Proposals to Implement Article 23 Broadly Consistent with Johannesburg Principles

Objective

This note explains why the legislative proposals to implement Article 23 of the Basic Law are already broadly consistent with the Johannesburg Principles, in response to the request raised at the joint meeting of the Panel on Security and Panel on Administration of Justice and Legal Services on 6 February 2003.

Introduction

2. The Government was determined to comply with the human rights guarantees contained in the International Covenant on Civil and Political Rights (ICCPR). This is required by the Basic Law.

3. There are views that full compliance with our human rights obligations is not sufficient; and that our laws should also comply with the Johannesburg Principles. This is notwithstanding that the principles do not belong to any international covenants and are not binding on the HKSAR, and even the advocates of the principles are unable to point to any other jurisdiction or country which has adopted that standard or which has laws which fully comply with the Principles. Nevertheless, we recognise that the Johannesburg Principles provide a useful benchmark against which the proposals may be judged.

4. Broadly speaking, the Article 23 proposals comply with most of the Principles. For example, Principle 7 enumerates a list of protected expression which should not be considered a threat to national security, including expression that advocates non-violent change of government policy or of the government itself; and criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation. The proposals to implement Article 23 of the Basic Law do not seek to prohibit any such forms of expression.

5. The Johannesburg Principles are concerned with the protection of the freedom of expression and information in the area of national security. They are particularly relevant to two areas where we are constitutionally obliged to legislate - sedition and theft of state secrets.

Sedition

6. Some commentators have suggested that the proposed offence of sedition would not comply with Principle 6. A similar comment might be made in respect of those aspects of treason that touch upon expression. Principle 6 states that expression may be punished as a threat to national security only if a government can demonstrate that -

(i) the expression is intended to incite imminent violence;

(ii) it is likely to incite such violence; and

(iii) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

7. We consider that Principle 6 is unnecessarily restrictive.

8. First, there may be many situations where it would be consistent with international human rights standards, and also appropriate, to prohibit the incitement of non-violent acts. Examples of non-violent acts that have the potential of threatening a legitimate national security interest include -

(i) the disabling of a national defence computer system;

(ii) the use of biological or chemical weapons; and

(iii) broadcasting propaganda for the enemy during a state of war.

It should be possible to criminalise not only these acts but also the incitement of such acts. Principle 6 would seem to prevent this.

9. Secondly, Principle 6 provides that incitement to violence cannot be punished as a threat to national security unless the intention is to incite **imminent** violence.

10. However, where a person intentionally urges another to commit a crime of violence, there is no justifiable reason to distinguish between imminent violence and violence at a later date. Our general law of incitement makes no such distinction. For example, inciting someone to murder another person is an offence regardless of whether the murder being urged is immediate or in a few weeks' time.

11. The are three major difficulties in adopting the imminent violence test into our laws, namely -

(i) it is contrary to general principles of our criminal law;

(ii) it introduces great uncertainty into a serious offence, since "imminent" is a vague concept; and

(iii) most importantly, it appears to be illogical. For example, can a state not legitimately prohibit a terrorist group from inciting others to prepare for a secessionist war say six months in the future, by arming themselves with missiles and other weapons? The "imminent violence" test would seem to leave the state powerless to deal with such a threat.

12. Thirdly, Principle 6 states that incitement to violence can only be punished if it is likely to succeed. If a person intentionally incites violence, whether against an individual or the State, he has demonstrated behaviour that is unacceptable. Long established common law principles provide that the law can legitimately punish such behaviour, irrespective of its chances of success, in the same way that it punishes attempted crimes which may have had no chance of success.

13. The well-intentioned attempt to limit restrictions on freedom of expression in Principle 6 does not produce appropriate results in all cases. The prevailing tests as are now applied by the courts in respect of the ICCPR and the European Convention on Human Rights (ECHR) are that of balancing competing interests.

14. Weighing the competing interests in a candid and informed manner, the proposed offences of treason and sedition, i.e. -

(i) instigating foreign armed forces to invade the PRC;

(ii) assisting by any means a public enemy at war with the PRC, with intent to prejudice the position of the PRC in the war;

(iii) inciting others to commit the offences of treason, secession or subversion; and

(iv) inciting others to violent public disorder that seriously endangers the stability of the state,

are entirely justifiable restrictions on the grounds of national security. The fact that Principle 6 may not in all cases be satisfied would not prevent a court from upholding these offences as being consistent with the Basic Law or ICCPR. Nor should it be a valid ground for not enacting the proposed offences.

Theft of state secrets

15. The Official Secrets Ordinance largely fulfills our obligation to legislate against the theft of state secrets. The National Security (Legislative Provisions) Bill seeks to slightly amend the Ordinance to, inter alia, fill one loophole and to delineate the offences more clearly.

16. Principles 15 and 16 of the Johannesburg Principles are relevant. The first part of Principle 15 states that no person may be punished on national security grounds for disclosure of information if the disclosure does not actually harm, and is not likely to harm, a legitimate national security interest.

17. With regard to the unauthorized disclosure of protected information, with one exception, our proposed laws will fully comply with the first part of Principle 15. That is, an offence will only be committed if the disclosure was damaging, or was likely to be damaging, in the manner specified in the current law. The exception relates to unauthorized disclosures of security or intelligence information by members of the security and intelligence services. This is not consistent with the first part of Principle 15, but the British House of Lords has recently decided that such a restriction is consistent with the UK's Human Rights Act, and through it the ECHR, which is similar to the ICCPR in the relevant aspects.

18. The second part of Principle 15 provides that no person may be punished on national security grounds for disclosure of information if the public interest in knowing the information outweighs the harm from disclosure. Principle 16 contains a similar principle in respect of disclosures by public servants.

19. Neither our current law, nor the National Security (Legislative Provisions) Bill, incorporate such a principle. Our law is based on the UK's Official Secrets Act 1989. During the debate on the Act in the UK Parliament, a "public interest defence" was rejected for two reasons. First, a central objective of the reforms to the Act was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. It was considered that no one should be allowed to disclose information which he knows may, for example, lead to loss of life, simply because he has a general reason of a public character for doing so.

20. The enactment of the UK's Human Rights Act in 1998 enabled

defendants in the UK (as in Hong Kong) to challenge criminal offences as contravening the guaranteed rights. Questions were raised as to whether offences relating to unauthorized disclosure could be reconciled with the guarantee of freedom of expression. The concern was focused, on the perceived need to allow "whistleblowers" to reveal public wrongdoing, on the grounds that this would be in the public interest.

21. Those concerns were answered by the House of Lords in its decision in *Shayler* in 2002. The relevant offence was held to be consistent with the Human Rights Act. The court considered that the law provides sufficient protection for a "whistleblower" to reveal wrongdoings in appropriate cases.

Conclusion

22. The Johannesburg Principles are in no way binding on the HKSAR. While we do not propose to implement a few of the principles on grounds of policy and consistency with other laws, our proposals are broadly in line with the principles. As required, they are consistent with the Basic Law and the ICCPR. We therefore consider our present proposals strike the right balance between the protection of national security and the freedom of expression and information.

Security Bureau

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