Law Society Forum on Article 23

16th November 2002

Comments of Members (up to 11 November 2002)

Treason

1. The definition of levying war should be more tightly defined

Argument

The reference to the loose and obsolete definition of "levying war" in para 2..7 and footnote 17 to include "a foreseeable disturbance that is produced by a considerable number of persons" is problematic and not in line with the spirit of the Proposal to confine "treason" to the most reprehensible conduct against the State. The so-called common law definition has not been applied by the court for decades. "Levying" war" for the purpose of "treason" should be confined to "true" war in the international sense.

2. The definition of treason should exclude "intimidate or over awe the PRCG"

Argument

See paragraph 10 of Points for Discussion.

Sedition

3. The proposed new sedition offence should be confined to inciting others to commit the offence of treason, secession or subversion

Argument

Proposed as an alternative to paragraph 7 of the Points for Discussion.

4. There should be no offence in respect of seditious publications.

Argument

Proposed as an alternative to paragraph 8 of the Points for Discussion, which proposed that publication should only be criminalized if done with intent. If the intent of the publisher etc. is to incite others to commit the offence of treason, secession or subversion, he can be prosecuted under the substantive sedition offence. If he has no such intention, the mere publication, distribution etc. of books of pamphlets is an exercise of one's freedom of expression and should not be punished.

Theft of State Secrets

5. Additional argument under paragraph 11 of the Points for Discussion:

In particular, the categories of protected information relating to "international relations" and to "relations between the Central Authorities of the PRC and the HKSAR" are too wide and too loosely defined. While the UK Official Secrets Act 1989 contains similar provisions relating to "international relations" information, it has never been used and tested in court as to their compatibility with the UK Human Rights Act. Most UK academic publications take the view that such provisions are incompatible with the Human Rights Act. The recent House of Lords decision in Shayler relied on by Government concerns the prosecution of a former security agent in relation to "security" or "defence" information. It does not justify the retention of the problematic provisions relating to "international relations" information or to the offence of unauthorized disclosure by the media or other third parties. The purported justification for the "international relations" category was that unauthorized leakage of such information might jeopardize the relationship between the State and the other country. However other major democratic countries such as the United States and Canada do not have corresponding offences. It is also a fact of life in modern times that the media from time to time report sensitive, confidential and embarrassing information relating to international relationship leaked out from some "insider" sources.

6. Comment on paragraph 12 of Points for Discussion:

[for reasons stated above, I strongly disagree with this suggestion. Take for an example, if it happens that the CPG has secretly decided who should be the next Chief Executive of the HKSAR and gives secret instructions to the relevant officials concerned, any disclosure of such information could be "damaging" to the CPG or HKSAR Govt concerned. I don't however think that any such disclosure should be criminalized as leaking out state secret.]

Foreign Political Organizations

7. Additional argument under paragraph 13 of the Points for Discussion:

Similar power to proscribe an organization is not found in any other major democratic countries such as the US, the UK, Canada or Australia.

Proscription of organization – Appeal Tribunal

8. It is proposed that there be additional powers to proscribe organizations beyond those which already exist under the Societies Ordinance. Given the existing powers, it is not at all clear to me that there is need for additional powers. Perhaps the representatives of the Security Bureau and/or the Department of Justice can clarify this aspect of the proposals.

It is suggested that a tribunal be established to hear appeals by proscribed organizations. As stated above, I am not at all sure that there is a need for enhanced powers to proscribe organizations given the existing power under the Societies Ordinance.

Assuming there is to be enhanced power to proscribe organizations I am of the provisional view that the proposals are insufficient with regard to access to the court.

The proposals envisage appeals on fact to a tribunal, and on law to the court. As Ms Carole Peterson, Associate Professor of Law at the University of Hong Kong has stated (radio interview in late October 2002) questions of fact and law are not necessary neatly separated. Many such questions are of mixed fact and law. I am not sure that the proposed bifurcated procedure would work.

I accept that matters of national security sometimes involve a degree of confidentiality that militates against proceedings in open court. I also accept that a tribunal procedure may be quicker and cheaper than court proceedings.

However we are not here dealing with matters of domestic concern, such as the matters within the jurisdiction of professional disciplinary tribunals. We are dealing with matters which affect the fundamental rights of the people, in particular freedom of association. In my view, in principle, issues as to proscription of organizations should be ventilated at the highest judicial level, i.e. the Court of First Instance.

The Court of First Instance has well established inherent jurisdiction to deal with the whole or part of sensitive cases *in camera*. That is sufficient to protect the interests of national security. As Lord Denning once said (and I paraphrase) 'who can we trust if not the judges'.

Specialist tribunals have proved, in my respectful opinion, not particularly successful in this jurisdiction. I would cite the example of the Immigration Tribunal where the appearance of judicial scrutiny is created by appointment of retired judges, and yet in practice most of the appeals are dismissed without a hearing (the legislation so provides).

Further, judicial review is not a sufficient remedy to a party aggrieved on a decision as to fact. The court's judicial review jurisdiction is limited to (i) illegality; (ii) procedural impropriety; and (iii) irrationality. In short the judicial review procedure rarely involves review of issues of fact. Thus judicial review would not be a sufficient check.

In result I am of the view that any proscription of an organization should be within the sole jurisdiction of the court without limitation as to questions of fact or law.

The most preferable scenario would be a requirement that an organization may only be proscribed by order of the court. The Secretary for Security would have to apply for a proscription order.

Alternatively, if the Secretary for Security should be given a discretion to

proscribe an organization, there should be a fast-track appeal on the Constitutional and Administrative Law List of the High Court without limitation as to questions of fact and law. It would be left to the court to decide whether to proceed in chambers or open court.

Trial by Jury

9. Provision should be made to ensure a right to trial by jury in the case of charges under any of the proposed offences.

Experience shows that juries are a bulwark in protection of individual freedoms on charges of the type contemplated. The Ponting case (UK; 1980s) is an example.

It is not suggested that the proposed offences should necessarily be tried by a judge and jury, merely that the accused have a right to choose a trial by jury.

This last point gives rise to comment of more general application. Unfortunately the existing legislation in Hong Kong provides that criminal trials in the Court of First Instance will always be with a jury, whereas those in the District Court may never be with a jury (despite the fact that court-rooms in the Wan Chai law courts were fitted out for juries). The prosecution is left with the decision as to venue in those cases where there is a choice. The defendant has no right to choose. Experience in other jurisdictions shows that where the election is left to the defendant many more trials may be left to a judge alone, thereby saving costs and expense to the public. There can be no infringement of the right to trial by jury where the election is vested in the defendant.