How the Hong Kong Criminal Law Is Affected by the Central Government: The Case of Article 23 of the Basic Law

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Introduction

Article 23 is one of the most sensitive articles in the Basic Law.[1] It is fundamental and political. This is particular so when it is imposed by a Communist one party state on a relatively liberal and free society. How the Legislative Council (LegCo) in the Hong Kong Special Administrative Region (SAR) enacts laws to comply with this Article, how courts will interpret such laws and, in general, how the SAR government will respond to this responsibility will help determine the direction to which the SAR's political life will take. How Article 23 plays out in practice can be seen as an index of civil liberties enjoyed in Hong Kong. It is a "battle field" not only between the Hong Kong government (before and after the transition) and the Central Government, but also among different interest groups, including political parties in particular, as they attempt to define Hong Kong's political future according to their own political persuasions and institutional interests. In legislating Article 23 offenses, the SAR legislature is bound to take Beijing's position seriously. But Beijing's political influence should not be exaggerated. Local resistance by interest groups, armed with the

[1] It provides that: "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".

"One Country, Two Systems" doctrine, will make direct and express political interference by Beijing into the legislative process extremely difficult. In the end, neither the "high degree of autonomy" nor interference by the Central Government are "givens" in the SAR's political life. Certain future criminal laws in the SAR will be subject to a tortuous process of negotiation, compromise and conflict.

Article 23 of the Basic Law

Article 23 offenses can be variously referred to as political offenses, national security offenses or even counter-revolutionary (CR) offenses. Regardless of what names are used, they include threats which challenge the fundamental structure of a particular society. These threats can arise from both foreign hostile forces and domestic subversion. In Canada, national security interests include Canada's territorial integrity and the democratic process of government; and threats to Canada's national security can arise from foreign intelligence activities, domestic subversion and terrorism. In Australia, national security concerns include espionage, active measures by a foreign power through agents of influence, disinformation, and deceptive action, domestic subversion and sabotage.[2]

Several points could be made about national security offenses. First, each country has different priorities with regard to national security concerns due to "its own character, interests, and vulnerability".[3] Hanks argues that the precise meaning of a national security threat "lie(s) in the broad geopolitical and strategic factors

[2] H.P. Lee, P.J. Hanks and V. Morabito, *In the Name of National Security: The Legal Dimension* (SWN: LBC Information Services, 1995); and Laurence Lustgarten and Ian Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994).

[3] Lustgarten and Leigh, ibid., p.3.

[4] Peter Hanks (1988), "National Security – A Political Concept", 14 *Monash University Law Review* 114, at p.117.

on which the version...of the concept have been based."[4] National character abounds in identifying the elements of national security.

Second, the term "national security" is elastic, vague, controversial and is incapable of precise definition. The courts have given it different interpretations in different historical times. The term concerns matter relating to sedition, subversion or treason, which are probably the most controversial offenses at common law. Yet the term is so important that in both domestic constitutions and in international law, rights and freedom can be suspended in the interest of national security, and the abuse of power by the government is justified in its name. The invocation of national security concern clearly outweighs other considerations. And a national government is generally entitled to determine when a national security concern arises.[5] National security will take precedence when a state is threatened.

Third, a state reacts strongly when it perceives a threat to its national security. Many political crimes are created at such moments of crisis and then they remain permanently on the statute book. The UK Official Secrets Act 1911, for instance, primarily targeted German spies who flagrantly engaged in espionage in the UK before the First World War, but it remained after the crisis was over;[6] when Canada become involved in the Korean War, the offence of treason was amended to include aiding any armed forces against which Canadian forces were engaged in hostilities.[7] China's National Security Law was passed to counter the perceived threats posed by "hostile foreign forces" after the 1989 suppression of the student democratic movement. Part of the Article 23 of the Basic Law itself was inserted in the draft of the Basic Law by the Chinese Government to prevent Hong Kong from becoming a base for the overthrow of Communist rule in the mainland.

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[5] It is likely that many national security claims "turn out on closer examination to be no more than disguised attempts by a favoured class, ethnic group, or political-military elite to seize some advantage for itself". Lustgarten and Leigh, supra note 3, at p.8.

[6] James Michael, *The Politics of Secrecy* (London: Penguin, 1982).

[7] Law Reform Commission of Canada, *Crimes against the State* (Canada: Law Reform Commission of Canada, 1986), p.10.

Fourthly, these offenses, ancient in their origins, have little application in modern societies. They, with the exception of the Official Secrets Act in UK,[8] have been rarely used since the Second World War. Political trials of different kinds have virtually disappeared in Western democracies. Vehement political dissidence is simply tolerated.[9] The suspension of political prosecutions, however, does not mean that activities threatening a state's fundamental interests have not been punished. There has been a de-politicization process in which political activities are increasingly punished by ordinary criminal legislation. Public order offenses, such as unlawful assembly, become an important alternative to more political charges, such as seditious libel.[10] In Hong Kong, immigration offenses and deportation have comprised the primary measures against Communists.[11] The enemy are no longer traitors, spies, counter-revolutionaries or subversive elements, they are now terrorists, rioters, fundamentalists, and so on. This de-politicization process has recently taken place in China when the amended Criminal Law replaces Counter-revolutionary offenses with national security offenses. However, the reform may represent no more than a switch to a less offensive name. All the previous CR offenses can still be punished by different provisions of the new criminal law.[12]

[8] Michael, supra note 6.

[9] Eric Barendt, *Freedom of speech* (Oxford: Clarendon Press, 1985).

[10] Michael Lobban (1990), "From Sedition Libel to Unlawful Assembly: Peterloo and Changing Face of Political Crime c1770-1820", 10 *Oxford Journal of Legal Studies* 306.

[11] Lo Ah, *Zhengzhibu Huiyilu (Memories of Special Branch, RHKP)* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong, 1997).

[12] The key offences, including treason, secession, espionage, subversion, sedition have been renamed state security offences. Many CR offences were abolished only once the same activities were covered by other criminal offences. Other CR offences are separated into state security offences and ordinary offences. Unlawful disclosure of state secrets was divided into two offences, it would be a state security offence if the state secrets or intelligence is disclosed to persons or organizations outside of China. It is an ordinary offence if disclosed domestically. Other offences were "declassified" or "depoliticized". For a critical analysis of the amendment, see, Human Rights in China and Human Rights Watch/Asia, *Whose Security? "State Security" in China's New Criminal Code* (New York: Human Rights in China and Human Rights Watch/Asia, 1997).

Finally, subsequent punishment through political trials and persecution in public has been replaced by more covert political surveillance by each national security establishment. Covert political surveillance has been intensified in the major common law jurisdictions. Western democracies became, as the Cold War progressed, national security states and surveillance societies. Political control became more preventative and proactive. It also became more expansive and assertive. Well-equipped national security agencies enable each state to respond to potential threats to national security before they matured. For Western democracies today the immediate threats to civil liberties are not the classical political trials, but the abuse of power by their national security agencies and, consequently, the "normalization" of the use of emergence powers.

Dealing with Article 23

The 1989 student democratic movement in China and its subsequent political suppression generated unprecedented fear in Hong Kong for the future erosion of civil liberties after the transition. It was a catalyst for Hong Kong's democratization. Article 23 presents a direct threat to liberties in Hong Kong. Because the offenses in Article 23 of Basic Law are not defined, there were concerns that the central government may impose the mainland definitions in Hong Kong after the transition. Many in the mainland and some in Hong Kong have strongly suggested that Article 23 offenses need standard definitions within the PRC, including the Hong Kong SAR.

When we look at the criminal law in PRC for guidance as to how we might comply with Article 23, we find that these offenses are CR-offenses (recently renamed as national security offenses) which, to no one's surprise, are not defined with any clarity. The intention is normally imputed objectively. It is determined by the nature of the act. Once the act is determined, the subjective aspect of the act

is almost irrelevant. There is little legislative guidance for the court in its application of the law. The court is able to sweep various forms of harmless political behaviour into the seditious libel category. There is a priori justification for penalising speech against the government. No force or the threat of force is required.

The prosecution and conviction of Xi Yang, a Hong Kong based journalist, for stealing state secrets in China in 1994, and the prosecution and conviction of Wang Dan and Wei Jingsheng for subverting the government in 1996 highlighted the vagueness of China's criminal law.[13] These prosecutions caused wide-spread fear and concern in Hong Kong, as Article 23 contains the equivalent offenses. They triggered the legislative efforts in Hong Kong to limit the remit of Article 23.

Hong Kong's concerns about applying mainland criminal law within the SAR is also pragmatic. Theoretically, the jurisdiction of mainland criminal law cannot be exercised in the SAR against SAR residents.[14] Hong Kong and the mainland are two equal and mutually exclusive criminal jurisdictions. The Hong Kong SAR's high degree of autonomy is protected by the Basic Law. Under the "One Country, Two Systems" doctrine, the legal system in the SAR will remain unchanged for fifty years after the transition.[15] The Hong Kong SAR will have its separate and independent criminal law regime. The Hong Kong SAR courts will have exclusive criminal jurisdiction over crimes committed by SAR residents within the SAR and SAR residents will have no duty to abide by PRC criminal law.

The high degree of autonomy of Hong Kong's criminal law may be qualified in two aspects, however. First, all SAR legislation must be consistent with the Basic Law. The National People's Congress (NPC) and its Standing Committee retain the power to review and

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[13] H.L. Fu and Richard Cullen, *Media Law in the PRC* (Hong Kong: Asia Law and Practice, 1997).

[14] H.L. Fu (1997), "The Relevance of Chinese Criminal Law to Hong Kong and its Residents" 27 *Hong Kong Law Journal* 229.

[15] Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997).

repeal any SAR legislation which is deemed to contravene the Basic Law. The veto power may not need to be actually used, the threat itself may be sufficient to achieve compliance from the SAR legislature. Second, less visible and invisible political influence could be easily deployed by the central government in Beijing to affect SAR laws. Beijing's control over the Chief Executive (CE), other government officials and lawmakers are substantial. The unholy alliance between the most powerful communists in Beijing and the richest capitalists in Hong Kong provides the most effective channel for Beijing to influence Hong Kong's political and legal development.

The Tiananmen crackdown in 1989 provoked a confidence crisis in Hong Kong. In response, the British adopted several measures to speed up Hong Kong's democratic process. Two events are especially important. The first is the enactment of the Hong Kong Bill of Rights Ordinance (BOR) in 1991 which incorporated the ICCPR. Section 3(2) of the BOR provides that: "All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed". Hong Kong's Letters Patent (Hong Kong's pre-transition "constitution") was amended in 1991, to provide that no law of Hong Kong could be made which restricted the rights and freedom enjoyed in Hong Kong which was inconsistent with the ICCPR as applied to Hong Kong.

The incorporation of ICCPR into Hong Kong's domestic law has had the most profound impact on criminal law and led to its constitutionalization. BOR challenges were frequently raised in criminal litigation and the courts have struck down several legislative provisions for BOR inconsistency. At the same time, the government reviewed certain legislative provisions, including the controversial provisions in the Public Order Ordinance (PO) and Societies Ordinance (SO), which were likely to be inconsistent with the BOR, and proposed their repeal. In doing so, the government was able to satisfy those arguing for the wide application of the BOR and at the same time, preemptively limit the remit of Article 23.

The second event was the LegCo electoral reforms in 1991 and

in 1995 which increased numbers of members of LegCo subject to popular election. The 1995 election, in particular, was unique in Hong Kong's history. It was the most democratic election ever held in Hong Kong and returned a large group of liberal oriented legislators (many of them from the Democratic Party). Popularly elected, these legislators had a stronger sense of representation and tended to be highly critical of both the colonial and Chinese governments. They were instrumental in compelling the government to legislate on Article 23 according to democratic values and international human rights standards. It was within this context of political development in Hong Kong that the colonial government amended and enacted laws to comply with Article 23, to prevent Article 23 from becoming Beijing's instrument for political suppression and to alleviate wide-spread fear. These moves also were designed to prevent the post-colonial legislature from casting too wide a net against political dissidents in Hong Kong.

Crimes (Amendment) (No.2) Bill 1996

In anticipation that the first SAR LegCo would take action after the first of July 1997 to respond to Article 23 by legislating specifically to control sedition, subversion, treason and secession, Chris Patten, the last Governor in Hong Kong, with the support of the Democratic Party, tabled a Crimes (Amendment) (No.2) Bill on 21 November 1996, in which two new offenses, secession and subversion, were introduced, and certain changes were made to the existing offenses of treason and sedition.[16]

[16] Subversion was defined as: "A person who (a) does any unlawful act with the intention of overthrowing the Government of the United Kingdom by force; (b) incites or conspires with any other person to overthrow the Government of the United kingdom by force; or (c) attempts to overthrow the Government of the United Kingdom by force, is guilty of subversion and liable on conviction on indictment to imprisonment for 10 years". Secession was defined as: "A person who incites or conspires with any other person or who attempts to supplant by force the lawful authority of the Government of the United Kingdom in respect of any part of the United Kingdom or in respect of any British dependent territory is guilty of secession and liable on conviction on indictment to imprisonment for 10 years".

China had, in principle, refused to discuss matters relating to Article 23 offenses and made it clear that laws relating to Article 23 offenses should be dealt with by the post-hand-over legislature. China's response to the tabling of the Bill was swift and firm. On 28 November 1996, the Hong Kong and Macau Affairs Office under the PRC State Council announced that any attempt by the colonial government to legislate any Article 23 offenses would infringe the authority of the post-hand-over legislature and consequently violate the Basic Law.

The issue was hotly debated in Hong Kong, and the concern was aggravated by the high profile prosecutions of Wei Jingsheng and Wang Dan on the mainland in 1996 for the offence of subverting the government under a loosely defined criminal law provision. The Secretary for Security, Peter Lai Hing-ling, explained that the government tabled the Bill because the community was deeply concerned about the remit of Article 23 offenses. From a strategic point of view, it was hoped that by legislating explicitly to prohibit subversion in Hong Kong prior to 1 July 1997, the future SAR government will be prevented from enacting an anti-subversion law which could be framed in more harsh terms.[17] If there was a consensus in Hong Kong about the Amendment, the future government would find it more difficult to scrap the law and replace it with a more restrictive one.[18]

This was precisely the reason why the Chinese government was against the proposal. On the surface, the central issue appeared to be a legal one: whether the colonial government had the authority to legislate as it proposed to do, and whether the legislative power of the post hand-over legislature would be infringed. But the political motive was very clear. Hong Kong Affairs Adviser, Elsie Leung Oi-sie, who later becomes the first Secretary for Justice in the SAR, was quoted as saying that the amendment "gave a clearer definition of what constituted sedition and treason, something which

[17] Chris Yeung, "Pattern move sure to anger China", *South China Morning Post (SCMP)*, 27 November 1996.

[18] Ibid.

was not usually clearly spelled out in Chinese Law".[19] Some Preparatory Committee (PC) members, including Professor Lau Siu-kai, indicated that Beijing wanted a tougher law passed by the post-hand-over Provisional legislature. It was thought that it would increase uncertainty in the community if the Bill was passed because the law would definitely be interpreted as contrary to the Basic Law and be nullified.[20]

When the Bill went to the Bills Committee stage, the focus was soon shifted from the new offenses of subversion and secession to the existing offenses of treason and sedition. It became evident after the consultation process that, despite the liberal nature of the draft subversion definition, the legal profession and other deputations did not support the creation of the offenses of subversion and secession, for three reasons. First, although the Basic Law does obligate the Hong Kong government to prohibit subversion and secession, it does not necessarily demand the government to create new statutory offenses; second, public order is sufficiently safeguarded by other measurers and offenses; and finally, the two new offenses could be covered by the existing offence of treason.[21]

When the Bill emerged from the Bills Committee, it had a very different content. The two new offenses, which had caused much controversy, were removed. Instead, the offence of treason was further watered down. The other substantial change proposed by the administration and accepted by the Bills Committee was the amendment in relation to sedition. Under the Bill, no offence of sedition would be committed unless the accused had the intention to cause violence or create public disorder or a public disturbance.

The Bill was passed, 23 to 20, on 24 June 1997 after long debate. Governor Chris Patten signed the Bill on 26 June 1997, 4 days before the transition. He was quoted as saying that although he

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[19] Linda Choy, "Beijing will want to take tough line", *SCMP*, 27 November 1996.

[20] Ronald Arculli, "Subversion bill just political posturing", *SCMP*, 5 December 1996.

[21] Legislative Council, Report of the Bills Committee on the Crimes (Amendment) (No.2) Bill 1996 (Paper for the House Committee Meeting on 13 June 1997), Ref.: CB2/BC/6/96.

preferred the original government draft, the law as passed was fine. He hoped that the government Bill could provide a very helpful benchmark and the future SAR will find it a useful base for any subsequent legislation that they need on subversion and secession.[22] A spokesman for the Chief Executive-designate's (CED) office reiterated the position that the post-colonial SAR government should enact laws to comply with Article 23, and "we will not accept these amendments which are themselves confusing, and we will take necessary action to rectify the situation."[23] But the Ordinance has not been effective. Section 1 of the Ordinance provides that it shall come into operation on a day to be appointed by the notice in the Gazette. No such notice has been given.

Official Secrets Ordinance

Despite the strong PRC opposition to the subversion law amendment, the Chinese Government didn't object to the previous LegCo localizing laws to comply with Article 23 of the Basic Law, if their content was satisfactory.

The UK Official Secrets Act 1911 was part of Hong Kong law and the Official Secrets Act 1989 was extended to Hong Kong in 1992. By early 1994, local legislators started to criticize the colonial government for failing to address the issue of localizing the UK secrets legislation. The government was afraid of consulting the Chinese government on this sensitive issue.[24] As the UK laws would lapse on 1 July 1997, there would be a legal vacuum if the law were not localized before the transition. While it was not ideal to have a legal vacuum, localizing the UK law also ran the risk that China might simply scrap any reform in 1997 fearing a British conspiracy.[25]

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[22] *SCMP*, 25 June 1997, p.1.

[23] Ibid.

[24] Michael Smith, "Post-1997 secrets law still up in the air", *Hong Kong Standard*, 1 March 1994.

[25] Mary Blinks, "State Secrecy Dilemma", *Eastern Express*, 4 August 1994.

Xi Yang's case was instrumental in pressing the colonial government to provide a clear definition of state secrets. The strong and spectacular public reaction to the prosecution and conviction of Xi Yang forced the colonial government to act. It started its secret negotiation with the Chinese government through the Joint Liaison Group (JLG) on the possibility of localizing the secrets laws, and an agreement was soon reached. In September 1994, the Beijing-appointed think tank, a sub-group of the Preliminary Working Committee (PWC) renounced its stance on the issue and recommended the localization before 1997. It stated explicitly that the localization of UK legislation would not conflict with the Basic Law. Clearly, the Chinese Government also had an interest in showing that the Chinese secrets law, which is largely an executive prerogative, would not be replicated in Hong Kong. The unexpected Chinese decision was welcome by civil libertarian legislators, including James To and Christine Loh.[26] By the middle of 1995, the colonial government formally reached an agreement with the JLG on the secrets law and was ready to take a Bill to LegCo.[27]

On 18 December 1996, the government tabled the Official Secrets Bill in LegCo to localize the UK Official Secrets Acts. With certain revisions on espionage because of possible ICCPR inconsistency and other minor technical changes, the Bill contained the UK Official Secrets Acts 1911, 1920, 1939 and 1989. The Chinese government consented to the localization. According to Peter Lai:

> (The Bill) is based largely on current legislative practices, grounded in the Common Law system, and was agreed by the Chinese side of the Joint Liaison Group after detailed discussions, so that its provisions will provide a familiar and reasonable foundation for the future. This is a particularly important consideration when we bear in mind that the Bill

[26] M.Y. Sung and Moria Holden, "PWC call to adopt Britain's secrets act", *Hong Kong Standard*, 7 September 1994.

[27] Wing Kay Po, "Localization of secrets act planned", *Eastern Express*, 25 July 1995.

> encompasses that part of the provisions in Article 23 of the Basic Law, that the Hong Kong Administrative Region shall enact laws on its own to prohibit, inter alia, the theft of state secrets.[28]

Once the Bill was tabled, the legislators and other interest groups, including the Bar Association and the Hong Kong Journalists' Association, (re)discovered its draconian aspect and called for its liberalization. They all insisted upon the liberalization of the UK secrets laws, instead of a mere localization. The main concern was that the part on espionage, which was enacted in 1911 in UK, was out dated, that it didn't provide for a proper defence, and that it did not provide the harm test for the unlawful disclosure of certain official secrets. If the Bill was passed as it was, it would suppress press freedom and the free flow of information after the transition.

The liberal legislators were determined to dilute the law by adding the defence of public interest and prior publications in the Bill. They succeeded at the Bills Committee stage.

China's consent was however conditional. The condition was that the UK legislation would be localized in its totality, subject to minor technical changes. Hong Kong's legislature had no right to change its substance. A deputy Director of the New China News Agency (NCNA), Zheng Guoxong, asserted that the secrets law was localized according to a Sino-UK agreement, which was binding on the colonial government and its LegCo.[29]

The Chinese Government was in alliance with the colonial government in this instance. The colonial government was equally firm in rejecting any proposed change. It stressed the fact that the Bill was a piece of localizing legislation, and it was not necessary or appropriate to conduct a comprehensive review of the official secrets legislation. At the resumption of second reading of the Bill, Peter Lai said:

> The Administration therefore do not support any of the proposals now before us which seek to amend the Bill substantially. If the

[28] *Hong Kong Hansard*, 4 June 1997, p. 101.

[29] *Ta Kung Pao*, 14 December 1996.

key Committee Stage amendments are adopted, it will throw open the future of the whole Bill, and there is no guarantee that such a bill will survive the change of sovereignty. The law in this sensitive area will then be left in a state of uncertainty, and the future Special Administrative Region legislature may then be left with no option but to reopen the whole issue soon after July 1, 1997.[30]

The alliance between Chinese government and the colonial administration angered many liberal legislators. As Christine Loh said at the resumption of second reading: "We are told that Britain and China had agreed to the Bill, and as such, any amendment to it runs the risk of the post-1997 government throwing it out. If we were to adopt this attitude, then we might as well not have formed a Bills Committee at all".[31] The liberal legislators urged the members to accept their amendment. Otherwise, "the enactment of this Bill will be an unmitigated disaster for the people of Hong Kong",[32] and "we all are going to live in the dark age"[33] Despite the efforts, the Bill was passed, 24 to 21, without amendment.

Connection with Foreign Political Organizations

The power to veto Hong Kong legislation can be forcefully deployed if a law is passed without the prior consent of the Chinese Government. In February 1997, the NPC Standing Committee passed a Decision[34] to repeal laws which it said were in contravention of the Basic Law, including major amendments to the

[30] *Hong Kong Hansard*, 4 June 1997, p.103.

[31] *Hong Kong Hansard*, 4 June 1997, p.92.

[32] Margaret Ng, *Hong Kong Hansard*, 4 June 1997, p.204.

[33] James To, *Hong Kong Hansard*, 4 June 1997.

[34] Decision of the Standing Committee of the National people's Congress on the Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted by the Standing Committee of the Eighth National People's Congress at its 24th session on 23 February 1997).

SO since 17 July 1992, and PO since 27 July 1995.

Even in a case in which a dramatic decision was taken, there was room for negotiation and compromise, because the Decision, to a large extent, reflected the antagonism between the Patten's government and Beijing which developed before the transition. Records have to be corrected if only for the sake of honour and face. But how the repealed laws were to be redrafted after the transition was a totally different matter.

The SO has a long history in Hong Kong and it was liberalized in 1992. Before the 1992 amendment, within 14 days of its establishment, a society had to apply to the Registrar (the Commissioner of Police) for registration or for exemption from registration. The Registrar may register or refuse to register according to the enumerated grounds. The operation of a society became unlawful if its registration was rejected or not exempted. One of the grounds for rejection was where the society was a branch of or was affiliated to or was connected with any organization or group of a political nature established outside Hong Kong.[35]

The registration requirement was replaced by a notification requirement after the 1992 amendment, and accordingly, a society only needed to notify the Societies Officer (again the Commissioner of Police). The discretion of the Societies Officer was also limited. He could only recommend to the Secretary for Security that the operation of the society be prohibited if he "reasonably believes that the operation or continued operation of a society may be prejudicial to the security of Hong Kong or to public safety or public order." Foreign political connections *per se* were not a ground for prohibition.

Chinese government claimed that the post-1992 SO was inconsistent with the Basic Law and that it would reinstate the old

[35] Since the beginning of the century, Hong Kong laws prohibited foreign political interference in local political process. Since 1949 when the SO was amended, the purpose had been to prevent the Nationalists and the Communists from operating in Hong Kong in the open. Steve Tsang, *Government and Politics* (Hong Kong: The University of Hong Kong Press, 1995), at p.283. Apart from being used to manage and control the political process closely, the SO is developed to target organised crime, a long-standing serious problem in Hong Kong and in China.

law after the transition, on the ground, among others, that the deletion of the foreign political connection test as a ground violated Article 23 of the Basic Law. Indeed, China was fundamentally suspicious of any "rush" to "liberalize" local laws. After Mr Tung Chee-hwa became the CED, he immediately announced what was commonly referred to as the "reinstatement" of "draconian laws". On 9 April 1997, the CED's office published a consultation document proposing the amendment of the PO and SO. Based upon the pre-1992 versions, the proposed amendment re-introduces the registration system and prohibits foreign political influence on local political organizations. The CED's Office argued that the amendments were based on three principles: to strike a proper balance between civil liberties and social order; to uphold the Basic Law and the ICCPR as they apply to Hong Kong; and to guard against interference by foreign political forces in local political activities.[36]

Many local political and community organizations were firmly against the amendments. The colonial government criticized these amendments as being "sadly predictable and a retrograde step." It was also pointed out that they could hardly be reconciled with the provisions of the Basic Law.[37] The international community also cautioned against the danger of the amendments. The US government called upon China to re-examine the amendments and President Bill Clinton reiterated that Hong Kong's freedom and civil liberties were crucial to the territory's economic success.

What were the draconian aspects of the amendments? Under the amendments, political organizations or bodies in Hong Kong were prohibited from establishing ties with foreign political organizations. Establishing ties included soliciting or accepting financial assistance or loans of any kind, directly or indirectly, from aliens and foreign

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[36] Chief Executive-Designate's Office, *Civil Liberties and Social order Consultation Document* (Hong Kong: Chief Executive's Office, Hong Kong Special Administrative Region, People's Republic of China, 1997).

[37] Hong Kong Government, *Commentary on Civil Liberties and Social Order Consultation Document* (Hong Kong Government, April, 1997). "Government's response to human rights recommendations", 19 January 1997. <*http://www.info.gov.hk*>.

organizations or direct or indirect affiliation with foreign political organizations. Political bodies were referred to as those societies which directly participate in political activities relating to government institutions and comment on public affairs as their main objective.

The main criticism against the amendments was that the proposed restrictions were more than necessary and that they went far beyond the pre-1992 version of the SO. Even some members of the Provisional LegCo, who were hand-picked by Beijing thought terms like "political body" and "connection" too vague.[38] The colonial government doubted whether mere acceptance of foreign assistance from an alien or foreign political organization, or the mere affiliation with a foreign political organization could be valid grounds under the ICCPR for refusing registration of a group.

It was argued that "alien" should not include Hong Kong permanent residents, wherever they reside. Thus donations from permanent residents of Hong Kong who are living in other countries should be allowed. Article 26 of the Basic Law allows permanent residents (wherever they reside) of the Hong Kong SAR to vote and stand for election, there is no reason for the SAR government to forbid them to make donations to the SAR.

The net of prohibition was cast too wide in prohibiting political contributions. The Chairperson of the Hong Kong Bar Association, Audrey Eu, argued that "...the proposed amendments go much further than Article 23 in seeking to catch foreign influence, and not just foreign political ties, and in seeking to catch aliens and foreign organizations. The entire focus of Article 23 is shifted".[39] Many of the non-government organizations in Hong Kong also raised similar concerns, for their major financial sources are often from foreign donations.[40] The Democratic Party and the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China, two leading political bodies not favoured by the Chinese government

[38] Sharon Cheung, "Rule on overseas links 'too vague'", *SCMP*, 9 April 1997.
[39] Audrey Eu, "The flaws in this exercise", *SCMP*, 30 April 1997.
[40] "Genuine Fears", *SCMP*, 21 April 1997.

claimed they were the true victims of the proposed amendment.[41]

Another issue taken up by the critics was whether donations from Taiwan and mainland China would be prohibited. According to the consultation document, the word "alien", "foreign organization" and "foreign political organization" also applied to Taiwan. It is clear that either connection with or donation from Taiwan would be prohibited, the reason, as explained by the post-handover Executive Councillor, Henry Tang, being that Taiwan has a history of influencing foreign government through political funding.[42] But CED strongly insisted that donations from mainland China would not be prohibited, as Hong Kong and China are one country and Hong Kong is part of China.

Political donations from the mainland would be acceptable, while those from other countries (including Taiwan) would not. It was said that Democrats and other civil libertarians were concerned that the Mainland government would be encouraged to influence Hong King politics. Mr Tung responded that since China is the sovereign entity to which Hong Kong belongs, if China wants to influence Hong Kong, it has many other channels, apart from political donations.[43] When Mr Tung was challenged on the basis that he had donated fund to the Conservative Party in the UK, his Secretary of Justice designate, Elsie Leung defended him by explaining that at the time when Tung made the donation, Hong Kong was still a Colony of Britain, and the donation was thus lawful.

The term "foreign political organization" was also criticized as being potentially too broad, as human rights groups, environmental groups and labour unions are political organizations in the broadest sense.[44] Human rights advocacy would be hampered if the amendment was adopted. In addition to these worries, religious groups also expressed their concerns. They wondered whether they, too, would be regarded as political. The Secretary for Justice

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[41] No Kwai-yan and Sharon Cheung, "Pattern lashes out at 'bid to tighten screw'", *SCMP*, 10 April 1997.

[42] Genevieve Ku, "Curbs on Taiwan donations defended", *SCMP*, 16 April 1997.

[43] "Tung considered to relax political donation", *Apple Daily*, 18 April 1997.

[44] Eu, Supra note 39.

designate responded firmly that they would not be regarded as political.

When the Societies (Amendment) Bill 1997 was tabled, it was revised in response to some of the criticisms raised during the consultation process. The term "alien" was removed and the term "foreign organization" was revised to "foreign political organization". "Political body" is defined as "a political party or an organization that pinports to be a political party; or an organization whose principal function or main objective is to promote or prepare a candidate for an election". The "draconian law" has been re-enacted but its remit is limited and clearly defined. As a result, the prohibition on foreign donations will only restrict direct or indirect financial contributions from foreign political organizations or political organizations from Taiwan. The revisions represent a substantial change from the Consultation Document.

National Security

Considerable restrictions have been imposed in Hong Kong on assembly and demonstration, partially due to its nature as a crowded and bustling place and partially due to the experience of riots and disturbances experienced in the 1960s. Control of public order was achieved through a licensing system, according to which, the holding of a public procession required a licence to be issued by the Commissioner of Police, An application for a process may be rejected on the ground that "the applicant or any person associated with the application has, in relation to any past public gathering, acted contrary to the Public Order Ordinance or any other law or any condition of a licence issued under the Public Order Ordinance or any other law".[45]

Due to the impact of the enactment of the BOR, the licensing system was regarded by the colonial administration as inconsistent with the rights protected under the BOR. In 1995, the LegCo

[45] Section 13(6)(a), Public Order (Amendment) Ordinance 1980.

amended the PO in compliance with the BOR. The most important change was to replace the original licensing system with a "notification system".[46]

After the NPC Standing Committee decided to repeal the 1995 amendment, the Provisional LegCo announced the restoration of the pre-1995 version. However, in addition to the resurrection of the licensing system, more grounds were provided in the PO for the Commissioner of Police to reject an application for a procession or demonstration. In particular, it introduced concept of national security as a ground for rejection. Under the new PO, an application may be rejected, "if the Commissioner of Police considers the holding of the procession is not in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others". The term national security was not defined.

The term national security had never been used in Hong Kong legislation. But an equivalent term "security for Hong Kong" appeared in the repealed section 2 of the SO 1992, as one of the grounds to assess whether a society should be allowed in Hong Kong. That section provided that:

> Where the Societies Officer reasonably believes that the operation or continued operation of a society may be prejudicial to the security of Hong Kong or to public safety or public order, the Societies Officer shall notify the Secretary for Security who may by order published in the Gazette prohibit the operation of the society.

In the second reading, the Secretary for Security explained the meaning of "security for Hong Kong":

So far as the expression "security" is concerned the Bill enables

[46] Under Section 13(1) of the Public Order (Amendment) Ordinance 1995, "a public procession may take place if (a) the Commissioner of Police is notified of the intention to hold a public procession; (b) the holding of the procession is not prohibited by the Commissioner of Police; and (c) the statutory conditions are complied with ...".

> the operation of a society to be prohibited on the ground that it is prejudicial to the security of Hong Kong. It is, I believe, well established and accepted that the similar term "national security" can refer only to the survival or well-being of the nation as a whole. Similarly, the expression "security in Hong Kong" can refer only to the survival or well-being of the territory as a whole and not simply to the well-being of sectional or lesser interests, or to the interests or well-being of the Government. I can therefore state that the power to prohibit societies will be exercised only in situations where there are strong reasons for believing that the operation or continued operation of a society prejudices either the security of Hong Kong, in the restrictive sense to which I have referred, or constitutes a real and serious threat to public safety or public order in the territory, for example, because it promotes terrorism.[47]

The introduction of the term "security" into the statute book in Hong Kong as a ground to ban a society didn't cause much controversy either in the LegCo or amongst the public at that time. There could be three reasons for the general acquiescence. First, the ground was limited to "security for Hong Kong" instead of the more general term national security. Hong Kong's fear has been a potential threat from the mainland.

Second, the government gave the term a restrictive interpretation and closely related to the use of force, violence and terrorism. Finally, the clause was introduced as part of a law reform package which was regarded as imposing limitations on the government in compliance with the requirement of the BOR.

When the SAR government made it known that it would introduce the term national security in amending PO, there was a wide-spread outcry, even though the term has been adopted in the BOR, and the ICCPR, as a possible ground for restricting rights. It was seen as part of the effort of the central government to curtail human rights in Hong Kong. Moreover, it restricted the rights of the

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[47] *Hong Kong Hansard* 15 July 1992, pp. 4281-4282.

Hong Kong people principally to protect the interests of a Communist regime on the mainland. Political dissidents are punished in the mainland based on an ill-defined ground of endangering "national security".[48] As a member in the Preparatory Committee, Kenneth Chow, said it is possible the term may be interpreted according to Chinese law.[49]

The spokesman for the Alliance in Support of the Patriotic Democratic Movement in China said that: "National security is like a knife hanging over the head of the Alliance. The order of execution lies with Mr Tung".[50] As speeches may amount to a threat to national security, local political groups would be put in grave danger. The spokes person for the Amnesty International, Robyn Kilpatrick, reminded the CED that "national security should not become a reason to restrict freedom".[51]

To alleviate fear in the community, the CED insisted that the term "national security" would be defined in accordance with the common law and within the international covenant,[52] and in any event its use would be confined to upholding territorial integrity, national independence and sovereignty of China. Besides, he also said that the term will be interpreted by the courts instead of any executive body.[53]

The colonial government took a forward position. It pointed out that the term national security is used in ICCPR in a different context. It needs further definition in any domestic legislation.[54] Otherwise, it may render it "normal" to employ emergency powers. The Hong Kong Bar Association also expressed the view that since issues concerning "national security" are within the scope of Article

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[48] H.L. Fu and Cullen (1996), "National Security Law in China", 34 *Columbia Journal of Transnational Law* 449.

[49] May Sin-mi Hon, "Proposals seen as more restrictive", *SCMP*, 11 April 1997.

[50] Joice Pang, "National Security 'Knife hanging over us'", *SCMP*, 16 May 1997.

[51] Quoted at Political Desk, "National Security notion must go, say legal experts", *SCMP*, 2 May 1997.

[52] Hon, supra note 49.

[53] Chris Yeung and Kwai-yan No, "National Security terms attacked by A-G", *SCMP*, 19 April 1997.

[54] Hon, supra note 49.

23 of the Basic Law, the government should only legislate on this issue after more careful and systematic consideration, as there is no comprehensive and authoritative common law definition of "national security", as admitted by the former Attorney General, Mr. Mathews. The Attorney General further pointed out, supported by legal academics in Hong Kong, that, national security should be limited to the situation when territorial integrity was threatened by force.[55] As such, the proposed amendment in the public order context would be inconsistent with the Basic Law and international human rights covenants. Accordingly, it should not have been introduced.[56]

Three weeks of consultations resulted in certain changes being made in relation to the use of the term national security. The term is defined as "the safeguarding of the territorial integrity and the independence of the People's Republic of China". In addition, the government announced Administrative Guidelines on National Security on 18 July 1997 (the Guidelines). According to a SAR Government spokesman, the Commissioner of Police has the authority to apply the concept of national security according to the ICCPR, and the ground of national security would be invoked only if the Commissioner believes it is reasonable and necessary to do so.

The Guidelines say that "in coming to his decision, the Commissioner of Police will take into consideration, among other things, whether or not the declared purpose of the notified public meeting or procession is to advocate separation from the People's Republic of China including advocacy of the independence of Taiwan or Tibet".

This is a very narrow concept of national security in the sense that it includes only the territorial integrity of China. But the Guidelines are too broad in the sense that they ban any such advocacy even if no violence or use of force is advocated. In addition, it politicizes the police force in Hong Kong by asking the Commissioner of Police to determine what constitutes a national security threat to China - a highly political concept. It is not certain

[55] Sharon Cheung, "Move to pin down 'national security'", *SCMP*, 11 April 1997.

[56] Political Desk, supra note 51.

whether or not and how the courts in the SAR may review such police decisions. As the former Attorney General stated, it would be the executive which would primarily decide what constitutes a national security concern, and any judicial review of such a decision "would be extremely limited".[57]

Keeping the common law tradition[58]

The Basic Law requires the SAR government to enact laws to prohibit those activities listed in Article 23. The Basic Law does not require the SAR government to create the respective offenses unknown to Hong Kong's common law tradition. The Hong Kong SAR government could comply with the demands in Article 23 without disturbing the existing criminal offenses in Hong Kong. The sensitive offenses of secession and subversion are not formally part of Hong Kong's criminal law. They are part of the mainland criminal law but are vaguely defined and frequently abused. It would help maintain Hong Kong's autonomy for these offenses not be added to Hong Kong's criminal law.

Subversion is not an offence known to common law. The conventional argument was that if we cannot get assistance from the common law, then what we have in Article 23 is essentially a Chinese concept. To our horror we may have to look at the criminal law in PRC for guidance in order to comply with Article 23. In the PRC we find that the offence of subversion is one of a number of State Security offenses which is not defined with any clarity. But this does not have to be the answer. A more careful look at the

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[57] Mr. Matthews quoted Lord Diplock's well known passage in *Council of Civil Service Unions v Minister of Civil Service* [1985] A.C. 374 at 412: "National Security is the responsibility of the executive government; what action is needed to protect its interests is ... a matter on which those or whom the responsibility rests and not the courts of justice ... It is per excellence a non-justiciable question. The judicial process is totally of problems which it involves".

[58] This section is based upon H.L. Fu and Richard Cullen, "Subversion and Article 23 of the Basic Law", unpublished mono.

common law provides an alternative argument which complies with the common law tradition of Hong Kong and satisfies the requirements of Article 23 of the Basic Law. The conventional understanding is in error because it takes extremist views about subversion in both common law jurisdictions and in the PRC.

Although the precise offence of subversion is not an offence at common law, it is misleading to say that subversive activity is not criminal at common law. This is because sedition, blasphemy and treason provide crucial sanctions for subversive activities. Not every subversive activity is criminalized by law, but many are and all serious subversive activities are criminalized. While subversion is not an offence in itself in common law jurisdictions, subversive activities can readily be punished by invoking the existing criminal law. Legislatures and the courts have used the term subversion in the course of describing certain criminal offenses. Blasphemy has been described as subversive language against Christianity, seditious libel as subversive language against the government, and treason might be committed as a result of a subversive act against the state.[59]

The interesting question is, when the state strikes first to prevent subversive activities by using the criminal law, what kind of criminal offenses are used, given that subversion is an offence unknown to common law. In the US, the criminal charge frequently used is conspiring to advocate or teach the forcible overthrow of the US government.[60] In the UK, the most recent prosecutions included the use of Disaffection Act 1934 in *Arrowsmith*[61] and the Official Secrets Act 1911 in *Chandler v DPP*.[62] Subversive activities are criminalized if they are genuine threats to national security. The distinguishing

[59] Under s.24AA of the Australian Crimes Act 1914 (as amended) (Cm), It is treachery to "do any act or thing with intent–

i. to overthrow the constitution of the Commonwealth by revolution or sabotage; or

ii. to overthrow by force or violence the established Government of the Commonwealth, of a state or of a proclaimed country".

[60] Athan Theocharis (1984), "FBI Surveillance: Past and Present", 69 *Cornell Law Review* 883. See also Paul Chevigny (1984), "Politics and the Law in the Control of Local Surveillance", 69 *Cornell Law Review* 786.

[61] [1975] QB 678.

[62] [1962] 3 All ER 142.

features in China is that Chinese criminal law directly punishes subversive activities, or more precisely, subversion is an offence known to Chinese criminal law.

It follows that Hong Kong does not have to create a new offence of subversion. Subversive activities in Hong Kong can be punished by the existing laws where those activities pass the necessary threshold of criminal liability. The effort made by the colonial administration to create the offence of subversion (described above) may have been unnecessary. Hong Kong has an impressive or frightening, depending on your standpoint, array of laws and processes designed to monitor and control subversive activities, which readily satisfy the requirement spelled out in Article 23 for laws to prohibit subversion. The same argument could be easily made to the offence of secession, which, while not a criminal offence known to common law, is easily punishable under the offence of treason.

Democratic conception of Article 23

While the state is the protector of its nationals, it could be more dangerous and destructive of the freedom of its citizens than the enemy from outside. At one level, you can enforce the obedience of citizens through repression of individual rights and by maintaining well-patrolled borders. But respect of human rights is another imperative element of any true concern with national security. Politically oppressed people are released from the obligation to obey, a dictatorship does not command any legitimacy.

National security can certainly be reconciled with respect for human rights. They should not be traded off in a balancing exercise, where the promotion of one means the derogation of the other. As Lustgarten and Leigh point out "political and civil rights are major constituents of national security itself".[63] They call for "a democratic conception of national security", which purports to "strip the concept

[63] Lustgarten and Leigh, supra note 2, p.5.

down to its irreducible minimum": political violence, and foreign political influence, invasion and unlawful disclosure of narrowly defined official secrets.[64] Under this de minimis approach, "the government should be required to present a comprehensive elaboration of the character of the danger, its degree of seriousness and immediacy, the interests and range of persons affected, the reasonable anticipated duration of the proposed measure, and a credible explanation of why it is likely to achieve results beyond the capacity of existing repressive powers".[65]

This minimalist approach, by limiting the scope of national security, draws a clear distinction between legitimate dissent and a national security threat: a distinction which recognizes the difference "between, on the one hand, those who wish to overthrow the democratic system or use violence or threats of violence to violate democratic procedures and, on the other hand, those who seek radical change in the social, economic or political arrangements within the democratic system".[66] A principal milestone of any real democracy is the recognition of the right to dissent, to criticise the government and to uphold and disseminate unpopular opinions. Friedman argues that the problem of distinguishing subversion from legitimate dissent only faces a democratic state.[67] A dictatorial or authoritarian state allows no political dissent, difference means deviance and has to be suppressed.

Under a democratic concept of Article 23, the government's power to control or suppress lawful protest and dissent is clearly and legally excluded. There are many examples of legislative efforts in this regard. In New Zealand, the New Zealand Security Intelligence Service Act 1969 prohibits the Security Intelligence Service from instituting surveillance of any person or class of persons by reason of his or their involvement in lawful protest or dissent. The function of CSIS, Canada's secret service, is limited by the CSIS Act "to

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[64] Ibid., p.35.

[65] Ibid., pp.14-15.

[66] Lee, Hanks and Morabito, supra note 2, p.17.

[67] Martin L. Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell, 1984).

what is strictly necessary for the purpose of protecting the security of Canada and that the security intelligence agency should not investigate any person or group solely on the basis of that person's or group's participation in lawful advocacy, protest or dissent".[68] In the same manner, the Australian Security Intelligence Organization (ASIO) Act provides that: "This Act shall not limit the right of a person to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organization shall be construed accordingly".[69]

The main concern is whether the offenses are stripped to their "irreducible minimum". The democratic concept of national security requires that Article 23 laws be clearly defined and certain. One of the cardinal principles of criminal law is that it must be predictable and able to be relied upon. The Hong Kong government has enacted laws in relation to Article 23 with relative clarity and certainty. But examples of vagueness and uncertainty abound. The Official Secrets Ordinance is unduly broad in widening the scope of official secrets and unduly narrow in excluding the defence of prior notice and public interest. The proposed offence of secession was not defined at all and remained to be the vaguest definition. The net it cast was wide enough to catch advocacy of the independence of Taiwan and Tibet, with or without the use of (or threatened use of) violence or force.

Finally, a democratic concept of Article 23 mandates a vigorous judicial review of any executive power exercised in relation to Article 23, including without limitation the classification of official

[68] Section 2, CSIS Act.

[69] Section 17A, ASIO Act. The right to dissent should be protected legally and practically. That would require vigorous judicial and legislative control over the government agencies involved. Given the broad scope of the national security concept and the preventative notion of national security agencies, encroachment into lawful dissent would be difficult to prevent. See, for example, H.P. Lee (1989), "The Australian Security Intelligence Organisation – New mechanism for Accountability", 38 *International and Comparative Law Quarterly* 890; Murray Rankin (1986), "National Security: Information, Accountability, and the Canadian Security Intelligence Service", 36 *University of Toronto Law Journal* 249; and John Wadham (1994), "The Intelligence Services Act 1994", 57 *Modern Law Review* 916.

secrets and the definition of national security. The judiciary in Hong Kong, perhaps more than anywhere else in the common law world, is burdened with an especially difficult task of protecting civil liberties. In an executive-led political system where the authority of the legislature is restrained and the legislator is only partly directly elected, the judiciary needs to be more creative and innovative to balance executive power. The court should have the right to decide whether a matter is a genuine national security concern, whether a document is properly classified as containing official secrets and above all, whether a law enacted by the SAR legislature is consistent with the Basic Law. It is not certain how the courts will respond to this legal challenge. But given the active role played by the court in repealing laws which admit inconsistency with the BOR, the courts may continue to play the role in deciding the constitutional validity of Hong Kong laws.

The Limits of Article 23

The role of law in protecting civil liberties is limited. A well defined legal test cannot guarantee freedom. Many existing political offenses, however vaguely defined, may be buried in the statute books and be rarely, if ever, used. Legal repression was well known in South Africa during the years of apartheid, sedition charges became a useful instrument used against black political activists. But sedition law in the Roman-Dutch tradition, as was the case in South Africa, was more libertarian than seditious libel in English common law.[70] However, a better drafted law did not produce a fair system. As Lobban argues, "what appeared to be an ancient offence well honed by authority could be vague in its application, very much depending on a judge's interpretation of intention and facts. In this uneasy space between legitimate protest and sedition, colour would

[70] In the Roman-Dutch tradition, it is sedition only if words are uttered for an unlawful purpose in defiance of authority, although violence is not a necessary element.

obviously play a major part".[71]

It would be misleading to think that a 'well honed' law could only be abused in a regime such as South Africa during the apartheid era. The "clear and present danger" test invented by the US Supreme Court, has been considered to be the most rigid test for sedition. However, according to its critics, as strict as it is, the test protected only "puny anonymities,"[72] and the "incredible fatuities of the lunatic fringe."[73] It depends on the judge's subjective interpretation.[74]

Political tradition is more important in protecting civil liberties. Mere penal provisions can never be effective in creating and sustaining an oppressive national security regime. A repressive political culture is essential. When the Rosenburgs were convicted and executed, the courts in the US simply joined in the witch-hunting against communists under McCarthyism.[75] Australian seditious libel prosecutions against Communist sympathizers similarly reflected the popular hysteria of the early stages of the Cold War.[76] Liberal law cannot protect civil liberties in a repressive age.

Repressive laws are difficult to pass if there is a free and rigorous press, a multi-party system, genuine political participation, and above all, a political culture supportive of civil liberties. Repressive

[71] Michael Lobban, White Man's Justice: South African Political Trials in the Black Consciousness Era (Oxford: Clarendon Press, 1996), pp.228-229.

[72] Abrams v US 250 US 624 (1919).

[73] David A J Richards, "Free Speech as Toleration" in W J Waluchow (ed.), *Free Expression: Essay in Law and Philosophy* (Oxford: Clarendon Press, 1994).

[74] Judith Schenck Koffer and Bennett L. Gershman (1984), "The New Seditious Libel" 69 *Cornell Law Review* 816.

[75] Marjorie Carber and Rebecca L:. Walkowitz (eds.), *Secret Agents: The Rosenberg Case, McCarthyism, and Fifties American* (New York: Routledge, 1995); Mary S. McAulife (1976), "Liberals and the Communist Control Act of 1954", 63 *Journal of American History* 351; Michael E. Parrish (1977), "Cold War Justice: The Supreme Court and the Rosenbergs", 82 *The American Historical Review* 805; and Allen Weinstein (1972), "The Symbolism of Subversion: Notes on Some Cold War Icons" 6 *Journal of American Studies* 165.

[76] Laurence W. Maher (1992), "The Use and Abuse of Sedition", 14 *Sydney Law Review* 287; "Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case", 16 *Adelaide Law Review* 1. See also, Cain, *The Origins of Political Surveillance in Australia* (Sydney: Angus and Robertson, 1983): Ricketson (1976), "Liberal Law in a Repressive Age: Communism and the Law 1920-1950", 3 *Monash Law Review* 101.

laws, even if passed, will not be easily enforceable, where there is a restrained government and a truly independent judiciary. The court may interpret the law in favour of civil liberties. The application of Official Secrets Act in Canada illustrates the point. Judges may give repressive laws a liberal interpretation to such an extent that they defeat the original purpose of the law. A purposive and innovative interpretation of law can expand the scope of political freedom. Even when a judge faithfully applies the repressive law, arguing that it is for the Parliament to make the law, a jury may still nullify the law.[77]

Hong Kong has had many repressive laws on its statute book, but political prosecution has been rare. Hong Kong's political and legal tradition has determined the extent to which civil liberties are enjoyed in the society. Today numbers of draconian provisions have more or less been restored. But the prophecy of political prosecution and the erosion of civil liberties have yet to be fulfilled. Political activism continues, political protest becomes even louder, and self-censorship, which was practised before the transition, appears to be diminishing. The continuity of political liberalism in Hong Kong is a product of the persistent pursuit of democracy and rule of law by the people of Hong Kong. A developing political culture in the mainland which is less conducive to political prosecution is allowing space for this process to persist.

Conclusion

The transition is complete, Hong Kong is now part of the People's Republic of China. Under the Basic Law, Hong Kong is meant to enjoy a high degree of autonomy within the Chinese state. With regard to criminal law, Hong Kong is an independent jurisdiction seeking a new identity. It was, and continues to be, at the margins of the common law world. But it is also at the periphery of China's legal system. The challenge for the Hong Kong SAR is to maintain Hong Kong's self-identity and, at the same time, situates

[77] Jury revolted in the case of *Ponting* [1985] *Crim LR* 318.

Hong Kong within the broad political context of the new sovereign.

The Central Government has already had an effect on the development of Hong Kong criminal law, using Basic Law as a justification when it sees fit. Some of the interference is direct and express, such as NPC's pronouncement of the illegality of the sections of PO and SO. Other interference is more subtle and indirect, such as the threat of using the NPC Standing Committee veto power in relation to the proposed Crimes (Amendment) Bill and the Official Secrets Ordinance.

The Central Government is most concerned about Article 23 laws in the SAR. Hong Kong has exerted profound economic and cultural influences on the mainland. One can anticipate its political influence will tend to grow in the future. Hong Kong's democratic processes could serve as catalysts for further political reform in the mainland.[78] Beijing has a vested interest in watching closely how the sensitive political activities listed in Article 23 of the Basic Law are regulated in Hong Kong, and in ensuring that local political activism in Hong Kong will not be directed at the Communist regime in the mainland.

But Beijing's political concerns are bound to be vague, extensive and broad. It is inconceivable that they could be entertained in Hong Kong to their full extent (assuming that their full extent can be known). Many of their concerns are nationalistic and formalistic and relate to issues arising from the antagonism between the UK and China during the final years of transition. Even in these circumstances, Beijing showed it could compromise and was prepared to accommodate local interests in certain cases. As Tsang notes: "a more assertive population, particularly if ably represented and organized by an adept political leadership, could have secured for themselves a greater say in local politics and perhaps even in the pace or extent of political reform."[79]

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[78] Michael Yahuda, "a Catalyst for Change? The Hong Kong Special Administrative Region and Chinese Politics" in Beatrice Leung and Joseph Cheng (eds.), *Hong Kong SAR: In pursuit of domestic and international order* (Hong Kong: The Chinese University of Hong Kong Press, 1997).

[79] Steve Tsang, "Realignment of Power: The Politics of Transition and Reform in Hong Kong" in Li Pang-kwong (ed.), *Political Order and Power Transition in Hong Kong* (Hong Kong: The Chinese University Press, 1997).

Now the emotionally turbulent time is over. Under the new sovereign, the SAR government can now directly represent Hong Kong in negotiations with the Central Government. Before the transition, Beijing had rejected the "three legged stool" and refused to enter into negotiations with the Hong Kong government, thus undermining the potential impact of the Hong Kong government and its people who have been increasingly politically active. The British Government is now removed from the power equation in Hong Kong politics. The SAR government is now clearly the legitimate representative of Hong Kong. As such it can actively engage in political negotiations with the Central Government. Fighting for local interests is politically and legally justifiable in China. The Basic Law (not to mention Hong Kong's tradition and material and human resources) provides firm ground for the active assertiveness of Hong Kong's interests. With the further development of a more tolerant political system and political culture in the mainland, there is less likelihood that the Central Government will interfere with Hong Kong's legislative process actively and directly as we have observed. The next step would be to entrench the SAR/Central governments' relationship to protect the SAR's high degree of autonomy within the Chinese Constitution.