Past and Future Offences of Sedition in Hong Kong

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For Sir James Fitzjames Stephen, whether the offence of sedition is justifiable depends on how the relationship between the ruler and the ruled is conceptualized. "If the ruler", according to Stephen, "is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistake or not no censure should be cast upon him likely or designed to diminish his authority."[1]This has been the underlying logic to justify sedition for all forms of dictatorial and authoritarian regimes.

Conversely, if the ruler is regarded as the agent and servant, and the subject (i.e. the public) as the wise and good master who has delegated the power to the so-called ruler, then there can be no sedition, for censuring the government is only an exercise of the right by a member of the public to find fault with his servant.[2] Therefore, "no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."[3]

The answer to Stephen's question is self-evident even at Stephen's time, for Stephen made it clear that nothing short of an immediate tendency to produce disorder ought to be regarded as sedition. Indeed, that was taken as the law in England in the latter part of the 18th century.[4] It has been commonly accepted that political speech is essential to a democracy and thus deserves more protection than other types of speech, and public political advocacy is fundamentally different from a private solicitation of crime and thus should be treated as such by criminal law.[5]

Law reformers have almost universally advocated the abolition of sedition as a criminal offence. The Canadian Law Reform Commission criticizes sedition as "an outdated and unprincipled law", which is inconsistent with the Canadian Charter of Rights. The Commission asks, "Is it not odd then that our Criminal Code still contains the offence of sedition which has as its very object the suppression of such freedom?"[6] The Law Commission of the United Kingdom has also recommended the abolition of sedition. In addition to the fact that criminalizing sedition stifles political discussion and is detrimental to the exercise of the right to criticize government, the Commission argues that "there is likely to be a sufficient range of other offences covering conduct amounting to sedition".[7] Furthermore, the offence is "political", and the Commission preferred seditious acts punished by apolitical laws.[8] Common

law courts have, to various degrees, required incitement to violence as part of the definition and thus narrowed the scope of the offence. The fact that the offence has been abolished in some countries and retained in others mainly has to do with how the offence has been defined in those different countries.

This paper reviews the past seditions offences in Hong Kong and the possible future development of the law of sedition in light of developments in other common law jurisdictions. This paper has three parts. Part one is a brief historical review of the legislation and case law of sedition in Hong Kong in chronological order. Part two considers the evolution of sedition in certain common law jurisdictions and discusses several key concepts and distinctions between sedition and legitimate dissent. Part three comments upon the proposed sedition offence in the Consultation Paper in light of the historical development of the offence.

Sedition as an Offence in Hong Kong

Regulating the Press

Although the development of the law of sedition in Hong Kong dates back to the 1840s when Hong Kong was ceded to Britain, the law itself had little, if anything, to do with the English law practiced at home. The development of the law closely related to the regulation of the press in the territory.[9] Newspapers at that time included the Hong Kong Gazette (mainly publishing military notices) and the Friend of China (published by English missionaries). The first type-set Chinese newspaper—the *Zhong Wai Xin Bao* — began publication in 1858.

Regulation of the press in China was indispensable to every dynasty, although the restrictions varied from one dynasty to another. Since Hong Kong was governed by the *Da Qing Luli* (the Great Qing Code) before being ceded to Britain, the *Da Qing Luli* remained the law governing the operation of the press in the first few years of British rule. After the establishment of the executive and legislative structures of Hong Kong, an Ordinance of 1844 was passed to regulate the press in Hong Kong.

As explained in the Chronological Table of Ordinances[10], the Ordinance was "to regulate the printing of books and papers, and the keeping of printing presses within the Colony of Hong Kong."[11] Under the Ordinance, proprietors of newspapers were only required to declare their places of abode before a magistrate. While bonds and sureties were required, the amounts required were much lower than their British counterparts.[12] The reason for such a policy, as explained by Sir Hercules Robinson,

the Governor of the time, was "to assimilate the press of the Colony with the most respectable press in the world, namely, the press of England".[13] Hong Kong enjoyed freedom of the press in the first 20 to 30 years of colonial rule.[14]

The Government started to tighten control over the press after cases involving the Friend of China, one in 1857 and the other in 1859. Two reports run by the Friend of China, one on *Cheong Ahlum's* case, the other on the argument between the Attorney General and the Colonial Secretary, angered the Government. The Government prosecuted the newspaper for libel.[15] As a result, the proprietor of the newspaper, William Tarrent was sentenced to imprisonment for 3 months and 1 year respectively. The *Friend of China* was forced to suspend publication. This was the first time that a newspaper was compelled to suspend publication.[16]

The Legislative Council subsequently passed a series of laws to establish the regulatory framework for the press and for general printing and publication. In 1860, the Legislative Council passed Ordinance No.16 to amend the law relating to newspapers in Hong Kong.[17] In 1886 and 1888, the Legislative Council passed the *Printers and Publishers Ordinance* and the *Colonial Books Registration Ordinance* respectively. These two Ordinances laid down the framework for the regulation of printers and publishers in Hong Kong. In 1927 more stringent mechanisms, including a licensing system, were created to control the press to respond to the increase in anti-government publications in the aftermath of the 1925-26 general strike.[18] The Commissioner of Police for example was empowered to grant, at his discretion, a license to keep a printing press at any specified place.[19] While historically the press in Hong Kong was generally free in making political commentaries, the Government attempted to enforce censorship at more difficult times, such as during the 1925 general strike, the time prior to the Japanese occupation, and during the Cultural Revolution. [20]

Legislative Control over Seditious Books & Newspapers

It was not until the early 20th century that the Legislative Council started to control the seditious content of books and newspapers. The regulation of content was directly related to the rapid political changes in China. The Civil War in China resulted in the competing factions creating newspapers in Hong Kong with particular political persuasions. These newspapers were used as instruments of the political factions in China to extend their hostilities to Hong Kong. The early legislative efforts at content control sought to control this type of political propaganda and agitation.

The first law which authorized the Hong Kong government to impose direct control over the content of the press was the *Chinese Publications (Prevention) Ordinance 1907*. The immediate cause of passing this Ordinance was the fact that "[t]here has been an amount of seditious matter published in this Colony for some time past, which in the opinion of the Government may have the effect of inciting to crime in China". In particular there was a publication of an anti-Manchu cartoon. The cartoon portrayed "some of China's leading statesmen sitting with their heads in their hands".[21] The Hong Kong Government asserted that the cartoon and other publications could incite "rebellion against the great and friendly empire which lies so close to our border" in order to deter the press in Hong Kong from becoming too deeply involved in the politics of China and save the Government from embarrassment.[22]

The Hong Kong Government passed the *Chinese Publications (Prevention) Ordinance* on 11th October 1907, a law which was regarded as "rather dangerous" and may attract "*bona fide* criticism" from the public.[23] The Attorney-General stated at the Second Reading of the Bill that the object of the Ordinance was "to prevent Hong Kong becoming a place where seditious pamphlets [might] be printed and circulated with a view to distribution in China"[24] and "to prevent this Colony being made a center for seditious publications".[25] The legislative intention was more expressly stated in the Preamble of the Ordinance, which provided that "Whereas, owing to the proximity of the Colony of Hong Kong to the mainland of China and to the tendency to create internal dissension in that country, it is deemed expedient to prohibit within the Colony the publication of matter calculated to excite such dissension".[26]

The *Chinese Publications (Prevention) Ordinance* contained only one main provision. Under section 2 of the Ordinance, any person who "printed, published, or offered for sale or distributed any printed or written newspaper or book or other publication containing matter calculated to excite tumult or disorder in China or to excite persons to crime in China" would be liable for a fine not exceeding five hundred dollars or a maximum of 2 years' imprisonment or both.

The law was not limited to the Chinese press. As the real target of the Ordinance was those publications that might be calculated to incite tumult in the Mainland, the language used was irrelevant. Newspaper articles written in English concerning politics in Mainland China were also subject to the operation of this Ordinance.[27]

While the *Chinese Publications (Prevention) Ordinance* punished those local printers, publishers, sellers and distributors who printed or published any books or newspapers that calculated to excite tumult or disorder in China, the *Post Office Ordinance 1900* dealt with the prohibition of sending seditious, indecent or obscene materials. Under section 12 of the *Post Office Ordinance 1900*, the Post Office was prohibited from receiving and delivering articles that were seditious, indecent or obscene in character. However, there was doubt about the effectiveness of this section. One of the criticisms was that the power under this Ordinance was limited to controlling those materials coming to Hong Kong through post. The Postmaster could take no action other than returning the seditious matter to the Post Office of origin. At the Legislative Council meeting in 1914, the Colonial Secretary claimed that it was difficult and often practically impossible to control seditious materials with success.[28]

The first comprehensive *Seditious Publications Ordinance* was passed in Hong Kong in 1914. The new law was necessary, according to The Attorney General and the Colonial Secretary, because of the fact that 'newspapers and documents of a highly objectionable character have been brought into the Colony and distributed amongst some of its inhabitants.' Those publications which were `of a highly seditious and disloyal character and which contain matter which is subversive of all social and economic conditions and which, disseminated amongst ill-educated persons, are likely to be productive of disturbance and ill-feeling in the Colony.'[29]

The objectives of the Seditious Publication Ordinance were threefold:

1) To make it clear what matter was to be deemed to be seditious;
2) To provide for more effective means of preventing the introduction into the Colony of seditious matter;
3) To provide for the seizure and forfeiture of seditious publications.[30]

The 1914 Ordinance was different from the earlier laws that regulated the press in several aspects. First, unlike the earlier regulations (such as the 1886 Ordinance), the scope of the *Seditious Publications Ordinance* was broader. Under the 1886 Ordinance, only books printed or published in Hong Kong and newspapers printed for sale and published in Hong Kong periodically or in parts or numbers at intervals not exceeding 26 days were subject to control.[31] The 1914 Ordinance, however, regulated any books, newspapers and even documents (including also any painting, drawing or photograph or other visible representation) wherever printed and printed at whatever intervals.[32]

Secondly, the 1914 Ordinance clearly defined what amounted to "seditious matter" under the Ordinance. According to the definition, seditious matter referred to "any words, signs or visible representations contained in any newspaper, book or other document which said words, signs or visible representations are likely or may have a tendency, directly or indirectly whether by inference, suggestion, allusion, metaphor, implication or otherwise –

1) To incite to murder or to any offense under the Explosive Substances Ordinance 1913, or to any act of violence; or
2) To seduce any officer, sailor or soldier in His Majesty's navy or army from his allegiance or his duty; or
3) To bring into hatred or contempt His Majesty, or the Government established by law in the United Kingdom or in this Colony or in any British possession or in British India or the administration of justice in any of such places or to excite disaffection towards His Majesty or any of the said Governments; or
4) To put any person in fear or to cause annoyance to him and thereby induce him to deliver to any person any property or valuable security, or to do any act which he [was] not legally bound to do, or to omit to do any act which he is legally entitled to do; or
5) To encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order; or
6) To convey any threat of injury to a public servant, or to any person in whom that public servant [was] believed to be interested, with the view to inducing that public servant to do any act or to forbear or delay to do any act connected with the exercise of his public functions.

According to section 3 of the Ordinance, the power to decide whether a book, newspaper or document was seditious was vested in the Governor in Council. The Governor in Council could also declare that seditious matters be forfeited.

Thirdly, the power of the Postmaster-General was also strengthened in dealing with seditious matter. Under the Ordinance, the Postmaster-General was "to detain any article in the course of transmission by post which he [suspected] contain[ed] any newspaper, book or other document containing seditious matter".[33] The power to detain seditious matter was also extended to the Superintendent of Imports and Exports to control those materials coming to Hong Kong through other channels. Indeed, any person who reasonably suspected that any seditious matter was in any

building, vessel or place might, at the discretion of a magistrate, obtain a warrant which authorized the police officer to enter such building, vessel or place and search and seize the seditious matter and arrest the person who possessed them.[34]

Sedition Ordinance 1938

The *Sedition Ordinance* 1938 (No. 13) and *Sedition Amendment Ordinance* (No. 28) were important for two reasons. First, the definition of seditious intention in the Ordinances was essentially the same as their British counterpart. Second, the law laid the foundation for the existing offence of sedition in Hong Kong. Both Ordinances were passed without any debate.[35]

According to the Seditious Amendment Ordinance (No. 28), a "seditious intention" was an intention—

(i) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or against the Government of this Colony or the Government of any other part of His Majesty's dominions or of any territory under His Majesty's protection as by law established[36]; or

(ii) to excite His Majesty's subjects or inhabitants of the Colony to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Colony as by law established; or

(iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Colony; or

(iv) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Colony; or

(v) to promote feelings of ill-will and hostility between different classes of the population of the Colony.[37]

A statutory defence was provided in the 1938 Ordinance. Thus an act, speech or publication is not seditious by reason only that it intends —

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

(b) to point out errors or defects in the Government or Constitution of the Colony as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Colony to attempt to procure by lawful means the alteration of any matter in the Colony as by law

established; or

(d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Colony.

Section 3(2) of the *Sedition Ordinance* provided an objective test for seditious intention. It stated:

> In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

It remained an offence to print, etc. any seditious publication, punishable by two years' imprisonment for a first offence, and three years for a subsequent offence. Possession of any seditious publication was made an offence punishable by one year imprisonment for a first offence and two years' imprisonment for a subsequent offence.[38]

The other important Ordinance was the *Control of Publications Consolidation Ordinance* 1951. The coming to power of the Communist Party on the Mainland once again changed the framework of press regulation in Hong Kong. Although the Civil War in the Mainland ended, hostilities continued between the communists on the Mainland and the Nationalists in Taiwan. More seriously, the Korean War started, involving both the UK and the People's Republic of China. The Hong Kong Government became more concerned over the power of the press, passing the *Control of Publication Consolidation Ordinance* in 1951.

The 1951 Ordinance subjected three broad categories of newspapers to its control. The first category was publications that might be "calculated or tending to persuade or induce any person or persons whether individually or as members of the general public or of class or sections to commit an offense.[39] The second category was those publications that were calculated or tending to persuade or induce any person or persons whether individually or as members of the general public or of classes or sections to become members of, contribute to the support of, recruit for or proselytize on behalf of or otherwise adhere to any unlawful society (within the meaning of the *Societies Ordinance* 1949) or any political party, group or association

established outside the Colony adherence to which within the Colony had by virtue of any enactment been declared by the Governor in Council to be prejudicial to the security of the Colony or to the prevention of crime or to the maintenance within the Colony of public order or safety.[40] The last category that was subjected to control was those publications that were "likely to alarm public opinion or disturb public order".[41]

Apart from these three categories, any publication that was, from the point of view of the Governor in Council, "calculated or [was] likely to be prejudicial to the security of the Colony or the prevention of crime or to the maintenance within the Colony of public order, safety, health or morals" might also be prohibited from importation.[42]

To suppress any publications that contained such undesirable contents, upon the application of the Attorney General (and regardless of whether there was any pending proceeding), the Court or a magistrate could order the suppression of that publication for a period not exceeding 6 months. Upon the violation of any suppression order, seizure and detention of all the machinery and publications were possible.[43] Any overseas publication falling within with any of the prohibited categories might also be prohibited from being imported into Hong Kong.[44] Those persons who, in whatever way, constructively possessed the prohibited publications (e.g. possessing, having the right to order or disposing or controlling the prohibited documents), might also be criminally liable.[45]

Sedition Prosecutions

On 2nd November 1951, a disastrous fire occurred in Tung Tao Village which consumed a large number of wooden huts. The Government's performance in response to this incident was criticized as unsatisfactory. The discontent of the public towards the Hong Kong Government became even more apparent as disturbances following the fire became more serious. On the 1st March, 1952, a Canton Comfort Mission planned to come to Hong Kong to visit the Kowloon City Tung Tao Village Fire Victims. Some Hong Kong residents organized themselves into a group to welcome the Comfort Mission. This action drew the attention and suspicion of the Hong Kong Government. A large number of policemen were ordered to the railway station where the Comfort Mission was expected to arrive. The Comfort Mission was also forbidden from entering Hong Kong. A confrontation resulted between the police and the public at the railway station. Many of the protesters were charged, and some of them were even deported. This was the well-known "March First Incident".

The People's Daily published an article protesting the arrest and killing of some Chinese inhabitants in Hong Kong by the Hong Kong Government. This article was reprinted in *Ta Kung Po*, which also published other stories and editorials relating to the event. The newspaper was charged with publishing a seditious publication under section 4(1)(c) of the *Sedition Ordinance*, that is, printing, publishing, selling, offering for sale, distributing or reproducing seditious publication and its proprietor-publisher, printer, editor were arrested and prosecuted.

The proprietor-publisher and editor were found guilty and appealed against their conviction, arguing that, in publishing the article, they lacked seditious intent. The defendant offered evidence that *Ta Kung Po* had three different articles on the same front page, covering the same event from three different angles, except the republication of the offending article from the *People's Daily*, the newspaper also had a story on the UK Parliamentary report on the same event and a story on the reaction in Guanzhou. The newspaper was simply reporting on the event and lacked any seditious intent.

The defendants were convicted and appealed against the conviction. The Court of Appeal, relying on *Wallace-Johnson v The King* (1940) A.C. 231, rejected the appellants' submission that incitement to violence was a necessary element to be proven by the prosecution. Further no intention to publish seditious words was required according to the express provisions of the law, and it was not necessary for the prosecution to establish that the publication was intended to incite violence. In upholding the conviction, the court approved the trial judge's summing-up:

> ... a person is deemed to intend the consequences naturally flowing from his conduct at the time and under the circumstances in which he conducted himself. If the article when published, would in the natural course of events stir up hatred or contempt against the Government, it is *prima facie* evidence of a publication with a seditious intention. It is unnecessary to produce any extrinsic evidence of a publication with a seditious intention.[46]

Ta Kung Po was found guilty under the *Sedition Ordinance* and the *Control of Publication Consolidation Ordinance*.[47] The court also ordered the suspension of publication for 6 months, which was reduced to 12 days upon Beijing's protest. [48]

The sedition charge was frequently used by the colonial government in dealing with the 1967 riots in Hong Kong.[49] The leading case was the prosecution of three

pro-China local Chinese newspapers, *Tin Fung Daily*, *Afternoon News* and *Hong Kong Evening News*, for publishing false and seditious news, publishing articles with intent to arouse the discontent of police officers and violating the provisions in the *Control of Publication Consolidation Ordinance* as a result of their reports of the June Seventh Riot in 1967. The offending publications included reports or editorials which called upon Hong Kong people to organize to resist the British repression and to bury the reactionary government and urged the Hong Kong police of Chinese race to defect and rebel against the government. The false news related to a report in the Hong Kong Evening News that Chinese navy battle ships were approaching Hong Kong.[50]

On 9 September 1967, the police arrested the proprietors of the three newspapers, Hu Di Wei and Pan Huai Wei, and three printers. The trial started on 21 August 1967 in the Central Magistracy. All of the defendants were found guilty as charged and were sentenced to three years' imprisonment. The court also ordered a six month suspension against the three newspapers. The defendants insisted that the trial was political persecution and refused to appeal.

The three newspapers were the peripheral organizations of the Chinese Communist Party in Hong Kong, and played only supporting roles in inciting the riots. The colonial government did not prosecute the CCP owned newspapers, such as the *Ta Kung Po*, nor the CCP members for inciting the riots, who were said to have played the leading and more direct role behind the riots in Hong Kong. Nevertheless, China reacted strongly to the prosecution and Red Guards in Beijing surrounded the British Office of the Charge d'Affaires and then set it on fire, an event which caused a diplomatic crisis between China and the UK.

Further Amendments

The *Sedition Ordinance* was further amended in 1970. Two additional types of seditious intention were added to the lists: "to incite persons to violence" and "to counsel disobedience to law or to any lawful order.[51] The Ordinance existed until the end of 1971 when it was consolidated into the *Crimes Ordinance*, which also incorporated both incitement to disaffection and incitement to mutiny.[52]

The enactment of the *Bill of Rights Ordinance* (BORO) has affected the sedition law. The constructive intention clause was removed[53] after the enactment of the BORO. The government proposed its repeal on the ground that the presumption of intention was probably inconsistent with Article 11 of the BORO.[54]

The final amendment of the sedition law occurred in 1997, immediately before the Reunification. The Hong Kong legislature then was, in principle, in favor of repealing the offence of sedition in 1997, although the majority of that body felt bound to accept the "political reality" and narrowed the scope of the offence without deleting it from the statute book. The main argument for the deletion was stated by the Bills Committee as follows:

> The offence of sedition is archaic, has notorious colonial connotations and is contrary to the development of democracy. It criminalizes speech or writing and may be used as a weapon against legitimate criticism of the government.[55]

Nevertheless, many members appreciated the "political reality" that the future government would be duty-bound to legislate on sedition under Art 23, thus they proposed to narrow the scope of the offence and enlarge the possible defence by inserting the following three principles:

1. Narrowing the definition of seditious intention in section 9;
2. Providing an additional element of having the purpose of disturbing the "constituted authority" in section 9 to make prosecutions more difficult; and
3. Incorporating Principle 6 of the Johannesburg Principles.[56]

With the support of the Democratic Party, the Government amendment on sedition passed the third reading on the night of 23 June 1997. The amendment codifies the existing common law requirement and limits the scope of the offence by requiring "the intention of causing violence or creating public disorder or a public disturbance". The law was enacted but has not been implemented.

Defining Sedition in Other Jurisdictions

Publications or the Effect of the Publications? An Issue of Methodology

There have two competing approaches in determining a seditious intent. One approach looks at words themselves to determine whether they are capable of triggering action. The other approach looks at the circumstances surrounding the words to determine whether the words could produce certain harmful results. This distinction can be traced to the earlier history of the offence of sedition.

Sedition was a Star Chamber creation, but the abolition of Star Chamber in 1641 did not, however, bring to a halt the prosecution of seditious offences.[57] Seditious libel was transfigured into common law and thus came within the jurisdiction of the King's Bench.[58] In several important ways, the common law courts incorporated Star Chamber practice, for example, by requiring a jury to consider only the issue of whether a publication has occurred. By defining the issues in dispute in this way, the common law procedure became analogous to the trial by Star Chamber without a jury.[59] Whether or not the content was seditious was also determined by the judges, who made their determination by examining the content of a publication. As the ground for seditious libel included the vague concept of diminishing the affection of the people for the King and his government, the judges "effectively decided the libelousness themselves, for in the circumstances nobody could or would disagree with them."[60]

The passage of *Fox's Libel Act* in 1792 softened the prosecution of sedition. This Act had a direct and indirect effect. The direct result was that the jury was given more power in that jurors decided on whether a publication was seditious. The jury took from the judge the power to determine the nature of the words uttered or written, so that the issue became a matter of fact rather than a matter of law. The indirect result was that, as the jury started to look into the issue of whether a publication was seditious, the offence of sedition went beyond the mere words themselves. The jury began to consider their context and effect. As Stephen said: "The Libel Act must thus be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller to the purpose for which he wrote."[61] As Lobban[62] emphasizes, "in cases of sedition, it was the context that became all-important".

> The eighteenth century's most common form of political prosecution began to stress the seditious effect of the words rather than their intrinsically libellous nature...the judge could not tell the criminal character alleged purely from the words on the record, as this increasingly involved questions of context and effect.[63]

The debate continued across the Atlantic between Hand and Holmes. The clear and present danger test is an example of the circumstance approach . In *Schench v. US* in 1919,[64] the defendant was charged under the *Espionage Act* for circulating leaflets against military induction. Justice Holmes created this much celebrated test in this case: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[65]

In *Abrams* which involved the distribution of pamphlets against America's decision to send troops to Russia to fight against the Communists,[66] Justice Holmes, in his dissenting opinion, further developed the 'clear and present danger' test:

> ...I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.

Much has been written on the Holmes test both inside and outside the US. But this test has been more a rhetorical than an objective and hard test. The test, as it has been used in the US courts, has relied upon each judge's subjective interpretation of the circumstances. The intention of an accused was determined not through the actual words uttered, but through decoding and reconstruction and by revealing the innuendo behind the words used. Thus in *Debs*,[67] although the speech of Eugene Debs, the US Socialist leader and a soon-to-be presidential candidate, touched upon merely "socialism, its growth, and a prophecy of its ultimate success,"[68] Holmes nevertheless could find "the manifest intent of the more general utterance…to encourage those present to obstruct the recruiting service". From a statement from Debs that Debs might not be able to say all that he thought, Holmes was able to conclude that Debs was intimating to his audience that they "might infer that meant more…"[69] holding that the "natural and intended effect was to obstruct recruiting.[70] Debs was sentenced a lengthy 14 years' imprisonment under the clear and present danger test, a sentence that Holmes himself later regretted.[71]

The court ventured deeply into the subjective world and ignored the objectivity of the danger.[72] Koffer and Kershman have criticized the test as follows:

> Judicial recourse to hidden meanings renders impossible any objective examination of the government's case against these dissenters. But it also raises even more acutely the problem of authorial intent: not the intent of the *defendant*, but rather the intent of the *judge*. Through interpretation, the Court has politically appropriated the statement of dissenters and turned them to its own purpose.[73]

It is "the speaker's enthusiasm for the result", according to a judge's interpretation,

which distinguishes abstract advocacy from incitement to action.[74]

The clear and present danger became so distorted in application that the Supreme Court of the US decided in *Brandenburg* in 1969, that it had no place in the interpretation of the First Amendment of the US Constitution. The Court explained the great misgivings' about the test:

> First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all out political trial which was part and parcel of the Cold War that has eroded substantial parts of the First Amendment.[75]

Mere intention to incite violence, however inferred from circumstances, is not sufficient for the offence of sedition. In the First Amendment jurisprudence in the US, the alternative test to the clear and present danger test has been a word-oriented incitement test. The leading advocate was Judge Learned Hand, who formulated the test in the case *Masses*,[76] which stressed the need to look at the words themselves to determine whether they could trigger action.

The *Masses* case was decided in 1917 by Learned Hand. The case concerned a journal called Masses. The offending content was some cartoons, a tribute to two conscientious objectors and letters which could be interpreted as condemning the US Government for its war policies. The journal was barred by the Postmaster from circulation for violating the *Espionage Act*.[77] The publisher of Masses sought an injunction against the Order.

In granting the injunction, Learned Hand held, unless the cartoons and letters could, according to a more objective test "based upon the nature of the utterance itself", actually urge violent or unlawful activity, their publication would not be unlawful. He concluded that 'If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.'[78]

Hand's contribution is his criticism of the then prevailing approach which second-guessed the likely consequence of a subversive speech through examining the circumstances of the speech and background of the speakers, an approach that was largely inherited by Holmes in his present and immediate danger test. Hand conceded to

the argument of the Prosecution that the anti-war speech in Masses "tends to promote a mutinous and insubordinate temper among the troops."[79] Indeed Hand agreed that readers of Masses might be affected by the anti-war speech: "men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by the tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination."[80] But he believed that the reliance on the doctrine of causation and second guessing the probable impact of the speech in punishing political speech was misleading and dangerous. The consequence would be that all political agitations would have the tendency to produce such an impact and thus became illegal. A reliance on the broad concept of causation would criminalize all hostile criticism of the government policies.

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the *causal relation* between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.[81]

Criminal law thus only punishes "direct incitement" and direct advocacy, even through the indirect incitement might also arouse a seditious disposition. An incitement or advocacy is direct when a person "urge(s) upon (another) either that it is his interest or his duty to do it." Praising and admiration of law violation, or in the case Masses praising conscientious objectors in jail, are not, even such praising and admiration are likely to lead to emulation.

> That such comments (in Masses) have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain…One may admire and approve the course of a hero without feeling an duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passage can be said to fall within the law. [82]

The Hand test has its own problems. It is very limited in dealing with harmless inciters because of its refusal to look into circumstances in which words are uttered. It

also fails to tackle the issue of innuendo behind the words used because of its exclusive focus on words themselves. The *Brandenburg* test has provided remedies for the deficiencies by combining the two approaches of Hand and Holmes.

Inciting Violence or Disorder: The Minimum Requirement:

Hong Kong's sedition law needs reform because it lags far behind other common law jurisdictions. In common law offence, intention to cause violence is a necessary element of that offence. Although no such intention was required in the earlier case law,[83] in a series of cases leading to the Canadian decision *Boucher*, the courts required the prosecution to prove intention to incite disorder, tumult or violence.[84]

In *Collins*, for example, Littledale, J, in his summing up, stated that it was seditious if the defendant intended that 'people should make use of physical force as their own source to obtain justice', should 'take the power into their own hands' to 'tumult and disorder'.[85] In *R v. Burns,* Cave J. directed the jury at 363 as follows to "trace from the whole matter laid before you that they had a seditious intention to incite the people to violence, to create public disturbance and disorder".[86] In *Aldred*, the court held that the proper test for sedition should be whether language used was intended 'to promote public disorder or physical force or violence.' And the word "sedition"…implies violence or lawlessness in some form."[87]

In *Boucher v R,*[88] the Supreme Court of Canada held that, for the offence of seditious libel, there must be incitement to violence or the incitement of violence must be against Her Majesty or institutions of government. The court stated:[89]

> There is no modern authority which holds that the mere affect of tending to create discontent or disaffection…but not tending to issue in illegal conduct, constitutes the crime [of sedition], and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life.

Thus "nothing short of direct incitement to disorder and violence is a seditious libel". The freedom to engage in passionate criticism of government, including the judiciary, and the incitement to mere disaffection cannot amount to criminal offence.

The requirement of inciting violence or public disorder is further confirmed in *Choudhury*, in which the English Divisional Court, following *Boucher*, held that:

> …the seditious intention on which a prosecution for seditious libel must be found is an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government…Not only must there be proof of an incitement to violence in this connection but it must be violence or resistance or defiance for the purpose of disturbing constituted authority. [90]

There may be differences in national treatment of the name of the sedition. The US does not have an offence as such. In *New York Times v. Sullivan,*[91] the US Supreme Court held that there is 'a broad consensus that (sedition), because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment'. In *Carrison v. Louisiana,*[92] Justice Black of the US Supreme Court stated that, "under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious libel". But the sedition offences abolished by the court involved non-violent forms of false, scandalous and malicious publications against the state authorities.

The constitutionality of sedition has also been tested in India. The Indian law punishing sedition, as we mentioned above, is equivalent to the *Crimes Ordinance* in Hong Kong. India also enjoys Constitutional protection of freedom of expression [93] equivalent to the *Basic Law* of Hong Kong. In *Kedarnath v State of Bihar,*[94] the Supreme Court of India held that the law of sedition in section 124-A of the Indian *Penal Code* is consistent with the Constitutional protection of freedom of expression. The court stated:

> The expression "Government established by law" is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. That is why sedition as the offence in S.124-A has been characterised, comes under Chapter VI relating to offences against the State. Hence any act within the meaning of S.124-A which has the effect of subverting the Government by bringing that Government into contempt or hatred or creating disaffection against it, would be within the penal statute, because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In order words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously include in the term 'revolution' have

been made penal by the section in question.

The US and Indian approaches to sedition are different. But it is a distinction without real differences because the courts are talking about different things when they speak of sedition. The Indian Supreme Court has retained the offence but defines it differently by imposing a clear incitement to violence requirement. The US Supreme Court has abolished the offence but has made incitement to violence punishable under other laws. The real question, perhaps, is should incitement to violence be called sedition or something else?

Discussion, Advocacy and Incitement

The best cases for discussing this distinction are the US cases *Dennis*[95] and *Yates.*[96] *Dennis* was a leading case prosecuted under the Smith Act, which provided that it was seditious if one "knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the Government of the United States." *Dennis* involved the prosecution of the twelve members of the governing body of the Communist Party of the US, who were charged with plotting the overthrow of the Government. In upholding the conviction, the majority of the Supreme Court was of the view that there is a difference between advocacy and discussion of violence against the Government. The Smith Act "is directed at advocacy, not discussion" said the court. Discussion is any peaceful communication of ideas, such as the studies of Marx in universities; advocacy is the communication used to urge, plan or set in motion illegal acts against the Government.

While a theoretical difference was drawn between discussion and advocacy, it immediately vanished when the court started to apply the law to the case at hand. The court twisted this distinction into an unrecognizable form. According to Chief Justice Fred M. Vinson, who wrote for the majority,

> If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.[97]

He continued:

> Certainly an attempt to overthrow the Government by force, even though doomed

> from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that the petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike unless there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.[98]

Six years later, the Supreme Court decided that *Dennis* went too far in criminalizing all advocacy of violence against the Government. In *Yates* Communist leaders in California had been charged. The Supreme Court declined to persist with the *Dennis* approach. The Court held that people are free to talk about the desirability of using violence to overthrow the Government, and may also express the hope that the government might be overthrown by violence.

> The advocacy and teaching prohibited by the Smith Act...is not of a mere abstract doctrine of forcible overthrow of the government, but of action to that end; this is so even though such advocacy or teaching is engaged in with evil intent.[99]

The difference between lawful and unlawful advocacy is whether "those who the advocacy is addressed must be urged to do something, now or in the future, rather than merely believe in something." Under the *Yates* test, the defendant must have advocated actual *action* aimed at violent overthrow of the government. Advocacy of violence against the government in the abstract, or "principles divorced from action" is not sufficient. [100]The court in *Yates* was concerned about the intention of the advocates not the probability of their success. "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[101] But the court insisted that "immediacy" or "likelihood" of an unlawful act was not the requisite element of the offence. While *Yates* is a liberal move away from *Dennis*, its distinction between speech divorced from action and speech advocating action could be one without difference, because of the lack of the requirement of imminence or immediacy. The most express statement in limiting

sedition to direct incitement comes from the US case *Brandenburg*, in which the court states: "mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence" is not seditious.

The Nature of the Danger Created

What is the nature of the danger or risk that has been created by words uttered and writings published and the corresponding need to suppress the words or writings? How imminent must that danger be?

The law on sedition was settled in *Brandenberg* in 1969, in which a Ku Klux Klansman in Ohio was charged with violating Ohio's *Criminal Syndicalism Act* which made it an offence for any one to "advocate or teach the duty, necessity, or propriety (of violence) as a means of accomplishing industrial or political reform." The Supreme Court held that the Ohio law was unconstitutional.[102] The court said:

> The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.

The case further refined Justice Holmes' clear and present danger test. Justice Black and Justice Douglas in their concurring opinions declaimed that Holmes' "'clear and present danger' test should have no place in the interpretation of the First Amendment."[103]

The court extended the scope of the First Amendment protection by holding that a "mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence" is not seditious. Advocacy of the use of force and law violation cannot be prohibited unless the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[104] *Brandenburg* highlighted the importance of the pre-eminence of danger in determining sedition - a test which is protective of freedom of speech and gave greatest protection to the most subversive speech.[105] *Brandenburg* endorsed the governing principle of laissez-faire in the marketplace of ideas.

Should the imminence test be used in implementing Article 23 of the Basic Law? There seem to be four reasons against codifying this test into Hong Kong law. First, it is

uncertain the extent of the test's application in criminal law. There is clearly a distinction between public, especially political public, advocacy and private solicitation of crime. Clearly imminence is not a test for the ordinary law of incitement. Second, like the clear and present danger test, the imminent danger test is a judicial, not a legislative, creation. This is a significant difference. Once the test is written into the law, it has the characteristic of permanency, and the court may not have the necessary discretion in determining a case considering the prevailing political circumstances. Courts in the US have formulated different tests in different historical times in response to threats of different natures.

This leads to the third reason. *Brandenburg* concerns a Ku Klux Klansman who was charged with violating Ohio's *Criminal Syndicalism Act*. His offending speech included merely racist slurs against blacks and Jews. It has not been applied in the US in the context of zealous, organized political dissents urging the overthrow of the fundamentals of government.

Finally, the imminence test has not been adopted by courts in other common law jurisdictions. In English law, the likelihood of danger is sufficient to punish political speech. In *Arrowsmith*[106] the defendant was charged with incitement to disaffection under section 1 of the *Incitement to Disaffection Act 1934*. She was convicted and sentenced to 18 months imprisonment. She distributed leaflets at an army centre advocating soldiers to desert rather than serve in Northern Ireland. In dismissing her appeal, Lawton L.J found that the leaflet was 'mischievous' and 'wicked' and that the defendant's act constituted incitement to mutiny and desertion.[107] The court stated the likelihood of the defendant's activity as follows:

> What it [the court] is concerned with is the *likely effects* on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding. It is particularly concerned about young soldiers who either come from Ireland or who have family connections with Ireland: there are probably a large number of them in the British Army. These young soldiers are encouraged to desert on learning of a position to Northern Ireland and to mutiny. If they mutiny, they are liable to be sentenced by court martial to a very long term of imprisonment, and if they desert, they must expect to get a sentence of at least 12 months' detention. For mature women like this defendant to go around military establishments distributing leaflets of this kind amounts to a bad case of seducing soldiers from both their duty and allegiance.[108]

Her conviction was upheld by the ECHR after considering the possible result of mutiny and desertion if Arrowsmith's campaign were not halted.[109] This is also the law of Hong Kong.

The Consultation Paper

The Consultation Paper suggested three offences of sedition, with different malice and different social harms. The principal offence of sedition is defined as "*inciting others a) to commit the substantive offence of treason, secession or subversion; or b) to cause violence or public disorder which seriously endangers the stability of the state or the HKSAR*".

The first limb of the offence is a codification of the common incitement to commit the substantive offence. This codification is necessary, according to the government, because state security interests merit protection by specific provisions. The second limb goes beyond implementing Art 23, and it is an adaptation of Section 9 of the Crimes Ordinance, particularly subsections (f) and (g). Inciters of the 1967 riots, including the three newspapers mentioned above, would continue to be caught by this section, it seems.

The government intends to limit the scope of the offence in two ways, although the proposed limitations have not been made clear in the proposed definition. First, "isolated incidents of limited violence or disturbance of public order" will not satisfy the requirement of the sedition offence under Article 23, because the new sedition offence requires speech or publications that endanger state security. Whatever criminal or unlawful act that has been incited must be a series of acts which, when judged objectively, are intrinsically dangerous and capable of producing serious harm to national security. The Consultation Paper does not encompass harmless inciters.

The second limit on sedition is problematic. It distinguishes between *mere* views, reports or commentaries and views, reports or commentaries which incite, (in essence, views, reports or commentaries *plus*). This could become a distinction without differences, and a better position is to follow Hand's trigger of action approach. Holmes said that "every idea is an incitement." But the idea which does not directly advocate actual action should not be punished as sedition.

There are also two lesser offences of sedition. One relates to seditious publication,

the other relates to possession of certain publications. Under the seditious publication offence, *It should be an offence if a person – (a) prints, publishes, sells, offers for sale, distributes, displays or reproduces any publication; or (b) imports or exports any publication, knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion.* A defence of "*reasonable excuse*" is proposed.

The offence of seditious publications may partially overlap with the principal offence of sedition, e.g. does printing or publication amount to incitement of one of the substantive offences. If, for example, a person, like Hu Di Wei in the 1967 riot, publishes articles calling for armed resistance against the government, that person would be guilty of inciting subversion directly and the offence of seditious publications. The defense of reasonable excuse would be irrelevant. The overlapping part of the offence is thus not necessary.

The offence of seditious publication makes sense only when a person who publishes seditious materials but without a direct intention, or any intent at all, to incite the substantive offence. The key element of the offence is to produce publications that are objectively seditious. A person would be guilty if he knew the likelihood that the publications may incite others to commit one of the substantive offences, or if he should have suspected such likelihood. How the prosecution is to discharge its burden of proof is unclear, so is the standard of a reasonable person. The worst-case scenario is that once the defendant is caught with printing a seditious publication, there may not be much else for the prosecution to prove. Whether he is liable depends on whether he could offer reasonable grounds, and the burden might lie with him. Such an objective approach would not be substantially different from that used in the 1952 sedition prosecution against *Ta Kung Po*, according to which the subjective intention was not a required element of the crime and the defendant was deemed to intend the natural consequence of his act. The ghost of *Fei Yi Ming* may continue to haunt us in the future.

Even with the burden on the prosecution, the offence will have serious implications on both privacy and freedom of expression. Sedition and other Article 23 offences are politically motivated crimes. They will not be low priority crimes in Hong Kong. When the police are demanded to search for evidence to prove purpose/motivation, the implication is serious. We are not sure, for example, how far back the police might go in seeking evidence to prove purpose/motivation, and what exactly can be used as evidence. The police are likely to scrutinize the suspects' past

experiences, association, and other records. It is not surprising for the police to canvass one's classmates, co-workers, and neighbors to discover the purpose/motivation. There is a serious privacy concern. There may also be a long-term threat to freedom of expression if purpose/motivation become a criminal law issue.[110]

While the first sub-section is not necessary, the second sub-section is overly broad. Its main purpose is not to punish the inciters who directly and intentionally urge the commission of the substantive offences. Using the words of the Consultation Paper, the offence punishes people who, for reasons such as profits, print publications which are *likely* to incite others to commit the related offences. The second sub-section can be put in the same category with the offence of mere possession. This offence is committed with the same mental element as the offence of seditious publication and same defence is also provided. Because the offence can be committed with the mental state of *knowing or having reasonable grounds to suspect that the publication, if published, would be likely to incite others to commit the offence of treason, secession or subversion.* The offences cast the net too wide, by punishing not only for their intentional incitement, but also for their recklessness, carelessness and even stupidity in printing or possessing publications. It is a preventative measure, designed to not only chill certain political discussions, but also eliminate the necessary intellectual environment which makes such discussion possible. The possession offence is particularly draconian in that, with the exception of a privileged few (academics, journalists, etc.), no one shall read things that offer passionate criticisms of the governments.[111]

The two lesser offences punish not the crime of sedition, but what is perceived to be the cause of sedition. It is not directed at the inciters, but at where they may get the seditious ideas. It is not directed at the content of a publication but at its likely effect. Once the law moves from a crime to the cause of the crime and from incitement to publication itself, it will indefinitely expand its territory, it will over-criminalize, and it will lead to the abuse of power in law enforcement. By expanding from punishing direct incitement to printing and possession of seditious publications without the intent to incite, legal protections offered against the principal offence of sedition will diminish or even vanish in dealing with the lesser offences. Legal protections, such as punishing incitement not discussion, reports or commentaries, which are important to the principal offence of sedition, will become less relevant, if at all, to the two lesser offences.

It is crucial to note that publications involved in the possession offence do not have to be seditious in themselves, it is sufficient if they are capable of inciting others to commit the offences. What is punished is not the content of a publication, but its potential impact. But what kind of book is likely to incite treason, secession, or subversion? In the 1952 and 1967 prosecutions, the newspapers were found guilty because they accused the British and the colonial governments of abusing their powers and mistreating the Chinese. Those publications were regarded as likely to incite people to rebel. To understand the rationale of sedition and the underlining concerns of the government, one has to go back to the days of Star Chamber, when the offence was invented.

The offence of seditious libel was based upon the presumption that those who did not share the government's beliefs "must regard its attempt to propagate those beliefs as tyrannical, and to be disobeyed".[112] Thus "anyone who attempted to persuade others that the government's methods were profoundly wrong must intend the natural consequences of his acts, which would be rebellion".[113] The offence postulated that utterance alone may cause harm to the sovereign. "An attack on the dignity or respectability of authority was deemed to undermine its authority and to subvert the affection of its subjects in the same manner that libel or slander injured an individual's reputation".[114]

Criticisms against the government had to be quashed because they "threatened appearances".[115] According to Chief Justice Holt in the leading case of *John Tutchin,* which was tried in 1704:

> To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is necessary for all governments that people should have a good opinion of it.[116]

Since the purpose of the offence of seditious libel was to maintain a good opinion of the government, truth was eliminated as a defence.[117] The ratio decidendi of the first seditious libel case in Star Chamber, *De Libellis Famosis*, in 1606 was

> If it be against a magistrate or other public person it is a greater offence for it concerns not only the breach of the peace, but also the scandal of government: for what greater scandal of government can there be than to have corrupt or

> wicked magistrates to be appointed and constituted by the King to govern his subjects under him and greater imputation to the State cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.[118]

Therefore, "It is not material", declared Lord Coke, "whether the libel be true, or whether the party against whom it is made, be of good or ill fame".[119] The mere tendency of the words to undermine the authority of the government is sufficient ground for prosecution.[120]

By punishing mere publication and possession, the law protects the reputation of the government rather than punishing incitement. The kind of books which are likely to incite rebellion are not those which teach subversion, independence for Xinjiang or Taiwan's rejection of Chinese Sovereignty. The subversive books are those which expose political nepotism, corruption, and the dark side of the system, books that undermine the legitimacy of the system. The *Communist Manifesto, State and Revolution* and the writings of Mao Zedong may not be seditious for they merely try, but often fail, to agitate people. It is books such as *Tiananmen Papers*, various AI and HRIC reports which are seditious.

Conclusion

The colonial law never provided sufficient protection of rights in Hong Kong in this area of law. The local circumstances were such that the colonial government found it impossible to extend its own law to Hong Kong which offered more protection of rights. Hong Kong sedition law has been repressive in two aspects in spite of its superficial resemblance to English law. First, since seditious intention was not an element of the offence, it was easier for the prosecution to discharge its burden. Once a publication was proven seditious, the burden was shifted to the defence to prove innocence. Hamburger has argued that, historically, the prosecution of sedition in the UK reflected more "a legal doctrine subject to the constraints of precedent and legal custom" than mere government policies. The law of sedition empowered the Crown in silencing political dissidents, it also posed serious substantive and procedural constraints which the Crown could not bypass or ignore.[121] The colonial governments were not burdened with such legal constraints in Hong Kong's sedition prosecutions, because seditious intent was imputed and it was not necessary to prove intention to incite violence.[122]

Second, unlike the sedition offence in other jurisdictions, the law in Hong Kong covers two lesser offences of seditious publication and possession. The offence was widely and effectively used during the 1967 riots and as mentioned above, the consequence was repressive and draconian.

This, of course, has to do largely with the geo-political position of Hong Kong and the overwhelming impact of the China factor.[123] Sedition law was used with to punish sedition either against China or from China. On the one hand, Hong Kong had been used as a base for different political forces to subvert the Chinese government, be it the *Qing* Dynasty, the Nationalists or the Communists. The colonial government was sensitive to this political reality and cautious not to provoke its giant neighbor. On the other hand, and more importantly, the sedition law was also used to punish seditious publications of the Communists and their followers. Communist infiltration was perceived as the most direct political threat to Hong Kong.[124]

The Reunification in 1997 has changed the dynamics of political dissidence in Hong Kong. Allegedly, the threat once again comes from those who are attempting to use Hong Kong as a base for subverting the mainland system through force or otherwise. This time, the national security interests of Hong Kong are identified with those of the mainland, and there is a gradual and painful process of convergence. Nevertheless, Hong Kong's national security interest can be made distinctive, in spite of the similarities. Thus sedition against the central people's government occurring in Hong Kong is fundamentally different from sedition occurring in Beijing or Shanghai. Politically, Hong Kong is a free and liberal society where freedom of expression and the freedom to criticize the government receive more protection than in the mainland. Legally, Hong Kong has an obligation to comply with international standard in defining sedition narrowly.

Among the three sedition offences proposed by the government, the direct incitement offence is consistent with the common law tradition and with the requirement of international human rights law, although the protection clauses need to be made more expressly in the text of the definition or in separation sections. The two lesser offences are broadly drafted and the net is cast too wide. The offences are neither necessary nor proportionate. To punish people for publishing or possessing books can neither enhance the protection of China's national security nor dignify and honor the state. The two lesser offences are awkwardly copied from colonial legislation without careful consideration.[125] They simply cannot be brought to life after their long dormancy. It is time to break away from this draconian colonial

tradition.

Notes:

[1] Sir James Fitzjames Stephen, *A History of The Criminal Law of England* (New York: Burt Franklin), 299.

[2] Ibid. 299-300.

[3] Ibid. 300.

[4] *Boucher v The King* [1951] 2 D L R 369.

[5] Kent Greenawatt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, (Princeton: Princeton University Press, 1996).

[6] Law Reform Commission of Canada, *Working Paper 49: Crimes Against the State*, (Canada: Law Reform Commission of Canada, 1986), 35-36.

[7] Or more precisely, as put by Leigh, the abolition of sedition "would not leave a hiatus in the coverage of matters which ought to be covered." L.H. Leigh, "Law Reform and the Law of Treason and Sedition," (1977) *Public Law* 128, 147.

[8] Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (Working Paper No. 72), (London: H.M. Stationery Office, 1977), 48.

[9] Li Gucheng, *A Comment on the Press of HK* (Hong Kong: Ming Pao, 2000).

[10] Sir John W. Carrington, *The Ordinances of Hong Kong —Chronological table and Index*, (Hong Kong: Government Printers, 1904), 1.

[11] Ibid.

[12] James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 653.

[13] Ibid.

[14] Leung W.Y. and Johannes M.M Chan (ed.), *Chuanbofa Xinlun* (Media Law in Hong Kong), (Commercial Press, Hong Kong, 1995), Chapter 10. James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 328.

[15] Leung W.Y. and Johannes M.M Chan (ed.), *Chuanbofa Xinlun* (Media Law in Hong Kong), (Commercial Press, Hong Kong, 1995). See also, James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 440.

[16] James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong*, (Hong Kong: Vetch and Lee Limited,1971), 440.

[17] Sir John W. Carrington, *The Ordinances of Hong Kong —Chronological table and Index*, (Hong Kong: Government Printers, 1904), 19.

[18] *Printers and Publishers Ordinance* 1927.

[19] Section 5, ibid. Norman Miners "The Use and Abuse of Emergency Powers by the Hong Kong Government," (1996) 26 *Hong Kong Law Journal* 47. For analysis of the law, see Huang Hanlong, "Printing and Media Control: Hong Kong Publications Law (1)" in Leung W Y and Johannes M M Chan (eds.) *Chuanbofa Xinlun* (Media Law in Hong Kong) (Commercial Press, Hong Kong, 1995).

[20] Hong Kong Government wished to maintain its neutrality in the Sino-Japanese war prior to the Japanese invasion of Hong Kong. Government censors actively examined newspapers and prohibited any anti-Japanese publications. Li Gucheng, *A Comment on the Pres of HK*, 154-155. In 1936, the Government issued a guideline to Hong Kong press, prohibiting, among others, any pro-Communist publications, probably under the pressure from the Nationalist Government in the Mainland. See, Kwai-yeung Cheung, *Jin Yong (Lois Cha) and the Press*, 392.

[21] *Hong Kong Hansard* 1907, 56.

[22] *Hong Kong Hansard 1907, 56.*

[23] *Hong Kong Hansard* 1907, 56.

[24] *Hong Kong Hansard* 1907, 55.

[25] *Hong Kong Hansard* 1907, 56, per Hon. Mr. Osborne.

[26] The preamble, *Chinese Publications (Prevention) Publications* 1907 (No. 15 of 1907).

[27] Section 5, *Colonial Books Registration Ordinance*.

[28] *Hong Kong Hansard* 1914, 34.

46 *Hong Kong Hansard* 1914.31.

[30] *Hong Kong Hansard* 1914, 35.

[31] Section 2(b), *Printers and Publishers Ordinance* 1886.

[32] Section 2, *Seditious Publications Ordinance* 1914.

[33] Section 6, *Seditious Publications Ordinance* 1914.

[34] Section 9, *Seditious Publications Ordinance* 1914.

[35] *Hong Kong Hansard* 1938, 85 and 198.

[36] The original version in Sedition Ordinance was as follows: to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or the Government of the Colony as by law established…

[37] The *Sedition Amendment Ordinance* 1938 repealed section 3(1)(vi) of the *Sedition Ordinance* 1938 and its provisos. Section 3 (1)(vi) was as follows: to endeavor to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty. It was said that this section could be better dealt with by a special legislation based on UK's *Incitement to Disaffection Act* 1934.

[38] Section 4 (1) and (2). *Sedition Ordinance* 1938.

[39] Section 3 and section 4, *Control of Publications Consolidation Ordinance* 1951.

[40] Section 3, *Control of Publications Consolidation Ordinance 1951*.

[41] Section 6, *Control of Publications Consolidation Ordinance 1951.*

[42] Section 5, *Control of Publications Consolidation Ordinance 1951*.

[43] Section 4, *Control of Publications Consolidation Ordinance 1951*.

[44] Section 5, *Control of Publications Consolidation Ordinance 1951*.

[45] Section 11, *Control of Publications Consolidation Ordinance 1951*.

[46] *Fei Yi Ming and Lee Tsung Ying v R* (1952) 36 HKLR 133 at 156.

[47] Section 13 of the *Control of Publications (Consolidation) Ordinance* reversed the burden to the

defendant to prove beyond reasonable doubt that he lacked the necessary knowledge or otherwise was innocent, if a newspaper was found having printed illegal matter. This section was instrumental in the court's holding.

[48] Kwai-yeung Cheung, *Jin Yong (Louis Cha) and the Press* (Hong Kong: Ming Pao Press, 2000), 16.

[49] Cheung Ka Wai, *Inside Story of 1967 Riot in Hong Kong* (Hong Kong: The Pacific Century Press Limited, 2000). See also Kwai-yeung Cheung, *ibid*.

[50] One of the most unfortunate sedition charges in the 1967 episode was the prosecution of Zeng De Cheng, the younger brother of the current DAB Chairman Zeng Yu Cheng. Zeng De Cheng was a promising form 7 student in the St. Paul College, who was sentenced to two years' imprisonment for distributing pamphlets critical of the colonial education system to fellow students inside the College. Zeng was awarded the title of Justice of Peace after 1997. Cheung Ka Wai, pp. 150-162.

[51] *Sedition (Amendment) Ordinance* 1970, Section 2. Another significant change was the expansion of police power in relation to sedition. Under the Section 7 of the 1938 Ordinance, any search and seizure of seditious materials required a warrant from a Magistrate. Under the 1970 amendment, any police officer may enter into any premises to remove seditious materials without a warrant.

[52] After the 1992 amendments to the *Crimes Ordinance*, these offences were defined in section 6 and 7 as follows: Section 6 states that:

> Any person who knowingly attempts —
>
> (a) to seduce any member of Her Majesty's forces or any member or officer of the Royal Hong Kong Regiment from his duty and allegiance to Her Majesty; 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 endeavor to make a mutinous assembly,
>
> shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

Section 7(1) provides that:

> Any person who knowingly attempts to seduce-
>
> (a) any member of Her Majesty's force;
>
> (b) any member or officer of the Royal Hong Kong Regiment;
>
> (ba)any member of the Government Flying Service;
>
> (c) any police officer; or
>
> (d) any member of the Royal Hong Kong Auxiliary Police Force, from his duty or allegiance to Her Majesty shall be guilty of an offence.

Section 7(2) also punishes any one who assists the commission of a section 7(1) offence or any person who conceals or assists in concealing a deserter or absentee without leave. The penalty for section 7 offences is a fine of $5,000 and imprisonment for 2 years.

[53] *Crimes (Amendment) (No.2) Ordinance* 1992.

[54] Hong Kong law has not progressed very far in this area of law, and such disregard of intention is still

accepted in the law of contempt of court. Hong Kong courts preferred the objective approach. It held, in relation to the offence of scandalizing the court, that the defendant must intend to do the acts which are said to constitute the contempt, but "it is not necessary to show that the contemner intended to undermine public confidence in the administration of justice" (661). The court adopted the same approach in determining the *mens rea* for the offence of interfering with the administration of justice. Once it is established that D had the intention to approach the court the way he did, *mens rea* is proved. It is not material whether D intended to interfere with the administration of justice. Using the words of Donovan LJ, which was cited by the court with approval, 'The question is whether the respondents' action was calculated so to interfere, and this involves a consideration not of their state mind on this particular point but of *the inherent nature of their act* (emphasis added).' (663). If the act is 'inherently likely' to interfere, court does not need to look into the motives of the particular act of the defendant. In answering the question how to determine whether there is a real risk (i.e. a great likelihood) that the confidence in the administration of justice will be undermined, the court looked at the circumstances of the act and publications, i.e. the timing, concerted efforts, and the support that the newspaper claimed it had received from the public.

[55] LegCo Paper No. CB(2)2638/96-97, *Report of the Bills Committee on the Crimes (Amendment)(No.2) Bill 1996*, 4.

[56] Under Principle 6, expression may be punished as a threat to national security if the government can demonstrate that 1) the expression is intended to incite imminent violence; 2) 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. (Ibid).

[57] Two explanations about the relationship between the common law and the offence of sedition are commonly given. Conventional wisdom held that after the abolition of the Star Chamber, the common law courts "incorporated" its substantive law . See, Irving Brant, "Seditious Libel: Myth and Reality" (1964) 39 *New York University Law Review* 1. Barnes, on the other hand, argues that there was a parallel, rather than subsequent, development of seditious offences in the common law courts. He explains that: "the holders of high judicial office, the chief justices, chief baron, justices, and barons, who sat regularly in Star Chamber...were both apt teachers-in the Star Chamber-and apt learners-as judges of assize and in their respective courts. What was done in one place, was extended to the other." Thomas G Barnes, "Star Chamber and the Sophistication of the Criminal Law" (1977) *Criminal Law Review* 316, 326.

[58] Ibid. Brand.

[59] Ibid. Brant. See also William T Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression" (1984) *Columbia Law Review* 91.

[60] Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press" (1985) 37 *Stanford Law Review* 661, 702.

[61] Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 359.

[62] Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of

Political Crime c1770-1820" (1990) 10 *Oxford Journal of Legal Studies* 305, 348.

[63] Ibid.

[64] *Schench v. US* 249 US 47 (1919).

[65] Ibid., 52. The immediate and present danger test, with its stress on examining the circumstances of each case had its precedent in English law. In *R v Aldred,* which was decided in 1909, the publisher of the Indian Socialist, a periodical advocating the independence of India, was charged with seditious libel for publishing materials which applauded political assassination as a means of achieving a political goal. The *Aldred* decision stressed the effect of the seditious words:

> In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling...You are entitled also to take into account the place and mode of publication.

[66] *Abrams v. United States* 250 U.S. 616.

[67] 249 US 211 (1919).

[68] Ibid. 212.

[69] Ibid. 212-213.

[70] It has been argued that during that period of time, English common law offered more protection for the freedom of expression than the First Amendment. See an interesting comparison between the US and UK sedition law as practiced during the First World War, see, James E. Boasberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson," (1990) 10 *Oxford Journal of Legal Studies* 106.

[71] In his letter to the English jurist Frederick Pollock, Holmes mentioned that he hoped the President would pardon Debs after the conviction. Cited in James E. Boasberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson," (1990) 10 *Oxford Journal of Legal Studies* 106.

[72] Holmes's reasoning in *Schench* is illustrative: "the (offending) document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could have expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out". 249 US 51.

[73] Judith Schenck Koffer and Bennett L Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816, 834.

[74] *Gitlow v New York,* 268 U.S. 662, 673 (1925). The meaning of "clear and present danger" is expressed more soundly and clearly by Justice Brandeis in his dissenting opinion in *Whiteney v California 274 US 357 (1927)*:

> To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practised. There must be reasonable grounds to believe that the danger

apprehended is imminent. There must be reasonable grounds to believe that the evil to be prevented is a serious one...But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement, and there is nothing to indicate that the advocacy would be immediately acted on...In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

[75] *Brandenburg*, 438.

[76] 244 F 535.

[77] The Espionage Act was passed in 1917 to suppress the anti-war movement. The law was amended in 1918, which made any expression against any efforts of the war, and indeed any government effort, seditious. Pub L No 150, HR 8753 (16 May 1918).

[78] 244 F 535 (SDNY 1917), 540.

[79] *Ibid*, 539.

[80] *Ibid.*

[81] *Ibid*. 540. Emphasis added.

[82] *Ibid.* 541-542.

[83] It was certain seditious for Pine to say King Charles I "was unwise a king as ever was, and so governed as never king was, for he is carried as a man would carry a child with an apple. Also, before God he is no more fit to be king than Hickwright (Pine's shepherd)" Pine's Case, cited in Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 308.

[84] *R v Collins* (1839) 9 C. & P. 910; *R v Burns* (1886) 16 Cox C.C. 355; and *R v Aldred* (1909) 22 Cox C.C. 1.

[85] *R v Collins*, 912. The defendant was charged with sedition for publishing a letter in a unlawful assembly which stated: "a wanton, flagrant, and unjust outrage has been made upon the people of Birmignham by a blood-thirsty and unconstitutional force from London, acting under the authority of men who…seek to keep the people in social slavery and political degradation." P. 911.

[86] *R v. Burns* (1886) Cox C.C. 355, at 363.

[87] *R v Aldred* (1909) 22 Cox 1. Alfred Aldred was the printer of a newspaper called *Indian Sociologist*, which published articles advocating political assassination. He was found guilty and sentenced to 12 months imprisonment.

[88] *Boucher v. R* (1951) 2 DLR 369. In this case, a member of the Jehovah's Witnesses was convicted of seditious libel for publishing in Quebec a pamphlet entitled "Quebec's Burning Hate for God and Christ and Freedom". The pamphlet alleged that members of the sect were prosecuted in the province and that police, public officials and Roman Catholic clergy were behind the prosecution.

[89] [1951] 2 DLR 369.

[90] *Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 All ER 306, 322-323.

[91] *New York Times v. Sullivan* 11 L Ed 2d (1964) 704.

[92] 378 U.S.64 (1964), p. 80.

[93] Article 19(1) of the Constitution protects the right of freedom of speech and expression subject to reasonable restrictions. And any laws which are inconsistent with the rights protected by the Constitution are void.

[94] *Kedarnath v. State of Bihar* 1963 1 S.C.J 18.

[95] 341 US 494 (1951).

[96] 354 US 298 (1957). The English case *R v. Bowman* (1912) 22 Cox CC 729 is also very useful in this regard. Browman was charged with sedition for printing a publication calling on soldiers to disobey orders when asked to quell a strike. The test, according to the trial judge, was as follows: Was the publication meant "to induce soldiers to disobey their officers in the event of being ordered to quell a strike?" or was it a "merely a comment upon the use of armed military force by the State for the suppression of industrial riots?" The crucial distinction was whether the publication legitimately criticised the use of military force, or encouraged soldiers to rebel and were thus incitement to mutiny.

[97] *Dennis*, 509.

[98] *Ibid.*

[99] *Yates*, 324-325.

[100] *Ibid*.

[101] Holmes and Brandies in *Gitlow v New York*, 268 U.S. 652 (1925), 673.

[102] Unlike the earlier cases discussed above, *Brandenburg* concerned the validity of state legislation, not the application of legislation conceded as valid. For a discussion of this difference, see Hans A. Linde, "'Clear and Present Danger' Reexamined: Dissonance in the *Brandenburg* Concerto". 22 *Stanford Law Review* 1163.

[103] *Brandenburg*, 345.

[104] Ibid. 431.

[105] Bernald Schwartz, *Freedom of the Press* (New York: Facts on File, 1992).

[106] [1975] 1 Q.B. 678.

[107] The court nevertheless substituted a sentence which allowed the defendant's immediate release.

[108] [1975] 1 Q.B. 678, 684.

[109] *Arrowsmith v United Kingdom* (Application No. 7050/75) 19 Eur. Comm HR (1978) 5, 31.

[110] The danger is well presented by Gellman in the context hate crime in the US: "In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with ethnic intimidation as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular

sentiment on the subject of ethnic relations." (n131)

[111] The defense also appears to be ironic. Sedition is in essence to incite violence and disorder, and the maximum impact is achieved by wide publicity of seditious words. What are the better forums to disseminate information than newspapers? This was the exact the irony in the prosecution of the Australian Communist Party members in the later 1940s and early 1950s. In the case of *The King V Sharkey* (1949) 79 CLR 121, Laurence Louis Sharkey, the General Secretary of the Communist Party of Australia said to a reporter during an interview that, in case Soviet force enters Australia, "Australian workers would welcome Soviet Forces pursing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis". A Sidney newspaper reported the interviews under the title "Reds Welcome". Uproar ensued and Sharkey was charged with sedition as a result. He was found guilty by a jury and sentenced to three years at hard labor, which was later reduced to 18 months. The Sharkey and other cases, the right wing newspapers played an instrumental role in publicizing seditious speeches by CPA members. See Laurence W Maher, "The Use and Abuse of Sedition," (1992) 14 *Sydney Law Review* 262

[112] C S R Russell, "Sedition in a Democratic State" (1965) 13 *Political Studies* 372.

[113] Ibid.

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

[115] Ibid.

[116] *Rex v Tutchin*, 14 A Complete Collection of State Trials 1095, 1128 (1704) (T.Howell comp. 1816), as quoted by Judith Schenck Koffer and Bennett L Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816, 822.

[117] *Ibid.*

[118] *De Libellis Famosis* 77 E.R. 251. Cited in Sir James Fitzjames Stephen, A History of The Criminal Law of England (New York: Burt Franklin), 304-305.

[119] Sir James Fitzjames Stephen, *A History of The Criminal Law of England* (New York: Burt Franklin), 304-5.

[120] Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxford Journal of Legal Studies* 305.

[121] Hamburger, 761.

[122] *Fei Yi Ming and Lee Tsung Ying v R* (1952) 36 HKLR 133.

[123] Norman Miners, "The Use and Abuse of Emergency Powers by the Hong Kong Government," (1996) 26 *Hong Kong Law Journal* 47. Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong, Oxford University Press, 1989).

[124] H L Fu and Richard Cullen, "Political Policing in Hong Kong," *Hong Kong Law Journal* (Forthcoming, 2003)

[125] See Margaret Ng, "Has the Offence of Sedition Been Narrowed?" *Ming Pao* 9 Nov. 2002; and Albert Chen, "Reflections on Incitement to Rebel and Other Issues," *Tai Yang Bao* 28 October 2002.