“Knock, knock. Who’s there?” - Warrantless Searches for Article 23 Offences

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"Knock, knock. Who's there?" - Warrantless Searches for Article 23 Offences

By Simon N.M. Young, Assistant Professor,
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June 2, 2003

> *[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are* per se *unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption…that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some.*
>
> Coolidge *v.* New Hampshire*, 91 S.Ct. 2022 (1971), per Stewart J.*

> *[I]t may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure.*
>
> Hunter *v.* Southam Inc. *(1984) 14 C.C.C. (3d) 97 at 109 (S.C.C.), per Dickson J.*

I. Introduction

In times of unrest and internal subversion, most would agree that the police should have effective powers to enforce the law and maintain public order. But what appears justifiable as a temporary measure in times of emergency should not automatically be taken to be so in times of peace and stability. In a civil society living under a constitutional duty to protect human rights, the enactment of a permanent warrantless entry, search and seizure power in the name of national security must be preceded by a clear and convincing justification from the state.

When the Hong Kong government proposed an emergency police power to enter and search premises without warrant as part of its package of proposals to implement article 23 of the Basic Law ("BL"), many were taken by surprise as

article 23 mentioned nothing about adding new police powers. In the government's Consultation Document, it was asserted that the power was necessary given the seriousness of the offences. They also pointed out that other countries had similar powers and similar powers already existed in Hong Kong ordinances. [1] After the National Security (Legislative Provisions) Bill was introduced in February 2003, public attention was drawn mostly to the substantive parts of the bill, while the new warrantless entry power seemed to be accepted complacently as an inevitable adjunct to the rest of the provisions.[2]

This chapter argues that the new warrantless entry power lacks legitimacy in Hong Kong's civil society. The proposed new power is assessed against three constitutional principles of legitimacy applicable in the context of police entry, search and seizure. It will be argued that the new warrantless power is presumptively objectionable, and as such, the government carries a heavy burden to show that the power is necessary and has sufficient safeguards to avoid a disproportionate impact on the fundamental right to privacy. A close examination of the points asserted by the government as reasons justifying the proposed new power reveals that none of them are convincing. Furthermore, additional safeguards can be added to both the exercise and execution of the power without undermining its effectiveness. Lastly, it will be argued that the proposed new power provides insufficient protection to specific domains in which constitutionally protected activity, such as lawyer-client consultations, news-making or religious practices, takes place. The analysis of legitimacy begins with a brief introduction to the proposed new power.

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[1] Security Bureau, *Proposals to implement Article 23 of the Basic Law: Consultation Document* (Hong Kong: HKSAR Government, Sept. 2002) 48-51, Annex 1 [hereinafter referred to as "*Consultation Document*"].

[2] The proposed new entry power is contained in s. 7 of the National Security (Legislative Provisions) Bill [hereinafter referred to as "the Bill"].

II. The new entry, search and seizure power

Under the proposed s. 18B of the Crimes Ordinance (Cap. 200), the new warrantless entry, search and seizure power applies to the investigation of five article 23 offences: treason, subversion, secession, sedition and handling seditious publications.[3] The power is exercisable if a senior police officer (i.e. of or above the rank of chief superintendent)[4] reasonably believes a number of conditions to be true: that one of the five offences has been committed or is being committed, that "anything which is likely to be or likely to contain evidence of substantial value to the investigation of the offence is in any premises, place or conveyance", and that "unless immediate action is taken, such evidence would be lost and the investigation of the offence would be seriously prejudiced as a result".[5]

In other words, reasonable belief must pertain to four elements: (1) the commission of an applicable offence, (2) the likelihood of finding important evidence in a certain place, (3) the risk of immediate loss of this evidence, and (4) the injurious consequences to the investigation if the evidence is lost. A 'conveyance' is exhaustively defined as referring to any vehicle, tramcar, train, vessel or aircraft, while the meaning of 'premises' includes any structure.[6] It is important to note that this power cannot be exercised on reasonable belief that an applicable offence is about to be committed; it must be a reasonable belief as to a completed or continuing offence. Given the terms of the proposed ss. 159H and 159A-F of the Crimes Ordinance (Cap. 200), it is highly unlikely that the proposed new power can apply to investigations into attempts or statutory conspiracies to commit any of the five offences.[7]

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[3] Section 18B is proposed by s. 7 of the National Security (Legislative Provisions) Bill 2003. The other proposals mentioned in the *Consultation Document* to add or extend police powers were not introduced in the Bill.

[4] There are about 72 police officers who come within this category. See *Hong Kong Police Review 2001*, Annex 3, which can be found at http://www.info.gov.hk/police/aa-home/review/2001/text_only/t_e_others.htm.

[5] Crimes Ordinance (Cap. 200), s. 18B(1).

[6] *Ibid.*, s. 18B(6).

[7] One possible difficulty with the argument that the new power applies to statutory attempts is that s. 159H(2), which extends the power of "arrest", "search", "seizure" and detention of property to attempts, does not mention the power to "enter" premises. While this interpretation may seem technical, it may have some plausibility when one recognizes the greater privacy intrusion involved

The section does not contemplate the senior officer as being a member of the team who actually executes the search.[8] When the senior officer has attained sufficient reasonable belief, this enables that officer's power to direct any police officer to exercise one or more of the enumerated enforcement powers in relation to the specific premise, place or conveyance. There is neither an obligation to apprise the executing officer(s) of the grounds for the reasonable beliefs nor to put the direction in writing.

The enumerated enforcement powers are broad and coercive. They include the power to enter a premise or place, using force if necessary, to stop, board and detain a conveyance, to search the premise, place or conveyance and any person found therein, to seize anything found in the premise, place or conveyance which appears to be evidence of an applicable offence, and to remove by force any person or thing obstructing the executing officer.[9] Any search of the person must be done by an officer of the same gender.[10] The use of force by the executing officers is not subject to any express reasonableness requirement. As well, it seems the power to search persons found in the premise, place or conveyance can be exercised irrespective of whether the senior officer or executing officer had prior reasonable grounds to believe that the persons to be searched would have in their physical possession evidence of an applicable offence. Thus, in a case where the power is exercised in commercial premises or on a public bus, each and every person in the premise or on the bus may be lawfully searched. It seems difficult to understand the justification for extending the search power to such an extent.

Contrary to what is suggested in the title of this chapter, the police actually do not need to 'knock, knock' and announce their presence and purpose before carrying out their enforcement powers. The only prior duty on the executing officer to provide information is to produce his or her police warrant card for

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in entering private premises in order to search them. Note that there is no equivalent provision to s. 159H(2) in relation to the statutory offence of conspiracy: see ss. 159A-F of *ibid.*

[8] *Ibid.*, s. 18B(2).

[9] *Ibid.*

[10] *Ibid.*, s. 18B(4).

inspection, if requested.[11] Such a warrant card only identifies the police officer as such and contains no details about the purpose or scope of the search.[12]

The obvious purpose behind this new warrantless search power is to facilitate the gathering of evidence (and hence the detection and prosecution) of the more serious article 23 offences. As the power does not target specific dangerous instruments or situations, and can only be exercised after an offence has commenced, the primary purpose is not one of public protection or crime prevention. However, where the power is exercised while the offence is continuing, it will no doubt serve to prevent a possible escalation of the criminal activity. Ultimately, the power serves the aim of making the investigation and prosecution of known article 23 offences more effective.

There are probably no unique classes or descriptions of evidence that will be specially targeted by this power. As the applicable offences will typically involve a high degree of planning and co-ordination amongst a number of persons, evidence of such planning and the motives (e.g. political, financial or otherwise) behind the offences will be sought. Typically, this evidence will be in the form of written or oral communications in any format, including documents, electronic data, and other forms of electronic media. As the offences of treason, subversion and secession will generally require proof of the use of force or other serious criminal means, real evidence of the means used to carry out the criminal activity will also be sought. The near infinite variety of tools and instruments that could be used to commit these offences includes everything from computer systems, firearms, explosives to biological and chemical means and weapons. For the offences of sedition and handling seditious publications, the police will no doubt be seeking the very publication or source that is allegedly inciting the treason, subversion or secession. Typically, the means of incitement will be in a written paper form, such as a book, pamphlet, letter, or other document, but non-paper forms will also

[11] *Ibid.*, s. 18B(3).

[12] Warrant cards normally contain the name and photo identification of the officer. See for example, Police Force Ordinance (Cap. 232), s. 18. Under s. 8(2) of the Customs and Excise Service Ordinance (Cap. 342), a member of the Service must show his warrant card if his authority is questioned, but only if it is 'reasonably practicable' to do so.

be sought, such as electronic publications or audiovisual broadcasts.[13] Finally, as with any other offence, if the identification of the perpetrator(s) is in issue, evidence that will assist in making the link between the person and the offence will inevitably be important.

III. Constitutional principles relevant to entry, search and seizure

Having outlined the scope and effect of the new police power, it is now necessary to consider its legitimacy according to constitutional principles, particularly the principles that relate to police entry, search and seizure. The purpose of this inquiry is not to conduct a strict legal assessment of the constitutionality of the proposed new power. Such an assessment can rarely be done in a vacuum, without the colour and texture of a real life factual problem. Instead, the inquiry to be embarked upon appraises the proposed new power from a political-legal perspective. It assesses the legitimacy of both the existence and scope of the proposed new power in a 'civil society', like Hong Kong, that adheres to the rule of law and democratic values.[14] In such an assessment, legitimacy is measured by the values and principles of that civil society as expressed and embodied in its constitution. Measuring legitimacy according to constitutional values and principles reaffirms the rule of law as much as it is necessitated by it.

In Hong Kong, the relevant constitutional values and principles can be found in the Basic Law and the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong, which is an integral component of the constitution by virtue art. 39 of the Basic Law.[15] The "embodiment of the ICCPR as applied to

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[13] See the broad definition of 'publication' in s. 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

[14] In *Ng Ka Ling* v. *Director of Immigration* (1999) 2 H.K.C.F.A.R. 4 at 14 (CFA), Chief Justice Li stated the following in referring to Chapter III of the Basic Law, "[t]here rights and duties are expressed as constitutional guarantees for freedoms which are of the essence of Hong Kong's civil society." The Court has also referred to Hong Kong as a 'civil society' in *HKSAR* v. *Ng Kung Siu* (1999) 2 H.K.C.F.A.R. 442 at 446 (CFA): "The Basic Law contains constitutional guarantees for the freedoms that are of the essence of Hong Kong's civil society", per Li CJ; *Cheng* v. *Tse Wai Chun* (2000) 3 H.K.C.F.A.R. 339 at 345 (CFA), per Li CJ; *Next Magazine Publishing Ltd.* v. *Ma Ching Fat* [2003] 1 H.K.L.R.D. 751 at 761 (CFA), citing the relevant passage from *Cheng* v. *Tse*, *ibid.*

[15] For cases on the relationship between the Basic Law and the ICCPR as applied to Hong Kong, see *HKSAR* v. *Ng Kung Siu*, *ibid.* at 455; *Chan Kam Nga* v. *Director of Immigration* (1999) 2 H.K.C.F.A.R.

Hong Kong" in domestic legislation is the Hong Kong Bill of Rights Ordinance (Cap. 383) ("BORO").[16] The Hong Kong Bill of Rights ("Bill of Rights" or "BOR") embodies the enumerated rights and is found in Part II of the BORO. Unlike the constitutions of the United States and Canada, neither the Basic Law nor Bill of Rights contains an express prohibition against 'unreasonable search and seizure'.[17] Nevertheless, there is little doubt that the right to be free from such state conduct is clearly protected in both these instruments.

Article 14(1) of the Bill of Rights, which is taken from art. 17 of the ICCPR, provides, *inter alia*, that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". Paragraph 2 of the same article makes it clear that the law itself must protect the person from such interferences. In even stronger terms, article 29 of the Basic Law provides that the "homes and other premises of Hong Kong residents shall be inviolable" and "[a]rbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited". In addition, arbitrary or unlawful detention and search of the body of any resident is prohibited: BL, art. 28. The freedom and privacy of communication is protected in art. 30, BL.

The language in art. 14 of the BOR is unique in that it expressly mentions the fundamental value of 'privacy' which underlies the prohibition against unreasonable search or seizure.[18] In this respect, the article shows greater similarity with the formulation of the equivalent right under both the European

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82 at 90 (CFA); *Shum Kwok Sher* v. *HKSAR* (2002) 2 H.K.L.R.D. 793 at ¶ 53 (CFA); *HKSAR* v. *Lau Cheong* (2002) 2 H.K.L.R.D. 612 at ¶ 32 (CFA).

[16] See Bokhary PJ's separate opinion in *HKSAR* v. *Ng Kung Siu*, *ibid.* at 463.

[17] See The Constitution of the United States of America, U.S.C.A. Const., Amend. IV, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized", and s. 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11 [hereinafter referred to as the "Canadian Charter"], which provides that "[e]veryone has the right to be secure against unreasonable search or seizure." The New Zealand Bill of Rights Act 1990, s. 21, uses the same wording as s. 8 of the Canadian Charter, but with the additional concluding clause, "whether of the person, property, or correspondence or otherwise."

[18] One can debate if the right against unreasonable search and seizure in both the Canadian and United States constitutions protects more than privacy. The highest courts from both of these jurisdictions have hinted that it does. See *Katz* v. *United States*, 389 U.S. 347 at 350, 88 S.Ct. 507 at 510 (1967) and *Hunter* v. *Southam Inc.* (1984) 14 C.C.C. (3d) 97 at 108 (SCC).

Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and the American Convention on Human Rights 1969, although even compared with these instruments, there are notable differences.[19]

The generality of the right in BOR, art. 14, is important as it serves to fill possible gaps in the Basic Law. For example, given the terms of BL, art. 29 and its reference to only 'homes and other premises', it is unclear whether it extends to searches of vehicles or other conveyances, when obviously it should, as individuals can reasonably expect to have privacy interests in such places. BOR, art. 14, fills this potential gap by providing a general right to be free from arbitrary or unlawful interferences with one's privacy irrespective of the type of space within which the privacy interest lies.

At the heart of these BOR and BL guarantees is the qualifier, 'arbitrary or unlawful', which serves to distinguish between legitimate and illegitimate searches and seizures. Few Hong Kong cases have articulated the principles informing the interpretation of this qualifier in the context of entry, search and seizure. However, the Court of Final Appeal has interpreted these words in relation to the freedom from arbitrary or unlawful imprisonment in BL, art. 28.[20] The Court held that the concept of arbitrariness was different from non-compliance with the law; in other words, a "lawful" measure may nonetheless be "arbitrary". In giving an autonomous meaning to arbitrary, the Court held that it is necessary to consider whether the state conduct was "capricious, unreasoned, without reasonable cause', in other words, whether it was done "without reference to an adequate determining principle or without following proper procedures". [21] This interpretation is consistent with the Human Rights Committee's General Comment 16 on art. 17 of the ICCPR in which it is said that "the concept of arbitrariness is

[19] Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter referred to as "European Convention"] provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." The American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123, O.A.S.T.S. 36, 9 I.L.M. 673, art. 11(2) provides that "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence…"

[20] See *HKSAR* v. *Lau Cheong*, n ** above at ¶ 47-8.

[21] *Ibid.* The Court applied an interpretation articulated in *Neilsen* v. *Attorney-General* [2001] 3 N.Z.L.R. 433 at ¶ 34 (CA).

intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[22]

While these elaborations demonstrate that the word 'arbitrary' has an autonomous meaning and encompasses more than mere unlawfulness, they are too general to be useful in setting constitutional standards for regulating police entry, search and seizure. Indeed, there has yet to be clear appellate authority in Hong Kong as to what standards a police search power must meet to avoid the characterization of being "capricious, unreasoned, [or] without reasonable cause". In assessing legitimacy in a civil society adhering to the rule of law and democratic values, it is submitted that there are (at least) three relevant constitutional principles to apply. The three principles of legitimacy are as follows,

1. Warrantless searches are presumptively objectionable.

2. Warrantless search powers must be strictly justified on the basis of necessity and proportionality.

3. Constitutionally protected domains must be given greater protection.

Each of these principles will be discussed in greater detail below in the context of the new police power. The implications of each principle will be examined separately in arriving at an overall picture of the legitimacy of the proposed new power.

[22] *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, 32nd Sess., 791st Mtg. (8 April 1988), "GENERAL COMMENT 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)", UN Doc. CCPR/C/21/Rev 1, ¶ 4. See also the arguments of Prof. F. Volio, "Legal Personality, Privacy, and the Family" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 185 at 191-2.

IV. Principle 1: Warrantless searches are presumptively objectionable.

A. A principle of long standing authority

Searches by governmental authorities are either authorized or unauthorized by law. If the search is unauthorized by law then the interference with privacy is unlawful, and potentially arbitrary. When authorized by law, though the search is lawful, it is still subject to scrutiny as being arbitrary. Here, the question often to be considered is whether the law authorizing the search is itself arbitrary. In answering this, or a similar question pertaining to reasonableness, many national courts and international tribunals have applied, as a starting point, the constitutional principle that warrantless searches, whether authorized by law or not, are presumptively invalid and objectionable.

The principle has its origins in the common law. More than two hundred years ago, it was stated in *Entick* v. *Carrington* that English "law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."[23] Even in modern times, it has been reaffirmed that the police have no common law right to enter a private premise without warrant to search for or seize instruments or evidence of a crime however serious.[24] The basis for this rule lies in the long established common law principle that an "Englishman's home is his castle".[25] In *McLorie* v. *Oxford*, it was said that this was one of the few principles known to every English citizen.[26] There seems to be no reason why the same could not be said about Hong Kong residents.[27] The common law principle is simply an

[23] *Entick* v. *Carrington* (1765) 95 Eng. Rep. 807 (K.B.)
[24] *McLorie* v. *Oxford* [1982] Q.B. 1290 at 1298 (DC). See also *Regina* v. *Rao* (1984), 12 C.C.C. (3d) 97 at 110 (Ont.C.A.) and *Philips* v. *Meany* (1919), 33 C.C.C. 60 (Que.S.C.).
[25] *Semayne's Case* (1604) 5 Co. Rep. 91a, aff'd in *Morris* v. *Beardmore* [1981] A.C. 446 (HL).
[26] *McLorie* v. *Oxford*, n ** above at 1296.
[27] Interestingly, there are only a few references to this principle in Hong Kong. See mention of the principle in *Yuen Tai-Bu* v. *The Queen* [1978] H.K.L.R. 128 (CA) and *Wong Kwai Fun* v. *Li Fung* (unreported decision, 28 Jan. 1994, HC, HCA 005810/1986).

illustrative way of affirming the inviolability of one's home. Article 29 of the Basic Law is a constitutional affirmation of the common law principle.

There is a danger, however, in assimilating constitutional rights and principles with common law rules. This is because common law rules restricting the power of the police to search without warrant were historically anchored on tangible property concepts, such as trespass, without recognizing intangible fundamental values, such as privacy. In the seminal and revolutionary American case, *Katz* v. *United States*, the United States Supreme Court made this point:

> this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection…But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[28]

The Supreme Court of Canada, in its foundational decision on s. 8 of the Canadian Charter of Rights and Freedoms (hereinafter "Canadian Charter"), followed the approach in *Katz*. In this case, *Hunter* v. *Southam Inc.*, Justice Dickson (as he then was) writing for an unanimous court explained why following only the common law approach was inappropriate for a constitutional instrument:

> the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick* v. *Carrington*. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.[29]

After identifying this broad and fundamental interest behind the right, both courts affirmed the constitutional principle that warrantless searches are *prima facie* unreasonable. In *Katz*, the Stevens J. for the majority wrote, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to

[28] *Katz* v. *U.S.*, n ** above at 351.
[29] *Hunter* v. *Southam Inc.*, n ** above at 107.

a few specifically established and well-delineated exceptions."[30] In *Hunter* v. *Southam Inc.*, the Court held that the Canadian Charter required "the party seeking to justify a warrantless search to rebut this presumption of unreasonableness."[31]

The principle is also found in the jurisprudence of the European Court of Human Rights ("European Court") and the United Nations Human Rights Committee.[32] The jurisprudence of the European Court recognizes that warrantless searches of a dwelling house interfere with an individual's right to respect for his private life and home.[33] The central issue is whether the interference can be justified by the state under the narrowly interpreted exceptions in art. 8(2) of the European Convention. In *Funke* v. *France*, the Court held that to be justified, the power did not only have to be aimed at a legitimate purpose, but "the relevant legislation and practice must afford adequate and effective safeguards against abuse."[34]

In Hong Kong, the principle appears to have been adopted by a few lower courts in the context of the Bill of Rights.[35] In *Regina* v. *Yu Yem Kin*, Justice Chan found a statutory power under the Dangerous Drugs Ordinance (Cap. 134), which allowed any police officer to enter and search any premise for evidence reasonably suspected to be present, to violate art. 14 of the Bill of Rights.[36] The power was overly broad and could not meet the "test of reasonable necessity and minimum intrusion".[37] In *obiter*, the court suggested that a statutory limitation restricting the exercise of the power to instances where "it would not be reasonably

[30] *Katz* v. *U.S.*, n ** above at 357.
[31] *Hunter* v. *Southam Inc.*, n ** above at 109-110.
[32] See *Funke* v. *France* (1993) 16 E.H.R.R.297 (ECHR); *Camenzind* v. *Switzerland* (1999) 28 E.H.R.R. 458 (ECHR); *McLeod* v. *United Kingdom* (1999) 27 E.H.R.R. 493 (ECHR); *José Antonio Coronel* v. *Colombia* (No. 778/1997, 24 Oct 2002, HRC). See also B. Emmerson & A. Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001) 201-4.
[33] *Funke* v. *France*, *ibid.* at ¶ 48; *Camenzind* v. *Switzerland*, *ibid.* at ¶33-5.
[34] *Ibid.* at ¶ 56.
[35] See *R.* v. *Yu Yem Kin* (1994) 4 H.K.P.L.R. 75 (HC); *Re Hong Kong and Shanghai Banking Corporation Ltd. and Others* (1991) 1 H.K.P.L.R. 59 (DC).
[36] *Ibid.* at 97-8.
[37] *Ibid.* at 98.

practicable to obtain a warrant would bring the operation of the section within the bounds of reason and necessity".[38]

While the principle appears to be well accepted, it is important not to lose sight of the reasons for why there should be preference for a warrant requirement. At the heart of the principle is the notion that in a civil society, arbitrary state interferences with privacy is most effectively prevented by having an impartial and independent judicial officer scrutinize the grounds for the search before it is in fact carried out. As was held in *Hunter* v. *Southam Inc.*, it is a constitutional imperative to have "a system of prior authorization, not one of subsequent validation."[39] The reason for having an impartial and independent decision-maker was also explained in this case:

> For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.[40]

In addition to the impartial arbiter, a system of prior authorization has other additional safeguards. The written statement of the police officer's grounds for belief becomes a court record, available for scrutiny at any time, subject to claims of public interest immunity. This statement is normally made under oath or affirmation, which enhances the reliability of the information upon which coercive action is taken. The terms of the warrant, appearing in a written form, gives the executing officers a clear indication of the limits of the search and provides notice to persons directly or indirectly affected by potentially intrusive action.[41]

B. Application of the principle to the proposed new power

In applying the first principle to article 23, it is clear that the new warrantless entry power is *prima facie* objectionable. The power applies to places in which

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[38] *Ibid.* at **
[39] *Hunter* v. *Southam Inc.*, n ** above at 109.
[40] Ibid. at 111
[41] Hong Kong courts have also recognized the importance of warrants and have held the police to strict standards, see *Re an application by Messrs Ip and Willis* [1990] 1 H.K.L.R. 154 (HC); *Apple Daily Ltd.* v. *Commissioner of the Independent Commission Against Corruption* [2000] 1 H.K.L.R.D. 647 at 673-4 (CA), per Chan CJCH.

persons will have legitimate privacy interests. The onus must rest with the state to demonstrate the legitimacy of the proposed new power. Before the proposal of this new power, with one limited exception, there did not exist any warrantless entry, search and seizure powers specifically for investigating offences of treason and sedition. The long-standing acceptable method for investigating these serious offences was by warrant only.[42] The one limited exception was in relation to the removal of seditious publications visible from a public place.[43] It would seem this narrowly confined power had a public protection purpose behind it, i.e. removal of material that could incite sedition and potentially public disorder.[44] But the power remains problematic because generally one would only find published material on public display in places such as bookstores where written items are legitimately sold. Freedom of expression protects not only the right to publish but also the rights to sell, display, browse and buy published materials. The proposed decision to repeal this power in 2003 is long overdue.

The introduction of the proposed new power reflects a sudden change in governmental policy with no obvious explanation. Coupled with the constitutional principle presumptively against warrantless searches, these are strong reasons to insist on a convincing and reasoned justification for the proposed new power.

V. Principle 2: Warrantless search powers must be strictly justified on the basis of necessity and proportionality.

A. Constitutional principles of justification in political discourse

The second principle of legitimacy is a natural counterpart to the first one. Like the first principle, it is derived from principles and values inherent in the constitution. In Hong Kong's human rights jurisprudence, it has been recognized

[42] No special investigatory powers were included for treason. Specific search warrant powers were included for offences related to incitement to disaffection and sedition: see Crimes Ordinance (Cap. 200), ss. 8, 13.
[43] See Crimes Ordinance (Cap. 200), s. 14, now to be repealed.
[44] The power remained problematic and a serious threat to freedom of expression. An impartial arbiter is needed before the search is carried out to balance the fundamental freedom against law enforcement goals. The decision to repeal this power was certainly a good one.

that restrictions to fundamental rights and freedoms, such as the freedom of expression, will only be justified if they are necessary and proportional.[45] To be justifiable, the restriction must be necessary for the protection of a legitimate governmental objective and must infringe the right no more than is reasonably necessary in achieving that objective. This jurisprudential principle employed in constitutional litigation can be usefully adapted and applied in political discourse aimed at the legitimacy of new police powers, particularly those presumptively objectionable.

For the jurisprudential principle to be useful to political discourse, it must be adapted by broadening the meaning of necessity and proportionality. Inherent in the jurisprudential principle is a degree of judicial deference to the political choices made by governments.[46] This margin of deference gives rise to a narrow scope of review. However, in political discourse, it is unwarranted to include this element of deference as the purpose of the discourse is to scrutinize the governmental choices themselves in the political arena outside the strict confines of legal analysis. In a civil society, it is expected that there will be free and open debate when the state proposes to enact new police powers that trample upon established human rights. The approach to proportionality should also avoid being unnecessarily constrained as the polity has the right to insist on having the best possible measures that safeguard against, prevent and deter potential abuses of authority.

B. Necessity

With the proposed new power being presumptively objectionable, there is a bias towards maintaining the status quo unless there are exceptionally good reasons for adding the power. It is clear that the Basic Law itself cannot supply those reasons as the terms of art. 23, or any other article, do not require the

[45] See generally *HKSAR* v. *Ng Kung Siu*, n ** above at 460-1; *HKSAR* v. *Lee Ming Tee* (2001) 4 H.K.C.F.A.R. 133 at 176 (CFA); *Ming Pao Newspapers Ltd.* v. *Attorney General* [1996] A.C. 907 at 917 (PC); *Attorney General of Hong Kong* v. *Lee Kwong Kut* [1993] A.C. 951 at 969 (PC).
[46] See generally *HKSAR* v. *Lau Cheong*, n ** above at ¶ 102; *Yau Kwong Man* v. *Secretary for Security* [2002] 3 H.K.C. 457 at ¶106; *A.G. of H.K.* v. *Lee Kwong Kut*, *ibid.* at 975.

enactment of the proposed new power. In the absence of constitutional necessity, other justificatory reasons must come forward.

Aside from constitutional necessity, plausible arguments can appear in two forms: empirical and rational necessity. Empirical necessity exists when actual operational experience reveals the inadequacy of existing laws and powers, thereby suggesting the need to reform the law. When governments act on empirical necessity alone, the governmental response is a reactive one, i.e. the state is responding to an experience-based problem. However, governmental action does not and should not have to be reactive only. Legitimate proactive governmental action occurs when there is a rational necessity for the action based not on actual first-hand experience but on other reasons, such as the operational experience of other comparable countries, or logical inferences derived from the social, political and legal context of the home country. Identifying rational necessity involves a certain degree of abstract thinking to determine if circumstances of empirical necessity could reasonably develop in the future.

1. Empirical Necessity

In the Consultation Document, it was asserted that the

> existing investigation powers may not always be adequate to cater for the special nature of some Article 23 offences. For example, at common law, a police officer can, *inter alia*, enter private premises without a warrant in emergencies in order to stop a crime. However, there are no emergency entry and search powers for the purpose of an investigation. This may well be a major weakness with regard to the investigation of some of the more serious Article 23 offences.[47]

Aside from these bare assertions, there is no mention of any operational experience or difficulties to ground a claim of empirical necessity.[48] This is understandable. In the history of Hong Kong, as there have been so few investigations and prosecutions for national security offences, it is not surprising

[47] *Consultation Document*, n ** above at 49.
[48] The Police Commissioner, Tsang Yam-pui, was unable to supply any evidence of operational necessity when asked about this after the *Consultation Document* was published. See S. Lee, "Officers 'won't abuse new authority'", *S.C.M.P.*, Sept 27, 2002.

that operational experience is lacking.[49] Without having been put to the challenge of catching persons who have threatened national security, it is difficult to sustain an argument for the inadequacy of existing powers. Rather, canvassing the panoply of entry, search and seizure powers presently available to the Hong Kong police reveals a striking array of intrusive powers which appear to have served the police well in investigating the most serious crimes, such as murder, to the most organized criminal activity relating to triads or drug trafficking. In the absence of operational necessity, it is unclear why existing powers of entry and search are inadequate to the meet the evidence gathering and crime prevention purposes of the proposed new power.

Perhaps the most significant power that the police have to search a person's home or premise is the one incident to arrest contained in s. 50 of the Police Force Ordinance (Cap. 232).[50] When an individual is arrested, whether with or without a warrant, the arresting officer may search for and take possession of documents or objects of value to the investigation found on the individual's person or in or about the place where the arrest occurs.[51] The police do not have absolute fiat to enter private premises to carry out an arrest. If there is authority to enter the premises, such as with the consent of the flat owner, then the arrest and consequent search will likely ensue with little difficulty. Indeed, subsection 50(3) imposes a duty on persons residing in or in charge of such premises to allow the police free access for the purpose of carrying out the arrest.

However, if the police are unable to obtain access into the premises with the cooperation such persons then they may forcibly enter in two situations: if they are acting under an arrest warrant, or such a warrant could issue but cannot be obtained at the time without affording the person to be arrested an opportunity of escape.[52] Realistically, in relation to the second situation, once the person to

[49] See Cullen & Choy paper.
[50] The officer must reasonably believe the person will be charged with or reasonably suspect that the person is guilty of one of three category of offences: an offence for which the sentence is fixed by law (e.g. murder), an offence for which a person may be sentenced to jail on a first conviction, or an offence for which service of an summons appears to the officer to be impracticable.
[51] Police Force Ordinance (Cap. 232), s. 50(6).
[52] *Ibid.*, s. 50(4).

be arrested is made aware of the police presence and intention to arrest, the risk of escaping will be present. Before entering in either situation, the officers must give notification of their authority and purpose and demand to be admitted.[53] This restricted power to arrest without warrant in a dwelling house appears to codify and extend the common law power, which had mainly applied in cases of hot pursuit of a felon.[54]

The scope of the power to search incident to arrest is ambiguously worded in s. 50(6) of the Police Force Ordinance (Cap. 232). It is unclear whether the power to search "in or about the place at which he has been apprehended" extends only to the immediate vicinity, such as the room in which the arrest occurs, or to all the remaining parts of a house or flat in or near where the arrest occurs. The modern common law position on this issue, as stated by the House of Lords in *Regina (Rottman)* v. *Commissioner of Police of the Metropolis*, is that the power to search extends to the entire premise.[55] If the scope of the power in s. 50(6) is interpreted in accordance with this common law position, then the Hong Kong police will have a very wide power to search private premises, which arguably applies to the search of a residential flat even if the person is arrested in the ground floor lobby of his or her estate complex.[56]

In addition to this statutory authority, the police probably retain other exceptional common law powers to enter private premises.[57] The most relevant of those powers exercisable short of an arrest is the one for the purpose of

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[53] *Ibid.*
[54] For discussion of this common law right, see *McLorie* v. *Oxford*, n ** above at 1296-7.
[55] [2002] 2 A.C. 692 (HL). Four of the five Law Lords accepted this position. However, Lord Hope wrote a very strong dissenting opinion on this issue, arguing that there was no clear authority to extend the scope of the power to such an extent and any such extension would violate the art. 8 of the European Convention.
[56] In *Regina (Rottman)* v. *M.P.C.*, *ibid.*, the claimant was arrested in the driveway of his house, which was a few yards from the front door.
[57] It has been suggested that the powers of entry of a Hong Kong police officer are defined exhaustively in statute without retention of any common law powers. See P. Morrow, "Police Powers and Individual Liberty" in R. Wacks, ed., *Civil Liberties in Hong Kong* (Hong Kong: Oxford University Press, 1988) 243 at 264. However, the cases, *Ho Shau-Hong* v. *Commissioner of Police* [1987] H.K.L.R. 945 (CA) and *Hall* v. *Commissioner of the Independent Commission Against Corruption* [1987] H.K.L.R. 210 (CA) would tend to suggest otherwise.

preventing a real and imminent risk of a breach of the peace.[58] The facts in *Thomas* v. *Sawkins* provide a good example of the usefulness of this power in preventing riotous outbreaks following a large gathering of people.[59] In this case, it was held that the police had authority to enter and remain present in a private hall during a public meeting of between 500 and 700 people, in which seditious speech likely leading to a breach of the peace would have been expressed had the police not been present.[60]

The police also have at its disposal a range of statutory warrantless entry and search powers that will play a critical role in protecting national security. Two powers found respectively in the Official Secrets Ordinance (Cap. 521) and Societies Ordinance (Cap. 151) are directly relevant to article 23. There is an emergency power to enter forcibly, if necessary, any premise to search for and seize items reasonably suspected to be connected to an espionage offence.[61] Every person found in the premises is also liable to be searched. What is extraordinary about this power is that the entry and search (but not the seizure) is permitted on a mere reasonable suspicion that a relevant offence has been or is about to be committed. There is no need to be satisfied that evidence of the offence will in fact be found inside the premise or that the offence is about to be committed in those premises.[62]

The second important power allows a senior police officer, who has reason to believe that a meeting of any unlawful society is taking place in any dwelling-house or building, to enter and arrest all persons found inside associated with the society, and to search for and seize articles reasonably believed to be connected

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[58] *Thomas* v. *Sawkins* [1935] 2 K.B. 249 (KBD), appl'd in *McLeod* v. *Commissioner of Police of the Metropolis* [1994] 4 All. E.R. 553 (CA), which added the more restrictive test of 'real and imminent risk' , but this decision was the subject of a successful complaint before the European Court of Human Rights, see *McLeod* v. *United Kingdom* (1999) 27 E.H.R.R. 493 (ECHR). A modern example of the application of this power is the forcible entry into a home after receiving a disconnected emergency 999 call (or 911 in Canada) from that home: see *Regina* v. *Godoy* [1999] 1 S.C.R. 311.

[59] *Thomas* v. *Sawkins*, *ibid.*

[60] *Ibid.*

[61] Official Secrets Ordinance (Cap. 521), s. 11(2).

[62] This open-ended power invites arbitrary fishing-expeditions from the police and falls below the standards for a constitutional search power set down in *Hunter* v. *Southam Inc.*, n ** above at 110-5, which were adopted and applied in *Re The Hong Kong and Shanghai Banking Corporation Ltd.* (1992) 1 H.K.D.C.L.R. 37 (DC).

with the unlawful society.[63] This power can be exercised at any time even without exigent circumstances. An unlawful society is either a triad society or one prohibited by the Secretary for Security, which includes political bodies connected with a Taiwan or foreign political organization, and those prohibited on grounds of national security or public order (*ordre public*).[64] The Court of Appeal has found that the basis for reasonable belief that the meeting is occurring does not have to be based on any overheard conversation in the supposed meeting.[65]

As part of its role to protect the public, the police may also exercise a host of warrantless powers to enter premises and search for instruments of crime used for violence or intimidation, such as firearms and ammunition,[66] and dangerous goods, such as explosives, poisonous gases or vapours, radioactive material.[67] As well, intelligence related to weapons of mass destruction may be seized without warrant in emergency situations.[68]

In relation to the search of vehicles or other conveyances, the police already have an extremely wide power under s. 54 of the Police Force Ordinance (Cap. 232) to stop and detain any person who is found to be acting in a suspicious manner.[69] The scope of the power extends to demanding identification, making inquiries and, if necessary, to search of the person for anything that may present a danger to the officer. A wider power to search the person for evidence exists if the officer reasonably suspects the person of having committed or about to commit or intending to commit any offence.[70] Similar and more specific powers to stop,

[63] Societies Ordinance (Cap. 151), s. 33. This power is in addition to the one possessed by the Societies Officer under s. 31 to enter any place or premise reasonably believed to be a meeting or business place of a society.
[64] See *ibid.*, ss. 8, 18.
[65] See *The Queen* v. *Ho Kwok Chu* [1994] 106 H.K.C.U. 1 (CA). The test was met where a group of undercover officers pretended to place mahjong in a restaurant while observing (without hearing the conversation inside) a birthday party at which known triad members were present.
[66] Firearms and Ammunition Ordinance (Cap. 238), s. 40.
[67] Dangerous Goods Ordinance (Cap. 295), ss. 3, 12(3).
[68] Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526), ss. 6(2), 7.
[69] The power does not appear to allow the officer to search the vessel or conveyance on or in which the person is found.
[70] Police Force Ordinance (Cap. 232), s. 54(2).

detain and search in relation to persons in conveyances exist under many other criminal or quasi-criminal law ordinances.[71]

Finally, having outlined the many warrantless police powers available to enforce article 23 offences, the effectiveness of warrant based entry and search powers in Hong Kong should be underlined. With Hong Kong being a relatively small geographical jurisdiction with technologically advanced communications (particularly wireless communication) and an efficient legal system, there is no suggestion that police officers experience delays in obtaining warrants. Although the Hong Kong police officer must still appear before a magistrate before a warrant can issue,[72] the government has reported that the average time for obtaining a warrant is between one and a half to three hours, during office hours, and between two to four hours, outside office hours.[73] In a jurisdiction sometimes criticized for its bureaucratic inefficiencies, these time delays are by no means onerous.

2. Rational Necessity

Irrespective of whether there is empirical necessity for the proposed new power, one might still argue that there are good reasons for why the power is necessary. One argument that has been put forward by the Administration points to the seriousness of the offences being investigated. It is true that the relevant

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[71] See Weapons Ordinance (Cap. 217), s. 12; Firearms and Ammunition Ordinance (Cap. 238), ss. 41, 42; Control of Chemicals Ordinance (Cap. 145), s. 12; Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526), ss. 5, 6(3), 7; Customs and Excise Service Ordinance (Cap. 342), s. 17B; Immigration Ordinance (Cap. 115), s. 56.

[72] Hong Kong has not adopted innovations such as 'tele-warrants', which have been adopted in Canada, the United States, and Australia. See s. 487.1 of the Criminal Code (Canada), R.S.C. 1985, c. C-46. For a discussion of similar provisions in the United States, see G.P. Alpert, "Telecommunications in the Courtroom: Telephonic Search Warrants" (1996) 38 *U. of Miami L. Rev.* 625. See also Crimes Act 1914 (Austr.), s. 3R.

[73] See Annex C to Security Bureau, "The Administration's response to the issues raised at the Joint Meeting of the Panel on Security and Panel on Administration of Justice and Legal Services on 21 October 2002" (December 2002), which can be found at http://www.basiclaw23.gov.hk/english/resources/legco/legco_article/article3.htm. See also "Letter to Mrs. Sharon Tong, Clerk to the Panel on Security and Panel on Administration of Justice and Legal Services from the Judiciary Administrator dated January 2, 2003", which can be found at http://www.legco.gov.hk/yr02-03/english/panels/ajls/papers/ajlsse0107cb2-793-2e.pdf for details on how and when search warrants are signed by magistrates in Hong Kong.

five offences are serious, as evidenced by the maximum life imprisonment sentence for four of them, i.e. treason, subversion, secession, and serious sedition (i.e. as it relates to the former three offences). However, the argument is unpersuasive when one considers the number of other serious offences in Hong Kong which have not attracted special warrantless entry and search powers, including such serious offences as genocide,[74] torture,[75] murder,[76] manslaughter,[77] serious non-fatal offences against the person,[78] serious and organized crimes,[79] and anti-terrorism offences.[80]

Looking at the argument more closely, it becomes clear that the concern is not so much with the formal punishment, but rather, with the potential calamitous consequences to society flowing from these types of offences. In a speech by the Secretary for Justice in October 2002, the following reasons were given for why the power was necessary:

> We must bear in mind the consequences when national security is endangered. In view of the catastrophic effect and huge loss of lives and property that this may bring about, it is imperative that it be forestalled in time. Hence, it is necessary to expand the necessary powers.[81]

It seems that the Secretary for Justice was contemplating new powers designed to prevent serious national security offences from materializing. However, the newly enacted power, which can only be exercised after an offence has commenced (or completed), does not readily serve such a preventive purpose. Indeed, police pre-emption of serious national security offences will likely have to rely on existing public protection/preventive police powers, some of which were discussed earlier. Where the offence escalates to a catastrophic level, truly exceptional measures

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[74] Offences Against the Persons Ordinance (Cap. 212), s. 9A.
[75] Crimes (Torture) Ordinance (Cap. 427).
[76] Offences Against the Person Ordinance (Cap. 212); Homicide Ordinance (Cap. 339).
[77] *Ibid.*
[78] Offences Against the Person Ordinance (Cap. 212).
[79] Organized and Serious Crimes Ordinance (Cap. 455).
[80] United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575).
[81] E. Leung, "A Legal Perspective of the Proposals to Implement Article 23 of the Basic Law" (speech given at lunch meeting of Newspaper Society of Hong Kong, October 17, 2002), the full text of which can be found in *Press Release: "Speech by SJ"* (October 17, 2002) online at http://www.info.gov.hk/gia/general/200210/17/1017170.htm. An abridged version was reported in the South China Morning Post in "Two systems will remain", S.C.M.P., Oct. 18, 2002.

under existing emergency legislation may need to be taken.[82] Thus, the argument for necessity based on forestalling catastrophic effects is also unpersuasive since the enacted power is neither aimed at nor effective in realizing this purpose.

In constructing an argument based on rational necessity, one might try to draw an analogy to existing warrantless entry and search powers.[83] But the analogy breaks down as many of the existing powers do not share the same scope or purpose as the proposed new power. These existing emergency powers are backed by rational policy reasons, which do not readily apply to the new article 23 power, such as the relative ease of destroying or concealing the targeted objects (e.g. dangerous drugs, articles infringing or used to infringe copyright, dutiable commodities), or the inherent dangerousness of the objects (e.g. firearms, dangerous substances, etc.). Few existing powers allow for emergency entry for the general purpose of gathering evidence of certain offences.[84] As discussed earlier, other than in an investigation into handling seditious publications, there is nothing unique or special about the kinds of evidence seized under the proposed new power. As in any kind of serious investigation into organized criminal activity involving violent means and consequences, the police will come across an unimaginable assortment of evidence probative of the offence.

While searches in relation to handling seditious publications are more focused on a particular type of evidence (i.e. publications typically in written or electronic form), generally this evidence, unlike evidence such as dangerous drugs, is incapable of immediate destruction without leaving a trace. Even with deleted electronic data, there are many ways to recover such data with expert computer

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[82] See generally Emergency Regulations Ordinance (Cap. 241) and Basic Law, art. 18.

[83] References to the presence of existing warrantless search powers in Hong Kong have been repeatedly made by the Administration. See *Consultation Document*, n ** above at 48; Secretary for Justice's speech, n ** above; Security Bureau, "Proposals to Implement Article 23 of the Basic Law – Police Investigation Powers", paper for the Legislative Council Panel on Security and Panel on Administration of Justice and Legal Services (October 2002), which can be found at http://www.basiclaw23.gov.hk/english/resources/legco/legco_article/article2.htm [hereinafter referred to as "Paper on Police Powers"].

[84] The exceptions includes powers under the Official Secrets Ordinance (Cap. 521), s. 11; Prevention of Bribery Ordinance (Cap. 201), s. 17, Copyright Ordinance (Cap. 528), s. 123(3); Prevention of Copyright Piracy Ordinance (Cap. 544), s. 19. One suspects there is empirical necessity behind all these powers.

forensic technology.[85] In most cases, persons investigated for this offence will be believed to have a large supply of written seditious publications on hand.[86] Attempts to remove such items from the premises can be easily intercepted by the surveillance team who would have been posted pending the warrant obtaining process.

The police also have an extraordinary warrant based power specifically aimed at entering premises to seize seditious publications and any evidence of sedition.[87] The power is extraordinarily broad because the magistrate need only be satisfied of one precondition before issuing the warrant, i.e. reasonable cause to believe that sedition related offences have been or is about to be committed. There is no need to believe or even suspect that evidence of the offences will be found in the premises to be searched.[88] Such a power is a recipe for arbitrary searches and fishing expeditions, and most likely falls below constitutional requirements.[89] Until it is successfully challenged or amended, the police have at its disposal a warrant based search power in relation to sedition offences that is easier and quicker to obtain than most other warrants.

Arguments of rational necessity founded on the experiences and practices of other countries, while asserted by the Administration, are also deficient when considered closely. The new warrantless entry and search power finds no exact counterpart in the laws of England, New Zealand, Australia, Malaysia, and Singapore.[90] While some of these jurisdictions have warrantless search powers in relation to seditious or subversive publications and espionage offences, none have an emergency power that allows entry into premises to gather evidence of treason

[85] See S.W. Brenner & B.A. Frederiksen, "Computer Searches and Seizures: Some Unresolved Issues" (2002) 8 *Mich.Telecomm.&Tech.L.Rev.* 39 for a discussion of legal issues related to police searches of computers.
[86] The investigations will tend to be serious as every prosecution requires the written consent of the Secretary for Justice before it can proceed. See proposed s. 18C of the Crimes Ordinance (Cap. 200)
[87] See *ibid.*, s. 13.
[88] The warrant power under s. 26 of the Official Secrets Ordinance (Cap. 521) has the same deficiency.
[89] See n ** above for similar observations made about *ibid.*, s. 11(2).
[90] See table surveying the various powers available in other countries in Security Bureau's Paper on Police Powers, n ** above.

or other equivalent offences against the state.[91] Canada and Ireland, however, are exceptional in that the former has an emergency entry and search power that applies to all offences and the latter has a general warrantless entry and search power in respective of offences against the state exercisable even without exigent circumstances.[92]

However, the exceptional powers in these two jurisdictions were a product of the unique social, political and legal historical background of each country. In Ireland, its extremely wide warrantless entry power was part of a package of measures enacted in 1939 in response to the escalating terrorist acts committed by the illegal Irish Republican Army against Britain.[93] In Canada, the general power to enter and search in exigent circumstances was enacted in 1997 following the Supreme Court of Canada's decision in *Regina* v. *Silveira*, a case in which the police entered a dwelling-house without legal authority to protect the evidence of a drug offence while a search warrant was being obtained.[94] The majority of the Court found that the entry, which was not only unauthorized by law but also in defiance of the laws then in place, violated s. 8 of the Canadian Charter.[95] This sent a strong message to Parliament that even if s. 8 of the Charter provided an exception for entry in exigent circumstances, a pre-requisite to recognizing such an exception was the existence of an enacted power.[96] In looking at the

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[91] There is an emergency search power for investigating offences in the Official Secrets Act 1911 (UK) in s. 9(2). The Police and Criminal Evidence Act 1984 (UK) does not have a general emergency warrantless search power for premises. New Zealand has an emergency entry and search power for espionage offences in the Crimes Act 1961 (NZ), s. 78D(1)(b). In Australia, there is a general emergency power to search without warrant in Crimes Act 1914 (Austr), s. 3T, but it only applies to conveyances and not premises. Malaysia has a general emergency search power in its Official Secrets Act 1972, s. 19 and Sedition Act 1948, s. 8, but not in relation to offences against the state in Chapter VI of the Penal Code. Singapore has emergency search powers in its Official Secrets Act (Cap. 213), s. 15(1), Sedition Act (Cap. 290), s. 8(2) and Internal Security Act (Cap. 143), s. 66(2); the latter only relating to searches in designated security areas. It also has other coercive entry powers in relation to subversive documents in its Criminal Law (Temporary Provisions) Act (Cap. 67).

[92] See Criminal Code (Canada), n ** above, s. 487.11; Offences Against the State Act 1939 (Ireland), s. 29.

[93] See D.P.J. Walsh, "The Impact of Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom" (1989) 62 *Temp. L. Rev.* 1099 at 1100-1.

[94] *Regina* v. *Silveira* (1995) 97 C.C.C. (3d) 450 (SCC). Section 487.11 of the Criminal Code (Canada), n ** above, came into force on June 16, 1997.

[95] *Ibid.* at ¶ 140.

[96] Although the majority admitted the evidence in this case, it noted that in future such conduct would likely lead to the inadmissibility of the evidence. See *ibid.* at ¶155. Courts and commentators have recognized that s. 487.11 was enacted partly in response to the decision in *R.* v. *Silveira*, *ibid.*, see annotations in *Martin's Annual Criminal Code 2003* (Aurora: Canada Law Book,

contextual circumstances behind the enactment of these powers, they are sufficiently unique to render them unhelpful examples for Hong Kong to follow.

Finally, supporters of the proposed new power may point to the minimum one and a half hour delay to obtain a warrant as being a 'window of opportunity' for evidence to be destroyed. This argument, however, must be assessed from a realistic perspective. If it is known that there are no persons in the premises which house the material evidence then there is no urgency to enter, and ordinarily, the police will monitor the premises from the outside while a search warrant is obtained. Even if persons are known to be in the premises or are seen returning, it cannot automatically be assumed that there is urgency to enter and secure the premises. Without good reason, genuine subversive conspirators will not suddenly destroy or erase important intelligence before executing their operation. Such measures would only be taken if they were led to believe that the police were 'onto them', which often occurs due to police conduct, negligent or otherwise, triggering the attention of the conspirators.[97] Where the subversive act is taking place or has completed, smart conspirators will probably have already eliminated its paper and evidence trail to avoid detection. In any case, early identification of arrestable suspects together with a strategic arrest at the targeted premise will provide a reasonable opportunity to search the premises for evidence.

It follows from this review of conceivable arguments for rational necessity that none are particularly persuasive. If rational necessity is said to exist, it lies on the common sense notion that conspirators will attempt to destroy or conceal evidence when they believe the police are 'onto them'. However, this notion arises independent of the nature of article 23 offences or the types of evidence

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2003) CC/839; *R.* c. *Pichette* [2003] J.Q. no 20 (Quec.C.A.); *Regina* v. *Sam* [2003] O.J. No. 819 (Sup.Crt.J.). Legislative history shows that the Canadian Parliament first responded by enacting in 1996 a specific warrantless search power in its drug legislation. The general power in s. 487.11 was enacted in 1997 as a logical progression from the increasing number of warrantless search powers for exigent circumstances seen in other legislation. See generally the *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, April 21 and 22 (afternoon sitting), 1997.

[97] In *R.* v. *Silveira, ibid.*, the public arrest of a drug trafficker in a particular community gave rise to exigent circumstances because of the strong likelihood that news of the arrest would be rapidly sent to the occupants of the offender's home located in the same community.

targeted. Indeed it can apply 'across the board' to any kind of organized criminal activity. Be that the case, the legislature has historically not seen the need for a general emergency warrantless search power that applies 'across the board'. The likelihood of this narrow window of rational necessity materializing in practice can be minimized with intelligent and strategic police investigatory work.

C. Proportionality

Necessity alone is an insufficient basis for justifying the legitimacy of a new police power. This is because the democratic values of a civil society can tolerate only a proportional and reasonable interference with constitutional rights. A good example of this was seen in the summer of 2002 when, after two and a half years of deliberations, the Administration withdrew its proposal to enact and amend money laundering offences having a lower (and easier to prove) *mens rea* standard notwithstanding strong empirical evidence suggesting the inadequacy of the existing offence.[98]

The principle of proportionality requires the scope and terms of the proposed new power to be shaped in such a way as to minimize both authorized (i.e. when the power is properly exercised) and unauthorized (i.e. when the power is abused) interferences with rights, without unduly impairing the utility of the power. Attention to potential unauthorized uses of the power is important because of the reality that new powers will be relied upon in mistake or in pretence of deliberate abusive conduct. Ultimately proportionality is about achieving a tolerable level of interference with fundamental rights relative to the importance and the need for the interfering power. Achieving this level requires

[98] The proposals were originally introduced on December 15, 1999 in the Drug Trafficking and Organized Crimes (Amendment) Bill 1999. They were backed by strong evidence of operational and empirical necessity from the police showing the difficulties in obtaining convictions under the then present law, Yet due to numerous concerns that the proposals would catch morally innocent persons, the Administration succumbed to the concerns and withdrew the proposals shortly before the re-introduced 2000 bill was passed in July 2002. See "Report of the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill 2000", a paper prepared by the Legislative Council Secretariat for the House Committee meeting on 28 June 2002, which can be found online at http://legco.gov.hk.

having a clear and narrowly defined power on its face and sufficient safeguards to prevent and deter its improper use.

In applying the principle of proportionality to the proposed new power, it becomes apparent that the terms of the power are insufficiently narrow and additional safeguards can be added to prevent abuse without risk of eviscerating the power itself. When assessing proportionality, it must be remembered that the necessity for the power, if it can be said to exist at all, is not great, while the interference with fundamental human rights is substantial for it reaches into constitutionally protected private places. The preconditions for exercising the power, the scheme for execution, and consequences for improper use will be discussed separately.

1. Pre-requisite conditions to exercising the power

Who can exercise the power? Presently, it is proposed that the power can be exercised by a police officer of or above the rank of chief superintendent of police; at the end of 2001, there were 72 officers coming within this category.[99] If the category was narrowed by moving up one rank into the various Commissioner of Police grades, then the number falls to 21.[100] It seems sensible that, given the exceptional yet serious nature of the offences and the intrusiveness of the power, its exercise should be reserved for the highest grade of police officers in the region. Leaving the exercise of the power to the highest echelons of the police force offers a greater degree of accountability. Presumably, this senior officer, who is far removed from day-to-day frontline police work, will be more likely insist on receiving documented and reliable information before coming to a dispassionate view on the existence of reasonable grounds to believe.

Applicable offences. Given the stated intention of the Administration to reserve the power for the most serious Article 23 offences, it is difficult to

[99] See n ** above.
[100] There were 14 Assistant Commissioners of Police, four Senior Assistant Commissioners of Police, two Deputy Commissioners of Police and one Commissioner of Police. See *ibid*.

comprehend why the offence of handling seditious publication is to be included.[101] The elements of this offence, unlike that of the other four offences, do not include the use serious criminal means, force or the materialization of instability. The maximum punishment for this offence is only a fine of $500,000 and/or imprisonment for seven years, which is markedly lower than the life imprisonment maximum for treason, subversion, secession and the serious form of sedition.

But what is more problematic is that the use of the proposed new power in relation to seditious publications is inimical to the freedom of expression and contradicts the Administration's promise to respect the warrant based regime for journalistic material. The line separating a 'seditious publication' from an object of legitimate expression will often be a fine one. Drawing the line, and deciding on which side the object falls, involves balancing weighty constitutional values against legitimate public policy goals; it is a task best left for an impartial judicial officer. But under the proposed new power, this important decision is left to executing police officers who do not need to be apprised of the pre-requisite grounds for belief. In practice, there is little doubt that the balance will tilt strongly on the side of public policy during the execution stage, leaving to the judiciary the task of rectifying the balance on review after the search has been completed.[102]

Such an approach contradicts the express intention to respect and maintain the exclusive warrant based system for searching and seizing journalistic materials, as set out in Part XII of the Interpretation and General Clauses Ordinance (Cap. 1).[103] The ambiguous definition of 'journalistic material' (i.e. any material acquired or created for the purposes of journalism) leaves much room for argument over whether a suspected seditious publication is also journalistic material; but in many cases, it will be.[104] In more cases than not, a search of premises for seditious publications will be a search for journalistic material

[101] *Consultation Document*, n ** above at 49.
[102] See text accompanying n ** below for a discussion of the power of the court to exclude evidence obtained without proper authorization.
[103] See s. 18B(5) of the Crimes Ordinance (Cap. 200).
[104] Other inadequacies of Part XII are discussed in the text accompanying n ** below.

thereby rendering the proposed new power inapplicable. But to leave this threshold decision of classification to police discretion is unsatisfactory. The risk of error is great given the exigencies felt by the police at the time and the tendency to over-seize leaving any correction to be done by judicial review after the search. If the intention behind protecting journalistic material is to be truly respected, the offence of handling seditious publications should be taken outside the scope of the proposed new power so as to leave the important balancing exercise for a judicial officer before the entry takes place.

Places to be searched. The proposed power applies to residential and commercial premises, other places and conveyances in the same manner without discrimination. But this should not be the case because people hold different reasonable expectations of privacy in these various places. A person's residential home has the highest degree of privacy expectation and should be treated separately. As stated by Justice Cory in *Regina* v. *Silveira*, "there is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'". [105] Traditional police powers respect this distinction, and recognize that residential homes deserve a higher degree of protection than places such as a motor vehicle, which involves state licensed activity.[106] As well, the right to be free from arbitrary and unlawful searches in the Basic Law, art. 29, refers to "homes and other premises", a phrase which serves to distinguish and elevate the status of residential premises.

With the heightened privacy interest in residential premises, one should consider removing them from the reach of this proposed power entirely because nothing short of a warrant is acceptable. Alternatively, in the absence of full exclusion, there should be an added safeguard to limit entry under the power only when truly necessary. Such a safeguard can take the form of a 'last resort' precondition to the exercise of the power. A 'last resort' condition is one in which the senior officer must reasonably believe that there is no other reasonable alternative source of obtaining the same or substantially same evidence.

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[105] See n ** above at ¶140.
[106] Compare ss. 50 and 54 of the Police Force Ordinance (Cap. 232).

Emergency preconditions. There are two emergency preconditions: unless immediate action is taken, (i) evidence of substantial value to the investigation would be lost, and (ii) the investigation of the offence would be seriously prejudiced as a result. It is difficult to make sense of the second precondition. The only two plausible interpretations suggest the precondition will either never be satisfied or will always be satisfied. On the one hand, it could be said that the lost opportunity to obtain evidence, no matter how important it might potentially be, has a neutral impact on the investigation, which is no better or worse off than before. Under this interpretation, the failure to obtain evidence is simply the failure to advance the investigation rather than prejudicing it. When interpreted in this way, the second emergency precondition will never be satisfied.

On the other hand, it could be said that the reason why the evidence has substantial value is because the failure to obtain it will substantially hurt the overall investigation. In this way, the value of the investigation is defined according to how close the investigators are to developing a solid case for prosecution. A lost opportunity to secure substantially important evidence will in almost all cases constitute a serious set back to the investigation. Accordingly, under this interpretation, satisfying the first precondition will inevitably satisfy the second one. Given the lack of utility of the second precondition, its presence can only be a red herring offering false comfort.

2. Execution of the power

Written directions needed. One of the advantages of the warrant-based procedure, in preventing abuse of authority, is the existence of the written warrant itself setting down the clear scope and limits of the search. The warrant contains the written instructions which guide and remind the officers on how the search should be carried out lawfully. The warrant also serves to notify persons affected of the purpose and parameters of the search. Most importantly, the warrant provides the clear standard by which to measure the lawfulness of the conduct if and when such lawfulness is contested.

With the proposed new power, the senior officer directs other officers to execute the entry, search, seizure and other powers. However, the provision does not require this direction to be in writing. It is common knowledge that the imperfections of oral communication lead inevitably to miscommunication. This is especially true when information is communicated down a chain of individuals to a group of persons. There seems to be no reason why the direction cannot be in a written form in order to realize the advantages already mentioned. Indeed this is the approach seen with other emergency warrantless search powers in Hong Kong and in other countries.[107]

As the proposed power separates the person who forms the prerequisite reasonable grounds from the persons who in fact carry out the search, it is extremely important that the limits of the search authority be clearly communicated to all those involved in the execution. Indeed since there is no duty to apprise the executing officers of the reasonable grounds for belief, many of them will not know the full background behind the search. They will be heavily reliant on having clear instructions to follow. Without clear instructions, there is a risk that the executing officers will take the full list of enumerated enforcement powers, set down in subsection (2) of the new provision, as their instructions.[108] This would be wrong and inconsistent with the intention behind the scheme, which is to have the executing officers exercise only those powers authorized by the senior officer. Hence, a written direction serves the dual purpose of committing the senior officer to a specification of the limited powers to be exercised by the

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[107] In Hong Kong, see Official Secrets Ordinance (Cap. 521), s. 11; Prevention of Bribery Ordinance (Cap. 201), s. 17(1B); Firearms and Ammunition Ordinance (Cap. 238), s. 40; Gambling Ordinance (Cap. 148), s. 23(1). In other jurisdictions, see Official Secrets Act 1911 (UK), s. 9(2); Crimes Act 1961 (NZ), s. 78D(1)(b); Offences Against the State Act 1939 (Ireland), s. 29(1); Official Secrets Act 1963 (Ireland), s. 16(2); Official Secrets Act (Cap. 213) (Singapore), s. 15(5).

[108] The executing officers,

(a) may enter the premises or place and, if necessary, break open any door or window of the premises or place for that purpose;
(b) may stop and board the conveyance;
(c) may search the premises, place or conveyance or any person found therein;
(d) may seize, detain or remove anything found in the premises, place or conveyance which appears to him to be or to contain evidence of an offence under section 2 (treason), 2A (subversion), 2B (secession), 9A (sedition) or 9C (handling seditious publication);
(e) may detain the conveyance for such time as may be necessary for his exercise of the power conferred by paragraph (c) or (d); and
(f) may remove by force any person or thing obstructing him in the exercise of any power conferred by this subsection.

executing officers and of informing such officers of their limited authority. The written direction also serves to notify potentially innocent home owners of the purposes for the police intrusion.

Knock and announce before entry. At common law, an arrest inside a dwelling house had to be preceded by a knock and announcement by the arresting authority.[109] The proposed new power has not codified this requirement, inferentially suggesting it has been removed. The only duty pertains to producing the officer's warrant card, which simply identifies him or her as a police officer, if requested. There are good reasons for maintaining a knock and announce requirement as least insofar as it relates to residential premises.[110] As a matter of effective practice, a forceful and unannounced entry is more likely to raise an alarm and lead to resistance from the inhabitants of the premises. But a courteous announcement followed by a clear statement of purpose could in fact be followed by cooperation from those inside leading to a consensual search. However effective in practice, following the latter approach will less likely bring the police conduct into disrepute, particularly when the persons with privacy interests inside the premises are unconnected with the investigated criminal activity.

Law enforcement is obviously concerned that having a knock and announce requirement will contribute to the loss or destruction of evidence. But when one considers the context in which the power will be exercised, this fear is largely unwarranted. The delay incurred by such a requirement will normally only be momentary. The type of evidence sought after will rarely be such as to allow for immediate destruction (e.g. drugs which can be flushed down the toilet in seconds). Even data deleted from a computer can often be recovered with expert computer forensic skills. Furthermore, the police in Hong Kong are not strangers to a knock and announce requirement since the general power to force entry into a dwelling home for the purpose of carrying out an emergency arrest under s. 50(4)

[109] *Semayne's Case*, n ** above; *Eccles* v. *Bourque* [1975] 2 S.C.R. 739.
[110] Such a duty would include producing any written direction made by the senior officer.

of the Police Force Ordinance (Cap. 232) must be preceded by "notification of [the officer's] authority and purpose and demand of admittance duly made".[111]

Search of persons inside should be based on reasonable grounds. Executing officers, if authorized, are entitled to search any person found in the premise, place or conveyance. The officer need not form any additional reasonable grounds to believe or suspect that the individual to be searched will likely have evidence on his or her person. Any belief or suspicion in this regard is constructive based solely on the fact that the person is found inside the premises. To avoid claims of being an arbitrary power, there needs to be a rational connection between the reasonable belief that evidence will be present in a particular premise and the likelihood of finding evidence on persons inside those premises. The existence of this rational connection will largely depend on the circumstances of the case, particularly the type of evidence being sought, the nature of the place being searched, and the likelihood of finding persons in the premise or conveyance who are unconnected to the criminal activity. The deficiency with the proposed power is the lack of any requirement on the part of the senior officer or the exercising officers to establish in their minds this rational connection before either authorizing or exercising, as the case may be, this intrusive search power.

Force used should be reasonable. It is proposed that executing officers are entitled to use force, if necessary, to break into a premise or place and to use force to prevent any person or thing from obstructing the exercise of the powers. The provision, however, does not prescribe that the force used must be reasonable. But surely, this must be an implicit requirement and is likely constitutionally

[111] For the similar arrest power in Canada, police officers are presumptively required to make a prior announcement unless immediately before entering the dwelling-house, the officer has reasonable grounds to suspect that prior announcement would expose persons to imminent bodily harm or death, or reasonable grounds to believe that prior announcement would result in the imminent loss or imminent destruction of evidence. See Canadian Criminal Code, n ** above, s. 529.4(3).

mandated.[112] The legislature would never intend the authorized use of force to be exercised other than in a reasonable manner.

3. Consequences for improper use

There is little recourse for persons who are affected by an unlawful or abusive exercise of the proposed new power. Aside from bringing a civil action for trespass or false imprisonment (which is highly unrealistic for the average person) or filing a complaint potentially leading to police disciplinary proceedings, there are few other ways of obtaining compensation or acknowledgement of the state's wrongdoing. To add salt to the wound, the common law rule allows unlawfully obtained evidence to be admitted in a criminal proceeding so long as the individual's privilege against self-incrimination has not been undermined and the evidence is more probative than prejudicial.[113] Ordinarily the unlawful seizure of incriminating real evidence, such as documents and objects, will come within neither of these two exceptions and will be admissible at trial.[114] To allow the police and prosecution to enjoy the fruits of illegal police work will, in any civil society, surely lead to a loss of confidence in the integrity of the justice system. Rather than deter abuse of authority, such a rule of evidence encourages sloppy or deliberately abusive police investigatory work. It is for these reasons that jurisdictions such as the United States[115] and Canada[116] have recognized a judicial power to exclude evidence obtained in breach of constitutional human rights.

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[112] See, by analogy, jurisprudence under the Canadian Charter: *Collins* v. *The Queen* (1987) 33 C.C.C. (3d) 1 at 14-5 (SCC); *Genest* v. *The Queen* (1989) 45 C.C.C. (3d) 385 (SCC).

[113] *Secretary for Security* v. *Lam Tat Ming* (2000) 3 H.K.C.F.A.R. 168 at 178-9 (CFA), adopting the approach in *Regina* v. *Sang* [1980] A.C. 402 (HL).

[114] A good example is seen in *R.* v. *Yu Yem Kin*, n ** above, where the evidence was admitted.

[115] The United States Constitution did not expressly provide for a judicial power to exclude evidence obtained in breach of constitutional rights. The power was read in as a matter of interpretation. The U.S. exclusionary rule in federal cases was first recognized by the Supreme Court in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341 (1914). The rule was expanded to derivative evidence in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 40 S.Ct. 182 (1920). Later it was extended to state prosecutions in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961). Numerous exceptions and qualifications apply to the basic rule of exclusion: see notable cases, *Segura* v. *United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984) [independent source doctrine]; *Nix* v. *Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984) [inevitable discovery doctrine]; *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963) [attenuation doctrine]; *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) [good faith exceptions]. For an excellent discussion of the law in this area, see M. Zalman, *Criminal Procedure: Constitution and Society*, 3rd ed. (New Jersey: Pearson Education Inc., 2002) 61-96.

It remains undecided whether Hong Kong courts have a broad jurisdiction to exclude evidence obtained in breach of human rights provisions in the Basic Law. Pre-1997 jurisprudence suggested that the power to exclude evidence consequent on a Bill of Rights violation was no greater than the residual power to exclude at common law.[117] While awaiting appellate clarification on this issue, it is open to the legislature to enact a judicial power to exclude evidence obtained illegally under the purported use of the proposed new search power. As submitted in the following paragraph, this is an important safeguard which the legislature should add given the impotence of the common law rule to protect the public fully from executive abuses of authority.

It is not proposed that the exclusionary power apply on every occasion of non-compliance with the legislation.[118] The court must be allowed to balance the individual's fundamental interests in privacy against the state's interest in law enforcement of serious crimes. In setting the terms of the new exclusionary power, it is instructive to have regard to the established jurisprudence in Hong Kong on abuse of process.[119] One branch of this jurisprudence allows a court to stay a proceeding if the abuse of power so offends the court's sense of justice and propriety that the entire prosecution is tainted.[120] As the remedy of exclusion of evidence is usually far less drastic than a stay of proceedings, the requisite degree of impropriety will not need to rise to the same level. Perhaps the most effective and balanced manner of formulating the test is to ask whether the admission of the evidence, having regard to all the circumstances, would bring the

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[116] Section 24(2) of the Canadian Charter provides that where "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." The two leading Supreme Court of Canada decisions on this power are *Regina* v. *Collins*, n ** above and *Regina* v. *Stillman* (1997) 113 C.C.C. (3d) 321 (SCC). The jurisprudence in this area is discussed in D. Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Scarborough: Carswell, 2001) 466-521.

[117] *Regina* v. *Cheung Ka Fai* (1995) 5 H.K.P.L.R. 407 (CA); *R.* v. *Yu Yem Kin*, *ibid.* The former case was criticized on this point in S. Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?" (1999) 29 H.K.L.J. 216.

[118] Some would say this is the American approach, but in reality when all the exceptions and qualifications are added together, the position is much more sophisticated. See discussion at n ** above.

[119] See *HKSAR* v. *Lee Ming Tee* (2001) 4 H.K.C.F.A.R. 133 at 148-151 (CFA).

[120] *Ibid.* at 150.

administration of justice into disrepute.[121] Such an approach would allow the court to consider a multitude of factors including the seriousness of the police misconduct, the nature of the evidence, the importance of the evidence to the prosecution, and so on. The inclusion of this judicial exclusionary power will act as an ultimate safeguard to ensure that the police conduct themselves with the highest standards of diligence and integrity when relying on the proposed new power.

VI. Principle 3: Constitutionally protected domains must be given greater protection.

A. Definition and justification of the principle

The third principle of legitimacy asserts the idea that there are some places which deserve, as a matter of constitutional imperative, a greater degree of protection from state intrusion than others. The suggestion of such a general principle was expressed by the Supreme Court of Canada in discussing the role of the judge in issuing a search warrant:

> Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled. It goes without saying that the justice may sometimes be in a poor position to assess the need for the search in advance. After all, searches, while constituting a means of gathering evidence, are also an investigative tool. It will often be difficult to determine definitively the probative value of a particular thing before the police investigation has been completed. Be that as it may, there are places for which authorization to search should generally be granted only with reticence and, where necessary, with more conditions attached than for other places. One does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office. One does not search the premises of a third party who is not alleged to have participated in the commission of a crime in the same way as those of someone who is the subject of such an allegation…[122]

[121] This would be similar to the approach applied under the Canadian Charter, s. 24(2). See n ** above.
[122] *Descoteaux* v. *Mierzwinski* (1982) 70 C.C.C. (2d) 385 at 410-1 (SCC).

The basis for this added protection lies in the predominant use of the premises for the purposes of exercising of a constitutional right or freedom in addition to the right to privacy (i.e. a protected purpose). In the absence of a better term, premises having such a character will be referred to as 'constitutionally protected domains'.[123] When constitutionally protected domains are invaded by the state, in addition to infringing the inhabitants' privacy interests, there is the added interference with the right or freedom being exercised within the domain. Examples of some constitutionally protected domains include law offices, offices of a magazine or newspaper, and places of worship, as these are places in which the right to confidential legal advice, freedom of speech, and freedom of religion, respectively, is exercised.

Unlike the other two principles, the third principle has yet to achieve general recognition internationally as a jurisprudential principle applied in constitutional litigation. One reason for this may be that where the search impinges on another constitutional right, such as the right to legal advice, the court treats this as a distinct complaint analyzed separately from the right to privacy. Another reason is the need for courts to avoid the appearance of applying different standards of review depending on the type of place being searched, as this might lead the public to believe mistakenly that lawyers, journalists, and priests receive preferential treatment under the law.[124]

While not as yet a general jurisprudential principle, it should still be treated as a principle of legitimacy given its inherent respect for constitutional human rights. Indeed, this principle is already reflected in a number of legislative provisions and judicial authorities in Hong Kong. For example, the general search power (both warrant and warrantless) under s. 17 of the Prevention of Bribery Ordinance (Cap. 201) expressly excludes law offices from its application unless it is the lawyer or law office staff who is the subject of the investigation.[125] As well, it has been recognized in Hong Kong that legal professional privilege (LPP) is not only

[123] Of course, this is not to suggest that residential premises are not constitutionally protected.
[124] For example, see the reasons of L'Heureux-Dubé in *Canadian Broadcasting Corp.* v. *Lessard* [1991] 3 S.C.R. 421.
[125] See s. 17(2) of the Prevention of Bribery Ordinance (Cap. 201).

a testimonial shield but is relevant to both the issuance and execution stages of a search warrant.[126] There is a very strong presumption of the application of this common law privilege, and courts have effectively required express abrogation before declining to apply it.[127] In addition, the legislature has seen fit in various enactments to exclude materials covered by LPP expressly from the application of exceptional police powers.[128]

Protections against police powers have also been put in place for the press and media. In 1995, the legislature enacted Part XII of the Interpretation and General Clauses Ordinance (Cap. 1), which provided an exclusive warrant-based regime for all searches involving 'journalistic material'.[129] The regime imposes additional hurdles and safeguards which do not apply to regular search warrants.[130] It is clear that Part XII applies to the proposed new power, meaning that the power cannot be used to seize journalistic material.[131]

B. Application of the principle to the proposed new power

In applying the third principle to the proposed new article 23 power, two conclusions can be derived. First, and most fundamentally, it could be said that constitutionally protected domains are valued too much in our civil society to be subjected to the new warrantless search power. Any form of entry into such domains for the purposes of investigating serious article 23 offences will necessarily interfere with the protected activity being conducted inside. As well,

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[126] See *Shun Tak Holdings Ltd.* v. *Commissioner of Police* [1995] 1 H.K.C.L.R. 48 at 56 (HC).
[127] *Ibid.* at 56-7. Compare with *Pang Yiu Hung* v. *Commissioner of Police* [2002] 4 H.K.C. 579 at ¶82-3 (CFI) where the court applied the strict test of 'expressly or by necessary implication'.
[128] See Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), ss. 2(14), 20-22; Organized and Serious Crimes Ordinance (Cap. 455), ss. 2-5; United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), s. 2(5); Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), ss. 2(10), 13, 15; Telecommunications Ordinance (Cap. 106), s. 13M(7).
[129] Section 82 of Cap. 1 defines 'journalistic material' as any material acquired or created for the purposes of journalism. To qualify as 'journalistic material', it must also be in the possession of a person who acquired or created it for the purposes of journalism, or received it from a person who intended the recipient to use it for the purposes of journalism.
[130] For interpretation of the regime, see *Re Commissioner of the Independent Commission Against Corruption, Ex Parte Apple Daily Ltd.* [1999] H.K.E.C. 826 (CFI), aff'd [2000] 1 H.K.L.R.D. 647 (CA), leave refused [2000] 1 H.K.L.R.D. 682 (CFA AC).
[131] See s. 18A(5) of the Crimes Ordinance (Cap. 200).

if the domain is being used legitimately for its protected purpose, then it will be rare for the circumstances of emergency envisaged by the proposed new power to materialize in such places. In other words, the protected interests in such domains far outweigh the necessity for the power and any investigatory advantage that might be realized.

It is not suggested, however, that protected domains be entirely immune from police investigation; the position put forward here is that all entry in such domains must be based on a warrant issued by an impartial and independent judicial officer. This appears to be the attitude taken towards 'journalistic materials'. However, the regime in Part XII is still imperfect when applied to the proposed new power as it allows officers to enter without warrant for the purpose of searching for non-journalistic materials.[132] The reality of such an entry is that it will still be disruptive to the operations of the media organization as the executing officers will need to comb through the organization's documents and materials in deciding what is and is not journalistic material.

The same criticism can be made of the presumption of LPP, which does not appear to be rebutted by the new search power. When the presumption is applied to the proposed new power, it is left to the police to govern themselves to respect LPP as the search is executed. However, in practice, police officers will not assess at the scene whether an item is covered by LPP; instead, they will err on the side of over-seizure (in sealed packets), leaving to a court in judicial review to determine what is or is not privileged. Where in fact privileged items have been seized, the only material consequence is for the item to be returned to the person from whom it was seized without the police ever having seen the item. The reality of this process shows that the presumption of LPP does little to restrain the police in both the exercise and execution of the proposed new power. On the other hand, where a warrant-based system is in place, an independent and impartial judicial officer is required to scrutinize the likely impact on LPP and to refrain from issuing the warrant or impose conditions to prevent an infringement of the privilege

[132] The problem is exacerbated by the ambiguous definition of 'journalistic materials'. See the earlier discussion accompanying n ** above.

before any entry occurs. If the search is simply a front to seize privileged communications untainted by a criminal or fraudulent purpose then it is the duty of the judicial officer to refuse the warrant. Effective protection of constitutionally protected activity must take the form of an express exclusion for the place itself. Accordingly, it is recommended that an exclusion from the proposed new power should be included for law offices, media organizations and places of worship.

The second conclusion follows as an alternative to the first one, that if there is no blanket exclusion for constitutionally protected domains, the senior officer must be satisfied of additional preconditions before exercising the proposed new power. Two additional preconditions are recommended, each respectively relating to the necessity and proportionality limbs of the principle of justification in relation to constitutional breaches. As with residential premises, which have a heightened privacy interest, the police should only be allowed to enter a constitutionally protected domain without warrant as a 'last resort' course of action, and not simply because the opportunity presents itself. Such a condition requires the senior officer to consider, in addition to the other preconditions, whether all other reasonably viable avenues for obtaining the evidence have been exhausted. Only in this way, can the search be said to be truly necessary.

The second additional precondition requires the senior officer to assess the extent to which immediate execution of the search will impact on the privacy interests and protected activity, and the degree to which such impact can be minimized by imposing restrictive conditions on the manner of search. If after doing this calculation, the senior officer finds that there will still be a substantial impact on the constitutional rights of the persons inside the premises then the officer must find that the precondition has not been met. While what will constitute 'substantial impact' will vary depending on the circumstances of the search and the rights in question, some relevant general considerations include whether the search requires innocent members of the public to suspend the exercise of their constitutional rights pending the search, whether the search will create a 'chilling-effect' detrimental to the future conduct of the protected

activity, whether innocent persons inside the premises will have to be subjected to detention and search, and the duration of and number of persons affected by the search.

VII. Conclusion

If enacted in its present form and challenged in legal proceedings, it is conceivable that the judiciary will uphold the constitutionality of the proposed new power properly exercised. An ordinary person might then ask, 'why bother discussing the matter when the courts have found it, or are likely to find it, constitutional?' However, compliance with constitutional human rights norms only means that the power has met minimum standards of protection. In a civil society such as Hong Kong, the legitimacy of governmental action cannot rest on achieving minimum standards alone. This is because the people of such a society are entitled to expect the highest degree of protection of individual rights (beyond minimum standards) reasonably possible. However, in the beginning years of the bimillennium, this expectation has increasingly been under attack as the world has seen modern governments, even in the most liberal democratic countries, take increased security measures under the threat of organized crime, international terrorism and, most recently, the spread of the severe acute respiratory syndrome.[133]

Against this backdrop of increasing international threats, it is easy for people in Hong Kong to accept uncritically new police powers in the name of national security. Unfortunately, such complacent acceptance leads to a gradual erosion of fundamental rights and freedoms. In this chapter, it has been argued that the new entry, search and seizure power for article 23 offences lacks legitimacy as the government has failed to justify the removal of prior judicial authorization according to strict principles of necessity and proportionality. Legitimacy will only be obtained if the power itself is abrogated or alternatively, if further safeguards are added to protect fundamental privacy interests and

[133] See K. Roach paper.

constitutionally protected domains. In the course of this analysis, it has been noted that other existing police powers relevant to article 23 offences attract constitutional scrutiny, particularly, s. 13 of the Crimes Ordinance (Cap. 200) and ss. 11 and 26 of the Official Secrets Ordinance (Cap. 521), as none of these powers require any reasonable grounds to believe or suspect that evidence will be found in the places to be searched. Any future reform of the new warrantless entry power will require these existing powers to be brought in line with constitutional standards as well. Nothing less should be tolerated in Hong Kong's civil society.

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