THE LAW SOCIETY OF HONG KONG 香港律師會

The Law Society's Comments on the Proposed Committee Stage Amendments to the Article 23 Blue Bill

1. Instigation as Treason

It is still proposed to retain as a treason offence the instigation of foreign armed forces to invade the People's Republic of China with force.

As previously pointed out, this offence is of an extremely serious nature but is very easily committed. By contrast the other proposed treason offences require specific mental elements or specific acts.

In line with the legal policy that proposed the repeal of misprision of treason, the existing instigation offence (in section 1(1)(d) of the Crimes Ordinance) should be repealed and should not be enacted in a modified form.

2. Sedition – two classes of persons

It is proposed to add the following subsection 1A to section 9A:-

> (1A) An incitement shall not constitute an offence under subsection (1) unless the nature of the incitement and the circumstances in which the incitement is made are such that -
>
> (a) one or more persons incited are likely to be induced; or
>
> (b) an ordinary person would likely be induced,

to (where subsection (1)(a) applies) commit the offence or to (where subsection (1)(b) applies) engage in violent public disorder.

The distinction drawn between one or more persons who are incited and likely to be induced and an ordinary person who would likely be induced is perplexing. Two classes of persons are distinguished, but what is the difference and to what purpose?

3. Handling seditious publication

The test of the offence is changed from "likely to cause the commission of" to "likely to induce a person to commit".

This is objectionable because as previously drafted the court will look into all surrounding circumstances and then determine whether the publication was likely to cause the commission of the offence. In fact this is the test adopted in the proposed amendment to the sedition offence, namely "nature of the incitement and the circumstances in which the incitement is made".

The proposed change to "likely to induce a person to commit" would require the court to inquire into a hypothetical person's state of mind, importing a large subjective element into the offence, and weakening the causation element in the offence.

This proposed amendment ought not to be adopted.

Further, a person who handles a seditious publication with intent would already be guilty of sedition and there is no need for a separate offence of handling seditious publication.

The proposed offence should not be enacted.

4. Time limit for prosecution

A 3 year time limit for prosecution is proposed for handling seditious publication. There is no time limit for sedition.

However, handling seditious publication with intent is also sedition, and if the publication offence is time-barred, a person could still be charged under the more serious offence of sedition.

Further, there is an element of causation in respect of both sedition and handling seditious publication. The court has to assess "likelihood". With the passage of time

the assessment of likelihood would become more difficult and even speculative.

It is therefore proposed that:

(a) there should not be an offence of handling seditious publication; and

(b) there should be a time bar shorter than 3 years for prosecution of sedition. A period of 1 year would appear reasonable.

5. Investigation power

The change from "chief superintendent" to "assistant commissioner" is insignificant: no case has been made out for giving the police the additional investigation power. Further, evidence obtained pursuant to an unlawful exercise of the power might still be admissible in court proceedings.

It is objectionable to expand executive power unnecessarily.

6. Proscription of organizations

The ground on which the Secretary for Security may proscribe a local organization is where "he reasonably believes that the proscription is necessary and the interests of national security and is proportionate for such purpose".

The organization which is proscribed may then appeal to the Court of First Instance against the proscription within 30 days after the proscription takes effect.

Under the United Nations (Anti-terrorism Measures) Ordinance a person may be specified as a terrorist in one of two ways: first where he is designated by the Committee of the United Nations Security Council as a terrorist the Chief Executive may publish a notice in the Gazette and secondly the Chief Executive may make an application to the Court of First Instance for an order to specify a person as a terrorist.

In the former case there is already a determination by the Security Council Committee; in the latter case the Chief Executive has to apply to the Court for an order and satisfy the Court there are grounds for so doing.

In the proposals under the Societies Ordinance the Secretary for Security does not need to apply to the Court for an order; he proscribes and then the proscribed

organization has to go to court to challenge the proscription.

Further, the ability to challenge is circumscribed by the proposed appeal procedure. In particular, it is proposed that:

(a) proceedings may take place without the appellant being given full particulars of the reasons for the proscription in question;
(b) proceedings may be held in the absence of any person, including the appellant and any legal representative appointed by him;
(c) the rules of evidence may be waived; and
(d) any appeal from the decision of the Court of First Instance is limited to an appeal to the Court of Appeal on a ground involving a question of law.

The procedure is weighed in favour of the Government, even when compared with the United Nations (Anti-Terrorism Measures) Ordinance. There is no apparent justification for adopting a procedure more extreme than that considered necessary for the purpose of anti-terrorism, and for restrictively prescribing the role of the court.

In accordance with general principles the proper procedure to be adopted is that if the Secretary for Security desires to proscribe an organization he should apply to the court for an order to that effect in the normal way instead of his being entitled to proscribe simply because he "reasonably believes" as presently provided. The appeal procedure should also follow the normal legal course rather than the extraordinary arrangements now proposed.

7. Further time for consideration

There are issues of fundamental importance which have not yet been addressed. It seems unlikely that they could be sufficiently debated and considered under the present timetable. There appears to be no need to rush into legislation. LegCo should adopt a more sensible timetable.

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Constitutional Affairs Committee
12 June 2003
68819