

THE PRINCIPLE OF MINIMUM LEGISLATION FOR IMPLEMENTING ARTICLE 23 OF THE BASIC LAW

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The Government of the Hong Kong Special Administrative Region published the Consultation Document on the Proposals to Implement Article 23 of the Basic Law in September 2002. Article 23 of the Basic Law requires the Hong Kong Government to enact laws on its own to prohibit any act of treason, secession, sedition or subversion against the Central People's Government, or the theft of state secrets. The Hong Kong Government must also prohibit foreign political organisations or bodies from conducting political activities in Hong Kong and prohibit political organisations or bodies in Hong Kong from establishing ties with foreign political organisations or bodies. A list of proposals is made in the consultation document on how to implement Article 23. This article analyses those proposals on the basis of the principle of minimum legislation. Though many of the proposals are acceptable, some are not necessary or could be refined according to the principle.

Introduction

Five years after the handover of Hong Kong to China, the Government of the Hong Kong Special Administrative Region (the Hong Kong Government) has finally started the legislative process to implement Article 23 of the Basic Law. According to Article 23, the Hong Kong Government must enact laws on its own to prohibit a range of activities that include any act of treason, secession, sedition or subversion against the Central People's Government (CPG) and the theft of state secrets. The Government must also prohibit foreign political organisations or bodies from conducting political activities in Hong Kong and prohibit Hong Kong's political organisations or bodies from establishing ties with foreign political organisations or bodies.

The *Proposals to Implement Article 23 of the Basic Law: Consultation Document*¹ (the consultation document) was published in late September 2002. In the consultation document, the Hong Kong Government puts forward a list of proposals on how to implement Article 23 and seeks public opinion on those proposals. The historical background and guiding principles are

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¹ Available at <http://www.info.gov.hk/sb/eng/report/reportre.pdf> (hereinafter the consultation document).

provided in the consultation document, together with detailed suggestions and justifications. This article analyses those proposals according to the principle of minimum legislation. Justification is provided for why such a principle should be followed. The desirability of the proposals included in the consultation document is discussed in light of this principle.

Relevant Considerations

In the consultation document, the Government lists several guiding principles behind the proposals. The guiding principles are relevant to how Article 23 should be implemented, but they should not be treated as exhaustive, especially if the matter is approached from the wider political and constitutional context of Hong Kong.

The Hong Kong Government considers that it is very important to fulfil the requirements of the Basic Law.² That is, Hong Kong has a constitutional duty to comply with Article 23, which requires that the Hong Kong Government enact laws. No one doubts that there is such a constitutional duty. However, is a new law necessary to fulfil this duty?³ Can existing laws be amended? Some people go even further, and question whether it is necessary to legislate at all to fulfil this constitutional duty.⁴

The Hong Kong Government also recognises that there are other requirements under the Basic Law that it must fulfil. The consultation document mentions Chapter III of the Basic Law, which guarantees the fundamental rights and duties of Hong Kong residents. Articles 27 and 39 of the Basic Law especially are referred to in the consultation document. Article 27 guarantees freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to

² Consultation document, para 1.10. The Hong Kong Government might have chosen to initiate the legislation at this particular time because of pressure from the PRC Government. After waiting for five years, the PRC Government might be reluctant to wait any longer. See the view of Qiao Xiaoyang, Deputy Secretary of the Legislative Affairs Commission, National People's Congress Standing Committee, reported in *Wenweibo*, 27 Sept 2002.

³ Before the Hong Kong Government published the consultation document, the Hong Kong Bar Association held the view that existing laws of Hong Kong are sufficient to prohibit the acts that are listed in Article 23 and that there was clearly no need to create new offences or enact additional laws. See the *Position Paper of the Hong Kong Bar Association on Legislation under Article 23 of the Basic Law*, available at <http://www.hkba.org/whatsnew/submission-position-papers/index.html>. The Hong Kong Human Rights Monitor shares this view. See Hong Kong Human Rights Monitor, "Ticking Time Bomb? Article 23, Security Law, and Human Rights in Hong Kong", available at <http://www.hkhrm.org.hk/english/reports/docs/art23.rtf>.

⁴ Before the Hong Kong Government published the consultation document, this was the position of two local political parties or organisations in Hong Kong: the Democratic Party, see http://www.dphk.org/e_site/press_release/020913a.htm and the Frontier, see http://www.frontier.org.hk/main_c/statements/statement_pdf/BasicLaw_23_Suggestion_020923.pdf.

form and join trade unions and to strike. However, it has already been observed⁵ that the Basic Law itself cannot sufficiently protect the human rights of Hong Kong residents. Fortunately, the Hong Kong Government also finds that it has a duty to comply with Article 39, which states that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong will remain in force and be implemented through the laws of Hong Kong. Therefore, in enacting any laws under Article 23, there is a co-existing constitutional duty to comply with the international standards on the protection of the fundamental rights that are enjoyed by Hong Kong people. However, the commitment of the Hong Kong Government to comply with the ICCPR may not be as strong as that of the Court of Final Appeal (CFA).⁶ The Hong Kong Government is still not prepared to state clearly that the ICCPR enjoys constitutional status in Hong Kong.⁷ This might have affected how the Government understands the requirements under the ICCPR. One may take a more expansive view on the protection of human rights, or a more restrictive view, though both may still be compatible with the ICCPR.⁸

Another guiding principle that is adopted by the Hong Kong Government is to provide adequate protection to the State's essential interests, namely: sovereignty, territorial integrity, unity and national security. Again, not many people will deny the legitimacy of these interests. However, they are all abstract concepts and it is not clear how much and how far such interests should be protected. A major concern is that very often if these interests are to be protected, some fundamental rights and freedoms will inevitably have to be sacrificed or at least restricted. Many will put this as a question of balancing conflicting values: the fundamental rights of the people against the interests of

⁵ Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd edn, 1999), Ch 10.

⁶ See *HKSAR v Ng Kung-siu and Another* [1999] 3 HKLRD 907, 920, where the CFA stated that "the ICCPR is incorporated into the Basic Law by its Article 39".

⁷ Consultation document, para 1.2. However, the CFA might have softened its position in two recent decisions. *Shum Kwok Sher v HKSAR*, unrep., FACJ No 1 of 2002, 10 July 2002 and *Gurung Kesh Bahadur v Director of Immigration*, unrep., FACV No 17 of 2001, 30 July 2002. The CFA now states that "the Hong Kong Bill of Rights Ordinance provides for the incorporation into the laws of Hong Kong of the provisions of the ICCPR as applied to Hong Kong. The incorporated provisions are contained in the Hong Kong Bill of Rights ...". It is not clear whether the ICCPR still enjoys a constitutional status through Art 39 of the Basic Law or a more indirect and non-constitutional legal status through incorporation into the laws of Hong Kong by the Hong Kong Bill of Rights Ordinance in accordance with Art 39.

⁸ This is reflected in a note in the consultation document which states that the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, the two sets of Principles that provide more expansive protection of human rights, are not yet widely accepted. This may indicate that the Hong Kong Government does not want to adopt a more expansive view of human rights protection.

the State. It appears from the consultation document that the Hong Kong Government is determined to avoid any infringement of the fundamental rights and freedoms that are protected under the Basic Law and the ICCPR. In such conflicts, the Government will try to find an arrangement so that the limitation on the rights will not constitute an infringement on those rights, but will be within justifiable restrictions. Even so, that may not be sufficient. As stated above, there will not be one solution or one point of balance alone in this exercise. A question that demands more careful study is how to choose from the available options, which may all be compatible with the ICCPR. The ICCPR only sets the lowest requirement on the protection of human rights. Is the attainment of the lowest requirement in Hong Kong acceptable, or can more be expected? The Government has not explicitly indicated its preference.

The last guiding principle that is adopted by the Hong Kong Government is to ensure that the laws enacted are clearly and tightly defined to avoid uncertainty. Legal certainty is one of the criteria of the rule of law.⁹ Moreover, under human rights jurisprudence, all laws that impose limitations on individual rights have to be clear enough to make the scope of constraint that will be imposed on the people reasonably foreseeable.¹⁰ The issue of legal certainty is relevant when considering whether to legislate under Article 23, whether by way of amendment to the existing laws or through the creation of new offences. If no law is to be enacted, then the problem of the legal uncertainty that is created by existing laws is encountered. Under existing laws, the offences of treason are totally inappropriate, especially because they cover many offences against the sovereign as a natural person. Even though the Interpretation and General Clauses Ordinance (Cap 1) provides a formula of legal adoption to allow such provisions to be maintained after the transfer of sovereignty,¹¹ there is still too much uncertainty in the scope and objectives of those provisions.¹² Failing to legislate to clarify some of the difficult and vague concepts under the existing laws may threaten the rule of law.

Other than these expressly stated guiding principles, the Hong Kong Government has been influenced by further considerations. In many places in the consultation document, the Government refers to the practices of other countries in how they deal with crimes against the State. It seems that the

⁹ Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton, Vic: Melbourne University Press, 1988), Ch 1.

¹⁰ See *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, p 271, para 49.

¹¹ Section 6 of the Reunification Ordinance is amended the Interpretation and General Clauses Ordinance (Cap 1) by adding a new schedule (Schedule 8) concerning construction after the transfer of sovereignty of words and expressions in laws previously in force in Hong Kong.

¹² Another uncertainty is whether the existing treason offence in the Crimes Ordinance can cover secession. It has been argued that s 2(1)(c)(i) can be interpreted to cover the secession offence, but this is doubted. (See the consultation document, para 3.2 and fn 23.)

Hong Kong Government would like to give an impression that all of the proposals in the consultation document are consistent with the practices of many States, especially some Western liberal States.¹³ Although the proposals may be similar to what can be found in many Western liberal States, specific laws cannot be considered outside of their political and constitutional context. Some major differences exist between Hong Kong and those States. First, Hong Kong does not have a democratic system of elections. The Western liberal States have such democratic systems to provide additional balancing forces to ensure that their governments do not use their powers in suppressive ways. The experience in many Asian States shows that these laws can easily be abused in States with no democracy.

Second, the Hong Kong Government is not accountable to the people of Hong Kong through the electoral system or other constitutional systems (eg there are no effective checks and balances between the legislature and the executive authorities).¹⁴ Third, the human rights protection system is not well entrenched and does not provide constitutionally secure guarantees to the people of Hong Kong.¹⁵ It is very naïve in a constitutional sense if no attention is given to the relevant constitutional practices in Western liberal States. Many Western liberal countries have allowed such practices to lapse into disuse and have not prosecuted any person under the relevant laws

¹³ See reference to the Law Reform Commission of Canada, *Working Paper 49: Crimes Against the State* (1986) in the consultation document, paras 1.4 and 2.16. House of Lords decisions are also quoted (paras 2.16 and 6.24) and a working paper of the English Law Commission, *Working Paper No 72: Codification of the Criminal Law: Treason, Sedition and Allied Offence* (1977) is used to support a proposal (para 2.16). The Australian Committee on Review of Commonwealth Criminal Law, *Fifth Interim Report* (1991) is cited (para 2.16). A decision of the Supreme Court of Canada is used to illustrate a point (para 3.2) and reference is also made to the relevant provisions in the French Penal Code (para 3.3), the German Penal Code (paras 3.3 and 5.2), the Canadian Criminal Code (para 5.2) and the Australian Crimes Act (para 5.2).

¹⁴ See Benny Tai, "The Development of Constitutionalism in Hong Kong", in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999).

¹⁵ In *HKSAR v Ng Kung Siu and Another* (n 6 above), the CFA assumed that the ICCPR enjoys a constitutional status through Art 39 of the Basic Law without any discussion on the legal effect of the 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 Art 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 Feb 1997. This decision repealed ss 2(3), 3 and 4 of the Hong Kong Bill of Rights Ordinance (Cap 383). It shows clearly that the PRC Government wanted to take away any superior legal status enjoyed by the Hong Kong Bill of Rights Ordinance (if any) and the ICCPR before the transfer of sovereignty. How this decision will affect the constitutional status of the ICCPR and the Hong Kong Bill of Rights Ordinance now that sovereignty has been transferred is unclear. There is always a possibility that the Standing Committee of the National People's Congress may give an interpretation of Article 39 itself and clarify the meaning and impact of this decision. If the Standing Committee was to make an interpretation that this decision reflects its intention of not agreeing to a constitutional status for ICCPR, the decision of the CFA on the status of the ICCPR would have to be overruled.

for a long time.¹⁶ There may be all kinds of reasons for not repealing these laws,¹⁷ but in any serious study constitutional conventions or practices are as important as, or even more important than, the text of the statutes.¹⁸

One other implied principle that is applied by the Hong Kong Government in the consultation document is the use of common law rules and concepts to support the proposals.¹⁹ Indeed, this is the correct approach, as Hong Kong has a common law legal system.²⁰ However, all common law rules and concepts should not be indiscriminately accepted. The background and evolution of each of the rules and concepts must be understood. Like statutory offences, these common law rules and concepts also have to be read within their specific political and constitutional context.²¹

Retaining the existing laws as far as possible seems to be another hidden principle, although the Government does explain why the laws would be retained in some of the proposals. Extreme care must be taken when deciding to retain certain existing laws, especially if those laws were borrowed from a very different constitutional order or were made hundreds of years ago. All such laws must be scrutinised according to the specific political and constitutional context of Hong Kong.

There are other relevant considerations in the evaluation of the proposals to implement Article 23 of the Basic Law. They are drawn from the specific political and constitutional context of Hong Kong, and it seems that they might not have been fully considered by the Government. These additional considerations interact with the express and implied guiding principles adopted by the Government. They provide a more complete picture to guide the strategy to implement Article 23 in Hong Kong.

One such consideration is the imminence of legislating to implement Article 23. Even if it is accepted that there is a duty to legislate under Article 23, now may not be the time to do it. One argument is that there is no immediate

¹⁶ Hualing Fu, "The National Security Factor: Putting Article 23 of the Basic Law in Perspective", in Steve Tsang (ed), *Judicial Independence and Rule of Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2001).

¹⁷ The Law Reform Commission of Canada has argued that the existing laws on crimes against the State in Canada are out of date, and that they should be updated to adjust to changes in the underlying values of these offences. See *Working Paper 49: Crimes Against the State* (n 13 above).

¹⁸ Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 5th edn, 1964), Ch III.

¹⁹ See the consultation document, paras 2.7, 2.10, 2.13, 2.16, 3.11, 3.124.11, 4.21 and 6.24.

²⁰ Arts 8, 81 and 84 of the Basic Law.

²¹ Consultation document, para 2.7. The Hong Kong Government proposes to keep the term "levying war" in the treason offence and seems to support the continued application of the common law meaning of that phrase in the new legislation. However, that phrase originated in an English statute that was enacted in the 14th century and English courts developed the common law meaning in the 19th century. The Law Reform Commission of Canada in its *Working Paper 49: Crimes Against the State* (n 13 above) argued that the phrase has an old-fashioned ring to it and is used in an unfamiliar sense.

threat to the State's interests in Hong Kong and therefore there is no need to legislate now. However, others emphasise the urgency of the matter and that there should be no more delay.²² This consideration is relevant not only to the decision about whether any enactment is needed; it is also relevant when considering the extent of legislation under Article 23. If there is no imminent danger that national security will be threatened in Hong Kong, then it is more difficult to justify more stringent legal measures. Those who put forward such proposals carry a much heavier burden of justification.

Another consideration is the nature of all the so-called crimes against the State. Inevitably, the definitions of such crimes have to be phrased in a manner that is comparatively vague and tends to be restrictive of individual rights and freedoms. The scope of the powers that are enjoyed by the government is usually wide and the powers are also subject to fewer checks because the government may need the powers to deal with emergency situations or situations that threaten the continuation of the existing constitutional order. Political controversies arise whenever these laws have to be put into use. There is always a concern that the government will be tempted to use the wide powers that are granted under this kind of law to suppress political opposition, and history shows that this concern is not without grounds. The same concern exists in Hong Kong.²³ Recently, three local political activists were prosecuted for helping to organise an unauthorised assembly. The assembly was unauthorised because the activists failed to comply with the requirement under the Public Order Ordinance²⁴ to obtain a notice of no objection from the Commissioner of Police before organising a procession. Since the transfer of sovereignty in 1997, there have been 527 public processions organised without such a notice of no objection.²⁵ The judge stated that this was a case that was political in nature.²⁶ His comment could be understood as a criticism of the Government for prosecuting the organisers of the

²² See Qiao Xiaoyang (n 2 above).

²³ One example from the 1950s is *Fei Yi-ming v R* (1952) 36 HKLR 133. The proprietor and publisher, the printer and the editor of *Ta Kung Pao* were prosecuted and convicted for publishing a seditious publication concerning the colonial government. The publication included a report of a commentary by *Peking's People's Daily* accusing the colonial government of prosecuting some Chinese inhabitants who were active union members. Since the enactment of the Public Order Ordinance (Cap 245) in 1967, the colonial government had used the various public order offences to suppress political opposition, especially during the 1970s. There was some relaxation in the 1980s and the early 1990s, but since the Hong Kong Special Administrative Region was established in 1997 it seems that the Government has reactivated the use of public law offences to deal with political opposition.

²⁴ Section 13, Public Order Ordinance.

²⁵ *Mingpao*, 26 Nov 2002 and the homepage of the Hong Kong Police, available at <http://www.info.gov.hk/police/aa-home/english/statistics/statsframe.htm>.

²⁶ Unrep., Kowloon City Magistrates' Courts No 8456 of 2002. See also "Activists are found guilty over illegal rally", *South China Morning Post*, 26 Nov 2002.

public procession for political reasons, because they were prosecuted while the organisers in all the other “unlawful” public processions were not. However, the judge still had to convict the accused because they had breached the law. This case clearly shows that laws could be used by the Hong Kong Government to put pressure on or even suppress political opposition. If public order laws can be so used, the Hong Kong Government can manipulate the laws prohibiting crimes against the State even more easily because these laws will give the Government even more discretionary powers.²⁷

A related consideration is how much trust the people of Hong Kong have in the Government. All of the laws made to implement Article 23 will have to be implemented and enforced. The question is how the Hong Kong Government will treat the laws. Will it only take these laws as dead letter laws, as do many Western liberal States? Alternatively, will the Government use the laws widely to suppress all opposition within the territory? From many surveys that have been conducted since the transfer of sovereignty, it seems that the people of Hong Kong are placing less and less trust in the Chief Executive and the Government.²⁸ There is a need to be sensitive to this distrust when formulating any legislative schemes to implement Article 23.

The situation in Hong Kong is further complicated by the fact that the Government is only an autonomous government of a special region of China. There is always a possibility that the Sovereign in Beijing might interfere in these matters, especially as they all involve the State’s interests. Hong Kong enjoys a high degree of autonomy under the Basic Law,²⁹ but this autonomy has been described as only “autonomy under supervision”.³⁰ The provisions of the Basic Law reflect the potential supervisory role of the CPG in Hong Kong.³¹ The fact that in the last five years the CPG has not used its supervisory powers widely does not mean that it will not do so in the future.³² This is the greatest concern of many Hong Kong people in relation to any new legislation. They fear that the Hong Kong Government might in the future be subject to pressure from Beijing, and have to enforce the laws in a suppressive manner.

²⁷ Two other political activists, Lau San Ching and To Kwan Hang, were recently arrested on a similar ground for organising a public procession without obtaining a notice of no objection in accordance with s 13 of the Public Order Ordinance.

²⁸ See the opinion survey that was conducted by the Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong. The score that reflected the level of trust the people of Hong Kong have in the Chief Executive dropped from 61.8 in July 1997 to 46.3 in September 2002. 50 is the passing score (see <http://www.cuhk.edu.hk/ipro/020923.htm>).

²⁹ Arts 2 and 12 of the Basic Law.

³⁰ Zhang Youyu, “The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression” (1988) 2 *Journal of Chinese Law* 5.

³¹ Examples are Arts 17, 18, 158 and 159 of the Basic Law.

³² Benny Y. T. Tai, “Chapter One of Hong Kong’s New Constitution: Constitutional Positioning and Repositioning”, in Ming Chan and Alvin Y. So (ed), *Crisis and Transformation in China’s Hong Kong* (London: M. E. Sharpe, 2002).

This concern must be taken into consideration in devising any legislative scheme to implement Article 23.

One method to maintain the autonomy of Hong Kong is to ensure the separation of the legal systems of Hong Kong and the Mainland. The CPG's decision not to legislate directly for Hong Kong on Article 23 offences shows that the autonomy enjoyed by Hong Kong is built on the separation of the two legal systems. If that is the intention of the Basic Law, then it should be respected in fulfilling the constitutional duty to legislate under Article 23.

Judicial independence and judicial autonomy are also relevant considerations in the wider political and constitutional context. Some people argue that even though the laws enacted under Article 23 will inevitably be vague and subject to different interpretations, and could be very suppressive, Hong Kong still has an independent judiciary which will apply those laws independently and fairly. Some people may rely on this to assert that people need not worry about the enactment of the laws, as they will be implemented fairly by the courts of Hong Kong. It may be correct that judicial independence is constitutionally guaranteed³³ and practised,³⁴ but the fact cannot be ignored that judicial independence in Hong Kong must still be exercised within the constraints of Hong Kong's judicial autonomy. The judicial autonomy of the courts of Hong Kong has already been challenged seriously, in particular when the Standing Committee of the National People's Congress re-interpreted the Basic Law in 1999.³⁵

Some of the considerations discussed above conflict with one another. Trying to balance them may not be an easy task. Nonetheless, the weighting to be given to each of the considerations must be determined before the proposals in the consultation document can be implemented.

The Principle of Minimum Legislation

The principle of minimal legislation is the result of an attempt to balance all of the considerations mentioned above. It is based on a weighting scale that has been developed by taking into account what are submitted to be the true

³³ Arts 2, 19 and 85 of the Basic Law.

³⁴ Benny Y. T. Tai, "The Development of Constitutionalism in Hong Kong", in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999).

³⁵ See Tai (n 32 above). There is one more consideration from the Basic Law and it is the exclusion of the jurisdiction of HKSAR courts over acts of state under Art 19 of the Basic Law. The exact scope and manner of the operation of this rule is not clear, as it depends on how Hong Kong courts, the Hong Kong Government and the Central Authorities will interpret and apply the concept of an "act of state". See Benny Y. T. Tai, "The Jurisdiction of the Courts of the Hong Kong Special Administrative Region", in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998).

ends of constitutional government.³⁶ As will be illustrated, this principle borrows heavily from liberal constitutionalism, the rule of law and human rights laws, but one would find that this principle in some circumstances might set standards that are even higher than its sources. However, the principle put forward is not intended to be a general and comprehensive constitutional doctrine. Rather, it is proposed as a means of dealing with particular types of legislative measures³⁷ concerning crimes against the State, within the special political and constitutional context of Hong Kong.³⁸

In simple terms, the principle of minimum legislation is to legislate as little as possible in fulfilling Hong Kong's constitutional duty to implement Article 23. The minimising requirement of the principle has several elements. First, the option that fulfils the constitutional duty under Article 23 with the least legislative measures should be adopted. Second, if there is an option that will impose less restriction on individual rights than another, although both may be compatible with the ICCPR as justifiable restrictions, the one that imposes lesser restrictions should be adopted. Third, if the existing laws are clear enough and are compatible with the protection of individual rights and freedoms as stated in the second sense of the principle of minimum legislation, then there is no need to enact new laws. Fourth, all of the legal terms should be defined as clearly as possible to minimise the discretion granted to the law enforcement agencies. Fifth, the number of legislative authorities that can legislate directly or indirectly for the matters that are covered by Article 23 should be kept to a minimum. In fact, that power should be limited to the legislative authority of Hong Kong alone. Proposals that would allow a legislative authority other than the legislative authority of Hong Kong to enact laws for Hong Kong, even indirectly, should be avoided.

The principle presumes the need to enact new laws to implement Article 23. Much weight is given to legal certainty in the balancing exercise. It is submitted that a clear law is better than a vague law even though the clear law may be more restrictive. This is because a vague law could allow

³⁶ To summarise, the ultimate goal of a constitutional government is to protect the individual rights and freedoms of its population. A constitutional government has the following features. First, the government must only exercise those powers authorised by the constitution and the law in the manner so provided by them. Second, the constitution separates, balances and checks the powers of various branches of government, including the executive, legislative and judicial authorities. Third, the constitution establishes a democratic electoral system by periodically empowering the population to choose representatives to run their government, the leaders of which are accordingly accountable to the people. Fourth, the constitution has an in-built human rights protection system, which interacts with other constitutional arrangements to achieve the ultimate goal of the constitution.

³⁷ The principle may not be applicable to other laws because in appropriate situations we may expect the government to devise more comprehensive legislative schemes of regulation, not only minimum measures. One example is the law on social welfare.

³⁸ There may be other principles more appropriate to guide legislative measures in other constitutional systems. See the law reform papers in England, Canada and Australia referred to in n 13 above.

more threats of abuse. Indeed, the existing laws are so vague that if legislation is not adopted to clarify the concepts, then individual rights may be subject to even more threats.³⁹

It is therefore important for Hong Kong to legislate in regard to Article 23 in order to fulfil its constitutional duty, and to do so is also compatible with the rule of law. That there is no imminent danger in Hong Kong for such legislation⁴⁰ may not be a strong enough argument to outweigh this duty, especially if one takes into consideration the requirement of legal certainty. However, this constitutional duty need not be fulfilled more than is necessary, especially because individual rights and freedoms must not be compromised.

It is good that the Hong Kong Government's proposals recognise the principle that all limitations on individual rights and freedoms must be justifiable restrictions under the ICCPR, but this is not sufficient. One may argue that the Government has already promised that the proposals in the consultation document will be compatible with the ICCPR. According to the ICCPR, any limitation on fundamental rights will be scrutinised according to a well-accepted principle of proportionality, and that would already provide sufficient protection to the human rights of Hong Kong people.⁴¹ The principle of proportionality⁴² does not require the least restriction on a fundamental right, but only that the means used to restrict a right must be proportionate to the legitimate aim justifying that restriction. Laws are not like computer data, which can be 100 per cent accurate, and more than one legal measure can satisfy the requirement of proportionality. While national security is one of the justifiable grounds to restrict human rights, the meaning of national security is not very clear. There may be many available options in limiting a human right that are all proportionate limitations, though some may comparatively impose more restriction and some impose less.⁴³

From the special political and constitutional context of Hong Kong, however, the Hong Kong Government should not be allowed to choose among

³⁹ See p 582 above.

⁴⁰ See p 585 above.

⁴¹ *Handyside v United Kingdom* (1976) 1 EHRR 737 and *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

⁴² See Yash Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights", in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993), p 19.

⁴³ The Hong Kong Government has commissioned a leading human rights lawyer in the United Kingdom, David Pannick QC, to provide an opinion on the compatibility of the proposals in the consultation document with human rights law (see <http://www.legco.gov.hk/yr02-03/english/panels/se/papers/ajlssecb2-375-1e.pdf>). David Pannick held the view that the proposals are consistent with human rights law. In his opinion David Pannick emphasised that there should be a fair balance between the demands of the general interest of the community and the requirements of the protection of individuals' fundamental rights. This fair balance principle is just the principle of proportionality in another form. It is argued that the fair balance principle or the principle of proportionality cannot provide sufficient protection to the rights of Hong Kong people against any law made to implement Art 23.

all these proportionate limitations, but should choose the restriction that imposes the least limitation. There are three reasons for preferring the principle of minimum legislation to the principle of proportionality in determining the justifiable restriction on human rights. First, Hong Kong does not have a firmly entrenched bill of rights.⁴⁴ Second, the Hong Kong courts may adopt a more conservative approach in interpreting the extent of the rights to be enjoyed by Hong Kong people when it is under pressure.⁴⁵ Third, the record of the Hong Kong Government shows that its conception of human rights protection is rather distorted, in that it will only tolerate the rights of the population on the condition that they will not threaten the order of society.⁴⁶ Rights are not considered to be fundamental, but just things to be balanced with many other interests which the Government considers to be important. The Hong Kong Government and the courts of Hong Kong tend to give more weight to these other interests.⁴⁷

There is no argument about the State's interest being given a primary concern, but the question is how far such interests should be protected. Individual rights and freedoms should not be put on the same level as national security. Rights are fundamental⁴⁸ and there must be clear justification before a right can be restricted. National security or all of the State's interests are accordingly given such weight.

Although common law, existing laws and laws in democratic States may provide support for some of the proposals, they must be considered within their specific constitutional and political contexts, which are very different from those in Hong Kong under the new constitutional order and in the new millennium. Much weight has been given to the fact that Hong Kong has an imperfect constitutional system. Hong Kong's undemocratic political system, the weak accountability of the Government to the people of Hong Kong⁴⁹ and the uncertain status of Hong Kong's bill of rights together give Hong Kong people rather weak constitutional protection of their human rights.⁵⁰ Therefore, even if harsher laws can be justified in other jurisdictions, Hong Kong cannot afford similar laws. The powers of the Government under the laws must be subject to stricter limitations than in other countries to minimise any possible chance of abuse. If not, then the rights and freedoms of Hong Kong people will be laid on an even weaker foundation.

⁴⁴ See n 15 above.

⁴⁵ See the analysis of *HKSAR v Ng Kung Siu and Another* (n 6 above) in Tai (n 32 above).

⁴⁶ See the "Chief Executive's statement on 50th Anniversary of Human Rights Declaration", 10 Dec 1998.

⁴⁷ *HKSAR v Ng Kung Siu and Another* (n 6 above).

⁴⁸ *The Sunday Times v United Kingdom* (n 41 above).

⁴⁹ See p 583 above.

⁵⁰ See n 15 above.

Hong Kong's judicial independence may balance people's concerns about potential abuse by the Government.⁵¹ However, the potential threat to Hong Kong's judicial autonomy is still a factor that counts very much against legislation under Article 23. Unfortunately, the power of the Standing Committee of the National People's Congress to interpret the Basic Law is something that cannot be removed from Hong Kong's constitutional system. By separating the two legal systems as far as possible, Hong Kong may be able to minimise interference from Beijing.

As one can see, the justification for the principle of minimum legislation is the practical⁵² and contextualised⁵³ considerations in Hong Kong. Clear discrepancies can be found in the Hong Kong constitutional system from the ideal of a constitutional government. To ensure that the fundamental rights of Hong Kong people can still be sufficiently protected, the standard and strategy that should be adopted in this legislative exercise to implement Article 23 must be adjusted accordingly. People may disagree with the weighting that is given to each of the considerations,⁵⁴ but it is submitted that the principle of minimum legislation is built on rational grounds.

⁵¹ See p 587 above.

⁵² The principle is developed on the basis of a practical consideration that there is nothing one can do in Hong Kong to prevent the Hong Kong Government from legislating Art 23 as it dominates the Legislative Council. It may not be very worthwhile at this stage to continue to be entangled in the issue of whether laws need to be legislated to implement Art 23. What is more constructive is to convince the Hong Kong Government to adopt the more expansive view of human rights protection in this legislative exercise. However, one has to be careful in developing one's arguments. Even if the Hong Kong Government would like to accept a less stringent suggestion in principle, it still needs to justify its acceptance of the suggestion. The Hong Kong Government has to be accountable to the Central Authorities on this matter. Therefore, arguments for a suggestion have to be made in a way that will provide justification for the Hong Kong Government for accepting it. The principle of minimum legislation, especially the first element (legislating just to the extent to satisfy the minimum requirements of Art 23) can at least be presented to be less political and controversial than directly asserting the expansive requirements of human rights or bluntly showing one's distrust of the Hong Kong Government and the Central Authorities.

⁵³ The principle of minimum legislation allows the Hong Kong Government to consider the matters from a wider political and constitutional context. The consideration of how to regain the trust of the Hong Kong people is missed in the consultation document. Hong Kong is currently experiencing economic difficulties. Regaining the trust of the Hong Kong people will be very important to the Government in the coming five years. Whether the Government can smoothly carry out its policies to bring economic prosperity back to Hong Kong depends on whether it has the trust and support of its people. If the Government adopts the principle of minimum legislation to guide its legislation to implement Art 23, this comparatively neutral and less controversial principle should be able to satisfy the Central Authorities as well as regain the trust of the Hong Kong people.

⁵⁴ In the enactment of the United Nations (Anti-Terrorism Measures) Ordinance, the Secretary for Security had adopted a similar "minimalist approach" and agreed that any increase in enforcement powers must be strictly in accordance with the need to ensure public safety. See the speech of the Secretary for Security in the second reading of the bill, available at <http://www.legco.gov.hk/yr01-02/english/counmtg/hansard/cm0417ti-translate-e.pdf>. However, the question of what a government official considers to be minimum may not be the same as what other citizens consider to be minimum.

Application of the Principle

In this section, the proposals in the Government's consultation document are examined as to their compatibility with the principle of minimum legislation.

Treason

Treason is a concept that involves the betrayal of one's country in collaboration with an external enemy threatening the existing constitutional order.⁵⁵ The Hong Kong Government proposes⁵⁶ that all the offences against the person of the sovereign or head of state under the existing laws⁵⁷ should be deleted. The offences are inherited from the colonial constitutional order, under which the sovereign was the head of state, ie the Queen of the United Kingdom. However, under the new constitutional order, the sovereign is no longer the head of state, ie the President of the People's Republic of China. It is no longer appropriate to provide special protection to the head of state as a person. The deletion of the offences is compatible with the principle of minimum legislation because the provisions are not essential components of an offence of treason.

The consultation document suggests that a person commits treason if he or she levies war by joining forces with a foreigner with the intent to overthrow the PRC Government, compels the PRC Government by force or constraint to change its policies or measures, puts any force or constraint upon the PRC Government or intimidates or overawes the PRC Government. The consultation document suggests that the common law meaning of levying war should be applied; this includes a riot or insurrection involving a considerable number of people for some general public purpose, but does not include an uprising for a limited, local or private purpose.⁵⁸ One difference with the existing legal provision⁵⁹ is that in the new provision the person must join forces with a foreigner in levying war. The Hong Kong Government has studied laws of the Mainland and overseas jurisdictions and found that treason usually involves the betrayal of one's country in collaboration with an external enemy. On that basis, it is proposed that "joining forces with a foreigner" be added. In the proposal concerning treason by instigating a foreigner to invade the country, the consultation document defines a foreigner as armed forces which are under the direction and control of a foreign government or which are not based in the PRC.⁶⁰ Presumably, this definition

⁵⁵ Consultation document, paras 2.4 and 2.5.

⁵⁶ *Ibid.*, para 2.6.

⁵⁷ Sections 2(1)(a), 2(1)(b) and 5, Crimes Ordinance (Cap 200).

⁵⁸ Consultation document, para 2.7.

⁵⁹ Section 2(1)(c), Crimes Ordinance.

⁶⁰ Consultation document, para 2.9.

should also be applicable to treason by levying war. Hence, the person must be joining forces with an armed force outside the PRC and not merely joining forces with an individual foreigner.

Another difference in the proposed offence is that the act of levying war must be accompanied by one of four specific intentions, while the existing laws are not clear as to what intention the person must have to commit treason (other than the intention to dispose the sovereign). By rephrasing the wording of the existing laws, the intention element is clarified.

At first sight, the proposal is compatible with the principle of minimum legislation. Common law concepts are used to define legal terms, experiences in other jurisdictions, especially in democratic States, are considered and legal requirements are clarified. However, the phrase "levying war" originated in an English statute that was enacted in the 14th century⁶¹ and the common law meaning was developed by English courts in the 19th century.⁶² It has been argued that the phrase has an old-fashioned ring to it and is used in an unfamiliar sense.⁶³ By adding the requirement that the person must levy war by joining forces with a foreigner, the common law meaning may not cover situations of internal disorder. To clarify the phrase and avoid doubt, a suggestion made by the Canadian Law Reform Commission to change "levying war" to "engaging in war" could be adopted.⁶⁴

The proposal includes four kinds of intention, at least one of which must accompany the act of levying war in order for an act to be seen as treason. The first, which is similar to existing laws, is the intent to overthrow the PRC Government.⁶⁵ The wording of the other three intentions are all borrowed from existing laws, but they have been adapted to read as intentions rather than as consequences. This change appears to be an attempt by the Government to confine the scope of the existing laws, which is in accord with the principle of minimum legislation. However, the intention to support the criminal act of treason should be further refined. The intention to put any force or constraint upon the PRC Government is inherited from the colonial order, when the sovereign was a natural person. It seems unnatural that force or constraint can be put upon a government. As argued, all offences linked with the sovereign as a person should be deleted, and so this intention should also be deleted. Moreover, the intention to intimidate or overawe the PRC Government overlaps with the intention to compel the PRC Government by force or constraint to change its policies or measures. According to the principle of minimum legislation, legislation should be minimised as much

⁶¹ UK Statute of Treasons 1351.

⁶² *R v Dowling* (1848) 7 St Tr (NS) 381, p 460 and *R v Gallagher* (1883) 15 Cox CC 291.

⁶³ The Law Reform Commission of Canada (n 13 above), p 35.

⁶⁴ See *ibid.*, pp 46–47.

⁶⁵ Section 2(1)(c)(i), Crimes Ordinance.

as possible and overlaps should be avoided. Therefore, the remaining two intentions should not be included.

The existing laws⁶⁶ include a treason offence if a person instigates any foreigner to invade the country. It is proposed to keep this offence, but to clarify the meaning of “foreigner”.⁶⁷ Clarifying a legal term is certainly required by the principle of minimum legislation, as this will minimise the discretion of the law enforcement agencies. However, the meaning of “instigate” is not clear. The Chinese translation of “instigate” in the consultation document is “鼓動”, which may have a different or wider meaning than “instigate” in English. The key to instigating something is to bring about or to cause it to happen. However, the Chinese translation may include mere speech or acts of persuasion. Moreover, the causation and consequence factors are not clearly specified in the Chinese translation. A person may make a speech that may cause people to believe that he is inviting foreign forces to invade the country. But if an invasion does not occur as a result of the speech, or if the speech does not cause any invasion by foreign forces, should the person be punished for treason? Unless the factors of causation and consequences are clearly spelt out, the proposal should not be accepted. Even though there are existing laws in this area, the provision would be inconsistent with the principle of minimum legislation because the offence is not clearly defined (at least in the Chinese translation) and too much restriction is imposed on freedom of speech.

The consultation document proposes that the treason offence of assisting any public enemy who is at war with the PRC be retained.⁶⁸ Under common law, a public enemy is someone whose country is in a state of war with one’s country. The state of war may be formally declared or may consist of armed conflicts to which sufficient publicity has been given, ie open hostility. Assistance means any act done to strengthen the enemy or weaken one’s country to resist the enemy.⁶⁹ The consultation document also suggests codifying these common law positions. As the act is generally recognised as a form of treason, the retention and codification of this offence are compatible with the principle of minimum legislation.

The consultation document proposes to codify the common law offence of misprision of treason. It is suggested that if anyone fails to take reasonable steps within a reasonable time to inform the police of the fact that another person has committed treason, they are also liable. This would clearly contravene the principle of minimum legislation. Article 23 only requires Hong Kong to enact laws to prohibit treason. Misprision of treason is not treason

⁶⁶ Section 2(1)(d), Crimes Ordinance.

⁶⁷ Consultation document, para 2.9.

⁶⁸ Section 2(1)(e), Crimes Ordinance.

⁶⁹ Consultation document, para 2.10.

itself. By codifying misprision of treason, people who should not be included in the legislation that will implement Article 23 will be included. In addition, this will place a positive duty on everyone to report any act of treason. This may be against the general principles of criminal law and may infringe individual rights, or at least restrict individual freedoms more than necessary to protect the State from treason. If a person acts in a manner that may in some way assist a person who has committed treason, then he or she could be punishable under the inchoate and accomplice offences of the treason offence.⁷⁰ Therefore, the common law offence of misprision of treason should simply be abolished.

Secession

No existing law in Hong Kong covers secession. Secessionist activities are not universally considered to be an offence. In some countries, there is a constitutional right for a part of the territory to secede from the country.⁷¹ As the consultation document correctly points out, laws on secession in individual countries are determined by the history and special circumstances of the country in question. Many Chinese hold the traditional belief that the unity of China brings prosperity and separation brings disorder. China's historical background may justify the view that secessionist activities should be discouraged. However, Hong Kong is a modern society. Any restrictions on individual freedoms that are justified only by the beliefs of ancestors must be strictly scrutinised.

The consultation document proposes to create a new offence to prohibit acts of secession to fulfil the constitutional duty of Article 23.⁷² However, the description of the offence is very unclear. The consultation document proposes that if a person, by levying war, use of force, threat of force or other unlawful means, withdraws a part of the PRC from its sovereignty or resists the CPG in its exercise of sovereignty over a part of China, he or she will be liable for the secession offence. Unlike treason, the act is not limited to levying war, but the point made above on "levying war" also applies here.⁷³ Mere "use of force" casts the net too wide and contradicts the principle that the Hong Kong Government itself has relied upon. The inclusion of "serious unlawful means" at least shows that a certain degree of seriousness has to be involved. The mere use of force without any requirement as to scale or degree will not be compatible with the principle of minimum legislation. By the same reasoning, the threat of force should also not be accepted. Threat of force could also be rejected on the ground that by its very nature it is different

⁷⁰ *Ibid.*, para 2.13. See p 610 below.

⁷¹ One example is the autonomous arrangement between the Cook Islands and New Zealand.

⁷² Consultation document, para 3.6.

⁷³ See p 592 above.

from the other acts. All the other acts are concrete acts rather than threats to act. If the act rises to the level of an attempt, then the act could be covered by the inchoate or accomplice offences of the substantial offence.⁷⁴ As illustrated in the previous discussion concerning instigation, the criminalisation of a mere threat (without any additional requirement of causation and consequence) arguably casts the net too wide.⁷⁵

The last act is serious unlawful means. The consultation document confines the term to serious violence against a person, serious damage to property, endangering a person's life, creating a serious risk to the health or safety of the public or a section of the public, serious interference with or disruption of an electronic system or serious interference with or disruption of an essential service, facility or system, whether public or private.⁷⁶ The first aspect of serious unlawful means, which requires serious violence against a person, demonstrates the point that has been made that the mere use of force should not be sufficient to attract liability. The other aspects seem to be reasonable, except for serious interference with or disruption of an electronic system. There is no description as to the type of electronic system, unlike the following aspect which emphasises the essential nature of the service, facility or system. This would be more acceptable if the proposal was limited to electronic systems that are linked with or that manage an essential service, facility or system. However, this would then overlap with the following aspect, which covers serious interference with or serious disruption of an essential service, facility or system. A serious interference with or serious disruption of an electronic system that is linked with or manages an essential service, facility or system must also be a serious interference with or disruption of that essential service, facility or system. According to the principle of minimum legislation, this aspect should be removed from the proposal.

It is not clear whether the aspect that covers withdrawing a part of the PRC from its sovereignty or resisting the CPG in its exercise of sovereignty over a part of China concerns the intention, the act or the consequence of the offence. From the context, it is likely that this aspect refers to the intention rather than to the act or the consequence. However, this must be clarified.

Sedition

Although the existing laws include provisions relating to sedition,⁷⁷ they were enacted during colonial rule and adapted to the Hong Kong situation after

⁷⁴ See p 610 below.

⁷⁵ See p 594 above.

⁷⁶ Consultation document, para 3.7.

⁷⁷ Sections 9 to 14, Crimes Ordinance. The common law offence of seditious intention is seriously criticised in that it contravenes the right to free speech. (See Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), pp 152–160.) Although many countries have retained this offence, it is seldom used and numerous refinements and qualifications are added. See n 82 below.

the transfer of sovereignty. The new political and constitutional context is very different, and the Hong Kong Government agrees that the offence has to be redrafted to satisfy at least the guiding principles that are listed in the consultation document. The proposal is that sedition involves inciting others to commit the substantive offences of treason, secession or subversion or to cause violence or public disorder that seriously endangers the stability of the State or Hong Kong.⁷⁸ Incitement is a common law offence⁷⁹ and it means to seek to influence someone else to commit a crime. To be guilty of the offence of incitement, there is no requirement that the person so incited must have carried out the crime. Incitement may be committed by means of suggestion, persuasion, threats or pressure, by words or by implication.⁸⁰

The net is still cast too wide.⁸¹ If mere incitement can amount to sedition, the restriction on freedom of expression will be too excessive, notwithstanding that the consultation document states that the mere expression of views or reports or commentaries on views or acts of others will not be criminalised. However, if the law requires that the others so incited must have committed the act, the person who has incited them might have already committed the inchoate or accomplice offences of the substantive offence of treason, secession or subversion. Thus, there is no need to enact laws on sedition. To comply with the duty to enact laws to prohibit sedition, the law can include an additional requirement that, on an objective basis, it is highly likely that the person so incited will commit the substantive offences of treason, secession or subversion. This suggestion would not require the prosecution to prove that the person so incited has committed the act, but it does require the prosecution to satisfy an objective test of whether the person who has incited

⁷⁸ Consultation document, para 4.13.

⁷⁹ *Higgins* (1801) 102 ER 269.

⁸⁰ Smith and Hogan, *Criminal Law* (London: Butterworths, 9th edn, 1999), pp 267–272.

⁸¹ Concerning the limits of speech posing threat to the established government, the US Supreme Court has developed the *Brandenburg* test: The speech must: (a) advocate the use of force; (b) such advocacy must be directed to inciting or producing imminent lawless action and (c) such advocacy must be likely to incite or produce such action. (See *Brandenburg v Ohio* 395 US 444 (1969).) The European Court of Human Rights has in a series of cases also developed the requirement of incitement to violence in the expression before a limitation could be justified. (See *Arslan v Turkey*, 8 July 1999, *Beskeya and Okcuoglu v Turkey*, 8 July 1999, *Ceylan v Turkey*, 8 July 1999, *Erdogdu and Ince v Turkey*, 8 July 1999, *Gerger v Turkey*, 8 July 1999, *Karatas v Turkey*, 8 July 1999, *Öztürk v Turkey*, 8 July 1999, *Polat v Turkey*, 8 July 1999, *Sürek (No 1) v Turkey*, 8 July 1999, *Sürek (No 2) v Turkey*, 8 July 1999, *Sürek (No 3) v Turkey*, 8 July 1999, *Sürek (No 4) v Turkey*, 8 July 1999 and *Sürek and Ödemir v Turkey*, 8 July 1999.) However, the European Court of Human Rights is less ready to expressly incorporate the imminence and likelihood requirements in its test as the US Supreme Court has done, though some judges have suggested similar requirements as adopted by the US Supreme Court in their judgments (see the judgment of Judge Palm and Judge Bonello in *Sürek (No 1) v Turkey*, 8 July 1999).

others has a good chance of success before he or she is liable. The restriction of freedom of speech will thus be reduced.⁸²

Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information⁸³ provides that expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. The counter-proposal put forward in this article is consistent with Principle 6 because the intention of the offender, the likely consequence of the act objectively proved and the causation are all required. The Solicitor General has argued in a newspaper article⁸⁴ that it is not appropriate to apply this principle because the law will not be able to cover some situations⁸⁵ that should be prohibited. Whether these acts should be prohibited has to be considered in light of the principle of minimum legislation. If the Johannesburg Principles or the counter-proposal would provide more protection for individual rights, then Hong Kong should adopt such an option.⁸⁶

Moreover, the content of the incitement should be limited to inciting others to commit the substantive offences of treason, secession or subversion. As Article 23 already requires these acts to be prohibited, there is no objection to incitement to perform them being included in sedition. However, causing violence or public disorder that seriously endangers the stability of the State or Hong Kong is not a requirement of Article 23. Article 23 requires Hong Kong to prohibit acts of sedition, and sedition in Chinese is “煽動叛亂”. The Chinese term includes “betrayal”, “叛”. Merely inciting others

⁸² See the offence of inciting racial hatred under s 18 of the UK Public Order Act. The offence makes it an alternative for the prosecution to prove either that the accused intended to incite racial hatred or under all the circumstances racial hatred was likely to have been incited. This indicates that we can have an objective element in an offence of incitement. Although the Public Order Act provides that it is an alternative element to intend to incite, the situation in Hong Kong justifies having it as an additional element. It has already been argued that it is particularly draconian to impose liability for words or behaviour in the absence of an immediate threat to somebody else (see David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press, 1993), pp 811–814).

⁸³ These Principles were adopted on 1 Oct 1995 by a group of experts in international law, national security and human rights convened by ARTICLE 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in the judgments of national courts) and the general principles of law that are recognised by the community of nations.

⁸⁴ Bob Allcock, “Freedom of expression will not be threatened”, *Mingpao*, 30 Sept 2002 (in Chinese).

⁸⁵ The examples used are people who incite others to take up arms to prepare for levying war for secession in the future and people who incite others to interfere with and disrupt the electronic system of the national defence.

⁸⁶ This proposal is also very similar to the *Brandenburg* test adopted by the US Supreme Court referred to in n 81 above.

to violence or public disorder that seriously endangers the stability of the State does not necessarily involve any betrayal, unlike inciting others to commit treason, secession and subversion. Stability in Hong Kong is clearly not a matter of concern in relation to Article 23. These acts may well be covered by the existing public order laws.⁸⁷ Even though similar provisions can be found in other jurisdictions, the principle of minimum legislation would disallow such legal measures, as Article 23 simply does not require them.

The consultation document also proposes offences concerning seditious publication.⁸⁸ If the act of dealing with seditious publication is part of an act of incitement, then it may already be punishable as sedition (if the added objective test is satisfied). Punishing a person who prints, publishes, sells, offers for sale, distributes, displays, reproduces or imports or exports seditious publication is, again, not required by Article 23, even when such a person knows or has reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion. Article 23 requires Hong Kong to prohibit only acts of sedition. If an act does not amount to sedition by itself, then there is no constitutional duty to legislate such an offence. The same will apply to the proposed offence of possession of seditious publications.⁸⁹

Subversion

Like secession, there is no existing law on subversion. To distinguish it from treason, subversion covers violent or unlawful acts by internal or domestic elements threatening the existing constitutional order or the constitutionally established government without the involvement of external enemies.⁹⁰ There is no concept of subversion under common law, though one may argue that the existing laws on treason which prohibit anyone from committing any act that aims to overthrow Her Majesty's Government already covers the offence of subversion.⁹¹

To fulfil its constitutional duty under Article 23, there is a need for the Hong Kong Government to enact new laws to govern subversion. The consultation document proposes a new offence of subversion.⁹² A person commits such an offence if she, by levying war, the use of force, the threat of force or other unlawful means, intends to intimidate the PRC Government, to overthrow the PRC Government or to disestablish the basic system of the State as established by the PRC Constitution. As argued in the discussion concerning

⁸⁷ One example is s 19, Public Order Ordinance.

⁸⁸ Consultation document, para 4.17.

⁸⁹ *Ibid.*, para 4.18.

⁹⁰ *Ibid.*, para 2.5.

⁹¹ *Ibid.*, para 5.1.

⁹² *Ibid.*, para 5.5.

secession above, the principle of minimum legislation will not allow the mere use of force or threat of force as constituting the act for this offence because this would criminalise acts that may not have a sufficient degree of “seriousness”.⁹³ The meaning of “serious unlawful means” should be amended in a way similar to that suggested above for secession.⁹⁴ Again, it is unclear whether intimidating or overthrowing the PRC Government or disestablishing the basic system of the State is an intention or a consequence. There should be an intention to support any act of subversion as in the case of the secession offences,⁹⁵ and this needs to be clarified.

Theft of Official Secrets

Article 23 requires Hong Kong to enact laws to prohibit the theft of state secrets. Offences that concern state secrets are already covered by the Official Secrets Ordinance (OSO).⁹⁶ However, the OSO covers government secrets as well as state secrets. It does not only prohibit theft of official secrets, but also the unlawful disclosure of such secrets. The OSO was originally enacted to localise the Official Secrets Acts⁹⁷ (which was applicable to colonial Hong Kong), but it has now been seen as legislation to implement Article 23. If the principle of minimum legislation is applied, then many provisions in the OSO may not be needed. If theft of state secrets alone has to be prohibited under Article 23, what is needed will only be those provisions on spying and related provisions in the OSO. The whole set of provisions concerning unlawful disclosure of protected information are not needed, or at least not to fulfil the requirement of Article 23, because they are either not related to theft or they are not related to state secrets or even secrets. A different justification will have to be provided for the provisions and Article 23 should not be used as the constitutional basis for those provisions prohibiting unlawful disclosure.

It is agreed that the “theft” of state secrets cannot be understood in the same sense as the theft of personal property, because in respect of state secrets there is often no permanent deprivation of information.⁹⁸ The meaning of “theft” can only include unauthorised access to, transmission of or dealing with protected information as suggested by the consultation document.⁹⁹ However, if unauthorised disclosure of the protected information is included within the meaning of “theft”, then the concept may be stretched too far.

⁹³ See pp 595 – 596 above.

⁹⁴ See p 596 above.

⁹⁵ See p 596 above.

⁹⁶ Cap 521.

⁹⁷ 1911, 1920 and 1989, United Kingdom.

⁹⁸ Consultation document, para 6.20.

⁹⁹ *Ibid.*, para 6.21.

One may have stolen certain information according to the above meaning without disclosing it, though in most situations the theft is for the purpose of disclosing the information to some person. If disclosure has to be included, the disclosure must be limited to disclosure to an enemy. If disclosure in other contexts is also covered, such as disclosure to embarrass the Hong Kong government, it would not be within the requirement of Article 23. Article 23 states that a series of acts including treason, secession, sedition, subversion and the theft of state secrets have to be prohibited. The other four offences are much more serious than mere disclosure of government information. If "theft of states secrets" is read widely to include unlawful disclosure, then it would contravene the legislative intent of Article 23.

Concerning the spying provisions in the OSO, the consultation document proposes that the information to be protected should include that which is likely to be useful to an enemy and is obtained or disclosed for a purpose that is prejudicial to the safety or interests of the State or Hong Kong. This is compatible with the principle of minimum legislation, except that it does not need to include the disclosure of information for a purpose that is prejudicial to the safety of Hong Kong. Article 23 only requires the protection of state secrets and state interests.

The prohibited acts under the spying provisions in the OSO include acts that are not directly acts of obtaining or attempting to obtain information. Most of these related provisions (such as harbouring¹⁰⁰ or the unauthorised use of uniform)¹⁰¹ may be concrete examples of the inchoate or accomplice acts of the substantial offence. However, some of the related offences prohibit acts that may not even constitute an attempt. A general rule that should be applied in reviewing these offences is that if the prohibited act under those spying provisions is already covered by the inchoate or accomplice acts or the direct acts of obtaining information, then the offence is acceptable under the principle of minimum legislation.¹⁰² An offence that prohibits acts which could not fall under the inchoate acts or accomplice acts of the offence of obtaining information should not be accepted (unless the Hong Kong Government can find a justification other than Article 23 to support them).

The spying provisions also include provisions that concern the prosecution of the offences. The accused is placed in a very disadvantaged position, and many presumptions against the accused are included.¹⁰³ These prejudices against the accused in persecution cannot be found in other Article 23 offences. The inconsistency in evidential proof cannot be justified, because all of the

¹⁰⁰ Section 4, OSO.

¹⁰¹ Section 5, OSO.

¹⁰² See p 610 below.

¹⁰³ Section 3(3), (4) and (5), OSO.

offences are Article 23 offences. If such prejudices are not found in the offences of treason, secession, sedition and subversion, they should also not be applicable to the theft of state secrets.

Under the unlawful disclosure provisions in the OSO, it is an offence for members of security and intelligence services to disclose without lawful authority any information, document or other article that relates to security or intelligence which is or has been in their possession by virtue of their position as a member of any of those services.¹⁰⁴ The information involved may be state secrets, but unlawful disclosure does not necessarily involve any act of theft. This may be justified, but the constitutional basis should not be Article 23.

It is also an offence for a public servant or a government contractor to make damaging disclosures of information relating to security, intelligence or defence, international relationships or the commission of offences and criminal investigations.¹⁰⁵ Information that relates to security, intelligence or defence and international relationships may include state secrets, but again the act does not need to involve theft. A similar conclusion therefore applies. Information that is related to the commission of offences and criminal investigations are clearly not state secrets. The same applies to information that relates to relations between the Central Authorities and Hong Kong, which the Hong Kong Government would like to add to the list of information that is protected from unlawful disclosure. The prohibition of disclosure is not absolute, and it will only be an offence if the disclosure is "damaging." If something can be lawfully disclosed, then it is difficult to call it "secret". These provisions are not required by Article 23 and should be deleted unless the government can offer some other legal or constitutional justifications. A civil servant may not be able to assert any free speech right as a speaker. However, the free speech right that can be invoked is the right of the public to receive as much information as possible to enable them to contribute effectively to political debate.¹⁰⁶

Another proposal is to make unauthorised and damaging disclosure of protected information that was obtained through unauthorised access unlawful.¹⁰⁷ One uncertainty of this proposal is that it is not clear whether there is

¹⁰⁴ Section 13, OSO.

¹⁰⁵ Section 14 to 18, OSO.

¹⁰⁶ Barendt (n 77 above). Under s 15 of the Canadian Security of Information Act, a limited defence of public interest is available to civil servants or government contractors if the disclosure is about the commission of a statutory offence by another government official and the public interest in the disclosure outweighs the public interest in non-disclosure.

¹⁰⁷ It is not clear from the consultation document whether unauthorised access to such protected information is also to be made unlawful under the OSO if the access is not for a purpose prejudicial to the safety or interests of the State. The proposal only states that the unauthorised and damaging disclosure of protected information will be unlawful.

any territorial requirement on the act of obtaining through unauthorised access. It is not clear whether the act of obtaining through unauthorised access must be done in Hong Kong. There is no question that the act of disclosure can be in Hong Kong or overseas.¹⁰⁸ The existing offences cover disclosure of protected information from a public servant or a government contractor in Hong Kong. The information that they may disclose or leak to others would most likely be in Hong Kong. The act of obtaining the information would also be in Hong Kong. If the proposal is aiming at plugging a “loophole” rather than extending the scope of application of the existing laws,¹⁰⁹ the act of obtaining the protected information through unauthorised access must be limited to an act committed in Hong Kong. If a person obtains the protected information in the mainland, but discloses the information in Hong Kong, he should not be liable under Hong Kong law.¹¹⁰ Moreover, this proposal should also be objected to on the ground that it has no relationship with the implementation of Article 23. If the Hong Kong Government believes that there is justification for making such laws, then it should propose it in another legislative exercise, rather than mixing non-constitutional legislative measures with constitutional ones.

Foreign Political Organisations

Article 23 requires that foreign political organisations or bodies should be prohibited from conducting political activities in Hong Kong, and political organisations or bodies of Hong Kong should be prohibited from establishing ties with foreign political organisations or bodies. These requirements are fulfilled by the Societies Ordinance,¹¹¹ but the consultation document proposes to establish an additional proscription mechanism to prevent foreign political organisations from conducting political activities in Hong Kong or establishing ties with local political organisations that are harmful to national security or unity.¹¹² According to the consultation document, the power to proscribe will only be exercised by the Secretary for Security if the objective, or one of the objectives, of the organisation is to engage in any act of treason, secession, sedition, subversion or theft of state secrets, or if the organisation has committed or is attempting to commit any act of treason, secession, sedition, subversion or theft of state secrets, or the organisation is affiliated with a mainland organisation that has been affiliated with another mainland organisation which has been proscribed in the Mainland by the Central

¹⁰⁸ Consultation document, para 6.26.

¹⁰⁹ *Ibid.*, para 6.22.

¹¹⁰ It is unclear whether a person is liable if he hacks into a mainland electronic system from a computer in Hong Kong and obtains the protected information.

¹¹¹ Cap 151.

¹¹² Consultation document, para 7.2.

Authorities, in accordance with national law, on the ground that it endangers national security.¹¹³

The Hong Kong Government has already accepted that existing laws allow a Societies Officer, after consultation with the Secretary for Security, to refuse an application for registration to be a society¹¹⁴ or cancel the registration of a society¹¹⁵ if he reasonably believes that the refusal or the cancellation is necessary in the interests of national security¹¹⁶ or if the society is a political body that has a connection with a foreign political organisation¹¹⁷ or a political organisation of Taiwan.¹¹⁸ If a society continues to operate after its application for registration has been refused or its registration has been cancelled, then every office bearer of the society commits an offence.¹¹⁹

Existing law also empowers the Secretary for Security, on the recommendation of a Societies Officer, to make an order prohibiting the operation or continued operation of a society if he reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or if the society or the branch is a political body that has a connection with a foreign political organisation or a political organisation of Taiwan.¹²⁰ Such a society will become an unlawful society.¹²¹ Any office bearer of and any person managing any unlawful society is guilty of an offence.¹²²

The kinds of societies or organisations that may be covered by the proposed new proscription mechanism include those that are operating in a manner contravening the proscribed situations from the date of its establishment or after its establishment. It is very unlikely that a society or an organisation that operates in a manner contravening the proscribed situations from the date of its establishment will apply to be registered under the Societies Ordinance. However, the office bearers of such a society or organisation can be punished for failing to register it.¹²³

¹¹³ *Ibid.*, para 7.15.

¹¹⁴ Section 5A(3), Societies Ordinance.

¹¹⁵ Section 5D, Societies Ordinance.

¹¹⁶ This means the safeguarding of the territorial integrity and the independence of the PRC. See s 2, Societies Ordinance.

¹¹⁷ This includes a government of a foreign country or a political subdivision of a government of a foreign country; an agent of a government of a foreign country or an agent of a political subdivision of the government of a foreign country; or a political party in a foreign country or its agent. See s 2, Societies Ordinance.

¹¹⁸ This includes the administration of Taiwan or a political subdivision of that administration; an agent of the administration of Taiwan or an agent of a political subdivision of the administration; or a political party in Taiwan or its agent. See s 2, Societies Ordinance.

¹¹⁹ Section 5F, Societies Ordinance.

¹²⁰ Section 8, Societies Ordinance.

¹²¹ Section 18, Societies Ordinance.

¹²² Section 19, Societies Ordinance.

¹²³ Section 5C, Societies Ordinance.

If the society or organisation operates in a manner contravening the proscribed situations after its establishment, it is likely that it is already a registered society. Such a society can then be prohibited from operation under the existing laws. If the situations covered by the proscription system can already be covered by existing laws then, under the principle of minimum legislation, there is no need to establish another proscription mechanism.

Even if it is accepted that the Secretary for Security could have this power, the conditions for exercising it and the possible consequences still need to be carefully studied. Article 27 of the Basic Law protects the freedom of association of Hong Kong people. Such a right is also protected under Article 22 of the ICCPR. While a law requiring a body of persons to register in order to obtain legal personality is compatible with the right to freedom of association, such a registration process must not nullify the exercise of the right by setting requirements that are unreasonably onerous, either in terms of the quantity of information or the type of disclosure required.¹²⁴ Associations should be free to maintain contact or affiliation with associations in other countries or international bodies.¹²⁵ The right can be subject to restrictions that are prescribed by and are necessary in a democratic society in the interests of national security, but the limitation must be interpreted cautiously so as to narrow the scope for governments to invoke it.¹²⁶

The first two conditions seem to be justified because acts of treason, secession, sedition, subversion and the theft of state secrets are prohibited by Article 23. If an organisation has such an objective, then the preventative measure of proscribing it is reasonable (although it is very unlikely that the society's registration would have been allowed to begin with). If an organisation has committed or is attempting to commit those prohibited acts, most likely its officers or some of its members who are directly involved in those acts would be prosecuted under the relevant laws.

The biggest problem is the condition that an organisation in Hong Kong may be proscribed if it is affiliated with a mainland organisation that has been proscribed by the mainland authorities in accordance with national law on the ground that it endangers national security. This condition will allow mainland laws to be indirectly applicable to Hong Kong. This is against the principle of minimum legislation as well as the autonomy of Hong Kong. It

¹²⁴ Lawyers Committee for Human Rights, *The Neglected Right: Freedom of Association in International Human Rights Law* (United States: LCHR, 1997). See also *Lavisse v France*, Appl. No 14223/88, Decisions and Reports, Vol 70 at 218–239.

¹²⁵ Art 5 of the International Labour Convention No 87 guarantees the right of trade unions to affiliate with international organisations of workers and employers.

¹²⁶ It has been suggested that there is no right to associate for a purpose that is illegal in national law, but there is serious doubt whether this is the correct approach. See Harris, Boyle and Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p 420.

is unclear on what legal basis mainland organisations will be proscribed by the mainland authorities on the ground of national security. The criteria and procedures the mainland authorities will apply is unknown. According to Article 23 of the PRC Law on National Security,¹²⁷ any person or organisation that commits any act that violates the national security of the PRC will be criminally liable. There is no specific rule for the proscription of an organisation on the ground of national security in the law. The Implementation Rules of the Law on National Security¹²⁸ also do not include a specific proscription system. Articles 102 to 113 of the Criminal Law of the PRC¹²⁹ establish various offences on crimes endangering national security. Again, these provisions impose criminal liability on individuals and organisations but no proscription mechanism is established. A proscription system for cults can be found under the Resolution of the Standing Committee of the National People's Congress on the Ban of Cults and Prevention and Punishment of Cult Activities.¹³⁰ The resolution was passed to supplement Article 300 of the Criminal Law of the PRC concerning offences by cults. In the future, a similar resolution may be passed to deal with organisations that are involved in crimes against national security. However, there is no existing law to authorise proscription of organisations in the Mainland on the ground of national security. Even for the proscription of cults in the Mainland, it is unclear what organisations will be proscribed and what procedures will be followed when an organisation is proscribed under the resolution.¹³¹ Thus the mainland authorities could proscribe all kinds of organisations in China, from underground churches to social clubs, NGOs or political groups, on the ground of national security.

Following this arrangement, an organisation in Hong Kong may be subject to a proscription order merely because it maintains an affiliation with a mainland organisation without committing any other unlawful acts. The restriction imposed on the Hong Kong organisation's right to freedom of association is much more than necessary in a democratic society.

Regardless of the definition and procedure, a decision on the basis of such national laws will be made indirectly applicable to Hong Kong because any organisation in Hong Kong affiliated to that organisation will also be proscribed in Hong Kong. The consultation document does not define affiliation.

¹²⁷ Adopted by the 30th Session of the Standing Committee of the Seventh National People's Congress on 22 Feb 1993.

¹²⁸ Enacted by the State Council to implement the Law on 10 May 1994.

¹²⁹ Adopted by the 2nd Session of the Fifth National People's Congress on 1 July 1979 and amended by the 5th Session of the Eighth National People's Congress on 14 Mar 1997.

¹³⁰ Passed by the Ninth National People's Congress on 30 Oct 1999.

¹³¹ See the Explanations of the Supreme People's Court and the Supreme People's Procuratorate on the Application of Law Concerning Crimes Involved in the Organisation and Utilization of Cults passed on 9 Oct 1999 and 8 Oct 1999.

There is also doubt about whether an organisation in Hong Kong could be proscribed by the central authorities directly on the ground of national security. Presumably, the Secretary of Security would have to proscribe that organisation in Hong Kong. The impact of the national law might be even more direct.

To avoid these situations from arising, the first two conditions only should be implemented. An organisation in Hong Kong, regardless of any possible affiliation to a proscribed organisation in the Mainland, that has committed or is attempting to commit any act of treason, secession, sedition, subversion or theft of state secrets, can already be proscribed in Hong Kong. Affiliation by itself is not an act to be prohibited under Article 23. Such affiliation does not necessarily cause an organisation in Hong Kong to commit prohibited acts. As the standards for these prohibited acts in Hong Kong are very different from the Mainland, it is totally undesirable that a Hong Kong organisation could be proscribed only on the basis of affiliation.

In addition, the proposed proscription has a very wide impact.¹³² It affects the office bearers of the organisation, its members, any person who supports it and any organisation that has a connection with it. The consultation document proposes to make it an offence for persons to organise or support the activities of a proscribed organisation.¹³³ Such support includes being a member of, providing financial assistance, other property or facilitation to, and carrying out the policies and directives of the proscribed organisation. The Secretary of Security may also declare an organisation unlawful if it has a connection with a proscribed organisation.¹³⁴ A connection is defined as including solicitation or acceptance by the association of financial contributions, financial sponsorships or financial support of any kind or loans from a proscribed organisation, or vice versa; affiliation with a proscribed organisation, or vice versa; determination of the association's policies by a proscribed organisation, or vice versa; or direction, dictation, control or participation in the association's decision making process by a proscribed organisation, or vice versa.

The difference between an organisation being proscribed by the Secretary of Security and an organisation being declared unlawful in such a manner is still not clear. It is assumed that persons who organise or support activities of a proscribed organisation will only be liable for the offence after the organisation has been proscribed. If not, it would be a clear breach of the right against retrospective criminal liability.¹³⁵ If there is already a list of

¹³² This may mean that proscription is different from a prohibition under existing laws. However, following the principle of minimum legislation, this new proscription mechanism may not be justified as it imposes more restrictions on individual rights and freedoms.

¹³³ Consultation document, para 7.14.

¹³⁴ *Ibid.*, para 7.17.

¹³⁵ Art 15, ICCPR.

inchoate or accomplice offences for the prohibited acts, then such people could be punished for committing those acts.¹³⁶ If what they have done does not constitute an inchoate or accomplice act of the prohibited acts, then why should they be punished? A member of a proscribed organisation may have no relationship with the acts that are committed by the office bearers or other members of the organisation. This goes against the principle of minimum legislation.

Investigation Powers

The consultation document proposes that special powers which have already been granted to the police to investigate some of the prohibited acts under the existing laws should be retained. It is argued that additional powers should also be granted to the police to enforce the offences under Article 23. The issue is whether under the principle of minimum legislation special powers need to be given to the police to enforce these offences, regardless of whether they are under existing laws or newly added provisions.

There are usually several reasons to justify special powers for police. First, there is an imminent danger of widespread contravention of the offence in question. Second, the offence is of such a serious nature that society should use all measures, even at the cost of individual rights, to suppress them before their occurrence. Third, there is a genuine difficulty in investigation, collecting evidence and prosecuting the offender. However, due to the possible infringement of individual rights, special powers should only be allowed in very exceptional situations, and they must be well justified.

The power proposed to be retained¹³⁷ is the power of a police officer to enter any premises or place, or stop and board any vehicle to remove or obliterate any seditious publication.¹³⁸ Under the existing laws, this power should not be exercised without a warrant if the seditious publication is not visible from a public place. The consultation document proposes to restrict this power to enter and remove the seditious publication without a warrant only in cases of great emergency. The consultation document is not very clear about whether seditious publications will be seized. As the Hong Kong Government proposes to create an offence of dealing with seditious publications and retain the offence of the possession of a seditious publication, presumably it will also retain the existing provision that allows seditious publications be seized and disposed of as the court may direct.¹³⁹

¹³⁶ See p 610 below.

¹³⁷ Consultation document, para 8.3.

¹³⁸ Section 14(1), Crimes Ordinance.

¹³⁹ Section 14(4), Crimes Ordinance.

It is doubtful that a seditious publication should be seized if the mere dealing in or possession of seditious publications is not an offence. If a seditious publication is involved in the commission of the act of sedition, the publication should be seized and disposed of as property that has been used in the commission of an offence.¹⁴⁰ However, the power to be retained is a power to search for all seditious publications, even though they will not be seized together with an offender. This is not necessary according to the principle of minimum legislation and if the power to seize cannot be retained then the power to enter and seize, or the power to enter and seize with or without warrant and under whatever conditions, cannot be retained.

An additional power that is suggested in the consultation document is to authorise the police to enter private premises without warrants in emergencies for investigations.¹⁴¹ It is proposed that the power can only be exercised by a superintendent when he reasonably believes that a relevant offence has been committed or is being committed; evidence of substantial value will be lost if no immediate action is taken and the investigation of the relevant offence will be seriously prejudiced as a result. The Commissioner of Police in cases of exceptional emergency and in the interest of national security or public safety may require a bank to disclose to him information that is relevant to the investigation where there is reasonable suspicion that the relevant offence has been committed or is being committed. It is also suggested that offences under Article 23 should be included under the Serious Crimes Ordinance,¹⁴² and such inclusion will afford additional powers for dealing with the offences.¹⁴³ These additional powers include the power for the Secretary for Justice to make an *ex parte* application to the Court of First Instance for an order to require a person to answer questions or furnish material that reasonably appears to be relevant to an investigation (ie a witness order) or to produce or to grant access to materials that are specified in an order that is likely to be relevant to an investigation (ie a production order). An authorised officer may also make an application to the Court of First Instance or the District Court for a warrant to search specified premises for the purpose of an investigation when the witness order or production order is not complied with.

The offences under Article 23 are of a serious nature, but at present in Hong Kong there is no imminent danger of widespread contravention. The Hong Kong Government has not proven that there are genuine difficulties in investigating, collecting evidence and prosecuting offenders of the Article 23

¹⁴⁰ Section 102, Criminal Procedure Ordinance (Cap 221).

¹⁴¹ Consultation document, para 8.5.

¹⁴² Cap 455.

¹⁴³ Consultation document, para 8.7.

offences. Therefore, these special powers are not compatible with the principle of minimum legislation.

Unlawful Drilling

The consultation document proposes¹⁴⁴ to retain the offence to punish the trainers and trainees in any unauthorised training in the use of arms or military exercise.¹⁴⁵ However, if the training is linked with any offence under Article 23, it should already be caught by the inchoate or accomplice acts of the substantial offences.¹⁴⁶ Hence, there is no special need to retain the offence according to the principle of minimum legislation.

Inchoate or Accomplice Offences

The consultation document proposes to create statutory offences for inchoate and accomplice acts including attempting, conspiring, aiding and abetting, counselling and procuring the commission of the substantive offences of treason, secession and subversion under Article 23. Sedition covers the inchoate offences of incitement of the substantial offences of treason, secession and subversion.¹⁴⁷

Whether these inchoate and accomplice offences are acceptable under the principle of minimum legislation must be considered from an holistic perspective. The inchoate and accomplice acts are partly common law and partly statutory creations,¹⁴⁸ and they apply to all crimes. As they are already covered by existing laws there may not be a need to legislate new statutory offences according to the principle of minimum legislation. However, the provisions are scattered through several pieces of legislation, and it may also be consistent with the principle to codify them specifically for the offences under Article 23 on the condition that the new statutory offences only systematise and clarify the existing laws. As illustrated above, if these inchoate and accomplice offences for all of the offences under Article 23 are created, many of the proposals in the consultation document will not be needed because they either are already covered by the inchoate and accomplice offences or these offences will impose less restriction on individual freedoms than the proposals.¹⁴⁹

One interesting point is that the consultation document only proposes to create new statutory offences on the inchoate and accomplice acts for treason,

¹⁴⁴ *Ibid.*, para 9.3.

¹⁴⁵ Section 18, Crimes Ordinance.

¹⁴⁶ See "Inchoate or Accomplice Offences" below.

¹⁴⁷ Consultation document, para 2.13.

¹⁴⁸ Section 159A, Crimes Ordinance (conspiracy); s 159G to 159K, Crimes Ordinance (attempt) and s 89, Criminal Procedure Ordinance (aiding and abetting, counselling and procuring).

¹⁴⁹ See the discussion of treason, secession, sedition, theft of state secrets, the affiliation of organisations in Hong Kong with mainland organisations and unlawful drilling above.

secession and subversion. No proposal has been made concerning inchoate or accomplice offences for sedition. Does this mean that it will not be an offence to attempt, conspire, aid, abet, counsel or procure to incite under the sedition offence, or would the general legal scheme¹⁵⁰ under the existing laws be still applicable?¹⁵¹ If the general legal scheme on inchoate and accomplice offences is applicable to sedition, then why do specific statutory offences for the inchoate and accomplice acts of the substantive offences of treason, secession and subversion need to be created?

Related to this question is whether the general legal scheme on inchoate and accomplice offences will also be applicable to the new statutory offences on the inchoate and accomplice acts of the substantial offences of treason, secession and subversion.¹⁵² One consideration that must be looked at is the legal significance of creating statutory offences for inchoate and accomplice acts of the substantial offences of treason, secession and subversion. If these newly created inchoate and accomplice offences are considered to be substantial offences on their own, then there is a much stronger argument to make all of the above double inchoate and accomplice acts unlawful. Then, attempting to conspire, attempting to aid, abet, counsel or procure,¹⁵³ conspiring to aid, abet, counsel or procure or aiding, abetting, counselling or procuring someone to attempt¹⁵⁴ to commit the substantive offences of treason, secession and subversion will be unlawful. The result is that liability might be put too far back. It may not be the intention of the Hong Kong Government to create such statutory offences.

Moreover, is it an offence to incite a person to attempt¹⁵⁵ or to conspire¹⁵⁶ or to aid, abet, counsel and procure another person¹⁵⁷ to commit treason, secession or subversion? It seems that the consultation document does not intend these to be unlawful, as the person to be liable must have actually incited another person to commit the substantial offences of treason,

¹⁵⁰ See n 148 above.

¹⁵¹ There may even be the possibility of inciting someone to incite. See Glanville Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 2nd edn, 1983), pp 443–444.

¹⁵² We may call this double inchoate or accomplice liability.

¹⁵³ See s 159G(5), Crimes Ordinance. However, if the statutory offences of the inchoate and accomplice acts of the substantial offences of treason, secession and subversion are taken as substantial offences themselves, then it may still be possible that it is an offence.

¹⁵⁴ *Dunnington* (1984) QB 472.

¹⁵⁵ There may not be a need to have this offence, as inciting a person to attempt to commit an offence almost inevitably involves inciting the person to commit the substantial offence.

¹⁵⁶ Under existing laws, it is unlawful for someone to incite another to conspire to commit an offence.

¹⁵⁷ Under existing laws, if the offence is a substantial offence such as s 33B of the Offences Against the Person Ordinance (Cap 212), which makes it an offence to aid, abet, counsel or procure another to commit or attempt to commit suicide, then it is possible that a person will be convicted for inciting someone to aid, abet, counsel and procure that offence. If not, then as aiding, abetting, counselling and procuring is not an offence by itself, inciting the commission of these accomplice acts is not an offence.

secession and subversion. This may also be evidence that the Hong Kong Government does not want the general legal scheme on inchoate and accomplice offences to be applicable to all of the offences, substantive as well as inchoate and accomplice, under Article 23.

Application

The consultation document proposes that the treason offences, secession offences, subversion and sedition are applicable to all persons who are voluntarily in Hong Kong for acts that are committed in Hong Kong and to HKSAR permanent residents for acts that are committed outside Hong Kong. Other persons may also commit the secession offences for acts outside Hong Kong if such actions are linked to Hong Kong either under common law or as set out in the Criminal Jurisdiction Ordinance.¹⁵⁸ For the offence of sedition, if the person intends in the incitement that the offence of treason, secession or subversion be committed in Hong Kong¹⁵⁹ then they are also liable.

All of these rules are either based on common law or existing laws that are applicable to all other crimes. Therefore, they are compatible with the principle of minimum legislation.

Conclusion

The benefit of the doubt may be given to the Hong Kong Government that the consultation document is a sincere attempt to fulfil its constitutional duty under the Basic Law. The Government does not regard the implementation of Article 23 as its only constitutional duty. In the consultation document, it expressly states that it also has the duty to implement other relevant provisions of Chapter III of the Basic Law, particularly Articles 27 and 39,¹⁶⁰

¹⁵⁸ Cap 461. The consultation document summarises that Hong Kong courts have jurisdiction over offences in the following cases: (a) if any of the conduct (including an omission) or part of the results that are required to be proved for conviction of the offence takes place in Hong Kong; (b) if there has been an attempt to commit the offence in Hong Kong, whether or not the attempt was made in Hong Kong or elsewhere and irrespective of whether it had an effect in Hong Kong; (c) if there has been an attempt or incitement in Hong Kong to commit the offence elsewhere; (d) if there has been a conspiracy to commit in Hong Kong the offence wherever the conspiracy is formed and whether or not anything is done in Hong Kong to further or advance the conspiracy; or (e) if there has been a conspiracy in Hong Kong to do elsewhere that which if done in Hong Kong would constitute the offence, provided that the intended conduct was an offence in the jurisdiction where the object was intended to be carried out.

¹⁵⁹ This part of the consultation document is rather unclear as it uses the following terms: "in the case of other persons Hong Kong should have jurisdiction over extra-territorial conduct only if it is intended or likely to incite the offence of treason, secession or subversion, or incite violence or public disorder as described in paragraph 4.13, in Hong Kong ...". What is unclear is the meaning of "intended or likely to" and to what "likely to" refers. Is it referring to what is intended? (ie someone intends the offence to be likely to be committed in Hong Kong). Is it referring to the intention itself? (ie it is likely that the person intends the offence to be committed in Hong Kong).

¹⁶⁰ Consultation document, para 1.7(a).

both of which are related to the protection of fundamental rights and freedoms of the people of Hong Kong. According to Article 23, Hong Kong has the duty to enact laws to prohibit the listed acts, and such a duty was presumably active when the Basic Law came into force on 1 July 1997. The Hong Kong Government has tried very hard to delay the legislation to implement Article 23. Again, the Government can be given the benefit of the doubt that its strategy to delay the legislation was not merely out of its own interest or the interest of the CPG. The Hong Kong Government has tried to find the best time to initiate the legislative process to implement Article 23.

The Hong Kong Government has also tried to strike what it considers to be the proper balance between two conflicting values: (a) the State's essential interests of sovereignty, territorial integrity, unity and national security; and (b) the fundamental rights and freedoms of the people of Hong Kong. There is much improvement in the attitude of the Hong Kong Government towards human rights protection and this is reflected in the consultation document when it is compared with the past record of the Hong Kong Government.¹⁶¹

When the Hong Kong Government first released the consultation document, legal professional bodies and human rights activists were caught unprepared, because the document seemed to be much more liberal than they expected. However, from more detailed analysis, there are still some problems in the Government's attitude towards human rights protection. First, the Government wants to satisfy the international standard on the protection of human rights in fulfilling its constitutional duty under Article 23, but it only tries to satisfy the lowest requirement. There are more expansive options on human rights protection, but it seems that the Hong Kong Government has no intention of adopting them. Second, rather than considering the specific needs of Hong Kong on human rights protection, the Hong Kong Government only refers to the English common law rules, the existing laws or laws in other Western liberal States to support its proposals. Such rules and laws only reflect the needs of those States at the time when the rules or laws were made. This approach may not be appropriate for dealing with human rights protection in Hong Kong, which has a very different political and constitutional setting. Third, the Hong Kong Government seems to be using this opportunity to achieve many objectives¹⁶² other than just to implement Article 23. Such ulterior motives may cause people to question the sincerity of the Hong Kong Government in this legislative exercise.

¹⁶¹ Tai (n 14 above).

¹⁶² One example is the proposal to create a new offence in the OSO prohibiting unauthorised and damaging disclosure of protected information that was obtained directly or indirectly by unauthorised access to it. The consultation document expressly states that this proposal is to deal with a loophole in the OSO, but that is not necessary in fulfilling the duty under Art 23. See p 602 above.

The Hong Kong Government must review its constitutional position in the existing constitutional order of Hong Kong. Because it is not a directly elected government, what it lacks is legitimacy and trust. The proposals in the consultation document do not do enough for the Hong Kong Government to rebuild a trust relationship between the Government and the people of Hong Kong. Only with such trust can the Government reclaim its legitimacy in ruling Hong Kong. Without such legitimacy, it will be very difficult for the Government to lead Hong Kong society in dealing with the difficult problems, both economic and social, that Hong Kong is encountering.

If the Hong Kong Government insists on using the proposals in the consultation document to implement Article 23, it should not have much difficulty in having those proposals passed as laws by the Legislative Council according to its own timeframe. It is true that if the Hong Kong Government adopts this strategy, the result may not be very damaging because the trust of the people in the Government is already at a very low level. However, the Hong Kong Government will miss a golden opportunity to rebuild trust and reassert its legitimacy to rule Hong Kong.