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Editor's Note

In the "*Focus*" section of this issue, we examine the Safeguarding National Security Ordinance ("SNSO") which is essential to the successful implementation of the "one country, two systems" policy. The enactment of the SNSO not only fulfils our constitutional obligation under BL 23 but is also in line with international practice. We highlight that the SNSO expressly stipulates the protection of human rights in accordance with the law and the adherence to the principle of the rule of law in safeguarding national security. We then illustrate that the main offences under the SNSO are reasonably certain and clear with suitable exceptions and defences, and that the extra-territorial effect of the offences under the SNSO is proportionate, reasonable and tailored to address the specific national security threats concerned. We further explain the important gate-keeping role played by our courts under the SNSO.

In our usual column "*Judgment Update*", there are summaries of two judgments of the CFA and one judgment of the CA concerning the following matters:

- What constituted "earnings of prostitution of another" and the scope of the offence of living on the earnings of prostitution of another, as well as the constitutionality of s. 137(1) of the Crimes Ordinance (Cap. 200).
- In a prosecution for an offence of incitement to knowingly take part in an unauthorized assembly contrary to common law and s. 17A(3)(a) of the Public Order Ordinance (Cap. 245), whether it was open to a defendant to raise by way of defence the legality of the police's prohibition of the subject public meeting even though the police's decision had been subsequently upheld by the Appeal Board.
- Upon proper interpretation of Regulation 21(1)(b) of the Legal Aid Regulations (Cap. 91A), to what extent, if any, is the legal professional privilege at common law, also a right guaranteed constitutionally under BL 35, abrogated or limited.

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ABBREVIATIONS

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CJ	Chief Justice
Constitution	Constitution of the People's Republic of China
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China

Safeguarding National Security Ordinance – a Milestone in the Implementation of BL 23

A. Background

Enactment of the Safeguarding National Security Ordinance ("SNSO")

1. On 19 March 2024, the LegCo unanimously passed the SNSO. The Ordinance was gazetted on 23 March 2024 and takes effect from that day. As highlighted by the CE, the passage of the Bill was a "historic moment" for Hong Kong. The constitutional responsibility and historic mission of legislating for BL 23 have been fulfilled. "It is a proud moment for all of the HKSAR in collectively making glorious history."[1]

BL 23 and the constitutional obligation

2. It is beyond question that the HKSAR bears an obligation under BL 23 to enact legislation to prohibit acts or activities endangering national security. BL 23 sets out this obligation in plain language. The article reads as follows:

> "The Hong Kong Special Administrative Region **shall enact laws** on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." (Added Emphasis)

3. Even during the formulation stage of the first draft of BL 23, the drafters of the Basic Law pointed out that the HKSAR, "being part of the PRC, has the obligation to safeguard the unity and security of the country."[2] Commenting on BL 23, Wang Shuwen, a member of the Basic Law Drafting Committee, reiterated that the HKSAR is part of the PRC and it is because of the policy of "one country, two systems", the HKSAR is authorized by BL 23 to enact laws on its own to prohibit those acts referred to in the article.[3]

4. The HKSAR, however, has not been able to fulfill the constitutional obligation under BL 23 for a prolonged period leading to plain deficiencies in the work on safeguarding national security, and ultimately resulting in the Hong Kong version of "colour revolution" in 2019 which posed serious threats to the sovereignty, national security and development interests of our country. To plug the loopholes, and to uphold and improve the "one country, two systems" institution, the NPC adopted the Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security on 28 May 2020 ("the 5.28 Decision"). The 5.28 Decision clearly states that it is "the constitutional obligation of the HKSAR to safeguard national sovereignty, unity and territorial integrity". It requires the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law, and to effectively prevent, suppress and impose punishment for any act or activity endangering national security.[4] The 5.28 Decision further

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1 Address by CE to LegCo on passage of Safeguarding National Security Bill on 19 March 2024 (https://www.info.gov.hk/gia/general/202403/19/P2024031900717.htm).

2 Progress Report of the Subgroup on the Relationship between the Central Authorities and the HKSAR, 13 April 1987, published in *Collection of Documents of the Fourth Plenary Session of the Drafting Committee*.

3 Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn., Law Press China and Joint Publishing (H.K.) Co., Ltd., 2009), p. 245; see also Xiao Weiyun, *One Country, Two Systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press, 2001), p. 159.

4 Paragraph 3 of the 5.28 Decision.

stipulates that the HKSAR shall establish and improve the institutions and enforcement mechanisms for safeguarding national security, strengthening the enforcement force for safeguarding national security and step up enforcement to safeguard national security.[5]

5. In a similar vein, Article 3 of the Law of the PRC on Safeguarding National Security in the HKSAR ("HKNSL"), adopted by the NPCSC on 30 June 2020 pursuant to the 5.28 Decision, states that it is the duty of the HKSAR under the Constitution to safeguard national security and the HKSAR shall perform the duty accordingly. Article 7 of the HKNSL requires the HKSAR to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and to refine the relevant laws on safeguarding national security.

6. While BL 23 apparently requires the HKSAR to enact laws on its own to prohibit seven types of acts and activities endangering national security[6] ("BL 23 offences"), the fundamental purpose of BL 23 is to require the HKSAR to enact laws to safeguard national sovereignty, security and development interests. Reading BL 23 together with the 5.28 Decision and the HKNSL, it is crystal clear that the HKSAR bears a constitutional duty to enhance the legal system for safeguarding national security continuously as an on-going effort to effectively prevent, suppress and punish acts or activities endangering national security in a fast-changing world where new types of national security risks may emerge from both traditional and non-traditional security fields.[7] Accordingly, the SNSO does not only make provisions for those BL 23 offences not covered by the HKNSL,[8] it also encompasses enforcement powers, procedural matters and the mechanisms for safeguarding national security so as to ensure that the HKSAR can effectively handle any national security risks and threats which may arise any time.

Full support of the community

7. The enactment of SNSO has the full support of the community. The HKSARG conducted a public consultation exercise on the BL 23 legislation from 30 January to 28 February 2024. The vast majority, *i.e.* 98.6%, of the submissions received showed positive support for the BL 23 legislation. Apparently, the community is fully aware of the need for a bespoke local legislation to prohibit acts or activities endangering national security and is prepared to shoulder the responsibility to protect national sovereignty, unity and security.

B. International practice

8. National security is of paramount importance to the stability, prosperity and long term survival of every country and society, without which the livelihood and safety of ordinary people cannot be guaranteed.[9] Hence it is not surprising that a state would enact national security law to protect its security, territorial integrity and political independence.[10]

9. While some may be skeptical about the HKSAR's enactment of the SNSO, the practical reality is that many states have enacted some form of national security laws and some may have more than one piece of national security law. Common law jurisdictions such as the United States ("US"), the United Kingdom ("UK"), Canada, Australia, New

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[5] Paragraph 4 of the 5.28 Decision.

[6] Those offences include any act of treason, secession, sedition, subversion against the CPG, or theft of state secrets, prohibition of foreign political organizations or bodies from conducting political activities in the Region, and prohibition of political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

[7] The holistic view of national security expounded by President Xi Jinping in 2014 encompasses 20 major traditional and non-traditional security fields. Please see the discussion in Part C below.

[8] Only secession and subversion against the CPG are directly covered by the HKNSL.

[9] Mr Robert Lee, SC commented in the National Security Law Legal Forum held in 2022 that "[n]ational security is the foundation of social order within which the true freedoms and rights of the people can be realized, the rule of law can operate, and upon which prosperity and progress can be pursued." *Proceedings of the National Security Law Legal Forum – Thrive with Security*, p. 249, published by the Department of Justice , available at: https://www.doj.gov.hk/tc/publications/pdf/NSL_Thrive_with_Security_2022_e_c.pdf.

[10] Article 2(4) of the United Nations Charter highlights the importance of territorial integrity and political independence to every state.

Zealand and Singapore have all enacted laws to safeguard national security. In terms of the number of national security-related legislation, the US, for instance, has at least 21 pieces;[11] the UK has at least 14 pieces;[12] Australia has at least 4 pieces;[13] Canada has at least 9 pieces;[14] New Zealand has at least 2 pieces;[15] and Singapore has at least 6 pieces.[16]

10. The need to protect national security is not unique to common law jurisdictions but is a common concern of different states irrespective of their legal tradition. For instance, the Federal Republic of Germany, a civil law jurisdiction, has made use of its Criminal Code to prohibit treason, high treason, acts endangering national security,[17] terrorist training,[18] terrorism financing[19] as well as espionage.[20] In

[11] See *e.g.* Logan Act, Foreign Agents Registration Act of 1938, National Security Act of 1947, Central Intelligence Agency Act of 1949, National Security Agency Act of 1959, Foreign Intelligence Surveillance Act of 1978, Foreign Mission Act, USA Patriot Act of 2001, Homeland Security Act of 2002, Intelligence Reform and Terrorism Prevention Act of 2004, Cybersecurity Information Sharing Act of 2015, Title 8, Title 18 and Title 50 of the United States Code.

[12] See *e.g.* Treason Act 1351, Treason Felony Act 1848, Official Secrets Act 1911 (repealed in 2023), Official Secrets Act 1920 (repealed in 2023), Incitement to Disaffection Act 1934, Official Secrets Act 1939, Official Secrets Act 1989, Security Service Act 1989, Computer Misuse Act 1990, Political Parties, Elections and Referendums Act 2000, Terrorism Act 2000, Anti-terrorism, Crime and Security Act 2001, Terrorism Act 2006, Terrorism Prevention and Investigation Measures Act 2011, Terrorist Offenders (Restriction of Early Release) Act 2020, National Security and Investment Act 2021, National Security Act 2023.

[13] See *e.g.* Crimes Act 1914, Criminal Code Act 1995, Foreign Influence Transparency Scheme Act 2018 and National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.

[14] See *e.g.* Criminal Code, Security of Information Act, Canada Evidence Act, National Defence Act, Canadian Security Intelligence Service Act, Access to Information Act, Canada Elections Act, Secure Air Travel Act, National Security Act 2017.

[15] See *e.g.* Crimes Act 1961, Intelligence and Security Act 2017.

[16] See *e.g.* Penal Code 1871, Official Secrets Act 1935, Internal Security Act 1960, Societies Act 1966, Computer Misuse Act 1993, Foreign Interference (Countermeasures) Act 2021.

[17] See sections 94 to 100a of the Criminal Code of the Federal Republic of Germany. An English translation is available in the following web page: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

[18] See section 89a of the Criminal Code of the Federal Republic of Germany.

[19] See section 89c of the Criminal Code of the Federal Republic of Germany.

[20] See section 96 of the Criminal Code of the Federal Republic of Germany.

addition, the German Identity Card Act and Passport Act prevent the travel of foreign terrorists and make it easier for other countries to identify them.[21]

11. The existence of national security laws in different states demonstrates that, regardless of the size, history, political orientation, legal system or socio-economic outlook of those states, it is a common aspiration of them all to protect national security. Further, safeguarding national security is an on-going concern and states need to review and update their national security laws timely to address new threats. Take the example of the UK, though the country has four Official Secrets Acts ("OSAs")[22] protecting the country from spying and information leakage, those OSAs were considered inadequate to deal with modern espionage which generally involves the use of technology and the internet from outside the UK to collect, communicate and store valuable information. The counter-espionage framework under the OSAs was overhauled by the National Security Act 2023 which introduced, *inter alia*, reforms to the UK's counter-espionage law. The 2023 Act introduced three new espionage offences, *i.e.* "protected information espionage",[23] "trade secrets espionage",[24] and a preparatory offence.[25] The new offences have a wider territorial ambit and apply to conduct that occurs within or outside the UK[26] regardless of the individual's nationality.[27] It was considered that these new offences, by capturing the "modern methods of spying", are necessary to "reflect the evolving threat and the interconnected nature of the modern world".[28]

12. There is ample evidence that different countries have enacted national security laws and many have built up their national security regimes over the years. Viewed in light of the experience of other states in safeguarding national security, the enactment of the SNSO is not only necessary to fulfil our constitutional obligation under BL 23, it is also in line with international practice.

C. Fundamental principles of the SNSO

13. On 15 April 2014, President Xi Jinping pioneered at the first general meeting of the National Security Commission the holistic approach to national security (總體國家安全觀), which encompasses not only the traditional but also the non-traditional security fields.[29] Article 2 of the National Security Law of the PRC defined "national security". The same concept of national security should apply throughout our country,[30] and the national security concept of our country should also apply to the HKSAR. Therefore, the HKSAR shall discharge its responsibility of safeguarding national security in accordance with the holistic approach to national security.

14. The SNSO is a comprehensive piece of local legislation for safeguarding national security in the HKSAR. It implements the requirements under BL 23, the 5.28 Decision and the HKNSL to improve the legal system and enforcement mechanisms for safeguarding national security in the HKSAR. The HKNSL, the SNSO and the other laws concerning

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[21] Gesley, Jenny. *Germany: New Anti-Terrorism Legislation Entered Into Force.* 2015. Web Page. https://www.loc.gov/item/global-legal-monitor/2015-07-10/germany-new-anti-terrorism-legislation-entered-into-force/.

[22] See note 12 above.

[23] Section 1 of the National Security Act 2023.

[24] Section 2 of the National Security Act 2023.

[25] Section 18 of the National Security Act 2023.

[26] Sections 1(3), 2(4) and 18(5) of the National Security Act 2023.

[27] Section 36(1)(a) of the National Security Act 2023.

[28] Explanatory Notes, National Security Bill 2022, paragraph 16(a). (Available at the following web page: https://publications.parliament.uk/pa/bills/cbill/58-03/0007/en/220007enlp.pdf).

[29] The twenty interconnected fields include political security, military security, homeland security, economic security, financial security, cultural security, societal security, science and technology security, cybersecurity, food security, ecological security, resource security, nuclear security, overseas interests security, outer space security, deep sea security, polar security, biosecurity, artificial intelligence security, and data security.

[30] Keynote speech at the Webinar in Commemoration of the 30th Anniversary of the Promulgation of the Basic Law: National Security Legislation: Current Status and Prospects (Mr Zhang Yong, Vice-Chairperson of the HKSAR Basic Law Committee under the NPCSC, 8 June 2020).

safeguarding national security in Hong Kong have together established an effective legal system for safeguarding national security in the HKSAR, which is essential to the steadfast and successful implementation of the policy of "one country, two systems", ensuring the effective protection of the national security of "one country" and the long-term prosperity and stability of the HKSAR under "two systems".

Legislative purposes of the SNSO

15. As stipulated in the Preamble, the legislative purposes of the SNSO are:

(1) to resolutely, fully and faithfully implement the policy of "one country, two systems" under which the people of Hong Kong administer Hong Kong with a high degree of autonomy;

(2) to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security; and

(3) to prevent, suppress and punish acts and activities endangering national security in accordance with the law, to protect the lawful rights and interests of the residents of the HKSAR and other people in the HKSAR, to ensure the property and investment in the HKSAR are protected by the law, to maintain prosperity and stability of the HKSAR.

Legislative Principles of the SNSO

16. Part 1, section 2 of the SNSO further stipulates the following three fundamental legislative principles:

(1) the highest principle of the policy of "one country, two systems" is to safeguard national sovereignty, security and development interests;

(2) human rights are to be respected and protected, and the rights and freedoms enjoyed under the Basic Law and the provisions of the ICCPR and ICESCR as applied to the HKSAR are to be protected in accordance with the law; and

(3) for acts and activities endangering national security, there must be adherence to active prevention in accordance with the principle of the rule of law, and suppression and punishment in accordance with the law.

Safeguard national sovereignty, security and development interests

17. It is noteworthy that the SNSO is the first piece of legislation enacted locally in the HKSAR which expressly manifests the highest principle of

the policy of "one country, two systems", namely, to safeguard national sovereignty, security and development interests.

18. The 1st legislative principle of the SNSO fully aligns with the Basic Law, the 5.28 Decision and the HKNSL. As enshrined in the Basic Law, the Preamble of which states clearly that the HKSAR was established for, amongst others, upholding national unity and territorial integrity. BL 1 and BL 12, which are the fundamental provisions in the Basic Law,[31] further state that the HKSAR is an inalienable part of the PRC and a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the CPG. The provisions of 5.28 Decision and the HKNSL also stipulate clearly that the principle of "one country, two systems" must be unswervingly, fully and faithfully implemented, and it is the constitutional obligation of the HKSAR to safeguard national sovereignty, unity and territorial integrity.

19. As highlighted in the report to the 20th National Congress of the Communist Party of China, the policy of "one country, two systems" is the best institutional arrangement for the long-term prosperity and stability of Hong Kong,[32] and we must adhere to it in the long run. Safeguarding sovereignty, security and development interests of our country is the core requirement for the comprehensive and accurate implementation of the policy of "one country, two systems". The more firmly the "one country" principle is upheld, the greater the strength of "two systems".

Protect human rights and adhere to the principle of rule of law

20. The 2nd and 3rd basic legislative principles of the SNSO are to respect and protect human rights, and to adhere to the principle of the rule of law.

21. In line with Article 4 of the HKNSL, section 2(b) of the SNSO expressly provides that the rights and freedoms, including the freedoms of speech, of the press and of publication, the freedoms of association, of assembly, of procession and of demonstration, enjoyed under the Basic Law, the provisions of the ICCPR and the ICESCR as applied to the HKSAR, are to be protected in accordance with the law.

22. Section 2(c) of the SNSO, which incorporates the requirements under Article 5 of the HKNSL, further mandates expressly that the principle of the rule of law shall be adhered to in preventing, suppressing and imposing punishment for acts and activities endangering national security, and accordingly (i) a person whose act constitutes an offence under the law is to be convicted and punished in accordance with the law; no one is to be convicted and punished for an act that does not constitute an offence under the law; (ii) a person is to be presumed innocent before the person is convicted by a judicial authority; (iii) the right to defend, and other rights in a legal action, enjoyed in accordance with the law by a criminal suspect, defendant and other participants in the action are to be protected; and (iv) a person who has already been finally convicted or acquitted of an offence in judicial proceedings is not to be tried or punished again for the same act.

Legislative principles fully taken into account in the SNSO

23. The various offences, enforcement powers, procedures and other provisions stipulated in the SNSO have fully taken into account the above legislative principles. The three legislative principles highlight the fundamental importance of safeguarding national security, while at the same time emphasize that human rights are to be respected and protected, and the principle of the rule of law must be adhered to, in safeguarding national security. The principles also reflect the basic fact that safeguarding national security is fundamentally consistent with the respect and protection of human rights, and is ultimately, for better protecting the lawful rights and interests of the residents of the

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[31] See Article 2 of the HKNSL.

[32] Chapter XIII, "Upholding and Improving the Policy of One Country, Two Systems and Promoting National Reunification" in *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive in Unity to Build a Modern Socialist Country in All Respects*, Report to the 20th National Congress of the Communist Party of China, 16 October 2022, available at: https://english.www.gov.cn/news/topnews/202210/25/content_WS6357df20c6d0a757729e1bfc.html.

HKSAR and other people in the HKSAR, ensuring the property and investment in the HKSAR are protected by the law, maintaining prosperity and stability of the HKSAR, and thereby achieving the overarching goal of ensuring the steadfast and successful implementation of "one country, two systems".

Provisions on interpretation

24. The SNSO is a piece of local legislation formulated in accordance with the law drafting style, techniques and practices prevailing in the HKSAR under the common law system. On the other hand, as mentioned, the national security concept of our country should apply to the HKSAR.

25. In this regard, section 4 of the SNSO adopts the same definition of "national security" under Article 2 of the National Security Law of the PRC[33] and provides for the meaning of "national security" as follows:

> "In this Ordinance or any other Ordinance, a reference to national security is a reference to the status in which the state's political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security."

26. The underlying rationale is clear. The same concept of national security should apply throughout the country. As an inalienable part of the PRC, the national security concept of our country should also apply to the HKSAR. It is the overarching responsibility of the HKSAR to safeguard national security according to the law to ensure a faithful implementation and effective deployment of the holistic approach to national security originated by President Xi. The definition of national security in the HKSAR's local legislation should be consistent with that in the laws of our country. Hence, section 4 of the SNSO further provides that the meaning of "national security" therein shall apply not only to the SNSO, but also any other Ordinances, to ensure that the term "national security" in other local laws

[33] Article 2 reads as follows:
"國家安全是指國家政權、主權、統一和領土完整、人民福祉、經濟社會可持續發展和國家其他重大利益相對處於沒有危險和不受內外威脅的狀態，以及保障持續安全狀態的能力。"

of Hong Kong should be given the same meaning which aligns fully with the definition under the laws of our country.

D. Main offences under the SNSO and the underlying principles

27. The main offences under the SNSO are set out in Parts 2 to 6. Many offences under the SNSO were pre-existing offences under Hong Kong law, such as the Crimes Ordinance (Cap. 200), the Official Secrets Ordinance (Cap. 521) and the Societies Ordinance (Cap. 151). These pre-existing offences were incorporated into the SNSO with suitable adaptation and improvement. There are also newly added offences in the SNSO that were formulated with reference to the relevant laws of other common law jurisdictions, whilst at the same time taking into full consideration the actual circumstances and practical needs of the HKSAR.

28. One of the principles of the rule of law is that the law needs to be reasonably certain and clear. In line with this principle, the SNSO clearly sets out the elements of the offences (including the *actus reus* and *mens rea* of the offences), together with appropriate exceptions and defences (including the burden of proof in relation to defences) to ensure that legitimate day-to-day activities do not constitute an offence.

29. As discussed, the SNSO has been formulated according to the established drafting approach under the HKSAR's common law system. These include ensuring (as far as reasonably practicable) that the legal provisions are detailed and clear, as well as providing definitions for terms and concepts that are relatively critical and important. Apart from Part 1 of the SNSO which contains definitions of general application such as "national security", "external force", each of Parts 2 to 6 contains further definitions that are relevant to those Parts.

30. As to the requirement of legal certainty, the courts have held that this requires a criminal offence to be sufficiently clear to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for that offence. At the same time, in some cases the law has to be flexible enough to embrace many different ways of committing that offence, which is necessary for the offence to be effective and responsive to meet the risks or threats to national security that the society is facing at the time. Moreover, the courts develop the law, clarifying and modifying it to meet new circumstances and conditions.[34]

31. The ensuing paragraphs will focus on some of the main offences under Parts 2 to 6 of the SNSO, and provide an overview of the relevant constitutional and human rights considerations behind these offences.

Part 2: Treason, *etc.*

32. Treason offences have a long history in the laws of many countries, and are provided for, with a maximum penalty of life imprisonment in general, in countries such as the UK, Australia and Canada. In the US, the maximum penalty for this offence is death penalty, and persons convicted of the offence of treason shall be incapable of holding any public office in the US for life.

33. Most of the offences in Part 2 of the SNSO are modelled on the corresponding offences in the pre-existing Parts I and II of the Crimes Ordinance. These include the offence of treason (section 10), the offence to publicly manifest intention to commit offence of treason (section 11) and the offence of unlawful drilling (section 13). These offences target acts that generally involve the use or threat of serious violence endangering national sovereignty, unity or territorial integrity, or involve related preparatory acts, which conducts clearly go beyond the legitimate exercise of fundamental rights and freedoms.

34. Suitable exceptions and defences have been provided for certain offences under this Part. For example, the offence of failing to comply with the "requirement on disclosure of commission by others of offence of treason" in section 12 of the SNSO, which provides for the offence of misprision of treason under common law as a statutory provision with appropriate improvement, expressly

[34] See the recent judgment of the CA in *HKSAR* v *Tam Tak Chi* [2024] 2 HKLRD 565.

provides that it does not affect any claims, rights or entitlements on the ground of legal professional privilege, so as to buttress the right to confidential legal advice guaranteed by BL 35.

Part 3: Insurrection, Incitement to Mutiny and Disaffection, and Acts with Seditious Intention, *etc.*

35. The offence of insurrection (section 15 of the SNSO) deals with serious civil disturbances or even armed conflicts within China, as well as violent acts in the HKSAR, that are more serious in terms of nature and degree than general acts of "riots". It generally targets violent acts that endanger the sovereignty, unity or territorial integrity of the PRC or the public safety of the HKSAR as a whole, which acts clearly go beyond the legitimate exercise of fundamental rights and freedoms.

36. The offence of incitement to mutiny (section 17 of the SNSO) is modelled on the corresponding offence in the pre-existing section 6 of the Crimes Ordinance. Given the special nature of members of the armed forces (in particular, they are responsible for defence work and have the easiest access to firearms and military intelligence), it is necessary to retain and improve this offence to address the tremendous national security risks arising from the abandonment of duties, abandonment of allegiance and carrying out mutinous acts by members of armed forces. The SNSO has improved on the pre-existing provision by clearly defining the meaning of "mutiny", with reference to the definition in section 83.1 of the Criminal Code of Australia. The offence only covers a person who knowingly incites a member of a Chinese armed force to mutiny. In other words, the person in question must be aware that the person being incited is a member of a Chinese armed force.

37. The offences related to "incitement to disaffection" are set out in Division 3 of Part 3 of the SNSO, and are modelled on the corresponding offences in the pre-existing section 7 of the Crimes Ordinance. They are necessary because if public officers or personnel of the offices of the Central Authorities in the HKSAR are incited to disaffection, this will likely seriously affect or interfere with the operation of the government and the performance of duties and functions of relevant authorities, and very likely endanger national security. The *actus reus* and *mens rea* are clear: for instance, a person commits an offence under section 19 (inciting disaffection of public officers) if the person knowingly incites a public officer to "abandon upholding the Basic Law" and "abandon the allegiance to the HKSAR", which expressions are to be construed with reference to section 3AA of the Interpretation and General Clauses Ordinance (Cap. 1). Moreover, the person in question must be aware of the identity of the target of incitement, *i.e.* knowing that the person being incited is a public officer. The offences will not affect legitimate expressions of views, including criticism of state institutions.

38. Offences in connection with "seditious intention" under Division 4 of Part 3 of the SNSO are modelled on those under the pre-existing sections 9 and 10 of the Crimes Ordinance. The courts have ruled in different cases that the pre-existing offences in connection with "seditious intention" are consistent with the relevant provisions of the Basic Law and the BoR on the protection of human rights.

The relevant provisions clearly set out what does and does not constitute a "seditious intention". Properly read together with the right to free expression, they make it plain that criticizing the Government, the administration of justice; or engaging in debates about or even raising objections to government policy or decision, however strongly, vigorously or critically, will not constitute a seditious intention.

Part 4: Offences in connection with State Secrets and Espionage

39. Division 1 of Part 4 of the SNSO was formulated with reference to pre-existing offences on the protection of official information under the Official Secrets Ordinance and, in particular, has introduced offences in connection with the unlawful acquisition, possession or disclosure of state secrets. These offences are qualified by stringent conditions and are committed only if all of the following three conditions are met, namely: the acquisition, possession or disclosure of information without lawful authority; the information in question constitutes a "state secret"; and the person has the requisite mental element. A member of the public who does not know he or she is handling state secrets and who does not have the requisite intention will not fall foul of the offences.

40. Section 29 of the SNSO clearly defines "state secret" as information which belongs to any of the seven specific categories of secrets, the disclosure of which, without lawful authority, would likely endanger national security. In the light of the common practice of various countries (including the UK, Canada and the US), sensitive information concerning important fields of national security may be regarded as "state secrets" as long as improper disclosure of such information is likely to prejudice national security or interests. As noted by the European Court of Human Rights, European States have adopted different rules on how secrecy is defined and conditions for prosecuting persons who disclose information unlawfully. The European Court has held that states enjoy a certain margin of appreciation in devising such rules.[35]

41. More importantly, the SNSO provides for suitable defences to the offences in connection with state secrets. In particular, unlike the state secrets laws in some jurisdictions such as the UK or US which do not recognize any defence based on public interest, the SNSO specifically provides for a defence for "specified disclosure" based on public interest (as defined in section 30). Because the protection of state secrets is a public interest of importance in its own right, the SNSO has set out very strict conditions for this defence; and the defence is applicable to the situation where a person knows that any information, document or other article is or contains a state secret, and the person, without lawful authority, acquires, possesses, or discloses the information, document or article. Permitting disclosure under the strict conditions strikes a balance between the important public interest in protecting state secrets and the freedom of expression.

42. Division 2 of Part 4 of the SNSO improves the pre-existing offences in connection with "espionage" under the Official Secrets Ordinance. In fact, given the current complex international landscape and modern-day acts of espionage, many countries (including Australia[36] and the UK[37]) have in recent years strengthened their laws on espionage activities.

43. The offence of "espionage" under section 43 of the SNSO targets acts relating to prohibited places, acts relating to information calculated or intended to be useful to an external force, and colluding with

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[35] See *Stoll v Switzerland* (2008) 47 EHRR 59.

[36] Australia passed the National Security Legislation Amendment (Espionage and Foreign Interference) Act in 2018. The Act significantly increases the penalties for engaging in espionage and divulging state secrets. Even higher penalties will be applicable if a person colludes with foreign forces to commit some of the relevant offences. The Act also introduces the offence of supporting foreign intelligence agency and the offence of funding or being funded by foreign intelligence agency.

[37] The National Security Act 2023 recently passed in the UK includes an array of new offences with very wide coverage, including reform of laws relating to "espionage" and an offence relating to obtaining or disclosing "protected information", introduction of a new offence aimed at the protection of trade secrets as well as new offences targeted at acts of assisting a foreign intelligence service. In addition, the Act applies the "foreign power condition" to all criminal offences, so that if the criminal act involves a foreign power, the court must treat that fact as an aggravating factor that warrants a more severe penalty in sentencing. See also the discussion in Part B above.

an external force to publish to the public a statement of fact that is false or misleading. The offence sets a high threshold of the requisite mental state and specifically targets persons who either intend to endanger national security or are reckless as to whether national security would be endangered. These conditions ensure that the offence would not affect legitimate activities, including normal exchanges with other countries, regions or relevant international organizations, which are protected by the Basic Law and the laws of Hong Kong.

Part 5: Sabotage Endangering National Security *etc.*

44. Acts of damaging or weakening public infrastructure will pose a high risk to national security. In recent years, some foreign countries have enacted specific offences to deal with this situation. Among them, Australia has introduced the offence of sabotage through the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018, which prohibits all forms of sabotage activities or acts of introducing vulnerability against public infrastructure, with intent to (or recklessness as to whether they will) prejudice national security. The UK has also introduced a similar type of offence in the National Security Act 2023, which prohibits any person from damaging any asset (whether located in the UK or not) for a purpose that they know or ought reasonably to know is prejudicial to the safety or interests of the UK with the involvement of a foreign power.

45. The offence of "sabotage endangering national security" under section 49 of the SNSO targets acts of damaging or weakening a public infrastructure, where the person in question either intends to endanger national security or is reckless as to whether national security would be endangered. There are clear definitions of the phrases "weakening" and "public infrastructure". Clearly, destruction of or damage to public property exceeds the proper exercise of fundamental rights, especially where the person has the relevant mental element to endanger national security.

46. On the other hand, given the common use and rapid development of computer or electronic system technologies, the potential national security risks posed should not be overlooked, especially the risks arising from computers or electronic systems being hacked into or interfered with. Foreign countries have enacted offences that deal with this situation. For example, the Computer Misuse Act 1990 of the UK prohibits any person from doing an unauthorized act in relation to a computer if the person intends to (or is reckless as to whether the act will) cause serious damage to national security, and the act will actually cause serious damage to national security (or create a significant risk of serious damage to national security).

47. The offence of "doing acts endangering national security in relation to computers or electronic systems" under section 50 of the SNSO is committed only where the person does the relevant

unauthorized acts with intent to endanger national security and where, objectively speaking, the act endangers (or is likely to endanger) national security. The offence would only catch malicious actors who are blameworthy, and will not affect those who engage in legitimate activities in relation to a computer or electronic system.

Part 6: External Interference Endangering National Security and Organizations Engaging in Activities Endangering National Security

External interference endangering national security

48. As mentioned above, normal exchanges with other countries, regions or relevant international organizations are protected by the Basic Law and the laws of Hong Kong. These normal exchanges are distinct from external interference by the use of improper means, which not only exceeds the acceptable limit in normal international practice (*e.g.* genuine criticisms against government policies, legitimate lobbying work, general policy research, normal exchanges with overseas organizations or day-to-day commercial activities), but also contravenes the principle of non-interference under international law, undermines national sovereignty and political independence, and poses risks to national security. In recent years, some countries, such as the UK, Australia, Singapore and Canada, have implemented laws that target external interference.

49. In order to address acts of external interference, Division 1 of Part 6 of the SNSO introduces the offence of "external interference endangering national security". The offence stipulates three important conditions, namely in addition to the intention to "bring about an interference effect" (as defined in section 53 of the SNSO), the person must "collaborate with an external force" (as defined in section 54) and must "use improper means" (as defined in section 55). Persons or organizations concerned must meet all three conditions at the same time to commit the offence. Legitimate external exchange activities, including legitimate international collaboration, do not meet the above three conditions and the persons or organizations concerned will not inadvertently breach the law.

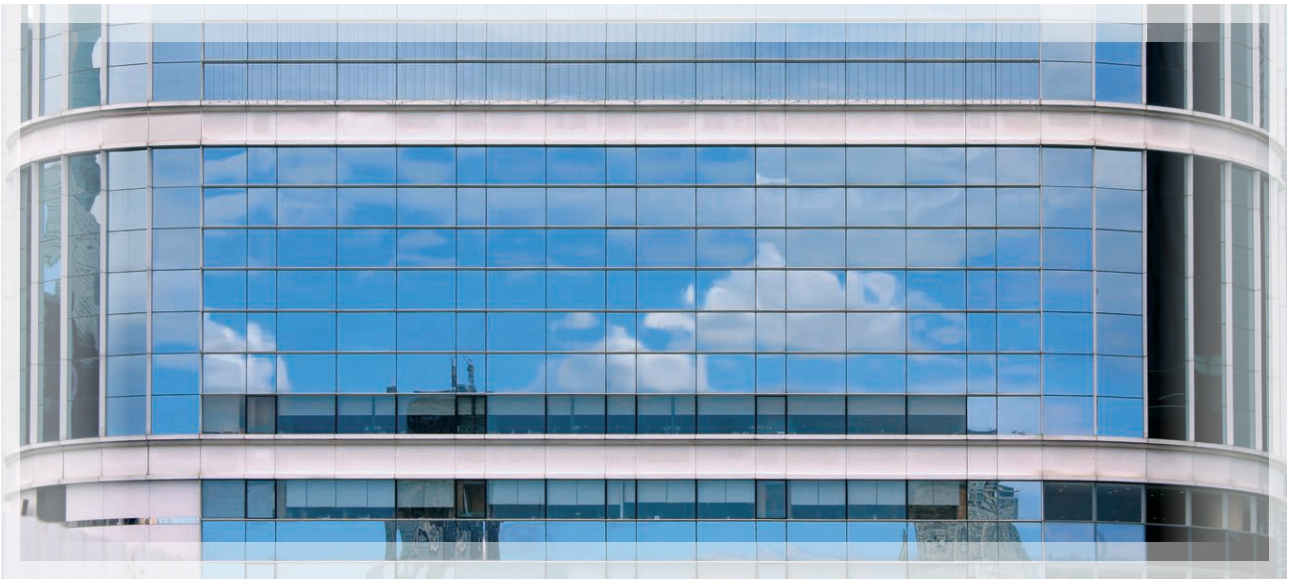
50. It must be pointed out that the government's decision-making, the legislative process and the administration of justice may affect the well-being, rights and freedoms of Hong Kong residents.[38] Therefore, this offence is not only necessary to protect national security, but also serves to promote the well-being, rights and freedoms of Hong Kong residents by ensuring that the exercise of fundamental rights and freedoms (such as the right to vote and stand for election) and the processes in relation to the performance of functions by the relevant authorities are not subject to improper external interference.

Organizations engaging in activities endangering national security

51. As for the power to prohibit the operation in the HKSAR of organizations engaging in activities endangering national security under Division 2 of Part 6 of the SNSO, the grounds for prohibition are nothing new and can also be found under the pre-amended Societies Ordinance. Moreover, the Secretary for Security must exercise this power in a reasonable and proportionate manner, in light of the circumstances of each case and with due regard to both the safeguarding of national security and the right to freedom of association guaranteed by BL 27 and Article 18 of BoR.

52. Suitable procedural safeguards are provided in the SNSO to ensure compliance with principles of procedural justice, including section 60 which provides that the Secretary for Security must not make an order without first affording the organization an opportunity to be heard or to make representations in writing as to why an order should not be made, unless the Secretary for Security reasonably believes that affording the organization an opportunity to be heard or to make written

[38] The "interference effect" covered by the offence of "external interference endangering national security" specifically targets interference with, amongst others, the government's decision-making (section 53(1)(a)), the legislative process (section 53(1)(b)) and the administration of justice (section 53(1)(c)).



representations would not be practicable in the circumstances of that case.

E. Extra-territorial effect

53. Criminal acts and activities endangering national security threaten the fundamental interests of a state. Hence, offences endangering national security are by nature different from other general criminal offences. Given their serious nature and consequence, no state will turn a blind eye to such criminal acts and activities endangering national security, be they committed outside the territory or locally. It is both necessary and legitimate to provide for extra-territorial effect of offences endangering national security.

Firm legal basis of extra-territorial effect

54. In general, the criminal law of a state only regulates acts that take place within the territory of that state. This is known as the "territorial principle" in the international law and international practices, and is also a basic common law principle. However, in the area of national security laws, it is common practice to provide for extra-territorial effect of offences endangering national security to tackle criminal acts committed outside the sovereign territory. The legal bases are the well-established "personality principle" and "protective principle" under international law. The "personality principle" enables a state to exercise jurisdiction over criminal acts committed by its citizens or residents (as opposed to a foreigner who has no ties with the state) outside its territory, whereas the "protective principle" allows a state to exercise its prescriptive criminal jurisdiction over a foreigner who commits criminal acts abroad against the sovereign state that endanger its security or its vital interests (such as government institutions or functions).

In line with international practice

55. The extra-territorial effect of the offences under the HKNSL, as provided under Articles 36, 37 and 38, fully aligns with the aforesaid "territorial principle", "personality principle" and "protective principle". Other offences relating to national security covered by the existing laws of the HKSAR also have extra-territorial effect, such as the offences related to unlawful disclosure under Part 3 of the Official Secrets Ordinance.[39]

56. Other major common law jurisdictions, such as the US, the UK, Singapore, Australia and Canada, also have extra-territorial laws in place which apply to acts and activities endangering national security committed outside their sovereign territories. Indeed, there are numerous overseas examples of national security laws which apply to acts and

[39] See section 23 of the Official Secrets Ordinance.

activities committed outside the sovereign territory pursuant to the "personality principle", such as the offence of treason and the Terrorism Act 2000 in the UK, and the foreign interference offence in Australia; and pursuant to the "protective principle", such as the terrorism offences in the US and the offences on espionage in Australia and Canada.

Extra-territorial effect of offences under the SNSO

57. Offences under the SNSO were designed and formulated with a view to effectively addressing national security risks concerned with different natures and circumstances. The extra-territorial effect of the various offences under the SNSO is clearly specified in the relevant parts of the SNSO,[40] based on the national security threats which the respective offences are designed to address, as well as the circumstances in which different individuals or organizations may commit the relevant acts outside the HKSAR. In line with the international law, international practices, principles of the common law and existing laws in the HKSAR, the extra-territorial effect under the SNSO is proportionate, reasonable and tailored to address the specific national security threats concerned.

58. In considering and formulating the scope of extra-territorial effect of the offences under the SNSO, the following five principles were adopted:

(1) *A person who owes a duty of allegiance* – in the HKSAR context, the extra-territorial effect shall apply to all HKSAR residents (including permanent and non-permanent residents) who are Chinese citizens.

(2) *HKSAR residents* – HKSAR residents, whether permanent or non-permanent residents, all enjoy different levels of protection and benefits[41] in the HKSAR and should not commit acts endangering national security. Further, as all HKSAR residents have the right to enter the HKSAR, if they commit acts endangering national security outside the HKSAR, it has to be ensured that they will be subject to legal sanctions upon return to Hong Kong, so as to prevent them from continuing any acts and activities endangering national security.

(3) *HKSAR permanent residents* – a particular type of offence endangering national security should not, by nature, be applicable to non-permanent residents (especially considering that they are not entitled to the right of abode in the HKSAR and are not staying in the HKSAR permanently) and should be applicable to Hong Kong permanent residents only.

(4) *Organizations in the HKSAR* – in general, all criminal laws are applicable to natural persons and legal persons (such as companies).[42] Article 6(2) of the HKNSL also stipulates that organizations in the HKSAR shall not engage in any act or activity endangering national security. Except for a small number of offences, the extra-territorial effect shall apply to body corporates incorporated or registered in the HKSAR or bodies of persons that have a place of business in the HKSAR.

(5) *Any person and organization* – Various premises or facilities (*e.g.* diplomatic and consular missions, offices or other facilities) have been set up by the CPG or the HKSARG in overseas countries. To ensure that these overseas premises or facilities are protected from threats, extra-territorial effect of offences endangering national security that target these premises or facilities shall apply to any person and organization.

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[40] See sections 14, 16, 28, 40, 48, 51 and 57 of the SNSO which provide extra-territorial effect for the relevant Divisions/Parts of the SNSO.

[41] *E.g.* HKSAR permanent residents enjoy the right of abode and have the right to land in the HKSAR as well as the right not to be subject to any condition of stay or deportation. HKSAR non-permanent residents have the freedom to travel and to enter or leave the HKSAR.

[42] Section 3 of the Interpretation and General Clauses Ordinance states that "person" (人、人士、個人、人物、人選) includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

59. The basic precept is that the extra-territorial effect of most of the offences under the SNSO should cover HKSAR residents, including permanent residents and non-permanent residents (principle (2) above) and organizations in the HKSAR, including body corporates incorporated, formed or registered in the HKSAR, and bodies of persons that have a place of business in the HKSAR (principle (4) above). The basic precept applies to, for example, the offences of "assisting members of Chinese armed force to abandon duties or absent without leave" (section 18), "inciting disaffection of public officers" (section 19), "inciting disaffection of personnel of offices of Central Authorities in Hong Kong" (section 21), "unlawful acquisition of state secrets" (section 32), "unlawful possession of state secrets" (section 33) and "unlawful disclosure of personal data of persons handling cases or work concerning national security" (section 118).

60. The remaining offences under the SNSO either have no extra-territorial effect, or have extra-territorial effect different from the aforesaid basic precept in view of the special nature of the offence concerned, applying, amongst others, principles (1), (3) and (5) above, for example:

(1) Principle (1): The extra-territorial effect of offences related to treason (section 10) applies to HKSAR residents who are Chinese citizens. This is in line with the extra-territorial effect of treason offences in other jurisdictions which generally apply to their citizens who owe a duty of allegiance to their country. The offence of "insurrection" (section 15) which is similar in nature, likewise has extra-territorial effect applicable to HKSAR residents who are Chinese citizens, and also organizations in the HKSAR.

(2) Principle (3): The extra-territorial effect of the offence of "unlawful drilling" involving external forces (section 13(3)) only covers HKSAR permanent residents and organizations in the HKSAR. It is because conceptually, the introduction of this offence is to prevent HKSAR permanent residents from gaining the ability to endanger the security of the HKSAR upon return to Hong Kong after attending drills led by an external force in a foreign country, hence it is necessary and proportionate to provide for extra-territorial effect applicable to, amongst others, HKSAR permanent residents who have the right of abode.

(3) Principle (5): In line with the "protective principle", the extra-territorial effect of the offences of "sabotage endangering national security" (section 49) and "doing acts endangering national security in relation to computers or electronic systems" (section 50) apply to any person and organization. This is to cater for the actual need to protect

any public infrastructure and computer or electronic systems located outside the HKSAR.

F. Enforcement mechanism for safeguarding national security

61. Apart from enacting laws to prohibit acts and activities endangering national security and providing extra-territorial effect to the relevant offences, it is necessary to ensure that the legal system for safeguarding national security can be implemented effectively and can operate continuously to safeguard national security.[43] On the basis of the experience gained from handling national security cases over the past few years, and with reference to the methods deployed by other jurisdictions in handling similar matters, the SNSO makes a number of improvements to the enforcement mechanism. The ensuing paragraphs will discuss the new law enforcement powers in Division 1 of Part 7 of the SNSO.

Court as the gatekeeper

62. The SNSO clearly stipulates the conditions for and restrictions on the exercise of the new law enforcement powers, so as to ensure that such powers are no more than necessary for safeguarding national security. Furthermore, these powers are subject to an important safeguard: law enforcement officers must seek prior authorization from the court for the exercise of such powers. The courts play an important gate-keeping role in this regard. It will only grant the application if satisfied that the statutory conditions have been met and the application is justified by the facts, as well as ensure that the measure goes no further than is reasonably necessary for the permissible objective.

Extension of detention period

63. In general, an arrested person will not be detained by the Police for more than 48 hours. However, in handling an offence endangering national security, the Police may require a longer time to complete the gathering of evidence and decide if charges should be laid against the arrested persons.

64. Subdivision 1 of Division 1 of Part 7 of the SNSO provides for the extension of the detention period of a person arrested without charge under strict conditions. If a person has been arrested in connection with an offence endangering national security and it is necessary to extend the detention period of the person, a police officer of the rank of Chief Superintendent or above (or a police officer authorized by that officer) must make an application to the court. The court must not hear the application unless the arrested person has been brought before the court. The above requirements ensure that the arrested person will be promptly brought before the court and have ample opportunities to make representations (with the benefit of legal representation).

65. The court may only grant an extension of the detention period if it is satisfied that (a) the investigation of the offence is being diligently and expeditiously conducted by the police, and cannot reasonably be completed before the date of the application and (b) the detention is necessary for securing or preserving evidence of the offence *etc.*

66. The court may grant an extension for an initial period of not more than 7 days, and in any event for a total period not exceeding 14 days in total. Besides, if a police officer no longer has reasonable grounds to believe that the specified grounds for extension still exist, then, unless the arrested person is charged, the person must be discharged immediately.

67. These multiple safeguards ensure that the arrested person would not be subject to unlawful or arbitrary detention, and ensure adequate protection of the arrested person's freedom of the person guaranteed by BL 28 and Article 5 of BoR.

68. Similar provisions can be found in other common law jurisdictions. Apart from Part 6 of Schedule 6 to the National Security Act 2023 of the UK, other UK laws also give their police the power

[43] Paragraph 4 of the 5.28 Decision clearly states that the HKSAR must establish and improve the enforcement mechanisms for safeguarding national security, strengthen the enforcement forces for safeguarding national security, and step up enforcement to safeguard national security. See the discussion in Part A above.

to apply to a judicial authority for an extension of detention of people arrested for serious crimes (especially those involved in terrorist activities) for up to 14 days.

Restrictions in relation to consultation with legal representatives

69. Offences endangering national security are often insidious, serious and complex in nature. Some suspects will even attempt to exchange information with external sources and other members of their syndicate through various channels after the law enforcement actions have commenced. It is necessary to empower the Police to take additional measures to effectively prevent any circumstances that may jeopardize the investigation and prevent the risks of arrested persons further endangering national security.

70. Subdivision 2 of Division 1 of Part 7 of the SNSO provides for the power to restrict consultation with legal representatives, which is attended by sufficient safeguards to ensure that it is consistent with the right to confidential legal advice and the choice of lawyers guaranteed by BL 35, as well as the right to communicate with counsel of own choosing under Article 11(2)(b) of BoR.

71. According to the jurisprudence of the European Court of Human Rights, an arrested person's right to consult a lawyer may be temporarily restricted in exceptional circumstances where the government has compelling reasons to do so.[44] Various jurisdictions, *e.g.* the UK, the European Union, the US and Canada, also permit the imposition of restrictions on consultation with legal representatives. Among them, the National Security Act 2023 of the UK

[44] See *Ibrahim and Others v The United Kingdom* (Application nos. 50541/08, 50571/08, 50573/08 and 40351/09), judgment of 13 September 2016.

allows police officers to decide for themselves whether to delay consultation with a lawyer without prior judicial authorization. In contrast, the SNSO requires a police officer (who must be a police officer of the rank of Chief Superintendent or above, or a police officer authorized by that officer) to make an application to the court, which will independently scrutinize the facts of the case and play an important gate-keeping role.

72. The court may only grant such application where there are reasonable grounds to believe that one of the specified circumstances exists, such as where the consultation would endanger national security, cause bodily harm to any person or pervert or obstruct the course of justice.

73. Where the person's consultation with a particular legal representative is restricted under section 79 of the SNSO, the person may consult any other legal representatives of the person's choosing. On the other hand, where the person's consultation with any legal representative is restricted under section 80, the restriction can only last for a maximum period of 48 hours. In contrast, in some other jurisdictions, the time limit on the imposition of similar restrictions is not explicitly stated. Plainly, the time limit specified under the SNSO would provide an arrested person with more safeguards. In any event, the provisions do not restrict the person from consulting a legal representative before the arrest or after the person is formally charged with an offence.

74. Although the arrested person's right to consult a legal representative is restricted to some extent, the investigating officers must still respect the other rights that the arrested person is entitled to under the law (including the right to silence). If the police officer no longer has reasonable grounds to believe that the specified grounds for the restriction remain in existence, the police officer must immediately cease to impose the restriction on the person.

75. Overall, the restriction would not result in any irretrievable prejudice to an arrested person's interests, and in any event the relevant criminal procedures would ensure that the defendant enjoys the right to a fair trial.

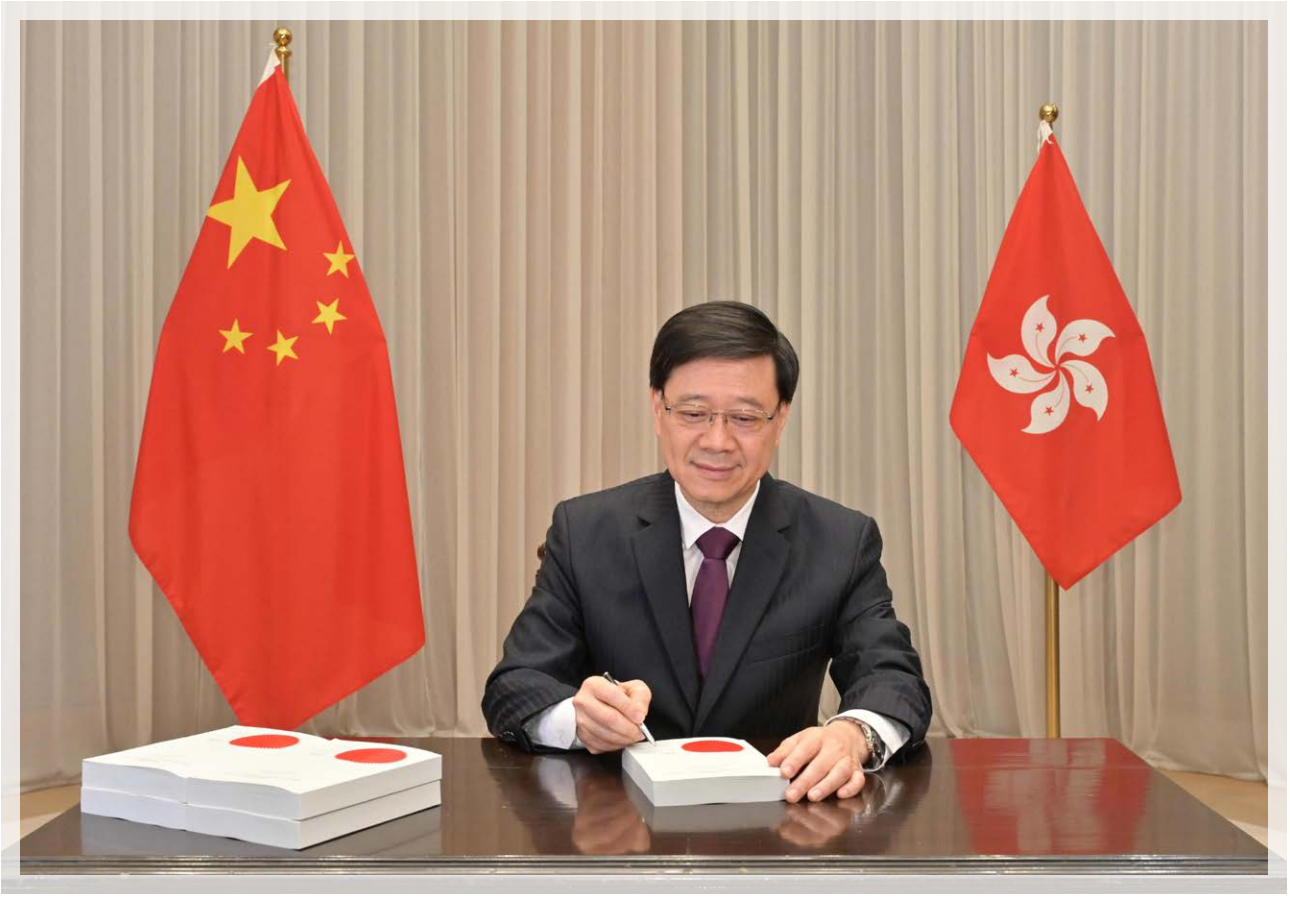
Restrictions in relation to persons on bail

76. An arrested person involved in an offence endangering national security may also pose considerable national security risks while on bail and pending further investigation. With reference to relevant provisions of the National Security Act 2023 of the UK, Subdivision 3 of Division 1 of Part 7 of the SNSO provides that the magistrate may make a movement restriction order and impose certain requirements on the suspect who is about to be or has been released pending investigation. Such requirements are similar to the bail conditions that the court may, under existing law, impose on a defendant in a criminal case.

77. A police officer of the rank of Chief Superintendent or above (or a police officer authorized by that officer) has to make an application to a magistrate. The magistrate may only grant such application where there are reasonable grounds to believe that one of the specified circumstances exist, such as where the suspect will not report to the police in accordance with specified conditions, there will be perversion or obstruction of the course of justice, or national security will be endangered. The magistrate may specify any one or more requirements as is appropriate based on the circumstances of the case.

78. In order to ensure that the police's investigation of the case is being expeditiously conducted without unreasonable delay, the movement restriction order is valid for 3 months, and may be extended for a further period of 1 month at a time.

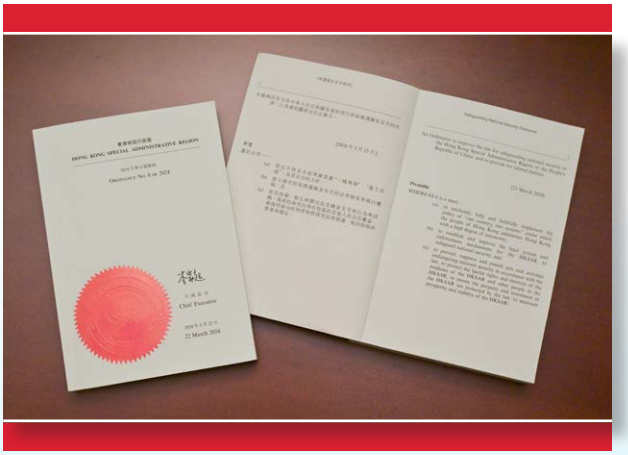
79. Furthermore, the suspect may apply to a magistrate to vary or discharge the movement restriction order and, if the magistrate refuses the application, make a review application to the CFI for revoking or varying the magistrate's decision. Both the magistrate and the CFI will ensure that any restriction on the suspect's rights and freedoms, such as the freedom of movement guaranteed under BL 31 and Article 8 of BoR, is proportionate without resulting in an unacceptably harsh burden on the person.



G. Conclusion

80. The SNSO will better protect our country from threats to national security in the increasingly intricate geopolitics of our time. The legislation fully aligns with the principles of international laws and practices. The SNSO clearly specifies that the rights and freedoms enshrined in the Basic Law, as well as the provisions of the ICCPR and ICESCR as applied to Hong Kong, are to be protected in accordance with the law. This important principle forms a cornerstone of the SNSO, and is literally written in the new law. The SNSO strictly adheres to the principles of rule of law. The offences under the SNSO are certain and clear, and they come with appropriate exceptions and defences.

81. The SNSO is a milestone which marks the fulfilment of the HKSAR's constitutional obligation under BL 23, and at the same time, starts a new chapter for the successful implementation of the "one country, two systems" policy. When national security is firmly safeguarded by the HKNSL and the SNSO, the well-being of all Hong Kong residents would be enhanced, and the HKSAR would continue to thrive under the Basic Law.



Judgment Update

HKSAR v Fung Ka Chun and Another; HKSAR v Chan Pau Chi

CACC No. 368 of 2016; CACC No. 228 of 2019 (20 January 2023)[1]

CA

Background

1. Both appeals concerned the statutory interpretation of the meaning of "living on the earnings of prostitution of another" under s. 137(1)[2] of the Crimes Ordinance (Cap. 200) whilst the Appellants in CACC 368/2016 additionally challenged the constitutionality of s. 137(1).

2. In CACC 368/2016, the Appellants operated a website ("Website A") which featured an adult forum with different membership levels for male and female members. Female memberships were free but female members were required to provide personal information such as height, age, body measurements, photographs and contact details which male members could have access to and make request for meeting depending on the membership fees they paid and their membership level. Police evidence suggested that Website A was being used as a platform for advertising prostitution. Accordingly, the income generated from the website was deemed to constitute "earnings of prostitution of another" as defined in s. 137(1) of Cap. 200. The 1st and 2nd Appellants were charged with (i) living on the earnings of prostitution of another; and (ii) aiding, abetting, counselling, and procuring another to commit an offence under s. 137(1), respectively. Both were convicted after trial.

3. In CACC 228/2019, the Appellant was the "overall boss" of a website ("Website B"), which the prosecution alleged was promoting prostitution by providing a platform for sex workers to advertise

their services for a fee. The Appellant was convicted, *inter alia,* of the charge of conspiracy to live on the earnings of prostitution of another contrary to s. 137(1) of Cap. 200.

4. Following their convictions, the Appellants of both cases appealed to the CA. Leave was granted to them to appeal on the questions of what constitutes "earnings of prostitution of another" and the scope of the offence of living on the earnings of prostitution of another, as well as the constitutionality of s. 137(1) of Cap. 200.

Grounds of appeal

5. The Appellants in CACC 368/2016 presented multiple grounds of appeal. Central to their arguments was the contention that s. 137(1) should be given a narrow interpretation that respects both

[1] Reported at [2023] 1 HKLRD 1265.

[2] S. 137(1) of Cap. 200 provides that:
"A person who knowingly lives wholly or in part on the earnings of prostitution of another shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years."

the construction of the provision and the Appellants' constitutional rights, including freedom of choice of occupation, protection of privacy, and the right to the safety and personal security of prostitutes. They argued that the prosecution had relied on an overly broad interpretation of the law, leading to an expansion of liability for the offence. They asserted that the focus should be on the exploitation of individuals for the purpose of prostitution or instances where there is control, direction, or influence over the movements of prostitutes. Adopting a broader interpretation would result in uncertainty in the application of the offence.

6. They also argued, *inter alia*, that the earnings in question did not come from female members but from male members and could not be considered as "earnings of prostitution".

7. The Appellant in CACC 228/2019 contended that the evidence, even when considered at its highest, did not satisfy the legal requirements for the offence of conspiracy to live on the earnings of prostitution. Specifically, he challenged the applicability of the precedent set in *Shaw v Director of Public Prosecutions* [1962] AC 220, arguing that it was wrongly decided. The Appellant argued, alternatively, that the present case could be distinguished from *Shaw*, and therefore, the Appellant should not have been convicted.

Major grounds

(a) CACC 368/2016

Statutory construction of s. 137(1)

8. The Appellants questioned the parameters of the offence under s. 137(1) and submitted that a narrow interpretation was correct for the expression "earnings of prostitution", that is, the offence is confined to an individual who exerts actual control or influence over the person or exploits the person for the purpose of prosecution. They further argued that when s. 137(1) is read with s. 137(2),[3] the expression is not apt, nor intended, to extend to an individual who profits from or is involved in the activities of a prostitute without actually controlling any of those activities. It was contended that adopting a wide interpretation would extend the liability of the offence and lead to uncertainty in its application and operation.

9. The CA adopted a purposive approach to the interpretation of s. 137(1) taking into account its context and purpose, and rejected the narrow interpretation proposed by the Appellants. The CA acknowledged that s. 137(1) was necessarily framed in general terms to cater for the myriad of circumstances in which a defendant could be living on the earnings of prostitution of another. It recognized that the focus of the offence is the parasitic or exploitative nature of the relationship between the offender and the prostitute. The mischief it aimed to address is any system or instrument of exploitation of sex workers, which seeks to profit from their work and take advantage of their vulnerable circumstances in which they operate and conduct their trade. Having reviewed the authorities, the CA found that it is clear that there is a distinction to be drawn between a service which could be supplied to a person, whether a prostitute or not, and one which by its nature is referable to prostitution and nothing else.

10. The Court found the Appellants' proposed interpretation to be unrealistic. To establish the offence, it must be proven that a defendant knowingly lives on the earnings of prostitution. The relationship between a defendant and the prostitute must be exploitative, with a defendant's reward directly tied to the prostitution. The CA highlighted that the purpose and structure of Website A were to facilitate the provision of sexual services by female members to male members. The earnings derived from the website were considered to be from the exploitation of the prostitutes and thus fell within the ambit of the "earnings of prostitution". The Court emphasized that there must be a close connection between the receipt of money and the trade before the recipient committed an offence. The Court concluded that the ambit of the offence

[3] S. 137(2) of Cap. 200 provides that:
"For the purposes of subsection (1), a person who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over another person's movements in a way which shows he or she is aiding, abetting or compelling that other person's prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he or she proves the contrary."

provision in s. 137(1) is not unfairly wide, it would not catch persons who are not exploiting prostitutes. Accordingly, the Appellants' submission was rejected.

Constitutionality of s. 137(1)

Freedom of choice of occupation

11. The Appellants raised a constitutional challenge based on the freedom of choice of occupation under BL 33[4] and the right to privacy or private life under BL 30[5] and Article 14 of BoR[6] which, the Appellants argued, provide a derivative right to work. They asserted that these rights have been encroached upon by s. 137(1) of Cap. 200 which barred them from engaging in the work of their choice, namely setting up and operating Website A.

12. In addressing the constitutional arguments, the Court first examined whether the rights identified by the Appellants exist as defined by them. It then considered whether these rights have been encroached upon and, if so, the nature and degree of such encroachment ("encroachment of rights issue"). The Court noted that the "wide interpretation" of s. 137(1) was central to the encroachment of rights issue. Accordingly, once the "narrow interpretation" as submitted by the Appellants was rejected, the arguments advanced by them on the encroachment of rights issue largely fell away.

13. Despite maintaining their stance on the "narrow interpretation" being the correct one for s. 137(1), the Appellants also questioned the basis of a previous CA decision in *Leung Sze Ho Albert v Bar Council of Hong Kong Bar Association* [2016] 5 HKLRD 542 ("*Albert Leung*"). In that case, the CA followed the CFA's decision in *GA v Director of Immigration* (2014) 17 HKCFAR 60 and held that BL 33 only protects against conscription to particular fields of occupation and does not confer a right to work in general. The Appellants argued that they had the freedom to engage in their chosen occupation of setting up a dating website and it would be overly restrictive not to allow them to do it because some activities related to the sex trade were also taking place. They contended that *Albert Leung* was plainly incorrect.

14. The CA rejected this argument and maintained that BL 33 does not confer a right to work in general. The Court did not accept the Appellants' contention that the right under BL 33 requires the government not to do anything to interfere with, diminish or take away what a resident chooses to do as an occupation. The reality of the situation was that the Appellants were not prevented from taking up the occupation of their choice, as long as it did not involve any criminal offence. There was nothing preventing the Appellants from setting up a dating website which was not engaging in any criminal activities.

Right to privacy

15. In addition, the Appellants relied on Article 14 of BoR, which provides for the protection of "private life". It was submitted that the concept of "privacy" or "private life" encompasses a person's professional or business life or employment, including freedom of choice of occupation, citing Article 8 of the European Convention on Human Rights[7] ("ECHR 8") in support.

16. The CA, however, did not find Article 14 of BoR

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[4] BL 33 provides that:

"Hong Kong residents shall have freedom of choice of occupation."

[5] BL 30 provides that:

"The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

[6] Article 14 of BoR provides that:

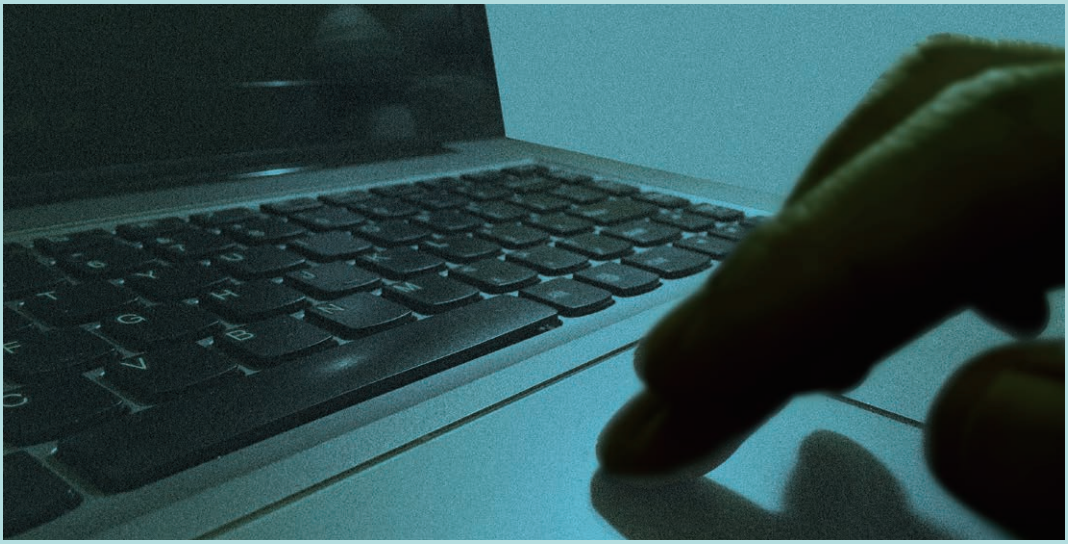
"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

[7] ECHR 8 provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."



engaged in this case. The Court held that BL 33 is the specific provision dealing with the right to work and it does not accord a positive right to work. Accordingly, such right cannot be derived from other general, non-specific provisions in the Basic Law or BoR such as Article 14 of BoR. While the Appellants heavily relied on the concept of "private life" under ECHR 8, the Court clarified that it does not give rise to a right to choose a particular occupation.

Safety and personal security

17. The Appellants raised another constitutional challenge based on the right to safety and personal security of prostitutes under Articles 5(1)[8] and 14 of BoR which, the Appellants argued, provide a derivative right to personal security or protection from violence. They argued that there is an independent right to security separate from that of liberty, and it protects the physical integrity of the person. They contended that under the "wide interpretation" of s. 137(1), persons not exploiting prostitutes would be captured and that prostitutes would be prevented from hiring persons, such as drivers, receptionists, and bodyguards, to provide them with protection and security or operating through a secure environment as offered by Website A. The CA rejected this argument.

18. The Court held that in Hong Kong, the right of liberty and security under Article 5 of BoR is a conjoint right. The article does not encompass an independent right to security separate from the right to liberty, as affirmed in *HKSAR v Coady* [2000] 2 HKLRD 195 and *SW v Secretary for Justice* [2019] 1 HKLRD 768. The Court found no compelling reason to overturn the precedent set in *Coady*. There was no evidence to suggest that the decision was plainly wrong or that the CA had misapplied or misunderstood the law.

19. Furthermore, the Appellants lacked the requisite standing to raise this aspect of the challenge since it specifically relied on the rights of prostitutes of which the Appellants did not have sufficient interest to advance or represent in the proceedings.

The proportionality test

20. As previously mentioned, the CA was not persuaded that the Appellants' constitutional rights were engaged. Even if any of the Appellants' rights were indeed engaged, the Court considered the restrictions on such rights satisfy the four-step proportionality test. The Court found that the offence provision of s. 137(1) serves a legitimate purpose, which is to protect prostitutes from abuse and exploitation by others who live on their earnings,

[8] Article 5(1) of BoR provides that:
"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

without improperly criminalizing their conduct. The Court held that there is a clear, rational connection between the protection of females in the trade of prostitution and s. 137(1). The Court further held that s. 137(1) is also rationally connected to furthering the aim of curtailing the criminality of prostitution. S. 137(1) does what is necessary and strikes a reasonable balance between the societal benefits of the encroachments and the inroads made to the rights in question. The Court concluded that s. 137(1) clearly satisfied the four-step proportionality test.

(b) CACC 228/2019

Statutory construction of s. 137(1) and *Shaw*

21. The CA agreed with the respondent that the broad mischief which s. 137(1) aims to address is the exploitation of prostitution for financial gain and held that this is apparent from the language of the offence and by reference to other related offences in the same section titled "Exploitation of other persons for sexual purposes" in Part XII of Cap. 200. It found that the approach taken in *Shaw* appropriately balanced the concern, on the one hand, to give effect to the underlying legislative intent to address the problem of those taking advantage of the prostitution of others, which may take many forms and involve a wide range of means; and on the other, to provide a fair and rational basis for those, like the ordinary tradesmen in their ordinary course of business, who do not directly and intentionally gain a reward specifically from others because of their involvement in prostitution.

22. The Court clarified that the inclusion of evidence showing "control, direction, or influence" over a prostitute's movements is not a necessary ingredient of the offence under s. 137(1). It emphasized that s. 137(2) provides an evidential presumption that, if satisfied, presumes a person is knowingly living on the earnings of prostitution. This evidentiary presumption is supported by a strong line of authority. The absence of the "control, direction or influence" requirement in s. 137(2) means that the burden of proving the elements of the offence under s. 137(1) lies with the prosecution.

23. The Court held that the circumstances in *Shaw* were not dissimilar to those in the present case, except that the medium through which sex workers advertised their sexual services was a printed publication rather than a social website in this case.

24. The Court found that the plain language of s. 137(1) clearly encompasses individuals who financially benefit from businesses promoting or facilitating the prostitution of others. It emphasized that s. 137(1) is part of a framework of offence provisions aimed at regulating and curtailing prostitution and related vice activities. There is no good reason to restrict the natural meaning and scope of the statutory wording to exclude individuals profiting from websites promoting prostitution.

Conclusion

25. The CA unanimously dismissed the appeals in both cases.

HKSAR v Chow Hang Tung

FACC No. 9 of 2023 (25 January 2024)[1]

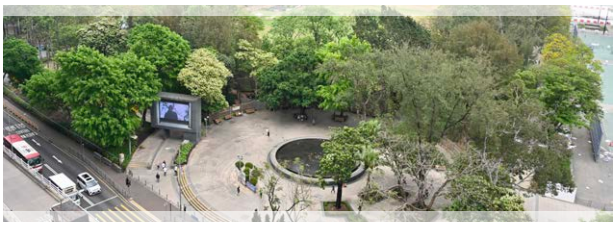
CFA

Background

1. This appeal concerned whether a collateral challenge to the validity of a prohibition of the holding of a public meeting can be mounted by a defendant in a prosecution for inciting others to take part in the prohibited meeting, contrary to s. 17A(3)(a) of the Public Order Ordinance (Cap. 245)[2] and the common law.

2. On 27 April 2021, the Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("Alliance"), as required by ss. 7(1)(a)[3] and 8[4] of Cap. 245, gave a notice to the Commissioner of Police ("CP") of its intention to hold a meeting at Victoria Park on 4 June 2021 to commemorate the 32nd anniversary of "June 4". The Respondent was the Vice Chairman of the Alliance but not named as the organizer of the intended meeting.

3. On 27 May 2021, the CP issued a notice to the Alliance pursuant to s. 9 of Cap. 245,[5] prohibiting the intended meeting ("the prohibition") since he considered this necessary for maintaining public safety and public order, and protecting the rights and freedom of others after taking into account Covid pandemic situations at the time.



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1 Reported at (2024) 27 HKCFAR 71.

2 S. 17A(3)(a) of Cap. 245 provides that:

"(3) Where any public meeting … is an unauthorized assembly by virtue of subsection (2)—

(a) every person who, without lawful authority or reasonable excuse, knowingly takes or continues to take part in or forms or continues to form part of any such unauthorized assembly; …

shall be guilty of an offence and shall be liable—

… on summary conviction, to a fine at level 2 and to imprisonment for 3 years."

3 S. 7(1) of Cap. 245 provides that:

"(1) Subject to this Ordinance, a public meeting may take place if, but only if,—

(a) the Commissioner of Police is notified under section 8 of the intention to hold the meeting; and

(b) the holding of the meeting is not prohibited by the Commissioner of Police under section 9."

4 S. 8 of Cap. 245 provides that:

"(1) For the purposes of section 7, notice of the intention to hold a public meeting shall be given in writing to the Commissioner of Police—

(a) not later than 11 a.m. on the same day of the week in the preceding week as the day on which the meeting is intended to be held; or

(b) where the last day for giving notice under paragraph (a) would fall on a general holiday, not later than 11 a.m. on the first day immediately preceding that day which is not a general holiday.

…"

5 S. 9 of Cap. 245 provides that:

"(1) Subject to this section, the Commissioner of Police may prohibit the holding of any public meeting notified under section 8 where he reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others.

…

(4) The Commissioner of Police shall not exercise the power conferred by subsection (1) to prohibit the holding of a public meeting in any case where he reasonably considers that the interests of national security or public safety, public order or the protection of the rights and freedoms of others could be met by the imposition of conditions under section 11(2)."

4. The Alliance appealed under s. 16 of Cap. 245[6] against the prohibition to the Appeal Board on Public Meetings and Processions ("Appeal Board"). On 29 May 2021, the Appeal Board dismissed the appeal.

5. The government then issued a press release informing the public of the CP's prohibition of the intended public meeting on 4 June 2021. It advised that the intended meeting, if held, would be an unauthorized assembly.

6. That notwithstanding, the Respondent published posts in social media on 29 May 2021, as well as a newspaper article on 4 June 2021 criticizing the prohibition and encouraging others to attend the prohibited meeting. She was charged with the offence of "incitement to knowingly take part in an unauthorized assembly", contrary to s. 17A(3)(a) of Cap. 245 and the common law.

Before the magistrate and CFI

7. The Respondent was convicted after trial by the magistrate who decided that it was not open to the Respondent to challenge the validity of the prohibition by way of defence in criminal prosecution, holding that such a challenge should be mounted by way of judicial review.

8. The Respondent's appeal against conviction was allowed by Barnes J who found the prohibition invalid. She held that the CP had failed to discharge his positive duty under s. 9(4) of Cap. 245 to take the initiative to consider or propose conditions that could be imposed to enable the meeting to be held.

Issues

9. Leave to appeal to the CFA was granted in respect of the following questions:

(1) In a prosecution for an offence of incitement to knowingly take part in an unauthorized assembly contrary to common law and s. 17A(3)(a) of Cap. 245 and punishable under s. 101I of the Criminal Procedure Ordinance (Cap. 221),[7] is it open to a defendant to raise by way of defence the legality of the police's prohibition of the subject public meeting which was subsequently upheld by the Appeal Board? ("Issue 1")

(2) If the answer to Issue 1 is "yes", what is the correct approach that the court should take in considering a defendant's challenge to the legality of the police's prohibition and of the subsequent determination by the Appeal Board? ("Issue 2")

CFA decision

10. The CFA's decision, consisted of four judgments, unanimously allowed the prosecution's appeal. Ribeiro PJ delivered a judgment, with which Fok PJ and Gleeson NPJ concurred in their joint judgment. CJ Cheung and Lam PJ delivered their separate judgments.

Ribeiro PJ, Fok PJ and Gleeson NPJ

(a) The Respondent may challenge the legality of the prohibition by way of defence in criminal proceedings

11. Ribeiro PJ distinguished a collateral attack

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[6] S. 16 of Cap. 245 provides that:

"(1) A person, society or organization—

(a) named in a notice given under section 8 or 13A;

(b) to whom a notice of prohibition is given under section 9; or

…,

who is aggrieved by the decision of the Commissioner of Police to prohibit a public meeting … or to impose conditions on the holding of a public meeting … may appeal to the Appeal Board.

…"

[7] S. 101I(2) of Cap. 221 provides that:

"Where a person is convicted of …

(c) incitement,

to commit an offence for which a maximum penalty is provided by any Ordinance, and no penalty is otherwise provided by any Ordinance for such … incitement, he shall be liable to be sentenced to that maximum penalty."

from a constitutional challenge. A collateral attack is a challenge to the prohibition's legality based on non-constitutional grounds alleging, *e.g.*, that the statutory requirements were not complied with. A constitutional challenge, on the other hand, is one mounted on constitutional grounds. A challenge might be mounted on both grounds.

12. Issue 1 and Issue 2 were therefore elaborated as: is it open for the Respondent to mount a collateral attack and/or a constitutional challenge on the prohibition by way of defence in the criminal proceedings? If so, what are the respective principles for determining when such a challenge is permissible and whether it succeeds?

13. His Lordship highlighted that the above questions arose in the context of two separate processes, firstly, the decision process (involving the process under Cap. 245 which led to the CP's prohibition of the intended meeting by giving the organizers notice to that effect ("Prohibition Order")) and, secondly, the criminal proceedings against the Respondent before the lower courts. These two processes were entirely separate and distinct. They should not be confused as they required the application of different legal principles.

14. Ribeiro PJ held that where, in cases like the present where the Respondent was not a party to the decision process under which the CP made the Prohibition Order, the defendant's challenge of an impugned order by way of defence in criminal proceedings could not properly be excluded on the ground that the defendant ought to have challenged that order at a different forum in an earlier separate process.

15. However, the above approach is subject to one exception, *i.e.* the "same person" cases, where the person seeking to mount a collateral attack is the very person against whom the administrative order was specifically directed. Given that such individuals must realize that they will face prosecution if the order is contravened, it would be reasonable to expect them to challenge the order by an available appeal procedure and/or by judicial review. As the current case did not belong to the "same person" category, the exception did not provide a basis for excluding a collateral attack raised by the Respondent by way of defence in the subsequent prosecution.

Collateral challenge

16. Ribeiro PJ held that whether a collateral attack

is available to a defendant in criminal prosecution by way of criminal defence depends on the construction of the relevant statute, asking whether the legislative intent is to exclude a collateral attack and that the formal validity of the order challenged suffices to found criminal liability or whether the legislative intention is that the order's validity might be impugned by way of defence.

17. The starting-point is a strong presumption in favour of allowing the defendant to raise the defence. If successful, the defendant would be acquitted. This led to the proposition that such a collateral attack will only be permitted if, as a matter of construction of the offence-creating provisions, it bears on an essential ingredient of the offence.

Constitutional challenge

18. As with collateral attacks, it is necessary for a constitutional challenge to engage an essential element of the offence charged, so that if successful, it would operate by way of defence.

19. Ribeiro PJ held that the lawfulness of the CP's Prohibition Order is plainly an essential element of the offence created by s. 17A(3)(a) and of the associated charge of incitement.

20. Nevertheless, his Lordship emphasized that unlike a collateral challenge, whether a constitutional challenge to an impugned order may be permitted by way of defence in criminal prosecution cannot be determined simply by construing the offence-creating provision since, by virtue of BL 8,[8] BL 11,[9] BL 18[10] and BL 39,[11] constitutional rights enjoy an entrenched status under the Basic Law. The right of peaceful assembly relied on by the Respondent is guaranteed by Article 17 of BoR,[12] which is entrenched by BL 39. Any statutory provisions or administrative orders made thereunder which are inconsistent with those entrenched rights must give way, unless the restrictions on those rights pass the proportionality test as elaborated in *Hysan Development Co Ltd v Town Planning Board*.[13] The proportionality test extends to constitutional challenges made by way of defence in criminal proceedings.

21. Ribeiro PJ ruled that it was open to the Respondent to raise a collateral challenge by way of defence in the criminal proceedings on the following two bases: first, construction of the offence-creating provision in the context of Part III of Cap. 245 and second, the clear intention that Cap. 245 should operate consistently with the constitutional right of peaceful assembly. It was not the legislative intention that formal validity of such prohibition orders should suffice.

22. Alternatively, if the challenge is based on a

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8 BL 8 provides that:

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

9 BL 11 provides that:

"In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including … the system for safeguarding the fundamental rights and freedoms of its residents, … shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

10 BL 18 provides that:

"The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. …"

11 BL 39 provides that:

"The provisions of the International Covenant on Civil and Political Rights … as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

12 Article 17 of BoR provides that:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society *in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*." (*emphasis* added)

13 (2016) 19 HKCFAR 372 at [131]-[141].

constitutional right which is engaged because the Prohibition Order restricts the right of peaceful assembly, that challenge is in principle available, since it bears on an essential element of the s. 17A(3)(a) offence and thus represents a relevant challenge by way of defence. A constitutional challenge cannot be excluded simply on the basis that, as a matter of statutory construction, it was the legislative intention that a formally valid order would be sufficient.

23. Delivering a joint judgment, Fok PJ and Gleeson NPJ agreed with Ribeiro PJ that as a matter of statutory construction, a lawful prohibition of the public meeting is an essential element of the s. 17A(3)(a) offence.

24. In view of the nature and importance of the fundamental rights under BL 27[14] and Article 17 of BoR, other than the "same person" cases, their Lordships found that neither the existence of the s. 16 appeal mechanism, nor the constitution of the Appeal Board, nor the finality of the Appeal Board's determination would require a conclusion that the prosecution need only prove the formal validity of a prohibition notice for a s. 17A(3)(a) prosecution.

25. The test of what is "necessary" in ss. 9(1) and 11(2)[15] should correspond with the proportionality test that applies under Article 17 of BoR. As to s. 44A(7),[16] the "finality" of the Appeal Board's determination reflects the end of an administrative process but s. 44A(7) does not have the effect that the prohibition, if upheld by the Appeal Board, is deemed to be lawful as the prohibition could be subject to judicial review.

26. Their Lordships concluded that the Respondent was entitled to raise a collateral attack to the lawfulness of the prohibition in question, including a constitutional challenge, by way of defence in criminal prosecution.

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[14] BL 27 provides that:
"Hong Kong residents shall have freedom … of assembly, of procession and of demonstration …."

[15] S. 11(2) of Cap. 245 provides that:
"The Commissioner of Police may, where he reasonably considers it necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others, impose conditions in respect of any public meeting notified under section 8 …."

[16] S. 44A(7) of Cap. 245 provides that:
"The determination of an appeal by the Appeal Board shall be final."

(b) The Respondent's collateral attack and constitutional challenge failed

27. Ribeiro PJ held that the Respondent's collateral attack had failed. Firstly, on proper construction, s. 9(4) would not impose a proactive duty on the CP but merely oblige him to give genuine and reasonable consideration to any pertinent conditions. Secondly, the conditions suggested by the Respondent before the CFI could not be "obviously" considered as potentially meeting the public health concerns. Thirdly, the CP and the Appeal Board did consider possible conditions that might be imposed.

28. As for the constitutional challenge, his Lordship found that it also failed. Whilst the aim of the Prohibition Order, *i.e.* protection of public health, is one of the legitimate aims listed in Article 17 of BoR,[17] and the prohibition during the Covid-19 pandemic was plainly rationally connected with that objective, the Prohibition Order was a proportionate measure, which represented a reasonable balance between the restriction on the right of peaceful assembly and the societal benefits of the prohibition.

29. Fok PJ and Gleeson NPJ concurred with the above.

CJ Cheung

30. Cheung CJ held that whether a collateral challenge may be mounted in a criminal court is a matter of statutory construction of the relevant legislation. A more focused and accurate way of putting it is whether on a proper construction, the validity of the administrative act in question (the prohibition in the present case) is an essential element of the offence or a statutory defence. If the answer is "yes", the criminal court will necessarily have to deal with the issue when trying the prosecution. If the collateral challenge based on constitutional grounds does not go to any of the elements of the offence or defence(s), it is simply not an issue that the criminal court needs or has jurisdiction to deal with. If it is contended that the offence, as constituted, is not constitutional, a direct challenge against the offence-creating provision may always be made before the criminal court hearing the prosecution of the offence.

31. Under Cap. 245, the strong emphasis on time regarding the giving of notification of an intended meeting, the notification of a prohibition, and the hearing and disposal of an appeal, coupled with the expressly provided "finality" of the Appeal Board's determination, is highly indicative of a statutory intent to ensure that everyone clearly knows where they stand in relation to the proposed meeting. If the s. 17A(3) offence permits a defendant to re-open in criminal prosecution the validity of a prohibition even though it has been upheld by the Appeal Board, this would weaken the authority of the prohibition and might result in uncertainty and confusion among members of the public as to whether they could attend the intended meeting.

32. The legislative intent that the Appeal Board's decision cannot be re-opened in a s. 17A(3) prosecution can be further demonstrated by the stringent qualification requirement for the Chairman of the Appeal Board, the "finality" of the Appeal Board's decision under s. 44A(7) and the s. 44A(6)[18] requirement that the Appeal Board shall determine an appeal "with the greatest expedition possible".

33. It would be legitimate to assume that the legislature intended the intending participants to rely on the organizers to challenge the prohibition. If the organizers do not appeal a prohibition and the meeting is still proceeded with, a participant, if arrested or prosecuted, may still challenge the prohibition by judicial review.

34. Thus, a balance is well struck under Cap. 245 between achieving the object of the Ordinance (that is, protecting the interests of national security, public safety, public order or the rights and freedoms of

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[17] See the italized text in note 12 above.

[18] S. 44A(6) of Cap. 245 provides that:
"Where any notice of an appeal is given the Appeal Board shall consider and determine the appeal with the greatest expedition possible so as to ensure that the appeal is not frustrated by reason of the decision of the Appeal Board being delayed until after the date on which the public meeting … is proposed to be held."

others) and upholding the rights to freedom of assembly, and also between the need for effective enforcement of a prohibition on the one hand and upholding the rule of law by affording those affected by it a means to challenge the prohibition on the other.

35. Accordingly, Cheung CJ construed s. 17A(2) when it refers to a public meeting taking place "in contravention of section 7" to mean a public meeting of over 50 persons taking place despite a formally valid prohibition by the CP under s. 9. It would be a formally valid prohibition under s. 9 if on the face of it, it complies with the requirements of that section and has not been reversed by the Appeal Board or quashed by judicial review before the conclusion of the criminal proceedings.

36. Given that the validity of the prohibition is not relevant to any issues facing the criminal court, the CJ held that no collateral challenge to its validity, whether on conventional public law grounds, or on constitutional grounds, may be mounted in a prosecution under s. 17A(3)(a). Cheung CJ's answer to Issue 1 was a "no".

37. The CJ considered it not necessary to answer Issue 2.

Lam PJ

38. Lam PJ agreed with Cheung CJ on Issue 1. Although Issue 2 would then be disposed, Lam PJ agreed with Ribeiro PJ that the judge wrongly held that the prohibition had failed to satisfy s. 9(4) of Cap. 245. His Lordship also agreed that even assuming that there is scope for the CFA to conduct a *Hysan* proportionality assessment, the prohibition should be upheld.

39. Lam PJ found that given the statutory intention and the purpose behind the offences, the finality of a prohibition shall have effect in both the statutory decision process and the subsequent criminal proceedings.

40. Under the Cap. 245 regime, both s. 8 notice and s. 9 prohibition are only effective in respect of the holding of the public meeting by *the named* organizer, and s. 7 only permits public meeting involving a large number of participants when there is an organizer accountable for the safe conduct of the meeting. That organizer must give a s. 8 notice of *his/her* intention to hold the meeting.

41. Hence, when the organizer who had previously given notice of his/her intention to hold the meeting

subsequently abandoned such intention in light of a prohibition, the prohibition has no relevance in any subsequent criminal proceedings against others. The meeting was unauthorized because no person took up the role of an organizer to give a notice to the CP with regard to his/her intention to hold the meeting. A participant who took part in such an unauthorized meeting is therefore not deprived of any opportunity to challenge any relevant element of the offence in criminal prosecution.

42. For the reasons given by Cheung CJ and in light of the other features in the Cap. 245 regime mentioned above, Lam PJ agreed that the substantive validity of a prohibition should only be challenged by judicial review but not in criminal proceedings. His Lordship supported the CJ's construction of s. 17A(2) and (3)(a).

43. As for the constitutional challenge, the close resemblance of wording of Article 17 of BoR and s. 9(1) and (4) of Cap. 245 suggested that the relevant concepts under Article 17 of BoR have been incorporated into Cap. 245 and the Cap. 245 restrictions on freedom of assembly are inherently proportionate.

Conclusion

44. The CFA unanimously allowed the appeal, restored the Respondent's conviction and remitted the appeal against sentence to the judge for determination.

MK v Director of Legal Aid

FACV No. 8 of 2023 (22 March 2024)[1]

CFA

Background

1. This appeal concerns the application of legal professional privilege ("LPP") in relation to the relationship between a person who has been granted legal aid, the lawyers assigned to conduct the litigation, and the Director of Legal Aid ("the Director").

2. The Appellant and her same-sex partner attended a conference in June 2018 ("the conference") with Mr Hectar Pun SC ("Mr Pun") and other counsel including a Mr Wong concerning a judicial review application. The Appellant revealed her financial status in the conference, *i.e.* the Appellant and her same-sex partner jointly owned and operated a pet shop ("financial status").

3. Legal aid was granted to the Appellant on 25 July 2018. Mr Pun, but not Mr Wong, was assigned as counsel for the Appellant in the judicial review application. The Director received an anonymous email on 22 January 2019 revealing the Appellant's financial status. Mr Wong informed the Director by an email of 31 January 2019 that the legal team was informed during the conference about the Appellant's financial status. In response to the Director's request to provide information, Mr Pun wrote to the Director confirming the same on 3 May 2019.

4. The Director revoked the Appellant's legal aid certificate on 9 May 2019 on ground that she had willfully failed to disclose her financial resources. The Appellant lodged a legal aid appeal to a Master of the High Court arguing that the information on her finance was provided prior to the legal aid application and should not be considered by the Director but the appeal was dismissed by the Master in his administrative capacity.

CFI and CA decisions

5. The Appellant lodged a judicial review application to challenge the Master's decision. The CFI allowed the judicial review on the basis that the information provided by Mr Pun and Mr Wong should not have been considered, as Regulation 21(1) of the Legal Aid Regulations (Cap. 91A)[2] did not apply to privileged communications made before an application for legal aid. The Director's appeal to the CA was allowed. The CA held that LPP had been abrogated by Regulation 21(1)(b) of Cap. 91A and would not have protected the information, namely, the Appellant's financial status, disclosed by Mr Pun to the Director.

The question before the CFA

6. The Appellant appealed to the CFA in respect of the following question of law:

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[1] Reported at (2024) 27 HKCFAR 204.

[2] Regulation 21 of Cap. 91A provides that:

"(1) Where an aided person's solicitor or counsel has reason to believe that the aided person—

(a) has required his case to be conducted unreasonably so as to incur unjustifiable expense or has required unreasonably that the case be continued; or

(b) has willfully failed to comply with any regulation requiring him to provide information or in furnishing such information has knowingly made a false statement or a false representation,

the solicitor or counsel shall forthwith report the fact to the Director.

(2) Where the solicitor or counsel is uncertain whether it would be reasonable for him to continue acting for an aided person, he shall report the circumstances to the Director."

> Upon proper interpretation of Regulation 21(1)(b) of the Legal Aid Regulations, Cap. 91A, what is the extent, if any, of the abrogating effect by necessary implication against LLP at common law which is a right guaranteed constitutionally under BL 35?[3] In particular, does the abrogation by necessary implication extend to communications protected by LLP prior to the application for and/or granting of legal aid to the client?

7. The CFA also invited the parties to make submissions as to whether waiver of LPP might be relevant in considering disclosure of the Appellant's financial status.

The legal aid scheme

8. The statutory scheme of legal aid has two aims: first, to provide legal assistance to litigants who have limited financial means; second, to ensure that this assistance is not abused by litigants who fail to make true disclosure of their means. The Legal Aid Ordinance (Cap. 91) came into force in 1967. It deals with the application for and the grant of legal aid, creating the tripartite relationship between the person who has been granted legal aid ("the aided person"), the lawyers assigned to the aided person and the Director. Cap. 91 deals with the manner in which LPP and other duties of confidentiality arise out of that relationship.

9. Cap. 91A, which came into force in the same year, deals with the customary duties of the assigned lawyers in relation to the conduct of the litigation on behalf of the aided person. Cap. 91A also imposes on the assigned lawyers a duty to report to the Director the progress of the litigation and, in particular, to act as the Director's watchdog in relation to possible abuse by the aided person ("watchdog duties").

Waiver

10. Although LPP is a fundamental right under BL 35, the CFA held that it is subject to exceptions and can be waived. The test of whether LPP has been waived is an objective one. It is not material whether the litigant, or indeed the legal representative, intends to waive or appreciates that his or her conduct amounts to waiver. The CFA held that privilege will be waived if it will be unfair to permit the aided person to rely upon the portion disclosed without taking into consideration the balance of the material.

11. In this case, as the Appellant had through another counsel, Ms Mok, informed the Director that she had the permission of the Appellant to give an account of the conference "*in order to assist your Department*", and as the Appellant had never denied giving the consent, the CFA held that this was a clear waiver of privilege in relation to what was said at the conference. Further, when the Appellant selected Mr Pun to be assigned to act for her under her legal aid certificate, she knew or must be deemed to have known that Mr Pun would be under the reporting duty imposed by Regulation 21(1) of Cap. 91A upon his assignment. As such, the Appellant had clearly waived LPP in relation to the discussion of her financial status at the conference. The Appellant's appeal was dismissed on the basis of waiver.

Tripartite relationship

12. The CFA held that prior to the grant of legal aid, information conveyed within the bipartite relationship between lawyer and client is protected by LPP against the outside world. After the grant of the legal aid and the assignment of lawyers, the relationship becomes tripartite, made up of the aided person, the lawyers and the Director. The lawyers are paid by the Director and owe duties not only to the aided person but also to the Director. The tripartite relationship with the Director being part of the relation brings with it a change in the operation of LPP. The privilege does not afford protection from disclosure within the tripartite relationship and does not prevent the assigned lawyers from passing on information derived from the aided person to the Director. This is especially so given that the assigned lawyers owe watchdog duties under Cap. 91A to report abuses of legal aid to the Director.

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[3] BL 35 provides that:

"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

Watchdog duties

13. The CFA held that lawyers are subject to watchdog duties under the legal aid scheme. A proper understanding of such watchdog duties would leave no scope of debate on the question whether LPP has been abrogated by Regulation 21(1)(b) by way of necessary implication. The watchdog duties were originally introduced only by Regulations 12(7) and (8) of Cap. 91A.[4] They give solicitor and counsel the right to give up a case on the ground of specified abuses of legal aid by the aided person. If the assigned lawyers exercise that right, they are required to "make a report to the Director of the circumstances in which that right was exercised." This report will necessarily set out the abuse that caused the solicitor or counsel to give up the case.

14. The watchdog duties have been strengthened by Regulation 21, the effect of which is to advance the time which solicitor and counsel have a duty to report to the Director the abuses referred to in Regulations 12(7) and (8). These have to be reported "forthwith" once solicitor or counsel has "reason to believe" that such abuses have occurred.

15. The CFA, however, considered the effect of Regulation 12(10) lies at the heart of this case.[5] This is because Regulation 12(10) is an express provision which abrogates LPP. The CFA held that the wording of Regulation 12(10) is very wide. On its natural meaning, it covers information imparted to the

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[4] Regulation 12 is headed "Conduct of proceedings by solicitors". Regulations 12(7) and (8) provide that:

"(7) Without prejudice to the right of solicitor or counsel to give up a case for good reason, any solicitor or counsel may give up an aided person's case if, in his opinion, the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued.

(8) Where any solicitor or counsel exercises the right to give up an aided person's case—

(a) under the provisions of paragraph (7); or

(b) on the ground that the aided person has willfully failed to provide the information to be furnished by him or in furnishing such information has knowingly made a false representation,

the solicitor or counsel shall make a report to the Director of the circumstances in which that right was exercised."

[5] Regulation 12(10) provides that:

"A solicitor shall not be precluded, by reason of any privilege arising out of the relationship between solicitor and client from disclosing to the Director any information or from giving any opinion which may enable the Director to perform his functions under the Ordinance."

Director pursuant not merely to Regulation 12(9)[6] but Regulation 12(8) and Regulation 21. The CFA found that any report made by a solicitor to the Director under Regulation 21 will, if it would otherwise have included information subject to LPP, nonetheless be lawfully made to the Director by reason of Regulation 12(10), provided that Regulation 12(10) is not *ultra vires*.

The *ultra vires* issue

16. As to whether the abrogation of LPP by Regulation 12(10) is *ultra vires* because it involves an abrogation of a fundamental right, the CFA held that Regulation 12(10) is a qualification on the right to LPP that is *sui generis*. It is designed to resolve a conflict between the assigned lawyers' duties not to disclose communications between them and the aided person, and their reporting duties to the Director including the watchdog obligations. Regulation 12(10) resolves this conflict by abrogating LPP.

17. The CFA held that LPP is not an absolute right and can be subject to exceptions. Regulation 12(10) is an exception with very good reasons:

(1) The grant of legal aid was a dramatic social measure that involved a heavy charge on public funds. It necessarily involved putting in place measures designed to protect those funds. These measures were introduced by Cap. 91A pursuant to the very general provision in s. 28(1) of Cap. 91,[7] being "generally for the better carrying out of this Ordinance". The *vires* of these measures has not been questioned.

(2) Imposing reporting duties on the lawyers assigned to act for the aided party was an obvious measure to take as part of the arrangements for protecting the legal aid fund. Again the *vires* of this have not been challenged.

(3) Inherent in the reporting obligations was the possibility of the conflict. Putting in place Regulation 12(10) was necessary to deal with this contingency.

(4) The abrogation of LPP effected by Regulation 12(10) is very limited. Disclosure is permitted only to the Director, who is part of the aided person's legal team but not other parties.

(5) The limited abrogation of LPP effected by Regulation 12(10) is imposed as a result of the aided person's own decision to apply for legal aid, thereby accepting the rigorous disclosure obligations imposed by Cap. 91.

(6) By selecting, or accepting, the assignment of the assigned lawyers the aided person accepts that they will be subject to the reporting obligations and acquiesces in this.

18. Regulation 12(10) formed part of the original Cap. 91A and has stood for over half a century without challenge. The exception made by Regulation 12(10) to LPP was well established by the time that the Basic Law came into effect. BL 35 must be read subject to that exception.

19. Whilst Regulation 12(10) is only expressed to apply to "solicitor", reading Regulation 12(10) in light of the watchdog obligations imposed by Regulation 12(8) and Regulation 21(1) which apply to both solicitor and counsel, the CFA held that, by necessary implication, Regulation 12(10) also applies to assigned solicitors and counsel.

The live issues to be resolved

20. The CFA held that the live issues in this case were temporal ones:

(1) Does Regulation 21(1) impose a duty to

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[6] Regulation 12(9) of Cap. 91A provides that:
"An aided person's solicitor shall give the Director such information regarding the progress and disposal of proceedings to which the certificate relates as the Director may from time to time require for the purpose of performing his functions under the Ordinance and without prejudice to the generality of the preceding words, a solicitor who has acted or is acting for an aided person, on being satisfied that the aided person has died or has had a receiving order made against him, shall report the facts to the Director."

[7] S. 28(1) of Cap. 91 provides that:
"The Chief Executive in Council may make regulations prescribing any matter which by this Ordinance is to be or may be prescribed and generally for the better carrying out of this Ordinance."

report matters that pre-date the assignment of the solicitor or counsel? If "yes",

(2) Does the abrogation of LPP extend to those matters?

(3) Did the reporting duty imposed by Regulation 21(1) apply to Mr Pun, notwithstanding that he had ceased to be an assigned lawyer at the time that he communicated the information, namely, the Appellant's financial status to the Director?

21. The CFA held that the answer to question (1) is plainly "yes". Regulation 21(1) requires the solicitor or counsel to report "forthwith" on having "reason to believe" that a specified abuse of legal aid has occurred. The "reason to believe" may well be based on facts pre-dating and post-dating the assignment of solicitor or counsel. Hence, the duty to report to the Director covers both pre-dating and post-dating assignment periods.

22. As to question (2) above, the CFA held that the answer is plainly "yes". The express abrogation under Regulation 12(10) would apply to the information "which may enable the Director to perform his function under the Ordinance". There is no reason why the abrogation of LPP should not apply to the information arising from pre-dating assignment and it would plainly be desirable that the Director should learn of such information.

23. The CFA held that the answer to question (3) above is clear. Regulation 21(1) imposes a duty to report on "an aided person's solicitor or counsel". The natural meaning of this provision is that the duty is imposed on a solicitor or counsel who is currently acting as such, but does not include those who has ceased to act in a case. Accordingly, Mr Pun was not subject to statutory abrogation of the duty of confidentiality imposed under Regulation 21(1) when he reported the Appellant's financial status to the Director.

Conclusion

24. The CFA unanimously dismissed the appeal.

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