**Submission No. 9**

# Comments on the National Security (Legislative Provisions) Bill

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1. Article 23 of the Basic Law ("BL 23") requires the Hong Kong Special Administrative Region ("HKSAR") to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government." It also deals with issues of state secrets and the activities of foreign political organizations in Hong Kong. Many of the issues raised by BL 23 are considered to be politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

2. The consultation exercise on the Government's legislative proposal on the implementation of BL23 concluded with the publication on 28 January 2003 of the multi-volume *Compendium of Submissions* and the Government's announcement on the same day of 9 sets of clarifications or modifications of the original proposal. This was followed by the publication of the National Security (Legislative Provisions) Bill ("the bill") on 13 February and its first reading in the Legislative Council (LegCo) on 26 February. Although the bill has not yet been passed into law at the time of writing, it seems that the basic principles underlying it do have the support of the majority of LegCo members. Therefore, it is now possible to see in broad outline how Hong Kong's laws will change as a result of the proposed legislation on the implementation of BL23.

3. *Treason*. The existing definition of treason in the Crimes Ordinance will be narrowed down to cover only situations where the accused joins foreign armed forces at war with China, instigates foreign armed forces to invade China or assists a public enemy at war with China. The term "war" used in the existing law will be narrowed down to include only open armed conflicts (and not mere riots and civil disturbances). The existing "treasonable offences" (which are extremely broad and criminalize all "overt acts" or publications manifesting treasonous intention), the offence of assault on the sovereign, and the common law offences of "compounding treason" (corruption in deciding not to prosecute treason) and "misprision of treason" (failure to report treason) will be abolished. The proposed reform of the law of treason as particularized above, together with the proposed reform of the law of sedition discussed below, demonstrate that the BL23 exercise is not intended to make Hong Kong's laws more draconian. Instead, it is an exercise to review and reform the existing law in the light of the

principles enshrined in BL23, and to remove repressive laws that Hong Kong has inherited from its colonial era which are now out-of-date and inconsistent with progressive notions of human rights.

4. *Sedition*. Like treason, sedition is an existing crime under Hong Kong's Crimes Ordinance. The existing law of sedition, introduced by the British colonial government and modeled on similar laws in other British colonies, is very harsh, though it has not been strictly enforced in recent decades. For example, any speech or publication that "brings into hatred or contempt or excite disaffection against the Hong Kong Government" is regarded as seditious under the existing law. This law was actually used in 1952 (in the case of *The Crown v Fei Yi-ming and Lee Tsung-ying* (1952) 36 HKLR 133) to prosecute and convict the publisher and editor of the pro-China newspaper in Hong Kong, *Ta Kung Po*, for re-publishing an article from the *People's Daily* that was critical of the colonial government. Furthermore, the existing law criminalizes possession of and handling of (e.g. printing, importing, displaying, selling) seditious publications. The bill now proposes to liberalize the existing law of sedition by (a) narrowing the definition of sedition to confine it to situations where there is incitement to commit treason, secession or subversion, or incitement to "engage in violent public disorder that would seriously endanger the stability of the People's Republic of China" --- thus unless there is advocacy of the use of violence or serious criminal means (as discussed below) for certain specified purposes, sedition will not be committed; (b) abolishing the offence of possession of seditious publications; (c) restricting the offence of "handling seditious publications" to situations where the accused actually intends to incite treason, subversion or secession; and (d) incorporating into the definition of "seditious publications" the "likelihood" test in "principle 6" of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (adopted at a conference in 1996 convened by Article 19, a London-based NGO) --- so that "seditious publications" are those that are "likely to cause the commission of" the offence of treason, subversion or secession. Such proposed liberalization of the sedition law is undoubtedly a welcome development for freedom of information and freedom of expression and the press in the HKSAR.

*5. Subversion and secession*. Part of the requirements of BL23 is that the HKSAR should legislate to prohibit "subversion" and "secession" --- two concepts that are unknown to Hong Kong's existing law but exist in mainland Chinese law. It is therefore necessary for the Government to come up with definitions of new crimes of subversion and secession. There have been concerns that any introduction of the mainland concepts of subversion and secession into Hong Kong will be inconsistent with the principles of "one country, two systems", of not changing Hong Kong people's way of

life and of not reducing the pre-1997 level of protection of human rights in Hong Kong. The HKSAR Government has risen to the challenge of legislating on subversion and secession by *not* importing the relevant mainland laws and standards to Hong Kong, and by creatively designing for these two crimes legislative models that are unique to the HKSAR. Thus according to the bill, secession and subversion will be defined respectively as "withdraw[ing] any part of the PRC from its sovereignty" (in the case of secession) and "disestablish[ing] the basic system of the PRC as established by the Constitution of the PRC; overthrow[ing] the Central People's Government; or intimidat[ing] the Central People's Government" (in the case of subversion) --- in both cases by "engaging in war" or using "force or serious criminal means that seriously endangers the stability of the PRC" (the means are similar to those "terrorist acts" defined in Hong Kong's United Nations (Anti-terrorism Measures) Ordinance 2002). It should be noted that these definitions of secession and subversion proposed for the HKSAR are much narrower than the corresponding definitions in articles 103 and 105 of the Chinese Criminal Code, which do not require acts of violence as an essential element in the offences of secession and subversion. However, **the loose language used by the definitions in the bill (for example, the phrase "intimidates the Central People's Government" in the proposed definition of subversion) still leaves much to be desired and may hopefully be refined in the committee stage for the bill.**[1]

*6. State secrets*. BL23 also requires the HKSAR to legislate against theft of state secrets. The protection of official secrets against espionage and unlawful disclosure is already provided for fairly adequately in the Official Secrets Ordinance 1997, which was modeled on the corresponding British legislation. The bill now proposes three major amendments to this ordinance. First, a new category of official secrets is to be created --- information on "affairs concerning the HKSAR which are, under the Basic Law, within the responsibility of the Central Authorities", where disclosure is likely to endanger national security. This category of information is not provided for in the existing ordinance which was enacted shortly before the handover. Secondly, it is proposed that unauthorized and damaging disclosure of official secrets "acquired by means of illegal access" --- defined to mean computer hacking, theft, robbery, burglary or bribery --- be criminalized. This proposed amendment is apparently designed to plug a "loophole" in the existing law whereby a computer "hacker may openly sell stolen protected information to a publisher who may then openly publish the information for

[1] Whether an act can "intimidate" the PRC Government depends very much on whether the PRC Government is of such nature that it is easily susceptible to intimidation. Our law should rest on objective standards rather than such subjective considerations as the state of mind of the PRG Government and its susceptibility to intimidation. I believe that the first two limbs of the proposed offence of subversion (overthrowing the PRC Government, or disestablishing the basic system of the state) are perfectly

profit" (para. 6.22 of the *Consultation Document*) without the publisher committing any offence under the existing official secrets law. Thirdly, the existing definition of "public servants" (which is crucial as official secrets are defined mainly by reference to their being in the possession of public servants and falling within the defined categories) will be localized. This proposed amendment is significant in limiting the scope of official secrets covered by the ordinance. Taken as a whole, the proposed amendments to the Official Secrets Ordinance are reasonable and consistent with the spirit of "one country, two systems". However, it remains to be seen whether the "public interest" and "prior publication" defences advocated by the legal and journalistic communities in Hong Kong will be added to the bill during its committee stage.[2] **In this regard, I support the introduction of a limited version of the public interest defence drafted along the lines of section 30(3) of the existing Prevention of Bribery Ordinance.**

*7. Proscribed organizations*. The requirements in BL23 regarding prohibition of links between local and foreign political organizations have already been implemented by the amendment of the Societies Ordinance at the time of the handover in 1997. Under this ordinance, the HKSAR Government already has the power to prohibit the operation of a local society or association on the ground of national security. The Government is now proposing a set of amendments to the Societies Ordinance designed to elaborate this power. According to the bill, where a local organization (a) has the objective of engaging in or (b) has committed or is attempting to commit treason, secession, subversion, sedition or spying, or (c) is "subordinate to" an organization in mainland China which has been proscribed by the Central Authorities' open decree for reasons of national security, the HKSAR's Secretary for Security may proscribe the local organization "if he reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose". The court will have the power to review whether the proscription is justified by applying the human rights standards enshrined in the International Covenant on Civil and Political Rights. Part (c) of the proposal has aroused much public opposition, but it seems unlikely that the Government will agree at the committee stage to drop it. The policy behind the proposal is apparently to send a signal to deter people from "making use of Hong Kong's free and open environment as a base against national security and territorial integrity" (para. 3.8 of the *Consultation Document*). Another controversial amendment proposed in this regard empowers the Chief Justice to make rules on the hearing of appeals against proscription that may enable the court, in cases where disclosure of certain information

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sufficient to capture the concept of subversion as understood in China and elsewhere.

[2] The public interest defence would enable the courts to weigh the damage caused by the disclosure against the public benefit of such disclosure. This defence has been recognised in the Canadian Security of Information Act. Prior publication as a defence also seems to have been recognised by the European Court of Human Rights. (See Mr Kevin Lau's articles in *Ming Pao* on 13, 14 and 17 December 2002 in

is considered detrimental to national security, "to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him", although the court may "appoint a legal practitioner to act in the interests of the appellant" in such cases. The Government argues that precedents for such provisions exist in Canada and Britain in the context of immigration and anti-terrorism laws (e.g. the UK Special Immigration Appeals Commission Act 1997). However, **insofar as the bill has not brought the existing system of appeals (to the Chief Executive in Council rather than the court) against the cancellation of a society's registration or prohibition of a society's operation (which may also be on the ground of national security) in line with the proposed system of judicial appeals against proscription of local organizations, there will be a significant anomaly in the law unless this problem is addressed in the committee stage of the present bill.**

*8. Extra-territorial application.* I agree with the point made in the Bar's submission on the Consultation Document that the extent of the extra-territorial application of Chinese criminal law should be taken into account in formulating the extra-territorial scope of the BL23 laws. In particular, I do not believe that the criminal laws of the HKSAR relating to BL23 should have a wider extra-territorial application than the mainland Chinese criminal law.

9. The extra-territorial application of the mainland Chinese criminal law is governed by articles 7 to 9 of the Chinese Criminal Code (enacted in 1997). For our purposes, article 8 is most relevant. This article extends the applicability of Chinese criminal law to foreign nationals outside the territory of the PRC who commit a relatively serious crime (punishable by not less than 3 years' imprisonment under Chinese law) against the Chinese State or a Chinese citizen except "where the crime is not punishable according to the laws of the place where it is committed". The purpose of the exception is to avoid imposing duties under Chinese criminal law on foreign nationals outside China whose primary duty is to obey their own criminal law. This seems to suggest that offences such as treason, subversion and secession cannot be committed by foreign nationals outside the PRC. While it seems reasonable to subject foreign nationals who are Hong Kong permanent residents to Hong Kong laws while they are in Hong Kong, it seems that it would not be reasonable to subject them to Hong Kong law when they are outside the PRC *in circumstances where conditions for the extra-territorial application of even PRC law would not be satisfied*. In other words, if a foreign national (whether or not also a Hong Kong permanent resident) who has committed an act outside the PRC against Chinese national security (e.g. treason, subversion, secession) is not subject to the criminal jurisdiction of the Chinese court when s/he travels to the mainland, Hong Kong is under no constitutional duty under BL23 to render such a

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this regard.)

person subject to the criminal jurisdiction of the Hong Kong court. If this analysis is correct, then **the existing provisions of the bill on subversion and secession having extra-territorial application to foreign nationals who are Hong Kong permanent residents should be carefully reviewed and amended.**

**Further Comments on the National Security (Legislative Provisions) Bill: The proposed definition of "subversion"**

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1. One of the most important and interesting technical legal issues raised by the proposed definitions of subversion and secession in the Bill is what exactly is the actus reus of each of the offences. In this regard, it is important to note the following:

(a) The Document is not proposing that it is an offence (of subversion) to engage in war, or to use "force or serious criminal means that seriously endangers the stability of the PRC", for the purpose of disestablishing the basic system of the PRC, overthrowing the Central People's Government (CPG) or intimidating the CPG (hereinafter called "Rule 1"). Instead, it is proposing to make it an offence (of subversion) to "disestablish the basic system of the PRC as established by the Constitution of the PRC; overthrow the CPG; or intimidate the CPG" by using "force or serious criminal means that seriously endangers the stability of the PRC or by engaging in war" (hereinafter called "Rule 2").

(b) The Document is not proposing that it is an offence (of secession) to engage in war, or to use "force or serious criminal means that seriously endangers the territorial integrity of the PRC", for the purpose of withdrawing any part of the PRC from its sovereignty (hereinafter called "Rule 3"). Instead, it is proposing to make it an offence (of subversion) to "withdraw any part of the PRC from its sovereignty" by "using force or serious criminal means that seriously endangers the territorial integrity of the PRC; or engaging in war" (hereinafter called "Rule 4").

2. It should be stressed that there is a significant difference between Rules 1 and 2, and between Rules 3 and 4. Rules 1 and 3 contain significantly lower threshold requirements for subversion and secession (i.e. make it much easier for the offences to be committed). Consider the following example. Suppose people in a demonstration in Hong Kong against one-party rule in China set fire to vehicles and shops ("causing serious damage to property" is one of the "serious criminal means" as defined in the Bill[3]) while shouting the slogan "down with the Chinese Communist Party". This

[3] See the proposed sections 2A(4)(b) and 2B(4)(b) of the Crimes Ordinance in clause 4 of the Bill.

would probably amount to the offence of subversion under Rule 1, but is less likely to amount to subversion under Rule 2. The issue raised by this example is what exactly is the actus reus of subversion. The structure of the problem is similar in the case of secession.

3. Rules 2 and 4, rather than Rules 1 and 3, have been adopted in the Bill. The actus reus required by Rules 2 and 4 is more onerous (for the prosecution to establish) than the actus reus required by Rules 1 and 3. Thus under Rule 2, the actus reus is not just engaging in war or using "force or serious criminal means that seriously endangers the stability of the PRC". It is necessary to consider whether such acts really have the effect of (a) "disestablishing the basic system of the PRC", (b) "overthrowing the CPG", or (c) "intimidating the CPG". As far as (b) is concerned, it may be pointed out that the offence is committed only if the offender has actually succeeded in overthrowing the Chinese government, in which case there would be no government left to prosecute him. Similar considerations may apply to limb (a) of subversion as well as the offence of secession, which is committed only if the offender has actually succeeded in withdrawing a part of the PRC from its sovereignty. Thus in practice it seems unlikely that any one will actually be charged with limbs (a) or (b) of the subversion offence or with secession. It is more likely that the inchoate offences relating to subversion and secession, such as conspiracy and attempt, will have greater significance in practice. For example, where an accused is charged with attempt to commit subversion, the court will apply the common law "doctrine of proximity" in assessing his actus reus. The doctrine of proximity distinguishes between an act which remotely leads towards the commission of a crime and an act which is more immediately connected with the commission of the crime, even where both acts are committed with an intention to commit the crime ultimately. In the example given, the court will determine whether the acts committed by the accused (involving war, or force or serious criminal means that seriously endangers the stability of the PRC) are sufficiently proximate to the realisation of the ultimate objective of (a) disestablishing the basic system of the PRC, (b) overthrowing the CPG or (c) intimidating the CPG.

4. *It is submitted that the most problematic aspect of the Bill as far as the law of treason, subversion and secession is concerned is limb (c) of the proposed definition of subversion --- "intimidating the CPG"*. Whether the offence of subversion can be established on the basis of limb (c) depends not only on (i) what concrete acts have been done by the accused (in terms of war, force or serious criminal means), and (ii) his intention to intimidate the CPG, but also on (iii) whether the CPG has been

intimidated.[4] How can it be established as a matter of objective fact that the CPG has been intimidated? This, then, is the crux of the problem. The problem also arises where the accused is charged with attempting to commit subversion on the basis of limb (c). The question there is whether the acts of the accused are sufficiently proximate to the realisation of the objective of intimidating the CPG.

5. *It is submitted that limb (c) of the subversion offence is too vague and indeterminate, and fails to satisfy the requirement of clarity and precision in the criminal law.* Given that subversion is basically a "political offence", clarity and precision are particularly important here. It is not a sufficient answer to say that as the word "intimidate" already appears in the existing law of treason, there is no reason why it should not be employed in the definition of subversion. *In the law of treason, the word "intimidate" is not used to define the actus reus of the offence*; it is only used in the context of the mens rea. The relevant provision in the existing law is section 2(1)(c) of the Crimes Ordinance, under which treason is committed if the accused "*lev[ies] war* against Her Majesty" (i) "with the intent to depose Her Majesty" or (ii) "in order by force or constraint to compel Her Majesty to change Her 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" (emphasis supplied).[5] In this provision, the actus reus of the offence is "levying war", and one limb of the mens rea is "to intimidate Parliament". Using the concept of "intimidation" as part of the mens rea of treason is one thing; using it as part of the actus reus of subversion is another.

6. *I would propose that limb (c) of the proposed offence of subversion be deleted. Limbs (a) and (b) are sufficient for the purpose of constituting the offence.*

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[4] According to the *Collins Cobuild English Language Dictionary* (1987), "If you intimidate someone, you make them frightened enough to do what you want them to do, especially by behaving in a threatening way. EG *In 1972 his neighbours intimidated his family into leaving*."
[5] See also s 3(1) of the Crimes Ordinance, under which the word "intimidate" is used in the context of defining the intention of the offender for the purpose of "treasonable offences".