

National Security Law in a Common Law Framework

**- a speech by the Solicitor General, Mr Bob Allcock,
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Dr Leung, distinguished speakers, ladies and gentlemen,

Common law background

National security laws in common law jurisdictions are, in many respects, broadly similar. This is because relevant common law and statutory provisions that were created in England and Wales spread throughout the former British Empire. Once exported, the British laws of treason, sedition and official secrets were retained by most common law jurisdictions after they gained their independence.

2. In addition to retaining those three core laws on national security, some common law jurisdictions introduced other laws to deal with particular local problems. Some of these laws, such as the Malayan Internal Security Act were introduced during the colonial era and were retained after independence.

3. Not all of the national security laws that were so exported or developed may still be regarded as appropriate, or consistent with fundamental human rights. Indeed, local additions in some jurisdictions are regarded as the source of abuses of human rights. In other jurisdictions, such as the USA and Canada, constitutional guarantees of human rights will override inconsistent national security laws. Relatively few common law jurisdictions have completely updated relevant laws. Law reform reports were produced in England and Canada but were never implemented.

Hong Kong before Reunification

4. The position in Hong Kong before Reunification may be summarised as follows :-

- (1) we had offences in the three core areas of treason, sedition and official secrets, plus the common law offences of misprision of treason and compounding treason;

- (2) there was one additional local law to deal with potential problems, namely the Emergency Regulations Ordinance (Cap 241), but all the Regulations made under it had been repealed;
- (3) all relevant laws and Regulations were only enforceable to the extent that they complied with the Hong Kong Bill of Rights Ordinance and the ICCPR, which was entrenched in the Letters Patent.

Hong Kong after Reunification

5. Since Reunification the position so far has been broadly the same. The statutory offences remain in force, but must be read as if adapted in accordance with the Hong Kong Reunification Ordinance. As a result they already protect Chinese national security, rather than British national security.

6. Those laws must also be read subject to the constitutional guarantees of human rights contained in the Basic Law, particularly Articles 27 and 39.

7. But one constitutional obligation remains largely unfulfilled – the obligation to implement Article 23. Legislation relating to political ties between foreign and local political organizations was enacted in 1997. But other parts of Article 23 have not been implemented. The SAR government has therefore published its proposals for implementing Article 23.

8. In formulating those proposals, the Government is committed to preserving our common law system. As paragraph 5 of the Consultation Document states : “The Basic Law provides for the continuity of the common law system of the HKSAR, and it follows that the implementation of Article 23 should be effected through making use of existing legislation as far as possible.”

9. The Government has no intention of introducing Mainland laws or Mainland concepts in respect of national security. Instead it will rely on laws and concepts that are familiar to common lawyers around the world. At the same time, it will modernise the law where appropriate and ensure that it does not conflict with fundamental human rights.

10. Let me run through the proposals to demonstrate these fundamental points.

Treason

11. Our current law of treason is similar to that in the UK and many other common law jurisdictions. Ignoring the adaptation that needs to be made since Reunification, the main heads of treason are –

- (a) killing or causing bodily harm to Her Majesty;
- (b) forming an intention to do that;
- (c) levying war against Her Majesty –
 - (i) with the intent to depose Her Majesty from the Crown of the United Kingdom or of any other of Her Majesty's dominions; or
 - (ii) in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory;
- (d) instigating any foreigner with force to invade the United Kingdom or any British territory; or
- (e) assisting by any means whatever any public enemy at war with Her Majesty.

12. It is also an offence merely to form an intention to do certain of these acts, and to manifest such an intention by an overt act.

13. The equivalent of treason in the Mainland is found in Article 102 of the Criminal Law. The offence consists of colluding with a foreign state “to endanger the sovereignty, territorial integrity and security of the People's Republic of China”.

14. The Administration's proposal for treason does not refer to such concepts, but to specific actions that are familiar to the common law. It takes the current law of treason as a starting point, but then restricts it to threats that come from outside the PRC. The proposed offence of treason would involve -

- (a) levying war by joining forces with a foreigner to –
 - (i) overthrow the PRCG; or

- (ii) compel the PRCG to change its policies or measures by force or constraint; or
 - (iii) put any force or constraint upon the PRCG; or
 - (iv) intimidate or overawe the PRCG; or
- (b) instigating a foreigner to invade the PRC; or
- (c) assisting by any means a public enemy at war with the PRC.

15. The concepts referred to are all found in existing laws of treason in the common law world e.g. “levying war”, “compelling a change in policy or measures by force or constraint”, putting “force or constraint upon”, “intimidating or overawing”, and “a public enemy at war”.

16. I am, of course, aware that some of these concepts have been criticised during the consultation exercise as being vague or antiquated. Those comments will be given careful thought. We are faced with something of a dilemma. Do we retain expressions that are familiar to the common law world, and that may be the subject of developing case law elsewhere, or do we branch out with new expressions and cut off our links with those jurisdictions?

17. This dilemma is not limited to terminology. It also involves policy choices. For example, the Law Society has suggested that the concept of “levying war” should be replaced by “war” in its general sense. If this were done, it would no longer be an offence of treason to join with foreign forces who were **not** at war with China, by organizing an insurrection aimed at overthrowing the government. But why should such activities **not** amount to treason? The Law Society does not explain, and merely states that “levying war” is “too wide”. That concept is still used to protect national security in the USA, Australia, Canada, New Zealand and the UK. Why is it too wide to protect Chinese national security?

Misprision of treason

18. The common law offence of misprision of treason is committed if a person, knowing that another person has committed treason, fails to report this to the proper authority within a reasonable time. Similar offences exist (for example) in the UK, USA and Singapore, and in Canada and New Zealand it is an offence to fail to report the fact that a person is about to commit treason.

19. Some commentators have suggested that the offence is archaic and have referred to reform proposals in England and Canada. However, a close look at those proposals reveals that, in both jurisdictions, it was recommended that failure to report treason should be an offence in certain situations.

20. The English Law Commission stated as follows –

“The common law offence of misprision of treason should be abolished, but the offence should be re-enacted at least in relation to treason in wartime; we seek views on the need for an equivalent offence in relation to conduct aimed at the overthrow of constitutional government by force.”

21. The Canadian Law Reform Commission recommended that it should be an offence to fail to report knowledge that an offence of engaging in war or assisting the enemy is about to be or has been committed.

22. The proposed new offence of treason in Hong Kong would be narrower than the existing offence, in that it would apply only to threats that come from outside the country. Looked at in that light, the government’s proposal to retain the offence of misprision of treason is well in line with other common law jurisdictions.

Secession

23. Turning to secession, common law jurisdictions do not generally have a separate offence known as “secession”. However, that does not mean they do not prohibit certain types of secessionist acts. On the contrary, the offences of treason and treasonable offences are often broad enough to cover such acts.

24. As I have said, the offence of treason and treasonable offences in Hong Kong and the UK includes acts of levying war with intent to depose Her Majesty from the Crown of the UK or of any of her dominions, and any overt acts manifesting an intention to depose her.

25. The relevant offence in the Mainland is found in Article 103 of the Criminal Law and refers to “splitting the State or undermining unity of the country”. There is no intention to introduce an offence along these lines in Hong Kong. Instead, the government proposes to prohibit only those secessionist acts that are committed by levying war, or by the use or threat of

force, or by other “serious unlawful means”. The proposed meaning of the latter expression is similar to the meaning of “terrorist act” in the United Nations (Anti-Terrorism Measures) Ordinance.

26. Such acts would almost certainly be covered by the current offence of treason or treasonable offences. As I have said, “levying war” is found in the current offence of treason. In the context of an internal secessionist uprising, I would query whether it would be appropriate to limit the prohibited acts to “war” in the general sense of a war between countries, or even to civil war. There are surely acts that may not amount to the waging of a civil war that should be prohibited if done as part of an act of secession.

27. The government accepts that it should not prohibit **any** act done with the aim of promoting secession. The current treasonable offence which prohibits any overt act manifesting an intention to depose the sovereign is certainly too wide. In the UK, that offence has recently given rise to concern that peaceful acts promoting the creation of a republic might contravene that offence.

28. By limiting the offence in the way I have outlined, the government feels it would be staying within the common law framework, but would avoid being too restrictive.

Subversion

29. The next offence is subversion. It is often said that “subversion” is a concept that is unknown to the common law. That is not correct. The concept was previously found in the Australian Security Intelligence Organization Act, although it has now been replaced by another expression; and the Canadian Access to Information Act has a list of activities that are described as “subversive or hostile activities”. The UK Security Service Act does not expressly use the term “subversion”, but refers to “actions which are intended to overthrow or undermine parliamentary democracy by political, industrial or violent means”.

30. Common law jurisdictions generally prohibit the violent overthrowing of the government or the constitution. This is often achieved by the law of treason. In Australia, the relevant offence is known as treachery and prohibits overthrowing the constitution by revolution or sabotage, or overthrowing by force or violence the established government. In the USA,

the offence of seditious conspiracy is committed if two or more persons conspire to overthrow by force the US Government, or to levy war against it, or to oppose the Government by force.

31. In the Mainland, the relevant offence is found in Article 105 of the Criminal Law, which refers to “subverting the State power or overthrowing the socialist system”. The SAR government does not propose to create an offence along these lines.

32. Instead, it proposes an offence of subversion that is within the common law tradition. The prohibited conduct would again be limited to levying war, the use or threat of force, or other serious unlawful means. And the substantive offence would only be committed if a person managed –

- (a) to intimidate the PRCG; or
- (b) to overthrow the PRCG or disestablish the basic system of the state as established by the Constitution,

by means of such conduct.

Sedition

33. With regard to sedition, most common law jurisdictions have this offence. Some publicity has been given to the fact that both the English and Canadian Law reform agencies recommended the abolition of their current sedition laws. However, I wish to emphasize two points –

- (1) those recommendations have not been implemented;
- (2) the SAR government is also recommending the abolition of the current offence of sedition.

34. The current sedition laws in all three jurisdictions are too broad. At present, words can be seditious if they merely bring the Government into hatred or contempt, or if they merely raise discontent amongst local inhabitants. According to a local case, there is no need to show an intention to cause violence or public disorder.

35. The Government proposes to replace that very broad offence by an offence of sedition that can be committed in only two ways –

- (1) by inciting others to commit treason, secession or subversion; or
- (2) by inciting others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

36. Such an approach would limit the offence to conduct that incites serious crimes, violence or public disorder, and would be in line with the English and Canadian recommendations.

37. It may be contrasted with the offence in Article 105 of the Chinese Criminal Law of inciting others “by spreading rumours or slanders or any other means” to subvert the state power or overthrow the socialist system. There is no intention to introduce any such law in Hong Kong.

38. There is a proposal to introduce a new offence relating to seditious publications, and this has caused some concern. I would like to make two comments on this. First, there are already offences relating to the possession of, and dealing with, seditious publications in the laws of Hong Kong and other common law jurisdictions. The government’s proposal would involve a **narrowing** of the definition of “seditious publications” and thus a liberalisation of the law. Secondly, the concerns that have been expressed, particularly about the offence of possessing seditious publications are noted by the government. The proposal will therefore be reviewed in the light of the concerns expressed.

Theft of State Secrets

39. With regard to the theft of state secrets, most common law jurisdictions have offences relating to the unlawful disclosure of certain types of official information. In some countries, such as Australia and Singapore, the offence is broad – in that it covers all types of confidential information, and prohibits all unauthorized disclosures, even if they are not damaging.

40. Hong Kong’s current law is less restrictive, and follows the UK’s Official Secrets Act 1989. As a result, only specific categories of information are protected from disclosure and, as a general rule, only damaging disclosures are prohibited.

41. The government proposes to retain the current Official Secrets Ordinance. That means that Hong Kong law, and Hong Kong courts, will determine whether official information is protected from unauthorized

disclosure. The manner in which a document is classified in the Mainland, and Mainland law, will be entirely irrelevant to that process.

42. The changes that are proposed to our current legislation are as follows –

- (1) to prohibit the damaging disclosure of protected information that has been obtained by unauthorized **access** (as opposed to by an authorized **disclosure**); and
- (2) to adapt the current definition of “international relations” to reflect the fact that it now applies to relations between Hong Kong and the Central Authorities, and to provide for the protection of information concerning those relations under a new sub-head.

43. Neither of these changes will extend the categories of information that are protected under the current law. Nor will they create offences that do not exist in other common law jurisdictions.

Proscription of organizations

44. The manner in which organizations that threaten national security are dealt with in the common law world varies from country to country.

45. In Australia and Singapore they are dealt with under laws relating to unlawful associations. Under the Australian Crimes Act an unlawful association includes any body of persons that advocates or encourages

- (i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;
- (ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government;
- (iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States; or
- (iv) any act done with the object of carrying out a seditious intention.

46. In Singapore, a society must be refused registration if its

registration would be contrary to the national interest. And a person commits an offence if he or she manages or becomes a member of an unregistered society.

47. In the USA, an organization is required to register with the Attorney General if (among other things) its purpose or aim is the establishment, control, conduct, seizure or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats. Failure to register is an offence.

48. The SAR Government's proposal in this area is somewhat similar to the approach in Singapore. But there are two important differences. Firstly the power to proscribe an organization in the interests of national security, public safety or public order could only be exercised in a manner that is consistent with human rights guarantees. In particular, the proportionality test would need to be satisfied and the Secretary for Security could not "use a sledgehammer to crack a nut". And judicial oversight would exist in the form of judicial review and an appeal avenue.

49. The second difference is that Hong Kong needs to take into account its unique responsibility to give protection under its own system to the nation of which it forms only a small part. That explains the proposal to regard a banning of an organization in the Mainland on the grounds of national security as a pre-condition to the **possible** banning of a subordinate organization in Hong Kong. However, as Mr David Pannick QC has pointed out –

"If the Secretary for Security were to proscribe an organization simply because it had been proscribed in the Mainland, or failed to ask whether action was necessary, that would plainly be unlawful ..."

Conclusion

50. This brief overview of the proposals will, I hope, demonstrate that they are fully in line with other, liberal, common law jurisdictions. Some critics have acknowledged this, but have said that this is not enough. They want Hong Kong to comply fully with the Johannesburg Principles, even though no common law jurisdiction does so. They want public interest and prior disclosure defences in relation to the unauthorized disclosure of protected information, even though few common law jurisdictions have them.

51. The Government's view is that we should strike the right balance between protecting national security and safeguarding individual rights and freedoms. The proposals put forward were a genuine attempt to achieve this. I believe that reliance on common law precedents and principles instead of those of the Mainland is an excellent example of how "one country, two systems" can work, even in the context of national security.

52. As the consultation period comes to an end, the government will need to review its proposals in the light of comments received. However, I am not aware of any call to move away from the common law approach that has been recommended.