Submission No.57

Summary of the Speech by Mr Gerard McCoy SC at "Dialogue on Article 23" organised by the Basic Law Institute on 23 December 2002

I have reluctantly agreed to participate in the public commentary on the government's proposals to implement Article 23 of the Basic Law. I have no political statement to make. I will not make an emotional one. I am not on anyone's side and I am certainly not a government apparatchik. I restrict myself to dispassionate legal analysis.

Treason

I suspect I am the only person in HK who has ever prosecuted a treason case. It is undoubtedly the most serious offence in the criminal calendar. In a sense it is the attempted murder of a country. It criminalises the attempted destruction of the legal and governmental order. The aim of the crime of treason is therefore the preservation of the State and its apparatus for the benefit of the people. Every country has the right to protect itself from invasion or destruction. Treason and subversion are innately offences of self-preservation by the State.

HK has some history of treason trials. In 1945 and 1946 we had trials for treason arising from the Japanese occupation of HK. UK had treason trials arising out of World War II, South Africa in 1923, Australia in 1946, the Caribbean for much of the 1980s and of course Fiji this year (2002). People think treason never happens in their time. But only last week the Indian High Court gave convictions of treason to three persons who had fomented armed rebellion in India, and last year, the United Kingdom Government, in response to the September 11 attack, stated that they may consider charging terrorists with treason.

The Consultation Document states that treason involves the betrayal of one's country in collaboration with an external enemy. As a matter of law, I do not agree. Collaboration with an external enemy is not a requirement of the law treason. An attempted coup d'etat without foreign involvement would amount to treason. This is quite clear under English law. So the effect of the government proposal is actually to significantly narrow the existing crime of treason. The full common law

extent of the offence is not intended to be replicated by the crime of treason envisaged in the Consultation Document.

Subversion

The offence of subversion has been created, but this offence has a respectable common law pedigree. It was always encompassed by the offence of treason. As a concept, treason is fixated on violent tumultuous upheaval, such as invasion or other types of war. Subversion however also deals with non-violent means; more subtle but equally insidious types of attack on the organs of State. It could not be constitutionally invalid to enact penal legislation preventing subversion by stealth, subversion by computer, subversion by electronic means. There is nothing in the International Covenant that prohibits such laws. Subversion is simply a modern response to modern inventions directed at imperilling the integrity of the State.

Misprision of Treason

Misprision of treason is an existing common law offence, but who had ever heard of the word "misprision" before Article 23 came to the fore? The consultation paper defines the offence of misprision of treason as – when a person knows that another person has committed treason but omits to disclose to the proper authority within a reasonable time. In my opinion, this is not correct. On this formula again the government is actually proposing to significantly narrow the existing offence. Misprision of treason occurs at common law upon, as the consultation paper says, failure to disclose actual treason to the authorities but it also includes failure to disclose threatened acts of treason. The object of misprision of treason is therefore two-fold. Firstly, preventative to prevent a planned treason coming into fruition by placing a criminal responsibility on someone learning of the intended treason; and secondly to emphasize the special potential evil of treason in the correlative responsibility to help society prosecute those concerned who take part in traitorous activities. To be consistent with the comparative statutory formulation of the offence in other common law jurisdictions, this offence should cover both temporal spheres; post-treason and pre-treason concealment.

Test it this way, as a matter of a legal analysis. If you learn that people intend to explode a bomb under LegCo in order to disestablish HK or to start an armed invasion, should you not have a responsibility to your fellow citizens, to inform the police? This example, of course, is not fanciful. It is taken directly from the most well known treason trial in the common law. The trial of Guy Fawkes, who placed kegs of gunpowder under the Houses of Parliament in London. The correlative duty between the citizen and society is the essence of the conceptual underpinning of misprision of treason. Because you have rights in terms of citizenship, permanent residence or whatever, you have reciprocal obligations to your society in this extreme situation.

Extra-territoriality

There is nothing in the ICCPR that commends the view that the legislature is not entitled to enact extra-territorial penal legislation. On the contrary, such legislation already exists. Secondly, the principles of objective territoriality emphasise the right of a State to bring criminal proceedings even if the entire criminal act occurred outside the State. For example, it is already a criminal offence, under general criminal law, justiciable in HK, for two people to unlawfully conspire in a foreign country to do something unlawful here. This was decided by the Court of Appeal in 1987 and confirmed by the Privy Council. The rationale for this is the impact theory of criminal law – where was the object of the criminal conspiracy to be carried out? If HK would be the intended victim it has criminal jurisdiction over the plotters wherever they conspired.

One feature, however, to be kept in mind is that virtually every extradition agreement, if not all, that HK has entered into contains the commonly found so-called "political offence" exception, in which any fugitive seeking to resist extradition, may claim that the basis of crime for which the extradition is sought is actually political. This is a recognised bar to extradition.

Safeguards

It is important in considering the ICCPR to analyse the safeguards which exist under our system of the law. The first safeguard is the Basic Law itself. There is no possibility whatsoever that Article 39 of the Basic Law does not apply to offences to be created under Article 23.

Put in a positive way, the provisions of the International Covenant of Civil and Political Rights will undeniably apply to ameliorate, if necessary, the specific language of the offences to be created under Article 23. It therefore follows that the constitutional validity of any offence to be created under Article 23, just like any other criminal offence in HK, may be the subject of successful challenge before the courts of HKSAR.

The second safeguard, in terms of legal principle, is the Secretary for Justice. A specific non-delegable consent of the Secretary of Justice could be required by the legislature as a lawful condition precedent to the institution of any prosecutions under the proposed Article 23 offences. If that was incorporated into the final legislation it should not be underrated as a powerful potential inhibitor.

Thirdly, there is the Director of Public Prosecutions who has, in an admirable open and transparent way, published guidelines to be applied in the decision-making process whether to prosecute or not. These guidelines will equally apply to Article 23 offences. The integrity of his office and those retained to prosecute crimes is an additional safeguard. It is well known that, to avoid conflicts of interest, the DPP will often seek the advice of independent counsel in sensitive cases or cases of potential difficulty or peculiar complexity.

The fourth safeguard is the private bar of HK. It is composed of resolute professionals who are voraciously independent. We fearlessly defend all, including the most unpopular cases. The Bar, the separate independent Bar, has a vital and permanent role, to play in the administration of the rule of law in relation to Article 23 offences.

And then the Judiciary – independent free thinkers with a deserved international cachet. Under our system, the government is only an equal party before the law. It has no advantage. We have no compliant judiciary. The courts will apply Article 39, its thrust as well as its resonance, to all criminal laws. There is an interactive role between the courts and the legislature in terms of applying Article 39.

And finally, the government's undertaking - the government has, unequivocally stated that it intends to comply with Article 39. Article 39 binds the government tightly, like a Shanghai crab. It cannot escape.

Article 39

Article 39 incorporates the International Covenants. Those Covenants impose, firstly, an evolutive and dynamic approach to interpretation of the proposed criminal offences. Secondly the ICCPR is an expression of fundamental principles rather than a set of mere rules. Any proposed laws must accommodate legitimate security concerns, and yet simultaneously afford a substantial measure of procedural justice for those at the sharp end of possible prosecutions.

Some concerns have understandably been raised about the uncertainty or the width of the proposed laws. The principle of legal certainty that applies under the ICCPR does not require that any person must be able to predict the legal consequences of his actions with absolute certainty. The European Court itself said that experience shows this to be unattainable. The European Court has generally been prepared to recognise a wide margin of appreciation - a discretion where measures taken to safeguard national security are at stake. The court said it was a valid law to prohibit disclosing military information described as being "of minor importance". Such a crime was upheld as being valid. Perhaps, more importantly, this year (2002) the House of Lords, the highest English court in the case of Shayler, held that the absence of a public interest defence under the Official Secrets Act was compatible with the ICCPR or European Convention obligations. The fact that there was no whistle-blower defence did not make the law invalid.

In any challenge to an offence created under Article 23 the court will ask if the legislative technique adopted falls outside the range of responses reasonably open to LegCo bearing in mind the ICCPR. David Pannick, QC, perhaps the foremost public lawyer in England, has provided a legal opinion. I essentially agree with his conclusions, and I would say as a matter of legal principle, the proposed offences do not violate the international covenants. But it would be important, if enacted, to ensure that the application of the law is consistent with human rights.