

**National Security (Legislative Provisions) Bill :
Application of the proposed subversion and
secession offences outside Hong Kong**

It is proposed that the offences of subversion and secession should apply to acts done outside Hong Kong by any Hong Kong permanent resident. This paper explains –

- (1) the legal basis upon which such provisions can be enacted;
- (2) the policy justifications for legislating in such a manner; and
- (3) how the Administration intends to implement these extra-territorial provisions.

Legislative competence

2. Neither before nor since Reunification has Hong Kong's Legislative Council had the powers of a sovereign legislature. Its powers have been limited to those conferred on it by relevant constitutional instruments.

3. However, according to common law principles, "There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision" (Lord Uthwatt in *Wallace Brothers & Co Ltd v Commissioner of Income Tax, Bombay City and Bombay Suburban District* (1948) LR 75 Ind App 86, at p.98).

4. The limitation on the legislative competence of a subordinate legislature imposed by the common law appears to be that there must be some "nexus" between the territory concerned and the provisions of the legislation. On such "nexus", Professor Peter Wesley-Smith is of the view that the test is whether the legislation bears a "real or substantial relation" to the territory.

5. Article 17 of the Basic Law states that "The Hong Kong Special Administrative Region shall be vested with legislative power". Article 73(1) empowers the Legislative Council to "enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". There are no provisions in the Basic Law which expressly prohibit the legislature of the HKSAR from legislating extra-territorially. However, the Legislative Council may be subject to the common law rule that the legislation of a subordinate legislature needs to have sufficient connection with the territory.

6. Article 19(2) of the Basic Law provides that –

“The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

Having regard to this Article, and to the principle of continuity that underpins many aspects of the Basic Law, it is considered that the Legislative Council has the power to enact laws having extra-territorial effect where those laws have a sufficient connection with the Hong Kong SAR.

7. Examples of legislation having extra-territorial effect that were enacted before and after Reunification are (respectively) section 4 of the Prevention of Bribery Ordinance (Cap 201) and section 7(1A) of the Gambling Ordinance (Cap 148). The former provides that any person who “whether in Hong Kong or elsewhere” bribes a public servant shall be guilty of an offence. The latter makes it an offence for a person to engage in bookmaking by receiving, negotiating or settling “outside Hong Kong” a bet which was placed from Hong Kong.

8. In the case of the proposed offences of subversion and secession, the connection with the SAR would be –

- (1) the HKSAR has a constitutional duty to enact laws on its own to prohibit secession and subversion against the Central People’s Government;
- (2) Hong Kong permanent residents have constitutional rights under the Basic Law, including the right of abode;
- (3) Hong Kong permanent residents retain those rights, even when they are outside Hong Kong, and therefore continue to have a constitutional connection with the HKSAR; and
- (4) any act of secession or subversion against the Central People’s Government, wherever committed, would affect the HKSAR which is part of the PRC.

This combination of factors is considered to create a sufficient connection between acts of secession or subversion committed outside Hong Kong by Hong Kong permanent residents and the HKSAR to empower the Legislative Council to prohibit such acts.

Policy justifications

9. In deciding whether it is appropriate to legislate for acts of subversion or secession committed outside Hong Kong, the following considerations have been taken into account.

(1) ***Comity of nations***

The general principle of “comity of nations” refers to a friendly understanding by which each nation respects the laws and usages of other nations, without prejudice to its own rights and interests. Under this principle, one country does not generally legislate for activities conducted within the jurisdiction of another country.

(2) ***Established exceptions***

International law recognizes exceptions to the above principle, including the following well-established principles –

- (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; 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.

(3) ***Relevant foreign laws***

In many other common law jurisdictions, activities that would fall within the proposed offences of subversion and secession would generally be covered by the law of treason. The general rule that applies to offences of treason in such jurisdictions is that they have extra-territorial effect on persons who owe allegiance to the state. That will include not only nationals of the state but also any non-national who owes allegiance to it. For example, in *Joyce v DPP*, a non-national who had improperly obtained a British passport was convicted of treason. The conviction was based on the fact that he owed allegiance to the Crown on account of his continuing use of the British passport which enabled him to obtain the protection of the Crown in a foreign country.

(4) ***Hong Kong permanent residents***

Since Hong Kong is not a sovereign state, it is not possible to apply the concept of allegiance to Hong Kong in determining the application of the proposed offences of subversion and secession. The closest concept is that of the protection afforded to Hong Kong permanent residents under the Basic Law. The constitutional rights conferred on a permanent resident subsist so long as an individual is a permanent resident, regardless of whether he or she is physically in Hong Kong.

(5) ***Legal policy***

According to Francis Bennion “It would plainly be against legal policy for persons to be able to go abroad to commit their crime and then return without punishment” (see *Statutory Interpretation*, 3rd ed, p.290). In the context of the UK, Bennion comments that “In the nature of things, this is more likely to happen with Britons than foreigners. They belong to the legislating territory, and may be likely to return to it. Nowadays, their absence abroad may be very brief indeed”.

In the context of Hong Kong, similar considerations apply to permanent residents.

(6) ***Mainland laws***

Under the principle of “one country, two systems”, Hong Kong is not obliged to adopt the same approach to extra-territoriality as the Mainland. However, since the Bill deals with the protection of national security, the extent to which relevant Mainland laws have extra-territorial application is a factor to be taken into account.

Under Articles 7 and 8 of the Criminal Law of the PRC, crimes prescribed in that law apply outside the PRC -

- (a) to any PRC citizen, but he may be exempted if the maximum punishment for the offence is fixed term imprisonment of not more than three years; and
- (b) to any foreigner, provided the minimum punishment for the offence is fixed-term imprisonment of not less than three years, and provided the offence is also punishable according to the laws of the place where it was committed.

10. Having regard to all these factors, and to the special status that Hong Kong permanent residents have under the Basic Law, it is considered

appropriate to apply the proposed offences of subversion and secession to the acts of permanent residents committed outside Hong Kong.

11. The effect of such an approach is that there be circumstances in which the acts of a Hong Kong permanent resident committed outside Hong Kong (whether in the Mainland or not) might amount to offences against the state both in Hong Kong and the Mainland. However, the fact that there would be concurrent jurisdiction to prosecute the person is not considered to be a problem. On the contrary, a Hong Kong permanent resident who is arrested in Hong Kong for an extra-territorial offence of subversion or secession would be subject to prosecution in Hong Kong under Hong Kong laws. Mainland laws would not be applicable in Hong Kong.

Interpretation

12. The extra-territorial clauses of the offences of subversion and secession provide for the circumstances where the courts have jurisdiction to try these offences committed outside of the geographical boundaries of Hong Kong. These clauses will not extend the enforcement powers of Hong Kong authorities to investigate an offence or apprehend a suspect outside of the territory. Enforcement of the extra-territoriality scope of the offence provisions will be a function of various factors including relevant principles of international law, considerations of jurisdictional issues as well as relevant agreements on mutual legal assistance, rendition or extradition.

13. A Hong Kong permanent resident who committed an extra-territorial offence of subversion or secession and who returned to Hong Kong could be arrested and prosecuted before Hong Kong courts in the normal way.

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