware of the Party's commitment to the violent overthrow of the government.

Today these and related Acts are either unconstitutional under the Supreme Court's current case law or, in the case of the McCarran Act, have since been repealed. Since the enactment of these and similar laws, the the Supreme Court, in the landmark decision of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), enunciated a stringent test under which "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In other words, the government cannot criminalize speech or membership in an organization based upon its message, unless first, the words used are intended and would be understood to incite immediate unlawful activity and second, the words were conveyed in circumstances in which the immediate unlawful activity would likely occur. As a practical matter, this test has made government prohibition of "dangerous words" - and membership in groups that employ dangerous words - extremely difficult.

In addition, the proscription of particular organizations also implicates the Constitution's prohibition against bills of attainder (Article I, Sections 9 and 10). At common law, a bill of attainder was essentially a punishment imposed upon an individual or set of individuals by act of the legislature without a judicial trial. As the Supreme Court has interpreted the constitutional version of this concept, an act would be an illegal bill of attainder, first, if it singled out an individual or group of individuals in order to punish them rather than for some non-punitive purpose, and second, if the measure resulted in punishment. Here, the proscription of a local group could be construed to constitute a bill of attainder since its purpose would be first, to single out a group to punish them and second, under Section 8C (i) to make participation in a proscribed organization automatically a criminal offense subject to punishment.

Finally, it is worth noting that under Subsection (2)(c), Hong Kong would enjoy less autonomy from the Central authorities than a given State of the United States would from the Federal government. Under a recent U.S. Supreme Court ruling, the Federal government may not compel executive or legislative officials of any state to implement Federal policy.

Printz v. United States, 521 U.S. 898 (1997). This is so even though the citizens of the United States elect both the President and Congress and thus have a voice in the direction of Federal policy. By contrast, Subsection (2)(c), as noted, pressures the Hong Kong Secretary for Security to further determinations made not in Hong Kong but in Beijing, and it does so without Hong Kong residents having the opportunity to elect representatives to the National People's Congress directly.

SECTION "2A. SUBVERSION" AND RELATED SECTIONS AMENDING THE CRIMES ORDINANCE

a. Drafting Concerns

Article 39 of the Basic Law, constitutionally entrenching the ICCPR within the Hong Kong Special Administrative Region, mandates that "[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law." "Prescription by law" requires more than mere codification; it necessitates the compliance of such legislation comport with generally accepted principles of the Rule of Law.

The proposed Section 2A is overbroad, does not satisfy the constitutional requirement of "prescription by law" set forth in Article 39 of the Basic Law and suffers from several other basic defects that violate well established legal principles underlying national security legislation.

The proposed offenses comprising the crime of subversion, specifically, the use of the terms "disestablish" in Subsection (1)(a), "intimidate" in Subsection (1)(c) and "serious criminal means" in Subsection (1), are ambiguous, overbroad and vague, making it impossible for one to know whether his or her contemplated action would violate the law.

It is unclear what Subsection (l)(a), proscribing the "disestablish[ment of] the basic system of the People's Republic of China," criminalizes. This "disestablishment" concept is not defined in the proposed legislation and the Hong Kong Bar Association has stated that it is not a known concept under Hong Kong law.[2] Subsection (l)(c), proscribing "intimidat[ion of] the Central Government," is similarly vague and ambiguous leaving unclear what it means to "intimidate the Central Government." Again, the "intimidation" concept is not defined in the proposed legislation and is unknown under Hong Kong law.[3]

Proposed Section 2A further provides that the means by which the crime of subversion is committed must fall within one of three categories: (1) use of force, (2) use of "serious criminal means that seriously endangers the stability of the People's Republic of China" or (3) engaging in war. While the proposed legislation provides a definition of "serious criminal means," such definition remains vague and overbroad. Representatives of the H.K.S.A.R.G. have addressed the vagueness of this concept and stated publicly that "serious criminal means" refer to offenses of a grave nature and refer to acts akin to terrorism.[4] Nonetheless, the plain language of the definition found in the text of the proposed Section 2A, particularly in Subsection (4)(b)(iv) and (v), is broad enough to encompass acts beyond those "akin to terrorism," acts that would otherwise be considered legitimate. For example, the accidental destruction of property or disruption of an electronic system while participating in an otherwise

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2 Hong Kong Bar Association's Response to the Consultation Document on the Proposals to Implement Article 23 of the Basic Law ("HK Bar Response").

3 Id.

4 H.K.S.A.R.G. Press Release, 12/8/02, "More BL 23 Offences Explained"

peaceful demonstration in front of a Central Government office located in Hong Kong (or elsewhere) could be argued to fit within the language of the proposed amendment.

b. Relevant U.S. Experience

Beyond the vague, imprecise, and overbroad language employed in the proposed Section 2A, the provision remains deficient in other regards. The U. S. experience with legislation regulating subversive activities during the World War II and post-World War II eras[5] is instructive. While certain aspects of such legislation remain in force in the United States, the reach of the original legislation has been constrained through repeal of certain provisions and through judicial interpretation narrowing the application of such legislation. See *Yates v. United States*, 354 U.S. 298, 320 (1957); and *Scales v. United States*, 367 U.S. 203, 209 (1961).

U.S. courts interpreting such anti-subversive activity legislation require, in addition to proof of the offense elements laid out in the clear language of such legislation: (1) a showing of the intent to overthrow the government by use of force and (2) a determination that the action in question presents a "clear and present danger" to the government's stability and security within a limited or "imminent" time frame. See *Brandenburg*, *supra*. Accordingly, the Association further suggests that the proposed Section 2A import the requirements of intent to commit the substantive offense and the presentation of a "clear and present danger" as elements of the offense of subversion.

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5 The Smith Act of 1940, the Internal Security Act of 1950 (also known as the McCarran Act of 1950) and the Communist Control Act of 1954. See *Supra*.

SECTION "9A. SEDITION" AND RELATED SECTIONS AMENDING THE CRIMES ORDINANCE

a. Drafting Concerns

Section 9A of the proposed law prohibits the inciting of others to commit treason, subversion or secession, or "to engag[e] in violent public disorder that would seriously endanger the stability of the People's Republic of China."

Section 9C outlaws publishing, selling, distributing, displaying, printing, reproducing, importing or exporting any "seditious publications," meaning publications "likely to cause" treason, subversion or secession.

We believe that Section 9A, which criminalizes the act of inciting others to commit certain specified illegal acts, is so broad that it intimidates the exercise of fundamental human rights in the absence of a clear nexus between the incitement and the likelihood of the incitement resulting in the specified prohibited acts. Criminalizing the incitement of others to engage - in Hong Kong or elsewhere - in violent public disorder endangering the stability of the People's Republic of China has the similar defect of impeding freedom of speech, press and assembly outside of Hong Kong and of affecting non-Hong Kong citizens. We recommend that Section 9A be eliminated, and that, where necessary, prosecutors simply rely upon existing laws concerning "aiding and abetting" crimes.

Further, we recommend that Section 9C, which concerns "handling seditious publications" be eliminated in its entirety as a blatant violation of freedom of the press. Vague terms such as "likely to cause the commission of an offense" provide little or no guidance and sweep vast categories of political and civic actions within the reach of super-attenuated causation. Amorphous crimes such as publication "with intent to incite others by means of the

publication" are clearly restrictions of the fundamental right to a free press under the Basic Law. Moreover, the limited acts specifically permitted under the law would preclude a wide range of legitimate activities.

Although Section 9D does purport to provide a "safe harbor" for certain "prescribed acts," they are vague, subjective and limited in scope.

Anti-sedition laws may have been permitted under Hong Kong's colonial rule, which had no explicit constitutional protection for the rights to free speech, press, assembly or association and which allowed these acts only to the extent permitted by Parliament. Hong Kong now has a written constitution, however, that expressly protects these rights, and they cannot be abridged by the Government except in the most pressing cases where the danger to "national security" is clear and present.

b. Relevant U.S. Experience

Such broadly worded sedition laws are inconsistent with democracy because they criminalize legitimate criticism of the government and its officials, as demonstrated by the United States' negative experience with anti-sedition laws. Although freedom of speech, assembly and the press are expressly protected under the First Amendment to the United States Constitution, the United States enacted a Sedition Act in 1798. The Sedition Act prohibited persons from opposing government measures, intimidating government officials or counseling others to do so. The Sedition Act also targeted seditious publications, which it broadly defined as publications that might bring the government or government officials "into contempt or disrepute." Thus the 1798 Sedition Act contained similarly vague terms as the proposed Sedition

and Seditious Publications provisions of the Bill and prohibited not only armed resistance to, but also simple criticism of, government officers, acts and legislation.

President John Adams and the Federalist majority in Congress justified the laws as necessary to protect American citizens against foreign interference during a time of tension with France, but it was a clear attempt to suppress Thomas Jefferson's nascent political party and gag criticism of the government.

The actual implementation of the Sedition Act demonstrates the high risk of arbitrary and capricious enforcement of legislation concerning speech. In its short life, there were 25 arrests, 12 trials and 11 convictions (resulting in fines and imprisonment), including of prominent journalists and even Congressmen. Although the Sedition Law provided that the truth of a statement was a defense, Federalist judges instructed grand juries to disregard that defense in determining whether to bring an indictment. Moreover, although the Supreme Court never addressed the obvious conflict between the Sedition Law and the First Amendment, Supreme Court justices, who also served as trial judges, instructed grand juries that as a matter of law the Sedition Act was not unconstitutional.

Although the Sedition Law expired of its own terms on the last day of President Adams' single term and was not renewed with a newly elected President Thomas Jefferson and Congress in office, America's misguided experiment with sedition laws did not end in 1801. Laws punishing sedition were enacted during the American Civil War (by both sides) and World War I, but these were repealed after those conflicts ended. Even today the United States prohibits "seditious conspiracy," but in contrast to earlier Sedition Laws and to the proposed Hong Kong law, the presence of "force or violence" are necessary for an act to be seditious,

rather than the mere presence of speech. This concept is firmly established in American constitutional law. *See Brandenburg v. Ohio, supra.*

SECTION "16A. INFORMATION RELATED TO HONG KONG AFFAIRS WITHIN THE RESPONSIBILITY OF THE CENTRAL AUTHORITIES" AMENDING THE OFFICIAL SECRETS ACT

a. Drafting Concerns

The sweeping language of Section 16A expands what would be deemed an "official secret" in so overbroad and vague a manner that it would chill the robust exercise of free speech necessary in a democratic society. Under Section 16A(1) a current or past government official or contractor would commit a criminal offense if he or she made an unauthorized and "damaging" disclosure of "any information, document or other article" which Subsection (1)(a) defines as relating "to any affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Authorities." Presumably, Subsection (1)(a)'s definition therefore covers anything relating to foreign affairs, defense and the military, and even the selection of the Chief Executive, since the Basic Law specifies that all these matters are the responsibility of the Central Government.

Moreover, the additional language meant to limit Section 16A is likewise unclear. In particular, Subsection (2)'s definition of "damaging disclosure" first specifies that it must (a) "endanger national security," or (b) be "of such a nature that its unauthorized disclosure would be likely to endanger national security." No attempt is made to further specify what comprises "endangering," what constitutes "national security," or what would be the sufficient degree of "likelihood" or imminence for the purposes of the provision. In this light, Subsection (3)'s affirmative defense that a person may prove that he or she did not know or have reasonable cause

to believe that the disclosed information was subject to these prohibitions offers no more guidance than the prohibitions themselves.

As a result, any number of troubling applications of Section 16A appear plausible. Divulging documents about the temporary refusal to allow the docking of a certain nation's naval vessels in Hong Kong harbor, or even the potential international impact of the newly identified disease SARS, would conceivably relate to foreign affairs, a matter for the mainland authorities and further "endanger" national security by causing those authorities to be embarrassed or by revealing aspects of their decision-making process. Similar analysis could apply to releasing internal documents critical of the selection of the Chief Executive.

b. Relevant U.S. Experience

A provision such as Section 16A would immediately implicate constitutional requirements that statutes restricting speech be narrowly drafted and precise. To safeguard the First Amendment's guarantees of free speech and a free press, U.S. courts will strike down statutes that are so "overbroad" that they prohibit speech that should be protected, such as political debate, even if they reach other expression that would not, for example, statements that further a criminal conspiracy. For similar reasons, statutes can also be declared void for "vagueness" when they fail to give the public a clear idea of what actions or statements will be considered criminal and those that will not.

To avoid these rules against "overbreadth" and "vagueness," U.S. statutes dealing with official secrets or national security information are far more precise than the proposed Bill. One approach is to prohibit government employees from divulging information that specifically has been "classified" under previously set forth standards and procedures. 50 U.S.C. sec. 783.

Another is for the statute itself to provide procedures for classification in substantial detail. 18 U.S.C. sec. 793. Other provisions in fact do both. 18 U.S.C. sec. 798.

Beyond vagueness and overbreadth, even a precise statute will be read to define the term "national security" narrowly. In the famous "Pentagon Papers" case, the Supreme Court refused to prevent the publication of 47 volumes of often embarrassing Defense Department analysis of U.S. policy in the Vietnam War, rejecting the government's claim that this information would endanger national security. *New York Times v. United States*, 403 U.S. 713 (1973). The Court did so, moreover, even though the war was still going on. Conversely, the instances in which U.S. courts have or would have allowed prior restraint of publication have been extreme: in one instance the publication of how to build an H-Bomb and in another, of a book by a CIA agent that failed to clear information under the terms of an express employment agreement.

Nor are the free speech rights of public employees any less than that of the general public when it comes to matters of public concern. While the government may discipline or dismiss workers for statements that disrupt the workplace, the same First Amendment protections that apply to citizens in general apply to government workers when it comes to commenting upon the government in general. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

To the extent that Section 16A expands the official secrets that the press cannot report, this result would likewise be inconsistent with the First Amendment were a similar measure to be enacted in the United States. The "Pentagon Papers" case remains a landmark in demonstrating how far the media can proceed in the face of government claims concerning national security. In addition, the Supreme Court more recently has held expressly that the press

is free to publish material that it has lawfully obtained even when the source that provided it obtained the information illegally. *Bartnicki v. Vopper*, 532 U.S. 514 (2000).

Finally, we should note that Congress has attempted to balance whatever restrictions it has placed upon disclosure of sensitive information with the promulgation of the Freedom of Information Act. 5 U.S.C. sec. 552. This law gives any person the right to request and receive Federal agency records or information. Here the chief relevant exception relates to matters specifically authorized under standards established by Presidential order to be classified in the interest of national defense or foreign policy and properly classified under those standards. In short, the government can legitimately maintain national security secrets not through a vague general provision, but only by following previously set out criteria and procedures in each instance.

SECTION "2. TREASON" AMENDING THE CRIMES ORDINANCE

a. Drafting Concerns

The drafters of the Treason Clause of the United States Constitution were influenced by experiences that taught them to fear the abuse of the treason statute as much as the crime itself. It is from this perspective that the Association expresses its concern over Sections 2(l)(b) & (c) of the Bill.

In particular, the use of the term "instigating" in Section 2(l)(b) provides broad latitude to arrest under a charge of treason any dissident who may have spoken out against official government policy prior to the onset of hostilities with a foreign state. In no place does the statute explain what "instigation" consists of, or how clear or direct the relationship between an allegedly inciting act and foreign military action must be. Nor does the statute explain what

degree of intent a potential defendant might need in order to be convicted. The breadth of this term would chill public discourse at precisely the time that it would be most necessary, and could lead to a charge of treason against lawmakers, politicians, and even military officials, who might have unsuccessfully attempted to broker peace.

Section 2(l)(c) raises similar concerns. The broadness of its language would facilitate the arrest and indictment of any dissident who might express opposition to military action in which China might be engaged, whether offensive or defensive. Equally troublesome is the fact that this legislation could be used to arrest and charge legal advocates of persons accused of treason or otherwise accused of crimes against the state. By way of illustration, were the United States to enact legislation similar to Section 2(l)(c), individuals and members of the media who have protested or otherwise opposed the current war in Iraq could be arrested and charged with treason, as could the attorneys engaged in their defense.

Clearly, such overbroad language is not necessary for the national security of Hong Kong or the People's Republic of China, nor would such legislation even serve to further their interests, as it would significantly harm the international community's perception of Hong Kong as a free and open society - the primary characteristic that serves to encourage foreign investment and business activity in Hong Kong.

b. Relevant U.S. Experience

The stability and security of the United States confirms that a narrowly tailored treason law does not compromise national security. The crime of treason, the only crime specifically defined by the U.S. Constitution (Art. III, § 3), is as follows:

> Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court.
>
> The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work corruption of Blood or Forfeiture except during the life of the person attainted.

The framers of the Constitution were faced with the dilemma of protecting the United States from treasonous acts while simultaneously protecting against the abuse of treason statutes they had experienced under colonial rule. The landmark case of *Cramer v. United States*, 325 U.S. 1, 27, (1945) identifies two specific dangers against which the drafters of the treason clause sought to defend, "(1) Perversion by established authority to repress peaceful political opposition; and (2) Conviction of the innocent as a result of perjury, passion, or inadequate evidence." Thus, one interest is restricting the scope of the application of the clause, the second interest is procedural in nature, intended to protect against abusive application of the law.

How then does the language of this clause protect the aforementioned interests? The simplicity of the clause belies its effectiveness. The use of the word "only" in the first sentence of the clause prohibits expansion of the crime of the treason by the legislature. See *Cramer* at 24. The crime of treason is therefore restricted exclusively to those acts consisting of waging war against the United States, or rendering aid and comfort to an enemy *and* adherence to that enemy. Thus, unwittingly providing aid to an enemy of the state at a time of war, or intentionally providing such assistance without overtly allying oneself to the cause of that enemy, cannot constitute treason. In this manner, political activity involving opposition to

official government policy - even in a time of war - cannot constitute treason, even where such activity might give "aid and comfort" to enemies of the United States.

Similarly, the requirement of an "overt act" further serves to ensure that mere thoughts and ideas cannot constitute the basis of a treason conviction. Further protection against abuse is found in the requirement that there be two witnesses to the same "overt act" that forms the basis of the alleged treason. It should be noted that the limitation of treason to cases involving both an overt act and adherence to the enemy cause, dates back to the statutes of Edward IV (c. 12.5 and 6), and thus forms part of the common law tradition of which Hong Kong is a part.

In view of the strictly drawn provision in the Treason clause of our Constitution, cases and convictions for treason are rare, the most famous being *United States v. Burr*, 25 Fed. Cas. 55, no. 14,693 (C.C.D. Va. 1807) in which the Supreme Court, in a lengthy opinion, found former Vice President Aaron Burr not guilty.

CONCLUSIONS AND RECOMMENDATIONS

The Bill, as national security legislation in a constitutional framework, is, in our view, in need of more careful drafting, and in many respects beyond the mandate of Article 23.

Many substantive provisions, including the definitions of treason, subversion, sedition and secession, are overly broad and vague; use terms unknown to common law jurisprudence; can be applied to criminalize the exercise of fundamental human rights; create a chilling effect on freedom of speech, press, assembly and association; and grant wide discretion

to government officials to restrict individuals and groups deemed offensive to Hong Kong or Central Government officials.

The sections on proscription of organizations suffer from the same defects and infringe on Hong Kong's autonomy by permitting the Central Government to undermine the principle of "one country - two systems." It also is beyond the mandate of Article 23.

The Official Secrets provisions are a carry-over from authoritarian colonial rule and run contrary to the need for greater - not less - transparency in government, the bedrock of a democratic society.

From our perspective, the Bill threatens rights embedded in the Basic Law.

This Bill, as presently drawn, will result in years of costly litigation while creating doubts as to Hong Kong's commitment to fundamental human rights.

We strongly recommend that the Legislative Council, with the advice of advisors experienced in constitutional law and national security, redraft with greater clarity the provisions referred to above, with the view to enacting a new, simple national security law which all will agree can be labeled with pride "Made in Hong Kong."

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New York, New York

Respectfully submitted by:

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