

**National Security (Legislative Provisions) Bill :
Justification for heads (a) and (c) of the subversion offence**

Article 23 of the Basic Law provides that the Hong Kong SAR shall enact laws **on its own** to prohibit (amongst other things) any act of subversion against the Central People's Government.

2. It would be unacceptably vague to enact a law that simply makes it an offence to commit "any act of subversion against the Central People's Government". It is therefore necessary to specify more precisely what acts are to be prohibited on the grounds that they would amount to subversion. It is for the HKSAR to determine precisely what acts are to be prohibited.

3. In deciding what acts should be prohibited, the Administration has considered the ordinary meaning of "subversion" and the use of that term, or that concept, in common law jurisdictions. Relevant information is summarised in paragraphs 5.2 and 5.3 of the Consultation Document (attached). A further example is found in the Canadian Security Intelligence Service Act, under which "threats to the security of Canada" are defined as including "activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada". Although the term "subversion" is not used in that provision, writers commonly refer to that subhead of threats to the security of Canada as the subversion section.

Disestablishing the basic system of the PRC

4. The Central People's Government exists and operates under and in accordance with the Constitution of the PRC. Under the Constitution, the Central People's Government (the State Council) is the executive body of the highest organ of state power (i.e. the National People's Congress) and is the highest organ of state administration. Its functions and powers include "to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law" (Article 89(1)), "to draw up and implement the plan for national economic and social development and the state budget" (Article 89(5)); and "to direct and administer economic affairs" (Article 89(6)).

5. If the basic system of the PRC as established by the PRC Constitution were disestablished by force or serious criminal means that seriously endangered the stability of the PRC, or by war, the nature and

functions of the Central People's Government would have been fundamentally subverted. It could no longer operate in the manner envisaged by the Constitution. For example, if the National People's Congress were disestablished, the Central People's Government could no longer submit proposals to it as envisaged by Article 89(2) of the Constitution; the CPG could not report its work to it under Article 92; and the CPG could not look to a non-existent NPC for assignment of powers and functions under Article 89(18).

6. It is therefore considered appropriate to protect the Central People's Government from such subversion by including head (a) in the proposed offence of subversion.

Intimidating the CPG

7. In order to fully discharge its responsibilities under the Constitution, the Central People's Government must be able to exercise its power at its free will. If policies or measures are forced onto it by those using force or serious criminal means that seriously endangers the stability of the PRC, or by those engaging in war, the function of the Central People's Government in carrying out its responsibilities would undoubtedly have been seriously hampered. Such means of intimidation could legitimately be regarded as a form of subversion against it. For example, a group that organized nationwide terrorist attacks in order to intimidate the Central People's Government into changing its policies in a certain area could be considered to have conspired to commit subversion.

8. For these reasons, it is considered appropriate to include head (c) in the proposed offence of subversion.

Department of Justice
April 2003

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 government⁴². In Australia, it is treachery to overthrow the constitution of Australia by revolution or sabotage; or to overthrow by force or violence the established government⁴³. 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 constitution⁴⁴.

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

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

⁴⁴See 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

⁴⁵Protection 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.*”

⁴⁶Other 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.