



Balancing National Security and the Rule of Law:

Article 23 of the Hong Kong Basic Law

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EXECUTIVE SUMMARY

On 1 July 2003, at least 500,000 people marched from Victoria Park to the Government of Hong Kong's Central Offices. Lasting more than 6 hours, at the time the march constituted the largest anti-government protest since the handover of Hong Kong in 1997. The catalyst was an unpopular government bill to implement Article 23 of the Basic Law of the Hong Kong Special Administrative Region, which contained certain draconian provisions and could have been used by the government to curtail freedom of speech and other civil liberties.

The protest led to the legislation being shelved in 2003. Fifteen years later, however, certain pro-Beijing politicians are calling for a new bill to fully implement Article 23. Although Hong Kong already has strong laws protecting national security (and prohibiting many of the acts listed in Article 23), the local government is under pressure to add to this body of law by explicitly proscribing 'subversion' and 'secession'. Yet the local government is also obligated to comply with the International Covenant on Civil and Political Rights (ICCPR) and to protect the rule of law, which is essential to Hong Kong's autonomy and its status as an international financial centre. At this sensitive time in Hong Kong's history, it is critical that human rights, the rule of law, and the city's free economy are not compromised in the name of national security.

This report highlights the fact that Hong Kong already has strong anti-terrorism laws and legislation prohibiting most of the acts specified in Article 23, and therefore additional legislation is far from an urgent priority in a city with pressing livelihood and human rights concerns. The existing body of law is overdue for reform to bring it into line with international standards, especially because recent events indicate that the local government is willing to use laws and administrative procedures to stifle political speech that displeases the Central Government. If drafted badly, additional legislation could be abused for similar political purposes. Rather than rushing to create additional offenses, the government should ask the Law Reform Commission to conduct a study reviewing Hong Kong's existing laws (as well as related administrative procedures and enforcement policies) for compliance with the ICCPR.

If the government does decide to propose additional legislation, there are lessons that can be learned from the failed attempt to legislate in 2003. In order to ensure that the legislation is acceptable to a broad cross-section of Hong Kong's society, and that it is in line with the Basic Law and the Sino-British Joint Declaration, any additional legislation must be implemented without violating the ICCPR or other international human rights norms.

Freedom of expression and access to information are particularly important because these rights play a vital role in Hong Kong's free economy and efforts to fight corruption. Business concerns with the failed legislation in 2003 focussed on these areas. It is also important not to enact laws that would further undermine freedom of speech in Hong Kong, which is already under threat.

POLICY RECOMMENDATIONS¹

The government of Hong Kong should:

- recognise that there is no urgent need for additional legislation as Hong Kong already has legislation prohibiting many of the acts specified in Article 23, as well as strong anti-terrorism laws.
- only propose additional legislation on the basis of Article 23 after universal suffrage has been fully implemented, while also ensuring that any proposed legislation fully complies with the ICCPR and the rule of law.
- only propose additional legislation after the Law Reform Commission has reviewed Hong Kong's existing laws (as well as related administrative procedures and enforcement policies) for compliance with the ICCPR, and the government has acted on its recommendations.
- fully consult the public and circulate a 'White Paper' before introducing any new laws to further implement Article 23, in light of the lessons learnt from the failed attempt to legislate in 2003.
- incorporate all of the amendments that Chief Executive Tung Chee Hwa agreed to after the 1 July 2003 protest march in any future legislation implementing Article 23.
- refer to the UN Human Rights Committee's General Comment 34 and other international jurisprudence for guidance on how to protect national security while complying with the ICCPR.
- ensure that any legislation implementing Article 23 contains express clauses stating that the laws must be interpreted and applied so as to comply with the ICCPR.
- ensure that legislation does not prohibit peaceful advocacy for self-determination or constitutional reforms as this would violate the ICCPR and Article 39 of the Basic Law.
- take all measures necessary to protect freedom of expression and access to information as these rights play a vital role in fighting corruption; undue restrictions would undermine Hong Kong's status as a free economy and international financial centre.

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INTRODUCING ARTICLE 23

Article 23 is one of the most controversial and sensitive provisions in the Hong Kong Basic Law. On one hand, the provision reinforces autonomy by authorizing Hong Kong to enact laws protecting national security ‘on its own.’ Thus, there is no obligation for Hong Kong to copy or enforce the national security laws of Mainland China. On the other hand, the text of Article 23 introduces certain concepts that are foreign to common law legal systems and free economies.

An early draft of the provision in the 1980s was extremely vague and stated that Hong Kong ‘shall prohibit by law any act designed to undermine national unity or subvert the Central Government.’² After this language was criticized, the Basic Law Drafting Committee revised it to list specific offences, stating that Hong Kong ‘shall enact laws, on its own, to prohibit any act of treason, secession, sedition, or theft of state secrets.’³ Unfortunately, this second draft (which was released for public consultation in February 1989) was not the final version. In May 1989, the Central Government imposed martial law in Beijing and the Basic Law drafting process was suspended after the events of June 4. When the Drafting Committee resumed its work, representatives from the Mainland insisted on broadening the language of Article 23. It was at this point that the reference to ‘subversion’ was reinserted and the reference to ‘foreign political bodies’ was added.

The text of Article 23

The final version of Article 23, which came into force on 1 July 1997, provides:

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 political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.⁴

While Hong Kong law already prohibits many of the acts specified in Article 23, it does not currently define or prohibit ‘secession’ or ‘subversion.’ It will be challenging to enact such offenses while also complying with the ICCPR, as required by Article 39 of the Basic Law.⁵ The next sections of this report summarize Hong Kong’s existing laws, lessons that should be learned from the failed attempt to pass new legislation in 2003, and the international norms that should be followed if any new legislation is drafted.



Photo: The Epoch Times

NATIONAL SECURITY PROVISIONS IN EXISTING LEGISLATION

Existing laws protect national security

Contrary to what some commentators have claimed⁶, Hong Kong already has a significant body of laws protecting national security.⁷ Laws with provisions that protect national security are listed below:

- The Crimes Ordinance (Cap. 200) criminalizes both treason and sedition (defined in fairly draconian terms), as well as a number of related offenses.
- The Official Secrets Ordinance (Cap. 521) prohibits espionage and also the disclosure of a wide range of government information.⁸
- The Public Order Ordinance (Cap. 245) gives the Commissioner of Police broad powers, allowing him to, inter alia, object to public processions, direct the conduct of public gatherings, and/or specify the route and time of public processions if he reasonably believes the restrictions are ‘necessary in the interests of national security.’⁹
- The Societies Ordinance (Cap. 151) gives the government broad powers to control the registration and operation of societies, incorporating some of the express language of Article 23.¹⁰ Indeed, the Hong Kong government has publicly conceded that the Societies Ordinance already fully implements the last two requirements of Article 23.¹¹
- Hong Kong also enacted, in 2002, the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).

Taken together, this body of legislation is certainly adequate to protect the national security and territorial integrity of the PRC, despite the fact that Hong Kong has no criminal statute expressly prohibiting ‘secession’ or ‘subversion’ against the Central Government.¹²

Existing laws need reform to meet international human rights standards

This existing body of law is overdue for reform to bring it in line with human rights standards, especially because recent events indicate that the local government is willing to use laws and administrative procedures to stifle political speech that displeases the Central Government. The UN Human Rights Committee has expressed its concerns regarding the government's increasingly harsh interpretation and application of the Public Order Ordinance, which makes it more difficult for pro-democracy groups to organize demonstrations.¹³ A prime example is the annual pro-democracy march on the 1st of July. Prior to 2017, the organizers were permitted to start this march on the soccer pitches of Victoria Park and the march has always been orderly and peaceful. However, in the past two years, the government allocated the soccer pitches to pro-Beijing organizations and confined the pro-democracy marchers to less desirable spaces. The police also warned people not to join the pro-democracy march at any other point, threatening them with arrest for 'unlawful assembly.'¹⁴ The government's actions are not justified by any genuine threat to public order. Rather they are a transparent attempt to discourage people from expressing their desires for greater local democracy and thus a clear violation of the ICCPR and the Basic Law.

The Hong Kong government has also begun to use its powers under the Societies Ordinance to restrict the expression of ideas. On 17 July 2018, the Secretary for Security notified Chan Ho-Tin, the Convenor of the Hong Kong National Party, that the Assistant Commissioner of Police (in her capacity as an Assistant Societies Officer) made a recommendation (relying on s. 8 of the Societies Ordinance) that the Secretary for Security issue an order prohibiting the operation of the party.¹⁵ The police have apparently been monitoring this tiny political party for 18 months and created a dossier of more than 700 pages of its activities. The letter originally gave the party a mere three weeks to respond to the claims and to demonstrate why it is not a threat to national security, although this deadline was subsequently extended.¹⁶ It should be noted that government does not allege that the National Party has ever engaged in violence. Rather, the police accumulated this enormous dossier by taking the rather far-fetched position that any public advocacy in support of independence for Hong Kong could constitute a threat to the PRC's national security. On 24 September 2018, Hong Kong's Secretary for Security published a notice in the Hong Kong Gazette banning operation of the Hong Kong National Party. When the Secretary announced his decision to the press, he attempted to deflect criticism by insisting that the leader of the party had once used the term 'armed revolution.'¹⁷ But he failed to cite even one example of a violent act that has been taken or incited by the party. This is an exceedingly slippery slope and could be the start of a severe curtailment of peaceful political speech.

Although this is the first time since the handover that the Hong Kong government has sought to prohibit the operation of a political party, it has also taken aggressive steps to 'disqualify' numerous elected legislators and candidates for the Legislative Council.¹⁸ More recently, the Hong Kong Foreign Correspondents' Club (FCC) has been subjected to extreme pressure not to allow anyone who supports Hong Kong independence to even speak at its premises. This pressure has come from very high-levels: China's Ministry of Foreign Affairs; Hong Kong's former Chief Executive, CY Leung; and Hong Kong's current Chief Executive, Carrie Lam. Indeed, CY Leung went so far as to suggest that the FCC should be compelled to give up its lease on its historic building if it permits Chan Ho-Tin to speak there.¹⁹ While the FCC has made it clear that it will not practice self-censorship, the controversy will inevitably damage Hong Kong's reputation as an international city.

Conclusion

In light of the local government's willingness to use legislation and administrative powers to stifle political speech, it is exceedingly important that any legislation adopted in the name of 'national security' be tightly drafted. Otherwise, local government officials who seek to please Beijing may be tempted to use Article 23 legislation as leverage over individuals, organizations, and businesses. Rather than rushing to create additional offenses or proscription mechanisms, the government should ask the Law Reform Commission to conduct a study reviewing Hong Kong's existing laws (as well as related administrative procedures and enforcement policies) for compliance with the ICCPR. This would help to restore Hong Kong's reputation as an open and free society that respects the rule of law.



LESSONS FROM THE FAILED LEGISLATIVE EXERCISE IN 2002-2003

If additional legislation is required, then it is essential that the government move cautiously and avoid repeating the mistakes that led to the massive protest march of 1 July 2003. In 2002, the Hong Kong government distributed a Consultation Paper suggesting ways to more fully implement Article 23. The drafters had clearly done considerable research and some of the proposals would have greatly improved the existing body of law. For example, the government's proposals would have liberalised the law of sedition, much of which is probably unenforceable because it conflicts with the ICCPR.²⁰ Similarly, the proposed definition of 'treason' would have modernized and improved Hong Kong law (particularly if the government had been willing to accept amendments designed to tighten certain definitions).²¹

Unfortunately, the government also included proposals that went far beyond the requirements of Article 23. For example, the government tried to use the legislative exercise as a vehicle for giving the police special entry, search, and seizure powers, which are never even mentioned in the text of Article 23.²² The government also proposed a very controversial 'proscription mechanism,' which could have given the Central Government a role in the proscription of local organizations.²³ This mechanism is not required by Article 23, as demonstrated by the fact that it was not included in the Macau Special Administrative Region National Security Law, which was enacted in 2009 to comply with Article 23 of the Basic Law of Macau.²⁴

The government also attempted to use Article 23 as a justification for expanding liability for unlawful disclosure of local government information. This proposal had no clear connection to national security and could have greatly inhibited investigative reporting by the press.²⁵ It caused alarm in the business community and the general public, as the press plays an important role in the prevention of corruption. Before the establishment of the Independent Commission Against Corruption (ICAC), corruption was widespread in Hong Kong and particularly serious in the police force.²⁶ Since the

establishment of the ICAC, Hong Kong has painstakingly worked to restore its image as a corruption-free jurisdiction that provides a level playing field for all companies, both local and multinational. However, it is widely recognized that strong laws are not sufficient to prevent corruption. Investigative reporting is essential, not only for revealing corruption but also for pointing out any failures by anti-corruption agencies to investigate and prosecute corruption.²⁷

By the end of the consultation period in 2002, many business organizations had submitted comments to the government regarding the proposals to implement Article 23, including: the International Chamber of Commerce - Hong Kong, China Business Council; the Hong Kong General Chamber of Commerce; the American Chamber of Commerce; and the British Chamber of Commerce. The business community was concerned that some of the proposals would reduce the flow of information, stifle creativity and market research, and damage Hong Kong's reputation as an international business centre.²⁸ The business community also wanted the government to issue a White Paper (a draft of the legislation) before formally introducing a bill. This request for a White Paper was shared by many in the community.

Despite these concerns, the Hong Kong government took very little time to digest the comments that were submitted on its proposals and flatly refused to publish a White Paper. Instead, it quickly introduced the National Security (Legislative Provisions) Bill 2003 into the Legislative Council.²⁹ Government officials then requested an accelerated timetable for scrutinizing the Bill and resisted many of the amendments proposed by legislators.

Ultimately, the government's approach backfired and more than 500,000 people joined an anti-Article 23 protest march on 1 July 2003. After the march, Chief Executive Tung Chee-Hwa offered some important amendments (e.g. deleting the extraordinary search powers and the proposal to give the Central Government a role in the proscription of local organizations). If these concessions had been made before the protest march, then the Bill might well have been enacted in 2003. However, the last-minute concessions were not sufficient after the march and the government was ultimately compelled to withdraw the Bill from the Legislative Council.³⁰

If the government decides to use the 2003 Bill as a starting point for new legislation, then it must not propose laws that go beyond the strict requirements of Article 23. It should also promise to incorporate the amendments agreed to by the government and Chief Executive Tung Chee Hwa in July 2003. Before drafting new legislation, the government should also ask the Law Reform Commission to conduct a comparative study of national security laws in countries that comply with the ICCPR. This would provide a reliable and unbiased source of research, which could be drawn upon by government drafters, legislators, and the public.



Photo: Mondo

ENSURING THAT ANY FUTURE LEGISLATION COMPLIES WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

All Hong Kong ordinances must comply with international human rights standards, as set forth in the ICCPR.³¹ This section analyses what that means in practice, focussing on three of the core rights that are protected in the ICCPR: Article 19 (freedom of expression and access to information); Article 21 (freedom of peaceful assembly); and Article 22 (freedom of association). In Hong Kong's domestic legal framework, these rights are expressly protected by the Bill of Rights Ordinance³² and the Hong Kong Basic Law.³³

The ICCPR permits governments to place certain restrictions on freedom of expression, assembly, and association but only if those restrictions are 'provided by law' and necessary for certain legitimate purposes, which include the protection of national security. If a government relies upon 'national security' as a reason for restricting civil liberties then the UN Human Rights Committee (the treaty-monitoring body for the ICCPR) will expect it to 'demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.'³⁵

It is also important to emphasize that 'national security' is not synonymous with the security of a particular government or political party and it should not be relied upon as a justification for prohibiting advocacy for multiparty democracy. For example, in *Mukong v. Cameroon*, the government of Cameroon prosecuted a journalist for 'intoxication of international and national opinion' after he criticized the one-party system in an interview with the BBC. The government argued that it was necessary to restrict advocacy for multiparty democracy in order to build national unity. The UN Human Rights Committee rejected the government's position, concluding that even if strengthening national unity is accepted as a legitimate aim, the government could not lawfully pursue that aim by

‘attempting to muzzle advocacy for multiparty democracy, democratic tenants, and human rights.’³⁶

The UN Human Rights Committee has also determined that governments seeking to restrict the rights of expression and association must demonstrate precisely how the restricted activities could threaten national security. For example, in *Tae-Hoon Park v. Republic of Korea*, the applicant became involved (while studying in the United States) in a student association that advocated for the peaceful reunification of North and South Korea. The association was also highly critical of the government of South Korea (and of the United States for supporting South Korea). The Korean student was later convicted under a South Korean national security law. The UN Human Rights Committee found that his conviction violated the ICCPR, in part because the government could not demonstrate how the student’s activities threatened national security. The burden was on the South Korean government to ‘specify the precise nature of the threat which it contends that the author’s exercise of freedom of expression posed.’³⁷ The UN Human Rights Committee has applied a similar approach when reviewing complaints arising from restrictions on speech advocating for labor strikes or other forms of peaceful assembly.³⁸

In addition to decisions on individual communications, the Hong Kong government should also look to **General Comment 34**, which was adopted by the UN Human Rights Committee in 2011, to provide guidance to governments on their obligations under the ICCPR.³⁹ One of the topics that was discussed at length during the deliberations of **General Comment 34** was the importance of not treating ‘national security’ or ‘public order’ as broad exceptions to governments’ general duty to protect freedom of expression and access to information. Rather, governments must take ‘extreme care... to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements’ of the ICCPR.⁴⁰ The final version of **General Comment 34** reiterates that limitations on freedom of expression and access to information are only consistent with the ICCPR if the restrictions meet the tests of necessity and proportionality, which means that the government must adopt the least intrusive means to achieve the legitimate aim. In addition, any restrictions provided by law ‘must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.’⁴¹

General Comment 34 further emphasizes that laws purporting to protect national security must not be used by governments as an excuse for suppressing the public’s access to information, noting that:

It is not compatible with paragraph 3, for instance, to invoke [national security] laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.⁴²

This is a particularly important principle if Hong Kong is to continue to be viewed as a reasonably transparent government and one of the leaders in Asia in the campaign against corruption. Sadly, there is already less public confidence in the independence of Hong Kong’s Independent Commission Against Corruption (ICAC) and its ability to investigate corruption without political interference.⁴³ In that atmosphere, it is absolutely essential that no new restrictions are enacted that could hamper the ability of journalists to obtain information on possible wrongdoing by government officials. The government could help to address public concerns by agreeing to introduce a law on Freedom of Information, one that can be enforced by the independent judiciary.⁴⁴

In addition to the Human Rights Committee, Hong Kong can also look to ‘**soft law**’ instruments for guidance on the relationship between national security and civil liberties. For example, the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* set parameters on the extent to which governments can rely on national security as a ground for restricting of freedom of expression and assembly.⁴⁵ National security may justify measures limiting these rights but only when they are taken to respond to a genuine threat to the existence of the nation, its territorial integrity, or political independence.

The *Johannesburg Principles* further explain the relationship between national security laws and freedom of expression.⁴⁶ A foundational principle is that a government should only seek to prohibit expression when it can demonstrate that the expression is intended to incite imminent violence and is likely to do so.⁴⁷ Moreover, a government that seeks to restrict freedom of expression on the ground of national security has the burden of first demonstrating that the restriction is necessary to protect a legitimate national security interest.⁴⁸ This means that the genuine purpose and demonstrable effect of the restriction must be to ‘protect a country’s existence or its territorial integrity *against the use or threat of force*, or its capacity to respond to the use of force.’⁴⁹

The *Johannesburg Principles* also provide important guidance on access to information and the rights of journalists. For example, laws prohibiting ‘theft of state secrets’ must not be used to prevent politicians, journalists, and the general public from obtaining access to information about the operation of the government. A government should not categorically deny access to information but rather should designate only those ‘specific and narrow categories of information’ that must be withheld to protect a legitimate national security interest.⁵⁰ Journalists’ sources must also be protected⁵¹, and individuals who obtain information by virtue of government service should not be penalized for disclosure if the public interest outweighs the harm.⁵²

Finally, under both the ICCPR and the *Johannesburg Principles*, an individual accused of a security-related offence must be given all of the normal procedural protections under international law.⁵³ If a government seeks extraordinary powers of investigation or detention then it must be able to show that these powers do not violate fundamental rights of due process and are truly necessary to respond to a genuine threat to national security.

PROTECTING FREEDOM OF SPEECH AND PEACEFUL ADVOCACY FOR CONSTITUTIONAL CHANGE



A pro-independence rally on July 1st 2018 Photo: SCMP

Until recently, there was no independence movement in Hong Kong. Residents accepted that they would enjoy a form of ‘internal self-determination,’ through the development of local democracy and the ‘high degree of autonomy’ provided for under the Basic Law. However, as democracy reforms were delayed and Beijing began to interfere more openly in local affairs, a small number of residents have lost faith in the ‘*One Country, Two Systems*’ model of autonomy and have embraced what are known as ‘*localist*’ views.⁵⁴ A very small number have begun to advocate for independence from China.⁵⁵

Some public figures have insisted that these developments create an urgent need to enact additional ordinances prohibiting advocacy for independence.⁵⁶ However, if Hong Kong wishes to be seen as a jurisdiction that adheres to the ICCPR and other international human rights norms, then it must not attempt to prohibit peaceful advocacy for self-determination (whether it be internal self-determination in the form of autonomy and local democracy or external self-determination in the form of independence). Nor should peaceful advocacy for democratic reforms or other changes to the constitutional framework ever be deemed a ‘threat’ to national security. It is true that Hong Kong cannot unilaterally amend the Hong Kong Basic Law (which is a national law enacted by China’s National People’s Congress). But the Hong Kong Special Administrative Region does have the authority to *propose* amendments (via a rather complicated mechanism involving a vote by the local Legislative Council and Hong Kong’s Deputies to the National People’s Congress and consent of the Chief Executive).⁵⁷ Thus, by definition, Hong Kong residents must have the freedom to discuss and peacefully advocate for amendments to any provision in the Basic Law, including Article 1.⁵⁸

The European Court of Human Rights reached a similar conclusion in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*. The Court held that the mere fact that a group of persons were likely to call for autonomy or request secession (which could involve fundamental constitutional and territorial changes) could not, by itself, justify a prohibition on that group’s assemblies. This is because simply ‘[a]dvocating for territorial changes in speeches and

demonstrations does not automatically amount to a threat to the country's territorial integrity and national security.⁶⁰ A peaceful request for secession may shock the authorities and the general public; but that does not justify prohibiting the expression of this desire unless there is a demonstrable threat to national security. Indeed, it is of the 'essence of democracy to allow diverse political programmes to be proposed and debated, even ones that call into question the way a State is currently organized, provided that they do not harm democracy itself.'⁶¹

In contrast, the European Court of Human Rights has also considered a number of cases arising in the context of a violent separatist movement. For example, in the case of *Sürek v. Turkey*, the Court accepted Turkey's argument that it was necessary to prosecute the applicant for commentary that described the actions of the PKK (a terrorist organization) as a struggle for 'national liberation' and supported the PKK's use of armed force.⁶² However, the Court has been far more skeptical when Turkey prosecuted individuals who simply used harsh language to criticize the government's treatment of the Kurdish population. For example, in the case of *Incal v. Turkey*, the Court found that Turkey violated Article 10 of the European Convention on Human Rights when it prosecuted the applicant for circulating a pamphlet that accused the government of harassing Kurdish traders and urged citizens to oppose the harassment through neighborhood committees.⁶³ The Court rejected Turkey's assertion that this particular pamphlet threatened its national security or territorial integrity. Similarly, when Turkey prosecuted a trade union president for writing an article that condemned acts of 'state terrorism' against the Kurdish people, the Court found that the criminal conviction was disproportionate because there was no evidence that the applicant was encouraging violence against the state.⁶⁴ Rather the applicant was publishing critical commentary directed at the government.

The *Johannesburg Principles* also provide that a restriction on speech cannot be justified on the ground of national security if the 'genuine purpose or demonstrable effect' of the restriction is to entrench a particular ideology or to protect a government from criticism, embarrassment, or exposure of wrongdoing.⁶⁵ This is a delicate matter in the context of Hong Kong because the Central Government is accustomed to stifling criticism in Mainland China. In contrast, under the Joint Declaration, the ICCPR, and the Basic Law, Hong Kong residents have a right to criticize both the local and



Lee Bo Photo: Asia Pacific

the national governments.⁶⁶ The disappearance of Lee Bo from Hong Kong in December 2015 has already shaken the confidence of Hong Kong people in this regard. Although he has since returned to the territory, the Central Government has made no attempt to reassure the local public (or the international community) that other residents of the territory will not be similarly 'disappeared' in the future. More generally, there is strong evidence that academic freedom and politically sensitive speech is under threat in Hong Kong.⁶⁷ Under these circumstances, it is essential that no local legislation be enacted that could further undermine the right to publish views that are critical of the Central Government, its policies, or its leaders.

CONCLUSION

When Deng Xiaoping first proposed that the ‘One Country, Two Systems’ model of autonomy be applied to Hong Kong, there was considerable optimism that this model would enable the territory to maintain its status as a free society with a vibrant economy. On paper, the Basic Law has endowed Hong Kong with considerable autonomy, including the right to enact its own local legislation protecting national security and public order. Hong Kong does already have strong local legislation prohibiting many of the acts specified in Article 23 and there is no urgent need to enact additional legislation at this time. Instead, the local government should devote its resources and political capital towards addressing the shortage of affordable housing and other pressing social concerns in the territory.

The local government also needs to rebuild confidence in Hong Kong’s autonomy and rule of law. The tiny independence movement is a reflection of young people’s frustration with Hong Kong’s eroding autonomy and lack of progress towards democracy. But this new movement has been entirely peaceful, does not threaten public order in the territory, and could not conceivably threaten the security of the larger nation. Rather than enacting draconian laws (which would only increase support for the tiny independence movement), the Hong Kong government should ask the Law Reform Commission to review the existing statutes and administrative procedures to ensure that they comply with the ICCPR. This would show good faith by the local government and do far more to dampen desires for independence than any legislation enacted under the umbrella of Article 23.

ENDNOTES

¹ This report does not address the forthcoming legislation to implement China's National Anthem Law in Hong Kong, as this will be addressed in a separate report by Hong Kong Watch. The government has not claimed that a law on the national anthem is necessary for national security; rather, the government is introducing this legislation because the NPC Standing Committee decided, in November 2017, to add the National Anthem Law to Annex III of the Basic Law, entitled 'National Laws to Be Applied in the Hong Kong Special Administrative Region.'

² The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China for Solicitation of Opinions, 20 *Case Western Reserve Journal of International Law* 301 (1988).

³ Basic Law of the Hong Kong Special Administrative Region (Second Draft) (1989).

⁴ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted on 4 April 1990 by the National People's Congress and brought into force on 1 July 1997, at Article 23.

⁵ Article 39 of the Basic Law provides, in relevant part, that the provisions of the ICCPR as applied to Hong Kong 'shall remain in force and be implemented through the laws of the Hong Kong Special Administrative Region.'

⁶ See e.g. Tony Cheung, Hong Kong is 'only place in the world without national security law', liaison office chief says, *South China Morning Post*, 15 April 2018.

⁷ Existing laws are only summarized here; for detailed analysis of existing laws and the legislation proposed by the government in 2002-2003 (but not enacted), see Fu Hualing, Carole J. Petersen, and Simon N.M. Young, eds, *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (HKU Press 2005).

⁸ The Official Secrets Ordinance was enacted in 1997 and largely modeled on the British Official Secrets Act 1989, which had previously been applied to Hong Kong.

⁹ Public Order Ordinance (Cap. 245), especially ss. 6, 9, 11, 14, and 15.

¹⁰ Societies Ordinance (Cap. 151), ss. 5, 5A, 5D and 8.

¹¹ Proposals to Implement Article 23 of the Basic Law: A Consultation Document (Hong Kong Government, Sept. 2002) (available at: <https://www.basiclaw23.gov.hk/english/>), p. 44.

¹² It should be noted, however, that acts that would be covered by an offense of 'subversion against the Central People's Government' may already be prohibited under the existing treason offenses in the Crimes Ordinance (Cap. 200).

¹³ UN Human Rights Committee, Concluding Observations on the third periodic report of Hong Kong, China, 29 April 2013, CCPR/CHN-HKG/CO/3, paras 10-11.

¹⁴ See e.g. Christy Leung, Hong Kong's July 1 march participants could face legal action over start point in shopping areas, police chief Stephen Lo warns, *South China Morning Post*, 15 April 2018.

¹⁵ For coverage and a summary of the correspondence from the Secretary of Security, see *Hong Kong Free Press*, In full: The 700-page Hong Kong police dossier detailing the words and movements of independence party chief, at <https://www.hongkongfp.com/2018/07/21/full-700-page-hong-kong-police-dossier-detailing-words-movements-independence-party-chief/>. See also *Hong Kong Watch*, 3 reasons to worry about the decision to ban the Hong Kong National Party, at <https://www.hongkongwatch.org/all-posts/2018/7/20/3-reasons-to-worry-about-the-decision-to-ban-the-hong-kong-national-party>.

¹⁶ See Alvin Lum, Hong Kong National Party gets extra 28 days to argue against police attempt to ban it, *South China Morning Post*, 31 July 2018.

¹⁷ See Transcript of Remarks by Secretary for Security on exercising power under Societies Ordinance, 24 September 2018, available at: <https://www.sb.gov.hk/eng/press/> (citing many activities that are clearly entirely peaceful and lawful in Hong Kong, such as standing for election).

¹⁸ See Hong Kong Watch, Political Screening in Hong Kong: A report on the disqualification of candidates and lawmakers, at <https://www.hongkongwatch.org/all-posts/2018/3/7/political-screening-in-hong-kong-a-report-on-the-disqualification-of-candidates-and-lawmakers>.

¹⁹ See Kimmy Cheung and Sum Lok-Kei, Ex-leader CY Leung dares Foreign Correspondents' Club to give up lease and make open bid for site as Andy Chan row escalates, *South China Morning Post*, 31 July 2018.

²⁰ See Fu Hualing, Past and Future Offences of Sedition in Hong Kong, Chapter 7 in Fu, Petersen, and Young, *supra* note 7.

²¹ See D. W. Chow and Richard Cullen, Treason and Subversion in Hong Kong, Chapter 5 in Fu, Petersen, and Young, *supra* note 7.

²² For an analysis of these proposals (which were only slightly modified from the Consultation Document to the Bill), see Simon N.M. Young, Knock, Knock. Who's there? – Entry and Search Powers for Article 23 Offences, Chapter 12 in Fu, Petersen, and Young, *supra* note 7.

²³ For analysis of the proposal, see Lison Harris, Lily Ma, and C.B. Fung, A Connecting Door: The Proscription of Local Organizations, Chapter 10 in Fu, Petersen, and Young, *supra* note 7.

²⁴ Article 23 of Macau's Basic Law is virtually identical to Article 23 of Hong Kong's Basic Law. See Basic Law of the Macau Special Administrative Region of the People's Republic of China, adopted on 31 March 1993 by the National People's Congress and brought into force on 20 December 1999, at Article 23.

²⁵ There is no freedom of information law in Hong Kong (only an administrative Code on Access to Information); the media therefore rely heavily upon leaks in their investigative reporting. See Doreen Weisenhaus, Article 23 and Freedom of the Press: A Journalistic Perspective, Chapter 9 in Fu, Petersen, and Young, *supra* note 7.

²⁶ See, e.g. Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (2004), especially ch. 2.

²⁷ There is a body of empirical research documenting the importance of freedom of expression in preventing, exposing, and remedying corruption. For an example of this research and a summary of other studies, see Christopher Starke, Teresa K. Naab, and Helmut Scherer, *Free to Expose Corruption: The Impact of Media Freedom, Internet Access, and Governmental Online Service Delivery on Corruption*, 10 *International Journal of Communication* 4702-4722 (2016).

²⁸ See, e.g. International Chamber of Commerce Hong Kong, China Business Council, Comments on Consultation Document on Proposals to Implement Article 23 of the Basic Law, (2002); Ravina Shamdasani, Ernest Kong and Cheung Chi-fai, Foreign banks voice concerns over Article 23, *South China Morning Post*, 3 Dec 2002, p. 1; Mark L. Clifford and Pete Engardio, Is the Sun Setting on Hong Kong's Freedom?, *Business Week*, 18 Nov 2002; and Jian Tianlun, Article 23 and its Impact on Hong Kong's Economy, Association for Asian Research, 29 December 2002, available at: <http://www.asianresearch.org/articles/1128.html>.

²⁹ National Security (Legislative Provisions) Bill 2003, available at: <https://www.basiclaw23.gov.hk/english/>.

³⁰ Interestingly, even the normally pro-Beijing DAB party wanted the Bill delayed by that point because they feared retribution in the September 2003 elections to the Legislative Council; for discussion, see Carole J. Petersen, Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003, Chapter 1 in Fu, Petersen, and Young, *supra* note 7.

³¹ See Joint Declaration, Article 3(5) and Annex I, Article XIII; Basic Law, Article 39; and *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442 (holding that the ICCPR is incorporated into the Basic Law).

³² Hong Kong Bill of Rights Ordinance (Cap. 383), s. 8, at Articles 16-18.

³³ Basic Law, at Articles 27 and 39.

³⁴ ICCPR, Articles 19, 21, and 22.

³⁵ UN Human Rights Committee, General Comment 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 35. General Comments are considered to be highly authoritative interpretations of human rights treaty obligations.

³⁶ *Mukong v. Cameroon*, Human Rights Committee Communication No. 458/91, Views adopted on 21 July 1994, para. 9.7.

³⁷ *Tae-Hoon Park v. Republic of Korea*, Human Rights Committee Communication No. 628/1995, Views adopted 20 October 1998, para. 10.3.

³⁸ See, e.g. *Sohn v. Republic of Korea*, Human Rights Committee, Communication No. 518/1992, Views adopted on 18 March 1994, especially para. 10.4.

³⁹ UN Human Rights Committee, General Comment 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

⁴⁰ *Id.* at para. 30.

⁴¹ Id. at paras 24-25.

⁴² Id. at para. 30.

⁴³ See, e.g., Cal Wong, Hong Kong Corruption Watchdog's Independence at Risk: Questions arise after the Independent Commission Against Corruption's head of operations is removed, *The Diplomat*, 14 July 2016, available at: <https://thediplomat.com/2016/07/hong-kong-corruption-watchdogs-independence-at-risk/>.

⁴⁴ Currently, Hong Kong has only a Code on Access to Information, which can generate a complaint to the Ombudsman. For details concerning recent complaints to the Ombudsman regarding government responses to requests for information, see Office of the Ombudsman, Hong Kong, Selected Cases Relating to Code on Access to Information, available at http://ofomb.ombudsman.hk/abc/en-us/code_informations.

⁴⁵ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, at Part VI, National Security.

⁴⁶ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information(1995), available at <http://www.refworld.org/docid/4653fa1f2.html>.

⁴⁷ Id. at Principle 6.

⁴⁸ Id. at Principle 1(d) (emphasis added).

⁴⁹ Id. at Principle 2 (a) (emphasis added).

⁵⁰ Id. at Principle 13.

⁵¹ Id. at Principle 18.

⁵² Id. at Principle 16.

⁵³ Id. at Principle 20.

⁵⁴ See Carole J. Petersen and Alvin Y. H. Cheung, Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of 'One Country, Two Systems,' (2017) 42 *North Carolina Journal of International Law* 665, especially Part VII.

⁵⁵ See discussion (accompanying notes 15-17 above) concerning the Hong Kong National Party.

⁵⁶ See e.g. Alvin Lum, Jeffie Lam, and Kimmy Chung, Will Andy Chan separatist saga force Hong Kong leader Carrie Lam to act on national security law? *South China Morning Post*, 27 August 2018.

⁵⁷ Basic Law, Article 159.

⁵⁸ Article 1 of the Basic Law describes Hong Kong as an 'inalienable part' of China.

⁵⁹ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECHR (First Section), Applications nos. 29221/95 and 29225/95 (2001), para 97.

⁶⁰ *Id.*, para. 97.

⁶¹ *Case of Socialist Party and Others v. Turkey*, (20/1997/804/1007), ECHR (Grand Chamber) (1998), para. 47; see also *Ivanov v. Bulgaria*, ECHR (First Section), Applications no. 46336/99 (2005), para. 64.

⁶² *Sürek v. Turkey* (No. 3), ECHR (Grand Chamber), Application no. 24735/94 (1999).

⁶³ *Incal v. Turkey*, ECHR (9 June 1998), in Reports of Judgments and Decisions 1998-IV, p. 1569.

⁶⁴ *Ceylon v. Turkey*, ECHR (Grand Chamber) (1999).

⁶⁵ Johannesburg Principles, Principle 2(a).

⁶⁶ The Hong Kong Court of Final Appeal made this clear in *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442 (upholding ordinances prohibiting desecration of the regional and national flags but noting that this was permissible because it was a very narrow restriction on the form of expression rather than a restriction on the content of expression).

⁶⁷ See generally, Petersen and Cheung, *supra* note 54 above, and Hong Kong Watch, Academic Freedom in Hong Kong Since 2015: Between Two Systems, available at: <https://www.hongkongwatch.org/all-posts/2018/1/22/academic-freedom-report>.



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