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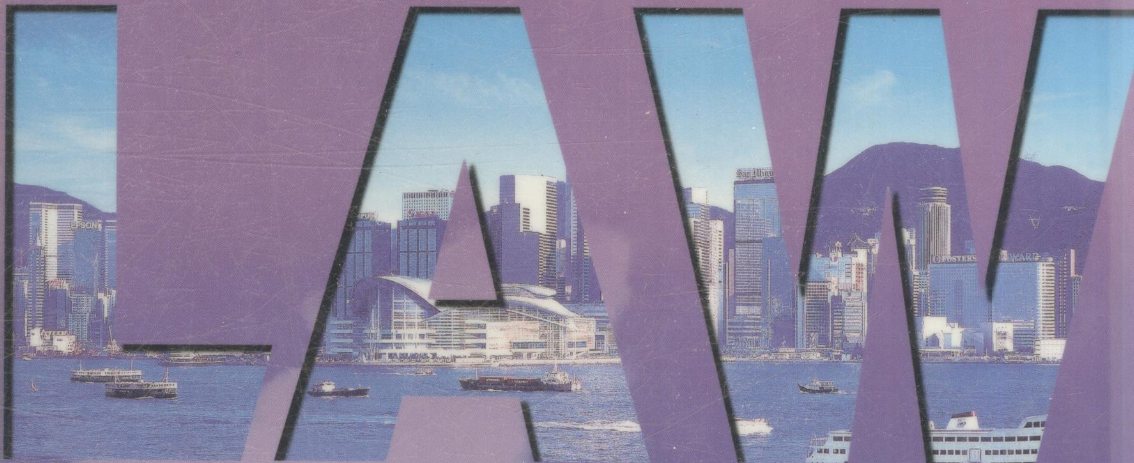

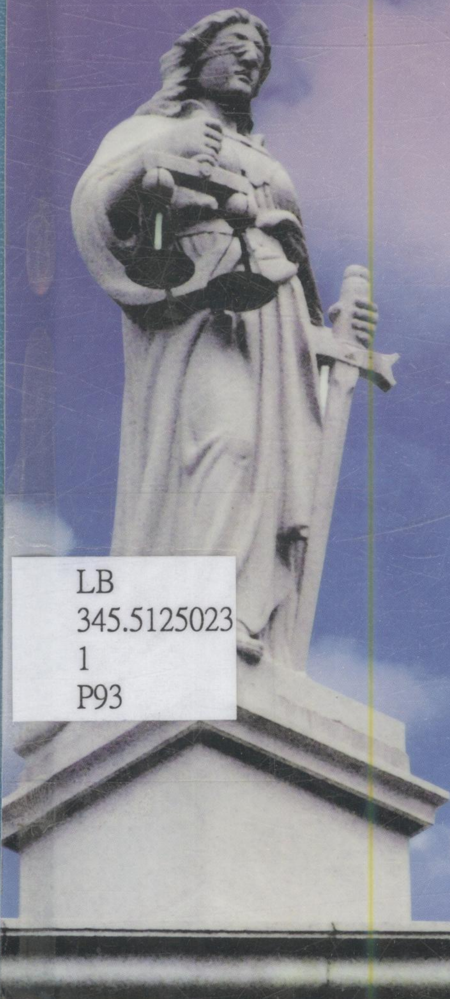

CENTRE FOR COMPARATIVE AND PUBLIC LAW
UNIVERSITY OF HONG KONG FACULTY OF LAW

Preserving Civil Liberties in Hong Kong: The Potential Impact of Proposals to Implement Article 23 of the Basic Law

Rayson Huang Theatre, University of Hong Kong
Saturday, 23 November 2002
9:00 a.m. - 1:00 p.m.

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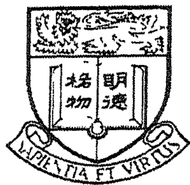
香港大學法律學院



Centre for Comparative and Public Law (CCPL)
Faculty of Law
UNIVERSITY OF HONG KONG

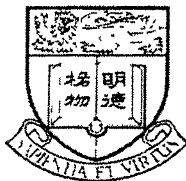
Conference

Preserving Civil Liberties in Hong Kong: The Potential Impact of Proposals to Implement Article 23 of the Basic Law

Saturday, 23 November 2002; 9:00 a.m. – 1:00 p.m.
Rayson Huang Theatre, The University of Hong Kong

Programme

8.30-9.00	**Registration**
9.00-9.10	**Introduction** Associate Professor Carole Petersen, Director, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong
9.10-9.30	**State Powers of Investigation and Article 23** Assistant Professor Simon N.M. Young, Faculty of Law, University of Hong Kong
9.30-9.50	**Theft of State Secrets and the Proposed New Offence of Unauthorized and Damaging Disclosure of Protected Information** Professor Johannes M.M. Chan, Dean, Faculty of Law, University of Hong Kong
9.50-10.10	**Past and Future Offences of Sedition in Hong Kong** Associate Professor Fu Hualing, Faculty of Law, University of Hong Kong
10.10-10.30	**Treason, Secession, Subversion and Proscribed Organizations: Comments on the Consultation Document** Professor Albert H.Y. Chen, Faculty of Law, University of Hong Kong
10.30-11.00	**Question and Answer Session**
11.00-11.30	**Tea Break**
11:30-12:50	**Discussion Panel** Chaired by Assistant Professor Anne S.Y. Cheung, Faculty of Law, University of Hong Kong Mr. Cliff Buddle, News Editor, South China Morning Post Mr. Law Yuk-kai, Director, Hong Kong Human Rights Monitor The Honourable Margaret Ng, member of the Hong Kong Legislative Council Mr. James O'Neil, Acting Solicitor-General, Department of Justice Assistant Professor Doreen Weisenhaus, Journalism and Media Studies Centre (HKU)
12.50-1.00	**Closing Remarks** Carole Petersen



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23 November 2002

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Centre for Comparative and Public Law
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UNIVERSITY OF HONG KONG

Preserving Civil Liberties in Hong Kong: The Potential Impact of Proposals to Implement Article 23 of the Basic Law

23 November 2002

Conference Participants

Carole Petersen

Carole Petersen is an associate professor at the University of Hong Kong (HKU) Faculty of Law. She is also director of the Centre for Comparative and Public Law and a deputy head of the Department of Law. Carole teaches Law of Contract, Constitutional Law, Human Rights in Hong Kong, and Equality & Non-Discrimination. She publishes in the areas of equality rights and academic freedom. She is currently leading a research project on the enforcement of equal opportunities legislation, particularly the use of conciliation to resolve discrimination claims. She is also a member of the Equal Opportunities Commission's Task Force on Equal Pay for Equal Value and the Women's Studies Research Centre at HKU.

Simon N.M. Young

Simon N.M. Young is an assistant professor at the HKU Faculty of Law and a deputy head of the Department of Law where he teaches criminal law and evidence. Prior to joining HKU, he worked as trial and appellate Crown counsel in the Criminal Law Division of the Ministry of the Attorney General for Ontario, Canada. He is presently working on a research project studying constitutional rights and remedies in Hong Kong's criminal investigation process.

Johannes M.M. Chan

Johannes M.M. Chan is a professor and dean of the HKU Faculty of Law. He specialises in human rights, constitutional and administrative law, and has taught human rights courses at both the undergraduate and graduate levels. He is a practicing barrister and has appeared as counsel in many leading Bill of Rights cases. Internationally, he has worked on specific issues with non-governmental organizations, appeared in official international fora, and acted as a trial observer in the Asian region. He has published widely in his fields in both local and international journals. Professor Chan has served on many public and professional bodies, including the Bar Council, the Consumer Council, the Broadcasting Authority, the Press Council, the Council of the Hong Kong Red Cross, the Central Policy Unit, among others. In 1995 he was elected as one of the Ten Young Outstanding Persons in Hong Kong and he received the Human Rights Press Award in 1999.

Fu Hualing

Fu Hualing is an associate professor at the HKU Faculty of Law and is the programme director of the LLM in Chinese Law. He is interested in criminal justice studies and constitutional law, and has published widely on criminal justice and human rights in China, and cross-border legal relations between Hong Kong and mainland China. He teaches Human Rights in China, Cross Border Legal Relations, Criminology, Constitutional Law, and Law and Society.

Albert H.Y. Chen

Albert H.Y. Chen is a professor at the HKU Faculty of Law. He served as head of the Department of Law from 1993-1996, and as dean of the Faculty from 1996-2002. Prior to joining HKU in 1985, he completed a postgraduate degree at Harvard and then worked in a solicitors' firm in Hong Kong from 1982 to 1984. Professor Chen has taught legal system and legal method, constitutional and administrative law, the legal system of the PRC, the law of business associations, the use of Chinese in law, law and society, and jurisprudence. He has written over 90 articles published in English and Chinese-language journals as well as several books. Professor Chen is a member of the Law Reform Commission of Hong Kong, a Justice of the Peace, and a member of the Committee for the Basic Law of the Hong Kong SAR under the Standing Committee of the National People's Congress of the PRC. He is an honorary professor or researcher at several universities in mainland China and is member of the editorial boards of academic journals published in the UK, China and Hong Kong.

Anne S.Y. Cheung

Anne S.Y. Cheung is an assistant professor at the HKU Faculty of Law. It is her desire to encourage law students to practice alternative lawyering. Her major interests include socio-legal issues and anything that is "more than law". She is currently working on a research project covering issues of self-censorship, media law, and law and religion. She teaches Law and Society and is launching a new course on Media Law. Her recent publications include articles on the role of lawyers in society and self-censorship and press law.

Cliff Buddle

Cliff Buddle worked as a journalist in London for 12 years before coming to Hong Kong to work for the South China Morning Post in 1994. He spent six years as the Post's chief court reporter, covering many of the major constitutional cases which followed the handover. He then spent two years helping to edit the opinion pages and writing a column about legal affairs and has recently been appointed news editor.

Law Yuk-kai

Law Yuk Kai is the director of the Hong Kong Human Rights Monitor, founded in 1995 by a group of lawyers and activists including members of the Legislative Council. Since the early 1980s, Law has been involved in "agenda-setting," as it was known during his student days, working as a teacher and with one of the residents' groups which were precursors to the current political parties. At the Monitor, Law,

along with other members of the group, is active locally and internationally on Hong Kong human rights and rule of law issues. The Monitor sends shadow reports and representatives to most hearings relating to Hong Kong by various UN treaty bodies and conducts research on human rights topics, including those related to Article 23. The Monitor acts as the secretariat in support of the campaign against Article 23 legislation by the Civil Human Rights Front, a movement of 42 non-governmental organisations (NGOs).

Margaret Ng Ngoi-yee

Margaret Ng is a member of the Legislative Council of the Hong Kong SAR ("LegCo") representing the Legal Functional Constituency and is a practicing barrister. She was elected to LegCo in 1995 and served until 1997. She was returned by the same constituency in the elections of May 1998 and September 2000. She is the chairman of the LegCo Panel on the Administration of Justice and Legal Services, deputy chairman of the Committee of Rules of Procedures, and participates actively in the vetting of bills and proposed subsidiary legislation. She has been chairman or deputy chairman and member of several Bills Committees including those formed for the Ombudsman (Amendment) Bill, the Securities and Futures Bill and the Banking (Amendment) Bill, the Chief Executive Election Bill, the Copyright (Suspension of Amendment) Bill, and the Hong Kong Court of Final Appeal (Amendment) Bill 2001. She has served extensively on public committees and has spoken to international audiences on democracy and the rule of law in Hong Kong on numerous occasions.

James O'Neil

James O'Neil is currently acting solicitor general and deputy solicitor general (constitutional) overseeing the Basic Law Unit and the Human Rights Unit of the Legal Policy Division of the Hong Kong SAR Government. He is a Scottish qualified lawyer with 30 years experience in the public service and came to Hong Kong in 1983 to join the Government. Projects he has worked on have included former Governor Chris Patten's Electoral Package and the Chief Executive (Election) Ordinance. Prior to joining the Legal Policy Division in 1997 he held the post of deputy crown solicitor.

Doreen Weisenhaus

Doreen Weisenhaus is an assistant professor at the Journalism and Media Studies Centre at HKU and teaches two core graduate-level courses: "Critical Issues in Journalism and Global Communications" and "Media Law" as well as courses on thesis and opinion writing. She also created and supervises the JMSC's Media Law Program, a learning and training resource for students, journalists, scholars, media lawyers and others in the communications industry in Hong Kong, mainland China and the region. Prior to joining HKU in January 2000, Weisenhaus was city editor of The New York Times and was the law and political editor of The New York Times Sunday Magazine from 1994-1998. Prior to her work with The New York Times, Weisenhaus was editor-in-chief of The National Law Journal, the largest-selling publication for lawyers in the U.S. While editor, she was a regular television commentator on legal issues. She is trained as bot a lawyer and a journalist.

State Powers of Investigation and Article 23

Simon N.M. Young
23 November 2002

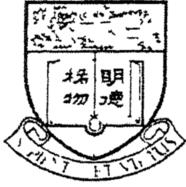
Abstract

The consultation paper proposes to give the state new extraordinary powers to search premises and to obtain financial information without warrant or prior judicial authorization. The arguments put forward for these new powers are unconvincing, especially since Article 23 itself does not expressly require implementing such powers.

It has been said that these powers are necessary given the great calamitous consequences arising from the commission of internal security offences. However, this calamitous consequences argument ignores the existing emergency powers available to the government when such consequences occur or appear imminent. It has also been said that the new powers are necessary because none presently exist. While this may be true, it hardly answers the question of whether they are empirically necessary to deal with the specified Article 23 offences, having regard to the wide powers enjoyed by Hong Kong state agents at present. A further point has been made that the new powers are not extraordinary as there exists already many similar powers in Hong Kong for other offences. But by their nature, some of these other emergency warrantless search powers can be clearly justified (e.g. drugs are easily disposed of, firearms are inherently dangerous, etc.). It is also noteworthy that laws aimed at tackling organized crime, money laundering, and terrorist financing have not seen fit to include extraordinary warrantless search powers in relation to premises. Finally, it has been said that many other countries have similar powers. However, this point is weakened by the lack of uniformity in state practice. As well, differences in the legal regime of other countries may result in differences in the practical application of these powers, especially in terms of how often they are resorted to.

Any proposal to create new police powers must be subjected to principled scrutiny having regard to the fundamental freedoms and rights potentially threatened by those powers, namely the inviolability of one's home, the right to privacy and the freedom of expression. It

is submitted that three governing principles should inform the thinking behind any legislative proposal in this area. The three principles are as follows, (1) all warrantless searches are *prima facie* unreasonable and should be prohibited; (2) the state has the onus of demonstrating that the warrantless search (and/or search power) is empirically necessary and reasonably restricted; and (3) there must be special considerations given to constitutionally protected domains.



Centre for Comparative and Public Law (CCPL)
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Preserving Civil Liberties in Hong Kong:
The Potential Impact of Proposals to Implement
Article 23 of the Basic Law

Past and Future Offences of Sedition in Hong Kong

presented by

Dr. Fu Hualing
Associate Professor
Faculty of Law
University of Hong Kong

23 November 2002

Past and Future Offences of Sedition in Hong Kong

H L Fu
Department of Law
University of Hong Kong

Work in Process. Please Don't Cite.

For Sir James Fitzjames Stephen, whether the offence of sedition is justifiable depends on how the relationship between the ruler and the ruled is conceptualized. "If the ruler", according to Stephen, "is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistake or not no censure should be cast upon him likely or designed to diminish his authority."[1]This has been the underlying logic to justify sedition for all forms of dictatorial and authoritarian regimes.

Conversely, if the ruler is regarded as the agent and servant, and the subject (i.e. the public) as the wise and good master who has delegated the power to the so-called ruler, then there can be no sedition, for censuring the government is only an exercise of the right by a member of the public to find fault with his servant.[2] Therefore, "no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."[3]

The answer to Stephen's question is self-evident even at Stephen's time, for Stephen made it clear that nothing short of an immediate tendency to produce disorder ought to be regarded as sedition. Indeed, that was taken as the law in England in the latter part of the 18th century.[4] It has been commonly accepted that political speech is essential to a democracy and thus deserves more protection than other types of speech, and public political advocacy is fundamentally different from a private solicitation of crime and thus should be treated as such by criminal law.[5]

Law reformers have almost universally advocated the abolition of sedition as a criminal offence. The Canadian Law Reform Commission criticizes sedition as "an outdated and unprincipled law", which is inconsistent with the Canadian Charter of Rights. The Commission asks, "Is it not odd then that our Criminal Code still contains the offence of sedition which has as its very object the suppression of such freedom?"[6] The Law Commission of the United Kingdom has also recommended the abolition of sedition. In addition to the fact that criminalizing sedition stifles political discussion and is detrimental to the exercise of the right to criticize government, the Commission argues that "there is likely to be a sufficient range of other offences covering conduct amounting to sedition".[7] Furthermore, the offence is "political", and the Commission preferred seditious acts punished by apolitical laws.[8] Common

definition and thus narrowed the scope of the offence. The fact that the offence has been abolished in some countries and retained in others mainly has to do with how the offence has been defined in those different countries.

This paper reviews the past seditions offences in Hong Kong and the possible future development of the law of sedition in light of developments in other common law jurisdictions. This paper has three parts. Part one is a brief historical review of the legislation and case law of sedition in Hong Kong in chronological order. Part two considers the evolution of sedition in certain common law jurisdictions and discusses several key concepts and distinctions between sedition and legitimate dissent. Part three comments upon the proposed sedition offence in the Consultation Paper in light of the historical development of the offence.

Sedition as an Offence in Hong Kong

Regulating the Press

Although the development of the law of sedition in Hong Kong dates back to the 1840s when Hong Kong was ceded to Britain, the law itself had little, if anything, to do with the English law practiced at home. The development of the law closely related to the regulation of the press in the territory.[9] Newspapers at that time included the Hong Kong Gazette (mainly publishing military notices) and the Friend of China (published by English missionaries). The first type-set Chinese newspaper— the *Zhong Wai Xin Bao* — began publication in 1858.

Regulation of the press in China was indispensable to every dynasty, although the restrictions varied from one dynasty to another. Since Hong Kong was governed by the *Da Qing Luli* (the Great Qing Code) before being ceded to Britain, the *Da Qing Luli* remained the law governing the operation of the press in the first few years of British rule. After the establishment of the executive and legislative structures of Hong Kong, an Ordinance of 1844 was passed to regulate the press in Hong Kong.

As explained in the Chronological Table of Ordinances[10], the Ordinance was "to regulate the printing of books and papers, and the keeping of printing presses within the Colony of Hong Kong."[11] Under the Ordinance, proprietors of newspapers were only required to declare their places of abode before a magistrate. While bonds and sureties were required, the amounts required were much lower than their British counterparts.[12] The reason for such a policy, as explained by Sir Hercules Robinson, the Governor of the time, was "to assimilate the press of the Colony with the most

respectable press in the world, namely, the press of England".[13] Hong Kong enjoyed freedom of the press in the first 20 to 30 years of colonial rule.[14]

The Government started to tighten control over the press after cases involving the Friend of China, one in 1857 and the other in 1859. Two reports run by the Friend of China, one on *Cheong Ahlum's* case, the other on the argument between the Attorney General and the Colonial Secretary, angered the Government. The Government prosecuted the newspaper for libel.[15] As a result, the proprietor of the newspaper, William Tarrent was sentenced to imprisonment for 3 months and 1 year respectively. The *Friend of China* was forced to suspend publication. This was the first time that a newspaper was compelled to suspend publication.[16]

The Legislative Council subsequently passed a series of laws to establish the regulatory framework for the press and for general printing and publication. In 1860, the Legislative Council passed Ordinance No.16 to amend the law relating to newspapers in Hong Kong.[17] In 1886 and 1888, the Legislative Council passed the *Printers and Publishers Ordinance* and the *Colonial Books Registration Ordinance* respectively. These two Ordinances laid down the framework for the regulation of printers and publishers in Hong Kong. In 1927 more stringent mechanisms, including a licensing system, were created to control the press to respond to the increase in anti-government publications in the aftermath of the 1925-26 general strike.[18] The Commissioner of Police for example was empowered to grant, at his discretion, a license to keep a printing press at any specified place.[19] While historically the press in Hong Kong was generally free in making political commentaries, the Government attempted to enforce censorship at more difficult times, such as during the 1925 general strike, the time prior to the Japanese occupation, and during the Cultural Revolution. [20]

Legislative Control over Seditious Books & Newspapers

It was not until the early 20th century that the Legislative Council started to control the seditious content of books and newspapers. The regulation of content was directly related to the rapid political changes in China. The Civil War in China resulted in the competing factions creating newspapers in Hong Kong with particular political persuasions. These newspapers were used as instruments of the political factions in China to extend their hostilities to Hong Kong. The early legislative efforts at content control sought to control this type of political propaganda and agitation.

The first law which authorized the Hong Kong government to impose direct

control over the content of the press was the *Chinese Publications (Prevention) Ordinance 1907*. The immediate cause of passing this Ordinance was the fact that "[t]here has been an amount of seditious matter published in this Colony for some time past, which in the opinion of the Government may have the effect of inciting to crime in China". In particular there was a publication of an anti-Manchu cartoon. The cartoon portrayed "some of China's leading statesmen sitting with their heads in their hands".[21] The Hong Kong Government asserted that the cartoon and other publications could incite "rebellion against the great and friendly empire which lies so close to our border" in order to deter the press in Hong Kong from becoming too deeply involved in the politics of China and save the Government from embarrassment.[22]

The Hong Kong Government passed the *Chinese Publications (Prevention) Ordinance* on 11th October 1907, a law which was regarded as "rather dangerous" and may attract "*bona fide* criticism" from the public.[23] The Attorney-General stated at the Second Reading of the Bill that the object of the Ordinance was "to prevent Hong Kong becoming a place where seditious pamphlets [might] be printed and circulated with a view to distribution in China"[24] and "to prevent this Colony being made a center for seditious publications".[25] The legislative intention was more expressly stated in the Preamble of the Ordinance, which provided that "Whereas, owing to the proximity of the Colony of Hong Kong to the mainland of China and to the tendency to create internal dissension in that country, it is deemed expedient to prohibit within the Colony the publication of matter calculated to excite such dissension".[26]

The *Chinese Publications (Prevention) Ordinance* contained only one main provision. Under section 2 of the Ordinance, any person who "printed, published, or offered for sale or distributed any printed or written newspaper or book or other publication containing matter calculated to excite tumult or disorder in China or to excite persons to crime in China" would be liable for a fine not exceeding five hundred dollars or a maximum of 2 years' imprisonment or both.

The law was not limited to the Chinese press. As the real target of the Ordinance was those publications that might be calculated to incite tumult in the Mainland, the language used was irrelevant. Newspaper articles written in English concerning politics in Mainland China were also subject to the operation of this Ordinance.[27]

While the *Chinese Publications (Prevention) Ordinance* punished those local

printers, publishers, sellers and distributors who printed or published any books or newspapers that calculated to excite tumult or disorder in China, the *Post Office Ordinance 1900* dealt with the prohibition of sending seditious, indecent or obscene materials. Under section 12 of the *Post Office Ordinance 1900*, the Post Office was prohibited from receiving and delivering articles that were seditious, indecent or obscene in character. However, there was doubt about the effectiveness of this section. One of the criticisms was that the power under this Ordinance was limited to controlling those materials coming to Hong Kong through post. The Postmaster could take no action other than returning the seditious matter to the Post Office of origin. At the Legislative Council meeting in 1914, the Colonial Secretary claimed that it was difficult and often practically impossible to control seditious materials with success.[28]

The first comprehensive *Seditious Publications Ordinance* was passed in Hong Kong in 1914. The new law was necessary, according to The Attorney General and the Colonial Secretary, because of the fact that 'newspapers and documents of a highly objectionable character have been brought into the Colony and distributed amongst some of its inhabitants.' Those publications which were `of a highly seditious and disloyal character and which contain matter which is subversive of all social and economic conditions and which, disseminated amongst ill-educated persons, are likely to be productive of disturbance and ill-feeling in the Colony.'[29]

The objectives of the Seditious Publication Ordinance were threefold:

1) To make it clear what matter was to be deemed to be seditious;
2) To provide for more effective means of preventing the introduction into the Colony of seditious matter;
3) To provide for the seizure and forfeiture of seditious publications.[30]

The 1914 Ordinance was different from the earlier laws that regulated the press in several aspects. First, unlike the earlier regulations (such as the 1886 Ordinance), the scope of the *Seditious Publications Ordinance* was broader. Under the 1886 Ordinance, only books printed or published in Hong Kong and newspapers printed for sale and published in Hong Kong periodically or in parts or numbers at intervals not exceeding 26 days were subject to control.[31] The 1914 Ordinance, however, regulated any books, newspapers and even documents (including also any painting, drawing or photograph or other visible representation) wherever printed and printed at whatever intervals.[32]

Secondly, the 1914 Ordinance clearly defined what amounted to "seditious

matter" under the Ordinance. According to the definition, seditious matter referred to "any words, signs or visible representations contained in any newspaper, book or other document which said words, signs or visible representations are likely or may have a tendency, directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise –

1) To incite to murder or to any offense under the Explosive Substances Ordinance 1913, or to any act of violence; or
2) To seduce any officer, sailor or soldier in His Majesty's navy or army from his allegiance or his duty; or
3) To bring into hatred or contempt His Majesty, or the Government established by law in the United Kingdom or in this Colony or in any British possession or in British India or the administration of justice in any of such places or to excite disaffection towards His Majesty or any of the said Governments; or
4) To put any person in fear or to cause annoyance to him and thereby induce him to deliver to any person any property or valuable security, or to do any act which he [was] not legally bound to do, or to omit to do any act which he is legally entitled to do; or
5) To encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order; or
6) To convey any threat of injury to a public servant, or to any person in whom that public servant [was] believed to be interested, with the view to inducing that public servant to do any act or to forbear or delay to do any act connected with the exercise of his public functions.

According to section 3 of the Ordinance, the power to decide whether a book, newspaper or document was seditious was vested in the Governor in Council. The Governor in Council could also declare that seditious matters be forfeited.

Thirdly, the power of the Postmaster-General was also strengthened in dealing with seditious matter. Under the Ordinance, the Postmaster-General was "to detain any article in the course of transmission by post which he [suspected] contain[ed] any newspaper, book or other document containing seditious matter".[33] The power to detain seditious matter was also extended to the Superintendent of Imports and Exports to control those materials coming to Hong Kong through other channels. Indeed, any person who reasonably suspected that any seditious matter was in any building, vessel or place might, at the discretion of a magistrate, obtain a warrant

which authorized the police officer to enter such building, vessel or place and search and seize the seditious matter and arrest the person who possessed them.[34]

Sedition Ordinance 1938

The *Sedition Ordinance* 1938 (No. 13) and *Sedition Amendment Ordinance* (No. 28) were important for two reasons. First, the definition of seditious intention in the Ordinances was essentially the same as their British counterpart. Second, the law laid the foundation for the existing offence of sedition in Hong Kong. Both Ordinances were passed without any debate.[35]

According to the Seditious Amendment Ordinance (No. 28), a "seditious intention" was an intention—

(i) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or against the Government of this Colony or the Government of any other part of His Majesty's dominions or of any territory under His Majesty's protection as by law established[36]; or

(ii) to excite His Majesty's subjects or inhabitants of the Colony to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Colony as by law established; or

(iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Colony; or

(iv) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Colony; or

(v) to promote feelings of ill-will and hostility between different classes of the population of the Colony.[37]

A statutory defence was provided in the 1938 Ordinance. Thus an act, speech or publication is not seditious by reason only that it intends —

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

(b) to point out errors or defects in the Government or Constitution of the Colony as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Colony to attempt to procure by lawful means the alteration of any matter in the Colony as by law established; or

(d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Colony.

Section 3(2) of the *Sedition Ordinance* provided an objective test for seditious intention. It stated:

> In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

It remained an offence to print, etc. any seditious publication, punishable by two years' imprisonment for a first offence, and three years for a subsequent offence. Possession of any seditious publication was made an offence punishable by one year imprisonment for a first offence and two years' imprisonment for a subsequent offence.[38]

The other important Ordinance was the *Control of Publications Consolidation Ordinance* 1951. The coming to power of the Communist Party on the Mainland once again changed the framework of press regulation in Hong Kong. Although the Civil War in the Mainland ended, hostilities continued between the communists on the Mainland and the Nationalists in Taiwan. More seriously, the Korean War started, involving both the UK and the People's Republic of China. The Hong Kong Government became more concerned over the power of the press, passing the *Control of Publication Consolidation Ordinance* in 1951.

The 1951 Ordinance subjected three broad categories of newspapers to its control. The first category was publications that might be "calculated or tending to persuade or induce any person or persons whether individually or as members of the general public or of class or sections to commit an offense.[39] The second category was those publications that were calculated or tending to persuade or induce any person or persons whether individually or as members of the general public or of classes or sections to become members of, contribute to the support of, recruit for or proselytize on behalf of or otherwise adhere to any unlawful society (within the meaning of the *Societies Ordinance* 1949) or any political party, group or association established outside the Colony adherence to which within the Colony had by virtue of

any enactment been declared by the Governor in Council to be prejudicial to the security of the Colony or to the prevention of crime or to the maintenance within the Colony of public order or safety.[40] The last category that was subjected to control was those publications that were "likely to alarm public opinion or disturb public order".[41]

Apart from these three categories, any publication that was, from the point of view of the Governor in Council, "calculated or [was] likely to be prejudicial to the security of the Colony or the prevention of crime or to the maintenance within the Colony of public order, safety, health or morals" might also be prohibited from importation.[42]

To suppress any publications that contained such undesirable contents, upon the application of the Attorney General (and regardless of whether there was any pending proceeding), the Court or a magistrate could order the suppression of that publication for a period not exceeding 6 months. Upon the violation of any suppression order, seizure and detention of all the machinery and publications were possible.[43] Any overseas publication falling within with any of the prohibited categories might also be prohibited from being imported into Hong Kong.[44] Those persons who, in whatever way, constructively possessed the prohibited publications (e.g. possessing, having the right to order or disposing or controlling the prohibited documents), might also be criminally liable.[45]

Sedition Prosecutions

On 2nd November 1951, a disastrous fire occurred in Tung Tao Village which consumed a large number of wooden huts. The Government's performance in response to this incident was criticized as unsatisfactory. The discontent of the public towards the Hong Kong Government became even more apparent as disturbances following the fire became more serious. On the 1st March, 1952, a Canton Comfort Mission planned to come to Hong Kong to visit the Kowloon City Tung Tao Village Fire Victims. Some Hong Kong residents organized themselves into a group to welcome the Comfort Mission. This action drew the attention and suspicion of the Hong Kong Government. A large number of policemen were ordered to the railway station where the Comfort Mission was expected to arrive. The Comfort Mission was also forbidden from entering Hong Kong. A confrontation resulted between the police and the public at the railway station. Many of the protesters were charged, and some of them were even deported. This was the well-known "March First Incident".

The People's Daily published an article protesting the arrest and killing of some

Chinese inhabitants in Hong Kong by the Hong Kong Government. This article was reprinted in *Ta Kung Po*, which also published other stories and editorials relating to the event. The newspaper was charged with publishing a seditious publication under section 4(1)(c) of the *Sedition Ordinance*, that is, printing, publishing, selling, offering for sale, distributing or reproducing seditious publication and its proprietor-publisher, printer, editor were arrested and prosecuted.

The proprietor-publisher and editor were found guilty and appealed against their conviction, arguing that, in publishing the article, they lacked seditious intent. The defendant offered evidence that *Ta Kung Po* had three different articles on the same front page, covering the same event from three different angles, except the republication of the offending article from the *People's Daily*, the newspaper also had a story on the UK Parliamentary report on the same event and a story on the reaction in Guanzhou. The newspaper was simply reporting on the event and lacked any seditious intent.

The defendants were convicted and appealed against the conviction. The Court of Appeal, relying on *Wallace-Johnson v The King* (1940) A.C. 231, rejected the appellants' submission that incitement to violence was a necessary element to be proven by the prosecution. Further no intention to publish seditious words was required according to the express provisions of the law, and it was not necessary for the prosecution to establish that the publication was intended to incite violence. In upholding the conviction, the court approved the trial judge's summing-up:

> ... a person is deemed to intend the consequences naturally flowing from his conduct at the time and under the circumstances in which he conducted himself. If the article when published, would in the natural course of events stir up hatred or contempt against the Government, it is *prima facie* evidence of a publication with a seditious intention. It is unnecessary to produce any extrinsic evidence of a publication with a seditious intention.[46]

Ta Kung Po was found guilty under the *Sedition Ordinance* and the *Control of Publication Consolidation Ordinance*.[47] The court also ordered the suspension of publication for 6 months, which was reduced to 12 days upon Beijing's protest. [48]

The sedition charge was frequently used by the colonial government in dealing with the 1967 riots in Hong Kong.[49] The leading case was the prosecution of three pro-China local Chinese newspapers, *Tin Fung Daily*, *Afternoon News* and *Hong*

Kong Evening News. for publishing false and seditious news, publishing articles with intent to arouse the discontent of police officers and violating the provisions in the *Control of Publication Consolidation Ordinance* as a result of their reports of the June Seventh Riot in 1967. The offending publications included reports or editorials which called upon Hong Kong people to organize to resist the British repression and to bury the reactionary government and urged the Hong Kong police of Chinese race to defect and rebel against the government. The false news related to a report in the Hong Kong Evening News that Chinese navy battle ships were approaching Hong Kong.[50]

On 9 September 1967, the police arrested the proprietors of the three newspapers, Hu Di Wei and Pan Huai Wei, and three printers. The trial started on 21 August 1967 in the Central Magistracy. All of the defendants were found guilty as charged and were sentenced to three years' imprisonment. The court also ordered a six month suspension against the three newspapers. The defendants insisted that the trial was political persecution and refused to appeal.

The three newspapers were the peripheral organizations of the Chinese Communist Party in Hong Kong, and played only supporting roles in inciting the riots. The colonial government did not prosecute the CCP owned newspapers, such as the *Ta Kung Po*, nor the CCP members for inciting the riots, who were said to have played the leading and more direct role behind the riots in Hong Kong. Nevertheless, China reacted strongly to the prosecution and Red Guards in Beijing surrounded the British Office of the Charge d'Affaires and then set it on fire, an event which caused a diplomatic crisis between China and the UK.

Further Amendments

The *Sedition Ordinance* was further amended in 1970. Two additional types of seditious intention were added to the lists: "to incite persons to violence" and "to counsel disobedience to law or to any lawful order.[51] The Ordinance existed until the end of 1971 when it was consolidated into the *Crimes Ordinance*, which also incorporated both incitement to disaffection and incitement to mutiny.[52]

The enactment of the *Bill of Rights Ordinance* (BORO) has affected the sedition law. The constructive intention clause was removed[53] after the enactment of the BORO. The government proposed its repeal on the ground that the presumption of intention was probably inconsistent with Article 11 of the BORO.[54]

The final amendment of the sedition law occurred in 1997, immediately before

the Reunification. The Hong Kong legislature then was, in principle, in favor of repealing the offence of sedition in 1997, although the majority of that body felt bound to accept the "political reality" and narrowed the scope of the offence without deleting it from the statute book. The main argument for the deletion was stated by the Bills Committee as follows:

> The offence of sedition is archaic, has notorious colonial connotations and is contrary to the development of democracy. It criminalizes speech or writing and may be used as a weapon against legitimate criticism of the government.[55]

Nevertheless, many members appreciated the "political reality" that the future government would be duty-bound to legislate on sedition under Art 23, thus they proposed to narrow the scope of the offence and enlarge the possible defence by inserting the following three principles:

1. Narrowing the definition of seditious intention in section 9;
2. Providing an additional element of having the purpose of disturbing the "constituted authority" in section 9 to make prosecutions more difficult; and
3. Incorporating Principle 6 of the Johannesburg Principles.[56]

With the support of the Democratic Party, the Government amendment on sedition passed the third reading on the night of 23 June 1997. The amendment codifies the existing common law requirement and limits the scope of the offence by requiring "the intention of causing violence or creating public disorder or a public disturbance". The law was enacted but has not been implemented.

Defining Sedition in Other Jurisdictions

Publications or the Effect of the Publications? An Issue of Methodology

There have two competing approaches in determining a seditious intent. One approach looks at words themselves to determine whether they are capable of triggering action. The other approach looks at the circumstances surrounding the words to determine whether the words could produce certain harmful results. This distinction can be traced to the earlier history of the offence of sedition.

Sedition was a Star Chamber creation, but the abolition of Star Chamber in 1641

did not, however, bring to a halt the prosecution of seditious offences.[57] Seditious libel was transfigured into common law and thus came within the jurisdiction of the King's Bench.[58] In several important ways, the common law courts incorporated Star Chamber practice, for example, by requiring a jury to consider only the issue of whether a publication has occurred. By defining the issues in dispute in this way, the common law procedure became analogous to the trial by Star Chamber without a jury.[59] Whether or not the content was seditious was also determined by the judges, who made their determination by examining the content of a publication. As the ground for seditious libel included the vague concept of diminishing the affection of the people for the King and his government, the judges "effectively decided the libelousness themselves, for in the circumstances nobody could or would disagree with them."[60]

The passage of *Fox's Libel Act* in 1792 softened the prosecution of sedition. This Act had a direct and indirect effect. The direct result was that the jury was given more power in that jurors decided on whether a publication was seditious. The jury took from the judge the power to determine the nature of the words uttered or written, so that the issue became a matter of fact rather than a matter of law. The indirect result was that, as the jury started to look into the issue of whether a publication was seditious, the offence of sedition went beyond the mere words themselves. The jury began to consider their context and effect. As Stephen said: "The Libel Act must thus be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller to the purpose for which he wrote."[61] As Lobban[62] emphasizes, "in cases of sedition, it was the context that became all-important".

> The eighteenth century's most common form of political prosecution began to stress the seditious effect of the words rather than their intrinsically libellous nature...the judge could not tell the criminal character alleged purely from the words on the record, as this increasingly involved questions of context and effect.[63]

The debate continued across the Atlantic between Hand and Holmes. The clear and present danger test is an example of the circumstance approach . In *Schench v US* in 1919,[64] the defendant was charged under the *Espionage Act* for circulating leaflets against military induction. Justice Holmes created this much celebrated test in this case: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[65]

In *Abrams* which involved the distribution of pamphlets against America's decision to send troops to Russia to fight against the Communists,[66] Justice Holmes, in his dissenting opinion, further developed the 'clear and present danger' test:

> ...I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.

Much has been written on the Holmes test both inside and outside the US. But this test has been more a rhetorical than an objective and hard test. The test, as it has been used in the US courts, has relied upon each judge's subjective interpretation of the circumstances. The intention of an accused was determined not through the actual words uttered, but through decoding and reconstruction and by revealing the innuendo behind the words used. Thus in *Debs*,[67] although the speech of Eugene Debs, the US Socialist leader and a soon-to-be presidential candidate, touched upon merely "socialism, its growth, and a prophecy of its ultimate success,"[68] Holmes nevertheless could find "the manifest intent of the more general utterance...to encourage those present to obstruct the recruiting service". From a statement from Debs that Debs might not be able to say all that he thought, Holmes was able to conclude that Debs was intimating to his audience that they "might infer that meant more..."[69] holding that the "natural and intended effect was to obstruct recruiting.[70] Debs was sentenced a lengthy 14 years' imprisonment under the clear and present danger test, a sentence that Holmes himself later regretted.[71]

The court ventured deeply into the subjective world and ignored the objectivity of the danger.[72] Koffer and Kershman have criticized the test as follows:

> Judicial recourse to hidden meanings renders impossible any objective examination of the government's case against these dissenters. But it also raises even more acutely the problem of authorial intent: not the intent of the *defendant*, but rather the intent of the *judge*. Through interpretation, the Court has politically appropriated the statement of dissenters and turned them to its own purpose.[73]

It is "the speaker's enthusiasm for the result", according to a judge's interpretation, which distinguishes abstract advocacy from incitement to action.[74]

The clear and present danger became so distorted in application that the Supreme Court of the US decided in *Brandenburg* in 1969, that it had no place in the interpretation of the First Amendment of the US Constitution. The Court explained the great misgivings' about the test:

> First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all out political trial which was part and parcel of the Cold War that has eroded substantial parts of the First Amendment.[75]

Mere intention to incite violence, however inferred from circumstances, is not sufficient for the offence of sedition. In the First Amendment jurisprudence in the US, the alternative test to the clear and present danger test has been a word-oriented incitement test. The leading advocate was Judge Learned Hand, who formulated the test in the case *Masses*,[76] which stressed the need to look at the words themselves to determine whether they could trigger action.

The *Masses* case was decided in 1917 by Learned Hand. The case concerned a journal called Masses. The offending content was some cartoons, a tribute to two conscientious objectors and letters which could be interpreted as condemning the US Government for its war policies. The journal was barred by the Postmaster from circulation for violating the *Espionage Act*.[77] The publisher of Masses sought an injunction against the Order.

In granting the injunction, Learned Hand held, unless the cartoons and letters could, according to a more objective test "based upon the nature of the utterance itself", actually urge violent or unlawful activity, their publication would not be unlawful. He concluded that 'If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.'[78]

Hand's contribution is his criticism of the then prevailing approach which second-guessed the likely consequence of a subversive speech through examining the circumstances of the speech and background of the speakers, an approach that was largely inherited by Holmes in his present and immediate danger test. Hand conceded to the argument of the Prosecution that the anti-war speech in Masses "tends to promote a

mutinous and insubordinate temper among the troops."[79] Indeed Hand agreed that readers of Masses might be affected by the anti-war speech: "men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by the tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination."[80] But he believed that the reliance on the doctrine of causation and second guessing the probable impact of the speech in punishing political speech was misleading and dangerous. The consequence would be that all political agitations would have the tendency to produce such an impact and thus became illegal. A reliance on the broad concept of causation would criminalize all hostile criticism of the government policies.

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the *causal relation* between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.[81]

Criminal law thus only punishes "direct incitement" and direct advocacy, even through the indirect incitement might also arouse a seditious disposition. An incitement or advocacy is direct when a person "urge(s) upon (another) either that it is his interest or his duty to do it." Praising and admiration of law violation, or in the case Masses praising conscientious objectors in jail, are not, even such praising and admiration are likely to lead to emulation.

> That such comments (in Masses) have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain...One may admire and approve the course of a hero without feeling an duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passage can be said to fall within the law. [82]

The Hand test has its own problems. It is very limited in dealing with harmless inciters because of its refusal to look into circumstances in which words are uttered. It also fails to tackle the issue of innuendo behind the words used because of its

exclusive focus on words themselves. The *Brandenburg* test has provided remedies for the deficiencies by combining the two approaches of Hand and Holmes.

Inciting Violence or Disorder The Minimum Requirement·

Hong Kong's sedition law needs reform because it lags far behind other common law jurisdictions. In common law offence, intention to cause violence is a necessary element of that offence. Although no such intention was required in the earlier case law,[83] in a series of cases leading to the Canadian decision *Boucher*, the courts required the prosecution to prove intention to incite disorder, tumult or violence.[84]

In *Collins*, for example, Littledale, J, in his summing up, stated that it was seditious if the defendant intended that 'people should make use of physical force as their own source to obtain justice', should 'take the power into their own hands' to 'tumult and disorder'.[85] In *R v. Burns*, Cave J. directed the jury at 363 as follows to "trace from the whole matter laid before you that they had a seditious intention to incite the people to violence, to create public disturbance and disorder".[86] In *Aldred*, the court held that the proper test for sedition should be whether language used was intended 'to promote public disorder or physical force or violence.' And the word "sedition"...implies violence or lawlessness in some form."[87]

In *Boucher v R*,[88] the Supreme Court of Canada held that, for the offence of seditious libel, there must be incitement to violence or the incitement of violence must be against Her Majesty or institutions of government. The court stated:[89]

> There is no modern authority which holds that the mere affect of tending to create discontent or disaffection...but not tending to issue in illegal conduct, constitutes the crime [of sedition], and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life.

Thus "nothing short of direct incitement to disorder and violence is a seditious libel". The freedom to engage in passionate criticism of government, including the judiciary, and the incitement to mere disaffection cannot amount to criminal offence.

The requirement of inciting violence or public disorder is further confirmed in *Choudhury*, in which the English Divisional Court, following *Boucher*, held that:

> ...the seditious intention on which a prosecution for seditious libel must be found is an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government...Not only must there be proof of an incitement to violence in this connection but it must be violence or resistance or defiance for the purpose of disturbing constituted authority. [90]

There may be differences in national treatment of the name of the sedition. The US does not have an offence as such. In *New York Times v. Sullivan,* [91] the US Supreme Court held that there is 'a broad consensus that (sedition), because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment'. In *Carrison v. Louisiana,* [92] Justice Black of the US Supreme Court stated that, "under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious libel". But the sedition offences abolished by the court involved non-violent forms of false, scandalous and malicious publications against the state authorities.

The constitutionality of sedition has also been tested in India. The Indian law punishing sedition, as we mentioned above, is equivalent to the *Crimes Ordinance* in Hong Kong. India also enjoys Constitutional protection of freedom of expression [93] equivalent to the *Basic Law* of Hong Kong. In *Kedarnath v State of Bihar,* [94] the Supreme Court of India held that the law of sedition in section 124-A of the Indian *Penal Code* is consistent with the Constitutional protection of freedom of expression. The court stated:

> The expression "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. That is why sedition as the offence in S.124-A has been characterised, comes under Chapter VI relating to offences against the State. Hence any act within the meaning of S.124-A which has the effect of subverting the Government by bringing that Government into contempt or hatred or creating disaffection against it, would be within the penal statute, because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In order words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously include in the term 'revolution' have been made penal by the section in question.

The US and Indian approaches to sedition are different. But it is a distinction without real differences because the courts are talking about different things when they speak of sedition. The Indian Supreme Court has retained the offence but defines it differently by imposing a clear incitement to violence requirement. The US Supreme Court has abolished the offence but has made incitement to violence punishable under other laws. The real question, perhaps, is should incitement to violence be called sedition or something else?

Discussion, Advocacy and Incitement

The best cases for discussing this distinction are the US cases *Dennis*[95] and *Yates.*[96] *Dennis* was a leading case prosecuted under the Smith Act, which provided that it was seditious if one "knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the Government of the United States." *Dennis* involved the prosecution of the twelve members of the governing body of the Communist Party of the US, who were charged with plotting the overthrow of the Government. In upholding the conviction, the majority of the Supreme Court was of the view that there is a difference between advocacy and discussion of violence against the Government. The Smith Act "is directed at advocacy, not discussion" said the court. Discussion is any peaceful communication of ideas, such as the studies of Marx in universities; advocacy is the communication used to urge, plan or set in motion illegal acts against the Government.

While a theoretical difference was drawn between discussion and advocacy, it immediately vanished when the court started to apply the law to the case at hand. The court twisted this distinction into an unrecognizable form. According to Chief Justice Fred M. Vinson, who wrote for the majority,

> If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.[97]

He continued:

> Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a

sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that the petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike unless there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.[98]

Six years later, the Supreme Court decided that *Dennis* went too far in criminalizing all advocacy of violence against the Government. In *Yates* Communist leaders in California had been charged. The Supreme Court declined to persist with the *Dennis* approach. The Court held that people are free to talk about the desirability of using violence to overthrow the Government, and may also express the hope that the government might be overthrown by violence.

> The advocacy and teaching prohibited by the Smith Act...is not of a mere abstract doctrine of forcible overthrow of the government, but of action to that end; this is so even though such advocacy or teaching is engaged in with evil intent.[99]

The difference between lawful and unlawful advocacy is whether "those who the advocacy is addressed must be urged to do something, now or in the future, rather than merely believe in something." Under the *Yates* test, the defendant must have advocated actual *action* aimed at violent overthrow of the government. Advocacy of violence against the government in the abstract, or "principles divorced from action" is not sufficient. [100]The court in *Yates* was concerned about the intention of the advocates not the probability of their success. "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[101] But the court insisted that "immediacy" or "likelihood" of an unlawful act was not the requisite element of the offence. While *Yates* is a liberal move away from *Dennis*, its distinction between speech divorced from action and speech advocating action could be one without difference, because of the lack of the requirement of imminence or immediacy. The most express statement in limiting sedition to direct incitement comes from the US case *Brandenburg*, in which the court

states: "mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence" is not seditious.

The Nature of the Danger Created

What is the nature of the danger or risk that has been created by words uttered and writings published and the corresponding need to suppress the words or writings? How imminent must that danger be?

The law on sedition was settled in *Brandenberg* in 1969, in which a Ku Klux Klansman in Ohio was charged with violating Ohio's *Criminal Syndicalism Act* which made it an offence for any one to "advocate or teach the duty, necessity, or propriety (of violence) as a means of accomplishing industrial or political reform." The Supreme Court held that the Ohio law was unconstitutional.[102] The court said:

> The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.

The case further refined Justice Holmes' clear and present danger test. Justice Black and Justice Douglas in their concurring opinions declaimed that Holmes' "'clear and present danger' test should have no place in the interpretation of the First Amendment."[103]

The court extended the scope of the First Amendment protection by holding that a "mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence" is not seditious. Advocacy of the use of force and law violation cannot be prohibited unless the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[104] *Brandenburg* highlighted the importance of the pre-eminence of danger in determining sedition - a test which is protective of freedom of speech and gave greatest protection to the most subversive speech.[105] *Brandenburg* endorsed the governing principle of laissez-faire in the marketplace of ideas.

Should the imminence test be used in implementing Article 23 of the Basic Law? There seem to be four reasons against codifying this test into Hong Kong law. First, it is uncertain the extent of the test's application in criminal law. There is clearly a

distinction between public, especially political public, advocacy and private solicitation of crime. Clearly imminence is not a test for the ordinary law of incitement. Second, like the clear and present danger test, the imminent danger test is a judicial, not a legislative, creation. This is a significant difference. Once the test is written into the law, it has the characteristic of permanency, and the court may not have the necessary discretion in determining a case considering the prevailing political circumstances. Courts in the US have formulated different tests in different historical times in response to threats of different natures.

This leads to the third reason. *Brandenburg* concerns a Ku Klux Klansman who was charged with violating Ohio's *Criminal Syndicalism Act*. His offending speech included merely racist slurs against blacks and Jews. It has not been applied in the US in the context of zealous, organized political dissents urging the overthrow of the fundamentals of government.

Finally, the imminence test has not been adopted by courts in other common law jurisdictions. In English law, the likelihood of danger is sufficient to punish political speech. In *Arrowsmith*[106] the defendant was charged with incitement to disaffection under section 1 of the *Incitement to Disaffection Act 1934*. She was convicted and sentenced to 18 months imprisonment. She distributed leaflets at an army centre advocating soldiers to desert rather than serve in Northern Ireland. In dismissing her appeal, Lawton LJ found that the leaflet was 'mischievous' and 'wicked' and that the defendant's act constituted incitement to mutiny and desertion.[107] The court stated the likelihood of the defendant's activity as follows:

> What it [the court] is concerned with is the *likely effects* on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding. It is particularly concerned about young soldiers who either come from Ireland or who have family connections with Ireland: there are probably a large number of them in the British Army. These young soldiers are encouraged to desert on learning of a position to Northern Ireland and to mutiny. If they mutiny, they are liable to be sentenced by court martial to a very long term of imprisonment, and if they desert, they must expect to get a sentence of at least 12 months' detention. For mature women like this defendant to go around military establishments distributing leaflets of this kind amounts to a bad case of seducing soldiers from both their duty and allegiance.[108]

Her conviction was upheld by the ECHR after considering the possible result of mutiny and desertion if Arrowsmith's campaign were not halted.[109] This is also the law of Hong Kong.

The Consultation Paper

The Consultation Paper suggested three offences of sedition, with different malice and different social harms. The principal offence of sedition is defined as "*inciting others a) to commit the substantive offence of treason, secession or subversion; or b) to cause violence or public disorder which seriously endangers the stability of the state or the HKSAR*".

The first limb of the offence is a codification of the common incitement to commit the substantive offence. This codification is necessary, according to the government, because state security interests merit protection by specific provisions. The second limb goes beyond implementing Art 23, and it is an adaptation of Section 9 of the Crimes Ordinance, particularly subsections (f) and (g). Inciters of the 1967 riots, including the three newspapers mentioned above, would continue to be caught by this section, it seems.

The government intends to limit the scope of the offence in two ways, although the proposed limitations have not been made clear in the proposed definition. First, "isolated incidents of limited violence or disturbance of public order" will not satisfy the requirement of the sedition offence under Article 23, because the new sedition offence requires speech or publications that endanger state security. Whatever criminal or unlawful act that has been incited must be a series of acts which, when judged objectively, are intrinsically dangerous and capable of producing serious harm to national security. The Consultation Paper does not encompass harmless inciters.

The second limit on sedition is problematic. It distinguishes between *mere* views, reports or commentaries and views, reports or commentaries which incite, (in essence, views, reports or commentaries *plus*). This could become a distinction without differences, and a better position is to follow Hand's trigger of action approach. Holmes said that "every idea is an incitement." But the idea which does not directly advocate actual action should not be punished as sedition.

There are also two lesser offences of sedition. One relates to seditious publication, the other relates to possession of certain publications. Under the seditious publication

offence, *It should be an offence if a person – (a) prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication; or (b) imports or exports any publication, knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion.* A defence of "*reasonable excuse*" is proposed.

The offence of seditious publications may partially overlap with the principal offence of sedition, e.g. does printing or publication amount to incitement of one of the substantive offences. If, for example, a person, like Hu Di Wei in the 1967 riot, publishes articles calling for armed resistance against the government, that person would be guilty of inciting subversion directly and the offence of seditious publications. The defense of reasonable excuse would be irrelevant. The overlapping part of the offence is thus not necessary.

The offence of seditious publication makes sense only when a person who publishes seditious materials but without a direct intention, or any intent at all, to incite the substantive offence. The key element of the offence is to produce publications that are objectively seditious. A person would be guilty if he knew the likelihood that the publications may incite others to commit one of the substantive offences, or if he should have suspected such likelihood. How the prosecution is to discharge its burden of proof is unclear, so is the standard of a reasonable person. The worst-case scenario is that once the defendant is caught with printing a seditious publication, there may not be much else for the prosecution to prove. Whether he is liable depends on whether he could offer reasonable grounds, and the burden might lie with him. Such an objective approach would not be substantially different from that used in the 1952 sedition prosecution against *Ta Kung Po*, according to which the subjective intention was not a required element of the crime and the defendant was deemed to intend the natural consequence of his act. The ghost of *Fei Yi Ming* may continue to haunt us in the future.

Even with the burden on the prosecution, the offence will have serious implications on both privacy and freedom of expression. Sedition and other Article 23 offences are politically motivated crimes. They will not be low priority crimes in Hong Kong. When the police are demanded to search for evidence to prove purpose/motivation, the implication is serious. We are not sure, for example, how far back the police might go in seeking evidence to prove purpose/motivation, and what exactly can be used as evidence. The police are likely to scrutinize the suspects' past experiences, association, and other records. It is not surprising for the police to

canvass one's classmates, co-workers, and neighbors to discover the purpose/motivation. There is a serious privacy concern. There may also be a long-term threat to freedom of expression if purpose/motivation become a criminal law issue.[110]

While the first sub-section is not necessary, the second sub-section is overly broad. Its main purpose is not to punish the inciters who directly and intentionally urge the commission of the substantive offences. Using the words of the Consultation Paper, the offence punishes people who, for reasons such as profits, print publications which are *likely* to incite others to commit the related offences. The second sub-section can be put in the same category with the offence of mere possession. This offence is committed with the same mental element as the offence of seditious publication and same defence is also provided. Because the offence can be committed with the mental state of *knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion.* The offences cast the net too wide, by punishing not only for their intentional incitement, but also for their recklessness, carelessness and even stupidity in printing or possessing publications. It is a preventative measure, designed to not only chill certain political discussions, but also eliminate the necessary intellectual environment which makes such discussion possible. The possession offence is particularly draconian in that, with the exception of a privileged few (academics, journalists, etc.), no one shall read things that offer passionate criticisms of the governments.[111]

The two lesser offences punish not the crime of sedition, but what is perceived to be the cause of sedition. It is not directed at the inciters, but at where they may get the seditious ideas. It is not directed at the content of a publication but at its likely effect. Once the law moves from a crime to the cause of the crime and from incitement to publication itself, it will indefinitely expand its territory, it will over-criminalize, and it will lead to the abuse of power in law enforcement. By expanding from punishing direct incitement to printing and possession of seditious publications without the intent to incite, legal protections offered against the principal offence of sedition will diminish or even vanish in dealing with the lesser offences. Legal protections, such as punishing incitement not discussion, reports or commentaries, which are important to the principal offence of sedition, will become less relevant, if at all, to the two lesser offences.

It is crucial to note that publications involved in the possession offence do not have

to be seditious in themselves, it is sufficient if they are capable of inciting others to commit the offences. What is punished is not the content of a publication, but its potential impact. But what kind of book is likely to incite treason, secession, or subversion? In the 1952 and 1967 prosecutions, the newspapers were found guilty because they accused the British and the colonial governments of abusing their powers and mistreating the Chinese. Those publications were regarded as likely to incite people to rebel. To understand the rationale of sedition and the underlining concerns of the government, one has to go back to the days of Star Chamber, when the offence was invented.

The offence of seditious libel was based upon the presumption that those who did not share the government's beliefs "must regard its attempt to propagate those beliefs as tyrannical, and to be disobeyed".[112] Thus "anyone who attempted to persuade others that the government's methods were profoundly wrong must intend the natural consequences of his acts, which would be rebellion".[113] The offence postulated that utterance alone may cause harm to the sovereign. "An attack on the dignity or respectability of authority was deemed to undermine its authority and to subvert the affection of its subjects in the same manner that libel or slander injured an individual's reputation".[114]

Criticisms against the government had to be quashed because they "threatened appearances".[115] According to Chief Justice Holt in the leading case of *John Tutchin,* which was tried in 1704:

> To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is necessary for all governments that people should have a good opinion of it.[116]

Since the purpose of the offence of seditious libel was to maintain a good opinion of the government, truth was eliminated as a defence.[117] The ratio decidendi of the first seditious libel case in Star Chamber, *De Libellis Famosis,* in 1606 was

> If it be against a magistrate or other public person it is a greater offence for it concerns not only the breach of the peace, but also the scandal of government: for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his

> subjects under him and greater imputation to the State cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.[118]

Therefore, "It is not material", declared Lord Coke, "whether the libel be true, or whether the party against whom it is made, be of good or ill fame".[119] The mere tendency of the words to undermine the authority of the government is sufficient ground for prosecution.[120]

By punishing mere publication and possession, the law protects the reputation of the government rather than punishing incitement. The kind of books which are likely to incite rebellion are not those which teach subversion, independence for Xinjiang or Taiwan's rejection of Chinese Sovereignty. The subversive books are those which expose political nepotism, corruption, and the dark side of the system, books that undermine the legitimacy of the system. The *Communist Manifesto*, *State and Revolution* and the writings of Mao Zedong may not be seditious for they merely try, but often fail, to agitate people. It is books such as *Tiananmen Papers*, various AI and HRIC reports which are seditious.

Conclusion

The colonial law never provided sufficient protection of rights in Hong Kong in this area of law. The local circumstances were such that the colonial government found it impossible to extend its own law to Hong Kong which offered more protection of rights. Hong Kong sedition law has been repressive in two aspects in spite of its superficial resemblance to English law. First, since seditious intention was not an element of the offence, it was easier for the prosecution to discharge its burden. Once a publication was proven seditious, the burden was shifted to the defence to prove innocence. Hamburger has argued that, historically, the prosecution of sedition in the UK reflected more "a legal doctrine subject to the constraints of precedent and legal custom" than mere government policies. The law of sedition empowered the Crown in silencing political dissidents, it also posed serious substantive and procedural constraints which the Crown could not bypass or ignore.[121] The colonial governments were not burdened with such legal constraints in Hong Kong's sedition prosecutions, because seditious intent was imputed and it was not necessary to prove intention to incite violence.[122]

Second, unlike the sedition offence in other jurisdictions, the law in Hong Kong

covers two lesser offences of seditious publication and possession. The offence was widely and effectively used during the 1967 riots and as mentioned above, the consequence was repressive and draconian.

This, of course, has to do largely with the geo-political position of Hong Kong and the overwhelming impact of the China factor.[123] Sedition law was used with to punish sedition either against China or from China. On the one hand, Hong Kong had been used as a base for different political forces to subvert the Chinese government, be it the *Qing* Dynasty, the Nationalists or the Communists. The colonial government was sensitive to this political reality and cautious not to provoke its giant neighbor. On the other hand, and more importantly, the sedition law was also used to punish seditious publications of the Communists and their followers. Communist infiltration was perceived as the most direct political threat to Hong Kong.[124]

The Reunification in 1997 has changed the dynamics of political dissidence in Hong Kong. Allegedly, the threat once again comes from those who are attempting to use Hong Kong as a base for subverting the mainland system through force or otherwise. This time, the national security interests of Hong Kong are identified with those of the mainland, and there is a gradual and painful process of convergence. Nevertheless, Hong Kong's national security interest can be made distinctive, in spite of the similarities. Thus sedition against the central people's government occurring in Hong Kong is fundamentally different from sedition occurring in Beijing or Shanghai. Politically, Hong Kong is a free and liberal society where freedom of expression and the freedom to criticize the government receive more protection than in the mainland. Legally, Hong Kong has an obligation to comply with international standard in defining sedition narrowly.

Among the three sedition offences proposed by the government, the direct incitement offence is consistent with the common law tradition and with the requirement of international human rights law, although the protection clauses need to be made more expressly in the text of the definition or in separation sections. The two lesser offences are broadly drafted and the net is cast too wide. The offences are neither necessary nor proportionate. To punish people for publishing or possessing books can neither enhance the protection of China's national security nor dignify and honor the state. The two lesser offences are awkwardly copied from colonial legislation without careful consideration.[125] They simply cannot be brought to life after their long dormancy. It is time to break away from this draconian colonial tradition.

Notes:

[1] Sir James Fitzjames Stephen, *A History of The Criminal Law of England* (New York: Burt Franklin), 299.

[2] Ibid. 299-300.

[3] Ibid. 300.

[4] *Boucher v The King* [1951] 2 D L R 369.

[5] Kent Greenawatt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, (Princeton: Princeton University Press, 1996).

[6] Law Reform Commission of Canada, *Working Paper 49: Crimes Against the State*, (Canada: Law Reform Commission of Canada, 1986), 35-36.

[7] Or more precisely, as put by Leigh, the abolition of sedition "would not leave a hiatus in the coverage of matters which ought to be covered." L.H. Leigh, "Law Reform and the Law of Treason and Sedition," (1977) *Public Law* 128, 147.

[8] Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (Working Paper No. 72), (London: H.M. Stationery Office, 1977), 48.

[9] Li Gucheng, *A Comment on the Press of HK* (Hong Kong: Ming Pao, 2000).

[10] Sir John W. Carrington, *The Ordinances of Hong Kong –Chronological table and Index*, (Hong Kong: Government Printers, 1904), 1.

[11] Ibid.

[12] James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 653.

[13] Ibid.

[14] Leung W.Y. and Johannes M.M Chan (ed.), *Chuanbofa Xinlun* (Media Law in Hong Kong), (Commercial Press, Hong Kong, 1995), Chapter 10. James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 328.

[15] Leung W.Y. and Johannes M.M Chan (ed.), *Chuanbofa Xinlun* (Media Law in Hong Kong), (Commercial Press, Hong Kong, 1995). See also, James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 440.

[16] James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 440.

[17] Sir John W. Carrington, *The Ordinances of Hong Kong –Chronological table and Index*, (Hong Kong: Government Printers, 1904), 19.

[18] *Printers and Publishers Ordinance* 1927.

[19] Section 5, ibid. Norman Miners "The Use and Abuse of Emergency Powers by the Hong Kong Government," (1996) 26 *Hong Kong Law Journal* 47. For analysis of the law, see Huang Hanlong, "Printing and Media Control: Hong Kong Publications Law (1)" in Leung W Y and Johannes M M Chan (eds.) *Chuanbofa Xinlun* (Media Law in Hong Kong) (Commercial Press, Hong Kong, 1995).

[20] Hong Kong Government wished to maintain its neutrality in the Sino-Japanese war prior to the Japanese invasion of Hong Kong. Government censors actively examined newspapers and prohibited any anti-Japanese publications. Li Gucheng, *A Comment on the Pres of HK*, 154-155. In 1936, the Government issued a guideline to Hong Kong press, prohibiting, among others, any pro-Communist publications, probably under the pressure from the Nationalist Government in the Mainland. See, Kwai-yeung Cheung, *Jin Yong (Lois Cha) and the Press*, 392.

[21] *Hong Kong Hansard* 1907, 56.

[22] *Hong Kong Hansard 1907, 56.*

[23] *Hong Kong Hansard* 1907, 56.

[24] *Hong Kong Hansard* 1907, 55.

[25] *Hong Kong Hansard* 1907, 56, per Hon. Mr. Osborne.

[26] The preamble, *Chinese Publications (Prevention) Publications* 1907 (No. 15 of 1907).

[27] Section 5, *Colonial Books Registration Ordinance*.

[28] *Hong Kong Hansard* 1914, 34.

46 *Hong Kong Hansard* 1914.31.

[30] *Hong Kong Hansard* 1914, 35.

[31] Section 2(b), *Printers and Publishers Ordinance* 1886.

[32] Section 2, *Seditious Publications Ordinance* 1914.

[33] Section 6, *Seditious Publications Ordinance* 1914.

[34] Section 9, *Seditious Publications Ordinance* 1914.

[35] *Hong Kong Hansard* 1938, 85 and 198.

[36] The original version in Sedition Ordinance was as follows: to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or the Government of the Colony as by law established...

[37] The *Sedition Amendment Ordinance* 1938 repealed section 3(1)(vi) of the *Sedition Ordinance* 1938 and its provisos. Section 3 (1)(vi) was as follows: to endeavor to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty. It was said that this section could be better dealt with by a special legislation based on UK's *Incitement to Disaffection Act* 1934.

[38] Section 4 (1) and (2). *Sedition Ordinance* 1938.

[39] Section 3 and section 4, *Control of Publications Consolidation Ordinance* 1951.

[40] Section 3, *Control of Publications Consolidation Ordinance 1951.*

[41] Section 6, *Control of Publications Consolidation Ordinance 1951.*

[42] Section 5, *Control of Publications Consolidation Ordinance 1951.*

[43] Section 4, *Control of Publications Consolidation Ordinance 1951.*

[44] Section 5, *Control of Publications Consolidation Ordinance 1951.*

[45] Section 11, *Control of Publications Consolidation Ordinance 1951.*

[46] *Fei Yi Ming and Lee Tsung Ying v R* (1952) 36 HKLR 133 at 156.

[47] Section 13 of the *Control of Publications (Consolidation) Ordinance* reversed the burden to the defendant to prove beyond reasonable doubt that he lacked the necessary knowledge or otherwise was innocent, if a newspaper was found having printed illegal matter. This section was instrumental in the court's holding.

[48] Kwai-yeung Cheung, *Jin Yong (Louis Cha) and the Press* (Hong Kong: Ming Pao Press, 2000), 16.

[49] Cheung Ka Wai, *Inside Story of 1967 Riot in Hong Kong* (Hong Kong: The Pacific Century Press Limited, 2000). See also Kwai-yeung Cheung, *ibid.*

[50] One of the most unfortunate sedition charges in the 1967 episode was the prosecution of Zeng De Cheng, the younger brother of the current DAB Chairman Zeng Yu Cheng. Zeng De Cheng was a promising form 7 student in the St. Paul College, who was sentenced to two years' imprisonment for distributing pamphlets critical of the colonial education system to fellow students inside the College. Zeng was awarded the title of Justice of Peace after 1997. Cheung Ka Wai, pp. 150-162.

[51] *Sedition (Amendment) Ordinance* 1970, Section 2. Another significant change was the expansion of police power in relation to sedition. Under the Section 7 of the 1938 Ordinance, any search and seizure of seditious materials required a warrant from a Magistrate. Under the 1970 amendment, any police officer may enter into any premises to remove seditious materials without a warrant.

[52] After the 1992 amendments to the *Crimes Ordinance*, these offences were defined in section 6 and 7 as follows: Section 6 states that:

Any person who knowingly attempts —

(a) to seduce any member of Her Majesty's forces or any member or officer of the Royal Hong Kong Regiment from his duty and allegiance to Her Majesty; or

(b) to incite any such person—

(i) to commit an act of mutiny or any traitorous or mutinous act; or

(ii) to make or endeavor to make a mutinous assembly,

shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

Section 7(1) provides that:

Any person who knowingly attempts to seduce-

(a) any member of Her Majesty's force;

(b) any member or officer of the Royal Hong Kong Regiment;

(ba)any member of the Government Flying Service;

(c) any police officer; or

(d) any member of the Royal Hong Kong Auxiliary Police Force, from his duty or allegiance to Her Majesty shall be guilty of an offence.

Section 7(2) also punishes any one who assists the commission of a section 7(1) offence or any person who conceals or assists in concealing a deserter or absentee without leave. The penalty for section 7 offences is a fine of $5,000 and imprisonment for 2 years.

[53] *Crimes (Amendment) (No.2) Ordinance* 1992.

[54] Hong Kong law has not progressed very far in this area of law, and such disregard of intention is still accepted in the law of contempt of court. Hong Kong courts preferred the objective approach. It held, in relation to the offence of scandalizing the court, that the defendant must intend to do the acts which are said to constitute the contempt, but "it is not necessary to show that the contemner intended to undermine public confidence in the administration of justice" (661). The court adopted the same approach in determining the *mens rea* for the offence of interfering with the administration of justice. Once it is established that D had the intention to approach the court the way he did, *mens rea* is proved. It is not material whether D intended to interfere with the administration of justice. Using the words of Donovan LJ, which was cited by the court with approval, 'The question is whether the respondents' action was calculated so to interfere, and this involves a consideration not of their state mind on this particular point but of *the inherent nature of their act* (emphasis added).' (663). If the act is 'inherently likely' to interfere, court does not need to look into the motives of the particular act of the defendant. In answering the question how to determine whether there is a real risk (i.e. a great likelihood) that the confidence in the administration of justice will be undermined, the court looked at the circumstances of the act and publications, i.e. the timing, concerted efforts, and the support that the newspaper claimed it had received from the public.

[55] LegCo Paper No. CB(2)2638/96-97, *Report of the Bills Committee on the Crimes (Amendment)(No.2) Bill 1996*, 4.

[56] Under Principle 6, expression may be punished as a threat to national security if the government can demonstrate that 1) the expression is intended to incite imminent violence; 2) it is likely to incite such violence; and c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. (Ibid).

[57] Two explanations about the relationship between the common law and the offence of sedition are commonly given. Conventional wisdom held that after the abolition of the Star Chamber, the common law courts "incorporated" its substantive law . See, Irving Brant, "Seditious Libel: Myth and Reality" (1964) 39 *New York University Law Review* 1. Barnes, on the other hand, argues that there was a parallel, rather than subsequent, development of seditious offences in the common law courts. He explains that: "the holders of high judicial office, the chief justices, chief baron, justices, and barons, who sat regularly in Star Chamber...were both apt teachers-in the Star Chamber-and apt learners-as judges of assize and in their respective courts. What was done in one place, was extended to the other." Thomas G Barnes, "Star Chamber and the Sophistication of the Criminal Law" (1977) *Criminal Law Review* 316, 326.

[58] Ibid. Brand.

[59] Ibid. Brant. See also William T Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression" (1984) *Columbia Law Review* 91.

[60] Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press" (1985) 37 *Stanford Law Review* 661, 702.

[61] Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 359.

[62] Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxford Journal of Legal Studies* 305, 348.

[63] Ibid.

[64] *Schench v. US* 249 US 47 (1919).

[65] Ibid., 52. The immediate and present danger test, with its stress on examining the circumstances of each case had its precedent in English law. In *R v Aldred*, which was decided in 1909, the publisher of the Indian Socialist, a periodical advocating the independence of India, was charged with seditious libel for publishing materials which applauded political assassination as a means of achieving a political goal. The *Aldred* decision stressed the effect of the seditious words:

> In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling...You are entitled also to take into account the place and mode of publication.

[66] *Abrams v. United States* 250 U.S. 616.

[67] 249 US 211 (1919).

[68] Ibid. 212.

[69] Ibid. 212-213.

[70] It has been argued that during that period of time, English common law offered more protection for the freedom of expression than the First Amendment. See an interesting comparison between the US and UK sedition law as practiced during the First World War, see, James E. Boasberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson," (1990) 10 *Oxford Journal of Legal Studies* 106.

[71] In his letter to the English jurist Frederick Pollock, Holmes mentioned that he hoped the President would pardon Debs after the conviction. Cited in James E. Boasberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson," (1990) 10 *Oxford Journal of Legal Studies* 106.

[72] Holmes's reasoning in *Schench* is illustrative: "the (offending) document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could have expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out". 249 US 51.

[73] Judith Schenck Koffer and Bennett L Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816, 834.

[74] *Gitlow v New York*, 268 U.S. 662, 673 (1925). The meaning of "clear and present danger" is expressed

more soundly and clearly by Justice Brandeis in his dissenting opinion in *Whiteney v California 274 US 357 (1927)*:

> To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practised. There must be reasonable grounds to believe that the danger apprehended is imminent. There must be reasonable grounds to believe that the evil to be prevented is a serious one...But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement, and there is nothing to indicate that the advocacy would be immediately acted on...In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

[75] *Brandenburg*, 438.

[76] 244 F 535.

[77] The Espionage Act was passed in 1917 to suppress the anti-war movement. The law was amended in 1918, which made any expression against any efforts of the war, and indeed any government effort, seditious. Pub L No 150, HR 8753 (16 May 1918).

[78] 244 F 535 (SDNY 1917), 540.

[79] *Ibid*, 539.

[80] *Ibid.*

[81] *Ibid.* 540. Emphasis added.

[82] *Ibid.* 541-542.

[83] It was certain seditious for Pine to say King Charles I "was unwise a king as ever was, and so governed as never king was, for he is carried as a man would carry a child with an apple. Also, before God he is no more fit to be king than Hickwright (Pine's shepherd)" Pine's Case, cited in Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 308.

[84] *R v Collins* (1839) 9 C. & P. 910; *R v Burns* (1886) 16 Cox C.C. 355; and *R v Aldred* (1909) 22 Cox C.C. 1.

[85] *R v Collins*, 912. The defendant was charged with sedition for publishing a letter in a unlawful assembly which stated: "a wanton, flagrant, and unjust outrage has been made upon the people of Birmignham by a blood-thirsty and unconstitutional force from London, acting under the authority of men who…seek to keep the people in social slavery and political degradation." P. 911.

[86]*R v Burns* (1886) Cox C.C. 355, at 363.

[87] *R v Aldred* (1909) 22 Cox 1. Alfred Aldred was the printer of a newspaper called *Indian Sociologist*, which published articles advocating political assassination. He was found guilty and sentenced to 12 months imprisonment.

[88] *Boucher v. R* (1951) 2 DLR 369. In this case, a member of the Jehovah's Witnesses was convicted of seditious libel for publishing in Quebec a pamphlet entitled "Quebec's Burning Hate for God and

Christ and Freedom". The pamphlet alleged that members of the sect were prosecuted in the province and that police, public officials and Roman Catholic clergy were behind the prosecution.

[89] [1951] 2 DLR 369.

[90] *Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 All ER 306, 322-323.

[91] *New York Times v. Sullivan* 11 L Ed 2d (1964) 704.

[92] 378 U.S.64 (1964), p. 80.

[93] Article 19(1) of the Constitution protects the right of freedom of speech and expression subject to reasonable restrictions. And any laws which are inconsistent with the rights protected by the Constitution are void.

[94] *Kedarnath v. State of Bihar* 1963 1 S.C.J 18.

[95] 341 US 494 (1951).

[96] 354 US 298 (1957). The English case *R v. Bowman* (1912) 22 Cox CC 729 is also very useful in this regard. Browman was charged with sedition for printing a publication calling on soldiers to disobey orders when asked to quell a strike. The test, according to the trial judge, was as follows: Was the publication meant "to induce soldiers to disobey their officers in the event of being ordered to quell a strike?" or was it a "merely a comment upon the use of armed military force by the State for the suppression of industrial riots?" The crucial distinction was whether the publication legitimately criticised the use of military force, or encouraged soldiers to rebel and were thus incitement to mutiny.

[97] *Dennis*, 509.

[98] *Ibid.*

[99] *Yates*, 324-325.

[100] *Ibid.*

[101] Holmes and Brandies in *Gitlow v New York*, 268 U.S. 652 (1925), 673.

[102] Unlike the earlier cases discussed above, *Brandenburg* concerned the validity of state legislation, not the application of legislation conceded as valid. For a discussion of this difference, see Hans A. Linde, "'Clear and Present Danger' Reexamined: Dissonance in the *Brandenburg* Concerto". 22 *Stanford Law Review* 1163.

[103] *Brandenburg*, 345.

[104] Ibid. 431.

[105] Bernald Schwartz, *Freedom of the Press* (New York: Facts on File, 1992).

[106] [1975] 1 Q.B. 678.

[107] The court nevertheless substituted a sentence which allowed the defendant's immediate release.

[108] [1975] 1 Q.B. 678, 684.

[109] *Arrowsmith v United Kingdom* (Application No. 7050/75) 19 Eur. Comm HR (1978) 5, 31.

[110] The danger is well presented by Gellman in the context hate crime in the US: "In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers

ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with ethnic intimidation as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations." (n131)

[111] The defense also appears to be ironic. Sedition is in essence to incite violence and disorder, and the maximum impact is achieved by wide publicity of seditious words. What are the better forums to disseminate information than newspapers? This was the exact the irony in the prosecution of the Australian Communist Party members in the later 1940s and early 1950s. In the case of *The King V Sharkey* (1949) 79 CLR 121, Laurence Louis Sharkey, the General Secretary of the Communist Party of Australia said to a reporter during an interview that, in case Soviet force enters Australia, "Australian workers would welcome Soviet Forces pursing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis". A Sidney newspaper reported the interviews under the title "Reds Welcome". Uproar ensued and Sharkey was charged with sedition as a result. He was found guilty by a jury and sentenced to three years at hard labor, which was later reduced to 18 months. The Sharkey and other cases, the right wing newspapers played an instrumental role in publicizing seditious speeches by CPA members. See Laurence W Maher, "The Use and Abuse of Sedition," (1992) 14 *Sydney Law Review* 262

[112] C S R Russell, "Sedition in a Democratic State" (1965) 13 *Political Studies* 372.

[113] Ibid.

[114] Judith Schenck Koffer and Bennett L Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816.

[115] Ibid.

[116] *Rex v Tutchin,* 14 A Complete Collection of State Trials 1095, 1128 (1704) (T.Howell comp. 1816), as quoted by Judith Schenck Koffer and Bennett L Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816, 822.

[117] *Ibid.*

[118] *De Libellis Famosis* 77 E.R. 251. Cited in Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 304-305.

[119] Sir James Fitzjames Stephen, *A History of The Criminal Law of England* (New York: Burt Franklin), 304-5.

[120] Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxford Journal of Legal Studies* 305.

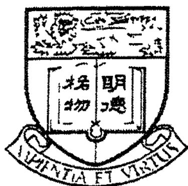
[121] Hamburger, 761.

[122] *Fei Yi Ming and Lee Tsung Ying v R* (1952) 36 HKLR 133.

[123] Norman Miners, "The Use and Abuse of Emergency Powers by the Hong Kong Government," (1996) 26 *Hong Kong Law Journal* 47 Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong, Oxford University Press, 1989)

[124] H L Fu and Richard Cullen, "Political Policing in Hong Kong," *Hong Kong Law Journal* (Forthcoming, 2003)

[125] See Margaret Ng, "Has the Offence of Sedition Been Narrowed?" *Ming Pao* 9 Nov 2002, and Albert Chen, "Reflections on Incitement to Rebel and Other Issues," *Tai Yang Bao* 28 October 2002



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Preserving Civil Liberties in Hong Kong:
The Potential Impact of Proposals to Implement
Article 23 of the Basic Law

Treason, Secession, Subversion and Proscribed Organizations: Comments on the Consultation Document

presented by

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Treason, Secession, Subversion And Proscribed Organizations: Comments On The Consultation Document

Albert H.Y. Chen

Introduction

Article 23 of the Basic Law ("BL 23") of the Hong Kong Special Administrative Region (HKSAR) requires the HKSAR to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government." It also deals with issues of state secrets and the activities of foreign political organizations in Hong Kong. Many of the issues raised by BL 23 are considered to be politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

What is interesting about BL 23 is that it does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers the HKSAR --- in practice its legislature --- to enact laws to define and penalize such actions. This is an important aspect of the autonomy of the HKSAR under the concept of "one country, two systems," which demonstrates respect for the existing social, economic and legal systems in Hong Kong at the time of the handover and ensures that mainland laws and practices will not be imposed on Hong Kong.

On 24 September 2002, the HKSAR Government released its Consultation Document ("the Document") on *Proposals to Implement Article 23 of the Basic Law.* The Document represents the fruit of years of hard work and in-depth study of the matter on the part of the HKSAR Government. It deserves to be carefully studied with an open mind, and discussed in detail in a rational manner. In this paper, I will comment on those parts of the Document which relate to the matters of treason, secession, subversion and proscribed organizations.

The general approach adopted by the Document

The Document takes as its point of departure the existing law of Hong Kong as set out in, for example, the Crimes Ordinance (which covers, among other things, treason and sedition) and the Societies Ordinance (which deals with the issue of the

activities of foreign political bodies in Hong Kong). These ordinances are part of Hong Kong's inheritance from the colonial era. The Document then considers to what extent the existing law needs to be modified in order to fulfill the requirements of BL 23.

It is noteworthy that in doing so, the Document has attempted to take into account international human rights standards as enshrined in article 39 and other provisions of the Basic Law, and to consider also whether there is any room for a liberalization of the existing law. Most important of all, it recognizes that "the manner in which the state's sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ. Indeed, this has to be the case given the different situations, including the respective legal framework, of the Mainland and the HKSAR. Therefore, the HKSAR has a duty to enact laws to protect national security in accordance with the common law principles as have been practised in Hong Kong, and such laws must comply with the Basic Law provisions protecting fundamental rights and freedoms." (para. 1.6 of the Document)

Treason, secession and subversion

The offences of treason and sedition are already defined in the existing Crimes Ordinance, but there is no mention of "secession" and "subversion." The Document proposes to amend the law of treason so as to confine it to situations where the offender collaborates with a foreign state. "Levying war" against one's own state is the fundamental element of the existing offence of treason. The Document proposes to use this element as the basis for the new offences to be created --- secession and subversion. Thus secession and subversion will be defined respectively as "withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China" and "intimidating the Chinese Government, overthrowing the Chinese Government or disestablishing the basic system of the state" by "levying war", or by "force", "threat of force" or "other serious unlawful means" (the means are the same as those defined in the United Nations (Anti-Terrorism Measures) Ordinance enacted in July this year).

First, to give due credit to the proposal, it may be noted that the definitions of secession and subversion proposed for the HKSAR are much narrower than the corresponding definitions in articles 103 and 105 of the Chinese Criminal Code, which do not require acts of violence as an essential element in the offences of secession and subversion. Under mainland law, an attempt by peaceful means to

secure the secession from the PRC of, say, Tibet or to challenge the principle of "the leadership of the Communist Party" and replace it by a multi-party system would already constitute an offence under chapter 1 of part II of the Criminal Code, which deals with offences against state security. For example, to establish a political party advocating the secession of any part of China (including Taiwan) or the establishment of a Western-style liberal democracy in China would be to commit a crime under articles 103 and 105 respectively of the Chinese Criminal Code.

Secondly, although the concept of "levying war" against the state (which is in the existing law of treason and will, according to the proposal in the Document, be one of the elements of the new crimes of secession and subversion) seems on the face of it to require very serious and large-scale violence amounting to war, this may not in fact be the case. As pointed out in a footnote to the Document itself (note 17 to chapter 2), "it is not essential that the offenders should be in military array or be armed with military weapons." For example, according to old English law, if a considerable number of persons assemble together and create a disturbance directed at the release of the prisoners in all the jails, this might already be an act of "levying war". However, it is doubtful whether such pre-19th century English conception of treason should still be applicable today. I would therefore suggest that in the implementing legislation for BL23, *there should be an express provision to the effect that for the purpose of the offences of treason, secession and subversion, "war" shall not include a riot or disturbance of a local nature that does not amount to an armed rebellion* --- such a riot or disturbance is already adequately covered by the existing criminal law other than the law of treason.

Thirdly, it is not the case that the Document merely proposes to build the new offences of secession and subversion on the base of the existing law of treason without broadening the base. There is broadening insofar as the existing definition of treason does not refer to the use of "force or threat of force," nor to "serious unlawful means." The inclusion of these two concepts as alternative bases (in addition to "levying war") for secession and subversion means that the scope of the acts covered by the new offences is broader than the existing scope under the law of treason, not to mention the broadening of the objectives which the acts are aimed at (e.g. to include secession). In particular, the reference to "threat of force" would seem to cast the net very wide. Take, for example, the hypothetical case of a person sympathetic to the cause of Taiwanese (or, for that matter, Tibetan) independence who expresses the view in public that Taiwan may legitimately defend itself against any military attack launched in the mainland. Can he or she be prosecuted and convicted for the proposed

offence of secession? The answer depends on the discussion in the following paragraph. Although such a prosecution would be highly unlikely in the present political climate, the same cannot be said if and when cross-strait relations further deteriorate and war becomes imminent.

Fourthly, the language used in the Document to express the proposal regarding the new offences is not the technical language used in legal drafting, and it is not completely clear what are the elements of the new offence. It is regrettable that the Document does not include as an appendix a white bill for the purpose of implementing the proposals in the Document, in the absence of which it is difficult for lawyers to decide whether some of the proposals are worthy of support. For example, it is proposed (para. 3.6 of the Document) that "withdrawing a part of the PRC from its sovereignty, or resisting the Central People's Government in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means should be outlawed by the offence of secession." It is not clear what is the actus reus of the proposed offence. The same problem regarding the uncertainty of the actus reus exists with regard to the proposal (para. 5.5 of the Document) "to make it an offence of subversion (a) to intimidate the PRC Government, or (b) to overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means."

In this regard, it is important to note the following:

(a) The Document is not proposing that it is an offence (of secession) to levy war, or engage in the use of force, threat of force or other serious unlawful means for the purpose of or with the intent of "withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China" (hereinafter called Rule 1). Instead, it is proposing to make it an offence (of secession) to "withdraw a part of China from its sovereignty or resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means" (hereinafter called Rule 2).

(b) The Document is not proposing that it is an offence (of subversion) to levy war, or engage in the use of force, threat of force or other serious unlawful means for the purpose of or with the intent of "intimidating the Chinese Government, overthrowing the Chinese Government or disestablishing the

basic system of the state" (hereinafter called Rule 3). Instead, it is proposing to make it an offence (of subversion) to "intimidate the Chinese Government, or to overthrow the Chinese Government or to disestablish the basic system of the state by levying war, or by force, threat of force, or by other serious unlawful means" (hereinafter called Rule 4).

It should be stressed that there is a significant difference between Rules 1 and 2, and between Rules 3 and 4. Rules 1 and 3, if adopted in the implementing legislation, would lower significantly the threshold requirement for secession and subversion respectively (i.e. make it much easier for the offences to be committed). Consider the following example. Suppose a person in a small-scale demonstration for Taiwanese independence sets fire to a car ("serious damage to property" is one of the "serious unlawful means" as defined in the Document) while shouting a slogan in support of Taiwanese independence. Would this amount to the offence of secession which, according to the present proposal, attracts a maximum punishment of life imprisonment? What if the person does not damage property but merely shouts a slogan suggesting that Taiwan should strengthen its military so as to defend itself against the mainland (this might amount to "threat of force")? In both cases, the offence of secession might have been committed under Rule 1, but probably not under Rule 2.

It is therefore heartening to note that the Document proposes to introduce Rules 2 and 4 rather than Rules 1 and 3. The actus reus required under Rules 2 and 4 is more onerous (for the prosecution to establish) than the actus reus required under Rules 1 and 3. Under Rules 1 and 3, the actus reus required may be no more than a mere threat of force or any act which technically satisfies the broad definition of "serious unlawful means". In the drafting stage of the bill, it will be important not to slip back from Rule 2 to Rule 1, or from Rule 4 to Rule 3. But there are some technical problems to be resolved if Rules 2 and 4 are to be turned into legislative language. In relation to Rule 2, what actus reus (in addition to, say, the mere threat of force or an act which merely satisfies the definition of a serious unlawful act) is required to constitute "withdrawing a part of the PRC from its sovereignty" or "resisting the CPG in its exercise of sovereignty over a part of the PRC"? If the act committed by the accused really has the effect of "withdrawing a part of the PRC from its sovereignty" or "resisting the CPG in its exercise of sovereignty over a part of the PRC", would this not mean that secession has actually been achieved already?

Similarly, in relation to Rule 4, what actus reus (in addition to, say, the mere

threat of force or an act which merely satisfies the definition of a serious unlawful act) is required to constitute "overthrowing the PRCG" or "disestablishing the basic system of the state"? If the act committed by the accused really has the effect of "overthrowing the PRCG" or "disestablishing the basic system of the state", would this not mean that subversion has actually been achieved already?

I would therefore propose that in the drafting stage of the bill, Rule 2 should be reformulated as follows. *The offence of secession is committed if the accused attempts to (a) withdraw a part of China from its sovereignty or (b) resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means*" (hereinafter called Rule 2A). This would ensure that the actus reus required for the offence will not be a mere threat of force or any act which technically satisfies the definition of serious unlawful means. This is because the use of the word "attempt" in Rule 2A brings into play the common law "doctrine of proximity" in the criminal law of attempt. The doctrine of proximity distinguishes between an act which remotely leads towards the commission of a crime and an act which is more immediately connected with the commission of the crime, even where both acts are committed with an intention to commit the crime ultimately. Defining "secession" as an "attempt to (a) withdraw a part of China from its sovereignty or (b) resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means" would enable the court to determine the actus reus of the offence by considering whether the acts committed by the accused (involving levying war, force, threat of force and other serious unlawful means) are sufficiently proximate to the realisation of the objective of (a) withdrawing a part of China from its sovereignty or (b) resisting the Chinese Government in its exercise of sovereignty over a part of China.

Similarly, I would propose that in the drafting stage of the bill, Rule 4 should be reformulated as follows. *The offence of subversion is committed if the accused intimidates or attempts to intimidate the Chinese Government, or attempts to overthrow the Chinese Government or to disestablish the basic system of the state by levying war, or by force, threat of force, or by other serious unlawful means* (hereinafter called Rule 4A). For the same reasons as explained above, this would enable the court to determine the actus reus of the offence by considering whether the acts committed by the accused (involving levying war, force, threat of force and other serious unlawful means) are sufficiently proximate to the realisation of the objective of intimidating the Chinese Government, overthrowing the Chinese Government or

disestablishing the basic system of the state.

Fifthly, the Document in its paragraph on "serious unlawful means" used in the context of secession (para. 3.7) promises that "adequate and effective safeguards should also be in place to protect the freedoms of demonstration and assembly, etc. as guaranteed by the Basic Law, including peaceful assembly or advocacy." The chapter on subversion again refers to such "adequate and effective safeguards of guaranteed rights, described in paragraph 3.7" (see note 47 in chapter 4). However, nowhere in the Document can we discover what are the "safeguards" to be put "in place" in this regard. I would propose that one of such safeguards should be an express provision that *in a peaceful demonstration the mere display or shouting of slogans the content of which involves the threat of force will not amount to the offence of secession or subversion. This safeguard should be equally applicable to the offence of sedition.*

Finally, the proposed maximum penalties for secession, subversion and the related inchoate and accomplice offences (in Annex 2 of the Document) are the same, namely, life imprisonment. This in fact means that in some cases the same act against national security would be punishable in a more severe manner in the HKSAR than in the mainland itself. For example, both articles 103 and 105 of the Chinese Criminal Code divide into three categories the punishment for secession and subversion respectively and apply them differentially in accordance with the offender's degree of involvement: (a) imprisonment for 10 or more years (up to life imprisonment); (b) imprisonment for 3 to 10 years; (c) imprisonment for less than 3 years. I would therefore propose that *the proposed provisions for punishment be re-considered.*

Societies and national security

When the Societies Ordinance was amended by the Provisional Legislative Council in 1997, BL 23 considerations were already taken into account. For example, the 1997 amendment empowers the Government to prohibit the existence of a society on the ground of "national security," in addition to the existing grounds of "public safety" and "public order." The amendment also provides that political bodies in Hong Kong may not have any connection with foreign or Taiwan political organizations, otherwise the existence of such Hong Kong political bodies may be prohibited.

The Document now proposes further changes to the Societies Ordinance. The proposal is designed to amplify the power which the HKSAR Government has of

refusing to register (section 5A), cancelling the registration of (section 5D) or prohibiting the operation of (section 8) a local society on the ground of national security. The proposed amendment provides that where a local "organization" (defined in para. 7.15 as "an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure") (a) has the objective of engaging in treason, secession, subversion or espionage, or (b) has committed or is attempting to commit any such offence, or (c) is "affiliated with" an organization in mainland China which has been proscribed for reasons of national security, the HKSAR Government may proscribe the local organization. The policy behind the proposed amendment is to make it clear that it would be unlawful to "make use of Hong Kong's free and open environment as a base against national security and territorial integrity." (para. 3.8 of the Document)

This is one of the most controversial and politically sensitive proposals in the Document, and is probably the one which gives the greatest prominence to the "one country" principle. The Document states (in para. 7.16) that "to a large extent, on the question of whether such a mainland organization endangers national security, we should defer to the decision of the Central Authorities." According to the proposal, a "proscribed organization" will attract more severe sanctions than "unlawful societies" under section 18 of the existing Societies Ordinance. For example, it will be an offence to "support" its activities (para. 7.14 of the Document). Furthermore, organizations which have "connections" (as defined in para. 7.17) with it may be declared "unlawful societies."

The Document does not explain what is meant by "affiliation", a crucial concept in determining whether a local organization may be proscribed on the ground of its relationship with a mainland organization. It is also not clear whether for the purposes of (a) the offence of "supporting" proscribed organizations, and (b) rendering unlawful local societies that have "connections" with proscribed organizations, "proscribed organizations" refers only to those proscribed in Hong Kong by the Secretary of Security and not to mainland organizations. The better view is that only Hong Kong proscribed organizations are relevant here, and this apparently is also the view of the Solicitor-General (see Robert Allcock, "Why we need to update our security law," *South China Morning Post*, 2 October 2002, p.14). It is hoped that this approach will be confirmed in the implementing bill.

Whether the implementing bill will prove to be acceptable will depend significantly on whether and how the term "affiliation" is defined in the bill. The

Societies Ordinance as it stands provides a definition of "connection" (as including four categories of circumstances, one of which is "affiliation"), but the term "affiliation" is not itself defined. In order for the bill to be acceptable, "affiliation" must be defined to mean a degree of "connection" much higher than the "connection" under existing law. I would propose that the term "affiliation" be defined both from a negative point of view and from a positive point of view as follows.

From the negative point of view, it should be provided that *"affiliation" is not to be established (a) merely because a local organization bears the same name or a similar name as a proscribed organization in the mainland, (b) merely because one of the organizations contributes financially to the other, (c) merely because a local organization is affiliated to or have a connection with an overseas organization which is affiliated to or have a connection with a mainland proscribed organization, or (d) merely because one organization has a connection with the other.*

From the positive point of view, it should be provided that *two organizations (one in the mainland and the other in Hong Kong) will be regarded as being affiliated with each other only if there is an extremely high degree of connection between them, having regard, inter alia, to the following: (a) whether membership of one organization automatically entails membership of the other; (b) whether there is regular and frequent communication between the two organizations; (c) whether many aspects of their operation are under the control and direction of the same person or persons; (d) whether one organization makes a substantial financial contribution to the operation of the other. The court, rather than a special tribunal, should be empowered to hear an appeal against the Government's determination that a local organization is affiliated with a mainland proscribed organization,* in addition to the court's power to hear an appeal on points of law as proposed in the Document.

Conclusion

In the light of the above, it may be seen that some of the proposals in the Consultation Document are problematic and cannot be supported in their present form. Some are in desperate need of being clarified by high-quality drafting in the bill for the proposed legislation. Having said that, I also think that the general orientation of the Document deserves to be supported. The successful implementation of the concept of "one country, two systems" depends on due regard being given to both the "two systems" element and the "one country" element. The proposals in the Document have given effect to the "two systems" principle by not importing the relevant

mainland laws and standards to Hong Kong, and by creatively designing a legislative model unique to the HKSAR. At the same time, the proposals affirm the importance of the "one country" principle by providing for various crimes against the sovereignty, territorial integrity, unity, and security of the Chinese state, and by empowering the HKSAR Government to prohibit the activities in the HKSAR of organizations proscribed in the mainland for reasons of national security. Thus the Consultation Document is a concrete demonstration of the principle of "one country, two systems" at work How the proposals, if implemented by law, will affect civil liberties in Hong Kong remains to be seen However, there exist considerable institutional safeguards that can ensure the continued vitality of civil liberties in the HKSAR: the elected Legislative Council that will ultimately decide the content of the law to be enacted on the basis of the proposals; the vigilant local and international public opinion which will continue to monitor actively the Rule of Law and human rights in Hong Kong; and, last but not least, the strong and independent courts of the HKSAR which will --- though I believe such cases will be rare --- be called upon, in the final resort, to interpret and apply the relevant laws in cases litigated before them.

(This is a substantially revised version of the author's article, "Will our Civil Liberties Survive the Implementation of Article 23?" published in *Hong Kong Lawyer*, November 2002, pp 80-88).

Media Have No Reason to Fear

by Bob Allcock, Solicitor General
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Under Article 23 of the Basic Law, the Hong Kong SAR must enact laws on its own to prohibit certain harmful activities, including the theft of state secrets. The Consultation Paper on proposals to implement Article 23 suggests how this should be done.

Some concern has been expressed as to the impact the proposed law would have on press freedom. I would like to explain why I think that concern is unnecessary.

First, press freedom will continue to be fully guaranteed in accordance with the Basic Law and the International Covenant on Civil and Political Rights. Secondly, it is proposed that the current Hong Kong Official Secrets Ordinance should continue to govern the law in this area, and that very few changes should be made to it.

That Ordinance is based on UK legislation that was substantially liberalised in 1989. Before then, the law in both England and Hong Kong was indeed draconian. It penalised the disclosure of any information obtained by an official in the course of his or her duties, however trivial the information and irrespective of the harm likely to arise from its disclosure. It also generally made it an offence for anyone simply to receive information they knew or had reasonable cause to believe had been disclosed unlawfully.

That old law was replaced by much more liberal legislation in both the UK and Hong Kong. Instead of protecting all official information, our current Official Secrets Ordinance provides that only four categories of information are protected from unauthorized disclosure. It is no longer an offence merely to receive unauthorized communications. And simply refusing to disclose the source of information does not, and will not, constitute an offence under that Ordinance.

The four categories of information, and the kind of harm that could be caused by their unauthorized disclosure, are as follows –

- security and intelligence information – leaks concerning intelligence gathered on terrorist attacks could tip-off those responsible

- defence – disclosure of defence plans to deal with a possible outbreak of war could assist the enemy

- international relations – a disclosure concerning relations between China and another state could disrupt that relationship and result in measures being taken against Chinese interests or nationals

- the commission of offences and criminal investigations – a leakage of information concerning a suspect could help a criminal avoid arrest.

It is therefore in the public interest that the law should restrict unauthorized disclosure of such protected information, even though not all of it relates to state secrets. However, the

prohibition should not be all-embracing. Some information within the four categories could be disclosed without any harmful consequences. The publication of information leaked by the police about an arrest they have made might, for example, have no adverse consequences on police work.

As a result, members of the public or the media who disclose information commit an offence only if their disclosure was without lawful authority, and

- the information came into their possession through an unlawful disclosure or entrustment,
- they knew, or had reasonable grounds to believe, that the information was protected, and had come into their possession in that way, and
- the disclosure was damaging and they knew, or had reasonable cause to believe, that it would be damaging.

The meaning of "damaging" is set out clearly in the legislation in respect of each category. For example, the unauthorized disclosure of information relating to criminal investigations is an offence if it results in the commission of an offence, helps a prisoner to escape, or impedes the prevention or detection of offences, or is likely to have such an effect.

Who decides whether information falls within one of the categories, and whether the disclosure is damaging? When the old English legislation was being reviewed, it was proposed that a government Minister could issue a conclusive certificate to the effect that the disclosure would cause serious injury to the interests of the nation. That proposal was criticised and dropped. Under both English and Hong Kong law it is now the courts that decide whether the elements of the offence have been proved.

This approach of prohibiting the damaging disclosure of limited categories of official secrets will not change under the government's proposals. The vast majority of official documents here and in the Mainland, including those relating to economic matters, will not fall within the offences relating to unlawful disclosure. The leakage and eventual publication of information concerning the gold reserves of the Bank of China would not, for example, be an offence in Hong Kong.

No new police powers are proposed in respect of official secrets. Current powers of search and seizure are subject to special safeguards if "journalistic materials" are involved. The Organized and Serious Crimes Ordinance, under which a court may require a person to provide information for the purposes of a criminal investigation, will <u>not</u> be extended to the investigation of official secrets offences. And if a person is suspected of committing any offence, he will continue to have the right to remain silent. His silence cannot be treated as evidence of guilt.

The only significant amendment of the current law that is proposed in this area is to create an offence of making an unauthorized and damaging disclosure of protected information obtained by unauthorized access. Such a disclosure could be just as damaging to the public interest as a disclosure resulting from a leak by a civil servant. For example, the disclosure of information concerning a police investigation, obtained by hacking into a police computer, could tip-off the suspect in the same way as a disclosure based on a police

leak.

The safeguards that exist in respect of the current offence of unauthorized disclosure will apply to the new offence. Members of the media and the public would not therefore commit an offence if they did not know, and had no reasonable ground to believe

- that the information was within one of the protected categories, or
- that the information had been obtained by unauthorized access, or
- that the disclosure would be damaging.

Another change that is proposed is to adapt the text of the current legislation to reflect the change in sovereignty. Instead of protecting information concerning relations between the United Kingdom and Hong Kong, it will protect information concerning relations between the Central Authorities and the HKSAR. That protection has in fact been in place since Reunification as a result of interpretation provisions in the Reunification Ordinance. In addition, information concerning the relations between Hong Kong and China was protected before Reunification, since this involved international relations.

Some concern has been expressed about this proposed adaptation. However, it should be appreciated that –

- there will be no change in the substance of the law, which does not appear to have caused problems for press freedom
- a disclosure of such information would only be an offence if it is "damaging" in the way specified in the legislation.

For example, the premature publication by the media of an official report concerning relations between Hong Kong and Beijing that causes embarrassment but no damage would not be an offence. The restriction is there to protect the public interest from being harmed, not to simply to prohibit disclosures that are undesirable, a betrayal of trust, or an embarrassment to the government.

Some commentators have argued for a general defence that disclosure is in the public interest. That defence might apply, for example, where a whistle-blower makes an unauthorized disclosure in order to reveal an abuse of power.

The British Government considered such a defence in 1988, but rejected it for two reasons. First, a central objective of its reforms was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. No person should be allowed to disclose information which he knows may, for example, lead to loss of life simply because he has a general reason of a public character for doing so.

More recently, it was argued in an English case that, under the Human Rights Act, an unauthorized disclosure could be justified if it was in the public interest. The House of Lords rejected this argument. The court held that there were sufficient safeguards in the

legislation, and through the availability of judicial review, to ensure that the power to withhold authorization was not abused and that proper disclosures were not stifled. It also decided that the restriction on freedom of expression created by relevant offences was not greater than was required to achieve the legitimate object of protecting national security.

The reasoning of the House of Lords applies equally to Hong Kong's law on official secrets.

Some commentators have suggested that a person who has made an unauthorized disclosure should have a defence if the leaked information had previously been made available to the public. However, a disclosure in such circumstances could still be harmful. For example, an initial newspaper story concerning protected information might carry little weight and cause no damage. However, an unauthorized confirmation of that story by a senior official could be very damaging.

Although our law does not provide a defence of prior publication, the effect of such publication may be that a subsequent disclosure is not damaging and does not therefore amount to an offence.

I hope this clarification of the existing law relating to official secrets, and of the limited changes that are proposed, will be reassuring. There will be no roll-back of press freedom. Even though the law will protect state secrets, Mainland concepts of secrecy will not be introduced into our law. This is a striking example of the manner in which "one country, two systems" is being successfully implemented.

Freedom of Expression is NOT Under Threat

by Bob Allcock, Solicitor General
Hong Kong SAR Government

Freedom of expression in general, and freedom of the press in particular, are hallmarks of Hong Kong's open and pluralistic society. Recently, concern was expressed, both in Hong Kong and elsewhere, that these cherished freedoms would be curtailed by the proposed laws to implement Article 23 of the Basic Law.

The Consultation Paper makes it absolutely clear that this will not be the case. If the proposals are enacted, freedom of expression will continue to be fully enjoyed in Hong Kong. Let me refer to each of the proposed offences and explain why this is so.

The proposed new offence of treason will be narrower than the existing offence. It will therefore impose no new restrictions on freedom of speech. The only situations in which words could amount to treason under the proposals would be where the words instigate a foreigner to invade the PRC or assist a public enemy at war with the PRC. For example, if China is at war with a foreign country, and a Hong Kong permanent resident broadcasts propaganda for the enemy, he may be convicted for assisting that enemy. This result is entirely defensible and should not be a matter of concern.

The proposed offences of secession and subversion will both involve levying war, the use or threat of force, or criminal action which falls within the definition of "serious unlawful means". None of these elements can be the result merely of words. Again, freedom of speech is not touched.

The new offence of sedition does relate to spoken and written words, but only those that incite others to commit –

- treason, secession or subversion, or
- acts of violence or of public disorder that seriously endanger the stability of the state or the HKSAR.

Moreover, offences relating to seditious publications will be limited to those that are likely to incite treason, secession or subversion.

A person only "incites" another to do something if he encourages or otherwise pressures that other person to do it, and intends that the other should do it. For example, if someone encourages another to assist a public enemy at war and intends that the other should do so, this will be incitement to commit treason.

How will this affect comments, news-reporting and academic discussion of sensitive issues? It is hard to imagine any impact at all.

The expression of an opinion, the reporting of news, and academic discussion may not be intended to encourage action by anyone. If they are so intended, they will normally encourage lawful action. No offence will be committed under the proposed new laws in

such circumstances.

However, statements must not incite people to commit any of the three offences or acts described above.

Incitement to commit treason is an existing offence. The proposed new offence involving such action will not impose any new restrictions on freedom of speech.

The offences of incitement to commit secession or subversion do not currently exist under those names. However, most of the acts that would be caught by them would now amount to incitement to commit treason, or would be one of the existing treasonable offences. Those acts that do not amount to such offences will involve inciting another –

- to commit criminal acts amounting to "serious unlawful means",
- to use, or threaten to use force, or
- to commit acts of violence or of public disorder.

Inciting a person in these ways will almost invariably amount to an offence under existing law.

What about the theft of "state secrets", which has been another area of concern to journalists? The answer should again be reassuring. The current law, found in Official Secrets Ordinance, will remain basically unchanged. That Ordinance is based on UK legislation and deals both with "spying" and unauthorized disclosures.

"Spying" involves a narrow band of activities that are done for a purpose prejudicial to the safety or interests of the state or of Hong Kong. The offence primarily targets information that is likely to be useful to an enemy.

The offences relating to unauthorized disclosure mainly affect public servants and government contractors. They are prohibited from disclosing four categories of information ("protected information") unless they are authorized to do so. The four categories relate to –

- security and intelligence
- defence
- international relations
- the commission of offences and criminal investigations.

In relation to the last three of these categories, an offence is committed only if the disclosure is damaging. The Ordinance explains what damaging means. For example, the disclosure of information relating to criminal investigations is damaging if it results in the commission of an offence, helps a prisoner to escape, or impedes the prevention or detection of offences, or is likely to have such an effect. With very few exceptions, the unauthorized disclosure of such information in other circumstances would not be damaging and would not be an offence.

Members of the public or of the media who disclose protected information commit an offence only if their disclosure was without lawful authority, and

- the information came into their possession through an unlawful disclosure or entrustment,
- they knew, or had reasonable grounds to believe, that the information was protected, and had come into their possession in that way, and
- in the case of the first three categories, the disclosure was damaging and they knew, or had reasonable cause to believe, that it would be damaging.

These existing offences are extremely narrowly drawn. Only limited categories of information are protected, and it is for the court to decide whether particular information falls within them. Neither the Central Authorities or the Hong Kong SAR can simply classify a document as "secret" and thereby claim protection of the Ordinance.

Some commentators have, however, called for a relaxation of the law, arguing that an unauthorized disclosure should not be an offence if it was "in the public interest". It has been said that a public-spirited whistle-blower may, through an abuse of power, be denied the authority to disclose information that should be disclosed. However, these arguments were recently rejected in an English case decided by the House of Lords. The court held that there were sufficient safeguards in the legislation, and through the availability of judicial review, to ensure that the power to withhold authorisation was not abused and that proper disclosures were not stifled.

The only significant extension of the current law that is proposed in this area is to create an offence of making an unauthorized and damaging disclosure of protected information obtained (directly or indirectly) by unauthorized access. The existing safeguards in respect of unauthorized disclosures by those who are not public servants or government contractors would apply equally to the new offence.

In addition, the existing statutory protection of information concerning relations between the UK and Hong Kong under the definition of "international relations" will be adapted to refer to "relations between the Central Authorities and Hong Kong".

These changes are entirely justifiable restrictions, and should not create any problems for the media. Moreover, each of the proposals are considered to be consistent with the International Covenant on Civil and Political Rights.

Some commentators have suggested that the proposals should also comply with the Johannesburg Principles – a set of non-binding recommendations concerning national security, freedom of expression and access to information. Our proposals are in line with most, but not all, of those Principles. In particular, we have respectfully declined to follow Principle 6 which states that expression may be punished as a threat to security only if the expression is intended and likely to incite imminent violence.

In our view, compliance with this Principle would leave serious and unacceptable gaps in our law. For example –

- inciting people to arm themselves in order to prepare for a secessionist war in the future would not be covered;

- inciting people to hack into a national defence computer system in order to cripple it would not be covered;

In declining to follow Principle 6, we are in line with most common law jurisdictions. Moreover, as Sandra Coliver, a renowned human rights commentator, has pointed out "some of the [Johannesburg] Principles undoubtedly are more protective of freedom of expression than widely accepted international norms".

The bottom line is that the proposals will not have any significant impact on freedom of expression, or freedom of the press, as they are currently enjoyed. As we begin the consultation process, the views of all members of the community, including members of the media, are earnestly sought. If there are still areas of concern, the government will pay attention. We share a common goal of preserving freedom of expression in Hong Kong and, together, we can ensure that this goal is achieved.

Proposals to implement Article 23 of the Basic Law

Consultation Document

Security Bureau
September 2002

We welcome your views

The Government has always attached great importance to comments from the public We have now formulated the proposals to implement Article 23 of the Basic Law as detailed in this document, for public consultation

We sincerely invite your views on the proposals Comments on the proposals are welcomed, by 24 December 2002, as follows —

- by post — Security Bureau
(Attn AS(E)2, E Division)
6th Floor, East Wing
Central Government Offices
Lower Albert Road
Central
Hong Kong
- by fax — 2521 2848
- by e mail — b123@sb gov hk

Any person submitting views and comments should be aware that the Government may publish all or part of the views and comments received and disclose the identity of the source in such manner as the Government considers appropriate, unless he/she requests any part of the views and comments and/or his/her identity be treated in confidence

Copies of the consultation document are available at all District Offices and can be accessed at the Security Bureau website at http //www info gov hk/sb or the Government Information Centre website at http //www info gov hk/eindex htm In an effort to reduce paper consumption we encourage you to access the consultation document through these websites as far as possible

For enquiries, please contact the Security Bureau at 2810 2593

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Summary

Background

Article 23 of the Basic Law stipulates that the Hong Kong Special Administrative Region (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."

2. In line with the high degree of autonomy for the HKSAR as provided under Article 2 of the Basic Law, and the guarantee that the socialist system and policies shall not be practised in the HKSAR as set out in Article 5, national laws for the protection of essential interests of the state and national security have not been promulgated in Hong Kong. The HKSAR has both practical and legal obligations to implement Article 23.

3. Every nation has laws to protect its sovereignty, territorial integrity, unity and national security. It is universally accepted that a national owes allegiance to his state, in return for the protection afforded by the state against foreign aggression, and for the provision of a stable, peaceful and orderly society within which to carry out his pursuits. The intent of Article 23 is to prohibit by law acts that would undermine the sovereignty, territorial integrity, unity and national security of our country.

4. Some of the Article 23 offences are already dealt with under existing legislation. Parts I and II of the Crimes Ordinance (Cap 200) deal with treason and sedition respectively. Where the protection of official information is concerned, the Official Secrets Ordinance (Cap. 521) deals with spying and unlawful disclosure of official information. The Societies Ordinance (Cap. 151) regulates, *inter alia*, the activities of and ties with foreign political organizations.

Guiding Principles

5 The Basic Law provides for the continuity of the common law system of the HKSAR, and it follows that the implementation of Article 23 should be effected through making use of existing legislation as far as possible. We have also taken into account the following guiding principles —

(a) the need to meet fully the requirements of the Basic Law, including Article 23 which stipulates the acts to be prohibited; and other relevant provisions in Chapter III, in particular Article 27 which guarantees certain fundamental rights and freedoms of Hong Kong residents, and Article 39 which stipulates, *inter alia*, that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as applied to Hong Kong shall remain in force, and shall be implemented through the laws of the HKSAR;

(b) the need to protect adequately the State's essential interests, namely sovereignty, territorial integrity, unity and national security; and

(c) the need to ensure that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law.

The Proposals

Treason

6. Treason means the betrayal of one's country. The interests to be protected against treason are the sovereignty, territorial integrity and security of the People's Republic of China (PRC) as a whole, and the PRC Government (PRCG). Treason offences under the Criminal Law of the PRC refer to those acts endangering the sovereignty, territorial integrity and security of the PRC committed by a PRC citizen in collusion with a foreign state, or with an organization or individual outside the territory of the PRC. Treason offences are essentially crimes of endangering state

security from without and the legal interest to be protected is the external status of the country.

7. Having studied the existing offence of treason, the Criminal Law of the PRC and the relevant provisions in other jurisdictions, we propose to update and improve the treason provisions in Part I of the Crimes Ordinance by restricting the substantive offences to —

(a) levying war by joining forces with a foreigner to —

(i) overturn the PRCG; or

(ii) compel the PRCG to change its policy or measures by force or constraint; or

(iii) put any force or constraint upon the PRCG; or

(iv) intimidate or overawe the PRCG; or

(b) instigating a foreigner to invade the PRC; or

(c) assisting by any means a public enemy at war with the PRC.

We also propose 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).

8. The current treasonable offences and offence of assaults on the sovereign are proposed to be repealed.

Secession

9. Preserving the territorial integrity and unity of a nation lies at the heart of the welfare of a nation. A breach of that integrity by force or other serious unlawful means will almost invariably lead to war. There is at present no offence termed "secession" in the HKSAR. To ensure the protection of territorial integrity and unity of our country, we propose to create a specific offence of secession, making it an offence to —

(a) withdraw a part of the PRC from its sovereignty; or

(b) resist the CPG in its exercise of sovereignty over a part of the PRC

by levying war, or by force, threat of force, or other serious unlawful means. The specific inchoate and accomplice offences of attempting, aiding and abetting,

counselling and procuring the commission of the substantive secession offence, and conspiring to commit the substantive offence, are also proposed

Sedition

10. While it is universally accepted that the freedom of expression, in particular the right to voice dissenting opinions, is a fundamental right in modern democratic societies, the ICCPR specifically provides that the freedom of expression is not absolute and carries special duties and responsibilities. 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. Examples would include a speech inciting others to commit an offence endangering national security. For this reason, the freedom of expression may under the ICCPR be restricted on certain specified grounds, such as national security. Many jurisdictions, including the most liberal and democratic societies, retain sedition as a serious criminal offence. There is therefore a continued need for sedition offences to protect the state and key institutions from stability-threatening communications.

11. We propose to narrow the existing offence of *sedition* so that it is an offence —

(a) to incite others to commit the substantive offences of treason, secession or subversion; or

(b) to incite others to violence or public disorder that seriously endangers the stability of the state or the HKSAR

12. While the sedition offence should cover one aspect of communications threatening the security and stability of the state, there is also a need to deal with seditious publications. However, offences targetting publications are a direct restriction on the freedom of expression, and should therefore be narrowly defined in order to comply with the necessity and proportionality criteria as required under the ICCPR. If the act of dealing with seditious publications is part of an act of incitement, it may be covered by the offence proposed in paragraph 11 above However, if someone deals with seditious publications for some other reasons such as profit, while at the same time being fully aware that the publications would incite offences that endanger national security, such dealings should also be suitably regarded as criminal acts

13. We propose to narrow the existing definition of "seditious publication" A publication should be regarded as seditious only if it would incite persons to commit the substantive treason, secession and subversion offences, and that it would be an offence, with knowledge or reasonable suspicion that a publication is seditious,

(a) to deal with that publication without reasonable excuse; or

(b) to possess that publication without reasonable excuse.

14. The mere expression of views, or mere reports or commentaries on views or acts, will not be criminalized, unless such expressions, reports or commentaries incite others to achieve a specified purpose through levying war, force, threat of force, or serious unlawful means. This is in compliance with Article 39 of the Basic Law, which enshrines protection of the freedom of expression

Subversion

15. In the context of the protection of state institutions, subversion is commonly understood to involve overthrowing or undermining the constitution, the constitutionally established government, or system of government by internal or domestic elements. There is no specific offence of "subversion" in the laws of the HKSAR, although the violent overthrow of the government is covered by the existing treason offence of "levying war to depose the sovereign".

16. The targets of protection against subversion should be the basic system of the state and the PRCG. We propose to define the offence of subversion as —

(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 related inchoate and accomplice offences of attempting, aiding and abetting, counselling and procuring the commission of substantive offences, and conspiring to commit the substantive offences, are also proposed to be codified.

Theft of State Secrets

17. While open government and a high degree of transparency of government actions encourages participation in public affairs and enhances accountability, some information has of necessity to be kept confidential to protect the security of the country and the people, and to ensure the smooth running of government. There should therefore be legal sanctions against unauthorized access or disclosure of such information. At the same time, in order to safeguard freedom of expression and information, protection should only be afforded to truly deserving categories of information, and the means of protection should be clearly defined. We propose to retain the stipulations of the existing Official Secrets Ordinance, specifying that the targets of protection against the theft of state secrets should be —

(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

18. "Spying", which generally refers to the procurement of information useful to a foreign power and prejudicial to state security, is regarded worldwide as a serious national security offence meriting heavy punishment In contrast, in order to preserve the balance between protecting state security and promoting open government, it is considered that unauthorized disclosure of official information should only be criminalised where the information is of a sensitive nature

19. The Official Secrets Ordinance already provides a good foundation for protecting state secrets. Nonetheless, we propose to introduce a new offence of unauthorized and damaging disclosure of protected information obtained by unauthorized access.

Foreign Political Organizations

20. The existing provisions in the Societies Ordinance are sufficient to prohibit foreign political organizations from unduly influencing the local political process, and should be retained. On the other hand, political activities that pose genuine threats to national security are likely to be organized. Prohibition of such threatening political activities can be achieved to a large extent under the existing Societies Ordinance, which enables the Secretary for Security to declare an organization within the HKSAR unlawful where this is necessary on national security grounds.

21. To thwart organization of such activities that would genuinely endanger the state, it is proposed that an organization that endangers state security could be proscribed, but only where necessary under the standards of the ICCPR to protect national security, public safety and public order, and where one of the following circumstances exists —

(a) the objective, or one of the objectives, of the organization is to engage in any act of treason, secession, sedition, subversion, or spying; or

(b) the organization has committed or attempts to commit any act of treason, secession, sedition, subversion, or spying; or

(c) the organization is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities in accordance with national law on the ground that it endangers national security.

22. We propose to make it an offence to organise or support the activities of proscribed organizations, or to manage or to act as an office-bearer for these organizations. An organization which has a connection with a proscribed organization might also be declared as unlawful where necessary under the standards of the ICCPR.

23. The decision to proscribe and to declare an organization unlawful would be subject to an appeal procedure. To ensure fairness, this procedure should involve two levels. First, points of fact may be appealed to an independent tribunal. Secondly, points of law may be appealed to the court.

Others

24. It is necessary to ensure that sufficient account is taken of the possible implications of technological developments and the vastly increased ease of communications on extra territorial acts Very broadly, we propose to claim jurisdiction over an offence only where a sufficient nexus with the HKSAR is present, i.e. either the act is committed by a HKSAR permanent resident overseas, or the act has a specified "link" with the HKSAR At present, under the Criminal Jurisdiction Ordinance (Cap. 461), HKSAR courts already have jurisdiction over various offences of fraud and dishonesty even if they do not take place in Hong Kong, provided there is a specified link with the HKSAR. Also, at common law, an attempt, conspiracy or incitement to commit an offence in Hong Kong is an offence here We propose to adopt these common law and statutory principles in defining what constitutes a "link".

25. Effective investigation powers are required to deal with threats to the security or interests of the State or the HKSAR. We propose to provide enhanced powers for dealing with the more serious of the Article 23 offences.

Chapter 1

Introduction

This paper sets out the Administration's proposals as to how Article 23 of the Basic Law[1] should be implemented.

I. Background

(a) Basic Law

1.2 The Basic Law is enacted in accordance with the Constitution of the People's Republic of China (PRC) to prescribe the systems to be practised in the Hong Kong Special Administrative Region (HKSAR), in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong It is premised on the "one country, two systems" principle, and provides for a high degree of autonomy for the HKSAR. There is provision for the HKSAR to have its own executive authorities and legislature (Article 3 of the Basic Law). Article 8 of the Basic Law provides for the preservation of the laws previously in force before the Re-unification. Chapter III of the Basic Law guarantees the fundamental rights and duties of HKSAR residents. These rights include, for example, equality before the law, freedom of the person, freedom and privacy of communication, freedom of movement and freedom of religious belief The two Basic Law articles of more immediate relevance for our current purpose are Article 27 and Article 39. Article 27 provides that —

> "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."

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[1]The full name of the Basic Law is "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China". It was promulgated by decree of the President of the People's Republic of China on 4 April 1990.

Article 39 stipulates that —

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

1.3 Article 19[2] of the International Covenant on Civil and Political Rights (ICCPR) guarantees both the right to hold opinions without interference and the right to freedom of expression. The right to hold opinions is an absolute one for which the ICCPR permits no exception or restriction The right to freedom of expression is, however, subject to some permissible limitations, including those necessary for the protection of national security or of public order (*ordre public*) Moreover, such restrictions should be provided by law. Similar restrictions are also permissible under the Covenant in its protection of the freedoms of peaceful assembly and association

(b) The concept of protection of the state

1.4 The protection of the state, the prevention of crimes posing serious threats to sovereignty and national security, is a concept of high importance both past

[2]The article reads —

1 Everyone shall have the right to hold opinions without interference

2 Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice

3 The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

(a) for respect of the rights or reputations of others,

(b) for the protection of national security or of public order (ordre public), or of public health or morals

and present. The constitutionally established government has the responsibility to exercise its powers in accordance with the law to protect its nationals from violent attack or coercion, whether by foreign invaders or domestic insurgents, to provide welfare for its nationals, and the peace and stability within which to pursue their individual pursuits. To achieve such aims, it is an essential and foremost task of every nation to afford their states special protection against crimes which threaten their well-being and hence indirectly the well-being of individuals who make up the states, ensuring the sovereignty, territorial integrity and safety of the nation. All countries around the world, including both common law and civil law jurisdictions, have express provisions on their statute books to prevent and punish crimes which endanger the sovereignty, territorial integrity and security of the state. Therefore, while nationals of a state enjoy the privilege of protection provided by it on the one hand, the individual citizens have a reciprocal obligation to protect the state by not committing criminal acts which threaten the existence of the state, and to support legislation which prohibits such acts on the other hand[3].

1.5 In the HKSAR, the Central Authorities provide us with effective protection against possible foreign aggression, and a stable framework within which the fundamental rights and freedoms of HKSAR residents can be realized. The HKSAR therefore has a duty to ensure that the sovereignty and security of the state is protected. Article 18 of the Basic Law provides that the national laws of the PRC (with limited exceptions) do not apply in the HKSAR As a result, the relevant national laws to protect national security have not been applied to the HKSAR. In this context, Article 23 of the Basic Law provides that:

> "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 "

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[3] *The Canadian Law Reform Commission Working Paper 49* provides a good summary of this concept of a "reciprocal relationship" between the state and the individual, pointing out that "the reciprocal relationship between the individual and the State involves, on the part of the State, protection of the individual from violent invasion and oppression, and, on the part of the individual, a concomitant obligation to uphold the State and not betray it Thus if the State affords such protection to the individual, betrayal of the State by the individual would be wrongful and deserving of criminal sanction." (*Canadian Law Reform Commission (LRC) Working Paper 49* (1986) pp 43-44)

1.6 The above provisions illustrate that the manner in which the state's sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ. Indeed, this has to be the case given the different situations, including the respective legal framework, of the Mainland and the HKSAR. Therefore, the HKSAR has a duty to enact laws to protect national security in accordance with the common law principles as have been practised in Hong Kong, and such laws must comply with the Basic Law provisions protecting fundamental rights and freedoms.

II. Proposals to Implement Article 23 of the Basic Law

(a) Guiding principles

1.7 The HKSAR has to discharge its responsibility to protect the state by implementing Article 23 of the Basic Law, to ensure that national security is not threatened by serious criminal offences. In considering how best to implement Article 23, we have taken into consideration the following guiding principles —

(a) the need to fully implement the provisions of the Basic Law, including Article 23 which stipulates the acts to be prohibited; and other relevant provisions in Chapter III, particularly Article 27 and Article 39;

(b) the need to protect adequately the state's essential interests, namely, sovereignty, territorial integrity, unity, and national security, and

(c) the need to ensure that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law.

(b) Existing legislation

1.8 Some of the offences referred to in Article 23 are already dealt with under existing legislation. Parts I and II of the existing Crimes Ordinance (Cap. 200) deal with treason and sedition.

1.9 Where the protection of official information is concerned, the Official Secrets Ordinance (Cap. 521) deals with espionage and the unlawful disclosure of official

information. The Societies Ordinance (Cap 151) regulates, *inter alia*, the activities of and ties with foreign political organizations

(c) Objectives of local legislation to implement Article 23

1.10 In recognition of the explicit stipulation in the Basic Law that the HKSAR should enact laws on its own to fulfill its obligation to protect the state from serious criminal offences, we consider that legislation implementing Article 23 should be focused on the objectives of protecting the sovereignty, territorial integrity, unity and security of our country[4]. Since the offences of "treason", "sedition", "spying" and "unlawful disclosure" of official information are already provided for in existing legislation, we intend to achieve the above objectives by making use of existing legislation where appropriate. Certain existing legislative provisions will need to be modernized. Regarding acts of secession and subversion, new offences of "secession" and "subversion" will need to be created Express legislative provisions will also need to be introduced to prohibit the organization of activities endangering national security, the conduct of political activities by foreign political organizations or bodies in the HKSAR; and the establishment of ties between political organizations or bodies of the HKSAR and foreign political organizations or bodies.

(d) Compliance with international human rights covenants

1.11 On the other hand, the fundamental freedoms of expression, assembly and association, particularly the right to raise dissenting views regarding the governance of the state, are the cornerstones of a democratic society. In the course of drawing up the legislative proposals, we have paid careful attention to the provisions governing the protection of fundamental rights and freedoms in the international human rights covenants, namely, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are entrenched in the HKSAR by virtue of

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[4]See Articles 51 to 55, Chapter 2 of the *Constitution of the People's Republic of China*, which broadly set out the obligations of citizens of the state in relation to protection of the state It specifies that Chinese citizens should uphold the security and interests of the country They have a duty to defend the Motherland and resist aggression. They should not infringe the interests of the state or rights and freedoms of others. They should safeguard the unification of the country and unity of different ethnic groups of the country. They should safeguard state secrets

Article 39 of the Basic Law[5]. We have also studied thoroughly other human rights conventions and declarations and related literature, although they are not legally binding on the HKSAR. These include the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information[6], as well as the relevant jurisprudence. We are satisfied that the legislative proposals put forward are consistent with the principles governing limitation and derogation from the basic rights enshrined in the ICCPR, in that the measures proposed which would impose restrictions on such rights and freedoms are both necessary and proportionate[7] to the legitimate aims of protecting the sovereignty, territorial integrity, unity and security of our country.

(e) Other considerations

1.12 In the course of drawing up its legislative proposals, the Hong Kong Special Administrative Region Government (HKSARG) have studied extensively national security legislation in other jurisdictions, law reform proposals put forward in various countries and common law principles. The HKSARG have also examined carefully the views put forward on this subject, both before and after the Re-unification, including those submitted by the Hong Kong Bar Association, the Law Society of Hong Kong, Justice (Hong Kong Section of the International Commission of Jurists), the Hong Kong Human Rights Monitor, the Hong Kong Journalists Association, and various political parties and legislators.

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[5]See, for example, Article 19 of the ICCPR which guarantees the right to freedom of speech, and Article 22 which guarantees the freedom of association

[6]We note that the Siracusa Principles and the Johannesburg Principles are not yet widely accepted international norms See, for example, *Human Rights Quarterly* 20 1 (1998) at 15

[7]See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737 on the principles established by European jurisprudence

Chapter 2

Treason

I. Current Laws : Summary

At present, Part I of the Crimes Ordinance deals with treason[8]. Under section 2, there are a number of acts of treason, each punishable with imprisonment for life. Taking into account the Interpretation and General Clauses Ordinance (Cap 1) as amended by the Hong Kong Reunification Ordinance, the main heads of treason under this section are —

(a) killing, wounding or causing bodily harm to the sovereign[9] or imprisoning or restraining him/her;

(b) forming an intention to do any act in (a) above and manifesting such intention by an overt act;

(c) with various intents such as to compel the Central People's Government (CPG) or other competent authorities of the PRC[10] to change its measures, levying war against the PRC[11];

(d) instigating any foreigner to invade with force the PRC[12] or any of its territory; and

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[8]The Chinese term for treason is "叛國" in Article 23, and "叛逆" in the existing Crimes Ordinance

[9]The original term was "Her Majesty" as a person, to which there is no direct equivalent in post-Reunification Hong Kong

[10]The original term was "Her Majesty", to which there is no direct equivalent in post Reunification Hong Kong. According to the Interpretation and General Clauses Ordinance as amended by the Hong Kong Reunification Ordinance, the term "the Central People's Government or other competent authorities of the People's Republic of China" should be used instead

[11]The original term was "Her Majesty". The term chosen here, i e, "the People's Republic of China", is an alternative to "the Central People's Government or other competent authorities of the People's Republic of China", which is the strictly correct term See note 10

[12]The original term was "United Kingdom". The term "People's Republic of China" is used instead

(e) assisting any public enemy at war with the PRC[13]

2.2 The Crimes Ordinance also provides, under section 3, for certain "treasonable offences", punishable by imprisonment for life. These offences involve forming an intention to —

(a) depose the sovereign;

(b) levy war against the PRC[14]; or

(c) instigate any foreigner with force to invade the PRC[15] or its territory,

and manifesting that intention by an "overt act" or by publishing any printing or writing.

2.3 Sections 3 and 4 impose various restrictions on (with certain exceptions) prosecution. Section 3(2) provides that no person convicted or acquitted of a treasonable offence should subsequently be prosecuted for treason under section 2 for the same acts. Section 4 provides that prosecutions must be commenced within three years after the offence is committed.

II. Considerations and Proposals

2.4 The existing practice, as set out in the relevant provisions of the Crimes Ordinance, of equating assaults on the sovereign as acts of treason has its origins in the days of monarchical rule and is no longer appropriate to the HKSAR. It is necessary to modernise the concept of "treason" and to bring it in line with the HKSAR's constitutional position as set out in the Basic Law.

2.5 A survey of the offence of treason in Mainland laws as well as overseas jurisdictions shows a common feature, namely the concept that treason involves the betrayal of one's country in collaboration with an external enemy. Such offences against the state are to be distinguished from other violent or unlawful acts instigated by internal insurgents, which we propose to deal with under the offence of "subversion". In the light of this guiding principle, we propose to amend the existing offence of treason in the following way —

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[13]See note 11

[14]Ditto

[15]Ditto

(a) Offences against the person of the sovereign or head of state

2.6 For the HKSAR, the head of state is the President However, equating attacks on the head of state as treason of the highest order is no longer appropriate under our country's present-day constitutional order. Thus we propose that paragraphs (a) and (b) of section 2(1) and the whole of section 5 (which stipulates the offence of assaults on the sovereign) of the Crimes Ordinance should be deleted.

(b) Levying war

2.7 Under section 2(1)(c) of the Crimes Ordinance, a person commits treason if he "levies war" against the state —

(a) with the intent to depose the sovereign; or

(b) in order by force or constraint to compel the CPG or other competent authorities of the PRC[16] to change its measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe the legislature.

No definition is given of "levying war" However, at common law, "levying war" has been held to include a riot or insurrection involving a considerable number of people for some general public purpose, but does not include a rising for a limited, local or private purpose[17].

2.8 The concept of protecting the sovereign as an individual is no longer appropriate under the constitutional situation of Hong Kong after Re-unification, and should therefore be removed. The use of force to overthrow, intimidate or overpower

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[16]See note 10.

[17]A fuller exposition of the concept of levying war has been provided as follows —

> "'War', here, is not limited to the true 'war' of international law, but will include any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a 'general' character, e g, to release the prisoners in all the gaols It is not essential that the offenders should be in military array or be armed with military weapons It is quite sufficient if there be assembled a large body of men who intend to debar the government from the free exercise of its lawful powers and are ready to resist with violence any opposition" *Kenny's Outlines of Criminal Law* (19th ed, 1966) p 398

the PRC Government (PRCG)[18], on the other hand, should continue to be punishable as such acts clearly threaten the fundamental security of our country. Given the overriding principle discussed in paragraph 2.5 above, *the scope of provisions in paragraph (c) of section 2(1) of the Crimes Ordinance should be more tightly defined to refer only to levying war by joining forces with a foreigner with the intent to —*

(a) *overthrow the PRCG;* or

(b) *compel the PRCG by force or constraint to change its polices or measures;* or

(c) *put any force or constraint upon the PRCG;* or

(d) *intimidate or overawe the PRCG.*

(c) Instigation of foreigner to invade the country

2.9 An armed invasion is clearly a serious breach of the sovereignty, territorial integrity and security of the country. The offence of instigation of foreigners to invade the country should therefore be retained as a treason offence. We note, however, that at present the term "foreigner" is not defined in the Crimes Ordinance, and believe that it should be. In most cases, a foreign invader is the armed forces of a foreign country. There might however be cases where the invader is not under the direction of a foreign country or government, but consists of, for example, militias or mercenaries engaged by a hostile foreign entity. We propose that the term "foreigner" should be defined along the following lines — "armed forces which are under the direction and control of a foreign government or which are not based in the PRC." Thus *there should continue to be a treason offence along the lines of paragraph (d) of section 2(1) of the Crimes Ordinance, with the meaning of "foreigner" defined. The territory to be protected should be the entire territory of the state.*

(d) Assisting public enemy at war

2.10 According to case law, a public enemy is someone whose country is in a state of war with one's country. The state of war may be formally declared or may consist of

[18] In the context of this paper, the term "PRC Government" represents collectively the Central People's Government, and other state organs established under the Constitution.

armed conflicts to which sufficient publicity has been given, i e open hostilities. Any act done to strengthen the enemy or weaken one's country to resist the enemy counts as assistance.

2.11 A country will only go to war or engage in other forms of armed hostilities with another country when its essential interests are at stake. It would therefore be highly reprehensible for a person to assist a public enemy at war with his country, and the act is generally recognized as a form of treason in almost all jurisdictions. We propose *to retain this offence*. We propose also *to codify the case law position as summarized above.*

(e) Non-violent threats

2.12 In so far as a non-violent attack (e.g. electronic sabotage) is part of a larger planned operation by which foreign forces levy war or invade the territory of the state, it would be caught by the offences proposed in paragraphs 2.8 and 2.9.

(f) Inchoate or accomplice acts

2.13 We have considered carefully whether it is necessary to retain the special category of "treasonable offences" (see paragraph 2.2 above) to catch inchoate or preparatory acts. Treasonable offences were developed at a time before the law of attempt became generally applicable. They do not merely reflect the general inchoate offences, but are based on "forming an intention" and "manifesting that intention by an overt act", and could therefore be rather wide. In view of the seriousness of the offences in question, we propose *to provide expressly for statutory offences for inchoate and accomplice acts, i.e. attempting, conspiring, aiding and abetting, counselling and procuring the commission of the substantive treason offences*[19] (incitement to treason, one of the inchoate offences, will be dealt with in Chapter 4). Subject to this, *treasonable offences, i.e. section 3 of the Crimes Ordinance, should no longer be retained.*

[19]Under our present law, attempting or conspiring with others to commit a substantive offence (except conspiracy to defraud) is a crime under sections 159A and 159G of the Crimes Ordinance Under section 89 of Criminal Procedure Ordinance (Cap 221), any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence. Nevertheless, that provision is procedural in nature. Strictly speaking, other inchoate or accomplice acts are common law crimes.

(g) Misprision of treason

2.14 At present, misprision of treason is a common law offence. It is committed when a person knows that another person has committed treason but omits to disclose this to the proper authority within a reasonable time. In view of the possible severe consequences of such suppression of information to national security and to provide for more certainty as regards what constitutes the "proper authority", we propose *to make misprision of treason a statutory offence.* This should cover failure to take reasonable steps within a reasonable time to inform the Police of the fact that another person has committed treason.

(h) Compounding treason

2.15 Compounding treason is another common law offence. It is committed by anyone who agrees for value to abstain from prosecuting a person who has committed treason. Where the act involves misprision as well, it will be caught by the proposed statutory offence for misprision already. Where it involves the mere omission of prosecution for value, we would suggest that it be dealt with under anti corruption laws and that *no specific offence need to be created for the purpose.*

(i) Application within the HKSAR

2.16 In many jurisdictions, it is considered that only someone who owes allegiance to the state or enjoys its protection may commit treason against it[20]. It would be inappropriate to charge a member of an invading foreign army with treason, for example. On the other hand, case law indicates that allegiance does not necessarily have to be based on nationality[21]. Indeed, some law reform proposals favour applying

[20]See UK House of Lords decision in *Joyce v DPP* [1946] 1 All ER 186. Lord Jowitt, L.C., said at 189-190, *inter alia*, "The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King ... It must be asked, whether there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance."

[21]Lord Jowitt, L.C., also said, at 189 of the decision of the case of note 20 above, that "Allegiance is owed to their Sovereign Lord the King by his natural born subjects, so it is by those who, being aliens, become his subjects by denisation or naturalization ; so it is by those who, being aliens, reside within the King's realm..."

the offence of treason to all those who enjoy protection by the state[22]. We agree with the latter approach, as it is only reasonable that protection enjoyed by any person by being present in a state, regardless of his nationality, should be reciprocated at least by abstention from actions endangering the vital interests of the state. Therefore, *the treason offences should apply to all persons who are voluntarily in the HKSAR*

(j) Extra-territorial application

2.17 Many jurisdictions provide that treason offences have extra-territorial application only to those who owe allegiance to the country. As noted above, modern legal thinking favours basing allegiance on the concept of *protection*. On that basis, if a country's national or someone under the continuing protection of the country commits an act of treason in a place outside his country, he would still be triable by his country. The rationale of such an approach is that it would be anomalous if the offender should be left scot-free on his return to the country even if he is known to have committed an act of treason overseas (e g. assisting an enemy at war with the country), the most serious of all offences.

2.18 The question lies in defining who enjoys the protection of the HKSAR and hence by extension that of the state for the purpose of extra-territorial application. One possibility is to confine such application to those who are entitled to consular protection and assistance of the representative offices of the PRC whilst overseas. The idea is that for those who are not so entitled, the reciprocity argument no longer applies. However, this arrangement might give rise to anomalies. For example, a non-Chinese national who is permanently resident in and hence under the protection of the HKSAR (and hence the state), but is not entitled to Chinese consular protection or assistance overseas because of his foreign nationality, could repeatedly go overseas to conspire with a foreign government to launch an invasion of the Mainland from the HKSAR, and would not be caught by the offence of treason on return to the HKSAR.

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[22]See, for example, Canadian Law Reform Commission, *Working Paper 49 Crimes Against the State* (1986) at 56-57 : "Anyone voluntarily present in Canada and benefiting from Canada's protection (whether he is a Canadian citizen, landed immigrant, visitor, and so forth) would be liable for crimes against the state committed in Canada " English Law Commission, *The Law Commission Working Paper No. 72* (1977) at paragraph 54 : "any person, including an enemy alien, who is voluntarily in the UK ...in respect of any act of treason in the UK ...but excluding any foreign diplomatic representative or a member of an invading or occupying force." Australian Committee on Review of Commonwealth Criminal Law, *Fifth Interim Report* (1991) at paragraph 31 34 : "any person (including an enemy alien) voluntarily in Australia."

The technical and temporary "absence" of a permanent resident from Hong Kong should not outweigh the fact that the person's family and properties in the HKSAR continue to enjoy protection by the HKSAR In addition, many of his statutory rights, for example, his right of abode, continue to be protected even when he is temporarily outside the HKSAR. On balance, therefore, it would seem more logical *to subject all HKSAR permanent residents to the extra territorial application of treason offences in respect of their actions outside the HKSAR*

Chapter 3

Secession

I. Current Laws

There is no specific offence termed "secession" under existing laws in the HKSAR[23].

II. Considerations and Proposals

(a) General

3.2 Secession is defined by political scientists as "the formal withdrawal from an established, internationally recognized state by a constituent unit to create a new sovereign state"[24]. Generally speaking, secession involves the refusal on the part of a distinct, constituent community to recognize the sovereignty of the existing political authority, and to create a new independent state with its own geographical territory, thereby necessitating a change in internationally recognized boundaries. The law on acts of secession in individual jurisdictions is determined by the constitutional situation of individual states. Unitary states do not provide for the possibility of secession in their constitutions. For example, Article 52 of the Constitution of our country specifically provides that all citizens of the PRC have the responsibility of safeguarding national unity. Federal states, on the other hand, may have a constitutional mechanism for a constituent part of the federal union to secede

[23] It may be argued that secession is covered by the existing section 2(1)(c)(i) of the Crimes Ordinance (Cap 200), but since the term "Her Majesty's other dominions" is peculiar to the United Kingdom and has not been dealt with in section 6 of the Hong Kong Reunification Ordinance, there is no certainty that the term automatically becomes "any part of Chinese territory" after the Re-unification

[24] See Viva Ona Bartkus, *The Dynamic of Secession* (Cambridge Cambridge University Press, 1999)

from the union However, to our knowledge, no federal states allow the **unilateral** secession of their constituent parts For example, the Supreme Court of Canada has declared that neither the provincial government of Quebec nor the Quebec legislature has a legal right under Canadian constitutional law or under international law to unilaterally secede Quebec from Canada[25]

3.3 Some jurisdictions have expressly outlawed secession. For example, in France, the country's territorial integrity is part of the fundamental interests of the nation protected by the law on treason[26]. In Germany, the offence of high treason includes attempts to detach a part from the territory of the Federal Republic[27] Pakistan also has specific offences against depriving the country of its sovereignty over any part of its territory[28].

3.4 The actual development of the law on secession of individual countries is determined to a large extent by the history and special circumstances of the country in question. Where there are, within a particular country, distinct, discontented communities associated with a geographical territory in respect of which they intend to establish new independent states, the country in question has a pressing need to formulate clear policies and laws on secessionist attempts The need for specific legislation to proscribe secessionist attempts or acts is particularly acute where such actions have become violent or could result in the fragmentation of a country, or threaten its unity or peace.

(b) The importance of countering secessionist activities

3.5 Nations provide their nationals, and others who lawfully reside in the nations, protection from foreign attacks or coercion, stability, peace and security, apart from other benefits. Preserving the territorial integrity of the nation lies at the heart of the

[25]In its 1998 ruling, the Supreme Court of Canada also confirmed that the secession of any Canadian province would only be lawful with an amendment to the constitution of Canada Such an amendment would in turn require negotiations in relation to secession involving at least all the provincial governments and the federal government

[26]See Title I, Book IV of the *French Penal Code* regarding the threats against the fundamental interests of the nation

[27]See sections 81 and 92 of the *German Penal Code of 1871* Separation of constituent territories from Germany is regarded as high treason which undermines the continued existence of the state

[28]See section 121A, Chapter VI of the *Pakistan Penal Code*

welfare of a nation, and is a top priority of most countries. Breach of that integrity by force, threat of force or other serious unlawful means almost invariably leads to war, and any efforts to tamper with territorial integrity should be discouraged. For our country, we strongly agree that upholding sovereignty, territorial integrity and unity, and the "One-China" Principle[29] is crucial to the well-being of our country as a whole. We should as a matter of principle staunchly resist moves to break up the nation.

(c) Secessionist activities using violent or other unlawful means

3.6 Acts undermining the territorial integrity of a nation by levying war, use of force, threat of force or other serious unlawful means threaten the unity and underlying security of a country, and are prohibited in one way or another in all jurisdictions. In view of the reprehensible nature of such acts threatening the fundamental well-being of a country, they need to be severely dealt with. For this reason, in line with the practice of many countries, we propose to create specific offences relating to secession attempts where they are undertaken by levying war, force, threat of force or other serious unlawful means. In sum —

(a) *withdrawing a part of the PRC from its sovereignty*; or

(b) *resisting the CPG in its exercise of sovereignty over a part of China*,

by levying war, use of force, threat of force or by other serious unlawful means should be outlawed by the offence of secession.

3.7 To avoid casting the net too wide and including relatively minor offences as secession, the term "serious unlawful means" should only refer to offences of a grave nature. We propose to further elaborate the term to mean 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;

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[29]See Taiwan Affairs Office & Information Office, State Council, *The One China Principle and the Taiwan Issue* (February 2000).

(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.

Adequate and effective safeguards should also be in place to protect the freedoms of demonstration and assembly, etc. as guaranteed by the Basic Law, including peaceful assembly or advocacy.

(d) Organization or support of secessionist activities

3.8 In the HKSAR, because of our proximity to the Mainland, individuals or groups of individuals could become involved in organizing and supporting secessionist activities on the Mainland. Such activities, which involve making use of Hong Kong's free and open environment as a base against national security and territorial integrity, should be prohibited. Any secessionist activities against our country would likely involve some form of organization. To deal with such activities, we will discuss the proscription of organized secessionist activities in Chapter 7.

(e) Inchoate or accomplice acts

3.9 In addition to actual acts of secession, the related inchoate and accomplice acts should be dealt with. Given the very serious threat of secession to the country, we propose *to provide for statutory offences in respect of attempting and conspiring to commit the substantive secession offences*. Similarly, *the general law regarding aiding and abetting, and counselling and procuring the commission of offences should also be codified as statutory offences where secession is concerned*. As with the approach in dealing with the treason offences, incitement to secession will be dealt with in Chapter 4.

(f) Extra-territorial application

3.10 Regarding the territorial application of the secession offences, it is considered that, as for treason offences, those who enjoy the protection of the HKSAR and

hence the state should have a reciprocal duty to safeguard the national security and territorial integrity of the state. In other words, *secession offences should apply to all persons who are voluntarily in the HKSAR, and have an extra-territorial effect on HKSAR permanent residents in respect of their actions outside the HKSAR.*

3.11 Furthermore, commission of secession, a major crime against the state, is not limited to those owing "allegiance" to it. We need to avoid the anomalous situation that a foreigner who is known to have plotted a major crime against the state whilst outside the HKSAR being left untouched when he transits through or visits the HKSAR. In international law, well-established principles which are applicable to such situations include —

(a) the principle of objective territoriality, which allows a place to assume jurisdiction where the result or effects of the crime are sustained in that place[30]; and

(b) the protective principle, which applies if the conduct abroad threatens the security, integrity or the proper functioning of the government of the place initiating the prosecution[31].

3.12 Presently, at common law, an attempt, conspiracy or incitement to commit an offence in Hong Kong is an offence here even though it took place elsewhere. Furthermore, under the Criminal Jurisdiction Ordinance (Cap. 461), HKSAR courts have jurisdiction over various offences of fraud and dishonesty even if they do not take place in the HKSAR, as long as a specified "link"[32] with the HKSAR is

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[30]See Geoff Gilbert, *Aspects of Extradition Law* (Kluwer Academic Publishers, 1991) p.41.

[31]See Karl M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International Ltd , 1996) at 109.

[32]The Criminal Jurisdiction Ordinance provides that the HKSAR courts have jurisdiction over offences included in the Ordinance in the following cases —

(a) if any of the conduct (including an omission) or part of the results that are required to be proved for conviction of the offence takes place in the HKSAR; or

(b) if there has been an attempt to commit the offence in the HKSAR, whether or not the attempt was made in the HKSAR or elsewhere and irrespective of whether it had an effect in the HKSAR; or

(c) if there has been an attempt or incitement in the HKSAR to commit the offence elsewhere; or

(d) if there has been a conspiracy to commit in the HKSAR the offence wherever the conspiracy is formed and whether or not anything is done in the HKSAR to further or advance the conspiracy; or

established. In view of the considerations and the international law principles on extra-territoriality above, we consider that these common law and statutory approaches should be adopted to apply to all persons who are not HKSAR permanent residents for their actions outside the HKSAR in respect of the secession offences Thus, in addition to the application in paragraph 3.10 above, *secession offences should have an extra-territorial effect on all persons in respect of their actions outside the HKSAR, if such actions have a "link" with the HKSAR, either under the above common law principle or as set out in the Criminal Jurisdiction Ordinance.*

(e) If there has been a conspiracy in the HKSAR to do elsewhere that which if done in the HKSAR would constitute the offence, provided that the intended conduct was an offence in the jurisdiction where the object was intended to be carried out

Chapter 4

Sedition

I. Current Laws : Summary

Sections 9 to 14 of Part II of the Crimes Ordinance deals with what may broadly be categorized as seditious acts The following summary of these sections has taken into account the provisions of the Interpretation and General Clauses Ordinance as amended by the Hong Kong Reunification Ordinance.

4.2 Sections 9 and 10 of the Ordinance deal with acts done with a "seditious intention". The latter term is defined in section 9(1) of the Ordinance as an intention to —

(a) bring into hatred or contempt or to excite disaffection against the CPG or other competent authorities of the PRC[33] or the HKSARG or the government of any part of the sovereign's dominions, or

(b) excite Chinese nationals or HKSAR inhabitants[34] to attempt to change, otherwise than by lawful means, any other legally established matter in the HKSAR; or

(c) bring into hatred or contempt or excite disaffection against the administration of justice in the HKSAR; or

(d) raise discontent or disaffection among Chinese nationals or HKSAR inhabitants[35]; or

(e) promote feelings of ill will and enmity between different classes of population of the HKSAR; or

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[33]The original term was "the person of Her Majesty" See note 10

[34]The original term was "Her Majesty's subjects or Inhabitants of Hong Kong"

[35]Ditto

(f) incite persons to violence, or

(g) counsel disobedience to law or to any lawful order

4 3 Under section 10 of the Ordinance, it is an offence to —

(a) do or attempt to do, or make any preparation to do, or conspire with any person to do any act with a seditious intention;

(b) utter any seditious words;

(c) print, publish, sell, offer for sale, distribute, display or reproduce any seditious publication (i.e , a publication with seditious intention); or

(d) import any seditious publication

This offence is punishable on first conviction by a fine of $5,000 and imprisonment for two years.

4.4 It is also an offence, punishable on first conviction by a fine of $2,000 and imprisonment for one year, for a person to have any seditious publication in his possession without lawful excuse. Section 14 further provides for the removal of seditious publications In addition, section 32(1)(h) of the Post Office Ordinance (Cap. 98) provides that no person shall post any seditious publication The offence is punishable by a fine of $20,000 and imprisonment for six months

4.5 The Crimes Ordinance expressly provides that an act, speech or publication is not seditious by reason only that it intends to —

(a) show that the CPG or other competent authorities of the PRC[36] has been misled or mistaken in any of its measures, or

(b) point out errors or defects in the government or constitution of the HKSAR or in its legislation or in the administration of justice with a view to remedying such errors or defects, or

(c) persuade Chinese nationals or HKSAR inhabitants[37] to attempt to procure by lawful means the alteration of any legally established matter; or

[36] The original term was "Her Majesty" Please see note 10

[37] Please see note 34

(d) point out, with a view to their removal, any matters that are producing or have a tendency to produce feelings of ill will and enmity between different classes of the population of the HKSAR

4.6 In terms of procedural safeguards, section 11 provides that prosecution for the offence of sedition must be brought within six months of the commission of the offence, and be with the written consent of the Secretary for Justice Section 12 further provides that no person shall be convicted of an offence of sedition on the uncorroborated testimony of one witness.

4.7 Sections 8 and 13 of the Crimes Ordinance deal with applications for search warrants in respect of premises for evidence of incitement to disaffection and sedition offences. The application has to be made to a judge or magistrate.

4.8 The offences in the Crimes Ordinance relating to seditious activities are based on a common law offence. It has been clearly established that the common law offence is committed only if the person with the seditious objective intends to achieve that objective by causing violence or creating public disorder or public disturbance. However, that element of the common law offence is not set out in the Crimes Ordinance and, according to a Hong Kong case decided in 1952, such legislation is not to be construed according to the common law but on its own terms[38]. But this judicial decision must now be viewed in the light of the constitutional guarantee of freedom of speech in Article 27 of the Basic Law, and Article 19 of the ICCPR as applied to the HKSAR by Article 39 of the Basic Law. It is therefore highly likely that the court will read into the legislation the common law element

II. Considerations and Proposals

(a) Need for crimes of sedition

4 9 We are aware of doubts as to the place that crimes of sedition should occupy in a modern criminal code. It has been argued, for example, that sedition offences could be abused to curb freedom of expression or persecute political dissenters, especially if the offences are cast widely Some have also argued that, if it is required

[38] *Fei Yi-ming v R* (1952) 36 HKLR 133

that the intention to incite violence or public disorder or disturbance be present (paragraph 4 8 above), the defendant would likely have committed incitement to commit other offences, e g those against the person or property, or those against unlawful assembly It should therefore be sufficient for his misconduct to be dealt with by these latter offences, and no specific offence of sedition should be necessary

4 10 While it is universally accepted that the freedom of expression, in particular the right to voice dissenting opinions, is a fundamental right in modern democratic societies, it is also widely recognized that the fundamental national security interests of the state and the stability of the state may sometimes be seriously endangered by verbal or written communications, including those conveyed electronically Examples would include a speech inciting others to commit an offence endangering the national security interests of the state, or a publication calling on the people to attack the forces of law and order The possible serious consequences of seditious acts to the security and stability of lawfully established government and hence to society in general have been recognized for centuries and cannot be under estimated Experience round the world, and the retention of sedition as a serious criminal offence in many jurisdictions, argue strongly in favour of retaining sedition as a specific offence against the state, in order to protect the security and stability of the state and the HKSAR, and hence society at large. This would be in keeping with the practice adopted by the most liberal and democratic jurisdictions The crux lies in striking a balance between proscribing such highly damaging communications and protecting the freedom of expression

(b) The offence of sedition

4.11 It would be useful to note that the term "sedition" is rendered as "煽動叛亂" in the Chinese version of Article 23 of the Basic Law "煽動" is normally understood as "incite", "fan" or "instigate", while "叛亂" as "rebellion" or "armed rebellion". "煽動叛亂" may therefore be translated as "incitement to [armed] rebellion" "Sedition", in common law jurisdictions, is commonly understood to involve incitement of resistance to lawful authority[39] Thus, the two terms carry essentially similar meanings Under both Mainland laws and Hong Kong's legal

[39]At common law, "disturbing constituted authority" is a necessary element for the offence "Constituted authority" refers to "some person or body holding public office or discharging some public function of the state". See *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 Q B 429

system, the offence of "sedition" involves incitement to actions, armed or otherwise, against lawful authority.

4.12 The sedition offence under Article 23 of the Basic Law should focus on serious cases which endanger the security or stability of the state, instead of isolated incidents of limited violence or disturbance of public order. The existing provisions under the laws of Hong Kong are sufficient to deal with ordinary cases of violence or disturbance of public order.

4.13 The commission of treason, secession and subversion offences are obviously the most serious type of attacks on lawful authority and fundamental national security interests. As discussed earlier, the act of inciting others to commit these substantive offences is itself already an offence under common law. Nevertheless, we consider it necessary to underscore the seriousness of such acts by codifying these incitement offences in the context of sedition. Similarly, the overall stability of the state and that of the HKSAR are vital to the security of the state and the implementation of the "one country, two systems" principle, and merit protection by specific provisions. Thus, we propose *to provide that inciting others —*

(a) *to commit the substantive offence of treason, secession or subversion*; or

(b) *to cause violence or public disorder which seriously endangers the stability of the state or the HKSAR*

amounts to sedition.

4.14 Therefore, the mere expression of views, or mere reports or commentaries on views or acts of others, will not be criminalized, unless such expression, report or commentary incites others to achieve a purpose of endangering the state through levying war, force, threat of force or serious unlawful means, or incites violence or public disorder which seriously endangers the stability of the state or the HKSAR. We are satisfied that our proposals are in keeping with Article 19 of the ICCPR, which guarantees the right to freedom of expression, subject to necessary restrictions for the purpose of, inter alia, the protection of public order and national security.

(c) Seditious publications

4.15 The acts of dealing with a seditious publication, covered by section 10 of the Crimes Ordinance, are conceptually different in nature from the crime of incitement.

There is a case for dealing with them separately Offences targeting publications, when the persons involved may not have the intention to incite offences against the state, are a direct restriction of freedom of expression, and should therefore be narrowly defined in order to comply with the necessity and proportionality criteria as required under the ICCPR.

4.16 We therefore propose to restrict the scope of the offence to publications that would incite the crime of treason, secession or subversion only. If the act of dealing with seditious publications is part of an act of incitement, it may be covered by the offence proposed in paragraph 4.13 above In addition, if, for example, someone prints a publication for some other reasons such as profit, while being fully aware that the publication would incite offences that endanger national security, we believe that such dealings should also be suitably regarded as criminal acts.

4.17 We propose therefore to create a separate offence of dealing with seditious publications. To protect the unwitting agent, we propose that the offence should include an element of knowledge or reasonable suspicion. Thus *it should be an offence if a person —*

(a) *prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication*; or

(b) *imports or exports any publication,*

knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion. To cater for cases where such publications are dealt with under legitimate circumstances, such as academic research or news reporting, *a defense of "reasonable excuse" should be provided.*

4.18 *There should continue to be a separate offence of possession of seditious publications with the mental element and defence that are proposed in paragraph 4.17 above.* With this offence and that in paragraph 4 17 in place, *there should be no need to retain section 32(1)(h) of the Post Office Ordinance regarding the posting of seditious publications.*

(d) Safeguards

4.19 Strictly speaking, with the incorporation of the intention to cause violence or create public disorder as described above in the definition of the sedition offence, *the*

current defences in section 9 of the Crimes Ordinance (please see paragraph 4 5) are not absolutely necessary. However, for the purpose of reassurance, we propose that *they should be retained.*

4.20 Currently, *section 12 of the Crimes Ordinance* provides that no person shall be convicted of sedition offences on the uncorroborated testimony of one witness. This requirement for corroboration goes against the general principle that it is the quality and not the quantity of evidence that should count in a criminal trial. The approach in most common law jurisdictions has been to move away from this requirement. At the same time, we recognize that a similar requirement still exists in the sedition laws of many common law jurisdictions such as Canada, Australia and New Zealand. The paucity of sedition cases brought to the court in recent years also means that there is not much empirical experience to support either its removal or its retention. For the sake of reassurance, therefore, we propose that *the existing requirement should be retained.*

(e) Extra-territorial application

4.21 Sedition involves the act of inciting others to commit crimes against the state and the HKSAR. *Prima facie*, the objective territoriality and protective principles as discussed in Chapter 3 should similarly apply. In addition, at common law English courts have jurisdiction over an incitement offence committed abroad provided that it was intended to result in the commission of an offence in England[40]. This being so we suggest that *the HKSAR should have jurisdiction over offences of sedition committed by an HKSAR permanent resident anywhere. In the case of other persons the HKSAR should have jurisdiction over extra-territorial conduct only if it is intended or likely to incite the offence of treason, secession or subversion, or incite violence or public disorder as described in paragraph 4.13, in the HKSAR, or has a "link" with the HKSAR of the kind set out in the Criminal Jurisdiction Ordinance*[41]. In other cases, it should not be subject to criminal sanctions under Hong Kong laws.

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[40]See *DPP v Stonehouse* [1978] AC 55, [1977] 2 All ER 909, HL; *Somchai Liangsiriprasert v Government of the USA* [1991] 1 AC 225, [1990] 2 All ER 866, and *Archbold — Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell Limited, 2002) section 33-74

[41]See paragraph 3 12 of Chapter 3.

Chapter 5
Subversion

I. Current Laws

In the context of the protection of state institutions, subversion is commonly understood to involve overthrowing or undermining, either overtly or covertly, the constitution, the constitutionally established government, or system of government by internal or domestic elements. There is no specific offence termed "subversion" under existing laws of the HKSAR. However, acts aimed at overthrowing the government are covered by existing provisions on treason, for example, that on levying war to "depose the sovereign".

II. Considerations and Proposals

(a) General

5.2 Many jurisdictions have law against acts of overthrowing or undermining the constitutionally established government, the constitution and/or the system of government. The details vary. For instance, in Canada, it is treason to use force or violence for the purpose of overthrowing the government[42]. In Australia, it is treachery to overthrow the constitution of Australia by revolution or sabotage; or to overthrow by force or violence the established government[43]. Similarly, in Germany, a person commits an offence of high treason against the federal government if, by violence or the threat of violence, he undermines the stability of Germany or changes the system of government established by the constitution[44].

[42]See section 46(2)(a) of the *Canadian Criminal Code*

[43]See section 24AA at Part 2 of the *Australian Crimes Act 1914*

[44]See section 81 of the *German Penal Code of 1871*

5.3 Although there are not many examples of offences termed "subversion" in common law jurisdictions, the concept is by no means alien. For example, the UK government has adopted the following definition of the term "subversion" —

> "actions which are intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means"[45].

In Canada, the term "subversive or hostile activities" is defined as, inter alia, "activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means"[46].

(b) The offence of "subversion"

5.4 The essence of any subversion offence should therefore be the protection of the basic system of government and the constitutionally or legally established government.

5.5 The basic system of the state, as well as the PRCG, which includes the National People's Congress, the Central People's Government and other state organs, are the key institutions of the state. Overthrowing or undermining them by illegal means should be viewed most seriously. Conceptually such acts are akin to treason, except that these acts may or may not be perpetrated in collusion with foreign

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[45]Protection of national security against threats from such activities is one of the functions spelled out for the UK Security Service (MI5) in the UK Security Service Act According to the official website of the MI5, "The Security Service Act does not use the term 'subversion', but provides a definition of it by reference to *actions which are intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*"

[46]Other meanings of the term "subversive or hostile activities" under the Canadian Access to Information Act are as follows —

(a) espionage against Canada or any state allied or associated with Canada;

(b) sabotage;

(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states;

(d) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada; or

(e) activities directed toward threatening the safety of Canadians, employees of the government of Canada or property of the government of Canada outside Canada.

elements. Moreover, we are keenly aware that acts of subversion are not confined to acts involving the use of force. Indeed, with the rapid development of technology, a serious threat to the country's security and stability might come from illegal acts employing non-violent means, such as electronic sabotage. We therefore propose *to make it an offence of subversion —*

(a) *to intimidate the PRCG; or*

(b) *to overthrow the PRCG or disestablish the basic system of the state as established by the Constitution,*

by levying war, use of force, threat of force, or other serious unlawful means[47].

5.6 As with secession (see Chapter 3), it is imperative to ensure that the HKSAR will not be used as a base for supporting subversive activities in or against the Mainland. The means to proscribe organized activities aimed at endangering national security will be discussed in Chapter 7.

(c) Inchoate or accomplice acts

5.7 In addition to the substantive subversion offence, inchoate offences such as attempts to commit subversion, and accomplice offences such as aiding and abetting in relation to the substantive offence should be dealt with. In view of the serious consequences of such offences, we propose *to create statutory offences of attempting, conspiring, aiding and abetting, and counselling and procuring the commission of the subversion offence.*

(d) Extra-territorial application

5.8 We consider that the principles relating to extra-territorial conduct proposed for the secession offences (Chapter 3) should also apply to subversion offences. Thus subversion offences should *apply to all persons who are voluntarily in the HKSAR, and have an extra-territorial effect on —*

[47] The term "serious unlawful means" should have a similar meaning as that proposed in respect of secession, including the adequate and effective safeguards of guaranteed rights, described in paragraph 3.7.

(a) *HKSAR permanent residents in respect of their actions outside the HKSAR, and*

(b) *all other persons in respect of their actions outside the HKSAR if such actions have a "link" with the HKSAR either under the common law principle or as set out in the Criminal Jurisdiction Ordinance*

Chapter 6

Theft of State Secrets

I. Current Laws : Summary

At present, state or government secrets are protected by the Official Secrets Ordinance (Cap 521) There are two main categories of offences under the Ordinance — espionage and unlawful disclosure of protected information

(a) Espionage

6 2 Under section 3 (on spying), a person commits an offence if he, *for a purpose prejudicial to the safety or interests of the PRC or the HKSAR*[48] —

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters, a 'prohibited place [49],

(b) makes a sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to an enemy, or

(c) obtains, collects, records or publishes, or communicates to any other person, any secret official code word or password, or any sketch, plan, model or note or other document or information that is likely to be or might be or is intended to be directly or indirectly useful to an enemy

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[48]The original term was "the United Kingdom or Hong Kong"

[49]Section 2(1) of the Official Secrets Ordinance provides a long definition of the term prohibited place" It includes for example any work of defence arsenal naval or air force establishment of the government, any place for building or storing munitions for the government any place declared to be a prohibited place by the Chief Executive and any railway road gas water or electricity works declared to be a prohibited place

6.3 Under section 4, it is an offence to harbour a person who has committed or is about to commit a section 3 offence (paragraph 6.2 above)

6.4 Under section 5, it is an offence for a person to be involved in any falsification of statements, forgery or unauthorized use of uniforms etc. for the purpose of gaining admission to a prohibited place, or for any other purpose prejudicial to the safety or interests of the state or the HKSAR.

6.5 Section 6 prohibits the unauthorized use of official documents for any purpose prejudicial to the safety or interests of the state or the HKSAR.

6.6 A person convicted under section 3 is punishable by imprisonment for 14 years. For other offences, the penalty is imprisonment for 2 years on conviction on indictment or a fine at level 4 and imprisonment for 3 months on summary conviction.

(b) Unlawful disclosure

6.7 Section 13 deals with breaches by *members of the security and intelligence services*. It is an offence for any such member to disclose, without lawful authority, any information, document etc. relating to security or intelligence that is or has been in his possession by virtue of his position or in the course of his work.

6.8 *A public servant or a government contractor* commits an offence if he, without lawful authority, makes a *damaging disclosure* of any information in his possession by virtue of his position, that relates to security or intelligence (section 14), defence (section 15) or international relations (section 16) The circumstances constituting a damaging disclosure vary depending on the nature of the information in question. For security and intelligence information, a disclosure is damaging if it causes damage to the work of the security or intelligence service. For defence information, a disclosure is damaging if it damages the capability of the armed forces to carry out their tasks; or leads to loss of life or injury to members of the armed forces or serious damage to the equipment or installations of those forces For both defence and international relations information, a disclosure is damaging if it endangers the interests of either the state or the HKSAR which are located elsewhere, seriously obstructs the promotion or protection of those interests or endangers the safety of Chinese nationals[50] or HKSAR permanent residents elsewhere. It is also a damaging disclosure if the

[50] The original term was "British nationals".

information disclosed is of such a nature that its unauthorized disclosure would likely have any of the effects described above

6.9 Under section 17, it is an offence for a public servant or a government contractor to disclose, without lawful authority, any information in his possession by virtue of his position if the disclosure would actually or would be likely to —

(a) result in the commission of an offence;

(b) facilitate an escape from legal custody; or

(c) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

6.10 Under section 18, it is an offence for a person who comes into possession of information protected under sections 13 to 17 as a result of unlawful disclosure or on terms of trust to disclose it without lawful authority, if he knows or has reasonable cause to believe that the information disclosed is protected information and that the disclosure would be damaging.

6.11 Under sections 19 and 20, it is an offence for a person to disclose, without lawful authority, information resulting from spying or communicated in confidence by the CPG or the HKSARG[51] to a territory, state or international organization

6.12 A person convicted of an offence for unlawful disclosure is liable to imprisonment (from 3 months to 2 years), and a fine (from level 4 to $500,000), depending on the type and seriousness of the offence

II. Considerations and Proposals

(a) General

6.13 It is accepted that open government and a high degree of transparency of government actions encourages participation in public affairs and enhances accountability. However, some information has of necessity to be kept confidential to protect the security of the country and the people, and to ensure the smooth running

[51] The original term was "the Government of the United Kingdom or Hong Kong"

of government. Given the importance of such information to the country's security, there should be suitable legal sanctions against its unauthorized access or disclosure At the same time, in order to safeguard freedom of expression and information, it is important to afford protection only to truly deserving categories of information, and to clearly define the means of protection.

6.14 In keeping with the Article 23 requirement, we propose to focus on the protection of state secrets, i.e. information the unauthorized disclosure of which will be damaging to the state, rather than the protection of all Government information as such. We consider that the existing provisions of the Official Secrets Ordinance already strike an appropriate and delicate balance between the need for open government and for protection of state secrets. However, Article 23 should not be interpreted as implying that information other than state secrets needs no protection. We therefore propose that, subject to the refinements below, the Ordinance should be retained in its present form.

(b) Categories of Information that require protection

6.15 The Official Secrets Ordinance does not use the term "state secret". Where espionage is concerned, the protected information as such is not defined, but the *purpose* of obtaining the information and related acts has to be one *prejudicial to the safety or interests of the state or the HKSAR* Where unlawful disclosure is concerned, the following types of information are protected —

(a) *security* and *intelligence* information;

(b) *defence* information;

(c) information related to *international relations*; and

(d) information related to the *commission of offences* and *criminal investigations*.

6.16 The apparently asymmetrical treatment of "spying" and "unlawful disclosure" under existing legislation is not hard to understand given the different nature of the offences involved. "Spying", which generally refers to the procurement of information useful to a foreign power and prejudicial to state security, is regarded worldwide as a serious national security offence meriting heavy punishment. In contrast, in order to preserve the balance between protecting state security and promoting open government, it is considered that unauthorized disclosure of official

information should only be criminalized where the information is of a sensitive nature and the unauthorized disclosure is damaging

6.17 Another point of detail concerns information protected from unlawful disclosure. The Official Secrets Ordinance already sets out some specific targets of protection (paragraph 6.15). With one exception, we believe that they all fit the description of state secrets. The exception concerns information related to the commission of offences and investigations. As presently cast, this may relate to all offences and investigations; thus information not necessarily related to secrets of the state may also be covered. Although not directly related to the objects of the present exercise which are to protect sovereignty, territorial integrity, unity and security, the present provisions of the Official Secrets Ordinance protecting information relating to all offences and investigations have proved a useful deterrent and should be retained

6.18 Section 16 of the Official Secrets Ordinance relates to the disclosure of any information etc. relating to "international relations". In accordance with this provision, prior to the Re-unification, information relating to the relationship between Hong Kong and the Mainland was protected. Following the Re-unification it would not be appropriate to protect such information under the rubric of "international relations". To ensure that information relating to the relationship between the Central Authorities of the state and the HKSAR continues to be protected, we propose *to create a new class of protected information — "relations between the Central Authorities of the People's Republic of China and the HKSAR", to protect such information from unauthorized disclosure.*

6.19 To summarize, therefore, we propose that —

(a) *where spying is concerned, the information to be protected should include that which is likely to be useful to an enemy, and is obtained or disclosed for a purpose prejudicial to the safety or interests of the state or the HKSAR*; and that

(b) *where unlawful disclosure is involved, the following categories of information should be protected —*

(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*

(c) Means of protection

6.20 Article 23 refers to the "theft" of state secrets. In relation to information, however, the concept of theft cannot be applied in the same way as to the theft of other properties. Generally speaking, the legal concept of theft involves the permanent deprivation of property belonging to someone. With information, the question of ownership and permanent deprivation normally does not arise. It is possible to "steal" information without stealing the medium through which the information is stored or kept. In addition, memory or knowledge cannot easily be purged.

6.21 Given the considerations above, we believe that state secrets should be protected by preventing —

(a) unauthorized access to, transmission of or dealing with protected information; and

(b) unauthorized disclosure of protected information.

To a large extent, the present approach of the Official Secrets Ordinance already tallies with this thinking. Part II of the Ordinance seeks to prevent unauthorized access to protected information through spying. Section 2 specifically provides that obtaining or retaining any document, note etc. includes copying or causing to be copied such document, note etc. In addition, communication of such a document includes the transfer or transmission of the document. Part III seeks to prevent unauthorized disclosure of both information obtained from spying, as well as other information specified in Part III. We believe that *as far as spying is concerned, the present protection under the Ordinance is adequate as it covers access to, transmission of, dealing with and disclosure of information resulting from spying*

6.22 As regards information that is protected from unlawful disclosure, however, the Official Secrets Ordinance only prohibits disclosure of such information either by people who have come to possess such information in the course of performing their duties or by those who have obtained the information from such people. It does not provide sanctions against the unauthorized access to, transmission of and dealing with such information. We consider that the present loophole of a damaging disclosure being made by a person who obtains protected information

through unauthorized access, whether by himself or through another person, ought to be plugged. We should avoid situations where, for example, a hacker may openly sell stolen protected information to a publisher who may then openly publish the information for profit, without being caught by Part III of the Official Secrets Ordinance, even though the disclosure is highly damaging. Thus we propose *there should be a new offence of making an unauthorized and damaging disclosure of information protected under Part III of the Ordinance that was obtained (directly or indirectly) by unauthorized access to it.* The existing damaging disclosure test as well as the defences in section 18 should, with necessary modification, apply to the new offence.

(d) Application

6.23 As regards the *persons* to whom the different provisions of the Ordinance apply, we believe that the current arrangement is by and large along the right lines. We note, for example, that under section 12, the definition of the term "public servant" includes any person employed in the civil service. We consider that this is appropriate. Part III of the Official Secrets Ordinance lays down clear guidelines as to when unauthorized disclosure is an offence. Except with members of the security and intelligence services who disclose security or intelligence information they possess by virtue of their position or in the course of their work, *a damaging disclosure test has to be satisfied.* The more onerous requirement imposed on members of the security and intelligence services is well justified, given the sensitivity of their work. We consider that *the present arrangement should continue.*

6.24 We propose to introduce two technical amendments as regards the application of the Official Secrets Ordinance. We have identified a potential loophole in section 18(2) of the Ordinance. Currently it refers to "a public servant or government contractor" only, and not to a former public servant or government contractor. This is to be contrasted with sections 14 to 17 of the Ordinance, all of which refer to "a person who is or *has been* a public servant or government contractor" (emphasis added). The ambiguity was highlighted in a UK case in 1989[52]. We propose *to amend section 18(2)*

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[52] Section 18(2) of the Official Secrets Ordinance is modelled on section 5(1) of the UK Official Secrets Act 1989. In *Lord Advocate v The Scotsman Publications Ltd* [1989] 3 WLR 358, Lord Jauncey of Tullichettle said, "Section 5(1) does not refer to past Crown servants, as does section 1(1) and (3). Upon the assumption that section 5 was intended to apply to confidential information deriving from

to put it beyond doubt that the provision applies to information deriving from both present and past public servants and government contractors

6.25 The other proposed amendment relates to government contractors It is arguable whether the present definition[53] covers *agents and informants* engaged by the Police to assist in their security and intelligence work Some of these agents and informants work for a reward, and others provide their service solely as a civic duty. While paid agents could presumably count as government contractors, the case regarding informants is more doubtful. Given that these agents and informants may come across protected information in the course of performing their service, we believe that they *should also be expressly covered by the definition of "government contractors" under the Ordinance.*

(e) Extra-territorial application

6.26 *Extra-territoriality already applies to most offences related to unauthorized disclosure by virtue of section 23 of the Official Secrets Ordinance.* It is an offence for any Chinese national, HKSAR permanent resident or a public servant to do any act outside the HKSAR should that be an offence under Part III of the Ordinance (except for a few provisions) if it were done in the HKSAR *There is a continued need for such a provision* in order to cover situations where, for example, a public servant of the HKSARG discloses protected information whilst overseas. As pointed out in paragraph 6.24, public servants should include ex-public servants

6.27 At present, there is no express statutory provision to apply spying offences (Part II of the Official Secrets Ordinance) extra territorially. We have considered if this should be changed. In theory, consideration may be given to making express provision for such offences to have extra-territorial application where the information involved in the act of spying concerns the safety or interests of the state, including that of the HKSAR. In practice, however, the need for such extra-territoriality effect is likely to be small. Where the spying act involves communication or unlawful disclosure (Part III of the Ordinance), extra-territorial application already applies

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past as well as present members of the security services, an assumption which may well be unjustified having regard to the obscurity of the language .. "

[53] Section 12(2) of the Official Secrets Ordinance defines "government contractor" as "any person who is not a public servant but who provides, or is employed in the provision of, goods or services [sic] for the purposes of the Crown in right of the Government of Hong Kong [sic]"

in most cases. Where only foreign agents are involved, it is questionable what real effect extra-territorial application would have It is implausible for a foreign government to surrender its secret agents to another government for trial on spying charges. In addition, given the highly clandestine nature of spying, and the intricate international relations involved, it is highly unlikely that the HKSAR on its own will have sufficient information to investigate and hence bring charges against spying activities conducted entirely outside of the HKSAR. We *do not* therefore propose *to apply extra-territoriality to spying offences* Correspondingly, the definition of "prohibited place" for the espionage offence should be confined to those under the territorial jurisdiction of the HKSAR.

Chapter 7

Foreign Political Organizations

I. Current Laws : Summary

At present, the main legislation dealing with foreign political organizations (FPOs) is the Societies Ordinance (Cap. 151).

7.2 Under section 5 of the Societies Ordinance, a local society, or a branch thereof[54], has to apply to the Societies Officer for registration or exemption from registration within one month of its establishment. The term "local society" is defined comprehensively to mean any society organized and established in the HKSAR or having its headquarters or chief place of business in the HKSAR. In addition, a society is deemed to be established in the HKSAR if any of its office-bearers or members resides or is present in the HKSAR, or if any person in the HKSAR manages or assists in the management of the society or solicits or collects money or subscription on its behalf. However, the registration (or exemption from registration) requirement does not apply to certain entities set out in the Schedule to the Ordinance. These entities include, for example, companies registered under the Companies Ordinance (Cap. 32), co-operative societies registered under the Co-operative Societies Ordinance (Cap. 33) and trade unions registered under the Trade Unions Ordinance (Cap. 332)[55].

7.3 If a society is a political body[56] that has a connection[57] with an FPO[58] or a

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[54]Henceforth the reference to "society" should be taken to mean a society and/or its branch(es).

[55]Others include pupils' associations, companies or associations constituted pursuant to or under any Ordinance or other legislation, Chinese temples, credit unions, building management corporations, recreation groups and unincorporated trusts.

[56]Please see paragraph 7.4 below.

[57]Please see paragraph 7.7 below.

[58]Please see paragraph 7.5 below.

political organization of Taiwan (TPO)[59], the Societies Officer may —

(a) refuse to register or to exempt from registration the society after consultation with the Secretary for Security (S for S);

(b) cancel the registration or exemption from registration of the society after consultation with S for S; or

(c) recommend to S for S the making of an order prohibiting the operation or continued operation of a society.

These same powers also apply if the Societies Officer reasonably believes that they are necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others.

7.4 The Societies Ordinance defines "political body" as follows —

(a) a political party or an organization that purports to be a political party; or

(b) an organization whose principal function or main object is to promote or prepare a candidate for an election[60].

7.5 The Societies Ordinance defines an FPO as follows -

(a) a government of a foreign country or a political subdivision of a government of a foreign country;

(b) an agent of a government of a foreign country or an agent of a political subdivision of the government of a foreign country; or

(c) a political party in a foreign country or its agent.

Points (a) and (b) above include the government of a foreign country at the sub-national or local level and its agents.

7.6 A TPO is defined as —

(a) the administration of Taiwan or a political subdivision of the administration;

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[59]Please see paragraph 7.6 below.

[60]An election will include an ordinary election or a by election of persons to act as members of the Legislative Council or a District Council.

(b) an agent of the administration of Taiwan or an agent of a political subdivision of the administration; or

(c) a political party in Taiwan or its agent.

7.7 In relation to a local society that is a political body, "connection" is defined to include —

(a) solicitation or acceptance by the society of financial contributions, financial sponsorships or financial support of any kind or loans from an FPO or TPO;

(b) affiliation with an FPO or TPO;

(c) determination of the society's policies by an FPO or TPO; or

(d) direction, dictation, control or participation in the society's decision making process by an FPO or TPO.

7.8 A society that is refused registration or exemption or has had its registration or exemption cancelled is obliged to cease its operation under section 5F(1) of the Societies Ordinance. Failure to comply with this requirement makes every office-bearer liable to a fine at level 3 for a first conviction, and to a fine at level 4 and imprisonment for three months for a second or subsequent conviction. A default fine of $300 is imposed on a daily basis while the offence continues.

7.9 Where the Secretary for Security makes a prohibition order pursuant to a recommendation made by the Societies Officer (paragraph 7.3(c) above), a society will be deemed an "unlawful society" if it continues operation. Its office-bearers will be liable to a fine of $100,000 and imprisonment for three years. Its members, sponsors etc. are punishable by a fine of $20,000 and imprisonment for one year on a first conviction, and a fine of $50,000 and imprisonment for two years on a second or subsequent conviction. There are other related offences of aiding, inciting and procuring the affairs of an unlawful society.

7.10 Under section 15 of the Societies Ordinance, the Societies Officer may require any society to furnish him with such information as he may reasonably require for the performance of his functions under the Ordinance. The information required may include the income, the source of the income and the expenditure of the society. Failure to comply is punishable by a fine of $20,000.

II. Considerations and Proposals

7.11 We believe that the existing provisions of the Societies Ordinance, in particular those governing the definition of "foreign political organizations" and "connections", are sufficient for the purpose of prohibiting foreign political organizations from taking part in the political process of the HKSAR. Many jurisdictions have similar provisions preventing undue influence or interference by foreign political organizations in domestic politics. These provisions should be retained.

7.12 For the purpose of protecting national security, separate provisions are needed to prevent foreign political organizations from conducting political activities in the HKSAR, or establishing ties with local political organizations, that are harmful to national security or unity.

7.13 In fact, organized political activities endangering the security of the state must be proscribed by effective measures, regardless of whether such threats originate from foreign or domestic elements. The existing power under the Societies Ordinance to prohibit the operation of a society on national security grounds already provides effective sanctions against such activities. However, in view of the highly serious and reprehensible nature of activities damaging national security, together with the possibility that such activities would extend beyond the HKSAR and have national-wide effects, more specific measures are needed to address national security concerns.

7.14 We therefore propose *to make it an offence to organize or support activities of a proscribed organization*. The element of knowledge or reasonable suspicion should be included in the offence. The concept of "support" includes, for example, being a member of; providing financial assistance, other property or facilitation to; and carrying out the policies and directives of the proscribed organization.

(a) Proscription mechanism

7.15 Taking into account the above considerations, we propose that the Secretary for Security should be given the power to proscribe an organization, if he or she reasonable believes that this is necessary in the interests of national security or public safety or public order. As with the interpretation of these terms in the Societies

Ordinance, the expressions "public safety" and "public order" are interpreted in the same way as under the ICCPR as applied to Hong Kong, and "national security" means the safeguarding of the territorial integrity and the independence of the state. For our purpose, an organization should be defined as an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure. The power to proscribe an organization may only be exercised if —

(a) the objective, or one of the objectives, of the organization is to engage in any act of treason, secession, sedition, subversion or theft of state secrets (espionage); or

(b) the organization has committed or is attempting to commit any act of treason, secession, sedition, subversion or theft of state secrets (espionage); or

(c) the organization is affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security.

7.16 Regarding (c) above, the HKSAR may not be in a position to determine whether an organization poses a threat to national security, especially for those entities based in Mainland with cells in the HKSAR affiliated with them. Therefore, to a large extent, on the question of whether such a Mainland organization endangers national security, we should defer to the decision of the Central Authorities based on the comprehensive information that it possesses. Formal notification by the CPG that a Mainland organization has been proscribed on national security grounds should be conclusive of the fact that the organization has been so proscribed. Nevertheless, the Secretary for Security must then be satisfied by evidence of the said affiliation, and must reasonably believe that it is necessary in the interests of national security or public safety or public order to ban the affiliated organization, before the power of proscription can be exercised.

7.17 In addition, it should be possible to prohibit the operation of an organization that has a connection with a proscribed organization. The Secretary for Security should be empowered to declare such an organization unlawful, if he or she reasonably believes that this is necessary in the interests of national security, public safety or public order, according to the interpretation of ICCPR, etc. as mentioned in paragraph 7.15 above. It would then be *an offence for anyone to manage or be*

an office-bearer of the unlawful organization 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 In order to avoid casting the net too wide, the concept of "connection" above should be clearly defined to include —

(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*

A similar concept is already comprehensively covered under the Societies Ordinance[61].

(b) Appeal mechanism

7.18 The decision to proscribe and to declare an organization unlawful should be subject to an appeal procedure. To ensure fairness, this procedure should involve two levels. First, points of fact may be appealed to an independent tribunal Second, points of law may be appealed to the court. Given that sensitive information

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[61] In the context of a local society that is a political body, the Societies Ordinance (Cap 151) now defines "connection" as —

(a) if the society or the branch solicits or accepts financial contributions, financial sponsorships or financial support of any kind or loans, directly or indirectly, from a foreign political organization or a political organization of Taiwan,

(b) if the society or the branch is affiliated directly or indirectly with a foreign political organization or a political organization of Taiwan,

(c) if the society's or the branch's policies or any of them are determined directly or indirectly by a foreign political organization or a political organization of Taiwan; or

(d) if a foreign political organization or a political organization of Taiwan directs, dictates, controls or participates, directly or indirectly, in the decision making process of the society or the branch

or intelligence may be involved, the rules of procedures of appeal should protect confidential material and sources from disclosure while ensuring procedural fairness

Chapter 8

Investigation Powers

I. Introduction

The very essence of Article 23 is to protect the sovereignty, territorial integrity, unity and security of the state, and hence the fundamental interests of our country It is therefore important that sufficient powers be provided for investigation into the offences proposed This need is well recognized in many other jurisdictions, where the security and intelligence services are almost invariably given enhanced powers for investigating activities that may harm the nation's fundamental interests At the same time, we are mindful of the need to ensure that the investigation powers are proportionate to and necessary for the offences in question, and are compatible with the requirements of the ICCPR Sufficient safeguards and oversight procedures should be built into the regulatory mechanism

II. Existing Powers

8.2 Some basic investigation powers are already provided in the Police Force Ordinance (Cap. 232). They are applicable to all offences, unless otherwise provided for under specific pieces of legislation. They cover such issues as search and seizure of suspected property, etc. In addition, there are special provisions in some ordinances setting out the circumstances in which certain investigation powers under those ordinances may be exercised For example, sections 8 and 14 of the Crimes Ordinance (Cap. 200) and section 11 of the Official Secrets Ordinance (Cap 521) provide for the circumstances under which search warrants should be used

8 3 We have reviewed *existing provisions governing investigation into treason, sedition and official secrets* in the Crimes Ordinance and Official Secrets Ordinance We consider that, by and large, they continue to be appropriate and *should be retained*,

subject to certain adaptations For example, the criteria for the exercise of the power to remove seditious publications without a court warrant, as at *section 14 of the Crimes Ordinance*, should not be conditioned solely upon whether such publications are visible from a public place. Instead, *such powers should only be exercised in case of great emergency* irrespective of whether the publications are visible to the public, and would be adapted in accordance with the approach in paragraph 8.4 below.

III. Additional Powers

(a) Emergency entry, search and seizure powers

8.4 The existing investigation powers may not always be adequate to cater for the special nature of some Article 23 offences For example, at common law, a police officer can, *inter alia*, enter private premises without a warrant in emergencies in order to stop a crime. However, there are no emergency entry and search powers for the purpose of an investigation. This may well be a major weakness with regard to the investigation of some of the more serious Article 23 offences. Critical evidence for suspected offences could have been destroyed if a search warrant could not be obtained in time.

8.5 We therefore propose that *an emergency entry, search and seizure power should be provided to the police for investigating some Article 23 offences.* 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.

(b) Financial investigation power

8.6 Critical evidence for an investigation could be destroyed if relevant financial information could not be obtained in time. Therefore, *for selected Article 23 offences*

where illicit financial backing may particularly be relevant, we propose that emergency financial investigation powers should be provided. The power should enable the Commissioner of Police, in cases of exceptional emergency and in the interests of national security (the safeguarding of the territorial integrity and the independence of the state) or public safety, to require a bank or a deposit taking company to disclose to him information relevant to the investigation where there is reasonable suspicion that the relevant offence has been committed or is being committed.

(c) Organized and Serious Crimes Ordinance powers

8.7 Some of the more serious Article 23 offences are likely to involve an organized element. For example, it is improbable that an individual could pull off a successful act of subversion or secession single-handedly. The enhanced powers of the Organized and Serious Crimes Ordinance (OSCO) (Cap. 455) should therefore be made available for dealing with these offences. We propose *to include selected Article 23 offences under Schedule 1 to the Ordinance.* Such inclusion would afford the following additional legal powers for dealing with the offences in question.

(a) Witness order

Under section 3 of the OSCO, the Secretary for Justice may make an ex parte application to the Court of First Instance for an order to require a person to answer questions or furnish material that reasonably appears to be relevant to an investigation.

(b) Production order

Under section 4 of the OSCO, the Secretary for Justice or an authorized officer may make an ex parte application to the Court of First Instance for an order to require a person to produce or to grant access to material specified which is likely to be relevant to an investigation.

(c) Search warrant

Under section 5 of the OSCO, an authorized officer may make an application to the Court of First Instance or the District Court for a warrant to search specified premises for the purpose of an investigation where the witness order or production order is not complied with.

There are also other powers such as restraint orders and charging orders on crime proceeds, as well as enhanced sentencing

IV. Offences Requiring Enhanced Investigation Powers

8.8 Annex I sets out the selected Article 23 offences for which enhanced investigation powers (as set out in paragraphs 8 4 to 8.7 above) are proposed and the specific power(s) proposed for each of the offences in question.

Chapter 9

Procedural and Miscellaneous Matters

I. Introduction

This chapter examines the procedures and other miscellaneous matters for dealing with the offences proposed in Chapters 2 to 7

II. Unlawful Oaths and Unlawful Drilling

9.2 *Sections 15 to 17 of the Crimes Ordinance* deal with the administration or taking of unlawful oaths for undertaking various offences such as treason and sedition. There is no record of an offence having been charged under them, and their continued usefulness is doubtful. When a person who takes an oath has the required mental element to be guilty of conspiracy or incitement to commit Article 23 offences, he could be prosecuted for those offences Where there is no such mental element, the person should not be regarded as having committed an offence We therefore consider that these sections are not necessary in respect of treason and sedition or, for that matter, other offences, and suggest that they *should be repealed*.

9.3 Another relevant legislative provision is *section 18 of the Crimes Ordinance* Under this section, it is an offence to train, or be trained, in the use of arms or the practice of military exercises, without the permission of the Chief Executive or the Commissioner of Police. The purpose of such training is not specified in section 18, but the context in which the section is placed makes it clear that it is intended to catch military training for offences against the state This section should have continued usefulness, and accordingly we propose that *it should be retained*

III. Procedures

9.4 The Criminal Procedure Ordinance (Cap. 221) sets out the procedures generally applicable to all cases, unless otherwise specified in specific legislation. With regard to the latter, we have reviewed existing provisions governing procedures for dealing with treason, sedition and official secrets to see whether they require improvement.

(a) Time limits for bringing prosecutions

9.5 Sections 4(1) and 11(1) of the Crimes Ordinance provide, respectively, that prosecution for treason must be brought within three years, and for sedition within six months, after the offence is committed. However, at common law there are no time limits imposed on the institution of prosecutions for indictable offences. Statutory time limits for indictable offences are also very rare. As a matter of principle, we question whether it is right to "write off" a serious criminal offence because of the expiry of a time limit for prosecution. The reprehensible nature of treason and sedition should not diminish with time. In addition, the proposed treason and sedition offences are now much more tightly drawn than the current provisions. There should therefore be enough safeguards against possible abuse As such we propose *to remove the current time limits for bringing prosecutions against treason or sedition.*

(b) Consent of Secretary for Justice

9.6 At present, the consent of the Secretary for Justice has to be obtained before prosecutions for such offences as sedition and unlawful disclosure of protected information may be brought. This is a safeguard to protect the accused from, for example, inappropriate prosecutions such as vexatious private prosecutions or prosecutions in trivial cases. It also affords some central oversight over the use of the criminal law in sensitive and potentially controversial areas, and ensures that prosecution decisions on these take sufficient and consistent account of important public policy considerations.

9.7 At present, the Secretary for Justice may at any stage take over the conduct of proceedings instituted by private prosecution and, if appropriate, discontinue the

proceedings. Given this power, it may be argued that it is not necessary to specify that the consent of the Secretary for Justice must be sought before prosecutions are brought for sedition or other Article 23 offences Nonetheless, given the sensitive nature of the offences and hence the possible significant public interests involved, we propose to stipulate that *the requirement for consent of the Secretary for Justice for bringing prosecutions should apply to all offences against the state in the Crimes Ordinance and the Official Secrets Ordinance, and to other proposed Article 23 offences*

IV. Penalties

9.8 Given their potentially very serious impact on the stability and survival of the state, crimes against the state usually attract very severe penalties in other jurisdictions. The same considerations should apply in our case. Penalties that suitably reflect the seriousness and repugnance with which society views the offences are required. Otherwise the deterrent effect could be lost. The statutory penalty levels are of course only the maximal that may be meted out. It is entirely within the power of the court to determine, within the limits set by law, the appropriate level of penalty in each particular case having regard to its circumstances.

9.9 Taking into account the seriousness of the offences, existing penalties where applicable, and penalties for comparable offences where appropriate, we propose *the penalties for the various Article 23 offences set out at Annex 2.*

Annex 1

Proposed Enhanced Investigation Powers

Selected Article 23 Offences[62]

Offence	Emergency entry, search and seizure powers	Emergency financial investigation powers	Inclusion under Schedule 1 to Organized and Serious Crimes Ordinance	Justifications and Remarks
Treason	**yes**	**yes**	**yes**	**Most serious of all offences Evidence could well be lost without emergency powers Organization and covert financial dealings likely**
Secession	**yes**	**yes**	**yes**	**Threat to territorial integrity and hence survival of country Evidence could well be lost without emergency powers. Organization and covert financial dealings likely**
Sedition: incitement to commit treason, secession and subversion	**yes**	**yes**	**yes**	**Same consideration as for substantive offences**

[62] Only those offences for which enhanced investigation powers are proposed are set out in this annex For a tabular summary of all the Article 23 offences, please see Annex 2

Offence	Emergency entry, search and seizure powers	Emergency financial investigation powers	Inclusion under Schedule 1 to Organized and Serious Crimes Ordinance	Justifications and Remarks
Sedition: incitement to violence or public disorder that seriously endangers the stability of the state or HKSAR	yes	yes	yes	Consequence — very serious threat to stability of society Evidence could well be lost without emergency powers Organization and covert financial dealings likely
Dealing with seditious publications	yes (by amendment of existing powers)	yes	yes	Consequence — substantive offences of treason, secession and subversion Very serious threat to national security Organization and covert financial dealings likely
Subversion	yes	yes	yes	Serious threat to national security and stability Evidence could well be lost without emergency powers Organization and covert financial dealings likely
Organizing or supporting proscribed organization	yes	yes	yes	Threat to national security and territorial integrity and hence survival of country Evidence could well be lost without emergency powers Organization and covert financial dealings likely

Offence	Emergency entry, search and seizure powers	Emergency financial investigation powers	Inclusion under Schedule 1 to Organized and Serious Crimes Ordinance	Justifications and Remarks
Unlawful drilling	no	no	yes	Preparatory to serious offences of treason, secession etc Organization likely.
Inchoate and accomplice offences of treason, secession and subversion (attempts, conspiracy etc.)	Same powers as for substantive offences.			Same considerations as for substantive offences.

Annex 2

Proposed Penalties for Offences

Offence	Existing penalties (if applicable)	Proposed penalties
Treason		
Treason	Life imprisonment (s. 2(2), Cap. 200)	Retain existing penalty, i.e., life imprisonment.
Treasonable offences	Life imprisonment (s. 3(1), Cap 200)	N/A — the offences are proposed to be repealed
Attempt, conspiracy, aiding, abetting, counselling and procuring the commission of treason	Currently not specific statutory offences But normally attempt, conspiracy etc. to commit an offence are punishable by the same penalties for the substantive offence. (s. 159C, s. 159J, Cap 200, s. 89, Cap. 221)	In line with the normal practice, the penalty should be set at the same level as that for the substantive offence.
Misprision of treason	Currently a common law offence, with no statutory penalties. Section 101I(1) of the Criminal Procedure Ordinance (Cap. 221) provides that where a person is convicted of an offence which is an indictable offence and for which no penalty is otherwise provided by any Ordinance, he shall be liable to imprisonment for 7 years and a fine.	In line with the spirit of s. 101I(1), Cap 221, we propose 7 years' imprisonment and an unlimited fine
Compounding treason	Currently a common law offence, with no statutory penalties — 7 years' imprisonment and a fine (s. 101I(1), Cap. 221)	N/A — the offence is proposed to be repealed

Offence	Existing penalties (if applicable)	Proposed penalties
Secession		
Secession	No direct equivalent, but may draw reference from levying war under treason — life imprisonment	Given the seriousness of the offence which could directly threaten the territorial integrity of the country, we propose life imprisonment.
Attempt, conspiracy, aiding, abetting, counselling and procuring the commission of secession	N/A	In line with the normal practice, same penalty as the substantive offence.
Sedition		
Incitement to commit treason, secession or subversion	N/A	In line with the normal practice, same penalty as the substantive offence, i e life imprisonment.
Incitement to violence or public disorder which seriously endangers the stability of the state or the HKSAR	No direct equivalent, but may draw reference from sedition. First offence — 2 years' imprisonment and $5,000 fine Subsequent offence — 3 years' imprisonment (s. 10(1), Cap. 200)	Given the higher threshold of "seditious intention" (seriously endangers the stability of the state or the HKSAR), more severe penalties are called for. We suggest 7 years' imprisonment and an unlimited fine.
Dealing with seditious publications	Same as sedition, publications to be forfeited (s. 10(1) and (3), Cap 200)	Given the serious consequences that may be brought about by publications endangering national security, the existing penalties are on the low side. We suggest 7 years' imprisonment and a fine of $500,000 to act as an effective deterrent. The publications should be forfeited.

Offence	Existing penalties (if applicable)	Proposed penalties
Possession of seditious publications	First offence — 1 year's imprisonment and $2,000 fine, publications to be forfeited Subsequent offence — 2 years' imprisonment, publications to be forfeited (s. 10(2) and (3), Cap 200)	While the existing custodial term is appropriate, the fine should be updated to level 5 (currently $50,000) to act as a more effective deterrent. The publications should be forfeited.
Posting of seditious publications	6 months' imprisonment and $20,000 fine (s. 32(1)(h), Cap 98)	N/A — the offence is proposed to be repealed
Subversion		
Subversion	No direct equivalent, but may draw reference from levying war under treason — life imprisonment (s 2(2), Cap 200)	To reflect the very serious nature of the offence which could result in the illegal toppling of the basic system of the State or the lawfully established government, we suggest life imprisonment
Attempt, conspiracy, aiding, abetting, counselling and procuring the commission of subversion	N/A	In line with the normal practice, same penalties as the substantive offence.
Theft of State Secrets		
Spying	14 years' imprisonment (s 3, 10(1), Cap 521)	Retain the existing penalty level

Offence	Existing penalties (if applicable)	Proposed penalties
Harbouring, unauthorized use of uniforms, official documents, obstruction, failure to provide information etc.	2 years' imprisonment on conviction on indictment 3 months' imprisonment and a level 4 fine (currently $25,000) on summary conviction (s. 4-8, 10(2), Cap 521)	The gravity of the offences could vary considerably, and it is appropriate to retain convictions on indictment and summary convictions To reflect more accurately the full range of potential seriousness, we propose 5 years' imprisonment on conviction on indictment, and 3 years' imprisonment and a level 6 fine (currently $100,000) on summary conviction.
Unauthorized disclosure of protected information obtained by virtue of official position or unauthorized disclosure, etc.	2 years' imprisonment and $500,000 fine on conviction on indictment 6 months' imprisonment and a level 5 fine (currently $50,000) on summary conviction (s. 13-20, 25(1), Cap 521)	The existing custodial term appears to be on the low side given the significant damage that unauthorized disclosure may bring about We suggest increasing it to 5 years' imprisonment for conviction on indictment, and 3 years' imprisonment on summary conviction The other existing penalties should be retained.
Unauthorized disclosure of protected information obtained by unauthorized access	N/A	Same as the proposed penalties for unauthorized disclosure of protected information obtained by virtue of official position or unauthorized disclosure, etc.
Failure to safeguard protected information or return documents	3 months' imprisonment and a level 4 fine (currently $25,000) (s. 22, 25(2), Cap. 521)	Retain the existing penalties

Offence	Existing penalties (if applicable)	Proposed penalties
Organized Crime against National Security		
Organizing or supporting proscribed organization, or operating a prohibited association	N/A	7 years' imprisonment and an unlimited fine
Others		
Unlawful drilling or military training	For the trainer — 7 years' imprisonment (s. 18(1), Cap 200) For the trainee — 2 years' imprisonment (s. 18(2), Cap 200)	The existing penalties should be retained
Unlawful oaths	Imprisonment for life or 7 years (s. 15-16, Cap 200)	N/A — the offence is proposed to be repealed

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The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39.

INTRODUCTION

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

PREAMBLE

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the

Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;
Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

I. GENERAL PRINCIPLES

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is 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 or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and

information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

Principle 5: Protection of Opinion

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

(i) advocates non-violent change of government policy or the government itself;

(ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials [3], or a foreign nation, state or its symbols, government, agencies or public officials;

(iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;

(iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency
Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

III. RESTRICTIONS ON FREEDOM OF INFORMATION

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate

national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence pose a clear risk to the safety of others.

IV. RULE OF LAW AND OTHER MATTERS

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

(a) the right to be presumed innocent;

(b) the right not to be arbitrarily detained;

(c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;

(d) the right to prompt access to counsel of choice;

(e) the right to a trial within a reasonable time;

(f) the right to have adequate time to prepare his or her defence;

(g) the right to a fair and public trial by an independent and impartial court or tribunal;

(h) the right to examine prosecution witnesses;

(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and

(j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

(a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

Principle 23: Prior Censorship

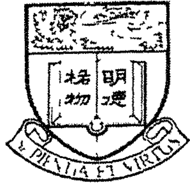
Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.



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Preserving Civil Liberties in Hong Kong: The Potential Impact of Proposals to Implement Article 23 of the Basic Law

Theft of State Secrets and the Proposed New Offence of Unauthorized and Damaging Disclosure of Protected Information

presented by

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23 November 2002

Article 23 and Theft of State Secrets

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2002/11/22

The Context

- Open and transparent government
- No legal right of access to information
- The law is to restrict access and disclosure of official information
- The issue is not how many prosecutions have been taken out
- What chilling effect the law has, especially when the law is unclear, vague or complex
- ***Ambiguity enhances self-censorship***

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Introduction: The Existing Law

- Official Secrets Act 1911
- Official Secrets Ordinance 1997 which is modeled after the Official Secrets Act 1989
- Spying and related offences (ss 3-6)
- Unlawful disclosure of security or intelligence information by members of the security and intelligence services (s 13)
- Unlawful and damaging disclosure of prohibited information by a public servant or a government contractor (ss 14-17)

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The Proposals

- Expand the categories of protected information to cover relations between the Central Authorities of the PRC and the HKSAR
- Create a new offence of unauthorized and damaging disclosure of protected information obtained directly or indirectly by unauthorised access

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Elements of the new offence

- Unauthorized access to protected information
- Unauthorized access could be direct or indirect
- Unauthorized disclosure of protected information
- Damaging disclosure of protected information
- Section 18 defence

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What is protected information?

- Security and intelligence information
- Defence information
- Information relating to international relations
- *Information relating to relations between the Central Authorities of the PRC and the HKSAR*
- Information relating to commission of offences and criminal investigations

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Source or nature?

- What information is covered? Defined by source or substance?
- Information relating to *relations* between the Central Authorities and the HKSAR: a broad or narrow test?
- Which organ falls within the meaning of 'central authorities'? (NPC, NPCSC, State Council, all central government bureaus and ministries, President and Ministers, procutorate, National Political Consultative Committee, local delegates, HK Macao Office, China Liaison Office, Communist party?)

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Damaging Disclosure

- No explanation of 'damaging disclosure' in the context of information relating to the relations between the central authorities of the PRC and the HKSAR
- On 'international relation', disclosure is damaging if it 'endangers the interests of the state elsewhere'
- Endanger the interests of the central authorities in the mainland and overseas?

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Damaging: Harm Test I

- Information belonging to a category the disclosure of which would be likely to cause harm – trivial information which cannot by itself cause harm will be covered
- Harm is likely to flow from disclosure of a specific document

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trial

Damaging: Harm Test II

- In central/HKSAR relations, disclosure appears to be damaging if it causes damage to the area of government operation covered by the category.
- The only safe approach would be non-disclosure of almost all relevant information.

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Damaging: Harm Test III

- Lord Advocate v Scotsman Publications Ltd [1990] 1 AC 812 (necessary to show a strong likelihood that harm will arise and the nature of the harm must be specified)
- No further harm could generally be done if there is prior publication; further undermining confidence in the government by further publication is insufficient to satisfy the harm test

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Who is covered under existing law?

- Members of security and intelligence services, public servants, government agents and contractors
- They obtain the information by virtue of their position and make an unauthorized and damaging disclosure
- The narrow range of persons and means of access to protected information mitigates the wide scope of the protected information

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Who is covered under the Proposals?

- Unauthorized access either directly or indirectly; information no longer confined to that coming into the hands of public servants etc by reason of their position
- The provision will have a particular impact on the press and researchers

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Unauthorized Access

- What is unauthorized access? Note that there is no legal right of access to any official information
- Right not to disclose the source of information – presumption of unauthorized access if access is not explained?
- What if there is prior publication?

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Defence I

- Defence if one does not know or has no reasonable cause to believe that the information disclosed is protected information ***and*** that the disclosure would be damaging
- How many defences? Whether knowledge refers to both nature and effect or any one of them?
- Transfer of mens rea
- Objective test: reasonable cause to believe
- No defence if one genuinely believes that the information is not protected or disclosure is not damaging

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Defence II

- No public interest defence
- No prior publication defence

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Proposals I

- Protected information should be defined by content and not by source
- Damaging disclosure should require proof of a strong likelihood of specified harm or clear and present danger of harm
- Once information has been made generally available, by whatever means, whether lawful or not, no further justification to prohibit disclosure from the public

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Proposals II

- Introduce a defence of public interest: no offence if the public interest in knowing the information outweighs the harm from disclosure
- Clearly define unauthorized access and confine it to the hacker situation
- Protection of national security should not be used as a reason to compel a journalist to reveal a confidential source

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Proposals III

- Subjective mens rea be required so that it would be a defence if one honestly believes the information is not protected or its disclosure is in the public interest and the information is lawfully acquired.
- All offences should be prosecuted within 6 months
- Jury trial be required
- Access to Official Information Ordinance?
- Difficult to have meaningful consultation without details: White Bill should be published

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2002/11/22

Article 23 and Subversion

Prof Johannes Chan
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1. Chapter 5 of the Proposals to Implement Article 23 of the Basic Law sets out the proposals of the HKSAR Government to create an offence of subversion.

2. The Government proposes to:

    1. Create an offence of subversion to ensure that the HKSAR will not be used as a base for supporting subversive activities in or against the Mainland.

    2. Make it an offence of subversion to intimidate the PRC Government or overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means. The basic system of the state includes the National People's Congress, the Central Peoples' Government and other state organs.

    3. Create statutory offences of attempting, conspiring, aiding and abetting, and counseling and procuring the commission of the subversion offence.

    4. Apply subversion offence to all persons who are voluntarily in the HKSAR and to extra-territorial conduct by HKPR and all other persons whose conduct has a link with the HKSAR either under the common law or the Criminal Jurisdiction Ordinance.

A Sweeping Offence

3. A political offence should be narrowly and clearly defined in order not to undermine or encroach upon fundamental rights and freedoms that are protected in the Basic Law and that form the pillar of the success of Hong Kong.

4. The offence of subversion is vaguely defined. The concept of "intimidating the PRC Government" or "disestablishing the basic system of the state" is not known to our law. Nor are these concepts defined in the Government Proposals. The literal meaning of "intimidation" is "threat". Thus, under the Proposals, it will be an offence to threaten (intimidate) the Government by the threat of force!

5. The essence of subversion is to overthrow the government by force or violence. The offence of subversion should be so confined. We accept that with the rapid development of technology, a serious threat to the country's security and stability might come from illegal acts employing non-violent means, such as electronic sabotage. If it is considered necessary to prohibit electronic sabotage that poses a clear and present danger to the stability and security of the country, the prohibited act should be clearly set out and be so confined. The scope of "disestablishing the basic system of the state" goes beyond the legitimate concern, and is a vague and sweeping concept.

6. The prohibited acts include "levying of war", "threat of force", and "other serious unlawful means". These are again very broad concepts.

7. "Levying of war" is not limited to war in international law or internal armed conflicts, but includes "any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is of a general character. It is not essential that the offenders should be in military array or be armed with military weapons." (at p 9, fn 17) A riot or serious social disturbance can fall within the meaning of "war"!

8. A threat of force is prohibited. There is no requirement that the threat has to be real and imminent.

9. By definition, "unlawful means" are means against the law and are already prohibited under existing criminal law. It is said to refer to

   a. serious violence against a person;
   b. serious damage to property;
   c. endangering of a person's life, other than that of the person committing the action;
   d. creation of a serious risk to the health or safety of the public or a section of the public;
   e. serious interference or serious disruption of an electronic system; or
   f. serious interference or serious disruption of an essential service, facility or system, whether public or private. (para 3.7)

10. Most of these acts are already prohibited by criminal offences under existing law. Some of them attract very heavy penalties. It is difficult to see what additional protection to the community or the State there exists by making these criminal acts an element of another serious criminal, albeit political, offence. The ambit of the last three categories is unclear.

11. On the other hand, the danger that it may pose to freedom of expression, assembly and demonstrations is obvious. A protest in the form of sending mass emails to a Government site (which is said to have caused serious disruption of an electronic

system) or a public call to jam the long distance telephone calling system by massive and repeated internet phone calls in protest of the dramatic price increase by the national enterprise on telecommunication), or an industrial strike by postal or medical services (which may be said to cause serious disruption of an essential service) could come within the meaning of "unlawful means" and can be punished by the offence of subversion if they "disestablish the basic system of the state".

12. While the Government Proposals state that "adequate and effective safeguards should be in place to protect the freedoms of demonstration and assembly" (fn 47 at p 30, referring back to para 3.7), nowhere in the Proposals have such "safeguards" been explained.

13. There is no requirement of any casual connection between the acts (levying war, use of force etc) and the consequences (overthrowing the PRC Government or disestablishing the basic system of the state). It is wrong in principle that someone can be found guilty of the offence by chanting at Victoria Park that Taiwan should strengthen its military force to liberate the Mainland, even when it is obvious that such threat has no impact on the stability or the security of the government at all.

14. Subversion is a serious offence and hence should be confined to acts the commission of which will pose a clear and present danger to the stability and security of the Government.

15. It is alarming to learn that the reason for having the offence of subversion (and secession) is to ensure that the HKSAR will not be used as a base for supporting subversive activities in or against the Mainland. It is important to ensure that lawful activities in Hong Kong, which may not be lawful or acceptable in the Mainland, should not be prohibited or suppressed by the subversion offence through the back door. Suppose a HKPR in Hong Kong provides moral and financial support to a Mainland organization which advocates for a peaceful change of the PRC Government by means which are considered unlawful under the PRC criminal law. Could that person be guilty of conspiring with persons outside Hong Kong to commit the subversion offence, as they conspire to adopt "serious unlawful means" to "intimidate the PRC Government", or could he be guilty of aiding and abetting the commission of the subversion offence by providing financial support? Alternatively, if the Mainland organization is proscribed by the PRC Government on the ground of national security due to activities which are considered unlawful under the PRC Criminal Code but lawful under the laws of Hong Kong, the HKPR may be found guilty by reason of his affiliation with such organization.

16. The subversion offence or related inchoate offences should not be a means to suppress peaceful advocacy for a change of the PRC government or peaceful support for such change by any organization that adopts constitutionally approved means in the Mainland even if the organization is proscribed as unlawful in the Mainland or its activities are considered unlawful under PRC criminal law.

My Proposals

17. It would be difficult to have any meaningful consultation if the offence of subversion is contained in the broad and vague outline. It is imperative to publish a White Bill so that the public knows precisely what they are asked to agree or support so as to ensure genuine public consultation.

18. The notion of "intimidating the PRC Government" should be abandoned, and the act of "disestablishing the basic system of the state" should be confined to those acts commission of which poses a clear and present danger to the stability and security of the PRC Government and which are committed with intent to overthrow the PRC Government.

19. The concept of "other serious unlawful means" be narrowed only to those acts which poses a clear and present danger to the stability and security of the State and should not cover those unlawful acts that already constitute an offence under the existing criminal law.

20. It should be expressly stated what the "adequate and effective safeguards of guaranteed rights" are and how the guaranteed rights are safeguarded.

21. The concept of "levying war" should be confined to international war or internal armed conflicts.

22. It should be expressly provided that a threat of force has to be real and imminent for the purpose of the subversion offence.

23. There should be clear causal connection between the prohibited acts and the consequences. No one shall be guilty of the offence of subversion unless what he does will cause a clear and present danger to the stability and security of the government. It shall be necessary for the prosecution to prove the existence of such clear and present danger.

24. Any constitutionally approved methods of advocating change in the PRC Government or the HKSAR could not be considered subversion.

25. No one shall be convicted of an offence of subversion or related inchoate offences solely by reason of affiliation with a mainland organization that has been proscribed by the PRC Government on ground of national security.

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The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39.

INTRODUCTION

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

PREAMBLE

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the

Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;
Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

I. GENERAL PRINCIPLES

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is 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 or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and

information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

Principle 5: Protection of Opinion

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

(i) advocates non-violent change of government policy or the government itself;

(ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials[3], or a foreign nation, state or its symbols, government, agencies or public officials;

(iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;

(iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency
Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

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A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate

national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

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Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

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Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence pose a clear risk to the safety of others.

IV. RULE OF LAW AND OTHER MATTERS

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

(a) the right to be presumed innocent;

(b) the right not to be arbitrarily detained;

(c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;

(d) the right to prompt access to counsel of choice;

(e) the right to a trial within a reasonable time;

(f) the right to have adequate time to prepare his or her defence;

(g) the right to a fair and public trial by an independent and impartial court or tribunal;

(h) the right to examine prosecution witnesses;

(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and

(j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

(a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.

Course Evaluation

Course Provider: Faculty of Law, University of Hong Kong

Course Title: Preserving Civil Liberties in HK: The Potential Impact of Proposals to Implement Article 23 of the Basic Law

Date of Course: 23 November 2002

To help us serve you better, please complete this form at the end of the course and give it to the course co-ordinator. **Please note that the overall rating of the course may be posted on the Law Society's web-site.**

1 **General Evaluation:** How would you rate today's course?

☐ Excellent ☐ Good ☐ Fair ☐ Poor

2 **Content:** Did the content meet your needs/expectations? Please explain.

____

3 **Presentation:** How could the style of presentation be changed to meet your needs?

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4 **Materials:** How would you like to see the course materials improved?

____

5 **Miscellaneous:** Please give us suggestions for other courses you would like the Law Society to present.

____

6 **About yourself:** Please help us create a profile of those who attended today's course.

Are you a ☐ first year trainee ☐ second year trainee

☐ first year solicitor ☐ other : __ no. of years of practice

Thank you for giving us your evaluation. You need not sign this form.

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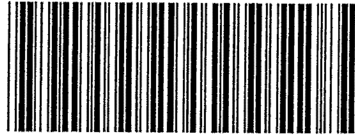

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