

**National Security (Legislative Provisions) Bill :
instigating armed forces to invade and sedition**

This paper explains -

- (1) why it is necessary to include within treason an offence of “instigating foreigner armed forces to invade”, given that it is a sedition offence to incite treason; and
- (2) whether the former offence would be covered by the latter, as it is possible for someone to incite an offence in circumstances where the commission of that offence is impossible.

Relevant provisions

2. The treason offence under the proposed section 2 of the Crimes Ordinance is cast as follows –

“A Chinese national commits treason if he –

- (a)
- (b) instigates foreign armed forces to invade the People’s Republic of China with force; or
- (c)”

3. “Foreign armed forces” are defined to mean –

- (a) armed forces of a foreign country;
- (b) armed forces which are under the direction or control of the government of a foreign country; or
- (c) armed forces which are not based in, and are not armed forces of, the People’s Republic of China.

4. The sedition offence under the proposed section 9A is cast as follows –

“A person commits sedition if he incites others to commit an offence under section 2 (treason)”

5. As has previously been explained “instigate” has a meaning of “urge on, incite (person to action)”; or “to cause something to happen by own effort”. It therefore has a similar meaning to “incite”, which appears in the sedition offence.
6. The question is whether the offence of inciting treason covers all situations in which a person instigates foreign armed forces to invade the People’s Republic of China (PRC). For the reasons given below, the Administration believes that it does not.

Non-Chinese nationals cannot commit treason

7. Under the Bill, only Chinese nationals can commit treason. Foreign armed forces that do not contain Chinese nationals cannot commit treason. An invasion of the PRC by such armed forces would not amount to treason.

A person cannot incite non-Chinese nationals to commit treason

8. A person who incites such armed forces to invade the PRC would not therefore be inciting an offence of treason.
9. Even a person who incites non-Chinese nationals armed forces to invade the PRC, believing it is an offence for them to do, could not be convicted of inciting treason. That mistake is one of law, which cannot make the person guilty of a non-existent offence.
10. And a person who incites non-Chinese armed forces to invade the PRC, believing them to be Chinese nationals, could not be convicted of inciting treason, since a person cannot be guilty of inciting an offence where some element of the offence is in fact missing.

Instigating foreign armed forces to invade

11. It is considered appropriate to make it an offence to instigate foreign armed forces to invade the PRC, regardless of their nationality. This being so, it is necessary to have an offence separate from, and additional to, the offence of sedition. That offence is one head of the proposed offence of treason.

12. A similar point was made by the Canadian Law Reform Commission in its Working Paper on Crimes Against the State (at p.47) in respect of the offence of aiding an enemy.

“When a person aids an enemy at war with Canada, he does not aid the commission of a crime because it is not a crime under domestic law for an enemy to wage war against Canada. Thus, the offence of assisting the enemy is a primary offence, just like the offence of engaging in war.”

Practical examples

13. In practice any “instigation” would be directed at those in control of the foreign armed forces, i.e. those who give the orders.
14. For the first and second legs of the definition of “foreign armed forces” in the treason offence, the “instigation” would in practice need to be directed to the foreign country or the foreign government controlling the armed forces. The instigation or incitement would not be directed at the individuals who make up the “foreign armed forces” and who would be expected to carry out the act of invasion of the People’s Republic of China.
15. The third leg of the definition covers “armed forces which are not based in, and are not the armed forces of, the People’s Republic of China. This third category would cover forces which were not under control of a government and are not part of the armed forces of a country which would not otherwise be covered (Taleban forces in Afghanistan would be an example).
16. Where “instigation” was directed at a foreign government or a foreign country it would not be caught by the sedition offence. In the sedition offence the subject of the incitement is the individual who would carry out the offensive act. A foreign government or a foreign country could not directly commit the offence of treason against the PRC. Treason can only be committed by individuals who are Chinese citizens. For a person to commit an offence of incitement, as the sedition offence is cast, the course of conduct incited must constitute an offence by the person incited. That would not be the case for a foreign government or a foreign country. Nor would it be the case where no Chinese national was involved.

Justification

17. In most situations, the offence of instigating foreign armed forces to invade the PRC by force would not amount to the offence of sedition. It therefore needs to be included as a head of treason.

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