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Amnesty International Hong Kong Section

On the enactment of Article 23 Legislation in Hong Kong

The proposed legislation is described as:

“A Bill to amend the Crimes Ordinance, the Official Secrets Ordinance and the Societies Ordinance pursuant to the obligation imposed by Article 23 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and to provide for related, incidental and consequential amendments.”

These proposals represent the HKSAR government’s response to Article 23 of the Basic Law of Hong Kong:

“The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any acts 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 from the Region from establishing ties with foreign political organizations or bodies”

Amnesty International remains deeply concerned over much of the proposed legislation and is also disappointed and disturbed by the handling of the public consultation process and the apparent desire by the HK SAR government to push this important piece of legislation into existence without according it appropriate attention and discussion.

General Concerns

Amnesty International believes that the proposed legislation goes further in its amendments to the various existing ordinances than the obligation imposed by Article 23 actually requires. In addition, Amnesty International believes that proposed revisions to some existing and controversial legislation such as articles in the Societies Ordinance relating to proscription of societies exacerbates legislation which is already overly restrictive of fundamental human rights.

Several aspects of the draft legislation, including key definitions, remain too vague and expansive to be satisfactory. Assurances from the Hong Kong government that such wide-ranging legislation will not be used to limit fundamental freedoms, while welcome, are no substitute for a clear and tightly defined Ordinance, which will do more to allay fears than the

words of the Secretary of Security.

Article 23 implicates fundamental human rights and legislation passed on it should be clearly and narrowly defined so as to limit disproportionate restrictions, avoid criminalizing the exercise of fundamental freedoms and facilitate public certainty about what exactly constitutes a criminal offence. Amnesty feels that the proposed legislation is not sufficiently clear and well defined, and its enactment in its present form could result in abusive prosecutions.

Several offences, as currently drafted, appear to be at risk of conflicting with fundamental freedoms contained within the International Covenant on Civil and Political Rights (ICCPR) as well as with the rights of Hong Kong people to exercise freedom of association and expression under the Basic Law of the Hong Kong SAR.

Amnesty believes that several clauses' within the draft legislation seriously erode the principle of "One Country-Two Systems", which is enshrined in the Basic Law, by introducing vaguely defined PRC legal concepts, asserting the supremacy of PRC interpretations on proscribed societies over Hong Kong definitions and traditions. This has serious repercussions for the whole future of "One Country-Two Systems" and the independence of the Hong Kong SAR legal system. The retention of such clauses, together with the vague and ill-defined nature of the proposed legislation increases the possibility that this piece of legislation could be used to suppress freedom of speech and association in the future. Additionally the government's apparent need to push through legislation by July 2003 seriously undermines any prospect of full and informed debate on the bill and limits the possibility for substantive legislative revisions to be incorporated into the proposals.

Concerns about the Consultation Process (September 1 to December 24, 2002)

As Amnesty International and many other groups noted, the public consultation process was limited from the outset by the decision to publish an outline of the proposed legislation rather than a White Bill which would have enabled groups to focus on concrete proposals made by the government. The consultation document was vague, ill-defined and contained misleading and inaccurate references to other state and international legislation. Given the limitations this placed on the public consultation and the widespread calls by groups and individuals in Hong Kong for a White Bill, Amnesty International was disappointed the Hong Kong government decided not to introduce a White Bill on the proposed Article 23 legislation.

The consultation process was a source of great concern, with many detailed submissions and advice being rejected out of hand by government spokespersons. The government Compendium of Submissions (the Compendium) presented during the consultation process was deeply flawed: many submissions were not included in the Compendium. For example, Amnesty International's submission, though mentioned in the foreword to the compendium was not, in fact, included. We, along with many other groups, were appalled that submissions made to the Legislative Council (Legco) security panel on 14 December 2002 were not included in the Compendium. We believe this omission reflects the lack of respect afforded to the public submissions and to members of Legco.

The classification of many of the submissions was also flawed. Many submissions which were clearly opposed to the passing of the proposed legislation as it stood, were listed as being "unclear" in their views on the legislation. Amnesty International is disappointed that the Hong Kong SAR government appears to have failed to use the three-month consultation period thoroughly to study and follow up on the work done by the hundreds of groups in Hong Kong and overseas and instead chose, in some instances, to exclude the advice proffered by these

groups.

The publication of an incomplete compendium of submissions, and the incorrect classification of submissions appear to reveal a lack of a real commitment to consult the public and to incorporate the results of such consultation into the debate on the proposed legislation. In these circumstances, the sincerity of the HK SAR Government's motives in consulting the public has to be questioned.

Revisions made to the Proposed Legislation

Amnesty International has many concerns about the proposed legislation set out in the Blue Bill. These include concerns over provisions which have not been revised or narrowed since their inclusion in the Consultation document, and problematic new additions to the legislation. Despite these concerns Amnesty International welcomes many of the changes made by the government to the legislative proposals set out in the Consultation document. In particular, we welcome with caution the decision to remove from the proposals the archaic offence of misprision of treason. We remain concerned that this offence may well be covered *de facto* by other amendments to the existing legislation. We also are glad to see the removal of the unacceptable offence of possession of seditious publications and some of the revisions made to the definition of links between mainland groups and Hong Kong groups. However, Amnesty International believes that continued inclusion of the offence of handling seditious materials and the proposal to proscribe groups banned in the mainland remain unacceptable as currently drafted.

Specific Concerns

Treason, Subversion and Secession

To ensure that the offences of Treason, Sedition and Subversion are not used to limit fundamental freedoms and to ensure that the population of Hong Kong are clear about what constitutes an offence, the definition of all three needs further revision and clarification. Without such clarification, the offence of sedition, incitement to sedition and handling seditious publications will also remain ambiguous.

In particular several areas of concern remain which were highlighted in the submission made by Amnesty International to Legco on 12 December 2002. (AI Document No: ASA 19/003/2003). Within the three definitions of treason, subversion and secession, there are still ambiguities requiring further clarification. For example, it is still not clear what is meant by the terms "intimidate" or "compel" the Central People's Government (CPG). Nor has the definition of the CPG been adequately clarified. As it stands, the term "CPG" could also be applied to provincial and local government offices, raising the possibility that a campaign or an action against a particular ministry, bureau or provincial body may well be taken as a campaign designed to "intimidate the Central People's Government".

The definition of "serious criminal means" in the clauses on secession and sedition remains disturbingly expansive.

Treason

The proposed amendments to the Crimes Ordinance, Section 2, are as follows:

“Treason

(1) A Chinese national commits treason if he-

(2)(a) with intent to-

(i) overthrow the Central People’s Government;

(ii) intimidate the Central People’s Government, or

(iii) to compel the Central People’s Government to change its policies or measures,

joins or is part of foreign armed forces at war with the People’s Republic of China,

(b) instigates foreign armed forces to invade the People’s Republic of China with force; or

(c) assists any public enemy at war with the People’s Republic of China by doing any act with intent to prejudice the position of the People’s Republic of China in the war...”

The terms “intimidate and “compel” need to be removed or significantly narrowed. Although, there has been some welcome narrowing of this amendment from the original draft version in the Consultation Document, the definition of this offence remains extremely broad and could potentially be used against groups or individuals who do not use or advocate violence. In particular Amnesty International is concerned about the (2 (1) (c)) which refers to the offence of assisting “any public enemy at war with the People’s Republic of China by doing any act with intent to prejudice the position of the People’s Republic of China in the war”. This could be taken to include mass demonstrations to in Hong Kong against a war between the PRC and another state or, for example, if war erupts between Taiwan and the PRC. In addition, acts of humanitarian assistance to an enemy of the PRC in time of war should be clearly excluded from the offence of treason. In order to avoid the peaceful expression of views on any such war being classified as treasonable offences, the offence of “treason” should be more narrowly defined to refer to specific acts of war and violent hostilities.

Subversion

The Proposed Amendments to the Crimes Ordinance, Section 2, are as follows:

2A Subversion

(1) A person commits subversion if he-

(a) disestablishes the basic system of the People’s Republic of China as established by the Constitution of the People’s Republic of China;

(b) overthrows the Central People’s Government; or

(c) intimidates the Central People’s Government;

by using force or serious criminal means that seriously endangers the stability of the People’s Republic of China or by engaging in war...”

The definition of subversion is still overly vague. As discussed earlier, the term “intimidate” remains ambiguous. The term “force or serious criminal means” remains too encompassing and still includes action which “seriously endangers the health or safety of the public or a section of the public” or which “seriously interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private)”. Amnesty International believes this delineation of serious criminal means remains too expansive as it could potentially include the actions of groups organizing mass demonstrations which disrupt traffic, legitimate workers or trade union action, or the use of electronic systems such as mass email actions to try to change the policies of the CPG.

Without tighter definitions of this terminology, subversion, as well as sedition and succession could easily be used to silence political opponents and be detrimental to the diverse civil society which is a hallmark of Hong Kong.

Sedition

The proposed amendments to the “Provisions of the Crimes Ordinance, section 2 are as follows:

9A Sedition

(1) A person commits sedition if subject to Section 9D, he-

(a) incites others to commit an offence under Section 2 (treason), 2A (subversion) or 2B (Secession); or

(b) incites others to engage, in Hong Kong or elsewhere, in violent public disorder that would seriously endanger the stability of the People’s Republic of China.”

Section 9D Certain acts are not incitement

A person shall not be regarded as committing sedition in the following cases;

“(a) showing that the Central People’s Government or the Government of the Hong Kong SAR has been misled or mistaken in any of its measures;

(b) pointing out errors or defects-

(i) in the government or constitution of

(ii) in the laws of; or

(iii) in the administration of justice in,

the People’s Republic of China or the Hong Kong Special Administrative Region with a view to the remedying of such errors or defects;

(c) persuading members of the public in the People’s Republic of China or in the Hong Kong Special Administrative Region to attempt to procure, by lawful means, the alteration of any matter provided for in the law of the People’s Republic of China or of the Hong Kong Special Administrative Region, as the case may be; or

(d) pointing out any matter which is producing or has a tendency to produce feelings of ill-will or enmity between the different classes of the population of the People’s Republic of China or of the Hong Kong Special Administrative Region with a view, to the removal of such matter .”

Amnesty International reiterates the call made in our earlier submission to Legco that the offence of sedition be removed from the legislative proposals. Sedition is a crime of speaking words against the state and has long been used as a tool to suppress dissent and imprison dissidents and others for peacefully exercising their rights to freedom of expression and association. It has origins from the 1600’s in England, and the offence was a concomitant of the once prevalent view that rulers were superior beings exercising a divine mandate, beyond the reproach of the common people. It has been removed from the legislation in many countries and in countries where it is retained it is generally no longer used. Introducing it in Hong Kong would be a retrograde step.

Amnesty International believes that the offence of Sedition should be omitted from the proposals for several reasons, including the fact that it duplicates other offences. If the proposed offence of Sedition 9 (A (1) (a)) is intended to refer to incitement to commit other offences such as treason or secession and, as such, to include incitement to commit violence or murder, then this [incitement to-violence] could be covered by other legislation.

The concept of “incitement” in the proposal is vague and unclear resulting in uncertainty in the law, which is contrary to the government’s own “Guiding Principles” in proposing this legislation. When combined with the potential scope of the offences of secession or treason, the legislation could be open to abusive prosecutions infringing upon human rights.

Furthermore the proposed offence does not comply with the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which state that expression might be punished only if the government can demonstrate the expression was intended to incite imminent violence, the expression was very likely to incite such violence, and there was direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Given the broad application in the mainland of the concept of “*seriously endangering the People’s Republic of China*”, legitimate public concern remains about its use in Sedition as currently drafted in 9 (A (1) (b)). Without further clarification, this could include groups or people encouraging or urging people to participate in anti-war demonstrations directed at China or campaigns commemorating the events in China in 1989.

The provisions relating to **handling seditious publications** are also of great concern to Amnesty International. While we do welcome the removal of the charges of possession of seditious publications, we note that the draft legislation continues to include provisions relating to the handling of such materials, namely the possibility of prosecution for anyone who publishes, sells, offers for sale, distributes or displays seditious materials. These provisions go far beyond requirements under Article 23 of the Basic Law and could seriously erode the right of Hong Kong’s media, journalists, academics, libraries and NGOs to collect, research, publish and distribute important but controversial materials, such as information considered to be subversive in the PRC.

Amnesty International is also concerned with the definition of a “seditious publication” in the proposed section 9C(1) the Crimes Ordinance as being a publication which “*is likely to cause the commission of an offence under section 2 (treason), 2A (subversion) or 2B (secession)*.” Such a low and ambiguous low threshold of causality means the offence could be used widely, limiting basic rights to freedom of expression and information.

Freedom of Information Issues

Provisions of the Official Secrets Ordinance (Cap .52 1) part 3 16a (concerning information related to Hong Kong affairs within the responsibility of the Central Authorities).

The projected area of information covered by this offence is still too broad and its application remains open to wide interpretation. There is insufficient clarification of the concepts of “damaging disclosure” and “endangering national security”. Only with further definition of these concepts will civil society, academics, information specialists and journalists in particular be confident over exactly what information is to be protected.

In addition, Amnesty International would like to see, as a further safeguard against the imprisonment of people for legitimate exercise of freedom of expression and information including the expression of conscientiously held beliefs, the ability of defendants to rely on the defence of “public interest” when prosecuted for revealing information.

Proscription of Societies

The proposed legislation is as follows:

Section 8A Proscription of organizations endangering national security

- (1) *The Secretary for Security may by order proscribe any local organization to which this section applies if he reasonably believes that the proscription is necessary in the interest of national security and is proportionate for such purpose.*
- (2) *This section applies to any local organization*
 - (i) *the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit an offence of spying;*
 - (ii) *which has committed or is attempting to commit treason, subversion secession or sedition or an offence of spying; or*
 - (iii) *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 law of the People's Republic of China."*

Amnesty International has serious concerns about these provisions and believes that they go far beyond what is called for in Article 23 and introduce into Hong Kong PRC legal definitions and standards, contrary to the principle of "One County-Two Systems". There is nothing in Article 23 which calls for the HK SAR Government to proscribe local organizations or defer to mainland proscription of organizations. Article 23 only refers to the need to proscribe foreign political organizations or for local organizations that have ties to foreign political organizations.

The draft legislation gives additional powers to the Secretary for Security to proscribe an organization if he or she "reasonably believes" that the proscription is necessary in the interests of national security and is proportionate for such purposes. Amnesty International believes that the need to legislate against groups as outlined in Article 23 is already more than adequately covered by existing legislation including the recent Anti-Terrorist legislation, the Societies Ordinance on grounds of national security and by existing power of the Chief Executive to ask the courts to proscribe a group. Amnesty International believes that there is no need to add further legislation to cover the proscription of societies.

In addition the organization or groups proscribed do not have adequate opportunity prior to proscription to make representations and will in fact denied the opportunity to make such representations should the Secretary for Security "reasonably believe" that such an opportunity is not practicable. Appeals against proscription include appeals on the grounds that the evidence is insufficient to prove the group or organization in question falls in section 8A (2) A,B, or C. It would be extremely difficult to appeal as the definition of such groups is so wide ranging and the Secretary for Security need only have "reasonable belief" that the group is engaged in treason or similar activities. It will also be very difficult for any group to actually make an appeal against proscription on the grounds of 8A (1) c as this proscription depends solely on whether or not it has been proscribed in Chinese mainland law on the grounds of national security.

Punishments are overly harsh and include imprisonment for up to three years for any person who is a member of a proscribed organization.

The introduction of provisions on groups with links to organizations proscribed on the mainland goes beyond the terms of Article 23 and allows for PRC concepts of national security to take precedence in the HK SAR. Although Amnesty International welcomes the narrowing of the definition of the relationship between groups in Hong Kong and proscribed groups in the

mainland, the current definition is still too loose could have very serious repercussions for Hong Kong as a centre for study, research, debate, and civil society activism about the full diversity of issues on the mainland. This offence could seriously impede the freedom of expression and association of exiled mainland dissidents in Hong Kong.

Fair Trials

Proposed amendments to the Societies Ordinance: Before proscribing an organization, the Secretary for Security must afford the organization an opportunity to be heard or to make representations in writing unless:

“8B (2) ... Where the Secretary for Security reasonably believes that affording the organization an opportunity to be heard or to make representations in writing would not be practicable in the circumstances of the case.

8D appeal against proscription

(5) If in the course of any proceeding before the Court of the First Instance, the court is satisfied, upon application by the Secretary for Security, that the publication of any evidence to be given or any statement to be made in the course of the proceedings might prejudice national security; the Court may order that all or any portion of the public shall be excluded during any part of the hearing so as to avoid such publication.

8E Chief Justice may make rules for appeals which include

8E (3) (a) enabling proceedings to take place without the appellant being given full particulars of the reasons for the proscription in question,

(b) enabling the Court of First Instance to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him; and

(c) enabling the Court of First Instance to give the appellant a summary of any evidence taken in his absence”.

Amnesty International is strongly opposed to any use of trials in camera and in absentia which restrict universally respected rights to fair trials unless they strictly comply with the narrow limits placed on their use set out in the ICCPR. Amnesty International notes that certain similar provisions were included in the draft Anti-Terrorism Legislation but subsequently amended after debate and criticism. Amnesty International very much hopes that these provisions will be removed from this proposed legislation, in the interests of protecting the fundamental rights of Hong Kong citizens and fulfilling the responsibility of the Hong Kong SAR government to uphold the relevant articles of the Basic Law protecting the rights to fair trials.

Amnesty International is concerned at the proposed amendments to the Societies Ordinance that the government may make provisions *“enabling proceedings to take place without the appellant being given full particulars of the reasons for the proscription in question”* and 8E(3) (b) that the *“Court of First Instance may hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him”*. Amnesty again urges the Hong Kong SAR Government to be mindful of its obligations under international standards and Article 35 of the Basic Law to accord the right to adequate legal defense for defendants. To deny people the right to know the reasons for proscription and to hold hearings without either themselves or their lawyers being present runs counter to internationally recognized legal standards.

Investigation Powers

Amnesty International remains concerned at the additional powers contained in the draft

legislation given to police officers of or above the rank of chief superintendent if they reasonably believe” that offences have been or are being committed to search, and remove evidence from private premises. The term “reasonably believe” needs to be further defined. In addition, to protect fundamental rights of privacy the police should make an application to a magistrate before searching and removing evidence.

Amnesty International reminds the HK SAR Government that such powers must be consistent with Articles 29 of the Basic Law which require substantive and procedural safeguards against unnecessary police intrusion and promotes privacy; *“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of or intrusion into, a resident’s home or other premises shall be prohibited.”*

Conclusions

Amnesty International notes that the parts of the three main ordinances amended by this draft legislation are subject to a clause which directly refers to the supremacy of Article 39 of the Basic Law. Amnesty International welcomes the apparent desire by the Hong Kong SAR government to reassure its citizens that legislation passed for Article 23 will conform to Article 39 which reads:

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.”

However, Amnesty also reminds the government that, under the Basic Law, all legislation must conform with all Articles of the Basic Law and not simply to Article 39. We urge the government to ensure that any legislation passed on Article 23 also conforms with Articles 9, 14, 19, 21 and 22 of the Basic Law covering fair trials, freedom of expression and association. In addition, Amnesty urges the government to uphold its obligations to the International Covenant on Civil and Political Rights and in particular to be mindful of its obligations under articles 9,14,15,19,21, and 22 and the need to ensure that any limits on those freedoms conform to the narrow limitations set out in Article 4 of the ICCPR.

Amnesty International continues to support the calls made by numerous groups for the introduction of a White Bill or, failing that, for the proposed legislation to undergo a more thorough and extensive consultation period that the proposed timetable allows for.

There appears to be no objective necessity for the legislation to be rushed through the legislative process and indeed, legislation on Article 23 is so important and potentially damaging to basic human rights that Amnesty International believes there must be further opportunity for public debate and for the government of the HK SAR to further revise its proposals to ensure any legislation on Article 23 conforms to the ICCPR and the Basic Law.

Amnesty International believes that unless the proposed legislation is revised and clarified, there remains a great potential for widespread abuse and a dramatic reduction in the protection and promotion of the rights of Hong Kong citizens to exercise their fundamental rights of freedom of expression, information and association. We sincerely hope the Hong Kong SAR Government will adopt the recommendations outlined in this submission and those contained in other submissions by bodies that include the Hong Kong Bar Association.