Response to the Hong Kong SAR Government Consultation Document on proposals to implement Article 23 of the Basic Law

Submission to the Legislative Council, 23 December 2002

Submitted by Human Rights in China Ltd., Hong Kong, on behalf of Human Rights in China[1]

"The HK 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 organizations or 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 of the Basic Law of the Hong Kong SAR

I. Introduction

In September 2002, the Hong Kong Special Administrative Region (SAR) government released a consultation document outlining its proposals to implement Article 23 of the Basic Law.[2] Perhaps the single most controversial provision of the Basic Law, Article 23 has had a troubled history right from its inception.

Under the 1984 Joint Agreement between Great Britain and China, the basic governmental structure of Hong Kong would be spelled out in a Basic Law, a sort of quasi-constitution for Hong Kong.[3] Drafting of the Basic Law by the newly formed Basic Law Drafting Committee (BLDC) began in 1986. The BLDC, composed of 36 representatives from the mainland and 23 from Hong Kong, was generally acknowledged to be a rather conservative group.[4] The mainland Chinese members of the committee were largely government officials, with some academics also on the list. The Hong Kong group was a bit more diverse, but "there was a clear dominance of business people, including the most wealthy and influential of them."[5]

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[1] This briefing paper was researched and drafted by Tom Kellogg, a student of Harvard Law School, with final editorial review by HRIC.

[2] Article 23 reads as follows:

> (The Hong Kong SAR government) shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central people's Government (CPG), 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 of the Region from establishing ties with foreign political organizations or bodies.

[3] Joint Declaration, Annex 1,Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong.

[4] Chan and Clark, eds., *The Hong Kong Basic Law: Blueprint for 'Stability and Prosperity' under Chinese Sovereignty?*, M. E. Sharpe, 1991, p. 6.

[5] Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, 2nd ed., Hong Kong University Press, 1998, p. 57.

Working under close scrutiny, the BLDC produced its first draft Basic Law in April 1988.[6] Although the first draft did contain strong rights protections, it also contained a draft Article 23 (Article 22 in the original draft), which stated that the government would "prohibit by law any act designed to undermine national unity or subvert the Central People's Government."[7] Under the process laid out by the BLDC, the issuance of the draft was followed by a solicitation of public commentary. This commentary was then integrated into a second draft, issued in February 1989. While the text of Article 23 was improved, it was still far from perfect: the word "subversion" had been removed, but Article 23 still called for the Hong Kong government to "enact laws on its own to prohibit any act of treason, secession, sedition, or theft of state secrets."[8]

Further solicitation of public opinion followed, but the drafting process was interrupted by the 1989 Tiananmen Square protests and the subsequent military crackdown ending them. In the wake of the crackdown, recommendations to further liberalize or even remove Article 23 from the Basic Law were ignored, and the BLDC instead chose to take a conservative turn on Article 23, reinserting subversion and otherwise broadening its scope.[9] The third draft of the Basic Law was enacted by the National People's Congress in Beijing on April 4, 1990; its creation was met with a mixture of anger and indifference in Hong Kong.[10]

Since Article 23 became a reality, repeated attempts have been made to both limit its effect pre-handover and to guide the post-handover SAR government in the drafting and implementation of Article 23 legislation. These attempts have borne little fruit: the voice of civil society was largely ignored in the drafting of the September 2002 government consultation document (the so-called "blue paper"). Despite the flaws of Article 23 and the questionable motives behind its creation, nonetheless the government could have used Article 23 as a chance to improve the security law of the SAR. Instead, the government has proposed broadening existing law, while further empowering both the local government and the national government in Beijing to infringe on the rights of the people of Hong Kong.

The key components of the proposed revisions include creation of new offenses of subversion and secession; extending state secrets to include all communications between the Hong Kong SAR government and the central government in Beijing; and adding provisions that allow the central government in Beijing to play a role in the security law of the Hong Kong SAR.

This paper gives a close analysis of the government's proposals in light of international standards, and offers specific recommendations for change. In drafting Article 23 legislation, the government should not be constrained by the existing ideas laid out in its own consultation document. Instead, it should follow the suggestions laid out by the Hong Kong Bar Association, Hong Kong civil society groups, and others, and significantly narrow its proposals to ensure that basic rights are protected.

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[6] Chan and Clark, supra note 3, p. 4.
[7] Hong Kong Human Rights Monitor (HKHRM), *A Ticking Time Bomb?*, p. 6.
[8] Ibid.
[9] Ibid., p. 7.
[10] Chan and Clark, supra note 5, p. 29.

Recommendations

In drafting Article 23 legislation, the government should

- **Withdraw all proposals not specifically mandated by Article 23.** Many of the government's proposals, while certainly related to national security, are not required by Article 23, and should be abandoned until after the legislature has dealt with the government's central proposals. Article 23 is silent on matters of criminal procedure, for example, and therefore the government's proposals on conducting searches without warrants should be postponed.

- **Remove archaic and easily manipulated language from the colonial-era statutes covering treason and sedition.** Words like "constrain" and compel" have been part of British law of treason for centuries, and date to an archaic loyalty-based concept of national security law. Yet much modern political activity, including public speech and public protest, is geared toward "compelling" the government to change its policy, and thus the retention of such terms may have a chilling effect on political activity in Hong Kong. Given its connection to speech and other expressive activity, the crime of sedition is particularly vulnerable to abuse. The government should therefore consider completely eliminating the offense of sedition.

- **Remove the offense of seditious publication from Hong Kong law.** Because it specifically targets the written word, the offense of seditious publication can have a more direct impact on freedom of speech and a free press. The government proposes to preserve the offense for publications that "incite others to commit the offense of treason, secession, or subversion," but this slight reworking of the offense should be rejected in favor of dropping it altogether.

- **Withdraw the proposal to create a new offense of subversion.** The Hong Kong government's assertions to the contrary, subversion is very much a stranger to the common law, and has been used to crack down on political dissent in a number of jurisdictions. The government should therefore leave subversion out of its draft Article 23 legislation.[11]

- **Withdraw the proposal to create a new offense of secession.** The government's proposals on secession are both vague and overly broad, and thus could be easily stretched to cover protected speech regarding the political status of Taiwan, Tibet, or Xinjiang. Given that truly secessionist activity could be prosecuted under a narrowly drawn treason statute, the government should withdraw its proposal to create a separate offense of secession.

- **Withdraw the proposal to extend "state secrets" protection to all communications between the SAR government and Beijing.** Such blanket protection is both unprecedented and unnecessary, and could have a significant chilling effect on free speech in Hong Kong.

- **Include explicit rights protections in its proposals for new offenses.** In several jurisdictions, rights are protected against abuse through safeguards in the law that prevent normal political activity from being covered by security law. The Hong Kong government has made no explicit provisions for the

[11] The government has chosen to read Article 23 as mandating the creation of actual offenses in each of the areas listed, including subversion. Such a reading is not the best one, especially in light of the numerous human rights protections found in other parts of the Basic Law. Rather than legislating for each and every offense, the government could instead cover all of the activities listed in the text of Article 23 through existing law. This would obviate the need for a specific offense of subversion.

prevention of the misuse of security law; doing so would do much to allay the fears of the people of Hong Kong.

- **Eliminate proposals for Beijing to play a role in the operation of security law of Hong Kong.** At several points, the proposals of the SAR government call for the central government in Beijing to play a key role in the operation of security law in Hong Kong. This choice is difficult to justify. The use of security law as an instrument for silencing critics of the government is a well-documented practice in China. Inviting the central government in Beijing to have a hand in the operation and execution of Hong Kong law also violates the concept of "one country, two systems." Those proposals that call for Beijing's involvement should therefore be removed from the draft legislation.

- **Adhere to international standards and jurisprudence on national security law, including the Johannesburg Principles on National Security, Freedom of Expression, and Access to Information.** Although the government mentions both the Johannesburg Principles and international human rights law several times through the text of the Consultation Document, it violates the fundamental principles of both in its proposals for change to the security law of Hong Kong. The Johannesburg Principles emphasize clear and concise legislative language and narrow tailoring of the law related to national security; the government has accomplished neither in its proposals.

- **Issue a draft White Bill and extend public consultation.** HRIC is particularly concerned that the government has presented a draft consultation document and not a draft White Bill, which means that the public still have little information as to how the Bill may be worded. There is a need for a longer public consultation period and a White Bill to be presented before the more final "Blue Bill" is issued.

The government's proposals: why now?

From a legal point of view, the government's decision to act now is difficult to explain. Both before the reversion to Chinese sovereignty and over the five years since the handover, Hong Kong has experienced no major security threats, be they internal or external. If fears over security post-September 11 are a concern, then the government should look to existing anti-terrorism and basic criminal law rather than laws covering treason, sedition, and subversion.[12]

The government's stated rationale for acting now to revise Hong Kong's security law seems to be simply that all jurisdictions must have laws on national security, and that Hong Kong is no exception to this rule. Further, the government argues, Article 23 requires that the government create new laws on national security.[13] This argument neglects the fact that Hong Kong already has legislation covering all of the areas mentioned in Article 23. There is no legal vacuum in Hong Kong's national security law in the way that the government seems to suggest. Also, Article 23 does not set any particular timetable for the presentation of legislation; the government could have chosen to continue to do nothing, given that existing law has proven more than adequate over the five years since the handover.

And yet the government has decided, in the absence of any real need, to move forward on national security law. Its considerations may be much more political than legal: by waiting several years after the handover, the government has avoided the maximum scrutiny that would have accompanied any such proposals in the wake of the transition.

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[12] See United Nations (Anti-Terrorism Measures) Ordinance, cap. 575, which was passed in August 2002.
[13] See Regina Ip, "Hong Kong Needs National Security Laws," *Asian Wall Street Journal*, September 30, 2002. A similar argument is laid out in the Government Consultation Document in paragraphs 1.4-1.6.

The government's decision to advance these proposals now may also have to do with the upcoming District Council and Legislative Council (LegCo) elections, which should take place in late 2003 and late 2004, respectively. By moving to enact these laws now, the government may be seeking to avoid turning Article 23 legislation into an election issue. If, as the government hopes, LegCo passes the legislation by early 2003, any new laws will be several months old by the time the 2003 elections come around, and over a year old by the time of the LegCo elections. This distance could be crucial in terms of maintaining the current balance of power in LegCo, in which pro-Beijing parties currently hold a comfortable majority over the pro-democratic parties.

Given the closed-door nature of the consultations between Beijing and the SAR government, it is impossible to know if Beijing pushed for action on Article 23, despite the clear provision that Hong Kong would enact any such legislation "on its own." But given that many of the legislative items suggested by SAR government in its consultation paper could be used against persons or entities perceived as Beijing's foes in Hong Kong, including, the spiritual group Falun Gong, it seems likely that the concerns of the central government also played a role in the SAR government's decision to legislate.

The SAR's decision to legislate despite the absence of any timetable compelling them to do so comes after five years of steady erosion of Hong Kong's rights protections framework. Before the handover, the central government announced that it would repeal significant reforms to Hong Kong's colonial laws governing free association and assembly. It also announced its intention to remove Hong Kong's Bill of Rights Ordinance (BORO), passed in 1994, from its prominent position in Hong Kong law. After the 1997 handover, the government replaced the elected Legislative Council (LegCo), the first to be elected by universal suffrage in Hong Kong's history, with its own appointed Provisional LegCo, and then moved to amend Hong Kong's election laws so as to drastically reduce the number of eligible voters. The new electoral system virtually guaranteed that Hong Kong's pro-democratic parties would remain in the minority in LegCo despite broad public support. In 1999, the government dealt a serious blow to the autonomy of Hong Kong's court system when it sought a reinterpretation from Beijing of the high court's ruling in the infamous right of abode case.

As a result of these and other actions taken by the Hong Kong government, confidence in the government's willingness to take seriously its constitutional obligation to protect the rights of the citizens of Hong Kong remains very much in doubt.[14] Sadly, the proposals laid out in the government blue paper are very much in line with previous action taken by the Hong Kong government in the area of rights protection. Article 23 has been a cause of concern since its inception, and the government's proposals bring closer to reality the fears expressed by several commentators over a continued weakening of Hong Kong's rights protection framework.

The analysis and recommendations below outline the flaws in the government's proposals, and make suggestions for national security legislation more in line with international human rights standards and Hong Kong law in relation to the following draft provisions:

- Treason
- Secession
- Sedition
- Subversion
- Theft of State Secrets

- Foreign Political Organizations

[14] Under Basic Law Article 5, the Hong Kong government has the duty to "safeguard… the rights and freedoms of the residents and other persons in the Region…"

- Investigation Powers

Even at this late hour the Hong Kong SAR government can demonstrate its responsiveness to Hong Kong public opinion by seriously and carefully considering the concerns raised and the recommendations presented.

II. Treason

The government's proposal on treason is novel: it suggests splitting the offense of treason into two parallel offenses. Treason would cover only acts committed in concert with a foreigner, while subversion would cover purely domestic acts.[15] While on its face the proposal seems innocuous, the two offenses outlined by the government are together potentially much broader than the one offense of treason currently in place. This section addresses the proposed new offense of treason; subversion is dealt with below.

The government's proposal on treason a bit schizophrenic: although the government rightly calls for the elimination of the most antiquated language in the statute, it does not propose to remove other equally out-of-date language that could be used to crack down on free speech and association. Hong Kong law on treason is inherited from the British, and the language of the law is largely drawn from the Treason Felony Act of 1848, which defines treason as an affront to the Queen and thus the State. Under the Act, treason is defined as follows:

> To levy war against Her Majesty within any part of the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament.[16]

This language is typical of the original concept of treason, which entailed a violation of the requirement of personal allegiance to the State. The modern concept of treason has moved away from a concept of allegiance and toward one of armed resistance. In the words of the British Law Commission, "the modern concept… regards treason as 'armed resistance made on political grounds to the public order of the realm.'"[17]

Because the incoming SAR government rejected the pre-handover amendments to the Crimes Ordinance, current Hong Kong law still outlaws attacks on the bodily person of the Queen. Such provisions are no longer useful, and the government is right to call for their removal from the law. However, other language that implies an attack on an individual person or a violation of the duty of loyalty to the State is retained.

Under the government's proposals, attempts to "constrain" the government in order to change its policies, or to "intimidate" or "overawe" the government would still be considered treason. A separate provision, which the government wishes to keep on the books, forbids individuals from "instigat(ing) any foreigner

[15] The government rightly moves to define the key term of "foreigner" in relation to the proposed offense. The government's proposed definition for foreigner is "armed forces which are under the direction and control of a foreign government or which are not based in the PRC." As long as the government sticks to a reasonable definition of what constitutes a connection to a foreign "armed forces" so as not to include, for example, businesses that have entered into a commercial relationship with a foreign military, then this definition should prove less dangerous.
[16] Treason Felony Act, 1848. This language is itself drawn from the prior British law on treason, including the common law and the first Treason Act of 1351.
[17] Law Commission Working Paper no. 72, paragraph 14, in Supperstone, Michael, *Brownlie's Law of Public Order and National Security*, London, Butterworths, 1981, p. 230.

with force to invade the United Kingdom or any British territory."[18] Although there is some ambiguity in this language, the government consultation paper makes it clear that instigation under Section 2(1)(d) need not be forceful. In common parlance, "instigate" has no association with violent acts, and is defined rather as urging or provoking another to act. As such, it is somewhat similar to the offense of sedition as outlined by the government, with the added element of foreign involvement. There is therefore a risk that the offense, like the other provisions relating to treason, could be stretched to cover peaceful public protest or other criticism of the government.[19]

Also problematic is the government's preservation of the somewhat archaic term "levying war." Under the government's proposed definition, levying war would include not only armed attack against the government, but also "a riot or insurrection involving a considerable number of people for some general public purpose."[20] Such a definition explicitly covers public demonstrations that get out of hand, and should be amended so as to cover only violent action aimed at overthrowing the state. Damage to public property during public protest is extremely rare in Hong Kong, and such incidents, if and when they do occur, should be covered by the relevant criminal statutes relating to vandalism, destruction of property, public disorder, and the like, rather than treason, which is one of the most serious crimes contemplated by the criminal law.

Rather than using centuries-old language that could potentially be manipulated to cover peaceful protest and dissent from official policy, the government should further modernize the crime of treason in Hong Kong by expunging all of these terms from the law, and by creating a law of treason that covers only attempts to overthrow the government by force.[21]

In expunging such language from the statute, the SAR government would be following the advice of the British Law Commission, which made similar recommendations for the revision of British law on treason in its 1977 working paper on treason, sedition, and related offenses. After deliberating over the necessity of the offense of treason at all in the peacetime context, the Law Commission concluded that, while a narrowly tailored offense "aimed at the overthrow, or supplanting, by force, (of the) constitutional government" should be retained, nevertheless the language of the statute should be reworded:

> It is because of the extent of the present offenses of treason in peacetime and because of the difficult language in which they are cast that it is in our view necessary at least to restate the offences in simple language.[22]

Although the government maintains that its proposals are in accordance with international standards, the UN Human Rights Committee (UNHRC) has previously called on the Hong Kong government to clean up the language of both its statutes on treason and subversion. In its Concluding Observations, the Committee noted that "the (current) offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under Article 19 of the

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[18] Crimes Ordinance, Cap. 200, Section 2(1)(d).
[19] This is especially so given that there is no requirement that the act of instigation actually lead to an attack on Hong Kong or another part of Chinese territory.
[20] Government Consultation Paper, paragraph 2.7.
[21] The removal of the pre-modern terms like constraint, intimidate, and overawe is especially necessary given the paucity of treason cases. Treason cases are virtually unknown in 20th century Britain, and cases are few and far between in other common law jurisdictions. If the courts were called upon to interpret any of the terms in question, they might have little precedent to aid them in rejecting a broad interpretation of the terms, although they would be able to turn to modern international human rights norms.
[22] The Law Commission, Working Paper No. 72, Codification of the Criminal Law: Treason, Sedition and Allied Offences, London, May 1977, paragraph 57.

Covenant."[23] By refusing to update the language of the law on treason, the government is coming needlessly close to a violation of international standards as articulated by the UNHRC. The government has also failed to live up to the standards articulated in the Johannesburg Principles, which call for the elimination of ambiguity in the law.[24]

The force requirement

Treason has also traditionally been thought of as a crime that is only committed through the use of force. As the British Law Commission has pointed out, "(i)t is difficult… to postulate a conspiracy illegally to overthrow or supplant constitutional government, without the use of force."[25] The Hong Kong government takes a different view, arguing that certain activity, while aimed at the overthrow of the government, may not involve the use of force:

> In so far as a non-violent attack (e.g. electronic sabotage) is part of the larger planned operation by which foreign forces levy war or invade the territory of the state, it would be caught by the offences proposed (in the consultation document).[26]

If the goal of the government is to capture acts like electronic sabotage that are committed in conjunction with an armed attack on Hong Kong, then it should tighten the language of the proposed laws as suggested above so as to ensure that there is no over-inclusiveness. As mentioned above, simple acts of vandalism or destruction of property cannot generally be considered acts of treason.

In addition to being vague and over-inclusive, the proposal on treason is also duplicative: under the government's proposal, Section 2(1)(e) of the Crimes ordinance, which forbids anyone from "assist(ing) by any means whatever any public enemy at war with Her Majesty," would be retained at the same time that the common law offenses of aiding and abetting, counseling, and procuring treason would be codified by law.[27] There seems to be little substantive difference between the two provisions. As the Hong Kong Bar Association has pointed out, such duplication is "simply creating an offence for the sake of creating an offence."[28] The government should therefore rework its proposals so as to eliminate the duplication.

The government has also proposed to codify the offense of misprision of treason, which is essentially the offense of failure to disclose the commission of the act of treason by another within a reasonable time. Although it may be unnecessary for the government to take this action given the paucity of such cases,[29] codifying the offense does not violate international norms. While the UK and Canada have left the offense in the common law rather than committing it to statute, the US, for example, has codified the offense.[30] The move to codify the offense is primarily troubling in the context of the overly broad proposal for the offense of treason itself and in the uncertain legal and political environment in Hong Kong.

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[23] Concluding Observations of the Human Rights Committee, 1999, in *A Ticking Time Bomb?*, supra note 6, p. 9.
[24] See in particular Principle 1.1(a), which calls for national security laws to be "accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful."
[25] Ibid., paragraph 61.
[26] Government Consultation Document, p. 11.
[27] Ibid., paragraph 2.13.
[28] Submission of the Hong Kong Bar Association, paragraph 25.
[29] The last case of misprision of treason in the UK was R. v. Thistlewood, 33 State Tr 681, which was brought in 1820.
[30] See 18 USCA 2382.

III. Secession

In the section on secession, the government points out that "(t)he actual development of the law on secession of individual countries is determined to a large extent by the history and special circumstances of the country in question."[31] After laying down this principle, the government goes on to state that

> Where there are, within a particular country, distinct, discontented communities associated with a geographical territory in respect of which they intend to establish new independent states, the country in question has a pressing need to formulate clear policies and laws on secessionist attempts. The need for specific legislation to proscribe secessionist attempts or acts is particularly acute where such actions have become violent or could result in the fragmentation of a country, or threaten its unity or peace.[32]

In essence, the government is laying down a rough test for whether a law on secession is necessary: if there is an active secessionist movement, then there is a need for legislation prohibiting secessionist activity. Presumably, if there is no such movement, then there is no need for legislation.

While there are, to use the phraseology of the government report, "distinct, discontented communities" in Tibet, Xinjiang, and even, to a lesser extent, Inner Mongolia, there is no secessionist movement in Hong Kong. No political party or other group has advocated independence for Hong Kong in the years since the resumption of Chinese sovereignty, and there have been no violent acts by any party in support of an independent Hong Kong. It stands to reason, then, that under the government's test for legislation on secession, it is unnecessary to legislate in Hong Kong.

Even looking at Hong Kong's status vis a vis other parts of China, there remains no need to legislate on secession. Historically, Beijing's fears to the contrary, Hong Kong has not been used as a base for secessionist movements inside China. However, it has long been a place where important and sensitive issues regarding China's present and future are discussed and debated. It is this tradition that is put at risk with the creation of a secession offense.

The government's proposal on secession, which could easily be stretched to cover open discussion of independence for Taiwan or Tibet, does little to allay fears of intervention by the central government. If the government insists on passing a law, then it needs to be more precise in its drafting of the offense. As it now stands, one may commit the offense by either levying war, the use or threat of force, or by "other serious unlawful means." As with treason, it is difficult to imagine a serious secessionist threat that did not engage in the use of force, and thus the expanded definition seems unnecessary. The government recognizes that there is a risk inherent in the use of such language, and in order to "avoid casting the net too wide and including minor offenses" within the definition of the offense, lays down a definition of "criminal actions" which could constitute serious unlawful means.[33] But their definition is itself elastic.

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[31] Government Consultation Document, p. 16.
[32] Ibid.
[33] Government Consultation Document, p. 17. The six listed "criminal actions" in the consultation document, which were taken directly from Section 2 of the United Nations (Anti-Terrorism Measures) Ordinance, are:
(a) serious violence against a person;
(b) serious damage to property;
(c) endangering of a person's life, other than that of the person committing the action;
(d) creation of a serious risk to the health or safety of the public or a section of the public;
(e) serious interference or serious disruption of an essential service, facility or system, whether public or private.

As one prominent commentator has pointed out, "the list is not a list of criminal offences but of the results, intended or unintended, of criminal action."[34]

The risk, therefore, is that certain action, which may or may not be illegal, could rise to the level of secession. Protests in favor of human rights in Tibet, for example, though legally conducted, could cause a serious disruption to public transportation, which is unquestionably an "essential service," and thus would come within the ambit of the law. Although such incidents are rare in the Hong Kong context, public protests can sometimes cause damage to public property. Such incidents may be a violation of the law, but cannot reasonably considered secessionist activity. Nonetheless, the law would cover such an occurrence.

IV. Sedition

The Crime of Sedition

As the government points out, many commentators have questioned the need for any provision on sedition in modern national security law.[35] When the outgoing British colonial government moved to amend Hong Kong's security law before the return to Chinese sovereignty, LegCo member Emily Lau tabled a proposal to eliminate the crime altogether.[36] Although the proposal received significant support from other legislators, it and all other proposals to amend Hong Kong's law on sedition failed to win a majority, and the law remains unchanged.

As with treason, the offense of sedition in Hong Kong law is archaic in that the text of the law fails to reflect a narrowing of the offense. Under the current statute, it is an offense to "excite disaffection against the Central People's Government," "raise discontent or disaffection among Chinese nationals," or to promote feelings of ill-will or enmity between different classes" in the SAR.[37] Such language could easily be stretched to cover normal political activity, even with the retention of various protections found in Section (2) of the Crimes Ordinance.[38]

It is unclear whether the government intends to remove this language from the statute, but it should do so.[39] In its relevant provision on incitement, US law refers directly and unambiguously to "overthrowing or destroying the government."[40] Canadian law takes a similar tack: it places primary evidence on "the

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[34] Margaret Ng, "Draconian measures threaten HK freedoms," *South China Morning Post*, October 9, 2002.
[35] Government Consultation Document, p. 23.
[36] See Hong Kong Human Rights Monitor, *A Ticking Time Bomb?*, *supra* note 22, p. 13.
[37] Crimes Ordinance, Section 9.
[38] Those protections extend to any speech that intends to influence policy or that "points out errors or defects in the government or constitution of the HKSAR." Speech that advocated civil disobedience, for example, could be punished under a sedition statute.
[39] As mentioned above, the government has already been admonished by the UN Human Rights Committee to narrow the language of its statute on sedition. *A Ticking Time Bomb?*, *supra* note 35, p. 9.
[40] 18 USC 2385. It is worth noting that US law avoids the use of the word "sedition" to cover such activity, instead using the phrase "advocating overthrow of Government" to describe the offense. The relevant part of the s. 2385 reads as follows:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
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> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating,

use, without the authority of law, of force as a means of accomplishing a governmental change within Canada."[41] Perhaps most instructive, the UK has declined to codify the offense of sedition at all. In the view of the British Law Commission, "there is likely to be a sufficient range of other offences covering (seditious) conduct," and therefore "there is no need for an offense of sedition in the criminal code."[42]

In addition to concerns over the language of the statute, there are also flaws in the government's approach to the conceptualization of the offense itself. First, the government acknowledges the narrowing of the offense that has taken place in several common law jurisdictions:

> It has been clearly established that the common law offence is committed only if the person with the seditious objective intends to achieve that objective by causing violence or creating public disorder or public disturbance.[43]

This is a rather garbled and less than full expression of the central principle regarding incitement, first enunciated in American law in *Brandenburg v. Ohio*:

> Constitutional guarantees of free speech and free press do not permit a State to forbid advocacy of the use of force… except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[44]

The Brandenburg test, then, is a two-part test, for both intent and for actual likelihood that the speech will produce the called-for action.

The leading Commonwealth case, *Boucher v. R.,* unlike *Brandenburg*, deals specifically with sedition. It holds that in order to be held seditious, "there must be an intention to incite violence or resistance or defiance for the purpose of disturbing constituted authority." Although less protective than the *Brandenburg* test, the Boucher case still presents a high bar for prosecution for sedition.

The government notes that no such narrowing has taken place in Hong Kong:

> (T)hat element of the common law offence is not set out in the Crimes Ordinance and, according to a Hong Kong case decided in 1952, such legislation is not to be construed according to the common law but on its own terms.[45]

Given this gap in the law, the government may want to add the intent requirement into its own reform proposal. It indirectly explains this omission by pointing to the obligation of the courts of Hong Kong to

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> advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
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> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof--
> Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

[41] Criminal Code of Canada, s. 59(4).
[42] Working Paper No. 72, *supra* note 21, paragraph 78.
[43] Government Consultation Document, p. 23
[44] 395 US 444 (1969) at 447.
[45] Government Consultation Document, paragraph 4.8.

look to the free speech protections found in the Basic Law and in Article 19 of the ICCPR.[46] But the ICCPR calls on state parties to incorporate the rights protections found in the Covenant into existing *law*, and in the absence of any such protection in either case law or statutory law, the Hong Kong government should consider such an approach.[47]

A move to incorporate the common law protections would not be without precedent. The South African Constitution, for example, explicitly denies protection to expression that is "incitement (to) imminent violence," which might be read as a nod to the imminence requirement of *Brandenburg*, and expression that is "propaganda for war."[48] Although neither clause has yet been interpreted by the courts, the reference to war might be read as a requirement that the speech must be directed toward a "constituted authority," as per *Boucher*.

The Crime of Seditious Publication

As with the crime of sedition, the proposed crime of seditious publication also fails to conform to the *Brandenburg* standard. Under the government's proposal, an individual is guilty of seditious publication if she or he publishes an item that he either "know(s) or has reasonable grounds to know" is "likely to incite others to commit the offence of treason, secession, or subversion." At first glance, this construction seems to contain both the intent test and the actual likelihood test of *Brandenburg*. But "knowing or having reasonable grounds to suspect" is not the same as actual intent. Under the government's proposed language, all publishers, including newspapers, magazines, and book publishers, can be at risk for the crime of seditious publication even in the absence of clear intent to do anything beyond inform public debate.

The government rightfully calls for a defense of reasonable excuse, but does not spell out the content of its proposal. Also, creating a law that will potentially criminalize regular news reporting and academic inquiry but for a "reasonable excuse" is likely to have a significant chilling effect, as publishers and editors wonder whether their reporting will fall into the "reasonable excuse" category.

This is especially the case when all of the flaws of the proposed offenses of treason, secession, and subversion are built into the offense of seditious publication. A publication that supports the right of Falun Gong protestors to make their case to the people of Hong Kong and that stirs Falun Gong followers to engage in organized protest might be illegal, given that peaceful protest could fall under the law as defined in the government blue paper. By many accounts, press freedom in Hong Kong has suffered greatly since the handover.[49] The government should abandon its proposals on seditious publication in order to preserve aggressive reporting and critical debate in Hong Kong.

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[46] Interestingly, the government does not point to the Bill of Rights Ordinance, which embedded into Hong Kong law the provisions of ICCPR Article 19. In fact, the Bill of Rights Ordinance is not mentioned at all in the government document, which may be an indicator of the government's view of the place of that particular law in the body of Hong Kong law.

[47] The relevant provision of the ICCPR is very clear:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. ICCPR Article 2(2).

[48] Constitution of the Republic of South Africa, Section 16.

[49] One recent example is the decision of the Hong Kong-based magazine *China Law & Practice* not to publish an article on Chinese criminal law by prominent expert Jerome Cohen. See "Self-Censorship Exposed," *Asian Wall Street Journal*, October 24, 2002.

V. Subversion

Perhaps the weakest part of the government consultation document is the section on subversion. In an attempt to draw a parallel between its own proposal to create an offense of subversion and the law of other countries, the government cites examples from Canada, Australia, and Germany. But none of these countries have subversion laws on the books.

Although it admits that "there are not many examples of offences termed 'subversion' in common law jurisdictions," the government nonetheless claims that "the concept is by no means alien."[50] Yet it fails to cite a single example of an offense of subversion in a common law system. Strangely, the government makes reference to British law, despite the fact that there is no offense of subversion in the UK. In claiming the connection, the government cites the British Security Service Act 1989. The reference to the Act is somewhat disingenuous, as the word "subversion" is not mentioned at all in the Act itself. As the name of the Act suggests, the Security Service Act is concerned with the creation of a security service, and does not discuss criminal offenses.

The government instead turns to the website of MI5, the British security agency, which was created by the Security Service Act. Under its section on "threats," MI5 lists subversion as one of the activities that it addresses. But the pronouncements of MI5 have nothing to do with British criminal law, and it is unclear why the Hong Kong government refers to MI5 in its proposals.[51]

The government makes a further reference to Canadian law, but the law that it cites does not discuss subversion as a criminal offense. Rather, the law, the Canadian Access to Information Act, allows for the denial of access to government information on the grounds that the information requested would have a negative effect on government efforts to counter "subversive or hostile activities."[52]

In addition to providing no comparative basis for the law, the government also fails to narrowly define the offense. Subversion includes "intimidation" of the central government, a word that could well be abused to cover the exercise of basic rights. As with secession, the offense is committed by levying war, the use or threat of force, or by "other serious unlawful means," which means that the same flaws regarding "other serious unlawful means" discussed above would also apply to subversion.

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[50] Government Consultation Document, paragraph 5.3.

[51] Ironically, the assessment of the MI5 is that "the threat from subversive organizations… is now insignificant." Presumably the threat is no greater in Hong Kong. See http://www.mi5.gov.uk/th5.htm.

[52] The relevant provision is Article 15 of the Access to Information Act, which reads as follows:

> 15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defense of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities…

VI. Theft of State Secrets

Since its inception, the Hong Kong Official Secrets Ordinance (OSO), derived from the UK Official Secrets Act (OSA), has been the subject of much criticism: several groups have called for its substantial narrowing so as to bring it in line with international standards.[53] In fact, the UK OSA may have to be narrowed in order to conform to Britain's new human rights commitments as part of the European Union:

> In light of the Human Rights Act 1998 and the new Freedom of Information Act 2000, which will come into force fully by 2005, some of the basic principles by which courts have upheld official secrecy require re-evaluation. It is now becoming increasingly difficult to justify the harshness of the offenses under the Official Secrets Act.[54]

In the consultation document, the SAR government ignores all calls for reform of the OSO. Instead, the government would dramatically broaden the scope of protected information. If implemented, the government's proposed changes may have the most far reaching negative effects on Hong Kong's freedoms of all the proposals in the consultation document: because the proposals extend protected status to large and loosely defined categories of information, there is a real risk that research and reporting by journalists, academics, and non-government groups will be significantly hampered under the new regime.

As with its proposal to extend the government's ability to conduct searches without warrants, the government's proposal to extend protection to information beyond state secrets is not required by Article 23. The government seems to acknowledge as much when it states that "Article 23 should not be interpreted as implying that information other than state secrets needs no protection."[55] While it is true that Article 23 does not designate "state secrets" as the only category of information in need of protection, it also does not call for protection of other categories of information. It is simply silent on the issue. Proposals to protect other categories of information should therefore be postponed until Article 23 is dealt with.

In its consultation document, the government proposes creating a new category of protected information: "relations between the Central Authorities… and the HKSAR." This category of information is unbelievably broad: it would seem to cover all information and communication that flows between Beijing and Hong Kong and that relates to the governance of Hong Kong. The government does not qualify the category in any way, to include, for example, only information that is related to national security that concerns both Hong Kong and Beijing, but rather extends blanket coverage.[56] Extending protected status to such information would seem to be without precedent: there is no protection for communications between the United States federal government and state governments, for example, nor are there similar provisions for protection of information flowing between the British government in London and the parliaments of Scotland and Wales.

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[53] See HKHRM, *A Ticking Time Bomb?, supra* note 35, pp. 18-21. For more on criticism of the UK OSA, see Lawrence Lustgarten, "Freedom of Expression, Dissent, and National Security in the United Kingdom," in Coliver, ed., *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, Martinus Nijhoff Publishers, the Hague, 1999.

[54] Edwin Shorts, *Human Rights Law in the UK*, Sweet and Maxwell, London 2001, p. 333.

[55] Government Consultation Document, paragraph 6.14.

[56] As such, the proposal runs afoul of several provisions of the Johannesburg Principles, including, most crucially, Principle 12, which states that "A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest."

The government offers little justification for its proposal to extend protected status to this category of information. It merely points out that, before the handover, such information was protected under the category of "international relations," and that that category no longer applies. But the relationship between Beijing and Hong Kong has changed, and it is appropriate that the right of the people of Hong Kong to know about dealings between Hong Kong and Beijing should change, and expand, with it.

In addition to broadening the substantive coverage of the OSO, the government also seeks to expand its applicability beyond the core groups of public servants and government contractors. Under the government's proposal, *any* unauthorized disclosure of protected information, including information in the new category of Beijing-Hong Kong relations, by any party, including journalists, academics, and non-governmental groups, would be punishable under the OSO.[57] In expanding the punitive reach of the OSO in this way, the government claims to be closing a "loophole" in the current law. But in closing that loophole, the government opens up the entire Hong Kong media and all of civil society to possible prosecution for disclosure of state secrets.

The government claims that its proposals are narrowly tailored in that although entire categories of information are put off limits, the disclosure of the information is punishable only in certain circumstances. According to Hong Kong's solicitor general, "(m)embers of the public or of the media who disclose protected information commit an offence only if their disclosure was without lawful authority, and the information came into their possession through an unlawful disclosure or entrustment" and, in most cases, if the disclosure is "damaging."[58]

The words of the solicitor general only confirm that which is obvious from the text of the consultation document itself: the proposal in effect makes the Hong Kong government leak-proof. Any document leaked to a journalist is a "disclosure without lawful authority." Yet leaks are a regular part of journalistic (and even, some might say, political) practice in an open society. As one scholar commenting on the American situation has observed, "an enormous amount of currently classified information is in fact leaked to the press," including information relating to military action and national security.[59]

Although the government has repeatedly claimed that "the proposals will not have any significant impact on freedom of expression, or freedom of the press" in Hong Kong, such assertions are difficult to justify. As a prominent American journalist pointed out, "(without) the use of 'secrets'… there could be no adequate diplomatic, military and political reporting of the kind our people take for granted… and there could be no mature system of communication between the Government and the people."[60]

The qualification that disclosures must be damaging also offers scant protection.[61] The OSO defines "damaging" in a broad manner so as to include any disclosure that "endangers the interests of the United Kingdom or Hong Kong" or even "would be likely to have that effect." The "interest" affected need not be related to national security, nor need the threat created be particularly serious. Under the Johannesburg Principles, the standard for punishing disclosures is much higher:

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[57] Government Consultation Document, paragraph 6.21.
[58] Bob Allcock, "No change to freedom of speech," *South China Morning Post*, September 30, 2002.
[59] Hoffman and Martin, "Safeguarding Liberty: National Security, Freedom of Expression, and Access to Information: United States of America," in Coliver, ed., *Secrecy and Liberty*, *supra* note 52, p. 493. Hoffman and Martin cite examples of a CIA report on Bosnia that was leaked to the New York Times, and of information on CIA involvement in a murder case in Guatemala, but examples abound.
[60] Max Frankel, affidavit filed on behalf of the New York Times in the Pentagon Papers case (New York Times v. United States, 403 US 713, 1971), reproduced in Dycus, *National Security Law*, p. 1019.
[61] The OSO defines damaging in a broad manner so as to include any disclosure that "endangers the interests of the United Kingdom or Hong Kong" or even "would be likely to have that effect." See OSO II, section 16.

> No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from the disclosure.[62]

This standard is in line with the laws of the United States, Austria, Germany, the Netherlands, and Sweden, among others. In all of these countries, "journalists and editors are not subject to prosecution for publishing official secrets, unless the disclosure risked severe damage to national defense or international relations."[63] In defining a legitimate national security interest, the Principles make clear that national security is usually directly related to the nation's ability to respond to the use or threat of force. National security cannot be applied to situations in which a government seeks to protect itself from "embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology."[64] The vague language of the OSO cannot reasonably be compared to the stringent requirements of the Johannesburg Principles.

The government has claimed that its proposals do not represent a radical expansion of the law, and that much of what it proposes is in line with existing provisions of the OSO. In an address to the Newspaper Society of Hong Kong, Secretary for Justice Elsie Leung noted that "the knife has always been above your heads, although no one had (sic) bothered to take a close look at it."[65] Ms. Leung was referring to Section 18 of the OSO, which prohibits the disclosure by any party of information protected by the OSO without "lawful authority." The fact that Section 18 may be read as having the same potential applicability to legitimate news reporting should not allay the fears of the news media, nor should it calm fears over the government's proposal to expand its ability to prosecute those who disclose information without prior approval. But it does raise a legitimate question: if Section 18 of the OSO can be used in this way, why is the government seeking to enact further proposals that also put protected speech and activity at risk?

One possible answer is that the government wants to ensure that all information disclosed by all sources is covered. Although Section 18 would cover the vast majority of situations, it would not cover situations in which a person came across information in some manner other than unauthorized official disclosure. In other words, the new offense as proposed by the government would apply to information obtained by the media under any circumstances, whereas Section 18 of the OSO applies more directly to information obtained through leaks by government officials. By focusing in its proposals on "unauthorized disclosure" regardless of the source of the information, the government would be able to prosecute publishers in all cases in which prior approval to publish was not received.

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[62] Johannesburg Principle 15, General Rule on Disclosure of Secret Information.
[63] Coliver, ed., *Secrecy and Liberty*, *supra* note 58, p. 63-4.
[64] Johannesburg Principle 2.
[65] Ng Kang-chung, "Majority believes government meddles with media: survey," *South China Morning Post*, October 22, 2002.

VII. Foreign Political Organizations

Under international standards, social groups may form at any place and at any time for virtually any purpose under the sun.[66] It is appropriate under international standards to require those nongovernmental groups (NGOs) that wish to obtain legal status or privileges such as charitable tax exemption to *notify* the government of their establishment, but it is generally not considered acceptable to force NGOs to *register* with the government, such that their successful formation is conditioned on government approval.

For most of its history, however, Hong Kong had a registration system for nongovernmental groups. This changed in 1992, when the government amended the Societies Ordinance so that all that was required from newly formed groups was that they notify the government of their formation.[67] Despite the enormous success of the new system, the incoming government returned to the compulsory registration system.[68] After the return to Chinese sovereignty in 1997, new societies were dependent upon the approval of the SAR government in order to open their doors.

With its new proposals as outlined in the Consultation Document, the SAR government seeks to shift a significant measure of authority over social groups in Hong Kong to Beijing. Under the government's proposal, the central government in Beijing can notify the government of the HKSAR government that a particular group is a threat to national security, and the local government must take action against the local representatives or branch organizations of the group.

There are few entities less well equipped than Beijing to handle the task. While social group activity in China has increased dramatically over the past two decades, all nongovernment activity takes place only with government permission and with strict government oversight. Relevant laws on NGO formation reflect Beijing's view that the nongovernment sector should be under the oversight and control of the government, and that the role of social groups is to serve the state.[69] Allowing Beijing a role in deciding which nongovernment groups are a threat to national security represents a threat to freedom of association in Hong Kong.

The government claims that the censure of groups named by Beijing would not be automatic. Rather, the local government would act as a check on Beijing:

> (T)he Secretary for Security must then be satisfied by evidence of the said affiliation, and must 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.[70]

It is difficult to see the proposed review by the Secretary for Security as a significant check against abuse of power. The Hong Kong government has never publicly disagreed with Beijing on any major issue during the five years since the handover. The chief executive, toeing Beijing's line, has publicly denounced Falun Gong as an "evil cult;" the SAR's immigration service has denied entry to Falun Gong protestors during important international meetings; and the police have kept all protestors away from

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[66] With the exception of advocating the violent overthrow of the government or engaging in other illegal activity, almost any peaceful purpose is permitted.
[67] HKHRM, *A Ticking Time Bomb?*, *supra* note 52, p. 15.
[68] The change in Hong Kong's civil society was dramatic: according to one local group, "The NGO community expanded rapidly (after 1992)… The period after Tiananmen brought a huge shift in Hong Kong's political culture. Historic quiescence gave way to an explosion of activism." HKHRM, *Tightening the Leash*, p. 10.
[69] See Human Rights in China, *Freedom of Association Regulated Away*, 1997.
[70] Government Consultation Document, paragraph 7.16.

international meetings attended by top leaders from Beijing. In addition, the SAR government has refused to criticize the politically motivated detention of Hong Kong-based academics by mainland security agents, and some prominent Chinese dissidents in exile have been kept out of Hong Kong. Under these circumstances the proposal that the Secretary for Security would serve as an effective check on the misuse of the proposed process must be met with considerable skepticism.

The government, perhaps sensing that the public would likely have little faith in the SAR government's willingness to stand up to Beijing, also proposes an appeal mechanism. Under the proposed appeal mechanism, questions of fact would be heard by an independent tribunal, while questions of law would go to the courts of Hong Kong. Because no information is given about the makeup of the independent tribunal, it is difficult to say how effective this mechanism would be in practice. Such a tribunal would face the prospect of contradicting both the central government in Beijing and the SAR government, putting it under enormous political pressure. As for appeal to the courts, they too would be under severe political strain if called upon to reverse the decision of both Beijing and the SAR government, particularly on a matter allegedly relating to national security.

Even assuming that the SAR government would act as a guarantor of the rights of assembly and association for the people of Hong Kong against possible intrusion by Beijing, the fact remains that the behavior that the proposal seeks to proscribe should instead be protected. The government seeks to outlaw groups that have a "connection" with proscribed mainland groups, and would ban groups based on whether or not such a connection exists. But the Beijing government has banned several groups that have engaged in peaceful political and social activity. Subjecting social groups in Hong Kong to penalties for associating with these groups serves to validate the action of the central government in Beijing.

Although most attention has focused on the question of Falun Gong, it is not the only group that would be placed in an extremely difficult position if the government's proposal became law. Religious groups that maintained connections with underground Christian house churches, for example, would likely fall under the ambit of the law, as would human rights groups that maintained a connection with banned political action groups or victims' groups on the mainland. Under the law, such groups would be faced with a Hobson's choice: either sever ties with activists on the mainland, or risk loss of registration in Hong Kong.

It should also be noted that the proposals in the consultation document significantly expand the type of groups subject to the powers of the Secretary for Security on national security grounds. While the Secretary for Security is already empowered to ban groups under the revised Societies Ordinance that reimposed compulsory registration, it applies only to groups that seek to register as "societies."[71] By contrast, the consultation document uses the term "organization," which it defines much more broadly to include "an organized effort by two or more people to achieving [sic] a common objective, irrespective of whether there is a formal organizational structure."

VIII. Investigation Powers

In addition to significantly increasing the scope of national security law, the government also calls for strengthening the procedural powers of the police. Such changes to the procedural law are in no way mandated by Article 23 of the Basic Law. The government sees the changes as a necessary complement to the substantive legal changes proposed:

[71] Many NGOs in Hong Kong are in fact registered as companies.

> The very essence of Article 23 is to protect the sovereignty, territorial integrity, unity and security of the state, and hence the fundamental interests of our country. It is therefore important that sufficient powers be provided for investigation into the offenses proposed.[72]

Whether or not the police need enhanced investigative powers is a matter of heated debate. Regardless, the expansion of such powers is simply not called for by Article 23, and should be left until the debate over Article 23 legislation is completed.

Regardless of when the LegCo examines the executive's proposals on criminal procedure, it will find that the proposals are unnecessary as a means for furthering the security of the people of Hong Kong. Instead these proposals only weaken the safeguards against administrative violations of the privacy rights of the people of Hong Kong.

The most controversial of the government's proposals that allowing the police to execute a search without a warrant in situations in which a "sufficiently senior police officer… reasonably believes that" an offense has been committed and that evidence of that crime will be destroyed unless the police act immediately.[73] But, as several commentators have pointed out, the police already have significant power to carry out searches without a warrant. A long list of exceptions to the general rule that warrants must be executed in order to conduct a search already exist:

> Under Section 50 of the Police Force Ordinance, the police may in order to carry out an arrest enter premises without a warrant and conduct a search on the premises. Under section 11(2) of the Official Secrets Ordinance, in cases of "great emergency" in which immediate action is necessary, a superintendent of police may authorize a police officer to enter and search premises without a warrant. Under section 14 of the Societies Ordinance, the police may enter and search premises without a warrant to remove and obliterate any seditious publications.[74]

In light of this long list of exceptions, the government would need to offer a very compelling rationale for further expanding the police power to conduct searches without a warrant. The government offers no such compelling justification: it offers no evidence that criminal investigations have been hindered in the past, nor does it suggest any provisions to protect against the misuse of this power by the police.

IX. Conclusion

In moving to rewrite security law in Hong Kong, the government has proposed laws that increase the power of the government to investigate private individuals, to dissolve social groups that have done nothing illegal, and to limit speech critical of the government. Despite the protections of the one-country, two-systems framework, the government proposes to allow Beijing an active role in the determination of security threats in Hong Kong, regardless of Beijing's history of abuse of security law on the mainland and its intolerance for political activity outside of Communist Party control.

With a precious few exceptions, the government proposals ignore suggestions made by a wide spectrum of social groups both in Hong Kong and in the international community over the past several years,

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[72] Government Consultation Document, p. 48.
[73] Government Consultation Document, p. 49.
[74] Albert H. Y. Chen, "Will Civil Liberties in Hong Kong Survive the Implementation of Article 23?," *Hong Kong Lawyer*, November 2002.

including the Hong Kong Human Rights Monitor, the Hong Kong Bar Association, and several of Hong Kong's political parties. This decision does not bode well for civil society in Hong Kong.

Since the release of the Consultation Document, a number of social groups, media organizations, and members of LegCo have criticized the government's proposals as being insufficiently protective of the rights of the people of Hong Kong. Rather than taking these suggestions seriously and engaging in an extensive reworking of its proposals, the government has instead derided the criticisms of the flaws found in the consultation document as so many "doomsday scenarios." Yet the risks posed by the deep and central flaws in the government's proposals are all too real, and threaten Hong Kong's vibrant media sector, its dynamic NGO community, and even its business sector.

Of particular concerned is that the government has presented a draft consultation document and not a draft White Bill, which means that members of the public still have little information as to the eventual specific wording of the Bill. The government should provide a longer public consultation period and a White Bill before the more final "Blue Bill".

Ever since Hong Kong's reversion to Chinese sovereignty in June 1997, the system of rights protection in the SAR has been in flux. Although a historic change like the one that took place in Hong Kong five years ago is bound to bring about some uncertainty as the new system takes hold, the central government and the government of the Hong Kong SAR have made the situation worse by moving repeatedly to weaken basic rights protections in the law and to repeal last-minute improvements to the law made under the outgoing British colonial administration. Some observers had hoped that the trend of ever-weaker rights protection that has persisted since 1997 would end with the introduction of Article 23 legislation. With the issuance of the Consultation Document in September, the government has shown no inclination to reverse this trend.

Despite its failure to integrate international human rights standards into its proposals regarding Article 23, the Hong Kong SAR government should not pass up this final opportunity to address public concerns and thereby signal its renewed commitment to rights protection and rule of law in Hong Kong.