National Security and Fundamental Freedoms

Hong Kong's Article 23 Under Scrutiny

Edited by Fu Hualing, Carole J. Petersen and Simon N.M. Young

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Introduction

Carole J. Petersen

Article 23 of the Basic Law is one of the most controversial provisions in Hong Kong's constitution.[1] It 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.

The debates over how this provision should be implemented embody the tension that is inherent in the "one country, two systems" model that governs Hong Kong's relationship with the Mainland. From the perspective of the Chinese government, the fact that Article 23 allows Hong Kong to enact its own laws in this field is already a concession, particularly since the responsibility for Hong Kong's defence lies with the Central People's Government. What other national

1. The Basic Law is a national law, enacted by the National People's Congress. In the Hong Kong legal system, it is a superior law and is regularly referred to (by the Hong Kong government, judges, and legal scholars) as Hong Kong's constitution, constitutional instrument, or constitutional document. *See*, for example, "Some Facts About the Basic Law", on the Hong Kong government's website on constitutional development (at http://info.gov.hk/basic_law/facts/index.htm).

government would allow a regional government to enact its own laws governing offences like treason and theft of state secrets?

From the perspective of many Hong Kong residents, Article 23 is one of the greatest threats to civil liberties. Offences like "subversion" and "secession" are unknown in the Hong Kong legal system. Even familiar concepts, such as "theft of state secrets", take on a more sinister meaning when considered in the context of the Mainland where an exceptionally broad definition of "state secret" is adopted. This is significant because it has always been assumed that the Chinese government would exercise some influence over the drafting of the legislation, if only because it appoints Hong Kong's Chief Executive. Moreover, the Standing Committee of the National People's Congress (SCNPC) has the power, under Article 17 of the Basic Law, to invalidate a local law if it determines that the law does not conform to the Basic Law regarding affairs within the responsibility of the Beijing or regarding the relationship between the Central Authorities and the SAR. Thus, the implementation of Article 23 in a manner that satisfies Bejing, while respecting the rights and freedoms of Hong Kong residents, has been one of the most difficult challenges faced by the Hong Kong government.

Appreciating the difficulties of the task, the Hong Kong government conducted substantial research on comparative laws before releasing its proposals in a Consultation Document in September 2002, more than five years after the handover. The government then drafted and introduced, in February 2003, the National Security (Legislative Provisions) Bill 2003 ("the Bill"). Article 23 covers a wide range of complex legal issues and some of the legislative proposals were provocative. Thus, the government could not have been surprised when its proposals attracted extensive public criticism. Nonetheless, given the make-up of the Legislative Council in 2003 and the procedural rules for government bills, the Hong Kong government felt confident that it would secure enough votes to enact the Bill and that it could defeat any amendments proposed by opposition legislators.[2] Armed with this confidence, the government was adamant in wanting to pass the Bill before the 2003 summer recess. It declined to negotiate with opposition legislators or to delay the Bill, even by a few months. As discussed in greater detail in Chapter One of this volume, the government's inflexible approach to the legislative process, combined with the poor economy and the stress of the SARS episode, created a true "spring of discontent" in 2003.

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2. As discussed further in Petersen, Carole, "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003", Chapter 1 of this volume, one-half of the seats in the Legislative Council are chosen by "functional constituencies", rather than geographic constituencies. Under Annex I of the Basic Law, bills and amendments to government bills proposed by individual legislators are subjected to a split voting system and only pass if they receive a majority vote from both the categories of legislators. Thus, the functional constituency representatives effectively have veto power over any amendment proposed by a legislator to a government bill.

On 1 July 2003, eight days before the Legislative Council was to resume the second reading debate on the Bill, more than 500,000 people took to the streets. This was the largest protest march ever held against the Hong Kong government. It was the second largest demonstration in Hong Kong's history, exceeded only by the 1989 demonstrations in support of the students in Tiananmen Square. The huge turnout was a shock to almost everyone and the normally pro-government Liberal Party withdrew its support for the government's plan to enact the Bill in July 2003. The government was compelled to delay and ultimately withdraw the Bill from the legislature. As many have observed, the successful protest was a turning point in Hong Kong's history. Although Hong Kong still does not have an elected government and its Legislative Council is only partly elected from geographic constituencies, the concept of "people power" is now a part of Hong Kong politics.

Why publish a book about a Bill that was not enacted? First, there is little doubt that the Bill will return, albeit perhaps in a somewhat altered form. Hong Kong does have a constitutional duty to implement Article 23 and the reaction of the Chinese government to the withdrawal of the Bill indicates that it will not wait indefinitely. It is far better for Hong Kong to enact such laws "on its own", as provided for in Article 23, then to risk having national laws imposed upon it. Thus, at some point after the 2004 Legislative Council elections, the Hong Kong government will likely introduce a new bill. When it does so, it will almost certainly use the 2003 Bill as its starting point. For that reason, it is important to provide detailed and balanced commentary on the Bill. The chapters in this volume do precisely that, analyzing the government's proposals, including any changes that were made in response to public concerns, and assessing them against certain standards, including pre-existing Hong Kong law, the laws of comparable common law jurisdictions, and international human rights standards. Many of the authors have gone further in that they have proposed new ideas of how implementation can be achieved without overstepping the boundaries that protect human rights in a civil society. It is our hope that this commentary will assist the government, legislators, and the broader community when a new bill is drafted and scrutinized.

Article 23 also provides a window through which one can consider broader issues that go beyond the legislation itself. These include the strengths and weaknesses of the "one country, two systems" model, the extent to which Hong Kong exercises meaningful autonomy within the national system, and the growing demand for greater democracy in Hong Kong. Another theme that is discussed in the book is the relevance of international human rights law and the capacity of the Hong Kong courts to place meaningful constraints on executive power. The International Covenant on Civil and Political Rights (ICCPR), as applied to Hong Kong, has been incorporated into its domestic law, through the Hong Kong Bill of Rights Ordinance and Article 39 of the Basic Law. As a result, the courts are obligated to declare invalid any ordinary laws or executive actions that violate the ICCPR. In an effort to reassure the public that Article 23 legislation would

not be an exception, the Hong Kong government added clauses to the Bill that expressly instructed courts to interpret the proposed legislation so as to be consistent with Article 39 of the Basic Law. These clauses were intended to alleviate concerns regarding a number of vague clauses in the Bill. It is, however, arguably dangerous to put that burden on the courts. This is partly because of the overriding power of the SCNPC, under Article 158 of the Basic Law, to issue an interpretation of any article in the Basic Law which would, thereafter, bind the Hong Kong courts. Moreover, as pointed out in several chapters in this volume, courts throughout the world are notoriously reluctant to interfere in executive actions taken in the name of "national security" or, since 11 September 2001, "anti-terrorism". While many commentators would argue that the offences in Article 23 do not all relate to national security, but rather to the desire by the Chinese Communist Party to stifle internal expressions of political dissent, it is unlikely that courts will shed their normal deference to pierce the veil of national security.

Part I — General Perspectives

The book is divided into two parts. Part I contains four general chapters which are designed to give the reader an overview of the proposals made by the Hong Kong government and also an understanding of the political and legal context in which the Bill was proposed and debated. Chapter One, "Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill 2003", by Carole Petersen, begins by summarizing the historical background of Article 23, the impact of the tragic events of 4 June 1989 on its drafting, and the many ways in which the Central government can control Hong Kong, despite its formal status as a special administrative region. In light of this context and the widespread fear of Article 23, the Hong Kong government needed to be especially sensitive to this history when drafting the legislation. Instead, the government created its own crisis, first by including controversial proposals that were outside the scope of Article 23 and then by taking an inflexible, at times even arrogant, approach to public consultation. Even so, the government likely could have secured enactment of the Bill had it only agreed to issue a White Paper and to make a few significant concessions earlier in the legislative process. The chapter concludes with a brief discussion of the implications of the failure to enact the Bill for local governance, the democracy movement, and Hong Kong's relationship with Beijing.

In Chapter Two, "Counter-Revolutionaries, Subversives, and Terrorists: China's Evolving National Security Law", Fu Hualing puts the Article 23 debate into context by analyzing the regime of political offences in mainland China. This is a particularly important chapter for those unfamiliar with Chinese law. The chapter further explains why so many Hong Kong people have feared Article 23 and analyses the recent changes in the Chinese government's approach. Fu first discusses the concept of "counterrevolutionary offences" (CR offences) and

provides data on prosecutions and trials, noting that the majority of prosecutions in the 1980s were expression-based. He describes how the subversion offence has been used to punish political dissidents and nonviolent critics of the government. Fu also notes, however, that prosecutions for subversion are decreasing as there is a gradual move away from CR offences and towards national security offences. There is a clear trend towards depoliticizing China's criminal law and people enjoy more political freedom than in past decades. Nonetheless, political persecution is still common, particularly against religious groups, political dissidents, and labour activists. Indeed, the number of individuals prosecuted for national security offences is increasing. Thus the CR offence has not really been abolished but only "transfigured into a new form". What are the implications for Hong Kong? The concern is that Article 23 legislation, particularly the previously unknown offences of subversion and secession, will be used to import mainland restrictions into Hong Kong. Fu argues, however, that this need not happen, since subversion and secession can and have been defined differently in Hong Kong. He also agrees with many commentators that the concepts of subversion and secession in Hong Kong law could be effectively covered by the existing offence of treason.

In Chapter Three, "The Consultation Document and the Bill: An Overview", Albert Chen provides a systematic analysis of the Bill as a whole. He points out that many of the proposals would have liberalized Hong Kong law and that there are important differences between the government's proposals and Mainland law. For example, Chen explains how the proposed definitions of subversion and secession are much narrower than the corresponding definitions in the Chinese Criminal Code. At the same time, Chen criticizes several vague and indeterminate clauses in the Bill and argues that these clauses should be clarified before the next legislative exercise. Chen views these problematic clauses largely as technical defects which can be fixed. He concludes that the general orientation of the Bill is reasonable and that the proposals, as a whole, "represented a sincere and genuine attempt to put the principle of one country, two systems into practice". Chen is more optimistic than some of the authors in this book on how the legislation would likely be applied if enacted. In particular, he predicts that public opinion, both local and international, would help prevent abuse of the laws, that prosecutions would be rare, and that the independent judiciary could be relied upon in the "last resort" to interpret any vague clauses in a manner that is consistent with international standards of human rights.

Part I of the book concludes with Chapter Four, "Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws", by Kent Roach. This chapter also analyses the Bill as a whole but through a different lens than that used by Chen. Roach notes that at first glance the Hong Kong proposals seem to be based primarily upon the "old" concept of national security, which focuses upon betrayal of the state. He argues, however, that labels can be deceiving and that the Bill also included aspects of the newer vision of national security that is found in many countries' post-September 11 anti-terrorism laws. In the

second half of the chapter, Roach demonstrates these similarities, which were not pointed out by the government in its explanatory notes to the Bill. This is significant, Roach suggests, because the Bill does not contain the safeguards for protests, advocacy, and labour strikes that are normally included in the recent anti-terrorism laws. He concludes that the Bill, if enacted, could give Hong Kong a "double dose" of security without adequate protection for civil liberties. He also warns that such laws can be particularly oppressive in a society without a democratically elected government and that one should not rely upon the courts to "read down" repressive laws.

Part II — Specific Topics

Part II of the book consists of eight chapters, each of which focuses upon a particular topic and provides the reader with detailed analysis, not only of the Bill itself but also of the historical development of the relevant offences and a comparative analysis of laws in other common law jurisdictions. For example, in Chapter Five, "Treason and Subversion in Hong Kong", D.W. Choy and Richard Cullen begin by discussing how the offence of treason developed in common law and in the Hong Kong statute books. Turning to the Bill, they note that at first glance the treason provisions do not seem to differ significantly from Hong Kong's existing law and may even appear narrower in scope. Closer study reveals many uncertainties and broadly defined terms. Among other examples, the authors cite the concept of "assistance to an enemy", which was defined broadly in the Bill, with no particular mental element required. The authors note that this definition could be interpreted to include even humanitarian aid offered by humanitarian organizations based in Hong Kong. They also maintain that the Bill's definition of subversion lacks certainty and, if interpreted broadly, could "cover mere strong criticism of policies in China". Although agreeing with Albert Chen on several specific points, Choy and Cullen are more critical in their overall assessment of these two offences. They conclude that the uncertainties and broad language of the Bill could easily result in unacceptable restrictions on fundamental human rights.

In Chapter Six, "A Secession Offence in Hong Kong and the 'One Country, Two Systems' Model", Kelley Loper analyses another proposed offence that has no precedent in Hong Kong or in the common law generally. She begins by discussing the relationship between secession and the right to self determination, as recognized in international law. While this is a difficult issue throughout the world, it is particularly sensitive in Hong Kong because the central government's "one China" policy does not tolerate, in Mainland China, any debate about its authority over territories like Tibet and Taiwan. Yet, as Loper points out, in Hong Kong, people can and do openly discuss whether the people of Tibet and Taiwan have a right to self determination. Moreover, any law on secession must be drafted

in a manner that does not violate the right to freedom of expression under the ICCPR and the Basic Law. Loper then turns to the proposals in the Bill and identifies several vague terms that need to be clarified. She warns that legislators must closely scrutinize not only the principal offence but also the inchoate offences of conspiracy and attempt to commit secession, which she argues pose greater dangers for the protection of human rights.

In Chapter Seven, the government's proposals regarding sedition receive a generally positive assessment. In "Past and Future Offences of Sedition in Hong Kong", Fu Hualing first discusses the law of sedition in the colonial era. This fascinating account demonstrates that although Hong Kong colonial law bore a superficial resemblance to English law, it was actually far more repressive. Seditious intent was imputed, and it was not necessary to prove intention to incite violence. The colonial government did not hesitate to use the law to silence newspapers, particularly during the civil war in China and during the Cultural Revolution. Although the law gradually fell into disuse, it was never reformed; after 1991, any enforcement of the law would almost certainly violate the Hong Kong Bill of Rights. In the second part of the chapter, Fu discusses the liberalization of sedition laws in other common law jurisdictions, providing a benchmark against which to test the government's proposals in the Bill. This was one area where the government did respond to comments, agreeing, for example, to narrow the definition of sedition and to abandon its initial proposal to retain the offence of "possession of seditious materials". Fu concludes that the Bill, had it been enacted, would have significantly improved Hong Kong law.

In contrast, Chapter Eight, "National Security and the Unauthorized and Damaging Disclosure of Protected Information", by Johannes Chan, provides a stinging critique of the Bill's provisions relating to protection of government secrets. This is one of the areas where the government arguably went well beyond the strict requirements of Article 23, which only refers to the need to protect state secrets. The Official Secrets Ordinance protects state secrets and Chan maintains that this Ordinance is already overly broad, particularly as Hong Kong has no access to information laws. The government's proposals went beyond state secrets and proposed to expand the liability for "unauthorized and damaging disclosure" of government information. Chan points to many vague and overly broad terms in the Bill and argues that it would have been almost impossible for a journalist to know, with any certainty, whether a story would violate the law, thus casting a chill on freedom of expression. As Chan notes, after the huge protest march of 1 July 2003, the government finally agreed to add a "public interest" defense. While this concession was too late to save the Bill in 2003, Chan concludes his chapter by analyzing its value and its limitations.

In Chapter Nine, the proposals relating to sedition, secession, and government secrets are examined once again, but this time from the point of view of the media. In "Article 23 and Freedom of the Press: A Journalistic Perspective", Doreen Weisenhaus, a former reporter for the *New York Times* and

an expert on media law, puts the legislative proposals into context. She first discusses the nature of the Hong Kong press, which has long been regarded as one of the freest in Asia. She explains how journalists get stories, noting that they regularly rely upon unofficial government leaks because there is no freedom of information law and the government's voluntary code on access to official information is largely unworkable. Perhaps most importantly, Weisenhaus captures the increased sense of insecurity that journalists feel, in part because Hong Kong journalists have been arrested in China and in part because so many of the Article 23 proposals could impact directly upon their work. Weisenhaus argues strongly against the proposal to increase liability for damaging disclosure of government secrets, noting that important stories of government misconduct may never see the light of day if these provisions are enacted.

Chapter Ten, "A Connecting Door: The Proscription of Local Organizations", by Lison Harris, Lily Ma, and C.B. Fung, examines the remaining two prohibitions in Article 23, those pertaining to political organizations. Like Fu Hualing's discussion of sedition, this chapter demonstrates how potentially oppressive Hong Kong law was in the early colonial era. Fortunately, the Societies Ordinance was liberalized in the last decade before the handover, and freedom of association is now constitutionally protected by the Basic Law, the ICCPR, and the Bill of Rights Ordinance. It is a freedom that is particularly cherished by members of religious and political reform organizations, who are well aware that their counterparts are often persecuted on the Mainland. Thus, it is not surprising that the government's proposals in this field would be carefully scrutinized. Ironically, the government need not have touched upon this topic at all because the Societies Ordinance had already been amended, in 1997, to comply with the strict requirements of Article 23. In particular, the Ordinance prohibits foreign political organizations from operating in Hong Kong and prohibits local political organizations from forming ties with foreign organizations. It also empowers the Secretary for Security to proscribe an organization on national security grounds. In the Bill, however, the government proposed to add a mechanism allowing the Secretary to consider proscribing a Hong Kong organization affiliated with an organization that had been proscribed in the Mainland. This became one of the most controversial aspects of the Article 23 debate. The Hong Kong government argued that it did not really increase the Secretary for Security's powers, but for many people the mechanism opened the "connecting door" to Mainland law far too wide. Despite many calls for the government to abandon this proposal, it refused to do so until after the massive protest march of 1 July, a gesture which proved too late to save the Bill. This is a particularly relevant chapter as it is not known, at this time, whether the government will attempt to reintroduce this provision when it drafts a new bill.

The final three chapters focus upon procedural and jurisdictional aspects of the Article 23 legislation. In defending the proposal regarding the proscription of organizations, the government often pointed to the fact that the any member

of an organization that was subject to a proscription order could appeal that decision to the Court of First Instance. Yet the appeal mechanism in the Bill gave rise to additional controversies. The Bill would have authorized the Secretary for Security to make regulations allowing such appeals to take place without the appellant being given full particulars of the reasons for the proscription and in the absence of any person, including the appellant and her legal representative. Although many countries have procedures for special "in camera" hearings to safeguard national security, the suggestion that such procedures be used in connection with Article 23 legislation aroused public concern. Of course, it is difficult to assess regulations that have not actually been drafted. However, in Chapter Eleven, "The Appeal Mechanism Under the National Security Bill: A Proper Balance Between Fundamental Human Rights and National Security?", Lin Feng discusses comparable procedures used in the United Kingdom and Canada. While acknowledging that they are controversial, he demonstrates that in camera procedures have been upheld by English and Canadian courts, as well as by the European Court of Human Rights. Thus, the author concludes that regulations of this nature would likely fall within the recognized exceptions to the right to a fair and public hearing, protected under the Bill of Rights Ordinance and the Basic Law.

Another important procedural issue in the Article 23 debate is the extent to which the police should enjoy any special investigatory powers for such offences. The privacy of one's home and the requirement of a judicial warrant for any search and seizure is an important feature of Hong Kong's legal system, perhaps one of the most important distinctions between the Hong Kong SAR and the Mainland. This right is expressly protected in the Bill of Rights Ordinance, the ICCPR, and the Hong Kong Basic Law, which states that "homes and other premises of Hong Kong residents shall be inviolable". Article 23 itself says nothing about special powers to investigate national security offences and thus the Hong Kong government had no constitutional duty to propose such powers as part of the legislative package. Nonetheless, in the 2002 Consultation Document, the government proposed to give the police emergency entry, search, and seizure powers, including the power to conduct a search without a warrant when investigating certain Article 23 offences. This came as a surprise to many in the community and, predictably, created great controversy. In Chapter Twelve, "Knock knock. Who's there? Entry and Search Powers for Article 23 Offences", Simon Young assesses these proposed search powers, as well as certain existing powers, from a constitutional perspective. He draws upon case law from other common law jurisdictions and from the European Court of Human Rights and concludes that the Hong Kong government failed to justify the warrantless search power according to constitutional principles of legitimacy, including the principles of necessity and proportionality. The government did offer to make some minor amendments (such as raising the level of officer who must approve the warrantless search) but it insisted on keeping the power in the Bill. It was only after the protest

march of 1 July 2003 that the government offered to abandon the proposal entirely. It may, however, attempt to gain extraordinary investigatory powers in a future bill, and Young concludes his chapter by recommending necessary safeguards. He also argues that certain existing police entry and search powers should be repealed and that a general review of such powers should be conducted.

In Chapter Thirteen, "A Case for Extraterritoriality", Bing Ling focuses upon a particular issue that could affect the constitutionality of a number of clauses in the Bill: the question of whether the Hong Kong legislature had the power to enact legislation that purports to have extraterritorial effect and thus apply to acts committed outside Hong Kong. He begins by analyzing the powers of the Hong Kong Legislative Council, both in the colonial era and since the handover. The Basic Law contains no express provision conferring, or excluding, the power to make extraterritorial laws. The author thus examines other provisions in the Basic Law and argues that its general framework, particularly the very limited applicability of national law in Hong Kong, shows an intention to give the local legislature extraterritorial power, at least to a limited degree. He also assesses whether the relevant clauses in the Bill can be justified under the relevant principles of international law. The author concludes that the assertion of extraterritorial legislative jurisdiction in the Bill can be justified so long as a sufficiently close connection exists between the offence and Hong Kong. The local court would be required under international law to consider whether the exercise of jurisdiction over the offence would constitute an unreasonable invasion of the domestic affairs of the other state. This chapter should be closely read by anyone who is concerned about possible prosecutions in Hong Kong for acts committed in another jurisdiction.

The book also includes a chronology of significant events and, in the Appendix, a guide to the main proposals in the Bill. The legislative proposals were not drafted as one new ordinance. Rather, the Bill consisted of a series of amendments to existing legislation. The Appendix juxtaposes the proposals against the relevant provision in existing legislation (e.g. the Crimes Ordinance, the Official Secrets Ordinance, or the Societies Ordinance). This makes it easier for the reader to compare the proposals to existing law. The Appendix also shows the changes that the government agreed to make in the committee stage amendments and in the "three concessions" offered after the protest march of 1 July 2003.

As noted earlier in this Introduction, there is little doubt that the Article 23 legislation will resurface and the new legislation is likely to be based upon the National Security (Legislative Provisions) Bill 2003. Indeed, as pointed out by many of the authors, much of the Bill was quite reasonable and would have improved existing law. With more time for discussion of the problematic clauses, it is hoped that the community can reach a true consensus on the way forward.

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