

## NATIONAL SECURITY OFFENCES AND CIVIL LIBERTIES IN HONG KONG: A CRITIQUE OF THE GOVERNMENT'S "CONSULTATION" ON ARTICLE 23 OF THE BASIC LAW

On 24 September 2002 the Hong Kong Government published its *Proposals to Implement Article 23 of the Basic Law: Consultation Document*.<sup>1</sup> In theory, this commenced a three-month period of "public consultation" on a range of criminal offences related to national security, namely, treason, secession, sedition, subversion against the Central People's Government and theft of state secrets. However, what the Government has actually launched is a massive publicity campaign to persuade the public that its proposals are correct and that opposing views on any major issues should be rejected, even before the consultation period ends. Although many of the Government's proposals are reasonable, others pose substantial threats to human rights. This comment argues that the Government needs to slow down and pull back from its current "hard sell" approach to Article 23 legislation. The Government should also agree to the widespread public request that it publish a white paper (a draft of the proposed legislation) once it has considered the public submissions and drafted the specific language of the new offences.

Why is it so important that public consultation on Article 23 be done properly? There are two reasons, neither of which is discussed openly in the Government's consultation document. First, Article 23 is fundamentally threatening because "national security" offences are regularly used in mainland China to suppress political dissent. Second, although Hong Kong currently enjoys civil liberties and the rule of law, it does not have a democratically elected government and there is no firm promise that it will get one in the future. Thus an important safeguard that helps to prevent abuse of national security laws in many countries simply does not exist in Hong Kong. It is therefore particularly important that we do not retain or enact laws which are based upon archaic relics of the colonial past or which might open the door to the application of mainland law. Any Hong Kong laws implementing Article 23 must be drafted very precisely and must expressly comply with modern standards of human rights. There is also no reason to enact laws that go beyond what is strictly required by Article 23, as this would only invite undue interference in the civil liberties of Hong Kong people.

<sup>1</sup> Security Bureau, Hong Kong Government, *Proposals to Implement Article 23 of the Basic Law: Consultation Document* (Sept 2002) (hereinafter the consultation document).

We should start by recalling exactly what is required by Article 23. It provides that the Hong Kong Special Administrative Region (SAR):

“... shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government or theft of state secrets, to prohibit foreign political bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

Article 23 was the subject of much debate when the Basic Law was being drafted and it has been widely reported that the Hong Kong representatives on the Drafting Committee (who were outnumbered by the mainland representatives) were not happy with the final language.<sup>2</sup> It is unfortunate that the Basic Law was still in draft form in the summer of 1989, because the Chinese Government made Article 23 much stricter after June 4 by adding the language on subversion and the control of political organisations.<sup>3</sup> The final version of Article 23 was a warning to Hong Kong, issued at a time when the Central Government was openly angry with Hong Kong people for protesting against the bloodshed in Tiananmen Square. Thus it is not surprising that Hong Kong people would view any legislative proposals implementing Article 23 with a certain degree of scepticism and fear. Perhaps the only positive thing that can be said about Article 23 is that it does provide that Hong Kong should enact the implementing legislation “on its own”. Thus the Central Government should not seek to dictate the precise content of the legislation. Moreover, the investigatory powers and judicial procedures through which the legislation is enforced should be consistent with Hong Kong’s commitment to due process and the protection of civil liberties.

If the promise that Hong Kong can enact these highly controversial laws “on its own” is to have any meaning, however, there must be a genuine and unbiased consultation exercise on the way forward. It was suggested (soon after 1997) that the issue be sent to Hong Kong’s Law Reform Commission. The Law Reform Commission probably would have approached Article 23 in much the same way that it has approached other controversial legal issues. It

<sup>2</sup> See H. L. Fu, Richard Cullen and Pinky Choi, “Curbing the Enemies of the State in Hong Kong – What Does Article 23 Require?” (2001–2002) 5 *Journal of Chinese and Comparative Law* 45, 49–52. See also Martin Lee, “A Tale of Two Articles”, in Peter Wesley-Smith and Albert Chen (eds), *The Basic Law and Hong Kong’s Future* (Hong Kong: Butterworths, 1988).

<sup>3</sup> In the draft of the Basic Law that was published in Feb 1989, Art 23 was shorter and stated simply: “The Hong Kong SAR shall enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets”. See Ming K. Chan and David J. Clarke (eds), *The Hong Kong Basic Law: Blueprint for “Stability and Prosperity” under Chinese Sovereignty?* (Hong Kong: Hong Kong University Press, 1991) (reproducing the Feb 1989 draft at pp 145–161; see especially p 149).

would have established a sub-committee to conduct a comprehensive study of other countries' legislation in the field and to issue a neutral consultation paper that summarised the research and sought the views of the community. The Law Reform Commission would have then issued a report on the results of the consultation and recommended how Article 23 could be implemented without offending the constitutional guarantees of civil liberties in Hong Kong. Since the Law Reform Commission is an independent body (with representatives from the legal profession as well as the Government and the broader community) the consultation exercise would have had substantial credibility with the Hong Kong people. The Government would not have been bound by the Law Reform Commission's recommendations, but the Commission would have given the Government a sound basis on which to draft its proposals for legislation.

The Government has approached Article 23 in a very different manner. When the Basic Law came into force on 1 July 1997, the Government made certain limited amendments (approved by the Provisional Legislative Council) which were clearly designed to implement Article 23 through existing laws.<sup>4</sup> Then, for the next five years, the Government quietly conducted research and drafted its proposals out of the public's view. It has also been reported that the Government discussed its proposals with the Central Government before it released them publicly.<sup>5</sup> The result is that the paper published by the Government in September 2002 does not read like a typical consultation document. It does not present alternatives, but rather a fully formulated proposal. It also avoids mentioning the many criticisms that have been made (eg by law reform commissions in other common law jurisdictions) regarding legislation that is similar to that proposed for Hong Kong. When criticised for this, the Secretary for Security was reported to have responded: "Of course, it is free for us, as authors of the document, to quote whatever we think is *helpful to our argument*."<sup>6</sup> This is quite different from the approach that would have been taken by the Law Reform Commission, which would not have had any vested interest in persuading the public to adopt a particular argument and thus would have been willing to discuss expert opinions on both sides of an issue. One cannot help

<sup>4</sup> For example, the Societies Ordinance (Cap 151) was amended to give the Government the power to prohibit the operation of a society on the ground that it has connections with a "foreign political organization" or on the ground that the Secretary for Security reasonably believes that such an order is necessary in the interests of national security.

<sup>5</sup> Cliff Buddle and Mary Luk, "Justice Chief's promise on sedition law", *South China Morning Post* (SCMP), 12 July 2002, p 1.

<sup>6</sup> Emphasis added. See Angela Li and Ng Kang-chung, "Article 23 paper uses quotes that fit, Regina Ip admits", SCMP, 31 Oct 2002, p 1; and Mark Daily, "Let's not follow the example of Malaysia", SCMP, 6 Nov 2002 (calling upon the Government to release "a supplementary consultation document including the comparative aspects of [the Government's] research that were not only helpful to their arguments but that would be helpful to [the public] in coming to a fully informed view").

but form the impression that the Government's three-month consultation exercise is designed not to consult, but rather to sell a carefully packaged proposal to the community.

This impression has deepened during the overwhelming publicity campaign that followed the release of the Government's proposals. Only one week into the three-month consultation period, the Chief Executive, Tung Chee Hwa, confidently announced that there was broad support for the proposals in Hong Kong.<sup>7</sup> The Secretary for Security has repeated this claim, despite the fact that opinion polls "have indicated a level of support falling well short of a majority".<sup>8</sup> Senior officials from the Security Branch and the Justice Department have been sent out to public meetings to staunchly defend the proposals. They have also been assigned to write newspaper articles and letters to the editor. The Security Bureau's website actually contains a page entitled "Myths and Facts", which labels objections to its proposals as "myths" and does not acknowledge even the possibility that the proposals could inhibit civil liberties.<sup>9</sup> Perhaps the lowest point in this process was when Qian Qichen, the Vice Premier of the People's Republic of China, entered the debate by claiming (one month into the three-month consultation period) that the majority of Hong Kong people support the proposals and that people who doubted the proposals must have some guilty secrets or "devils" in their hearts. He was quoted as asking: "Do they have worries because they have things to fear? Otherwise what is the problem?"<sup>10</sup>

Is the Government right? Are the concerns that are being raised about its proposals simply misguided "myths", with no basis in reality? Consider just one example, from Chapter 7 of the consultation document. The chapter is entitled "Foreign Political Organisations" and addresses the second half of Article 23, which requires Hong Kong "to prohibit foreign political bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies". As the consultation document acknowledges, this is one area in which Hong Kong law already complies with Article 23. The Provisional Legislative Council amended the Societies Ordinance in 1997, giving the Government the power to prohibit a society if it is a political body that has a connection with a foreign political organisation or a political

<sup>7</sup> See Angela Li, Ng Kang-Chung and Ravina Shamdasani, "Tung praises 'support' for anti-subversion law", SCMP, 2 Oct 2002, p 3.

<sup>8</sup> See Editorial, "Wishful thinking", SCMP, 30 Oct 2002, p 17. See also May Sin-mi Hon and Angela Li, "Most back security law, says Regina Ip", SCMP, 29 Oct 2002, p 1.

<sup>9</sup> See Hong Kong Government, "Proposals to Implement Article 23 of the Basic Law: Myths and Facts", available on the Hong Kong Government's website at <http://www.info.gov.hk/sb/eng/23/leaflet2.htm>.

<sup>10</sup> See Ambrose Leung and Angela Li, "Opponents of Article 23 are outnumbered, says Qian", SCMP, 26 Oct 2002, p 3.

organisation of Taiwan.<sup>11</sup> The Government also already has the power to prohibit a local society if it reasonably believes that it is necessary in the interests of national security, public safety, public order or the rights and freedoms of others. Indeed, the Government itself appears to acknowledge that existing law fulfils the requirements of Article 23, stating in the consultation document that:

“We believe that the existing provisions of the Societies Ordinance, in particular those governing the definition of ‘foreign political organizations’ and ‘connections’ are sufficient for the purpose of prohibiting foreign political organizations from taking part in the political process of the HKSAR.”

If that is the case then Chapter 7 should conclude there. Yet the Government then goes on to propose new powers that go beyond the title of the chapter and beyond the strict requirements of Article 23. The existing Societies Ordinance defines “society” as “any club, company, partnership or association of persons, whatever the nature of objects, to which the provisions of this Ordinance apply”. The Government now proposes to extend its powers to an “organization”, to be defined as “an organized effort by two or more people to achieving [sic] a common objective, *irrespective* of whether there is a formal organizational structure”.<sup>12</sup>

This is an extremely broad definition and the Government has not offered any specific justifications for adopting it. The second worrying aspect of the proposal can be found in the circumstances under which the Secretary for Security may exercise the power to proscribe a local organisation. Subparagraphs (a) and (b) provide that such power can be exercised if the organisation has the objective of committing, has attempted to commit, or actually has committed any act of treason, secession, sedition, subversion or theft of state secrets. However, subparagraph (c) proposes that an organisation could also be proscribed in Hong Kong if:

“[T]he organization is affiliated with a Mainland organization, which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security.”<sup>13</sup>

This proposal could open a “connecting door” between mainland and Hong Kong concepts of national security that is potentially much wider than that required by Article 23 (which only refers to ties between local and foreign

<sup>11</sup> Consultation document, para 7.3 and Societies Ordinance, s 8.

<sup>12</sup> Consultation document, para 7.15. Emphasis added.

<sup>13</sup> *Ibid.*, para 7.16.

political organisations). The Hong Kong Government has tried to reassure the public by insisting that the Secretary for Security would not only have to be satisfied by the evidence of affiliation, but would also have to “reasonably believe that it is necessary in the interests of national security or public safety or public order to ban the affiliated organization, before the power of proscription can be exercised”.<sup>14</sup> However, this provides little comfort. The Hong Kong Government has expressly stated that it will “defer” to the Central Government authorities on the question of whether a mainland organisation threatens national security and that “formal notification” by the Central Government that a particular organisation has been prohibited in the Mainland on the ground of national security shall be conclusive on that issue.<sup>15</sup> Although the Government has stressed that this would not *automatically* mean that the Hong Kong affiliate would also be deemed a threat to national security, it does seem likely that the Secretary for Security would at least take into account the views of the Central Government when deciding whether she has a “reasonable belief” that the affiliated local organisation threatens national security. In fact, once this legal door is opened, it is hard to imagine our Secretary for Security defying the Central Government by taking the opposite view regarding a Hong Kong affiliate of a mainland organisation that has been banned on national security grounds.

The dangers of this proposal are heightened by the fact that the Government has proposed a curious two-step procedure for any appeals from a decision to proscribe an organisation: it is suggested that points of fact should be appealed to an “independent tribunal” and that only points of law may be appealed to a court.<sup>16</sup> The consultation document gives no information about how this division would work in practice (many issues on appeal would actually be mixed questions of law and fact) or about the nature of the proposed tribunal. The legal community is concerned by the proposal in any event, since administrative tribunals are frequently criticised for being unduly deferential to government decisions.<sup>17</sup> The Government has sought to reassure lawyers by suggesting that any decision would be subject to judicial review. However, it would be exceedingly difficult for a local organisation to establish, in an action for judicial review, that the Secretary for Security’s belief that it is necessary to ban a Hong Kong organisation in the interests of national security is “unreasonable” (particularly if the law provides that the Central Government’s notification that the affiliate organisation in mainland China

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para 7.18.

<sup>17</sup> See Cliff Buddle, “Lawyers attack security tribunal plan”, SCMP, 27 Oct 2002, p 2.

has been banned on national security grounds is conclusive on that issue). There is also the danger that the Government would later take the position that the matter was an “act of state” and not subject to judicial review. As one constitutional expert has noted:

“If full judicial review is to prevail, the language of the statute must clearly state that all facts respecting the reasonable belief in a threat to national security must be presented on review and that it will be for the court alone to judge whether such a threat objectively exists. It should be clear that if the government fails to make its case on the facts, then the ban must be overturned. There should be no presumption in favour of the determinations of either the central government or the local Secretary for Security. Even if the statutory language is cleaned up ... [c]urrent statements that the government will not seek to bar judicial review as an act of state are clearly not binding on a future government. In this regard, since this is a constitutional requirement it is not even clear the above suggested statutory language would secure power for the courts. It would still be open to a future Secretary for Security to challenge such statutory language limiting her power as violating the Basic Law.”<sup>18</sup>

One must also ask whether it is wise to enact a statutory scheme that could put the Hong Kong courts in the position of having to quash a decision of the Secretary for Security proscribing a local organisation that is affiliated with an organisation banned in the Mainland. It is easy for the Hong Kong Government to reassure people that the courts will strike down laws or executive acts that do not comply with the International Covenant on Civil and Political Rights.<sup>19</sup> However, the Hong Kong Government did not hesitate to go to the Standing Committee of the National People’s Congress when it did not like the “final judgment” of the Court of Final Appeal in the right of abode cases and the resulting “reinterpretation” issued by the Standing Committee dealt a severe blow to the independence of our courts.

Of course, the proposed new ground for prohibiting a local organisation would not be so worrying if China were a free and open society. The problem is that the Central Government’s concept of “threats to national security” includes much of what we would consider to be legitimate exercises of our

<sup>18</sup> See Michael Davis, “Who defines national security?”, Submission to the Hong Kong Legislative Council, LC Paper No CB(2)201/02-03(11), available at [http://www.legco.gov.hk/yr02-03/english/panels/ajls/papers/ajls\\_zz.htm](http://www.legco.gov.hk/yr02-03/english/panels/ajls/papers/ajls_zz.htm).

<sup>19</sup> See, for example, the letter to the editor of Mr James O’Neil, Deputy Solicitor General, SCMP, 2 Nov 2002, p 15, stating that the Hong Kong courts have “demonstrated that they can and will, strike down laws and decisions” which conflict with the International Covenant on Civil and Political Rights.

freedom of expression, association and academic inquiry. National security offences tend to be poorly defined in China and are used to prohibit what were formally known as “counter-revolutionary” activities.<sup>20</sup> Although the names of the offences may have changed, the reality of the situation has not; peaceful expressions of dissent and criticism of the one-party State are simply not tolerated in China and are severely punished. Thus it is completely understandable that Hong Kong people would be alarmed to see a proposal that allows the Central Government’s views of what is a “threat to national security” to play any role in the decision to proscribe a Hong Kong organisation.

Naturally, the first group that comes to mind is Falun Gong, since it is prohibited in China but currently allowed to operate in Hong Kong.<sup>21</sup> The Hong Kong Secretary for Security has dismissed these concerns, accusing critics of the proposals of being “obsessed with Falun Gong” and noting that it is not prohibited in China on the ground of national security, but rather on the ground that it is an “evil cult”. However, that distinction is meaningless since the Chinese Government could change the ground under which Falun Gong is proscribed at any time. (There is no independent legislature or court in China to *question* the Central Government if it decides to proscribe Falun Gong in the Mainland on the ground of national security.) Will the Central Government seek to have Falun Gong prohibited in Hong Kong? It probably would not do so in the near future as it would not want to undermine, so quickly, the assurances given by the Secretary for Security during the Article 23 consultation exercise. However, the sword will be hanging over the heads of this and any other organisation that is affiliated with a “prohibited” organisation in China. For example, a representative of the Catholic Church in Hong Kong has expressed concern that it may be considered to have an affiliation with the underground church in the Mainland.<sup>22</sup> There is a real danger that the fear of proscription could have a chilling effect on the rights of these and other organisations, both formal and informal.

Given that Article 23 only refers to relationships with foreign political organisations, one would expect the Government to have offered some specific justification for the proposals regarding the prohibition of local

<sup>20</sup> See Fu Hua Ling, “Judicial Independence and the Rule of Law in Hong Kong”, in Steve Tang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001), pp 75–76.

<sup>21</sup> It should be noted that while Falun Gong is not prohibited in Hong Kong, it is also not popular with certain Hong Kong Government officials, who have taken several opportunities to make disparaging remarks about it. While these remarks may have been made only to appease the national government (which no doubt finds the open existence of Falun Gong in Hong Kong extremely irritating), they have raised concerns about freedom of religion and association in Hong Kong. See, for example, Asia Human Rights Commission, “Hong Kong: Threats against Falun Gong Threaten ‘One Country, Two Systems’”, available at <http://www.wahrchk.net/hrsolid/mainfile.php/2001vol11no3/44/>.

<sup>22</sup> See Ella Lee, “Article 23 frightening says bishop; Catholic Church head voices anti-subversion law fears and hits back at Beijing’s top SAR envoy”, SCMP, 4 Oct 2002, p 2.



organisations. However, the Government does not point to one instance in which the existing laws have proven too weak. Rather, the Government insists that it is not really expanding its powers, claiming (on its “Myths and Facts” webpage) that “the proposed mechanism does not go beyond the scope of the existing power under the Societies Ordinance”.<sup>23</sup> If that is really the case then one must ask why the Government went to the trouble of drafting this new language, which it must have known would give rise to enormous controversy? Is it trying to send some political message to local organisations that are affiliated with groups in the Mainland? If so, is that an appropriate use of this legislation?

In any event, it is clear that many experts do not agree with the Government’s claim that the proposals would not expand its power to proscribe local organisations. Professor Albert Chen, a member of the Committee for the Basic Law which advises the Standing Committee of the National People’s Congress when it interprets the Basic Law, has described the proposal regarding proscription of organisations as an effort “to amplify the power” that the Government has under the existing Societies Ordinance and as “one of the most controversial and politically sensitive proposals in the Document”.<sup>24</sup> He has also noted that the document does not provide any definition of “affiliation” (a crucial concept in the Government’s proposals) and that a “proscribed organization” would attract more severe sanctions than unlawful societies under the existing Societies Ordinance.<sup>25</sup> After Professor Chen made these points at a recent conference<sup>26</sup> (in which the Acting Solicitor-General also participated), I asked whether the Government would now consider amending the “Myths and Facts” page of its website. However, at the time of writing, the website of the Security Bureau continues to maintain that its proposals do not go beyond the existing Societies Ordinance.

The new mechanism for prohibiting a local organisation is but one example of many worrying issues in the consultation paper.<sup>27</sup> For example, Chapter 8 proposes to give the Government “extraordinary powers to search premises and to obtain financial information without warrant or prior judicial authorization”.<sup>28</sup> At present, Hong Kong police can enter private premises

<sup>23</sup> See Hong Kong Government, “Proposals to Implement Article 23 of the Basic Law: Myths and Facts”, available on the Hong Kong Government’s website at <http://www.info.gov.hk/sb/eng/23/leaflet2.htm> at p 6 of 7.

<sup>24</sup> See Albert Chen, “Treason, Secession, Subversion and Proscribed Organizations: Comments on the Consultation Document”, paper presented at Preserving Civil Liberties in Hong Kong: the Potential Impact of Proposals to Implement Article 23 of the Basic Law (conference organised by the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, 23 Nov 2002), pp 7–8.

<sup>25</sup> *Ibid.*, p 8.

<sup>26</sup> For conference details see n 24 above.

<sup>27</sup> See generally the article by my colleague, Benny Tai, which appears at pp 579–614 of this issue.

<sup>28</sup> See Simon Young, “State Powers of Investigation and Article 23”, abstract of paper presented at Preserving Civil Liberties in Hong Kong: the Potential Impact of Proposals to Implement Article 23 of the Basic Law (n 24 above).

without a warrant in an emergency to stop a crime. However, the Government considers that it is also necessary to give the police emergency entry, search and seizure powers to simply *investigate* certain Article 23 offences.<sup>29</sup> Commentators have rightly questioned whether this can be justified, given that Article 23 itself says nothing about special enforcement powers. Moreover, the legislature has not granted such extraordinary search powers for investigations under equally important laws, such as those aimed at organised crime, money laundering and terrorist financing.<sup>30</sup> Given the sensitive nature of these offences, it is difficult to imagine a situation in which police would not anticipate the need to obtain a search warrant for an investigation. Indeed, in this modern era (when even secondary school students carry mobile telephones), magistrates and judges are never completely out of contact and thus a warrant could be obtained on an emergency basis if required. At a minimum, the police should be required to demonstrate a real need (based upon actual cases) before the legislature departs from this important principle of personal and family privacy.

Chapter 6 of the consultation document, on theft of state secrets, has also generated substantial public concern. This is a sensitive topic in Hong Kong because the mainland authorities interpret “state secrets” very broadly and have already prosecuted some Hong Kong journalists and scholars for allegedly violating national state secret laws while working in the Mainland.<sup>31</sup> It would be wise, therefore, to take a cautious approach and do the minimum that is required under Article 23. Yet the Hong Kong Government appears to want to legislate beyond the strict requirements of the Basic Law, maintaining that “Article 23 should not be interpreted as implying that information other than state secrets needs no protection”.<sup>32</sup> The Government proposes to broaden the restrictions on “unauthorized and damaging disclosure” of protected information.<sup>33</sup> The existing Official Secrets Ordinance only prohibits the disclosure of such information by people who have come across the information in the course of their duties (eg public servants and government contractors) or by those who have obtained the information from such people.<sup>34</sup> The Government claims that this is a major “loophole” in the law because it does not sanction other subsequent disclosures of the information. It thus seeks to prohibit the making of an unauthorised and damaging disclosure of information that was obtained directly *or indirectly* by unauthorised

<sup>29</sup> Consultation document, para 8.5.

<sup>30</sup> Young (n 28 above).

<sup>31</sup> See, for example, Gary Cheung, “Researchers fear study threatened by new law”, SCMP, 14 Oct 2002, p 5 (interviewing Dr Li Shaomin, formerly an academic at City University of Hong Kong, who was detained for five months in China).

<sup>32</sup> Consultation document, para 6.14.

<sup>33</sup> *Ibid.*, para 6.22.

<sup>34</sup> See Official Secrets Ordinance (Cap 521), ss 14–18 and the consultation document, paras 6.15–6.22.

access to it. The Security Bureau appears to dismiss concerns about this proposal, claiming (on its website) that it is a “myth” that it would widen the scope of the offence of unlawful disclosure to cover people who are not public servants. Of course, strictly speaking, the Government could prosecute an ordinary citizen under the existing law, but it would be extremely difficult to do so. The proposed new offence would, indeed, broaden the potential *criminal liability* of people who do not work for the Government and it poses a particular threat to news reporters.<sup>35</sup> Indeed, Professor Chen has argued that unless “unauthorized access is clearly defined to limit it to computer hacking or other prescribed criminal behaviour the proposal ... will be a very severe threat to press freedom and freedom of information in Hong Kong”.<sup>36</sup> Journalists and publishers have asked that the Government abandon this proposed offence or, at a minimum, adopt public interest and prior publication defences.<sup>37</sup> Representatives of the business community are also concerned by this proposal as they recognise that it could seriously undermine access to information, which is crucial to a healthy business environment.<sup>38</sup> The potential impact of the new offence would be heightened by the fact that the Government also proposes to include, as a class of protected information, “information relating to relations between the Central Authorities of the PRC and the HKSAR”.<sup>39</sup> This category is extremely vague and broad and is particularly threatening to journalists, because stories on the relations between the two governments are regularly reported in Hong Kong newspapers.<sup>40</sup> The proposals regarding sedition have also caused great concern among journalists,<sup>41</sup> publishers,<sup>42</sup> academics,<sup>43</sup> lawyers and even

<sup>35</sup> For examples of journalists’ concerns, see, for example, the written submission by the Foreign Correspondents Club of Hong Kong, dated 18 Nov 2002, available at <http://www.fchhk.org/media/bl23-1.htm>.

<sup>36</sup> See Professor Albert Chen, “Will Our Civil Liberties Survive the Implementation of Article 23?”, *Hong Kong Lawyer*, Nov 2002, pp 80–88, at p 87.

<sup>37</sup> See, for example, letter from Cyril Pereira, Chairman of the Society of Publishers in Asia (SOPA), to the Legislative Council Panel on Security, 29 Oct 2002; and Hong Kong Journalists Association, *Submission to the Legco on the Government’s Consultation Paper on Basic Law Article 23 Offences*.

<sup>38</sup> See, for example, British Chamber of Commerce, *Response to the Hong Kong SAR Government Consultation of Article 23 of the Basic Law*, 19 Nov 2002. See also Ravina Shamdasani, Ernest Kong and Cheung Chi-fai, “Foreign banks voice concerns over Article 23”, *SCMP*, 3 Dec 2002, p 1; and Mark L. Clifford and Pete Engardio, “Is the Sun Setting on Hong Kong’s Freedom?”, *Business Week*, 18 Nov 2002.

<sup>39</sup> Consultation document, para 6.19. See also Professor Johannes Chan, “Theft of State Secrets and the Proposed New Offence of Unauthorized and Damaging Disclosure of Protected Information”, paper presented at *Preserving Civil Liberties in Hong Kong: the Potential Impact of Proposals to Implement Article 23 of the Basic Law* (n 24 above); and Ronny Tong, “Article 12 Legislation: State Secrets – What You Must Know”, pamphlet published by the Article 23 Concern Group, Nov 2002.

<sup>40</sup> See, for example, Hong Kong Journalists Association, “Enactment of Article 23: HKJA fears SAR’s media centre status, freedoms, could be at risk”, available at [http://www.freeway.org.hk/hkja/press\\_free.statement/article-23-ENG.htm](http://www.freeway.org.hk/hkja/press_free.statement/article-23-ENG.htm).

<sup>41</sup> *Ibid.*

<sup>42</sup> See Pereira (n 37 above).

<sup>43</sup> See Dr Fu Hau Ling, “Past and Future Offences of Sedition in Hong Kong”, paper presented at *Preserving Civil Liberties in Hong Kong: the Potential Impact of Proposals to Implement Article 23 of the Basic Law* (n 24 above).

librarians.<sup>44</sup> As one commentator noted, the proposal to criminalise possession and “dealing” in seditious publications would require:

“everyone who comes into contact with a publication, or proposal to prepare some publication, to ask whether the publication would be likely to incite some unknown individual to commit treason, secession, or subversion. If there is any reason to suspect it would, the person must refuse to have anything to do with it. When one writes or edits an article, or files a report, or copies some materials or even allows some material to come into or remain in one’s possession, one must ask the same question.”<sup>45</sup>

I would argue that this brief summary of concerns challenges the Government’s position that the proposals enjoy broad support in Hong Kong. The fact is that a large number of well-informed people in the community, from a range of professions and political viewpoints, regard the proposals as threatening to civil liberties and the flow of information in Hong Kong. International organisations, foreign governments and foreign professional bodies are also taking an interest<sup>46</sup> and a campaign to oppose the overly broad proposals has been launched by journalists from around the world.<sup>47</sup> The level of international interest is not surprising because Hong Kong, while small, is a very special place – it is the only territory in China that enjoys freedom of expression and access to information. The international community and foreign investors are naturally concerned by laws that could allow the eventual erosion of those freedoms.

The Security Bureau’s tendency to label concerns about Article 23 as “myths” will not be enough to quiet this debate. It does appear that the Government may be willing to compromise on certain discrete issues. However, statements made by certain senior officials give the impression that the Government’s position on the big issues is pre-determined and simply not negotiable. Indeed, the Secretary for Security has an unfortunate tendency to reject criticisms very quickly, insisting that they are “unbalanced” and “paranoid”, based on “spurious grounds” and a “flawed understanding”.<sup>48</sup> What

<sup>44</sup> See letter from Dr Anthony W. Ferguson, Librarian for the University of Hong Kong, to the Members of the Security Panel of the Hong Kong Legislative Council, dated 17 Oct 2002 (seeking an exemption for libraries for any seditious offences), available at <http://www.article23.org.hk>.

<sup>45</sup> See Margaret Ng (a barrister and the representative of the legal profession in Hong Kong’s Legislative Council), “Next will it be a crime to own books?”, SCMP, 6 Nov 2002.

<sup>46</sup> For example, the British House of Commons has debated the issue and it has been reported that the British Bar Association also plans to study the proposals. See Jimmy Cheung, “Overseas investors’ fears ignored at our peril, Martin Lee warns: Bar Association in Britain will give its view of proposals”, SCMP, 25 Nov 2002, p 2.

<sup>47</sup> See Jimmy Cheung, “Journalists in 155 countries form a united front against Article 23”, SCMP, 25 Nov 2002, p 2.

<sup>48</sup> See, for example, Regina Ip, “Hong Kong Needs National Security Laws”, *Wall Street Journal*, 30 Sept 2002.

is most disappointing is the fact that the Government has so far refused to promise to issue a white paper after the conclusion of the initial public consultation exercise. Rather, the Government has suggested that it will start drafting the formal “blue bill” as soon as the initial three-month consultation is concluded, with the aim of introducing it promptly into the legislature. Indeed, some people believe that the drafting of the bill actually began long before the end of the consultation period and that the Government will seek to have the bill enacted by the summer of 2003, a mere nine months after the start of the process of public consultation.

There has been widespread opposition to the hasty approach to such important legislation taken by the Government. Academics, students, lawyers, legislators, journalists, business groups and a wide range of community and religious organisations have all implored the Government to slow down, to issue a white paper in 2003 and to conduct a full round of consultation on it. Even Anson Chan, the former Chief Secretary of Hong Kong (who has generally refrained from making public comments on government policy since her retirement) has urged the Government to publish a white paper.<sup>49</sup> A white paper would give the public an opportunity to comment upon the *specific* language of the proposed offences, which is missing from the consultation document. Government officials have argued that this is not necessary because the public can always comment on the formal blue bill when it is considered by the legislature. The problem with that approach is that most people feel that it is more difficult to amend a legislative proposal once it is formally introduced as a blue bill. The fear is that the Government will become hardened in its views once it has introduced a formal bill. Moreover, it is exceedingly difficult for the legislature to amend a formal bill over the objections of the Government. This is because an amendment proposed by a legislator will only pass if it receives a majority of the votes from both groups of legislators – those elected by the undemocratic “functional constituencies” and those elected by the geographic constituencies and the election committee.<sup>50</sup> Suppose, for example, that 44 of our 60 legislators voted for an amendment to the Government’s bill; it could still fail if a mere 16 functional constituency legislators voted against it. Thus, by lobbying a small number of functional constituency representatives (who are generally quite conservative) the Government could defeat an amendment that is supported by the majority of legislators. This is why people would prefer to see the specific language of the proposed new offences in the form of a white paper – in the hope that the Government can be more easily persuaded to amend the language at that informal stage.

<sup>49</sup> See Cheung Chi-fai, “Come clean on Article 23, says Anson Chan”, SCMP, Dec 2002, p 2.

<sup>50</sup> See Basic Law, Annex II, Part II.

It was recently reported that the Security Bureau may consider publishing a draft version of the legislation.<sup>51</sup> However, at the time of writing no promises have been made and it is not at all clear that the Government will be willing to adjust its legislative timetable to allow for a full round of public consultation on a draft bill. If the Government is determined to pass the legislation by the summer of 2003 then it will be almost impossible to first conduct a meaningful consultation on a white paper. Indeed, in that short period of time it would be difficult for the Legislative Council to conduct comprehensive public hearings on the formal blue bill. The public's reaction to the consultation document demonstrates that a large number of individuals and organisations will want to make written and oral submissions on the actual bill – perhaps more submissions than for any other piece of legislation enacted since the establishment of the Hong Kong SAR in 1997. The public's interest in commenting on the legislation should not be viewed with hostility and the legislative process should not be rushed. Rather, comments and suggestions for change should be welcomed and should be considered with an open mind. It is not too late for the Hong Kong Government to slow down its timetable, soften its public stance and adopt a more flexible approach to Article 23.

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<sup>51</sup> See Angela Li and Chris Yeung, "Article 23 draft law to be considered, says Security Bureau", SCMP, 9 Nov 2002, p 8.

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