Group Submission to the Legislative Council, the Department of Justice, and the Security Bureau of the Hong Kong SAR on the National Security (Legislative Provisions) Bill

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Group Submission to the Legislative Council, the Department of Justice, and the Security Bureau of the Hong Kong SAR on the National Security (Legislative Provisions) Bill[1]

Introduction

1. The implementation of Article 23 of the Basic Law is one of the most important constitutional developments in Hong Kong since 1997. It constitutes a major test of the "one country, two systems" model and the issues at stake are fundamental and controversial. The proposals should, therefore, be carefully scrutinized. The final legislation should ensure that civil liberties and the rule of law continue to thrive in the SAR and should avoid any unnecessary extension of mainland controls over words, activities and legitimate organizations in the Hong Kong SAR.

2. We welcome the improvements made by the Hong Kong Government to the original proposals contained in the Security Bureau's Consultation Document released for public consultation in September 2002. However, concerns remain with many of the proposed provisions in the National Security (Legislative Provisions) Bill introduced in the Legislative Council in February 2003. We believe the following recommendations strengthen and clarify these provisions, and we hope they will be seriously considered by the Bills Committee of the Legislative Council, and by the Security Bureau and Department of Justice.

Treason

3. The second class of treason defined in the proposed s. 2(1)(b) of the Crimes Ordinance (Cap. 200) should be reworded to clarify that an invasion by foreign forces must have actually taken place for treason to occur. We suggest the section be re-drafted as follows: "A Chinese national commits treason if he … (b) <u>successfully</u>[2] instigates foreign armed forces to invade the People's Republic of China with force". The legislative intention of not making this an inchoate offence must be made clear.

4. The third class of treason in s. 2(1)(c) prohibits assisting any public enemy at war with the People's Republic of China (PRC) by doing any act with intent to prejudice the position of the PRC in the war. A proviso should be added to this section explicitly exempting assistance provided on humanitarian grounds. Australia recently amended its treason offences by providing for such a humanitarian exemption [see Criminal Code Act, 1995 s.80.1 as amended by Security Legislation Amendment (Terrorism) Act 2002 no.65, 2002].

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[2] Words underlined represent a proposed addition to the original wording in the Bill.

Subversion

5. The meaning of the phrase, "basic system of the People's Republic of China as established by the Constitution of the People's Republic of China" in s. 2A(1)(a), is uncertain. We recommend the provision of an exhaustive list specifying the particular executive, legislative, and judicial organs of the PRC included in the definition of "basic system". Some concrete examples of how one can commit this offence would also be useful to achieve greater clarity and certainty.

6. The *actus reas* element of intimidating the Central People's Government (CPG) under the proposed s. 2A(1)(c) of the Crimes Ordinance (Cap. 200) is too vague and indeterminate. The CPG is not a single person but a political entity made up of many persons. Is the suggestion that intimidating any member of the CPG would be sufficient to satisfy this element? But surely this would be too broad and would go beyond the purpose of the offence. The element fails to satisfy the requirements of clarity and precision in the criminal law. It should either be removed entirely or, at least, defined separately in a clear and restricted manner.

7. The inclusion of "using force" as an element of subversion and secession in addition to "serious criminal means" and "engaging in war" implies that "using force" is actually something different than the acts included in these two other categories and would not necessarily need to constitute an offence under Hong Kong law. Indeed the notion of "using force" could be interpreted quite broadly to encompass everything from the mere touching of a person's body to the splashing of water on a person or property. Given the over-broad compass of "using force", it is recommended that the terms be deleted (since the other elements are adequate) or the stricter notion of "serious violence" (which seems to be more consistent with the notions of "serious criminal means" and "engaging in war") be substituted.

8. The definition of "serious criminal means" is the broadest and most problematic part of the definition of the new crimes of subversion and secession. It is unnecessary to include all serious damage to property and all serious interference with essential services and electronic systems. Although the term "serious criminal means" under the proposed s. 2A(4)(b), is modeled on the list of "serious criminal means" used in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), s. 2(1) (part (b) of "terrorist act"), it fails to include the key clause used in the latter ordinance excluding "the use or threat of actions in the course of any advocacy, protest, dissent or industrial actions". In order to protect freedom of demonstration and freedom of expression, this clause should also be added in the subversion provision.

Secession

9. The *actus reus* element of secession in the umbrella clause of s. 2B(1) ["withdraws any part of the People's Republic of China from its sovereignty] is unclear, especially the term "part" of the People's Republic of China. The ordinary meaning of 'part of the PRC' can imply both material and immaterial objects. Consistent with the object behind the secession offence (i.e. to protect territorial integrity), the expression, 'any part of the

People's Republic of China' should be replaced with 'any territory of the People's Republic of China'.

10. Comments regarding "using force" and "serious criminal means" in paragraphs 7 and 8 above also apply to the definition of secession in s. 2B(1)(a).

Extraterritorial Subversion and Secession

11. Section 2C purports to confer criminal liability in the form of conspiracies and attempts for conduct abroad that amounts to subversion or secession. In other words, it criminalizes such conspiracies and attempts that begin and end in Hong Kong but culminate in completed full offences taking place outside Hong Kong. Another way of stating the proposal is inchoate liability for extraterritorial subversion and secession. The Government probably feels this section is necessary given the limitations of ss. 159A and 159G of the Crimes Ordinance (Cap. 200), which only criminalize conspiracies and attempts to commit full offences intended to take place on the territory of Hong Kong.

12. However, what the Government has not justified is why the usual manner of conferring extraterritoriality in Hong Kong by way of the Criminal Jurisdiction Ordinance (Cap. 461) has not been employed. What is important about this Ordinance is that for extraterritorial conspiracies and attempts (in the sense proposed by s. 2C), additional elements that link the full offence to Hong Kong are required to be proven, such as the existence of a further act performed on the territory or effects directed at the territory of Hong Kong. Presently, s. 2C does not require proof of an added link to Hong Kong. It is only necessary to show that the overseas conduct, had it occurred in Hong Kong, would constitute subversion or secession. There is no need to show an actual impact or effect on Hong Kong itself. It is recommended that in place of s. 2C, the Government employ the usual means of extending extraterritoriality by adding and treating the conspiracy and attempt offences as if they were Group B offences in the Criminal Jurisdiction Ordinance (Cap. 461). It is not proposed that the offences of subversion and secession themselves be made Group A offences as this would be going beyond the intention behind the proposal.

Sedition

13. Political advocacy should be distinguished from private solicitations of ordinary criminal activities. Crimes created in the National Security Bill are not ordinary ones and should not be treated as such. Therefore, the general rule of common law incitement, which does not require any probabilistic relationship between the acts constituting incitement and the acts being incited, should not apply in the context of Article 23 legislation. Incitement within the meaning of the National Security Bill should be qualified by requiring proof that the words uttered and published by a person, objectively assessed, are likely to incite others to commit sedition, and that the person is aware of this likelihood.

14. The intention behind the proposed s. 9D of the Crimes Ordinance (Cap. 200) is to exempt certain legitimate conduct from the offences of sedition and handling seditious publications. Given the present wording of ss. 9A-D, it is unclear who bears the burden of proof in showing the exempting conditions in s. 9D. Indeed, the most likely answer, applying the negative averment provision in s. 94A of the Criminal Procedure Ordinance

(Cap. 221), is that the defendant bears the onus of proof on a balance of probabilities. This would mean that the publisher charged with selling seditious publications who wants to take advantage of the exemption in s. 9D(2) will need to prove on a balance of probabilities that he had the exclusive intent to perform a prescribed act, such as pointing out defects in the government of the PRC. Such an arrangement reverses the traditional burden of proof on the prosecution. No good reasons have been offered for why this should be the case. Indeed, the Government would be going back on what it had promised in the Consultation Document (p. 26) to make "knowledge or reasonable suspicion" an element of the offence (for which the onus would be on the prosecution to prove). Constitutionally, the Basic Law or Bill of Rights may require that the prosecution negative the exempting conditions beyond a reasonable doubt, once there is some evidence that they might apply: see *Regina* v. *Lambert* [2001] 3 WLR 206 (HL). But this is not always the case [see the recent case of *Regina v. Johnstone* [2003] UKHL 28 at paras. 44-54 (HL) which highlights the importance of making the legislative intent clear]. It is recommended that a subsection (4) be added to s. 9D making clear that where there is some evidence supporting the application of subsections (1) or (2), the prosecution has the burden to prove beyond a reasonable doubt that subsection (1) or (2), whichever may be the case, does not apply.

15. The definition of "prescribed act" in s. 9D(3)(b) should be widened to include unconstructive political and social criticisms of the government. Criticism for its own sake without intending or suggesting how to remedy the problem is valued as much as constructive criticism.

16. The qualification "by lawful means" included in the definition of "prescribed act" in s. 9D(3)(c) should be removed. Attempting to persuade people to change unjust laws through civil disobedience has a long and honourable history in many democracies. Protests not infrequently violate some laws and it is inappropriate to treat those who violate minor laws during their protests or strikes as serious criminals. The definition of "prescribed act" in paragraph (c) should be expanded to apply to all non-violent attempts to change the law.

Official Secrets

17. Although Hong Kong currently has a generally transparent and open system when it comes to disclosing information, the recent SARS outbreak has demonstrated the importance of avoiding any moves toward the creation of a culture of non-disclosure. Any provisions related to official secrets should ensure that a future Hong Kong government will not be able to cover up embarrassing information when it would be in the public interest to disclose such information.

18. Protected information should be defined by content and not by source or class. Specifically, in the second part of the test for damaging disclosure in ss. 14 to 16A of the Official Secrets Ordinance (Cap. 521), the words "is of such a nature that" should be deleted.

19. Damaging disclosure should require proof of a strong likelihood of specified harm or clear and present danger of harm, which harm should flow from the content of the information disclosed rather than from the nature or class of information disclosed.

20. Subjective mental states should be exclusively required so that it would be a defense if one honestly believes that the information is not protected or that the information is lawfully acquired.

21. Once information has been made generally available, by whatever means, whether lawful or not, there is no further justification to prohibit disclosure from the public. Civil action of breach of confidence is sufficient to protect whatever Government interest there is against further disclosure of the information concerned.

22. There should be a defence of public interest or a defence of reasonable excuse so that no offence will be committed if the public interest in knowing the information outweighs the harm done or likely to be done by disclosure.

23. The definition of "national security" should be further refined to expressly exclude protection of the Government from embarrassment or exposure of wrongdoing or concealment of information about the proper functioning of public institutions.

24. Protection of national security shall not be used as a reason to compel a journalist to reveal a confidential source.

25. A time limit for prosecution, we suggest six months from the time of discovery, should be imposed.

26. The entire Official Secrets Ordinance (Cap. 521) should be reviewed in the context of a public right of access to government information, and an access to information ordinance shall be enacted to replace the current administrative regime governing the constitutional right of access to government information.

The Power to Proscribe Organizations

27. In our view, existing legislation already provides mechanisms for proscribing groups on the ground of national security (see both the Societies Ordinance (Cap. 151) and also the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575)). Indeed, these laws go beyond what is necessary to comply with Article 23. Even the Government's Consultation Document acknowledged that Hong Kong law already complies with Article 23 in this respect.[3]

28. Moreover, the Government has not demonstrated any real *need* for additional statutory provisions on the control of local organizations. We question why the Government would wish to change the existing statutory scheme if it cannot point to any examples in which the Secretary for Security found that the existing laws were inadequate.

29. Proposed s. 8A(2) of the Societies Ordinance (Cap. 151) identifies three types of organizations that are liable for proscription under the new proposed mechanism. The first two categories are organizations that have the objective of committing or have

[3]Consultation Document, para 7.3.

attempted to commit, or actually have committed any act of treason, secession, sedition, subversion or theft of state secrets.

30. The third, very controversial, category includes an organization that is "subordinate" to a Mainland organization which has been proscribed there "by open decree" on the ground that it endangers national security. In our view, this proposal should be deleted from the bill as it opens a connecting door between Mainland and Hong Kong concepts of national security which is not required by Article 23 (as Article 23 only refers to ties between local and foreign political organizations). The Hong Kong legislature should not reduce Hong Kong's autonomy more than is required by the Basic Law. This is particularly true in the context of a law that has the potential to restrict freedom of association, a fundamental right of Hong Kong residents.

31. The Bill provides that the decision to proscribe an organization can be appealed to the Court of First Instance but that a certificate from the Mainland authorities shall constitute "conclusive evidence" that the relevant Mainland organization was banned on such grounds. There is no justification for this at the appeal stage, as the Secretary for Security will have sufficient time to gather any necessary evidence of the underlying facts. In our view, if such a decision is appealed, the Secretary for Security should be required to prove all of the alleged facts (including the fact of proscription of the relevant Mainland organization) in the ordinary way.

32. The Bill also contains a clause that would empower the court to exclude the public from all or part of the hearing where it is satisfied that publication of evidence might prejudice national security. It also states that the rules may provide for the hearing to take place without the appellant being given full particulars of the reasons for the proscription and in the absence of any person, including the appellant and his legal representative.[4]

33. The Government has pointed out that similar procedures exist in other common law jurisdictions, for example in recently enacted anti-terrorism laws. However, the lack of democracy in Hong Kong and the fear that Mainland concepts of national security will eventually be imported into Hong Kong makes such procedures more worrying in Hong Kong.

34. In our view, rules that allow for the exclusion of the appellant and his/her lawyer from the hearing on the appeal could restrict a person's rights of access to the courts, effective legal advice, and judicial remedy and could therefore potentially conflict with Article 10 of the Bill of Rights (right to fair and public hearing) and Article 35 of the Basic Law. The rules should allow the person appealing from the decision (and his/her lawyer) access to the full particulars of the reasons for proscription and to all materials that the Secretary for Security *relies upon* to support the act of proscription.

35. If the Legislature agrees with the Government that rules are needed to limit access to the hearing of appeals on orders of proscription then we would prefer that these rules be primary legislation rather than subsidiary legislation. This is too important an issue to delegate to the Chief Justice, who is not an accountable official. Moreover, if the Chief Justice makes the rules then he would have to disqualify himself from adjudicating any constitutional challenge to the rules.

[4] *See*, Clause 15 of the Bill, adding s 8E(2) and (3) to the Societies Ordinance.

New Warrantless Entry, Search and Seizure Power

36. Ideally, the proposal should be dropped entirely as it cannot be legitimatized in accordance with constitutional principles and values. A warrantless search power is presumptively objectionable in a civil society as it interferes with an individual's fundamental right to privacy without prior judicial authorization. The Administration cannot show convincing empirical or rational necessity for adding the power. The insufficient safeguards to the exercise and execution of the power results in an impact on rights that is disproportionate to the importance and necessity of the power.

37. As it is, the power is over-broad and has not been framed in such a way as to minimize the impact on constitutional rights. The following restrictions and safeguards are recommended.

38. The exercise of the power should be reserved for senior officers in the various Commissioner of Police grades. This reduces the number of eligible senior officers from 72 to 21. Leaving the exercise of the power to the highest echelons of the police force offers a greater degree of accountability.

39. The power should not apply to the offence of handling seditious publications. The offence is not serious, relative to the other four offences, and its inclusion is contrary to the stated intention of the Administration to respect the warrant based regime for "journalistic materials". If left to the police to decide whether sought after seditious publications are "journalistic materials", they will inevitably err on the side of immediate warrantless seizure. This is inimical to freedom of expression.

40. Private dwelling homes should be excluded from the new power because of the superior privacy interest that lies in such places. As well, constitutionally protected domains, such as law offices, media organizations and places of worship, should also be excluded since entry and searches in these places will inevitably interfere with not only the right to privacy but also other fundamental rights and freedoms. Nothing short of a warrant issued by an impartial and independent judicial officer should authorize searches in all these places. In the absence of a blanket exclusion, added safeguards are needed before these places can be entered. For example, the senior officer should also have reasonable grounds to believe that all other avenues of locating the same or similar evidence has been exhausted and no other reasonable alternative source of the evidence exists.

41. The senior officer should be required to present written directions to the executing officers, who are responsible for performing the search but will not normally be apprised of the reasonable grounds underlying it. Written directions serve three important purposes: they commit the senior officer to a specification of the limited powers to be exercised by the executing officers, they inform the executing officers of their limited authority, and they notify innocent persons inside the premises of the purposes for the police intrusion.

42. Search of persons inside the place being searched should have to be predicated on reasonable grounds to suspect that such persons have evidence of the offence on their body. The reasonable grounds can be formed either before the search occurs or while the search is being carried out.

43. Judges should be given a statutory power to exclude evidence in a prosecution for treason, subversion, secession, sedition, handling seditious publications (and any of their inchoate offences), if the evidence was obtained unlawfully and admitting the evidence would bring the administration of justice into disrepute. This will serve to deter deliberate abuse of the power and hopefully encourage more diligent compliance with the law.

Reforming Other Existing Article 23 Police Powers

44. Section 11 of the Official Secrets Ordinance (Cap. 521) is probably unconstitutional, as it allows a police officer to enter and search any residential premise in Hong Kong after only satisfying a magistrate (or a senior police officer in case of emergency) that there are reasonable grounds for suspecting an espionage offence has been or is about to be committed. To comply with constitutional standards, there must also be reasonable grounds to suspect that evidence of the offence will be found in the premises to be searched.

45. The search warrant power in s. 13 of the Crimes Ordinance (Cap. 200) in relation to sedition and handling seditious publications also suffers from the same defect. Similarly, there must be a further pre-requisite condition, i.e. reasonable grounds to suspect that evidence will be found in the premises, if it is to comply with the Basic Law.

Conclusion

46. We would be happy to provide further information if legislators or the Government have questions regarding any of the suggestions made in this submission. We are aware that the Government has requested an expedited review of this Bill. However, the Bill seeks to amend many different ordinances, is very complex, and will inevitably place some restrictions on fundamental freedoms. Therefore, the legislature must be given adequate time to consider all suggested amendments from the public and to ensure that the final statutory language is clear, unambiguous, and places the minimum restrictions necessary in a free society. There is no urgent need for this Bill to be enacted before the 2003 summer recess.

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