Law Society Forum on Article 23

16th November 2002

Points for Discussion

General

1. HKSAR has a constitutional obligation to enact laws pursuant to Article 23 of the Basic Law.

2. Article 23 is a statement of principle, and HKSAR is entrusted with the right to determine the manner of compliance.

3. HKSAR has no obligation to go beyond Article 23, and all existing and proposed laws should be evaluated on that basis.

Misprision of treason

4. Misprision of treason should be repealed.

Argument

This offence has its origin in a very different historical and social context, namely feudal England. Failure to inform the King of any treason coming to the knowledge of the subject was a criminal offence. A 1950 edition of Stephen's Commentaries on the Laws of England stated as follows: "There is, however, no modern precedent of an indictment for the crime, and it seems, for all practical purposes, to be obsolete."

Secession

5. Secession offences should only have effect in respect of a specific territory and they should only come into effect when a state of secession is declared to exist.

Argument

Secession is about Taiwan and the One China Principle (see paragraph 3.5 of the Consultation Document and speech of Secretary of Justice on 17 October 2002). Reunification of Taiwan with China is a stated political objective (see Preamble to the Chinese Constitution). How the situation develops hinges on acceptance of the One-China Principle by Taiwan (see State Council paper "The One China Principle and the Taiwan Issue"). Much is said on both sides of the Taiwan Straits. Statements by the Taiwan leadership could easily amount to secession as proposed to be defined. Such statements could bring offences into being in Hong Kong under the category of "inchoate and accomplice acts". The proposed law has no application to the Taiwan leadership (paragraph 3.10 of the Consultation Document), but if a principal offence (as proposed to be defined) were committed by them, Hong Kong people could become guilty of aiding and abetting or counselling or procuring in a variety of circumstances. No such offences

should come into being unless a specified situation came into being or if there were a declared state of secession.

6. In the context of secession "sovereignty" in relation to Taiwan should be defined with reference to the One-China Principle".

Argument

The Chinese Constitution does not use the word "sovereignty" in relation to Taiwan though sovereignty is implicit in the assertion that Taiwan is part of China. What the State Council paper emphasizes is that there should be acceptance of the One-China Principle by Taiwan. Phrases like "withdrawing from sovereignty" or "resisting exercise of sovereignty" in the context of Hong Kong law are by themselves unsatisfactory because the situation between the Mainland and Taiwan could give rise to legal argument as to what constitutes sovereignty.

Sedition

7. The proposed new sedition offence should replace all existing sedition offences.

Argument

The Chinese version of Article 23 refers to "incitement to rebellion" rather than "sedition" as understood in the sense of the English criminal law (see paragraph 4.11 of the Consultation Document). In the latter sense "seditious intention" includes an intention to "excite disaffection against the CPG…. or the HKSARG" or "raise discontent or disaffection among Chinese nationals or HKSAR inhabitants" or "promote feelings of ill-will and enmity between different classes of population of the HKSAR".

These concepts are derived from the English common law in a different historical and social context and cannot be said to have been contemplated by Article 23. The reference to "classes of population" is a reference to an English social structure which is now historical. The Consultation Document accepts that the offence under Article "should focus on serious cases which endanger the security or stability of the state, instead of isolated incidents of limited violence or disturbance of public order" (paragraph 4.12).

Seditious publications

8. In relation to seditious publication the proposed wording of the offence should be amended as follows:

It should be an offence if a person –

(a) prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication; or

(b) imports or exports any publication, with intent to incite others to commit the offence of treason, secession or subversion.

Argument

The words proposed to be replaced are "knowing or having reasonable grounds to suspect that the publication, if published, would be likely". The objection to them is that instead of proving an intention to incite, the prosecution only has to prove that the defendant knew or ought to have known. However, intention is an essential element of the offence, as acknowledged in paragraph 4.8 of the Consultation Document.

9. Mere possession of a seditious publication should not be an offence.

Argument

This is consistent with the requirement that there should be a seditious intention. It is no consolation to a person prosecuted that he might have a defence of "reasonable excuse". He would have to go through a trial to find out whether his excuse was reasonable.

Subversion

10. The proposed offence of subversion should not be expressed in terms of "intimidating" the PRCG.

Argument

The word "intimidate" is used in the Treason Felony Act 1848 which made it an offence to "intimidate or overawe both houses or either house of parliament". This was in a context where the London mob had a role in English politics. It is difficult to imagine the PRCG being intimidated but an attempt (not necessarily successful) would already be an offence. Similarly aiding and abetting or counselling and procuring would also be an offence. This would widen the offence unnecessarily.

Theft of State Secrets

11. The opportunity should be taken to review the Official Secrets Ordinance.

Argument

Article 23 refers to "theft of state secrets". Paragraph 6.14 of the Consultation Document states that "Article 23 should not be interpreted as implying that information other than state secrets need no protection". Five categories are set out in paragraph 6.19 of the Consultation Document:

(i) security and intelligence information;
(ii) defence information;
(iii) information relating to international relations;
(iv) information relating to relations between the Central Authorities of the PRC and the HKSAR; and
(v) information relation to commission of offences and criminal investigations.

Some of these categories are very broad. The Government considers the existing law to be satisfactory, subject to "refinements", but as the existing law goes beyond Article 23 it should be reviewed.

12. What is required to be protected under "information relating to relations between the Central Authorities of the PRC and the HKSAR" should be defined with reference to the specific responsibilities of the Central People's Government under the Basic Law.

Argument

Under Chapter II of the Basic Law the Central People's Government has specified responsibilities in respect of HKSAR, such as foreign affairs (Article 13), defence (Article 14) and appointment of the Chief Executive and principal officials. The information required to be protected should be defined having regard to such specific responsibilities.

Foreign Political Organizations

13. The Secretary for Security should not have power to proscribe an organization.

Argument

Article 23 only refers to foreign political organizations. The Government considers existing laws to be adequate for this purpose (paragraph 7.11 of the Consultation Document). The additional power proposed is not a requirement of Article 23, but is derived from the separate concept of "protecting national security" (paragraph 7.12 of the Consultation Document). The Secretary for Security already has power to prohibit the operation or continued operation of a society (section 8 of the Societies Ordinance Cap.151). The proposed additional power provides a more direct link between the Central Authorities and the HKSAR. Whilst the HKSAR should certainly consider national interests and security, such a link appears to be an unnecessary extension of the relationship between the Central Authorities and the HKSAR under Chapter II of the Basic Law.

Investigation Powers

14. It is objectionable to grant the additional investigation powers proposed in Chapter 8 of the Consultation Paper.

Argument

The police already has substantial investigation powers. What is now wanted is an emergency entry and search power for the purpose of investigation (as distinct from stopping a crime the power for which already exists). The reason in support is "critical evidence for suspected offence could have been destroyed if a search warrant could not be obtained in time" (paragraph 8.4 of the Consultation Document). It is difficult to conceive of the "critical evidence" contemplated that could effectively be secured by such a power: perhaps name lists and computer disks?

The case for financial investigation power also does not appear to be justified. The proposal is that a bank or deposit-taking company may be required to disclose financial information. But it does not appear probable that financial information possessed by a bank or deposit-taking company

could be destroyed if not obtained in time (paragraph 8.6 of the Consultation Document).

15. The extension of powers under the Organized and Serious Crimes Ordinance (Cap.455) should only be considered after the issue of what laws should be enacted pursuant to Article 23 is settled.

Argument

The matter of the substantive offences should first be settled. Further, there is proposed to be included in Schedule 1 of the Ordinance the offence of "unlawful drilling" which is not covered by any heading in the Consultation Document. This offence appears to have been derived from the English Unlawful Drilling Act of 1819 which is perhaps another historical relic.

Draft Legislation

16. To ascertain the effect of the proposed legislation, a draft should be made available together with an explanatory memorandum as to its intended effect, and sufficient time provided for queries, comments and discussion in public.

Argument

The effect of the proposed legislation depends on its wording. It is also desirable to have the legislative intent clearly set out in a document to ensure there is no misunderstanding over the effect of the draft legislation. The Consultation Document has resulted in the raising of issues not addressed in that document, and there should be further elaboration of Government thinking as well as consultation.