SLIDING BACK?

An Analysis of Hong Kong's Proposed National Security Legislation

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INTRODUCTION AND RECOMMENDATIONS

Since the July 1997 handover of Hong Kong from Britain back to China, Freedom House has raised concerns about the limitations on political rights and the slow but steady erosion of the protection of civil liberties accorded the territory's residents. In September 2002, the government of the Hong Kong Special Administrative Region (HKSAR) decided to move forward on implementing national security legislation required by Article 23 of the Basic Law. The government released a Consultation Document outlining its approach to the new legislation and called for public comment and debate until December 24, with final passage of the legislation targeted for July 2003.

The Consultation Document and the public statements of many Hong Kong government officials have created an unprecedented level of concern domestically and internationally that the new legislation will serve as a mechanism to further restrict the protection of basic freedoms within the territory. Hong Kong democracy activists have appealed to members of the international community to weigh in with the Hong Kong government with their views.

In response, Freedom House Executive Director Jennifer Windsor and Senior Program Officer Christine Nelson traveled to Hong Kong in November 2002 to meet with representatives of the HKSAR government, the Legislative Council (LegCo), nongovernmental organizations, the media, and other activists on a fact-finding mission related to the proposed legislation under Article 23.

Freedom House found that:

- There is serious concern among LegCo members, students, religious groups and leaders, journalists, trade unions, and human rights activists within Hong Kong that the proposed Article 23 legislation will significantly limit the rights and freedoms enjoyed by the residents of Hong Kong.

- The Consultation Document is filled with vague and broad language that does not meet international standards and that will allow the Hong Kong government enormous latitude to suppress basic freedoms arbitrarily.

- Even if never applied, the law as outlined would create a hostile environment for the exercise of freedoms of information and association within Hong Kong, because residents would hesitate to engage in peaceful political action or to freely express controversial views.

Freedom House calls upon the Hong Kong government:

- To abide by international norms and draft clear, unambiguous, and narrowly drawn legislation that specifically protects essential rights, especially freedoms of expression and association.

- To release to the public a complete legislative draft in the form of a white bill

- To allow ample time for thoughtful and comprehensive public analysis of the draft.

THE STATE OF DEMOCRACY IN HONG KONG

Hong Kong respects the rule of law and basic civil liberties, has a functioning multiparty system, and boasts a vibrant press and an active civil society. It stands in sharp contrast to the authoritarian system in Mainland China, which is dominated by a single party, has limited political space, lacks recognition and respect for fundamental human rights, and demonstrates marked intolerance of any discussion of political reform not sanctioned by the ruling Communist Party.

When the reunification of Hong Kong and China raised fears that the liberties enjoyed by Hong Kong residents would be endangered, Beijing agreed that the HKSAR should maintain its autonomy in the "one-country, two-systems" structure, Beijing also agreed that, with certain exceptions, the HKSAR would retain independence in legislating.

The Basic Law, the mini-constitution of Hong Kong that was promulgated in 1990, specifically guarantees basic freedoms to residents of Hong Kong and generally commits the Hong Kong government to uphold the rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR). It also establishes the independence of the judiciary. As a result, Hong Kong today remains host to a myriad of civic groups and media outlets advocating a range of opinions that would not be tolerated on the Mainland. Likewise, the quality and professionalism of the Hong Kong judiciary is a source of pride for residents and contributes to a favorable international business climate.

That being said, the state of freedom within Hong Kong is still limited, and the political and economic system is controlled by an oligarchy of conservative business elites whose interests lie in bringing the territory closer to Beijing. Five years after the end of colonial rule, as Freedom House has detailed in its annual survey *Freedom in the World,* there has been no progress in making the political system in Hong Kong more democratic.

Although the Basic Law describes the election of the Chief Executive and LegCo by universal suffrage as the "ultimate aim," the lack of any significant progress towards realizing that goal suggests that the Hong Kong government will continue to lack any democratic accountability to the people into the near future. Chief Executive Tung Chee Hwa was recently appointed to a second term by a committee seen as sympathetic to Beijing. The new Principal Officials Accountability System (POAS), introduced in July 2002, increases the accountability by senior government officials to the Chief Executive but does not extend that accountability to the legislature or to the people of Hong Kong. And LegCo has limited powers to check the executive branch.[1] Moreover, only half of LegCo's members are directly elected through universal suffrage, thus limiting the representative quality of the body.

As a result of the "right of abode" cases, which dealt with the rights of Mainland-born Chinese to Hong Kong residency, serious questions were raised about the ability of the judiciary to serve as a check against executive power. When the Court of Final Appeal (CFA) released its controversial decision on the matter in 1999, the Hong Kong administration took a number of troubling actions. First, Secretary for Justice Elsie Leung asked the CFA for a clarification on its ruling, reportedly after consulting Beijing. When this did not produce the desired results, the Chief Executive sought a reinterpretation from China's National People's Congress (NPC),[2] which ultimately overrode the CFA ruling. The handling of the case illustrates that there are

limits to the independence of the judicial system in Hong Kong where politically sensitive matters are at issue.

The impact of the erosion of protections for basic civil liberties in Hong Kong has been subtle but significant. In the area of freedom of expression the change is perhaps most obvious. Self-censorship has noticeably increased over the last five years, especially in the Chinese-language press. As reiterated to Freedom House by multiple activists within Hong Kong, most Chinese-language journalists are actively discouraged from covering certain topics deemed sensitive to China, including the internal political debate within the country and issues related to independence in Taiwan and Tibet. Economic pressures, often difficult to measure, are also playing a role, as the vast majority of newspapers and other media outlets are owned by organizations with economic interests on the Mainland. Moreover, several Hong Kong-based groups active in the politics of China reported in interviews with Freedom House that they are regularly subject to harassment by unidentified callers.[3] Falun Gong practitioners, in particular, have been arrested for demonstrations and have faced enormous difficulty in securing facilities in Hong Kong for their annual meetings and conferences.[4]

In short, the behavior of the Hong Kong government since re-unification has dashed hopes that it would jealously guard, and indeed expand, the freedoms and rights accorded to the residents of Hong Kong. Democratic activists within the country argue that Hong Kong officials have failed to adequately protect the autonomy of Hong Kong allowed under "one country, two systems." By acting on what they perceive to be in the interests of Beijing, the Hong Kong administration has significantly eroded the protections for the rights that residents now enjoy.

It is in this context that the Hong Kong government decided to move forward on implementing national security legislation required under Article 23 of the Basic Law. To date, the Hong Kong government has failed to reform outdated laws dating from the British colonial period such as the Emergency Regulations Ordinance, the Official Secrets Ordinance, and the Societies and Public Order Ordinances, all of which have all been criticized by democratic activists within Hong Kong for eroding basic freedoms.[5] Instead, it has introduced new legislation that places additional restrictions on the rights of Hong Kong residents.

NATIONAL SECURITY LEGISLATION UNDER ARTICLE 23

Article 23 of the Basic Law requires the following (emphasis added):

> [The] Hong Kong Special Administrative Region 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 organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

During the discussions over the terms of the 1997 handover, Beijing was insistent that such a requirement be part of the Basic Law. Its motivation was clear: to prevent the repeat of events during the 1989 Tiananmen Square uprising in which Hong Kong residents actively supported the democracy movement in China. The initial draft, which broadly required that the HKSAR "prohibit by law any act designed to undermine national unity or subvert the Central People's

Government,"[6] generated fierce debate, with democracy activists calling for clarifications and limitations on exactly what type of crimes should be covered. Although the final legislation specified seven crimes and preserved the ability of the Hong Kong government to "enact laws on its own," democracy activists have worried its passage about how and when the government would decide to satisfy Article 23.

Given the lack of a specific time requirement, exactly what triggered the Hong Kong government to act on the Article 23 requirement at this time is a subject of broad speculation within the country. It may have been triggered by the actions of particular groups such as the Falun Gong, the press coverage within Hong Kong of Chinese politics, or continued debate on the issue of Tibet or Taiwan. What is clear, though, is that the political balance within Hong Kong is propitious for such action, given the pro-Beijing tilt of LegCo and the current lack of democratic accountability of the executive branch.[7]

The Hong Kong government released a Consultation Document outlining its approach to meet the requirements of Article 23 in September 2002. The government acknowledges that existing law covers much of what is required under Article 23. It drew on this existing legislation, expanding significantly some offenses and in others introduced wholly new provisions. Thus far, the government has refused to release a white bill, which would contain the legislation in its full and complete form for public comment before the introduction of legislation to the LegCo.[8] As a result, Freedom House (and more importantly, the citizens of Hong Kong) cannot carry out a full analysis or make concrete comments on the legislation. However, the Consultation Document and comments from the government do give a fairly clear indication of their approach.

Compliance with Current International Legal Norms

Under the Basic Law, the Hong Kong government is committed to continued compliance with the International Covenant on Civil and Political Rights (ICCPR).[9] Indeed, the Consultation Document itself, as well as public and private assurances from the Hong Kong Security Bureau, attempts to assure citizens that the government seeks to comply with the ICCPR, as well as with several other international documents governing this type of legislation.[10] Although the HKSAR is not bound by these instruments, they do set the norms by which to evaluate whether national security legislation is drafted in a way that will protect essential freedoms.

The ICCPR[11] makes special allowances for the limitations of certain rights and freedoms where "necessary for the protection of national security or of public order."[12] However, the ICCPR—and specifically the Siracusa Principles[13]—do make clear that where civil liberties are challenged by national security legislation, protection of civil liberties takes the priority. In particular, the ICCPR notes that "all limitation clauses shall be interpreted strictly and in favor of the rights at issue." Likewise, laws should not be open to varying interpretations or "vague or arbitrary limitations." One must guard against the infringement on fundamental liberties under the pretext of national security, and any security provisions should "only be invoked when there exist adequate safeguards and effective remedies against abuse."[14]

Many of these same provisions are reiterated in the Johannesburg Principles,[15] which represent the latest guidance based on current practice and the "general principles of law recognized by the community of nations." [16] Principle 1.1(a) states: "Any restriction on expression or information

must be proscribed by law. The law must be accessible, ***unambiguous***, ***drawn narrowly*** and ***with precision*** so as to enable individuals to foresee whether a particular action is unlawful." (emphasis added) Principle 1.3 states that any such laws should utilize the "least restrictive" measures when imposing on civil liberties.[17]

Despite statements by the Hong Kong government, articulated in the Consultation Document and in a number of official pronouncements,, that its approach to Article 23 is in accordance with international norms (including specifically the ICCPR, the Siracusa Principles, and the Johannesburg Principles), this is clearly not the case. Rather, as detailed below, the document is filled with undefined, broad terms that will give the Hong Kong government wide latitude to utilize its new authority arbitrarily to suppress the essential rights of the residents of Hong Kong.

The proposed legislation also could have a significant impact on basic freedoms within Hong Kong, even if it is never applied. If laws are vague or unclear, individuals are unable to determine easily what actions might be considered unlawful. Statutes must also be carefully drawn to limit the reach of the legislation and, in this case, clearly define protected and unprotected expression and other behavior. The language laid out in the Consultation Document is vague and imprecise, and many who have attempted to interpret the meaning of the various offenses contained in the proposal have found them to be confusing and so broadly drawn that they are likely to outlaw nonviolent speech and actions that are protected under international law.[18]

In addition, government officials have argued that their proposal is no worse than existing legislation in a number of other countries. To be sure, many countries do have objectionable and outdated laws on their books, but they are no longer actively utilized. In some cases, certain offenses have been eliminated entirely.[19] Moreover, many of the countries cited by the Hong Kong government (Canada, the United Kingdom, and the United States) operate under a democratically accountable system of government, which Hong Kong still lacks. They also have long-established and more comprehensive safeguards and remedies in place to ensure that national security laws are not abused.

In interviews, government officials sought to assure Freedom House representatives that concerns about vagueness of laws are baseless given the independence of the judiciary. As noted above, though, recent precedents established by the "right of abode" case make clear that the Hong Kong administration will not hesitate to appeal to Beijing to override its own judicial system in cases affecting the critical interests of either government. Decisions handed down from Beijing on matters of national security most certainly will not be concerned with protecting basic freedoms.

Moreover, no matter how independent the courts, they must apply the law as written, even if it is unreasonable. For this reason, laws must be clear on their face and not violate the standards and norms protecting human rights.[20] Freedom House recognizes, though, that Hong Kong may have latitude in following these international instruments, and is not advocating that it apply other nations' examples blindly. However, given the gravity of the offenses under consideration and its own stated intention to abide by international legal principles, the Hong Kong government should make a concerted effort to abide by the overarching principles contained in these international documents and look to the examples of other democratic nations for guidance on providing adequate protections against the misuse of such legislation.

Specific Issues of Concern

A. Treason, Subversion, and Secession

In the Consultation Document, the HKSAR proposes amending existing legislation on treason and adding new laws on subversion and secession. All would aim to protect against violence targeted to overthrow the state. Although many activists and lawyers have advocated that provisions against all three are not necessary,[21] it is clear that the Hong Kong government's intention is to prohibit as broad a range of activities as possible.

Treason, subversion, and secession are defined in the Consultation Document as follows (emphasis added):

"Treason means the betrayal of one's country. The interests to be protected against treason are the sovereignty, territorial integrity and security of the ***People's Republic of China (PRC)*** as a whole, and the ***PRC Government (PRCG***)." In the Consultation Document, it is defined as:

> (a) ***levying war*** by joining forces with a foreigner to:
> (i) overturn the PRCG; or
> (ii) compel the PRCG to change its policy or measures by force or constraint; or
> (iii) put any force or ***constraint*** upon the PRCG; or
> (iv) intimidate or overawe the PRCG; or
> (b) instigating a foreigner to invade the PRC; or
> (c) assisting by any means a public enemy at war with the PRC.[22]

Subversion offences should protect "the basic system of government and the constitutionally or legally established government. The basic system of the state, as well as the ***PRCG***, which includes the ***National People's Congress***, the ***Central People's Government and other state organs***, are the key institutions of the state." It would be an offense:

> (a) to intimidate the PRCG; or
> (b) to overthrow the PRCG or disestablish the basic system of the state as established by the Constitution, by ***levying war***, use of force, threat of force, or other ***serious unlawful means.***[23]

Secession crimes threaten "the territorial integrity and unity of a nation." As such, it would be an offense to:

> (a) withdraw a part of the PRC from its sovereignty; or
> (b) resist the CPG in its exercise of sovereignty over a part of the PRC by levying war, or by force, threat of force, or other ***serious unlawful means***.[24]

The new legislation will also abolish the statute of limitations of three years for the prosecution of treason, allowing the government to mount a prosecution at any time after the alleged commission of an offense.

The separate provisions against treason, subversion, and secession employ common language and depend on terms that are broad, open to multiple interpretations, and susceptible to possible misuse. An overriding concern throughout the document is the broad description of what constitutes the state. In general, the Consultation Document defines the "PRC Government" as collectively the Central People's Government, and other state organs established under the Constitution."[25] This definition, when taken into consideration with Mainland Chinese legislation, could extend all the way to local governments and courts. Each of the provisions, as noted above, uses a slightly different term to describe the state, which together could encompass almost any definition the government should choose when an instance arises for prosecution. An individual citizen would have difficulty determining in advance what may be proscribed exactly.

What is lost in the proposal is the distinction between allowing citizens the right to challenge their government on its policies and procedures versus preventing them from seeking to overthrow the constitutional system of the government. One of the challenges inherent in all democracies is the need to balance the needs of national security with the protection of the right to dissent. That is, a distinction must be drawn "between, on the one hand, those who wish to overthrow the democratic system or use violence or threats of violence to violate democratic procedures and, on the other hand, those who seek radical change in the social, economic or political arrangements within the democratic system."[26] The issue is made more difficult in Hong Kong given the "one country, two systems" structure and especially in light of the authoritarian nature of the Chinese political system. Activities that would be considered legitimate dissent if directed at the Hong Kong government could be seen by Beijing as a threat to the national security of the Central People's Government.

Freedom House believes that any legislation must reconcile the two systems so as to preserve Hong Kong's established civil liberties. Clarifying the definition of the state here is essential so that, for example, civil disobedience challenging the lack of democratic reforms is not prohibited.

Another major concern here is the broad definition of "levying war." A footnote in the Consultation Document states that it "include[s] any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a general character."[27] There is no mention of declaring war; nor does it specify the use of the military, let alone force. This language could include any number of nonviolent acts against the government that, if enacted, would stifle essential freedoms enshrined in the ICCPR and guaranteed under the Basic Law. In a private interview with Freedom House, Robert Allcock, the Solicitor General, acknowledged the legitimacy of the concern and conceded that this provision was under review by the Security Bureau.

The term "constraint upon the PRCG" is also broad, unclear, and could be used to limit freedom of expression. Human rights activists have speculated as to what it might cover, suggesting "a strike, [a] peaceful protest or other forms of peaceful speech designed to constrain the PRC Government by stopping it from…persecuting dissidents. It appears to give carte blanche to the Government to suppress any form of organized opposition to the policies of either the Central People's Government or the Government of the SAR."[28]

A number of legitimate concerns have been raised about what constitutes "serious unlawful means." The document proposes to prohibit "serious interference or serious disruption of an

electronic system; or serious interference or serious disruption of an essential service, facility or system, whether public or private."[29] Some activists fear that the government might choose to label as "serious" low-level civil disobedience designed merely to question government actions, such as protesting outside a government building (if it infringed in any way on the government's ability to do its work), "jamming the fax or telephone lines of the authorities to protest against one party dictatorship by repeated faxes or calls," or demonstrations for a secessionist cause that seriously disrupted traffic.[30]

The document also provides expressly for the "inchoate and accomplice offences of attempting, aiding, abetting, counseling and procuring the commission"[31] of each crime. The "inchoate and accomplice offenses" as elaborated under treason, secession, and subversion further exacerbate the problems of ambiguity in the Consultation Document. Given that the definitions of each crime are already expansive, adding the crimes of aiding and abetting increases the possibility of overzealous prosecution.

Freedom House is also concerned about the codification of misprision of treason, or failing to inform the government of another person's treason. This law is outdated, archaic, and has not been utilized in decades by either Britain or Hong Kong. [32] It is unclear why this crime has been revived and amplified in the proposed legislation.

Most domestic and international observers of Honk Kong assume that the main reason behind the establishment of a new crime of secession is to try to suppress any support within Hong Kong for the independence of Taiwan. The Solicitor General assured Freedom House that there is "no doubt, discussions of Taiwanese independence will be completely allowed," but admitted that in a state of hostilities, a Hong Kong citizen stating a preference for separatists in Taiwan would be liable under the new legislation.[33] It is unclear how and who can determine when a state of "hostility" has developed. The final legislation should address all of these concerns by clarifying such issues.

Finally, it is worth noting that the proposed penalties for treason, subversion, and secession are life imprisonment. For aiding or abetting any of the three, the penalty is the same. Misprision carries a penalty of seven years. The seriousness of the penalties for these crimes cannot be denied and, therefore, the necessity for clarity is particularly urgent.

B. Sedition

The proposed legislation, which modifies and expands current law prohibiting sedition, has raised extensive concerns within the human rights community because it is so vague and overbroad. The Consultation Document states, for example, that it is in offense of sedition to:

> (a) incite others to commit the substantive offences of treason, secession or subversion; or
> (b) incite others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

The Consultation Document goes on to say that the HKSAR is narrowing the existing offense by adding the language on violence. However, the proposed language fails to define clearly what will constitute "inciting violence." In addition, the proposal adds a new offense regarding seditious publications, making it a crime to (a) print, publish, sell, offer for sale, distribute,

display or reproduce any publication; or (b) import or export any publication, or possess a seditious publication.[34]

The Johannesburg Principles require that three criteria be met before someone can be charged and convicted of a seditious offense:

(a) the expression is intended to incite imminent violence;
(b) it is likely to incite such violence; and
(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Even though the Consultation Document cites the Johannesburg Principles, government representatives noted in interviews with Freedom House that they do not agree with these criteria. They also noted that several other countries choose not to follow these principles. However, although it is true that several countries known to protect freedoms of expression do not follow the Johannesburg Principles to the letter, most do have a strict test for restricting speech. For example, under the U.S. Supreme Court decision in *Brandenburg v. Ohio*, speech is protected from prosecution "unless it (is) directed to inciting imminent lawless action and (is) likely to incite that action."[35] Israel's High Court also uses an "imminent probability test".[36] In the Netherlands, the Supreme Court laid down its rule that a publication cannot be prohibited simply by virtue of the fact that it might endanger safety. Instead, the government must illustrate that the feared consequences would occur.[37] Canada sets a similarly high standard. In *Boucher v. The King* (1951) 2 DLR 369, the Supreme Court of Canada held that in order to constitute sedition there had to be proof of "incitement to violence for the purpose of disturbing constitutional authority." In contrast, the Hong Kong proposals outlaw any incitement to violence or public disorder, even if it is neither imminent nor likely.

In a meeting with Freedom House, Robert Allcock plainly stated that HKSAR officials "do not accept [as criteria] the likelihood of inciting violence or imminence." He argued that if someone incites violence that erupts 12 months from now, the government should be able to prosecute that behavior. This statement indicates a willingness to give the government the power to prosecute even where there is no likelihood that violence will occur, and to do so at the expense of freedom of expression.

The inclusion of incitement not just to violence but to "public disorder" would make the proposed legislation, as described in the Consultation Document, among the most aggressive sedition laws in the free world. In contrast, courts in many other free nations uphold the right of the citizenry to criticize their government, even where there is some threat of public disobedience. The United States has upheld speech that teaches a moral necessity for violence, as it "is not the same as preparing a group for violent action,"[38] and has upheld speech that "induces a condition of unrest…or even stirs people to anger."[39] The High Court in Ghana allowed a group to hold its protest despite the fact that the protest was likely to lead to a breach of the peace.[40] These examples illustrate a specific willingness by governments to allow for critical speech that includes some mention of violence and certainly civil disobedience.

This is exactly the type of activity that the proposed Hong Kong legislation would outlaw. It is worth noting that while some civil disobedience might violate minor offenses that carry limited liability to the offender, the proposed law on sedition would carry a heavy penalty of seven years

imprisonment and a high fine. The passage of this broad, overreaching legislation will certainly lead to a serious increase in self-censorship. Civil disobedients are often willing to risk a night in jail or a small fine as the price for making their point known to their government, but long-term imprisonment is another risk altogether.

Even the action of drafting a new, expanded sedition law is a departure from international trends. In most jurisdictions, sedition laws have been eliminated from legislation, narrowed significantly, or simply not enforced. For example, the UK Law Commission and the Law Reform Commission of Canada, two jurisdictions Hong Kong looks to in interpreting its common law, both recommended that sedition offences be abolished.[41] Even in Hong Kong, the last prosecution for sedition was in 1952.[42]

If Hong Kong must incorporate sedition as called for in the Basic Law, Freedom House urges the Hong Kong government to draft stringent standards for what constitutes violence. This will ensure that the only actions restricted will be those that actually threaten national security, and not acts of minor civil disobedience that might be disruptive to public order but are not dangerous.

C. Theft of State Secrets

The Hong Kong government's proposal expands existing law under the Official Secrets Ordinance by protecting against the theft of state secrets through spying or "unlawful disclosure" of information that threatens the safety or interests of the PRC or the HKSAR. "Unlawful disclosure" also includes "information relating to relations between the Central Authorities of the PRC and the HKSAR."[43] This prohibition has wide-reaching connotations in terms of the kinds of information that could be deemed "secret."

International norms are specific in requiring governments to protect free access to information and the ability to monitor government actions. The Johannesburg Principles explicitly recognize the overriding importance of access to information, even where national security is concerned,[44] and call for an exception to official secrets acts when public interest outweighs the harm that might be done to national security.[45] The Johannesburg Principles also provide an exception when information has already been released to the public.[46]

Similarly, the European Court held that an individual could not be held liable for releasing information once it had been released to the general public, whether or not it was necessary to protect national security.[47] Likewise, the Pentagon Papers case in the U.S. put the onus on government officials not to disclose secrets, refusing to constrain the press after the government had failed to keep silent. The U.S. Supreme Court noted in this case that "[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information."[48]

Of particular concern in the Consultation Document is the prohibition of unauthorized and damaging disclosure of protected information by anyone with "unauthorized access" to that information.[49] Thus, the HKSAR proposes to put the onus on an editor of a newspaper to ensure that the articles he or she publishes do not contain any information which the HKSAR would deem to be a "state secret," even if that information is widely available elsewhere (the prior publication defense) or where there is strong public interest in its disclosure (the whistleblower

or public interest defense). The result will be a strong disincentive to probe too deeply into governmental actions for fear that the information may be deemed a state secret.

The Johannesburg Principles also state that official secrets laws are "not legitimate"[50] if states use national security as a pretext for restricting expressive rights when they involve criticism of the sitting government. Given the broad scope of the state secrets law the HKSAR is proposing, one could certainly conclude that government officials are seeking to limit access to information that may "expos(e) them to wrongdoing."

The state secrets provision has generated considerable concern among Hong Kong journalists and media representatives and will only add to the practice of self-censorship within Hong Kong. Already, the Mainland government has used state secrets regularly as a pretext for jailing journalists, academics, and sometimes business people,[51] and the risk that the practice will grow in Hong Kong is clear. When asked recently about the Ming Pao case, Hong Kong Minister of Justice Elsie Leung argued that charges of releasing state secrets were brought because the journalist refused to name the source for the offending story. Such a comment, according to Mak Yin-ting of the Hong Kong Journalists Association, demonstrated government intent under the new legislation to curtail investigative reporting related to the government: "People in the street will not know what a state secret is, and the easiest thing for them will be not to tell anything."[52] Other journalists noted that "under existing legislation, when they print something classified as state secrets, if the government can find the leak, the person who leaked the information is in trouble. Under the proposed legislation, we are in trouble. It is akin to a person leaking the Pentagon papers, and *The New York Times* getting shut down too. It will have a very chilling effect."[53]

Freedom House urges the Hong Kong government to draft this legislation narrowly and to include a "public interest" and "prior publication" defense. Using this law to limit access to information as a way of protecting the state from criticism is a violation of international norms.

D. Foreign Political Organizations

The Consultation Document acknowledges that the existing Societies Ordinance is "sufficient, and should be retained."[54] However, the Hong Kong government proposes to re-legislate it and add an additional element that will allow the government to outlaw any organization with an affiliation or connection to an organization that has been banned on the Mainland on national security grounds.[55] In an interview with Freedom House Margaret Ng, a leading lawyer and Member of LegCo, criticized the new legislation and commented on the increased influence it will give to Beijing:

> The Consultation Document expands the draconian powers already laden in the Societies Ordinance. Notification is conclusive; it just says banned for national Security reasons. What inference can one expect the courts to draw from such a notification?

The government should spell out how an organization will be proscribed in the event that the Chinese initiate this process. Currently the Consultation Document notes that the proscription decision can be appealed through the courts, except for "points of fact" that can be appealed to an "independent tribunal." Government officials could not answer Freedom House's query as to why Hong Kong's official court system would be bypassed in this instance.

This raises concerns that organizations such as the Falun Gong, Alliance in Support of Patriotic Movement in China, and the Catholic Church are targets of this legislation, just as they are targets of the Mainland authorities. In regards to the church, Mr. Allcock stated that he did not "see how the Catholic Church has anything to worry about."[56] However, the Catholic Bishop of Hong Kong Joseph Zen told Freedom House that the legislation could indeed have grave implications for churches in Hong Kong. Given the Beijing government's persecution of and hostility towards the Catholic Church, it might not hesitate to proscribe the organization. Given the official connection, the open and regular contact, and indeed the material support that the Hong Kong Catholic Church provides to its Mainland counterparts, the proposed legislation clearly applies.

While the Chinese have notoriously persecuted the Falun Gong in China, until recently the Hong Kong branch has functioned relatively freely. Recently, however, the Hong Kong government has demonstrated its dislike of the organization, and Falun Gong members say they have repeatedly had difficulty obtaining approval for peaceful protests. Members of the Falun Gong told Freedom House that they believe they are a direct target of this legislation and fear that their organization will be outlawed in the future if the legislation is implemented.[57]

Another concern here is the broad definition of an "organization." The Consultation Document redefines an "organization" as "an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure." Mr. Allcock stated that "it is necessary in terms of national security" to have this broad definition, adding that it would difficult to persuade a court that a couple of journalists constituted an organization.[58] The problem is that this "broad" definition could encompass both journalists and other small, informal, or temporary collaborations among individuals. Freedom House urges that any such definition be appropriately narrowed to erase any potential confusion or abuse.

E. Investigative Powers

Finally, the proposed legislation significantly expands the investigative powers of the police by allowing for searches without a warrant. In October 2002, Hong Kong Security Chief Regina Ip argued the need for such a provision: "If the magistrate has gone off to Shenzhen, or if he is on an outlying island eating seafood, it would take us longer [to get a search warrant]." However, that argument is inadequate given that the ICCPR specifically calls for protection against arbitrary or unlawful interference in privacy and home.[59] Human Rights activists have commented that "the current proposal would allow search without warrant for seditious publications, something that was declared unlawful at common law as long ago as 1765 in the landmark case of Entick v Carrington."[60]

Moreover, any claims that the police exceeded their powers elaborated in the Consultation Document would be heard by an oversight body within the police department.[61] To avoid the likelihood of abuse, or the appearance of abuse, a check on the police should come from an independent court. Searches without warrant can be used to intimidate or harass political opponents and their associations, and should only be utilized in narrowly defined instances given the negative implications for the protection of basic civil liberties.[62]

CONCLUSION

Freedom House has serious concerns both about the broad approach and the specific provisions of the Hong Kong government's proposed new security legislation, as articulated in the Consultation Document on Article 23. The entire process has been poorly managed and seems to be a deliberate attempt to limit public knowledge of the details of the proposal and any constructive input into its outcome.

Instead of seizing the opportunity to establish new and strengthen existing legal protections for the exercise of rights by the people of Hong Kong, the HKSAR government has done the opposite. It has drafted or proposed legislation that is draconian, excessively broad, and clearly intended to stifle legitimate dissent within Hong Kong. The current approach does not meet the fundamental principles of international law and violates the guarantees laid out in the Basic Law. Within Hong Kong, journalists, students, trade union activists, civic activists, religious leaders, and opposition legislators were unanimous in telling Freedom House representatives that the proposed legislation poses a significant threat to the rights and liberties currently protected in Hong Kong. They agree that if passed this legislation will have a severe chilling effect on the atmosphere for civil liberties. Business leaders also have recently joined the chorus of criticism, arguing that the legislation could undermine exactly the legal guarantees that have allowed Hong Kong to become a leading financial center in the region.

Freedom House urges the Hong Kong government to fundamentally rethink its approach to Article 23 and calls on it:

- To draft clear, unambiguous, narrowly drawn legislation that specifically protects freedoms of expression and association.

- To release a detailed draft of the legislation in the form of a white bill.

- To allow adequate time for a thoughtful and comprehensive public analysis of the draft.

[1] See Article 74 of *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* which states that independent members of LegCo cannot introduce any laws related to government policy without the "written consent" of the Chief Executive. For a succinct discussion of the current legislative powers, see the National Democratic Institute, *The Promise of Democratization in Hong Kong: The 2002 Chief Executive Election and the Transition Five Years after Reversion.*

[2] Weng, Byron S.J., *Judicial Independence under the Basic Law*, Judicial Independence and the Rule of Law in Hong Kong, Edited by Steve Tsang.

[3] Information related during a meeting with Han Dongfang of the China Labor Bulletin on November 13, 2002.

[4] Information related during a meeting with Falun Gong practitioners on November 15, 2002.

[5] The Hong Kong Human Rights Monitor, August 2001, p. 1.

[6] Drafting Committee for the Basic Law, *The Draft Basic Law of the Hong Kong Administrative Region of the People's Republic of China*, April 1988, p.3.

[7] This has the potential to change leading up to 2007, as the Basic Law allows for significant changes in the current political system, including the direct election by universal suffrage of the Chief Executive and LegCo.

[8] In Hong Kong, there are a number of procedures that can be used to ensure thorough public understanding and debate on particularly contentious or significant pieces of legislation, including the release of a detailed "white bill" which contains actual proposed statutory language for public comment before it is introduced as a "blue bill" within Legco. HKSAR officials have elected in this instance to bypass that process and have released a "consultation document" that outlines their intentions and the basic approaches they intend to follow in producing a more detailed blue bill. At the blue bill stage, amendments that are objectionable to the government are nearly impossible to pass in the Legco process as currently structured.

[9] See Article 39 of the Basic Law, which reads: "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international Labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."

[10] Government of Hong Kong Security Bureau, *Proposals to Implement Article 23 of the Basic Law Consultation Document* (Hong Kong, China: Government Printing Office, 2002), p.5.

[11] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

[12] See ICCPR Articles 19, 21, 22.

[13] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

[14] See The Siracusa Principles, Section 1.A.3.

[15] See Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N.Doc. E/CN.4/1996/39. The introduction states that these Principles "were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations. These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency."

[16] See the preamble of Johannesburg Principles, which state:

> Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;
>
> Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;
>
> Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;
>
> Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and
>
> Reiterating the need for judicial protection of these freedoms by independent courts.

[17] See Johannesburg Principles, Principle 1.3, which states (emphasis added):

> To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:
>
> (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
>
> (b) the restriction imposed is the ***least restrictive means*** possible for protecting that interest; and
>
> (c) the restriction is compatible with democratic principles.

[18] See *Hong Kong Bar Association's View on Legislation Under Article 23 of the Basic Law*.

[19] For example, the three Commonwealth countries of Australia, Canada, and India have eliminated subversion.

[20] See Johannesburg Principles, Principles 20, 21, 22.

[21] See *Hong Kong Bar Association's View on Legislation Under Article 23 of the Basic Law*

[22] Government of Hong Kong Security Bureau, pp.vi and vii.

[23] Ibid., pp.29-30.

[24] Ibid., p.vii.

[25] Ibid., p.1, n.18.

[26] Lee, Hanks and Morabito, *In the Name of National Security,* op.cit.p.17. Quoted in Steve Tsang, ed., *Judicial Independence and the Rule of Law in Hong Kong* (New York: Palgrave Publishers, 2001), 89.

[27] Consultation Document, p.9, n.17.

[28] Hong Kong Human Rights Monitor, *Response to Government Consultation Document "Proposals to Implement Article 23 of the Basic Law"*, p.8, n.32, 15 November 2002.

[29] Consultation Document, p.17. "Serious unlawful means" refers to:

> (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 electronic system; or*
> *(f) serious interference or serious disruption of an essential service, facility or system, whether public or private.*

[30] Hong Kong Human Rights Monitor, p.14, n.50.

[31] Ibid., p.11.

[32] See Hong Kong Human Rights Monitor p.11, s41, which notes: "It is doubtful whether there has ever been a prosecution for this offence in Hong Kong's history. Nor has there been a prosecution in England during the 20th or 21st centuries despite two world wars. The last English prosecution arose from the Cato Street conspiracy in 1820."

[33] Robert Allcock, Solicitor General, interview by Freedom House, November 14, 2002.

[34] Seditious Publication is defined in the Consultation Document in part as: "publication should be regarded as seditious only if it would incite persons to commit the substantive treason, secession and subversion offences, and that it would be an offence, with knowledge or reasonable suspicion that a publication is seditious, (a) to deal with that publication without reasonable excuse; or (b) to possess that publication without reasonable excuse. It will be an offence if a person knowing or having reasonable grounds to suspect that the publication if published, would be likely to incite others to commit the offence of treason, secession or subversion." See Consultation Document, p.26, 4.18.

[35] *Brandenburg v. Ohio* (1969) 395 U.S. 444, 477.

[36] See *Kol Ha'am Company Lmt. & Al-Ittihad Newspaper v. Minister of the Interior*, High Court 73/53 (per Agranat J).

[37] HR 6 Nov. 1916, NJ 1916, 1223.

[38] See *Brandenburg v. Ohio*, *supra* at 448, citing also to *Herndon v. Lowry* (1937) 301 U.S. 242, 259-261; *Bond v. Floyd* (1966) 385 U.S. 116, 134.

[39] See *Terminiello v. Chicago*, 337 US 1, 4 (1949) (per Douglas J) where the court stated "[a] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

[40] See *Republic v. Tema District Magistrate Grade I*, ex parte Akotiah, High Court (1979) Ghana LR 315.

[41] See Law Reform Commission of Canada, Working Paper 49, *Crimes Against the State*(1986) and The UK Law Commission, Working Paper No. 72, Codification of the Criminal Law Treason, Sedition and Allied Offenses, where the Commission stated that there is a "sufficient range of other offences covering conduct amounting to sedition, we think it better in principle to rely on these ordinary statutory and common law offences that to have resort to an offence which has the implication that the conduct in question is 'political'."

[42] *Fei Yi Ming v R* (1952) 36 HKLR 133.
[43] Consultation Document, p.x.
[44] See Johannesburg Principles, Principle 11: General Rule on Access to Information
Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest
Principle 12: Narrow Designation of Security Exemption
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.
[45] Principle 15: General Rule on Disclosure of Secret Information
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 disclosure.
[46] Principle 17: Information in the Public Domain
Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.
[47] *The Observer and Guardian v. United Kingdom* (1992) 14 EHRR 153, para. 59(b).
[48] *New York Times Co. v. United States* (1971) 403 U.S. 713, 722. Justice Brennan went on to note that "the present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress."
[49] See Consultation Document, p.37, 6.22, where it states: "Thus we propose there should be a new offence of making an unauthorized and damaging disclosure of information protected under Part III of the Ordinance that was obtained (directly or indirectly) by unauthorized access to it."
[50] Principle 2: Legitimate State Security Interest. (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including for example, to ***protect a government from embarrassment or exposure of wrongdoing***, or to conceal information about the functioning of its public institutions, or ***to entrench a particular ideology***, or to suppress industrial unrest.
[51] Rebiya Kadeer is an example. Kadeer was charged with state secrets for sending her husband, who resides in the United States, daily newspapers containing articles about the Uighur independence movement. She was sentenced to eight years in prison for this offense. More recently, in September 2002, Web writer Chen Shaowen, who wrote about social inequities and unemployment, was also arrested for subversion. The Public Broadcasting Service (PBS) reports that 14 journalists are currently in prison for publishing and distributing material online; of those, 11 were charged under Article 111 for state secrets violations. Dr. Xu Zerong, who wrote about the role of the PLA in the Korean War and the Mao-Stalin relationship, the subject of his doctoral research at Oxford, was sentenced in January 2002 to a thirteen-year prison term for illegally providing state secrets to unknown persons and for brining banned books into the mainland. Chen Shaowen, the Web writer, was accused of falsifying information and slandering the communist party, officially of "using the internet to subvert state power". His essays were allegedly posted on reactionary websites. The topics included as previously mentioned social inequities, unemployment, and the legal system.
[52] Mak Yin-ting, interview by Freedom House, November 13, 2002.
[53] Lui Kin Ming at *Apple Daily*, interview by Freedom House, November 15, 2002.
[54] Consultation Document, p.xi.
[55] Consultation Document, 7.15 (c) the 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." It is an offense under the proposed legislation to "support the activities of proscribed organization."
[56] Allcock interview.
[57] Falun Gong interview.
[58] Allcock interview.
[59] See ICCPR, Article 17 states, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence…"
[60] Hong Kong Human Rights Monitor, p.6, n.24.

[61] Allcock interview.
[62] Hong Kong Human Rights Monitor, p.24, n.91.