Executive Summary

In recent years, a small number of people advocated the independence of Hong Kong and in so doing, challenged Article 1 of the Basic Law ("BL1") as well as the “One Country” under “One Country, Two Systems”. In order to ensure that the “One Country, Two Systems” principles and policies are not to be shaken, we deem it appropriate to revisit BL23, namely the national security law, which we believe, by way of local legislation, will forge mutual trust between the Central Authorities and the Hong Kong Special Administrative Region (“HKSAR”). While giving due respect to the status of “One Country”, we think it will also demonstrate the autonomy as reflected in local legislation.

2. This paper seeks to explain that in the interests of both the Central Authorities and the HKSAR, as a feasible and alternative option, it is worth considering that in fact BL23 has already been implemented through local legislation.

3. It happened when the Hong Kong Reunification Ordinance (Instrument A601) was passed shortly after midnight on 1 July 1997, thus affirming that the laws previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subsidiary legislation and customary law, which have been adopted as the laws of the HKSAR, shall continue to apply – thus including the local ordinances protecting national security. In other words, these ordinances came into effect – as they were adopted as the laws of the HKSAR – shortly after the Basic Law came into effect at midnight on 1 July 1997. It also happened subsequently when amendments were introduced to these ordinances.

4. On the issue of national security, if challenged, the Court of Final Appeal as required under BL158 shall seek an Interpretation from the Standing Committee of the National People’s Congress (“NPCSC”) on matters concerning affairs which are the responsibility of the Central People’s Government (“CPG”), or concerning the relationship between the Central Authorities and the Region.

5. The relevant ordinances include: (a) Societies Ordinance; (b) Companies (Winding Up and Miscellaneous Provisions) Ordinance; (c) Crimes Ordinance; (d) Public Order Ordinance; and (e) Official Secrets Ordinance. The relevant sections of these ordinances, though fragmented, all point to and give effect to the seven aspects under BL23 (see table below).
6. In the circumstances, prohibition of advocacy for the independence of Hong Kong under the existing Crimes Ordinance is indeed constitutional; and BL39 is to be construed accordingly, and in accordance with Article 16(3)(b) of the Hong Kong Bill of Rights Ordinance, to allow such restrictions in the interests of national security. There are queries on whether such prohibition is constitutional. In this regard, we would argue that under “One Country, Two Systems”, given the fact that the HKSAR is an inalienable part of the People’s Republic of China (“PRC”), the Johannesburg Principles may not fully apply.

7. After the implementation of BL23 fell through in year 2003, there was the enactment of the National Security Law in the Macao Special Administrative Region (“Macao”) in year 2009 and the adoption of the PRC National Security Law in year 2015. Following the promulgation of the PRC National Security Law, there is now a clearer definition and a broader scope of what constitutes national security, with much higher and more stringent demands. It is important to note that the words “national security” appear about 150 times in the National Security Law of the People’s Republic of China, as compared to about 65 times in its previous version (year 1993), and about 10 times in the Criminal Law of the People’s Republic of China (revised in year 2015).

8. On the other hand, the UK National Security Strategy and Strategic Defence and Security Review 2015 as presented by the UK Prime Minister to Parliament in November 2015 covers a wide scope of national security concerns, ranging from cyber security to military capabilities, cultural links and economic security etc. To some extent, it mirrors the coverage under the PRC National Security Law and begs the question of whether the HKSAR has already covered all areas.

9. Given the current political situation in Hong Kong, it is entirely foreseeable that implementation of BL23 in the HKSAR is getting more and more difficult. While it is true that a structured Composite Bill on BL23, being neat and tidy, is most desirable, nevertheless it is not essential nor a pre-requisite.

10. As an alternative option, it is arguable and sensible to state that the HKSAR has already fulfilled its constitutional duty and obligation to implement BL23 through local legislation by way of the Hong Kong Reunification Ordinance and subsequent amendments to various local ordinances to suit the needs of the local community.

11. While it is arguable that BL23 has already been implemented through local legislation, on the issue of national security there appears a need to clarify the essential role of the Central Authorities’ counter-espionage operation in the HKSAR, on which the local law is now silent, when it is reasonable to expect that such counter-espionage operation would have been underpinned by legislation, such as that in the UK. We believe that regulation of such operation is beneficial to both sides.
Meanwhile, it is important to note that advocacy for the independence of Hong Kong remains unlawful under the existing Crimes Ordinance. Any attempt to test the law is futile and will be met with serious consequences. In the circumstances, we believe that our proposal is a pragmatic approach to problem-solving and it serves the interests of both the Central Authorities and the HKSAR.

<table>
<thead>
<tr>
<th>National Security Related Crimes</th>
<th>Individual Action</th>
<th>Collective/ Organizational Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Treason (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(2) Secession (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(3) Sedition (related to the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(4) Subversion against the Central People’s Government</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b)</td>
</tr>
<tr>
<td>(with the use of violence etc)</td>
<td>Prohibited under BL23</td>
<td>(c), (d) Prohibited under BL23</td>
</tr>
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<td>-------------------------------</td>
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</tr>
<tr>
<td>(5) Theft of state secrets</td>
<td>Prohibited by existing law (e)</td>
<td>Prohibited by existing law (e)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(6) Foreign political organizations or bodies conducting political activities in the Region</td>
<td>N/A</td>
<td>Foreign political organizations or bodies prohibited by existing law (a), (b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(7) Political organizations or bodies of the Region establishing ties with foreign political organizations or bodies</td>
<td>N/A</td>
<td>Society/company prohibited by existing law (a), (b)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Prohibited under BL23</td>
</tr>
</tbody>
</table>

PART A: PREAMBLE

Constitutional Duty and Obligation to Safeguard National Security and HKSAR’s Long Term Stability and Prosperity

In addressing the Third Session of the Seventh National People’s Congress on 28 March 1990, Mr Ji Pengfei, Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, in The Explanations on “The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft)” and Its Related Documents, said that:-
“One Country, Two Systems” is the fundamental policy of the Chinese Government for bringing about the country’s reunification. In line with this policy, the Chinese Government has formulated a series of principles and policies regarding Hong Kong. The main point is to establish a special administrative region directly under the Central People’s Government when China resumes its sovereignty over Hong Kong. … The Chinese Government has written the above principles and policies into the Sino-British Joint Declaration on the Question of Hong Kong and proclaimed that all the principles and policies regarding Hong Kong will remain unchanged for 50 years, which is to be codified in the Basic Law. The concept of “One Country, Two Systems” and all the principles and policies regarding Hong Kong formulated on the basis of this concept provide the fundamental guarantee for the resumption of China’s sovereignty over Hong Kong and the maintenance of Hong Kong’s stability and prosperity; they also conform to the basic interests of the Chinese people, particularly those of the Hong Kong compatriots. … …

The draft law also stipulates that the Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, or subversion against the Central People’s Government, or theft of state secret, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies. These stipulations are entirely necessary for maintaining the state sovereignty, unity and territorial integrity as well as for preserving Hong Kong’s long-term stability and prosperity.

2. From the above, as a matter of history and constitutional law, it is absolute that the HKSAR is an inalienable part of the PRC. Under the “One Country, Two Systems” arrangement, while the HKSAR enjoys a high degree of autonomy (i.e. “Two Systems”), we also have the constitutional duty and obligation to enact laws to safeguard national security (i.e. “One Country”), for the purpose of “maintaining the state sovereignty, unity and territorial integrity as well as for preserving Hong Kong’s long-term stability and prosperity”.

3. Indeed, under the “One Country, Two Systems” arrangement, the Basic Law, being a national law, has sought to strike a fine balance in regulating the affairs between the Central Authorities and the HKSAR, the rights and freedoms enjoyed by all as well as the duties and obligations involved.

4. It is therefore right from the outset, BL1 states that “The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China”.

5. According to BL23, “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies
of the Region from establishing ties with foreign political organizations or bodies.” We shall deal with these seven aspects under BL23 later in this paper. The Chinese text reads:-

香港特別行政區應自行立法禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行為，禁止外國的政治性組織或團體在香港特別行政區進行政治活動，禁止香港特別行政區的政治性組織或團體與外國的政治性組織或團體建立聯繫。


6. If one proposes that selection of the Chief Executive of the HKSAR by universal suffrage and election of all the members of the Legislative Council by universal suffrage as granted and set out in BL45 and BL68 respectively is our natural right and entitlement, one must also admit that it is the HKSAR’s unequivocal constitutional duty and obligation to safeguard national security by implementing BL23 through local legislation. On the practical side, one may say that implementation of BL23 through local legislation serves as a connecting bridge to demonstrate mutual trust and confidence between “One Country” and “Two Systems”.

7. It is noted that national laws on national security were not introduced directly to the HKSAR through their addition to the Annex III to the Basic Law, but instead by implementing BL23 through local legislation. This clearly shows that the Central Authorities endorse that under “One Country, Two Systems”, certain unique local values and sentiments in the HKSAR are respected and recognized. Given the rights and freedoms guaranteed under the Basic Law, such terms as “treason, secession, sedition, subversion” etc should be discussed and defined in the local legislation suitably and penalties imposed accordingly, as may be different from the definitions employed, and penalties imposed, in Mainland China.

PART B: FREEDOM OF OPINION AND EXPRESSION

Common Law

8. BL8 provides that “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”

9. Although common law continues to be practiced in the HKSAR, we all understand that it cannot contravene the Basic Law.

10. Indeed, as statute law overrides common law in case of conflict or inconsistency, after the enactment of BL23, subject to the extent of the scope of local legislation, common law that touches on national security will be superseded and replaced accordingly.
Rights and Freedoms – Freedom of Opinion and Expression

Article 39 of the Basic Law

11. We are aware of the serious concerns that the enactment of BL23 may have a profound impact on the rights and freedoms as guaranteed under BL39, which provides that:

(1) The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

(2) The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

International Covenant on Civil and Political Rights

12. Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") reads:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;

   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Hong Kong Bill of Rights Ordinance

13. As a matter of fact, the ICCPR as applied to Hong Kong has already been implemented through the enactment of the Hong Kong Bill of Rights Ordinance ("BORO"), Cap 383, in year 1991.

14. While we agree that BL23 should be read together with BL39, it is noted that both need to be implemented through local legislation. To the extent of the scope of local legislation, the common law concept of freedom of speech will be formulated and confined by local legislation, in the interests of national security. While BL39 has already been implemented through BORO,
BL23 has yet to be implemented. It therefore requires a fine balance between national security of the PRC on the one hand, and HKSAR residents’ rights and freedoms on the other hand. In so doing, both BL39 and BL23 will be satisfied to the extent that freedom of speech will not tolerate advocacy for the independence of Hong Kong to a certain extent as proscribed, as we shall explain in the ensuing paragraphs.

15. In fact, under Article 16(3)(b) of BORO, Government can restrict freedom of speech by law for the protection of national security. In other words, to address the issue of advocacy for the independence of Hong Kong (even without the use of violence, act of war, breach of public order etc), restriction of such “freedom of opinion and expression” under Article 16 of BORO is acceptable, which reads (same as ICCPR):

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

(一) 人人有保持意見不受干預之權利。

(二) 人人有發表自由之權利：此種權利包括以語言、文字或出版物、藝術或自己選擇之其他方式，不分國界，尋求、接受及傳播各種消息及思想之自由。

(三) 本條第(二)項所載權利之行使，附有特別責任及義務，故得予以某種限制，但此種限制以經法律規定，且為下列各項所必要者為限：

(甲) 尊重他人權利或名譽；或

(乙) 保障國家安全或公共秩序，或公共衛生或風化。

16. Under Article 16(3)(b) of BORO as mentioned above (i.e. for the protection of national security or of public order (ordre public), or of public health or morals), it is noted that the last two items (public health or morals) have nothing to do with the use of violence, act of war, breach of public order etc. In other words, while BORO allows restrictions on freedom of expression with regard to national security (and public order), it apparently has not mentioned or considered the issue regarding the use of violence etc.
Other local ordinances

17. For restrictions on freedom of speech, we find that locally there are such restrictions in the National Flag and National Emblem Ordinance (Instrument A401), the Race Discrimination Ordinance (Cap 602), the Defamation Ordinance (Cap 21), the Control of Obscene and Indecent Articles Ordinance (Cap 390), the Generic Code of Practice on Television Advertising Standards, to name a few.

18. Since there are restrictions on freedom of speech/expression in local ordinances regarding the national flag and emblem, shouldn’t BL1 (national unity) be more important than the national flag and emblem?

Nazism

19. Due to historical reasons, in Europe for instance, promotion of Nazism is a criminal offence and is prohibited by law in Germany and Austria, among others.

Offense Principle

20. The following extract from the Stanford Encyclopedia of Philosophy is instructive:

   The other response to the harm principle is that it does not reach far enough. One of the most impressive arguments for this position comes from Joel Feinberg who suggests that the harm principle cannot shoulder all of the work necessary for a principle of free speech. In some instances, Feinberg suggests, we also need an offense principle that can guide public censure. The basic idea is that the harm principle sets the bar too high and that we can legitimately prohibit some forms of expression because they are very offensive. Offending is less serious than harming so any penalties imposed should not be severe.

   https://plato.stanford.edu/entries/freedom-speech/

Johannesburg Principles

21. On the other hand, it is noted that the Hong Kong Bar Association (“HKBA”) advocated a “minimalist approach” when giving its views on the HKSAR’s National Security (Legislative Provisions) Bill 2003:

   The proposals went too far because a minimalist approach was called for in keeping with human rights instruments and generally accepted principles relating to the drafting of national security laws in the 21st century, in particular the Johannesburg Principles.

   http://www.hkba.org/sites/default/files/20020722-prel-e.pdf

22. While we fully respect the HKBA’s views from the common law perspective, given that national security falls within the “One Country” ambit, however, there is a need to strike a balance between the “Two Systems” as we shall elaborate in the ensuing paragraphs.

Article 5 of the Basic Law

23. BL5 states that “The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.” Commentators argued that any departure from the BORO is a derogation of the rights previously enjoyed by Hong Kong people. In fact, as we shall explain below, such rights as freedom of speech have always been restricted, before and after 1 July 1997.

Article 1 of the Basic Law and the Crimes Ordinance

24. Indeed, section 9 of the Crimes Ordinance, Cap 200, states that incitement is a serious offence (“to bring into hatred or contempt or to excite disaffection against … the Government of Hong Kong”, “to excite … inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established” etc).

25. From a legal point of view, advocacy for the independence of Hong Kong is against the Basic Law (i.e. BL1) and the Crimes Ordinance imposes sanctions on such offences.

26. Some commentators argue that the Crimes Ordinance itself could be ultra vires to the extent that the relevant section(s) may not sit well with BL39 (as implemented through BORO). However, if one reads BL39/BORO, BL23 and BL1 together, the following conclusions can be drawn:-

(a) BORO allows certain restrictions on freedom of speech in the interests of national security.

(b) BL1 provides the constitutional framework under which sanctions are imposed through the relevant section(s) of the Crimes Ordinance.

(c) Regarding the national flag and emblem where there are restrictions on freedom of speech/expression, it is only logical and rational to deduce that BL1 (national unity), being paramount and more important than the national flag and emblem, should have, to say the least, the same restrictions on freedom of speech.

(d) The Johannesburg Principles may not fully apply in the “One Country, Two Systems” framework, having regard to the unique fact that the HKSAR is an inalienable part of the PRC, as well as the arguments as set out in (b) and (c) above.

(e) In line with the Offense Principle, depending on the extent to which restrictions on freedom of speech are imposed, the relevant section(s) of the Crimes Ordinance are indeed intra vires.
27. Whether and if so, when, society should lessen or tighten the restrictions is a matter of judgment of the current state of affairs of that society, as well as its unique history, culture, core values etc, and normally there are no hard and fast rules. Despite the HKBA’s views above, suffice it to say that in response to the latest political situation and the exponential propagation of ideas harmful to national security, to a certain extent some restrictions on freedom of speech (i.e. advocacy for the independence of Hong Kong) should be worth considering.

28. As reported by South China Morning Post, on 1 July 2017 President Xi Jinping warned the HKSAR not to cross the “red line” of undermining Chinese sovereignty. “Any attempt to endanger China’s sovereignty and security, ... or use Hong Kong to carry out infiltration and sabotage activities against the mainland is an act that crosses the red line,” he said.

PART C: HONG KONG AND MACAO

HKSAR’s National Security (Legislative Provisions) Bill

29. The National Security (Legislative Provisions) Bill introduced in year 2003 (“HKSAR Bill on National Security”) focuses on such offences that involve the use of violence, act of war, breach of public order etc for which the maximum penalty is life imprisonment.

30. A copy of the HKSAR Bill on National Security can be found at the following website(s):


31. We shall explain that such offences without the use of violence, act of war, breach of public order etc (i.e. advocacy for the independence of Hong Kong) are still offences punishable under BL23, although it should bear a relatively lighter sentence.

2009 National Security Law of Macao

32. For reference purpose, Article 23 of the Macao Basic Law, which is in an essence the same as Article 23 of the HKSAR Basic Law, reads:-
33. Similar to the HKSAR Bill on National Security, the Macao National Security Law (維護國家安全法), enacted in year 2009, also focuses on such offences that involve the use of violence, act of war, breach of public order etc, but unlike the HKSAR Bill:-

(a) the maximum penalty is 25 years imprisonment (with additional sanctions depending on the gravity and circumstances of the crime) as opposed to life imprisonment under the HKSAR Bill on National Security; and

(b) preparatory acts are punishable with a maximum of 3 years imprisonment (with additional sanctions depending on the gravity and circumstances of the crime).

34. On paragraph 33(b) above, it is noted that section 10 of the existing Crimes Ordinance also touches on preparatory acts (see below).

35. It is also noted that unlike the HKSAR Bill on National Security, the Macao National Security Law does not relate to Article 40 of the Macao Basic Law regarding rights and freedoms (the same as BL39 of the HKSAR Basic Law). As we pointed out above, BL39 does allow restrictions on freedom of expression in the interests of national security (and public order) even without the use of violence etc.

PART D: NATIONAL LAWS

Law of the People’s Republic of China on Guarding State Secrets

36. For reference purpose, the Law of the People’s Republic of China on Guarding State Secrets (2010 Revision) (中華人民共和國保守國家秘密法) states that:-

第十條 國家秘密的密級分為絕密、機密、秘密三級。

絕密級國家秘密是最重要的國家秘密，洩露會使國家安全和利益遭受特別嚴重的損害；機密級國家秘密是重要的國家秘密，洩露會使國家安全和利益遭受嚴重的損害；秘密級國家秘密是一般的國家秘密，洩露會使國家安全和利益遭受損害。

第十五條 國家秘密的保密期限，應當根據事項的性質和特點，按照維護國家安全和利益的需要，限定在必要的期限內；不能確定期限的，應當確定解密的條件。


國家秘密的保密期限，除另有規定外，絕密級不超過三十年，機密級不超過二十年，秘密級不超過十年。

第十七條 機關、單位對承載國家秘密的紙介質、光介質、電磁介質等載體（以下簡稱國家秘密載體）以及屬於國家秘密的設備、產品，應當做出國家秘密標誌。

不屬於國家秘密的，不應當做出國家秘密標誌。

37. As we see it, the above classifications and handling of state secrets will have a bearing on our understanding of the issues involved. A copy of the Law of the People’s Republic of China on Guarding State Secrets can be found at the following website:

http://www.gov.cn/flfg/2010-04/30/content_1596420.htm

Counterespionage Law of the People’s Republic of China

38. For reference purpose, the Counterespionage Law of the People’s Republic of China (中華人民共和國反間諜法), promulgated in year 2014, states that:

第四條 中華人民共和國公民有維護國家的安全、榮譽和利益的義務，不得有危害國家的安全、榮譽和利益的行為。

第五條 反間諜工作應當依法進行，尊重和保障人權，保障公民和組織的合法權益。

第八條 國家安全機關在反間諜工作中依法行使偵查、拘留、預審和執行逮捕以及法律規定的其他職權。

第三十二條 對非法持有屬於國家秘密的文件、資料和其他物品的，以及非法持有、使用專用間諜器材的，國家安全機關可以依法對其人身、物品、住處和其他有關的地方進行搜查；對其非法持有的屬於國家秘密的文件、資料和其他物品，以及非法持有、使用的專用間諜器材予以沒收。非法持有屬於國家秘密的文件、資料和其他物品，構成犯罪的，依法追究刑事責任；尚不構成犯罪的，由國家安全機關予以警告或者處十五日以下行政拘留。

第三十八條 本法所稱間諜行為，是指下列行為：

（一）間諜組織及其代理人實施或者指使、資助他人實施，或者境內外機構、組織、個人與其相勾結實施的危害中華人民共和國國家安全的活動；

（二）參加間諜組織或者接受間諜組織及其代理人的任務的；
（三）間諜組織及其代理人以外的其他境外機構、組織、個人實施或者指使、資助他人實施，或者境內機構、組織、個人與其相勾結實施的竊取、刺探、收買或者非法提供國家秘密或者情報，或者策動、引誘、收買國家工作人員叛變的活動；

（四）為敵人指示攻擊目標的；

（五）進行其他間諜活動的。

39. As we see it, counter-espionage operation is essential to the protection of national security. We shall address this point later in our discussion below. A copy of the Counterespionage Law of the People’s Republic of China can be found at the following website:-

http://www.npc.gov.cn/npc/xinwen/2014-11/02/content_1884660.htm

National Security Law of the People’s Republic of China

40. The National Security Law of the People’s Republic of China (中華人民共和國國家安全法), promulgated in year 2015, states that:-

“中國的主權和領土完整不容侵犯和分割。維護國家主權、統一和領土完整是包括港澳同胞和台灣同胞在內的全中國人民的共同義務。”

“香港特別行政區、澳門特別行政區應當履行維護國家安全的責任。”

41. In particular, the definition of “national security” is instructive:-

第二條：國家安全是指國家政權、主權、統一和領土完整、人民福祉、經濟社會可持續發展和國家其他重大利益相對處於沒有危險和不受內外威脅的狀態，以及保障持續安全狀態的能力。

42. The National Security Law (year 2015) has the following chapters:-

第一章 總則
第二章 維護國家安全的任務
第三章 維護國家安全的職責
第四章 國家安全制度
　　第一節 一般規定
　第二節 情報信息
第三節 風險預防、評估和預警
第四節 審查監管
第五節 危機管控

第五章 國家安全保障

第六章 公民、組織的義務和權利

第七章 附則

43. In response to a question raised at the Legislative Council, the HKSAR Government replied on 8 July 2015: “Adopted at the Fifteenth Session of the Standing Committee of the Twelfth National People’s Congress on July 1 this year, the National Security Law (NSL) has a wide scope encompassing 11 areas, including political security, homeland security, military security, cultural security, technology security and so forth. In seven chapters, the NSL makes provisions for the duties and responsibilities in respect of safeguarding national security, national security system, national security protection, obligations and rights of citizens and organisations, etc.” (“第十二屆全國人大常委會第十五次會議於本年七月一日表決通過了《國家安全法》。《國家安全法》涵蓋範圍十分廣泛，包括政治安全、國土安全、軍事安全、文化安全、科技安全等 11 個領域。《國家安全法》共有七章，對維護國家安全的任務與職責，國家安全制度，國家安全保障，公民、組織的義務和權利等多方面進行了規定。”)

44. In comparison, its previous version (year 1993), i.e. the one it has replaced, had the following chapters:-

第一章 總則

第二章 國家安全機關在國家安全工作中的職權

第三章 公民和組織維護國家安全的義務和權利

第四章 法律責任

第五章 附則

45. Indeed, following the promulgation of the National Security Law of the People’s Republic of China in year 2015, there is now a clearer definition and a broader scope of what constitutes national security, with much higher and more stringent demands. It is important to note that the words “national security” appear about 150 times in the National Security Law of the People’s Republic of China, as compared to about 65 times in its previous version (year 1993), and about 10 times in the Criminal Law of the People’s Republic of China (revised in year 2015, see below).
46. A copy of the National Security Law (year 2015) as well as its previous version (year 1993) can be found at the following websites:-

http://www.npc.gov.cn/npc/xinwen/2015-07/07/content_1941161.htm

https://zh.wikisource.org/wiki/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%AE%B6%E5%AE%85%E8%90%A8%E6%B3%95_(1993%E5%B9%B4)

Criminal Law of the People’s Republic of China

47. For reference purpose, the Criminal Law of the People’s Republic of China (中華人民共和國刑法) (revised in year 2015) is a criminal code that deals with offences related to national security, among other things.

48. It is noted that the last sentence in Article 13 is instructive (“但是情節顯著輕微危害不大的，不認為是犯罪”):-

第十三條【犯罪概念】

一切危害國家主權、領土完整和安全，分裂國家、顛覆人民民主專政的政權和推翻社會主義制度，破壞社會秩序和經濟秩序，侵犯國有財產或者勞動群眾集體所有的財產，侵犯公民私人所有的財產，侵犯公民的人身權利、民主權利和其他權利，以及其他危害社會的行為，依照法律應當受刑罰處罰的，都是犯罪，但是情節顯著輕微危害不大的，不認為是犯罪。

49. We shall address this point later in our discussion below. A copy of the Criminal Law can be found at the following website:-

http://www.chnlawyer.net/law/subs/xingfa.html#102

National Flag, National Emblem and National Anthem

50. Through Annex III to the Basic Law, there is local legislation protecting the national flag and national emblem; and following the NPCSC’s decision that the national anthem law should be added to Annex III to the Basic Law, it will soon be implemented through local legislation criminalizing insults to the national anthem. As mentioned above, BL1 (national unity) must be more important than the national flag, national emblem and national anthem. As we see it, the whole matter should be put in such context. Whether harm is actually done or not, shouting “fire” inside a cinema maliciously when there is none is a criminal act. Likewise, advocating or shouting for the independence of Hong Kong is going down a slippery and dangerous slope.
PART E: LOCAL LAWS

Existing Local Laws Protecting National Security

51. In the local scene, there are existing laws protecting national security, including:

(a) Societies Ordinance, Cap 151 – regarding refusal to register etc

For example, Section 5A(3) reads:

The Societies Officer may, after consultation with the Secretary for Security, refuse to register or to exempt from registration a society or a branch-

(a) if he reasonably believes that the refusal is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others; or

(b) if the society or the branch is a political body that has a connection with a foreign political organization or a political organization of Taiwan.

52. A copy of the ordinance can be found at the following website:


53. In this connection, it is noted that under BORO, so far as national security is concerned:

Article 18 reads:

(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

(b) Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 – regarding refusal to register etc

For example, Section 360B(1) reads:
If the Registrar suspects that the relevant documents relate to a company which is being formed with the object of circumventing-

(a) the refusal of the Societies Officer to register or to exempt from registration a society under the Societies Ordinance (Cap 151); or

(b) the cancellation by the Societies Officer of the registration or exemption from registration of a society registered or exempted under the Societies Ordinance (Cap 151); or

(c) the prohibition of the operation or continued operation of a society by the Secretary for Security under section 8 of the Societies Ordinance (Cap 151),

or for the purpose of otherwise evading or defeating the provisions of the Societies Ordinance (Cap 151) or anything done thereunder, it shall be lawful for him to withhold registration of the same ...

Section 360N reads:-

If the Chief Executive in Council is satisfied that a non-Hong Kong company would, if it were a society in respect of which the Societies Ordinance (Cap 151) applied, be liable to have-

(a) its registration or exemption from registration cancelled under section 5D of the Societies Ordinance (Cap 151); or

(b) its operation or continued operation prohibited by the Secretary for Security under section 8 of the Societies Ordinance (Cap 151),

the Chief Executive in Council may order the company to cease to carry on business within Hong Kong ...

54. A copy of the ordinance can be found at the following website:-


**Interpretation and General Clauses Ordinance, Cap 1**

The relevant sections of the following Crimes Ordinance, Cap 200, and the Official Secrets Ordinance, Cap 521, shall be read together with the Interpretation and General Clauses Ordinance, Cap 1, where Schedule 8 says:-
(1) Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision-

(a) relates to title to land in the Hong Kong Special Administrative Region;

(b) involves affairs for which the Central People’s Government of the People’s Republic of China has responsibility;

(c) involves the relationship between the Central Authorities and the Hong Kong Special Administrative Region,

shall be construed as a reference to the Central People’s Government or other competent authorities of the People’s Republic of China.

(2) Any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) in contexts other than those specified in section 1 shall be construed as a reference to the Government of the Hong Kong Special Administrative Region.


(c) Crimes Ordinance, Cap 200 – regarding treason, sedition etc

For example, Section 2 reads:-

(1) A person commits treason if he-

(a) kills, wounds or causes bodily harm to Her Majesty, or imprisons or restrains Her;

(b) forms an intention to do any such act as is mentioned in paragraph (a) and manifests such intention by an overt act;

(c) levies war against Her Majesty-

(i) with the intent to depose Her Majesty from the style, honour and royal name of the Crown of the United Kingdom or of any other of Her Majesty’s dominions; or

(ii) in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory;

(d) instigates any foreigner with force to invade the United Kingdom or any British territory;
(e) assists by any means whatever any public enemy at war with Her Majesty; or

(f) conspires with any other person to do anything mentioned in paragraph (a) or (c).

(2) Any person who commits treason shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

Section 3(1) reads:-

Any person who forms an intention to effect any of the following purposes, that is to say-

(a) to depose Her Majesty from the style, honour and royal name of the Crown of the United Kingdom or of any other of Her Majesty’s dominions;

(b) to levy war against Her Majesty within the United Kingdom or any British territory in order by force or constraint to compel Her Majesty to change Her measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, Parliament or the legislature of any British territory; or

(c) to instigate any foreigner with force to invade the United Kingdom or any British territory,

and manifests such intention by an overt act or by publishing any printing or writing, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

Section 6 reads:-

Any person who knowingly attempts-

(a) to seduce any member of the Chinese People’s Liberation Army from his duty and allegiance to the People’s Republic of China; or

(b) to incite any such person-

(i) to commit an act of mutiny or any traitorous or mutinous act; or

(ii) to make or endeavour to make a mutinous assembly,

shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

Section 9(1) reads:-

A seditious intention is an intention-

(a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the
government of any other part of Her Majesty’s dominions or of any territory under Her Majesty’s protection as by law established;

(b) to excite Her Majesty’s subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or

(d) to raise discontent or disaffection amongst Her Majesty’s subjects or inhabitants of Hong Kong; or

(e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or

(f) to incite persons to violence; or

(g) to counsel disobedience to law or to any lawful order.

Section 10(1) reads:-

Any person who-

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or

(b) utters any seditious words; or

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

(d) imports any seditious publication, unless he has no reason to believe that it is seditious, shall be guilty of an offence and shall be liable for a first offence to a fine of $5,000 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.

55. A copy of the ordinance can be found at the following website:


(d) Public Order Ordinance, Cap 245 – regarding public gatherings (collective actions) etc

For example, Section 6(1) reads:-
If the Commissioner of Police reasonably considers it to be necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others, he may, in such manner as he thinks fit, control and direct the conduct of all public gatherings and specify the route by which, and the time at which, any public procession may pass.

56. A copy of the ordinance can be found at the following website:


57. In this connection, it is noted that under BORO, so far as national security is concerned:

Article 17 reads:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

(e) Official Secrets Ordinance, Cap 521 – regarding theft of state secrets etc

For example, Section 3(1) reads:

A person commits an offence if he, for a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong-

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters, a prohibited place;

(b) makes a sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) obtains, collects, records or publishes, or communicates to any other person, any secret official code word or password, or any sketch, plan, model or note, or other document or information, that is likely to be or might be or is intended to be directly or indirectly useful to an enemy.

Section 10(1) reads:

A person who commits an offence under section 3 is liable on conviction on indictment to imprisonment for 14 years.

Section 13(1) reads:
A person who is or has been-

(a) a member of the security and intelligence services; or

(b) a person notified that he is subject to the provisions of this subsection,

commits an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence that is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.

Section 14(1) reads:-

A person who is or has been a public servant or government contractor commits an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence that is or has been in his possession by virtue of his position as such but otherwise than as mentioned in section 13(1).

Section 25(1) reads:-

A person who commits an offence under any provision of this Part other than section 22(1), (4) or (5) shall be liable-

(a) on conviction on indictment to a fine of $500,000 and to imprisonment for 2 years;

(b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

58. A copy of the ordinance can be found at the following website:-


59. Some commentators said that there are no such concepts as “subversion” and “secession” in common law or in our existing local legislation. However, Mr Bob Allcock, the then Solicitor General, said at the “Dialogue on Article 23” seminar held on 23 December 2002 that:-

Turning to secession, common law jurisdictions do not generally have a separate offence known as “secession”. However, that does not mean they do not prohibit certain types of secessionist acts. On the contrary, the offences of treason and treasonable offences are often broad enough to cover such acts. … …

The next offence is subversion. It is often said that “subversion” is a concept that is unknown to the common law. That is not correct. The concept was previously found in the Australian Security Intelligence Organization Act, although it has now been replaced by another expression; and the Canadian Access to Information Act has a list of activities
that are described as “subversive or hostile activities”. The UK Security Service Act does not expressly use the term “subversion”, but refers to “actions which are intended to overthrow or undermine parliamentary democracy by political, industrial or violent means”.


PART F: NATIONAL SECURITY LAW IN UNITED KINGDOM

60. For comparison, in the UK, there are existing laws protecting national security, for example:-

(a) Security Service Act 1989, Cap 5

Section 1 reads:-

(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

Section 3(1) reads:-

No entry on or interference with property shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section.


(b) Intelligence Services Act 1994, Cap 13

Section 1 reads:-

(1) There shall continue to be a Secret Intelligence Service (in this Act referred to as “the Intelligence Service”) under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be-

(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

(b) to perform other tasks relating to the actions or intentions of such persons.
(2) The functions of the Intelligence Service shall be exercisable only-

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty’s Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime.


(c) Regulation of Investigatory Powers Act 2000, Cap 23

According to the Preamble, this Act is “to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed; to provide for Commissioners and a tribunal with functions and jurisdiction in relation to those matters, to entries on and interferences with property or with wireless telegraphy and to the carrying out of their functions by the Security Service, the Secret Intelligence Service and the Government Communications Headquarters; and for connected purposes.”


61. In short, the above Acts provide for the establishment of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters in the UK to protect its national security. We trust that the CPG, if not the HKSAR Government, is responsible for this essential role in the HKSAR. We shall address this point later in our discussion below.

62. In addition, a National Security Strategy and Strategic Defence and Security Review 2015 as presented by the UK Prime Minister to Parliament in November 2015 includes the following chapters:-

Chapter 4 – Protect our People

A. Protecting the UK, Overseas Territories and British nationals overseas

B. Our Armed Forces

C. The nuclear deterrent

D. Combating extremism and terrorism

E. Cyber

F. Serious and organised crime
G. Crisis response and resilience

Chapter 5 – Project Our Global Influence

A. Global influence
B. Allies, partners and global engagement
C. Strengthening the rules-based international order and its institutions
D. Tackling conflict and building stability overseas

Chapter 6 – Promote Our Prosperity

A. Economic security and opportunity
B. Innovation
C. The defence and security industries and skills


63. In short, the UK National Security Strategy and Strategic Defence and Security Review 2015 covers a wide scope of national security concerns, ranging from cyber security to military capabilities, cultural links and economic security etc. To some extent, it mirrors the coverage under the PRC National Security Law and begs the question of whether the HKSAR has already covered all areas.

PART G: LAWFUL DISCUSSION

Lawful Discussion or Promotion in respect of Matters not related to National Security

64. Given the guarantees under “One Country, Two Systems”, what is considered to be an offence in Mainland China may not be an offence in the HKSAR. For example, the operation of Falun Gong should still be allowed in the HKSAR, as well as any lawful discussion or promotion with a view to proposing amendments to the Constitution and/or the HKSAR Basic Law. Unlike advocacy for the independence of Hong Kong which harms national unity, which the Constitution and the local ordinance forbid whether it be at individual or collective/organizational level, under the Constitution and the HKSAR Basic Law, there are existing channels for proposing amendments, and we think such discussion or promotion should remain lawful in the HKSAR.

65. In other words, it all boils down to the subject of national security. Whether it is individual or collective/organizational action, there should be laws to protect national security and unity. In other cases, such as proposing amendments to the Constitution or the HKSAR Basic Law,
whether it is individual or collective/organizational action, we think such discussion or promotion should remain lawful in the HKSAR.

PART H: ANALYSIS and PROPOSAL

Implementation of BL23

66. This paper seeks to explain that in the interests of both the Central Authorities and the HKSAR, as a feasible and alternative option, it is worth considering that in fact BL23 has already been implemented through local legislation.

67. It happened when the Hong Kong Reunification Ordinance (Instrument A601) was passed shortly after midnight on 1 July 1997, thus affirming that the laws previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subsidiary legislation and customary law, which have been adopted as the laws of the HKSAR, shall continue to apply – thus including the local ordinances protecting national security. In other words, these ordinances came into effect – as they were adopted as the laws of the HKSAR – shortly after the Basic Law came into effect at midnight on 1 July 1997. It also happened subsequently when amendments were introduced to these ordinance(s), such as:-

(a) Section 5A(3) of the Societies Ordinance which reads: The Societies Officer may, after consultation with the Secretary for Security, refuse to register or to exempt from registration a society or a branch- (a) if he reasonably believes that the refusal is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others … (Amended 10 of 2008 s. 4)

(b) Section 7(1A) of the Crimes Ordinance which reads: Any person who knowingly attempts to seduce any member of the Chinese People’s Liberation Army from his duty or allegiance to the People’s Republic of China is guilty of an offence. (Added 2 of 2012 s. 3)

(c) Section 17 of the Official Secrets Ordinance which reads: (1) A person who is or has been a public servant or government contractor commits an offence if without lawful authority he discloses any information, document or other article to which this section applies and that is or has been in his possession by virtue of his position as such. (2) This section applies to- … (c) any information, document or article which is interception product within the meaning of the Interception of Communications and Surveillance Ordinance (Cap 589) … (Replaced 20 of 2006 s. 68)

68. BL160 stipulates that “Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this
Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.” As we see it, there is no contradiction between the expression regarding the HKSAR to enact laws on its own and the expression under BL160 to adopt laws, as “enactment” should cover the meaning of “adoption”. As a matter of fact, the Hong Kong Reunification Ordinance was passed after it had been given three readings, as it was called midnight legislation at the time.

69. On the issue of national security, if challenged, the Court of Final Appeal as required under BL158 shall seek the NPCSC’s Interpretation on matters concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region.

70. The relevant ordinances include: (a) Societies Ordinance; (b) Companies (Winding Up and Miscellaneous Provisions) Ordinance; (c) Crimes Ordinance; (d) Public Order Ordinance; and (e) Official Secrets Ordinance, as mentioned above. The relevant sections of these ordinances, though fragmented, all point to and give effect to the seven aspects under BL23. The extent to which BL23 has been implemented is summarized in the following table:-

<table>
<thead>
<tr>
<th>National Security Related Crimes</th>
<th>Individual Action</th>
<th>Collective/ Organizational Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Treason (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(2) Secession (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(3) Sedition (related to the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td>(4) Subversion against the Central People’s Government (with the use of violence etc)</td>
<td>Prohibited under BL23</td>
<td>Society/company prohibited by existing law (a), (b) (c), (d), (e)</td>
</tr>
<tr>
<td>(5) Theft of state secrets</td>
<td>Prohibited by existing law (c)</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(6) Foreign political organizations or bodies conducting political activities in the Region</td>
<td>Prohibited under BL23</td>
<td>Foreign political organizations or bodies prohibited by existing law (a), (b), (e)</td>
</tr>
<tr>
<td>(7) Political organizations or bodies of the Region establishing ties with foreign political organizations or bodies</td>
<td>N/A</td>
<td>Society/company prohibited by existing law (a), (b), (e)</td>
</tr>
</tbody>
</table>

71. The full descriptions of (a), (b), (c), (d) and (e) in the table above are as follows:-

(a) : Societies Ordinance
(b) : Companies (Winding Up and Miscellaneous Provisions) Ordinance
(c) : Crimes Ordinance
(d) : Public Order Ordinance
72. The above analysis is important, in that it affirms the constitutionality of the existing local laws effective from 1 July 1997 to protect our national security in pursuance of BL23, to the extent that prohibition of advocacy for the of independence of Hong Kong under the existing Crimes Ordinance is indeed constitutional; and that BL39 is to be construed accordingly to allow such restrictions in the interests of national security.

73. There are queries on whether such prohibition is constitutional. In this regard, we would argue that under “One Country, Two Systems”, given the fact that the HKSAR is an inalienable part of the PRC, the Johannesburg Principles may not fully apply. On the other hand, we agree that bona fide discussion and promotion of amendments to the Constitution and the Basic Law under the existing constitutional framework should remain lawful.

74. While it is arguable that BL23 has already been implemented through local legislation, on the issue of national security there appears a need to clarify the essential role of the Central Authorities’ counter-espionage operation in the HKSAR, on which the local law is now silent, when it is reasonable to expect that such counter-espionage operation would have been underpinned and regulated by legislation, such as that in the UK. We will discuss this important issue below.

75. Indeed, following the promulgation of the National Security Law of the People’s Republic of China in year 2015, there is now a clearer definition and a broader scope of what constitutes national security, with much higher and more stringent demands. It is important to note that the words “national security” appear about 150 times in the National Security Law of the People’s Republic of China, as compared to about 65 times in its previous version (year 1993), and about 10 times in the Criminal Law of the People’s Republic of China (revised in year 2015).

76. Given the current political situation in Hong Kong, it is entirely foreseeable that implementation of BL23 in the HKSAR is getting more and more difficult. It is true that a structured Composite Bill on BL23, being neat and tidy, is most desirable. However, it is not essential nor a pre-requisite. We believe that our proposal is a pragmatic approach to problem-solving and it serves the interests of both the Central Authorities and the HKSAR.

77. In short, we take the view that the HKSAR has indeed fulfilled its constitutional duty and obligation to implement BL23 through local legislation by way of the Hong Kong Reunification Ordinance and subsequent amendments to existing ordinances.

**Composite Bill**

78. Be that as it may, should any Composite Bill for national security be somehow deemed necessary anytime from now, that is, should the HKSAR Government or anyone wish to
go down this difficult route, perhaps there would be a need to revisit the HKSAR Bill on National Security of year 2003, and make necessary adjustments:-

(a) with reference to:-

(i) the existing local laws; and

(ii) the subsequent developments in respect of the Macao National Security Law (維護國家安全法) of year 2009; and

(b) to be in line with such fundamental concepts as are defined under the National Security Law of the People’s Republic of China (中華人民共和國國家安全法) of year 2015.

79. Regarding paragraph 78(b) above, we are not advocating the wholesale adoption of the National Security Law of the People’s Republic of China in our local legislation. Otherwise, there will not be any need to implement BL23 through local legislation. While we should take into consideration the unique values and sentiments of the local community in proposing our local legislation, as mentioned above, it is well noted that under the National Security Law of the People’s Republic of China, “national security” is defined in Chapter 1 (General Principles) as follows:-

第二條：國家安全是指國家政權、主權、統一和領土完整、人民福祉、經濟社會可持續發展和國家其他重大利益相對處於沒有危險和不受內外威脅的狀態，以及保障持續安全狀態的能力。

80. With reference to the Macao National Security Law, if the actual criminal acts are Step “3” and the preparatory acts are Step “2”, both related to the actual use or future use of violence etc, one may say that the expression of opinion to the extent of advocating or shouting for the independence of Hong Kong without the use of violence etc may be called Step “1”. A table with such categorization is prepared as follows:-

<table>
<thead>
<tr>
<th>National Security Related Crimes</th>
<th>Individual Action</th>
<th>Collective/Organizational Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Treason (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td></td>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
</tr>
<tr>
<td>(2) Secession (with the use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
<td>Society/company prohibited by existing law (a), (b), (c), (d)</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(3) Sedition (related to the use of violence etc)</th>
<th>Prohibited by existing law (c)</th>
<th>Society/company prohibited by existing law (a), (b), (c), (d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(4) Subversion against the Central People’s Government (with the use of violence etc)</th>
<th>Prohibited by existing law (c)</th>
<th>Society/company prohibited by existing law (a), (b), (c), (d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(5) Theft of state secrets</th>
<th>Prohibited by existing law (e)</th>
<th>Prohibited by existing law (e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited under BL23</td>
<td>Prohibited under BL23</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(6) Foreign political organizations or bodies conducting political activities in the Region</th>
<th>N/A</th>
<th>Foreign political organizations or bodies prohibited by existing law (a), (b)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Prohibited under BL23</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>(7) Political organizations or bodies of the Region</th>
<th>N/A</th>
<th>Society/company prohibited by existing law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Advocacy for the Independence of Hong Kong etc (without any use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
</tr>
<tr>
<td>--------</td>
<td>---------------------------------------------------------------------------------</td>
<td>------------------------------</td>
</tr>
<tr>
<td>Step 2</td>
<td>Preparatory Acts (with the future use of violence etc)</td>
<td>Prohibited by existing law (c)</td>
</tr>
<tr>
<td>(8) Counter-espionage operation</td>
<td>Prohibited by existing law (e)</td>
<td>Prohibited by existing law (e)</td>
</tr>
</tbody>
</table>

81. From the table above, it is noted that all the seven aspects under BL23 have been implemented to varying degrees.

82. For “Step 3” offences, an 8th category is added, namely counter-espionage operation in the HKSAR, which we will discuss below in detail.

83. For “Step 2” offences, namely preparatory acts, the Macao National Security Law is for reference only.
84. For “Step 1” offences, while bona fide “discussion” per se on the independence of Hong Kong etc should remain lawful (e.g. academic discussion in university), one should be careful that “advocacy” (at individual or collective level) can be interpreted as an incitement under some circumstances. We therefore propose that such terms as “discussion” and “advocacy” should be clearly defined in the Composite Bill (if required), to be in line with Article 2 of the National Security Law of the People’s Republic of China (i.e. definition of “national security” in Chapter 1 (General Principles) therein).

85. It is noted that under the Criminal Law of the People’s Republic of China (中華人民共和國刑法) (2015 Revision), if the circumstances are clearly minor and the harm is not great, such acts are not deemed to be crimes. In line with this principle and spirit, we suggest that the new law should also clearly set out a relatively high threshold for Step 1 offences which should not be confused with bona fide discussion.

86. For theft of state secrets, we note that the Law of the People’s Republic of China on Guarding State Secrets (2010 Revision) (中華人民共和國保守國家秘密法) has a definition on the different categories of state secrets.

87. Once a certain group has been proscribed or refused to be registered as a society or a company, it cannot raise funds or open bank accounts or hold assemblies. However, with the latest development in the Internet, in particular social media such as Facebook, people nowadays form virtual chat groups, which the Societies Ordinance and the Companies Ordinance (not being updated enough) may not be able to ban. We therefore propose that the HKSAR Government should examine how to regulate the virtual chat groups by reference to the existing legislation that regulates real societies and companies.

88. On the other hand, for discussion or promotion with a view to proposing amendments to the Constitution or the HKSAR Basic Law, unless the content or conduct is a threat to national security, as mentioned above, we propose that such discussion or promotion should remain lawful in the HKSAR:-

<table>
<thead>
<tr>
<th>Proposed Amendments to Constitution or HKSAR Basic Law</th>
<th>Individual Action</th>
<th>Collective/ Organizational Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not a threat to national security</td>
<td>Allowed at the moment</td>
<td>Allowed at the moment</td>
</tr>
<tr>
<td></td>
<td>Should be allowed under BL23</td>
<td>Should be allowed under BL23</td>
</tr>
</tbody>
</table>
89. As regards the need to recognize the legal status of CPG’s counter-espionage operation through our local legislation or otherwise, we consider that it may be more comprehensive and consistent with the spirit of BL23 if the present exercise could cover counter-espionage operation as well. As a matter of fact, due to the strategic position of the HKSAR in the Far East region and the historical background of its being an ex-colony of the UK, it is an open secret that extensive foreign espionage activities are conducted here. Recognition of the legal status of CPG’s counter-espionage operation in the HKSAR is not only important but it is also essential for the purpose of safeguarding our national security.

90. In drafting a Composite Bill (if required), we propose that the HKSAR Government should strike a balance between:

(a) protecting our national security and unity, which is a “collective” concern, and

(b) maintaining our freedom of speech, which concerns the rights and freedoms of the “individuals”.

91. Under “One Country, Two Systems”, for matters that fall within the ambit of our own “System”, BL5 provides that the previous capitalist system and way of life shall remain unchanged for 50 years. On the other hand, for matters that fall within the ambit of “One Country”, we should be mindful that such matters as national security and unity are of constitutional importance and should not be compromised.

92. For Step 1 offences, it is a matter of judgment whether advocacy for the independence of Hong Kong (without the use of violence etc) should be restricted, as is the case for other matters restricted under the existing law (e.g. protection of our national flag and emblem etc). Whether it is done individually or collectively has no major difference. In our analysis, such restriction is compatible with and will not undermine BL39. What we further suggest is that in line with the Criminal Law of the People’s Republic of China (2015 Revision), there should be a relatively high threshold for Step 1 offences, thus ruling out minor acts which are not deemed to be crimes.

93. As we see it, the Composite Bill (if required) has no conflict with the National Security Law of the People’s Republic of China of year 2015.
Essential role of Security Operation in the HKSAR

94. Last but not the least, BL22 states that “No department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

95. One must note that such security service operation falls outside “the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”.

96. While such national law as the Counterespionage Law of the People’s Republic of China (中華人民共和國反間諜法) of year 2014 has not been added to Annex III to the Basic Law (not that we are suggesting), it does not follow that such operation per se is unlawful in the HKSAR.

97. Having said that, in case such operation has breached any local law, BL19 states that “The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.”

98. One must note that the words “such as” indicate that the examples given (i.e. defence, foreign affairs) are the important ones but they are by no means exhaustive.

99. Under BL158, the Court of Final Appeal will need to seek interpretation on matters “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region.”

100. The words “acts of state” are mentioned in BL19 which is under Chapter 2 (concerning the relationship between the Central Authorities and the HKSAR). This in turn means that the NPCSC has the locus to interpret what constitutes an “act of state” under BL19. If so, what else is there besides defence and foreign affairs? It seems that common law interpretation of what constitutes an “act of state” may not necessarily apply.

101. Under the circumstances, subject to the NPCSC’s interpretation (if required), could counter-espionage (security service) operation in the HKSAR against foreign agents or spies be construed as an “act of state”?”
102. On this question,《最高人民法院關於執行〈中華人民共和國行政訴訟法〉若干問題的解釋》of year 1999 is instructive:

第一條 公民、法人或者其他組織對具有國家行政職權的機關和組織及其工作人員的行政行為不服，依法提起訴訟的，屬於人民法院行政訴訟的受案範圍。

公民、法人或者其他組織對下列行為不服提起訴訟的，不屬於人民法院行政訴訟的受案範圍：

（一）行政訴訟法第十二條規定的行為；
（二）公安、國家安全等機關依照刑事訴訟法的明確授權實施的行為；
（三）調解行為以及法律規定的仲裁行為；
（四）不具有強制力的行政指導行為；
（五）駁回當事人對行政行為提起申訴的重複處理行為；
（六）對公民、法人或者其他組織權利義務不產生實際影響的行為。

第二條 行政訴訟法第十二條第（一）項規定的國家行為，是指國務院、中央軍事委員會、國防部、外交部等根據憲法和法律的授權，以國家的名義實施的有關國防和外交事務的行為，以及經憲法和法律授權的國家機關宣布緊急狀態、實施戒嚴和總動員等行為。

http://www.readers365.com/law/ssf/200311/20031109195414.htm

103. From the above, it may be inferred that the acts of police and security service (公安、國家安全等機關的行為) may not be included in the acts of state (行政訴訟法第十二條規定的國家行為). This will impact on whether the local court has jurisdiction over such operation.

104. Whichever way it takes, a certain red line has to be drawn to avoid abuse of power. One way is to add a specific national law on counter-espionage operation in the HKSAR (not necessarily the one as mentioned above) to Annex III to the Basic Law, as in the case of the Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administrative Region.

105. To summarize:-

(a) As in other countries, security service operation is essential in the protection of national security.
(b) Such operation falls outside “the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”.

(c) While the relevant national law was not added to the Annex III to the Basic Law, it does not follow that such operation per se is unlawful in the HKSAR.

(d) Having said that, in case such operation has breached any local law, subject to the NPCSC’s interpretation of what constitutes an “act of state”, the local court may/may not have jurisdiction over these cases.

(e) Given that such acts are committed in the HKSAR, the mainland court does not have any jurisdiction on these cases either (this is in line with the 《最高人民法院關於執行〈中華人民共和國行政訴訟法〉若干問題的解釋》of year 1999, i.e. “不屬於人民法院行政訴訟的受案範圍 … 公安、國家安全等機關依照刑事訴訟法的明確授權實施的行為”). Nor does the mainland court have the authority to interpret the HKSAR Basic Law.

(f) In short, even though in a broad sense such operation is not unlawful, any breach of the local law may/may not fall under the local jurisdiction, nor the mainland jurisdiction.

106. It therefore begs the question of how, from a legal point of view, security service can fulfil this essential role of protecting national security in the HKSAR. In addition, it also appears that the scope of our local enactment of the national security law is narrower than that in the UK. There appears a legal lacuna which might have to be dealt with separately. One way is to add a specific national law on counter-espionage operation in the HKSAR (not necessarily the one as mentioned above) to Annex III to the Basic Law, or as an alternative, to embody the counter-espionage operation in our Composite Bill (if required).

Conclusion

107. After the implementation of BL23 fell through in year 2003, there was the enactment of the National Security Law in Macao in year 2009 and the adoption of the National Security Law of the People’s Republic of China in year 2015 with much higher and more stringent demands. The UK National Security Strategy and Strategic Defence and Security Review 2015 covers a wide scope of national security concerns, ranging from cyber security to military capabilities, cultural links and economic security etc. To some extent, it mirrors the coverage under the PRC National Security Law and begs the question of whether the HKSAR has already covered all areas. Given the current political situation in Hong Kong, it is entirely foreseeable that implementation of BL23 in the HKSAR is getting more and more difficult. While it is true that a structured Composite Bill on BL23, being neat and tidy, is most desirable, nevertheless it is not essential nor a pre-requisite. As an alternative option, it is arguable and sensible to state that the HKSAR has already fulfilled its constitutional duty and obligation to implement BL23 through local legislation by way of the Hong Kong Reunification Ordinance and subsequent amendments
to various local ordinances to suit the needs of the local community. Indeed, the relevant sections in the above ordinances, though fragmented, all point to and give effect to BL23. While it is arguable that BL23 has already been implemented through local legislation, on the issue of national security there appears a need to clarify the essential role of the Central Authorities’ counter-espionage operation in the HKSAR, on which the local law is now silent, when it is reasonable to expect that such counter-espionage operation would have been underpinned and regulated by legislation, such as that in the UK. Meanwhile, it is important to note that advocacy for the independence of Hong Kong remains unlawful under the existing Crimes Ordinance. Any attempt to test the law is futile and will be met with serious consequences. In the circumstances, we believe that our proposal is a pragmatic approach to problem-solving and it serves the interests of both the Central Authorities and the HKSAR.

Public Law Milestone
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