

## Second set of Comments for Article 23 Roundtable

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1. I have been asked to give an opinion on whether the following activities present a prima facie case for prosecution of crimes under the National Security (Legislative Provisions) Bill (with CSAs up to 10.7.2003):

- (a) The Occupy Movement 2014;
- (b) The Mongkok Incident 2016;
- (c) Setting up a political organization calling for Hong Kong to become an independent state;
- (d) Publishing or reporting of materials that challenge one-party rule or harm the reputation of senior Chinese leaders, such as Central Committee of CPC members, (eg by disclosing their personal lives or financial status, reporting the Panama papers);
- (e) Publishing materials calling for self-determination by a university student body;
- (f) Producing and broadcasting the film "Ten Years";
- (g) Falun Gong activities in Hong Kong.

2. **The Occupy Movement 2014** The Occupy Movement 2014 is a composite of activities. Further instructions are needed to enable one to focus on the particular activities in respect of which opinion is sought. In the absence of instructions, one shall assume that the focus would be on the alleged activities of specified "leaders" of the Occupy Movement. In this connection, it is necessary to distinguish the alleged activities by different individuals at different times. Also, it is necessary to indicate that the Occupy Movement post 28.9.2016 was a relatively "leaderless" collective act of occupation of three main thoroughfares in Hong Kong.

(i) *Benny Tai*: This associate professor of the Faculty of Law of the HKU who launched the OCLP movement in January 2013 after his piece on occupation the streets in Hong Kong as bargaining tactic with the Central Authorities for democratic elections in the HKSAR in the HK Economic Journal gathered political support. The OCLP movement evolved and after the Decision of the NPCSC of 31.8.2014, it appeared that the planned final act of the OCLP movement would be limited to an unauthorized protest against the Decision to be staged in Central between 30.9.2014 and 1.10.2014. Tai called Occupy Central for a premature start at Admiralty in the early hours of 28.9.2014 in response to the arrests of Scholarism and HKFS leaders on 26.9.2014. What that premature start was intended to be requires further evidence and instructions. In so far as what Tai called for was an unauthorized protest to occupy the roads of Hong Kong to persuade the Central Authorities to change their minds over the NPCSC Decision of 31.8.2014, it is unlikely that a prima facie case under the *subversion offence* or the *inciting subversion offence* of the Revised Bill can be established. This is because under the

(c) limb of intimidation of the Central People's Government, the element of "using force or serious criminal means that seriously endangers the stability of the People's Republic of China" is unlikely to be established (the stock market in Hong Kong still functioned), even though it is arguably that "serious criminal means" is satisfied as the act is one which "seriously interferes with or disrupts ... an essential service, facility or system (whether public or private), and is done in Hong Kong and is an offence under the law of Hong Kong". As to inciting subversion, it is an offence only under the offence of sedition, which requires proof of intention to incite and proof of nature of incitement and the circumstances in which the incitement be such that one or more persons incited are likely to be induced or an ordinary person would, if subjected to the incitement, likely to be induced to commit the offence of subversion. On the other hand, the *sedition offence* in the Revised Bill has the (b) limb of "intentionally incites others to engage, in Hong Kong ..., in violent public disorder that would seriously endanger the stability of the People's Republic of China". One needs instructions and evidence on whether Tai incited by any means that others should in Hong Kong engage in violent public disorder, especially bearing in mind that the public information available prior to 28.9.2016 had the appearance that the intended acts would be peaceful and non-violent. In any event, the "prescribed act" protection from sedition arguably applies, since Tai's approach apparently had to been: (a) to show that the Central Authorities had been mistaken in its measures, (b) to point out errors or defects in the government or constitution of the HKSAR with a view to the remedying of such errors or defects. Limb (c) regarding acts to persuade members of the public in the HKSAR to attempt to procure, by lawful means, the alteration of any matter provided for in the laws of the People's Republic of China or of the HKSAR is not applicable since Tai had all along been advocating for the use of "unlawful means" (though a issue of causation may apply as the unlawful means in question would not by itself directly induce the alteration) and in so far as one is concerned with the pre-31.8.2014 activities, there was as yet no matter provided for in the laws of the People's Republic or of the HKSAR.

(ii) *Joshua Wong, Nathan Law, Alex Chow, Lester Shum, Yvonne Leung*: They were the student leaders who began occupying parts of Admiralty on 26.9.2014. The involvement of JW, NL and AC in the event over the "reclamation" of "Civic Square" in the Tamar GHQ precinct on 26-27.9.2014 was resolved by prosecution and conviction for inciting others to engage in unlawful assembly and participating in unlawful assembly on 21.7.2016, and JW announced on 29.8.2016 that he had lodged an appeal against conviction. In so far as any of their acts had been to have the intended effect of prolonging the occupation (such as their encouragements to others to return to the streets with tents on 9.10.2014 and speeches in Admiralty after the televised meeting with the HKSAR Government's Constitutional Development task force in the evening of 21.10.2014), incitement of others to commit (or continue to commit?) offences under the Public Order Ordinance (Cap 245) may have been established on a prima facie basis. As to the Revised Bill offences, the point made above regarding proof of seriously endangering the stability of the People's Republic of China for the purpose of the subversion offence

is maintained. Also the points made above regarding proof of engaging in violent public disorder and the “prescribed act” protection for the purpose of the sedition offence are maintained, though the applicability of the “prescribed act” protection is less clear cut to them

3. **The Mongkok Incident 2016.** Serious criminal means were used. As to whether the *secession offence* or the *inciting secession offence* in the Revised Bill can be established, the prosecution needs to show that the accused “withdraws [the HKSAR] from [the sovereignty of the People’s Republic of China] by using ... serious criminal means that seriously endangers the territorial integrity of the People’s Republic of China”. Again for the *sedition offence* under limb (b), there must be proof of intention to incite others to engage in Hong Kong in violent public disorder “that would seriously endanger the stability of the People’s Republic of China”.

4. **Establishing Political Organization calling for Hong Kong to be independent sovereign state.** No instructions have been received concerning the object and constitution of existing political organizations that allegedly call for Hong Kong to be an independent sovereign state whether in the near future or after 2047. But the proscription provision in the Societies Ordinance (Cap 151) of the Revised Bill may apply if the local organization in question has the objective (or one of the objectives) of engaging in treason, subversion, secession or sedition; or has committed or is attempting to commit treason, subversion, secession or sedition. Then it is up to the Secretary for Security to order the local organization’s proscription if he reasonably believes that proscription is necessary in the interests of the national security of the People’s Republic of China (ie the safeguarding of the territorial integrity and the independence of the People’s Republic of China) and is proportionate for such purpose. Office bearers, managers, members, and attendees of meetings of a proscribed organization commit a criminal offence. Persons who without the prior written approval of the Secretary for Security pays money to or give any other form of aid to a local organization after it has been proscribed is guilty of a criminal offence. This might include lawyers who offer pro bono services and hence the lawyers must charge an astronomical fee for their services to defend a proscribed local organization in order to escape suspicion.

5. **Publishing or reporting of materials that challenge one-party rule or materials that harm the reputation of senior Chinese leaders, such as Central Committee of CPC members, by disclosure of sensitive personal or personal financial information of themselves or their relatives.** The first category relates to subversion and incitement of subversion as sedition, though the instructions present the difficult question of whether challenging one-party rule (which is a misnomer since the political system of the People’s Republic of China is based on the co-operation of multiple parties under the leadership of the CCP) is “disestablishes the basic system of the People’s Republic of China as established by the Constitution of the People’s Republic of China”.

The second category may impinge on the Official Secrets Ordinance (Cap 521) amendments in the Revised Bill. Usually, one is concerned with the publication

by a third party who comes into possession information, document or other article “acquired by means of illegal access (whether by himself or another) to it [ie by unauthorized access to computer by telecommunications, access to computer with criminal or dishonest intent, theft, robbery, burglary, or exchange of advantage punishable as bribery) and that the disclosure by publication has to be damaging and the publisher makes it knowing, or having reasonable cause to believe that it would be damaging. However, such a disclosure would not be a criminal offence if the disclosure is one that reveals any unlawful activity, abuse of power, serious neglect or duty or other serious misconduct by any public official or a serious threat to public order, public security or the health or safety of the public; and that does not exceed the extent that is necessary for revealing that matter; and that having regard to all the circumstances of the case, the public interest served by the disclosure outweighs the public interest served by not making that disclosure. Other possible bases include information relating to affairs concerning the HKSAR which are under the Basic Law within the responsibility of the Central Authorities or information resulting from spying.

**6. Publishing materials calling for Hong Kong self-determination by a university student body.** A seditious publication under the Revised Bill is a publication that is likely to induce a person to commit the treason offence, the subversion offence or the secession offence. The publisher, distributor, printer, importer and exporter of such a seditious publication who intends to incite others by means of the publication to commit the treason offence, the subversion offence or the secession offence is guilty of an offence. The next question is under what circumstances would a publication calling for Hong Kong self-determination is not sedition under the prescribed act protection. Here the relevant prescribed acts may include limb (a) (described above), limb (b) (described above), and limb (c) (described above).

**7. Producing and broadcasting the film “Ten Years”.** It must be remembered that the film in question was approved for screening under the Film Censorship Ordinance (Cap 392). Copies of a film that has been so approved for screening can be published without hindrance pursuant to the Part VIA of the Film Censorship Ordinance, though that part allegedly applies to “videotapes and laserdiscs”. The Control of Obscene and Indecent Articles Ordinance (Cap 390) does not apply to copies of a film that has been approved under the Film Censorship Ordinance. The Generic Code of Practice on Television Programme Standards issued by the Communications Authority states in Chapter 3, para 2 that in the presentation of television programmes, certain basic standards must always be observed, ie not including in its programmes: (a) any material which is indecent, obscene, or of bad taste which is not ordinarily acceptable to the viewers taking into consideration the circumstances in which the programme is shown; (b) any material which is likely to encourage hatred against or fear of, and/or considered to be denigrating or insulting to any person(s) or group(s) on the basis of ethnicity, nationality, race, gender, sexual preference, religion, age, social status, or physical or mental disability; or (c) anything which is in contravention of the law. The Generic Code

also states Chapter 3, para 18 that where a Film Censorship Authority certification exists for a version of a film proposed for showing on programme services, it may be used as a guide to programming. The responsibility for ensuring the acceptability of a film ultimately rests, however, with the licensee. The Generic Code of Practice further states in Chapter 8, para 2 that “licensees should consider, where appropriate, the use of clear and unambiguous warnings or labelling where there is a significant risk that viewers, particularly children, may otherwise be unprepared for material that may shock or offend them. This does not diminish the licensee’s responsibility for sensitive scheduling of programmes to reduce the risk of causing offence to the minimum”.

**8. Falun Gong activities in Hong Kong.** There was an attempt in the Revised Bill to fast track the proscription of a local organization if its Mainland counterpart had been banned. This fast track provision apparently was removed in the Revision. Falun Gong activities in Hong Kong have been under monitoring in Hong Kong and means under the disposal of the HKSARG in immigration control and the municipal services have been used to restrict such activities.

**9. The Pannick Clause.** In all prosecutions that involve the statutory construction of the offences under the Revised Bill, the relevant statutory provisions are to be interpreted, applied and enforced in a manner that is consistent with Chapter III of the Basic Law. In this respect, the jurisprudence cited in the first set of comments applies.