Main concerns with regard to the Hong Kong Special Administrative Region (HKSAR) government's proposal to implement art. 23 of the Basic Law

Article 23 of the Basic Law (Hong Kong's Constitution) stipulates that HKSAR "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government (CPG), or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies".
Article 23 of the Basic Law (Hong Kong's Constitution) stipulates that HKSAR "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government (CPG), or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies". That provision was added to the draft Basic Law on the insistence of the government of the People Republic of China in the aftermath of the Tien An Men crack down in 1989.

The government consequently issued a consultation paper on 24 September 2002, and the consultation period will end on December 24. The Bill should then be introduced in February, and enacted no later than in July 2003.

The HKSAR government's proposal intends to replace the current offence of treason by a new definition; to establish the offence of secession from the People Republic of China; to reactivate and redefine the offences of sedition and dealing with seditious publications; to establish the offence of subversion; to broaden the existing provisions on theft of State secrets; to expand the provisions on foreign political organisations endangering state security; and to extend police powers of entry, search and seizure of evidence without a warrant from the Court.

Our organisations consider that if this proposal becomes a law, freedom of opinion and expression as well as freedom of assembly and association will be endangered in the HKSAR. In addition, human rights defenders might face repression in the future if that legislation concretises.

Eventually, such a law would be contradict the UN Human rights Committee concluding observations on Hong Kong issued in 1999, in which the Committee expressed its "concern that the offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms", and expressly recommended that "all laws enacted under article 23 of the Basic Law must be in conformity with the Covenant."

**TREASON**

The proposed definition reads as follows (paragraph 2.8 - emphasis added):

"(a) levying war by joining forces with a foreigner to:
(i) overturn the People's Republic of China Government (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) instigate a foreigner to invade the PRCG; or
(c) assist by any means a public enemy at war with the PRC (People's Republic of China)."

In theory, treason should involve an intention to overthrow the state by violence. However, the definition proposed is not clear in that regard since it includes the notion of "constraint", which might well give rise to abusive interpretation resulting in the repression of any form of opposition designed to change the policy of the Government of the PRC (strike, peaceful protest or speech).

Our organisations also fear that the term "public enemy" might cover Taiwan since no peace treaty has been signed
The document proposes "to codify the common law inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of substantive offences, and conspiring to commit the substantive offences; and also the offence of misprision of treason (i.e. failure to report a known offence of treason) ".

This extension of the definition of treason might have far-reaching consequences since the offence of treason itself as newly defined will be very broad, and even vague... The establishment of the offence of misprision of treason is preoccupying as well since anyone who knows that someone else is committing the proposed new broadly defined offence of treason will himself/herself be guilty of an offence if he/she does not inform the authorities. It thus opens the door to a "Big Brother" society in which it will be every citizen’s duty to spy on every other citizen.

Our organisations consequently consider that the proposed definition of treason entails the risk of unacceptable restrictions to freedom of expression and peaceful assembly (UDHR, art. 19 and 22 ; ICCPR, arts. 19 and 20 ; Declaration on Human Rights Defenders, art. 5).

**SECESSION**

The government proposes to create a specific offence of secession, making it an offence to (para 3.7 - emphasis added):

"(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".

The term "serious unlawful means" refers to any of the following criminal actions taken for the purpose of secession :

"(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".

The inclusion of the bullets (b), (e) and (f) results in an excessive extension of the scope of that provision; it means, e.g., that a pro-Tibetan demonstration which would disrupt the traffic would fall under the "secession" offence. This provision would therefore violate freedoms of expression and peaceful assembly (UDHR, art. 19 and 22 ; ICCPR, arts. 19 and 20 ; Declaration on Human Rights Defenders, art. 5).

**SEDITION**

The last prosecution in Hong Kong for sedition was in 1953 - such a provision is totally unnecessary since it duplicates the existing offences of conspiracy to murder, attempted riot, or inciting violence at public meetings (Section 26 of Hong Kong’s Public Order Ordinance).

The proposal suggests as well a definition of the offence of publishing a seditious publication (para 4.17) : a publication would be considered as seditious 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".

The government justifies that position by saying that "it is also widely recognized that the fundamental national
security interests and stability of the state may sometimes be seriously endangered by verbal or written communications, including those conveyed electronically” (para 4.17). The FIDH and HKHRM consider that the proposed provision might unduly restrict freedoms of expression and information (arts. 19 UDHR, art. 19 ICCPR, art. 6 Declaration on Human Rights Defenders). Publishers, dealers and even simple possessors of such publications would fall under that legislation. In addition, this proposal is even more dangerous since the substantive crimes of treason, secession and subversion would also be very broadly defined.

SUBVERSION

The government proposes the following definition (para 5.5) :

"(a) to intimidate the PRCG; or (b) to overthrow the PRCG, or to disestablish the basic system of the state as established by the PRC constitution, by levying war, or by force, threat of force, or by other serious unlawful means”.

The same criticism applies in relation to the "serious unlawful means" as to the crime of secession (see above). The meaning of the term "intimidations" is not clear either.

The offence of subversion is largely used in the PRC to suppress legitimate opposition. We therefore fear that such an offence might result in severe restrictions on freedoms in the HKSAR.

THEFT OF STATE SECRETS

The government proposes to specify that the targets of protection against the theft of state secrets should be (para 6.19) :

"(a) where spying is concerned, information which is likely to be useful to an enemy, and whose obtaining or disclosure is for a purpose prejudicial to the safety or interests of the PRC or the HKSAR;
(b) where unlawful disclosure is involved, information belonging to the following categories :
(i) security and intelligence information;
(ii) defence information;
(iii) information relating to international relations;
(iv) information relating to relations between the Central Authorities of the PRC and the HKSAR; and
(v) information relating to commission of offences and criminal investigations”.

It should be the norm that communications between the Central People's Government and the SAR Government are in the public domain. Such communications should only be confidential where they fall within one of the three existing confidential areas, namely security and intelligence, defence information, or information relating to international relations. Otherwise there is no reason why communications between central and local government should be hidden from public scrutiny.

The proposed offence will criminalise many newspaper scoops about Government policy. It will also have a chilling effect on newspaper reporting and publishing generally, as any newspaper which publishes a story directly or indirectly involving Government, other than from a handout from an official press spokesperson, will risk finding out too late that the information is protected information, and facing prosecution. Our organisations therefore consider that proposal contrary to freedoms of information and expression (art. 19 ICCPR ; art. 19 UDHR ; art. 6 of the UN Declaration on Human Rights Defenders). It goes against the general trend towards increased transparency as a means to ensure good governance and participation. Secrecy in governments is often a cover for incompetence and maladministration.

FOREIGN POLITICAL ORGANISATIONS

The government proposes to make it an offence to organise or support activities of a proscribed organisation. Proscribed organisations would notably be defined as an organisation "affiliated with a Mainland organisation which
has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security” (Consultation Document paragraph 7.15).

There is no requirement under Article 23 of the Basic Law to introduce any legislation of this kind. Article 23 does not mention links with Mainland organisations, but only with foreign organisations. In addition, that provision is particularly preoccupying since independent organisations are systematically prohibited in Mainland China: attempts to set up legal political parties or independent trade unions are not tolerated; in the religious field, freedom of association is not respected either, and there is still no possibility of establishing rights monitoring groups inside the country.

The Government will have the power to shut down any organisation with which even a weak connection with a Mainland organisation could be shown: it would merely have to produce a certificate from the Central People’s Government that a Mainland organisation has been banned on national security grounds and prove a connection (para 7.16).

Thus an organization that endangers national security, whether on the Mainland or in the HKSAR, may be proscribed, and a grouping in the HKSAR affiliated with it may become unlawful. The concept of “connection” would include (para 7.17 - emphasis added):

“(a) solicitation or acceptance by the association of financial contributions, financial sponsorships or financial support of any kind or loans from a proscribed organization, or vice versa;
(b) affiliation with a proscribed organization, or vice versa;
(c) determination of the association's policies by a proscribed organization, or vice versa; or
(d) direction, dictation, control or participation in the association's decision making process by a proscribed organization, or vice versa”.

The use of the phrase “vice versa” means that where a Hong Kong organisation has contributed financial support of any kind to a Mainland organisation the Hong Kong organisation might be banned.

If enacted, that provision would violate freedom of association (art. 22 ICCPR; art. 20 UDHR; art 5 of the UN Declaration on Human Rights Defenders).

INVESTIGATION POWERS

The Government proposes that an emergency entry, search and seizure power be provided to the police for investigating some Article 23 offences, without a warrant.

The power “should only be exercised by a sufficiently senior police officer (e.g., a superintendent) when he reasonably believes that:
(a) a relevant offence has been committed or is being committed;
(b) unless immediate action is taken evidence of substantial value to the investigation of the offence would be lost; and
(c) the investigation of the relevant offence would be seriously prejudiced as a result” (para 8.5).

The real reason for seeking these extraordinary wide powers is to enable the Government to terrorise political opponents by entering their homes or their offices without warning to carry out searches for seditious publications. We believe that such exceptions to the legal guarantees in the criminal procedure should be exceptional and very limited. The vagueness of the definition of the crimes concerned makes such an exception quite dangerous, and contrary to the right to respect of privacy (ICCPR, art. 17; UDHR, art. 12).
PROCEDURE AND PENALTIES

At present there is a 3 year time limit for prosecutions for treason and sedition. The Government proposes to abolish that time limit and to have no time-limit for any of the proposed new offences.

The penalties proposed are draconian: life imprisonment for subversion, or for incitement to commit subversion; 7 years for mere possession of a seditious publication, and to 7 years for misprision of treason i.e. not reporting that someone else is doing something treasonable.

The imprescriptibility of those crimes and the heaviness of the penalties seem quite disproportionate with regard to the wide scope of the offences concerned.

In view of the provisions analysed above, the FIDH and HKHRM consider that the proposals made by HKSAR government seriously threatens freedoms of expression, opinion, information, peaceful assembly and association.