

Carole's Notes on Agenda for Article 23 Roundtable (30 August 2016)

Part I: New and remaining concerns with Article 23 legislation

1. b. What might be the impact on civil society, the enjoyment of rights and liberties and accountable governance if the Revised Bill is to be enacted? **Have new concerns emerged – those that did not exist in 2003 – given developments in the past decade?*

[Doreen, Amy, Puja, Carole; comparative perspectives: Fiona, Imtiaz, Denis]

Carole: I do not recommend trying to re-introduce the Revised Bill at this time, given the tense atmosphere and lack of trust. If the Hong Kong government genuinely feels the need to introduce legislation implementing Article 23 then I would suggest starting over with a new legislative process and asking the Law Reform Commission to play a role this time in researching comparative laws and consulting the public. One could also consider whether it is really necessary to address all aspects of Article 23 in one legislative process. It might be better to start with a smaller legislative project to see whether it is possible to reach agreement and thereby rebuild trust between the central government and the people of Hong Kong.

Assuming, however, that the Hong Kong government decides to try to re-introduce the Revised Bill as one large legislative project then it would be important to include the “three concessions” that the Hong Kong government offered to make in July 2003 and also to circulate the draft legislation this time as a White Paper. The three “concessions” were: (1) deletion of the provisions regarding possible proscription of a local organization that is subordinate to a Mainland organization proscribed on the grounds of national security; (2) addition of a “public interest” defense for the offense of unlawful disclosure of damaging information; and (3) deletion of the power to search without a warrant.

I would also want to make sure that any legislation implementing Article 23 contains a clause requiring it to be interpreted and applied in a manner that is consistent with the ICCPR. (I would prefer a reference to the ICCPR itself rather than to Article 39 of the Basic Law, as Article 39 might someday be subject to an interpretation by the Standing Committee of the NPC.)

It must be acknowledged, however, that the situation is even more tense in 2016 than it was in 2003 and thus it may be difficult to have a rational debate on the merits of any legislation. In 2002-2003, there was no advocacy for independence. We also felt reasonably confident in the ability of our local institutions to enforce local laws and thus protect civil liberties within Hong Kong's borders. In contrast, in 2016, we have witnessed the disappearance of Li Po (and the failure of the central or local governments to reassure the people of Hong Kong following his abduction). Although this was a particularly egregious case it is not the only example of increased threats to civil liberties within the territory. We also have decreased public confidence in certain local institutions, such as the ICAC. At the same time, the Umbrella Movement and the recent advocacy for independence by certain groups in Hong Kong could be used by

the central and local governments as an excuse to demand broader legislation implementing Article 23. That tension could make it impossible to agree upon legislation that would implement Article 23 without violating the ICCPR.

In these circumstances, in my view, there needs to be a rebuilding of trust before any legislative process is started. The central government could help to rebuild trust by reassuring the people of Hong Kong that they are safe within Hong Kong's borders and that it will not try to punish Hong Kong people (even if they happen to be in the Mainland) for acts that are perfectly legal in Hong Kong. The central government could also build more trust by being more responsive to the Hong Kong public's legitimate demands for greater democracy and better governance.

The local government could help to rebuild trust if it would promise to: (1) involve the Law Reform Commission in any new process of studying national security legislation around the world and proposing legislation to implement Article 23; (2) adopt a more neutral and open-minded approach to public consultation than was followed in 2002-2003; and (3) circulate a White Paper before introducing any new bill.

Political parties in Hong Kong could help to rebuild trust by making a commitment to support only peaceful advocacy for "internal self-determination" for the territory. While everyone has a legal right to discuss alternative constitutional structures for Hong Kong, there is no doubt that if the small pro-independence movement expands then it will be far more difficult to have a rational debate on legislation implementing Article 23 and to enact legislation that does not violate the ICCPR.

2. Can the concerns against Article 23 legislation be mitigated? What is the relationship between rights protection, democracy, separation of powers, and "one country two systems"? [~1 hour]

a. Can the concerns against Article 23 legislation be mitigated by the following means? [Michael, Carole, PY, Benny]

i. Drafting techniques; or should legislation be opposed in principle?

Carole: I would not rule out any legislation implementing Article 23 "in principle" because it is always *possible* that the process could lead to narrowly drafted legislation that meets the requirements of Article 23 and increases the trust between the central government and the people of Hong Kong. As noted in response to Question 1(b) above, I would recommend starting over, using the Law Reform Commission this time, and using a better process of consulting the public. It might be wise to try to address certain parts of Article 23 rather than trying to enact one large bill this time.

However, if the Hong Kong government is not willing to follow that strategy then I think that an acceptable bill could be drafted if we *started* with the Revised Bill (including the three concessions offered by the local government in July 2003)

and included a clause providing that the legislation must be interpreted and applied in a manner consistent with the ICCPR itself (rather than with Article 39 of the Basic Law, which might someday be interpreted by the Standing Committee of the NPC). It would not be perfect (and amendments would be necessary to clean up some of the drafting). But it might be worth working with the Revised Bill if it would help to persuade the central government to allow greater democracy in Hong Kong.

b. Are there institutional and social prerequisites to the introduction of Article 23 legislation? [Michael, Carole, Doreen, Benny]

Carole: both sides need to be reassured and show restraint in debates on Hong Kong's future. The central and local governments need to reassure the people of Hong Kong that they are safe within Hong Kong's borders; that Hong Kong's separate common law legal system will be allowed to function without interference; that Hong Kong will be allowed to pursue genuine democratic reforms; and that there is no plan to completely absorb Hong Kong into Mainland China's legal system in 2047 (see below).

If the local and central governments could reassure the people of these basic points then hopefully the main "pan-democratic" political parties would be willing to reassure the central government that they will not oppose all legislation to implement Article 23 and will not support calls for independence (but rather seek only internal self-determination and the high degree of autonomy promised in the JD and the BL). (Of course, that does not mean that the pan-democrats would support restrictions on the rights of individuals to peacefully advocate for independence.)

c. How is the uncertainty clouding the post-2047 constitutional arrangements relevant to the consideration of issues regarding Article 23? [Michael, Carole, Eric Ip, Benny]

Carole: 2047 is a huge concern; if things are this tense now, what will happen when the "promise" not to change HK's basic way of life for 50 years has run its course? The people need to be reassured on this point.

Part II: The place of Hong Kong in China's security order

2. The Causeway Bay Books incident and Poon Wai Hei incident (incidents nos. 11 and 31 in the Timeline) apparently show that it is possible for Mainland authorities to enforce Mainland security laws extra-jurisdictionally (in Hong Kong), thereby importing Mainland laws extra-constitutionally. In any case, the Mainland authorities have jurisdiction to enforce Mainland security laws against Hong Kong residents who are physically in the Mainland. If Article 23 legislation is introduced, would the use of Mainland security legislation by Mainland authorities against Hong Kong residents (either in the Mainland or cross-jurisdictionally) be reined in or aggravated? How sound is the argument that introducing Article 23 legislation and placing it in the hands of the local judiciary and enforcement agents can help recapture the security territory – a territory that is increasingly being lost to the Chinese Government? How are the concerns regarding Article 23 and the extradition arrangements between China and Hong Kong related? [~1 hour] [Hualing, Mingtao, Albert, Lin Feng , Danny, Carole; comparative perspective: Denis]

Carole: In my view, there is no genuine relationship between the extra-legal abduction of Lee Bo from within Hong Kong's borders and China's "national security". Rather, the abduction was an attempt to protect the leaders of the Chinese Communist Party from embarrassment and criticism. There is a huge difference.

I very much doubt that Hong Kong's Legislative Council would enact local legislation prohibiting the kind of books that Causeway Bay Books published. (No legal system that adheres to the ICCPR could rationally deem that type of book to be a "threat to national security".)

So . . . if the Mainland authorities feel threatened by that type of book then Article 23 legislation is unlikely to solve the problem. Mainland authorities will still be looking for ways of intimidating Hong Kong publishers so as to prevent such books from entering the Mainland.