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A Defence of 'Public Interest'

A Paper Prepared for the LegCo Panel on Administration of Justice and Legal Services

Introduction

1. The Administration has been invited to submit a paper on the possibility of creating a defence of 'public interest'. The request comes via a letter from the Clerk to the LegCo Panel on the Administration of Justice and Legal Services dated 26 February 1999. The context in which this issue arises, to use the words of the letter is:

> Arising from a recent case where the appeal brought by a defendant who was originally convicted for gaining access to a confidential file in a hospital with a view to making dishonest gain was allowed by the Chief Judge with a lesser sentence, the Panel has considered whether public interest could be adduced as a reason for defence under certain special circumstances. In this connection, a copy of the note prepared by our Legal Adviser is attached for your information.
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> The Administration is requested to consider whether "public interest defence' should be introduced for offences against disclosure of confidential information and to set out its views in writing.

Public Interest Defences In General

2. There is no general defence to conduct penalised under the criminal law that the accused did the act in the public interest. There are instances in the statute book where the strict operation of the law is ameliorated or where in cases where the principal conduct the subject matter of the offence is committed but for external various reasons the accused is

not guilty. Examples of that may be seen in section 30 of the Prevention of Bribery Ordinance and perhaps to a lesser extent in section 28 of the Control of Obscene and Indecent Articles Ordinance.[1] Looking more broadly, the general defence at common law of necessity[2] and duress[3] and the defence to many offences in the nature of assault of self defence[4] might be said to contain a similar moral approach - an acceptance that the crime charged was committed but there was something which exculpates that accused which is external to the crime - a greater good.

3. A less articulate 'defence' of public good was raised in cases such as the Ponting Case.[5] There a civil servant breached the Official Secrets Acts and admitted in open court that he did so. He said he did so to prevent, in effect, a cover up of certain conduct by the British in the Falklands war. The judge ruled that there was no defence in law to his conduct but the jury nonetheless acquitted. It is to be noted that our Official Secrets Ordinance contains no defence of public good. It should be noted that others who leaked defence information 'for the greater good' did not fare so well.[6]

4. A slightly broader context may be seen in section 101A of the Criminal Procedure Ordinance which provides:

> A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

This is, of course, a provision not limited in its scope to police officers and has its roots in the common law. The essence of it that of reasonable force in the prevention of crime. The unspoken but well understood scope of this provision extends to lethal force which would otherwise be murder or manslaughter but that in the circumstances of the case such force would be reasonable. The underlying rationale is that the use of such force - provided it is reasonable force - is an acceptable price to pay for the prevention of crime.

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1 See legal advice of Jimmy Ma, Legal adviser to LegCo.

2 Halsbury's Laws of Hong Kong Vol 9 [130.051]

3 Halsbury's Laws of Hong Kong Vol 9 [130.029]

4 Halsbury's Laws of Hong Kong Vol 9 [130.353]

5 *R v Ponting* [1985] Crim LR 319.

6 An example of that might be seen in the case of Sarah Tisdall who was convicted following the leak of information about cruise missiles at Greenham Common airbase. She was convicted and was sentenced to 6 months imprisonment.

5. In the context of the crime of criminal damage reference might also be made to the case of *Blake v DPP*[7] where a defence based on the assertion that the accused was acting under God's orders was held to be not a defence.

Discussion

6. In relation to both the statutory and common law contexts mentioned above the striking thing is how limited in scope they are. That is because in many of them, it is recognised that what the accused has done in order for some of these defences to arise is to have committed what would otherwise be a crime. One of the great features of the system of criminal law that we have in Hong Kong is the relative certainty of the law. In other words, it is relatively clear what conduct is criminal and what is not. (It is accepted that this is not universal.) The concept of a general defence of public good would be inconsistent with the whole basis of our current system of criminal law and would inject into it a wide element of uncertainty as to the scope of criminal liability. The dangers that can easily be seen in anything other than very narrow and carefully circumscribed defences which involve a 'public good' or 'greater good' defence are many and include:

- the creation of uncertainty in the law in the sense that a member of the community will not know whether his or her conduct will be subject to criminal sanctions

- the difficulty of defining the public interest - what may be strongly justifiable to one person might be anathema to another

- the difficulty of determining who is to decide what is in the public interest

- the difficulty of who has to prove whether something is in the public interest

- the difficulty in balancing the protection of the public with what on a subjective basis may be genuinely held views - the greater weight given to the subjective element, the greater risk that obedience to the criminal law becomes optional rather than mandatory. (Mr. Blake[8] doubtless genuinely believed that he was obeying God's commands in committing criminal damage.)

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7 [1993] Crim LR 586.

8 Blake v DPP [1993] Crim LR 586.

7. Even in the context of section 30 of the Prevention of Bribery Ordinance, the scope of the 'public interest defence' in the disclosure of information is very limited. That provision attempts to balance legitimate concerns with the exposure of the matters described in section 30(3) - unlawful activity by the Commissioner of ICAC etc. with the need for confidential investigation and the right to those who are investigated to have that done in private.

Application to section 161 of the Crimes Ordinance

8. Section 161 of the Crimes Ordinance goes well beyond the scope of the conduct proved to have occurred in *HKSAR v Tsun Shui-lun* HCMA 723/98 (the case concerning the disclosure of the medical records of the Secretary for Justice). The crime is:

> (1) Any person who obtains access to a computer-
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> (a) with intent to commit an offence;
> (b) with a dishonest intent to deceive;
> (c) with a view to dishonest gain for himself or another; or
> (d) with a dishonest intent to cause loss to another,
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> whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.

Apart from gaining access to private medical records, the offence may be committed in a vide variety of ways and for a wide number of purposes. The computer might hold business records. It might contain personal matters. Assuming the prosecution can prove the states of mind mentioned in section 161(1), the motive of the accused may be varied. All of the general problems relating to a public interest defence are demonstrated in sharp focus in considering such a defence to this Ordinance. Applied specifically to this context these considerations include:

- The defence would be inconsistent with privacy rights.

- While on one view it might be said that the right to freedom of expression might be enhanced, even that right is qualified under Article 19 of the International Covenant on Civil and

Political Rights in the sense that restrictions on that right may be justified to protect the rights and reputations of others. It cannot be doubted that the rights to which this part of Article 19(3) refers include privacy rights.

- Public interest or interesting to the public? This is a shorthand for an expression of difficulties in defining the public interest here. The mere selling of a few more newspapers does not define the scope of the public interest.

- How subjective might the belief that the act was motivated by the public interest be? If it is left to the sincerity of the accused's belief that his act was in the public interest, all manner of injustices might arise.

- Who would decide what the public interest was?

- What measure?

9. What if something like the public interest defence in section 30(3) of the Prevention of Bribery Ordinance was adapted to section 161? The first point is that the accused would have failed miserably under this defence. It is hard to see how exposure of the medical condition of the Secretary for Justice comes within such a provision even if it could be suitably adapted. It must also not be forgotten that section 30(3) deals directly with disclosure of information. Section 161 of the Crimes Ordinance does not. The crime is committed whether the technician who obtains access to the medical records of a person has them published in the next day's newspaper or he does not. The crime is committed long before public exposure. What would be required if this idea was to be carried forward is a defence where the motive of the accused in gaining access was somehow noble. This is something wholly unlike any of the matters mentioned above which approximate to a public interest defence because in those contexts, the greater good was in doing the act which was otherwise a crime.

10. It is difficult to see how even a limited public good defence could be constructed to add to section 161 - especially if it is to balance the legitimate privacy rights of the community. Even if the defence was limited to the disclosure of matters relating to those in the public eye (which must include legislators) it is difficult to balance the right to know with their legitimate privacy rights.

11. The further difficulty that arises where a defence that the motive for a crime was the public interest is created is ending it logically in section 161. Section 161 is essentially a form of electronic burglary. If the accused in the Secretary for Justice's case had broken into her home (as

opposed to broken into the computer at her hospital) and stolen her medical records from her desk what would the response be? The accused might equally say that his motive was the same: it was in the public interest.

Conclusion

12. While it is recognised that the law has in very limited circumstances and in a very circumscribed way recognised something approximating to a public interest defence, a proposal that would widen the scope of this to the disclosure of information would set the criminal law off in a direction hitherto virtually unknown to it. There are serious dangers in that and scope for uncertainty in such a course. It would be unwise to embark on such a course.