# HONG KONG BAR ASSOCIATION'S VIEW ON LEGISLATION UNDER ARTICLE 23 OF THE BASIC LAW

## THE BAR'S POSITION

1. The Bar notes the recent discussions in relation to the possibility of legislating under Article 23 of the Basic Law ("Article 23") in the near future. The Bar is of the view that this provides an excellent opportunity for the Government of the HKSAR to review our existing laws and to make such changes as are necessitated by the change of sovereignty.

2. The Preamble of the Basic Law recognizes the importance of 'maintaining the prosperity and stability of Hong Kong' and the 'history and realities' of Hong Kong. The Preamble and Article 5 also reiterate that 'under the principle of 'one country, two systems' the socialist system and policies will not be practised in Hong Kong'.

3. Article 23 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."

4. Article 23 of the Basic Law emphasizes that the HKSAR **shall enact laws on its own**. Furthermore, there is a restriction on applying national laws under Article 18 of the Basic Law. If any national law is to be applied in the HKSAR, it has to be included in Annex III of the Basic Law by the Standing Committee of the National People's Congress after consulting the

Committee on the Basic Law and the HKSAR Government. Borrowing or adopting Mainland Laws by the HKSAR Government is therefore inappropriate.

5. Accordingly, the Bar is of the view that the Basic Law does not require the HKSAR Government to enact Article 23 legislation in terms identical to the relevant provisions of the Criminal Law of the PRC.

6. The Bar appreciates that it is the duty of the Legislative Council of the HKSAR to enact domestic laws on its own to prohibit the acts listed in Article 23. However, the Bar emphasizes that laws in relation to Article 23 must conform with the minimum standards contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. They must also be compatible with Articles 27-34 of the Basic Law which guarantee the fundamental rights of our residents.

7. Article 23 covers 7 areas: -

(1) Treason;
(2) Secession;
(3) Sedition;
(4) Subversion against the Central People's Government;
(5) Theft of state secrets;
(6) Conduct of political activities in the HKSAR by foreign political organizations or bodies; and
(7) Establishing ties by political organizations or bodies of the HKSAR with foreign political organizations or bodies.

8. The Bar is of the view that in most areas, the existing laws of the HKSAR, subject to what is stated below, are sufficient to prohibit the acts listed in Article 23 and there is clearly no need to create new offences or enact additional laws under Article 23. The Bar notes that although subversion and secession are not common law offences, the existing laws are sufficient to deal with subversive activities and activities which advance a secessionist cause. The Bar further notes that there are substantial

overlaps between the offences of treason, sedition, secession and subversion.

9. The Bar is of the view that existing legislation which deals with treason, sedition and theft of state secrets are out of date and not compatible with the ICCPR. They should also be amended not only to reflect the constitutional changes brought about by the resumption of exercise of sovereignty by the PRC, but also to bring them in line with the ICCPR.

10. The Bar has no objection to any proposal which seeks to put existing laws dealing with the matters listed on Article 23 in a systematic way. However, such legislation must be consistent with: -

(1) The provisions of the ICCPR as applying to Hong Kong by virtue of Article 39 of the Basic Law and implemented under the Hong Kong Bill of Rights Ordinance (Cap. 383);

(2) Other provisions of the Basic Law; and

(3) The Johannesburg Principles on National Security, Freedom of Expression and Access to Information ("the Johannesburg Principles")[1].

11. It should be noted that Article 18 and Article 19 of the ICCPR distinguish between

(1) The freedom of thought, conscience, religion or belief and to hold opinions; and

(2) The freedom to manifest religion or belief and to express one's opinion.

The ICCPR does not permit any limitation whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice or freedom to hold particular opinions. These freedoms are protected unconditionally.

12. Expression of opinion and manifestation of a religion or belief may be termed the "active" component of one's freedom, as opposed to the

[1] Created at a conference of international legal scholars, judges and lawyers in Johannesburg, South Africa in 1995. The Principles lay down guidelines for the creation of effective national security regulations that fully respect basic rights. The text can be found in the appendix.

"passive" component, which consists of mere adherence to certain beliefs and views. The Bar accepts that the freedom of expression and the freedom to manifest religion or belief are not absolute and may be subject to limitation.

13. However, pure expression of opinion should not be criminalised. In particular, the Johannesburg Principles provide that expression might be punished as a threat to national security only if the government can demonstrate that:-

(1) The expression was intended to incite imminent violence;

(2) The expression was very likely to incite such violence; and

(3) There was direct and immediate connection between the expression and the likelihood or occurrence of such violence.

14. Any drafting under Article 23 must be unambiguous, drawn narrowly and with precision.

## EXISTING HONG KONG LAWS AND RECOMMENDED DRAFTING PARAMETERS

### Treason

Treason under Common Law and in Common Law Jurisdictions

15. Treason first emerged in English common law. The earliest legislation by the English Parliament on treason was the Treason Act of 1351. Originally broadly defined as any breach of faith owed to the king and severely punished, treason has since been limited to levying war against the state or aiding and abetting enemies of the state, usually in wartime. The offence itself is unique in that prosecutions for treason are inevitably for treasonable acts that failed.

16. Intent is a necessary element of the offence in most jurisdictions; any accidental or unintentional aiding of the enemy cannot be considered treason, though it may be actionable under other laws.

17. In Australian Legislation, the Government of the State or the Commonwealth is the focus of protection. In Canada, the offence of treason is defined as "levying war against the sovereign state or assisting the enemies at war."

Treason as defined in Crimes Ordinance (Cap. 200)

18. Sections 2 to 5 of the Crimes Ordinance create a statutory offence of treason and treasonable offence.

19. Section 2(1) provides that a person commits treason if he:

(a) kills, wounds or cause bodily harm to the Sovereign, or imprisons or restrains the Sovereign;

(b) forms an intention to do any such act as is mentioned in (a) and manifests such intention by an overt act;

(c) levies war against the Sovereign;

(i) with the intent to depose the Sovereign from the style, honour and royal name of the Crown of the UK or of any other of the Sovereign's dominions; or

(ii) in order by force or constraint to compel the Sovereign to change the Sovereign's measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe Parliament or the legislature of any British territory;

(d) instigates any foreigner with force to invade the UK or any British territory;

(e) assists by any means whatever any public enemy at war with the Sovereign; or

(f) conspires with any person to do anything mentioned in (a) or (c) above.

20. Section 2(2) states that a person who commits treason commits an offence and is liable on conviction on indictment to imprisonment for life.

21. Section 6 of the Hong Kong Reunification Ordinance added Schedule 8 of the Interpretation and General Clauses Ordinance (Cap. 1) by providing that:

> "1. Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision:-
>
> (a) relates to title to land in the Hong Kong Special Administrative Region;
>
> (b) involves affairs for which the Central People's Government of the People's Republic of China has responsibility;
>
> (c) involves the relationship between the Central authorities and the Hong Kong Special Administrative Region,
>
> shall be construed as a reference to the Central People's Government or other competent authorities of the People's Republic of China.
>
> 2. Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or similar names, terms or expressions) in contexts other than those specified in section 1 shall be construed as a reference to the Government of the Hong Kong Special Administrative Region."

22. There are certainly difficulties in construing the sections relating to treason after 1997. While the PRC has a head of State, the President of China, the position of the President is different from that of the British Monarch. The latter is not simply the head of state but the formal embodiment of the state and thus, e.g., a person who levies war against the UK would properly be described as levying war against the British Monarch, however, it would not be correct to describe the levying of war against the PRC as levying war against the President of the PRC. References to the Monarch or Sovereign are used in different senses in the Ordinance.

<u>Recommendations</u>

23. There is clearly a need to amend the Crimes Ordinance to provide further clarification and to avoid any confusion in interpreting section 2(1).

However, great care must be taken to ensure that the amendment is appropriate.

24. The Bar has no objections to amending the Crimes Ordinance in relation to treason in order to reflect the necessary changes brought about by the change of sovereignty.

25. It is submitted that scope of the offence should be minimized by deleting the provisions in relation to personal attacks on the sovereign. It is unnecessary and undesirable to transpose the notion of the British Monarch into any particular person or entity under a different Constitution. Further, the offence must be directed at acts against the State rather than the Government.

26. As to the current section 2(1)(e), it is submitted that there must be a public declaration of war before anyone can be charged with the offence.

27. The Bar is also of the view that the defendant's action must involve violence or be likely to lead to violence in order to be liable to prosecution for the crime of treason. *Mens rea* to overthrow the existing political regime is also necessary.

**Sedition**

Sedition under Common Law

28. Sedition is an offence originally based on the divine rights of the Monarch. It is doubtful whether it is still needed in the modern age to protect the Government. However, it is a typical offence found in colonial administrations and used by them or their immediate successors to censor dissenting political opinion.

29. The orthodox definition remains that given *by* ***Stephen, Digest of the Criminal Law, 9th ed., Art 114***:

> "Sedition consists of any act done, or words spoken or written and published which (i) has or have a seditious tendency and (ii) is done or are spoken or written and published with a seditious intent."
>
> Seditious intention and seditious tendency refer to "an intention or tendency to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty or government... or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State or to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."

30. Sedition is not a crime of strict liability; lawful criticism is a good defence to such a charge. This was adopted as correct in ***R v Burns (1886) 16 Cox 355***, which went further: -

> "If you come to the conclusion that they were activated by an honest desire to alleviate the misery of the unemployed – of they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the heat of the moment".

31. The common law imposed another limitation upon sedition: a requirement that there be a tendency towards violence or insurrection. See ***R v Sullivan (1868) 11 Cox 44***.

32. In the U.S., speech is protected from prosecution unless it is directed to inciting imminent lawless action and is likely to incite that action. See: ***Brandenburg v Ohio*** **395 U.S. 444 (1969) at 477**. In Canada, incitement to violence alone is insufficient. The violence or defiance incited by the speaker must be for the purpose of disturbing constitutional authority. It was also held that neither language calculated to promote feelings of ill-

will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority. See ***Boucher v R.*** **(1951) 2 D.L.R. 369**.

Sedition under Crime Ordinance (Cap. 200)

33. Section 10 of the Crimes Ordinance provides that a person commits the offence of sedition if he-

(1) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or

(2) utters any seditious words; or

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

(4) imports any seditious publication, unless he has no reason to believe that it is seditious.

34. Section 9 of the Crime Ordinance provides that a seditious intention is an intention:

(1) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established;

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

(3) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or

(4) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or

(5) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or

(6) to incite persons to violence; or

(7) to counsel disobedience to law or to any lawful order.

35. The definition reproduces many components of the definition at common law and limits the width of that definition. The definition is further limited by the Ordinance in that an act, speech or publication is not seditious by reason only that it intends:

(1) to show that Her Majesty has been misled or mistaken in any of Her measures; or

(2) to point out errors or defects in the government or constitution of Hong Kong 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

(3) to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or

(4) 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 Hong Kong.

Recommendations

36. It is submitted that an intention to incite violence or create public disorder against the "constituted" authority is necessary. As stated by Watkins LJ in ***Ex p Choudhury*** **[1991] 1 QB 429 at 452** citing Lord Cockburn:

> "the usual objects of seditious libel are the Sovereign, the Houses of Parliament, the Administrators of Justice, Public Officers and Departments wielding and representing the State's power or dignity. It is the public Majesty which must be assailed, and that must be required to be protected… The guilt of sedition is often described of consisting of its tendency to produce public mischief … and so it is. But it is not every sort of mischief that will exhaust the description of the offence. It must be that sort of mischief that consists in and arises out of directly and materially obstructing public authority".

37. It is further submitted that an intention to incite violence or public disorder for the purpose of disturbing "constituted" authority and an actual likelihood of such response to the incitement must be present in order to constitute the offence of sedition.

**Theft of State Secrets**

The Official Secrets Ordinance (Cap. 521)

38. The Bar opines that some provisions of the Official Secrets Ordinance (Cap. 521) ("OSO") should be amended so as to bring it in line with standards set out in the ICCPR and the Johannesburg Principles.

39. For example, Section 3(2) of the OSO provides that:

> "In any proceedings against a person for an offence under this section, it shall *not* be necessary to show that he was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, *it appears that* his purpose was a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong."

40. The language here is neither unambiguous nor narrowly drawn. Under this subsection, an individual can be convicted of violating the OSO when, in the absence of hard evidence, his purpose appears to have been prejudicial to the safety or interests of the State. The danger of section 3(2) is exasperated by section 3(3), which effectively absolves the prosecution to prove such purpose by providing that `the fact that [the accused] has been *in communication with* … a foreign or Taiwan agent … *shall be evidence* that he has, for a purpose prejudicial to the safety of [the state] …, obtained or attempted to obtain information that is calculated to be or might be or intended to be directly or indirectly useful to an enemy.' Thus,

so long as an accused is proved to be in communication with a foreign agent, the section 3(1) offence of spying is proved, without the prosecution having to prove whether or not the accused knows or suspects the other party of being a foreign agent; and whether or not the content of the communication involves any state secret.

41. Moreover, section 3(5) defines "foreign agent" to be someone who "is or has been or is *reasonably suspected of being* or having been employed by a foreign state or Taiwan either directly or indirectly for the purpose of committing an act ... prejudicial to the safety or interests of the United Kingdom or Hong Kong".

42. It is unacceptable to allow an undefined "reasonable suspicion" to take the place of concrete evidence thus making the burden of proof less onerous for the prosecution and creates the potential for misuse.

43. Another area in which the language is overly broad is section 3(1), which outlaws the "approaching, … (being in the neighborhood of) or enter(ing)" of a "prohibited place" for a "purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong." Prohibited places under the OSO include not only government facilities but also private facilities which do work for the government. Because there is no explicit requirement that the "purpose prejudicial to the safety or interests of… Hong Kong" be directly connected to "prohibited place", a peaceful public demonstration that is deemed to be against the interests of Hong Kong and that is held at or near a government facility – be it an airfield, a government office, or a public park, assuming the government had prohibited protests there -- could be against the law.

44. Sections 13 to 17 of the Ordinance relating to state secrets and disclosure depart even further from the guidelines of Part III of the Johannesburg Principles on Restrictions on Freedom of Information. Part III of the Johannesburg Principles emphasizes that no person may be punished on national security grounds for disclosure of information if the disclosure does not actually harm and is not likely to harm a legitimate national

security interest; or the public interest in knowing the information outweighs the harm from disclosure. Similarly, disclosure of information a person has learnt by virtue of public service should not attract punishment if the public interest in knowing the information outweighs the harm from disclosure[2].

Recommendation

45. The Bar therefore urges that an extensive review of the OSO be conducted and provisions be brought in line with the Johannesburg Principles, in particular, Principles 2, 6, 12, 15, 16 and 17.

**Secession**

Secession not an offence under common law

46. Secession is not an offence known to the common law. In its ordinary meaning, secession refers to an attempt to break away from the central government and declare an independent state or allegiance to the government of another state. Thus conduct calculated to bring about such results are punishable at present as treason.

The offence of secession in the Crimes (Amendment) (No 2) Bill 1996

47. The Crimes (Amendment) (No 2) Bill 1996 sought to introduce the offence of secession into Hong Kong law in the following terms —

> "A person who incites or conspires with any other person or who attempts to supplant by force the lawful authority of the Government of the United Kingdom in respect of any part of the United Kingdom or in respect of any British dependent territory is guilty of secession and liable on conviction on indictment to imprisonment for 10 years."
>
> This proposed provision was deleted in the legislative process.

Recommendations

[2] Johannesburg Principles, Principles 15, 16.

48. The Bar considers that any actual secessionist activity would likely be actionable as a criminal offence under other legislation. For example, acts of violence or acts inducing violence in furtherance of a secessionist cause can be punished under the offence of sedition. And an attempt to achieve a secessionist cause through instigating or assisting a foreign enemy in armed conflict with the sovereign is punishable under the existing offence of treason[3]. Further, the Bar considers that any declaration of a secessionist cause short of inciting violence or having the likelihood of inciting violence is pure expression of opinion or thought and, following the Johannesburg Principles, should not be outlawed. Accordingly, the value of anti-secession legislation is questionable in the modern era.

49. If it is considered that an offence should be enacted to outlaw secession, the Bar submits that anything short of actual violence or acts which induces actual violence should not be considered as an offence. An intention to incite violence and an actual likelihood of such response to the incitement must be present in order to constitute an offence.

**Subversion**

Subversion not a common law offence but a statutory offence in some common law jurisdictions

50. Subversion is not an offence known to the common law. In the small handful of common-law countries where the offence does exist, subversion is usually associated with the overthrow of the government by force. Australia, one of the few common-law countries to introduce subversion into the law (namely the Australian Security Intelligence Organization Act 1979), defined subversion primarily as an act whose purpose is to "overthrow or destroy the constitutional government of the Commonwealth or of a State or Territory." Force or any other unlawful act was a necessary element of the definition, and certain activities directed against the military or against society and public order as a whole were also considered as a threat to security under the heading of subversion.

[3] Indeed the proposed offence of secession in the Crimes (Amendment) (No 2) Bill 1996 was said to be based upon the treasonable offence under section 3(1)(a) of the Crimes Ordinance; see Explanatory Memorandum.

51. As with secession, much of what might be covered by the subversion statute is already covered by treason. In their commentary on the Australian law, the drafters emphasized that subversion can only cover that activity "whose purpose is, directly or ultimately, to overthrow constitutional government and in the meantime to weaken or to undermine it", and that any constitutionally approved methods of advocating change in the government could not be considered subversion.

52. Concern over the vagueness of the term "subversion" is reflected in the Australian government's decision to remove the term from the law in 1986, replacing it with the phrase "politically motivated violence". The change in language increased the emphasis on the necessary element of force, and distanced Australian law from the misuse of anti-subversion statutes in other jurisdictions.

53. In other countries, subversive activities are readily punished by invoking existing criminal law. In the US, the criminal charge frequently used is conspiring to advocate or teach the forcible overthrow of the US government. In the UK, the most recent prosecutions included the use of the Disaffection Act 1934 in ***R v Arrowsmith*** **[1975] 1 All ER 463**; and the Official Secrets Act 1911 in ***Chandler v. DPP*** **[1962] 3 All ER 142**.

The offence of subversion in the Crimes (Amendment) (No 2) Bill 1996

54. The Crimes (Amendment) (No 2) Bill 1996 sought to introduce the offence of subversion into Hong Kong law in the following terms —

> "A person who —
>
> (a) does any unlawful act with the intention of overthrowing the Government of the United Kingdom by force;
>
> (b) incites or conspires with any other person to overthrow the Government of the United Kingdom by force; or
>
> (c) attempts to overthrow the Government of the United Kingdom by force,

is guilty of subversion and liable on conviction on indictment to imprisonment for 10 years."

This proposed provision was deleted in the legislative process.

Recommendations

55. The Bar considers that the existing legislation outlaws many if not all manifestations of subversion, in the sense of acts calculated to cause the forcible overthrow of the Central People's Government. The existing offence of treason adequately covers subversive activities[4]. Further, section 5 of the Public Order Ordinance (Cap. 245) outlaws quasi-military organizations. Furthermore, the Crimes Ordinance prohibits incitement to mutiny and incitement to disaffection in sections 6 and 7, though those sections require amendments to bring them in line with the ICCPR. The Bar therefore questions the need for a generic offence of subversion.

56. If it is considered that an offence should be enacted to outlaw subversion, the Bar submits that anything short of actual violence or acts which induces actual violence should not be considered as an offence. An intention to incite violence and an actual likelihood of such response to the incitement must be present in order to constitute an offence.

**Foreign Political Organizations**

Recommendations

57. Article 23 will be complied with if there are provisions in electoral law (for example, the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554)) prohibiting foreign political organizations from directly or indirectly participating in local elections.

58. Participation will include financial contribution to a local political party, but it must be shown that such financial contribution is related to election purpose. Any financial contribution made by a foreign political

[4] Indeed the proposed offence of subversion in the Crimes (Amendment) (No 2) Bill 1996 was said to be based upon the offence of treason under section 3(1)(a) of the Crimes Ordinance; see Explanatory Memorandum

organization within a certain specified period before and after a general election may be deemed to be contribution for election purposes, unless such contribution is earmarked for a non-election purpose and is so used or there is evidence to the contrary. All contributions by foreign political organizations, whether election related or not, should be disclosed and reported to an independent election monitoring body.

59. This area is also covered by the Societies Ordinance (Cap. 151) (see below).

**Other related legislation**

60. Apart from the above-mentioned legislation, there is other legislation which enables the government to prosecute or deal with acts mentioned in Article 23. Also, the United Nations (Anti-terrorism Measures) Ordinance has just been enacted to implement certain anti-terrorist measures adopted by the United Nations Security Council.

Emergency Regulations Ordinance (Cap. 241)

61. The Ordinance confers on the Chief Executive in Council power to make regulations on occasions of emergency or public danger on areas such as:

(1) censorship;
(2) arrest, detention, exclusion and deportation;
(3) appropriation, control, forfeiture and disposition of property, and of the use thereof;
(4) amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification;
(5) authorizing the entry and search of premises;
(6) the taking of possession or control on behalf of the Chief Executive of any property or undertaking;
(7) requiring persons to do work or render services; and
(8) the apprehension trial and punishment of persons offending against the regulations or against any law in force in Hong Kong

62. If it appears to the Chief Executive in Council to be necessary or expedient to secure the enforcement of any regulation or law or to be otherwise in the public interest, regulations can be made under the Emergency Regulations Ordinance to provide for the punishment of any offence (whether such offence is a contravention of the regulations or an offence under any law applicable to Hong Kong) with such penalties and sanctions (including a maximum penalty of mandatory life imprisonment but excluding penalty of death) and may contain such provisions in relation to forfeiture, disposal and retention of any article connected in any way with such offence and as to revocation or cancellation of any licence, permit, pass or authority issued under the regulations or under any other enactment .

63. In fact, under Article 4 of the ICCPR, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the Government may take measures derogating from part of their obligations under the ICCPR to the extent strictly required.

Societies Ordinance (Cap. 151)

64. If the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of **national security** or public safety, **public order** or the protection of the rights and freedoms of others; or if the society or the branch is a political body that has **a connection with a foreign political organization** or a political organization of Taiwan, the Societies Officer would notify the Secretary for Security who would then decide whether or not to issue an order banning the society (section 8).

## CONCLUSION

65. Legislation under Article 23 may provide the HKSAR Government with a good opportunity to conduct an extensive overhaul of the existing laws on the matters. Article 23 itself does not create any crime. It also does not mandate the Legislative Council of the HKSAR to make new laws which are incompatible with other provisions of the Basic Law and the common law.

66. The new legislation must therefore conform to international standards as codified in the ICCPR through Article 39 of the Basic Law, as well as the domestic protections found in the Basic Law (Article 4 - safeguard the rights and freedoms of the residents of the HKSAR; Article 11- no law enacted by the Hong Kong legislature shall contravene the Basic Law; Article 27- freedoms of speech, association and assembly; Article 34 - the freedom to engage in academic research, literary and artistic creation, and other cultural activities).

67. Pure expression of opinion should not be criminalised. Relevant principles under the Johannesburg Principles should also be observed. In any new legislation having the potential to affect the right to express opinion, a statutory limitation along the lines of s. 17A of the Australian Security Intelligence Organization Act should be included[5].

68. On secession and subversion, HKSAR Government should not introduce any legislation, as other laws more than adequately cover such behaviour, including the crime of treason.

69. Further, it is also submitted that for all offences under Article 23, the consent of the Secretary for Justice for any prosecution should be obtained. The Secretary for Justice is the proper person to weigh the public interest in prosecutions. It is necessary and proper for there to be a statutory requirement that the Secretary for Justice's consent is needed before any prosecution and such consent should not be delegable.

Hong Kong Bar Association
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[5] "This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security."

| Area under Basic Law, Art 23 | The Bar's Recommendations |
|---|---|
| **Treason** | (a) The provisions in the Crimes Ordinance in relation to treason should be amended to reflect the necessary changes brought about by change of sovereignty.<br>(b) The offence of treason should be directed as acts against the State rather than the Government. It should also be limited by deleting the provisions in relation to personal attacks on the sovereign.<br>(c) In order to be liable to prosecution for the offence of treason, the defendant's action must involve violence or likely to lead to violence. He should also have the mens rea to overthrow the existing political regime. |
| **Sedition** | In order to constitute the offence of sedition, there must be present an intention to incite violence or create public disorder against "constituted" authority; and actual violence or public disorder as a result of such incitement or an actual likelihood of such response to the incitement. |
| **Theft of State Secrets** | The Official Secrets Ordinance (Cap 521) and in particular, section 3 and sections 13 to 17 thereof, should be amended to bring it in line with the standards set out in the ICCPR and the Johannesburg Principles. It is important that disclosure of official information should not attract punishment if the public interest in knowing the information outweighs the harm from disclosure. |
| **Secession** | (a) Secessionist activities are likely to be actionable as a criminal offence under existing legislation, eg the offence of treason and the offence of sedition. But pure expression of opinion by declaring a secessionist cause short of inciting violence or having the likelihood of inciting violence should not be outlawed. It is doubtful if there is a need for an offence of secession.<br>(b) An offence of secession should not prohibit any act short of actual violence or act which induces actual violence. |

| | |
|---|---|
| **Subversion** | (a) Many, if not all manifestations of subversion, are prohibited under existing legislation. It is doubtful if there is a need for an offence of subversion.<br>(b) An offence of subversion should not prohibit any act short of actual violence or act which induces actual violence. |
| **Foreign political organizations conducting political activities in the HKSAR**<br><br>**HKSAR political organizations establishing ties with foreign political organizations** | Article 23's requirements are fulfilled if electoral laws contain provisions prohibiting foreign political organizations from directly or indirectly participating in local elections (including financial contribution to a local political party related to an election purpose). It should be noted that the existing Societies Ordinance (Cap 151) has provisions regulating HKSAR political organizations establishing ties with foreign political orgainzations. |

# APPENDIX I : THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

## 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 peacefu1 exercise of the right to freedom of expression shall not be considered a threat to nationa1 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 result to, the nation, the state or its symbols, the government, its agencies, or public officials, 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 or public official unless the criticism or insult was intended and likely to incite imminent violence.

**Principle 8 :** Mere Publicity of Activities That May Threaten National Security

Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest.

**Principle 9:** Use of a Minority or Other Language

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 the 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 would 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 car 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.