

Treason, Secession, Subversion And Proscribed Organizations: Comments On The Consultation Document

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Introduction

Article 23 of the Basic Law (“BL 23”) of the Hong Kong Special Administrative Region (HKSAR) requires the 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.

What is interesting about BL 23 is that it does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers the HKSAR --- in practice its legislature --- to enact laws to define and penalize such actions. This is an important aspect of the autonomy of the HKSAR under the concept of “one country, two systems,” which demonstrates respect for the existing social, economic and legal systems in Hong Kong at the time of the handover and ensures that mainland laws and practices will not be imposed on Hong Kong.

On 24 September 2002, the HKSAR Government released its Consultation Document (“the Document”) on *Proposals to Implement Article 23 of the Basic Law*. The Document represents the fruit of years of hard work and in-depth study of the matter on the part of the HKSAR Government. It deserves to be carefully studied with an open mind, and discussed in detail in a rational manner. In this paper, I will comment on those parts of the Document which relate to the matters of treason, secession, subversion and proscribed organizations.

The general approach adopted by the Document

The Document takes as its point of departure the existing law of Hong Kong as set out in, for example, the Crimes Ordinance (which covers, among other things, treason and sedition) and the Societies Ordinance (which deals with the issue of the

activities of foreign political bodies in Hong Kong). These ordinances are part of Hong Kong's inheritance from the colonial era. The Document then considers to what extent the existing law needs to be modified in order to fulfill the requirements of BL 23.

It is noteworthy that in doing so, the Document has attempted to take into account international human rights standards as enshrined in article 39 and other provisions of the Basic Law, and to consider also whether there is any room for a liberalization of the existing law. Most important of all, it recognizes that "the manner in which the state's sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ. Indeed, this has to be the case given the different situations, including the respective legal framework, of the Mainland and the HKSAR. Therefore, the HKSAR has a duty to enact laws to protect national security in accordance with the common law principles as have been practised in Hong Kong, and such laws must comply with the Basic Law provisions protecting fundamental rights and freedoms." (para. 1.6 of the Document)

Treason, secession and subversion

The offences of treason and sedition are already defined in the existing Crimes Ordinance, but there is no mention of "secession" and "subversion." The Document proposes to amend the law of treason so as to confine it to situations where the offender collaborates with a foreign state. "Levying war" against one's own state is the fundamental element of the existing offence of treason. The Document proposes to use this element as the basis for the new offences to be created --- secession and subversion. Thus secession and subversion will be defined respectively as "withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China" and "intimidating the Chinese Government, overthrowing the Chinese Government or disestablishing the basic system of the state" by "levying war", or by "force", "threat of force" or "other serious unlawful means" (the means are the same as those defined in the United Nations (Anti-Terrorism Measures) Ordinance enacted in July this year).

First, to give due credit to the proposal, it may be noted that the 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. Under mainland law, an attempt by peaceful means to

secure the secession from the PRC of, say, Tibet or to challenge the principle of “the leadership of the Communist Party” and replace it by a multi-party system would already constitute an offence under chapter 1 of part II of the Criminal Code, which deals with offences against state security. For example, to establish a political party advocating the secession of any part of China (including Taiwan) or the establishment of a Western-style liberal democracy in China would be to commit a crime under articles 103 and 105 respectively of the Chinese Criminal Code.

Secondly, although the concept of “levying war” against the state (which is in the existing law of treason and will, according to the proposal in the Document, be one of the elements of the new crimes of secession and subversion) seems on the face of it to require very serious and large-scale violence amounting to war, this may not in fact be the case. As pointed out in a footnote to the Document itself (note 17 to chapter 2), “it is not essential that the offenders should be in military array or be armed with military weapons.” For example, according to old English law, if a considerable number of persons assemble together and create a disturbance directed at the release of the prisoners in all the jails, this might already be an act of “levying war”. However, it is doubtful whether such pre-19th century English conception of treason should still be applicable today. I would therefore suggest that in the implementing legislation for BL23, *there should be an express provision to the effect that for the purpose of the offences of treason, secession and subversion, “war” shall not include a riot or disturbance of a local nature that does not amount to an armed rebellion --- such a riot or disturbance is already adequately covered by the existing criminal law other than the law of treason.*

Thirdly, it is not the case that the Document merely proposes to build the new offences of secession and subversion on the base of the existing law of treason without broadening the base. There is broadening insofar as the existing definition of treason does not refer to the use of “force or threat of force,” nor to “serious unlawful means.” The inclusion of these two concepts as alternative bases (in addition to “levying war”) for secession and subversion means that the scope of the acts covered by the new offences is broader than the existing scope under the law of treason, not to mention the broadening of the objectives which the acts are aimed at (e.g. to include secession). In particular, the reference to “threat of force” would seem to cast the net very wide. Take, for example, the hypothetical case of a person sympathetic to the cause of Taiwanese (or, for that matter, Tibetan) independence who expresses the view in public that Taiwan may legitimately defend itself against any military attack launched in the mainland. Can he or she be prosecuted and convicted for the proposed

offence of secession? The answer depends on the discussion in the following paragraph. Although such a prosecution would be highly unlikely in the present political climate, the same cannot be said if and when cross-strait relations further deteriorate and war becomes imminent.

Fourthly, the language used in the Document to express the proposal regarding the new offences is not the technical language used in legal drafting, and it is not completely clear what are the elements of the new offence. It is regrettable that the Document does not include as an appendix a white bill for the purpose of implementing the proposals in the Document, in the absence of which it is difficult for lawyers to decide whether some of the proposals are worthy of support. For example, it is proposed (para. 3.6 of the Document) that “withdrawing a part of the PRC from its sovereignty, or resisting the Central People’s Government in its exercise of sovereignty over a part of China, by levying war, use of force, threat of force or by other serious unlawful means should be outlawed by the offence of secession.” It is not clear what is the actus reus of the proposed offence. The same problem regarding the uncertainty of the actus reus exists with regard to the proposal (para. 5.5 of the Document) “to make it an offence of subversion (a) to intimidate the PRC Government, or (b) to overthrow the PRC Government or disestablish the basic system of the state as established by the Constitution, by levying war, use of force, threat of force, or other serious unlawful means.”

In this regard, it is important to note the following:

- (a) The Document is not proposing that it is an offence (of secession) to levy war, or engage in the use of force, threat of force or other serious unlawful means for the purpose of or with the intent of “withdrawing a part of China from its sovereignty or resisting the Chinese Government in its exercise of sovereignty over a part of China” (hereinafter called Rule 1). Instead, it is proposing to make it an offence (of secession) to “withdraw a part of China from its sovereignty or resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means” (hereinafter called Rule 2).
- (b) The Document is not proposing that it is an offence (of subversion) to levy war, or engage in the use of force, threat of force or other serious unlawful means for the purpose of or with the intent of “intimidating the Chinese Government, overthrowing the Chinese Government or disestablishing the

basic system of the state” (hereinafter called Rule 3). Instead, it is proposing to make it an offence (of subversion) to “intimidate the Chinese Government, or to overthrow the Chinese Government or to disestablish the basic system of the state by levying war, or by force, threat of force, or by other serious unlawful means” (hereinafter called Rule 4).

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, if adopted in the implementing legislation, would lower significantly the threshold requirement for secession and subversion respectively (i.e. make it much easier for the offences to be committed). Consider the following example. Suppose a person in a small-scale demonstration for Taiwanese independence sets fire to a car (“serious damage to property” is one of the “serious unlawful means” as defined in the Document) while shouting a slogan in support of Taiwanese independence. Would this amount to the offence of secession which, according to the present proposal, attracts a maximum punishment of life imprisonment? What if the person does not damage property but merely shouts a slogan suggesting that Taiwan should strengthen its military so as to defend itself against the mainland (this might amount to “threat of force”)? In both cases, the offence of secession might have been committed under Rule 1, but probably not under Rule 2.

It is therefore heartening to note that the Document proposes to introduce Rules 2 and 4 rather than Rules 1 and 3. The actus reus required under Rules 2 and 4 is more onerous (for the prosecution to establish) than the actus reus required under Rules 1 and 3. Under Rules 1 and 3, the actus reus required may be no more than a mere threat of force or any act which technically satisfies the broad definition of “serious unlawful means”. In the drafting stage of the bill, it will be important not to slip back from Rule 2 to Rule 1, or from Rule 4 to Rule 3. But there are some technical problems to be resolved if Rules 2 and 4 are to be turned into legislative language. In relation to Rule 2, what actus reus (in addition to, say, the mere threat of force or an act which merely satisfies the definition of a serious unlawful act) is required to constitute “withdrawing a part of the PRC from its sovereignty” or “resisting the CPG in its exercise of sovereignty over a part of the PRC”? If the act committed by the accused really has the effect of “withdrawing a part of the PRC from its sovereignty” or “resisting the CPG in its exercise of sovereignty over a part of the PRC”, would this not mean that secession has actually been achieved already?

Similarly, in relation to Rule 4, what actus reus (in addition to, say, the mere

threat of force or an act which merely satisfies the definition of a serious unlawful act) is required to constitute “overthrowing the PRCG” or “disestablishing the basic system of the state”? If the act committed by the accused really has the effect of “overthrowing the PRCG” or “disestablishing the basic system of the state”, would this not mean that subversion has actually been achieved already?

I would therefore propose that in the drafting stage of the bill, Rule 2 should be reformulated as follows. *The offence of secession is committed if the accused attempts to (a) withdraw a part of China from its sovereignty or (b) resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means*” (hereinafter called Rule 2A). This would ensure that the actus reus required for the offence will not be a mere threat of force or any act which technically satisfies the definition of serious unlawful means. This is because the use of the word “attempt” in Rule 2A brings into play the common law “doctrine of proximity” in the criminal law of attempt. 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. Defining “secession” as an “attempt to (a) withdraw a part of China from its sovereignty or (b) resist the Chinese Government in its exercise of sovereignty over a part of China by levying war, or by force, threat of force, or other serious unlawful means” would enable the court to determine the actus reus of the offence by considering whether the acts committed by the accused (involving levying war, force, threat of force and other serious unlawful means) are sufficiently proximate to the realisation of the objective of (a) withdrawing a part of China from its sovereignty or (b) resisting the Chinese Government in its exercise of sovereignty over a part of China.

Similarly, I would propose that in the drafting stage of the bill, Rule 4 should be reformulated as follows. *The offence of subversion is committed if the accused intimidates or attempts to intimidate the Chinese Government, or attempts to overthrow the Chinese Government or to disestablish the basic system of the state by levying war, or by force, threat of force, or by other serious unlawful means* (hereinafter called Rule 4A). For the same reasons as explained above, this would enable the court to determine the actus reus of the offence by considering whether the acts committed by the accused (involving levying war, force, threat of force and other serious unlawful means) are sufficiently proximate to the realisation of the objective of intimidating the Chinese Government, overthrowing the Chinese Government or

disestablishing the basic system of the state.

Fifthly, the Document in its paragraph on “serious unlawful means” used in the context of secession (para. 3.7) promises that “adequate and effective safeguards should also be in place to protect the freedoms of demonstration and assembly, etc. as guaranteed by the Basic Law, including peaceful assembly or advocacy.” The chapter on subversion again refers to such “adequate and effective safeguards of guaranteed rights, described in paragraph 3.7” (see note 47 in chapter 4). However, nowhere in the Document can we discover what are the “safeguards” to be put “in place” in this regard. I would propose that one of such safeguards should be an express provision that *in a peaceful demonstration the mere display or shouting of slogans the content of which involves the threat of force will not amount to the offence of secession or subversion. This safeguard should be equally applicable to the offence of sedition.*

Finally, the proposed maximum penalties for secession, subversion and the related inchoate and accomplice offences (in Annex 2 of the Document) are the same, namely, life imprisonment. This in fact means that in some cases the same act against national security would be punishable in a more severe manner in the HKSAR than in the mainland itself. For example, both articles 103 and 105 of the Chinese Criminal Code divide into three categories the punishment for secession and subversion respectively and apply them differentially in accordance with the offender’s degree of involvement: (a) imprisonment for 10 or more years (up to life imprisonment); (b) imprisonment for 3 to 10 years; (c) imprisonment for less than 3 years. I would therefore propose that *the proposed provisions for punishment be re-considered.*

Societies and national security

When the Societies Ordinance was amended by the Provisional Legislative Council in 1997, BL 23 considerations were already taken into account. For example, the 1997 amendment empowers the Government to prohibit the existence of a society on the ground of “national security,” in addition to the existing grounds of “public safety” and “public order.” The amendment also provides that political bodies in Hong Kong may not have any connection with foreign or Taiwan political organizations, otherwise the existence of such Hong Kong political bodies may be prohibited.

The Document now proposes further changes to the Societies Ordinance. The proposal is designed to amplify the power which the HKSAR Government has of

refusing to register (section 5A), cancelling the registration of (section 5D) or prohibiting the operation of (section 8) a local society on the ground of national security. The proposed amendment provides that where a local “organization” (defined in para. 7.15 as “an organized effort by two or more people to achieving a common objective, irrespective of whether there is a formal organizational structure”) (a) has the objective of engaging in treason, secession, subversion or espionage, or (b) has committed or is attempting to commit any such offence, or (c) is “affiliated with” an organization in mainland China which has been proscribed for reasons of national security, the HKSAR Government may proscribe the local organization. The policy behind the proposed amendment is to make it clear that it would be unlawful to “make use of Hong Kong’s free and open environment as a base against national security and territorial integrity.” (para. 3.8 of the Document)

This is one of the most controversial and politically sensitive proposals in the Document, and is probably the one which gives the greatest prominence to the “one country” principle. The Document states (in para. 7.16) that “to a large extent, on the question of whether such a mainland organization endangers national security, we should defer to the decision of the Central Authorities.” According to the proposal, a “proscribed organization” will attract more severe sanctions than “unlawful societies” under section 18 of the existing Societies Ordinance. For example, it will be an offence to “support” its activities (para. 7.14 of the Document). Furthermore, organizations which have “connections” (as defined in para. 7.17) with it may be declared “unlawful societies.”

The Document does not explain what is meant by “affiliation”, a crucial concept in determining whether a local organization may be proscribed on the ground of its relationship with a mainland organization. It is also not clear whether for the purposes of (a) the offence of “supporting” proscribed organizations, and (b) rendering unlawful local societies that have “connections” with proscribed organizations, “proscribed organizations” refers only to those proscribed in Hong Kong by the Secretary of Security and not to mainland organizations. The better view is that only Hong Kong proscribed organizations are relevant here, and this apparently is also the view of the Solicitor-General (see Robert Allcock, “Why we need to update our security law,” *South China Morning Post*, 2 October 2002, p.14). It is hoped that this approach will be confirmed in the implementing bill.

Whether the implementing bill will prove to be acceptable will depend significantly on whether and how the term “affiliation” is defined in the bill. The

Societies Ordinance as it stands provides a definition of “connection” (as including four categories of circumstances, one of which is “affiliation”), but the term “affiliation” is not itself defined. In order for the bill to be acceptable, “affiliation” must be defined to mean a degree of “connection” much higher than the “connection” under existing law. I would propose that the term “affiliation” be defined both from a negative point of view and from a positive point of view as follows.

From the negative point of view, it should be provided that *“affiliation” is not to be established (a) merely because a local organization bears the same name or a similar name as a proscribed organization in the mainland, (b) merely because one of the organizations contributes financially to the other, (c) merely because a local organization is affiliated to or have a connection with an overseas organization which is affiliated to or have a connection with a mainland proscribed organization, or (d) merely because one organization has a connection with the other.*

From the positive point of view, it should be provided that *two organizations (one in the mainland and the other in Hong Kong) will be regarded as being affiliated with each other only if there is an extremely high degree of connection between them, having regard, inter alia, to the following: (a) whether membership of one organization automatically entails membership of the other; (b) whether there is regular and frequent communication between the two organizations; (c) whether many aspects of their operation are under the control and direction of the same person or persons; (d) whether one organization makes a substantial financial contribution to the operation of the other. The court, rather than a special tribunal, should be empowered to hear an appeal against the Government’s determination that a local organization is affiliated with a mainland proscribed organization, in addition to the court’s power to hear an appeal on points of law as proposed in the Document.*

Conclusion

In the light of the above, it may be seen that some of the proposals in the Consultation Document are problematic and cannot be supported in their present form. Some are in desperate need of being clarified by high-quality drafting in the bill for the proposed legislation. Having said that, I also think that the general orientation of the Document deserves to be supported. The successful implementation of the concept of “one country, two systems” depends on due regard being given to both the “two systems” element and the “one country” element. The proposals in the Document have given effect to the “two systems” principle by not importing the relevant

mainland laws and standards to Hong Kong, and by creatively designing a legislative model unique to the HKSAR. At the same time, the proposals affirm the importance of the “one country” principle by providing for various crimes against the sovereignty, territorial integrity, unity, and security of the Chinese state, and by empowering the HKSAR Government to prohibit the activities in the HKSAR of organizations proscribed in the mainland for reasons of national security. Thus the Consultation Document is a concrete demonstration of the principle of “one country, two systems” at work. How the proposals, if implemented by law, will affect civil liberties in Hong Kong remains to be seen. However, there exist considerable institutional safeguards that can ensure the continued vitality of civil liberties in the HKSAR: the elected Legislative Council that will ultimately decide the content of the law to be enacted on the basis of the proposals; the vigilant local and international public opinion which will continue to monitor actively the Rule of Law and human rights in Hong Kong; and, last but not least, the strong and independent courts of the HKSAR which will --- though I believe such cases will be rare --- be called upon, in the final resort, to interpret and apply the relevant laws in cases litigated before them.

(This is a substantially revised version of the author’s article, “Will our Civil Liberties Survive the Implementation of Article 23?” published in *Hong Kong Lawyer*, November 2002, pp.80-88).